6 Phil. 215

[G.R. No. 1963. April 30, 1906]

BAER SENIOR & CO.'S SUCCESSORS, PLAINTIFF AND APPELLEE, VS. LA COMPANIA MARITIMA, DEFENDANT AND APPELLANT.

D E C I S I O N

WILLARD, J.:

The plaintiff, being the owner of the launch Mascota, which was then at Aparri, made a contract with the defendant about the 2d day of February, 1903, by the terms of which the defendant agreed to tow the launch from Aparri to Manila. In accordance with this agreement the launch was delivered to the defendant at Aparri on the day named, and the defendant's steamer *Churruca* left Aparri on that day with the launch in tow. The steamer, with the launch in tow, arrived safely at Vigan. Two or three hours after leaving Vigan the wind increased in violence, with a rough sea. The speed of the steamer was decreased so that the tow might travel more easily. About half-past 11 at night the lookout, who was stationed in the stern of the steamer for the purpose of watching the launch, reported to the officer of the deck that the launch had disappeared. The steamer was stopped and search was made the rest of the night for the launch, but without success, and in the morning the steamer proceeded on her way to Manila. This action was brought to recover the value of the launch; Judgment was rendered in the court below in favor of plaintiff. The defendant moved for a new trial, which was denied, and it has brought the case here by bill of exceptions.

The first question to be determined is as to the nature of the liability of the defendant. Articles 1601 and 1602 of the Civil Code are as follows:

> "ART. 1601. Carriers of goods by land or by water shall be subject with regard to the keeping and preservation of the things intrusted to them, to the same obligations as determined for inkeepers by articles 1783 and 1784.

> "The provisions of this article shall be understood without prejudice to what is prescribed by the Code of Commerce with regard to transportation by sea and land.
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> "ART. 1602. Carriers are also liable for the loss of and damage to the things which they receive, unless they prove that the loss or damage arose from a fortuitous event or *force majeure*."

Article 618 of the Code of Commerce is in part as follows:

> "ART. 618. The captain shall be civilly liable to the agent and the latter to the third persons who may have made contracts with the former—
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> "1. For all the damages buffered by the vessel and its cargo by reason of want of skill or negligence on his part. If a misdemeanor or crime has been committed he shall be liable in accordance with the Penal Code."

Article 620 of the same code is in part as follows: "Art. 620. The captain shall not be liable for the damages caused to the vessel or to the cargo by reason of *force majeure*; but he shall always be so—no agreement to the contrary being valid—for those arising through his own fault."

These articles treat of the liability of a carrier of goods, but we do not think that the defendant was a carrier of goods in respect to this launch. The reasons for so holding under the American law found in the case of The *J. P. Donaldson* (167 U. S., 599, 602, 603) are equally cogent when applied to the Spanish law. The court there said: "While the tug is performing her contract of towing the barges they may indeed be regarded as part of herself, in the sense that her master is bound to use due care to provide for their safety as well as her own and to avoid collision, either of them or of herself, with other vessels. (*The Syracuse*, 9 Wall., 672, 675, 676; The *Civilta*, 103 U. S., 699, 701.)

> "But the barges in tow are by no means put under the control of the master of the tug to the same extent as the tug herself, and the cargo, if any, on board of her. "A general ship carrying goods for hire, whether employed in internal, in coasting, or in foreign commerce, is a common carrier; and the ship and her

owners, in the absence of a valid agreement to the contrary, are liable to the owners of the goods carried as insurers against all losses, excepting only such irresistible causes as the act of God and public enemies. (Liverpool Steamship Co. *vs*. Phenix Ins. Co., 129 U. S., 397, 437.) But a tug and her owners are subject to no such liability to the owners of the vessels towed, or of the cargoes on board of them. The owners of those "vessels or cargoes can not maintain any action for the loss of either against the tug or her owners, without proving negligence on her part. As was said by Mr. Justice Strong, and repeated by the present Chief Justice: 'An engagement to tow does not impose either an obligation to insure or the liability of common carriers. The burden is always upon him who alleges the breach of such a contract to show either that there has been no attempt at performance, or that there has been negligence or unskillfulness to his injury in the performance. Unlike the case of common carriers, damage sustained by the tow does not ordinarily raise a presumption that the tug has been in fault. The contract requires no more than that he who undertakes to tow shall carry out his undertaking with that degree of caution and skill which prudent navigators usually employ in similar services.' (*The Webb*, 14 Wall., 406, 414; *The Burlington*, 137 U. S., 386, 391. See also The *L. P. Dayton*, 120 U. S., 337, 351.)" The obligation of the defendant grew out of a contract made between it and the plaintiff, and the liability of the former is defined in articles 1101 and 1104 of the Civil Code, which are as follows:

"ART. 1101. Those who in fulfilling their obligations are guilty of fraud, negligence, or delay, and those who in any manner whatsoever act in contravention of the stipulations of the same, shall be subject to indemnify for the losses and damages caused thereby."

"ART, 1104. The fault or negligence of the debtor consists of the omission of the steps which may be required by the character of the obligation, and which may pertain to the circumstances of the persons, time, and place. "Should the obligation not state what conduct is to be observed in its fulfillment that observed by a good father of a family shall be required."

We do not think that the provisions of articles 1902 and 1903 are applicable to this case. (Manresa's Commentaries on the Civil Code, vol. 8, pp. 29, 69.)

By the terms of article 1104 the defendant was bound to exercise what is known in the American law as ordinary diligence, taking into consideration the nature of the obligation and the circumstances of persons, time, and place. We think the evidence in the case shows that the defendant did exercise the diligence required of it by law. As we understand the evidence the towing line was passed from the steamer to the launch, around the stern of the launch once or twice, and one or two other lines passed entirely around the bow of the launch and under the keel. These lines were fastened to a post in the bow of the launch, which post, according to the testimony of the defendant's witnesses, was used for fastening ropes in cases of towing, and, according to one witness of the plaintiff, for the purpose of fastening the launch to the wharf. At the time the loss occurred the towing line did not break, but this post did, and was found fastened to the towing lines when they were pulled on board the steamer. The captain of the steamer and the first mate, both men of experience in the matter, testified that the lines were properly adjusted and the tow properly made fast to the steamer. The only evidence to the contrary was the evidence furnished by one witness of the plaintiff, who testified that he was present when the towing lines were made fast by the captain himself, of the steamer; that he then told the captain that it should be done another way. The captain denied this. This witness had had no experience, according to his own testimony, in the matter of towing; had never had occasion to make fast a tow to a tug, and had never seen it done, with one exception; and that was when this same launch was towed from Manila to Aparri. We do not think his evidence is sufficient to overcome the evidence of the defendant.

The judgment of the court below is reversed, and judgment entered for the defendant, absolving it from the complaint, with the costs of the lower court. No costs will be allowed to either party in this court. After the expiration of twenty days final judgment will be entered in accordance herewith and ten days thereafter the case remanded to the lower court for proper procedure. So ordered.

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

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