

ED. A. KELLER & CO. (LTD.), PLAINTIFF AND APPELLEE, VS. ELLERMAN & BUCKNALL STEAMSHIP CO. (LTD.) AND THE INSULAR COLLECTOR OF CUSTOMS, DEFENDANTS. ELLERMAN & BUCKNALL STEAMSHIP ...

G.R. No. 12308. August 28, 1918

Ponente: MALCOLM, J.

Read online (full-text search, related cases, audio case brief): <https://batas.org/library/g-r-no-12308/>

MALCOLM, J.:

The defendant, Ellerman & Bucknall Steamship Co., Ltd., appeals from a judgment of the Court of First Instance of the city of Manila, finding in favor of the plaintiff, Ed. A. Keller & Co., Ltd., and absolving the defendant, Bernard Herstein, Insular Collector of Customs of the Philippine Islands.

Action was begun by complaint of Ed. A. Keller & Co., Ltd., praying judgment against Ellerman & Bucknall Steamship Co., Ltd., for the sum of P3,155.39 (as amended), alleged to be due because of the failure of the defendant company to deliver six cases of goods to the plaintiff. Defendant answered, alleging compliance with its contract by delivery of the goods in question into the custody and control of the Philippine Customs authorities. Later, on motion of plaintiff, Bernard Herstein, the Insular Collector of Customs for the Philippine Islands, was joined as defendant. The Collector of Customs' answer denied all the principal averments of the complaint. After due trial, judgment was rendered by the Honorable Richard Campbell, judge of first instance, decreeing that the plaintiff, Ed. A. Keller & Co., Ltd., have and recover from the defendant, Ellerman & Bucknall Steamship Co., Ltd., the sum of P2,205.39 with interest thereon since April 24, 1915, together with the costs of the action. It was further decreed that the complaint be dismissed as against the defendant, Bernard Herstein, the Collector of Customs for the Philippine Islands, without costs.

Appellant's five Assignments of error relate principally to the facts, incidentally concern a question of evidence relative to the failure of plaintiff to object to a certain question, and finally impugn the action of the trial court in rejecting the defendant's offer in evidence of the original record in criminal case No. 12920 (*The United States vs. Tan Tiap Co et al.*[1]). We proceed first to set forth the facts as disclosed by the proof and as found by the trial court.

Regarding certain points there is no dispute. Thus, it is agreed that the six cases of goods in question were delivered at New York, U. S. A., to the defendant, Ellerman & Bucknall Steamship Co., Ltd., for transportation to Manila, in pursuance of its business as a common carrier. Further, the plaintiff admits that it has received two cases of the six cases of merchandise. And, finally, the value of the goods is admitted by defendant to be as alleged in the complaint.

The bill of lading constituted the contract of shipment. It provided in part that:

"In accordance with the regulations of the Philippine Customs Service, cargo is to be conveyed by the ship's agents, at consignees' risk and expense, from the steamer to the customs house wharf, and there delivered into the

custody of the United States Customs House, for account of the consignee, and such delivery shall constitute a full discharge of the carrier's obligation under this bill of lading, etc., etc."

The crucial question to decide, therefore, is whether or not the defendant and appellant made a delivery of the four cases of merchandise to the customs authorities at the port of Manila or to the plaintiff.

Upon the defendant steamship company rests the burden of proof to establish actual delivery of the cases of merchandise called for in the bill of lading to the customs authorities at the port of Manila, or to the plaintiff. As there is not the slightest intimation that the plaintiff has received the cases, the onus is on the defendant to account for the goods. (See 10 Corpus Juris, 372; sec. 297, Code of Civil Procedure; art. 1214, Civil Code; Nicolas vs. Guerrero [1912], 23 Phil., 178; Ortiz and De Rotaeché vs. Melliza [1912], 22 Phil., 133; Belen vs. Belen [1909], 13 Phil., 202; De Guzman vs. Balarag [1908], 11 Phil., 503; Insular Government vs. Behn, Meyer & Co. (Ltd.) [1916], 35 Phil., 281.) Defendant having to assume this burden, the question thus recurs to ascertaining if defendant has by proof, direct or circumstantial, shown delivery at the port of Manila.

The only direct proof had to do with the two cases which plaintiff admits having received. The surveyor of the port, from the customs records, corroborated by the discharge records, testified that only these two cases were landed at the customs pier. In addition, the defendant steamship company presented evidence intended to show by circumstances that it had landed the goods, and that if the said goods were not delivered to the plaintiff, it was because the same had been stolen from the pier after delivery to the customs authorities. The court, however, found that, while there was no doubt as to theft of merchandise similar to that in question in this case having occurred from the customs authorities at the port of Manila after delivery by steamship companies to them, the defendant steamship company had wholly failed to establish that the goods in question were delivered to the customs authorities at the port of Manila or that this merchandise had been stolen. Moreover, as evidence for the plaintiff tending to break the chain of circumstances relied upon by the defense, there can be mentioned the following: The short landing by the Steamship Kalomo of a large number of cases and packages; the overlanding at the customs piers of some 55 packages and cases destined for consignees in Singapore, Hongkong, and Shanghai; and failure to identify the four cases involved in this suit as the four cases which had been stolen from the customs piers. Can we therefore say that the Ellerman & Bucknall Steamship Co., Ltd., has sustained its defense by a fair preponderance of the evidence? Are we warranted in asserting that the findings of fact by the trial court are plainly and manifestly against the proof?

This brings us to a more specific, consideration of the point above-mentioned, having to do with the contention of the defendant that the loss of the plaintiff's goods was due not to short landing but to the theft of the property by customs employees conspiring with an employee of the plaintiff. Appellant says that this has been proved by the statement of one of the customs employees, a participant in the crime, introduced without objection on the part of the plaintiff. In this connection, it is to be noted that this statement was made to M. J. Toomey, a member of the Manila police force during the course of an investigation of the theft of goods from the customs house preliminary to criminal prosecution in the case of The United States vs. Tan Tiap Co. Carlos Lopena, who made the statement, was not presented as a witness, but the attempt was made to introduce it through the testimony of Toomey in the instant civil action. Turning to the record, we discover that while the attorney for the plaintiff appears not to have objected to the particular question having to do with this statement, he had previously and did thereafter object to questions of the same tenor.

We find no fault with the principle announced by this Court in *Abrenica vs. Gonda and De Gracia* ([1916], 34 Phil., 739), to the effect that an objection to the admission of evidence must be made at the proper time and if not so made it will be understood to have been waived. Professional vigilance is the price of success. But this proposition has various corollaries. For example, a single objection to a class of evidence when first offered and

an exception to an erroneous ruling admitting it is sufficient, and neither the objection nor the exception is waived by failure constantly to repeat them when subsequent offers of the same class of evidence are made. (Salt Lake City vs. Smith [1900], 104 Fed., 457.) The court may treat the objection as a continuing one. It is unnecessary when the objection has once been distinctly made further to vex the court with useless objections and exceptions. (See People vs. Melvane [1870], 39 Cal., 614; People vs. Mullings [1890], 83 Cal., 138; Diamond Coal Co. vs. Cook et al. [1900], 61 Pac, 578; McCormick vs. State [1916], 186 S. W., 95; Cathey vs. Missouri K. & T. Ry. Co. [1911], 104 Tex., 39; Dilleber vs. Home Life Ins. Co. [1877], 69 N. Y., 256; Cohen and Cohen vs. Benguet Commercial Co., Ltd. [1916], 34 Phil., 526.) We believe that in accordance with these rules seasonable objection and exception was made to the introduction of a class of hearsay testimony as incompetent. The objections made by the counsel for the plaintiff seem to have been understood by the court as applying to each question. Since no one was misled this should be sufficient.

There is another view which can be taken of this question. Let us ask ourselves if the statement of Lopena was relevant. The rule is that facts may be established by evidence thereof given on a former trial, provided the court is satisfied: (1) That the party against whom the evidence is offered, or his privy, was a party on the former trial; (2) that the issue is substantially the same in the two cases; (3) that the witness who proposes to testify to the former evidence is able to state it with satisfactory correctness ; and (4) that a sufficient reason is shown why the original witness is not produced.. (16 Cyc, 1088.) But where these conditions are not present, a court is justified in not receiving the evidence. To admit such incompetent and hearsay evidence "would be contrary to the first principles of justice."

Appellant's second assignment of error concerns the subject just discussed, but in larger form, namely—the action of the court in rejecting defendant's offer in evidence of the record in case No. 12920 (The United States vs. Tan Tiap Co). The decision of the Supreme Court in this case, found reported in 35 Phil., 611, relates to the theft of cases of cotton fabrics imported by the firm Forbes, Munn & Co. from Europe on the British steamer Middleham Castle.

A judgment of conviction in a criminal proceeding cannot be admitted in evidence in a civil action. The parties and the issues are not the same. It is an axiom of the law that no man shall be affected by proceedings to which he is a stranger. In the old case of Jones vs. White (1 Strange, 67), quoted approvingly by the United States Supreme Court, it was said: "if a verdict be given in evidence, it must be between the same parties; and therefore an indictment, which is at the suit of the King, cannot be read in an action which is at the suit of the party." There is want of mutuality—of mutual estoppel. Among many authorities, a decision of the Supreme Court of the United States on a Philippine appeal, establishes these propositions. (Chantangco vs. Abaroa [1910], 218 U. S., 476, 481.) A record in a criminal case may be admitted by way of inducement, or to show a collateral fact, but may not be admitted where the party has had no right to control in some degree the proceedings and to appeal from the judgment.

The plaintiff herein took no part in the criminal case. The plaintiff could not control the trial in the criminal prosecution in any degree. The issues of the two cases were different. The alleged theft of the cargo with which the plaintiff was concerned was not directly involved in the criminal case. That there was theft of goods from the customs piers as disclosed in one instance is not proof that there was theft of goods in another instance.

To sum up, we hold that the defendant steamship company has not proved, in accordance with the terms of its contract with plaintiff, the delivery of four cases of merchandise into the custody of the Philippine Customs authorities. We further hold that the defendant steamship company has not proved negligence and consequent liability on the part of the defendant, Bernard Herstein, as Insular Collector of Customs.

Judgment must be affirmed with costs against appellant. Following the provisions of section 510 of the Code of Civil Procedure, as construed in *Lim Tuico vs. Cu-Unjieng* ([1912], 21 Phil., 493), there shall be added interest at the rate of 6 per cent per annum on the principal sum and the interest due thereon from the date of the judgment to the date of the final judgment of this Court. So ordered.

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

Johnson, J., concurs in the result.

[1] ([1916], 35 Phil., 611.)

ABOUT BATAS.ORG

Study smarter at BATAS.org

The Philippine bar review and law-school companion built around how your brain actually remembers.

The complete Philippine law library - free for everyone.

More than 100,000 Supreme Court decisions, Republic Acts, and executive issuances - full-text searchable, browsable by category and year, and always free. No paywall, no login. This PDF came from it.

Audio case-brief lectures.

Any decision becomes a podcast-style lecture - facts, issues, ruling, and doctrine - with read-along highlighting and a hands-free presentation mode. Study while commuting, working out, or resting your eyes.

Bar review built on the science of memory.

Complete, sequenced courses for all eight bar subjects, narrated like podcasts and reinforced with retrieval practice and spaced review - the study techniques with the strongest evidence behind them.

The full law-school curriculum.

One subscription unlocks the entire J.D. curriculum - every subject, every lesson, with your progress tracked down to the paragraph so you can pick up exactly where you left off, on any device.

Mock exams that tell you where you stand.

Timed multiple-choice exams graded instantly, with per-subject score breakdowns and focus suggestions that point you at your weakest topics first.

A study planner that keeps you on pace.

Set your schedule and BATAS tells you every day whether you are on track for bar day - and exactly which lesson to take next.

Start free at <https://batas.org>

The law library is free forever - and your first lesson is one click away.

The text of this document is an official public record and remains in the public domain. Formatting, presentation, and compilation © 2026 batas.org.

Downloaded free from the batas.org Law Library. Share it freely - the library is free for every law student, bar reviewee, and practitioner.