

1894 GERSHON S. MAYES APPELLANT;
 *May 8. AND
 HER MAJESTY THE QUEEN.....RESPONDENT.
 ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

*Contract—Public work—Authority of Government engineer to vary terms—
 Delay.*

Under a contract with the Dominion Government for building a bridge, the specifications of which called for timber of a special kind which the contractor could only procure in North Carolina, the Government was not obliged, in the absence of a special provision therefor, to have such timber inspected at that place and was not bound by the act of the Government engineer in agreeing to such inspection the contract containing a clause that no change in its terms would be binding on the crown unless sanctioned by order in council.

A provision that the contractor should have no claim against the crown by reason of delay in the progress of the work arising from the acts of any of Her Majesty's servants was also an answer to a suit by the contractor for damages caused by delay in having the timber inspected.

APPEAL from a decision of the Exchequer Court of Canada, (1) allowing a demurrer by the crown to suppliant's petition of right.

The suppliant, Mayes, in 1886, entered into a contract with the Dominion Government to build a bridge at Pictou, N. S., in connection with the Intercolonial Railway. The contract contained, among others, the following clauses :

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

*PRESENT :—Sir Henry Strong C.J., and Fournier, Taschereau, Gwynne and King JJ.

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."

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

By the specifications the piles when in one length were to be of the best North Carolina yellow pine creosoted throughout and when spliced the square upper parts were to be of the same material. One clause of the specifications was as follows:

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."

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The contractor procured the creosoted pine timber as required and wrote to the engineer asking to have the same inspected in North Carolina before it was shipped, which the engineer agreed to do, but delayed such inspection for some months whereby the suppliant was put to expense in consequence of having to cancel the charter of a vessel engaged to carry it from North Carolina and by having to proceed with his work late in the year. He proceeded against the crown by petition of right to recover damages arising from such delay, and the Exchequer Court allowed a demurrer to such petition, holding that he had no cause of action under the contract.

The suppliant appealed from that decision.

Pugsley Q.C for the suppliant.

W. H. B. Ritchie for the crown.

The judgment of the court was delivered by

THE CHIEF JUSTICE :—(Oral). We think this appeal must be dismissed. As regards the objection based on the arbitration clause, the general averment in the petition of right that all conditions precedent were performed is no doubt sufficient answer to that.

The learned judge of the Exchequer Court in giving judgment for the crown proceeded upon two grounds, first, that there was no stipulation in the contract obliging the engineer to appoint an inspector, and secondly, that the case comes within the special provision of the contract regarding delay.

As to the first ground, it is impossible to say that there was any obligation on the part of the crown to send an inspector, and the engineer had no authority to contract for any inspection of the timber. By the terms of the contract no change therein is to be binding upon the Government unless sanctioned by order of the Governor General in Council, and the statute

provides that no contract by any of the servants of the crown shall bind it. This shows that no contract or agreement by the engineer to send an inspector to inspect the timber at the place where it was being prepared could have been obligatory on the crown. Further, there is great force in Mr. Ritchie's contention that in reality the engineer never intended to bind the crown by any such agreement, and that any offer to send the inspector to North Carolina must, on the suppliant's own allegations in the petition, be taken to have been purely gratuitous.

As to the other ground, I am of opinion that the crown cannot be held liable for delay caused by the engineer because this ground of complaint is entirely covered by the clause of the contract expressly providing that the contractor should not have any claim against the crown for damages caused by delay.

Upon all the grounds it appears that the demurrer was properly allowed and the appeal must therefore be dismissed with costs.

Appeal dismissed with costs.

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

Solicitor for respondent: *W. F. Parker.*

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 Justice.