1958
Nov. 24, Dec. 31
1959
March 6,
May 14

CHRISTINA YORKI DIKOMITI AND ANOTHER,
Appellants (Defendants),

v.

MICHAEL COSTI HAJI KOLOS AND ANOTHER,
Respondents (Plaintiffs).

(Civil Appeal No. 4260).

Highway—Public road—The rule "once a highway always a highway"—Public nuisance—Right of action—Special damage required, the Attorney General excepted—Civil Wrongs Law. Cap. 9, section 41.

Right of access to a public road from a private property—Interference with such right as distinct from public nuisance—Action for infringement of such right.

Crown property—No right of way can be acquired thereon by prescription—The Immovable Property (Tenure, Registration and Valuation) Law, Cap. 231, section 10 (1) (b) proviso.

Arazi - Mirié Land—Right of way—Acquisition of, by ab antiquo user—The Land Code, article 13—By thirty years user—The Immovable Property (Tenure, etc.) Law, Cap. 231, (supra) section 10(1) (b).

Practice—Costs.

In an action brought by the respondents-plaintiffs against the appellants - defendants the Court of trial granted injunctions: (1) restraining the defendants from interfering with the plaintiffs' right of access from their lands to the adjoining highway and from erecting certain structures on part of an old public road and (2) directing them to remove certain structures built and trees planted thereon. On the material before it the Supreme Court refrained from adjudicating on whether the disputed land was a public road or a Crown property or a private one, and proceeded to dispose of the appeal in considering the only three possible alternatives open in this case as aforesaid. The Court, reversing the judgment of the trial Judge,

Held: (1) If the finding of the trial Court is correct *viz.* that the disputed strip of land is a public road, then it is clear that what the defendants-appellants did on this road were unlawful acts obstructing the public road, amounting to a public nuisance. But, under the proviso to section 41 of the Civil Wrongs Law no action can be brought in respect of public nuisance save (a) by the Attorney General for an injunction or (b) by any person who has suffered special damage thereby.

In this case the respondents neither alleged nor pleaded that they suffered any special damage and therefore no action could be brought by them against the appellants-defendants. What amounts to a special damage in cases where a public road is obstructed is illustrated in a number of cases referred to in page 591 of Clerk and Lindsell, On Torts, 11th Edition. We need not go into them.

(2) It is clear from the evidence, that the proposed house was partly built on the land of the appellants and on the disputed road. The trees were also planted in the road. Nowhere it has been alleged or shown that the planting or the erections complained of blocked or stopped the access to the road from the lands of the respondents or vice versa. A right of access to a public road is a private right and an action can be maintained if such a right is interfered with, but any obstruction on the public road and especially when such obstruction is not between the highway and the frontager's land cannot be regarded as an interference with the right of access to the adjoining land.

Statement of the law in *Chaplin and Co. Ltd. v. Westminster Corporation* (1901) 2 *Ch.* 329, *p.* 333, *per* Buckley, J., *followed.*

(3) The trial Judge did not find that the right of access to the public road in question was interferred with before the plaintiffs (respondents) would reach the road but merely that by the proposed building operations on part of the road their right to use the road was interfered with. Therefore the trial Judge misdirected himself in holding that the appellants-defendants interfered with the plaintiffs'-respondents' right of access to the highway from their lands. Consequently the restraining order cannot stand.

(4) If the space in question has become a Crown property other than a public road, then the respondents-plaintiffs would have no legal ground for complaining of any encroachment on such land.

(5) If on the other hand the space in question has become the property of the appellant No.1, as she alleged, then the respondents could not establish a right of way over it because from 1900 up to 1925 the disputed space formed part of a public road and as such it could not be a subject of a private right of way: it could only be a subject of common right to use a public road.

A right of way on land on the *arazi mirié* category could only be acquired by *ab antiquo* user under the old law, see article 13 of the Land Code. The learned trial Judge did not find that there was *ab antiquo* right of way but found that for a period of 30 years and over the respondents exercised the right of way over the disputed space. A right of way, if any, could only be acquired after the year 1925 when the disputed

area has ceased to be a public road and has become a private property of the appellant No. 1; but from 1925 to the early part of 1954 when the right of way has been interrupted and the present action was brought the period of 30 years was not complete and the proviso to section 10 of sub-section 1(b) of Cap. 231 (*supra*) makes it clear that no right of way can be acquired on the immovable property held by or vested in the Crown.

(6) For the aforesaid reasons we think that the appeal should be allowed and the judgment of the trial Court should be set aside with costs in favour of the appellants.

As to the costs of the Court below we order that each party should bear its own costs owing to the fact that the trial of this case has taken unnecessarily protracted course for which both parties are to be blamed and we consider it unfair to burden respondents with the costs of the trial also.

Appeal allowed.

Per curiam: Bailey and another v. Jamieson and another (1875-76) I.C.P.D. 329, places a limitation on the doctrine "once a highway always a highway". Where a way ceased to be a public highway by being cut on both ends, its character of public highway was held to have gone also.

Cases referred to:

Bailey and another v. Jamieson and another (1875-76) I.C.P.D. 329.

W.H. Chaplin and Co. Ltd. v. Mayor of the City of Westminster (1901) 2 Ch. 329.

Appeal.

The defendants appealed against the judgment of the District Court of Nicosia (Judge Ch. K. Pierides) dated the 23rd April, 1958 (in Action No. 2187/54) whereby they have been : (1) restrained from interfering with the right of access of the plaintiffs from their property to a public road, by erecting certain structures on part of an old road, (2) directed to remove certain buildings built and trees planted thereon interfering with the plaintiffs' aforesaid right of access.

Lefcos Clerides for the appellants

St. Pavlides, Q.C. with

A. Haji Ioannou for the respondents

Chr. Benjamin, Assistant Commissioner of Nicosia for the Commissioner of Nicosia.

Cur. adv. vult.

The facts sufficiently appear in the judgment of the Court read by :—

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v.
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ZEKIA, J : This is a case in which the respondents (plaintiffs) sought (a) an order of the Court restraining the appellants (defendants) from unlawfully interfering with their right of access to a public road from their property consisting of two pieces of land (plots 391/1 and 391/2) at Yerolakkos, locality "Litos", (b) an order directing the defendants to cease any building works started on the highway forming the southern boundary of their aforesaid lands and removing any trees planted or structures erected on the said highway which trees and structures obstructed the right of access from the lands of the respondents to the highway in question

The learned trial Judge having heard the case gave his judgment in the following terms

"1 Defendants are hereby restrained from interfering and/or trespassing with the plaintiffs' right of access from their lands described in the writ of summons to the adjoining highway

2 Defendants are hereby ordered to cease any building works started into the said highway and to remove any building or other erections or structures erected into the old road which road touches the southern boundary of the plaintiffs' lands under plot 364, 365 in exh. 1, except the hut built and trees planted therein which do not obstruct plaintiffs' right of access

3 Defendants are hereby restrained from interfering with the right of way which plaintiffs have acquired over the land of defendant No 1 under plot 362 at Yerolakkos all along the above-mentioned old road in order to go and enter their adjacent lands, under plot 364 and 365 on foot, by animals, and by motor-vehicles

4 Defendants to pay the costs of this action which will be assessed by the Court"

In this rather unduly protracted case the facts material to the issues involved can be briefly stated as follows

The property under plots 391/1 and 391/2 consists of cultivable lands of three donums and three donums and one evlek in extent, respectively.

Appellants 1 and 2 are husband and wife and the wife is the owner of the neighbouring land, bearing plot No 362 Admittedly there was a public road between the lands of the litigants or their predecessors in title which road was abandoned when in 1925 a new asphalted road between Nicosia and Yerolakkos was constructed and part of the old road, a bend of some length passing between the properties of the litigants, was left out of the new road For a number of years this portion of the old road had been ploughed and cultivated with the result that no signs of its being once a road coud be traced in the recent years There is no doubt that, after the

construction of the new asphalt road, portion of the old road, which formed a bend, ceased to be a public road in the ordinary sense of the word and from the evidence of the Assistant Commissioner called by the Court it appears that as far as the District Administration is concerned the said part of the old road was abandoned and the inclusion of the part of the road opposite the land of the appellant 1 in her title deed along with the remaining piece of her land was not objected to by the District Commissioner's Office. It is also in evidence that both the old and the new roads passed through the land held by the appellant No. 1, the new road dividing her land into two.

It appears that no compensation was paid to the land owners for the diversion of the road in 1925. It is not also clear how the old road was cut off at the points of diversion for the purpose of straightening the road when the new asphalt road was constructed. The locality in question is not a built up area.

Appellant No. 1 built a hut in the year 1952 on the northern side of her land : this hut is not opposite respondents' lands. She also planted trees on the same side of her property. In the year 1954 she obtained a building permit for a house the foundation of which was laid and building works started on it in July 1954. Respondents objected to the construction in question and brought the present action. The space on which the trees were planted, the hut was erected and the house which was partly built forms the disputed area in this action.

The respondents allege that the space in dispute is part of the public road and forms the southern boundary of their property and that the erections mentioned interfered with his right of access to his property from the said road and *vice versa*. Appellants contended that the disputed space formed part of their property and was properly included in their title deed and as such they are perfectly entitled to plant the trees in question and to erect the proposed house. The evidence adduced on this aspect of the case was a conflicting one. The learned trial Judge accepted the evidence of the surveyor Costas Papa Constantinou and acted upon the plan exhibit 1 prepared by him.

The points in issue were reduced before this Court. On behalf of the appellants Mr. Clerides submitted (a) the old road was abandoned by the proper authorities in favour of the appellant (1) and it ceased to be a public road since 1925 and there was no encroachment therefore by the appellants on the so-called road interfering with the rights, if any, of the respondents ; (b) if the disputed space was not abandoned in favour of the appellant and it was not properly included in her title deed then the space in dispute lost its character of being part and parcel of a public road and since 1925 be-

came a Crown property over which no right of way by prescription could be acquired. At any rate if there is any claim for a right of way over the disputed area the period of 30 years required by law could only start in 1925, after the completion of the new road and the abandonment of the old one, and the running of the prescriptive period having admittedly been interrupted in 1954 the learned trial Judge was wrong in holding that for the full period of 30 years and over the plaintiffs-respondents made use of their right of way over the disputed land.

Mr. Pavlides, Q.C., on the other hand on behalf of the respondents submitted that the finding of the trial Court that the disputed space was part of the old road was conclusive and the common law rule that "once a highway always a highway" applies and in the absence of any exchange or alienation of part of a public road in accordance with the law under section 17 of the Immovable Property (Tenure, Registration and Valuation) Law by the Governor, the portion of the road in question retains its character as a public road and the adjoining land owners' right to make use of the road remains unaffected and it is of no consequence whether such road is properly maintained by the authorities as a public road or not.

He further argued that an individual under the old law, Article 1217 of Medjellé, could only acquire and add to his house part of the road which is surplus by paying its equivalent price provided it does not cause harm to a passer-by and this is not the case in the present action.

The appellants' counsel argued that there is no need for a formal way of abandonment in favour of an individual when a public road ceases to be used as such.

We have endeavoured so far to give a brief account of the points raised which call for consideration by this Court.

It is difficult to arrive at definite conclusions on certain points involved in this case such as whether this disputed part of the old road retains its character as a public road notwithstanding that it ceased to be used as a public road and for several years it has been ploughed and cultivated as a field.

Costas Papaconstantinou, the surveyor, the witness who has been credited by the learned trial Judge, said in his evidence that on the 2nd March, 1955, when he carried out a local inquiry there was no sign of any road in the disputed area and in the plans prepared in 1930—31 when a general survey started no such road was indicated. It was on the plan of 1920 — 21 on which the road in question was shown. The new road as it has already been mentioned, passed through the land of defendant No. 1 dividing her land.

The authorities might have abandoned the portion of the old road touching the northern part of appellant 1's land in her favour in exchange of the property allotted to the new road from another part of the same plot. This might explain why the District Administration consented to the inclusion of part of the old road in dispute in appellants' title deed. There is not, however, adequate evidence for definite conclusions on this point. It is a moot point whether a public road which is primarily allocated for the common use of the people continues to be regarded as a public road in the eye of the law notwithstanding the fact that the primary object of its being used as a public road does no longer exist.

Bailey and another v. *Jamieson and another* (1875-76) I.C.P.D. 329, places a limitation on the doctrine "once a highway always a highway". Where a way ceased to be a public highway by being cut on both ends, its character of public highway was found to have gone also.

Again according to the common law if a public road lawfully ceases to be such it reverts to its old owner. If the area in dispute for all intents and purposes can be regarded as having lost the character of a public road that portion would revert to its old owner and if the old owner was the Crown it would become a Crown property and if its old owner is a private owner it would become private property.

In his judgment the trial Court in page 48 states:

> "This public road when in the year 1907 was repaired one portion was removed to a higher level and passed through the land of the defendant 1 and replaced the previous public road and it was used by the people as the previous one".

As we have already stated there is no adequate material to adjudicate on these points and it would be undesirable to do so in any case where the Crown has not been made a party. But this appeal may be disposed of by considering the only three alternatives available in the case.

1. If the disputed space is assumed to be a public road as it has been found by the trial Court and it has been maintained by the respondents, would the alleged obstructions on the said road give a right of action to the plaintiff respondents?

2. If the disputed space lost its character as a public highway and has become a Crown property can the respondents maintain an action against the alleged encroachment on that space?

3. If the disputed area in question has become a private property of appellant No. 1 did the respondent establish a right of way over such property? If the respondents in

neither case can successfully support the claim for which they obtained an order of the trial Court then there is no need for this Court to come to definite conclusions on other points raised here and in the Court below and it would be sufficient for the purposes of this Court to deal only with the three assumptions:

The first : If the conclusion arrived at by the trial Court and supported by the respondents is correct then it is clear that what the appellants did on this road were unlawful acts obstructing the public road amounting to a public nuisance. But under the proviso to section 41 of the Civil Wrongs Law no action can be brought in respect of public nuisance save (a) by the Attorney-General for an injunction or (b) by any person who has suffered special damage thereby.

In this case the respondents neither allege nor pleaded that they suffered any special damage and therefore no action could be brought against the appellants-defendants by them. What amounts to a special damage in cases where a public road is obstructed is illustrated in a number of cases referred to in page 591 of Clerk and Lindsell, On Torts, 11th Edition. We need not go into them.

There appears to have been a source of confusion throughout the trial and the judgment of the Court below, a point which received particular consideration of this Court. It is clear from the evidence and from the plan, exhibit 1, produced to the trial Court by Surveyor Costas Papa Constantinou, which plan has been accepted by the trial Judge, that the proposed house was partly built on the land of the appellant and some part of it lies on the disputed road. The trees were also planted in the road. Nowhere it has been alleged or shown that the planting or the erections complained of blocked or stopped the access to the road from the lands of the respondents or *vice versa*. A right of access to a public road is a private right and an action can be maintained if such a right is interfered with but any obstruction on the public road and especially when such obstruction is not between the highway and the frontager's land cannot be regarded as an interference with the right of access to the adjoining land. This is made abundantly clear in *Chaplin & Co. Ltd.* v. *Westminster Corporation* (1901) 2 Ch. 329; we quote from page 333 per Buckley, J.:

> "The plaintiffs set up a right to have a particular portion of the highway so kept as that they shall be in a position to exercise an alleged right of using it to the maximum of their own convenience. It does not seem to me that they have any such right. What is their right? It has been put forward that they have some private right. It seems to me that that is wrong. The right which they here seek to exercise is a right which they enjoy in com-

mon with all other members of the public to use this highway. They have an individual interest which enables them to use without joining the Attorney-General, in that they are persons who by reason of the neighbourhood of their own premises use this portion of the highway more than others. They have a special and individual interest in the public right to this portion of the highway, and they are entitled to sue without joining the Attorney-General because they sue in respect of that individual interest ; but the right which they seek to exercise is not a private right, but a public right. A person who owns premises abutting on a highway enjoys as a private right the right of stepping from his own premises on to the highway, and if any obstruction be placed in his doorway, or gateway, or, if it be a river, at the edge of his wharf, so as to prevent him from obtaining access from his own premises to the highway, that obstruction would be an interference with a private right. But immediately that he has stepped on to the highway, *and is using the highway, what he is using is not a private right, but a public right*".

In our opinion the trial Judge obviously misdirected himself in finding that the defendants (appellants) interfered with the plaintiffs' right of access to the highway from their lands and consequently the restraining order cannot stand.

The trial Court did not find that the right of access to the public road in question was interfered with before the respondents would reach the road but the finding is merely that by the proposed building operations on part of the road their right to use the road was interfered with. We quote from his judgment page 48 — 49:

> "In the year 1925 a new asphalted road was made which divided the land of the defendant No. 1 in two portions, and people who were using the second road in order to come to Nicosia and back abandoned the second road and followed the third asphalted road, but people who were using the second road in order to go and enter their lands continued to do so even after the construction of the new asphalted road. Amongst these people plaintiffs were included, who were using the second road in order to go to their lands under plots 364 and 365 from Yerolakkos village and back, either on foot or with animals, or by vehicles. They continued doing so and when the land under plot 362 was bought by the defendant No. 1 and thereafter until the year 1954 when defendants started building in it a house at the west side of the land under plot 362 and by this way they prevented them to continue using the old road".

There was no interference with the respondents' rights of access to the road since there was nothing done between the

boundary of respondents' lands and the nearest side of the public road and according to the plan half of the width of the road bordering the lands of the respondents was free for the respondents to enter on to the public road from their lands.

The second alternative does not help the respondents either. If the space in question has become a Crown property other than a public road, then the respondents would have no legal ground to complain of any encroachment on such land.

The third alternative:— If the space in question has become the property of appellant No. 1, as she alleges on the facts of this case, the respondents could not establish a right of way over it because from 1900 up to 1925 the disputed space formed part of a public road and as such it could not be a subject of a private right of way; it could only be a subject of common right to use a public road.

A right of way on land of the *arazi mirié* category could only be acquired by *ab antiquo* user under the old law, see article 13 of the Land Code. The learned trial Judge did not find that there was *ab antiquo* right of way but found that for a period of 30 years and over the respondents exercised the right of way over the disputed space. A right of way, if any, could only be acquired after the year 1925 when the disputed area has ceased to be a public road and has become a private property of the appellant No. 1; but from 1925 to the early part of 1954 when the right of way has been interrupted and the present action was brought the period of 30 years was not complete and the proviso to section 10 sub-section 1 (b) of Cap. 231, makes it clear that no right of way can be acquired on the immovable property held by or vested in the Crown.

For the aforesaid reasons we think that the appeal should be allowed and the judgment of the trial Court should be set aside with costs in favour of the appellant.

As to the costs in the Court below we order that each party should bear its own costs owing to the fact that the trial of this case has taken an unnecessarily protracted course for which both parties are to be blamed and we consider it unfair to burden respondents with the costs of the trial also.

Appeal allowed.