[HADJIANASTASSIOU, A. LOIZOU, MALACHTOS, JJ.]

THEODORA CHARILAOU AND ANOTHER,
Appellants-Defendants,

v.

KALLOU HJI GEORGHIOU AND ANOTHER,
Respondents-Plaintiffs.

(*Civil Appeal No.* 5361).

Findings of fact—Made by trial Court based on the credibility of witnesses—Appeal turning on such findings—Principles on which Court of Appeal interferes—Two conflicting versions—Plaintiff's version preferred by trial Court—Satisfactory reasons given for believing plaintiff's evidence—Ample evidence before trial Judge to enable him reach the conclusions he did—Court of Appeal not prepared to interfere with his findings.

The only ground on which this appeal was fought was that the trial Judge erred in believing and preferring the evidence of the plaintiffs to that of the defendants.

The trial Judge having evaluated the evidence before him accepted that of the plaintiffs and gave reasons for doing so.

The Court of Appeal, after restating the principles on which it may set aside findings of fact made by trial Court based on the credibility of witnesses, dismissed the appeal, having held that there was ample evidence to enable the trial Judge to reach the conclusion he did. (See p. 196 et seq. of the judgment *post*).

Appeal dismissed.

Cases referred to:

Pyrgas v. *Stavridou* (1969) 1 C.L.R. 332;

Economides v. *Zodhiatis*, 1961 C.L.R. 306 at p. 307;

Kyriacou v. *Aristotelous* (1970) 1 C.L.R. 172;

Aradipioti v. *Kyriakou and Others* (1971) 1 C.L.R. 381, at pp. 386–388.

Appeal.

Appeal by defendants against the judgment of the District Court of Paphos (Laoutas, D.J.) dated the 8th October, 1974,

(Action No. 1449/72) ordering the defendants to re-open a drain in the same manner as it existed before the institution of the action and restraining them from in any way interfering with the flow of rain-water through the above drain and from interfering with the property of the plaintiffs.

E. Korakides, for the appellants.

K. Talarides, for the respondents.

The judgment of the Court was delivered by:-

HADJIANASTASSIOU, J.: This is an appeal by the defendants against the judgment of a Judge of the District Court of Paphos dated 8th October, 1974, in which in allowing the claim of the plaintiffs, he ordered (a) that the defendants re-open the drain at point B on *exhibit* 1 in the same manner as existed before the institution of the present action; (b) restraining the defendants, their servants or agents from in any way interfering with the free flow of the rain-water through the above drain; and (c) restraining the defendants, their servants or agents from interfering with the property of the plaintiffs.

The defendants, feeling aggrieved, appealed against the judgment of the trial Judge and although the notice of appeal raised a number of legal grounds, the case was finally argued on the factual issue that the Court erred in believing and preferring the evidence of the plaintiffs to that of the defendants, and counsel further argued that, the Judge ought to have believed the defendant's evidence which was supported also by the real evidence.

The facts, as shortly as possible, are these:-

The plaintiffs brought this action complaining that they were prevented from making a proper use of their properties because the defendants, who are husband and wife, or their representatives were interfering with their right of discharging the rain water into the property of the defendants through a drain.

The first plaintiff is the registered owner of plot 16/2, sheet/plan 45/52 under Registration No. 4367, and the second plaintiff is the registered owner of plot 16/1 of the same sheet/plan under Registration 4371, and their properties are situated at Mesa Chorion of Paphos. On the other hand, the defendants are in possession of plot 17 of the same sheet/plan which adjoins the properties of the plaintiffs. There was no dispute that the

property of the defendants was situated at a lower level than the properties of the plaintiffs, and that the rain water, due to the natural inclination of the ground used to be discharged from the property of the second plaintiff to that of the first and subsequently through a drain into the property of the defendants.

There was evidence that the drain existed on the dry wall separating the property of the defendants and of the first plaintiff, and that the plaintiffs' right to discharge the rain water through the above drain had been exercised for over a period of 50 years. There was a further allegation by the plaintiffs that in October, 1972, the defendants or their representatives repaired and reinforced the existing dry wall with concrete in such a way as to block the drain, and that because of such unlawful interference they have suffered damages.

The learned trial Judge, having heard the evidence of a D.L.O. clerk on that question as well as the evidence of a number of witnesses, including both the plaintiffs and the defendants, and having properly addressed his mind as to the legal position that, in order to constitute an easement there must be two tenements, a dominant one to which the right belongs and a servient one upon which the obligation is imposed, and having evaluated the evidence before him, accepted the evidence of the plaintiffs and rejected that of the defendants and his reasons were, as he put it, that:-

> " They impressed me as truthful witnesses. They answered all the questions promptly and positively. Their testimony was natural and within logic. On the other hand the evidence of the defendants and that of their witness were self-contradicting and conflicting to one another.
>
> Defendant No. 2 impressed me very poorly in the witness box. His evidence cannot be accepted and is beyond logic. He was evasive. He twisted facts in an effort to escape from the predicament he himself created. He was very puzzled. He kept changing his testimony. In cross-examination he admitted that a drain at point A was visible from the yard of his house but he denied seeing any water since 1948, running through that drain. No reasonable person can accept or believe this fantastic allegation. He also alleged that since 1948 he did not see water which was stagnant in plaintiff's No. 1 property,

whereas before he said that 'the rain water falling in the yard of plaintiff No. 1 cannot be absorbed (aporofithi) by the earth and becomes stagnant at that part of plaintiff's No. 1 property which adjoins the property of PapaSavvas's *i.e.* plot 15/1'."

Then he goes on:

" I gathered the impression that D.W.2 was not telling the truth but he tried desperately to help the defendants. I do *not agree that he is an independent witness. On the* contrary, I believe that he was very biased against plaintiffs. This I cannot explain. His evidence is in conflict with the evidence of defendants."

Finally, the learned Judge, having given reasons why he disbelieved the evidence of the defendants and their witness, he reached the conclusion that the plaintiffs have acquired a legal right, as a result of the long user, which was over 30 years and said that "the drains at A and B have always been at the position indicated on *Exhibit* 1; the rain-water from the properties of the plaintiffs used to be discharged into the property of the defendants until recently and before the drain at B was built in as a result of the concrete wall;....."

Having heard exhaustive and able argument by counsel for the appellants that the trial Judge ought to have accepted the version of the appellants and that the Supreme Court should interfere, having regard to the totality of the evidence, we think we should reiterate that undoubtedly the Court of Appeal has the power to set aside the findings of fact made by the trial Judge, where he has failed to take into account circumstances material to an estimate of the evidence or where he has believed testimony which is inconsistent with itself or with indisputable facts. (*Pyrgas* v. *Stavridou* (1969) 1 C.L.R. 332).

It should be added that since the enactment of the Courts of Justice Law, 1960, (Law No. 14/60), under s.25(3) it has been laid down time after time that this Court is not bound by any determinations on questions of fact made by the trial Court, and has power to re-hear any witnesses already heard by the trial Court, but only if the circumstances of the case justify such a course. But it has to be understood, however, that the provisions of s.25(3) have to be applied in the light of the general principle that a Court of Appeal ought not to take

the responsibility of reversing the findings of fact made by a trial Judge, merely on the result of their own comparisons and criticism of the witnesses, and of their own view of the probabilities of the case.

There is a long line of decided cases such as *Economides* v. *Zodhiatis*, 1961 C.L.R. 306 at p. 307; *Kyriacou* v. *Aristotelous*, (1970) 1 C.L.R. 172; *Aradipioti* v. *Kyriakou & Others*, (1971) 1 C.L.R. 381, at pp. 386–388 supporting that principle.

With this in mind, and having read the evidence to which learned counsel for the appellants has drawn our attention, and to the whole of the evidence before the learned trial Judge, we have reached the conclusion that there was ample evidence to enable him to reach his conclusion. Having, therefore, believed the version of the plaintiffs to that of the defendants, and once satisfactory reasons have been given why he believed such evidence, we think that we are not prepared to interfere with the findings of the learned Judge which were based on the credibility of those witnesses.

We would, therefore, dismiss the appeal with £20 costs in favour of the respondents.

Appeal dismissed with £20 *costs.*