

THE GOVERNMENT OF THE PHILIPPINE ISLANDS, PLAINTIFF AND APPELLANT, VS. W. O. BINGHAM, C. D. SQUIRES, AND ALBERT BRYAN, DEFENDANTS AND APPELLEES.

G.R. No. 4895. June 15, 1909

Ponente: JOHNSON, J.

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JOHNSON, J.:

On the second day of August, 1907, the plaintiff commenced an action in the Court of First Instance of the city of Manila to recover of the defendants the sum of 200 dollars, United States currency, basing said action upon a failure on the part of the defendants to perform the conditions of a certain bond. On the 26th day of February, 1908, the defendants filed a general and special answer to said complaint. On the second day of March, 1908, the attorneys for the respective parties entered into an agreement in words and figures as follows:

"For the trial and determination of the issues joined in this cause and now submitted to the court, and for the purpose of such trial, the said parties, by their respective attorneys, agree that the facts are as follows:

"1. That in pursuance of the provisions of Act No. 652 of the Philippine Commission, amendatory of Act No. 175, as amended from time to time, and of Executive Order No. 9 of March 25, 1903, as amended by Executive Order No. 27, issued May 16, 1906, in conformity with the requirements of the aforesaid Act, the chief of police of the city of Manila did on the 22d day of August, 1906, issue to W. O. Bingham a license to purchase and keep the following firearm, viz., one revolver, Smith & Wesson, caliber .38, No. 154990, and one hundred rounds of ammunition.

"2. That said W. O. Bingham, in accordance with the requirements of the aforesaid Executive Order No. 9 did, on August 21, 1906, execute his bond or written obligation with C. D. Squires and R. W. Squires as his sureties on said bond, whereby they acknowledged themselves held and firmly bound unto the plaintiff in the sum of \$200, United States currency, to be paid to said plaintiff; the said bond was and is subject to the certain condition thereunder

written in the following words and figures, viz:

" 'The condition of this obligation is such that, whereas, the chief of police has on this 22d day of August, 1906, issued to the above-bounden W. O. Bingham a license to purchase and keep the following firearm, viz., one revolver, Smith & Wesson, caliber .38, No. 154990, and 100 rounds of ammunition; and the above-bounden W. O. Bingham has covenanted and agreed, and does hereby covenant and agree, that he will safely keep the said arms and each of them, and will deliver the same to the Government of the Philippine Islands on demand.'

"The said bond is as follows:

''' Know all men by these presents, that we, W. O. Bingham, residing in the town of Manila, Province of Manila, Philippine Islands, as principal and C. D. Squires, residing in the town of Manila, Province of Manila, Philippine Islands, and R. W. Squires, residing in the town of Manila, Province of Manila, Philippine Islands, as sureties, are held and firmly bound unto the Government of the Philippine Islands in the penal sum of two

hundred (\$200) dollars (two hundred dollars for each firearm), United States currency, to the payment of which sum well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

"The condition of this obligation is such that, whereas, the chief of police has on this 22d day of August, 1906, issued to the above-bounden W. O. Bingham, a license to purchase and keep the following firearm; viz: One revolver, Smith and Wesson, caliber 38, No. 154990, and 100 rounds of ammunition, and the above-bounden W. O. Bingham has covenanted and agreed and does hereby covenant and agree that he will safely keep the said arms and each of them, and will deliver, the same to the Government of the Philippine Islands on demand.

"Now, therefore, if the above-bounden W. O. Bingham shall and will in all respects duly and fully observe and perform all and singular the aforesaid covenants, conditions, and agreements, by the said W. O. Bingham to be observed and performed, according to the true intent and meaning thereof, then the above obligation shall be void and of no effect; otherwise to remain in full force and virtue."

"3. That on the 18th day of April, 1907, the plaintiff demanded of the said W. O. Bingham the delivery of the aforesaid revolver and ammunition mentioned and described in said bond, but notwithstanding said demand, the said W. O. Bingham failed to deliver to the plaintiff the aforesaid revolver and ammunition and has not delivered same.

"4. That on the 3d day of January, 1907, prior to the aforesaid demand made upon the said W. O. Bingham for the delivery of said revolver and ammunition or, in default thereof, for compliance with the conditions of said bond, the said W. O. Bingham, with said revolver and ammunition in his possession, was engaged in the business of pearl fishing, and with a crew of eight men was on board his pearling schooner known as the Tamarao about 2½ miles south of the Island of Maripipi; that while thus engaged at said time and place there arose a severe storm; that said schooner was sunk in about 80 fathoms of water through no fault of the said W. O. Bingham or his crew, and that the said revolver and ammunition, being then and there on board said schooner, went down with it and were lost.

"5. That the violence of the storm was such that neither the said W. O. Bingham nor any member of the crew had time to save the said revolver and ammunition, and that it is impossible to recover same on account of the depth of the sea wherein they were lost as aforesaid.

"And upon the foregoing facts this case is submitted to the court upon the issues joined herein, with leave to either party to except to any rulings of the court upon propositions of law that may be moved by either as applicable to this case and to take a bill of exceptions in respect thereof.-(Signed.) Gregorio Araneta, for plaintiff.-W. H. Bishop, for defendant."

After considering the agreed facts, the lower court upon the 30th day of June, 1908, rendered a judgment in favor of the defendants and dismissed said cause, without making any findings as to costs. The judgment of the lower court is so full in its discussion of the facts and the law applicable thereto that we hereby make it a part of this decision. The Decision of the lower court was, in part, as follows:

"Therefore, from the facts agreed upon between the parties to this suit it appears:

"(a) That W. O. Bingham bound himself to the Government of the Philippine Islands to keep and care for a revolver and ammunition, for the possession of which he was granted a license by the chief of police of this city on the 22d of August, 1906, in accordance with the legal provisions cited, and to surrender the said revolver and ammunition whenever so required by the Government.

"(b) That said obligation was secured by the other two defendants jointly and severally with W. O. Bingham, the principal, in the sum of \$200, United States currency,

payable to the plaintiff in case the said principal did not keep and care for the said weapon and ammunition, or failed to surrender the same when called upon by the Government of these Islands.

"(c) That the said revolver and ammunition was not surrendered, nor could the same be surrendered by the defendant W. O. Bingham when he was called upon, for the reason that, without any fault of the defendant, they were lost during a strong gale which caused the foundering of the sloop Tamarao, on which the defendant, together with several members of the crew, was fishing pearls from the sea, toward the south of Maripipi Island; the revolver and ammunition went to the bottom of the sea together with the vessel, and it was impossible to recover the same.

"The representative of the plaintiff, in view of the above facts, asks that judgment be entered as against the defendants sentencing them to pay the aforesaid \$200, United States currency, with interest thereon from the 18th of April, 1907, and costs, for the reason that the plaintiff had been prejudiced to the said amount on account of the non-fulfillment of the said bond, and the defendants in turn claim that they be acquitted and exempted from such payment.

"It is of course evident that the loss of the said revolver and ammunition, and the material impossibility on the part of the defendant, Bingham, to deliver said article to the plaintiff on demand was due to causes which were independent of his will; to an event which he could not have foreseen, or which, even if he had foreseen it, was unavoidable; to an event known under the Spanish law by the name of *caso fortuito*, and designated in American law as 'an act of God,' arising out of a natural cause, and not from man's will.

"As a matter of fact, as maintained by the representative of the plaintiff, it is a well-established rule in American law, that where a person enters into or contracts an obligation by means of an express contract he can not be permitted to evade its compliance on the plea that such a contract is impracticable, or that it can not be carried out owing to an act of God, or to a *caso fortuito* or *force majeure*. It differs from where the obligation is imposed by the law, in which case the person bound may be relieved from complying by reason of facts or acts of such nature. This doctrine has been established by the courts of the United States in several decisions cited by the said representative.

"However, this rule is not so absolute as to lack exceptions even within the American law, and its application must be adjusted to the principles of justice and equity, and depends upon the character, the nature, and sometimes upon the very conditions in the contract.'

" 'Executory agreements ordinarily are made on the implied condition that the performance of the agreement shall not be rendered impossible by the intervention of some accidental and uncontrollable superior agency. In the civil law this agency is termed *vis major*; in the common law, act of God; and means an inevitable accident produced by an irresistible physical cause which human skill, could not have prevented or human judgment foreseen. The intervention of such an agency may excuse performance (Am. & Eng. Ency. of Law, 2d ed., vol. 1 (7), p. 147.)

" 'The act of God which exempts one from an obligation in a contract is that which renders its performance impossible.' (Dewey vs. Alpena School Dist., 43 Mich., 480, 38 Am. Rep., 206.)

" 'And akin to this is the case of contracts relating to some specific article which the act of God destroys. Here there is an implied condition in the promise that the preventing contingency shall not arise.' (Am. & Eng. Ency. of Law, 2d ed., vol. 7, p. 148.)

"Furthermore, 'the rule that the intervention of the act of God will excuse performance does not apply where the essential purpose of the contract is capable of substantial accomplishment, although a literal performance has become physically impossible.' (Ibid.)

In the present case the purpose or essential object of the contract entered into between the Government of the Philippine Islands and the defendant, W. O. Bingham, was that the latter should care for and keep said weapon

and ammunition, and deliver the same to the Government when the latter should demand it. This purpose, this end, can not be substantially accomplished because the said articles have disappeared and can not be recovered, as the parties have agreed to, and therefore, said rule may be applied to the said contract, or what is the same thing, that fortuitous event, that act of God excuses the defendant from the performance of said contract, and that the purpose or the essential object of the contract was what has already been stated is evident because the intention of the Government, upon imposing said obligation on the defendant, and of the latter in accepting it, was certainly not that said defendant and his bondsmen should pay the \$200, United States currency, amount of the bond, but to prevent said revolver and ammunition passing into the possession of another person, or falling into the hands of evil doers, lawbreakers, or of persons who might make unlawful use of the same.

"It is also an established rule in American law, that: 'When performance of a contract is dependent upon the continued existence of a given person or thing, and such continued existence was assumed as the basis of the agreement, the death of the person or the destruction of the thing puts an end to the obligation.' (7 Am. & Eng. Ency. of Law, 2d ed., p. 116.) And that 'where a contract is entered into, of a continuing character, or to be performed at a future time, dependent upon the continued existence of a particular person or thing, or the continuing ability of the obligor to perform, subsequent death, destruction or disability will excuse the obligor from compliance with the terms of the contract (1 Am. & Eng. Ency. of Law, 2d ed., pp. 590, 591, and decisions cited therein.)

"And the reason of said rule is, that 'the liability of an obligor in a contract having reference to the continued existence of a particular person or thing does not in strictness constitute an exception to the general rule as to the liability of obligors in express contracts, but results from a reasonable construction of the contract with reference to its subject-matter.' (Am. & Eng. Ency. of Law, *ibid.*, 592.)

"In the case at bar, the obligation contracted by the defendant, W. O. Bingham, and secured by the other two defendants, his bondsmen, was to care for and keep the revolver and ammunition, the use and possession of which had been granted to the former, and to surrender the same revolver and ammunition to the Government whenever so demanded; so that the said contract was based on the assumed existence of a determined thing, of the revolver and ammunition specified in the respective license, and the compliance of said contract was fixed for a future time, that is to say, whenever the Government should demand the surrender of the said weapon and ammunition, on the basis, of course, that such articles were in existence.

"Therefore, inasmuch as the said revolver and cartridges were lost, or rather, buried at the bottom of the sea beyond the possibility of finding or recovering them, which is equivalent to their destruction, there can be no doubt whatever that, in applying the provisions of said rule of the American law, the defendant, W. O. Bingham, and consequently the other defendants, his bondsmen, have been excused from the performance of said obligation for the reasons which will hereafter be stated.

"The said rule in the American law is more clearly and precisely contained in the provisions of article 1182 of the Civil Code in force, which reads:

" 'An obligation, consisting in the delivery of a specified thing, shall be extinguished when said thing should be lost or destroyed without fault of the debtor and before he should be in default.'

" 'It is understood,' so reads article 1122 of the same code, 'that the thing is lost when it perishes, becomes unsalable, or disappears in such a manner that its existence is unknown, or it is not possible to recover it.'

"As the revolver and cartridges that were in the possession of W. O. Bingham sank with the sloop Tamaraao, they undoubtedly became unsalable, disappearing in such a manner that it is not now known where they are, that is, their existence; they were lost, and it is now impossible to recover the same, as has been agreed to between the parties to this suit. Said loss occurred without the fault of said defendant and before he was in default, because the Government did not call upon him to surrender the weapon and cartridges before the

shipwreck took place, but several months after the occurrence.

"It is therefore unquestionable that the provisions of the Civil Code in regard to this matter are also in accordance with the American law. Both are based on the same thing, which is the material impossibility to comply with or substantially perform an obligation where the subject-matter does not exist. W. O. Bingham is not bound to comply with the said obligation for the reason that, according to law, it has become extinguished.

"The bond obligation contracted for by the other two defendants jointly and severally with the principal obligor, W. O. Bingham, that is, the defendant, is accessory to the obligation contracted by the latter to deliver to the Government the revolver and cartridges whenever so required, and consequently it became extinguished at the same time as the principal obligation on account of the loss of said articles. (Art. 1847, Civil Code.)

"That obligation was also an accessory one which was established or determined by the penalty clause to pay the plaintiff \$200, United States currency, in case the defendant, W. O. Bingham, should fail to comply with the principal obligation, that is, to surrender said weapon and ammunition whenever required to do so because the said obligation was secured by means of said penalty clause; the defendants can not be compelled to suffer said penalty, to wit, to pay the said sum in lieu of delivering the revolver and cartridges mentioned above, for the reason that it is not an alternative obligation, since the defendant, W. O. Bingham, could not choose between delivering the weapon and ammunition when so required, or paying said amount; he was expressly obliged to keep said weapon and ammunition, and surrender them to the Government whenever so demanded in view of the special purposes of the Government in granting such licenses, which purposes are no other than, as it has already been stated, to prevent firearms in the hands of private individuals or of municipalities from falling into the possession of evil doers and enemies to law and order, and to be in a position at any given moment, to gather in said weapons in order to attain said purpose; and this could not be effected if the possessor or possessors of the weapons could, at their choice, fail to deliver them and pay the penalty to the Government.

"Finally, the case of the The Government of the Philippine Islands vs. Graciano Punsalan et al., which was decided by the Supreme Court of these Islands on the 26th of February, 1907, cited by the representative of the plaintiff in order to sustain the theory that, as the defendants had bound themselves unconditionally in the contract, they can not be excused from complying therewith, and consequently from the payment of the bond as indemnity for the damages suffered for the loss of the revolver and cartridges above-mentioned, can 'not serve as a precedent for the decision of the question at bar, because in said case the loss of the rifles was partly due to the negligence of the members of the municipality who had charge of said weapons; said weapons passed into the possession of the bandits who stole them; from this it could not be held that they were lost in the legal sense of the word for the very reason that it was not impossible to recover them, and because their whereabouts could be determined in some manner, while in the present case the revolver and cartridges that were in the hands of the defendant, W. O. Bingham, were totally lost, disappeared and became unsalable, not through his fault but by an act which was independent of his will which he could not foresee or avoid; by a fortuitous event or by an act of

God; and as it is no longer possible to recover the said articles, the essential purpose of the contract, entered into between him and the Government with respect to the said revolver and cartridges, can not be substantially complied with.

"For the reasons above set forth the court absolves the defendants of the complaint without any special ruling as to the costs. So ordered."

From this decision the plaintiff appealed, and made the following assignments of error:

"1. The court erred in not determining the liability of defendants and appellees according to American legal precedents.

"2. The court erred in determining the liability of defendants and appellees under their contract or bond

according to the Spanish Civil Code in force in the Philippine Islands.

"3. The court erred in holding and deciding that the obligation of defendants and appellees under their contract or bond was extinguished under the provisions of the Spanish Civil Code by reason of the fact that the loss of said firearms and ammunition resulted from fortuitous events.

"4. The court erred in holding and deciding that, even under American legal precedents, defendants and appellees would be released from the obligation of their bond by reason of the fact that the firearms and ammunition were lost by act of God.

"5. The court erred in holding and deciding that the essential purpose of the contract or bond of defendants and appellees was to prevent the firearms and ammunition from falling into the hands of wrongdoers, violators of the law, or persons who would use them for some illegal purpose.

"6. The court erred in rendering judgment for defendants and appellees against plaintiff and appellant.

"7. The court erred in denying the motion of plaintiff and appellant to set aside the said judgment and award it anew trial on the ground that said judgment was contrary to law and that the evidence was not sufficient to sustain the decision."

With reference to the first above assignment of error, it may be noted that the lower court cited both American and Philippine authorities and by following the doctrine of one or of the other, he would have reached the same conclusions. We are at a loss to understand why this particular law (Act No. 652, amending Act No. 175) should be solely construed under American precedents any more than any other law enacted by the legislative department of the Philippine Government. But whether this case is decided by applying American jurisprudence or the laws of the Philippine Islands, we are of the opinion that the result will be the same. Justice is about the same under whatever law. Civilized nations everywhere have adopted about the same rules of justice and law when they relate to fundamental principles affecting the rights of men: The rule of the Shylock-pound-of-flesh is no longer in force where impossibility has prevented the performance of an obligation between men, which impossibility neither of the parties could reasonably anticipate nor prevent. We are of the opinion, and so hold, that the lower court committed no error in applying the jurisprudence which he cites in his decision. This we believe answers both the first and the second assignments of error.

The third and fourth assignments of error may be considered together. The obligation which the defendants in their bond assumed was that the said revolver and ammunition should be returned to the plaintiff upon demand of the plaintiff or of its representatives. No demand was made until after the said revolver and ammunition were lost in the manner described in paragraph 4 of the stipulated facts. Said paragraph 4 shows that the revolver and ammunition were lost in about 80 fathoms of water, through no fault of the defendant.

Article 1182 of the Civil Code provides that-

"An obligation, consisting in the delivery of a specified thing, shall be extinguished when said thing should be lost or destroyed, without fault of the debtor and before he should be in default."

It would seem that this article was a complete answer to the contention of the plaintiff. (See also decision of the supreme court of Spain of the 18th of February, 1897.) Under article 1183 of said code, the loss shall be presumed to be by the negligence of the person upon whom the obligation rests to return it unless there is proof to the contrary. In the present case it is expressly admitted that there was no fault on the part of the defendants.

Article 1105 of said Civil Code provides that-

"No one shall be liable for events (speaking of obligations) 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."

In the present case there were no exceptions expressly mentioned in the law; neither were there any mentioned in the bond. The loss in the present case was certainly one which, even though it might have been foreseen, was inevitable under the circumstances.

There is no doubt but that the general rule is that one who obligates himself to do or not to do a particular thing is obliged to comply with his obligation unless he is relieved by some express exception or stipulation. But this general rule has so many exceptions that in fact it has but little application. The general exception is the one commonly quoted to wit, the act of God or the public enemy. To this, or to these, may be added many others.

In the case of *Clifford vs. Watts* (Law Reps., 5 Com. Pleas, 577), Watts undertook to dig from the premises of the plaintiff, and obligated himself under a bond to do so, not less than 1,000 tons of potter's clay annually. There was a default on the part of Watts, and Clifford brought an action against him. Watts pleaded that there never had been so much as 1,000 tons of clay under the land. The court held that the plea furnished a good answer to the plaintiff's claims. Brett, J., who wrote the opinion, said: "Both parties might well have supposed that there was clay equal to the amount which the defendant had obligated to dig under the land." It was absolutely impossible for the defendant to comply with his obligation, and the mere fact that he was mistaken in the amount of clay which might be dug and the mere fact that he did not make an exception in his contract, were not sufficient to render him liable.

Another illustration may be given. Parties may bind themselves in a lawful contract without making any exceptions whatever and be prevented from the performance of the contract by a legal impossibility arising from a change in the law. An impossibility arising in this manner will certainly relieve the parties from their obligations. To illustrate by a specific example: A enters into a contract with B, obligating himself under a bond to construct a dwelling house or other building upon a particular tract of land. Before the construction of the house or building is completed by an act of the legislative department of the government, acting under the law, the land is appropriated under the power of eminent domain for some public purpose thus preventing the contractor from complying with his obligation. The plaintiff sues him for a failure to comply with the conditions of his bond. Will it be contended by any court that, notwithstanding the fact that he had been legally prevented from carrying out his contract, he is still liable? Such a conclusion is nauseating to the very idea of justice.

A case in point may be found in *Baily vs. De Crespigny* (Law Reps., 4 Q. B., 180); *Cordes vs. Miller* (29 Mich., 581); *People vs. Globe Mutual Life Ins. Co.* (91 N. Y., 174); *Jamison vs. Indiana Natural Gas Co.* (128 Ind., 555).

There are also other exceptions to the general rule above stated, to-wit: where the existence of a specific thing is essential to the performance of the contract. If the specific thing essential to the performance of the contract is destroyed from no fault of either of the parties, such destruction will operate as a discharge of the parties from their obligation. To illustrate: A rents of B a hall for the purpose of giving a public concert on a particular day. B obligates himself to furnish the hall under a penalty. Before the day for the concert the hall is destroyed by fire, or storm, or earthquake, for which destruction B was in noway responsible. This illustration covers the facts in the present case. Certainly under this contract A could not recover any damages from B for his failure to furnish the hall. (*Dexter vs. Norton*, 47 N. Y., 62; *Stewart vs. Stone*, 127 N. Y., 500; *Walker vs. Tucker*, 70 111., 527; "The Tornado," 108 U. S., 342; *Cleary vs. Sohier*, 120 Mass., 210; *Butterfield vs. Byron*, 153 Mass., 517; supreme court of Spain, July 2, 1899; supreme court of Spain, July 8, 1903; *Taylor vs. Caldwell*, 3 B. & S. (Eng. Reps.), 826; *Appleby vs. Meyers*, Law Reps., 2 Com. Pleas, 651.)

A further exception to the general rule is in contracts which have for their base the rendering of personal service. Suppose a man should obligate himself in a contract to render some particular personal service and give a bond

for the performance of such service, but, before the time arrives for the performance of the obligation, the performer dies. Can the person to whom the obligation runs enforce the bond? This question was presented in the case of *Robinson vs. Davison* (Law Reps., 6 Excheq., 269) and *Bramwell, J.*, in answering the question said (p. 277):

"This is a contract to perform a service which no deputy could perform and which, in case of death, could not be performed by the executors of the deceased, and I am of opinion that by virtue of the terms of the original bargain incapacity of body or mind in the performer, without default on his part, is an excuse for nonperformance. The contract must in my judgment be taken to have been conditional and not absolute."

So also may an unforeseen peril, as a general conflagration or inundation, or the prevalence of a contagious disease, and many other things which can not be avoided, work a discharge and a release from an absolute obligation fixed in a contract. (*Lakeman vs. Pollard*, 43 Me., 463.)

With reference to the fifth above assignment of error, we find that the court committed no error in his statement as to the purpose of the bond in question. That was a mere opinion, and in our judgment did not influence the conclusions of the court.

We deem it unnecessary to discuss the assignments of error numbered six and seven.

In the foregoing conclusions we have not overlooked the decisions of this court in the case of *The Government of the Philippine Islands vs. Punzalan et al.* (7 Phil. Rep., 546), and the case of *The Government of the Philippine Islands vs. Amechazurra et al.* (10 Phil. Rep., 637). Neither is it intended herein to overrule those decisions. There is no reason why those decisions should not be followed when the facts are as the facts were in those cases. In the present case it was admitted by both parties that the impossibility on the part of the defendant to comply with the terms of his bond was caused through no fault of the said defendant. In the case of *Punzalan et al.*, this court said:

"There is evidence of record tending to show that there was more or less negligence in the performance of their duties as municipal officials on the part of some, if not all, of the defendants, which may have contributed to the loss of these arms."

In the case of *Amechazurra* there is no reference in detail to conditions under which the firearms in question were lost, but inasmuch as the court followed the doctrine in the cause of *Punzalan*, it is to be presumed that the facts were the same substantially.

For all of the foregoing reasons we are of the opinion, and so hold, that the judgment of the court below should be affirmed, with costs.

Arellano, C. J., Torres and Mapa, JJ., concur.

Carson and Willard, JJ., dissent.

[1] Cause No. 4896, *The Government of the Philippine Islands vs. W.O. Bingham, C.D. Squires, and Albert Bryan*, involving the same subject-matter was considered and decided at the same time with the same result.

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