

ARTHUR F. ALLEN, PLAINTIFF AND APPELLANT, VS. THE PROVINCE OF ALBAY AND THE PROVINCE OF AMBOS CAMARINES, DEFENDANTS AND APPELLEES.*G.R. No. 11433, December 20, 1916*

Ponente: TRENT, J.

Read online (full-text search, related cases, audio case brief): <https://batas.org/library/g-r-no-11433/>**TRENT, J.:**

On February 25, 1913, the Director of Public Works, acting for the Provinces of Albay and Ambos Camarines, advertised for sealed proposals, to be opened March 15, 1913, for the construction of a re-enforced concrete bridge over the Agus River on the Albay-Ambos Camarines boundary. At the request of the plaintiff, the opening of the bids was postponed until March 20, on which date plaintiff submitted his bid to construct the proposed bridge for the sum of P30,690. On April 25, 1913, the Director of Public Works asked the provincial boards of Albay and Ambos Camarines for authority to contract with the plaintiff for the construction of the bridge. The boards passed the necessary resolutions of May 6 and the plaintiff was notified of their action on June 13. The formal contract was duly executed on June 26, 1913. The bridge was completed and accepted by the defendant provinces on April 1, 1914. The plaintiff was paid the contract price less P1,301.45, P325 being retained as liquidated damages at the rate of P25 per day from February 15, 1914, to March 31, 1914; P175.03 for expenses of inspection from November 1, 1913, to February 15, 1914; and P201.42 for the operation and maintenance of a ferry across the Agus River during the last mentioned period. This action was instituted for the purpose of recovering the amount of P1,301.45, P200 overcharges on steel not delivered, P2,000 for damages caused by the defendants' delay, and P878 for extra work and material furnished on the bridge at defendants' request. From a judgment in favor of the defendants dismissing the complaint on the merits, with costs, the plaintiff appealed and now urges that the trial court erred (1) in finding that the delay in completing the work under the contract in question was due to the fault and negligence of the plaintiff and not to that of the defendants; (2) in holding that the defendants were entitled to deduct from the contract price for the construction of the bridge (a) the sum of P925 as a penalty or liquidated damages, (b) the amount of P201.42 for the operation and maintenance of a ferry, and (c) the amount of P175.03 for expenses of inspection; and (3) in rendering judgment in favor of the defendants, dismissing the plaintiff's complaint and not rendering judgment for the plaintiff for the amounts prayed for. The first and second alleged errors will be considered together.

The contract which was, as we have said, duly executed on June 26, 1913, provided in paragraph 4 for the completion of the bridge on or before the 1st day of September, 1913. And in paragraph 5 it was agreed that in the event that the necessary steel should be furnished by the provinces at ship side in Legaspi, a deduction from the contract price should be made of 11 centavos per kilo of steel thus delivered. The advertisement, instructions to bidders, general conditions, specifications, proposal, and plans were made a part of the contract.

The plaintiff in his proposal stated:

"All work contemplated by this contract is to be completed on or before four months after contractor furnishes sand and gravel."

The provincial board of Albay in its resolution of May 6 stated that it had received a communication from the Director of Public Works to the effect that "Mr. Allen's bid was the only one received for this work which the contractor agrees to finish in four months." The time for the commencement of the work is not stated. The provincial board of Ambos Camarines in its resolution of May 6 stated, "All work to be completed on or before November 1, 1913." In "Information to bidders," which was made a part of the contract, it was provided that "the contractor will be required to complete the bridge and have same ready for traffic on or before September 1, 1913." The Province of Ambos Camarines in its resolution of January 6, 1914, stated that the time for the completion of the bridge was intended to be November 1, 1913, and the Province of Albay in its resolution of May 5, 1914, stated that, "granting the contention of the provincial board of Ambos Camarines, it was the intention of the parties to fix the original date for the termination of the work on November 1, 1913, although the original contract fixed September 1, 1913, * * * ." On December 1, 1913, F. T. James, acting on behalf of the plaintiff, addressed the following letter to the provincial board of the Province of Albay:

"December 1, 1913.

"GENTLEMEN: I have the honor to request that an extension of time be granted me for the construction of the Argos River Bridge.

"Immediately upon entering into contract with the Province of Albay on June 26, 1913, I ordered cement for the work, but due to the shortage in the Manila market at that time did not receive delivery until the middle of July, when same was shipped to Legaspi where it arrived four days later.

"I had made previous arrangements to have this cement hauled to the bridge site by automobile truck, but when an attempt was made to do so in July, the recent rains so softened the road beyond Polangui that it was impossible to send a loaded truck over it with any assurance of safe arrival of the cargo of cement at Argos River in good condition. Therefore I was obliged to haul by truck to Ligao only and from there to Argos by carabao carts.

"The contractor in Ligao then began to haul cement and also the steel for the bridge. Shortly a quarantine on animals was put into effect in the town of Polangui, and the hauling had to stop, when I had had delivered at the bridge site only a few barrels of cement and a very small number of bars of steel for the piles. It was not until early in October, therefore, that sufficient steel and cement were delivered at the Argos River to warrant beginning work casting the piles. This work began however immediately this condition obtained and the sixty concrete piles were completed November 22.

"Due to the fact that the material in the Argos River, into which the piles must be driven, is exceptionally hard and of a very compact nature it is almost imperative that the piles have considerably more than the usual thirty days for ripening before driving, and of necessity I must wait at least until December 15 before handling even the first piles cast. My pile driver is being shipped to Nueva Caceres at present writing. I am obliged to send all my plant and balance of materials in by that port due to the fact that nobody in Albay is willing to attempt hauling heavy machinery over the road beyond Polangui for reasons best known to the honorable board, and it is only a question of hauling same from Nueva Caceres to Argos River as to the actual date of beginning driving.

"As was unforeseen, at the time of entering into contract for this bridge, I have been obliged to use two plants on my work in the Province of Bulacan where it was anticipated that one would be enough, due to the unusual conditions and delays from floods and typhoons, so I have not been able to ship my engine and driver so as to have it at Argos River on the date expected. Therefore, for these above-named reasons, I have the honor to request that I be granted an extension of time until February 15, 1914, to complete the Argos Bridge.

"Very respectfully.

"ARTHUR F. ALLEN, Contractor,

(Sgd.) "Per F. T. James."

On May 5, 1914, the provincial board of the Province of Albay passed resolution No. 227, the pertinent parts of which are as follows:

* * * * *

"Whereas there exists pending a petition of the contractor for the extension of the termination of the work of the cited bridge until the 15th day of February, 1914;

* * * * *

"Resolved, That this board proposes an amicable settlement for the final settlement of this matter based upon the following conditions:

"Grant extension to February 15, 1914, providing the contractor will pay to the province the sum of P1,725.78, being the amount for extra cost for inspection expense, interest on loan, cost of ferry operation to February 15, and 37 days liquidated damages at P25 per day for the time between February 15 and April 1, 1914.

"Resolved further, That all previous resolutions of this board in regard to this matter which are in conflict hereof are hereby repealed.

"Resolved lastly, That copies of this resolution be furnished the district engineer, Albay, contractor Allen, provincial treasurer and provincial board of Ambos Camarines."

On June 17, 1914, the provincial board of Albay passed resolution No. 383 which, after stating the reasons for the resolution, reads:

"Resolved, That the final payment to A. F. Allen for the construction of the Agus River Bridge be, and hereby is, authorized according to the contract, deducting the amount of P1,301.45, same to cover inspection charges from November 1, 1913, to February 15, 1914, operation and maintenance of ferry from November 1, 1913, to February 15, 1914, and 37 days liquidated damages from February 15 to March 31, 1914, inclusive, Sundays and holidays excepted, at P25 per day."

* * * * *

Copies of the above resolution were furnished the provincial treasurer and district engineer of Albay, the provincial board of Ambos Camarines, and the plaintiff.

The provincial board of Ambos Camarines, in its resolution No. 669 passed June 24, 1914, concurred in resolution No. 383 of the Province of Albay.

The provincial board of Ambos Camarines passed on January 6, 1914, resolution No. 50, the pertinent parts of which read as follows:

"The recorder presented copy of resolution No. 1114 of the provincial board of Albay, series of 1913, with accompanying papers, being the application of Mr. A. F. Allen for an extension of the contract time in which he is to complete the Agus Bridge (on the provincial boundary) and the recommendation of the Director of Public Works and the district engineer of Albay.

"Being informed of the contents of said resolution and accompanying papers,

"On motion,

"The board resolved as follows:

* * * * *

"(b) As to any further extension, the facts alleged by contractor which must be basis of same, obstacles impeding the transport of his supplies, occurring within the Province of Albay, this board proposes to be guided by the recommendations of the board of Albay in the matter. However, as it does not appear that the contractor acquiesces and accepts the extension and conditions embodied in the resolution of the board of Albay, but on the contrary, Mr. James, representing the contractor being present, informs the board of Camarines that the contractor is not satisfied with the extension and conditions embodied in the before mentioned resolution of Albay, therefore this board abstains from concurring in resolution No. 1114 of Albay and suggests that, if the Albay board finds cause for extending the contract time past November 1, 1913, that the contractor's concurrence and acceptance of such further extension be procured before forwarding for the concurrence of this board. Further this board believes that any arbitrary extensions (contractor not concurring or accepting conditions) or extensions 'by grace' could better and more properly be had upon completion of the bridge as a final adjustment of the matter.

"Approved unanimously."

Resolution No. 1114 of the provincial board of Albay, series 1913, referred to in resolution No. 50 of the provincial board of Ambos Camarines, was not presented during the trial in the court below and forms no part of the record of this case.

The provinces, exercising their right under the contract, furnished all the steel at shipside in Legaspi. The steel was received by the contractor on the following dates: 27,056 kilos on July 26, 1913; 3,636 kilos on August 4, 1913; and 7,890 kilos on September 1, 1913. The bridge site is 51.7 kilometers from Legaspi.

The first question to be determined is that relating to the time agreed upon for the completion of the bridge. Did the contracting parties fix September 1, 1913, as the date? On the one hand we have an explicit statement in the information to bidders that "the contractor shall commence the work herein contracted to be done in ample time to complete the contract within the time specified/1 In the contract it was expressly stipulated that the contractor must complete the work on or before the 1st day of September, 1913, or pay P25 a day as liquidated damages for every day thereafter. And James in his letter of December 1, after referring to the fact that the contract was signed on June 26, requested an extension of time for the completion of the work until February 15, 1914. While on the other hand, we have the statement of the plaintiff's proposal to the effect that the work contemplated should be completed on or before four months after the contractor furnished gravel and sand; the statement of the provincial board of Albay that the contractor agreed to finish the bridge in four months; the same board's later statement referring to the contention of the board of Ambos Camarines that it was the intention of the parties to fix the time on November 1, the two statements of the provincial board of Ambos Camarines to the effect that it understood that November 1 was the date agreed on; and the fact that the provinces deducted inspection expenses and expenses for the operation of the ferry from November 1.

It will thus be seen that the provinces did intend that the date for the completion of the work should be November 1 and not September 1. Such were the instructions to the Director of Public Works in consummating the contract, but the Director did not comply with these instructions as to the date for the termination of the work. He and the contractor agreed that the date should be September 1. Although this was not in accordance with the intention of the provinces, yet they (the provinces) subsequently ratified the contract by their own acts—furnishing the steel and making payments. The result is that the provinces obligated themselves through the Director of Public Works to furnish all the steel at ship side in Legaspi early enough to permit the contractor to complete the bridge by September 1. This the provinces did not do, as quite a large shipment of steel arrived in Legaspi on the very day

agreed upon for the completion of the bridge. It may be true that the contractor could not have completed the bridge by September 1, if all of the steel had arrived in Legaspi immediately after the signing of the contract.

Even admitting that the true date for the completion of the bridge was November 1, yet the contractor could not have completed the work on or before that date on account of the quarantine established and enforced by the authorities. James, in his letter of December 1 asking for the extension of time, said, "The contractor in Ligao then began to haul the cement and also the steel for the bridge. Shortly a quarantine on animals was put into effect in the town of Polangui, and the hauling had to stop when I had had delivered at the bridge site only a few barrels of cement and a very small number of bars of steel for the piles." And James in his testimony says, "Jaucian was unable to promptly deliver these materials at the Argus bridge site, due to a rinderpest quarantine placed, I think, by the Bureau of Agriculture on carabao and cattle passing on the interprovincial road between Ambos Camarines, Albay, and in all of the towns north of Ligao." Jaucian in his deposition testified that he encountered difficulties in hauling materials for the bridge from Ligao to the Agus River; that the first difficulty was the quarantine placed upon animals in Polangui; that he had been delivering the materials for a week when the quarantine was ordered; that the quarantine, as he remembered, commenced in July and was removed in October or November; that the quarantine was uninterrupted during this time; and that it consisted in a definite or absolute prohibition against the passage of animals from kilometer 30 to kilometer 40. So it is conclusively established that the only way that the contractor had of moving the materials from Ligao to the bridge site was by means of animals and that this could not be done from sometime in July until October or November on account of the quarantine.

Marshall, the district engineer who represented the provinces during the construction of the bridge, testified that the plans called for the piles of the bridge to be 11 meters long; that the contract was signed on this basis; that after the contract had been signed Von Schmelling, the former district engineer, was down there and in a verbal conversation it was decided that instead of casting the piles 11 meters long they should be cast 9 meters long, thereby saving something like 13 cubic meters of concrete; that on October 11 or 12 there came a flood and the water rose about 15 centimeters higher than the extreme high water shown in the original plans; that it was thereafter agreed to raise the caps on the piles 42 centimeters higher; and that the raising of the bridge was outside of the original specifications. The testimony of this witness is corroborated on this point by both the plaintiff and James.

The plaintiff, through his agent, requested an extension of time until February 15, 1914, within which to complete the bridge, but the parties did not agree upon the extension. From the resolution of the provincial board of Ambos Camarines, dated January 6, 1914, it appears that Albay imposed certain conditions in consideration for the extension, which were rejected by the plaintiff.

We must, therefore, conclude that the provinces waived the contract time, whether it were September 1 or November 1, by their failure to deliver the steel promptly, by reason of having placed the strict quarantine on animals and on account of the change in the plans subsequent to October 12, and that the waiver operated to eliminate the definite date from which to assess liquidated damages; and though the plaintiff, in continuing the work, was obligated to complete the same within a reasonable time, the liquidated damage clause was not thereby restored and made applicable to an unreasonable time. Where strict performance on the part of the contractor is prevented or waived by the other party, a claim by such party of fines and penalties for delay or failure cannot be sustained. (*District of Columbia vs. Camden Iron Works*, 181 U. S., 453.) The same rule applies in cases containing liquidated damage clauses. (*United Engineering and Contracting Co. vs. U. S.*, 47 Ct. Cls., 489 [1912].) If it be true that the plaintiff contractor was responsible for a large number of days of delay and the provinces for only a few of the days thereof, yet, under such circumstances, we cannot "apportion" such delay

between the contracting parties and hold the contractor liable in liquidated damages for the number of days delayed by him in completing the bridge. (Jefferson Hotel Co. vs. Brumbaugh, 168 Fed. Rep., 867 and cases cited therein; Willis vs. Webster, 37 N. Y. Sup., 354; Mosler Safe Co. vs. Maiden Lane Safe Dep. Co., 199 N. Y., 479; 37 L. R. A., (N. S.) 363, decided in 1910.) The result is that the provinces are limited to such damages which they may have suffered on account of an unreasonable delay on the part of the plaintiff in completing the bridge, if there were, in fact, an unreasonable delay. It would seem, however, that as the plaintiff asked for an extension on December 1, sometime after the quarantine had been raised and also after the change in the plans had been made, until February 15, 1911, he should have finished the work on or before the latter date and all time thereafter would constitute an unreasonable delay. However this may be, the provinces have proven no actual damages resulting after February 15. It is true that they deducted P175.03 for inspection charges, but this was done for such inspection prior to February 15, and the same is true of the item of P201.42 for the maintenance of a ferry. Certainly there was no unreasonable delay prior to February 15. Consequently, the provinces had no right to withhold the P1,301.45.

The plaintiff sought to recover, in addition to the amount withheld, P200 overcharges on steel, P2,000 for damages caused by the defendants' delay, and P878 for extra work and material furnished at defendants' request. While it is true that the question whether the plaintiff is entitled to recover these amounts is raised by the third assignment of error, yet no specific reference is made in the plaintiff's brief to said amounts, counsel saying nothing more than, "It is respectfully submitted that appellant is entitled to a reversal of the decision of the Court of First Instance, and to an order for judgment in accordance with the prayer of his complaint." We have examined the record, however, and find that the evidence is not sufficient to warrant an affirmative holding that the plaintiff is entitled to recover these items or either of them.

For the foregoing reasons the judgment appealed from is reversed and judgment will be entered in favor of the plaintiff and against the defendants for the sum of P1,301.46, with legal interest from April 1, 1914. No costs will be allowed in this instance. So ordered.

Torres, Johnson, and Carson, JJ., concur.

Araullo, J., concurs in the result.

Moreland, J., see dissenting opinion.

DISSENTING OPINION

MORELAND, J.:

This case arises over the construction by plaintiff, under a written contract, of a reenforced cement bridge across the Argos River which forms the boundary line between the Provinces of Albay and Ambos Camarines, defendants. The contract was entered into June 26, 1913. The plaintiff was to construct the bridge for a certain sum and furnish all labor, materials, tools, implements and machinery, and to complete the work by the first day of November, 1913. It was agreed, however, that, if he desired, the defendants would sell to plaintiff and plaintiff would buy of defendants, at a fixed price, the steel necessary to reenforce the concrete bridge as well as the cement piles which were to be driven as the foundation of the bridge. If the steel was purchased of defendants they were to deliver it on board steamer in the harbor of Legaspi; and plaintiff was to accept delivery there and, by his own means and at his own expense, transport it to the bridge site on the Argos River, 51 kilometers inland from Legaspi. Nowhere in the evidence or record does it appear when the steel was to be delivered under this contract. On that point, and it is, under plaintiff's theory, the vital point in the case, the record is absolutely silent. The contract provided that plaintiff should pay defendants as liquidated damages P25 for every day after

November 1, 1913, until the bridge was completed, except Sundays and holidays.

The controversy which resulted in this action springs from the failure of plaintiff to complete the work in time, i. e., within the time specified in the contract. The failure is admitted by plaintiff. The sole defense in the court below, and here on this appeal, is that his noncompliance with the contract in this regard was due to the failure of the defendants to deliver in time the steel mentioned; and that such failure prevented his completing the bridge on time and, accordingly, relieved him from all damages caused to the defendants thereby.

The Supreme Court finds that plaintiff's defense is well founded. How the court arrives at this conclusion I am unable to understand. In my judgment the findings of the court are not only unsupported by the evidence but they are contrary to the undisputed evidence and the testimony and admissions of the plaintiff and his witnesses.

Let us look, first, at plaintiff's own words on the question of delay. They not only help us in that connection but in not completing the structure by the 1st of November, 1913, are given by plaintiff's engineer and superintendent, James, who had complete charge of the construction of the bridge, the plaintiff being absent from the country. He was also his attorney-in-fact and fully authorized to act for him in all ways. On the first day of December, the piles for the foundation of the bridge not having yet been driven, the plaintiff, through his engineer, superintendent, and attorney-in-fact, made, in the form of a letter to the defendant provinces, an application for an extension of the time within which the bridge was to be completed under the contract of construction. This application, as appears upon the face thereof, contains a full statement of the reasons and grounds upon which the application was based. Even a cursory reading discloses that it is a complete and absolute refutation of every contention made by the plaintiff in this case with respect to his failure to complete the bridge on time and is a complete and absolute refutation of the opinion of this court upon that question. It reads as follows:

"GENTLEMEN : I have the honor to request that an extension of time be granted me for the construction of the Argos River Bridge.

"Immediately upon entering into contract with the Province of Albay on June 26, 1913, I ordered cement for the work, but due to the shortage in the Manila market at that time did not receive delivery until the middle of July, when same was shipped to Legaspi where it arrived four days later.

"I had made previous arrangements to have this cement hauled to the bridge site by automobile truck, but when an attempt was made to do so in July the recent rains so softened the road beyond Polangui that it was impossible to send a loaded truck over it with any assurance of safe arrival of the cargo of cement at Argos River in good condition. Therefore I was obliged to haul by truck to Ligao only and from there to Argos by carabao carts.

"The contractor in Ligao then began to haul the cement and also the steel for the bridge. Shortly a quarantine on animals was put into effect in the town of Polangui, and the hauling had to stop when I had had delivered at the bridge site only a few barrels of cement and a very small number of bars of steel for the piles. It was not until early in October, therefore, that sufficient steel and cement were delivered at the Argos River to warrant beginning work of casting the piles. This work began however immediately this condition obtained and the sixty concrete piles were completed November 22.

"Due to the fact that the material in the Argos River into which the piles must be driven is exceptionally hard and of a very compact nature it is almost imperative that the piles have considerably more than the usual thirty days for ripening before driving, and of necessity I must wait until at least December 15 before handling even the first piles cast. My pile driver is being shipped to Nueva Caceres at present writing. I am obliged to send all my plant and balance of materials in by that port due to the fact that nobody in Albay is willing to attempt hauling heavy machinery over the road beyond Polangui for reasons best known to the honorable board, and it is only a question of hauling same from Nueva Caceres to Argos River as to the actual date of beginning

driving.

"As was unforeseen at the time of entering into contract for this bridge, I have been obliged to use two plants on my work in the Province of Bulacan where it was anticipated that one would be enough, due to the unusual conditions and delays from floods and typhoons, so I have not been able to ship my engine and driver so as to have it at Argos River on the date expected. Therefore, for these above-named reasons, I have the honor to request that I be granted an extension of time until February 15th, 1914, to complete the Argos Bridge.

"Very respectfully,

"ARTHUR F. ALLEN, Contractor.

"(Sgd.) Per F. T. JAMES.

"The Honorable Provincial Board,

"Albay, Albay.

"Through The Director of Public Works, for indorsement"

Viewed in connection with the opinion of the Supreme Court, this is a striking document in several particulars. Let us first consider the time of execution and the purpose of the document. It was dated the 1st day of December, 1913, one month after the time when the bridge should have been completed. Now it is clear that, if the defendants had caused plaintiff's failure to complete the bridge by November 1, he was relieved of all responsibility which would have otherwise arisen by reason of that failure; and his only duty was to proceed with the work with ordinary diligence and skill. Under such circumstances it was unnecessary for him to ask for an extension of time. It had already been extended, at least for a time reasonably required to complete the structure, by defendants causing plaintiff delay and failure. From plaintiff's point of view, then, his request for the extension was unnecessary as it had already been extended. But from defendant's point of view the request for extension was very significant. It meant that plaintiff knew his failure was due to his own fault and that, by making the application for an extension, he was trying to avoid the consequences of that failure. I believe this inference is a fair one under all the circumstances. Men do not ordinarily ask for things which they already have and claim as their own; and when they do so it instantly raises the suspicion that they themselves doubt the validity of their title. According to plaintiff's theory the time had already, in legal effect, been extended for a period reasonably sufficient to complete the bridge by the omissions of the defendants, and plaintiff had been operating for a month under that extension. Why, then, ask for an extension? But, above all, why seek to excuse his own delay and failure to fulfill? On the other hand, if it be urged that plaintiff was simply asking for the recognition of a right which, by virtue of the defendants' delay, was already his, would not the allegation of such delay in the letter asking for an extension of time have been the strongest reason which plaintiff could possibly have offered to obtain what he was seeking? Why present excuses for so many of his own failures as a ground for extension if he could have closed the mouths of defendants against objection by alleging their own failure? Why pray for a privilege when he could demand a right? Can any reasonable man conclude that, if the defendants had failed as plaintiff now asserts they failed, he would have neglected to mention that failure in his letter requesting an extension?

Second, let us consider the nature of the document. In the first place, it is a prayer. It is not a declaration of a right and a demand for its express recognition. "I have the honor to request that an extension of time be granted me" says the document at the beginning; and "therefore, for these above named reasons, I have the honor to request that I be granted an extension of time" says the document at the close. This is a request, a petition, a prayer and not a demand based on a claimed right or one for the express recognition of a right already existing.

In the second place, it is an excuse for a failure to perform and not a declaration that he had not, by his own neglect, failed to perform. It admits his failure and seeks to excuse it. The whole document is filled with nothing but admissions and excuses. It does not contain an allegation or a claim of a single right against the defendants. It is filled from beginning to end with admissions that the plaintiff had failed to fulfill his contract; but nowhere is there even a suggestion that the defendants had failed to fulfill theirs.

The first excuse offered is that, although the plaintiff had ordered the cement immediately after the execution of the contract, nevertheless "due to the shortage in the Manila market at that time did not receive delivery until the middle of July, when same was shipped to Legaspi where it arrived four days later." Although the contract was signed on the 26th of June plaintiff did not obtain delivery of the cement at Legaspi until about the 20th of July. This is the first reason offered to excuse his failure to perform. Who was to blame here?

The second reason offered is that "I had made previous arrangements to have this cement hauled to the bridge site by automobile truck, but when an attempt was made to do so in July the recent rains so softened the road beyond Polangui that it was impossible to send a loaded truck over it with any assurance of safe arrival of the cargo of cement at Argos River in good condition. Therefore I was obliged to haul by truck to Ligao only and from there to Argos by carabao carts." From this it is clear that the plaintiff began to haul the cement during the latter part of the month of July and that at that time the road was so bad that the automobile truck could not pass over it. Whose fault was it then that he was unable to transport his cement to the Argos river? Was it due to any act of the defendants? Clearly this is an admission that it was due to his own failure.

The third excuse is that the contractor in Ligao was obliged to discontinue the hauling of the cement and steel from Ligao to the bridge site on account of a quarantine on animals imposed by the Government. This occurred, says the plaintiff, "when I had had delivered at the bridge site only a few barrels of cement and a very small number of bars of steel for the piles." Whose fault was this? Was it the fault of the defendants? The plaintiff admits that it was not. That which caused all of the subsequent difficulties including those arising from the quarantine was the failure of the plaintiff to begin the delivery of his cement to the bridge site from Legaspi before the roads had been rendered impassable by the rains. If he had delivered his cement in Legaspi in time he himself admits that he would have been able to transport it to the bridge site in an automobile truck and would not have been obliged to rely on carabaos. The necessity, therefore, of using carabaos was due to plaintiff's own negligence and procrastination in not procuring the delivery of the cement in Legaspi prior to the beginning of the heavy rains. This is not only a legitimate but an absolutely necessary inference from the document which we are discussing.

The fourth excuse is that, by reason of the facts already stated, "it was not until early in October, therefore, that sufficient steel and cement were delivered at the Argos River to warrant beginning work of casting the piles." This excuse needs no discussion other than that already given respecting other excuses.

The fifth excuse given is that "due to the fact that the material in the Argos River in which the piles must be driven is exceptionally hard and of a very compact nature, it is almost imperative that the piles have considerably more than the usual thirty days for ripening before driving, and of necessity I must wait until at least December 15 before handling even the first piles cast." Was the hardness of the soil attributable to the defendants? Was the fact that he had to give the piles more than thirty days to ripen due to any act of the defendants? Certainly not. It was a mere miscalculation in his part which he offered as an excuse in the hope that the defendants would be generous and overlook it with his other mistakes and omissions.

The sixth excuse offered for his failure is that "my pile driver is being shipped to Nueva Caceres at present writing (December 1, 1913);" and it is admitted that it did not arrive until January. The reason for this delay is

given by the plaintiff as follows: "As was unforeseen at the time of entering into contract for this bridge, I have been obliged to use two plants on my work in the Province of Bulacan where it was anticipated that one would be enough, due to the unusual conditions and delays from floods and typhoons, so I have not been able to ship my engine and driver so as to have it at Argos River on the date expected." Is not this clearly an excuse offered for plaintiff's own failure, for his own negligence?

The document is not only an excuse, it is an admission. It is a comprehensive admission on plaintiff's part that he alone was responsible for every delay that occurred. I have already referred to several passages in the letter which show that it is a confession and a prayer for clemency. "I failed in this; I failed in that; I failed in the other thing;" says the plaintiff in the letter. "Wherefore," says he, "I * * * request that an extension of time be granted me * * *." One does not request where he has the right to demand; and one does not grant that which another has a right to require.

"I failed," says the plaintiff in effect, "to get the cement to Legaspi before the rains made the road from there to the bridge site impassable;" and this is the reason he gave in his letter for that failure: "Immediately upon entering into contract with the Province of Albay on June 26, 1913, I ordered cement for the work, but due to the shortage in the Manila market at that time did not receive delivery until the middle of July, when same was shipped to Legaspi where it arrived four days later."

The plaintiff further says, in effect: "I failed to deliver the cement at the bridge site in time to complete the work as agreed;" and this is the reason he gives in his letter for that failure: "I had made previous arrangements to have this cement hauled to the bridge site by automobile truck, but, when an attempt was made to do so in July, the recent rains so softened the road beyond Polangui that it was impossible to send a loaded truck over it with any assurance of safe arrival of the cargo of cement at Argos River in good condition. Therefore I was obliged to haul by truck to Ligao only and from there to Argos by carabao carts. The contractor in Ligao then began to haul the cement and also the steel for the bridge. Shortly a quarantine on animals was put into effect in the town of Polangui, and the hauling had to stop when I had had delivered at the bridge site only a few barrels of cement and a very small number of bars of steel for the piles. It was not until early in October, therefore, that sufficient steel and cement were delivered at the Argos River to warrant beginning work of casting the piles. This work began however immediately this condition obtained and the sixty concrete piles were completed November 22."

This is, of course, a clear admission that, on account of a series of circumstances with which the defendants had nothing to do, he failed to deliver the cement at Legaspi before the rains made the roads impassable, and failed to deliver the cement at the river until October. The defendants admittedly had nothing to do with the cement; and it goes without saying that plaintiff could do absolutely nothing in the construction of the bridge until he had cement. The bridge was a cement bridge; the piles were cement piles. He was utterly helpless until the cement arrived, no matter how many tons of steel he may have had. Nowhere in all the case is there a shadow of claim that the defendants interfered with the purchase or delivery of the cement and nowhere is there a shred of evidence to show that an earlier delivery of steel would have availed plaintiff anything.

In the passage last quoted plaintiff says in effect: "I failed to complete the bridge on time because I did not finish casting the piles until November 22." If, by lack of cement he did not complete the piles until November 22, how could he have completed the bridge November first, the date specified in the contract, even though he had had boatloads of steel at his disposal?

Plaintiff further says in his letter, in effect: "I failed to drive the piles in time to complete the bridge as agreed." We have already seen some of the reasons for this failure, such as lack of cement and his failure to deliver it at the bridge site in time. But plaintiff gives two additional reasons. The first one is stated in the letter as follows: "Due to the fact that the material in the Argos River into which the piles must be driven is exceptionally hard and of a

very compact nature it is almost imperative that the piles have considerably more than the usual thirty days for ripening before driving, and of necessity I must wait until at least December 15 before handling even the first piles cast;" and the second is that: "My pile driver is being shipped to Nueva Caceres at present writing;" and "As was unforeseen, at the time of entering into contract for this bridge, I have been obliged to use two plants on my work in the Province of Bulacan where it was anticipated that one would be enough, due to the unusual conditions and delays from floods and typhoons, so I have not been able to ship my engine and driver so as to have it at Argos River on the date expected."

The court makes the following findings:

"We must, therefore, conclude that the provinces waived the contract time, whether it was September 1 or November 1, by their failure to deliver the steel promptly, by reason of their having placed a strict quarantine on animals and on account of the change in the plans subsequent to October 12th, * * *."

Compare these findings and conclusions with plaintiff's own statement of the reason why he failed to complete on time contained in the letter of December 1, and what is the result? I repeat, plaintiff's own statement of the reasons why he failed to perform on time are a confession that his inability to perform was brought about by his own acts and omissions with which the defendants had nothing whatever to do. This is shown beyond shadow of doubt by plaintiff's letter quoted above; and every fact and circumstance stated in the letter is fully supported by the undisputed evidence in the case.

These facts are undisputed in the record. Most of them are established from plaintiff's own mouth or the mouths of his own witnesses:

- That there was a nonperformance. That, while the agreement obliged him to complete the bridge by the 1st day of November, 1913, it was not finished until the 81st day of March, 1914.
- That the bridge was to be a cement structure and that the cement necessary for its construction and for the casting of the piles was to be furnished and delivered to the bridge site by the plaintiff.
- That although the contract was signed on the 26th day of June, 1913, and the bridge was to be completed according to that contract on or before the 1st day of November, 1913, the cement did not arrive at Legaspi until about the 20th day of July and at the bridge site until the last week in October.
- That, although the plaintiff began transporting the cement from Legaspi to the bridge site soon after its arrival on the 20th of July, the rains had at that time so softened the roads that transportation by automobile truck from Legaspi to the bridge site was impossible; and that for that reason the cement did not reach the bridge site until the last week in October.
- That the rains began before the arrival of the cement at Legaspi and they had so softened the roads as to prevent the delivery of the cement from Legaspi direct to the bridge site by automobile truck as plaintiff had planned; and that as a result thereof the cement did not reach the bridge site until the last week in October.
- That the work of casting the cement piles was not begun until about the 1st day of November and was not finished until the 22d of November.
- That the piles were not seasoned enough to be driven until the 15th of December, 1913.
- That plaintiff's pile driver did not reach the bridge site until the month of January, 1914, and the driving of the piles did not begin until that time

Under these facts, which all parties admit, how can it be claimed that it was the act or omission of the defendants which caused the contractor's failure to complete the bridge on time ? But let us go farther. With respect to the alleged failure of the defendants to deliver the steel in time, the following facts also stand

uncontroverted in the case:

- That the steel to be furnished by the defendants was to be used by plaintiff to reenforce the concrete bridge and the piles which were to be driven as the foundation of the bridge and could not be used except jointly with the cement.
- That the steel to be furnished by the defendants was to be delivered by them in Legaspi on ship board from whence plaintiff was to transport it to the bridge site fifty-one kilometers inland.
- That defendants furnished all the steel required, namely, 38,582 kilos. 27,056 of the 38,582 kilos, that is, three-quarters of all the steel to be furnished, were delivered at Legaspi on July 26, 1913; 3,636 kilos on August 4, and 7,890, the last delivery under the contract and about one-sixth of the whole, on September 1. Note in this connection that it is admitted that the cement which arrived in Legaspi on July 20, or thereabouts, could not be transported to the bridge site on account of the condition of the roads caused by the rains. Note, therefore, that the steel could not be transported from Legaspi to the bridge site for the same reason. In other words, plaintiff was just as late with his cement as the defendants with their steel, even admitting that defendants were late at all in its delivery.
- That the plaintiff could have begun the transportation of the steel at the same time that he actually began the transportation of the cement; that when he began the transportation of the cement from Legaspi to the bridge site on the Argos River in an automobile truck he found that (plaintiff's own words) "the recent rains so softened the road beyond Polangui that it was impossible to send a loaded truck over it with any assurance of safe arrival of the cargo of cement at Argos River in good condition."

Under these undisputed facts, and plaintiff's own statement already discussed, what act of defendants caused the failure of plaintiff, conceded by all, to complete the construction on time? When we note that plaintiff's sole contention is that the failure of the defendants to deliver the steel in time caused his delay and then compare that contention with the foregoing admitted facts, the contention becomes ridiculous. The claim that plaintiff was hindered and delayed by defendants' alleged failure to deliver the steel is, in the face of the admitted fact that the steel was at Legaspi almost as quick as plaintiff's cement, that no attempt to transport the cement from Legaspi to the bridge site was made until after the steel arrived in Legaspi, that the transportation of the cement was at that time impossible, that, therefore, no cement was at the bridge site until the last week in October, that the piles were not cast until November 22, that they would not be driven until December 15, and that the pile driver did not arrive until January, 1914, so devoid of merit as not to be entitled to serious consideration.

It must be remembered that, under the contract of construction, plaintiff himself was to deliver everything at the bridge site on the Argos River, including the steel. The defendants discharged their obligation as to the delivery of the steel when the ship bearing it stood ready to unload in the harbor of Legaspi. The plaintiff was to transport it from there to the bridge site. He was to furnish and deliver there all machinery, tools, and implements necessary to complete the bridge within the time specified in the contract, November 1, 1913; yet he did not begin to transport his cement from Legaspi to the bridge site until after the steel arrived in Legaspi, his cement did not reach the bridge site until the last week in October, the piles, the driving of which was the very first act in the construction of the bridge, as they were the foundation thereof, were not cast until November 22, and were not ready to be driven until the 15th of December, and the pile driver itself was not on the ground until the month of January, 1914. It is admitted that the steel could not be used and, therefore, was not needed at the bridge site until the cement arrived there, as the steel was to reenforce the cement piles; and that plaintiff did not begin to cast the piles until November and they were not completed until November 22. Defendants delivered three-fourths of the steel required by the 26th of July. Another delivery was made a few days later and the balance, about one-sixth of

the whole, was at Legaspi September 1. Therefore, if plaintiff did not begin to cast the piles until November, certainly it was not due to any act of defendants as they had delivered the steel at Legaspi three months before that date, and substantially as soon as he had delivered the cement and before plaintiff was prepared to begin the transportation of his materials from Legaspi to the bridge site.

It is a proposition of law set down in plaintiff's brief on appeal that, before the delay of defendants can be of service to the plaintiff in the defense offered for his failure to perform on time, it must have delayed plaintiff, i. e., defendants' delay must have caused or contributed materially to plaintiff's delay; and plaintiff cites many authorities to that effect. Among them are the following:

"It is a well settled rule that, where one party demands strict performance as to time by another party, he must perform on his part all the conditions which are requisite in order to enable the other party to perform his part; and a failure on the part of the party demanding performance to do the preliminary work required in order to enable the other party to complete his within the time limited, operates as a waiver of the time provision in the contract." (Dannat vs. Fuller, 120 N. Y., 554.)

"There is no question with respect to the law applicable to the case, for by the express terms of the contract, as well as under the general rule of law, the time prescribed by the contract for the performance of the plaintiff's work was abrogated by the owner's delay, and the plaintiff had a reasonable time under all the circumstances for completing performance after the expiration of the delay caused by the owner." (Levering & Garrigues Co. vs. Century Holding Co., 160 N. Y. Supp., 649.)

"The courts have laid down a very salutary rule to the effect that they will not attempt to apportion such delays where the causes thereof have been mutual, but will refuse under the circumstances to enforce the penalty." (Jefferson Hotel Co. vs. Brumbaugh, 168 Fed., 867.)

"Where the parties are mutually responsible for the delays, because of which the date fixed by the contract for completion is passed, the obligation for liquidated damages is annulled and, in the absence of some provision under which another date can be substituted, it cannot be revived." (Mosler Safe Co. vs. Maiden Lane Safe Deposit Co., 199 N. Y., 479.)

"Here the delays of the Government prevented the claimant from a strict performance, and thereby it waived the contract time within which to perform, and that waiver operated to eliminate the definite date from which to assess liquidated damages * * *. Whatever loss the Government may have suffered by reason of the claimant's breach to perform within a reasonable time must be reduced to actual damages, if any, susceptible of proof." (United Engineering & Contracting Co. vs. United States, 47 Court of Claims, 489.)

"The same doctrine is found in Allen vs. Province of Bulacan, post, p. 875.

These cases assert expressly or impliedly the proposition that, if the owner's failure to fulfill does not cause or contribute materially to the contractor's delay, then the latter is not excused for failure to perform within the time specified; and he cannot take refuge behind the delay of the owner. If the owner's delay does not hinder the contractor, does not in the slightest degree impede or interfere with his progress, it does no harm, is immaterial, and produces no effect; and it cannot, therefore, be made the basis of an excuse for the contractor's failure to perform.

In the case before us, even admitting a delay on the part of defendants in delivering the steel at Legaspi, still it was delivered before plaintiff began to transport his cement from Legaspi to the bridge site, long before plaintiff could possibly use it, as his cement did not reach Legaspi until just before the steel arrived there and did not reach the bridge site until the last week in October, could not be used by the plaintiff until November, and the piles made therefrom could not be driven until the pile driver arrived in January. If it is a fact, and plaintiff admits it, that (I use plaintiff's own words) "It was not until early in October, therefore, that sufficient steel and cement were

delivered at the Argoa River to warrant beginning the work of casting the piles/" then certainly the delivery of the steel by defendants in July and August could not have contributed in the slightest to plaintiff's delay. It could not have prevented his getting the cement at the bridge site. It could not have prevented his getting the steel at the bridge site as he could have begun the transportation of the steel, as he did his cement, from Legaspi the last of July, as three-quarters of the steel was delivered on the 26th of July at Legaspi. Instead he did not transport either the steel or the cement until the month of October, or the very last part of September according to his own admission; and he did not begin the transportation of his cement until after the steel arrived. Moreover, and this is also important, the steel arrived at the bridge site as soon as the cement. How, then, did the failure of the defendants to deliver at Legaspi before July 26 hinder or delay plaintiff? There is only one answer to this query: It did not affect plaintiff's progress in the slightest degree. Why should effect be given to something which in the very nature of things can produce no effect? An athlete who is to run in a race to be held on June 1 makes a contract with a dealer to hire a pair of racing shoes for the occasion, the dealer agreeing to deliver the shoes on the race track at 9 a. m. of June 1. On May 31 the athlete loses both legs in an accident. The dealer, learning of the accident, does not deliver the shoes as agreed. Can the athlete legally claim that he lost the race or was injured or prejudiced in any manner because of the failure of the dealer to deliver the shoes as agreed? Certainly not; but why? Because neither law nor common sense requires the doing of an idle and useless thing. What, then, can and should be said of a decision of a court which holds that the failure of the shoe dealer to deliver the shoes at the race track at 9 o'clock in the morning of June 1 caused or materially contributed to the failure of the athlete to win the race, although at the very moment when the race took place he was in the hospital with both legs off. Nevertheless that is what this court would have to hold if it followed the principles enunciated in this decision. Take another view of it. An owner of a city lot makes a contract in June to construct a house thereon, to be completed November 1, the contractor to furnish all labor and materials, tools, implements, etc., except that the owner was to furnish the roofing shingles which, under the contract, were to be delivered on the ground July 1. Could the contractor, who did not complete the house until the first of April of the year following the making of the contract, successfully defend an action for breach of contract brought by the owner by proving that the latter did not deliver the roofing shingles until July 26 instead of July 1, when the contractor, at the same time, admitted that he did not even break ground for the foundation of the house until the month of October, and that he could not possibly have used them before November even if he had had them? Certainly not. The contention is, of course, unsustainable that the failure to deliver the roofing shingles at the time agreed on caused delay when they were actually delivered before the foundation of the house was even laid and months before the contractor could, under any circumstance, have used them. Nevertheless that is, in substance, the contention which, in my judgment, this court has sustained in this case. It has held that the failure of the defendants to deliver steel for reenforced concrete piles to be driven as the foundation of a bridge caused a delay to the contractor in the construction of the bridge from November 1 to the 31st of March following, although the steel was actually delivered in Legaspi before plaintiff began the transportation of his cement to the bridge site and could have been, and as a matter of fact was, transported at the same time as the cement, was actually delivered months before the contractor could possibly use it, months before the cement he himself was to furnish was on the ground, months before he was able to begin casting the piles, and nearly six months before he had even obtained a pile driver with which to sink the piles. Such a decision, it seems to me, overrules the unquestioned doctrine that a breach of contract will be disregarded where absolutely no injury results therefrom (*Lassing vs. James*, 107 Cal., 348). It is contrary to the principle that the delay of the owner will be disregarded unless it causes or materially contributes to the contractor's delay (*Allen vs. Province of Bulacan*, post, p. 875; *Dannat vs. Fuller*, 120 N. Y. (554; *Levering & Garrigues Co. vs. Century Holding Co.*, 160 N. Y. Supp., 649; *Cheney vs. Libby*, 134 U. S., 68; *Erickson vs. U. S.*, 107 Fed., 204; *Missouri Bridge & Iron Co. vs. Stewart*, 134 Mo. App., 618; *District of Columbia vs. Camden Iron Works*, 181 U. S., 453; *Willis vs. Webster*, 27 N. Y. Supp., 354; *Weeks vs. Little*, 89 N. Y., 566; *Ocorr &*

Rugg Co. vs. City of Little Falls, 178 N. Y., 622; Manistee Iron Works vs. Shores Lumber Co., 92 Wis., 21; Wyant vs. U. S., 46 Court of Claims, 205; Smith vs. United States, 48 Court of Claims, 235). It is opposed to the rule that the failure to perform of any party to a contract will not excuse performance by the other unless the breach is material or such as prevents the other party from performing his part. (See cases above cited.)

Plaintiff claims that the defendants did not deliver the steel at Legaspi until the rainy season had commenced and the roads were impassable. "But," reply the defendants to the contractor, "you did not deliver the cement in Legaspi until after the rainy season had commenced and the roads were impassable and you began the transportation of the steel as soon as you actually began the transportation of the cement;" and they say to him: "How could you have used the steel without the cement? What difference would it have made if we had delivered the steel the first day of June and it had arrived at the bridge site the 2d day of June (although the contract was not made until the 26th of June) ? Your cement was not there till the last week in October and the steel could not have been used without the cement. Nothing could have been done with it no matter how early it may have been there. It would have had to lie there from June 2d to the last week in October without the possibility of being used. How can you claim that we delayed you when, by reason of your own negligence and incompetency, you could not have used the steel no matter how early it might have been delivered at Legaspi or at the bridge site? How can you say that you would have completed the bridge by November 1 if we had delivered the steel at Legaspi earlier than July 26, in the face of your own admission that you were wholly unable to deliver the cement at the bridge site until the last week in October; in the face of your own admission that the concrete piles were not cast until November 22; in the face of your own admission that they were not ready to be driven until December 15; and in the face of your own admission that you were wholly unable to get the pile driver on the ground until the month of January, 1914?"

Not only is the decision contrary to the evidence of plaintiff, as I view the record, but two of the three defenses which the court establishes in favor of the plaintiff to protect him against his failure to perform in time were not presented as defenses in this case. These two "defenses" are the quarantine and the change in plans. They were not offered or considered as such in the court below; nor were they offered as such in this court. The sole defense which plaintiff has presented in this case, and it is one which he did not think of offering when he prayed for an extension of time December 1, is that the defendants did not deliver the steel at Legaspi so that the plaintiff could transport it to the bridge site before the roads became impassable from rains. This is the only defense alleged, offered or presented anywhere in the case.

To demonstrate the truth of this statement let us take first the allegations on plaintiff's own pleadings as to his defense for his failure to perform on time, and there are his only allegations on that subject. His complaint states:

"That plaintiff fully and faithfully complied with all the terms and conditions of the said contract on his part to be performed, and duly completed and delivered to defendants the said bridge, and that the same was duly accepted by said defendants.

"That the defendants, in violation of the aforesaid contract, and notwithstanding repeated requests on the part of plaintiff, failed, neglected, and refused to furnish and deliver to plaintiff, at reasonable times as required and requested by plaintiff, and at the places agreed upon the reinforcing steel necessary for the proper construction of the said bridge, thereby hindering and delaying plaintiff in the performance of his part of the said contract; that the first partial delivery of the said steel was completed in Legaspi on or about July 10, 1914, and complete delivery was not made until September 30, 1914, in the said port of Legaspi; that at the time said steel arrived the rainy season had commenced, and had so softened the direct roads, means of communication between Legaspi and the site of the said bridge, that plaintiff was compelled to incur extra expenditure for the hauling of said steel, to wit, the sum of P2,000 which said sum, notwithstanding repeated requests of plaintiff, has not been paid, nor any part thereof, by defendant to plaintiff."

The latter allegation is made for the purpose of obtaining pay for extra work rather than as a defense of his failure to perform on time; but it shows plaintiff's theory as to the cause of his delay. At that time there appears to have been no thought of the quarantine or the change in plans as being primarily involved in causing his delay. The whole theory was simply that failure to deliver the steel before the rains set in and softened the road waived the time requirement in the contract.

Let us take, second, the opinion of the trial court[1] with reference to the matter under discussion here. The trial court said:

"The third cause of action is for the recovery of P2,000 as extra expenses caused plaintiff by the failure of defendants to deliver the steel for the bridge within the time specified by the plaintiff."

Further on the opinion of the trial court said:

"James, the representative and attorney-in-fact of the plaintiff, the person who had full charge and control of the construction of the bridge on the Argos river, testifies that the steel was delivered between July 26 or 27 and the first week in September, 1913; that when the steel arrived the rainy season had begun and it was impossible to transport the materials from Polangui—a town in the Province of Albay—to the bridge site except by vehicles drawn by carabaos; that the result was not only a loss of time in the transportation of the materials but extra expense also."

This is the only discussion in the opinion of the court below relative to plaintiff's defense of his failure to perform in time. Nothing is said of quarantine or change in plans.

Let us take, third, the brief of plaintiff-appellant in this court[1] and ascertain from it what question he desired to present to this court. From that brief, the material parts of which will be found in a foot-note, it is clear that plaintiff neither presented nor relied upon either the quarantine or the change in plans as a defense to or an excuse of his failure to perform. Neither is mentioned or even suggested in the argument. On the contrary they are impliedly rejected. Counsel says:

"The date stipulated in the final contract, signed on June 26, for the completion of the bridge, was September 1, 1913,[1] and defendants' right to retain any sum as a penalty or liquidated damages must depend upon the contractor's failure to finish the bridge by that date. It is true that the bridge was unfinished on September 1, but it is readily shown by defendants' own evidence that the failure to finish the bridge by September 1 was caused by their own delay in furnishing the necessary steel. * * * If the decision of the trial court is correct, defendants may mulct the contractor for liquidated damages because he did not complete a reinforced concrete bridge the very day on which they furnished the materials."

From this quotation it is clear that there is no place in counsel's theory for the defense of quarantine or of change in plans. What did the mischief, from plaintiff's point of view, was the failure of the defendants to finish delivering the steel at Legaspi, more than 51 kilometers from the bridge site, until September 1, the very day on which the bridge was to be completed; and he triumphantly asks the question how could the plaintiff be expected to complete the bridge on the very day the steel arrived. To this sole contention plaintiff's brief joins the proposition of law that, "Time was the essence of the contract, and defendants, by making it impossible for plaintiff to complete the bridge on September 1, waived that date, and could only hold plaintiff to a reasonable time for performance." This theory excludes both the quarantine and the change of plans as an excuse for failure to perform on time. If counsel had discussed the question of whether the plaintiff performed within a reasonable time after September 1, then it is possible that quarantine and change of plans might have been pertinent, if they had been pleaded as such, a point which we now come to consider.

From these observations it is clear that at no stage of the proceedings in this action has plaintiff claimed as an

excuse for his failure to complete the bridge on time that he was prevented from doing it by a quarantine of animals or by a change of plans. Every pleading he has filed, every argument he has made, every word he has uttered, is not only foreign to but excludes the possibility of their being urged in his favor; and the only guide which this court has to do justice between the parties, that is, that which, if we may so, frames the issues in this court and tells it on what theory the parties have proceeded and desire to proceed, the question they present and wish to have decided, namely, the briefs filed by the parties in this court, not only fails to present the defenses on which this court absolves the plaintiff for his failure to perform, but the theory on which the appellant relies excludes such defenses from consideration by this court.

But there is an additional consideration which, of itself, shows, in my humble judgment, that the decision of this court is erroneous in that regard. Neither of these defenses was pleaded by plaintiff in reply to the defenses offered by the defendants to plaintiff's complaint. In their answer the defendants deny the allegations of the complaint that plaintiff fully performed according to its terms his part of the contract and allege that he negligently failed to complete the bridge within the time agreed and that they were greatly damaged thereby. The only issue framed by the complaint and answer was whether plaintiff completed the bridge within the time specified in the contract. They raised no question as to the failure of defendants to perform as agreed. The plaintiff having alleged in his complaint performance strictly in accordance with the terms of the contract could not be presumed to have later alleged that he did not perform in accordance with the terms of the contract but, on the contrary, failed so to perform, at the same time adding that such failure was due to the breach of contract of defendants. Plaintiff made no reply to defendants' charge of failure to perform; and therefore framed no issue on that subject except the one already framed by the complaint and answer referred to, namely, whether plaintiff actually performed in accordance with the terms of the contract, not whether he was excused for or justified in his failure so to perform. It is true that, notwithstanding the failure of a plaintiff to reply to new matter in an answer constituting in itself a cause of action, it is deemed to be denied, nevertheless it is a mere denial and cannot be considered to be an allegation of a special defense to the cause of action set out in the answer (sec. 104, Code Civ. Proc.). It is simply a general denial; it is not a special defense, or a plea of confession and avoidance, such as, in effect, would be the plea that plaintiff failed to perform but that his failure was excused and justified by certain acts of the defendants.

Nor did the pleadings present an issue on the question of quarantine. If a defense at all, it is one under article 1105 of the Civil Code which provides that:

"No one shall be held liable for events which could not be foreseen (viz major) or those which, even when foreseen, were inevitable, aside from the cases expressly stated by law or those in which the obligation so declares."

This defense is one that must be specially pleaded. It is not one which can be proved under a general denial.

It is apparent from what has been said that the pleadings raised no issue with respect to an excuse for or justification of plaintiff's breach based either on defendants' failure to perform, or in a change of plans, or in the happening of a fortuitous event, which prevented timely performance on plaintiff's part. All these are special defenses excusing a failure to perform on time and must be specially pleaded. They cannot be proved under a general denial; and especially not when plaintiff's own pleading affirmatively alleges, as does the complaint in this action, full performance on his part in strict accordance with the terms of the contract. If defendants were to be charged with a breach of contract they had a right to be notified of that charge by plaintiff's pleadings and be given an opportunity to defend themselves in that regard. The mere allegation by plaintiff of a complete performance in accordance with the terms of the contract and a denial of full performance by the defendants coupled with an allegation of failure to perform on plaintiff's part does not raise such an issue as would permit the

introduction of evidence tending to show a breach of contract on the part of the defendants.

The pleadings, therefore, were not framed with the intention or for the purpose of charging the defendants with a breach of contract which should form the basis of an excuse of the failure of the plaintiff to perform the contract according to its terms.

While, however, there was no issue framed by the pleadings with respect to the failure of the defendants to deliver the steel at Legaspi in accordance with their contract with the plaintiff, that question was raised in the trial court by the plaintiff without objection on the part of the defendants and was there passed upon by the trial court and has been presented to this court by the briefs of counsel. We have the right and it is our duty, therefore, to determine that question although the pleadings filed by the parties do not in law present such an issue or raise such a question (*Lizarraga Hermanos vs. Yap Tico*, 24 Phil. Rep., 504). The other two defenses found by the court in favor of the plaintiff were not so raised on the trial or passed upon by the trial court and were not presented by briefs of counsel on this appeal. We have, therefore, no authority to consider those defenses. To give the plaintiff the benefit thereof would be to surprise the defendants who had never been notified that the plaintiff claimed any such a defense and have never had an opportunity to meet it.

In my judgment there is no ground for the finding of the court that the defendants actually failed to comply with their contract in the delivery of the steel at Legaspi. I am unable to find any evidence in the record to establish such a breach of contract. Even though we admit that the plaintiff alleges it, the defendants stoutly deny it and plaintiff has not offered evidence to sustain his allegation. The contract for the construction of the bridge itself does not mention the time when the steel shall be delivered. There is no evidence in the case showing what the contract or arrangement was between the parties relative to the time of the delivery of the steel. There is no evidence to show when the plaintiff ordered the steel. There is some evidence to the effect that before the contract was signed the plaintiff gave to the district engineer of the department of public works of the Philippine Islands a list of the steel which would probably be required. There is not, however, a scintilla of evidence in the record showing that there was an agreement as to when the steel should be delivered, or at what time the defendants were required to have it at Legaspi for transportation to the bridge site. From the signing of the contract on the 26th of June forward, the record is naked of evidence showing that the plaintiff ordered any steel of the defendants or that he ordered it delivered at any particular time. There being no evidence as to when the steel was ordered there can be no assumption as to when the steel was to be delivered; and there being no evidence as to when the steel should be delivered there can be no assumption that it was not delivered as required by the contract. But, says plaintiff, it was certainly intended that the steel should be delivered before the time when the bridge should be completed under the contract. But precisely the same may be said with regard to the cement. The cement was not all delivered at the bridge site until the last week in October and was not delivered in Legaspi until the last part of July, about the same time that the steel was delivered. Certainly, if the defendants delivered the steel, or such portions as would give the plaintiff the opportunity to begin his work without delay, as quickly as plaintiff himself delivered his cement, there can be no presumption or claim that the steel was not delivered in time or that it was not delivered in accordance with the contract. Defendants delivered at Legaspi three-quarters of the quantity of steel finally used in the construction of the bridge substantially as soon as plaintiff delivered his cement at Legaspi; and there is no evidence whatever to show that if all of the steel had been required at that time or at any particular time the defendants could not have furnished it as required. Why should the defendants be presumed to have broken their contract for a failure to deliver the other sixth of the steel in Legaspi when none of plaintiff's cement then in Legaspi could be transported to the bridge site to be used in any way? All that any contract could have required of defendants was that they deliver at Legaspi as fast as the plaintiff needed it. It is clear that plaintiff did not need the steel either at Legaspi or in any other place until his cement was delivered at Legaspi and there was a possibility of its being transported to the bridge site. There can be no presumption that defendants

broke their contract to deliver the steel when, if it had been delivered the 1st day of June, 1913, and had been transported to the bridge site on the 2d day of June, it could not possibly have been used by the plaintiff until the last week in October, which was the time when his cement arrived at the bridge site.

I repeat, therefore, that there is no evidence in the record showing what the agreement of the parties was as to the delivery of the steel and, therefore, there is no evidence showing that the defendants were guilty of a breach of contract in the delivery of the steel; and especially is there no evidence in the record showing that even if there was a breach of contract, it prejudiced the plaintiff in the slightest degree.

While the plaintiff claims that the contract provides that the bridge should be completed by the 1st day of September, 1913, the defendants contend that it was to be completed on or before the 1st day of November of that year. It is true that the written contract provides that the bridge shall be completed on or before the 1st day of September. That, however, was found by the trial court, upon evidence, to be a clerical error and the date should have been November 1. Fixing the date of completion at September 1 would make the delivery of the steel by the defendants at Legaspi in the last part of July appear so late as compared with the date when the bridge should be completed as to show that the defendants prevented the plaintiff from completing the bridge on time. If the date when the bridge was to be completed was September 1 and the delivery of the bulk of the steel did not occur until the last part of July, the argument that defendants prevented the plaintiff from completing the bridge on time would be much stronger than if the date of completion was November 1st. As we have seen from plaintiff's brief, he has made full use of that argument Plaintiff forgets, however, that the earlier he makes the date of completion the worse it is for him. His cement did not arrive in Legaspi until the latter part of July and it was not delivered at the bridge site until late in October. His cement piles were not ready for driving until December and his pile driver did not arrive on the ground until January.

I think my position in this case is fully supported by the decision in the recent case of *Allen vs. Province of Bulacan*, post, p. 875. That case is very much the same as the case at bar; and involved many of the same questions, including that of the failure of the province to deliver the steel in time, thereby causing a delay in the completion of the bridges which plaintiff in that case had agreed to build for the defendant province and to complete on or before a given date. There was in that case also the construction which should be given to a letter directed by the plaintiff to the provincial board asking for an extension of time. That letter is very similar in tone and substance to that involved in the case at bar. In order to show that fact, as well as to demonstrate the different views taken by the court of these two letters, I quote it:

"Malolos, Bulacan, July 25, 1913.

'Gentlemen: I have the honor to inform you that the earliest date at which I could procure a proper kind of cement and in a sufficient quantity for beginning work on the Malolos-Hagonoy and Malolos-Calumpit Bridges, was June 16. The inclosed letter from Messrs. Findlay, Richardson to the honorable board explains the difficulty.

The notification of the awarding of the contract to us was forwarded by the Director of Public Works during the last week in February. During that same week the cement dealer made delivery of the last of an order placed in August, 1912, for an Ilocos Sur contract, but until the abovementioned date (June 16) made none for the work in Bulacan.

"Therefore, gentlemen, in view of this unavoidable delay in the starting¹ of work requiring this essential material, for its construction, I have the honor to request an extension of time beyond August 1, for completion of said bridges, of one hundred and ten (110) working days, which is approximately the loss of time incurred by non-delivery of cement.

"The piles have already been cast at Paombong, Sapang Patay, and Pinagtulayan Rivers, and will be cast at Baungun the coming week and immediately following that at Kalumpang Creek. Driving of these piles commence at an early date.

Trusting that will receive your consideration from the point of view that delays such as in this instance are not to be foreseen and justify an extension of time, I am.

"Very respectfully yours,

(Sgd.) "Frank T. James, Contractor.

"The Honorable Provincial Board,

"Province of Bulacan, Malolos.

"Through the District Engineer."

Concerning the letter just quoted and the alleged failure of the defendant to deliver the steel in time, this court said in that case:

"The foregoing testimony and exhibits establish beyond question that the failure on the part of the province to deliver the steel earlier, after the contract had been executed, did not in any way cause the delay in completing the bridges nor contribute thereto. James, in his letter of July 25 to the provincial board, stated that the earliest date that he could procure the proper kind of cement and in sufficient quantity to begin work on two of the bridges was June 10; that the piles for two others had been cast; that the piles for the fifth would be cast the following week; and that the driving of the piles would commence at an early date. Not a word was said in this letter about the steel not being delivered in time. In fact, out of the twenty-seven shipments of steel all had arrived before June 1st except four and these four were to be used in the Kalumpang Bridge, which, as late as November 3, had hardly been commenced, the piles only having been cast. The three rolls of wire mesh which were substituted for the defective ones did not arrive until October 14, nevertheless, they could not be used before November 3 in either of the bridges, with the possible exception of Paombong, as James in his letter of that date states. The three rolls were so small a portion of that kind of material that their delay certainly could have made no difference, especially when taken into consideration with the condition of the work even on November 3.

"As the province did not cause any delay in the construction of the bridges by reason of not having delivered the steel earlier after the signing of the contract, consequently, it is self-evident that no delay was caused by reason of the failure to order the steel before that time."

Are not these remarks equally applicable to the case at bar under the facts ?

One of the strange features of the case is that, while defendants admit that there was an extension of time to complete the bridge from the first of November till the 15th of February and offer the plaintiff the benefit of that extension, plaintiff contends and asserts that there was no extension of time and he rejects the benefits which defendants offer him arising from that fact. Plaintiff says in his brief:

"It is true that plaintiff, through his agent, requested an extension of time; but that he refused to agree to the defendants' proposition is plainly shown by the resolution of the provincial board of Ambos Camarines (defendants' Exhibit 5)."

Another statement in the brief is to the effect:

"There was no agreement for the substitution of another date in this case. Defendants arbitrarily set the time for completion as February 15, 1914—an arrangement which was never agreed to by the plaintiff."

If there was no extension of time then the defendants would have been entitled to recover P25 a day for every day of delay specified in the contract from November 1 to March 31. They only ask, however, for damages from February 15 to March 31. That much they are entitled to under the decision in *Allen vs. Province of Bulacan*, *supra*.

I am of the opinion, therefore, that the amount of the recovery should be reduced by the amount of damages proved.

[1] The following is the opinion of the court below:

The complaint contains four causes of action.

It alleges in the first place that the plaintiff and the defendants executed a contract whereby the former agreed to perform all the labor and furnish the necessary equipment and materials for the construction and termination of a bridge at a point situated on the boundary line between the Provinces of Albay and Ambos Camarines, which provinces agreed to pay to the plaintiff for this work P30,810. Of this sum there still remains to be paid P1,590, according to the plaintiff: hence the first cause of action, to wit, the recovery of this amount.

The second cause of action is for the purpose of recovering P200, the price of 16 steel bars which the defendants bound themselves to deliver to the plaintiff for the construction of the said bridge and which, notwithstanding the stipulations in the contract were not furnished by the defendants.

The third cause of action is for the recovery of P2,000 as the amount of the extra expenses caused the plaintiff by the defendants' failure to deliver within the time specified by the plaintiff the necessary steel for the construction of the bridge.

And the last cause of action is to recover P1,790, the value of certain additional work performed on the bridge at the defendants' requirement.

Under these different causes of action the total amount claimed is P5,580.

The defendant provinces, through their authorized legal representatives, filed an answer which contains not only a general denial of the allegations of the complaint but also several special defenses, all of them tending to show that the plaintiff has absolutely no right whatever to claim any sum from the defendant provinces.

The work entrusted to the plaintiff was the construction of a reenforced concrete bridge across the Argos River which forms the boundary line between the Provinces of Albay and Ambos Camarines. On June 26, 1913, the plaintiff and the Director of Public Works entered into a contract to that effect, the former [latter] in representation of the aforementioned provinces. The price of the contract was fixed at P30,690. The plaintiff engaged not only to perform the work of constructing the bridge, but also to furnish all the materials and necessary machinery; but it was agreed that in case the necessary steel were furnished by the interested provinces, its value, at the rate of eleven centavos for each kilo of steel furnished, should be deducted from the stipulated price and that this steel was to be delivered by the defendants and received by the plaintiff at the latter's risk, at ship's side in the Port of Legaspi (Albay). The date fixed for the termination of the work was September 1, 1913, but, at the request of the plaintiff himself, the provincial boards of Albay and Ambos Camarines decided to grant him an extension of time until February 16, 1914, on condition that the plaintiff should pay, as losses and damages for the delay, the expenses occasioned the defendants by the inspection of the work and the maintenance of a raft or ford there was in and across the Argos River for the passage of vehicles and pedestrians from one bank to the other—expenses which amounted to P386.45.

The work, however, was not turned over until April 1, 1914, that is, until thirty-seven days after the last date fixed for the completion of the bridge.

In settling the amount of what was owing Mr. Allen for the construction of the bridge, the provincial boards of Ambos Camarines and Albay decided to deduct from the stipulated price the sum of P1,301.45, itemized as follows:

Cost of inspection, from November 1, 1913, to February 15, 1914

P175.03

Operation and maintenance of the ford, November 1, 1913, to February 15, 1914

201.42

Liquidated damages for thirty-seven days, February 15, to March 31, 1914, inclusive, except Sundays and holidays, at the rate of P26 per day

926.00

Total sum to be deducted from the contract price

1,301.45

The plaintiff admitted that he had been paid the price of the contract, less the sum of P1,301.45, plus P120 for cement analysis made by the Government and P87.04, the value of the steel that he did not receive.

In view of the terms and conditions of the contract and the documents accompanying the same, the defendants are entitled to recover from the plaintiff the sum of P25 as liquidated damages for each day that elapsed from the date when he should have completed the work.

From the testimony given by Mr. James, the plaintiff's representative and attorney in fact and the person who had charge of the construction work on the bridge across the Argos River, it appears that he received the steel necessary for the work on the bridge, between the 26th or 27th of July and the first week in September, 1913. When the steel arrived the rainy season had commenced and it was then no longer possible to transport the materials from Polangui, a town in the Province of Albay, to the bridge site, except by carabao carts, and this was the cause, not only of the delay in the transportation of the materials to the place where the work was performed, but also of the extra expense. However, Mr. James' testimony shows that all the materials were delivered at the place where the construction work on the bridge was performed during the last week of October.

In order that the plaintiff may be relieved from the payment of P25 for each day of the delay, he must prove that he was in no manner responsible for the delay. On the other hand, the record in this case does not show that the defendant provinces were to blame for the failure to complete the work between the 1st of November, 1913, and the 15th of February, 1914, a period of three and one-half months.

Mr. James himself suggested to the provincial boards of Albay and Ambos Camarines the date of February 15, 1914. If the plaintiff already had all the materials for the work at his disposal toward the end of October, 1913, the defendants are not responsible for the plaintiff's inability to finish the work within the period of time he himself requested.

The real reason why the bridge was not finished on February 15, 1914, appears to be suggested by the testimony of J. T. Marshall, district engineer of Albay and Ambos Camarines at the time of the building of this bridge. This reason was that the work of casting the piles was not commenced until very late, about the middle of October,

1913, and they were begun to be driven only on January 1, 1914; all this was due to the fact that the proper machinery for the purpose was not on the ground and that it only arrived there about December 25, 1913. Had the required machinery been on hand in October, the bridge could have been finished about February 15, 1914. Therefore the delay was due to the plaintiff's own negligence and he is not entitled to recover the amount which was deducted by the defendant provinces as liquidated damages; still less is he entitled to recover the amount retained by the defendants for cost of inspection and for the maintenance of the ford, for these conditions were imposed upon the plaintiff and were accepted by him when he was granted an extension of time within which to finish the work on the bridge.

The claim for the value of the 16 steel rods, the second cause of action, has not been supported by any evidence at the trial and therefore must be disallowed. On the contrary, Exhibits 2, 2-a, 2-b, 2-c, and 2-d, show that the plaintiff by his agent B. F. Mills received all the steel that was furnished by the Province of Albay.

The claim of P2,000 for extra expenses incurred by the plaintiff in the transportation of materials from Legaspi to the bridge site, is wholly unfounded inasmuch as the sole obligation undertaken by the defendants in the contract was that of delivering the materials to be furnished by them, in the Port of Legaspi at ship's side. It is immaterial that the delivery might not have been made in time, for this could only afford the plaintiff ground for a claim in the event that such delay had been the cause of hindering the progress of the work.

The last cause of action is founded on the allegation that, at the defendants' request, an alteration was made in the construction by raising the bridge about 42 centimeters. The record does not disclose that this alteration was authorized in writing either by the Director of Public Works or by the defendant provinces; therefore, in accordance with paragraphs 18 and 22 of the instructions to bidders, which are a part of the contract, no payment can be made on account of this change or alteration.

What occurred was this: After the contract had been signed, it was verbally agreed by and between the then district engineer Von Schmelling and Mr. James, the representative of the plaintiff-contractor, that the piles should be only nine meters long instead of eleven, provided that, were it necessary for them to be of greater length, the plaintiff would make good the difference, at his own cost, either by building up the difference on the piles themselves or by increasing the thickness of the top and head of the bridge. Subsequently, about October 11, 1913, there was a flood and it was observed that the water rose 15 centimeters more than the highest water-mark indicated on the plan. Harrison, the district engineer, then suggested to Mr. James that he should raise the bridge instead of lowering it, to which Mr. James and Mr. Emerson agreed, as to do so meant the same amount of work, steel and concrete, and perhaps a little less; no demand was made for the payment of an additional amount for this work, therefore the plaintiff is not entitled to recover on this account.

For the foregoing reasons, the defendant provinces should be absolved from the complaint, with the costs against the plaintiff.

[1] The following are the assignments of error and the argument of plaintiff-appellant in the Supreme Court:

ASSIGNMENT OF ERRORS.

Now comes appellant, by his undersigned counsel, and avers that in the trial of the above entitled cause, in the Court of First Instance of the city of Manila, there was manifest error, prejudicial to appellant, in this, to wit:

- That the said court found in its decision that the delay in completing, the work under the contract in question was due to the fault and negligence of the plaintiff.
- That the said court did not find in its decision that the delay in completing the work under the contract in

question was due to the fault and negligence of the defendants.

- That the said court found in its decision that defendants were entitled to deduct a certain part of the amount due from defendants to plaintiff, under the said contract, as a penalty or liquidated damages.
- That the said court found in its decision that the defendants were entitled to deduct a certain part of the amount due from defendants to plaintiff, under the said contract, for expenses incurred in the operation of a ferry.
- That the said court found in its decision that the defendants were entitled to deduct a certain part of the amount due from defendants to plaintiff, under the said contract, for expenses of inspection.
- That the said court rendered judgment in favor of defendants, dismissing plaintiff's complaint, and did not render judgment for the plaintiff for the amount prayed for in his complaint.
- That the said court denied plaintiff's motion for a new trial.

ARGUMENT.

Defendants' claim to the P925 deducted from the contract price of the bridge rests on section 42 of the General Conditions, which was, by agreement, made a part of the contract; reading as follows:

"It is understood that time is an essential feature of the contract herein contemplated, and that, upon failure to complete the said contract within the time stipulated, the contractor will be required to pay the Province of Ambos Camarines the sum of P25, Philippine Currency, per diem, for each day of delay, Sundays and legal holidays excepted, in the completion of the work, the said payment to be made as liquidated damages, and not by way of penalty; and the province may deduct from any sum due or to become due the contractor any sums accruing for liquidated damages as herein stated."

The date stipulated in the final contract, signed on June 26, for the completion of the bridge, was September 1, 1913, and defendants' right to retain any sum as a penalty or liquidated damages must depend upon the contractor's failure to finish the bridge by that date. It is true that the bridge was unfinished on September 1st, but it is readily shown by defendants' own evidence that the failure to finish the bridge by September 1 was caused by their own delay in furnishing the necessary steel. As proven by defendants' Exhibits 2, 2-A, 2-B, 2-C, 2-D, the first shipment reached Legaspi July 26, a month after the signing of the contract, and six weeks after plaintiff's requisition, while the last did not arrive until September 1. If the decision of the trial court is correct, defendants may mulct the contractor for liquidated damages because he did not complete a reinforced concrete bridge the very day on which they furnished the materials.

Defendants' negligence having made it quite impossible for the plaintiff to perform his part of the contract within the time limited, the latter is thereby exempted from liability for liquidated damages, and may be held only for actual damages proven to have been caused by his delay. Time was the essence of this contract, and defendants, by making it impossible for plaintiff to complete the bridge on September 1, waived that date, and could only hold plaintiff to a reasonable time for performance. This view of the case has the support of a long line of American and English authorities:

"When liquidated damages are stipulated, there must be a definite date from which they are to run. If, by the operation of intervening circumstances, the date fixed by the contract has ceased to be operative, and there is no provision in the contract under which another date can be substituted, all right to recover the sum stipulated as liquidated damages has been put an end to, because there is no date from which the penalties can run." (3 Halsbury's Laws of England, 243.)

"It is a well settled rule that, where one party demands strict performance as to time by another party, he must perform on his part all the conditions which are requisite in order to enable the other party to perform his part; and a failure on the part of the party demanding performance to do the preliminary work required in order to enable the other party to complete his within the time limited, operates as a waiver of the time provision in the contract." (Dannat 4 vs. Fuller, 120 N. Y., 554.)

"There is no question with respect to the law applicable to the case, for by the express terms of the contract, as well as under the general rule of law, the time prescribed by the contract for the performance of the plaintiff's work was abrogated by the owner's delay, and the plaintiff had a reasonable time under all the circumstances for completing performance after the expiration of the delay caused by the owner." (Levering & Garrigues Co. vs. Century Holding Co., 160 N. Y. Supp., 649; Erickson vs. U. S., 107 Fed., 204; Missouri Bridge & Iron Co. vs. Stewart, 134 Mo. App., 618; District of Columbia vs. Camden Iron Works, 181 U. S., 453; Willis vs. Webster, 27 N. Y. Supp., 364; Weeks vs. Little, 89 N. Y., 566; Ocorr & Rugg Co. vs. City of Little Falls, 178 N. Y., 622; Manistee Iron Works vs. Shores Lumber Co., 92 Wis., 21; Wyant vs. U. S., 46 Court of Claims, 205; Smith vs. U. S., 48 Court of Claims, 235.)

Even where both parties have been negligent, the courts have constantly held the contractor to be absolved from liability for liquidated damages.

"The courts have laid down a very salutary rule to the effect that they will not attempt to apportion such delays where the causes thereof have been mutual, but will refuse, under the circumstances, to enforce the penalty." (Jefferson Hotel Co. vs. Brumbaugh, 168 Fed., 867.)

"Where the parties are mutually responsible for the delays because of which the date fixed by the contract for completion is passed, the obligation for liquidated damages is annulled, and, in the absence of some provision under which another date can be substituted, it cannot be revised." (Mosler Safe Co. vs. Maiden Lane Safe Deposit Co., 199 N. Y., 479; 37 L. R. A., (N. S.) 363.)

There was no agreement for the substitution of another date in this case. Defendants arbitrarily set the time for completion as February 15, 1914—an arrangement which was never agreed to by the plaintiff (defendants' Exhibits 3, 4, and 5).

The provision for liquidated damages having been waived by defendants' delay, the contractor was bound only to complete the bridge within a reasonable time. If he failed so to do, the defendants might set off against the contract price any actual damage proven to have caused them by his delay beyond such a period. They have produced no such proof of damage, but rather have rested their case squarely upon the penalty clause.

"If the respondent failed to complete within a reasonable time after crediting the appellant's delays, then the latter had a cause of action for the former's neglect, and the measure of damages would be the actual loss proved to have been sustained." (Mosler Safe Co. vs. Maiden Lane Safe Dep. Co., supra.)

Building contracts entered into with the Government of the United States have been a fruitful source of litigation on facts almost identical with those in the present case, and the United States Court of Claims has constantly reaffirmed the authorities quoted above. In *United Engineering & Contracting Co. vs. United States* (47 Court of Claims, 489), Chief Justice Peele, after an exhaustive review of the previous decisions, says:

"Here the delays of the Government prevented the claimant from a strict performance, and thereby it waived the contract time within which to perform, and that waiver operated to eliminate the definite date from which to assess liquidated damages * * *. Whatever loss the Government may have suffered by reason of the claimant's breach to perform within a reasonable time must be reduced to actual damages, if any, susceptible of proof."

The trial court was obviously influenced by the so-called extension of time granted by the defendant provinces after the bridge was finished. It is difficult to see what effect any such extension of offer of compromise could have on plaintiff's right to recover the contract price of the bridge. It is true that plaintiff, through his agent, requested an extension of time; but that he refused to agree to the defendants' proposition is plainly shown by the resolution of the provincial board of Ambos Camarines (defendants' Exhibit 5). If, as we believe, the right to claim liquidated damages was wiped out by defendants' delay occurring before September 1, 1913, the acts of the parties after that date are entirely immaterial, in the absence of proof of specific damage.

The retention of P376.45 for inspection charges from November 1 to February 16, and for the maintenance of a ferry during the same period, was clearly unjustified. Plaintiff never agreed that any such deduction be made, and absolutely no proof was offered at the trial that such charges had ever been incurred.

It is respectfully submitted that appellant is entitled to a reversal of the decision of the Court of First Instance, and to an order for a judgment in accordance with the prayer of his complaint.

[1] The real date was November 1 as will be shown later.

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