

THE MANILA RAILROAD CO., PLAINTIFF AND APPELLANT, VS. LA COMPAÑIA TRASATLANTICA, DEFENDANT AND APPELLEE, AND THE ATLANTIC, GULF & #038; PACIFIC CO., DEFENDANT AND APPELLANT.*G.R. No. 11318. October 26, 1918*

Ponente: STREET, J.

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In March, 1914, the steamship Alicante, belonging to the Compañia Trasatlantica de Barcelona, arrived at Manila with two locomotive boilers aboard, the property of The Manila Railroad Company. The equipment of the ship for discharging heavy cargo was not sufficiently strong to handle these boilers, and it was therefore necessary for the Steamship Company to procure assistance in the port of Manila.

The Atlantic, Gulf and Pacific Company (hereafter called the Atlantic Company) was accordingly employed by the Steamship Company, as having probably the best equipment for this purpose of any contracting company in the city. The service to be performed by the Atlantic Company consisted in bringing its floating crane alongside the Alicante, lifting the boilers out of the ship's hold, and transferring them to a barge which would be placed ready to receive them.

Upon the arrival of the Alicante, the Atlantic Company sent out its crane in charge of one Leyden. In preparing to hoist the first boiler the sling was unfortunately adjusted near the middle of the boiler, and it was thus raised nearly in an horizontal position. The boiler was too long to clear the hatch in this position, and after one end of the boiler had emerged on one side of the hatch, the other still remained below on the other side. When the boiler had been gotten into this position and was being hoisted still further, a rivet near the head of the boiler was caught under the edge of the hatch. The weight on the crane was thus increased by a strain estimated at fifteen tons with the result that the cable of the sling parted and the boiler fell to the bottom of the ship's hold. The sling was again idjusted to the boiler but instead of being placed near the niddle it was now slung nearer one of the ends, as should lave been done at first. The boiler was again lifted; but is it was being brought up, the bolt at the end of the lerrick boom broke, and again the boiler fell.

The crane was repaired and the boiler discharged, but t was found to be so badly damaged that it had to be rehipped to England where it was rebuilt, and afterwards vas returned to Manila. The Railroad Company's damage by reason of the cost of repairs, expenses, and loss of he use of the boiler proved to be P22,343.29; and as to the amount of the damage so resulting there is practically io dispute. To recover these damages the present action was instituted by the Railroad Company against the Steamship Company. The latter caused the Atlantic Company to be brought in as a codefendant, and insisted that whatever liability existed should be fixed upon the Atlantic Company as an independent contractor who had undertaken to discharge the boilers and had become responsible or such damage as had been done.

The judge of the Court of First Instance gave judgment in favor of the plaintiff against the Atlantic Company, but absolved the Steamship Company from the complaint. The plaintiff has appealed from the action of the court in

failing to give judgment against the Steamship Company, while the Atlantic Company has appealed from the judgment against it.

The mishap was undoubtedly due, as the lower court found, to the negligence of one Leyden, the foreman in charge; and we may add that the evidence tends to show that his negligence was of a type which may without exaggeration be denominated gross. The sling was in the first place improperly adjusted, and the attention of Leyden was at once called to this by the man in charge of the stevedores. Nevertheless he proceeded and, instead of lowering the boiler when it was seen that it could not readily pass through the hatch, he attempted to force it through; and the ship's tackle was brought into use to assist in this maneuver. The second fall was, it appears, caused by the weakening of the bolt at the head of the derrick boom, due to the shock incident to the first accident. This defect was possibly such as not to be patent to external observation but we are of the opinion that a person of sufficient skill to be trusted with the operation of machinery of this character should have known that the crane had possibly been weakened by the jar received in the first accident. The foreman was therefore guilty of negligence in attempting to hoist the boiler the second time under the conditions that had thus developed. It should be noted that the operation was at all its stages entirely under Leyden's control; and, although in the first lift he utilized the ship's tackle to aid in hoisting the boiler, everything was done under his immediate supervision. There is no evidence tending to show that the first fall of the boiler might have been due to any hidden defect in the lifting apparatus; and if it had not been for the additional strain caused by one end of the boiler catching under the hatch, the operation would doubtless have been accomplished without difficulty. The accident is therefore to be attributed to the failure of Leyden to exercise the degree of care which an ordinarily competent and prudent person would have exhibited under the circumstances which then confronted him. This conclusion of fact cannot be refuted; and, indeed, no attempt is here made by the appellant to reverse this finding of the trial court.

Three questions are involved in the case, namely: (1) Is the Steamship Company liable to the plaintiff by reason of having delivered the boiler in question in a damaged condition? (2) Is the Atlantic Company liable to be made to respond to the steamship company for the amount the latter may be required to pay to the plaintiff for the damage done? (3) Is the Atlantic Company directly liable to the plaintiff, as the trial court held?

It will be observed that a contractual relation existed between the Railroad Company and the Steamship Company; and the duties of the latter with respect to the carrying and delivery of the boilers are to be discovered by considering the terms and legal effect of that contract. A contractual relation also existed between the Steamship Company and the Atlantic Company; and the duties owing by the latter to the former with respect to the lifting and the transferring of the boilers are likewise to be discovered by considering the terms and legal effect of the contract between these parties. On the other hand, no contractual relation existed directly between the Railroad Company and the Atlantic Company.

We are all agreed, that, under the contract for transportation from England to Manila, the Steamship Company is liable to the plaintiff for the injury done to the boiler while it was being discharged from the ship. The obligation to transport the boiler necessarily involves the duty to convey and deliver it in a proper condition according to its nature, and conformably with good faith, custom, and the law (art. 1258, Civ. Code). The contract to convey imports the duty to convey and deliver safely and securely with reference to the degree of care which, under the circumstances, are required by law and custom applicable to the case. The duty to carry and to carry safely is all one.

Such being the contract of the Steamship Company, said company is necessarily liable, under articles 1103 and 1104 of the Civil Code, for the consequences of the omission of the care necessary to the proper performance of its obligation. The contract to transport and deliver at the port of Manila a locomotive boiler, which was received by it in proper condition, is not complied with by delivery at the port of destination of a mass of iron the utility of

which had been destroyed.

Nor does the Steamship Company escape liability by reason of the fact that it employed a competent independent contractor to discharge the boilers. The law applicable to this feature of the case will be more fully discussed further on in this opinion. At this point we merely observe that in the performance of this service the Atlantic Company was no more than a servant or employee of the Steamship Company, and it has never yet been held that the failure to comply with a contractual obligation can be excused by showing that such delinquency was due to the negligence of one to whom the contracting party had committed the performance of the contract.

Coming to the question of the liability of the Atlantic Company to respond to the Steamship Company for the damages which the latter will be compelled to pay to the plaintiff, we observe that the defense of the Atlantic Company comprises two contentions, to-wit, first, that by the terms of the engagement in accordance with which the Atlantic Company agreed to render the service, all risk incident to the discharge of the boilers was assumed by the Steamship Company; and secondly, that the Atlantic Company should be absolved under the last paragraph of article 1903 of the Civil Code, inasmuch as it had used due care in the selection of the employee whose negligent act caused the damage in question.

At the hearing in first instance the Atlantic Company introduced four witnesses to prove that at the time said company agreed to lift the boilers out of the Alicante, as upon other later occasions, the Steamship Company was notified that the service would only be rendered upon the distinct understanding that the Atlantic Company would not be responsible for damage. In this connection the president of the company testified that he stipulated that the company would assume no responsibility for any damage which might be done to the lifts or to the steamer or to its contents or to individuals during the progress of making these lifts, from any source whatever in connection with the breaking of the lifting equipment. The vice-president of the Atlantic Company testified that he was present upon the occasion when the agent of the Steamship Company made arrangements for the discharge of the boilers and he heard the conversation between the president and said agent. According to this witness the substance of the agreement was that, while the Atlantic Company would use all due care in getting the boilers out, no responsibility was assumed for damage done either to ship or cargo. The intermediary who acted as agent for the Steamship Company in arranging for the performance of this service stoutly denied that any such terms were announced by the officials or anybody else connected with the Atlantic Company at any time while the arrangements were pending.

In the conflict of the evidence, we recognize that, by a preponderance of the evidence, some reservation or other was made as to the responsibility of the Atlantic Company; and though the agent who acted on behalf of the Steamship Company possibly never communicated this reservation to his principal, the latter should nevertheless be held bound thereby. It thus becomes necessary to discover what the exact terms of this supposed reservation were.

We think that we must put aside at once the words of studied precision with which the president of the Atlantic Company would exclude the possibility of any liability attaching to his company, though we may accept his statement as showing that the excepted risk contemplated breakage of the lifting equipment. There is undoubtedly a larger element of truth in the more reasonable statement by the vice-president of the company. According to this witness the contract combined two features, namely, an undertaking on the part of the Atlantic Company to use all due care, combined with a reservation concerning the company's liability for damage.

The Atlantic Company offered in evidence a number of letters which had been written by it at different times, extending over a period of years, in response to inquiries made by other firms and persons in Manila concerning the terms upon which the Atlantic Company would make heavy lifts. These letters tend to show that the Atlantic

Company was not accustomed to assume the risk incident to such work and required the parties for whom the service might be rendered either to carry the risk or insure against it. One such letter, dated nearly four years prior to the occurrence which gave rise to this lawsuit, was addressed to the Compañia Trasatlantica de Barcelona one of the defendants in this case. It was stated in this communication that the company's derrick would be subject to inspection prior to making the lift but that the Atlantic Company would not assume responsibility for any damage that might occur either to ship or cargo from any cause whatsoever. The Steamship Company rejected the services of the Atlantic Company in that instance as being too onerous.

The letters directed to third parties, it may be observed, would not, generally speaking, be admissible as against the plaintiff for the purpose of proving that a similar reservation was inserted in the contract with it on this occasion; but if knowledge of such custom is brought home to the Steamship Company, the fact that such reservation was commonly made is of some probative force. Reference to a number of these letters will show that no particular formula was used by the Atlantic Company in defining its exemption, and the tenor of these various communications differs materially. We think, however, that some of the letters are of value as an aid in interpreting the reservation which the Atlantic Company may have intended to make. We therefore quote from some of these letters as follows:

"We will use our best endeavors to carry out the work successfully and will ask you to inspect our plant but we wish it distinctly understood that we cannot assume responsibility for damage which may occur * * * while the lift is being made." (To Rear Admiral, U. S. N., Oct. 4, 1909.)

"Our quotation is based on the understanding that we assume no responsibility whatever from any accident which may happen during our operations. We always insert this clause as a precautionary measure, but we have never had to avail ourselves of it as yet and do not expect to now." (To "El Varadero de Manila," Nov. 1, 1913.)

"As is customary in these cases, we will use all precautions necessary to handle the gun in a proper manner. Our equipment has been tested and will be again, before making the lift, but we do not assume any responsibility for damage to the gun ship, or cargo." (To Warner, Barnes & Co., June 7, 1909.)

The idea expressed in these letters is, we think, entirely consonant with the interpretation which the vice-president of the company placed upon the contract which was made with the Steamship Company upon this occasion, that is, the company recognized its duty to exercise due supervisory care; and the exemption from liability, whatever may have been its precise words, had reference to disasters which might result from some inherent hidden defect in the lifting apparatus or other unforeseen occurrence not directly attributable to negligence of the company in the lifting operations. Neither party could have supposed for a moment that it was intended to absolve the Atlantic Company from its duty to use due care in the work.

It is not pretended that negligence on the part of the Atlantic Company or its employees was expressly included in the excepted risk, and we are of the opinion that the contract should not be understood as covering such an exemption. It is a rudimentary principle that the contractor is responsible for the work executed by persons whom he employs in its performance, and this is expressed in the Civil Code in the form of a positive rule of law (art. 1596). It is also expressly declared by law that liability arising from negligence is demandable in the fulfillment of all kinds of obligations (art. 1103, Civil Code). Every contract for the prestation of service therefore has annexed to it, as an inseparable implicit obligation, the duty to exercise due care in the accomplishment of the work; and no reservation whereby the person rendering the services seeks to escape from the consequences of a violation of this obligation can be viewed with favor.

"Contracts against liability for negligence are not favored by the law. In some instances, such as common carriers, they are prohibited as against public policy. In all cases such contracts should be construed strictly, with every

intendment against the party seeking its protection." (Crew vs. Bradstreet Company, 134 Pa. St., 161; 7 L. R. A., 661; 19 Am. St. Rep., 681.)

The strictness with which contracts conferring such an unusual exemption are construed is illustrated in *Bryan vs. Eastern & Australian S. S. Co.* (28 Phil. Rep., 310). The decision in that case is not precisely applicable to the case at bar, since the court was there applying the law of a foreign jurisdiction, and the question at issue involved a doctrine peculiar to contracts of common carriers. Nevertheless the case is instructive as illustrating the universal attitude of courts upon the right of a contracting party to stipulate against the consequences of his own negligence. It there appeared that the plaintiff had purchased from the defendant company a ticket for the transportation of himself and baggage from Hongkong to Manila. By the terms of the contract printed in legible type upon the back of the ticket it was provided that the company would not hold itself responsible for any loss or damage to luggage, under any circumstances whatsoever, unless it had been paid for as freight. It was held that this limitation upon the liability of the defendant company did not relieve it from liability for negligence of its servants by which the baggage of the passenger was lost. Said the court: "Ordinarily this language would seem to be broad enough to cover every possible contingency, including the negligent act of the defendant's servants. To so hold, however, would run counter to the established law of England and the United States on that subject. The court then quoted the following proposition from the decision of the King's Bench Division in *Price & Co. vs. Union Lighterage Co.* ([1903], 1 K. B. D., 750, 754) :

" 'An exemption in general words not expressly relating to negligence, even though the words are wide enough to include loss by negligence or default of carriers' servants, must be construed as limiting the liability of the carrier as assurer, and not as relieving him from the duty of exercising reasonable skill and care.' "

Even admitting that, generally speaking, a person may stipulate against liability for the consequences of negligence, at least in those cases where the negligence is not gross or wilful, the contract conferring such exemption must be so clear as to leave no room for the operation of the ordinary rules of liability consecrated by experience and sanctioned by the express provisions of law.

If the exemption should be understood in the sense which counsel for the Atlantic Company now insists it should bear, that is, as an absolute exemption from all responsibility for negligence, it is evident that the agreement was a most inequitable and unfair one, and hence it is one that the Steamship Company can not be lightly assumed to have made. Understood in that sense it is the equivalent of licensing the Atlantic Company to perform its tasks in any manner and fashion that it might please, and to hold it harmless from the consequences.

It is true that, in these days, insurance can usually be obtained in the principal ports of commerce by parties circumstanced as was the steamship company in the case now before us. But the best insurance against disasters of this kind is found in the exercise of due care; and the chief incentive to the exercise of care is a feeling of responsibility on the part of him who undertakes the work. Naturally the courts are little inclined to aid in the efforts of contractors to evade this responsibility.

There may have been in the minds of the officials of the Atlantic Company an idea that the promise to use due care in the lifting operations was not accompanied by a legal obligation, such promise being intended merely for its moral effect as an assurance to the steamship company that the latter might rely upon the competence and diligence of the employees of the Atlantic Company to accomplish the work in a proper way. The contract can not be permitted to operate in this onesided manner. The two features of the engagement, namely, the promise to use due care and the exemption from liability for damage should be so construed as to give some legal effect to both. The result is, as already indicated, that the Atlantic Company was bound by its undertaking to use due care and that the exemption was intended to cover accidents due to hidden defects in the apparatus or other unforeseeable

occurrences not having their origin in the immediate personal negligence of the party in charge of the operations.

We now proceed to consider the contention that the Atlantic Company should be absolved from liability to the Steamship Company under the last paragraph of article 1903 of the Civil Code, which declares that the liability there referred to shall cease when the persons mentioned therein prove that they employed all the diligence of a good father of a family to avoid the damage. In this connection the conclusion of fact must be conceded in favor of the Atlantic Company that it had used proper care in the selection of Leyden and that, so far as the company was aware, he was a person to whom might properly be committed the task of discharging the boilers. The answer to the contention, however, is that the obligation of the Atlantic Company was created by contract, and article 1903 is not applicable to negligence arising in the course of the performance of a contractual obligation. Article 1903 is exclusively concerned with cases where the negligence arises in the absence of agreement.

In discussing the liability of the Steamship Company to the plaintiff Railroad Company we have already shown that a party is bound to the full performance of his contractual engagements under articles 1101 et seq. of the Civil Code, and other special provisions of the Code relative to contractual obligations; and if he falls short of complete performance by reason of his own negligence or that of any person to whom he may commit the work, he is liable for the damages resulting therefrom. What was there said is also applicable with reference to the liability of the Atlantic Company upon its contract with the Steamship Company, and the same need not be here repeated. It is desirable, however, in this connection, to bring out somewhat more fully the distinction between negligence in the performance of a contractual obligation (*culpa contractual*) and negligence considered as an independent source of obligation between parties not previously bound (*culpa aquiliana*).

This distinction is well established in legal jurisprudence and is fully recognized in the provisions of the Civil Code. As illustrative of this, we quote the following passage from the opinion of this Court in the well-known case of *Rakes vs. Atlantic, Gulf & Pacific Co.* (7 Phil. Rep., 359, 365), and in this quotation we reproduce the first paragraph of the passage from Manresa chiefly for the purpose of here presenting a more correct English version of said passage.

"The acts to which these articles are applicable are understood to be those not growing out of preexisting duties of the parties to one another. But where relations already formed give rise to duties, whether springing from contract or quasi contract, then breaches of those duties are subject to articles 1101, 1103, and 1104 of the same code. A typical application of this distinction may be found in the consequences of a railway accident due to defective machinery supplied by the employer. His liability to his employee would arise out of the contract of employment, that to the passengers out of the contract for passage, while that to the injured by-stander would originate in the negligent act itself. This distinction is thus clearly set forth by Manresa in his commentary on article 1093:

" 'We see with reference to such obligations, that culpa, or negligence, may be understood in two different senses, either as culpa, substantive and independent, which of itself constitutes the source of an obligation between two persons not formerly bound by any other obligation; or as an incident in the performance of an obligation which already existed, which can not be presumed to exist without the other, and which increases the liability arising from the already existing obligation.¹'

Justice Tracey, the author of the opinion from which we have quoted, proceeds to observe that Manresa, in commenting on articles 1102 and 1104, has described these two species of negligence as contractual and extra-contractual, the latter being the *culpa aquiliana* of the Roman law. "This terminology is unreservedly accepted by Sanchez Roman (*Derecho Civil*, fourth section, chapter XI, article II, No. 12), and the principle stated is supported by decisions of the supreme court of Spain, among them those of November 20, 1896 (80 *Jurisprudencia Civil*, No. 151), and June 27, 1894 (75 *Jurisprudencia Civil*, No. 182.)"

The principle that negligence in the performance of a contract is not governed by article 1903 of the Civil Code but rather by article 1104 of the same Code was directly applied by this court in the case of Baer Senior & Co.'s Successors vs. Compañia Maritima (6 Phil. Rep., 215); and the same idea has been impliedly if not expressly recognized in other cases (N. T. Hashim & Co. vs. Rocha & Co., 18 Phil. Rep., 315; Tan Chiong Sian vs. Inchausti & Co., 22 Phil. Rep., 152).

What has been said suffices in our opinion to demonstrate that the Atlantic Company is liable to the Steamship Company for the damages brought upon the latter by the failure of the Atlantic Company to use due care in discharging the boiler, regardless of the fact that the damage was caused by the negligence of an employee who was qualified for the work and who had been chosen by the Atlantic Company with due care.

This brings us to the last question here to be answered, which is; Can the Atlantic Company be held directly liable to the Railroad Company? In other words, can the judgment entered in the trial court directly in favor of the plaintiff against the Atlantic Company be sustained? To answer this it is necessary to examine carefully the legal relations existing between the Atlantic Company and the Railroad Company with reference to this affair; and we shall for a moment ignore the existence of the contract between the Steamship Company and the Atlantic Company, to which the railroad company was not a party.

Having regard then to the bare fact that the Atlantic Company undertook to remove the boiler from the ship's hold and for this purpose took the property into its power and control, there arose a duty to the owner to use due care in the performance of that service and to avoid damaging the property in the course of such operation. This duty was obviously in existence before the negligent act was done which resulted in damage, and said negligent act may, if we still ignore the existence of the express contract, be considered as an act done in violation of this duty.

The duty thus to use due care is an implied obligation, of a quasi contractual nature, since it is created by implication of law in the absence of express agreement. The conception of liability with which we are here confronted is somewhat similar to that which is revealed in the case of the depositary, or commodatary, whose legal duty with respect to the property committed to their care is defined by law even in the absence of express contract; and it can not be doubted that a person who takes possession of the property of another for the purpose of moving or conveying it from one place to another, or for the purpose of performing any other service in connection therewith (*locatio operis faciendi*), owes to the owner a positive duty to refrain from damaging it, to the same extent as if an agreement for the performance of such service had been expressly made with the owner. The obligation here is really a species of contract *re*, and it has its source and explanation in the vital fact that the active party has taken upon himself to do something with or to the property and has taken it into his power and control for the purpose of performing such service. (Compare art. 1889, Civil Code.)

In the passage which we have already quoted from the decision in the Rakes case this Court recognized the fact that the violation of a quasi contractual duty is subject to articles 1101, 1103, and 1104 of the Civil Code and not within the purview of article 1903. Manresa also, in the paragraph reproduced above, is of the opinion that negligence, considered as a substantive and independent source of liability, does not include cases where the parties are previously bound by any other obligation. Again, it is instructive in this connection to refer to the contents of article 1103 of the Civil Code, where it is declared that the liability proceeding from negligence is demandable in the fulfillment of all kinds of obligations. These words evidently comprehend both forms of positive obligations, whether arising from express contract or from implied contract (quasi contract).

In this connection it is instructive to recall the celebrated case of *Coggs vs. Bernard* (2 Ld. Raym, 909), decided in the court of the King's Bench of England in the year 1703. The action was brought by the owner of certain casks of brandy to recover damages from a person who had undertaken to transport them from one place to another. It

was alleged that in so doing the defendant so negligently and improvidently put them down that one of the casks was staved and the brandy lost. The complaint did not allege that the defendant was a common carrier or that he was to be paid for his services. It was therefore considered that the complaint did not state facts sufficient to support an action for breach of any express contract. This made it necessary for the court to go back to fundamental principles and to place liability on the ground of a violation of the legal duty incident to the mere fact of carriage. Said Powell, J.: "An action indeed will not lie for not doing the thing, for want of a sufficient consideration ; but yet if the bailee will take the goods into his custody, he shall be answerable for them; for the taking of the goods into his custody is his own act." So Gould, J.: "* * * any man that undertakes to carry goods is liable to an action, be he a common carrier or whatever he is, if through his neglect they are lost or come to any damage: * * *." Behind these expressions was an unbroken line of ancient English precedents holding persons liable for damage inflicted by reason of a misfeasance in carrying out an undertaking. The principle determined by the court in the case cited is expressed in the syllabus in these words: "If a man undertakes to carry goods safely and securely, he is responsible for any damage they may sustain in the carriage through his neglect, though he was not a common carrier and was to have nothing for the carriage." Though not stated in so many words, this decision recognizes that from the mere fact that a person takes the property of another into his possession and control there arises an obligation in the nature of an *assumpsit* that he will use due care with respect thereto. This must be considered a principle of universal jurisprudence, for it is consonant with justice and common sense and as we have already seen harmonizes with the doctrine above deduced from the provisions of the Civil Code.

The conclusion must therefore be that if there had been no contract of any sort between the Atlantic Company and the Steamship Company, an action, could have been maintained by the Railroad Company, as owner, against the Atlantic Company to recover the damages sustained by the former. Such damages would have been demandable under article 1103 of the Civil Code and the action would not have been subject to the qualification expressed in the last paragraph of article 1903.

The circumstance that a contract was made between the Atlantic Company and the Steamship Company introduces, however, an important, and in our opinion, controlling factor into this branch of the case. It cannot be denied that the Steamship Company had possession of this boiler in the capacity of carrier and that, as such, it was authorized to make a contract with the Atlantic Company to discharge the same from the ship. Indeed, it appears in evidence that even before the contract of affreightment was made the Railroad Company was informed that it would be necessary for the Steamship Company to procure the services of some contractor in the port of Manila to effect the discharge, as the ship's tackle was inadequate to handle heavy cargo. It is therefore to be assumed that the Railroad Company had in fact assented to the employment of a contractor to perform this service.

Now, it cannot be admitted that a person who contracts to do a service like that rendered by the Atlantic Company in this case incurs a double responsibility upon entering upon performance, namely, a responsibility to the party with whom he contracted, and another entirely different responsibility to the owner, based on an implied contract. The two liabilities can not in our opinion coexist. It is a general rule that an implied contract never arises where an express contract has been made.

If double responsibility existed in such a case as this, it would result that a person who had limited his liability by express stipulation might find himself liable to the owner without regard to the limitation which he had seen fit to impose by contract. There appears to be no possibility of reconciling the conflict that would be developed in attempting to give effect to those inconsistent liabilities. The contract which was in fact made, in our opinion, determines not only the character and extent of the liability of the Atlantic Company but also the person or entity by whom the obligation is exigible. It is of course quite clear that if the Atlantic Company had refused to carry out

its agreement to discharge the cargo, the plaintiff could not have enforced specific performance and could not have recovered damages for non-performance. (Art. 1257, Civil Code; Donaldson, Sim & Co. vs. Smith, Bell & Co., 2 Phil. Rep., 766; Uy Tarn and Uy Yet vs. Leonard, 30 Phil. Rep., 471.) In view of the preceding discussion it is equally obvious that, for lack of privity with the contract, the Railroad Company can have no right of action to recover damages from the Atlantic Company for the wrongful act which constituted the violation of said contract. The rights of the plaintiff can only be made effective through the Compañia Trasatlantica de Barcelona with whom the contract of affreightment was made.

The judgment entered in the Court of First Instance must, therefore, be reversed not only with respect to the judgment entered in favor of the plaintiff directly against the Atlantic Company but also with respect to the absolution of the Steamship Company and the further failure of the court to enter judgment in favor of the latter against the Atlantic Company. The Compañia Trasatlantica de Barcelona should be and is hereby adjudged to pay to the Manila Railroad Company the sum of twenty two thousand three hundred forty three pesos and twenty nine centavos (P22,343.29), with interest from May 11, 1914, until paid; and when this judgment is satisfied, the Compañia Trasatlantica de Barcelona is declared to be entitled to recover the same amount from the Atlantic Gulf & Pacific Company, against whom judgment is to this end hereby rendered in favor of the Compañia Trasatlantica de Barcelona. No express adjudication of costs of either instance will be made. So ordered.

Arellano, C. J., Torres, Araullo, and Avanceña, JJ., concur.

Johnson, J., with whom concurs Malcolm, J.

DISSENTING OPINION

JOHNSON, J., dissenting:

The only question presented by the appellant, the Atlantic, Gulf & Pacific Company, is whether or not. it is liable, either to the Manila Railroad Company, or to the Compañia Trasatlantica, for the damage caused to a certain locomotive boiler while being discharged at the port of Manila.

The essential facts important for a decision upon the rights and liabilities of the Atlantic, Gulf & Pacific Company may be stated as follows:

(1) That the Manila Railroad Company purchased certain locomotive boilers in Europe and contracted with the Compañia Trasatlantica to transport the same to Manila by its steamship Alicante; (2) That the tackle and equipment of the steamship Alicante being insufficient to discharge said locomotive boilers, the Compañia Trasatlantica entered into a contract with the Atlantic, Gulf & Pacific Company by virtue of the terms of which the latter company agreed to discharge the said locomotive boilers from the said steamship Alicante by using its tackle and equipment for that purpose; (3) That in the effort of the Atlantic, Gulf & Pacific Company to discharge the said locomotive boilers from the said steamship, the apparatus, used, broke and one of the boilers was discharged in the manner described in the complaint and damaged to the amount found by the lower court; (4) That while the Atlantic, Gulf & Pacific Company attempted to show, during the trial of the cause, that it and its employees exercised due care and diligence, it admitted in this court that its employees had perhaps been negligent in the performance of their duties.

Considering that the relations between the Compañia Trasatlantica and the Atlantic, Gulf & Pacific Company were contractual, it becomes important to ascertain what were the terms of the contract, in order to properly understand the rights and liabilities of the parties thereto, in relation to the admission of the Atlantic, Gulf &

Pacific Company that its employees had perhaps been guilty of negligence in the discharge of said boiler.

The contract was not wholly reduced to writing; it was partly written and partly oral. The Compañía Trasatlantica alleged that under the terms of the contract the Atlantic, Gulf & Pacific Company was to discharge said boilers from the steamship Alicante, using its tackle and apparatus therefor, and that no condition of any character was imposed, while the Atlantic, Gulf & Pacific Company alleged that it agreed to discharge said boilers and to use its tackle and equipment for that purpose, but with the express condition that it was, under no circumstances or conditions, to assume any responsibility for any damage whatever which might be occasioned thereby, either to the cargo, ship or persons.

In support of the allegation of the Compañía Trasatlantica, it really presented but one witness, while the Atlantic, Gulf & Pacific Company presented several witnesses, including its president, vice-president and several others, together with a number of documents showing that the contract was in conformity with its usual custom in making similar contracts. The Atlantic, Gulf & Pacific Company also showed that the Compañía Trasatlantica had actual knowledge of such custom.

A careful examination of the proof, in our opinion, clearly shows by a large preponderance, that the contract in question was as the Atlantic, Gulf & Pacific Company alleged 'and that by its terms said company (A. G. & P.) was relieved "of any responsibility for any damage which might occur either to the ship, cargo or persons, from any cause whatsoever"

The contract is the law governing the rights and obligations of the parties, subject to certain well defined exceptions. Persons have a right to enter into any contract with any clauses, or conditions, or limitations which they may deem convenient and advisable so long as such clauses or conditions do not conflict with the existing laws, morals or public order. (Art. 1255, Civil Code.) There are some well defined exceptions to that rule, the most notable of which are contracts with common carriers. (Hartford F. Ins. Co., vs. Chicago, M. & St. P. Railway Co., 175 U. S., 91, 97.) The Atlantic, Gulf & Pacific Company, so far as the record shows, is not a common carrier, and the exception, therefore, just noted does not apply to it. Neither was the contract between the Compañía Trasatlantica and the Atlantic, Gulf & Pacific Company a contract for the carriage of merchandise. It was a contract for services of an entirely different character from that of a common carrier.

If then, generally speaking, persons may enter into contractual relations with any clauses or conditions which they may deem advisable and convenient, which do not conflict with existing laws, morals or public order, we may ask: Is a contract of the character of that before us in which one of the parties stipulates "that he will not assume any responsibility for any damage which may occur from any cause whatsoever" in the execution of said contract, contrary to the laws, morals or public order?

The contract in question was not one which the parties were obliged to enter into. In that respect, it differed from contracts with common carriers, wherein the latter have no option, generally speaking. In the present case, the Atlantic, Gulf & Pacific Company had a perfect right to refuse to enter into the contract in question until and unless its terms were satisfactory and acceptable. The parties being at perfect liberty to enter into the contract or to refuse so to do, they must be bound by the law which they themselves have made for themselves. Having voluntarily made the law (contract), they must abide by its terms until it can be shown that the same is contrary to the laws, morals or public order.

It is a fundamental rule of the law that what one may refuse to do entirely, he may agree to do upon such terms as he pleases so long as he does not contravene the laws, morals or public order. The Atlantic, Gulf & Pacific Company having had the right to refuse absolutely to enter into the contract, it must have had the right to refuse to enter into it except upon just such terms and conditions as it saw fit to require. The Atlantic, Gulf & Pacific

Company, therefore, had a right to refuse to enter into the contract in question until and unless the Compañía Trasatlantica agreed to relieve it of all responsibility for any damages which might occur either to the ship, cargo or persons from any cause whatsoever. By the terms of the contract the Compañía Trasatlantica assumed all responsibility for damages in the discharge of the said locomotive boilers. That must be true considering that, by the terms of the contract, the Atlantic, Gulf & Pacific Company was relieved from any and all damages whatsoever which might occur.

The only purpose on the part of the Atlantic, Gulf & Pacific Company, in imposing the condition above-mentioned, was to avoid the consequences of the negligence of its agents or employees or of any act or accident which might cause damage, and to avoid possible lawsuits growing out of the alleged negligent acts.

The question which we are discussing is not a new one in jurisprudence. The courts have been called upon many times to interpret contracts with conditions like those contained in the contract before us. (*Coup vs. Wabash, St. Louis & Pac. Railway Co.*, 56 Mich., Ill; 56 Am. Rep., 374; *Mann vs. Pere Marquette R. Co.*, 135 Mich., 210; *Stephens vs. Southern Pacific Co.*, 109 Cal., 86; 29 L. R. A., 751; *Quimby vs. Boston & Maine R.*, 150 Mass., 365; 5 L. R. A., 846; *Pittsburgh, etc. Railway Co. vs. Mahoney*, 148 Ind., 196; *Russell vs. Pittsburgh, etc., R. Co.*, 157 Ind., 305; 55 L. R. A., 253; *Hartford Fire Ins. Co. vs. Chicago, M. & St. P. Railway Co.*, 175 U. S., 91, 97; *Baltimore, etc. Railway Co. vs. Voigt*, 176 U. S., 498; *Osgood vs. Railway Co.*, 77 Vermont, 334; 70 L. R. A., 930.)

In the case of the *Hartford Insurance Company vs. Chicago, M. & St. P. Railway Co.* (175 U. S., 91, 97, *supra*). a contract was made by which one of the parties was relieved from all liability for damage, et cetera, et cetera, even the liability for damage which might result "from the carelessness or negligence of employees or agents of said railway company," and the Supreme Court of the United States held that such a condition in contracts of that character was not void as against public policy, or public morals or contrary to law. (*Baltimore, etc. Railway Co. vs. Voigt*, 176 U. S., 498; *Osgood vs. Central Vermont R. Co.*, 77 Vermont, 334; 70 L. R. A., 930.)

Courts must not forget that they are not to extend, arbitrarily, those rules which say that a given contract is void as being against public policy, or public laws, because if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily, shall be held sacred and must be enforced in courts of justice. Courts should not lightly interfere with the freedom of contracts. (*Baltimore, etc., Railway Co. vs. Voigt*, 176 U. S., 498; *Printing, etc. Company vs. Sampson*, Law Reps., 19 Equity, 465; *Osgood vs. Central Vermont R. Co.*, 77 Vermont, 334.)

The record shows that the Atlantic, Gulf & Pacific Company had, at various times, discharged other freight from steamships in Manila Bay of much greater weight than the boiler in question, by means of the same tackle and equipment and by the same employees which were used in the present case. The record also shows that the tackle and equipment was ample and that the men in charge were experienced in the work they were to perform. The record further shows that the Atlantic, Gulf & Pacific Company undertook the discharge of said boilers at a very low price, for the very reason that they were relieved of all liability whatsoever for damages in the discharge of the same. The record further shows that the representative of the Compañía Trasatlantica, who made the contract in question, was requested to and did make a casual examination of the tackle and equipment which were to be used in the discharge of the boilers. The record further shows that said company, after receiving the information that the tackle and equipment and employees of the Atlantic, Gulf & Pacific Company had discharged, on various occasions, other and heavier freight without accident or mishap, and after having made a casual examination of such equipment, voluntarily and willingly and without any objection or protest for and on behalf of the Compañía Trasatlantica, entered into the contract as above described, accepting fully and without protest the conditions

imposed by the Atlantic, Gulf & Pacific Company. Having entered into the contract in question and the same not being in contravention of the laws, morals or public order, the Compañia Trasatlantica is bound by its terms.

The rule above announced may seem to be a hard one, but when we remember that the right to enter into contracts carries with it the freedom to impose such conditions as the parties may see fit to impose, subject to specific limitations, the hardship, if any, is one self-imposed by the parties.

An example may serve to make the rule which we have announced plainer:

A is the owner of an automobile at Manila which he desires to deliver at Baguio. B is the owner of a garage at Manila and has in his employ experienced chauffeurs. A desires to employ B to take the automobile to Baguio and offers a certain price for the services. B accepts A's proposition with the condition that he will assume no responsibility whatever for any damages which might occur to the said automobile in the course of its delivery. In passing the zigzag on the way to Baguio, an unforeseen accident happens through the casual neglect or lack of care on the part of the chauffeur and the automobile is damaged. Can B be held liable, in an action upon the contract, for the damages in the face of the fact that A had relieved him of all liability for any damages which might occur? The cases which we have cited above, together with many others which might be cited, all answer that question in the negative. That question is answered in the negative upon the theory that A, by the terms of his contract, relieved B, in an action upon the contract, from all liability whatsoever.

It must not be forgotten that what we have said relates to actions upon the contract with the conditions mentioned and not to actions for damages in an action *ex delicto* resulting from the negligent performance of duties and obligations assumed.

The appellant, the Atlantic, Gulf & Pacific Company, contends that inasmuch as it had exercised the care of a good father of a family in selecting its employees, that it should be relieved from all liability by virtue of the provisions of article 1903 of the Civil Code. We do not believe that the provisions of said article can be invoked when the rights and liabilities of parties to an action depend upon a contract. The rights of parties are defined by the contract and there is no occasion to invoke the statute. The argument employed by the Atlantic, Gulf & Pacific Company, if valid, would also relieve the Compañia Trasatlantica from all liability. Certainly, the Atlantic, Gulf & Pacific Company would not deny that the Compañia Trasatlantica had not exercised the care of a good father of a family in selecting it for the discharge of said boilers. Neither do we believe that the provisions of article 1902 of the Civil Code can be invoked in favor of the Compañia Trasatlantica, for the reason that the contract governs the rights and liabilities and by the terms of the contract the Atlantic, Gulf & Pacific Company is relieved from all liability whatsoever. A relief from all liability is a relief from any liability caused by negligence, especially so when the action is based upon a contract. Whether or not that rule should be followed in an action of tort growing out of wilful negligence, *quaere*?

From all of the foregoing, we are persuaded that the judgment of the lower court should be modified and that the Atlantic, Gulf & Pacific Company should be relieved from all liability under the complaint.

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