

NICOLAS LIZARES, PLAINTIFF AND APPELLANT, VS. ROSENDO HERNAEZ, DEFENDANT AND APPELLANT, AND ENRICA ALUNAN VIUDA DE LIZARES, DEFENDANT IN CROSS-COMPLAINT AND APPELLANT.

G.R. No. 14977. March 30, 1920

Ponente: STREET, J.

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STREET, J.:

The action herein was begun on April 15, 1918, in the Court of First Instance of Occidental Negros, by the plaintiff, Nicolas Lizares, as lessee of two haciendas, located in the municipality of Talisay, in the province aforesaid, known respectively as panaogao and matagoy No. 2, against the defendant, Rosendo Hernaez, as lessor of said haciendas, to rescind the contract of lease and to recover a sum of money as damages alleged to have been suffered by the plaintiff by reason of the failure of the defendant to comply with certain obligations incumbent upon him under the contract. The defendant answered, denying all liability, and interposed a counterclaim for the purpose of recovering damages alleged to have been suffered by him by reason of the default of the plaintiff in the performance of the obligations of the latter under the same contract. One of the items of damages thus claimed by the defendant consists of unpaid rents; and for the purpose of obtaining the satisfaction of this claim, Sra. Enrica Alunan was named as a party defendant in the cross-complaint, she having obligated herself jointly and severally with the plaintiff in the contract of lease, in the character of surety for him. Process was accordingly served upon her, and she in due time answered the cross-complaint with a general denial. Both the plaintiff and the defendant seek to recover the attorney's fees and other expenses of this litigation.

Upon hearing the cause the trial judge rendered a decision, the salient features of which are these: (1) The contract of lease is declared to be rescinded, with leave to the plaintiff to make use of the leased property until May 30, 1919, for the purpose of harvesting the crops planted by him thereon and completing the milling of the cane. (2) The defendant, Rosendo Hernaez, as lessor, was found to be liable in damages to the plaintiff, in the sum of P1,736.01, with interest, by reason of his failure to reconstruct within a reasonable time a camarin which had existed upon the leased premises but which had been destroyed by fire. (3) The plaintiff, Nicolas Lizares, was found to be indebted to the defendant for rents due and unpaid in the sum of P3,583.33, with interest from April 16, 1918; and for this amount judgment was rendered in favor of the defendant upon the cause of action stated in the cross-complaint against the plaintiff, Nicolas Lizares, and Enrica Alunan, as his surety. (4) The plaintiff was further ordered to cause an artesian well to be bored, before May 30, 1919, on the hacienda Panaogao, in accordance with a stipulation in the contract of lease. Both parties appealed from this decision, each manifesting disapproval of such features of the judgment as were not in conformity with his particular pretensions.

It appears in evidence that on August 21, 1916, the plaintiff, Nicolas Lizares, and the defendant, Rosendo Hernaez, entered into a contract (Exhibit A), whereby the former became the lessee of the two haciendas Panaogao and Matagoy No. 2. Among the improvements existing upon the hacienda Panaogao, and which the plaintiff was entitled to use, was a large iron-roofed camarin, containing furnaces, boilers, mills, engines, and

other apparatus for the manufacture of sugar.

At about 7 p. m., on March 16, 1918, a fire of unknown origin occurred at this sugar mill, which destroyed the camarin and greatly damaged the sugar-milling apparatus. Soon after the fire the plaintiff informed the defendant of the calamity and made demand upon him for the reconstruction of the camarin. The defendant refused to recognize the existence of any obligation on his part to reconstruct the camarin. Insisting that the plaintiff, being the lessee, and not himself, as lessor, was responsible for the fire and answerable for the damage occasioned thereby. These antagonistic views presently culminated in the litigation now before us.

The dominating question, to which attention must first be directed, has reference to the responsibility for the loss due to the fire. Upon this point it is contended by the defendant that the plaintiff, Lizares, is chargeable with negligence in more than one respect, as for instance in not having maintained upon the premises a fire-fighting equipment reasonably adapted to the needs of the situation and in not having a competent manager actually present and in charge of the mill at the time the fire occurred. In addition to this it is said that, after the fire was discovered, the employees present negligently failed to take proper measures to put it out.

Upon these points the trial judge found that the fire was of unknown and accidental origin and that no fault or negligence was attributable to the plaintiff in regard either to the conditions antecedent to the fire or the manner in which the flames were resisted. He was, therefore, of the opinion that the loss caused by the fire was due to *casus fortuitus*, for the consequences of which no one was responsible.

As observed in the brief of the defendant, as appellant, there is no evidence which points out clearly and unmistakably the immediate cause of the fire; but much proof was taken at the hearing with reference to the conditions under which the fire occurred and what was done to arrest its progress. Indeed, nothing seems to have been left undone by either party in the effort to ascertain the origin of the fire and to fix the responsibility therefor.

In the camarin existing upon the hacienda Panaogao at or about the time the fire occurred, which was during the milling season, there was a complete set of apparatus for the manufacture of sugar, consisting of furnaces, boilers, mills, and other accessory equipment. The laborers were accustomed to begin work in this camarin at about 4 o'clock in the morning and continued on duty until about 8 o'clock at night, during which time strong fires were continually kept in the furnaces for the purpose of heating the boilers containing sugar cane juice.

In maintaining the fires, highly inflammable bagasse, or dry crushed cane, were used for fuel, heaps of which were stacked along the eastern and northeastern sides of the camarin. When the fires were burning low, they were stirred by means of stoking rods, called *tulags*. These were made of bamboo, the young and green ones being chosen, as not easily susceptible of ignition. Nevertheless their frequent contact with the flames and embers in the furnaces naturally tended to dry them out and make them inflammable. In case these *tulags* became ignited they were immersed by the stokers in buckets of water kept nearby.

The places where the stokers are accustomed to stand in firing furnaces of this, character are called, in the vernacular, *cabcaban*. These stands consist of excavations in the ground and are immediately in front of the openings of the furnaces. It is the duty of the stokers not only to keep the fires going but to be on the lookout and extinguish any sparks emitted from the furnaces which might give origin to a conflagration.

The testimony of the plaintiff's witnesses shows that upon the occasion in question the usual and necessary number of stokers were posted immediately in front of the openings of the furnaces to guard the fires. Buckets of water were at hand in which to immerse the burning ends of the stoking rods (*tulags*); and other buckets of water were placed at convenient points for the extinguishment of flames, if fire should break out in any part of the camarin. The precautions thus taken were in keeping with those adopted in other sugar mills operated under

similar conditions, and were such as are commonly considered sufficient. It appears that stoking-rods made of iron are sometimes used instead of the bamboo tulgags, but inasmuch as the iron rods soon got hot and burn the hands of the stokers these implements are not extensively used for stiring the fires.

Upon the actual occasion of the fire in question the plaintiff was absent on business in the city of Iloilo, having left Amando Ereñeta in charge of the hacienda. The latter had left the camarin at about 5 p. m. on the date referred to; and when the fire occurred he was at the corral where the carabaos were kept, a short distance away from the camarin. Instead of hastening to the fire at once, after the alarm was given, he remained a little while in the corral in order to get the animals into a place of safety. Felipe Beldua, apparently next in authority to Amando Ereñeta, and who was engaged in the sugar-boiling department, had left the camarin at about 4 p. m. in order to get something to eat. As he was returning to the camarin, and while yet a short distance away, he discerned the flames rising from a pile of bagasse at the north side of the camarin. He was the first person to see the fire and at once gave alarm. It should be noted that the fire did not originate in that part of the bagasse which was lying in closest proximity to the stoking-stands but a little distance away where it was unnoticed by the stokers.

When Felipe Beldua left the camarin, two of his assistants remained on duty, and the evidence shows that other employees, such as the stokers, machine-cleaners, and sugar boilers, were busy at work. The stoker Lucas Bendado was on duty at the cabcaban immediately in front of the opening of the furnaces at the time the fire occurred. Amando Ereñeta, who was first in charge of the camarin at the time, was employed by the plaintiff to look after the animals, and his duties were not such as to require him to be continually inside the camarin.

After the fire was discovered, the flames spread with great rapidity, owing to the highly combustible nature of the bagasse, and the employees, who gathered around immediately after the ringing of the bell, were unable to stop the progress of the fire. The suggestion that the employees were undisciplined and incompotent and that the fire could have been put out if they had been properly directed is based more or less upon conjecture and is not in our opinion proved. The stacks of dry bagasse ranged along the eastern and northeastern sides of the camarin supplied material to the flames which made its extinguishment impossible.

How the fire originated remains an admitted mystery. Possibly a spark, emitted from the furnace, had been casually conveyed to the spot where the flame was kindled, or it is conceivable that it may have been started from the hot end of a stoking-rod which had been carelessly thrown aside, but this supposition seems untenable; and after all the origin of the fire is a matter of pure conjecture. Upon the whole we find no sufficient ground for any revision of the trial court's finding to the effect that the fire was one of those fortuitous casualties which cannot be foreseen and for the happening of which nobody can be held responsible.

It is, however, insisted for the defendant that, inasmuch as the cause of the fire is unknown, the plaintiff, as lessee, is responsible for the loss, under article 1563 of the Civil Code, which declares that the lessee is liable for any deterioration or loss suffered by the thing leased, unless he proves that it took place without his fault. The lessee, in order to acquit himself under this provision must, so it is argued, prove how the fire was caused, and from the known cause the court must judge whether the loss occurred with or without his fault. We cannot agree with this contention.

It must be admitted that when a loss of the leased property occurs, there is a presumption against the lessee, which makes him responsible, in the absence of proof that the loss happened without his fault. But the question whether there has been fault on his part must be determined in relation with other provisions of the Civil Code as well as in the light of the general principles of jurisprudence. Under article 1561 of the Civil Code the lessee of lands is not responsible for a loss resulting from inevitable cause and in article 1106 the general rule is declared that, in the absence of express provision to the contrary, no one is liable for events which can not be foreseen or which, if

foreseen, are inevitable.

As applied to the case before us we are of the opinion that when the trial court found that reasonable precautions had been taken by the lessee to prevent fires, but that nevertheless fire did occur, of inscrutable origin, which destroyed the camarin in spite of all that could be done to prevent it, this equivalent to a finding that the lessee was without fault and that the loss was in fact due to an inevitable cause. In other words the presumption against the lessee is overcome by proving that the usual and proper care was used to protect the leased property from fire.

Upon principle the responsibility of the lessee for the property leased is substantially the same as that of a person who has possession of movable property belonging to another, as in the case of bailment. It is a well known fact in legal history that the doctrines of English law applicable to the bailment of chattels are in great part identical with those developed by the civil law of Rome, of which indeed the English doctrines may be considered mere emanations. This circumstance makes it instructive here to refer to the case of *Bryan vs. Fowler* (70 N. C., 596), decided by the Supreme Court of North Carolina. It there appeared that the plaintiff had sent quantity of raw cotton to the ginhouse of the defendant, where it was stored for the purpose of being ginned. At one o'clock p. m. on a certain day, while the gin was in ordinary course of operation, with all hands present, fire was discovered in the lint-room, and as cotton is very inflammable, almost like powder, it was impossible to extinguish it. The entire plant was destroyed, including the raw cotton belonging to the plaintiff. The latter accordingly instituted an action against the owner of the gin-house to recover the value of the raw cotton which the plaintiff had deposited in the gin-house. It was insisted for the plaintiff that, inasmuch as the gin-house had been in operation for a considerable time, and under the same circumstances, and had never burned down before, it should be concluded that the fire had originated from some negligent act of the defendant or his servants and that as a consequence the defendant should be held liable. The Supreme Court of North Carolina, however, refused to take this view and absolved the defendant, saying:

"When we hear that a man's house has been burned, by which he suffers loss, the inference is that he did not burn it, but that it was the result of accident, or the work of an incendiary. And it is hard to believe that he did not use ordinary care of his own. But grant that * * * it was incumbent on the defendant to show that he did use ordinary care; then it appears that he did show it. He proved that it was general orders, that 'no fire, pipes or matches' were to be allowed in the gin-house, and that none were used. What more could he prove? * * *

"From all the testimony, it is a mystery how the fire occurred. Take it that the fact of burning made a case of prima facie negligence so as to put it upon the defendant to show proper and usual care, still we think he did prove due care.

"The evidence raises some suspicion that a friction match may have been carried to the gin-house in seed cotton, as hands picking out cotton are known to use matches in the fields. And there was some probability that the seed cotton in the gin-house took fire spontaneously; as it is known that grassy cotton is liable to spontaneous combustion, and mashing the seed will grease the cotton.

"But however this may be, there is no evidence of negligence against the defendant, except the fact of the fire and that he has met by showing that usual and proper care was used."

In this connection we may be permitted to quote a few words from an unpublished decision rendered in the First Division of this Court in 1919.[1] If there appeared that the plaintiff had left a number of photographic films with the defendant corporation in the city of Manila to be washed and refixed. Two or three days later a fire occurred in the defendant's place of business and destroyed the films. The Court found upon the proof that the fire was accidental. In an action brought by the plaintiff to recover the value of the films, we said:

"The defendant is, in our opinion, not liable. This was a bailment *locatio operis faciendi* cause, which term is applied to that bailment where compensation is given for labor and service done upon a chattel or in

connection with it; as where cloth is delivered to a tailor to be made into clothes, or where a watch is left with a jeweler to be mended.

"In this bailment ordinary care and diligence are required of the bailee and he is not liable for the inevitable loss or destruction of the chattel, not attributable to his fault. If while the bailment continues, the chattel is destroyed, or stolen, or perishes, without negligence on the bailee's part, the loss, as in other hirings, falls upon the owner, in accordance with the maxim *res perit domino*. * * *

"Upon this point the civil and common law are agreed; and we find nothing to the contrary in the Spanish Civil Code. Article 1183 declares that when a thing is lost while in the possession of the debtor it shall be presumed that the loss occurred by his fault and not by fortuitous event in the absence of proof to the contrary. But where it is found, and the fact is indisputable, as here, that the fire which destroyed the negatives was accidental, this is equivalent to a finding that the fire was not attributable to the fault of the defendant and negatives every idea of negligence on its part with reference to the origin of the fire. This was *casus fortuitus* such as to exempt the defendant from liability.

"Article 1183 must be construed in relation with the next preceding article (1182), which says that the obligation to deliver a thing is extinguished when the thing is destroyed without the fault of the debtor. * * *"

We now pass to the consideration of a special clause found in the contract of lease (paragraph 4, [b]), declaring that the lessee shall be obliged, upon his own account and risk, to make all repairs upon the improvements existing on the haciendas which were the subject of the lease, and to bear the expense of the same without right to reimbursement. The attorneys for the lessor, Rosendo Hernaez, insist that under this provision it was a duty of the lessee, Nicolas Lizares, at his own expense to restore the *camarin* after it was destroyed by fire. On the other hand, it is insisted for the latter that it was the obligation of the lessor, under subsection 2 of article 1554 of the Civil Code, to make all repairs necessary to keep the leased property in a serviceable condition for the purpose for which it was intended, and that this obligation involves the duty to reconstruct the destroyed *camarin*.

We are of the opinion that neither the articles last cited nor the special provision of the contract to which reference has been made has any bearing on the solution of the case. In this connection it will be noted that the obligation imposed on the lessor by article 1554 is to make repairs (*reparaciones*). The obligation fixed upon the lessee by the special provision of the contract is also limited to repairs (*composiciones*). From an examination of the two provisions it is evident that the two different Spanish words used in the sense of repairs (*reparaciones*, *composiciones*) are exactly equivalent; and it is seen that the obligation imposed by the code on the lessor is transferred by the contract to the lessee. In both cases, however, the obligation is limited to the making of repairs, which is a very different thing from reconstruction in case of total loss. The Spanish terms "*reparaciones*" and "*composiciones*," like the English word "repairs" in its ordinary acceptation, must be understood to apply to the restoration of things after injury or partial destruction, without complete loss of identity in the thing repaired. (34 Cyc., 1336, 1337.)

In subsection (d) of paragraph 4 of the *contn* declared to be the duty of the lessee to maintain the improvements on the haciendas in good condition and to deliver them in the same state to the lessor upon the termination of the lease. This is merely a statement of the obligation imposed by law generally upon all lessees; and the duty thus defined is to be understood as subject to the limitations and exceptions recognized by law. There is nothing in this provision which deprives the lessee of the defense arising from the destruction of the property without his fault.

We are aware that the rule above stated, as applicable in this jurisdiction, is at variance with the doctrine stated in some of the common law authorities. At an early day the rule seems to have become fixed in the common law that if a lessee covenants to repair, to keep in repair, or to surrender the premises in good repair, he is liable for the destruction of buildings not rebuilt by him, though the destruction may have been caused by fire or other accident,

or by the act of enemies and without fault on his part. (16 R. C. L., pp. 1085, 1089.) This peculiar common law rule, which is applied in contracts of landlord and tenant, supplies the only instance apparently where the obligation to repair is held to import the duty to rebuild. Upon principle we consider it incompatible with the spirit which informs the Civil Code, and especially with the general rule laid down in article 1105. It is true that even under this article a party to any contract may make himself responsible for loss resulting from fortuitous and inevitable events. But the provision imposing this obligation should be clearly expressed; and we cannot hold that the express obligation to make repairs and surrender the premises in good condition involves the obligation to rebuild in case of destruction by fortuitous or accidental causes occurring without the fault of the lessee. The undertaking expressed does not reach to any such extent. Where the parties to a contract desire to create an unusual obligation, the expression of intention to that effect should be clear.

It results in our opinion that there was no positive duty on the part of either the lessor or lessee to reconstruct the camarin after it had been totally destroyed by fire; neither can therefore be held liable to the other for any damages which may supposedly have resulted from the failure to reconstruct. The judgment of the trial court must therefore be modified by eliminating the item of P1,736.01, which was awarded to the plaintiff as damages for the failure of the defendant promptly to reconstruct the camarin.

The fact should perhaps be here stated that the lessor reconstructed the camarin after the expiration of a few months, but it was not finished in time to permit of its use in milling the remainder of the harvest for the season when the fire occurred. The trial judge found that the camarin could have been rebuilt within the period of thirty days from the date of the fire; and the damages awarded art; those which the plaintiff is supposed to have suffered between the date when the camarin should have been finished and the conclusion of the milling season for that year. It is contended for the defendant as appellant that the period fixed by the court for the reconstruction of the camarin was unreasonably short and that no damages should have been awarded for that season. In view of the proposition above laid down by us, that the lessor was not bound to rebuild, it is unnecessary for us to consider the length of time which would reasonably have been required for the reconstruction of the camarin.

In the orderly discussion of the case it is convenient next to consider the question of the liability of the lessee for rent, after the fire occurred; for it appears that the lessee is in arrears to the amount of P1,700, of the stipulated rent, payable upon February 15, 1918, as well as for all amounts payable under the contract at later dates. The failure of the defendant to pay these rents is explained by his claim that the contract could be rescinded and that damages should be assessed in his favor by reason of the delinquency of the defendant in the performance of the obligations of the contract of lease. But as we have found, that there was no obligation on the part of the lessor to rebuild the camarin, it results that the plaintiff is not entitled either to the damages claimed or to a rescission of the contract. The lessee is, therefore, liable for the stipulated rent, unless the destruction of the camarin by fire operates as a matter of law to absolve him from liability for the rent, in whole or in part.

Upon this point it is obvious that the most to which the lessee could be entitled in a case of this character would be a possible abatement of the rent, under article 1575 of the Civil Code, for the period of time intervening between the date of the fire and the completion of the reconstructed camarin. But even supposing that this article could be properly considered applicable to the lease of this sugar mill in connection with the farm whereon it is placed—a question upon which we need not here express a definite opinion—the proof supplies no data from which we could determine the amount of reduction to which the lessee would be equitably entitled during the period mentioned. The two haciendas covered by the lease contain an area of about 250 hectares and the value of the land for cultivable purposes undoubtedly supplied the chief element of value in the lease. The lessee has apparently remained in possession of both the haciendas, and there is nothing to show the proportional rental value of the camarin in relation with the whole property. This circumstance makes it unnecessary for us to enter

into any discussion of the legal question as to when the lessee is entitled to an equitable abatement of the rent on account of the destruction of the improvements on a farm. In passing we may observe that the civil law is much more favorable to the lessee than the common law as will be discovered from a perusal of the opinion of the Supreme Court of the United States in *Viterbo vs. Friedlander* (120 U. S., 707 [30 L. ed., 776]), where the provisions of the French Code, as reproduced in the Code of Louisiana, are compared with the common law doctrines with great erudition and copious learning. The provisions of the Spanish Civil Code apparently occupy a position between the two extremes.

The contract of lease contains a stipulation with regard to liability for expenses of possible litigation, which has been the subject of controversy. Said provision is to the effect that in case litigation arises by reason of the failure of either party to comply with the contract, the attorney's fees and other expenses, judicial and extra-judicial, shall be paid by the person whose delinquency gives rise to the litigation. The trial judge found that both parties were in some respects in default, and accordingly held that neither could invoke this provision. In the view we take of the case, the lessor is not in default at all. He is therefore entitled to recover of the lessee, as the person in default, proven expenses including the attorney's fee, in the amount of P2,630.

The trial court declared the contract of lease to be rescinded, which action has been assigned as error by the defendant as appellant. Though technically well taken, this assignment is overruled, for the reason that the defendant in his brief expresses his conformity in this feature of the appealed decision and consents that the order of rescission be affirmed. We will accordingly here act upon the maxim *consensus tollit errorem*, and affirm this feature of the case. It may be added that the right of the defendant to a rescission under the facts proved is unquestionable. Inasmuch, however, as the period fixed by the trial court during which the lessee might retain possession for the purpose of harvesting and milling the cane grown on the haciendas has passed, and other crops are probably now in course of production, it will be the duty of the lower court upon the return of this record to make such orders as may be necessary to adjust the rights of the parties in harmony with article 1578 of the Civil Code and other provisions applicable to the case.

The contract of lease also contains a stipulation whereby the plaintiff-lessee bound himself to cause an artesian well to be bored on the hacienda Panaogao in the harvest season of 1917-1918. This provision has not been complied with, and the trial judge included in his decree an order requiring the plaintiff to cause the well to be opened on or before May 30, 1919, in compliance with the stipulation referred to. In view of the rescission of the contract, the order for the performance of this stipulation must be reversed. Ordinarily, in such situation the lessor would be entitled to compensation in damages for this breach of the contract but we discover no basis in the proof upon which such damages could be computed.

In conclusion, the decision appealed from is affirmed in declaring the lease contract rescinded and in giving judgment in favor of Rosendo Hernaez against Nicolas Lizares and Enrica Alunan, viuda de Lizares, for rents accrued and unpaid, with interest, it being further understood, however, that the obligation to pay rent will continue until possession of the two haciendas is surrendered to the lessor. The decision is reversed in so far as it awards damages to Nicolas Lizares against Rosendo Hernaez in the sum of P1,736.01, with interest; and the defendant is absolved from this part of the judgment. The decision is also reversed in so far as it requires the plaintiff to construct an artesian well upon the Panaogao hacienda. It is further ordered that Rosendo Hernaez recover of Nicolas Lizares and Enrica Alunan, viuda de Lizares, jointly and severally, the sum of P2,630, as expenses of litigation, with interest at six per cent from November 14, 1918, the date of the decision in the lower court. (Sec. 511, Cod. Civ. Proc.)

No special pronouncement will be made as to costs. So ordered.

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

Justice Johnson voted in the session room concurring with the preceding decision; but being absent he cannot sign it.

(Sgd.) C. S. ARELLANO, Chief Justice.

Judgment affirmed in part and reversed in part.

[1] Brown vs. Roberts Incorporated, R. G. No. 14390, decided June 24, 1919.

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