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.

---

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

1928. Dec. 18.

OMBASHI v. RIFAT.

JUDGMENT :—

BELCHER, C.J.: This is an appeal by the defendants against the judgment given in action No. 155/25 in the District Court, Kyrenia, whereby certain registrations in their names were ordered to be set aside, and they were ordered to pay the plaintiff £10 : a counterclaim by them being dismissed.

One Hassan Chaoush died in 1919, leaving properties at Kyrenia. There survived him his brother who is the plaintiff; a lawful wife Eminé who had no children by him; and also the defendants who were his children by a granddaughter of Eminé. After the death the defendants got themselves registered in respect of the immovables of the deceased at Kyrenia, as heirs of the deceased and went into possession. Plaintiff (respondent) knew of this but took no action till 1925, when he applied to the Sheri Court for a declaration as to who were the right heirs of the deceased. A *fetva* was given by the Mufti answering (in a hypothetical form) the question whether the defendants could inherit, in the negative : on this *fetva* the Sheri Court informed defendants (who were represented before them) that they were not the heirs, and found that the deceased's estate belonged to Eminé and plaintiff as heirs and to no one else. Under the Civil Procedure Law, No. 10 of 1885, Section 95, a litigant who obtains from a Sheri Court a judgment ordering the payment of money or the performance of any other act or thing may apply to a District Court for its execution, so that assuming the Sheri Court judgment in this case to be one which falls within the category mentioned in the section the plaintiff need not have brought any action on it but merely applied for the appropriate form of writ of execution. Whether he might or might not have taken this course, plaintiff did not do so but instead instituted, as in my view he was entitled to do, a substantive action in the District Court, the judgment wherein is now appealed from, whereby he claimed an injunction against interference by the defendants with the immovables for which they had been registered and also rectification of the register, rent and damages. The Court, after hearing the whole case, ordered the rectification of the register as sought and that defendants should pay £10, the counterclaims being dismissed except so far as admitted; and the plaintiff was given his costs. The grounds on which defendants appealed to us against this judgment were: (1) that the District Court had no jurisdiction; (2) that in any case they were wrong in treating the *ilam* as conclusive of the question of heirship; (3) that the plaintiff by issuing his writ waived his rights under the *ilam*; (4) that the proper constitution

of the Sheri Court ought not to be presumed; and (5) that the District Court went beyond the *ilam* by purporting to fix the respective shares of the heirs.

To take these grounds in order: the alleged want of jurisdiction is that the matter before the District Court was one exclusively within the jurisdiction of a Moslem religious tribunal. It can hardly be questioned that to decide who are a Moslem's legal heirs is a matter for the Sheri Court and for that Court alone; but the writ in this case claims no decision as to heirship but only a judgment of a kind which is made constantly by the Civil Courts and which cannot be said to be primarily concerned with any matter of a religious character, treating as it does the question of status as one already determined. Then it is said that if there was jurisdiction in the District Court the plaintiff's right to sue as heir was not properly proved before it, that is to say, that it was not conclusively proved by putting in the *ilam*. We were referred to the case of *Mustafa & Another* v. *The King's Advocate* (1). The decision in that case was that an *ilam* declaring certain persons to be heirs did not affect the Crown's claim to the inheritance as *mahlul*.

The facts were quite different here, where the matters before the Sheri Court concerned Moslems and Moslems only: if in such a case an *ilam* was not binding it would mean that the Sheri Courts had no effective jurisdiction at all. Now it must be necessary for a plaintiff in the Civil Courts who claims through someone else, be it as heir, assignee, or otherwise, to prove the chain of his title. When that title depends on civil transactions, evidence of those must be given in the ordinary way, but when it is matter of heirship already decided by the Sheri Court then, if the District Court were to take further evidence and itself decide it, it would be usurping the functions of the religious tribunal. It was enough for plaintiff to do as he did, and put in the incontrovertible proof afforded by the existence of the Sheri judgment. Then it is said that plaintiff waived his rights under the *ilam*. It is enough to say as to this that he rested his whole case on the rights given him by the *ilam* and that I can find nothing in the evidence pointing to any intention to waive them in the slightest degree. Not was there any challenging of the constitution of the Sheri Court till the 4th ground of appeal was argued before us: it may have been open to plaintiff to show that what purported to be a religious tribunal was not one at all, but he did not do so.

Finally, the District Court says in its judgment that the *ilam* is conclusive of plaintiff's right to three-fourths of the property. No attempt has been made to show us that that

(1) 11 C.L.R. 64.

1928. Dec. 18.

OMBASHI v. RIFAT.

was not the effect of the *ilam*, as regards the extent of the share taken by the plaintiff: it was certainly open to the District Court, on the *ilam* certifying that Eminé and plaintiff were the heirs, to take judicial notice of the proportions in which they would by Moslem law share; and in no other way could they ascertain to what plaintiff was entitled as against the defendants, which was what they had to do, seeing that Eminé did not join as a plaintiff.

For the rest, the figures into which the District Court goes merely affect the relationship between the true owner and third parties and have nothing to do with the question of heirship: it is for the Civil Court and not for the Religious Court to decide a question arising out of a sale at public auction or the amount of rent received from a property; and the apportionment made of the mortgage debt is a consequence involved in the decision of the Sheri Court; it does not alter or extend that decision.

We also deal with a further argument put before us by the defendants at the hearing of the appeal, that even if the plaintiff's title, as certified in the *ilam*, is not controvertible (as we have held) yet the rents of the property having been received by the defendants under a *bona fide* claim of right and while the property was registered in their names and before the *ilam* was promulgated, cannot be recovered by the plaintiff. We were referred by Mr. Kakoyannis in support of this argument to *Haji Demetri* v. *Haji Demetri* (1). But there is the difference that in that case the possession under which the rents or profits were received was given by the true owner and justifiable on that ground: here the act of defendants in taking possession was no less a trespass though they procured a mukhtar's certificate (and then registration) to support them in assuming control of the plaintiff's property. There is no question here of third parties' rights (such as those of *bona fide* purchasers) being affected. I think we should proceed upon the principle laid down in England in the case of *West* v. *Roberts* (2), where it was held that legatees who had taken shares and dividends under probate of a will, which probate was later revoked in favour of a codicil making another disposition of the same property, must refund the dividends as well as re-transfer the shares. The present case falls well within that principle seeing that the persons having to make the refunds are actually those who purported to administer the estate and not mere legatees accepting what the executors paid over to them.

The appeal fails on all grounds and must be dismissed with costs.

Appeal dismissed.

(1) 6 C.L.R. 65.
(2) (1909) 2 Ch. 180.