[CREAN, C.J., AND GRIFFITH WILLIAMS, J.]

1940
March 7.

KIANI OSMAN SHEMMEDI, *Plaintiff-Respondent,*

v.

MEHMED OSMAN SHEMMEDI, *Defendant-Appellant.*

(Civil Appeal No. 3627.)

KIANI OSMAN SHEMMEDI *v.* MEHMED OSMAN SHEMMEDI.

RIGHT OF PASSAGE—AB ANTIQUO RIGHT.

The respondent brought an action in the District Court of Famagusta for a declaration that the appellant had no right of passage through his house and yard, and for an injunction restraining the appellant from passing through his property and interfering with his possession. Judgment was given in respondent's favour, and the appellant appealed from that part of the judgment which decided that his alleged right over the above passage was not an ab antiquo *right.*

HELD: (1) *That as the appellant parted with the ownership of the property, to which he alleged an* ab antiquo *right was attached, to argue now, that he still retained that right was unreasonable;*

(2) "Ab antiquo *right" is analagous to a right by prescription in English Law.*

P. Paschalis with *Mylonas* for the appellant.

Zekia for the respondent.

The judgment of the Court was delivered by the Chief Justice.

CREAN, C.J.: The appellant and the respondent are brothers and they reside at Ayios Andronikos. Their houses are very close to each other. The respondent brought an action against the appellant for a declaration that the appellant had no right of passage through his house and yard in Ayios Andronikos, and for an injunction restraining the appellant from passing through this property and interfering with his possession.

The respondent asked for other relief in his action which was granted him, but the appellant only appeals from that part of the judgment which decides that his alleged right over the above passage is not an *ab antiquo* right.

It is set out in the notice of appeal that the evidence accepted by the Court was sufficient to establish a right of passage through the respondent's property even if such a right was not recognized by the Land Registry Office and the interested persons at the time of the issue of the title-deed No. 3310. This right of the appellant, it is alleged, has existed from time immemorial as shewn by exhibit A.J. 2 and the appellant's older title-deed No. 3310. And it is set out in the notice also, as a ground of appeal, that the District Judge wrongly interpreted the decision of the Supreme Court in the case of *Panayiotis Petri v. Styliani Petri*, Cyprus Law Reports, Vol. XIII, p. 96.

It is admitted that the respondent built a door on his property and that the effect of that is to lessen the width of the passage adjoining

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it. The appellant insisted that the respondent had no right to do so, and that by so doing, his use of the passage is restricted. The appellant's case is that he had an *an antiquo* right to use this passage in its original state and he calls evidence to shew that the passage has been used by him and the former owners of the house and land from time immemorial. The documents of title under which the appellant claims is No. 3310 L.R.O.

In order to trace the title in this matter it is necessary to refer to the evidence of the Land Registry official. The title-deed for property 3460 belongs to the respondent. That title-deed includes properties which were formerly Nos. 506, 507, 3310 and 3907 before being embodied in title-deed No. 3460 dated the 22nd August, 1933. The title-deed 3310 was dated 27th March, 1913, and was in the name of the appellant as purchaser and the name of Halil H. Mehmed as vendor. But, according to the evidence, this plot was joined to other plots at the new registration survey, and included in title-deed 1909 of the 29th August, 1926, in the name of the father of the appellant and the respondent. Later it was included in the title-deeds 3459 and 3460 in the name of the parties' father again.

This evidence may be considered to be incontrovertible as it is taken from the L.R.O. documents; therefore, the appellant ceased to have any interest in title-deed 3310 as from the year 1926. Later both title-deeds 3459 and 3460 were transferred into respondent's name. Consequently, the property in title-deed 3310, is in respondent: But, notwithstanding that, the appellant gave evidence in the Court below and said that the right of use of the passage adjoining this property, had been enjoyed by the appellant and his predecessors in title from time immemorial.

The title-deeds 3460 and those of the year 1926 do not show that they are subject to a right of passage by appellant; in fact, the Land Registry officer says that according to the title-deeds and plans no such right exists in appellant. Therefore, it must be taken that for eleven years before the institution of this action there were title-deeds registered according to which appellant had no right of passage as claimed by him, and so it seems difficult to understand how he can now claim an *ab antiquo* right of passage over the blind alley referred to in the evidence. If he really believed he had such a right we have no doubt that he would have seen that it was included in the registration of 1926 which embodied title-deed 3310 and the later titles vesting this property in his father, and then in the respondent. And the witness knows of no older registrations than these and he refers to title-deed 3459 which is

in respondent's name and speaks of a passage reserved to respondent. From this evidence it may be safely assumed that if there is a right of passage in anyone such right would be preserved by the title-deeds.

The ground on which the appellant relies is that he has an *ab antiquo* right to pass over part of a passage on which respondent has built. According to the Ottoman Land Code article 13 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. There is a definition of an "*ab antiquo* right" given in the Mejellé. It is there defined as, "that, the beginning of which no one knows." It is practically analogous to a right by prescription in English law. Originally the time necessary to establish a title by prescription was "time whereof, the memory of man runneth not to the contrary." In practice the enjoyment as of right for 20 years was regarded as proof of user from the time of the commencement of legal memory. The courts resorted to the fiction of a lost modern grant, and where user for 20 years was proved, juries were directed to find that the right in question had been the subject of a grant, but that the grant had been lost. This period of 20 years was fixed by analogy to the period required by the old Statute of Limitations—21 of James the first.

In this case there can be no question of a lost grant for the appellant's interest in title-deed 3310, to which it is alleged the right of way is attached, was transferred from him in 1926 to his father and subsequently to the respondent. Therefore on that ground the appellant must fail. And if he relied on the evidence of former owners of title 3310 as to a right of way from time immemorial that evidence cannot have been accepted by the District Judge when he says that he cannot hold that the appellant has in any way established the right from time immemorial.

Apart from this, it seems to us that the appellant is largely founding his claim to this right of passage, on the fact that the owner of property in title 3310 had a right of way for some years prior to his becoming the owner in 1926. But, as the appellant parted with this ownership 14 years ago, to argue now, that he retains that right which was attached to the property, when he is no longer the owner thereof, does not appear to us reasonable. Consequently, we think, this appeal should be dismissed with costs, and costs in the Court below allowed to respondent also.

Appeal dismissed with costs here and in the Court below.