

10 February 1967

Judges

His Hon. Mr. Justice Prof. Sir Anthony J. Mamo, O.B.E.,
C.St.J., Q.C., B.A., LL.D. — President
The Hon. Mr Justice Prof. J.J. Cremona, K.M., LL.D., B.A.,
D.Litt (Rome), B.A. Hons. (Lond.), Ph.D. (Lond.),
F.R.Hist.S. — Vice President
The Hon. Mr Justice J. Flores, B.L. Can., LL.D.

Walter Cleaver Turner et

versus

William J. Gaffary et noe

Ingliz, proceduri b' — Nullità ta' — Privilegg — Kancellament ta'

Jekk u kif ghandu wiehed jipprocedi b'lex jottfent l-kancellament ta' privilegg mir-Registru Pubbliku.

The Court, having seen the writ of summons filed before the Court of Magistrates of Judicial Police for Gozo and Comino in its Superior jurisdiction in Commercial Matters whereby plaintiffs after premising that —

By deed published by Notary Dr. Joseph R. Grech on January 10th 1962 (Dok. A) a special privilege was reserved in favour of defendant Gaffary over Villa "Mistral House" in

Xaghra Road, Marsalforn, Gozo, and the two lateral drives adjoining it as described in detail in the said deed; that the said special privilege has been registered in the Gozo Public Registry under Note No. 84 of the year 1962, (Exh. B); and the price and relative interests for the payment of which the special privilege was reserved, having long ago been paid to the defendant as can be seen from the judgment given by the Commercial Court on July 5th 1965 (Exh. C) and from the documents filed herewith (Exh. D to J); that therefore it was no longer necessary for the privilege to remain in force; and consequently its cancellation should be ordered prayed that defendant Caffary should show cause why — having it been declared if necessary that the price of five thousand pounds (£5,000) for the Villa "Manor House" has been paid by plaintiffs, and that the registration of the special privilege was no longer required — defendant Cefai nomine should not be ordered to take the necessary steps to (obtain cause) the cancellation of the registration of the said special privilege; saving all other rights of plaintiffs against defendant Caffary, including those for the refund of moneys unduly paid to him, and of other sums owing by him. With Costs.

Having seen the statement of defence of defendant Caffary, wherein he pleaded that plaintiffs' claim could not be allowed as he was still their creditor for the price of the Villa, which they had not yet paid;

Having seen the statement of defence of defendant Cefai nomine who said he would bide the evidence forthcoming during the hearing of the case.

Having seen the further statement of defendant Caffary wherein he claimed that a commercial association existed between plaintiffs and himself, and that the said Villa formed part of the said association; and that therefore plaintiffs demand

could not be entertained before the winding-up of the said association was duly completed.

Having seen the further statement of defence of the other defendant Cefai nomine wherein it was submitted that he has no interest in the present suit;

Having seen the judgment of the first Court of the 8th of November 1966, whereby plaintiffs' demand was disallowed with costs, that Court having first considered —

Plaintiffs' demand, as it stands, is in effect directed solely against defendant Cefai nomine in that the Court is being asked to order said defendant to take the necessary steps to obtain the cancellation of the note of special privilege bearing number 84 of the year 1962 registered in favour of defendant Caffary against plaintiffs.

It is true that plaintiffs have included in their request a declaration to the effect that the price of Villa "Manor House" has been paid by plaintiffs; and also another declaration to the effect that in consequence of such payment the said note of privilege is no longer necessary; — but both these declarations are being sought only "if necessary", and as ancillary to the main request that defendant Cefai nomine be ordered to effect the necessary cancellation.

The law lays down at section 2165 of the Civil Code that a registration may be totally cancelled either with the consent of the creditor given in a public deed, or in virtue of a judgment of the competent Court. At section 2166 it is laid down that if the total extinguishment of a registered debt results from a judgment which has become "res judicata", or from any other public deed the cancellation of the registration may be effected without the consent of the creditor.

At section 2169 it is laid down that:— “the cancellation of a registration may also be ordered by a judgement.....if it is shown that the right of the creditor is extinguished”. By section 2170 the Civil Code sets the procedure to be followed in order to obtain a cancellation of a registration, namely: “There shall be presented to the Director of the Public Registry a note containing the following particulars — (d) an indication of the judgment, or deed, if any, under which the cancellation is demanded”. And finally, section 2172 states: “Where the cancellation is demanded in pursuance of a judgement, the note shall be signed by the Registrar of the Court by which the judgment was delivered”.

It is evident from the above that a person seeking to obtain the cancellation of a note of privilege registered against him, he must first obtain the creditor's consent signified in a notarial deed, or a judgment sought from the competent Court by means of a writ in contestation with the unwilling creditor. Having obtained either the deed or the judgment as aforesaid, the debtor shall prepare a note containing the particulars detailed under section 2170 of the Civil Code, amongst which an indication of the deed or judgment under which the cancellation is demanded, said note shall be signed by the Notary receiving the deed, or by the Registrar of the Court by which the judgment was delivered, and it shall be presented to the Director of Public Registry. It shall then be the duty of the latter to effect the cancellation by accepting said note, and inscribing it in the relative registers.

It follows from the above that the Director of Public Registry can only be sued in case of his refusal to accept the said note conforming with all the requirements of section 2170 of the Civil Code.

In the present case, it does not appear that any such

note has been, or indeed could have been, presented to and refused by defendant Cefai nomine, at any time before the filing of the suit.

Having seen plaintiff's note of appeal and their petition whereby they prayed that the judgement appealed from be reversed and their demand allowed with costs, in both Courts, against the respondents.

Having seen the answer by respondent Cefai nomine wherein he submitted that the judgement appealed from the extent that it concerned him, was just and fair and deserved to be affirmed with costs against the appellants.

Having seen the answer by respondent Caffary wherein he also submitted the judgment appealed from is just and fair and deserved to be affirmed with costs.

Having seen the record of the proceedings and heard Counsel;

Now considers as follows.

In the first place the appellants submit that the judgment appealed from is null. They base this claim on the fact that, on the 16th November, 1965, the first Court ordered the proceedings to be conducted in the English Language. Consequently when respondent Cefai, on the 26th of February 1966, filed a further statement of defence in Maltese, that statement ought not to have been accepted and should, in any event, have been struck off the record. Yet in spite of all this, the first Court in delivering judgment made express reference to that statement which, instead, it should not have considered.

The Court does not think that there is any ~~thing in this~~

submission. The further statement of defence to which objection is taken was served on plaintiffs' Council (Dr. G.M. Camilleri) on the 4th of March, 1966. Yet though the case was, after that, adjourned on several occasions, mostly at the request of Dr. Camilleri himself, until finally it was adjourned for judgement "on the plea of defendant Cefai" on the 4th of October, 1966 no complaint on the score of the said irregularity was formally raised by him, at any time:— "Indeed on 26th April, 1966, the case was put off "for the filing of a note of submissions by the plaintiffs" which to the date of the judgment appealed from was never, in fact, filed.

Now, apart from the fact that the irregularity aforesaid does not, in the circumstances, appear, by itself, to have caused any prejudice to the appellants, it must be clear from the record that they themselves "proceeded and knowingly suffered others to proceed to subsequent acts, without pleading the nullity" within the meaning of section 792 of the Code of Organization and Civil Procedure. Consequently their plea of nullity of the further statement of defence and of the judgment appealed from cannot be allowed and is hereby dismissed with the relative costs against the appellants.

On the merits, however, this Court is unable to agree with the conclusion of the first Court. On the plea which was raised by respondent Cefai alone and which concerned only himself in the capacity in which he had been sued, the first Court disallowed appellants' claim outright in respect of both respondents. At worst, that plea might conceivably have justified the nonsuiting of the appellants in regard to respondent Cefai, but it could never have justified the dismissal of the appellants' claim in the merits as against respondent Caffary.

The first Court essentially proceeded from the premise, which it set out right at the start of its reasoning, that "plain-

tiffs' demand, as it stands, is in effect directly solely against defendant Cefai nomine in that the Court is being asked to order the said defendant to take the necessary steps to obtain (cause) the cancellation of the special privilege..." With great respect that premise is not well found. Having regard to the terms of the writ of summons it is clear that the principal defendant is respondent Caffary: it is he who is called upon to show cause why — in view of the fact that, as alleged by the appellants, the debt has been completely paid, — the respondent Cefai should not be ordered to cause the cancellation to be made. The essential issue was thus between the appellants, as plaintiffs, and the respondent Caffary and the rôle of the respondent Cefai in the proceedings was merely passive, so to say, that is to carry out the order of the court for the cancellation of the privilege should that issue be finally resolved in favour of the appellants.

That is, no doubt, why respondent Caffary did not raise any procedural complaint on the writ of summons but limited himself to contesting the merits: and that is also why respondent Cefai in his first statement of defence, rightly as this Court thinks, abided the evidence and stated that "once the evidence (of payment) was produced and the requisite formality was complied with, he would have no difficulty in making) the cancellation asked for".

At worst then, the joining of respondent Cefai in the proceedings was superfluous, but it, certainly, did not, either vitiate the whole proceedings or, much less, negative the claim in the merits vis-a-vis respondent Caffary.

Where the cancellation of a registration is ordered in virtue of a judgment there is implied an order to the Director of the Public Registry to carry out the cancellation provided the formalities prescribed in section 2170 of the Civil Code

are complied with. The cancellation by virtue of a judgment is ordered as against the creditor (respondent Caffary) and the Director of the Public Registry need not be a party to the proceedings. If, however, the Director is made a party, as respondent Cefai has been made in the present case, the question is one of costs which, of course, should in any event in his regard be borne by the appellants.

If in the result the appellants prove that the debt owing respondent Caffary has in fact been paid and the Court, consequently, allows their claim against respondent Caffary there is nothing against the Court making the order asked for by the appellants directing the respondent Cefai to cause the cancellation to be made, on condition, of course, that the note provided for in the said section 2170, duly signed by the Registrar as provided in section 2172 is presented to him.

For these reasons the Court allows the appeal for the plaintiffs, reverse the judgment appealed from and orders that the records be sent back to the Court of Magistrates of Judicial Police for the Islands of Gozo and Comino in its Superior Jurisdiction in Commercial Matters, for the hearing of the case to be proceeded with according to law. The costs of first instance are reserved for the decision on the merits; The costs of this appeal are to be bore in equal parts by the three parties.
