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THE LAW ON REAL PROPERTY

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RELATIVE TO THE REGULATION OF REAL PROPERTY  
AND THE POSSESSION OF TITLES TO IMMOVABLE  
ESTATE

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IN

THE REPUBLIC OF LEBANON

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Translated literally from the original French, again from the official Arabic version, placed in usable English, cases and discussed with relation to laws on Real Property and Land Tenure extant in the Codes of Civil Law in general use today.

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## INTRODUCTION

It was originally considered that this work would entail a detailed examination and discussion of all laws pertaining to Land Tenure in the Republics of Lebanon and Syria. This was to be followed by suggested methods of improvement and reform. However, after considerable time and effort was made to obtain the laws with their amendments to date, the resultant time found necessary to translate both the French text and the Arabic version and to compare the variances and discrepancies of each was prohibitive. The scope of work was early found to be too great for that expected of a Master's Degree thesis, yet at the same time it was found impossible to separate one link from the chain as a whole and still have a comprehensible work. As a result the author has gathered the material for the complete work which should entail three volumes of material and at least two more years of time to complete.

The contents of this thesis have been confined to those laws relative to the regulation of real property and the possession of titles to immovable estate. The projected Volume II (which it is hoped will, together with Volume III, contain sufficient area for a Doctorate dissertation) will entail the laws pertaining to the census and the delimitation of the real properties and estates, the laws pertaining to the institution of a Land Register, and the details of the application of the Land Register. That of the projected Volume III will entail these laws relative to expropriation, public domain, etc.. In addition, a supplement from the Lebanese Law of Contracts and Obligations, relative to rental and sales of Real Properties, is planned to be appended to this volume. As mentioned above the gathering of the necessary material for this work is nearing completion but the



necessary time limits the completion of Volume I for the scope of this Master's Degree thesis.

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The text given hereafter includes Arrete No. 3339, Dated November 12, 1930, and all amendments made in the original text by virtue of the following Arretes, in force in both Syria and Lebanon:

- Arrete No. 57/LR, dated June 18, 1931
- Arrete No. 102/LR, dated August 6, 1932
- Arrete No. 48/LR, dated March 28, 1933
- Arrete No. 101/LR, dated July 12, 1933
- Arrete No. 135/LR, dated June 22, 1934
- Arrete No. 235/LR, dated October 9, 1934
- Arrete No. 323/LR, dated December 6, 1940
- Arrete No. 31/LR, dated February 14, 1941
- Arrete No. 53/LR, dated March 5, 1941
- Arrete No. 295/LR, dated May 8, 1942

Amendments brought about by Lebanese Legislative Decree No. 72/L, dated February 1, 1933 (Law on Civil Procedure), are in force only on Lebanese territory.

A SUMMARY

of a dissertation relating to

THE LEGAL ASPECTS OF LAND TENURE

in the

Republic of Lebanon

Volume I

THE LAW ON REAL PROPERTY

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## THE LEGAL ASPECTS OF LAND TENURE IN LEBANON

The accompanying dissertation endeavors to present, for the first time in English, the Law on Real Property as it exists today in the Republic of Lebanon. A brief history of the development of legal jurisprudence in the Republic of Lebanon and her neighbor the Republic of Syria is followed by a slightly detailed description of the development under the tutelage of the Republic of France which was given the mandate of both countries at the division of the spoils by the great powers after the First World War. At the time that the mandatory Power took over the government, there was complete chaos in regard to the ownership of the land, because the existing code of Ottoman Law had not even succeeded in establishing the legal title of the occupiers. This situation had arisen because the Ottoman Land Code, promulgated in 1858, never succeeded in enforcing general registration of individual title to land. This was partly on account of the well-known defects of administration in Ottoman times; and partly because individual title was unsuited to the type of semi-collective village organization which then prevailed.

The main deficiency of the Ottoman Land Code was that it made no provision to secure the position of the share-tenant. This is not surprising, because the main purpose of the Ottoman Code was not to help the cultivator, but to establish a claim to revenue by the government. In order to tax every piece of land, it was necessary to establish its ownership and the State's claim that it owned all the land really only meant that the State did not recognize ownership unless the title were registered and the land therefore taxable.

The object of the Ottomans was to establish a form of individual ownership in opposition to the feudal or tribal forms in existence. The Turks wanted to create a strong central government over a large number of small cultivators, in order to be able to extract the maximum revenue from the land and so, therefore, they opposed the rule of the tribal sheikhs, because their tribal power was a threat to the central government. This was the intent but history has shown us that the results were a dismal failure.

In Syria and Lebanon the Ottoman system prevailed until the end of World War I, when strong French influence set in under the French mandate. Many of the codes were modernized, following mainly the French pattern, and some legal literature in French was published. In accepting the Mandate, the Mandatory obligated itself to institute a judicial system that would guarantee to the various populations the full respect of their Personal Status laws. The task thus assumed was a most delicate one owing to the presence of so many conflicting, and often irreconcilable traditions and usages of long standing, so many religious sects, each with its particular Personal Status Laws. Political considerations complicated still further the already intricate and ungrateful task: the various sects and communities had to be satisfied and their good will held if the foothold acquired by the Mandatory was to be established and maintained.

In pursuance of the policy adopted, the Mandatory divided the country into two States, Syria and the Lebanon. This left its impress upon the judicial system which the Mandatory sought to establish. Lebanon was to be endowed with a judicial system which drew its inspiration from the

judicial systems of the Christian States of Europe, especially France. Syria was to retain its judicial system which was based upon the legislation of the Ottoman Empire and the Shari'ah Law as propounded by the Hanafi School of Jurisprudence.

Under the policy laid down by the Mandatory, legislation was hesitant and uncertain, and the efforts put forth by the successive High Commissioners met with failure. In the Lebanon, this was due to the fact that the Christian majority, even with the large number of Armenians and Assyrians grafted upon the body politic, was not large enough to warrant the enforcement of the Civil Law. To this must be added the determined opposition of the spiritual chiefs and the clergy who felt that the proposed measures would curtail the privileges and prerogatives which they had enjoyed so long.

The educational activities of the mandatory authorities, while promoting French cultural influence for its own sake, aimed also at undermining the props of the Arab cultural influence and this policy alone is perhaps the fundamental reason for continued instability. The most visible manifestations of that policy were the compulsory teaching of French in all State schools and its use in the courts of justice on a footing of equality with Arabic -- a manifestation that is still apparent to marked degree and remains a disrupting influence. In themselves, these measures were not indefensible but they were carried to excess, with a singular disregard of their psychological effect and, still more, of the claims of education and justice; and, as the officials who applied them were quite often unable to understand or make themselves understood by the public, there were frequent and sometimes scandalous abuses. Serious



denials or miscarriages of justice occurred merely because the French magistrate who tried the case knew no Arabic and had to rely on indifferent interpreters. The fundamental cause was that the French service as a whole had had no previous experience of, and was psychologically unfit to deal with, many of the problems they were faced with as the great majority of them had received their training in North Africa and other French possessions of which the inhabitants were culturally and politically less advanced and more amenable to dictation than those of Syria; and they approached their tasks in the mandated territories with minds accustomed to the summary methods of French rule in the colonies.

That the Mandatory Power took another view of the situation is only logical. In its yearly report to the League of Nations it laid claim that the Moslem Land Law and the Ottoman Land Code were both defective and indefinite in their application. It did not catalogue the ambiguities, omissions, contradictions and redundancies as they stood but stated that, as the Moslem Law was neither definite nor totally codified it, therefore, depended solely on the interpretation of the judges. The Mandatory Power rejected the Ottoman Land Code for much the same reason and pointed out that "It was a body of laws drafted at irregular intervals and often contradictory in nature." As an excuse for its actions it stated that due to the state of confusion resulting from these serious defects, the High Commissioner in 1929 ordered an interstate commission of jurists to attack the evils of the existing laws of immovable property. The work of this commission resulted in the compilation of a new Land Code, which was promulgated by the High Commissioner on November 12, 1930, in Arrete No. 3339. In the words of

the report: "The new Land Code constitutes a modern juridical instrument wherein proper provision is made for a new system of land registration for the use of land credit, and for the better cultivation of landed property."

The introductory material concludes with many examples of mistranslations from the original French to the official Arabic version as well as many discrepancies and contradictions in the Real Property Code itself. Also, a series of conclusions as to the present situation of legal jurisprudence in Lebanon precedes the main body of this volume. The bulk of the dissertation being a literal translation of the Real Property Code from the original French, again from the official Arabic version, placed in usable English, cased and discussed with relation to laws on Real Property and Land Tenure extant in the Codes of Civil Law in general use today.

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## THE LEGAL ASPECTS OF LAND TENURE IN LEBANON

Aside from a brief survey in a Master's Degree dissertation by Professor Isam Y. Ashour, American University of Beirut, Beirut, June 10, 1946, and The Law of Inheritance in the Republics of Syria and Lebanon by Ibrahim A. Khairallah, which touches only one aspect, we will find that the legal aspects of land tenure in Lebanon have never been studied in other than the original sources --- the basic Arabic, or French during the period of the Mandate. The following study endeavors to present, for the first time in English, the Law on Real Property as it exists today in the Republic of Lebanon. It must be noted that the modernization of the legal systems of the Middle East began under the Ottomans around the middle of the nineteenth century, when codes were enacted in the field of commercial law, criminal law, and criminal procedure. They were thoroughly Western in concept and followed very closely the respective French codes. The law of contracts, evidence, and some procedural matters were likewise codified, but upon the basis of Islamic law of the Hanafite rite. This compilation, the Majallah, is thus Islamic in content but follows in form more or less the model of European codifications. The Majallah is still in use, at least in a subsidiary fashion, in many of the successor states of the Ottoman Empire, such as the Hashimite Kingdom of Jordania, Iraq, Syria, and Lebanon.(1)

At the time that the mandatory Powers took over the government, there was complete chaos in regard to the ownership of land, because the existing code of Ottoman Law had not even succeeded in establishing the legal title of the occupiers. This situation had arisen because the Ottoman Land Code, promulgated in 1858, never succeeded in enforcing general registration of individual title to land. This was partly on

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(1) The various Ottoman codes and other important Ottoman legislation were published in French by George Young, Corps de Droit Ottoman (7 vols., Oxford, 1905-06).

account of the well-known defects of administration in Ottoman times; and partly because individual title was unsuited to the type of semi-collective village organization which then prevailed.<sup>(1)</sup>

The main deficiency of the Ottoman Land Code was that it made no provision to secure the position of the share-tenant. This is not surprising, because the main purpose of the Ottoman Code was not to help the cultivator, but to establish a claim to revenue by the government.<sup>(2)</sup> In order to tax every piece of land, it was necessary to establish its ownership and the State's claim that it owned all the land really only meant that the State did not recognize ownership unless the title were registered and the land therefore taxable.<sup>(3)</sup>

When the Ottoman Sultans established their power, they divided some of the conquered lands among their troops, and left others in the hands of their Arab owners, and still others with their non-Moslem owners. All three groups held such lands in fee simple, with the difference that the first two paid the 'ushr, and the last, the kharaï.<sup>(4)</sup> The Bait al-Mal lands, henceforth, are designated miri lands.

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(1) Warriner, Dereen Land and Poverty in the Middle East (London, 1948) page 15.

(2) Ibid., page 17

(3) Ibid.

(4) Alfred Benne in his "State and Economics in the Middle East", page 113, states in relation to the origin of this: "According to early Moslem writers Moslem landowners were liable to payment only of the modest Osher, a tax on the yield of the land amounting to 5-10 per cent, according to whether the land was irrigated or unirrigated; in the case of property whose owners were left in possession though they had not accepted the Moslem faith, the quite oppressive Kharaï was levied, a tributary tax of 20-50 per cent on the gross yield." He adds to this in a footnote on page 400 that: "In order to ensure a certain stability of revenue and at the same time to help prevent conversion to the Moslem faith for the sake of evading the taxes, these tax liabilities were regarded as a permanent charge on the land."

Thus through the medium of tax differentiation in respect of landed property the religious cleavage of the population introduced in the occupied countries by the leaders of Islam in its early militant stage was perpetuated in the land laws. For this reason we find Moslem land legislation and Moslem authors far more concerned with questions arising out of the tax classification of the land than with the complicated problems of agrarian rights on which the development of land legislation turned in other countries. (1)

The object of the Ottomans was to establish a form of individual ownership in opposition to the feudal or tribal forms in existence. The Turks wanted to create a strong central government over a large number of small cultivators, in order to be able to extract the maximum revenue from the land and so, therefore, they opposed the rule of the tribal sheikhs, because their tribal power was a threat to the central government. (2) This was the intent but history has shown us that the results were a dismal failure.

Thus Bergheim writes (as quoted by Alfred Benne on page 118 of State and Economics in the Middle East) in 1891 in a survey of land ownership conditions in Palestine, in respect of the Turkish reforms which were introduced 28 years previously and particularly affected the land constitution, that they were carried out against the wish and will of the people. Their enforcement cannot, however, have been everywhere equally vigorous: the Ottoman land code, for instance, theoretically prescribes the dissolution of the institution of Mushaa, i.e. common land ownership:

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(1) Benne, Alfred op. cit., page 114.

(2) Warriner, Dereen op. cit., page 17.



"Article 8: The whole land of a village or of a town cannot be granted in its entirety to all of the inhabitants, or to one or two persons chosen from amongst them. Separate parcels are granted to each inhabitant and a title deed is given to each showing his right of possession."<sup>(1)</sup>

In actual fact this provision was evaded, owing to the failure of the administration to register land title systematically as no general registration was ever carried out.<sup>(2)</sup> At the same time as the Ottoman Government introduced compulsory registration of title in 1858, it also carried out a census and, while in theory this census established title to individual holdings of land by registering a claim under the name of the occupying owner, in fact the titles as they were then established did not correspond at all to reality.<sup>(3)</sup> The villagers, fearing that the registration was a preliminary to call up for military service, or for taxation purposes, falsified the returns, registering the property either in the name of the head of the tribe, or in the name of a member of the family who could not be liable for military service and in practice they disregarded the titles which were granted (known as the Senet-Tapu) and continued to farm in various semi-tribal ways.<sup>(4)</sup> Thus complete confusion resulted, since there arose one situation established by law under which certain owners held titles to divided land, and a situation existing in fact, in which the persons cultivating the land had claims recognized by custom or presumptive right, which were not enforceable by law.<sup>(5)</sup>

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(1) Bonne, Alfred op. cit., page 118.

(2) Warriner, Doreen op. cit., page 17.

(3) Ibid., page 18.

(4) Ibid.

(5) Ibid.



In Syria and Lebanon the Ottoman system prevailed until the end of World War I, when strong French influence set in under the French mandate. Many of the codes were modernized, following mainly the French pattern, and some legal literature in French was published. Most of the law codes also are available in French translations. A very good bilingual (French and Arabic) law review, the *Revue Judiciaire Libanaise*, appeared for a number of years in Lebanon, publishing articles as well as decisions and important legislative enactments. The periodical no longer appears, in accordance with a tendency of recent years in the Levant States, especially since the abolition of mixed jurisdiction following the termination of the French mandate, to publish legal treatises in Arabic rather than French. In the past in the Republic of Lebanon current legislation was published in an official journal<sup>(1)</sup> which was indexed at the end of the year. However, in 1950 we note that a complete compilation and cross-indexing of the laws were made and it is possible to go to any one of ten volumes (in Arabic) and find the particular laws we desire filed under a general heading, such as: Real Property, Personal Property, Contracts, etc.. For anyone who wants to have anything but a superficial knowledge of Islamic law or the Civil Code extant in the Republic of Lebanon, or for that matter in any of the states of the Middle East, a knowledge of the Arabic sources and literature is indispensable. In addition, since more and more legal studies are being written in the local languages of the Middle East, it will be increasingly difficult to keep up with the developments in the field of law without a knowledge of Arabic. To facilitate the task of

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(1) Having since been supplanted by the Al-nashrah al-qadaiyah al-lubnaniyah.

understanding, even in broad outlines, the law of the various states of the area, systematic up-to-date studies of the legal systems in question--- their statutory bases, judicial organization, and legal practise---would be most desirable but unfortunately as stated originally only several studies are available at present.<sup>(1)</sup> It is quite true that there have been several translations and legal studies in the English language of Moslem law, its origin, development and present interpretation. But let us not lose sight of the fact that the majority of these were by English authors who have limited their studies to the application and interpretation of Moslem law as found in India. Of the rest it could well be said that, in general, they were scholarly works covering either particular aspects, such as limited interests, waqf of movables, etc., or they were but general surveys of the principles of Moslem law.<sup>(2)</sup>

It is to be hoped that the present translation will not only be of benefit but will be the starting point of a complete translation of the laws existent. The Lebanese Law of Contracts and Obligations, for instance, would be of great aid and assistance to the many foreigners, foreign firms, institutions and so forth, which are engaged in commerce, trade, educational, religious, or other activities in the Republic of Lebanon. In addition, with respect to land tenure, great understanding is needed by the foreigner to grope with the legal maze that besets the property owner at every turn in this country.

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(1) Western Influence in the Legal Systems Middle East Journal Vol. 3, 1949, pages 466-469.

(2) This of course would not include that comprehensive work of C. A. Hooper, The Civil Law of Palestine and Transjordan (a translation of the Ottoman Code -- the Majallah).

Before entering the legislation proper let us review briefly the legal background of the country. Of course it is well known that all laws are elastic and they are justly meant to be so. Changing conditions in the maelstrom of western civilization meeting the rigidity<sup>(1)</sup> of Islamic jurisprudence has entailed growing pains perhaps more pronounced in the Republic of Lebanon than in any other country. The legislator, as is customary, lays down the laws of the land in a general manner and trusts to the judiciary to interpret them as befits the spirit of the legislation. As possible cases are limitless it is quite impossible for the legislator

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(1) Masse, Henri Islam, as translated by Halide Edib, (New York, 1938) page 113 states that "to the 'ilm, which represented the traditional theology and the canonical law, was added the fiqh (juris prudentia) which comprised ethical speculation." Again: Lammens, H. Islam Beliefs and Institutions (London, 1929) page 92, states that "the fiqh is deemed to have sprung from Qoranic revelation, and owes to this conception its immutable character. It is not for man to modify the decisions of revelation. Moreover, this rigidity has always obstructed its plenary application except in certain matters: the personal statute and property in mortmain (waqf). Even in those countries governed by Muslim rulers the state has never refrained from laying down a complete code of independent secular law (Qanun, Mejelle, etc.). This is how the fiqh has become a speculative science, concerned with an ideal law and a purely academic state of society, divorced from the realities of modern life.

With as much seriousness and diligence as a Mawardi, the theorist of power in Islam (1058), would have brought to the task, the fiqh continues to study a Muslim State which no longer exists. It describes in minute detail its component parts and the working of its machinery. It discourses on the administration and use of the imaginary revenues of this State. It starts with the postulate of a world-wide Caliphate, destined to make the universe bend under the law of Islam. It determines the rules of international law and the laws of war, together with the system of government to be applied to the tributaries of Islam. Its conception of commercial law and of civil contracts clashes with the organization of financial credit and with the economic relations established between modern peoples. It expatiates upon a penal law wherein the Qoran (2, 175) has maintained the Beduin principles of 'qisas', an eye for an eye. To the victims and their relatives, it leaves the choice between pardon and a pecuniary settlement, diya, and the decision of the injured party deprives the State of all power to punish violation of social law. In the case of certain offences the State likewise finds itself compelled to abide by the 'hudud Allah', penalties laid down by the Qoran."

to particularize and to lay down special provisions for specific cases. . Therefore we find the human element arises as the judge is forced to interpret the laws as best he can, dependent solely upon his inherent ability, knowledge of the law and belief in the reliability of previous decisions and interpretations. When we examine the complexities of the legal system peculiar to the Republic of Lebanon we readily see how the courts are hindered by many difficulties which are not found in modern and progressive countries.

The present laws of real property and immoveable estate being a result of the land tenure reforms carried out by the French under the Mandate, let us examine the structure, the reasons for it, its causes and its effects. In accepting the Mandate, the Mandatory obligated itself to institute a judicial system that would guarantee to the various populations the full respect of their Personal Status Laws.(1) The task thus assumed was a most delicate one owing to the presence of so many conflicting, and often irreconcilable traditions and usages of long standing, so many religious sects, each with its particular Personal Status Law. Political considerations complicated still further the already intricate and ungrateful task: the various sects and communities had to be satisfied and their good will held if the foothold acquired by the Mandatory was to be established and maintained.(2)

In pursuance of the policy adopted, the Mandatory divided the country into two States, Syria and the Lebanon, and sub-divided the former further

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(1) Davis, Helen Miller, Constitutions, Electoral Laws, Treaties of States in the Near and Middle East. (Cambridge University Press, 1947) Article 6, page

(2) Khairallah, Ibrahim A. The Law of Inheritance in the Republics of Syria and Lebanon. (American Press, Beirut, 1941) page vii.

into three subdivisions, Syria proper, comprising the four great cities of Damascus, Aleppo, Homs and Hama; Djebel Druze; and the Alouite Distruct.

The division and subdivision of the country into these four political entities followed religious lines. Lebanon was meant to be the Christian State; Syria, the Moslem State; Djebel Druze, the Druze District; and the Alacuite, the Nusairi territory. This left its impress upon the judicial system which the Mandatory sought to establish. Lebanon was to be endowed with a judicial system which drew its inspiration from the judicial systems of the Christian States of Europe, especially France.<sup>(1)</sup> Syria was to retain its judicial system, which was based on the legislation of the Ottoman Empire and the Shari'ah law as propounded by the Hanafi School of Jurisprudence.<sup>(2)</sup>

Under the policy laid down by the Mandatory, legislation was hesitant and uncertain, and the efforts put forth by the successive High Commissioners met with failure.<sup>(3)</sup> In the Lebanon, this was due to the fact that the Christian majority, even with the large number of Armenians and Assyrians grafted upon the body politic, was not large enough to warrant the enforcement

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(1) Khairallah, Ibrahim A. op. cit., page viii.

(2) Klein, Rev. F. A., The Religion of Islam (London, 1906) page 34, states "The Imam Abu Hanifah was the founder of the Hanafi School which was adopted by the 'Abbaside Khalifs and other Muslim sovereigns of the East, and to which the rulers of the Ottoman Empire adhered (until the abolition of the Caliphate in 1923), and which, therefore, enjoys the highest authority in Turkey and the Middle East. The Hanafites are called by Sharastani 'the men of speculation, of reasoning', as they allowed themselves to be guided by their own judgment, in distinction from the other schools, which rejected the use of private judgment and adhered more tenaciously to the dictates of Tradition."

(3) Khairallah, Ibrahim A. op. cit., page viii.

of the Civil Law.<sup>(1)</sup> To this must be added the determined opposition of the spiritual chiefs and the clergy who felt that the proposed measures would curtail the privileges and prerogatives which they had enjoyed so long.<sup>(2)</sup> In Syria, the Moslem community is about 90% of the entire population, and matters of Personal Status are governed by the Qur'an, and as such are sacred and immutable.

The reader will do well to keep in mind the radical difference between the Moslem and the Modern conceptions of the Law. Moslem law, in the most absolute sense, fits the old definition, and is the science of all things, human and divine. It tells what we must render to Casar and what to God, what to ourselves and what to our fellows. The bounds of the Platonic definition of rendering to each man his due it utterly shatters. While Muslim theology defines everything that a man shall believe of things in heaven and on earth and beneath the earth --- and this is no flat rhetoric --- Muslim law prescribes everthing that a man shall do to God, to his neighbor, and to himself.<sup>(3)</sup> In the Islamic system, law is of divine origin: it is a direct communication or khitab from God with regards to men's acts, revealed in God's own words to the Prophet Muhammed as containing His wishes and commands, and promulgated in the Qur'an and in the Hadiths. The text existed from eternity and was communicated to the Prophet in verses, which laid down rules with references to cases which actually arose. Considering its divine origin, both the text and the form are sacred, infallible, and immutable.<sup>(4)</sup> Further, the basic

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(1) Khairallah, Ibrahim A., op. cit., page viii.

(2) Ibid., page viii.

(3) MacDonalld, Duncan B. Development of Muslim Theology, Jurisprudence and Constitutional Theory. (New York, 1903) page 66.

(4) Khairallah, Ibrahim A., op. cit., page ix.



principle of Moslem Jurisprudence is the Personality of the Law: law is addressed to the followers of a religious system, and is not meant to govern the inhabitants of a particular country: it is not affected by the constitution of a particular society: its authority is based on men's conscience, and not on political force.<sup>(1)</sup> The Moslem carries it with him wherever he goes, and is governed by it wherever he may establish himself outside the jurisdiction of the Moslem State.<sup>(2)</sup> It takes all duty for its portion and defines all action in terms of duty. Nothing can escape the narrow meshes of its net. One of the greatest legists of Islam never ate a watermelon because he could not find that the usage of the Prophet had laid down and sanctioned a canonical method of doing so.<sup>(3)</sup> The Moslem Law, therefore, is exclusively applicable to Moslems, and inherently inapplicable to non-Moslems. On the other hand, in the modern world, law is a civil institution, the product of social evolution, and subject to modification to meet the ever changing needs of society. The basic principle of modern legal systems is the Territoriality of the law, in contradistinction to the Personality of the Moslem Law. Europeans and Americans think in terms of "territorial" laws. Moslems do not. Law to "true believers" is something eminently "personal". To their minds it seems to spring from the individual and to be associated with him.<sup>(4)</sup> Law is applicable to all the inhabitants of a particular territory irrespective of their religious beliefs. It necessarily follows that the

(1) Khairallah, Ibrahim A. op. cit., page ix.

(2) Ibid.

(3) MacDonald, Duncan B. op. cit., page 67.

(4) Crabites, Pierre. Islam, Personal Law and the Capitulations. The Moslem World, Vol. XVIII, 1928, page 173.

Moslem conception of the State, Law, and Sovereignty is basically different from the modern notions of the function of the State, the authority of the Law, and the scope of Sovereignty. This does not mean to imply that the Qur'an itself draws this distinction between "territorial law" and "personal law". The point that I feel constrained, however, to bring out is that the companions of the Prophet did.<sup>(1)</sup> The jurists of Islam have apparently accepted, without reservations of any kind, this principle of "personal law". In other words, for over thirteen hundred years the Moslem world has based its internal administration upon the predicate that there was no such thing as "territorial law".<sup>(2)</sup> This doctrine appears to have been introduced into Islam by one of the cherished Companions of the Prophet, and accepted through the ages by the unanimous consent of that "Islamic Community" which cannot err, and whose decrees are fixed, immutable and eternal.<sup>(3)</sup> The difference need not be interpreted as derogatory of the Islamic system, which has the advantage of stability, and of being more idealistic. However the conception of a rounded and complete system which will meet any case and to which all cases must be adjusted by legal fiction or equity, the conception which we owe to the genius and experience of the Roman lawyers is foreign to Moslem Law.

The spiritual privileges and immunities enjoyed by the non-Moslem Communities were not concessions graciously accorded by the conqueror to the conquered peoples, but rather a modus vivendi provided for those, who, by the very nature of the Shari'ah law, could not become cives of the City of Islam, and participators in the fas proprium musulmanorum which was revealed for the especial benefit of the Moslems to the exclusion of all

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(1) Crabitte, Pierre. op. cit., page 174.

(2) Ibid.

(3) Ibid., page 176.



others.<sup>(1)</sup> They are rights issuing from treaties or 'uquod dhimmah freely concluded by the Arabs with the conquered peoples of Syria, and later, upon the fall of Constantinople, extended by Muhammed II to all the millets or nations of his new empire. Those treaty rights guaranteed to the non-moslem Communities security for their persons and property, freedom of worship, and the application of their national laws and usages by their own judges.<sup>(2)</sup>

It behooves us to remember that the Shari'ah law, until the abolishment of the Caliphate by Kemal Attaturk in 1923, and the establishment of the Turkish Republic upon the ruins of the Ottoman Empire, remained the fundamental law of the Ottoman Empire. The spiritual privileges and immunities of the non-Moslem Communities remained in force in spite of the ardent faith of the Sultans which revolted against the modus vivendi confirmed by the Ottoman Sultan Muhammed II, in 1453, and of their reforming zeal during the XIX Century which chafed at the barriers erected by these privileges and immunities, and notwithstanding the numerous efforts put forth by the Ottoman Administration to violate them, level them down, and assimilate the non-Moslems in a common subjection to the Shari'ah law.<sup>(3)</sup>

The secularisation of parts of the Ottoman Law, and the promulgation of a number of Ottoman Codes in the middle of the XIX Century left the Personal Status Law outside the scope of the reformed law.<sup>(4)</sup>

The Shari'ah law considers every question of Personal Status an integral part of the Faith, and consequently subject to the principles of the

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(1) Khairallah, Ibrahim A. op. cit., page ix.

(2) Ibid., page x.

(3) Ibid.

(4) Ibid.

religious law, and the jurisdiction of the religious courts.<sup>(1)</sup> The grasp of the dead hand of Islam is close, but its grip at many points has been forced to relax. Very early the canon law had to give way to the will of the sovereign, and ground once lost it has never regained. Now, in every Moslem country, except perhaps the Wahhabite state in central Arabia, there are two codes of law administered by two separate courts.<sup>(2)</sup> The one judges by this canon law and has cognizance of what we may call private and family affairs, marriage, divorce, inheritance, its judges, at whose head in Turkey originally stood the Shakh al-Islam, a dignity first created by the Ottoman Sultan Muhammad II in 1453, after the capture of Constantinople, also give advice to those who consult them on such personal matters as details of the ritual law, the law of oaths and vows, etc.; the other court knows no law except the custom of the country (urf, ada) and the will of the ruler, expressed often in what are called Qanuns, statutes.<sup>(3)</sup> Thus in Turkey, besides the codices of canon law, there developed an accepted and authoritative corpus of such Qanuns. They were based on the Code Napoleon and administered by courts under the Minister of Justice.<sup>(4)</sup> This is the nearest approach in Islam to the development by statute, which comes last in Sir Henry Maine's analysis of the growth of law. The court guided by these Qanuns decides all matters of public and criminal law, all affairs between man and man. Such is the legal situation throughout the whole Moslem world, from Sulu to the Atlantic and from Africa to China. The

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(1) Khairallah, Ibrahim A. op. cit., page x.

(2) MacDonald, Duncan B. op. cit., page 113.

(3) Ibid., page 114.

(4) Ibid.

canon lawyers, on their side, have never admitted this to be anything but flat usurpation. There have not failed some even who branded as heretics and unbelievers those who took any part in such courts of the world and the devil. They look back to the good old days of the rightly guided Khalifas, when there was but one law in Islam, and forward to the days of the Mahdi when that law will be restored. There, between a dead past and a hopeless future, we may leave them. The real future is not theirs.(1)

In modern times many elements from European codes have been freely adopted by Moslem governments, until the Shari'ah has become more and more confined to what we should call canon law, and limited to such matters as public worship, marriage, and inheritance, vows and pious benefactions. This process has gone farthest in Turkey which abolished the Caliphate, disestablished Islam, and frankly is endeavoring to order its life on the model of the western European nations.(2)

The matters which are subject to the religious law may be divided into two groups, namely, the purely religious matters, and the civil matters issuing from the Personal Status. The former comprise, among others, spiritual crimes and offences whether committed by laymen or the clergy, such as apostacy, heresy, simony, perjury, insubordination and irreverence towards bishops and their delegates, the exercise of ecclesiastical functions contrary to the canons of the church, bigamy, validity and nullity of marriage, declaration of the death of an absent spouse. The civil matters issuing from Personal Status in the Orient cover a much larger field than in the Occident. They comprise not only every question pertaining to engagement, marriage, separation, divorce, filiation, paternal

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(1) MacDonald, Duncan B. op. cit., page 114.

(2) North, C. R. An Outline of Islam (London, 1934) page 68.

authority, guardianship, curatorship, but also matters which are related to heirship, the right to succession, the administration and liquidation of estates, last wills and testaments, alimony, dower, pious foundations and wagfs or mortmain.<sup>(1)</sup> The Western reader may find this difficult to understand because in Western countries Personal Status is generally defined as statutum quod ad personam respicit or the law which regulates the legal condition and capacity of persons. Applied to the Orient and the Shari'ah law such definition is imperfect in as much as it comprises the Personal Status stricto sensu only and leaves out those matters which form an integral part thereof, namely, succession and devolution of property testate and intestate.<sup>(2)</sup>

Under the mandate, the Ottoman Law was left practically intact in the Republic of Syria. In the Lebanon, a law was promulgated in 1929 regulating Last Wills and Testaments of non-Moslems.<sup>(3)</sup> It marked a departure from the Shari'ah law. The devolution of estates ab intestat remains unreformed and it is to be hoped that in the not distant future a uniform legislation for the non-Moslem Communities, more in harmony with the progressive legislation of the West, and assuring the equality of the sexes, will be passed.<sup>(4)</sup> The step should not be difficult, as under the Ottoman rule, it was taken with regards to the devolution of miri and wagf lands. The present Republic of Lebanon will render an invaluable service, that which the Mandatory Power failed to do, if it will extend to the

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(1) Khairallah, Ibrahim A. op. cit., page xi.

(2) Ibid.

(3) Ibid.

(4) Ibid.

property owned in fee the rules which govern the devolution of miri and waqf lands.(1)

It would not do to discuss the land reforms imposed by France under the Mandate without giving due consideration to the views expressed by the Mandatory for the reasons and explanations of their undertaking. These were officially published by the High-Commissariat in conjunction with the publishing of these reforms in their final form on 1 May 1932. As their translation has never been accomplished in English it is thought best to present them here as they are of no slight interest in the evolution of the land tenure reform in the Republics of Lebanon and Syria. It must be remembered, of course, that here was a Western power, without knowledge of the language, customs, religious laws and juridical foundation, attempting to govern an oriental country. Many of the reasons offered seem scarcely plausible to the native and in some instances of an extremely high-handed nature to a student of comparative governments. In any case, despite the bitter reactions there is no doubt that the Mandatory was striving to aid and abet progress and improve the conditions of land tenure in the light of Western civilization. With the passage of over twenty years it can clearly be seen that an unhappy medium was struck by the conscientious efforts of the Mandatory --- midway between that of the reactionaries, who would allow no departure from the Shari'ah religious code of laws, and that of the extreme modernists, who desired to take this opportunity to completely revolutionize the juridical structure of the countries into a completely westernized and up-to-date structure.

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(1) Khairallah, Ibrahim A. op. cit., page xi.

The author's translation of the Mandatory's official explanation for the institution of these reforms is as follows: (1)

"I -- THE CADASTRE (2) AND THE REGIME OF PUBLICITY IN THE LAND REFORM

1 -- CHARACTER OF NECESSITY OF THE REFORMS IN THE STATES OF  
THE LEVANT UNDER MANDATE

The Arretes No. 186, 187, 188 and 189 of 15 March 1926, by virtue of which the cadastre and the Land Register were instituted, have been in force since 15 March 1926. They represent an essential element of land and agrarian reforms, realized by the Arretes No. 275 of 5 May 1926, on the alienation and the management of the domain, No. 3290 of 23 September 1930, on the societies of Land Credit, No. 3339 of 30 November 1930, regulating the property and the real property rights, as well as by the subsequent Arretes promulgated by the High Commissioner or the local Governments.

The results already obtained in economic and social domain justify the hope that these reforms will remain the base of the urgent, necessary and sound reconstruction which is imposed upon the States of the Levant under French Mandate.

In this order of ideas, it should be observed that the vital interest which these reforms answered, is not lessened. The exploitation of the soil constitutes, for the States of the Levant under French Mandate, the principle, we can say the only, resource. The commerce of exportation is supplied by the products of agriculture and of breeding. It is likewise

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(1) Haut-Commissariat de la Republique Francaise en Syrie et au Liban Recueil des textes legislatifs relatifs au regime foncier des Etats de Syrie et du Liban. (Beirut, 1 May 1932) Volume I, pages 7-11.

(2) Registers of the area and valuation of land, etc..

important industries (spinning-mills, weaving of silk and of wool, preserves of fruits, etc...) which utilize the first material, produced directly by the country. The tax on the products of the soil or of the breeding, constitutes the major part of budgetary resources. Finally, if we observe that the prospecting of the under-soil has not given, up to the present, appreciable results, we can affirm that the exploitation of the land dominates and governs the activity of exchanges, the industrial or financial situation; that is to say, the economic life of the country, which reflects instantaneously the state of the agriculture or of the breeding.

Now, experience teaches us that in countries of this nature where the rural economy is still punitive, prosperity depends on the adaptation of the land and agrarian regime to the economical and social needs of the state, and of the measure in which this regime assures the guaranty and the solidity of the laws, the practice of the urban and rural land credit, the co-operation, the emancipation of the peasant and the realization of hydraulic works or the agricultural improvement.

2 -- COMPARATIVE SITUATION OF THE REGIONS WHERE THE CADASTRE  
AND THE LAND REGISTER ARE IN FORCE AND THOSE WHERE THE OLD  
REGIME OF PUBLICITY SUBSISTS

In the regions where the reforms are actually applied, the cadastre has in a precise and definitive manner fixed the assessment of the property and has facilitated the execution of works of irrigation or of land improvement. The Land Register has consolidated the rights defined by the Code of Property and of real rights and has favorised the practice of long term land credit, by the guaranties assured to the lessor of lands (the sleeping partner). In short, the dismemberment of the State Domain has



freed the farmer, in permitting to affect, to the constitution of the rural property or the agricultural colonization, 400,000 hectares of cultivable lands.

In the other regions, on the contrary, the assessment of the property is uncertain; the absence of all graphic representation, the unprecision of the titles (deeds) and the bad keeping of the registers are the source of incessant litigations, which leave, suspended on the head of the small land proprietor, multiple causes of eviction. The real credit is an instrument of fraud and of spoliation at the hands of usurers or merchants of lands. The ousted or spoliated cultivator is reduced to a quasi bondage in the exploitation of the Latifundia formed at the expense of the peasant property. In short, the land is no longer in these regions, the instrument of production by excellence, but the support of the exploitation of the peasant, which puts an almost absolute obstacle to the development of agriculture and to the social progress of the country.

This contrast which points out that the reform has fulfilled its object, charges more forcibly the necessity to favorize the extension (of the reform) in the shortest delay to the whole of the country. To attain this aim, an increase of credits inscribed in the local budgets could not be relied on. The reforms are of costly application and the heavy sacrifices which the states are imposing at present, represent a maximum which could not, it appeared, be surpassed. We have therefore been led to envisage a simplification of the previous procedure of inquiry and the adaption of proper measures to accelerate the rythm of the reform, without (for that) diminishing the guaranties destined to safeguard the interested parties.



II -- OBSERVATIONS TO WHICH THE APPLICATION OF THE REFORM OF  
THE REGIME OF PUBLICITY AND CADASTRAL HAS GIVEN PLACE

The measures making the object of the enclosed texts, correct, modify or complete the provisions of Arretes No. 186, 187, 188 and 189. They answer the conditions exposed above, and will permit, according to the reckonings which we have all come to believe exact, the doubling of the present yield of the reform.

By these measures, it has remedied the difficulties to which in the practice are hurting the surveyors, commissions, magistrates or agents of the Land Register, charged with the execution of the procedures. It has been equally profited of this circumstance to put in harmony the Arretes 186, 187, 188 and 189 with the further interpreting or modificative Arretes taken by the High-Commissioner or the local Governments.

The difficulties encountered are due to diverse causes:

The land reforms have put down principles unknown up till now to oriental legislation; they have introduced in these new provisions interpretations which could not be looked for in the previous practice or jurisprudence. The legislator could not, on the other hand, foresee all the conflicts of law, and in spite of all the precautions taken, these texts involved gaps; besides certain provisions did not reflect with enough precision the intention of the legislator and could give place to mistakes or to divergent interpretations. It is to these causes that the decisions should be attributed, sometimes contradictory, rendered in the courts of these last years, by the diverse Courts of Appeal of the States under Mandate, charged with creating the jurisprudence in land matters.

In the same order of ideas, the defective presentation of the texts has had certain inconveniences. It was, in reality, believed obligatory

to group in two separate texts, on the one hand the fundamental provisions, on the other hand, the provisions of execution. This method which is generally consecrated by juridical practice offers only advantages in that which concerns the Arretes relative to the Land Register. These texts are, in fact, properly juridical; they create the principles and the rules of a new law, it was then, in conforming with good order, decided to separate from the text of the law, the provisions of execution or of detail of procedure, and to group them in an Arrete of execution. This process was on the other hand revealed defective for that which concerns preliminary inquiry; that is to say the delimitation and the census, which is not, in short, but an operation, technical, administrative or of procedure. In practice, the consultation, for the same object, of the two texts of which the articles are differently numbered, has been the source of errors, or omissions or of difficulties, which were not without influence on the efficient running of the operations.

On the other hand, the recasting and the putting at definitive point, of Arretes on the land reform, was imposed by the issuing of numerous texts modificative, or interpretative (arretes, instructions of juridical or technical order), emanating from the High-Commissariat or of the local services, and which by the diversity of the authorities which have decided them, were sometimes contradictory.

The elements of the proposed modifications emanate from diverse sources. We are inspired by the jurisprudence of the courts and by the tribunals and decisions or observations of the High Magistrates of the French or local jurisdictions. We have taken into account, on the other hand, the wishes expressed by the Governments or the local land services, in the

periodical questionnaire addressed to this High-Commissariat, as well as of the desiderata expressed by the surveyors in the reports of land reconnaissance. We have equally established, in the course of frequent inspections of the local land services or of the delimitation commissions, or of conversations with the interested ministers, advisers, directors or officials of the States, the gaps or the imperfections necessitating a rectification. We have retained the experiences made in other countries, Germany, Switzerland, Alsace-Lorraine, French colonies or countries under protectorate, etc....., the elements of improvement of the conditions of execution of the reform.

In taking into account the considerations which preceded, the provisions of Arrete's No. 186, 187, 188 and 189 have been modified, completed or abrogated in the following manner: ....."

Again the evolution and the reform of the Real Property Code required an explanation and the reasons therefore by the Mandatory. In this case, again, we find the only evidence expressed by the High-Commissariat, with respect to informing the people of the reasons why this was undertaken, is to be found only appended in a volume published by the High-Commissariat, in conjunction with the publishing of these reforms in the final form on 1 May 1932. The translation thereof is as follows: (1)

"OUTLINE OF THE MOTIVES OF ARRETE NO. 3339 REGULATING THE LANDED PROPERTY  
AND THE IMMOVABLE REAL RIGHTS  
(PROPERTY CODE)

The reform of the regime of publicity realized by Arrete's No. 186, 187, 188 and 189 of 15 March 1926, and the institution of the Land Register which is its corollary, necessitated an adaption of the existing civil

(1) Haut-Commissariat de la Republique Francaise en Syrie et au Liban  
op. cit., pages 180-183.

legislation, to the principles of absolute publicity of immovable real rights, of authentic force and of the continuity of the inscriptions concerning them, which characterize the new regime of publicity.

The Moslem law, which was governing property and real rights in the legislation in force, was only partly codified. The Majallah (Civil Code) did not comprise all the real rights and was, properly speaking, but a code of civil and commercial obligations.

The Land Law (Qanun al-aradi) which fixed the statute and juridical condition of lands, constituted a superannuated juridical instrument. In short, the contradictions of the numerous laws, irades, and regulations promulgated on the subject, created such confusion that it was almost impossible for the courts to fix their jurisprudence and to find where they stood in the confusion of contradictory provisions; and a fortiori to private persons to ascertain the nature and extent of their rights.

This situation, of which the Governments of the States, the judicial corps and the lawyers were complaining, and which gave a precarious character to immovable property, could not last without danger. It is for these reasons that the High Commissioner, in the Month of May 1929, and at the request of the States, had to charge a Commission comprising representatives of each of the States and competent officials of the High Commissariat as well as jurists, with the task of codifying the provisions of the local Law of Real Property and to adapt them to the land tenure reform.

The project of the attached Arrete, represents the fruit of the works of the Commission and regulates the Landed Property (Propriete Fonciere) and the immovable real rights, it abrogates in general the previous laws and constitutes a modern juridical instrument, inspired, however, by the

old law, in as much as it adapts itself to the necessities of the Land Register (Registre Fonciere), to the needs of credit, and to the care of ameliorating the exploitation of landed property.

This project of the Arrete is not therefore properly speaking, like the Majallah, a codification of Moslem Law. In its general form, it resembles the texts of the Land Law of the countries of North Africa--- Tunisia, Algeria, Morocco. It borrows from the Swiss Civil Code a certain number of provisions and like it, creates in a way, the right of the Land Register in making entries in this register, the generator and the point of departure of immovable real rights.

It contains, on the other hand, certain provisions of procedure, which, it was found obligatory, by reason of the gaps of the present legislation, to introduce in the body of the Arrete, although in due form they should have taken place in the number of laws of procedure. Such is especially the procedure of execution in the matter of realization of a pledge when due (matured note) or that of the inscription of the promise of sale.

In the same order of idea, it innovates in certain matters of the civil law lying under the jurisdiction of the personal statute, especially in the matter of the inheritance of real property, ab intestate or testamentary, where the stranger finds himself granted the benefit of his national law, and at the same time applying the principle of reciprocity. Be that as it may, this text preserves a specifically local character in that (which) it maintains, in specifying the principles relative to the distinction and to the juridical condition of the real property, or to the rights of which they make object; and it regulates, moreover, the rights such as the Waqf and the various contracts of dismemberment affecting it, administered up to the present by the provisions of the Shari'ah Law.

There were, however, brought certain modifications in the distinction of real properties. The Ottoman Law distinguished seven (7) categories of lands, themselves comprising several sub-categories:

1. -- The Mulk Land, only susceptible to make the object of a law of property, which contains three classes: the Mulk land (situated in the interior of towns and villages), the 'Ushriyah Mulk Land (subjugated to the tithe), and the Kharaj Mulk Land (subjugated to the payment of a tribute).

2. -- The Waqf Land, which made object of a vocation to the profit of a pious work (church property).

These two categories of lands were governed by the moslem canonical law.

3. -- The Amiriyah Land, the raqabah (eminent domain) of which belonged to the State and the Tasarruf of which (useful domain) might be granted to individuals. This land, which comprised 6 classes, was answering to the destruction of the land or the nature of the right of which it made object.

4. -- The Matrukah Mahmiyah Land (Public domain) which was destined to the use of the public.

5. -- The Matrukah Murtafaqah (collective) made the object of a collectivity.

6. -- The Dead Land (not appropriated to memory of man) of which every one might acquire property by enlivening the land.

7. -- The Mubah Land (out of commerce) which could not make object of any law.

The applicable legislation regulated simply the exercise of the principle right (property, tasarruf -- use -- etc...) of which the lands might make object. It remained silent as to what touched the nature, the

extent and the juridical condition of immovable real rights.

It completed the cycle of the land reforms and endowed the countries under French Mandate with legislation inspiring economic and social order and by consequence, favoring progress."

This explanation completely refutes the arguments frequently proffered by Lebanese jurists and legal personalities that the Land Reforms were initiated without explaining to the people why they were initiated and for what purpose. Michel Boulos in his Lamahah fi ahkam al-shif'ah (Tripoli, 1946) concludes his book on pre-emption by wholeheartedly damning the mandatory administration for undertaking this work. Here a former judge in the judicial system of the Republic of Lebanon asserts that these reforms resulted in nothing but "confusion, disorder, and perplexity..... confusion in legislation, confusion in interpretation, confusion in application, and we and the judiciary fumble in this confusion as a drowning man in the sea, whereas the high authorities, God bless them, act as if the matter does not concern them." He states that under the Turks there were laws and provisions laid down by official committees of the best learned men. That these were acknowledged by the legislator and applied by courts for many years until the interpretation thereof became well-known. His complaint, however, when the Turks left, and the legislation was taken over by the High Commissariat and the various national governing bodies, that the High Commissariat laid down thousands of decrees and regulations and an equal quantity was put down by the national bodies which were dispersed and had no central unifying authority, has much wisdom and justice in it.

Even Ibrahim Khairallah in his work has arrived at the conclusion that "the legislation under the Mandate has been hesitant and uncertain,



a fact that is amply evidenced by the mass of arretes and decrets-lois, often contradictory, which were promulgated with astounding rapidity."(1) He, however, is of the opinion that political expediency played a marked, and often leading role and was the basis for this. He gives as his reasons that the task assumed by the Mandatory Power and its representatives in Syria and Lebanon, was a very difficult one. There were....."so many currents, so many conflicting interests, so many racial and religious prejudices, so many usages of long standing, so many communities, or 'nations', each with its own traditions and aspirations, each with its own tenets and canon laws, each clamoring for sufficient and adequate representation in the administration and on the bench; and each and every one and all had to be satisfied and their good-will courted and held if the foothold acquired on the eastern shore of the Mediterranean was to be maintained."(2)

However, the educational activities of the mandatory authorities, while promoting French cultural influence for its own sake, aimed also at undermining the props of the Arab cultural influence and this policy alone is perhaps the fundamental reason for continued instability. The most visible manifestations of that policy were the compulsory teaching of French in all State schools and its use in the courts of justice on a footing of equality with Arabic -- a manifestation that is still apparent to marked degree and remains a disrupting influence. In themselves, those measures were not indefensible but they were carried to excess, with a singular disregard of their psychological effect and, still more, of the claims of education and justice; and, as the officials who applied them

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(1) Khairallah, Ibrahim op. cit., page 182.

(2) Ibid., page 183.

were quite often unable to understand or make themselves understood by the public, there were frequent and sometimes scandalous abuses.<sup>(1)</sup> Serious denials or miscarriages of justice occurred merely because the French magistrate who tried the case knew no Arabic and had to rely on indifferent interpreters.<sup>(2)</sup> The fundamental cause was that the French service as a whole had had no previous experience of, and was psychologically unfit to deal with, many of the problems they were faced with as the great majority of them had received their training in North Africa and other French possessions of which the inhabitants were culturally and politically less advanced and more amenable to dictation than those of Syria; and they approached their tasks in the mandated territories with minds accustomed to the summary methods of French rule in the colonies.<sup>(3)</sup>

That the Mandatory Power took another view of the situation is only logical. In its yearly report to the League of Nations it laid claim that the Moslem Land Law and the Ottoman Land Code were both defective and indefinite in their application. It did not catalogue the ambiguities, omissions, contradictions and redundancies as they stood but stated that, as the Moslem Law was neither definite nor totally codified it, therefore, depended solely on the interpretation of the judges. The Mandatory Power rejected the Ottoman Land Code for much the same reason and pointed out that "It was a body of laws drafted at irregular intervals and often contradictory in nature."<sup>(4)</sup> As an excuse for its actions it stated that

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(1) Antonius, George The Arab Awakening (New York, 1946) page 374.

(2) Ibid., also Boulos, Michel Lamahah fi ahkam al-shif'ah (Tripoli, 1946) pages 78 through 85.

(3) Ibid., page 375.

(4) Republique Francaise, Ministere des Affaires Etrangeres, Rapport a la Societe des Nations sur la Situation de la Syrie et du Liban, 1930 (Paris, 1931), page 62.

due to the state of confusion resulting from these serious defects, the High Commissioner in 1929 ordered an interstate commission of jurists to attack the evils of the existing laws of immovable property. The work of this commission<sup>(1)</sup> resulted in the compilation of a new Land Code, which was promulgated by the High Commissioner on November 12, 1930, in Arrete No. 3339.<sup>(2)</sup> In the words of the report: "The new Land Code constitutes a modern juridical instrument wherein proper provision is made for a new system of land registration for the use of land credit, and for the better cultivation of landed property."<sup>(3)</sup>

From this we can gather that:

- (1) The original texts were formulated and promulgated in French in the year 1930.
- (2) The original texts were translated in 1946 to Arabic as a result of an aversion towards the French language; a reaction which is only natural during the birth of a new nation after being forcibly subjected to the use of a language foreign to their country and their people.
- (3) The translations are not accurate in every respect and in each degree. This could only be the result of the official Arabic translations being made by secretaries or translators who had not any juridical

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(1) It is noteworthy in this respect that the former judge and eminent lawyer of Tripoli, Michel Boules, has informed the author in a private interview that "those who presided in the composition of this commission were not at all qualified for this kind of work for two principal reasons: (1) They had no juridical education proper and had only acquired a superficial knowledge of the matter through the practice of their previous administrative functions, not in Lebanon, but in North Africa. (2) They had not any knowledge of the Arabic language and less of Moslem legislation, tradition or Ottoman laws."

(2) Republique Francaise, Minister des Affaires Etrangeres, op. cit., page 62.

(3) Ibid.

knowledge and who could not therefore, give an accurate translation of some technical provisions due to a lack of perception of the original intent of the legislators.<sup>(1)</sup> The comments following Article 3 gave one illustration of this; the following examples are added to illustrate the errors in translation. In Article 10 the original French version has given us in real right No. 5 that it is "the right of preference on the free lands" whereas the official Arabic translation gives us only "the right of preference." Article 48 of the original French version has defined "the expenses payable jointly by the bare-owner and the usufructuary" whereas the official Arabic translation gives us only "...the owner of the real property and the usufructuary."

Article 92 of the original French version gives us "Any transferable real property may be...." whereas the official Arabic translation gives us instead "Any saleable real property may be...." Article 96 of the original French version has given us in the last paragraph "...shall be set aside by privilege for the settlement of the debt...." whereas the official Arabic translation gives us only "...shall be set aside by preference for the settlement of the debt...." Article 100 of the original French version has given us "...then the creditor shall be entitled to demand the sale of the property...." whereas the official Arabic translation gives us "...then the purchaser shall be entitled

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(1) It is noteworthy in this respect that, although Lebanon has clung to the single department system of translation for all documents, laws, decisions, etc., we find that in the neighboring Republic of Syria a remarkable improvement has been made in that each department in each Ministry has official translators who are specialists in the field of their department. No documents in a language other than Arabic can be held as legal before the courts unless the pertinent department has authenticated their translation through the medium of their specialist translators. (Information obtained from Mejid Din Jabri, former Mayor of the City of Aleppo.)

to demand the sale of the property...." Article 101 of the original French version has given us "...or in the hands of a third party." whereas the official Arabic translation gives us "...or in the hands of a custodian." Article 104 of the original French version has given us "Any transferable property...." whereas the official Arabic translation gives us "Any saleable property...." Article 105 of the original French version has given us "The real property given in mortgage may guarantee the debt...." whereas the official Arabic translation gives us "Any property may be mortgaged as a security for a debt...."

Article 112 of the original French version has given us "...the amount of such expenses by privilege from the price of the property." whereas the official Arabic translation gives us "...the amount of such expenses by preference from the price of the property." Article 184 of the original French version has given us "The right of permanent tenure is transmissible by succession, ab intestate or testamentary...." whereas the official Arabic translation gives us "The right of permanent tenure shall be heritable and transferable by testament...." Article 200 of the original French version has given us "The right of Muqata'a is transmissible by way of succession ab intestate or testamentary...." whereas the official Arabic translation gives us "The right of Muqata'a is transmissible by succession or testament...."

Article 238 of the original French version has given us in the first paragraph "...against payment of the purchase price." whereas the official Arabic version gives us "...against payment of the purchased price." This difference has caused many magistrates using the Arabic version to require an official appraisal of the value of the land, in turn creating

dissension among the lawyers.<sup>(1)</sup> Article 249 has the same basic error as Article 238 above. Article 262 of the original French version has given us in the last phrase ".... an acquired prescription." whereas the official Arabic version gives us "....right acquired by prescription."

(4) The corps of judges and jurists, in the main are either:

(a) unable to read French (this, of course, is not true of any of the French Law School trained jurists sitting on the benches of the Court of Appeals or Courts of First Instance --- but in the main refers to the corps of magistrates and jurists in general),<sup>(2)</sup> (b) do not care to use the original French version,<sup>(3)</sup> or are prevented by law, regulation, statute, or otherwise from using the original version in certain cases.<sup>(4)</sup>

(5) Therefore the interpretations being made are based upon inaccurate translations as has been previously indicated, or

(6) Again, some of the interpretations may be based on the original French and therefore there would be a conflict of interpretations.<sup>(5)</sup>

(7) With the abolition of the Court of Cassation there is no central authority to unify the interpretation of the law. It is true that the government realized its error and created a High Court of Appeal to unify interpretation of the laws, but it hamstrung this interpretation by restricting its capacity to the review of cases where there has been a direct contradiction in the interpretation.<sup>(6)</sup>

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(1) Information acquired in a private interview with Michel Boules, Tripoli, Lebanon and affirmed by Jean Tay Yan, the President of the Lawyer's Syndicate in Lebanon.

(2) Boules, Michel Lamah fi ahkam al-shuf'ah (Tripoli, 1946) page 4.

(3) Ibid.

(4) Information acquired in a private interview with Michel Boules.

(5) Boules, Michel Lamah fi ahkam al-shuf'ah (Tripoli, 1946) page 4.

(6) Ibid., page 83.



(8) All four Chambers of the Courts of Appeal can give interpretations differing from one another. This applies to the Courts of First Instance as well.<sup>(1)</sup> This leads to frequent appeals until the loser receives the interpretation he desires ---- or until he who has sufficient funds to finance the appeals wins through the lack of funds of his contestant. The law of 10 May 1950 reorganized the juridical system and reconstituted the Court of Cassation but failed to prevent two major deficiencies. First, the appeal in Cassation becomes a luxury interdicted to the small purse. An appeal costs about 200 Lebanese Pounds, therefore the rich only can have recourse thereto. Secondly, all the affairs relative to the contracts of location, houses of residence, commerce and of industry remain under the previous system. The number of the actions relative to contracts of rent are innumerable and the means to unify the jurisprudence on this subject should have been provided for.<sup>(2)</sup> For these contradictions see: La Revue Al-Muhami, the collection M. Ch. Hatem; La Revue Judiciaire; and La Revue Sader. A special Chamber of the Court of Cassation should be set aside so that the poorer element of the population could benefit therefrom. The costs of an appeal should in no case exceed 20 or 30 Lebanese Pounds.

(9) Contrary to all systems of modern law, the jurists of Lebanon have the right, and de practice, the custom of expounding their views on a particular case, in the official Judicial Review, prior to the case ever coming before the court. In addition it has been known to have the judge who thus published his views to actually sit on the case when it came to court. Thusly prejudicing the case of either one of the litigants.<sup>(3)</sup>

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(1) Boulos, Michel op. cit., page 81.

(2) Boulos, Michel in a private interview with the author.

(3) Ibid., pages 84-85.



Michel Boules has maintained that the bare-ownership has no practical or economical value. However, the author disagrees. The person with the bare-ownership may leave his land untilled, for investment purposes shall we say, or due to economic reasons, for hundreds of years as long as he pays the taxes thereon. This is in itself a negative value. This right is denied to the owner of the right of tasarruf of miri property as Article 19 stipulates that the land subjected to the tasarruf returns to the State if the titular of this right does not exploit it for a period of five years. A positive value would be the fact that the titular of tasarruf, who does not have the bare-ownership ---- that being vested in the State, inscribed in the Land Register, may not lose his right by means of prescription (active or passive). The only difference which is expressly stipulated in the Property Code is that prohibiting the titular of a right of tasarruf from constituting a wagf thereon.

Article 31 stipulates that the right of surface may not, henceforth, be constituted on any property. However, this is superfluous as the right of tasarruf on a miri property, inso facto includes the right of surface. Michel Boules has stated that the tribunals have decided that the right of surface may be constituted anew and have ordered its inscription in the Land Register, despite its exclusion from Article 10.

Also we find under Articles 91 thru 100 stipulations concerning a so-called "redeemable sale" and "sale with exploitation" which is a sale under condition of recovering the property sold, by the seller within a determined delay. However, this contract is a variety of the contracts of sale and has nothing in common with the mortgage. Therefore why is it placed in this Real Property Code and not in the Lebanese Code of Obligations and Contracts coincident with the "sale with the option of recovery"? This chapter, although previously found in the Majallah

under the same heading should, as far as this author is concerned, be excluded from the Real Property Code.

We find that when the French attempted to reorganize the provisions relating to mortgage, they found that the Majallah used the same term (rahn) for both immovables and movables, merely designating which was meant, i.e. "mortgage of a movable" (rahn al-manqul) or "mortgage of an immovable" (rahn shair al-manqul). However, having already used the term hypothecue (which is used in French legal terminology as mortgage) for lien, it becomes evident that when arriving to the mortgage proper the commission of French experts used the term nantissement instead.<sup>(1)</sup> And where the thing deposited was a moveable they applied the term gage; where it consisted of an immovable real property they applied the term antichrese. Also we find that the original French version entitled Title Four as "The Rights of Gage" and there were no articles pertaining to gage in the entire Title Four. Instead this Title pertains only to Chapter One which contains the redeemable sale and the sale with exploitation and Chapter Two which contains the rahn proper or antichrese.

Article 131, as amended in sub-paragraph two, has for some very peculiar reason allowed a forced lien to be imposed on the husband's real property as security for the wife's dowry, marital rights, and the compensation due for obligations imposed on the husband but ordinarily executed by the wife. This seems odd indeed that the fortune of the two spouses is independent one from the other. It is true that the husband should provide the needs of his wife but should the fortune of the

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(1) Dalrymple, A. W. French-English Dictionary of Legal Words and Phrases (London, 1948), 2nd edition, page 90 states that nantissement is a: "contract by which a debtor delivers something to his creditor to secure the payment of a debt or loan; security; pledge."

husband be burdened with this lien and be possibly totally paralysed? As for the last phrase "the compensation due for obligations imposed on the husband but ordinarily executed by the wife." I must confess that I find this phrase so enigmatic that I completely fail to get its meaning. And as yet I have not been able to find any Lebanese lawyer who did. The closest possible guess that the author could make is that this phrase refers to debts incurred by the wife which the husband could be held responsible for. The legislator should clarify this point.

A basic contradiction is found in Article 204 which states that: "any person acquiring a property by inheritance, expropriation or court decision shall be the owner of such property even before registration...." but then comes up with the contradiction that "...such acquisition shall not have any effect except after registration." Again, Article 205 states that the effects of records are described in Article 11 of Arrete No. 188 relative to the Land Register. This Article 11 states that "no deed or contract shall be effective, even to the contracting parties, except after registration in the Land Register." Actually this is merely the making of a distinction between the acquisition of ownership and the time when the ownership takes effect. Such a fine distinction can be the source of countless disputes and should be clarified by the legislator. Either ownership or real rights are acquired and take effect by succession, contract, expropriation, judgment, etc. or they should both be acquired and take effect upon registration.

Perhaps one of the most basic discrepancies is found in Article 5 of Chapter II pertaining to the "Types of Real Property." This important article in defining "private estate" or milk lands ends with "with the exception of lands and buildings situated within the territories of the formerly autonomous Governorate of Mount Lebanon, which shall remain

subject to local custom and usage." For what reason should any administrative district in a Republic be given any preferential treatment over the rest of the country? It more than likely hearkens back to the troubles of 1845 and 1860 when Mount Lebanon was given special status in this area through the intervention of foreign powers.<sup>(1)</sup> However, if reforms are needed and if this Republic is to be governed in a modern, democratic and just manner this discrepancy should be removed. Nothing is more archaic and a relic of feudalism than the presence of preferential stipulations in a law that is ostensibly of the people, by the people and for the people.

In the articles of the Real Property Code that follow, the reader will note that in the main the comparisons have been made with the French Civil Code. This is due to the fact that the legal system in the Republic of Lebanon, though evolved from the Islamic Law, has found in the various reforms under the Mandatory Power, a basis predominantly French. It is true that certain innovations have been introduced from the Swiss Civil Code and that a goodly portion is based upon the Land Reforms instituted by France in North Africa but all variances will be found under the specific articles to which they pertain.

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(1) Their deliberations resulted in the drawing up of a protocol which was later expanded into an instrument known as the Reglement Organique of 1864.

TITLE ONE

REAL PROPERTY

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CHAPTER I

DEFINITION OF REAL PROPERTY

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ARTICLE 1 - There are three categories of real properties:

Real properties by nature

Real properties by destination

Real properties incorporeal

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Real properties by nature are those which have a perpetual fixity such as the land and the house. Real properties by destination are, in reality, movables, but the legislator included them amongst the fixed properties in view of their specialization and because they are inserted in the real property as an accessory. The incorporeal real properties are all the rights affected on the real property. (1)

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(1) Yaken, Zouhdi Sharh Qanun al-mulkiah al-'acarivah (Beirut, 1937)  
Volume I, Page 19.

ARTICLE 2 - The term "real property by nature" shall mean those material objects possessing, by virtue of their very essence, a fixed and unchanging position, such as lands, mines, plants rooted in the soil (so long as they are fixed therein), and buildings.

The term "buildings" shall mean, not only ordinary structures (such as dwellings, store-houses, work-shops, warehouses, barns, etc.), but also technical constructions of any description (such as bridges, wells, furnaces, dams, reservoirs, tunnels, etc.), and, more generally, any concentration of building materials bound together in a fixed manner, whether on the surface of the ground or under it.

All equipment, parts, etc., attached to the building and destined for the completion thereof (such as balconies, sewers, lightning-rods, water-pipes) shall be deemed as being real property by nature.

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Lands are real properties and involve the surface of the ground together with that which lies beneath it. There is no difference whether they are in towns or outside them, as the suburbs, and whether they are destined for construction or cultivation.<sup>(1)</sup> As to the parts which are extracted from the ground such as stones and minerals, these become movables upon their extraction therefrom.<sup>(2)</sup>

This article considers the mines as real properties by nature. That is to say, the owner of a mine may alienate it, rent it, or sell it, and the mines follow the conditions of ownership as to the possibility of rent, independent mortgage and sale. The quarries also are regarded as real properties by nature by provision of special arretes and regulations and are considered inseparable from the ownership of the land. They follow its conditions and may be alienated, rented or sold.<sup>(3)</sup>



Treasures and antiquities are neither a part of the land nor a fruit of it. They are, therefore, immovables found beneath the surface of the ground and are not considered real properties. However, the antiquities may be a real property if they were built and fixed in the ground.

The plants, herbs, trees, and shrubs which are attached to the ground by their roots, as well as the crops which are still attached to the earth, fruits on the trees and which are not yet cut, are considered real property. This means that these things, as long as they are attached to the earth form a part inseparable from it. On the contrary, as soon as they are detached, even though they are not moved from their place, they are considered movables.<sup>(4)</sup> Seeds are considered real property by nature when they are cast on the earth and unite in its parts.<sup>(5)</sup> The trees destined to be cut are not considered movables except when detached from the earth. The arrival of the time for their pruning does not matter, it is the actual cutting thereof that counts.

The plants and the trees, still standing and not yet cut and detached from the earth, are considered movables according to the will of the contracting parties if they consider them as detached from it beforehand, in accordance with the principle of continuity in jurisprudence, i.e. the quality of the movable or real property may be determined and fixed by the intention of the contracting parties and by what they note during the contracts. And so we find that the purchaser of the trees for the purpose of making charcoal is considered as purchaser of the wood separated from the earth and does not acquire any real property real right on them.<sup>(6)</sup>



The trees and shrubs are real properties in the hand of the owner of the land and are not considered movables except by separating them from the land. They remain real properties as long as they are not separated from the earth.<sup>(7)</sup> It is evident that what is meant by the attachment of the plants to the soil by their roots is the exclusion of the plants which are put in vessels and boxes, as these are considered immovables even though the vessels and the boxes are fixed in the ground.<sup>(8)</sup> However, the trees of nurseries are considered real properties by nature even though they are removed to a fixed land in order to strengthen their growth.<sup>(9)</sup>

The small trees are real properties by nature although they have only been recently planted.<sup>(10)</sup> They do not become movables unless they are removed from their place to be planted in a new place for a short and limited period.<sup>(11)</sup> If the removal is meant to retain them for a long period in order that they grow then they become real properties.<sup>(12)</sup> The general opinion is that the crops which are not yet harvested, the woods which are not yet cut, and the materials which are still mixed in the earth are not considered real properties.<sup>(13)</sup> Likewise the share of the farmer from the fruits and plants is a movable.<sup>(14)</sup> The authors considered the fruits, here, as movable, although they are attached by their roots or by their branches. This is because the farmer has not the least right in the bare-land. His right is confined in the ownership of the fruits, which is a special ownership distinct from the ownership of the land.

According to what has been mentioned, the sale of the fruits and woods separated from the land is considered a personal right for the

purchaser on the seller and not a real right. This is because the sale of the trees from the wood, in order to be cut, is a sale of movables and the purchaser has no personal case against the seller.<sup>(15)</sup> Therefore the seller of the trees cannot pursue the latter, after he has begun the exploitation and commenced the cutting, because the first purchaser did not pay him the price, and to demand the repeal of the sale and the return of the thing sold.<sup>(16)</sup>

We have said that the plants and the fruits when cut are considered movables and we say now that there is no difference whether the cutting happens by the act of the owner, another person, is the effect of a force majeure or because of their ripening. The plants which are as real properties are not looked upon in relation to their value, as the large tree and the small herb are equal and the crux is the attachment.<sup>(17)</sup>

The building is the gathering of the materials which were fixed on the surface of the land or beneath the surface of it so that it may not be removed without damage or destruction.<sup>(18)</sup> Buildings comprise not only the known buildings such as houses, stores, warehouses, etc., but also comprise technical constructions such as reservoirs, furnaces, arches, bridges, tunnels,<sup>(19)</sup> canals used for the flow of water, dams and gas pipes.<sup>(20)</sup>

Buildings are considered real properties by nature as long as they are attached to the land on which they are built.<sup>(21)</sup> The constructions which are made on the land without foundations or fixed land supports; such as the shops which are built for the duration of an exhibition or the halls which are built in a garden for a season, to be demolished later on, these are movables, as if they are not attached to the ground.<sup>(22)</sup> It is not conditional that the adhering of the building to the ground should

be perpetual nor the one who started building should be the owner of the land. Buildings are counted real properties even though the one who built them does not own the land; <sup>(23)</sup> for example, the owner of the right of usufruct or the tenant. The matter of ownership has nothing to do with it. <sup>(24)</sup> The buildings established in this manner become movables when demolished <sup>(25)</sup> or when the owner chooses to demolish the building after the termination of the term of rent.

As to the railways, the rail line constructed on the land is a real property by destination, whether it is constructed permanently by the owner of (the right of) privilege on a purchased land, or on a land normally rented for the benefit of the company. But the railroad constructed on the lands for the benefit of a quarry and its exploitation, and made on a part of the land of the exploiter, and a part of the lands of others from whom these lands are rented for this purpose for a fixed period, are counted as real properties by nature for the duration of the rent. <sup>(26)</sup>

The buildings constructed on the land of others are real properties, even though the owner has the right to recover them by law or after a contractual agreement by the expiry of the time of the usufruct of its builder. Even though the owner has kept them for himself, or has undertaken to demolish them or have had their materials removed by the builder himself, the nature of real property does not cease to exist thereof. <sup>(27)</sup> The real property ownership remains as long as the building remains on the land of others. If it is demolished it becomes movable. <sup>(28)</sup>

It is the same with buildings constructed on land reserved for military purposes where it is stipulated in the contract of lease that an annual rent will be paid and that there is possibility of demolishing it at first demand from the authority concerned. But the constructions,

the salt pools and the fisheries made on the sea coasts and forming a part of the general State Domain, are real properties in relation to the usufructer thereof, if they are established after being granted the privilege or a permit from the Government.<sup>(29)</sup> The buildings constructed on the State Domain properties by the license of the administration are considered real properties, although it is provided that the administration can withdraw the license whenever it so desires.<sup>(30)</sup>

If a house is sold in order to be demolished, is it a sale of a movable or of a real property? It is answered that the quality of the real property or the movable is decided by referring to the will of the contracting parties and to what they intended at the time of the contract.<sup>(31)</sup> Thus, if a house is sold to be demolished, the sale is a sale of a movable, and the case which is raised for the execution of the undertaking of sale is considered a personal case and not a real property one.

It may be noticed from this discussion that the buildings are considered real properties by nature. However, there is a great difference between the lands and the buildings because the latter are not considered fixed properties by nature except by the adherence of the primitive materials, of which they are composed, firmly to the ground. As to the demolished buildings, the materials resulting from the demolition are considered movables. The buildings, as long as they adhere to the ground, are real properties.<sup>(32)</sup>

Water mains which are used by the water supply company in underground canals and under the main roads unite with the ground and thus become a real property by nature.<sup>(33)</sup> Gas and electric tubes are also considered, like the water pipes, real properties by nature.<sup>(34)</sup> The pipes may be

independent from the buildings or a part thereof. The rule, however, is the same in both cases. The water pipes are considered independent from the house with which the water is connected, if they are appropriated by a person other than the owner of the dwelling and if they are not adhered to it accessorially. But if they adhere to it accessorially, then they are considered a part of the dwelling. As to the gas tubes which run through the main streets, these are considered to belong to the gas company, even though they are at a great distance from it. They are not considered to belong to the street in which they exist. (35)

Wind or water mills fixed on supports and forming a part of the building are also real properties by nature. (36) There is no necessity to look into the capacity of the person who built them as to whether he is the owner or the appropriator, nor into whether the adherence to the ground is permanent or temporary. (37)

The accessories and utensils which form a fundamental and complementary part of a mill fixed on supports or forming a part of a building are real properties by nature. (38) They, however, become movables when they are detached from the ground, by actual separation or by selling them separately.

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(1) Yaken, Zouhdi op. cit., Vol. I, page 21, referring to Dalloz, Nouveau Code Civil Annoté, par. 1.

(2) Ibid., referring to Dalloz, Repertoire Pratique, No. 11 and Nouveau Code Civil Annoté, par. 36.

(3) Ibid., referring to Arrête No. 253/LR issued on 8 November 1935 (Refer to al-majallah al-qadaiyah, 16th year)

(4) Ibid., referring to Articles 520 and 521 of the French Civil Code and Dalloz, Nouveau Code Civil Annoté with the comments thereon.

(5) Ibid., referring to Demolombe, Cours de Code Napoleone, part 9, par. 130 and Dalloz, Nouveau Code Civil Annoté, par. 6.

- (6) Yaken, Zouhdi op. cit., Vol. I, page 23, referring to Dalloz, Nouveau Code Civil Annote, par. 12 and Court of Cassation, 14 February 1899.
- (7) Ibid., page 23, referring to Dalloz, Nouveau Code Civil Annote, par. 13.
- (8) Ibid., page 23, referring to Dalloz, Repertoire Pratique, No.'s 37 and 38, and French Cassation, 5 July 1880.
- (9) Ibid., referring to Dalloz, Nouveau Code Civil Annote, par. 15, and Aubry et Rau, Cours de Droit Civil Francais, 5th edition, part 2, par. 164.
- (10) Ibid., referring to Paris, 9 April 1821.
- (11) Ibid., referring to Dalloz, Nouveau Code Civil Annote, par. 16 and 17, and Demolombe, Cours de Code Napoleon, part 9, par. 147.
- (12) Ibid., referring to Demolombe, Cours de Code Napoleon, part 9, par. 147.
- (13) Ibid., referring to Duranton, Cours de Droit Francais, part 4, par. 43, and Demolombe, Cours de Code Napoleon, part 9, par. 155 and Dalloz, Nouveau Code Civil Annote, par. 24.
- (14) Ibid., referring to Dalloz, Nouveau Code Civil Annote, par. 25.
- (15) Ibid., page 24, referring to Dalloz, Nouveau Code Civil Annote, pars. 26 to 31.
- (16) Ibid., referring to French Cassation, 12 December 1842.
- (17) Ibid., referring to Jesserand, Droit Positif Francais, 1st edition, page 686.
- (18) Ibid., page 25, referring to Planiol, Ripert et Picard, Traite Pratique de Droit Civil Francais, Les Biens, 1926, no. 73.
- (19) Ibid., referring to Aubry et Rau, Cours de Droit Civil Francais, 5th edition, par. 164 and French Cassation, 29 July 1902.
- (20) Ibid., referring to French Criminal Cassation, 18 June 1891.
- (21) Ibid., referring to Aubry et Rau, Cours de Droit Civil Francais, 5th edition, part 2, par. 164 and Dalloz, Nouveau Code Civil Annote, par. 2.
- (22) Ibid., referring to Duranton, Cours de Droit Francais, part 4, par. 20.
- (23) Ibid., referring to French Cassation, 13 February 1872.
- (24) Ibid., referring to Planiol, Ripert et Picard, Traite Pratique de Droit Civil Francais, Les Biens, 1926, No. 73.
- (25) Ibid., page 26, referring to Court of Lyons, 18 March 1871.
- (26) Ibid., referring to Dalloz, Nouveau Code Civil Annote, par. 13.



- (27) Yaken, Zouhdi op. cit., page 26, referring to Dalloz, Nouveau Code Civil Annote, par. 14.
- (28) Ibid., referring to French Court of Cassation, 13 February 1872.
- (29) Ibid., referring to Cannes, 3 April 1824.
- (30) Ibid., referring to French Court of Cassation, 10 April 1867.
- (31) Ibid., referring to Dalloz, Nouveau Code Civil Annote, par. 28.
- (32) Ibid., page 27, referring to Baudry -- Lacantinerie, Traite Theorique et Pratique de Droit Civil, pars. 42 and 43.
- (33) Ibid., referring to French Court of Cassation, 9 October 1898.
- (34) Ibid., referring to Baudry -- Lacantinerie, Traite Theorique et Pratique de Droit Civil, par. 54.
- (35) Ibid., page 28, referring to French Court of Cassation, 15 May 1915.
- (36) Ibid., referring to the stipulations of Article 519 of the French Civil Code.
- (37) Ibid., referring to French Court of Cassation, 19 July 1893.
- (38) Ibid., page 29, referring to Dalloz, Nouveau Code Civil Annote, par. 15.



ARTICLE 3 - The term "real property by destination" shall mean those objects that, in themselves, may be regarded as personal (movable) property, but that are complementary to some real property by nature, provided:

- (1) such objects, together with the real property by nature, be owned by one and the same person; and
- (2) the said objects be destined for the exploitation of the real property or, more generally, for the service of the real property to which they are complementary.

Among other objects, the following shall be regarded as real property by destination:

- (1) In respect of Agricultural exploitation: animals destined for agricultural uses, agricultural implements, presses, alembics, vats, fish in streams, beehives, silk cocoons in huts, manure and straw destined for fertilization, vine-props.
- (2) In respect of Industrial exploitation: stored materials and equipment of any description (including trucks, carts, horses, etc.), provided the building wherein the said materials and equipment are kept be specially equipped to receive the same.

(Furniture belonging to hotels, furnished houses, night clubs, (the Casino) bath-houses, and business premises shall not be regarded as real property.)

Movable objects that are finally and definitively fixed to the ground shall be regarded as real property.

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The expression "filature de soie" inscribed in the Land Register must consist not only of a naked building, but of all the objects, immovable by destination, serving in the exercise of the industry. <sup>(1)</sup>

Any interested party must observe carefully that in the official Arabic translation the phrase "large barrels destined for holding the grapes in the wine factories" was translated thusly from the original French version which reads "as well as the large casks serving to lodge the harvest in the cellar." Above it will be noted that the author has used the term "vats" in order to strike a happy medium. No known amendment to this article exists as far as the author has been able to ascertain. Also the term (the Casino) has been omitted in the Arabic translation.

The real properties by destination are those movable chattels which were attached to the real property in order to serve it or to exploit it by the knowledge of the owner. They are figurative real properties imagined by the legislator who excluded them from the movables and made them real properties. His aim was to strengthen the tie among the movables united with the real property and to prevent their separation from it, in many cases; such as their seizure independently from the seizure of the real property, or their willing to a person other than the legitimate heir thereof. Because, in this case, the separation of these movables from the real property and the stripping of them from it, lessens its importance and prevents its exploitation.

It would appear from the above that the real properties by destination are, in origin, movables by nature, but the law endowed them with real property quality, figuratively and imaginatively, because of their attachment to the real property by nature, and because they are considered of its accessories and adherents, such as agricultural implements and animals used in the cultivation of the land and industrial tools in a factory. (2)

The legislator, in this consideration, has avoided the harmful consequences which would appear contrary to the will of both parties and to justice, especially in the case of independent seizure of the agricultural implements or the animals, as this would make it impossible for the farmer to exploit his land and would disable him from fructifying it. A reference should be made here to the differentiation between the real properties by destination and the movables which become real property after being incorporated in them.

The movables which are incorporated into the real property become real property by nature whoever the person who makes this incorporation may be. Thus, the building or other materials which were used to repair the whole or part of a building, by the knowledge of the ordinary tenant or the usufructer, without the knowledge of the owner, will be considered as real properties by nature, after the occurred incorporation. Whereas, the movables reserved for the benefit of the real property and its exploitation (or fructification) are not considered real properties by destination unless the destination has occurred by the knowledge of the owner himself.<sup>(3)</sup>

The real properties by destination become movables if they are removed from the real property, as for example, when they are sold by the owner independently. But they do not lose their character as real properties by destination if they are removed from the real property temporarily; as for example, when the cattle are removed from the land to which they are attached in order to be employed in other work, or in cases of emergency. On the other hand, the real property character extincts from the movables if the use to which they are employed in the

real property ceases to exist. Again, the character of the real properties extincts and they become movables, at the desire of the owner, whether express or implied; as for example, if the owner sells the real property and keeps for himself the movables which were reserved for the service of the real property, even though they are not removed from the real property.

The things enumerated in this article by the legislator, are only for explanation and not to be complied with as being a cautious restriction. Any movable when placed permanently by the owner on the real property and attached to it for its exploitation; such as animals destined for agricultural purposes, seeds, and all agricultural implements, are considered real property by destination. In all cases, the movables should have been placed by the owner in an apparent and express manner for the exploitation of the real property, as it is not sufficient that he should express his desire for their use at any time. Moreover, the use of these movables should be useful and regular.<sup>(4)</sup>

The animals destined for agricultural purposes are considered real property by destination, no matter who carries out the cultivation of the ground, the owner himself or the farmer to whom the land is delivered by the owner.<sup>(5)</sup> The draft-horses employed in ploughing are considered real properties in contrast to the riding horses destined to the personal service of the owner of the real property<sup>(6)</sup> and to pull his own carts. The latter are considered movables. The animals which were bought to be resold, after being fattened, are not considered real properties by destination because they are not reserved for cultivation. For example, these would encompass those animals destined for commerce; such as

chickens, cattle destined for slaughter, etc.,<sup>(7)</sup> In applying the general principle it can be said that animals are not considered real property unless they are owned by the owner of the real property himself and delivered by him to the tenant-farmer, and are placed for the service and exploitation of the land.

The agricultural implements include the implements utilized for ploughing, presses, boilers, casks, alembics, barrels, vats, whatever their size or their adherences to the soil may be, on condition that they are destined for the use of the real property permanently and continuously. Those things destined to be filled with the products for later sale, such as barrels used for the storage of oil, are not considered real properties if they are sold to the purchaser. If they are used for the storage of oil extracted from olives, and are not sold with the oil, they are considered real properties. The agricultural implements include: the ploughs, mobile machinery, agricultural machines, wagons, and in general, everything used for the production of the crops and the storage of the fruits of the real property.

Seeds are real properties by destination before being sowed in the ground. After being sowed, they become real properties by nature.<sup>(8)</sup>

Domestic poultry and small animals may not be considered real property by destination, because they are not destined for agricultural exploitation<sup>(9)</sup> and for the service of the real property.

Manure and hay on the farms and fields are considered means of agricultural exploitation and, thus, constitute real properties. But the hay meant for provender, and found in towns, is considered as a movable property.

The factories include, tools, hammers, compressors, anvils and the machinery which is fixed in the ground. It also includes every building owned and reserved by the owner for the practise of his trade and destined by him for industrial exploitation. It includes, then, all industrial places in general, on condition that there must be a building constructed for the enclosing of the machinery and implements.

The implements and tools, which are used by a worker in his trade, are not considered real properties.<sup>(10)</sup> Also the ovens used in the houses of a town, unless they are permanently attached to real property by the owner, are not considered real properties.<sup>(11)</sup> The implements which are not destined for industrial exploitation are not considered real properties. Thus, in the spinning mills, the cotton-gins are considered real properties, but the furniture, which ~~have~~<sup>has</sup> no connection with the exploitation, is not.

The movable objects which are only employed for commercial exploitation in the factory, are not considered real properties; such as horses and carts used for selling the goods wholesale.<sup>(12)</sup> Likewise, the automobiles which are not used in the factory for industrial operations but are destined for the personal transportation of the factory owner; even though they are put in a place belonging to his factory, for in this case, they are considered his personal properties.

The furniture of houses; such as tables, carpets, straw-seats, safes, wardrobes placed by the owners in furnished houses for rent and on the stair-landings, in galleries and in servant-quarters, etc., are not considered real properties by destination; although these things were specialized for the service of the real property.

The implements which are placed by the textile maker in a room are not considered immovables if he lives in the same house. Also the hand tools which are carried by the worker with him to and from work are not considered immovables.

The movables which the owner puts on his real property are considered real properties when they are delivered to him as deposit or on a loan or as a mortgage.<sup>(13)</sup> The movables which are attached to the real properties by the owners are considered real properties by destination, whatever the means the owner used in attaching them thereto; especially if it were not possible to remove them without causing damage or destruction in so doing.

The following rule is preferably taken for certain movables to be considered real properties, either by nature or by destination:

(a) - The movables constituting a complementary part to the building, so as the building may not be considered complete without them, are considered fixed properties by nature; such as the ladder, doors, windows, wooden-shutters used for closing the shops, and the locks with their keys.

(b) - The movables which are not complementary to the building, but placed in it for its use and exploitation, are considered real properties by destination; such as the shelves made in the kitchen.<sup>(14)</sup>

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(1) Sentence of the Judge of Peace, No. 111, dated 4 March 1938. See Repertoire de Jurisprudence Libanaise, Juridictions mixtes, 1924-1946, Tome Premier, par. 90, page 609.

(2) Yaken, Zouhdi op. cit., page 32, referring to Jossierand, Droit positif francais, 1st edition, par. 1350.

(3) Ibid., page 33, referring to Articles 522 and 524 of the French Civil Code.

(4) Ibid., page 39, referring to Dalloz, Nouveau Code Civil Annote, page 77, and Ghand Court, 19 March 1887.



- (5) Yaken, Zeuhdi op. cit., page 39, referring to French Court of Cassation, 1 April 1935.
- (6) Ibid., page 40, referring to Dalloz, Nouveau Code Civil Annoté, par. 95.
- (7) Ibid., referring to Dalloz, Nouveau Code Civil Annoté, par. 99.
- (8) Ibid., page 43, referring to Baudry -- Lacantinerie, Traite Theorique et Pratique de Droit Civil, par. 68.
- (9) Ibid., page 44, referring to Aubry et Rau, Cours de Droit Civil Francais, 5th edition, Vol. 2, par. 164.
- (10) Ibid., page 48, referring to Demolombe, Cours de Code Napoleon, Vol. 9, par. 261 et. al. and Aubry et Rau, Cours de Droit Civil Francais, 5th edition, Vol. 2, par. 164.
- (11) Ibid., referring to French Court of Cassation, 19 October 1896.
- (12) Ibid., referring to Dion, 8 July 1901.
- (13) Ibid., page 55, referring to Baudry -- Lacantinerie, Traite Theorique et Pratique de Droit Civil, par. 93.

ARTICLE 4 - By "incorporeal property" shall be meant all titles, liens, easement rights, and also the claims which involve a corporeal real property.

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This article comprises the following:

- 1 - Incorporeal real properties
- 2 - Real rights, original and accessory
- 3 - Real property debts
- 4 - Real property cases
- 5 - Right of surface

Incorporeal real properties, called also immaterial or abstract, are the following: the liens, the real easements, the mortgage, the right of usufruct, the right of dwelling, the right of privilege on a real property, as well as the judicial cases on natural real properties, the long term lease, the right of usufruct and the right of surface (the exploitation of the surface of the land).

Real rights are the following: the original real rights as the right of usufruct, the right of usage, the right of dwelling, the right of easement, the long term lease and the right of surface, and the accessory real rights as the right of lien and mortgage.

Real property debts: some classifications must be put down here because the right of the creditor is always movable. The subject of the right of the creditor is to oblige the debtor to do something or to prevent him from so doing; or to give something. If the subject is an action or abstention from an action, the debt is considered movable, because it is not the thing itself which the debtor undertakes to

fulfill but his action itself, which, logically, may not be included in the class of real properties.

By provision of Articles 10 and 11 of Arrete No. 188 and Article 5 of Arrete No. 45/LR, the right of the purchaser, after the institution of the Land Register, is a movable right before the inscription takes place.

The nature of the property, whether movable or immovable, subject to the real property cases, is fixed according to the subject of the thing and not by referring to its origin. The rule is that the right, if it is a real right, will be a real property if its subject is a real property --- whether by nature or by destination --- and will be a movable if its subject is movable. Therefore the right of usufruct is a real right or movable, according to what it is relative, to a real property or to a movable. This real property nature does not apply except to the usufruct itself, and does not extend to the benefits resulting from it. Thus, the fruits and the rental of the agricultural lands, and the buildings of a real property burdened with a right of usufruct, are not real properties. But the right of easements constituted necessarily on a real property are always real properties.

The right of surface is also a real property right, but some consider it a kind of right of ownership and consequently a real property by nature. Some others see to the contrary and hold that the right of surface is an incorporeal real property and that it is a real right on a thing owned by others. <sup>(1)</sup>

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(1) Yaken, Zouhdi op. cit., Vol. 1, page 58.

CHAPTER II  
TYPES OF REAL PROPERTY

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ARTICLE 5 - By "private estate" (Mulk) shall be meant those ~~lands and buildings~~ situated within the precincts of built agglomerations as determined administratively, and that may be subjected to the right of absolute ownership, with the exception of lands and buildings situated within the territories of the formerly autonomous Governorate of Mount Lebanon, which shall remain subject to local custom and usage.

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The Ottoman Land Law issued on the 7th of Ramadhan on 1274 (1868) states that private lands (Mulk) are those lands located inside of villages and towns and lands extending outside of villages and towns of an area estimated at one-half dunum at the most which is considered as a complement of the building. Whereas the area of the dunum amounts to 1600 square pics (58 centimetres) i.e. 919.30 square metres, therefore the area within which the lands are located is considered "absolute real property" (Mulk) fixed at about 460 square metres. There was not any other condition or administrative arrangement binding the consideration of real properties as "absolute real property" (Mulk).

As for the new law of ownership of real property, that is to say the present Arrete No. 3339, which cancelled the Ottoman Land Law and replaced it, it has stipulated the necessity of considering "absolute real property" (Mulk) that which was located within the boundaries of districts considered administra-

tively as a built agglomeration. Its French stipulation is as follows:

"Les immeubles Mulk sont ceux qui, situes a l'interieur du perimetre des agglomerations baties, tel qu'il est determinee administrativement....."

It has, therefore, become necessary to know the legal principles which the administrative authority applies in determining the districts in order to determine the legal category of the real properties because the real properties which are included within the localities determined administratively to belong to the total buildings, are considered as "absolute real property" (Mulk)

In Lebanon the stipulation of Article 11 from Arrete No. 1207, dated 10 March 1922, in connection with the organization of municipalities, is often followed. Its text in the French origin is as follows:

"Le territoire des municipalites est limite a l'agglomeration urbaine, de telle sorte que la solution de continuite entre l'agglomeration proprement dite et les hameaux et ]maisons eparses ne depasse pas en principe, 300 metres....."

Its Translation (as found in the Arabic version and retranslated into English): "The municipal district is limited by the urban house agglomeration, so that the distance dividing between this agglomeration and the hamlets and dispersed houses does not exceed about 300 metres."

It is deduced from this stipulation that the real properties which are located within the scope limited by this administrative

definition for the municipal district are considered "absolute real properties." Therefore in the event of dispute on the determination of the legal category of any real property, it is necessary to refer to the Arrete issued by the administrative authority in fixing the boundaries of the municipal district, in order to know whether the real property, subject of dispute, is located within it or not.

The Lebanese Court of Appeal, Chamber of Real Property, held that if the real property district was not determined administratively, the lands whose distance alternates between 150 and 400 metres from the last buildings located in the town are considered as owned lands (Mamlukah) (1)

It must be mentioned that this Decision neither layed down a general rule nor fixed the distance, but it confined itself to the solving of a single case. (2)

Mulk property comprises:(3)

1. Personal property --- or manqoulat, movables.
2. Realty, or ghair-manqoulat, immovables.
3. Mugata'a immovables, i.e. buildings and plantations  
mulk on waqf property.
4. Mines.
5. Guediks constituted as mulk on waqf property, and consisting in the right to exercise an industry in a house or real estate.
6. Real actions.
7. Bonds, debts, and generally all rights arising out of a contract or conferred by law.

8. Personal actions.

Mulk lands are classified in the (Ottoman Land) Code under the following sub-divisions:(4)

1. Those lying and situated within villages and qasabas (5) and those in the vicinity within the perimeter of an one-half denum, which are deemed to be appurtenance to habitation.
2. Those, taken away from the public domain, and, for valid Shar'i cause, given to individuals to have and to hold in fee simple.
3. 'Ushri lands.
4. Kharaj lands.

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(1) Decision No. 28, dated 20 May 1944.

(2) Mushahwar, Amin, Majmu'ah al-nusus al-qanuniyah al-khassah bi-al-tashri' al-'iqariyah wa-bi-nizam al-malakiyah al-'iqariyah fi suriyah wa-lubnan, (Beirut, 1946)  
~~etc. see footnote above.~~

(3) See Young, George Corps de Droit Ottoman Oxford Clarendon Press, 1905, Vol. I, pages 305 and 306.

(4) Article 2 of the Ottoman Land Code, Aristarchi, Gregoire Legislation Ottomane ou Recueil des Lois, Reglements, Ordonnances, Traites, Capitulations et autres Documents Officiels de l'Empire Ottoman, Constantinople, 1874, I page 59.

(5) Qasaba, consists of several villages and corresponds to "Canton" Aristarchi, I, page 59, Note 7, quoting Belin, La Propriete Fonciere en Pays Musulman et Specialement en Turquie, Journal Asiatique, 1861.



ARTICLE 6 - By "State Domains" (Al-amiriyah) shall be meant those lands or buildings of which the State is the ultimate possessor, but which may be held in fee simple by private individuals (the right of disposal thereof is known as tasarruf)

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"The Miri lands fall entirely under the public domain. They are the fields, summer and winter camping grounds and commons, forests and other domains the use of which the government let, and the tasarruf whereof formerly was acquired in the case of sale, or failure of holders, by the permission and concession given and conceded by the feudal masters of the timars and za'amats, in their capacity as masters of the land (Sahib al-ardh) and, later by the permission and concession of the maltazims, and muhassils; and, whereas such order of things has been abolished, the possession of such lands shall henceforth be acquired by the permission and concession of the agent ad hoc of the Government. Persons acquiring the possession of such lands will receive a title deed to the possession (titre possessoire) called tapou crowned with Imperial Tughra. The tapou is a mu'ajjala, payment in advance, made to the competent agent for the account of the treasury, in exchange for the title."<sup>(1)</sup> (Aristarchi, Gregoire Legislation Ottomane ou Recueil des Lois, Reglements, Ordonnances, Traites, Capitulations et autres Documents Officiels de l'Empire Ottoman Constantinople, 1874 pages 60, 61 and notes 13 and 14. Multazim is tenant for term or concessionnaire of Iltizam according to Belin in his Relations Diplomatiques de la Republique de Venise avec la Turquie, Journal Asiatique, 1876.

Footnote which goes at end of this Article

Muhassil, according to Hammer, and quoted by Belin, is the Pasha to whom the Porte conceded for life the right to collect the taxes of a Sandjak or district.)

Footnote which goes at end of this Article.

Albert Khury in his dissertation printed by B. Himadeh in his Economic Organization of Syria, Beirut, 1936, has given us a much more complete study of this subject. He states that Miri land is land over which the state retains the right of ownership while the right of occupation is enjoyed by private individuals. The holder has the right to use the property as he desires providing he fulfills certain conditions. He may sell, mortgage or lease the property, but he cannot convert it into waqf except with the consent of the State. The area of miri land in Syria is not definitely known, although with the exception of pre-war Lebanon, practically all agricultural lands in Syria are miri lands, originally large estates transferred by the State to feudal lords for the purpose of securing their support. (2) Some of these have been divided into smaller holdings by sale and succession.

Private interest in miri land can exist only by grant from the tabu office. (3) Upon transfer of any interest so created, application must be made for the issue of a title deed (qushan) in favor of the new property holder, which, in effect, registers the new holder of the interest under the original tabu grant.

The miri land holder who occupies the land under a lease of indefinite duration pays as a remuneration to the state a double rent, part being the payment for the tabu grant and other fees of transfer and succession, and part being the tithe, a

tax payable yearly to the government treasury.

As has been mentioned title deeds for miri grants were issued subject to certain restrictions. The most important of these is continuous cultivation. If miri land remains uncultivated for five successive years without valid excuse, it reverts to the state. (4) The holder may redeem it, however, upon payment of its unimproved capital value (badal al-mithl). Miri land also reverts to the state upon the failure of legal heirs. Formerly the definition of legal heirs was very restricted, but now it has been widely extended with the result that land less frequently reverts to the state for this reason. The termination of a holder's interest under a tabu grant does not necessarily render the state free to grant the land to anyone it may choose. The holder and his heirs have preferential rights (tabu rights) to claim the land upon payment of due tabu value. The land is not pure mahlul until the "right to tabu" has expired, when it shall be auctioned off to the highest bidder. (5)

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According to the Ottoman Land Code, Miri land normally was cultivable land and must be used as such. Holders had no right to change the character of the land over which they held the privilege of occupation. They could not, without the consent of the tabu office change arable land into vineyards<sup>(6)</sup> or woodlands<sup>(7)</sup> or build on it.<sup>(8)</sup> These restrictions have been radically changed. The miri land holder, at present, can do practically anything with his land. He can plant it with trees, build on it, and the like, without having to obtain the consent of the tabu office.

So far as the use of the land is concerned, mulk and miri lands are now practically the same. If minerals are found on State land, however, they belong to the treasury.<sup>(9)</sup>

At present the economic drawback of miri tenure to the agricultural development of the country lies in the fact that miri land is mostly in the hands of large land holders, who do not attend properly to its cultivation.<sup>(10)</sup> These holdings are given by the absentee landlords to tenants according to a system of tenancy by metayer, the evils of which come under Agricultural Tenancies.

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(1) Aristarchi, Gregoire Legislation Ottoman ~~1878~~ ou Recueil des Lois, Reglements, Ordonnances, Traités, Capitulations, et autres Documents Officiels de l'Empire Ottoman (Constantinople, 1874)

(2) This practise was very customary in the past.

(3) Murr, Duabis Ahkam al-Arabi (Jerusalem 1923) page 14

(4) See Article 19 of this Arrete.

(5) Y. Chaoui Le Regime Foncier en Syrie, 1928, page 56

(6) The Ottoman Land Code of 1324, A.H., Article 25.

(7) Ibid., Article 31.

(8) Ibid.

(9) See Article 16 of this Arrete.

(10) La Syrie et le Liban, 1919-1927, page 291.

ARTICLE 7 - By "dominated abandoned estate" shall be meant those  
[ ] lands or buildings which belong to the State, and  
over which a certain comm<sup>un</sup>ity enjoys a right of use, the charac-  
teristics and extent of which are determined by local custom or  
by administrative regulations.

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This form of land tenure ( ) known as Matrukah - Murfaqah )  
applies to stretches of land assigned to the inhabitants of a  
village or town, or several villages or towns grouped together,  
such as threshing floors, forests, pastures, and the like. (1)

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(1) Y. Chaoui, op. cit., page 70.

ARTICLE 8 - By "protected abandoned estate" shall be meant those  
[ ] lands or buildings which belong to the State or to  
municipal bodies, and which are public property.

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This is land owned by the state but reserved by law for the  
use of the general public, and not for a particular community,  
such as highways, public cemeteries, rivers, (1) and so forth.  
It is known as Matrukah-Mahmiyah land.

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(1) Y. Chaoui, op. cit., page 70.

ARTICLE 9 - By "unoccupied commons" shall be meant uncultivated  
[ ] State Domains which have not been explored or deli-  
mited, and over which the first occupant by virtue of a State  
permit shall acquire a right of priority within the terms and con-  
ditions indicated in the regulations concerning State Domains.

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This is unowned or unreclaimed land (known as Khaliyah-Mubahah)  
not assigned to any particular town or village. It must be beyond  
shouting distance from the nearest village. Any person in need of  
land may, with the permission of the authorities, use such land  
but legal ownership remains vested in the state. (1)

Aradi-mawat are those lands which are not the Mulk property  
of anyone, and are not the grazing ground of a town or village, or  
for their collecting firewood, that is to say, the locality in  
which the inhabitants of a town or a village have a right to cut  
firewood, and are far from the distant parts of a village or  
town, that is to say, the shouting of a person who has a loud  
voice cannot be heard from the houses which are the extreme limit  
of the town or village. (2)

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(1) Khuri, Albert, op. cit. page 55

(2) Majallah, Article 1270.



CHAPTER III  
RIGHTS AND RIGHT-HOLDERS

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ARTICLE 10 - Real estate may be subject to the real rights set forth hereunder:

- (1) Private ownership
- (2) Freehold (tasarruf)
- (3) Surface rights
- (4) Usufruct (1)
- (5) Priority
- (6) Easement
- (7) Hypothecation: mortgage (antichrese) and redeemable sale (bai' bi al-wafa')
- (8) Privilege and lien
- (9) Fee tail (entailment, or "saqf")
- (10) Permanent tenure (Ijaratain)
- (11) Long-term lease (Al-Ijarah al-tawilah)
- (12) Option resulting from a promise of sale.

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(1) They have preferred to use the word استفاد (utilization, benefit, advantage, profit) instead of the word استغلال (fructification, investment) in order to explain the meaning of the French word "usufruit," because the right of the usufruct includes more than the reaping of a yield.

The rights which may be exercised on the properties are real or personal.

Real rights are those which allow its owner to obtain from the thing, immediately, all or some of the benefit to which he is entitled, without need to the mediation of another person. (1)

Personal rights are those which its owner, called the creditor, cannot benefit therefrom except by means of another person called the debtor, whether they are relative to granting something and giving it or to doing something or abstaining from doing it. They constitute a legal relation between two persons; whereas the real rights apply to the thing directly.

The owner of the real right, if his right is relative to a real property, has the right of preference over the one who has no real right on the same real property. For instance, the mortgag<sup>t</sup>ee, who is preferred to the normal creditor, and who has the right to pursue the real property to whatever hands it is appropriated. In contrast to this the owner of the personal right may not claim his right except from the debtor personally.

The personal right is proportional and may not be exercised except against definite persons and which results in a personal case. The owner thereof is not granted the right of pursuance nor the right of preference. The real rights are absolute whether they are relative to a real property or to a movable and may be sustained against any person and entitle its owner the right to raise a real case. (2)

Moreover, the personal rights are not limited in number. The undertakings made by a person before another are limitless.

It should be noted that the real rights are negative. This means that its subject is always the abstention to do something; because the right, if it implies giving something or doing a thing, is a positive right. If it implies the abstention of doing a thing, it is negative. The real rights come under the second category. (3)

Original right is the one standing by itself. The consequential right is the one which stands by another. The ownership is an original right because it exists without need to be relating to another right. Similar to this is the right of usufruct and the right of easement. But the mortgage is a consequential right because its existence cannot be imagined without another original right relating to it and accessory to it. (4)

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- (1) Yaken, Zouhdi op. cit., Vol. I, page 104, referring to Dalloz, Repertoire Pratique, pars. 228 and 229
- (2) Ibid.,
- (3) Ibid., referring to Dalloz, Nouveau Code Civil Annote, P. 230
- (4) Ibid., Page 105

TITLE TWO  
CHAPTER I  
PRIVATE PROPERTY

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ARTICLE 11 - By the private ownership of real property shall be meant the right to use, enjoy and dispose of a certain estate within the limits imposed by laws, decisions and regulations.

This right shall apply only to private estate of the Mulk category.

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Under mulk tenure (private ownership) the holder exercises complete rights of ownership and disposition. He cannot be hindered in any use of his property except where it involves excessive injury or damage to another party. However, when a mulk owner dies without issue, the property ultimately reverts to the state by virtue of its sovereignty, and not by virtue of its claim upon the proprietor. Mulk property having thus reverted to the state, becomes mulk-mahlul.<sup>(1)</sup>

Mulk property consists of four classes: (a) land within cities and villages, (b) land separated from crown lands, (c) 'ishriyah land, and (d) kharaaj land.<sup>(2)</sup>

The majority of mulk land in Syria falls into the first class, comprising all land within cities and villages which is the site of a dwelling, including the necessary stretch surrounding each.

Land separated from crown lands is that land which was converted from miri to mulk by authorization of the Sultan, when the Turkish treasury was in great need of funds. The holder of miri land, upon payment of its full value in money to the treasury, received a certificate of ownership.

Ishriyah land is mulk land subject to the tithe, originally owned by Moslems, or distributed to Moslems after the conquest, while kharaj, or tribute paying land, remained in the hands of non-Moslems after the conquest, as was true in the Lebanon. These two categories have ceased to be of any real significance.

Mulk tenure would seem to be most desirable for small agricultural countries like Syria (and Lebanon), since it is under this type of tenure that permanent improvements and maximum efforts may be expected, for the mulk holder himself profits by them. However, except in the state of Lebanon, the area of agricultural land held as mulk is comparatively insignificant. (3)

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- (1) See Article 5 of this Arrete.
  - (2) Murr, Duabis Ahkam al-Aradi, (Land Regulations), (Jerusalem, 1923), pages 8-13.
  - (3) Khuri, Albert, op. cit., page 52.

ARTICLE 12 - Private ownership shall entitle the owner to  
[ ] everything produced by his estate, as well as to  
all its incidental appurtenances, whether the appurtenance  
or produce be natural or artificial.

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The ownership of a thing, whether movable or immovable,  
gives right to what it produces and on what is adhered to it  
accessorily, naturally or artificially. This right is called  
accession; or more clearly, the addition of the accessories  
to the property. This right is supported by the rule which  
says that the branch follows the origin and that what is meant  
by accession is only this meaning. (1)

The law considers as accessories the following:

- 1 - The products produced by the real property.
- 2 - All accessories or complementaries united thereto  
naturally or artificially and which are necessary  
to it. (2)

The law looks at the accession, sometimes as a means to  
acquire the ownership in favour of the owner of the thing.  
This legal context however is not absolute and a contrary  
evidence may be raised to negate it, whether this evidence  
arises from a deed or from other strong evidences or from  
prescription. (3)

The general rule of this article is applied, especially,  
to the ownership of canals and drains belonging to factories  
and to the ownership of the land necessary for the reparation  
and cleaning of the canals and to the shores of swamps. (4)

The owner of the factory which is run by water (hydraulics) is considered the owner of the canals which bring the water or of the connection canal, as well as of the canal which discharges the water, provided that these canals are dug by the hand of man and reserved for his factory, because these canals are considered necessary accessories to the factory. This idea tends to consider the owner of the factory as owner of an amount of the land which is necessary for the maintenance and cleaning of the canals and drains.

There is no difficulty to settle this question if the owner of the factory is the owner of the lands which separate his establishment from the shore where the water reaches to the drains and canals. In this case there is no dispute in considering that owner the owner of the canals. (5)

If the drains are located on lands which are not the property of the owner of the factory and there is no ascription in support of his ownership, then this article should be referred to in order to find any possibility of applying the legal pretext. (6)

The opinion of the jurists, given preponderance, considers the drains and canals made by the hand of man, the property of the factory owner. (7) According to this, the jurisprudence decided in perpetual and continuous manner that the artificial canal, reserved for the factory, is a necessary accessory thereof and that the ownership of the factory necessitates positively the ownership of the canal.



The ownership of a mill does not include the ownership of the canal, through which the water comes in to move and run the mill. The owner of a mill, instituted on an artificial canal by the hand of man, is considered the owner of this canal. Some decisions went so far as to consider the artificial canal leading the water to the factory not only an accessory thereto but also an inseparable part thereof.

It makes no difference for the canal to be considered an accessory to the factory, whether it is destined for the discharge of water or to bringing it in. Moreover, there is no consideration as to whether the canal is destined also to irrigate the lands neighboring the shores.

The ownership of a thing, as already mentioned, whether it is a movable or real property, gives the owner the right to all of that which it produces. We add now that the ownership of the thing extends to the fruits and the accessories whether they occur by themselves or are made by the hands of men. It extends also to the amounts of money which may be obtained through it.

The fruits apply to all of that which the thing produces at fixed times without suffering damages or tangible diminishing of its material. The fruits, because of their periodical nature, are also called proceeds. (8)

Among the fruits are included the financial benefits which the author obtains due to his copyright, (9) the products of the quarries, and the mines, (10) although these can not be obtained without causing damage in the material of the thing. Also their outcome is not defined at fixed times.

The fruits are divided into natural fruits, artificial fruits and civil fruits. <sup>(11)</sup> Some, however, have divided fruits into two parts: natural or artificial fruits and civil fruits.

The natural fruits are those produced by the thing immediately without the action of man; such as grass growing in the meadows, and produce of animals.

The artificial fruits are those which the thing produces by the deed of man; such as the plants of fields, vineyards and vegetables, cereals and beehives. <sup>(12)</sup>

In reality, the natural fruits and the artificial fruits all unite and are embodied under the rules of the general natural fruits, contrary to the civil fruits. It is preferable, therefore, to divide the fruits into natural or artificial fruits and civil fruits.

The civil fruits are the amounts of money which do not result immediately from the thing but from its proceeds. This is because they are incumbent on the usufructu<sup>a</sup>ries against the abandonment of the usufruct thereof by the owner to them; such as, the rent of houses, and agricultural lands, and the proceeds incumbent on an owner of a concession of a mine to the owner of the surface of the land, and the interest on money loaned. <sup>(13)</sup> The civil fruits may extend to the gains of the commercial house and the industrial establishment.

The cut trees of the woods, which are subject to a definite regulation, are considered natural fruits, in contrast to the stones extracted from the quarries not destined for exploitation

(closed). These are products because the usufruct, in this case, benefits from the stones, at times not fixed, although he lessens the substance of the thing. Thus the cutting of wood from the forests is considered as a product and not a fruit. However, after the extraction of the stones and the cutting of the trees, the products become fruits, because time is the actual distinguishing sign of the fruits from the product.<sup>(14)</sup> The gathering of the fruits shall be regarded as occurring from the time of separation from the thing even before they are removed.

The fruits, as long as they are in place, are considered accessories to the land. If it is sold, the fruits enter the sale accessorially. Nevertheless, the owner can sell the fruits while in place.<sup>(15)</sup>

The division of the proceeds into fruits and products and the division of fruits into natural, artificial and civil, has no importance as regards the owner, because the owner has the right on all these proceeds whatever their names differ. This division has a characteristic and great importance as to the right of usufruct, because the owner of the right of usufruct has no right, except on the real fruits, which are the natural and artificial fruits, by collecting and reaping them. As to the civil fruits, these he appropriates day by day.<sup>(16)</sup>

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- (1) Yaken, Zouhdi op. cit., Vol. I, page 138, referring to Dalloz, Nouveau Code Civil Annote pertaining to Article 546, par. 2.
  - (2) Ibid., referring to Colin et Capitant, Cours Elementaire de Droit Civil Francaise, 8th edition, par. 701.
  - (3) Ibid.

- (4) Ibid., page 139, referring to French Court of Cassation, 10 May 1899.
- (5) Ibid., referring to Dalloz, Nouveau Code Civil Annote, pertaining to Article 546.
- (6) Ibid., par. 16.
- (7) Ibid., page 140, referring to Aubry et Rau, Cours de Droit Civil Francais 5th edition, Vol. II, par. 192.
- (8) Ibid., page 142, referring to Dalloz, Nouveau Code Civil Annote, pertaining to Article 547, par. 4.
- (9) Ibid., referring to Paris, 18 May 1877.
- (10) Ibid., referring to Aubry et Rau, Cours de Droit Civil Francais, 5th edition, Vol. II, par. 192 and French Court of Cassation, 23 February 1881.
- (11) Ibid., referring to Colin et Capitant, Cours Elementaire de Droit Civil Francais, 8th edition, par. 702.
- (12) Ibid., page 143.
- (13) Ibid., referring to Aubry et Rau, Cours de Droit Civil Francais, 5th edition, Vol. II, par. 192.
- (14) Ibid., same as footnote (11) above.
- (15) Ibid., referring to Dalloz, Nouveau Code Civil Annote, par. 17.
- (16) Ibid., page 144, referring to French Civil Code, Article 585 and 586.

ARTICLE 13 - The ownership of the land shall include ownership [ ] of everything over or under the surface thereof. Consequently, the owner of any piece of land shall be entitled to grow any plants or erect any edifices thereon, to effect therein excavations to any depth desired by him, and to extract therefrom anything that may be found, within the restrictions imposed by laws, decisions and regulations.

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The owner of the real property is considered the owner of everything which may be counted an inseparable part of the real property. This includes the height and the depth.<sup>(1)</sup>

Some examples on the ownership of the height are as follows. If a tree is found buried beneath the surface of the land, and covered by dust, and has been so for a long time and has no apparent trace outside the ground, then this tree is considered the property of the owner of the real property by way of accession.<sup>(2)</sup> If there is a chimney in a common wall between two adjacent real properties, this chimney is considered the property of the owner of the real property on which it exists,<sup>(3)</sup> unless otherwise there is a contradicting evidence. This stipulation of the Article may be extended to include the air located above the real property.<sup>(4)</sup> Some who have objected in establishing this, on the grounds that the ownership of the air, did not consider the shooting above the land of others and shooting on the land of others without permission, an infringement of the shooting regulations.<sup>(5)</sup> This is disputable and far from being true, because Article 73, paragraph 1, of this Arrete allows the owner to demand the branches stretching over his land to be cut.<sup>(6)</sup>



The ownership of the real property extends so far to the ownership of the depth as to embrace anything existing in it. Thus, the owner of the real property owns any treasure hidden in his land. Although the law gives its discoverer a share, this is but a means of judicial reconciliation based on equity and which includes in itself recognition of the first right to the owner.<sup>(7)</sup> On the other hand, he is considered in principle the owner of the minerals he finds in his land; and although he grants a concession therefore, yet his right is preserved by the share which the owner of the concession is obliged to deliver to him. It should be known that this article includes the quarries which are considered the property of the owner of the height.<sup>(8)</sup>

Furthermore, there arises from the principle of ownership of the depth, that the real property owner is the sole owner of an antiquity he finds under his land<sup>(9)</sup> with preservation of the right of the authorities concerned to appropriate it obligatorily for the public benefit; and that the stones which fall from the sky (meteors, meteorites, etc.) and land on his ground are considered his and accessories to his land by merely falling on it. The farmer who finds them cannot claim the ownership thereof.<sup>(10)</sup>

The owner of the real property is the owner of the fountains springing in his land whether they emanated by natural manner or through excavations carried out by the owner. On the other hand, the water which, after having burst forth, first on an upper ground, flows underneath the ground and issues forth,

far away in a lower real property, through artificial canals, is considered the absolute property of the owner of the land from which it emanated and burst forth. The owner of the lower land cannot claim that it has unified in his property by way of adherence. (11)

The ownership of the height may be separated from the ownership of the depth by a special agreement (12) in such a way as the former being for one person and the latter for another person. (13) The depth, moreover, may be separated from the surface of the ground by a decree of expropriation for public utility. (14) The owner of the height is not always the owner of the real property as well. If it is supposed that an owner has buildings stretching out over a land, he will not, by this reason, be the owner of the real property above which the buildings are stretching.

It results from the rule which says that the owner of the real property is the owner of the height that he is alone able to use it, and to plant whatever he wishes of plants, and to construct whatever buildings he wants, and having the right to prevent others in sharing with him in the use and benefit of his ground or in the use of the air which is above it. (15) It results also that he may prosecute the electric company, if it extends electric wires over his land because this is considered violation of the right of ownership.

The owner of the real property, being in principle the owner of the depth, is entitled to make in his land whatever excavations he wants, on condition that he respects the rights



of the adjacent neighbors, otherwise he will be held responsible in accordance with the rules of public responsibility. He is also entitled to create artesian wells to any depth, and to extract from his land all minerals located therein. (16)

- (1) Yaken, Zouhdi op. cit., Vol. I, page 152, referring to Dalloz, Nouveau Code Civil Annote, par. 1.
- (2) Ibid., referring to Dijon, 9 March 1894.
- (3) Ibid., page 153, referring to Brussels, 29 December 1886.
- (4) Ibid., referring to Lorand, Vol. 6, par. 327.
- (5) Ibid., referring to the Law of 13 December 1879 and mentioned by Hauk, Vol. IV, par. 127.
- (6) Ibid., referring to Dalloz, Nouveau Code Civil Annote, par. 8.
- (7) Ibid., referring to Aubry et Rau, Cours de Droit Civil Francais, 5th edition, Vol. II, par. 192.
- (8) Ibid., referring to Dalloz, Nouveau Code Civil Annote, pars. 12-16.
- (9) Ibid., page 154, referring to French Court of Cassation, 13 December 1881.
- (10) Ibid., referring to Ax, 17 January 1898.
- (11) Ibid., referring to Demolombe, Cours de Code Napoleon, Vol. IX, par. 644.
- (12) Ibid., referring to Dalloz, Nouveau Code Civil Annote pertaining to Article 552, par. 29.
- (13) Ibid., referring to French Court of Cassation, 14 November 1888.
- (14) Ibid., referring to French Court of Cassation, 1 August 1866.

- (15) Ibid., page 155, referring to Aubry et Rau, Cours de Droit Civil Francais, 5th edition, Vol. II, par. 192.
- (16) Ibid., referring to Hauk, Vol. IV, par. 128.

CHAPTER II

FREEHOLD

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ARTICLE 14 - By the term "freehold" (tasarruf) shall be meant the right to use, enjoy and dispose of land within the terms and conditions set forth in the present Arrete, and also in the existing laws, decisions and regulations. This right shall apply only to State Domains. (Al-Amiriyah).

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The tasarruf (freehold) in miri lands and in waqfs affected for the use of a determined object or foundation falls short of the dominium plenum, but is more than simple possession and the consequent enjoyment of the use which it entails. It comprises legal possession, the right to transmit to the heirs, and, with the permission of the competent authority, the right to alienate inter vivos. It is conceded to persons by virtue of a possessory title called tapou.<sup>(1)</sup>

The tasarruf in these lands partakes of the locatio perpetua agrorum civitatis vectigalium, and the usufructus of the Roman Law. It fits in between these two institutions, and embraces the dominium usufructus as distinguished from the dominium proprietatis, which<sup>is</sup> in the state. The miri lands or public domain of the Ottoman Empire, and those of the Roman State, 'agri publi', have the same origin. According to the jus gentium of ancient peoples, which was adopted by the Roman Law, quae ex hostibus capiuntur, jure gentium statim capiuntur fiunt --- (Lex. 5 7, Lex. 51 l. Dig. 41. 1);

however, the booty was allotted to the State, and the conquered lands became ager publicus (Lex. 13. Dig. 48. 13. Lex. 20 1. Dig. 49. 15). These agri publici were qui in perpetuam locantur, that is to say, upon payment of rent, neither those to whom they were conceded, nor their heirs, could be dispossessed thereof (Lex. 9-11. Dig. 39. 4: comp. also Lex. 1. Dig. 6, 3); the miri lands are those which were acquired by the State in consequence of conquest, and the tasarruf therein conceded to individuals. (2)

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(1) Aristarchi, <sup>sp. cit.</sup> I, 56, Note (a)

(2) Ibid., page 65, Note 25.

ARTICLE 15 - The right of freehold, (tasarruf) in respect of any particular estate, shall entitle the holder to everything produced by the estate, as well as to all its incidental appurtenances, whether the appurtenance or produce be natural or artificial.

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ARTICLE 16 - The holder of a freehold (tasarruf) title shall have the right of growing any plants and erecting any edifices on the land; of excavating the land to any depth desired by him; of extracting therefrom any building materials, and of disposing at will of such materials, to the exclusion of all other products, such operations to take place within the restrictions imposed by existing laws, decisions and regulations.

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Prior to the Ottoman fiscal year 1329 (1914) the land had to pertain to trees and erections as far as the legislative category is concerned; that is to say the State (Miri) Land which is planted with trees or vineyards or gardens or on which buildings are erected, becomes absolute real property (Mulk), and is governed by the Laws of Real Property (Mulk). But from the time of 30 March of the fiscal year 1329 and in reliance to Article 5 of the Law of Possession of Immovable Properties dated on the 5th Jamadi al-Ula of the year 1331, which is equivalent to the 30th of March of the (Ottoman) fiscal year 1329 (1914), everything caused to the State Lands (Miri) by changes and alterations such as erection of buildings, planting of fruitful or unfruitful trees, gardens, meadows, vineyards, orchards, etc... is subject to the Land Law as far as relation to possession and transfer. That is to say that the trees and buildings, as far as the legal category is concerned, have become fixtures to the land. (1)

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(1) {Mushahwar, Amin "Majmu'ah al-nusus al-qanuniyah al-khassah bi-al-tashri' al-'iqariya wa-bi-nizam al-malakiyah al-'iqariyah fi suriyah wa-lubnan" page 147.}

ARTICLE 17 - The holder of a freehold (tasarruf) title to any estate shall have the right of performing thereon any act arising from his title, with the exception of entailment (waqf).

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ARTICLE 10 - Any entailment (waqf) imposed on a Miri land after the promulgation of the present Arrete on any State domain shall be regarded as null and void.

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Comments on Article 19

The fasarruf is a real right.<sup>(1)</sup> It comes in the second place after ownership which is an absolute right. It differs from ownership in that it is not a permanent right, that is to say, the right of ownership does not become extinct by prescription as fasarruf does by non-ploughing or non-use for five years.

Furthermore, the right of fasarruf does not only include the surface, but also under-the-surface and above-the-surface, provided that the special regulations, as those of mines and quarries, are complied with.

It must be noted that the prescription does not have effect on incompetent persons until they come of age.

The right of fasarruf, on the other hand, may be exercised by moral persons in accordance with Article One of Arrete No. 2547 dated 7th April 1924, which allows these persons to purchase, appropriate and dispose of real properties within towns and villages in Syria and Lebanon.<sup>(2)</sup>

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(1) Article 10 of this Arrete.

(2) Yaken, Zouhdi, op. cit., Vol. II, pages 158, 159, ~~and~~ 165, and 166.

CHAPTER III

JOINT OWNERSHIP OF REAL TITLES

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ARTICLE 20 - The co-owner of a joint property shall not be entitled to exercise his rights to all or part of the property without the consent of the rest of the co-owners, nor may he exercise any right on the share of another co-owner without the latter's permission. In respect of works connected with the administration and management of the property, the absent co-owner's permission shall always be presumed to be given, unless such works should cause prejudice to the absent co-owner to the extent of at least one fifth of his right. These provisions, however, shall not prevent the application of Arretes No. 188 and 189 whereby the land settlement system is established.

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In the event of their management, the managing co-proprietors are not bound by any joint and several liability towards the absent. (1)

The implied authorization of a non-present co-proprietor being presumed, he cannot claim anything except his share in the profits. (2)

It is deduced from this article and from Articles 13 of this Arrete and 827 of the Lebanese Code of Obligations and Contracts combined with Articles 1194 and 1120 of the Majallah, that the ownership of the soil involves the ownership of the surface and ~~the~~ that the co-proprietor cannot modify anything without the consent of the other as long as that thing is indivisible. The other

partner can oblige the occasioner of the modification to reinstate the thing at his expense. (3)

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(1) Lebanese Court of Cassation. Decision No. 228, dated 12 December 1936. See Repertoire de Jurisprudence Libanaise, Juridictions mixtes 1924-1946, Tome Premier. Par. 2, page 419.

(2) Lebanese Court of Cassation. Decision No. 9, dated 21 February 1933. Also the Lebanese Court of Appeal. Decision No. 31, dated 2 May 1933. See Revue al-Muhami, 1935, Part 2, page 92. See also Repertoire de Jurisprudence Libanaise, Juridictions mixtes 1924-1946, Tome Premier. Par. 1, page 419.

(3) Lebanese Court of Cassation. Decision No. 39, dated 20 February 1937. See Repertoire de Jurisprudence Libanaise, Juridictions mixtes, <sup>1924-1946,</sup> Tome Premier. Par. 3, page 419.

ARTICLE 21 - The co-owners shall determine by mutual agreement the method of enjoyment of the joint property, and the produce shall be divided among the co-owners in proportion to their respective shares, except in the event of an agreement to the contrary.

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ARTICLE 22 - Each co-owner shall be required to contribute, in proportion to his share, to the expenses of management, repair and maintenance of the joint property, and to the taxes and charges imposed thereon. The co-owner who has advanced all or part of the said expenses or charges shall be entitled to have the same refunded to him, unless the money has been spent on the improvement or embellishment of the property, in which case the spender shall not be entitled to any refund.

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ARTICLE 23 - Each co-owner shall be completely free to dispose of his rights to the joint property, and he may cede these rights to another person or effect a lien thereon, without the permission of the other co-owner, but he shall not be entitled to mortgage his share.

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ARTICLE 24 - None of the co-owners may compel any of the others to cede to him his share of the joint property, but each shall be entitled to demand partition, unless joint ownership is rendered compulsory by virtue of a deed to this effect.

Partition may not be prevented for a period of more than five years.

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ARTICLE 25 - In the event of a dispute among the co-owners, or if any of them should be disqualified, then each co-owner shall be entitled to demand legal partition in accordance with the provisions of the law.

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ARTICLE 26 - Joint ownership shall cease to exist with the real partition of the property, or with the sale or surrender of all of the shares to one of the co-owners.

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ARTICLE 27 - In the event of partition (by private settlement or through legal channels), the holders of real titles to the partitioned estate must present themselves in person or send their legal representatives, in default of which the partition shall not apply to them.

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Comments on Article 27

A thing may be owned by several persons at once, in each case all the persons are said to be co-owners. Co-ownership must be distinguished from ownership by separate people of different parts of the same thing, that is to say, different storerooms of a house. In true co-ownership it is not the thing, but the right of ownership, which is divided.

Co-owners whose rights take the form of such co-ownership (in French, Indivision) are said each to have rights of ownership over every part of the object owned, the separate share of each being not physically distinguished, but only abstract or ideal.<sup>(1)</sup> Thus if A and B are co-owners of a farm "en etat d'indivision" neither of them owns any determinate part of the farm, but each has a right to an undivided share in the whole.

The inconvenience of co-ownership are so great that the law does all it can to encourage the co-owners to effect a partition of the property so that each may become a separate owner of a determinate portion. This principle is laid down in Article 815 of the French Civil Code, which makes it open to any co-owner by indivision to demand partition, any agreement to the contrary notwithstanding. Article 1139 of the Majallah stipulates :- "If one joint owner claims partition, and the other objects, the judge can act and can compel by force partition on both." Also Article 1140 stipulates :- "When partition and dismemberment of a thing held jointly is beneficial to one of the joint owners,

but prejudicial to the other.... the judge can bring about by force partition at the request of ~~him~~<sup>he</sup> to whom the partition will be beneficial."

The form of co-ownership discussed above is that which normally arises from inheritance, gift, or joint purchase—known to the Majallah as "Sharikat-Al-Mulk." Another form of co-ownership is that which exists when several people agree to form a common capital fund and to employ it with a view to profit. (partnership) Sharikat-Al-Aqd.(2)

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- (1) Goadby, M. Frederic, Introduction to the Study of Law, (3rd ed.) 1921, referring to Planiol's Traite Elementaire de Droit Civil (6th ed.) para. 2497.
- (2) Ibid., pages 391, 392 and 393.

CHAPTER IV  
SURFACE RIGHTS

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ARTICLE 28 - By the term "surface rights" shall be meant a person's title to buildings, installations or plants situated on land belonging to another person.

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Right of surface is the ownership of the buildings and the plants attached to the surface of the earth. As to the depth (that which lies beneath the surface) this belongs to another owner.

Right of surface is not a partition of the abstract ownership right<sup>(1)</sup> such as the right of usufruct, but it is a true ownership right.<sup>(2)</sup>

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(1) Yaken, Zouhdi op. cit., Vol. I, page 234 referring to Demolombe, Cours de Code Napoleon, Vol. XI, par. 483. XI

(2) Ibid., referring to French Court of Cassation, 22 April 1891.



ARTICLE 29 - Surface rights may be transferred to another person, and may have a lien effected thereon.

Easement rights may be imposed on lands that are subject to surface rights, provided these easement rights be compatible with the exercise of surface rights.

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The right of surface does not become forfeited by non-use, as is the case with the right of usufruct.<sup>(1)</sup> It is a real property right which may be sold and mortgaged. It is a permanent right, contrary to the right of usufruct. It is the owner of the right of surface, alone, who benefits from a stipulated share of the product of the mine which is ~~provided~~ under the surface. He may institute thereon, rights of easement, provided that these rights do not prejudice the exercise of the right of surface.

This right of surface may be complete, i.e., it may include everything which is on the surface of the land. In this case, there remains for the owner of the depth (that which lies beneath the surface), the right of usufructing what is beneath the surface of the ground; such as stones, and of exploiting thereof as if it were a mine against which he receives a stipulated or partial share. The right of surface may also be for a limited number of things existing on the surface of the land; such as buildings and plants. It does not encompass all the surface of the land.<sup>(2)</sup>

The owner of the depth (that which lies beneath the surface) reserves all the rights belonging to him as such, on condition that he does not constitute damages to the owner of the surface.

The owner of the right of surface, although his right might be partial, benefits from all the rights belonging to the owner of the real property on the surface. He may alter the cultivation of the ground, and the nature of the exploitation itself. He may also build new buildings and demolish those existant. (3)

The right of surface does not constitute, with the right of the owner of the depth, a kind of indivision. (4) Thus, neither the owner of the right of surface nor the owner of the depth, may demand partition. (5) They may agree to remain in this condition for the period they decide upon, whatever the extent of which may be.

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(1) Yaken, Zouhdi op. cit., Vol. I, page 234 referring to French Court of Cassation, 18 March, 1858.

(2) Ibid., referring to Colin et Capitant, Cours Elementaire de Droit Civil Francais, 7th edition, 1931, par. 768.

(3) Ibid., page 235 referring to Brodan, Vol. VIII, par. 3724 et. al.

(4) Ibid., referring to Dalloz, Repertoire Pratique, par. 1186.

(5) Ibid., referring to Colin et Capitant, Cours Elementaire de Droit Civil Francais, 7th edition, 1931, par. 768.

**ARTICLE 30 - Surface rights shall cease to exist**

(1) when they are combined with other rights in the name of a single person; or

(2) when the buildings or installations situated on the land are demolished, or when the plants are removed.

This Arrete, according to the first Article of Arrete No. 96, dated 14 April 1925, begins to have effect after two complete days from the arrival of the Bulletin of the High Commissariat to the House of Government. As it arrived to the House of Government in Damascus on 6 March 1931, it would have effect in Syria as from 4 March 1931. However in Lebanon the date of its arrival to the House of Government could not be ascertained. (1)

1) Yaken, Zouhdi op. cit., Vol. I, page 236.

ARTICLE 31 - With effect as from the date of promulgation of the present Arrete, no surface rights shall be instituted.

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As from the date of the promulgation of the Code of Property dated 12 November 1930, the right of surface may not be established anew.

This Arrete, according to the first Article of Arrete No.96, dated 14 April 1925, begins to have effect after two complete days from the arrival of the Bulletin of the High Commissariat to the House of Government. As it arrived to the House of Government in Damascus on 6 March 1931, it would have effect in Syria as from 9 March 1931. However in Lebanon the date of its arrival to the House of Government could not be ascertained.<sup>(1)</sup>

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(1) Yaken, Zouhdi op. cit., Vol. I, page 236.

CHAPTER V

USUFRUCT

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ARTICLE 32 - By the term "usufruct" shall be meant a real right to use and enjoy an object belonging to another person. This right shall automatically cease to exist with the usufructuary's death.

No usufruct may be instituted in favour of corporations or other groups.

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The usufruct is a real right relative to the use of a thing belonging to others during the life of the usufructuary, on condition that the substance of the thing, on which the usufruct is established, is preserved.

There is a substantial difference between the use by the usufructuary and the use by the owner. The owner may benefit from the thing despite the fact that his usufruction may result in altering the material substance or basic use of the thing, or into the damage thereof; whereas, the usufructuary, on the contrary, must keep the thing and use it with respect to the use reserved for it.

The right <sup>of</sup> usufruct, includes the usus and the fructus of things reverting to others. It does not, therefore, assign a portion of the ownership to the usufructuary. The bare-ownership remains to the owner, who is called the bare-owner; i.e., in relation to the usufructuary. If the owner disposes of the bare-ownership, the usus, and the fructus remain to the usufructuary.



The usufruct, on the other hand, is a private right; it may not be compared to joint-property with the bare-owner. Therefore, neither the owner nor the usufructuary may demand division in kind or demand sale because of the impossibility of division.

It is a real right which may be sold, leased and mortgaged.

The right of usufruct is not partitionable, so, the usus, and fructus may not be two different persons. This, however, does not prevent it from being consigned upon an undivided share of a real property. In this case the incomes will be divided in kind, or if not partitionable, the price of its sale will be distributed among the share-holders, each receiving the equivalent of his share from the price.

The right of usufruct is established on all things which are subject to the right of ownership, either immovables or movables. If it relates to immovable property, it will be subjected to registration.

The right of usufruct applies also to incorporeal and immaterial things, such as the rights of authors, the debts, the business establishments etc. The right of usufruct is assumed, in relation to debts, in seizing the profits until the extinction of the debt. (1)

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(1) Yaken, Zouhdi op. cit., Vol. I, page 236.

ARTICLE 33 - Usufruct rights shall be instituted at will, and may be established for a given period or under given condition.

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This article has not abrogated Article 429 of the Majallah, the consequence of which is that the lease of a property, consented by a co-proprietor on his share without the consent of the others is nul and void.

Supposing that this text is abrogated; it would result in an extensive interpretation of Article 23 of this Arrete, the text making an unlimitative enumeration that a lease, comparable to the mortgage, which is like it a dismemberment of the enjoyment of possession, cannot be executed by a co-proprietor alone on his share. (1)

The right of usufruct is created by a contract or a will. It may be acquired by prescription like the rest of the real rights. If it is relative to a real property, it must be registered like all other real property contracts which are subject to registration. If it is created by a will it is not conditional to be registered.

This article stipulates: (1) The right of usufruct may be created for a given period. This means that it is provided that this right shall not commence except from a fixed time, and (2) it may be created under given condition, whether (a) dependant or (b) abolishing.

The dependant condition is that on which the occurrence of the event depends. For example, if someone insured his real property in order that the Insurance Company would pay him an



indemnity in case it is damaged by accident, the company would not be obliged to pay the indemnity unless the accident occurred.

The abolishing condition is that which results in the forfeiture of the obligation. For example, if a person sells a real property on condition that the real property shall be returned to him if he repays the latter the purchase price. The condition here is an abolishing one because the contract has been completed but it is threatened by extinction in case the condition is realized. The dependant right results only in the future; whereas, the abolishing right has actually been created but is threatened by forfeiture afterwards. In both conditions the right of usufruct may be established.

If the condition is dependant, the usufructuary may, even before maturity, initiate proceedings to retain the property, because the owner may not dispose of his property with prejudice to the owner of the right of usufruct on the mentioned condition. If he does so the usufructuary may take legal action against him.

The right of usufruct is a right exercised by the mere will of man, but in order that this right be valid, the owner must be legally competent to dispose of his property and must be the true owner thereof.

If the contract is constituted by a will, it must comply with the provisions of the will; i.e., as the legator is competent to make the grant, and the legatee is alive at the time of the legacy, whether his life is certain or implied. The first is evident, the second comes in cases of pregnancy. The will to him is valid but the will is not due to him unless

his existence is realized at the time of the legacy. This is not realized legally unless he was born less than six months from the date of the will. If he is born after a full six months or more, his existence or non-existence is probable at that time, and so the will is not valid.

The usufruct is limited by the lifetime of the usufructuary and extincts instantly with his death. Nevertheless it may be made for a fixed time expiring before his death.

It may be established on fixed real properties or on a part thereof. It may also be for many persons either by way of joint-tenancy among them or to each his fixed part. It may be established, on the other hand, for one person; then, after his death, for another; on condition that these persons were existing at the time of creating the usufruct, if by a contract and at the death of the legator, if by a will. (2)

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(1) Judgment of the Tribunal. Decision No. 233, dated 21 May 1941. Also Tribunal of Beirut, dated 29 August 1934 and of Tribunal of the Biqa', dated 15 November 1935. See al-Muhami, 1934, Part 2, pages 59 and 295. See also Repertoire de Jurisprudence Libanaise, Juridictions mixtes 1924-1946, Tome Premier, Par. 8, page 178.

(2) Yaken, Zouhdi op. cit., Vol. I, pages 241 and 242, referring to Article 81 of the Lebanese Code of Obligations and Contracts.

ARTICLE 34 - In real estate transactions, usufruct rights may be instituted in respect of the following rights:

- (1) Private ownership
  - (2) Freehold (tasarruf)
  - (3) Surface rights
  - (4) Permanent tenure (Ijaratain)
  - (5) Long-term lease (Al-Ijarah al-tawilah)
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This Article is self-evident. Tasarruf is applied to the Amiriyah lands. The first three rights were defined previously, the other two will be discussed in their proper places.

SECTION 1.

USUFRUCTUARY'S OBLIGATIONS BEFORE EXERCISING HIS RIGHTS

ARTICLE 35 - Before proceeding to exercise his rights, the usufructuary shall be required to:

- (1) draw up an inventory of the property in question; and
- (2) present a solvent guarantor.

The usufructuary may be exempted from the above two obligations by virtue of a special clause incorporated in the usufruct contract.

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Failure to draw up such an inventory does not entail the loss of usufruct rights, and only leads to one of two consequences: (a) - the owner may prevent the usufructuary from making use of the property if he has not yet taken effective possession of it, or (b) - failure to draw up the inventory may be regarded as evidence that the property was in perfect condition when taken possession of by the usufructuary, while the proprietor shall be entitled to invoke any and all methods of proving his claims concerning the condition of the property. (1)

The purpose of providing such a guarantee is to assure the owner of the dues to which he may be entitled in the event of the usufructuary's failure to use the property for <sup>the</sup> purpose agreed upon, and also to ensure compensation for any damage that may be caused to the property. The object of the guarantee is not to ensure payment for usufruct rights. (2)

The duties of the usufructuary before possessing the usufruct are two:



1 - to draw up a statement of the real properties, manifesting in it their condition, contents and positions. The documents of ownership are also to be mentioned.

This statement is necessary for the purpose of knowing what must be returned at the expiry of the right of usufruct, and of referring to it if a dispute should arise between the usufructuary and the bare-owner regarding the contents of the real properties on which the usufruct is established.

2 - to present a solvent guarantor.

This presentation of guarantees is to secure for the bare-owner the damages which the usufructuary might cause during his usufruction, so that he would take good care of the real properties. If the usufructuary does not present a fully capable guarantor, who undertakes to bear all sorts of responsibilities which might be incumbent upon him, he shall not have the right to oblige the bare-owner to deliver to him the real properties.

If he does not draw up a statement of the real properties, it will be assumed that the usufructuary has received them in good and sound condition. The owner, then, may prove the contents of the real property at the time of the beginning of the usufruct by all legal means. He may also prevent the usufructuary from taking possession of them until after presentation of the statement, the expenses of which are borne by the usufructuary. (3)

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(1) Decision of the First Instance Court of the Biqa', May 24, 1945. See Al-nashrah al-Qadaiyah al-Lubnaniyah 1st Year, page 291, Interpretations Section.

(2) Ibid.

(3) Yaken, Zouhdi, op. cit., Vol. I, page 243, referring to  
Colin et Capitant, Cours Elementaire de Droit Civil Francaise  
7th edition, 1931, pars. 787 and 788.

ARTICLE 36 - The inventory must be drawn up in the presence of the owner or after a legal summons has been issued to him, and must be executed by the Notary public at the usufructuary's expense. However, the usufructuary and the owner may, if they are of age and possess legal contracting capacity, agree together to draw up the inventory by private settlement without incurring any cost.

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The proces-verbal should be made out, vis-a-vis, to the owner of the properties; so that it will be a plea against him, and so that it cannot be protested as to the correctness of its items. If he is absent he should be summoned to present himself in a legal manner by a warning through the Notary public, or by a registered letter against receipt. The summons should determine the day, the time and the place; because if it is not legal, the contents of the statement will not apply to the owner. In all cases the summons would be in writing, such as a registered letter or a warning or a telegram.

The expenses of the preparation of the minutes of the statement are borne by the usufructuary. The manner of its preparation is to compile it according to the form followed by the Notary Public. It must be, at least, ratified and signed by the latter if it was not prepared by him.

If the two parties are adults, the contract may be carried out by a deed with an ordinary signature, without the least expense being incurred on the usufructuary. Otherwise it should be ratified or prepared by the Notary Public.



It is not sufficient, however, to summon only the owner of the real properties, but also all parties concerned, if any, such as the other usufructuaries, if they are more than one, or the co-owners of the property or of the succession.

The proces-verbal of the statement is not made out except at the time of the beginning of the usufruct. The usufructuary may not be forced to draw it up during the usage, for it is up to the judges themselves to make a new one if the usufructuary misuses the exploitation.

The usufructuary may not be asked to make a new proces-verbal, except in case the owner of the real properties makes it as a precautionary measure against the usufructuary's later denial, for fear of not being able to prove it at the time of maturity.

In case of an omission occurring in the first proces-verbal the owner may demand a supplementary proces-verbal to be made. This may not be done unless if the omission is proved. When this is proved, the court may go so far as to cancel the term of the usufruct if it was by deceit or fraud of the usufructuary. (1)

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(1) Yaken, Zouhdi, op. cit., Vol. I, page 244, referring to Article 618 of the French Civil Code.

ARTICLE 37 - If the guarantee is presented at a later date, any produce collected by the owner in the meantime shall be handed over to the usufructuary.

The guarantee may be replaced with a mortgage or lien on an amount of possession deemed to be of sufficient value.

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If the usufructuary delays in presenting the guarantee for some reason or another, like being unable to find a solvent guarantor, he shall not, nevertheless, be deprived from his right in the fruits, because they are due to him as from <sup>the</sup> date of making the usufruct. The law, therefore, does not permit the owner to take possession of the fruits until the presentation of the guarantor. In this instance, the bare-owner must detain the crops in order to deliver them to the usufructuary. He cannot dispose thereof unless he is afraid that they would suffer deterioration. In this case he may sell them and keep the price thereof in order to deliver it afterwards to the usufructuary, as soon as the latter presents the guarantee.

The cause for the laying down of this Article is, that the project of the right of the usufruct is, mainly, to secure and support the livelihood of the usufructuary. It is not fair, therefore, to deprive him from the fruits, if he delays in presenting the guarantee.

The guarantee may be a pawn or the presentation of bank notes or a mortgage on real properties considered adequate.

The usufructuary may be exempted from presenting the guarantee and preparing the statement if it is as stipulated in the

contract. However, the stipulation must be explicit.<sup>(1)</sup>

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(1) Yaken, Zouhdi op. cit., Vol. I, pages 245 and 246.

ARTICLE 38 - If the usufructuary fails to present a guarantee or any other form of security, the property in question shall be leased or placed under legal custodianship, the custodian's pay to be deducted from the amount of the proceeds.

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If the donor or legator is assumed to have exempted the usufructuary, by the contract, from presenting the guarantee, then he may not impose it upon him. However in the case where the usufructuary exploits the real property and uses it harmfully, he is obliged, upon claim from the bare-owner, to present a guarantee. This is applicable also to the case where the usufructuary falls into financial deficiency or commercial bankruptcy.

If the donor or the seller reserves the right of usufruct for himself, there will be no necessity for presenting a guarantee.

If the seller sells the bare-ownership and reserves for himself the right of usufruct, then the guarantee will not be demanded from him, except if it is insisted upon by the purchaser. If the latter does not demand it at the time of contract, this will be considered as ceding it on his part. To sum up, the exemption from the guarantee shall not occur except in the case where confidence exists; otherwise, the court may order the presentation of a guarantee. (1)

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(1) Yaken, Zouhdi op. cit., Vol. I, pages 246 and 247.

SECTION 2.

RIGHTS OF USE AND ENJOYMENT PERTAINING TO THE USUFRUCTUARY

ARTICLE 39 - The usufructuary shall have the right of using the property for his personal enjoyment or for his private interests, such right to have the same extent as that of the owner and to include the rights of enjoying easement, hunting and trapping rights, unless such rights have been leased by the owner before the signing of the usufruct contract.

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We previously said that the usufructuary has two rights: the right of usage and the right of exploitation. The right of usage is the right to benefit from all the benefits reserved for the thing. The owner thereof has the right to reside therein by himself and to use the movables existing on it.

The usage must be for his own enjoyment or for his personal interest. It must not alter the substance of the thing. It must observe what the owner himself does according to what the real property is destined for. The usufructuary shall benefit from the rights of easement; such as the right of passage, and from all the rights which the owner is entitled to benefit from, according to what they are destined for by him. Thus, if the right of usufruct belongs to residence and dwelling, the house may not be destined for something else. Moreover, if the usufructuary wants to exercise the usufruct by himself and not by the intermediary of others, he shall have the right of hunting and fishing in the land, and of benefiting from the rights of easement established for the real property on another real

property. However, if the owner of the real property leases the right of hunting and fishing before establishing the right of usufruct, they will not revert to the usufructuary but to the tenant.<sup>(1)</sup>

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(1) Yaken, Zouhdi op. cit., Vol. I, page 247.

ARTICLE 40 - The usufructuary shall be entitled to the produce of the property, that is, the products in kind or in specie yielded by the property at certain regular intervals without any diminution in the essence of the property. Such proceeds shall include income derived from the lease of hunting and trapping rights.

The proceeds shall include materials extracted from covered and uncovered mines and quarries if these materials belong to the owner (provided the mine or quarry was opened before the commencement of the usufruct), and also trees producing fruit at regular intervals or for the consumption or sale of timber from such trees.

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It was previously explained that the crops are divided into fruits and products; that the fruits are those which are renewed at known times and do not lessen the substance of the thing, and that the products are those things which are extracted from the real property, the material of which is exhausted with their extraction, such as the products of mines and quarries.

Now, it is established here, that the usufructuary has the right to the fruits which the real property gives at fixed times. This is self-evident, because the usufruct has been reserved for the exploitation of such fruits. As for <sup>the</sup> products, these have been granted by the article to the usufructuary, on condition that their extraction has commenced prior to the beginning of the usufruct. This is because they lessen the material of the



thing and they may not be consumed by the usufructuary unless they had already been reserved by the owner before starting the usufruct.

As for the big trees, these are not appropriated by the usufructuary except in one case; if the bare-owner had previously fixed a regulation for their exploitation at fixed times, as they would follow in this case, the rule of the fruits.<sup>(1)</sup>

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(1) Yaken, Zouhdi op. cit., Vol. I, page 248.

ARTICLE 41 - At the commencement and end of the usufruct period, any produce or part thereof not yet collected shall be divided between the usufructuary and the owner in the same proportion existing between the period wherein the usufruct rights were in force and the period wherein such rights were not <sup>m</sup>in force, account being taken of the time of yield of the annual or seasonal products. Neither party shall be entitled to <sup>the</sup>refund, by the other party, of any expenses incurred by the tilling of the land, but account shall be taken of the cost of any fertilisers and seeds used at the commencement or end of the usufruct period.

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The usufructuary takes possession of the natural fruits, such as the plants, by separating them from their origin, there being no need to remove them from their place. So long <sup>as</sup> these fruits are not separated and remain attached to the origin, they are not considered the property of the usufructuary. If they are detached from the origin, even though, by a force majeure <sup>(1)</sup> or by compulsory event, they become the property of the usufructuary.

It must not be forgotten at all, to reserve the right of the farmer, if he exists, his share of the fruit at the beginning and at the end of the usufruct. <sup>(2)</sup>

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(1) a natural force which cannot be humanly resisted.

(2) Yaken, Zouhdi op. cit., Vol I, page 250.

ARTICLE 42 - The usufructuary shall respect any lease contracts concluded by the owner prior to the institution of the usufruct. Lease contracts concluded by the usufructuary shall not be binding on the owner after the lapse of three years from the end of the usufruct period.

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The usufructuary may exploit the real property by himself or lease it or place it under cultivation no matter what the real property may be; whether an agricultural land or a house, on condition that this will not affect the ways of exploitation of the real property. By this the legislator means to prevent any important modification or alteration in its benefits.

The lease by the usufructuary of the real properties shall be exercised on the bare-owner for a period of three years after the forfeiture of the right of usufruct. This is so that any exploitation by the usufructuary is not hindered in an indirect manner, such as not being able to find a tenant willing to rent from him should he know that the contract is not exercised on the bare-owner.

If the period of the rent exceeds three years, the bare-owner may demand its decrease, which matter the tenant may not do, because the condition was laid down for the benefit of himself.

If any lease was completed before the beginning of the usufruct by the owner, it will not be applicable to the usufructuary whatever its term may be. <sup>(1)</sup>

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(1) Yaken, Zouhdi op. cit., Vol. I, page 250.

ARTICLE 43 - The usufructuary shall be free to transfer his rights to another person, either gratuitously or against payment, unless the contrary is provided for in the usufruct contract. After transfer, the usufruct rights shall remain in force in favour of the transferrer alone, who shall not, on account of the transfer, be absolved of any of his obligations towards the bare-owner. The usufruct rights shall cease to exist with the death of the transferrer and not of the transferee.

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The right of usufruct may be sold, donated or mortgaged. This, however, must be restricted by the period of the usufruct of the usufructuary, not longer. Then the transferee shall benefit from what the usufructuary himself was benefiting from. He may also, therefore, mortgage the right of usufruct. (1)

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(1) Yaken, Zouhdi op. cit., Vol. I, page 251.

SECTION 3.

USUFRUCTUARY'S OBLIGATIONS DURING HIS ENJOYMENT OF THE PROPERTY

ARTICLE 44 - The usufructuary shall be required to enjoy the property as a diligent and painstaking owner would. Particularly he must inform the owner of any encroachments committed on the property by others, failing which he shall be held responsible for any damage incurred by the owner. He must also renew any insurance policies that may have been subscribed to previously, and must settle insurance premiums.

In the use and enjoyment of the property, the usufructuary must respect the customs followed by former owners, especially with respect to the purpose for which the buildings are destined, the method of cultivating the land, and the exploitation of forests and quarries. He may, however, cultivate disused land and, more generally, improve cultivation methods.

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One of the most important duties of the usufructuary is to preserve and to maintain the substance of the thing. The usufructuary may make minor alterations which will not cause a modification in the substance of the thing, if they revert with great benefit to him, on condition that he return the thing to its original state, should the owner so demand.

He may not, in this circumstance, make a change in the outer form of the building, nor build another story on the house, nor remove the outer door, nor enlarge or lessen the size of the windows or create new ones. Also, he may not change the course of the drains in the house, nor remove the stairs, nor increase

or lessen the number of the rooms. He may, however, divide the large house into small apartments for rental purposes. He may not change the dwelling house into an hotel or viceversa. It is, however, up to the judges to decide whether the change occurred is to be considered a modification by way of usufruction or ordinary restoration.

Nevertheless, the usufructuary may create buildings or carry out necessary works for the exercise of the right of usufruct; such as creating a barn for the produce, or a house for the lodging of the caretaker or a watering-place for the animals, on condition that what he creates does not change the substance of the thing nor effect its being. As to the constructions he creates, which have <sup>no</sup> relation to the usufruct or do not comply with it, he shall be held liable for them.

Among his obligations is that he should continue to pay the insurance instalments which were previously contracted on the real property, against disasters and catastrophes. The bare-owner, by this stipulation, becomes entitled to benefit from the amount of indemnity allotted to him, even though the premiums were paid by the usufructuary, because the latter is considered as an intruder who administers the property of others.

One of his most important obligations also, is to take precautionary measures to prevent an act of prescription on the bare-owner, in his capacity as an occupant of the real-property. He has to inform the owner of the aggressions of others on the real property. He is considered a representative of the owner in the matters which have prejudice to his right, and which

may not be separated from the right of usufruct. He is also considered as an accidental possessor vis-a-vis to the bare-owner, he cannot, therefore, come forward with an act of prescription against him. (1)

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(1) Yaken, Zouhdi op. cit., Vol. I, pages 252, 253 and 254.



ARTICLE 45 - All land taxes of any description shall be borne by the usufructuary, who shall also pay the cost of all repairs necessitated by the maintenance of the property. Major repairs such as those required for the renovation of an important portion of the property and entailing unusual expenditure, shall be borne by the bare-owner.

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The usufructuary should preserve the thing and keep it in as good condition as he received it.

He is obliged to carry out the necessary repairs which are termed the maintenance expenses. These are the ordinary minor repairs, the purpose of which is to preserve the substance of the thing.

The major repairs, such as the repair of the complete roof, the walls, the fences, the supports of the building, etc., are borne by the owner. These, however, will be borne by the usufructuary if they are caused through his negligence in making minor repairs.

The maintenance repairs are not obligatory on the usufructuary except during his enjoyment of the real property. If they were necessary before he began the usufruct, they are not incumbent upon him. By beginning<sup>of</sup> the usufruct is meant the time in which the right of the usufructuary to take the fruits begins, and not the time at which the right was created. This is because the maintenance expenses are not incumbent upon the usufructuary except against his use and exploitation of the thing, and because the bare-owner is not obliged to carry out the maintenance for the usufruct of the usufructuary.

The usufructuary may evade his duty of carrying out the ordinary expenses on condition that he cedes his right of usufruct and delivers the real property to the owner, but he cannot escape the repairs which were necessary from the time he actually began the usufruct until he ceded it, if these repairs were necessitated because of his neglect.<sup>(1)</sup>

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(1) Yaken, Zouhdi op. cit., Vol. I, pages 254 & 255

ARTICLE 46 - Neither the bare-owner nor the usufructuary shall be required to rebuild any structure that collapses on account of its oldness or by reason of an Act of God. However, if the structure collapses as a result of a catastrophe and has been insured wholly or in part, the amount of the insurance may, at the request of the bare-owner or the usufructuary, be used in rebuilding <sup>or repairing</sup> the property.

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If the bare-owner refuses to carry out major repairs there will be no means to force him to do so, because his is not the duty to do so nor is he obliged to repair the real property and present it to the owner of the right of usufruct.

However, in case the real property is demolished by the effect of a misfortune like fire then the indemnity paid will be employed for the renewal or the restoration of the buildings of the real property; according to the demand by one of the two parties, the usufructuary or the owner. (1)

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(1) Yaken, Zouhdi op. cit., Vol. I, pages 255 & 256.

ARTICLE 47 - If a debt is due the settlement of which requires the sacrifice of part of the capital, the usufructuary shall be required to contribute to the settlement by reducing his income proportionally in the following manner:

- (1) The owner shall pay the amount of the principal required, and the usufructuary shall pay interest thereon, as long as the usufruct lasts.
- (2) The usufructuary shall be free to advance the principal amount, in which case the owner shall be required to return the said amount without interest to the usufructuary at the end of the usufruct period.

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The usufructuary is not responsible for the debts incumbent upon the owner before beginning the usufruct, except in case the usufruct is exercised on a mortgaged real property, where the usufructuary is obliged to pay the required debt on maturity. He has the right, however to revert to the bare-owner for restitution of what he paid.

Now that we have spoken of the rights and obligations of the usufructuary, we give hereunder, a brief outline of the rights and duties of the bare-owner.

The bare-owner must let the usufructuary enjoy the real properties on which the usufruct is established, without putting obstacles in his way, or creating anything which would prevent him from enjoying the usufruct or lessening it or altering its form.

The owner is entitled to dispose of the bare-property; i.e., to sell the real property, to mortgage it with the reservation

of the right of the usufructuary. He may not, however, pawn the real property in ordinary pawn, because this will necessitate the creditor taking possession of the real property; whereas, the possession of the property has been reserved for the usufructuary. However, if he wants to carry out major repairs which lessen temporarily the usufruct, the usufructuary may not prevent the owner from doing so or demand indemnity for the owners so doing.

The owner, on the other hand, may not delay a repair until the time when the extinction of the right of usufruct becomes near for the sake of depriving him from the usufruct during this period and bothering him during its execution.<sup>(1)</sup>

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(1) Yaken, Zouhdi op. cit., Vol. I, pages 256, 257 & 258.

ARTICLE 48 - The expenses payable jointly by the owner and the usufructuary, as stated in the previous Article shall be the following:

- (1) Expenses entailed by major repairs.
- (2) Unusual charges imposed on the property during the usufruct period, such as war tax, indemnities paid to the swamp draining contractor when such drainage is imposed by order of the public authorities, etc.
- (3) Contributions imposed on the property for the settlement of an inherited debt, if the usufruct involves the whole property of the deceased. In order to determine the amount of this contribution, appraisal shall be made, if need be, of the value of the inheritance.

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Refer to Article 47 of this Code.

ARTICLE 49 - As a matter of principle, the usufructuary shall bear no obligation in respect of any debt guaranteed with a lien on the property enjoyed by him.

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Refer to Article 47 of this Code.



SECTION 4

FORFEITURE OF USUFRUCT RIGHTS

ARTICLE 50 - The usufruct right shall cease to exist with the expiration of the period thereof, or with the usufructuary's death, or with the complete deterioration of the property, or with the usufructuary's abandonment thereof, or with forfeiture thereof through misuse, or with the qualities of usufructuary and owner being combined in the same person. Such disentitlement shall not have any legal effects until the entry pertaining to the usufruct is struck off the Land Register.

In case of need, usufruct rights shall be transferred for use in the payment of insurance indemnities or of compensation for land expropriated for public utility.

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The right of usufruct extincts in the following seven cases:

- (1) As soon as the term fixed in the contract expires.
- (2) By the death of the usufructuary, because the usufruct is a temporary right. It extincts by the death of the usufructuary, even though the period prescribed in the contract has not elapsed. However, if the usufruct was assigned to persons successively in such a manner that a second person inherits it upon the death of the first and by the death of the latter the right is transferred to a third person, and so forth, until the final owner of the right dies; then it returns to the bare-owner. If the right of usufruct was established for several persons, the death of one of them forfeits the proportion of his share, which would not be added to the sha-

re, ~~which would not be added to the shares~~ of the rest; but instead would return to the bare-owner, unless it is stipulated in the contract to the contrary.

(3) By the complete destruction of the thing on which the right of usufruct is established. But if the damage is only partial, the right of usufruct remains for the part which did not suffer damage. If the thing is destroyed and its accessories remain, these latter follow the provision of the origin, except if it were possible that ~~†~~ these might be ~~the~~ subject to an independent right of usufruct; as for example, in the case of the garden when the house is destroyed. If the damage or destruction occurred by the act of the usufructuary or the bare-owner, each one of these two would be responsible, vis-a-vis, to the other for indemnity. If the damage occurred by act of a person other than the bare-owner or the usufructuary, the right of usufruct is transferred to the amount of the compensation received from the insurance. The usufructuary is entitled to this compensation in lieu of the loss, either temporary or permanent, of his right of usufruct.

(4) By the ceding of the right of usufruct by the usufructuary. This occurs when the usufructuary gives up his right. However, the creditors of the usufructuary may object against the ceding if it was meant to prejudice or deceive them. It should be noted that the ceding of the usufructuary of his right of usufruct does not effect in any degree the real rights incumbent upon the right

of usufruct, relative to the real property; such as mortgage. The ceding of the usufruct must be registered in the Land Register because it is a real right. The ceding might be implied; as when the usufructuary was present at the sale of the real property by the bare-owner, who did not mention in the contract of sale that a right of usufruct was established on the real property, and the usufructuary saw the receiving of the price from the purchaser and did not make any objection to this.

- (5) By the extinction of the right of usufruct due to misuse. This is when the usufructuary uses it excessively and thus causes damage or deficiency in its substance. Also when neglect, through failure of the usufructuary to spend the required expenses in order to preserve and maintain it, until it creates material deterioration.
- (6) By the consolidation of the two capacities of the usufructuary and the owner of the real property in one person. This occurs in the case where the bare-owner dies and has no heir but the usufructuary.
- (7) By the expropriation of the real property, burdened with a right of usufruct, for the public utility. There are two ways to solve this problem: (a) - to pay to the usufructuary the compensation of the real property expropriated, provided that he presents a guarantee and at the end of the usufruct period returns the compensation to the bare-owner, or (b) - to deposit the value of the compensation in a bank, from which the usufructuary takes the interest.

It must be added that the right of usufruct extincts if the usufructuary does not exercise his right for fifteen years, just as all other real rights extinct for non-use.(1)

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(1) Yaken, Zouhdi, op.cit., Vol. I, pages 259, 260 & 261.

ARTICLE 51 - At the expiration of the usufruct period, the usufructuary shall be answerable to the owner for any damage caused by him to the property. The usufructuary shall not be entitled to any compensation for improvements made by him in the property without the owner's consent. However, if improvement and damage should occur at the same time, then a comparative estimate shall be made. In the case of new installations set up and new trees planted by the usufructuary, application shall be made of Article 218 of the present arrete.

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The usufructuary is obliged to return the real property in the same condition in which he received it at the beginning of the usufruct. If it is impossible for him to do so, he is obliged to pay indemnity if the damage was caused by his act; otherwise he is not responsible if the real property was damaged by a force-majeur or by an unavoidable act like fire, without neglect being proved on his part. He, however, must prove the incident, if he does, he is exempted from liability, and then the damage of the real property would be incumbent upon the owner. The condition of the real property is proved by referring to the proces-verbal prepared at the beginning of the usufruct. (1)

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Yaken, Zouhdi, op. cit., Vol. I, pages 261 & 262.

ARTICLE 52 - If the usufruct right involves only a building and if this building should be destroyed by fire or any other accident or if it should collapse on account of old age, then the usufructuary shall not be entitled to the enjoyment of the land or of the building materials. On the other hand, the contrary shall prevail if the usufruct involves all the property of which the said building forms part, unless the last stipulations of Article 46 are applied in the above cases.

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This is evident because the right of the usufructuary is confined to the usufruct of the building and not of the real property itself, thus by its damage his right extincts.(1)

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Yaken, Zouhdi op. cit., Vol. I, page 263.

ARTICLE 53 - The usufructuary may also forfeit his right by virtue of a court decision at the request of the bare-owner by reason of the usufructuary's abuse of his enjoyment rights, particularly if he causes damage to the property or allows it to deteriorate through neglect.

In such cases, the usufructuary's creditors shall be permitted to interfere in the matter, and to offer to repair the damage or to provide securities for the future.

The chairman of the court may, according to the gravity of the circumstances, either pronounce the definitive forfeiture of the usufruct right, or order that the property be not returned to the bare-owner unless he undertakes to pay to the usufructuary, or to the person to whom the usufruct right has been transferred, a certain sum each year until the expiration of the usufruct period.

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If the <sup>a</sup>damage of the usufructuary is extreme, the bare-owner is allowed to have recourse to the courts, which will make an estimation of the damages which the usufructuary is causing to the real property. If it happens that the usufructuary has previously mortgaged his right and he has acted in such a way as to forfeit his right, this act does not affect the mortgagees, as their right remains confirmed by the strength of the mortgage deed even though the right of usufruct extincts in relation to the usufructuary. (1)

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Yaken, Zouhdi. op. cit., Vol. I, pages 263 & 264.



ARTICLE 54 - If the bare-owner sells the property which is under usufruct, the sale shall not affect the usufructuary's rights in any way, and he shall continue to enjoy these rights unless he explicitly relinquishes them.

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This means that the usufructuary is entitled to the use and the exploitation, whereas the bare-owner has the right of disposal. If the latter disposes of his right, he will not effect any change in the right of the usufructuary. (1)

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Yaken, Zouhdi, op. cit., Vol I, page 264.

ARTICLE 55 - The usufructuary's creditors shall be entitled to take measures for the prevention of the return (of the property to the bare-owner) if such a return is prejudicial to their interests.

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TITLE THREE

EASEMENT

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ARTICLE 56 - By the term "easement" shall be meant an obligation imposed on a certain property for the benefit of another property owned by a person other than the owner of the former. Such an obligation shall consist either in granting another person the right of using the property in question in a certain manner, or in depriving the owner of the said property of exercising some of his rights.

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The purpose of the right of easement is to be able to benefit from the real property on which this right is established in order that the owner of the first real property is able to use it and to exploit it in what it was destined for. It is admitted that the real property burdened by the right of easement, will suffer deficiency as a result of the easement and its use will be restricted and the liberty of the owner will be limited in benefiting from his real property in an absolute manner, but this slight damage, however, does not equal the heavy damage which might be suffered by the first real property, should it have been deprived of it.

The law has restricted the easement for the benefit of the real property. If a private benefit for the owner of the real property is noticed, it would then be regarded as the result of personal agreements and would be included among the undertakings subject to the general law. This is because the easement is not meant for the benefit of the bare-owner of the real property but ~~but~~ for the real property itself, for which the right of easement is

established. We say this, because there is a material difference between the real obligation which is established on a real property for the benefit of a real property, and <sup>the</sup> personal obligation which is established on a real property for the benefit of a person and not for the benefit of a real property. The jurists and interpreters agree upon the fact that the condition laid down by the owner of the real property shall not be considered as a right of easement unless a valuable and permanent benefit arises therefrom for the benefit of the real property for which this condition was laid down. If the benefit was personal it shall be considered as a temporary personal obligation which shall only apply to the contracting parties, contrary to the real obligations which have no connection with the persons of the contracting parties, like easement which is a permanent right by nature and will exist as long as the real property on which the right of easement is established, exists.

It should be known therefore that the right of easement is one which has the nature of an original right and does not relate to a personal right such as lén, which is a real right relating to a personal right which is the debt of the creditor.

The easement may not be established on the real property of the owner himself. There must be an independent owner for each real property. Consequently the partner in a real property may have ~~a~~ a right of easement ~~on~~ this real property for the benefit of another real property which ~~they~~ <sup>he</sup> independently owns.

The charge imposed on a real property must be of benefit to the first real property. This benefit must be of value which will increase the value of the real property in a permanent manner, by way of usufruct or the increase of production or the ornamentation

of the real property. The benefit, however, ~~is~~<sup>may</sup> be probable and not actual; therefore, it is possible to create a right of easement for the benefit of <sup>a</sup> building, the construction of which is not commenced yet. Therefore, the creation of a right of easement for the benefit of real properties which will be owned by the owner, is possible, because it is a right of easement dependent on a condition and not a negative condition, and imposed for the benefit of the person ~~to~~<sup>for</sup> which the right is established as some jurists have decided. Accordingly, it is admissible for the owner to conclude contracts with others to create a right of easement for a probable benefit for his real property. Nevertheless, if there is not a present or future benefit, the contracting to establish a right of easement is null and void because it does not fulfill the condition of the benefit.

The right of easement is indivisible, but if the real property is partitioned among the partners, and some of these partners did not use the right of easement for the part allotted to him as a result of the partition, then the right of easement shall extinct from the partners who did not use their right, by the effect of prescription, and shall remain to the others.

The right of easement differs from the right of usufruct, because the subject of the latter is a real property for the benefit of a person, and may be imposed on movables as well. Whereas the easement may not be imposed on other than a real property and for the benefit of the same real property ~~and~~ and not for the the person of the owner. Furthermore, the right of usufruct extincts by the death of the usufructuary because ~~it~~<sup>is</sup> a temporary right, but the easement is a permanent right and remains ~~along~~<sup>as</sup> as

the real property remains. On the other hand, the usufruct may be sold, leased or liened, but the easement may neither be sold independently nor leased nor liened.

The right of easement is established on all material real properties except those which may not be owned. It may be established on lands and buildings, but not on trees, nor on real properties by destination nor on real properties by accession. It may not be established on the public properties except for the general <sup>use</sup> ~~rule~~ to which they are destined; such as the right of passage, disposal of rain-water and water of houses, etc., which comply with the Road Regulations. Finally it may not be established on Military reinforcement positions and city walls; nor on the buildings, churches and mosques preserved for worship and which may not be possessed by prescription or disposed of. <sup>(1)</sup>

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→ (1) Yaken, Zouhdi op. cit., pages 265 thru 271. He compares the explanation of this Article to the explanation of the French Civil Code Article 637, from parts 1 thru 97. Also Coling et Capitant, Cours Elementaire de Droit Civil Francais, 7th edition, 1931, pars. 809-811.

**ARTICLE 57** - The right of easement shall result either from the natural position of the premises, or from obligations imposed by law, or from contracts concluded between owners.

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This article has divided the right of easement into three parts: (1) the rights of easement resulting from the natural position of the places. These are dealt with in Articles 59 thru 61 and are called the natural easements, (2) the rights of easement resulting from obligations imposed by the law. These are discussed in Articles 62 thru 83 and are called legal easements, and (3) the rights of easement resulting from conventions among the owners of the real properties. These are dealt with in Article 84 and are called contractual easements.

There is another kind of easement which is not mentioned in this Property Code and not included among the above. The right of easement established by the head of the family or the owner of two neighboring real properties. It is the right established by an owner on one of two neighboring real properties until they are transferred to two persons and subsequently this right is considered existing in relation to them. As, for example, when a man owns two neighboring real properties and made one of them irrigated by the other, and then these two real properties are transferred to two different persons. Then the purchaser of the real property on which the owner has established the right of drinking shall own the real property with this right of easement and the purchaser of the other real property shall not be entitled to object thereto.



However, one of the fundamental conditions for the validity of establishing such a right is that the owner of the two real properties must be competent to establish this right of easement.

There are two kinds of easement: (1) the continuous or uninterrupted easement. These are those easements which are used in a continuous manner without being there a certain present action of man, such as the water courses, views, and pipes used for water, and (2) the interrupted or non-continuous easement in which the person, in order to benefit therefrom, should unavoidably carry out a present action such as the right of passage.

The above are also divided into two or three parts: (a) public easements, which have an apparent and open existence such as windows, doors, and canals destined for the flowing of water, (b) the hidden easements, which have no apparent existence such as the undertaking to not doing a certain thing; as not building, or the undertaking of not building to a certain height, and (c) easements which have both the public and hidden qualities such as the right of passage. These may be apparent where there are traces pointing to their existence, such as open doors or paved narrow pathways. On the contrary, they may be not apparent such as the passage through agricultural lands.(1)

There are, moreover, positive and negative easements: (a) positive easements are those relative to an act carried out by the owner of the real property, for which the right of easement is established, on the real property burdened by the right of easement,

and (b) negative easements are those, the benefits of which are confined for the owner of the real property for which the right of easement is established, in not doing an act such as not building. Negative easements are apparent and not continuous. (2)

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(1) Yaken, Zouhdi op. cit., Vol. I, page 275, referring to Colin et Capitant, Cours Elementaire de Droit Civil Francais, 7<sup>th</sup> edition, 1931, par. 819 - 3.

(2) Ibid., par. 819 - 4.

ARTICLE 58 - Contrary to the rule imposed by Article 10 of the Arrete relative to the Land Register, all easement rights resulting from the natural position of the premises or from obligations imposed by law shall be exempt from publicity.

However, easement relative to the right of way by reason of the interference of one property with another may be precisely defined at the request of the owner of the dominated property.

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The right of easement is a real right subject to registration like all other real rights, if established by a living person.

The law has excluded two rights of easement from publication or in clearer term from registration. These are those resulting from the natural location of the places and those resulting from the obligations imposed by the law. There is a third one already mentioned in the previous article, i.e. the right of easement established by the head of the family. The reason of exclusion is that these two rights mentioned in this article are restrictions of the right of ownership and for which there is no need to be mentioned in the contracts or to be registered, and that is because the position of the places and the regulations establish them and therefore there is no necessity in registering them. In the same manner the right of easement, established by the head of the family, follows.

The second paragraph of this article will be discussed in Articles<sub>x</sub> 74, 75 and 76.<sup>(1)</sup>

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(1) Yaken, Zouhdi op. cit., Vol. I, page 276.

CHAPTER I

NATURAL EASEMENT

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ARTICLE 59 - Lowlands shall have the obligation, towards the highlands dominating them, of receiving the waters flowing naturally from such highlands, if such flow is not interfered with by any human agency.

It is illegal for the owner of the dominated land to set up a dam to check the said flow.

It is illegal for the owner of the dominating land to attempt to aggravate the easement obligation imposed on the dominated land.

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Natural easement rights are not subject to registration, and therefore may be claimed even after the expiration of the opposition period.<sup>(1)</sup>

This article deals with the natural flowing of water. It is an easement, resulting from the position of the places, for the benefit of the elevated lands.

There is another kind of easement, not stated by the law and which also results from the position of the places; this is the bearing by the lower lands of the earth of the higher land in case of its collapse by an accident (slides, avalanches, etc.) in which the hand of man has no contribution, but resulting from the natural situation of places.

Some jurists have established that the receiving of natural water flowing from the higher lands by the lower lands, is not a

true right of easement, but a kind of restriction of the right of ownership resulting from the neighborhood. (2) Whatever the name or the origin of this right may be, this article is referring to the water flowing naturally, because of the position of places, from the higher lands to the lower lands. (3)

The easement of the right of flowing of natural water is effected on all material real properties, whether they are relating or subject to the right of ownership or otherwise. Likewise are the properties which may not be appropriated provided that their special regulations are complied with. Also the lands connected with the public properties, such as roads, are subject to the provisions of this article. This article, moreover, applies to the real properties in spite of their <sup>being</sup> separated from each other by a public road. (4)

The right of flowing includes all the water flowing naturally. It includes the rain-water flowing naturally from a higher land, the water emanating from the melting of snow by way of infiltration, the water of swamps and pools which flood because of rain, and the water of springs flowing naturally in the higher land, whether they have a regular course or not, provided they are continuous.

The provisions of this article do not apply to the water brought by the act of man or the gathered water, like the water of casks and the water flowing from the roof-gutters (rain spouts) and the home water or that emanating from a factory.

The provisions of this article also do not apply to the built lands; they are restricted to lands which are still in their natural state. If this is the case, the owner of the lower land

shall have the right to prevent the kinds of water excluded by the provisions, by any means he thinks fit, and he is entitled to claim indemnity.

What has been stated above does not apply to the water flowing on the public roads or in the public drains. The courts have decided that the right of flowing on the public roads belongs to every person and includes rain-water flowing from the roofs, and also the home-water.

It should be noted, however, that the provisions of this article are not absolute as it is restricted by Article 60 which permits the owner of the higher land to make water spring up in his land by means of sounding or by underground works; and which obliges the owner of the lower land to receive the water, preserving his right to claim indemnity of the right of easement increases the limits fixed by the article in question. (5)

The owner of the lower land is obliged to receive the dispersion of the waters in his land without having the least right to claim an indemnity, whatever the damage to his land may be, even though the water washes away sand and rocks. The case is the same with the water falling from mountainous places and floods the neighboring lands like a torrent, because this also results from the position of places.

Among the obligations of the owner of the lower land is that he may not erect obstacles or dams to prevent the flowing of the water naturally. If he does, the owner of the higher land is entitled to demand the removal of these obstacles and the former

is obliged to do so. It is sufficient that the damage is probable or not immediate.

Nevertheless, what is admissible to the owner of the lower land is that he can erect simple dams lessening the overflow of water on condition that these shall not cause the water to accumulate and stagnate in the higher land.

The owner of the lower land can escape this right of easement established by this article, by putting barriers during the time of his acquiring the right of prescription; thus preventing the natural water from reaching his land from the higher land, whether he puts this barrier in his land or in the land of his neighbor.<sup>(6)</sup>

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- (1) Decision of the Court of First Instance of Beirut, August 12, 1931. See Al-Muhami, 6th year, part 2, page 91.
  - (2) Yaken, Zouhdi op. cit., Vol. I, page 277, referring to Dalloz, Nouveau Code Civil Annote pertaining to Article 640, par. 4.
  - (3) Ibid., par.5.
  - (4) Ibid., par. 7 et al.
  - (5) Ibid., page 278, pars. 11 - 32.
  - (6) Ibid., page 280, pars. 60 and 61.



ARTICLE 60 - The owner of any property shall be entitled to use and dispose of rain-water falling on his land; but if the use of such water or the direction which it is made to follow should tend to aggravate the natural easement obligation referred to in the previous Article, then compensation must be made to the owner of the dominated property.

The same provisions shall apply to the waters of springs flowing in any land.

If the owner of a land opens a spring of water in his land either by probing the source thereof or by effecting underground explorations, the owners of the dominated land shall be required to receive such water, but they shall be entitled to an indemnity if the flow of the said water causes them any loss.

Dwellings, open spaces, orchards, parks and closed plots adjacent to habitations shall not, in the cases provided for in the previous paragraphs, <sup>be</sup> subject to any extension of the easement rights relative to the flow of water.

Disputes concerning the creation or exercise of the easement rights provided for in the preceding paragraphs, or the determination of the indemnities that may be due to the owners of dominated lands, shall be referred to the Peace Judge (Magistrate) of the district. In rendering judgment, the Judge must reconcile between agricultural and industrial interests and the respect due to the right of ownership.

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The jurisprudence has continuously established that rain-water

is owned by the owner of the land on which the water falls or upon which it pours, because it is considered as unowned property which is owned by appropriation by taking possession thereof. The owner thereof may dispose of it by his consent or neglect it or allow it to pour in its positions. He may also direct its accumulation against a price or otherwise, into other lands or he may allow it to run to the lower lands without benefiting therefrom. He may, furthermore, use it in a land other than that on which it fell, or accumulate it in special cisterns. If it is supposed that the owner of the higher land allows it to flow to the lower land, ~~then the owner of the higher land allows it to flow to the lower land,~~ then the owner of the latter becomes the owner thereof.

He, the latter, may then use it as if it fell on his land directly.<sup>(1)</sup>

It has been argued that owners of the lower lands may take possession of the water gathered in the higher land by effect of prescription. Nevertheless he may not take possession of it unless he has carried out his activities continuously and openly on the upper land during the period of prescription, as it is not sufficient that there is merely a ditch between the two properties, made by the owner of the upper land for the purpose of directing the flow of the water to the lower land and having been cleaned by him for this purpose.<sup>(2)</sup>

Rain-water flowing in public roads or falling directly thereon is regarded as the rain-water falling on the lands. The owner of the properties which are adjacent to the public roads may take that water and dispose thereof. It is, however, not permitted to

take possession of rain-water falling on the public streets by using prescription as an excuse for gathering it, even though this water is mixed with spring water when the spring water no longer followed its natural course and was overflowing due to an excess of rain-water.

There is a substantial restriction to taking possession of the water falling on the public street and that is when the public administration did not restrict its use in accordance with administrative decrees. In this manner it is not permitted to possess that water by anyone simply by taking possession of it.

The rain-water falling on the public roads is subject to special agreements of the adjacent owners. The owner of the upper land which is adjacent to the public road may deprive himself of benefitting from it to the benefit of the owner of the lower land. If this renunciation occurs, it is considered as a true right of easement from which every owner of the lower land shall benefit. (3)

This article has permitted the owner of the land, in connection with the flowing of rain-water, to aggravate the easement, either by modifying the course or by usage. However, he is obliged to indemnify the owner of the lower land for the damages which his act has necessitated.

Most jurists have established that the owner of the lower land is obliged to bear the modification made by the owner of the upper land and which aggravates the right of easement of the lower land, whether this modification results into agricultural benefit for the owner of the higher land or whether the aggravation is

caused by this latter in creating a building. They say also, that, if the owner of the lower land has constructed a building which was a cause to hinder the course of rain-water from the upper land, he then should bear the responsibility and pay damages to the owner of the upper land,

According to this article, the owner of the upper land is entitled to use the rain-water for his benefit whether it lessens the right of easement or it aggravates it for the lower land, contrary to the provision of the previous article. However, this is on condition that an indemnity is paid, in this case, if from the aggravation of the right of easement a damage results to the owner of the lower land. At any rate the owner of the lower land is not obliged to receive the water which does not comply with the agricultural necessities, or which causes damage thereto.

The owner of the lower land is obliged to receive the spring water flowing naturally in the upper land. If the owner of the upper land carries out modification for his benefit, and thus prejudices the right of easement of the lower land he is, then, obliged to pay indemnity as is the case with the natural water.

The houses mentioned in paragraph 4 of this article include the buildings, even though they are not destined to be dwelling houses. As to the fenced gardens, these must be close to the dwelling houses, and a literal interpretation should be applied to them. (4)

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(1) Yaken, Zouhdi, op. cit., Vol. I, page 281, referring to Dalloz,

Nouveau Code Civil Annote pertaining to Article 641, pars. 1 - 11.

- (2) Ibid., page 282, pars. 12 et al.
- (3) Ibid., pars 26 et al.
- (4) Ibid., page 284, par. 99 et. al.

ARTICLE 61 - The owner of any property shall be entitled to enclose the same, unless such an enclosure should interfere with the exercise of the right of easement imposed for the benefit of a neighbouring property.

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The right of ownership is absolute and entitles the owner to erect a wall or to leave his land free from being enclosed. Nevertheless, if rights for others are established on the property before enclosing; such as the right of passage, then the owner of the property has not right to deprive the owner of the easement of using this right by erecting the wall. If he does erect the wall, he must not prejudice the right to its owner (that is, the right of the easement).(1)

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(1) Yaken, Zouhdi op. cit., pages 285 - 286, Vol. I,

CHAPTER II  
LEGAL EASEMENT

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ARTICLE 62 - Legal easement shall be either for public or for private utility.

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SECTION I  
LEGAL EASEMENT PERTAINING TO  
PUBLIC UTILITY

ARTICLE 63 - legal easement pertaining to public utility, whether it be intended for easy access to the seashore and to the banks of rivers or streams, or to ensure or facilitate the preparation of public roads or installations and the maintenance or use thereof, particularly military or naval installations, is defined by the special laws and regulations in force.

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Some of the legal easements established for the public interest are appended hereunder for explanation:

1 - Restrictions laid down for planting trees along the sides of public roads.

2 - Obligations imposed upon the owners neighboring the public roads to receive the water of public roads on their lands and the material extracted from the ditches in order to clean them.

3 - Special restrictions for erecting buildings in fixed lines along public roads.

4 - Special restrictions of preventing building within a specified distance near the cemeteries.

5 - Obligations imposed on buildings not to be erected near monumental places, public places, and military positions.

6 - Obligations imposed on buildings not to be constructed within a specified distance near the railroads.

7 - Imposed regulations during the exploitation of mines near the dwelling houses.

8 - Restrictions imposed on public drainage and the hire of rivers. These obligations may not result into claiming an indemnity by the one charged with bearing them, because they are not expropriation for the public benefit.<sup>(1)</sup>

It should be carefully noted that the rights of easement established for the public benefit are other than the restrictions of ownership established for the public interest, because the condition of the rights of easement is that there should be a real property for which this right is established.

Moreover, the legal rights of easement do not provide for the consent of the property owner, because they emanate from a stipulation of the law. In fact, these rights established by the law, in view of considerations relative to public interest, are not easement in the customary meaning of the word, because they are stipulations established legally in favor of lands and the usufruct thereof, whereas the ordinary easement is the result of agreement in the legal meaning of the word.<sup>(2)</sup>

As the owners of real properties are obliged to abandon their real properties for the public interest, by means of forced expropriation, their liberty in disposing thereof is likewise restricted for the public benefit. Similarly, the legal easement established for the public interest results from the natural situation of places, contrary to the legal easement established for the interest of particulars which arise from the adjacency of the real properties, the one to the other.<sup>(3)</sup>

The legal easements established for the public benefit may be defined as charges imposed upon the owners or upon the real properties for the benefit of the human society.<sup>(4)</sup> They differ from the true easement in that they are mostly imposed upon the owners not for the interest of another real property but for the public benefit. It is provided, however, that they should have direct relation to the real properties. Thus, there shall be no legal easement established for the public benefit, when the charge imposed upon the owner should be executed by him independent from the real property; such as the obligation imposed upon the owner of the house to contribute in the sweeping of the street.<sup>(5)</sup>

Accordingly, the obligations imposed for the industrial works may not be considered as easements established for the public benefit, unless they come on the real property ownership itself; as is the case with the restrictions imposed upon the private ownership relative to buildings which have either an unhealthy or a disturbing influence.<sup>(6)</sup>

Likewise neither the forced expropriation, nor the duty of paying the real property tax, is considered as a legal easement established for the public benefit.<sup>(7)</sup>

The easement established for the public benefit includes all real properties, even those belonging to the State or the municipality. It is established by the order of the law, without the consent of the owner. Therefore the real properties of minors and interdicted (noncompos mentis) persons, are subject to the legal easements established for the public interest without there being a necessity for the consent of guardians

and trustees.<sup>(8)</sup> The legal easement established for the public benefit becomes extinct with the extinction of the public benefit. It is not sufficient for its extinction to be taken from conditions and actual circumstances, but must be by explicit decision of the public authority. Consequently the easements do not become extinct merely by the fortresses being demolished and the roads being destroyed.

Furthermore, the prescription does not effect the extinction of this legal right of easement established for the public benefit.<sup>(9)</sup>

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(1) Yaken, Zouhdi op. cit., Vol. I, page 287 referring to Articles 4, 5 and 6 of the Law of 7 June 1937 relating to the right of easement of the drainage. Also decisions of the French Consultative Council on 3 July 1840, 24 July 1856 and 5 February 1857. Also decision of the French Court of Cassation, 27 December 1869.

(2) Ibid., page 288, referring to Dalloz, Nouveau Code Civil Annote, pertaining to Article 649, par. 4.

(3) Ibid., pars. 2 and 3.

(4) Ibid., page 289, referring to Dalloz, Nouveau Code Civil Annote, pertaining to Article 650, par. 1.

(5) Ibid., par. 2.

(6) Ibid., pars. 6 et. al.

(7) Ibid., pars. 8 and 9.

(8) Ibid., pars. 41 - 47.

(9) Ibid., referring to Trulong, pars. 132 - 139 and Davvil, par. 873.

SECTION 2  
LEGAL BASEMENT PERTAINING TO  
PRIVATE UTILITY

ARTICLE 64 - The owner of any property shall be required to  
build the roofs in such a manner as would permit  
rain water to flow on his own property or along the public  
road, except in the event of application of special road  
regulations. It is illegal to allow such water to flow  
through neighbouring land.

This article prevents particularly the distribution of  
water falling from the roofs to the land of the neighbor. This  
means that the roofs should be built in such a way as to let  
the rain water flow on the land of the owner. Nevertheless,  
after the arrival of the rainwater to his land, he is not  
obliged to prevent its spreading and its flowing onto the land  
of the neighbor, whether this was by reason of the slope of  
places or by the abundance of rain which makes the water run  
into all directions. (1)

According to this, the roofs or the gutters should not  
protrude over the land of the neighbor, because this would  
make the rain water arrive directly to it, which is prohibited  
by this article. The owner, however, may let the falling rain  
water flow from the roof of his house to the land common  
between him and his neighbor, provided that it shall neither

affect what the land is destined for, nor shall it result in damages thereto. (2)

It is evident that the right of rain water flowing on the land of the neighbor may be acquired, either by a deed or by pacific, free-from-dispute prescription. (3) The owner may let the rain water, falling from the roofs, flow on the roads and streets, but complying there with the local regulations. (4) Regarding the rain water not falling from the roofs, the owners may not direct it onto the public roads unless its flow is natural. (5) This easement does not include the private roads. (6)

As to the distribution of house water and other waste water, these should comply with the special regulations applying to them. (7)

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(1) Yaken, Zouhdi op. cit., Vol. I, page 290, referring to Demont et Kolimt St. Har, Vol. II, par. 536.

(2) Ibid., page 291, referring to French Court of Cassation, 5 December 1827, and Aubry et Rau, Cours de Droit Civil Francais, 5th edition, Vol. II, par. 72.

(3) Ibid., referring to Baudry - Lacantinerie, Traite Theorique et Pratique de Droit Civil, par. 1043.

(4) Ibid., referring to French Court of Cassation, 22 May 1876.

(5) Ibid., referring to Dalloz, Repertoire Pratique, par. 534.

(6) Ibid., referring to French Court of Cassation, 3 June 1891.

(7) Ibid., referring to Arrete No. 2761 of December 1933,  
Legislative Decree No. 7975 of 5 May 1931, Legislative Decree  
No. 16/LR, Chapter 6, The Law of 30 June 1932 and the Law of  
7 June 1937, relative to rights of easement and drainage.



ARTICLE 65 - Any owner wishing to perform on his land  
[ ] operations tending to cause damage to the  
neighbouring lands, such as digging, drilling, exploration,  
or the setting up of dangerous, offensive or unhealthful store-  
houses, shall be required to observe the local regulations  
fixing the distance that must be maintained between his  
property and the neighbouring lands or determining the nature  
of the partitions that must be set up between them.

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This article is based upon the fact that the owner may  
not, during his use of his property, cause a damage to others.  
Accordingly the stipulation of this article is a kind of  
ownership restriction more than a right of easement.<sup>(1)</sup> The  
local regulations referred to in this article are those adopted  
by the administrative authority in order that their stipulations  
shall remain continuous and constant<sup>(2)</sup> and that the courts  
shall follow and respect them.<sup>(3)</sup>

In case there is no special regulation, the courts review  
the conditions of the case. It may ask the help of experts,  
if the matter necessitates, to prevent damages in accordance with  
the general rules.<sup>(4)</sup> The cases arising from the application  
of this article shall be decided by the magistrate.

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- (1) Yaken, Zouhdi op. cit., Vol. I, page 292, referring to Dalloz, Nouveau Code Civil Annote, pars. 1 and 2.
- (2) Ibid., page 293, referring to Baudry et Chauvau, par. 1023.
- (3) Ibid., referring to Aubry et Rau, Cours de Droit Civil Francais, 5th edition, par. 198.
- (4) Ibid., referring to Dalloz, Nouveau Code Civil Annote, par. 16.

ARTICLE 66 - The owner shall not have in his building any  
[—————] direct opening, window, balcony or any other  
protrusion overlooking any enclosed or open space belonging  
to his neighbour, unless there be a distance of at least two  
metres between the wall wherein the opening is made and the  
neighbouring land. If the said distance is less than two  
metres, windows or other holes may only be opened at a height of  
at least 2.50 metres from the floor if the room in question  
is located on the ground floor, and at a height of 1.90 metres  
from the floor if the room is located on an upper floor.

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Refer to Article 69 of this Arrete.

ARTICLE 67 - No oblique or side opening overlooking any  
E\_\_\_\_\_ enclosed or open space belonging to a neighbour  
may be made unless there be a distance of at least half a  
metre between the wall wherein the opening is made and the land  
in question. (1)

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(1) The legal purpose of forbidding the opening of windows  
within the distance limits assigned in Arts. 66 and 67 is to  
prevent the neighbour's house from being exposed to view. This  
purpose, however, can be achieved through various methods which  
differ with circumstances and means. If a modern method is  
found which leads to this end and which is less costly to the  
owner, then the law courts shall not prevent the use of such  
method. Consequently, the owner may build a structure of  
masonry which obstructs the view or of unbreakable glass which  
fulfills all the technical requirements. (1)

Doors are not included among the openings designated in  
Arts. 66 and 67, and therefore are not subject to the distance  
limits assigned. (2)

Refer to Article 69 of this Arrete.

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(1) Decision No. 118 of the Lebanese Appeal Court, Civil Bench,  
May 5, 1937. See Al-Muhami, 11th Year, part 2, page 98.

(2) Court of the Biqat, January 8, 1938. See Al-Muhami, 11th  
Year, part 2, page 147.

ARTICLE 68 - The prohibition provided for in Arts. 66 and  
[ ] 67 above shall not apply to roofs or windows  
overlooking public roads.

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Refer to Article 69 of this Arrete.

ARTICLE 69 - The distances mentioned in Articles 66 and 67 shall be computed from the outside of the external wall wherein the openings are made. In respect of balconies and other protrusions, the said distance shall be computed from their outer extremities to the line dividing the two real properties.

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Articles 66, 67, 68 and 69 are connected with each other; they are therefore explained together.

The legislator meant by apertures the ordinary windows. They are the openings used to let in the air and the light, the purpose of which is to lighten the interior of the place and to benefit also from the exterior view. They open and close easily, contrary to the small openings preserved for letting in the light and not the air and which are called in French jours or jours de souffrance.

By balconies are meant the balconies proper and other protrusions provided that their purpose is for greater enjoyment of the view and not for something else <sup>(1)</sup> as for example, to support the building or to ornament it. <sub>(2)</sub>

In order to differentiate between the openings discussed in Article 66 and those in Article 67 the openings which directly overlook the land of the neighbor, without the necessity of turning one's head left or right, are those dealt with in Article 66. If the contrary is supposed and the openings would not allow one to see the property of the neighbor unless, he, standing, returns left or right, these are discussed in Article 67.

If the openings are made in the wall in a manner exactly or nearly parallel to the house of the neighbor, Article 66 shall be applied, in view of the fact those openings overlook directly the property of the neighbor. But, if they are made in the wall in a perpendicular way, exactly or nearly, in relation to the house of the neighbor, then Article 67 is applied, in view of the fact that they overlook the property of the neighbor obliquely.

If there is a jointly owned land between the two real properties then the prescribed distance should be complied with. It is of reliable opinion that if there is real property enclosed with a high wall to such an extent as to prevent the looking into the land of the neighbor, the distance shall not be complied with. The distance provision is adhered to when it is possible to see from the overlooking place onto the land of the neighbor.<sup>(3)</sup>

If the owner of the real property does not adhere to the legal distance, the neighbor shall have the right to demand the removal of the windows opened by the former in that distance, or to build a wall in front of them to close them, even though their existence did not result into a damage to the neighbor, because the damage here is probable in the legal point of view.

However, if the owner of the real property opens windows on the land of the neighbor and does not comply with the legal distance, it is admissible for him to acquire this right as if it were a right of easement by prescription. It is also possible for the owner of the real property to erect a building without complying with the legal distance as an effect of an



agreement or a testament, and these two define the nature and the extent of this right of easement.<sup>(4)</sup> The judges in this instance have wide powers to interpret the agreement in referring to the intentions of the two parties. If windows were made by the head of the family, it is not permissible to build a real property in order to obstruct their view.<sup>(5)</sup>

In order to acquire the right of easement by prescription, the conditions of continuity, publicity and other conditions necessary to the acquisition by prescription should be fulfilled;<sup>(6)</sup> provided that this shall not be the result of toleration, as for example the existence of the window overlooking the neighboring unbuilt land.

Accordingly the owner who opens windows in the prohibited distance shall have the right to keep them after the expiry of the prescription. His neighbor is not entitled to demand the removal thereof or to close them by building a wall within a distance less than the legal one.<sup>(7)</sup>

Regarding the small high openings in the walls, which are narrow and cannot easily be seen through and which are preserved for letting in light, these have no respective provisions in the law. The owner of the real property, therefore, may make such openings unconditionally, and the neighbor shall not have the right to object thereto, because he is exercising his absolute right of ownership. Nevertheless if these small high openings cause harm to the neighbor, the latter may remove the harm by demanding the closure thereof or the construction of a wall. If it is possible to overlook through these openings, they shall be governed by the provision of the

windows and shall be considered prohibited in law.

The door which is made by the owner of the real property shall follow the rule of the windows and comply with the provisions of Article 66 and 67 regarding the distance. If the owner of the real property opens a door at a distance less than that fixed by the law, the neighbor shall have the right to demand the closure thereof. If on the other hand the owner of the door pretends that he has opened it for the sake of having access to the public road and that its closure would deprive him of thoroughfare, he must establish by argument or other evidence the existence of this right; otherwise the door must be closed.

The cases relative to the opening of windows on the property of others, and other cases arising from the application of the above articles, are within the jurisdiction of the Courts of First Instance. (8)

The rights of easement arising from the natural situation<sup>u</sup> of places and from the obligations imposed by the law, such as the right of thoroughfare from one real property to another, enclosed from all its sides, and the right to receive light, to prevent darkness entirely, are exempted from publication and announcement, and at the same time from registration, contrary to the principle established by Article 10 of the Arreté relative to the institution of the Land Register. Therefore they can be claimed at any time, whether the prescribed period, for the protest against the registration has expired or not.

But the right of easement claimed by a person on another real property, to pass therein to his garden and to open the windows of his house thereon, by reason of the fact that he has had this right for a long period of time, i.e., that he has acquired it by possession; not by reason that he has no other passage to his garden, or by reason that closing his windows would prevent the light entirely; in other words, not by reason of its consideration as an obligation in his favor imposed by the law, the acquisition of this right is dependent upon its announcement to others by means of its registration in the Land Register. (9)

This Arrete does not apply to incidents previous to it. Therefore the provisions of Articles 66 \* thru 69 shall not be applied to incidents prior to it. (10)

The right of easement resulting from the application of Articles 66 thru 69 of this Arrete does not include the rights of easement which were acquired during the time of the rule of the Majallah because the law cannot touch a real right prior to its promulgation without prejudice to the acquired right. It is not therefore retroactive in respect of acquired rights. (11)

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- (1) Yaken, Zouhdi, op.cit., Vol. I, page 294, referring to Demolombe, Cours de Code Napoleon, Vol. V, par. 408.
  - (2) Ibid., referring to Durantou, Cours de Droit Francais, par. 408.
  - (3) Ibid., page 295, referring to Colin et Capitant, Cours Elementaire de Droit Civil Francais, 7th edition, 1931, par. 729, page 771.

- (4) Ibid., page 297, referring to French Court of Cassation, 10 February 1908.
- (5) Ibid., 8 January 1901.
- (6) Ibid., 5 May 1906 and Aubry et Rau, Cours de Droit Civil Francais, 5th edition, Vol. II, par. 196, page 23.
- (7) Ibid., referring to French Court of Cassation, 29 July 1907 and Aubry et Rau, Cours de Droit Civil Francais, 5th edition, Vol. II, par. 196, page 36.
- (8) Ibid., page 299, referring to Beirut Court of First Instance, 24 May 1933.
- (9) Ibid., page 301, referring to Beirut Court of First Instance, 12 November 1931.
- (10) Ibid., referring to Syrian Court of Cassation, 12 April 1933.
- (11) Ibid., referring to Lebanese Court of Cassation, 28 February 1936.

ARTICLE 70 - The joint owner of a wall shall not be entitled  
E-----to remove this wall or build thereon without  
the consent of the other owners. Nevertheless, he may place  
or lay against the wall, from the side of his property suppor-  
ts for bridges or any other installations or structures up to  
half the amount of pressure that can be supported by the wall, ~~///~~

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No windows may be opened in a jointly-owned wall without  
the consent of the other owners. (1)

In executing the provision of the second sentence of this  
article, the co-owner must obtain the consent of his co-owner;  
if he refuses, he shall have recourse to the Court.

The appropriation of the party wall is dependent upon the  
conditions laid down in Article 71, and is not obligatory.

The co-ownership of the party wall may be acquired by the  
effect of prescription. (2) One may not be the owner of a wall  
and have a share in it, if he is not the owner of one of the  
two real properties between which the wall is the dividing el-  
ement. (3) That is to say that the party wall is usually betw-  
een two real properties owned by two different owners. (4)  
Thus, if one of the two real properties is annexed to the public  
properties, as when it is taken as a road, the party wall will  
no longer exist. (5)

The obligations imposed upon the owners of the party  
wall are in general the same obligations of the co-owners of  
the common property.



They must take care of its maintenance, avoid any action which would lead to its damage, and each one must restore any damage in proportion to his share in it and must respect the right of the other co-owners in it. (6)

Moreover, each owner has the right to raise a case against his co-owners in order to oblige them to contribute with him in the necessary expenses. (7) The repairs are obligatory on all the owners, disregarding the side which needs the repairs. (8) It is not conditional to demand the restoration or the rebuilding, that the wall is on the point of collapse; it is sufficient that it is in a condition which necessitates the repair thereof. (9)

If one of the owners causes any damage to be done in the party wall, then he, alone, is obliged to bear the expenses of removing the damage. Likewise, if one of the owners has rebuilt the wall anew for his benefit in order to rely upon it as a support for his building, which is more important than the former building; then he, alone, shall bear the expenses. (10) Furthermore, if one of the co-owners demolishes the wall and rebuilds it, when it was still possible to keep it for a time, as it was not yet on the point of collapse; then he, alone, shall bear the expenses. In this case, he may not use as a defense that the wall was old, or in a faulty condition, especially if his act was solely for his own benefit. (11)

The owner of the party-wall shall benefit generally from those rights accorded to owners in joint-ownership; provided that he shall neither cause damage thereto, nor prevent the other owners from exercising their rights. He may build beside it, provided that the prescribed distance for building construction is complied with. He may support on it bridges or other constructions which do not deprive the other owner of his similar right. (I2) If he desires to do so he must obtain the consent of his co-owner. In case of refusal he must obtain a report of investigation from an expert to the fact that what he intends to do will not effect the right of the other co-owner or prejudice it. (I3) This consent is not obligatory except in case the co-owner wants to lay upon it any object that will increase its weight or effect its strength. All other simple works, such as simple restoration or plastering or painting, do not need the consent of his co-owner because they do not prejudice his right. (I4)

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(1) Lebanese Court of Cassation, 29 August 1940. See Al-Muhami, 13th Year, Part 1, Page 23.

(2) Yaken, Zouhd, op. cit., Vol. I, page 308, referring to French Court of Cassation, 3 November 1905.

(3) Ibid., referring to Paris, 17 August 1872.

(4) Ibid., Referring to Hauk, Vol. IV, par. 323.

(5) Ibid., Referring to Marseille, 22 May 1904.



- (6) Ibid., page 309, referring to Dalloz, Repertoire Pratique, par. 315.
- (7) Ibid., par. 317.
- (8) Ibid., referring to Demolombe, Cours de Code Napoleon, Vol. XI, par. 387.
- (9) Ibid., referring to Paris, 17 June 1872 and 3 August 1873.
- (10) Ibid., referring to Orleans, 22 May 1866 and Rouen, 31 August 1876.
- (11) Ibid., referring to Paris, 3 August 1873.
- (12) Ibid., page 310, within the required legal conditions.
- (13) Ibid., referring to Article 662 of the French Civil Code.
- (14) Ibid., page 310.

ARTICLE 71 - No person shall be compelled to surrender to his  
[-----] neighbour his joint title to a wall; but if any of  
the co-owners should, with the consent of the other, increase  
the height of the wall, then the other co-owner who did not con-  
tribute to the cost shall be entitled to acquire joint ownership  
of the newly-constructed part of the wall, provided he pays half  
the cost and, if need be, half the price of the land used to  
increase the thickness of the wall.

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Refer to the comments under the previous article.

ARTICLE 72 - If the floors of one house are owned by different persons, the repairs and restorations carried out in the building shall be subject to the following rules, unless stipulations to the contrary are set forth in the title-deeds:

The cost of the thick walls and of the roofs shall be borne by all the owners, each in proportion to the value of the floor owned by him;

*The owner of each floor shall bear the cost of the portion used by him;*  
The owner of each floor shall bear the cost of the portion of the staircase leading to his floor, the owner of the second floor shall bear the cost of that portion of the staircase leading from the first to the second floor, and so forth.

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The crux of this matter is the determination of the nature of the owners rights of the house constructed in stories (floors). In fact, there is no joint-ownership among them, because each one owns independently the story belonging to him. But there is indivisibility in the parts of the real property from which all of them benefit equally, such as the walls, the roofs, the stories, the general gate of the house, the wells, the lavatories, the elevator, the drainages and the courtyards. (1)

The jurists have agreed upon the opinion that the owner of the upper story may not erect a building on this upper story. (2)

The reasons they gave are that the building constructed by the owner of the upper story will prejudice the rights of the other owners by overburdening the building and by passing through it and by changing its form.

Each owner has the right to use the parts of the real property in which he has the right of co-ownership in view of the nature of this obligatory and permanent common ownership. He has the right to use them in a wider manner than the use of the co-owner in the ordinary co-ownership. He may modify or change these common parts on condition that he does not cause inconveniences to the neighbors or a change in what the thing was destined for naturally. Thus, each owner may plaster or paint the large walls, or carve openings to place statues. He may also install wardrobes or cupboards within the wall, or put up a chimney therein, or support water or gas pipes on it or install electric wires therein.

In contrast, the owner of the ground floor, which is destined for the exploitation of a cafe, may not open, in the large wall and in the common yard, a door for the lavatories, because this will hinder the passage of the other owners and violates what the thing was destined for.(3)

This article shall not be applied except in the non-existence or inadequacy of formal deeds.(4) It may not also apply to the houses constructed before the promulgation of this Property Code.(5)

If the building collapses, by a force majeure or by a fault in it; the individual owner, if he refuses to reconstruct the building, may demand its sale (i.e. the materials left on the building site may be sold).<sup>(6)</sup> If, for instance, the lower building collapses and its renewal is being done, the owner of the upper story has the right to demand that the height of the new building should be maintained as it was before, if he has an apparent interest therein.<sup>(7)</sup>

The individual owner must pay what is spent for the benefit of all of them, such as the cleaning of lavatories, or the maintenance of wells, common yard and the common outer door.<sup>(8)</sup>

Any one of the owners may escape, in the future all of what is incumbent upon him of the expenses, by renouncing the ownership of the story belonging to him.<sup>(9)</sup> But he cannot escape paying what was due from him in the past, whether special or common if that was the result of his act, but not the result of faults in the building.<sup>(10)</sup>

The stipulation of this article includes all the large walls and is not restricted to only the walls surrounding the building. The roofs are similarly included. The vaults, above which the building is built, are considered like the large walls, the expenses of which are borne by all the owners,<sup>(11)</sup> contrary to the case where the building is demolished by an accident with which the will of the individual owner has nothing to do, or by reason of deterioration and the owner has refused to renew it.

In this latter case the preferred opinion is to sell it with the material. (I2)

Furthermore, when estimating the value of the story, its largeness and convenience must be taken into consideration for the purpose of allotting on its owner the part of the expenses due from him, independently from the furnishings and ornaments which it contains. (I3) The owner is not obliged to restore the carvings and the ornaments which were previously existing in the ceiling which forms the floor of the story above it, unless there is an agreement contrary to this, or unless the damage occurred by deceit. (I4)

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(1) Yaken, Zouhdi, op. cit., Vol. I, page 312, referring to Grenoble, 22 June 1897; Aubry et Rau, Cours de Droit Civil Français, 5th edition, Vol. II, par. 221, page 592 and Hawk, Vol. IV, par. 351.

(2) Ibid., page 313, referring to Colin et Capitant, Cours Elementaire de Droit Civil Français, 7th edition, 1931, page 809.

(3) Ibid., page 314, referring to Grenoble, 27 June 1899.

(4) Ibid., referring to French Court of Cassation, 9 March 1879.

(5) Ibid., referring to Boitier, 26 July 1886.

(6) Ibid., referring to Dalloz, Dictionnaire de Droit Civil, par. 127.

- (7) Ibid., referring to Aubry et Rau, Cours de Droit Civil Francais, 5th edition, Vol. II, par. 121.
- (8) Ibid., referring to Baudry et Chauvaud, par. 986.
- (9) Ibid., referring to Hauk, Vol. IV, par. 352.
- (10) Ibid., referring to Demolombe, Cours de Droit Napoleon, Vol. XI, par. 453.
- (11) Ibid., page 315, par. 427.
- (12) Ibid., referring to Lowan, Vol. 7, par. 493.
- (13) Ibid., referring to Aubry et Rau, Cours de Droit Civil Francais, 5th edition, Vol. II, par. 222, page 549.
- (14) Ibid., referring to Durantou, Cours de Droit Francais, Vol. V, par. 344.



ARTICLE 73 - The owner of a piece of land may have trees, ~~big or small~~ big or small, near the boundaries of the neighbouring land, but the owner of the neighbouring land shall be entitled to cut down the branches growing over his property.

Big or small trees of any kind may be planted close to the partition wall on either side without leaving any space between the wall and the trees, but no trees shall be allowed to reach a height exceeding that of the wall.

If the wall is not joint property, then the owner alone shall be entitled to prop his plants against such wall.

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Article 672 of the French Civil Code, modified by the law dated 12 February 1921, stipulates that if the trees were planted within the legal distance but their roots stretch into the land of the neighbor or their branches extend over his property, then the owner shall be obliged to cut those branches, but he has the right to cut the roots as he desires. (1)

The right of cutting the branches and the trees does not extinct by prescription. This is the general concensus of opinion. (2) It is, however, possible to keep the branches and and the roots stretching in the land of the neighbor if this was by effect of a special agreement embodied in an official deed and in an explicit and evident manner. Some jurists say that the right of keeping the branches and the roots may be implied, for example as a consequence of a sale.

Article 1196 of the Majallah stipulates that when there

is one whose trees in his garden have branches which overhang the house or garden of his neighbor, then the neighbor is entitled to force him to <sup>f</sup>empty the air by tying or cutting. But if the neighbor claims that the shadow of the tree is harmful to his plantings, the tree shall not be cut as this is not a valid injury to his rights.

This article applies to the agricultural lands and to the lands situated in the towns as well. It even applies to the fenced or unfenced lands,<sup>(3)</sup> and to forests and woods.<sup>(4)</sup>

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(1) Yaken, Zouhdi op. cit., Vol. 1, page 317, referring to Colinet Capitant, Cours Elementaire de Droit Civil Francais, 7th edition, 1931, pars. 731 and 732, page 774.

(2) Ibid., page 318, referring to Aubry et Rau, Cours de Droit Civil Francais, 5th edition, Vol. II, par 197.

(3) Ibid., Page 320, referring to Baudry - Lacantinerie, Traite Theorique et Pratique de Droit Civil, par. 1011.

(4) Ibid., referring to French Court of Cassation, 2 June 1877.

ARTICLE 74 - The owner of any property surrounded on every side  
E ——— and having no outlet to the public road shall be  
entitled to demand a right of way through the neighbouring land  
against payment of an indemnity in proportion to the loss or  
damage that may be caused by the right of way. The same right  
shall be granted to the owner of a land already possessing an  
outlet, if this outlet is insufficient for the agricultural or  
industrial exploitation thereof.

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Refer to the comments on Article 76 of this Code.

ARTICLE 75 - The right of way must, as a rule, be chosen where  
[ ] the distance between the surrounded land and the  
public road is the shortest.

However, the right of way must be assigned where it causes  
the least damage to the owner of the land who grants it.

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Refer to the comments on Article 76 of this Code.

ARTICLE 76 - If any piece of land becomes surrounded on every  
E side as a result of partitioning following an  
act of sale, exchange, division or any form of contract, then  
the right of way shall not be claimed on any lands other than  
those that have been subjected to the said formalities. How-  
ever, if it is not possible to institute an adequate right of  
way on the partitioned lands, then the provisions of Article 74  
shall be applied.

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It would appear, when comparing this article with Articles  
74 and 75 of this Code, with Articles 682, 683 and 684 of the  
French Civil Code, that the owner of the land may not demand  
a passage through the neighbor's land unless his land is not  
connected with the public road; because in such a case it is  
difficult for the owner to exploit his real property, being  
unable to reach it in order to move its products. Therefore the  
law has obliged the owners, in view of the pressing need to  
allow him a passage in their lands, which would contact the  
public road, against his paying them a compensation in advance.  
This passage is, in all cases, restricted to reach the public  
road, not to any other direction. (I)

It is sufficient for the owner to prove that his land is  
enclosed and has no issue to the public road, in order to obt-  
ain the passage. He is not obliged to prove his ownership

thereof by an official deed, because the land is not under dispute.(2)

It is to be noted that Article 74 of this Code is derived from Article 682 of the French Civil Code, as amended, and which says that the passage may be demanded in case where there is no issue at all or in case the issue is inadequate for the agricultural or industrial exploitation. In this way the two Codes agree.(3)

However, the passage may not be demanded unless the real property has no issue to the public road by a reason outside the control of the owner. Therefore, the owner shall not demand the passage if he himself constructed a building by which he blocked the passage through which he had an issue to the road. Likewise, he shall not demand a passage, if his thoroughfare has been established by a special agreement, or if his right of passage was based on mere toleration, as long as his right of thoroughfare is still standing.(4)

But, if the passage which connects the land of the owner and the public road can not be used for the passage of his cattle and agricultural machinery, or if there is a natural obstacle like a steep slope which prevents the passage of animals and cattle for the exploitation of the land, he shall in these two cases be entitled to demand a passage.(5)

The difficulty of the passage is not sufficient alone for the demand of a special passage,(6) nor if the owner is able to construct a passage to the public road in his land, even though the expenses of constructing this passage are not

proportionate to the value of the exploitation of the land.

It was said that the easement right of passage is admissible on the real property, even though it is enclosed. In this case its owner must open an issue in the wall as a door to the owner so that he may pass through it to the public road and to deliver to him the key of the door. (7)

The courts shall decide whether or not the existing passage is adequate for the industrial and agricultural exploitation, (8) on condition that it is necessary and not merely being useful or easy.

The real property is considered surrounded on all its sides if it previously had an issue to the road and then become impassable. If the case is to the contrary, the passage may not be demanded. (9) Likewise, the passage may not be demanded if the road is not good, but may be repaired, for example when it is merely in a bad condition (10)

If the real property is surrounded on its three sides by the lands of the neighbors and on the fourth by a navigable river, it shall not be considered surrounded if the transport by boats or ships presents no difficulty or it does not necessitate heavy expenses. (11) But if the transport on the river is dangerous and creates difficulties which hinder the exploitation of the land, then the land is considered surrounded and its owner shall be entitled to claim a passage on the lands of the neighbors. (12)

Moreover, if there are natural difficulties on the bank of the river or in the boundaries of the lands which prevents



the exploitation and the transport by boats or the use of a bridge unless heavy expenses are spent, then the land is considered surrounded. The same case is applied when the water is high and the land is low. (I3)

Paragraph 2 of Article 74 recognized the right of claiming a passage for the owner whose issue is inadequate for its industrial or agricultural exploitation. But if a change occurred in the use of the real property by the owner thereof, as if to exploit it industrially when it was agricultural, and the passage had been adequate and then became inadequate for the industrial exploitation, should it then be admissible to demand an adequate passage? This was answered on 25 February 1874 by the French Court of Cassation which ruled in favor of this demand.

The right of passage for the land surrounded on all its sides is considered a legal right of easement. It may not be demanded except by the owner of the land itself or by the person who has a real right on it. (I4) Therefore, the passage may be demanded by the person who has the right of use or usufruct. (I5) It may not be demanded by the farmer or the tenant for the sake of exploiting the land. (I6)

The tenant or the farmer must request the owner to demand the passage. If he does not, they shall be entitled to cancel the contract of tenancy or sue for damages. (I7)

The passage, to reach the public road, shall be demanded by the owner of the land which has an issue to the public road.

If it is necessary to pass on several lands, the passage must be demanded from each of them. The owner shall not be forced to raise a case except against the neighboring owner in whose lands the road would pass, and which the passage would reach the public road with the least distance and the least damage. (18) The passage is demanded, in case of partition, only from the owner of the land connected with the public road. (19)

The right of passage may be established on any land whether enclosed or not, owned by individuals or by the Government, (20) or Amiriyah land. Nevertheless, if the public lands were preserved for something else, which prohibits the passage to be taken on them, then it may not be established in this manner. (21) The owner shall not use the passage for another land which he purchased at a later date but he must obtain a new passage for it, although it might be the former passage itself. (22)

It is provided for taking the passage, that the land must be by its nature, far from the public road. The road must pass in the direction which is the nearest to the public road taking into account not to cause any damage to the real property in which the passage is to be taken. The court may fix for the passage a real property other than that which is nearer to the public road, if it would appear that the expenses thereof are less and that the damages resulting from passing therein are also less. For example, if the surrounded land is neighboring a school or a hospital, and also a land owned by an individual, then, in this case it is better to take the

place of the passage in the privately owned land, because the passage in the first is not as easy as in the second.

It is provided for in this article that if the disconnection with the public road arose from partitioning a land by reason of sale or exchange or division or any other contract, then the passage may not be obtained except in the lands which were subject to these contracts. This is because the separation from the public road occurred by the act of the contracting parties, and the owners of the neighboring properties shall not have to bear the result of their actions; and, because, upon the division, the contracting parties had noticed the necessity of creating places for passage for their lands which would connect them to the public road. However, in the second paragraph of this article it excluded the case of the impossibility of opening an adequate passage on the partitioned land. In this case the land shall be considered surrounded, and the provisions of Article 74 shall be effected thereon.

It must be carefully noted, that the passage resulting from the contracts shall not have any compensation or indemnity. Moreover, if the separation of the land from the public road occurred as a result of expropriation for the public benefit, then the land shall be considered surrounded, and so the provision of Article 74 shall be applied thereto.

The indemnity mentioned in Article 74 must be paid in advance. This indemnity is fixed either by the agreement of the two parties or by the judgment of the court after being established by the experts.

It must be noted, however, that the indemnity shall be estimated in proportion to the damage resulting to the land, and not in proportion to the benefit which the claimant of the passage is aiming at. This is explicitly expressed by the purport of Article 74. (23)

If the land lost its surrounded state, then the indemnity paid may not be recovered. The owner of the real property has acquired a right which ought not to be eliminated, because if the owner of the enclosed land continued to use the passage in a fixed manner and place during the legal period, then his appropriation shall be as an acquisitive deed to the right of easement and shall become part of the accessories of the real property for the benefit of which it existed.

It must also be noted that the right of claiming the passage does not extinct by prescription, as long as the real property has no issue to the public road. Nevertheless, the non-use of the passage in the land of the neighbor during the time of prescription shall extinct his entitlement thereto. If his land is still enclosed, he must claim anew passage by presenting an indemnity to the owner, or he must use a passage during the term of the prescription, in a continuous manner and acquire it by prescription. (24)

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(1) Yaken, Zouhdi op. cit., Vol. I, page 322, referring to Dalloz, Repertoire Pratique, page 548 and Planiol, Ripert et Picard, Traite Pratique de Droit Civil Francais, les Biens, 1926, par. 930.

(2) Ibid., referring to French Court of Cassation, 23 August 1827.

- (3) Ibid., referring to Dalloz, Nouveau Code Civil Annote., par. 16.
- (4) Ibid., page 323, referring to French Court of Cassation, 16 March 1870.
- (5) Ibid., 30 January 1884.
- (6) Ibid., 6 January 1890.
- (7) Ibid., referring to Colin et Capitant, Cours Elementaire de Droit Civil Francais, 7th edition, 1931, par. 735.
- (8) Ibid., referring to French Court of Cassation, 17 February 1880.
- (9) Ibid., referring to Baisouson, 23 May 1828.
- (10) Ibid., referring to St. Flor Civil Court, 25 May 1898.
- (II) Ibid., referring to Bordeaux Court, 9 January 1838.
- (I2) Ibid., page 324, referring to French Court of Cassation, 31 July 1844.
- (I3) Ibid., 25 November 1845\* and Angers Court, 14 January 1847.
- (I4) Ibid., referring to French Court of Cassation, 16 June 1880.
- (I5) Ibid., referring to Dalloz, Nouveau Code Civil Annote., par. 127.
- (I6) Ibid., referring to Baudry - Lacantinevie, Traite Theorique et Pratique de Droit Civil, par 1049.
- (I7) Ibid., referring to Dalloz, Nouveau Code Civil Annote., par. 129.
- (I8) Ibid., page 325, referring to Court of Bordeaux, 15 December 1835.
- (I9) Ibid., referring to Dalloz, Nouveau Code Civil Annote., par. 139.
- (20) Ibid., referring to Aubry et Rau, Cours de Droit Civil

Francais, 5th edition, Vol. III, par. 243, page 47.

(21) Ibid., referring to Baudry -Lacantinerie, Traite Theorique et Pratique de Droit Civil, par. 1052.

(22) Ibid., referring to Demolombe, Cours de Code Napoleon, Vol. XII, par. 639.

(23) Ibid., page 327, referring to Aubry et Rau, Cours de Droit Civil Francais, Vol. III, par. 243, page 47.

(24) Ibid., page 330, referring to French Court of Cassation, 30 December 1884.

ARTICLE 77 - Any owner wishing to use natural or man-made water sources, of which he enjoys the right of free disposal, for the irrigation of his land may obtain a passage for such water through the lands lying between the water source and his own land, provided he advances an indemnity for such right of way.

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The right of easement of passing the water in the land of others, which is intermediate between the land and the water, has been created for the benefit of agricultural lands only. Therefore, it is not possible to demand a passage for water intended for industrial, domestic or ornamental needs. <sup>(1)</sup>

This right of easement is exercised on any land to which the water is to be supplied, no matter what kind of land it is: whether a pasture or destined for cultivation or to be a garden, <sup>(2)</sup> regardless of how small it is.

A dispute arose as to the possibility of using the water after the irrigation; such as directing it to a mill. Some jurists have admitted that, on condition that it would not aggravate the right of easement. <sup>(3)</sup> Some, however, have disagreed. The first opinion is the more prevalent.

The passage of water may not be demanded except by the owner of the land; not by the persons who have only the right of usufruct therein, such as the farmer or the usufructuary.

The benefit of this article is not restricted to the owner adjacent to the water course, but it is benefited from by the persons whose real properties are not on the water course and who have acquired the right of disposing of the water according to a renunciation from individuals, or by a



concession from the government for the purpose of irrigating  
their lands. <sup>(4)</sup>

In order to obtain the passage for the water, the owner must have the right of disposal of the water. It makes no difference whether this water is emanating naturally and directly from the earth, or it is brought to the surface of the earth by an artificial means. Moreover, no matter what the source of this water is, whether it is coming from a natural water course, a reservoir, a swamp, or whether it is rain-water accumulated by a technical means (artesian wells, etc.) or coming from sources of water in a navigable river in accordance with a permit from the authorities. <sup>(5)</sup>

In the meantime, the right of easement of the water course discussed in this article may not be instituted on the real properties which form part of the public properties, especially on the public roads in towns or villages. <sup>(6)</sup> The right of passage also includes, besides the passage of water through a canal, the passage for the purpose of maintaining, repairing and clearing the canal. <sup>(7)</sup>

Against the use of this mentioned right of easement, the owner of the land must pay the owner of intermediate lands, an indemnity according to the proportion of the actual damages. He must pay the price of the land in which the course was taken, and the land annexed to it in order to make possible the passage thereon for the maintaining and cleaning of the canal, together with the damage which occurred to the

intermediate lands as a result of constructing the canal. (8)  
The indemnity may not be paid in annual installments; it must  
be paid in full at one time and before commencing the work. (9)

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(1) Yaken, Zouhdi op. cit., Vol. I, page 331, referring to French Court of Cassation, 29 June 1859 and Aubry et Rav, Cours de Droit Civil Francais, 5th edition, Vol. III, par. 241, page 28.

(2) Ibid., referring to Orleans, 27 November 1885.

(3) Ibid., referring to Baudry - Lacantinerie, Traite Theorique et Pratique de Droit Civil, par. 874.

(4) Ibid., referring to French Court of Cassation, 29 May 1877.

(5) Ibid., referring 29 March 1778.

(6) Ibid., referring to Limoge Court, 1 March 1881.

(7) Ibid., referring to Baudry - Lacantinerie, Traite Theorique et Pratique de Droit Civil, par. 876.

(8) Ibid., referring to Dalloz, Dictionnaire de Droit Civil, par. 60.

(9) Ibid., referring to Rouen Court, 20 August 1873.

ARTICLE 78 - The said owner may also obtain permission, against payment of an advance indemnity, to have the water flowing from his land after irrigation pass through neighbouring lands.

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Care should be taken that this article is not considered merely a reiteration of Article 59. The difference lies in that Article 59 was laid down for the water flowing naturally with the hand of man having no contribution thereto. This Article (78) was laid down for the water ~~flowing~~ flowing from the irrigated land to the lower land, disregarding its source, whether natural or artificial. <sup>(1)</sup> It differs from Article 59 in respect of the indemnity imposed by Article 78 for the owner of the lower land. There is another difference as well. The court has the right to burden the one who benefits from the canal, in which the water of his land flows after irrigating it, to the lower land, the expenses of the necessary works for lessening the damages occurring from the course of water, as much as possible, and which occurred by applying the provisions of this article.

The courts, according to the conditions, shall decide as to the permit of benefit<sup>t</sup>ing from the flowing of irrigation water to the lower lands, and shall have a vast power of estimation in this respect. <sup>(2)</sup> The indemnity due to the owner of the lower land depends upon the occurrence of an actual damage to him. <sup>(3)</sup>

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(1) Yaken, Zouhdi op.cit., Vol. I, page 333, referring to Bordeaux, 1st August 1864.

(2) Ibid., referring to Demolombe, Cours de Code Napoleon, Vol. XI, par. 226 and Dalloz, Dictionnaire de Droit Civil, par. 618.

(3) Ibid., referring to French Court of Cassation, 21 February 1894 and Baudry - Lacantinerie, Traite Theorique et Pratique de Droit Civil, par. 878.

ARTICLE 79 - Due account being taken of the regulations concerning water pumps, the owner of any land adjacent to a watercourse who wishes to use the water for the irrigation of his land may obtain, against payment of an advance indemnity, permission to support the technical installations necessary for the setting up of the pump against the land facing his own on the other side of the stream.

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Refer to the comments on Article 80 of this Code.

ARTICLE 80 - If the owner of the land against which the said technical installations are to be supported requests the use of the dam, he shall be required to pay half the amount of the constructions and maintenance costs, and shall not, in such a case, be entitled to any indemnity whatever on account of the support of the dam against his land, but shall be required to refund any indemnity he may have received.

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This article and the previous Article 79 were derived from the first article of the French Law dated 11 July 1847, which stipulated that the owner of the land bordering an unnavigable water course should bear the barrages and the technical construction<sup>s</sup> put up by the owner of the real property bordering the water course opposite to him, in order to use the water for irrigating his land; because, in order to bring the water in the irrigation canals he must raise the level of the river. The Law of 1847 allowed the owner to demand from the court a permit to construct barrages on the opposite bank against a fair and advanced indemnity.

It can easily be perceived at first sight, the difference between the right of easement of barrage and the right of easement pertaining to the water course itself; because the owner in front of whose land the constructions were put up, has the right to demand its common use, against bearing half of the construction and maintenance expenses.

It should be noted that the agricultural benefit was kept in view in the use of the constructions and barrages. Therefore the owner of the adjacent land shall not be obliged to bear them

(1)  
if they were meant for industry.

The provisions of Article 79 may not be benefited from unless the claimant proves that he has an actual benefit relevant to the irrigation of his land, and that it does not do great  
(2)  
harm to the other lands.

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(1) Yaken, Zouhdi op. cit., Vol. I, page 334, referring to Colin et Capitant, Cours Elementaire de Droit Civil Francais, 7th edition, 1931, par. 727.

(2) Ibid., referring to French Court of Cassation, 11 August 1880.



ARTICLE 81 - Any owner wishing to improve his land through the use of any drainage methods may establish water conduits, either above or underground and against payment of an equitable indemnity in advance, across the lands lying between his own and some water-course or any other water trench. This particular easement obligation shall not be imposed on dwellings, yards, orchards, parks or enclosed spaces adjacent <sup>to</sup> habitations.

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This article does not differentiate whether, by improvement of the land, is meant the agricultural exploitation or otherwise, the matter being different in the previous articles. It also, does not take into consideration the kind of water and the source thereof. (1)

Some jurists have established that Article 81 does not apply if the water has stagnated in the land by the act of the owner. This opinion, however, is not prevalent. (2)

The right of easement provided for in this article is granted to any owner who claims it, by fulfilling the legal conditions, contrary to the right of easement of the water course and barrages. The courts shall not have the right to reject the granting of this right on the grounds that the benefits expected do not equal the damages which might happen to the intermediate land. The courts shall only fix the place and the manner of using this right.

This right shall be exercised, disregarding the source of the water, whether it is running naturally or resulting from works carried out by man for the benefit of irrigation. This right shall also be benefited from in the lands preserved for the

extraction of minerals, because Article 81 is not solely applied to agricultural exploitation. However, it does <sup>not</sup> include the lands located ~~in~~ towns, but only the agricultural lands. Therefore, the demand to distribute the water resulting from a vault (cellar) on which a house is erected, is rejected. Also, the houses, yards, orchards, and the gardens close to the dwelling houses are excluded from this right. (3)

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(1) Yaken, Zouhdi op.cit., Vol. I, page 335, referring to Dumont et Colt de Sainte, Vol. II, par. 498.

(2) Ibid., referring to Dalloz, Dictionnaire de Droit Civil, pars. 64, 65 and 66.

(3) Ibid., page 336.

ARTICLE <sup>82</sup><sub>A</sub> The owners of the neighbouring lands or the lands through which the water flows shall be entitled to use the installations described in the previous Article for the drainage of their lands. In such cases, they shall be responsible for:

- (1) part of the cost of such installations, in proportion to the usefulness to them thereof;
  - (2) the expenses entailed by any modifications that may be necessary to enable them to exercise the said right;
  - (3) their share of any eventual costs for the maintenance of such installations, which shall become joint property.
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ARTICLE 83 - All disputes arising from the institution or use of such easement rights, the delimitation of water passages, the carrying out of drainage work, or questions relative to indemnities or maintenance costs, shall be referred to the Peace Judge (Magistrate) of the district who must, in rendering judgment, try to reconcile between the interests of the enterprise and the respect due to the right of ownership.

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The law has empowered the judge to reconcile, in connection with the use of water, between the interests of the right of easement and the respect due to the right of ownership. The judge, however, shall act in this matter within the limits of his competence, <sup>in order that he will not interfere in the competence</sup> relating to others, such as the administrative authorities who have a legal interest in the matter of water.

The legislator, thus, has allowed the judge to sacrifice very little of the rights relating to the right of ownership in favor of the agricultural lands. This indicates that the absolute enjoyment of ownership has not been limited. Article 544 of the French Civil Code justifies this position. (1)

It should be noted that the power of the judge in reconciling between two conflicting interests may be exercised when there is no special agreement between the owners. If there is one between them for the usufruct in a fixed and definite manner, it shall be effected on condition that this will not interfere with the public interest. This is because the agreement is the legal result of competent contracting parties.

The courts shall also fix the quantity of water which every owner has the right to dispose of. They shall order the retention or removal of the works carried out by one of the owners according to their injuriousness to the other owners. However they cannot grant a person an excess quantity of water, or entitle him to change the natural water course. (2)

In the disputes, the courts have absolute power, and their discretion shall not be subject to the control of the Court of Cassation. They should also make recourse to experts in order to justify their decision. (3)

The agreements between the owners for benefiting from the water, called also individual regulations, are those laid down by the owners on a water course and not issued by the public authority. These may result from a contract or from an agreement between owners themselves. (4)

If an obscurity or ambiguity arises in the contract, it will be up to the courts to interpret it. (5) The provisions of the contract must be complied with if it is formal and explicit, and the courts may not modify its purport. (6) The person who acquired a right of benefiting from the water by prescription, or from the allotment by the head of the family must abide by these individual regulations. (7) (8)

The local regulations of water are those laid down by the administrative authority for the entire water course or for a part thereof. (9) These are not within the judicial authority control. (10) They must be applied without any interpretation (11)

because this is relative to the authority which issued them.

The administrative authority, however, when drawing up a local regulation, may, contrary to the judicial authority, modify and change the local individual regulations themselves, (12) whether the right of benefiting from the water is by a contract or by any other reason. (13) When there are local regulations, the courts shall not have the right to hinder the execution thereof, but they may order that general and necessary means be taken to point out for every owner the exercise of his right in the water course. (14)

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(1) Yaken, Zouhdi op. cit., Vol. I, page 339, referring to Article 11 of this Code.

(2) Ibid., page 342, referring to French Court of Cassation, 11 May 1868.

(3) Ibid., referring to Duranton, Cours de Droit Français, Vol. V, pars. 216, 217 and Tolle, Vol. III, par. 136.

(4) Ibid., page 342, referring to French Court of Cassation, 20 January 1840.

(5) Ibid., referring to Baudry-Lacantinerie, Traite Theorique et Pratique de Droit Civil, par. 862.

(6) Ibid., referring to French Court of Cassation, 23 May 1891.

(7) Ibid., 19 December 1882.

(8) Ibid., 4 June 1834.

(9) Ibid., page 343, referring to Aubry et Rau, Cours de Droit Civil Français, 5th edition, Vol. III, par. 246.

(10) Ibid., referring to French Court of Cassation, 2 March 1868.

(11) Ibid., 26 January 1841.

(12) Ibid.

(13) Ibid., 3 August 1863.

(14) Ibid., 6 April 1906.

CHAPTER III  
CONTRACTUAL EASEMENT

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ARTICLE 84- Owners shall be entitled to create any easement rights on, or for the benefit of, their lands, provided such rights be imposed on, or in favour of, a particular land, not person, in default of which such rights shall be deemed as being illegal.

The use and extent of such easement rights shall be determined in the contract whereby they are instituted, in default of which, application shall be made of the rules set forth hereunder:

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It was stated when commenting on Article 57 that the rights of easement result <sup>either</sup> from the natural situation of places, or from obligations imposed by the law or from agreements concluded among the owners of real properties. The first two have already been discussed. The third is being dealt with in this chapter.

As in the right of easement there is a restriction of the right of ownership, it is not permissible to be instituted except by the owner who has the right of disposing of the real property. The co-owner may not institute a right of easement on the real property, without the consent of his co-owners. If he does, the right may not be exercised except with the permit of the remaining co-owners or when the real property is divided among them and the part on which the easement is established is allotted to him. In this case the right of easement, on the real property or on the part allotted to him, is valid. <sup>(1)</sup> The owner is entitled to



establish the right of easement under a dependant or annulling condition, but it will be dependant on the realization or the failure of the condition. (2) The right of easement established by one of the heirs without the consent of the rest is similar to that in the case of co-owners in the property. It is not sufficient that the person who arranges the right of easement is an owner, but he must be competent of the disposal thereof. Thus, the non-compos mentis and the minors cannot establish such a right. If the easement was made by way of a donation, it is provided that the donor fulfills the special conditions required for the validity of the donation. (3)

However, if the establishment of the easement is for the benefit of the real properties of the minors, then they should accept it, because this will increase the value of their real properties. It has been decided that the possessors in good faith or bad faith and the managers of properties of others have to accept the right of easement in this case. Similarly the co-owner before taking the consent of his co-owners must accept the right of easement under these conditions.

The restriction laid down in this article on the owners of the real properties when instituting the rights of easement are three:

- 1 - The easement must not be given a preference to one real property over another.
- 2 - The established right of easement must not be violating the public order.
- 3 - The easement must not be established against a person or for the benefit of a person, but must be established for the benefit of a real property on another real property.

The first and the third conditions which were derived from the French Civil Code (Articles 638 and 686 respectively) were laid down in France in order to put an end to the privileges of the nobles during the epoch of feudalism, when the landlord had a kind of predominance on the lands of others; receiving therefrom a certain pay, and where personal considerations had been in view before the French Revolution exterminated these privileges.

The second restriction which is derived from Article 686 of the French Civil Code, is meant to prohibit putting down conditions contrary to the public order; such as to establish a permanent right of easement which may not be disposed of. This was discussed previously in detail.

The charge established on a real property must not be benefited from except by the owner of the real property for which the right of easement is established, in his capacity as an owner. Moreover the right of easement shall not be established except for the benefit of the real property and not for its improvement or its embellishment. Also, the right of easement shall be benefited from by every one who owns the real property for which this right is established. (4)

Therefore, the tenant or the farmer may not establish, on the rented real property, an easement for the benefit of the neighboring real property, because their right is personal and temporary. If they do so, this will necessitate the extinction of the easement they arranged by the extinction of their right in the rented real property.

The easement must be established on a real property and not on a person. <sup>(5)</sup> This means that the person is not obliged to carry out special obligations due to the fact that he has become the owner of a certain real property, by way of spending part of his personal efforts for the benefit of his neighbor or his neighbor's real property.

If the right of easement is legal, then the law shall determine its scope. If it is conventional, then recourse should be taken in the deed of its creation in accordance with the provision of the second paragraph of this article. If there is no deed, the provisions of Chapter Four from Article 85 thru Article 89 shall be complied with. In case of dispute, the judge shall decide the extent of the easement according to the intention of the contracting parties. <sup>(6)</sup> He shall not deviate from the intentions of the contracting parties fixed in the agreement, by reason of interpretation. <sup>(7)</sup> In case of doubt, the liberation of the real property from the easement shall be considered, i.e. the judge shall consider the side of the real property burdened by the easement. <sup>(8)</sup> If the right of easement is acquired by prescription, then its possession upon which the prescription is based shall fix its use and its limits. <sup>(9)</sup>

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(1) Waken, Zouhdi op. cit., Vol. I, page 366, referring to Dalloz, Repertoire Pratique, pars. 651 and 652, page 770.

(2) Ibid., referring to Duranton, Cours de Droit Français, Vol. V, par. 545.

(3) Ibid., referring to Dalloz, Repertoire Pratique, pars. 555-660.

(4) Ibid., page 367, referring to Art. 1019 of the German Code.

(5) Ibid., page 369, referring to Colin et Capitant, Cours Elementaire de Droit Civil Francais, 7th edition, 1931, par. 818.

(6) Ibid., page 371, referring to French Court of Cassation, 6 July 1891.

(7) Ibid., referring to Dalloz, Repertoire Pratique, par. 761.

(8) Ibid., par. 765.

(9) Ibid., referring to French Court of Cassation, 1 July 1861.

CHAPTER IV

CONDITIONS FOR THE EXERCISE OF EASEMENT RIGHTS

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ARTICLE 85 - Anyone instituting an easement right shall be deemed as having implicitly granted all that is required for the exercise of such right. The right of drawing water from a spring, for instance, automatically involves the right of way on the land wherein the spring is situated.

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The easement mentioned in the above article is called the "consequential easement." Thus, a person who has a right of easement on a source of water, shall be entitled to benefit from all the rights necessary for the exercise of his right to bring the water by a canal (as it was decided by the French Court of Cassation on 25 May 1884). Furthermore, the person who owns a canal on which he has a right of easement to bring the water to his factory, has the right to clean it and cast on its sides what comes out of it (French Court of Cassation on 21 May 1860). The courts shall have the power of estimating as to the use of the sides of the canal, and the necessary amount of the consequential easement of benefiting from the canal, and whether it is necessary or not. The necessities shall be estimated according to their amount; e.g. the right of passage does not include the right of view. The owner of the real property establishing on a real property a thoroughfare for others, is entitled to erect on his real property a building and open in it windows, provided that all this shall not effect the thoroughfare preserved for the others (French Court of Cassation 14 August 1851).

In all circumstances, it shall be provided that the consequential easement be necessary for benefiting from the original easement. The consequential easement being merely useful, or making the original easement easy, is not sufficient. (1)

The distribution or the taking of water does not result in a right of thoroughfare, if the exercise of this right was but to make the exercise of the original easement easier. (2)

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(1) Yaken, Zouhdi op. cit., Vol. I, page 372, referring to Dalloz, Repertoire Pratique, par. 768, page 777.

(2) Ibid., referring to Bordeaux Court, 20 December 1836, and Tolie, Vol. III, par. 646.

ARTICLE 86 - The owner of the dominant land shall be entitled to set up on the dominated land any installations necessary for the exercise and maintenance of his easement rights.

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By the term dominant real property is meant the real property for the benefit of which the right of easement is established. It is the translation of the French term "fonds dominant". The purpose of this article <sup>(1)</sup> is that the works which are necessary for the exercise of the easement; such as the construction of a road or a water course or a bridge or a wall, or the repairs thereof, may always be done by the owner of the real property <sup>(2)</sup> for which the right of easement is established.

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(1) Yaken, Zouhdi op. cit., Vol. I, page 372 referring to Dalloz, Repertoire Pratique, par. 763.

(2) Ibid., page 373, referring to Article 697 of the French Civil Code.



ARTICLE 87 - The cost of the installations necessary for the exercise and maintenance of the easement right shall be borne by the owner of the dominant property.

The expenses of the constructions, carried out by the owner of the real property for which the easement is established, are borne by him and not by the owner of the other real property burdened by the easement; unless otherwise the deed of creating the easement provides for the contrary. This article corresponds to Article 698 of the French Civil Code. The rule established by it is general and without exception. (1) These expenses are borne by the owner of the real property for which the right of easement is established, even in the case of changing the place of easement because of the modification occurring to locations. (2)

It is undeniable that the agreement upon the expenses being borne by the owner of the real property on which the right of easement is established, is admissible and valid, as provided for in Article 698 of the French Civil Code. If the owners are more than one they shall share the expenses among them of the works they construct on the real property on which the easement is established. (3)

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(1) Yaken, Zouhdi op. cit., Vol. I, page 373, referring to Aubry et Rau, Cours de Droit Civil Francais, 5th edition, Vol. III, par. 253, and French Court of Cassation, 16 March 1869.

(2) Ibid., referring to Dalloz, Repertoire Pratique, par. 773, and French Court of Cassation, 11 December 1861.

(3) Ibid., referring to French Court of Cassation, 2 Feb., 1825.

ARTICLE 88 - If the dominant property is partitioned, the  
E \_\_\_\_\_ easement right shall continue to be enjoyed by  
each of the divisions without increasing the onus borne by  
the dominated property on this account. The right of way,  
for instance, must be exercised by all of the co-owners along  
the same route.

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The owner of the land on which an interrupted right of  
easement is established; such as the right of thoroughfare,  
may not object against the passage of several persons if  
this land was owned afterwards by several persons, on the  
grounds that the charge in easement is aggravated if they  
were passing in the same place. This is because the owner  
of the easement at the time of its constitution is considered  
to have noticed the occurrence of this aggravation and implied  
his consent thereto in case the real property is partitioned  
or sold to several persons.<sup>(1)</sup> Thus, damages would not incur  
on the owners of the right of easement if they sold or part-  
itioned their real properties.

But if the easement was based on a deed in which the  
one who is entitled to use the passage was mentioned, it is  
not admissible to overlook what is in the deed. The same  
measure is followed if the easement holder has the right to  
take a certain quantity of water daily, weekly or monthly.  
Thus it is not admissible either to change the quantity by  
taking more than is mentioned in the deed, or to change the  
fixed time of taking it.<sup>(2)</sup>

If the right of easement may be divided, and will not aggravate with damages the real property on which the easement is established, it will be divided among the owners of real rights. (3) If it appears that the easement was of no benefit except for one part or for several parts, it shall be judged extinct in relation to the other parts.

If the real property on which the easement is established is divided, this right shall remain as it was before. (4) In order to know whether each part shall remain burdened by the easement, the manner in which the right was exercised shall be referred to. For example, if the right of easement of not building on a certain part of the land exists, nothing shall change in the right of easement. But, if for the use of easement a certain piece of land was set aside, such as the use of a road or a well, then the division of the real property burdened by the easement shall necessitate releasing the other parts of the real property from this right of easement. (5)

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(1) Yaken, Zouhdi op. cit., Vol. I, page 374, referring to Demolombe, Cours de Code Napoleon, Vol. XII, pars. 860 et. al.

(2) Ibid., referring to Par Dess., Vol. I, par. 64.

(3) Ibid., referring to Baudry-Lacantinerie, Traite Theorique et Pratique de Droit Civil, par. 1138.

(4) Ibid.

(5) Ibid., referring to Dalloz, Repertoire Pratique, par. 833.

ARTICLE 89 -It is illegal for the owner of the dominated  
[ ] property to perform any act with the object of  
restricting the exercise of easement rights or of rendering  
such exercise more difficult.

It is therefore illegal for any such owner to change  
the state of the premises, or to transfer the easement right  
to a new place.

However, if the easement right in its old place has  
become more inconvenient to the owner of the dominated property,  
or prevents him from carrying out useful repairs, he may offer  
to the owner of the dominant property a new place having the same  
facilities as the old one for the exercise of his rights, and  
the latter shall not be entitled to refuse the offer.

Similarly, any person enjoying an easement right shall  
be entitled to exercise the same only in accordance with the terms  
of his contract, and shall not be permitted to perform, either  
on his own or on the dominated property, any act tending to  
aggravate the onus imposed on the said property.

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The stipulation of the first paragraph of this article is  
general and is applied to all kinds of easement. It comprises  
the owner who benefits from the legal easement; such as the  
right of thoroughfare in case the real property is not connected  
with the road.<sup>(1)</sup> It includes, as well, the right of easement  
resulting from the effect of the contract or of the prescription.

It was previously said that the owner of the real property on which the easement is established in connection with the right of thoroughfare, has the right to surround the building with a wall or to raise it above the place of thoroughfare, on condition that this shall not effect the use of the thoroughfare.(2) Now, on the contrary, he may not cultivate the thoroughfare(3) **BUT HE MAY CULTIVATE ON** either side of it, and also, he may erect a wall to prevent the cattle of the owner of the real property for which the easement is established from damaging the plants during their passage (Court of Cannes 1859). However, he is not allowed to erect things which would hinder the passage in ~~the passage in~~ the thoroughfare or to make it difficult,(4) if he does, he shall be ordered to remove the obstacles.(5)

Regarding paragraph 2 of this article, the judge will estimate this all, but the expenses will be borne by the owner of the real property burdened by the easement, i.e. the one who demands the change.(6)

If the changes, as stated in the last paragraph of this article will not result in a substantial damage, then the owner of the right of easement may carry out the change, as the prohibited change is that which increases the charge on the real property burdened with the easement.(7)

The one who has the right to pass on foot is not permitted to pass with carts or wagons. Also, the owner of the predominant real property may not change the place of easement without the consent of the owner of the real property on which the right of easement is established.(8)

The fundamental principle of the easement is to exercise it in the benefit of the real property for which this right is established. However the French courts<sup>(9)</sup> have made it admissible to use the easement for the benefit of other real properties if harm would not result therefrom. It happened once that the owner of a real property burdened by easement raised a case to the fact that the water was used for the benefit of other real properties than those for which the easement was established. The court dismissed the plea on the grounds that there would not arise aggravation on the real property in relation to the quantity of water taken or to the manner of its passage.

If the easement is assigned for a fixed condition it shall not be permitted to surpass it. However, if it is general, it may be used for all special needs.<sup>(10)</sup> If the holder of the right of easement on another real property violates the obligation imposed upon him, then the courts shall order the removal of the works and their return to their original condition, and they may order an indemnity to be paid if necessary.<sup>(11)</sup>

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(1) Yaken, Zouhdi op. cit., Vol. I, page 375, referring to Metz Court, 19 January 1858 and Court of Po., 10 November 1862.

(2) Ibid., page 376, referring to French Court of Cassation, 27 October 1890.

(3) Ibid., referring to Dalloz, Repertoire Pratique, par. 804.

(4) Ibid., referring to Court of Po., 10 November 1862.

(5) Ibid., referring to Dalloz, Repertoire Pratique, par. 813.

(6) Ibid., referring to Dalloz, Repertoire Pratique, par. 821 et. al.

- (7) Ibid., page 377, referring to French Court of Cassation, 20 June 1904<sup>x</sup> and 10 May 1905.
- (8) Ibid., referring to Article 701 of the French Civil Code.
- (9) Ibid., referring to French Court of Cassation, 20 Nov. 1872.
- (10) Ibid., page 378, referring to Baudry-Lacantinerie, Traite Theorique et pratique de Droit Civil, par. 1134.
- (11) Ibid., referring to Planiol, Ripert et Picard, Traite Pratique de Droit Civil Francais, les Biens, 1926, par. 985.



CHAPTER V

EXPIRY OF EASEMENT RIGHTS

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ARTICLE 90 - Easement rights shall cease to exist at the time  
[ ] of abolition thereof. Such abolition shall take  
[ ] place by virtue of contracts or court decisions.  
Also, the chairman of the court may order the abolition of ease-  
ment rights if such rights have become useless or inapplicable.

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The rights of easement shall become extinct for any of the following reasons:

1 - By cancellation. This will be by the effect of agreements. Because it is permissible for the owner of the predominant real property, if he has legal competence, to extinct his right of easement. This extinction must be so express that it shall not be taken by pretext nor by conditions. For instance, if the owner of the real property on which the easement is established, carried out works and the owner of the predominant real property kept silent, his silence shall not be interpreted as a forfeiture of his right, as long as the period of prescription did not lapse, during which he may express his desire. (1)

The extinction of the right of easement occurs by the abolition, cancellation or revocation of the contract established therefor. This takes place by the conditions or judgments arising therefrom. (2)

The forfeiture may be express or implied, without the need of the acceptance of the owner of the real property burdened by the easement. (3)

It involves the easements established by individuals as well as those constituted by law for the benefit of the individuals, such as the easement established for the land which is surrounded on all its sides without having any access to the public road.

As for those easements established for the public benefit, these are considered as a part of the public properties. As such, it is neither permissible to dispose of them, nor for the Government to renounce them, because it is the law which created them and, therefore, a law must abrogate the former legislation in order to cancel them.<sup>(4)</sup>

2 \* By uselessness or unenforceability. This happens when the use of the right of easement becomes impossible because of a change occurring to the real property for which the right of easement is established or to that burdened by it. For example, when the real property, for the benefit of which the right of easement is established, is demolished. As for the deficiency in the right of easement, this has no bearing in the matter because the partial deficiency in the right of easement shall not invalidate it or extinct it. This is because in this case the right of easement extincts from the part which cannot be used, and remains for the other part.

This happens also when a change in the exercise of the easement occurs, if this would not result into causing damage or aggravation.

It is assumed in the extinction of the right of easement, when it becomes useless or inapplicable, that this occurs by a force majeure causing a material impossibility to use the right, or by reason of one of the owners or others carrying out an action which results in the extinction of the right.

But if the use stopped by an illegal or unlawful reason, through the act of the owner of the real property burdened by the easement or by others, this would not necessitate its extinction. Thus, if it were possible to return the condition as it was, then the owner of the real property burdened by the easement is forced to do so. Otherwise the right of the titular of the easement shall be transformed into an indemnity in compliance with the principles of the general law.<sup>(5)</sup> The claim of the indemnity is valid against the Administrative authority if the right of easement becomes extinct in an illegal manner.<sup>(6)</sup>

To summarize, it shall be said that the right of easement extincts when its subject-matter extincts..... In other words, if the thing changes into another thing.<sup>(7)</sup>

The right of easement shall become extinct when the two real properties, the one for which the right is established and the one burdened by it, unite in one. That is to say, when the owners of the two real properties are unified in one and the same person. This is in accordance with the Roman rule which says that no one shall have a right of easement on his own property. This is provided for in Article 705 of the French Civil Code but not mentioned in this article (Article 90).

This occurs by purchasing the real property or taking it by preemption or succession or, by the forfeiture of the right by its titular.

If the owner of the real property remains not benefitting from the advantages established for his right, this shall be considered as a presumption that it is useless for its titular, or that he has renounced the benefit therefrom. Therefore, the right of easement shall become extinct by the extinctive prescription because of non-use.

It must be noted that the prescription does not apply to the rights inscribed in the Land Register, but it is assigned to the places which are not yet registered therein.

On the other hand all rights of easements must be registered in the Land Register, as well as all changes occurring to the boundaries. Also, those rights of easements resulting from a construction or from the advancement of roads, drainages, canals and railroads, in order that they will be subject of protest towards others, must be registered in the Land Register. <sup>(8)</sup>

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(1) Yaken, Zouhdi op. cit., page 378, referring to French Court of Cassation, 6 November 1889.

(2) Ibid., referring to Colm et Capitant, Cours Elementaire De Droit Civil Francais, 7th edition, 1931, par. 1019.

(3) Ibid., referring to Baudry-Lacantinerie, Traite Theorique et Pratique de Droit Civil, par. 1173.

(4) Ibid., page 379, referring to French Court of Cassation, 6 November 1889.

(5) Ibid., page 381, referring to Lorand, Vol. VIII, par. 290.

(6) Ibid., referring to Dalloz, Repertoire Pratique, pars. 866 and 869.

(7) Ibid., referring to Demolombe, Cours de Code Napoleon,

Vol. XII, par. 971.

(8) Ibid., page 384.

TITLE FOUR  
MORTGAGE RIGHTS

CHAPTER I

MORTGAGE THROUGH TRANSFER OF PROPERTY  
(REDEEMABLE SALE)

ARTICLE 91 - By the term "redeemable sale", (bai' bi al-wafa')  
or mortgage through the transfer of property,  
shall be meant the sale of a property under condition that the  
seller be entitled to take back the sold property at any time  
or at the end of the assigned period, against return of the  
sale price, and that the purchasor be entitled to take back  
the said price at the time of returning the property.

~~(1)~~ The redeemable sale provided for in this chapter differs  
from the sale, with the choice of redemption, provided for in  
the Lebanese Law of Obligations and Contracts, and which is  
named in French vente a' remèrè. This name has been translated  
to Arabic, however, in the Law of Obligations as "redeemable  
sale." (1)

The bai' <sup>bi</sup> al-wafa (redeemable sale), as defined by this article  
obeys as in the Ottoman Law the rules of a contract by which  
a movable is delivered by a debtor to his creditor, or by a  
borrower to his lender, in guarantee of the debt or loan, and  
permits therefore the forced execution (of the redeemable sale) <sup>(2)</sup>

Refer to the footnote to Article 158 of this Arrete.

It is difficult to see a difference between it and between  
mortgage except that there is no provision for an interest on  
the capital while the other provisions are similar to those

of the mortgage. This appears from the comparison between the redeemable sale and the Real Property mortgage in this Code, but in the Islamic Law the jurists decided that the redeemable sale is, in fact, a mortgage, and that the real property sold, in the hand of the purchaser, is like the mortgage in the hands of the mortgagee. Redeemable sale is not possessed nor can it be usufructed without the permission of the owner and there is no difference between it and between the mortgage in any provision. (3) They have decided that the contractors, though they called it a sale, still their aim was mortgage and was to insure the debt. The moral is therefore in the intention and not in the terms and construction. (4)

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(1) Mushahwar, Amin "Majmu'ah al-nusus al-qanuniyah al-khassah bi-al-tashri' al-'iqariyah wa-bi-nizam al-malakiyah al-'iqariyah fi suriyah wa-lubnan", page 127.

(2) Lebanese Court of Appeal. Decision No. 77, dated July 2,

1941. See Repertoire de Jurisprudence Libanaise, Juridictions mixtes 1924-1946, Tome Premier. Par. 13, page 513.

(3) See Article 118 of the Majallah.

(4) Jami'a al-fatwa on redeemable sale.



ARTICLE 92 - Any saleable property may be sold with right of ~~redemption~~ redemption. A stipulation may be included in the redeemable sale contract to the effect that the seller shall continue to occupy the premises as a tenant.

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The objects fit for sale and which are fit to be sold in redemption are determined by Articles 382 and 385 of the Lebanese Code of Obligations and for the importance of these articles the following abridged statement is appended.

1.- It shall be conditional in the sale that the thing which is sold may be disposed of.

2.- The sold thing shall be owned by the seller at the time of contracting or deemed to be owned by him. His share of the succession may not be sold before the legator is dead. It may not be owned or deemed to be owned but it may usually be possible to be owned by the seller; such as the selling by the merchant of goods which he has not and which he has not yet bought. The sale of the property of others is void except in the following conditions:

a - If the thing sold is fixed by its kind and its sort only. It is not conditional here that the seller should be the owner of the thing he sells at the time of contracting, but that it is necessary to be the owner thereof at the time of delivery.

b - If the owner permits it.

c - If the seller acquired later the right of ownership of the thing sold.

But if the owner refuses to allow the sale, the seller guarantees indemnifies to the purchaser if he was aware

that he does not own the thing sold and the purchaser was ignorant of that. The seller has no right to claim the invalidity of the contracts on the plea that the sale was concluded on the property of another.

3. - The sale should be fixed. It is allowed to the partner in the property held in partnership, to sell his common share in the property for the purpose of settling an account, as long as it has been allowed to him to have it mortgaged under the provision of Article 837 of the Lebanese Law of Obligations.

The Bai' al-Istighlal (sale of the fructification) is the sale of the property provided that the seller takes it on lease as was stated in Article 119 of the Majallah. The sale of the fructification acquires the nature of sale in view of certain judgments; as the purchaser can lease to the seller or to another, the real property which he purchased by way of fructification and that he can benefit from its rank. Thus it acquires the nature of a mortgage as it cannot be completed except by receipt of money. In the case of the inability of the purchaser to sell to another the thing sold and as he is more eligible to it ~~than~~ <sup>than</sup> all other contestants, it was stated in Article 403 of the Majallah that all other contestants have no right to interfere with the sale unless the purchaser has received his debt.

Whereas the owner of the right of usufruct has all the rights of an owner in whatever he owns and in the extent of his ownership, he has the right to enjoy the thing directly or indirectly such as the rent or partnership or farming etc..

He has the right to mortgage it in all kinds of mortgage and to effect thereon rights of easements and to dispose with the sale and the amount of sale and any other allowable disposals by law capable to be effected in the properties of which is the redeemable sale. However all these disposals do not last except during the lasting of the right of usufruct and must end when it ends, but the rights of easement shall not be sold independently from the real property as they are fixed for its benefit and they are governed by the sale of the real property, they being deemed of the accessories thereto.(1)

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(1) Yaken, Zouhdi, op. cit., Vol. II, pages 11-14.

ARTICLE 93 - During the period of the contract, neither the seller nor the buyer shall be entitled to transfer, lease or impose real rights on the property without the mutual consent of the two parties.

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The redeemable sale has the jurisdiction of a mortgage in every aspect of it. It is not for either the seller or the purchaser to effect a redeemable sale to another without the permission of the other. Article 397 of the Majallah has indicated this also. This jurisdiction involves the mortgage also as it will appear later.(1)

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(1) Yaken, Zouhdi op. cit., Vol. II, page 14.

ARTICLE 94 - A stipulation may be included in the contract to the effect that the purchaser shall be entitled to a certain particular benefit from the property without charge, or to avail himself of part of the proceeds thereof.

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The jurisdiction of the redeemable sale is that of the mortgage. The purchaser shall not benefit from the crops for himself without making payment therefore, unless the two parties have contracted to that in the deed.<sup>(1)</sup>

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(1) Yaken, Zouhdi op. cit., Vol. II, page 15.

ARTICLE 95 - In default of an agreement to the contrary, the purchaser shall be responsible for the maintenance of the property and for the carrying out thereon of useful and necessary repairs, and shall be entitled to deduct, from the amount of the yield, all expenses and costs entailed by maintenance and repair work.

When the purchaser takes over the property, he shall become responsible towards the seller for the produce yielded by the property, unless there be an agreement to the contrary. The purchaser shall deduct, each year, the amount of the produce from the principal amount of his debt, after deducting from the said amount of the produce that part (if any) of the yield allotted to him by the contract, and also any amounts spent by him on the property.

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The first paragraph of this article has created an obligation on the purchaser to keep up the maintenance of the real properties and to look after it just as the head of the family keeps up his affairs or the owner keeps up his property.(1)

The purchaser is responsible to the seller for the crops he gathered unless there exists a stipulation contrary to that, making the whole or part of the crops for the purchaser as was stated in the commentary to Article 94. Then the crops must be deducted from the amount of debt after deducting therefrom, when necessary, the lot of the purchaser agreed upon therein, in accordance with the terms stipulated in the deed, together with the costs which he has defrayed on the real property and which

are necessary and essential ~~to~~ thereto.(2)

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(1) Yaken, Zouhdi op. cit., Vol. II, page 17.

(2) Ibid.



ARTICLE 96 - The purchaser shall be held responsible for the damage or the destruction caused to the property in his possession, within the following conditions:

The amount of the damage or destruction shall be deducted from the principal amount of the debt. If the said amount is equivalent to, or in excess of, the sale price, then the sale shall be abolished automatically, and the balance shall be paid by the purchaser, unless the damage or destruction has occurred through unavoidable circumstances.

If an insured property is damaged or destroyed, the insurance indemnity shall be set aside by priority for the settlement of the debt, and the debtor shall then be relieved of part of the debt equivalent to the amount of the indemnity.

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We said in the explanation of the previous article that the purchaser by redemption must maintain the sold real property, and take care of its maintenance; such as the care of the owner with his property, otherwise he is responsible and his responsibility will result from any slight mistake.(1) If the real property sold by redemption is destroyed by a force majeure, then this destruction is borne by the seller because the purchaser is not asked about the destruction of the real property or its damage, unless it has resulted from his neglect. But the damage or the destruction which result from the effect of a force majeure has no relation to the purchaser, but he has to prove that, in order to relieve himself of responsibility.

The damage and the ruin shall be considered as resulted by a force majeure if it had happened by the act of the seller or by the act of a stranger, and the purchaser will not be considered as responsible for it civilly.(2)

If the damage has occurred by the act of the purchaser and the amount of the sold exceeded the price of the purchased then the sale will be directly cancelled. The purchaser must pay the amount of the excess, and if the damage occurred by the act of the debtor, then the creditor shall have the right to claim his debt with damages and losses, and the debt shall fall due if it were delayed.(3)

If the destruction has occurred by the act of others, then the creditor shall have the right to claim the amount due to him, and if the value of the real property exceeds the amounts of the debts he must remit the excess.(4)

The creditor purchaser shall be considered as responsible for the destruction of the real property if he shall fail to hand it over to the seller after warning him in the manner prescribed by law.(5)

The sale by redemption grants the purchaser a privilege on the price of the sold real properties until he recovers the debt. If the real property is destroyed by an accident or by the act of others, then the right of the privilege shall be transmitted to the indemnity which is payed to him, or to the amount of security if the real property was insured.

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(1) Yaken, Zouhdi op.cit., Vol. II, page 18, referring to Guillord, par. 188 and Aubry and Rau, par. 433.

(2) Ibid., referring to Baudry and Dilluand, par. 138.

- (3) Ibid., referring to Article 113 of the Code of Obligations.
- (4) Ibid., page 19 referring to Baudry and Dilluand, par. 138.
- (5) Ibid., referring to Article 291 of the Lebanese Code of Obligations.

ARTICLE 97- On the death of the purchasor or the seller, the  
[ ] right of abolition shall be taken over by the  
[ ] heirs of the deceased.

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The right of annulment of the sale shall be transferred to the heirs of the purchasor or seller on their death, or the death of one of them. This corroborates the jurisdiction of Article 402 of the Majallah.

There remains the question of the death of the seller before the maturity. Does it allow, to the heirs of the purchasor, to claim the value and to annul the sale on account of death? No.(1)

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(1) Yaken, Zouhdi, op. cit., Vol. II, page 20.

ARTICLE 98 - An act of redeemable sale shall be indivisible,  
[ ] though the amount of the debt be divided among  
[ ] the purchaser's or seller's heirs.

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The redeemable sale, as is the mortgage and the lien, is incapable of being partitioned. The real property in toto guarantees every part of the various parts of the debt.(1)

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(1) Yaken, Zouhdi op. cit., Vol. II, page 20.

ARTICLE 99 - Throughout the period of the contract, the  
E \_\_\_\_\_ seller's creditors shall not be entitled to  
E \_\_\_\_\_ exercise any right over the property before the  
E \_\_\_\_\_ sale price is refunded to the purchaser.

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ARTICLE 100 - If the seller fails to refund the price, then the  
[ ] purchaser shall be entitled to demand the sale of  
[ ] the property for the purpose of recovering his  
[ ] debt from the price of sale.

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Refer to the footnote to Article 158 of this Arrete.

If the seller does not return the value of the real property, the creditor purchaser has the right to claim sale of the real property by public auction, in order to receive his debt from its value. However, he shall not claim sale if he does not possess an irrevocable power of attorney from the debtor, in accordance with the provisions of Article 158, second paragraph, as amended of this Law.(1) It is necessary for him to procure a judgment giving the deed an executive aspect.

If it was conditional to own the property sold by redemption at maturity, and the debt was not settled, the condition becomes null and void in order to protect the debtor. This may cause a field for allowing interest and annul the conditions of owning the real property only, for the deed of sale remains standing.(2) The annulment is connected with the general order. Neither party shall be allowed to renounce it,(3) as it is not permissible. The court shall adjudge it of its own accord.(4)

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(1) Amended by the first Article of Arrete No. 102, dated 6 August 1932. See Al-Majallah al-qadaiyah, Volume 2, page 496.

(2) Yaken, Zouhdi, op. cit., Vol. II, page 22, referring to Deloin and Baudry, par. 127.

(3) Ibid., referring to French Cassation, 4 March 1902.

(4) Ibid., referring to Baudry and Deloin, par. 194.



CHAPTER II

MORTGAGE (ANTICHRESE)

ARTICLE 101 - By the term "mortgage" (Antichrese or Rahn) shall [ ] be meant a certain form of contract by virtue of which the debtor places a property of his in the hands of his creditor, or in the hands of a custodian. The creditor shall be entitled to hold over the property until he receives payment of his credit in full. If such payment is not made, then the creditor shall be entitled to take legal action for the expropriation of his debtor.

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A custodian is a person entrusted with the mortgaged object (security) delivered to and deposited with him by the mortgagor and the mortgagee. (1)

The real property mortgage is a contract in accordance of which the debtor shall put a real property in the hands of his creditor, or in the hands of he to whom both parties have agreed, as a security for the debt. (2)

This contract shall give the creditor the right of holding the mortgaged real property until he has been completely repaid. If the debt shall not be repaid, he shall have the right to recover it from the price of the mortgaged real property, by way of expropriation from his debtor, legally and distinguishingly from other creditors. From this collective definition it is understood that the mortgaged real property may be in the hands of the creditor himself; that is to say, the mortgagee, or in the hand of another person agreed upon by both parties. The mortgaged real property may remain in the hand of the debtor if the creditor has returned it to him or leased it to him as shall come in the explanation of Article 115 of the Code.

Mortgage linguistically is absolute imprisonment, and legally is what was decided by Article 701 of the Majallah. This Code has organized its provisions in a manner which coincides with the foundation of the legal origin.

Mortgage is of two kinds, mortgage of movables and mortgage of the immovables. The French Code has given the term Gage for the mortgage of movables and Antichrese to the immovables.(3) But in Lebanon and in Syria the term mortgage(Rahn) is used to include the movable and the real property. If it is desired to particularize one of them it is said "mortgage of movables" and/or "mortgage of real properties."

The real property mortgage necessitates the actual delivery of the mortgaged real property to the creditor until the settlement of the debt. During this period the creditor shall enjoy the fruits and the profits therefrom, provided that they shall be deducted annually from the interests due. If the profit exceeds the interest it shall be deducted from the capital.

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(1) Majallah, as quoted by Mushahwar, Amin, op. cit., page 169.

(2) Yaken, Zouhdi, op. cit., Vol. II, page 23, referring to Article 765 of the Turkish Civil Code as annotated by Mustafa Rashid.

(3) Ibid., page 24 referring to Article 2071 and 2072 of the French Civil Code.

ARTICLE 102 - It is illegal to assign a mortgage for the  
[ ] purpose of ensuring an obligation for the  
performance or non-performance of an act.

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It is an acknowledged fact that the mortgage is made as a  
guarantee to the settlement of an amount of money.

The subject matter or the place of the mortgage must be  
in the present and not in the future as it is impossible for  
the creditor to appropriate anything which will exist in the fu-  
ture. Is it necessary for the debtor to accomplish his under-  
taking if he mortgaged anything to exist in the future? Yes.  
The debtor shall be obliged to accomplish his undertaking at  
the time the thing starts to exist and until that time the  
mortgage does not exist.(1) The deed is considered a mere  
promise of mortgage if it affects anything which will exist  
in the future.

The mortgagor can be the debtor himself. He should not  
be subject to interdiction or disqualification. A thing can  
be mortgaged as a guarantee for a debt due from a person other  
than the mortgagor.(2) In both cases, however, it is condi-  
tional that the mortgagor should be the owner of the real  
property mortgaged.(3)

The person who mortgaged his real property, in guarantee  
of a debt due from another, is called the "real guarantor" in  
differentiation from the "personal guarantor" as the difference  
between them is great. The undertaking of the real guarantor  
is lighter than that of the personal guarantor.

The personal guarantor under the provisions of Article 1072 of the Law of Obligations is entitled to demand that the creditor sue first the original debtor in his movable and immovable properties. In this circumstance the suing of the guarantor will stop until the execution was effected in the properties of the debtor. But the real guarantor will not meet any obligations except in the amount of the debt for which the mortgage was made and of the subject matter mortgaged only. He shall not undergo any obligation in his other properties and also shall have no right to bring suit against the debtor first; such as the personal guarantor. (4)

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- (1) Yaken, Zouhdi, op. cit., Vol. II, page 39, referring to Baudry, Lacantinerie and De Louan, para. 36.
- (2) Ibid., referring to Articles 2077 and 1099 of the French Civil Code.
- (3) Ibid., referring to the Court of Seine, 30, October 1900.
- (4) Ibid., page 40, referring to Baudry, Lacantinerie and De Louan, para. 12.

ARTICLE 103 - The validity of the mortgage shall be subject  
[ ] to the existence of a validly confirmed debt.

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The mortgage, as is the case with the guarantee, is a subsidiary deed as it functions in guaranteeing a debt. It requires the existence of a real undertaking to be attached thereto, and it stands as a guarantee for its execution. Therefore, the annulment of the mortgage does not necessitate the annulment of the real undertaking.(1)

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(1) Yaken, Zouhdi op. cit., referring to the Lyons Court, 3 January 1873.



ARTICLE 104 - Any saleable property shall be capable of being  
~~\_\_\_\_\_~~ mortgaged.

~~It is illegal to mortgage shares owned jointly~~  
by several persons.

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This article has prohibited in its second paragraph the mortgage of common shares and made it conditional that the mortgage must be distinguishable. Nevertheless, Article 837 of the Law of Obligations had allowed, in its second paragraph, the mortgage of common shares. It explicitly said that "it is allowed to the partner to sell his common share in the ownership held in partnership or have it transferred or mortgaged" (la constituer en nantissement). The second paragraph of the Law of Obligations had modified the provisions of the second paragraph of this article in Lebanon. In Syria, however, the jurisdiction of this article is still in practice.

The expression nantissement as used by the Law of Obligations in the second paragraph of Article 837 means the mortgage in general. If the mortgage was of movables, it was termed by the expression Gage; and if it was of immovables, it was termed by the expression antichrese.(1)

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(1) Yaken, Zouhdi op. cit., Vol. II, page 43.

ARTICLE 105- Any property may be mortgaged as a security for a debt incurred by a person or persons other than the mortgagor.

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In the majority of cases the mortgagor should be the debtor himself. However, he can be a person other than the debtor, as was stated in this article.

The person, other than the debtor, may have concluded a mortgage with the knowledge of the latter. And again, he may have done so without his knowledge. If he has done so with his knowledge, he would be acting for him and representing him. If he has done so without his knowledge he would be exceeding his limits but would have the right to hold the debtor liable if the debtor has settled the debt out of the value of the thing mortgaged. In this case he would be equal to a guarantor.(1)

In all cases, whether the mortgagor, or a person other than he, was the debtor, he should be the owner of the thing mortgaged.(2)

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(1) Yaken, Zouhdi op. cit., Vol. II, page 44, referring to Article 148 et. al. of the Lebanese Code of Obligations.

(2) Ibid., referring to Article 726 et. al. of the Majallah.



ARTICLE 106, The whole of the mortgaged property shall be a security for each and every part of the debt. Consequently, the debtor shall not be entitled to demand enjoyment of his property before settlement of the debt.

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This means that the whole of the mortgage is a guarantee to every part of the parts of the debt. If the mortgagor pays off some of the debt, the mortgagee will not be liable to deliver to him some of the thing mortgaged because the mortgage is incapable to be partitioned. Therefore, the creditor shall not compel the mortgagee to surrender the thing mortgaged, neither in part nor in whole, as long as he ~~was~~ not received his debt in toto.

This principle is a corroboration to Article 113 of this law and Article 731 of the Majallah.

An exception to this is if the thing mortgaged was two real properties, for each of which an amount of the debt was fixed. If one of the amounts fixed for one of them was payed off, the mortgagor is entitled to release that real property only. This is because the distribution of the debt to each of the two properties separately is not intended to do other than make each of them an independent mortgage for the <sup>rele-</sup> ~~corre-~~ vant amount of the debt. (1)

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(1) Yaken, Zouhdi op. cit., Vol. II, page 44.

ARTICLE 107- It is illegal to contract for the mortgaged  
[ ] object to remain the creditor's property in the  
event of non-payment of the debt.

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The mortgagee has the right of privilege over the mortgaged thing by demanding its sale in order to receive his debt, as was stated in Article 101 of this Law. He is not entitled to become the owner thereof in the event of non-payment. Therefore, every condition purporting that the mortgagee may become the owner of the thing mortgaged in the event of non-settlement is considered void.

It is not permissible between the contracting parties to agree on the condition of giving the creditor a permit to possess the thing mortgaged at the time of maturity without adopting special proceedings in petitioning the courts to allow the sale. (1) This is termed prohibition de la voie patee. If the two parties do conclude an agreement to this effect, their agreement shall be null and void.

We have said that it is not permissible to agree that the mortgaged real property becomes the ownership of the creditor in the case of non-payment. Does this condition have any effect on the deed of mortgage itself? The debtor usually accepts this condition under the pressure of his need for the money. Therefore the condition only becomes void and has no effect on the deed of mortgage <sup>itself</sup> (2)

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(1) Taken, Zoubdi opl

(1) Yaken, Zouhdi op. cit., Vol. II, page 46 explains that what is meant by this is the condition that entitles the creditor to dispose of the mortgage without complying with the proceedings of expropriation such as the sale of the mortgaged property by the creditor without the intermediary of the Court.

(2) Ibid., page 47, referring to Baudry and Deloin, par. 117. This agrees with the provisions of the Islamic Law whereby it is not allowed to lay as a condition the transference of the ownership of the thing mortgaged to the mortgagee, in lieu of the debt, if the debtor does not pay it off at the date fixed for its payment. In this case the mortgage remains and the condition is annulled.

ARTICLE 108 - The property shall remain under the supervision  
E\_\_\_\_\_ of the occupant, and under the care and responsibility of the owner if the mortgagee proves the occurrence of unavoidable circumstances.

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The mortgagee must preserve the mortgaged real property and shall protect it with the same diligence expected of a head of a family taking care of his private affairs or such as the care of the proprietor himself with his property. If the mortgagor is guilty of neglect in the maintaining of the mortgage, he shall be responsible for his negligence and he shall be held responsible for the repair of what he had damaged.

If damage occurs by a force majeure, or by an unexpected act, then the mortgagee shall not be responsible for it. In addition to an act of force majeure, the damage of the real property by the debtor himself or by the act of another person, having no relation to the creditor, and who is civilly not responsible for his behaviour, will likewise exempt the mortgagee from liability.

The burden of proof is upon the creditor to prove that the damage has occurred by an act of a force majeure or by the act of the debtor, or by an act of a stranger who is civilly not responsible, in order to gain exemption from any liability. (1)

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(1) Yaken, Zouhdi op. cit., Vol. II, pages 47 and 48.

ARTICLE 109- The mortgage shall not affect real rights to the property, if such rights are acquired in a legal manner (and maintained) before the mortgage is entered in the Land Register.

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The real rights acquired before the establishment and the inscription of the real property mortgage shall be preserved. The right of the real property mortgage shall not harm these rights. The priority shall be given to whoever is prior in the inscription by virtue of Articles 36 and 37 of Arrete No. 188, dated 15 March 1926.(1)

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(1) Yaken, Zouhdi op. cit., Vol. II, page 50.

ARTICLE 110- The mortgage shall involve all objects which were,  
[ ] or have become, integral parts of the property,  
or appurtenances or necessary appendages thereto.

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This Article conforms with Article 711 of the Majallah.  
It means that the mortgage shall consist not only of what was  
attached basicly to the mortgaged real property, such as the  
buildings and the trees, but what was also attached to it for  
cutting; such as plantings and fruits, even though this was not  
clearly stipulated.(1)

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(1) Yaken, Zouhdi op. cit., Vol. II, page 50.



ARTICLE III.- The creditor shall not be entitled, without the debtor's consent, to receive any free benefit from the mortgaged property, and he shall be required to collect all the proceeds that the said property is capable of yielding. The amount of such proceeds shall be deducted from the amount of the debt even before the debt falls due, the deduction to be made first in respect of interest, costs and expenses, and then in respect of the principal.

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This article is derived from Article 2085 of the French Civil Code which stipulated that the mortgagee must not benefit by mortgage without an adequate reciprocation. He must exploit it according to its capacity, unless it was provided for to the contrary. The value of the crops shall be deducted first from the interests and costs, and then for the original debt. And vice-versa, the mortgagor must not benefit by the mortgage without an adequate reciprocation unless by the consent of the debtor. Moreover, the amount of the value of the crops shall be deducted from the amount of the debt even before maturity of the mortgage.

The right of benefit given to the creditor is a personal right. Any case which is raised by the creditor for the execution of the contract is a personal case and shall be raised in the place of residence of the defendant. (1) The creditor cannot insure this right of his. (2) The creditor shall exploit the real property in the manner for which it was destined. He must not change the manner of exploitation of the real property handed over to him. (3)



In France, in accordance with Article 2082 of the French Civil Code, if the creditor misused or exceeded his right in the exploitation, then the right of his benefit from the mortgaged real property shall be forfeited and shall be handed over to the debtor;<sup>(4)</sup> whereas, here, in this country, the creditor shall be liable for an indemnity only.

It was said that the crops shall be first deducted from the due interest, then from the capital, provided that there shall be no special contrary agreement between both parties.<sup>(5)</sup> However, in case the debt does not provide for interest, then the crops shall be accounted from the capital directly.

The creditor must himself gather the crops, otherwise, he shall be responsible for them to the debtor,<sup>(6)</sup> if he failed to gather them or was negligent in their gathering.<sup>(7)</sup> In addition it is incumbent upon the creditor to submit an accurate account of the crops received.

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(1) Yaken, Zouhdi op. cit., Vol. II, page 52, referring to French Cassation, 22 November 1847.

(2) Ibid., referring to Dalloz, Repertoire Pratique, par. 324 and 326.

(3) Ibid.<sup>x</sup>

(4) Ibid., referring to Dalloz, Repertoire Pratique, par. 328.

(5) Ibid., referring to Dalloz, Repertoire Pratique, para. 329.

(6) Ibid., referring to Baudry, Lacantinarié and De Louan, Vol. I,

par. 183.

(7) Ibid., referring to French Cassation, 10 April 1811.

ARTICLE II2 - The creditor shall be required to keep the mortgaged property in a good state of maintenance and to carry out therein all useful and necessary repairs, and shall be entitled to deduct from the amount of the proceeds all maintenance and repair expenses, or to receive the amount of such expenses by priority from the price of the property. Also, the creditor may, at any time, relieve himself of the above obligations by relinquishing his mortgage rights.

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The mortgagee must take care of the maintenance of the real property which is in his hands and must effect thereon the necessary repairs.<sup>(1)</sup> He must watch over the mortgaged real property, by preventing the institution thereon of any real right, through his negligence; such as the right of easement, in which case he would be held liable to the debtor. The preservation of the mortgaged real property by the mortgagee shall be interpreted as the expending of the necessary funds to insure the proper preservation of it; such as the care the proprietor gives to his property.

The creditor shall be compelled, if there shall be no contrary agreement between him and the debtor, to pay the annual taxes and costs. He shall do this on behalf of the proprietor and not in his capacity of being personally responsible for it.<sup>(2)</sup>

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(1) Yaken, Zouhdi op. cit., Vol II, page 53<sub>x</sub> referring to Aubry and Rau, Vol. 4, page 719 and also <sup>Bavdry-Lacantinerie and</sup> De Louan, Vol. 1, par. 212.

(2) Ibid., page 54 referring to Dalloz, Repertoire Pratique, par. 360.

ARTICLE 113 - A mortgage shall be indivisible, though the debt be distributed among the heirs of the debtor or of the creditor. Thus the debtor's heir who pays his share of the debt shall not be entitled to demand restitution of the mortgaged property. Similarly, the creditor's heir who receives his share of the debt may not hand over the property, thus causing prejudice to the interests of the other heirs who have not yet received their shares of the debt.

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The creditor has the right to hold the mortgaged object until he recovers his debt in full. If the mortgager shall settle a part of the debt, then he shall not be entitled to call on the mortgagee to return to him a part of the mortgaged real property. By this it is meant that the mortgage is indivisible. That is to say, the mortgagee shall not be compelled to surrender the mortgage, partially or fully, so long as he did not recover his debt completely. (I)

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(I) Yaken, Zouhdi op. cit., page 54. Vol. II,

ARTICLE II4.- Neither the debtor nor the creditor shall be entitled to dispose of the mortgaged property without the mutual consent of the two parties. Any contract concluded at variance with this rule shall be regarded as null and void.

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The creditor is not allowed to dispose of the mortgaged real property without the consent of the mortgagee, as this hinders the right of holding and priority returnable to the mortgagee. This is consistent as the purpose of the mortgage is to reserve the right of occupation, privilege, and priority for the creditor. The aim of putting the hand of the creditor on the mortgaged object is to prevent the debtor from disposing of the object for the disadvantage of the creditor, or his effecting an imaginary disposal by way of collusion. (I)

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(I) Yaken, Zouhdi op. cit., Vol II, page 56.

ARTICLE II5.- The mortgaged property loaned or leased by the creditor, who is the mortgagee, to the debtor shall continue to be held as a security for the payment of the debt.

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The meaning of this article is that when the mortgagee hands back, to the mortgagor, the mortgaged real property, by way of a lease; then this shall not affect the right of the mortgagee on the real property mortgaged with him until the recovery of his debt. This is because the reoccupation of the real property by the debtor does not affect, in any way, the rights of the mortgagee on the real property. So long as he holds a true and valid mortgage, his rights shall be upheld by law. The stipulation of this Article conforms with the provisions of Islamic Law. (I)

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(I) Yaken, Zouhdi op. cit., Vol II, pages 56-57.



ARTICLE II6 - The mortgage shall cease to be effective with the payment of the debt on maturity, or by agreement between the debtor and the creditor(mortgagee), or at the mortgagee's wish. The lifting of the mortgage shall not have any legal effects except after the entry relative thereto is struck off the Land Register.

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The mortgage shall terminate on payment of the debt and its attachments by the debtor, since the mortgage is a subordinate contract, and whereas, when the origin falls then the branch shall fall. It shall terminate also through other means of settlements such as the settlement of the debt by counterclaiming an equal amount due, the discharge, and the renewal of the debt.

The mortgage shall not terminate by prescription as long as the mortgagee is exercising his rights on the mortgaged real property. The existence of the mortgagee exercising his rights prevents prescription, for it is a continuous confession by the debtor of the existence of the debt. The mortgage shall terminate by the abandonment of the mortgage by the creditor. But, this abandonment shall not forfeit his right in the debt. This shall remain as normal and it must be registered in the Land Register.

If the debtor renounces the mortgage, then this shall not exempt him from making up an account of the crops before his renouncement. All the cases which have been mentioned shall be recorded in the Land Register, as other real property contracts, in order that there may be indication of the extinction of the mortgage. (I)



(I) Yaken, Zouhdi, op. cit., Vol II, page 57.

TITLE FIVE  
PRIVILEGE AND LIEN

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CHAPTER I  
PRIVILEGES

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ARTICLE II7 - In matters relative to property, by the term "privilege" shall be meant a certain real right accorded to the creditor by virtue of the particular character of his debt, giving him preference over all other creditors, including lienholders.

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This article has defined the real property privilege as a real right decided by the law for certain creditors, due to the nature of their debt, to recover it by preference over the rest of the creditors even though they were insured. This particular quality, authorizes the creditor to precede other creditors in recovering his debt from the price of the object. This quality refers to several aspects such as the services rendered by the creditor in relation to the rest of the creditors. An example is where he spends his own money for putting the secured real property on auction.

The privilege shall be decided by the law itself and there shall be no privilege without a legal stipulation.<sup>(1)</sup> It must not be established by way of precedence. Individuals are not permitted to establish a privilege without a clear legal stipulation thereto.

The real property privilege is a real right such as the mortgage. It does not relate to the creditor, in person, but it refers to the quality of the debt itself.<sup>(2)</sup>

The real property privilege differs from lien by the following:

- (1) The real property privilege is being decided by the quality of the debt.
- (2) The law has not provided it publicity and inscription (Article 115 of this Code<sub>x</sub>).
- (3) It has the priority on the owners of liens.
- (4) The order of preference in the real property privilege refers to the quality of the debt.

As to lien, it is as follows:

- (1) It cannot be, except after a mutual agreement between the debtor and the creditor.
- (2) Its publicity and inscription are conditional.
- (3) It has no priority on the owners of the right of privilege.
- (4) The order of preference refers in it to the more prior inscription and the hour of inscription.

It appears that the real right, if attached to a real property, then its owner shall have the right of preference on whoever has no real right on the real property. For example, the mortgagee has the preference on the ordinary creditor. The owner of the real right shall have also the right of pursuance. That is to say he will have the right to follow the real property in the hand of any person wherever it is found, contrary to the personal right, whose owner shall not demand it except from a particular person who is indebted. The real right is an absolute

right which can be held against every person, and gives its owner the right of raising a real case.<sup>(3)</sup>

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(1) Yaken, Zouhdi op. cit., Vol. II, page 60, referring to Articles 2095, 2099, and 2100 of the French Civil Code.

(2) Ibid., page 61, referring to Colin et Capitant, page 867.

(3) Ibid., pages 61 and 62.

ARTICLE IIS - There shall be three, and only three, privileged debts:

- (1) Debts defined in Article 44 of Arrete No. 186 dated March 15, 1926.
- (2) Legal costs arising from the sale of the property and the distribution of the price thereof.
- (3) Transfer fees, and fines imposed for false statements concerning the price of sale.

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The privileged debts defined by Article 44 of Arrete 186, dated March 15, 1926, are those debts such as the fees of transfer, alienation, delimitation of borders, liberation, limitation and survey, fixed in the provisions of the law. When necessity demands, the value of the price of exchange of State lands shall be added to the aforementioned expenditure. This debt shall be paid in ten annual installments. Each installment will be recovered annually with the real property tax, and the government shall enjoy, against this debt, a right exempted from inscription.

The costs arising from the sale of the property and the distribution of the price thereof, shall be paid by priority before the payment of the debts of other creditors because they have benefited from them and they were spent for the interest of all of them. The privileged judicial expenses are those which were spent in the interest of all the creditors to maintain the object owned for the debtor and for its sale by the court.(I)

It must be noticed that the privilege of the legal expenses which were incurred in the sale of the debtor's real property, shall not include all the properties of the debtor but is limited to the sold real property only. (2) Also the expenses from which some of the creditors did not benefit, shall not be considered as privileged in relation to them. Therefore, it is not permissible to add to the legal expenses what was spent by the creditor in support of his special right.

The fees of the inscription of the real property and fees of transfer from the name of the intestator to the heirs, and what shall branch from it, are privileged by virtue of this Article, with the fines imposed on false statements in stating the prices of sale of the real properties during the inscription required by provision of Article 16 of Legislative Decree No.12, dated 28 February 1930. This Article has stipulated that the fees and the taxes due on other real property contracts, or on the sale whether it was conventional or forced, shall be recovered on the basis of the allowed price, or on the basis of the value of the real property assessed by the Wirko if this value assessed exceeded the allowed price.

If the fees and the taxes were recovered on the basis of the allowed price; and if the assessed value of the real property by the Wirko exceeded this price, then the administration shall have the right to recover, within a year from the date of the inscription, through administrative means, from both parties in agreement, jointly and collectively, a cash fine equivalent to ten times the fee which the government shall have lost.

If a part of the price, should appear to have been concealed , then the treasury shall have the right, to confirm, within a year from the date of the registration, this concealment, by any and all means possible. The case shall be tried by the Court of First Instance in whose jurisdiction the real property is located. (3)

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(1) Yaken, Zouhdi op. cit., page 119 referring to Article 2101, par. 1, French Civil Code.

(2) Ibid., referring to Baudry, De Louan, par. 316 and 610.

(3) Ibid., page 64.



ARTICLE II9 - Contrary to the general rule imposed by Article 10 of the Arrete relative to the institution of the Land Register, the above privileges shall be exempt from registration.

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The debts fixed by Article 44 of Arrete No. 186 shall be exempted from registration in accordance with the stipulation of this Article and with the stipulation of Article 44 itself. The legal expenses resulting from the sale of the real property and from the distribution of its price shall be exempted from registration also, by virtue of this Article. <sup>These were exempted from registration prior to this Article by virtue of</sup> Article 40 of ARR-  
ete No. 1329, dated 22 March 1922. (I)

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(I) Yaken, Zouhdi, op. cit., Vol. II, page 65.

CHAPTER II

LIEN

SECTION 1

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GENERAL RULES

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ARTICLE 120 - By the term "lien" shall be meant a certain real right to <sup>lands and/or buildings assigned as a security for the</sup> performance of some obligation. By the nature thereof, a lien shall be indivisible, shall remain wholly effective on the entire property assigned and on each and every part of the said property, and shall follow the same to whomever it is transferred.

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The lien is a real right in accordance of which the creditor shall be granted the right of priority and the right of pursuance of the real property assigned for the settlement of a certain undertaking. Article 41 of Arrete 1329, dated 22 March 1922, has defined the lien as being a constant right on immovable properties imprisoned for settlement of a due debt. It is indivisible and shall fully remain on detained immovables, on each of them, and on each part of their parts, whatever the hand to which it was transferred may be. This definition does not differ from the definition of this Article.

The right of the lien differs from the real property privilege in two ways:

- (I) The lien shall be established either by legal stipulation or by the agreement of both parties or a judicial judgment; whereas the privilege cannot be established

except by a legal stipulation.

- (2) The priority in liens shall refer to the more prior inscription in the Land Register, where it shall be referred to the date; whereas the priority in the privilege shall refer to the cause and the quality of the debt as has been mentioned in the explanation of Article 117 of this Code.

As to lien, it is similar to mortgage, though it differs in that the mortgage necessitates putting the creditor's hand on the real property and he shall gather its fruits and its crops, which shall be deducted from the amount of the debt and its interest. Lien, however, retains the real property in the hand of the debtor, who will manage it and dispose of it as he likes, as well as he may sell the real property or re-establish a second or a third lien thereon. Also, he may institute on it rights of easement and lease the real property and dispose of its fruits, provided that the diminishing of the value of the liened real property will not result. (1) The creditor, in his turn, may, though his debt is subject to annulment and suspension, take the necessary precautions which prevent the debtor from diminishing the value of the real property. (2) In all cases, the rights of the creditor shall remain preserved on the real property until the recovery of the debt and its attachments. (3)

The lien grants its owner a real right on the liened real property. (4) In accordance with this real right, the creditor shall be entitled to sue all others, (5) even the debtors of the

debtor himself and on those who are in possession of the liened real property. The lien also includes the right of priority and the right of pursuance. With the right of priority, the creditor shall precede other creditors following him, in the price of the sold real property, until he recovers his debt and its attachments.

It was stated that the lien aims at the realisation of the settlement of the debt from the price of the real property. Due to this, it shall not be considered as partition of the right of ownership. Those who have stated the aforesaid, are outdated authorities.<sup>(6)</sup> Contrarily, following the opinions of the majority of recent authorities, the lien necessitates the partition of the real property, because the proprietor cannot, due to the lien, dispose absolutely and unconditionally with the real property.<sup>(7)</sup>

The lien is a contract, subordinate to an original undertaking, and without which it cannot exist,<sup>(8)</sup> Therefore, if the original undertaking is being terminated, then the lien shall terminate forthwith. If the debt was invalid, then the lien shall be invalid, because the branch follows the origin.<sup>(9)</sup>

Some have said that the contract of lien is a subordinate contract to that of the debt. Therefore, it is not possible to renounce the lien alone, as it guarantees the debt.<sup>(10)</sup> While others have held to the contrary.<sup>(11)</sup> We incline to this latter opinion as the debt will then become ordinary.

The lien is by its nature indivisible. Every part of it is regarded as securing the whole debt, and every part of the debt

~~regarded as securing the whole debt, and every part of the debt~~  
is regarded as guaranteed by the entire liened real property. (12)  
That is to say that it is not permissible to divide the liened  
real property; for, if several real properties were placed as a  
security for the debt, then each real property and each part of  
it is guaranteed for the whole debt. (13) If the secured  
real property was divided among the heirs, then every part of  
the real property shall remain as a guarantee for the whole debt.  
The creditor can claim his debt completely from each possessor;  
in turn the latter shall preserve his right by giving up the  
part in his land or by enabling him to recover his debt from  
the real property by expropriation.

If the debtor settles some of the debt to his creditor,  
then this settlement shall not effect the real property which shall  
remain entirely securing the remaining part. (14)

Lien is unknown in the Islamic Law. Its provisions were  
taken from the French Code. The Islamic (Sharia's) Law has defined  
the redeemable sale and the mortgage only.

The lien is a real property right, though it was securing  
a personal debt regarded in itself as movable, because it does  
not fall on other than real properties. (15)

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(1) Yaken, Zouhdi op. cit., Vol. II, pages 67-70 referring to  
Aubry et Rau, Cours de Droit Civil Francais, para 2810 (footnote  
1 repeated).

(2) Ibid., referring to Baudry, De Louan, para 2002.



- (3) Ibid., referring to Jossierand, Droit Positif Francais, para 1636 B.
- (4) Ibid., referring to Hogue, part 13, para 168.
- (5) Ibid., referring to Jossierand, Droit Positif Francais, para 1635.
- (6) Ibid., referring to Demolombe, Cours de Code Napoleon, part 9, para 427.
- (7) Ibid., referring to Baudry, Lancantinerie et De Louan, para 894.
- (8) Ibid., referring to Colen et Capitant, Cours Elementaire de Droit Civil Francais, page 968.
- (9) Ibid., referring to Colin et Capitant, Cours Elementaire de Droit Civil Francais, page 969.
- (10) Ibid., referring to French Court of Cassation, 25 January 1883.
- (11) Ibid., referring to Dewonthe et Colmette de Centaire, part 9, para 75.
- (12) Ibid., referring to Planiol, Traite' Elementaire de Droit Civil, part 2 para 2653.
- (13) Ibid., referring to Baudry, Lancantinerie et De Louan, part 2, para 898.
- (14) Ibid., referring to Aubry et Rau, Cours de Droit Civil Francais, para 284.
- (15) Ibid., referring to Jossierand, Droit Positif Francais, para 1638 and 1361.

ARTICLE 121- The following objects alone shall be capable of  
being pledged in lien:

- (1) Built or unbuilt property capable of being sold or bought, together with all the accessories thereof regarded as real property.
- (2) Usufruct rights relative to the above and accessories, throughout the usufruct period.
- (3) Permanent tenure (Ijaratain) and long <sup>term</sup> lease (Ijam h al- tawilah) rights.
- (4) Surface rights.

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A lien may be concluded on the real properties which may be subject to ownership and to sale and to purchase or, in better words the real properties which may be attached and may be put up for auction. (1) A lien shall not be concluded except on the real property and not on the movables (2) as may appear later. The real property should be capable of disposal and liable to be sold and bought as the lien may consequently be converted to a forced sale. For this reason the common lands and their accessories shall not be liened. As to the private lands of the state, it was decided by interpretation that they could be liened and an individual shall enjoy the right of priority on the price when they are offered for sale, (3) notwithstanding the fact that such properties shall not be concluded on the properties which may not be disposed of; such as the properties of the wife, who is subject to the "bride's marriage portion" system, (4) and likewise the real properties bequeathed with a condition not to be sold. Similarly the real properties which are not liable to attachment. There are also things which shall not be subjected to a lien as they are independent of the land, such as the real



properties by destination.

Some of the French courts have decided that the lessee or the farmer can effect a lien on the buildings he has established on the land leased, (5) notwithstanding the fact that it has been stipulated in the deed of lease that these buildings shall be pulled down at expiry or that the owner shall become the proprietor thereof on payment of a specific compensation. (6)

It is permissible to effect the lien on the buildings erected on the State Domains such as seashores or military properties with a pre-obtained license from the government? Yes, this is allowable by preserving the right of cancellation which the government liberally makes as a condition in this respect. (7)

The trees and plants, as well as the fruits borne thereby, which have not yet been reaped are considered to be real properties by themselves and can be subject to the lien with the land which they adhere to. (8) It is not necessary to include them in a special term in the deed of lien as the fruits are inter alia included with the lien as an accessory to the land. (9) The lien shall not be effected on the fruits separately. (10) As to the trees, plants and shrubs, forming part of a bed, they shall be considered a real property as long as they are connected with the land and they do not lose this real property aspect unless and until they are pulled out of the real property, (11) or by being sold separately from the land. (12) If a building was sold for the purpose of pulling it down and benefitting from its debris, this shall be considered similar to the sale of the fruits standing on the trees. That is to say, a sale of movables. (13)

The owner cannot sell the building materials of a liened house in order to harm the creditor. (I4)

The real properties by destination or the accessories considered as part of the real properties, and these are the movable things which the owner of the real property has set therein for his benefit or exploitation or those things which he has attached thereto to remain therein permanently, shall not be liened independent from the real property belonging thereto. However, if a lien was concluded on the real property; such a lien includes them, as was mentioned previously.

Certain real property rights are real properties by accession. The real property rights such as the right of usufruct, can be either movable or real property in accordance with the right relevant thereto. The usufruct, covering the real properties and their accessories, may be liened. (I5) Whereas the usufruct is a temporary right, the lien is similar in effect and shall not be for a longer period than that of the usufruct. (I6) When a lien is created on the right of usufruct the lien shall effect the beneficiary of the fruits which the real property yields. (the usufructuary). (I7) The bare-owner can effect a lien thereon (I8) but it is not possible to effect a lien on the Bare-ownership independent from the right of usufruct when both belong to the same owner. (I9) The rights of usage and dwelling shall not be subject to a lien as they are not capable of disposal and on account of their being personal rights to the owners thereof.

For this reason they shall not be disposed of to others. (20)

The rights of Ijaratain and Muqata'ah are likewise affected.

The owner of the right of Ijaratain has the right to use the real property and to enjoy it as if he <sup>were the true owner. He can benefit from it himself or he can lease it out</sup> and he can dispose of his right freely by his renunciation thereof, in lien of a payment, or without a payment, or by mortgaging it, or by effecting a lien thereon, or by making it bear all the real rights defined in Article 183 of this Code, which shall be commented on in due course. The owner of this right of Muqata'ah is the owner of the constructions erected and the plants planted on the dedicated (Waqf) real properties. He therefore, uses and enjoys them and disposes of them with full freedom, as if they were his own property. It is possible for him more specially, within the limits of his rights, to renounce them in lieu of a payment, or without a payment, or to mortgage them, or to effect a lien on them, or dedicate them (to the Waqf) or effect on them any other real rights, or rights of easement, as it is explicitly governed by Article 198 of this Code. Whereas it was allowed to sell the right of surface, the law, by this article and by Article 29 of this Code, has allowed the effecting of a lien thereon, provided the lien follows the original contract and extinguishes by its extinction. Therefore a lien can be effected on the whole of a real property, or on its surface, or on a story of its stories, in case it was composed of stories. (21)

Certain real property actions are real properties by accession. The person who owns the right to institute a real property action such as a case of maturity of a contract, a case redeeming

the property sold by redemption, a case for cancellation on account of fraud, and a case of annulment of sale, cannot effect a lien thereon as long as there remains an action. (22)

No lien can be effected on the lien itself. (23)

The mines are natural real properties under the provisions of Article 2 of this Code, and therefore they are liable to be effected by liens in accordance with the real property. (24) However, the shares of the owners are movable rights and shall not be liened. (25) What is permissible to be liened is the right of exploitation of the mines, or the mine itself, but the materials extracted from the mines are movables and likewise are the shares and the dividends in a company or a project for exploiting the mines. (26) The license for excavation is a movable right (27) but the license for exploitation and for concessions are immovables, (28) and both have a definite period and are detached from the ownership of the land.

The surface minerals and quarries do not form an ownership independent from the land. (29) Therefore it is agreed that the sale of these minerals is considered a sale of a movable thing and no lien can be effected thereon independent from the land. (30) A lien may be effect<sup>ed</sup> on the surface minerals and quarries, together, with the land they are extracted from. (31) Whereas the quarries are not like the mines, subject in their exploitations to the control of the State, they do not form an ownership independent of the surface of the ground. Consequently the lien which effects the land includes the quarries and the debtor shall not be allowed to sell the existing quarry in order to



harm the creditor. (32) Is it allowed to the creditors to object to the opening of a quarry? Are they allowed to demand the increase in the liens if in the event that the extraction from the quarry results in the decrease in the surface of the land, or is it allowed to them to claim their debts immediately? In this connection, reference should be made to the general rules found in <sup>the</sup> Law of Obligations. (33)

The railroads established by the State or granted by concession to a company are considered accessories of the public properties and therefore they do not belong to the company which was granted the concession to construct the railroad. The company enjoys the right of exploitation. It results from this, according to the standing interpretation of the French Court of Cassation, the right of the company, limited to receive the profits, is the right of exploitation or usufruct of a movable. (34) Such a right is incapable of being attached as a real property and therefore it cannot be liened. (35) Some have said that the lien can be effected on the right of the company, as it stands for a long term lease, etc. (36) In accordance with this view it is allowed to the company to conclude a lien and it shall include all the machines, implements, and locomotives destined as real properties; but the lien terminates at the termination of the company contract if the State kept it to herself at the expiry of the concession. (37) But if the State has established the railroad and has not granted a concession therefore, such a railroad is considered to be of the State Domain and no lien can be effected thereon.

As for the bridges put up for the use of the public by an industrial establishment which enjoys the right to collect a special fee from users of the bridge during the period of the company's concession, these cannot be liened and are considered as part of the State Domain.(38) Similarly a lien cannot be effected on the special fee which the company collects during the period of concession because it is movable.(39) On the other hand the canals made to lead the waters of the rivers to the electric power plant are real property and can be liened.(40)

The lien on the real properties, which accrue to the debtor in the future, is void, as such real properties should be the ownership of the debtor at the time of the creation of the lien. A son shall not be allowed to effect a lien on the property of his father on the plea that he is his only heir.

Article 42 of Arrete No. 1329, which modified the Ottoman Code of Liens, has decided that a lien is not acceptable except on immovable properties owned in accordance with a deed of registration and belonging to the following kinds: (a) The raqabah (bare-land) with or without constructions and the dedicated (Waqf) lands and the State <sup>D</sup>omains (Miri) subject to a personal or joint disposal if these with all their immovable accessories and benefits are considered under the commercial usage to be private property (Mulk) (b) Their income, together with the income of their accessories and benefits during the period of the right of exploitation, (c) The rights of both the Ijaratain and the Muqata'ah resulting from the Waqf and its contents, and (d) The private properties of the municipality.(41)

- (1) Yaken; Zouhdi, op. cit., Vol II, page 71, referring to Joss-  
erand, Droit Positif Francais, para 1654.
- (2) Ibid., referring to Josserrand, Droit Positif Francais, para  
1650 and to Article 2119 of the French Civil Code.
- (3) Ibid., referring to Colin et Capitant, Cours Elementaire  
de Droit Civil Francais, page 972.
- (4) Ibid., referring to Josserrand, Droit Positif Francais, para  
1655.
- (5) Ibid., referring to French Court of Cassation, 15 April 1846.
- (6) Ibid., referring to Paris Court, 30 May 1864.
- (7) Ibid., referring to Article 14 etc. of Arrete No. 1445 applied  
in Syria by the provision of Arrete No 299; and to French Court  
of Cassation, 10 April 1867.
- (8) Ibid., referring to Baudry, Lacantinerie et De Louan, Traite  
Theorique et Pratique de Droit Civil, Part 2, para 914.
- (9) Ibid., referring to Dalloz, Repertoire Pratique, para 41.
- (10) Ibid., referring to <sup>Baudry</sup>~~Baudry~~, Lacantinerie et De Louan, Traite  
Theorique et Pratique de Droit Civil, part 2, para 914.
- (11) Ibid., referring to Dalloz, Repertoire Pratique, para 80 and  
321.
- (12) Ibid., referring to French Court of Cassation, 5 July 1880.
- (13) Ibid., referring to Dalloz, Repertoire Pratique, para 48.
- (14) Ibid., referring to Dalloz, Repertoire Pratique, para 49.
- (15) Ibid., referring to Josserrand, Droit Positif Francais, para  
1657.



- (16) Ibid., referring to Dalloz, Repertoire Pratique, para 70.
- (17) Ibid., referring to Baudry, Lacantinerie, Traite' Theorie<sup>u</sup> et Pratique de Droit Civil, para 919.
- (18) Ibid., referring to Jossierand, Droit Positif Francais, para 1655.
- (19) Ibid., referring to Aubry et Rau, Cours de Droit Civil Francais, para 209, footnote 6.
- (20) Ibid., referring to Jossierand, Droit Positif Francais, para 1658.
- (21) Ibid., referring to Jossierand, Droit Positif Francais, para 1655.
- (22) Ibid., referring to Aubry et Rau, Cours de Droit Civil Francais, para 259.
- (23) Ibid., referring to Laurens, part 30, para 218.
- (24) Ibid., referring to Aubry et Rau, Cours de Droit Civil Francais, para 259, page 2.
- (25) Ibid., referring to Jossierand, Droit Positif Francais, para 1156.
- (26) Ibid., referring to Shari'ah, 21 April 1810, Articles 8 and 9.
- (27) Ibid., referring to Article 6 of Arrete No. 113, L.R.
- (28) Ibid., referring to Article 7 of Arrete No. 113, L.R.
- (29) Ibid., referring to Article 2 of Arrete No. 212 L.R.
- (30) Ibid., referring to Paris Court, 22 January 1877.
- (31) Ibid., referring to Laurens, part 30, para 201.
- (32) Ibid., referring to Dalloz, Repertoire Pratique, para 123.

- (33) Ibid., referring to Article 1231, para 17 of the French Civil Code.
- (34) Ibid., referring to French Court of Cassation, 15 May 1861, and to Article 2 of Arrete No. 144 enforced in Syria by Arrete No. 299.
- (35) Ibid., referring to Jossierand, Droit Positif Francais, para 1651.
- (36) Ibid., referring to L. Fleury, 3rd impression, page 103.
- (37) Ibid., referring to Dalloz, Repertoire Pratique, para 126.
- (38) Ibid., referring to Hogue, para 174.
- (39) Ibid., referring to French Court of Cassation, 20 February 1865.
- (40) Ibid., referring to an article by B<sup>o</sup>ncet in Dalloz, 1906.
- (41) Ibid., page 78.

ARTICLE 122 - Any lien concluded by a co-owner in a joint property without permission from the other co-owners shall be transferred, after partition, to the share which falls to the said co-owner. The amounts due to such co-owner from the equalisation of share values or from the price of the property in the event of sale shall be used in payment of the amount for which his share is held in lien.

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It is permissible to accomplish the lien, either by the knowledge of the debtor or by some other person who is personally free from debt. This person shall be called the real guarantor (caution réelle). This guarantee differs from the ordinary guarantee to the extent that the real property guarantor is limited only to the specific guaranteed real property. If the price of the real property on sale does not suffice the whole debt, then he shall not be personally responsible for the remainder. (1)

The liening person must be a proprietor. This is a material condition, and the provisions of this principle shall take effect, whether the lien was a contract on a real property or on a real right. For instance, it is not permissible to lien the right of usufruct except by the owner of this right himself. (2)

If the usufructuary has effected a lien and the text of the contract was in a general form, then the lien shall not be invalid, and shall be regarded as due on the right of the usufructuary only. (3)

The lien of a real property which is subject to a condition depends on the occurrence of the act. If a person insured his

real property, on condition that the insurance company shall pay, in case of its damage in an accident, a compensation; then the company must not pay the compensation unless that accident has occurred. There-fore, it was called the lien of a real property which is subject to a condition (conditional lien) because it is pending on the occurrence of a thing. The condition of annulment depends on the forfeiture of the obligation; such as when a person sells a real property, and the seller puts condition that if the seller returns the price to the purchaser, the latter shall surrender to him the real property. The one who becomes an owner under the condition of dependence,<sup>(4)</sup> shall not be the owner unless the condition was realized. In the event of its non-realization, he never becomes the owner. It is permissible to the owner under the condition of dependence to conclude a lien.<sup>(5)</sup> However, the lien follows the effect of the condition. If the condition was realized, the lien becomes valid from its creation; and if not, it does not.<sup>(6)</sup> Under these circumstances the purchaser under the dependent condition, as well as the seller under the same condition, become owners of the deed of lien.<sup>(7)</sup> But if the condition were a condition of annulment; such as the effecting of a sale with reservation to the seller for redemption,<sup>(8)</sup> the purchaser becomes entitled to effect a lien which shall drop if the condition was realized and the seller paid the value within the period fixed for this. Its jurisdiction shall be as that of liening the property of others.<sup>(9)</sup>

This article has made the validity of the lien dependent on the result of the partition. If the partner has liened his

common share or the entire real property, it has to be considered whether the real property liened is allotted to the liening person. If so, the lien becomes valid, in accordance with the retroactive principle for partition because the liening partner is considered owner, not only from the time of the partition but from the time he became owner of his common right.<sup>(10)</sup> The lien shall not become effective if the real property is allotted to one of the other co-partners.

It is not permissible for the members of a company, which is considered a moral person (other than a living person), to effect a lien on their shares included in the properties of the company, as long as the company stands and before it is liquidated.<sup>(11)</sup>

It is permissible for the agent to conclude a lien on the real properties of his principle, on condition that he possesses an explicit special power to that effect. This is because every act relating to the disposal of real property; such as the sale, the mortgage, the liening, and the arranging of the right of usufruct are not allowed to be concluded by the agent except with a clear special text to that effect.<sup>(12)</sup>

The agency is divided into (1) a conventional agreement, the source of which is based on the agreement of the contracting parties and (2) a legal agency derived as an agency from the law; such as the agency of a guardian and (3) a judicial agency which the court decided; such as appointing a legal custodian and it gives the same effect whatever the sources are. This judicial agency is not usual except in relation to temporary administrative functions.



The agent, whether his agency is originating from the agreement or from the law, shall have the right to lien the real properties of his client, if he is in possession of a special power of attorney thereto. The manager of the company or the liquidator of a dissolved company<sup>(13)</sup> are not allowed to mortgage its real properties unless he has an explicit authority for its accomplishment.<sup>(14)</sup> As for the guardians, they cannot lien the real property of minors except with a special permission from the competent authority, which is the Shari'ah court for Moslems and the Civil court for others.<sup>(15)</sup> The husband is not allowed to lien the properties of his wife unless he has a special power of attorney from her.<sup>(16)</sup>

The power of attorney is conditional upon official authentication by the Notary Public and the signature should be authenticated if the power of attorney was done in a foreign country.

Every person who finished his eighteenth year of age is competent to undertake legal responsibilities unless he declares his incompetence by a legal stipulation. The person who is completely deprived of the power of discretion; such as minors and insane persons, his behavior shall be regarded as if it did not occur. As to the behavior of the persons who have no competence but have the power of discretion; such as the rational minor, their undertakings are voidable. However, it is not allowed to anyone who has entered into an agreement with an incompetent person to depend on a plea of annulment, as it is a right of the incompetent himself or of his agent or of his heir.

If the contract established by the rational minor was subject to a special form, then the annulment is due by not following this form. The minor who is allowed to practise commerce or industry, must not benefit from declaring his incompetence but he must be treated as an adult in the circle of his commerce and according to his capacity. As to those who are declared noncompos mentis, it is allowed for every person who has an interest to protest their incompetence.<sup>(17)</sup> Therefore, the lien effected by the minor and by those who are legally declared noncompos mentis, is not valid juridically or legally. As for persons in financial straits and who were not merchants, they can lien their properties to one of their creditors. The lien thereto shall be valid, contrary to those who are bankrupt or falling under legal liquidation.<sup>(18)</sup> Also the person who grants his real property to others or wills it to him, may provide the non-selling or non-liening of the real property. If that was provided then it shall not be liable for attachment and its liening is not permissible.<sup>(19)</sup>

Moreover, it is not permissible to the owner of the real properties to effect a lien thereon subsequent to the registration of an attachment injunction in the Record of the Real Properties.<sup>(20)</sup>

The annulling of the lien concluded by an incompetent person extincts in the event of his approval when he becomes competent; provided he remains owner of the real property or the period for the action of the annulling has lapsed. If there is prescription, the lien becomes effective on others as from the date of its registration and it shall have a retroactive effect.<sup>(21)</sup>



- (1) Yaken, Zouhdi, op. cit., Vol II, page 78, referring to Aubry et Rau, Cours de Droit Civil Francais, para 266, page 439.
- (2) Ibid., referring to Dalloz, Repertoire Pratique, para 898.
- (3) Ibid., referring to Dalloz; Repertoire Pratique, para 901.
- (4) Ibid., referring to Article 88 of the Lebanese Code of Obligations.
- (5) Ibid., referring to Article 64 of the Law of Mortgages, No. 1329 (abrogated).
- (6) Ibid., referring to Aubry et Rau, Cours de Droit Civil Francais, para 266.
- (7) Ibid., referring to Dalloz; Repertoire Pratique, para 921.
- (8) Ibid., referring to Lebanese Code of Obligations, Article 485.
- (9) Ibid., referring to Lebanese Code of Obligations, Article 473, etc.
- (10) Ibid., referring to French Court of Cassation, 6 March 1907.
- (11) Ibid., referring to Guilloird, para 956.
- (12) Ibid., referring to Article 1988, French Civil Code, and Article 778 of the Lebanese Code of Obligations.
- (13) Ibid., referring to Baudry, Lacantinerie et De Louan, Traite Theorique et Pratique de Droit Civil, para 1307.
- (14) Ibid., referring to Troublong, para 1022.
- (15) Ibid., referring to Legislative Decree No. 6.
- (16) Ibid., referring to Laurens, para 187.

- (17) Ibid., referring to Article 215, etc, of the Lebanese Code of Obligations.
- (18) Ibid., referring to Dalloz, Repertoire Pratique, para 935.
- (19) Ibid., referring to Aubry et Rau, Cours de Droit Civil Francais, para 266.
- (20) Ibid., referring to Article 735 of the Lebanese Code of Civil Procedure.
- (21) Ibid., referring to Durantou, para 345.

ARTICLE 123 - Acquired lien shall involve the buildings, plants and improvements added to the pledged property.

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The acquired lien includes all the improvements which occur to the liened real properties whatever their nature is,<sup>(1)</sup> whether they were considered real properties by nature or as real properties by destination.<sup>(2)</sup> This means that the improvements which include a wing added to the liened building or a story which was built onto the building<sup>(3)</sup> also include the movables added to the real properties subsequent to the conclusion of the lien contract and thus became real properties by destination, immaterial to their being attached permanently, such as boards and mirrors, or placed in the real property for its exploitation and benefit. An example of these are the animals and implements relevant to cultivation and used on agricultural land. Under all circumstances it shall always be necessary to refer to the court for the consideration of the movables as real properties by destination, or otherwise.

On the other hand the improvements occurring in the real properties shall be covered by the contract of lien, whether the debtor himself, or the possessor of the real property, had made them or not.<sup>(4)</sup> Provided that the creditor shall pay to the debtor the amount in excess (plus value) which returned to the real property on account of the expenses or improvements which he carried out. This is so that the creditor does not become wealthy at the expense of the debtor.<sup>(5)</sup>

In accordance with interpretations and jurisprudence, the improvements include all modern buildings which have been erected

on the liened real properties; as well as the increase occurring by alluvial deposit<sup>(6)</sup> provided the alluvium shall not exceed the ordinary as if it had left wide and large tracts of land, which could not be said to be united with the original land but are distinct from it as if they were new pieces of land.<sup>(7)</sup> They also include the buildings, plantings and rights of easements established for the benefit of the liened real property.<sup>(8)</sup>

The creditor may benefit from the increase occurring in the value of the real property due to the opening of a road near the liened real property, or the establishment of a public square or a public garden (park), or by the expiry of the right of easement which existed on the real property liened. He likewise shall incur the deficit which occurs to the value of the real property due to any economical cause.<sup>(9)</sup>

Some jurists have said<sup>(10)</sup> that the lien does not include the buildings constructed on the liened and unbuilt land because they are not regarded in this case as mere improvements, but as new real properties. While others have been of the opinion, and a more probable one, that the lien includes them, because the construction is not considered independent from the land but attached to it. The stipulation of this Article has definitely<sup>e</sup> adopted this opinion.

Disagreement has occurred among jurists regarding the appearance of a new island near the liened real property. Does the lien affect it? Some say that the lien does not affect it as it enjoys an independent distinct existence.<sup>(11)</sup> Others say, and we adopt this view that the lien occurring on a real

property near the seashore affects the new island created near it.<sup>(12)</sup>

Frequently the debtor appropriates a land neighboring his liened land. In this case the lien instituted on the liened land, shall not include the neighboring land which became attached to the former due to its appropriation by the same debtor.<sup>(13)</sup> That is to say, that the lien does not include the increase resulting to the real property, other than the improvements. If the debtor has bought a land and has annexed it to the liened land, this annexation shall not be regarded as an improvement. The lien does not include the lands bought or annexed, because these are not considered accessories of the liened real property or its improvements, but are independent real properties.

The stipulation of this article includes all kinds of lien. It is not restricted to the contractual lien.<sup>(14)</sup> This article refers to the indivisibility of the lien mentioned in Article 12 of this Code.

The lien shall include all the following: (a) the accessories existing at the time of the conclusion of the lien, such as the fruits which are not yet gathered,<sup>(15)</sup> (b) the movables regarded as real properties by destination, provided that they remain belonging to the real property,<sup>(16)</sup> and (c) the right of easement established for the interest of the real property.<sup>(17)</sup>

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(1) Yaken, Zouhdi, op. cit., Vol II, page 83, referring to Hogue, part 13, pars 232.



- (2) Ibid., referring to Planiol, Traite Elementaire de Droit Civil, para 2846.
- (3) Ibid., referring to Dalloz, Repertoire Pratique, para 3.
- (4) Ibid., referring to French Court of Cassation, 2 August 1886.
- (5) Ibid., referring to Aubry et Rau, Cours de Droit Civil Francais, para 284, footnote 3.
- (6) Ibid., referring to Planiol, Traite Elementaire de Droit Civil, para 2742 and 2744.
- (7) Ibid., referring to Dalloz, Repertoire Pratique, para 25.
- (8) Ibid., referring to Dalloz, Repertoire Pratique, para 666.
- (9) Ibid., referring to Baudry et de Louan, Traite Theorique et Pratique de Droit Civil, para 1937.
- (10) Ibid., referring to Aubry et Rau, Cours de Droit Civil Francais, para 284.
- (11) Ibid., referring to Demolombe, Cours de Code Napoleon, part 10, para 159.
- (12) Ibid., referring to Aubry et Rau, Cours de Droit Civil Francais, para 284.
- (13) Ibid.
- (14) Ibid., referring to Dalloz, Repertoire Pratique, para 38.
- (15) Ibid., referring to Baudry, Lacantinerie et de Louan, Traite Theorique et Pratique de Droit Francais, para 914.
- (16) Ibid., referring to French Court of Cassation, 21 November 1894.
- (17) Ibid., referring to Paris Court, 10 May 1898.

ARTICLE 124 - The creditor whose principal credit is registered with interest or on the instalment plan shall be entitled to demand that the same grade of lien accorded to the principal be also assigned to the interest and instalments (for the year of maturity on the date of application for execution, and also for the current year, provided the whole amount does not exceed the total amount of interest for two years), on condition that such claim be a corollary of the contract itself, that it be registered, and that the rate of interest be expressly mentioned.

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ARTICLE 125 - Any lien legally entered in the Land Register shall conserve its grade and validity, without the need for any new formality, until the act of acquittance is legally entered in the same Register.

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The lien is one of the official contracts whereby the law has provided its registration. The lien shall not be regarded as existing unless it was registered in the Land Registration Departments. It is permissible to every person who has an interest, even the debtor himself, to claim its annulment (if unregistered), because the registration is a fundamental condition for the existence of the lien.<sup>(1)</sup>

The rank of priority is fixed as from the date of the inscription in the Daily Register in accordance with the two Articles, Numbers 63 and 65, of Arrete No. 188. It was stated in the first that it is upon the Assistant Chief of the Office to keep a Daily Record in which he records under a serial number, the formalities presented to him and the documents received by him. He shall record the date and the number of registrations in the Daily Record and in the Control Paper. He should carry out the transactions in sequence, in accordance with the date of their registrations in the Daily Register. The order of priority is considered in accordance with the date of the registration of the petition in the Daily Register.

Article 45 of Arrete No. 188 has stated that the deeds, which must be publicized by being registered in the Land Registry Register, may be confirmed by an oral or written declaration before the Assistant Chief of the Office, in the district

wherein the real property exists, by an ordinary deed. If the deeds were concluded in foreign countries, they should be drawn up in the official form. Nevertheless, and under this circumstance, the lien deeds, sales by redemption and sale of the proceeds, can be drawn up in ordinary deeds, authenticated by the competent authorities, as provided for in the laws in effect.

In accordance with Article 2128 of the French Civil Code the lien deed drawn in a foreign country shall not have effect on French territories, unless there existed provisions contrary to this rule in the political laws or in the treaties. But Article 45 of Arrete No. 188 has allowed the conclusion of lien deeds, sales by redemption and sales of the proceeds in accordance with ordinary deeds provided they are authenticated by the competent authorities within the procedures and rules stipulated in the laws in effect.

It is evident that the Consuls of the States in foreign countries carry out the function of the Notary Public concerning the transactions of the subjects of their States in their original country and authenticate the genuiness of signatures and stamps issued from the official departments in the country in which they represent their own State. If anyone institutes a deed before the foreign Notary Public, or if he extracts a document from an official department in a foreign country, and the Consul authenticates the genuiness of the official signature and the Foreign local ministry or anybody acting for it had corroborated the genuiness of the signature of the Consul, such

a deed becomes acceptable at the Department of the State as those deeds authenticated by the Notary Public.

It was mentioned in Article 7 of Arrete No. 45/LR as amended by Article 15 of Arrete No. 188, that any person who has sustained a harm to his right on account of an inscription or modification or cancellation occurring without a legal force, has the right to have that annulled or modified. It is not permissible to effect any annulment or modification whatsoever in the records of the Land Register without a judicial decision to that effect, except in the event when those concerned have agreed to that in writing. The Registrar, who is the Chief of the Land Registry Office, can correct the simple clerical errors within the term stipulated in Articles 29, 30 and 31 of Arrete No. 189. (2)

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- (1) Yaken, Zouhdi, op. cit., Vol. II, page 92, referring to Dalloz, Repertoire Pratique, para 963 etc.
- (2) Ibid., pages 93 - 96.

ARTICLE 126 - The lien shall be either forced or contractual, and shall have no legal effects in either case until after registration thereof.

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Refer to comments on Article 126 of this Code.

ARTICLE 127 - Several liens may be imposed on the same property. Regardless of whether such liens are forced or contractual, the grades thereof shall be determined following the dates of the entries in the Land Register.

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The law has divided the lien into two kinds: forced and contractual. The aim of the conventional lien shall appear in the explanation of Article 128 of this law, and <sup>the</sup> aim of the forced lien shall appear in the explanation of Article 131 of this law.

It is permissible, by virtue of this Article to have several liens on one real property. The determination of the rank of priority shall be regarded from the date of the registration in the Daily Register, as has been explained in the previous article, according to Articles 63 and 65 of Arrete No. 188. It is permissible to effect inscription at any time but the rank of the lien shall not be considered except from the date of its inscription, therefore it is in the interest of the creditor to hurry in effecting the inscription so that he will not be preceded by he whose lien or his contract is later and hurries to effect registration before him.

If the debtor disposes of the mortgaged real property, and the purchaser hurries to register his contract before the registration by the mortgagee, then this registration shall deprive the creditor from benefitting from the inscription of the lien, due to the extinction of the debtors ownership. If a judgment of bankruptcy of the creditor has been issued it will prevent the effecting of the inscription.

It is not permissible, thereafter, to effect any inscription with the lien. Bankruptcy cannot be measured with the state of insolvency of the debtor, for it is permissible in this case to effect the inscription of the lien.<sup>(1)</sup>

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(1) Yakenç Zouhdi, op. cit., Vol. II, pages 97, 98 and 99, referring to Article 448 of the French Commercial Law.



SECTION 2

CONTRACTUAL LIEN

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ARTICLE 128 - No contractual lien shall be concluded except by a person who has the legal capacity of disposing of the property or of the title or claim whereon the lien is to be imposed.

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This article speaks about the contractual lien which results merely by the agreement of both parties. This article coincides with Article 2124 of the French Civil Code. According to the stipulation of this article it is not possible to constitute the lien except by the owner of the liened real property, or by the owner of the right offered for lien. On the other hand he must be competent to dispose of the real property, but the law does not provide that the lienor should be the debtor with the debt to which the lien was constituted, for it is possible to effect the lien by other than the debtor. In this case he will not be responsible except for the amount of the price of the liened real property. In case of the competence of disposition, it shall be referred to conditions of the personality of the lienor. If it is presumed that the lien was effected by an incompetent person, then the lien will not be absolutely invalid but proportionally so. He who is allowed to claim its invalidity is the guardian or trustee or the minor himself after he becomes of age. The lien which results in such a manner shall be liable to authentication,



contrary to the lien which is absolutely invalid; such as the lien effected on a real property by other than its owner. If the proportionally invalid lien was in such a manner correct, then, it shall have a retroactive effect, provided that it shall not prejudice the acquired registered rights instituted for the others, on the real property.

In accordance with the provisions of Article 735 of the Lebanese Code of Civil Procedure the person whose property is under an order of attachment is not allowed to sell the real property or a part of it, or to partition his ownership or to mortgage it by mere registration of the real property attachment minutes by virtue of Article 734.

Therefore, in order to be able to effect the lien, the contractor must be the owner of the real property or must be in possession of a real property real right which he may effect the lien thereon.<sup>(1)</sup> If it is intended to take a part from the real property for widening one of the public roads, then the mere preparation of the plans does not deprive the owner from benefitting from his property or to seize his possession of the part which is intended to be taken off for its annexation with the public road. The owner can, as long as he is not paid the indemnity due, lien this part and the remaining part, then the lien will change to the amount fixed as a price for the taken part, and which is due to the owner, and on the interest due thereto.<sup>(2)</sup>

If a person has granted his sons his properties and divided them among them, and he did not register the contract of the

donation, then he may conclude the lien on those real properties which are considered remaining on his property due to the nonregistration of the contract of the donation in relation to him and to others.<sup>(3)</sup>

The liening of the property of others is fundamentally invalid.<sup>(4)</sup> It shall be regarded as if it had never happened. Therefore it cannot have any effect, whatever the formalities following it may be.<sup>(5)</sup> Also, it is not possible to consider the liens as valid due to the fact that the true owner shall become the sole heir of the lienor.

The dominant opinion in jurisprudence and interpretation is the nonpermissibility of liening the real property by a person on condition to take possession of it in the future.<sup>(6)</sup> In all cases, the invalidity of the lien necessitates the forfeiture of the usufruct during the prescribed period.<sup>(7)</sup>

The invalidity may be used by the true owner as grounds for protest or by he to whom the right was transferred by the true owner. The lien effected on the property of others by other than the owner cannot be said to be valid, whether it was meant to harm the owner, who can protest by the invalidity, or by he to whom the right was transferred by the owner; such as the liening mortgagors. The ordinary creditors may also claim the invalidity if it was effected to harm them.<sup>(8)</sup>

Most of the jurists state that the lienor who has liened the property of others and then becomes its owner is allowed to claim the invalidity if the real property has reached him after effecting the lien, whether by purchase or by inheritance.<sup>(9)</sup>

The interpretations and the jurisprudence have agreed on

the validity of the lien effected by an apparent owner; such as the sole heir taking possession of the real property,<sup>(10)</sup> unless the lienee was negligent and he could easily recognize the inefficiency of the lienor on the real property.<sup>(11)</sup> The validity of the lien which is exercised by the apparent owner who carries a valid, legal and registered deed, was approved though it appeared later that his name in the deed was an alias (but that his true name appeared) in accordance with a secret contract<sup>(12)</sup> provided that the lienee was unaware of the existence of a secret contract. If he was aware of it, he can protest its application to him and he shall be regarded as negligent and shall bear the damages made by him.<sup>(13)</sup>

If the right of ownership of the lienee was subject to a dependant condition then the lien is permissible if the condition was realized, because the lienee is considered as owner from the time of concluding the contract of giving possession, following the rule of the retroactive effect of the condition. Therefore, the seller is allowed, on condition that he restore the real properties after returning the price which he had previously received, to effect a lien during the period falling between the time of the sale and the recovery of the real property. Likewise, the lien, subject to the condition of annulment, is valid; the purchaser himself being allowed to effect the lien on the real property. If the recovery of the real property by the owner did not occur, then the lien is valid and is considered as existing from the time of its occurrence.<sup>(14)</sup>

It was stipulated by Article 6 of Arrete No. 45/LR, abrogating Article 13 of Arrete No. 188, that everyone who acquires a right

in an immovable property, relying upon inscriptions and statements of the Land Register, shall remain in possession of that acquired right. The reasons of depriving him from this right, resulting from the cases raised against him, in accordance with the provisions of Article 31 of Arrete No. 186 issued on March 15, 1926, and Article 17 of this Arrete, may not be the basis of a protest against him. It is not possible that the provisions pertaining to these cases, establish the annulment of the acquired right which is legally inscribed.

It was stipulated by Article 7, abrogating Article 15 of Arrete No. 188, that every person who was harmed in his rights because of an inscription, modification or cancellation, occurred without any legal cause, may obtain the annulment or the modification thereof. It is not possible to effect an annulment or modification in the inscriptions of the Land Register without a judicial decision, unless those concerned have consented to that in writing.

The rights and the matters whose inscription in the Land Register is deemed necessary to prove its existence, its modification, or its annulment, are:

(1) All the real rights; such as the rights of mortgage, privileges, liens, and the rights of easement approved by the law and determined by Article 10 of this Arrete, or the rights approved by the laws and arretes subject to the inscription.

(2) All the real property restrictions and attachments.

(3) Real property cases.

(4) All the modifications in the borders (boundaries) or in the rights of easement established after the registration as a result of the planning, opening, widening or repairing of the roads, water drains, or drainages, or the railroads. Likewise, the modifications resulting from the construction of the new buildings or the modification of the old buildings.

(5) All the agreements among the living whether it was in exchange or free, and all the final decisions, and generally all the acts which lead to the constitution, transfer, modifications or extinction of a real property real right.

(6) The decisions judging bankruptcy and the decisions necessitating the opening of the judicial liquidation in relation to the real property wealth of the person.

(7) Waqf (mortmain or trust) deeds and likewise the deeds of dividing the Waqf.

As to the registration which is intended for the notification of the others and to make his inscriptions enforced thereon, shall include: (a) the rent of the agricultural lands or the buildings, and (b) the receipts or the renouncement of the due rent for more than a year.

As to the inscriptions which are intended to establish a practical legal effect for the contracts, they shall include: (a) the indications and the statements declared in case of an incompetence, whereby the right is being registered in the name of the minor or the incompetent; such as the absentee, the insane, and the person under indictment known as noncompos mentis, according to the declarations presented to the Registrar; (b)



(b) statements relative to the restriction of the right of Tasarruf when the right is registered in the name of the married woman and her personal status necessitates the reference to a restriction of this kind; and (c) clarifications relating to the owner of the right of Tasarruf to point out the real right registered for the interest of others. If it were Waqf the name of the institution, or the persons who benefit therefrom, should be mentioned. (15)

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- (1) Yaken, Zouhdi op. cit., Vol. II, page 100, referring to Aubry et Rau, Cours de Droit Civil Francais, 5th edition, par. 266.
  - (2) Ibid., page 101, referring to French Court of Cassation, 19 March 1838.
  - (3) Ibid., page 101, referring to Dalloz, Repertoire Pratique, pars. 78, 1 and 106.
  - (4) Ibid., page 101, referring to Ponth, par. 624.
  - (5) Ibid., page 101, referring to Baudry - Lacantinerie, Traite Theorique et Pratique de Droit Civil.
  - (6) Ibid., page 102, referring to Lorand, par. 472.
  - (7) Ibid., referring to Dalloz, Repertoire Pratique, pars. 37, 38, 39, 41 and 44.
  - (8) Ibid., referring to Baudry - Lacantinerie, Traite Theorique et Pratique, par. 1311 and French Court of Cassation, 18 November 1896.
  - (9) Ibid., page 103, referring to Aubry et Rau, Cours de Droit Civil Francais, 5th edition, par. 266.
  - (10) Ibid., referring to Brussels Court, 10 February 1830.

- (11) Ibid., referring to Dalloz, Repertoire Pratique, par. 86.
- (12) Ibid., referring to French Court of Cassation, 30 March 1836.
- (13) Ibid., referring to Aubry et Rau, Cours de Droit Civil Francais, 5th edition, par. 756.
- (14) Ibid., page 104, referring to Article 2125, as amended on 31 December 1910, of the French Civil Code and to Articles 476 and 485 of the Lebanese Code of Obligations.
- (15) Ibid., pages 109-110.



ARTICLE 129 - It is illegal to impose a lien on the titles or claims of incompetent persons, minors or persons under custody except for the reasons and through the methods provided for in the special law relative to the personal status of such persons. In respect of the rights or claims of absent persons, as long as tenure is granted only temporarily, no lien may be imposed thereon except by permission of the court.

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The lienor must be of competence to enjoy disposal. A lien of a property cannot be concluded by an incompetent person. The lien concluded by a person who is totally unpossessed of the power of discretion; such as the child and the insane, shall be considered as if it were never concluded; but the acts of the incompetent persons who possess the power of discretion are apt to be annulled. That is to say, they are proportionately annulled; such as in the case of the minor who is capable of discretion. It is not permissible to the contractor with an incompetent person to advance the plea of annulment, as it is of the rights of the incompetent person himself or his agent or his heirs. If the contract made by the minor who is capable of discretion was not subject to a special wording, the minor may not be able to annul it, unless he establishes the proof of his being defrauded.

As it is allowable to the father to sell his property to his son and to purchase for himself the property of his son, it is likewise allowable to him to mortgage his own property with his son and to mortgage to himself the property of his son, in lieu of a debt owing from him. If the mortgagor and the

mortgagee in the two illustrations is one and the same person, as when he is the father, he shall be excluded from the saying that one person does not hold both ends of the deed of mortgage. That is to say, he shall not be a mortgagor and a mortgagee.

If such a contract is allowable, it shall also be allowable if the father mortgaged the property of his son with a stranger in lieu of a debt owing from the son because the contractors are different in this case; they are the father and the creditor, contrary to the first illustration. As it is allowed legally to the father to mortgage the property of his son in lieu of a debt accruing from him, it is allowable for him to mortgage it in lieu of a debt owing from him personally because the father owns the right of entrusting it with others.

Whereas the dealings of the father with the property of his son is subject to the benefit, he does not possess the right to lend it, as this action causes damage to the property which remains unexploited. As it is not allowable for him to lend it to others, it is likewise not allowable for him to borrow it for himself, for the above mentioned reason. The guardian is similar to the father and the law has prohibited interest.

It is conditional, in allowing the father to lien the property of the son, that it should be to the benefit of the minor on one hand and on the other hand that the father should not be known to be lacking judgment. If he was qualified to be just and of good behaviour and trustworthy of keeping the property or if he were an ordinary man, he shall therefore enjoy the guardianship over the property of his son. But if the father was a spendthrift, untrustworthy of keeping the property

of his son, he shall not be allowed to dispose of it whatsoever and the judge shall withdraw the property from his possession and deliver it to a guardian selected by him for the disposal thereof to the benefit of the child.

The guardian enjoys the guardianship over the properties of the orphan. He shall himself discharge the duties allowed to him by law. He can appoint another and this other can dispose of his responsibilities on his behalf, therefore it is permissible for the guardian to mortgage the property of the orphan with another creditor other than himself even if this debt was due from a dead person or from the orphan. Also he is entitled to mortgage the property of the debtor with himself whether the debt was for a dead person or an orphan. The disposal by the guardian of the property of the orphan is restricted to accruing benefits and is subject to the approval of the Sharia'ah Court if the orphan was a Moslem and the Civil Court if the orphan was of the Christian communities. (Article 7, par. 2, of the Sharia'ah Law and Article 33 of Legislative Decree No. 6.)

If the lien on the property of the minor occurred without a legal cause or the approval of the competent reference; such a lien is null and void.

The persons who are incompetent to dispose of and consequently to conclude the lien are:

(1) The minors who have not completed the eighteenth year of their ages. If they were capable of discretion, the lien shall be considered as proportionally null and void but if they were incapable of discretion the lien is considered as totally null and void.

(2) The persons interdicted judicially or legally.

(3) Bankrupts, as from the time of the declaration of their bankruptcy. These persons cannot sell or lien their real properties as from the issuance of the judgment of their bankruptcy.<sup>(1)</sup>

(4) The debtors, other than the insolvent merchants, who have not relinquished their real properties to their creditors. These may conclude a lien, but is subject to refutation by the creditors, in accordance with Article 278 of the Lebanese Code of Obligations.

(5) The persons who have obtained a judgment for judicial liquidation, having failed to settle their debts, may not conclude liens harming the creditors.

(6) The legatees or the donees with the condition of temporary nondisposition, and it is prohibited for them to effect a lien on the real property willed or donated.<sup>(2)</sup>

(7) The legatees or the donees, with the condition of the nonliability of the donated real properties to attachment, cannot effect alien thereon. (refer to Para. 10, Article 594 of the Lebanese Code of Civil Procedure)<sup>(3)</sup>

Attention must be given to the condition of noneffecting the lien, mentioned in a deed of a testament or a donation, which must be considered as valid within the same restrictions and conditions imposed on the condition of nondisposition.<sup>(4)</sup>

(8) The minors who are legally permitted to practice commerce or industry are not regarded as incompetents, but they are treated as adults in the circle of their commerce and according to its need (Article 217 of the Lebanese Code of Obligations). It is provided for in Article 215 of the aforesaid Code that

every person who has completed 18 years of his age, is competent to undertake legal obligations, unless he declares his incompetency in a legal stipulation.

It is provided for in the last paragraph of Article 129 that the possessed rights of the absentees, as long as that possession is temporarily permitted, that is it not permissible to effect the lien thereon except with a legal permission.

If a person was absent, and it was not known whether he is alive or dead, he will be called as missing. He either would have left an agent before he became missing or he will not have done so. If he had left an agent, then the latter is he who will maintain the properties of the former and manages his interest in order to keep the power of attorney after he became missing. The heirs are not allowed to deprive the agent from the money because they are not entitled to his money by way of inheritance, except after the authentication of death. The agent cannot repair the real properties of the missing person, if they had needed that, except with a permission of the judge, because the absent person may be dead, and so the agent will not be a guardian. If the absentee did not leave an agent, the judge will appoint a person who will enumerate his properties, whether they were movables or real properties, and will increase them to the interest of the absentee. He will collect the rents of the properties rented before the person becomes missing. He will rent others and will collect the debts which were admitted by the debtors, and likewise the deposits. He will have the right to litigate in the rights which accrued during his absence,



as he is an original party thereof. (5)

Whereas the missing person is unable to look after his own interests and the judge is the one who looks into that, therefore the commission to sell the thing capable of deterioration is established for him, whether this property was movable or a real property; such as, in the first instance, the fruits and in the second, such as a land or a house on the bank of a river, both of which are likely to be ruined by it. Subsequent to the sale the judge shall keep the price. If the missing person reappears, the judge shall deliver the price to him; and if his death was determined after the lapse of the legal period he shall deliver the price to his heirs, who are entitled thereto.

Whereas the status of the missing person is not known, he cannot be sentenced by the judgments concerning the living or the dead and therefore the jurists have stipulated that the sentences against him must vary. They said that he would be considered alive in certain judgments and dead in respect to other judgments. He would be considered as alive in respect of the judgments which harm him and those are dependent on the establishment of his death. It is therefore based on this that his property will not be divided amongst his heirs and the lease, which he had concluded before his becoming missing, cannot be cancelled. All these things will continue until his status is revealed and then judgment will be given accordingly. He shall be considered as dead in respect of the judgments which benefit him and harm others and these are dependent on the establishment of his being alive. It is therefore based on this that he does

not inherit from others and no judgment can be given regarding his entitlement from a will if anything was bequeathed to him and the bequeathor died during his being missing. Such a lot, of his inheritance and his entitlement in a will, will have to be deferred until he appeared to be alive or judgment given proving his death. If he appears alive, he would be entitled to the inheritance and to the bequests of the will. If his being alive was not proved and judgment was given to the effect that he was dead, whatever was deferred for him from the inheritance and the will shall be transferred to the heirs of the testator and bequeathor. (6)

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- (1) Yaken, Zouhdi op. cit., Vol. II, page 113, referring to Baudry, Lancantinerie et de Louan, Traite Theorique et Pratique de Droit Civil, par. 342.
  - (2) Ibid., referring to Aubry et Rau, Cours de Droit Civil Francais, par. 266.
  - (3) Ibid., referring to Jiar, ~~par.~~ par. 208.
  - (4) Ibid., referring to Aubry et Rau, Cours de Droit Civil Francais, par. 266.
  - (5) Ibid., page 115, referring to Lebanese Court of Cassation, 19 July 1927, "The guardian & custodian shall be entitled only to receive and keep the properties of the absentee, and shall not have the right to litigate on the latter's behalf."
  - (6) Ibid., page 115.



ARTICLE 130 - It is illegal to impose a lien on property to be acquired in future.

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This article is in conformity with Paragraph 2 of Article 2129 of the French Civil Code. The logic in promulgating it is to safeguard the interest of the debtor in order that he does not push himself to effect liens on his real properties, which he hopes to procure in the future; because if it is allowed to effect liens on the real properties hoped to be procured in the future, this will tempt the children of the wealthy to effect liens for a trivial amount on the real properties which they shall inherit. This will cause harm to them and the usurers will benefit thereby.(1)

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(1) Yaken, Zouhdi, op.cit., Vol. II, pages 119<sup>d</sup>120.

SECTION 3

FORCED LIEN

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ARTICLE 131 - (Repealed by Arrêté No. 102/LR dated August 6, 1932, and replaced with the following provisions):

By the term "forced lien" shall be meant a lien to be registered de jure, with or without the owner's consent, and in the cases designated hereunder. Such lien shall be made out under a particular name. The rights, claims, or debts for the security of which a forced lien may be imposed shall be the following:

- (1) Rights, claims and debts due to minors and ~~persons~~ persons under custody: in such cases, the forced lien shall be imposed on the property of the guardians or custodians.
- (2) Rights, claims and debts due to a married woman: in such cases, the forced lien shall be imposed on the husband's real property as security for the wife's dowry, marital rights, and the compensation due for obligations imposed on the husband but ordinarily executed by the wife.
- (3) Rights, claims and debts due to the State, municipalities and public administrations: in such cases, the forced lien shall be imposed on Accountants' property. In respect of rights, claims and debts due to the State, the forced lien shall be imposed on the debtors' property.

- (4) Rights, claims and debts due to the seller, barterer or participator: in such cases, the forced lien shall be imposed on the property that has been sold, bartered or partitioned when a contractual lien is not concluded as security for the price of sale, or for the barter or partition balance.
- (5) Rights, claims and debts due to creditors or legatees: in such cases, the forced lien shall be imposed on the inherited property as security for the separation of the legator's property from that of the legatee.

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(1) This article is not applicable to the rights which arose before the enforcement of Arrete No. 3339 and Arrete No. 102, except by reason of the right being extensive and creating its effect after the issuance of the two aforementioned Arretes. Therefore it is not possible to put the forced lien as a lien in respect of a government debt and judged (by the courts) prior to the issuance of the two above-mentioned Arretes. And vice-versa, it is possible to levy the forced lien on properties of the State Accountant or the guardian of a minor, both of whom were and are still holding their offices and remained in them subsequent to the issuance of those two Arretes, (1)

First, this article is totally similar to the old one (prior to abrogation) except the phrase appearing in the third

paragraph where the following was added: "In respect of, claims and debts due to the State, therefor<sup>ly</sup> lien shall be imposed on the debtors property."

The French Civil Code had enumerated three kinds of forced lien in Article 2121. The first is the forced lien which shall effect the real properties of the husband in order to secure the rights of the wife. This was explained in detail by the second paragraph of Article 131 of this Property Code, as amended. It stated that the forced lien is concluded on the real properties of the husband in security for his wife's dowry and her marriage rights, for the compensation, according to her from the obligations of the husband, which she carries out. The second is the lien effected on the properties of the guardians in security for the properties of the minors and the interdicted persons. The third is the lien effected as security for the rights and debts of the government and the public administrations on the real properties of the Chief Accountants and Treasurers.

The lien established for the benefit of the minors and those who are under indictment is taken from the Roman Law. The ancient laws have granted the minors and those who did not reach the age of discretion, the right to recover their debts before the ordinary creditors, through their debtors, the guardian or trustees. Emperor Constantine, seeing that this lien was not sufficient, changed it to a stable lien and gave it the right of priority on their liens, from the date <sup>were granted to those who are under indictment on the real properties of the</sup> of the opening of the will. Then the same securities<sup>ly</sup> of their guardians. The old French Laws have preserved this lien. (2)  
Then the Code of Musadar, for the third year of the First

French Republic, annuled the lien given to the minor and annuled at the same time all the other hidden liens. Then the Code of 11 Brumaire, for the seventh year, had restored it by the two Articles 4 and 21, where he subjected it to registration, like the ordinary lien. It, therefore, had no legal effect, except from the date of its registration, on all the real properties of the guardian.

Then came the French Civil Code, which saw that it was necessary to lien the real properites of the guardian in order to guarantee the rights of the minors and those who are indicated persons (noncompos mentis). It necessitated its publication by registration, but it did not make that a fundamental condition for the validity of the lien, so the priority in it was given from the date of the opening of the will . (3)

The above mentioned Code has necessitated the forced lien in order to guarantee the rights of the persons whose real properties are in the hands of a guardian, and who are: (a) the legitimate minors (who have lost one of their parents), (b) the recognized natural children, (c) those who are judicially indicted,<sup>(4)</sup>x and/or (d) those who are legally indicted by being sentenced for a disgraceful crime.(5)

It has been said that the forced lien, which is necessary to guarantee the rights of the minors and those who are indicated, is popular in France and includes all the real properties, present and future, even the real properties acquired after the expiration of the guardianship, contrary to the case here

in Lebanon, whereby the lien shall not include anything but the registered real properties.

The forced lien, concluded for the guarantee of the rights and debts of the minors and indicted persons, shall include all the debts due to the minor, by the guardian, and which concern the management of his properties, even those originating before assuming his guardianship for the benefit of the minor; because the guardian is compelled to settle the debts of the minor, he being his representative. (6)

The Brouaire's Law for the seventh year, had in France, subjected to registration all the forced liens, among which was the lien established for the interest of the minors and indicted persons. The creators of the Code of March 23, 1855 have treated this case, and kept the principle of the French Civil Code for the rank of the lien. They limited the responsibilities of the guardian until the expiration of the guardianship. (Article 8)

In view of the importance of the said Article No. 8, its text is hereby mentioned: "The minor who reached the age of maturity and the interdicted person who was freed from the inscription during the year following the expiration of the guardianship. If they did so, the forced lien keeps its rank for whoever's interest it was put. If they did not do so, the forced lien can be effected later but under this circumstance--it shall have no retroactive effect up to the date when the guardian assumes his guardianship and its rank shall be considered as from the later date of its inscription



in the Land Register, and thereby it shall have no effect on the registered liening creditors, of the properties of the guardian, prior to the later registration nor on the others who have acquired real rights on these real properties, by way of a registered deed, prior to the inscription of the forced lien."

The <sup>idea</sup> ~~lien~~ of giving the married woman guarantees, to <sup>safeguard</sup> the return of her dowry, refers back to the Roman rights. This idea had come into practice at the time when it was decided to force the husband, at the abolishing of the contract of marriage, to return the dowry. The married woman was guaranteed, thereby, a privilege above the rest of the creditors, no matter who they were. If the dowry was in ~~the~~ <sup>she has the right to claim, herself, the transfer of the ownership of that real property</sup> form of a real property, to her, because such a real property was not capable to be sold, or a real right be assigned thereon in the way of a lien effected by the husband. If the dowry was in the form of movables she enjoys the privilege on the properties of the husband, prior to his ordinary creditor.

The forced lien for the married <sup>woman</sup> secures the settlement of all the amounts due from the husband to the wife until the ~~abolishing~~ <sup>abolishing</sup> of the marriage agreement. It includes all the debts of the wife assigned to her as marriage rights and from her conducting the obligations imposed on the husband and the debt of the dowry.

The forced lien shall have effect on the liened real



properties, which are registered in the Land Register in accordance with Articles 126 and 132 of this Code.

The forced lien established for the married woman, must be inscribed and registered, otherwise it shall have no legal effect towards others. The amounts secured by the forced lien and the liened real properties must be explicitly mentioned in the inscription and registration of the lien.

The forced lien weakens the financial status of the husband, more specially in France, if it covered all the husband's real properties or the most important thereof. This is because, under this circumstances, if the husband wanted to sell one of his real properties, which are being subjected to the forced lien, he should seek the help of his wife, in order that she renounce her forced lien in favour *who wishes to make a contract with the husband, no matter whether such a person* of the transferee. In fact, the person, was a creditor or a purchaser, would not agree to make the contract unless the wife had transferred to him the right of benefitting from her forced lien. If she does not do so, he refuses to effect the contract, fearing that she will pursue him for her debt.

It was said that if the husband wanted to borrow money, the capitalists with whom he is negotiating would demand a lien to be effected on his real properties or on the real properties of the married couple. On the other hand, they would demand to step into the shoes of the wife, in whose interest the forced lien is placed, in order that this wife shall not enjoy any privilege on them during the proclamation

of the properties for sale.

The forced lien in favor of the married woman, though it is void of actual security to her, in view of the usage in the countries that adopted it, such as France, has revealed to us that the woman in more than one occasion renounces her forced lien in order to return the financial status to her husband. On the other hand, it effects the natural aspect of exchanging of the real properties and therefore many authors(7) have advocated the necessity to abolish it.

The forced lien concerned with the State, the municipalities and the public administrations was decided by paragraph 3 of this article, which is in conformity with the provision of Article 2121, paragraph 4. It is noticed that this right was granted by the law to the public interests and not to the companies conducting public service, because the private companies are able to look after <sup>the</sup> safeguarding of their interests and utilities. Whereas the public interests are administrative bodies, emanating from the State or the District, or the Sub-District, entrusted to carry out the functions leading to public benefit; and whereas the private companies are, in fact, legal bodies and the special rights are applied thereon.

The forced lien relating to the seller was stipulated by paragraph four of the amended Article 131; whereby it was stated that it is concluded on the real property sold to guarantee the payment of the price when there will not be any contractual lien thereon. This lien does not occur except

on the sold real property. The wisdom for the creation of this lien, is that it is presumed in the seller that he has kept exclusively for himself a privilege on the real property which he had sold, as security for the payment of the price; and reasonably he is more deserving of the priority on others from the creditors of the purchaser because he has delivered it to him. This lien shall be to every seller of a real property, whether the sale was conventionally or judicially.(8)

The forced lien relating to the barterer is the same as that of the sale. If the debtor had given his creditor a real property in exchange for the debt due from him, and the creditor shall be indebted with the difference because the value of the real property is more than the value of the debt; then he who has given the real property shall have a privilege of receiving the guarantee of the difference between the two values. If, for instance, Zaid is indebted to Umar for 100 Lebanese Pounds and he gave, it was provided that Umar has to pay to him the difference, that is 50 Lebanese Pounds in cash, then Zaid shall have the lien of the creditor for payment of the difference.(9)

The forced lien relating to the shares is for settlement of all that results from the division(debts). The intention of this forced lien is to guarantee the payment of the debts resulting from the division or because of division.

Its wisdom is the same as that of the forced lien relating to the seller. <sup>(10)</sup>

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- (1) The Lebanese Civil Court of Appeal. Decision of 27 January 1936, published in the magazine al-Muhami, 10th year, part 2, page 2.
- (2) Yaken, Zouhdi, op. cit., Vol. II, page 123, referring to Potieh, part I, page 642.
- (3) Ibid., page 124, referring to Colin et Capitant, Cours Elementaire de Droit Civil Francais. para 1276.
- (4) Ibid., referring to Article 489 of the French Civil Code.
- (5) Ibid., referring to Article 29 of the French Criminal Code.
- (6) Ibid., Page 125, referring to French Court of Cassation, 23 October 1898.
- (7) Ibid., page 135, referring to Colin et Capitant, Cours Elementaire de Droit Civil Francais, para 1239.
- (8) Ibid., page 140. referring to Baudry et De Lojan, Traite Theorique de Droit Civil Francais, para. 574.
- (9) Ibid., page 141, referring to Planiol. Traite Elementaire de Droit Civil, para 2892.
- (10) Ibid., page 142.

ARTICLE 132 - In the forced lien, the amounts for which the lien is imposed and the property whereon the said formality is imposed shall be designated in each case.

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The judicial lien ~~mortgage~~ is not validly inscribed, unless the amount of the guaranteed credit is mentioned in the inscription. (1)

This article has necessitated the limitation of the guaranteed sums by the forced lien as well as necessitated the designation of the liened real properties so that both will be known to others, in order that they know how to enter into an agreement with the other. (2)

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(1) Lebanese Court of Appeal. Decision No. 9, dated 25 February 1942. See Repertoire de Jurisprudence Libanaise, Juridictions mixtes 1924-1946, Tome Premier, Par. 17, page 416.

(2) Yaken, Zouhdi op. cit., Vol. II, page 142.

ARTICLE 133 - The basis of the compulsory lien concluded for the interest of minors and interdicat<sup>e</sup>d persons and its consistency and conditions shall be fixed by the authority in charge of the supervision of the management of the guardians in accordance with the legislation in force.

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The forced lien was created in order to g<sup>a</sup>rantee the management of the guardian. Its subject is all the debts which shall be due from him (the guardian) in his capacity as a guardian, such as the debts originating from his management or from his mistakes, or his carelessness. It guarantees the debts originating for the interest of the minor against the guardian for a reason which is not relating to guardianship, such as the debts accruing to him by inheritance or which ~~be~~ have become due to him during the guardianship. (1)

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(1) Yaken, Zouhdi, op.cit., Vol. II, page 143 referring to French Court of Cassation, 23 February 1898.



ARTICLE 134 - The bases, terms and consistence of the forced lien imposed in favor of the married woman may be determined explicitly in the marriage contract concluded before the authorities concerned in accordance with the forms and conditions provided for by the Laws in force.

If no marriage contract is drawn up, or if the contract does not make provision for the enforcement of the lien, then such enforcement shall be ordered by the civil court of the district.

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The basis of the forced lien relating to the married woman, its conditions, its amounts, and the real properties attached to it, may be agreed on by both parties ~~in the marriage~~ in the marriage contract. If there will be no marriage contract, or both parties did not agree on it, then it will be designated by the Court of Civil Rights in the place of residence of both parties, in accordance with the form and conditions fixed by the laws in force.(1)

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(1) Yaken, Zouhdi, op. cit., Vol. II, page 144.



ARTICLE 135 - If it should appear that the amount of the security given to minors, persons under custody and married women is not adequate, then the lien may be extended by the authority mentioned in Article 133 in respect of minors and persons under custody, and by the court in respect of married women.

If, on the other hand, it should appear that the amount of the security given to the said persons is exorbitant, then reduction thereof may be made through the methods described in the previous Paragraph.

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Paragraph 1 of this article has established that the lien securities given to minors, interdicted persons or to the married woman, if these appear to be inadequate then the authority charged, in accordance with the laws in force with the supervision of the management of the guardians, shall have the right to demand the extension of these lien securities relating to the minors and the interdicted persons. Similar measures concerning the married woman can be adopted by the court.

The second paragraph established that the lien securities given to minors and interdicted persons or to the married woman, if these securities appear to be excessive, they could be lessened within the conditions determined in the preceding paragraph. That is to say, by the applications of the supervisors of the management of minors and interdicted persons, after investigation has been made to that effect, and on the basis of a court judgment in what it relates to the

married woman. (1)

(1) Yaken, Zouhdi, op. cit., Vol. II, page 147.

ARTICLE 136 - (Repealed by Arrete No. 102/LR dated August 6, 1932, and replaced with the following provisions):

The lien on Accountants' property, as well as on the property of persons indebted to the State, shall be imposed by decision of the Minister of Finance or by his delegate.

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It was stated in the comments on Article 132 of this Code that the forced lien must be limited, whether by the secured amounts or by the real properties liened. After it was explained in Article 133 that this limitation should be in connection with the minors and the interdicted persons, with the knowledge of the authorities designated for supervision on the management of <sup>a</sup> guardians which we have explained in the comments relating to the said article, and after it was explained also in Article 134 that this limitation, in as much as it relates to <sup>the</sup> married woman, must be either in Court of Civil Rights, this article has established that the limitation of the the contract of marriage or by limitation of the forced lien concluded on the real properties of the Accountants and the real properties of those indebted to the State, must be by a decision from the Minister of Finance or the officials acting for him. The real properties and the required due amounts must be determined in this decision. (1)

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(1) Yaken, Zouhdi, op. cit., Vol. II, page 150.

ARTICLE 137.- Sellers or barterers of real estate or participants therein shall be entitled to demand, in the contract of sale, barter or partition, a lien from the other parties on the sold, bartered or transferred property, as security for payment of all or part of the sale price, or for the barter or partition balance.

If no provision is made for the conclusion of a contractual lien, then the seller, barterer or participant shall be entitled to have a forced lien imposed on the property by virtue of a decision issued by the court of the district wherein the property in question is situated.

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The legislator wished in this article to conciliate between the privilege of the seller, barterer and the sharer of real properties and between the system of the Land Register. He asked from them in case of purchase, barter or sharing, that they demand a security on the real properties sold or bartered or renounced, to guarantee the payment of the price fully, or to guarantee the payment of a part of it, or to guarantee the payment of the differences resulting from barter or sharing. This was explained by Article 131, paragraph 4, as amended, of this Code. (1)

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(1) Yaken, Zouhdi, op. cit., Vol. II, page 151.

ARTICLE 138 - Creditors and legatees shall be entitled to reserve their rights in the distribution of the inherited property by means of forced registry entered during the six months following the opening of inheritance formalities.

If such registration is not made within the said period, then the right referred to shall not have any effect on the property.

The registration shall be effected on the strength of a court decision taken in camera at the request of those concerned and after hearing the public prosecutor's statement, and shall not be given a grade except after the entering thereof in the Land Register, unless it is preceded by the protective registry provided for in Article 139.

The lien registered at the request of one of the creditors or legatees, or at the request of a number of them simultaneously or in succession, shall be for the benefit of all of the creditors and legatees, without affecting any of the causes of priority or preference that may have occurred among them previously, and without creating any new causes for priority or preference. Such lien shall have its effect on the heir's personal creditors as well as on the creditors of the legator and on the legatees who did not apply for registration before the expiration of the period provided for in the first paragraph of the present Article.

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This article is applied to open estates before probate. But the respite stipulated therein does not begin from the date of

the opening of the estate but from the date of the enforcement of Arrete No. 3339.<sup>(1)</sup>

It should not be construed from this article that the debtor or the legatee loses his right if he does not register during the stipulated respite. Under the circumstances this negligence leads to enable the debtor or an inheritor to share with him in the properties of the estate.<sup>(2)</sup>

Article 138 is applied to unsurveyed real properties in view of the possibility of registration of a forced lien in accordance with the Laws of Executive Number 12 issued on 28 February 1930.<sup>(3)</sup>

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(1) The Lebanese Civil Court of Appeal, dated 24 November 1937. See Al-Muhami, 12th Year, part 2, page 14.

(2) The Lebanese Civil Court of Appeal, dated 25 August 1939. See Al-Muhami, 12th Year, part 2, page 209.

(3) Ibid.



ARTICLE 139 - In all the various cases of forced lien, and in the event of an emergency, the president of the Court may, on application, order the registration of any required protective entries, which shall be effective only until the issuance of the court decision required to be registered. If the final decision provides for the confirmation of all or some of the entries, then the lien, as defined, shall assume the grade assigned thereto as from the date of the protective entry.

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It was established in paragraph five of the amended Article 131 of this Code, that the forced lien shall be concluded on the real properties of the legacy in order to guarantee the separation of the legacy of the legator from the properties of the inheritor, according to the request of the creditors and the legatees. Article 131 explained the procedures of the forced lien, its periods and its effects, together with this Article.

The logic for promulgating these articles is that the legator on his death, his properties <sup>a</sup> may intermix with the properties of his heirs, whereby it would be possible to the creditors of the latter to obtain their demands of whatever rights they may have; such as the mortgages they enjoy of the properties of their debtors, in accordance with Article 268 of the Lebanese Code of Obligations, out of the total properties. That is to say, the property of the testator as well as the property of the heirs, thereby causing harm to the creditors of the deceased as well as the legatees. <sup>(1)</sup> Therefore, the law has allowed the



creditor and the legatees to preserve their rights on the distribution of estates, one from the other, by means of a forced lien made within the six months following the commencement of liberation of the estate. Thus, preventing the transfer of the properties of the testator to the heirs and from these to their creditors.

It is the responsibility of the creditors and legatees during the six months that follow the commencement of liberating the estate to levy the forced liens in security of their rights.<sup>(2)</sup> The abiding to the period of six months is necessary in order that their rights may not be affected by preventative measures; such as the force majeure.<sup>(3)</sup> The benefit from the fixed period shall not be withheld if the real properties remain among the heirs. In such a condition the claim to distribution of the estate is permissible.<sup>(4)</sup>

The forced lien can be levied on the basis of a judgment issued in camera, without the presence of the two parties, in accordance with the request of those concerned in the matter and after hearing the Attorney General. The rank of this inscription shall be fixed from the date of its mention in the Land Register. However, the creditor may have effected the interim inscriptions in accordance with Article 139 of this Code. This is because, in all the circumstances of the forced lien, the president of the court is entitled, in the existence of emergencies, to issue an order, based on a claim submitted to him, to carry out whatever is necessary of provisional registrations ~~or~~ temporary registrations and such registrations shall

have no effect except until the time of the issuance of the final judgment which shall cause the forced lien to be registered. This means if the final judgment orders the keeping of the registration, in whole or in part, the lien shall therefore have a retroactive effect as from the date of the provisional inscription, giving consideration to the rank of the lien as limited in the given judgment.

The provisions of the temporary inscription were explained by Articles 25 and 26 of Arrete No. 188 and in view of the importance of these two articles and their relations with Articles 138 and 139 of this Code, its literal text is hereby given:

Article 25: Everyone who claims any right whatsoever in a real property, registered in the Land Register, can demand the registration of a temporary inscription in order to preserve this right temporarily.

The same rule is applicable to the person whose demand was rejected in order that he shall be able to complete the required conditions. In all other circumstances in which the application for registration of the temporary inscription relies on an official deed or on the agreement of those concerned, the registration of a temporary inscription shall not be permissible unless reliance to that effect be made on a memorandum issued by the president of the Court of First Instance in the place where the real property is situated. The orderly rank, relevant to the registration of the right, will be determined later from the date of the temporary inscription.

Article 26: When the application for the registration of the temporary inscription is based on an official deed, its effect shall cease after the lapse of ten days.

If the application for the registration of the temporary inscription was based on the agreement of the two parties, its effect shall cease at the expiry of the period agreed upon. If the application for the registration of the temporary inscription was based on the permission from the president of the Court of First Instance, its effect shall cease after the lapse of one month. This is in case the action concerning this was not instituted and this was not inscribed within this period in the Land Register.

In all circumstances the effect of the temporary inscription shall cease if the final registration has not taken place within the six months following the temporary inscription.

It has been stated in Article 27 of Arrete No. 188, that the registration and the temporary inscription registered in the Land Register are liable to be annulled on the basis of any deed or judgment acquiring a final and decisive effect, establishing to all those concerned the right declared in the registration and the non-existence of or the extinction of the right or the thing relevant thereto. It was provided in Article 28 thereof, that the said registration and the temporary inscription, registered in the Land Register, can be annulled also, either by the agreement of the two parties realized by ways of normal procedure or forthwith within the terms stipulated in the laws in effect. Also, in accordance with Article 29 of Arrete

No. 188, any temporary inscription which was liberated in the Land Register and the lapse of time stipulated in Article 26 of this Code have lapsed against it, such a temporary inscription must be annulled forthwith.

The legislator intended to safeguard the rights of the creditors of the deceased and the legatees. He therefore allowed to them, within a fixed period, which is the six months which follow the date of commencement to liberate the estate, to safeguard their rights by way of a forced registration in order that their rights shall not be lost by sale effected by the heir who may become insolvent subsequent to the sale, and the purchaser in good faith may seize at the effects of the inscriptions of the Land Register. If they neglect to effect this registration, their previous right shall have no effect on others, in view of the fact that they have neglected to safeguard their rights, <sup>and</sup> eventually shall be unable to object to the contracts which the heir has carried out, unless they were carried out in bad faith. Under this circumstance the creditors of the deceased and the legatees may claim the annulment of the inscription which was made by judgment and thus harming them, by relying on the text of Article 13 of Arrete No. 188 as amended by Article 6 of Arrete No. 45, paragraph 2; and Article 14 of Arrete No. 188 and Article 278 of the Lebanese Code of Obligations. (5)

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(1) Yaken, Zouhdi op. cit., Vol. II, page 157 referring to Dalloz, Nouveau Code Civil Annote, para 1.

- (2) Ibid., page 158, referring to Dalloz, Nouveau Code Civil Annote, para 98.
- (3) Ibid., referring to Bordeaux Court, 24 June 1836.
- (4) Ibid., page 159, referring to Aubry et Rau, Cours De Droit Civil Francais, para 614.
- (5) Ibid., pages 159 - 161.

SECTION 4.

DEFERRED LIEN

ARTICLE 140 - The publication or registration of a contractual lien may, if a short-term loan or credit is contracted, be deferred for a period of not more than ninety days, without the creditor becoming, on this account, liable to lose the grade assigned to him and which shall continue to be reserved for him provided he observes the stipulations set forth hereunder.

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Refer to comments on Article 142 of this Code.

ARTICLE 141 - The lien contract shall be drawn up in the usual form, and the original or copy thereof shall be delivered, together with the title-deed, to the creditor, who shall deposit the said documents at the Land Office. The creditor shall send to the head of the Land Office a written warning to refrain from accepting any application for registering that may be prejudicial to his interests within a period of not more than ninety days.

Such a deposit, which shall be regarded during the said period as an act of opposition, shall be entered in the Day Register, and shall be referred to by means of a temporary entry in the Land Register. As an exceptional measure, the registration of such entry in the title-deed preserved at the Land Office shall not be required.

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Refer to the comments on Article 142 of this Code.



ARTICLE 142 - If a new application for registry is presented during the period assigned for the validity of opposition, the head of the Land Office shall first of all, register the deferred lien in a regular manner, and assign to the said lien the grade due thereto as from the date of deposit of the opposition formality.

On the other hand, the creditor shall be required, at the expiration of the 90-days period, to withdraw the papers or demand the regular registration of his claim, the security accorded him through the deposit of the opposition formality having ceased to exist.

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The lien may be up to a certain sum of money promised to be lent, and may be taken by the borrower gradually when it is necessary. It is called Credit ouvert or it is a security for a current account and is called Compte courant provided that it will be for a short term not to exceed ninety days. In accordance with Article 140 of this Code, the inscription of the contractual lien in the original folio of the real property, or its publication may be postponed in case of the current accounts or the opening of credits for short terms which do not exceed the ninety days. Due to this the creditor will not be liable to lose the rank of his debt which he obtained, and which shall remain to him if he had completed the conditions mentioned in Article 141 of this Code, which are the writing of a contract of lien in the ordinary contractual manner agreed upon. The original copy or a copy of it with the deed of appropriation will be delivered to the creditor who, in his

turn will deposit it in the Land Registry Office. The Chief of the Office shall be warned in writing not to accept any application for registration which shall prejudice the right of the creditor during a period which shall not exceed ninety days.

Articles 453 thru 457 of the Lebanese Code of Civil Procedure approved the conditions of the forced lien to guarantee the judgment. <sup>to the provisions of the liens it is necessary to give the stipulations</sup> In view of their relation<sup>A</sup> of these articles with their explanation in order to complete the subject.

Article 453: Every litigant who won his case may register on the properties of his debtor a forced mortgage to secure the judgment.

For that, it is necessary for him to submit a petition to the Chief of the Executive Department, under whose jurisdiction are the real properties on which it is intended to effect the mortgage. He must submit with the petition a copy of the judgment, authenticated by the clerk, or a certificate from the office of the court, containing the judgment and including the following:

1 -- The name of the creditor, his family name, his trade and his residence, with the designation of the place in which the court was held.

2 -- The name of the debtor, his family name, his trade and his residence.

3 -- The date of the judgment and the court issuing it.

4 -- The amount of the debt.

5 -- A clear and explicit delimitation of the real properties, whether in view of their kind or their location, in accordance with the descriptions taken from the Survey Map and the Land Register.

Article 454: The Chief of the Executive Department shall insert his decision at the bottom of the application. He must take a special consideration of the amount of the debt and the approximate value of the designated real properties. He shall, if necessary, specify the mortgage on a part of the real properties or on one real property of these real properties or on a part of one real property, if he saw that this part was sufficient for payment of the capital, the interest and the costs due to the creditor.

Article 455: If the debt judged, was not liquidated as yet then the Chief of the Executive Department may temporarily liquidate it and fix the amount to which the mortgage shall specify.

Article 456: If the Chief of the Executive Department has rejected the application, the applicant shall have the right to transfer the decision of the rejection to the Court of First Instance, and he shall demand the presence of the debtor therein with a summons for a period of twenty-four hours.

Article 457: The decision of the Chief of the Executive Department, or the judgment allowing the establishment of the mortgage, shall be inscribed in the Land Register. The forced mortgage, stipulated by Article 453, shall have no effect except from the date of the inscription.

The benefit of the legal ~~lien~~ is the same benefit noticeable in the forced lien itself. It secures the execution of judicial

judgment; thus protecting the creditor from the acts of his debtor when the latter sells his real properties to others and thus harms the former.

It was stated in the first paragraph of Article 453 of the Lebanese Code of Civil Procedure that every litigant who won his case may register, on the real properties of his debtor, a forced lien<sup>(1)</sup> in security for what the judgment has decreed. However, there does not appear in it the kind of judgment<sup>s</sup>, according to which the application for the forced lien is permissible. Therefore, is it permissible to apply for a forced lien in the judgment either by default or in presence, of the Court of First Instance issued on appeal or is it conditional in them to have become final? The text in its general form explains that every judgment whether it is by default or in presence or whether final or not final, it is permissible for the creditor in such a judgment to apply for the carrying out of the forced lien in security of his debt, its interests and costs. Undoubtedly it should be a judgment in the full sense of the word. No application for a forced lien can be lodged on the basis of official deeds. It is preferable to be based on ordinary deeds because they are not placed before the courts and no judgment is given thereby. On the other hand, it is conditional that the judgment has decided the debt immediately (Condamnation actuelle) or in the prospective future (Eventuelle). There is no difference whether the thing decided was an amount of money or the delivery of a thing. (2)

The judgments according to which the forced lien is not permissible are: (1) The judgment rejecting the case, except if the judgment has assigned the costs on one of the parties. (2) The judgment issued prior to deciding the subject matter of the dispute; such as the appointment of legal custodians, interim orders and decisions on presumptions. (3) The judgment deciding the jurisdiction or otherwise. (3) (4) The judgment of solicitation such as the decision requiring the appointment of the guardian or the custodian, and the decision requiring the putting up of the real property for auction.

Article 30 of the Lebanese Code of Civil Procedure stipulated that the purpose of raising a case may be to confirm a right whose existence was denied, though there was no obstacle in the way of its use. It may also be to make an inquiry aiming to avoid any future or probable conflict which may possibly occur, or to follow one of the means of pursuance which is called Action in futurum. For instance, if a person who is in possession of an ordinary deed which shall have effect after a particular period, saw that the debtor, may deny the contract or the signature thereon, he may call upon the debtor, through an original case, to decide that this contract was written by him or signed by him. If he refuses to do as such, he may demand the comparison<sup>(4)</sup> and the application of the provisions of Articles 184, 185 and 205 of the Code of Civil Procedure. However, it is not correct to demand the debt before its maturation, whatever the reasons may be.



It is permissible to effect the forced lien according to the judgments which contain the approval on amicable settlement, according to the most prevalent opinion. It is also permissible to request the forced lien, according to the arbitrary judgments (Sentences arbitrales), when these become enforced. As to the foreign judgments, it is not permissible to permit the forced lien therein before giving it the legal and executory form. (5)

It is not permissible to effect the forced lien except on the real properties which are possessed by the debtor at the time of the inscription of the forced lien, with no regard to their category whether they were private property (Mamlukah), but they should be of what can be sold by auction. The real properties which are not permitted to be attached or to be disposed of; such as the real properties of the wife in the dowry system, are not permitted to have a lien effected thereon. (6)

The forced lien, which is requested by the winning litigant, shall not be decided merely by the issuance of the judgment, but it is necessary for a special application from the Chief of the Executive Department in whose jurisdiction, the real properties intended to effect the mortgage thereon, are located. The application must contain the particulars mentioned in paragraph 2 of Article 453 of the Code of Civil Procedure. The Chief of the Executive Department will permit it without any need to summons the debtor to present himself before him, and without giving the decision in the presence of the debtor. Nevertheless, if the Chief of the Executive Department shall reject the application, the applicant shall, according to his

request, be entitled to transfer the decision of the rejection to the Court of First Instance, and ~~to~~<sup>to</sup> demand the summons of the debtor thereto, through a summons for a twenty-four hour period, as this was necessitated by Article 456 of the Code of Civil Procedure.

Attention must be drawn to the fact that the forced lien follows the judgment. If this was annulled or revoked, then the forced lien shall be annulled, because "the branch follows the origin." (7)

In case of the merchant becoming bankrupt, the creditor is ~~not~~ allowed to effect a forced lien because it is prohibited for him to claim his debt individually. He shall rank with the rest of the creditors on the same footing. If he had obtained a permission for the forced lien before the bankruptcy, and he did not register it, then the bankruptcy occurred, he will not benefit from his lien and he cannot register it. (8)

There is no stipulation for the debtor requesting redemption of the forced lien in the Code of Civil Procedure. Some have established that the debtor has no means to object against the decision of the Chief of the Executive Department to impose the forced lien. The truth is that the debtor shall be entitled to raise a special case demanding the erasure of the forced lien and the erasure of its inscription, if he was acquitted from his obligation by the effect of prescription or judgment. Nothing shall prevent the referring to the same Chief of the Executive Department, or to the court demanding the cessation



of the execution. His reference, however, does not extinct the effect of the forced lien nor its inscription by the Chief of the Land Office.

Article 457 of the Code of Civil Procedure, states that the decision of the Chief of the Executive Department or the judgment which has allowed the creation of the lien in the Land Register, must be inscribed. The forced lien stipulated in Article 453 shall not have effect except from the date of this inscription. It is understood from this that the registration of the forced lien follows the same principles fixed for the rest of the liens.

The winning litigant, who has been allowed the forced lien by the Chief of the Executive Department or by the court, benefits from all the rights of the lienee. The winning litigant enjoys the right of pursuance and the right of preference.<sup>(9)</sup> The forced mortgage is a security for the debt itself, its interest and costs. It has preference to the rest of the liens and the real property mortgages at the time it is inscribed.

The execution of judgment must be secured for the interest of the winning litigant as the social order and the influence of the public authority has ordained to that effect. If the forced lien did not exist it would have been incumbent upon the creditor to carry out the attachment formalities, but this does not prohibit other creditors to participate in it. It is, therefore, seen that the creditor is satisfied with the forced lien more than anything else, due to the fact that other creditors do not compete with him as soon as he inscribes it by

order of the Chief of the Executive Department in the Daily Register. On the other hand, it protects the creditor from the debtor's actions when the latter squanders his wealth or disposes of it in a manner causing harm to the creditor. Nevertheless, the non-adoption of the forced lien is prevalent nowadays, even in the cases of execution of what the judgment has ordained. (10)

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(1) Yaken, Zouhdi op. cit., Vol. II, page 168, quotes "The Lebanese Code of Civil Procedure calls the judicial forced lien, as the forced mortgage, the former name is preferably correct."

(2) Ibid., referring to Baudry et de Louan, Traite Theorique et Pratique de Droit Civil, para. 1227-1230.

(3) Ibid., page 169, referring to Colin et Capitant; Cours Elementaire de Droit Civil Francais, par. 1248.

(4) Ibid., page 170, referring to Josserand, Droit Positif Francais, par. 1698.

(5) Ibid., page 171, referring to Josserand, Droit Positif Francais, page 916.

(6) Ibid., referring to French Court of Cassation, 23 March 1898.

(7) Ibid., referring to French Court of Cassation, 4 August 1913 and Montpellier Court, 4 January 1911.

(8) Ibid., page 172, referring to Colin et Capitant, Cours Elementaire de Droit Civil Francais, para 1022.

(9) Ibid., referring to French Court of Cassation, 1 March 1893.

(10) Ibid., pages 172-173.

CHAPTER III

LIEN-HOLDER'S RIGHTS

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ARTICLE 143 - The lien-holder (creditor) shall not be entitled to transfer his claim to another person except with the debtor's explicit consent, unless he is expressly entitled by the contract to do so (such as the inclusion in the contract of a stipulation to the effect that the lien is granted "to the order of...").

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Refer to the footnotes to Articles 144 and 158 of this Arrete.

ARTICLE 144 - The right shall be transferred either through the entering thereof in the Land Register or the Lien Register, or by endorsing the registry certificate. In the last case, the endorser's signature must be officially certified in accordance with the provisions of Articles 59, 60 and 61 of Arrete No. 188 dated March 15, 1926.

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Refer to the footnote to Article 158 of this Arrete.

Article 143 of this law has allowed the creditor, who is the owner of the lien, to transfer his right to another if there existed an explicit agreement to that effect in the text of the contract, as in the case when the lien is subject to the order of the creditor. This article has necessitated that the explicit agreement should be contained in the same contract and if it was on a separate <sup>special</sup> paper, it shall be disregarded. If the authorization of the creditor to transfer the right of lien to others was not stipulated in the deed, he is therefore not entitled to transfer it alone. If the creditor who is granted the right of transfer, intended to transfer it to others, he should, in accordance with the provisions of Article 144 of this law, either inscribe it in the Land Register in person and with the presence of the transferee before the Chief of the Land Registry Office in the locality where the real property is located or by endorsing the certificate of lien to the transferee. In this case the signature of the endorser must be authenticated by the conditions stipulated in Articles 59, 60 and 61 of Arrete No. 188 issued by the High Commissariat on 15 March 1926, for the purpose of establishing

the genuiness of the date, in order that such an endorsement of lien does not cause harm to others. (1)

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(1) Yaken; Zouhdi; op. cit., Vol. II, page 175.



ARTICLE 145 - The creditors holding a lien on any property shall be entitled to pursue such property to whomever it is transferred and to receive the amount due to them, each according to the grade allotted to him in the Register.

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This right is called Droit de Suite. It means that the creditor lienee can pursue the real property in whatever <sup>hands</sup> it is, no matter if such a real property was sold to others or the ownership thereof was transferred to them gratuitously. He can, therefore lay an attachment thereon and demand its sale judicially in order to redeem his debt out of the value. He, the possessor of the attached real property, must not be personally responsible for the debt, because if he was personally responsible then all his properties will be guaranteeing the debt of the lienee and the creditor would be able to execute the attachment and the sale on all his properties including the liened real property. Neither the debtor, nor the guarantor, nor the inheritor of the debtor, if he was personally responsible for the debt, shall be regarded as the possessor. (1) The inheritor shall not be regarded as a third party because he takes the place of the legator.

This right shall be established for every lienee creditor even though his rank is inferior. (2) This right is established also for the owners of the forced liens, as well as for the owners of the contractual lien. This right shall be used at the maturation of the debt, (3) because prior to that the debtor is not bound to pay the lienee creditor. The purchaser of the liened real property or to whom the ownership was transferred, shall



benefit from all the delays granted to the debtor; such as the delays granted by the court to the insolvent debtor, whose conditions do not compel him to settle his debt, and which are called "delay of grace". After maturation the creditor lienee shall have the right, whether maturation has occurred by the expiration of the delay agreed on, or by the bankruptcy of the debtor or his inability to pay, to take the necessary measures for expropriation stipulated by the law. (4) He shall not have the right of pursuing the real property against others unless that lien was registered before the registration of the debtor's sale to others. ~~And~~ likewise is the case with the forced mortgages because they are also subject to registration. (5)

The right of pursuance shall be accomplished by effecting the measures of the real property attachment. This is accomplished in accordance with Article 720, et. al. of the Lebanese Code of Civil Procedure. The creditor who wishes to attach a real property or a real property real right belonging to his debtor, must submit a claim with his executory deed to the Chief of the Executive Department, in the court in which jurisdiction of the real property is located. After the submission of the claim the Chief <sup>of the</sup> Executive Department shall send a warning to the debtor. If the owner of the real property or the owner of the real right was, at the same time personally indebted to the attachor, then this warning will be sufficient, otherwise the Chief of the Executive Department must, in addition to the warning of the debtor, send a notification to the owner of the real property or the owner of the real right. The above-mentioned warning and noti-

fication shall apply to the third person from their registration in the Real Property Folio. (6)

The right of priority is the right of the mortgages on the price resulting from the sale of the real property, to recover it prior to the remaining creditors. (7) It is the right aimed at by the creditor in order to recover his debt at maturation during the conclusion of the lien.

In order that the creditor shall be preferred to others, two things are necessary; first, there should exist several creditors and second, that the real property is sold. The creditor who is the owner of the right of lien shall be preferred to other ordinary creditors in accordance with the date of the inscription in the Daily Register, disregarding other dates except ~~the~~ the date of the lien itself. (8) This shall apply to all liens whether they were contractual or forced.

The right of priority is used on the proceeds of the sale of the real property. If the real property is damaged, and it was insured, then the right of priority shall be established on the value of the insurance for which the real property was insured. (9)

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(1) Yaken, Zouhdi, op. cit., Vol. II, page 176, referring to Jossierand, Droit Positif Francais, para 1887, and to Colin et Capitant, Cours Elementaire de Droit Civil Francais, para 1302.

(2) Ibid., referring to Aubry et Rau, Cours de Droit Civil Francais, para 283, footnote 14 and 287 footnote 26, and to Article 2169 of the French Civil Code.

- (3) Ibid., referring to Josserand, Droit Positif Francais, para 1888 and to Article 2167 of the French Civil Code.
- (4) Ibid., page 177, referring to Planiol, Traité Elementaire de Droit Civil, para 3182.
- (5) Ibid., referring to Josserand, Droit Positif Francais, paras 1889 and 1891.
- (6) Ibid., page 179, referring to Josserand, Droit Positif Francais, para 1892; to Article 2217 of the French Civil Code and to Article 673 of the French Code of Civil Procedure.
- (7 and 8) Ibid., referring to Josserand, Droit Positif Francais, paras 1868-1869.
- (9) Ibid., page 180, referring to Article 2151 of the French Civil Code.

CHAPTER IV

EFFECT OF LIEN WITH REGARD TO DEBTOR  
AND PERSONS TO WHOM THE PROPERTY IS  
TRANSFERRED

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ARTICLE 146 - The debtor or tenant shall have the right of free disposal of the property under lien, and shall be entitled, in accordance with the rules set forth hereunder, to relieve himself of the obligation even before the expiration of the time-limit and without permission from the lien-holders(creditors).

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Refer to the comments on Article 147 of this Code.

ARTICLE 147 - If, after the conclusion of the lien contract, the debtor should sell the property or the right placed under lien, then the transferee who is involved in the case shall have the option either of paying to the creditor the whole principal amount of the debt, plus interest, costs and expenses, or of submitting to the forced expropriation formalities performed by the creditor.

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One of the basic rules of liens is that the debtor shall remain in possession of the liened real property. (1) Therefore the debtor (whose property is under lien) may sell the real property to others, and the right of pursuance, pertaining to the lienee creditor, shall be preserved against he to whom the real property was transferred, as expressed by Article 146. He may also conclude a new lien, or a right of easement, or a right of usufruct, but the creditor in this case shall have the right to sell the real property free from any right of easement or usufruct. (2)

But, if the debtor has done so in order to cause harm to the creditor, the latter is entitled to institute a Polyaniyah (3) action to annul the sale which has been started by his debtor. He has, as well, the right to benefit from the second paragraph of Article 113 of the Lebanese Code of Obligations by demanding the forfeiture of the right of the debtor. The debtor may lease the liened real property and the contract of lease becomes a proof against the creditor lienee, if such a deed of lease was registered in accordance with Article 16 of Arrete No. 188.

However, if it were not registered, it shall have no effect on others, in any period exceeding three years lease, unless it was the result of collusion. (4)

The debtor can collect the fruits and can dispose of them even if they were included in the lien; because, if the fruits were separated (set aside) they become movables and thus become excluded from being accessories to the real property. However, they become real property in favor of the creditor, by way of registering the attachment report in the Real Property Folio, in accordance with Article 735 of the Lebanese Code of Civil Procedure, paragraph 2. Similarly, it is not permissible for the debtor, from the date of the registration of the warning or the injunction in the Real Property Folio, to conclude a lease contract in respect to the real property intended for attachment. Nor can he renounce in advance the amount of the rent in order to cause harm to the creditor. (Article 725 of the Lebanese Code of Civil Procedure). The legislator has done well to promulgate the text on this point because it was subject to dispute.<sup>(5)</sup>

The debtor has no right to receive the rental during the twenty-four hours which follow the attachment report (Article 736 of the Lebanese Code of Civil Procedure); whereas, it is permissible for the debtor himself, if the creditor has not applied to the Chief of the Executive Department for a decision of eviction, to remain enjoying the real property until the sale by auction. He can remain collecting and consuming the fruits necessary for his livelihood and that of his family, and under this circumstance it is incumbent on the attached debtor to render an account of



the excess fruits and to keep them in kind, if their keeping was possible. Otherwise, he should deliver them to the Chief of the Executive Department who shall sell them without delay and keep the proceeds of the sale to be added to the proceeds of the sale of the real property. (See Article 737 of the Lebanese Code of Civil Procedure).

Care should be given to the fact that the registration of the attachment report in the Land Register gives the attachor a real right on the real property (See Article 740 of the Lebanese Code of Civil Procedure). If a third person intended to purchase from the attachee he should, in order to be able to have his contract registered, deposit an amount of money sufficient to settle the debt due on him, together with the expenses. The effect of this depositing will raise the attachment registered in the Real Property Folio and this right becomes non-existent when the decision of transmission was issued, (see Article 740 of the same Code).

The possessor has the right to object to the injunction imposed on him for the following reasons:

- (1) That the deed of lien is void in form or in subject or by expiry.
- (2) That the registration is null and maturity has not fallen due.
- (3) That he should come forward with the payment called "security payment" in case the creditor was obliged, prior to the possessor, to pay the security. As in the case of his being an heir to the seller or a guarantor



to him. (6) This will be accomplished if the possessor was the purchaser of the real property from the legator of the creditor.

And vice-versa the possessor is not allowed:

- (1) To oblige the creditor to offer for sale the other real properties liened with him and which are still in his possession or in the possession of other persons to whom these real properties were transferred, subsequent to the transfer of his real property to him. This is because the creditor may use his right in relation to any real properties liened with him which he selects, without being obliged to sell a specific real property.
- (2) It is not possible for the possessor to protest against the notification forwarded to him on the grounds that his lien is prior to that of the pursuant/poursuivant creditor, if he had a prior lien.
- (3) It is not possible for him (the possessor) to protest by stating that he has borne useful and necessary expenses on the real property.

It was stated in this Article that the possessor, who purchased the real property from the debtor, shall have the right to pay the debt to the creditor who is requesting the sale or he shall have the right to have the formalities of expropriation take effect thereon. If the possessor has chosen the payment of the debt, then the formalities of forced expropriation shall

stop, and thus the possessor shall take the place of the paid creditor, and he shall benefit from the rank of the creditor and shall have the priority on other creditors, if the paid creditor was privileged over others by the priority of his registration. However, he shall be preceded by whoever was prior to him.

If the possessor did not pay the debt and its attachments, then the official formalities of expropriation shall occur as if they were directed against the original debtor, thus resulting in the following:

- (1) The possessor shall not become an owner by virtue of a future judgment of transfer. With regards to the past, his ownership shall be regarded as from the day which he took possession until judgment of the transfer. The last bidder shall take his right from the possessor and not from the debtor who has liened the real property. Therefore, the excess in the price of the real property shall be taken by the possessor and not by the former owner. Likewise, the liens established on the real property and the forced liens, in the name of the possessor, shall be regarded as valid during the period falling between the date of taking possession of the real property and the judgment of transfer. The liens shall maintain their rank of priority, after the previously registered creditors recover their rights from the proceeds of the sale. But the lienee creditors, and those who are not affected by the formalities mentioned

above, shall have the right to sell the real property with the exclusion of the aforesaid rights, by providing a special condition in the list of the conditions of the sale. (7) The right of use and the right of dwelling shall be measured as such.

(2) After the completion of the registration of the report of attachment, the possessor must give back the crops and the fruits. This has been stipulated in Article 735 of the Lebanese Code of Civil Procedure. Prior to that, however, the fruits shall be for the possessor, but after the registration of the report of attachment they shall become for the creditor attachors. The possessor must submit an account thereon.

Hereunder are the results obtained from the settlement of the disputes which shall occur at the handing over <sup>of</sup> the sold real property to the purchaser:

- (a) The contract of lease, concluded prior to the date of possession, remains in effect under the terms stipulated therein, until the expiry of the term of lease. Therefore, it is not permissible to evict the tenant for the mere reason that the thing sold was transferred to the name of the purchaser. However, he should be notified by the Executive Department that the purchaser has become the owner of the real property, in order that the tenant pay the rental to him.
- (b) If a tenancy or the like occurs subsequent to possession, such a thing remains in effect in respect of the two parties

until the carrying out of the transfer formalities, and it shall remain in effect in respect to the purchaser until the date of taking delivery. The persons who have dwelled in the attached real property, subsequent to the possession thereof, shall be notified to evict same within a period of one week, whatever were the reasons they relied on for their occupancy. Subsequent to this period the Executive Department shall evict them and shall deliver the sold real property to the purchaser without necessity of procuring a judgment to that effect.

- (c) It shall be considered that the property sold has entered into the ownership of the purchaser, in accordance with the principles of the Law of Execution, as from the date of possession. Therefore, the accessories occurring in the property sold, subsequent to the said date, are included automatically in it.
- (d) The Law of Execution did not consider the edible herbs and all the produce of the land to be attached permanent accessories. Therefore, this law did not include them in the sale unless they were mentioned. Also, if the purchaser has agreed with the judgment debtor (the one against whom the judgment is given) or with the farmer or with the tenant on the value of the produce which has been planted by any one of them, it shall be incumbent on the purchaser to deliver their value forthwith. Otherwise, the Chief of the Executive Department and the two parties shall appoint an expert. If the two parties do

not appoint an expert, the Chief of the Executive Department shall appoint the three and they shall estimate the value of the land, together with the constructions thereon or the trees planted thereon, on one hand, and on the other hand to estimate the value minus them. The difference accruing from the two estimations shall be the value of the trees or constructions existing thereon in accordance with what was stated in Article 882 of the Majallah. Also, if the purchaser does not pay this value the land shall be left in the hands of the farmer until the crops are reaped.

- (e) The possessor is regarded responsible towards the creditors for the damage <sup>(8)</sup> resulting by him or due to his carelessness, and they have the right for indemnity. This case is returnable to all the creditors who have an order of attachment. However, in fact it does not benefit anyone but those creditors who have an interest in claiming the indemnities, as had it not been for the damage occurred to the real property, it would have been sold at a higher price and they would have benefited from the difference in the proceeds of the sale. <sup>(9)</sup> The possessor shall not be responsible for the damage which occurs by a force majeure or from an unexpected accident or due to age and ordinary use, but it shall be borne by the creditors. <sup>(10)</sup> The lienee creditors may raise a case for indemnity, even before the formalities of the lien. It may be raised also with the knowledge of the person whose debt is not matured as yet



- or he whose debt was subject to a condition, but in this case the amount judged for the damage shall be deposited. (11)
- (f) It may happen that the possessor of the expropriated real property may have rights of easement or other real rights or mortgages thereon before its transfer to him. Due to his possession these rights mix with the right of ownership or remain suspended, because, with regard to the right of easement, if two real properties gather in one person, there shall be no predominant real property and real real property burdened with an easement. (12)
- (g) In case of forced expropriation, the possessor may raise a case against the seller. (13) He may do this from the time of his notification through the Executive Department; whereas the protest is regarded as having occurred on ~~that~~ date. He has the right to raise a case against the debtor who was the cause for the forced expropriation because he has paid the debt of others. In this case it will be judged ~~to~~ <sup>for</sup> him to be repaid of what he has actually expended on his own account.
- (h) If there will be several possessors, that is to say that there are several liened real properties, for one debt and that ownership was transferred to several persons, then the possessor against whom the formalities were taken, may involve in the case the remaining possessors of the liened real properties for the sake of the same debt. If he shall not involve them in the case and he was obliged to pay or he was deprived of his ownership, he must raise

a case on the other possessors, each one in proportion to the value of the real properties under possession, after deducting the part which belongs to his real properties. (14)

- (i) If the debt was guaranteed by a guarantor, the interpreters have differed in their interpretations whether or not the possessor, who was expropriated, has the right to raise a case against the guarantor. Some state that the guarantee must be treated in one way and to divide the loss between them all, but the position of the guarantor is preferred to that of the possessor, as it was possible for the latter at the transfer of the ownership of the real property to him, to remove the lien, therefrom, by offering the price to the lienee creditor. Thus, he would save himself and the guarantors from the debt by the amount of the price paid. And as he did not do so, he may not raise a case against the guarantor even though the lien has occurred after the guarantee. And contrary to that if the guarantor pays, he may raise a case against the possessor. (15)

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(1) Yaken, Zouhdi op. cit., Vol. II, page 181, referring to Article 7 of the Ottoman Law of placing the immovable properties in security for the debt.

(2) Ibid., referring to Baudry, Lacant ~~merie~~ et De Louan, Cours de Droit Civil Francais, par. 1664.

(3) Ibid., page 182, referring to Article 2131 and 1188 of the French Civil Code.

(4) Ibid., referring to Colin et Capitant, Cours Elementaire de Droit Civil Francais, par. 1284.



- (5) Ibid., referring to Aubry et Rau, Cours de Droit Civil Francais, par. 286, and to Baudry et De Louan, Traité Theorique et Pratique de Droit Civil, par. 2028.
- (6) Ibid., page 184, referring to Planiol, Traité Elementaire de Droit Civil, par. 3209.
- (7) Ibid., page 185, referring to Planiol, Traité Elementaire de Droit Civil, par. 3246<sup>nd</sup> 3175.
- (8) Ibid., page 187, referring to Golin et Capitant, Cours Elementaire de Droit Civil Francais, par. 1325, and to Josse-  
rand, Droit Positif Francais, par. 1944.
- (9) Ibid., page 188, referring to Planiol, Traité Elementaire de Droit Civil, par. 3256.
- (10) Ibid., referring to Baudry et De Louan, Traité Theorique et Pratique de Droit Civil, par. 2203.
- (11) Ibid., referring to Aubry et Rau, Cours de Droit Civil Francais, par. 287.
- (12) Ibid., referring to Baudry et De Louan, Traité Theorique et Pratique de Droit Civil, par. 2211.
- (13) Ibid., referring to Josserand, Droit Positif Francais, par. 1941.
- (14) Ibid., referring to Dalloz, Repertoire Pratique, par. 1614.
- (15) Ibid., referring to Dalloz, Repertoire Pratique, par. 1616.

ARTICLE 143 - If any deterioration or damage should occur to the property under lien so that it becomes inadequate as security for the debt in question, the creditor shall be entitled forthwith to demand restitution of his money on the strength of a court decision to that effect, or to require that additional security be furnished.

Insurance indemnities shall, in the first place, be assigned for the repair of the premises, provided such indemnities are sufficient to restore the property to its previous state. The work of repair and the expenditure of the money shall take place under the supervision of the lien-holders (creditors) within the terms agreed upon between them and the debtor. In default of such agreement, the matter shall be decided by the court.

If the amount of the insurance indemnity is insufficient, or if the debtor should decline to proceed with the repair work, the said amount shall be distributed among the privileged creditors and the lien-holders taking part in the distribution, each according to the grade allotted to his debt. The debtor shall then forfeit his right to benefit from the time-limit in proportion to the said distributed amount.

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The two contracting parties are considered, when they have agreed upon the lien deed, to have stipulated, inter alia, that in the event of the insufficiency of the lien to settle the debt, the creditor shall have the right to claim the increase thereof or the payment of the amount. Moreover, the lien real property

may be damaged by a force majeure action or by the actions of the debtors or by the action of a stranger.

It was stipulated in Article 113 of the Law of Obligations that the debtor who benefits from the delay forfeits his right to benefit therefrom in the following cases: (1) If he is declared a bankrupt or he becomes insolvent. (2) If he commits an action diminishing the special securities given to the creditor in accordance with the deed creating the obligation or with the deed which is subsequent to it or in accordance with the law. But, if the diminishing in the securities was due to a cause in which the debtor was not at liberty to act, the creditor has the right to claim the increase in the security. If he does not attain this, he shall have the right to demand the execution of the obligation forthwith. (3) If the debtor has not advanced the securities which he promised in the deed.

If it is assumed that the debtor did not come forward with the securities he promised then the debt becomes due forthwith, as it is explicitly stipulated in the last paragraph of Article 113 of the Lebanese Law of Obligations, because the judiciary is not empowered to force the debtor to execute a lien.

If the deficiency in the value of the real property liened was on account of economical reasons which tended to decrease the value of real properties, this shall not be considered as damage of the real property, as it is conditional that the damage should be material.

If the debtor was able to prevent any damage or defect, and subsequently such a thing happened but in a manner beyond his

power, he should be considered to be at fault and the creditor has the right to claim his debt forthwith, as such a damage or defect will weaken the securities of the creditor.

The debtor himself has the right to determine the new real property which he offers. In the event of a dispute about that, occurring between him and the creditor, the matter should be referred to the court. If the court finds that the new security is insufficient the debt should be considered due, considering the debtor incapable.

The second paragraph of this article has dealt with the conditions whereby damage is caused to the real property which is insured by the insurance company. It has stipulated that the amount of the indemnity due to the debtor must be allotted for the repair of the real property in order to return it to its original state. This will be done if the amount of the security was sufficient. Otherwise, the creditor has the right to consider the debt due, in the amount of the indemnity. It shall be divided between the privileged creditors and the lienors, everyone in accordance with his rank and the real property shall remain liened until settlement of the balance. If a real property was expropriated for the public benefit, the creditors become entitled to an indemnity which shall be divided amongst them in accordance with their rank.

If the damage were partial, then the lien shall remain on the undamaged part, in accordance with the principle of the indivisibility of the lien. For instance, if a real property on which a building was burned or collapsed, the lien shall remain on

the land. If the land disappeared as a result of inundation, then the lien shall vanish completely. However this is rare. (1) If the remaining part was not damaged the creditor shall have the right to claim an additional lien or to claim the debt, in accordance with the cases mentioned in the first paragraph of the explanation of this article.

If ~~the~~<sup>an</sup> amount became due for the debtor from a person who created damages then the first thing which comes to mind is whether that indemnity due to the debtor, for the responsibility of the person who made the damage, must be divided among the creditors equally or it must consider the rank of priority of some debtors over others due to the rank of their debt and the date of its registration. It is seen that consideration should be given to the preference of some debtors on others, in accordance with the ranks of their debts and in accordance with their being lienee creditors or ordinary creditors.

In order to apply the first paragraph of this article it is conditional:

- (1) that the liened real properties should become insufficient for the creditor to lien his debt.
- (2) that that should be resulting from the destruction or from a damage in the real properties.
- (3) that the liened debt should not be due for settlement.
- (4) that the insufficiency of the real property should not occur after the establishment of the contract of the lien. (2) Therefore, the creditor must not benefit from the provisions of the first paragraph of this article

if the contract of the lien was on a common share in a real property, then this share extincts as a result of division or of auction, from the ownership of the debtor. (3)

(5) that the damage is not due to an economic reason, but it is conditional that it should be material, as was previously mentioned. This is true also in the occurrence of a decrease due to the change in the locality and the place; such as the opening of a new street which diminished the value of the, real properties located in the old street, and that the decrease has occurred due to the general economic crisis, or occurred due to the deterioration of the real properties.

(6) that the decrease in the value should not be slight so as not to necessitate a substantial change in the material value of the real properties. (4)

(7) that the damage has occurred as a result of a force majeure. (5)

If the damage has occurred after the maturation of the debt then it is not necessary to apply this article, but the creditor may raise a case against the debtor and obtain a forced lien on the other properties of the debtor, by virtue of a judgment given to him. (6)

In accordance with the dominant and prevalent opinion concerning the indemnity for the expropriation for the public benefit, it is not possible for the debtor to offer an additional lien and keep himself the amount of the indemnity due. This is because the lien shall be transferred to the amount of the indemnity



due. (7) The same is the case with fire and the sufficiency of the money to insure the real property.

The additional lien is a new lien. Its establishment needs a new contract and a new registration. (8) If the creditor did find that the real property offered by the debtor is not sufficient then the judge shall settle the dispute between both parties in the sufficiency or the insufficiency of the real property. (9)

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(1) Yaken, Zouhdi, op. cit., Vol. II, page 193, referring to Fossierand, Droit Positif Francais, para 1963.

(2) Ibid., page 194, referring to Baudry, Lacantinerie et de Louan, Traite Theorique et Pratique de Droit Civil, part 2, para 1392, and to Aubry et Rau, Cours de Droit Civil Francais, part 3, para 286, page 711.

(3) Ibid., referring to Tezard, para 67.

(4) Ibid., referring to Laurens, part 30, para 517.

(5) Ibid., (quotes) " If the damage was caused by the debtor, the creditor would be entitled to benefit from Article 148 or Article 113, para 2, of the Lebanese Code of Obligations."

(6) Ibid., referring to Paris Court, 6 April 1850.

(7) Ibid., page 195, referring to Belgian Court of Cassation, 26 August 1850.

(8) Ibid., referring to Hogue, para 226.

(9) Ibid., referring to Baudry, Lacantinerie et de Louan, Traite Theorique et Pratique de Droit Civil, para 1391.



ARTICLE 149 - If the transferee should make any change in the  
[ ] nature of the property under lien, then any damage  
resulting from such change or from neglect and causing prejudice  
to the lien-holders (creditors) shall entitle them to sue the  
transferee for damages and costs. The transferee shall, in  
turn, be entitled to put in a claim for any expenses incurred  
by him which, in his opinion, were necessary for the maintenance  
of the property.

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Refer to the comments on Article 148 of this Code.

CHAPTER V  
EXPIRATION OF LIEN

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ARTICLE 150 - A lien shall cease to exist through the cancellation thereof. Such cancellation shall take place:

- (1) through the cessation of the obligation for which the lien is given as security; or
- (2) through the creditor relinquishing his claim.

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Cancellation is the marking on the margin of the Register indicating the extinction and the forfeiture of the right of lien. This must be done by the official in charge. This article should not be recognized in its literal meaning by erasing it materially off the Register and it shall be disclosed in the following article how it should be accomplished.

The lien is a contract pertaining to the original undertaking (which is the debt). If this expires the lien consequently expires and this forfeiture is called the "consequential forfeiture."

The lien becomes extinct through all the means whereby the original debt is forfeited, provided the extinction of the debt should be complete, because the lien is indivisible. It shall remain if any part of the debt remains unless agreement to the contrary exists. The lien becomes forfeited as a result of the following reasons:

- (1) Settlement of the debt.
- (2) The exchange of the debt for another debt unless an agreement to the contrary exists.
- (3) To settle an account by counterclaiming an equal amount due.
- (4) The creditor writing off the debt.
- (5) The union of the debts.
- (6) Cancellation or annulment of the original undertaking.

The second paragraph of this article stipulated the forfeiture of the lien by the renouncement of the creditor of his right. This will be by the renouncement of the creditor of his rights. This results from the renouncement of the creditor of his right in the lien without receiving the debt; if he did receive it then the lien shall extinct with the debt. The renouncement of the creditor of his right in the lien alone, shall be either express or implied. The implied renouncement of the creditor of his right results from his behavior indicating this renouncement in a decisive manner; such as the participation of the creditor in the sale of the real property with the knowledge of the debtor, if this participation could not be interpreted in another way. The renouncement of the creditor of his right is a contract of only one party. The acceptance of the person who took the place of the creditor. The agreement of the two parties is then conditional.<sup>(1)</sup> This is because the renouncement is either absolute and it includes the whole, or it is proportional for the interests of a particular person.

There is another reason whereby the lien is forfeited. This is in the case in which the lienee creditor becomes the owner of the liened real property, but the rank of the inscriptions of his lien shall remain as it is if there were other registered debts. In this case he shall have a lien on his real property. (2)

The lien shall also be forfeited in case of the annulling or the cancellation of the contract of appropriation but the debt shall remain, taking into consideration the conditions of good and bad faith with regard to the lienee creditor, resulting from the rules of registration. Another reason is the noninscription of the lien before the sale of the real property by the debtor to others. This is rare because the registration is conditional in the lien.

The lien shall extinct but the debt shall be retained in case of the forfeiture of the right itself; such as the right of the usufruct, but the lien does not extinct by the renouncement of the usufructuary of his right by his own free will. However, in the latter case the lien shall remain until the right of the usufruct is terminated by some other manner. (3)

The lien shall extinct by the destruction of the real property; as for example when the building is burned down. In this case the creditor may benefit from the provisions of the previously mentioned Article 148 of this Code by demanding an additional lien or by the aid of the right of priority on the value of the compensation due to the debtor from the insurance company. If the destruction was partial then the lien shall remain on the

remaining part for the sake of the whole debt. The lien shall not remain on the new thing which has taken the place of the vanished object because the lien was concluded on the building and this only was burned. Therefore, the lien shall not be effective on the new building which was erected in the place of the old one. (4)

Some jurists have decided that the existence of prescription, if the debtor remains in possession of the real property, may not be conceived. The lien remains as long as the original undertaking remains existing, and it becomes extinct if the original undertaking becomes extinct. The provisions of Article 257 of this Code are explicit in connection with the forfeiture of rights by prescription, if these rights are related to real properties not registered in the Land Register.

Moreover, if the debtor sold the real property to another and the latter possessed it with the intention of owning it, then under the provisions of Article 257 of this Code, if the real property was not surveyed, he shall own it free of any rights within a period of five years if he possesses a genuine deed thereof. Otherwise, he shall become the owner thereof after the lapse of fifteen years. However, if the real property was registered, prescription shall have no effect whatsoever, on the right of the lien in accordance with Article 255 of this Code.

It is apparent that Article 257 of this Code is explicit regarding the acquisition of the right by prescription, in relation to the real properties and the rights which are not

registered in the Land Register by inscription. Therefore, the lien, like any other right, becomes extinct by prescription. If the real property liened remained in the possession of the debtor, the lien becomes extinct by the prescription limited for the forfeiture of the original undertaking, which is the debt. Whereas, if the real property was held by the possessor who purchased it, the latter acquires the lien by prescription limited for the acquisition of ownership in his favor. (5)

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- (1) Yaken, Zouhdi op. cit., Vol. II, page 197 referring to Baudry, Lacantinerie, Traite Theorique et Pratique de Droit Civil, par. • 2259.
- (2) Ibid., referring to French Court of Cassation, 12 February 1900 and 29 January 1902.
- (3) Ibid., referring to Planiol, Traite Elementaire de Droit Civil, para 3414.
- (4) Ibid., referring to Paris Court, 9 December, 1890 and to Aubry et Rau, Cours de Droit Civil Francais, para 292, footnote 13.
- (5) Ibid., pages 198 and 199.



CHAPTER VI  
ABOLITION OF LIEN RECORDS

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ARTICLE 151 - Lien records shall be abolished by consent of the  
E\_\_\_\_\_ two parties who have the necessary qualifications,  
or by virtue of a final court decision or a decision that has  
acquired the force of law. Such abolition may also be effected  
without the consent of the creditors, if the amount of the debt  
is deposited after being actually offered to the creditors and  
refused by them.

Deposit of the amount of the debt, after being actually  
offered (to the creditors), shall acquit the debtor of his  
obligation, and shall take the place of settlement with regard  
to the debtor, if the offer has been a valid one. The amount  
or object thus deposited shall be at the creditor's risk and  
responsibility.

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Refer to the comments on Article 157 of this Code.



ARTICLE 152 - For the actual offer to be effective for the abolition of lien records, the following conditions must be fulfilled:

- (1) The offer must have been made to the person in whose name the lien is registered.
- (2) The offered sum must include the whole amount due, plus all instalments and interest owing, legal costs and any indemnities provided for.
- (3) The terms and conditions provided for must have been fulfilled.
- (4) The offer must have been made at the place agreed upon for settlement. If no particular place has been agreed upon, then the offer must be made at the place of residence chosen for the execution of the contract.

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Refer to the comments on Article 157 of this Code.

The second article of the High Commissioner's Arrete No. 48/LR, dated the 28th of March 1933, containing the approval of the Lebanese Code of Civil Procedure issued by Lebanese Legislative Decree No. 72, dated the 1st of February 1933, has stipulated that Article 152 and what is subsequent to it up to Article 157, and Article 159 and what is subsequent to it up to Article 173 from the present Arrete No. 3339, ceases to be applicable to the lands of the Lebanese Republic from the date on which the enforcement began in accordance with the Lebanese Code of Civil Procedure.

It is certain that the aforementioned law and the Lebanese Law of Contracts and Obligations commenced their enforcement in Lebanon simultaneously, on the morning of 12 October 1934.

Nevertheless, these articles had to be confirmed because they are still enforced until today in the Republic of Syria.

However, in Arrete No. 235/LR, issued by the High Commissioner and dated 9 October 1934, was an Addendum to the previously mentioned Arrete No. 48/LR, stating that, contrary to these laws, the obligatory expropriation of property transactions continues to be subject to the laws of Part Seven of Chapter Five of the present Arrete No. 3339, provided that the Arrete deciding the sale of the property secured by public auction in accordance with the stipulation of Article 162 from Arrete No. 3339 has been issued prior to the date of 11 October 1934.

Under that circumstance, the real property official, who has decided to sell the real property by public auction, continues to execute these transactions.

But, in all other circumstances, the transaction will be entrusted to the Chief Execution Officer who is empowered to act as such.

And finally it is good to refer to the provision of Article 856 of the Lebanese Code of Civil Procedure which stipulates that executionary transaction in real properties, to which the Regulation of Land Registration did not apply, remains subject to the present legislation; that is to the provisions of Arrete No. 3339. (1)

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(1) Mushahwar, Amin, "Majmu'ah al-nusus al-qanuniyah al-  
khassah bi-al-tashri al-'iqariya wa-bi-nizam al-malakiyah  
al-'iqariyah fi suriyah wa-lubnan." page 183.

ARTICLE 153 - At the time of deposit, the debtor shall deliver  
[ ] the amount or object offered, plus interest till  
the day of deposit, in the name and for the account of the cre-  
ditor.

A statement of the deposit and of the kind of currency  
offered shall be drawn up.

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Refer to the comments on Article 157 of this Code.

ARTICLE 154 - The statement drawn up in accordance with the  
[ ] previous Article shall be attached to the appli-  
cation for abolition and shall be notified to the creditor (at  
the same time inviting him to withdraw the deposited object) by  
the head of the Land Office who is charged by the existing laws  
with the performance of registration formalities.

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Refer to the Comments on Article 157 of this Code.

ARTICLE 155 - The notification shall be valid if it is sent to  
[ ] the place chosen for the execution of the contract.  
If no such place has been chosen, then the notification shall  
be sent to the Land Office.

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Refer to the comments on Article 157 of this Code.

ARTICLE 156 - At sight of the statement of deposit, and after  
[ ] ascertaining that the deposited amounts are equivalent to the amounts owing mentioned in the lien contract, the official in charge of the Land Register shall proceed forthwith to notify the creditor, in accordance with the methods prescribed in the Code of Civil Procedure, of the deposit made by the debtor. If the creditor does not lodge an opposition through the judicial authorities within the legal time-limits, then the above-mentioned official shall strike off the lien records under consideration.

However, if the said records indicate the existence of special clauses or stipulations the execution of which cannot be legally and validly ascertained except through the judicial authorities, then the abolition shall not be effected except after taking cognizance of the court decision confirming the execution of the said clauses and stipulations.

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Refer to the comments on Article 157 of this Code.



ARTICLE 157 - The equivalence between the amounts deposited  
[ ] by the debtor in accordance with Article 153  
and the amount of the debt entered in the records shall be valid  
when the amount paid in legal-tender currency is equivalent in  
value to the amounts provided for, at the rate of exchange current  
on the day of payment.

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Optional or voluntary cancellation is the cancellation which  
takes place by the consent of the two parties who have the com-  
petence to do so. It differs whether the cause for the release  
of the lien is the payment of the debt or otherwise. If the  
release of the lien was caused by payment of the debt, then who-  
soever was competent to receive the debt shall be competent to  
agree on the release of the lien.<sup>(1)</sup> Whereas, if the release of  
the lien took place without being preceded by the payment of  
the debt, as if it were on account of the renunciation of the  
lien only with the preservation of the debt, then the creditor  
should have the competence of disposal in relation to the debt  
itself.<sup>(2)</sup>

The release should take place with the consent of the cre-  
ditor and the debtor, if it were voluntary. An official deed  
should be drawn to that effect and registered in the Land  
Register. This is because the lien is concluded in this official  
manner, its release should be done officially also. If the cre-  
ditor agreed to have the lien released by an ordinary deed then  
the creditor may claim the execution thereof in a legal manner.

If the lien was released at the office of the Secretary of the Land Registry and then the courts decided the invalidity of it, either on account of the deed establishing the release being fraudulent or on account of the existence of a deficiency in the competence or on account of an error made or on account of coercion, will the lien revert to its first rank or will the date of the new inscription be considered as a principle for the right of priority of the creditor? If it is said that the new inscription has a retroactive effect, this shall have effect on the rights of the creditors who have registered their liens, subsequent to the release of the first lien which was adjudged as null and void. And if it is said that the new inscription is considered as the principle for the right of priority of the creditor, then the liens concluded prior to it and subsequent to the release of the lien shall have effect on it.

The right which should be adhered to is to adopt the non-consideration of the validity of the release, except from the date of its new inscription in order not to prejudice the creditors with good faith or the purchasers in good faith who have relied on the inscriptions in the Land Register which they saw void of any trace of mortgages to others. Therefore, if there existed a second lien and the first lien was the one which was adjudged not to be released and not to be reinscribed, this inscription, under this circumstance, shall effect the second lienor as no harm is possible to occur to him because he was aware of the first lien when he concluded his second lien.

The cancellation in accordance with a final judgment or with a judgment acquiring a final effect occurs in the event of the creditor refusing to release the lien. This is notwithstanding the fact that the law compels him to do so, or if the deed of lien was void or was annulled owing to the realization of the condition of nullification of which the extinction of the lienor's ownership is based.<sup>(3)</sup> Any person who has an interest therein; such as the lienee creditor who comes next to the first creditor,<sup>(4)</sup> or the purchaser of the real property,<sup>(5)</sup> or the debtor himself. However, the debtor may not have the right to claim the release of the lien on account of a deficiency occurring in the registration, as such a registration was found for the interest of others and not for his own interest.<sup>(6)</sup> The action can be instituted against those who are interested in the keeping of the registration, or against their heirs.<sup>(7)</sup> It shall not be instituted against the registrar,<sup>(8)</sup> nor against the debtor.<sup>(9)</sup> The action shall be instituted before the courts where the real property exists. However, if the claim for the release related to the action of the debt itself, then the judgments relating to the release may be given by the court, before which the action concerning the debt is placed. This may be done even if it were a court other than that in which the real property exists, in order that the lienor shall not be obliged to institute the action of release after he obtains judgment forfeiting the original undertaking.<sup>(10)</sup> At any rate the release does not occur except after the judgment has attained its final effect. That is to say, it ceases to be subject to ordinary

reviewing. (11)

The cancellation of registered liens is completed if the amount of the lien has been deposited subsequent to its being actually offered to the creditors, and their refusing to accept it.

The real or actual offer was explained in Article 152 of this Code and Articles 850, 851 and 853 of the Lebanese Civil Code of Procedure. Article 150 of this Code said that the actual offer which necessitates the cancellation of liens must be:

- (1) to have occurred in favor of the person in whose name the lien was registered.
- (2) that the debtor must have offered to pay off the debt in toto or in installments, if the debt was subject to payment by installments, together with the due interests and the established costs and when necessary, the stipulated indemnities.
- (3) that all the fixed conditions have been accomplished. For example, the depositing of the money at a bank and the warning of the creditor to that effect shall not be considered the legal real offer. Likewise, if the offer was not made through the official departments, it is not to be considered. Therefore, the real offer shall not be subject to any proof as it has no legal value like that of the legal offer. (12)
- (4) that the offer should take place at the place agreed upon for payment, and in the absence of a special agreement regarding the place for payment, the offer

must be made at the place fixed for the execution of the agreement.

It was stipulated in Article 851 of the Lebanese Code of Civil Procedure that the offer inventory specifies the thing offered and the amount of the money. It mentions the acceptance or the refusal and whether the creditor has signed or refused to sign or declared that he is unable to sign. It was stipulated in Article 852 of the Lebanese Code of Civil Procedure that a copy of this inventory shall be left for the creditor. This all means that, if the creditor refuses to accept the agreed upon settlement, he can offer the debt as a real offer to his creditor through the Notary Public. (13)

There appeared in Article 151 of this Code that the real offer, coupled with the depositing, releases the debtor from the debt. The benefits of depositing are:

- (1) It prohibits the creditor from commencing the legal proceedings; such as the imposing of attachments, etc..
- (2) It stops the accruing of the interest.
- (3) The amortization becomes incumbent on the creditor, according to the provisions of this law, and subsequent to the offer, according to the provisions of the Lebanese Law of Obligations and Contracts.

The basic rules for the offer are:

- (1) that there should exist a debt which the debtor wishes to settle.
- (2) that the creditor is under the legal obligation to accept settlement, as for example, if the debt falls



due immediately or at a later time, in favor of the debtor.

- (3) that the debtor is legally competent to pay the debt. The offer shall not be made from persons other than the debtor unless they have an interest therein; as in the case of a guarantor, or a person liening his property for a debt due from another person. This is similar to the way in which the real property guarantees are made.
- (4) that the offer must be directed to the creditor or to he who has the authority for acceptance on his behalf.
- (5) that the offer must contain all the due amount, the installments, the due interests, and the estimated and unestimated expenses with the readiness to pay what exceeds the latter, on what was estimated by the debtor. This is because the creditor is not obliged to accept some of the due amount and therefore, the deposit should contain everything mentioned above, including the interests due after the offer.
- (6) that the money is that which was agreed upon between both parties, otherwise payment shall be made according to the legal way followed at the time of payment.
- (7) that the offer must not contain any condition or restriction which contradicts its nature and aim, otherwise it will be invalid, unless the conditions do not do any harm to the creditor; such as the statement of

the debtor to keep all his rights against the creditor, and such as his demand for the handing over of the mortgaged real property to him, if it were in the hands of the creditor. (14)

The description of the offered object, its value and the presence or absence of the creditor should be mentioned in the offer report as well as the statements of the creditor whether before the offer or its refusal. One copy of this report should be delivered to the creditor personally or in his original residence or in the place selected for the execution. If the creditor accepts the offer, it should be confirmed in the report. This confirmation is regarded as a clearance, provided that it is signed by the creditor. However, if he refuses to sign the report it will be regarded as a refusal of the offer. If the creditor has refused the offer and provided his acceptance on conditions, and refused to sign the report, then the offer shall be regarded as if it did not exist. If the creditor was absent, then the object cannot be delivered except to he who is in possession of a special power of attorney from the creditor to receive the object. This treatment is not granted to those persons who are qualified to receive the documents on behalf of the creditor, because there is a great difference between the receipt of the documents and the receipt of the debts. If the creditor was absent and no person who was qualified for the receipt was present, then the offer should be regarded as refused, and deposit must occur at that time.



The deposit is the delivery of the offered object to the cashier of the government treasury, which is the place where the offer must occur, or to an institution which is legally recognized. The creditor must be notified about the date in which the offer shall occur, so that he will be able to come to accept the offer and to avoid the deposit.

The dispute concerning the offer is not subject to a particular form nor to a fixed period to be raised in front of the court. The plaintiff may be the creditor therein as well as the debtor may be the plaintiff. It is possible to raise a case before the deposit, then the judgments shall not include the offer.<sup>(15)</sup> It is also possible to be raised after the deposit, and then the judgment will include it. The case shall be raised to the courts of the defendant; for example, if the plaintiff was the creditor then it is raised in the court of the debtor, and vice versa. If it was agreed that the payment should be in the locality of the creditor, then the court of this locality is the competent court to decide on the validity of the offer given by the debtor.

The advantages resulting from the offer are:

- (1) the lapse of time fixed for settlement does not forfeit the right of the debtor, as for example, the case in the sale with the condition of the recovery by the seller. The offer by the purchaser before the expiry of the period prevents the forfeiture of his right in recovering the sold real property even though it is not followed by a deposit.

- (2) the penalty clause provided in the contract will not be applied to the debtor if he made the offer before the maturation of the period.
- (3) If it was provided in the contract, or if its nature necessitates an exception, that the falling due of the fixed date establishes the effects agreed upon, then the offer before the fixed period prevents the consideration of the creditor as being late for settlement, by the mere expiration of the period.
- (4) In accordance with Article 294 of the Lebanese Code of Obligations and Contracts the amortizement shall be borne by the creditor after he had been offered settlement officially, contrary to Article 151, second paragraph, of this Code, which has stipulated that the depositing should follow that.

Some are of the opinion that it is valid for the creditors of the debtor to attach the deposited thing prior to the acceptance of the offer and the depositing by the creditor. This is because the money is still on the property of the debtor and he can draw it prior to the acceptance of the creditor. But the interpretation does not admit that because the debtor is entitled to select the creditor he wishes for the settlement of his debt prior to anyone else.

If the annulment of the offer and the depositing was decided, then the costs relating thereto must be on the debtor. But if the validity of the offer and the depositing was decided,

the costs shall be on the creditor. If the offer was refused and the depositing was accepted, then the costs shall be on the creditor, if the debt was of the category which is payable at the place of the debtor. At any rate, the costs of the offer accepted by the creditor before the depositing, in case this depositing does not exist at the time of the offer, shall not be borne by the creditor, unless the debtor proves that he had offered him the debt amicably, and that the creditor refuses to accept it without any acceptable legal reason. (16)

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- (1) Yaken, Zouhdi, op. cit., Vol. II, page 201, referring to Aubry and Rau, Cours de Droit Civil Francais, 5th edition.
- (2) Ibid., referring to French Court of Cassation, 20 March 1907.
- (3) Ibid., page 202, referring to the Court of Po, 17 July 1885.
- (4) Ibid., referring to French Court of Cassation, 5 May 1874.
- (5) Ibid., referring to French Court of Cassation, 19 April 1856.
- (6) Ibid., referring to Guilloird, par. 1440.
- (7) Ibid., referring to French Court of Cassation, 6 December 1859.
- (8) Ibid., referring to Hogue, ~~par.~~ par. 348.
- (9) Ibid., page 203, referring to Dalloz, Repertoire Pratique, par. 1439.
- (10) Ibid., referring to Article 91 of the Lebanese Code of Civil Procedure.
- (11) Ibid., referring to Planiol, Traite Elementaire de Droit Civil, par. 3068.

- (12) Ibid., page 204, referring to Garconnet, part 7, par. 2714.
- (13) Ibid., stating that before that, through the Assistant Head of the Land Bureau in accordance with the provision of Article 154 of this Code.
- (14) Ibid., page 208, referring to Garconnet, part 7, par. 2715, page 333.
- (15) Ibid., referring to Article 853 of the Lebanese Code of Civil Procedure.
- (16) Ibid., page 210, referring to Jossierand, Droit Positif Francais, part 3, pars. 866, 898 and 1127 and Colin et Capitant, Cours Elementaire de Droit Civil Francais, 7th edition, 1931, pars. 298 to 301.

CHAPTER VII  
FORCED EXPROPRIATION

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ARTICLE 158 - (Repealed by Arrete No. 102/LR dated August 6,  
[-----] 1932, and replaced with the following provisions:)

In default of payment as soon as the debt falls due, any of the creditors, whatever his grade may be, shall be entitled to take legal action for the sale of the property or claim under lien through the method of forced expropriation.

The mortgagee or the purchaser under a contract of redeemable sale shall have the same right, but he may exercise such right only if the debtor has given him an irrevocable power of attorney to this end.

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Refer to the footnote to Article 152 of this Arrete.

It results from the combination of this Article as well as Articles 91 and 100, in the real meaning of this Arrete, that in the matter of a redeemable sale the acquirer by bei el wafa can pursue the sale by means<sup>of</sup> forced expropriation of the real property, object of the contract, in the case where his debtor has entrusted him for this purpose with an irrevocable mandate.

This mandate does not produce effect except by a living mandatory, since the mandate is not transferable by means of heritage or by testament. Hence it will be found, in accordance with the provisions of Articles 1528 and 1529 of the Majallah, cancelled by the death of the mandatory.

Whereas Article 760 of the Majallah stipulates that the mandatory, charged to sell the mortgaged real property on maturity, is dismissed by the death of the creditor or the debtor; then, this test is not in contradiction with Articles 1528 and 1529 of the same Code, since it does not refer but to the creditor taken in his sole capacity as a creditor and not in his capacity as a mandatory. On the other hand, the transfer of a redeemable sale, contrary to that which is allowed for the mortgage by Articles 143 and 144 of this Arrete, cannot be effected by means of endorsement. (1)

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(1) Judgment of the Tribunal. Decision No. 253, dated 16 May 1934. See Repertoire de Jurisprudence Libanaise, Juridictions mixtes 1924 - 1946, Tome Premier, Par. 14, page 513.



ARTICLE 159- The application for the sale of the property or  
[ ] claim under lien through the method of forced  
expropriation shall be received by the official in charge  
of the Land Register of the district concerned.

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By virtue of this Code the official in charge of placing  
the real property under public auction is the official of the  
Real Property Department (Land Registry) in charge of keeping  
the records of the real properties of the area. The application  
should be submitted to this official, if the real property was  
in his area. After receiving the application, he shall place  
the real property at public auction, after executing the legal  
notifications.

The person who takes charge of the sale is the Execution  
Officer, in accordance with Article 589 and 590 of the Lebanese  
Code of Civil Procedure, under the supervision of the Chief of  
the Executive Department or the Magistrate (Peace Judge) if  
there was no court of First Instance in his area (Article 584  
of the Lebanese Code of Civil Procedure). The provisions of the  
real property attachment mentioned in the Code of Civil  
Procedure are applied if the real properties were surveyed and  
subjected to the system of real property registration. Other-  
wise, the provisions of Articles 89-119 of the Ottoman Execution  
Code shall be applied.(1)

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(1) Yaken, Zouhdi op. cit., Vol. II, page 215.



ARTICLE 160 (As amended by Article 1 of Arrete No. 101/LR dated July 12, 1933):

If several parcels are allotted to the same creditor, no legal action may be taken for the forced expropriation of the parcels all at once except with the debtor's consent, or by permission given in the form of a decision by the chairman of the civil court. Such decision shall designate the parcels to be expropriated.

For the purposes of the present Article, industrial and agricultural installations (such as factories, workshops and annexes thereto, or ranch<sup>h</sup>es, farms, and the buildings and agricultural lands pertaining thereto) which constitute an indivisible unit shall be regarded as a single parcel, even though they may include several parcels each of which has a separate entry in the Land Register.

Exemption from the formalities provided for in the present Article shall be made in the case of land credit firms defined in Arrete No. 3290 dated September 23, 1930 concerning such firms.

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If several real properties were placed for sale for one debt, then the creditor may not sell them as one property, except after an agreement with the debtor. If no agreement was attained between them, then the real properties which must be expropriated shall be fixed by the decision of the president of the Civil Court after his cognisance of the amount of the debt and the value of the real properties. He shall then order the sale of

some of them in the amount equivalent to the debt and its interests and legal costs. This rule shall not be applied to the real property loan companies established by Arrete No. 3290, issued on 23 September 1930 as modified by Arrete No. 3298, issued on 7 October 1930.

The law has considered as one real property the factories and workshops with their accessories, and farms with the buildings thereon and the agricultural lands pertaining to them, even though they had several real properties attached thereto. This is because they will be regarded, in what they were destined for, as one real property. However, the separating of them will be harmful for the creditors because it shall diminish the desire to purchase them.(1)

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(1) Yaken, Zouhdi, op. cit., Vol. II, page 216.

ARTICLE 161 - The real property official to whom the application [ ] for forced expropriation is submitted must, on his own responsibility and in accordance with the procedure described in Articles 53-61<sup>of</sup> Arrete No. 188 dated March 15, 1926, verify the applicant's identity and ascertain that the operation applied for is not at variance with the records. He shall then send to the debtor, in accordance with the procedure described in Article 155 of the present Arrete, a notification requiring him to settle the debt or to prove that such settlement has been made within eight days following the date of notification.

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When an application is being submitted to the real property official in whose area the real property is located, for<sup>an</sup> expropriation of the ownership of the debtor, he shall inquire on his own responsibility, first; about the identity of the applicant and his being the owner of the debt (1) or his agent, and secondly; about the validity of the deed and its being in conformity with inscriptions of the Land Register and thirdly; of the maturation of the period of the debt and its issuance. Having completed all that he shall notify the debtor that he must pay the debt or prove the occurrence of the payment in the period fixed by this article, which is eight (8) complete days, excluding the day of the notification and its last day. The notification shall be valid if it did occur in the place fixed for the execution of the agreement. If there is no special agreement, it shall be valid if it did occur in the place of the Real Property Office as was explained previously in the explanation of Article 157 of this Code. (2)

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(1) Yaken, Zouhdi, op. cit., Vol. II, page 217, referring to Articles 53-61 of Arrete No. 188. Also, Articles 42-47 and 53 of the Lebanese Notary Public Law.

(2) See also the comments on Article 163 of the Code.

ARTICLE 162- (Repealed by Article 2 of Arrete No. 101/LR dated  
[-----] July 12, 1933, and replaced with the following  
[-----] provisions:)

With the expiration of the time-limit prescribed in the previous Article, if payment is not made by the debtor, the said official shall order the sale by auction of the property under lien, at the same time assigning the date of opening of the auction.

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If the period fixed in the previous article and which is eight (8) complete days, has elapsed as from the date of notification, and the debtor did not present himself to make payment during that period, the real property official shall order the placing of the real property at auction. The date of the opening of the auction should be fixed at the same time.(1)

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(1) Yaken, Zouhdi, op. cit., Vol. II, pages 217 and 218.

ARTICLE 163 (Repealed by Article 3 of Arrete No. 101/LR dated  
[ ] July 12, 1933, and replaced with the following  
[ ] provisions:)

The sale decision assigning the date of opening of the auction shall be in lieu of specifications of sale, and shall include:

(1) The purport of the execution order on the  
[ ] strength of which the sale is to be carried  
[ ] out.

(2) Designation and description of the parcels to  
[ ] be sold.

(3) Conditions of sale.

The official in charge of execution shall notify the said decision without delay, and in accordance with the procedure described in Article 155 of the present Arrete, to each of the creditor and the debtor.

The creditor and the debtor may, unless the execution is demanded by a land credit firm established in accordance with Arrete No. 3290 dated September 23, 1930, concerning such firms, submit their observations, through the method of opposition, on the decision providing for the sale and for the assignment of the date of opening of the auction, to the local civil court within the eight days following the date of notification.

Judgment in respect of the opposition shall be rendered by the court in camera.



The court decision may amend the specifications or require the creditor to present a solvent guarantor. If the court finds that the sale value of the property under consideration has greatly diminished by reason of adverse but essentially fortuitous circumstances in the real property district wherein the sale is to take place, then it may order the sale to be deferred for a period which shall not, under any circumstances, exceed one month, as it may, with the consent of both the creditor and the debtor, place the property offered for sale in the hands of the creditor, at the expense and on the responsibility of the debtor.

On the strength of the court decision, such forced trusteeship shall enter into effect within the eight days following notification thereof to the debtor, the notification to be made in accordance with Article 155 of the present Arrete. Such decision shall not be open to any method of appeal.

During the period of forced trusteeship, the creditor shall be entitled, in spite of any opposition or seizure formalities, to collect the proceeds and the crops of the property and to allot such produce by priority towards the settlement of the debt, of all interest due and of the costs and expenses incurred.

This privilege shall have a grade next to that assigned to maintenance costs, tilling expenses, the costs of seed, and the claims of the Treasury in respect of the taxes due from the property in question.

In the event of a dispute, trusteeship accounts shall be



submitted to the court, which shall decide on the matter without delay.

With the expiration of the period of deferment of the auction, the official in charge of execution shall proceed with the auction sale within the conditions prescribed in the present Arrete.

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Paragraph 1 of this article has established that the decision which the official adopts and in which he orders the sale and limits therein the date of the opening of the auction, is considered as the Booklet of the Conditions for the Sale. The official, in accordance with the second paragraph, notifies the decision to both the creditor and the debtor. The notification to the debtor is made either to him personally or to his permanent place of residence, (1) or to the place selected by him under the contract. Otherwise, the notification should be made at the Land Office in the locality in which the real property is located, in accordance with Article 155 of this Code.

The first thing that should be criticized in paragraph 2 of this article is the limitation of the modification of the decision ordering the sale and opening the auction to the debtor and creditor only. Whereas, an agreement may be made whereby the debtor may sell the real property to another, and this is permissible, as was stated in the comments on Article 146 of this Code. Then it would be necessary to adopt the formalities against the purchaser who is the possessor and not

against the debtor himself. The notification to the purchaser is necessary. Likewise, and in the event of the creditor taking delivery of the liened real property with the agreement of the debtor, the formalities must be adopted against him in his capacity as the guardian of the real property which was delivered to him by the debtor, in accordance with paragraph 4 of this article. The notification to him is also necessary.

There remains an important question and that is: subsequent to the sale of the liened real property by the debtor to a third person, will it be necessary to carry on with <sup>the</sup> transaction in the name of the debtor or in that of the purchaser? The question is in dispute in France(2) and the correct thing to do is to notify the purchaser and to carry out the transaction against him only, provided that the debtor should be notified also.

If it is assumed that a person has guaranteed the debt of another in a real property guarantee, the formality must be made in his name and the debtor shall also be notified at the time for offering it for auction. The debtor, the creditor or the purchaser who is the possessor may lodge an objection during eight (8) days, as from the date of the notification against the decision ordering the sale and opening the auction, to the Civil Court in the district in which the real property exists, by submitting a written petition. The court decides this objection in camera.

The Book of Conditions must contain:

(1) a statement of the deed of execution, according to which

(2) a statement of the deed of execution

the sale is pursued.

(2) a statement of description of the real properties subject to the sale.

(3) the conditions of the sale.

The benefit of the statement of the deed of execution, according to which the sale is pursued, is to allow the others to read it and to know its contents. The purpose of the statement, describing the real properties subject to the sale, is to know if the lands were cultivable or lands defined for building; thereon or if they were buildings. The locality of the real properties and their areas should be stated. If the real property was a building; its locality, the number its stories, its contents, its boundaries and its category should be stated so that the prospective purchaser may peruse same. The purpose of the conditions of sale is to let the debtor peruse same so that, in order if he has an objection, he could submit same within the legal delay. And in order also that the court, in case an objection was submitted to it by any one of the two, may be able to investigate the establishment of some of the conditions or to abolish them.

Moreover, this Code has confined itself to the conditions of the sale and did not discuss their nature. These conditions are in the jurisdiction of the courts to establish their validity in the face of an objection.(3) In accordance with this law, the Land Registry Official prepares them, and it is usual to mention in the conditions the manner of payment of the deposit

by the purchaser or the manner of depositing the price. The costs, including auction fees, are borne by the purchaser. In the existence of any rents, they must be stated. It must be mentioned that these rents should not be touched and that the sale covers the whole of the real property or part of it, etc..

All the ~~the~~ creditors of the debtor shall be regarded as represented in the person of the creditor effecting the auction sale. But they have a special qualification which entitles them to interfere in the measures taken if there is an interest for them ~~in that~~ <sup>in that</sup>, and especially when they request the correction of the list or the modification of the conditions, as well as if they wish the partition of the real properties, or the change of the partition submitted by the applicant of the sale. (4)

It is possible for the mortgagees, the ordinary creditors, the debtor, the applicant for the sale, ~~the~~ the renters, and to every person who claims a right of ownership, usufruct, easement or any other real right on the real property, to protest on the conditions, if they were harmful to his interests or contravening the law. As to the prospective purchaser, he cannot object thereon.

As to the debtor, he may object and his objection, according to the law, is general. He may present all features of nullification which he sees formal or relating to the basis; such as his objection to the validity of the notification sent to him or the non-compliance with the legal delay, or to the validity of the debt or to the settlement of the amount or to the postponement of the debt after concluding the lien. This may be done either contractually or due to a later law nece-

assitating the postponement. He, as well as the creditor, has the right to object on the conditions of the sale, on the established price, and on the conclusion of the sale on certain real properties. Then it is possible for the court, as far as the conditions of sale are concerned, to annul or to retain whatever it thinks fit of the conditions and to give its decision in camera after the consultation with those mentioned. It may oblige the creditor to offer a solvent guarantor.

If the court saw that due to economic conditions the value of the real properties was diminished in the area wherein the sale is being effected and that decrease was apparent and important, but it is not permanent but only temporary, then the court has the full right to postpone the auction for a period which in no case should exceed one month and to authorize the handing over of the delivery of the real properties requested for sale by auction to the creditor on his own expense and responsibility. This is done if the court has seen an apparent interest for the debtor. In this case the creditor takes delivery of the real properties in the period of the eight days subsequent to the notification of the copy of judgment to the debtor, in accordance with the provisions of Article 155 of this Code. The judgment issued in this sense is final and shall not be subject to any way of questioning. This taking of delivery does not deprive the debtor from receiving the amount of income and produce during the period of guardianship, in order that he shall allot same in a privileged manner for the settlement of the debt, its due interest, and the legal costs incurred. This privilege comes next to the expenditure <sup>for the</sup> maintenance of



the real property, the plowing expenses, the value of the seeds sown and the settlement of the treasury dues relating to taxes levied on the liened real property. No objection or forthcoming attachment shall have any effect on the debtor receiving the value of the amount of the income and the produce. If a dispute arises concerning the account of the legal guardianship, the matter should be referred to the Civil Court, which decides the issue immediately.

At the expiry of the period fixed for the notification of the order for sale, which contains the Booklet of the Conditions for Sale, and the non-existence of an objection in the form which has been described previously, the Land Registrar commences the execution by selling the real property in public auction, under the conditions enumerated in the following articles.

The creditor and the debtor are forbidden to submit any objection, in the form detailed above, if the application for the execution was submitted by one of the Real Property Loan Companies established under the provisions of Arrete No. 3290, referred to above.(5)

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(1) Yaken, Zouhdi op. cit., Vol. II, page 220, referring to Paris Court, 16 January 1909.

(2) Ibid., referring to Garconnet, part 4, par. 32.

(3) Ibid., referring to Garconnet, part 4, par. 375.

(4) Ibid., referring to Garconnet, part 4, par. 391.

(5) Ibid., page 222.

ARTICLE 164 (Repealed by Article 4 of Arrete No. 101/RR dated  
[ ] July 13, 1933, and replaced with the following  
[ ] provisions:)

The sale decision and the date of opening of the bidding shall be published in the Official Gazette and in three local newspapers at the applicant's expense and through the efforts of the official in charge of the sale. Copies of such announcement shall be posted at the door of the said official's office and also at the entrance to the court clerk's office.

The first sum offered shall be the auction price.

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The text of the first paragraph of this article is similar to the first paragraph of the old article. However, the second paragraph has made the basic value for the sale to be the first value payable by the bidders, whereas, in the old article the first value payable by the auctioneers was considered to be the preliminary value.

And whereas the sale should have been preceded by sufficient publications of the date fixed therefore and for all the statements which the purchaser desires to know, paragraph 1 of this article has decided that the publication of the notice for the commencement of the sale by public auction, should be at the expense of the applicant for the sale, under the supervision of the Land Registrar, in the Official Gazette and in three <sup>local</sup> newspapers. In addition to this the notice of the sale should be posted on the door of the Land Registry and on that of the Court of the District so that whosoever desires to purchase can come forward



to do so.

The legislator has decided that the official should be present in the formalities for the publication so that no mistakes or errors may be committed which would result in the necessity of repeating the auction or the annulling thereof. The publication expenses are borne by the applicant for the sale.(1)

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Yaken, Zouhdi, op. cit., Vol. II, pages 223 and 224.

ARTICLE 165- (As amended by Article 5 of Arrete No 101/RR dated [—————] July 12, 1933):

The auction shall remain open for 60 days, and no bid shall be accepted after the expiration of the said period. Bids must be made in writing, under pain of invalidation, and must be confirmed by the bidder either in person or through his agent in the presence of the official in charge of the sale. Such confirmation shall be effected immediately through the signing of the auction report by the bidder or his agent. In any case, the validity of the bidding shall be conditional upon the deposit of the amount of the difference between the price offered by the last bidder and that offered by the preceding bidder.

Contrary to the above stipulations, any person shall be entitled to take part in the bidding without attending in person or through his agent, by sending a written declaration to the official in charge of execution. Such declaration shall be made out in three copies, indicating the property under auction and the exact amount of the over-bid, and shall be sent together with a Treasury receipt proving that the amount of the difference between the price offered by such bidder and that offered by the bidder preceding him has been deposited at the Treasury. After ascertaining that the above formalities have been duly performed, the official in charge of execution shall confirm his acceptance of the over-bid by means of a statement drawn up and signed by him.

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This article has made the period of the auction sixty continuous days, at the expiry of which no higher bid whatsoever will be acceptable. Prior to the expiry, any higher bid must be offered in writing by the bidder or his official<sup>ly</sup> empowered agent in order to be valid. Otherwise it shall be null and void. The proces-verbal of bidding should be signed by the bidder personally or by his agent in order to prove that the bidding occurred by him. In order to accept the bidder in the auction, he should deposit at the government treasury the difference existing between the first bid and the second bid. The continuation of bidding can be made without the presence of the person himself if he forwards a petition, authenticated by an official empowered for the authentication of signatures. It should be in three copies and contain a clear statement of the real properties and the price he pays. It should be accompanied with a receipt from the treasury proving the depositing of the difference between the two biddings. Subsequently, the Land Registrar prepares a proces-verbal accepting the bid which should be signed by the said bidder.

This article does not indicate the competence of the bidder. However, it should be conditional for him to be competent for the purchase. It is not possible for the guardian to purchase the property of those who are under his guardianship. Neither can the agent purchase the property which was entrusted to him for sale, nor can the agent of the demander of the sale purchase for himself, nor can the official in charge of the sale purchase the real property under auction.

The debtor cannot increase the bid or purchase his own real property, for he should pay the debt in order to dispense with the sale. As for the real property guarantor, and the possessor of the real property, they may purchase by auction because they are not personally indebted.(1) No bidding is accepted except from an official agent and it cannot be accepted by means of proxy.(2)

Must the creditor deposit the difference between the two biddings? There is no stipulation to that in this article. The applicant of the sale and the bidder, if he was a creditor and as long as the excess did not amount to the value of his debt and its accessories, should be exempted. If it did amount to the value of his debt and its accessories, he should deposit the difference resulting from the excess. The guarantee is not accepted for payment of the difference, but the actual deposit by the bidder is acceptable for this payment.

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(1) Yaken, Zouhdi op. cit., Vol. II, page 225, referring to Garconnet, part 5, par. 425.

(2) If the bidding occurs by an official agent, the agent's patron shall be considered purchaser and responsible for payment.

ARTICLE 166- Bids offered during the last fifteen days of the  
[ ] 60-day period provided for in the previous Article  
shall be legally regarded as null and void if they do not exceed  
the amount of the last bid by at least three percent, (3%).

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ARTICLE 167 The bids offered shall be entered in a special record. The official in charge of the sale shall certify each entry by signing it and stamping it with his official seal. He shall then deliver to the bidder a certificate to the effect that the bidding has been accepted.

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If the stipulations of the above mentioned article did not occur then the bidding is considered as annulled, in order not to give an opportunity for fraud and deceit in accepting false bidders. And, whereas the bidding report is an official report, until it is proven false, the legislator has taken care that the particulars mentioned therein are organized in a regular manner, signed and sealed by the seal of the Department, and confirmed by the receipt given to the bidder by the official confirming his acceptance of the bidding.(1)

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(1) Yaken, Zouhdi, op. cit., Vol. II, page 226.



ARTICLE 168 - (Repealed by Arrete No. 102/LR dated August 6, 1932, and replaced with the following provisions:)

With the expiration of the period provided for in Article 165 for the acceptance of bids, the property shall be made over to the last bidder if the highest price offered is at least equivalent to the amount of the official appraisement, after deduction of 20% of the said amount.

The auction report shall be signed by both the official in charge of the sale and the purchaser.

If no bidder presents himself within the period indicated in Article 165, or if the last price offered does not fulfill all the conditions prescribed in the previous paragraph, the property shall be offered for sale by auction for another period of thirty days, at the end of which the property shall be made over to the last bidder,

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Refer to the comments on Article 169 of this Code.



ARTICLE 169 (Repealed by Article 6 of Arrete No. 101/LR dated  
[ ] July 12, 1933, and replaced with the following  
provisions:)

After the property is made over to the last bidder in accordance with Article 168, the purchaser shall be granted a delay of eight days within which he must prove that he has fulfilled the obligations provided for in the specifications and that he has deposited or paid the price.

At sight of such proof, the Registrar of the Land Register shall, ex officio, strike off the lien records and register the property in the Land Register under the purchaser's name.

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The adjudication of the real property in the name of the last bidder results in:

(1) the ownership being transferred to him and the real property becoming owned by him. The seller is considered the creditor and the applicant for sale is considered the debtor because the first carries out the formalities and the second lets the real property be sold without objection.(1)

(2) that he is responsible for the carrying out of all the obligations of the purchaser, in paying within a delay of eight (8) days.

(3) that the adjudication of the real property, in the name of the last bidder, recovers the real property from all liens and privileges which were on it, and the right of the creditor transfers to the price.(2)

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- (1) Yaken, Zouhdi op. cit., Vol. II, page 169, referring to Garconnet, part 5, page 82, par. 448.
- (2) Ibid., pages 169 and 170.

ARTICLE 170- (Repealed by Article 7 of Arrete No. 101/LR dated  
[ ] July 12, 1933, and replaced with the following  
provisions:)

If the purchaser fails to pay the price within the 8-day period provided for in the previous Article, the official in charge of the sale shall deem him<sup>a</sup> frivolous bidder, and shall automatically re-open the auction forthwith and before recording any entry in the Land Register.

The new auction shall remain open for 30 days, and shall proceed in accordance with methods provided for in Articles 164-169 above.

At the expiration of the above-stated period, the property shall be made over to the last bidder, whatever the amount of the over-bid may be.

However, the frivolous bidder shall remain responsible, under pain of imprisonment, for the amount of the difference between the price offered by him and the price actually reached following the frivolous bidding, and also for the legal interest amounts imposed for delay. He shall not be entitled to any surplus that may occur, such surplus being allotted to the creditors, or reverting to the debtor if the creditors have received their dues in full.

At sight of the proofs presented by the purchaser to the effect that he has carried out all the obligations provided for in the specifications, or that he has paid or deposited the price within the 8-day period indicated above, the Registrar of the Land Register shall forthwith strike off the lien records and register the property in the Land Register

under the purchaser's name.

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It is worthy of mention that this text was promulgated in the year 1933; that is to say, at the time when the debtor was exposed to a sentence of imprisonment until he settled his debt. This text ceased to be effective in Lebanon as from the promulgation of the Lebanese Code of Civil procedure; i.e., from the morning of 12 October 1934.(1)

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(1) Mushahwar, Amin " Majmu'ah al-qanuniyah al-khassah bi-al-tashri' al-'iqari wa bi-nizam al-malakiyah al-'iqariyah fi suriyah wa-lubnan," page 191.

ARTICLE 171 - ( Repealed by Article 8 of Arrete No. 101/LR  
[-----] dated July 12, 1933, and replaced with the  
[-----] following provisions: )

In all cases, the official in charge of  
execution shall notify the results of the transfer to the  
purchaser, the debtor and the registered creditors, within 24  
hours following the close of the auction.

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Refer to comments on Article 173 of this Code.

Article 172- (Repealed by Article 9 of Arrete No. 101/LR  
[-----] dated <sup>July</sup> 12, 1933, and replaced with the following  
[-----] provisions:)

With the conclusion of transfer formalities within the conditions set forth in Articles 169 and 170, the lien shall be abolished and the creditors' claims <sup>conveyed</sup> to the price which shall be distributed in accordance with the provisions of the following Article.

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Refer to comments on Article 173 of this Code.



ARTICLE 173 After deduction of costs and expenses, the price  
[ ] of the property shall be distributed among the-  
[ ] lien-holders,  
each receiving the amount assigned to him in the distribution  
according to the grade allotted to him in the records.

Registered debts not applied for shall be kept in  
the name of the creditor or creditors on their own responsibility.

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The purpose for repeating the auction due to the careless bidder is to safeguard the interest of the creditors and not harm the debtor. The repetition of the sale is merely an auction like all auctions. It cannot be said, according to this law of ownership, that if the careless purchaser has failed to pay the value of the first adjudication, that <sup>that</sup> would eventually cause the cancellation of his ownership. This is because this will lead to the return of the ownership to the debtor and this is not valid. It cannot be said that it is merely a repetition of sale as there does not exist more than one dispossession formality and there is no attachment on the careless purchaser in order that a new sale should be made. There is but one attached person and one seller, who is the debtor, and one purchaser who is the final purchaser. The final auction cancels the preceding one. It is therefore seen that the careless purchaser is considered irresponsible for any indemnity by the mere fact that the new application was made in a larger value than that of the first,



even if the final purchaser had not paid it. However, the careless purchaser would be responsible for the decrease in the value of the sold real property if it was sold for a lesser amount than that for which the failing purchaser has purchased it. He would be deprived of any increase if the real property sold gave a value higher than its worth. The failing purchaser shall be responsible for the expenses accruing from the new auctioning and from the decision of the first adjudication.(1)

Moreover the new purchaser shall be considered the owner as from the day of the first auction. All the real rights which the failing purchaser has granted to others shall be forfeited in favor of the new purchaser. If the sale affected real ~~properties~~ or different parts of real properties, the responsibility of the purchaser shall affect the whole amount of the value due from him. If the prices of these different parts have become changed, whereby some have increased and others have decreased, consideration must be made to the total and not to every part separately, because the right of the creditors was connected with the whole and not with every part separately.(2)

Articles 172 and 173 have abrogated the dispute in existence between the jurists in France. Some of them found that the repetition of the sale will save the careless purchaser from his obligations, but he would be required to pay the difference in the form of compensating the creditors for the harm they have sustained due to his carelessness and haste in purchasing a real property, which he is unable to pay for or which he does not want to pay for. This compensation shall be

entitled to all the creditors and shall not enjoy any privilege for the mortgagees. Others found that the repetition of the sale shall not exempt the careless purchaser from his obligations, even if all rights were annulled. Therefore, he would be obliged, towards the creditors, to pay the value on which the sale was offered to him. It is therefore established that the difference in the value shall be the right of the registered creditors and shall not be returned to the debtor and to his ordinary creditors, except in the absence of registered creditors. This is the view that was accepted by the Law of Ownership.(3)

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- (1) Yaken, Zouhdi opcit., Vol. II, page 232, referring to Garconnet, pars. 515 and 1104.
- (2) Ibid., referring to Glasson, part 2, par. 1497.
- (3) Ibid., referring to Garconnet, part 5, par. 505 and Glasson, parte 2, pars. 1499, 151<sup>0</sup> and 1501.

TITLE SIX.

ENTAILMENT; PERMANENT TENURE  
AND LONG-TERM LEASE

CHAPTER I

ENTAILMENT (WAQF)

ARTICLE 174- Entailed property (waqf) may not be sold, surrendered  
E\_\_\_\_\_ gratuitously or against payment, inherited, mortgaged  
E\_\_\_\_\_ or placed under lien. Such property, however, may be  
E\_\_\_\_\_ exchanged for another or given under a contract of  
E\_\_\_\_\_ permanent tenure or long-term lease.

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The institution known as waqf is peculiar to Moslem law. Waqf lands are mortmain property, which has been dedicated to some religious or charitable object or family trust. (1) It bears some resemblance to the trust in English Law. The nature of the waqf differs according to the purpose for which it is dedicated. Some are strictly charitable or religious foundations dedicated, for the use of churches, mosques, schools, etc. This type is known as waqf khayri. Others are made as a means of securing the use of land to the founder and his heirs along an explicitly stipulated <sup>li-</sup> ~~li-~~ line of inheritance. This is known as waqf dhurri, in which the charitable object is not evident until the line of succession has come to an end. (2) Another type of waqf is a combination of the above types whereby the proceeds of the waqf are divided between some charitable organization and the heirs of the dedicator.

"Waqf is a form of alienation by which a property passes from the ownership of the person making the disposition without its being transferred to the ownership of any human being. Waqf literally means detention and is constituted by the appropriation or tying up of property in perpetuity so that no proprietary rights can be exercised over the corpus but only over the usufruct... The object which is sought to be advanced by a waqf must be charitable in the very general sense of being of some benefit to men." (3)

Waqfs, according to their nature, are divided into two main divisions:<sup>(4)</sup>

Waqf Sahih -- (lit. the real, perfect, valid, or authentic waqf).

Waqf Ghair Sahih -- (lit. the waqf that is not real).

The waqf sahih comprises those lands which originally were owned in fee simple by individuals, but which were constituted waqf by the waqif (donor) thereof pursuant to formalities imposed by the Shar'i Law, and subject thereto. The waqf sahih is outside the scope of the Land Code and the subsequent amendments thereof.<sup>(5)</sup>

The waqf ghair sahih comprises those lands which were taken away from the public domain and constituted waqf by the Sultan, or by any other person with the Sultan's authorization. It is not properly speaking waqf, but the attribution of the revenues or other rusoom of such lands for the use of a particular object. The nuda proprietas being in the Bait al-Mal (public domain). ~~The~~ The provisions of the Land Code are applicable to these waqfs only.<sup>(6)</sup>

Both mulk and miri can be dedicated as waqf, though in the second case it is essential to obtain the consent of the state. Waqf of mulk land is the only true waqf. It is governed by religious law and is not subject to the Land Code. (7) This is synonymous with waqf sahih mentioned before. Waqf of miri land (takhs-isat) is state land, the proceeds of which, generally the tithe, had been dedicated to some special object either by the Sultan or others with Imperial sanction. (8) This is what we have previously mentioned as Waqf Ghair Sahih.

Under Turkish rule the waqf affairs were administered by the "Ministry of Awqaf" according to Article 1 of the Ordinance of 7 Jamada Tani, 1287: (9)

"Les vacoufs sis dans l'Empire Ottoman se devisent en deux categories: les uns sont administres et regis par le Tresor des ~~des~~ Vacoufs imperiaux, ou bien sont administres par une personne speciale (mutevelli) sous l'inspection du dit Tresor qui reglera directement toutes les questions concernant les dits immeubles; les autres sont administres par les administrateurs sous la surveillance du Tresor des Vacoufs Imperiaux".

The former constitutes the waqf mazboot, the latter the waqf ghair mazboot. (10)

This was automatically superseded upon the French occupation and the "Supreme Moslem Council for the Inspection of Waqf", which was attached to the High Commission, was the authorized body for the control and supervision of Moslem waqf.



Christian or Jewish waqf property is administered by the chief religious heads of the community (patriarchs, bishops and chief rabbis) with the assistance of a council. Waqf property of communities detached from Islam (duruz, Alouites) is under the direct control of the qadi who is the religious judge of the community. (11)

For purposes of administration, waqf property has been divided into four categories: (12) (a) waqf mazbut, <sup>(b) waqf mulhaq</sup> (c) waqf mudawwar, (d) waqf mustathna.

Waqf mazbut is managed by responsible boards assisted by the departments of waqf administration. Waqf mulhaq is managed by a trustee who is appointed in accordance with conditions laid down by religious law, and directly supervised by special boards assisted by the departments of waqf administration. Waqf mudawwar is managed by the department of finance of each state, and is treated as mulhaq, but supervised by the religious courts of the community. The trustee or the mutawalli has no right to sell the property, but may under certain circumstances exchange it for other property. ~~but~~ In administering the waqf he is bound by the terms set by the dedicator in the trust deed (waqfiya-h). (13)

Waqfs may further be classified under the headings of: (14)

Masaqqafat -- (lit. covered with a roof)

Mustaghallat -- (lit. productive of revenue)

The musaqqafat comprise the (urban)<sup>waqf</sup> lands on which are erected buildings, or which had buildings erected thereon, or which are destined for the erection of buildings. (15)

The mustaghallat comprise the (rural) lands which yield income derived from crops and plantations. (16)

The musaqqafat and mustaghallat, in their turn, are divided into two categories: (17)

Waqf bi-Ijara Wahidah ---- simple lease.

Waqf bi-Ijaratain ---- double lease.

When no special provision is made by the waqif (donor) for the letting of the property, the administrator may not let the musaqqafat bi-Ijara Wahida for a period exceeding one year, and the mustaghallat bi-Ijara for a period exceeding three years, without the authorization of the qadi. (18)

The waqf system has retarded the development of the country socially and economically. It is<sup>so</sup> complicated that any person acquiring such land must proceed with great caution and under legal advice. The charitable or religious waqf requires an elaborate system of administration which is difficult to maintain because waqf property is so extensive and so widely scattered over the country. Quite often as a result of inadequate supervision the waqf system offers a tempting field for the practice of fraud and theft. In cases where the waqf is dedicated for the benefit of an individual and his family, another serious problem arises,



As time goes on and the number of heirs increases, the property is divided into minute shares of little value to their individual owners. In such cases interest in the property is lost and improvements discouraged. Thus the system tends to create a discontented class of property owners. (19)

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- (1) Luke and Keith-Roache, Handbook of Palestine, 1922, (London, 1930), page 183.
  - (2) Murr, Duabis, op. cit., page 17.
  - (3) Abdur-Rahim, The Principles of Muhammedan Jurisprudence, 1911 Edition, pages 303 and 304.
  - (4) Khairallah, Ibrahim A., The Law of Inheritance in the Republics of Syria and Lebanon, (Beirut, 1941)
  - (5) Article 4, 1 of the Ottoman Land Code, Aristarchi, 1, pages 61 and 92.
  - (6) Article 4, 2 of the Ottoman Land Code, Ibid., pages 62 and 63.
  - (7) Y. Chaoui, op. cit., page 64.
  - (8) Ibid., page 65.
  - (9) Article 4, 2 of the Ottoman Land Code, Aristarchi, 1, page 242.
  - (10) Khairallah, <sup>Ibrahim A.</sup> op. cit., page 100.
  - (11) Rapport ala Société des Nations, 1926, pages 113 and 114.
  - (12) R. O'Zoux, Les Etats du Levant sous Mandat Francais, page 144.
  - (13) Khuri, <sup>Albert</sup> op. cit., page 56.
  - (14) Khairallah, <sup>Ibrahim A.</sup> op. cit., page 100.
  - (15) Article 2 of the Ordinance of 7 Jamada Tani 1217, Aristarchi l.c. page 342, also Note (1) page 260.
  - (16) Ibid., Aristarchi, l.c. page 342, 353, also Note (2) page 260.
  - (17) Khairallah, <sup>Ibrahim A.</sup> op. cit., page 101.
  - (18) Murr, <sup>Duabis</sup> Ahkan al-Aradi, page 22.
  - (19) Khuri, <sup>Albert</sup> op. cit., page 56.

ARTICLE 175 - The entailment shall not adversely affect any real titles legally acquired and maintained in respect of the property before <sup>the</sup> recording of the entailment in the Land Register.

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→] Rights of ~~the~~ others may be connected with the entailed real property as it is valid to entail a real property for a charitable purpose while it is mortgaged or rented. Neither the mortgage contract nor the lease contract can be revoked on account of this entailment, but that real property shall return as a waqf for the purpose entailed for, after the expiration of the lease period, the settlement of the debt, and the redemption of the mortgage. Jurists have established that if the person who gives a property for waqf has died before the settlement of his debt to the mortgagee, his property will be inspected in order to see if its value is sufficient to settle the debt to the mortgagee, and ~~the~~ <sup>the</sup> mortgaged real property shall remain as a waqf. If he has no other property, then the mortgaged real property will be sold and its price will be paid to the mortgagee for the settlement of the debt. However, the stipulation of this article does not allow the adherence to the opinions of the jurists in this respect, whereby the mortgagee has to refer to the other real property of his debtor. But he has to pursue the mortgaged real property by virtue of the right granted to him by the law in the registered contract of the mortgage, which is prior to the waqf and to its inscription in the Land Register. In the light of this the Shar'i stipulation has, in accordance with this Code, stipulated the non-compelling of the mortgagee, in case of the insufficiency

of the other properties of the mortgagor, to refer first to him for their sale. Instead he is to proceed with <sup>the</sup> sale, and the mortgagor himself or his heirs shall sell his remaining properties in order to redeem the mortgage.

The wagf is valid even though the person was indebted and the entailment has covered all of his property. If the debtor was not in possession of anything to settle his debt besides the real property which he entailed after the confirmation of the debt and the request of the creditor for payment of his debt, then if this real property ~~of the creditor for payment of his debt, then if this real property~~ was sufficient to satisfy the creditor, the entailment shall be regarded as invalid and the judge shall decide its invalidity.

If there was a right of easement on the real property, whatever its kind may be, prior to the inscription of the entailment in the Land Register, then its owner shall remain enjoying it as he did before the entailment and before its inscription in the Land Register. (1)

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(1) Yaken, Zaahdi op. cit., Vol. II, page 262.

ARTICLE 176 - The entailment shall not have any legal effect except from the date of the entering thereof in the Land Register.

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The waqf is a real right (pertaining to real property) subject to registration. Article 10 of this Code has stipulated that explicitly. \* The immovable real rights licensed to be established by the law and the real property restrictions and attachments and also the real property actions concerning a real property or an immovable registered property, should be inscribed in the folio assigned for every real property or immovable property in the Register of Ownership. Therefore the waqf should be registered similar to the other real rights according to Article 9 of Arrete No. 188 issued on 15 March 1926, concerning the Land Register, in respect of the immovable real properties and abrogated by Article 4 of Arrete No. 45/LR, dated 20 April 1932.

It has been in dispute whether the benefit in the waqf should be considered a personal right, that is to say, confined to the claiming of the benefit in the crop, or it is a real right similar to the right of usufruct. The correct thing is that it is a personal right and therefore the entitlement in the waqf shall not be mortgaged nor shall it be liened. The share of the person entitled to benefit from the waqf shall be a security for what his creditors claim from him as from the time he becomes entitled to the crop. The attachments can be placed on the crop or its value in money unless the bequeather has made a condition denying the attachment to be made. There is nothing in the law to prevent the beneficiary from renouncing his right in the crop of the waqf, because the right of the beneficiary in the crop of the dedicated property is a complete right of ownership. The mutawalli of the waqf is nothing but an agent for the beneficiary, and the crop he holds is a trust. (1)

*again here*  
(1) Yaken, Zouhdi op.cit., Vol. II, page 269.



ARTICLE 177 - The entailment shall involve all objects which were, or have become, integral parts of the property, or appurtenances or necessary appendages thereto.

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If a person entails his house, its rights, its accessories; such as the private road, the right of obtaining water for drinking, and the right of directing the flow of the water are included therein, even if he did not mention that he had bequeathed these rights. If he entailed a ground there must be included in it everything that there was in it at the time of the entailment of buildings and plants even if they were not mentioned. If he entailed a house and mentioned its contents incorrectly (deficitly), the boundaries shall be legally considered and there shall be included in the entailment all the contents within these boundaries.

All the movable things pertaining to the entailed buildings which are considered as accessories thereof, shall be considered as waqf in accordance with this article. The Lebanese Court of Cassation has issued Decision No. 64, dated 18 September 1934, establishing this fact. However, there must be provided four conditions for the consideration of the movable property as waqf with the real property:

First -- that the original thing must be a real property by nature.

Second -- that the movable thing was put in the real property for the service thereof.

Third -- that its placement therein was made by the knowledge of the bequestor of the real property.

Fourth -- that the owner of both is the same. (1)

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(1) Yaken, Zouhdi op. cit., Vol. II, page 270.



ARTICLE 178. - No title or claim whatever may be acquired by prescription in respect of entailed property used as a mosque, church, synagogue, hospital or educational institution, or reserved for public use.

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Refer to comments on Article No. 257 of this Code.

The mosques and the public charitable institutions assigned for public education or charity, hospitals, churches and places of worship, whether they were under the administration of the government or whether or not the government is paying for their maintenance and upkeep, and the places provided for public use, such as cemeteries, shall be regarded as attached to the public properties whereby it is not permissible to dispose of or to possess them by prescription, or to institute thereon any right of easement or order of attachment. It is not possible to acquire by prescription the right of overlooking on a mosque entailed and assigned for worship, but it is possible to establish a right of easement for the interests of the public properties on other properties. All the rights of easement which are necessary for the mosques, churches, hospitals, etc., are considered as public properties assigned for public use. The lands assigned for public use may become private properties by the cessation of the public use for which they were assigned. In this case they will become liable for appropriation by prescription, taking into consideration the provisions of Article No. 255 of this Code. "If they were registered in the Land Register or they were under the administration of the government, then prescription shall not apply thereon." Therefore, the cemeteries

which are not inscribed in the Land Register and which are not under the administration of the State Domain, shall be regarded as part of the public properties even though no further burials are taking place, as long as it is still keeping its general state as a cemetery. But, if these conditions were abolished and they become dead lands, then they will lose this quality of being a cemetery and it is possible to own them by prescription.

The period of prescription in the other entailed real properties, besides what is stipulated in Article 255 of this Code, is fifteen years, provided that the possessor is not in possession of a valid deed. Otherwise it is five years by virtue of Article 257 of this Code. The Lebanese Court of Cassation has recently established in Decision No. 86, dated 28 May 1937, the confirmation of what has been stated. Article 270 of this Code (1) has, as from 1930, definitely abrogated the Majallah provisions and all the laws following it which relate to the Real Property system. This Article stipulates that it is not possible to acquire by prescription any right whatsoever on the entailed real properties assigned as a mosque, a church, a synagogue, a hospital, an educational institution or those assigned for public use. The article left aside the real property rights on which prescription may be applied according to the general principles, such as the ownership of a piece of land or the right of using a spring. Article 257 of this Code, in what concerns real properties and the unregistered rights, stipulates that the right in registering them in the Land Register, is acquired if the person had possessed them quietly,

openly and continuously as if he were the owner of the real property, for a period of five years, either he himself or through another person on his behalf, provided that the possessor is in possession of a valid deed. If he is not in possession of a valid deed, <sup>then the period shall be fifteen years. It is understood from all these</sup> stipulations that the period of prescription in the waqfs, except the stipulation of Article 255, has become fifteen years in the event of the non-existence of tasarruf based on a genuine deed.

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(1) Refer to Article 270 of this Code.

ARTICLE 179 - The rules relative to the entailment of property, the validity of the entailment and the aim, division, lease and exchange thereof are set forth in the special laws pertaining thereto.

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CHAPTER II  
PERMANENT TENURE

ARTICLE 180 - By the term " permanent tenure" (Ijaratain) shall be meant a certain form of contract under which a person acquires the permanent right to use and enjoy an entailed (waqf) property against payment of the price thereof. Such price shall be appraised at a certain figure to be regarded as a rent paid in advance and equivalent to the value of the transferred title or claim. To this amount shall be added a permanent yearly fee of 3 per thousand of the value of the property as assessed for the levy of the land tax.

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The Ijaratain (permanent tenure) corresponds to the locatio perpetua agrorum civitatis of the Roman Law. (1) It is constituted when the waqf property is in urgent need of repairs, and the income derived therefrom is not sufficient to pay for the repairs, and the mutawalli (agent or trustee of the waqf) is unable to let it bi-Ijara Wahida. Under such circumstances, the mutawalli obtains the Qadi's sanction to let it out bi-Ijaratain.... (2)

The Ijaratain is a lease for an indefinite period whereby the lessee acquires the property upon the payment of a mu'ajjala (payment in anticipation) equivalent to the real value of the property, paid upon entry into possession, and of a muajjala (deferred payment) or sum agreed upon and paid annually in lieu of rent. These lands may be ceded by the mutasarrif at will, and upon his death pass to his heirs. (3)

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(1) Aristarchi, I, Note (1) page 242. See also page 98 of

Khairallah, Ibrahim A. *op. cit.*

(2) Murr, <sup>Deabis</sup> Ahkam al-Aradi, page 22, quoting Omar Hilmi, Ahkam al-Awqaf, page 242.

(3) Aristarchi, page 87.



ARTICLE 181 - The permanent tenant shall be entitled at any time to purchase the mere property title against payment of an amount equivalent to thirty (30) annual installments.

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This article is a completion of Articles 3 and 7 of Arrete No. 80, issued on 29 January 1926. Article 3 stipulated that every titular of Ijaratain on a waqf real property has the right to demand the exchange of that real property. Article 7 of the same arrete stipulated that the exchange of the real properties takes place by means of paying an amount equal to thirty years rent of the value of the annuity. (1)

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(1) Yaken, Zouhdi op. cit., Vol. II, page 286.



ARTICLE 182 - Before the conclusion of the permanent tenure contract, permission must be obtained from the judge to that effect.

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As the contract of Ijaratain may not be concluded unless its benefit to the waqf is realized, therefore the authorization of the Shari'ah judge should be obtained for subjecting the real property to Ijaratain, in his capacity as the general trustee on the waqf. Without this authorization the contract shall be null and void in view of the fact that it does not fulfill its basic foundation.

Article 1 of Decree No. 79 issued on 29 January 1926 interdicted the authorization in respect of Lease Contracts relative to waqf real properties, but authorized those of one lease, provided that they do not exceed 19 years. (1) It also authorized no other kind of deeds than those of Ijaratain and the Mugata'ah. In all circumstances where the Shari'ah authorized the concluding of deeds of any kind other than those mentioned, then they would be substituted whether for the exchange of the real property or for a deed of Ijaratain, or for a deed of Mugata'ah. (2)

The Shar'iyah Courts interdicted, in Article 4 of the above mentioned decree, the acceptance or the approval of long term lease deeds other than those of Ijaratain or Mugata'ah. Every deed accepted contrary to what is stated would be null and void as of law.

Article 5 of the same decree stipulated that the waqf real properties burdened by a long term lease prior to the promulgation of this arrete, should be exchanged. According to Article

4 of Arrete No. 80, the owner of the right must demand the exchange within a year, otherwise the administration of the waefs would carry out the exchange by its own accord, as stated in Article 5 of the same arrete. (3)

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(1) Refer to Article 2 of the said Decree No. 79.

(2) Refer to Article 3 of the said Decree No. 79.

(3) Yaken, Zouhdi op. cit., Vol. II, page 287.

ARTICLE 183 - The permanent tenant shall be entitled to use and enjoy the property as a veritable owner, and he may enjoy it in person or lease it to another. He shall be entitled to the free disposal of his claim thereto, particularly to surrender such claim freely or against payment, to mortgage the same or place it under lien, and impose thereon any real rights,

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The titular of Ijaratain shall have the right to benefit from the real property as if he were the true owner. He may use it in any manner which is not interdicted by law. He may exploit it, i.e. benefit from its fruits for himself or rent it to others and receive the rental himself. He may, as well, dispose of it by transferring his right to others, gratuitously or for value received, or burden it with real rights.

His right, however, is restricted by Article 189 of this Code, according to which he may not cause damage thereto, or create a deficiency in the value of the real property.

If the mutasarrifs of waqf musaqqafat and mustaghallat of Ijaratain transfer these to another person gratuitously or for value received, or if they have them exchanged with another real property, they may do so without the consent of the mutawalli.

If the real property burdened by waqf is under the disposal of a minor at Ijaratain, and this real property becomes demolished, the trustee of the minor or his selected or appointed guardian, shall be entitled to transfer it to another person by

the discretion of the court. This<sup>is</sup> done if it appears that its transfer fulfills the legal conditions thereof; as for example when its proceeds do not cover its expenses, or when the minor is in need of means of support, and its transfer for value received is of more benefit to the minor. The same rule is applied to insane persons and those judged mentally incompetent.

If a mutasarrif of a waqf real property at Ijaratain transfers it to another on condition that the transferee will support the transferor until death, the transfer is valid and the condition is effective. The transferor shall not desist from his transfer and reclaim the transferred property from the transferee as long as he agrees upon the said condition (Iradah Sunniah, dated Rajab 1296).

The real property co-owned in waqf at Ijaratain may be divided among the co-owners. (1)

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(1) Yaken, Zouhdi op. cit., Vol II, Pages 287 and 288.

ARTICLE 184 - The right to permanent tenure shall be heritable and transferable  
by testament according to the rules applicable to State Domains.

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At the outset, upon the death of the mutasarrif in the waqf bi-Ijaratain, the property did not pass to the heirs, but reverted to the public domain. Under the Sharq'i Law, the lease was cancelled by the death of the lessee; but the children disregarded this rule, retained possession of the land acquired by their author, and the Government took no steps to enforce restitution, and the children of the deceased mutasarrif acquired the land.(1)

The right to inherit waqf lands acquired by Ijaratain, at first confined to children only, was extended to the father, mother, brother, sister and surviving spouse in the case of waqf masboot by the Law of 17 Moharram 1284,(2) and in the case of waqf ghair masboot or mulhaq by the law of 9 Jamadi Tani 1287. (3)

The Law of 4 Rajab 1292 (August 4, 1875) (4) fixed the devolution of the masaqqafat and mustaghallat.

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(1) Murr, Duabis op. cit., page 176.

(2) Young, George op. cit., Vol. I, page 318, referring to Dustour, Vol. II, page 225.

(3) Ibid., page 170.

(4) Ibid., Vol. I, pages 311-321. See likewise the official communication of 15 Zulki'da 1292, (Dec. 1874) making the obtaining of deeds upon payment of a tax optional and not obligatory --- quoted by Young, Vol. I, page 318, Note 2.

ARTICLE 185 - The right to permanent tenure shall involve the whole produce yielded by the property and everything incidentally attached thereto, whether such attachment be natural or artificial.

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The titular of Ijaratain has been granted the right to benefit from the real property in the same manner as the true owner. His right includes everything that <sup>the real property produces and everything that</sup> adheres or is united thereto accessorially, naturally or artificially. That is to say, his right is followed by the right of accession provided for in Article 206 et al. of this Code. The legislator therefore has granted the titular of Ijaratain the right to benefit from and to enjoy the real property as the true owner. (1)

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(1) Yaken, Zouhdi op. cit., Vol II, page 292.

ARTICLE 186 - The permanent tenant shall be entitled, with the permission of the custodian of the entailed waqf property, to plant any trees and erect any buildings on the said property, provided he observes police regulations and other regulations relative to roads, expansion and planning.

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1 Refer to the comments on Article 188 of this Code.



ARTICLE 187 - The permanent tenant shall be entitled to excavate the property to any depth desired by him, and to extract therefrom any building materials, to the exclusion of all other materials, provided he observes the laws and regulations relative to mines, quarries, antiquities, police control and roads.

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Refer to the comments on Article 188 of this Code.

ARTICLE 188 - Articles 215 et seq. of the present Arrete shall be applied in all cases wherein the permanent tenant has erected buildings or planted trees without previous permission from the custodian (al-mutalli<sup>wa</sup>) of the entailed property.

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The mutasarrif of a waqf, of a real property at Ijaratain owns its usage apart from its bare-property.(1) If he intends to construct on his land a building to be his property, the manager of the Waqf shall be entitled to prevent him. But if he does so without the permission of the manager, the provisions of Articles 215 et seq. of this Code shall be applied, and the manager may not say that this building is for the waqf, because it was stipulated in the deed that the mutasarrif thereof, whatever buildings he builds thereon shall ~~be~~ <sup>these</sup> granted to the waqf. His right is restricted to excavations and to extract therefrom only the building materials, with due consideration to the regulations and the arrets<sup>A</sup> relative to mines, quarries and antiquities, and the regulations of the police and the roads.

Moreover, the old condition of the musagqafat burdened by the waqf may not be changed, unless the need and the benefit are realized in the change. This is done at the discretion of the Judge and with the permit of the manager of the Waqf.

Article 13 of this Code should be referred to concerning the application of laws, arretes and regulations during the construction and the carrying out of excavations.(2)

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(1) Refer to Article 181 of this Code.

(2) Yakan. Zoubdi. op. cit. Vol. III. page 203.

ARTICLE 189 - The permanent <sup>/tenant</sup> shall be responsible for any loss caused by him to the property, and shall be expected to pay maintenance costs and all taxes and duties imposed thereon. He shall not be entitled to the refund of any expenses incurred by him or value of improvement caused by him.

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The owner of the right of Ijaratain is entitled, like the owner, to use the waqf real property and to benefit therefrom. He may benefit also from the rights of easement and all other rights which the owner may benefit from. However, he must use the waqf real property in what it is destined to or preserved for. If it is a house preserved for dwelling, he may not have it used as a shop, store or coffee house. If it is a business house, he may not turn it into a dwelling house, unless he obtains the consent of the mutawalli and the authorization of the Shar'i Judge.

On the other hand, he may benefit from the provisions of Article 183, but he shall remain, however, responsible for any deficiency which may occur in the value of the real property because of him, and not as a result of an accident occurring through circumstances beyond his control, or fortuitously or by the effect of economic reasons. Therefore, the legislator makes it incumbent upon him to keep the place under waqf in good order and condition, and to bear the expenses necessary for its maintenance.

Furthermore, he is obliged to pay the taxes and fees incumbent upon the real property. He shall not have the right to reclaim either the expenses he spent on it, or the improvements he made therein. (1)

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(1) Yaken, Zouhdi op. cit., Vol. II, page 294.

ARTICLE 190 - The permanent tenant shall be required to pay the permanent annual fee, failing which, or in default of payment of the indemnities (for loss or damage) and other costs and expenses due, the tenant may be expropriated through legal methods.

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If the titular of Ijaratain does not pay the deferred rental incumbent upon him, or if he caused, by neglect, a deficiency to occur in the value of the waqf, by not paying the indemnity due from him or not paying the taxes and fees imposed upon the real property burdened by the waqf, his expropriation may be pursued by ordinary legal ways, previously mentioned in the chapter on expropriation, in order to collect what is due from him. Formerly, in case the titular of Ijaratain failed to pay the deferred rental, the real property would be regarded freed and given to the charge of another person for the anticipated amount:<sup>(1)</sup>

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(1) Yaken, Zouhdi op. cit., Vol. II, page 295.

ARTICLE 191 - The right to permanent tenure shall subsist even if the last tenant does not leave any heirs, but then the said right shall revert to the entailment. The permanent tenant shall forfeit his right if he fails to exercise it over a period of ten years.

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This article establishes that the disinheritance of the titular of Ijaratain does not annul or extinct this right, although formerly the case was different. If the mutasarrif of a wagf real property at Ijaratain left for another country and ~~it was rumored~~ that he was dead or if he died intestate without leaving anyone entitled to the right of transfer, the manager of the Wagf may give it to the charge of another person for the anticipated price.

If the titular of Ijaratain does not use the real property for a period of ten years he forfeits his rights therein. In this circumstance, a case must be raised in order to cancel the inscription in the Land Register and to prove the non-use. However, if the notation remains in the Land Register, the deferred payment will remain existing and be paid to the Wagf. (1)

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(1) Yaken, Zouhdi op. cit., Vol. II, page 295.

ARTICLE 192 - The right to permanent tenure shall not cease to exist with the total deterioration of the buildings or plants, but shall subsist in relation to the land.

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If the buildings or the plants on the waqf property are totally destroyed, the right of Ijaratain shall not become extinct but the deferred rent will only be collected on the ground according to the new value estimated thereof. The amount relating to the buildings or the plants damaged or destroyed will be deducted. The grounds on which buildings and plants were demolished or burned down, and those which had originally no constructions thereon and then plants were planted or buildings constructed thereon, the deferred rent thereof will be fixed according to the provisions of Article 180 of this Code. <sup>(1)</sup>

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(1) Yaken, Zouhdi op. cit. Vol, II, page 296.



CHAPTER III

LONG-TERM LEASE (MUQATA'AH)

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ARTICLE 193 - By the term "long-term lease" (muqata'ah) shall be meant a certain form of contract whereby the beneficiary acquires, against payment of an amount contracted for, the right to erect any buildings or plant any trees desired by him on an entailed property. He may also acquire the exclusive possession of such buildings and trees within the conditions set forth in Article 196.

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—Refer to the comments on Article 194 of this Code.

ARTICLE 194 - Long-term lease by annuity (fixed annual installments) shall be the only form of contract permitted, to the exclusion of all others.

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The Muqata'aB is a fixed and definite annual rent imposed upon the land burdened by waqf. It is paid to the waqf by the person who is entitled to the buildings and plants on the land. The land is waqf and what is on it (the buildings and plants) are mulk properties.

This muqata'ah is also called "land-rent." It is known in this country as "hikr," or "ground-rent."

The owner of the buildings and plants may endow them as waqf, then the land becomes from one waqf and the buildings and plants from another waqf. In this instance a hikr is taken from the buildings and plants and paid to the waqf.

The hikr is a rent contract by which the leaseholder is allowed to benefit from the leased real property against paying an annual rent. The right of the leaseholder on the real property is a right of usufruct, therefore it is a real right.

The best comprehensive definition of muqata'ah is: "The muqata'ah is the annual rent paid to the waqf by the owner of the buildings, trees and vineyards owned and created on a ground burdened by waqf; it is also called "ground-rent." Thus the waqf of the muqata'ah is as mustaghallat leased by the waqf by an advanced rent and an annual fixed ground rent (muqata'ah) without fixing a period.

The provision of this article is a confirmation of Article 1 of Arrete No. 79, dated 29 January 1926, which stipulates that it may not be permitted to constitute deeds of lease relating to real properties burdened by waqf except by one lease, Ijaratain and mugata'ah, and not by any other deed whatsoever.

The last paragraph of Article 195 is a support to the provisions of Article 4 of Arrete No. 80, dated 29 January 1926, which establishes that any owner of a right resulting from a long term lease on a waqf real property, other than the Ijaratain or the mugata'ah, must demand the exchange of that real property. In accordance with Article 5 of the same arrete, the exchange shall be commenced forthwith by the waqf's administration, if the owner of the right does not fulfill the provisions of Article 4 of the same arrete, within a year.

It is evident that the deferred price or the fixed annual rent provided for in Article 195 of this arrete, is subject to increase or decrease according to the value of the land, its increase and decrease. Therefore, jurists established that the hikr of the land shall be increased until it equals the equivalent rent, according to the time and the circumstance. But, if the increase resulted from an improvement made by the owner of mugata'ah, he shall not be obliged to pay the increase.

It has been said that the hikr lease is a lease contract intended to retain the land burdened by waqf in the possession of a person called the leaseholder, of the constructions and plants

as long as he, on his own accord, pays the rent stipulated in paragraph 1 of Article 195, which is the equivalent of that rent estimated by the legislator. It must be mentioned that fundamentally the hikr lease is not permissible; but, if any building on a waqf property is demolished and ceases to give benefit at all, it may be given to a person in order to erect constructions in it <sup>and a rent (15)</sup> estimated as mentioned above.

The establishment of the hikr lease should fulfill three conditions:

(1) That the waqf should not have any proceeds or benefits that could be used. If it has, the ground shall not be leased under hikr lease.

(2) That there should not be a person who intends to rent it for an anticipated rent for a future period of not more than 19 years in order to be spent in its construction for the purpose of accruing benefits, in accordance with Article 2 of Arrete No. 79. If there is, the muqata'ah shall be dispensed with.

(3) That the waqf ground may not be exchanged. If it is and there exists a person intending to take it and to give to the waqf <sup>a substitute or money to buy a waqf</sup> replacing it, then this system is followed because it will be advantageous for the waqf.

When the holder of a hikr lease constructs or plants on the hikr leased land, the right of residence is established for him. He shall not be expropriated except by the reasons provided for in Article 201 and 202 of this Code. (1)

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(1) Yaken, Zouhdi op. cit., Vol. II, pages 297 to 299.

ARTICLE 195 - The annual instalment shall be a fixed sum equivalent to the value of the transferred claim, plus a permanent fee of 2.5 per thousand of the value of the property as assessed for land tax purposes.

Claims issuing from long-term lease contracts other than by annuity (mugata'ah) and occurring before the promulgation of the present Arrete must be redeemed through purchase in accordance with the provisions of Arrete No. 80, dated January 29, 1926.

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Refer to the comments on Article 194 of this Code.

ARTICLE 196 - The long-term lessee shall be entitled to acquire possession of the property any time he wishes to do so, through the payment of a purchase price equivalent to the total of thirty annual instalments.

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This article is a confirmation of Article 3 of Arrete No. 80, issued on January 29, 1926, which says that "every titular of a mugata'ah on a waqf real property shall be entitled to exchange that real property." This was referred to in the comments on Articles 179 and 181.<sup>(1)</sup>

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(1) Yaken, Zouhdi op. cit., Vol. II, page 299.

ARTICLE 197 - Previous permission for the conclusion of a long-term lease contract must be obtained from the judge.

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The mutawalli shall not lease or dispose of a real property by way of hikr. If he does so, his act shall be invalid.

However, if the buildings of the musaggafat are burned or demolished and the bare ground remains, and at that time there are no proceeds to afford the rebuilding thereof, nor anyone to rent it at one lease (Ijara<sup>h</sup> Wahida<sup>h</sup>) in order to build on it and benefit therefrom, the mutawalli then, shall be entitled to lease it on hikr, on condition, however, that the discretion of the judge should be given (formerly this required a permit from the Sultan). If the mutawalli leases it on hikr without the discretion of the Judge, his lease is invalid. (1)

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(1) Yaken, Zouhdi op. cit., Vol. II, page 299.



ARTICLE 198 - The long-term lessee shall be the owner of all buildings erected and trees planted on the entailed property, and shall be entitled to use, enjoy and dispose of such buildings and trees freely as an owner. He may particularly transfer his claim, gratuitously or against payment, mortgage the same or place it under lien, or entail it or impose thereon any other real right or easement obligation within the limits of his right.

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It was said before, that the ground alone belongs to the waqf. The buildings, trees and vineyards are the property of its owner in musagqafat and mustaghallat burdened with waqf at mugata'ah. This is supported by Article 198.

As the titular of the mugata'ah is the owner of the plants, trees, vineyards and buildings, he shall use them, enjoy them, and dispose of them ~~for a price or without a price~~, freely in the same manner as the owner. <sup>He may sell them, renounce them for a price or without a price.</sup> He may mortgage them, lien them and burden them with rights of easement or any other real right admitted and not interdicted by the express text of the law. He may particularly burden them with waqf. If their owner dedicated them to a waqf other than that of the ground, this latter becomes one waqf, the buildings and the plants become another waqf. In this case, a hikr must be taken from the waqf of the buildings and the plants and paid to the side of the waqf of the ground. The limits of the titular of the mugata'ah are re<sup>s</sup>tricted by the non-decrease of the value of only the ground burdened with waqf.

If the plants and buildings become the property of the person renounced to, these also become under charge of his disposal. For example, if a house is sold, the building of which is a mulk pro-

perty and the land of which is under hikr or if a garden or a vineyard is sold, the trees of <sup>which are</sup> ~~the~~ mulk property and the lands of which are under hikr, in this case the land also becomes under the disposal of the purchaser and there is no need for the land to be alienated apart by the permission of the mutawalli, unless otherwise the seller declares, at the time of sale, that he desires to keep the land under his disposal. In this instance, the land does not become under the disposal of the purchaser.

Likewise, if the person who owns a building and plants on a waqf land subject to hikr, dies, and his property is transmitted to his heirs, then the land of this property consequently becomes under the disposition of the said heirs without price and without substitute.

The right of muqata'ah is transferred by means of succession, with or without testament, in accordance with the provisions applied to the mulk real property, i.e. in accordance with the stipulations and provisions of the Shari'ah Law relating to testament for the Moslems, and with the testament law for others. This will be explained later in the comments on Article 299 and the following. (1)

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(1) Yaken, Zouhdi op. cit., Vol. II, pages 300 & 301.

ARTICLE 199 - The entailed land shall be regarded as attached to the buildings and trees existing thereon and shall therefore be involved in the transfer, unless an agreement to the contrary exists.

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Refer to the comments on Article 198 of this Code.

ARTICLE 200 - A long-term lease claim shall be heritable and transferable by testament in accordance with the rules governing the mulk private property.

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Refer to the comments on Article 198 of this Code.

ARTICLE 201 - If the buildings or trees should deteriorate so as to disappear completely from the land under long-term lease, the lessee shall forfeit his right to the lease if he fails to renew the buildings and trees following a notice addressed to him by the custodian, (al-mutawalli) of the entailed property, or if he does not pay, over a period of three years, the amount of the annual fee due from him. In either case, such forfeiture shall be decided upon by the court.

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The owner of the constructions and plants, as long as they exist thereon, has the right of disposal of the land under hikr. If no trace will remain thereof, and the mutasarrif of the land does not make constructions and plants therein, nor does he pay its old hikr to the wakf, then the mutawalli shall have the right to demand through the courts the cancellation of the hikr lease and the expropriation of the land from the mutasarrif thereof, and give it on hikr lease to others.

But if the mutasarrif of the land pays its old hikr within a specified time, the mutawalli shall not be entitled to cancel the hikr lease and the land shall not be expropriated from the mutasarrif thereof, even though no trace of the constructions and plants remained thereon. If the mutasarrif fails to pay the perpetual rent due for three years, or if he fails to replace the constructions and the plants to their former state, the mutawalli shall be entitled to demand the cancellation of the hikr lease. (1)

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(1) Yaken, Zouhdi op. cit., Vol. II, page 301.

ARTICLE 202 - The right to long-term lease shall become extinct with the combination thereof with other rights in the same person, or with the forfeiture thereof, or with the extinction of the succession line. In any of these three cases, the right shall revert to the entailment.

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In the cases stated in this article, the buildings and the plants return to the waqf. But if the titular of waqf dies without heirs the heirs of the titular of the muqata'ah will continue to use and enjoy the buildings and the plants as a legacy and of the ground gratuitously. The mutawalli shall not have the right to prevent this taking of possession by saying that these buildings and plants are standing on the ground of the waqf and therefore belong to him. <sup>(1)</sup>

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(1) Yaken, Zouhdi op. cit., Vol. II, page 302.

ARTICLE 203 - The rules governing joint property and partition shall be applicable to permanent tenure and long-term lease.

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The purpose of the legislator in this article is to point out that the manner of use in the property held in common among co-owners in the rights of Ijaratain and Mugata'ah is subject to civil provisions and not Shari'ah provisions. Therefore Articles 20 et. al. of this Code will be applied to them in Lebanon. Similarly, in the case of the partition of the common properties, the law relating thereto shall be applied. <sup>(1)</sup>

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(1) Yaken, Zouhdi op. cit., Vol. II, page 302.



TITLE SEVEN

ACQUISITION, TRANSFER AND  
EXTINCTION OF REAL RIGHTS

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CHAPTER I

THE METHOD OF ACQUISITION, TRANSFER AND EXTINCTION OF  
REAL RIGHTS. 

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**ARTICLE 204** - The acquisition or transfer of real rights shall take place with the recording thereof in the Land Register. Besides, rights of private property and freehold rights may be acquired by accession in accordance with the provisions of Chapter II of the present Title Seven.

Any person acquiring a property by inheritance, expropriation or court decision shall be the owner of such property even before registration, but such acquisition shall not have any effect except after registration.

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Refer to the comments on Article 205 of this Code.

ARTICLE 205 - The effects of records are described in Article 11 of Arrete No. 188 relative to the Land Register.

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After the establishment of the Land Survey and in accordance <sup>with</sup> ~~to~~ the provisions of Article 37, as amended, of Arrete No. 186, the Lebanese courts have come to interpret that the inscription of a real property shall be made in the name of the bearer of the ordinary deed thereof, if he was the possessor of the real property. (1)

The Lebanese Court of Cassation decided in a judgment dated February 25, 1938 that the ordinary sale occurring prior to the promulgation of Arrete 3339 and relating to real properties located in the Old Lebanon, and in a district which has not been affected by census and delimitation acts, shall be subject, as to its validity and legal consequences, to the law in force at the time of its occurrence, i.e., subject to Article {12} of the Regulations of the Mountain of Lebanon. This said article (12) stipulates that the contracts relative to the transfer of real properties shall be considered valid until they are registered in the Special Register handled by the Courts Clerk.

This registration formality is necessary for the validity of the contracts, even between the two parties, because the mutual agreement shall not be complete and effective except by registering the contract which is concluded according to this agreement. In case this formality is not carried out, the withdrawing party shall only be liable for damages; because the law does not entitle the party who is willing to execute the contract, to obligate the other party to adhere to his undertakings. The case being so, neither

the purchaser may oblige the seller to transfer the real property nor the seller may oblige the purchaser to pay the price. The payment of damages is obligatory on the part of the withdrawing party, without his having the right to say that the contract of sale does not exist except by registration; because the non-carrying out of this formality does not affect the undertakings of the two parties. It, however, only prevents the transfer of the real property. Moreover, Article 276 of this Arrete which stipulates that the right of registration is acquired by the effect of contracts, may not be applied to a contract prior to this Arrete, but it has no retroactive effect. (2)

In accordance with Arrete No. 44 amending Arrete No. 186, the verbal sale may be considered valid in some places where the custom and usage allow so. But the Lebanese Court of Appeal in a decision dated June 12, 1934, established that the verbal sale may not occur in Beirut according to custom and usage, as the sales therein are ratified before a specific government official, and the verbal contracting between the two parties is not to be considered, and the seller shall be entitled to recover his property and the purchaser to recover the amount paid.

Article 204 of this Code stipulates that the real rights are acquired and transferred by means of their inscription in the Land Register. The right of ownership and the right of tasarruf are acquired by means of accession in accordance with the provisions of Articles 206 thru 219 of this Code. Whoever acquires a real property by succession or expropriation or by court judgment, shall be the owner of that real property before it is inscribed

in the Land Register. However, this acquisition shall have no effect until after it has been inscribed.

Article 11 of Arrete No. 188 relating to real property registration and which is mentioned in Article 205 ~~was~~, of this Code, stipulates that "the voluntary deeds and the conventions having for effect to constitute, transmit, declare, modify or extinct a real right, do not produce effect, even among parties, except from the date of the inscription, without prejudice to the rights and reciprocal actions of the parties for the inexecution of their contracts. This provision applies mainly to the deeds and real property contracts, to the waqfiyat and to the deeds of the dismemberment of waqf organized or legalized by the Notary Public or by the Shari'ah Courts."

The Lebanese Courts in interpreting the provisions of Article 204 and 205 established that the real rights shall have no effect on other persons except by means of their registration, and that the sale, if not registered, does not at first sight, transfer the real property ownership to the purchaser. Nevertheless, such a sale in all circumstances, creates legal effects between the parties which would enable the purchaser to register the sale judicially, in accordance with Articles 227 and 267 of this Arrete and Article 48 of the Lebanese Code of Obligations and Contracts (See also the decision of the Lebanese Court of Cassation dated Nov. 16, 1937, that dated February 25, 1938, and that dated May 25, 1938).

In conclusion, the following summary may be made:

- (a) - It is permissible to enter into an agreement by an ordinary contract. It is obligatory upon both parties. If the contract is registered, the real right is trans-

ferred to the real property; if it is not registered, it will transform into the claiming of an indemnity.

- (b) - The ownership and the real rights are not transferred by the mere contract, but by registration. Accordingly the contracting parties shall not be entitled to transfer the ownership by their mutual consent.
- (c) - The contract on a movable property is an official formal contract, thus the contract transferring the ownership and the real right must be official. This is done by registering the contract. If it is not registered it shall fail to transfer the ownership and the real right.
- (d) - The contract which is not registered shall be valid for a case of indemnity and for a case of obtaining a judgment for its registration.
- (e) - The real rights which are necessary to be registered in the Land Register are those enumerated in Article 9 of Arrete No. 188 as abrogated and replaced by Article 4 of Arrete No. 45/LR. (3)

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(1) Yaken, Zouhdi op. cit., Vol. II, page 308, referring to Lebanese Court of Cassation, March 3, 1932 and Beirut Courts of First Instance, October 11, 1932.

(2) Ibid., Page 309, referring to Lebanese Court of Cassation, January 28, 1939.

(3) Ibid., pages 308 to 313.

CHAPTER II

ACCESSION

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ARTICLE 206 - The silt or mud deposited gradually and unnoticeably on land in the vicinity of a water-stream shall be the property of the owner of the said land.

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Accession is one of the titles of appropriation whereby the owner of the thing shall appropriate what is attached to it accessorially and which is impossible to be separated from the original thing without causing damage thereto. If this accession occurs, the owner of the original thing shall be considered the owner of the accessory.<sup>(1)</sup> However, he has to pay the owner of the accessory an indemnity in all the cases where the accession was not caused by the latter.<sup>(2)</sup> In case the accessory has no owner, then it shall be owned by the owner of the original thing, by taking possession of it.

The jurist has laid stress on the fact that if the two things were owned by two different persons prior to the accession, then each one of them may demand the separation of this thing from the other's. But when it is impossible to do so, or when this separation causes a damage which would affect the value of the thing, the owner of the original thing shall own the accessory, if this accession was not the result of an error or of an intention on his part.

It must be noted that if movable objects are attached to a real property, the land shall always be considered the original thing, and other things accessories to it. As for example, if a



building is constructed on the land, the ownership thereof shall be for the owner of the land, even though the value of the land is for less than the value of the building.

The accession is either natural or artificial. The natural accession is that which does not occur by the act of man but by nature, such as the increase resulting from the alluvion of the rivers mentioned in this article, or the alluvion of the lakes or that of the sea mentioned <sup>in</sup> the articles to follow. The artificial accession is that occurring by the act of man, such as the plants planted in and the buildings erected on the land.

In applying Article 206 and in order that the alluvion shall be property of the owner of the land which is on the bank of the river, the following conditions should be fulfilled:

(a) - That the resulting increase must be attached to the land bordering the bank of the river. Otherwise it shall not be the property of the owner of the land; as for example when it is separated therefrom by a public road, or when the water is allowed to flow between the increase and the land of the owner. In this case, this increase shall be the property of the Government.

(b) - That the increase should occur naturally, and not by the act of man. If the owner places stones or primitive materials in the river beside his land, thus the earth accumulates and adheres to the land, the owner of the land shall not own the increase, but his act shall be considered a trespass on the course of the river, which is considered of the Public State Domain.

(c) - That the increase should occur imperceptibly (and successively) i.e. gradually. If it occurs unexpectedly and all of a sudden, whether naturally or by the act of man, it shall be the



property of the Government.

As the land, which the owner takes possession by way of accession, is considered an accessory to that which belongs to him, this results in the following:

(a) - If the land was leased to others, the increase shall be included in the lease. However, according to the preferable opinion the lease holder should pay a rent on this increase to the owner of the land. (3)

(b) - If the original land was mortgaged, the mortgage should include this increase also.

(c) - If a person had a right of usufruct on the original land, this right would be exercised on the increase also. (4)

(d) - If the right of easement is established for others on the original land, it shall apply to the increase, such as when the right of easement is a right of passage to the river.

(e) - If the possessor of the land had appropriated it by prescription, and the increase occurred during his possession he would appropriate it accessorially, even though this increase occurred at the end of the period.

The displacement provided for in Article 207 is a cutting off of a large and known piece of land from the land of the owner to a lower land or to a land opposite to it. The displacement mostly occurs with trees when they are uprooted from their places and drift in the water to the lower lands.

The condition required for the application of this article is that the displaced part must be of importance and that the displacement must take place naturally and not by the act of man.

Moreover, if the displaced land remains in the course of water, the owner shall not lose his ownership thereof. He is entitled to claim it within a year. The year shall begin from the date the displacement is complete, ~~and not from the day the displacement is complete,~~ and not from the day the displacement begins to occur.

Article 559 of the French Civil Code goes so far as to allow the owner of the upper land to claim the displaced land, after the expiry of one year, if the owner of the lower land has not taken possession thereof. The displaced buildings and plants shall revert to their old owner and he has the right to claim them in kind. It is, however, reasonable that the owner should remove them and not retain them in their new place, in order to exercise his right of ownership thereon.

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(1) Yaken, Zouhdi op. cit., Vol. 11, page 314, referring to Article 551 of the French Civil Code.

(2) Ibid., referring to Colin et Capitant Cours Elementaire de Droit Civil Francais, part 1, page 897.

(3) Ibid., page 315, referring to Demolombe, Cours de Code Napoleon, part 10, para 90.

(4) Ibid., page 316, referring to Article 596 of the French Civil Code.

ARTICLE 207 - The owner of the land which accidentally slides from its place on to lower ground shall be entitled to claim such land, if it is still recognisable, within the year following the accident, failing which such claim shall abate.

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Refer to the comments on Article 206 of this Code.

ARTICLE 208 - Islands and islets formed in anatural manner in river-beds and streams shall be among the private domains of the State.

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Refer to the comments on Article 210 of this Code.

ARTICLE 209 - Islands, islets and silt formed inside lakes as well as all silt deposited by lake-water or sea-water shall belong to the private domains of the State.

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Refer to the comments on Article 210 of this Code.

ARTICLE 210 - Land reclaimed from the sea, lakes, streams, and marshes without previous permission issued to the explorer shall belong to the private domains of the State.

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The large and small islands, mentioned in Article 208 of this Code mean those lands surrounded on all their sides by water and formed in the bed of a river. The alluvion dismissed in Article 209 is that which is formed suddenly and not gradually and imperceptibly, because in the latter case, the provisions of Article 206 are applied. It is provided that the islands must always remain above the water level. Those remaining covered by water are not governed by the provisions of Articles 208 and 209, even though they appear above the surface of water at short or long intervals.

Moreover, the islands governed by the provisions of Articles 208 and 209 are those formed in the middle of rivers and streams as a result of the level of water becoming permanently lower. (1) But those lands drifted by water to the middle of the river are not considered islands and are governed by the provisions of displacement mentioned in Articles 206 and 207.

The following are considered private State Domain, in accordance with the provisions of Articles 208, <sup>209 and 210:</sup> ~~and 210 and 209:~~

(a) - Large and small islands which are formed naturally in the beds of rivers and streams, and not those lands drifted by overflowing water and cut off from the shores.

(b) - Large and small islands which are formed in the interior of the public lakes.

(c) - The alluvion which is formed in the interior of the public lakes.

(d) - The alluvion of the sea. If this occurs, the Government shall own the land even though there is on that seashore a property for individuals. Nevertheless, this will not prohibit the owner on the seashore from taking part of the alluvion necessary for him in order to reinstate the boundaries of his property to where they were before, thus avoiding the trespass on the sea land except for this purpose.

(e) - The lands acquired from the sea, public lakes, ponds, streams and swamps, without previous authorization from the Government, are the property of the Government.

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(I) Yaken, Zouhdi op. cit., Vol. II, page 318, referring to Baudry-Lacantinerie, Traite\* Theorique et Pratique de Droit Civil, page 410.



ARTICLE 211 - If a river or stream changes its old course and follows a new one, the owners of the adjoining property shall be entitled to acquire possession of the old course, each taking the area stretching in front of his own property to a line presumed to run through the middle of the river-bed. The price of the old course shall be determined by experts appointed by the president of the local court.

The proceeds of such sale shall be distributed as an indemnity to the owners of the lands occupied by the new course, each in proportion to the value of the land lost by him.

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The provisions of this article do not apply unless the river, whether large or small, takes a new course and abandons its former bed permanently and continuously as a result of the flooding and overflowing of water or as a result of a natural phenomena; such as a branch of the river changing its course, or a permanent lowering of the level of the land occurring. However, the flooding of water and its overflowing onto the lands of others as a result of heavy rain, storms, dams being demolished, etc., shall not be considered as a permanent change in the course of the river. This is because this is merely a temporary phenomena and will disappear with the disappearance of the causes thereof. It is conditional that the change of the course of the river should happen by natural act, and that it should not be the result of working carried out by the State or the owners. (I)

If the change in the course of water occurred as a result of works carried out by the State for the interest of navigation, the owner who lost his land by the effect of the water course, may claim an indemnity from the state, i.e. the price of the

land occupied by the new water course.(2)

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(1) Yaken, Zouhdi op. cit., Vol. II, page 321, referring to Aubry et Rau, Cours de Droit Civil Francais, part 2, para 203, page 391.

(2) Ibid., referring to Paris Court, 2 February 1872.

ARTICLE 212 - The owner of any land shall also become the owner by accession, of any seed sown by another person, provided he pays the cost thereof. He may, however, if he so desires, leave the crops to the other person against one year's rent.

If the sowing season has not yet passed, then the owner of the land may compel the other person who had sown the seed to remove the same, without compensating him for any tilling or sowing expenses.

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The above article is self-explanatory. It must be noted, however, that if the accession has occurred by the act of one of the owners of the thing, this act has to occur either in good faith or in bad faith. In all these circumstances, the rule that the property of others may not be used without compensation, must be taken into consideration. Whatever the decision may be regarding the ownership, the person who loses his property by way of accession must be compensated. The estimation of the compensation shall be based upon the circumstances of this case. (I)

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(I) Yaken, Zouhdi op. cit., Vol. 11, page 324.

ARTICLE 213 - Buildings, trees and installations existing on any land shall be presumed to have been set up or planted by the owner at his own expense, and to belong to the said owner, unless the contrary is proved.

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If plants are planted in the land or buildings built thereon or above the previous buildings, then there shall be considered an artificial accession or an accession by the act of man. If this happens the following rule shall be established. The fact that buildings or plants exist on the land of the owner is considered that they have occurred by the knowledge of the original owner or his agent. This is because he is the person who is regarded to have created the building or the plants at his own expense. He shall not have to prove anything in this respect. (1) However, to prove the contrary by evidence is valid, if another party claims that he has constructed the building or planted the plants. In this connection all means of proofs and evidences are acceptable, because it is often impossible for the two parties to conclude contracts in writing in this respect. (2)

If it is proved that the building is constructed or plants planted with materials and tools of others, Article 214 shall be applied. (3)

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(1) Yaken, Zouhdi op. cit., Vol. II, page 324, referring to Article 553 of the French Civil Code and to Planiol, Ripert et Picard, Traite Pratique de Droit Civil Francais, Tome III, para 262.

(2) Ibid., referring to French Court of Cassation, 23 May 1860.

(3) Ibid., page 324.

ARTICLE 214 - The owner who uses, on his own property, building materials or seed belonging to another person shall not be compelled to reconstitute such materials or seed, but must pay the price thereof to the owners.

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If it is proved that the buildings or the planting or the sowing were made with materials or implements belonging to others, (1) then the buildings, the plants and the seeds would, in this case, be the property of the owner by accession. This latter must pay the value thereof for the other persons, as it is not permissible to get wealthy at the expense of others. (2)

Article 554 of the French Civil Code stipulates that the owner shall be sentenced to pay an indemnity increasing the value of the materials, if he was acting in bad faith. Although this article (214) has no provision in this respect, yet the owner of the land may be sentenced to pay an indemnity, even though he has been acting in good faith. This occurs if this act results in damages necessitating a delay in the making of urgent repairs already started by the owner of the materials, at the time these materials were taken by the owner of the land and thus obliging the former to obtain others at a higher price. In no case shall the owner of the materials be allowed to demand the demolition and the taking of the debris.

The conditions for the application of this article are the following:

(a) - There must be an accession, i.e. the adherence of the things to the land. But in the case where these movables

are merely intended for construction or planting, this article shall not be applied thereto. Accordingly, the owner of the movable may not claim to recover them, and his right shall not be forfeited.

(b) - The plants shall be considered the property of the owner of the land by merely putting them thereon. It is not necessary that the roots thereof should have grown into the earth.

(c) - The builder may not escape the provisions of this article by returning the materials and the implements to their owner, if he had previously agreed upon that.

(d) - If the owner of the land constructs additional buildings above the old ones, then the entire building was demolished, by an accident resulting from a force majeure, or by the intention of the owner, the owner may not claim the recovery of the materials. He may, however, claim an indemnity. The cause for this is that the accession is one of the reasons of new ownership, whereby the ownership of the former owner of the materials and implements shall become extinct. (3)

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(1) Yaken, Zouhdi op. cit., Vol. II, page 325, referring to Article 554 of the French Civil Code.

(2) Ibid., referring to Planiol, Ripert et Picard, Traite' Pratique de Droit Civil Francais, Tome III, page 262.

(3) Ibid., pages 325 and 326.

ARTICLE 215 - The owner of a land whereon another person erects buildings or plants trees with materials belonging to the said proprietor shall become, by accession, the owner of such buildings or seed, within the following conditions:

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ARTICLE 216 - If the person who erected the buildings or planted the trees has acted in good faith, he shall not be called upon to hand over the proceeds collected by him, but shall be responsible for any loss or damage he may have caused. If he has erected any buildings or planted any trees on the land to be restituted, he shall not be required to remove such buildings or trees, but he shall receive a compensation for the improvement made by him in the property through the said buildings or trees. If the value of the buildings or trees is greater than that of the land, the owner of the buildings or trees shall be entitled to acquire possession of the land in question after paying to the owner the price of the bare property.

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Comments on Article 216

If a person builds on a land or plants therein, in the belief that its ownership is his by an acceptable reason, the plants shall not be removed and the buildings shall not be demolished. The true owner, however, shall pay what exceeds the value of the land due to the existence of the plants and the buildings therein, in accordance with the estimation of the experts.

The "good faith" mentioned in Article 216 may be explained as being the belief that the land built on is the property of the constructor<sup>(1)</sup> if he is the possessor thereof.

In estimating the excess in the value, the time of construction and not the time of claiming the recovery of the real property is to be considered.<sup>(2)</sup> The excess in the value is the excess in the venal value which occurs in the land on account of the buildings and not the benefit which reverted to the owner on account of the buildings.<sup>(3)</sup> In proving the "good faith" or "bad faith", the time of building should be considered.<sup>(4)</sup>

If the owner of the land is incapable of paying what exceeds the value of the land on account of the building, a delay may be granted by the judge to the debtor who had acted in good faith.

If the constructor was building on his land and committed a trespass on the land of his neighbour, took a part thereof, erected a building thereon and added it to his land, then he will be entitled to the ownership of this part of the land, as against the amount of the indemnity he pays to the owner. This is done

when the part is small and does not cause great harm to the neighbour. But, if it appears that the part so annexed is great and its cutting off should result in effecting damage to him, it is possible, in this case, that the demolishing may be resorted to, because the fault is not so slight as to be overlooked.

If it appears that the builder was acting in bad faith and in his constructing was trespassing he would be sentenced to have the buildings demolished.

If it appears that there is an owner at the time of constructing and this owner is charged at the time of raising the case for recovery of the land, then the builder shall hold the owner responsible at the time of raising the case and not the owner at the time of constructing. The former shall revert to the previous owner if the law granted him the right of guarantee.

It is evident from Article 216 that the law uses the term plants and buildings, which mean the new acts and not the improvements and the simple repairs, such as drying a swamp or purifying a drainage and so forth.

It follows that it is obligatory for the owner who recovers the real property to pay all expenses which were necessary for the repairs and improvements and without which the real property would have deteriorated. He shall not be obliged, however, to pay the expenses of ornamentations, no matter how he was acting, whether in good faith or in bad faith. This is because the owner shall not be entitled to demand ~~and~~ the removal of the improvements made even though the one who made them <sup>was</sup> acting in bad faith. (5)

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- (1) Yaken, Zouhdi, op. cit., Vol. II, page 327.
  - (2) Ibid., page 327 referring to Baudry-Lacantinerie, Traite Theorique et Pratique de Droit Civil, par. 365.
  - (3) Ibid., page 327 referring to Baudry-Lacantinerie, Traite Theorique et Pratique de Droit Civil, par. 365.
  - (4) Ibid., page 327 referring to Aubry et Rau, Cours de Droit Civil Francais, Vol. II, par. 204.
  - (5) Ibid., referring to Baudry-Lacantinerie, Traite Theorique et Pratique de Droit Civil, par. 372<sup>and</sup> 373.

ARTICLE 217.- If the person who erected the buildings or planted the trees has acted in bad faith, he must return to the owner the amount of the proceeds collected by him. If he is not responsible for any loss resulting from the fall of prices, he shall all the same be answerable for any damage or destruction, though not caused by him. If he has erected buildings or planted trees, he may be required to remove the same, unless the owner prefers to keep them, in which case he shall pay to the losing person the gross price of the materials and plants, after deduction of the cost of removal thereof in case he should be compelled to remove them later on.

At the end of the usufruct period, the above provisions shall be applicable to the usufructuary who has erected any buildings or planted any trees on the land.

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COMMENTS ON ARTICLE 217

If the planter or the constructor is acting in bad faith, he shall be forced to demolish the buildings and to uproot the plants, unless the owner of the land prefers to keep them. This, however, is on condition that he pays to the planter or the constructor the value of the plants and the building materials before the planting and the constructing.<sup>(1)</sup> In case these are removed, the expenses borne by the owner of the materials shall be deducted; that is to say, the usurper shall bear the expenses of removing the materials or demolishing them, without being paid any compensation whatsoever.

The builder shall be regarded acting in bad faith, if he has no reasonable cause to believe that the land on which he builds is his property; as for example when he purchases from a person who, he is aware, is not the owner. The owner of the land must prove the male fide of the builder, otherwise he shall not be entitled to demand the removal of the materials.

If the owner of the land chooses to have the materials removed, he may oblige the builder or the planter to do so, even though the removal makes them useless afterwards. If he chooses to keep the constructions and does not pay the indemnity provided for in this article, the builder may, either, demolish the constructions and take the debris, or lay attachment on the real property and sell it.

The builder or the planter acting in bad faith is forced to make an account to the owner of the land of the value of the proceeds he perceived. He is also responsible for the

loss or deterioration caused, although not by him; but he is not responsible for the depreciation due to the fall of prices.

This article shall apply to the tenant who erects buildings on the land rented to him, without the authorization of the owner, i.e., he shall be regarded as a constructor acting in badfaith. (2)

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(1) Yaken, Zouhdi op. cit., Vol. II, page 217 "en stat de demolition", i.e., the value of the plants and constructions less the expenses of the pulling down or the uprooting thereof.

(2) Ibid., page 333.



ARTICLE 218 - If the buildings or trees are erected or planted by a third person with materials not belonging to him, the owner of such materials shall not be entitled to demand restitution of such materials, but he shall be entitled to an indemnity payable by the said third person and by the owner of the land, the latter in proportion to the amount still in his possession.

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COMMENTS ON ARTICLE 218

It has been explained in the comments on Article 217 that if the constructor was acting in bad faith, the owner of the land shall have the option, either to keep the constructions on his land or to oblige the constructor to remove them. Article 216, however, stipulates that the constructor, if he was acting in good faith, would not be obliged to remove the buildings or uproot the plants. This is in relation to the owner of the land.

In relation to the owner of the materials, he shall not be entitled to reclaim them but only the value thereof. In other words, if the constructions or plants are made by one person on a land of another person, with materials which are the property of a third person, the owner of the materials may not reclaim these materials, but he shall have the right to an indemnity paid by the constructor or the planter or by the owner of the land, according to what is due from him.<sup>(1)</sup>

Moreover, the owner of the land shall be responsible for the value of the materials towards the owner thereof, if the indemnity is not paid by the owner of the land to the constructor, in part or in whole. If the owner of the land choses to demolish the constructions, in case he is allowed to do so, the owner of the materials may claim them in kind. On the other hand, the owner of the materials may retain, with the owner of the land, what is due to the constructor. He may not claim his balance of the indemnity from the owner of the land, before the constructor, because there is no engagement between the owner of the materials and the owner of the land.<sup>(2)</sup>

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(1) Yaken, Zouhdi op. cit., Vol. II, page 334.

(2) Ibid., page 334-335.

ARTICLE 219 - If the buildings or trees have been erected or planted on a joint property by one of the co-owners without permission from the others, the partition of the property shall be effected, if need be, by the court, and the provisions of Article 216 shall be applied to each share separately.

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In order to render this article applicable, the erection of buildings or the planting of trees should have occurred without the agreement of all partners. But if such erection or planting took place by one of the partners with the permission of his partners, then this article cannot be applied on the situation arising from the erection of buildings or the planting of trees. The partners who allowed such erection or planting would therefore be considered partners in the ownership of the buildings or trees. And the right of the partner who erected or planted will be confined in claiming from his partners their shares of what they should defray towards the expenses of the erection of buildings or the planting of trees.(I)

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(I) *The Lebanese Court of Appeal, Civil Bench, 20 June 1942. See Al-nashrah al-qadaiyah al-lubnaniyah, 1st year, Interpretations Part, page 216.*

TITLE EIGHT

PROMISE OF SALE, AND OPTION

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ARTICLE 220 - By the term "promise of sale" shall be meant a certain form of contract whereby a person undertakes to sell a certain object to another person as soon as this other person (who does not promise to buy the object in question) declares that he had decided to purchase the object thus promised. The promise of sale shall not be valid unless the agreement reached by the two parties includes, at the same time, the promised object, the price, and the period within which the promisee shall decide on the purchase. The said period shall not exceed fifteen (15) years. If the two parties should agree on a period of more than fifteen years, the promise shall be valid all the same, but shall be effective only for fifteen years.

The promise of sale may be made to a particular person or to "order", in which latter case the claim shall be transferable through endorsement of the promise of sale contract. Such endorsement shall not be valid unless it includes the date in full letters, the transferrer's signature, and the certification of this signature by the Notary Public. Promise of sale contracts made out to the "bearer" are null and void.

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Refer to the comments on Article 221 of this Code.

ARTICLE 221 - From the promise of sale a real right shall emanate which shall be subject as such to all legal provisions in force concerning real rights (including the provisions of <sup>Article</sup> ~~Article~~ No. 188 dated March 15, 1926, Article 10 of which shall particularly apply to the transfer of the promise of sale, and more particularly the endorsement of promises made to "order"), account being taken of stipulations to the contrary provided for in the present <sup>Article</sup> ~~Article~~.

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Article 220, in general, has defined the promise of sale as follows: "It is a convention whereby a person undertakes to sell a thing to another person forthwith, after the promisee declares that he accepts the purchase of the promised thing, but does not undertake to purchase it forthwith," Article 493 of the Lebanese Code of Obligations and Contracts has defined it as follows: "It is a contract by which a person undertakes to sell a thing to another person who does not undertake to purchase it at once."

Jurists have also given it the following comprehensive and restrictive definition; that the promise of sale is a promise by one party and an acceptance of that promise by another party, but without a promise from the latter, e.g. A promises B to sell him a house on a certain date if B accepts. B accepts this promise but does not promise to buy. In contrast, there is a promise of purchase. For example: A promises to purchase the house of B

on a certain date. B accepts this promise without promising to sell.

The contract of the promise of sale is valid on the party who promises. He is obliged to execute the contract when the other party so demands. The promise of sale shall not be valid unless both parties agree upon the following:

- (a) - The thing promised.
- (b) - The fixed price.
- (c) - The delay during which the promisee may realize his option.
- (d) - The delay is not to exceed fifteen years. If it exceeds this period the promise shall be considered as valid, but shall have no effect except during the fifteen years only.

If the contract is made out "to order" it must fulfill the following conditions:

- (a) - That the date should be written therein in letters.
- (b) - That the signature of the transferrer should be thereon, and
- (c) - That this signature should be certified by the Notary Public. Upon completion of this the endorsement of the title will be valid.

If the promise of sale is in respect of a real property, it shall be considered a real right and shall consequently be subject to registration like all other real rights. Article 498 of the Lebanese Code of Obligations and Contracts stipulates that the promise of sale with regard to the immovable real properties shall be subject to the real property laws in force.



The promise of sale with ordinary title is effective between the contracting parties but does not affect the others acting in good faith except from the date of its registration in the Land Register, in accordance with the provisions of Arrete No. 188 and Arrete 45/LR. Article 496 of the Lebanese Code of Obligations and Contracts stipulates; that, when the promisee expresses his intention to purchase, the promise turns to sale without having a retroactive effect. The transfer of ownership has effect on the day of acceptance. Assuming that before the promisee declares his acceptance, the promisor liens the real property or disposes of it to others, then the lien or the sale is considered valid. Yet, the promisee, if he has a valid reason may claim damages. Some jurists say that the promisee is entitled to nullify the disposal occurring on the part of the promisor, if the purchaser was aware of the promise and was acting in bad faith.

It was said above that at the time the promisee declares his intention to purchase, the sale becomes effective. This results in that, if the contract suffers nullification or cancellation, the prescription, as well as the period of the case of nullification or cancellation, shall begin from that time.

To this matter relates another, that of the person promising another person to the effect that in case he sells his real property he will prefer him to others. This promise, however, is considered, as established by jurists, a promise of sale emanating from one party. It does not become a real right, but a personal right whereby the promisee may claim damages from the promisor if this latter fails to fulfill his promise. (I)

The promise of sale is considered a dual promise, if the promissor undertakes to sell and the purchaser to purchase at one and the same time, but fixed for that a definite time or laid down special conditions. Otherwise, the promise would be an effective sale. It is, moreover, obligatory to both parties. It may not be nullified by the will of one of the two parties. It is an effective and complete sale, even though the sold property is not delivered or the price is not paid.<sup>(2)</sup> However, if the two parties agree upon the nullification of sale, then a new sale must take place.<sup>(3)</sup>

It is evident that the effects and the obligations thereof are transferred to the heirs of the contracting parties, as stipulated in Article 494 of the Lebanese Code of Obligations and Contracts. It must be known, however, that the promise of sale does not entail any obligation on the promisee but definitely obligates the promissor. It follows that the promissor cannot refrain from his offer, but must wait for the decision of the promised person.

The promise of sale is considered a one party contract. Furthermore, the promise of sale, even though it is written "to order" in order to have effect on the others, must be registered like all other real property real rights. As the promise of sale obligates the promissor in a definite manner, as was mentioned above, he cannot establish any real right on the real property during the fixed period. But he may establish a lien during the period granted to the promisee to decide as to his option.

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(1) Yaken, Zouhdi op. cit., Vol. II, page 340, referring to Limoge

Court, 5 June 1899.

(2) Ibid., page 341, referring to Chambri Court, 31 January 1894.

(3) Ibid., referring to Dalloz, Dictionnaire de Droit Civil,  
part 2, par. 54.

ARTICLE 222 - During the delay accorded to the promisee to decide  
E-----on the purchase, the promise of sale of a particular  
property shall prohibit the promisor from selling the property  
or from imposing thereon any real claim other than lien.

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Refer to the comments on Article 221 of this Code.

ARTICLE 223 - The promisor shall be entitled to conclude a lien [ ] on the promised property during the said period, but a lien so concluded shall not deprive the promisee of his rights. If the promisee decides to purchase the promised property, the sale price shall actually and effectively take the place of the property under lien, and the claims of the lien-holders (creditors) shall be transferred to the said price in accordance with the arrangement provided for in Articles 16 and 17 of Arrete No. 1329 dated March 20, 1922.

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Refer to comments on Article 225 of this Code.

ARTICLE 224.- The promise of sale, particularly the consequences thereof defined in Articles 222 and 223, shall not be applicable to persons who are not acting in good faith except from the date of the protective registration thereof in the Land Register in accordance with Article 25 of Arrete No. 188 date<sup>d</sup> March 15, 1926. Such protective registration shall not be valid unless express mention is made therein of the price, the period agreed upon, the promisee's name and address, and, if need be, the term "to the order of".

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Refer to comments on Article 225 of this Code.

ARTICLE 225 - If any lien is registered during the period falling [ ] between the protective registration of the promise of sale and the decision to purchase, the payment, by the purchaser, of the price of the property shall not be valid unless it is made through the Notary Public, who shall then be required to distribute the said price in accordance with Article 223 and other legal stipulations in force.

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It was said that the promisor may, in the delay given to the promisee, conclude a lien on the real property promised for sale. Now, Article 223 establishes that to conclude the lien on the real property shall not be an obstacle to the rights of the promised person. That is to say, if the promised person declares his option to the promisor, the price of the real property shall take the place of the real property burdened with the lien, and the rights of the creditors, the owners of the lien, will be transferred to the price in accordance with the order of the inscriptions in the Lien Register (Article 16 of Arrete 1329) according to the dates of their presentation. (Article 17 of Arrete 1329)

The reason for this is that the lienee creditor has the right to pursue (droit de suite) the real property in whatever hand it is, whether it is sold to others or its ownership is transferred to others gratuitously. He, also, has the right to demand its sale judicially in order to recover his debt from



the proceeds. The right of pursuance is permissible for every lienee creditor, even though his rank is inferior to others.<sup>(1)</sup> However, the right of pursuance is exercised against<sup>n</sup> any person who has become a titular of a real right, like the person to whom the ownership of the liened real property has been transferred.<sup>(2)</sup>

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(1) Yaken, Zouhdi op. cit., Vol. II, page 343, referring to Planiol, Traite Elementaire de Droit Civil, page 3163.

(2) Ibid., page 343.

ARTICLE 226 - If, during the said period, the promi<sup>s</sup>or should refuse to comply with the promisee's demand to conclude and register the final sale contract, then the promi<sup>s</sup>ee must take the following measures to maintain the effect of the protective registration until after the period of option:

- (1) Before the expiration of the said period, he must declare, in writing, to both the promi<sup>s</sup>or and the head of the Land Office that he has decided to purchase.
- (2) During the fifteen days following the decision to purchase, he must file a suit demanding that the final transfer be decided in his favour by the court. Such suit must be brought against the promi<sup>s</sup>or, and the head of the Land Office must be included in the case.

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Refer to the comments on Article 227 of this Code.

ARTICLE 227, - The head of the Land Office shall execute final transfer formalities at the purchaser's request as soon as the court decision to that effect becomes executory.

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It was stated previously that the promise of sale obliges the promissor with his promise, and the promissor cannot refrain from his offer, but he must wait for the decision of the promised person. If it is supposed that the promised person declared his option for the purchase but the promissor refrains from fulfilling his promise, Article 226 obliges the purchaser, in order to preserve the temporary registration effective after the period of the option (because it was previously stated that the demand for temporary registration, if it is based upon the agreement of the two parties, ceases to have effect upon the expiry of the period agreed upon ---- Article 26 of Arrete No. 188), to notify the promissor in writing, before the expiry of the period mentioned in the contract about his intention to purchase and to notify also the Chief of the Land Office. He shall, within the fifteen days which follow the establishment of the option, raise his case to the court in whose province the real property is located demanding that the promissor be obliged to execute the final transfer.

This case must be raised vis-a-vis of the promissor and the chief of the Land Office. This latter, after the judgment becomes final and according to the demand of the promised purchaser, carries out the final transfer in accordance with the proper procedure. (I)

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(I) Yaken, Zouhdi op. cit., Vol. II, page 344.

TITLE NINE  
ACQUISITION OF THE RIGHT OF  
REGISTRATION IN THE LAND REGISTER

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CHAPTER I

MEANS OF ACQUIRING THE RIGHT OF REGISTRATION

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ARTICLE 228 - The right of registration in the Land Register shall be acquired through any of the following methods:

- (1) By inheritance;
- (2) By free gift among the living, and by testament;
- (3) By occupancy;
- (4) By pre-emption;
- (5) By prescription;
- (6) By contract.

In respect of free gift and testament, the right of registration shall be acquired automatically with the occurrence of the gift or the transfer of the legacy (to the legatee).

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If it is said that the real property real rights shall be transferred merely by agreement, there will, undoubtedly, be a facility in transactions. But the harm this would entail is evident where the transfer of the real rights, in this way, are concealed and where nobody is aware of the same except the parties concerned. Thus, it often happens that a person concludes a contract with another person who no longer has possession of the real property under contract, as for example, when A comes to B

in order to purchase his real property, and it appears afterwards that B had sold the real property to C or had established on it a real right, such as a lien, etc., in favor of C.

In order to avoid such double sales, prejudices to the parties concerned and confusion in transactions, modern laws have been promulgated and the system of the Land Register has been established. Thus, the real property real rights become subject to registration and to publicity, which has established order, eliminated confusion and established confidence in real property transactions.

Arrete No. 188, which was laid down to this effect, has made the inscription obligatory in order to be valid and effective on the others, and also stipulates that the person acquiring the real right must be of good faith. If he is of bad faith and is aware of the discrepancy, he shall not benefit from the force of the registration. On the other hand, the Government is not responsible for the harm which may probably occur due to the establishment of the Land Register. However, if harm occurs due to failure or neglect on the part of the registrars, they shall personally be held responsible. (1)

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(1) Yaken, Zouhdi op. cit., Vol. II, page 348.

CHAPTER II

HEREDITAMENTS AND BEQUESTS

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ARTICLE 229 - The inheritor shall acquire, through inheritance, ownership of the property included in the hereditament, but he may not dispose of such property to another person except after registration thereof in the Land Register.

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An estate is the property left by a decedent over which third persons have no right. Any property, therefore, over which third persons have a right such as mortgaged property, property leased and the rental whereof has been paid in advance, property sold but the possession whereof has been retained by the vendor pending the payment of the purchase price, or property constituted into dower is not considered to be a part of the estate. (1)

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(1) Al-Ebiary, Shaikh Zaid Sharh al-Ahkam al-Shar'iyah, Vol. III, pages 7, 8, 9.

ARTICLE 230 - Hereditaments shall be subject to the provisions of common law.

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In this respect it is well to note that the Moslem Communities, Sunnites and Shi'ites, are governed by the Shari'ah Law, the former as interpreted by Imam Abu Hanifa, and the latter pursuant to the Ja'afari Rite.

The following are the provisions of the Lebanese Law governing last wills and testaments:

Art. 1. Every Lebanese subject of age may bequeath and devise all his possessions, movable and immovable (personal and real) to whomsoever he pleases, be the legatee an heir or not, unless such testator shall leave him surviving a father, or mother, or husband, or wife, or children, male or female. These and each of them have the right to inherit, of which the testator cannot deprive them if they survive his demise.

Art. 2. There shall be set apart from the estate before the enforcement of the will:

(a) 20% thereof for the husband or wife, and 5% thereof to each of the father or mother who shall survive the testator, unless such testator shall leave him surviving issue male, or female.

(b) 50% thereof for his issue, male or female, who shall survive the testator, unless such testator shall also leave him surviving a husband, or wife, or father, or mother.

The said 50% shall be distributed in equal shares among the issue, male or female, surviving the testator,



or shall devolve in its entirety upon the sole child, male or female, who shall survive him.

(c) If the testator shall leave him surviving, besides his issue, a husband, or wife, or father, or mother, the shares of such of these as shall survive him shall be as follows:

10% of the estate to the husband or wife, and 5% to each of the father or mother, and 30% to the children to be distributed in equal shares thereamong, male or female, or the whole of the 30% shall devolve upon the child who shall alone survive the testator.

Art. 3. The testator may modify or alter his will whenever he wishes.

Art. 4. The written will, which must be signed by the testator, by his own hand, or which shall have affixed thereto his seal before a duly qualified official and in the presence of witnesses, and which shall have complied with the provisions of Article 5 of the law herein, shall be valid to the exclusion of all others, and shall be enforced without any action or decree. The regular common law courts are competent to decide all matters arising therefrom.

Art. 5. Within the Lebanese Republic, the Notary Public, or Presiding Justice of any regular court, or the Bishop of the Community to which the testator belongs, shall legalize the signature of the testator, or his seal, which shall be subscribed or affixed in his presence and in the presence of four Lebanese witnesses, who shall be of age and shall not have any interest

in or derive any benefit from the will. Such official and witnesses shall not read the contents of the will if the testator knows how to read and write, and demand that the will be not read.

But the will of the person who does not know<sup>how</sup> to read and write shall be recorded word for word and shall be read in the presence of the witnesses before the testator shall affix his seal thereto, and mention<sup>of</sup> these facts shall be recorded in the clause of legalization.

If the testator knows how to read and write, and demands that his will be not read, the legalization of the signature shall be made upon the will in the following manner:

No..... Register..... Page ..... I authenticate the signature of ..... The testator who has subscribed his name to his will, by his own hand, on the date of the legalization thereof, to wit: the ..... (day) .....(month).....(year) before me ..... and in the presence of the witnesses ..... , ..... , ..... , ..... , and after it was proven to me that he knows how to read and write, and after he declared that he knows the contents thereof, and without anybody reading the same.

Signature of witnesses

Signature of recorder

The following entry shall be made in the register opposite the number: No..... Has been authenticated the signature of the testator, the said....., whose li-

teracy has been proven to me. He subscribed his name with his own hand to the will, the contents whereof were not divulged before me .....<sup>and in the presence of the witnesses</sup> ..... on the .....(day) .....(month) .....(year).

Signature of witnesses

Signature of recorder

If the literate testator asks that his will be recorded word for word, the following procedure shall be taken, which procedure shall be applicable to the will of the person who does not know how to read and write, to wit: The will shall be recorded word for word in the register. It shall then be read to the testator in the presence of the witnesses. Whereupon the testator shall affix his seal thereto. The recorder thereupon shall make the following entry in the register and upon the will itself which shall remain <sup>in</sup> the possession of the testator:

No.....Register.....Page.....

I authenticate the seal of .....who signed with his own hand before me .....and in the presence of the witnesses....., ....., ....., ....., the will herein which has been recorded on the date of this authentication the ..... ..(day).....(month).....(year), the same having been previously read to him.

Signature of witnesses

Signature of recorder

Upon every will there shall be affixed a 100 Syrian-Lebanese piastres stamp (author's note: this has been raised to over three hundred Lebanese piastres) but no fee for authentication shall

be charged.

Outside the territory of the Lebanese Republic, the authentication of wills may be effected in the manner in which wills are authenticated in the city where such will is executed, or in the manner in which official documents are authenticated thereat.

Art. 6. All provisions affecting wills, which are contrary to this law, are hereby annul<sup>l</sup>ed.

Art. 7. This law is not applicable to Lebanese subjects who belong to any of the Moslem communities. The wills of these remain subject to the provisions of the Moslem Shar'iah law, or to the traditions established by immemorial usage, of each of these Moslem communities. (1)

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(1) Khairallah, Ibrahim A. op. cit., pages 279-281.

ARTICLE 231 - An alien shall not acquire any hereditary or testamentary rights to the estate of a deceased person unless the laws of his country allow Lebanese and Syrians to acquire such rights.

Real estate left or bequeathed by an alien shall be subject to the laws of that alien's country.

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The rule laid down is general. No distinction is made between the various categories of real property, whether owned in fee simple (mulk), or miri lands, or waqf lands. The only condition imposed is that of reciprocity.

The distribution of the estate among the heirs and next of kin is governed by the foreign decedent's national law, provided such law grants the same right to Syrian and Lebanese subjects. In other words, the application of the foreign law is subject to the condition of reciprocity.

This Arrete extended to the Syrian Republic, and at the same time confirmed the Law enacted on June 18, 1929, by the Republic of Lebanon which modified the Ottoman Law and authorized the devolution of real property from Lebanese subjects to foreigners and vice versa, and among foreigners of different nationalities. The following is a translation of this Statute:

"The following law has been enacted by the Chamber of Deputies, and promulgated by the President of the Republic."

Art. 1. - Lebanese nationals may inherit personal and real property from foreigners.

"The nationals of foreign Powers may likewise inherit personal and real property from Lebanese Nationals provided that the laws of the States of which the foreigners are nationals accord the same right to the nationals of the Lebanese Republic.

"Likewise, foreigners of different nationalities may inherit personal and real property from each other."

Art. 2.-"The preceding article applies only to estates arising after the promulgation of this law."

Art. 3.-"All provisions contrary to this law are hereby abrogated." (1)

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(1) Khairallah, Ibrahim A. op. cit., page 123.



CHAPTER III  
FREE GIFTS AMONG THE LIVING

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ARTICLE 232 - The provisions of the local law relative to free gifts shall be applicable to aliens as well.

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The donation in Lebanon is subject to the provisions of Article 504 et. al. of the Lebanese Code of Obligations and Contracts. The above article establishes that the local laws are applied to foreigners with respect to donations.

Article 505 of the Lebanese Code of Obligations and Contracts stipulates that the donations which bring about their effect with the death of the donor are considered as acts issuing from the last will of the person and are subject to the rules of personal status relating to succession. The donation is fulfilled in accordance with the provisions of Article 507 of the Lebanese Code of Obligations and Contracts and the ownership of the donated real properties is transferred with the condition of applying the following provisions:

(1) The donor shall retain the right to refrain from the offer as long as the acceptance is not fulfilled. (1)

(2) The donation of a real property or of the real property real rights shall not be fulfilled except by their inscription in the Land Register. (2)

(3) The promise of donation is not valid unless it is in writing. The promise of donating a real property or of a real property real right is not valid unless it is inscribed in the Land Register. (3)



(4) A person may donate the bare-land to one person and its exploitation to another or several other persons, or he may keep for himself this exploitation. (4)

If the donation is not made by an official contract, it shall be null and void. The donor shall be entitled to adhere to nullification because it is an absolute nullification. The donation which is void in form due to not fulfilling the condition of being official, shall not be rectified by the authorization of the donee. In order to be rectified, a new contract must be made officially.

On the other hand, the void contract of donation shall not be considered a real title which acquires ownership after a period of five years. In this case, there must be for appropriation, a possession of fifteen years. (5)

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- (1) Refer to Article 508 of the Lebanese Code of Obligations.
  - (2) Refer to Article 510 of the Lebanese Code of Obligations.
  - (3) Refer to Article 511 of the Lebanese Code of Obligations.
  - (4) Refer to Article 514 of the Lebanese Code of Obligations.
  - (5) Yaken, Zouhdi, op. cit., Vol. II, page 354.

ARTICLE 233 - The personal qualifications for the institution of an entailment and the form of the entailment deed are governed by the provisions of local law.

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The creation of the waqf and the forms of the waqf deeds are fixed by the provisions of the Shari'ah Law. There was no need for this article, because Article 179 of this Code provides for this. It is but a repetition of the provisions of that article. The comments of which and of Article 174 et. seq. should be referred to.

The Moslem Shari'ah prohibits constituting any waqf which would harm the creditors, and the modern legal rules support this rule. If the waqf occurs, it shall be void. Nevertheless, the persons who may protest against the validity of the waqf are the creditors at the time of the creation of the waqf, and the person who carries a deed which has no fixed date, must prove that the deed is prior to the waqf.

If it is judged to invalidate the waqf in response to the demand of a creditor whose debt is prior to the creation of the waqf, the other creditor, whose debt is subsequent to the creation of the waqf, shall not benefit therefrom. The waqf becomes void according<sup>to</sup> the amount of the debt, neither more nor less. The creditor, whose debt is prior to the creation of the waqf, may not lay attachment on the proceeds of the waqf, in view of the fact that waqf is void and has caused damages to him, but he has first to obtain a judgment to invalidate the waqf.<sup>(1)</sup>

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(1) Yaken, Zouhdi op. cit., Vol. II, page 354.

CHAPTER IV  
OCCUPANCY

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ARTICLE 234 - Occupancy shall entitle the first occupant by  
[ ] virtue of a regular State licence to have priority over all other persons for the acquisition of freehold rights to unoccupied lands.

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The occupation is the means by which the ownership of a thing, not owned by anyone or having no one claiming the ownership thereof, is acquired. The occupation is effected by possession, joined with the intention of appropriation.

Article 1272 of the Majallah stipulates that the person who enlivens a portion of the dead lands by the Sultan's Authority, shall become the owner thereof. If the Sultan authorizes a person to enliven a land, provided that this person shall not appropriate it, but merely to benefit therefrom, this person shall dispose of the land as authorized, but he shall not be the owner of the land.

Also, Article 1275 of the Majallah stipulates that sowing seeds and planting saplings are considered enlivening of the land, as well as ploughing and watering or opening a brook for irrigation.

Article 713 of the French Civil Code stipulates that the things which have no owner are the property of the Government. This results in the following: If there exists a real property

and no one is claiming it, the Government must be considered the owner thereof. It may, however, be the property of the first possessor thereof, but it may not be possessed except by the permission of the Government. Thus, the means of this giving of possession, shall not be considered as an occupation in the proper meaning, because the true occupation takes place in relation to the properties which have no owner. (1)

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(1) Yaken, Zouhdi op. cit., Vol. II, page 355.

ARTICLE 235 - The holder of a priority title who can prove, after [ ] the lapse of three years, that he has cultivated or improved the land, or that he has erected buildings or planted trees therein, in accordance with the special regulations relative to State Domains, shall freely acquire the right of registering his freehold title to the part cultivated, improved, built or planted by him. However, he shall forfeit his freehold title if, after registration and during the following ten years, he fails to exercise his right for three consecutive years.

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The Khaliyah lands which have no owner (Al-mahlulah) may be appropriated by taking possession thereof. But the permission of the Government must be obtained. They may also be appropriated by cultivating, planting or erecting buildings thereon. Therefore, if a person cultivates a barren land or plants it and erects buildings thereon he shall become the owner thereof, provided, however, that, in order to remain owner, his possession is not interrupted for three years within a period of the ten years subsequent to registration. This is in compliance with the provision of this Article (235) which stipulates that the persons who enliven a Khaliyah land or plant it or make buildings thereon, shall acquire gratuitously the right of registration, if three years have passed on his possession and if his occupancy was authorized by the Government.

If the possessor interrupts his possession, after the registration for a period of three consecutive years within the ten

years subsequent to the registration, the possession must be considered in relation to the plants and buildings which he has already made, as a builder acting in good faith, and not as a builder acting in bad faith. This is because he built and planted according to a right conferred to him by law.

Once the registration takes place, the possessor shall be entitled to mortgage the building or donate it or sell it, and the Government shall not have the right to object thereto, on condition that his possession is not interrupted.<sup>(1)</sup>

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(1) Yaken, Zouhdi op. cit., Vol. II, page 356.



ARTICLE 236 - Occupancy shall not confer any title whatever to ~~E~~ property registered in the Land Register or placed under the Administration of State Domains, or to abandoned woodlands or parcels that are dominated or protected.

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The Khaliyah-Mubahah land is unowned or unreclaimed land, not assigned to any particular town or village as was stated in Article 9 of this Code. It must be beyond shouting distance from the nearest village. Any person in need of land may, with the permission of the authorities, use such land but legal ownership remains vested in the State. These are considered a part of the special State Domain and not general State Domain, as they are not preserved actually for a public benefit or according to a law or a decree. However, they may not be appropriated by prescription if they were under the administration of the State Domain, or if they were registered in the Land Register. Refer to Article 255 regarding this.

Likewise, no right on the Matrukah-Mahmiyah and Matrukah-Muraffaqah real properties, may be acquired by prescription, as will be shown in Article 256.<sup>(1)</sup>

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(1) Yaken, Zouhdi op. cit., Vol. II, page 357.

ARTICLE 237 - In respect of treasure-troves, three-fifths of [ ] the find shall go to the owner of the land, one-fifth to the discoverer and the last fifth to the Public Treasury, due account being taken of the restrictions provided for in the laws and regulations in force concerning mines and archaeological discoveries.

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Treasure is property the owner of which is not known, and which is buried in the interior of the ground or buildings. Article 716 of the French Civil Code defines it as everything, hidden or buried, which no person can prove that he is the owner thereof, and which is traced by chance. The sole condition for considering the property a treasure is that no owner thereof is known. Thus, if a person finds a hidden property in a ground and the owner of this property appears afterwards, the discoverer must deliver it to him.

The conditions of applying this article are five:

- (1) - That the treasure is movable.
- (2) - That it is hidden or buried, whether in the ground or anywhere else, and whether the concealment is old or new.
- (3) - That the ownership of the treasure cannot be proven.
- (4) - That the discovery thereof is by chance.
- (5) - That if it is a mineral or antiquities, the regulations of mines and antiquities shall be applied.<sup>(1)</sup>

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(1) Yaken, Zouhdi op. cit., Vol. II, pages 357 and 358.

CHAPTER V  
PRE-EMPTION

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ARTICLE 238 - (As amended by Arrete No. 57/LR dated June 18,  
1931):

The right of pre-emption shall consist in the co-owner of a private (mulk) property, or of real rights to a private (mulk) property, being entitled to evict any third person who may have acquired, by contractual transfer, part of the joint property or joint right, against payment of the purchase price.

The right of pre-emption shall apply to State Domains (Amiriqah) as well as to private (mulk) property. The rights of prevalence and registry provided for in the Land Law (Ottoman Law of April 21, 1858) are hereby abolished.

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Anyone who enjoys the right of way over sold property does not enjoy the right of pre-emption because he is not a partner in the property nor has he any real right in the property. (1)

On the other hand the partner in the right of drinking from a private stream has the right of pre-emption because he is a partner in the right of sale. (2)

The partner in a common wall is not entitled to claim pre-emption if his title is not registered in the Land Registry. The registration of such title in the Delimitation Report and on the Survey Map does not suffice. (3)

The Ottoman Law, known as the "Land Law" was issued on 7 Ramadan, 1274 (21 April 1858).

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(1) The Lebanese Court of Appeal, Chamber of Real Property, [— Decision of 12 July 1944. See Al-nashrah al-qadaiyah al-lubnaniyah, page 1, Interpretations Section, 1st year ---- and the Second Chamber, Decision of 21 February 1945. Al-nashrah al-qadaiyah al-lubnaniyah, page 173, Interpretations Section, 1st year.

(2) The Lebanese Court of Appeal, Third Chamber, Decision of [— 17 May 1945. Al-nashrah al-qadaiyah al-lubnaniyah, page 265, Interpretations Section, 1st year.

(3) The Lebanese Court of Appeal, Chamber of Real Property, [— 22 May 1942. See Al-nashrah al-qadaiyah al-lubnaniyah, 1st year, page 214, Interpretations Section.

ARTICLE 239 - The scale of priority in the exercise of the right  
[—————] of pre-emption shall be as follows:

- (1) The joint owner of the property itself.
  - (2) The joint owner of real rights to the property.
-

ARTICLE 240 - Joint owners (of the same property) shall have  
[ ] equal rights, and shall all be entitled to exer-  
cise the right of pre-emption at the same time and in the same  
proportion. If one or several of them should relinquish their  
right, then the others shall exercise such right in the same  
proportion (with one another).

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If one of two pre-emptors relinquishes his right before  
judgment is rendered by the court, then the other shall be entit-  
led - even compelled - to take over the property, in accordance  
with the principle of indivisibility of the right of pre-emption,  
as provided for in Article 245. <sup>(1)</sup>

No account shall be taken of the relinquishment of the right  
of pre-emption before sale. <sup>(2)</sup>

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(1) The Lebanese Court of Appeal, Third Chamber (Civil), Decision  
[ ] of December 7, 1944. See Al-nashr al-qadaiyah al-lubnaniyah, 1st year,  
[ ] page 62, Interpretations Section.

(2) Same Decision as above.

ARTICLE 241 - If there should be a concurrence of several  
[ ] categories of joint owners of various easement  
rights or claims, the category holding the most remunerative  
easement right or claim shall have priority over all others.

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The concurrence stated in the above article — such as  
when one has an easement of a right of passage and another a  
right of drinking, the category of the person who has the more  
useful easement is preferred to others. This preference of  
one right to another is estimated according to the condition  
of the real property after taking the opinion of experts. (1)

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(1) Yaken, Zouhdi op. cit., Vol. II, page 368.



ARTICLE 242 - The right of pre-emption shall be enjoyed by the ~~E~~ persons referred to in Article 239 of the present Arrete, whose deeds antedate that of the purchaser.

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It is conditional that the pre-emptor, at the time of the purchase of the real property intended to be taken by pre-emption, must be the owner of this real property under pre-emption, before the purchaser appropriates the pre-empted real property. Accordingly the purchaser may claim from the pre-emptor to prove this priority. As the purchaser is considered as a third party, the pre-emptor must be the owner of the real property which he pre-empts. He shall not be as such, unless his contract is registered, because only registration transfers ownership, and the mere consent of the two parties does not do so.

The pre-emptor, as it is said above, in order to claim pre-emption, must be the owner. This means that the pre-emptor at the time of the purchase of the real property, if he is found residing in a rented or leased house, in a house which he sold before the purchase, or in a house which he entailed as waqf has no right of pre-emption. He must prove that he is the owner at the time of the purchase.

It is not conditional that the pre-emptor should be the owner of the whole property which he pre-empts. It is sufficient for him to be a co-owner thereof.<sup>(1)</sup>

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(1) Yaken, Zouhdi op. cit., Vol. II, pages 368 and 369.

ARTICLE 243- The right of pre-emption shall not, on the death  
[ ] of the holder thereof, be transmitted to the heirs,  
nor may such right be transferred to another person, apart  
from the basic right to which the right of pre-emption shall  
be invariably attached.

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This article has made the pre-emption a personal right which  
may not be transferred by succession. It is evident that the  
condition of this is the non-issuance of a final decision of  
the court in favor of the pre-emptor before his death. In this  
case, the issued decision must be adhered to. But if the pre-  
emptor raises a case, and dies before it is decided, then the  
case shall be revoked because pre-emption may not take place  
by succession.

The right of pre-emption is a right belonging to the real  
property. This means that it may not be ceded to another person  
independent from the original right. Thus, the pre-emptor may  
not cede it to another person, in order that this latter  
will claim it in lieu of him. Therefore, the speculation  
therewith is interdicted.(1)

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(1) Yaken, Zouhdi op. cit., Vol. II, page 369.

ARTICLE 244 - The right of pre-emption may only be exercised against the paying purchaser or the donatory t~~é~~ed with a reservation. In the latter case, the right of pre-emption shall be exposed to the same causes of extinction, invalidation and abolition to which the free gift itself is subject.

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Pre-emption is not permissible except for the person who acquires a real property for value received, because, as it has been said, the pre-emption is not permissible except in the sale. Moreover, there will be no pre-emption in a donated real property, unless the donation is with a reservation. But if it appears from this contract that the real property is actually donated, the pre-emption shall not be valid. This fact is disclosed through the relationship of the seller to the purchaser or through an exceptionally low price. In this case it may be necessary for the donee to prove that the contract is in fact, a donation, or the pre-emptor to prove the contrary.(1)

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(1) Yaken, Zouhdi op. cit., Vol. II, page 370.

ARTICLE 245 The right of pre-emption shall be indivisible, and [ ] may not therefore be exercised in respect of a fraction of a share in a joint property or of a transferred parcel.

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Pre-emption is not permissible in a part of the sold real property, when this real property may not be partitioned. The pre-emptor, therefore, must take it in whole or leave it. As for example, when a person purchases a real property from a group of persons in one transaction, the pre-emptor may not take the part of one of the sellers and leave the rest.

On the other hand, if the sold property was several real properties, separated the one from the other, the right of the pre-emptor in this case, shall be confined to the real property in which he is the co-owner of its ownership or of its real rights.

If the sale was shares set apart, the pre-emptor shall have the option either to take the whole or some of the shares. But if the pre-empted real properties are connected with each other, or some are connected and some are not, then, in this case, the pre-emptor must take the connected real properties.(1)

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(1) Yaken, Zouhdi, op. cit., Vol. II, pages 370 and 371.

ARTICLE 246 The agent charged with the sale of a property to which he holds a right of pre-emption shall forfeit the said right.

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If the owner charges the pre-emptor with selling the real property on which he has the right of pre-emption, the right to claim the pre-emption on the part of the agent shall be forfeited, because this is considered as an implied ceding of the right of pre-emption. Otherwise he would not have sold the real property by agency and would have rejected the agency when offered to him.

One of the events, amongst others, from which the implied forfeiture is deduced is that when the pre-emptor rents the sold real property from the purchaser and pays the annual rent to the purchaser provided that the real property has been leased by the seller before the sale. Also forfeiture is deduced when the rights of easement for the division of the real property agriculturally if it is held in common, were agreed upon. And again when pre-emption is ceded to others, because the right of pre-emption is a personal right which may not be ceded by its owner to another person, and its ceding is regarded as a forfeiture thereof.

The implied ceding is considered as occurring by every act or contract which infers that the purchaser is defined therein as the final owner of the real property.(1)

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(1) Yaken, Zouhdi op. cit., Vol. II, pages 371 and 372.

ARTICLE 247 After registration of the purchase, the purchaser  
[ ] must notify such registration to each and every person holding a right of pre-emption. If the pre-emptor does not exercise his right within the three days following such notification plus the regular distance delay, he shall forfeit the said right.

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The notification intended by this article is the official notification which is conducted in a legal manner or through an official source such as a Notary Public. An insured letter is insufficient. (1)

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(1) Judgment of the Court of Beirut, dated 18 April 1945. See Al-Nashrah al-qadaiyah al-lubnaniyah, 1st year, page 295, Interpretation Section.



ARTICLE 248- If the purchaser fails to send the said notification, the right of pre-emption shall be lost by prescription with the lapse of two months from the date of the contract of sale in cases wherein the contract is concluded in the presence of the co-owners, and in all cases with the lapse of one year from the date of registration of the sale in the absence of the co-owners.

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The interpretation of the courts is still confused in relation to the loss of the right of pre-emption by those pleading excuses. The Mixed Court of Beirut finds that the respite of three days fixed in Article 247, is a fixed respite for review, subject to forfeiture of the right of decheance; and contrary to the other respites fixed in Article 248 which considers them as respites of prescription. According to this differentiation the aforementioned court considers that the first respite does not cease by excuses, contrary to the other respites. The Mixed Court bases its opinion on the wording of the stipulation of the two articles 247 and 248 if in one of them was used the words "forfeited right" (dechu) and in the second was used "prescribed" (prescrit). (1)

As for the national courts, they follow contradictory theory which does not differentiate between the description of each of the aforementioned respites and considers them all delays of forfeiture (delai de decheance) unceasable by excuses. (2)

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- (1) Judgment of 8 March 1944, published in Al-Nashrah al-qadaiyah al-lubnaniyah, 1st year, page 290, Interpretations Section.
- (2) Decision of the Lebanese Court of Appeal and Cassation issued on 11 September 1934. See al-Muhami, 8th year, part 1, page 48. Also Judgement of the Civil Court of Beirut issued on the 18th of April 1945. See al-Nashrah al-qadaiyah al-lubnaniyah, 1st year, page 295, Interpretations Section, <sup>comments</sup> and of Professor Fuad Rizq on this judgment, page 296.

ARTICLE 249 - The right of pre-emption shall not be exercised except on condition that the pre-emptor should fully compensate the purchaser for the purchase price paid by the latter, for the cost of improvements effected in the property during his occupancy thereof, and for all expenses, costs and registration fees incurred by him.

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The economical improvement, which did not result from the action of the purchaser or from increase to the pre-empted property is not to be considered. What is to be considered is the value of purchase, that is to say, the real value. (1)

The improvement stipulated by this article is that improvement which the purchaser had effected to the real property subsequent to his purchase and prior to the claim for pre-emption. (2)

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(1) Lebanese Court of Appeal, Third Chamber, Decision of 7 December 1944. See Al-nashrah al-qadaiyah al-lubnaniah, 1st year, Interpretations Section, page 62.

(2) Decision of the Lebanese Special Court of Appeal, issued on 7 July 1945. See Al-jaridah al-rasmiyah, No. 33, 1945, page 611.

ARTICLE 250 - If the transfer of the property to a third person is concluded through the entering thereof in the Land Register, it shall no longer be permissible to exercise the right of pre-emption.

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It will not be possible to use the right of pre-emption against the first purchaser and still reserve the right for the partner to use it against the second purchaser. (1)

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(1) Decision of the Court of Beirut, 7 January 1945. See Al-nashrah al-qadaiyah al-lubnaniyah, 1st year, page 141, Interpretations Section. Also Syrian Court of Cassation on 19 June 1937. See the magazine al-Muhami, 12th year, part 1, page 125 and the comments of Professor Fuad Rizq.

ARTICLE 251 - If a dispute should arise between the purchaser and the pre-emptor as to the amount of the price of the property, the real price shall be fixed by the judge.

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If a dispute arises from the application of Article 249, with regard to the amount of the price between the purchaser and the person who benefits from the pre-emption, the final price shall be fixed by the judge who shall have to hear all evidence presented to him in this respect. He may also seek the aid of experts.

The dispute in question may arise in such a manner as when the pre-emptor says that the price has been increased in order to cancel his pre-emption or whereas the purchaser says that the price has decreased because he has ceded a right of his to the seller in another sold thing, etc..(1)

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(1) Yaken, Zouhdi op. cit., Vol. II, page 376.

ARTICLE 252 - The pre-emption claim shall be deemed as settled, and the registration right as due to the pre-emptor either by the pre-emptor taking possession of the property with the purchaser's consent, or through payment to the purchaser of the purchase price and addenda provided for in Article 249 above, or by virtue of a court decision rendered in favour of the pre-emptor.

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The purpose of this article is that the ownership of the pre-emptor shall not be established in the sold real property except by his taking delivery thereof from the purchaser through mutual consent or through judgment of the court. When the property is established for the pre-emptor, he shall be entitled to dispose of it as he sees fit. The final judgment proving pre-emption shall be considered as a deed for the ownership of the pre-emptor, and this latter should register it in order to transfer the ownership to him. <sup>(1)</sup>

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(1) Yaken, Zouhdi op. cit., Vol. II, page 377.

ARTICLE 253. - The pre-emptor shall be deemed as having bought from the purchaser, and as having obtained from him full satisfaction of his claim. The pre-emption shall have, in respect of both the purchaser and the pre-emptor, the same effects as the sale itself.

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The right of pre-emption shall result in the replacement of the purchaser by the pre-emptor. The sale is considered as accomplished for the pre-emptor from the purchaser and not from the seller, as this article does not make any mention of the latter.

This results in the following:

(1) The pre-emptor must pay the price to the purchaser and not to the seller.

(2) If the pre-empted real property is transferred to another person after the pre-emption takes place, the costs incurred by the withdrawal of the pre-emptor shall be borne by the purchaser, not the seller as is the express text.

(3) The purchaser shall be responsible towards the pre-emptor for any concealed discrepancies in the pre-empted real property. He shall in turn be entitled to raise a case against the seller for the afore-mentioned damages. If the purchaser renounced the right of withdrawal for the discrepancies towards his seller, this condition shall not apply to the pre-emptor, because the article considers the pre-emption, with regard to its effect towards the purchaser and towards the owner of the right of pre-emption, as a new sale.

(4) If the thing is destroyed after being delivered to the pre-emptor, its destruction shall be borne by the latter. In

this case, the provisions of destruction contained in the Chapter of Sale in the Lebanese Code of Obligations and Contracts, Articles 394-396, should be complied with.

The pre-emptor in whose favor the pre-emption is decided shall be considered the owner of the pre-empted real property, as from the day of his demanding the consideration of the pre-emption. If the purchaser continues to have possession of the real property after the decision of the court, he shall guarantee the fruits towards the pre-emptor as from the day of the demand until the day of the delivery, an amount equivalent to costs and expenses of the administration. The interests of the price of sale should be deducted from the day of demanding the consideration of the pre-emption until the day of payment.<sup>(1)</sup>

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(1) Yaken, Zouhdi op. cit., Vol. II, pages 377 and 378.



ARTICLE 254 - The right of pre-emption shall not be exercised in the event of forced sale.

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The sale may either occur by means of individuals putting up the real property for sale by auction, and in this case the pre-emption is permissible because the desire is lacking in such a sale, or it may occur by means of the State putting up some of its properties for sale by auction. In this case, there shall be no pre-emption in the sold real property, because the pre-emptor is entitled to proceed with the bidding and thus takes the real property for his winning bid.

The real property may be sold by the Executive Department in executing a judgment which cannot be appealed from, or in executing a deed valid for execution. In this case also there shall be no pre-emption, because the pre-emptor may acquire the real property by bidding. Likewise, there is no pre-emption in the real properties sold by auction, because their partition among co-owners is not possible.

Article 238 of this Code stipulates that the right of pre-emption is accorded to a common co-owner in a Mulk real property or in real rights. Thus it is evident that there is no pre-emption on waqf. The reason for this is that the waqf has a special regulation.

If the real property is burdened by waqf it may not be liable for pre-emption, because the pre-emption is not allowed except in concluding sale. Therefore, the purpose of the entailor may not be realized if the pre-emption is allowed. But if the real property burdened by the waqf is exchanged and sold, the pre-

emption in it is allowed, as if it were an ordinary real property. Nevertheless, if the purchaser entails the real property in order to evade the exercise of the right of pre-emption, the waqf shall be null and void. This is because the right of the pre-emptor arises from the time the real property, subject to pre-emption, is sold.

On the other hand, the pre-emption is not permissible except in the valid and final contract of sale. Therefore the redeemable excluded because it is a kind of mortgage. The redeemable sale must be sale is differentiated from the sale with the right provided by the seller to recover the sold property within a fixed period of three years prescribed by law. This latter sale has the effect of a final sale, whereby the ownership is transferred by the mere sale and the purchaser becomes the owner. (1)

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(1) Yaken, Zouhdi, op. cit., Vol. II, pages 378 and 379.

CHAPTER VI

PRESCRIPTION

ARTICLE 255 - Prescription shall not apply to rights entered in the Land Register or subject to the Administration of State Domains.

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The purpose of the Land Register system is that a real right may not be established except by its registration therein. Thus prescription does not have effect on the real rights registered in the Land Register, as it is evident that the registration is itself the proof of ownership. Consequently, it is impossible to take, by means of prescription, a claim against the right inscribed in the Land Register, because the person in possession of an inscription in the Land Register is considered by law as a true owner. This force of proof includes all real property real rights which are subject to registration.

This article was promulgated after the Land Survey system was put into operation in this country, and after granting a delay of two years for any person to come forward with his objection against the inscription of the real properties by the Real Property Judges, and so that after the expiry of this delay the force of inscription would be effective on all real properties.

The prescription, on the other hand, shall not apply to State Domain real properties, which are under the administration of the Government, nor shall it apply to the real properties intended for the use of the public or a village, i.e. the matrukah-mahmiyah and the matrukah-muraffaqah real properties. Refer to the following article for the authentication of this. (1)

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(1) Yaken, Zouhdi, op. cit., Vol. II, pages 379 and 380.

ARTICLE 256 ~~422~~ No title whatever shall be acquired by prescription to abandoned, protected or dominated lands.

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Refer to the comments on Article 255 of this Code.

ARTICLE 257 - In respect of property or titles not entered in the Land Register, the right of registration shall be acquired by the person who quietly and openly takes possession of the property or title for a period of five years without interruption, either personally or through another person acting on his behalf and for his account, provided he has valid reasons for such act. In the absence of a valid reason, the (prescription) period shall be fifteen years.

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The Lebanese Court of Appeal, Chamber of Real Property, holds that the attainment of the right in kind by the prescription of five years, does not include the State (Miri) lands, even if the possession thereof took place in accordance with a justified reason (juste titre) and it relies in that, on the stipulation of Article 260. <sup>(1)</sup>

This article is applied to dedicated (endowed) real properties because Article 270 annulled the articles of the Majallah relating to prescription in a real property action; excluding therefrom the dedicated properties (endowments, sic. Awqaf), designated as a mosque, church, hospital, educational institution, those <sup>which are assigned for public use, and those</sup> which Article 178 has stipulated that prescription does not apply thereto.

Accordingly the period of prescription in a case of endowment (Waqf) has become fifteen years, and in the existence of a justified reason, the period becomes five years. <sup>(2)</sup>

Concerning the remainder of the interpretations relating to prescription, the footnotes of Article 37 from Arrete No. 186, dated 15 March 1926, should be referred to. These are

as follows:

"The five years prescription must be subject to the good intention (bona fide) of the possessor."<sup>(3)</sup>

The valid title deed is the deed issued from an apparent owner (who is) other than the true owner."<sup>(4)</sup>

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- (1) Decision of the Lebanese Court of Appeal, Chamber of Real Property, issued on 9 January 1942.
- (2) Decision of the Court of Cassation, issued on 16 July 1937.  
See al-Muhami, 12th year, part 1, page 137 and Decision of the Court of Appeal issued on 28 May 1937. See al-Muhami, 12th year, page 43.
- (3) Decision of the Court of Appeal issued on 30 January 1942 mentioned as reference to Decision of the Court of Appeal issued on 8 January 1943<sup>and</sup> published in Al-Nashrah al-Qadaiyah al-Lubnaniyah, page 5, 1st year, Interpretations Section.
- (4) Decision of the Court of Appeal, issued on 17 May 1940, published in the magazine al-Muhami, 13th year, part 2, page 58.

ARTICLE 258 - Possession shall be regarded as continuing uninterruptedly from the moment of its appearance through the ordinary and regular exercise of the right in possession. Any person invoking the right of prescription may base his claim on the possession exercised by the person from whom he obtained the property in question.

The cultivator (tenant), usufructuary, depositary, borrower or their heirs shall not be entitled to invoke the right of prescription.

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COMMENTS ON ARTICLE 258

The possessor is considered the owner as from the day he took possession of the real property. The possession itself may be taken as a proof for ownership. An illustration of this may be cited: If a person claims a real property under possession of another person, the lapse of the period (prescription) shall be an evidence to the fact that the plaintiff has disposed of the real property to the possessor, and the latter is not in a possession of a deed of appropriation.(1)

This prescription has a retroactive effect and thus results in the following:

(a) - The possessor shall be considered as the owner of the fruits he perceived from the real property during the entire period of prescription.

(b) - The possessor shall acquire the real property from any real right which occurred on the real property by the verus dominos during the possession of the possessor.

(c) - The real rights established on the real property by the possessor, shall become rights established finally thereon even if they have been menaced by extinction and should the prescription not be accomplished. These rights shall be regarded valid as from the time the prescription expires.(2)

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(1) Yaken; Zouhdi, op. cit., Vol. II, page 397.

(2) Yaken, Zouhdi op. cit., Vol. II, page 392.

ARTICLE 259 - The possession proved to have taken place at a determined date and the current possession shall constitute a presumption in favour of the continuance of the possession throughout the intervening period, unless the contrary is proved.

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This article, when read at first sight, may lead to misunderstanding. It may be put in the following words: "The present possessor who proves his possession in a previous time is considered possessor during the intermediary time (between the two periods), unless the contrary is proved."<sup>(1)</sup>

In other and more explicit terms: "He who proves his possession of a real property or of real rights for a certain period, and is the possessor of same at the present time, the intermediary between the two periods shall be considered as possession for him, unless otherwise it is proved to the contrary."

Some jurists say that the person who claims the interruption of possession occurred should be obliged to prove this claim. The possessor shall not have to prove that his possession was not interrupted. The proof should be produced by his opponent.<sup>(2)</sup>

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(1) Yaken; Zouhdi, op. cit., Vol. II, page 403, referring to  
[—] Planiol, Traite Elementaire de Droit Civil, part 1, para 2683.

(2) Ibid., page 403.

ARTICLE 260 - The right of registering a freehold title to State property not subject to the Administration of State Domains shall be acquired with the lapse of ten years after the date of possession, whether contractual or arbitrary, provided the possessor has been cultivating the land.

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Comments on Article 260

The provisions of this article do not apply to those matrukah and mawat lands and mubahah mountains, as well as the estates and wakfs sahihah. Nor do they apply to the rights inscribed in the Land Register and those lands which are under the administration of the State Domain, whether they belong to the State, and at the same time, a right of use is exercised thereon by a group of persons according to the local customs and administrative regulations, or they belong to the State or to the Municipalities, while they are part of the State Domain. (1)

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(1) Yaken, Zouhdi, op. cit., Vol. II, page 404.

ARTICLE 261 - No person shall acquire a real title by prescription against his own title-deed or that of his testators.

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This article conforms with Article 2240 of the French Civil Code which stipulates that a person may not appropriate by prescription what is contrary to the deed in his possession. This means that he may not change, for his own interest, the cause of his possession and the origin for which the possession was established.

There is, however, an exception provided for in Article 2238 of the French Civil Code which stipulates, inter alia, that the person who begins his possession as an accidental possessor, may turn out to be a possessor by means of becoming an appropriator by prescription, by reason of the change of his deed. This occurs in the following two cases:

(a) - As a result of an act carried out by a third party. For example, the owner of a real property dies and the farmer purchases the real property from a person who pretends falsely that he is the heir of the owner. After the purchase, the purchaser declines to pay the rent. If the period of prescription expires and the true heir appears, this latter may not claim delivery of the real property to him, on the grounds that the contract is not valid, as it was issued by a person other than the owner. The purchaser shall be entitled to repel the case by prescription, because the prescription has occurred here due to the change of the cause whereby the real property was in the possession of the farmer. The prescription shall begin from the

day of the sale and not from the day the farmer refused payment.

(b) - If it is assumed that the owner claims at the termination of the lease contract, the delivery of the real property to him and the lease-holder refuses to give delivery of the same on the pretence that he has deeds evidencing that he is the owner and not the lessor. In this case the ownership is judged in favor of the lessor if the period of prescription has elapsed, from the time he traced his deeds. The ownership of the lessor extincts, even though he claims that the deeds of the lessee are invalid and presents evidence as to their nullification. The reason for the appropriation of the lessee by prescription is the fact that an intervention in the title of possession has occurred.

To summarize: If an intervention of the title of possession has occurred and the lessee, the farmer and those persons mentioned in Paragraph 2 of Article 258 of this Code, have changed their intentions in regard to the real property and possessed it as owners, then they may appropriate it by prescription. In this case, the provisions of Article 261 shall not apply to them, as, for example, when the lessee denies the right of the owner and refuses to pay the rent and claims the ownership. But there must be an express intervention on the part of the possessor to the owner, with the latter's property. That is to say, the intervention must be joined with an apparent and external action indicating the denial of the possessor, of the right of the owner.

It is up to the Courts to decide whether the possessor has opposed the true owner in such a manner as is sufficient for the intervention of the title of his possession, by studying each of the special cases separately. <sup>(1)</sup>

(1) Yaken, Zouhdi, op. cit., Vol. II, pages 404, 405, and 406.

ARTICLE 262 - The right to prescription may not be relinquished in advance, but any person enjoying the free exercise of his rights may relinquish, in advance, a right acquired by prescription.

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The prescription may not be renounced in advance, because if this is allowed, this will be a "clause de style", which always occurs in contracts. Furthermore, the prescription becomes ineffective in the law as being a discharge from obligations, whereas the prescription was laid down for considerations referring to public benefit and discipline. All this is in respect of extinctive prescription. As regards the benefit of acquisitive prescription, it appears in preventing the owner from imposing conditions, in advance, on the lessee, the farmer and the agent, to produce, when necessary, the prescription in order to invalidate the prescription which might be brought forward by each one of them, if he carried out external actions indicating the intervention of the title of possession, from a simple possession to a complete possession.

Article 2220 of the French Civil Code contains a provision similar to this article in stipulating that, the right of appropriation by prescription may not be abandoned before its occurrence. This may be done subsequent to its occurrence. Any person in possession of legal competence may renounce the right of prescription after its occurrence. Article 2221 of the French Civil Code stipulates that the renouncement of prescription may be either express or implied. The implied prescription is deduced from an action indicating the renouncement of the acquired right. It is stipulated in Article 2222 of the French Civil Code that the



person who does not have the right of tasarruf, shall not have the right to renounce the acquisitive prescription.

If the debtor requests a delay, or pays a part of the debt, or pays the interests, or offered a guarantee for the debt, or rented the real property, or presented an account of the proceeds, he shall be considered as implicitly renouncing the benefit from the acquisitive prescription. However, it is conditional that the renouncement must be made by the person while aware that if he holds to the prescription which he would benefit from by confirming the right to him. If the renouncing person was not aware of that, the aforementioned actions shall not be considered a renouncement of using the right of prescription, because the person renounces of a thing which he knows and not of that which he is not aware of.

Accordingly, if a person wills a real property and another person comes to the inheritor and informs him that it was mortgaged under the hand of the legator, and if this inheritor delivers the real property to him, although the legator was in possession of it as an owner for a period of fifteen years, the delivery in this case shall not be considered a renouncement of holding to the prescription.<sup>(1)</sup> It is up to the Court, however, to decide whether the renouncement is implied or express, according to the facts of the case.<sup>(2)</sup>

The renouncement is not considered as an act transferring the ownership. It is a right not yet claimed. This results in the following:

(a) - The renouncement shall not be considered a contract between two parties. It is not contingent upon the consent of

the person renounced, to. It is a one-party act. Therefore, if the consent of the renouncing person is initiated by fraud, the renouncement is void, even though the fraud was not brought about by the person renounced to.

(b) - The renouncement shall not be subject to registration, because it is not a contract transferring ownership.

(c) - If the renouncement was an act transferring ownership, it would be possible for the creditors to raise the Poloyaniyah action if that renouncement prejudiced their rights. But, as it is merely a renouncement of a right, the creditors may take the place of the debtor in case he fails to offer the prescription as a plea, even though he renounced it. (3)

Any person who has the competence to dispose of his rights, has the right to renounce the holding to prescription after its occurrence. The minor, the noncompos mentis, the guardian, the trustee, the agent and he who has but the capacity of administration are not entitled to renounce the acquisitive prescription. (4)

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(1) Yaken, Zouhdi, op. cit., Vol. II, page 407 referring to

Planol, Traite Elementaire de Droit Civil, para 2713.

(2) Ibid., referring to French Court of Cassation, 21 May 1883.

(3) Ibid., referring to Article 2225 of the French Civil Code.

(4) Ibid., pages 407 and 408.

ARTICLE 263 - When prescription ceases, the period of possession prior to the occupancy of the property shall not be taken into account.

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Refer to the comments on Article 265 of this Code.

ARTICLE 264 - Prescription shall cease when the claimant forfeits his possession of the property in question, though such forfeiture may have been caused by another person.

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Refer to the comments on Article 265 of this Code.

ARTICLE 265 - Prescription shall also cease if the owner of the property claims his right through the law courts, provided he does not allow such claim to abate.

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The interruption of the prescription are those acts which cancel the period prior to them and make it, when calculating the period of prescription, as if it did not exist. In order to acquire ownership and real rights by prescription, the possession must not be interrupted for any reason. Otherwise the entire previous period shall become extinct and shall not be counted. It may however, begin and continue for a new period.

There are two kinds of interruption of the prescription: The first is the natural interruption which occurs by non-possession. The second is the civil interruption which occurs by the claiming of the real property with the knowledge of the owner. The period prior to these two kinds is considered extinct. Nevertheless, the possessor may retake possession anew for a fresh period in order to acquire a new prescription, the period of which shall only begin from the date of his new right of tasarruf of the real property, because the previous period becomes as if it never existed. (1)

It must be noted that the natural interruption occurs as follows:

(a) - By optional renouncement of the possession. This happens when the possessor gives up the real property of which he has the right of tasarruf, and if he afterwards resumes the right of tasarruf thereof, the former period shall not be counted. (2)

(b) - The forced dispossession, whether it happens by the act of the owner or by the act of a third party. This dispossession results in the interruption of the period, whether the dispossession occurs without the knowledge of the debtor or in his presence.<sup>(3)</sup> The dispossession by force-majeur does not interrupt the period,<sup>(4)</sup> unless the possessor was deprived of benefitting from the thing for more than a year, the possession of the real property shall not be lost.<sup>(5)</sup> This is confirmed by Articles 48-51 of the Lebanese Code of Civil Procedure, Article 2243 of the French Civil Code and Article 23 of the French Code of Civil Procedure. The former possessor may, within a year from the time of interference, raise a case of re-possession in order to recover the real property. If he succeeds in regaining his possession, even though the court judgment is issued after the expiry of the year, the former period shall be counted for him.<sup>(6)</sup> But, if the case was raised and rejected by a final court decision, even though before the expiry of the year, the period would be considered as interrupted.<sup>(7)</sup>

The civil interruption occurs by the judicial or non-judicial claim having the correct date, or by the possessor acknowledging the right of the creditor. If this acknowledgment is made the intention of the acknowledgor to appropriation ceases to exist. The point in making the claim before the court, in order to interrupt the prescription, is that the hearing of the case may last for a long period before it is decided. The prescription may not have effect as long as the dispute continues, especially as the decision issued shall have a retroactive effect which extends to the time of raising the case.

The judicial claim shall interrupt the prescription on the possessor. The civil interruption may only be held against the defendant or his heirs.<sup>(8)</sup>

The following shall not interrupt the prescription:

(a) - If the lawsuit was void in form.

(b) - If the bringing of the action is invalid and the action is rejected.

(c) - If the plaintiff renounces the case or forfeits his right therein.<sup>(9)</sup>

(d) - If the prescription occurs by raising the case, it extincts by the rejection of the case, on condition that the rejection thereof is not based on its invalidity in form.<sup>(10)</sup>

The acknowledgment of the possessor is not subject to a special form. It may be express or implied, such as the payment of the interests on the capital, the payment of an installment, the payment of the rent, the demanding of repairs in the real property, and may be made in court or outside the court. It is to be taken into consideration that the acknowledgement is made by a person enjoying the right of tasarruf of his properties.

The person who shall benefit from the civil interruption is only he who carried out the judicial proceedings,<sup>(11)</sup> contrary to the natural interruption which has an absolute effect, and from which every person who has, on the real property, rights menaced by prescription shall benefit therefrom; because the natural interruption is a material act, which is the dispossession.<sup>(12)</sup>

Article 264 stipulates that the prescription is interrupted if its owner loses his possession, even though this happens



on account of another person. The purpose of this article is that the possession may be extinguished from the mutasarrif, the possessor, by his own act. This occurs when he periodically takes possession and then gives it up, thus, the acquisitive period of the prescription is not complete for him and therefore is interrupted.

Furthermore, the prescription for the possessor is interrupted by the interference happening to him by another person. If the interruption occurs by the possessor himself, then this would imply that he has the intention of forfeiting his tasarruf and possession of the real property and would result in the complete extinction of the possession. (13)

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(1) Yaken, Zouhdi, op. cit., Vol. II, page 409, referring to  
E— Colin et Capitant, Cours Elementaire de Droit Civil Francais,  
E— par. 873.

(2) Ibid., referring to Planiol, Traite Elementaire de Droit  
E— Civil, para 2681.

(3) Ibid., page 409.

(4) Ibid.

(5) Ibid., referring to Colin et Capitant, Cours Elementaire de  
E— Droit Civil Francais, par. 874.

(6&7) Ibid., referring to Planiol, Traite Elementaire de Droit  
E— Civil, par. 2681.

(8) Ibid., page 410, referring to French Court of Cassation, 19  
E— March 1906.

(9) Ibid., page 411, referring to Articles 467-470 of the  
E— Lebanese Code of Civil Procedure, and to Article 348 of  
E— the French Code of Civil Procedure.

(10) Ibid., referring to Article 357, para 10 of the Lebanese  
E— Code of Obligations.

(11) Ibid., page 412, referring to Dalloz, Repa<sup>R</sup>toire Pratique,  
E— para 336.

(12) Ibid., referring to Planiol, Traite Elementaire de Droit Civil, part 1, par. 2682, and to French Court of Cassation, 14 March 1900.

(13) Ibid., page 413.

ARTICLE 266 - In questions relative to real property, prescription shall not apply to absentees or to legally disqualified persons.

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COMMENTS ON ARTICLE 266

The difference between interruption of the prescription and suspension of the prescription is that, in the first, as stipulated in Article 263, when the cause of interruption does not exist anymore, the period of prescription prior to the interruption is not calculated. While in the suspension, when the cause does not exist anymore, the period of prescription prior to the suspension is counted.

Prescription shall not be exercised on the following:

- (a) - Between the husband and the wife for the duration of the marriage.
- (b) - Between the father, the mother and their children.
- (c) - Between the incompetent or the moral person on the one hand, and the guardian, the trustee or the custodian on the other hand, as long as their occupation is not interrupted.
- (d) - Between the master and the servant, as long as the contract of employment is still standing.
- (e) - The minors and all other incompetent persons who have no guardians, or judicial supervisor, or trustee, until they become of age or until a guardian is appointed thereto.

Prescription, however, shall be exercised on the absentee, contrary to what is in force in Syria. But it is, nevertheless, suspended in favor of the creditor, when the prescription is

interrupted by a force majeure. For example, if a person is prevented from claiming his right by a force majeure, such as when the judiciary are delayed, or on vacation, or when martial law is proclaimed, or when the titular of the right is taken prisoner of war, or when a legal preventive cause exists, then the prescription is suspended in all the cases mentioned. (1)

If the capacities of the owner and the possessor are unified in one person, the prescription is suspended as long as this unification of the two capacities exists.

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(1) Taken, Zouhdi op. cit., Vol. II, page 416, referring to  
[— Colin et Capitant, Cours Elementaire de Droit Civil  
[— Francais, page 929.

CHAPTER VII

EFFECT OF CONTRACTS

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ARTICLE 267<sup>iii</sup> (As amended by Arrete No. 57/LR dated June 18, 1931):

The right of registration of real property titles shall be acquired through the effect of contracts.

The rules relative to sale and free gifts shall apply to State (Amiriyah) property and also to real rights belonging to such property.

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ARTICLE 268 - The obligation of surrendering real property shall involve the obligation of transferring the same in the Land Register and the maintenance thereof until the transfer is completed, under pain of indemnifying the creditor for damages and costs.

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ARTICLE 269 - The obligations relative to the transfer of real property in the Land Register are set forth in the legal provisions concerning sale, privilege and lien, and also in the provisions of Arretes No. 188 and 189 dated March 15, 1926, concerning the institution of the Land Register.

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Articles 267, 268 and this article were explained in detail under the Chapters on redeemable sale and on liens as well as the comments on Article 228 of this Code.

ARTICLE 270 - (As amended by Arrete No. 102/LR dated 2 August 1932 and of which new provisions were substituted and again amended by Arrete No. 135/LR dated 22 June 1934)

The Imperial Irade of March 30, 1929, relative to freehold tenure, and provisions of Parts Two, Three and Four of Arrete No. 1329 dated March 20, 1922, are hereby repealed.

Moreover, as from the date whereon the present Arrete becomes executory, all laws, Imperial Iradas, regulations, arretes and local decisions shall cease to have any effect in respect of any and all of the matters provided for in the present Arrete, particularly the (Ottoman) Land Law, the provisions of the Majallah, and other laws pertaining thereto.

Beirut, November 12, 1930