

BEHN, MEYER & CO., LTD., PLAINTIFFS AND APPELLEES, VS. EL BANCO ESPANOL-FILIPINO, DEFENDANT AND APPELLANT.*G. R. No. 4395. September 09, 1908*

Ponente: WILLARD, J.

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On the 3d of November, 1906, at Hongkong, Sander, Wieler & Co., as agents for the German steamship Hilary, chartered her to the interveners, Siu Liong & Co., of Manila. By the terms of the charter party, she was to proceed to the port of Saigon, take on a cargo of rice, and then proceed to Kamranh Bay, to load there or at Phu Yen Harbor as many head of cattle as the steamer could safely carry, and being loaded, then to proceed to the port of Manila and so end the voyage.

There is no competent evidence to show when the boat arrived at Saigon, but being there, she loaded the rice and then proceeded to Phu Yen Harbor, where she arrived on the 18th day of November, in the afternoon. The witness, Ullman, was there at the time, acting as agent for Pujalte & Co., of Manila. Tins firm had made a contract with the interveners for the transportation from Phu Yen Harbor to Manila of 200 head of cattle. Ullman had been notified of this contract and upon the arrival of the ship there on the 18th of November, he was all ready to proceed with the loading. He went on board the vessel the afternoon of her arrival, and told the captain that he was prepared to load 202 head of cattle. One hundred and fifty of these were cows and 52 carabaos. The captain told him that he might load the cows, but that he could not load the carabaos. The matter was discussed by them until half past 1 in the morning, the captain still refusing to permit the carabaos to come on board. Ullman then went on shore and early in the morning went to the town of Sung Cau, where he laid the matter before the governor, who advised him to procure a notary and make a protest. He procured the notary and returned with him to Phu Yen, where he arrived at about 10 o'clock in the morning. The weather was then very stormy and he did not succeed in getting on board until half past 1 in the afternoon. The captain then consented to receive the carabaos on board. The weather, however, was so bad that they could not be shipped, and it remained in this condition from that time until the 27th, when the ship sailed for Manila without the cattle. At no time during this period was it possible to load them.

When the vessel arrived on the 18th, the weather was fine and continued so until about 10 o'clock the morning of the 19th. During this time the cattle could have been loaded, so far as the weather was concerned, and some cattle belonging to Lichauco were, in fact, taken on board during that time. If the captain had permitted Ullman, when he first saw him, to load the carabaos, they could all have been taken on board on the 19th and the vessel could have left that day for Manila,

The above facts in relation to what took place at Phu Yen are clearly established by the evidence. Why the captain at first refused to take the carabaos on board does not appear. He was not a witness in the case. No reason for his refusal appears anywhere in the record. He, in fact, had at that time on board some carabaos and there was plenty of room to take all that Ullman wished to load; in fact the captain afterwards consented to do so. The refusal aforesaid was not justified and was a violation of the terms of the charter party and was the immediate and

proximate cause of the failure to bring the cattle of Pujalte from Phu Yen to Manila.

The captain cabled to the charterers on the 22d of November stating that he could not ship the cattle on account of bad weather and asking for instructions as to how long he should remain. The interveners answered that he should wait to load the cattle. On the 24th of November, he again cabled the interveners, stating that he could not wait any longer than the 26th of November; that he had not sufficient water for the cattle then on board, and that Lopez, who was on board as the agent of Lichauco, was getting impatient, and that the weather continued very boisterous. On the 26th of November he made demand on Ullman for 30 tons of fresh water, saying that Ullman would not be permitted to ship his cattle unless he brought with them that amount. Ullman stated that he was unable to do so, and on the 27th of November the captain wrote a letter to Ullman telling him that he saw that it was impossible for him to load the cattle or to bring the water, and that he would leave that afternoon for Manila, which he did.

The vessel arrived in Manila on the 3d of December, which was Sunday. The interveners, the charterers, desiring to unload part of the rice at Iloilo, as soon as the boat arrived made a contract by cable with Sander, Wieler & Co., in Honkong, for a voyage to Iloilo, agreeing to pay therefor 800 Hongkong dollars. As soon as the boat arrived the captain applied to the plaintiffs to act as his agents and to attend to the business while here. Before that time the plaintiffs had never acted as the agents for this steamer.

By the terms of the charter party, the freight for the voyage from Saigon to Manila, which was 9,250 Hongkong dollars, was to be paid on or before the delivery of the cargo and cattle at Manila. The charterers did not desire to make that payment until the balance of the cargo had been unloaded at Iloilo. Behn, Meyer & Co. would not allow the vessel to leave for Iloilo until the freight and all claims for demurrage had been paid or secured. Thereupon the charterers deposited P13,000 with the defendant bank, and it wrote the following letter to Behn, Meyer & Co:

"MANILA, December 4, 1906.

"Messrs. BEHN, MEYER & CO., Present.

"GENTLEMEN: Our clients, Messrs. Siu Liong & Co., have advised us that it is to their best interest to completely unload the steamer Hilary, chartered to you, before paying the amount of the freight and demurrage, and inasmuch as you have required them to furnish a guaranty by a bank, we now have the honor to inform you that we guarantee the said Siu Liong & Co., in the sum of 12,000, during the unloading of the said steamer; and if, upon the completion of the unloading, the price stipulated in the agreement and the demurrage is not paid by said parties, this bank binds itself to make such payment.

"We will be obliged if you will favor us with your acknowledgment of this letter, and we remain,

"Your obedient servants,

"EL BANCO ESPAÑOL-FILIPINO,

"PER EUGENIO DEL SAZ-OROZCO,

"Director in charge."

The vessel finished unloading here on the 5th of December and then went to Iloilo. On the 10th of December, Behn, Meyer & Co, presented to the charterers, the interveners, an account amounting to 12,350 Hongkong dollars. The charterers refused to pay it; application was then made by Behn, Meyer & Co. to the defendant bank, and it refused to pay, and thereafter, and on the 5th of March, 1907, this action was commenced by Behn, Meyer & Co. against the defendant bank. During the progress thereof, the charterers, Siu Liong & Co., were permitted, against the objection and exception of the plaintiffs, to intervene in the action and to join with the bank in opposing the complaint. In their answer they denied all of the allegations of the complaint and set up a

counterclaim for damages caused to them by the violation on the part of the captain of the terms of the charter party in refusing to receive the cattle on board at Phu Yen on the 19th day of November. The amount of the counterclaim exceeded the claim of the plaintiffs by P13,673.33 and they asked judgment against the plaintiffs for that amount.

The court below did not sustain the counterclaim and ordered judgment against the bank and the interveners for the sum of P12,081, with interest and costs. From that judgment the defendants have appealed.

Passing for the present the questions which are raised relating to procedure, and coming to the merits of the case, we think it very clear, as before stated, that the captain violated, the terms of the charter party in refusing on the 18th day of November to receive on board the carabaos which Ullman then had ready to embark. The court below in its decision said that the captain was not at fault in not receiving the carabaos, because, by the terms of the charter party the charterers were bound to furnish water and food for the cattle and when, on the 26th of November the captain made a demand on Ullman for 30 tons of water and Ullman refused to furnish it, he was justified in sailing without the cattle, and that his failure to bring them was due not to any fault of his own, but to the failure of the charterers to comply with the terms of the charter party in furnishing water.

We do not think the evidence supports this view of the case. On the contrary, it clearly appears that if the captain had agreed to take the carabaos on board when he was first asked to, he would have left Phu Yen on the 19th in the afternoon. The evidence shows that the journey from Phu Yen to Manila is one of about four days, and if he had left on the 19th he would have had on board plenty of water for his trip to Manila. Moreover, there was evidence undisputed that, although by the terms of the charter party the charterers were bound to pay for the water, yet it was the universal custom for the captain to furnish the water and charge the charterers therefor.

The captain having violated the terms of the contract, the next question is, what damages did the charterers suffer by reason of this violation? It was proven that they had made a contract with Pujalte & Co., by the terms of which they had agreed to transport 200 head of cattle from Phu Yen to Manila in this boat and were to receive therefor P12 for each cow and P13 for each carabao. Pujalte & Co. had ready for transportation 202 head of cattle and the testimony was that, although the contract mentioned 200, yet they had a right thereunder to transport 200, or 202, or 204. This freight, amounting to P2,476, the charterers have never received from Pujalte & Co., and of course have no claim against them therefor. Their failure to receive it was directly due to the violation of the terms of the contract by the captain in his refusal to take the cattle on board when they were ready to be shipped, and that violation was the direct and proximate cause of the loss to the charterers of this P2,476.

It is suggested in the brief of the appellee that Ullman might have loaded the cows and left the carabaos there. There is nothing in this suggestion. The testimony shows that Ullman himself intended to come on the Hilary, and as he very well said, he was under no obligation to leave a part of his stock there. (Gould vs. Grafflin, 62 Fed. Rep., 605.)

The interveners claim damages also for the difference between the value of their rice on the day on which it arrived and its value on the day when it would have arrived if the ship had left Phu Yen On the 19th of November.

As has been stated, the interveners, on the 24th of November, directed the captain to wait at Phu Yen. For the delay after that time, the ship was not responsible. There is no evidence to show what the price of rice was the day the ship would have arrived if she had sailed on the 24th. The interveners are entitled therefore to recover nothing upon this item of their claim.

They claim damages also for losses which Pujalte & Co. and Lichauco suffered by reason of the delay at Phu Yen. These losses consisted of the death of some of the cattle and their depreciation in value at the time they arrived in

Manila.

The interveners have paid nothing to either Lichauco or Pujalte & Co. on account thereof and neither one of these persons has commenced any action against the interveners for damages. Whether the interveners will ever be compelled to pay anything to them can not now be known. These damages are, in our opinion, too remote to be the subject of an adjudication in this case. Moreover, as to the greater part; of them, namely, the depreciation in the value of the stock, the same can be said as was said in reference to the claim for the loss upon the rice. The charterers were responsible for the delay from the 24th to the 27th of November, and there is no evidence to fix the value of the stock or what its condition would have been if the ship had sailed from Phu Yen on the 24th.

The charter party provided for nine lay days during which the cargo should be taken on board and discharged, and for five days of demurrage at the rate of 250 Hongkong dollars a day. The plaintiffs make a claim for demurrage for six days.

We do not think that this claim can be sustained. There is nothing in the case to show how many lay days were consumed in taking on cargo at Saigon and the most that we can assume is that one day was so employed. If the captain had complied with the contract and loaded the cattle at Phu Yen when he should have done so, not more than two days would have been used there. Not more than three days were used in unloading here. The time employed at Iloilo does not appear and in no event could that be considered, for that voyage was the subject of a special contract. So that even if the delay from the 24th of November to the 27th be charged to the charterers, no more than nine days were consumed, which was the time allowed by the charter party.

The interveners admitted at the trial that they owed 9,250 Hongkong dollars, the freight to Manila, and 800 dollars, the freight to Iloilo, and these are the only amounts which, in our opinion, the plaintiffs are entitled to recover. The evidence indicates that the contract made by the bank was made after the contract with reference to the voyage to Iloilo, and we think from all the evidence in the case that the bank's contract covers the 800 dollars freight to Iloilo. Reduced to Philippine money at the rate found by the court below the freight amounts to P10,753.50. From that amount should be deducted the P2,476 above-mentioned, leaving a balance of P8,277.50 as the amount that the plaintiffs are entitled to recover.

Coming to the questions of procedure; the most difficult one is that raised by the first assignment of error, to the effect that the plaintiffs are not the real parties in interest in this case, the claim of the appellants being that the action should have been brought in the name of the owners of the vessel, and that Behn, Meyer & Co. were not the real parties in interest, as that term is used in section 114 of the Code of Civil Procedure. That section is in part as follows:

"Every action must be prosecuted in the name of the real party in interest. But in the case of an assignment of a right of action, an action by the assignee shall be without prejudice to any set-off or other defense existing at the time of or before notice of the assignment; but this last provision shall not apply to a negotiable promissory note, or a draft or a bill of exchange, transferred in good faith and upon good consideration before maturity. And an executor or administrator or legal representative of a deceased person, or a trustee of an express trust, or a person expressly authorized by law so to do, or a lawfully appointed guardian of a person of unsound mind, or of a minor, may sue or be sued without joining with him the person for whose benefit the action is prosecuted or defended.

"Otherwise than as provided in this section, all persons having an interest in the subject of the action and in obtaining the relief demanded shall be joined as plaintiffs."

The matter is further complicated by the title of the case, which is as follows: "Behn, Meyer & Co., Ltd., in representation of themselves and of the steamer Hilary, and of Messrs. Sander, Wieler & Co., owners of said

steamer, plaintiffs," and by an allegation in the complaint that the contract made by the defendant bank on the 4th of December was made with the plaintiffs in their capacity as agents of the steamer and of the said owners of the same.

If Behn, Meyer & Co. had brought this action upon the charter party itself to recover, the freight therein mentioned, it is very clear that it could not be maintained. They were not parties to that contract and had no interest therein. The action, however, is not brought upon that contract, but is brought upon another contract to which the only parties are the defendant bank and Behn, Meyer & Co. The defendant bank contracted directly with Behn, Meyer & Co. and no mention is made in the contract of the owners of the steamer.

After considerable hesitation, we have reached the conclusion that the action can be maintained by Behn, Meyer & Co. in their own names by virtue of article 246 of the Code of Commerce, which is as follows:

"When the agent transacts business in his own name, it shall not be necessary for him to state who is the principal and he shall be directly liable, as if the business were for his own account, to the persons with whom he transacts the same, said persons not having any right of action against the principal, nor the latter against the former, the liabilities of the principal and of the agent to each other always being reserved."

The evidence shows that Behn, Meyer & Co. were agents of the captain and that the transaction to which their agency relates was a mercantile one. Being such agents, they made a contract in their own names with the defendant bank. It appears from the testimony of the manager of the bank that he was not notified and never knew for whom Behn, Meyer & Co. were acting. The document itself shows that he contracted with them in their own names and there is no evidence to show that Behn Meyer & Co. disclosed to the bank the names of the persons for whom they were acting. The manager of the bank never saw the charter party and knew nothing about its contents. The provisions of article 246 of the Code of Commerce are substantive law and are not repealed or modified by section 114 of the procedural law above referred to. (See *Castle Brothers, Wolf & Sons vs. Go-Juno*, 7 Phil. Rep., 144; *Pastells vs. Hollman*, 2 Phil. Rep., 235; *Herranz vs. Ker*, 8, Phil. Rep., 162.)

The plaintiffs excepted to the order of the court below permitting the charterers to intervene in this proceeding, but they have not appealed from the judgment. In any event, it seems very clear that, the action being brought against a surety, the principal debtor would have a right to intervene and join with the defendant in opposing the claim under the provisions of section 121 of the Code of Civil Procedure. The principal debtor has a direct, legal interest in defeating the claim against his surety. The judgment of the court below is modified, and judgment is ordered in favor of the plaintiffs and against the defendants for the sum of P8,277.50, with interest thereon at the rate of 6 per cent per annum since the 8th day of December, 1906, and for the costs of the first instance. No costs will be allowed to either party in this court. So ordered.

Arellano, C. J., and Torres, J., concur.

Mapa and Carson, JJ., concur in the result.

CONCURRING

TRACEY, J.,

Admitting that Behn, Meyer & Co. can maintain this action on the guaranty of the bank, which was a contract made with them alone, and conceding that Sin Liong & Co., the charterers, were properly allowed to intervene as the real principals in a transaction in which the defendant bank was a surety only, nevertheless the intervener could set up its claims against the Hongkong owners of the vessel in this action brought in the name of the Manila

firm to the extent only of a defense, entire or partial, to the plaintiffs' complaint, and not as an affirmative counterclaim against these plaintiffs. Behn, Meyer & Co. were not liable on the owners' Hongkong contract and no recovery could be had against them thereon. From their damages the 2,476 awarded Siu Liong & Co. should not be deducted, but should be left to be adjusted between the parties to the original charter. That result would leave the transaction in a simpler and more manageable condition, as this judgment can not operate as a bar in any action between the charterers and the owners.

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