GERSHON S. MAYES.....SUPPLIANT; 1891

Nov. 28.

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Contract for construction of a public work—Delay in exercising crown's right to inspect materials—Independent promise by crown's servant, effect of—The Government Railways Act, 1881.

It was a term in suppliant's contract with the crown for the construction of a public work that certain timber required in such construction should be treated in a special manner, to the satisfaction of the proper officer in that behalf of the Department of Railways and Canals. By another term of the contract it was declared that the express covenants and agreements contained therein should be the only ones upon which any rights against the crown should be founded by the suppliant.

The suppliant, immediately after entering upon the execution of his contract, notified A., the proper officer of the Department in that behalf, that he intended to procure the timber at a certain place and have it treated there in the manner specified, before shipment. A. approved of the suppliant's proposal, and promised to appoint a suitable person to inspect the timber at such place. The inspector was not appointed until a considerable time afterwards, and by reason of such delay the suppliant had to pay a higher rate of freight on the timber than he otherwise would have had to pay, and was compelled to carry on his work in more unfavorable weather and at greater cost, for which he claimed damages.

Held, on demurrer to the petition, that the crown was not bound under the contract to have the inspection made at any particular place; and that in view of the 98th section of *The Government Railways Act*, 1881, and the express terms of the contract, A. had no power to vary or add to its terms, or to bind the crown by any new promise.

2. The suppliant's contract contained the following clause:—"The "contractor shall not have or make any claim or demand, or bring "any action, or suit, or petition against Her Majesty for any dam- "age which he may sustain by reason of any delay in the progress "of the work *arising from the acts of any of Her Majesty's agents*; "and it is agreed that, in the event of any such delay, the contrac-

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"tor shall have such further time for the completion of the work "as may be fixed in that behalf by the Minister."

Held, that this clause covered delay by the Government's engineer in causing an inspection to be made of certain material whereby the suppliant suffered loss.

Statement of Facts.

DEMURRER to a petition of right for damages arising out of a contract between the crown and the suppliant for the construction of a pile trestle bridge on the Intercolonial Railway, between Brown's Point and Loch Broom Point, in the County of Pictou, N.S.

The facts of the case as admitted by the demurrer are stated in the reasons for judgment.

The full text of the clauses of the contract referred to in the reasons for judgment is as follows:—

Clause 8. "The engineer shall be the sole judge of work and material in respect of both quantity and quality, and his decision on all questions in dispute, with regard to work or material, as to the meaning or intention of this contract, and the plans, specifications and drawings shall be final; and no work, or extra or additional work, or changes, shall be deemed to have been executed, nor shall the contractor be entitled to payment for the same, unless the same shall have been executed to the satisfaction of the engineer, as evidenced by his certificate in writing, which certificate shall be a condition precedent to the right of the contractor to be paid therefor."

Clause 10. "In case any material, or other things, in the opinion of the engineer, not in accordance with the said several parts of this contract, or not sufficiently sound, or otherwise unsuitable for the work, be used for or brought to the intended work, or any part thereof, or in case any work be improperly executed, the engineer may require the contractor to remove the same, and to provide proper material or other things, or properly re-execute

the work, as the case may be, and thereupon the contractor shall and will immediately comply with the said requisition, and if twenty-four hours shall elapse and such requisition shall not have been complied with, the engineer may cause such material or other things, or such work, to be removed, and in any such case the contractor shall pay to Her Majesty all such damages and expense as shall be incurred in the removal of such materials, or other things, or of such work; or Her Majesty may, in Her discretion, retain and deduct such damages and expenses from any amounts payable to the contractor."

use 15. "The contractor shall not have or make any claim or demand, or bring any action, or suit or petition against Her Majesty for any damage which he may sustain by reason of any delay in the progress of the work arising from the acts of any of Her Majesty's agents; and it is agreed that in the event of any such delay the contractor shall have such further time for the completion of the work as may be fixed in that behalf by the Minister."

Clause 32. "It is distinctly declared that no implied contract of any kind whatsoever, by or on behalf of Her Majesty, shall arise or be implied from anything in this contract contained, or from any position or situation of the parties at any time, it being clearly understood and agreed that the express contracts, covenants and agreements herein contained and made by Her Majesty, are and shall be the only contracts, covenants, and agreements upon which any rights against Her are to be founded."

Clause 35. "It is distinctly declared and agreed that none of Her Majesty's Ministers, officers, engineers, agents or servants, have or shall have power or

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authority in any way whatever to waive, on the part of Her Majesty, any of the clauses or conditions of this contract, it being clearly understood that any change in the terms of this contract to be binding upon Her Majesty must be sanctioned by order of the Governor-General in Council."

The following is the full text of clause 8 of the specifications referred to in the reasons for judgment:

(8). " The piles in one length, and square upper parts of spliced piles, including the upper cleat in the splice, as shewn, must contain not less than 16 lbs. per cubic foot of the best dead oil of coal tar creosote, injected under a pressure of from 120 to 160 lbs. per square inch. All piling intended to be creosoted must be heated through with the temperature between 212 and 250 degrees, Fahrenheit, have all the air and moisture exhausted, and in that condition receive the creosote."

" The whole of the work of creosoting must be done in the most approved manner, and to the satisfaction of the engineer, or inspector, who shall have full power to reject any creosote, or creosoted timber, whether before or after treatment."

August 20th, 1891.

It was ordered, by consent, that instead of the argument on demurrer being made orally, counsel might submit their contentions to the court in writing.

Ritchie, in support of demurrer, submitted, *inter alia*, the following:—

1. The crown was not bound to send an inspector to South Carolina. (See clauses 8 and 10 of contract) (1).

2. No implied contract to make the inspection at South Carolina can arise under the express provisions of the written contract. (See clause 32 of contract) (2).

(1) *Ante* p. 404. (2) *Ante* p. 405.

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3. Suppliant relies upon an agreement of the engineer to have the inspection made there. It is objected to this :—

(*a*). That such agreement is without consideration.

(*b*). That the engineer had no power to alter the contract, or to bind the crown to send an inspector to South Carolina. (See clause 35 of contract) (1).

4. Suppliant's claim is by reason of delay by the engineer, and such delay, under the terms of the contract, can give rise to no claim. (See clause 15 of contract) (2). Cites *O'Brien* v. *The Queen*, (3) ; *Jones* v. *The Queen* (4).

Pugsley, Q.C., (Solicitor-General, N.B.), *contra*, submitted, *inter alia*, the following :—

1. In answer to the first point taken, that the crown was not bound to send an inspector to South Carolina, it is alleged in the petition of right that the creosoting had to be done in the United States, there being no place in Canada where it could be done. This is admitted by the demurrer.

As the creosote and the creosoting had to be to the satisfaction of the Government engineer or inspector, he had the right, under the contract, to say that the creosoting should not be done until he had inspected the timber and the creosote, and to have an inspector present when the work was being done. It was, therefore, necessarily a part of the contract that the engineer should appoint a time and place of inspection. It is admitted by the demurrer that he appointed Charleston, S. C., the place named by the suppliant, and agreed to send an inspector as alleged in the petition. The crown, through its engineer, having agreed to send an inspector to Charleston, was clearly under obligation to do so, as the suppliant could not begin the work of creosoting until the inspector was present.

(1) *Ante* p. 405.
(2) *Ante* p. 405.
(3) 4 Can. S. R. 529.
(4) 7 Can. S. C. R. 570.

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It is provided by clause 8 of the specifications (1) that all the creosoted square timber for the upper part of the piles were to be of North Carolina yellow pine; it surely never was contemplated that the timber should be brought to Nova Scotia, then inspected, and taken back to the United States to be creosoted. By this clause, too, it was provided that the process of creosoting was to be done to the satisfaction of the engineer, thus clearly showing that it was contemplated that he would be present while the work of creosoting was going on.

2. The suppliant does not rely upon an implied contract in this behalf, but upon the express promise of the crown through its engineer; and this promise was made under and in accordance with the contract, and is essential to its execution by the suppliant.

3. In answer to the objection that the agreement of the engineer to have the timber inspected in South Carolina was without consideration, it is submitted: 1st, that it is not necessary to have any consideration independent of the contract which provided for the inspection; 2ndly, if any new consideration were necessary, the fact that the suppliant was, by the contract, obliged to delay the work of creosoting until the inspector was present, would afford a sufficient consideration.

In answer to objection (*b*), that the engineer had no power to alter the contract, or to bind the crown to send an inspector to South Carolina, it is submitted that this was not an alteration of the contract. If by an agreement to perform any work it would be reasonable that the party for whom the work is to be performed should inspect it, then anything that arises between the parties in connection with inspection arises out of the contract, and not *dehors* the contract.

(1) *See Ante* p. 406.

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In the present case it was not only reasonable that the inspection should take place, but it was expressly provided by the contract that such inspection should be had. As the crown intrusted the inspection to the engineer, he was acting within the scope of his authority in appointing Charleston as the place of inspection, and the crown is bound by his act in this particular.

4. Clause 15 (1) of the contract does not apply to this case. It was only intended to include cases where the extension of time for completion of the work would afford compensation for the delay caused by acts of *agents* of the crown. It would apply to unavoidable acts of the crown's agents, but not to wilful or intentional acts. The delay herein complained of did not arise from acts of the crown's agents, but from the crown's *engineer* not having attended to the work as he was bound to do. The delay here has caused a loss in respect of which no extension of time would afford relief, because the damages arise in connection with the charter of vessels to carry freight.

Ritchie in reply :

Assuming that the contract contemplated that the inspection of the creosoting was to be done in the United States, this does not bind the crown to inspect there. The right of inspection is a privilege given to the crown, not something which the crown contracts to do.

BURBIDGE, J. now (November 28th, 1891,) delivered judgment.

About the 5th May, 1886, the suppliant entered into a contract with the crown, bearing date the 20th of April, preceding, for the construction, for the sum of $32,900, of a pile trestle bridge between Brown's Point and Loch Broom Point, in the County of Pictou

(1) *Ante* p. 405.

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and Province of Nova Scotia, the work to be completed by the 31st of October following. Part of the structure was to consist of piles of North Carolina yellow pine timber, which were to be of the quality and dimensions mentioned in the specification, and were to be treated with creosote in the manner therein set out. Such piles were to contain not less than 16 lbs. per cubic foot of the best dead oil of coal tar creosote injected under a pressure of from 120 to 160 lbs. per square inch, and were to be heated through with the temperature between 212 and 250 degrees, Fahrenheit, have all the air and moisture exhausted, and in that condition receive the creosote. The whole of the work of creosoting was to be done in the most approved manner, and to the satisfaction of the engineer or inspector, who had full power to reject any creosote or creosoted timber either before or after treatment. By the contract the word engineer was defined to mean the Chief Engineer and General Manager of Government Railways, and to include any of his assistants acting under his instructions, and it was provided that the engineer should be the sole judge of work and material in respect of both quantity and quality, and that his decision in regard thereto should be final. At the time when the contract was entered into, Mr. P. S. Archibald was the Chief Engineer of the Intercolonial Railway, and (I am stating the facts as admitted by the demurrer to the suppliant's petition) the engineer to whose satisfaction such creosoting had to be done. There was no place in Canada where timber could be treated with creosote. The suppliant immediately after entering upon the work which, under his contract, he had to perform, notified Mr. Archibald that he was about to procure the North Carolina yellow pine timber at Charleston, South Carolina, and to have the same creosoted there. Mr. Archibald approved, and

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promised to appoint a suitable person to inspect the creosoting and all matters connected therewith at that place. In a letter of 28th April, 1886, he suggested to the suppliant the advisability of the latter communicating with a specialist in creosoting, whom he named, stating that there had been a number of failures of creosoted piles in the South attributable to the use of imported dead oil. He added that he would go himself, or send some one, to ascertain exactly what kind of oil they used where the suppliant proposed to buy his timber, and that the latter better not make any definite arrangement without "their" approval, as he would run the risk of having the timber condemned if not in accordance with the specification. On the 1st of May, 1886, Mr. Archibald wrote the suppliant, that "in "order to forward the work he would probably "send his assistant, Mr. McKenzie, down to in- "spect the piles and creosoting process in the "course of two or three weeks." This was not done, and although the suppliant continued his efforts to get an inspector appointed, no such appointment was made until about the 5th of July. By reason of this delay the suppliant was compelled to pay a higher rate of freight on the timber than he otherwise would have had to pay, and the timber was not delivered at Pictou until the 29th of September; whereas, if the inspection had been promptly made, it could have been put down there by the 30th of July. In consequence, he had to carry on his work in more unfavorable weather, and at a greater cost, than if the piles had been delivered at Pictou at the earlier date. For the loss thereby occasioned, and for the increased rate of freight he was compelled by reason of such delay to pay, he brings his petition of right.

Briefly stated, the suppliant's case is that the crown was bound, upon being notified that the timber would

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be subjected to the process of creosoting at Charleston, in South Carolina, to appoint without undue delay a person to inspect the same and such process at that place; and that there was undue delay in making such appointment, resulting in a loss to the suppliant, for which he is entitled to damages. To this the crown demurs on the grounds (among others which I shall not have occasion to consider): (1). That the petition does not disclose any such obligation: and (2). That if it were assumed that it did, the suppliant has, by his contract, agreed that such delay should not give him any right of action for any damages resulting therefrom.

Whatever answer may be given to the inquiry as to the crown's obligation to name a person to inspect the timber and the process of subjecting the same to creosote at Charleston, the second objection is, it appears to me, and for reasons that I shall have occasion briefly to notice, conclusive against the suppliant's claim to maintain his petition.

I shall proceed, however, in the first place, to examine the contention that the crown was under the obligation referred to, not because such an examination is, in the view I take of the case, necessary for its determination, but for the reason that it will, I think, assist somewhat to a just appreciation of the position of the parties. By the 32nd clause of the contract set out in the petition, it was declared and agreed that no implied contract of any kind whatsoever, by or on behalf of Her Majesty, should arise or be implied from any thing contained in the contract, or from any position or situation of the parties at the time, and that the express contracts, covenants and agreements contained in the contract should be the only ones upon which any rights against Her Majesty were to be founded. By the 8th clause of the contract

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it was agreed, as has been seen, that the engineer should be the sole judge of work and material, and that his decision on all questions in dispute should be final; and by the 10th clause, that in case any material which, in his opinion, was not in accordance with the contract, or not sufficiently sound, or otherwise unsuitable for the work, was used for, or brought to, the intended work, or in case any work was improperly executed, he might require the contractor to remove the same and to provide proper material, or to properly execute such work, as the case might be. By the 8th clause of the specification it was provided, as already stated, that the whole of the work of creosoting was to be done in the most approved manner, and to the satisfaction of the engineer or inspector, who should have full power to reject any creosote or creosoted timber, whether before or after treatment.

The suppliant argues, and I think with reason, at least so far as the process of creosoting was concerned, that this gave the crown a right to an inspection of the timber, of the creosote, and of the work or process of creosoting, at the place where such process was carried on. Involved in that right, he adds, is the reciprocal obligation to appoint a person to make such inspection there. But does that follow ? The suppliant was free to buy the North Carolina yellow pine where he pleased and to prepare it where he saw fit. He was bound, I think, to give the crown an opportunity of examining the creosote intended to be used, and, probably, of inspecting the timber before treatment and the process of treatment. This of course could not under the circumstances have been done elsewhere than at Charleston. But, on the other hand, there is nothing in the contract expressly binding the crown to inspect the creosote or the process of creosoting the timber. The inspection provided for was, as Mr. Ritchie contends,

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for its benefit, not something that the crown contracted to do. It was no doubt the duty of the engineer to see that the inspection was made, but that, primarily, at least, was a duty that he owed to the crown.

The suppliant having made arrangements for the purchase of the timber, and its treatment with creosote, at Charleston, was, it seems to me, in this position, that it was his duty to give the engineer notice of what he had done, and to afford him a fair opportunity of making any inspection at Charleston that he saw fit to make there. But the suppliant, however prudent it may have been to take such a course, was not, I think, bound to submit to any undue or unreasonable delay on the engineer's part. Having afforded the engineer the opportunity spoken of, it was open to him to satisfy himself that his timber was of the dimensions and quality specified in the contract, and that it was prepared in accordance with its provisions, and to proceed with his shipments. It may be that any inspection that the engineer could have made when the timber had been delivered at Pictou, where it was to be used, would, in respect of the process of creosoting, have been more or less imperfect; and that he would have had to rely in a measure upon the evidence supplied to him by the contractor that the specification had in that particular been complied with. But that was the crown's affair, not the contractor's. The real difficulty, as appears from the petition, no doubt was that the persons who were to prepare the timber would not deliver it to the suppliant until it was inspected, unless his acceptance was taken to be an admission that they had fulfilled their contract with him. The risk involved in taking delivery of the timber under such terms, and before it had been passed by the Government inspector, was one that naturally enough he wished to avoid. But unless the crown was bound to have the inspection

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made at the place where the timber was subjected to the process of creosoting, it was a risk from which, under certain circumstances, he could not escape No doubt it was fair and business-like for the inspection to be made at Charleston, and the engineer was, it appears to me, acting reasonably and within the line of his duties in arranging for such inspection to take place there; but that is not the issue. The question is, was the crown under any obligation to appoint some one to make the inspection at Charleston? and I fail to find in the contract any such undertaking on its part.

The suppliant relies, however, on Mr. Archibald's promise. To this contention the respondent answers that by law and the contract Mr. Archibald had no power to vary or add to its terms, or to bind the crown by any new promise. By the 98th section of *The Government Railways Act*, 1881 (44 Vic. c. 25), in force in 1886, he could make no contract binding upon the crown, unless specially authorized in writing by the Minister of Railways; and in respect to the work in question the Minister could not give any such authority, for the reason that by the 35th clause of the contract it was distinctly declared and agreed that none of Her Majesty's Ministers, officers, engineers, agents or servants had or should have any power or authority in any way whatever to waive on the part of Her Majesty any of the clauses or conditions of the contract, it being clearly understood that any change in the terms thereof, to be binding upon Her Majesty, must be sanctioned by order of the Governor-General in Council. The answer appears to me to be conclusive.

The second ground of demurrer to which I have referred is based upon the 15th clause of the contract, by which it was agreed that the suppliant should not have or make any claim or demand, or bring any action, or suit, or petition against Her Majesty for any damage

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which he might sustain by reason of any delay in the progress of the work arising from the acts of any of Her Majesty's agents; and that in the event of any such delay he should have such further time for the completion of the work as might be fixed in that behalf by the Minister. The suppliant does not complain that he has not been allowed an extension of time in which to complete the contract. His contention is that clause 15 does not apply to this case; that it was only intended to include cases where the extension of time for the completion of the work would afford compensation for the delay caused by acts of the agents of Her Majesty, and would not cover a case like the present, where the damages arise in connection with the charter of vessels to carry materials, in respect of which no extension of time would afford relief; and, anyway, that it does not apply to a delay such as that for which it is alleged Mr. Archibald was responsible. With that view I cannot agree. The language of the clause is plain and free from ambiguity, and I see no reason to doubt that it applies to the case under consideration. Whether the extension of time provided for would in any given case afford adequate relief is not material to the enquiry. The question is, has the suppliant agreed to accept it as the only relief to which he is entitled, and thereby barred himself from prosecuting his petition? That question must, I think, be answered in the affirmative.

There will be judgment for the crown on the demurrer to the petition of right, and with costs.

Demurrer allowed with costs.

Solicitor for suppliant: *C. N. Skinner.*

Solicitor for respondent: *Wallace Graham.*