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39, 1948

Appeal No. 62 of 1946.
 UNIVERSITY OF LONDON
 W.C.1.
 -9 OCT 1956
 INSTITUTE OF ADVANCED
 LEGAL STUDIES

In the Privy Council.

ON APPEAL

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

44468

Between MARY KHAYAT

Appellant

AND

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

Case on behalf of the Respondents.

Record

1. This is an Appeal from the Judgment of the Supreme Court sitting as a Court of Appeal, Jerusalem, dated the 14th day of February, 1945, dismissing the Appeal of the Appellant from the Judgment of the District Court of Haifa dated the 7th day of March 1944, whereby the Appellant's claim in an action by the Appellant against the Respondent, Civil Case No. 181/1943, was dismissed.

2. The Appellant's claim in the said action, as appears by the Statement of Claim dated the 6th August 1943, was a claim for interest on three promissory notes each made on the 11th October, 1929, and signed by the Respondent and of which the particulars are as follows:—

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- (i) for 2,000 Turkish gold pounds maturing on 23rd May 1930;
- (ii) for 300 Turkish gold pounds maturing on the 23rd May 1930. p. 1.
- (iii) for 47 Turkish gold pounds maturing on the 21st October 1929; p. 2, ll. 4-6.

making in all a sum of 2,347 Turkish gold pounds. This sum converted into the currency of Palestine was held in a previous action to amount at the material time to L.P.2,052.475 mils. Default was made in payment of each of the said promissory notes but the Appellant did not protest any of the said notes upon the Respondent, or the Firm of which he was a member. p. 2, l. 19.

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p. 18, ll. 4-6.
p. 2.

p. 2, ll. 20-30.

The Appellant's claim for interest, as finally amended at the trial before the District Court of Haifa, amounted to L.P.1,324.122, the original claim as set out in the Statement of Claim being for L.P.1,414.784, such claim being made up as to L.P.1,780 from the 27th October 1930 up to the respective dates of payments and made on account of the total amount due on the said promissory notes, as set out in paragraph 5 of the Statement of Claim, and as to L.P.272.475 from the 27th October 1930 to the 1st August 1943.

4. The Respondent at the time of the making of the said promissory notes was a partner with his brother the late Youssif Khoury in the firm of S. N. Khoury, Merchants of Haifa, and the claim against the Respondent was against him personally and as representing the heirs of his late brother. This firm was adjudicated bankrupt on the 30th October 1930. It is from the date of such adjudication that the present claim is made as hereinbefore appears. The proceedings in this bankruptcy were closed in the month of July 1940. 10

p. 44, l. 25.
p. 63, ll. 29-31.

p. 68, ll. 4-7.

p. 68.

p. 68,
ll. 26-27.

5. The Appellant had brought previous proceedings in respect of the said promissory notes against both the Syndics of the Khoury Bankruptcy and the Respondent (Civil Case No. 183/37), claiming the principal sum due and interest, before the District Court of Haifa, from which proceedings the Respondent was dismissed on the ground that being bankrupt he could not be a party to such proceedings; but as against the other Defendants, the Syndics of the Khoury Bankruptcy, the Appellant obtained judgment for the balance of the three promissory notes with interest up to the date of the adjudication in bankruptcy. The judgment was the subject of appeals both to the Supreme Court sitting as a Court of Civil Appeal and to His Majesty in Council. In the result the Appellant obtained Judgment for L.P.2,052.473 mils (less a sum of L.P.1,780 paid on account as hereinbefore set out) with interest on L.P.2,012.500 from the 23rd May 1930 to the 27th October 1930 at the rate of 9 per centum per annum; and on L.P.39.875 from the 21st October 1929 to the 27th October 1930 at the like rate, the 27th October 1930 being the date of the adjudication in bankruptcy. This Judgment was stated to be without prejudice to any future claim for interest under Article 305 of the Ottoman Commercial Code. The main issues raised and determined in this previous action are not relevant to the present appeal. 20 30

pp. 1-2.

6. In the action the subject of the present Appeal the Appellant's claim as appears by the Statement of Claim dated the 6th August 1943 was for interest as from the date of the adjudication in bankruptcy, namely the 27th October 1930 to the respective dates of the various payments on account hereinbefore referred to, on the sum of L.P.1,780; and from the like date on L.P.272.475 up to the 1st August 1943; and further for interest from the date of the filing of the Statement of Claim up to the date of payment. 40

7. By her Statement of Claim the Appellant alleged *inter alia*:—

- (a) that the previous claim against the Syndics included a claim for interest up to the 27th October 1930 but reserved a claim for interest due and accruing after such date;
- (b) that both the Supreme Court and the Privy Council had reserved to her a right to sue under Article 305 of the Ottoman Com-

mercial Code for interest due on the amount of the promissory notes after the date of the adjudication in bankruptcy and that such reservation of her right afforded a ground upon which her claim could be properly founded; *Record*

- (c) that at the time of the closing of the bankruptcy considerable assets remained undistributed and were handed over to the Respondent without satisfying interest due after such adjudication;
- (d) that the firm of S. N. Khoury as well as its members and/or their heirs were jointly and severally liable for all interest up to the date of payment.

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8. The Respondent by his Defence dated the 20th September 1943 denied each of the allegations contained in the Statement of Claim as set out in the preceding paragraph hereof and further alleged in respect thereof:— p. 3.

- (i) that the claim for interest in the previous action Case No. 183/37 was a general claim and was not limited to the period up to the 27th October 1930;
- (ii) that no right could be reserved to the Appellant to sue for interest pursuant to Article 305 of the Ottoman Commercial Code either by the Supreme Court or the Privy Council and that Article 305 gave no such right to the Appellant, its only effect being to reserve certain rights to her in the event of the Respondent applying for his rehabilitation;
- (iii) that the claim to interest on the claim was in any event not recoverable being a claim to interest on interest.

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The Respondent by paragraph 7 of his Defence raised the following further points by way of defence to the claim:— pp. 3-4.

- (A) that the Statement of Claim disclosed no cause of action;
- (B) that the Appellant did not protest the said promissory notes, and that accordingly no interest whatsoever was payable thereon;
- (C) that the Appellant's cause of action was barred in accordance with Article 146 of the Ottoman Commercial Code more than five years having elapsed from:
 - (1) the due date of payment of the promissory notes;
 - (2) the date of the last payment on account of the principal sum (which was the 23rd September 1937);
- (D) that prior to the Statement of Claim in the previous action by the Appellant against the Syndics in Bankruptcy (Civil Case 183/37) the Appellant never claimed interest and never made any reservation of her rights, if any, to claim interest either against the makers of the promissory notes or from the Syndics in Bankruptcy of the makers and that the Appellant thereby admitted that no interest was due to her;
- (E) that the Appellant's claim for the principal amount due under the promissory notes was admitted by the Syndics on the 14th March p. 55.

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1934 and duly approved and certified by the Judge Commissaire which admission was duly notified to the Appellant; that the said admission was not appealed by the Appellant and that no claim in respect thereof was raised in the competent Court; and that the Appellant was thereby barred from making her claim for interest and demanding more than the Syndics and the Judge Commissaire had adjudged her, and that the matter of her claim for interest was accordingly *res judicata*;

- (F) that in the previous action against the Syndics (Civil Case 183/37) the Appellant claimed interest up to the date of final payment on account of the promissory notes, but that all the Courts before which the said claim had come for determination dismissed her claim for any interest subsequent to the 27th October 1930, and that the Appellant was accordingly barred from making the claim for interest in the action the subject of the present appeal and that the matter was *res judicata*; and that such rights as had been reserved to her in the respective judgments of the Courts in the previous action did not give rise to any cause of action 10

The Respondent will rely on the allegations of fact contained in the above points of Defence as correctly stating the facts which are material for the decision of this Appeal. 20

- p. 5. 9. The parties after the close of pleadings agreed upon the issues, eight in number, which fell to be determined by the District Court and embodied such agreement in a document entitled "Agreed Issues" dated 27th October 1943 and signed by the respective advocates of the parties. This is document No. 3 in the Record of Proceedings. This statement of the eight agreed issues sets out in compendious form the material facts and issues hereinbefore indicated as having been raised by the Statement of Claim and the Defence.

- pp. 17-26. p. 26. 10. The District Court consisting of their Honours Judge Aaron Shems and Judge Nasr having received evidence and heard argument gave judgment on the 7th day of March 1944 as aforesaid dismissing the Appellant's claim with costs. From the judgment of His Honour Judge Shems, who delivered the judgment of the Court, it appears that the ground upon which the Court dismissed the Appellant's claim was the fact, as found by the Court, that none of the said promissory notes had been protested by the Appellant upon default of payment at maturity of each of them, and that under the law applicable thereto the Appellant's failure to protest the promissory notes deprived her of any right to claim interest thereon. The relevant portions of the judgment dealing with this issue, and setting out the material facts and submissions, is as follows:— 30

p. 23, l. 23. "40. The next point is whether the promissory notes should "have been protested. 40

"41. 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 acknowledgement 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 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.’

10 “ 42. 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, 47 of 1929.

20 “ 43. 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.

30 “ 44. 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 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.

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

“ 46. The promissory note for Fifty-seven Turkish Gold Pounds was made and became due at the time when Article 41 of the Commercial Code was still in vigour, and consequently it should have been protested if interest is to be claimed on it.

40 “ 47. 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 this Ordinance was enacted, and there is nothing in the Ordinance to indicate that it has a retro-active or retrospective effect (see in particular pages 370 and 371 of 9 P.L.R.) where the Judgment in Civil Appeal 36/1942 is reported.

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“ 48. 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.

“ 49. On this ground the claim of the Plaintiff cannot be main-
 “ tained.

“ 50. Counsel for Plaintiff contends that the submission of the
 “ promissory notes to the Syndic was equivalent to protest. 10

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

p. 36.

“ 52. 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
 “ 27.10.1930, until full payment.

“ 53. 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 20
 “ upon the Defendants as required by Article 141 of the Commercial
 “ Code. It is not an effective substitute to the protest upon the Defen-
 “ dants as required by Article 119 which states that: ‘Where pay-
 “ ment of the Bills of Exchange is refused as maturity, such refusal
 “ shall be recorded the day following the maturity by means of a docu-
 “ ment called the “protest”; if that be a legal holiday the protest
 “ shall be made on the following day.’

“ 54. The promissory notes should have been duly protested if
 “ interest is to be claimed on them.”

It is respectfully submitted that the District Court came to a correct deter- 30
 mination in law on the effect of the failure of the Appellant to protest the pro-
 missory notes upon the Respondent or his said Firm on default of payment
 thereof, on her claim for interest thereon; and that the Appellant’s claim was
 rightly dismissed on that ground. The Respondent respectfully adopts the
 reasoning contained in the portions of the Judgment hereinbefore set out.

11. The District Court further found in the Respondent’s favour that the
 Appellant could not found any claim on Article 305 of the Ottoman Commercial
 Code and that such Article had no application to her claim inasmuch as the
 Respondent had not applied for rehabilitation and the claim was not based on
 any alleged rehabilitation; and it is respectfully submitted that the District 40
 Court in this matter also came to a correct decision.

12. On the issues of prescription and *res judicata* raised in the action the
 District Court found in favour of the Appellant. The Respondent will, if
 necessary, submit that the District Court came to a wrong decision on each of
 these issues, and that the Respondent’s case on each and all such issues as set

forth in paragraph 7 of his Defence was correct and ought to have been upheld; and that upon each and all of such grounds the Appellant's claim could and should have been dismissed as well as the ground upon which the District Court did in fact dismiss the claim. *Record*
pp. 3-4.

13. The Appellant in consequence of the dismissal of her claim appealed to the Supreme Court sitting as a Court of Appeal, Jerusalem, upon the grounds set out in the Notice of Appeal dated the 31st March 1944. The appeal was heard by a Court consisting of Mr. Justice Edwards and Mr. Assistant Justice Plunkett the judgment of the Court being given by Mr. Justice Edwards on the 14th February 1945. The Supreme Court by its judgment upheld the District Court on its conclusions on all matters which had come before it and dismissed the appeal with costs. The relevant passage in the judgment of Mr. Justice Edwards on the issue upon which the District Court dismissed the Appellant's claim, namely the failure of the Appellant to protest the promissory notes, is as follows:— pp. 26-28.
pp. 28-30.

20 “ 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. 29, l. 30.

30 “ After all, the Appellant cannot have it both ways. She succeeded in convincing the Court below that there was no privity and that there is no *res judicata* and also that the bills were not prescribed. Why has she succeeded on all those grounds? Simply because she convinced the Court that the Syndic and Nasrallah Khoury himself were two entirely different legal persons or legal entities. It is, therefore, quite illogical and unreasonable for her now to rely on the demand addressed to the Syndic as being equivalent to the official document which had to be served on Nasrallah Khoury himself as required by Articles 91 and 92. I accordingly agree with the reasoning of the District Court in paragraphs 51-54 at page 13 of their judgment, and in particular with the remarks with regard to Article 119 of the Ottoman Commercial Code.”

40 15. It is respectfully submitted that the Supreme Court came to a correct determination in law on the issue of the effect of the failure of the Appellant to protest the promissory notes and rightly dismissed the appeal. It is respectfully submitted that on the issues of prescription and *res judicata* raised by the Respondent the Supreme Court came to a wrong decision.

15. The Appellant has preferred this appeal from the Judgment of the Supreme Court and the Respondent humbly submits that the same should be dismissed with costs on the following among other

REASONS.

(1) BECAUSE the failure of the Appellant to protest the said promissory notes on default of payment of each of them debars her from claiming or recovering interest on such notes under the provisions of Articles 119 and 141 of the Ottoman Commercial Code and Articles 91 and 92 of the Appendix to the Code or alternatively under the provisions of the Bills of Exchange (Protest) Ordinance 31 of 1924. 10

(2) BECAUSE the Bills of Exchange Ordinance 47 of 1929 which came into force on the 31st December 1929 does not affect the position in law of the said promissory notes or any of them in regard to the requirement that they should be protested on default of payment as a necessary condition for the claiming or recovery of interest thereon.

(3) BECAUSE the submission of the said promissory notes to and the filing thereof with the Syndic did not constitute a protesting of the said notes, such submission and filing of the notes with the Syndic being for purposes only of verification of the debt. 20

(4) BECAUSE the Notarial Notice sent by the Committee of Creditors to the Syndic on the 14th September 1935, in which interest was claimed in respect of all their claims as from the 27th October 1930 until full payment, was not a protest upon the Respondent within the statutory provisions hereinbefore referred to or in any way effective against the Respondent.

(5) BECAUSE the Appellant's claim to interest was barred by prescription under the provisions of Article 146 of the Commercial Code. 30

(6) BECAUSE the Appellant's claim for interest is *res judicata* by reason of the fact that in Civil Case 183/37 the Appellant claimed interest up to the date of final payment, but such interest was awarded to her up to the 27th October 1930 only; and further by reason of the fact that by the judgment of the Privy Council in such action the only right to claim interest reserved to the Appellant was under Article 305 of the Code in the event of the Respondent's rehabilitation. 40

(7) BECAUSE the judgment appealed against is right.

H V. LLOYD-JONES.

In the Privy Council.

ON APPEAL

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

BETWEEN

MARY KHAYAT

Appellant

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1. NASRALLAH SALIM KHOURY.
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Case on behalf of the Respondents.

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