1984 March 16

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

GEORGHIOS NICOLAOU ELLINAS,
Appellant-Plaintiff,

v.

IOANNIS HJISOLOMOU,
Respondent-Defendant.

(*Civil Appeal No.* 5010).

Immovable Property—Transfer—Formal transfer in cases where certificate of registraton is based on the survey plan—Means the transfer of the plot to which the registration relates and nothing more and nothing less—Land which is possessed by transferor over and above the plot to which his certificate of registration relates does not pass to the transferee—Immaterial whether such transfer made before the date of the coming into operation of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224 or after such date—Position different when registration of the transfer is not based on the survey plan.

These proceedings arose over a piece of land of an extent of 3 donums, one evlek and 1800 sq. feet situated at Emba village between plot 112, the property of the appellant-plaintiff under Registration No. 6153 dated 20.1.1934 and plot 392, the property of the respondent-defendant under Registration No. 7724 dated 25.5.1954.

In 1967 the dispute between the litigants was brought by the appellant before the Director of Lands and Sureys in D.L.O. Application No. 1862/67 as a boundary dispute under section 58 of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224, who decided that the disputed piece of land was covered by the registration of the appellant as being part of plot 112. As the respondent failed to comply with the decision of the Director the appellant brought an action against him claiming, inter alia, a declaration that the respondent had no right in any way over appellant's land plot No. 112.

In his statement of defence the respondent pleaded that the disputed area was never in the possession of the appellant but it was always in the possession of the respondent and, possibly, by mistake, it was included in the registration of the appellant, and that the appellant claimed its ownership for the first time after the local inquiry was made in Application No. 1862/67 and so he was estopped by conduct and/or otherwise from claiming it.

The respondent further alleged that the disputed piece of land belonged to him by virtue of undisputed and uninterrupted possession for the full prescriptive period, and he adduced a counterclaim for a declaration, inter alia, of the Court that the disputed area belonged to him by long lawful possession and/or adverse possession and that he was entitled to registration by the D.L.O.

On the 15th November 1924, following a local inquiry both plots were transferred in the name of Ioulios D. Loizides. Plot 112 was transferred on the 25th November, 1933 as a result of a forced sale and public auction in the name of Melissa Bank and on the 20th January, 1934 it was transferred in the name of the appellant.

Plot 392 was transferred in 1936, as a result of a forced sale and public auction in the name of Evlambia Omirou Demetriades who transferred it in the name of Andriani Iouliou Loizides in 1942. The latter sold it to the wife of the respondent in August 1946; and in May 1954 the wife transferred it, by way of gift, to her husband-the respondent.

With regard to the possession of the disputed land the trial Court found that "this has been proved to have begun on 25.11.1933 when plot 112 was registered in the name of Melissa Bank whilst its previous owner Ioulios D. Loizides retained the registration of plot 392 and continued possessing the last mentioned plot including the disputed area; and that this being so, by virtue of the first proviso to section 10 of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224, the law to be applied for prescriptive right by possession is the Ottoman Law as the period of possession began before the date of the coming into operation of the said Law (Cap. 224) i.e. before 1.9.1946". The trial Court further found that with each transfer

and registration of plot 392 the disputed area was transferred and registered also independently of its possession; that the boundaries mentioned in each registration of plot 392 covered the disputed area and, therefore, the disputed area was also transferred and registered; and that, in view of the fact that each such registration, save that in the name of the respondent, was made before 1.9.1946 when Cap.224 came into operation, section 50 of that Law, which provides that "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.....", had no application in the present action and Article 47 of the Ottoman Land Code applied by which the boundaries mentioned fix the area of land of each registration irrespectively of whether the extent was fixed or not.

In view of the above, the trial Court found that the period of prescriptive right by possession of ten years from 25.11.1933 in favour of respondent of the disputed area has been proved to be completed and also that in view of Article 47 of the Ottoman Land Code even the ownership itself of the disputed area has been transferred to the successive registered owners up to and including the registration of plot 392 in the name of Defendant's wife, which took place on 9.8.1946, i.e. before 1.9.1946 the date of the coming into operation of Cap. 224, when (respondent's wife) transferred to respondent a complete and perfect title of plot 392 together with the disputed area.

Upon appeal by plaintiff owner of plot 112:

Held, per Malachtos J., L. Loizou J. concurring and Hadjianastassiou J. dissenting, that formal transfer of immovable property in cases where the certificate of registration is based on the survey plan means the transfer through the D.L.O. of the plot to which the registration relates and nothing more, nothing less; that land which is possessed by the transferor over and above the plot to which his certificate of registration relates does not pass to the transferee of that registration; that it is immaterial whether such transfer was made before the 1st September, 1946, the date of coming into force of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224, or after such date; and that the position is different when the registration of the transferor is not based on the survey plan; that, therefore, assuming that possession of the disputed

portion of land by the predecessors in title of the wife of the respondent, could be added up, so that she could complete the ten years required period under the old Law, as found by the trial Judge, since the transfer of the property in the name of the respondent took place after the coming into force of the new Law, her possession could not be added up to that of the respondent, as the certificate of registration was based on the survey plan and did not include the disputed portion; accordingly the appeal must be allowed.

Appeal allowed.

Cases referred to:

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

HjiKyriacou and Another v *Manuel*, 10 C.L.R. 15;

HadjiSavva v. *Maroulou*, 7 C.L.R. 89;

Ibrahim v. *Souleiman*, 19 C.L.R. 237 at p. 238;

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

Millington-Ward v. *Roubina* (1970) 1 C.L.R. 88;

Terzian v. *Michaelides*, 18 C.L.R. 125.

Appeal.

Appeal by plaintiff against the judgment of the District Court of Paphos (Pitsillides, D.J.) dated the 9th September, 1971 (Action No. 1076/68) whereby his claim for a declaration that the defendant has no right over plaintiffs field under registration No. 6153 was dismissed.

L. Papaphilippou, for the appellant.

A. Triantafyllides, for the respondent.

Cur. adv. vult.

The following judgments were read.

HADJIANASTASSIOU J.: The main question in this appeal is whether the land described in the statement of claim is the property of the respondent, Ioannis Hjisolomou, having established a prescriptive right for a period of over 10 years.

The facts of the case are these:

On September 30, 1968, the plaintiff, Georghios Nicolaou Ellinas, filed action 1076/68 claiming that the defendant, Ioannis Hjisolomou, has no right at all on the land in question covered by plot 112 and was seeking an order of the Court to prevent the

latter from interfering with the said plot of land. Furthermore, he was claiming, in the alternative, an order to annul or amend the registration and/or to prevent him from interfering with the rights of the plaintiff.

On June 5, 1969, the defendant repudiated the averments of the plaintiff and alleged that the piece of land of about 3 donums was never in the possession of the plaintiff and that, by mistake, it was included in his title. In any event, the defendant pointed out that the plaintiff has lost any rights on that piece of land because he never had any possession of it; and that for the first time he claimed the ownership of that land after a local enquiry was carried out in application No. 863/67, by the Lands Registry Office in Paphos.

Furthermore, it was the case for the defendant that the plaintiff is estopped from raising such a claim, i.e. that he has trespassed on that piece of land, and alleged that the said land belongs to him because he remained in lawful possession and without protest by anybody for a continuous adverse period of 30 years; and/or in accordance with lawful, continuous uninterrupted and undisputed possession by him of a period of over 10 years; and that in accordance with the law, he was entitled to seek registration in his name.

On October 3, 1970, the District Lands Officer, Mr. Neophytos Michael, told the Court that on January 28, 1970, he carried out a local enquiry on the basis of the pleadings of this action by order of the Court. Present were the parties; the wife of defendant, Maria Evangelou, the rural constable of Emba, Georghios Demetriou, and the muhktar of Emba. The parties had agreed that the disputed area of the land, exhibit 1' was that coloured red, of an extent of 3 donums, 1 evlek, and 1,800 sq.ft.

Turning to the purchase of the land in question, he said that the plaintiff purchased plot 112 (coloured blue and red on the sketch prepared) from Melissa Bank, which was the registered owner under Registration No. 6104 dated November 25, 1933. It was transferred to the said bank by a certain Ioulios D. Loizides, who was the registered owner under Registration No.4945 dated November 15, 1924. That piece of land was transferred

earlier to Ioulios Loizides by a certain Demetrios Christodoulou Loizides by inheritance and division. The said Demetrios Loizides was the registered owner under Registration No.1228 dated November 1890. That registration described the extent as 4 donums. The Registration No. 4945 in the name of Ioulios Loizides was preceded by a local enquiry because of an application No. 1610/1924. After that local enquiry, the registration No. 4945 was issued and described the property as plot 112, a field of the extent of 22 donums and 3 evleks. That description was the first one made, and all the subsequent registrations followed that description.

It appears further that plot 392 was transferred to defendant by Maria Evangeli Charalambous, the wife of the defendant, who was the registered owner under registration No. 6373 dated August 9, 1946, by a declaration of gift. It was transferred to her by Andrianou Iouliou Loizides, who was the registered owner under the same registration No. 6373 dated August 20. 1942. This piece of land was transferred to the said Andrianou Iouliou Loizidou by Evlambia Omirou Demetriadou who was the registered owner under the same registration No. 6373 dated May 21, 1936. This very same piece of land was transferred earlier to the said Evlambia Omirou Demetriades by Ioulios D. Loizides who was the registered owner under Registration 4952 dated November 15, 1924. The last mentioned registration was made by application No. 1610/1924. The said registration No. 4952 described the property as plot 392, Frakti, of the extent of 5 donums and 2 evleks of arazi miric category. This description was the first made and all subsequent registrations followed that description.

Mr. Ioulios Loizides acquired plot 392 by inheritance and division from his father, Demetrios Christodoulos Loizides, who was the registered owner under Registration No. 1235 and described the property as a field of 2 donums, arazi miric category. Maria Evangeli purchased plot 392, Registration No. 6373 of an extent of 5 donums and 2 evleks from Andrianou Loizidou. The D.L.O. clerk further added that plot 111 is Hali Land with big rocks. But the remaining of the red area was cultivated. The red line between the red and blue areas was 323 ft. long and corner A to corner B was 238 feet.

Regarding the disputed area, the witness added that there is a

decision of the Director, dated July 1, 1968 (see exhibit 2). The disputed area, in fact, appears in the plan attached to the said decision in red colour.

This witness was cross-examined at length and he conceded that if the red area formed part of plot 112, Ioulios Loizides would be boundary on three sides of plot 392, but he added that he did not know if the clerk who fixed the boundaries in Registration No. 7724 meant the red line or not. He further went on to add that he would record in any case, only once, Ioulios D. Loizides, because this is their practice today. He admitted, however, that up to a few years ago, one boundary was mentioned as many times as the sides it occupied.

It is correct, he added, that since 1928, for the fixing of a plot and its extent, they used the boundaries, but it is not correct, he added, that the plot number is decisive for the fixing of a plot since 1946. Plaintiff's plot is scale 1:5000 at the locality "Elies" and is described as a field. Defendant's plot is on scale 1:1250 in the village and is described as "fracti".

Finally, he added that the decision of the Director was based on the existence of the survey plan of the boundary line which separates the yellow area from the red area. He also conceded that there have been mistakes made by the D.L.O. in the survey plans and in the registrations.

In re-examination, he said that he did not know if the defendant was ever the owner of plot 393, but admitted that plots 392 and 393 were assessed in the name of defendant at the general survey. He also conceded that there have been mistakes as to the existence of trees in a plot and many mistakes of the extent of property before the general survey.

The case was adjourned to May 10, 1971 for further hearing, but on that date no further evidence was called in support of the case of the plaintiff. The defendant called Mr. D. Loizides who told the Court that his father had a lot of property at Emba including the field at locality "Elies", and a fracti by the name "Ktiston", which was adjacent to that field. The fracti was sold by public auction and was purchased by Melissa Bank and later on by the plaintiff.

The field at Elies was distinctly separate from the said fracti

which was 2 - 6 feet higher than the field in question. They were separated by a dry wall and by a pathway leading from the main Paphos-Emba road through the boundaries of the said field and fracti and was proceeding towards the south. He knew that pathway, the witness added, and that he had seen it on that date (10.5.71) and it had the same route, being about 6 - 8 feet wide. There was a dry wall between the pathway, and the fracti and the latter had a dry wall all around it, and that was the reason why it was called "Ktiston".

The fracti was purchased at a public auction along with the other plots on its east side by Evlambia Demetriadou. The witness further explained that his mother later on purchased the said fracti with the other plots but she transferred them in the name of his sister Andriani. He also added that Evlambia did not purchase the field "Elies".

In 1942, a permit was issued to sink a well in the name of his sister and a well was sunk during that period in the fracti which still exists. They used to sow the remaining part of the fracti with cereals up to the side which was near the field "Elies". Finally, the witness added that on the side of the fracti which is near the field Elies, there were, and still are two carob trees and a terebinth tree. There were other trees there and he remembered that they used to gather the carobs.

In cross-examination, he said that the dry wall existed ever since he remembered, but he did not know which was the disputed land which the parties claimed.

In re-examination, he said that the plaintiff never interfered with the fracti or with the well and that he never had any claim on them.

There was further supporting evidence by Papagregorios Nicolaou (a priest of Emba), 74 years of age, who told the Court that he knew the parties, the field and the fracti in questions. The field, he said, was on the level of the pathway and the fracti was on a higher level. They both belonged to Loizides who had the fracti even after the plaintiff acquired ownership of the field. The higher level of the fracti is between 2 and 5 feet higher. The pathway there existed for the last 60 - 65 years, and a lot of people used it. He was using that pathway since he was a small boy.

In 1944, the plaintiff brought an action against PapaGregorios for that pathway, but finally they arrived at a settlement. They placed poles to separate the pathway which was 4 ft. wide from the field of the plaintiff, on the western side of the pathway. He also added that they did not agree to place the poles on the side of the fracti. On the fracti a well was sunk, whilst it was the property of Mr. Ioulios Loizides, and it was used for watering animals; the water was raised to the surface with a hand mill. The well was visible from a long distance. Finally, he said that the defendant has been gathering the carobs.

In cross-examination, he said that the oktus separating the field from the fracti was made of stones. He remembered the public auction in which the plaintiff purchased the field, but he did not remember if Evlambia owned the fracti. He also remembered that it belonged to Ioulios Loizides and it was sold by public auction in a compulsory sale and someone purchased it along with other property.

In re-examination, he said that the plaintiff never possessed the disputed area, and that plaintiff admitted in public and in his presence, that he never possessed the disputed area, but claimed it because the plan shows that it was his. He agreed that the defendant cultivated the disputed area with tractors.

The wife of the defendant, Maria Evangeli, in supporting further the case of her husband, said that she purchased the said fracti from Andriana Loizides by a declaration of sale on August 9, 1946, and this plot was known as fracti or Ktiston. The field of the plaintiff is separated from the fracti by a pathway which passes on the side of the plaintiff's field. Over that pathway there is an oktus. The plaintiff used to sow and plant his field, but he never tried to use the fracti or to claim ownership over it. Mr. Loizides used the water of the well for watering animals and for irrigating some vegetables in the fracti. In explaining the reason why the certificates of registration were not produced, she said that the D.L.O. lost her certificates of registration which she gave with the declaration of gift to her husband.

In cross-examination, she said that the certificate of registration was read over to her before she purchsed the fracti from Andriana Loizidou. She was positive that the contents of the

registration were read to her and that the area was 5 donums and 2 evleks.

In re-examination, she said that the boundaries of the field were shown to her and that the argaki ran from east to west, and had been filled by them with a bulldozer.

The defendant told the Court that the fracti which was purchased by his wife was higher than the field of the plaintiff and that the plaintiff never interfered with any part of their property.

In cross-examination he said that they raised water every day from the well and they used it for giving water to their animals and for irrigation purposes. They lowered the depth of the well about 15 years ago.

The learned trial Judge, having reviewed the evidence before him, accepted the evidence for the defence, and said:-

> "In view of the location of the pathway which has been proved by the D.L.O. clerk and by defendant and all his witnesses to be within the blue area of exhibit 1, alongside the oktus separating the blue area from the yellow and red (disputed areas), no doubt can arise that by the inclusion in the above condition of the words 'At the eastern end of his (plaintiff's) field along the boundary of the adjoining field of Ioulios Loizides, the plaintiff admitted that the property beyond the eastern side of that pathway (including the disputed red area in exhibit 1) did not belong to him but that it belonged to Ioulios Loizides, that pathway being the eastern landmark of his property'".

Then the learned Judge - having no doubt, went on to add that (a) when the plaintiff purchased plot 112, he and the vendor knew that he purchased only the blue area and that the red disputed area was not included; that neither the plaintiff nor his predecessor-in-title of plot 112 (Melissa Bank) ever possessed the disputed area or even showed any act of ownership thereon, and that he first started asserting his claim upon it by his application No. A1862/1967 to the D.L.O. of Paphos, under s.58 of Cap. 224; after he discovered that according to the survey plan the red area was included in plot 112; (b) when the defendant's wife purchased plot 392, she and the vendor knew that the disputed area was included in the property purchased, and that the

disputed area was always in the exclusive possession of the defendant, of his wife and of their predecessors-in-title to plot 392; (c) the survey plan was wrongly drafted to include the disputed area in plot 112 whereas it always formed part of plot 392 and that this error resulted from the drawing of the separation line between Emba village and locality Elies; and (d) that the decision of the Director was based on the existence of the survey plan of the said separation line which was wrongly drafted.

Then the learned Judge, having dealt with the legal points regarding possession reached this conclusion:

> "I find that the period of prescriptive right of possession of 10 years from 25.11.33 in favour of defendant of the disputed area has been proved to be completed and also that in view of Article 47 of the Ottoman Land Code, even the ownership of the disputed area has been transferred to the successive registered owners up to and including the registration of plot 392 in the name of defendant's wife which took place on 9th August 1946 i.e. before 1st September 1946 the date of the coming into operation of Cap. 224, who, (defendant's wife) transferred to defendant the complete and perfect title of plot 392 together with the disputed area."

With that in mind, the learned trial Judge dismissed the action of the plaintiff and gave judgment in favour of the defendant on his counterclaim as per paragraphs (a), (b) and (c) with costs in favour of the defendant.

On appeal, counsel made four propositions in support of his contention that the learned trial Judge was wrong in law in reaching the said decision.

On the contrary, counsel for the respondents, in a strong and full argument, contended that the decision of the trial Court was rightly taken, both factually and legally.

I have already stated that the learned trial Judge had before him evidence as to the physical state of the land and also evidence as to possession and documentary evidence. On the contrary, there was a complete lack of evidence on behalf of the appellant. There is no doubt that the physical state of the land is an important one, if one considers whether there was a mistake in law, and

this finds support in *Ibrahim* v. *Souleyman*, 19 C.L.R. 237. Halinan, C.J., speaking about the question whether there was a mistake, said at p. 238:-

> "If there has been such a mistake then we consider that it must be presumed that Djaffer Halil, the transferor to the respondent, was, before the mistake was made, the registered owner of the land claimed by the respondent, and that Djaffer Halil in 1946 legally transferred all his rights in the land of which he was owner to the respondent. Defendant-appellant acquired her interest in plot 29/1 by gift; she is not a bona fide purchaser for value. If the appellant's predecessor in title by error obtained registration for part of Djaffer Halil's title, the register must be rectified. (*Mihtat* v. *Loiza*, 6 C.L.R., 13).
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> In our view, the true issue in this case is whether delineation of plot 30 on the survey plan is correct or not, having regard to the description of the boundaries in the certificates of title No. 12,342, the evidence of trees in the certificates of title of both appellant and respondent, the changes in the areas of plots 29 and 30 over the material period, and lastly the evidence of actual possession of the land in dispute by either party or their predecessors in title.
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> If the respondent succeeds in this issue then it is not necessary to consider whether he has obtained a prescriptive right to the land in dispute. Under the law relating to lands prior to 1946 it is very doubtful if a person who has obtained by prescription alone a right to be registered, can transfer his right verbally to another unless he perfects his title by registration so as to give the transferee a right of action."

I would reiterate that although there was ample evidence on behalf of the defendant and his predecessors-in-title, the plaintiff never gave evidence, and no evidence was adduced regarding his possession. This is indeed one of the few cases, as far as I can remember, where counsel for the plaintiff did not even challenge the credibility of the witnesses.

Turning now to the law which governs this case, I think one can derive some assistance or guidance from the case of *Spanou* v. *Savva*, (1965) 1 C.L.R. 36, with regard to transfers

which were completed on September 1, 1946. This was an appeal against the judgment of the District Court of Nicosia, whereby it was declared, inter alia, that a strip of land adjoining defendant's property belonged to plaintiff by prescription. This appeal was concerned with transfers effected prior to the enactment of Cap. 224, which the trial Court determined upon the law in force at the time of the transfer, i.e. the law as it stood before Cap. 224 came into force in September, 1946. Vassiliades, J., as he then was, in a short judgment, in dismissing the appeal, said at pp. 37–38:–

> "The appeal was based mainly on the authority of a land case decided in May, 1963, *Rodothea PapaGeorghiou* v. *Antonis Savva Komodromou*, (1963) 2 C.L.R. 221, specifically referred to in the grounds of appeal.
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> As pointed out in the course of the argument this morning, the subject-matter in that case were transfers of registration effected after the enactment of the Immovable Property (Tenure, Registration and Valuation) Law, 1946, now Cap. 224; and the case was decided on certain provisions of that statute. Here we are concerned with transfers effected prior to the enactment of Cap. 224, which the trial Court determined upon the law in force at the time of the transfer, i.e. the law as it stood before Cap. 224 came into force in September, 1946.
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> We are unanimously of opinion that the learned trial Judge was right in deciding this case on what he described in his judgment as the 'old law' which, we think, he correctly applied. Having reached this conclusion, we can dispose of this appeal without discussing the effect of the judgments in *Georghiou* v. *Komodromou* (supra) which, as already stated, turned mainly on the provisions of the present law, the Immovable Property (Tenure, Registration and Valuation) Law, 1946".

Having quoted this case, and in view of the various registrations, it appears that the law governing the present case is Article 46 of the Ottoman Land Code which provides that a man buys what he sees physically, and this was exactly what had happened in this case when the wife of the defendant purchased the field which was pointed out to her and its boundaries.

After 1946, the position has changed, and one can contrast section 50 of Cap. 224, with regard to the mode of determining the area of registered land. This section says that:

> "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 or 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".

With this in mind, it appears that when the defendant's wife bought the land in question in August, 1946, the period of 10 years' prescription had already been completed. It is equally true to say that the property transferred by her into the name of her husband in 1954, included all the land or area of the land which was possessed by her since 1946.

It is equally true to say that Cap. 224 which came into force on September 1, 1946, has no retrospective effect, and consequently, the provisions of the law in force immediately prior to the enactment of Cap. 224, govern the rights of the parties in the present case. (See *Millington-Ward* v. *Roubina*, (1970) 1 C.L.R. 88).

This principle finds further support in *Terzian* v. *Michaelides*, 18 C.L.R. 125. The respondent's father became owner in 1925 by purchase of a house and a yard adjoining his wife's house, and in the same year, he gave as a gift to his wife, the then owner of the respondent's house, a small space from his plot, 6 ft. x 6 ft. on which a W.C. was constructed for the wife's house. On the 31st July, 1939, the wife transferred her house to their daughter, the respondent, and by the declaration of sale, admittedly in the handwriting of the father who was a Land Registry Official, the mother asked for the tranfer to the respondent of this W.C. along with other additions to the house. In effect, the title deed issued to respondent in pursuance of this declaration, and after a local enquiry, specifically mentioned the W.C. in question. It was necessary to exclude this space from the father's registration, for which the father's consent would be required, but inadvertently this was not done. On

the evidence, it was clear that the father acquiesced in the inclusion of the space in the respondent's title deed. In 1943, the father transferred his own house, as it was originally registered in his name, to another daugher, who sold and transferred it in the following year to the appellant, who, in February, 1945, contended that he was the owner of the space in question. The respondent then brought an action claiming ownership by registration or prescriptive adverse possessior, and the Court had to determine which of the two registrations should prevail in respect of the space in dispute.

The Court of Appeal held (1) that the appellant's predecessor-in-title, namely respondent's father, remained inadvertently formally registered for the space in dispute, and appellant, who inspected the premises before his purchase cannot be considered a bona fide purchaser without notice. The transfer to respondent was effective to include this space, but even if doubts were to persist as to this result, the respondent's title was perfected by the lapse of the prescriptive period of 15 years.

Griffith Williams, J., in dismissing the appeal, affirmed the judgment of the District Court, and said at p. 128:-

> "On this head of claim the evidence, in our opinion, is conclusive in favour of respondent both as to exclusive possession and as to adverse possession. We do not overlook the fact that the husband, the donor, was residing with his wife in her house until his transfer to Kyrenia in 1936. This circumstance does not change the adverse character of the wife's possession during her ownership of the house. The wife as owner was in possession of the whole house including this W.C. space which was, as we said, permanently attached to her house as best they could make it, and the owner's intention on her part could not but extend over this space. The husband's intent on the other hand to part with the ownership of this space in favour of the wife is clear from the fact of his having made a gift of it to his wife.
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> This exclusive and adverse possession of the wife was continued down to and beyond the completion of the prescriptive period by her daughter, the respondent. So that the respondent's claim based on prescriptive possession is unanswerable.

The result is that in our opinion the appellant's predecessor in title, namely respondent's father, remained inadvertently formally registered for this space, and appellant cannot be considered a bona fide purchaser without notice. The transfer to respondent in the circumstances enumerated was effective to include this space, but even if doubts were to persist as to this result, the responent's title was perfected by the lapse of the appropriate prescriptive period of 15 years".

Finally, in *Rodothea PapaGeorghiou* v. *Antonis Savva Charalambous Komodromou*, (1963) 2 C.L.R., 221 the facts were these:-

"The appellant (defendant) is the owner of a plot of land No. 631 under title deed under registration No. 6555 dated the 28th March, 1955. The respondent (plaintiff) is the owner of the adjoining plot No. 632 under Registration No. 6231 dated the 21st September, 1949. A dispute has arisen between the parties as to the ownership of a strip of land 2,500 sq. ft. in extent which was found to be included in the plot No. 632 registered as aforesaid in the respondent's name. The previous registrations of the latter's title deed No. 6231 were Nos. 2343 and 2344 in the name of the father of the respondent. After a local inquiry held some time in 1949, the said two registrations were identified to the survey plan and the new title deed No. 6231 was issued to the father who shortly afterwards transferred the land to his son, the respondent.

The registrations of the appellant's title deed No. 6555 were Nos. 2308 and 2309 in the name of her mother for which after local inquiry the new title deed No. 6555 was issued to the mother, who transferred the land to her daughter the appellant, some time in 1955. The disputed portion of land was being cultivated by the mother at least as far back as from 1915 till 1938 or 1939 when she informally gave the whole field (including the disputed area) to her daughter (appellant) as dowry who as from that date was cultivating the whole field until the present day. The respondent instituted his action against the appellant claiming *on foot* of his aforesaid title deed under registration No. 6231 an injunction restraining the appellant from interfering with the portion of land in dispute. The appel-

lant (defendant) disputed the claim and counter-claimed for an order of the Court directing the registration in her name of the land in dispute on account of: (a) undisputed adverse possession for fifty years and (b) mistake whereby the said portion of land has been included in the title deed of the plaintiff (respondent).

The trial Court found that the disputed area is included in the plaintiff's (respondent's) title deed under reg. No. 6231, dated the 21st September, 1949. To the question whether the period of possession by the mother of the appellant could be added to that of the daughter-appellant, the trial Court answered in the negative inasmuch as the disputed portion possessed by the mother from 1915 to 1938 or 1939 could not be transferred informally to the daughter and, therefore, the latter, having not completed from 1938 or 1939 to the 1st September, 1946 (on which date Cap. 224 (supra) came into force) a full period of ten years' possession of her own, was only entitled to the land actually transferred to her by her mother in 1955 under registration No. 6555 (supra) which title deed admittedly does not include the disputed area of land. Consequently, the trial Court granted to the appellant (plaintiff) the injunction claimed for. On appeal by the defendant, the High Court (Vassiliades, J. dissenting), upholding the judgment of the trial Court

Held, (Vassiliades, J. dissenting),

(I) in our view two are the points of law which fall for decision:

(1) Whether the appellant's mother's period of possession or part thereof over the disputed portion of land might be added to the period actually possessed by the appellant so that, prior to the 1st September, 1946, the date of the coming into force of the Immovable Property (Tenure, Registration and Valuation) Law, 1946, she would complete the required 10 years' period to enable her to obtain prescriptive right over the disputed land.

(2) Whether the plaintiff-respondent was entitled to the injunction restraining the defendant from interfering with

the disputed land notwithstanding that the former was never in possession of the said land and the inclusion of the disputed portion of land in his title deed might as well be due to a mistake".

Zekia, J., in delivering the judgment of the majority, said at p. 233:-

"As to the first point, possessory rights, prior to the enactment of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224, were governed by Article 20 (in the case of lands of Arazi Mirie category) of the Ottoman Land Code and by the Immovable Property Limitation Law, 1886 (Law 4 of 1886)".

Then, having quoted Article 20, and sections 2 and 3 of Law 4 of 1886, and having observed that the main object of Law 4 of 1886 was in his view, to amend the second part of Article 20 of the Ottoman Land Code so that a person who adversely possesses a particular piece of land would not be debarred of the right of acquiring ownership of the land even if he acknowledges that he arbitrarily possessed such land, he said that "it is clear from the old and new law relating to the transfer of immovable property that registration in one way or the other was necessary for the validity of the transfer".

"In this case the mother, the predecessor-in-title of the appellant was not, as far as the evidence goes, the registered owner in respect of the disputed portion of land and when she made a gift of the land possessed by her including the disputed portion as dowry to her daughter, the appellant, in 1938 or 1939, that gift not having been made in accordance with the Law, could not be considered to be a transfer in the legal sense of the word. On the other hand, when she transferred the land registered in her name, which registration did not include the disputed portion, in 1955 that transfer could not comprise the disputed portion on account of section 50 of the Immovable Property (Tenure, Registration and Valuation) Law, which reads as follows:-.....

"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 and in transfers where the title

deed is not related to a survey plan, excluding the area in question, and in such a case the proviso to section 50 will operate and the period of adverse possession by transferor and transferee will then be added up. Prior to 1946, when Article 47 of the Ottoman Land Code was in force in a transfer where the boundaries were indicated the extent of the area mentioned was not material but what mattered was the area included within the boundaries named: Article 47 reads:.....

Before the General Survey and the system of registration with reference to a survey plan was introduced in this country, transfers by kotchans or tapou seneds were in vogue. These kotchans and seneds as a rule did not relate to any survey plan and therefore where a dispute between two neighbouring land-owners in respect of a portion of land falling between their properties arose the only way of deciding the dispute was to find out which of the neighbouring land-owners had undisputed possession over the disputed portion and in such cases possession by transferor and by transferee of the disputed portion could be computed together. The first proviso to section 10 of the Immovable Property (Tenure, Registration and Valuation) Law has been interpreted by this Court in a number of cases and needs no further consideration. The period of prescription, if not completed by 1st September, 1946, cannot be completed thereafter against a registered owner and in this case the possession started by the appellant in 1938 or 1939 being incomplete by 1st September 1946 it cannot be completed after that date against a registered owner, the father of the respondent and later the respondent in this case, by continuing to possess the land in dispute.

I am of the opinion, therefore, that whatever possessory rights were vested in the mother of the appellant in respect of disputed land those rights did not pass to the daughter either by virtue of the agreement of dowry in 1938 or 1939 or on the strength of the transfer in 1955 which transfer did not include the disputed land".

Turning now to the second point, viz. whether the plaintiff respondent was entitled to the injunction sought, Zekia, J. in dismissing the appeal, had this to say at pp. 238-239:-

". ..I think the case of *HjiGeorghi HjiKyriacou and another* v. *Kypriano Manuel* (1910), 10 C.L.R. p. 15, is to the point. There the defendant by a cross-action claimed a right to registration on the ground of prescription but failed to prove his claim. On the other hand, it had been proved that the plaintiff's title deed was obtained by a false certificate and on this fact the district Court dismissed the plaintiff's claim. The Supreme Court, however, allowed the appeal with costs.

Tyser, C.J., at p. 16 states:

"The Courts are not Courts of Appeal from the Land Registry Office. All that the Court does is this, that where by subsistence of any registration injury is done to some one who is entitled to the land, and where the person agrieved comes into Court to assert his rights as against the person registered, the Court hears his claim and makes a declaration of his rights, and the Land Registry Office acts upon the Court's declaration.

The Court has no right to take the quochan into its own hands and without the quochan's being challenged by any person entitled to the property, to decline to enforce it.....

Perhaps a brief reference might also be made to the case of *Tsikinou HadjiSavva against Kyriakou Georghiou Maroulou* (1907) 7 C.L.R., p. 89, where it was held that in a dispute as to the boundaries between two adjoining properties, both claiming under Kotchans, each of which is consistent with the claim of the person holding under it, and where one of the parties is in possession of the land in dispute, the onus lies upon the party seeking to disturb that possession to establish his claim to the satisfaction of the Court. Obviously this case is distinguishable from the present one because the title deeds of both parties are not equally consistent with claim and counter-claim. Had the transfer in the names of the litigants been made without reference to plots in a survey plan no doubt this case would have a strong bearing in the present appeal.

On the former authority quoted I am of the opinion that even if the registration in the name of the respondent in

this case included the disputed portion by mistake he was entitled to have judgment in his favour".

I have very carefully considered the material and substantial facts of this case, and in my view, the present case is distinguishable from the facts of that of *Rodothea's* case. In any event, the ratio decidendi lays down that the transfers should be made formally, and not informally as was the case in *Rodothea* v. *Komodromou* (supra). On the contrary, in the present case, the Court came to the conclusion that the said transfers were made formally, and I would support the judgment of the trial Judge on all three issues raised and argued before him.

For the reasons I have given at length, and in the light of the various decisions I have quoted, I think I would express my indebtedness to both counsel—once they have argued their case very ably and were indeed very helpful to this Court in reaching its decision.

Appeal is therefore, dismissed.

MALACHTOS J.: This is an appeal by the plaintiff in Action No. 1076/68 of the District Court of Paphos against the judgment of a District Judge of that Court where his claim was dismissed and judgment was given in favour of the defendant on his counterclaim.

The dispute arose over a piece of land of an extent of 3 donums, one evlek and 1800 sq. feet situated at Emba village between plot 112, the property of the appellant-plaintiff under Registration No. 6153 dated 20.1.1934 and plot 392, the property of the respondent-defendant under Registration No. 7724 dated 25.5.1954.

In 1967 the dispute between the litigants was brought by the appellant before the Director of Lands and Surveys in D.L.O. Application No. 1862/67 as a boundary dispute under section 58 of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224, who decided that the disputed piece of land was covered by the registration of the appellant as being part of plot 112 and the relevant decision dated 1.7.1968 was communicated to the parties.

As a result of non compliance with the said decision of the

Director by the respondent, the appellant on 30.9.1968 instituted the present proceedings claiming:

(a) a declaration of the Court that the defendant has no right in any way over plaintiff's field, plot 112 S/P 45/51. Registration No. 6153;

(b) an injunction ordering the defendant to cease interfering in any way with the plaintiff's said field;

(c) an order for the cancellation or alteration of any registration or impediment affecting plaintiff's right: and

(d) £60.- damages and/or otherwise.

In the statement of his defence the defendant pleaded that the disputed area was never in the possession of the plaintiff but it was always in the possession of the defendant and, possibly, by mistake, it was included in the registration of the plaintiff, and that the plaintiff claimed its ownership for the first time after the local inquiry was made in Application No. 1862/67 and so he is estopped by conduct and/or otherwise from claiming it.

The defendant further alleged that the disputed piece of land belongs to him by virtue of undisputed and uninterrupted possession for the full prescriptive period, and he adduced the following counterclaim:

(a) a declaration of the Court that the disputed area belongs to him by long lawful possession and/or adverse possession and that he is entitled to registration by the D.L.O.;

(b) an order for the registration of the disputed area in defendant's name setting aside and cancelling any other existing registration and/or amending it to the extent that the rights of the defendant are affected; and

(c) a declaration of the Court that the plaintiff has no right on the disputed area and/or that he lost his rights, if any.

At the trial before the District Court the plaintiff relied exclusively on the strength of his certificate of registration and

in support of his case called as a witness only the D.L.O. clerk who carried out a local inquiry on 28.1.1970 by Order of the Court on the basis of the pleadings.

On the other hand, the defendant in support of his case besides giving evidence himself, called three more witnesses namely, his wife, Demetrakis I. Loizides, the son of Ioulios D. Loizides late of Emba, and Papagregorios Nicolaou, the priest of Emba.

On the evidence adduced the trial Judge found that both the property of the plaintiff and the defendant as well as the disputed piece of land, originally belonged to Demetrios Chr Loizides of Emba under Registration Nos. 1228 of an extent of 4 donums, and 1235 of an extent of two donums, both dated November, 1890.

On the 15th November, 1924, after a local inquiry both registrations, which were of Arazi Mirie category, were transferred in the name of Ioulios D. Loizides, the son of Demetrios Chr. Loizides. Registration No. 1228 was identified as plot 112 comprising 22 donums and three evleks in extent of S/P 51/45 and was transferred in the name of Ioulios D. Loizides under Registration No. 4945. Registration No 1235 was identified as Plot 392 comprising five donums and two evleks in extent and was transferred in the name of Ioulios D Loizides under Registration No. 4952.

It must be noted here that Plot 112 including the disputed portion is to scale 1/5000 whereas Plot 392 it to scale 1/1250 and that the General Survey for the Paphos area was completed on 27.5.1924.

Registration 4945 was transferred as a result of a forced sale and public auction in the name of Melissa Bank under Registration No. 6104 dated 25th November, 1933, and later was transferred in the name of the plaintiff under Registration No. 6153 dated 20th January, 1934 and is registered in his name ever since.

Registration 4152 was transferred also as a result of a forced sale and public auction in the name of Evlambia Omirou Demetriades under Registration No. 6373 dated 21st May, 1936. It was later transferred in the name of Andrianou Iouliou Loi-

sides under the same registration No. 6373 dated 20th August, 1942 and was later transferred in the name of Maria Evangelou Charalambous, the wife of the defendant, under the same registration No. 6373, dated 9th August, 1946. Finally, it was transferred by way of gift in the name of the defendant under Registration No. 7724 dated 25th May, 1954.

On the question of possession of the disputed piece of land the trial Judge made the following findings as they appear at page 37 of the record:

"From all the evidence adduced in this action, including that of the D.L.O. clerk (P.W.1), I have no doubt that:-

(a) When Plaintiff purchased plot 112 he and the vendor knew that he purchased only the blue area and that the red disputed area was not included; that neither the Plaintiff nor his predecessor in title of plot 112 (Melissa Bank) ever possessed the disputed area or even showed any act of ownership thereon and that he first started asserting his claim upon it by his application No. A1862/1967 to the D.L.O. Paphos under section 58 of Cap. 224 after he discovered that according to the Survey plan the red area was included in plot 112.

(b) When Defendant's wife purchased plot 392 she and the vendor knew that the disputed area was included in the property purchased and that the disputed area was always in the exclusive possession of the Defendant, of his wife and of their predecessors in title to plot 392.

(c) The Survey plan was wrongly drafted to include the disputed area in plot 112 whereas it always formed part of plot 392 and that this error resulted from the drawing of the separation line between Emba village and locality 'Elies'.

(d) The decision of the Director was based on the existence on the survey plan of the said separation line which was wrongly drafted.

The first legal matter which falls for consideration in the present action is whether Defendant acquired ownership of

the disputed area by long period of possession; but before this point is discussed, mention should be made that Civil Appeal No. 4012 (*Akil Hussein Arnaout* v. *Emine Hussein Zinouri*) (1953) C.L.R. Vol. XIX, pages 249-258, at p. 255, leaves no doubt that registration can be defeated by evidence of possession by another".

Pausing here for a moment I must say that the findings of the trial Judge under (a) and (b) above are correct, with this modification as regards (b); that when defendant's wife purchased plot 392 she and the vendor were under the impression that the disputed area was included in the property purchased.

As regards his findings under (c) and (d), that the survey plan was wrongly drafted to include the disputed area in plot 112, are arbitrary and, consequently, not correct. Besides the fact that this issue is not raised in the pleadings of the defendant, it is also not supported by the evidence adduced.

Having gone through the record of proceedings the only evidence I could trace on this point was the evidence of the D.L.O. clerk who in answer to a general question, in cross-examination, stated that "there have been mistakes made by the D.L.O. in the Survey plans and in the registration".

It appears that the trial Judge took into account this piece of evidence and applied it to the case in hand on the assumption that mistakes must have been made in the present case. The trial Judge then proceeded further and concluded his judgment at page 38 of the record as follows:

"With regard to the legal point in hand, i.e. that of possession of the disputed area, this has been proved to have begun on 25.11.1933 when plot 112 was registered in the name of Melissa Bank under registration No. 6104, whilst its previous owner Ioulios D. Loizides retained the registration of plot 392 and continued possessing the last mentioned plot including the disputed area. This being so, by virtue of the first proviso to section 10 of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224, the law to be applied for prescriptive right by possession is the Ottoman Law as the period of posession began before the date of the coming into operation of the

said Law (Cap. 224), i.e. before 1.9.46. This has been decided in a number of appeal cases, two of which are: Civil Appeal No. 4106 (*Enver Mehmet Chakarto* v. *Hussein Izzet Liono)* (1954), 20 C.L.R. part I, page 113, and Civil Appeal No. 4787 (*Aspasia Millington-Ward* v. *Chloi Roubina)* (1970) 3 J.S.C. page 277. As to the category of the disputed area I have no doubt that this falls within the arazi mirie category, as both plots 112 and 392 are arazi mirie; the period of prescription for arazi mirie is ten years as provided by Article 20 of the Ottoman Land Code. Plot 392, however, changed registered owners and those successive owners came into possession of the disputed area as well; the said successive registered owners were: Evlambia Omirou Demetriades (registration No. 6373 dated 21.5.36), Andrianou Iouliou Loizides (registration No. 6373 dated 20.8.42), Defendant's wife (registration No. 6373 dated 9.8.46) and lastly Defendant (registration No. 7724 dated 25.5.54).

The question which now remains is: if the periods of possession of the said successive owners can be added to make up the ten years required for ownership by possession. Civil Appeal No. 4393 (*Rodothea Papa Georghiou* v. *Antonis Savva Charalambous Komodromou* (1963) C.L.R. part 2, pages 221-265, is clear on this point and it decided that possessory rights vested in a person cannot pass to his successor in possession in case of an informal transfer because a transfer of ownership is not made in accordance with the Law, i.e. without transferring the land with the D.L.O., and therefore void. However, in the present action transfer of plot 392 was made legally in the names of the successive registered owners and therefore the period of possession of each such registered owner was transferable and added to the period of possession of his successor in title. The question left is whether with each transfer and registration of plot 392 the disputed area was transferred and registered also independently of its possession. From the evidence of the D.L.O. clerk (P.W.1) no doubt is left that the boundaries mentioned in each registration of plot 392 covered the disputed area and therefore the disputed area was also transferred and registered, and, in view of the fact that each such registration, save that in the name of the Defendant, was made before 1.9.46 when Cap. 224 came into

operation, section 50 of that Law, which provides that '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..... .', has no application in the present action and Article 47 of the Ottoman Land Code applies by which the boundaries mentioned fix the area of land of each registration irrespectively of whether the extent is fixed or not.

In view of the above, I find that the period of prescriptive right by possession of ten years from 25.11.33 in favour of Defendant of the disputed area has been proved to be completed and also that in view of Article 47 of the Ottoman Land Code even the ownership itself of the disputed area has been transferred to the successive registered owners up to and including the registration of plot 392 in the name of Defendant's wife, which took place on 9.8.46, i.e. before 1.9.46 the date of the coming into operation of Cap. 224, who (defendant's wife) transferred to defendant a complete and perfect title of plot 392 together with the disputed area".

I must say at the outset that the trial Judge was unfortunately mistaken in taking the view as to what is meant formal and informal transfer in the case of *Rodothea Papageorghiou* v. *Antonis Savva Charalambous Komodromou* (1963) 2 C.L.R. 221 and distinguished it from the case in hand. The present case, in my view, is on all fours with that case. The facts of that case and the reasoned decision appear in the majority judgment of Zekia J., as he then was, from page 232 to 239 of the report and are worth quoting them verbatim.

"The plaintiff's property is registered under reg. No.6231 dated 21st September, 1949, and is of one donum and two evleks in extent (plot 632). Defendant's plot has registration No. 6555 (plot 631) dated 28th March, 1955, and is of two evleks and 900 sq. feet in extent. Both lands are at Polemi village. The title deeds of the litigants are based on a survey plan bearing No.45/13.

The previous registration Nos. of the title deed of the plaintiff were 2343 and 2344. After a local inquiry, held in 1949, the said registrations were identified to the survey plan and a new title deed, bearing No.6231, was issued.

The father of the plaintiff transferred the land, covered by the new title deed, to his son, the plaintiff, in 1949.

The previous registrations of the title deed of the appellant were 2308 and 2309 for which, after a local inquiry, a new title deed, bearing No.6555, was issued in the name of her mother who transferred it in the name of her daughter, the defendant, some time in 1955.

The Court found that the disputed portion of land was cultivated by the defendant's mother, at least as far back as 1915 till 1938 or 1939, when the defendant's mother gave the field to the defendant as dowry and from that date the disputed portion of the land was cultivated by the defendant herself until the present day.

There was an earth bank (ohto), before it was interfered with by the plaintiff, between the disputed portion and the undisputed portion of the land covered by the plot of the plaintiff which bank was one foot wide and half a foot high and, according to the Land Registry Officer, whose evidence the Court accepted, the disputed portion is on a lower level, approximately 8" lower than the surface of the remaining portion of the land of the plaintiff. The disputed land was formerly covered by mulbery trees.

The trial Court, having recorded the facts, considered whether the period of possession by the defendant's mother could be added to that of the defendant so that the latter would be entitled to acquire the disputed portion on the strength of long undisputed adverse possession.

The Court held that, inasmuch as the disputed land possessed by Eleni, the mother, could not be transferred verbally, the defendant was only entitled to the land actually transferred to her under reg. No.6555 which registration did not include the disputed portion and accordingly the plaintiff was entitled to the injunction claimed for. But, having failed to prove damages, the plaintiff's claim as to damages was rejected. Plaintiff was awarded his costs.

There was ample evidence as to the facts found by the Court and could not further be challenged. It was the points of law

involved which were material in this appeal and which have been argued at length before us.

In my view two are the points of law which fall for decision:

(1) Whether the appellant's mother's period of possession or part thereof over the disputed portion of land might be added to the period actually possessed by the appellant so that, prior to the 1st September, 1946, the date of the coming into force of the Immovable Property (Tenure Registration and Valuation) Law, Cap. 224, she would complete the required 10 years' period to enable her to obtain prescriptive right over the disputed land.

(2) Whether the plaintiff-respondent was entitled to the injunction restraining the defendant from interfering with the disputed land notwithstanding that the former was never in possession of the said land and the inclusion of the disputed portion of land in his title deed might as well be due to a mistake.

As to the first point, possessory rights, prior to the enactment of the Immovable Property (Tenure, Registration and Valuation Law, Cap. 224, were governed by Article 20 (in the case of land of *Arazi Mirie* category) of the Ottoman Land Code and by the Immovable Property Limitation Law, 1886 (Law 4 of 1886)

Article 20:

'In the absence of a valid excuse according to the Sacred Law, duly proved, such as minority, unsoundness of mind duress, or absence on a journey (muddet-i-sefer) action concerning land of the kind that is possessed by title-deed the occupation of which has continued without dispute for a period of ten years shall not be maintainable. The period of ten years begins to run from the time when the excuses above-mentioned have ceased to exist. Provided that if the defendant admits and confesses that he has arbitrarily (fouzouli) taken possession of and cultivated the land no account is taken of the lapse of time and possession and the land is given back to its proper possessor'.

Section 2 of Law 4 of 1886 reads:

'The period of prescription shall be computed to commence

from the time when the right to bring an action for the recovery of property adversely possessed first arose;'

Section 3 of Law 4 of 1886 reads:

'An action for the recovery of immovable property of which some person in whose name the same has not been registered has had undisputed adverse possession for the period of prescription shall not be maintainable unless the person instituting the action has, during some part of the time, of such adverse possession, prior to the expiration of the period of prescription, been lawfully entitled to be and has been actually registered as the owner thereof; but such action shall be maintainable where the person instituting it has during some part of the time aforesaid been lawfully entitled to be and has been actually so registered'.

The main object of the Immovable Property Limitation Law, 1886 (No.4 of 1886) was, in my view, to amend the second part of Article 20 of the Ottoman Land Code so that a person who adversely possesses a particular piece of land would not be debarred of the right of acquiring ownership of the land even if he acknowledges that he arbitrarily possessed such land.

Halis Eshref, commenting on Article 20 of the Land Code, at p.200, states:

'The period of possession or abandonment by persons from whom and to whom land devolves and the period of possession by the transferor and transferee is added up.

As the person from whom and the person to whom the property devolves and also the transferor and the transferee of a property are deemed to be one person the period of possession by both persons should be added'.

I have no doubt that this is a correct intepretation of Article 20 but the point in the present case is to find whether the appellant-defendant and her mother could be regarded as transferee and transferor within the scope of this interpretation.

The words 'transfer' and 'transferee' 'farigh' and "mefroughunleh' are legal terms and, according to Professor Djemaledin, the corresponding words in French are 'cedant' and 'cessionaire'.

I am inclined to the view that the words "transferor" and "transferee", unless the context otherwise requires, could not be taken to include informal void transfers. The same words, transferor and transferee, occur in Article 36 of the Land Code which reads:

'A possessor by title deed of State land can, with the leave of the Official, transfer it to another, by way of gift, of for a fixed price. Transfer of State land without the leave of the Official is void. The validity of the right of the transferee to have possession depends in any case on the leave of the Official, so that if the transferee dies without the leave having been given the transferor (farigh) can resume possession of it as before. If the latter dies (before the leave is obtained) leaving heirs qualified to inherit State land as hereafter appears they inherit it. If there are no such heirs it becomes subject to the right of tapou (musthiki tapou) and the transferee (mefroughunleh) shall have recourse to the estate of the original vendor to recover the purchase money. In the same way exchange of land is in any case dependent on the leave of the Official. Every such transfer must take place with the acceptance of the transferee or his agent'.

The transfer of a State land (Arazi Mirie) without the leave of the official was void. The mode of transfer, however, was altered by a Law of 1890, the Land Transfer (Amendment) Law. By section 40 of the Immovable Property (Tenure, Registration and Valuation) Law, 1946, Cap. 224, it was enacted that -

'(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 person unless he is the registered owner of such property:

Provided that the executor or administrator of an estate of a deceased person shall, for the purposes of this subsection, be deemed to be the registered owner of any immovable property registered in the name of the deceased'.

It is clear from the old and new law relating to the transfer of

immovable property that registration in one way or the other was necessary for the validity of the transfer.

In this case the mother, the predecessor-in-title of the appellant was not, as far as the evidence goes, the registered owner in respect of the disputed portion of land and when she made a gift of the land possessed by her including the disputed portion as dowry to her daughter, the appellant, in 1938 or 1939, that gift not having been made in accordance with the Law, could not be considered to be a transfer in the legal sense of the word. On the other hand when she transferred the land registered in her name, which registration did not include the disputed portion, in 1955 that transfer could not comprise the disputed portion on account of section 50 of the Immovable Property (Tenure Registration and Valuation) Law, which reads as follows:

> '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'.

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 and in transfers where the title deed is not related to a survey plan, excluding the area in question, and in such a case the proviso to section 50 will operate and the period of adverse possession by transferor and transferee will then be added up. Prior to 1946, when Article 47 of the Ottoman Land Code was in force in a transfer where the boundaries were indicated the extent of the area mentioned was not material but what mattered was the area included within the boundaries named; Article 47 reads:

> 'When there is a question as to land sold as being of a definite number of donums or pics the figure alone is taken into consideration. But in the case of land sold with boundaries definitely fixed and indicated the number of donums or pics contained within them are not taken into consideration whether mentioned or not, the boundaries alone are taken

into account. So for example if a piece of land which has been sold, of which the owner has fixed and indicated the boundaries, saying that they contain twenty-five donums, such owner cannot claim from the purchaser either the separation and return of seven donums of land or an enhancement of the purchase money, nor if he dies after the transfer can his ascendants or descendants prosecute such a claim.

Similarly if the piece of land only contains eighteen donums the transferee cannot claim the refund of a sum of money equal to the value of the seven donums'.

Before the General Survey and the system of registration with reference to a survey plan was introduced in this country, transfers by kotchans or tapou seneds were in vogue. These kotchans and seneds as a rule did not relate to any survey plan and therefore where a dispute between two neighbouring land-owners in respect of a portion of land falling between their properties arose the only way of deciding the dispute was to find out which of the neighbouring land-owners had undisputed possession over the disputed portion and in such cases possession by transferor and by transferee of the disputed portion could be computed together. The first proviso to section 10 of the Immovable Property (Tenure, Registration and Valuation) Law has been interpreted by this Court in a number of cases and needs no further consideration. The period of prescription, if not completed by 1st September, 1946, cannot be completed thereafter against a registered owner and in this case the possession started by the appellant in 1938 or 1939 being incomplete by 1st September, 1946 it cannot be completed after that date against a registered owner the father of the respondent and later the respondent in this case, by continuing to possess the land in dispute.

I am of the opinion, therefore, that whatever possessory rights were vested in the mother of the appellant in respect of disputed land those rights did not pass to the daughter either by virtue of the agreement of dowry in 1938 or 1939 or on the strength of the transfer in 1955 which transfer did not include the disputed land.

As to the 2nd point, I think the case of *HjiGeorghi HjiKyriacou and another* v. *Kypriano Manuel* (1910), 10 C.L.R. p.15, is to the point. There the defendant by a cross-action claimed a right

to registration on the ground of prescription but failed to prove his claim. On the other hand, it had been proved that the plaintiff's title deed was obtained by a false certificate and on this fact the District Court dismissed the plaintiff's claim. The Supreme Court, however, allowed the appeal with costs.

Tyser, C.J., at page 16 states:

'The Courts are not Courts of Appeal from the Land Registry Office. All that the Court does is this, that where by subsistence of any registration injury is done to some one who is entitled to the land, and where the person aggrieved comes into Court to assert his rights as against the person registered, the Court hears his claim and makes a declaration of his rights, and the Land Registry Office acts upon the Court's declaration.

The Court has no right to take the qochan into its own hands, and without the qochan's being challenged by any person entitled to the property, to decline to enforce it".

Further down, Bertram, J. says:

"I agree. No claim to have this qochan set aside on the ground that it was given on a false certificate was made in the cross-action, and even if it had been made it could not have succeeded, as the defendant was neither herself registered nor entitled to be registered either on the ground of prescription or otherwise.

It is clear from the case of *Juma* v. *Halil Imam* (1899) 5 C.L.R. 16, that a person who has neither a qochan nor a right to a qochan cannot challenge a tresspasser. Much less can he challenge a person armed with a qochan. And if the defendant is not entitled to challenge the plaintiff's qochan by cross-action, still less can he do so by way of defence'.

Perhaps a brief reference might also be made to the case of *Tsikinou HadjiSavva against Kyriakou Georghiou Maroulou* (1907) 7 C.L.R., p.89 where it was held that in a dispute as to the boundaries between two adjoining proprietors, both claiming under kotchans, each of which is consistent with the claim of the person holding under it, and where one of the parties is in possession of the land in dispute, the onus lies upon the party seek-

ing to disturb that possession to establish his claim to the satisfaction of the Court. Obviously, this case is distinguishable from the present one because the title deeds of both parties are not equally consistent with claim and counter-claim. Had the transfer in the names of the litigants been made without reference to plots in a survey plan no doubt this case would have a strong bearing in the present appeal.

On the former authority quoted I am of the opinion that even if the registration in the name of the respondent in this case included the disputed portion by mistake he was entitled to have judgment in his favour.

I would, therefore, dismiss the appeal with costs".

It is clear from the above case that formal transfer of immovable property in cases where the certificate of registration is based on the survey plan means the transfer through the D.L.O. of the plot to which the registration relates and nothing more, nothing less. Land which is possessed by the transferor over and above the plot to which his certificate of registration relates does not pass to the transferee of that registration. It is immaterial whether such transfer was made before the 1st September, 1946, the date of coming into force of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224, or after such date. The position is different when the registration of the transferor is not based on the survey plan. The case of *Hji Savva v. Maroullou* (supra) is clear on this point.

Applying the above principles to the facts and circumstances of the case in hand, and assuming that possession of the disputed portion of land by the predecessors in title of the wife of the respondent, could be added up, so that she could complete the ten years required period under the old Law, as found by the trial Judge, since the transfer of the property in the name of the respondent took place after the coming into force of the new Law, her possession could not be added up to that of the respondent, as the certificate of registration was based on the survey plan and did not include the disputed portion.

To make matters more understandable, let us suppose that the wife of the respondent was the purchaser of the property instead of Evlambia Omirou Demetriades and was keeping it in her pos-

session till the time she transferred it in the name of the respondent in 1954. Certainly she would have completed the required ten years period to enable her to obtain prescriptive right over the disputed portion prior to the 1st September, 1946, the date of the coming into force of Cap. 224.

And I pose the question. Could the position of her husband be different from the position of the appellant in the case of *Papageorghiou* v. *Komodromou* (supra)? Certainly not. It would be exactly the same.

However, as I have already said earlier in this judgment, the trial Judge was wrong in deciding that possession of the disputed piece of land could be added up to that of the wife of the respondent, as he has misinterpreted and applied the words "formal transfer" referred to in the case of *Papageorghiou* v. *Komodromou* (supra).

In the present case we have it that the registrations of both the appellant and the respondent on 25.11.24, shortly after the General Survey for the Paphos District had been completed, were issued in the name of Ioulios D. Loizides under Nos.4945 and 4952, respectively, both based on the survey plan. Registration No.4945, eventually the property of the appellant, was identified as being plot 112 comprising 22 donums and three evleks in extent and covering the disputed piece of land, was transferred as a result of a forced sale at a public auction to Melissa Bank, as the highest bidder, under Registration 6104 dated 25th November, 1933. About two months later, this property was transferred in the name of the appellant under Registration No. 6153 dated 20th January, 1934.

Registration No. 4952, eventually the property of the respondent, was identified as plot 392 comprising five donums and 2 evleks in extent, was also transferred, as a result of a forced sale and public auction in the name of Evlambia Omirou Demetriades, as the highest bidder, under Registration No.6373 dated 21st May, 1936.

Obviously, what was put up for sale at the public auction of both properties and formally transferred through the D.L.O., was

plot 112 which included the disputed portion in the name of Melissa Bank and plot 392 in the name of Evlambia Omirou Demetriades. So, when the wife of the respondent bought plot 392 from Andrianou Iouliou Loizides, who had purchased it from Evlambia Omirou Demetriades what was formally transferred in her name through the D.L.O., was a piece of land of an extent of 5 donums and 2 evleks which did not include the disputed portion. Consequently, the disputed portion was never formally transferred in the name of the successive owners of plot 392 and so no one of them had completed the ten years prescriptive period required under the Law in force prior to 1st September, 1946.

For the reasons stated above, I would allow the appeal, set aside the judgment of the trial Court and give judgment and Order as per paragraphs (a) and (b) of the claim of the plaintiff in the action, with costs, both here and in the Court below.

L. Loizou, J.: I have had the advantage of reading and discussing the judgment of my brother Malachtos, J. with him and I am in full agreement that for the reasons stated therein the appeal should be allowed.

It is common ground that the disputed portion of land is included in appellant's registration 6153 of the 20th January, 1934; it is also a fact that shortly after the completion of the general survey in Paphos on the 27th May, 1924, appellant's plot was identified as plot 112 and that of the respondent as plot 392, in both instances after a local inquiry and that the respective title deeds of the two properties are related to a survey plan made to scale.

Having regard to the history of the registrations of the two plots, which is given in detail in the judgment, even on the assumption that any possessory rights may have been vested in the predecessor-in-title of the respondent, his wife Maria Evangeli Charalambous, in respect of the disputed portion of land - which does not seem to be the case - such rights could not pass to her husband, the respondent, when plot 392, which admittedly did not include the disputed land, was registered in his name on the 25th May, 1954 i.e. after Cap. 224 came into force on the

1st September, 1946, under registration 7724 and this on account of s.50 thereof.

In the result the judgment of the trial Court is set aside and the appeal is allowed by majority with costs here and in the Court below.

Appeal allowed by majority. Order for costs as above.