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

MARIKKOU NEARCHOU,
Appellant-Defendant,

v.

MARIA DEMETRI PAPAEFSTATHIOU,
Respondent-Plaintiff.

(*Civil Appeal No.* 4830).

Immovable property—Right of way—See infra.

Right of way—Agricultural holdings—Dominant and servient tenement—Long user—Prescription—See infra.

Right of way—Acquisition by long user for over the period of prescription—Section 11 (1) (*b*) *of the Immovable Property (Tenure, Registration and Valuation) Law, Cap.* 224—*Existence of fixed and trodden pathway—Very strong evidence tending to support the claim for such right of way over the land of the respondent—Exercise of right of way supported by real and undisputable evidence—Findings of fact made by the trial Judge unsatisfactory and set aside notwithstanding that such findings were based on the credibility of witnesses as assessed by the trial Judge.*

Appeal—Findings of fact based on credibility of witnesses—Unsatisfactory in the present case—Set aside on appeal.

Right of way—Cap. 224 (supra) *section* 11 *as amended by Law No.* 10 *of* 1966—*Provides a machinery for dealing with disputes concerning right of way—Not made use of by the parties in the present case*

Findings of fact—Made by trial Courts—Based on the credibility of witnesses—Set aside on appeal in this case—See supra.

Cases referred to :

Georghiou v. *HjiPhesa*, reported in this Part at p.58 *ante* ;
Ponou v. *Ibrahim*, reported in this Part at p.78 *ante* ;
HadjiDemosthenous v. *Georghiou* (1969) 1 C.L.R. 187 ,
Patsalides v. *Afsharian* (1965) 1 C.L.R. 134 ;
Mamas v. *The Firm "Arma" Tyres* (1966) 1 C.L.R. 158 ;
Imam v. *Papacostas* (1968) 1 C.L.R. 207 ;
Panayi v. *Lefteri* (1958) 23 C.L.R. 204 ;
Voskou v. *HjiPetrou*, 1964 C.L.R. 21.

The facts sufficiently appear in the judgment of the Court allowing the appeal and setting aside the findings made by the trial Judge.

Appeal.

Appeal by defendant against the judgment of the District Court of Paphos (Pitsillides, D.J.) dated the 7th June, 1969 (Action No. 1181/65) whereby she was ordered to stop interfering in any way with a field belonging to the plaintiff and her counterclaim for a right of way through the said field was dismissed.

I. Iacovides with *F. Markides*, for the appellant.

F. Galatopoulos, for the respondent.

The judgment of the Court was delivered by :

VASSILIADES, P.: The parties to this appeal come from the village of Kallepia, in the District of Paphos, where they both live. They, both, own property in the vicinity of the village ; and the dispute between them is whether the appellant is entitled to a right of way over respondent's property in order to proceed from the public road to her neighbouring land.

The property of the respondent is plot 527 on the plan prepared by the Land Registry witness who gave evidence in this case and produced the plan, admitted as *exhibit* 1 on the record. It is agricultural land, of 9 1/4 donums in extent, abutting on a public road. It was purchased by the respondent in 1964 for £500. The dispute arose soon after this purchase.

The property of the appellant consists of two plots, 607 and 602 on the plan (*exhibit* 1) also agricultural land acquired by the appellant from her adoptive father as dowry when she got married some twenty years ago. In fact one of the titles (*exhibit* 3 for plot 607) appears to have been transferred to appellant from her father in November, 1945. In her evidence the appellant stated that she knew her father's property in question, ever since she was a child ; and she was 50 years of age, she said, when giving evidence.

Appellant's property lies about 200 yards away from that of the respondent ; and there is a path leading from appellant's property to that of the respondent, ending (at the

time of the local enquiry in September, 1966) at a point at respondent's boundary from which appellant claims to have a right of way over respondent's plot 527 to the public road on the other side.

At the local enquiry, carried out under a Court order for the purposes of this action, in the presence of the parties and of several other persons who later gave evidence at the trial and in the presence of the village authority, as usual, the part of respondent's plot over which the right to pass is claimed by the appellant, was pointed out on the spot. It is marked with the dotted line A-B-C-D on the plan. The length of this line is—according to the Land Registry witness—580 feet or say about 200 yards. The right claimed is alleged to have been acquired by long user as prescribed in section 11 (1) (*b*) of Cap. 224 ; and it is to pass on foot and by animal for access to and from the appellant's plots 607 and 602 for the purposes of their use and enjoyment as agricultural land. The width of the land affected on the servient tenement would be about eight feet (loaded animals and yoked oxen) for the length of the line A-B-C-D ; and its value was estimated at " about £15 to £20 ".

It is common ground, established by the evidence adduced by both sides that there is a fixed trodden pathway from point D at respondent's boundary to point E at appellant's boundary. The length of this pathway is, according to the Land Registry witness, 470 feet (or say about 150 yards) and its width about 6–8 feet. It passes along the boundary line of two adjacent plots 595 and 616 as marked on the plan ; and then over plot 615 along the latter's boundary with 595 to appellant's adjacent plot 607. Respondent's predecessor in title, called by the respondent, stated in her evidence in answer to questions from appellant's advocate—

> " I remember defendant's (appellant's) parents using route A-B-C-D-E since 1926. I happened to see a pathway along A-B-C-D-E in the years when my field was not cultivated. I did not bring any action against any person. The owner of plot 616 used also route A-B-C-D. So did also the owners of plot 595 and 615. D to E is a fixed pathway."

Besides the Land Registry clerk, eleven other witnesses were called ; seven by the appellant and four by the respondent. One of them was the chief of the village authority (the Mukhtar) for 28 years from 1924 to 1952. Another was a farmer who for about 30 years, he said, from 1934 to 1964 when plot 527 belonged to respondent's predecessor in

title, he cultivated respondent's land on the usual partnership basis between landowner and farmer. Others were owners or occupiers of neighbouring plots. They all knew and used the trodden fixed path E-D ; and each of them spoke of the passage from point D to A over plot 527 for many years until the respondent ploughed it after acquiring the property in 1964.

As the appellant (and others) continued passing from point A on the road to the pathway at point D, claiming a right to do so as owners of their dominant tenements in the vicinity, (plots 607 and 602) the respondent filed the present action in November, 1965, for trespass. She claimed an injunction to restrain the appellant from passing over her plot 527 ; £15 for damage to crops during the previous " 3-4 years " ; a declaration that the appellant has no right of way over her said property ; and costs.

The appellant defended the action alleging that she was entitled to pass over respondent's land in the exercise of right of way attached to the use and enjoyment of her neighbouring property, plots 607 and 602 from time immemorial and in any case for the period prescribed by law. The appellant further alleged that the same right of way had been exercised by the onwers of eight other plots in the vicinity which she specified in her pleading ; and she counterclaimed for a declaration that she was entitled to such a right of way.

The Land Registry evidence was taken in May, 1967 ; and the action went to trial in December, 1968, after an attempt for settlement had failed in October of that year. In the meantime Law 10 of 1966 was enacted in March, 1966, to provide a machinery for dealing with such disputes through the Land Registry, by amending the provisions of section 11 of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224. This recent amendment was discussed in *Constantinos Georghiou* v. *Evangelia HjiPhesa* (reported in this Part at p. 58 *ante*) ; and was referred to in *Salih Omer Ponou* v. *Ziver Fehim Mulla Ibrahim*, (reported in this Part at p. 78 *ante*). Neither side, however, seems to have considered the amendment ; or to have drawn the attention of the learned trial Judge to the possibility of making use of the new provisions in section 11 in connection with the dispute between the parties herein and the other persons concerned with the passage in question.

At the conclusion of a strongly contested litigation the trial Judge proceeded to deal with the evidence before him

and to make his findings on the main factual issue ; the exercise of a right of way for the period of thirty years prescribed in section 11 (1) (*b*) and as provided therein. As the Judge put it in his carefully considered judgment—

> " the question is whether the defendant (appellant) proved a right of way in favour of her plots 602 and 607 over plaintiff's plot 527."

The extent of the easement claimed, was not put into question. The issue was whether it had been acquired under the provisions of section 11.

Taking the evidence of the witnesses called by the appellant in support of her alleged right of way, the Judge found that he could not act on their testimony as one after another they appeared to have an interest in the matter. Some were related to the appellant ; and others were owners of neighbouring plots who had been using the same passage and claimed a similar right of way. In such circumstances the Judge took the view that the only reliable and unbiassed witness on whose evidence he could safely act, was the respondent's predecessor in title. On her testimony, he came to the conclusion that—

> " under the circumstances as explained by P.W. 1 (respondent's predecessor in title) in which the defendant (appellant) and her parents used the route A-B-C-D no right of way can in law be acquired in favour of plot 602 and 607, as that use was permissive and interrupted."

Upon that conclusion the trial Judge granted the respondent a declaration and an injunction as claimed, dismissing appellant's counterclaim for a right of way. He also dismissed, however, respondent's claim for damages as very vague and insufficient of proof.

The appellant challenges this judgment mainly on the ground that it is against the weight of the evidence before the Court. Learned counsel for the appellant pointed out a number of points in the evidence in support of that contention ; especially regarding the finding that the passing and repassing over respondent's plot 527 was " permissive and interrupted."

We find it unnecessary to go into detail regarding the evidence. As pointed out earlier in this judgment the existence of a fixed and trodden pathway of a permanent nature, leading from the appellant's plot 607 (adjacent to her plot 602) to the respondent's plot 527, in the direction to the

public road on the other side of the plot, is beyond all dispute. The pathway from point E to point D on *exhibit* 1 is common ground. The dispute is for the passage from point D to point A over the respondent's plot ; and this dispute has arisen only after 1964 when the respondent acquired plot 527. Neither the judgment of the trial Court nor the advocate of the respondent in his elaborate and exhaustive argument explained the existence of the permanent pathway from E to D otherwise than for gaining access to and from the road on the other side of respondent's plot 527. None of the witnesses suggested a passage from point D to the road other than A-B-C-D. A different route of access to appellant's property was suggested during the trial but was not pursued with any proofs. (See *HadjiDemosthenous* v. *Georghiou* (1969) 1 C.L.R. 187).

With all respect to the learned trial Judge, we have no difficulty or hesitation in coming to the conclusion that his findings on the main factual issue is unsatisfactory ; and it cannot be sustained. (See *Patsalides* v. *Afsharian* (1965) 1 C.L.R. 134 ; *Sofoclis Mamas* v. *The Firm "Arma" Tyres* (1966) 1 C.L.R. 158 ; *Imam* v. *Papacostas* (1968) 1 C.L.R. 207).

The possession, use and enjoyment of plots 602 and 607 as agricultural tenements by the appellant and her predecessors in title, during the whole of the material period, has never been questioned by the respondent ; nor was their access thereto from the village where they lived. Supported by the real and undisputable evidence regarding the existence and use of the permanent path and the ploughing up of its continuation by the respondent only after 1964, the other evidence in the case amply establishes the exercise of a right of way on foot and animal over respondent's plot 527 for a period well over thirty years without interruption (until respondent's interference with it in 1964) by the appellant and her predecessors in connection with their ownership of plots 607 and 602 as agricultural tenements. Such exercise of a right of way establishes a legal right to do so under section 11 (1) (*b*) of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224, attached to the ownership of plots 607 and 602 as dominant tenements ; and appellant's conduct in the exercise of such a right cannot constitute trespass. (See *Panayi* v. *Lefteri* (1958) 23 C.L.R. 204 ; *Voskou* v. *HjiPetrou*, 1964 C.L.R. 21).

The action of the respondent for trespass and her claim for the injunction sought against the appellant must, therefore, fail ; and the counterclaim of the appellant for a declaration of her said right of way, must succeed.

Action dismissed with costs here and in the District Court on the scale of the claim. Declaration made as sought in the counterclaim for a right of way as per paragraph (1) thereof. No order for costs in the counterclaim, which was tried and determined together with the action.

Appeal allowed with costs here and in the Court below.