

[STRONGE, C.J., AND FUAD, J.]

THEODOROS SAVVA

v.

THE DECEASED MARCOS YANNI HAJI
MARCOULLI BY HIS HEIRS, ETC.

(Appeal No. 3484.)

1936.
Oct. 2.
—
THEODOROS
SAVVA
v.
THE
DECEASED
MARCOS
YANNI
HAJI
MARCOULLI
BY HIS
HEIRS, ETC.

Prescription under Article 1660 of the Mejellé — Application to sell immovable property heard more than fifteen years after judgment.

Plaintiff, under a judgment obtained on 17th March, 1919, filed on 12th March, 1934, an application for an order directing sale of the defendant's immovable property, which was heard on 28th March and 3rd May, 1934, and upon which an order as prayed was made on 12th May, 1934. That order was appealed from (Limassol District Court No. 172/1919).

Held, that the effect of Article 1660 is not the interposition of a mere time bar but the taking away of the judge's jurisdiction, and that the filing of an application before the lapse of the fifteen years does not avail to enable the application to be heard after that period has run out.

S. Poulacheris for appellant (defendant):

The mere filing of the application does not prevent the prescriptive period from running—see *Mejellé*, Articles 1660 and 1613. In fact that period had run out by the time the application was filed; for the years mentioned there are lunar years, in spite of *Yemenidji v. Azizé*, 2 C.L.R., 140.

E. Pitsillides for respondent (plaintiff):

The filing of the application before the expiry of the fifteen years interrupted the period of prescription: *Cirilli v. Demetri*, 6 C.L.R., 81. The years are calendar years pursuant to *Yemenidji v. Azizé*.

The judgment of the Court was delivered by the Chief Justice.

STRONGE, C.J.: Where the only step taken by a judgment creditor before the expiration of the 15-year period after which, according to Article 1660 of the *Mejellé* actions cannot be heard, is an application for the sale of immovables, Mr. Pitsillides asks us to say that the effect of such an application is to interrupt the prescriptive period and prevent it from running. He relied as an authority upon *Cirilli & Sons v. Demetri*, 6 C.L.R., 81. But the final sentence of the judgment in that case by which the Court expressly refrained from pronouncing any decision upon cases where the application was made within the prescriptive period prevents it from being an authority for the proposition put forward by Mr. Pitsillides. The

words "cannot be heard" occurring in Article 1660 of the Mejjellé coupled with the commentary of Ali Haidar make it clear that it is the jurisdiction of the judge to hear the action that is taken away and not as in English law the interposition of a mere time bar. Article 1666 of the Mejjellé, in our opinion, is authority for the proposition that a mere application filed in the registry of the Court is insufficient to prevent the running of the prescriptive period. That article contrasts quite clearly the hearing in the judge's presence with extra judicial claims made without a judge being present. Ali Haidar, commenting on this article, expressly states that the hearing in the judge's presence contemplates the presence of both parties and he gives the example of an application being filed and served on an opponent within the prescriptive period calling on him to appear before the judge for the hearing of the claim against him and the learned commentator says that the application is not capable of being heard if the actual hearing comes after the expiration of the period of prescription.

We are of opinion that it is now too late in the day to challenge successfully the decision in 2 C.L.R., 140, *Yemenidji v. Azizé & another*, that by universal custom in Cyprus the word "year" wherever it occurs in any Ottoman Law means a calendar year of 365 days. Whatever our individual opinion may be on the correctness of this decision it has stood too long as an unquestioned authority to be disturbed forty-three years after it was pronounced.

Appeal allowed.

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