

YAP KIM CHUAN, PLAINTIFF AND APPELLEE, VS. ALFONSO M. TIAOQUI, DEFENDANT AND APPELLANT.*G. R. No. 10006. September 18, 1915*

Ponente: TORRES, J.

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This is an appeal filed through a bill of exceptions by counsel for the defendant from the judgment of March 20, 1914, whereby the Honorable A. S. Crossfield, judge, sentenced him to pay to the plaintiff the sum of P1,019 with legal interest at the rate of 6 per cent a year, from August 4, 1903, and the costs.

Under date of August 4, 1913, counsel for the plaintiff filed a written complaint in the Court of First Instance of Manila, alleging as his first cause of action that on March 15, 1913, plaintiff leased the building at No. 218 Calle Rosario, owned by the defendant, up to December 31 of the same year, undertaking to pay therefor the sum of P310 from said March 15 to June 30, 1913, and P315 from the subsequent first of July until the termination of the lease; and that on April 14, 1913, because of the leaks in the roof of the storeroom of said building, without fault or negligence on the plaintiff's part, some of his merchandise stored in said storeroom was so wet and damaged as to cause him a loss amounting to P1,169. He set forth as his second cause of action that subsequent to this occurrence, to wit, on April 15, 1913, a list of the damaged goods was made out in the presence of the plaintiff, the defendant and a notary public; that afterwards the defendant expressly authorized the plaintiff to sell the damaged goods at any price, promising to pay the difference between the selling price and the regular price of the articles in good condition; that by virtue of said authorization and promise, plaintiff accordingly disposed of all the damaged goods that could be sold, at a loss of P1,169; and that notwithstanding the repeated demands made upon him to pay this amount, according to promise, said defendant had refused and refuses to pay. Therefore, judgment is prayed against the defendant, sentencing him to pay to the plaintiff the sum of P1,169 with legal interest, and the costs.

On September 3, 1913, defendant filed his answer in writing, admitting certain paragraphs of the foregoing complaint but specifically denying the rest, and alleging as a special defense that the building the plaintiff occupies had been recently finished, the construction thereof having been under the direction and inspection of an engineer, after approval of the plans and specifications by the engineering and sanitation departments of the city of Manila; that it was opened for use after acceptance of the work by the city engineer and approval by the said departments of engineering and sanitation; that about 5 o'clock in the afternoon of April 14, 1913, there fell over the city of Manila a torrential rain the heaviest from the month of January of that year; that because of the large amount of water and the extraordinary violence of the downpour many buildings in the Escolta and adjacent business sections, not only many buildings of wood merely, but even those of reinforced concrete, were flooded by the overflowing of the drains, gutters, and by filtrations, because the gutters of the eaves and roofs were inadequate for holding the extraordinarily excessive rainfall on that occasion; that the wetting the plaintiff's merchandise sustained from that rainfall was not caused wholly by the leaks and drips but was in large part due to the improper situation or location of said merchandise inside the building; that in neither case was there fault or

negligence on defendant's part, said occurrence having been unforeseen, or, even being foreseen, unavoidable; that it is true an inventory of the plaintiff's damaged goods was made in the presence of the interested parties before a notary public; that said plaintiff presented to the defendant his claim for the damages sustained, asking the latter to pay them; that the truth is that the defendant never authorized plaintiff to sell the said merchandise inventoried, as set forth in the complaint; that it is not the truth the defendant promised, either expressly or tacitly, to make good to the plaintiff any loss sustained through the difference between the price of the articles in good condition and the price thereof after being damaged, for, as recorded in the document drawn up on April 15, 1913, signed by the plaintiff, the defendant's intervention therein did not signify a tacit acceptance of any liability for the alleged loss sustained by the plaintiff, but was merely to determine the cause thereof and the manner in which the water got into the building. As another special defense he alleged that on August 2, 1913, defendant transferred all his own rights, claims, and obligations in the lease, as well as the absolute ownership of the building occupied by plaintiff's store, to Senoras Romana, Cecilia, Luisa, and Maria, of the surname Tantungco y Guepangco who, by agreement set down in the instrument of transfer, took over all the premises covered by the lease made by the defendant to the plaintiff from the date thereof, to wit, March 15, 1913, and consequently they were parties directly interested in the present suit.

After trial and introduction of the evidence by both parties, the court rendered the judgment that has been set forth, whereupon defendant saved his exception and filed a written motion for a reopening of the case and a new trial. This motion was denied, with exception on appellant's part and presentation of the corresponding bill of exceptions, which was approved and forwarded to the clerk of this court.

The question raised in this case No. 10006, and in two others of the same nature, Nos. 10007 and 10008, is whether the owner of a tenement occupied by each of the defendants in the three cases cited, each in his respective rooms or apartment, is responsible for the deterioration through the wetting of the cloth and other goods that said plaintiffs as tenants had in same and its storerooms, as a result of the torrential and extraordinary rain which fell upon the city for nearly an hour in the afternoon of April 14, 1913.

Defendant's building, composed of four apartments, had just been finished and a few months ago was inspected by the city engineer and approved for the use for which it was intended. There is no record that said building presented any indication or sign of having defects in its roof such as might cause leaks and damage to the merchandise placed therein, for, to enable the Chinese contractor Machuca to hand over the same, as finished, the work was previously approved by the architect who superintended the construction and finally by the city engineer, who authorized the use and occupancy of the building for leasing, therefore it is to be presumed, in the absence of proof to the contrary that the owner who invested many thousands of pesos in the construction would not have approved or accepted the work on his building unless he had been convinced that the building, finished by the contractor and approved by his architect who superintended the work and by the city Engineer, had been properly constructed, and therefore that in leasing it to the plaintiff-tenants he acted in the greatest good faith; that they on their part, in taking over and occupying the leased premises, did so satisfied and persuaded that the building was adequate and would serve for the use they had for it and that it had no defect which would cause any injury or loss to their interests.

The principal rights and obligations of lessor and lessee are comprised in the two following articles of the Civil Code. "ART. 1554. The lessor is obliged: 1. To deliver to the lessee the thing which is the object of the contract. 2. To make thereon, during the lease, all the necessary repairs in order to preserve it in condition to serve for the purpose to which it was destined. 3. To maintain the lessee in the peaceful enjoyment of the lease during all the time of the contract. Art. 1555. The lessee is obliged: 1. To pay the price of the lease in the manner agreed upon. 2. To use the thing leased as a diligent father of a family would, applying the same to the use agreed upon; and, in

the absence of an agreement, to the use which may be inferred from the nature of the thing leased according to the custom of the land. 3. To pay the expenses arising from the instrument constituting the contract. Art. 1556. If the lessor or lessee should not Comply with the obligations mentioned in the preceding articles, they may request the rescission of the contract and indemnity for losses and damages, or only the latter, leaving the contract in force."

Did the defendant owner of the building in question fail to carry out any obligation imposed by the law in the foregoing articles, or at least some obligation imposed in the lease? There is no evidence in the case that he failed in the performance of the obligations he assumed in executing the lease, nor does there appear to have been stipulated therein the liability now imputed to him.

Article 1562 of the same code reads: "If, at the time of the lease of the estate, the condition of the same was not mentioned, the law presumes that the lessee received it in good condition, unless there be proof to the contrary."

Have the plaintiffs proven that when they accepted defendant's building it was uninhabitable and inadequate for the use for which they leased it? There is no evidence in the case to prove such a circumstance.

Nor have the plaintiffs themselves even in the least way proven that the three of them, or any one of them, notified the defendant after they had occupied the premises that repairs were necessary thereon for keeping the same in condition suitable for the use intended, and never did they notify the defendant that the roof was defective or had holes or cracks that might cause leakage and the wetting of the merchandise within the building. The fact is that neither the lessor nor the lessees knew that the roof was defective and was going to leak when it rained, for they only became aware of the leaks during the rainstorm on the afternoon of the day mentioned, April 14; and therefore only on the hypothesis that the lessor had known of such defect and had concealed it from the plaintiffs could he be held responsible for the consequences thereof on account of the leakages that occurred, especially when it has not been duly proven that the defendant lessor failed to perform any of the obligations imposed by the law in the article quoted, 1554, by which he might be held responsible to the plaintiffs for damages and losses for which indemnity is unwarrantedly sought.

Besides the articles quoted there is nothing in the Civil Code by virtue whereof the lessor may be declared responsible for the damages and losses the lessees may have sustained as a consequence of the leaks in the roof of the building leased and for the other troubles they have encountered.

If as a consequence of the torrential rainfall mentioned, which in scarcely an hour filled the squares, streets and lots of the city of Manila, and if as a result of the large quantity of water that fell the yard of the premises in question was flooded and the roof leaked, there being no outlet for the water through the drain-pipes, by reason whereof the plaintiffs had to break open four bell traps in the yard so that the water would quickly and swiftly flow away thus preventing a greater inundation of the yard of the premises, the occurrence was undoubtedly due to force majeure, being a fortuitous event which could not have been foreseen by the owner or the plaintiff-tenants, or many other proprietors of stores whose interiors were flooded as a result of that heavy rainfall, and consequently the damages and losses the water inflicted upon the plaintiffs could not be ascribed to the owner of the premises so as to hold him liable for the indemnity.

Article 1105 of the same Code prescribes: "No one shall be liable for events which could not be foreseen, or which having been foreseen were inevitable, with the exception of the cases expressly mentioned in the law or those in which the obligation so declares."

The wetting sustained by the goods and merchandise of the plaintiffs as a consequence of the heavy torrential rainfall on the afternoon mentioned, which caused leaks in the building and flooded the yard, is not a case expressly mentioned by the law for which the owner of the premises is responsible, and further it does not appear

to have been provided against in the lease to be seen on folio 15, letter A, by virtue whereof the lessor would be liable to an indemnity for the damages and losses caused his tenants by that rainfall ; and so, in accordance with the provisions of the article quoted above, the defendant is not responsible for the results of the torrential rainfall that has been described.

A fortuitous event is an accident independent of the obligor's will to carry out some stipulation and it is plain that for him to escape the imputation of not performing his obligation he must be placed in a situation arising from an unforeseen event, or in one where, even if he had foreseen it, still he could not have avoided it, by reason of the fact that its unexpectedness and inevitability places it beyond human control.

It was not stipulated in the lease executed between the defendant and the plaintiffs that, if the goods and merchandise the defendant-tenants might have on the premises should get wet, the defendant would as lessor thereof liable for indemnity, nor have the plaintiffs been able to allege such liability in their claim; and we do not know of any article of the Civil Code included in the chapter which deals with leasing of urban property that makes any provision for such liability on the part of the owner of the property.

If, on the said afternoon of April 14, it rained so heavily and) so abundantly that the roof of the building occupied by the plaintiffs, even though in good condition, according to the municipal architect's certificate, leaked, and if as a consequence of that torrential rainfall said merchandise of the plaintiffs got wet, the occurrence is not imputable to the lessor owner of the building, nor according to any evidence in the case to the lessor's fault. Being evidently a fortuitous event, unforeseeable by any of the litigating parties, inevitable on account of force majeure, the case discloses no proof of any kind that the defendant Tiaoqui knew that the roof of the building leased to the plaintiffs had cracks or defects in it that would cause leakages, just as the plaintiff-tenants did not know that fact themselves, for otherwise they would have notified the defendant-lessor in due season and demanded immediate repair thereof so as to avoid injury to their interests.

Nobody, neither the defendant nor the plaintiffs, could have foreseen that on the said afternoon of April 14 it was going to rain in torrents and in an extraordinary manner, wherefore it is neither right nor proper to ascribe the wetting of the merchandise of the plaintiff-tenants to negligence, carelessness, or fault on the defendant's part. It was a case of accident and force majeure which could not have been foreseen and which nobody could have prevented, and the fact that the defendant repaired and fixed the leaks in the roof the next day cannot be taken as proof of his liability, for he did not know and could not have foreseen that it was going to rain in torrents the said afternoon and that the roof of the building would leak and show defects. It would be an absurdity which the law cannot authorize for said tenant to be entitled to claim damages from the owner because the roof of a building leaked and some of the tenant's goods got wet, for no provision of the law relating to leases of urban property places any such obligation on the owner to pay indemnity for damages, when he himself did not know that there was any defect to cause such damages.

Article 1553 of the Civil Code declares that the provisions relating to warranty contained in the title of purchase and sale are applicable to leases.

In connection with a lease, warranty is the obligation to repair or correct the error whereunder the lessee took over the property leased, but when, the law declares that the lessor must warrant the thing leased, it is not to be understood that he must also indemnify the lessee. Liability for the warranty is not equivalent to liability in damages, as the latter is an obligation distinct from the former.

For proper understanding of the provisions of articles 1484 and 1485 of the Civil Code dealing with warranty it is necessary to remember that under their provisions the lessor is liable for the warranty of the thing leased against any hidden defects it may have, even when unknown to said lessor, but this liability for warranty of the thing

leased does not amount to an obligation to indemnify the tenant for damages, which is only to be allowed when there is proof that the lessor acted with fraud and in bad faith by concealing the defect in the thing leased and in not revealing it to the lessee.

Article 1486 of the Code reads:

"In the cases of the two preceding articles (1484 and 1485) the vendee (sc. lessee) may choose between withdrawing from the contract, the expenses which he may have incurred "being returned to him, or demanding a proportional reduction of the price, according to the judgment of experts.

"If the vendor (sc. lessor) knew of the faults or hidden defects in the thing sold (sc. leased) and did not give notice thereof to the vendee (sc. lessee), the latter shall have the same option, and, furthermore, be indemnified for the losses and damages should he choose the rescission."

It must be kept in mind that the foregoing article and the two previously quoted appear in the title on contracts of purchase and sale and are in every way applicable, according to article 1553 of the same code, to, leases.

Hence, while the lessor is obligated by general rule to warranty of the thing leased, whether or not he may know of the existence therein of defects that render it inadequate for the use the tenant intends, he is only liable for an indemnity for damages in addition to the warranty when he knew of the defects in the thing leased and had not revealed them to the lessee, a procedure which induces the presumption that he acted with fraud and in bad faith; but in order to hold him responsible for the damages and losses caused by such defects there must be the express condition that the lessee should choose rescission of the contract, according to the prescription of the second paragraph of the article quoted above, whence it is inferred that, should the lessee insist upon continuing the contract by occupying the property, he must be understood to have waived the indemnity.

The plaintiffs, without choosing warranty of the property leased, supposing that they were, entitled to require it, set up a direct claim for indemnity for losses and damages from the lessor, without having proven that the latter had knowledge of the defects in the roof of the building leased and in spite of such knowledge did not reveal it to the plaintiff- tenants, thus acting with malice and bad faith; and yet they continued to occupy the property without having sought or demanded rescission of the contract; wherefore, even supposing that the lessor were liable under the law for losses and damages, the plaintiffs were not and are not entitled to' claim such, because they in fact waived the indemnity. Read the above-quoted article of the code carefully.

As for the rest, article 1101 of the Civil Code reads:

"Those who in fulfilling their obligations are guilty of fraud, negligence, or delay, and those who in any manner whatsoever act in contravention of the stipulations of the same, shall be subject to indemnity for the losses and damages caused thereby."

It has not been demonstrated in the case that the defendant lessor failed to fulfill the conditions of the lease or that he acted with fraud, negligence or delay in the fulfillment of said conditions. (Arts. 1102-1104, Civil Code.)

In a judgment on appeal of October 29, 1887, the supreme court of Spain, in applying said article 1101 of the civil code of that, country, identical with the one in force in these Islands, laid down the principle that, according to established jurisprudence, indemnity for losses and damages cannot be claimed when they are caused by a fortuitous event.

As for the other facts alleged by the parties, which have been the subject of the evidence adduced by them, the record contains a certificate from the Observatory in this city to the effect that the rain which fell over the city on April 14, 1913, was the heaviest from January to the said month of April of that year, for 48.3 mm. of water were registered in the rain-gauge, an amount of rainfall notably excessive and the greatest during that period of four

months.

Counsel for the plaintiffs has strongly insisted in his briefs that the defendant-lessor agreed and stipulated to pay the amount of the deterioration or depreciation of the goods and merchandise that were wet.

It has not been duly proven in the case that the lessor Tiaoqui admitted, or agreed to pay, the amount of the losses and damages sustained by the plaintiffs because they sold the merchandise, wet by the rainfall that afternoon, for a lower price than it was really worth. The declarations of the three plaintiffs do not constitute sufficient proof to offset the positive denial of the defendant Tiaoqui; and the witnesses called by said plaintiffs, far from confirming their allegations, made affirmations contradictory among themselves and at variance with the assertion of the plaintiffs interested, for the latter aver that two of them demanded of Tiaoqui and were promised by him that he would pay a half of the difference caused by the lower price at the sale of the goods, while the witnesses cited stated under oath that Tiaoqui agreed to pay the whole amount resulting from the depreciation in the value of the merchandise.

In fact, the record reveals that the defendant Tiaoqui denied in a sworn statement (folios 25 and 28) that he had agreed to pay damages to the plaintiffs and alleged that, not only did he make plain that his intervention in the notarial instrument drawn up the day after the disaster did not signify that he tacitly accepted any responsibility arising from the alleged losses in the merchandise, but furthermore, when demand was made by two of them that he pay the amount averred as the extent of said respective losses, he replied that he could not pay it; and he added that, when for a second time the plaintiffs saw him for the purpose of collecting, he answered in the greatest good faith that he would investigate whether there were defects in the roof of the building to cause leaks, in which case he would collect from the contractor Machuca and that the sum the latter might pay him he would deliver to the plaintiffs to cover said losses and damages, but that if said contractor did not pay up or if the leaks had resulted from the torrential rain which fell over Manila he would not pay them a cent. The promise contained in the first part of the defendant's answer plainly has a condition attached to it, and there is no record that the plaintiffs accepted it or that they agreed to the condition mentioned, and therefore it cannot serve as ground for an adverse finding.

The contractor Rafael Machuca Gotaucó testified that he constructed the defendant's building, located in Calle Rosario, according to plans and specifications which were kept before him, and that after the work had been finished the architect certified that said building was well constructed; and he added that he did not know why the water penetrated at the junction of the roof of the building with the firewall, for that junction had been carefully made, but thought it must have been due to that torrential rainfall.

The attorney, Vicente Miranda, testified in his sworn statement that on the afternoon in question he was in Clarke's situated in the Escolta and that as a consequence of the rainfall the persons there had to put their feet on the tables because the water rose so high that it overflowed the sidewalk. This the witness Aurelio Acuna corroborates in his testimony by saying that his store at No. 201 Calle Rosario was filled with water flowing from the yard and the street, so that he sustained damages, and that he saw his neighbors had to bail the water out of the interior of their stores or shops with pails and washbasins. Attorney Miranda added that over a week after the occurrence he had interviews with Attorney O'Brien, counsel for the plaintiff Tan Tiap, and they two talked about the liability of the defendant for the losses and damages sustained by the plaintiff Tan Tiap, and he did not then hear that the defendant Tiaoqui had promised to pay the plaintiffs a part or all of the amount of the losses and damages they may have sustained through the wetting of their goods and merchandise.

Summing up, the record fully demonstrates that the defendant Alfonso M. Tiaoqui is not liable under the law to pay indemnity for losses and damages because of the wetting of the goods and merchandise of Yap Kim Chuan,

plaintiff in case No. 10,006; of Marciano Ong Qui Sing plaintiff in case No. 10,007; and Tan Tiap, plaintiff in case No. 10,008; and that on the other hand these cases do not reveal satisfactory and conclusive evidence that the defendant lessor Tiaoqui agreed to make up all or part of the loss or depreciation on the sale of the goods and merchandise that was wet.

It is to be observed that as the three said cases are based on analogous facts, having the same origin, they were tried together and the parol and documentary evidence adduced by the parties in each of said cases was all taken in No. 10,006; and as the questions of fact and of law raised in all three cases are the same, the legal grounds for the final decision in all three cases are set forth only in the decision of the first of them, in order to avoid useless and unnecessary repetition.

Romana Tantungco and three others, represented by the same counsel for the defendant, as owners of the building leased to the plaintiffs after August 2, 1913, through the transfer made by the defendant, prayed that they be allowed to intervene in these three cases, that the said cases be finally dismissed and that they be absolved from the complaints filed. These contentions were opposed by the plaintiffs, but the record does not show that any action was taken on the motions presented by the parties.

For the foregoing reasons the judgment appealed from, as rendered in this case, No.,10006, must be reversed, and the defendant Alfonso M. Tiaoqui absolved, as we do absolve him, from the complaint filed by Yap Kim Chuan, without special finding as to costs in both instances. So ordered.

Arellano, C. J., and Araullo, J., concur.

Johnson, J., concurs in the result.

TRENT J., with whom concurs CARSON, J., dissenting:

The decision is apparently based upon two points.

1. That the rainfall was a fortuitous event and the lessor is therefore relieved from liability. According to the report of the Weather Bureau, received in evidence at the trial and admitted to be correct, the rainfall in question amounted to 46.5 millimeters, or 1.83 inches, all of which occurred in one hour. This court holds that this amount of rain in one hour is a fortuitous event or an "act of God." In volume 1 of the Census of the Philippine Islands (1903), at page 117, a table is given of the most abundant rainfalls which have occurred within one hour or part thereof between 1885 and 1902. Nineteen such occurrences during this period are chronicled, in all but four of which greater precipitation than 46.5 millimeters occurred, the highest being 60 millimeters and the lowest 42 millimeters. These rainfalls average more than one per year. In the year 1891 there were three one-hour periods in which rain fell to the amount of 55, 50.3 and 49.8 millimeters, respectively. In 1889 there were two such periods in which the rainfall was 48 and 47.2 millimeters, respectively. In 1888 there were three such periods in which the rainfall was 47, 47, and 42.8 millimeters, respectively. It is now held that 46.5 millimeters of rain in one hour is a fortuitous event. This holding automatically bars all actions seeking redress from builders or owners of buildings whose non-performance of their contracts is caused by a precipitation equaling 46.5 millimeters in one hour. All they have to do to escape liability is to plead the rainfall as a fortuitous even. Logically, the boon ought also to be extended to all other obligations. In view of the frequency with which such rainfalls occur in this country, I cannot lend assent to such doctrine. Owners and builders of buildings should be required to construct their buildings to withstand much more than 46.5 millimeters of rain in one hour. It is well known that heavy rains, strong winds, and earthquakes are to be expected in this country. These forces of nature are with more frequency and with greater intensity visited upon us than in many other parts of the world. All persons entering into contracts which require that the elements be reckoned with in the fulfillment thereof ought to be required to prepare for all such

occurrences as may be said to be within the experience of mankind in that particular portion of the world where the contract is to be performed.

2. The judgment of the court seems also to rest upon the ground that a lessor is obliged to choose between two alternatives ; (a) the rescission of the contract of lease and an action for damages, or (b) performance of the contract of lease and an action for the proportional reduction of the rent. Plaintiff has elected to abide by the lease and has brought this action for damages. This, according to the court, cannot be done. It occurs to me that under the circumstance, it would be extremely paradoxical for the plaintiff to now ask for a proportional reduction of the rent, inasmuch as repairs to the building have been made by the lessor and it is now presumably in a better condition to with stand rainfalls than it was before. What would be the view of this court of a complaint asking for a proportional reduction of the rent on the ground that the building once leaked and did considerable damage to the plaintiff's goods, although it is now in good repair ? If a literal compliance with the law as laid down by the court be required in this manner, it is a mere matter of computing the equitable distribution of plaintiff's damages over the remaining rent-payments of his lease. A simple mathematical calculation stands in the way of granting the plaintiff the relief he asks. An immaterial amendment of the complaint, which we are authorized to make (sees. 109, 110, C. C. P.), to make it conform with the law as interpreted by the court would complete the technical requirements of the case, without in the least infringing upon the defendant's rights. It is true that article 1553 provides that provisions of the Code relating to warranty as a covenant of the contract of sale are applicable also to contracts of lease. But I understand this to mean where they are logically applicable and when there are no specific provisions in that portion of the Code for the contract of lease. Aside from the inconvenience and the difficulty of applying article 1486 to a contract of lease, as I have pointed out above, it appears to me that there is a specific article of the code relating to lease contracts which provides for the case at bar. It is one of the covenants of the lessor "to maintain the lessee in the peaceful enjoyment of the lease during all the time of the contract," (Art. 1554, No. 3.) The next article of the code enumerates the covenants of the lessee. Article 1556 then provides: "If the lessor or lessee should not comply with the obligations mentioned in the preceding articles, they may request the rescission of the contract and indemnity for losses and damages, or only the latter, leaving the contract in force."

It is clear that this article allows a lessee, at his option, (a) to rescind the contract of lease and maintain an action for damages, or (B) to adhere to the contract of lease and maintain an action for damages, when the covenant of peaceful enjoyment is broken. This latter course was that pursued by the plaintiff in the case at bar.

3. On the issue of fact of whether the defendant promised to pay the damages suffered by the plaintiff upon hearing thereof, there is a conflict of evidence. The trial court held that such a promise had been made by the defendant, but this court finds otherwise from an examination of the record. I am compelled to dissent from this portion of the opinion also.

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