THE OTTAWA NORTHERN AND WESTERN RAILWAY CO. (DEFENDANTS) ..... APPELLANTS.

AND

THE DOMINION BRIDGE CO. (PLAINTIFFS) ..... RESPONDENTS.

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*May, 9, 10

*June, 3.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Pleading — Cross-demand — Compensation — Arts. 3, 203, 215, 217 *C.P.Q.—Practice—Damages—Construction of contract—Liquidated damages—Penal clause—Arts.* 1076, 1187, 1188 *C.C.—Estoppel—Waiver.*

A debt which is not clearly liquidated and exigible cannot be set off in compensation of a claim upon a promissory note except by means of a cross-demand made under art. 217 of the Code of Civil Procedure of the Province of Quebec. Judgment appealed from affirmed, Nesbitt and Idington JJ. dissenting.

By a clause in a contract for the construction of works, the completion thereof was undertaken within a specified time and in default of completion as stipulated it was agreed that the contractor should pay "as liquidated damages, and not as a penalty, the sum of fifty dollars for every subsequent day until the completion." The works were not completed within the time limited, and, in consequence, both parties joined in a petition to a municipal corporation for extension of the time during which subsidies it had granted towards the cost of the works could be earned. The petition was granted and the works were completed within the extension of time allowed by the corporation.

Held, Nesbitt and Idington JJ. dissenting, that damages accruing under the clause in question did not, upon mere default, become sufficiently liquidated and ascertained so as to be set off in compensation against a claim upon a promissory note.

Held, per Girouard and Davies JJ. (Nesbitt and Idington JJ. *contra*), that by joining in the petition for extension of time the party in whose favour the penal clause might take effect had waived the right to claim damages thereunder during the period of the extension so obtained in the interests of both parties to the contract.

*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Nesbitt and Idington JJ.

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APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the Superior Court, District of Montreal, by which the plaintiffs' action was maintained with costs.

The Dominion Bridge Company, respondents, brought the action for $4,571.65 on a promissory note made by the railway company, appellants, for the balance due the bridge company on a contract between the Ottawa and Gatineau Railway Company, the Pontiac and Pacific Railway Company and Horace Janson Beemer, of the one part, and the said bridge company, of the other part, whereby the bridge company agreed to supply, build and erect the metal superstructure of the interprovincial bridge across the Ottawa River between the City of Ottawa and the City of Hull.

The railway company contested the action and, among other defences, pleaded that, under the contract, the bridge company had undertaken that the works would be fully completed in August, 1900, but had failed to finish their part of the works within the time limited and did not complete them until some time in January, 1901; that by a clause in the contract, in case of such default, it was stipulated that the bridge company should pay "as liquidated and ascertained damages for such default, and not as a penalty, the sum of fifty dollars for every subsequent day until the completion of the said bridge superstructure"; that the default continued for 155 days, and, thereby, there became due by the bridge company in virtue of said clause, to the defendants, $7,750.00 as damages, liquidated and ascertained, still owing and unpaid, at the time of the action, and which the defendants offered, *pro tanto,* in compensation against any sum that might be due to the plaintiffs. The defend-

ants, however, did not set up this claim for damages by a cross-demand.

The respondents met this plea by three objections: First, that the appellants had not alleged that they had suffered any damages by the delay; Secondly, that the superstructure and piers which the railway companies and Beemer had undertaken by the first contract, were to be fully completed on the 1st of September, 1899, and that this work was not completed until November following, and that, having themselves been the cause of the delay, the penalty clause cannot be enforced; Thirdly, that both appellants and respondents had subsequently joined in a petition to the Council of the City of Ottawa (which had granted subsidies for the construction of the bridge, provided it was completed and opened to the public on or before the 9th of September, 1900) to extend the time during which the subsidies could be earned and received; that, consequently, the penalty stipulated had failed by reason of such petition, and that the appellants had, by waiver as well as by acquiescence in the respondents' acts, lost the right to enforce the said clause respecting damages.

The Superior Court condemned the defendants to pay the $4,571.65, with interest, and rejected the defendants' plea setting up the claim for liquidated damages in compensation.

The defendants appealed to the Court of King's Bench, which affirmed the judgment of the Superior Court, four of the judges affirming on the sole ground that the debt offered in compensation was not *claire et liquide,* sufficiently liquidated, and, therefore, could not be offered in compensation; the fifth judge, Blanchet J. differing from the majority on this point and being to confirm on the sole ground that

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the appellants had renounced their right to claim liquidated damages by joining in the request with the bridge company to the City of Ottawa for an extension of the time of the earning and the payment of the subsidies. The majority of the court, in referring to this ground taken by Mr. Justice Blanchet, were of opinion that the acts recited were not a renunciation.

The questions raised on the present appeal sufficiently appear in the judgments now reported.

Campbell K.C. and *K. R. Macpherson* for the appellants. Notwithstanding the strict words of art. 217 C.P.Q., compensation takes place by the sole operation of law, and the issue is properly raised by simply pleading it. Arts. 1076, 1188 C.C., arts. 3, 203 and Sch. E. 4, C.P.Q. In this case, which fulfils all the requirements of the articles of the Civil Code, just cited, the damages sought to be set off, although not absolutely *claire et liquide,* are so easy of proof that they fall within the principle laid down in *Hall* v. *Beaudet* (1); *Duguay* v. *Duguay* (2); *Ross* v. *Brunet* (3); *Decary* v. *Pominville* (4). This is also the doctrine of the French law: 2 Pothier, No. 628; 28 Demolombe, Nos. 522, 523, 524, 525; 18 Laurent, No. 405; Merlin, Rep. de Jur. *vo.* "Compensation," para. 2, No. 1; 4 Aubry & Rau, p. 227. The clause of the contract is a liquidation of the damages exempting the railway companies from any proof as to the amount, and leaving it only necessary for them to establish the number of days during which the works remained incomplete. See also *Kneen* v. *Mills* (5); Mignault No. 5, p. 424; Delorimier No. 8, p. 347; 3 Larombiere, art. 1231; 6 Toullier, Nos. 813-814. In *McDonald* v. *Hutchins* (6),

(1) 6 L.C.R. 75
(2) 2 Rev. de Jur. 212.
(3) 5 R.L. 229.
(4) M.L.R. 5 S.C. 366.
(5) M.L.R. 7 S.C. 352.
(6) Q.R. 12 K.B. 499.

cited by Blanchet J., it was held "that no evidence was permissible or required to prove damages resulting from the inexecution of an obligation within a specified time where these damages have been agreed upon by the parties to the contract at a certain stipulated sum or rate per day."

The defendants were, consequently, within their rights in pleading compensation and set-off, and there was not, in this case, any necessity of filing a cross-demand. Whether the opinion of the majority of the court below on this point is technically correct or not, it is within the power of this court, the whole merits of the contestation being now before it, to define and determine the respective responsibilities of the parties, and to declare the plaintiffs' claim compensated, and no ends of justice will be served nor principles of law vindicated by refusing the claim of the appellants and forcing them to prolong this litigation by an independent action.

The plaintiffs were not delayed or inconvenienced in any way by any act or default of the defendants in respect to the completion of the portions of the bridge to be constructed by the railway companies: *Holme* v. *Guppy*(1); *Bettini* v. *Gye*(2); *Graves* v. *Legg*(3); The completion of the works by the railway companies was not a condition precedent: *Wheelton* v. *Hardisty* (4).

The application for extension of time for the completion of the works was proposed and carried out by the plaintiffs. The railway companies only joined in it because they were forced to do so in order to avoid large pecuniary loss by the forfeiture of the subsidies.

(1) 3 M. & W. 387.
(2) 45 L.J.Q.B. 209.
(3) 23 L.J. Exch. 228.
(4) 27 L.J.Q.B. 241.

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There was no waiver either express or implied, and although Blanchet J. quoted authority for his opinion, it was not shared by the majority of the court below. That defendants never waived their rights is abundantly clear from the evidence of the plaintiffs' engineers and one of the directors, that the works to be performed by the railway companies could have been completed within the time specified in the original contract and in time to earn the subsidies, even though the extension had not been granted.

Gormully K.C. and Cross K.C. for the respondents. It is clear that, the number of days during which the default continued being disputed, the alleged penalty is not a debt certain and demandable and does not possess the essential characteristics of a claim which could be set off against a claim due under a promissory note. Arts. 1178, 1188 C.C.; Art. 217 C.P.Q.; Pothier, "Obligations," No. 628; Mourlon, No. 1442; 16 Laurent, No. 304; Dalloz, 96, 2, 180; *Finnie* v. *City of Montreal*(1); Pand. Fr. *vo.* "Obligation," Nos. 5692, 5693, 5701, 5703, 5709. The penalty is not exigible because of the appellants' own default, or rather, because of the default of the persons with whom respondents contracted to comply with their precedent or reciprocal obligations under the contract to complete their share of the bridge work within the time limited. *Holme* v. *Guppy*(2). Moreover, they joined in the petition to the City of Ottawa for an extension of the time fixed for the completion of the works and, thereby, lost the right to enforce the penalty, by acquiescence in the modification of the contract whereby the necessity of completion of the works within a specified time ceased. The application was acceded to; the bridge

(1) 32 Can. S.C.R. 335. (2) 3 M. & W. 387.

was completed at a later date and the bonuses were secured and paid. Under these circumstances there was failure of the consideration for which the penal clause was stipulated, and both contracting parties having secured the benefit of the bonus, the benefit which in the very words of the contract it was the object and intention of the parties to secure, the appellants cannot now claim the penalty in addition. Dalloz Rep. supp., *vo.* "Obligation" Nos. 665, 1594, 1619; Dalloz, 79, 1, 122, notes 1 and 2; 54, 1, 288; *Dodd* v. *Churton* (1); *Kerr Engine Co.* v. *French River Tug Co.* (2); Pand. Fr. *vo.* "Obligations" No. 2562; Rolland de Villargues, *vo.* "Clause pénale" Nos. 49, 50.

The claim for damages cannot, in any event, be set off under a plea of compensation. Such damages can be recovered and set off only upon a cross-demand filed according to the provisions of articles 203, 215 and 217 of the Code of Civil Procedure. This has not been done, and, consequently, compensation cannot be declared by the court.

THE CHIEF JUSTICE.—Je renverrais cet appel sur le motif donné par la cour du banc du roi que la créance de l'appelante n'étant pas claire et liquide ne peut être opposée en compensation de celle de l'intimée et qu'elle ne pouvait d'ailleurs être reclamée dans l'instance que par une demande reconventionelle. L'article 217 du Code de Procédure ne me paraît pas laisser de doute sur la question, et, comme le remarque le savant juge en chef de la cour du banc du roi, la jurisprudence en ce sens est maintenant fixée sur la question.

(1) [1897] 1 Q.B. 562.

(2) 21 Ont. App. R. 160; 24 Can. S.C.R. 703.

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GIROUARD J.—Je serais porté à croire, avec la majorité de la cour d'appel, que, dans les circonstances de cette cause, la compensation des dommages liquidés ne peut avoir lieu sous l'empire du nouveau code de procédure civile (art. 217), sans former une demande reconventionelle, surtout lorsqu'il y a objection de la part du défendeur. Mais je préfère renvoyer l'appel avec dépens pour le motif adopté par M. le juge Blanchet. Pour les raisons qu'il developpe, je n'ai aucune hésitation à conclure avec lui qu'il y a eu prolongation du délai stipulé pour l'execution des travaux, à laquelle l'appelante a non seulement acquiescé, mais qu'elle a demandé elle même pour le bénéfice de toutes les parties intéressées—elle même comprise.

DAVIES J.—The respondents sued the appellant to recover a balance due on a promissory note for $4,571.65, and the appellants representing, under a change of name, The Ottawa & Gatineau Railway Co., and the Pontiac Pacific Railway Co., pleaded by way of compensation under the Code certain liquidated damages payable to them under a contract made 26th April, 1899, between the two said railway companies, now merged in and represented by the appellants, and the bridge company, respondents, for the building and erection of the superstructure of the Interprovincial Bridge between Ottawa and Hull, which was being constructed by the companies and parties the appellants now represent, and in which it was stipulated that:

In case the said superstructures should not in all respects be completed on or before the first day of August, 1900, then the bridge company should pay to the parties of the second part (now represented by the appellant company) as liquidated and ascertained

damages for such default and not as a penalty the sum of $50 for every subsequent day until the completion of the said bridge superstructure.

The railroad companies and persons now represented by the appellants, who had undertaken to erect the Interprovincial Bridge and had secured certain subsidies towards its construction from the Dominion and provincial governments, and from the Cities of Ottawa and Hull, not being considered financially strong, had secured the co-operation of a financial syndicate to assist them and contemporaneously with the execution of the contract for the construction by the bridge company of the superstructure, another contract was entered into between the same parties and the financial syndicate as a third party in which, after reciting the contract by the bridge company for the erection of the metal superstructure and the disposition of the different bonuses and subsidies granted and expected towards the construction of the bridge, the syndicate agreed with the bridge company to supply the railroad companies and persons with whom it had contracted, now represented by appellants, with all the necessary funds to enable them to carry out the construction of all those portions of the bridge and its approaches as had not been undertaken by the bridge company by their past recited agreement, so as to enable such companies and parties to carry out and complete the works in the third clause of the agreement within the respective times therein mentioned.

The railroad companies and persons represented by appellants thereupon in the said third clause agreed with the bridge company, respondents (*inter alia*), that:

All of the substructures and piers of the said bridge should be

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fully completed and ready for the building and placing by the bridge company of the metal superstructures thereon on or before the first day of September, 1899.

The learned trial judge found in accordance with the evidence that the defendants (appellants) did not complete the substructure till some months after the stipulated time, and that the delay in the completion by the bridge company of the superstructure contract was not caused by the delay of the defendants in constructing the substructure, but by the difficulty of the bridge company in obtaining structural steel. He further found that the work of the defendant in completing the approaches and in finishing the bridge ready for traffic was not delayed by the delay in the plaintiff's work, that, thus, the defendant suffered no damage by plaintiffs' delay, and that the conditions of the payment of the subsidies as to time were at the request of both parties, plaintiffs and respondents, extended for six months, so that no damage resulted from loss on that score.

In the result he held that as the several obligations of the parties for the construction of the substructure and the superstructure were dependent, the covenant on the part of the defendants for the construction of the substructure within the specified time limit was a condition precedent to their right to the liquidated damages provided for, and not having been complied with, the liquidated damages could not be recovered as such or be opposable in compensation against plaintiffs' claim on the note.

He further held that even if the penalty or liquidated damages were held to be recoverable in whole or in part the debt represented by them was not "liquid" either as to its existence or amount within the meaning of the Code. An appeal to the Court of King's

Bench was dismissed on the latter ground. Mr. Justice Blanchet, however, while concurring in dismissing the appeal, did so on the ground that the parties by their conduct and actions in applying for extensions of time for the completion of their work to the governments and corporations paying the subsidies had thereby waived the agreement to pay stipulated damages for non-compliance with their contractual agreements as to time.

I confess that I have had great doubts on the questions involved. After much consideration, however, I have reached the conclusion that the two clauses in the contract deeds providing, the one for the completion of the substructure, and the other of the superstructure, at specified times, were mutual and dependent one on the other, and that as the defendants failed to complete the substructures for some months after the period they had stipulated to do so, and there are, to say the least, grave doubts as to whether their default was not the occasion, at least in part, of plaintiffs' default in completing the superstructure, they lost the right to recover the liquidated damages stipulated for and were relegated to their ordinary right to recover just such damages as they could prove they sustained.

The construction of the substructure was, of course, a necessary condition precedent to the erection of the superstructure. Whether a contractual obligation had been specifically entered into by the appellants for the construction of such substructure or not it would necessarily have to be implied, and if by delay on the appellants' part in providing the substructure or the approaches the bridge company was prevented completing its superstructure contract within the stipulated time, the provision for stipulated damages

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could not be invoked and the appellant would be relegated to his ordinary proof of damages. Then, why was any stipulation required by the bridge company as to the completion of the substructure and approaches? Simply, as was so strongly argued by the respondents' counsel, because they desired to incorporate the element of time in the condition. The building of the substructure being a condition precedent the time within which it should be built was inserted and made part of that condition. If a condition precedent it must, of course, have been fully performed and satisfied in order to render the promise absolute, and it lies upon the promisee to prove the performance or an excuse for non-performance. *Heard* v. *Wadham*(1); *Clack* v. *Wood*(2).

> The dependence or independence of covenants is to be collected from the evident sense and meaning of the parties and, however transposed they may be in the deed, their procedure must depend upon the order of time in which the intent of the transaction requires their performance. Mansfield C.J. *Kingston* v. *Preston*, (3); Leake on Contracts (4 ed.) p. 456.

Of course it makes no difference whether the parties have put their contract in one or more deeds. Their intent must be gathered from the entire contract, and if there are contemporaneous deeds on the same subject matter affecting the relative rights of the parties *inter se*, they must, of course, be read together. If the covenant by the appellants to build the substructure and approaches by a specified time was in the same deed as the covenant by the bridge company to finish the superstructure, the dependence of the one covenant upon the other might seem more marked. But the fact of the mutual

(1) 1 East 619 at p. 631. (2) 9 Q.B.D. 276.
(3) 2 Doug, 689.

covenants being in separate deeds cannot make any difference in their construction.

The law is stated very clearly with respect to the right to recover liquidated damages where impossibility of performance is caused by an act of a party to the contract in Leake on Contracts (4 ed.) p. 496, where all the cases are collected. The latest case appears to be that of *Dodd* v. *Churton*(1). In that case the act of the promisee, which, it was held, discharged the promisor from his liability to pay liquidated damages at a stipulated rate for each week's delay, was the requiring of certain extra work to be done as it was stipulated in the contract he had a right to require. The additional works called for only involved two weeks' delay after the specified date. The actual delay was for twenty-five weeks longer, and for these twenty-five weeks the owner claimed from the contractor the stipulated and liquidated weekly damages. The Court of Appeal held, however, the contractor had been exonerated, and that if the clause relating to stipulated damages was intended to be applicable to a condition where extra work had been required to be done it must be explicitly made so applicable. All the authorities are reviewed in this case, and the application of the principle it lays down to the case before us is fatal to the right claimed by appellants.

As I understand that principle, it is that if the owner by the ordering of extra work or by the doing or omitting to do any act which he ought to have done or omitted has delayed the contractor in beginning the work or necessarily increased the time requisite for finishing the work he thereby disentitles himself to claim the penalties for non-completion provided for by the contract.

(1) [1897] 1 Q.B. 562.

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It avails not for the promisee to say there were other reasons besides my default for your failure to fulfil your covenant, in fact the real cause of your failure lay with and in yourself, and my failure was not the reason of yours. Such reasoning would avail in any action in which the actual damages suffered were sought to be recovered, but not in an action to recover stipulated iquidated damages in the nature of a penalty. Where the promise broken is dependent on a promise of the promisee which in itself is a condition precedent of the fulfilment of the promise sought to be enforced, and such condition precedent is not performed, only the actual damages and not the stipulated can be recovered.

In this case I am not satisfied that the appellants' delay and default with regard to the substructure did not delay the respondent in completing the superstructure, nor am I satisfied that the conduct of the parties subsequently did not operate as a waiver. I therefore concur in the conclusion of the Chief Justice that the damages claimed cannot be opposed by way of compensation to plaintiffs' claim on the note.

NESBITT J. (dissenting).—The plaintiffs, the bridge company, sued upon a note made by the railway company, and to this there is no defence other than the claim by the railway company that the bridge company were in default under a contract by which it agreed:

> And in case the said superstructures shall not in all respects be completed on or before the 1st day of August, 1900, then the bridge company shall pay to the parties of the second part as liquidated and ascertained damages for such default and not as a penalty the sum of $50 for every subsequent day until the completion of the said bridge superstructures covered by sub-clause a of clause 2 hereof.

The first objection taken is a matter of procedure, viz.: that this defence is set up as a matter of compensation. Art. 1188 provides:

> Compensation takes place by the sole operation of the law between debts which are equally liquidated and demandable and have each for object a sum of money or a certain quantity of indeterminate things of the same kind and quantity.

On this point I do not desire to reiterate the reasons given by Mr. Justice Blanchet in the court below.

The next objection was that two other parties should be plaintiffs, and I again adopt the reasoning of Mr. Justice Blanchet upon this point without repeating his language.

The next objection is that by another contract the defendants were to provide the approaches, etc., eleven months before the date stipulated in the contract I have referred to when the penalties should begin to run.

The defendants answered this by alleging that the evidence clearly established that their default in no way had relation to the failure to complete the approaches, and that it is indisputable that such default to supply the superstructures arose from the plaintiffs' inability to obtain structural steel. The plaintiffs, I think, cannot rely upon this being a condition precedent, as I think it is proved the delay did not affect the plaintiffs' default, and the case seems to me to differ from such cases as *Holme* v. *Guppy*(1) and *Dodd* v. *Churton*(2). See the language in *Wright* v. *Cabot*(3); Hudson on Building Contracts (2 ed.) p. 237; *Russell* v. *Da Bandiera*(4); also *Dodd* v. *Churton*(2), at pp. 566 and 568, where Lord Esher M.R.

(1) 3 M. & W. 387.
(2) [1897] 1 Q.B. 562.
(3) 89 N.Y. 570.
(4) 13 C.B.N.S. 149, at p. 203.

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and Chitty L.J. both indicate the condition *must have effected the delay.*

The plaintiffs further object that no damage is shewn and appeal to article 1066, C.C., which is as follows:

> The creditor, without prejudice to his claim for damages, may require also that anything which has been done in breach of the obligation shall be undone, if the nature of the case will permit, and the court may order this to be effected by its officers, or authorize the injured party to do it, at the expense of the other.
>
> But if the obligation has been performed in part, to the benefit of the creditors, and the time for its complete performance be not material, the stipulated sum may be reduced unless there be a special agreement to the contrary.

The defendants reply art. 1076, C.C., which is as follows:

> When it is stipulated that a certain sum shall be paid for damages for the inexecution of an obligation, such sum and no other, either greater or less, is allowed to the creditor for such damages.

I need only refer to the latest case upon the point, *Clydebank Eng. & Shipbuilding Co.* v. *Don Jose Ramos Yzquierdo y Castaneda*(1), to establish the proposition that this $50 a day is not a penalty. In this case the sum reserved was fixed by the parties to cover many elements of damage which might be suggested, such as payment of interest while the payment of subsidies was delayed; loss of the use of the bridge, etc., and, indeed, the railway companies gave notes during the process of manufacture which were deducted by the bridge company from the subsidies assigned to it, and interest for the delay occasioned by the bridge company was deducted by the bridge company from the railway company.

The next objection, and the only one in which Mr.

(1) [1905] A.C. 6.

Justice Blanchet agreed with the plaintiffs was, that owing to the defendants having petitioned for an extension of the time within which the subsidies were payable there as an implied consent to waive the damage clause. I cannot agree in this view. The defendants were to be paid subsidies conditional upon completion within a time stated. The plaintiffs were under contract with the defendants to finish within that period, and under contract to pay a certain *per diem* sum for failure. The plaintiffs notified the defendants they could not finish within that period owing to their inability to get structural steel. The defendants were compelled by this default to apply for the extension of the time for payment of subsidies, and I fail to see how that affects the contract of the plaintiffs with them to complete. No other practical course was open to the defendants, and in the absence of an express agreement to waive their right against the plaintiffs under the contract I cannot see how they have lost them. I was inclined to think the doctrine referred to in *Hughes* v. *Metropolitan Railway Co.* (1) would assist the bridge company, and that it might say that, while no waiver at law existed in its favour, yet the defendants by applying for the extension had (unintentionally it may be) led it to suppose that the contract for time would not be insisted upon, and I would have been of the view that it was a good answer but for the fact that the bridge company asserted that the application for time would have no effect on its conduct, and it would finish so soon as it could. We cannot imply in a party's favour what he himself says is not the fact.

In my view the plaintiffs are liable to the defend-

(1) 2 App. Cas. 439, at pp. 452-3.

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ants for the $50 per day for every day they were in default under the clause I have quoted, and the appeal should be allowed with costs in all courts.

Since writing the above I have read the judgments of the Chief Justice and my brother Girouard, and although I would at once withdraw any view I might entertain on a question of procedure in Quebec, which was contrary to one expressed by them, I think that as all the fact were fully tried out, and it was not suggested any further evidence could be adduced on a trial in which the defendants claimed the sum stipulated for as a *per diem* allowance, the justice of the case demands this court should make any amendments necessary to dispose of the real question in issue. See *Price* v. *Fraser*(1).

IDINGTON J. (dissenting).—The respondents sued appellants upon their promissory note and they set up a defence of compensation arising out of another transaction between the same parties.

The appellants are the successors of other companies whose rights, and the rights of one Beemer, are vested in them in respect of a covenant contained in a deed dated 26th April, 1899:

This covenant is as follows:

> And in case the said superstructures shall not in all respects be completed on or before the first day of August, A.D. 1900, then the bridge company shall pay to the parties of the second part as liquidated and ascertained damages for such default, and not as a penalty, the sum of fifty dollars for every subsequent day until the completion of the said bridge superstructure covered by sub-clause *a* of clause 2 hereof.

The work was not done within the specified time. The parties of the second part, referred to as such

(1)31 Can. S.C.R. 505, at p. 514.

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in the covenant, are those whose rights the appellants have acquired.

It has been contended that those liquidated damages are not *claire et liquide* such as can be set up by simple defence of compensation, and that any rights appellants may have to claim the same can only be asserted by means of a cross action or an independent action.

I think, if simplicity of character in the claim and its susceptibility of easy proof are the tests to apply to find out whether it is within the meaning of article 1188 of the Civil Code, this stands that test very well.

That is certain which can be reduced to certainty.

It is admitted such a principle may in some cases be invoked to bring claims within the meaning of this article.

It is shewn here much evidence has been taken and how many questions the parties have tried to raise, and we are asked to consider the point in light thereof, and pressed that if we do we must conclude that the claim was not *claire et liquide* as the authors say it ought to be.

I dissent from that. I think the claim must, as regards the length of the evidence and argument, be looked at by the results arrived at. If the evidence and other things, such as pleadings, contentions and arguments, have been unfounded they cannot be considered in deciding as to the point of simplicity or complication of the claim. Litigants can, if so disposed, always make the clearest and simplest look the very reverse.

It is quite clear that the respondents covenanted to pay so much per day after a certain date if their work was not then finished, and there has been no real contest as to the fact that the work was not finished

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then, or until a date at which that *per diem* allowance would exhaust all the appellants can claim in this action.

The respondent sets up also that the covenant in question was conditional upon the performance by the appellants of their covenant to have the substructure of the work in question done by a certain date.

These respective covenants of the parties are in separate deeds.

I do not attach much importance to that. Even if they had formed a part of the same deed we must, in construing them, have asked, as we do now: Did the parties intend and express the intention that the one covenant should be dependent on the other?

If they intended so they have here clearly omitted to do so.

Is there anything to be implied in the contract or both contracts read as a whole to supply this want of expression?

I am unable to see how.

The covenant of the appellants with, and required by, respondents from appellants' assignors

> that the substructures and piers of the said bridge shall be fully completed and ready for the building and placing by the bridge company of the metal superstructures thereon on or before the first day of September, 1899, etc.

exists in a document that has relation to, and aimed entirely at, securing the fulfilment of the conditions upon which subsidies therein referred to were to be earned, and secured to the respondents as their source of payment or security for payment.

It could not be said to have relation to anything else save that all documents between the parties had reference to the common purpose of a bridge to be erected.

It sometimes happens that parties engage in works of construction where one of them to permit of due expedition by the other of his work, must give assurance that a particular part of such work will be done and out of the way of the other by a given date, and in such cases we often find mutual covenants for liquidated damages or penalties.

The frame of the contract in such cases evidences the intention and, with or without the provisions for damages being mutual, there sometimes occur expressions of mutuality that enables the court to imply dependence of the one covenant in the performance of the other. The case of *Dodd v. Churton*(1) illustrates, in a way, one form of the many such cases that can be found in the books, but this case in hand, so far as I can see, is not brought within any of them.

I think the respondents had just that security that every contractor has, that the law implies that he for whom the work is being done shall not omit to do all that is needed in reason to be done to enable the work to proceed with due regard to the time specified for its completion.

If the owner fails to observe this implied obligation, and by reason thereof there has been delay, then the contractor is absolved from his covenant for performance or penalties or damages absolutely or partially as the terms of the contract may declare or imply.

If the north end pier had been shewn to be a necessity for the possible execution of the respondents' work at the other end of the bridge, or its absence a serious obstacle to the work, then they might have been absolved. Nothing of the kind is shewn. It is a daily occurrence that one class of work may be pro-

(1) [1897] 1 Q.B. 562.

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ceeding on one part of the structure whilst another may not yet be quite begun.

Here there was nothing done or omitted to be done by the appellants that by reason thereof can fairly be said to have occasioned respondents' delay that is now in question.

I include in that all that has been said or can be said to have arisen from the appellants joining in the application to the City of Ottawa for an extension of time.

There was nothing inconsistent in all that took place in that connection with the completion by the respondents of their work within the specified time or the continued existence of the obligation then resting upon them to have it so completed.

How or upon what principle of law, short of some inconsistency being created, between the sanction to be given by the City to the extension asked, and the continuance of the obligation or possibility of the due fulfilment thereof, such consent as appellants gave could release the obligation, I am quite unable to comprehend.

Had there been created such a conflict by the acts to which appellants' assignors were parties, then there must of necessity have been implied a rescission or modification of the original contract.

That not being the case I think the appeal must be allowed with costs and the action be dismissed with costs, save such costs as the plaintiffs therein may be entitled to up to the time of the communication of Beemer's want of interest in the claim.

Appeal dismissed with costs.

Solicitors for the appellants: *Campbell, Meredith, Macpherson & Hague.*

Solicitor for the respondents: *A. G. Cross.*