dispute between the parties was not a dispute within the purview of section 53 ; but the trial Court was not correct in concluding that the dispute must be determined under that section. The appellant is therefore entitled to a declaration that the dispute in this case is not a dispute which can be referred to the Registrar under section 53, and that the order of the Registrar appointing an arbitrator and the proceedings of the arbitrator are *ultra vires* and void.

1953
June 20

HUSSEIN SHEFIK
v.
THE FIRST LIMASSOL CO-OPERATIVE SAVINGS BANK, LTD., OF LIMASSOL.

The case is sent back to the trial Court to hear and determine the appellant's claim for damages and the respondents' counter-claim. The parties to be at liberty to call such further evidence as they deem fit.

Respondents shall pay the appellant's costs in this appeal.

ZEKIA, J: I agree.

[HALLINAN, C.J., AND ZEKIA, J.]

(June 22, 1953)

1953
June 22

AKIL HUSSEIN ARNAOUT
v.
EMINE HUSSEIN ZINOURI.

AKIL HUSSEIN ARNAOUT OF PLATANISSO, *Appellant,*

v.

EMINE HUSSEIN ZINOURI OF PLATANISSO, *Respondent.*

(*Civil Appeal No.* 4012).

Unregistered prescriptive title—Purchaser for value of registered title—No enquiries before purchase—No estoppel against prescriptive owner.

The defendant had been in possession of the land in dispute for about 30 years. The plaintiff by purchase in 1950 became registered as the owner of land which included the land in dispute. The trial Court held that the defendant had a prescriptive right; the plaintiff knew of this right and was not a purchaser for value without notice. The defendant was declared entitled to the land.

Held on appeal: The defendant by failing to register her prescriptive right was not estopped from claiming against the registered owner who was a purchaser for value since the purchaser had failed to make reasonable enquiry before purchase, and the principle in *Michael and others* v. *Nikoli and others* (VIII C.L.R., 113) did not apply.

Appeal dismissed.

Appeal by plaintiff from the judgment of the District Court of Famagusta (Action No. 262/52).

M. K. Haji Demetriou for the appellant.

S. Emphieji for the respondent.

The facts and findings of the trial Court appear from the following extracts of that Court's judgment:

CH. PIERIDES, D.J.: ".... The plaintiff bought the whole field under plot 192 from its previous owners, i.e. the heirs of Babaliki, in the year 1950 at the agreed sale price of £300, and he has become the registered owner thereof on the 20.12.50..... The defendant, by the evidence adduced before the Court, proved to the satisfaction of the Court that she had in her possession the disputed portion of field for about 30 years, before plaintiff acquired the field No. 814 ....."

The trial Court then referred to sections 8 and 9 of the Immovable Property (Tenure, Registration and Valuation) Law (Cap. 231) and continued :—

"... It is obvious from this last provision that since defendant had acquired a prescriptive right over the disputed portion of land in accordance with the old law, and before the commencement of the new law, she is entitled to be registered as owner thereof. But due to the decisions cited by the counsel of plaintiff, the prescriptive right of the defendant over the disputed portion of land would be of no value if the plaintiff had acquired the field under Reg. No. 814 as a *bona fide* purchaser for value, and without notice of the defendant's claim over it.

The plaintiff is a regular resident of Platanisso village, i.e. in the village where the disputed land is situated, and he, in accordance with his own evidence, shortly after he bought it applied to L.R.O. for the determination of the boundaries of the field at the side of the field of the defendant. From the evidence of L.R.O. clerk (witness No. 1) it appears that the local enquiry was made on the 24.4.51 and that the transfer of the field into the name of the plaintiff from the previous owners was effected on the 20.12.50. It is obvious that the application to L.R.O. by plaintiff was made sometimes between the 20.12.50 and the 24.4.51, i.e. short time after the plaintiff bought it. Moreover in accordance with the evidence of witness No. 2 for the defendant, i.e. Moustafa Hussein, plaintiff and defendant shortly after plaintiff bought the field asked him to go on spot and show the boundaries of their fields, and he did so, but when he informed plaintiff that the disputed portion of land is included in defendant's property he did not accept.

From all the above facts it is extracted that the plaintiff knew that the defendant had a prescriptive claim over the disputed portion of land, although in his evidence before the Court he denied such a thing. For the above reasons I find that the plaintiff was not a *bona fide* purchaser for value and without notice of defendant's claim over the disputed portion, and therefore the defendant, although delayed to claim registration, she is not estopped from setting up her claim against the plaintiff ....."

Upon appeal judgments were delivered by Hallinan, C.J. and Zekia, J. :—

HALLINAN, C.J. : The question which falls for decision in this case is whether the decision in *Michael and others* v. *Nikoli and others* (VIII Cyprus Law Reports, 113) should be followed or whether the present case can be distinguished on its facts. In *Michael's* case the head-note begins as follows :

> " A person who has acquired a prescriptive claim to be registered in respect of immovable property but who delays in obtaining registration is estopped from setting up his claim as against a *bona fide* purchaser for value, who without notice of his claim has acquired the property from the registered owner."

I have been unable to find any English authority which has applied the doctrine of estoppel so as to defeat the title of a person claiming land under a prescriptive right ; nor is it surprising that there is no such authority. The great majority of land sales in England concern land which is not registered and there can be no question of a person in long possession having any duty to rectify the register as against the registered owner. In the case of such sales, if a vendor purports to sell land the title of which he has lost by adverse possession, the purchaser can get no better title than that which the vendor has himself. If on the other hand the land is registered, under section 75 of the Land Registration Act, 1925, where a title to such land, in whole or in part, is acquired by long possession but is not registered, the registered proprietor is deemed to hold the land which he has lost by prescription in trust for the person who has acquired a prescriptive right. Here again the question of whether the person entitled to the prescriptive right can be estopped by *bona fide* purchaser for value without notice cannot arise.

The trend of judicial decisions in Cyprus appears to have been towards making the title of the registered owner as nearly as possible indefeasible. No doubt it was for this reason that the Court here invoked the doctrine of estoppel in *Michael's* case. The kind of estoppel relied on in that case appears to be the one which is dealt with in 13 Halsbury's Laws of England, 2nd Edition, 499, under the heading : " Estoppel by Negligence ". At para. 568 it is said :

> " Before anyone can be estopped by representation inferred from negligent conduct, there must be a duty to use due care towards the party misled or towards the general public of which he is one."

And at paragraph 570 (page 502) two further elements are prescribed in order to constitute estoppel by negligence : The negligence must be in the transaction itself, and must

not only be calculated to have a misleading effect attributed to it, but must be the proximate or real cause of that result. Now, according to the general principles of the law of negligence, the party who is alleging negligence in the other side must himself have used due care, and if his failure to take reasonable precautions has been the proximate cause of the result then there is no estoppel by negligence.

This failure to take reasonable care is generally referred to as " contributory negligence " ; but it must be remembered in using this expression that it does not mean that, in order to prove contributory negligence, it is necessary to prove that there has been a breach of duty. In *Ellerman Lines Ltd.* v. *Grayson Ltd.*, 1920 A.C., 466, Lord Parmoor states :

> " I do not think that the question of contributory negligence depends upon any breach of duty as between the plaintiff and a negligent defendant ; it depends entirely on the question whether the plaintiff could reasonably have avoided the consequence of the defendant's negligence."

This principle is referred to in the case of *Sharpe* v. *Southern Railway* (1925) 2 K.B. 311, cited in Charlesworth Law of Negligence 2nd Edition, p. 464 :

> " If a railway train draws up at a platform which is too short for the train, a passenger in a carriage which is short of the platform owes no duty to the railway company not to alight, but if he gets out without looking where he is going it is contributory negligence on his part."

On the evidence before us in this case it is quite clear that if the purchaser had made reasonable enquiry he would have at once discovered that the respondent was and had for many years been in possession of the piece of land in dispute. It is true that the purchaser has no duty or obligation to enquire about the land he is buying ; but if he fails to make reasonable enquiries—for example that the boundaries of the land as registered conform with the actual physical boundaries of the land itself, or to see whether the land is in possession of the vendor—then in my view he cannot be heard to say that the negligence of the person entitled to a possessory right was the proximate cause of his purchasing the land without notice of this possessory right.

The doctrine of estoppel as laid down in *Michael's* case does not therefore apply ; on the whole I prefer to distinguish that case from the present one on the ground that the failure of the purchaser to make reasonable enquiries amounts to contributory negligence rather than to rely on the doctrine of constructive notice.

I agree that this appeal must be dismissed with costs.

ZEKIA, J. : Appellant in this case is the registered owner of a piece of land, plot No. 192, in the village of Platanisso, under registration No. 814 dated the 28th December, 1950, comprising an area of 13 donums and 2 evleks. Respondent-defendant is the owner of an adjoining piece of land, plot 189, under registration No. 811, dated 18th November, 1924, of an area of four donums and 2 evleks. A portion of land of one evlek and 375 square feet in extent included in plot 192, lying next to the plot 189, described in Exhibit 1, coloured red, constitutes the disputed portion which forms the subject matter of the action and of this appeal.

Both the appellant and the respondent as owners of two adjoining lands, applied to the Land Registry for the determination of their boundaries; twice a local enquiry was held and it has been ascertained that the disputed portion was included in plot 192 registered in the name of the appellant. Respondent, notwithstanding the result of the local enquiry, went on cultivating the disputed portion as her own property and appellant, in order to stop her doing so, brought an action before the Famagusta District Court and claimed (*a*) a declaration that he was the owner of the disputed area; (*b*) an order restraining defendant from interfering with it. The trial Court found that the land in dispute was the property of the respondent on account of long undisputed possession by her, and ordered the exclusion of the said portion from the title deed of the plaintiff-appellant and the inclusion of same in plot 189 as the property of the defendant-respondent.

The plaintiff appealed to this Court from the decision of the trial Court and his grounds of appeal were mainly three :

1. That the finding of the learned trial Judge that the disputed land was possessed by the defendant for a prescriptive period without dispute was not justified by the evidence adduced ;

2. That the decision of the Director of Land Registration and Surveys in determining the boundaries upon application made by the litigants was not appealed by respondent within the prescribed period under section 75 of the Immovable Property (Tenure, Registration and Valuation) Law and it became final and could not be questioned in this Court;

3. That there was no evidence upon which the learned Judge could find that the plaintiff was not a *bona fide* purchaser of the disputed land for value and without notice of the defendant's claim for prescriptive title over it.

Ground 1 : After some discussion before this Court appellant's advocate conceded that there was evidence for the trial Judge to arrive at the finding that respondent had long, over prescriptive period, undisputed possession of the land in dispute and very rightly he did not insist on this ground of appeal.

Ground 2 : Appellant was referred to a recent decision of the Supreme Court (Civil Appeal No. 3978) in which the point raised was decided upon and as a result he did not pursue the point any further and this ground was abandoned.

Ground 3 : This was the only ground left for the decision of this Court. Appellant alleges that he is a *bona fide* purchaser for value without notice of the prescriptive right of the respondent and therefore defendant-respondent could not succeed on account of long undisputed possession, in her counterclaim to obtain registration in her name of the disputed land.

It has been stressed that there was no evidence that appellant was not a *bona fide* purchaser for value without notice and the Court's finding to the contrary could not stand.

The rule that a *bona fide* purchaser for value without notice could defeat a statutory title conferred by sections 20 and 78 of the Ottoman Land Code on the person who acquires prescriptive title by long undisturbed possession, was first introduced to this Island in the case of *Haji Petri* v. *Haji Gregori*, 1892, 2 C.L.R., p. 108, which was followed in *Savvas* v. *Paraskeva*, 1898, 4 C.L.R., p. 71 ; and followed and expounded in *Haji Haralambo Michael & Others* v. *Haji Stylli Nicoli & Others* 1909, 8 C.L.R., p. 113. Reference to *bona fide* purchaser was made also in a recent case, in *Haji Artin Terzian* v. *Maroulla Ch. Michaelides*, 1948, 18 C.L.R. p. 125.

The doctrine of *bona fide* purchaser for value without notice is based on estoppel by conduct. Tyser, Chief Justice, explains the application of this doctrine to land cases as follows :

> " In this case the defendant bought from the registered owner. It appears that the plaintiffs had a prescriptive title against the vendor ; if they had a prescriptive title it was their duty to register, if by their neglect a *bona fide* purchaser without notice of this right acquires the property from the registered owner, the persons who have the prescriptive right against the vendor are barred or estopped from ascertaining their claim."
>
> (*Haji Haralambo Michael & Others* v. *Haji Stylli Nicoli & Others*, p. 115 above cited.)

Had I considered myself not bound by those decisions I should have found it extremely difficult to reach the same conclusions.

The obligation to obtain a title deed by the possessors of *arazi mirié* land was imposed by article 1 of Regulation 7th Shaban 1276 (28th February, 1860) which reads :

> " Henceforth nobody shall be allowed under any circumstances to hold *arazi mirié* without title deed. It shall be obligatory for persons having no title-deeds to take them out, and those having old titles other than the ones with the Tughra at top to change them. The Valis, Mutessarifs, Kaimakams, Members of Mejlis, Mal Memours, Mudirs of Kazas, and Tapu Clerks having been appointed to carry out the necessary inquiries with regard to this, in case of negligence they will all be responsible. The person appointed to fill the post of Tapu Clerk shall be selected from among the Kaza, Mahkeme, and Nafus Clerks, whoever must be most trustworthy and efficient."

This article was never taken to entail a penalty on the defendant, of the nature described by C. J. Tyser. The effect of non-compliance with article 1 is explained by Professor Djemaleddin in page 90 of his book on Ottoman Land Code :

> " Those contravening this article are neither liable to punishment nor his possessory rights invalidated. He can continue to cultivate his land as before and he can lease the same. But he cannot transfer it and he cannot mortgage it and for this purpose he cannot bring an action to restrain interference. These are the effects of non-compliance."

In page 98 of the same book it is stated that a title deed furnishes a documentary evidence of possession but it is rebuttable and could be defeated by evidence of possession by another person. It is evident that a purchaser cannot fully rely for good title on the certificate of registration because such registration is only *prima facie* evidence of ownership. Section 7 (3) of the Land Transfer Amendment Law reads :—

> " The Principal Officer of Land Registry of the district within which the property is situate may for reasonable cause direct that the sale or mortgage be not registered unless and until the person desiring to sell or mortgage the property shall furnish him with such further evidence as to ownership of the property or nature, extent and boundaries thereof."

This also indicates in my view that a registered sale does not confer on the purchaser an indefeasible right of ownership. Land Registries before issuing title deeds to the heirs of a registered deceased land owner insist to be supplied with a village certificate from the village authorities where the land is situate testifying that the lands inherited were

under the undisputed possession of the registered deceased owner up to the time of his death. There is no reason why a prospective purchaser should not be considered bound to make reasonable enquiries in order to find out whether his vendor in addition to being the holder of title deed is also the undisputed owner in possession of the land to be sold. At any rate mere negligence or inaction was never considered sufficient to deprive of his rights a person who acquired statutory title against a registered owner by long undisturbed possession over a particular land.

It seems to me that the general rule that a vendor cannot convey a better title to the purchaser than that of his own has been vigorously applied in land transfers under the Ottoman Land Laws. I do not think that under the English Law a different rule is obtaining. I may cite a passage from Cheshire's Modern Real Property, 6th Edition, p. 692 :

> " The effect of the conveyance upon interest in land held by third parties varies according as these interests are legal or equitable. The purchaser of a legal estate is subject to all legal estates and interests which were enforceable against the land while it was in the hands of the vendor, it is immaterial whether the purchaser has notice of such interest or not."

Once we introduce the doctrine of *bona fide* purchaser for value from English Law we should in its application borrow also its complements under the same law. The doctrine of estoppel by conduct could properly be applied in the present case only if certain conditions requisite for its application are present. I may refer to certain passages from Halsbury Laws of England, 2nd Edition, on estoppel, page 495, paragraph 566 :

> " Mere silence or inaction is not, in the absence of a duty to speak, such conduct as to amount to a representation."

On page 496, same paragraph :

> " . . . . and one who culpably stands by and allows another to hold himself out to the world as the owner of property and thereby to sell it to a *bona fide* buyer cannot afterwards assert his title against the latter."

Further down, on page 497 :

> " Courts of Equity would not permit an owner of property who had knowingly allowed another person to enter into a contract for its purchase or for the advance of money upon it in ignorance of the former's title, afterwards to set up that title to the prejudice of the purchaser. Nor would they allow one who had stood by with the knowledge that another was expending money on his land under a mistaken belief as to his own

rights and in ignorance of those of the true owner, afterwards to assert his title without at least making compensation for the money so expended, or otherwise doing equity to him who had laid it out."

On page 499, paragraph 568, it is stated :

"Before anyone can be estopped by a representation inferred from negligent conduct, there must be a duty to use due care towards the party misled or towards the general public of which he is one."

In page 502, para. 570 :

"A second essential condition of estoppel and negligence is that the negligence must be in the transaction itself and a third, which is so closely connected with the second that it is impossible to treat them separately, is that the negligence must not only be calculated to have a misleading effect attributed to it but must be the proximate or real cause of that result."

Respondent did nothing to mislead the appellant purchaser that the disputed portion was not her property. It cannot be argued that she has been the proximate cause for the purchaser being misled if he was misled at all. On the contrary until the local inquiry was carried out she believed that the disputed portion was included in her title deed.

Another important aspect of this case is to examine on which of the parties the onus of proof lies in establishing a *bona fide* sale for value without notice. The onus of proving that a particular purchaser for value is a *bona fide* purchaser and had no notice of the prescriptive claim of the respondent lies on such purchaser. We read from Hanbury's Modern Equity, 5th Edition, p. 34 :

"The defence of a *bona fide* purchaser for value is an affirmative defence. In order to establish it a purchaser must show, in the words of Fry J. in *re Morgan*, 'that he took all reasonable care and made enquiry and that having taken that care and made enquiry he received no notice of the trust which affected the property.' The word 'notice' must now be examined. It is of the three varieties, actual, constructive and imputed. (1) It is actual where a purchaser actually knows of the existence of the equitable interest. (2) It is constructive where the interest would have come to his knowledge if he had made such enquiries as he ought to have made. (3) Imputed notice covers actual or constructive notice to his agent as such in the transaction in question."

As to what amounts to notice we may usefully read from page 39 of Snell's Principles of Equity, 22nd Edition :

"With regard to what amounts to notice, the law, so far as concerns purchasers, including mortgagees and

lessees is now summarised by section 199 of the Law of Property Act, 1925, which provides that a purchaser is not to be prejudicially affected by notice of any instrument, matter, fact, or thing, unless it is within his own knowledge or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him;"

The learned trial Judge found that the appellant was not a *bona fide* purchaser for value without notice and we do not think that there is reason to disturb such finding. It was up to the appellant to satisfy the trial Court that he had no notice of the rights of the respondent. There is no direct evidence to show that he took reasonable steps to ascertain the actual boundaries of his property before he purchased the land in question. It is unlikely however that a farmer who buys land in his village would not care to go and inspect the land and ascertain the boundaries before the sale. Had he made reasonable enquiries it would have come to his knowledge that the disputed piece was uninterruptedly possessed by the respondent for over 20 years and the fact that the disputed portion was on the same level with that of the respondent's land both of which were on a higher level than that of the vendor and both separated from the latter by a retaining wall would have conveyed to the appellant the extent of land actually occupied and possessed by his vendor. If he did not bother to verify for himself the extent of the land he was going to buy in that case he was to be blamed and could not be considered *bona fide* purchaser for value without notice. As the respondent in this case had completed the prescriptive period over the land in question before 1946 her rights were not affected by the Immovable Property (Tenure, Registration and Valuation) Law.

For these reasons I think that the appeal must be dismissed with costs.