1928.
Dec. 19.

DERVIS
v.
TSERIOTI.
(No. 3).

[BELCHER, C.J., LUCIE-SMITH AND FUAD, JJ.]

THEMISTOKLES N. DERVIS *Appellant*,

v.

CHRISTOFI P. TSERIOTI AND OTHERS (No. 3).

Respondents.

Procedure—Cyprus Courts of Justice Order, 1927, *Clause* 30 (ii)—*Transfer to Divisional Court—Constitution of Court where issue is Fraud.*

Appellant, after obtaining a judgment against respondent for £158, applied to the District Court to set aside a mortgage of respondent's property to his wife for £435 and asked that the application should be transferred to the Divisional Court.

Held: (1) that the applicant's interest being only the amount of the judgment, the application to set aside a mortgage of over £300 is not an action involving a claim or question to property of the value of £300 or over, and, therefore, the application was within the jurisdiction of the District Court;

(2) that Clause 30 does not contemplate primary proceedings in one Court and subsidiary proceedings in another;

(3) that it is the duty of the Court so to interpret the provisions of the Cyprus Courts of Justice Order, 1927, that it shall be a constructive instrument for the administration of justice;

(4) that the Order of 1927 did not contemplate that a case should exist for one purpose in the District Court and for another purpose in the Divisional Court;

(5) that where an issue of fraud is raised the case must go before the full District Court.

Rossides v. *Haji Toussoun* (1) followed.

APPEAL by plaintiff applicant from the order of the District Court of Nicosia dated 21st January, 1928, dismissing an application of his to have the case transferred to the Divisional Court.

Triantafyllides: Appeal is from an order dismissing an application of appellant that the case should be transferred to the Divisional Court. Submit that the case was one proper for the Divisional Court. The issue was heard before one Judge. Submit on the authority of *Rossides* v. *Haji Toussoun* (1) that, as the issue raised was one of fraud, the proper Court is the full District Court.

Clerides: This cannot be called "an action of first instance" within the meaning of Clause 30 (ii) of the Courts Order. See Order 21, Rules 1 to 11. If appellant's contention is right, wherever property sought to be taken in execution is worth more than £300, the case must go before the Divisional Court irrespective of the amount of the judgment in the action.

(1) 8 C.L.R. 43.

Panayides in reply :

Clause 30 is too wide in its terms to be limited to original process.

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

JUDGMENT :—

BELCHER, C.J. : This is an appeal from an order of the District Court of Nicosia dismissing an application by the appellant to have an application (also by him) to set aside a mortgage under Section 3 (1) of Law 7 of 1886 transferred to a Divisional Court. The judgment obtained by the plaintiff in the original action was for £158, or thereabouts, and it is admitted that the mortgage in question is for £435 and that the mortgage premises, which are sought to be taken in execution are worth more than £300. The question we have to decide is whether the application to set aside the mortgage is an " action where the matter in dispute amounts to £300 or over," or whether it " involves directly or indirectly some claim or question to or respecting property or some civil right amounting to or of the value of £300 or over." In either case the proviso to Clause 30 (ii) of the Cyprus Courts of Justice Order, 1927, is mandatory : The District Court (through the President) must, if such a case is defended, (it appears on the record that the application now in question was opposed) transfer it to a Divisional Court for hearing and determination.

We were referred by appellant's counsel to Clause 2 of the Order in Council, by which " action " is defined (with usual saving words in the case of repugnancy) as including all proceedings of a civil nature before any Court. Those words, on the face of them, are wide enough to include interlocutory and subsidiary applications as well original process ; of that there can be no doubt. Is that primary meaning to be altered when Clause 30 is read ? Now Clause 30 is in part a re-enactment, with slight alteration, of Clause 29 in the 1882 Order, and in part, that part which is in question here, it is a new legislation introduced to lay the foundation for Divisional Court jurisdiction. If we read this new part as meaning that every application which may come before the District Court is necessarily to be transferred if it is opposed, and if it involves a question relating to property worth £300, then it follows that, though the case itself is not transferred, yet every opposed application for a writ of sale of immovables worth £300 must go to the Divisional Court even if the amount sought to be recovered is only, say, £50 (the present case is really but a specific and elaborated example of that general class).

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A case would exist for some purposes in one Court and for others in another at one and the same time. Such a state of things can hardly have been contemplated.

It is this Court's duty so to interpret the Order in Council that it may not fail in the purposes of being a constructive instrument for the administration of justice; and if strict application of the definition of "action" to Clause 30 leads to something which cannot have been intended we should conclude that the context is repugnant to such literal meaning and that some other must be found. Now proceedings in execution, and proceedings which arise out of those proceedings (as these do) are intimately bound up with what may be called the primary proceedings, those in which the judgment was given: I cannot imagine that the framers of Clause 30 intended that there should be at once primary proceedings in one Court and subsidiary ones in another, but that they meant the kind of transfer they referred to and provided for, to be a complete transfer of the whole proceedings, primary and (if any such should arise) subsidiary as well, from a Court of lesser jurisdiction to one of greater because the action from its very nature was one fit for a superior tribunal. That is to say, that the action to be transferred is not a mere application in another action, but one of an independent and originating character, which, once it is to be defended, is transferred together with all the possibilities of ancillary proceedings.

The use of the phrase "where such actions are defended" is just as appropriate to such an action as it is inappropriate to the opposing of an interlocutory or subsidiary application, however important to the parties the latter may be; if this restricted meaning is given, as I think it must be, there can be no question of transfer at later stage than that at which the defence is made and the question of value must be one raised, directly or indirectly, by the claim. It is impossible to argue that a claim for a money debt involves, even indirectly, the question of the value of any lands whatever which may be taken in execution under a judgment for that debt: in the present case neither the value of the mortgaged land nor the amount of the mortgaged debt is of importance: all the interest of the applicant stops at the amount of his judgment, and if that were paid the mortgagor and mortgagee might make whatever arrangements they pleased so far as the judgment creditor is concerned; it is not necessary for us to decide it here, but it by no means follows that if the mortgage is set aside as to the judgment creditor it may not still hold good as between the parties to it.

The other ground for the appeal is that the District Judge was wrong in deciding that this was a case for a single Judge and not for a full District Court. Now the

ground of application for setting aside the mortgage is fraud, and the case of *Rossides* v. *Toussoun* (1) is clear authority for saying that such a matter must be dealt with by the full Court; on this ground, therefore, the appeal must succeed.

We think as the respondent succeeded on one ground which was that principally argued, while the appeal itself is allowed on the other ground, and as the case is admittedly a test one, we shall make no order as to costs.

Appeal allowed.

[BELCHER, C.J., LUCIE-SMITH, AND SERTSIOS, JJ.]

MUSTAFA FUAD OMBASHI AND OTHERS
Appellants,

v.

RASHID AGHA HUSSEIN RIFAT *Respondent.*

Civil Procedure—Sheri Law—Jurisdiction of District Court to hear Action for Trespass brought against registered owners by persons declared by Sheri Court to be heirs—Liability of trespassers to refund rents.

Upon the death of H.C. the appellants as his heirs obtained registration of his immovables and went into possession. Respondent obtained a *fetva* from the Sheri Court that the heirs were respondent and E., the wife of deceased H.C. Respondent thereupon brought an action in the District Court to restrain appellants from interfering with the property, and claiming cancellation of the registration in appellants' names, rent and damages.

Held: (1) that the action was properly brought in the District Court;

(2) the decision of the Sheri Court was conclusive on a question of heirship;

(3) the District Court was right in apportioning the shares of the heirs in accordance with Sheri law; and that

(4) although appellants obtained possession in pursuance of a Mukhtar's certificate, they were trespassers and liable to refund the rents received.

Kakoyannis for the appellants.

Rifat for the respondent (plaintiff).

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

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(1) 8 C.L.R. 43.