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INSTITUTE OF ADVANCED
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In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT SITTING AS A COURT OF APPEAL,
JERUSALEM.

BETWEEN—

MARY KHAYAT *Appellant*

— AND —

- 1. NASRALLAH SALIM KHOURY
- 2. NASRALLAH SALIM KHOURY on behalf of the heirs of his late brother Youssif *Respondents*

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CASE FOR THE APPELLANT.

RECORD.

1. This is an appeal from the judgment of the Supreme Court of Palestine, sitting as a Court of Appeal, dated the 14th February, 1945, affirming the judgment of the District Court, Haifa, dated the 7th March, 1944, which Court had dismissed the Appellant's claim against the Respondents.

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20 2. The question raised by this appeal is whether the Appellant is entitled to recover from the Respondents interest on three promissory notes all signed by the Respondent Nasrallah Salim Khoury and dated the 11th October, 1929, and maturing respectively the 21st October, 1929, the 23rd May, 1930, and the 23rd May, 1930. The Respondent Nasrallah Salim Khoury and his late brother Youssif formerly carried on business in partnership as merchants at Haifa under the name of "S. N. Khoury" and in that name were adjudicated bankrupt on the 27th October, 1930. In a former action brought by the Appellant on the same promissory notes that reached the Privy Council in the year 1943 and is reported in L.R. (1943) 30 A.C. 507 it was held *inter alia* that the Appellant was entitled to

recover from the Syndic in the bankruptcy interest from the dates of the maturity of the notes to the date of adjudication. By Article 155 of the Ottoman Commercial Code no interest is recoverable from the Syndic from the date of adjudication. The present suit was instituted to recover such interest from the bankrupt himself after the bankruptcy was terminated.

3. It is convenient to set out certain of the provisions of the Ottoman Commercial Code and the Bills of Exchange (Protest) Ordinance, 1924, referred to in the proceedings below.

OTTOMAN COMMERCIAL CODE.

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(a) ARTICLE 119: Where payment of the bill of exchange is refused at maturity, such refusal shall be recorded the day following the maturity by means of a document called "protest"; if that day be a legal holiday, the protest shall be made on the following day.

(b) ARTICLE 141: The interest payable on a bill of exchange dishonoured by non-payment is calculated from the date of the protest.

(c) ARTICLE 155: The order of adjudication stops, only so far as the estate of the bankrupt is concerned, the running of interest on all claims which are not privileged, or secured by a pledge (Rohn) or mortgage (Istighal). 20

Interest upon a secured claim can be obtained out of the proceeds of such goods or property as may have been delivered to a creditor by way of privilege, pledge or mortgage.

APPENDIX TO OTTOMAN COMMERCIAL CODE.

ARTICLE 91. No damages in respect of the breach or delay in the performance of a contract or engagement to give or do a thing shall be recoverable from the promisor unless he has been officially notified in writing to carry out his engagement. 30 Provided that where what the promisor has promised does not come within the category of such things as may be given or done after the expiration of a stipulated time and such time has expired without any performance, damages shall be recoverable without any notification to the promisor.

In like manner, if the engagement consists in omitting to do a particular thing and the promisor has violated such engagement, he shall be liable to pay damages without notification or protest.

ARTICLE 92. The notification to the promisor shall be effected by serving on him a notice or protest or other similar official document.

Where the agreement contains stipulation to the effect that, in the event of the promisor failing to perform by the stipulated time that which he bound himself to do, there should be no notification, the mere expiration of the stipulated time being regarded as equivalent to a notification or protest, such stipulations shall hold good accordingly.

10 ARTICLE 99. The damages to be awarded in respect of any delay in the performance of engagements limited to the payment of a sum of money shall only consist in interest calculated at the rate of one per cent. per month on such sum.

Such interest shall be awarded and paid without any obligation on the part of the creditor to prove that he has suffered any loss.

20 If an acknowledgment of debt contains no stipulation as to interest, the interest on such debt shall be computed from the date of the protest, if any has been made, or, in default of protest, from the date of the fiat referring the petition to the Court.

ORDINANCE No. 31 of 1924.

An Ordinance to amend the provisions with regard to the protest of Bills of Exchange.

1. This Ordinance may be cited as the "BILLS OF EXCHANGE (PROTEST) ORDINANCE, 1924"

2. A bill of exchange shall not be protested on a Friday, Saturday or Sunday, or on any legal holiday which may be notified in the Official Gazette. Where payment of a maturity is Friday, Saturday or Sunday, or a legal holiday, protest shall
30 be made on the Monday or the day following the legal holiday.

3. Notwithstanding the provisions of Article 112 of the Code of Civil Procedure and of Article 141 of the Commercial Code, the interest payable on a bill of exchange dishonoured by non-payment shall be calculated from the date of maturity of the bill.

4. The provisions of this Ordinance shall apply to all negotiable instruments.

40 4. Several applications were made to the Syndic in the course of the bankruptcy of the firm S. N. Khoury including one by a Notarial Notice by the Committee of Creditors dated the 14th

September, 1935, that interest might be paid on the bankrupts' debts from the date of adjudication in view of the fact that there were sufficient assets in the bankruptcy to allow for the payment of the debts in full and for interest, but on the 12th August, 1937, the District Court, Haifa, ruled that such interest was not recoverable, the Order of the Court running:—

p. 42, l. 3

The estate is not liable for the interest due after the date of adjudication (see Article 155 of the Commercial Code) but the bankrupts may be sued personally after the Syndics have ceased to act.

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p. 42

5. On the 27th October, 1937, the Appellant commenced the action referred to in paragraph 2 above against the Syndic in the bankruptcy of the firm and against the Respondent No. 1 claiming among other relief "legal interest from the respective dates of "maturity of the promissory notes".

p. 44, l. 25

p. 44
p. 45, l. 1

6. Respondent No. 1 put in a Defence. His main submission was that as he was a bankrupt he could not be sued personally. He took a number of other points on the merits of the claim, but his answer to the claim for interest was limited to a plea that "it is "clearly laid down in Section 155 of the Ottoman Commercial Code "that all interest on claims from the masse shall cease as from the "date of the declaration of the bankruptcy". He did not take the point on which he has succeeded in this action in the Courts below that interest was not due because the notes had not been protested. Nor did the Syndic who put in a separate and detailed Defence take the point either.

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p. 46

p. 63, l. 28

7. On the 26th April, 1938, Respondent No. 1 was dismissed from the said action on the grounds that the bankruptcy proceedings had not been completed and that he was still a bankrupt.

p. 63

8. On the 17th January, 1940, the District Court, Haifa, delivered judgment in the said action. The question of interest on the said notes was dealt with as follows:—

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p. 65, l. 9

Having decided that the documents in question are promissory notes and not undertakings it is convenient now to deal with the issue regarding the question of interest. Originally under Article 141 of the Commercial Code the interest payable on a promissory note (or bill of exchange) which had been dishonoured by non-payment was calculated from the date of protest. In 1924, however, by virtue of Sections 3 and 4 of the Bills of Exchange (Protest) Ordinance No. 31 of 1924, it was enacted that the interest payable in such case should be calculated from the date of maturity of the instrument "notwithstanding the provisions of Article 112 of the Code of Civil "Procedure and Article 141 of the Commercial Code". It

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follows therefore that the three promissory notes in question carry interest at 9% per annum as from their respective dates of maturity, viz. 23rd May, 1930, as to Exhibits P/1 and P/2, and from 22nd October, 1929, as to Exhibit P/3 (see Section 24 (a) of the Interpretation Ordinance, Chapter 69, Volume II, Laws of Palestine, page 730), until the date of adjudication of the bankrupt firm of which Nasrallah Salim Khoury, the maker in all these instances, was a member—see Article 155 of the Commercial Code. This however is without prejudice to any claim which may be brought in the future for interest under Article 305 of the Code.

This judgment was upheld by the Supreme Court on the 24th April, 1940.

9. In September, 1940, pursuant to an Order of the District Court, Haifa, dated the 19th July, 1940, the bankruptcy of the firm S. N. Khoury was terminated and the assets and properties of Respondent No. 1 released from the bankruptcy. p. 57

10. On the 8th November, 1940, in making an order for the return to Respondent No. 1 of his books and documents the District Court, Haifa, explained that their failure so to order would be “to the prejudice of the rights of such creditors as may care to institute civil proceedings against Mr. Nasrallah Khoury personally”. p. 71
p. 71, l. 36

11. The Appellant appealed from the judgment of the Supreme Court referred to in paragraph 8 above to His Majesty in Council. This is the case reported in L.R. (1943) A.C. 507 referred to in paragraph 2 above. The only passages in the judgment (which is printed in the Record herein) material to the present appeal are the following:— p. 72

30 The Supreme Court, affirming the District Court, held that the instruments were promissory notes and that interest was payable from the dates of maturity, but not beyond the date of adjudication in bankruptcy. The Court further held that the dates of payment of the notes were the dates at which the exchange was to be taken. Any claim for interest under Article 305 of the Code was reserved for further decision in Palestine and is not now before the Board. . . . p. 73, l. 15

40 In their Lordships' opinion the Courts in Palestine were right in holding that the three instruments were promissory notes whether the definition applied is that contained in Article 145 of the Ottoman Code or in the Bills of Exchange Ordinance of 1929, Section 84 (1), which corresponds with Section 83 (1) of the English Bills of Exchange Act (1882) in particular because the notes were unconditional promises to pay a sum certain of money. p. 75, l. 18

p. 76, l. 31

Their Lordships think that the appeal fails on this issue and the Respondent is therefore entitled to interest from the date of maturity, though the interest will not run beyond the date of adjudication. . . . The Act (that is, of 1882) was a codifying Act and purported, not to change the law, but to declare it, and the Palestine Ordinance expressly states that it declares the law. It is true that the Act and Ordinance state the rule as being applicable to bills drawn out of and payable in the United Kingdom or Palestine as the case may be but not expressed in the currency of the United Kingdom or Palestine. But their Lordships think that the essence of the rule applies in a case where the sum is not expressed in the United Kingdom or Palestine currency, and is payable in the United Kingdom or Palestine. Their Lordships accordingly consider the Ordinance to involve an authoritative declaration of the proper rule to apply to the calculation of the exchange in a case like this. Nor do their Lordships think it necessary to consider whether the Ordinance (see s. 72 (4)) applies to all the three notes or only to the notes which matured before the date of the Ordinance. The Ordinance only declares what the English rule is, and, as it is, so it has been for many years. . . .

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p. 78, l. 15

The sum of LP. 272.375 paid into Court on 13th December, 1937, is not sufficient to cover interest due from dates of maturity to date of adjudication. . . .

p. 78, l. 26

This judgment to be without prejudice to any future claim for interest under Article 305 of the Code.

12. Article 305 of the Ottoman Commercial Code gives the creditors the right to make a claim against a bankrupt who applies for rehabilitation. Respondent No. 1 has not applied for rehabilitation and accordingly this Article is not material to the present appeal.

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p. 1

13. On the 6th August, 1943, the Appellant commenced

THE PRESENT SUIT

claiming by her Statement of Claim the sum of LP. 1,414.784 as interest on the said promissory notes from the date of the said adjudication.

p. 3

14. The Defence filed on the 20th September, 1943, raised a number of points, but the only one it is necessary to mention here is the plea

p. 3, l. 39

The Plaintiff did not protest the said promissory notes, so that no interest whatsoever is payable thereon.

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15. At the hearing of the action before the District Court on the 12th January, 1944, the Judge Commissaire in the bankruptcy from 1931 to 1938 who was called on behalf of the Appellant said:—

In the result the creditors got 100% of the approved claims. There remained over LP. 100,000 for the bankrupt. The creditors always claimed interest on their claims as from the date of adjudication. . . . I discussed with Mr. Nasrallah the question of the interest on the debts. I explained to him that the estate was not liquidated at once because it would not bring 100% and made it clear to him that in consideration of the creditors waiting to receive their claims they were entitled to interest on their claims in as much as the estate realised more than the debts. Nasrallah agreed on principle to pay interest and left it to me to assess its amount, but he was not inclined (*sic*) a high rate of interest as compensation to the creditors who had waited seven or eight years to receive their claims. No definite result was achieved.

p. 8, l. 16

p. 8, l. 25

Respondent No. 1 gave evidence and admitted that he had not paid the interest that was claimed in this action.

p. 11, l. 18

20 16. The District Court delivered judgment on the 7th March, 1944. One of the submissions made on behalf of the Respondents had been that the Appellant's claim was barred by the previous proceedings hereinbefore referred to, the argument being

p. 17

Trustee in bankruptcy and bankrupt are privies. Having claimed against the Syndic she cannot claim the same subject-matter against the debtor, they being privies. At material time the interest of the Syndic was that of the bankrupt.

p. 12, l. 27

30 This submission was rejected by the District Court. So was another submission on the Respondents' behalf that the claim was prescribed.

17. On the point of protest, which has been decided in both Courts below against the Appellant, the District Court said:—

40 Article 141 of the Commercial Code provides that the interest payable on a bill is calculated from the date of protest. Article 99 of the Appendix provides that "if an acknowledgment of debt contains no stipulation as to interest, the interest on such debt shall be computed from the date of the protest if any has been made, or in default of protest, from the date of the fiat referring the petition to the Court". Article 119 of the Code provides that "where payment of the bill of exchange is refused at maturity, such refusal shall be recorded the day following maturity by means of a document called protest; if that day be a legal holiday, the protest shall be made on the following day".

p. 23, l. 25

The Bills of Exchange (Protest) Ordinance 31 of 1924 provided that a negotiable instrument would not be protested on a Friday, Saturday and Sunday, or on any legal holiday, but "protest shall be made on the Monday or the day following the "legal holiday"; and "notwithstanding the provisions of "Article 112 of the Code of Civil Procedure and of Article 141 "of the Commercial Code, the interest payable on a Bill of "Exchange dishonoured by non-payment shall be calculated "from the date of maturity of the bill". This Ordinance has been repealed by Section 96 of the Bills of Exchange Ordinance, 10 47 of 1929.

The Bills of Exchange Ordinance, 47 of 1929 was enacted and came into force on 31st December, 1929. Section 58 provides that the measure of damages are the amount of the bill and interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case and the expenses of protest.

It is clear that under the Ottoman Code interest was calculated as from the date of protest and that no claim for interest was entertainable without protest (Article 141 of the Code and 20 Article 91 of the Appendix). The effect of the Bills of Exchange (Protest) Ordinance, 31 of 1924 was to allow interest as from the date of maturity, but it still required protest to be made, viz., on Monday or the day next following the legal holiday. It did not dispense with protest.

None of the promissory notes for which interest is claimed in this action has been protested.

The promissory note for fifty-seven Turkish Gold Pounds was made and became due at the time when Article 141 of the Commercial Code was still in vigour, and consequently it should 30 have been protested if interest is to be claimed on it.

As to the other two notes, they were made when Article 141 of the Ottoman Code was in vigour, but became mature after the coming into force of the Bills of Exchange Ordinance, 47 of 1929. Following the judgment of the Supreme Court in Civil Appeal 36/1942 (9 P.L.R. page 367) the law in force at the time the notes were made is the law to be applied. The Bills of Exchange Ordinance, 1929, does not apply to these notes. They were made before the Ordinance was enacted, and there is nothing in the Ordinance to indicate that it has a retroactive or retrospective 40 effect (see in particular pages 370 and 371 of 9 P.L.R.) where the judgment in Civil Appeal 36/1942 is reported.

In these circumstances, and as the law applicable to all the three notes with regard to a claim for interest is Article 141 of

the Commercial Code, which provides that the interest payable on a negotiable instrument dishonoured by non-payment is calculated from the date of the protest, and as none of the promissory notes was protested, no interest can be claimed on them.

On this ground the claim of the Plaintiff cannot be maintained.

Counsel for Plaintiff contends that the submission of the promissory notes to the Syndic was equivalent to protest.

10 His submission is not supported by authority. The notes were filed with the Syndic merely for the purpose of verification of the debt.

Counsel for Plaintiff submitted that on 14th September, 1935, the Committee of Creditors sent a Notarial Notice to the Syndic in which they claim interest in respect of all their claims as from 27th October, 1930, until full payment (*vide* Exhibit P/1). p. 36

20 The Syndic was not liable for the payment of interest according to Article 155 of the Commercial Code and it cannot be maintained that this Notarial Notice was equivalent to the protest upon the Defendants as required by Article 141 of the Commercial Code.

18. In the result the District Court dismissed the Appellant's claim. p. 25, l. 46

19. The Appellant appealed to the Supreme Court of Palestine (Edwards J. and Plunkett A./J.). p. 26

20. On the 14th February, 1945, the Supreme Court delivered judgment dismissing the Appellant's appeal. The leading judgment was delivered by Mr. Justice Edwards, who said:— p. 28

30 We have listened to lengthy arguments on questions of *res judicata*, prescription, privity of parties and other matters. I am, however, of opinion that it is unnecessary for us in this Court to discuss these matters. I think that the District Court came to a correct conclusion on all the matters before them, and no useful purpose would be served by my adding in any way to their judgment as I consider that their reasons also are sound. p. 29, l. 10

40 The only matter on which I have some doubt is the question of *res judicata* and the effect of the words in the Judgment of their Lordships of the Judicial Committee, namely:—

“This judgment to be without prejudice to any future “claim for interest under Article 305 of the Code.”

On the whole, however, I think that we must not read into that judgment any suggestion that it was intended to debar the present Appellant from bringing any action against Nasrallah Khoury personally, even although Nasrallah Khoury did not take—and it is admitted that he has not taken—action under Article 305 of the Ottoman Commercial Code. It is, however, desirable that I should deal at greater length with the effect of non-protest. I consider that all reference to Article 141 of the Ottoman Commercial Code and to the Bills of Exchange (Protest) Ordinance, 1924, is irrelevant because these statutory provisions of law apply only when there has been a protest. In my view the relevant provisions of law are Articles 91 and 92 of the Addendum to the Ottoman Commercial Code. It is admitted that no protest or other similar official document was ever served on Nasrallah Khoury as required by Article 92 of the Addendum. It was strenuously argued by Mr. Margolin and Mr. Attallah that the claim which they presented to the Judge-Commissaire and to the Syndic was a “demand in justice” and as such, a compliance with Article 92. Whatever force that demand may have had as against the Syndic and the Judge-Commissaire, I do not think it can be said to be binding in these proceedings against Nasrallah Khoury himself.

p. 28

21. The Appellant submits that the judgment of the Supreme Court of Palestine dated the 14th February, 1945, is wrong and should be reversed for the following among other

REASONS.

1. BECAUSE whether the matter is governed by the Ottoman Code and the Bills of Exchange (Protest) Ordinance, 1926, or by the Bills of Exchange Ordinance, 1929, interest was due on the said notes from their respective dates of maturity, whether or not they had been protested.
2. BECAUSE if contrary to the Appellant's submission protest was necessary the submission of the notes to the Syndic and/or the Notarial Notice were equivalent thereto.
3. BECAUSE in the previous proceedings on the notes Nasrallah Khoury had not taken the point that protest was necessary.
4. BECAUSE in the previous proceedings interest on the said notes had been awarded from the respective dates of their maturity.

5. BECAUSE in the previous proceedings on the notes the Syndic must be taken as representing Nasrallah Khoury and/or as being privy with him.
6. BECAUSE the Bills of Exchange Ordinance, 1929, applies to the notes and the judgment of the Supreme Court of Palestine in Civil Appeal 36/1942 was wrong.
7. BECAUSE the judgments of both Courts below were having regard to the facts and the law applicable wrong.

PHINEAS QUASS.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT SITTING AS A
COURT OF APPEAL, JERUSALEM.

BETWEEN—

MARY KHAYAT *Appellant*

— AND —

**NASRALLAH SALIM KHOURY and
Another** *Respondents*

CASE FOR THE APPELLANT.

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