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

IMPERIAL OTTOMAN BANK *Plaintiff,*

v.

CHRISTODOULO MAVROMOUSTACHI & SONS *Defendants.*

Dec. 2.

BILL OF EXCHANGE—RIGHTS OF INDORSEE AGAINST DRAWER—PROTEST—PROVISION—INDEBTEDNESS OF ACCEPTOR TO DRAWER AT MATURITY OF BILL—CESSATION OF PAYMENTS—SUSPENSION OF PAYMENTS—BANKRUPTCY—EXIGIBILITY OF PROVISION AT MATURITY OF BILL—COMMERCIAL CODE, ARTICLES 74, 120, 122, 125, 127, 128, 147, 150, 151 AND 153.

The indorsees of a bill of exchange, when payment was refused by the acceptor, did not protest the bill until 27 days after it was due. Subsequently they sued the drawers on the bill. The drawers proved that at the time the bill became due, the acceptor was indebted to them to an extent far exceeding the amount of the bill. It was not proved that the acceptor had ever been declared a bankrupt.

HELD: That as the acceptor at the time when the bill became due was indebted to the drawer in an amount exceeding that of the bill, there was such provision as the law requires in the hands of the acceptor so as to protect the drawer.

HELD ALSO: That the provision in the hands of an acceptor of a bill of exchange must, to protect the drawer, be exigible when the bill becomes due; and that where the acceptor has become bankrupt before the date when the bill becomes due there can be no such provision in his hands, inasmuch as he has been divested of all control over his property by operation of law.

The bankruptcy of an acceptor must be established by the judgment of the Court declaring him to be a bankrupt.

APPEAL from the District Court of Limassol.

Pascal Constantinides for the appellants.

Economides for the respondents.

SMITH, C.J. & MIDDLETON, J.

IMPERIAL OTTOMAN BANK v. CHRISTODOULO MAVROMOUSTACHI AND SONS.

Dec. 9.

The facts and arguments sufficiently appear from the judgment.

Judgment: This is an action brought by the plaintiffs as indorsees of a bill of exchange against the defendants, who are the drawers.

The bill was drawn on one Kivork Toronsian, who carried on business at Jaffa, on the 29th February, 1893, and was payable 11 days after sight. It was accepted on the 7th March by Kivork, and was thus payable on the 18th March. The bill was not paid by the acceptor, and the plaintiffs seek to recover the amount of it from the drawer. At the settlement of the statement of the matters in dispute, the defendants did not dispute the drawing of the bill, but alleged that the bill had not been protested within due time, and that they had provision for the payment of the bill in the acceptor's hands and were, therefore, freed from all liability.

The plaintiffs admitted that the protest, which was not made until April 14th, was not duly made, but contended that this was immaterial as the drawer had no provision for payment in the acceptor's hands at the date when the bill became due.

The Court, therefore, settled the following issues, two of which appear to be questions of law, viz.:—

(1) Can plaintiff recover, protest not having been made in due time?

(2) Had drawer made provision for payment?

(3) Is a debt due by an acceptor to drawer a sufficient provision in terms of Article 128?

On these issues the case went to trial, and during the course of the hearing, Nicola Mavromoustachi, one of the defendants, stated that he had been "informed by a friend" that Kivork suspended payment on the 16th March, and Mr. Tocchi, the manager of the branch of the plaintiff Bank at Limassol, stated "the agent at Jaffa thought it unnecessary to protest because Kivork had suspended payment before bill was due."

A further issue or issues were thereupon added by the Court to the following effect: "What was the effect of the suspension of Kivork before bill was due." "Could there then be said to be provision?"

"Would plaintiff be released from necessity of protest?"

All these issues are in the nature of questions of law, and no issue of fact was settled as to whether Kivork had in fact become a bankrupt before the day on which the bill became due.

The District Court gave judgment for the defendants on the ground that the drawers had provision in the hands of the acceptor, and the plaintiffs had, therefore, lost their rights by failing to protest the bill at the proper time; and further that the plaintiffs' action was not brought within the time allowed by law as laid down by Article 122 of the Commercial Code. The Court further held that under Article 120 of the Commercial Code, the holder of a bill is bound to protest, even though the acceptor may have become a bankrupt before the date when the bill became due.

Against this judgment this appeal is made, and it is contended for the appellants, that they had not lost their rights against the drawer by their failure to protest the bill within the time prescribed by law; that it was incumbent on the drawer to prove that he had provision in the hands of the acceptor at the date when the bill became due, and that the defendants had failed to establish this; and further that as the acceptor had suspended payment before the date when the bill became due, there was and could not be any provision in the acceptor's hands, within the meaning of the law.

For the respondents it was contended that they had proved that at the date when the bill became due, Kivork was indebted to them to an amount greater than the amount of the bill, which was provision for the bill within the meaning of Section 74 of the Commercial Code. It was further contended that the bankruptcy of the acceptor must be established by the order of a Court declaring him to be a bankrupt, and that unless that was proved, there was no evidence that the acceptor was bankrupt so as to be divested of the control of his property under Section 153 of the Commercial Code.

SMITH, C.J. & MIDDLETON, J.

IMPERIAL OTTOMAN BANK v. CHRISTODOULO MAVROMOUSTACHI AND SONS.

It appears to us that the law on this subject is clear. If the holder wishes to preserve all his rights against indorsers and drawer, he ought to protest the bill on the day following that on which it became due, if it be not paid, and neither the death nor the bankruptcy of the acceptor free him from this obligation (Section 120). If he do not so protest it, he loses all rights against the indorsers (Section 125); and he loses his rights against the drawer also, if the latter establish that he has made provision for the bill at maturity (Section 127). The whole question in this case appears to us to turn upon whether there was such a provision as the law requires in the acceptor's hands at the date of the maturity of the bill. As to whether the acceptor was or was not indebted to the defendants, there is the evidence of one of the defendants, Nicola Mavromoustachi, who swears that on the 18th March Kivork was indebted to the defendants' firm to an amount greatly exceeding that of the bill of exchange, and his testimony is supported by the bill of lading of goods shipped. This stands uncontradicted, and, in the absence of evidence to the contrary, affords evidence that the acceptor Kivork was indebted to the defendants at the date when the bill became due, in an amount exceeding that of the bill of exchange, and it thus appears to us that other considerations apart, there was provision in the hands of the acceptor when this bill became due on the 18th March.

But it is said that the acceptor had then suspended payment, and was thus in a state of bankruptcy, and that thus there could be no provision in the acceptor's hands. It has been pointed out to us by the appellants' counsel, that the Ottoman Commercial Code is a literal transcript of the French Code de Commerce, and we have been referred to the decisions of the French Courts, which establish that the provision in the acceptor's hands must be exigible at the moment the bill of exchange becomes due, and that where an acceptor has been declared a bankrupt, there is no provision for payment inasmuch as his power of meeting the bill has been taken away from him.

Although of course decisions of the French Courts are not binding upon us here, they are extremely valuable as being decisions practically upon the same law as we have to construe here, and the decisions we have been referred to, commend themselves to us as founded on a sound

principle ; and if we were satisfied that the evidence showed that Kivork was a bankrupt at the time when the bill of exchange became payable, we should feel no difficulty in deciding in favour of the plaintiffs. In our opinion, however, the evidence adduced in this case does nothing of the kind. The evidence that Kivork suspended payment is of the shadowiest kind, and suspending payment is a different thing from the cessation of payment, which under Article 147 of the Commercial Code proves a trader to be in a state of bankruptcy. The sole evidence even of the suspension of payment is nothing but hearsay—what "a friend" wrote to the defendants, and apparently what the agents of the plaintiff Bank at Jaffa wrote the manager at Limassol in excuse for not protesting the bill. A trader may under temporary stress of circumstances suspend his payments, or be unable to meet his engagements, and yet not be bankrupt, and it is for this reason that Article 150 of the Commercial Code has laid it down that a bankruptcy is declared by a judgment of the Commercial Court ; and the following section provides that the Court fixes the date when the trader has ceased his payments, so as to be in a state of bankruptcy under Section 147. When a trader has by such a judgment been declared a bankrupt, his control over his property ceases, and then no doubt he can no longer be said to have in his hands any provision to meet any bill of exchange which he has accepted. If no date is fixed in the judgment, then the trader will be considered to be in a state of bankruptcy from the date of the judgment itself, or of any protest for non-payment.

In the case before us there is not a fragment of evidence that Kivork has been declared a bankrupt at any time. If the plaintiffs were going to rely upon his bankruptcy to shew that there was not, and could not have been provision for this bill of exchange in his hands when it became due, they should have raised it at the settlement of the statement of the matters in dispute, or at least have been prepared with proper evidence of it at the trial, under the issue that there was no provision, *i.e.*, no legal provision in the acceptor's hands when the bill became due. The burden lay upon the plaintiffs of proving that by reason of the bankruptcy there was no provision in Kivork's hands, and they made no effort to lay any evidence to that effect before the Court. As they have not chosen to do so,

SMITH, C.J. & MIDDLETON, J.

IMPERIAL OTTOMAN BANK v. CHRISTODOULO MAVROMOUSTACHI AND SONS.

the only evidence before us is, that there was provision for this bill in Kivork's hands at the date when the bill became due; and as it is admitted that the protest was not made in time, we must decide that the judgment of the Court below was right. That judgment is, therefore, affirmed and this appeal dismissed with costs.

Appeal dismissed.