HUTCHINSON, C.J. & MIDDLETON, J. 1899

Dec. 18

[HUTCHINSON, C.J. AND MIDDLETON, J.]

MEHMED HAMDI HADJI MOUSSA, AS GUARDIAN OF THE HEIRS OF HADJI KELESH EFFENDI, DECEASED. *Plaintiff.*

v.

GEORGHI, ONOUFRIOS AND NIKOKLI MICHAIL APOSTOLIDES, *Defendants.*

EX PTE. HELENE JASSONIDES, AS HEIRESS OF GEORGE AKAMAS, DECEASED.

MORTGAGE—CANCELLATION—RELEASE OF PART OF MORTGAGED PROPERTY—WATER RIGHTS—EVQAF—MUSSAQAFAT AND MUSTEGHILLAT—GEDIK—REGISTRATION—PRACTICE OF THE LAND REGISTRY OFFICE—PLEDGE—PRESCRIPTION—QUESTION OF FACT RAISED IN APPEAL COURT—ART. 26, TAPU LAW, DATED 8 JEMAZI-UL-AKHIR, 1275—ART. 16, LAW CONCERNING TITLE-DEEDS ISSUED BY THE DEFTER KHAQANI FOR SIMPLE EMLAK, DATED 28 REJEB, 1291—ARTS. 15, 16, LAW CONCERNING THE PROCEDURE OF VAQFS MUSSAQAFAT AND MUSTEGHILLAT, DATED 9 JEMAZI-UL-AKHIR, 1287—ART. 2, LAW CONCERNING CONDITIONS FIXING THE SECURING OF DEBT AFTER DEATH BY ARAZI-MIRIE AND MEVQOUFE, AND MUSSAQAFAT AND MUSTEGHILLAT VAQFIE, DATED 23 RAMAZAN, 1286—LAW CONCERNING THE MORTGAGE OF PROPERTIES, DATED 21 REBI-UL-AKHIR, 1287—ART. 3, LAW CONCERNING MUSSAQAFAT AND MUSTEGHILLAT MEVQOUFE HELD IN IJARETEIN, DATED 4 REJEB, 1292—ART. 11, INSTRUCTIONS SHEWING THE PROCEDURE TO BE FOLLOWED IN THE ISSUE FROM THE DEFTER KHAQANI OF TITLE-DEEDS FOR MUSSAQAFAT AND MUSTEGHILLAT VAQFIEH IN CONSTANTINOPLE AND IN THE PROVINCES, DATED 9 REBI-UL-EVEL, 1293.

Defendants in 1881, *duly mortgaged in the Land Registry Office to Akamas one quarter of an Ijaretein Vaqf Chiftlik and included in the parcels mortgaged were* 7½ *days of running water per month under kochan No.* 9. *In* 1882, *by agreement between the mortgagors and mortgagee,* 17 *hours out of the* 7½ *days of running water was sold to a third party, and kochan No.* 9 *was exchanged for two others, one of which was given to the purchaser, and the other, under No.* 93, *for the balance of* 6 *days and* 19 *hours, in the names of the Defendants, came into the possession of the mortgagee. No.* 93 *was not entered in the mortgage deed book, but on the back of the page containing the entry of the original mortgage a note was made in the handwriting of the Chief Clerk, to the effect "that title-deed, No.* 9, *had been cancelled "and a portion thereof had been sold to another person, and another kochan, had "been issued, No.* 93, *which took the place of kochan No.* 9, *and had been mortgaged "in lieu thereof."*

On the mortgage certificate in possession of the mortgagee, was an endorsement to the effect that the mortgage on No. 9 *was released. On both the book and duplicate were endorsements as to fees taken and to be taken.*

No evidence of any formal declaration before the Land Registry Office of cancellation and re-mortgage was forthcoming, but it was clear that the parties to the mortgage intended that the mortgage on the property described in No. 93 *should continue.*

HELD, reversing the judgment of the District Court: that even if part of the property registered under No. 9 had been duly released from the mortgage imposed on it in 1881, yet there is nothing in the law making it obligatory that where a part of a parcel of mortgaged property is released from the mortgage there should be a formal release of the whole parcel and a formal new mortgage of the part which is to remain in mortgage, and that, consequently, the property described under kochan No. 93 was still subject to the mortgage, and could not be ordered to be sold for the judgment debt of the Defendants, the mortgagors, upon a simple application for an order for the sale of their immoveable property in satisfaction of their judgment debt.

SEMBLE: that water rights, unless they include or involve the ownership in whole or in part of some channel or source, do not require to be registered.

QUÆRE: if the water rights of an Ijaretein Chiftlik are Gediks or appurtenances equivalent to Mussagafat and subject to the same incidents as regards sale and mortgage. Obiter dictum in Olympia Peristiani v. Panayoti Lefteri. Vol. III. C.L.R., p. 5, dissented from.

APPEAL from the District Court of Limassol.

Lascelles, Q.A., for the Appellants.

Pascal Constantinides (with him *Economides*), for the Respondents.

The Defendants did not appear.

The facts and arguments sufficiently appear from the judgments.

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Jan. 5

HUTCHINSON, C.J. The Plaintiff having an unsatisfied judgment against the Defendant wished to have it executed by sale of the Defendant's immoveable property, and obtained from the Land Registry Office a certificate of search shewing that the Defendants were the registered owners of (besides other property) certain water rights; and upon application to the Court obtained an order for sale of the water rights and other property. The Defendants appeared on the hearing of the application, and stated that the water rights were mortgaged to the present Appellant; but as the certificate of search did not shew this, the Court made the order for sale. The Appellant then applied to the District Court to have the order for sale set aside, or to have the water rights exempted from the sale; the District Court refused the application, and this appeal is from that refusal.

The evidence shews that on the 9th of February, 1881, the Defendants mortgaged to George Akamas certain land and water rights to secure £570 advanced to them by him, with interest. The mortgage was duly registered and the kochans for the mortgaged property, together with two certificates of mortgage, were delivered to Akamas. Amongst the kochans was one numbered 9 which was for certain water rights.

The Applicant, Helene Jassonides, is the successor in title of the mortgagee, Akamas.

In February, 1882, by agreement between the mortgagors and the mortgagee, part of the mortgaged land and part of the water rights were sold to a third person. The kochan for the water rights (No. 9) was then delivered up by the mortgagee; a new kochan for the portion of them sold was given to the purchaser; and a new kochan (No. 93) was given for the balance, which kochan is in the possession of the mortgagee, the present Appellant.

No question arises about the land; but with regard to the unsold portion of the water rights (described in kochan 93) the Plaintiff contends that the mortgage was released by the transactions of February, 1882, whereas the Appellant contends that it was the intention of the parties that the mortgage should be kept alive, and that their intention was effectually carried out, and that the water rights described in kochan 93 are still subject to the mortgage.

There was no formal release or cancellation of the mortgage in the books of the Land Registry Office, but kochan No. 9 was cancelled and two new kochans issued in place of it, for the sold and the unsold portions respectively; and on the entry of the mortgage in the mortgage registry in the office there is a note in pencil, in Turkish, unsigned, but proved to be in the writing of Bessim Effendi, then Chief Clerk in the Office, the translation of which is as follows:

" The title deed No. 9 for the water has been cancelled and a portion " thereof has been sold to another person, and another kochan has been " issued, No. 93 of 20th February, 1882, which title deed takes the place " of the said title deed No. 9 and has been mortgaged in lieu thereof, " 20th February, 1882. 13 p., cancelling fee has been taken."

And on one of the two mortgage certificates in the mortgagee's possession there is a note, in whose writing we do not know, to this effect:

" 53,000 mentioned in the body of this sened,

" 15,360 being payment against the sened,

" 37,640 dated February, 1881, No. 9, the mortgage is released."

The only inference that I can draw on the question of the intention of the parties at the time of the transactions of February, 1882, is that they intended to keep alive the mortgage on the unsold water rights, and that the Land Registry Officer believed that to be their intention, and meant to record it and carry it out in his books.

The District Court held, however, that their intention could not lawfully be carried out without a new mortgage: the Court said, " As the

" new title deed No. 9 was issued and Bessim Effendi's note is to the " effect that that mortgage is discharged, we must consider the transac- " tion to have been a new mortgage, putting an end to the old registration, " and we think that a new registration was necessary and ought to have " been made under clause 16," (of the Law of 28 Rejeb, 1291.) But I cannot find that Bessim Effendi's note is to the effect stated by the District Court. He says that the title deed No. 9 has been cancelled; but that is not the same thing as cancelling the mortgage on the property for which that title deed was given; and his note goes on to say that title deed No. 93 has been mortgaged in lieu of No. 9; and, as he did nothing more, I infer that he thought that his note, coupled with the possession of the new kochan by the mortgagee, would be sufficient. As the Queen's Advocate said, it is not a kochan which is mortgaged, but the property described in the kochan. Certain formalities are required by law for the registration of a mortgage, and certain formalities are also required for the release of a mortgage. The mortgage on the property for which No. 9 was given was duly registered, but it was never duly released; and the principal evidence that there was an intention to release it as to part of the property is Bessim's note, and that very note also shews that the intention was also that the other part of the property should still be subject to the mortgage. No doubt it was irregular for Bessim to make his note in pencil and not to sign it, and perhaps he may have meant to make afterwards some other more formal entries in his books for the purpose of recording the transaction; but that was an irregularity for which the mortgagee was not responsible.

The District Court, however, held, and it was also contended before us, that the intention to keep alive the mortgage on the unsold water rights could not be lawfully carried out without a new mortgage. If a new mortgage was necessary, then no doubt it must be carried out and registered in the manner prescribed by law for the making of mortgages. But I cannot find anything in the law to make it necessary, where a part of mortgaged property is released from the mortgage, to have a formal release of the whole property and a formal new mortgage of the part which is to remain in mortgage. It is said to be the practice of the Land Registry Office now to carry out such a transaction in that way, and I assume that the office considers that to be the most convenient way; but I do not know that that was the practice in 1882: and I have not found anything in the law which forbids the cancellation of the mortgage on part of the property leaving the mortgage on the remainder uncancelled.

It was also argued for the respondents that such water rights as these, —a right to the running water from a certain source or in a certain

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channel for so many days or hours each month,—are not capable of registration, and therefore cannot be mortgaged. This point was not raised in the Court below. I know that such rights are constantly registered and I believe that they have generally been treated, without question, as capable of registration and requiring registration. But if that practice is wrong (as to which I express no opinion, though I am certainly not satisfied that it is wrong), and if these rights cannot be mortgaged with the formalities required for mortgages of immoveable property which is capable of registration, I know of no law which forbids their being mortgaged without those formalities.

Lastly, it was urged for the Respondent that the Applicant's rights under the mortgage are barred by lapse of time, 15 years having expired from the date of the mortgage before the application was made. This point was not taken in the Court below and I decline to allow it to be taken now: for it raises a question of fact upon which, if it had been raised at the hearing in the District Court, evidence might have been given. I should like to say one thing, however, about the case which was quoted by Mr. Pascal in support of his contention that the written acknowledgment signed by the mortgagors in 1885 does not prevent the time running as against the mortgagees and that the 15 years should be reckoned from the date of the mortgage and not from the date of the acknowledgment. The case is that of Olympia Peristiani, *v.* Panayoti Lefteri, Cyprus Law Reports Vol. III., p. 4. in which the Supreme Court expressed an opinion that the written acknowledgment referred to in Art. 1674 of the Mejellé must be an acknowledgment made after and not before the period of prescription has expired. All that was necessary for the decision in that case, and all that was in fact decided, was that part payment of the debt does not prevent the time running as against the creditor; the question whether the acknowledgment referred to in Art. 1674, must be made after the time has expired did not, so far as I can see from the report, arise in that case, and I should like to say that, as at present advised, I doubt the correctness of the opinion above quoted.

In my judgment the mortgage on the water rights which are described in kochan No. 93 was never released and they are still subject to the mortgage; and the order of the District Court dismissing this application ought to be set aside, and an order made that the 6 days and nights and 19 hours of water ordered to be sold by the order of the District Court No. 421/96, of the 24th March, 1897, be exempted from the sale: and that the Plaintiff pay the Appellant's costs in the District Court, (except those which the Appellant undertook or was ordered to pay in any event), and the costs of this appeal.

MIDDLETON, J. . . . . .

Before discussing the main point, I will deal with the question of prescription which I agree with the Queen's Advocate in thinking ought not to be allowed to be raised at so late a period in the case.

This is really a question of fact which was not put forward in the Court below, and if it had been, the Appellant would have been entitled to adduce evidence upon it. As this was not done, I do not consider that the Respondent ought to be allowed to raise it in the Appeal Court.

As a member of the Court deciding the case of Olympia Peristiani, &c., *v.* Panayoti Lefteri, I would like to say that the judgment in that case only decides that the course of prescription is not interrupted by part payment. That part of the judgment which appears to express the opinion, that a written acknowledgment if duly proved would not bar prescription is *obiter dictum* founded, perhaps, on a misconception of the meaning of the Greek text of the Mejellé resulting from the absence of an existing translation into English.

We now come to the main question submitted to us, viz.: whether the transaction which is evidenced by the notes and endorsements in the books of the Land Registry Office, and on the certificate of mortgage and the exchange of No. 9 kochan for No. 93 has had the effect of releasing the property registered under No. 93 from the mortgage which was undoubtedly registered upon that property when it formed part of the property registered under No. 9 kochan.

In the first place, the property in question consists of the right of the user of water for a certain time during a fixed period of the year, and being incorporeal in its nature, it seems doubtful if it is capable of alienation or mortgage apart from the land to which it is appurtenant.

It is also clear, we think, that it is property forming part of a Mazbuta Vaqf Chiftlik held in Ijaretein which had been made Mulk previous to its dedication in 1035 (see Vol. I., C.L.R., p. 50).

What then was the law which regulated the procedure upon the mortgage, if such be possible, of incorporeal property appurtenant to such a class of Vaqf property in 1882?

It has been the practice, I believe, from my own experience, to register in the books of the Land Registry Office ordinary rights to the user of water, and to carry out transfers and register mortgages on them as though they were substantive Mulk property, but whether this practice was a universal custom peculiar to Cyprus I cannot say.

Looking at the preface to the Law of 28 Rejeb, 1291, concerning title-deeds issued by the Defter Khaqani for simple Emlak, only corporeal property appears to be referred to, nor does that Law anywhere so far as I have studied it, refer to incorporeal property of any kind.

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In their arguments before us, Counsel seem to have assumed that the property in question is of such a nature as to require registration upon its mortgage or alienation, and it is conceivable that if it is what is known as a Gedik of the Chiftlik, or if it is in fact corporeal, though described as incorporeal, this may be the case, inasmuch as on the latter hypothesis each apportionment of the right of user may involve a corresponding share in the channel or source by which and whence the water is conveyed and derived. There is, however, no evidence of this before us, and the only thing described in kochan No. 9 is so many days of running water which can hardly be construed as anything but a right to use the water during the period named.

We find ourselves, therefore, facing the following difficulties: we are aware of a practice as to the registration of such property which may be a custom to be given the force of law, but that custom has not been proved. The burden of proving the necessity of registration on a mortgage on property of this character was on the Respondents. They have, perhaps, naturally assumed that it was necessary, and accordingly brought no evidence forward on the point.

So far as I can gather from a careful search through all the laws, regulations, instructions, &c., comprised in Mr. Ongley's translation, and we have not been referred to any other authorities, I can find no evidence that it is necessary to register rights to water if they are not Gediks of a Vaqf, or that upon a mortgage or pledge of such rights, any formalities are laid down as being obligatory or necessary. I particularly wish to guard myself from being supposed to be deciding that the registration of such rights when they are apparently the adjuncts and results of an ownership of a Mulk channel or source, is not necessary, and all that I now take upon myself to say is, that, in my opinion, such rights standing alone do not require to be registered, nor do I think that if they are pledged, any formalities other than an agreement between the parties are necessary to evidence that fact.

If therefore this view is correct, it seems to me on the evidence before us that under the document marked P. there is a still subsisting mortgage or pledge in favour of the Appellant on so much of the water rights as are represented by the kochan No. 93, the rest of them having been released from mortgage and disposed of by the Defendants by agreement between them and Mr. Akamas in 1882, and this appeal must be allowed.

Assuming, however, that these water rights do in fact represent a share in the ownership of the channel or source from which they are derived, or are appurtenant as Gediks of the Chiftlik to the Musteghillat

Vaqfié also mortgaged, we will consider whether in the case before us all such formalities as were necessary have been carried out so as to preserve the rights of the Appellant as mortgagee. This must depend greatly, initially, upon what is our opinion of the transaction in 1882. From the evidence I consider that the view taken by Mr. Jelajian was a correct one, and that what really occurred and what the parties intended to carry out was a release on payment of its supposed value by the mortgagors to the mortgagee of a part of one item of the property mortgaged, and not a release of the whole item and a supposed new mortgage of the part unsold by the mortgagor.

I cannot however find, with careful research, that the law makes any provision for such a transaction, as it apparently, only contemplates the making of mortgages and the entire cancellation of mortgages of Mussaqafat and Musteghillat held in Ijaretein or even of any other kind of immoveable property.

Article 15 of the Law concerning the procedure of Vaqfs Mussaqafat and Musteghillat, dated 9 Jemazi-ul-akhir, 1287, enacts that " the way " in which alienation definite and by mortgage should be carried out is " stated in this chapter; it is forbidden to execute it in any other way."

Article 16 lays down that the conditions and procedure to enable Mussaqafat and Musteghillat to satisfy debt . . . . are defined in special laws.

Those special laws appear to be the Laws numbered XV. and XVI. in Mr. Ongley's translation.

Article 2 of No. XV. enacts that the method of mortgaging Arazi-mevqoufé property (which includes Vaqf property of the description which in the latter part of my judgment I am assuming this to be) must be in accordance with Article 26 of the Tapu Law.

It is true that Article 3 of the Law concerning Mussaqafat and Musteghillat Mevqoufé held in Ijaretein, dated 4 Rejeb, 1292, states that the conditions and procedure detailing the system of feragh bil vefa (or mortgage) of such property will be fixed by special law, but so far as I can ascertain no such special laws other than those I have mentioned exist, or at any rate were existing in 1882.

Again Article 11 of the Instructions shewing the procedure to be followed in the issue from the Defter Khaqani of title-deeds for Mussaqafat and Musteghillat Vaqfié in Constantinople and the provinces lays down that " all the events of Mussaqafat and Musteghillat " Mevqoufé, *i.e.* the alienation, inheritance and other procedure in " accordance with their special laws will be arranged and supervised " through the Defter Khaqani Officials."

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If, therefore, these water rights are appurtenant to Musteghillat, and are Gediks equivalent to Mussaqafat under Article 2 of the Law, dated 6 Jemazi-nl-akhir, 1287, concerning the procedure of Vaqfs Mussaqafat and Musteghillat. then the procedure to be followed on mortage should be that laid down in Article 26 of the Tapu Law, and so far as I can judge, the provisions of that Article were complied with on the original mortgage of this property. The difference in procedure under Article 26 of the Tapu Law and Article 16 of the Law of 1291, as to Emlak appears to be that under the former Article a declaration before the Medjliss seems to be necessary, while in the latter the procedure was not to be carried out without a Sheri Ilam. In other respects the procedure appears to be practically the same in the Defter Khaqani. If therefore, I find that the Defter Khaqani had carried out its part, as I do, I should assume that the preliminary formalities had been complied with, consequently, if this property represents a share in the ownership of the channel or source, the provisions of Article 16 were complied with on the original mortgage presuming them to be applicable.

Was it necessary then, presuming it to be either Gedik or Mulk, on a release of a portion of it, to make a fresh mortgage and carry out all the formalities again in order to bind that portion of the property not released? If I answer this question in the affirmative, it seems to me that I shall be adding a fresh restriction to the already formality-bound authority to deal with immoveable property which is not warranted by the law.

I cannot think, therefore, that it was necessary to make a new mortgage on what was already mortgaged, although a part of it had been withdrawn by release.

In order to sell a portion of the property described in No. 9 kochan it was considered necessary to cancel it and replace it by kochans for the two portions, one for the vendee and the other for the vendor and mortgagor.

A note of the transaction was duly recorded on the back of the duplicate certificate of mortgage, and the vendor's new kochan for the unsold portion handed to the mortgagee, and although that kochan is not recorded in the certificate of mortgage, that does not appear to be the fault of the mortgagee, and there is no doubt, to my mind, that the Land Registry Office Clerk at the time deemed that the property described in it was still under mortgage and intended the notes as evidence of it.

So far as I can see, the Land Registry Office Clerk did what he thought necessary at the time, in the absence of any express regulation on the point, to indicate that a portion of the mortgaged property was

released, while the rest was to be considered still under mortgage, and I cannot doubt that if a note of the substance of the endorsement on the back of p. 35 in the mortgage deeds book had appeared on the certificate of search, which was produced on the original application of the Plaintiff, that the sale of this property would never have been ordered, and the point before us would never have arisen.

If, however, it was strictly necessary under the law that No. 93 should be recorded in the mortgage certificate, and its duplicate in the Land Registry Office in the place of No. 9, the fact that it is not so recorded is not the fault of the mortgagee but of the Land Registry Office, and I am not aware that there is any limit of time within which it should be recorded so as to prevent its being recorded now. The evidence shews that some fee was paid, and there is no evidence that all that was demanded at the time was not paid, or that the mortgagee did not fulfill every obligation required of him. Are we then to make the Appellant suffer for an omission of a public department which, I am of opinion, may even now be rectified? I think not: and for these reasons I hold that the property described under kochan No. 93 is still subject to the mortgage made in 1881, and ought not have been ordered to have been sold at the suit of the Plaintiffs. In my opinion, therefore, the order of the District Court ought to be set aside, and in lieu thereof our order should be that the property in question be exempted from the order of the Greek Judge of the District Court and the sale thereof under that order stayed. I think that the Plaintiffs should pay the costs of this appeal and in the Court below.

Appeal allowed with costs.