[WILSON, P., ZEKIA, VASSILIADES AND JOSEPHIDES, JJ.]

CHRISTODOULOS (*alias* TOOULIS) YIANNI VOSKOU,

Appellant-Plaintiff,

v.

MICHAEL HJI PETROU,

Respondent-Defendant.

(*Civil Appeal No.* 4455)

Immovable property—Easements—Right of way—Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224, *sections* 11 (1) (*b*), 12 *and* 55—*Acquisition of right of way by thirty years user—Computation of the period of thirty years under section* 11 (1) (*b*) *of the Law—Inclusion therein of the years during which the predecessor in title of the respondent exercised the right of passage—Ottoman Land Code, Article* 13—*Mejelle, Article* 166—*Ab antiquo right*—"*Qadim*"—Georghiou *v.* Komodromou, (1963) 2 *C.L.R.* 221 distinguished—*Cap.* 224, *sections* 40 *and* 50 (supra).

Easements—Easement being appurtenant to the dominant tenement passes to the purchaser thereof by the transfer of the dominant land—Cap. 224, *section* 12 (1) (supra).

Statutes—Interpretation—In order to ascertain the intention of the legislature reference to the previous state of the law is allowed, especially where the present Law is one for Consolidation and amendment of the old Law.

Section 11 of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224 provides :

"(1) No right of way or any privilege, liberty, easement, or any other right or advantage whatsoever shall be acquired over the immovable property of another except—

(*a*).....

(*b*) where the same has been exercised by any person or by those under whom he claims for the full period of thirty years without interruption :

Provided....."

Section 12 of the same Law provides :

"(1) where any right, privilege, liberty easement or other advantage has been acquired as in sub-section (1) of

section 11 of this Law in respect of any immovable property, the same shall be deemed to be attached to such property and to be included in any dealing made with such property.

(2) Where any such right, privilege, liberty....."

Section 55 of the aforesaid Law, Cap. 224, provides :

" Where any land is subject to or enjoys any right, privilege, liberty, easement or other advantage as in section 12 of this Law, the same shall, on the application of any interested party, be recorded in the Land Register and in the certificate of registration relating to such land."

The appellant-plaintiff is the owner of plot No. 74 in the village of Kalogrea and the respondent-defendant is the owner of an adjoining piece of land, plot No. 77. The respondent, alleging a thirty years uninterrupted user, claimed under section 11 (1) (*b*) of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224 a right of way through plot No. 74 for the benefit of his adjoining land the aforesaid plot No. 77. In computing the thirty years user, the respondent took into account the period from the years 1929 to 1951 during which plot No. 77 was held by his predecessor in title, a certain C.T. from whom he bought the land in question *i.e.* plot No. 77 some time in the year 1951 when same was transferred and registered in his (respondent's) name. The appellant owner of plot No. 74 brought an action in 1960 against the respondent claiming *inter alia*, an injunction restraining him from interfering with his said land, plot No. 74. The defendant-respondent set up the defence based on the aforesaid right of way and counterclaimed for a declaration accordingly. On the evidence adduced the trial Court found that the defendant and his predecessors in title, on foot and by their animals passed uninterruptedly for a period of over 30 years (*viz.* from 1929 to 1960 when the action was instituted) through a definite pathway in plot 74 belonging to the plaintiff, in order to reach their field plot No. 77 for farming purposes. On those facts the trial Court held that the 30 years user provided by section 11 (1) (*b*) (*supra*) has been established, dismissed the action and issued a declaration to the effect that the defendant is entitled to a right of way through plot No. 74, the plaintiff's land, in favour of his land, plot No. 77 and that he is entitled to have the said right registered in the books of the Land Registry Office.

On appeal by the plaintiff, the High Court, dismissing the appeal :

Held, (1) we are of opinion the conjunction " or " recurring in section 11 (1) (*b*) (*supra*) should be read disjunctively and conjunctively. The trial Judge was, therefore, right in adding the years during which the predecessor in title of the respondent exercised the right of passage for plot No. 77 by passing through the pathway on the appellant's land, plot No. 74. *Georghiou* v. *Komodromou* (1963) 2 C.L.R. 221 *distinguished*.

(2) Both the previous law obtaining in the Island and the English Law regarded as material the length of user independently of the owners of the dominant tenement over the property of another, and it is unlikely that the legislature here intended otherwise in enacting the relevant sections of the present Immovable Property Law, Cap. 224 (*supra*).

Appeal dismissed with costs.

Per curiam : Section 12 (1) Cap. 224 (*supra*) makes it clear that an easement such as a right of way being appurtenant to the dominant tenement passes to the purchaser by the transfer of the dominant land. This point does not arise, however, in this case because C.T., the vendor and predecessor in title of the respondent, did not exercise the right of passage for the full period of 30 years (*supra*) and his interest in such right being an inchoate one could not be subject of registered transfer if that was required by law.

Cases referred to :

Georghiou v. *Komodromou*, (1963) 2 C.L.R. 221

Dimitri v. *Cleanthis*, 18 C.L.R. p. 141.

Appeal.

Appeal against the judgment of the District Court of Kyrenia (Evangelides, D.J.) dated the 24.6.63 (Action No. 309/60) whereby plaintiff's action for an order of the Court restraining the defendant from interfering with his land under Reg. No. 1099 was dismissed and a declaration that defendant is entitled to a right of way in the books of the L.R.O. was made.

C. S. Constantinides, for the appellant.

A. Christofides, for the respondent.

Cur. adv. vult.

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The following judgments were read :—

WILSON, P.: Mr. Justice Zekia will deliver the judgment in this case.

ZEKIA, J.: Appellant-plaintiff is the registered owner of a plot of land No. 74 in the village of Kalogrea and respondent-defendant is the owner of an adjoining plot No. 77. Plot 74 is bounded by a road on the south. Plot 77 is to the north of plot 74. The right of way claimed by respondent for his above field is through a passage 6 feet wide which starts from the road mentioned, passing from the extreme east portion of plot 74 and reaching respondent's land.

The learned Judge found that " the defendant and his predecessors-in-title had been passing though the passage in question continuously and without objection or interruption for a period of over 30 years before the defendant was interrupted by the plaintiff a short time before this action. They were doing so in the open, that is to say, not by stealth, and in my opinion the defendant has established a right under sections 11 and 12 of the Immovable Property Law Cap. 224 ". The learned Judge goes on to say : " I find that the defendant has proved that he and his predecessors-in-title have exercised a right of way through the passage claimed for the full period of 30 years without interruption, up to a short time before the hearing of this action. The manner in which they were passing, *i.e.* in the open and regularly and continuously shows that they were doing so under a claim of right and as it is stated in Gale on Easements, 13th ed., p. 154, last line ' The presumption is that a party enjoying an easement acted under a claim of right until the contrary is shown '."

Plaintiff appealed from the said judgment and his Counsel contended in his appeal (*a*) that there was no evidence to support the findings of the Court that defendant (respondent) himself and his predecessor-in-title exercised a right of way for plot 77 over the land of the plaintiff-appellant for the full period of 30 years without interruption ; (*b*) that the Court below was wrong in law—because—(i) in computing the 30 years period took into account the years between 1929–1951 when plot 77 was held by Christoforos Hji Toumazou, the predecessor-in-title. Without the addition of these years the required period of 30 years is incomplete. The adding up of the two tenures of possession during which the right of way was exercised is contrary to section 11 (1) (*b*), of the Immovable Property Law, Cap. 224 ; (ii) The words

" immovable property " comprises easements and, therefore, the transfer of a right of way is subject to section 40 of Cap. 224. The right of passage—if any—owned by Christoforos Hji Toumazou, the vendor of plot 77, was not transferred in 1951 when plot 77 was registered in the name of the respondent.

Reference was made to *Georghiou* v. *Komodromou*, (1963) 2 C.L.R. 221 and to section 4 of the said Law.

Mr. Christofides for respondent distinguished the present case from *Georghiou* v. *Komodromou* and referred us to section 11 (1) (*b*) of the Law.

Facts of the Case :—

Four were the witnesses who testified to the facts to the effect that respondent and his predecessor-in-title, Christoforos, on foot and by their animals passed uninterruptedly for a period of over 30 years through a definite pathway in plot 74, in order to reach their field plot 77 for farming purposes.

The Court believed these witnesses and their evidence remained almost uncontradicted by other evidence. I think, therefore, that the trial Court was justified in its finding.

Legal aspect of the Case :

Two are the points which arise for consideration :

(1) For the computation of the period of 30 years can section 11 (1) (*b*) of the Law be read and interpreted in such a way, contrary to the view held by the trial Court, as to exclude from reckoning the years during which a right of way has been exercised by the said predecessor-in-title.?

(2) Can an inchoate interest in such a right of way enjoyed by the said vendor be transferred to a purchaser, the respondent in this case, without the registration and transfer of such a right ?

The answer to the first question depends on the construction to be laid on section 11 (1) (*b*) which reads :

> " Where the same has been exercised by any person or by those under whom he claims for the full period of thirty years without interruption."

The construction of the above narrows down to the interpretation of the conjunction " or " occurring between the words " by any person " and " by those under whom " in the section.

I am of the opinion that in order to give effect to the intention of the legislature it is permissible in this case to read " or " disjunctively and conjunctively.

In order to ascertain the intention of the legislature we may go to the previous state of the law especially where the present Law is one for the consolidation and amendment of the old Law. This appears to be so from the heading of the present Law, Cap. 224.

Maxwell on the Interpretation of Statutes, 12th Edition, page 24, gives a brief summary of the authorities on the point :

> " If an Act is intituled an Act to consolidate previous statutes, the courts may lean to a presumption that it is not intended to alter the law and may solve doubtful points by aid of such presumption of intention rejecting the literal construction. And, even where the Act, is ' to amend and consolidate the Law of Bankruptcy,' Chitty J. holds it reasonable to infer that the legislature intended the law to stand."

The right of passage in the previous law was governed by Article 13 of the Ottoman Land Code which reads " Every possessor of land by title deed can prevent another from passing over it, but if the latter has an *ab antiquo* right of way he cannot prevent him ". The word " *ab antiquo* right " is defined in Article 166 of Mejelle as " *Qadim* is that the beginning of which no one knows ". " *Qadim* " corresponds to the words " *ab antiquo* right ".

In *Dimitri* v. *Cleanthis*, 18 C.L.R., p. 141, the law relating to *ab antiquo* right of passage was expounded by the Supreme Court of Cyprus. The following passage from page 547, Halsbury's Laws of England, 3rd Edition, volume 12, in my view may be taken to be a brief statement of the law on the subject which equally applies to *ab antiquo* rights under Ottoman Laws :

> " *Time for which user must be proved.* As it is usually impossible to prove user or enjoyment further back than the memory of living persons, proof of enjoyment as far back as living witnesses can speak raises a *prima facie* presumption of an enjoyment from the remoter era. Where evidence is given of the long enjoyment

> of a right to the exclusion of all other persons, enjoyed as of right as a distinct and separate property in a manner referable to a possible legal origin, it is presumed that the enjoyment in the manner long used was in pursuance of such an origin, which, in the absence of proof that it was modern, is deemed to have arisen beyond legal memory."

According to the previous law what was material in the acquisition of the right of passage—otherwise than by an express grant—over the land of another was the length of time this right was exercised irrespective of any change in the possessors or owners of the dominant land. The uninterrupted user of such right in favour of a particular piece of land for a long period amounting to "*Qadim*" secured a right of passage over the servient plot for any possessor of the dominant land. This kind of right of way of course lapses when the possessor of both dominant and servient land is the same person, which is not the case here.

The new law apparently in order to overcome the difficulties of establishing user and enjoyment of easements from time immemorial or "*Qadim*"—an indefinite and uncertain period—adopted the modern feasible way of prescribing a definite minimum period for acquiring such rights. It seems the length of user independently of any change in the possessor of the dominant tenement is what is material also in English Law in the acquisition of easements by long user (see page 152, Gale on Easements, 13th Edition).

I am of the opinion, therefore, that the learned judge was right in adding the years during which the predecessor-in-title of the respondent exercised the right of passage for plot 77 by passing through the pathway referred on appellant's land, plot 74.

With regard to the *second* point, section 12 (1) of the Law provides—

> "Where any right, privilege, liberty easement or other advantage has been acquired as in subsection (1) of section 11 of this Law in respect of any immovable property, the same shall be deemed to be attached to such property and to be included in any dealing made with such property."

This makes it clear that an easement such as a right of way being appurtenant to the dominant tenement passes to the purchaser by the transfer of the dominant land.

This point does not arise in this case because Christoforos Hji Tomazou, the vendor, did not exercise the right of passage for the full period of 30 years and his interest in such right being an inchoate one could not be subject of registered transfer if that was required by Law.

A right of passage is incorporeal in nature and is attached to the land and does not exist independently of it. It follows the land and it relates to its mode of enjoyment. This is quite different in nature from acquisitive prescription applicable to the corpus of the land whereby a person could acquire the land, the property of another, by adverse possession. In *Georghiou* v. *Komodromou* (*supra*) it was the combined effect of sections 40 and 50 of the Immovable Property Law, Cap. 224, which led the Court to reject the submission that the appellant, although not a transferee in respect of the disputed area within the said sections, could be regarded so because the predecessor-in-title had acquired prescriptive title over such disputed area.

Reference was also made to section 55 of the Law which reads :

> " Where any land is subject to or enjoys any right, privilege, liberty, easement or other advantage as in section 12 of this Law, the same shall, on the application of any interested party, be recorded in the Land Register and in the certificate of registration relating to such land."

This section read together with section 57 leaves no doubt that, unless an interested party applies for the registration of an easement, such registration is not essential for the easement to be transferred along with the transfer of the land to which it is attached.

In short, both the previous law obtaining in the Island and the English Law regarded as material the length of user independently of the owners of the dominant tenement over the property of another, and it is unlikely that the legislature here intended otherwise in enacting the relevant sections of the present Immovable Property Law, Cap. 224.

I am of the opinion, therefore, that the appeal should be dismissed with costs.

VASSILIADES, J.: I agree with the judgment of Mr. Justice Zekia, that the appeal fails and should be dismissed with costs. The evidence amply supports the finding of the trial Court regarding the exercise of the right of way by the respondent and his predecessor in possession, for the full period of prescription. On that finding, the respondent has established the right of way claimed, adjudicated by the trial Court. In *Georghiou* v. *Komodromou* (*supra*) I expressed my view as to the validity of prescriptive rights. This appeal must fail, with costs.

JOSEPHIDES, J.: I have had the advantage of reading the judgment of my learned brother Zekia, J., and I agree that this appeal should be dismissed for the reasons stated by him.

Appeal dismissed with costs.