1970
Mar. 5

ASPASIA MILLINGTON-WARD v. CHLOI ROUBINA

[JOSEPHIDES, STAVRINIDES, LOIZOU, JJ.]

ASPASIA MILLINGTON-WARD,
Appellant-Plaintiff,

v.

CHLOI ROUBINA,
Respondent-Defendant.

(*Civil Appeal No.* 4787).

Immovable Property—Building site—Storeys held in horizontal ownership—Storeys in the same building, originally forming part of one single registration—Firstly divided into two separate registrations in 1937 *after the death of the owner—On the application of the executor of her (deceased owner's) last will—Ownership of the site on demolition of the building in* 1964*—Matter governed by the law in force at the time of aforesaid separate registrations in* 1937*—Mejelle, Article* 1315*—The Immovable Property (Tenure, Registration and Valuation) Law, Cap.* 224, *section* 6, *dealing with ownership of storeys held in horizontal ownership, inapplicable—Cap.* 224 *put into operation on September* 1, 1946*—Said section* 6 *applying prospectively and not retrospectively—The Interpretation Law, Cap.* 1, *section* 10 (2) (*c*) *and* (*e*)*—Cf. Article* 1314 *of the Mejelle—Cf. Sections* 3, 4, 9, 10 *and* 11 *of Cap.* 224 (supra).

Horizontal ownership of storeys in the same building—Rights of the owners of the various storeys in respect of the site on which the building stands or stood—Position under the law in force before the coming into operation of Cap. 224 *on September* 1, 1946*—The Mejelle Article* 1315*—Cf. Article* 1314 *thereof—Position thereafter under section* 6 *of Cap.* 224*—See also* supra.

Storeys—Separate ownership—See supra.

Statutes—Construction—Construction of sections 6, 3 *and* 4 *of Cap.* 224*—The rule against retrospectivity—Scope and effect—Section* 10 (2) (*a*) *and* (*e*) *of the Interpretation Law, Cap.* 1*—In view of that section of Cap.* 1 *the provisions of section* 6 *of Cap.* 224 (supra) *apply prospectively and not retrospectively—Consequently the position of the parties in the present case regarding the site in question* (supra) *is that which existed in* 1937 *under the Mejelle when the two separate registrations aforesaid were made* (supra).

Retrospective effect of statutes—Repeal by statute of any enactment—The rule against retrospectivity of such repealing statute—Scope and effect of such rule embodied in section 10 (2) (*a*) and (*e*) *of the Interpretation Law, Cap.* 1.

Estates—Will—Executor—Beneficiaries of the will—As from the testator's death the executor holds the immovable (*and other*) *property of the deceased in trust for the beneficiaries—And not personally—Consequently, the rights of the beneficiaries in relation to such immovable property are governed by the law in force at the time of the registration of such property into the name of the executor in* 1937*—And not by the law in force at the time when* 14 *years thereafter i.e. in* 1951 *the executor transferred it into the names of the parties in the present case* (*viz. the beneficiaries of the will in question* supra).

Executor—Holds estate in trust for the beneficiaries—Supra.

The material facts of this case are very shortly as follows :-

The appellant is registered as the owner of plot 37 under registration No. 1295 dated May 8, 1951. The description of the property is as follows. " House of one entrance on the ground floor, and a hall, four rooms, terrace, W.C. with laundry and kitchen on the first floor ". It is further stated on the certificate of ownership that " the rooms on the first floor of this registration stand on plot 36 ". Now this last plot 36 is registered in the name of the respondent under registration No. 1294 of the same date (i.e. May 8, 1951). The origin of these two registrations (Nos. 1294 and 1295) is registration No. 291, dated August 20, 1921, in the name of one Aglaoniki, and it consisted of both said plots 36 and 37 which are now covered by the present registrations Nos. 1294 and 1295, respectively. The aforesaid Aglaoniki died some time in 1936. She left a will under No. 301 dated January 3, 1936, in respect of which probate was duly granted to the executor named therein one Klokkaris (now deceased), father of the appellant and uncle of the respondent. The said executor applied to the Land Registry Office under application No. A.20/36 N.T. for the division of the aforesaid original registration No. 291 (dated 20.8.1921) ; and as a consequence the two registrations, No. 1294 in respect of plot 36 and No. 1295 in respect of plot 37, were issued in his name " as executor of the will of Aglaoniki.....". The date of these two registrations is *March* 31, 1937.

Subsequently the executor Klokkaris " executing the will of the deceased Aglaoniki " in 1951 transferred registration No. 1295 (plot 37) in the name of the appellant, and No. 1294 (Plot 36) in the name of the respondent. It is recorded in these registrations that they have been made on the strength of a probated will No. 301, dated January 3, 1936 (i.e. the will of the said Aglaoniki *supra*). It should also be noted that registration No. 1294 (plot 36) in the respondent's name, consists of " half of one hall four rooms one verandah, W.C. kitchen, hencoop and yard "; and the registration carries this note : " The upstairs room standing on this plot (i.e. plot 36) belongs to plot 37 ".

In about March 1964 both the ground-floor and the first floor, found to be in a dangerous condition, were demolished by the Nicosia Municipality. After the demolition of the structure the respondent made use of the vacant land as parking place for motor cars and collected all the proceeds for her own benefit. Hence, the present action whereby the appellant (plaintiff) (owner of plot 37) claimed an injunction restraining the respondent from unlawfully interfering with and/or leasing without her consent the site in dispute (plot 36). The defendant (respondent) alleged that the appellant (plaintiff) had no ownership of the said site which was registered in her (respondent's) name, and she counterclaimed for a declaration that she was the sole owner of the site (plot 36).

The trial Court dismissed both the action and the counterclaim ; and the plaintiff now appeals from that judgment. There is no cross-appeal by the defendant.

The only issue before the trial Court was whether the defendant (respondent) was the sole owner of the site under plot 36 after the demolition of the building in 1964 (*supra*) or whether she was a co-owner thereof along with the appellant (plaintiff) under section 6 of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224. The answer depended upon whether or not the matter is governed by the law in force prior to the coming into operation in 1946 of Cap. 224, viz. the Mejelle particularly Article 1315 (*infra*).

By section 6 (2) of Cap. 224 (*supra*) the site on which the building is standing " shall be owned, held and enjoyed " by all the owners of the various storeys in undivided shares ".

It was argued on behalf of the appellant that this provision of Cap. 224 (in force since September 1, 1946) has retrospective effect and the Mejelle particularly Article 1315 (*infra*) does not apply.

Article 1315 of the Mejelle reads as follows (Tyser's translation) :—

" 1315. When a building is destroyed or burnt, the upper storey of which belongs to one person and the lower storey to another person, each one can make his building as it was before. Neither of them can prevent the other. And if the owner of the upper storey say to the owner of the lower storey ' you make your building and I will make my building upon it ', and the owner of the lower storey refuse, the owner of the upper storey obtains the leave of the judge, and when he has built both the upper and lower buildings, until the owner of the lower storey has paid his share of the expense, he is prohibited from using and disposing of the lower storey. "

The Court reached the conclusion that the law applicable to the facts of this case was the Mejelle particularly Article 1315 ; and consequently dismissed both the action and the counterclaim. The reason for the conclusion reached by the trial Court was that the properties now under registration Nos. 1294 and 1295, which originally formed part of one registration (No. 291 *supra*), were first divided into two separate registrations on March 31, 1937, on the application of the executor of the will No. 301 (*supra*), under the law in force at the time; and the coming into operation in 1946 of Cap. 224 did not alter the position as to the rights appertaining to the two separate registrations, since under section 10 (2) (*c*) and (*e*) of the Interpretation Law, Cap. 1, when a Law repeals any other enactment, then, " unless the contrary intention appears " the repeal shall not " affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed ", or " affect any remedy in respect of such right, privilege, obligation, etc." ; and the trial Court held that no contrary intention appears in Cap. 224 which repealed the relevant provisions of Mejelle.

The trial Court were further of the view that the fact that the transfer of the properties in question to the appellant and the respondent, respectively, was effected by the executor in 1951 (*supra*) did not affect the position in the least since

the matter had been finally settled by the division of the original plot No. 291 and consequent separate registrations in 1937 in the name of the executor of the aforesaid will No. 301 (*supra*). Consequently, it was held that the plaintiff-appellant could not be held as being co-owner of plot 36 under section 6 (2) of Cap. 224, because the law applicable to the rights of the parties in the year 1937 is the Mejelle. However as Article 1315 of the Mejelle (*supra*) does not touch the question of the ownership of the site on which the building stood (as does section 6 of Cap. 224), but only regulates the rights as to future rebuilding, it was held that the appellant could not succeed in her claim.

As regards the counterclaim, the trial Court held, that, although the respondent-defendant was the registered owner of the site (under plot 36 of an area of 1824 square feet), her rights were " qualified " by the provisions of the Mejelle, Article 1315 and that she could not, therefore, succeed in her claim for a declaration that she was the sole owner of the site under plot 36 without any restriction or limitation.

It was argued by counsel for the appellant that Cap. 224 (*supra*) which came into operation in 1946 and repealed, *inter alia*, Article 1315 of the Mejelle (*supra*) "revolutionized " the old law as regards land tenure and registration, and placed it on a completely new footing to such an extent that the intention of the legislature appears clearly that it was to change the old law completely, sweep away all rights of ownership under the old law and have them regulated under the provisions of Cap. 224 only. He submitted that section 6 of that Law, Cap. 224 should be read in conjunction with sections 3 and 4 (*infra*), and that section 6 so read covered all buildings, whether built before or after the introduction of Cap. 224 in 1946;and that consequently, under the provisions of section 6(2), the site on which the building in the present case stood " shall be owned, held and enjoyed by all of them (i.e. the owners of the various storeys) in undivided shares ".

The second point taken by learned counsel for the appellant was that those properties, that is the registration No. 1295 in the name of the appellant and the registration No. 1294 in the name of the respondent, were separately owned for the first time in 1951 (*supra*) and by that time the provisions of section 6 of Cap. 224 were already in operation.

Dismissing the appeal the Court :—

Held, (*I*). The sole question before us in this appeal is whether the appellant is co-owner with the respondent in undivided shares of the site in question under plot 36, by virtue of section 6 (2) of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224 (*supra*). For the reasons we have endeavoured to explain in this judgment, we hold that she is not, and the appeal, therefore, fails and must be dismissed with costs.

Held, (*II*). *Reasons* :—

(1) (*a*) Counsel for the appellant submitted that by virtue of section 3 (1) of Cap. 224 all land as from September 1, 1946 " shall be owned, held and enjoyed subject to and in accordance with the provisions of this Law. .... " and that, consequently, as the same phraseology is to be found in section 6 (2) of the same Law viz. Cap. 224, to the effect that the site on which the building is standing " shall be owned, held and enjoyed " by all owners of the various storeys in " undivided shares ", this provision has retrospective effect and the Mejelle does not apply in the present case.

(*b*) With great respect we find ourselves unable to agree with counsel's construction of section 3 (1) of Cap. 224. The intention of the legislature in enacting that section was to regulate the rights of the citizens vis-a-vis the State and not as among themselves. And this becomes apparent from the very wording of sub-sections (2) and (3) of the said section 3 (*Note* : sub-sections (2) and (3) are set out in full post in the judgment of the Court).

(2) (*a*) The other section relied upon by counsel for the appellant was section 4 of Cap. 224, which was originally embodied in section 3 of Law No. 8 of 1953. By section 4 no estate, interest or right whatsoever in any immovable property " shall subsist or shall be created, acquired or transferred except under the provisions of this Law "; and counsel went on to argue that this showed clearly the intention of the legislature to do away with all legislation previously in force and to have the rights of property owners regulated exclusively under the provisions of Cap. 224.

(*b*) We are unable to accept counsel's construction of section 4. The history of the events which led to the enactment of that section in 1953 is well known and is to be found

in the case *Kontou* v. *Parouti* (1953) 19 C.L.R. 172 at p. 175. We have no doubt whatsoever in our mind that the only intention of the legislature in enacting the present section 4 of Cap. 224 was to exclude expressly the provisions of the common law and the doctrines of equity as far as immovable property was concerned.

(3) (*a*) Under the provisions of section 10 (2) (*c*) and (*e*) of the Interpretation Law, Cap. 1, where a law repeals any other enactment, then, " unless the contrary intention appears ", such repeal shall not " affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed " or " affect any remedy in respect of such right, privilege, obligation etc." The trial Court held and counsel for the respondent submitted that no such contrary intention appears in Cap. 224 which repealed the relevant provision of Mejelle ; and that, consequently the position created in the present case in the period when the Mejelle was in force has not been affected by Cap. 224 and particularly section 6 thereof. We agree with the above and hold that section 6 of Cap. 224, which section is a provision regulating the ownership of storeys held in horizontal ownership, applies prospectively and not retrospectively, that is, to storeys in buildings registered at the Land Registry as from the day of the coming into operation of Cap. 224 on September 1, 1946 and not before that date.

(*b*) As regards storeys registered before that date, the respective rights of the persons concerned have to be governed according to the terms of their registration at the time they were originally registered at the Land Registry as separate storeys under the provisions of the law in force prior to 1946, in the present case in force in 1937 (when the separate registrations under Nos. 1294 and 1295, respectively, were effected at the Land Registry (*supra*), that is, the Mejelle.

(*c*) The rights of the owner of the upper storey in the present case (the appellant), under the provisions of the Mejelle, are a right of support and a right to rebuild in case the building is destroyed or burnt ; and Article 1315 (*supra*) lays down the machinery for the safeguarding of such rights, but it does not give the right to the appellant to be a co-owner of the site in undivided shares—as it is now expressly provided in section 6 (2) of Cap. 224. The difference in these

rights is made more apparent by a comparison of Article 1314 of the Mejelle (*Note :* it is fully set out post in the judgment) with Article 1315 (*supra*).

(4) Although it is unfortunate that the will No. 301 dated January 3, 1936 of the deceased Aglaoniki (*supra*) was not produced before the trial Court, nevertheless, on the evidence on record we have no difficulty in drawing the inference that the two registrations in question had been bequeathed by the said testatrix to the appellant and the respondent separately. It follows that as from the testatrix's death some time in 1936 the appellant had a beneficial interest in plot 37 under registration No. 1295, and the respondent in registration No. 1294, plot 36, and that, therefore, the executor held the said properties in trust for the beneficiaries, and not personally. Consequently, notwithstanding the executor's delay (about fourteen years') in effecting the transfer of the aforesaid two registrations, which were made in 1937 *supra*, into the parties' respective names (this was not done until 1951, *supra*), their rights *inter se*, which existed prior to the coming into operation of Cap. 224 on September 1, 1946, are governed by the law in force prior to that date.

Appeal dismissed with costs.

Cases referred to :

Kontou v. *Parouti* (1953) 19 C.L.R. 172 at p. 175 ;

Gavrilides v. *Hadji Kyriako and Another* (1898) 4 C.L.R. 84, at p. 87 ;

Liatsou v. *Zannetou* (1953) 19 C.L.R. 210 at p. 212 ;

Cyprus Cinema and Theatre Co. v. *Karmiotis* (1967) 1 C.L.R. 42 at p. 56 ;

Dai and Another v. *Satrazam* (1959–60) 24 C.L.R. 259 at p. 264 ;

Dikomiti and Another v. *Haji Kolos and Another* (1959–60) 24 C.L.R. 53.

Appeal.

Appeal by plaintiff against the judgment of the District Court of Nicosia (Ioannides, Ag. P.D.C. and Kourris, D.J.) dated the 20th December, 1968 (Action No. 4207/67) dismissing plaintiff's action whereby she was, *inter alia*, claiming that the defendant do render an account in connection with

the use of an empty space or building site at Tripiotis quarter Nicosia, of which the plaintiff is co-owner with the defendant and that defendant pay to the plaintiff her share.

Chrysis Demetriades and *A. Hajiloannou*, for the appellant.

P. L. Cacoyiannis and *L. Papaphilippou*, for the respondent.

Cur. adv. vult.

The judgment of the Court was delivered by :—

JOSEPHIDES, J.: The present dispute concerns the ownership of a small building site in Solon Street, Nicosia, opposite the Trypiotis Church. The appellant (plaintiff) claimed an order of the court restraining the respondent (defendant) from unlawfully interfering and/or leasing and/or doing any other act in connection with the site in dispute (under plot 36) without the former's consent ; and the respondent (defendant) alleged that the appellant had no ownership of the said site which, the respondent alleged, was registered in her (respondent's name), and she counter-claimed for a declaration that she was the sole owner of that property.

The trial Court, after hearing the case, dismissed both the claim and counterclaim, and the plaintiff now appeals against that judgment. There is no cross-appeal by the defendant.

The material facts, which are not in dispute, are as follows : The appellant is registered as the owner of property under registration No. 1295, dated the 8th May, 1951. This registration, according to the certificate of ownership produced in court, covers plot 37, under Sheet/Plan XXI/46.6.V, Block " B ". It is situate in Trypiotis Quarter, Nicosia, and its area is 144 square feet. The description of the property is as follows : " House of one entrance in the ground floor, and a hall, four rooms, terrace, W.C. with laundry and kitchen on the first floor ". It is further stated in the certificate of ownership that " the rooms on the first floor of this registration stand on plot 36 " (in respect of which plot the respondent is registered as owner and to which we shall refer later). The previous registration is stated to be No. 1295, dated the 31st March, 1937. Finally, the certificate states that this registration was made on the strength of a probated will No. 301, dated the 3rd January, 1936.

The respondent is stated to be the owner of plot 36 under the same sheet and plan. She is registered as the owner of one-half of that plot under registration No. 1294, dated the 8th May, 1951 ; and on the 17th April, 1967, her sister Thalia A. Apeitou, who was the registered owner of the other half, made a declaration of transfer of her share in the said registration No. 1294 in the name of her sister, the respondent, although the registration had not been actually made in the books of the Land Registry until the day (8th November, 1968) when the Land Registry Clerk was giving evidence before the trial Court in the present case. The reason for such non-registration in the Land Register was not stated but, as no legal impediment to such registration has been mentioned by the Land Registry Clerk, it may be reasonably inferred that there is none, and that the delay may, probably, be due to pressure of work in that Department. For the purposes of this case we assume that the respondent is the onwer of the whole property under registration No. 1294. As already stated, this registration covers plot 36 and, according to the evidence of the Land Registry Clerk, the area of this plot is 1824 square feet.

We have no evidence as to the category of these properties prior to the abolition of the categories of immovable property on the 1st September, 1946, under the provisions of section 3 (1) of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224 ; but as the property in question was a dwelling-house situate within the city walls of Nicosia town, it must have been of the " mulk " category.

The origin of the two registrations (Nos. 1294 and 1295) was traced by the Land Registry Clerk who gave evidence from the official Land Records. The original registration was No. 291, dated the 20th August, 1921, in the name of one Aglaoniki Sofocli Constantinidou, and it consisted of both plots 36 and 37, which are now covered by the present registrations Nos. 1294 and 1295, respectively. The said Aglaoniki must have died some time before March, 1937, and, possibly, in the year 1936. There is no evidence as to the exact date of her death. She left a will under No. 301 in respect of which probate was granted to the executor, one Antonios Klokkaris (now deceased), who was the father of the appellant and the uncle of the respondent. Some time in 1936 the executor of Aglaoniki's will, namely Antonios Klokkaris, applied to the Land Registry Office, under application No. A.20/36 N.T., for the division of the original registration No. 291 (dated 20.8.1921) ; and, as a consequence the two registrations, No. 1294 in respect of plot 36,

and No. 1295 in respect of plot 37, were issued in his name "as executor of the will of Aglaoniki Constantinidou" (see the Land Registry Clerk's evidence). The date of those registrations is the 31*st March*, 1937.

Subsequently, according to the evidence of the Land Registry Clerk, "Antonios Klokkaris executing the will of the deceased" in 1951 transferred registration No. 1295 in the name of the appellant and registration No. 1294 in the name of the respondent and her sister, Thalia Apeitou, half share each. The subsequent history of those registrations has already been given. It should also be stated that registration No. 1294 (plot 36), in the respondent's name, consists of "half of one hall, four rooms, one verandah, W.C., kitchen, hencoop and yard"; and the registration carries this note: "The upstairs room standing on this plot belongs to plot 37".

In March, 1964, the District Officer, Nicosia, notified the parties that both the ground-floor and the first floor were in a dangerous condition and that they should be demolished and in fact they were so demolished in about March, 1964, by the Nicosia Municipality. After the demolition of the structure, the respondent made use of the vacant land as parking place for motorcars and collected all the proceeds for her own benefit. Hence, the present action.

The only issue before the trial Court was whether the respondent was the sole owner of the site under plot 36, after the demolition of the building, or a co-owner along with the appellant.

The case in the Court below was argued on the footing that section 6 of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224 was applicable, but the trial Court, in their considered judgment, reached the conclusion that the law applicable to the facts of this case was the law in force in Cyprus prior to the coming into operation of Cap. 224, namely, the Mejelle and, particularly, Article 1315, which reads as follows (Tyser's translation):—

> "1315. When a building is destroyed or burnt, the upper story of which belongs to one person and the lower story to another person, each one can make his building as it was before. Neither of them can prevent the other. And if the owner of the upper story say to the owner of the lower story 'You make your building and I will make my building upon it', and the owner of the lower story refuse, the owner of the upper story obtains

the leave of the judge, and when he has built both the upper and lower buildings, until the owner of the lower story has paid his share of the expense, he is prohibited from using and disposing of the lower story."

The reason for the conclusion reached by the trial Court was that the properties now under registration Nos. 1294 and 1295, which originally formed part of one registration, were first divided into two separate registrations on the 31st March, 1937, under the law in force at the time ; and the coming into operation of Cap. 224 in 1946 did not alter the position as to the rights appertaining to the two separate registrations since, under the provisions of section 10 (2) (*c*) and (*e*) of the Interpretation Law, Cap. 1, where a law repeals any other enactment, then, " unless the contrary intention appears ", the repeal shall not " affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed ", or affect " any remedy in respect of such right, privilege, obligation, etc.," ; and the trial Court held that no contrary intention appeared in Cap. 224 which repealed the relevant provision of the Mejelle.

The trial Court were further of the view that the transfer in 1951 did not affect the position since the matter had been finally settled by the division and consequent registrations in 1937. Consequently, it was held that the law applicable to the rights of the parties was that obtaining in the year 1937, that is, the Mejelle, as already stated. However, as Article 1315 of the Mejelle did not touch the question of the ownership of the site on which the building stood (as does section 6 of Cap. 224), but only regulated the rights as to future rebuilding, it was held that the appellant could not succeed in her claim.

As regards the counterclaim, the trial Court held that, although the respondent was the registered owner of the site in question (plot 36, of an area of 1824 square feet), her rights were " qualified " by the provisions of the Mejelle and that she could not, therefore, succeed to the declaration sought that she was the sole owner of plot 36 without any restriction or limitation.

After hearing a forceful submission on behalf of the appellant we have not been persuaded that the trial Court were wrong in their conclusion and we shall proceed to give our reasons after we give a summary of the submissions made by counsel on both sides.

Mr. Demetriades for the appellant argued that, assuming that a right accrued in favour of the appellant, the provisions of Cap. 224, which, *inter alia*, repealed Article 1315 of the Mejelle, " revolutionized " the old law as regards land tenure and registration, and placed it on a completely new footing to such an extent that the intention of the legislature appears clearly that it was to change the old law completely, sweep away all rights of ownership under the old law and have them regulated under the provisions of Cap. 224 only. He submitted that section 6 should be read in conjunction with sections 3 and 4, and that section 6 so read covered all buildings, whether built before or after the introduction of Cap. 224 in 1946 ; and that, consequently, under the provisions of section 6 (2), the site on which the building in the present case stood " shall be owned, held and enjoyed by all of them (i.e. the owners of the various storeys) in undivided shares ".

The second point taken by learned counsel for the appellant was that these properties, that is the registration in appellant's name and the registration in respondent's name, were separately owned for the first time in 1951 and by that time the provisions of section 6 of Cap. 224 were in operation in any event.

In support of his first argument learned counsel referred to the wording of sections 3 (1), 4, 9, 10, 11 and 21 of Cap. 224 which, in his submission, showed definitely an intention on the part of the legislature of changing completely existing rights. We shall revert later to sections 3 (1) and 4 on which he laid particular emphasis.

In addressing us learned counsel referred to the following cases : *Liatsou* v. *Zannetou* (1953) 19 C.L.R. 210 at p. 212 (in respect of the present section 22) ; *Kontou* v. *Parouti* (1953) 19 C.L.R. 175 ; *Cyprus Cinema and Theatre Co.* v. *Karmiotis* (1967) 1 C.L.R. 42 at page 56 ; *Dai and Another* v. *Satrazam* (1959–60) 24 C.L.R. 259 at page 264 ; *Dikomiti* and *Another* v. *Haji Kolos and Another* (1959–60) 24 C.L.R. 53.

Counsel for the appellant referred, as already stated, to section 3 (1) of Cap. 224, whereby the categories of immovable property (except pure vakf) known under the Ottoman Land Code were abolished and it was provided that " thereafter all immovable property whatsoever shall be *owned*, *held* and *enjoyed* subject to and in accordance with the provisions of this Law or any other Law in force for the time

being " ; and he submitted that this is a very general provision to the effect that all land as from the 1st September, 1946, " shall be owned, held and enjoyed " in accordance with the provisions of Cap. 224, and that, consequently, as the same phraseology is to be found in section 6 (2) of Cap. 224, to the effect that the site on which the building is standing " shall be owned, held and enjoyed " by all the owners of the various storeys in " undivided shares ", this provision has retrospective effect and the Mejelle does not apply in the present case.

With great respect we find ourselves unable to agree with counsel's construction of section 3 (1) of Cap. 224. The intention of the legislature in enacting that section was to regulate the rights of the citizens *vis-a-vis* the State and not as among themselves. And this becomes apparent from the very wording of sub-sections (2) and (3) of section 3 which read as follows :

> " (2) All immovable property hitherto known as ' Mulk ' or ' Arazi Memlouke ' and privately owned as such at the date of the coming into operation of this Law shall continue to be owned, held and enjoyed as private property.
>
> (3) All immovable property known as ' Arazi Mirié ' and privately possessed as such at the date of the coming into operation of this Law shall be owned, held and enjoyed as private property."

It will thus be seen that the immovable property known as " Mulk " and privately owned as such at the date of the coming into operation of Cap. 224 " shall *continue* to be owned, held and enjoyed as private property ". The emphasis is on the word " continue " because " mulk " land (" arazi memlouke ") was the subject of complete ownership as private property. While the category of property known as " arazi mirié " (State land), was subject to certain restrictions and limitations because the legal ownership was vested in the Treasury (the Beit-ul Mal), the enjoyment of which was granted by the Government. It was treated as a personal right of possession ; and if the land remained uncultivated or if it was abandoned and left unproductive by the possessor, without a valid excuse, then it was confiscated by the Government (we shall revert to this matter later).

It will be observed that in the case of " arazi mirié " property, section 3 (3) of Cap. 224 provides that such land which was privately possessed at the date of the coming into

operation of Cap. 224 " shall be owned, held and enjoyed as private property "; unlike mulk property, the statute did not provide (as in section 3 (2)) that it " shall *continue* to be owned, etc.," as private property. The difference is immediately apparent. We have no doubt whatsoever in our mind that section 3 (1) of Cap. 224 abolished the categories of land under the Ottoman Land Code and provided for the rights of the citizens *vis-a-vis* the State and not among themselves.

The other section relied upon by learned counsel for the appellant, was section 4 of Cap. 224, which was originally embodied in section 3 of Law No. 8 of 1953 and subsequently amended by Law No. 3 of 1960 (which amendment, however, does not seem to affect the position in the present case). Learned counsel laid particular stress on the provision in that section that no estate, interest or right whatsoever in any immovable property " shall subsist or shall be created, acquired or transferred except under the provisions of this Law ", and he went on to argue that this showed clearly the intention of the legislature to do away with all legislation previously in force and to have the rights of property owners regulated exclusively under the provisions of Cap. 224 and no other enactment.

We are afraid that we are unable to accept counsel's construction of section 4. The history of the events which led to the enactment of that section is well known and is to be found in the case of *Kontou* v. *Parouti* (1953) 19 C.L.R. 172 at page 175. The judgment in that case was delivered by the Supreme Court of the Colony of Cyprus on the 6th February, 1953, and it was therein adumbrated that, with the abolition of the categories of immovable property, " the combined effect of the Immovable Property Law (then Cap. 231 and now Cap. 224) and the Courts of Justice Law (at the time section 28 (1) (*c*) of Cap. 11) might well be that, since the law of the Ottoman Land Code has ceased to apply, and as no other provision has been made, the path is clear for the application of the common law. At common law, any person holding an absolute interest in land is entitled to carve out and transfer to another limited estates such as a leasehold chattel interest or an estate for life. However, it is not necessary in the present case to decide whether the document of the 17th September was an agreement to create a freehold estate ".

The Land Registry Authorities, who were eager to have their Land Register watertight, were disturbed and, as a consequence, Law 8 of 1953, embodying the present section

4, was speedily enacted by the legislative authority and published in the Cyprus *Gazette* on the 4th March, 1953. We have no doubt whatsoever in our mind that the only intention of the legislature in enacting the present section 4 of Cap. 224 was to exclude expressly the provisions of the common law and the doctrines of equity as far as immovable property was concerned.

In dealing with matters affecting the legal rights of owners under the Ottoman Land legislation, it is important to note that, as already stated, it was only in the case of mulk property that the owner held and enjoyed in absolute ownership. He had the full legal ownership. During his lifetime it was at his free disposition subject to certain rights (such as pre-emption, etc.) ; and it devolved by inheritance like movable property. The owner had both the legal ownership (raqabe) and the right of possession which constituted the full dominium. In short, the owner of mulk land had the most complete form of ownership of land known to Ottoman Law.

In the case of arazi mirié land (State land), however, the legal ownership always remained vested in the State ; and the right to possession of such land was throughout the law treated as a personal right. The State was the owner of the land and the law did not recognise the possibility of the existence of any right in, or over it, save a right of possession, which could be assigned by permission of the proper representative of the State. The possession of cultivable arazi mirié was granted solely for the purpose of cultivation and the production of a tithe ; and, if its possessor failed to cultivate the land for a period of three years without a valid excuse, as laid down in the Ottoman Land Code, the State was entitled to resume possession and its former possessor could only have it transferred to him again on payment of its " tapou " value (equivalent value), under Article 68. By the Confiscation of Public Lands Law, 1885 (Law 14 of 1885), now Cap. 217, the period of non-cultivation was enlarged to ten years ; but the principle underlying Article 68 is manifest throughout the Ottoman Land Code which, by Article 21, went so far as to protect the cultivator and tithe payer, even though as regards the rightful possessor he may have been a wrongdoer (see *Gavrilides* v. *Hadji Kyriako and Others* (1898) 4 C.L.R. 84 at page 87). Moreover, under the legislation in force prior to 1946 (the Wills and Successions Law, 1895), arazi mirié property could not be disposed of by will and there were certain limitations in respect of the right of succession to arazi mirié.

Generally, the law was in an anomalous state (also as regards buildings and trees erected or planted on the various categories of land) which led to complications, confusion and expensive litigation. It was in order to remedy this undesirable state of affairs and to simplify the work in the Land Registry Department that Cap. 224 came to be enacted, abolishing the categories of land and providing that in future all land (except pure vakf) would be held and enjoyed in absolute ownership as provided in section 3 of Cap. 224.

Sir Panayiotis Cacoyiannis, for the respondent, submitted that section 6 of Cap. 224 did not have retrospective effect and that, consequently, the provisions of the law in force immediately prior to the enactment of Cap. 224, that is, Article 1315 of the Mejelle, governed the rights of the parties in the present case. In making his submission learned counsel referred also to the provisions of Article 1192 of the Mejelle (which was repealed by the Civil Wrongs Law, 1932, now Cap. 148), and to Article 46 of the Mejelle which reads as follows (Tyser's translation) :—

> "46. When an obstacle and a want have presented themselves, the obstacle is given precedence. Therefore, a man cannot sell to another his property, which is pledged in the hands of his creditor."

In referring to that Article, counsel cited the following extract from the Greek translation of the Ottoman Codes by Dem. Nicolaides (1889), at page 55, which reproduces the views of leading Turkish commentators of the time on the Article in question :

> «Ὁ ἰδιοκτήτης τοῦ ἀνωτέρου πατώματος οἰκίας τινὸς δὲν δικαιοῦται ἄνευ τῆς ἀδείας τοῦ ἰδιοκτήτου τοῦ κάτω πατώματος καὶ τ' ἀνάπαλιν, νὰ κάμῃ τι ἐπιζήμιον εἰς τὸν ἕτερον, οὔτε δικαιοῦται νὰ κρημνίσῃ τὸ ἴδιον κτίριον, διότι ὁ μὲν τοῦ ἀνωτέρω πατώματος κύριος ἔχει τὸ δικαίωμα τῆς στηρίξεως, ὁ δὲ τοῦ κατωτέρω τῆς στεγάσεως. Ὅθεν μολονότι τὸ δικαίωμα τοῦ νὰ διαχειρίζηται καὶ διαθέτῃ αὐτὸ ὡς βούλεται εἶναι ἐνασκήσιμον καὶ ἀπαραβίαστον, τουτέστι χρειῶδες, ἐν τούτοις συγκρινόμενον μετὰ τοῦ δικαιώματος τοῦ ἑτέρου, τοῦθ' ὅπερ ἀποτελεῖ τὸ κώλυμα, περιορίζεται κατὰ τὴν ἐρμηνευομένην ἀρχήν.»

The substance of this extract is that the owner of the upper storey of a house is not entitled, without the permission of the owner of the ground floor, and *vice versa*, to do anything injurious to the other storey, nor is he entitled to demolish the building, because, on the one hand, the owner of the upper storey has a right of support over the lower storey, and, on the other, the owner of the ground floor has a right to be roofed.

Counsel also relied on the general principle of construction applicable to the retrospective operation of a statute as regards vested rights, as stated in Maxwell on Interpretation of Statutes, 11th edition, at page 206, which reads as follows :

> " It is chiefly where the enactment would prejudicially affect vested rights, or the legality of past transactions, or impair contracts, that the rule in question prevails. Every statute, it has been said, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions or considerations already past, must be presumed, out of respect to the legislature, to be intended not to have a retrospective operation."

We are in agreement with counsel for the respondent on this principle of construction regarding the retrospective operation of a statute, and we would also refer to page 205 in the same book which reads as follows :

> " Perhaps no rule of construction is more firmly established than this, that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only (see cases quoted in footnote 18). But if the language is plainly retrospective it must be so interpreted. At the same time, it is laid down that regard must be paid to the dominant intention, and the Act in question (the Law Reform (Married Women and Tortfeasors) Act, 1935 (c.30)) was held to be retrospective and was construed as putting an end to the liability of a husband for his wife's torts whenever committed unless legal proceedings had been started before the passing of the Act. Where an Act abrogated the doctrine of common employment, it was held that, although that Act was not retrospective, the doctrine ought not to be extended in any cases in which it might still apply.
>
> A statute is not to be construed to have a greater retrospective operation than its language renders necessary. Even in construing a section which is to a

certain extent retrospective, the maxim ought to be borne in mind as applicable whenever the line is reached at which the words of the section cease to be plain. For it is to be observed that the retrospective effect of a statute may be partial in its operation."

Finally, having given serious consideration to the submission made by learned counsel for the appellant, to the effect that section 6 of Cap. 224 was a general provision which regulated the ownership of storeys held in horizontal ownership and that (when read in conjunction with sections 3 and 4, as well as other sections, of the Law) it had retrospective effect and it applied immediately after the coming into operation of Cap. 224 to existing separate registrations of storeys in the same building, we are of the view that, having regard to what we have stated earlier in this judgment and to the other sections in Cap. 224, the provisions of section 6 apply prospectively and not retrospectively, that is, to storeys in a building registered at the Land Registry as from the day of the coming into operation of Cap. 224 on the 1st September, 1946, and not before that date. As regards storeys registered prior to that date, the respective rights of the parties concerned have to be governed according to the terms of their registration at the time they were originally registered at the Land Registry as separate storeys under the provisions of the Law in force prior to 1946, in the present case the law in force in 1937 (when the separate registrations were effected at the Land Registry), that is, the Mejelle.

The rights of the owner of the upper storey (the appellant), under the provisions of the Mejelle, are a right of support and a right to rebuild in case the building is destroyed or burnt ; and Article 1315 lays down the machinery for the safeguarding of such rights, but it does not give the rights to the appellant to be a co-owner of the site in undivided share—as it is now expressly provided in section 6 (2) of Cap. 224. The difference in these rights is made more apparent by a comparison of Article 1314 with Article 1315 of the Mejelle. Article 1314 reads as follows (Tyser's translation) :—

"1314. So when property owned in common, not being capable of partition, such as a mill or a bath, is entirely destroyed, in case it remains a mere building site, and one of the owners wishes to build, if the other objects, a compulsory order for building is not made, their building site is divided."

It will thus be seen that in that case it is expressly provided that the co-owner of property which cannot be partitioned (a mill or a bath) is entitled to part of the building site. Short of clear and unequivocal language in the new statute (Cap. 224) it is inconceivable that the legislature in 1946 intended to change private rights by taking away rights from one person and giving them to another.

The final point taken by counsel for the appellant was that there was nothing on the record to show by what provision of the will the respective parties acquired their property, and that it may well be that they may have done so by agreement ; moreover, he submitted that there was no material on record to show that this was a specific legacy. This being so, he argued, and as the properties of the parties were separately registered in their respective names and owned by them for the first time in the year 1951, the provisions of Cap. 224 were applicable as that law came into operation in 1946.

Although it is unfortunate that the will was not produced before the trial Court, there is evidence to the following effect on record, which comes from the Land Registry Clerk who gave his evidence from official records :

(*a*) that Antonios Klokkaris was the executor of the will of Aglaoniki Constantinidou ;

(*b*) that the said Klokkaris, in his capacity as executor under the will, applied to the Land Registry in 1936 for the two separate registrations ;

(*c*) that these registrations were issued in his name in 1937 as executor of the will of the deceased Aglaoniki.

And there is also evidence on record, from the official certificate of registration produced in evidence, that the will of the deceased (under No. 301) was probated by the court and that the registrations were made in execution of the provisions of that will. It is true that the executor of the will did not transfer these separate registrations in execution of the will until 14 years later, that is, in 1951, and there is no explanation on record for this neglect or delay on the part of the executor in the performance of his duties as such.

Nevertheless, on the evidence on record we have no difficulty in drawing the inference that the two registrations in question had been bequethed by the testatrix to the

appellant and the respondent separately. It follows that as from the testatrix's death the appellant had a beneficial interest in Registration No. 1295 (plot 37), and the respondent in Registration No. 1294 (plot 36), and that the executor held the said properties in trust for the beneficiaries, and not personally. Consequently, notwithstanding the executor's delay in effecting the transfer of the registrations made in 1937, into the parties' respective names, their rights *inter se*, which existed prior to the coming into operation of Cap. 224 in 1946, are governed by the law in force prior to that date.

The sole question before us in this appeal was whether the appellant is co-owner with the respondent in undivided shares of the site under plot 36, by virtue of the provisions of section 6 (2) of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224. For the reasons we have endeavoured to explain in this judgment, we hold that she is not, and the appeal, therefore, fails and is dismissed with costs.

Appeal dismissed with costs.