[VASSILIADES, P., TRIANTAFYLLIDES, LOIZOU, JJ.]

PETROS PAPA XANTHOU,

Appellant-Defendant,

v.

PANAYIOTIS CHARALAMBOUS AND OTHERS,

Respondents-Plaintiffs.

(Civil Appeal No. 4564).

Immovable Property—Right of way—Prescription—User—Width of passage—Findings of trial Court on the issue of user, the mode of use and the location of the passage over which right of way is claimed—Upheld by Court of Appeal—Findings of trial Court on the issue of the width of the passage set aside as they could not be supported having regard to all the evidence before such Court.

Right of way—See under "Immovable Property", above.

The appellant-defendant in this appeal complains against the judgment of the trial Court whereby it was declared that the respondents-plaintiffs have a right of way for agricultural purposes through the appellant's land, over a strip 8 feet wide on the ground and 10 feet wide in the air and he (the defendant) was restrained from interfering with the exercise of the right of way and he was further ordered to remove any obstruction built by him anywhere on the said strip of land.

The appellant relied on the following grounds of appeal :

"The judgment of the Court issued on the 18th December, 1965, that the respondents-plaintiffs (1-4) have acquired a right of way is wrong in law and/or unjustifiable and/or against the weight of evidence because :

(A) The Court was wrong in law to adjudge that the respondents have acquired a prescriptive right of way over the appellant's land, as the period of 30 years required by law for adverse use of the right of way has not been completed.

(B) The Court was wrong in law to adjudge that the evidence adduced was sufficient to establish uninterrupted adverse use of the right of way by the respondents-plaintiffs.

(C) The finding of the Honourable Court that the respondents-plaintiffs have exercised an *ab antiquo* right of way over appellant's-defendant's land is against the weight of evidence.

(D) The finding of the Court that the respondents-plaintiffs' right of way is eight feet in width is against the weight of evidence".

The respondents'-plaintiffs' claim was based on user without hindrance or interruption since 1910 in the case of plots 222 and 223 and for a period of over 30 years in the case of plots, 72 and 73.

The appellant's-defendant's case on the other hand was that the respondents never exercised the right of way over this plot 148 and denied that any of them had acquired a right of way over his said plot. The appellant-defendant further alleged that in any way the respondents were estopped from claiming a right of way and/or that their rights if any, had been waived and this in view of the fact that in 1951 he built a house and shop on his plot 148 without any protest from or on behalf of the respondents. The trial Court accepted the evidence offered by the plaintiffs-respondents and rejected that for the appellant. It further rejected the defence of estoppel and waiver and found that the four respondents had exercised a right of way for agricultural purposes over the eastern edge of appellant's plot 148 without interruption from 1918 until the 10th August, 1963, in respect of their plots 72, 222, 73 and 223 respectively, and that, therefore, such right had been established. With regard to the mode of use and width of the right of way the trial Court found that the width of the passage was 8 feet on the ground and 10 feet in the air.

Held, (I). *With regard to grounds A, B and C of the appeal:*

In so far as the issue of user, the mode of use and the location of the passage over which the right of way is claimed are concerned there was abundant evidence upon which the trial Court could reasonably base their findings. It seems to us that the evidence in support of the case for the Respondents was more consistent and direct to the point and it was open to the Court to come to the conclusion that it did; and the findings on these issues cannot be disturbed. With regard to ground "C" we need only say that neither the plaintiffs' claim was based on an *ab antiquo* right as opposed to a prescriptive right, nor did the Court make any finding that the right was exercised *ab antiquo*. On the contrary the finding of the trial Court was

to the effect that the respondents exercised this right of way without interruption from 1918 to the 10th August, 1963. In the light of the above the appeal in so far as grounds A, B and C are concerned must fail.

Held, (II). With regard to ground D of the appeal :

(1) We do not think that the trial Court could safely make an exact finding that the right of way was eight feet wide on the ground and ten feet in the air from the facts proved, nor do we think that this finding can be supported having regard to all the evidence before the Court; therefore to the extent of this finding only the appeal will be allowed.

(2) In the result the declaration made by the trial Court will be varied to read as follows :

"It is hereby declared that these plaintiffs as owners of plots 72, 222, 73 and 223 respectively, have a right of way for agricultural purposes both on foot and with yoked oxen and/or loaded beasts of burden, over a strip extending along the whole of the eastern edge of plot 148".

Held, (III). With regard to costs :

As regards costs we consider that in the circumstances there should be no order as to costs in the appeal; but the order for costs made by the trial Court will remain unaffected.

Appeal allowed in part. Order for costs as aforesaid.

Appeal.

Appeal against the judgment of the District Court of Nicosia (Stavrinides P.D.C. and Izzet D.J.) dated the 18th December, 1965, (Action No. 4000/65) whereby it was declared, *inter alia*, that the plaintiffs 1, 2, 3 and 4 as owners of plots Nos. 72, 222, 73 and 223 respectively, are entitled to a right of way with or without loaded beasts of burden, for agricultural purposes, over a strip 8 feet wide on the ground and 10 feet wide in the air, along the eastern boundary of defendant's land plot No. 148 sheet-plan 19-53 W.2 at Karavostasi village.

C. J. Myrianthis with *Ph. Clerides*, for the appellant.

E. Odysseos with *J. Mavronicolas*, for the respondents.

Cur. adv. vult.

VASSILIADES, P. : The Judgment of the Court will be delivered by Mr. Justice Loizou.

LOIZOU, J. : The Respondents-Plaintiffs together with two other persons, who are not parties to this appeal, commenced proceedings in the District Court of Nicosia (Action No. 4000/63) seeking : (*a*) declaration that they had a right of way through the Appellant's land, sheet-plan 19-53 W.2, plot 148, Karavostasi locality, (*b*) an Order of the Court ordering the Appellant to withdraw whatsoever obstruction he had put over the said way, (*c*) a perpetual injunction prohibiting the Appellant from in any way interfering with the aforesaid right of way and (*d*) damages.

The claim for damages was in the course of the trial abandoned.

The claims of the four Respondents were made in respect of their plots 72, 222, 73 and 223 respectively and were based on user without hindrance or interruption since 1910 in the case of plots 222 and 223 and for a period of over 30 years in the case of plots 72 and 73.

The Appellant by his defence alleged that the Respondents never exercised the right of way over his plot 148 and denied that any of them had acquired a right of way over his said plot. It was further alleged that in any way the Respondents were estopped from claiming a right of way and/or that their rights, if any, had been waived and this in view of the fact that in 1951 he had built a house and shop on his plot 148 without any protest from or on behalf of the Respondents.

It appears from the evidence that the land comprising the plots involved in this Case was part of a property which at one time belonged to one and the same person and that the whole was purchased jointly by Ioannis Georghiou Mandis and Savvas HadjiMichael, who subsequently divided the property between them. All the parties to this appeal are the descendants of these two persons and they have inherited their respective plots directly or indirectly from them. Ioannis Georghiou Mandis was the father of Respondent 2 and the grandfather of Respondent 4 and the Appellant and a great-grandfather of Respondent 1. Respondent 3 is a grandson of Savvas HadjiMichael.

Ioannis Georghiou Mandis died in about 1899 and his share of the property was jointly held by his heirs until 1918 when it was divided between them.

In a reserved judgment in the course of which the evidence adduced was analysed in great detail, the District Court found that the four Respondents had exercised a right of way for agricultural purposes over the eastern edge of Appellant's plot 148 without interruption from 1918 until the 10th August, 1963, in respect of their plots 72, 222, 73 and 223 respectively and that, therefore, such right had been established. The defence with regard to estoppel and waiver was rejected.

Having so found the trial Court then proceeded to deal with the question of the right of way as regards mode of use and width; "as was natural—they say—the evidence as to width varies. However, there was ample evidence about user with a pair of oxen, sometimes yoked, and with beasts of burden carrying sheaves. Accepting that evidence as we do, we further find that the width of the passage was, and must be, 8 feet on the ground and ten feet in the air".

On the basis of these findings the trial Court made the following declaration and Orders :

"1. It is hereby declared that these Plaintiffs as owners of plots 72, 222, 73 and 223 respectively, have a right of way for agricultural purposes, with or without animals, over a strip 8 feet wide on the ground and 10 feet wide in the air, extending along the whole of the Eastern edge of plot 148.

2. The defendant is hereby ordered to remove any obstruction built by him anywhere on the said strip.

3. Defendant is hereby restrained from interfering with the exercise of the right of way".

The Appellant now appeals from the Judgment of the trial Court on the following grounds :

"The judgment of the Court issued on the 18th December, 1965 that the Respondents-Plaintiffs (1–4) have acquired a right of way is wrong in Law and/or unjustifiable and/or against the weight of evidence.

Because :

(A) The Court was wrong in Law to adjudge that the respondents have acquired a prescriptive right of way over the appellant's Land, as the period of 30 years required by law for adverse use of the right of way has not been completed.

(B) The Court was wrong in Law to adjudge that the evidence adduced was sufficient to establish uninterrupted adverse use of the right of way by the respondents-plaintiffs.

(C) The finding of the Honourable Court that the respondents-plaintiffs have exercised an *ab antiquo* right of way over appellant's-defendant's land is against the weight of evidence.

(D) The finding of the Honourable Court that the respondents-plaintiffs' right of way is eight feet in width is against the weight of evidence".

It is convenient to take the first three grounds of appeal together.

The trial Court heard in all 12 witnesses, 7 in support of the case for the Respondents and five in support of the case for the Appellant. The evidence of three of the witnesses for the Respondents *i.e.* P.W.1. Georghios Ioannou Mandis, P.W.3. Anastassis Bakallouris, P.W.4 Efthimia Ioannou Mandi, who is the mother of the Appellant, related to user of the disputed passage during the whole of the period from 1918 to 1963, whereas that of the other witnesses for the Respondents to certain parts of this period and to the mode of use.

The Appellant and his witnesses on the other hand denied the existence of any right of way over plot 148 and this they sought to establish by proof that along the whole of its northern side there was a high "ohtos", which would prevent anyone entering Appellant himself further said in evidence, for the first time it would appear in so far as these proceedings are concerned, that since 1952 when he built a house on his plot 148 he had been using the strip over which the Respondents claim a right of way as a storing place for timber. Another defence witness D.W.3 Polykarpos Petsides, a retired land clerk, said in evidence that in 1942 he visited the area in connection with the new registration which in the area of Karavostasi was carried out by him. Claims to rights of way, he said, were entered in a claims column of the field book and if the owner of the property over which the right was claimed had no objection or if the right was already recorded in the Land's Office books it would then be recorded in the new registration. He had no independent recollection in so far as plot 148 was concerned but if a claim had been made he said it would have been recorded

and investigated and if upheld it would have been entered in the certificates of registration of both the servient and the dominant tenements.

It is not in dispute that in 1963 the Appellant blocked the disputed passage by building a wall across it.

The Court accepted the evidence of the witnesses for the Respondents and rejected that of the witnesses for the Appellant.

We consider it unnecessary to say more about the evidence than that in so far as the issue of user, the mode of use and the location of the passage over which the right of way is claimed are concerned there was abundant evidence upon which the trial Court could reasonably base their findings. It seems to us that the evidence in support of the case for the Respondents was more consistent and direct to the point and it was open to the Court to come to the conclusion that it did; and that the findings on these issues cannot be disturbed. With regard to ground "C" we need only say that neither the Plaintiffs' claim was based on an *ab antiquo* right, as opposed to a prescriptive right, nor did the Court make any finding that the right was exercised ab antiquo. On the contrary the finding of the Court was to the effect that the Respondents exercised this right of way without interruption from 1918 to the 10th August, 1963.

In the light of the above the appeal in so far as grounds A, B and C are concerned must fail.

We now come to ground "D" *i.e.* that the finding of the Court that the Respondents' right of way is 8 feet in width is against the weight of evidence.

No particulars at all are given in the Statement of Claim regarding the width of the right of way claimed. The evidence adduced in support of the Plaintiffs' case on the question of the mode of use is consistent and it is to the effect that the Respondents exercised the right of way over the disputed passage for agricultural purposes both on foot and with yoked oxen and/or beasts of burden loaded with sheaves. The evidence of the same witnesses however, on the question of the width of the passage varies to a great extent.

P.W.1 Georghios Ioannou Mandis, who is Plaintiff 2, gave the width of the passage as ten feet. P.W.2 Andreas Ioannides, who drove his tractor over the passage on a number of occasions

between 1962 and 1963 gives the width as eight feet. P.W.3 Anastassis Bakalouris gave it as eight feet on the ground and ten feet in the air. This witness in cross-examination said that the owner from time to time of plot 148 when sowing it would leave a strip 3 to 5 feet wide uncultivated to serve as a passage. P.W.4 Efthimia Ioannou, Appellant's mother, gave the width of the passage as two feet. P.W.5 Savvas PapaMichael as 8 feet but like P.W.3 he went on to say that when plot 148 was cultivated a strip of four feet wide was left uncultivated to allow for the exercise of the right. P.W.6 Petros HadjiApostoli gave it as 3 or 5 feet wide on the ground and 7 in the air. Lastly P.W.7 Haralambos Yianni gave it as 8 feet wide and also stated that a strip of land 8 feet wide was always left uncultivated to serve as a passage. Asked to indicate what he meant by 8 feet this witness showed a width of 5 feet.

It will be seen from the above that the evidence on the issue of the width of the passage is most conflicting. In fact according to the versions of the various witnesses the width ranges from two to ten feet.

The trial Court appear to have based their finding on the fact that the Respondents had proved user with a pair of oxen, sometimes yoked and with beasts of burden carrying sheaves.

We do not think that the trial Court could safely make an exact finding that the right of way was eight feet wide on the ground and ten feet in the air from the facts proved, nor do we think that this finding can be supported having regard to all the evidence before the court; therefore, to the extent of this finding only the appeal will be allowed.

In the result the declaration made by the trial Court will be varied to read as follows :

"It is hereby declared that these plaintiffs as owners of plots 72, 222, 73 and 223 respectively, have a right of way for agricultural purposes both on foot and with yoked oxen and/or loaded beasts of burden, over a strip extending along the whole of the Eastern edge of plot 148".

As regards costs we consider that in the circumstances there should be no order as to costs in the appeal; but the order for costs made by the trial Court will remain unaffected.

Appeal allowed in part. Order for costs as aforesaid.