

*Privy Council Appeal No. 97 of 1925.*

Andrew Mantoura and Sons - - - - - *Appellants*

• v.

Menachem David - - - - - *Respondent*

FROM

THE SUPREME COURT OF PALESTINE.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 22ND JUNE, 1926.

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*Present at the Hearing :*

VISCOUNT HALDANE.

LORD ATKINSON.

LORD DARLING.

[*Delivered by* LORD ATKINSON.]

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This is an appeal from a judgment of the Court of Appeal of Palestine dated the 15th April, 1924, dismissing an appeal of the appellants from a judgment of the District Court of Jaffa dated the 1st November, 1923, given in favour of the present respondent for P.T. 57,170 and costs.

The action out of which this appeal has arisen was, on the 21st May, 1921, instituted by the respondent to recover the value of 5 boxes or cases of cotton goods to be carried to the port of Jaffa and there delivered to the consignee, the respondent in the present appeal. These boxes were never delivered to the respondent at all, either at Jaffa or elsewhere. These five boxes formed portion of a larger number of the same description intended to have been all shipped at the same time in the same ship at the port of Venice, to be all carried to Jaffa. Any difficulty in dealing with it which exists in the case arises mainly from this, that while the evidence given in the case is on certain important points, according to the rules and principles of law, sufficient to cause one to conjecture, surmise or apprehend, that certain events

occurred and certain arrangements or transactions were carried out which, if they had in fact, occurred or been in fact carried out, would have entitled the respondent to recover the value of these goods, no evidence, however, has been given legally admissible according to law sufficiently clear, definite, relevant and convincing as to form a just and adequate basis for judicial decision in a court of law of contested points.

For instance, there is no direct evidence whatever that any one of the five boxes of the respondent's were, in fact, loaded on the s.s. "Baron Call" at Venice. The evidence bearing on that point is this. Art. 1608 of the Medjelle or Ottoman Code of Civil Procedure provides that entries in books customarily used by merchants are equivalent to an admission in writing. Well, in this case no books of any merchant were produced, but a certificate was by the British Vice-Consul at Milan given under his hand certifying that he had examined the ledger of Messrs. Asser, Gabriele & Battino (described as now in liquidation), who were, it is to be presumed, the vendors of these goods, and that he found entries in their books to show that the vendors had, on the 11th and 16th March, 1920, delivered to a firm of forwarding agents—M. Luciano Franzosini—for transmission to Venice, and from the latter place to Jaffa, to Mr. David S. David's address, the goods mentioned, namely, five cases, the numbers and weights of which were given, four of the cases being lettered R.H., one lettered D.S.D. It may well be that the entries in the ledger of the vendors would be evidence if the book were produced in Court, but it by no means follows that the certificate of the Consul setting out the items he found in the ledger of this firm is admissible as evidence of the contents of the ledger. But even if the certificate be assumed to be admissible evidence for that purpose, it amounts to little.

No agent of the forwarding agents or person employed by them was examined at any of the trials to prove that the respondent's goods were, in fact, transmitted to Venice, or, in fact, loaded on the s.s. "Baron Call" at all. The weights and dimensions of these boxes were such that they might be readily carried away. There is no evidence whatever as to how or where these boxes, if they were loaded at all, were stowed, or for what purpose the ship visited the four or five ports it is admitted she did visit en route from Venice to Jaffa, whether it was for discharging cargo or receiving it, or what, if any, were the opportunities afforded for theft.

There are two bills of lading given in evidence, numbered respectively 4 and 5. The first sets out upon the face of it that four cases (Nos. R.H. 3122/25) were shipped by Luciano Franzosini, Venice branch (this is the firm of forwarding agents), on the 6th April, 1920, on the s.s. "Baron Call. And the bill of lading No. 5 sets out that two cases (not one) marked 315/316 were similarly shipped on the same day. These bills had a clause upon

their face, which was translated into English as follows : “ Weight and measurement of contents are unknown.” Each bill of lading had an identical clause, which has been variously translated, but of which their Lordships may adopt the translation set out on the bills of lading. That translation runs thus : “ The company shall never be responsible for captains or sailors strike, and the captain also shall not be held responsible for sailors strike. Likewise the company shall not be liable for robberies and other damages of goods whilst these are in the stores, depots or being transported in trucks kept on seashore awaiting shipping or when they are being loaded or unloaded.” It is obvious that it rest upon the shipowners, when sued for the value of non-delivered goods, of their desire to escape liability to bring themselves within the letter of this clause.

They have not done so in this case. All they have done is to show that facilities for theft existed and that it might be one of the ways accounting for the non-delivery of the cases. In their Lordships’ view the shipowners cannot get rid of this liability as carriers by relying on a half-proven clause such as this.

In their Lordships’ view the proof of the receipt on board the s.s. “ Baron Call ” at Venice of the 5 cases of goods sued for is not so clear and satisfactory as could be desired ; but they now turn to Clause 32 printed on the back of the bills of lading. It is, they think, clear that the shippers of goods must be bound by this clause as a purchaser of a railway ticket is bound by the conditions printed on the back of it, if he has had a reasonable opportunity of reading them, and especially if his attention has been called to them. It is part of a contract made with the passenger which qualifies in each of these cases the contract of carriage.

The translation, which may be treated as reliable, of the important part of Article 32 runs as follows :—

The Company shall be liable within two days (from date of shipping) for all consignments to the Adriatic ports for eight days for those (consignments) to the Levant Ports (the Grecian, Turkish and Egyptian Ports) as well as the Ports of Black Sea and Danube, and for a full month for those across Suez Canal or Gibraltar.

Any claim made regarding shortage, loss or damage of goods on their delivery, shall be acceptable, provided that such claim is made in writing and presented to the Company’s Agent in the destination port, within the period as fixed above.

The words acceptable mean, they think, shall be accepted as binding. Jaffa is a Levant Port. The “ Baron Call ” arrived at Jaffa on the 19th April, 1920. The 5 cases were then missing, and were nowhere to be found. Yet no claim in writing for loss or shortage was made against the owners, the present appellants, for some months after that date—indeed, not till or about the 16th September, 1920. That was obviously quite too late, and the shipowners were quite entitled to rely upon the fact that it was late. The present respondent, the consignee of these goods, contends

that the letter of the 19th October, 1920, written by the owner to him, amounted by itself or together with the letter of the 16th September, 1920, to which it was an answer to a waiver of this condition as to notice of the loss within 8 days.

Their Lordships are quite unable to take that view.

One does not know what were the contents of the letter of the 16th September, 1920, written by the owner of the non-delivered goods, but the shipowners' right to protect themselves by the non-receipt of the notice within 8 days from the date the loss had already accrued. It afforded a good legal defence to the action to recover the value of these goods. Their Lordships cannot find anything in these letters expressive of a desire or intention on the part of the shipowners to deprive themselves of the advantage of that defence. They therefore think that no waiver by the shipowners of the stipulation for the receipt of notice in paragraph 32 was proved. And that therefore the appellants succeed on this appeal which must be allowed and the action dismissed with costs here and below, and they will humbly advise His Majesty accordingly.



In the Privy Council.

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ANDREW MANTOURA AND SONS

vs.

MENACHAM DAVID.

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DELIVERED BY LORD ATKINSON.

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