[ZEKIA AND ZANNETIDES JJ.]

ATHINA ZAVOYIANNI AND ANOTHER, *Appellants*,

AND

COSTAS KALISPERAS, *Respondent.*

(*Civil Appeal No.* 4216).

*Practice—Civil Procedure—Appeal—From Magistrate to President, District Court—Rehearing of evidence—New trial—Discretion—Courts of Justice Law*, 1953, *section* 28 (2).

The President of the District Court of Kyrenia, upon an appeal from the decision of a Magistrate, refused to order that the evidence taken at the trial should be heard afresh before him.

It was argued that the President had no discretion in the matter when any party to the appeal gave security for costs to the Registrar under section 28 (2) of the Courts of Justice Law, 1953, and that he was bound to order that the evidence should be reheard.

*Held :* that under section 28 (2) of the Courts of Justice Law, 1953, the President had a discretion to order or not a new trial before him, and that such discretion must be exercised judicially and not arbitrarily.

*Misirlioglou* v. *Fehmi* (unreported) (Civil Appeal No. 4074 decided on March 15, 1954) ; and *Watt* v. *Watt* (1905) A.C. 115, referred to.

*Decision of President, District Court, affirmed.*

Cases referred to :

(1) *Misirlioglou* v. *Fehmi* (unreported) (Civil Appeal No. 4074, decided on March 15, 1954).

(2) *Watt* v. *Watt* (1905) A.C. 115.

**Appeal.**

The appellants appealed against the order of the District Court of Kyrenia (Theocharides, P.D.C.) (Appeal No. 4/55), in Action No. 191/53, dated the 16th February, 1957, refusing to order that the evidence taken at the trial of this case be heard afresh by him, under section 28 (2) of the Courts of Justice Law, 1953. The application was dismissed with costs against the appellants (defendants).

*Chr. Mitsides* for the appellants.

*X. Clerides* for the respondent.

The facts are set out in the judgment of the Court which was delivered by :

ZEKIA J. : This is an appeal against the refusal of the President of the District Court, Kyrenia, to order the evidence taken at the trial of this case to be heard afresh by him. The application for the hearing of the evidence was based on section 28 (2) of the Courts of Justice Law, 1953, which reads :—

> " Upon the application of any party to the appeal and upon such party giving security for costs to the Registrar, not exceeding ten pounds, the President of the District Court may order that the evidence taken at the trial shall be heard afresh before the President of the District Court and also such further evidence as he may deem fit to allow."

The grounds of appeal were two : (1) It was argued that the President had no discretion in the matter and when any party to the appeal gives security for costs to the Registrar as per section 28 (2) we have just cited, the President of the District Court is bound to hold a new trial. This Court in an earlier case, namely in *Yussuf Izzetin Misirlioglou* v. *M. Fehmi*, Civil Appeal No. 4074*, held that the President was bound to hear such evidence anew as the law stood before the passing of the Courts of Justice Law, 1953, but the present Law which came into operation on the 1st January, 1954, has given a discretion to the President to order or not a new trial before him. We are bound by this authority and we need not say more.

Coming to the second ground of this appeal : Having accepted that an order for a new trial is discretionary, the discretion, no doubt, must be based on sound principles and cannot be arbitrarily exercised (*Watt* v. *Watt* (1905) A.C. 115). The powers of the Court as to new trials are given in Order 58, rule 10, of the Rules of the Supreme Court and the grounds on which a new trial may be ordered are enumerated in the Annual Practice, 1957, pages 1268—1274, given as explanatory to Order 58, rule 10.

The appellants in this case had to satisfy this Court that they had at least one of the recognized grounds entitling them to a new trial and that the President did not use his discretion in the matter judicially. The appellants contended that the notes of the trial Judge were defective and this is their main ground for applying that the evidence be heard afresh. In support of their submission they filed an affidavit sworn by one of the litigants who was present during the hearing at the trial Court but did not keep any notes for himself but made use of the notes made by his counsel. Solicitor or counsel engaged in an action may take notes of evidence for his personal use and indeed he

* Unreported (decided on Mar. 15, 1954).

may, if occasion arises, rely on such notes and swear as to what has been said by a particular witness but it would be, in our view, stretching the matter too far if a client was allowed to swear affidavits long after the evidence of a particular witness was given relying on notes kept of such evidence by his counsel. The learned President went further and inquired whether, if what has been alleged in the affidavit of the applicant was true, it would justify an order for fresh trial and there again he found that there was no adequate ground for him to order evidence to be reheard. It has not been shown to this Court that the learned President either acted arbitrarily or not judicially in refusing the application in question.

The appeal, therefore, should be dismissed with costs.

*Appeal dismissed.*