

TAN CHIONG SIAN, PLAINTIFF AND APPELLEE, VS. INCHAUSTI & CO., DEFENDANT AND APPELLANT.*G.R. No. 6092. March 08, 1912*

Ponente: TORRES, J.

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This is an appeal through bill of exceptions, by counsel for the firm of Inchausti & Co., from a judgment rendered by the Honorable A. S. Crossfield, judge.

On January 11, 1909, the Chinaman, Tan Chiong Sian or Tan Chinto, filed a written complaint, which was amended on the 28th of the same month and again amended on October 27 of the same year, against the said firm, wherein he alleged, among other things, as a cause of action; That, on or about November 25, 1908, the plaintiff delivered to the defendant 205 bundles or cases of general merchandise belonging to him, which Inchausti & Co., upon receiving, bound themselves to deliver in the pueblo of Catarman, Province of Samar, to the Chinaman, Ong Bieng Sip, and in consideration of the obligations contracted by the defendant party, the plaintiff obligated himself to pay to the latter the sum of P250 Philippine currency, which payment should be made upon the delivery of the said merchandise in the said pueblo of Catarman; but that the defendant company neither carried nor delivered the aforementioned merchandise to the said Ong Bieng Sip, in Catarman, but unjustly and negligently failed to do so, with the result that the said merchandise was almost totally lost; that, had the defendant party complied well and faithfully with its obligation, according to the agreement made, the merchandise concerned would have had a value of ₱20,000 in the said pueblo of Catarmay on the date when it should have been delivered there, wherefore the defendant party owed the plaintiff the said sum of ₱20,000, which it had not paid him, or any part thereof, notwithstanding the many demands of the plaintiff; therefore the latter prayed for judgment against the defendant for the said sum, together with legal interest thereon from November 25, 1908, and the costs of the suit.

Counsel for the defendant company, in his answer, set forth that he admitted the allegations of paragraphs 1 and 2 of the complaint, amended for the second time, and denied those of paragraphs 3, 4, 5, 6, and 7 of the same. As his first special defense, he alleged that on or about November 28, 1908, his client, the said firm, received in Manila from Ong Bieng Sip 205 bundles, bales, or cases of merchandise to be placed on board the steamer Sorsogon, belonging to the defendant, for shipment to the port of Gubat, Province of Sorsogon, to be in the said port transhipped into another of the defendant's vessels for transportation to the port of Catarman, Samar, and delivered to the aforesaid Chinaman, Ong Bieng Sip; that the defendant company, upon receiving the said merchandise from the latter, Ong Bieng Sip, and on its entering into a contract of maritime transportation with him did not know and was not notified that the plaintiff, Tan Chiong Sian, had any interest whatever in the said merchandise and had made with the plaintiff no contract relative to the transportation of such goods, for, on receiving the latter from the said Ong Bieng Sip, for transportation, there were made out and delivered to him three bills of lading, Nos. 38, 39, and 76, which contained a list of the goods received and, printed on the back thereof were the terms of the maritime transportation contract entered into by and between the plaintiff and the

defendant company, copies of which bills of lading and contract, marked as Exhibits A, B, and C, are of record, attached to and made an integral part of the said answer; that Ong Bieng Sip accepted the said bills of lading and the contract extended on the backs thereof; that the merchandise mentioned was put on board the steamer Sorsogon and carried to the port of Gubat, Province of Sorsogon, where this vessel arrived on November 28, 1908, on which date the lorchka Pilar, into which the said merchandise was. to be transshipped for carriage to Catarman, was not at Gubat, and therefore the goods had to be unloaded and stored in the defendant company's warehouses at Gubat; that, on the 4th of December of the same year, the lorchka Pilar arrived at Gubat and, after the termination of certain necessary work, the goods received from the Chinaman, Ong Bieng Sip, were taken aboard the same, together with other merchandise belonging to the defendant party, for the purpose of transportation to the port of Catarman; that, before the said lorchka could leave for its destination, a strong wind arose which in the course of the day .increased in force until, early in the morning of the following day, the lorchka was dragged and driven, by the force of the storm, upon the shore, despite the means employed by the crew to avoid the accident, and notwithstanding the five anchors that held the craft, which was thus wrecked, and completely destroyed and the merchandise with which it was laden, including the 205 bundles or packages taken aboard for the said Chinaman, was scattered on the shore; that, on that occasion, the lorchka Pilar was in good condition, provided with all the proper and necessary equipment and accessories and carried a crew of sufficient number in command of a skillful patron or master, wherefore the wreck of the said craft was solely due to the irresistible force of the elements and of the storm which drove it upon the shore; that the defendant company, with the greatest possible diligence, gathered up the said shipwrecked goods that had been shipped by the Chinaman, Ong Bieng Sip, but, owing to the damage they had suffered, it was impossible to preserve them,,so, after having offered to deliver them to him, the defendant proceeded, in the presence of a notary, to sell them at public auction and realized from the sale thereof P1,693.67, the reasonable value of the same in the condition in which they were after they had been gathered up and salvaged from the wreck of the lorchka Pilar; that the expenses occasioned by such salvage and sale of the said goods amounted to P151.35, which were paid by the defendant party; that the latter offered to the Chinese shipper, the plaintiff, the amount realized from the sale of the said merchandise, less P151.35, the amount of the expenses, and the sum of P250, the amount of the freight stipulated, and is still willing to pay such products of the said sale to the aforementioned Ong Bieng Sip or to any other person who should establish his subrogation to the rights of the Chinaman, Ong Bieng Sip, with respect to the said amount; that, as his client's second special defense, the defendant company alleged that one of the conditions of the shipping contract executed between it and the Chinaman, Ong Bieng Sip, relative to the transportation of the said merchandise, was that the said firm should not be held liable for more than P25 for any bundle or package, unless the value of its contents should be stated in the bill of lading, and that the shipper, the Chinaman, Ong Bieng Sip, did not state in the bill of lading the value of any of the bundles or packages in which the goods shipped by him were packed. Counsel for the defendant company, therefore, prayed the court to absolve his client from the complaint, with the costs against the plaintiff.

After the hearing of the case and the introduction of testimony by the parties, judgment was rendered, on March 18, 1910, in favor of the plaintiff, Tan Chiong Sian or Tan Chinto, against the defendant Inchausti & Co., for the sum of P14,642.68, with interest at the rate of 6 per cent per annum from January 11, 1909, and for the costs of the trial. The defendant party appealed from this judgment.

This suit was brought for the purpose of collecting a certain sum which it is alleged the defendant firm owes the plaintiff for losses and damages suffered by the latter as a result of the former's noncompliance with the terms of an agreement or contract to transport certain merchandise by sea from this city to the pueblo of Catarman, Island of Samar, for the sum of P250.

The principal question to be determined is whether the defendant is liable for the loss of the merchandise and for

failure to deliver the same at the place of destination, or whether he is relieved from responsibility on the ground of force majeure.

Article 1601 of the Civil Code prescribes:

"Carriers of goods by land or by water shall be subject with regard to the keeping and preservation of the things entrusted to them, to the same obligations as determined for innkeepers by articles 1783 and 1784.

"The provisions of this article shall be understood without prejudice to what is prescribed by the Code of Commerce with regard to transportation by sea and land."

Article 1602 reads:

"Carriers are also liable for the loss of and damage to the things which they receive, unless they prove that the loss or damage arose from a fortuitous event or force majeure."

The articles aforecited are as follows:

"ART. 1783. The depositum of goods made by travelers in inns or hostelries shall also be considered a necessary one. The keepers of inns and hostelries' are liable for them as such bailees, provided that notice thereof may have been given to them or to their employees, and that the travelers on their part take the precautions which said innkeepers or their substitutes may have advised them concerning the care and vigilance of said goods.

"ART. 1784. The liability referred to in the preceding article shall include damages to the goods of the travelers caused by servants or employees of the keepers of inns or hostelries as well as by strangers, but not those arising from robbery or which may be caused by any other case of force majeure."

Article 361 of the Code of Commerce provides:

"Merchandise shall be transported at the risk and venture of the shipper, unless the contrary was expressly stipulated.

"Therefore, all damages and impairment suffered by the goods in transportation, by reason of accident, force majeure, or by virtue of the nature or defect of the articles, shall be for the account and risk of the shipper.

"The proof of these accidents is incumbent on the carrier.

"ART. 362. The carrier, however, shall be liable for the losses and damages arising from the causes mentioned in the foregoing article if it is proved that they occurred on account of his negligence or because he did not take the precautions usually adopted by careful persons, unless the shipper committed fraud in the bill of lading, stating that the goods were of a class or quality different from what they really were.

"If, notwithstanding the precaution referred to in this article, the goods transported run the risk of being lost on account of the nature or by reason of an unavoidable accident, without there being time for the owners of the same to dispose thereof, the carrier shall proceed to their sale, placing them for this purpose at the disposal of the judicial authority or of the officials determined by special provisions.

"ART. 363. With the exception of the cases prescribed in the second paragraph of article 361, the carrier shall be obliged to deliver the goods transported in the same condition in which, according to the bill of lading, they were at the time of their receipt, without any detriment or impairment, and should he not do so, he shall be obliged to pay the value of the goods not delivered at the point where they should have been and at the time the delivery should have taken place.

"If part of the goods transported should be delivered the consignee may refuse to receive them, when he proves that he can not make use thereof without the others."

On November 25, 1908, Inchausti & Co. received in Manila from the Chinaman, Ong Bieng Sip, 205 bundles, bales or cases of goods to be conveyed by the steamer Sorsogon to the port of Gubat, Province of Sorsogon, where they were to be transshipped to another vessel belonging to the defendant company and by the latter transported to the pueblo of Catarman, Island of Samar, there to be delivered to the Chinese shipper with whom the defendant party made the shipping contract. To this end three bills of lading were executed, Nos. 38, 39, and 76, copies of which, marked as Exhibits A, B, and C, are found on pages 13, 14, and 15 of the record.

The steamer Sorsogon, which carried the goods, arrived at the port of Gubat on the 28th of that month and as the lorchá Pilar, to which the merchandise was to be transshipped for its transportation to Catarman, was not yet there, the cargo was unloaded and stored in the defendant company's warehouses at that port.

Several days later, the lorchá just mentioned arrived at Gubat and, after the cargo it carried had been unloaded, the merchandise belonging to the Chinaman, Ong Bieng Sip, together with other goods owned by the defendant Inchausti & Co., was taken aboard to be transported to Catarman ; but on December 5, 1908, before the Pilar could leave for its destination, towed by the launch Texas, there arose a storm, which, coming from the Pacific, passed over Gubat and, as a result of the strong wind and heavy sea, the lorchá was driven upon the shore and wrecked, and its cargo, including the Chinese shipper's 205 packages of goods, scattered on the beach. Laborers or workmen of the defendant company, by its order, then proceeded to gather up the plaintiff's merchandise and, as it was impossible to preserve it after it was salvaged from the wreck of the lorchá, it was sold at public auction before a notary for the sum of P1,693.67.

The contract entered into between the Chinese shipper, Ong Bieng Sip, and the firm of Inchausti & Co., provided that transportation should be furnished from Manila to Catarman, although the merchandise taken aboard the steamer Sorsogon was to be transshipped at Gubat to another vessel which was to convey it from that port to Catarman; it was not stipulated in the said contract that the Sorsogon should convey the goods to their final destination, nor that the vessel into which they were to be transshipped, should be a steamer. The shipper, Ong Bieng Sip, therefore assented to these arrangements and made no protest when his 205 packages of merchandise were unloaded from the ship and, on account of the absence of the lorchá Pilar, stored in the warehouses at Gubat nor did he offer any objection to the lading of his merchandise on to this lorchá as soon as it arrived and was prepared to receive cargo; moreover, he knew that to reach the port of Catarman with promptness and dispatch, the lorchá had to be towed by some vessel like the launch Texas, which the defendant company had been steadily using for similar operations in those waters.

Hence the shipper, Ong Bieng Sip, made no protest or objection to the methods adopted by the agents of the defendant for the transportation of his goods to the port of their destination, and the record does not show that in Gubat the defendant possessed any other means for the conveyance and transportation of merchandise, at least for Catarman, than the lorchá Pilar, towed by the said launch and exposed during its passage to all sorts of accidents and perils from the nature and seafaring qualities of a lorchá, from the circumstances then present and the winds prevailing on the Pacific Ocean during the months of November and December.

It is to be noted that a lorchá is not easily managed or steered when traveling, for, out at sea, it can only be moved by wind and sails; and along the coast near the shore and in the estuaries where it customarily travels, it can only move by poling. For this reason, in order to arrive at the pueblo of Catarman with promptness and dispatch, the lorchá was usually towed by the launch Texas.

The record does not show that, from the afternoon of the 4th of December, 1908, until the morning of the following day, the 5th, the patron or master of the lorchá which was anchored in the cove of Gubat, received any notice from the captain of the steamer Ton Yek, also anchored near by, of the near approach of a storm. The said

captain, Juan Domingo Alberdi, makes no reference in his sworn testimony of having given any such notice to the patron of the lorch, nor did the latter, Mariano Gadvilao, testify that he received such notice from the captain of the Ton Yek or from the person in charge of the Government observatory. Gadvilao, the patron, testified that only between 10 and 11 o'clock of Saturday morning, the 5th of December, was he informed by Inchausti & Co.'s agent in Gubat that a baguio was approaching; that thereupon, on account of the condition of the sea, he dropped the four anchors that the lorch had on board and immediately went ashore to get another anchor and a new cable in order more securely to hold the boat in view of the predicted storm. This testimony was corroborated by the said representative, Melchor Munoz. So the lorch, when the storm broke upon it, was held fast by five anchors and was, as testified by the defendant with- out contradiction or evidence to the contrary, well found and provided with all proper and necessary equipment and had a sufficient crew for its management and preservation.

The patron of the lorch testified specifically that at Gubat or in its immediate vicinity there is no port whatever adequate for the shelter and refuge of vessels in cases of danger, and that, even though there were, on being advised between 10 and 11 o'clock of the morning of the 5th, of the approach of a storm from the eastern Pacific, it would have been impossible to spread any sails or weigh anchor on the lorch without being dragged or driven against the reefs by the force of the wind. As the craft was not provided with steam or other motive power, it would not have been possible for it to change its anchorage, nor move from the place where it lay, even several hours before the notice was received by its patron. A lorch can not be compared with a steamer which does not need the help or assistance of any other vessel in its movements.

Due importance must be given to the testimony of the weather observer, Antonio Hocha, that the notice received from the Manila Observatory on the afternoon of December 4, with regard to a storm traveling from the east of the Pelew Islands toward the northwest, was not made known to the people of Gubat and that he merely left a memorandum notice on the desk of the station, intending to give explanations thereof to any person who should request them of him. So the notice of the storm sent by the Manila Observatory was only known to the said observer, and he did not apprise the public of the approach of the storm until he received another notice from Manila at 20 minutes past 8 o'clock on Saturday morning, December 5. Then he made a public announcement and advised the authorities of the storm that was coming.

The patron of the lorch Pilar is charged with gross negligence for not having endeavored to remove his craft to a safe place in the Sabang River, about half a mile from where it was anchored.

In order to find out whether there was or was not such negligence on the part of the patron, it becomes necessary to determine, first, whether the lorch, on the morning of December 5, could be moved by its own power and without being towed by any steamboat, since it had no steam engine of its own; second, whether the lorch, on account of its draft and the shallowness of the mouth of the said river, , could have entered the latter before the storm broke.

The patron, Mariano Gadvilao, stated under oath that the weather during the night of December 4 was not threatening and he did not believe there would be a storm; that he knew the Sabang River; and that the lorch Pilar, when loaded, could not enter as there was not sufficient water in its channel; that, according to an official chart of the port of Gubat, the bar of the Sabang River was covered by only a foot and a half of water at ordinary low tide and the lorch Pilar, when loaded, drew 6 feet and a half; that aside from the fact that the condition of the sea would not have permitted the lorch to take shelter in the said river, even could it have relied upon the assistance of a towboat, at half past 8 o'clock in the morning the tide was still low; there was but little water in the river and still less over the bar.

It was proven by the said official chart of the port of Gubat, that the depth of water over the bar or entrance of the

Sabang River is only one foot and a half at ordinary low tide; that the rise and fall of the tide is about 4 1/2 feet, the highest tide being at 2 o'clock in the afternoon of every day; and at that hour, on the 5th of December, the hurricane had already made its appearance and the wind was blowing with all its fury and raising great waves.

The lorchá Pilar, loaded as it had been from the afternoon of December 4, even though it could have been moved by means of poles, without being towed, evidently could not have entered the Sabang River on the morning of the 5th, when the wind began to increase and the sea to become rough, on account of the low tide, the shallowness of the channel, and the boat's draft

The facts stated in the foregoing paragraph were proved by the said chart which was exhibited in evidence and not rejected or assailed by the plaintiff. They were also supported by the sworn testimony of the patron of the lorchá, unrebutted by any oral evidence on the part of the plaintiff such as might disprove the certainty of the facts related, and, according to section 275 of the Code of Civil Procedure, the natural phenomenon of the tides, mentioned in the official hydrographic map, Exhibit 7, which is prima facie evidence on the subject, of the hours of its occurrence and of the conditions and circumstances of the port of Gubat, shall be judicially recognized without the introduction of proof, unless facts to the contrary be proven, which was not done by the plaintiff, nor was it proven that between the hours of 10 and 11 o'clock of the morning of December 5, 1908, there did not prevail a state of low tide in the port of Gubat.

The oral evidence adduced by the plaintiff with respect to the depth of the Sabang River, was unable to overcome that introduced by the defendant especially the said chart. According to section 320 of the Code of Civil Procedure, such a chart is prima facie evidence of particulars of general notoriety and interest, such as the existence of shoals of varying depths in the bar and mouth of the Sabang River and which obstruct the entrance into the same; the distance, length, and number of the said shoals, with other details apparently well known to the patron of the lorchá Pilar, to judge from his testimony.

Vessels of considerable draft, larger than the said lorchá, might have entered the Sabang River some seven or nine years before, according to the testimony of the Chinaman, Antonio B. Yap Cunco, though he did not state whether they did so at high tide; but, since 1901, or previous years, until 1908, changes may have taken place in the bed of the river, its mouth and its bar. More shoals may have formed or those in existence may have increased in extent by the constant action of the sea. This is the reason why the patron, Gadvilao, who was acquainted with the conditions of the port and cove of Gubat, positively declared that the lorchá Pilar could not, on account of her draft, enter the Sabang River, on account of low water.

The patron of the lorchá, after stating (p. 58) that at Gubat or in its vicinity there is no port that affords shelter, affirmed that it was impossible to hoist the sails or weigh the anchors on the morning of the 5th of December, owing to the force of the wind and because the boat would immediately have been dragged or driven upon the shoals; that furthermore the lorchá was anchored in a channel some 800 brazas wide, but, notwithstanding this width, the Pilar was, for want of motive power, unable to move without being exposed to be dashed against the coast by the strong wind and the heavy sea then prevailing. The testimony of this witness was neither impugned nor offset by any evidence whatever; he was a patron of long years of service and of much practice in seafaring, especially in the port of Gubat and its vicinity, who had commanded or been intrusted with the command of other crafts similar to the lorchá Pilar and his testimony was absolutely uncontradicted.

The patron Gadvilao, being cognizant of the duties imposed upon him by rules 14 and 15 of article 612, and others, of the Code of Commerce, remained with his sailors, during the time the hurricane was raging, on board the lorchá from the morning of December 5 until early the following morning, the 6th, without abandoning the boat, notwithstanding the imminent peril to which he was exposed, and kept to his post until after the wreck and

the lorchas had been dashed against the rocks. Then he solicited help from the captain of the steamer Ton Yek, and, thanks to the relief afforded by a small boat sent by the latter officer, Gadvilao with his crew succeeded in reaching land and immediately reported the occurrence to the representative of Inchausti & Co. and to the public official from whom he obtained the document of protest, Exhibit 1. By such procedure, he showed that, as a patron skilled in the exercise of his vocation, he performed the duties imposed by law in cases of shipwreck brought about by force majeure.

Treating of shipwrecks, article 840 of the Code of Commerce prescribes:

"The losses and damages suffered by a vessel and her cargo by reason of shipwreck or stranding shall be indivisibly for the account of the owners, the part of the wreck which may be saved belonging to them in the same proportion."

And article 841 of the same code reads:

"If the wreck or stranding should arise through the malice, negligence, or lack of skill of the captain, or because the vessel put to sea insufficiently repaired and supplied, the owner or the freighters may demand indemnity of the captain for the damages caused to the vessel or cargo by the accident, in accordance with the provisions contained in articles 610, 612, 614, and 621."

The general rule established in the first of the foregoing articles is that the loss of the vessel and of its cargo, as the result of shipwreck, shall fall upon the respective owners thereof, save for the exceptions specified in the second of the said articles.

These legal provisions are in harmony with those of articles 361 and 362 of the Code of Commerce, and are applicable whenever it is proved that the loss of, or damage to, the goods was the result of a fortuitous event or of force majeure; but the carrier shall be liable for the loss or the damage arising from the causes aforementioned, if it shall have been proven that they occurred through his own fault or negligence or by his failure to take the same precautions usually adopted by diligent and careful persons.

In the contract made and entered into by and between the owner of the goods and the defendant, no term was fixed within which the said merchandise should be delivered to the former at Catarman, nor was it proved that there was any delay in loading the goods and transporting them to their destination. From the 28th of November, when the steamer Sorsogon arrived at Gubat and landed the said goods belonging to Ong Bieng Sip to await the lorchas Pilar which was to convey them to Catarman, as agreed upon, no vessel carrying merchandise made the voyage from Gubat to the said pueblo of the Island of Samar, and with Ong Bieng Sip's merchandise there were also to be shipped goods belonging to the defendant company, which goods were actually taken on board the said lorchas and suffered the same damage as those belonging to the Chinaman. So: that there was no negligence, abandonment, or delay in the shipment of Ong Bieng Sip's merchandise, and all that was done by the carrier, Inchausti & Co., was what it regularly and usually did, in the transportation by sea from Manila to Catarman of all classes of merchandise. No attempt has been made to prove that any course other than the foregoing was pursued by that firm on this occasion; therefore the defendant party is not liable for the damage occasioned as a result of the wreck or stranding of the lorchas Pilar because of the hurricane that overtook this craft while it was anchored in the port of Gubat, on December 5, 1908, ready to be conveyed to that of Catarman,

It is a fact not disputed, and admitted by the plaintiff, that the lorchas Pilar was stranded and wrecked on the coast of Gubat during the night of the 5th or early in the morning of the 6th of December, 1908, as the result of a violent storm that came from the Pacific Ocean, and, consequently, it is a proven fact that the loss or damage of the goods shipped on the said lorchas was due to the force majeure which caused the wreck of the said craft.

According to the aforecited article 361 of the Code of Commerce, merchandise shall be transported at the risk and venture of the shipper, unless the contrary be expressly stipulated. No such stipulation appears of record, therefore, all damages and impairment suffered by the goods in transportation, by reason of accident, force majeure, or by virtue of the nature or defect of the articles, are for the account and risk of the shipper.

A final clause of this same article adds that the burden of proof of these accidents is upon the carrier; the trial record fully discloses that the loss and damage of the goods shipped by the Chinaman, Ong Bieng Sip, was due to the stranding and wreck of the lorchia Pilar in the heavy storm or hurricane aforementioned; this the plaintiff did not deny, and admitted that it took place between the afternoon of the 5th and early in the morning of the 6th of December, 1908, so it is evident that the defendant is exempt from the obligation imposed by the law to prove the occurrence of the said storm, hurricane, or cyclone in the port of Gubat, and, therefore, if the said goods were lost or damaged and could not be delivered in Catarman, it was due to a fortuitous event and a superior, irresistible natural force, or force majeure, which completely disabled the lorchia intended for their transportation to the said port of the Island of Samar.

The record bears no proof that the said loss or damage caused by the stranding or wreck of the lorchia Pilar as a result of the storm mentioned, occurred through carelessness or negligence on the part of the defendant company, its agents or the patron of the said lorchia, or because they did not take the precautions usually adopted by careful and diligent persons, as required by article 362 of the Code of Commerce; the defendant company, as well as its agents and the patron of the lorchia, had a natural interest in preserving the craft and its own goods laden therein n interest equal to that of the Chinese shipper in preserving his own which were on board the said lorchia—and, in fact, the defendant, his agents and the patron did take the measures which they deemed necessary and proper in order to save the lorchia and its cargo from the impending danger; accordingly, the patron, as soon as he was informed that a storm was approaching, proceeded to clear the boat of all gear which might offer resistance to the wind, dropped the four anchors he had, and even procured an extra anchor from the land, together with a new cable, and cast it into the water, thereby adding, in so far as possible, to the stability and security of the craft, in anticipation of what might occur, as presaged by the violence of the wind and the heavy sea; and Inchausti & Company's agent furnished the articles requested by the patron of the lorchia for the purpose of preventing the loss of the boat; thus did they all display all the diligence and care, such as might have been employed by anyone in similar circumstances, especially the patron who was responsible for the lorchia under his charge; nor is it possible to believe that the latter failed to adopt all the measures that were necessary to save his own life and those of the crew and to free himself from the imminent peril of shipwreck.

In view of the fact that the lorchia Pilar had no means of changing its anchorage, even supposing that there was a better one, and was unable to accept help from any steamer that might have towed it to another point, as wherever it might have anchored, it would continually have been exposed to the lashing of the waves and to the fury of the hurricane, for the port of Gubat is a cove or open roadstead with no shelter whatever from the winds that sweep over it from the Pacific Ocean, and in view of the circumstance that it was impossible for the said lorchia, loaded as it then was, to have entered the Sabang River, even though there had been a steamer to tow it, not only because of an insufficient depth of water in its channel, but also on account of the very high bar at the entrance of the said river, it is incontrovertible that the stranding and wreck of the lorchia Pilar was due to a fortuitous event or to force majeure and not to the fault and negligence of the defendant company and its agents or of the patron, Mariano Gadvilao, inasmuch as the record discloses it to have been duly proved that the latter, in the difficult situation in which unfortunately the boat under his charge was placed, took all the precautions that any diligent man should have taken whose duty it was to save the boat and its cargo, and, by the instinct of self-preservation, his own life and those of the crew of the lorchia; therefore, considering the conduct of the patron of the lorchia and that of the defendant's agent in Gubat, during the time of the occurrence of the disaster, the defendant company has not

incurred any liability whatever for the loss of the goods, the value of which is demanded* by the plaintiff; it must, besides, be taken into account that the defendant itself also lost goods of its own and the lorch a too.

From the moment that it is held that the loss of the said lorch a was due to force majeure, a fortuitous event, with no conclusive proof of negligence or of the failure to take the precautions such as diligent and careful persons usually adopt to avoid the loss of the boat and its cargo, it is neither just nor proper to attribute the loss or damage of the goods in question to any fault, carelessness, or negligence on the part of the defendant company and its agents and, especially, the patron of the lorch a Pilar.

Moreover, it is to be noted that, subsequent to the wreck, the defendant company's agent took all the requisite measures for the salvage of such of the goods as could be recovered after the accident, which he did with the knowledge of the shipper, Ong Bieng Sip, and, in effecting their sale, he endeavored to secure all possible advantage to the Chinese shipper; in all these proceedings, as shown by the record, he acted in obedience to the law.

From all the foregoing it is concluded that the defendant is not liable for the loss and damage of the goods shipped on the lorch a Pilar by the Chinaman, Ong Bieng Sip, inasmuch as such loss and damage were the result of a fortuitous event or force majeure, and there was no negligence or lack of care and diligence on the part of the defendant company or its agents.

Therefore, we hold it proper to reverse the judgment appealed from, and to absolve, as we hereby do, the defendant, Inchausti & Co., without special finding as to costs.

Arellano, C. J., Mapa, and Johnson, JJ., concur.

Carson and Trent, JJ., dissent.

DISSENTING

MORELAND, J.:

In my opinion the decision of the court below, which this court reverses, is clearly in accordance with law and in strict conformity with equity and justice. The defendant, a shipowner, agreed with the plaintiff to transport P14,000 worth of property from Manila to Catarman, Province of Samar. The defendant never fulfilled its contract. Instead of delivering the property at Catarman, Province of Samar, it left it on board of a lorch a in the waters of Gubat, a port in the southern part of the Island of Luzon, where, during a storm, the lorch a foundered and the property was lost.

This court holds that the Chinaman must lose his property. This is the manner in which the defendant lost the goods of the plaintiff:

The Sorsogon, on which the goods were loaded at Manila, arrived at Gubat about the 28th of November, 1908. A few days later the lorch a Pilar arrived at Gubat, towed by the tug Texas. The lorch a was without means of locomotion of its own, except its sails, which, from the record, appear never to have been used and were substantially useless, and could move about and protect itself from the weather only by being towed or "poled." The only boat on the coast owned by the defendant which could tow the lorch a was the tug Texas. Sometime before the 5th of December, at least one day before the storm broke, the goods belonging to the plaintiff were loaded on this lorch a. The tug Texas, under the orders of the defendant, left the locality where the lorch a was loaded and did not return until after it was wrecked.

Let us see what were the conditions at the time the defendant voluntarily and unnecessarily placed the property of the plaintiff on the lorchá Pilar;

(1) It must be remembered that Gubat is located on the Pacific coast. The waters of Gubat are not protected waters; they are not inclosed; they are not in the form of a bay; they are directly open to the winds from the Pacific Ocean, without protection or shelter of any kind, except possibly the mouth of the river, a matter here in dispute and which will be referred to later. They are likewise open to the full sweep of the waves of the Pacific coming from its widest reaches.

(2) At the time the plaintiff's goods were loaded upon the lorchá Pilar it was the height of the typhoon season in that locality. The prevailing winds were from the Pacific, Destructive baguios might reasonably be expected at any time. It was only with the exercise of diligence and prudence that shipping could be protected therefrom.

(3) As I have before indicated, the lorchá Pilar had substantially no means of locomotion of its own and depended for its protection in stormy weather entirely upon the steam tug Texas or being "poled" into the mouth of the river by its crew. At the time of the storm which destroyed the lorchá, and for some time prior thereto and for some days thereafter, the Texas was at the port of Barcelona, on the coast several miles south of Gubat, having been sent by order of the defendant, its owner.

Summarizing, theft, we have the defendant voluntarily placing the property of the plaintiff upon the kind of craft above described, dispatching to a distant port substantially - the only means of locomotion and protection which that craft had, except, as we have said, by being poled, placing that lorchá in waters directly exposed to the winds and waves of the Pacific and at the mercy of every baguio that blew; and this during a season of the year when winds were generally high and destructive baguios might be expected at any time, and with full knowledge that if a typhoon came while the agents of the defendant were unprepared the property of the plaintiff would in all probability be lost.

Having these facts in mind, let us see what the agents of the defendant did to protect the property of the plaintiff which they had voluntarily placed in a situation of such peril.

(4) At the time of the destruction of the lorchá there was a Government weather observatory at Gubat which received advices many hours in advance of the approach of a typhoon toward that locality. It had been there for some years. The purpose of that observatory was to furnish information to the public concerning the formation and approach of typhoons from the Pacific and of warning the people with exposed shipping to take such precautions as were necessary for its protection. This was known to the defendant's agents at Gubat. They knew that the observatory had a public office, open to anybody who cared to visit it, in which would be found all of the latest information relating to storms and baguios coming from the Pacific Ocean, They knew that the officials of said observatory were there for the express purpose of giving such information. The defendant's agents had at Gubat a barometer and all the other instruments usually kept by seamen and navigators for forecasting the weather.

(5) As we have said, the storm occurred on the 5th of December. It wrought its greatest havoc late in the afternoon and the early part of the night. At about 2 o'clock on the day before the storm, that is, on the 4th of December, the observatory at Gubat received notice from the Manila observatory that a baguio was forming in the Pacific Ocean. At about the same time at Barcelona, only 10 miles south of Gubat, the barometer on board the Texas dropped so rapidly as to indicate such dangerous weather probabilities that the captain of the Texas deemed it unsafe to venture out of the harbor. On the same afternoon the barometer on board the only steam vessel near Gubat, the Ton Yek, also went down. Although it does not expressly appear in the evidence, yet it is an inference entirely fair from the record, and against which nothing whatever can be urged, that the barometer in the possession of the

agents of the defendant also dropped with the same rapidity. In all human probability this could not be otherwise in view of the rapid and decisive fall of the barometer on board the Texas, only 10 miles away, and the fact that the typhoon broke over both places equally. At the same time, and more pronounced a little later, every symptom which men who have to deal with the sea could and would readily observe, and which the captain of the Ton Yek did observe as a matter of fact, indicated the approach of a heavy storm. These evidences were heeded by the captain of the Ton Yek, who, early on the morning of the 6th, without waiting for the appearance of a storm signal at the observatory, sent a messenger to the observatory for the purpose of ascertaining with more accuracy what was going to happen. In spite of all of these things, most of which occurred on the afternoon or evening of the day preceding the storm, the agents of the defendant did absolutely nothing to inform themselves as to the prospective weather conditions or as to whether or not a baguio was approaching, and did absolutely nothing to preserve or protect the property which they had placed in so exposed and dangerous a place.

(6) The morning of the 5th arrived. As we have already stated, all of the signs which men who have to do with the sea so readily read indicated unquestionably and decisively the approach of the storm which the advices received by the observatory at 2 o'clock on the afternoon before told the inhabitants of that locality was probably coming. Still the agents of the defendant did nothing. The captain of the Ton Yek, although his vessel was a steam vessel and was able to take care of itself by reason of its machinery, judging these signs and portents, found it advisable to consult with the observatory early on the morning of the 5th. The approach of a storm was apparent to him and he took precautions accordingly. Yet the agents of the defendant did nothing. Although the lorchas on which they had put the property of the plaintiff was, according to their own admissions, utterly unprotected, and although P14,000 worth of goods intrusted to their care was in great danger of being lost, still they did absolutely nothing, either by anticipation or otherwise, to protect that property therefrom.

(7) On the morning of the 5th at about 8.20 or 8.30 o'clock the observatory ran up the first danger signal. Still the agents of the defendant noted nothing, did nothing. They paid absolutely no attention to it, as they had paid no attention whatever to the other indications. They left the lorchas to its fate without lifting a finger to save it. At 9 o'clock the wind had risen and the waves had commenced to roll. Still nothing was done. At 9.30 the winds were still stronger and the waves higher. Still nothing was done. At 10.30 the increase in the strength of the wind and of the height of the waves continued. And yet the agents of the defendant did nothing. It was well toward 11 o'clock before they began to move. At that time it was too late. The wind and waves were so high that, with the means at hand, the lorchas could not be moved from the exposed position in which it was, even if it be conceded that there was any safer place within those waters. The lorchas were prevented from dashing itself immediately upon the rocks only by virtue of its anchor. At between 10.30 and 11 o'clock the captain of the lorchas came ashore to secure additional anchors. At that time, however, as we have observed, it was too late to unload the goods and too late to remove the lorchas to a safe place within the mouth of the river, even if that were possible. The agents of the defendant, having done absolutely nothing up to this time, now found, after they had awakened from their lethargy, that it was too late to do more than stand by and see the property, which had been intrusted to their care and for the carrying of which they had been paid, dashed to pieces on the rock and swallowed up by the sea.

(8) For nearly eighteen hours prior to the disaster the information that the disaster was coming lay under the very noses of the agents of the defendant. For nearly eighteen hours the barometer had been dropping steadily, so much so that their own vessel dared not leave a port only 10 miles distant on the afternoon before. For eighteen hours every warning which nature could give, indicating the disaster which subsequently came, had been repeatedly thrust upon them. Yet they did nothing. Having placed the goods of the plaintiff in an exposed and dangerous position, in waters open to the winds and waves of the Pacific Ocean, at the height of the typhoon season, in a vessel which had no motive power of its own, and having sent away that which they themselves substantially admit was its only protection, the agents of the defendant exercised no care or precaution whatever to the end that

they might protect the goods which they themselves had so recklessly exposed.

Yet this court, under such circumstances, holds that the defendant may go in peace and that the plaintiff is the one who must bear the burden of such negligence. With that decision I can not agree.

An act of God can not be urged for the protection of a person who has been guilty of gross negligence in not trying to avert its results. One who has accepted responsibility for pay can not weakly fold his hands and say that he was prevented from meeting that responsibility by an act of God, when the exercise of ordinary care and prudence would have averted the results flowing from that act. One who has placed the property of another, instructed to his care, in an unseaworthy craft, upon dangerous waters, cannot absolve himself by crying, "an act of God," when every effect which a typhoon produced upon that property could have been avoided by the exercise of common care and prudence. When the negligence of the carrier concurs with an act of God in producing a loss, the carrier is not exempted from liability by showing that the immediate cause of the damage was the act of God; or, as it has been expressed, "when the loss is caused by the act of God, if the negligence of the carrier mingles with it as an active and cooperative cause, he is still liable." The loss and damage to perishable articles in consequence of the weather will not excuse the carrier if it could have been prevented by due care and diligence. The carrier must not only show that it did all that was usual, but all that was necessary to be done under the circumstances. (*Wing vs. New York, etc., Ry. Co.*, *Hilt. (N. Y.)*, 235; *Philleo vs. Sanford*, 17 *Tex.*, 228.) To be exempt from liability for loss because of an act of God, the common carrier must be free from any previous negligence or misconduct by which that loss or damage may have been occasioned. For, although the immediate or proximate cause of a loss in any given instance may have been what is termed an act of God, yet if the carrier unnecessarily exposed the property to such accident by any culpable act or omission of his own, he is not excused. (*McGraw vs. Baltimore and Ohio Ry. Co.*, 41 *Am. Rep.*, 696.) In the case of *Wolf vs. American Express Co.*, 43 *Mo.*, 421, *Wagner, J.*, said:

"The act of God which excuses the carrier must not only be the proximate cause of the loss, but the better opinion is that it must be the sole cause. And where the loss is caused by the 'act of God,' if the negligence of the carrier mingles with it as an active and cooperative cause, he is still responsible. (*Amies vs. Stevens*, 1 *Stra.*, 128.)"

Where perishable property, such as potatoes, is received by a common carrier at a season when a very low temperature may reasonably be apprehended, great diligence should be used in forwarding such property with dispatch and haste; and where, by a delay of two or three days, the property is damaged by freezing, the carrier may be held liable for the damage. (*Hewett vs. The Chicago, B. & Q. Ry. Co.*, 63 *Ia.*, 611.) A carrier is bound to provide a vessel in all respects adequate to the purpose, with a captain and crew of requisite skill or ability; and, failing in these particulars, though the loss be occasioned by an act of God, the carrier may not set up a providential calamity to protect himself against what may have arisen from his own folly. (*Hart vs. Allen and Grant*, 2 *Watts (Pa.)*, 114.)

This doctrine is fully supported by the Spanish authorities on the subject.

Manresa in his commentaries to section 1105 of the Civil Code of Spain, volume 8, page 91, says:

"Elucidation of article 1105 and the idea of accident is interesting under the following aspects: Relation between it and the blame; enumeration of the requisites that must be present; proof of the event and characterization thereof; and the consequences it produces. Let us examine them.

"Even when the distinction is simple and reasonable between blame for some exempting circumstance (because it may not be serious enough to involve such blame, under the law or the obligation) and accident, since the former admits an imputation which the latter excludes, even when the 'former may not be the basis

for legal responsibility, and therefore it can not be said that where no responsible blame exists there the accident commences, yet the latter is undeniably characterized by unexpectedness and inevitability, circumstances susceptible of relative interpretation, and so whatever relates to the blame must be taken into account, because, as we shall see, it is in a certain sense, especially in practical application, connected with the matter under consideration.

"Aside from this statement of ideas, there may be another of consequences, for in the complexity of facts, in the same obligation, there may be present blame enough to involve such and also accident. When both causes are present, with separation of time and effects, for partial breach due to one of them may be possible and then the other may operate to aggravate or complete these consequences, the distinction is easy and to each cause may be assigned its own effect for the corresponding result, as neither exemption, on account of accident, can be extended to what may be imputed nor to what in any way depends upon it by basing responsibility arising from blame on the fact that the damage is the result thereof.

"The problem becomes more difficult when both causes concur to produce the same effect or when, even though the effect may be due to accident, the obligor has not exercised necessary diligence, however blameless he was for the results arising from the breach. In the first of the last two suppositions, the solution is plain, because when the obligor incurs the blame of actually producing the result, even when it is not the only cause, or even the principal one, there is still sufficient connection between it and the consequences to cause them to be imputed to him and, as a voluntary element exists in the causes, there is lacking the circumstance indispensable to exemption on account of accident. The second supposition presents a very difficult problem of proof, which rests upon the obligor, and calls for a careful analysis of the origin of the breach. The difficulty in this case consists in that the blame, in addition to its subjective aspect for imputing the consequences to the obligor, has an objective aspect, to wit, that these consequences may arise, that the damage which must be repaired is caused, in such manner that due diligence may be lacking and yet not extend to the point of involving responsibility, because it produces no results. Now then, if an accident occurs under these conditions, absolutely independent of the negligence that may have existed, it may have occurred with or without negligence and therefore any derivation of consequences was lacking, then it can not be said that responsibility arises therefrom; but to reach this conclusion there first rests with the obligor proof so difficult that, in addition to overcoming the presumption of existence of blame, it involves the very fine distinction of the origin of the breach and perfectly reveals the occurrence of the accident, joined by their coexistence, and demonstrating absolute lack of consequences and influence of blame.

"In connection with this question, a judgment of November 22, 1904, declares that there are some events which, independent of the will of the obligor, hinder the fulfillment of the obligation, and yet do not constitute cases of force majeure for the purposes of such fulfillment, because the possibility that they would occur could have been foreseen, articles 1101 and 1104 being applicable and not article 1105, since negligence or blame is also present from not informing the obligee, either at first or later on, of the state of affairs and the situation, so as to avoid the consequent damage. This was the case of a bull fight that could not be held because the ring was not completed in time for reasons beyond the control of the contractor, but the fact that the contract did not state that the ring was unconstructed and the possibility that it would not be at the time specified, reveals, in the opinion of the court, the lack of foresight or the negligence which makes article 1105 inapplicable.

"In an essentially analogous way, judgments were pronounced on June 12, 1899 (Tribunal contencioso administrativo), and on October 27, 1905 (Sola tercera), against the company leasing the tobacco monopoly, for losses caused by theft and fire. It was further decided in these cases that the company and not the State must bear the losses, for while accidental fire in a tobacco factory and theft of stamped goods stored in a branch house may constitute accidents, yet they do not deserve this characterization when they occur through omission, neglect or lack of care which imply breach of the contract.

"According to the text of article 1105, which agrees with the rational idea of accident, it is sufficient for the event to constitute such that it have any of the two characteristics enumerated; if it is foreseen, it is of little

import that it be unavoidable; and if it is unavoidable it does not matter that it may have been foreseen. The first supposition requires some explanation: an event may be wholly unforeseen, but, after it has occurred, be very slow in producing effects, and in such case, although it could not have been foreseen, as there is time before it produces its effects, the latter must be considered.

"Besides this special supposition, in which, if carefully considered, the two characteristics do not concur, since the idea of unexpectedness, as is seen, is relative, it will be sufficient that one or the other be present. The possibility of foresight must be weighed rationally with consideration of all the circumstances, but this general rule has, strictly speaking: an exception when the event, although in a general way very difficult, almost impossible to be foreseen, should for some reason be known to the obligor in due time.

"The condition of inevitability can not be understood in so absolute a sense that it should take away the character of accident from many that are strictly such, because they are undoubtedly causes, however powerful they may be, whose injurious effects might have been avoided by exercising a number of precautions, so exaggerated and so out of proportion to the importance of the trouble anticipated, that they would be unreasonable and not required in law. In such cases, if the means which can and must rationally be, employed are not effective, it will be held to have been unavoidable. t So we see demonstrated how the idea of diligence is related, somewhat in the nature of limitation, to the accident.

"Such was the doctrine established in our ancient law regarding the obligor; the reasons whereof are theoretically set forth further on; and as a written provision, law 20, title 13, partida 5, which expressly laid down this principle in connection with pawn-broking contracts, and which was, by analogy, made the basis for extending a similar provision to the remaining cases.

"That the Civil Code is inspired by the same idea is clearly expressed in article 1183 thereof, the commentary on which should be consulted. Still such solution depends upon the nature of the proof and of the accident, since its existence as an abnormal event hindering the fulfillment of the obligation must be proved and not presumed, and the burden of this proof rests upon the obligor, and not upon the obligee, whose proof would have to be negative. Moreover since an accident is the basis for exemption from responsibility, it must be proved by him who will benefit thereby and who objects to the requirement that he fulfill his obligations. To these reasons are joined those above set forth in connection with the proof of contractual blame, since they are, according to the same article, 1183, above cited, closely related questions, so much so that they become two phases of one question - presumption against the existence of accident and of what tends to establish presumption of blame, in the absence of proof to overcome it.

"Proof of accident must include these points: the occurrence of the event, the bearing it has upon breach of the obligation, and the concurrence of unexpectedness and inevitability. In connection with the first two points, the proof resting upon the obligor must be specific and exact; but as for the last, although it may be admitted as a general proposition that, in addition to proving the event, he must also demonstrate that it involves the condition required to make it an accident, there are some of such magnitude and, by their nature, of almost impossible prevision, that proof of their occurrence demonstrates their condition. Undoubtedly, and differently from proof of the accident, the exceptional circumstance that the event (which should as a general proposition be regarded as unforeseen) was known to the obligor for some special reason, must be proven by the obligee who asserts it, since the obligation of proof resting upon the former is fulfilled in this regard by demonstrating that the event ought rationally to be held to have been unforeseen.

"Since proof of the accident is related to proof of the blame, it is evident that the obligor must also prove, so far as he is concerned, that he is not to blame for breach of the obligation.

"Exemption from responsibility in accidents established by article 1105 has, according to its text, two exceptions, whereby an event may be plainly proven, and be unforeseen and unavoidable and still not produce such exemption, viz, when the exception is either stipulated in the obligation or is expressly mentioned by the law. The basis for these exceptions rests, according to the cases, either upon the freedom of contracts, which is

opposed to prohibition of a compact, wherein, without immorality, there is merely an emphasized stipulation, which is meant to guarantee in every case an interest and indirectly to secure careful and special diligence in the fulfillment of the obligation; or upon the nature of the obligations when risk is an essential element therein; or finally upon cases whose circumstances, as happens with that provided for by the last paragraph of article 1096, justify the special strictness of the law.

"In conclusion, we shall point out that in order to relieve the obligor from his obligation, it must be remembered that the occurrence of the event does not suffice, but that the impossibility of fulfilling the obligation must be the direct consequence of the accident, so that when it can be fulfilled it will subsist, even if only in part, and therefore, in order to see whether or not the accident produces this result the nature of the obligation must be considered, and according to whether it be specific or general, etc., it will or will not be extinguished."

To hold the carrier responsible in the case at bar, it is not necessary to go so far as the authorities just cited. The negligence is so clear that it is not necessary to strain doctrines or even press them to their limits.

I do not here argue the assertion of the plaintiff denied by the defendant, that, at any time before nine o'clock of the day of the destruction of the lorcha, the defendant's agents could have placed the lorcha in the mouth of the river out of harm's way. I believe that a fair preponderance of the evidence shows that this could have been done. The defendant denies this, asserting that the water was too shallow. Nevertheless, fourteen days after the storm, the foundered lorcha, water-logged and undoubtedly containing water, was "poled" by its crew from the place where it went on the rocks to a place of safety inside the mouth of the river. It is more than probable that this could have been done at any time before the storm became too high. At least common prudence would have required the unloading of the lorcha, which could easily have been accomplished before the storm if the agents of the defendant had awakened themselves to their duty.

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