

COMPAGNIE DE COMMERCE ET DE NAVIGATION D'EXTREME ORIENT, PLAINTIFF AND APPELLANT, VS. THE HAMBURG AMERIKA PACKETFACHT ACTIEN GESELLSCHAFT, DEFENDANT AND APPELLANT.*G.R. No. 10986. March 31, 1917*

Ponente: CARSON, J.

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For a statement of this case on appeal we cannot do better than to set forth the substance of the carefully prepared opinion in the court below, and the assignments of error by counsel on the appeals brought here by both parties.

"This is an action by the Compagnie de Commerce et de Navigation D'Extreme Orient, a corporation duly organized and existing under and by virtue of the laws of the Republic of France, with its principal office in the city of Paris, France, and a branch office in the city of Saigon, against the Hamburg Amerika Packetfahrt Actien Gesellschaft, a corporation duly organized under and by virtue of the laws of the Empire of Germany, with its principal office in the city of Hamburg, Germany, and represented in the city of Manila by Behn, Meyer & Company (Limited), a corporation. The plaintiff seeks to recover the full value in Saigon of a certain cargo of the steamship Sambia, alleged to amount to the sum of P266,930, Philippine currency, and prays that certain proceeds of the sale of said cargo, amounting to P135,766.01, now on deposit in this court, be applied on said judgment, and that judgment be rendered in favor of the plaintiff and against the defendant for such sum as may represent the difference between the said amount and the value of the payment and delivery unto plaintiff from said deposit, with legal interest and costs of suit.

"This is essentially a suit for damages growing out of the 'failure, refusal and neglect of the defendant to safely carry the said merchandise and cargo as in said charter party and bills of lading provided/ as shown by paragraph XI of the complaint and other allegations of said complaint.

"The plaintiff alleges (1) that on June 17, 1914, the defendant chartered and hired unto the plaintiff the steamship or vessel called the Sambia for the purpose of carrying a full cargo of rice, rice bran and cargo meal from the port of Saigon to the port of Dunkirk and Hamburg, via Suez Canal, upon the terms and conditions set forth and contained in the written charter party made and executed between the said parties on said date, a copy of which is attached to the complaint, marked Exhibit A; (2) that about July 28, 1914, under and in pursuance of said charter party, the plaintiff loaded and shipped on board the Sambia at said port of Saigon, destined for said ports of Dunkirk and Hamburg, via Suez Canal, certain merchandise and cargo as listed in Paragraph III of the complaint; (4) that upon the loading and shipment of said cargo on board the Sambia the master thereof, in due course, and in representation of said defendant, duly signed, executed and delivered to the plaintiff good and sufficient bills of lading for the said cargo; that save and except for the negotiation of said bills of lading unto the Hongkong & Shanghai Banking Corporation as security for the due acceptance and payment of certain bills of exchange drawn by plaintiff, the plaintiff has been and still continues to be the sole and exclusive owner and holder of said bills of lading and of the cargo described in the complaint which is evidenced thereby; (5) that about August 2, 1914, the said steamship Sambia sailed from the said port of Saigon bearing on board the said cargo, and acting under and in pursuance of orders from the defendant, as owners of said

vessel, but without the consent or approval of plaintiff as the charterer of said vessel and the owner of said cargo, and against the protest of plaintiff, the said vessel wholly failed, omitted and refused to sail unto said destinations of Dunkirk and Hamburg, or unto either of them, or unto any of the ports of call in the due course of said stipulated voyage, but wilfully and intentionally deviated from the said stipulated voyage and sailed to the port of Manila, Philippine Islands; that said vessel arrived at Manila on or about August 8, 1914, and has wilfully and intentionally abandoned the said stipulated voyage and has remained at Manila continuously from the said 8th day of August, 1914, until the present day; (6) that upon the arrival of said vessel at Manila, the defendant wholly failed, omitted and refused to tranship the said cargo of the plaintiff and to forward the same unto the stipulated destinations thereof, as in duty bound, and, in the absence of plaintiff, as owner of the said cargo, wrongfully and unlawfully detained the said cargo and the whole thereof at said port of Manila; (7) that on September 10, 1914, the defendant in the absence of plaintiff, sought and obtained by means of a petition filed in cause No. 12235 of this court, the authority of this court to discharge the said cargo of the plaintiff from the said vessel, and to sell the same at private sale, and sought and obtained the designation of Behn, Meyer & Company (Limited), of Manila, P. I., as agent of the said S. S. Sambia and the master thereof in making the said discharge and sale of said cargo; (8) the defendant, purporting to act under and in pursuance of said authority so obtained, has heretofore sold and disposed of the said merchandise and cargo, or so much thereof as then and there remained, and has paid and deposited in this court, as the proceeds of said sale, the sum of P135,766.01, subject to the further order of this court upon the determination of the person or persons who may be entitled thereto; (9) that plaintiff is informed and verily believes, and therefore alleges, any and all claims and demands of third persons in and to or against the said proceeds of said sale have been wholly paid and satisfied and that no person or persons other than this plaintiff has any right, title or interest in or to said deposit of P135,766.01; (10) that the true value and market price of said merchandise and cargo above mentioned and described f. o. b., Manila Bay, was and is not less than P266,930, and the true value and market price of the same in the market of Manila was and is the said value increased by the customs duties and landing charges thereof, and the value and market price thereof in the markets of Dunkirk and Hamburg was and is the said sum increased by the freight, insurance, interest, landing expenses, and other costs and charges requisite and necessary for the transfer of said merchandise and cargo unto said ports of destination thereof; (11) that under and by virtue of said failure, refusal and neglect of the defendant to safely carry the said merchandise and cargo as in said charter party and bills of lading provided, there has been wholly lost unto the plaintiff the said sum of P266,930, Philippine currency, and said loss has been diminished only in said sum of P135,766.01 so deposited as aforesaid, or by so much thereof as shall be paid and delivered unto plaintiff free and discharged of any and all adverse claims, charges, or liens of third persons.

"The plaintiff prays:

"1. That the proceedings known and designated as No. 12,235 in this court be wholly merged and consolidated with this cause.

"2. That the said deposit of f 135,766.01, Philippine currency, be paid and delivered unto this plaintiff free and discharged of any and all adverse claims, charges or liens of third persons.

"3. That the plaintiff have judgment against the defendant in the said sum of P266,930, Philippine currency, or in such other sum as may represent the difference between the said amount and the value of the payment and delivery unto plaintiff from said deposit, together with interest thereon at the legal rate until paid.

"4. That plaintiff have judgment for its costs of suit and for such other and further remedy and relief as may be proper in law and in equity.

"The Exhibit A attached to the complaint is here referred to as the charter party between the plaintiff and the defendant, dated June 17, 1914, without giving a synopsis of its contents.

"The defendant by its answer (1) makes a general denial, and (2) admits the first paragraph of the complaint, except that portion which alleges that the defendant has been represented in Manila by Ernest Vietmeyer, the

master of the steamship Sambia, and alleges that the said Viemeyer does not and has not at any time represented the defendant and has only represented the freight and cargo of the said steamer to the extent of attempting to collect freight and to make delivery and sale of the said steamer's cargo; (3) admits the second paragraph of the complaint, except that portion which alleges that the cargo was to be transported to the ports of Dunkirk and Hamburg, and in respect to that portion alleges that the transportation contract between plaintiff and defendant, which is made part of plaintiff's complaint, provides that said steamer should proceed to Dunkirk and Hamburg 'or so near thereunto as she may safely get;' (4) admits paragraph 3 of said complaint; (5) admits paragraph 4 of said complaint, except that portion which alleges that the bills of lading were negotiated to the Hongkong and Shanghai Banking Corporation as security for the acceptance and payment of bills of exchange drawn by plaintiff, and, having no information in relation thereto, denies the same, and except that portion of said paragraph 4 which alleges that the plaintiff has been and still is the sole and exclusive owner and holder of bills of lading of the cargo of the said steamer, and alleges in respect to both of said portions of said paragraph 4 of said complaint that in another proceeding in this court, numbered 12235, entitled 'In the matter of the petition of Ernest Viemeyer as captain of the German steamer Sambia for judicial authority to sell and dispose of cargo,' the said Hongkong & Shanghai Banking Corporation made and presented a claim for the said cargo of the said steamship Sambia and proceeds from the sales thereof, alleging that it was the holder and owner of the said bills of lading of said cargo and was entitled to the possession thereof; (6) further answering a portion of paragraphs 5 and 6 of the complaint, the defendant specifically denies that through the sailing master, or any other officer of the said steamship Sambia, or in any other way, by its orders, or otherwise, it refused sailing of said steamship to the ports of Dunkirk and Hamburg, or either of said ports, or any other ports of call, or that said steamship wilfully deviated from the due course of her voyage, and specifically denies that the said steamship abandoned the voyage which it was agreed should be made in defendant's contract with the plaintiff, as set forth in the charter party, and defendant specifically denies that it has ever refused to tranship the cargo of said steamship or to forward the same to its destination, or that it has detained the said cargo otherwise than as in its answer set forth, and that plaintiff, through its representative in Saigon, not only knew of the intention of sailing said steamer from Saigon to Manila, instead of upon its regular course, but consented thereto and approved thereof as the sailing of the said steamer in stress to a port of safety for the purpose of saving both the said steamship and its cargo from total loss; that said steamship is ready to sail and will proceed upon its regular voyage to Dunkirk and Hamburg as soon as the conditions of war now existing between the Empire of Germany and other nations of Europe will permit, and that defendant has never in any way been requested to tranship the cargo of the said steamship or to forward the same to its destination, and has not detained said cargo in Manila, or elsewhere, except as in the answer set forth; (7) the defendant admits paragraph 7 of plaintiff's complaint, and alleges in respect thereto, and calls attention to, the allegations contained in defendant's cross-complaint and counterclaim.

"The defendant files a cross-complaint and counterclaim, and (1) reiterates the admissions made in paragraph 2 of the answer and makes the same a part of the cross-complaint, and (2) alleges that the steamship Sambia was under charter to the plaintiff to load cargo, as provided in the charter party which is made a part of this cross-complaint, and was loading at Saigon, a French port, on the 2d day of August, 1914, and it was rumored that war had been declared between the Empire of Germany and the Republic of France, and thereupon the master of said steamship, fearing seizure because the said steamship was registered and sailing under the German flag and the port she was then in was a French port, desired to leave said port of Saigon, but was required by plaintiff to complete the loading of the total cargo called for by the said charter party, which the said master proceeded to do, and completed the loading so as to leave the said port on the 4th day of August, 1914, which was done, and said rumors of the declaration of war having been verified, the said master and the plaintiff's representative at Saigon, one Ducasse, concluded that it would not be safe for said steamship to proceed on its voyage to Dunkirk and Hamburg, nor to stay in said port of Saigon, and thereupon the master and said representative went to the French Governor at Saigon and asked for a pass or safe-conduct to the port of Manila, but the said Governor refused to issue such pass or safe-conduct for the reason that he had not been officially notified of said declaration of war, and thereupon plaintiff's agent at Saigon procured from the proper

authorities the necessary clearance papers for the said steamship and its bill of health for the port of Manila, which the said master and said representative decided was the nearest safe and neutral port of refuge, and thereupon the said master sailed the said steamship to the said port of Manila where he arrived with said steamship on the 8th day of August, 1914, where he, with said steamship, has been obliged to remain continuously since, because of the conditions of war existing which render the said steamship and cargo subject to seizure anywhere outside of a neutral or German port by any hostile nation with which the Empire of Germany is at war; (3) that almost immediately upon the arrival of said steamship at Manila, the defendant, through its agent in Manila, cabled plaintiff in relation to the steamship's cargo and sought instructions as to the disposal of it, but received no answer, and again cabled and still received no answer, and then wrote the plaintiff advising that the cargo had been inspected by the official surveyor, and that it was becoming heated and weevily, and there was no immediate prospect that the said steamship would be able to continue its voyage and that the said cargo would be sold, and that the German consul at Manila had instructed its sale, and that it was for the best interests of the plaintiff and for the insurers of said cargo to do so in order to realize something from the said cargo, and asked that the consular invoice of said cargo be sent to the plaintiff's agent in Manila in order that the cargo might be discharged in Manila with the permission of the Customs authorities; that still receiving no answer from the plaintiff, the defendant applied to this court and obtained authority on the 10th day of September, 1914, to dispose of the cargo as set forth in paragraph 7 of plaintiff's complaint, and proceeded to the sale thereof, and again advised plaintiff by letter under date of September 21, 1914, of the action taken, the amount of cargo sold at that time and the difficulties attending the sale, and in October the defendant's said agent received from plaintiff a letter, as follows:

" 'Compagnie de Commerce et de Navigation d'Extreme-Orient.

" 'Saigon le 1 October, 1914.

" 'Messrs. Behn, Meyer & Co., Ltd.,

" 'Manila.

" 'Dear Sirs:

" 'We beg to acknowledge receipt of your favors of the 7 & 21 of September. We have received none of your telegrams.

" 'SS. Sambia. Our opinion is that the matter of the ss. Sambia has to be discussed between the owners of the steamer and the underwriters of the war risk.

" 'Up to now we have not received any instructions either directly or indirectly to interfere and we shall abstain from doing so without exact orders.

" 'Anyhow we shall be very much obliged for every information you might be able to give us on the subject.

" 'We are, dear sirs,

" 'Yours faithfully,

(Sgd.) " 'Compagnie de Commerce et de

Navigation de Extreme Orient.

""Le Directeur;" "

that the sale authorized was proceeded with and all of the cargo available was disposed of, and the balance which was putrid and unfit for sale was dumped into the sea by order of the authorities of the port of Manila, and report was made to the court and the product of the sale of said cargo, amounting to P135,766.01, was deposited in court, under the order of the court, notwithstanding the fact that the master of said steamship

making the sale under the court's authority had paid of the amount deposited to Behn, Meyer & Company, a corporation and defendant's agent at Manila, the sum of P60,841.32 for freight charges upon said cargo, the sum of P18,259.18 as a deposit to insure the payment of general average in lieu of bond for general average against said cargo, and the sum of P18,259.18 as compensation to Behn, Meyer & Company, which had been authorized by this court to make sale of said cargo as agent for the master of said steamship and for the steamship itself, for its compensation in doing so; (4) that said Behn, Meyer and Company deposited out of its own funds the total of said three amounts mentioned in the preceding paragraph, in all P97,359.68, of which the said Behn, Meyer & Company has already accounted to the defendant for the sum of P79,100.50 and having so accounted in good faith, the defendant is bound to see said Behn, Meyer & Company safe from loss and to reimburse that corporation in the sum of P79,100.50; (5) that said defendant has and claims a lien upon the said sum deposited in Court as aforesaid to the amount of P79,100.50 on account of freight and general average deposited as stated, and the amount of P18,259.18 as fees for the expenditures and services performed by Behn, Meyer & Company in the sale of said cargo, which the defendant is obligated to pay to Behn, Meyer & Company; (6) the defendant further alleges that in addition to the amount stated and claimed by the said master, Vietmeyer, of said steamship Sambia he has spent the sum of P608.64 for internal revenue taxes upon the sale of said cargo; (7) the defendant alleges that Behn, Meyer & Company in obtaining discharge of said cargo, as agent of the said master and of the said steamship, and making sale hereof under the authority stated, was obliged to execute for customhouse bonds in the sum of P100 each, conditioned for the production of consular invoices of said cargo sold, and this defendant is obliged to hold the said Behn, Meyer & Company harmless on account of the execution of said bonds; and that plaintiff has refused and still refuses to produce the said invoices as required by law; that the customs authorities of the port of Manila now require the satisfaction of said bonds and the defendant is obliged to pay the amount thereof in the sum of P400 and has and claims a lien on the funds deposited in this court to the amount of P400; (8) that defendant, since the steamship Sambia arrived at the port of Manila up to March 31, 1915, has incurred expenses for wages and maintenance of the steamship's crew, the cost of entering the port of Manila, unloading of cargo, repairs of the steamer made necessary because of her coming to a port of refuge, for the upkeep and other expenses incidental to the said steamer, sojourning in said port of Manila as a port of refuge, amounting to P33,436.61 for which the defendant claims general average against the said cargo of the said steamer, and, as the said cargo has been disposed of, against the proceeds of sale, the balance of which is on deposit with this court, and that the defendant has and claims a lien upon said deposit in the sum of P33,436.61; (9) the defendant further alleges that the said steamship Sambia is still in the port of Manila, as a port of refuge, and is unable to leave for the same reasons which caused her coming to the port of Manila, which still exist; that she was obliged to enter this port; that there is no probability that said steamship will in the near future be able to resume her regular voyage which was interrupted by her entry in the port of Manila, and that defendant will be obliged to incur other and further expenses after the 31st of March, 1915, in the payment of wages and maintenance of the ship's crew and maintenance of the steamship itself, and other things, and that such expenses will be a general average charged against the said cargo of said steamship against the plaintiff, and, as the cargo has been sold, against the proceeds thereof now on deposit with this court, and the defendant claims a lien upon said deposit for such future expenses by way of general average; (10) the defendant further alleges that the insurers of said cargo and the amount of said insurance are known to the plaintiff and are unknown to the defendant, and that such insurers are chargeable on the general average with the loss sustained by the defendant as set forth in the foregoing cross-complaint and counterclaim, arising from the fact that the said defendant was obliged to enter and remain in the port of Manila as a port of refuge to save both said steamship and her cargo from entire loss, occasioned by the capture and seizure thereof by one of the nations with which the Empire of Germany was at war at the time when the said steamer sought refuge, and with whom the said Empire of Germany has continuously since been at war; (11) the defendant further alleges that the plaintiff is not now entitled to any judgment against the defendant for any sum whatever or against the proceeds from sale of the cargo of said steamer Sambia, and not until general average shall have been adjusted between the defendant as owner of the said steamship and of the freight charges upon the cargo and the plaintiff as owner of the cargo, or any other person or entities having an interest in the transportation of said cargo from Saigon to

the port of destination.

"The defendant prays that the plaintiff take nothing by its action; that general average be adjusted as set forth by defendant, and then only for such amount as may appear due to the plaintiff from such adjustment; that defendant have judgment against the plaintiff for freight due upon said cargo amounting to P60,841.32 and for such further amount as may be found due the defendant upon the adjustment of general average; for the sum of P608.64 paid for Internal Revenue taxes, and for the sum of P400 on account of bonds to produce Consular invoices, and that all of said amounts be declared a lien upon said deposit in court as far as the same shall be sufficient, and for such other and further amounts as the said defendant shall here- after be entitled to as expenses for the maintenance and wages of crew of the said steamer, and for the maintenance of the said steamer and any other expenses properly chargeable to general average, and for the costs of this action.

"The plaintiff denies each and every and all and singular the allegations of the said cross-complaint and counterclaim, and the whole thereof. * * *

"The pleadings in this case might indicate that there is considerable dispute about the facts, but there is not. The principal and material facts are not in dispute, and are substantially as follows:

"1. That the steamship Sambia, registered in Germany and sailing under the German flag, and owned by the defendant, under and by virtue of a charter party dated June 17, 1914, proceeded to the port of Saigon and was there taking on a cargo belonging to the plaintiff when on the second day of August, 1914, there were rumors of impending war between Germany and France and other nations of Europe.

"2. That on said second day of August, 1914, the master of the steamship Sambia received an order from the owner of said steamship to proceed at once to a neutral port for refuge, the port of Saigon being a French port; that the plaintiff objected and insisted that the said steamship should load the whole cargo in accordance with the terms of the charter party; that the master complied and the said steamship remained in the port of Saigon and the loading was completed during the night of the third day of August, 1914.

"3. That the plaintiff did all within its power to prevent its property from leaving the port of Saigon, and to that end made application to the judicial authorities at Saigon for the compulsory detention of the vessel, which application failed, and the Governor of Saigon refused to issue to the master of said steamship a safe-conduct because he had not been officially notified of the declaration of war.

"4. That on August 4, 1914, the said steamship sailed from Saigon, having cleared officially for Dunkirk and Hamburg, but the master and the agent of said steamship also obtained and took along a bill of health for Manila, issued by the United States consul at Saigon.

"5. That the steamship Sambia came directly from Saigon to Manila, where it arrived on the 8th day of August, 1914, and where she has remained continuously ever since owing to the condition of war existing between Germany, France, Great Britain and Russia, and where the defendant says she will be compelled to remain until said war conditions cease.

"6. That upon and after the arrival of said steamship at Manila no attempt was made by the owners, master and agent of the said steamship to complete the voyage according to the charter party or to deliver the said cargo to the stipulated destinations, or to tranship the said cargo to said destinations, or to conserve the perishable merchandise composing the said cargo.

"7. That on or about August 7, and 14, 1914, the defendant's agent in Manila, Behn, Meyer & Company, attempted to communicate with the plaintiff by cable messages to Saigon, making an offer to purchase the cargo on said steamship, but the messages were not received by the plaintiff and therefore were not answered; that on September 7, 1914, the defendant's said agent wrote to the plaintiff in relation to the cargo informing it of the condition of same.

"8. That on September 10, 1914, a survey was made of the said cargo, and it was found to be weevilly and heating, and the master of said steamship thereupon applied to this court for authority to sell said cargo, and under such authority the cargo was sold for the sum of P182,591.46, and the balance of said cargo was dumped into the sea by order of the port authorities as unfit for sale, and the proceeds of the sale in the sum of P135,766.01 after deducting certain expenses incident to the sale, were deposited in this court to await the orders of the court.

"9. That on September 21, 1914, the defendant's said agent at Manila again wrote to the plaintiff informing the said plaintiff of the disposition which had been made of the said cargo, and thereafter, on October 1, 1914, received an answer to said letters of September 7 and 21, 1914, in which the plaintiff said: 'Up to now we have not received any instructions either directly or indirectly to interfere, and we shall abstain from doing so without exact orders.'

"10. That the value of the cargo which is the subject matter of this action, at the time of its loading at Saigon was the invoice price of P266,930, and that at the port of destination said cargo would have been worth its said invoice price plus the freight thereon to the respective ports of destination.

"11. That the freight on the cargo from Saigon to Dunkirk and Hamburg, according to the charter party, amounted to P60,841.32 and no part of the freight on said cargo has been paid by the plaintiff.

"12. That no other person, company or entity than the plaintiff, so far as the evidence shows, has any right, title, interest or claim in and to the said cargo of the steamship Sambia, or to the proceed thereof, the subject-matter of this action.

"13. That the defendant claims that more than P33,000 have been expended by it in the upkeep and maintenance of the said ship and crew since arrival in Manila Bay, and that for this and future expenses of the same character the defendant claims a lien upon the proceeds of the sale of said cargo by way of general average.

"14. That the defendant claims a lien on the proceeds of the sale of said cargo for the payment of the sum of P18,259.18 to Behn, Meyer & Company as its commissions for making the sales of said cargo.

"15. That the defendant claims a lien upon the proceeds of the sale of said cargo for the freight claimed under the terms of the charter party, amounting to P60,841.32 and for the sum of P608.46 for the internal revenue taxes on the sale of said cargo, and for the sum of P400 to cover the amount of bonds given by its agent to the customs authorities in Manila to guarantee the production of the consular invoices for said cargo, which consular invoices the plaintiff refuses to produce.

"Upon a consideration of all the facts in evidence and of the arguments of counsel, the authorities cited and other authorities pertinent to the questions at issue in this cause, the court has reached the following conclusions as to the law:

"1. That it was the duty of the defendant, under the terms of the charter party in evidence, to transport the cargo in question from Saigon to Dunkirk and Hamburg, via Suez Canal, under steam all the way (unless disabled), or so near thereunto as she might safely get, and there to deliver the said cargo (always afloat) in any safe dock or berth which the charterers or their agents might appoint.

"2. That the freight on the cargo having been made payable on right and true delivery of the cargo at Dunkirk and Hamburg; and the transportation of the cargo having been abandoned by the defendant at Manila, no part of the freight was earned without such delivery, in the absence of an agreement that the ship owner should become entitled to a proportion of the freight on delivery of the cargo in a port of refuge. (Carver on Carriage of Goods by Sea, section 307.)

"3. That the fear of the owners and master of the seizure or capture of the said steamship Sambia by one of the

belligerent powers at war with Germany was not the result of force majeure and was not a legal or sufficient excuse for having fled with a French cargo from Saigon, a French port, to Manila, or for the failure of the defendant to transport and deliver the said cargo to the consignees at Dunkirk and Hamburg, or for the failure to tranship the same and cause it to be delivered in accordance with the terms of the charter party.

"4. That the provision contained in the charter party requiring the ship to make delivery of the cargo at Dunkirk and Hamburg, 'or so near thereunto as she may safely get' was no legal justification of authority for the deviation of the ship to enter Manila Bay in order to avoid the seizure or capture of the ship by an enemy of Germany, since that cause was intended only to justify the master of the ship in discharging the cargo at some outside anchorage, when by reason of her draft or obstruction to navigation she could not reach the usual wharf or anchorage of a designated port. (See *Meissner vs. Brun*, 128 U. S., 474; 32 Law. Ed., 496.)

"5. That there can be no general average unless there has been a voluntary and successful sacrifice of a part of the maritime adventure for the benefit of the whole adventure, and for no other purpose; in other words, there must be an intentional sacrifice of a part of the property on board the vessel for the purpose of saving the remainder from a common peril, or extraordinary expenditures must be incurred for the purpose of saving the property in peril. (*McAndrews vs. Thatcher*, 3 Wall., 347, 366; *The Star of Hope vs. Annan*, 9 Wall., 203, 228; *Fowler vs. Rathbone*, 12 Wall., 102, 114; *Hobson vs. Lord*, 92 U. S., 397, 404; *Ralli vs. Troop*, 157 U. S., 386, 393; *Barnard et al. vs. Adams*, 10 How., 270, 303; Philippine Code of Commerce, articles 806, 808, 811 and 812.)

"6. That inasmuch as the French cargo was absolutely safe in the French port of Saigon, and the deviation of the steamship *Sambia* from her intended voyage to Dunkirk and Hamburg and her entry into Manila Bay were induced by fear of the capture of the vessel by one of the belligerents at war with Germany, the alleged peril which induced the master of said vessel to enter Manila Bay was not common to both ship and cargo as required by the York-Antwerp Rules as a condition precedent to the levying of a general average; that this cargo under the law of nations was not subject to confiscation by any enemy of Germany, and the cargo not having been imperilled, the expense and loss to the ship and its owners occasioned by the deviation and by taking refuge in Manila Bay during the European war were not for the benefit of the cargo, but for the sole benefit of the ship and its crew; and therefore the cargo should not in any event be called upon for contribution under general average.

"7. That it was the duty of the defendant under the charter party to transport said cargo to Dunkirk and Hamburg in the steamer *Sambia*; but if for any reason, the transportation could not be effected in that vessel within a reasonable time, it was the legal duty of the owners of said vessel and of the master thereof to make the shipment in another vessel. (*Carver on Carriage of Goods by Sea*, sections 304, 305.)

"8. That Behn, Meyer & Company, agent for the defendant, having been appointed by this Court as agent of the petitioner Ernest Vietmeyer (master of the steamship *Sambia*) and of the said ship in making the discharge and sale of said cargo, the court is of the opinion that said Behn, Meyer & Company is entitled to a reasonable compensation for its services in making the sale of said cargo under the authority of the court. And the court is further of the opinion that five per cent (5%) of the net proceeds of a large cargo of this kind is reasonable compensation for said services in making the sale. Therefore, the clerk of this court is hereby directed to retain five per cent (5%) of the amount of said deposit in the court, subject to the further orders of the court in Civil case No. 12235 for the services of said Behn, Meyer & Company in making the sale.

"9. That the defendant is liable to the plaintiff for the damages caused to plaintiff in not having delivered the said cargo to Dunkirk and Hamburg, in accordance with the terms of the charter party; and the transportation of the cargo having been abandoned by the defendant at Manila, and the defendant not having earned the freight money, the value of the cargo at Saigon must be basis for determining the damages suffered by the plaintiff; that since the proceeds of the sale of said cargo, after deducting certain expenses of the sale as shown in said Civil cause No. 12235, resulted in the sum of P135,766.01 having been deposited in this court, and the

court having allowed Behn, Meyer & Company the sum P6,788.30 for their services in making said sale, there now remains subject to the further order of this court the sum of P128,977.71.

"10. It having been alleged in the complaint and admitted in the trial of this case that the value of the cargo at Saigon was the invoice price of P266,930 Philippine currency, and the court being of the opinion that the value of the cargo in Manila was the price at which it was sold under the authority of the court, P182,591.46 less the expenses of the sale and the commissions of the said Behn, Meyer & Company, the court finds that the plaintiff is damaged by the acts of the defendant complained of in the amount of the difference between the agreed value of the cargo at Saigon (P266,930) and the net proceeds of the sale in Manila (P128,977.71) or the sum of P137,952.29; but the court further finds that by paragraph 28 of the charter party the penalty for nonperformance of said agreement is proved damages not exceeding the estimated amount of freight, and in this case the estimated amount of freight is P60,841.32.

"Therefore let judgment be entered in this cause in favor of the plaintiff and against the defendant for the said sum of P128,977.71, less any commissions of the clerk of this court free and clear of all liens, claims, or charges asserted by the defendant in this cause, with legal interest on said sum from the date of the filing of the complaint in this case until paid; and further, that the plaintiff have and recover from the defendant in this cause the sum of P60,841.32, as and for actual damages suffered by the plaintiff by the defendant's breach of the charter party in evidence, with legal interest thereon from the date of the filing of the complaint in this case until paid.

"The defendant's cross-complaint is hereby dismissed with the costs of this case against the defendant. It is so ordered."

Counsel for the defendant-appellant made the following assignments of error on appeal:

"1. The trial court erred in finding that it had jurisdiction to determine the subject-matter of this action.

"2. The trial court erred in finding that the plaintiff did all within its power to prevent its property from leaving the port of Saigon.

"3. The trial court erred in finding that the owner of the steamship Sambia made no attempt to complete the voyage, to tranship the cargo, or to conserve the perishable merchandise composing the cargo.

"4. The trial court erred in finding that the value of the cargo was its value at Saigon plus the freight to destination.

"5. The trial court erred in finding that the transportation of the cargo had been abandoned at Manila, and that no part of the freight was due without delivery at Dunkirk or Hamburg.

"6. The trial court erred in concluding that the fear of seizure or capture by belligerent powers at war with Germany was not force majeure and was not a legal excuse for fleeing to the neutral port of Manila for refuge, or for failure to deliver the cargo at its destination by transshipment or otherwise.

"7. The trial court erred in concluding that 'there can be no general average unless there has been a voluntary and successful sacrifice of a part of the maritime adventure for the benefit of the whole adventure, and for no other purpose ; in other words, there must be an intentional sacrifice of a part of the property on board the vessel for the purpose of saving the remainder from a common peril, or extra-ordinary expenditures must be incurred for the purpose of saving the property in peril.'

"8. The trial court erred in concluding that the cargo was safe in Saigon and that the entry into Manila Bay was alone induced by fear of capture of the vessel by one of the belligerents at war with Germany, and that the peril was not common to both ship and cargo, and that the entry into Manila Bay was for the sole benefit of the ship and its crew.

"9. The trial court erred in concluding that defendant was liable to plaintiff for the damages caused to plaintiff in not having delivered the cargo at Hamburg or Dunkirk.

"10. The trial court erred in concluding that the value of the cargo at Saigon must be the basis for determining damages.

"11. The trial court erred in finding that the estimated amount of freight as per charter party was P60,841.32.

"12. The trial court erred in entering judgment in favor of plaintiff and against the defendant for any sum whatever.

"13. The trial court erred in dismissing defendant's cross-complaint."

Counsel for the plaintiff appellant made the following assignments of error:

"1. The trial court erred in holding that the right of plaintiff to recover the full value of the cargo was limited by the terms of the charter party.

"2. The court erred in refusing to grant plaintiff's motion for a new trial.

"3. The court erred in failing to give judgment for plaintiff for the full value of the cargo of the steamship Sambia."

* * * * *

As counsel for the defendant appellant well says "the various assignments of error are so inextricably mixed one with the other" that it would be extremely inconvenient to deal with each specification of error separately; and it will make for convenience and a clear understanding of our rulings to follow the plan adopted by counsel in their briefs, and discuss the various specifications of error under the general headings into which the contentions of counsel naturally group themselves.

As indicated in the opinion of the trial judge, there is no real dispute as to the material evidential facts of record in this case; and it will readily be seen that the vital issue raised on this appeal is whether or not the master of the Sambia, when he fled from the port of Saigon and took refuge in the port of Manila, had reasonable grounds to apprehend that his vessel was in danger of seizure or capture by the public enemies of the flag under which he sailed.

If it was his duty to remain in the port of Saigon under the circumstances existing at the time when he completed the loading of the vessel, in the hope that he would be granted a laissez-passer or safe-conduct by the French authorities, it is manifest that his flight subjected the ship and her owners to liability for the resultant damages suffered by the cargo.

If, on the other hand, the master had reasonable ground to believe that by remaining in the port of Saigon he would expose the vessel to a real, and not a merely imaginary danger of seizure by the French authorities from which he could secure her by taking refuge in the port of Manila, his flight must be held to have been justified by the necessity under which he was placed to elect that course which would secure the vessel from danger of seizure by a public enemy of the country under whose flag she sailed; and the shipowner must be held to be relieved from liability for the deviation from the route prescribed in the charter party and the resultant damages to the cargo, under the general provisions of maritime law (Carver's Carriage of Goods by Sea, 5th Ed., sections 11 and 22), and the express provisions of article 7 of the charter party which is as follows:

"The act of God, the king's enemies, arrests and restraints of princes, rulers and people, perils of the seas, barratry of the master and crew, pirates, collisions, strandings, loss or damage from fire on board, in hulk or

craft, or on shore; and act, neglect, default or error in judgment whatsoever of pilots, master, crew or other servant of the shipowners in the navigation of the steamer; and all and every the dangers and accidents of the seas, canals and rivers, and of navigation of whatever nature or kind always mutually excepted."

Counsel for the cargo owner insist that having in mind accepted principles of public international law, the established practice of nations, and the express terms of the Sixth Hague Convention (1907), the master should have confidently relied upon the French authorities at Saigon to permit him to sail to his port of destination under a laissez-passer or safe-conduct, which would have secured both the vessel and her cargo from all danger of capture by any of the belligerents. Counsel for the shipowner, on the contrary, urge that in the light of the developments of the present war, the master was fully justified in declining to leave his vessel in a situation in which it would be exposed to danger of seizure by the French authorities, should they refuse to be bound by the alleged rule of international law laid down by opposing counsel. When the case was submitted we did not have at hand an authoritative report of the proceedings at the Hague Conference touching the adoption of the sixth convention, and we were not fully advised as to the final action taken by the world powers by way of ratification of, or adherence to its provisions. In the discussion of this branch of the case in the consultation chamber, our lack of definite and authoritative information as to these matters resulted in such a division of opinion as to the respective rights of the parties, that it was at first impossible to secure a majority vote for the final disposition of this, as well as some other important cases submitted at the same time, involving claims amounting to nearly half a million pesos. Recently, however, our library was furnished with a copy of Stockton's "Outlines of International Law" which briefly and as we think authoritatively sets forth what we now are all agreed would appear to be the present status of public international law on the subject of "days of grace" and "safe-conducts," which may be granted merchant vessels of an enemy, lying in the ports of a belligerent at the commencement of hostilities. Admiral Stockton, a retired officer of the United States Navy, was the first delegate from the United States to the London Naval Conference in 1909, and his text-book, which went to press soon after the outbreak of the war in Europe, contains the most recent statement of the doctrine by a recognized authority to which our attention has been invited.

In Chapter XXIX of the "Outlines of International Law," which is devoted to the consideration of several "Open and Unsettled Questions in Maritime Law," Admiral Stockton, discussing the question of the allowance of days of grace at the outbreak of war says:

"The convention (VI) of the Hague conference of 1907 treating upon this subject was so unsatisfactory to the American delegation that they declined to sign it, and consequently it was not submitted to the United States Senate for ratification. The reason given for this procedure was 'based on the ground that the convention is an unsatisfactory compromise between those who believe in the existence of a right and those who refuse to recognize the legal validity of the custom which has grown up in recent years.'

"The first article of this convention provides that 'when a merchant ship of one of the belligerent powers is at the commencement of hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either immediately or after a sufficient term of grace, and to proceed direct, after being furnished with a passport, to its port of destination or such other port as shall be named by it.

" 'The same applies in the case of a ship which left its last port of departure before the commencement of the war and enters an enemy port in ignorance of hostilities.'

"As this is only a pious wish, it does not require any action of favor or grace from any of the belligerents, and seizure in port of an enemy vessel can be made immediately upon the outbreak of war. The article is not as liberal as the practice has been in the past.

"The policy of the United States in such matters was shown in the Spanish-American War in the rules laid

down by the President in his proclamation of April 26, 1898, the fourth article of which reads as follows:

" 'Article 4. Spanish merchant vessels, in any ports or places within the United States, shall be allowed till May 21, 1898 inclusive, for loading their cargoes and departing from such ports or places; and such Spanish merchant vessels, if met at sea, by any United States ship, shall be permitted to continue their voyage, if, on examination of their papers, it shall appear that their cargoes were taken on board before the expiration of the above term: Provided, That nothing herein contained shall apply to Spanish vessels having on board any officer in the military or naval service of the enemy, or any coal (except such as may be necessary for their voyage), or any other article prohibited or contraband of war, or any despatches of or to the Spanish Government.'

"This rule is an extremely liberal one and it is doubtful whether it would be generally accepted, especially in the case of states of Europe where quick mobilization maintains as a rule."

In an interesting article in *The American Journal of International Law*, Vol. II, 1908, p. 266, the writer, Professor James Brown Scott, after reviewing at some length the history of the practice of granting days of grace and safe-conducts which, he contended, should form a part of the law of nations, concluded his discussion of the subject with the following observations:

"It is therefore a source of regret that the Second Peace Conference refused to recognize it as a right but simply as a privilege, a *delai de faveur*, which may be accorded or refused at the opinion of the belligerent, and that the privilege was unaccompanied by any recommendation of a period of time within which the privilege in question should be accorded, * * * it may be said that the expression 'it is desirable' that the vessels should be allowed to depart freely amounts in reality to a command, and that the practice of the future will recognize the custom as freely as it has done in the past, thus establishing as a right what the conference modestly denominates a privilege. If such be the case the opposition of Great Britain to the recognition of the right will be as futile in practice as it was unreasonable at the conference."

The order in council of the British Government of the 6th of August, 1914, providing for the granting of "days of grace," which was substituted for a prior order in council of the 5th of August, 1914, is as follows:

"His Majesty being mindful, now that a state of war exists between this country and Germany, of the recognition accorded to the practice of granting 'days of grace' to enemy merchant ships by the convention relative to the status of enemy merchant ship at the outbreak of hostilities, signed at The Hague on the 18th of October, 1907, and being desirous of lessening, so far as may be practicable, the injury caused by war to peaceful and unsuspecting commerce, is pleased, by and with the advice of His Privy Council, to order, and it is hereby ordered as follows:

"1. From and after the publication of this order no enemy merchant ship shall be allowed to depart, except in accordance with the provisions of this order, from any British port or from any ports in any native state in India, or in any of His Majesty's protectorates, or in any state under His Majesty's protection or in Cyprus.

"2. In the event of one of His Majesty's Principal Secretaries of State being satisfied by information reaching him not later than midnight on Friday, the 7th day of August, 1914, that the treatment accorded to British merchant ships and their cargoes which at the date of the outbreak of hostilities were in the ports of the enemy or which subsequently entered them is not less favorable than the treatment accorded to enemy merchant ships by article 3 to 7 of this order, he shall notify the Lords Commissioners of His Majesty's Treasury and the Lords Commissioners of the Admiralty accordingly, and public notice thereof shall forthwith be given in the *London Gazette*, and articles 3 to 8 of this order shall thereupon come into full force and effect.

"3. Subject to the provisions of this order enemy merchant ships which

" (i) At the date of the outbreak of hostilities were in any port in which this order applies; or

" (ii.) Cleared from their last port before the declaration of war, and after the outbreak of hostilities, enter a port to which this order applies, with no knowledge of the war:

shall be allowed up till midnight (Greenwich mean time), on Friday, the 14th day of August, 1914, for loading or unloading their cargoes and for departing from such port:

Provided that such vessels shall not be allowed to ship any contraband of war, and any contraband of war already shipped on such vessels must be discharged.

"4. Enemy merchant ships which cleared from their last port before the declaration of war, and which with no knowledge of the war arrive at a port to which this order applies after the expiry of the time allowed by article 3 for loading or unloading cargo and for departing, and are permitted to enter, may be required to depart either immediately, or within such time as may be considered necessary by the customs officer of the port for the unloading of such cargo as they may be required or specially permitted to discharge.

"Provided that such vessels may, as a condition of being allowed to discharge cargo, be required to proceed to any other specified British port, and shall there be allowed such time for discharge as the customs officer of that port may consider to be necessary.

"Provided also that, if any cargo on board such vessel is contraband of war or is requisitioned under article 5 of this order, she may be required before departure to discharge such cargo within such time as the customs officer of the port may consider to be necessary; or she may be required to proceed, if necessary under escort, to any other of the ports specified in article 1 of this order, and shall there discharge the contraband under the like conditions.

"5. His Majesty reserves the right recognized by the said convention to requisition at any time subject to payment of compensation enemy cargo on board any vessel to which articles 3 and 4 of this order apply.

"6. The privileges accorded by articles 3 and 4 are not to extend to cable ships, or to seagoing ships designed to carry oil fuel, or to ships whose tonnage exceeds 5,000 tons gross, or whose speed is 14 knots or over, regarding which the entries in Lord's Register shall be conclusive for the purposes of this article. Such vessels will remain liable on adjudication by the prize court to detention during the period of the war, or to requisition, in accordance, in either case, with the convention aforesaid. The said privileges will also not extend to merchant ships which show by their build that they are intended for conversion into warships, as such vessels are outside the scope of the said convention, and are liable on adjudication by the prize court to condemnation as prize.

"7. Enemy merchant ships allowed to depart under articles 3 and 4 will be provided with a pass indicating the port to which they are to proceed, and the route they are to follow.

"8. A merchant ship which, after receipt of such a pass, does not follow the course indicated therein will be liable to capture.

"9. If no information reaches one of His Majesty's Principal Secretaries of State by the day and hour aforementioned to the effect that the treatment accorded to British merchant ships and their cargoes which were in the ports of the enemy at the date of the outbreak of hostilities, or which subsequently entered them, is, in his opinion, not less favorable than that accorded to enemy merchant ships by articles 3 to 8 of this order, every enemy merchant ship which, on the outbreak of hostilities, was in any port to which this order applies, and also every enemy merchant ship which cleared from its last port before the declaration of war, but which, with no knowledge of the war, enters a port to which this order applies, shall, together with the cargo on board thereof, be liable to capture, and shall be brought before the prize court forthwith for adjudication.

"10. In the event of information reaching one of His Majesty's Principal Secretaries of State that British merchant ships which cleared from their last port before the declaration of war, but are met with by the enemy at sea after the outbreak of hostilities, are allowed to continue their voyage without interference with either the ship or the cargo, or after capture are released with or without proceedings for adjudication in the prize court, or are to be detained during the war or requisitioned in lieu of condemnation as prize, he shall notify the Lords Commissioners of the Admiralty accordingly, and shall publish a notification thereof in the London Gazette, and in that event, but not otherwise, enemy merchant ships which cleared from their last port before the declaration of war, and are captured after the outbreak of hostilities and brought before the prize courts for adjudication, shall be released or detained or requisitioned in such cases and upon such terms as may be directed in the said notification in the London Gazette.

"11. Neutral cargo, other than contraband of war, on board an enemy merchant ship which is not allowed to depart from a port to which this order applies, shall be released.

"12. In accordance with the provisions of chapter III of the convention relative to certain restrictions on the exercise of the right of capture in maritime war, signed at the Hague on the 18th day of October, 1907, an undertaking must, whether the merchant ship is allowed to depart or not, be given in writing by each of the officers and members of the crew of such vessel, who is of enemy nationality, that he will not, after the conclusion of the voyage for which the pass is issued, engage while hostilities last in any service connected with the operation of the war. If any such officer is of neutral nationality, an undertaking must be given in writing that he will not serve, after the conclusion of the voyage for which the pass is issued, on any enemy ship while hostilities last. No undertaking is to be required from members of the crew who are of neutral nationality.

"Officers or members of the crew declining to give the undertaking required by this article will be detained as prisoners of war.

"And the Lords Commissioners of His Majesty's Treasury, the Lords Commissioners of the Admiralty, and each of His Majesty's Principal Secretaries of State, and all governors, officers and authorities whom it may concern are to give the necessary directions herein as to them may respectfully appertain.

"Note.—The standard local time corresponding with the Greenwich mean time mentioned in article 3 of the above order in council is 8 a. m. on Saturday, the 15th day of August, 1914."

The Decree of the President of France relating to German vessels in French ports at the outbreak of war is as follows:

"DECREE.

"Article 1. German commercial vessels which are now or "have been in French ports since and including the 3d of August, 1914, from 18.45 o'clock, or which enter the same unaware of the outbreak of hostilities, shall be accorded, from the date of the present decree, a delay of seven full days within which to freely leave said ports and, after providing themselves with a safe-conduct gain their port of destination, or such other port as may be designated by the naval authorities of the French port where they are, by some direct route.

"In consequence of the reservation made by the German Government in articles 3 and 4, subarticle 2, of the Sixth Hague Convention of 1907, the benefit of the foregoing provision does not apply to German vessels that left their last port of departure prior to August 3d, at 18.45 o'clock, and which, unaware of the outbreak of hostilities, are encountered on the high seas.

"Art. 2. All vessels of which the construction, armament, or appearance indicate that they are susceptible of being transformed into vessels of war or of being utilized for some public service, shall not benefit by the

provisions of article 1.

"In case such vessels are employed in the carriage of mails, the Department of Posts shall see that all the mail bags and parcels on board said boats shall be forwarded by the most expeditious route.

"Art. 3. The Minister of Foreign Affairs, of the Navy, of Public Works, of Commerce, of Posts and Telegraphs, and of the Colonies, are hereby charged with the duty of carrying out the provisions of the present decree.

"Done in Paris, this 4th day of August, 1914.

(Sgd.) "R. Poincare, President of the Republic. Gaston

Doumergue, Minister of Foreign Affairs. Victor Augagneur, Minister of the Navy. Rene Renoult, Minister of Public Works. Gaston Thomson, Minister of Commerce, Posts and Telegraphs. Maurice Raynaud, Minister of the Colonies."

A critical examination of the terms of the convention itself, having in mind the discussion which preceded its adoption, satisfies us that at the outbreak of the present war, there was no such general recognition of the duty of a belligerent to grant "days of grace" and "safe-conducts" to enemy ships in his harbors, as would sustain a ruling that such alleged duty was prescribed by any imperative and well settled rule of public international law, of such binding force that it was the duty of the master of the Sambia to rely confidently upon a compliance with its terms by the French authorities in Saigon; and it seems clear from a reading of the British order in council issued at the outbreak of the war, with its limitations, restrictions, and conditions imposed upon the exercise of the privileges secured therein, that while that nation recognized the advantages to be anticipated from the reciprocal adherence by all the belligerents to the practice in that regard which had been developed in recent years, in a more or less modified form, the order in council was not published in response to any imperative rule of public international law to which that nation felt itself bound to subscribe.

We have not overlooked the fact that President McKinley's proclamation of April 26, 1898, providing for the immunity of Spanish vessels in American ports at the outbreak of the Spanish-American War, recited in its preamble that it was issued in "harmony with the present views of nations, and sanctioned by their recent practice;" nor have we forgotten that the Supreme Court of the United States in the case of *The Buena Ventura* (175 U. S., 384; 44 Law. Ed., 206), which was decided at the October term, 1899, indicated that this proclamation was but a formal recognition of an established practice of nations, which had been recognized as early as the Crimean War by England, France and Russia. But the very fact that there was so substantial a divergence of views among the conferees representing their respective governments at the second Hague Conference in 1907, with regard to the existence and binding character of such a duty under accepted rules of International Law, as to make it impossible for the conferees to agree upon a convention setting forth anything beyond "a pious wish" in the premises, quite conclusively demonstrates that, thereafter, at least, adherence to the practice by any belligerent could not be demanded by virtue of any convention, tacit or express, universally recognized by the members of the society of nations; and that it may be expected only when the belligerent is convinced that the demand for adherence to the practice inspired by his own commercial and political interests outweighs any advantage he can hope to gain by a refusal to recognize the practice as binding upon him.

Professor Lawrence, an English authority, discussing the practice in 1904 said:

"Certainly it will be wise for British shipowners to read the signs of the times, and not calculate upon a continuance in future of the indulgences which have been accorded in recent years. * * *" And Professor Higgins, another English authority, observed that "each state will determine for itself whether the desire to injure its enemy * * * will prevail over the fear of offending neutrals by causing a great dislocation in trade, in which some of them are sure to be interested."

That the practice has been by no means uniform, and that the tendency in recent years has been to limit, restrict and in some cases, apparently, to disregard it altogether will appear from a very summary review of its historical development. In the Crimean War (1854), England and France gave Russian vessels six weeks for loading and departure. In the Prussian-Austrian War of 1866, six weeks were allowed. In the war of 1870 France granted a leave of thirty days. In the Spanish-American War (1898), Spain allowed American ships five days, and the United States allowed Spanish ships one month. In the Russo-Japanese War (1904), the Japanese allowed the Russians one week, but the Russians allowed the Japanese only two days. As to the present European War our sources of information are not absolutely authoritative, but it would appear that the English and Germans detained and seized each other's merchant vessels, and in some instances confiscated their cargoes, under circumstances which would seem to indicate that one belligerent or the other, or both, had wholly disregarded the pious wish of the sixth Hague convention. With reference to the other belligerents it is said that England and Austria-Hungary mutually granted ten days of grace; Germany and France, seven days; Prance and Austria, seven days; but that Great Britain and Turkey, and Great Britain and Bulgaria made no mutual allowance of time, and that Italy without granting days of grace captured all enemy vessels apparently intended for conversion into vessels of war, and sequestered the rest—a distinction without any very substantial difference.

We conclude that under the circumstances surrounding the flight of the *Sambia* from the-port of Saigon, her master had no such assurances, under any well-settled and universally accepted rule of public international law, as to the immunity of his vessel from seizure by the French authorities, as would justify us in holding that it was his duty to remain in the port of Saigon in the hope that he would be allowed to sail for the port of destination designated in the contract of affreightment with a *laissez-passer* or safe-conduct which would secure the safety of his vessel and cargo en route.

It is true that soon after the outbreak of the war, the Republic of France authorized and directed the grant of safe-conducts to enemy merchant vessels in its harbors, under certain reasonable regulations and restrictions; so that it would appear that had the master of the *Sambia* awaited the issuance of such a safe-conduct, he might have been enabled to comply with the terms of his contract of affreightment. But until such action had been taken, the *Sambia* was exposed to the risk of seizure in the event that the French government should decline to conform to the practice; and in the absence of any assurance in that regard upon which the master could confidently rely, his duty to his owner and to his vessel's flag justified him in fleeing from the danger of seizure in the port of an enemy to the absolute security of a neutral port.

Discussing the exception of "King's enemies," Carver says:

"The next exception, that of 'King's enemies,' relates to acts done by states or peoples with which the sovereign may be at war, at any time during the carriage of the goods.

It does not include robbers on land; but has been said to include pirates, or robbers on the high seas, as being enemies of all nations.

"The shipowner is bound to be careful to avoid the acts of such enemies; but where he has been so, he is not liable for losses occasioned by them. For example, for the destruction or capture of the goods by enemies' cruisers; or for a delay where the master has properly put into a neutral port for safety. The master is justified in putting in, and delaying, where he has a reasonable apprehension of danger from capture.

* * * * *

"An express exception of 'King's enemies' relates, at least, to the enemies of the state to which the carrier belongs. (Ang. Carr. s., 200; Story, Bail, s., 526. But see per Byles, J., in *Russell vs. Niemann*, (1864) 34 L. J., C. P. 10, at p. 14; Cf. *Morse vs. Slue*, [1671] 83 E. R., 453; Sir T. Ray. 220; 1 Vent. 238. The exception 'King's enemies,'

appears to have been made, originally, because the bailee who had lost the goods by their acts was without a remedy against them. *Southcote's Case*, 4 Co. Rep., 83 b; *The Teutonia* [1872] 42 L. J. Adm. 57; L. R., 4 P. C., 171; *The San Roman*, [1872] 42 L. J. Adm. 46; L. R. 5 P. C., 301; *Russell vs. Niemann*, [1864] 34 L. J., C. P., 10.)"

The danger from which the master of the *Sambia* fled was a real and not merely an imaginary one as counsel for the shipper contends. Seizure at the hands of an "enemy of the King," though not inevitable, was a possible outcome of a failure to leave the port of Saigon; and we cannot say that under the conditions existing at the time when the master elected to flee from that port, there were no grounds for a "reasonable apprehension of danger" from seizure by the French authorities, and therefore no necessity for flight. As was said in the case of *Australian Steam Nav. Co. vs. Morse* (L. R., 4 P. C., 222):

"The word 'necessity' when applied to mercantile affairs, where the judgment must in the nature of things be exercised, cannot, of course, mean an irresistible compelling power. What is meant by it in such cases is the force of circumstances which determine the course a man ought to take. Thus, where by the force of circumstances, a man has the duty cast upon him of taking some action for another, and under that obligation adopts a course which, to the judgment of a wise and prudent man, is apparently the best for the interest of the persons for whom he acts in a given emergency, it may properly be said of the course so taken that it was in a mercantile sense necessary to take it."

There can be and there is no question as to the necessity, arising out of the presence of enemy cruisers on the high seas which compelled the *Sambia*, once she had left the port of Saigon, to take refuge in the port of Manila and to stay there indefinitely pending the outcome of the war. We conclude, therefore, that the deviation of the *Sambia* from the route prescribed in her charter party, and the subsequent abandonment by the master of the voyage contemplated in the contract of affreightment, must be held to have been justified by the necessity under which he was placed to elect that course which would remove and preserve the vessel from danger of seizure by the public enemies of the flag under which she sailed; and that neither the vessel nor her owners are liable for the resultant damages suffered by the owner of the cargo.

Counsel for the cargo owner further contend that even if it be held that the action of the master of the *Sambia* in fleeing to a port of refuge and abandoning the prosecution of the voyage contemplated in the contract of affreightment, was justified or excused by the exigencies of war, it was his imperative duty, nevertheless, to tranship the cargo on a neutral vessel to one of the ports of destination designated in the contract.

We do not think that this contention is sustained by the evidence of record.

Under ordinary circumstances, it may fairly be presumed in the absence of instructions from a shipper whose goods are found aboard a vessel lying in a port of refuge, whose master has been compelled to abandon the attempt to transport the cargo in his own vessel, that the shipper's interests will be consulted by forwarding his property to the port designated by him in the contract of affreightment; it would appear therefore that, when practicable, the master is bound to act for the cargo owner in that way; but when the condition of the cargo is such as to render it inadvisable to attempt to tranship, or if there is ground to believe that such will be the case before suitable means of transshipment can be secured, the duty clearly rests upon the master to make such other advantageous disposition of the property of the shipper as circumstances will permit. (*The Niagara vs. Cordes*, 62 U. S., 7; *Carver's Carriage of Goods by Sea*, 5th ed., pars. 294, 302, 305; *Abbott* (13th), p. 412; *Shipton vs. Thornton*, 9 A. & E., 314, 337; *Matthews vs. Gibbs*, 30 L. J., Q. B., 55; *Cf. Gibbs vs. Grey*, 26 L. J., Ex., 286; *Shipton vs. Thornton*, 9 A. & E., 314; *Cannan vs. Meaburn*, 1 Bing., 243; *Ang. Carr. s.*, 187; *Cf. The Gratitude*, 3 C. Rob., 240; *The Hamburg*, 32 L. J., Ad., 161; 33 L. J., Ad., 116; *Atwood vs. Selar*, 3 Q. B. D., 342.)

The cargo of the Sambia being a perishable one, and it having proved impracticable to secure prompt instructions from the shipper, the master was confronted with the necessity of electing the course he should pursue, to protect the interests of the shipper whose property had been intrusted to him under a contract of affreightment which he found himself unable to execute upon his own vessel. He elected, after taking the advice of a competent marine surveyor, to sell the entire cargo under judicial authority, and to that end followed substantially the proceedings prescribed in such cases in section II, chapter III of the Commercial Code; and we are of opinion that not only is there nothing in the record which would sustain a finding that in so doing he failed to exercise a sound discretion in the performance of the duty resting upon him to protect the interests of the cargo owner, but that on the whole record it affirmatively appears that this was the only course open to him under all the circumstances existing at the time when he adopted it.

No direct evidence appears to have been submitted by either party as to whether it would have been practicable to secure a suitable vessel upon which to tranship the cargo. This may have been, and doubtless was, because the impracticability of an attempt to tranship was tacitly conceded in the court below. But however this may be, it is clear that the record will not sustain an affirmative finding that it was the duty of the master of the Sambia to tranship his cargo rather than to sell it in the port of Manila. On the contrary, we think it sufficiently appears that in adopting the latter course he acted discreetly, prudently and with due regard for the interests of the cargo owner.

Our conclusions in this regard are derived from considerations based upon the evidence of record, the admissions of counsel in argument, and matters of general knowledge of which we are authorized to take judicial notice.

On account of the unavoidable lack of ventilation while the Sambia lay at anchor beneath the rays of a tropical sun, her perishable cargo of rice and ricemeal began to heat soon after she put into Manila Bay, a part of the cargo being rendered absolutely worthless by heating and through the inroads of weevils so that it had to be thrown over-board.

Exhibit B which set out in full in the plaintiff's brief is a certificate dated the 7th of September, 1914, prepared by a marine surveyor, who having been called upon to examine the cargo aboard the Sambia, reported that it "showed signs of heating and of being infested with weevils" and recommended, "in the interests of all concerned, that it be discharged and disposed of as soon as possible" and that it "be sold by 'private treaty' in preference to 'sale by auction' owing to conditions in the local market."

The risks of heavy, and perhaps total loss, incident to an attempt to tranship this perishable cargo, were greatly augmented by the possibility, and indeed the probability, that any vessel used for this purpose would be exposed to unusual and protracted delays, as a result of the abnormal conditions prevailing in the shipping trade after the outbreak of the war, of which we think we may properly take judicial notice.

And finally, it is a matter of common knowledge in this jurisdiction that rice is not exported to Europe from the Philippine Islands, and that freight vessels suitable for the transportation of rice to Europe in bulk do not make a practice of lying in Manila Bay, unless previous arrangements have been made for their coming here under charter; so that in the absence of any evidence to the contrary, we are satisfied that if the master of a German vessel, lying in Manila Bay soon after the outbreak of the war, could, by any possibility, have secured the services of such a vessel, he could not reasonably have hoped to do so without the expenditure of considerable time in the effort.

It has been suggested that the danger of loss and damage to this perishable cargo might have been averted had it been transhipped immediately upon the arrival of the Sambia in Manila Bay and before it began to heat and deteriorate in the hold of that vessel.

But aside from any question as to the impracticability of securing a suitable vessel for that purpose immediately after the arrival of the Sambia in Manila Bay, it must not be forgotten that the act of the "King's enemy" which justified and excused her flight from Saigon, necessitated, and therefore justified and excused the retention of the cargo aboard the vessel by the master for such time as might be reasonably necessary to ascertain the facts upon which he could intelligently decide upon the proper course to be pursued thereafter; and that the deterioration of the cargo set in as soon as the vessel came to anchor and adequate ventilation could not longer be provided. It follows that the question which confronted him when the time had arrived for the making of his decision as to the disposition which should be made of the cargo aboard his vessel was whether the interests of the shipper would be consulted by the transshipment of a perishable cargo of ricemeal that had already begun to heat and to deteriorate, or by its sale on the local market for the best price he could get—and we are of opinion that it sufficiently appears that under all the circumstances his duty was to sell rather than to tranship.

Counsel for the cargo owners further contend that the shipowner should be held responsible, at all events, for the deterioration in the value of the cargo, incident to its detention on board the vessel from the date of its arrival in Manila until it was sold.

But it is clear that the master could not be required to act on the very day of his arrival; or before he had a reasonable opportunity to ascertain whether he could hope to carry out his contract and earn his freight; and that he should not be held responsible for a reasonable delay incident to an effort to ascertain the wishes of the freighter, and upon failure to secure prompt advices, to decide for himself as to the course which he should adopt to secure the interests of the absent owner of the property aboard his vessel.

"The master is entitled to delay for such a period as may be reasonable under the circumstances, before deciding on the course he will adopt. He may claim a fair opportunity of carrying out the contract, and earning the freight, whether by repairing or transshipping. Should the repair of the ship be undertaken, it must be proceeded with diligently; and if so done, the freighter will have no ground of complaint, although the consequent delay be a long one, unless, indeed, the cargo is perishable, and likely to be injured by the delay. Where that is the case, it ought to be forwarded, or sold, or given up, as the case may be, without waiting for repairs." (See Carver's Carriage by Sea, 5th ed., sec. 309.)

"A shipowner, or shipmaster (if communication with the shipowner is impossible), will be allowed a reasonable time in which to decide what course he will adopt in such cases as those under discussion; time must be allowed to him, to ascertain the facts, and to balance the conflicting interests involved, of shipowner, cargo owner, underwriters on ship, cargo and freight. But once that time has elapsed, he is bound to act promptly according as he has elected either to repair, or abandon the voyage, or tranship. If he delays, and owing to that delay a perishable cargo suffers damage, the shipowner will be liable for that damage; he cannot escape that obligation by pleading the absence of definite instructions from the owners of the cargo or their underwriters, since he has control of the cargo and is entitled to elect." (Idem, sec. 304a.)

"The other condition of the master's authority to sell is that the owners of the cargo must have been communicated with and their instructions taken before selling, if practicable. Whether that was so must be judged having regard to all the circumstances of the particular case. The master is not to delay for instructions where delay would be clearly imprudent. But if there is a fair expectation of obtaining directions, either from the owners of the goods, or from agents known by the master to have authority to deal with the goods, within such a time as would not be imprudent, the master must make every reasonable endeavor to get those directions; and his authority to sell does not arise until he has failed to get them.

"Should the master fail to seek for instructions when he might get them, or should he act against the instructions

he receives, any sale or hypothecation of the cargo he may make under those circumstances is wrongful and void." (*Idem*, sec. 299.)

It appears that two cablegrams were dispatched by the local agent of the shipowner and of the master, to the duly authorized representative of the cargo owners in Saigon, one on the very day of the arrival of the *Sambia* in Manila Bay, (August 8, 1914) and another a week later, advising him of the situation; that these cables were not delivered presumably because of the interruption of cable communications following the outbreak of war; that later, two letters were forwarded but remained unanswered until after the master had sought and secured judicial authority to sell the cargo—the answer when it was received being a flat refusal on the part of the Saigon representative of the cargo owners to give any instructions or assume any responsibility; that on September 4, 1914, the master of the *Sambia* had a survey made of the cargo, by a qualified marine surveyor, who reported that it "showed signs of heating and being infested with weevils," and recommended that it be sold "in the interests of all concerned;" that a copy of the marine surveyor's report was immediately mailed to the Saigon representative of the cargo owners; that on September 10, 1914, the master, not having been able to get into communication with the cargo owners or their representative in Saigon, sought and secured judicial authority to sell the cargo; and that it was sold under judicial authority granted in accordance with the provisions of local law made and provided in such cases.

It will be seen that thirty-three days elapsed from the date of the arrival of the *Sambia* in Manila Bay, to the date of the master's application for judicial authority to sell the cargo. But having in mind the extraordinary and exceptional conditions existing at that time as a result of the war, with its interruptions of mail and cable communications, its disruption of the markets throughout the world, its development of questions as to whether food supplies should or should not be declared contraband, and its threatening aspects with relation to shipping and commercial enterprises of all kinds throughout the world, we are unable to say that the master devoted an unreasonable length of time to the determination of the problem of the disposition of the cargo with which he was confronted after, his arrival in Manila Bay. On the contrary, we are of opinion that he proceeded with all reasonable dispatch, and did all that could be required of a prudent man to protect the interests of the owner of the cargo aboard his vessel; so that any losses which resulted from the detention of the cargo aboard the *Sambia* must be attributed to the act of the "enemies of the king," which compelled the *Sambia* to flee to a port of refuge, and made necessary the retention of the cargo aboard the vessel at anchor under a tropical sun, and without proper ventilation, until it could be ascertained that the interests of the absent owner would be consulted by the sale of this perishable cargo in the local market.

We come now to consider the various contentions of counsel for the shipowner denying the right of the owners of the cargo to a judgment for all, or some specified part, of the proceeds of the sale of the rice.

The contention that the court below was without jurisdiction of the subject-matter by reason of the provision in the charter party for the settlement of disputes by a reference to arbitration in London, may be disposed of without extended discussion. This objection to the jurisdiction of the court appears for the first time in defendant's brief on appeal. In the court below defendant not only appeared and answered without objecting to the court's Jurisdiction, but sought affirmative relief; and it is very, clear that defendant cannot be permitted to submit the issues raised by the pleadings for adjudication, without objection, and then, when unsuccessful, assail the court's jurisdiction in reliance upon a stipulation in the charter party which the parties were at entire liberty to waive if they so desired. We do not stop therefore to rule upon the contention of opposing counsel, that a contractual stipulation for a general arbitration cannot be invoked to oust our courts of their jurisdiction, under the doctrine announced in the cases of *Wahl and Wahl vs. Donaldson, Sims & Co.* (2 Phil. Rep., 301, 303), and *Cordoba vs. Conde* (2 Phil. Rep., 445, 447); and that this doctrine should be applied in the case at bar, notwithstanding the fact

that the contract was executed in England, in the absence of averment and proof that under the law of England compliance with, or an offer to comply with such a stipulation constitutes a condition precedent to the institution of judicial proceeding for the enforcement of the contract.

The claim advanced on behalf of the shipowner for freight is wholly without merit. Under the terms of the contract of affreightment, the amount of the freight was made payable on delivery of the cargo at the designated port of destination. It is clear then, that under the terms of that instrument freight never became payable. Carrying the cargo from Saigon to Manila was not even a partial performance of a contract to carry it from Saigon to Europe; and even if it could be treated as such, the shipowner would have no claim for freight, in the absence of any agreement, express or implied, to make payment for a partial performance of the contract.

The citation from Carver (section 307) referred to in the decision of the trial court is as follows:

"Should the master relinquish the attempt either to carry on the goods in his own ship or to send them to their destination in another ship, he will thereby wholly abandon any claim for freight in respect to them, unless it has been made payable in advance, or irrespective of delivery. Where freight is only payable on delivery, no part is earned until it is earned completely. So that whether the abandonment of the voyage be due to inability, or prevention of the ship, or to the necessity of selling the goods, either to raise funds for the ship's repairs or in their owner's interest, the shipowner loses the whole freight.

"On the other hand, if the cargo be accepted at the port of refuge under an agreement that delivery there shall be treated as a performance by the shipowner of his contract; or if the owner of the goods, by any act or default, prevents the shipowner from carrying them on to their destination, the whole of the freight becomes at once payable.

"Also sometimes the shipowner becomes entitled, by agreement, on delivery at a port of refuge, to freight in proportion to the part of the voyage which has been accomplished. This subject will be discussed more fully hereafter. Here it is enough to say that no agreement of this kind can arise, by implication, unless the cargo owner has consented to accept the goods under circumstances which left him an option to have them carried on to their destination by the shipowner, in his own or some other vessel.

"Where the vessel has been abandoned at sea by the master and crew, without any intention of returning to her, the freighter is entitled to treat the contract as a abandoned; so that if she be brought into port by salvors, he may claim the goods without becoming liable to pay freight.

"In *The Cito*, the Court of Appeal decided that the ship owner had no claim for freight after the abandonment; but declined to say that that put an end to the contract of affreightment. By the abandonment the shipowners gave the cargo owners a right to elect to treat the contract as at an end. 'We do not decide what would have been the result if, after the ship had been brought in as it was by the salvors, and before the cargo owners had come in and exercised their right to the cargo, the shipowners had given bail for the ship and cargo, and had carried the cargo on.'

The claim of the shipowner for general average cannot be sustained under the provisions of the York-Antwerp Rules of 1890, by reference to which, it was expressly stipulated in the charter party, all such questions should be settled. Rules X and XI, which treat of "Expenses at Port of Refuge, etc.," and "Wages and Maintenance of Crew in Port of Refuge, etc.," provide for general average "When a ship shall have entered a port or place of refuge, or shall have returned to her port or place of loading, in consequence of accident, sacrifice, or other extraordinary circumstances which render that necessary for the common safety * * *;" and an examination of the entire body of these rules discloses that general average is never allowed thereunder unless the loss or damage sought to be made good as general average has been incurred for the "common safety." It is very clear that in fleeing from the port of Saigon and taking refuge in Manila Bay the master of the *Sambia* was not acting for the common safety of the

vessel and her cargo. The French cargo was absolutely secure from danger of seizure or confiscation so long as it remained in the port of Saigon, and there can be no question that the flight of the Sambia was a measure of precaution adopted solely and exclusively for the preservation of the vessel from danger of seizure or capture.

Rule 18 of the York-Antwerp Rules is as follows:

"Except as provided in the foregoing rules, the adjustment shall be drawn up in accordance with the law and practice that would have governed the adjustment had the contract of affreightment not contained the clause to pay general average according to these rules."

If then, any doubt could properly arise as to the meaning and effect of the words "common safety" as used in this body of rules, we would be justified in resolving it in accordance with settled principles of maritime law; and an examination of the authorities discloses a substantial unanimity of opinion as to the general doctrine which provides that claims for contribution in general average must be supported by proof that sacrifices on account of which such claims are submitted were made to avert a common imminent peril, and that extraordinary expenses for which reimbursement is sought, were incurred for the joint benefit of ship and cargo.

The doctrine is discussed at length in numerous decisions of the Supreme Court of the United States, a number of which are cited in the court below, but for our purposes it will be sufficient to insert here a few extracts from two of the leading cases.

In the case of *The Star of Hope vs. Annan* (76 U. S., 203), Justice Clifford, speaking for the court said:

"Such claims have their foundation in equity, and rest upon the doctrine that whatever is sacrificed for the common benefit of the associated interests shall be made good by all the interests which are exposed to the common peril and which were saved from the common danger by the sacrifice. Much is deferred in such an emergency to the judgment and decision of the master; but the authorities, everywhere, agree that three things must concur in order to constitute a valid claim for general average contribution; First, there must be a common danger to which the ship, cargo and crew were all exposed, and that danger must be imminent and apparently inevitable, except by incurring a loss of a portion of the associated interests to save the remainder. Second, there must be the voluntary sacrifice of a part for the benefit of the whole, as, for example, a voluntary jettison or casting" away of some portion of the associated interests for the purpose of avoiding the common peril, or a voluntary transfer of the common peril from the whole to a particular portion of those interests. Third, the attempt so made to avoid the common peril to which all those interests were exposed must be to some practical extent successful, for if nothing is saved there cannot be any such contribution in any case. (*Barnard vs. Adams*, 10 How., 303; *Patten vs. Darling*, 1 Cliff., 262; 2 Pars., Ins., 278.)"

In the case of *Ralli vs. Troop* (157 U. S., 418), Justice Gray, delivering the opinion for the court said:

"The result of the principles above stated, confirmed by the authorities above referred to, may be summed up as follows:

"The law of general average is part of the maritime law, and not of the municipal law, and applies to maritime adventures only.

"To constitute a general average loss, there must be a voluntary sacrifice of part of the maritime adventure, for the purpose, and with the effect of saving the other parts of the adventure from an imminent peril impending over the whole.

"The interests so saved must be the sole object of the sacrifice, and those interests only can be required to contribute to the loss. The safety of property not included in the common adventure can neither be an object of the sacrifice, nor a ground of contribution."

In the opinion just cited there will be found a general historical review of the authorities upon which the foregoing conclusions were avowedly based, and we think we may properly close our discussion of this branch of the case at bar, with the following extracts therefrom:

"In the earliest case in this court, Mr. Justice Story, in delivering judgment, stated the leading limitations and contributions, and recognized by all maritime nations, to justify a general contribution, as follows: 'First, that the ship and cargo should be placed in a common imminent peril; secondly, that there should be a voluntary sacrifice of property to avert that peril; and, thirdly, that by that sacrifice the safety of the other property should be presently and successfully attained.' *Columbian Ins. Co. of Alexandria vs. Ashby and Stribling*, 38 U. S., 330; 13 Pet, 331, 338 (10: 186, 190).

"In the next case which came before this court, Mr. Justice Grier, in delivering judgment, defined these requisites, somewhat more fully, as follows: 'In order to constitute a case of general average, three things must concur: 1st. A common danger, a danger in which ship, cargo and crew all participate; a danger imminent and apparently "inevitable, except by voluntary incurring the loss of a portion of the whole to save the remainder. 2. There must be a voluntary jettison, jactus, or casting away of some portion of the joint concern for the purpose of avoiding this imminent peril, periculi imminentis evitandi causa, or, in other words, a transfer of the peril from the whole to a particular portion of the whole. 3. This attempt to avoid the imminent peril must be successful.'

* * * * *

"Mr. Justice Shee, in a note to *Abbott on Shipping*, after reviewing the statements of many continental writers upon the subject, concludes: 'Upon the whole, it is impossible, consistently with the opinion of Lord Tenterden, and with the doctrine of all the writers on maritime law, whose opinions have not been warped by the exceptional legislation or practice of the countries in which they have written, to recognize a rule respecting ship's expenses more comprehensive than the following one: Expenses voluntarily and successfully incurred, or the necessary consequences of resolutions voluntarily and successfully taken, by a person in charge of a sea adventure, for the safety of life, ship and cargo, under the pressure of a danger of total loss or destruction imminent and common to them, give, the ship being saved, a claim to general average contribution (*Abbott on Shipping* 11th ed., 537, note.) In *Harrison vs. Bank of Australasia*, L. R. 7 Exch., 39, 48, that statement was quoted as laying down the true rule, although there was a difference of opinion as to whether the facts of the case came within it. (See also *Robinson vs. Price*, L. R. 2, Q. B. Div., 91, 94, 295.)"

What has been said disposes of all the real issues raised on this appeal, except the contentions of the parties as to the effect which should be given the so-called penal clause of the charter party which our rulings on plaintiff's prayer for damages make it unnecessary for us to consider or decide.

We conclude that so much of the judgment entered in the court below as provides for the delivery to the plaintiff in this action of the sum of P128,977.71, the net proceeds of the sale of the cargo of rice aboard the *Sambia*, which has been deposited subject to the order of the court below, less any commissions to which the clerk of that court may be lawfully entitled at the date of payment, should be affirmed; but that so much of the judgment as provides for the recovery of damages in the sum of P60,841.32, should be reversed; and further, that so much of the judgment as provides for the payment of legal interest on the net proceeds of the sale of the rice deposited in the court below should be modified by substituting therefor a provision for the delivery to the plaintiff of any interest allowances which may have accumulated thereon, in any bank or other institution, wherein it may have been deposited, at the time when the principal is paid over to the plaintiff. No costs to either party in this instance. So ordered,

Torres, Moreland, Trent, and Araullo, JJ., concur.

RESOLUTION ON MOTION FOR REHEARING.

October 26, 1917.

CARSON, J.:

The motion of counsel for plaintiff to set aside the decision heretofore entered in this case and to grant a rehearing on the appeal is denied.

In so far as the arguments of counsel in support of his motion rest upon grounds heretofore decided adversely to his contentions, we find no sufficient reason for reopening the case.

In so far as the arguments rest upon an alleged unfounded distinction made in the disposition of this case and the case of *Compagnie Franco-Indochinoise vs. Deutsch, Australische Dampschiffs Gesellschaft* (p. 643, post), decided on the same day, we think that a comparison of the two decisions, and a review of the facts and the reasoning set out therein, is sufficient to refute the contentions of counsel in this regard.

It may be worth while, however, to discuss briefly one question that has arisen in this connection.

In one case, wherein we found that the facts disclosed the exercise of reasonable diligence on the part of the shipmaster, we relieved him from responsibility for losses which occurred while his vessel lay in Manila Bay for a period of time reasonably sufficient for the determination of the course which he should pursue in the disposition of his cargo.

In the other case, wherein we held that the shipmaster had not exercised due diligence and had failed to take the necessary measures looking to the disposition of his cargo, we held him and his vessel responsible for all damage to the cargo from the day he arrived in Manila Bay until it was sold.

It has been suggested that to be consistent, we should have relieved the master in the latter case of the loss by deterioration from the time he arrived in Manila Bay to the close of the period which would have been allowed him (had he exercised due diligence) for the determination of the problem of the proper disposition of his cargo.

But no evidence was offered to show what proportion of the loss by deterioration occurred during that period, and in the very nature of things it was and is impracticable to ascertain that fact, or to submit proofs which would sustain a judicial finding in that regard.

Said the Supreme Court of the United States (*Hamilton-Brown Shoe Co. vs. Wolf Bros. & Co.*, 240 U. S., 251, 262) and the Supreme Court of California (*Graham vs. Plate*, 40 Cal., 593, 596) in discussing an analogous situation.

"The difficulty lies in ascertaining what proportion of the profit is due to the trade-mark, and what to the intrinsic value of the commodity; and as this cannot be ascertained with any reasonable certainty, it is more consonant with reason and justice that the owner of the trade-mark should have the whole profit than that he should be deprived of any part of it by the fraudulent act of the defendant. It is the same principle which is applicable to a confusion of goods. If one wrongfully mixes his own goods with those of another, so that they cannot be distinguished and separated, he shall lose the whole, for the reason that the fault is his; and it is but just that he should suffer the loss rather than an innocent party, who in no degree contributed to the wrong."

In the case of *Compagnie Franco-Indochinoise vs. Deutsch, Australische Dampschiffs Gesellschaft* (supra), the wrongdoer could not be heard to contend that the cargo owner should not be permitted to recover any of the losses

due to the shipmaster's lack of diligence, on the ground that a part of those losses would have been incurred even had the master exercised due diligence, it appearing that it was inherently impossible to ascertain what proportion of the loss would have been incurred, in any event, and despite the exercise of the diligence required of the master in the situation in which he found himself.

Arellano, C. J., Torres, Araullo, and Street, JJ., concur.

Johnson, J.:

I reserve my vote.

MALCOLM, M., dissenting:

I dissent. I must confess that my mind fails to follow the three majority decisions in their discussion of "reasonable" or "due diligence" and other interrelated questions.

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