[ZEKIA, J. and ZANNETIDES, J.]

GAVRIEL CHRISTODOULOU,
Appellant (Plaintiff),

v.

PAVLOS PETROU HADJI TOFI,
Respondent (Defendant).

(*Civil Appeal No.* 4271).

Immovable property—Trespass—Local custom—Defence of, in an action for trespass—The Civil Wrongs Law, Cap. 9, s. 39 (2)—*Local custom—Attributes of—Local custom as distinct from general custom—English law applicable—Local custom as distinct from general custom—Local custom does not cease to be such because similar customs prevail elsewhere in the Island.*

Res judicata—Right of way by custom—Distinguishable from right of way acquired otherwise—Therefore, previous judgment in rem on the issue of right of way alleged to have been acquired otherwise than by local custom, is not res judicata where the right of way is sought to be established on such custom.

In an action for trespass the defendant set up the defence of a right of way by virtue of a "local custom" under the Civil Wrongs Law, Cap. 9, section 39(2) (*see post* in the judgment). The Magistrate who tried the case held that on the evidence the alleged custom did not possess some of the attributes required and, consequently, gave judgment for the plaintiff. The defendant appealed to the President of the District Court who, reversing the judgment of the Magistrate, allowed the appeal holding that the allegation of "local custom" was established. From that judgment the plaintiff appealed to the Supreme Court. It was argued on behalf of the appellant before the Supreme Court that there was no evidence to establish a local custom and that the learned President wrongfully interpreted the words "local custom". In this respect it was emphatically stressed by counsel for the appellant that because similar customs prevail in other parts of the island the alleged "local custom" ceases to be a "local custom" within the meaning of section 39(2) and that therefore it affords no defence in an action for trespass.

It was, further, argued on behalf of the appellant that in view of previous judgments *in rem* to the effect that no right of way existed over the land in dispute—the respondent-defendant is estopped by *res judicata* from setting up the defence of "local custom".

On appeal, affirming the judgment of the learned President,—

Held (1) The evidence was sufficient to establish the existence of the necessary attributes of a local custom as to

its being ancient, reasonable, uninterruptedly enjoyed and certain in its nature. The locality and area in which the property of the plaintiff-appellant is situated has been well defined and the evidence pointed in particular to that piece of land as being subject to a customary right of way.

(2) There was also evidence in general terms that a landowner did not object to his neighbour farmer passing through his land in order to reach his field when such land was not under crop and therefore no damage was likely to be caused to such land. It has been emphatically stressed that if a local custom is a general one, that is, an island-wide one, such custom ceases to be a local custom in the legal sense of the word and therefore cannot constitute a defence to an action of trespass. There is nothing in the English Law to show that a custom ceases to be a local one when the area within the limits of a locality or country is too big and indeed a custom prevailing throughout a country, such as Devonshire, was held to be a local one (*See Bastard v. Smith*, 1838, 2 Mood. & R. 129).

(3) We do not think that if a similar custom prevails in other parts of the island such a custom ceases to be a local one. It is true that in England a custom prevailing throughout the realm would not be considered a local one but if it carries with it the other attributes of a local custom will become part of the common law. But viewing Cyprus as an independent realm, an island-wide custom cannot become part of our law and for this reason it would lead to absurdity to argue that if a local custom prevails throughout the Island it will not have the force and effect given to such a custom under the relevant section of the Civil Wrongs Law. It would be inconceivable that the legislature intended that a custom established in respect of a particular area will have no effect and will constitute no defence in an action of trespass if similar customs prevail elsewhere in the Island.

(4) The previous judgments referred to clearly did not relate to a right of way derived from a local custom. Right of way existing by custom can easily be distinguished from public or private right of way acquired by prescription or otherwise. No *res judicata* therefore arises in this case.

For the above reasons we think that this appeal should be dismissed with costs.

Appeal dismissed.

Cases referred to :

Bastard v. Smith, 1838, 2 Mood. & R. 129.

Appeal.

Appeal against the judgment of the District Court of Famagusta (Vassiliades, P.D.C.), dated the 20th October 1958 (Action No.376/56, P.D.C. Appeal No. 1/57) as an Ap-

pellate Court, setting aside the judgment of the Magistrate of the D.C. of Famagusta in that action brought by the appellant-plaintiff against the respondent-defendant for trespass, the latter setting up a defence of a right of way over the former's land by virtue of a "local custom".

M. Triantafyllides with

G. Santis for the appellant.

O. Zihni for the respondent.

Cur. adv. vult.

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

ZEKIA J. : This is an appeal against the decision of the President of the District Court Famagusta as an appellate Court setting aside the judgment of the Magistrate. The subject matter relates to an alleged right of way over the land of the appellant by virtue of a local custom. The Magisterial Court found on the evidence that the alleged local custom did not possess one or more of the attributes required for such a custom and therefore gave judgment in favour of the plaintiff-appellant. Defendant appealed to the President of the Court who held that there was ample evidence to establish the custom alleged in the statement of defence and consequently found that the local custom as proved constituted a defence, under section 39 (2) of the Civil Wrongs Law. The said section reads:

> " 39 (2). Where the acts complained of are permitted by local custom, such custom if established shall be a defence but in any action brought in respect of any trespass to immovable property the onus of showing that the act of which complaint is made was not unlawful shall be upon the defendant".

The grounds of appeal briefly are:

1. In the statement of defence the local custom alleged was not pleaded.

2. There was no evidence to establish a local custom and the learned President wrongly interpreted the phrase "local custom.".

3. The effect of previous judgments *in rem* on the parties to this action was wrongly overlooked.

A perusal of the statement of defence and the reply to that statement shows that the plaintiff was adequately informed of the nature of local custom the defendant was seeking to establish as a defence before the Court. The land affected, the nature and extent of the customary right of way alleged to have been enjoyed for 40 years and over for the

purposes of cultivation and harvesting was readily ascertainable from the pleadings. No objection was taken before or at the trial of the case for defective pleadings. No particulars were asked for or refused by the respondents. We do not think, therefore, that the appellant was prejudiced in his claim by the kind of defence put up.

Ground 2:— A customary right of way over another one's land no doubt should possess the necessary attributes on which both the Magisterial Court and the President's Court dwelt at length. The learned counsel of the appellant is also right in submitting that the phrase "local custom" has to be interpreted in accordance with the principles of legal interpretation obtaining in England.

In our view the evidence was sufficient to establish the existence of the necessary attributes of a local custom as to its being ancient, reasonable, uninterruptedly enjoyed and certain in its nature. The locality and area in which the property of the plaintiff-appellant is situated has been well defined and the evidence pointed in particular to that piece of land as being subject to a customary right of way. Not only witnesses of the defendant but also those of the plaintiff admitted the existence of a custom for the neighbouring farmers in the locality in question for passing through the land of the plaintiff when not under crop in order to proceed to and from their nearby fields for cultivation and harvesting purposes. An old pathway reaching and leaving part of the land of the appellant was rightly taken as corroboration of the existence of the local custom in question.

There was also evidence in general terms that a landowner did not object to his neighbour farmer passing through his land in order to reach his field when such land was not under crop and therefore no damage was likely to be caused to such land. It has been emphatically stressed that if a a local custom is a general one, that is, an island-wide one, such custom ceases to be a local custom in the legal sense of the word and therefore cannot constitute a defence to an action of trespass. There is nothing in the English Law to show that a custom ceases to be a local one when the area within the limits of a locality or country is too big and indeed a custom prevailing throughout a country, such as Devonshire, was held to be a local one (See *Bastard v. Smith*, 1838, 2 Mood. & R. 129).

We do not think that if a similar custom prevails in other parts of the island such a custom ceases to be a local one. It is true that in England a custom prevailing throughout the realm would not be considered a local one but if it carries with it the other attributes of a local custom will become part of the common law. But viewing Cyprus as an independent realm, an island-wide custom cannot become part of our

law and for this reason it would lead to absurdity to argue that if a local custom prevails throughout the Island it will not have the force and effect given to such a custom under the relevant section of the Civil Wrongs Law. It would be inconceivable that the legislature intended that a custom established in respect of a particular area will have no effect and will constitute no defence in an action of trespass if similar customs prevail elsewhere in the Island.

Ground 3 : The previous judgments referred to clearly did not relate to a right of way derived from a local custom. Right of way existing by custom can easily be distinguished from public or private right of way acquired by prescription or otherwise. No *res judicata* therefore arises in this case.

For the above reasons we think that this appeal should be dismissed with costs.

Appeal dismissed.