

[HALLINAN, C. J. and ZEKIA, J.]
(April 13, 1955)

THEODORA NICOLA of Sylikou, *Appellant,*

v.

IFIGHENIA SOFOCLEOUS of Ay. Georghios, *Respondent.*
(*Civil Appeal No. 4129*)

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THEODORA
NICOLA
v.
IFIGHENIA
SOFOCLEOUS

"Mortgage"—Only a charge on land—Right of mortgagor to transfer subject to mortgage — Land Registry practice misconceived.

The appellant-plaintiff was the owner of property which was subject to a mortgage that was statute-barred. Under the practice of the Land Registry, the plaintiff could not dispose of her property until the mortgage was first cleared off. The plaintiff sued for a declaration that the mortgagee's right was prescribed and for a direction that the mortgage be cancelled.

The trial Court held that although the mortgagee's remedy was barred, she had not lost her right and dismissed the claim.

Held: In Cyprus a "mortgage" is not an interest or estate in land but only a charge thereon. The practice of the Land Registry in the matter is misconceived. The plaintiff granted a declaration that she has the right to transfer the land subject to the rights of the mortgagee, those rights being statute-barred.

Appeal allowed.

Appeal from the judgment of the District Court of Limassol (Action No. 815/54).

Platon Solomonides for the appellant.

Petros Papaioannou for the respondent.

The facts sufficiently appear in the judgment of this Court which was delivered by:

HALLINAN, C. J.: In this case the plaintiff-appellant mortgaged a property in 1929 to secure a debt for £25 and the mortgage was duly registered. It is common ground that the right of action to recover the mortgage debt is now barred under the provisions of section 3 (1) (a) of the Limitation of Actions Law, Cap. 21, and under subsection (2) (b) of that section the mortgagee's right to sell the mortgaged property under the powers conferred upon her by the Sale of Mortgaged Property Law, Cap. 239, is also barred.

Under the practice which now prevails in the Land Registry, the mortgagor is unable to dispose of the land unless the mortgage is first cleared off, despite the fact that the mortgagee cannot either by action or by proceedings under Cap. 239 enforce his security. In these circumstances the plaintiff has brought these proceedings for a declaration that the mortgage has been prescribed and is now without legal force, and for an order directing the defendant or the Director of Land Registration to

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cancel the mortgage. The learned trial Judge held that although the respondent-defendant, who is mortgagee, has lost her remedies, she has not lost her rights, and the trial Court therefore dismissed the action.

To prevent confusion of ideas it should be stated at once that the word "mortgage" as used in our Cyprus statutes and in these proceedings means nothing more than a charge on land which does not transfer any estate or interest in the land to the mortgagee. The mortgagor remains the registered owner of the land. This being so it appears at first sight strange that the Land Registry should refuse to allow the mortgagor to exercise his ordinary rights as owner to sell or transfer his land subject to the registered charge. The practice of the Land Registry is a survival from the Ottoman Law which was abolished in 1945. Under the Tapu Law of the 14th December, 1858, it is clear that any land which has been mortgaged cannot be transferred unless the mortgage debt has first been cleared off or unless the mortgagor has appointed a plenipotentiary (who was usually the mortgagee) to effect a transfer of the land and pay the debt out of the amount realized. In our view there is no legal justification now for the continuance of this practice which in fact defeats the object of the Limitation of Actions Law, which was enacted in 1945; for in effect, the mortgagee's remedies are not barred, if he can block the mortgagor's power to transfer his land until the mortgage debt is paid.

We agree with the trial Judge that the effect of the Limitations of Actions Law is to bar the remedy and not the right, and therefore the Court cannot declare that the mortgage or charge has been prescribed, nor should the Court direct its cancellation. It is indeed unfortunate that our Law does not distinguish in this respect between actions for the recovery of land (including actions for foreclosure or sale of mortgaged land) from other actions. Ever since the first statute of limitations relating to real property was passed in England (the Real Property Limitation Act, 1833, s.34), after the statutory period has lapsed the right of the person against whom the statute has run as well as his remedy is extinguished. There is not such provision in our Law.

However, the plaintiff is entitled to a declaration which will assist her in exercising her undoubted right to alienate the land subject to the charge for what it is worth. For these reasons the order of the trial Court dismissing the action with costs must be set aside and the plaintiff is entitled to a declaration that she has the right to sell or otherwise transfer the land the subject-matter of this suit subject to the mortgage and to the rights of the mortgagee whose right of action and whose right of sale under the Sale of Mortgaged Property Law are at the date of this declaration barred by the Limitation of Actions Law.

No order as to costs.