G.R. No. 17, August 26, 1901 DON LUCIANO CORDOBA, PLAINTIFF AND APPELLANT, VS. WARNER, BARNES & CO., DEFENDANTS AND APPELLEES.

D E C I S I O N

SMITH, J.:

This action was commenced in the Court of First Instance, Intramuros (Manila), by the plaintiff, Cordoba, to recover from the defendants, Warner, Barnes & Co., the sum of $479.57, Mexican currency, the value of certain merchandise alleged to have been short delivered by them as common carriers of the plaintiff, with 50 per cent of such value added as liquidated damages and also the costs of suit. In the court below judgment went for the defendants and plaintiff appealed.

The record discloses without contradiction that some time prior to June, 1900, the firms of Cahn, Nickelsberg & Co. and Trieste & Co. delivered at San Francisco, California, to the Pacific Mail Steamship Company on board its steamship *Rio du Janeiro*, for shipment to Manila via Hongkong, twenty cases of shoes and five cases of hats, respectively, freight prepaid as per "accountable receipt" or "way-bill." The goods were consigned to plaintiff, Manila, and properly marked with his name. On arrival at Hongkong they were delivered by the Pacific Mail to the steamer *Diamante* in good condition, for transshipment to Manila Bay, at which place the vessel arrived June 11, 1900, under consignment to the defendants. Ten days later the five cases of hats and six of the twenty cases of shoes were discharged into the lighters of Carman & Co., agents of the plaintiff, empowered to receive and transport them from the ship's side to the custom-house.

The court finds as a fact and the managing agent of the defendants positively testifies that before receiving the consignment of plaintiff, Carman & Co. called the attention of the defendants to the condition of the cases, and then and there protested their receipt on account of their "bad condition." Nevertheless, the carrier, without verifying the contents of the packages and without demanding an examination of them on board, voluntarily delivered them to the lighter men who, under customs supervision and control, brought them to the custom-house, where they were deposited in the bodega set apart for broken packages.

On the 25th and 27th of June, 1900, and while the goods were still in the custom-house, the plaintiff wrote to the defendants, notifying them that the five cases of hats and the six cases of shoes bore evidence of having been tampered with, and asking that they name a representative to be present at the customs examination of the cases in order to note any shortage which might be disclosed thereby. Warner, Barnes & Co. named Seor Abreu as their representative for the purpose, and he, conjointly with the customs officials, examined the cases in bad condition and reported to his principals that the packages were short 119 hats and 9 pairs of shoes. The merchandise found in the cases was received by the plaintiff from the custom-house some time subsequent to the 29th of June, 1900, on which date the duties were paid. Notwithstanding the report of their representative, the defendants declined to settle the claim presented for the missing goods, first, because the protested packages were not opened and examined before they left the ship's side as required by the bill of lading, and second, because the claim of loss was not presented within twenty-four hours after delivery of the goods to the lighter for transportation to the custom-house. Both contentions of defendants were sustained by the court below in the suit which was subsequently commenced against them, and plaintiff appealed.

In our opinion neither one nor the other of the defenses set up by the consignees of the vessel was well founded. The bill of lading which provides that "in the event of any packages being refused on account of condition, they are, if in bad order, to be examined on board the steamer and contents certified to, when steamer's responsibility will cease," gave to the defendants the undoubted right to retain on board and to examine all refused packages. This right, however, being exclusively for their own protection, they could waive it and they did waive it by discharging the goods, notwithstanding the protest, and accepting a receipt which specified on its face that the cases were in "bad condition" when delivered for transportation to the custom-house. It lay wholly with the carrier to say whether the goods should or should not be discharged from the vessel without examination, and having voluntarily elected to so discharge them the respondents can not now be permitted to urge that the failure to examine the cases on board was a bar to the claim of appellant. If the goods had been examined on board the failure of the consignees to give the certificate of shortage prescribed by the bill of lading would have constituted no defense to the action, and on the same principle their failure to retain and examine the packages after protest made can not be held to prejudice the rights of the plaintiff.

Respondents claimed on the hearing of this appeal that the duplicate receipt offered in evidence by the appellants could not be accepted as evidence, for the reason that on its face it appeared to have been written in different inks and by different persons. If the duplicate receipt was fictitious or manufactured for the occasion it could have been shown in a moment by the production of the original delivered to the carrier when the goods were discharged, and the failure to do so by defendants must be considered against them and as fatal to their contention.

Defendants' second defensethat plaintiff's suit must fail because his claim was not presented to the carrier or consignees of the vessel within twenty-four hours after receipt of the goodscan not be sustained for the reason that plaintiff's claim was presented not later than the 27th of June, 1900, and he did not receive his consignment within the meaning of article 366 of the Commercial Code before the 29th of the same month. The discharge of the merchandise into the lighters of Carman & Co. for delivery at the custom-house under customs supervision and control was not "the receipt of the merchandise" contemplated by article 366. The packages were then in the hands of the Government, and their owner could exercise no dominion whatever over them until the duties were paid or secured to be paid. The time prescribed by article 366 within which claims must be presented does not begin to run until the consignee has received such possession of the merchandise that he may exercise over it the ordinary control pertinent to ownership. For these reasons the judgment of the court below must be reversed without special finding of costs, and it is so ordered.

Arellano, C. J., Torres, Cooper, Willard, Ladd, and *Mapa, JJ.,* concur.