

**G. MARTINI, LTD., PLAINTIFF AND APPELLEE, VS. MACONDRA Y
& CO. (INC.), DEFENDANT AND APPELLANT.***G.R. No. 13972. July 28, 1919*

Ponente: STREET, J.

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In September of the year 1916, the plaintiff G. Martini, Ltd., arranged with the defendant company, as agents of the Eastern and Australian Steamship Company, for the shipment of two hundred and nineteen cases or packages of chemical products from Manila, Philippine Islands, to Kobe, Japan. The goods were embarked at Manila on the steamship Eastern, and were carried to Kobe on the deck of that ship. Upon arrival at the port of destination it was found that the chemicals comprised in the shipment had suffered damage from the effects of both fresh and' salt water; and the present action was instituted by the plaintiff to recover the amount of the damage thereby occasioned. In the Court of First Instance judgment was rendered in favor of the plaintiffs for the sum of P34,997.56, with interest from March 24, 1917, and costs of the proceeding. From this judgment the defendant appealed.

That the damage was caused by water, either falling in the form of rain or splashing aboard by the action of wind and waves, is unquestionable; and the contention of the plaintiff is that it was the duty of the ship's company to stow this cargo in the hold and not to place it in an exposed position on the open deck. The defense is that by the contract of affreightment the cargo in question was to be carried on deck at the shipper's risk; and attention is directed to the fact that on the face of each bill of lading is clearly stamped with a rubber stencil in conspicuous letters the words "on deck at shipper's risk." In this connection the defendant relies upon paragraph 19 of the several bills of lading issued for transportation of this cargo, which reads as follows:

"19. Goods signed for on this bill of lading as carried on deck are entirely at shipper's risk, whether carried on deck or under hatches, and the steamer is not liable for any loss or damage from any cause whatever."

The plaintiff insists that the agreement was that the cargo in question should be carried in the ordinary manner, that is, in the ship's hold, and that the plaintiff never gave its consent for the goods to be carried on deck. The material facts bearing on this controverted point appear to be these: On September 15, 1916, the plaintiff applied to the defendant for necessary space on the steamship Eastern, and received a shipping order, which constituted authority for the ship's officers to receive the cargo aboard. One part of this document contained a form which, when signed by the mate, would constitute the "mate's receipt" showing that the cargo had been taken on.

Ordinarily the shipper is supposed to produce the mate's receipt to the agents of the ship's company, who thereupon issue the bill of lading to the shipper. When, however, the shipper, as not infrequently happens, desires to procure the bill of lading before he obtains the mate's receipt, it is customary for him to enter into a written obligation, binding himself, among other things, to abide by the terms of the mate's receipt. In the present instance the mate's receipt did not come to the plaintiff's hand until Monday night, but as the plaintiff was desirous of obtaining the bills of lading on the Saturday morning preceding in order that he might negotiate them at the bank,

a request was made for the delivery of the bills of lading on that day. To effectuate this, the plaintiff was required to enter into the written obligation, calling itself a "letter of guarantee," which was introduced in evidence as Exhibit D-C. This document is of the date of September 16, 1916, and of the following tenor:

"In consideration of your signing us clean B/L for the undermentioned cargo per above steamer to be shipped on or under deck at ship's option, for Kobe without production of the mate's receipt, we hereby guarantee to hold you free from any responsibility by your doing so, and for any expense should the whole or part of the cargo be shut out, or otherwise, and to hand you said mate's receipt as soon as it reaches us and to abide by all clauses and notations on same."

In conformity with the purpose of this document the bills of lading were issued, and the negotiable copies were, upon the same day, negotiated at the bank by the plaintiff for 90 per cent of the invoice value of the goods. As already stated these bills of lading contained on their face, conspicuously stenciled, the words "on deck at shipper's risks." The mate's receipt, received by the plaintiff two days later, also bore the notation "on deck at shipper's risk," written with pencil, and evidently by the officer who took the cargo on board and signed the receipt.

The plaintiff insists that it had at no time agreed for the cargo to be carried on deck; and G. Martini, manager of Martini & Company, says that the first intimation he had of this was when, at about 4 p. m. on that Saturday afternoon, he examined the nonnegotiable copies of the bills of lading, which had been retained by the house, and discovered the words "on deck at shipper's risk" stamped thereon. Martini says that upon seeing this, he at once called the attention of S. Codina thereto, the latter being an employee of the house whose duty it was to attend to all shipments of merchandise and who in fact had had entire control of all matters relating to the shipping of this cargo. Codina pretends that up to the time when Martini directed his attention to the fact, he himself was unaware that the cargo was being stowed on deck; and, upon the discovery of this fact the two gentlemen mentioned expressed mutual surprise and dissatisfaction. Martini says that he told Codina to protest at once to Macondray & Company over the telephone, while Martini himself proceeded to endite a letter, which appears in evidence as Exhibit D-T of the defendant and is in its material part as follows:

"MANILA, September 16, 1916.

"MESSRS. MACONDRAY & CO.,

"Manila,

"DEAR SIRS : In re our shipment per steamship Eastern, we are very much surprised to see that the remark 'on deck at shipper's risk' has been stamped on the bills of lading Nos. 8 to 23. * * * and although not believing that the same have actually been shipped on deck we must hold you responsible for any consequence, loss, or damage deriving from your action should they have been shipped as stated.

"Yours faithfully,

"G. MARTINI, LTD.

"BY S. CODINA"

This letter was followed by another of the same date and of substantially the same tenor but containing the following additional statement:

"It is the prevailing practice that, whenever a cargo is being carried on deck, shipowners or agents give advice of it to shippers previous to shipment taking place, and obtain their consent to it. If we had been advised of it, shipment would not have been effected by us. We regret very much this occurrence, but you will understand that in view of your having acted in this case on your own responsibility, we shall have to hold you amenable for any consequences that may be caused from your action."

The first of these letters was forthwith dispatched by messenger, and upon receiving it, Macondray & Company called Codina by telephone at about 4.30 p. m. and, referring to the communication just received, told him that Macondray & Company could not accept the Cargo for transportation otherwise than on deck and that if Martini & Company were dissatisfied, the cargo could be discharged from the ship.

There is substantial conformity in the testimony of the two parties with respect to the time of the conversation by telephone and the nature of the message which Macondray & Company intended to convey, though the witnesses differ as to some details and in respect to what occurred immediately thereafter. Basa, who was in charge of the shipping department of Macondray & Company and who conducted the conversation on the part of the latter, says that he told Codina that if Martini & Company .was unwilling for the cargo to be carried on deck that they could discharge it and further advised him that Macondray & Company's empty boats were still at the ship's side ready to receive the cargo. In reply Codina stated that Martini, the manager, was then out and that he would answer in a few minutes, after communication with Martini. Within the course of half an hour Codina called Basa up and said that as the cargo was already stowed on deck, Martini & Company were willing for it to be carried in this way, and that their protest was a mere formality. Codina admits that he was informed by Basa that the cargo could not be carried under the hatches, and that if Martini & Company were dissatisfied to have it carried on deck, they could discharge it. He denies being told that it could be taken off in Macondray & Company's boats. Codina further states that when the conversation was broken off, for the purpose of enabling him to communicate with Martini, he consulted with the latter, and was directed to say that Martini & Company did not consent for the cargo to be carried on deck and that it must be discharged. Upon returning to the telephone, he found that the connection had been broken, and he says that he was thereafter unable to get Macondray & Company by telephone during that afternoon, although he attempted to do so more than once.

In the light of all the evidence the conclusion seems clear enough that, although Martini & Company would have greatly preferred for the cargo to be carried under the hatches, they nevertheless consented for it to go on deck. Codina, if attentive to the interests of his house, must have known from the tenor of the guaranty to which his signature is affixed that the defendant had reserved the right to carry it on deck, and when the bills of lading were delivered to the plaintiff they plainly showed that the cargo would be so carried.

It must therefore be considered that the plaintiff was duly affected with notice as to the manner in which the cargo was shipped. No complaint, however, was made until after the bills of lading had been negotiated at the bank. When the manager of Martini & Company first had his attention drawn to the fact that the cargo was being carried on deck, he called Codina to account, and the latter found it to his interest to feign surprise and pretend that he had been deceived by Macondray & Company. Even then there was time to stop the shipment, but Martini & Company failed to give the necessary instructions, thereby manifesting acquiescence in the accomplished fact.

In a later letter of October 25, 1916, addressed to Macondray & Company, Martini, referring to the incident says: "If previous to the mailing of the documents, you had actually notified us by phone or otherwise that you could not accept our cargo in any other way but on deck, we should have promptly given you instructions to leave it on the lighters and at our disposal."

From this it is inferable that one reason why the plaintiff allowed the cargo to be carried away without being discharged, was that the bills had been discounted and to stop the shipment would have entailed the necessity of refunding the money which the bank had advanced, with the inconveniences incident thereto. Another reason apparently was that Martini discerned, or thought he discerned the possibility of shifting the risk so as to make it fall upon the ship's company.

With reference to the practicability of discharging the cargo in the late afternoon or evening of Saturday,

September 16, before the ship departed, as it did at 8 p. m., some evidence was introduced tending to show that in order to get the cargo off certain formalities were necessary which could not be accomplished, as for instance, the return of the mate's receipt (which had not yet come to the plaintiff's hands)", the securing of a permit from the customs authorities, and the securing of an order of discharge from the steamship company. In view of the fact that the plaintiff did nothing whatever looking towards the discharge of the cargo, not even so much as to notify Macondray & Company that the cargo must come off, the proof relative to the practicability of discharge is inconclusive. If the plaintiff had promptly informed Macondray & Company of their resolve to have the cargo discharged, and the latter had nevertheless permitted the ship to sail without discharging it, there would have been some ground for plaintiff's contention that its consent had not been given for the goods to be carried on deck. Needless to say we attach no weight to the statement of Codina that he was unable to get Macondray & Company by telephone in order to communicate directions for the discharge of the cargo.

The evidence submitted in behalf of the defendant shows that there was no space in the hold to take the cargo; and it was therefore unnecessary to consider whether the chemicals to be shipped were of an explosive or inflammable character, such as to require stowage on deck. By reason of the fact that the cargo had to be carried on deck at all events, if carried at all, the guaranty Exhibit D-C was so drawn as to permit stowage either on or under deck at the ship's option; and the attention of Codina must have been drawn to this provision because Macondray & Company refused to issue the bills of lading upon a guaranty signed by Codina upon another form (Exhibit R), which contained no such provision. The messenger between the two establishments who was sent for the bills of lading accordingly had to make a second trip and go back for a letter of guaranty signed upon the desired form. The pretense of Codina that he was deceived into signing a document different from that which he supposed himself to be signing is wholly unsustained.

The result of the discussion is that Martini & Company must be held to have assented to the shipment of the cargo on deck and that they are bound by the bills of lading in the form in which they were issued. The trial court in our opinion erred in holding otherwise, and in particular by ignoring, or failing to give sufficient weight to the contract of guaranty.

Having determined that the plaintiff consented to the shipment of the cargo on deck, we proceed to consider whether the defendant can be held liable for the damage which befell the cargo in question. It of course goes without saying that if a clean bill of lading had been issued and the plaintiff had not consented for the cargo to go on deck, the ship's company would have been liable for all damage which resulted from the carriage on deck. In the case of *The Paragon* (1 Ware, 326; 18 Fed. Cas. No. 10708), decided in 1836 in one of the district courts of the United States, it appeared that cargo was shipped from Boston, Massachusetts, to Portland, Maine, upon what is called a clean bill of lading, that is, one in the common form without any memorandum in the margin or on its face showing that the goods are to be carried on deck. It was proved that the shipper had not given his consent for carriage on deck. Nevertheless, the master stowed the goods on deck; and a storm having arisen, it became necessary to jettison them. None of the cargo in the hold was lost. It was thus evident that although the cargo in question was lost by peril of the sea, it would not have been lost except for the fact that it was being carried on deck. It was held that the ship was liable. In the course of the opinion the following language was used:

"It is contended that the goods, in this case, having been lost by the dangers of the seas, both the master and the vessel are exempted from responsibility within the common exemption in bills of lading; and the goods having been thrown overboard from necessity, and for the safety of the vessel and cargo, as well as the lives of the crew, that it presents a case for a general average or contribution, upon the common principle that when a sacrifice is made for the benefit of all, that the loss shall be shared by all. * * * In every contract of affreightment, losses by the dangers of the seas are excepted from the risks which the master takes upon himself, whether the exception is expressed in the contract or not. The exception is made by the law, and falls

within the general principle that no one is responsible for fortuitous events and accidents of major force. *Casus fortuitous nemo praestat*. But then the general law is subject to an exception, that when the inevitable accident is preceded by a fault of the debtor or person bound, without which it would not have happened, then he becomes responsible for it. (Pothier, *des Obligations*, No. 542; *Pret. a Usage*, No. 57; *Story, Bailm.*, c. 4, No. 241; *In Majoribus casibus si culpa ejus interveniat tenetur*; *Dig. 44, 7, 1, s. 4.*)

"The master is responsible for the safe and proper stowage of the cargo, and there is no doubt that by the general maritime law he is bound to secure the cargo safely under deck. * * * If the master carries goods on deck without the consent of the shipper * * * he does it at his own risk. If they are damaged or lost in consequence of their being thus exposed, he cannot protect himself from responsibility by showing that they were damaged or lost by the dangers of the seas. * * * When the shipper consents to his goods being carried on deck, he takes the risk upon himself of these peculiar perils. * * * This is the doctrine of all the authorities, ancient and modern."

Van Horn vs. Taylor (2 La. Ann., 587; 46 Am. Dec. 558), was a case where goods stowed on deck were lost in a collision. The court found that the ship carrying these goods was not at fault, and that the shipper had notice of the fact that the cargo was being carried on deck. It was held that the ship was not liable. Said the court: "It is said that the plaintiff's goods were improperly stowed on deck; that the deck load only was thrown overboard by the collision, the cargo in the hold not being injured. The goods were thus laden with the knowledge and implied approbation of the plaintiff. He was a passenger on board the steamer, and does not appear to have made any objection to the goods being thus carried, though the collision occurred several days after the steamer commenced her voyage."

In the case of *The Thomas P. Thorn* (8 Ben., 3; 23 Fed., Cas. No. 13927), decided in the District Court in the State of New York, it appeared that tobacco was received upon a canal boat, with the understanding that it was to be carried on deck, covered with tarpaulins. Upon arrival at its destination it was found damaged by water, for the most part on the top, and evidently as a consequence of rains. At the same time a quantity of malt stowed below deck on the same voyage was uninjured. In discussing the question whether upon a contract to carry on deck, the vessel was liable for the wetting of the tobacco, the court said:

"It is manifest that the injury to the tobacco arose simply from the fact that it was carried on deck. The malt, carried below, although an article easily injured, received no damage, and the voyage was performed with usual care, and without disaster. Indeed, there is evidence of a statement by the libellant, that tobacco must of necessity be injured by being carried on deck. But, under a contract to carry upon deck, the risk of any damage resulting from the place of carriage rests upon the shipper, and, without proof of negligence causing the damage, there can be no recovery. Here the evidence shows that all reasonable care was taken of the tobacco during its transportation; that the manner of stowing and covering it was known to and assented to by the shipper; and the inference is warranted that the injury arose, without fault of the carrier, from rain, to which merchandise transported on deck must necessarily be in some degree exposed. Any loss arising from damaged thus occasioned is to be borne by the shipper."

Lawrence vs. Minturn (17 How [U. S.], 100; 15 L. ed., 58), was a case where goods stowed on deck with the consent of the shipper were jettisoned during a storm at sea. In discussing whether this cargo was entitled to general average, the Supreme Court of the United States said:

"The maritime codes and writers have recognized the distinction between cargo placed on deck, with the consent of the shipper, and. cargo under deck.

"There is not one of them which gives a recourse against the master, the vessel, or the owners, if the property lost had been placed on deck with the consent of its owner; and they afford very high evidence of the general and appropriate usages, in this particular, of merchants and shipowners.

"So the courts of this country and England, and the writers on this subject, have treated the owner of goods on deck, with his consent, as not having a claim on the master or owner of the ship in case of jettison. The received law, on the point, is expressed by Chancellor Kent, with his usual precision, in 3 Com., 240: 'Nor is the carrier in that case (jettison of deck load) responsible to the owner, unless the goods were stowed on deck without the consent of the owner, or a general custom binding him, and then he would be chargeable with the loss.' "

In *Gould vs. Oliver* (4 Bing., N. C, 132), decided in the English Court of Common Pleas in 1837, Tindal, C. J., said:

"Where the loading on deck has taken place with the consent of the merchant, it is obvious that no remedy against the shipowner or master for a wrongful loading of the goods on deck can exist. The foreign authorities are indeed express on that point. And the general rule of the English law, that no one can maintain an action for a wrong, where he has consented or contributed to the act which occasioned his loss, leads to the same conclusion."

The foregoing authorities fully sustain the proposition that where the shipper consents to have his goods carried on deck he takes the risks of any damage or loss sustained as a consequence of their being so carried. In the present case it is indisputable that the goods were injured during the voyage and solely as a consequence of their being on deck, instead of in the ship's hold. The loss must therefore fall on the owner. And this would be true, under the authorities, even though paragraph 19 of the bills of lading, quoted near the beginning of this opinion, had not been made a term of the contract.

It is undoubtedly true that, upon general principle, and momentarily ignoring paragraph 19 of these bills of lading, the ship's owner might be held liable for any damage directly resulting from a negligent failure to exercise the care properly incident to the carriage of the merchandise on deck. For (instance, if it had been improperly placed or secured, and had been swept overboard as a proximate result of such lack of care, the ship would be liable, to the same extent as if the cargo had been deliberately thrown over without justification. So, if it had been shown that, notwithstanding the stowage of these goods on deck, the damage could have been prevented, by the exercise of proper skill and diligence in the discharge of the duties incumbent on the ship, the owner might still be held.

To put the point concretely, let it be supposed that a custom had been proved among mariners to protect deck cargo from the elements by putting a tarpaulin over it; or approaching still more to imaginable conditions in the present case, let it be supposed that the persons charged with the duty of transporting this cargo, being cognizant of the probability of damage by water, had negligently and without good reason failed to exercise reasonable care to protect it by covering it with tarpaulins. In such case it could hardly be denied that the ship's company should be held liable for such damage as might have been avoided by the use of such precaution.

But it should be borne in mind in this connection that it is incumbent on the plaintiff, if his cause of action is founded on negligence of this character, to allege and prove that the damage suffered was due to failure of the persons in charge of the cargo to use the diligence properly incident to carriage under these conditions.

In *Clark vs. Barnwell* (12 How. [U. S.], 272; 13 L. ed., 985), the Supreme Court distinguishes with great precision between the situation where the burden of proof is upon the shipowner to prove that the loss resulted from an excepted peril and that where the burden of proof is upon the owner of the cargo to prove that the loss was caused by negligence on the part of the persons employed in the conveyance of the goods. The first two syllabi in *Clark vs. Barnwell* read as follows:

"Where goods are shipped and the usual bill of lading given, 'promising to deliver them in good order, the dangers of the seas excepted and they are found to be damaged, the onus probandi is upon the owners of the vessel, to show that the injury was occasioned by one of the excepted causes.

"But, although the injury may have been occasioned by one of the excepted causes, yet still the owners of the vessel are responsible if the injury might have been avoided, by the exercise of reasonable skill and attention on the part of the persons employed in the conveyance of the goods. But the onus probandi then becomes shifted upon the shipper, to show the negligence."

The case just referred to was one where cotton thread, put up in boxes, had deteriorated during a lengthy voyage in a warm climate, owing to dampness and humidity. In discussing the question of the responsibility of the ship's owner, the court said:

"Notwithstanding, therefore, the proof was clear that the damage was occasioned by the effect of the humidity and dampness of the vessel, which is one of the dangers of navigation, it was competent for the libelants to show that the respondents might have prevented it by proper skill and diligence in the discharge of their duties; but no such evidence is found, in the record. For aught that appears every precaution was taken that is usual or customary, or known to shipmasters, to avoid the damage in question. And hence we are obliged to conclude that it is to be attributed exclusively to the dampness of the atmosphere of the vessel, without negligence or fault on the part of the master or owners."

Exactly the same words might be used as applicable to the facts of the present case; and as it is apparent that the damage here was caused, by rain and sea water—the risk of which is inherently incident to carriage on deck—the defendant cannot be held liable. It is not permissible for the court, in the absence of any allegation or proof of negligence, to attribute negligence to the ship's employees in the matter of protecting the goods from rains and storms. The complaint on the contrary clearly indicates that the damage done was due to the mere fact of carriage on deck, no other fault or delinquency on the part of anybody being alleged.

It will be observed that by the terms of paragraph 19 of the bills of lading, the ship is not to be held liable, in the case of goods signed for as carried on deck, "for any loss or damage from any cause whatever." We are not to be understood as holding that this provision would have protected the ship from liability for the consequences of negligent acts, if negligence had been alleged and proved.

From the discussion in *Manila Railroad Co. vs. Compaiiia Transatlantica and Atlantic, Gulf & Pacific Co.* (38 Phil. Rep., 875), it may be collected that the carrier would be held liable in such case, notwithstanding the exemption contained in paragraph 19. But however that may be, damages certainly cannot be recovered on the ground of negligence, even from a carrier, where negligence is neither alleged nor proved.

The judgment appealed from is reversed and the defendant is absolved from the complaint. No express pronouncement will be made as to the costs of either instance. So ordered.

Arellano, C.J., Torres, Johnson, Araullo, Malcolm, Avanceña, and Moir, JJ., concur.

Judgment reversed.

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