ASSIZE COURT OF LARNACA

REX v. HALIL SHABAN

mistake, but so that the man thinks it over and carries it in his mind beforehand, and decides it, and with that decision and thought commits the act of homicide."*

Georgaki Effendi (MSS. notes, pp. 142-3).

Judgment. CHIEF JUSTICE: The question of premeditation is a question of fact.

A test often applicable in such cases is whether in all the circumstances a man has had sufficient opportunity after forming his intention, to reflect upon it and relinquish it.

Much must depend on the condition of the person at the time—his calmness of mind, or the reverse.

There might be a case in which a man has an appreciable time between the formation of his intention and the carrying of it into execution, but he might not be in such a condition of mind as to be able to consider it.

On the other hand, a man might be in such a calm and deliberate condition of mind that a very slight interval between the formation of the intention and its execution might be sufficient for premeditation.

In the present case we are not satisfied that the facts justify a finding of premeditation.

Sentence: Fifteen years hard labour.

TYSER, C.J. & BERTRAM, J. 1908

Nov. 27

[TYSER, C.J. AND BERTRAM, J.]

PEDROS ALEXANDROU, *Plaintiff,*

v.

NICOLAOS BAROUTES, *Defendant.*

COMMERCIAL LAW—BANKRUPTCY—CIVIL CAPACITY OF BANKRUPT—EFFECT OF CONCORDAT—DISTINCTION BETWEEN CONCORDAT AND UNION—EXCUSABILITY—REHABILITATION—INTERIM REPORT ON CHARACTER OF BANKRUPTCY—DATE OF OPERATION OF CONCORDAT—COMMERCIAL CODE, ARTS. 153, 226, 244-246, 305 AND 314.

By the pronouncement of a judgment directing the confirmation of a concordat arranged between a bankrupt and his creditors, the bankrupt is restored to his rights of suit against persons indebted to him.

It is not necessary for this purpose that his bankruptcy should have been declared excusable or that he should have obtained rehabilitation.

The difference between "concordat" and "union," and the effect of "excusability" and "rehabilitation" considered and explained.

A judgment confirming a concordat, not appealed against, cannot be afterwards impeached on the ground of informality in the previous proceedings.

The judgment confirming the concordat operates from the date of its pronouncement and not from the date of its entry.

This was an appeal from the judgment of the District Court of Nicosia.

---

* Cf. also Savvas Pasha: "Théorie du droit Musulman," Vol. XI, p. 517. "Ce que les Arabes appellent "amd" est une décision (détermination) que l'homme adopte après avoir bien considéré les raisons qui militent pour ou contre l'accomplissement d'une action."

The action was brought for the sum of 494 piastres alleged to be due upon an acknowledgment of debt. The Defendant pleaded that the Plaintiff having been adjudicated a bankrupt was not competent to sue.

It appeared that on November 30th, 1903, the Plaintiff was adjudged to be in a state of insolvency. A *juge-commissaire* and syndics were duly appointed and a concordat was come to which on May 28th, 1904, was approved by the District Court. The Court directed the necessary order of confirmation to be issued but this was not in fact done.

The District Court held that the Plaintiff was incompetent to sue on the following grounds:—

1. That the formalities prescribed by Arts. 244 and 245 had not been complied with, and that the question of the bankrupt's excusability had not been determined.
2. That he had not been rehabilitated under Arts. 305-315.

The Plaintiff appealed.

S. Stavrinides for the Appellant. Articles 244 and 245 do not apply where there has been a concordat. Rehabilitation is not essential to the restoration of civil rights.

N. Paschales for the Respondent. I cannot support the judgment on the first point, but the whole case was full of informalities and there was no effective approval of any valid concordat. In particular no interim report on the character of the bankruptcy was presented to the *juge-commissaire* or transmitted to the Court under Art. 190. Art. 226 shows that the functions of the syndics do not cease until the order of confirmation of the concordat has been formally drawn up, and this was never done.

The Court allowed the appeal.

Judgment: This appeal must be allowed. As to the first point the District Court seems to have confused two distinct procedures.

A bankruptcy, under the Ottoman Commercial Code (which closely follows the French Code de Commerce), may take one of two courses. The bankrupt may effect a concordat with his creditors. If he does so, and if the concordat is approved by the Court, the functions of the syndics cease, and the bankrupt resumes the control of his own affairs (Art. 226). By the declaration of bankruptcy all the bankrupt's rights of suit are vested in the syndics (Art. 153). By the approval of the concordat, when the functions of the syndics cease, those rights of suit revest in the bankrupt. This is not said in express words, but it follows by necessary implication.

If however the bankrupt fails to effect a concordat with his creditors (Art. 236), an alternative procedure applies, under which the bankrupt is subjected to a much more rigorous treatment. The creditors become in what is called " a state of union " and proceed through the syndics to the realisation of all his property, including the collection of all his debts. This liquidation of the bankrupt's estate must proceed to its conclusion, and it is only when it has reached its conclusion (Art. 254), that the articles referred to by the District Court (244 and 246) come into operation. The articles in question have no application at all to a case in which a concordat has been effected.

TYSER, C.J. & BERTRAM, J.

PEDROS ALEXANDROU v. NICOLAOS BAROUTES

As Arts. 245 and 246 appear to have been misunderstood, it may be well to explain their real purport. They are concerned with the question of " excusability." The notion of excusability is derived from the French Code and its explanation is as follows: The French Code, as originally promulgated, contained certain Arts. (566 to 575) relating to " *cession des biens.*" A bankrupt, who has failed to effect a concordat, and who is dealt with by his creditors in " a state of union " does not get a discharge from his debts on the conclusion of the liquidation. His creditors can still pursue their remedies as well against his person as against his property. The effect of the admission of a bankrupt to the privilege of " *cession des biens* " was that his creditors could no longer pursue their remedies against his person. (" *elle n'a d'autre effet que de soustraire le débiteur à la contrainte par corps.*" Code de Commerce, 1807, Art. 568). In 1838 " *cession des biens* " was abolished in France and " *excusabilité* " substituted. It has the same effect, and has the same effect also in the Ottoman Code (see Art. 246). The privilege of excusability has now very little significance in Cyprus as the remedies of creditors against the person of a debtor are now of a very restricted character. (See Civil Procedure Law, 1885, Secs. 81-84.) The question of excusability obviously can have no reference to the case where a concordat has been effected for by the concordat all the remedies of the creditors are necessarily suspended.

As to " rehabilitation," this also has been misunderstood. " Rehabilitation " is not concerned with civil rights. If a bankrupt effects a concordat he is remitted to all his civil rights so long as the concordat is in force. Bankruptcy however in all countries entails certain other incapacities besides loss of civil rights. Thus in France a bankrupt loses his electoral rights, his right of membership of public bodies, his right to edit a newspaper, to sit on Chambers of Commerce, to appear on the Exchange. It is to the exercise of these rights that in France rehabilitation restores him. Its effect in Cyprus it is not necessary now to define. Its only effect specified in the Ottoman Commercial Code is that it qualifies a merchant to re-appear on the Exchange. For the purpose of this case it is only necessary to say that rehabilitation is not required to restore to a bankrupt who has effected a concordat his rights of suit against his debtors. Those rights of suit are restored to him by the operation of Art. 226.

With regard to the technical points raised by Mr. Paschales, it is true that the interim report on the character of the bankruptcy required by Art. 190 was not rendered by the syndics or transmitted to the Court. It is very important that this report should be made, as without such a report the Court cannot exercise that control over bankruptcies which it is the intention of the law that it should exercise, but the failure to present this report does not invalidate the judgment approving the concordat, and no appeal having been made against the judgment, the objection cannot be raised now.

As to the further point, that the judgment is not operative until it has been drawn up, this is based upon the terms of Art. 226. The correct translation of the words relied upon seems to be as follows: " After its binding character has been adjudged " (*i.e.*,

after the concordat has been made obligatory) " by the issue of an Ilam containing the confirmation of the agreement of concordat, the functions of the syndics cease." The point is really a point of procedure. According to the procedure now in force in our Courts, a judgment becomes operative not from the moment it is drawn up but from the moment it is pronounced. (See Order XVI rule 2. " Every judgment when entered shall be dated as of the day on which it was pronounced and shall take effect from that date.") The judgment can be drawn up *nunc pro tunc* and our own judgment will be subject to this being duly done.

Subject to this point the appeal is allowed with costs.

Appeal allowed.

[TYSER, C.J. AND BERTRAM, J.]

GIULSUM OSMAN

v.

ZEHRA AHMED.

PRACTICE—AMENDMENT OF CLAIM—JUDGMENT—RIGHTS OF PARTIES AT TIME OF ACTION BROUGHT.

NUISANCE—OVERLOOKING—FALL OF PARTY WALL—ERECTION OF SCREEN AT JOINT EXPENSE——MEJELLE, ART. 1317.

A judgment determines the rights of the parties at the date of the issue of the writ.

An amendment of a claim cannot be granted unless it is justified by the circumstances existing at the date of the issue of the writ.

It is a condition precedent to the right of one co-owner of a fallen party wall under Art. 1317 of the Mejellé to an order of the Court for the erection of a screen at the joint expense of the co-owners so as to secure his house from overlooking, that he should have made an offer to the other co-owner to have the nuisance abated at their joint expense before action brought.

The Plaintiff brought an action claiming that the Defendant should rebuild a wall which the Plaintiff alleged to be her property and to have fallen by her negligence, on the ground that the fall of the wall subjected Plaintiff's house to overlooking. The Defendant denied the ownership of the wall. The District Court found that the wall was owned by the Plaintiff and Defendant in common and ordered the erection of a screen at the joint expense under Art. 1317 of the Mejellé.

HELD: (1.) That the order was not one that could be made in the action as it gave a remedy different from what was asked in the claim.

(2.) That no amendment could be made to the claim so as to enable the Court to make the order, inasmuch as at the date of the issue of the writ the Plaintiff had not offered to the Defendant to have the nuisance abated at the joint expense of the parties, and consequently was not entitled to the remedy accorded by Art. 1317.

This was an appeal from the judgment of the District Court of Nicosia.