DOCUMENT FIFTY-EIGHT

SALE OF MARE WITH SELLER’S RIGHT TO FIRST TWO FILLIES (1950)

Introduction

In the case under review, a tribesman of the 'Arab al-'Ubaydiyya sells to another tribesman and his son of 'Arab al-Ta‘āmira a mare on the following conditions: The mare’s first and second foals, if female, shall belong to the seller and if male, to the purchasers. If the purchasers fail to deliver a female foal to the seller, they will have to compensate him for this omission. As has already been noted in a similar transaction, the sharī‘a shares the view that in partnership in animals, the offspring of a fertilized mare belong with the mare,¹ though the sharī‘a, for obvious reasons, does not allow the distinction between offspring that are males and those that are females; a transaction based on such a distinction bears the flavor of uncertainty, hazard (gharar), which is tantamount to interest.² Hence it may be concluded that a customary sale of a horse is not inspired by the sharī‘a. Moreover, although the contract is based on the concept of offer and acceptance (ījāb wa-qabūl), it is basically in glaring contradiction to the sharī‘a. The delay of payment for the mare (two months after the conclusion of the transaction) also implies interest (ribā).

In this transaction, too, no conventional sureties are appointed to ensure the implementation of the contract, though the Purchasers guarantee each other and are jointly liable to each other for its implementation. But this collective, somewhat moral, guarantee and liability is toward each other rather than toward the Seller; moreover, the Second Party cannot be both the purchaser and his surety at one and the same time. The possibility that resort to the civil court will be sought in the event of infringement of the agreement cannot be ruled out. Thus it is stipulated that if the Second Party does not pay the price of the mare within a certain period, the First Party shall have the right to claim from the Second Party a specified sum of money as damages (aṭal wa-đarar), which seems to be derived from civil judicial practice.

¹ See Mejelle, art. 1074; cf. doc. 57 above.
² Schacht, Introduction, 145–47; 151–52; Saleh, 49ff.
November 6, 1950 [corresponding to] Shaʿbān 25, 1369H [Jordanian stamps]

[The Purchasers] guarantee each other (mutakāfilin) and are jointly liable to each other (mutadāminin) for payment of the money.4

(fingerprints of) Khīlīf Muḥammad Ṣaḥmān lāfī and Muḥammad Ṣaḥmān lāfī

CONTRACT OF SALE OF THOROUGHBRED OLD MARE

First Party (Seller): Shaykh Mūsā Muḥammad al-ʿUbaydi
Second Party (Purchasers): Muḥammad Ṣaḥmān lāfī and his son Khalaf Muḥammad Ṣaḥmān lāfī, of ʿArab al-Taʾāmira

1. The First Party, Shaykh Mūsā Muḥammad al-ʿUbaydi, hereby sells (qad bāʿa) [i.e., offers] to the Second Party, Muḥammad Ṣaḥmān lāfī and his son Khalaf of ʿArab al-Taʾāmira his eight-year-old cream-colored mare.

2. The Second Party hereby accepts (qad qabila) the purchase [i.e., offer] of the mare for the fixed (muqarrar) price, viz. fifty Palestine pounds in the coin current in our country, the Hashemite Kingdom of Jordan.

3. The parties agree that the price shall be paid upon the expiration of two months from the date of this document. If the Second Party does not pay the price within that period, the First Party shall have the right (ḥaqq) to claim from the Second Party the sum of twenty-five pounds as damages (ʿatāl wa-dārar).5

4. The First Party, the Seller, stipulates with the Second Party, the Purchasers, that the first and the second foals (fāʾiz [fāʾid]) [of the mare], if female, shall belong to the Seller, and if male, to the Purchasers.6

5. The Second Party undertakes that if it loses a filly, that is, a female, and thus fails to deliver it to the Seller, it will pay fifty pounds in current coin for this omission, being the non-delivery of the filly.

[Done on] Shaʿbān 25, 1369 [corresponding to] November 6, 1950 [Jordanian stamps]

Thumbprints of Muḥammad Ṣaḥmān lāfī of ʿArab al-Taʾāmira and Khalaf Muḥammad Ṣaḥmān lāfī of ʿArab al-Taʾāmira

Witness: Ṣaḥmān ʾIwatallāh [ʿIwaḍ Allāḥ]
Witness and person authorized to impress signature (maʾdhūn bi-waḍ al-imdā) Khalīl?): Ṣaḥmān ʾAṯiyya [?]

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3 The Purchasers as a party to the contract cannot, of course, be sureties in the conventional sense of the term. The reference is to mutual liability. On sureties, see Glossary, s.v. kufalāʾ.

4 The Purchasers are liable to each other to see to it that their obligations under the contract toward the Seller are fulfilled and to pay the damages if they fail to do it. The location of the liability should be at the end of the document; see fn. 1 of the Arabic printed text.

5 Claims for damages are common practice in civil court, and since no sureties have been appointed, the reference seems to be to legal proceedings in the civil court rather than tribal adjudication.

6 Cf. al-ʿĀrif, 144–45; Shawārbah, “Footnotes,” no. 26f., secs. 8–14, fn. 137.