*Privy Council Appeal No. 38 of 1928.*

**Haj Ragheb Canaan** – – – – – – *Appellant*

*v.*

**Haj Said Canaan** – – – – – – *Respondent*

FROM

## THE SUPREME COURT OF PALESTINE.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD JUNE, 1930.

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*Present at the Hearing:*

LORD BLANESBURGH.
LORD TOMLIN.
LORD RUSSELL OF KILLOWEN.

[*Delivered by* LORD BLANESBURGH.]

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This is an appeal from a Judgment of the Supreme Court of Palestine, dated the 31st May, 1926, setting aside a judgment of the District Court of Nablus of the 10th October, 1925. The District Court decreed the suit. The Supreme Court dismissed it with costs. The plaintiff appeals.

The action was for £E.2,000 money lent by the plaintiff appellant to the respondent. The loan was alleged to have been made on the 21st August, 1919. The action was commenced on the 15th December, 1924, more than five years after the loan. The date of suit is of relevance to a defence of prescription which was raised in the Supreme Court. His delay in instituting proceedings is also a circumstance which the appellant has not explained. The case in so far as any questions of law and procedure may be involved is governed by and is to be determined by the Ottoman Codes of Civil Law (*El-Mejellè*), Civil Procedure and Commerce as amended or supplemented by ordinances issued since the British occupation of Palestine.

The appellant attached to his statement of claim as a document on which he relied, a "sanad," purporting

to be signed by the respondent and being, in fact, a promissory note of the same 21st August, 1919, bearing that the respondent owed and would pay to the order of the appellant 200,000 Egyptian piastres, "value received in my hands in cash." The note, however—and it is important at once to accentuate this—was not thereby brought into suit. The action, doubtless for very good reason, never became an action on the note. The claim for money lent remained the appellant's only claim. The note was introduced merely to strengthen or confirm it. If the loan were otherwise proved, the appellant's case needed no support from the note. From the note his claim could derive no assistance if, in the result, it was shown that the note was unconnected with any transaction of loan.

The importance of all this in its relation to several of the matters discussed in the course of the proceedings was not always appreciated in the Courts below. If it had been, some mistakes made might have been avoided. Subtle questions as to the admissibility of the evidence and the like under the *El-Mejellè*, so much discussed even in argument before the Board, are seen to disappear so soon as the note's true place in the proceedings is assigned to it.

The facts of the case are a little involved. The real issue between the parties can perhaps best be exhibited if attention is first directed to the case which was put forward by the respondent.

The appellant and he are brothers. They are two of seven sons who, upon the death of their father in 1899, continued to carry on in partnership at Nablus, his business of a soap maker. By 1919, four of the brothers had withdrawn from the partnership. In that year, three of them only remained in the business, the appellant Ragheb, the respondent Said, and a third brother Mustapha. The respondent was possessed of the largest interest. He was in actual control of affairs and in obedience to an ordinance of May, 1919, requiring such partnerships to be publicly registered, he duly registered this partnership, entering in the return, as the amount of capital paid up, a sum which in the view of the appellant and Mustapha, represented a substantial under-estimate of the true position. These two became apprehensive that they might be precluded by the figures of the return from having the partnership accounts as at its date, truly taken, with their respective shares correctly ascertained, and they insisted, with the respondent, that they should be secured against that misfortune. And thus is explained by him the arrangement which resulted in the sanad or note in favour of the appellant, as well as another of even date and of like amount in favour of Mustapha, coming into existence.

The arrangement was one between the three, a fourth brother Tahir taking an active part in the transaction. Under it, the respondent made in favour of each of his partner brothers a promissory note for 200,000 Egyptian piastres,

as for value received, each note being handed to and retained by Tahir, so that in his hands it might remain a security to the promisee when the partnership accounts had been taken, either for any sum thereby found due to him or, in the event of the respondent's successful insistence that the registered figures were conclusive as at their date, that it might be a security for its full amount. Each of the notes was expressed to be for value received in cash. The choice of words was deliberate. The notes were to be, *ex facie*, invulnerable. But if there was cash received, there was none retained by the respondent.

What happened according to the respondent was that when the notes were given, a ceremonial exchange of money took place in the presence of the parties and the witnesses. The practice described as one provided by the Sharia law was adopted. The money was produced, but not by either the appellant or Mustapha. It was handed to the respondent, and was thereupon returned by him, mediately or immediately, to the person from whom it came. There was thus " mowadaah," or collusion, in the only payment made. There was, so the respondent insisted, no loan of any kind by the appellant to him. Nor was his note handed to the appellant. It was handed to Tahir in exchange for a receipt from him detailing the terms of the deposit, a document apparently in evidence in the District Court but not part of the record now. Long afterwards the note was obtained by the appellant from Tahir, in order, so Tahir deposed, that he might go and settle his account with the respondent. But this was without the knowledge or authority of the respondent. The partnership has been dissolved and its accounts are being taken. As between the respondent and Mustapha these have been agreed, and the note in his favour has been returned to the respondent and is produced. Questions with the appellant on the accounts remain outstanding. Accordingly, no liability even on the note has so far arisen. Such, broadly, was the respondent's case.

The appellant's story, on the other hand, was that there was an actual loan of £E.2,000 made by him to the respondent on the date named ; that it was evidenced by the note or sanad, handed to him direct and not handed to Tahir at any time ; and that the respondent's indebtedness to him was unconditional and had no connection whatever with his share in the partnership. It is to be observed that the transaction of even date between the respondent and Mustapha was in no way alluded to by the appellant. It is to be noted also that no explanation has ever been vouchsafed of his delay in instituting proceedings to recover his loan, or of the fact that it was on the day when the action was commenced, and only then, that the note was stamped under penalty.

The action came on for trial in the District Court on the 7th March, 1925. The hearing was protracted ; it continued during eight days, taken at intervals between March and October,

1925. At the outset the respondent's signature to the sanad was admitted, and it is clear enough that upon that admission made the appellant's case, a highly technical one, was in the view of his advisers thereby established. The Court, however, proceeded to take evidence of the facts. First, witnesses were tendered by the appellant to prove enmity between himself and the respondent from the date of the sanad until the date of suit. Then the appellant and the respondent gave evidence, apparently unsworn. Each of them seems to have spoken to the effect above attributed to him. It is, however, not certain that even the appellant went so far as to say that he lent any money of his own to the respondent on the date named, or, indeed, that he then lent to him any money at all. And amongst a great body of witnesses—those who attested both notes, brothers and other relatives of the parties, some, if not most of them, called by the appellant himself—there is no trace of corroboration of the appellant's allegation that either on the day in question or at any other time was there any loan by him to the respondent of £E.2,000, as alleged, or indeed at all. And, taking the evidence as a whole, their Lordships feel confident that the broad result may with sufficient accuracy be stated as follows:—

There was no loan of money in any sense by the appellant to the respondent. The transaction, on the day in question, between them took place at the same time and in presence of the same parties as the transaction between Mustapha and the respondent; the two transactions were in every respect indistinguishable, and were carried through to achieve the same end. It was with the intention that the appellant's promissory note should as such appear to be of full validity that the ceremony of passing money to the respondent representing the amount of the note was gone through, as in fact it was. Whether any money was actually handed by the appellant to the respondent is more than doubtful. That any money of his own was even produced is not suggested by any witness, while the original source of the actual money used is by some of the witnesses attributed to Tahir, and by others to Sadik, a fifth brother, who was present and attested the notes, it seems clear that after the money had reached the hand of the respondent it was, having fulfilled its role, returned either mediately or immediately to the source whence it came, and that source was never the appellant.

The learned Judges in the District Court were impressed by certain discrepancies in the evidence to which they call attention in their judgment, and some of which have just been alluded to. Their Lordships are not moved by these discrepancies. What really impresses them is the substantial measure of agreement amongst the different witnesses upon the points of real importance in the transaction. The passing of the money is with all of them a mere ceremony, and it is not surprising that six years later the descriptions given of that ceremony should vary in detail. Ought any doubt, for instance, to be cast upon

the story as a whole because Sadik, perhaps the most satisfactory witness of all, said, as he did, "I did not see that money was paid by Ragheb to Said"? Yet this statement is the only passage from Sadik's clear evidence on the transaction generally to which the learned Judges make any reference.

That the notes were handed to Tahir and were directly given in connection with the partnership accounts is hardly in contest. The contrary is not stated by anyone. Sadik, the fifth brother just referred to, in terms said that the notes were drawn up as security for the settlement of these accounts; that they were deposited with Tahir by the respondent, the appellant, and Mustapha; and that the respondent was to take them back after a settlement had been reached. Indeed, the appellant's assertion that his claim in this action for money lent was unconnected with his share of the partnership can hardly survive the evidence quoted by the learned Judges, of Sabek, one of his own witnesses, which was that when in conversation he told the appellant that if judgment were given in his favour in the action for £E.2,000 he would obtain a sum to which he had no right, the appellant replied, "This sum would be less than what my share is."

If the evidence, the effect of which has now been summarised, was all of it by law admissible—and it was apparently all of it accepted as such by the learned Judges—it would seem that the appellant's case had disappeared long before the evidence was over. But that evidence as a whole the learned Judges apparently felt themselves entitled to disregard. In reaching their decision in favour of the appellant they directed their attention to one branch of it only. They treated the action as one brought upon the note, and not pausing to consider the difficulties in the way of such a suit created by the deposit of the note with Tahir, they were apparently of opinion that so soon as the respondent's signature to the note was admitted, the appellant's case under Article 1610 of the Code was complete, unless the evidence as to "collusion" was satisfactory. And this they held it was not, by reason of the discrepancies already alluded to. Accordingly, intimating that such was their view, the learned Judges gave the respondent the option to tender the oath to the appellant to the effect that there was no collusion. Had the respondent accepted the option, and had the appellant repeated on oath the evidence already given by him unsworn, the result would, it is shown, have been to decide the issue in his favour. Not unnaturally, therefore, in view of the evidence then before the Court, the respondent declined the offer made him, intimating that he preferred to appeal rather than be bound by the appellant's oath. The learned Judges thereupon gave judgment against him for the amount claimed on the grounds:

(*a*) of the discrepancies in the statements of the witnesses called to prove collusion;

(*b*) of the respondent's refusal to tender the oath to the appellant; and

(*c*) of the respondent's admission that the signature to the note was his.

The District Court having treated the action as brought on the note, the respondent appealed to the Supreme Court, and raised for the first time the plea of prescription. The prescriptive period he alleged was five years from the date of the note: he was a merchant and the action was barred by Article 146 of the Commercial Code. In addition to a re-statement of his case as already here set forth, the respondent pointed out that the appellant's rights under the judgment were made independent of his claims in relation to the partnership and he applied to the Court for leave to adduce further evidence to demonstrate the real connection between the two transactions, and further to disclose the circumstances in which the appellant had obtained possession of the note from Tahir and in respect of other matters. In argument the appellant's answer to all this was confined apparently to the plea of prescription and in the result the Supreme Court repelled that plea. For the rest they held, clearly thinking no further proof necessary, that the evidence produced to the District Court was sufficient to show that the note for £E.2,000 was given as a guarantee for the appellant's share in the capital of the partnership and did not represent a loan as contended by him. The appellant accordingly could not succeed in his action, which should be dismissed with liberty to him to bring a fresh suit in respect to his claim to a share in the capital of the partnership, and they so adjudged. This is an appeal from their judgment.

It appears with sufficient clearness from what they have already said, that in their Lordships' judgment that appeal can only succeed, if at all, on some purely technical ground. And it was upon technical grounds that it was mainly rested by learned Counsel for the appellant. The first of these was that the promissory note, when produced, amounted within the meaning of Article 1610 to an admission of the respondent's debt, and that no evidence was receivable to vary or qualify that admission. To this contention, as it appears to their Lordships, the all sufficient answer in this case, without going further, is that the respondent's debt sued for was money lent to him, and that the note is neither on its face nor at all an admission of any such debt, which, in fact, remains entirely unproved.

Taking this view, it is unnecessary for their Lordships to discuss or even to consider whether if the action had in truth been based upon the note the defence of "mowadaah" was not made good by ample admissible evidence.

The second contention of the appellant was based upon Section 11 of the Law of Evidence Ordinance, by which it is provided as follows:—

> "The value of oral evidence and the credibility of witnesses are questions for the Court to decide, according to the demeanour of the witnesses, the circumstances of the case, and such indication of the truth as may appear during the trial. It shall not be the duty of the Court to make inquiry as to their credibility either through verbal testimony or by private inquisition."

In the appellant's submission the Judges of the District Court were made by this ordinance the final judges of the truth

or falsehood of the evidence called before them and the Supreme Court had no jurisdiction to reverse any finding of the District Court upon that evidence. To which, as their Lordships think, the answer is that the ordinance has not and is not intended to have any such sweeping operation as the submission involves. Its purpose is to substitute in the Courts in Palestine in place of the principles of Turkish procedure which the ordinance superseded those which are normal in British Courts of Justice. Certainly the terms of the ordinance cannot be so construed as to preclude a Court of Appeal from considering and giving effect, as in this case, to relevant evidence before the District Court which the learned Judges there did not, so far as appears, disbelieve, but which they ignored altogether.

Thirdly, the appellant relied on Article 15 of the amendment of the Code of Civil Procedure dated the 9th April, 1911, which provides *inter alia* as follows :—

> "All judgments and orders of Court will contain full reasons for the rejection and acceptance of each of the claims put forward by the parties and the articles of the law on which the decision is based. . . .
>
> "Any contravention of these rules will render the judgment void."

It was said that the judgment of the Supreme Court, the substance of which has been already stated, does not comply with the terms of this Article and is void.

Their Lordships are so far in agreement with this criticism as to say that the judgment of the Supreme Court does not appear to have been formulated with the conditions of this Article in mind, and it would be well if, so long as the Article remains in force, the judgments of that Court were framed in more obvious compliance with its provisions. But in the present case it is only necessary to look at the case on either side made before the Supreme Court to see the contentions which the learned Judges there accepted. Their judgment is sufficient as it stands for every practical purpose, and their Lordships are not prepared to recommend any interference with it on what at most is here a trifling informality quite void of effect. In no circumstances could they, in this case, recommend any course which would have as its result the restoration of the judgment of the District Court, for which, in its full result, nothing can be said.

Having reached these conclusions, it is unnecessary for their Lordships to deal with the respondent's plea of prescription, raising as it does serious questions of general importance. It is better that such questions should be finally decided in a case in which they necessarily arise.

In the result this appeal, while quite destitute of merits, is in their Lordships' judgment equally unsupportable on any technical ground, and they will humbly advise His Majesty that it be dismissed with costs.

**In the Privy Council.**

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HAJI RAGHEB CANAAN

*v.*

HAJ SAID CANAAN.

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DELIVERED BY LORD BLANESBURGH.

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