

**COMPAGNIE FRANCO-INDOCHINOISE, PLAINTIIF AND APPELLANT,
VS. DEUTSCH AUSTRALISCHE DAMPSCHIFFS GESELLSCHAFT,
DEFENDANT AND APPELLANT.**

G.R. No. 11169, March 31, 1917

Ponente: CARSON, J.

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CARSON, J.:

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 Franco-Indochinoise, a corporation organized and existing under the laws of the Republic of France, against the Deutsch-Australische Dampschiffs Gesellschaft, a corporation organized and existing under the laws of the Empire of Germany, asking that a receiver be appointed to take possession of the cargo of the German steamship Esslingen, consisting of 126,028 sacks of rice-meal and 600 wooden ventilators, and to dispose of the same and to hold the proceeds thereof subject to the order of the court; and also praying that a judgment be given in favor of the plaintiff and against the defendant for the delivery of the cargo, or for the value thereof, if such delivery cannot be made, and for damages and costs.

"Pursuant to a stipulation of the parties, the court below, on October 16, 1914, appointed as joint receivers in this cause Messrs. H. T. Fox and D. H. Jacoby to take possession of the cargo of the Esslingen, consisting of 116,808 sacks of white rice-meal, 9,220 sacks of cargo-meal, and 600 wooden ventilators, and to sell and dispose of the same, and to hold and deposit the proceeds of such sale subject to the further order of the court.

"The defendant, by its answer, admitted that the plaintiff is a corporation organized and existing under the laws of the Republic of France, and is represented in the Philippine Islands and the city of Manila by Mr. Paul Emile Nestor Colas; that the defendant is a corporation organized and existing under the laws of the Empire of Germany, and is represented in the Philippine Islands, in the city of Manila, by Behn, Meyer & Company (Limited), and by Captain Sparmann, master of the steamship Esslingen, then in the port of Manila.

"The defendant also admitted by its answer the allegations of the plaintiff that on the 9th day of June, 1914, in the city of Paris, France, plaintiff and defendant executed in writing a contract of charter party whereby defendant undertook that the German steamship Esslingen should proceed to the port of Saigon, in the French colony of Indo-China, and there load a cargo of rice-meal, belonging to plaintiff, not exceeding seven thousand tons.

"On January 22, 1915, the parties signed and filed a statement of facts as follows:

" 'It is stipulated and agreed by the parties in the above action through their respective attorneys that the following are the facts in this action in addition to those admitted by the pleading, viz:

" '1. That the contract of the charter party referred to in paragraph 2 of the complaint and paragraph 2 of the answer is as is shown by the copy thereof hereto attached, marked Exhibit A, which is made a part of this stipulation.

" '2. That the steamship Esslingen is and at all times herein mentioned has been a steamship owned by the defendant and registered in Germany, sailing under the German flag; that on the first day of August, 1914, the said steamship was in the French port of Saigon engaged in loading a cargo of rice-meal belonging to plaintiff, in accordance with the terms of the charter party Exhibit A hereto attached; that on or before the said first day of August the master of the said steamship received telegraphic instructions from the defendant to proceed to the port of Manila in the Philippine Islands and there await further orders, the instructions being given on account of the threatening aspect of war between Germany and France; that on the said first day of August the master of the said steamship delivered to plaintiff a letter, a copy of which is hereto attached, marked Exhibit B and is made a part of this stipulation; that on the same day the plaintiff delivered to the master of the said steamship a letter in answer to the said Exhibit B, a copy of which marked Exhibit C is attached hereto and made a part of this stipulation; that the said steamship remained in the port of Saigon and continued to load said cargo and completed the loading of the same on or before the 4th day of August, 1914; that on the same fourth day of August the said steamship left the port of Saigon for the port of Manila, pursuant to the aforesaid instructions from the owners; that plaintiff at the time of the departure of the said steamship from Saigon had full knowledge of the intention of her master to proceed to Manila, plaintiff's agents in Saigon being also the defendant's agents, and at the instance of the master, plaintiff through its agents, secured a bill of health and other necessary clearance papers for the voyage of the steamship to Manila; that war between the Republic of France and Empire of Germany began on the third day of August, 1914, and has continued from that date to the present time; that neither the master of the said steamship nor any other representative thereof or any other person sought to obtain from the French authorities at the port of Saigon a laissez passer or clearance, or other permission to proceed from Saigon to the ports of Liverpool, England, and Hamburg, Germany, or either of them, and that at the time of said steamship's leaving Saigon for Manila it was understood between the plaintiff and the defendant that the steamship should proceed only to Hamburg and the port of Liverpool was to be left out; that if the said steamship was justified in seeking refuge in a neutral port under the conditions existing, Manila was a reasonable and proper port of refuge; and that the rice-meal and cargo-meal constituting the cargo of the said steamship is a food product used principally for animals.

" '3. That the said steamship arrived at the port of Manila from Saigon in due time and has since remained and still remains in the said port of Manila; that the said cargo if delivered at its destination, Hamburg, as contemplated by the charter party, Exhibit A, would have been worth at such place at least its value at the time and place of embarkation, plus the freight from Saigon to Hamburg.

" '4. That on the 14th day of September, 1914, and at other times thereafter up to the time of filing of the complaint herein, plaintiff demanded delivery of the cargo of the said steamship from the master, and that defendant's agent has at all times been willing to deliver said cargo upon deposit in cash of the full amount for freight from Saigon to destination as stated in the charter party, amounting to nearly P70,000, Philippine currency, and has refused to deliver said cargo except upon the making of such deposit, and that plaintiff has at all times refused to deposit the freight charges as aforesaid; that the cash deposit was required in order to insure the payment of whatever freight might be found due upon adjustment under the terms of the charter party.

" '5. That the receivers appointed by this court in this action have taken possession of the cargo of said steamship and have sold the same for P61,154.58; that in making such sale the receivers, have necessarily incurred expenses as will be shown by their report, and are entitled to fees which may be fixed by the court for their services; that the net proceeds of the sale of the cargo to be determined by the deduction from the aforesaid gross proceeds and the expenses and fees of the receivers is the true and fair value of the cargo of the said steamship in the port of Manila.

" '6. It is further stipulated that without the introduction of testimony the judgment of the court may be entered upon the questions of law arising from the foregoing stipulation and the pleadings in the above entitled action.

"On the same day, by stipulation of the parties, the defendant filed an additional and supplemental answer,

alleging substantially as follows: (1) That since the arrival of the steamship Esslingen in Manila Bay, it had been unable to resume its voyage or to leave this port of refuge on account of conditions following the declaration of war and now existing, and that the plaintiff and defendant had incurred costs and expenses on account of coming into and remaining in this port of refuge as itemized in the answer, aggregating the sum of P26,116.98; (2) that the receivers of the cargo of the steamship Esslingen had sold the cargo for the sum of P61,154.58, and that defendant claimed a lien for the amount of costs and expenses as set forth in paragraph 1 against the proceeds of the sale of the cargo, and prayed that the lien be determined by way of adjustment of liability through general average of all entities interested in the adventure as evidenced by the charter party, a copy of which was attached to and made a part of the supplemental answer, and that such general average should be determined under the York-Antwerp Rules as provided in the charter party; (3) that the whole of the expenses and costs incurred by the defendant as set forth in paragraph 1 of the supplemental answer was still due from plaintiff to defendant by way of general average charges against the cargo of the steamship, of which cargo plaintiff alleged itself to be the owner; (4) that the steamship Esslingen was still unable to resume its voyage under the charter party owing to the conditions of war which still existed and that the defendant was unable to state when such voyage could be resumed, and that other and further expenses and costs would be incurred by the plaintiff in addition to those set forth, which will be a charge against the cargo to the plaintiff as the alleged owner thereof by way of general average, and the amount of such future and additional costs and expenses the defendant was then unable to state; (5) that there was justly due and owing from plaintiff to defendant for freight on the cargo of the Esslingen the sum of P68,376.04 in accordance with the terms of the contract between the plaintiff and defendant as appears in the charter party, no part of which freight had been paid or assured in any way; that this amount constitutes a lien upon the cargo and the product of the sale thereof by way of general average between all the entities in the adventure undertaken in accordance with the terms of the charter party, and that the general average between the parties had not yet been adjusted.

"The defendant prayed that judgment be entered against the plaintiff for the sum of P94,493.02 with legal interest thereon, and that such sum be declared a lien upon the proceeds of the sale of the cargo as made by the receivers theretofore appointed.

"Thereafter, on February 13, 1915, the defendant filed a motion to strike out that portion of paragraph 6 of the stipulation of facts made by counsel for both parties under date of January 22, 1915, which states that without the introduction of testimony judgment may be entered and that the defendant be allowed to present evidence in relation to past and future expenses as alleged in defendant's additional and supplemental answer which was filed by stipulation of the parties.

"This motion to strike out a portion of the agreed statement of facts was overruled by the court below on the ground that the court had no power or authority to strike out any part of an agreed statement of facts on the motion of one party without the consent of the other; but the court permitted the defendant to present evidence in relation to past and future expenses as alleged in defendant's additional and supplemental answer for the reason that the court was of opinion that there was no basis for the rendition of judgment upon the allegations of the answer without the taking of evidence or the filing of an additional agreed statement of facts.

"The evidence introduced upon the additional and supplemental answer was substantially as follows:

"It was stipulated that the amount of the freight to which reference is made in the stipulation of facts as about P70,000 is the amount of P68,376.04.

"Captain Sparmann, master of the steamship Esslingen, testified over the objection of the plaintiff, as to which the ruling of the court was reserved, that since coming to Manila he had incurred expenses in the maintenance of the crew and of the vessel itself, as shown by Exhibit A, which is a statement of expenses amounting to P49,501.87 incurred from the time the ship put in at Manila Bay up to the 15th of April, 1915; the total of Exhibit B for wages being the first item in Exhibit A, Captain Sparmann claimed a lien on the ship's cargo on account of these expenses. He said that it would be impossible for the ship to leave Manila harbor during the

European war, and that future expenses would be incurred for which a lien was also claimed.

"Exhibits A and B were offered in evidence against the objection of the plaintiff that they tend to prove general average expenses, although the pleadings and the stipulation of facts show that no general average had been claimed and no lien for general average had been claimed by the defendant; and, as plaintiff insisted, the general average could in no event be charged against the cargo after demand was made for the delivery of the cargo, and in no event could charges be attributed to the cargo after it was actually disposed of.

"Upon consideration of all the facts in evidence and of the arguments of counsel, the authorities cited and other authorities, pertinent to the question at issue in this cause, the trial court set forth the following conclusions as to the law:

" '1. That the court has jurisdiction of the parties and of the subject-matter in this action.

" '2. 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 Hamburg or Liverpool, 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

" '3. That the freight on the cargo having been made payable on delivery at Hamburg or Liverpool, and the transportation of the cargo having been abandoned by defendant at Manila, no part of the freight was earned without such delivery, in the absence of an agreement that the shipowner 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.)

" '4 That the fear of the owners and master of the seizure or capture of the said steamship Esslingen 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 Hamburg or Liverpool, or for the failure to tranship the same and cause it to be delivered in accordance with the terms of the charter party.

" '5. That the provision in the charter party for the delivery of the cargo at Hamburg and of Liverpool, "or so near thereunto as she may safely get" is no excuse or authority for entering Manila Bay to avoid the seizure or capture of the ship by an enemy of Germany, as that clause 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 obstructions 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.)

" '6. 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 vessels 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. 356, 393; Barnard vs. Adams, 10 How., 270, 303; Philippine Code of Commerce, articles 806, 808, 811 and 812.)

" '7. That inasmuch as the French cargo was absolutely safe in the French port of 'Saigon, and the deviation of the steamship Esslingen from her intended voyage to Hamburg and Liverpool and her entry into Manila Bay were induced by the fear of the captain of the vessel by one of the belligerents at war with Germany, the alleged peril which induced the master of said vessel to come to Manila 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 imperiled, the expenses 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.

" '8. That it was the duty of the defendant under the charter party to transport said cargo to Hamburg or Liverpool in the steamer Esslingen but if, for any reason, the transportation could not be effected in that vessel within a reasonable time, owing to the perishable nature of the cargo, it was the legal duty of the owners of said vessels and of the master thereof to make the shipment in another vessel. (Carver on Carriage of Goods by Sea, sections 304, 305.)

" '9. That the defendant is liable to the plaintiff for the damage caused in not having delivered the said cargo to Hamburg or Liverpool 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 the basis for determining the damages suffered by the plaintiff.

" '10. That since the report of the receivers appointed by this court, upon the agreement of the parties, to sell said cargo at Manila and to hold the proceeds subject to the order of the court, shows that said cargo was sold for the gross sum of P61,154.58, with expense of the sale amounting to P267.89, and the court having allowed the receivers the sum of P3,043.34 for their services in making said sale, there now remains subject to the order of the court the net sum of P57,823.35.

" '11. That it having been alleged in the complaint and admitted in the answer that the value of the cargo at Saigon was the equivalent of P145,600.91, Philippine currency; and it having been agreed in the statement of facts that the value of the cargo in Manila is the price for which it was sold by the receivers, P61,154.58 less the receivers' fees and expenses as above stated, 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 (P145,600.91) and the net proceeds of the sale in Manila (P57,823.35), or P87,777.56; but the court further finds that by paragraph 29 of the charter party the penalty which must be imposed in case of nonperformance of said agreement is the amount of the damages proved, provided same do not exceed the estimated amount of freight which in this case is P68,376.04.

"Therefore, let judgment be entered in this case in favor of the plaintiff and against the defendant for the said sum of fifty-seven thousand eight hundred and twenty-three and 35/100 pesos (P57,823.35) 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 of and from the defendant in this cause the sum of sixty-eight thousand three hundred and seventy-six and 4/100 pesos (P68,376.04) as and for actual damages suffered by the plaintiff by the defendants breach of charter party in evidence, with interest thereon from the date of the filing of the complaint in this case until paid.

"The defendant's cross complaint and counterclaim is hereby dismissed with the costs of this case against the defendant.

"It is so ordered."

Counsel for the defendant-appellant made the following assignment of errors on appeal:

"1. The court erred in finding that it has jurisdiction of the persons and subject-matter of this action.

"2. The court erred in finding that no part of the freight became due until delivery of the cargo at Hamburg or Liverpool and, in the absence of an agreement, that the shipowner would not be entitled to a proportion on delivery at a port of refuge.

"3. The court erred in finding that the fear of the owner and master of the S. S. Esslingen was not the result of

force majeure and was not a legal or sufficient excuse for leaving a French port or for failing to deliver the cargo to the consignee at the ports of delivery or to tranship same and deliver in accordance with the charter party.

"4. The court erred in finding that the provisions of the charter party for the delivery of cargo at Hamburg or Liverpool or so near thereunto as she may safely get was no excuse for entering Manila Bay to avoid capture.

"5. The court erred in finding that the entry of the S. S. Esslingen into Manila Bay to avoid capture was not ground for general average between the steamship/ the cargo and freight.

"6. The trial court erred in finding that the entry of the S. S. Esslingen into Manila Bay was not caused by peril common to both ship and cargo under the York-Antwerp Rules or any other.

"7. The court erred in finding that the defendant was bound to transport the cargo in another vessel if it could not be done by the chartered vessel, when no other vessels were available.

"8. The court erred in finding that the defendant was liable for damages for not having delivered the cargo at Hamburg or Liverpool.

"9. The court erred in finding that the transportation of the cargo had been abandoned at Manila and that no freight having been earned the value of the cargo at Saigon created the basis for the damages suffered by the plaintiff.

"10. The court erred in finding, as set forth in paragraph 10 of its decision, that any sum of money as proceeds of the sale of cargo was subject to the order of the court.

"11. The court erred in finding that the plaintiff was damaged by the acts of the defendant in the sum of the difference between the value of the cargo at Saigon and the net proceeds from the sale thereof in Manila.

"12. The court erred in entering judgment in any sum whatever in favor of the plaintiff and against the defendant before general average had been adjusted between ship, the cargo and freight, as provided by the terms of the charter party.

"13. The court erred in dismissing defendant's cross complaint and counterclaim."

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

"1. The court found that paragraph 29 of the charter party, Exhibit A of the agreed statement of facts, limits defendant's liability for damages to the estimated amount of freight, P68,376.04.

"2. The court ordered judgment for damages in the sum of P68,376.04 instead of P87,777.56."

* * * * *

From a comparison of the foregoing statement of this case with the statement of the case set forth in the opinion just filed in the case of the Sambia (Compagnie de Commerce et de Navigation d'Extreme Orient vs. The Hamburg Amerika Packetfahrt Actien Gessellschaft, (p. 590, ante), it will be seen that the controlling facts in both cases are strikingly similar, with the exception of the facts touching the disposition of the cargoes of the two vessels by their respective masters after they had taken refuge in the port of Manila.

Our rulings upon the various contentions of counsels in the former case may, therefore, be regarded as renewed with relation to like contentions in the case at bar, except only as to the contention that the shipowner should be held liable for the damages suffered by the cargo aboard the Esslingen while the vessel lay in Manila Bay, because of the failure of the master to proceed with reasonable promptness to take proper measures for the disposition of this perishable cargo by sale or otherwise, and because of his refusal to deliver it to its owner when

lawful demand was made therefor.

In the case of the *Sambia* it appeared that the vessel arrived from Saigon in Manila Bay on the 8th of August, 1914; that two telegrams were dispatched by the local agent of the shipowner and of the master, to the duly authorized representative of the cargo owner in Saigon, one on the day of arrival and another a week later, advising him of the situation; that these cablegrams were not delivered presumably because of the interruption of cable communication 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 owner 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 interest of all concerned; 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 the cargo was sold under judicial authority in accordance with the provisions of local law made and provided in such cases.

In the case of the *Esslingen* which arrived in Manila Bay on the 7th of August, 1914, it does not affirmatively appear that the master took any measures whatever looking to the protection of the interests of the cargo owners; and, on the contrary, it appears that although the duly authorized representative of the cargo owner was in Manila, and made demand upon the master for delivery of the cargo on September 14, 1914, "and at other times thereafter, up to the time of the filing of the complaint in this action" on October 15, 1914, the master and the local agent of the shipowner refused to make delivery without a deposit in cash of the full amount of freight charges agreed upon in the charter party, amounting to nearly P70,000, "to insure the payment of whatever freight might be found due upon adjustment under the terms of the charter party;"* that not until the day following the filing of the complaint in this action, praying for damages and the appointment of a receiver to take possession and dispose of the cargo, that is to say not until October 16, 1914, seventy days after the arrival of the vessel in the port of refuge, and then only upon stipulation of counsel in open court, were joint receivers appointed to sell the cargo and to hold and deposit the proceeds subject to the order of the court.

In our opinion in the case of the *Sambia* we discussed at some length the duty and the liability of the master and the shipowner as to the disposition of her cargo after the vessel had taken refuge in Manila Bay, and we held, substantially, that the master had complied with the duty resting upon him, in the absence of the owner of the cargo, to sell this perishable cargo which had been intrusted to him under a contract of affreightment which he found himself unable to execute; and that we could not say, from the facts disclosed by the record, that he had taken an unreasonable time in deciding upon the course he finally adopted, so as to charge the shipowner with damages resulting from the deterioration of the cargo while on board the vessel in Manila Bay.

In the case at bar, however, we think that under the doctrine laid down in the case of the *Sambia*, the master, and therefore the shipowner, must be held responsible for the damage suffered by the cargo aboard the *Esslingen* while it lay in Manila Bay. Not only did he fail and neglect to take any measures looking to the sale of the cargo, but he actually refused to deliver this perishable cargo to its owner upon demand, after it had lain in the hold of the vessel for about five weeks, unless the cargo owner would comply with his wholly unjustifiable requirement of a deposit of P70,000 cash, on account of freight to -which he had not the shadow of a lawful claim; and he persisted in that refusal until legal proceedings were instituted after the perishable cargo had lain in the hold of the vessel for more than two months under the rays of a tropical sun, and as was admitted in argument, without adequate ventilation, it being impossible to secure such ventilation while the vessel lay at anchor.

In the light of these facts, it would seem to be unnecessary to add anything to what was said in our former opinion

in order to sustain our ruling in the case at bar, but it may not be amiss to insert here the following citations from Carver's Carriage of Goods by Sea, 5th ed., which set forth the doctrine and the grounds upon which it rests in the clearest and most explicit terms:

"309. 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 transhipping. (See *The Blenheim* [1885] 54 L. J., Adm. 81; 10 P. D., 167; 5 Asp. M. C., 522.) 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 the repairs, or proper steps, if such are possible, taken to prevent the cargo suffering by the delay. Any failure on the part of the shipowner or master to perform his duty in these respects will be ground for an action by the owner of the cargo. (*Hansen vs. Dunn* [1906], 11 Com. Ca., 100; 22 T. L. R., 458.)

"304. 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 cargo or their underwriters, since he has control of the cargo and is entitled to elect. Thus, in *Hansen vs. Dunn* ([1906] 11 Com. Ca., 100; 22 T. L. R., 458) the shipowner was held liable for damage suffered by a cargo of maize, which he had kept in the ship's hold during an unreasonable delay in electing what course he should adopt. 'If instead of promptly transhipping, he preferred to negotiate for that to which he was not entitled, a pro mta freight on discharge of the maize at Cape Town, he had no right in order to obtain that advantage to keep the goods meanwhile where he knew that they were daily suffering damage and might thereby become unmerchantable. If he wished, for his own advantage, to delay action, it could only be done, in common fairness, by his incurring the expense involved in his doing his best for the goods by discharging them out of *The Closeburn's* hold.' (*Kennedy, J.*, 11 Com. Ca., at p. 105.)"

It is impossible, however, in the condition of the record brought here on appeal, to determine the amount of the deterioration and consequent loss in value of the cargo which should be attributed to its detention on board the *Esslingen* in Manila Bay. The value of the cargo in Saigon was admittedly 307,214.44 francs or P145,600.91, and its "true and fair value" in the condition in which it was found at the time when it was sold in Manila was expressly agreed to be the net proceeds of the sale, that is to say, P57,823.35; but how much of this heavy loss in value was due to the deterioration in the quality of the cargo while it lay in the hold of the vessel in Manila Bay, we are unable to determine from the agreed statement of facts upon which the case was submitted. There is no stipulation as to what this cargo of ricemeal would have brought had it been thrown on the market in Manila in the condition in which it was when it was brought into Manila Bay, and before it began to deteriorate as a result of its detention on board the vessel, nor is there a stipulation as to the market value in Manila of a similar cargo of rice-meal in good condition at the time when the damaged cargo was sold. We are unable to say, therefore, how much of the loss should be attributed to deterioration in quality; and how much should be attributed to a difference in values between the undamaged cargo of rice-meal in Saigon and a like cargo of undamaged rice-meal in Manila Bay. In the absence of any evidence of record on which to base a finding as to what the cargo would have brought had it not deteriorated in Manila Bay, we are wholly unable to fix the damages for which the shipowner should be held responsible, unless we assume without proof a value to be set on undamaged rice-meal in Manila which neither party included or intended to include in the agreed statement of facts upon which the case

was submitted for adjudication. Under our rulings in the *Sambia* case, the owners of the *Esslingen* are not liable for losses resulting from the flight of that vessel from Saigon and the carrying of the cargo to Manila; so that if the undamaged cargo was worth less in Manila Bay than in the port of Saigon, the loss must be borne by the cargo owner. As we have already indicated, the measure of the damages for which the shipowner can be held responsible is the amount of the deterioration of the cargo in Manila Bay, he being held responsible therefor, because of the master's failure to take prompt measures looking to the sale of this perishable cargo; and because of his wholly unjustifiable refusal to turn it over to its owners, on demand, after the voyage contemplated in the charter party had been abandoned.

Since we must reverse so much of the judgment entered in the court below as allows damages in the sum of P57,823.35 for the alleged breach of the contract to transport the cargo from Saigon to Dunkirk or Hamburg, and are unable from the agreed statement of facts to fix the amount of the damages which should be allowed because of the failure of the master, after arriving in Manila Bay, to turn over the cargo to its owners and "to take such measures in the interests of the shipper as might reasonably be required of a prudent man under the existing conditions," we are of opinion that a new trial should be allowed on this branch of the case.

Since we would not hesitate, upon the record now before us, to fix the amount of the damages suffered by the shipper as a result of the deterioration of the cargo in Manila Bay at the difference between the proceeds of the sale of the damaged cargo and the amount which could have been gotten for such a cargo of rice-meal in an undamaged condition in Manila Bay at the time when the damaged cargo was sold, if this latter amount could be determined from the record, it will make for the convenience of the parties and an early termination of this litigation, to limit the scope of the inquiry on the new trial to the determination of this latter amount, judgment to be entered, thereafter, in conformity with the doctrine of liability herein announced.

We conclude that so much of the judgment entered in the court below as provides for the delivery to the plaintiff of the sum of P57,823.35, the net proceeds of the sale of the cargo of the *Esslingen* now on deposit subject to the order of the court below, less commissions of the clerk of that court, but free and clear of all liens, claims or charges asserted by the defendant in this cause should be affirmed; but that so much thereof as provides for the recovery of P68,376.04, with interest, as and for actual damages suffered by the plaintiff by the defendant's breach of the charter party, should be reversed; and that so much thereof as provides for the recovery of the legal interest upon the amount of the proceeds of the sale of the cargo should be modified by substituting therefor a provision for the recovery of any interest allowances which may have accumulated in any bank or other institution wherein the said net proceeds of the sale of the cargo may have been deposited subject to the order of the court, and thus modified should be affirmed; and that the record should be returned to the court wherein it originated with instructions to grant a new trial, wherein the inquiry will be limited to the determination of the amount which could have been gotten for the cargo taken on board in Saigon, if such cargo had been offered for sale in an undamaged condition in Manila Bay at the time when the damaged cargo was sold, judgment to be entered, thereafter, in conformity with the doctrine of liability hereinbefore announced, without costs in both instances. So ordered.

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

C O N C U R R I N G

MORELAND, J.,

I should prefer to determine the case here and now upon the theory that the, value of the rice as stipulated was the value accepted and acted upon by all parties throughout the case as the basis for the computation of damages, was accepted and acted upon by the court as the basis of its judgment, and that no party has, on this appeal, questioned its correctness in the slightest way. Moreover, it is well-known as a matter of commercial history that the value of rice in Saigon never differs very seriously from the value in Manila.

The majority of the court believing, however, that the case should be returned, I do not dissent.

Judgment modified and case remanded for further proceedings.

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