[GRIFFITH WILLIAMS AND HALID, JJ.]

CHARALAMBOS K. ECONOMIDES, *Appellant.*

v.

CONSTANTI CHR. KOUKOULLI, *Respondent.*

(Civil Appeal No. 3717.)

Prescription—Mejellé Articles 1660 and 1666—Action to keep alive a judgment—Effect of issue of a writ of execution on running of time—Procedure articles of Mejellé superseded by Rules of Courts.

The appellant brought his action in the District Court, Kyrenia, to keep alive a judgment obtained against the respondent in 1926. It was contended by the respondent that the only thing that could prevent time running against the appellant was the actual appearance of both parties before a judge, and that this did not happen in the action before the Court, until the 15 years period of limitation under the Mejellé had expired.

Held : The commencement of an action in accordance with the Rules of the Supreme Court is sufficient to stop time running under Article 1660 of the Mejellé. The words " demand and claim not made in the presence of the judge " contained in article 1666 of the Mejellé have ceased to have any meaning, notwithstanding observations by the Court in the cases of Theodoros Savva *v.* The deceased Marcos Yanni Haji Marcoulli by his heirs, etc. (C.L.R. Vol. 15 p. 76) and Christodulos Tsigarides *v.* Kypris Elia (C.L.R. Vol. 15 p. 102).

Appeal from a judgment of the District Court of Kyrenia.

S. Christis for the appellant.

G. N. Rossides (with *C. Constantinides*) for the respondent.

The facts are set forth in the judgment of the Court which was delivered by :—

GRIFFITH WILLIAMS, J. : This action was brought in the District Court, Kyrenia, to keep alive a prior judgment by the appellant against the respondent, dated the 21st June, 1926, on which the appellant alleged he had been unable to obtain satisfaction. It was contended by the respondent that the action was not maintainable, on the ground that it was barred by prescription ; and this view was upheld by the lower Court and the action dismissed. From this decision the appellant has appealed to this Court.

The appellant on the 21st June, 1926, obtained judgment in the Kyrenia Village Judge's Court against the respondent for the sum of £13. 13*s*. 2*p*. with interest and costs. A writ of execution on movables was taken out by appellant, and property of the respondent was seized and sold ; but the proceeds of sale were insufficient even to pay the costs of execution. The return to the writ of execution was made on the 17th December, 1926. On the 6th June, 1941, in order to prevent his judgment debt becoming prescribed by the lapse of 15 years, the appellant commenced this action. Service was effected on the 21st June, 1941, and a Memorandum of Appearance was filed on the 25th June, 1941.

The District Court dismissed the claim of the appellant holding that the Court was bound by decisions of the Supreme Court in the cases of *Theodoros Savva* v. *Deceased Marco Yanni Haji Marcoulli by his Heirs* (C.L.R., Vol. XV, Part II, page 76) and *Christodoulos Tsigarides* v. *Kypris Elia* (C.L.R., Vol XV, Part II, page 102) and that the appellant's claim was barred by lapse of time.

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The appellant relies on two main arguments, namely: (1) that time did not begin to run against the appellant until the return of the writ of execution on the 17th December, 1926. If this were so, the parties having appeared before the judge on the 31st October, 1941, and the hearing of the action having been concluded on the 9th December, 1941, the 15 years period of prescritpion could not have expired. (2) that assuming that time began to run against the appellant from the date of his judgment—namely, the 21st June, 1926—the issuing of a writ in the present action on the 6th June, 1941, prevented the time from running after that date.

The respondent on the other hand says that time began to run against the appellant on the 21st June, 1926, and that no steps in the action at present on appeal before us was effective to prevent time running until the period of 15 years had expired and that only such appearance of both parties before the Court as occurred on the 31st October, 1941, after the prescriptive period had already elapsed, would prevent the running of time against the appellant.

We do not think there is anything in the argument of the appellant that time did not begin to run until the return of the *writ of execution. A writ of execution against movables, or even* an application to the Court for the sale of immovable property, does not affect the running of time on the original judgment save in respect of the actual application itself. This was made clear in the case of *Joseph Cirilli & Sons* v. *Kyprianos Christodoulou and Others* (C.L.R., Vol. X, page 12). In that case it was held that applications for the sale of immovable properties in satisfaction of a judgment, which applications are heard and disposed of during *the period of 15 years after the date of the judgment, do not serve* to extend the time so as to enable the appellant to take further proceedings in execution after the expiration of 15 years from the date of the judgment.

The one real point to be considered in this case is the effect of the taking out of a writ in the present action. By English Law this would automatically stop time running during the currency of the writ. It is however contended by the respondent that the Law of Cyprus is different, and that the prevention of time running is governed exclusively by Articles 1660 and 1666 of the Mejellé—and that time does not stop running out until both parties are before the Court.

The two cases on which the lower Court relied namely, *Theodoros Savva* v. *Deceased Marcos Yanni Haji Marcoulli by his Heirs* and *Christodoulos Tsigarides* v. *Kypris Elia* both turned on the meaning to be attributed to the words " a demand and claim not made in the presence of the judge " occurring in article 1666 of the Mejellé. Following these cases the Court seemed to think that article 1666 established a rule of law that the prescriptive period must continue to run until the plaintiff brought his claim against the defendant and both plaintiff and defendant were in the presence of the judge. This view is certainly in accordance with the decision in the first case referred to, and with the views expressed by *Stronge, C.J., in the second case at page 104.*

This article of the Mejellé has frequently been considered by this Court and we think that occasionaly too great weight has been

given to its literal interpretation. The law relating to the limitation of actions, or prescription, is governed by articles 1660-1675 of the Mejellé. Article 1660 expresses the general rule and is to the effect that, with certain exceptions, actions are not heard after the lapse of 15 years from the time the cause of action accrued. The present action is one of those which come under this article, and would be barred by the lapse of 15 years—unless action was taken to prevent time running.

The respondent contends that the words in the 2nd paragraph of Article 1666 before referred to are a statement of substantive law, and that nothing less than the actual appearance of the plaintiff and defendant before the judge in the action can put an end to the time of prescription running.

Article 1666 of the Mejellé according to Tyser's translation is as follows :—

> " If a person makes his claim against another person before the judge every few years, but his case is not decided. If in this way fifteen years pass, it does not prevent the hearing of the action.
>
> But a demand and claim not made in the presence of the judge does not prevent the passing of the time.
>
> Therefore, if a person demands and claims something in places other than the Court of the judge, and in this way the time passes, the plaintiff's action is not heard."

We find that this translation contains an error. The word " claim " in the first line should have been translated " action " as the Turkish word used was " Dava ", which in articles 1660, 1661 and 1662 is rightly translated " action ".

In order to understand this article it is necessary to go to other chapters of the Mejellé, which have now been repealed, to find out exactly what is meant by the words " a demand and claim made in the presence of the judge ".

Book XIV of Mejellé consists of two chapters—the first refers to actions, defences, parties and estoppel—that is to say, it is concerned entirely with matters of evidence and procedure and contains no substantive law—the second chapter relates to prescription alone.

By article 1613, which is the first article in Chapterr I, the Sheri term Dava is defined as follows : " Dava is someone claiming his right in the presence of a judge from another ". Dava would in our law be equivalent to the word " action "—as it is translated by Tyser.

Article 1618 is as follows :—

> " It is a condition that the opponent be present at the time of the action—namely Dava—and in case the defendant has refused to come to Court or to send a vekyl it will be explained in the book about the judge (Book 16) what shall be done ".

We doubt whether the word " judge " is a correct translation of the original text in which the word used is " qaza " which has several meanings including " a judge's office and functions ". This latter meaning seems to describe what is considered in Book

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XVI. In this book articles 1833 and 1834 lay down the procedure to be adopted in the absence of the defendant. They are as follows :—

" 1833. On the application of the plaintiff, the defendant is summoned to the Court by the judge.

If he refuses to come to the Court, or to send a vekyl, when there is no lawful excuse, he is brought to the Court by force ".

" 1834. When the defendant refuses to come to the Court or send his vekyl, in case it is not possible to make him come, on the demand of the plaintiff a summons on paper which is special to the Court is sent to him three times on separate days. And if, being summoned, he does not come, the judge informs him that he will hear the claim and evidence of the plaintiff and appoint a vekyl for him. If on this the defendant still does not come and does not send a vekyl, the judge appoints someone vekyl for him to protect his rights, and in the presence of the said agent hears and enquires into the claim and evidence of the plaintiff, and if it is true, after it is proved, he gives judgment."

The Mejellé, there, prescribes the procedure for the commencement and trial of an action. And it is clear that no action can be instituted unless and until the plaintiff and the defendant or his vekyl (agent) are together before the judge. Only then is an action deemed to commence, and be " Dava ".

Article 1666 must be read in the light of the existence of this obsolete procedure at the time it was enacted. Where it says " a demand and claim not made in the presence of the judge does not prevent the passing of time ", it means that " no procedure that does not amount to ' Dava ' serves to prevent the passing of time ".

Again where it says " if a person makes his claim against another person before the judge every few years, but his case is not decided. If in this way 15 years pass, it does not prevent the hearing of the action ", the meaning clearly is—" Where once ' dava ' has been made or begun then until the matter before the Court has been decided time ceases to run on the original cause of action—so that even if 15 years has expired the hearing of the action is not prevented, provided 15 years has not passed since the last time the parties came before the Court. Dava, then, or the bringing of an action, prevents the original period of 15 years from running.

Articles 1660 and 1666 of the Mejellé depended on the procedure contained in the Mejellé, which has now been superseded by rules of Court based on the English procedure. The form of action known in Sheri Law as Dava is now replaced by the proceeding known in English Law as an action ; and the steps required to be taken for the institution of an " action " are entirely different from those needed to effect a " dava ".

By the Rules of Court, 1938, Order I, Rule 3, action is defined as :—

" A civil proceeding commenced by writ or in such other manner as may be prescribed by any law or rules of Court ".

This definition is the same as the English definition contained in Section 225 of the Judicature Act, 1925.

Order 2, Rule 12, of the Rules of Court is as follows :—

" If the writ is such as may be sealed the registrar shall enter the action in the Civil Cause Book and give the writ a number

showing the order in which the action is so entered ; he shall mark the writ ' Filed and sealed on the day of 19 ', naming the date on which it is filed ; he shall then seal the writ with the seal of the Corut, and thereupon the writ shall be deemed to be issued and the action to be commenced."

The words " if the writ is such as may be sealed " are inserted because certain writs under Order 2, Rule 2—namely those for service out of Cyprus may not be sealed without leave of the Court or a judge—or under Order 2, Rule 15, if presented by a prodigal having a guardian under the Guardianship of Infants and Prodigals Law, 1935.

From this Rule 12 it is seen that the moment a writ is filed and sealed the action is deemed to be commenced.

The writ is a written document ; it sets out shortly what claim the plaintiff has against the defendant. The action is begun without any necessity of the plaintiff making his claim against the defendant in the presence of a judge.

That the framers of the Rules believed that the issue of a writ was sufficient in itself to prevent time running is shown by Order 4. This order refers to the writ remaining in force for 12 months only unless renewed, and provides for renewal of the writ before the expiration of that time. It concludes as follows :— " and a writ so renewed shall remain in force and be available to prevent the operation of any law whereby the time for the commencement of the action may be limited and for all other purposes from the date of the issuing of the original writ of summons ".

The thing contemplated as being limited was the time for the commencement of the action ; and the issue of the writ was to stop time running against the plaintiff on the original cause of action.

It is then clear that in the Rules of Court what is deemed to operate to prevent the time of prescription running is the bringing of an action and this is deemed to be brought when the writ is filed and sealed.

Now as we pointed out before, under the Mejellé an action, then called " Dava ", was not deemed to be begun until the plaintiff made his claim against the defendant in the presence of the judge. But " Dava " belongs to the old Sheri Procedure which is no longer in operation. We must therefore read Article 1666 of the Mejellé as if the procedure described therein, which was no other than " Dava ", were replaced by the simple commencement of action in accordance with the Rules of Court, 1938.

The fact that Article 1666 in speaking of " claim and demand made in the presence of the judge " is merely referring to the procedure laid down in the Mejellé for the bringing of an action is brought out very clearly in Ali Haidar's commentary—a translated extract from which reads as follows :—

" For example if eight days remaining to complete 15 years the plaintiff applies to the judge as aforementioned and summons his opponent to the Court and on completion of the eight days the parties appear before the judge for hearing, although at the time when the application was submitted and even when the summons was served the prescriptive period was not completed, since at the time of their appearance before the judge for hearing there is prescritpion, the action is not maintainable, because under

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the provisions in the text of the section what precludes prescription is the action; and as to action in accordance with the sections 1613 and 1618 a claim not made before the judge in confrontation of the opponent is not considered as an action ".

So in the opinion of Ali Haidar it was the " action which precluded prescription, and the making of the claim in the presence of the judge in confrontation of the opponent is only of importance on account of it constituting, at the time the Mejellé procedure was in force the only way of commencing an action.

According to Sheri procedure an action was commenced one way, according to present Cyprus procedure it is commenced another way. Since the abolition of the Sheri procedure contained in the Mejellé, this phrase : " In the presence of the judge " has ceased to have any legal meaning, so why it should be given legal effect we cannot understand. It does however seem from some of the decided cases that judges have been anxious to perpetuate this incongruous anachronism and incorporate it into the already chaotic legal system of Cyprus.

We do not agree with the construction given to Article 1666 of the Mejellé by the learned judges in the cases in C.L.R. Vol. XV, Part II, referred to in this case. We think that the commencement of an action by the procedure at present in force is sufficient under article 1660 of the Mejellé to stop time running, and that it is not affected by article 1666. But as we have pointed out, the Rules of Court suggest that the taking out of a writ is in itself sufficient to stop the operation of any law whereby the time for the commencement of an action might be limited. This must we think apply to the articles relating to Prescription contained in the Mejellé.

For the reasons we have mentioned we think that the action of the appellant was not prevented by lapse of time and his appeal should be allowed with costs. The action is therefore remitted to the District Court, Kyrenia, for decision on its merits.

Appeal allowed.