1896
Mar. 2.

DAMASE LAINÉ, OF THE TOWN OF LEVIS, MACHINIST, AND ARTHUR BELLEAU VANFELSON, OF THE CITY OF QUEBEC, CLERK, BOTH IN THEIR JOINT CAPACITY OF ADMINISTRATORS OF THE ESTATE OF CHARLES WILLIAM CARRIER, DECEASED, IN HIS LIFE TIME OF THE SAID TOWN OF LEVIS, DOING BUSINESS THERE AS FOUNDERS AND MACHINISTS, UNDER THE STYLE AND FIRM OF CARRIER, LAINÉ & CIE., } SUPPLIANTS;

AND

HER MAJESTY THE QUEEN. — RESPONDENT.

Contract for work done and materials supplied—Specifications—Interpretation of—Accident to subject-matter owing to cause not within contemplation of contracting parties—Allowance of interest against Crown—Computation.

The suppliants entered into a contract with the Crown to "place a second hand compound screw surface condensing engine" in a certain steamship belonging to the Dominion Government; and to convert the vessel from a paddle-steamer into a screw-propeller. By the specifications annexed to and forming part of the contract it was stipulated, *inter alia*, that the old engine and paddle-wheels were to be broken and taken out of the steamer at the contractor's expense, and that they should stop up all the holes both in the bottom and side of the vessel; that the contractors were to make new any part of the engine or machinery although not named in the specifications, which might be required by the Minister, &c., the whole to be completed and ready for sea, on a full steam pressure of 95 lbs. per square inch; ready to commence running on a certain date,—the whole work to be of first class style to the entire satisfaction of the engineer appointed to superintend the work. It was further agreed that the steamer was to be put in perfect running order; that the alterations of any parts of the steamer, for the purpose of fitting up the new works, and any openings or cuttings or rebuilding, were to be executed and furnished at the cost of the contractors. It was also provided that the steamer was to have a satisfactory trial trip of

1896

LAINÉ v. THE QUEEN.

Statement of Facts.

at least four hours' duration, steaming full speed, before being handed over to the Department.

The vessel was built of iron and very old. The suppliants had taken the old engine out of the hull, and had grounded her, preparatory to placing her in a dry dock in order to complete their work under the contract. Owing to the fact that the bottom of the vessel under the old engine seat had been eaten away by rust, it gave way and was broken in when she grounded. It was established that the accident did not occur through the negligence of the suppliants; but the Crown insisted that the suppliants were liable to repair this damage under the terms of the contract and specifications.

Held, that there was nothing to show by the terms of the contract and specifications that either party at the time of entering into the contract contemplated that the portion of the steamship lying below and hidden by the engine seat would require renewing; and that the stipulation in the specifications that "the steamer was to be put in perfect running order" was intended to apply only to the work the suppliants had expressly agreed to do, and should not be extended to other work or things which they did not agree to do or to replace or renew.

2. That in such a contract as this, neither by the law of England nor by that of the Province of Quebec is there any warranty to be implied on the part of the owner of the thing upon which the work is to be performed that the same shall continue in a state fit to receive the work contracted for.

3. *Held*, (following *St. Louis* v. *The Queen*, 25 Can. S. C. R.), that interest may be allowed against the Crown upon a judgment on a petition of right arising *ex contractu* in the Province of Quebec in the absence of any express undertaking by the Crown to pay the same, or any statutory enactment authorizing such allowance.

4. But such interest should only be computed from the date when the petition of right is filed in the office of the Secretary of State.

PETITION OF RIGHT for moneys claimed to be due upon a contract for work done and materials supplied to the Crown.

The facts of the case are fully stated in the reasons for judgment.

The case was referred to the registrar for the purpose of taking the evidence.

1896

LAINÉ v. THE QUEEN.

Argument of Counsel.

The argument upon the evidence took place at Ottawa on November 29, 1895.

I. N. Belleau, Q.C., for the suppliants: This is a case arising out of a contract between the suppliants and the Department of Marine and Fisheries for repairing or altering the steamer *Druid* from a paddle boat to a screw steamer. The boat, at the time the contract was made, was in the Louise Basin at Quebec, and was subsequently brought over to Levis to be docked there preparatory to repairs being done and the contract carried out. When the boat was taken from Quebec to Levis she was placed in Davie's Pond, and when she grounded she broke, because she was so decayed that she could not support her own weight.

We allege that it was not our fault the boat was broken; she was not fit to undergo the repairs the Government contracted for, and the Government ought, therefore, to bear the damages. The repairs were begun early in the spring. She was in the pond three days before she was broken. One of the workmen noticed she was leaking. He saw the water was coming in through a hole in the bottom. A man was sent to plug it up, and the plug he drove in went right through the place, it was so corroded.

One witness says that he examined one of the bad plates which were discovered, and that there were eight or nine of them in the ship's bottom. It was a mystery to the witnesses that the boat could have been carried over to Levis. They explain it in this way: during the winter there is ice that forms on the bottoms of the vessels, and that is the reason why she did not go to the bottom in bringing her over; but when she struck the bottom this coating of ice was broken. The witnesses say there was nothing to support the keel when the old engine was removed, and the break occurred where the old engine was situated. I con-

1896

LAINÉ v. THE QUEEN.

Argument of Counsel.

tend that the accident was the direct and only result of the condition of the steamer. If we are not responsible through any fault or negligence, are we bound by the contract to make the repairs? The contract was to place a second hand compound condensing engine in the steamer *Druid*." The Crown contends that by our contract and specifications we contracted and agreed in addition to placing the engine in the *Druid* to make new any part of the engine or machinery although not named in the agreement or specifications, and to complete the whole ready for sea to the satisfaction of the Minister of Marine and Fisheries; the alterations of any part of the steamer to be executed at the cost of the suppliants or any work done or alterations made in the deck to be replaced to the satisfaction of the officer in charge; and that a satisfactory trial trip of at least four hours duration be had, steaming full speed, before being handed over to the Department. It is contended that we have to do all these things under our contract. Now I understand perfectly well that in making new the engine and machinery we had to do all things that were inherent in the carrying out of the work upon which we were engaged, but I do not think that we were bound to build a new steamer for the Government. The Government having contracted to have a new engine placed in the steamer there was an implied warranty on its part that the steamer was fit for the repairs contracted for. The Government took the position that the suppliants were responsible and should make the repairs occasioned by this accident, and the suppliants said, "We are not." Then the Government decided to have her repaired, and they signed a new contract, on the 22nd of May, to make these repairs two days after we had to deliver up the boat under the first contract, that is on the 20th of May. One of the primary rules in the

1896

LAINÉ v. THE QUEEN.

Argument of Counsel.

interpretation of contracts is that, whatever the terms of the contract may be, it must always include the things to which the parties seem to have agreed, and this rule is founded upon a still more general rule that the contract must be interpreted in accordance with the intentions of the parties. I think it would be difficult to establish that when the Government contracted to put an engine into the steamer, they intended to contract for the rebuilding of the steamer. It is very likely that the Government did not know about the condition of the boat because it would not be reasonable that the Minister of Marine and Fisheries would leave the boat in such a condition. Evidently the Government did not think that they were contracting for a new bottom to this boat, because you will see that the repairs to the bottom cost over half of our original contract.

E. L. Newcombe (*D. M. J.*), Q.C.:—

It is important to bear in mind that this contract was made with regard to a vessel which was admittedly useless and unseaworthy. A vessel which for the purposes of a vessel as required by them, at the time of the contract, was of no manner of use to the Government. So the intention of the parties was to obtain by means of this contract, and the work done under it, a vessel that was, through certain alterations in her structure mentioned in the specifications, to be made of use to the Government. It was with regard to these circumstances that the contract was entered into. The contractors took possession of the vessel while in the Louise Basin on the Quebec side of the river; and they proceeded with the work there as far as they could without putting her into the dry dock, and then they took her across the river and for some reason or other she was grounded in this basin, where Mr. Davie repairs some of his vessels, on the outgoing tide, and

1896

LAINÉ
v.
THE
QUEEN.

Argument of Counsel.

when she took the ground it appears that a section of the bottom of the vessel which had been under the old engine seat gave way. It is beyond question that the work they undertook to do was not finished then. Even if the bottom had been perfectly sound, it was necessary for the vessel to go into dry dock for the completion of the original contract. The contractors were obliged under the contract, as any one would interpret it, to put this vessel in thorough running order. There is no case here of that having happened which should not have been contemplated at the time. The man who was put in charge by the suppliants to bring her over to Lévis was afraid to tell the crew the condition of the vessel. Personally, he knew it was a very risky matter to take the vessel across at the time. However, they took her across and let her ground with a knowledge of the bad condition of her bottom. So far as the grounding goes, however, we admit that they have gone a long way to show that they did whatever they could do to place the vessel properly. However, we do not rest our case upon that. We say our case is good upon the construction of the contract. If you make a contract like this and an accident happens through your negligence, or not, you are bound to make it good. We contracted for a seaworthy vessel. They now say to us,—You have to pay us over $4,000 more to do that; but we say to them,—No, under your contract you have got to make good this work. We regard the case exactly the same as if we made the second contract for repairing the bottom with another man. It was only after she was put into the dry dock that they finished the work which they admittedly had to do under the first contract. This goes to establish that the breakdown occurred in connection with the work they had undertaken to do. It was by reason of the removal of the old engine and the consequent decrease of support

1896

LAINÉ v. THE QUEEN.

Argument of Counsel.

which that engine gave to the bottom of the ship, that the break-down occurred when and as it did. It may be your lordship will come to the conclusion that she may have broken down anyway within two or three months, but it is certain that this immediate break-down occurred by reason of the operations of the suppliants under their contract and in connection with work which was contemplated by the contract. It is a usual and ordinary thing in vessels of this class to find the bottom corroded and rotten. I submit that so far as the duty of the contractors under their first contract went, it would be just the same as if the bottom and the old engine were all one piece. In dealing with the engine they had to make good whatever was disturbed by its removal. By the terms of the contract the specifications are to be taken and read as part of contract. We contend that the word "work" in the contract has to be construed according to the specifications. What is the "work" to be done? "Converting the steamer *Druid* into a screw propeller, &c."

I submit that it is very clear they were not in a position to refuse to do the work because they found it more expensive than they contemplated. I admit that the contract is based upon the assumption that the subject-matter is going to remain in existence during the repairs. If the contract was to repair a vessel and she had gone to the bottom, I admit then that the parties would be released. But here there is no admitted impossibility of performance. We say here is a steamer which the contractors knew was a steamer liable to be in a pretty bad condition; therefore, undertaking to do this work, should they not be held liable to do everything that is specified and involved in the specifications. But my argument need not go further than this, that in order to take out the engine they had to expose a weakness of the vessel,—they had to leave

1896

LAINÉ v. THE QUEEN.

Argument of Counsel.

that weak which was formerly apparently strong. The contract contemplated that so far as taking away old and putting in new, they should give us a ship that was seaworthy; and when they took away the old engine and found that, by reason of this taking away, the vessel is not in a position to go to sea, it is, I submit, necessary for them to make this good

We rely very much on the words "put in running order" in the specifications, under the rules of construction. These words must be construed according to their general meaning unless there is something to show that they ought to have a limited application. What has happened was within the reasonable contemplation of the parties. The contract was to put the boat in perfect running order. The contract being to change the vessel from one kind of a steamer to another, if the vessel had been in such a state as not to be a vessel within the meaning of the insurance cases, if burned or sunk, and impossible to be repaired, then there would not have been anything in existence in respect of which the contract was made, but that is not this case. We rely upon the law laid down in *Paradine* v. *Jane* (1). It is a question as to the contractors' obligation, and unless the accident arose from a cause so foreign to the business of the parties as to create an implied exception, then the contractors must be held bound according to the full extent of the obligations they entered into. *Taylor* v. *Caldwell* (2); *Brown* v. *Insurance Co.* (3).

I submit that there was no warranty to be implied on the part of the Government that the vessel was or should remain in a good condition, that she should remain in a seaworthy condition until these repairs were made and completed. *Appleby* v. *Myers* (4). There is no co-

(1) Aleyn, 27.
(2) 3 B. & S. 826.
(3) 1 El. & El. 853.
(4) L. R. 2 C.P. 651 and *Thorn's* case 1 App. Cas. 120.

venant on our part except to pay. The general construction of the contract is in our favour because, having stipulated expressly for a number of things the cumulative effect of the contract is in our favour. On the other hand suppliants did not specify what they were to do, but they say generally that the vessel is to be put in "perfect running order." Again, they have contracted to "stop up holes." Now it must be admitted that there were no holes which were necessary to be stopped up if the vessel were sound. If you take these specifications which are part of the contract, you can extract a number of requirements or obligations which have been entered into by the contractors and which would render them liable to do this very work. There are general terms which are large enough to require them to make good all the damages that have occurred. There is a principle of law that there may be certain exceptions of certain events, but the events that happened here were those within the contemplation of the parties to the contract. (*Bayley* v. *DeCrespiny* (1); *Leake on Contracts* (2).) The material question is whether the event which is required to be excepted is one that could be foreseen and guarded against in the contract.

For the doctrine as to the construction of written instruments generally, I would refer to *Broom's Legal Maxims* (3). I don't think there should be a difference between the construction of the Crown's ordinary contracts and the subjects', but so far as the King's grant goes, *Bacon's Abridgement* (4) and the authorities there cited show that it should always be construed in favour of the Crown.

W. D. Hogg, Q.C., followed. He contended that as the suppliants had contracted to put the ship in

(1) L. R. 4 Q. B. 185.
(2) 2nd Ed. 592 *et seq.* Pollock on do. 6 Ed. 396.
(3) 6th Ed. p. 498 *et seq.*
(4) Vol. 8 p. 149.

1896

LAINÉ v. THE QUEEN.

"running order," they were not entitled to be paid until they had carried out the contract to the fullest extent of the meaning of these words. He cited *Munro* v. *Butt* (1).

Reasons for Judgment.

Mr. Belleau replied.

THE JUDGE OF THE EXCHEQUER COURT now (March 2nd, 1886) delivered judgment.

The suppliants bring their petition to recover a sum of four thousand two hundred and fifty dollars, and interest, alleged to be due to them on a contract made on the 25th of January, 1894, between Messrs. Carrier, Lainé and Company of the Town of Levis, in the Province of Quebec, engineers and founders, of the first part, and Her Majesty the Queen, represented by the Minister of Marine and Fisheries, of the second part, whereby Carrier, Lainé and Company, for the sum of nine thousand two hundred and fifty dollars, agreed, in accordance with the provisions of the contract and the specifications annexed thereto, to place a second hand compound screw surface condensing engine in the steamship *Druid*, and to convert the latter from a paddle steamer into a screw propeller, the work to be completed and in every respect ready for use on or before the 20th of May, eighteen hundred and ninety-four. The contract, among other things, further provided, that Her Majesty might make payments in advance on materials or implements procured for or used in the work, which should thereupon become vested in Her Majesty and be held as collateral security for the due fulfilment of the contract, but should remain at the risk of the contractors until finally accepted by the Minister as a portion of the work contracted for; that the specification annexed to the contract should be

(6) 8 El. & El. 738.

1896

LAINÉ v. THE QUEEN.

Reasons for Judgment.

deemed taken and read as part thereof; that time should be deemed to be of the essence of the contract; and that if the contractors should fail fully to complete the work in the manner and time agreed upon they would pay to Her Majesty, as and for liquidated and ascertained damages, the sum of twenty-five dollars a day for each day during which the delay to complete the work should continue. In the body of the contract the work to be done was described as follows: "To place a second hand compound screw surface condensing engine in the steamship *Druid;*" but by reference to the specifications it will be observed that the steamer was also to be converted from "a paddle steamer" to a "screw propeller," and it was, among other things, thereby agreed "that the old engine and paddle wheels were to be broken and taken out of the steamer at the contractors' expense, the old material to be their property, and that they should stop up all the holes both in the bottom and side of the vessel; that the contractors were to make new any part of the engine or machinery, although not named in the specification, which might be required by the Minister or by the Inspector of the work, and to complete the whole ready for sea to the satisfaction of the Minister, or the Inspector whom he might appoint to superintend the work; the whole to be completed and ready for sea, on a full steam pressure of ninety-five pounds per square inch; ready to commence running on or before the 20th May, 1894, the whole work to be of first class style to the entire satisfaction of the engineer appointed to superintend the work. It was further agreed that the steamer was to be put in perfect running order; that the alterations of any parts of the steamer, for the purpose of fitting up the new works, and any openings or cuttings or rebuildings were to be executed and furnished at the cost of the contractors; any work done

1896

LAINÉ v. THE QUEEN.

Reasons for Judgment.

or alteration made in the deck or displacement of iron or wood-work to be replaced to the satisfaction of the officer in charge, free of cost to the Department. It was also provided in the specifications that the steamer was to have a satisfactory trial trip of at least four hours duration, steaming full speed, before being handed over to the Department, the contractors to find stores and crew for the engine during such trip; that the contractors were to repair and make good any defects or damage that might occur to the new parts within four months after the final acceptance of the same by the Department, other than the usual wear and tear or accident arising from the carelessness of the Department's servants, over which the contractors would reasonably have no control, and that to insure the carrying out of this provision twenty per centum of the contract price should be retained by the Department until the expiration of the said four months.

The *Druid* is an iron steamship, and was at the time the contract was entered into about forty years old. It does not appear, however, that on that account either party contemplated that any repairs to the hull of the ship would be necessary. All that the specifications provided for were such repairs and renewals as would be rendered necessary by the work to be done and the changes and alterations to be made in the ship, under the contract. As a matter of fact, however, the whole of the ship under the old engine seat was so corroded and eaten away by rust, that unless this part of her had been renewed she would have been unseaworthy and unfit even for the trial trip of a few hours that the parties had stipulated for. Owing to the manner in which she had been originally constructed, this part of her had not been accessible either for examination or repairs. And although, if the attention of the parties had been directed to this circumstance, it might

1896

LAINÉ
v.
THE QUEEN.

Reasons for Judgment.

have been reasonable for both to have anticipated that when the old engine was removed it would be found that substantial repairs and renewals were necessary, the matter does not appear to have been present to the mind of either. It is this incident that has given rise to the present controversy.

In January, 1894, the *Druid* was in the Louise Basin, at Quebec, and while she was there the old engine was taken out, and other parts of the work contracted for were proceeded with. On March 30th the Minister of Marine and Fisheries sent the suppliants five thousand dollars as a payment or advance, it does not clearly appear which, on account of the work done.

On the 3rd of April the vessel was taken by the contractors to Levis to be placed in a dry-dock there, to enable them to complete the work to be done. The dock happened to be occupied and the vessel was placed in an adjoining pond where she must ground at low water, and the result was that the bottom of the vessel under the old engine seat, that had been eaten away and weakened by rust, gave way, and was broken in. On the 11th of April the contractors, by letter, gave notice to the Minister of Marine and Fisheries of the accident that had happened; that the vessel had been successfully docked on the 10th, and that they were rushing the work through so as to cause no delay; and they asked that the Minister would send some person to investigate the matter and see who should stand the cost of the necessary repairs. On the same day (the 11th of April) Mr. Smith, the deputy of the Minister of Marine and Fisheries, wrote to the contractors that the agent of the Department at Quebec had advised him of the accident to the *Druid*, and that they, the contractors, would be held responsible for the damage, and that the Department would, notwithstanding the accident, require the vessel to be

1896

LAINÉ v. THE QUEEN.

Reasons for Judgment.

delivered up at the time specified in the contract. On the 12th the contractors replied to Mr. Smith's letter of the 11th, repudiating any responsibility for the accident and offering to make the repairs at once, if ordered to do so. Mr. Smith, on the 26th April, in answer to their letter of the 12th, wrote to the contractors that he was advised that as the vessel was in their charge as contractors when the accident happened, and it did not appear that the accident was one that proper care could not have prevented, they were liable for the loss, and further that the provisions of the contract would appear to be such as to make them liable to repair. On the 1st of May the contractors, by a telegram, which, though not addressed to, was, I infer, communicated to Mr. Smith on the 2nd, offered to make the repairs to the *Druid* as per survey held for four thousand five hundred dollars and deliver the boat on the 20th of May, or for four thousand dollars if delivered on the 1st of June, provided an answer was telegraphed at once. On the 10th of May the contractors wrote to the Minister that they had proceeded with their work according to the contract, and that it would be finished before the 20th of May; that the work requiring the docking of the *Druid* would be finished on Saturday, the 12th, and that they would be ready to undock her on Saturday evening; that what would then remain of the work to be done could be proceeded with when the vessel was afloat; and they concluded their letter by notifying the Minister that after that date they would not be responsible for the dock charges. The new engine was not, it ought perhaps to be observed, placed in the same position as the old engine; and it was, it appears, possible for the contractors to do all the work that they conceded that they had contracted to do without making the repairs that were in dispute, though there

1896

LAINÉ v. THE QUEEN.

Reasons for Judgment.

could of course be no trial trip until such repairs were completed. On the 14th of May Mr. Smith telegraphed the contractors asking them to state the lowest sum for which they would repair the vessel without prejudice to the contract under which he then considered them liable. On the 15th they answered that they would make the repairs to the *Druid*, in twenty working days after order given, for four thousand five hundred dollars, and if more time were given them, for four thousand dollars. On the 18th, Mr. Smith answered the contractors' letter of the 10th, and informed them that, as advised, the Department considered them liable to deliver the *Druid* in thorough repair according to the provisions of the contract upon the day agreed upon, and that any expenses incurred in reference to the vessel for docking or otherwise would have to be borne by the contractors. On the 22nd, without prejudice to the contract, he accepted the contractors' offer to make the repairs in twenty days for four thousand five hundred dollars, and subsequently a formal contract bearing that date was entered into between the parties for the making of such repairs, which were to be completed by the 14th of June, 1894. This second contract contained the following proviso:—

"Provided however, and it is the true intent and meaning of these presents that nothing herein contained shall in any wise be construed or held to prejudice, affect or operate as a release discharge or waiver of any right, claim or demand which Her Majesty may have against the contractors to require or compel them to do and perform all the works herein specified or any part thereof by reason of the contractors being now liable thereto on account of their own negligence or under and by virtue of the contract bearing date the twenty-fifth day of January, 1894, between Her Majesty and the contractors relating to the steamer *Druid*: Nor shall anything herein contained be in anywise held or construed to prejudice affect or operate as a release, discharge or waiver of any right, claim, demand, action or cause of action which Her Majesty may now have or hereafter may have

1896

LAINÉ
v.
THE QUEEN.

Reasons for Judgment.

against the contractors by reason or on account of any obligation or liability on the part of the contractors to make good the damage caused to the said vessel by reason of her bottom giving way while the works contracted to be performed by the contractors under their said contract of the 25th day of January, 1894, were in course of performance, or while the said vessel was in their charge: Nor shall anything herein contained be held or construed in anywise to prejudice affect or waive any claim for damages or non-performance of the said contract of the twenty-fifth day of January, 1894, which Her Majesty now has or hereafter may have against the contractors. Nor shall anything herein contained be held to mean or intend that the contractors are not, independently of this contract, and by reason of the said contract of the twenty-fifth day of January, 1894, or their negligence in the performance of the works called for by the last named contract, liable to make good the damage and restore the said vessel to Her Majesty in a seaworthy condition and in thorough running order. Nor to prejudice or affect the claim to that effect now set up by Her Majesty. The true intent of the contracting parties being that their respective recourse and liability under the contract of January last shall not be affected by the present contract."

The contractors completed the work embraced in the first contract, made the repairs mentioned in the second, and having given the vessel a trial trip handed her over to the agents of the Minister, and were paid the sum of four thousand five hundred dollars for making such repairs. There was some evidence adduced, which was directed to the question as to whether the work was done to the satisfaction of an inspector appointed by the Minister, and as to whether or not the agent of the Department at Quebec, and the engineer of the steamer, who were present during the trial trip, were authorized to represent the Minister. That, I think, is not now important. The specifications annexed to the contract of January 25, 1894, were prepared by Mr. Samson, the Inspector of boilers and engines at Quebec, and though he was not, it appears, appointed to superintend the work, it was in fact done under his superintendence, and he says it was completed in a good substantial and workmanlike manner, and in

1896

LAINÉ v. THE QUEEN.

Reasons for Judgment.

accordance with the specifications. The Crown very properly raises no question as to this, and if any were raised it would be clear that the provisions of the contract in that behalf had been waived. So too there is no objection that the trial trip and the delivery of the vessel to the Minister's agent did not take place on or before the 20th of May. These acts obviously had to be deferred until the repairs embraced in the second contract which the parties entered into, were completed. The delay was not great. Probably there would have been none if the suppliants' offer to make the repairs had been accepted when first made. At all events this question does not come into the present case, and may be put aside without further consideration.

There is another matter, too, which may be dismissed in a few words, and that is the contention at first set up by the officers of the Crown that the accident had happened through some negligence of the suppliants. It is clear, I think, that it did not result from any negligence on their part, but from the inherent weakness of the vessel. There was nothing improper or unusual in grounding the vessel in the pond where she was placed. And there was nothing at the bottom of the pond to cause the injury. Under any circumstances it would have been necessary to renew the part of the bottom of the vessel that was set up when she was grounded. The grounding may have made that clear somewhat earlier than otherwise might have been, but that was a fortunate rather than an unfortunate circumstance.

That, I think narrows the question, on which the suppliants' right to recover depends, down to this: Were the contractors bound under the contract of January 25th, 1894, to make the repairs mentioned in the contract of May 22nd? If so, their action fails; but if not, they are entitled to recover. That, I think, is, on the whole,

1896

LAINÉ v. THE QUEEN.

Reasons for Judgment.

the effect of the second contract that was entered into. But for the general clause with which the proviso I have cited concludes, I should have thought that to be free from doubt. By that clause it is stated that "the true intent of the contracting parties was that "their respective recourse and liability under the con- "tract of January 25th, should not be affected by the "contract of May 22nd." These words standing by themselves might, it seems to me. be taken to mean that any defence then open to the Crown should not be affected by, but should remain open to it, notwithstanding the second contract. When the accident happened the officers of the Crown in effect said to the contractors:—Here is something that you must make good, because it happened through your negligence, and because you have contracted to do it. To that the contractors answered in substance:—No, we are not in any way responsible for the accident, and we have not contracted to make good the damage; but the Crown is bound to make it good, and we demand that that be done, so that we may complete the work we have undertaken. There was obviously a third position that might have been set up by either party, and that was that by the accident both parties were excused from further performance of the contract, in which case each party would have had to bear the loss that had fallen upon him. That position, however, was not taken, and it is not necessary to consider how far under all the circumstances it was the true position, or whether in that case the Crown might not only have had a good defence to the action, but might also have recovered back the five thousand dollars that had been advanced to the contractors. Of course it was open to either party to make the repairs if that were for his advantage, but it may be that neither was bound to do so; and in that case the Crown would on the 22nd

1896

LAINÉ v. THE QUEEN.

Reasons for Judgment.

of May, 1894, when the Minister entered into the second contract, have had a good defence to an action such as the present. Was it the intention of the parties by the concluding clause of the proviso to the contract, to which I have referred, to reserve to the Crown that defence? On the whole I think not. The clause must be read with the proviso of which it forms part, and the whole tenor and effect of that was that the contractors should not in the aggregate be paid more than the contract price of the work embraced in the first contract, if for any reason the contractors were liable or bound to make the repairs mentioned in the second contract. Both parties seem, after the accident, to have been agreed that the repairs in question should be made, and it is obvious that the cost of making them must fall upon one party or upon the other. If the contractors were liable or bound to make them, they would of course have to bear the cost. If the Crown was bound to make the repairs the expense would fall upon it. But there was the further contingency that neither might be bound to make the repairs. On whom in that case should the cost fall? What as to that was the intention of the parties? It seems to me it was their intention that in that case the cost should fall upon the Crown, the owner of the vessel. The expense was to be borne by the contractors if they were liable or bound to make the repairs, but by the Crown if the contractors were not so liable or bound. It is not possible, it seems to me, to put the parties in the exact position which they occupied prior to the 22nd of May, 1894. It was at that time open to the Minister of Marine and Fisheries to say to the contractors:—You contend that the Crown is bound to make the repairs to the hull of the vessel, which it is clear must be made before she can be sent to sea. I do not agree. On the contrary, I think that you, the contractors, are liable

1896

LAINÉ
v.
THE
QUEEN.

Reasons for Judgment.

and bound to make such repairs, but whether or not you are so liable or bound, you have entered into a contract for a lump sum to convert the *Druid* into a screw propeller, to put in a second-hand compound screw surface condensing engine, and after a trial trip of at least four hours to deliver the vessel in perfect running order, and until you do that you will not be entitled to be paid anything. So if you wish to earn your money, it will be necessary for you to make the repairs in question. I am, however, ready now to agree with you to pay you for making the repairs but on the condition that you are not to be paid anything on your original contract price unless you are entitled to now recover without any trial trip, and without delivering the vessel to me in perfect running order. But what was said and done appears to me to be quite different. In substance it was this :—I am advised, the Minister, or those who spoke for him, said to the contractors, that you are not only liable to make the repairs in question because the accident happened through your negligence, but you are bound by your contract to do so. However I will pay you for making them, and if it turns out that you are either liable or bound I shall deduct the cost of the repairs from the contract price. That, it seems to me, is in substance the agreement to which the second contract gives expression, and by entering into it the Crown enabled the contractors to perform the conditions of the first contract, and to put an end to any defence that might otherwise exist because of the non-performance thereof.

Were the contractors liable or bound to make these repairs at their own cost and charges? That they were not liable because of any negligence on their part is, as I have already said, negatived by the facts of the case. Were they bound by the contract? The learned counsel for the suppliants contends that the Crown

1896

LAINÉ v. THE QUEEN.

Reasons for Judgment.

was itself bound to make the repairs, and if so, it is clear that the contractors were not. But with that view I cannot agree. It is clear that there was no express undertaking by the Crown to make any such repairs, or any express warranty that the vessel was in, or should continue in, a fit condition to enable the contractors to carry out the work and the alterations contemplated by the agreement of January 25th, 1894, and no such agreement or warranty is, I think, to be implied. In *Appleby* v. *Myers* (1), which I think supports that view, the facts briefly stated were that the plaintiffs had contracted to erect certain machinery on the defendant's premises at specific prices for particular portions, and to keep it in repair for two years, the price to be paid upon the completion of the whole. After some portions of the work had been finished, and others were in course of completion, the premises with all the machinery and materials thereon were destroyed by accidental fire. Montague Smith, J., who in the Common Pleas delivered the judgment of the court, after stating the general rule of law that when a man contracts to do a thing he is bound to do it or to make compensation, notwithstanding he is prevented by inevitable accident, went on to say that, in the case before the court, they held that an implied proviso was present in the contract on the part of the defendant to provide and keep up the buildings, and the plaintiffs had judgment for the value of the work done. But this judgment was reversed in the Exchequer Chamber. There Blackburn, J., delivering the judgment of the court, said:—(2)

The whole question depends upon the true construction of the contract between the parties. We agree with the Court below in thinking that it sufficiently appears that the work which the plaintiffs agreed to perform could not be performed unless the defendant's premises con-

(1) L. R. 1 C. P. 615. (2) L. R. 2 C. P. 658.

1896

LAINÉ
v.
THE QUEEN.

Reasons for Judgment.

tinued in a fit state to enable the plaintiffs to perform the work on them; and we agree with them in thinking that, if by any default on the part of the defendant, his premises were rendered unfit to receive the work, the plaintiffs would have had the option to sue the defendant for this default, or to treat the contract as rescinded, and to sue on a *quantum meruit*. But we do not agree with them in thinking that there was an absolute provision or warranty by the defendant that the premises should at all events continue so fit. We think that where, as in the present case, the premises are destroyed without fault on either side, it is a misfortune equally affecting both parties, excusing both from further performance of the contract, but giving a cause of action to neither.

Nor is there, I think, any difference in this respect between the common law and the civil law in force in the province of Quebec. By article 1683 of the Civil Code it is provided that where a party undertakes the construction of a building or other work by estimate and contract, it may be agreed either that he shall furnish labour and skill only, or that he shall also furnish materials; and, by article 1684, that if the workman furnish the materials, and the work is to be perfected and delivered as a whole, at a fixed price, the loss of the thing in any manner whatsoever before delivery, falls upon himself, unless the loss is caused by the fault of the owner or he is in default of receiving the thing.

There does not appear to be any ground for thinking that in the absence of an express warranty, the owner of the thing upon which the work is to be performed undertakes in such a case that the thing shall continue in a state fit to receive the work contracted for.

We come back, then, to the question as to whether or not the contractors, by the contract of January 25th, agreed to do work which included such repairs as were mentioned in the contract of May 22, 1894. If they did, they would not, it is clear, be excused because the work they had contracted to do had proved more difficult or expensive than had been contemplated. In

1896

LAINÉ v. THE QUEEN.

Reasons for Judgment.

Paradine v. *Jane* (1) it was held "that where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and he hath no remedy over, there the law will excuse him." * * * "But when the party by his own contract creates a duty or charge upon himself he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." And there is a long line of authorities relating to many differing subjects and circumstances, by which the principle is illustrated. (2.) In *Taylor* v. *Caldwell* (3) the rule is discussed at considerable length by Blackburn, J., in delivering the judgment of the court, and by reference to the report of the case it will be observed that he supports his views by reference to the principles of the civil law applicable to such cases.

There seems to be no doubt, he says, that where there is a positive contract to do a thing not in itself unlawful the contractor must perform it or pay damages for not doing it, although in consequence of

(1) Aleyn, p. 27.

(2) REPORTER'S NOTE:—The following are some of them: *Shelley's Case*, 1 Rep. 98; *Sparrow* v. *Sowgate*, W. Jones, 29; *Williams* v. *Lloyd*, W. Jones, 179; *Rolles' Abridgement*, P. 449, 450, *Condition G.*; *Brewster* v. *Kitchell*, 1 Salk, 198; *Menetone* v. *Celbrawe*, 3 Burr. 1592; *Cutter* v. *Powell*, 6 Term 320; *Gillett* v. *Mawman*, 1 Taunt. 136; *Rugg* v. *Minett*, 11 East 209; *Sinclair* v. *Bowles*, 9 B. & C. 92; *Roberts* v. *Havelock*, 3 B. & Ad. 404; *Jesse* v. *Roy*, 1 C. M. & R. 316; *Barr* v. *Gibson*, 3 M. & W. 390; *Marquis of Bute* v. *Thompson*, 13 M. & W. 487; *Hills* v. *Sughrue*, 15 M. & W. 253; *Shield* v. *Wilkins*, 5 Ex. 304; *Couturier* v. *Hastie*, 8 Ex. 40, 9 Ex. 102 and 5 H. L. C. 673; *Munroe* v. *Butt*, 8 E. & B. 738; *Scott* v. *Littledale*, 8 E. & B. 815; *Hall* v. *Wright*, E. B. & E. 746; *Hale* v. *Rawson*, 4 C. B. N. S. 85; *Brown* v. *The Royal Insurance Company*, 1 El. & El. 853; *The General Steam Navigation Company* v. *Slipper*, 11 C. B. N. S. 493; *Taylor* v. *Caldwell*, 3 B. & S. 826; *Appleby* v. *Myers*, L. R. 1 C. P. 615; *Ford* v. *Cotesworth*, L. R. 4 Q. B. 127; *Baily* v. *DeCrespigny*, L. R. 4 Q. B. 180; *Lord Clifford* v. *Watts*, L. R. 5 C. P. 577; *Anglo-Egyptian Navigation Company* v. *Rennie*, L. R. 10 C.P. 271; *Howell* v. *Coupland*, L. R. 9, Q. B. 463, 1 Q. B. D. 258; *Jefferys* v. *Fair*, L. R. 4 Ch. D. 448; *In re Arthur*, L. R. 14 Ch. D. 604; *Turner* v. *Goldsmith*, [1891], 1 Q. B. 544.

(3) 3 B. & S. 826.

1896

LAINÉ v. THE QUEEN.

Reasons for Judgment.

unforeseen accidents the performance of his contract has become unexpectedly burthensome or even impossible.....But this rule is only applicable when the contract is positive and absolute, and not subject to any condition either express or implied; and there are authorities which, as we think, establish the principle that where from the nature of the contract it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that when entering into the contract they must have contemplated such continuing existence as the foundation of what was to be done, there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor. (P. 833).

The same leading principle is expressed by Hannen, J., in delivering the judgment of the court in *Bailey* v. *DeCrespigny* (1), to which I refer only to quote the language used by him with reference to the rule of construction to be applied to an unqualified undertaking to do a thing that has become impossible through no act or default of the promisor:

> But where, he says, the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens. (P. 185.)

Now it is clear, I think, that there are in the contract of January 25th, 1894, in question here, no words that have any reference to the particular contingency that has happened, and as I have already stated nothing to show that either party at the time the contract was made contemplated that the portion of the steamship lying below, and hidden by the engine seat would require renewing. If the contractors were bound to renew this portion of the ship it is be-

(1) L. R. 4 Q. B. 180.

1896

LAINÉ
v.
THE
QUEEN.

Reasons for Judgment.

cause of some general clause or words to be found in their contract.

First, it is said that the contractors agreed to stop up all the holes both in the bottom and side of the vessel, but these words should be read with the other words of the paragraph of the specifications in which they occur, by which the contractors undertook, at their own expense, to break and take out the old engine and paddle wheels. This, it is clear, would leave holes in the sides of the vessel, and might by the removal of bolts or other fastenings leave holes in the bottom of the vessel. Such holes as these, the contractors, it seems to me, agreed to stop up, not to renew the whole of that part of the vessel's bottom that lay beneath the old engine. Then it is said that the contractors agreed to put the steamer in perfect running order, and these words are, it is clear, large enough to include an obligation to make such repairs as those in question, and probably a great deal more. They might possibly where that appeared to be the intention of the parties be thought to be wide enough to throw on the contractors the cost of repairing or renewing the vessel's furniture and tackle. Such words must, it is obvious, be construed by reference to the contract as a whole. What then did both parties have in mind and intend the contractors to do in the present case when they stipulated that "the steamer was to be put in perfect running order?" It was intended, I think, that with respect to the work the contractors had agreed to do, and the changes and alterations that they had contracted to make, the steamer was to be put in perfect running order; and not that in respect of other things or matters that they had not agreed to do nor to replace nor to renew, the steamer should when delivered be in perfect running order. If that is the case then it cannot be said, I think, that the contractors bound themselves by the first contract to

1896

LAINÉ v. THE QUEEN.

Reasons for Judgment.

make the repairs mentioned in the second. It was agreed no doubt that the steamer was to have a trial trip, and that was not possible unless such repairs were made; but that though a condition precedent to their right to recover the contract price of the work done, formed no part of such work.

In my opinion the contractors were neither liable because of any negligence, nor bound by the first contract to make the repairs to which I have had occasion to refer so often, and the result I think of the second contract is that in that event the cost of such repairs were to be borne by the Crown, and the contractors were to be paid the balance of the contract price of the work included in the first contract, amounting to the sum of four thousand two hundred and fifty dollars.

With reference to interest, it has been the rule of this court not to allow interest except where the same was made payable by statute or by contract.(1) But in the case of *St. Louis* v. *The Queen*, lately decided in the Supreme Court and not yet reported, that court, I understand, allowed interest to a contractor on the amount found to be due to him, from the date affixed to his petition of right. I do not understand that any reasons were given for departing from the rule laid down in *Gosman's* case, but I assume that as the contract in question in *St. Louis'* case was performed within the province of Quebec the practice in force in that province to treat the service of process as a demand of interest, and to allow interest from that date, was followed; the court being, it would appear, of opinion that the Crown is bound by the rule or practice in that behalf in force in that province. The rule is, it seems to me, a fair one. It affords at least a measure of relief and justice to suppliants who, in the absence of any statutory provision, or an express agreement, lose the

(1) See *in re Gosman*, L.R. 7, Ch. D. 771; *The Queen* v. *McLean*, Cass. Dig. 2nd ed., p. 399.

1896

LAINÉ v. THE QUEEN.

Reasons for Judgment.

interest on moneys that may be found to be justly due to them from the Crown. The only question is as to whether or not the rule is applicable to a petition of right, and that I take to be settled so far as the Province of Quebec is concerned by the case to which I have referred. It may, perhaps, be thought to be unfortunate that the practice should not be uniform throughout Canada, but that is a question for the legislature.

With reference to the date from which interest should be allowed, I am not sure that it would be safe, as a general rule, to allow it from the date when the petition is signed; because in such a case it would be very easy for the suppliant to antedate his petition. Besides, it would be unreasonable to hold the Crown liable on a demand of which it has had no notice. If the practice in force in Quebec is to be followed, it should, it seems to me, be followed as closely as possible; and I should think that interest should not be allowed at least prior to the date when the petition of right is filed in the office of the Secretary of State.

In the present case the petition is dated the 16th of October, 1894, and was filed in the office of the Secretary of State on the 17th, the day following; so that the difference here is altogether immaterial.

There will be judgment for the suppliants for four thousand two hundred and fifty dollars ($4,250.00), with interest from the 17th day of October, 1894, and for their costs.

Judgment accordingly.

Solicitors for suppliants: *Belleau, Stafford, Belleau and Gelley.*

Solicitor for respondent: *C. P. Angers.*