

GEORGE E. WORCESTER, PLAINTIFF AND APPELLEE, VS. BUCKNALL STEAMSHIP LINES, LTD., DEFENDANT AND APPELLANT.

G.R. No. 7027. March 20, 1912

Ponente: CARSON, J.

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CARSON, J.:

After the entry of judgment in the court below, and pending the submission of the case to this court on the bill of exceptions, a motion was submitted by the defendant-appellant for a new trial, based on the discovery of new evidence. This new evidence consists, substantially, of a deposition of the master of the steamship Kaloma touching the destruction and loss of her cargo as a result of the sinking of the ship in the harbor of Singapore for the purpose of extinguishing a dangerous fire which had broken out in the case-oil section of the cargo.

Ruling upon this motion was reserved pending the submission of the appeal, and it now becomes our duty to determine its admissibility in the light of the facts developed by the whole record and the argument of counsel upon the whole case.

Upon a review of the whole record we are satisfied that if it be held that a new trial should not be granted for the purpose of admitting the above-mentioned deposition, then the judgment of the lower court must be affirmed; but that if a new trial should be granted, and this deposition is offered in evidence on this new trial, it is "of such a character" that in all probability it would change the result. If the deposition of the master of the Kaloma is to be believed, and there is nothing at present in the record to put it in doubt, the fire which broke out in her cargo at Singapore was not "caused by the design or neglect" of the owners or of any of their employees, and the loss of the goods of the plaintiff which was occasioned thereby gave him no cause of action against the defendant, in view of the express provisions of the bill of lading, and of section 4282 of the Revised Statutes of the United States.

The question as to the right of the defendant to have a new trial on the ground that the evidence in question is newly discovered presents some difficulty. We recognize the difficulty which, in the ordinary course of events, would be encountered in securing the testimony of the responsible officers of an ocean-going ship as to the facts and circumstances attendant upon a fire aboard ship which occurred in a foreign port, many months prior to the institution of an action in our courts wherein the truth as to such facts and circumstances may be found to be of vital importance. At the same time we can not lose sight of the fact that the master of the Kaloma continued in the employ of the defendant after the fire took place and up to the time when his deposition was actually taken, so that, in these days of cables and rapid transportation, there would not seem to have been an absolutely insuperable difficulty in securing from him such information supported by affidavits as would doubtless have secured the necessary continuance in the court below to give opportunity for the taking and submission of the deposition before the entry of judgment in first instance.

Having in mind, however, the amount involved and all the circumstances of the case, we think that under the provisions of subsection 2 of section 497 of the Code of Civil Procedure we should grant a new trial upon the

payment by defendant and appellant of all the costs accrued in both instances up to the date of the entry of judgment in this court, and upon the further condition that plaintiff will be permitted, if he elects so to do, to dismiss his complaint at any time within thirty days from the return of the record to the court below, without further special condemnation of costs.

Twenty days after notification of this decision to counsel for appellant, let judgment be entered affirming the judgment of the court below with the costs of this instance in favor of appellee, unless prior thereto the defendant-appellant shall have filed with the clerk of this court a written acceptance of the conditions provided for the allowance of a new trial, in which event judgment will be entered reversing the judgment of the court below without costs in this instance and directing a new trial, wherein such further and additional evidence will be admitted as either of the parties desire to submit touching the loss of the goods of the plaintiff in the harbor at Singapore. So ordered.

Torres, Mapa, Johnson, Moreland, and Trent, JJ., concur.

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