THE CANADIAN GENERAL ELECTRIC COMPANY (PLAINTIFFS) ... APPELLANTS;

AND

THE CANADIAN RUBBER COMPANY OF MONTREAL (DEFENDANTS) ..... RESPONDENTS.

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*Nov. 18, 19.
*Dec. 29.

ON APPEAL FROM THE SUPERIOR COURT, SITTING IN REVIEW, AT MONTREAL.

Contract—Delivery—Specified time—Default—Liquidated damages—Pre-estimate—Penalty—Inexecution — Compensation — Cross-demand—Practice—Arts 1013, 1076, 1131 *et seq., C.C.—Art.* 217, *C.P.Q.*

A contract (in the form usual in the Province of Ontario) for the manufacture, in Ontario, of electrical machinery to be delivered within a specified time at Montreal, provided that in case of failure to deliver various parts of the machinery as provided therein the sum of $25 should "be deducted from the contract price as liquidated damages and not as a forfeit for every day's delay in the delivery of the apparatus as specified, etc." The contractor brought action in the Province of Quebec to recover an unpaid balance of the price and the defendants contended that they were entitled to have the claim reduced by a sum equal to the amount so stipulated for default in prompt delivery.

Held, that, on the proper construction of the contract, the intention of the parties was to pre-estimate a reasonable indemnity as liquidated damages for delay in the execution of the contract; that effect should be given to their intention by allowing the deduction of the amount so estimated from the contract price, and that there was no necessity for a cross-demand therefor by the defendants nor that they should allege or prove that they had sustained actual damages in consequence of the delay in delivery. *Dunlop Pneumatic Tyre Co.* v. *New Garage and Motor Co.* ([1915] A.C. 79); *Wallis* v. *Smith* (21 Ch. D. 243); *Web-*

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Anglin and Brodeur JJ.

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ster v. *Bosanquet* ([1912] A.C. 394); *Clydebank Engineering and Shipbuilding Co.* v. *Yzquierda y Castaneda*, ([1915] A.C. 6); *Hamlyn* v. *Talisker Distillery Co.* ([1894] A.C. 202); *The "Industrie"* ((1894) P. 58); and *Ottawa Northern and Western Railway Co.* (36 Can. S.C.R. 347), referred to.

Judgment appealed from (Q.R. 47 S.C. 24) affirmed.

APPEAL from the judgment of the Superior Court, sitting in review(1), affirming the judgment of Charbonneau J., in the Superior Court, District of Montreal, by which the action of the plaintiffs was dismissed with costs.

The material circumstances of the case are stated in the head-note. The defendants contended that, on account of delay in the delivery of the machinery in question, they were entitled to deduct from the amount of the purchase price the sum of $14,550, either as pre-estimated liquidated damages or as a reduction in price stipulated in the contract, but, being willing to effect an amicable settlement of the plaintiffs' contention that in some measure the delay was to be attributed to the defendants themselves, they had tendered to the plaintiffs, before action, $3,000 in full settlement of their claim, and they renewed the tender with their plea. In the trial court, Mr. Justice Charbonneau gave effect to the contentions of the defence and dismissed the plaintiffs' action with costs. This decision was affirmed by the judgment now appealed from.

F. W. Hibbard K.C. and *G. H. Montgomery K.C.* for the appellants.

A. Chase-Casgrain K.C. and *Errol M. McDougall* for respondents.

(1) Q.R. 47 S.C. 24.

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THE CHIEF JUSTICE.—I am of opinion that the judgment in this case is right. It is unnecessary for me to go into the facts of the case; the only point that was pressed upon us at the hearing of the appeal was the legal effect of the provision in the contract that

> the sum of $25 per day for each motor, each generator and a complete switchboard shall be deducted from the contract price as liquidated damages and not as a forfeit for every day's delay in the delivery of the apparatus as specified in the delivery clause.

The contract is in English, relates to a purely business transaction and uses terms well recognized in English law. The words "liquidated damages" and "forfeit or penalty" are commonly to be found in similar contracts and, as judicially interpreted by the courts, have a perfectly well understood meaning in English and French law.

A penalty is the payment of a stipulated sum on breach of the contract, irrespective of the damage sustained. The essence of liquidated damages is a genuine covenanted pre-estimate of damage.

I think any difficulty the case may present has arisen from the fact that similar terms have not perhaps quite the same meaning in English and in French law. In the latter the word "peine" does not correspond to the word "penalty" as construed by the English courts. Whilst the exact amount of the former may be recovered irrespective of damage, it is only so much of the latter as represents the actual damage sustained that the party in default can be made liable for. To some extent, therefore, the word "peine" corresponds more nearly to "liquidated damages" than to a penalty. See Planiol (6 ed.), vol. II., pp. 90 and 91. I think it must be some confusion of these terms which caused Mr. Justice Tellier to dissent from the

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judgment of all the other judges before whom the case has come. He seems to think that as the contract provides that the agreed sum payable in lieu of damages is declared not to be a forfeit, the respondent can only recover the damages which he is able to prove he has sustained.

Mais il n'y a pas lieu de rechercher si le créancier souffre ou non un dommage par suite de l'inexécution de l'obligation. La convention faite à forfait a justement pour but de supprimer tout examen de ce genre. La clause pénale est due (et c'est là un de ses grands avantages) dès que le débitur est responsable de l'inexécution. Planiol, *loc. cit.*

The first paragraph of article 1229, C.N., is not reproduced in the Quebec Civil Code.

There are innumerable cases in which it has been necessary, in particular cases, to decide whether the parties intended that the payment provided for by the contract should be in the nature of a penalty or liquidated damages. The principles on which such cases are determined are well established. It is only necessary for me to refer to the recent case in the House of Lords of *Dunlop Pneumatic Tire Co.* v. *New Garage and Motor Co.*(1), in which they are very clearly laid down. The English rule seems to be in accord with that laid down by Pothier, Obligations No. 345:—

Where the payment of a smaller sum is secured by a larger, the stipulation will be relieved against as penal, but where the agreement is for an act other than the payment of money and the injury that may result from a breach is not ascertainable with exactness, depending upon extrinsic circumstances, a stipulation for damages, not on the face of the contract out of proportion to the probable loss, may be upheld, the difficult cases turning mainly upon the interpretation of the language of the particular contract. Harvard Law Review, vol. 29, p. 129, and cases there cited.

(1) [1915] A.C. 79.

In the contract in the present case there is a clear agreement for the deduction from the contract price for delay in delivery; there is no objection to such an agreement being entered into and no reason why effect should not be given to the agreement by the courts. As Sir George Jessel puts it:—

> Courts should not overrule any clearly expressed intention on the ground that judges know the business of the people better than the people know it themselves.

Wallis v. *Smith* (1882) (1), at page 266.

Article 1076, C.C.:—

> 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.

As far back as 1849 it was said by Cresswell J., in the case of *Sainter* v. *Ferguson* (2):—

> If there be only one event upon which the money was to become payable and there is no adequate means of ascertaining the precise damage that may result to the plaintiff from a breach of the contract, it is perfectly competent to the parties to fix a given amount of compensation, in order to avoid the difficulty.

This ruling has been approved in many cases ever since. Halsbury, vol. 10, Damages Nos. 604 *et seq.* It appears to me that it entirely covers the stipulation in the present contract. It could not have been possible to ascertain the damage in advance; the amount fixed is not alleged to have been an extravagant one; and the provision was in every respect a reasonable and proper one which both parties may perfectly well be supposed to have intended.

I may add that the contract is for delivery of an apparatus consisting of the things therein specified, for which apparatus the purchaser agrees to pay

(1) 21 Ch. D. 243.

(2) 7 C.B. 716, at p. 730.

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$33,000. The delivery clause provides for the delivery of the apparatus not later than May 1st, 1911, and the contract provided that

> the sum of $25 per day for each motor, each generator, and a complete switchboard shall be deducted from the contract price (1) for every day's delay in the delivery of the apparatus.

It might perhaps be contended that until the whole apparatus was delivered, $25 per day should be deducted for each motor, etc., whether delivered or not. The contract does not say for each motor undelivered. It is not necessary, however, to decide this as the respondents advanced no claim on such a construction of the contract. I mention it because the appellant has certainly suffered no hardship in the deduction made from the contract price and perhaps is fortunate in not having to submit to a larger deduction. But one cannot entirely overlook that possible construction of the contract because of the second paragraph of article 1076 C.C. However, the parties are presumed to be the best judges of the object they had in view when this provision was inserted in the agreement and neither has chosen to raise the question as to whether the obligation to deliver was performed in part.

It may possibly be useful to observe that article 1076 C.C. is new law. See Report of Codifiers for the reasons why they reject the rule as laid down in Pothier, "Obligations," No. 345.

The appeal is dismissed with costs.

DAVIES J.—This is an appeal from the Court of Review of the Province of Quebec affirming a judgment of the Superior Court as to the proper construction of a contract made between the parties for the

manufacture and delivery by the electric company to the rubber company of certain apparatus comprising direct and alternating current motors and a large switchboard in the wiring.

The controversy turned upon the proper construction of a clause in the contract providing for the damages to be paid by the electric company to the rubber company in case default was made in the delivery of the apparatus within the time contracted for.

The clause reads as follows:—

> The sum of twenty-five dollars ($25) per day for each motor, each generator and a complete switchboard shall be deducted from the contract price as liquidated damages and not as a forfeit for every day's delay in the delivery of the apparatus as specified in the delivery clause herein, and this sum shall be over and above the cost of any extra inspection.

The rubber company, on being sued for the price of the apparatus manufactured and supplied, claimed the right under this clause to deduct from the contract price as genuine pre-estimated liquidated damages $25 per day for 582 days the plaintiff electric company was in default in delivering the motors and generators less 122 days which it conceded should not be charged because they were or might be attributable to the defendant company's own fault, thus reducing the number of days for which damages were chargeable to 460, and fixing the damages at $11,500.

Both courts below maintained the defendants' contentions alike as to its legal rights under the above clause of the contract and as to the actual number of days for which it was entitled to deduct the $25 per diem as genuine pre-estimated liquidated damages.

On the question of fact as to the actual number of days chargeable owing to fault in the delivery of the apparatus, after listening to the lengthy argument of

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counsel for the respective parties, I felt myself quite unable to say that the findings of the trial judge concurred in by the Court of Review should be disturbed.

As to the legal question, the principal objection raised was that it was not competent for the defendants, respondents, to plead in answer to an action for the recovery of the stipulated price of these motors and generators the liquidated damages agreed upon in the contract for delays in the delivery of the articles, unless and until damages of some kind and amount had at least been first alleged and proved.

I have not been able to understand on what principle such a contention can be maintained.

Once it is established that the damages are genuine pre-estimated liquidated damages, and are not unconscionable, I cannot see why they should not be pleaded in answer to a plaintiff's demand for the price of the article sold.

But in the case at bar the parties expressly provided that these damages should "be deducted from the contract price" and so the courts below properly held that the defendant was entitled to deduct them for the number of days he established the vendors' default.

It has been suggested as a possible construction of the contract that a failure to deliver even a fractional part of the "apparatus" might make the vendor liable for the $25 per diem even on the motors and generators he had delivered until the entire apparatus was delivered.

I think, however, this is not the true construction of the clause which only makes the vendor liable for the per diem damages pre-estimated for each motor

and each generator undelivered on time and for the days only there was default in the delivery of each such motor and generator.

If the suggested possible construction was the true one there would certainly be strong ground for holding the $25 per diem for each motor and generator not a genuine pre-estimated damage, but an unconscionable amount which was really a penalty.

On the whole, I would dismiss the appeal with costs.

IDINGTON J.—The appellant seeks to recover from the respondent the balance due for certain machines to be made at the factory of appellant in Peterborough, in Ontario, and delivered to respondent in Montreal for the contract price of $33,000 and for some other supplies and work incidental to the contract.

The differences between the parties are confined to a claim made by the respondent, and so far sustained by the courts below, to deduct $25 a day from the contract price in the event of a failure to comply with certain alleged terms of the contract.

The frame of the contract is in some regards ambiguous, and as the claim to these reductions must rest upon the correct interpretation and construction of the contract which is somewhat complicated, I purpose analyzing it.

It consists of three parts. The first is briefly the operative part and therein contains the respective obligations of each party as follows:—

> The contractor will manufacture, deliver and erect and operate the apparatus contracted for herein, consisting of four direct current motors—two motor generator sets—four alternating current motors, and a large switchboard with wiring, etc., all as herein specified.

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The purchaser agrees to accept and pay for the apparatus the sum of thirty-three thousand dollars ($33,000) under the terms and conditions set forth herein, provided that the apparatus complies in every respect with the general conditions and the specifications herein contained.

The next part consists of the conditions referred to in the foregoing. In one of these conditions is the following somewhat ambiguous expression:—

The contractor will begin work immediately upon signing the contract and complete the same as per the delivery clause, free of all liens and charges within the time specified herein, etc.

Another condition provides as follows:—

The sum of twenty-five dollars ($25) per day for each motor, each generator and a complete switchboard shall be deducted from the contract price as liquidated damages and not as a forfeit for every day's delay in the delivery of the apparatus as specified in the delivery clause herein, and this sum shall be over and above the cost of any extra inspection.

It is upon this clause coupled with the delivery clause thus referred to and what that delivery clause contains that the claim of respondent to reductions must rest.

This condition is immediately followed by another which says:—

In the event of the purchaser ordering the work in connection with this contract to be discontinued, or in any manner whatsoever delays the work, it is hereby agreed that such delay caused by purchaser shall be added to the delivery date, mentioned herein, and such delivery date extended by the number of days that will be equal to the delay caused by the purchaser.

Upon this condition the appellant rests a number of claims to reduction from what respondent might otherwise be entitled to. With these I shall deal presently in detail.

The respondent, however, alleges it has made due allowance for all such counterclaims as well founded.

These delays it estimated at one hundred and

twenty-two days in all and tendered a sum to cover same which the learned trial judge has found sufficient and in that has been sustained by the court of appeal.

The "delivery clause" above referred to I find under the heading "Delivery and Erection" and under that appear the following provisions:—

> The apparatus shall be delivered on purchaser's foundations, free of cost to the purchaser in his power house in the City of Montreal, Province of Quebec, not later than May 1st, 1911.
>
> In case the contractor should fail to deliver the apparatus by May 1st, 1911, the sum of twenty-five dollars ($25) per day for damages as provided for herein shall apply.
>
> * * * * *
>
> The purchaser agrees to have the power house foundations, etc., ready for the apparatus. If the purchaser causes any delay to the contractor thereby preventing the installation of the apparatus, or the delivery of the same, the damages of $25 per day provided for herein shall not apply for the number of days delay caused by the purchaser.

It is herein I find the ambiguity I first mentioned. Clearly there is in this latter clause a confusion between delivery and installation.

True, there are between these just quoted, two provisions I omit, of which one provides appellant shall provide men to erect without delay and have same complete and ready for service not later than May 20th, 1911. But as there is no reduction of price or provision for liquidated damages or anything specifically bearing thereon I find none can by any possibility be claimed in that regard. Indeed, respondent in argument renounced any such claim save in respect of failure to deliver within the time agreed upon.

Notwithstanding that, can appellant, by virtue of the clause lastly quoted, exonerating the appellant for delays caused by respondent, take any benefit therefrom in way of reduction of respondent's claim, by reason of the peculiar expression therein which reads:

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Thereby preventing the installation of the apparatus, or the delivery of the same,

followed by the words:—

The damages of $25 per day provided for herein shall not apply for the number of days' delay caused by the purchaser?

I am of opinion it cannot. It is restricted to the damages provided therein, and they are only provided for in respect of default in delivery. And that default must be computed from the date, after the 1st of May, when the delays caused by the purchaser have been duly credited, and thus appellant given a later day for delivery.

Now let us consider the bearing of these clauses, thus interpreted and construed, upon the respective claims of respondent to make the reductions allowed, and the appellant to be relieved therefrom by virtue of what the purchaser has thus agreed to excuse.

Beginning with the latter which is chiefly in question herein, I shall take them in the order presented.

The first claim so set up is a delay alleged by the respondent's failure, for nearly a month, to execute the contract, after the appellant had duly signed same and sent it to respondent to be executed. I cannot understand how it can be claimed that such a delay can be held as one of those which was caused by the purchaser within the meaning of the contract. It is clearly a hindering the progress of the work which is aimed at and nothing else.

The appellant had the remedy in its own hands by refusing, if it could justify such a course under the attendant circumstances, to go on, unless and until a modification of the terms had been made, but the contract cannot permit of such a mode of construction. Indeed, the appellant in fact did go on meanwhile with

the work. It was, as I read the contract in the expression I quote above, clearly contemplated by the parties that it should do so as soon as it had signed it; and everything must be treated as if the contract, which has no date, became operative from the date when the appellant signed it.

I have no doubt that, not only was that the purpose of the peculiar expression used, but also that it was the understanding of the parties.

The next item of claim is a change in three of the 175 h.-p. motors.

Inasmuch as the specifications forming part of the contract provided for terminals as follows:—

> The motors shall be provided with terminals located suitably for connecting to the switchboard leads; the terminals will be provided with approved insulating couplings. The switchboard location and wiring may call for the terminals to be on top of the motor,

it does not appear to me as self-evident that the respondent was to blame for asking that they should be placed as at first asked.

It was competent for the engineer to have insisted, as some stubborn, self-sufficient men might have done, that what he had written must stand. If he had I cannot see anything appellant could have done but submit.

Because the engineer was gracious enough to try and meet the appellant's urgent petition to save it expense I do not think his company can be bound to bear the burden thereof. Moreover, I suspect there was ample work for appellant's men, working on these machines, to keep going steadily on.

The next is in respect of the test on those 175 h.-p. motors. The evidence bearing upon this item illustrates, by the slip-shod methods of those in the appel-

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lant's employment, in charge of its business, how very provoking they could be.

The appellant had been warned by a letter of the 5th May, in the nature of a personal appeal to its vice-president, and by a formal letter of 9th May to the company, that full deductions for delays for non-delivery would be insisted upon. Yet in face of these appeals neither business energy nor ordinary despatch, much less the urgency that a possible loss of a hundred dollars a day should have evoked, was used. And there is no proof which can excuse them at the expense of the respondent.

The next item is in regard to three 175 h.-p. motors and one 20 h.-p. motor. The fault in part admittedly was on the part of appellant, and the requirements of the engineer in way of change were within the contract and no proof is adduced that the entire work was held up by any such cause as assigned.

The next cause of delay by respondent, if any, rests upon what transpired relative to some sub-bases which formed no part of the contract in question, yet were to be so used in connection with the work done under the contract that it might reasonably have been considered by the appellant as due to the respondent that the work done or to be done in Peterborough, pursuant to the contract, should be so fitted there as to be ready when erected to operate upon the sub-bases.

With every desire to give effect to this reasonable suggestion I am unable to discover wherein the parties concerned provided in the contract for the due execution thereof.

Whatever relief appellant is entitled to herein must rest within the terms of the contract as expressed in that condition above quoted providing for

the extension of the date of delivery by reason of the purchaser causing delay to the contractor.

The reasonableness of the suggestion made in the letter of 1st April, upon which and what followed appellant's claim rests, cannot be gainsaid. But how far does that carry us in relation to the business in hand ?

It, when coupled with what preceded and followed it, seems to disclose only this, that some one had blundered.

The contract itself does not seem to have provided for the contingencies involved in anything relating to the sub-bases. If the appellant's men had paid careful attention to the matter they should have seen to it earlier than this letter of 1st April to Sheldon's Ltd., indicates.

The fact is the fitting of the machines to be made by the appellant to serve sub-bases must have been patent to all concerned if heed paid to the business in hand and the means of doing so or anticipating same, ought to have been provided for in the contract. So far as I can discover this was not done.

In such a situation, what, within the contract, should have been done ?

Clearly the only alternative in law was to have gone on with the completion of the work according to contract so far as it reached, and shipment of the machines so that the terms regarding delivery might have been fulfilled. If shipped in that condition a new difficulty would have been presented no doubt. The installation would have been delayed but for that no damages per diem for delays could have been claimed. Another difficulty would have arisen relative to the extra expense of having the work of fitting

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done in Montreal instead of in Peterborough for which due compensation no doubt would have had to be made by respondent.

Indeed, the parts which needed fitting to the sub-bases might have had to be shipped to Peterborough. But for any such event the respondent would only have itself to blame. It need not have concerned appellant.

It is impossible now for us to re-mould the contract and provide for all this. It is, I repeat, within the lines of the contract as framed that we must determine the rights of the parties and not by something we can presume to have been inserted and assume to have been contemplated as within same when it is clearly not so provided.

A letter of 13th February from respondent to the appellant made clear what was wanted. And therein appellant is asked for a tender for these sub-bases and it ought to have dawned upon some one in appellant's employment that unless this unprovided for feature of the contract was duly provided for, there was trouble ahead.

It may be excusable to overlook the need of this provision in a contract which covers twenty-eight printed pages of the case before us, but doing so furnishes no basis for us to allot the shares to be borne of the burden of a joint blunder.

It was possibly a case for an application within the terms of the contract for an extension of time or for a direct appeal to respondent.

Instead of adopting either such course there was correspondence between appellant and the sub-contractors—Ross & Greig and Sheldons—and needless waste of time at that, without a direct communication

(and probable understanding) with respondent. The only direct thing appellant has from respondent to shew, and rely upon, is the ambiguous letter of the 4th May. It passes my understanding why that should be relied upon, for nothing preceding that letter had been done in any way approaching business methods so far as these sub-bases were concerned. Standing alone as it does, the letter is worthless for appellant's present purpose.

There certainly is fair ground for an appeal in regard to this item to the sense of justice respondent should have. It may or may not have taken that into consideration in arriving at the total of the hundred and twenty-two days it allows for.

But I can see no ground in law upon which to rest the claim made by the appellant in this regard.

I think it might have been possible for the appellant in a contract of this magnitude to have made the templets as requested in the letter of respondent of 13th February at, say, a couple of hundred dollars expense, even without an appropriation.

The next claim is one arising out of the admitted error made by the engineer in connection with the starters for the synchronous and induction motors. It seems well founded, but its consequences, in my opinion, are grossly exaggerated, and amply covered by allowances made.

The last claim relative to the motor generator sets may be disposed of by the like considerations.

I confess, notwithstanding the argument presented, I was disposed at its close to think the claims made by respondent were somewhat harsh and possibly unfounded in law, but the examination I have made

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leads to the conclusion that appellant has only itself to blame for the result.

There remains only the question of law striking at respondent's entire claim as presented for consideration.

In the first place it is to be observed that the terms of the contract raise a most formidable obstacle in the way of the appellant. It sues upon a contract for a price agreed upon which it is stipulated, in certain contingencies which have taken place, shall be reduced to another price. What can it matter in such a case that the reduction of price is called "liquidated damages"?

It is not for the law, unless such stipulation is against law, to act upon the name given or name assigned the amount of reduction, but to give effect to the contract.

Of course, if the law clearly expressed such a stipulation to be null, or subject to modication, then the contract could be of no avail.

I do not think the article 1076 of the Civil Code governing the parties' rights in the premises does so interfere with the efficacy of what the parties have contracted for.

The case of *Ottawa Northern and Western Railway Co.* v. *Dominion Bridge Co.*(1), does not help the appellant. It would be very difficult to extract from the decision in that case anything to help any one. For there was such a difference of opinion in the court as to render its decision unlikely to be ever applicable to another case unless that other should happen to be, as this is not, exactly the same.

(1) 36 Can. S.C.R. 347.

I had the misfortune, in common with my then brother, Mr. Justice Nesbitt, to differ from the result reached by the majority. But each member of that majority took different grounds for the conclusion reached.

There were two contracts involved therein; and in no way could one, by construction of the contract fixing the price, as may be held herein, be able to say that as the result of an application of the damages then and there in question, the price was thereby determined. The case chiefly turned, so far as the majority of those expressing opinions held, upon the point of whether there could be held to be an application of article 217 of the Code of Civil Procedure. The question of whether or not the party seeking there compensation or set-off based in liquidated damages or, as here, such a reduction of price as claimed herein must shew actual damages could only arise in a very incidental manner therein. And as I viewed it then my opinion would be against the appellant. If this court had by the majority clearly expressed a view in conflict therewith upon the exact point involved, I should cheerfully bow thereto, but unfortunately it did not.

The neat point raised herein, that, of necessity, in law the party claiming the reduction of price must allege and prove damages before he can apply the estimate fixed by the contract, does not seem to me tenable in this case.

In the first place the contract does not permit of such a holding. And in the next place the fact is that such proof as was adduced seems to answer the contention.

I can conceive of such a case arising as might give

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place to such a contention as raised herein, but not in this case, or in the way it is presented.

I find in respondent's factum, article 1076 C.C., quoted as follows:—

> 1076. 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.

This is not the whole of that article. The part quoted is followed by this:—

> But if the obligation have been performed in part, to the benefit of the creditor 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.

This gives an entirely different aspect to the article as a whole and provides for such cases as I have just indicated may possibly arise. In such a case this second part of the article should be availed of by pleading the facts applicable thereunder, which was not done or pretended to be claimed herein.

In concluding I may say that the parties are both agreed that the Quebec law must govern their rights. But there are many features in the case arising from the execution of the contract by appellant in Ontario, and the form of contract, which not only contemplated the work of constructing the machines in Ontario but also the right given respondent incidentally thereto to interfere with the expedition of the work there and the shipment thence and only a delivery at Montreal being provided for, before the clauses in question should become operative, which might suggest the law of Ontario was intended to govern. For the later work of installation, in respect of which nothing arises herein, different considerations might apply.

I express no opinion. I merely suggest there is

room for argument and should not feel bound in that regard by this decision in any case presenting the like features and any different submission as to the law of the place by which the contract should be interpreted.

I think the appeal should be dismissed with costs.

ANGLIN J.—The appellant submits three distinct grounds of appeal:—

(1) That the contract in question must be interpreted and effect given to it according to the civil law of Quebec and not according to English law; and that, under the former, the provision fixing the amount of damages to be paid by the vendors for delay in delivery, installation, etc., is not "a penal clause" within articles 1131 *et seq.*, of the Civil Code, but a pre-determination of the amount of damages under article 1076, and that the purchasers, therefore, cannot recover under it without alleging and proving that the delay complained of had actually caused them some damage, the appellants conceding, however, that upon proof of any damage, more than merely nominal, regardless of its extent, the purchasers would be entitled to recover the full sum stipulated for in the contract.

(2) That damages under the clause in question are not a proper subject of compensation or set-off, but recovery of them can be had only in a cross-action.

(3) That the number of days' delay charged to the vendor is excessive.

Before considering the character and legal effect of the clause in the contract upon which this litigation has arisen, a word should be said as to its scope. It has been suggested that it might render the vendors liable for the sum of $25 per day in respect of each of

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the eleven distinct articles which they undertook to supply so long as any one of them should remain undelivered, because until all had been delivered there was delay in the delivery of the "apparatus" contracted for. But both the parties, by their conduct before action and by their attitude in the litigation itself, have made it clear that they understood that the right to recover the stipulated sum for delay in respect of each of the eleven specified articles should be limited to delay in its delivery. That this is the real purview of the agreement seems to be at least equally probable. As the parties have acted upon this view of its scope and have suggested no other, it would appear to be contrary to sound construction to give to the clause in question an effect different from what they seem to have contemplated (art. 1013, C.C.) more onerous, and possibly calculated to render its enforceability doubtful.

The first point made by the appellants is based upon the words "as liquidated damages and not as a forfeit." Only a very cursory examination of the clause in question is required to make it practically certain that it was prepared from the point of view of the English jurist. It is in a form familiar to every English lawyer who knows anything of commercial contracts. It was no doubt taken from some similar contract framed for use in one of the provinces where English law prevails. The obvious purpose of the parties was to prevent the application of the equity rule, under which courts administering English law relieve from penalties and forfeitures, by inserting a provision that it would be difficult to regard as anything else than "a genuine covenanted pre-estimate of damages" (*Dunlop Pneumatic Tire Co.* v. *New Gar-*

age and Motor Co.(1), at p. 86), in a case in which "it was impossible to foresee the extent of the injury which might be sustained" by the purchasers should the vendors make default. *Webster* v. *Bosanquet*(2), at p. 398. The circumstances are such that it cannot be said that the sum agreed upon is extravagant or unconscionable; it is made to depend upon the number of articles undelivered and the duration of the delay in the delivery of each; and a precise estimate of actual damage either before or after the default would have been so difficult to arrive at as to be impracticable. *Clydebank Engineering and Shipbuilding Co.* v. *Yzquierdo y Castaneda*(3), at pp. 16, 19.

The apparent intention of the parties, therefore, was to provide for the payment by the vendors, on default, of a sum agreed upon as pre-estimated damages in such a manner that the courts would not relieve from or modify the stipulation and to dispense with what would possibly be very expensive proof of the actual loss to which the delay had subjected the purchasers. Such an intention is conformable to the policy of the civil law of Quebec quite as much as it is to that of English law. Under both systems alike their contract is the law of the parties. It is the duty of the courts to ascertain as best they can from what the parties have expressed, read in the light of the surrounding circumstances proper to be considered, the nature and extent of the engagements to which they intended to commit themselves, and to give effect to them. In English law the term "penalty" may bear a meaning and may import incidents which differ somewhat from

(1) [1915] A.C. 79.
(2) [1912] A.C. 394.
(3) [1905] A.C. 6.

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those attached to it by the Civil Code of Quebec. Yet where it is clear, as it seems to be in the present case, that it was the intention of the parties to contract according to English law, although their agreement was partly made and was partly to be carried out in the Province of Quebec, the courts of that province, giving effect to such intention, will put upon its language the interpretation which it would receive in an English court rather than defeat the real purpose of the parties by giving to the terms they have used the significance which they ordinarily bear in contracts governed by the civil law of Quebec when there is no sufficient indication that they should receive any other interpretation. The present contract was partly made in Ontario, where one of the contracting parties had its chief place of business. That fact may account for its having taken the English form. But, however that may be, effect must be given to the manifest intention of the parties that their contract should be construed according to the rules of English law. *Hamlyn & Co.* v. *Talisker Distillery*(1); *The "Industrie"*(2), at pp. 72, 73. In doing so we are but carrying out the provisions of article 8 of the Civil Code.

In this view it is unnecessary that I should consider the points suggested by the appellants as to the differences between the cases provided for by article 1076 C.C., and those dealt with under articles 1131, etc., or whether, if the present case falls under the first mentioned article, it would be necessary for the respondents to allege and to prove that they had sustained some actual damages. I may, however, observe that I would have difficulty in placing a con-

(1) [1894] A.C. 202. (2) [1894] P. 58.

struction on the clause in question which would require the purchasers to prove some actual damage, more than merely nominal, but would upon any such actual damage being shewn, regardless of its extent, entitle them to recover the entire amount stipulated for. I think the first ground of appeal fails.

The term of the contract that the purchasers shall deduct from the contract price any sum payable by the vendors for damages for delay in delivery is an express provision for set-off or compensation which must prevail, the contract being the law of the parties. The effect of this clause must have escaped the notice of Mr. Justice Tellier. But for it I should be prepared to accept his conclusion that, in view of the provisions of article 1188 C.C., and article 217 C.P.Q., there could not be compensation in such a case as this. *Ottawa Northern and Western Railway Co.* v. *Dominion Bridge Co.*(1).

A study of the record has satisfied me that there has been no overcharge against the vendors for the several periods of delay in delivery and that they have had the full advantage of any reduction in damages to which defaults of the purchasers entitled them. In every case where there was any room for doubt they have not been charged with delay. Only in a very clear case could we interfere on this branch of appeal with the concurrent judgments of the Quebec courts.

BRODEUR J.—Les appelants sont manufacturiers de pouvoirs moteurs électriques et ils s'étaient engagés envers l'intimée de lui livrer certaines machines le 1er mai, 1911, avec obligation de leur part de payer $25

(1) 36 Can. S.C.R. 347.

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par jour de dommages pour livraison tardive. La convention portait que ces dommages seraient déduits du prix du contrat

as liquidated damages and not as a forfeit for every day's delay in the delivery.

Il s'agit de savoir si la compagnie intimée était obligée d'alléguer et de prouver qu'elle avait souffert des dommages.

En principe général, le débiteur est tenu de payer des dommages quand il n'exécute pas son obligation (article 1065 C.C.) et le créancier est alors tenu de justifier de la perte qu'il a éprouvée et du gain dont il a été privé et il doit aussi établir le *quantum* des dommages. (Article 1073 C.C.) Cette preuve est parfois extrêmement difficile à faire et donne lieu à des frais d'enquête considérables et alors les parties conviennent d'une certaine somme pour tenir lieu des dommages-intérêts. (Article 1076 C.C.) C'est la loi qu'elles se font et qu'elles doivent, par conséquent, observer.

Il y a eu évidemment dans la cause actuelle inexécution de son obligation de la part de l'appelante. Elle n'a pas livré les machines dans le délai stipulé au contrat. Alors, comme la convention portait que le prix de vente serait reduit dans la proportion de $25 par jour de retard dans la livraison de chacune des machines, la defenderesse avait le droit par sa defense d'invoquer cette réduction (article 196(3) C. P.Q.).

Mais l'appelante dit que l'intimée aurait dû tout de même, malgré cette stipulation, prouver qu'elle avait subi des dommages.

Je suis d'opinion que la convention dispense le

créancier de faire aucune preuve du préjudice qui lui a été causé.

Marcadé et Pont, art. 1153, p. 421; Larombière Obligations, vol. 4, p. 32, art. 1231; 26 Demolombe, No. 663; 17 Laurent, No. 451, p. 448; *McDonald* v. *Hutchins* (1)..

Les parties avaient en vue évidemment qu'il était essentiel pour l'intimée d'avoir ses machineries à une date fixe et, à raison, je suppose, de certains contrats qu'elle aurait eu elle-même à remplir, il était absolument nécessaire pour elle qu'elles fussent livrées à cette date-là, afin de pouvoir à son tour remplir les obligations qu'elle avait contractées envers d'autres personnes. Comme ces dommages auraient été extrêmement difficiles à établir, il a été jugé à propos par les parties de déterminer immédiatement par convention le *quantum* de ces dommages et dans quelles conditions ils deviendraient dûs. Le *quantum* a été fixé à $25 par jour et la condition est que si la marchandise n'est pas livrée le 1er mai cette somme de $25 par jour pourra être déduite du prix de vente.

Si nous interprétons même littéralement la convention nous pouvons dire qu'une certaine somme avait été stipulée pour le prix des marchandises si elles étaient livrées le 1er mai mais que cette marchandise commanderait un prix moindre si elle était livrée plus tard.

Je ne vois pas comment l'intimée aurait été obligée, dans les circonstances, de prouver qu'elle a souffert des dommages.

L'appelante cependant aurait pu établir que si le temps pour l'entière exécution avait été de peu d'im-

(1) Q.R. 12 K.B. 499.

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portance la somme stipulée aurait pu être réduite (articles 1076, 1135); mais le fardeau de la preuve retombait sur elle; et, comme elle n'a pas rempli cet *onus*, nous ne pouvons pas faire autrement que d'appliquer la convention des parties et dire que l'appelante est tenue de subir une reduction de prix.

Une preuve volumineuse cependant a été faite sur la question de savoir si l'inexécution de la convention n'était pas due à la négligence de l'intimée. Une clause de la convention comportait que si l'acheteur causait quelque délai au vendeur, qui aurait pour effet d'empêcher l'installation des machineries ou leur livraison, la reduction de prix ne pourrait pas être réclamée pour le nombre de jours de délai qui auraient été causés par l'acheteur.

L'intimée elle-même admet dans ses plaidoiries qu'un certain nombre de jours de délai devaient lui être imputés et elle donne crédit à l'appelante de ce chef pour une somme d'environ $3,000.

Il s'agissait de savoir si les autres délais n'étaient pas également dûs à la faute ou à la négligence de l'intimée.

L'un des premiers chefs imputés à la *Canadian Rubber Company* était que le contrat n'avait été signé par elle qu'un mois environ après que l'appelante elle-même eût signé.

Il aurait fallu dans ce cas-là pour la demanderesse établir qu'elle avait au moins protesté l'intimée; mais elle n'a pas jugé à propos de faire cette procédure. Elle a reçu le contrat dûment signé par l'intimée et d'ailleurs il est en preuve que les parties s'étaient entendues longtemps auparavant sur la nature des travaux à faire et que même la demanderesse avait commencé à exécuter son contrat. Le contrat formel

qui a été signé n'a été fait que dans le but de coucher dans un document formel leurs conventions qui étaient déjà bien arrêtées et bien connues.

Il résulte de la preuve que la demanderesse a signé cette convention d'une manière bien imprévoyante. En effet, nous avons au dossier une lettre du surintendant de sa manufacture lui disant, peu de jours après la signature du contrat, qu'il était absolument impossible de fabriquer les machines dans le temps stipulé. Il me semble alors qu'avant de s'obliger formellement, comme elle l'a fait, la demanderesse aurait dû s'enquérir du surintendant de la manufacture s'il était en position de fabriquer ces machines dans le temps stipulé. Elle me paraît n'en avoir rien fait et alors elle n'a pas raison d'imputer ce delai à l'intimée, lorsqu'il est bien évident que c'est elle qui est en faute.

Elle se plaint également d'autres délais, concernant, par exemple, les bases sur lesquelles les machines devaient être assises.

Ces bases devaient être faites par la Canadian Rubber Company. Elle les a fait faire par un fabricant à Montréal; mais comme les machines avaient à être fixées sur ces bases-là, il était très important qu'elles fussent essayées à l'avance pour que ces machines qui demandent à être installées avec beaucoup de soin fissent les travaux qu'on attendait d'elles. L'appelante a fait transporter ces bases à sa manufacture à Peterboro pour faire ces essais.

Il y a divergence d'opinion dans la preuve à ce sujet. Quelques témoins disent que ces essais étaient nécessaires; d'autres disent que c'était inutile.

La Cour Supérieure et la Cour de Revision, sur ce

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point aussi bien que sur les autres, qu'il est inutile de discuter, sont arrivés à la conclusion que sur ces faits l'intimée devait réussir.

Il est bien difficile pour nous de mettre de côté ces décisions concurrentes des deux cours inférieures. Il s'agit, comme on le voit, d'une question de faits; et, suivant la jurisprudence bien établie de cette cour, nous ne devons intervenir que lorsqu'il y a une injustice bien flagrante et bien évidente.

Dans ces circonstances, je suis d'opinion que le jugement de la Cour de Revision doit être confirmé avec dépens.

On a dit que le contrat en question en cette cause-ci, étant un contrat commercial, devrait être interprété suivant la loi anglaise.

Je ne puis pas accepter ce principe. Nos lois dans Québec sur la clause pénale sont différentes de la loi anglaise. Glasson, dans son ouvrage sur l'Histoire du Droit et des Institutions de l'Angleterre, déclare expressément, au vol. 6, p. 375, que les lois françaises et les lois anglaises posent des règles différentes quant aux obligations avec clause pénale.

Appeal dismissed with costs.

Solicitors for the appellants: *Hibbard, Gosselin & Moyse.*

Solicitors for the respondents: *Casgrain, Mitchell, McDougall & Creelman.*