Even if it were not so, it would be altogether against the spirit of equity to allow an omission on the part of a partnership firm, to comply strictly with the provisions of the law affecting firm names, to operate to the injury of creditors whose confidence it has invited and then abused.

As already indicated we are in substantial agreement with the carefully considered judgment of the District Court and dismiss the appeal with costs.

The adjudication in bankruptcy of the appellant by the District Court on the 18th July, 1924, is confirmed.

[NETTLETON, C.J. AND DICKINSON, ACTING P.J.]

May 30

REX

v.

IOANNIS F. MODINO.

OTTOMAN CRIMINAL CODE, ART. 236—LAW 1 OF 1886, SEC. 61—"CONCEAL" OR "DESTROY."

Accused was charged on information before a District Court :—

1. *With concealing or losing to the prejudice of A. B. and C. D. the sum of* £219 17*s.* 6*cp. the property of the said A. B. and C. D. the said sum having been received by him, the accused, as paid agent, from the Registrar of the High Court of Northern Rhodesia, Livingstone, for the purpose of transmission to the said A. B. and C. D. contrary to Art.* 236 *of the Ottoman Penal Code ;*
2. *With stealing the said sum contrary to Art.* 230 *of the Ottoman Penal Code and Law* 1 *of* 1886, *section* 61.

The facts are as follows :—

A. B. and C. D. are brothers of a man called Harris John, who was killed in a wild part of Portuguese West Africa. The High Court of Northern Rhodesia took over and administered Harris John's estate. A. B. and C. D. obtained information from an African newspaper written in Greek called the "Nea Ellas" that Harris John was killed and that he was stated to be a Cypriot.

A. B. and C. D. are both illiterate, and A. B. went to the accused and asked him to help them to find out about Harris John's estate. Accused is literate and can read English, and in addition is a clerk in the employ of a member of the Paphos Bar.

NETTLETON, C.J. & DICKINSON, ACTING P.J.

REX v. IOANNIS F. MODINO

A. B. later gave an undertaking to the accused to pay him a share (the proportion is disputed) on any amount which came to them from their brother's estate. C. D. did not give any such undertaking. Accused states A. B. agreed to pay two-thirds of such amount. After correspondence between accused and the Rhodesia House, London, and also with the Registrar of the High Court of Northern Rhodesia the accused sent for A. B. and C. D. to come to him at Paphos and bring down the village commission to prove the fact that they were the next of kin to Harris John. This they did and three documents were drawn up in English, by a clerk of the District Court, at the dictation of accused, and these were duly signed and sealed before a certifying officer.

The documents were :—

1. *A certificate by the village commission that A. B. and C. D. were the heirs of Harris John ;*

2. *A Power of Attorney given by A. B. and C. D. to accused to carry out everything necessary to get the inheritance on their behalf ;*

3. *A covering letter to the Registrar of the High Court, Northern Rhodesia.*

The certifying officer did not understand English, and consequently could not explain the documents to the persons present, and they were perforce obliged to take them on trust.

After these documents had been sent to Northern Rhodesia High Court by the accused, A. B. and C. D. were continually demanding from accused whether the money had come yet. The last time A. B. asked him is fixed by him, as he was before the Magisterial Court at Paphos for a minor offence, and when the case was over he went to see accused at his house. This was in the latter half of June, 1924. Accused denied having received anything from Rhodesia, and A. B. went away to his village, accompanied by his brother C. D. As a fact a draft for £220 17s. 1cp. on the Standard Bank of South Africa was received by accused on May 5th, 1924. This draft he took to the Imperial Ottoman Bank at Paphos and accused having himself signed the draft for A. B. and C. D. the Bank sent it to London to clear, and on the 31st May the Bank, Paphos, received the draft from the Imperial Ottoman Bank, London, for £217 10s. 6cp. The Bank informed the accused, and he cashed the draft for the full amount on June 2nd. Accused kept £17 10s. 6cp., and with the £200 he opened a "caisse de famille" in his own name. Thus at the time accused denied to A. B. that the money had come, he had already spent £17 odd and had credited his own account with £200.

Accused stated (this the District Court refused to believe) that he had written to A. B. to come down about the money on two occasions, and to support this he produced what he said were copies of those letters.

The accused between June 2nd and July 25th drew £70 out of the £200, and this he spent for his own purposes. Now Mr. Markides, an advocate, practising in Paphos in some way got to hear about the accused boasting he had money, and he made some enquiries, and as a result he sent for A. B. and C. D. who were up to that time strangers to him, and they came to his office in Paphos on the 12th August. On instructions from A. B. and C. D., Markides visited accused, and accused admitted he had had the money. Markides reported the matter to the Police and later again visited accused

with A. B. and C. D. There was then an offer made between A. B. and accused which Markides told them must be approved by the Police before they, A. B. and C. D. could accept. The Police refused permission, and instituted a prosecution against accused. He was committed for trial and the District Court (by a majority) found him guilty (1) *of concealing or destroying* £108 15*s.* 3*cp. to the detriment of A. B. and C. D., and* (2) *of stealing the sum of* £163 3*s.*

The District Court gave the following judgment:—

" 1. The Court (Evangelides J. dissenting) find that the accused did " between the 2nd June, 1924, and the 14th August, 1924, conceal " or destroy to the prejudice of Towlis Ioannou of Phyti the sum " of £108 15*s.* 3*cp.*

" 2. The Court (Evangelides J. dissenting) find the accused guilty " on the second count, of larceny of the sum of £163 3*s.* on the " 2nd June, 1924."

From this conviction and sentence the accused appeals.

For Appellant *Nicolaides* and *Pavlides.*

For the Crown the *Attorney-General.*

Judgment: This is an appeal from the conviction of the appellant by the District Court of Paphos on the charges:

(*a*) of concealing or losing to the prejudice of one Costi Ioannou of Lassa and one Towli Ioannou of Phyti the sum of £217 10*s.* 6*cp.* received by him as paid agent from the Registrar of the High Court, Northern Rhodesia, for the purpose of transmitting same to the said Costi and Towli under article 236 of the Ottoman Penal Code.

It is to be observed that the charge is framed by employing the words " concealing or losing," which this Court held in a case against the present appellant on the 14th February, 1925, to be the correct translation, as stated in Bucknill's edition of the Code, of the words in Art. 236 of the Turkish original " ketim " (conceal) and " zai " (destroy or suffer to be lost), and which in Walpole's edition are incorrectly translated as " convert or dispose of."

(*b*) of stealing the said sum the property of the said Costi and Towli, under Law 1 of 1886, section 61, and Art. 230 of the Penal Code.

The appellant was sentenced to twelve months imprisonment with hard labour, on each count, the sentences to run concurrently.

NETTLETON, C.J. & DICKINSON, ACTING P.J.

REX v. IOANNIS F. MODINO

The Court found that there was abundant evidence to support the findings of the Court below on both charges, and dismissed the appeal and confirmed the conviction and sentence.

The facts of the case being clear, the only point for consideration is the meaning of the words " concealing or losing " in Article 236 of the Ottoman Penal Code, which, as indicated above, have been incorrectly translated in Walpole's edition, in general use in the Courts of this Island, as " convert or dispose of."

This article forms part of the chapter headed " Abuse of confidence," and it is clear that the concealment or destruction or losing or suffering to be lost to the prejudice of the owner of chattels, goods, money, commercial documents (or bonds, notes and negotiable papers) or other documents or deeds constituting bonds, undertakings or releases or any other thing entrusted to a person by way of deposit (or trust) or bailment, as paid or unpaid agent, for the purpose of dealing with the same in some particular way, must be associated with what in English Law is described as fraudulent intent, or, as stated by Reshat, the President of the Criminal Appeal Court of Syria, in his Commentaries, dated 1896, on the Ottoman Penal Code, there must be an abuse of trust with the intention of prejudicing the owner, who has reposed confidence in him with resultant loss to the owner.

From Professor D. Yerganian's Commentary on the Ottoman Penal Code at p. 116 *et seq.* in connection with this article, abuse of confidence within the meaning of the article may, it would appear, be constituted by the bailee's making himself, as he puts it, the owner, by (*a*) retaining the property entrusted to him (*b*) by his denying he has received it (*c*) by his stating it has been lost or stolen against the facts, or (*d*) by his consuming, *i.e.*, spending or selling or giving it away. There must, he says, be not only a breach of agreement on his part against the confidence reposed in him by the owner but also an illegal taking of possession or assumption of ownership to complete the offence of abuse of confidence.

In our view a " concealment " within the meaning of the article may be interpreted as and can arise from a forbearance or omission to disclose, and a " loss " or " destruction " may be caused by any of the above-mentioned acts in Yerganian's Commentary.

In view of the difficulty experienced in the correct interpretation of this article we think the following translations of extracts from the text of the Commentary of Professor Yerganian in this connection may well be set out at some length, especially as no translation of the original Turkish text has been published.

" The act referred to in this article is the exact offence represented " by ' abuse of confidence,' which offence arises from a thing being either " concealed or suffered to be lost which is entrusted to a person for a " specific object.

" In the case of a theft there is the ' dispossession ' of an owner or " possessor without his knowledge or consent, while in the cases con- " stituting the abuse of confidence the property sought to be unlawfully " owned, is originally found, in a legal sense, in the hands of the agent, " and therefore no dispossession is pre-conceived.

" This attempt of unlawfully owning and possessing arises from the " fact that he, the agent, has had the opportunity of taking advantage " of the property given in any way to him by the owner.

" For the completion of this offence there must exist four conditions, " namely:—

" 1. That the thing has either been concealed or suffered to be lost;

" 2. That a prejudice has been caused;

" 3. That the thing concealed or suffered to be lost was one of the " things enumerated in this article;

" 4. That these things were entrusted (or deposited) in one of the " ways prescribed under the law;

" As to these conditions:—

Concealing and losing.

" Article 236 was translated from article 408 of the Criminal French " Code in the form it was in 1832. Subsequently certain limitations and " terms were added to the said article in France, and it was reduced to a " more complete form such as it represents to-day.

" In the French Law the words ' detourner ' and ' dissiper ' were " used as corresponding to the words ' ketim ' and ' zai ' respectively. " But as the latter words do not exactly correspond with the words " ' detourner ' and ' dissiper ' many different constructions have been " given to the words ' ketim ' and ' zai,' and the distinction and defini- " tion of the offence, arising from abuse of confidence has, therefore, " become one of the most difficult legal questions.

" This offence (abuse of confidence) takes place as the result of a " breach of an agreement as in the case of ' emanet ' and ' vekialet,' etc. " But the breach of an agreement made in such a case does not categori- " cally constitute an offence in respect of abuse of confidence.

NETTLETON, C.J. & DICKINSON, ACTING P.J.

REX v. IOANNIS F. MODINO

" Infringement of the provisions of an agreement like that of ' emanet,' " ' vekialet,' etc., often entails civil liability only. Should the breach " of an agreement lead to illicit interference with (encroachment on) " the ownership of another person, then the offence of ' abuse of con- " fidence ' does accrue.

" In short ' abuse of confidence ' is not considered an offence on the " ground that there was a breach of the provisions of an existing " agreement, but it has been considered an offence because there was " an illicit encroachment on and interference with the ownership of " another person.

" This difference may be explained by the following example:—

" If a person puts on his finger a ring entrusted to him for safe- " keeping it, and uses it without the permission of the owner, his so " doing constitutes an infringement of the provisions of ' emanet ' " and a breach of the agreement in respect of ' emanet '; but by his so " doing the offence in respect of ' abuse of confidence ' does not " accrue unless the person receiving the ' emanet ' sells it to another " person with a view of meeting (doing away with) his financial need. " In such case, therefore, there appears to be an illegal possession " as well, in addition to the breach of the agreement.

" Abuse of confidence does accrue either (1) by way of appro- " priating a thing entrusted to a person under any conditions laid " down in the Law, or retaining it, or denying its having been received " by him, or falsely stating that it has been lost or stolen; or (2) " by selling it or giving it as a gift, or consuming it as if exercising an " ownership over that property similar to that of a proprietor himself.

" In the French Criminal Code the word ' detourner ' has been " used to cover the first part of the paragraph under discussion, and " in our law the word ' ketim ' has been used as denoting that word " ' detourner.' And likewise the word ' dissiper ' was used in French " Law to cover the 2nd part of the said paragraph, and we have used " the word ' zai ' in the same sense.

" The acts in the words ' ketim ' and ' zai ' must in any case take " place with a view of prejudicing either the owner of a property, " or must take place in an illegal way and with intent to secure the " benefit of the agent or of some one else; that is to say, they must be " based on an evil intention and criminal object.

" From these explanations it will be understood that a property " entrusted and delivered to a person under any conditions laid " down in the law has not been (*a*) either returned or given back to

" the legal proprietor on his demand as a result of his (agent) con-
" cealing or losing it, and that an illicit possession (ownership) over
" it has been proved; or (*b*) is not capable of being returned owing to
" its having been consumed or transferred to another person."

. . . . . .

In the present case there is abundant evidence on the record to show that a large proportion of this money entrusted and paid into the hands of the appellant as agent of the complainants is not capable of being returned to them owing to his having spent or consumed it; also that he failed to restore the money on the demand of his principals and forbore to disclose what had happened to it.

[DICKINSON, ACTING C.J. AND VERGETTE, ACTING P.J.]

POLICE
v.
SOTIRI PAVLOU.

The Police made a note in the statement taken from accused when he was charged with an offence that his character was bad. This statement was put in evidence before a Magisterial Court. Accused was found guilty of being in possession of two hens reasonably suspected of being stolen property and sentenced to one month's imprisonment.

From this conviction he appealed.

For Appellant *Mylonas.*

For Police the *Assistant Attorney-General.*

Mylonas: The note about accused's character on the statement is improper and the conviction must be quashed.

Assistant Attorney-General: I admit this is fatal.

Judgment: Appeal is allowed and the conviction and sentence are set aside and accused is discharged.