CONVERSION OF PLEDGE OF LAND INTO SALE AND ITS RESALE TO THE PLEDGER (1345/1926)

Introduction

A Bedouin of Ḥamūlat al-Rashāyida of al-ʿUbaydiyya tribe sells a parcel of land allegedly inherited from his ascendants, to some tribesmen of ʿAshīrat al-ʿUbayyāt of al-Taʿāmira tribe for a certain amount of French gold livres. Actually the same parcel was transferred to the seller’s ascendants as a pledge almost one hundred years previously, in the first half of the 19th century, against a loan. Since the loan has never been returned, the pledged land seems to have passed to the ownership of the creditor-pledgee. Now the heir of the pledgee, sells the pledged plot back to the heirs of the pledger, the original owner of the land. The price of the sale comprises the original price of the pledge, i.e., the nominal amount of the loan, plus an additional amount that seems to reflect the difference between the value of the pledge rights and the value of the ownership rights.

The sale transaction is performed in accordance with the sharʿī requirements, using technical terms that can be identified in the Mejelle though with some concessions to customary law. Thus one of the witnesses, an agnate of the seller, is nominated as a surety, his task being to see to it that the seller fulfills his obligations under the contract, i.e., to transmit the plot on receipt of the entire price. The pledge contract, on the other hand, seems to have been performed according to customary law or practice (it took place before the codification of the Mejelle). According to the Mejelle, if the pledger does not return the loan when it is due and does not comply with the court’s instruction to do so, the court may sell the pledge and reimburse the pledgee (art. 757). In this case, however, there seem to have been no legal proceedings, and in any case, the pledgee treated the plot as his private property. The plot was transferred by inheritance from one generation to another over a period of a century before it was returned to the ownership of the original owners by means of a sale.

The same phenomenon has been observed among the Bedouin of the Negev, where the pledge, as a rule, is not bound by a specific period of time: the pledger may return the loan any time at his will, even when several years elapse, and ask the pledgee to return the land to him. If, in the meantime, the pledger dies, his descendants may ask for the pledge to be revoked in return for restoration of the loan. The two parties to the pledge contract may, however, agree that if the loan is not returned within a specific period of time, the pledged land will become the private property of the pledgee. Some maintain that such a stipulation is null and void and that the pledgee can never become the owner of the pledged land.\(^1\)

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\(^1\) Stewart, “Customary Law,” 268; for further details, see idem, “Contract with Surety,” 6.

\(^2\) Cf. Schacht, “Rahn,” 400i.

\(^3\) Al-ʿĀrif, 238–399, arts. 25–28; cf. Shuqayr, 418–19 (the parties may agree that if the pledger does not return the loan in time, the pledgee will continue to cultivate the land until the loan is returned. In most cases, the pledger sells the land to the pledgee).
On the date indicated below,

I, who set my name and stamp at the bottom of this document, ‘Awda b. ‘Abd al-Muḥsin al-Juwayfīn, of ‘Arab Rashāyida, who belong to [the Qaḍa’ of] Bethlehem, confirm, acknowledge and attest that

I hereby sell (qad bi‘tu) to Ṣafī and ‘Abd al-Salām and to the children and brothers of ‘Awda Mubārak Nimr, (5)of ‘Arab al-‘Ibāyāt al-Ta‘ămira all that part of the estate (mukhallaṭat) of my father and ascendants (ajzād) that belongs to me (mā huwa lî), is owned by me as private property (jārin bi-milkī) and is under my absolute (talaq) disposition (tasarruf) and in my shar‘i possession (hiyāza), viz., the whole of the parcel of land known as Zahrat al-‘Ani[?], bounded by the land of Ṣar Ghafara in the west, Shi‘b al-A‘nāq in the south, the land of Khalat al-Ḥamrā‘ in the east and the land of Wādī Baṣā[?] in the north; it is a definite (bātt), complete (nājiz) shar‘i sale (bay‘) comprising offer (i‘jāb) and acceptance (qabūl), the conditions required for the validity (ṣiḥḥa) and irrevocability (luzūm) [of a sale], the knowledge (ma‘rif) of and acquaintance with [the thing sold] (‘ilmān wa-khibratan). The parcel is being sold [for] the price the stated (bayān) value of which is ninety-three French gold livres, paid in cash (aynan) to the aforementioned sons of my father’s paternal uncle, Ḥasan and ʿAḥmad al-Juwayfīn, [the price] being possessed (maqburā) by them [as follows:] (10)

[Drawn up] in the presence of witnesses (shuhūd al-hāl), but Allāh, exalted be He, is the best of witnesses.

4th Dhū al-Qa‘da, 1345 [1926] [Palestine Mandate stamp]


Scribe: Muḥammad al-Kḥāṭīb


4th Dhū al-Qa‘da, 1345 H.

Testified and guaranteed (kafala) to it [the agreement]: [illegible], Mūsā b. Ḥusayn al-Juwayfīn[?]

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4 Cf. Mejelle, arts. 200, 201, 203.
5 In other words, the plot the object of the present contract of sale had been previously given as a pledge. It seems that the loan had not been returned and the pledged land remained with the lender and actually became his private property. Now the heir of the lenders-pledgees sells the pledged land back to the heirs of the pledger, the original owner of the land. The nominal price loan that was given almost one hundred years previously is considered as a first payment on account of the sale. The present transaction is presented as a sale rather than the termination of a pledge.
6 In other words, 18 pounds were added to the nominal amount of the loan, probably with a view to compensating the original owners of the parcel for the fluctuation in prices of land that occurred over a period of almost a century since the conclusion of the pledge. Needless to say, the deviation from the nominal price is deemed interest under the strict shar‘a (cf. Schacht, Introduction, 78–79; Coulson, History, 142). It may well be that in order to hide the disguised interest the transaction was presented as a sale rather than restoration of the pledge on return of the loan.
7 A tribal customary surety, whose function is to secure the implementation of the obligations undertaken by his principal, backs up the contract of sale.