30/1954

In the Privy Council.

No. 32 of 1953.

ON APPEAL FROM THE COURT OF APPEAL, MALTA

BETWEEN

ANTONIO CASSAR TORREGGIANI nomine (*Plaintiff*) APPELLANT.

AND

PAOLO and EMMANUELE PISANI (*Defendants*) RESPONDENTS.

CASE ON BEHALF OF THE RESPONDENTS

RECORD

1.—This is an Appeal, by leave of that Court, from a Judgment of the Court of Appeal of Malta dated the 12th day of December, 1952, upon an Appeal by the Respondents from a Judgment of the First Hall of H.M. Civil Court dated the 31st day of October, 1951. p. 78 p. 63 *et seq* p. 36 *et seq*

2.—The question for determination upon this Appeal is whether the Appellant, who sues as representing the Cassar Company, Limited, by virtue of Clause 6 of its Deed of Settlement, as owner of St. George's Flour Mills at Church Wharf, Marsa, and of two adjacent fields known as "l-Ghalqa ta' Xatt il-Qwabar" and "l-Ghalqa tal-Marsa" was entitled to the right of pre-emption which he claims to have exercised on the 26th day of June, 1948, over certain tenements belonging to the Respondents and known as Nos. 25 to 38 inclusive Church Wharf, Marsa. p. 1 Exhibits, p. 8 p. 7 Exhibits, p. 3 *et seq*

3.—By the Civil Code of Malta (Ch. 23 of the Revised Edition of the Laws of Malta 1942) it is provided *inter alia* as follows :

S. 440. (1) Tenements at a lower level are subject in regard to tenements at a higher level to receive such water and material as flow or fall naturally therefrom without the agency of man.

(2) It shall not be lawful for the owner of the lower tenement to do anything which may prevent such flow or fall.

(3) Nor shall it be lawful for the owner of the higher tenement to do anything whereby the easement of the lower tenement is rendered more burdensome.

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S. 446. [Presumption as to ownership of party wall].

(3) Where there is a building on one side and a courtyard garden or field on the other side, the wall is presumed to belong entirely to the owner of the building.

S. 482. Every owner shall construct the roofs of his building in such a manner that the rainwater shall not fall on the neighbouring tenement.

S. 492. (2) Continuous easements are those the enjoyment of which is or may be continuous without the necessity of any actual interference by man, such as the easement of watercourses, eavesdrop, prospect and others of a like nature.

(4) Apparent easements are those the existence of which appears from visible signs, such as a door or window or an artificial watercourse.

S. 494. Continuous and apparent easements may be created

(b) by prescription, if the tenement over which such easements are exercised may be acquired by prescription.

S. 499. (1) In order to acquire an easement by prescription, possession for a period of not less than thirty years is necessary.

S. 502. Any easement which the emphyteuta, usufructuary or tenant suffers to be exercised over the tenement, without any pre-existing title, shall not prejudice the *dominus* or the owner of such tenement notwithstanding any length of time during which the easement may have been exercised.

S. 1508. (1) The right of pre-emption granted by law consists in the right of a person of assuming a sale made to another person, succeeding to all his rights and obligations.

S. 1510. (1) The right of pre-emption is granted
(c) to the owners of neighbouring tenements.

S. 1512. (1) The right of pre-emption by reason of neighbourhood is only granted to the persons and in the order hereinafter mentioned

(b) to the owner of a contiguous tenement enjoying an easement over the tenement sold.

(2) The easements mentioned in this section are those only which are created by the act of man or which consists in the right of way or watercourse.

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S. 1518. Provided the title shall have existed since the time of the sale, the time within which the right of pre-exemption may be exercised, ... is of one year to be reckoned from the day of the registration of the deed of sale in the Public Registry .....
.....
.....

S. 1527. (1) Where two or more tenements are sold together, the party having the right of pre-emption in regard to one of such tenements, may exercise his right in regard to that tenement only, and he cannot be compelled to repurchase any of the others.

S. 1654. The lessee is bound, under pain of paying damages, to give notice to the lessor without delay of any encroachment or damage affecting the thing let.

4.—The Appellant's said two fields lie to the North and West of the Respondent's said property upon which a row of Warehouses, which were destroyed by enemy action in the late War, formerly stood. The extreme eastern end of St. George's Flour Mill lies to the North-west of part of the Respondents' property. To the Southwest of the Respondents' said property between it and the Appellant's said property there is a yard (hereinafter called " the yard ") which is leased to the Appellant by a third party. Exhibits, p. 11 p. 38, ll. 38–40 p. 16, ll. 21–24

5.—St. George's Flour Mills comprises Warehouses and a Flour Mill. Until a date which has not been established but which was about twenty-six years prior to the commencement of this action, when the Appellant added two additional warehouses to those already existing, the rainwater catchment of the Warehouse roofs fell into the yard through rainwater spouts. The rainwater catchment of parts of the roof of the Flour Mill also found its way into the yard by means of a man-made channel through the Appellant's property between the points marked A and B and D on the Plan which forms the Appellant's Exhibit E. From the yard the rainwater is alleged to have found its way into the main channel hereinafter mentioned. p. 13, ll. 6–8 ; p. 15 ll. 7–8 ; p. 15, ll. 32–33 ; p. 16, ll. 20–21 ; p. 17, ll. 22–23 p. 16, ll. 21–26 p. 16 ; ll. 32–35 ; p. 17, ll. 1–8 p. 13, ll. 9–11 Exhibits, p. 11 p. 15, ll. 20–24 ; p. 16, ll. 25–28

6.—About twenty-six years prior to the commencement of this action the Appellant built two new Warehouses upon his said property, and at the same time extended the existing ditch between the points marked A and B on the said Plan to the point marked C and thereon to the point marked E thereon, thus skirting the new warehouses. This new ditch drained in the said main channel through a drainhole situate in the party wall at E. p. 13, ll. 6–20 Exhibits, p. 11

7.—Neither the original channel A–B–D (hereinafter called " the Original Channel ") nor the extended channel A–B–C–E (hereinafter called " the Ditch ") is visible from the Respondents' property, which is on a Exhibits, p. 11 p. 69, ll. 30–42 ; p. 70, ll. 1–5

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lower level than the Appellant's nor was there any evidence to show that any of the former owners thereof were aware of the existence of the same.

p. 23, ll. 13, 14
p. 70, ll. 26–30
p. 23, ll. 10–12 ; p. 38, ll. 40–42 ; p. 39, ll. 1–2
p. 23, ll. 30–38
p. 24, ll. 2–6
Exhibits, p. 11

8.—The Appellant's said fields stand on a higher land than the Respondents' said property with the result that rainwater falling thereon flows by the force of gravity into the Respondents' said property, which is separated from the said fields by a two foot wall which although described as a " party " wall was built by the Respondents' predecessors in title and as to which there was no evidence that it was not the Respondents' property and which therefore by virtue of Section 446 (3) of the Civil Code must be deemed to be the Respondents' property. This wall was constructed over 30 years ago, and is supplied with a number of draining holes at ground-level, each being approximately one foot square. These holes lead to a conduit, left in the thickness of the wall, which descends vertically to a water channel (hereinafter called " the Main Channel ") which runs the whole length of this wall on the Respondents' side and which ultimately drains into the sea after traversing the site of one of the warehouses comprised in the Respondents' said property.

p. 38, ll. 1–3

9.—The Respondents acquired their said property at the price of £15,200 by virtue of a Deed enrolled in the Records of Notary Victor Brisazza on the 26th day of June, 1947.

Exhibits, p. 3
p. 1

10.—By a Schedule of Pre-Emption and respective deposit dated the 26th day of June, 1948, the Appellant purported to exercise the right to recover the said property from the Respondents' possession by reason of neighbourhood and any other lawful title whatsoever. The Respondents, deeming the Appellant's said act to be wholly misconceived, took no step to comply with the same. The present proceedings were thereupon commenced by the Appellant on the 19th day of February, 1949.

p. 28, ll. 12–21

11.—As finally formulated, the Appellant's claim is that he is entitled to exercise a right of pre-emption by reason of the following three matters:—

(i) The existence of the flow of rainwater from the roofs of his old warehouses into the yard and thence into the Main Channel ;

(ii) The existence of the flow of rainwater from the roofs of his warehouse into the Ditch and thence into the Main Channel ; and

(iii) The existence of the flow of rainwater from his said two fields into the Main Channel through the draining holes and conduits in the said party wall.

Exhibits, p. 23

12.—On the 28th day of February, 1950, the Respondents entered a protest against the construction of the Ditch in accordance with Title VII of the Civil Procedure Code (Ch. 15 of the Revised Edition of the Laws of Malta, 1942).

13.—The Respondents contended :— RECORD

(i) With regard to the flow of water from the roofs of the Appellant's old warehouses into the yard and thence into the Main Channel that the site of each of their Warehouses was a separate parcel of property, and that in consequence only that site contiguous to the yard could possibly be the subject of pre-emption ; but that not even this site was so subject, since the yard was not the property of the Appellant, being held by him only on lease, so that the contiguity required by law failed ; p. 29, ll. 7–23

(ii) With regard to the flow of water from the roofs of the Appellant's warehouses into the Ditch and thence into the Main Channel, that only the site of the one warehouse wherein the Ditch joins the Main Channel could possibly be the subject of pre-emption (as being property to which the Appellant's property is contiguous within the meaning of Section 1512 (1) (b) of the Civil Code), but that not even this site was so subject since the ditch (which had been constructed contrary to Sections 482 and 440 (3) of the Civil Code) had been constructed less than 30 years before the said protest and could therefore be removed and that the Appellant could not thereby have gained any easement over the Respondents' property. p. 29, ll. 24–40 p. 10, ll. 5–8

(iii) With regard to the flow of rainwater from the Appellant's fields through the draining holes and conduits in the said party wall into the Main Channel that such easement remained, notwithstanding the construction of the work on the servient tenement, a natural easement. p. 30; p. 31, l. 12

14.—After certain interlocutory proceedings including the furnishing of a report by a Technical Referee and an Enquiry held *in situ* the First Hall of H.M. Civil Court (The Hon. Mr. Justice J. Carvana Colombo, B. Litt., LL.D.) by its judgment delivered on the 31st day of October, 1951, held :— p. 20, *et seq* p. 26 p. 36, *et seq*

(a) That each and every one of the Warehouse sites belonging to the Respondents was contiguous within the meaning of Section 1512 (1) (b) of the Civil Code with the Appellant's said property.

(b) That the connection of the Ditch with the Main Channel was not resolutive in that it was made within 30 years of the exercise of the right of pre-emption, but that what happened upon the construction of the Ditch was that the rainwater was diverted into the Main Channel in a different way ; and

(c) That by reason of the construction of the said party wall and the draining holes therein, and of the existence of the Main

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Channel, the easement of flow of rainwater was in all cases one created by the act of man within the meaning of Section 1512 (2) of the Civil Code.

p. 41, ll. 17–23

15.—The Court accordingly allowed the Appellant's claim and condemned the Respondents to effect a re-sale of their said property within twelve days, subject to the proviso that, in default, the re-sale thereof should be deemed to have been effected in pursuance of its said judgment and, in the circumstances of the case, ordered each party to bear its own costs bar the Registry Fees which were to be paid by the Respondents.

p. 45, *et seq*
p. 49, *et seq*
p. 56, *et seq*
p. 59, *et seq*

16.—From the Judgment both parties appealed: the Respondents upon the merits and the Appellant upon the question of costs. Both parties substantially adhered to their previous contentions.

p. 53, *et seq*
p. 63, *et seq*
p. 71, ll. 31–35

17.—After a preliminary inquiry *in situ* the Court of Appeal (The Hon. Mr. Justice A. J. Montanaro Gauci, LL.D., Acting President, The Hon. Mr. Justice W. Harding, B. Litt., LL.D., and the Hon. Mr. Justice T. Goulder, LL.D.) delivered its judgment allowing the Respondents' Appeal and dismissing the Appellant's Cross Appeal and ordering the Appellant to pay the costs both of the First and Second Respondents on the 12th day of December, 1952. The Court held

(i) So far as the flow of rainwater from the Appellant's old warehouses into the yard and thence into the Main Channel was concerned, that since that flow was on to the property of a third party on lease to him, the Appellant could not gain any prescriptive easement therefor; that there was no evidence to show the position before 1913 when the Appellant became tenant of the yard; and that even if such an easement had been acquired the Appellant did not claim to exercise the right of pre-emption in respect of the yard, which was the only neighbouring tenement within the meaning of Section 1512 (1) (b) of the Civil Code.

(ii) So far as the flow of rainwater from the Appellant's property into the Ditch and thence into the Main Channel was concerned, that the period of prescription commenced to run, if at all, from the date of the construction of this ditch; that a period of thirty years had not yet elapsed from such date; and that time has not yet commenced to run since the Ditch was invisible from the alleged servient tenement and that the easement was accordingly not " apparent " within the meaning of Section 492 of the Civil Code.

(iii) So far as the flow of rainwater from the fields into the Main Channel was concerned, that the works constructed upon the Respondents' land merely regulated the exercise of, and did

not cause any alteration in the nature of, the easement; that the flow of water still followed its natural course; and that in consequence it was not an easement created " by act of man."

18.—Against the said Judgment of the Court of Appeal the Appeal is now preferred, final leave so to do having been granted by the Court of Appeal on the 26th day of June, 1953. p. 78

19.—The Respondents humbly submit that this Appeal should be dismissed for the following among other

REASONS

(1) BECAUSE the Appellant is not entitled as against the Respondent to any easement " created by the act of man " within the meaning of Section 1512 (2) of the Civil Code.

(2) BECAUSE the only parts of the Respondents' property which could possibly be subject to pre-emption by reason of any easement of flow of rainwater from the roofs of the St. George's Flour Mills are (*a*) that adjoining the yard which is not in the ownership of the Appellant, so that the contiguity required by law fails and (*b*) that which receives the flow of water from the Ditch, but which is not bound so to receive it the title of the Appellant to any easement of flow being resolutive in that the Ditch was constructed within thirty years before the Protest of the 28th day of February, 1950.

(3) Because neither the Original channel nor the Ditch is visible from the Respondents' property, with the result that the flow of water therein was not " apparent " and that in consequence the Appellant could not acquire any prescriptive right to discharge water therefrom on to the Respondents' property.

(4) BECAUSE for the reasons therein stated the Judgment of the Court of Appeal was right.

RAYMOND WALTON.

In the Privy Council.

No. 32 of 1953.

ON APPEAL FROM THE COURT OF APPEAL, MALTA.

BETWEEN

ANTONIO CASSAR TORREGGIANI nomine (*Plaintiff*) APPELLANT

AND

PAOLO and EMMANUELE PISANI (*Defendants*) RESPONDENTS.

CASE ON BEHALF OF THE RESPONDENTS

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