1983 January 28

[HADJIANASTASSIOU, LORIS, PIKIS, JJ.]

ANDREAS ANASTASSIOU AND ANOTHER,
Appellants-Defendants.

v.

GEORGHIOS CHR. MOUYIA,
Respondent-Plaintiff.

(*Civil Appeal No.* 6255).

Evidence—Witness—Refreshing memory from written record—And production in evidence of such record—Principles applicable—Use that can be made of the document by the Court.

In the course of the trial of a claim for £1,992.810 mils for the supply of goods the respondent-plaintiff referred, by way of refreshing his memory, to certain notes which he made in loose pieces of paper and in which he had recorded, simultaneously with the supply of the goods, the goods supplied and their value. These notes were admitted in evidence but a perusal of the record showed that the respondent had an accurate recollection of the facts stated therein.

Counsel for the appellant contended that these notes were wrongly admitted in evidence, an error that crept into the judgment of the Court, leading to a misdirection, in that it was treated as independent evidence tending to establish the claim of the respondent.

Held, that a witness may refresh his memory from a record kept, purporting to record events that take place, provided the record is made contemporaneously with the event; that what is contemporaneous, is a matter of fact and degree; that a note made contemporaneously with the event is not evidence per se, i.e. it cannot be relied upon as evidence of the facts stated therein; that its use is limited to refreshing the memory of a witness in order to ensure that the contest between the parties is one of truth and not memory; that the document relied upon for the

refreshment of memory may be produced in evidence in order to disclose the premises upon which memory is refreshed and afford an opportunity to the other side to cross-examine the witness with regard to that part of the document relied upon exclusively for the refreshment of memory; that therefore, the trial Court was not wrong in accepting the production of the document in evidence, though it should have been made explicit that its content was not admitted in any derivative sense; that contrary to the submission of counsel, the trial Court drew no inferences from the contents of the document as such and relied upon it exclusively as a means of checking the accuracy of the evidence of the respondent, evidence that was accepted as truthful and reliable; that there was no misdirection whatever, in this or any other regard; and that consequently the appeal must fail.

Appeal dismissed

Cases referred to:

Senat v. Senat [1965] P. 117-177:

Halliday v. Holgate, 17 L.T. 18.

Appeal.

Appeal by defendants against the judgment of the District Court of Nicosia (Papadopoulos, P.D.C.) dated the 7th March, 1981 (Action No. 4725/76) whereby they were adjudged to pay to plaintiff the sum of £1,992.810 mils balance due for goods sold and delivered.

E. Lemonaris, for the appellants.

X. Syllouris, for the respondent.

HADJIANASTASSIOU J.: Having heard counsel for the appellants, we consider it unnecessary to call upon counsel for the respondent to address us on the issues raised in this appeal.

Mr. Justice Pikis will give our reasons for the decision.

PIKIS J.: This appeal was taken against a judgment of the District Court of Nicosia, upholding a claim of the respondent, a trader in animal feeds, for the recovery of a sum of £1,992.810 mils, from the appellants, husband and wife, owning a farm in partnership. The appellants disputed being partners in the running of the farm and, maintained that only the husband, appellant 1, was responsible for the management of the business

that belonged to him. There was a denial of any indebtedness to the respondent although it was agreed that appellant 1 was in account with the respondent over a long period of time. Far from acknowledging liability, appellant 1 maintained before the trial Court, that he overpaid the respondent owing to a mistake, by an amount of £91.785 mils in respect of which they raised a counterclaim.

By their appeal, the appellants disputed the factual substratum of the judgment and maintained that the findings of the Court were at variance with the weight of the evidence. Also they contested a finding that appellant 2 was the partner of appellant 1, contending there was no partnership between the two and no liability on her part to make good any debt owing to the respondent. By a notice of supplementary grounds of appeal, they challenged the validity of the judgment on a ground not specifically raised to start with, relating to the admissibility of a document, notably exhibit 6, consisting of notes made by the respondent, received in evidence, to record details of the value of goods supplied to the appellants over a period of time. Counsel for the appellants abandoned every ground of appeal but for the last mentioned, wisely in our judgment, in view of the existence of overwhelming evidence establishing the existence of a partnership between the appellants. Moreover, the remaining findings of the Court, far from going against the weight of the evidence, they appear to reflect such weight.

The parties had a successful business relationship over a period of time. After a period of years, the respondent noticed delays in the discharge of the monetary obligations of the appellants and insisted on payments being made coincident with the supply of animal feeds for the livestock of the appellants. Appellants were not apparently in a position, after 1974, to meet their obligations in time. Respondent thereupon made a practice of recording, simultaneously with the supply of goods to the appellants, in loose pieces of paper, the goods supplied and their value. The indebtedness of the appellants rose to £1,992.810 mils, a sum demanded from the appellants prior to the institution of this action. The lack of any favourable response, led to the institution of the present proceedings.

In the course of his evidence, the respondent referred to these

notes by way of refreshing his memory, although it appears from a perusal of the record that he had an accurate recollection of the facts noted therein. The notes were admitted in evidence, notwithstanding the objection of counsel for the appellants and, were made an exhibit in the proceedings.

The submission of counsel for the appellants is that these notes were wrongly admitted in evidence, an error that crept into the judgment of the Court, leading to a misdirection, in that it was treated as independent evidence tending to establish the claim of the respondent.

A perusal of the judgment of the Court reveals that the Judge confined the use of this evidence to its value, as an aid for the refreshment of the memory of the respondent and nothing more. The learned trial Judge was particularly well impressed by the demeanour of the respondent and his thorough recollection of the events, so much so that he felt no uncertainty whatever in relying on his evidence as a true reconstruction of the material facts of the case. Counsel for the appellants made extensive reference to *Phipson on Evidence*, 11*th ed.*, on the subject of the refreshment of a witness' recollection from written records made contemporaneously with the event (paras. 1528 et seq.) and, drew our attention to the decision of Sir Jocelyn Simon, P., as he then was, in *Senat* v. *Senat* [1965] P., pp. 172–177, on the legitimate use that may be made of a document relied upon for the refreshment of a witness' recollection.

The relevant principles may be briefly summarised as follows:

A witness may refresh his memory from a record kept, purporting to record events that take place, provided the record is made contemporaneously with the event. What is contemporaneous, is a matter of fact and degree. Its application need not be debated here for the respondent made the records in question immediately after the event. The element of contemporaneity is designed to eliminate the possibility of errors creeping into the record on the one hand and, the preparation of records long after the event, for self-serving purposes, on the other. A note made contemporaneously with the event is not evidence per se, i.e. it cannot be relied upon as evidence of the facts stated therein. Its use is limited to refreshing the memory of a witness in order to ensure that the contest between

the parties is one of truth and not memory. Montague Smith, J.. found the reason for the rule to be that a witness should not suffer from a mistake and should be able to explain an inconsistency. (See, *Halliday* v. *Holgate*, 17 L.T. 18). A document relied upon for the refreshment of memory may be produced in evidence in order to disclose the premises upon which memory is refreshed and afford an opportunity to the other side to cross-examine the witness with regard to that part of the document relied upon exclusively for the refreshment of memory. And so long as cross-examination is confined within those limits, the document will not be held to have been adopted by the cross-examining side as evidence in the case.

Therefore, the trial Court was not wrong in accepting the production of the document in evidence, though it should have been made explicit that its content was not admitted in any derivative sense. Contrary to the submission of counsel, the trial Court drew no inferences from the contents of the document as such and, relied upon it exclusively as a means of checking the accuracy of the evidence of the respondent, evidence that was accepted as truthful and reliable. There was no misdirection whatever, in this or any other regard. Consequently, the appeal fails.

The appeal is dismissed with costs.

Appeal dismissed with costs.