HUTCHINSON, C.J. & FISHER, ACTING J.

ANTONI THEODOTOU v. PHILOTHEUS, ARCHIMANDRITE OF THE ARCHBISHOPRIC

The Plaintiffs allege that the report was false, and ask for a declaration that it was invalid. They do not ask for any further or other relief: no damages, no injunction, no order of any kind.

The result, if the Court should give judgment for the Plaintiffs, would be futile: the parties would be just where they were before the writ was issued. No one else would be bound by the judgment. And if the Plaintiffs wanted any order against the persons whom this Defendant reported to have been elected, they would have to sue those persons and would be no better off than if they had obtained no judgment in this action.

For the reasons above given I am of opinion that this action is frivolous and ought to have been dismissed by the District Court on that ground. This appeal should therefore be dismissed and the Plaintiffs should pay the cost of it.

FISHER, ACTING J., concurred.

Appeal dismissed.

TYSER, C.J. & FISHER, ACTING J. 1906

Nov. 26

[TYSER, C.J. AND FISHER, ACTING J.]

MOLLA MUSTAFA HAJI AHMED, *Plaintiff,*

v.

ABDUL-KADIR HASSAN AND ANOTHER, *Defendants.*

ABDUL-KADIR HASSAN AND ANOTHER, *Plaintiffs,*

v.

MOLLA MUSTAFA HAJI AHMED, *Defendant.*

PRESCRIPTION—IMMOVABLE PROPERTY LIMITATION LAW, 1886—EFFECT OF REGISTRATION ON PRESCRIPTION.

A. K. was the registered owner of immovable property (assumed for the purpose of the judgment to be Mulk). M. M. had enjoyed undisputed adverse possession of the property for over 15 years. The evidence showed that A. K. was not lawfully entitled to be registered.

HELD (*per Tyser, C.J.*): *that an action by A. K. against M. M. for the recovery of the property was not maintainable.*

The effect of the Immovable Property Limitation Law, 1886 (No. IV of 1886) considered.

The case of Ali Effendi Hassan v. *Haji Paraskevou Sava (1892) (2 C.L.R., 58) commented on.*

These cases were appeals from the District Court of Nicosia.

The actions were taken as cross actions.

In one action (No. 913 of 1904) Mulla Mustafa Haji Ahmed was the Plaintiff and Abdul-Kadir Hassan and Mehmed Ibrahim were the Defendants.

In the other action (No. 1 of 1906) Abdul-Kadir Effendi Molla Hassan and five others were the Plaintiffs and Molla Mustafa Haji Ahmed was the Defendant.

Both actions were in respect of the same piece of land.

In No. 913 of 1904 the Plaintiff sought to restrain the Defendants from interfering with the land, which he claimed by document of title and by over 10 years uninterrupted and undisputed possession and to set aside any registration in Defendants' name.

The Defendant Abdul-Kadir admitted the interference but claimed the property by virtue of documents of title in the name of Molla Hassan Habib and Fatma Habib.

Abdul-Kadir was one of Molla Hassan Habib's heirs. The other Defendant was a servant of Abdul-Kadir and the action was not proved against him.

In action No. 1 of 1906 the Plaintiffs were Fatma Habib and the heirs of Molla Hassan Habib. The Defendant was Molla Mustafa Haji Ahmed.

The Plaintiffs alleged that the land belonged to them by document of title and claimed that the Defendant should be restrained from interfering with it and that any title-deed in his name should be set aside. The documents of title relied on were two in number, one being in the name of Fatma Habib and the other in the name of Molla Hassan Habib, father of the other Plaintiffs.

The actions were heard together. The Court found that the boundaries of the qochans relied on by Abdul-Kadir Hassan and the others did not include the disputed place, and that Molla Mustafa Haji Ahmed had proved his case in regard to prescription.

The Court gave judgment for the Plaintiff in No. 913 of 1904 and for the Defendant in No. 1 of 1906 and ordered the property to be registered in the name of the Plaintiff Molla Mustafa Haji Ahmed.

Abdul-Kadir Hassan appealed.

A. Kyriakides, *Pascal Constantinides* and *M. Sevasli* for the Appellant.

Th. Theodotou for the Respondents.

The Chief Justice differed from the finding of the District Court that the disputed place was not included in the qochans produced by the Appellant, and held that it was so included, but for reasons explained in his judgment decided that this did not entitle him to prevail against the Respondent's prescription. The Acting Puisne Judge concurred in the finding and judgment of the District Court.

For the purpose of his judgment the Chief Justice assumed that the property was Mulk.

The judgments were as follows:—

The CHIEF JUSTICE having stated that he differed from the finding of the District Court as to the extent of Appellant's qochan, and having explained the reason for the difference, and having further stated that he concurred in the finding of the District Court as to the prescription established by the Respondent, proceeded as follows:—

The Appellant is registered as owner of the land in dispute but the Respondent has had possession and the Appellant has been out of possession for the last 15 years before action brought.

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On these facts the Respondent could obtain judgment in the form suggested in the case of *Bishop of Kyrenia* v. *Costi* (1897) 4 C.L.R., 54, unless the law laid down by the judgments of this Court as to the construction of the laws limiting the right to bring action for immovable property and the laws dealing with registration of title are affected by the law contained in Statute IV of 1886 and V of 1887.

The limitation of action law as regards Mulk is Art. 1660 of the Mejellé.

Now Art. 1660 of the Mejellé and Sec. 20 of the Land Code differ in their wordings, but in effect they appear to be the same. It is necessary in either case that there should be an absence of possession by the person who has the right to the property and an actual possession by another to create the bar to the action imposed by those sections.

The cases on the one section are and have been treated as cases governing the construction of the other section.

Under both sections it has been held that where the action is barred by length of possession a legal right to possess the property is conferred on the person who is in possession.

As to the meaning of Art. 1660 of the Mejellé there is a dictum of this Court in *Yeronymos Michael* v. *Haralambo Andoniou* (1893) 2 C.L.R., 140, that a person can obtain a legal right to possess Mulk properties by undisputed possession for 15 years (p. 143).

It had previously been decided that 10 years' possession gives a legal right to Arazi Mirie although the possessor had no Tapu title (1 C.L.R., 12, 2 C.L.R., 58).

The enactments in Art. 1 of the Law of 28 Rejeb, 1291, do not seem at first to have been regarded as affecting the law as laid down in those judgments.

In fact there is a dictum at p. 143 in *Yeronymos Michael Yemeniji* v. *Haralambo Andoniou* (1893) 2 C.L.R., 140, that the Law of 28 Rejeb, 1291, was not intended to interfere with the law which enables a person to obtain a legal right to possess Mulk properties by undisputed possession for 15 years. This is only a dictum of the Court because the decision in the case was that no one had had possession for 15 years.

A different view was however subsequently taken. There is no reported case which shows how the different view of the effect of the registration laws arose. It may be that it was in consequence of the publication of Mr. Ongley's translation of the land laws, being the first translation into English of those laws, and not published till 1892.

However it may be, and whether it was right or wrong, it was firmly established in 1895 that length of possession was no defence to an action by the registered owner unless there was a cross action to set aside the registration, and this has continued to be the law ever since and has been upheld as law in this Court (*Yanni Pieri* v. *Mariou Philippou* (1903) 6 C.L.R., 67).

At one time indeed it was held that a person who had acquired a right to be registered by length of possession could not sue for the property unless he had been registered, or had applied for registration before action brought, but this view of the law was over-ruled in 4 C.L.R., 54 and 4 C.L.R., 62, in which cases it was held that a person who had been in possession of land for the prescribed time might sue for a declaration of his title to the land as against another person and of his right to have any other registration set aside and for an injunction to prevent other persons from interfering with the land, which injunction might be granted by the Court subject to the production of a qochan.

It is clear however that under those decisions the Plaintiff could in a claim properly framed obtain a judgment in the form therein prescribed.

The effect of the different decisions on these laws may be summed up as follows:—

1. Sec. 20 of the Land Code and Art. 1660 of the Mejellé which fix a limit of time within which the owner of real property of the kinds therein mentioned must sue for its recovery, confer upon a person who has been in possession for that time a statutory title to the land, and a right to be registered for it.

2. By virtue of Art. 1 of the Regulations for Tapu lands and Art. 1 of the Law of 28 Rejeb, 1291, the statutory title so acquired, until perfected by registration, does not confer any right which can be enforced in a Court of Law, except the right to claim a declaration of right to registration as against another and to have any existing registration set aside and an injunction to take effect upon registration.

I will further point out that on the production of a judgment declaring that a statutory title has been proved the Land Registry Office is empowered to make all necessary registrations consequent on such judgment, and will if there is no impediment to its doing so register the immovable property in the name of the person in whose favour the judgment has been given. (Sec. 75, Law X of 1885.)

As to the Law IV of 1886 it was passed soon after the decision in *Ibrahim Mehmed* v. *Haji Panayioti Kosmo* (1884) 1 C.L.R., 12, and appears from the enactments in it to be intended to alter the law as laid down in that case.

For example in Sec. 4 it enacts "If any person shall have undisputed adverse possession of any property for the period of prescription, and shall during the whole of that period have been registered as the owner thereof, no action for the recovery of the property shall be maintainable against him after the expiration of that period."

This enactment is not necessary if the law was not altered because any person registered or unregistered would by the law prior to its coming into force have acquired the right here given to a registered owner. (1 C.L.R., 12.)

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Again in Sec. 3 it draws a distinction between a registered and unregistered owner and appears to give a right against a person who has been in undisputed adverse possession for a time which constitutes a valid defence to an action, to a person who has been actually registered and lawfully entitled to be registered which he did not have before.

It is a curious fact that no notice seems to have been paid to Law IV of 1886 and V of 1887 for some years after they were passed.

In fact *Ali Effendi Hassan* v. *Haji Paraskevou Sava* (1892) 2 C.L.R., 58, seems to have been decided as if no such law existed or as if the law did not affect the decision in *Ibrahim Mehmed* v. *Haji Panayioti Kosmo* (1 C.L.R., 12).

The laws were not cited by the advocates nor referred to by the Court.

The laws nevertheless are in force and as has been stated in this Court do deal with the points decided in *Ibrahim Mehmed* v. *Haji Panayioti Kosmo* (1 C.L.R., 12). See *Pieri* v. *Philippou* (1903) 6 C.L.R., 69.

It has been decided moreover that the provisions in these laws as to the excuses which prevent the prescribed time from running are those stated in these laws and not the excuses permitted by the Sher' Law *Muzaffer* v. *Collet* (1904) 6 C.L.R., 108. Previous to that decision the law has been ignored as to this point too.

The fact that cases have been tried and decided since the passing of the law in which no mention was made of the law either by the parties or the Court is no authority for saying that the statutes have no effect. There is no decision as to their effect and the laws cannot be repealed by being ignored.

This is an action in which the Respondent bases his right as a consequence of his long possession, which, as he alleges, bars the Appellant's claim to rely on his registered title.

In effect the Respondent claimed a statutory title by reason of the Appellant being barred by the law from bringing his action to turn him out.

But Sec. 3 of Law IV of 1886 enacts in effect that " an action for " the recovery of immovable property, of which some person, in whose " name the same has not been registered, has had undisputed adverse " possession for the period of prescription, shall be maintainable where " the person instituting such action has during some part of the time of " such adverse possession, prior to the expiration of the period of pre- " scription, been lawfully entitled to and actually registered as owner " thereof."

The meaning of this enactment seems to me clear but as it has not been thoroughly argued I do not wish to give any opinion on the point.

I will assume that the law takes away the bar to the hearing of the registered owner's action and entitles him to maintain an action for the recovery of the immovable property and that as a consequence the right of the person in possession to remain in possession is destroyed.

I do not wish to give here any decision as to the meaning of those laws as it is unnecessary for the purposes of this action. But assuming that the Laws IV of 1886 and V of 1887 have the full effect stated above I am of opinion that on the evidence in this case the Defendant is not benefited by this because he has failed to prove a right to the possession of the land.

Having stated his reasons for coming to this conclusion of fact, the Chief Justice proceeded as follows:

Any person who wishes to take advantage of the law must not only be registered but have a right to be registered. When a person claims to have a right superior to that acquired by occupation for the prescribed time he must at all events prove that right—that is to say—he must prove not only that he is registered but that he has a right to be registered. Registration alone is not sufficient.

All the facts as to registration and possession were gone into in the Court below and in my opinion the Appellant failed to prove his right.

Assuming therefore that the Law of 1886 alters the law in *Ibrahim Mehmed* v. *Haji Panayioti Kosmo* (1884) 1 C.L.R., 12, it does not benefit the Appellant.

The appeal is dismissed.

Respondents to have costs of appeal and in Court below the Appellants to have costs of cross action up to order of consolidation.

FISHER, ACTING J.: In my opinion (1) the qochans produced include the property claimed by the Respondent and (2) the Respondent has proved uninterrupted possession, for over 15 years prior to the action brought by him, of the property claimed in the action. That being so I think that the Respondent is entitled as against the Appellants to be registered as owner of the property and I do not think that anything in Law IV of 1886 as amended by V of 1887 precludes me from coming to that conclusion even if the Appellants who are Plaintiffs in the cross action do in fact, as on the evidence given here and in the District Court I think they must be taken to do, come within the provisions of Sec. 3 of Law IV of 1886 as persons " who prior to the expiration of the period of prescription have been lawfully entitled to be and have been actually registered as the owners thereof."

I agree that the appeal must be dismissed with costs as mentioned by the Chief Justice.

Appeal dismissed.