[O' BRIAIN, P., ZEKIA, VASSILIADES and JOSEPHIDES, JJ.]

THOMAS ANTONI THEODOROU,
Appellant (Plaintiff),

v.

CHRISTOS THEORI HADJI ANTONI
Respondent (Defendant).

(Civil Appeal No. 4316).

Immovable property—Prescription—Acquisition of ownership by adverse possession—The Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224, section 10—Registered owner—Prescription against registered owner does not run—Section 9—Even though the period of prescription has started to run before the 1st September, 1946 when Cap. 224 came into force—Section 9 unaffected by section 10—To defeat the title to land of a registered owner, the prescriptive period must have been completed before the enactment of Cap.224.

Certificate of registration—Prima facie evidence of ownership.

Transfer of, or charge on, any immovable property—Not valid unless registered—Cap. 224, section 40—Area of land covered by registration—Section 50.

Natural boundary—Might be of immense help in ascertaining an error in the original registration or in boundary disputes.

The parties in these proceedings were the holders of certificates of registration in respect of two adjoining plots of land, respectively. The appellant-plaintiff complained that part of the land included in his title-deed under Registration No. 23663, was being trespassed upon by the respondent-defendant and by his action, instituted in 1957, claimed against the defendant for (a) a declaration that the aforesaid disputed portion is his; (b) an order restraining the defendant (respondent) from interfering with the said portion; and (c) damages. The respondent-defendant on the other hand contended that the disputed area belonged to him as part of his plot covered by his titltle-deed under Registration No. 23735. He further contended that, in any event, he was in possession of the disputed portion since 1942 and that, therefore, a right of ownership over that portion was created in his favour by adverse possession for a period of over ten years. He counterclaimed accordingly. Under the Land Code which

was in force until the 1st September, 1946, the property involved in this case was of the *arazi mirié* category and the relevant prescriptive period ten years. The Land Code, together with other enactments, was repealed as from that date (*i.e.* 1st September, 1946) by the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224. By section 9 of Cap. 224 it is provided that: "No title to immovable property shall be acquired by any person by adverse possession as against the Crown or a registered owner". Section 10 of the same Law (Cap. 224) provides:

> "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........"

The lower court gave judgment in favour of the defendant-respondent. On appeal by the plaintiff, the High Court reversing that judgment:—

Held: (1) (a) It has been clearly established that the whole of the area in dispute is outside the respondent's title-deed under Registration No. 23735 and forms part of the appellant's property covered by his title deed under Registration No. 23663.

(b) The certificate of registration is *prima facie* evidence of ownership. A person who claims to defeat the title or part thereof of a holder of such certificate has either to establish that the registration was effected in the name of the holder by mistake or error, or that, where there is room for acquisition of a prescriptive right, the holder of such certificate has lost his right over the land on the ground that it has been adversely possessed by such person.

(c) Even if it were to be assumed that the area in dispute

was the property of the persons from whom the respondent bought the land in 1942, transfer of which was effected in 1947, still it was not included in that transfer. Therefore, in view of sections 40 and 50 of Cap. 224 (both sections are set out in full in the judgment of ZEKIA, J. pp. 208-209 *post*), any right or interest the vendors-transferors might have had cannot be considered as having been vested in the transferee (respondent) either by operation of law or otherwise. The statement of the law in *Nicolaides v. Kotiri* 7 C.L.R. 7, at p. 8, *per Tyser*, J. should be read in the light of the provisions of the Land Code in force at the time but now repealed as from the 1st September, 1946, by Cap 224.

(2) Section 9 of Cap. 224 (*supra*) is unaffected by section 10 thereof (*supra*). Consequently, the appellant being the registered owner of the disputed area, acquisitive prescription over his said land cannot run against him after the coming into operation of Cap. 224 on the 1st September, 1946.

Chakarto v. Liono 20 C.L.R. 113; *distinguished;*

Stokkas v. Solomi 21 C.L.R. 209; *distinguished.*

(3) Where the rights of registered owners are concerned, the prescriptive period has to be completed before the day when Cap. 224 came into force (*i.e.* 1st September, 1946); only in such case the title to land of the registered owner can be defeated by prescriptive acquisition. Statement of the law in *Chakarto v. Liono*, 20 C.L.R., 113, at pp. 115 and 116 *considered.*

Appeal allowed.

Cases referred to:

Nicolaides v. Kotiri 7 C.L.R. 7;

Chakarto v. Liono 20 C.L.R. 113;

Stokkas v. Solomi 21 C.L.R. 209.

Per curiam: The natural boundary, such as an 'ohto' (bank), might be of immense help in ascertaining an error in the original registration or in a boundary dispute.

Appeal.

Appeal against the judgment of the District Court of Larnaca (Michaelides, D.J.) dated the 4.4.60 (Action No. 867/57) dismissing plaintiff's claim for a declaration that about four donums of land forming part of plot 273 and Sheet/Plan

53/16 belongs to him absolutely and is covered by his registration No. 23663 and an injunction restraining the defendant, his servants and/or agents from trespassing upon or otherwise interfering with the said piece of land, damages and costs and giving judgment for the defendant as per his counterclaim with a declaration that the disputed portion (coloured red) in the plan, exhibit 1, belongs to the defendant and forms part of his property with an order for amendment of the L.R.O. records affecting this property.

A. Frangos for the appellant.

C. M. Varda for the respondent.

Cur. adv. vult.

The facts sufficiently appear in the judgment of ZEKIA, J. and VASSILIADES, J.:

O' BRIAIN, P.: In this case I have had the advantage of reading the judgment of my brother Mr. Justice Zekia, and I agree with it. I have nothing to add except this: that if I could see on the transcript some evidence of loss or damage I would be prepared to give some sum by way of damages; but so far as I read the transcript it appears that the appellant claims £21.

ZEKIA, J.: The appellant-plaintiff and the respondent-defendant are the holders of certificates of registration in respect of two adjoining plots of land, Nos. 273 and 73 respectively. The former plot is of 10 donums and one evlek and the latter of 34 donums and two evleks in extent.

The appellant complained that part of the land included in his title, three donums and two evleks in extent, is trespassed upon by the respondent and he claims for (a) a declaration that the said disputed portion is his ; (b) an order restraining the respondent from interfering with the said portion; and (c) damages.

The facts found by the trial court are as follows: (From pages 20 and 21 of the record).

> "Relying on their evidence, I find as a fact that defendant came to possess his plot No. 73, at 'Kafkalia' including the disputed portion as from November, 1942, when he bought it from Messrs. Pavlides Ltd., under a contract and that since then he had been uninterruptedly cultivat-

ing it to the present day, enjoying also the crop of the trees in dispute.

I also find as a fact that the property of the defendant is separated from that of the plaintiff by a bank (ohto) which until 1959, was 5-8 feet high, forming a natural boundary, retained firmly by shinia and other bushes.

From the evidence before me further, emerges clearly that plaintiff's father who was in possession of his absent son's land interfered with this bank last year when by means of an excavator he uprooted the bushes standing on it and reduced the height of the bank in some parts, apparently in an attempt to remove this natural boundary. I find that plaintiff's father knew of defendant's possession in 1955, when he transferred his registration of plot 273 to the plaintiff by gift.

As I have already said, the plaintiff's father knew of defendant's possession of the portion now in dispute ever since the defendant went into possession in 1942 after the contract of purchase from Messrs. Pavlides Ltd., and he well knew what the portion was regarding the possession of the disputed portion in 1953, when he acquired title for plot 273, from his sister Stavroulla (D.W.1.)".

The trial court declined to uphold the submission of the appellant's advocate that possession since 1942 on the part of the respondent, in view of sections 9 and 10 of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224, could not create a right over the disputed portion in respondent's favour. The learned judge referred to a number of cases and held that possession since 1942 plus the *de facto* boundary were adequate grounds to defeat the title of the appellant in respect of the disputed portion and entitle the respondent to the registration in his name for that portion.

I have no doubt that section 9 of the Immovable Property (Tenure etc.) Law (Cap. 224) is unaffected by section 10 and acquisitive prescription over a land cannot run against a registered owner since the enactment of the said Law, 1st September, 1946. The prescriptive period in respect of Arazi Mirie (fields as a rule) was 10 years prior to 1946 before the repeal of the Ottoman Land Code. In a number of cases the Supreme Court held that persons cultivating uninterrupt-

edly lands of *arazi mirié* category for 10 years prior to 1946 were entitled to obtain registration in their name of the land so cultivated even after 1946, but the 1st September, 1946, is the material date prior to which the prescriptive period had to be completed where the rights of registered owners were concerned.

In the present case possession from 1942 up to 1946 falls short of the prescriptive period and the period of possession after 1946 cannot be taken into account against a registered owner, the appellant in this case.

As to *de facto* boundaries it may be observed that in the case cited by the learned judge the *ratio decidendi* was the fact that the period of prescription was completed before the year 1946 and the topography of the place was taken only to be corroborative of the plaintiff's case. Some old cases have been referred to, for instance that of *Nicolaides v. Kotiri* 7 C.L.R.7. The statement of the law made by Tyser, J., at p. 8 should be read in the light of the provisions of the Land Code in force at the time.

The certificate of registration, as it has been stated by the Supreme Court over and over again is *prima facie* evidence of ownership. A person who claims to defeat the title or part thereof of a holder has either to establish that the registration was effected in the name of the holder by mistake or error, or that, where there is room for acquisition of a prescriptive right, the holder of such certificate has lost his right over the land as it has been adversely possessed by such person.

The natural boundary might be of immense help in ascertaining an error in the original registration or in a boundary dispute.

Another pertinent point is section 40 of the Immovable Property (Tenure etc.) Law which reads:

"40 (1) No transfer of, or charge on, any immovable property shall be valid unless registered or recorded in the District Lands Office.

(2) No transfer or voluntary charge affecting any immovable property shall be made in the District Lands Office by any peson unless he is the registered owner of such property".

In the instant case it transpires from the record that the

certificate of registration of the respondent covers an area only of 34 donums and two evleks. Messrs. Pavlides Ltd., the predecessors in title of the respondent's land, transferred in the name of the respondent in 1947 only the number of donums mentioned. The three donums and two evleks, the disputed area, even if we assume that it was the property of Messrs. Pavlides Ltd., was not included in the transfer to the respondent. Therefore, any right or interest in respect of the disputed property which Messrs. Pavlides might have cannot be considered as being vested in the name of the respondent as a transferee either by operation of the law or otherwise. In this connection section 50 of the same law may be referred:

> "The area of land covered by a registration of title to immovable property shall be the area of the plot to which the registration can be related on any Government survey plan or any other plan made to scale by the Director:
>
> Provided that where the registration cannot be related to any such plan such area shall be the area of the land to which the holder of the title may be entitled by adverse possession, purchase or inheritance".

It seems to me, therefore, that any right or interest over the disputed land in favour of the respondent has strictly to be ascertained as from the year of 1942 and not earlier.

In the circumstances, I am of the opinion that the appeal should be allowed with costs here and in the court below. Appellant having failed to prove any damages he is entitled only to the declaration under claim (a) and to injunction under claim (b).

VASSILIADES, J.: This is an appeal against the judgment of the District Court of Larnaca in a property action.

The appellant, a Cypriot now in the U.S.A., instituted the present proceedings as registered owner of a plot of land in the area of Ay. Theodoros village, against the respondent who owns the adjacent plot, for a declaration that about 4 donums of land, valued, according to the writ, between £50 and £100, are part of appellant's plot, and not part of respondent's plots as claimed by the respondent.

A plan prepared by a Land Registry Officer (P.W.1.) for the purposes of this case, and put in evidence as exhibit 1, shows the two neighbouring plots, and marks the disputed

area. Plot 273, for 10 1/4 donums with some carob and olive trees standing thereon, is registered in appellant's name under registration 23663, dated 21.11.55; the adjacent plot 73, for 34½ donums, also with a number of carob and olive-trees therein, is registered in respondent's name under registration 23735 dated 10.2.47.

The disputed area, 3½ donums in extent, is all found in appellant's plot 273, according to the witness (P.W.1) as shown on the plan ; and is covered by appellant's registration 23663. This was the result of the witness' identification of the official plan with the land, at the local inspection, carried out, as usual, in the presence of the interested parties.

Appellant's case, as put in his statement of claim, rests on allegations of repeated acts of trespass, commencing from November, 1955, made under a claim of right on the part of the respondent, which (trespass) caused appellant £21 damages, he alleges. The acts of trespass complained of, consist of sowing the disputed area in November, 1955, reaping the crop the following June, and picking the fruit of the carob and olive-trees in the respective seasons. (Paras. 5, 6, 7, 8 and 9 of the statement of claim).

Appellant's cause of action, as pleaded, consists of trespass, made upon a false claim of right. And the remedy claimed is:—

(a) a declaration that the area in dispute is covered by appellant's registration, and forms part of his property;

(b) an order setting aside any registration in the name of the respondent in respect of the land and trees in dispute;

(c) an injunction restraining the respondent from entering the said land; and

(d) £21 damages.

The defence is a denial of the alleged trespass, based upon the assertion that the area in dispute belongs to the respondent as part of his adjacent plot 73, registered in his name under registration 23735.

Respondent's pleading further alleges that the respondent has had the exclusive, continued and undisturbed pos-

session of the land in dispute and the trees thereon, as part of his plot, for a period of over 16 years prior to the action.

And that "if it will appear that the disputed piece of land is not covered by respondent's registration", he (respondent) counterclaims for a declaration that he is entitled to be registered by adverse possession for the period of prescription ; and he claims an order for registration accordingly.

The respondent's case is thus put on two alternative grounds:

(a) his registration 23735; and

(b) his adverse possession for the period of prescription, against the registered owner.

Respondent's pleading moreover alleges that about 4 years before the present action, in 1953, appellant's father and predecessor in title "disputed by a civil action No. 790/53, defendant's (respondent's) ownership of the said portion of land and trees" and that that action was dismissed in consequence of an agreement between the parties that the matter was a boundary dispute which should first be determined by the Director of Lands and Surveys under s.56 of Cap. 231 (now s.58 of Cap. 224) under which (agreement) the parties to that action jointly applied to the Director accordingly under Ap. No. 507/54 (L.R.O., Larnaca).

At the trial, however, the respondent did not rely either on *res judicata* or on the result of Ap. 507/54. He relied on his registration and, mostly, on his possession.

The case turns mainly on three issues:-

1. Whether the area in dispute is covered by appellant's registration 23663, as part of plot 273 ; or is covered by respondent's registration 23735, as part of plot 73;

2. Whether at the time of the alleged acts of trespass, the disputed area was in the possession of the appellant, or in that of the respondent; and

3. If in the possession of the respondent, whether his possession was of such a nature and for such length of time, as to give the respondent a good title to the land; and enable him to succeed in his counterclaim for registration.

The pleadings raise also the ancillary issue of damages, in connection with the claim for trespass.

Three witnesses were called for the appellant (plaintiff), including a Land Registry Officer (P.W.1), and appellant's father and predecessor in title (P.W.2). And four witnesses were called for the other side including the respondent himself.

The evidence of the Land Registry witness clearly establishes that according to the existing Land Registry records, the whole of the area in dispute is part of appellant's property under registration 23663; and gives a definite and conclusive answer to the first issue.

The learned trial judge could not but find accordingly; and his order for the amendment of the existing record clearly indicates such a finding.

It was suggested in this connection, that the Land Registry plan which formed the basis of the evidence in question, may have been wrong, as the possibility of mistakes and errors could not be excluded from Land Registry records; but this suggestion was not pursued further. And it cannot be said that any error in the plan was actually proved.

The respondent, at the trial, relied mainly on his possession ; and on the ground that he purchased his plot on the assumption that the area in dispute formed part of that plot, as at the time of the purchase he was a tenant in possession of plot 73, including the part now in dispute.

As regards this latter ground, I agree with the judgment of my brother Zekia, J. (which I had the advantage of reading before writing this judgment) to the effect that transfer of immovable property described in a registration as required by s.40 of the Immovable Property (Tenure etc.) Law (Cap. 224) which (registration) can be related to a Government survey plan as provided in section 50, can only operate as a transfer of the property so described and related to the survey plan.

What the respondent acquired in 1947 by the purchase and transfer of the property under registration 23735, was the area of plot 73 as related to the Government survey plan in force at that time; the plan in exh. 1.

So the position narrows down to the second and third issues as set out above; that is to say the issue of the possession of the area in dispute at the time of the alleged acts of trespass ; and the legal effect of the possession proved.

On the evidence before him the learned trial judge found that the respondent was in possession of the area in question as from 1942 when he took up as tenant of the registered owner; now his predecessor in title.

The evidence fully justified this finding. There was the testimony of appellant's aunt Stavroulla (D.W.1) who knew well both plots; the evidence of the dispute in 1953, which led to action 790/53 and the subsequent application No. A.507/954 to the Director of Lands and Surveys, the evidence regarding the physical boundary in the form of a bank several feet high, which appellant's father and agent tried, recently, to remove; and the evidence of the owner of a neighbouring plot (D.W.3) who also knew well the position at the material time.

Upon the trial judge's findings on the issue of possession and physical occupation, the second issue must be decided in respondent's favour, and appellant's claim for trespass, must, in my opinion, fail. The respondent could not commit acts of trespass on land and trees in his possession, under the honest and reasonable belief that he was the registered owner of the property.

But there still remains the question whether respondent's possession since 1942, (which formed the main ground in his case at the trial, and the ground upon which the judgment in his favour rests) is sufficient to give him a good title to the property against the registered owner, as held by the trial court.

Both sides agree that the matter is governed by the provisions of the Immovable Property (Tenure, Registration and Valuation) Law, now Cap. 224; particularly sections 9 and 10.

The former is a short section which reads:—

"9. No title to immovable property shall be acquired by any person by adverse possession as against the Crown or a registered owner".

This is followed by section 10, which deals with "title by ad-

verse possession in certain cases", and begins with the words:-

"10. Subject to the provisions of section 9 of this Law, proof of undisputed and uninterrupted adverse possession, etc., etc."

It was submitted on behalf of the appellant that as the land in dispute has been shown to be "registered" property, the case is governed by section 9, to the exclusion of the provisions in section 10.

On the other hand, counsel for the respondent submitted that the trial judge was right in holding that on the authority of *Chakarto v. Liono* 20 C.L.R. 113, decided in 1954, the provisions of section 10 regarding prescription, are applicable to all kinds of property, registered and unregistered; and that the period of prescription in this case, having commenced to run prior to 1st September, 1946, when the Immovable Property Law came into operation, continued running until the filing of this action in 1957, with the effect of giving the respondent a good title to the property, as from 1952 on completion of the ten years period provided by the Ottoman Land Code for *arazi mirié* lands.

The provisions of these sections 9 and 10 (sections 8 and 9 respectively in the original statute, Cap. 231) were considered on appeal in *Chakarto v. Liono* (*supra*) in 1954, and in *Stokkas v. Christina Solomi* in 1956 (21 C.L.R., 209).

In the former case the main question for decision was whether a co-owner of land held in common could be said to be in adverse possession as against the other co-owners. In that connection the effect of sections 3 and 8 (now 9) was considered and the Court expressed the opinion that section 8 was not intended to have retrospective effect, where the prescriptive period was completed before the law came into operation. (Hallinan, C.J. at p. 115).

At page 116 the Court expressed their view in these words:—

"........It is sufficient for us to say that where a person claims a prescriptive right to land, even if that land is registered in another's name, and the claimant shows that he has been in possession for the full prescriptive period before the enactment of Cap. 231, then in our view, under the first proviso to section 9 (now 10) of that

Law, the proper law to be applied, is the Ottoman Law".

In *Stokkas v. Christina Solomi* (*supra*) two years later, the Court had to consider again the effect of these two sections regarding "unregistered" land, this time. After setting out the proviso to section 9 (now s.10) and dealing with the submissions made by counsel, the judgment at p. 210 reads:—

> "........If the legislature had intended that where the period of prescription which had started to run in a case of unregistered land before the Law came into operation should be 30 years, then the proviso would have been cast in quite a different form. In our view the determination of the trial court was correct. Where land is unregistered and the period of prescription has started to run before the Law, Cap.231, came into force, all matters relating to prescription in such a case are governed by the old Law including the period of prescription itself".

Both these cases are distinguishable from the present case, on the facts. The first is a case where the whole of the period of prescription under the old Law, had run prior to coming into operation of the new Law on 1st September, 1946 ; and the second is a case where the property was not registered.

It may well be that respondent's possession in the present case, could be traced back through his predecessors, for the full period of ten years prior to 1946, and probably more. This would appear to be more consistent with the position established by the evidence for the period after 1942. But the respondent chose to rely on the possession as from 1942. This is the period alleged in his pleadings; and subsequently proved at the trial. Neither of these two cases can, in my opinion, help him.

But I would go further. This is admittedly a case of registered property. And the provisions of section 9 of the present Cap.224, regarding registered property are, in my opinion, clearly expressed in plain language. The section provides that as from the 1st September, 1946, no title to immovable property can be acquired by any person by adverse possession as against the Crown or a registered owner. It is significant that the registered owner is put in the same position as the Crown, in this connection. And when the provisions of the following section 10 are expressly made subject to the

provisions of section 9, I cannot find, with all respect to the decision in *Chakarto v. Liono* (*supra*) any room for an interpretation, the effect of which is to reverse the position settled by the legislature, and make section 9 subject to the provisions of section 10.

As far as this case is concerned, I agree with the view expressed in the judgment of my brother Zekia, J. that the possession of the respondent from 1942, adverse and uninterrupted as found by the trial court, until the filing of this action in 1957, could not give him a title to the disputed land, against the appellant, a registered owner, of the property in the whole plot 273, as traced in the Government survey plan, exhibit 1.

I, therefore, come to the conclusion that the third issue must be decided against the respondent; and that his counterclaim for the ownership of the disputed property, by virtue of his possession from 1942 until the time of the action, must fail.

I would allow the appeal, and give judgment for the appellant-plaintiff in the action on the claim for a declaration that the whole of the area in dispute with the trees standing thereon, forms part of plaintiff's plot 273 and is covered by his registration 23663. I would, however, dismiss the claim for trespass; and I would refuse the injunction on the ground that there is nothing to indicate that the respondent-defendant shall, in future interfere with the property, after the judgment in the action. I would also dismiss the claim for damages, and respondent-defendant's counterclaim.

As to costs, I think that the appellant is entitled to his costs in the appeal. And, to one half of his costs in the action; and to his costs in the counterclaim.

JOSEPHIDES, J.: I have had the advantage of reading the judgment of my brother Zekia, J. and I am in full agreement with it.

I agree that the appellant-plaintiff is entitled both to a declaration and an injunction in the circumstances of this case.

O' BRIAIN, P.: As a result the appeal is allowed. There will be an order granting relief in the terms pleaded in the statement of claim and injunction under paragraph 11(a) and (c) with costs in both courts.

Appeal allowed with costs.