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and does alter from time to time. It is not necessary to decide how far the Law of 12 Safer is still in force; no one has suggested that the old charge for banderolles is payable as well as the new duty. But how much unmanufactured tobacco was there in the appellants' manufactory at the time the new duty came in ? I have stated what the Court thinks is the line between manufactured and unmanufactured tobacco. But the onus was clearly on appellants, who best were in a position to know what they had in hand to prove how much was manufactured and, therefore, not liable to the increase. They offered no evidence on this head, and we must accept the figures as stated and on those figures, taken as representing the quantity of unmanufactured tobacco on the premises on 18th January, 1923, and the difference between the two rates of duty on that quantity, I think the appellants are not entitled to any repayment, further than the sum of £13 found due to them by the learned Judge. The appeal must, therefore, be dismissed.

No order as to costs.

Sertsios and Fuad, JJ., concurred.

Appeal dismissed.

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[BELCHER, C.J., SERTSIOS, J., FUAD, J.]

LOIZO CHR. TSOLAKIDES

v.

SOFOCLES P. DEMETRIADES.

LIABILITY OF AGENT FOR LOST CHEQUE—AGENCY—ENGLISH OR OTTOMAN LAW—CYPRUS COURTS OF JUSTICE ORDER, 1882, CLAUSE 25—TRANSACTION NOT SO CONDUCTED AS TO EVIDENCE INTENTION THAT ENGLISH LAW SHOULD APPLY—MEJELLE, ARTICLES 1461 AND 1463.

Appeal by defendant (the appellant before a District Court) from the judgment of that Court dismissing his appeal from the judgment of a Village Judge.

Triantafyllides for appellant (defendant).

N. Pierides for respondent (plaintiff).

The facts are sufficiently disclosed in the judgment of the Court as delivered by the Chief Justice.

Judgment: The appellant, who was defendant in the Court of the Village Judge of Larnaca, was ordered by that Court to pay the plaintiff respondent £20 with interest

and costs. He appealed to the District Court, which dismissed the appeal, and from that judgment of dismissal he appeals to this Court.

The appellant at material times was an agent at Larnaca for foreign firms, and respondent gave him an order for goods to be supplied by a German firm, Wetzchewald and Wilmes, one of his foreign principals. This order was on a printed form used by appellant in his business, and contained a space (duly filled in in this case) for the name of the foreign firm. At the foot of it the appellant acknowledges the receipt as a deposit on account of the purchase of a cheque for £20 drawn to the order of Wetzchewald's. It is this cheque which gave rise to the action. For some reason or other Wetzchewald's never credited the appellant with the cheque, which, however, was paid in due course so that respondent lost his money.

It is convenient here to examine the cheque which is before us, and to see what was done with it by the appellant, as found by the Village Judge. The cheque is drawn by Mr. Demetriou, a Banker of Larnaca, upon Lloyd's Bank, Ltd., London, to respondent or order. Respondent endorsed it, before handing it to appellant, to Wetzchewald's. It then bears the following endorsements:—(1) Wetzchewald and Wilmes, general, (2) Herres and Co., special to Dresdner Bank, Hagen, (3) Dresdner Bank, Hagen, special to Dresdner Bank, Duisburg, (4) Dresdner Bank, Duisburg, special to Japhet and Co., London, (5) Japhet and Co., London, general. It appears to have been presented to Lloyd's Bank through the Westminster Bank, and Lloyd's Bank thereupon paid it. The significant endorsement for the purposes of this case is that of Wetzchewald's.

The issues as framed by the Village Judge were, shortly put:—(1) Did defendant (appellant) send the cheque to Wetzchewald's; (2) did it reach them otherwise; (3) was it paid to them on plaintiff (respondent's) account; (4) is appellant liable to respondent for the amount of the cheque. On these issues the Village Judge found that (1) appellant was instructed to send the cheque to Wetzchewald's direct and did not do so, (2) the cheque did not reach them, (3) it was not credited by them to respondent, and (4) appellant is liable to respondent for the amount of the cheque.

The District Court, composed of the President and one Judge, held that English law applied, and that on the authority of *Hutton* v. *Bulloch* (1824), L. R. 9 Q.B., 572, and cases there cited, an agent acting for a foreign disclosed principal is personally liable on a contract made with him as such agent by a third party in the absence of terms in the contract inconsistent with such liability: he found that there were no such inconsistent terms here..

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In my opinion Ottoman, and not English law, is to be applied. The latter might, at the time in question, have been applied if such appeared to be the intention of the parties, but there was no evidence of any such intention, and the only reason given for applying English law is the alleged absence of provision for this case in the Ottoman Commercial Code or the Mejellé. That I think, if correct in fact, is no reason for saying that Ottoman law does not apply: it may be useful to look at the English law as an analogous development of legal principle, but it can have no weight otherwise. If it had, I should be prepared to rule that the case of *Gadd* v. *Houghton* (1876), 1 Exch. Div., 357, was decisive of the matter. " When a man says that he is making a contract on account of someone else," says James, L.J., in his judgment in that case, " it seems to me that he uses the very strongest terms the English language affords to show that he is not binding himself but binding his principal."

It is enough to say that the fact that the respondent gave the appellant as a deposit a cheque which the latter could not himself negotiate but must, in order that it should be cashed, transmit to Wetzchewald's, shows plainly that the person whom he considered himself as contracting with was the firm Wetzchewald's, and not the appellant. There was no evidence at all of any intention of either party to this appeal to indicate that the appellant was accepting or was being expected to accept any liability at all. The case is exactly that given in the last paragraph to Article 1461 of the Mejellé. On the *main* contract, that is to say: for it will be seen that there is a *secondary* set of contractual relations in which the appellant did engage himself;—in this way, that he undertook with the respondent to forward the latter's order and cheque to Wetzchewald's as a preliminary to the principal contract that was in contemplation. It is only by reason of his failure to perform the obligations of this subsidiary engagement that appellant could be made liable in this action and it is now necessary to see whether he fulfilled them or not.

It is not questioned that the order reached Wetzchewald's, for it was executed by them: it is, however, immaterial for the present purpose whether it did so or not, or whether the cheque reached them or not, or was credited by them to respondent or not, if in fact appellant carried out his duties towards the respondent as regards the transmission of order and cheque, which was all he had to perform. But it is certainly highly significant, in considering whether appellant did perform his part, that he sent cheque and order to the same address and under the same cover, and

that the order reached Wetzchewald's, whilst they deny receipt of the cheque.

The fact was that in the ordinary course of business, followed in the present case, appellant used to send orders for Wetzchewald's goods not to that firm direct but to another firm at another place in Germany, Herres and Co., who not only acted as shippers for Wetzchewald's, but, as there can be not the slightest doubt from their letters to respondent and appellant, did habitually receive orders at Wetzchewald's agents.

The judge of first instance found that appellant did not send the cheque to Wetzchewald's but to Herres, but he seems to have directed himself that the burden of proof lay upon appellant to prove that he told respondent, and the latter, therefore, knew that the cheque would be sent not to Wetzchewald's direct but through the medium of Herres. In this I think the learned judge was in error: surely it was enough for appellant to show that he sent the cheque either to Wetzchewald's direct or to some person who had Wetzchewald's authority to receive it. As we have seen they looked on Herres as their agents to receive the order, and a letter of theirs to appellant showed that in other orders from the respondent the money was paid to Herres who in turn by arrangement accounted to Wetzchewald's. Respondent admitted in cross-examination that he did not care how the cheque got to Wetzchewald's so long as it reached them, and in these circumstances it would be difficult for him to contend that he had insisted on any other than the appellant's usual mode of transmission, which was through Herres. Decidedly the burden of proving any such special stipulation would be on him and not on the appellant. The cheque, therefore, in my view, was as regards its possession by the respondent, " property in the hands of a messenger for the performance of his message," in the words of Article 1463 of the Mejellé: the " message " was performed as the parties intended it should be and the messenger, having done all he was bound to do, is freed of responsibility for the acts of the principal at the other end. As regards the latter, I need only say that the extraordinary attitude taken up by Messrs. Wetzchewald's in disclaiming responsibility for Messrs. Herres and Co., and denying receipt of a cheque which bears their own endorsement, and which must be presumed to have been so endorsed by them either directly or by Herres on their instructions as their agents, is probably not unconnected with the fluctuations of the mark at material times.

The appeal must be allowed with costs here and below.

Appeal allowed.