[SMITH, C.J. AND MIDDLETON, J.]



G. P. MICHAILIDES *Plaintiff,*

*v.*

THEODORI ANDONIOU *Defendant.*

INHIBITION OF A SPENDTHRIFT—NOTICE OF INHIBITION—MEJELLE, ARTICLE 961—PRACTICE—ISSUES—PROMISSORY NOTE—VALIDITY—FRAUD—CONSIDERATION—ORDER VIII., RULE 21, OF RULES OF COURT, 1886—MEJELLE, ARTICLE 1610.

The mere affixing a notice outside the Court-house is not sufficient publication of the fact that an order of the Court has been made inhibiting a person as a spendthrift.

The issue as to whether a promissory note is valid is a question of law to be decided upon a consideration of facts which should be alleged by one party or the other at the time when the statement of the matters in dispute is agreed upon and settled.

Where, therefore, such an issue was agreed upon by the parties and no allegations were made at the time that the making of the note was obtained by fraud:

HELD: That the defendant was not entitled upon the hearing of the action to raise the defence that the making of the note was obtained by fraud, but that such a defence must be specifically raised.

Where parties have agreed to the trial of an issue of fact which is immaterial in point of law, the Court will not be debarred from giving judgment according to law, though evidence in support of the issue has been admitted.

APPEAL from the District Court of Famagusta.

*Rossos* for the appellant.

*Sevasli* for the respondent.

The facts and arguments sufficiently appear from the judgment.

*Judgment:* The plaintiff in this action claimed 11,600*p.* on a promissory note and 5,600*p.* due on a statement of account attached to the writ. *Nov.* 9.

No statement of the matters in dispute was settled before a Judge or before the Court, but a written statement of them was agreed upon between the advocates of the respective parties and filed.

The issues thus agreed upon were:—

1st. Is the judicial interdiction of the 13th June, 1888, still in force?

2nd. Is the promissory note of 6th August, 1894, valid?

3rd. Was there any consideration for the promissory note or for the attached account?

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At the hearing of the action it was proved that in June, 1888, the defendant was, on the petition of his mother, inhibited as a spendthrift by the District Court of Famagusta, and a notice of the order of the Court was posted up outside the Court-house of Varosha. The plaintiff swore that he first heard of this inhibition, after the present action was brought, from the defendant's advocate at the time of the settlement of issue. The plaintiff was cross-examined at considerable length with the view apparently of showing (1) that his books were irregular, not such as were required by the Commercial Code, and were entitled to no weight, and (2) that the state of his own affairs was such that it was improbable that he should have been in a position to advance to the defendant the amount for which the promissory note was given.

The making of the promissory note was not denied, and by that the defendant admitted that he had received the amount of 11,600*p.* in cash. The plaintiff was not asked either by his own advocate or in cross-examination as to the circumstances under which the promissory note came to be given, and whether he had handed to the defendant the amount stated in the note or not.

The defendant gave evidence on his own behalf, first stating that he received no money, and afterwards admitting that the plaintiff had given him £15. With regard to the making of the note the defendant states: "Plaintiff was "going to give me goods and money so I made the note; "I did this because plaintiff said he would send my note to "Nicosia to get the goods."

On these facts the Court gave judgment holding, 1st, that the publication of the interdiction was insufficient: 2nd, that as regards the promissory note judgment must go for the plaintiff on the authority of the case of *Haralambo Panayi Sotiri v. Euthimia Michail Sotiri*, C.L.R., Vol. II., p. 177, and that the claim on the account current must be dismissed.

From this judgment the defendant appealed, and it was contended for him that the publication of the order of the Court of June, 1888, was sufficient; that under the 2nd issue as to the validity of the promissory note it was competent for the defendant to allege fraud, and that the facts proved showed that the note was obtained by fraud, and also that the plaintiff having agreed to an issue raising the question of the consideration given for the note must be bound by it, and the defendant was, therefore, entitled to go into the question of consideration.

For the respondent it was contended that, as a matter of fact, there had been no proper inhibition as no formal order had been drawn up, and that if the inhibition were validly made, it had not been sufficiently published.

It was also urged that the question of fraud could not be raised under the second issue settled, as the meaning of that issue was to raise the question of the validity of the making of the note, having regard to the existence of the alleged inhibition, and further that, as a matter of fact, fraud had not been established.

With regard to these arguments, we are of opinion that it was established that the District Court of Famagusta had, in June, 1888, inhibited the defendant as a spendthrift.

It is true that no formal order is proved to have been drawn up, but this, doubtless, arose from the fact that the defendant's mother, the person interested in the matter, made no application for the issue of a formal order. We, however, see no reason to interfere with the decision of the District Court, that the mere affixing of one notice of the fact outside the Court-house, was not a sufficient publication. The Mejellé requires the publication of the inhibition, and we think it is the duty of the person who is interested in having a person inhibited as a spendthrift to take care that the fact of such inhibition is made known to the public, in order that they may not give credit to the spendthrift and thus lose their goods or money. In the present case it is obvious that the order of the Court could have been published by notices affixed to public places in the bazaar of Varosha, by advertisement in the Official Gazette, and in the newspapers published in Cyprus, and by the public crier. It has already been decided by the Supreme Court in the case of *Georghios Aggelidi v. Fehim Bey Tudjarbashi*, C.L.R., Vol. II., p. 69, that the insertion of one notice in one newspaper was not a sufficient publication, and it appears to us that one notice affixed outside the Court-house is also insufficient.

It was urged that the fact that mention of the inhibition was made in the issues shows, that the plaintiff must have been aware of it. We hardly see the cogency of this reasoning, however, as the existence of the inhibition was doubtless raised by the defendant, and there is nothing to show that the plaintiff became aware of it before the time when the issue was settled, as he himself asserts was the fact.

The next point for our consideration is whether the making of this note was obtained by the fraud of the plaintiff. Amongst the issues agreed upon between the parties there was none which directly raised the question of fraud, but the appellant's counsel contended that under the issue raising the question of the validity of the note he was entitled to raise the question of fraud.

Order VIII., Rule 21, which deals with a statement of matters in dispute agreed upon between the parties to an action, appears to us to contemplate a statement of the

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facts in dispute. The rule says : the Court or Judge may, if the statement so agreed upon sets forth any facts in dispute upon which the claim endorsed upon the writ appears to be founded, record such statement as the statement of the matters in dispute in the action. The issue as to whether the note is valid, appears to us to be a question of law to be decided upon a consideration of facts which do not appear to have been alleged by one party or the other at the time they agreed upon the statement, and certainly do not appear on the statement itself. The word "valid" has a wide signification, and it is impossible to say what the parties intended it to convey. The question of validity might depend upon the fact of the existence or not of the inhibition of the defendant by the Judge, upon whether the note was a forgery, or whether the making of the note was obtained by fraud. We think it most probable, having regard to the question as to whether the inhibition of the Judge was in force, that the issue of validity was intended, as the respondent's advocate contended it was, to raise the question as to whether the note was valid having regard to the existence of the alleged inhibition. The plaintiff was certainly entitled to know before going into Court what defence the defendant was going to raise, and, in our opinion, the question as to whether the making of the note was obtained by fraud should have been specifically raised. The object and intention of the Rules of Court undoubtedly is, that the parties before the hearing shall know exactly what facts are admitted, and what each has to prove, and under this issue it appears to us the plaintiff was entirely in the dark as to what the defence with regard to validity was going to be.

He, no doubt, agreed to it, but he may have done so in the belief that it was not intended to raise any question of fact as to the existence or otherwise of fraud, but considering that it was only a question of law, viz. : how far did the existence of the alleged inhibition affect the defendant's liability on the note.

We, therefore, think that under this issue it was not competent for the defendant to raise the defence of fraud.

Even if it were competent for this defence to be raised, we may say that we do not think that fraud was established in this case. The main evidence relied upon was the unsatisfactory character of the books kept by the plaintiff. The evidence seems to point to a good deal that is suspicious and unsatisfactory about these books, and the way in which they were produced and the entries made in them : but standing by themselves they do not appear to us to establish that the making of this note was induced by fraud.

It was urged too, that the case of *Haralambo Panayi Sotiri v. Euthimia Michail Sotiri* (*ubi sup.*) was in the defendant's favour, inasmuch as the defendant asserts that he signed the note because plaintiff promised to advance him money or goods which he partially at all events failed to do. With regard to this, it is a curious circumstance that the defendant's advocate does not appear to have addressed a single question to the plaintiff in cross-examination as to any such promise having been made, or as to any advance in money or goods to the defendant. The defendant's assertion stands alone, in contradiction to his acknowledgment in the note that he received the whole amount in cash. It would, we think, not be possible for us to hold on these facts alone that fraud had been established.

We cannot say what view the District Court took of these facts ; but the Court having the case of *Haralambo Panayi Sotiri v. Euthimia Michail Sotiri* before them, as the reference in the Judges' notes shows they had, must either have come to the conclusion that fraud had not been pleaded and could not, therefore, be raised as a defence, or that fraud had not been established.

If fraud had been pleaded, and the plaintiff had been cross-examined as to the time and manner in which he advanced the 11,600*p.* to the defendant, and as to any undertaking on his part to procure goods for the plaintiff, the case might have worn a different aspect to-day.

The last point raised is, that the plaintiff having agreed to an issue as to whether consideration was given for the note and the account, must fail if the defendant has succeeded in establishing that no consideration was given.

With regard to the account, this issue seems to be hardly appropriately worded. An examination of the account shows that it is made up of items showing cash advanced and goods sold to the defendant, and we presume that the defendant by this issue intended to set up that he had not received the money and goods mentioned in the account. However, as the Court decided against the plaintiff and there has been no appeal, it is unnecessary to discuss the meaning of the issue as regards the account further.

With regard to the note, the case stands in this way : Article 1610 of the Mejellé says, that in the case of such an acknowledgment of debt, as the one in question to-day, the maker of the acknowledgment cannot, in the absence of forgery or fraud in the document itself, dispute his liability under it. The plaintiff has assented to the defendant raising an issue as to whether he, the defendant, in fact received consideration for the note. What is the effect then of the plaintiff having consented to the defendant

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raising an issue that is immaterial? It appears to us that the plaintiff cannot be taken to have waived his legal rights by his consenting to the defendant raising by way of defence a matter that is no defence in law.

Another aspect of the case is this, viz.: that by agreeing between themselves upon this issue, the parties would, if the contention of the appellant's counsel be correct, put it out of the power of the Court to decide the matter according to the law. No authority has been cited to us for such a proposition as this, and we do not think that it can be sustained.

For these reasons we are of opinion that the decision of the District Court must be sustained and this appeal dismissed with costs.

*Appeal dismissed.*