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[G.R. No. 1638. December 02, 1905]

ANTONIO IRIBAR ET AL., PLAINTIFFS AND APPELLEES, VS. MILLAT, MARTY & MITJANS ET AL., DEFENDANTS AND APPELLANTS.

D E C I S I O N

MAPA, J.:

On the 3d day of July, 1893, the steamer *Don Juan*, while *en route* to Manila from the ports of Hongkong and Amoy, China, and still on the high seas at a distance of some 30 miles from the coast of the Island of Luzon, took fire. The fire reached such proportions that the vessel with all her cargo had to be abandoned by the captain, officers, and crew, together with such passengers as the small boats of the steamer could carry. A large number of the passengers remained on board, apparently for the lack of a sufficient number of small boats to save them.

On the 4th of July Antonio Iribar, the plaintiff in this case and at that time captain of the steamer *San Antonio*, then at anchor in the port of San Fernando de la Union, on learning of the accident, repaired with his ship to the aid of the *Don Juan*, which on the following morning he found abandoned in the manner aforesaid, still burning, a large part of it being already destroyed. In this condition he towed the vessel into Manila Bay arriving July 7 after two days' navigation, having saved also 101 passengers of the *Don Juan* who, had it not been for the timely assistance of the *San Antonio*, would probably have perished.

The cargo of the *Don Juan* consisted in part of Mexican silver coins then considered contraband, their importation into the Philippines being at that time prohibited. For this reason the duly authorized agents of the Government seized the silver in question and

deposited it with the Public Treasurer pending the result of the administrative proceedings instituted for the purpose of investigating and reporting on the matter of the contraband. The silver thus seized, considerably defaced and melted as a result of the fire, is now in the hands of the Insular Treasurer pending its delivery to the parties entitled thereto in accordance with the decision to be rendered in this case.

The action is brought against the silver exclusively and the libelants seek to recover:

First, the expenses incurred by reason of the salvage, and second, the salvage charges under the code.

(a) *Expenses.*—The libelants presented a claim for 4,454.50 pesos, including cost of coal consumed, wages and subsistence of the crew, loss of voyage to and from Ilocos and Cagayan, where the *San Antonio* was scheduled to go at the time of effecting the salvage of the *Don Juan*, pilot-age in and out, and transportation for the 101 passengers at the rate of 5 pesos each.

Such are the items which the libelants seek to recover. It will be noticed that the expenses incurred by them, with the exception of the cost of transportation of the 101 passengers, supposing the same to be true and duly established, were so incurred for the common benefit of the steamer *Don Juan* and her entire cargo and not exclusively for the benefit of the silver concerned in this case. It was proven that the vessel was not totally destroyed by the conflagration, it having been towed into Manila Bay by the *San Antonio*. Though more or less damaged by reason of the fire, the fact is that the hull of the *Don Juan* as well as her machinery were saved, all of which represented an actual value of the greater or lesser consideration which should contribute proportionately toward defraying the salvage expenses. On the other hand, it does not appear that any other part of the cargo besides the silver in question was saved from the steamer *Don Juan*. If there was any such cargo saved, it should be charged with its share of the salvage expenses. These expenses having been incurred in the saving

not only of the silver but also of the vessel and her cargo, they should be considered general or gross average under article 811 of the Code of Commerce, and as such should be proven and adjusted in accordance with the provisions of Sections I and II of Title V, Book III, of the same code. It was neither alleged nor shown that such adjustment was made. In the absence of such adjustment there is nothing upon which to determine the proportion in which the silver should contribute toward defraying the expenses. The claim of the libelants that they have a right to recover the total amount of the expenses out of the silver in question is manifestly unjust and can not be sustained, it being immaterial whether the steamer *Don Juan* is now totally lost, as alleged in the complaint. The averages in the case at bar should be adjusted with reference to the condition of the vessel twelve years ago, to wit, in July, 1893, when the salvage was effected, and not with reference to the present condition. This would be the only proper procedure under the law.

With respect to the transportation of the 101 passengers rescued by the *San Antonio*, we see no reason why it should be paid for by the libelees, who, as mere shippers on the *Don Juan*, had nothing to do with the transportation of such passengers. This would have been a proper charge against the agents of the ship, who were the only ones liable therefor.

We therefore hold that the libelants can not recover the amount claimed by them for expenses incurred in the salvage of the vessel upon the grounds set forth in the complaint. The judgment appealed from should accordingly be reversed in so far as it orders the libelees to reimburse the libelants for such expenses.

(b) *Salvage rights*.—The court below declares in its judgment that the libelants had a right to recover as salvage one-third of the silver saved from the steamer *Don Juan*, now in the hands of the Insular Treasurer. This part of the judgment is in conformity with the law, and should therefore be sustained.

There is no dispute over the fact of the salvage of the steamer *Don Juan* by the steamer *San Antonio*.

The libelees and appellants admit it on page 21 of their brief. They deny, however, the libelants' rights to recover the amount claimed for salvage, alleging that this was effected for the unlawful purpose of cooperating in the illegal importation into these Islands of the Mexican silver in question. The libelees claim that Antonio Iribar, one of the libelants, left Manila July 3 with the steamer *San Antonio* to meet the *Don Juan* on the high sea, and transfer into the former, by means of the steam launch *Santa Maria*, the silver that the *Don Juan* carried, and thence convey it to Aparri; but that he was unable to do so on account of the fire on the *Don Juan*, and was compelled to bring the *Don Juan* in tow to Manila.

The evidence shows, in effect, that Iribar agreed with one of the libelees to effect the transfer of the silver. The salvage was, however, something independent of such agreement, and can not, therefore, be affected by any defects which might have vitiated the latter. The burning of the *Don Juan*, which gave rise to the salvage, was an accident unforeseen by the owners of the silver, regarding which they made no agreement whatever with Iribar. The salvage was not effected as a part of the contract between them which only referred to the transfer of the silver, but was something outside of the terms and the natural scope of the contract. It may even be said that the salvage was contrary to what had been expressly agreed upon. The silver, as a result of the salvage, was conveyed to Manila instead of to Aparri, as stipulated between the parties. Iribar thus rendered possible the discovery of the contraband which would otherwise have been avoided.

It is said, also, that Iribar concealed a large part of the silver loaded on the *Don Juan*, thus committing actual theft. This matter was disposed of in the criminal case instituted in connection with this charge, and to which reference is made in the appellants' brief. It having been decided that there was no such theft, the principal of *res adjudicata* does not permit that the same question be again brought into discussion, not even as a mere allegation or by way of argument.

Another defense the libelees set up is that of prescription under paragraph 3 of article 952 of the Code of Commerce, which fixes one year as the time within which all actions for salvage must be brought. The salvage in question occurred in July, 1893, and the libelants did not file their complaint until nearly ten years thereafter, to wit, January, 1903.

According to the provisions of the article cited, the term of one year for the prescription of all such actions should be counted from the time the services were rendered or from the ending of the administrative proceedings if any should have been instituted in the case.

From the documentary evidence introduced by the parties, it clearly appears that proceedings were instituted in the matter of the salvage of the steamer *Don Juan*, Exhibit 3, dated August 9, 1893, and which appears on page 28 of the bill of exceptions, bears the following heading: "*Statement of expenses which the undersigned consignee of the steamer San Antonio submits to the fiscal in the proceedings relative to the salvage of the steamer Don Juan.*" In Exhibits 14, 15, and 23 (bill of exceptions, pp. 142, 143, 144, 164, and 165) express mention is also made of the proceedings instituted in the matter of the salvage; and finally, Exhibit 1 (bill of exceptions, p. 26) contains a notice to Antonio de Juban "*to appear in the matter of the administrative proceedings,*" quoting it literally, "that are being conducted by the maritime authorities concerning the wreck of the Spanish steamer *Don Juan* for the purpose of ascertaining the amount of the salvage expenses by him incurred in the wreck of the steamer *Don Juan.*"

This notice to appear, which seems to have been signed by the judge who conducted the investigation, is dated June 17, 1898, and was published in the Official Gazette of Manila on the 19th of the same month and year. This shows that the proceedings commenced in 1893 had not yet been terminated in June, 1898. There is nothing in the record to show whether the said proceedings were ever terminated; and if so, when. It was incumbent upon the libelees to show this, but they have furnished no proof upon this point. In the absence of such proof, there is no ground upon which to base a finding that the libelants are barred from bringing this action, since the prescriptive period should be counted

from the termination of the aforesaid proceedings. For these reasons, and not for those set out in the judgment appealed from, which must be considered modified accordingly, we hold that the defense of prescription set up by the libelees can not be sustained. The libelees also set up the defense of payment. In paragraph 2, No.4, of their answer they say literally that "*each and all of the charges and expenses claimed from the libelees for the salvage of the Mexican silver belonging to them were ordered by the said libelees to be paid, and were paid, long before this action was commenced.*" The libelants denied that such payment was ever made, and the libelees introduced no evidence tending to prove their contention, which accordingly can not be sustained.

The libelees set up a counterclaim for the sum of 50,000 pesos found missing from the silver loaded on the steamer *Don Juan*.

They alleged that the vessel carried 120,000 pesos, and that upon the seizure of the contraband by the authorities, the latter found only 70,000 pesos, the balance having been abstracted and concealed by the libelant Iribar, without the libelees having been able to recover it thereafter.

The libelees, in their counterclaim, practically charge Iribar with the theft of the missing silver. In regard to this matter it has already been said that there is a final judgment which acquitted Iribar of such a charge. If it be contended, as the libelees appear to contend, that although the alleged concealment of the silver by Iribar can not be deemed a theft on account of the judgment of acquittal referred to, it can, nevertheless, be regarded as an act of assistance or cooperation in the unlawful importation of the silver into these Islands, then the said act would constitute the crime of importing contraband articles into the Philippines, since the introduction of Mexican silver into these Islands was considered as such. The crime, if any, being common to both parties, they would have no action against each other under article 1305 of the Civil Code. However this counterclaim may be considered, it can not be sustained, even though it were true that Iribar had actually concealed that part of the silver missing from the cargo of the *Don Juan*.

It has been urged by the appellants that this doctrine should not be applied to them, they being mere libelees and not libelants, alleging further that they simply ask this court to preserve and maintain the same condition of affairs existing prior to the commencement of this suit. It is true, nevertheless, that they do not limit themselves in their answer to asking that the case be dismissed, but allege therein new facts which do not appear in the complaint, and pray judgment for 50,000 pesos against the libelants as a counterclaim. This last prayer can not be said to constitute a mere defense. It is a real and actual prayer for affirmative relief, which, in conformity with the section cited, and for the reasons above set forth, is denied them.

Again, there is not sufficient evidence of the alleged concealment by Iribar of the missing silver from the steamer *Don Juan*.

It is a fact that the greater part of the silver transferred to the San Antonio and the launch Santa Maria was seized by the authorities and forms a part of that now deposited with the Insular Treasurer, as appears from Exhibit 8, page 111, of the bill of exceptions. It seems that the only portion of the silver transferred to the steamer and launch which has not been recovered is the five or six thousand pesos referred to on page 137 of the printed record (Exhibit 12) as having been taken from the steamer Ban Antonio and buried in the beach at Salomague. This is a mere hearsay statement, which, not being corroborated by the evidence, is not entitled to any weight.

Furthermore, it is not stated in the document that it was Iribar who landed and concealed the silver at Salomague. Iribar, in a document dated May 11, 1894, and marked "*Libelees Exhibit 10*" (bill of exceptions, p. 117), said that when the money disappeared he was no longer in command of the steamer *San Antonio*, thus intimating that one of Marty's clerks had taken the money. This statement was not contradicted during the trial, but, as has just been said, was corroborated by a document introduced in evidence by the libelees themselves.

The difference between the amount of silver loaded on the Don Juan and that seized by the authorities who conducted the proceedings in question may be explained by Iribar's own statement, contained in Exhibit 10, to the effect that, "according to the statement made by the

chief steward of the *Don Juan* to the engineers and first officer of the *San Antonio*, several boxes containing money were lowered from the *Don Juan* into some of the small boats of the latter vessel, while others went to the bottom of the sea owing to the burning of their fastenings.”

Whatever weight such statements may in themselves have as evidence, the fact is that they appear in a document which the libelees accepted as good, and was by them introduced, in support of their own allegations and without any reservation.

For the foregoing reasons, the judgment appealed from is affirmed in so far as it declares that the libelants have a right to recover as salvage one-third of the silver in question in whatever condition it may be, and reversed in so far as it decrees that the libelees shall pay the expenses of the salvage amounting to 4,454.50 pesos claimed in the complaint. The counterclaim set up by the libelees is hereby disallowed. Each party shall pay its own costs in this court. After the expiration of twenty days let judgment be entered in accordance herewith, and let the case be remanded to the trial court for action in conformity with this decision. So ordered.

Arellano, C. J., Torres, Johnson, and Carson, JJ., concur.
