

CASES

DECIDED BY

THE SUPREME COURT OF CYPRUS

ON APPEAL FROM THE DISTRICT COURTS, THE
COMMERCIAL COURT AND THE DAAVI COURTS,
FROM THE YEAR 1883 TO THE YEAR 1890, INCLUSIVE.

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

BESH BESH, AS ATTORNEY FOR THE ABBOT OF
THE CHRYSIORIOTISSA MONASTERY *Plaintiff,*

v.

APOSTOLIDES AND OTHERS *Defendants.*

BOVILL,
C.J.
&
SMITH, J.
1883.

March 26,
May 2.

JURISDICTION—COMMERCIAL COURT—MONASTIC BODY—TRADER—
BANKRUPTCY—"CESSION DES BIENS"—"COMMERCIAL CODE,
ARTICLE 248"—MEJELLE, ARTICLE 999.

The Commercial Court has no jurisdiction to entertain an application in Bankruptcy made by a Monastic body.

The official note to Article 248 of the Commercial Code, referring to the "cession des biens," to be made by persons who are not traders, held to be without effect.

APPEAL from the judgment of the Commercial Court of Larnaca.

The plaintiff, as representative of the Abbot and Monks of the Chrysiortissa Monastery, brought an action against the defendants, who were the creditors of the Monastery, alleging that the Monastic body was unable to pay its debts in full and praying that the property of the Monastery might be sold and the proceeds divided equally amongst all the creditors.

The defendant Apostolides, who was a judgment creditor and had obtained an order of sequestration against some portion of the immoveable property of the Monastery, resisted the order being made.

The Commercial Court ordered that an inventory of the property should be made and an account given to the creditors and that application should then be made to the

BOVILL, C.J. Daavi Court of Paphos for directions as to whether the property should be sold or not.
 &
 SMITH, J. Defendant Apostolides appealed.

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Collyer, Q.A., for the appellants, contended that the action was really a proceeding in bankruptcy, and that, as the Monastery was not a trading corporation, the Commercial Court had no jurisdiction.

Respondent in person and *Peristiani* and *Diophanto* for defendants' creditors supported the judgment on the ground that the proceeding was not a bankruptcy proceeding but was a *cession des biens*, which by virtue of an official note to Article 248 of the Commercial Code was within the cognizance of the civil tribunals, and that the fact that some of the creditors were the holders of bonds would bring the matter within the jurisdiction of the Commercial Court.

BOVILL, C.J. In this case the Commercial Court has given a judgment the effect of which it is somewhat difficult to see. However, Mr. Apostolides, a defendant and one of the creditors of the Monastery, objects that this judgment may prejudice his interests, and he contends that the Commercial Court had no jurisdiction over the case, and that the process of bankruptcy which is applicable to merchants only has been applied to a Monastic institution, which, he says, cannot be treated as a trader or a trading community, and it is the questions thus raised on behalf of Mr. Apostolides that we have to deal with.

The arguments on the other side are somewhat contradictory. Besh Besh Effendi, who represents the plaintiff and who probably instituted these proceedings, says that this is a bankruptcy proceeding and that the Monastery can be properly adjudicated a bankrupt. Mr. Peristiani and Mr. Diophanto, however, who represent some of the defendants, say that this is not a bankruptcy proceeding but an application for a *cession des biens* such as is contemplated in the official note to Article 248 of the Commercial Code. They also say that as the debts of the defendants, or some of them, arise on *billets à ordre* this fact gives the Commercial Court jurisdiction. They object that the appellant wishes to put himself into the position of a creditor privileged to apply to the property of his debtor before the other creditors, and that he is not a creditor who would have any such a privilege under the Articles of the Commercial Code relative to bankruptcy. There were some other arguments on both sides which I do not think it material to mention, as I consider that the case must be decided on the points I have already mentioned.

It appears to me that the position of the parties is this : The abbots of the Monastery have been in the habit of borrowing money from time to time for use of the Monastery, and I do not understand that it is pretended that the present abbot is personally responsible for the debts so incurred, or that, if he is, he has any means of payment. One of the creditors (the present appellant) appears to have been somewhat actively pursuing his remedies against the Monastery ; and, for all that is known, other creditors may have been equally industrious ; but when this particular creditor believes that he is about to recover his debt, the Monastery apply to the Commercial Court asking for some relief, which, as far as I can ascertain is, that their property is to be rateably distributed among their creditors and that Mr. Apostolides is to lose the benefit of all the judgments and orders of execution he has obtained.

Besh Besh Effendi says that this is an application to be made bankrupts ; and, if it be so, then, I think, the case is at an end ; for I have no question that this Monastery cannot be treated as a trading community or as a trader. The fact that the creditors hold *billets à ordre* does not authorise the Commercial Court to interfere, though that Court might, perhaps, have had authority to entertain an action brought on one of these *billets à ordre*.

The contention of Mr. Peristiani and Mr. Diophanto is more difficult to deal with. The language of the official note to which they refer is perfectly plain, but it leaves in absolute doubt what is a *cession des biens*. I have been unable to find anything in the Ottoman Law corresponding to the *cession des biens* known under the French Law, and I can only assume that the official note to Article 248 of the Commercial Code is a transcript made by mistake from the French Commercial Code. The whole of the Ottoman Commercial Code is directly copied from the French ; and it would appear that a decision of some judicial tribunal or some Ottoman authority has been given with a view to supplement what appeared to be a defect in the Commercial Code. I do not think it is possible for us to incorporate into the Ottoman Law a law on *cession des biens* because of the existence of this note. It has been suggested that the law contained in Article 999 of the Mejlé is the law on *cession des biens* referred to in this official note. If this be so, I am of opinion that the Commercial Court, in compliance with the provisions of that note itself, should have abstained from interfering with the case : but I am of opinion that this is not a correct contention. The proceedings contemplated by Article 999 are clearly proceedings by creditors against a debtor for their own benefit,

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and that article does not contemplate such proceedings being initiated by a debtor to the detriment of some, perhaps, of his creditors. On these grounds, I am of opinion that the proceedings in the Court below are wholly informal, and, that being so, the question of privilege which was so much dwelt on for the respondents is wholly immaterial.

I would advert to an alleged principle of law put forward by the respondents, to the effect that the property of every debtor should be rateably distributed among his creditors. I know of no such principle of law as this, unless where a man may have been adjudicated a bankrupt: but, as I understand the Ottoman Law, it does not provide for any person being made a bankrupt who is not a trader.

I would also mention that the *cession des biens* provided for in French Law is of two kinds: one in which the creditors agree, and, as I understand, are unanimous in agreeing to allow a *cession des biens*: and the other, where the Court orders a *cession des biens* to relieve an unfortunate but honest debtor from imprisonment. In the case before us the creditors are not agreed, and the debtor, if the debt be that of the Monastery, cannot be sent to prison; so that, if we could incorporate this law on *cession des biens*, it would not apply in this case.

SMITH, J. This was an appeal of the defendant Apostolides from a judgment of the Commercial Court of Larnaca on an application by the representative of the Monastery to be allowed to sell the property of the Monastery and to hand over the proceeds to be divided between the creditors. The judgment is to the following effect: "That the creditors should appoint a memour to enquire into and separate the property of the Monastery which is mortgaged and sequestered under execution, and give an account to the creditors, and that application be made to the Court of the District within which the property is situated, so that the quantity of land and other property sufficient for the maintenance of the Monastery be left, and whether the remainder is to be sold or not."

What the meaning of this judgment may be or whether it has any meaning or effect at all I am quite unable to say. The defendant Apostolides, who is a judgment creditor for a large amount, fearing that it may affect his rights, appeals against it. It is contended on his behalf that this was a proceeding in bankruptcy, and that under the Ottoman Law such proceedings can only be instituted by *commerçants* as defined in Article 1 of the Commercial Code, that a Monastery does not fall within this definition, and that the Commercial Court had no jurisdiction. It was contended on the other side that it had jurisdiction for two reasons:

(1) because some of the creditors were the holders of *billets à ordre*, and (2) because some of the creditors were foreigners. With regard to the first of these arguments: unless the making of a *billet à ordre* ipso facto makes a person a *commercant* (and I am of opinion that it does not) it is of no avail. The second argument is founded upon a circular on p. 427, Vol. 2, Leg. Ott., but this does not appear to me in any way to bear out the argument sought to be deduced from it.

If the case rested here I should have had no hesitation in deciding in favour of the appellant. But another point raised on behalf of some of the other creditors, who were really respondents, raised a greater difficulty: this was, that this was not an application in bankruptcy but was for a *cession des biens*. It is difficult to determine what the application in the Court below really was, but it appears to have been considered as a bankruptcy proceeding, as the objection to the jurisdiction was raised by the appellant Apostolides, and over-ruled on the ground that some of the creditors were the holders of *billets à ordre*. However, it was now claimed that it was really an application for *cession des biens*, and this was founded upon an official note to Article 248, Commercial Code. Article 248 says, that persons who are not *commerçants* shall not be allowed to demand the benefit of a *cession des biens*, and the note says that such persons shall make their demands before the civil tribunals. So far as I can ascertain this is the only mention of a *cession des biens* in the Code. There is no definition of it; the right to demand it is nowhere granted, and no procedure relative to it is prescribed. It was contended that Article 999 of the Mejlé refers to it, but it is manifest that this is not so. The proceeding there contemplated is a proceeding by the creditors against the debtor, whilst the present application is by the debtor himself. Whether this note has been too hastily adapted from the French text I cannot determine; but it is sufficient to say that, on the best consideration I can give to the matter, I am unable to attach any meaning to it and I cannot accede to the argument founded upon it. Of the other arguments addressed to us, viz: whether a creditor who holds a judgment or order for sequestration thereby obtains any priority over other creditors, it is unnecessary to take notice. The consideration of this question would only necessarily arise if we allowed the Monastery to commence proceedings in bankruptcy.

I am therefore of opinion that the appellant is entitled to our judgment and that the judgment of the Court below must be set aside. The creditors to be at liberty to add the costs incurred to their existing debts.

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