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

THE HEIRS OF THE ESTATE OF LATE PIERIS THEODOROU, NAMELY VASSILIKI P. THEODOROU AND OTHERS,

Appellants-Plaintiffs,

v.

VIAS DEMETRIOU AND OTHERS,

Respondents-Defendants.

(*Civil Appeal No.* 4924).

Civil Procedure—Appeal—Findings of fact—Appeals turning on findings of fact and credibility of witnesses—Principles upon which the Court of Appeal acts, restated—See also infra.

Appeal—Findings of fact and credibility of witnesses—Approach of the Court to appeals turning on such matters—Principles restated—Cf. also infra.

Immovable Property—Claimed by virtue of adverse possession and registration—Trial Court findings against plaintiffs on both issues—Appeal turning on findings of fact—Court of Appeal satisfied that trial Court's findings of fact were clearly open to the trial Court on the evidence before it and that the reasons given for such findings were neither unsatisfactory nor defective—Not convinced that trial Court was plainly wrong in order to reverse the judgment under appeal.

Findings of fact and credibility of witnesses—Appeal turning on such matters—Approach of the Court of Appeal—Principles restated.

The Supreme Court, dismissing this appeal turning on findings of fact and credibility of witnesses, restated the principles upon which it acts in this kind of cases and held that the trial Court's findings of fact were clearly open to it and that the reasons given therefor were neither unsatisfactory nor defective.

Cases referred to :

Roussou and Others v. *Theodoulou and Others* (reported in this Part at p. 22, *ante*, at pp. 26-27) ;

Theodorou v. *Hadji Antoni*, 1961 C.L.R. 203, at p. 207 ;

Ibrahim Mehmet v. *Kosmo and Others*, 1 C.L.R. 12 ;

Muzaffer Bey v. *W. Collet and M. Irfan*, VI C.L.R. 109 ;

Monk v. *Nicola and Others*, XI C.L.R. 118 ;

Papa Georghiou v. *Komodromou* (1963) 2 C.L.R. 221 ;

Myrofora Spanou v. *Erato Savva* (1965) 1 C.L.R. 36.

Appeal.

Appeal by plaintiffs against the judgment of the District Court of Larnaca (Georghiou, P.D.C. and Orphanides, D.J.) dated the 19th June, 1970, (Action No. 215/66) dismissing plaintiffs' claim that they were entitled to be registered as owners of a disputed piece of land.

G. Constantinides with *A. Triantafyllides*, for the appellants.

G. Nicolaides, for the respondents.

Cur. adv. vult.

HADJIANASTASSIOU, J. : The judgment of the Court will be delivered by Mr. Justice A. Loizou :—

A. LOIZOU, J. : This is an appeal by the plaintiffs, who are the heirs of the estate of the deceased Pieris Theodorou, late of Larnaca, from the judgment of the Full District Court of Larnaca, dismissing their claim that—

" They were entitled to be registered as owners of a disputed piece of land because —

(*a*) it was covered by registration in the name of the said deceased, and

(*b*) on the ground that they have acquired a prescriptive right by adverse possession for the period of prescription by themselves and as heirs of the said deceased and/or their predecessors in title ".

The land in dispute is a field, 13 donums and 1,500 sq. ft. in extent, situated at locality ' Kathari ' within the boundaries of Larnaca town under Plot C.5. Originally it was registered in the name of the father of the defendants, but on the 14th August, 1957, it was transferred and registered in the name of all defendants. In the year 1961 defendant No. 2 transferred his share in the property

to defendant No. 5 by way of exchange of properties. On the 25th May, 1961, a new registration was issued in the name of defendants No. 1, 3, 4 and No. 5 and the disputed land stands so registered.

The plaintiffs' claim, as pleaded, was that the disputed land and/or an area of about 10 donums in extent was possessed and enjoyed continuously, undisputedly and uninterruptedly and for the period of prescription or otherwise —

(*a*) by the predecessor in title of the deceased Pieris Theodorou from 1895–1925.

(*b*) by the said Pieris Theodorou from 1927 down to his death, and

(*c*) after that by the plaintiffs who occupied and possessed same until 1963, the year the defendants as plaintiffs alleged, interfered with their possession.

The plaintiffs also pleaded that the disputed land originally formed part and parcel of Plot 34, by virtue of Reg. No. 4034 dated 22.10.27, which was registered in the name of the deceased Pieris Theodorou and which he possessed and enjoyed for the period of prescription and otherwise from 1927 down to his death in 1949.

It was their contention at the trial, that the registration in the name of the defendants' father was effected by mistake and/or oversight and on wrong information during the general registration carried out in the year 1939.

The defendants denied in their statement of defence all the above allegations of plaintiffs and pleaded that their deceased father was the rightful owner and was registered as such, of the property in question, at least since 1910 and up to 1957 when it was transferred and registered in their names.

The claim based on registration came from the evidence of the D.L.O. clerk Antonakis Savva (P.W.1) who carried out the local enquiry on 19.12.1968 under an order of the trial Court. According to his evidence, the disputed land originally formed part of Plot 43. This plot was registered in the name of Iacovos Stylianou Demetriou under Reg. No. 6002, Plot 43, dated 22.11.1910, and covering an area of 33 Cyprus donums in extent. The said Iacovos Stylianou Demetriou was also registered as an

owner of an adjoining plot, No. 47, under Reg. No. 7094, dated 22.8.1918, which plot covered an area of 30 Cyprus donums in extent. It may seem that both plots covered an area of 63 Cyprus donums, *i.e.* about 95 ordinary donums as are known to-day. During the general survey in respect of Larnaca town, carried out in the year 1938, under the Immovable Property Laws 1907–1937, these plots were split into two different registrations. The disputed land, until then forming part of plot 43, was given another plot number, namely plot C. 5 and another registration number, namely C. 6. The area covered by the new plot was limited down to 13 donums and 1500 sq. ft. The remaining part was given also another plot number, namely, plot 6, and covered an area of 63 donums in extent. Both new registrations were effected in the year 1939, in the name of the said Iacovos Stylianou Demetriou, who remained the registered owner thereof as far as the disputed area is concerned until 1957. In respect of these registrations, there was a survey plan in use since 1918, and the plan, *exhibit* 1 before the trial Court, is based on same and the area coloured yellow on the said plan shows the land in dispute between the litigants.

The plaintiffs are the holders of a certificate of registration in respect of a nearby plot of land, No. 34, coloured violet on the plan, *exhibit* 1, under Reg. No. 6142 and it covers an area of 13 donums and one evlek. This plot is separated from the disputed land by an area of about three donums in extent, coloured green on the plan, and which is outside the plaintiffs' title. In fact, this piece of land is not covered by any registration and at the local enquiry it was not claimed as forming part of their property by either the plaintiffs or the defendants. This area, hereinafter referred to as "the unclaimed area" is separated, according to the D.L.O. clerk from the disputed land by an 'arkadji' full of bushes known as 'sklinidjia' and it appears to be a continuous part of the plaintiffs' plot, No. 34. Originally this plot was registered in the name of one Maritsa Hj. Toouli of Aradippou under Reg. No. 1949, dated 1885. It covered an area of 23 donums and it came to her possession by inheritance and division. About ten years later, this property was sold by auction. The step-mother of plaintiff No. 1 purchased same and the property in question was registered in her name under Reg. No. 2239 dated 27.2.1906. In the year 1927, Pieris Theodorou, the husband of plaintiff 1, bought same from Anna Charalambous and her registration was transferred to Reg. No. 4034, dated 22.10.1927, into the name of the same Pieris Theodorou.

The trial Court, in its elaborate judgment, made these findings after weighing the evidence given by both sides :—

" From the evidence before us, it has been clearly established that the whole of the area in dispute is outside the title deed of the plaintiffs under Reg. No. 6142 and formed part of the property of the defendants covered by their title deed under Reg. No. C.6, plot C.5. It has also been established to our satisfaction that the area in dispute had always been outside the registrations of plaintiffs ' predecessors in title and that it has always been covered by the registrations of defendants and their father. In has been stressed by the decisions of the Supreme Court over and over again, that the certificate of registration is only *prima facie* evidence of ownership and that a person who claims to defeat the title of a holder has either to establish that the registration was effected in the name of the holder by mistake or error or the holder of such certificate has lost his right over the land as it has been adversely possessed by such person. The evidence adduced by the plaintiffs failed to establish that the registration of the disputed land was effected in the name of the father of the defendants or the defendants by mistake or error, and their claim, therefore, under this leg must fail. Their allegations contained in the statement of claim regarding this point remained just allegations, unsubstantiated by any evidence and we have found not a single shred of evidence to support them.

On the other hand, we cannot overlook the fact that the general survey in respect of the said property was carried out during the lifetime of plaintiffs ' predecessor in title. We believe that it is fair to assume that ' prior to effecting the said registration in the name of the father of defendants, due notices were given, published and posted in accordance with the provisions of the relevant laws and that the plaintiffs ' predecessor in title did not object to the new survey registration of this plot, the subject-matter of this action in the name of the father of the defendants, and neither did he claim any rights thereof ', as the defendants have very successfully pleaded in paragraphs 13 and 14 of their Statement of Defence. We believe also that we are entitled to invoke on this point, the maxim ' *Omnia praesumuntur rite esse acta* ' ".

The trial Court dealt further with the plaintiffs ' claim based on prescription. In reviewed the evidence of every

witness called by the plaintiffs and made the following findings :—

" It is evident that the evidence adduced by the plaintiffs has a very important feature in common : All witnesses are in agreement that the field of Pieris Theodorou which they cultivated with him in common adventure over the years, including the disputed area which they all named ' Roumana ', is situated within the limits of Livadhia village, whereas the land coloured yellow on *Exhibit* 1, which forms the subject-matter of these proceedings, and which plaintiffs indicated to the D.L.O. clerk as the land in dispute, has never been within the limits of Livadhia village, but within Larnaca town area. It has been argued that the witnesses could not possibly know the demarcation line separating Larnaca town from Livadhia as it is not a physical line. We do not think that this argument may be considered as correct. It is not a matter in our view of knowing the existence of an imaginary line. We believe that villagers usually know whether a particular field falls within the area of their village and to use the Greek expression ' *gnorizoun kata poson ena horafi pefti mesa sto homa tou horiou ton* '. This is more true in the case of a rural constable and the mukhtar of a village.

In the present case we are of the view that P.W.7 who served as a rural constable for 20 years, had a duty to know every field situated within his beats. In fact he stated in his evidence in his capacity as a rural constable, he assessed the damage caused by animals to the crop standing on the field in question in favour of Pieris Theodorou because the field was within the area of Livadhia. The ex-mukhtar of the village, P.W.5, went further than that. He claimed that he knew the existence of the demarcation line since 1917 and that it remained unchanged ever since. He claimed also that he knows the field of Pieris Theodorou and that it is within the limits of Livadhia village. He stated that in respect of this property he used to tax Pieris Theodorou and that it is within the limits of Livadhia village. He stated that in respect of this property he used to tax Pieris Theodorou collective fines known as ' *Kakovoulos zimia* '. A striking feature of the evidence of this witness is the reference he made to the existence of a ditch separating the disputed land from the property

of the defendants. At the end of his examination-in-chief he stated as follows :—

'This property which I hired from Mr. Demetriou was separated from the disputed property by a '*handaki*'. The field of Mr. Demetriou had a ditch '*handaki*' round it on all the boundaries'.

In cross-examination he made it more clear and stated :—

'As I said, the properties of Demetriou and Pieris Theodorou were separated by a ditch 'avgolia'; on the one side of this ditch there were the properties of the one family and on the other side the properties of the other family'.

P.W.8 also made reference to such a ditch separating the 'Roumana' the disputed land, from the land of the defendants. A reference to the existence of an '*arkadji*' was made also by (P.W.1) Antonakis Savva, the D.L.O. clerk, who carried out the local enquiry. He stated that the disputed land, coloured yellow on this plan, is separated from the unclaimed land coloured green by an '*arkadji*' and that this land, the unclaimed one, appears to be a continuous part of part of the land of the plaintiffs. At the end of his cross-examination he stated the following :—

'As far as I remember, there were '*sklinidjia*' only along the boundary line by the '*arkadji*' separating the disputed property from the properties coloured green and violet'.

We believe that the combined effect of the evidence above-mentioned, contradicts the plaintiffs' claim and destroys its foundations, and it strengthens our view that the plaintiffs are simply asking for some land to make up the difference between the extent of the land covered by the title of their predecessor in title and the less extent covered by their own registration. With reference to the extent of the whole field of the deceased including the disputed area, the only evidence came from Mr. Francis and his mother-in-law. Both stated that the extent of the field possessed and enjoyed by Pieris Theodorou was 23 donums presumably to be in accordance with the extent covered by his registration. Apparently not knowing the existence of the unclaimed land which is not covered by any registration, they claim that at least ten donums

of the disputed area form part of their registration which now covers an area of 13 donums. None of the witnesses, however, stated that they left any land uncultivated between the plot of the deceased and the land they claim to be in dispute. Consequently, it is fair to assume that the unclaimed land formed part of the deceased 's property which adds up another three donums to the plaintiffs ' land. Since the evidence of the plaintiffs is to the effect that their predecessor in title possessed only 23 donums of land, we believe that their claim that their predecessor in title cultivated, possessed and enjoyed the whole of the land in dispute or at least ten donums of it, is seriously contradicted.

None of the witnesses gave us the extent of the area known to them as '*Roumana*' and which according to the information given to them by plaintiffs formed the subject-matter of these proceedings, with the exception of Petros Adamou who gave us the extent of the whole field of the deceased to be 15–18 donums and Mouyis who in answer to a question put to him by the President of this Court, gave the extent of the disputed land to be about ten Cypriot donums, in other words, about 15 ordinary donums. With this background, we are of the view that the evidence adduced by plaintiffs is confusing and lacking of certainty. It has failed to establish that the disputed area coloured yellow on the plan corresponds with the area called '*Roumana*' which all witnesses called by plaintiffs referred to as the land in dispute and which they allegedly cultivated in common adventure with plaintiffs ' predecessor in title. We consider the evidence to be insufficient and unsatisfactory. It has been stated that :

> ' Possession is not a term of art, but a legal term and that in a case of long, undisputed and uninterrupted adverse possession, the onus lies on the person alleging such possession to prove affirmatively his acts of undisputed and uninterrupted possession which entitled him to registration '.

From the evidence before us we are satisfied that the plaintiffs failed to discharge this burden cast upon them and we hold that they have failed to prove to our satisfaction—(*a*) that they or their predecessor in title, Pieris Theodorou, had been in possession of the disputed land coloured yellow on the plan,

or any part thereof for the period of prescription or at all ; and (*b*) that they are entitled to be registered as owners thereof.

Consequently, their claim accordingly fails.

It may be observed that the plaintiffs limited their evidence to the acts of possession by their predecessor in title, *i.e.* for the period 1927–1949, prior to this period the evidence adduced is practically not existing. The only evidence came from Mrs. Vassiliki, the wife of the deceased, who alleged that she worked in this field from the year 1914 to 1915. We consider, however, the period prior to 1927 when the land was in the possession of Anna Charalambous as immaterial, because the plaintiffs are not claiming through her and any possessory rights she may have acquired could not be transferred with the sale of the land to Pieris Theodorou in 1927. The plaintiffs are claiming the disputed land as heirs of the deceased Pieris Theodorou and on the authority of *Papa Georghiou* v. *Komodromou* (1963) C.L.R. Part II, p. 221 :—

> ' The periods of possession of an area of land by successor and predecessor in title could be added up in cases of devolution by inheritance. . . . '

With the exception of the allegation of Dr. Francis that he had cultivated the land after the death of his father-in-law in the year 1956–1957, there is no other satisfactory evidence as to who was in possession and who was cultivating the field in question from 1949–1960 to the year 1963, the year of the alleged interference by defendants. It seems to us that such evidence could not change the position, had the plaintiffs proved long, undisputed possession by their predecessor in title. We cite the following passage from the case of *Thomas Theodorou* v. *Christos Hadji Antoni*, 1961 C.L.R 203 at the bottom of page 207 :—

> ' In a number of cases the Supreme Court held that persons cultivating uninterruptedly lands of *arazi mirie* category for ten years prior to 1946 were entitled to obtain registration in their name of the land so cultivated even after 1946 but the 1.9.1946 is the material date prior to which the prescriptive period had to be completed where rights of registered owners were concerned.'

It is in evidence that the disputed land is *arazi mirie* category and possession of this land by plaintiffs ' predecessor in title from the date he bought it in 1927

up to the 1.12.1946 could have given him the right to be registered owner thereof, but as we have explained earlier in this judgment, plaintiffs failed to prove possession of the disputed area and their claim therefore, fails ".

Mr. Triantafyllides in arguing the case for the appellants has endeavoured to show that these findings were wrong and unsupported by the evidence. In fact, five of the seven grounds of appeal relied upon, were to the effect that the evidence adduced by the plaintiffs was uncontradicted, the Court drew wrong conclusions and generally speaking the whole issue turned on the credibility of the witnesses as weighed and accepted by the trial Court, which wrongly did not act upon it.

The Supreme Court, in a number of cases, recently reviewed in the case of *Roussou* v. *Theodoulou & Others* (reported in this part at p. 22, *ante*, at pages 26–27), set out the principles under which a Court of Appeal will interfere with such findings of fact. Hadjianastassiou, J. at pages 26–27 of the judgment said :—

> " It has been said in a number of cases that an appeal on a matter of law has, as a rule, a greater chance of success than an appeal on any question of fact. If matters of fact only are involved, the judges of the Court of Appeal are naturally reluctant to disturb the finding of judge who saw and heard the witnesses and had the opportunity of judging their demeanour in the witness box. Both in Cyprus and in England when the action is tried by a judge, the Court of Appeal must decide whether, not having those advantages, they are in a position to say that the trial judge was plainly wrong. If, however, the appellant convinces them of that, the decision will be reversed, even though the judge has clearly relied on the demeanour of the witnesses in deciding the facts ".

We have gone through the record and we have heard Mr. Triantafyllides who so meticulously and painstakingly has argued this appeal on the factual aspect, as well as the arguments advanced for the defendants by Mr. G. Nicolaides. We are satisfied that the findings of fact regarding the question of the alleged mistaken registration and of adverse possession of the disputed land were clearly open to the trial Court on the evidence before it, and we have not been convinced that the Court was plainly wrong in order to reverse the judgment under appeal ; the reasons

given for such findings are neither unsatisfactory, nor defective. In fact, the making of such findings and the appreciation in general of the evidence at the trial make up what the trial judges are there for. It is what they had to decide about. They were undoubtedly bound to be influenced by the demeanour of the witnesses, and by the impression they had from them in the witness box. The transcribed record may sometimes be in parts, ambiguous, but on that material alone, it is always difficult for a Court of Appeal to say that the trial Court was wrong in making such findings.

The sixth ground of appeal relied upon by the appellants, namely that the Court erred in its rulings regarding the evidence by excluding admissible and allowing inadmissible evidence, was abandoned.

There remains to deal with the alternative approach of the trial Court which appears from the following extract from their judgment and which has given rise to the last ground of appeal. It reads :—

> " It is, however, an undisputed fact that the owner of the land over which the plaintiffs claimed rights of adverse possession, namely Iacovos Stylianou Demetriou, was absent from Cyprus in 1927 as he went to Greece in 1922 and never returned. The land in dispute was registered in his name since 1910, and consequently the time could not run against him. According to Article 20 of the Ottoman Land Code the period of ten years begins to run from the time when the excuse such as minority, have ceased to exist. We are, therefore, of the view that neither the plaintiffs nor their predecessor in title could acquire prescriptive rights over the land in dispute and destroy the registration of the owner ".

The legal point raised was that the absence of Iacovos Stylianou Demetriou from Cyprus from 1922 until his death in 1957, prevented the running of time against him even if the appellants or their predecessors in title had been found to have had adverse possession of the property in dispute during the time. It was, indeed, a very elaborate argument and reference was made to the cases of *Ibrahim Mehmed* v. *HadjiPanayioti Kosmo & Others*, 1 C.L.R. p. 12, *Muzaffer Bey* v. *W. Collet and M. Irfan Effendi*, C.L.R. Vol. VI p. 109, *Iacovos Nicolaou Monk* v. *Kyriako Nicola and Others*, C.L.R. Vol. XI, p. 118, *Papa Georghiou* v. *Komodromou* (1963) C.L.R. Vol. II, p. 221, and *Myrofora Spanou* v. *Erato Savva* (1965) 1 C.L.R. 36.

Determination, however, of this issue would have been necessary, had we reversed the findings of the trial Court regarding plaintiffs' claim for prescription. But that is not the case. We refrain, therefore, from making any pronouncement, as anything said will be purely obiter and we leave this matter open for determination in a proper case.

In the result the appeal is dismissed with costs.

Appeal dismissed with costs.