

SPYROS F. MICHAELIDES,

*Appellant-Applicant,*

*v.*

CHRYSSIS DEMETRIADES, ADVOCATE OF LIMASSOL,  
TRUSTEE OF THE ESTATE OF SPYROS F.  
MICHAELIDES, BANKRUPT, AND ANOTHER,

*Respondents.*

*(Civil Appeal No. 4634).*

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MICHAELIDES  
*v.*

CHRYSSIS  
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ADVOCATE OF  
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TRUSTEE OF THE  
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*Bankruptcy—Mortgage—Trustee—Sale of mortgaged house—  
House accommodation for debtor—Right of bankrupt to claim  
exemption—Powers and duties of trustee in bankruptcy in  
relation to bankrupt's property—House accommodation in-  
cluded in one registration with other mortgaged property—  
It vests in the trustee and it is divisible among creditors,  
subject to the mortgage—Bankrupt has no right to claim  
exemption from sale—Because the house in question being  
a mortgaged property is not exempt from execution and,  
consequently, not exempt from sale by the trustee in bankrup-  
tcy—Otherwise by his bankruptcy the debtor would have  
been put in a better position—It follows that the bankrupt  
has no locus standi to complain against the trustee in relation  
to the bona fide sale of the mortgaged house accommodation  
in question—As he had no interest in the property—The  
Bankruptcy Law Cap. 5, sections 9(2), 19(1), 41(a),  
42(a)(b), 49, 54(a), 56, 74, 75 and 90(1), and rules 11,  
12 and 13 of the Second Schedule to the same Law; The  
Civil Procedure Law, Cap. 6, sections 23 and 28(a); The  
Civil Procedure Law, 1885, sections 21, 48 and 53; The  
Bankruptcy Rules, rules 17, 20 and 21; The Rules of Sale,  
rule 9(1)(3), and Appendices "A" and "B" thereto;  
The English Bankruptcy Rules, 1952, rules 73 and 74.*

*Mortgage—A mortgage in Cyprus is not an interest or estate  
in land but only a charge thereon—See, further, under Bank-  
ruptcy above.*

*House accommodation—Exemption from execution—Mortgaged  
house accommodation—Not so exempted—See under Bank-  
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*Immovable Property—Mortgaged—House accommodation—Sale*  
—See above under *Bankruptcy; Mortgage.*

*Words and Phrases—“The property of the bankrupt” in sections 41 and 42 of the Bankruptcy Law, Cap. 5—“Last lot” in rule 9(3) of the Rules of Sale.*

*Sale of immovable property—Rules of sale, rule 9(1)(3).*

*Interest or estate in land—Mortgage is not an interest or estate in land but only a charge thereon—Effect of the distinction.*

*Estate in land—Mortgage is not an estate in land—See immediately above.*

The appellant, who is a bankrupt, is complaining against the act of the trustee in bankruptcy (the first respondent) to sell the whole of the bankrupt's immovable property which was mortgaged at the time, without providing for him “house accommodation”, under the provision of section 42(b) of the Bankruptcy Law, Cap. 5 and section 23 of the Civil Procedure Law, Cap. 6. The salient facts of this case are as follows:

The bankrupt mortgaged his immovable property which is the subject matter of these proceedings, to the Ktimatiki Trapeza Kyprou Ltd. for the sum of £8,500 by virtue of a mortgaged bond signed in December 1961. At the time of the sale *viz.* on the 23rd March 1966, the said mortgaged property consisted of an old house on the ground floor with yard, a shop, a large new store and two small stores behind it in continuation. Above the new large store there existed also a newly built house (flat). The new buildings were not mentioned in the relevant registration No. 13481 as they were erected after the issue of the title-deed in 1949; but they were all standing on plot 57 which was registered under one title-deed as aforesaid in the bankrupt's name and mortgaged to the aforesaid bank under that same title-deed.

The mortgage debt was never paid by the bankrupt and the mortgage was subsisting at the time when he was adjudged bankrupt by order of the District Court of Limassol on the 18th March, 1965. On the 14th March, 1965 an advocate acting on behalf of the bankrupt wrote a letter to the trustee (who was appointed on April 6, 1965) pointing out to him, *inter alia*, that it was his duty to apply

the Land Registry Office to secure separate registrations in respect of (a) the flat on the first floor which was the bankrupt's residence, (b) the stores and (c) the remaining property, so that properties (c) and (b) could be sold first in satisfaction of the mortgage debt, and in case the debt were not satisfied, and only then, to sell the bankrupt's accommodation under (a). On the 19th March, 1966, the mortgagee bank pressed the trustee to sell the mortgaged property in satisfaction of the mortgage debt notifying him that if he failed to do so they would proceed with the sale of the mortgaged property. The trustee replied on the 21st March, 1966, informing the mortgagee bank that he intended to sell the mortgaged property in satisfaction of the mortgage debt and enquiring to be informed whether they would be prepared to consent to the splitting of the one mortgaged registration into three registrations, as requested by the bankrupt's advocate, in order to have the house accommodation sold last in case the mortgage debt could not be satisfied from the sale of the other property comprised in the mortgage. The bank replied on the same day stating that they did not consent to any amendment of the registration or splitting of the mortgaged property or sale in separate parts of the said property, and that they were of the view that any such arrangement would be likely to prejudice their rights. By their letter they consented to the trustee proceedings with the sale of the whole property, provided that the sale price should not be less than the amount due to them under the mortgage and that the trustee should pay them off immediately on the sale of the property.

On the 23rd March, 1966, the Committee of Inspection having consented on behalf of the creditors, the trustee sold the property and transferred it to the second respondent for the sum of £10,500. Immediately on the sale and transfer of the mortgaged property, the trustee paid off the mortgage debt amounting then to £8,831.140 mils, and the balance of £1,688.860 mils passed to the trustee under the provisions of the Bankruptcy Law, as money available in the bankruptcy together with another sum of £2,226 already in the hands of the trustee. The trial Court found that the sale price of £10,500 was a fair and reasonable one and that the sale of the property excluding the residence would not be sufficient to pay off the mortgage debt.

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Soon after the sale the bankrupt filed an application with the District Court of Limassol under section 75 of the Bankruptcy Law, Cap. 5, (which section is quoted in the Judgment, *post*), praying for (a) an order setting aside the sale and transfer of the property, and (b) alternatively, any other order which the Court would deem necessary and just.

The trial Court found that the bankrupt's claim for house accommodation was groundless and that he was at no material time entitled to exemption under the relevant provision of the Bankruptcy Law (section 42(b)). The trial Court further held that the bankrupt's immovable property vested in the trustee who exercised his discretion fairly and reasonably and that he conveyed a good title in the property to the second respondent who was held to be a *bona fide* purchaser for value; and the Court dismissed the bankrupt's application. He now appeals against this judgment.

Under the provisions of the Bankruptcy Law, Cap. 5, the following property does not form part of the bankrupt's property divisible among his creditors, namely (a) trust property; and (b) "all property as would be exempt from execution under any Law for the time being in force in Cyprus". The expression "property" includes immovable property; and under the provisions of section 23 of the Civil Procedure Law, Cap. 6, (dealing with sale of immovable property in execution of a judgment debt—and not with sale of mortgaged property) "where the property consists in whole or in part of a house or houses there shall be left to or provided for the debtor such house accommodation as shall in the opinion of the Court be absolutely necessary for him and his family".

The appeal was argued on the following main grounds:-

- (1) That by mortgaging his house the bankrupt waived his rights to claim exemption for house accommodation only *vis-a-vis* the mortgagee and not generally *vis-a-vis* his other creditors or the trustee in bankruptcy;
- (2) that only property divisible among the bankrupt's creditors vests in the trustee and may be sold by him. In the present case the house accommodation

for the bankrupt was exempt under the law and it was, therefore, not divisible among the creditors;

- (3) that the trustee acted in excess of powers (a) in paying off the mortgaging debt, and (b) selling and transferring the whole of the bankrupt's immovable property, including his house accommodation.

*Held, I. As to ground (1) supra:-*

The bankrupt waived his rights to claim exemption, under section 23 of the Civil Procedure Law Cap. 6 and section 42(b) of the Bankruptcy Law, Cap. 5, for the house accommodation which was mortgaged by him, not only vis-a-vis his mortgagee but, generally, vis-a-vis his other creditors and the trustee in bankruptcy. What concludes the matter in this case is that the house accommodation formed part and parcel of one registration with the other immovable property and the mortgagee objected to its separation from that registration and to any separate sale. If there was a separate registration in respect of the house accommodation then, under the Rules of Sale, rule 9(3), this should "form the last lot to be sold", if the mortgage debt had not been satisfied by the sale of the other property. (*Philippides v. Hira* (1909) 9 C.L.R. 3; and *Triantafyllides v. Solomou* (1904) 6 C.L.R. 90, both distinguished. Reasoning in the following two cases adopted: *Ttofallides and Another v. Mehmed Ali* (1918) 11 C.L.R. 3; *Themistocles and Another v. Changari* (1918) 10 C.L.R. 124, at p. 125).

*Held, II. As to ground (2) supra:-*

(1) In considering whether house accommodation could or should have been exempted in this case, we shall ascertain the bankrupt's rights prior to his bankruptcy, because by his bankruptcy he could not be placed in a better position in this respect. In the present case we are concerned with property, including house accommodation, which was mortgaged long before the debtor was adjudged bankrupt, and we have to apply all relevant provisions of the Bankruptcy Law, Cap. 5, including sections 19, 41, 42, 49 and 54—(Note: The material parts of those sections are quoted in the Judgment *post*)—having regard to that material fact.

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(2) On the strength of the English authorities (see the cases quoted in 2 Halsbury's Laws of England 3rd edn. p. 422, paragraph 839, note (h)) we hold that the bankrupt's mortgaged property is this case, including the house accommodation, vested in the trustee subject to the mortgage. If the mortgaged property in this case did not include any house accommodation it would undoubtedly be divisible among the creditors subject to the mortgage, and it would so vest in the trustee under section 49 of the Bankruptcy Law; and under section 54 the trustee had power to sell such property either by public auction or by private contract, and transfer the mortgaged property, but subject to the mortgage and to the rights of the mortgagee: Cf. *Nicola v. Sofocleous* (1955) 20 C.L.R. Part II, 49, at p. 50, where it was held that a mortgage in Cyprus is not an interest or estate in land but only a charge thereon.

(3) But the position remains the same with regard to the mortgaged house (flat) in question. This house, which was included in the mortgaged property under one registration with all the other property, is not exempt from execution under section 23 of the Civil Procedure Law, Cap. 6 (*Supra*), because the law does not exempt from sale of a mortgaged house; consequently it was, subject to the mortgage, divisible among the creditors and vested in the trustee (see sections 19(1), 41, 42(b), 49 of the Bankruptcy Law, Cap. 5, quoted in the Judgment, *post*); and under section 54 the trustee had power to sell it as he did. The trustee, indeed stepped into the shoes of the debtor who, *inter alia*, owed a mortgaged debt of £8,500 (plus interest), and owned, under one registration immovable property including house accommodation, which was mortgaged to the mortgagee bank, as security. It follows that this house accommodation was not exempt from execution at the material time, and by his bankruptcy the debtor could not be put in a better position.

*Held, III. As to ground (3) supra :-*

(1)(a) Counsel for the Bankrupt submitted that under the law the trustee had no power to redeem the mortgage as the Second Schedule to the Bankruptcy Law, Cap. 5 did not give him such power; and he contended that so long as the mortgagee bank did not prove or value its security, the trustee had no right to sell the mortgaged

property (rules 11, 12 and 13 of the Second Schedule to the Bankruptcy Law). In support of his submission, counsel referred to *In re Vautin, Ex parte Saffery* [1899] 2 Q.B. 549.

(b) *Vautin* case (*supra*) is, however, inapplicable to the facts of the present case, because the mortgagee here pressed the trustee to sell and pay off the mortgage debt, otherwise he (the mortgagee) would proceed to sell the mortgaged property himself in satisfaction of the mortgage debt. Consequently, no question of redemption in the strict sense of that word may be said to arise in the present case.

(c) As already stated (*supra*) a mortgage in Cyprus is not an interest or estate in land but only a charge thereon. Consequently, if the mortgagee fails to enforce his right by the sale of the mortgaged property under the provisions of the law, it is the duty of the trustee to see that the mortgaged property is sold in satisfaction of the mortgage debt so that any surplus from such sale may be utilised in paying off unsecured creditors.

(2) We have already held that the mortgaged house (flat) could not be exempted from execution in any event. It was, therefore, not necessary for the trustee to apply to court for directions under section 74 of the Bankruptcy Law, Cap. 5. But, in any event, if the bankrupt was advised that he was entitled to exemption he was fully entitled to apply to court to decide this matter under section 90(1) of the said Law.

(3) We are of the view that it is not necessary for a mortgagee, in enforcing his right, to proceed under Bankruptcy Rules 20 and 21 (which correspond to rules 73 and 74 of the English Bankruptcy Rules, 1952). Normally a mortgagee may realise his security without any application to the court under rule 20. This rule applies only where the security cannot be realised without the intervention of the Court, or where the trustee challenges the validity of the security (cf. *Williams on Bankruptcy*, 17th edition, at pp. 605-6).

(4) It was counsel's contention that under the provisions of the Rules of Sale it was the duty of the official auc-

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ioneer to put up the properties for sale in no less than two lots, that is, first, the stores and other structures and last the house property. Now, rule 9(3) of the Rules of Sale provides: "Unless otherwise ordered by the Court or unless special instructions are given by the Principal Land Registry officer after application of the mortgagor or judgment debtor, house property will form the last lot to be sold". As a matter of construction, and considering the wording of rule 9(1) and (3), and Appendices "A" and "B" to the Rules of Sale, we hold the view that the expression "lot" in rule 9(3) means the whole property comprised in one registration and that the Land Registry has no power to split a registration into two lots in order to sell them separately.

*Held, IV: As to the question of the bankrupt's locus standi in the present proceedings:*

In the present case the bankrupt had no right to exemption as the house accommodation was included in one registration with other mortgaged properties. It follows that, in the absence of fraud, he has no *locus standi* to complain neither in these proceedings (which are based on section 75 of the Bankruptcy Law) nor on an application under section 90(1), that the trustee either sold at an under-value or that he mismanaged the sale, as the bankrupt had no interest in the property. (See *Jarrett v. Barclays Bank Ltd.*, [1947] 1 All E.R. 72, at pp. 75 and 77; *Re a Debtor v. Dodwell* [1949] 1 All E.R. 510).

*Appeal dismissed with costs.*

Cases referred to:

*Philippides v. Hira* (1909) 9 C.L.R. 3;

*Triantafyllides v. Solomou* (1904) 6 C.L.R. 90;

*Ttofallides and Another v. Mehmed Ali* (1918) 11 C.L.R. 3;

*Themistocles and Another v. Changari* (1918) 10 C.L.R. 124;

*Kenan v. Skordi* (1910) 10 C.L.R. 69;

*Bendall v. McWhirter* [1952] 1 All E.R. 1307, at pp. 1317 and 1318;



*Nicola v. Sofocleous* (1955) 20 C.L.R. Part II 49, at p. 50;

*In re Vautin, Ex parte Saffery* [1899] 2 Q.B. 549;

*In re Button, Ex parte Voss* [1905] 1 K.B. 602;

*Jarrett v. Barclays Bank Ltd.* [1947] 1 All E.R. 72, at pp. 75 and 77;

*Re a Debtor v. Dodwell* [1949] 1 All E.R. 510;

*See, also the cases quoted in 2 Halsbury's Laws of England, 3rd edition, p. 422 para. 823 note (h).*

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### Appeal.

Appeal by applicant, a bankrupt, against the judgment of the District Court of Limassol (Malachtos P.D.C. & Loris D.J.) dated the 25th May, 1967 (Application No. 1/65), whereby his application against the act of the trustee in Bankruptcy to sell the whole of the applicant's immovable property, without providing him for "house accommodation", under the provisions of section 42(b) of the Bankruptcy Law, Cap. 5, and section 23 of the Civil Procedure Law, Cap. 6, was dismissed.

*Sir Panayiotis Cacoyiannis* with *P. Pavlou*, for the appellant.

*The first respondent in person.*

*A. Myrianthis*, for the second respondent.

*Cur. adv. vult.*

The judgment of the Court was delivered by :-

JOSEPHIDES, J. : The appellant in this case, who is a bankrupt, is complaining against the act of the trustee in bankruptcy (the first respondent) to sell the whole of the bankrupt's immovable property, which was mortgaged at the time, without providing for him "house accommodation", under the provisions of section 42(b) of the Bankruptcy Law, Cap. 5, and section 23 of the Civil Procedure Law, Cap. 6. The second respondent is the purchaser for value of the aforesaid property.

Counsel for the bankrupt stated in the course of the argu-

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ment that he was not attacking the good faith of the trustee or the purchaser, but he contended that the trustee erred in that he acted beyond his statutory powers.

The bankrupt mortgaged his immovable property, which is the subject matter of these proceedings, to the Ktimatiki Trapeza Kyprou, Ltd., for the sum of £8,500 by virtue of a mortgage bond signed on the 1st December, 1961, and expiring 30 days later. The consideration for the bond was stated to be the renewal of a previous mortgage for £6,000 dated the 30th October, 1956. The said bond contained a mortgage clause whereby the bankrupt mortgaged to the said bank the property described in the bond, together with all additions or alterations and all structures which might be built thereon, and authorised the bank to sell all these properties at the expiration of the bond either through the Land Registry Office or by civil action. The mortgaged property was described as follows:

“Lemesos, Katholiki quarter, house and yard, the whole, Registration No. 13481/19.8.1949; sheet/plan 54/58, block IX, plot 57”.

The trial Court found that at the time of the sale the said mortgaged property consisted of “an old house on the ground floor with yard, a shop, a large new store and two small stores behind it in continuation. Above the large store there existed also a newly built house (flat) consisting of an entrance hall, sitting-dining room, kitchen, corridor, two bedrooms, bathroom and W.C.” According to the bankrupt’s evidence the new large store was built in 1955, the new house (flat) over it in 1958; one of the small stores in 1960 and the smaller store in 1962. The new buildings were not mentioned in the registration in question as they were erected after the issue of the title deed in 1949; but they were all standing on plot 57 which was registered in the bankrupt’s name and mortgaged to the aforesaid bank.

The mortgage debt was never paid by the bankrupt and the mortgage was subsisting at the time when he was adjudged bankrupt. The said property was sold and transferred by the trustee to the second respondent on the 23rd March, 1966, for the sum of £10,500, and thereupon the bankrupt filed an application with the District Court of Limassol under the provisions of section 75 of the Bankruptcy Law, Cap. 5, praying for (a) an order setting aside the sale and transfer of

the property, and (b) in the alternative, any other order which the court would deem necessary and just.

Section 75 of the Bankruptcy Law, reads as follows:-

“75. If the bankrupt or any creditor, debtor or other person is aggrieved by any act or decision of the trustee he may apply to the Court, and the Court may confirm, reverse, or modify the act or decision complained of, and make such order in the premises as it thinks just”.

The trial Court found that the bankrupt's claim for house accommodation was groundless and that he was at all material times not entitled to exemption under the relevant provision of the Bankruptcy Law. The Court further held that the bankrupt's immovable property vested in the trustee who exercised his discretion fairly and reasonably and that he conveyed a good title in the property to the second respondent who was held to be a *bona fide* purchaser for value; and the Court dismissed the bankrupt's application.

The appeal was argued before us on the following main grounds:

(1) that by mortgaging his house the bankrupt waived his rights to claim exemption for house accommodation only *vis-a-vis* the mortgagee and not generally *vis-a-vis* his other creditors or the trustee in bankruptcy;

(2) that only property divisible among the bankrupt's creditors vests in the trustee and may be sold by him. In the present case house accommodation for the bankrupt was exempt from execution under the law and it was, therefore, not divisible among the creditors;

(3) that the trustee acted in excess of powers (a) in paying off the mortgage debt, and (b) in selling and transferring the whole of the bankrupt's immovable property, including his house accommodation; and

(4) that the finding of the trial Court that the bankrupt was not entitled to exemption of house accommodation from sale was, having regard to the evidence, wrong.

It is now convenient to state the facts which are not in dispute in any material particular.

The bankrupt's son left for London in June or July 1964 to study and work, and at the material time he was employed

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by the Bank of Cyprus in London earning about £11 per week. In October-November 1964, the bankrupt had meetings with his creditors in order to reach a settlement with them but without any result. In November 1964 the bankrupt remitted to London the sum of £1,016.- On the 7th December, 1964, he applied to the Land Registry Office in Limassol for the issue in his name of two separate title-deeds in respect of his immovable property described above, under plot 57. As the property was mortgaged the consent of the mortgagee was required before the Land Registry could proceed to issue two separate title-deeds. This consent of the mortgagee was never produced by the bankrupt and the Land Registry did not issue separate title-deeds. The object of this application to the Land Registry was to have a separate title-deed for the flat on the first floor in which the bankrupt was residing.

On the 7th January, 1965, a writ of execution against the bankrupt's movable property having been issued by virtue of a judgment, his stores were closed by the court bailiff; and some six days later, that is, on the 13th January, 1965, the bankrupt left secretly for the United Kingdom without informing any of his creditors or his advocate. On the 16th January, 1965, a bankruptcy petition was filed against him, of which he received notice fifteen days after he left for the United Kingdom. A receiving order was issued against him on the 3rd February, 1965, and he was adjudged bankrupt on the 18th March, 1965. The present trustee was appointed on the 6th April, 1965, when he took possession of the bankrupt's immovable property. Meantime the bankrupt's wife had also left for the United Kingdom at the end of February of that year, and on the 30th March, 1965, the bankrupt acting as trustee for his minor son in London, purchased a leasehold property known as 46, Kendal Street, London, W.2., for the sum of £5,844.14.6d. In the trust-deed it was stated that the son was "beneficially owner of liquid assets not less than £6,000.0.0d." The said leasehold property consists of 10 rooms. The bankrupt, with his wife and son, lived in two rooms, from the 30th March, 1965, until February, 1966 (see below), and he leased the remaining eight rooms at £40.- per week.

In August, 1965, extradition proceedings were commenced against the bankrupt in London by the Government of the Republic of Cyprus. At first, he opposed the proceedings and he was kept in custody in Brixton Prison for 24 days.

He eventually submitted to an extradition order and he arrived in Cyprus on the 11th February, 1966, escorted by a member of the Cyprus Police Force. He was kept in custody for three days and then released on bail.

Meantime, in November, 1965, the trustee had advertised in the press the intended sale of the whole mortgaged property, giving a full description of the property, including the flat which the bankrupt used to occupy as his residence. This advertisement of sale was published in the "Eleftheria" newspaper on the 24th and 28th November, 1965, in the "Phileftheros" on the 25th and 26th November, 1965, and in the "Haravgi" on the 24th and 25th November, 1965.

On the 18th February, 1966, a written offer for £10,500 (firm for one month) was received from the second respondent. This was the only offer. The trustee brought it to the notice of the Committee of Inspection and he was authorised by them to sell the bankrupt's property to the second respondent for the sum of £10,500. On the 14th March, 1966, an advocate acting on behalf of the bankrupt wrote a letter to the trustee informing him that the bankrupt had returned to Cyprus and that his wife was expected to return soon, and pointing out to the trustee that it was his duty to apply to the Land Registry Office to secure separate registrations in respect of (a) the flat on the first floor which was the bankrupt's residence, (b) the stores and (c) the remaining property, so that properties (c) and (b) could be sold first in satisfaction of the mortgage debt, and in case the debt were not satisfied, and only then, to sell the bankrupt's house accommodation under (a). On the 19th March, 1966, the mortgagee bank pressed the trustee to sell the mortgaged property in satisfaction of the mortgage debt notifying him that if he failed to do so they would proceed with the sale of the mortgaged property. The trustee replied on the 21st March, 1966, informing the mortgagee bank that he intended to sell the mortgaged property in satisfaction of the mortgage debt and enquiring to be informed whether they would be prepared to consent to the splitting of the one mortgaged registration into three registrations, as requested by the bankrupt's advocate, in order to have the house accommodation sold last in case the mortgage debt could not be satisfied from the sale of the other property comprised in the mortgage. The mortgagee bank replied on the same day (21st March, 1966) stating that they did not consent to any amend-

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ment of the registration or splitting of the mortgaged property or sale in separate parts of the said property, and that they were of the view that any such arrangement would be likely to prejudice their rights. By their letter they consented to the trustee proceeding with the sale of the whole property, provided that the sale price should not be less than the amount due to them under the mortgage and that the trustee should pay them off immediately on the sale of the property.

On the 23rd March, 1966, the Committee of Inspection having consented on behalf of the creditors, the trustee sold and transferred the aforesaid property to the second respondent for the sum of £10,500. Immediately on the sale and transfer of the mortgaged property, the trustee paid off the mortgage debt amounting to £8,831.140 mils, and the balance of £1,668.860 mils passed to the trustee under the provisions of the Bankruptcy Law. In addition to this sum there was another £2,226 in the hands of the trustee as money available in the bankruptcy. The unsecured debts at the time were £38,000 (thirty-eight thousand pounds). Up to the time of the hearing of this application the trustee collected £4,700 (including the above), and he hoped to collect in all £6,000, less expenses. This would eventually allow payment of a dividend of 10 to 13 per cent to the creditors.

In any event, the trial Court found that the sale price of £10,500 was a fair and reasonable one and that the sale of the property, excluding the residence, would not be sufficient to pay off the mortgage.

The bankrupt, having been committed for trial before the Assizes, eventually pleaded guilty and was, on the 21st June, 1966, sentenced to one year's imprisonment on bankruptcy charges, three of which referred to the total sum of £1,016 which the bankrupt admitted having fraudulently remitted to London in November, 1964 (sec. 116 (j) of the Bankruptcy Law). His wife, who had all this time been in England, came to Cyprus on the 2nd or 3rd June, 1966, and left some three weeks later, on the 26th June, 1966, soon after the bankrupt's trial ended; and it would appear that during the present proceedings she was still living in the United Kingdom.

Having stated the facts we now proceed to consider the grounds of appeal. As already stated, the *first ground* was that by mortgaging his house the bankrupt waived his rights

to claim exemption for house accommodation only *vis-a-vis* the mortgagee and nobody else. Learned counsel for the bankrupt submitted that the trustee is in the same position as a judgment-creditor who has paid the mortgagee under section 28(a) of the Civil Procedure Law, Cap. 6. The trustee was, according to him, transferring free property to the purchaser and he should have exempted house accommodation. In support of his proposition counsel referred to two cases: *Philippides v. Hira* (1909), 9 C.L.R. 3; and *Triantafyllides v. Solomou* (1904), 6 C.L.R. 90.

The first of the two cases cited was decided under the old bankruptcy law as laid down in the Ottoman Commercial Code, and we do not think that it is applicable to the present case. In the second case (*Triantafyllides v. Solomou*), the plaintiff having obtained judgment against the defendants applied that the mortgagee of a house (which was the property of one of the defendants) should be ordered to sell the house, and that any balance of the purchase money after payment of the mortgage debt should be paid to the plaintiff in execution of the judgment. It was held that section 53 (now section 28) of the Civil Procedure Law, must be read with section 48 (now section 23), and that as no sufficient house accommodation was left to the debtor the order for sale could not be granted. The Supreme Court were of the view that the old section 53 provided the means and procedure for realising property which was mortgaged, but did not confer upon the creditor a right to take property which he could not take under the old section 48; and as the house was the only house of the debtor and no house accommodation was left or provided for the debtor the application ought to be refused. The trial Court in the present case in rejecting counsel's argument relied on the case of *Ttofallides and Another v. Mehmed Ali* (1918), 11 C.L.R.3, in which in the course of the judgment it is stated that "the debtor by mortgaging his house empowered the mortgagee to have it sold and have the mortgage debt paid out of the proceeds of sale". Further down it is stated "the respondent's (debtor's) house accommodation has been sold in consequence of something voluntarily done by himself". It was held in that case that the proviso to section 21 (now section 23) of the Civil Procedure Law, 1885 (now Cap. 6), regarding exemption of house accommodation, was not applicable and that the plaintiffs were entitled to an order of attachment (in execution of their

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judgment) of the surplus of the proceeds of sale after satisfaction of the mortgage debt

There is another Cyprus case which we think is to the point. That is the case of *Themistocles and Another v. Changari* (1918) 10 C.L.R. 124, in which it was held that where an action is brought claiming an order for the sale of mortgaged property and the court gives judgment ordering the sale, the plaintiff is entitled to have the whole of the property comprised in the mortgage sold; and the provisions of section 21 (now section 23) of the Civil Procedure Law, as to reservation of house accommodation do not apply to such a sale. The District Court in that case gave judgment in the action ordering the sale of the mortgaged property including two houses. It did not appear that the mortgagor had any other houses registered in his name. A copy of the judgment was lodged with the Land Registry Office for the purposes of execution (see *Kenan v. Skordi* (1910), 10 C.L.R. 69) and, on an application to the District Court by the Land Registry for directions, it was directed that the houses in question be sold subject to sufficient house accommodation being retained for the judgment debtor and his family. The Supreme Court held on appeal that that was a wrong direction. The plaintiffs having proceeded under the provisions of the Sale of Mortgaged Property Law, 1890, and having asked the Land Registry Office to give effect to a judgment of the District Court ordering the sale of the mortgaged property comprised in a certificate of mortgage without any reservation, in the opinion of the Supreme Court the two houses which were included in that mortgage should be included in the sale in their entirety (at page 125 of the report).

For these reasons we are of the view that (subject to what will be stated with regard to the other grounds of appeal) the bankrupt waived his rights to claim exemption for the house accommodation which was mortgaged by him, not only *vis-a-vis* his mortgagee but, generally, *vis-a-vis* his other creditors and the trustee in bankruptcy. What concludes the matter in this case is that the house accommodation formed part and parcel of one registration with the other immovable property and the mortgagee objected to its separation from the registration and to any separate sale. If there was a separate registration in respect of the house accommodation then, under the Rules of Sale, this should "form the last lot to be sold", if the mortgage debt had not



been satisfied by the sale of the other property. We shall be dealing with this point, as well as with other points, when we come to consider the second and third grounds of appeal.

The *second ground* was that only property divisible among the bankrupt's creditors vests in the trustee and may be sold by him; and that in the present case the house accommodation for the bankrupt was exempt from execution under the law and it was, therefore, not divisible among his creditors.

In arguing his case, learned counsel for the bankrupt submitted that the whole case rests on the question whether the trustee has power to sell under section 54 of the Bankruptcy Law, Cap. 5; whether the whole property, including house accommodation, vested in the trustee. If it did not vest then the trustee did not have power to sell. He further submitted that the bankrupt's house accommodation could not vest in the trustee under the provisions of section 41 and 42 of the Bankruptcy Law, which should be read together. The expression "the property of the bankrupt" in section 41, counsel submitted, means property of the bankrupt divisible among his creditors. The question was, therefore, whether "property as would be exempt from execution under any Law" in force (section 42(b)) is vested in the trustee though such property is not divisible among the creditors. He finally submitted that section 54 should be read subject to sections 41 and 42.

In considering whether house accommodation could or should have been exempted in the circumstances of this case, we should ascertain the bankrupt's rights prior to his bankruptcy, because by his bankruptcy he could not be placed in a better position in this respect. In the present case we are concerned with property, including house accommodation, which was *mortgaged* long before the debtor was adjudged bankrupt, and we have to apply all relevant provisions of the Bankruptcy Law, including sections 19, 41, 42, 49 and 54 having regard to that material fact. Those sections read as follows:

"19.(1) Where a receiving order is made against a debtor then if the creditors at the first meeting or any adjournment thereof by ordinary resolution resolve that the debtor be adjudged bankrupt, or pass no resolution, or if the creditors do not meet, or if a composition or scheme is not approved in pursuance of this Law

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within fourteen days after the conclusion of the examination of the debtor or such further time as the Court may allow the Court shall adjudge the debtor bankrupt; and thereupon the property of the bankrupt shall become divisible among his creditors and shall *vest in a trustee*".

"41. The property of the bankrupt divisible among his creditors in this Law referred to as the property of the bankrupt, shall comprise the following particulars:

(a) all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy or may be acquired by or devolve on him before his discharge;

(b) .....

(c) .....

42. The following shall not form part of the bankrupt's property divisible among his creditors, namely:-

(a) property held by the bankrupt on trust for any other person;

(b) all property as would be exempt from execution under any Law for the time being in force in Cyprus.

49. (1) Immediately on a debtor being adjudged bankrupt, the property of the bankrupt shall *vest in the trustee*. Until a trustee is appointed the official receiver shall be the trustee for the purposes of this section.

(2) On the appointment of a trustee the property shall forthwith pass to and *vest in the trustee* appointed.

(3) The property of the bankrupt shall pass from the trustee, including under that term the official receiver when he fills the office of trustee for the time being during his continuance in office, without any conveyance, assignment, or transfer whatever.

54. Subject to provisions of this Law, the trustee may do all or any of the following things:-

(a) sell all or any part of the property of the bankrupt (including the goodwill of the business, if any, and the book debts due or growing due to the bankrupt), by public auction or private contract, with

power to transfer the whole thereof to any person or company, or to sell the same in parcels;

.....”

Our Bankruptcy Law, Cap. 5, is substantially modelled on the English Bankruptcy Act, 1914. As Harman, J., said in *Re A Debtor v. Dodwell* [1949] 1 All E.R. 510, at page 512, bankruptcy has been a part of the English law for over a century, and in essence it has preserved the same principle throughout, namely, that the bankrupt is relieved of his debts and freed from the oppression of his creditors, but at a price, which is that he is stripped of all his property, that property vesting in a person who was originally known as the assignee, but who in more recent Acts has been described as the trustee. He is a trustee of the property, not for the bankrupt, but for the creditors, and, until the bankruptcy process is worked out, the bankrupt has no further interest in the assigned assets. That is the price, according to Harman J., he pays for obtaining his discharge and for being freed from the fetters of his debts. It is, in fact, the alternative to languishing indefinitely in the Fleet prison (at page 512 of the report).

Under the provisions of section 42 of our Bankruptcy Law, the following property does not form part of the bankrupt's property divisible among his creditors, namely, (a) trust property; and “(b) all property as would be exempt from execution under any Law for the time being in force in Cyprus”. The expression “property” includes immovable property; and under the provisions of section 23 of the Civil Procedure Law, Cap. 6 “where the property consists in whole or in part of a house or houses there shall be left to or provided for the debtor such house accommodation as shall in the opinion of the Court be absolutely necessary for him and his family”.

Pausing there, it would appear that a court decision is necessary to decide what, if any, house accommodation should be provided for the debtor when his immovable property is to be sold in execution of a judgment debt. Consequently, if for some reason the trustee does not apply to court for directions under the provisions of section 74 of the Bankruptcy Law, the bankrupt is entitled to apply to the court under the all-embracing language of section 90 of the Bankruptcy Law for such directions (cf. *Bendall v. McWhirter*

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[1952] 1 All E.R. 1307 at page 1318; the corresponding English section is s.105(1)).

On the English authorities if any part of the property of the bankrupt has been mortgaged, the property passes to the trustee subject to the estate or interest of the mortgagee and subject to the rights of the mortgagee to take possession even after the bankruptcy and to exercise all the other rights of a mortgagee (see the cases quoted in 2 Halsbury's Laws, 3rd edition, page 422, paragraph 839, note (h)). "The property of the bankrupt passes to the trustee in the same plight and condition in which it was in the bankrupt's hands, and is subject to all the equities and liabilities which affected it in the bankrupt's hands, and to all dispositions which have been validly made by the bankrupt, and to all rights which have been validly acquired by third persons at the commencement of the bankruptcy, unless the property which the trustee takes is released by some express provision of the bankruptcy law". *Bendall v. McWhirter* [1952] 1 All E.R. 1307, at page 1317; and 2 Halsbury's Laws, 3rd edition, page 421 paragraph 838.

On the strength of these authorities we hold that the bankrupt's mortgaged property in this case, including house accommodation, vested in the trustee subject to the mortgage. We have already given our reasons for holding that the mortgaged house in this case could not be exempted from execution under the law; and under section 54 the trustee had power to sell such property either by public auction or by private contract, and transfer the mortgaged property, but subject to the mortgage and to the rights of the mortgagee: cf. *Nicola v. Sofocleous* (1955) 20 C.L.R., Part II, page 49 at page 50, where it was held that a mortgage in Cyprus is not an interest or estate in land but only a charge thereon.

To sum up, if the mortgaged property in this case did not include any house accommodation it would undoubtedly be divisible amongst the creditors subject to the mortgage, and it would so vest in the trustee under section 49. As the house, which was included in the mortgaged property under one registration with all the other property, is not exempt from execution because the law does not exempt from sale a mortgaged house, it was, subject to the mortgage, divisible among the creditors and vested in the trustee. The trustee

stepped into the shoes of the debtor who, *inter alia*, owed a mortgaged debt of £8,500 (plus interest), and owned under one registration immovable property including house accommodation, which was mortgaged to the mortgagee bank, as security. Consequently, this house accommodation was not exempt from execution at the material time, and by his bankruptcy the debtor could not be put in a better position.

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The *third ground* of appeal was that the trustee acted in excess of his powers (*a*) in paying off the mortgage debt, and (*b*) in selling and transferring the whole of the bankrupt's immovable property, including house accommodation.

Counsel for the bankrupt submitted that under the law the trustee had no power to redeem the mortgage as the Second Schedule to the Bankruptcy Law did not give him such power. He conceded that the mortgagee could sell the debtor's houses but the trustee could not pay off the mortgage debt and step in the shoes of the mortgagee; and he contended that so long as the mortgagee did not prove nor value his security the trustee had no right to sell the mortgaged property (rules 11, 12 and 13 of Second Schedule to Bankruptcy Law). In support of his submission counsel referred to *In re Vautin, Ex parte Saffery* [1899] 2 Q.B. 549. With great respect, we do not think that this case supports counsel's proposition. What was decided in that case was that "there was nothing in the English Bankruptcy Act, 1883, or the rules thereunder, that entitled the trustee to redeem the shares at the amount at which they were valued in the petition" by the secured creditor himself. This case was considered in *In re Button, Ex parte, Voss* [1905] 1 K.B. 602, in which it was held that "where a secured creditor presents a petition in bankruptcy and gives an estimate of his security, if the estimate is a genuine estimate, the Court will not inquire into its correctness, although the result of the inquiry might be to shew that the unsecured balance of the debt was not sufficient to support the petition; and, when the petitioning creditor comes in to prove in the bankruptcy, in the absence of evidence of mistake as to value he will not be allowed to depart from his estimate". Sterling, L.J., was of the view that "justice requires that a creditor who comes in to prove shall be bound by his estimate" (at page 607 of the report).

It will thus be seen that the *Vautin* case is inapplicable to the facts of the present case. On the contrary, the mort-

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gagee here pressed the trustee to sell and pay off the mortgage debt, otherwise he (the mortgagee) would proceed to sell the mortgaged property himself in satisfaction of the mortgage debt. Consequently, no question of redemption in the strict sense of that word may be said to arise in the present case.

The trial Court in their judgment referred to Williams on Bankruptcy, 17th edition, page 563, where it is stated that one of the courses open to a secured creditor is that "he may rely on his security and not prove". We do not think that this course is open to a mortgagee in Cyprus. As already stated, a mortgage in Cyprus is not an interest or estate in land but only a charge thereon. Consequently, if the mortgagee fails to enforce his right by the sale of the mortgaged property under the provisions of the law, it is the duty of the trustee to see that the mortgaged property is sold in satisfaction of the mortgage debt so that any surplus from such sale may be utilised in paying off unsecured creditors.

In support of the third ground of appeal counsel for the bankrupt made the following additional points:-

(a) that it is the duty of the trustee to ascertain the property that should be exempted from execution, and that he should seek the directions of the court under the provisions of section 74 of the Bankruptcy Law, as the bankrupt can only apply under section 75 *after* the event, that is, after the act or decision of the trustee, and not before;

(b) that the mortgagee in enforcing his right under the provisions of section 9(2) of the Bankruptcy Law should proceed under Bankruptcy Rules 20 and 21 (see Subsidiary Legislation, volume II, page 19), in which case under rule 17 the bankrupt would be "a person affected thereby" and he would be entitled to notice of the application; and that only the debtor is in a position to dispute the debt and not the trustee; and

(c) that the Rules of Sale would then be applicable, and under rule 9(3) thereof "house property will form the last lot to be sold". On the strength of this provision one registration could be split and the land and house sold separately, so that in an application under Bankruptcy Rule 20 the bankrupt could have applied for the house to be sold separately as the last lot and the court could have exercised

its power to do justice under section 90 of the Bankruptcy Law.

With regard to *point (a)*, we have already held that the mortgaged house in question could not be exempted from execution in any event, and it was not necessary for the trustee to apply to court for directions under section 74. But, in any event, if the bankrupt was advised that he was entitled to exemption he was fully entitled to apply to court to decide this matter under the provisions of section 90(1) of the Bankruptcy Law.

With regard to *point (b)*, we are of the view that it is not necessary for a mortgagee, in enforcing his right, to proceed under Bankruptcy Rules 20 and 21, which correspond to rules 73 and 74 of the English Bankruptcy Rules, 1952. Normally a mortgagee may realise his security without any application to the court under rule 20. This rule applies only where the security cannot be realised without the intervention of the court, or where the trustee challenges the validity of the security (cf. Williams on Bankruptcy, at pages 605-6). In any event, the only person who would be entitled to notice of any application under rule 20 of the Bankruptcy Rules is the trustee and nobody else, as expressly provided in that rule; and under rule 21, the surplus, if any, after satisfaction of the mortgage debt (plus interest and costs), shall be paid to the trustee.

With regard to *point (c)*, rule 9(3) of the Rules of Sale reads as follows:

“Unless otherwise ordered by the Court or a Judge or unless special instructions are given by the Principal Land Registry Officer after application of the mortgagor or judgment debtor, house property will form the last lot to be sold”.

As stated earlier, the house accommodation of the bankrupt formed part and parcel of one registration together with other structures. It was counsel's contention that under the provisions of the Rules of Sale it was the duty of the official auctioneer to put up the properties for sale in not less than two lots, that is, first, the stores and other structures and last the house property. As a matter of construction, and considering the wording of rule 9(1) and (3), and Appendices “A” and “B” to the Rules of Sale, we hold the view that

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the expression "lot" in rule 9(3) means the whole property comprised in one registration and that the Land Registry has no power to split a registration into two lots in order to sell them separately. In fact, no such precedent was cited to us nor are we aware of a case where a house forming part of a registration with other land or structures was separated by the Land Registry, without the consent of the mortgagee, and sold separately. We, therefore, hold that the bankrupt's house accommodation could not be sold either separately or last, as it formed part of one whole registration which was mortgaged, and the property under such registration could not be divided into two registrations without the consent of the mortgagee, which consent was throughout withheld. Needless to say that if house property is covered by a separate registration it should form the last lot to be sold in satisfaction of a mortgage debt.

Before we conclude this ground of appeal we think we ought to deal also with the question of the *locus standi* of the bankrupt in the present proceedings which are based on section 75 of the Bankruptcy Law. His *locus standi* is based on his alleged right to exemption for house accommodation. If he did not have such right he would have no *locus standi* to complain either that the trustee sold at an under-value or that he mismanaged the sale, as the bankrupt had no interest in the property: see *Jarrett v. Barclays Bank Ltd.* [1947] 1 All E.R. 72 at page 77. In the present case the bankrupt had no right to exemption as the house accommodation was included in one registration with other mortgaged properties. In *Re A Debtor v. Dodwell* [1949] 1 All E.R. 510, it was held that although the court could in certain circumstances interfere at the instance of a bankrupt to control the actions of a trustee, section 80 (Cyprus section 75) and section 105(1) of the Act (Cyprus section 90(1)) did not, in the absence of fraud, justify interference in the day to day administration of the estate or entitle the bankrupt to question the exercise by the trustee in good faith of his discretion or hold him accountable for an error of judgment. It was for the trustee alone to decide (with the permission of the committee of inspection, under section 56) when and how to realise the estate, and he was not accountable to the bankrupt, except for the surplus to which the bankrupt was entitled under section 69 of the English Act.

Upon the bankrupt's adjudication the whole of his pro-



perty (subject to the mortgage) passed to and vested in the trustee. Thereafter it was only the trustee who could deal with the mortgaged property or in any way effectively complain against the mortgagee; and it was only he who could settle accounts with the mortgagee. The bankrupt could not go behind the trustee": see *Jarrett*, quoted above, at page 75.

The backbone of the bankrupt's case was that his house accommodation ought to have been carved out of the single registration—which was mortgaged—and registered separately and sold last, if the other mortgaged property failed to satisfy the mortgaged debt; or that, although the house formed part of one registration with other property, the other property should have been sold separately first, and if the debt was not satisfied the house property should have been sold last. But we have already held that under the law neither of these courses was open either to the trustee or to the Land Registry Office, and the bankrupt's application under section 75 should accordingly fail.

The *fourth and final ground* of appeal was that the finding of the trial Court, that the bankrupt was not entitled to exemption of house accommodation from sale, was, having regard to the evidence, wrong. Our conclusions on the first three grounds of appeal conclude the matter, as in law there was no house accommodation available for exemption. But, out of deference to counsel who argued the appeal at great length, we have also considered this ground. We quote below the reasoning of the trial Court in reaching their conclusion :

"From all the above facts it is crystal clear that the applicant left Cyprus with "animus non revertendi"; he left secretly with intent to evade his creditors; his subsequent conduct shows that he had no intention to return; he works in London, he resides in London in the house he bought as trustee of his son; and he only returns to Cyprus, 13 months later after he left, as a result of extradition proceedings, escorted by a member of the Cyprus Police Force.

We do not accept the version of the applicant; if his intention were to find money for his creditors why did he remit £1,016.- in November 1964 to London some time before or even at the time he was attempting

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to come to a settlement with his creditors in Cyprus? If his intention were to return why did he not return when he was informed that bankruptcy proceedings were commenced against him?

His wife left Cyprus after a receiving order was made against the applicant; she joined him in London and stayed there up to 2.6.66 or 3.6.66 when she returned to Limassol and stayed here up to the 26.6.66 when she left again for London where she still is. What other reasonable inference can be drawn except that she returned to Cyprus temporarily with a view to attending her husband's trial before the Assize Court?

For all these reasons we find that applicant's claim for 'house accommodation' is groundless, and the applicant was at all material times not entitled to exemption under the relevant provision of the Bankruptcy Law".

Having heard counsel and considered the evidence, we are of the view that on the evidence before the trial Court it was open to them to make the findings which they made, and we have not been persuaded that the reasoning behind such findings is unsatisfactory or that they are not warranted by the evidence when considered as a whole.

*For these reasons the appeal is dismissed with costs.*

*Appeal dismissed with costs.*