1918
May 27.

IN THE MATTER OF THE PETITION OF RIGHT OF
NAPOLEON TRUDEL,
SUPPLIANT,
AND
HIS MAJESTY THE KING,
RESPONDENT.

Contract—Hire—Building contract — Working days—Delay—Damages—Admission—Error—Costs—Interest.

Where dredges or machinery are hired from the Crown by the day, only working days can be charged for. The Crown, by failing to deliver a tug, as required by the terms of the lease, cannot recover the rent therefor, but is not liable for damages to the lessee, more or less remote, by reason of delays in work occasioned thereby.

2. An offer or statement of settlement based on error is not binding and cannot operate as a judicial admission under the Quebec Civil Code.

3. The Crown cannot be held for delays occasioned by it in the performance of a building contract, where by the terms of the contract it was relieved from liability in any such event. The Court, under sec. 48 of the *Exchequer Court Act*, is bound to decide in accordance with the stipulations of the contract.

4. Where a party does not succeed on all the issues of an action, the Court has a discretion to deprive him of the costs.

5. The right of action having arisen in the Province of Quebec, interest upon the amount due under the contract was allowed from the date of the deposit of the petition of right with the Secretary of State.

PETITION OF RIGHT to recover a balance due upon a contract and for damages occasioned in the performance thereof.

Tried before the Honourable Mr. Justice Audette, at Quebec, April 29 and May 1, 1918.

Pierre D'Auteuil, K.C., and *R. Langlais*, for suppliant.

E. Belleau, K.C., for respondent.

AUDETTE, J. (May 27, 1918) delivered judgment.

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The suppliant by his petition of right, seeks to recover the sum of $17,056.90 for an alleged balance due upon contracts, and for damages resulting from suspension of the works or delays in the execution of the same.

The case as presented is composed of two distinct issues. One is in connection with works done at Matane, and the other with respect to works done at Cap a l'Aigle.

MATANE CONTRACT.

The works, at Matane, consisted of the construction and completion of a breakwater on the east side of the mouth of the River Matane, at Matane, in the County of Rimouski, P.Q. The works were duly executed, under a contract, between the suppliant and the Crown, and finally accepted by the latter. There were also, in connection with this contract, extras to the amount of $8,000, which the Crown has duly recognized and paid.

The total amount of the contract was for
the admitted sum of $55,021.00
together with the sum of 8,000.00

for the extras, which amounted in all to
the sum of $63,021.00
The Crown has so far paid the suppliant in satisfaction of the contract, the sum of $39,810
and for the extras 8,000
47,810.00

leaving uncovered or in dispute the sum
of $15,211.00

The suppliant, under his contract, as required by clause 3 thereof, had to provide for all kinds of labour, *machinery and other plant, etc.* He therefore hired from the Crown, as he might have done from anyone else, at the rate of $236 per day, the use of the dredge "Progress", 2 scows and a tug, to remove the sand and prepare the foundation for the breakwater to be by him erected. The lease for such plant and machinery, reads as follows:

"Montmagny, Que., le 22 juin, 1912.

"Je soussigne, Napoleon Trudel, entrepreneur "pour la construction d'un brise-lames a Matane, "m'engage per les presentes a payer au Departe- "ment des Travaux Publics du Canada, la somme "de deux cent trente six piastres ($236.00) par jour "pour l'usage de la dragne 'Progress', de deux "chalands et d'un remorqueur, pour enlever le sable "et preparer la fondation du dit brise-lames.

"Le temps du loyer de la dite dragne & C., devra "commencer a compter au moment de son depart du "quai de Rimouski jusqu'a son retour au meme "quai.

"Le Departement devra fournir tout ce qui est "necessaire au bon fonctionnement de la dragne et "de ses accessoires durant toute la duree des tra- "vaux.

"Signe a Montmagny, ce vingt deuxieme jour de "juin, 1911. "Temoin: *Louis v. Gadbois.* Signe: "Nap. Trudel, Entrepreneur."

On June 29th, 1911, the dredge and scows, in tow of the tugs "Evelyn" and "Wetherbee," left Rimouski, at 7 a.m., and arrived at Matane at 5 p.m. It being found the tug "Wetherbee" was drawing

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too much water to enter the River Matane, and finding no haven, she returned at once to Rimouski, although she had been assigned to serve the dredge. The dredge remained without any tug to serve her, and her first work, after setting up her spuds and general installation, consisted in casting over. The Crown having failed to supply a tug, as bound to do under the lease, Trudel, the suppliant, hired, at his own cost and expense, first the "Shelby" and then the "Victoria."

The dredge was engaged in Trudel's work, at Matane, up to August 25th inclusively, when she finished dredging for the suppliant. She was then for a while engaged on some other government work at Matane, with which the suppliant has nothing to do, and finally was towed up to Rimouski.

The controversy with respect to the dredge is as to the number of days she was engaged working, and the rate at which the suppliant should pay, having regard to the fact that the Crown has failed to supply a tug, as called for by the lease.

Under the uncontroverted evidence adduced by the suppliant, it appears that when dredges or machinery of any kind are so hired by the day, that only the working days are to be reckoned exclusive of the Sundays. Moreover, this dredge was hired by the suppliant, as I have already said, under the provisions of clause 3; but, under clause 35 of the same contract the suppliant is absolutely forbidden to carry on any work whatever on Sundays. Were the dredge hired by the month, it is apparent that the full rent should be exacted; but it is otherwise under the custom of trade established by the evidence, when the hire is by the day,—in that case only working days should be charged.

	Days.
We have in June	2
In July	31
And in August	25
To which should be added another day	1
Which must be allowed to tow the dredge back to Rimouski, as provided by the lease, making in all	59
From the 59 days should be deducted the Sundays and Dominion Day (July 1st), when the machinery was not used. There were 8 Sundays within the period, and July 1st, a red-letter day, when no work was done—In all	9
	50

On those 50 days, we have 2 days only in which the Crown supplied the tug,—that is, the day the dredge was taken from Rimouski to Matane, and the return day—

Two days at $236 ..... $ 472.00

Now it has been established by the evidence at trial that the value of the tug per day represented about $50 in the $236 a day, the Crown having failed to supply a tug for 48 days, the lessee, the suppliant, should only pay $236, less $50.

$186 for these remaining 48 days .. $ 186
48

$1,488
7,44

$8,928 8,928.00

$9,400.00

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It is clearly spread upon the record by the evidence that the suppliant had to hire—outside of his lease—the necessary tugs to replace the one the Crown was bound to supply and which it failed to do.

The first obligation of a lessor, under Art. 1612 C.C., is to deliver to the lessee the thing leased. The Crown did not deliver the tug, and cannot recover the rent therefor.

The suppliant claims damages in the delay of execution of his contract which would have been occasioned by the want of tugs. These damages are more or less remote and not of a tangible nature, and have not been clearly established. The suppliant, in the course of the excavation made by the dredge, was allowed to *cast over,* to remove sand with shovels drawn by horses, and in addition thereto in the result paid much less than $50 a day for the tug's service—having the advantage, with respect to one of the tugs, to pay only so much per hour when needed, being thereby freed from the obligation to pay for that part of the day when the tide was low and when the tug could not be used,—and these small tugs gave better service at Matane than larger ones, according to witness Murphy. Moreover, the Crown, in the course of the negotiations of settlement, finally abandoned the claim for overtime. If the suppliant actually suffered any of the damages claimed, a very doubtful matter, they are more than amply set off by the full allowance of $50 per day for the tug, coupled with the circumstances above mentioned.

It will be noticed that considerable delays have elapsed since the termination of the works in question, and it appears that negotiations of a protract-

ed nature were kept on until legal proceedings were instituted. In the course of these negotiations it appears in some of the letters and statements submitted to the respondent by the suppliant, that he at one time was willing to settle upon his paying $11,800. From these offers of settlement, counsel-at-bar for the Crown contends that the suppliant is bound by such offer, which he terms under Art. 1244 C.C. an extra judicial admission. He further contends that Art. 1245, under which a *judicial admission* can be revoked through an error of fact, does not apply to an extra judicial admission. There may be some authority for such a contention, but the preponderance of the jurisprudence is against it. Mr. Mignault, *Droit Civil*,[1] contends that such revocation applies to both in case of error. Indeed, if this admission has been based upon an error of fact, he has made a mistake, an error, and it is the duty of such party to declare he was in error when he made such admission, instead of persisting in a contention which he has discovered to be false. In any case, if there was error, there was no admission: *Non fatetur qui errat.*

It cannot be contended that the Crown can say it has been led into error by such an admission; because if the suppliant omitted to deduct a certain amount for the tugs the Crown had failed to supply, the Crown was well aware of this fact it had not supplied the tugs.

I find that the suppliant is not bound, under the circumstances of the case, by any such statement or offer made in error, against himself, in the course of his endeavour to arrive at a settlement,—a state-

[1] p. 125, vol. 6.

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ment or offer which the Crown never clinched by an acceptance.

I therefore find, as above mentioned, that the suppliant performed works, including extras, for an amount of.....$63,021.00
That he has been paid on account thereof by the Crown the sum of..... 47,810.00

Leaving uncovered and in dispute the sum of $15,211.00
That the suppliant owes the Crown, in respect of the lease of the dredge, etc., the sum of 9,400.00

Leaving due him by the Crown the sum of $5,811.00
which he is entitled to recover.

Under sec. 48 of the *Exchequer Court Act,* the Court is denied the power to allow any interest upon this balance, but, following the cases of *St. Louis v. The Queen,*[1] and *Lainé v. The Queen,*[2] this being a case where the right of action has arisen in the Province of Quebec, interest will be allowed upon the sum of $5,811, from the date the petition of right was left with the Secretary of State, as provided by sec. 4 of the *Petition of Right Act,* namely, from May 8th, 1916, to the date hereof.

CAP-A-L'AIGLE CONTRACT.

On December 26th, 1916, the suppliant entered into a contract with the Crown for the construction of an extension to the wharf at Cap-a-l'Aigle, as provided by the contract filed herein as Exhibit No. 10.

[1] 25 Can S.C.R. 649 at 665.
[2] 5 Can. Ex. 103.

The question arising under this contract, freed and segregated from the numerous branches of money claims made by way of damages alleged to have been occasioned by delays, resolves itself, in the result, in the question as to whether or not the suppliant can, under his contract, make such a claim for which the Crown would be liable.

In the course of the preliminary work for the execution of this contract, and after the foundation for the extension of the wharf had been duly staked, a diver was sent to the bottom to ascertain the condition of the bottom of the river, and having then reported verbally to the Government Engineer, the latter took upon himself to suspend the execution of the work,—having, I presume (because he was not heard as witness), some doubt as to whether the nature of the material at the bottom could be built upon in the manner required by the contract.

Indeed, it was not unreasonable to verify the nature of the foundation, but what is claimed as unreasonable and is the source of all the trouble on this issue, is the alleged unreasonableness of the delay of such suspension, and especially so in view of the fact it was found the engineer should have gone on, and did finally go on, building upon the foundation or bottom as described by the diver at the time of the suspension.

As flowing from that suspension in the execution of the works, the completion of the enterprise was carried over to the following year. Now, the question to be determined is whether under the terms of the contract and sec. 48 of the *Exchequer Court Act* the suppliant is entitled to recover $9,333 claimed in that respect—a claim embodying all manner of damages—some of the most remote class or kind.

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The contract entered into by the suppliant is one substantially identical in terms to those commonly in use in undertakings of this sort, whereby the contractor is, if the literal terms of the contract be adhered to, handed over, bound hand and foot, to the other party of the contract, or to the engineer of the other party, and is absolutely without any recourse or remedy.[1]

It is unnecessary to review the several clauses of the contract into which the suppliant entered with his eyes open. He must be held to them notwithstanding that they might appear oppressive. *Modus et conventio vincunt legem.* The law to govern as between the parties herein is to be found within the four corners of the contract. The form of agreement and the convention of parties overrule the law.[2] The suppliant cannot reject the terms of his contract and claim the damages flowing from delays, in view of clause 44, which reads as follows:

> "The contractor shall not have, nor make any "claim or demand, nor bring any action or suit "or petition against His Majesty for any damages "which he may sustain by reason of any delay or "delays from whatever cause arising in the pro- "gress of the work."

Clause 15 of the contract also relieves the Crown from any liability in respect of any loss or damage whatsoever which may at any time happen to the *"materials, articles and things"* required for the contract. This clause is casually mentioned because the contractor has set up a claim in that respect. (See also clauses 11 and 49.)

[1] *Bush v. Whitehaven Trustees,* Hudson on Contracts, vol. II., 124, 4th Ed.

[2] *Broom's Legal Maxims,* 8th Ed. p. 537.

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Under the provisions of sec. 48 of the *Exchequer Court Act*, the Court is bound to decide in accordance with the stipulations of a contract in writing and it must be found that, under clause 44 of the contract, whether the suspension of the works occasioning the delays was rightly or wrongly done, the suppliant is out of court,—as the delays alleged to have given rise to the claim are such as are covered by this clause 44.

In arriving at the present conclusion, I am also following a similar decision of this court and of the Supreme Court of Canada in the case of *Mayes v. The Queen.*[1] There is also a long catena of cases upon this class of contract consecrating the same principle, but it is unnecessary to mention them. It is also unnecessary to either consider or decide other questions raised at bar. The case of *Mayes v. The Queen* (*ubi supra*) is a direct answer to most of them.

Coming to the question of costs, it is well to bear in mind that while the suppliant succeeds on one issue, the respondent succeeds on the other. Each issue covered a distinct claim arising out of two separate contracts, and if there is any difference between the actual time engaged on one issue as compared with the other, I would say, besides being for larger amount, the issue upon which the Crown succeeds is the heavier one and upon which pleadings and evidence were more lengthy.

"It seems to me," says Bowen, L. J., in *Badische Anilin und Soda Fabrik v. Levinstein*[2] that, with-"out laying down any hard and fast line, or trying "to fetter our discretion at a future period in any

[1] 2 Can. Ex. 403, 28 Can. S.C.R. 456.
[2] 29 Ch. D. 366 at 419.

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"other case, we are acting on a sensible and sound "principle, namely, the principle that parties ought "not, even if right in the action, to add to the ex- "penses of an action by fighting issues in which they "are in the wrong. It may be very reasonable as "regards their own interest, and may help them in "the conduct of the action, that they should raise "issues in which in the end they are defeated; but "the defendant who does so does it in his own in- "terest, and I think he ought to do it at his own ex- "pense." See also *Bennington v. Hill.*[1]

Again, in *Dicks v. Yates,*[2] Jessel, M.R., said: "I "think that the Court has a discretion to deprive a "defendant of his costs though he succeeds in the "action, and that it has a discretion to make him "pay perhaps the greater part of the costs by giving "against him the costs of issues on which he fails."

Under the circumstances of the case there will be no costs upon either of the issues, each party paying his own costs.

Therefore, there will be judgment entitling the suppliant to recover from the respondent the sum of $5,811, with interest thereon from May 8th, 1916, to the date hereof, and without costs.

Judgment for suppliant.

Solicitor for suppliant: *Pierre D'Auteuil.*

Solicitor for respondent: *Jules Gobeil.*

[1] 8 R.P.C. 326.
[2] 18 Ch. D. 76 at 85.