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No. 60 of 1946.

In the Privy Council.

UNIVERSITY OF LONDON W.C.1. -3 OCT 1956 INSTITUTE OF ADVANCED LEGAL STUDIES

14219

ON APPEAL

FROM THE SUPREME COURT OF PALESTINE.
SITTING AS A COURT OF APPEAL.

BETWEEN—

HASSAN IBN OMAR EL ZEIDEH

Appellant

— AND —

ROSE and EDMUND ALEXANDER

Respondents.

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CASE FOR THE APPELLANT.

RECORD.

1. This is an Appeal from a judgment of the Supreme Court of Palestine in its appellate jurisdiction delivered by Mr. Justice Plunkett on the 28th July, 1944, allowing on Appeal by the present Respondents from a judgment of the Land Court of Haifa delivered on the 15th of September, 1943, dismissing with costs the claim herein of the present Respondents.

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p. 52.
p. 43.

2. The proceedings the subject of this Appeal were commenced by the Respondents on the 3rd of April, 1935, and in their Statement of Claim therein they claimed a declaration that they are entitled to 14 shares out of 96 shares in a certain plot of "miri" land at Haifa and that the Appellant is not entitled to contest their ownership in respect thereof and a Declaration to this effect was made in the judgment of the Supreme Court. It is against this declaration that the Appellant now appeals. The question in the appeal is whether the Appellant is entitled to rely upon a plea of prescription.

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CASE FOR THE APPELLANT.

pp. 5, 13.

3. The Land Court in dealing with the matter framed the following issues:—

- (1) Had the Plaintiffs (Respondents) a good legal title to the land?
- (2) Has that title become barred by the possession of the Defendant (Appellant) for the prescriptive period? and
- (3) Did the Plaintiffs Kushan (Title Deed) include the land claimed by him in this Court?

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p. 6.

p. 9.

pp. 12, 13.

4. The Land Court dealt first with the first issue. It was established that the Plaintiffs on the 28th of September, 1933, became the registered owners of 14 ninety-sixth shares of the land by a transfer on sale of their shares from Malakeh Khoury Touma who had been the registered owner of those shares since the year 1909. Evidence was also given that the Plaintiffs purchased with notice of the claim of the Defendant and that the Defendant was registered as owner with the Werko (Urban Property Tax) Authorities. The Land Court however gave judgment on the 11th of April, 1938, in favour of the Plaintiffs on the first issue subject to proof of the third issue.

p. 14.

pp. 35-38.

p. 44.

5. The Land Court referred the third issue to a referee who reported on the 5th of May, 1940, that Plot A on the Plaintiffs' plan and the part of Plot B thereon specified in the report were included in the Plaintiffs Kushan. This report was adopted by the Land Court and no dispute now arises with regard to this.

pp. 44, 45.

6. The Land Court dealt lastly with the second issue. The findings of the Land Court and of the Court of Appeal on the facts relevant to the Defendant's possession are as follows: In the judgment of the Land Court it was stated that the Defendant's evidence, which was believed by the Court, showed that the possession of the Defendant commenced in the first decade of the present century. That at the beginning it took the form of fencing the land by building loose dry stone walls and by patch cultivation. That about the commencement of the War of 1914, or shortly before, the Defendant commenced planting trees and shortly afterwards built a stone hut, and later a large number of wooden barracks were erected. That at first the Defendant did not live on the land but only came there to work. That the Defendant came to live on the land in about 1914 and since that date continued to live on the land without interruption. The Court stated that the Plaintiffs' evidence on the question of possession was most unsatisfactory. They had given no evidence as to the period prior to 1913 and the one witness called dealt only with a few visits between 1913 and 1916. In the

judgment of the Court of Appeal the only reference to the facts regarding the Defendant's possession is contained in the following passage. "I hold . . . that as set out in the judgment of the "District Court Respondents possession is established as from 1917. "This will be the earliest date, therefore, under consideration " . . . " It is not clear why the year 1917 is mentioned since this year does not appear in the judgment of the Land Court but it is submitted that the judgment of the Court of Appeal did not intend to disagree with any finding of fact of the Land Court on this issue.

p. 55

10 7. The Plaintiffs' principal answer to the Defendant's plea of prescription depended upon a series of proceedings instigated by Nazira Cook who at all material times claimed to be the owner of certain other shares in the land. The principal facts regarding this are as follows. The said Nazira Cook in 1921 instituted criminal proceedings in the Magistrates Court at Haifa against the Defendant and others. The Magistrate by Order dated the 11th April 1921 warned the defendants to these proceedings "to take "their hands off the land and to deliver it to Nazira" but provided that the defendants would have the right to follow the legal course
20 before the competent Court which would go into the question of ownership and possession. The said Nazira Cook attempted to execute this order in 1924 and again in 1929 but the Land Court stated in regard to these attempts "In fact, however, we are satisfied "that Hassan Zeideh was never removed from the physical possession of this land or from the huts, but continued to remain therein "in physical possession" and "we have therefore come to the "conclusion that the Defendant Hassan Zeideh remained in actual "physical possession of the land from the time of his possession "commenced about 1903 until the present day".

pp. 59, 60.

pp. 67, 74.

p. 45.

p. 46.

30 8. In the year 1930 the said Nazira Cook obtained from the Magistrates Court, Haifa, an order sentencing the Defendant to one month's imprisonment and a fine (reduced on appeal to a fine or imprisonment) for "resuming possession after judicial delivery", but by a judgment of the High Court of Palestine delivered on the 25th of February 1932 the Chief Execution Officer of Haifa was ordered to be restrained from causing the Magistrates Order of 12th April 1921 to be executed in respect of the whole land but that such execution should be confined to such share of the said land as the said Nazira Cook was entitled to under her Kushan, i.e. nine
40 twenty-fourth shares.

pp. 76, 77.

p. 78.

9. A further matter relied upon by the Plaintiff was that prescription could not run in favour of the Defendant because Malakeh Touma from whom the Plaintiffs derive their title to the shares now in question was "absent on a journey" within the

p. 18. meaning of Article 20 of the Land Code so that prescription could not run against her. The facts relevant to this issue are that the Plaintiff adduced evidence that Malakeh Touma was born in Beirut and lived in Beirut, but it was admitted that she was in Palestine in p. 46. 1909, 1928 and 1933 and the Land Court accepted evidence given on behalf of the Defendant that she had been in Haifa in 1917, 1921, 1923 or 1924 and 1933. The Plaintiffs were unable to secure the attendance of Malakeh Touma as a witness in these proceedings and the Land Court declined to allow her evidence to be taken on pp. 15-22. commission. No evidence was adduced as to the distance of Beirut 10 from Haifa.

10. For convenience are set out in the Appendix hereto Articles of the Ottoman Land Code the Ottoman Civil Code (the Mejelle) and the Ottoman Execution Law referred to in the proceedings as of importance in connection with the points at issue.

pp. 43-47. 11. The Land Court delivered judgment on the issue of prescription on the 15th of September 1943. Having found the Defendant's possession proved as a matter of fact from at latest the year 1905, the Court held that the proceedings by Nazira Cook did not amount to an interruption of his possession first because he was 20 never divested of his physical possession of the property and secondly because in view of the decision of the High Court of the 25th February, 1932, the eviction could only apply to the shares owned by Nazira Cook. The Court also held that the Plaintiffs had not established the plea of "absence on a journey" even assuming that absence at Beirut was sufficient for this purpose. The Court also found that the Plaintiffs knew at the time they took their transfer from Malakeh Touma that the Defendant was in actual occupation of the land. The Court therefore dismissed the Plaintiffs' action with costs.

pp. 52-55. 12. The Plaintiffs appealed to the Supreme Court of Palestine 30 and judgment in the appeal was delivered by Mr. Justice Plunkett on the 28th July 1944. He held that the action taken by Nazira Cook and subsequent formal delivery made by the Execution Officer, although the Defendant resumed possession on each occasion, was sufficient to interrupt the running of the period of prescription. He further held that recovery of the whole land had been ordered and confirmed on appeal and although the High Court subsequently made an order to a return in 1930 that the execution should proceed only in respect of the shares of Nazira Cook, he did not consider that this order invalidated or repealed any of the previous 40 proceedings. He also held on the authority of Land Appeal 29/29 P.L.R.I. 422, 423 that a joint owner is in the position of a trustee for

an absent joint owner and may sue to preserve the rights of the joint owners of the whole property. He therefore held that the proceedings by Nazira Cook did interrupt the running of the period of prescription against the Plaintiffs and their predecessor in title Malakeh Touma. He also held that the claim by the Plaintiffs that no prescription could run while Malakeh Touma was at a distance of "Mudat Safar" was established. He accordingly ordered the judgment of the District Court to be set aside and judgment entered for the Plaintiffs confirming their title to the land, 14 out of 96
10 shares, and that the Defendant is not entitled to contest their ownership.

13. The Appellant desires to submit in the first place that it is immaterial whether or not his possession was interrupted as a result of the proceedings by Nazira Cook, since it is sufficient, in order to comply with the provisions of Article 20 of the Land Code, that he should have enjoyed uninterrupted possession of the land for more than ten years i.e. from 1905 until at the earliest 1921.

14. With regard to the proceedings by Nazira Cook it is in the first place submitted that interruption of possession of a nature to
20 interfere with a plea of prescription must be interruption by or as a result of proceedings brought by the claimant and not by a co-owner. Secondly it is submitted that the proceedings brought, being of a criminal nature, were not such as are contemplated by Article 20 of the Land Code. Thirdly it is submitted that these proceedings did not lead to interruption of possession in fact. Fourthly that the proceedings, if they in fact lead to any interruption of possession of the whole land, were nullified in this respect by the decision of the High Court in 1932.

p. 78.

15. With regard to the alleged "absence on a journey" of the
30 Respondents' predecessor in title it is in the first place submitted that no or no sufficient evidence of this was produced on their behalf. If it be considered that there is evidence that she resided at some material time at Beirut it is submitted first that such residence does not afford the required "valid excuse" having regard to the evidence of her being present in Haifa on a number of occasions. Furthermore no evidence was given that Beirut is at such a distance from Haifa as to give rise to this answer.

16. It is therefore submitted that the fact of the Appellant's
40 adverse possession for the material period is established by evidence accepted by the Land Court and not, in this respect, controverted by the Court of Appeal. That the Respondents have not established any answer within the meaning of Article 20 of the Land Code, as properly construed, to the Appellant's plea of prescription and that

therefore the Respondents are not entitled to the declaration claimed by them.

p. 57.

17. Final leave to appeal to His Majesty in Council was given by the Supreme Court on the 6th of June 1945.

18. The Appellant submits that the appeal should be allowed and that the judgment of the Land Court should be restored and an order made for payment by the Respondents to the Appellant of his costs here and in all Courts below and for repayment by the Respondents of their costs in any Court below paid by the Appellant for the following among other

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REASONS.

1. BECAUSE the judgment of the Land Court was right in deciding that the Appellant's plea of prescription succeeded.
2. BECAUSE the Appellant's possession had continued for the required period of ten years before any interruption is alleged and a subsequent interruption is not in law prejudicial to the Appellant's case.
3. BECAUSE the judgment of the Supreme Court was 20 wrong in holding that the Appellant's possession was ever interrupted in fact.
4. BECAUSE proceedings taken by a co-owner or possession obtained as a result of such proceedings are not in law effective to interrupt the running of prescription against another co-owner.
5. BECAUSE the Supreme Court was wrong in disregarding the effect of the judgment of the High Court in 1932 upon the previous proceedings by Nazira Cook.
6. BECAUSE the Supreme Court was wrong in upholding 30 the contention of the Respondents based upon "absence on a journey".
7. BECAUSE the judgment of the Supreme Court was wrong and ought to be reversed.

F. E. SKONE JAMES.

APPENDIX.

“ARTICLE 20 of the Ottoman Land Code. (Translation from
“S. Fisher ‘Ottoman Land Laws’).

“In the absence of a valid excuse according to the Sacred Law,
“duly proved, such as minority, unsoundness of mind, duress, or
“absence on a journey (muddet-i-sefer) actions concerning land of
“the kind that is possessed by title-deed the occupation of which
“has continued without dispute for a period of ten years shall not
10 “be maintainable. The period of ten years begins to run from the
“time when the excuses above-mentioned have ceased to exist.
“Provided that if the Defendant admits and confesses that he has
“arbitrarily (fouzoili) taken possession of and cultivated the land
“no account is taken of the lapse of time and possession and the
“land is given back to its proper possessor.

“ARTICLE 20 (Translation from G. Young ‘Corps de droit Ottoman’).

“Lorsqu’une personne ayant droit à la possession d’une terre
“miri l’aura laissé occuper par une autre pendant dix ans sans la
“revendiquer en justice, et sans pouvoir invoquer aucune excuse
20 “valable telle que la violence exercée par l’occupant la minorité la
“démence, l’absence pour cause de voyage, les procès tendant à la
“restitution de la possession de cette terre ne pourront pas être
“accueillis. Le délai de dix ans court à partir du moment où les
“excuses ci-dessus auraient cessé d’exister. Mais, si le défendeur
“reconnaît qu’il a pris possession de la terre et qu’il l’a cultivée
“sans droit (fouzouli), il n’est pas tenu compte due délai qui s’est
“écoulé et la terre est remise au légitime possesseur”.

THE MEJELLE.

(Translation from C. A. Hooper, “Civil Law of Palestine and
30 Transjordan”).

“ARTICLE 1075. The joint owners of property held in absolute
“ownership are strangers to one another as regards their shares.
“Neither is the agent of the other. Consequently neither joint owner
“may deal with the share of the other without the latter’s
“permission. But in the case of dwelling in a house which is
“jointly owned and as regards matters pertaining thereto, such as

“coming in and going out, each of the joint owners is considered to
 “be an absolute owner of such property.

“Examples:—

“(1) One of the owners of a jointly owned horse lends or
 “gives such horse on hire without the permission of the other,
 “and it is destroyed while in the possession of the borrower or
 “of the person taking it on hire. The second joint owner may
 “claim to have the loss of his share made good by the first.

“(2) One joint owner rides a jointly owned horse, or places
 “a load upon him without the permission of the other, the horse 10
 “is destroyed while being ridden or driven. The second joint
 “owner may claim to have the loss of his share made good by
 “the first.

“(3) One joint owner uses a horse for a certain period so
 “that it becomes weak and its value decreases. The other joint
 “owner may claim to have the decrease in value which is repre-
 “sented by his share made good.

“(4) One of two joint owners of a house lives in such house
 “for a certain period without obtaining the permission of the
 “other. He is considered to be living in his own property held 20
 “in absolute ownership, and he cannot be called upon by the
 “other joint owner to pay rent corresponding to his share. If
 “the house is burnt down by accident, he is likewise under no
 “obligation to make good any loss.

“ARTICLE 1077. If one of two joint owners of property lets
 “such property on hire and receives the rent therefor, he is obliged
 “to pay the other his share thereof.

“ARTICLE 1078. If one of the joint owners of property owned
 “in absolute ownership is absent, the one who is present may take
 “the usufruct of such property to the extent of his share thereof, 30
 “provided the consent of the other is given by implication, as is set
 “forth in the following Articles.

“ARTICLE 1086. If one of the joint owners of an orchard is
 “absent, the owner who is present stands in the place of the absent
 “joint owner, and when the fruit ripens may take and consume his
 “own share. He may also sell the share of the absent joint owner
 “and set aside the price thereof. The absent joint owner, on return,
 “has the option of either ratifying the sale and taking the price set
 “aside, or of rejecting the sale and claiming to be given the value of
 “his share.

“ARTICLE 1643. If an action is brought claiming some specific
 “piece of property owned by several joint owners, the ownership 40

“arising out of some cause other than inheritance, one of the joint
 “owners may not be made defendant in respect to the share of
 “another.

“ARTICLE 1660. Actions relating to a debt, or property depo-
 “sited for safe-keeping, or real property held in absolute ownership,
 “or inheritance, or actions not relating to the fundamental constitu-
 “tion of a pious foundation, such as actions relating to real property
 “dedicated to pious purposes leased for a single or double rent, or
 “to pious foundations with a condition as to the appointment of a
 10 “trustee, or the revenue of a pious foundation, or actions not relating
 “to the public, shall not be heard after the expiration of a period of
 “fifteen years since action was last taken in connection therewith.

“ARTICLE 1663. Limitation which is effective in this connec-
 “tion, that is to say, which prevents an action being heard, relates
 “only to a period of time which has been allowed to elapse without
 “any excuse. The effluxion of time which has occurred by reason
 “of some lawful excuse, such as cases where the plaintiff is a minor,
 “or a lunatic, or an imbecile, and that whether he has a guardian
 “or not, or where the plaintiff has gone to some other country for the
 20 “period of a journey, or where the plaintiff has been in fear of the
 “power of his opponent, is disregarded. Consequently, limitation
 “begins to run from the time of the cessation or removal of the
 “excuse.

“Examples:—

“(1) No attention is paid to time which has elapsed while
 “a person was a minor. The period of limitation only begins
 “as from the time he reaches the age of puberty.

“(2) A has an action against B, a person in authority of
 “whom he stands in fear. If time has elapsed by reason of A’s
 30 “not being able to bring an action against B while in authority,
 “this fact shall not prevent an action being brought. The period
 “of limitation only begins to run from the date of the cessation
 “of the power of B.

“ARTICLE 1664. The period of a journey is three days at a
 “moderate speed, that is a distance of eighteen hours.

“ARTICLE 1665. If one of two persons living in places which
 “are separated from each other by the period of a journey, meets
 “the other person in one of such places once during a certain
 “number of years, so that an action pending between them can be
 40 “brought to trial, but neither of them takes any steps in the matter,
 “no action may be brought by one against the other in respect to
 “any matter which arose before the period of limitation began to
 “run.

“ARTICLE 1666. If any person brings an action in Court
 “against any other person in respect to some particular matter once
 “in a certain number of years, without the case being finally decided,
 “and in this way fifteen years pass by, the hearing of the action is
 “not barred. But any claim made out of Court does not cause the
 “period of limitation to cease to run. Consequently, if any person
 “makes a claim in respect to any particular matter elsewhere than
 “in Court, and in this way the period of limitation elapses, the
 “hearing of an action by the plaintiff is barred.

“ARTICLE 1672. If some of a number of heirs in an action 10
 “brought in respect to property of the deceased in the possession
 “of some third person are barred owing to the period of limitation
 “having elapsed, and others, by reason of some valid excuse, such
 “as that they are minors, are not, and such action is successful,
 “judgment shall be given in their favour for their share of the
 “property but such judgment shall not include the others.

“ARTICLE 34 of the Ottoman Execution Law of 18th May 1914.
 “In case of decrees which have been completely executed, if
 “they be upset in opposition or cancelled in appeal or held invalid
 “in Cessation, and a decree be issued disallowing the whole or part 20
 “of the plaintiff’s claim, and this decree be final, the execution
 “proceedings are annulled and execution proceedings are returned
 “to the original position without the necessity for issuing a fresh
 “order”.

In the Privy Council.

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SITTING AS A COURT OF APPEAL.

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