

ATLANTIC, GULF & PACIFIC COMPANY, APPELLANT AND PLAINTIFF IN ERROR, VS. GOVERNMENT OF THE PHILIPPINE ISLANDS.

G.R. No. 64. December 19, 1910

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The break of May 1, 1906, due to the pressure of the fill upon the inclosing bulkhead, was the proximate cause of the subsequent injury to the work for the repair of which compensation is demanded. (*Milwaukee & St. P. R. Co. vs. Kellogg*, 94 U. S., 469, 474, 476; 24 L. ed., 256, 258, 259; *Aetna F. Ins. Co. vs. Boon*, 95 U. S., 117, 130; 24 L. ed., 395, 398; *The G. R. Booth*, 171 U. S., 450, 460; 43 L. ed., 234, 240; 19 Sup. Ct. Rep., 9.)

Judicial notice will extend to well-known climatic conditions that may exist in certain localities, that are known by virtue of the fact that they are part of the general history of the land. (*McGhee Irrigating Ditch Co. vs. Hudson*,— Tex. Civ. App., —, 21 S. W., 175.)

Even such a matter as the limitations in reference to weather suitable for yatching has been made the subject of judicial notice by this court. (*The Conqueror*, 166 U. S., 110, 134; 41 L. ed., 937, 947; 17 Sup. Ct. Rep., 510.)

The interval of a fortnight or so between the proximate efficient cause and the ultimate result is of no importance. (*Aetna F. Ins. Co. vs. Boon*, 95 U. S., 117, 130; 24 L. ed., 395, 398.)

Assistant Attorney-General Denison argued the cause and filed a brief for appellee and defendant in error:

The division of liability had no relation to any delinquency under the contract, nor to any negligence; and therefore the responsibility for remote consequences as in such delinquencies does not here exist, but only for the particular consequences contracted against, as in cases of insurance. (*Holms*, Common Law, pp. 77, 302, 303; *Phillips, Ins.*, p. 1134.)

When, at any point in the chain of cause and effect, we reach a consequence actually foreseen and provided for by the parties before the event, the rule of proximate cause must cease, and we are thrown on the agreement of the parties. (*Howard F. Ins. Co. vs. Norwhich & N. Y. Transp. Co.*, 12 Wall., 194; 20 L. ed., 378; *Fuller vs. Detroit F. & M. Ins. Co.*, 1 L. R. A., 801; 36 Fed., 470; *Beakes vs. Phoenix Ins. Co.*, 143 N. Y., 402; 26 L. R. A., 267; 38 N. E., 453; *Warmcastle vs. Scottish Union & Nat. Ins. Co.*, 201 Pa., 302; 50 Atl., 941; *Gilson vs. Delaware & H. Canal Co.*, 36 Am. St. Rep., 807, note; *General Mut. Ins. Co. vs. Sherwood*, 14 How., 351; 14 L. ed., 452; 15 Harvard L. Rev., 541; *Dudgeon vs. Pembroke*, L. R. 2 App. Cas., 297; 46 L. J. Q. B.,

N. S., 409; 36 L. T. N. S. 382; 25 Week. Rep., 499; 3 Asp. Mar. L. Cas., 393; 14 Eng. Rul. Cas., 105; L. R., 9 Q. B. 585; 43 L. J. Q. B. N. S. 220; 31 L. T., N. S., 31; 22 Week. Rep., 914; *Wilson vs. The Xantho*, L. R., 12 App. Cas., 514; 56 L. J. Prob., N. S., 116; 57 L. T., N. S., 701; 36 Week. Rep., 353; 6 Asp. Mar. L. Cas., 207; 24 Eng. Rul. Cas., 372; *Orient Mut. Ins. Co. vs. Adams*, 123 U. S., 67; 31 L. ed., 63; 8 Sup. Ct. Rep., 68; *Liverpool & G. W. Steam Co. vs. Phoenix Ins. Co.*, (*The Montana*), 129 U. S., 397, 438; 32 L. ed., 788, 791; 9 Sup. Ct. Rep., 469; *Northwest Transp. Co. vs. Boston M. Ins. Co.*, 41 Fed., 800; 2 Arnould, Marine Ins., 6th ed. pp. 737, 753; *Hildyard, Marine Ins.*, p. 269; *Phillips, Ins.*, sees. 1136, 1137.)

Mr. Justice Holmes delivered the opinion of the court:

This is an action upon a contract for an extension to the Luneta of the city of Manila. Both courts below decided for the government, the defendant, upon demurrer to the complaint. Abridged, the allegations are these: A contract for the work was made on July 24, 1905. On May 1, 1906, about 200 feet of bulkhead and rock revetment were displaced by pressure from the inside fill and moved about 20 feet into the bay of Manila, so that a large quantity of the fill that had been pumped behind the bulkhead escaped into the bay. On May 18, before the break could be repaired, a severe typhoon occurred, and the bulkhead and rock revetment, being without the support of the inside fill, were destroyed for about 1,800 feet by the pressure of the rock revetment and the wind and waves from the outside, and a large additional quantity of the inside fill escaped. The question is which party must bear the last-mentioned loss. If the first break had not happened, no damage would have been done by the typhoon. The plaintiff sets forth the cost of repairing the damages of May 18, and seeks to recover it in this suit.

The specifications of the contract contain the following:

"5. The contractor will be responsible for damages to the bulkhead and revetment arising from wave action or from

pressure of the revetment against the timber structure; but if a break is caused by pressure resulting from the mud fill, the repairs to the structure will be paid for by the Government at the prices specified in the contract; provided that the specifications have been fully complied with.

"12. * * * All losses of dredged material from the fills, excepting those due to failure of the bulkheads from pressure of the mud fill, as stated in article 5, will be measured as carefully as conditions will permit, and the computed amounts deducted from the statement for the final payment."

On May 24, a supplemental contract was signed. It recited that the repairs made necessary by the break of May 1 ought to be paid for by the Government; that the original project was modified so as to fill the space that had given way with rock, with clay, etc., for the interstices; and that the change would either increase or diminish the cost. It then agreed that the plaintiff should make the repairs, and the Government would pay the actual and reasonable cost, with certain qualifications, plus 15 per centum, which last was to cover all other items, including profit. This referred to the first damage only. On the next day, May 25, the Government director telegraphed to Commissioner Forbes; "for most of typhoon damage I hold contractor responsible; they claim Government responsible for all, on account delay repairing first break, but wish to make repairs in manner authorized for first break, leaving settlement of liability to be determined later. Repairs should be made at once, but in view of contract requirement * * * do not see how contractors can be authorized proceed before determination of liability." The answer approved "authorizing contractors to proceed immediately to make repairs on lines indicated, with the understanding that all rights reserved in regard to adjudication of liabilities." These telegrams were communicated to the plaintiff, and it was authorized to proceed to make repairs in the manner outlined in the agreement of May 24. It did so, and the Government now refuses to pay.

It will be understood that this case is in no way concerned with the possible difference in cost between the mode of repair adopted and that which might have been followed under the original contract. The question here is which party is responsible for the repairs, assuming no such difference to exist. We need not consider whether the effect of all that we have recited was or was not to substitute the new mode and new cost for the old, as that which the parties left at risk when they agreed that the should have any claim for the excess alone, if any, over plaintiff should go on and do the work. If the plaintiff the cost that would have been incurred under the original plan, it is not suing for it here.

Both sides found their case on the division of losses made by the specification quoted. On the one hand, the

accident would not have happened but for the pressure from the mud fill; on the other, the more immediate cause was wave action and the pressure of the revetment against the timber structure, the effects of which the contractor was to bear. We agree with the court below that the contractor must bear the loss. The question is not whether the responsibility of the Government might not have extended to the later consequences had it originally been a wrongdoer, and had it been sued in tort. The question is to what extent did the Government assume a risk which, but for the contract, would not have fallen upon it at all. The contract qualified the relation only cautiously and in part. If the break was caused by pressure from the mud fill, the Government agreed to pay for repairs to the structure. That was all.

But for the addition in 12, quoted above, it might be doubted whether "structure" meant anything but the bulkhead and revetment. But article 12 extends government liability to loss of dredged materials due to such a break. It is suggested that the reason for the Government undertaking was that the plan was made by the Government engineers. It may have been. But the plaintiff was content to work upon that plan; it, not the Government, was doing the work, and it took the risk so far as the contract did not make a change. The Government could not be charged by it with negligence or with causing the first break. That was- only something for repairing which the Government had promised to pay. Whatever the Government had not promised to pay for, the contractor had to do, in order to offer the completed work which it had agreed to furnish. The case is stronger for the Government than those upon policies of insurance, where courts refuse to look behind the immediate cause to remoter negligence of the insured. (General Mut. Ins. Co. vs. Sherwood, 14 How., 352, 366; 14 L. ed., 452, 458; Orient Mut. Ins. Co. vs. Adams, 123 U. S., 67; 31 L. ed., 63; 8 Sup. Ct. Rep., 68; Dudgeon vs. Pembroke, L. R. 2 App. Cas., 284, 295; 14 Eng. Rul. Cas., 105.) Here, as we have said, the plaintiff cannot charge the defendant with negligence; the immediate event was one of which the plaintiff took the risk; on general principles of contract it took that risk unless it was agreed otherwise, and it does not matter to the result whether we say that we cannot look farther back than the immediate cause, or that the undertaking of the government did not extend to ulterior consequences, not specified, of the break for repairing which it undertook to pay, but which it did not cause.

Judgment affirmed.

[1]219 U. S., 17; 55 L. ed., 70.

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