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PAPER ON

# FOREIGN COMPANIES IN EGYPT

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# FOREIGN COMPANIES IN EGYPT.

By F. R. SANDERSON.

The increasing importance of Egyptian Commerce and the fact that practically the whole of it is in the hands of traders of diverse foreign nationalities are my excuse for thinking that a sketch of certain aspects of the law affecting Foreign Companies in Egypt may be of interest to the members of the International Law Association. Some recent judgments of the Mixed Courts, to which I shall have occasion to refer, have filled the commercial community with surprise, not unmingled with consternation, and the principles on which they are based deserve consideration.

First it is necessary to consider the position before the Judicial Reform of 1875. The maxim, *Actor sequitur forum rei*, was then the rule of Jurisdiction. Every foreigner had to be sued before his Consular Court, which applied the law of its own country except in so far as local usages were regarded as binding. Accordingly any kind of partnership or company valid by the national law of its members could trade in Egypt, the personality conferred on it by its national law was recognised, and any limitation of liability valid by the law of the partnership received its application in Egypt. But when the parties were of different nationality? Only one solution was possible. The partners must choose to which nationality they desired to belong, and a company founded in conformity with the dispositions of that law became lawfully constituted.

All this was in conformity with the liberty of trade guaranteed by the capitulations and the customary rules as to jurisdiction which in Egypt somewhat modified those prevailing in Turkey.

The establishment of the Mixed Courts altered the rules of jurisdiction and the promulgation of the Mixed Codes altered the law. In place of jurisdiction and law varying with the nationality of the defendant—and who was to be defend-

ant only the future and not the parties at the moment of concluding the contract could determine—were substituted the Mixed Courts and the Mixed Codes for all disputes between foreigners and natives.* Civil, Commercial, Maritime and Procedure Codes were promulgated, and it was laid down in Tit. 1. Art. 34, R.O.J. as follows : " Les nouveaux tribunaux, dans l'exercice de leur juridiction, en matière civile et commerciale, et dans la limite de celle qui leur est consentie en matière pénale, appliqueront les codes presentés par l'Egypte aux puissances et, en cas de silence, insuffisance et d'obscurité de la loi, le juge se conformera aux principes du droit naturel et aux règles de l'équité." Note that the Courts have built up the whole Egyptian law of patent right trade-marks and copyright on the basis of the latter portion of the Article just cited, there being no disposition in the codes on these important subjects.

What effect had these dispositions on the law and jurisdiction applicable to partnerships whose members were of different nationality but formed in accordance with a legislation chosen by their members? In the first place those partnerships which were already in existence preserved the nationality acquired by them.† And the earlier judgments even point to the adoption of a general rule that a commercial partnership founded by traders of different nationality might adopt at its choice the nationality of any one of them. The assertion, however, by the Mixed Courts of the famous theory of Mixed Interests made the determination of the nationality of a partnership of little practical importance from the point of view of jurisdiction, and later judgments have laid down the rules that any partnership founded in Egypt must conform to the Egyptian Law, and assume the form of one of the types of partnership therein recognized. The theory of Mixed Interests is a gloss upon Article 9 of the Regl. d'Org. Jud. to the effect that jurisdiction is conferred upon the Mixed Courts not only when the parties to the cause are of different nationality, but also when the judgment in the cause will affect the interest of any person of different nationality from that of the actual parties. Thus the Mixed Courts assume jurisdiction in any bankruptcy or liquidation, if a single creditor is of a different nationality from that of the debtor, and in any cause raised by or against a partnership or company if a simple partner or shareholder is of a

* Regl. d'Org. Jud. Tit. I. Art. 9. There are certain exceptions to this general rule which do not here concern us.

† Nov. 15, 1883, R.O., ix. 5. Feb. 12, 1891, B.F.J., iii. 188.

different nationality from that of the others or of the partnership or company itself, and this, though the other party to the cause be of the same nationality as the partnership or company. Here, however, the theory of Mixed Interests causes a conflict of jurisdiction, which may be illustrated by the proceedings in the winding-up of the Bourse and Banking Company, Limited. On September 24th, 1907, this company, which is a company created under the British Company Acts and registered in London, decided at an extraordinary meeting upon a voluntary winding-up, and appointed Mr. Alfred Nahman, an Austrian subject, provisional liquidator. On January 25th, 1908, a new General Meeting confirmed his appointment and appointed a committee whose approval was necessary for any compromise by which more than 10 per cent. was remitted. About the same time a British shareholder made an application to the British Consular Court at Alexandria for the appointment of a judicial liquidator to wind up the company. Despite some question as to the jurisdiction of the Consular Court in winding up, the consular judge granted the application and appointed Mr. Morris to be liquidator, he being a person within the jurisdiction of the Court. Mr. Nahman, however, refused to hand over the books of the company to Mr. Morris, and an application to the Austrian Consul to compel him to do so was unsuccessful, the Austrian Consul declaring himself incompetent in a case in which persons of different nationality were concerned. Thereupon three shareholders of different nationality made an application to the Mixed Commercial Tribunal of Alexandria for a judicial liquidation and the appointment of a liquidator. In this action, Mr. Morris, the British liquidator, intervened and raised an exception of incompetence on the part of the Mixed Tribunal "à statuer sur toute action ayant trait à la dissolution ou à la liquidation d'une société étrangère constituée sous le régime les lois étrangères." This bold plea met with no acceptance from the Court, which pointed out that the Company's real place of business was in Egypt where the allotment of shares took place, and where its books were kept, and that only one of its directors was of British nationality.

To declare its incompetence to deal with questions relative to the dissolution or liquidation of a foreign company, and reserve it to the court corresponding to the nationality of the company—in this case the British Consular Court—would be to deny to every shareholder of a nationality different to that attributed to the company the right of demanding its

liquidation, since only the subjects and protégés of the different consulates have access to their Consular Courts. [This last argument seems to be unsound, for the jurisdiction of the British Consular Court is, in principle, open to plaintiffs of any nationality, and the limitation is " as regards all such matters and cases as come within the jurisdiction of any Egyptian Courts established with the concurrence of Her Majesty." But that is the very question in dispute.] * Hence, continues the Tribunal, it is better to determine competence by the interests involved, whether in respect to the dissolution or the liquidation of this company, or even as to its validity, " sauf à recourir aux lois qui ont presidé à sa formation pour savoir si ces lois ont été respectées." The Court therefore appointed a new judicial liquidator, and later on declared the company bankrupt. The conflict of jurisdiction here raised arose therefore from the denial by the Consular Judge of the theory of Mixed Interests as withdrawing the case from his jurisdiction, and the refusal on the part of the Mixed Courts to recognise the English liquidation as affecting their duty to grant the application made by a foreigner against a company of different nationality. Had the courts resided in different countries the solution would have been simple, for each court could have dealt with the assets within its jurisdiction, the foreign winding-up being ancillary to the other. In Egypt no such solution was possible, but a solution *de fait* came about in the abandonment by the Consular Court of any effort to enforce its judgment, of which indeed, nothing has since been heard.

As a matter of fact the Mixed Tribunal appointed an Englishman liquidator. He however resigned, and a foreigner was appointed in his stead. Had the Englishman retained his appointment, there might have been proceedings in the British Consular Court by the British liquidator against him to compel the latter to hand over to him the books and assets of the company, and a refusal would have made him liable to imprisonment for contempt of court. As it is, it is difficult to see how the British liquidator is to fulfil the duties with which he has been charged, though perhaps *force majeure* might be pleaded in defence. As for the directors of the Bourse and Banking Company, which must still continue to exist, as regards English law, unless the company gets finally wound up in accordance with the Companies Acts, any omission on their part to carry out the

* Order in Council of 1889, Art. 12.

duties laid upon them by these Acts will cause them to be liable to the penalties therein laid down, and accordingly even those of them who are foreigners must refrain from visiting England if they desire to avoid the possibility of unpleasant proceedings.

It will be noted that there was no plea or judgment to the effect that the company was null and non-existent in Egypt, though its position does not seem to have differed in principle from that of the company now to be considered.

The second and still more important case is that of the Commercial and Agricultural Society of Egypt, Limited. This company was one of a large number founded by Egyptian residents during the boom of 1906 and the early part of 1907, for the purpose of buying and reselling parcels of land. It was registered in London on May 1st, 1907. On January 6th, 1908, a petition was presented to the Mixed Tribunal of Alexandria by certain shareholders to have it declared null and non-existent in Egypt on the ground that the company was not an English company but had only been registered in London to evade the Egyptian laws, and was not invested with any Egyptian legal form. The Tribunal in a curious judgment followed the conclusions of the Ministère Public, and rejected the petition, the grounds of judgment being these. The company was registered in London with a fraudulent intention of evading the provisions of two decisions of the Council of Ministers (1899 and 1906), under which a firman (required for the constitution of every Egyptian Company) will only be granted provided there are no founders' shares (except in special cases), and provided the shares are fixed at not less than £E4 and that all the shares are subscribed for originally by the founders, who must also produce a certificate from a bank that 25 per cent. of the capital has been actually paid. In any other country this would be a fraud on the local law, and the company would be declared null and non-existent according to the principles of International Law. Not so in Egypt, for the decisions of the Council of Ministers have not received the assent of the Powers, as all legislation affecting Europeans must do to be binding upon them.* The "fraud" was therefore no fraud at all, for it was not a fraud on any law binding upon the company. As for Article 46, Code Comm. which is as follows :

* Art. 46, Code Comm. M. (*cit infra*), however, seems to give the Khedive free power to lay down under what conditions he will grant a firman, without further reference to the Powers.

"La Société anonyme ne peut exister qu'en vertu d'un firman du Khédive qui approuve les conditions contenues dans l'acte de société et qui autorise son installation," that article though inspired by the old French law (Code of 1807) could not have the same meaning as in France, for it was notorious that foreign companies could exercise their business in Egypt without any authorisation, and that thanks to the rights acquired in virtue of the capitulations. An example was the Alexandria and Ramleh Railway Company, Limited, constituted on February 28th, 1879, which had its board of directors, its books, and its field of activity at Alexandria, where also the general meetings were held. The true meaning of Article 46 was that those companies which wished to acquire the Egyptian personality must get a Khedivial authorisation; in other words, the rôle of the Khedivial firman is to invest these companies with the Egyptian nationality, and its absence could not deprive limited companies constituted under the protection of a foreign legislation of a legal existence perfectly valid in Egypt.

The case was taken to the Court of Appeal, and on this occasion the Ministère Public, reversing the views it had expressed to the Court of First Instance, put in conclusions for the nullity of the company. Matters were getting distinctly exciting, and the public waited feverishly for the final arrêt. It came on April 29th, 1907, after some delay. The argumentation may be thus summarised. The articles of the Mixed Code Com. which govern the constitution of "sociétés anonymes" are as follows:—Article 46, "La société anonyme ne peut exister qu'en vertu d'un firman du Khédive qui approuve les conditions contenues dans l'acte de société et qui autorise son installation. Article 47. Les sociétés anonymes qui se fonderont en Egypte seront toutes de nationalité Egyptienne et devront y avoir leur principal siège social." The first question was to determine the meaning of the expression "fonder une société," and the Court gave the following definition:—"fonder une société," veut dire: "la constituer en s'associant pour signer l'acte qui determine ses bases et les conditions de son fonctionnement, en vue d'obtenir l'autorisation necessaire et en souscrivant les capitaux." Accordingly the City and Agricultural Lands, Limited, was founded in Egypt. The registration in London could not give English nationality to the company. For the nationality of artificial persons is not dependent on convention but is that which legally flows from the conditions of its institution. The court then cites the resolutions of the Congrès de

Sociétés at Paris in 1889, and that of the Institute at Hamburg in 1891, and the provisions to the same effect of the Belgian, Italian, and Portuguese Commercial Codes, and goes on to state that from an appendix by the second English delegate to the report of the International Commission in Egypt in 1898, it appears that in England also doctrine and jurisprudence have laid down that it is the law of the real seat of the company and not that of the nominal seat indicated in the statutes that should be looked to. I do not think that this statement of English law is true in relation to the recognition of the existence or legality of foreign companies or to winding-up, for the invariable distinction is between companies incorporated in or outside of the United Kingdom, though it may be true of Income Tax Cases. See Westlake, § 131. ff.

The court goes on to argue as follows. If the company were not governed by Articles 46 and 47 of the Mixed Code there would be a return to the state of affairs before the judicial reform when in fact limited companies were established in Egypt under the empire of foreign law and protection, a practice which the above mentioned articles were precisely intended to put a stop to (see *Rapport de la Commission Internationale en Egypte, l'année* 1898, p. 7.)* The argument that the court in refusing to recognise the existence of the company would be infringing the rights obtained by foreigners in virtue of the capitulations and commercial treaties to trade freely in Egypt is thus dealt with : " Attendu qu'il ne peut être question de contester à une société anonyme véritablement étrangère le droit d'être reconnue en Egypt, d'y ester en justice et d'y exercer son commerce ou son industrie, soit directement, soit au moyen de succursales établies dans le pays; que le Gouvernement égyptien n'a jamais contesté ces droits auxdites sociétés, qu'il a souvent traité avec plusieurs d'entre elles qui exercent leur industrie en Egypte et que la jurisprudence des Tribunaux Mixtes n'offre pas d'exemple d'une décision contraire ; mais que toute différente est la question de savoir si une société déterminée est egyptienne ou étrangère, question qui, tant en Europe qu'en Egypte, relève du pouvoir judiciaire." Accordingly, the court declared the company non-existent in Egypt and appointed a liquidator.

Several other companies immediately made preparations

* This document is treated as confidential by the Foreign Office in Cairo, so the public could have no knowledge of its contents. See also note (*) on next page.

for a voluntary winding-up and reconstruction as Egyptian companies, and against others successful petitions have been made. This, of course, has led to a great deal of waste of money, the difficulties involved in reconstruction being tremendous. Many, however, are going on as before, the general impression being that the principle on which the judgment is based does not extend to companies whose connection with England is only slightly closer than that of the City and Agricultural Lands, or, in other words, extends only to companies coming within sub-division two of the third degree in M. Jitta's classification, if by place of birth we are to understand place of incorporation, with the additional qualification that the promotion of the company took place in the country where its business was intended to be carried on.

It is perhaps unnecessary to criticise this judgment in detail, but it undoubtedly disappointed the expectations of the general public, who had always believed that any limited company, legally incorporated abroad, could legally do business in Egypt. Not a single whisper as to their illegality had been heard of until the financial crisis drove some of the shareholders to imagine expedients by which they might escape the burden of paying calls upon shares which they could not sell. This was one of them, for the effects of a declaration of nullity were badly understood by the speculating public who expected to find themselves relieved of the necessity of paying further calls on the shares of companies declared non-existent in Egypt. The Judicial adviser in his Report for the year 1899, in which he gave an account of the new provisions regarding Egyptian Companies, had remarked that of course they would not apply to companies incorporated abroad.*

Whatever opinion one may have of the principles adopted by the judges in these cases, there is no doubt that the whole position of companies in Egypt is unsatisfactory, and as a piece of legislation the second judgment may serve a useful purpose. Suppose a company to be incorporated in England † and to be trading in Egypt. If the directors are not all of them of British nationality, it is obvious that those who are

* "Unfortunately, they by no means cover the whole ground, since the majority of companies formed to do business in Egypt *are incorporated abroad, and as such are independant of any Egyptian authorisation or control.*"

† The principles apply whatever country other than Egypt be the place of incorporation, and the evils affect shareholders of all nationalities.

not and who reside in Egypt escape entirely (unless they visit England) from any liability to criminal prosecution for offences against the Companies Acts. They could not be prosecuted in the British Consular Courts, and offences against the provisions of a British Statute would not make them amenable to the criminal law of their own country. Also in cases where they would be liable to a civil action in England at the instance of a shareholder, they would escape liability in Egypt unless (1) the circumstances were such as to found a claim under the Mixed Codes, or (2) the Mixed Courts were to hold that the directors were liable under contract to be answerable civilly for such acts as British Company law makes actionable. I do not think that this second hypothesis is likely, and as regards the first it is sufficient to point out that Continental countries whose codes possess a similar general article as to civil liability for any damage done by a man to his neighbour, have found it necessary to pass detailed company laws. A third hypothesis may be mentioned, viz. that the Mixed Courts might build up a company law in conformity with "the principles of natural law and the rules of equity." This kind of judicial legislation, slow and hesitating as it must be, can recommend itself to none.

The best remedy for the grave evils of the present system is to be found in the promulgation of a carefully thought out company law for Egypt, and that requires the consent of the Powers which have capitulations with the Ottoman Empire. It is not possible to elaborate a project of law in this paper, but one or two suggestions as to principles may be made.

(*a*) The Mixed Courts should be given criminal jurisdiction to be exercised in accordance with an amended Mixed Penal Code over persons of all nationalities who are directors of Egyptian companies. Since 1900 they have had criminal jurisdiction over all persons in bankruptcy cases, when a mixed interest is involved, *i.e.*, practically speaking in every case. (*b*) The Commercial Code should be amended so as to include a series of articles laying down clearly the conditions under which companies incorporated abroad shall be permitted to carry on business in Egypt, as well as the conditions for the incorporation of Egyptian companies (at present embodied in the Decisions of the Council of Ministers), and the civil liability of the directors of Egyptian companies.

The former series might well be based upon the Draft Code adopted by this Association. The peculiar circumstances, however, in which Egypt is placed by the fact that almost

without exception every company is promoted by foreigners and has on its board directors of different nationalities, while the capital is sought for not in the company of incorporation but in Egypt itself, make it necessary for stringent provisions to be added in the interest of the Egyptian public as regards the promotion of new companies. These should make the directors of all companies issuing prospectuses in Egypt or applying for quotation on the Egyptian Bourses liable both criminally and civilly to the provisions of the new Egyptian law, and amenable to the jurisdiction of the Mixed Courts, which by Tit. I. Art. 34 of the *Règlement d'organisation Judiciaire* can only apply the provisions of the Mixed Codes. If this could only be done practically by laying down that all such companies shall be incorporated in Egypt, where the board meetings shall be held, then legislation to that effect should be enacted. Such a solution would guarantee the recognition for all purposes of companies created abroad and desirous of trading in Egypt, while on the other hand it would protect the easily gullible Egyptian from the snares of the unscrupulous company-promoter, the more unscrupulous because of his present immunity from prosecution. A less convincing method would be to amend Tit. I. Article 34 of the *Règlement d'Organisation Judiciaire*, so as to allow the Mixed Courts to apply the provisions of the Company Law of the country of incorporation in actions by shareholders against the directors of foreign companies.

The difficulties of jurisdiction raised in the Bourse and Banking Company case should be met by giving the Consular Court exclusive jurisdiction in disputes as to the internal affairs of limited companies of its nationality, the application of the doctrine of Mixed Interests being thus restricted to actions brought by creditors of a nationality different from that of the company itself.