well be that the maxim: *salus reipublicae,* etc., is not only an absolute protection to acts and measures coming within the limits I have described but is also provisionally protective of acts and measures of a more doubtful character though still *bona fide.* It may not be desirable that such questions should be debated in the Law Courts, while the war is in existence. It might very seriously hamper military operations if while they are actually in progress officers were liable to have any of their acts challenged in a Court of law. Probably we reach here the true sphere of an Act of Indemnity. It is to protect the military authorities from having the necessity of their acts disputed or investigated. Now I am inclined to think that *Marais'* case was intended to go to this length and to exempt the military from the liability to have their *bona fide* actions challenged while hostilities are still going on; though I am not sure that it matters very much, because the Courts themselves, even if they had the authority, would certainly decline to exercise it.

There remains a *residuum* of cases to which I have already incidentally referred, in which military authority may be used as a cloak for acts of private vengeance or personal enrichment or wanton or capricious oppression. What is the position of the Courts with regard to them? I answer that in such a case as this, if it arose, so long as the military power is not used to close the Courts and to drive the Judges from their seats, they must exercise their constitutional authority.

The case now before the Court is one in which clearly the act complained of may be one which military necessity requires. The Court, therefore, cannot entertain the application.

Applicant's Attorneys: *Webb & Dyason.*

[G. v. P.]

EX PARTE MORRIS.

1915. *November* 22, 29. WESSELS, MASON and GREGOROWSKI, JJ.

Insolvency.—Composition.—Rehabilitation.—Dominium *of Insolvent estate.—Conditional rehabilitation.—Law* 13 *of* 1895, *secs.* 132, 135, 139.—*Registration of bonds.—Act* 25 *of* 1909, *sec.* 48 (2).

Where an insolvent has made a composition with his creditors he is, upon rehabilitation, reinstated by operation of law with the *dominium* of his assets,

movable and immovable, after payment of all objecting, concurrent, and preferent creditors.

In granting the rehabilitation of an insolvent, the Court may, under sec. 135 of Law 13 of 1895, attach the condition that the mortgage bonds registered against the titles of the insolvent's property prior to the insolvency shall remain valid and binding.

Sec. 48 (2) of Act 25 of 1909 does not apply to cases of composition and rehabilitation, but only to cases where the insolvency proceeds to its usual termination by distribution of assets amongst creditors.

Application for rehabilitation referred to the full Court by DE VILLIERS, J.P., on 15th November.

The applicant's estate was sequestrated on 4th August, 1914. In November, 1914, at a special meeting of creditors, he made an offer of composition of 2s. in the £ to concurrent creditors, his two preferent creditors to be paid in full. This offer was duly accepted by the requisite proportion of creditors, subject to the condition that the first and second bonds held by these two preferent creditors, Mrs. Holland and Messrs. Katz and Lurie, over his immovable property should remain in full force. The acceptance of the offer was duly confirmed, and the preferent creditors, who were not parties to the actual composition, consented thereto on the above condition. The account was confirmed on the 9th November, 1915, and the insolvent now applied for his rehabilitation subject to the condition mentioned.

The Master's report dealt with the cases of *Ex parte Widman* (1914, T.P.D. 416) and *Ex parte Skuy* (1915, T.P.D. not reported), and recommended that the application be granted. He submitted that the order asked for was within the power of the Court by virtue of sec. 135 of Law 13 of 1895, and also referred to Act 25 of 1909, sec. 48 (2).

W. S. Duxbury, for the applicant, moved.

I. Grindley Ferris appeared for the bondholder, Mrs. Holland to consent, provided such condition was one which could be imposed by the Court.

Cur. adv. vult.

Postea (November 29).

WESSELS, J.: It appears that the applicant Morris was declared an insolvent, and that he came to an arrangement with his concurrent creditors to pay them 2s. in the £. The preferent creditors are not parties to the actual composition, and are therefore

entitled to payment in full; but they consent to the rehabilitation of the applicant, provided their mortgage bonds can remain as valid and binding on the properties mortgaged to them by the insolvent.

The matter has been referred to the full Court in order to get an authoritative decision as to the future practice in case of rehabilitations following upon a composition with creditors.

Where concurrent creditors agree to accept a certain sum in the £, and also agree that the preferent creditors shall retain their securities, can the Court, if the preferent creditors are satisfied with the arrangement, rehabilitate the insolvent, and impose a condition that his land shall be restored to him, and that the bonds of the preferent creditors shall remain registered against his title to the land?

There have been several decisions to the effect that such conditions can be imposed, but these have been questioned by Mr. *Ferris*, and there is a great deal in his argument. He has contended that directly insolvency supervenes, the insolvent is divested of all his property, movable and immovable, and his whole estate is vested, at first in the Master, and then in his trustee. The law makes no special provision by which the Master or trustee is again divested of this estate, or by which the insolvent is reinstated as *dominus* of the balance of his estate, after payment of his creditors. This being the case, Mr. *Ferris* contends that there must be some formal transfer from the trustee or Master to the rehabilitated insolvent, and unless that is done the bonds registered against his title are valueless.

Were it not for secs. 132, 135 and 139 of the Insolvency Law (13 of 1895), I think this argument should prevail; but it seems to me that if we consider the scope and intention of the Insolvency Law, and interpret sec. 139 in that light, we are driven to the conclusion that the legislature intended in the case of a composition, that the insolvent should be reinstated, by operation of law, with the *dominium* of his assets, movable and immovable, after payment of all objecting concurrent and preferent creditors.

The reasons for this view are: The insolvent, upon the acceptance of an offer for composition, may be at once rehabilitated (sec. 132). The sequestration cannot be set aside, but the insolvent can be discharged by way of rehabilitation (*Ex parte Botha*, 1909, T.S. 707). The provisions regarding composition imply that the insolvent shall pay out his creditors, and that those who have agreed

to the compromise can compel him to do so by action. Those who have not agreed to the compromise, whether concurrent or preferent, are entitled to the full amount of their debt notwithstanding the composition (*Meeser* v. *Mulder*, 3 Menz., 222, and cases there cited). If, however, they agree to any other arrangement in lieu of full payment, they cannot afterwards question the composition so long as their agreement is adhered to. How is the insolvent to pay his creditors if he is not to have the full control of his estate? The whole effect of composition is to enable the debtor to continue his business and thus pay out the amount agreed upon. If a composition is accepted, the insolvent is not, prior to rehabilitation, discharged from his debts incurred before insolvency. The debts due by him prior to insolvency are still alive, but they are by the composition altered in amount, though not in character, and they are due and recoverable by action. The clause, therefore: "Save and except such claims as the creditors shall have against him by virtue of any offer of composition accepted by them, and which shall still remain unsatisfied", refers to all creditors who agree to the terms of the composition, whether preferent or concurrent. If then all parties, as in the present case, agree that the preferent creditors are to be paid in full and are to retain their securities, it follows that the Court must give effect to this arrangement, for if the Insolvency Law allows a composition between all creditors, preferent as well as concurrent, it must contemplate that legal effect can be given to this arrangement. This interpretation gives full effect to the words of sec. 135: "Upon the day fixed for the hearing of such application, it shall be lawful for the trustees, or any of the creditors, or other person interested in the estate, to appear in person or by counsel to oppose the granting of the rehabilitation aforesaid. The Court may grant or refuse to grant such rehabilitation, or annex such conditions thereto as the justice of the case may require."

It has been urged that even if this is so Act 25 of 1909, sec. 48 (2) is opposed to it, and being a later law makes the above interpretation of the Insolvency Law impossible. Is this so? This section does not contemplate the case of composition, but only cases where the insolvency proceeds to its usual termination and the assets are distributed amongst the creditors.

I ought to point out that the above views are not contrary to, but in accordance with the decision of my brother CURLEWIS in *Ex parte Skuy* (1915, T.P.D., not reported). In that case the

preferent creditors objected to the composition, and objected to the rehabilitation. In this case the preferent creditors raise no objection to the composition, and are prepared to consent to the rehabilitation, provided their bonds may remain registered against the title of the mortgaged property.

If the Court could not impose the conditions set out above the only other way of attaining the same object would be a re-transfer of the bond by the trustee to the insolvent, and the passing *pari passu* of fresh mortgage bonds in favour of the preferent creditors. It appears to us that this would entail unnecessary expenses, and that sec. 135 allows the Court to annex conditions to the rehabilitation, in order to avoid this very cumbersome practice.

The Court therefore orders that the insolvent be rehabilitated, subject to the condition that the claims of the preferent creditors remain intact, and that their mortgage bonds remain as valid and binding against the titles of the property of the insolvent mortgaged to them prior to the insolvency.

There will be no order as to costs.

MASON and GREGOROWSKI, JJ., concurred.

Applicant's Attorneys: *Pienaar & Marais;* Attorneys for the bondholder: *Tindall & Mortimer.*

[J. M. M.]

BROOK & OTHERS v. BROOK'S EXECUTORS AND ANOTHER.

1915. *November* 23, 24; *December* 3. MASON, BRISTOWE and GREGOROWSKI, JJ.

Will.—Bequest of property subject to conditions in a certain letter. —Failure of testator to write letter.—Evidence as to intention. —Effect of bequest.

A testator, in bequeathing certain property to S, declared that it should not accrue to S unless the executors certified in writing that S had complied with all the conditions laid down by the testator in a certain letter. The testator died without having written such letter. *Held,* that extraneous evidence relevant to the question why the testator did not write the letter was admissible. *Held,* further, that as the non-performance of the condition was due to some cause over which S had no control, and as the testator had failed to write the letter in question, S was entitled to the bequest.