1985 May 8

[A. LOIZOU, LORIS AND STYLIANIDES, JJ.]

1. STAVROU KYRIACOU KAKOULLOU,
2. ERINI KYRIACOU KAKOULLOU,

Appellants-Defendants,

v.

IOANNIS KYRIACOU KAKOULLI,

Respondent-Plaintiff.

(Civil Appeal No. 6625).

Immovable Property—Adverse possession—Prescription—Cannot run against a registered owner since the coming into force, on the 1st September, 1946, of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224—Prescriptive period against a registered owner had to be completed prior to the 1st September 1946—A record in the books of the D.L.O. not being a registration as defined in section 2 of Cap. 224, does not create any rights.

Trespass to land—Co-owner—Can only bring an action of trespass against the other co-owner if he has been actually ousted or dispossessed of the land—Measure of damages—Is the market rental value of the property occupied or used for the period of wrongful occupation or user—Party claiming damages has not only to plead that he suffered actual damages but has to prove them by positive evidence—No evidence on the issue of damages—Plaintiff awarded nominal damages.

Findings of fact—Appeal—Although Court of Appeal would be slow to reverse findings of primary facts, it would be prepared to form an independent opinion upon the proper conclusion to be drawn from a finding of primary facts.

The parties to this appeal, who were brother and sisters, were owners—by one third each—in undivided shares of a house at Psimolophou village. The shares of appellant 2

and respondent were transferred in their names by their sister and brother, respectively, in 1944; and the share of appellant 1 was transferred in her name by her father in 1936. The respondent who has been absent from Cyprus from 1923 to 1944 and from 1950 to 1978 went to stay in the above house when he returned to Cyprus in 1978. In 1979 he was expelled from the house by appellant 2 and he rented another house at £20.- per month as from June, 1979.

In an action by respondent for, inter alia, a declaration that he was entitled to registration of one-half share of the said house and for £20.- per month damages and/or mesne profits, appellant 1 did not enter an appearance but appellant 2 contested the claim and alleged that she continuously, adversely and uniterruptedly has been in possession of the whole house since 1944; and by counterclaim she claimed the registration of the whole plot in her name and the concellation of any existing registration in the name of the plaintiff.

The trial Judge held that no acquisitive prescription could be set up by defendant 2 with success as she was neither "a purchaser nor a stranger to her co-owners"; and awarded to plaintiff £20.- per month from the date he was expelled from the house.

Upon appeal by defendant 2:

Held, (1) that acquisitive prescription over immovable property cannot run against a registered owner since the coming into force, on the 1st September 1946, of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224 (see section 9 of the Law) and that the prescriptive period against a registered owner had to be completed prior to the 1st September 1946 in order to entitled a person—possessor—to obtain registration in his name of immovable property registered in the name of another; that even if adverse possession by the defendant No. 2 started in 1944, it could not be continued against the plaintiff, a registered owner, after 1.9.46 and, therefore, she could not have acquired any rights by prescription; that a record in the books of the D.L.O. not being a registration, as defined in s. 2 of Cap. 224. does not

create any rights; that the rights of the plaintiff and the defendants are those described in their existing valid registrations, i.e. each is the owner of one-third ab indiviso.

(2) That since plaintiff was ousted of the house by his co-owner, defendant 2, the latter is a trespasser; that a co-owner may maintain an action of trespass for mesne profits against his co-owners; that the normal measure of damages is the market rental value of the property occupied or used for the period of wrongful occupation or user; that the party who claims actual damages for trespass has not only to plead that he suffered actual damages but he has to adduce positive evidence to prove them; that there was no evidence before the Court on the issue of damages; that trespass is a tort actionable per se; that if a man having proprietary right proves an infringement of that right, the Law cannot presume that he suffered real damage; that this infringement in cases of trespass entitles him to the award of nominal damages; and that, therefore, the judgment given by the trial Court must be set aside and plaintiff will be awarded £5 nominal damages against defendant.

Held, further, that although the Court of Appeal would be slow to reverse the findings of primary facts made by trial Court, it would be prepared to form an independent opinion upon the proper conclusion of fact to be drawn from a finding of primary facts.

Appeal allowed.

Cases referred to:

Papageorghiou v. *Komodromou* (1963) 2 C.L.R. 202;

Chakarto v. *Liono,* XX C.L.R. Part 1, 133;

Angeli v. *Lambi and Others* (1963) 2 C.L.R. 274;

Stokkos v. *Solomi,* 21 C.L.R. 209;

Diplaros v. *Nicola* (1974) 1 C.L.R. 198;

Soteriou v. *Heirs of Despina HjiPaschali,* 1962 C.L.R. 280 at p. 281-282;

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

Kyriaki v. *Kyriaki*, 3 C.L.R. 145;

Ioannou and Others v. *Georghiou and Others* (1983) 1 C.L.R. 92;

Theodorou v. *HadjiAntoni*, 1961 C.L.R. 203;

Kannavkia v. *Arghyrou & Others*, 19 C.L.R. 186;

Vassiliou v. *Vassiliou*, 16 C.L.R. 69;

Universal Advertising and Publishing Co. v. *Vouros*, 19 C.L.R. 87;

Electricity Authority v. *Kipparis*, 24 C.L.R. 121;

Dervish v. *Sami* (1963) 2 C.L.R. 82;

Akamas and Another v. *Tsiakoli* (1967) 1 C.L.R. 206;

Murray Ash and Kennedy v. *Hall*, 137 E.R. 175;

Jacobs v. *Seward*, 41 L.J. C.P. 221 at p. 224;

Bull v. *Bull* [1955] 1 All E.R. 253 at p. 255;

Good Title v. *Tombs*, *3 Wills.* 118;

Clifton Securities Ltd. v. *Huntley and Others* [1948] 2 All E.R. 283 at p. 284;

Olymbiou v. *Kyriakoulli and Another* (1983) 1 C.L.R. 235;

Droushiotis (No. 2) v. *Cyprus Asbestos Mines Ltd.* (1966) 1 C.L.R. 215 at p. 228;

Montgomerie & Co. Ltd. v. *Wallace-James* [1904] A.C. 73 at p. 75;

Imam v. *Papacostas* (1968) 1 C.L.R. 207;

Nearchou v. *Papaefstathiou* (1970) 1 C.L.R. 109;

Patsalides v. *Afsharian* (1965) 1 C.L.R. 134;

Mamas v. *Firm Arma Tyres* (1966) 1 C.L.R. 158;

Kyriacou v. *A. Kortas & Son Ltd.* (1981) 1 C.L.R. 551;

Mentesh and Another v. *Hadji Demetriou* (1983) 1 C.L.R. 1;

Stylianou and Another v. *Petrou* (1984) 1 C.L.R. 362;

Mediana [1900] A.C. 113 at p. 116.

Appeal.

Appeal by defendant 2 against the judgment of the District Court of Nicosia (N. Nicolaou, D.J.) dated the 19th September, 1983 (Action No. 3891/80) whereby she was adjudged to pay to plaintiff the sum of £20.- per month as from 1.4.1979 up to the date the defendants will allow the plaintiff to use the house in which he is a co-owner with the other parties.

A. Magos, for the appellant.

C. A. Hadjiloannou, for the respondent.

Cur. adv. vult.

A. LOIZOU J.: The judgment of the Court will be delivered by Stylianides, J.

STYLIANIDES J.: This appeal—taken by defendant No. 2—is directed against a judgment of the District Court of Nicosia in an action concerning a house at Psimolophou village.

The plaintiff-respondent (hereinafter referred to as "the plaintiff"), the two defendants and five others are the lawful children of Kyriacos Petri Kakoullou, late of Psimolophou. In 1923 the plaintiff, at the age of 17, emigrated to Egypt. He returned to his native land in 1944 to leave again this country for England in 1950. Old and accompanied by his wife he reverted in 1978 to Psimolophou to pass peacefully the rest of his life. The old couple stayed for a period in the subject house under the occupation of defendant No. 2—the appellant—wherefrom he was expelled by her in April, 1979.

Thereafter, in vindication of his proprietary and possessory rights, he filed this action whereby he contended

that by virtue of registration and division effected by the father he is the owner of one-half share ab indiviso of the house and yard shown on D.L.O. maps Plot 280, Sheet/Plan XXX/42 of Psimolophou village. Defendant No. 2 wrongfully as from April, 1979, is in possession of the whole plot to the exclusion of the plaintiff. He claimed:-

"(a) Declaration of the Court that he is entitled to registration of one-half share of the aforesaid described property by virtue of inheritance, registration, partition and record in the books of the D.L.O.;

(b) Order for registration of the one-half share, and the setting aside of any registration in the name of the defendants, contrary to the aforesaid right of the plaintiff;

(c) Injunction restraining the defendants from interfering with his aforesaid share; and,

(d) £20.- per month damages and/or mesne profits as from 1.4.79".

Defendant No. 1 did not enter an appearance and did not take part in the proceedings.

Defendant No. 2 contested the claim and alleged that the subject property was as from 1944 registered by one-third share in the name of the plaintiff, herself and defendant No. 1; that she continuously, adversely and uninterruptedly was in possession of the whole plot since 1944; that the plaintiff on occasions was visiting this country and that she is the owner of the whole plot by registration and prescription. She denied that the appellant suffered any damages whatsoever. By counterclaim she claimed order for the registration of the whole Plot 280 in her name and the cancellation of any existing registration in the name of the plaintiff.

P. W. 1, Panayiotis Shakallis, a land clerk, the plaintiff and defendant No. 2 were the only witnesses before the trial Court.

P. W. 1, Shakallis, on 13.5.81 carried out a local inquiry in the presence of the parties. He prepared a sketch which he produced before the trial Court—(See exhibit No.

1). He testified that the father of the litigants was, by virtue of Registration No. 3697 dated 17.7.1905, the owner of immovable property at Psimolophou which was identified to correspond to Plots 280 and 113 of the plan in use today.

On 24.2.36 two titles were issued in substitution of the old title, namely, 8803 and 8804. 8803 was transferred in the name of defendant No. 1 and Evlavia and Costis Kyriacou Kakoullou, brother and sister of the parties, by one-third share each. In A.1735/42 Registration No. 8803 was transferred to Registration No. 9343 in the name of the same aforesaid persons, covering Plots 181/2 and and 182/2 of the plan in use at that time. Evlavia Kyriacou Kakoullou and Costis Kyriacou Kakoullou transferred by D.S. 3068/44 on 14.12.44 their shares in the name of the plaintiff and defendant No. 2, respectively.

Between 1944-1949 a general registration of all the immovable property in Psimolophou village was made. It emerges that a new plan was prepared and Registration No. 9343 covers part of Plot 280 and part of Plot 113 as delineated on the sketch, exhibit No. 1. Besides the old existing building defendant No. 2 built thereon two rooms, a corridor, etc.

The plaintiff testified about his movements in and out of the country from 1923-1978. He alleged that his father in 1948, when he happened to be in this country, told him that one-half share of Plot 280 was transferred in his name; that after his last arrival in Cyprus he resided in a house standing on Plot 280. Due to continuous quarrels between the plaintiff and the husband of defendant No. 2, she expelled him and his wife from the house. He rented another house at £20.- per month as from June, 1979.

Defendant No. 2 testified that as from 1944, when her brother, Costas Kyriacou Kakoullou, transferred his share of the subject property in her name, she has been occupying the whole property without interruption, dispute or claim by anyone as owner of the whole property.

The trial Court, relying on the dissenting judgment of Vassiliades, J., as he then was, in *Rodothea Papageorghiou* v. *Antonis Savva Charalambous Komodromou*, (1963) 2

C.L.R. 202, at p. 239, said that the period of possession that commenced before 1.9.46, the date of the coming into operation of the Immovable Property (Tenure, Registration and Valuation) Law, now Cap. 224, can continue even after that date, and on the basis of *Enver Mehmet Chakarto* v. *Hussein Izzet Liono*, XX C.L.R., Part 1, p. 113, and *Eleni Angeli* v. *Savvas Lambi and Others*, (1963) 2 C.L.R. 274, and having regard to the facts before it, it came to the conclusion that no acquisitive prescription could be set up with any chance of success as defendant No. 2 was neither "a purchaser nor a stranger to her co-owners".

The Law is well settled but we think that it is necessary to restate it.

Acquisition of ownership by prescription prior to the coming into operation of the Immovable Property (Tenure, Registration and Valuation) Law, now Cap. 224, was governed by Art. 20 of the Ottoman Land Code, as affected by the Immovable Property Law, 1886, (Law No. 4/86). The period of prescription for arazi mirie category was 10 years and for mulk category 15 years. During the disability of a person and his absence out of the country the time of prescription did not run. The 1886 legislation provided that a prescriptive right could be acquired 5 years after the end of such incapacitation.

Sections 9 and 10 of the new Law provide:-

> "9. No title to immovable property shall be acquired by any person by adverse possession as against the Crown or a registered owner.
>
> 10. Subject to the provisions of section 9 of this Law, proof of undisputed and uninterrupted adverse possession by a person, or by those under whom he claims, of immovable property for the full period of thirty years, shall entitle such person to be deemed to be the owner of such property and to have the same registered in his name:
>
> Provided that nothing in this section contained shall affect the period of prescription with regard to any immovable property which began to be adversely possessed before the commencement of this Law, and

all matters relating to prescription during such period shall continue to be governed by the provisions of the enactments repealed by this Law relating to prescription, as if this Law had not been passed:

Provided further that notwithstanding the existence of any disability operating under such enactments to extend the period of prescription such period shall not in any case exceed thirty years in all even where any such disability may continue to subsist at the expiration of thirty years".

Prescription where land is unregistered and the period of prescription had started to run before the Law, Cap. 224, came into force—1.9.46—all matters relating to prescription in such a case are governed by the old Law, including the period of prescription itself—*Christos Hji-Loizi Stokkas* v. *Christina Argyrou Solomi, of Nikitas,* (1956) 21 C.L.R. 209; *Christofis Yianni Diplaros* v. *Photou Nicola,* (1974) 1 C.L.R. 198).

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. Hji-Paschali,* 1962 C.L.R. 280, at pp. 281-282; and *Agathi Charalambous etc.* v. *Ioannis K. Ioannides,* (1969) 1 C.L.R. 72).

With regard to adverse possession by one co-owner against another co-owner in *Enver Mehmet Chakarto* v. *Hussein Izzet Liono* (supra), Hallinan, C.J., after dealing with the period of prescription for lands of arazi mirie and mulk, as provided in Articles 20 and 23 of the Ottoman Land Code, said at p. 116:-

"In his Commentary on the Ottoman Land Code, Jemaleddin, at p. 190, when discussing Article 23 says that if brothers are co-owners of land by inheritance and one only is in possession, such possession will not be deemed adverse as against the brothers who are not in possession because the brother in possesion is presumed to be there with their consent. From Article 23 and Jemaleddin's Commentary it can reasonably be inferred that where two co-owners have not derived their title from the former owner

by inheritance but each are purchasers and strangers, the consent of the co-owner out of possession cannot the presumed, and therefore the possession of the co-owner who is cultivating the land is adverse to the other co-owner".

In *Eleni Angeli* v. *Savvas Lambi and Others* (supra), Wilson, P., at p. 280 said.-

"Concerning this I concur with the trial Judge that the adverse possession of the plaintiff's father until partition in 1928 as against his brothers, who were co-owners of land by inheritance, but with only the plaintiff's father in possession, will not be deemed adverse against the brothers not in possession because the brother in possession is presumed to be there with their consent".

Hadjianastassiou, J., in *Diplaros* v. *Nicola* (supra) said at p. 215:-

"Now, as to the next argument that a co-owner cannot have an adverse possession against another co-owner, I think that the case of *Chakarto* (supra) covers the facts of this case, because the respondent did not derive her title from the same owner by inheritance as the appellant, and secondly, the two co-owners are strangers. Once, therefore, the respondent was cultivating all the portions of the lands exclusively, such possession in my view, is adverse to the other co-owner, the appellant".

Triantafyllides, P., in the same case said at p. 216:-

"The fact that the respondent was, during the material period, a co-owner of the said properties, in the sense that she had been given, by her father, the remaining ¾ shares therein, by way of dowry or gift, did not, in my opinion, prevent the possession by her of the ¼ shares of the appellant from being adverse, because the dicta in cases such as *Chakarto* v. *Liono*, 20 C.L.R., Part 1, 113, and *Angeli* v. *Lambi and Others*, (1963) 2 C.L.R. 274, regarding inference of consent in case of possession by co-owners, are not applicable in the particular circumstances of the

present case: The appellant and the respondent were not co-heirs nor did there exist any other ground justifying the inference of possession by the respondent with the consent of the appellant as a co-owner; and it should not be lost sight of that the respondent took possession of the shares of the appellant animo domini, on the strength of a contract for the sale of his shares to her".

The dicta in *Chakarto* and the line of cases that followed it, limit the implied consent of a co-owner that precludes adverse possession between co-owners who derive their title by inheritance. Possession following a division of the property amongst co-owners, including co-heirs, entitles the possessor to assert a prescriptive right—*Helene Kyriaki* v. *Nicola Kyriaki,* 3 C.L.R. 145; see, also, *Ioannou & Others* v. *Georghiou & Others,* (1983) 1 C.L.R. 92).

In the present case the co-owners did not derive their title by inheritance. They were not co-heirs but co-owners and the implied consent principle did not apply if the other requirements for acquisition of ownership by prescription were satisfied.

Section 9 of Cap. 224 is unaffected by the provisions of s. 10, and acquisitive prescription over immovable property cannot run against a registered owner since the coming into force of the new Law on 1st September, 1946. The prescriptive period against a registered owner had to be completed prior to the material date—1st September, 1946— in order to entitle a person-possessor— to obtain registration in his name of immovable property registered in the name of another— *(Thomas Antoni Theodorou* v. *Christos Theori Hadji-Antoni,* 1961 C.L.R. 203).

In case of unregistered immovable property the period of prescription need not have been completed by the 1st September, 1946, but the prescriptive period should have been completed before registration is issued, as it has been held that if a person obtains registration as owner of immovable property, that registration interrupts any prescriptive period which is running against him in respect of that property at the time of his registration—*(Annou Haji*

Kannavkia v. *Kleopatra Argyrou & Others,* 19 C.L.R. 186; *Eleni Angeli* v. *Savvas Lambi & Others* (supra)).

In the present case even if adverse possession by the defendant No. 2 started in 1944, it could not be continued against the plaintiff, a registered owner, after 1.9.46 and, therefore, she could not have acquired any rights by prescirption. A record in the books of the D.L.O. not being a registration, as defined in s. 2 of Cap. 224, does not create any rights. The rights of the plaintiff and the defendants are those described in their existing valid registrations, i.e. each is the owner of one-third share ab indiviso.

According to the evidence, as accepted by the trial Court, the defendant No. 2 was as from April, 1979, possessing and enjoying the subject property to the exclusion of the respondent-plaintiff. Is defendant No. 2 a trespasser and, if so, what are the remedies to which the plaintiff is entitled?

Trespass to immovable property consists of any unlawful entry upon, or any unlawful damage to or interference with, any property by any person—(Civil Wrongs Law, Cap. 148, Section 43).

Our Civil Wrongs Law is a codification of the English Common Law and should be interpreted and applied in accordance with the principles of the Common Law of England—(Section 2 of the Civil Wrongs Law, Cap. 148; *Vassiliou* v. *Vassiliou,* 16 C.L.R. 69; *Universal Advertising and Publishing Co.* v. *Vouros,* 19 C.L.R. 87; *Electricity Authority* v. *Kipparis,* 24 C.L.R. 121; *Mehmet Dervish* v. *Melek Sami,* (1963) 2 C.L.R. 82, per Josephides, J.; *Akamas and Another* v. *Tsiakoli,* (1967) 1 C.L.R. 206).

Trespass quare clausum fregit lies by one of several tenants in common against his co-tenant, where there has been an actual expulsion— *(Murray, Ash, and Kennedy* v. *Hall,* 137 E.R. 175).

In *Jacobs* v. *Seward,* 41 L.J.C.P. 221, it was held that one tenant in common cannot maintain trespass or trover against his co-tenant for cutting and carrying away the grass off their land unless there has been ouster, or unless

it is shown that the grass has been destroyed. The Lord Chancellor said at p. 224:-

"The whole case turns simply upon this, what are the rights of a tenant in common against his co-tenant in common in respect of acts by which that co-tenant takes possession either of the lands or of chattels connected with the land?

Now, as regards the question of trespass, it appears to be perfectly settled, and there is really no controversy between the counsel in the case upon that part of the matter, that unless there be an actual ouster of one tenant in common by another, trespass will not lie by the one against the other so far as the land is concerned. Therefore, what we have to look at in the findings before us is, whether or not there is anything stated which leads to the conclusion that the plaintiff was ousted by his co-tenant".

Lord Westbury at p. 227 had this to say:-

"It is undoubtedly settled Law that he cannot maintain trespass unless there is a case of ouster, and as I have already observed no facts amounting to a case of ouster are stated in the special case. But then it follows clearly, he is not entitled to trover for the entirety of the growing crops. All that he could allege would be, that he was entitled in some form or other, in Law or in equity, to have one half of the value of the growing crops".

In *Bull* v. *Bull,* [1955] 1 All E.R. 253, Lord Denning said at p. 255:-

"There is plenty of authority about the rights of legal owners in common. Each of them is entitled to the possession of the land and to the use and enjoyment of it in a proper manner. Neither can turn out the other; but if one of them should take more than his proper share the injured party can bring an action for an account. If one of them should go so far as to oust the other he is guilty of a trespass... Such being the rights of legal tenants in common, I think that the rights of equitable owners in common are

the same, save only for such differences as are necessarily consequent on the interest being equitable and not legal".

In *Clerk & Lindsell on Torts*, 14th Edition, paragraph 1328, we read:-

"*Co-owners. One* co-owner of land can only bring an action of trespass against the other if he has been actually ousted or dispossessed of the land. Each co-owner is entitled to possession of the whole land, so that if one turns the other off the land or part of it, it is a trespass".

In view of the aforesaid authorities defendant No. 2 is a trespasser. It has been established in the case of *Good Title* v. *Tombs*, 3 Wils. 118, that a tenant in common may maintain an action of trespass for mesne profits against his companion.

The normal measure of damages is the market rental value of the property occupied or used for the period of wrongful occupation or user—(*McGregor on Damages*, 13th Edition, para. 1076).

In *Clifton Securities, Ltd.* v. *Huntley and Others*, [1948] 2 All E.R. 283, Denning, J., as he then was, at p. 284 said:-

"There is no doubt that in point of Law the defendants were trespassers for that time, and that they can have no answer to this claim for mesne profits upto July 15, 1947. At what rate are the mesne profits to be assessed? When the rent represents the fair value of the premises, mesne profits are assessed at the amount of the rent".

(See, also, *Olymbiou* v. *Kyriakoulli and Another*, (1983) 1 C.L.R. 235).

The only evidence concerning damages was the statement of the plaintiff that on his expulsion from the house he let another house at £20.- per month.

Defendant No. 2 said that whilst her brother and his wife were staying with her, he was paying £10.- rent per

month and she was giving them hospitality free of charge. The plaintiff, on the other hand, stated that he was paying the £10.- per month for their meals and maintenance. The defendant No. 2 at some stage in her evidence said that she sent her brother away because the £10.- he was paying her was not sufficient—(«δεν με αρκούσαν οι £10.- που μου έδιδε»).

No evidence of description or comparison of the subject house and the rented house was adduced.

On this evidence the trial Court concluded that the £10.- per month should be shared in two equal moieties, i.e. for the use of the house and maintenance; and basing himself on this finding and inference he reached the conclusion that the plaintiff was deprived of the use and enjoyment of his property and he, having regard to the aforesaid evidence before him, assessed such loss at £20.- per month.

Defendant No. 2 complains that the findings of fact of the trial Court are not warranted by the evidence, and the inferences drawn are wrong.

This Court on appeal from the findings of trial Courts *under section 25(3) of the Court of Justice Law, 1960,* is not bound by any determinations on questions of fact made by the trial Court and has power to review the whole evidence and draw its own inferences; and although the Court of Appeal would be slow to reverse the findings of primary facts made by the trial Court (though it has done so in proper cases), it would be prepared to form an independent opinion upon the proper conclusion of fact to be drawn from a finding of primary facts—*(Charalambos Drousiotis (No. 2)* v. *The Cyprus Asbestos Mines Ltd.,* (1966) 1 C.L.R. 215, at p. 228).

Order 25, r.8, of the Civil Procedure Rules provides:-

> "The Court of Appeal shall have prower to draw inferences of fact and to give any judgment and make any order which ought to have been made."

In *Montgomerie & Co. Ltd.* v. *Wallace-James,* [1904] A.C. 73, at p. 75, Lord Halsbury said:-

> "But when no question arises as to truthfulness,

and where the question is as to the proper inferences to be drawn from truthful evidence, then the original tribunal is in no better position to decide than the Judges of an Appellate Court".

It is well settled that it is the practice of an appellate Court not to interefere with the findings of fact of the trial Court which had the advantage of hearing the witnesses and watching their demeanour. If on the evidence before him it was reasonably open to him to make the findings to which he arrived at, then this Court will not interfere unless the inferences drawn therefrom are not warranted by the findings whereupon this Court can draw its own conclusions— *(Imam* v. *Papacostas,* (1968) 1 C.L.R. 207; *Nearchou* v. *Papaefstathiou,* (1970) 1 C.L.R. 109, at p. 114; *Patsalides* v. *Afsharian,* (1965) 1 C.L.R. 134; *Sofoclis Mamas* v. *The Firm "ARMA" Tyres,* (1966) 1 C.L.R. 158; *Kyriacou* v. *A. Kortas & Sons Ltd.,* (1981) 1 C.L.R. 551; *Osman Mentesh and Another* v. *Evripides Hadji-Demetriou,* (1983) 1 C.L.R. 1; *Stylianou & Another* v. *Petrou,* (1984) 1 C.L.R. 362.

With all respect to the learned trial Judge we have no difficulty or hesitation in coming to the conclusion that the findings on the factual issue as to damages is unsatisfactory and it cannot be sustained. From the evidence both of the plaintiff and of the defendant No. 2 it is clear that the amount he was paying to defendant No. 2 was for the maintenance of himself and his wife and no part thereof was for rent. The only solid evidence is that the plaintiff, after he was ousted from the house, he let another house for £20.- per month. There is no evidence as to the state of the subject house or the rented house. No material before the Court for evaluation of the rental value of the subject house at all was adduced by the plaintiff.

It was submitted by counsel for the plaintiff that once trespass is proved and damages are claimed, it is upon the trespasser to disprove the amount claimed in the action.

This proposition is untenable in Law. The party who claims actual damages for trespass has not only to plead that he suffered actual damages but he has to adduce positive evidence to prove them. There was no evidence be-

fore the Court on the issue of damages. Trespass is a tort actionable per se. If a man having proprietary right proves an infringement of that right, the Law cannot presume that he suffered real damage. This infringement in cases of trespass entitles him to the award of nominal damages.

In *The Mediana*, [1900] A.C. 113, at p. 116 Lord Halsbury, L.C., said:-

> " 'Nominal damages' is a technical phrase which means that you have negatived anything like real damage but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed.
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> Nominal damages may be awarded in all cases of breach of contract and in torts actionable per se." *(Constantine* v. *Imperial London Hotels*, [1944] K.B. 693; *Armstrong* v. *Sheppard & Short, Ltd.*, [1959] 2 All E.R. 651).

The trial Court awarded to the plaintiff damages in the sum of £20.- per month from 1.4.79 until the defendants allow the plaintiff to use and enjoy the subject property as co-owner of one-third. This judgment was given against both defendants.

Defendant No. 1 did not enter appearance; did not take part in the proceedings. She committed no wrong at all and the plaintiff in his evidence stated that he had no complaint and no claim against her. Learned counsel for the plaintiff before us yesterday stated that he does not insist on the judgment given against this defendant and that actually he did not proceed to execution by registration of the judgment, as he did with the immovable property of defendant No. 2. We take this to mean that he admits that the judgment against defendant No. 1 was issued by the trial Court by oversight and he consents to this judgment being set aside by this Court.

In view of what we have endeavoured to explain, we shall set aside the judgment given by the trial Court but

we shall award to the plaintiff £5.- nominal damages against defendant No. 2.

In the result the appeal is allowed; the judgment of the trial Court is varied accordingly. No order as to costs before this Court or in the Court below.

Appeal allowed with no order as to costs.