

**ROCHA & CO., A COPARTNERSHIP, PLAINTIFF AND APPELLANT,
VS. THE STEAMSHIP MUNCASTER CASTLE; PERCY
WATSON AND MACONDRAY & CO., CONSIGNEE OF THE SAME,
DEFENDANTS AND APPELLEES.**

G.R. No. 5696. December 20, 1910

Ponente: JOHNSON, J.

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JOHNSON, J.:

This was an action commenced in the Court of First Instance of the city of Manila, by the plaintiffs against the defendants, to recover damages caused to the lorch *Marte* by the defendants on or about the 15th of April, 1908.

After hearing the evidence adduced during the trial of the cause, the lower court rendered the following decision:

"The following facts were proved at trial:

"1. Messrs. Macondray & Co., one of the business firms of this city, as agents at this port of the steamer *Muncaster Castle*, having to unload from the said vessel, which had come from New York and was anchored in Cavite Bay, a case of machinery weighing 25 tons, consigned to The Manila Electric Railroad and Light Company, accepted the offer of the lorch *Marte*, made to them by the plaintiffs, Rocha & Co., a mercantile copartnership company, also of this city, and owned by the latter, in order that the said case of machinery might be unloaded onto the lorch and transported from Cavite Bay to this port.

"2. Between 4 and 5 o'clock of the afternoon of the 14th of April, 1908 - that is, three days after Messrs. Macondray & Co. received the offer made by Rocha & Co. of the lorch *Marte* - and while proceeding with the operation of transferring the said case of machinery from the hold of the vessel before mentioned to the deck of the lorch *Marte*, using for this purpose the said vessel's main mast and spar, the latter attached to the former like a derrick, and while the said case was suspended above the starboard side of the lorch at a height of from 18 inches to 2 feet, the pulleys or links of the chain or cable which fastened the said mast broke, causing the latter, with the spar, to lean toward the side where the case was and to break, letting the case fall onto that part of the said craft - that is, the starboard side - the fall at the same time causing the lorch to incline to that side, with danger of the case going into the water.

"3. To avoid this, and also to save the lorch from the danger it was in, as it had begun to leak in consequence of the blow it received from the "fall of the case, and on account of its being somewhat under water on the said starboard side, they proceeded, under the orders of the captain of the steamer, to fasten both the case and the lorch to the side of the vessel by means of ropes and wire cables, the case remaining there in that condition until the following day, when it was extracted, by means of a large floating crane, by The Manila Electric Railroad and Light Company, the consignee of the said case, and transported to this port of Manila in another vessel.

"4. Macondray & Co. not having adopted any determination whatever with respect to the lorch, notwithstanding that they were notified of the accident by Rocha & Co., it remained fastened, by means of ropes and cables as before stated, to the side of the *Muncaster Castle*, though sunken to the level of the sea on

account of leakage and the damage consequent upon the loss of the hatches, until the morning of the 19th of April - that is, for five days after the accident occurred - when the said Rocha & Co. proceeded to salve the said lorch and to remove it to a shipyard of this city where repairs were made thereto, the cost of which, added to the expenses of salvage and the losses in the collection of freight charges from the 14th to the 30th. of April, amounted to the total sum of P2,493, according to the document, Exhibit A, which accompanied the complaint.

"Rocha & Co. alleged in the fifth paragraph of their said complaint that the cause of the breaking of the cables and the main mast, which constituted the apparatus for the raising and discharge of the case, was the latter's enormous weight of 27 tons, a weight heavier than the main mast and the cables could support and resist on account of their condition, the insufficiency of the said vessel's unloading apparatus, and the failure on the part of the captain and the employees and crew under his orders to adopt any measures or means which ordinary prudence counseled to previously make sure of the sufficiency, resistance, and good condition of the apparatus employed to perform the operation effected without the probability of the occurrence of the accident which happened. The plaintiffs, therefore, prayed that judgment be rendered against the defendants for the said sum of P2,493, as an indemnity for losses and damages, with interest and costs.

"From the evidence adduced, however, it was proved that the operation of unloading the said case, or of its transportation from the steamer Muncaster Castle to the deck of the lorch Marte, was performed under the supervision of the captain of the steamer, Percy Watson, and of a stevedore, a representative of William Sherman, after the said stevedore had tested the apparatus by means of which the said case was removed from the hold of the aforesaid vessel without any difficulty or mishap whatever. There is absolutely no proof that the said operation was conducted in an inappropriate manner or that means were employed which could have resulted in the accident.

"On the contrary, it was shown by the testimony of Captain Watson himself, not rebutted at the trial by the plaintiff's counsel, that, although both in loading and unloading cargo of that weight they had sometimes used, especially in the port of New York, floating cranes or derricks, because of their having a contract for this purpose, the employment of other means being considered harmful, nevertheless they had often used for such operations the spar or yard and the mast, even for larger weights; that in Japan they unloaded by this means two locomotives, whose boilers weighed 28 tons, and also in Manila Bay, three days before the accident, cast-iron cannons and boilers weighing 28 and 22 tons, respectively, with the sole difference that this freight was unloaded from the port side of the vessel, while the case in question was taken off from the starboard side.

"The record likewise shows, by the testimony given by Captain Watson, with no evidence whatever to the contrary, that he made sure, before attempting to unload, that the mast and the cables were able to resist the weight of the 27-ton case. This same witness moreover testified that the pulleys and cogwheels, and the wires of the said apparatus, had been thoroughly tested and could bear a weight of 50 tons; that he had a certificate from the Government which stated that the said apparatus could support such a weight, although, he added, he could not be held responsible for any defects which afterwards might be found and were not visible in the apparatus mentioned or which existed inside of the mast at the time of its construction. This mast was made entirely of steel.

"It is true that the stevedore, William Sherman, a witness for the defendants, who arrived at the steamer Muncaster Castle one hour and fifteen minutes after the accident, for he had his representative, Mr. Farris, there when the said operation of unloading was performed, testified at the trial that he thought that they intended to put into the said apparatus a load of greater weight than the mast could resist, giving it to be understood by this, perhaps, that it was due to this excess in weight of the load that the mast broke. It is also true that Tomas Felipe, a witness for the plaintiffs and customs inspector who was on the vessel Muncaster Castle at the time and was present at the accident, in referring to the unloading of four cannons in Manila Bay by means of the same mast and spar that is, the identical cannons referred to by Captain Watson of the said steamer - testified that on the occasion mentioned the load lowered 2 inches because of the lowering of the ring

which held the derrick.

"But it is to be borne in mind that the testimony of this second witness, Tomas Felipe, has but little or no importance in the present case to enable a conclusion to be drawn therefrom that the mast, the spar, or any of the component parts of the said unloading apparatus was in bad condition, inasmuch as such testimony is incredible, for in the matter of a load such as is inferred from a bulk like that of a cannon of 22 tons in weight it is not understood how nor why the said witness could have observed that the load had lowered so small a space as that of 2 inches, a space imperceptible and inestimable, particularly if we consider the movements made in operations of that kind; but be that as it may, such a statement made by a person who is not, like this witness, an expert, and without being in any manner corroborated at the trial, can not serve as a foundation whereupon to conclude with certainty that such a defect did exist in the apparatus, and consequently, that there was negligence or carelessness on the part of the captain of the Muncaster Castle by his again employing the said apparatus for the unloading of the case in question, several days afterwards, without taking such defect into account, or without having corrected it.

"With respect to the opinion expressed by the stevedore Sherman, a person of expert knowledge in this matter, it is to be taken into account that the original and primary cause of the accident was the breaking of two pulleys which held the mast fast, to which was attached the spar, as Captain Watson testified, and this was also given to be understood by the very witness of the plaintiffs, Tomas Felipe, in testifying that on that occasion, while the case was hoisted to the side of the ship, one of the rings burst and the mast buckled or bent downwards. The stevedore Farris testified that 'before the case could be put into a good position to let it fall or to place it upon the lorch, two links of the chain and an eyebolt broke, leaving the mast without any support, for they followed the ropes,' the result being, according to this same witness, that, with the rising and falling of the lorch and the case, due to the movement of the sea, the mast followed the same motion and fell. This witness Farris added that, in his opinion, there must have been some invisible defect in the manufacture of the bolts, the nut, and the links of the chain.

"The original and primary cause of the accident, then, did not consist in the breaking of the mast, but in the breaking of two pulleys or two links and an eyebolt of the chain sustaining the mast, which caused the spar and the mast to be drawn downwards by the weight of the case, and the mast, left without support on account of the breakage of the said pulleys or links, also broke. It is therefore evident that no consideration can be given to the opinion expressed by the stevedore, Mr. Sherman, with respect to the small resisting power of the mast to carry a weight heavier than it could support, an opinion given in order to lead to the conclusion that the accident was due to the breaking of the mast in question, because of its being unable to resist so heavy a weight as that of the 25-ton case; and it is perfectly well understood that such a deduction can not be reached, because, in the case under consideration, if the two pulleys of the mast, as Captain Watson testified, or the two links and an eyebolt of the chain, according to Stevedore Farris's testimony, had not broken, it is obvious that the mast would not have broken, because the said chain or eyebolt was what sustained the mast which, left without support, due to the weight of the case, necessarily had to break, as it could not maintain itself in a position perpendicular to the ship's deck.

"Briefly, the logical and reasonable conclusion to be drawn from the facts hereinbefore related, in connection with the fact of the said mast and spar having been used by Captain Watson on other occasions and three days before for the unloading of effects of equal weight, and sometimes of greater weight than that of the case of machinery mentioned, without any difficulty or mishap whatever, is that the mast and the spar and all of that apparatus for unloading, used in the removal of the said case from the steamer to the lorch, had no defect whatever) was suitable for the purpose, and that there was no imprudence, carelessness, negligence, nor omission whatever on the part of Captain Watson in his having used on the said occasion the apparatus referred to, and that the damage resulting from the accident was caused by a merely fortuitous event, for which neither the captain of the vessel nor the other defendants can be held responsible.

"Moreover, from the evidence adduced, it was also shown that, although the lorch Marte had a tonnage of 67

tons, net weight, and could carry from 70 to 75 tons, having received, one or two days before the accident, a load of 67 tons of oil in barrels or jars, notwithstanding it was not designed to carry on deck in a fixed place - that is, in a single mass - a case like the one in question, of 25 tons weight whose dimensions were, approximately, 24 feet in length, 12 or 14 feet in width, and 8 feet in height, because the said lorch had a round bottom and was of the type of boat used for receiving cargo in its hold, and not on its deck, which was not flat, but had hatches, which made it impossible or difficult to place the case on the deck; moreover, as the craft was not then carrying ballast, even though the case had been placed in the center of the deck, the lorch would not have had the necessary stability to maintain itself in a horizontal position, it being due to this, and especially to the fact of its having a round bottom, that it inclined to one side in the manner aforesaid when the case gravitated toward the prow on its starboard side until it became necessary for the lorch to be made fast to the Muncaster Castle, as before related.

"Now, then, the said lorch was offered by the plaintiffs to Macondray & Co., they, the plaintiffs, knowing, as indeed they must have known, the condition of the same, and knowing that it was intended to load therein the said 25-ton case, as shown by the letter, Exhibit 4, addressed on the 11th of April to the said Macondray & Co. by the plaintiffs; so that the failure of that operation is partly due and must be attributed to the latter themselves, for the fact of the lorch not being in suitable condition when it was placed at the disposal of the captain of the steamer alongside his vessel for the purpose of receiving the load contributed to the accident, since, as is easily understood from the explanations made by some of the defendants' witnesses, if the said craft had been sufficiently ballasted it, with the weight upon it, would not have listed so much toward the side where the case lay, and if it had had a flat deck and no hatches, it would have been easier to place the case on the deck than to have placed it in the hold.

"Although the case had so great a weight as that of 25 tons and although it be admitted that, on the bending or leaning of the mast and the spar by the breaking of the pulleys, the case fell onto the deck with the full impulse of its weight a distance of from 18 inches to 2 feet, the blow could not have been of such a nature as to have caused so much damage to the craft as was noted when it was placed in the shipyard for repairs.

"It is understood, of course, that as an immediate result of such a blow the lorch may have started to leak, and that, inclined on its starboard side, on account of the gravitation of the case in that direction, water must have entered its hold, but, as is deduced from the testimony of the captain of the steamer and from that of other witnesses of the defendants, the water could have been baled out so as to prevent the craft from submerging, and, with less indolence and inactivity on the part of the crew, the loss of the hatches and other parts of the upper works would have been avoided.

"At all events, it was proved that the captain of the steamer adopted the necessary measures to secure the lorch to the side of the vessel in such manner as to prevent its total loss and to enable the case to be removed from it, by means of a floating derrick, and brought ashore by the Manila Electric Railroad and Light Company, the lorch from that moment, being freed from the weight which was bearing down upon it, it was possible to remove the boat from its place alongside the ship and take it to the shipyard for repairs.

"This, however, was not done until four days afterwards, that is, on the 19th, the lorch having been during all that time attached to the steamer by cables and almost submerged, which, together with the blows it must have received from the vessel itself, on account of the movement of the waves, necessarily produced, in its upper works and also within, much damage that would not have been caused if the lorch had been removed from that place and taken to the shipyard the day following the accident.

"As neither the captain of the steamer nor Macondray & Co. were responsible for the said removal and conveyance, as aforesaid, it devolved upon the plaintiffs to perform those operations which in fact they did five days afterwards, and therefore the latter themselves must suffer the consequences of their lack of diligence, and because the lorch was not released from the said situation as soon as the case was extracted, which prevented the release of the craft, the latter received greater damage than was the immediate and direct result of the fall of

the heavy case upon it.

"Lastly, it was not proved that the captain of the Muncaster Castle failed to render the required aid in order to keep the lorch in such condition that the plaintiffs could remove it from its position at the side of the steamer and convey it to the shipyard, and it is unlikely, and can not be deemed as proved, that he prevented the lorch's crew from picking up the hatches and other appurtenances of the injured craft which were floating about on the sea, or from executing any other act for the salvage of the said lorch, and it is much less probable that the first officer of the said steamer compelled the said crew to throw the hatches overboard, as stated by the master of the lorch, Zacarias Labrador, in his testimony given at the trial, the testimony of Hilario Tan Toco, the man in charge or representative on the lorch of Rocha & Co., being more likely and credible, to the effect that he ordered the crew to gather up the hatches and that then one of the officers of the Muncaster Castle also ordered his crew to gather them up, a part of them being placed on the lorch and a part on the steamer; and it was also shown, by the testimony of Tomas Felipe, the customs inspector who was present at the time on the Muncaster Castle, that the crew of the lorch did nothing toward gathering up the hatches; from all of which it must be concluded that it was necessary for Hilario Tan Toco, Rocha & Co's man in charge, to order the lorch's crew to gather up the hatches in order to have them do so, and this is sufficient to conclude that the said crew did nothing by themselves, and were not disposed to do anything on their own initiative for the salvage of the craft and to avoid greater damage being done thereto during the period of time that elapsed from the moment the accident occurred on the afternoon of the 14th until the morning of the 19th, when the plaintiffs proceeded to save the said craft and convey it to a shipyard in this city; and it is unquestionable that, during those five days, the said plaintiffs could have done a good deal to prevent an increase of the losses and damages suffered by the lorch, without the necessity of orders being given for that purpose by the captain and officers of the Muncaster Castle, and they also could have gathered up the said hatches, if it were true that they had been put on a lighter or in the bow of the steamer by order of the first officer, as the master of the lorch testified.

"In conclusion, the testimony of the said master and of Arturo Blanco, the inspector of vessels, introduced in rebuttal by the plaintiffs to prove that the stevedore, Farris, was not on board the Muncaster Castle when the accident occurred, but arrived some moments afterwards, is not worthy of belief, because, besides the fact of these two witnesses being employees of the plaintiffs themselves, their testimony is contradictory to that given by the captain of the steamer, H. P. Winkler, a witness for the defendants, who mentioned Mr. Farris as one of those who was present at the time on the said steamer, and the testimony of Farris himself, considered in connection with the statements made by the other witnesses who were present during the accident, prove that he also was present. It is, moreover, strange, and can not but attract our attention, that Arturo Blanco, being aboard the Muncaster Castle that afternoon, according to his own testimony, when Farris, as he testified, arrived in a launch from Canacao, and Zacarias Labrador being at that same time, according to his own testimony, not on the steamer, but on the sea, these two, Farris and Labrador, should have testified that Farris arrived ten minutes after the accident - a uniformity of statements which makes the testimony of both of these witnesses suspicious, and so much the more that, in order to prove that point, the plaintiffs could have availed themselves of the testimony of Tomas Felipe himself, one of their witnesses, and that of the other persons who were aboard the steamer on that occasion.

"By virtue of the foregoing reasons, the court absolves the defendants, with the costs against the plaintiffs. So ordered. Manila, August 30, 1909. - (Sgd.) Manuel Araullo, judge."

From this judgment the plaintiff appealed and made three assignments of error in this court. These assignments of error present questions of fact only.

From an examination of the evidence brought to this court, we are of the opinion and so hold that there is a clear preponderance of evidence in favor of the finding of the lower court. Its sentence and judgment are, therefore, hereby affirmed, with costs.

After the bill of exceptions and the briefs of the respective parties had been filed in this court and after a request had been made to place the same upon the calendar of the July term, Mr. Carlos Young, on the 17th of May, 1910, presented a motion praying for the dismissal of the appeal, claiming to have purchased all of the interest of the plaintiff and appellant involved in this cause. Before this motion was acted upon, Mr. Carlos Young presented another motion on the 8th of July, 1910, asking that he be substituted for the plaintiff and appellant. These motions were opposed by the attorneys for the original plaintiff and appellant.

On the 12th of July, 1910, the court acted upon said motions and granted the one asking for the substitution of Carlos Young for the plaintiff and appellant, but denied the one asking for the dismissal of the appeal.

On the 16th of July, 1910, Mr. Carlos Young, through his attorney, presented another motion asking permission to withdraw his motion of the 8th of July, which motion was duly granted. It is so ordered.

Arellano, C. J., Torres, Moreland, and Trent, JJ., concur.

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