

BEAUDRY V. TATE, *et al.*

Contract—Putting en demeure—Diligence.

MONK, J. It appeared that the steamer *Iron Duke* had run aground a little below Longueuil in 1865. On the 11th August the plaintiff entered into an agreement with the defendants to have this boat launched or taken off the rocks. The contract was that the vessel should be removed within fifteen days from that date, the defendants to be allowed \$500. This would bring the period for fulfilling the contract to the 27th. The defendants went to work in pursuance of this contract. Some of the witnesses said there were sufficient labourers at work, and some said there were not. Some of the witnesses stated that the boat was stuck in such a way on the rocks that it was impossible to get her off. Whether that was the case or not, the fact was that they did not get her off; and on the 28th the boat took fire, and was burned to the water's edge. It did not appear that after this they exercised any great diligence to get her off. The boat remained there till the month of December, when she was carried off by the ice, floated down, and sustained great damage. Mr. Beaudry now brought his action for the damage done. The only questions for the Court were, first, did the defendants do diligence? They contended that they had not been put *en demeure*. Mr. Beaudry had never protested them. Mr. Beaudry was there frequently, and if they were not doing what they should have been doing, they say he should have protested them. Now, this putting *en demeure* was generally necessary, but in this case there was a precise limit of time fixed, and this just happened to be one of those contracts where time was of the essence of the contract, and in all such contracts putting *en demeure* was not necessary. Again, it was contended on the part of the defendants, that Mr. Beaudry, being present while the work was going on, acquiesced in the manner in which it was proceeding. But it was not his business to interfere. It was not to be supposed that Mr. Beaudry could judge what was necessary. Then, the Court came to the question, whether in point of fact, the defendants did do diligence. It was pretty well established by the evidence which they

had adduced, that they had three, five, ten men on the spot, and sometimes more. They found that they had made a hard bargain; but if the job was one of such difficulty, they ought to have employed more men. Powell, one of the witnesses, stated that they had all the men they could usefully employ; but the evidence of Lesperance was to the effect that thirty men at least should have been employed; that thirty men would hardly have been sufficient, and that there was no diligence done at all. The witnesses for the plaintiff concurred in saying that the number was altogether inadequate, and it might be easily understood that three or four men were not enough to raise a vessel. His Honour therefore came to the conclusion that the defendants did not do diligence, and that they did not employ sufficient force. The Court came now to another important point in the case, which was of real difficulty. His Honour did not know how far, as a matter of law, the parties employed to launch the boat would be considered to be in possession of her, but he did not think that for all purposes whatever they could be considered in possession of her, especially as Mr. Beaudry had a man in charge of the boat—a man who was described as an idle, drunken loafer, cooking his victuals there. It might be said that the plaintiff had possession of the boat through this man, and the boat having been burned while in his possession, the defendants were not responsible, the accident having rendered it impossible for them to fulfil the contract. On the other hand, if the defendants had launched the boat on the 27th, the fire might not have occurred. The fire, however, not being directly connected with the failure to launch her, the plaintiff could not claim damages for the loss by fire. Even admitting that it was more difficult to launch her after than it was before the fire, the defendants must be held liable for the damage caused by her being carried away, because they should have launched her before the 27th. But there was other evidence that this was not the case, and it stood to reason, inasmuch as nothing but the woodwork was burned and she did not sink any deeper on the rocks, that there could be no greater difficulty in getting her off before the fire than after it. The