The Folmina

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Appeal No. : 212 U.S. 354

Appellant : The Folmina

Judgement :

The Folmina - 212 U.S. 354 (1909)
U.S. Supreme Court The Folmina, 212 U.S. 354 (1909)

The Folmina

No. 84

Argued January 21, 22, 1909

Decided February 23, 1909

212 U.S. 354

CERTIFICATE FROM THE CIRCUIT COURT OF

APPEALS FOR THE SECOND CIRCUIT

SYLLABUS

When goods which were received in good order on board a vessel under a bill of lading agreeing to deliver them at termination of the voyage in like good order and condition are damaged on the voyage, the burden is on the carrier to show that the damage was occasioned by a peril for which he was not responsible. *Clark v. Barnwell,* 12 How. 272.

Merely proving that damage to cargo was by seawater does not establish that such damage was caused by peril of the sea within the exception of the bill of lading; in such a case, conjecture cannot take the place of proof. *The G. R. Booth,* 171 U. S. 450 .

Where a certified question does not propound a distinct issue of law,

Page 212 U. S. 355

but in effect calls for a decision of the whole case, this Court need not, and in this case does not, answer it. *Chicago, B. & Q. R. Co. v. Williams,* 205 U. S. 444 .

The question

"whether damage to the cargo of an apparently seaworthy ship, through the unexplained admission of seawater, in the absence of any proof of fault on the part of the officers or crew of the ship, is of itself a sea peril within the meaning of an exception in a bill of lading exempting the carrier from the act of God . . . loss or damage from . . . explosion, heat or fire on board . . . risk of craft or hulk or transshipment, and all and every the dangers and accidents of the seas, rivers and canals and of navigation of whatever nature and kind"

answered in the negative.

The question "whether the ship is relieved from liability in consequence of said exception," not presenting a distinct issue of law, not answered.

The facts are stated in the opinion.

Page 212 U. S. 359

MR. JUSTICE WHITE delivered the opinion of the Court.

Upon the hearing of an appeal from a decree of the District Court, Eastern District of New York, dismissing a libel, the Circuit Court of Appeals for the Second Circuit certified to this Court for decision, pursuant to 6 of the Judiciary Act of 1891, the following questions:

1. Whether damage to the cargo of an apparently seaworthy ship, through the unexplained explained admission of seawater, in the absence of any proof of fault on the part of the officers or crew of the ship, is of itself a sea peril within the meaning of an exception in a bill of lading exempting the carrier from

"the act of God . . . loss or damage from . . . explosion, heat or fire on board . . . , risk of craft or hulk or transshipment, and all and every the dangers and accidents of the seas, rivers, and canals and of navigation of whatever nature or kind."

2. Whether the ship is relieved from liability in consequence of said exception?

The facts upon which the questions arose were thus stated in the certificate:

The steamship *Folmina* sailed from Kobe, Japan, for New York with a large shipment of rice on board in No. 3 hold under a bill of lading which contained the exception set out in the first of the foregoing questions, and also a provision that the ship "is not liable for sweat, rust, decay, vermin, rain, or spray."

Page 212 U. S. 360

The rice was in good order when put on board, but, when discharged in New York, a large part of it stowed on the starboard side of the hold was found damaged. The area of injury was downward from the first six tiers of bags to the bottom of the hold, which was dry, forward from about the after end of the hatchway nearly to the bulkhead, and inboard about three or four bags. The damage was caused by water and consequent heat.

A majority of the Court are satisfied that the damage was caused by seawater, and that it was not shown that the vessel encountered sufficient stress of weather to warrant the inference that it came in because of the action of external causes. There was no evidence tending to show any negligence, fault, or error on the part of the ship's officers or crew; the cargo was well stowed and ventilated.

The *Folmina* was a steel steamship of the highest class in Lloyd's register. Before starting for Japan, she was in drydock at New York, and was there surveyed by Lloyd's surveyor. Sometime before, she had been in drydock at Cardiff, where some repairs were made to the rudder, rudder quadrant, and a ventilator. The master testified to the general good condition of the steamer at the time she sailed from Kobe.

During and after the delivery of the cargo, the main deck, the between deck, the pipes leading to or connected with No. 3 hold, and the shell plating in the wing of No. 3 hold were carefully examined by the officers of the ship, by surveyors representing the libellants and their underwriters, and it was afterwards examined by competent and experienced surveyors representing both parties. The decks, hull, side plating, and rivets of the ship were found to be sound, intact, and free from leaks. No evidence (other than the mere circumstance that the damage was by seawater, if that be considered evidence) was found that there had been leaks in part of the frame, structure, side plating, riveting, pipes, or appurtenances of the ship through which water might have reached that part of No. 3 hold where the damage was done. No adequate means of access of seawater

were found, nor any defect in the steamer, which then appeared to be seaworthy.

The answer to be given to the first question will be fixed by determining upon whom rests the burden of proof to show the cause of the damage when goods which have been received by a carrier in good order are by him delivered in a damaged condition.

As said in *Liverpool & Great Western S.S. Co. v. Phenix Ins. Co.,* 129 U. S. 397 , 129 U. S. 437 :

"By the settled law, in the absence of some valid agreement to the contrary, the owner of a general ship, carrying goods for hire, whether employed in internal, in coasting, or in foreign commerce, is a common carrier, with the liability of an insurer against all losses except only such two irresistible causes as the act of God and public enemies. Molloy, Bk. 2, c. 2, 2; Bac.Abr., ' *Carrier.* ' A; *Barclay v. Cuculla y Gana,* 3 Dougl. 389; 2 Kent, Com. 598-599; Story on Bailment, 501; *The Niagara,* 21 How. 7, 62 U. S. 23 ; *The Lady Pike,* 21 Wall. 1, 88 U. S. 14 ."

And as observed in the same case:

"Special contracts between the carrier and the customer, the terms of which are just and reasonable, and not contrary to public policy, are upheld; such as those exempting the carrier from responsibility for losses happening from accident, or from dangers of navigation that no human skill or diligence can guard against."

It was long since settled in *Clark v. Barnwell,* 12 How. 272, that, where goods are received in good order on board of a vessel under a bill of lading agreeing to deliver them at the termination of the voyage in like good order and condition, and the goods are damaged on the voyage, in a proceeding to recover for the breach of the contract of affreightment, after the amount of damage has been established, the burden lies upon the carrier to show that it was occasioned by one of the perils for which he was not responsible. But, as illustrated in the case of *The G. R. Booth,* 171 U. S. 450 , proof merely of damage to cargo by seawater does not necessarily tend to establish that such damage

was caused by a peril or danger of the seas. In that case, the facts were that the explosion of a case of detonators, which were part of a cargo, burst open the side of the ship below the waterline, and the seawater, rapidly flowing in through the opening made by the explosion, injured the plaintiff's sugar. It was held that,

although the explosion and the inflow of the water were concurrent causes of the damage, yet

"the explosion, and not the seawater, was the proximate cause of damage, and that this damage was not occasioned by the perils of the sea within the exceptions in the bill of lading."

As well observed by counsel in the argument at bar, the efficient cause of the damage sustained by the rice on board the *Folmina* must be sought in those conditions or events which caused or permitted the entrance of seawater. It cannot, in reason, be said that seawater was the efficient, the proximate, cause of the cargo damage because no other cause for that damage has been disclosed. As there must have been an efficient cause permitting the seawater to enter, so long as that cause remains undisclosed, it cannot be said that the damage has been shown to have resulted from causes within the scope of a sea peril. Of course, where goods are delivered in a damaged condition plainly caused by breakage, rust, or decay, their condition brings them within an exception exempting from that character of loss, as the very fact of the nature of the injury shows the damage to be *prima facie* within the exception, and hence the burden is upon the shipper to establish that the goods are removed from its operation because of the negligence of the carrier. But, in a case like the one before us, where showing an injury by seawater does not, in and of itself, operate to bring the damage within the exception against dangers and accidents of the sea, it follows that it is the duty of the carrier to sustain the burden of proof by showing a connection between damage by the seawater and the exception against sea perils. For the distinction between the two, *see The Henry B. Hyde,* 90 F. 114, 116; *The Lennox,* 90 F. 308, 309; *The Patria,* 132 F. 971, 972.

Page 212 U. S. 363

The inability of the court below to determine the cause of the entrance of the seawater would imply that the evidence did not disclose in any manner how the seawater came into the ship. In other words, while there was a certainty from the

proof of a damage by seawater, there was a failure of the proof to determine whether the presence of the seawater in the ship was occasioned by an accident of the sea, by negligence, or by any other cause. Manifestly, however, the presence of the seawater must have resulted from some cause, and it would be mere conjecture to assume simply from the fact that damage was done by seawater that therefore it was occasioned by a peril of the sea. As the burden of showing that the damage arose from one of the excepted causes was upon the carrier, and the evidence, although establishing the damage, left its efficient cause wholly unascertained, it follows that the doubt as to the cause of the entrance of the seawater must be resolved against the carrier. *The Edwin I. Morrison,* 153 U. S. 199 , 153 U. S. 212 . *And see* further the following cases, applying the principle just stated and holding that, because the damage to cargo was shown to have been occasioned by seawater, without any satisfactory proof as to the cause of its presence, in view of the burden resting upon the carrier, conjecture would not be permitted to take the place of proof: *The Sloga,* 10 Ben. 315; *The Compta,* 4 Sawyer 375; *Bearse v. Ropes,* 1 Sprague 331; *The Zone,* 2 Sprague 19; *The Svend,* 1 F. 54; *The Centennial,* 7 F. 601; *The Lydian Monarch,* 23 F. 298; *The Queen,* 78 F. 155, 165, 168, *aff'd,* 94 F. 180, 196; *The Phoenicia,* 90 F. 116, 119, *s.c.,* 99 F. 1005; *Ins. Co. v. Easton & M. Transp. Co.,* 97 F. 653; *The Presque Isle,* 140 F. 202, 205.

So far as the second question is concerned, it does not propound a distinct issue of law, but, in effect, calls for a decision of the whole, case, and therefore need not be answered. *Chicago, B. & Q. Ry. v. Williams,* 205 U. S. 444 , 205 U. S. 452 , and cases cited.

The first question is answered "No," and the second is not answered.