1983 February 25

[L. LOIZOU, DEMETRIADES, PIKIS, JJ.]

NAVSIKA STYLIANOU IOANNOU AND TWO OTHERS,
Appellants-Plaintiffs,

v.

ARESTIS SAVVA GEORGHIOU AND THREE OTHERS,
Respondents-Defendants.

(*Civil Appeal No.* 6162).

Immovable Property—Adverse possession—Prescriptive rights—Position prior to, and after, the enactment of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224—First proviso to section 10 of the Law—Under Ottoman Law a coheir in occupation deemed to be in possession in virtue of the implied consent of coheirs—And that possession by coheir under a dowry agreement established a prescriptive right—Implied consent of coheirs a rebuttable presumption of Law which may be rebutted in the light of evidence to the contrary—Implied consent in this case rebutted by evidence showing that coheirs were aware of existence of dowry agreement.

Evidence—Rebuttable and irrebuttable presumption—Legal and factual presumption.

Findings of trial Court—In arriving at its findings a trial Court need not recite or specifically debate every part of the evidence bearing on a given subject—Court of Appeal will be slow to disturb findings of fact so long as there is adequate review of the evidence.

In 1932 Stylianos Yianni executed a contract of dowry in contemplation of the marriage of his daughter Haralambou and among the plots of land promised to his daughter was a field of 7 donums in extent ("the disputed property"). The disputed property came in the possession of Haralambou shortly afterwards, upon her marriage in 1932 and remained in her possession continuously and uninterruptedly until the time of her death in 1973. It was common ground that her possession was open, peaceful and free from acrimony. None of her coheirs raised

any questions about her possession or enjoyment of the property. In the meantime the property remained registered in the name of the ancestor of Haralambou, Stylianos Yianni. Following the death of Haralambou in 1973 her heirs applied to the Director of Lands and Surveys Department for the registration of the disputed property in their name on the ground that they were entitled to be registered as owners thereto, in virtue of a prescriptive right. The coheirs of Haralambou ("the coheirs") objected to the registration and following the dismissal of their objection by the Director the coheirs initiated proceedings for a declaration that they were entitled to registration, as opposed to the heirs of Haralambou. The latter counterclaimed for the registration of the property in their names.

The trial Court found that the coheirs were, all along, aware of the fact of possession by their sister of the disputed property and they never questioned the right to its enjoyment or interfered with her possession; and that they also knew that the property had been given to her by their deceased ancestor as dower, on the occasion of a marriage. After finding as above the trial Court upheld the claim of the heirs of Haralambou to a prescriptive right notwithstanding the presumption noted in his judgment that a coheir in occupation is deemed to be in possession, in virtue of implied consent of the coheirs in view of the existence of the dowry agreement, defeating any inferences that would normally arise from the application of the legal presumption in question.

Upon appeal by the coheirs it was mainly contended that the trial Court wrongly found the respondents entitled to ascert a prescriptive right because the evidence before the Court was insufficient to displace the presumption that Haralambou was in possession as a result of the consent of her sisters and brother.

Held, that in arriving at its findings a trial Court need not recite or specifically debate every part of the evidence bearing on a given subject; that so long as there is adequate review of the evidence and the findings and, there is no misdirection, the Court of Appeal will be slow, as indeed it is in this case, to disturb findings of fact; that therefore, this Court is unwilling to interfere with the findings of the trial Court attributing knowledge to the appellants of the existence of the dowry agreement.

(2) *On the question whether, given the findings of the trial*

Court, the respondents had established a prescriptive right over the property:

That after the enactment of Cap. 224 no prescriptive rights can be acquired over registered land (see section 10 of Cap. 224); that prescriptive rights that had been acquired under the Law replaced by Cap. 224, basically the Ottoman Land Code, were saved provided possession was enjoyed for the period necessary under Ottoman Law (see the first proviso to s. 10 of Cap. 224); that under Ottoman Law possession in virtue of a right other than one originating from a lease or a loan of the property accompanied by effective dispossession of an owner not under disability, entitled the occupant to assert prescriptive rights, provided his possession was open, peaceful and lasted for the period envisaged by law; that, further, under Ottoman Law a coheir in occupation was deemed to be in possession in virtue of the implied consent of his coheirs and that possession after a dowry agreement where it was proved to be attributable to the dowry agreement and not to any other cause enabled the possessor to assert a prescriptive right; that in this case the presumed consent of the coheirs of Haralambou was a rebuttable presumption of law, because of its nature and effect, which may recede in the light of evidence tending to suggest the contrary; that in this case the presumption that Haralambou was, after the death of her father, in possession in virtue of the implied consent of her coheirs was rebutted by the evidence before the trial Court and the findings resting therein to the effect that the coheirs were aware of the existence of the dowry agreement; and that, therefore, Haralambou acquired a prescriptive right in 1945, five years after the end of the disability of her coheirs, that entitled her to become the registered owner of the property; accordingly the appeal must fail.

Appeal dismissed

Cases referred to:

Theofilo v. *Abraam*, III C.L.R. 236;

Georghiades and Another v. *Patsalides and Another*, 24 C.L.R. C.L.R. 275;

Chakkarto v. *Attorney-General*, 1961 C.L.R. 231;

Papageorghiou v. *Komodromou* (1963) 2 C.L.R. 221 at p. 234;

Alfred F. Beckett Ltd. v. *Lyons* [1967] 1 All E.R. 833;

Bligh v. *Martin* [1968] 1 All E.R. 1157;

Wallis's v. *Shell-Mex and B.P.* [1974] 3 All E.R. 575;

Hughes v. *Griffin* [1969] 1 All E.R. 360 (C.A.);

Ibrahim and Others v. *Haji Nicola and Others*, V C.L.R. 89;

Mourmouri v. *Haji Ianni*, VII C.L.R. 94;

Juma v. *Imam*, V C.L.R. 16;

Chakkarto v. *Liono*, 20 C.L.R. (Part II) 113;

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

Paourou and Others v. *Paourou* (Civil Appeal No. 4355, decided on 19.6.1962);

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

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

Ali Effendi Hassan Effendi v. *Hji Paraskevou Savva, Ex Parte Hji Eleni Papa Yianni*, II C.L.R. 58.

Appeal.

Appeal by plaintiffs against the judgment of the District Court of Paphos (Demetriou, S.D.J.) dated the 29th August, 1980 (Action No. 192/75) whereby their claim for an order of the Court that they are entitled to be registered owners of a field situate at Tremythousa village was dismissed.

A. Markides, for the appellants.

E. Komodromos, for the respondents.

Cur. adv. vult.

L. Loizou J.: The judgment of the Court will be delivered by Mr. Justice Pikis.

Pikis J.: Years after the death of Stylianos Yianni of Tremithousa, a dispute flared up among his surviving heirs as to the ownership of a field about 7 donums in extent, situate at the ancestral village. The property is claimed by the appellants, i.e. Navsika and Nicos, children of the deceased and, the personal representative of a third child Annou, now deceased, as inheritance from their father having devolved upon the four heirs of the deceased, in undivided shares, at the time of his death. The heirs of the fourth child Haralambou resisted the claim and asserted a right to the ownership of the entire property, in virtue of a contract of dowry of 15th October, 1932 and/or adverse possession of the property from 1932 onwards.

Some reference must be made to the facts giving rise to the

dispute in order to illuminate the factual background to the case and extract the facts relevant for the determination of the dispute.

In 1932, Stylianos Yianni executed a contract of dowry in contemplation of the marriage of his daughter Haralambou to Arestis Savva Georghiou of Tremithousa. The disputed property was among the plots promised to his daughter, intended to set her up in life according to custom and tradition (see, *Theofilo* v. *Abraam*, III C.L.R. 236). The property came in the possession of Haralambou shortly afterwards, upon her marriage to Arestis in 1932 and remained in her possession continuously and uninterruptedly, until the time of her death in 1973. It was common ground, as the learned trial Judge noted, that her possession was open, peaceful and free from acrimony. None of her coheirs raised any questions about her possession or enjoyment of the property. In the meantime, the property remained registered in the name of the ancestor of the parties, Stylianos Yianni.

In 1973 the heirs of Haralambou applied to the Director of the Lands Department for the registration of the property in their name on the ground that they were entitled to be registered as owners thereto, in virtue of a prescriptive right. As the application was not endorsed by the consent of the coheirs of Haralambou, a notice was published of the application of the respondents, inviting any person interested in the property to raise any objection he had to registration, within sixty days. The coheirs objected to the registration; their objections were dismissed by the Director who intimated to them his intention to register the property in the name of the heirs of Haralambou, unless proceedings were taken within thirty days before the Court, for a declaration that they were entitled to registration, as opposed to the heirs of Haralambou. The present proceedings were initiated in response to this intimation. The proceedings were defended by the heirs of Haralambou who added to their defence a counterclaim for the registration of the property in their names. Conflicting evidence was received about the knowledge the appellants—plaintiffs before the trial Court—had of the possession of the property by Haralambou and their knowledge of the existence of the dowry agreement. A large part of the evidence was devoted towards establishing the age of the appellants and their deceased

sister Annou, all three of whom were minors at the time of death of their father.

The trial Judge concluded, after a careful assessment of the evidence, that appellants were, all along, aware of the fact of possession by their sister, of the property in question and that, notwithstanding this knowledge, they never questioned her right to its enjoyment or interfered with her possession. After balancing the conflicting versions, the trial Judge found the professed lack of knowledge on the part of the appellants, as to possession of the property by their sister, an afterthought, designed to boost their claim to the property. Not only they knew that their sister was in possession but, as one may infer from the judgment, they also knew that the property had been given away to her by their deceased ancestor as dower, on the occasion of a marriage.

Guided by these findings and, the law applicable to the acquisition of a prescriptive right prior to the enactment of Cap. 224 in 1946, the trial Court found for the respondents and made a declaration along the lines of the counterclaim, approving registration of the property in her name. In accordance with the first proviso to s.10 of Cap. 224, matters relating to adverse possession that began prior to the enactment of the law, should continue to be governed by the provisions of the enactments repealed by Cap. 224, including the Ottoman Land Code, as amended, that regulated matters of prescription, both with regard to land situate in rural areas of the arazi mirie character and, urban property of the mulk type. He upheld the claim of the respondents to a prescriptive right notwithstanding the presumption noted in his judgment that a coheir in occupation is deemed to be in possession, in virtue of implied consent of the coheirs in view of the existence of the dowry agreement, defeating any inferences that would normally arise from the application of the legal presumption in question. The judgment is not expressed in these terms but this is the inevitable inference in view of the acknowledgment by the trial Court of the aforementioned presumption as between coheirs, on the one hand and, the statement, on the other that, the coheirs of Haralambou raised no claim to the property, not on account of their relationship with the person in possession but, because of knowledge of the existence of the dowry agreement and the acknowledg-

ment of a right on the part of Haralambou to be in occupation of the property.

Having thus concluded, the Court did not advert to the claim of the respondents for the specific enforcement of the dowry agreement, though it seems that in appropriate circumstances there is discretion to order the specific enforcement of a dowry agreement. (See, the analysis of the law made by the District Court of Nicosia in *Tilemakhos Gr. Georghiades and Another* v. *Odysseas Ioannou Patsalides and Another*, 24 C.L.R. 275).

The appeal was mainly argued on the ground that the trial Court wrongly found the respondents entitled to assert a prescriptive right. In their submission, the evidence before the Court was insufficient to displace the presumption that Haralambou was in possession as a result of the consent of her sisters and brother.

Mr. Markides made a survey of the statutory provisions governing prescription under Ottoman Law, notably those of the Ottoman Land Code, s.20 in particular and, the provisions of the Immovable Property Limitation Law, 1886 and a vast body of case-law on the subject built over the years, reflecting, one may say, the extent of property disputes in years past. Mr. Markides drew our attention to evidence before the trial Court as to the dealings among the parties with regard to the division of their inheritance from their father, in aid of his submission that the finding of the trial Court, that appellants knew of the existence of the dowry agreement, is erroneous.

The principal grounds pressed before us for setting aside the judgment of the trial Court, may be summarised as follows:-

(A) The dealings between the heirs with regard to the division of parental property were such as to be incompatible with knowledge on the part of the appellants as to the existence of the dowry agreement. Our attention was drawn, in particular, to exhibit 14 especially to a title deed under Registration 4915, recording a purchase by Haralambou of the share of her coheirs in a plot of land promised by way of dower, in the contract of dowry of 1932.

It was submitted that the transaction tends to negative knowledge on the part of the coheirs of the contents of

the dowry agreement and the absence of any claim by Haralambou of a right to properties promised therein in virtue of the dowry agreement.

(B) The trial Court misdirected itself as to the principles of the Ottoman Land law regarding acquisition of a prescriptive right against a coheir and their application to the facts of the case. The rule of Ottoman law that a coheir in possession is deemed to be in such occupation with the implied consent of his coheirs, was not given effect to by the trial Court. The cogency of the presumption relating to possession by a coheir was, in no way rebutted and remained cogent till the end of the day. An appreciation of its implications and proper application to the facts of the case ought to have led the trial Court to uphold the claim of the appellants.

Mr. Komodromos for the respondents, supported the judgment of the trial Court, correct in his submission both from the factual and legal angle. He argued there was ample material before the trial Court wherefrom to infer that the coheirs of Haralambou were aware of the existence of the dowry agreement and that the absence of any challenge on their part to her possession was attributable to that knowledge and recognition of her rights to the property. Adverting to the legal implications of the possession enjoyed by Haralambou, he argued that the presumption of Ottoman law, that an heir in possession was deemed to be there with the consent of his coheirs, was rebutted by knowledge on the part of the coheirs of the existence of the dowry agreement and the fact of possession by Haralambou in furtherance to her rights thereunder.

We took time to reflect on every aspect of the case not least because of the difficulties inherent in ascertaining the principles of Ottoman law on the subject of prescription and their application in diverse circumstances. We shall proceed to dispose of this appeal by pronouncing first on the validity of the findings of the trial Court pondered by reference to the evidence before the Court, recorded in the transcript of evidence and, then, guided by the findings relevant to our determination, we shall examine the legal rules of Ottoman law, as applied in Cyprus, for the acquisition of a prescriptive right and their application to the facts of the case.

The Facts: There was, in view of the relationship of the parties, an inherent likelihood of the appellants gaining knowledge of the existence of the dowry agreement and the claim of their sister Haralambou to the property in consequence thereof. The fact of possession of the property by Haralambou for about four decades, without any objection whatever on the part of the appellants, strengthens the possibility of knowledge, on their part, of the existence of the dowry agreement and tends to explain the absence of any objection to Haralambou exercising dominion over the property. Although we agree that the inclusion in the division of property among the heirs and agreements made thereupon indicate that Haralambou did not assert a prescriptive right over every part of the property given to her by the dowry agreement, this fact does not necessarily suggest absence of knowledge on the part of her coheirs of the dowry agreements and the circumstances under which she took up possession of the disputed plot. On the other hand, the exclusion of the property from the aforementioned agreement of the parties, may give rise to an inference that the heirs were aware of the circumstances of the occupation of the subject property by Haralambou and left matters at that, acknowledging her right thereto.

That the trial Court did not devote a specific part of its judgment to the agreement of the parties resulting in the distribution of family properties, evidenced by exhibit 14, does not sap of efficacy the findings relevant to the disputed property. The subject of knowledge of the dowry agreement was a live issue throughout the proceedings and received consideration as a distinct issue by the trial Court. In arriving at its findings a trial Court need not recite or specifically debate every part of the evidence bearing on a given subject. So long as there is adequate review of the evidence and the findings and, there is no misdirection, the Court of Appeal will be slow, as indeed we are in this case, to disturb findings of fact. Therefore, we are unwilling to interfere with the findings of the trial Court attributing knowledge to the appellants of the existence of the dowry agreement.

Next we must consider whether, given the findings of the trial Court, the respondents had established a prescriptive right over the property. Section 10 of the Immovable Property

(Tenure, Registration and Valuation) Law, Cap. 224, settled that no prescriptive rights can be acquired over registered land after the enactment of the law. The first proviso thereto saved prescriptive rights acquired under the laws it replaced, basically the Ottoman Land Code, provided possession was enjoyed for the period necessary under Ottoman law. (See, inter alia, *Ibrahim Mehmed Chakkarto* v. *Attorney-General*, 1961 C.L.R. 231).

To the attributes of prescription under Ottoman law, we shall now revert in order to determine whether respondents established, as the Court found, a prescriptive right.

Prescription under Ottoman Law: Article 20 of the Ottoman Land Code defined the circumstances under which a prescriptive right could be acquired. Apparently it embodied Ottoman law on the subject in a codified form. Article 20 stipulated, as the first prerequisite, continuous and uninterrupted possession of land for a period of time certain, ten years in the case of arazi mirie property and, fifteen years in the case of mulk property. The length of time during which possession was had was not the only consideration. There were two further qualifications:-

(a) Disability on the part of the lawful owner was a valid excuse for the non assertion of rights of ownership. So long as disability lasted it suspended the running of time against the owner. The law treated as disabled, in this regard, minors, persons of unsound mind and persons acting under duress or absent on a journey.

(b) Possession ought not to have originated from an arbitrary act.

The last qualification aimed primarily to protect the State from unauthorised incursions upon its land.

The Immovable Property Law 1886—Law 4/86—amended the provisions of Article 20 in several respects. Its principal effect was to erase from the Statute exclusion from the compass of prescription cases of possession originating from arbitrary acts. (See the judgment of Zekia, J., in *Rodothea Papa Georghiou* v. *Antonis Savva Charalambous Komodromou* (1963) 2 C.L.R. 221 at 234). A second change in the law brought about by the 1886 legislation, was the curtailment of the length

of time necessary to complete a prescriptive right after cessation of disability whereas, under s.20, time began to count the day disability ended and should run the full course envisaged by the law, under the 1886 legislation, a prescriptive right could be acquired five years after the end of incapacitation.

The 1886 legislation supplied a definition of "undisputed adverse possession" and "adverse possession". 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 rights 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).

Another similarity of Ottoman law with English common law on prescription, is that under both systems possession under a lease, grant, licence or a loan, could not give birth to a prescriptive right. (See, *Article* 23 of the *Ottoman Land Code* and *Hughes* v. *Griffin* [1969] 1 All E.R. 360 (C.A.)).

A series of decisions of the Supreme Court of Cyprus on the interpretation of s.20 of the Ottoman Land Code, as amended, throws light on the ambit of s.20 and its application in diverse circumstances. They illuminate, in particular, the factual background for the valid assumption of possession as a prelude to the acquisition of prescriptive rights.

The cases show that possession in virtue of a right other than one originating from a lease or a loan of the property, accompanied by effective dispossession of an owner not under disability, entitled the occupant to assert prescriptive rights, provided his possession was open, peaceful and lasted for the period envisaged by law. Thus, in *Katrie Ibrahim and Others* v. *Vasili Haji Nicola and Others*, V C.L.R. 89, entry after purchase of the property, unperfected by registration, was held

sufficient to justify the acquisition of a prescriptive right. Entry on the property and assumption of possession after a gift, was likewise held to give rise to the acquisition of a prescriptive title, after the effluxion of the period envisaged by law—*Morphia Haji Ianni Mourmouri* v. *Michael Haji Ianni*, VII C.L.R. 94.

On the other hand, a sale of the property unaccompanied by possession, was declared in *Mehmed and Keziban Juma* v. *Mehmed Halil Iman*, V C.L.R. 16, as incapable of giving rise to a prescriptive right. Possession was an indispensable prerequisite for the acquisition of a prescriptive right, as the Supreme Court noted. Possession aided in the perfection of a title in much the same way as usucapio was a means of perfecting a title under Roman law.

The Ottoman law acknowledged the acquisition of a prescriptive right against a co-owner, notwithstanding the indivisibility of the interest of each one of the coheirs over every part of the land. This was accepted as a sound legal proposition in *Enver Mehmet Chakkarto* v. *Hussein Izet Liono* 20 (Part I) C.L.R. 113. A different rule applied to co-owners in virtue of inheritance, as the Supreme Court observed, approving a commentary by *Jemaleddin*. A coheir in occupation was deemed to be in possession in virtue of the implied consent of his coheirs. These dicta in *Chakkarto* supra, though obiter, were approved in a number of subsequent decisions so as to be regarded as definitively settling the law on the subject, by the highest judicial authority. (See, the cases of *Eleni Angeli* v. *Savvas Lambi and Others* (1963) 2 C.L.R. 274; *Paourou and Others* v. *Paourou*—Civil Appeal No. 4355, decided on 19/6/62 and *Christofiis Yianni Diplaros* v. *Photou Nicola* (1974) 1 C.L.R. 198). We must so accept the law to be, though we have been unable to trace the precise origin of the rule or the basis of its application in jurisdictions other than Cyprus, where the Ottoman Land Code applied. Presumably, the relationship between coheirs eliminated the element of adversity in the possession of a coheir. Accepting, as we do, this principle as a valid part of the Ottoman Land law, as it applied in Cyprus, we must decide whether possession of the property by Haralambou, after the death of her father, was adverse against her coheirs.

There is no doubt that it was adverse as against her father

prior to his death in 1933. The decision in *Helene Kyriaki* v. *Nicola Kyriaki*, III C.L.R. 145, tends to establish that possession of immovable property, forming part of the inheritance by one or more heirs on a basis other than the inheritance, constitutes evidence in rebuttal of the presumption that a coheir is in possession with the implied consent of his coheir. So, possession following a division of the property among the heirs, was held to entitled the possessor to assert a prescriptive right. It is also settled that possession following a dowry agreement can found a prescriptive right. This was decided in *Ali Effendi Hassan Effendi* v. *HjParaskevou Savva Ex parte HjiEleni Papa Yianni*, II C.L.R. 58. Consequently, possession after a dowry agreement may, where possession is proved to be attributable to the dowry agreement and not to any other cause, enable the possessor to assert a prescriptive right.

And the immediate question we must resolve, is whether possession—in this case by Haralambou—in virtue of a dowry agreement, as the trial Court found, to the knowledge and with the consent of her coheirs in recognition of her rights thereto, was sufficient to rebut the presumed consent of her coheirs.

The presumed consent of the heirs was a rebuttable presumption of law because of its nature and effect. It presumed a state of facts to arise as a result of a given legal relationship. The law regulated the relationship of the parties in the absence of evidence to the contrary. The subject of legal and factual presumptions is discussed in *Phipson on Evidence*, 12th ed., para. 1266 etc. Presumptions, it is explained, are of two kinds—legal and factual. *Factual* presumptions are invariably rebuttable and aim to depict the inferences normally deriving from a certain factual situation. *Legal* presumptions on the other hand, are of two kinds—irrebuttable and rebuttable presumptions of law. There is a steady tendency to shorten the list of irrebuttable presumptions of law, apparently in deference to the realities of life. *Irrebuttable* presumptions of law are those relating to legitimacy, marriage, death and survival. *Rebuttable* presumptions of law are, in many respects, similar to factual presumptions and may recede in the light of evidence tending to suggest the contrary. The line of demarcation between presumptions of fact and rebuttable presumptions of law is a slender one.

The last question we must answer is, whether the presumption that Haralambou was, after the death of her father, in possession in virtue of the implied consent of her coheirs, was rebutted by the evidence before the trial Court and the findings resting thereon, noted earlier in this judgment. The trial Court ruled in effect that, the presumption was rebutted although the question was not cast in the terms approved in our judgment. Nevertheless, the judgment of the trial Court was, in our opinion, inevitable, in view of its findings that the coheirs were aware of the existence of the dowry agreement and refrained, on account of that, from disturbing Haralambou's possession, leaving her to exercise dominion over it. Therefore, she acquired a prescriptive right in 1945, five years after the end of the disability of her coheirs, that entitled her, to become the registered owner of the property.

The appeal fails. It is dismissed with costs.

Appeal dismissed with costs.