1984 July 30

[L. LOIZOU, HADJIANASTASSIOU AND MALACHTOS, JJ.]

ARISTOFANIS THRASYVOULOU AND ANOTHER,
Appellants-Defendants,

v.

ELISAVET THRASYVOULOU AND OTHERS,
Respondents-Plaintiffs.

(*Civil Appeal No.* 5216).

Immovable property—Right of way—Acquisition by thirty years' user—Section 11(1)(*b*) *of the Immovable Property (Tenure, Registration and Valuation) Law, Cap.* 224—*What is required for a person to claim a right of way over the property of another—Relationship between owners of the two tenements, who were husband and wife, during part of the period of user not in itself a ground for excluding such period from the computation of the statutory period of thirty years—User envisaged by the above s.*11(1)(*b*) *has not the same meaning as "adverse possession" in section* 10 *of Cap.* 224.

In an action* by the respondents-plaintiffs it was adjudged that respondent-plaintiff 1 ("the respondent") had a right of way six feet wide over the eastern boundary of appellant's property. The respondent had been exercising her right of way openly and continually since the year 1938 when the dominant tenement was registered in her name; and it was obviously acquiesced in both by the owner of the servient tenement prior to 1956 and by the appellant thereafter and that this went on for a period of over thirty years until some time in 1972, shortly before the institution of this action, when defendant 2 obstructed the passage as a result of building operations on the servient tenement on instructions from the appellant.

During the period from the year 1938 to 1956 the owner of the servient tenement was respondent 3, the husband of the re-

* The claim was based on section 11(1)(b) of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224 which is quoted at p. 417 post.

spondent; and upon appeal by the defendant - the present owner of the servient tenement - the question that had to be resolved was whether the relationship between the owners of the two tenements during part of this period of user i.e. from 1938 to 1956 was in itself a ground for excluding such period from the computation of the statutory period of thirty years.

Held, that what is required for a person to claim a right of way over the immovable property of another is open and peaceable enjoyment of such right by him or by those under whom he claims for the full period of thirty years; that to hold otherwise it would mean introducing into the section something which is not to be found there; and that, the relationship of the owners of the two tenements is not in itself, a matter that would prevent the acquisition of the right so long as the above prerequisites are satisfied; accordingly the appeal must fail (see s.11 (1)(b) of Cap. 224).

Held, further, that the user envisaged by s.11 of Cap. 224 has not the same meaning as "adverse possession" in section 10 of the law.

Appeal dismissed.

Cases referred to:

Earl de la Warr v. Miles [1881] 17 Ch. D. 537;

Voskou v. HadjiPetrou 1964 C.L.R. 21 at p. 27;

Charalambous v. Ioannides (1969) 1 C.L.R. 72;

Soteriou v. Heirs of Despina HadjiPaschali, 1962 C.L.R. 280 at pp. 281, 282;

William Brothers Ltd. v. Raftery [1957] 3 All E.R. 593 at p. 599;

Aradipioti v. Kyriacou and Others (1971) 1 C.L.R. 381 at p. 386;

Ioannou and Others v. Georghiou and Others (1983) 1 C.L.R. 92 at p. 102;

HadjiDemosthenous v. Georghiou (1969) 1 C.L.R. 187.

Appeal.

Appeal by defendant 1 against the judgment of the District Court of Nicosia (Kourris, S.D.J.) dated the 30th June, 1973 (Action No. 6883/72) whereby it was adjudged that plaintiff No. 1 had a right of way six feet wide over the eastern boundary of defendant's property under registration No. 4672 and as a

result an injunction restraining defendant from interfering with the said right was granted.

C. Ladas with *J. Symeonides*, for the appellants.

A. Tavernaris, for the respondents.

Cur. adv. vult.

L. Loizou J. read the following judgment of the Court. The appellant was defendant 1 in action No. 6883/72 and his appeal is directed against the judgment of the District Court of Nicosia whereby it was adjudged that the respondent-plaintiff 1 in the action had a right of way six feet wide over the eastern boundary of the former's property under registration No. 4672 and as a result an injunction was granted restraining the appellant from interfering with the said right and he was also ordered to remove any obstacle that interfered with such passage.

In the action there were three plaintiffs and two defendants. Plaintiff 1, the present respondent and the third plaintiff are husband and wife and parents of plaintiff 2 and defendant 1. Defendant 2 is the father-in-law of defendant 1 and, by virtue of a power of attorney, his representative in Cyprus. Defendant 1 was, at the time, residing in the U.K.

By their action the plaintiffs prayed for an order of the Court restraining the defendants from interfering with their right of way through the yard of the house of defendant 1 allegedly used by them and by their predecessors in title continuously since the year 1922 and for demolishing every obstacle which they had placed in their yard preventing the plaintiffs from using their right of way to their house and for restoring the passage to the condition that it formerly was; in the alternative and in case the Court refused to make the order they prayed for £1,000.- damages for the breach by the defendants of an agreement whereby they had agreed by virtue of a contract of dowry that plaintiff 3 would transfer the said house to defendant 1 on the express condition that the plaintiffs would have a right of way six feet wide through the yard of the house to the public road. Another claim of the plaintiffs by which they invoked the provisions of s.11(a) of Cap. 224 as amended by Law 10 of 1966 which provides a machinery for dealing with such disputes through the land registry was abandoned.

By their defence the defendants denied that the plaintiffs had

acquired a right of way either by exercising such right for the period since 1922 as alleged or at all or by virtue of any agreement and counterclaimed for an order of the Court restraining the plaintiffs from trespassing over the property of defendant 1 under registration No. 4672, plot 92/3/1 of sheet-plan XXXVII. 21.2.1.

The Court rejected the claim based on the alleged agreement contained in the contract of dowry as no such contract was produced and the evidence adduced on this issue was not considered satisfactory and the only issue that remained and on which the judgment of the trial Court was based was the claim based on s.11(1)(b) of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224.

The history of the properties involved in the proceedings is briefly as follows:

In 1922 plaintiff 3, the husband, bought two plots of land i.e. plots 92/2 and 92/3 of sheet-plan XXXVII.21.2.1. of Kakopetria village from the Archbishopric; both plots were registered in his name in 1924. In 1938 two separate title deeds were issued in his name i.e. registration No. 3687 dated 28.1.38 covering plot No. 92/2 and registration No. 3690 dated 18.3.38 covering plot 92/3.

Registration No. 3687 (plot 92/2) was transferred by plaintiff 3 in the name of his wife, plaintiff 1, on 28.1.38.

In 1949 plaintiff 3 divided the other plot 92/3 covered by registration No. 3690 in two parts and the result was plots 92/3/1 and 92/3/2. On the 19th April of the same year he transferred one of the two plots i.e. 92/3/2 in the name of his wife, the first plaintiff, which was amalgamated with plot 92/2 and a new title deed covering both plots was issued under Registration No. 4673. This certificate is exhibit 1 and covers the alleged dominant tenement. The other plot 92/3/1 under registration 4672 allegedly the servient tenement remained in the name of plaintiff 3 until the 19.11.56 when he transferred same in the name of his son, the first defendant.

It is common ground that no right of way is registered in any of the title deeds.

In the light of the evidence adduced the trial Judge found as a

fact that the plaintiffs had been using a passage six feet wide along the eastern boundary of the servient tenement on foot and with loaded animals for the statutory period of thirty years and that plaintiff 1 had acquired a right of way. In computing this period, the period during which there was unity of ownership i.e. from 1922 to 1938 was, quite rightly, disregarded.

In coming to this conclusion the trial Judge rejected the submission of counsel appearing for the appellants that the exercise of the right of way envisaged by s.11 should be given the same meaning as "adverse possession" in sections 10 and 12 of the Law or to use the words of the judgment "must be in some sort adverse."

With regard to the parties the Judge, accepting the submission of counsel for the appellant, found that plaintiffs 2 and 3 had no locus standi because the dominant tenement was not registered in their name and also that the action could not stand in so far as defendant 2 was concerned because he was merely representing and was the agent of defendant 1 and consequently dismissed the action in so far as plaintiffs 2 and 3 were concerned and also against defendant No.2. The present appeal does not concern this part of the judgment.

The appeal filed by the defendant 1 relates to the decision of the Court in view of the relationship of the owners of the dominant tenement, the husband (plaintiff 3) being the predecessor in title of the wife, plaintiff 1, and to the fact that from 1938 to 1956 the husband was the owner of the servient tenement; to the computation of the period; and to the nature of the user.

The gist of the elaborate argument of learned counsel for the appellant before this Court was that the period from the year 1938 to 1956 when the owner of the servient tenement was plaintiff 3, the husband of plaintiff 1, with whom she was cohabiting should not be taken into consideration in computing the statutory period of thirty years because the wife was not exercising the right "in her own right but at the sufferance or as co-possessor of the servient tenement with her husband. Learned counsel argued that for the exercise of a right to give rise to an easement the user must be "as of right" which has the same meaning as "adverse possession" in section 10 of the Law

and this because s.13 put the two sections 10 and 11 on the same footing. In the present case, learned counsel submitted, there was unity of possession of both tenements from the years 1938 to 1956 because although the wife was the registered owner of the dominant tenement the husband was in possession because he was cohabiting with her and also because the wife must be presumed to have been using the servient property with the consent of her husband.

In support of his case learned counsel submitted that the English Prescription Act 1832 which incorporated the common law on the subject and on which a number of authorities cited were based, was similar to our section 11(1)(b) except for the statutory period; and that the provisions of the English Act were applicable in Cyprus.

It is clear from the preamble to the act that its main object was to get rid of the inconvenience and injustice which resulted from the meaning which the law attached to the expression "time immemorial" or "time whereof the memory of man runneth not to the contrary" which was the period during which enjoyment of an easement at common law had to be proved subject to the qualification that proof of enjoyment as far back as living witnesses could speak raised a prima facie presumption of an enjoyment from the remoter era. See Halsbury's Statutes, 2nd ed., p. 669 and Halsbury's Laws of England, 3rd ed., vol.12, p. 547, para. 1185.

But both at common law and under the Prescription Act the user, in order to support a prescriptive right, had to be "as of right". In so far as the common law is concerned para. 1188 of Halsbury's Laws of England, 3rd Ed., vol. 12, p. 548 reads as follows:

> "1188. User must be as of right. The user or enjoyment of an alleged right in order to support a prescreptive claim, under the doctrine of prescription at common law, must be shown to have been user 'as of right', having been enjoyed nec vi, nec clam, nec precario, neither as the result of force, secrecy, or evasion, nor as dependent upon the consent of the owner of the servient tenement. Consent, or acquiescence on the part of the servient owner lies at the root of prescription and a grant cannot be presumed from long use

without his having had knowledge or at least the means of knowledge. He cannot be said to acquiesce in an act enforced by mere violence, or in an act which fear on his part hinders him from preventing or in an act of which he has no knowledge actual or constructive, or which he contests and endeavours to interrupt, or which he sanctions only for temporary purposes or in return for recurrent consideration".

In the Prescription Act 1832 the expression "claiming right thereto" in sections 1 and 2 of the Act has the same meaning as "as of right" in s.5 and *nec vi, nec clam, nec precario*, at common law (*See Earl de la Warr* v. *Miles* [1881] 17 Ch. D. 537).

It follows from the above that the Act has not changed the nature of the enjoyment or the user by which easements are acquired and that such enjoyment or user must be sufficient to indicate to a reasonable person in possession of the servient tenement that a continuous right of enjoyment is being asserted and ought to be resisted, if that right is not to be recognized, and if resistance to it is intended; and that enjoyment which cannot be physically interrupted and is not actionable cannot be user as of right because since acquiescence on the part of the servient owner lies at the root of prescription, no man can be presumed to acquiesce to an enjoyment which he cannot prevent (see Halsbury's Laws of England, 3rd ed., vol. 12, p. 558, para. 1209).

Turning now to our law, as stated earlier on, the law now applicable is contained in s.11(1)(b) of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224. It reads as follows:

"11(1). No right of way or any privilege, liberty, easement, or any other right or advantage whatsoever shall be acquired over the immovable property of another except -

(a) .....

(b) where the same has been exercised by any person or by those under whom he claims for the full period of thirty years without interruption:

Provided ....".

The right of passage before the enactment of the above section was governed by Article 13 of the Ottoman Land Code the translation of which reads:

> "13. A person can prevent another from passing without right through the land which he owns by Tapu, but he cannot do so if there is ab antiquo right of passage through that land."

Ab antiquo appears to be the translation of the Turkish word "Qadim" or as some authors spell it "Kadim" which is defined in Article 166 of the Mejelle as "ancient, everything that of which no one alive knows the commencement".

In the case of *Christodoulos (alias Tooulis) Yianni Voskou* v. *Michael HadjiPetrou,* 1964 C.L.R. 21, *Zekia,* J., as he then was, had this to say in dealing with the provisions of the Ottoman Law and the new law at p. 27:

> "According to the previous law what was material for the acquisition of the right of passage, otherwise than by an express grant - over the land of another was the length of time this right was exercised irrespective of any change in the possessors or owners of the dominant land. The uninterrupted user of such right in favour of a particular piece of land for a long period amounting to 'Qadim' secured a right of passage over the servient plot for any possessor of the dominant land. This kind of right of way of course lapses when the possessor of both dominant and servient land is the same person, which is not the case here.
>
> The new law apparently in order to overcome the difficulties of establishing user and enjoyment of easements from time immemorial or 'Qadim' - an indefinite and uncertain period - adopted the modern feasible way of prescribing a definite minimum period for acquiring such right. It seems the length of user independently of any change in the possessor of the dominant tenement is what is material also in English law in the acquisition of easements by long user."

In the present case it is clear from the evidence on record and the judgment of the Court that the respondent had been exercising her right openly and continually since the year 1938 when the

dominant tenement was registered in her name and that it was obviously acquiesced in both by the owner of the servient tenement prior to 1956 and by the appellant thereafter and that this went on for a period of over thirty years until some time in 1972, shortly before the institution of this action, when defendant 2 obstructed the passage as a result of building operations on the servient tenement on instructions from the appellant. And the question that has to be resolved is whether the relationship between the owners of the two tenements during part of this period of user i.e. from 1938 to 1956 is in itself a ground for excluding such period from the computation of the statutory period of thirty years as submitted by learned counsel for the appellant.

In deciding this issue we must say that we find ourselves unable to agree with the submission of learned counsel that the user envisaged by s.11 has the same meaning as "adverse possession" in s.10 of the law. Neither in s.11(1)(b) nor in the previous law is there anything to suggest that the user envisaged must be "adverse" in the sense of the words in s.10.

In the definition of "adverse possession" in s.2 of Cap. 224 it is clearly stated that the possession must be by a person not entitled thereto without the express or implied consent or permission of the person entitled to the possession of the property having been given or obtained. This definition is substantially the same as the definition in s.1 of the Immovable Property Limitation Law 1886 (Law 4 of 1886), where adverse possession was first defined, except for the words "implied consent" which do not occur in the earlier enactment.

In *Charalambous* v. *Ioannides* (1969) 1 C.L.R. 72, a case in which the claim was based on adverse possession, Josephides, J. in delivering the judgment of the Court said at p. 80: "It has also been held that adverse possession over the disputed land must be proved by positive evidence as to the acts of ownership which amount to possession which the nature of the land admits: *Anna Soteriou* v. *Heirs of Despina K. HadjiPaschali*, 1962 C.L.R. 280 at pp. 281, 282; compare also the English case of *Williams Brothers Ltd.* v. *Raftery* [1957] 3 All E.R. 593 at p. 599 where Morris L.J. said that there must be actual possession in the defendant of a nature that ousted the plaintiffs from possession,

or excluded them from possession". See also the judgment of Hadjianastassiou, J. in *Aradipioti* v. *Kyriacou and Others* (1971) 1 C.L.R. 381 at p. 386.

In a recent case *Ioannou and Others* v. *Georghiou and Others* (1983) 1 C.L.R. Pikis, J. in delivering the unanimous judgment of the Court said at p. 102:

> "The concept lying behind adverse possession is that the occupant should not be in possession by the consent of the lawful owner but in defiance to his right with a view to establishing a right to the property. His possession must be antagonistic to the rights of the owner over the land, expressed in Latin as possession animo domini. In this regard, it is very similar to the concept of adverse possession under English common law that envisaged discontinuance of possession by the owner or dispossession by the person in occupation, in either case involving an element of ousting the owner of his enjoyment of the land. (See, *Alfred F. Beckett Limited v. Lyons* [1967] 1 All E.R. 833; *Bligh* v. *Martin* [1968] 1 All E.R. 1157; *Wallis's Limited* v. *Shell-Mex and B.P.* [1974] 3 All E.R. 575)."

Very relevant to this issue is also a passage from the judgment in the *Voskou* case (supra) at p. 28 where it is stated:

> "A right of passage is incorporeal in nature and is attached to the land and does not exist independently of it. It follows the land and it relates to its mode of enjoyment. It is quite different in nature from acquisitive prescription applicable to the corpus of the land whereby a person could acquire the land, the property of another, by adverse possession."

Finally in the case of *HadjiDemosthenous* v. *Georghiou* (1969) 1 C.L.R. 187, another case based on the provisions of s.11(1)(b) of Cap. 224, the following is stated at p. 192: "Now what is the test to be applied in cases of long user? There must be positive evidence of open and peaceable enjoyment of the right for the full period of thirty years."

It seems to us that, having regard to the above and the language of s.11(1)(b) of the law what is required for a person to claim a right of way over the immovable property of another is

open and peaceable enjoyment of such right by him or by those under whom he claims for the full period of thirty years. To hold otherwise it would mean introducing into the section something which is not to be found there. We do not think that the relationship of the owners of the two tenements is, in itself, a matter that would prevent the acquisition of the right so long as the above prerequisites are satisfied. We might add that for the purposes of the present case it would make no difference to the outcome of this appeal even if we were to read into the section the provisions of the common law because it is clear from the evidence and the findings of the Court that long before the husband registered the dominant tenement in the name of the respondent in 1938 the passage over which the right of way is claimed was the only means to gain access to and from the dominant tenement and this fact alone was enough to convey to the mind of the owners of the servient tenement that a continuous right of enjoyment was being asserted and yet not only it was never resisted or interrupted but, on the contrary, it was acquiesced in by them until some three or four years after the statutory period of thirty years was completed.

In the light of the above we think that the conclusion of the trial Court was right and in the result this appeal must be dismissed with costs.

Appeal dismissed with costs.