

STANDARD OIL COMPANY OF NEW YORK, PLAINTIFF AND APPELLEE, VS. MANUEL LOPEZ CASTELO, DEFENDANT AND APPELLANT.*G. R. No. 13695. October 18, 1921*

Ponente: STREET, J.

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By contract of charter dated February 8, 1915, Manuel Lopez Castelo, as owner, let the small interisland steamer Batangueno for the term of one year to Jose Lim Chumbuque for use in the conveying of cargo between certain ports of the Philippine Islands. In this contract it was stipulated that the officers and crew of the Batangueno should be supplied by the owner, and that the charterer should have no other control over the captain, pilot, and engineers than to specify the voyages that they should make and to require the owner to discipline or relieve them as soon as possible in case they should fail to perform the duties respectively assigned to them.

While the boat was being thus used by the charterer in the interisland trade, the Standard Oil Company delivered to the agent of the boat in Manila a quantity of petroleum to be conveyed to the port of Casiguran, in the Province of Sorsogon. For this consignment a bill of lading of the usual form was delivered, with the stipulation that freight should be paid at the destination. Said bill of lading contained no provision with respect to the storage of the petroleum, but it was in fact placed upon the deck of the ship and not in the hold.

While the boat was on her way to the port mentioned, and off the western coast of Sorsogon, a violent typhoon passed over that region, and while the storm was at its height the captain was compelled for the safety of all to jettison the entire consignment of petroleum consisting of two hundred cases. When the storm abated the ship made port, and thirteen cases of the petroleum were recovered, but the remainder was wholly lost.

To recover the value of the petroleum thus jettisoned but not recovered, the present action was instituted by the Standard Oil Company against the owner of the ship in the Court of First Instance of Manila, where judgment was rendered in favor of the plaintiff. From this judgment the defendant appealed.

No question is made upon the point that the captain exercised proper discretion in casting this petroleum overboard, as a step necessary to the salvation of the ship; and in fact it appears that even after the vessel was thus eased, she was with difficulty prevented from capsizing, so great was the intensity of the storm.

The first question for discussion is whether the loss of this petroleum was a general average loss or a particular loss to be borne solely by the owner of the cargo. Upon this point it will be observed that the cargo was carried upon deck; and it is a general rule, both under the Spanish Commercial Code and under the doctrines prevailing in the courts of admiralty of England and America, as well as in other countries, that ordinarily the loss of cargo carried on deck shall not be considered a general average loss. This is clearly expressed in Rule I of the YorkAntwerp Rules, as follows: "No jettison of deck cargo shall be made good as general average." The reason for this rule is found in the fact that deck cargo is in an extra-hazardous position and, if on a sailing vessel, its presence is likely to obstruct the free action of the crew in managing the ship. Moreover, especially in the case of

small vessels, it renders the boat top-heavy and thus may have to be cast overboard sooner than would be necessary if it were in the hold; and naturally it is always the first cargo to go over in case of emergency. Indeed, in subsection 1 of article 815 of the Code of Commerce, it is expressly declared that deck cargo shall be cast overboard before cargo stowed in the hold.

But this rule, denying deck cargo the right to contribution by way of general average in case of jettison, was first made in the days of sailing vessels; and with the advent of the steamship as the principal conveyer of cargo by sea, it has been felt that the reason for the rule has become less weighty, especially with reference to coastwise trade; and it is now generally held that jettisoned goods carried on deck, according to the custom of trade, by steam vessels navigating coastwise and inland waters, are entitled to contribution as a general average loss (24 R. C. L., 1419).

Recognition is given to this idea in two different articles in the Spanish Code of Commerce. In the first it is in effect declared that, if the marine ordinances allow cargo to be laden on deck in coastwise navigation, the damages suffered by such merchandise shall not be dealt with as particular average (art. 809 [3], Comm. Code); and in the other it is stated that merchandise laden on the upper deck of the vessel shall contribute in the general average if it should be saved; but that there shall be no right to indemnity if it should be lost by reason of being jettisoned for the general safety, except when the marine ordinances allow its shipment in this manner in coastwise navigation (art. 855, Comra, Code).

The Marine Regulations now in force in these Islands contain provisions recognizing the right of vessels engaged in the interisland trade to carry deck cargo; and express provision is made as to the manner in which it shall be bestowed and protected from the elements (Phil. Mar. Reg. [1913], par. 23). Indeed, there is one commodity, namely, gasoline, which from its inflammable nature is not permitted to be carried in the hold of any passenger vessel, though it may be carried on the deck if certain precautions are taken. There is no express provision declaring that petroleum shall be carried on deck in any case; but having regard to its inflammable nature and the known practices of the interisland boats, it cannot be denied that this commodity also, as well as gasoline, may be lawfully carried on deck in our coastwise trade.

The reason for adopting a more liberal rule with respect to deck cargo on vessels used in the coastwise trade than upon those used for ordinary ocean borne traffic is to be found of course in the circumstance that in the coastwise trade the boats are small and voyages are short, with the result that the coasting vessel can use more circumspection about the condition of the weather at the time of departure; and if threatening weather arises, she can often reach a port of safety before disaster overtakes her. Another consideration is that the coastwise trade must as a matter of public policy be encouraged, and domestic traffic must be permitted under such conditions as are practically possible, even if not altogether ideal.

From what has been said it is evident that the loss of this petroleum is a general and not a special average, with the result that the plaintiff is entitled to recover in some way and from somebody an amount bearing such proportion to its total loss as the value of both the ship and the saved cargo bears to the value of the ship and entire cargo before the jettison was effected. Who is the person, or persons, who are liable to make good this loss, and what are the conditions under which the action can be maintained?

That the owner of the ship is a person to whom the plaintiff in this case may immediately look for reimbursement to the extent above stated is deducible not only from the general doctrines of admiralty jurisprudence but from the provisions of the Code of Commerce applicable to the case. It is universally recognized that the captain is primarily the representative of the owner; and article 586 of the Code of Commerce expressly declares that both the owner of the vessel and the naviero, or charterer, shall be civilly liable for the acts of the master. In this

connection, it may be noted that there is a discrepancy between the meaning of *naviero*, in article 586 of the Code of Commerce, where the word is used in contradistinction to the term "owner of the vessel" (*propietario*), and in article 587 where it is used alone, and apparently in a sense broad enough to include the owner. Fundamentally the word "*naviero*" must be understood to refer to the person undertaking the voyage, who in one case may be the owner and in another the charterer. But this is not vital to the present discussion. The real point to which we direct attention is that, by the express provision of the Code, the owner of the vessel is civilly liable for the acts of the captain; and he can only escape from this civil liability by abandoning his property in the ship and any freight that he may have earned on the voyage (arts. 587, 588, Code of Comm.).

Now, by article 852 of the Code of Commerce the captain is required to initiate the proceedings for the adjustment, liquidation, and distribution of any gross average to which the circumstances of the voyage may have given origin; and it is therefore his duty to take the proper steps to protect any shipper whose goods may have been jettisoned for the general safety. In ordinary practice this, we suppose, would be primarily accomplished by requiring the consignees of other cargo, as a condition precedent to the delivery of their goods to them, to give a sufficient bond to respond for their proportion of the general average. But it is not necessary here to inquire into details. It is sufficient to say that the captain is required to take the necessary steps to effect the adjustment, liquidation, and distribution of the general average. In the case before us the captain of the vessel did not take those steps; and we are of the opinion that the failure of the captain to take those steps gave rise to a liability for which the owner of the ship must answer.

But it is said—and the entire defense seems to be planted upon this proposition—that the liquidation of the general average is, under article 852 and related provisions, a condition precedent to the liability of the defendant, and that at any rate the defendant, as owner of the ship, should only be held liable for his proportion of the general average. It is also suggested that if the plaintiff has any right of action at all upon the state of facts here presented, it is against the captain, who has been delinquent in performing the duty which the law imposes on him.

This argument involves, we think, a misconception of the true import of the provisions relating to the adjustment and liquidation of general average. Clearly, for one thing, those provisions are intended to supply the shipowner, acting of course in the person of the captain, with a means whereby he may escape bearing the entire burden of the loss and may distribute it among all the persons who ought to participate in sharing it; but the making of the liquidation is not a condition precedent to the liability of the shipowner to the shipper whose property has been jettisoned.

It is true that if the captain does not comply with the article relating to the adjustment, liquidation, and distribution of the general average, the next article (852) gives to those concerned—whether shipowner (*naviero*) or shipper—the right to maintain an action against the captain for indemnification for the loss; but the recognition of this right of action does not by any means involve the suppression of the right of action which is elsewhere recognized in the shipper against the ship's owner. The shipper may in our opinion go at once upon the owner and the latter, if so minded, may have his recourse for indemnization against his captain.

In considering the question now before us it is important to remember that the owner of the ship ordinarily has vastly more capital embarked upon a voyage than has any individual shipper of cargo. Moreover, the owner of the ship, in the person of the captain, has complete and exclusive control of the crew and of the navigation of the ship, as well as of the disposition of the cargo at the end of the voyage. It is therefore proper that any person whose property may have been cast overboard by order of the captain should have a right of action directly against the ship's owner for the breach of any duty which the law may have imposed on the captain with respect to such cargo. To adopt the interpretation of the law for which the appellant contends would place the shipowner in a position to escape all responsibility for a general average of this character by means of the delinquency of his own

captain. This cannot be permitted. The evident intention of the Code, taken in all of its provisions, is to place the primary liability upon the person who has actual control over the conduct of the voyage and who has most capital embarked in the venture, namely, the owner of the ship, leaving him to obtain recourse, as it is very easy to do, from other individuals who have been drawn into the venture as shippers.

It results that the plaintiff is entitled to recover in this action; and the only additional point to be inquired into is the amount that should be awarded. In this connection it appears that the total value of the jettisoned cargo, belonging partly to the plaintiff and partly to another shipper, was P880.35, of which P719.95 represented the value of the plaintiff's petroleum. Upon the apportionment of this total loss among the different interests involved, to wit, value of ship, value of cargo, and the earned but lost freight, it appears that the amount of the loss apportionable to the plaintiff is P11.28. Deducting this from the value of the petroleum, we have as a result, the amount of P708.67, which is the amount for which judgment should be given.

Accordingly, modifying the judgment appealed from to this extent, we affirm the same, with costs. So ordered.

Johnson, and Villamor, JJ., concur.

Mapa, C. J., concurs in the result.

ARAUULLO, J., with whom concurs AVANCENA, J., dissenting:

As the loss of the petroleum shipped by the plaintiff company on board the vessel Batangueno, which belongs to the defendant, constitutes gross average and, as the latter, being, according to the law, an agent, all of which is admitted in the foregoing decision, the provisions applicable to the case and which should be taken into consideration in deciding the appeal before this court are those of various articles in sections 1 of title 4, and sections 1, 2, and 3, of title 5, of Book 3 of the Code of Commerce.

Article 811 defines gross or general averages as damages and expenses which are deliberately caused in order to save the vessel, her cargo, or both at the same time, from a real and known risk, and particularly, such as goods jettisoned to lighten the vessel, whether they belong to the vessel, to the cargo, or to the crew, and the damage suffered through said act by the goods on board; the damage caused to the vessel by scuttling or entering her hold in order to save the cargo; and the expenses of the liquidation of the average. Article 812 provides that in order to satisfy the amount of the gross or general average, all persons having an interest in the vessel and cargo at the time of the occurrence of the average shall contribute. Article 846 provides that the persons interested in the proof and liquidation of averages may mutually agree and bind themselves at any time with regard to the liability, liquidation and payment thereof, and that, in the absence of agreements, the proof of the average shall take place in the port where the repairs are made, should any be necessary, or in the port of unloading; that the liquidation shall take place in the port of unloading should it be a Spanish port (now Filipino); that should the average have occurred outside of the jurisdictional waters of the Philippines or should the cargo have been sold in a foreign port by reason of the arrival of the vessel under stress in said port, liquidation shall be made in the port of arrival; and, finally, if the average should have occurred near the port of destination, And that port is made, the proceedings for the proof and liquidation above-metioned shall be had there.

Article 847 provides that when the liquidation of the averages is made privately by virtue of agreement, as well as when a judicial authority takes part therein at the request of any of the parties interested who do not agree thereto, all of them shall be cited and heard, should they not have renounced this right; that should they not be present or not have a legitimate representative, the liquidation shall be made by the consul in said port, and where there is none, by the judge or court of competent jurisdiction, according to the laws of the country, and for the account of the proper person; and, finally, desiring to furnish all possible means to effect the liquidation, the legislator

provides in the last part of said article that, when the representative is a person well-known in the place where the liquidation takes place, his intervention shall be admitted and will produce legal effect, even though he be authorized only by a letter of the shipowner, freighter, or underwriter; and as to general or gross averages, he lays down concrete and conclusive rules in articles 853, 854, and 858, with respect to the form and mode in which the experts appointed by the interested parties or by the court shall fulfill their duties, as to the examination of the vessel, the repairs and the appraisal of their cost, as well as to the appraisal of the goods which are to contribute to the gross average and those which constitute the average, likewise providing in article 857 that, after the appraisal by the experts of the goods saved, lost, and those which constitute the gross average, and after the repairs have been made to the vessel, should any be necessary, and in such case, after the approval of the accounts by the persons interested or by the court, the entire record shall be turned over to the liquidator appointed, in order that he may proceed with the pro rata distribution of the average among the contributing values, after fixing the amount mentioned in said article of the contributing capital: (1) By the value of the cargo, according to the rules established in article 854; (2) by the value of the vessel in her actual condition, according to a statement of experts; (3) by 50 per cent of the amount of the freight, deducting the remaining 50 per cent for wages and maintenance of the crew.

Lastly, in relation to said provisions, article 851 authorizes the captain to proceed privately, upon the agreement of the parties interested, in the adjustment, liquidation, and distribution of the gross average, and for this purpose, it is his duty to call, within forty hours following the arrival of the vessel at the port, the persons interested in order that they may decide whether the adjustment or liquidation of the gross average is to be made by experts and liquidators appointed by themselves, in which case this shall be done should the persons interested agree, and said article also provides that should an agreement not be possible, the captain shall apply to the judge or court of competent jurisdiction, who shall be the one of the port where the proceedings are to be held in accordance with the provisions of the Code of Commerce, to the consul of Spain (now of the United States), should there be one, or otherwise to the local authority when the proceedings are to be held in a foreign port. And finally, the next article, 852, says: "If the captain should not comply with the provisions contained in the foregoing article, the shipowner or agent or the freighters shall demand the liquidation, without prejudice to the action they may bring to demand indemnity from him."

It is therefore beyond question that the action of the plaintiff to recover indemnity for the damages which it claims to have suffered by reason of the failure of the captain of the vessel *Batangueno* to proceed with the liquidation and distribution of the gross average in which it was a contributor, and by reason of his act in delivering to the other shippers their respective goods, without first requiring them to give bond, should have been brought not against the shipowner or agent, who is the defendant in this case, but against the captain himself of the vessel *Batangueno*.

Although in the preceding decision it is clearly recognized that the captain should have begun the proceedings for the adjustment, liquidation, and distribution of the gross average in question, and that it was his duty to take the proper steps to protect any shipper whose goods may have been jettisoned for the common security, it is also stated that in ordinary practice this is supposed to be complied with by requiring the consignees of the other cargoes, as a condition precedent to the delivery thereof, to give a sufficient bond to answer proportionally for the gross average, and, lastly, that the failure of the captain to take the necessary steps to effect the adjustment, liquidation, and distribution of said average gave rise to the responsibility which should be enforced against the defendant shipowner, against whom the shipper may immediately institute his action, the former having in turn, if he so desires, the right to bring suit against the captain. The majority opinion attempts to support the last proposition and invokes articles 586, 587, and 588.

First of all, according to articles 866, 867, and 888 of the same Code, a bond should be required of the shippers by the captain after the liquidation is already approved, if the contributors should fail to pay the amount of the quota by the third day after having been required to do so, and before delivering to them the goods saved,— the captain having the right, upon failure to give the bond, to delay the delivery of the goods until the shippers pay their part of the gross average corresponding to each of them—and not before proceeding with the liquidation, for the simple reason that the amount of the bojid may only be fixed after the determination of the amount which each of the shippers may be obliged to contribute to the payment of the average, and this is so clear and evident that in article 867 the captain is authorized to attach the goods saved until the shippers should pay the amount, if they should fail to do so by the third day after demand upon them. And since the captain may require bond, he may delay the delivery of the goods saved to the shippers until they make the payment. In the case at bar, no step having as yet been taken for the adjustment and liquidation of the gross average in question, the fact that the captain of the Batangueno delivered the respective cargoes of the other shippers without previously requiring a bond, can not constitute the basis for making the captain responsible, much less the owner of the vessel, as the trial court has erroneously held in the judgment appealed from and as this court is given to understand in referring to said filing of the bond as a prerequisite to the delivery of the cargo. This is because the time was not opportune when the captain should and could exact the bond and the law neither requires such bond to be filed before proceeding with the liquidation, inasmuch as the shipowner or agent, as well as the shippers, being interested in proceeding with the liquidation, the Code authorizes them, first, to demand it from the captain and later to institute the action corresponding to them against him to recover indemnity if he should not comply with the provisions upon the subject, that is, if he should fail to effect the liquidation, or if, in lieu thereof, he should deliver the respective cargoes to the shippers or permit them to dispose of the same, in which case the responsibility may be fixed upon the captain and not upon the agent upon this ground, and for not requiring the shippers to give said bond.

In the second place, although it is true that the captain is, as stated in the decision, primarily the representative of the shipowner or agent, it cannot in all cases, as the decision gives us to understand, be deduced that the shipowner must be civilly responsible for all the acts of the captain.

The Code of Commerce clearly and positively specifies the cases in which such responsibility is demandable from the agent or shipowner, and the cases in which he is not responsible, the responsibility attaching only to the captain. These cases can not be confused in view of the clear and positive provisions of said Code, in relation to the method adopted in the exposition thereof and following the order of the subjects contained in this law.

Articles 586, 587, and 588, invoked in the decision in question in order to maintain that theory, are found in title 2 of Book 3 of said Code which treats of the persons who intervene in maritime commerce, that is, as may be seen in sections 1, 2, and 3 thereof, the shipowners and agents, the captains and masters of vessels and the officers and crew thereof, respectively. Articles 806 to 818 and 846 to 849, and consequently, article 852, invoked in said decision and which refer to the gross or general average and to the simple or particular average, are found in titles 4 and 5 of the same Book 3 which, respectively, deal with the risks, damages, and accidents of maritime commerce and with the proof and liquidation of the averages; and they contain all the provisions of the law relative to said subjects and to the rights and obligations which arise from the averages.

There is no relation whatever between said articles 586, 587, and 588, invoked in the decision, and those which treat of averages. The first of said articles establishes the civil responsibility of the shipowner and agent for the acts of the captain and the obligations incurred by the latter for the repair, equipment, and provisioning of the vessel. The second, that is, article 587, establishes the same responsibility of the agent for indemnities, in favor of third persons, which may arise from the conduct of the captain in the care of the goods which the vessel may carry, from which he may exempt himself by abandoning the vessel with all her equipment and the freight he may

have earned during the voyage. In the present case it is not the conduct of the captain in the care of the goods which has given rise to the right to exact the corresponding civil responsibility, but, according to article 862, the failure of the captain to comply with the provisions of article 851, with respect to the adjustment, liquidation, and distribution of the gross average and the failure to attend to the claims which the agent or the shippers may or should have made, inasmuch as said article 852 clearly so declares, in referring to the agent or the shippers in the following words: "Without prejudice to the action they may bring to demand indemnity from him." The care of the goods to which article 857 refers consists in the placing of the goods in the proper and adequate place for their transportation and due preservation during the voyage, in such manner that they may not suffer damages or deterioration nor be taken away, for, according to article 618, which bears some relation to said article 587, the captain is civilly responsible to the agent and the latter to third persons, who may have contracted with him, for all damages which may have occurred to the vessel and the cargoes due to lack of skill or to negligence on his part and for the subtraction or theft committed by the crew, reserving his right to proceed against the guilty parties; and, according to article 619, he shall be liable for the cargo from the time it is turned over to him at the deck or afloat alongside the vessel at the port of loading until he delivers it on the shore or on the discharging wharf of the port of unloading, unless the contrary has been expressly agreed upon; and, finally, according to No. 5 of the same article 618, he shall be liable for those damages arising from an undue use of the powers and nonfulfillment of the obligations which are his in accordance with articles 610 and 612, one of which, the fifth mentioned in the last article, is to remain constantly on board the vessel during the time the freight is taken on board and carefully watch the stowage thereof, which acts, as is well-known, constitute the means for the effective custody of the goods which may be shipped on board.

In the present case, if the consignees or owners of the cargo on board the vessel Batangueno took away with them their respective cargoes or disposed of them upon arriving at port, after part thereof, which included the petroleum boxes belonging to the plaintiff, had been jettisoned, it was not because the captain of said vessel had not fulfilled his duty with respect to the care of the cargo, but because he did not proceed in accordance with the provision of article 851 already cited, in the adjustment, liquidation, and distribution of the gross average caused by that accident, and did not, as he should have done, according to article 852, require the liquidation either of the agent or the shippers. Therefore to them alone, including the plaintiff, and not to the conduct of the captain in the custody of the cargo, is the fact attributable that the shippers were able to carry away and dispose of the cargo saved upon the arrival of the vessel at port.

The third of said articles, that is, 588, cited also in the same decision, far from making the shipowner or the agent responsible for the obligations incurred by the captain, exempts them from all responsibility, if the captain should have exceeded the powers and privileges which are his by reason of his position or have been conferred upon him by the former, excepting the case, which bears no relation whatever to that in question, in which the amounts claimed were made use of for the benefit of the vessel.

Lastly, although this point has not been touched at all in the decision now under discussion, according to article 618, No. 5, the captain shall be civilly liable to the agent, and the latter to third persons with whom he may have contracted, for the damages arising from an undue use of his powers and the nonfulfillment of his obligations, but it adds that such liability shall be "in accordance with articles 610 and 612." These articles, as may be seen, refer to the powers and obligations inherent in the position of captain with respect to the appointment, contract, and command of the crew, direction of the vessel to the port of destination, the imposition of punishments for crimes committed on board, contracts for the charter of the vessel, its preservation and repair, the supplying of books of navigation, and others, which are mentioned in said last article, the equipping of the vessel and the receiving of the cargo, etc., among which obligations there is none which bears the slightest relation to those which the same Code imposes upon the captain with respect to the adjustment, liquidation, and distribution of the gross average.

On the other hand, in the various sections of title 4 of Book 3, and in section 1 of title 5, the Code, in treating of the risks, damages, and accidents of maritime commerce, specifically indicates the cases in which the responsibility of the captain is enforcible, those in which that of the agent or shipowner is demandable and those in which that responsibility is joint among them, as well as those cases in which no responsibility may be demanded of the agent or shipowner but only of the captain.

In effect, article 841 of section 3 of said title 4 provides that if the wreck or stranding should arise through the malice, or lack of skill of the captain, or because the vessel put to sea insufficiently repaired and prepared, the captain shall be responsible for the indemnification of damages caused to the vessel or the cargo by the accident, which liability may be demanded by the agent or the shippers; but there is in said section no provision whatever by which the agent or shipowner is made responsible.

In article 826 of section 3 of the same title, which deals with collisions, it is provided that the agent of the vessel at fault shall indemnify the losses and damages suffered, after an expert appraisal, if a vessel should collide with another through the fault, negligence, or lack of skill of the captain, sailing mate, or any other member of the complement, and, according to article 831, if a vessel should be forced to collide with another by a third vessel, the agent of the third vessel shall indemnify for the losses and damages caused, the captain being civilly liable to said agent, this liability being understood to be limited to the value of the vessel with all equipment and freight earned.

In treating of arrivals under stress, section 2 of the same title, in article 821, declares that when such arrival is not legitimate, the agent and the captain shall be jointly liable for the expenses incurred.

In treating averages, article 809, No. 8, in section 1 of the same title, which includes, in simple averages, the damage suffered by the vessel or cargo by reason of an impact or collision with another, declares that if the accident occurred through the fault or negligence of the captain, he shall be responsible for all the damages caused, and in No. 9 of the same article, that the owner of the cargo who is injured as a result of the fault, negligence, or barratry of the captain or the crew may demand indemnity from the captain, the vessel and freight, a rule which is based upon No. 1 of article 618, already mentioned, according to which the captain shall be civilly responsible to the agent and the latter to the third persons, for all damages suffered by the vessel and its cargo by reason of the want of skill or negligence on his part, a provision which, as is well known, cannot refer to the case in which the owners of the cargo, having the right to demand the adjustment, liquidation, and distribution of the gross average, upon the arrival of the vessel at port, should dispose of the cargo saved. Such case, as already stated, is the subject of the express and positive provisions of articles 851 and 852, in relation to articles 866, 867, and 868, included in section 2 of the same title, as is shown by the fact that the first of said articles declares that the captain is responsible to the owners of the goods averaged for the losses they may have suffered through his delay or negligence in collecting the amount of the contribution after the liquidation is approved, and by the fact that the last of said articles, that is, 868, declares that the captain may exact from the shippers a bond sufficient to answer for the amount corresponding to the gross average for the purpose of delaying the delivery to them of the goods saved until they pay said amount.

It is by these special provisions and not by the general provisions contained in sections 1, 2, and 3, of title 2, of Book 3 of said Code, that we must be governed when dealing with the risks, damages, and accidents of maritime commerce; and gross average being among them, then, for the failure of the captain of the vessel *Batangueno* to comply with the provisions relating to the adjustment, liquidation, and distribution, the defendant owner of the vessel can not and should not be made liable, but only the captain, for article 852, already cited, is clear and positive to the effect that in said case the agent or the shippers shall demand of the captain the liquidation and may exercise against him the action to recover the proper indemnity, a provision which excludes in such case all

responsibility of the agent or owner of the vessel, for the reason that, the latter being, according to the same article, one of those who, jointly with the shippers, may ask the captain for the liquidation and institute against him the corresponding action for indemnification, it would be absurd to pretend and maintain that the shippers may also institute the same action against the agent or owner of the vessel, in this manner converting him from plaintiff into defendant. But, as if it is still possible to put under discussion and interpret so clear and positive a provision as that of said article 852, and those related to it which, as has already been mentioned, are also of the same character, it is argued in the decision of this court that as "the owner of the ship ordinarily has vastly more capital embarked upon a voyage than has any individual shipper of cargo, and moreover, as the owner of the ship, in the person of the captain, has complete and exclusive control of the crew and of the navigation of the ship, as well as of the disposition of the cargo at the end of the voyage, the evident intention of the Code, taken in all of its provisions, is to place the primary liability upon * * * the owner of the ship, leaving him to obtain recourse, as it is very easy to do, from other individuals who have been drawn into the venture `bas shippers, for, to adopt another interpretation of the law would place the shipowner in a position to escape all responsibility for a general average of this character by means of the delinquency of his own captain. And it is therefore proper that any person whose property may have been cast overboard by order of the captain should have a right of action directly against the ship's owner for the breach of any duty which the law may have imposed on the captain with respect to such cargo."

Such reasoning, however, is not convincing. In the first place, it is not true that the average in question was occasioned by the fault of the captain of the vessel Batangueno, for on this point there is no evidence in the record, but because of the necessity of throwing overboard part of the cargo of said vessel to save it from the danger then threatening it; secondly, the purpose of the adjustment and liquidation of the gross average is to secure contribution from the parties interested in the vessel and cargo existing at the time of the occurrence thereof in order to pay the amount of such average (art. 812, Code of Commerce), for which purpose article 858 defines the procedure for the distribution of the value of the average, stating that there must be taken into consideration, as already stated by us, when we were discussing this article, the contributing capital determined by the value of the cargo, that of the vessel in her actual condition and the percentage of the amount of the freight reduced by 50 per cent for wages and maintenance of the crew, and further declaring that after the determination of the amount of the average, it shall be distributed pro rata among the contributing values and then paid to the proper parties, after the persons interested therein, that is, the agent or owner of the vessel and the shippers have consented thereto, or in default thereof, after the liquidation is duly approved; and, lastly, as repeatedly stated by us, according to the same articles, the owner of the vessel, or the agent, is also one of the interested parties and coparticipants in the adjudication of the average and its pro rata distribution among the contributing values. From what has just been said it results that no purpose is served by considering whether or not he has put in the voyage or undertaking a capital greater than that of any individual shipper for the purpose of making him principally liable, that is compelling him to pay to the shippers what each of the latter as well as he himself has the right to be paid for in proportion to the amount of the respective capital fixed according to the rules already stated in the distribution of the average. This is because, however great the value of the vessel may be, there cannot be conceded to the shippers in the adjudication a greater value than that corresponding to them in the adjudication and distribution of the average, according to the capital determined by the value of the cargo of each, in conformity with the rules established in article 854 for the assessment of the same cargo and of the goods which have to contribute to said average, nor can there be conceded to the owner of the vessel a value greater than that which may correspond to him in said adjudication and distribution, based upon the value of the vessel in its actual condition, according to a statement of experts and the rules for assessment thereof found in Nos. 6 and 7 of said article 854, from which it is necessarily inferred that it is notoriously unjust,—because the law does not authorize it and it would be a violation of its positive provisions—to compel the owner of the vessel, by the mere fact of having

put a greater capital in the undertaking, to pay to the shippers the quota which corresponds to each of them which, in this case, according to the majority opinion, is that which should correspond, without a previous liquidation, to the plaintiff, Standard Oil Company, saving to him, however, the right afterwards to bring action or proceed against the other shippers, as expressed in the same decision.' In short, it would amount to absolutely ignoring the provisions of the law, which are so clear, express, and positive with respect not only to the adjustment, liquidation, and distribution of the gross average, but also to the procedure for effecting the same and the rights and obligations of those who should contribute to the average. And it is very clear that error has been committed, because in the same decision, two paragraphs before that in which the theory already discussed is made, it is stated that there has been "a misconception of the true import of the provisions relating to the adjustment and liquidation of general average," in arguing that the right of action should be "against the captain, who has been delinquent in performing the duty which the law imposes on him," for "clearly," says the same decision, "those provisions are intended to supply the shipowner, acting of course in the person of the captain, with a means whereby he may escape bearing the entire burden of the loss and may distribute it among all the persons who ought to participate in sharing it; but the making of the liquidation is not a condition precedent to the liability of the shipowner to the shipper whose property has been jettisoned."

As is clearly seen, what has just been stated gives us to understand that the owner of the vessel must suffer all the loss in case of gross average, and that the provisions relating to the adjustment, liquidation, and distribution thereof are for the purpose of furnishing him the means for evading and enabling himself to distribute it between the persons who should participate in the average. This is erroneous, because these provisions, which intentionally are extensively mentioned in this opinion, do not have that object, for the reason that the shipowner is not the person who should suffer all the loss in case of gross average, but it should be partitioned and distributed between the shipowner or agent and the shippers, in proportion to their interests and the respective value of the cargo and vessel, which should be fixed according to article 850 and the rules for their assessment, stated in article 854 previously cited, after the liquidation and approval thereof, and after hearing the interested parties or their representatives; and all of these proceedings would surely be useless and unnecessary if the shipowner or the agent should have to suffer all loss but may afterwards distribute it among those participants therein, or, what is the same thing, if he should be compelled by law to pay the total value of the average and then partition it among the shippers or owners of the cargo, as is maintained in said decision. And there is no doubt that this is what is maintained in the decision, as the basis of the pronouncements made therein, because, as already stated, in the paragraph now under discussion, it is clearly stated that the liquidation is not a condition precedent to the enforcement of the liability of the shipowner to the shipper, whose goods may have been jettisoned. And this is not what the law says just as it does not say that the shipowner shall be liable to the shipper or owner of the goods, but that, on the contrary, it says that the shipowner or agent as well as the shippers may demand liquidation from the captain and institute against him the corresponding action to recover indemnity, that is, that he has the same right as the shippers to demand liquidation from the captain and, in default thereof, to recover indemnification, from which it is clearly inferred that the liquidation is a condition precedent, not to the liability of the shipowner to the shipper whose goods may have been jettisoned, as stated in the decision in question, but to the partition which must be made between the agent or shipowner and the shippers of the respective amount of the average. This partition, and not that the shipowner should suffer all loss but may afterwards evade and distribute it among all persons who should share in the average, is the real interpretation of the provisions to which reference is made in the same decision.

Neither is it true that, as stated in said decision, the shipowner has, through the captain, the complete and exclusive control of the crew and the sailing of the vessel, as well as of the destination of the cargo at the end of the voyage, and that, for this reason, the principal liability for the payment of the gross average must fall upon the

shipowner.

That he does not have the complete and exclusive control of the crew is shown, among other provisions of the same Code of Commerce, by the following articles: First, article 610, according to which, among others, it is an inherent power in the captain to appoint or make contracts with the crew in the absence of the agent and to propose said crew if said agent be present, but without any right on the part of the latter to employ any individual against the captain's express refusal. This provision necessarily implies the absolute power of the captain to take on and contract the crew, and article 634 confirms it, according to which the captain may make up his crew with the number he may consider advisable, taking on resident foreigners, in the absence of nationals, their number not to exceed one-fifth of the total crew, and may even, with the consent of the consul or marine authorities, complete his crew with foreigners in foreign ports if he should not find sufficient number of nationals, the captain being obliged to execute the contract with said members of the crew and others who compose the complement of the vessel; and finally, article 637 which empowers the captain, for sufficient cause, to discharge a sailor during the time of his contract and to refuse, before setting out on a voyage without giving any reason whatever, to permit a sailor he may have engaged from going on board, in which case he will be obliged to pay him his wages as if he had rendered services, this indemnity to be paid from the funds of the vessel only if the captain had acted for reasons of prudence and in the interests of safety and good service of the vessel; but, should this not be the case, says said article, it shall be paid by the captain personally. And, if in all that has just been stated the captain may act independently, it is obvious that the owner of the vessel or the agent does not have, through the captain, complete and exclusive control of the crew. In short, the captain directly exercises exclusively personal powers with respect to the crew and, for this reason, he is personally and particularly responsible for his acts, except in the only case already mentioned, in which he may have acted for the benefit of the vessel.

Another power inherent in the position of captain, according to article 610, is that of directing the vessel to the port of its destination, according to the instructions he may have received from the agent, but from this it cannot be inferred that the shipowner or agent has, through the captain, complete and exclusive control of the navigation of the vessel, for the simple reason that the captain may not obey said instructions and may act freely adjusting his decisions according to the circumstances of each case, as would occur in the case of risks/ damages, and accidents which we have previously discussed, cases in which the law imposes upon the captain the obligations to which titles 4 and 5 of Book 3 refer and indicates those cases which we have heretofore minutely discussed, in some of which he is personally responsible, in others the agent or shipowner, or the latter jointly with the captain, and still in others, in which the agent is not responsible but only the captain.

Nor is it true that the shipowner, through the captain, has the complete and exclusive control of the destination of the cargo at the end of the voyage, for article 619 says textually that the captain shall be liable for the cargo from the time it is turned over to him at the dock, or afloat alongside the ship, at the port of loading, until he delivers it on the shore or on the discharging wharf, of the port of unloading, unless the contrary has been expressly agreed upon, and that, according to article 620, he is not liable for the damages caused to the vessel or to the cargo by reason of force majeure, and article 625 adds that the captain, under his personal liability, as soon as he arrives at the port of destination, upon obtaining the necessary permission from the health and customs officers and fulfilling the other formalities required by the regulations of the administration, shall turn over the cargo, without any defalcation, to the consignees and, in a proper case, the vessel, rigging, and freights to the agent. And if the captain is personally responsible, according to the clear and positive text of said article, for the delivery of the cargo to the consignees and, of the vessel, rigging, and freight, to the agent or shipowner, it is clear that the latter does not have complete and exclusive control of the destination of the cargo at the end of the voyage, because the obligation to deliver is a personal obligation of the captain, and the agent or shipowner, just as any of the consignees, may demand said liability with respect to the vessel, rigging, and freight from the captain. And that

responsibility of the captain cannot be confused with the provision contained in article 618 of the same Code in favor of the agent, and that of the latter in favor of third persons who may have contracted with him, because in said article 618 are specifically mentioned the cases of responsibility to which the same article refers, and the responsibility of the captain from the moment the cargo is delivered to him until its unloading is specially declared in article 619 and even more particularly in article 625 which says that said responsibility is a personal responsibility of the captain.

It cannot, therefore, be inferred from all the provisions of the Code, that the evident intention thereof is to impose the principal responsibility upon the shipowner, as stated in the decision of the majority; and, if the law is to be complied with, it is useless effort to show its truth, by invoking the general provisions of the Code of Commerce, which govern the relations between the captain and the shipowner or the agent and those of one or the other or both with third persons who may have contracted with either of them, or by invoking those which deal with gross averages, as one of the damages and accidents of maritime commerce, because, in the first, there is no declaration expressly made upon the subject, and, in the second, what is established and declared is precisely the contrary, for the shipowner or agent has, just as the shippers, the right of action against the captain to enforce his responsibility and to be indemnified by him for the damages occasioned to them by reason of the failure of the captain to comply with the obligations imposed upon him by law with respect to the adjustment, liquidation, and distribution of the average, and with respect to the disposition and delivery of the goods saved to the shippers, before the payment by the latter of their aliquot part in the partition of the average, or without their having filed a sufficient bond to answer for the cargo, for the reason that, according to article 619, he is responsible for the cargo from the moment he takes charge thereof at the port of loading until its delivery at the port of unloading and, according to article 625, he is, under his personal liability, obliged to deliver the cargo, without defalcation, to the consignees or shippers and, in the proper case, the vessel, rigging, and freight to the agent upon the arrival at the port of destination. This shows, in relation to the provisions of articles 866 and 868, already cited, that the captain of the vessel should be personally liable to the owners of the goods averaged for the damages which were incurred by them, by reason of his delay or negligence in requiring a bond of the shippers before delivery to them of the goods saved,—this supposing that they are obliged to do so,—instead of proceeding to the adjustment, liquidation, and distribution of the gross average, inasmuch as the purpose of the law is to exact said personal responsibility for the due delivery to the consignees or shippers of the cargo.

The plaintiff, therefore, should have brought said action, if he had any, for the recovery of the amount claimed in the complaint, not against the defendant, owner of the vessel Batangueno, but against the captain thereof, and said defendant cannot and should not be sentenced to pay to the plaintiff the sum stated in the decision of this court which, with some modification as to the amount thereof, affirms the judgment of the trial court; and there is more reason for this assertion because that sum is, according to said decision, what the plaintiff should receive in the partition and distribution of the gross average in question and, yet, it does not appear that the corresponding liquidation, and, consequently, the division and distribution of said average, has already been made, as required by the provisions of the Code of Commerce in the articles mentioned at the beginning.

Regretting that I have to dissent from the respectable opinion of the majority, I am of the opinion, for the reasons above stated, that the judgment" appealed from should be reversed and the defendant should be absolved from the complaint.

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