FRANK L. BOONE.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

1932

June 6 & 7.
Dec. 6.

Contract—Crown—Alterations of conditions—Authority of District Engineer and Chief Engineer

The contract in question was for the construction of an Ice Pier at Barrington Passage, N.S. The specification, inter alia, provided that the foundations for the crib "must be excavated by means of a dredge to the rock and cleared off by a diver." This the contractor found more difficult than he anticipated, and he told the District Engineer that the excavation by dredge was impossible of performance. Thereupon

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the District Engineer verbally relieved him of the dredging, the foundation area for crib to be levelled off with bags of concrete, etc., but refused to put the instructions in writing. The contractor would not carry on and the work was taken out of his hands for delay in execution of the contract. Hence the present action for damages alleged to have been suffered.

Held, that if a party by his contract charges himself with an obligation possible to be performed he must make good, unless the performance becomes impossible in law or in fact, or by the conduct of the other party. If what is agreed is possible and lawful, it must be done.

2. That the changes in the work under the contract made by the District Engineer in this case were not matters of detail, but, from an engineering standpoint, were fundamental changes which could only be authorized by the Chief Engineer.

PETITION OF RIGHT by Suppliant herein to recover from the respondent the sum of $13,386.53 as damages resulting from the fact that the contract between him and his partner had been taken over by the Crown and the work completed by it.

The action was tried before the Honourable Mr. Justice Maclean, President of the Court at Saint John, N.B.

P. J. Hughes, K.C., for suppliant.

H. A. Carr for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

THE PRESIDENT, now (December 6, 1932) delivered the following judgment.

On September 22, 1928, the petitioner, F. L. Boone, and one Voye, severally and jointly entered into a written contract with His Majesty the King, represented by the Minister of Public Works of Canada, to construct Ice Pier No. 5, at Barrington Passage, Nova Scotia, according to a certain plan and specification, which form a part of the contract. Tenders had been publicly invited by the Department of Public Works for the construction of this work, and that of Boone and Voye was the lowest and was accepted. The contract was to be completely performed on or before September 1, 1929, and time was to be of the essence of the contract. I might here state that after the contract in question was entered into, Boone and Voye on March 21, 1929, entered into a written partnership agreement in respect of this contract, and two other contracts

which had been awarded them and which were to be performed at Halifax, N.S. On September 25, 1929, Voye, by a very informal letter, withdrew from the partnership, and it seems that any work done under the contract was carried out by Boone, and at his expense. It would appear that Boone accepted Voye's letter as the termination of the partnership, at least in so far as the work in question was concerned. It does not appear that the Department of Public Works was advised of this change in the partnership, or that it released Voye from his obligations under the contract. The respondent now claims that the petitioner Boone could not alone begin this proceeding by Petition of Right, and that Voye should have been joined, and for that reason the petitioner must fail, or that Voye should yet be joined. I shall return later to this point. It will be convenient hereafter to refer to the suppliant as the "contractor."

The specification provided that the pier was to be a certain size and shape and to be crib built to a specified elevation of squared creosoted timber and filled practically to the top with approved stone ballast; the top was to be of concrete. It provided also that the foundation for the crib "must be excavated by means of a dredge to the rock and cleared off by a diver." The footing for the crib work was then to be built with concrete in bags, which I understand to mean, that after the dredging was completed the floor was to be levelled off with bags of concrete, and the crib or pier was to rest on top of such bags of concrete. The contract provided that the same was made and entered into by the contractor on the distinct understanding that he had before execution, investigated and satisfied himself of everything and of every condition affecting the works to be executed and the labour and material to be furnished, and that the execution of the contract by the contractor was based on his own examination and judgment, and not upon any data contained in specifications, plans, maps or files, etc., furnished by the respondent, his officers or agents. Parties intending to tender were requested to visit the site of the proposed works and make their own estimates of the facilities and difficulties attending the execution of the work. The tender of Boone and Voye certified that they had visited and examined the site of the works, or had

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caused this to be done by a competent person. This in fact, I find, was not done. Boone had once worked near that locality, as a contractor in connection with another public work, and he was relying upon his observation of the general character of the locality at that time, and not upon any examination of the proposed site of the pier. The specification contained a clause, under the head of "Foundation," to the effect that while the section shown on the plan accompanying the specification, showing soundings or borings, or the nature or condition of the bottom was believed to be correct, still the Department of Public Works was not to be responsible for any errors which might be discovered during the progress of the work, in respect of any of the soundings or borings, or the nature or condition of the bottom where the foundation of the pier was to be placed. The contract provided for the payment of the following unit prices to the contractor in respect of the work to be performed.

Dredging for foundation, scow measurement, $3 per cu. yd.

Bag concrete in place, $24 per cubic yard.

Creosoted stone fill crib work in place, 65c. per cu. yd.

Concrete top in place $32 per cubic yard.

The bed of the stream where the foundation of the pier was to be laid was composed of large and small boulders, gravel, etc., and this is shown on the plan, soundings and borings having been made by the Department of Public Works some time previous to tenders being invited for the construction of the works in question. The contractor chartered one dredge, what is known as an orange peel dredge, which arrived on the scene of operations about July 1, 1929, but on account of the current and after a short trial, this dredge at once abandoned all intention of attempting to perform the dredging required by the contract. Then another dredge was brought to the scene, the latter part of July, a powerful bucket dredge, but she was unable to make satisfactory progress, and the superintendent of the dredge refused to continue dredging because it was causing serious injury to the dredge buckets. The contractor had made no examination of the bottom, and had made no preparation for the dredges in the way of blasting the boulders. I think it is probable, as was stated in evidence by some witnesses,

that only a dipper dredge could do this work, and then possibly some of the boulders would need to be first drilled and blasted. There is no evidence that the contractor made any attempt to procure another dredge nor do I think he ever intended to do so. It may be that the requirement of dredging the foundation down to the rock was perhaps difficult, expensive, and unnecessary, but nevertheless the contract required this to be done, and the contractor agreed to do it. The contractor then approached the District Engineer at Halifax, Mr. Locke, and represented that the excavation of the foundation for the pier by dredging was impossible of performance, or that he was unable to carry out that portion of the contract, and the District Engineer then informed the contractor that he would endeavour to alter the plan and specification to meet the apparent difficulties that had developed in that regard, and in the course of a few days the District Engineer presented the contractor with a plan indicating the changes that he was willing to make. The contractor was to be relieved of the dredging, the foundation area was to be levelled off with bags of concrete up to a certain elevation and thereon the crib work would be placed, and a talus, consisting of bags of concrete, was to be placed around the outer sides of the pier up to a determined point. These contemplated changes would eliminate the dredging of an approximated quantity of 975 yards, it would decrease the height of the crib work by ten feet, and it would, I think, call for the use of more concrete in the foundation and talus. On that occasion, I think, the contractor requested written instructions regarding these proposed alterations in the plan and specification, and this the District Engineer declined to do. The contractor had in the meanwhile constructed the crib-work up to a certain height, on shore, intending later to float it into position when it would be filled with stone, and practically all the material and equipment required was on the ground.

On August 28, 1929, the District Engineer wired the contractor as follows:

Kindly start concrete bag foundation for pier Barrington Passage. . . .

On the following day the contractor wrote the District Engineer as follows:—

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Dear Sir:

Re Contract 809 Barrington Passage

I received your wire yesterday *re* proposed changes in foundation. While I am willing and most anxious to do the work just as you wish it done, I wish to point out that in my opinion this change calls for work outside the provisions of the contract.

By the terms of the contract it is provided that the footing of the crib must be excavated by means of a dredge to the rock. We had the largest and most powerful dredge available undertake to do this excavation, and it was found impossible to excavate because the material was such that a dredge could not remove it.

The change now proposed is to meet the situation arising from the impossibility of using a dredge. I claim that this makes an entire change and a modification of the contract as to price and as to time for completion of the work should be made with us as a result.

We have also been put to large expense in connection with the attempt made to operate the dredge which under the circumstances ought to be paid by the Department.

As already requested I would like to have the instructions concerning the proposed changes made in writing before commencing the work.

The District Engineer did not furnish the written instructions requested, and the contractor did not take any steps to proceed with the works.

The contractor claims, it will be seen from his letter, that the alterations proposed were substantial and involved the introduction of something outside the contract, and that "an entire change and modification of the contract as to price and time and completion of the work," should be made. And the contractor seems to have taken this position because of the fact that he thought that the dredging required by the contract was impossible of performance. The District Engineer took the position that the proposed alterations did not mean that there was to be any substantial departure from the contract; that the provisions of the contract requiring the written permission of the Engineer to alterations in the plan and specification did not apply here, and that the proposed alterations involved only additions or deductions in the materials required for the works. If I understand it correctly, the ground which the District Engineer took—and he gave evidence at the trial—was that the contract provided that if the quantities of materials were increased or decreased, or if the pier was lowered or heightened, the contractor would be paid more or less as the case might be, according to the unit prices which I have mentioned, and that all that was involved in

the proposed changes was the abandonment of the dredging, the shortening of the height of the pier, the use of additional cement in the foundation and talus, and that alterations of this character were matters of detail, were within the authority of the District Engineer to make, and did not call for anything outside the provisions of the contract. There is a clause in the specification, which I have already mentioned, and which seems to mean that if for any reason the contractor is obliged to build to a greater or less height, presumably the crib work or pier, the increased or decreased quantities involved would be proportionately paid for or deducted from the amount of the contract.

By the terms of the contract the respondent was authorized to take the work out of the hands of the contractor for any delay in executing the works, and on September 18, 1929, notice was served upon the petitioner by the Chief Engineer of the Public Works Department at Ottawa, stating that the date of completion of the works was September 1, 1929, that the contractor was in default in not diligently continuing to advance or execute the works, and it called upon the contractor to put an end to his default and delay, and if within six days from the service of such notice, satisfactory progress was not made with the works, the Minister of Public Works would take over the works from the contractor together with all materials, articles, equipment and tools provided by the contractor on the works, which the Minister did, and he finished the work largely according to the modified plan proposed by the District Engineer to the contractor, and, it is alleged, at a cost of $23,994.67 which exceeded the contractor's contract price of $18,190. The contractor did not proceed with the work after such notice from the Chief Engineer, alleging to the Chief Engineer as the reasons for his default, the same as were advanced in his letter to the District Engineer. The contract provides that if the Minister took over the work, that the contractor would have no claim for any further payment in respect of the work performed, and that the contractor should be chargeable and liable for all loss and damage suffered by the respondent, that no claim should be raised or made by the contractor by reason of the ultimate cost of the works so taken over, for any reason proving greater than, in the

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opinion of the contractor, it should have been, and that any material, equipment, property, belonging to the contractor and taken over by the respondent, should remain and be the property of the respondent for all purposes incidental to the completion of the work, and might be used and exercised by the respondent as they might therefor have been used by the contractor, and that the Minister might at his option, on behalf of His Majesty, sell or dispose of such material, equipment, etc., at such prices as he may see fit, and detain the proceeds of such sale or disposition, on account of, or in part satisfaction of any loss or damage which His Majesty may have sustained.

The contractor claims to have suffered damage in the sum of $13,386.53 which includes the deposit of $1,850 accompanying the tender as security for the performance of the work, cost of material, freight, wages, and other sundry expenses, with interest on the several items of disbursement from the date thereof. The respondent has forfeited the deposit so pledged by reason of the default of the contractor in not executing the contract; and he has forfeited, as I understand it, all the plant and material on the works when the same was taken over.

The case is not free from difficulties, and I have given it anxious consideration, yet, I think, whatever hardship it works, the contractor must fail in his petition. In the first place, there is but one contract before the Court, and in respect of that contract the contractor is clearly in default, and the respondent was empowered thereunder to take the works out of the hands of the contractor and complete the same. The contractor agreed to dredge the foundation down to rock bed, and he seems to have been dilatory indeed, in making arrangements to procure the services of any dredge let alone one capable of doing the required dredging, and in informing himself as to the nature of the bottom to be dredged, before he sought the services of a dredge. At any rate the contract stands, and no new or amended contract has taken its place. The contractor cannot complain that to dredge the foundation was a difficult task. It is a settled rule of law that if a party by his contract charges himself with an obligation possible to be performed he must make it good unless the performance becomes impossible in law or in fact, or by the conduct of

the other party. If what is agreed to be done is possible and lawful, it must be done. There is no reason for holding that the foundation could not have been dredged as required; I think it could though perhaps that was not necessary. The contractor assumed the position that the proposed changes were such as to require "a complete readjustment of the contract," and that the proposed changes involved work outside the contract necessitating written directions from some one. If that were so, the District Engineer could not alter the contract, and the contractor did not appeal to the Chief Engineer for written authorization for such changes. He refused to follow the directions of the District Engineer, with the result that the contract remained to be executed according to the original plan and specification. The attitude of the contractor is somewhat difficult to understand because the changes proposed were, I think, for his benefit, and it is probable that had he acted upon the suggestion of the District Engineer, the changes in the plan and specification would have been approved of by the Chief Engineer. He seems to have assumed that because he had failed to dredge the foundation as required, with two dredges, that therefore he was relieved from this obligation, and was entitled virtually to a new and perhaps a more favourable contract.

The contractor's claim for damages is based upon the written contract of September 22, 1928, and there is no other contract. He contends he was damaged by the respondent taking over the works, together with the plant, materials, etc., on the site, not that he was not in default under the terms of the contract, but because the District Engineer declined to put in writing certain proposed changes in the plan and specification which he, the District Engineer, apparently was willing to authorize the contractor to act upon. The respondent was not under any obligation to revise the contract. Then, it seems to me that the contractor was left with the contract on his hands just as it stood on the day it was executed, and he was in default. The District Engineer could not vary the contract, or direct the contractor to do work outside the contract, and this the contractor is presumed to have known. If the District Engineer was authorized to make and direct such changes, and if the plan as modified and the telegram

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asking the contractor to lay the concrete bag foundation, constitute a direction in writing, then again the contractor is in default; and if the District Engineer was not authorized to make such changes, then his proposals go by the board, and the contractor was bound to proceed with the work according to the contract. It seems to me that however one looks at the matter the contractor was in default. On September 11, 1929, when the Chief Engineer notified the contractor to cure his default by proceeding with the work, the contract stood unvaried, and the contractor thereafter made no effort to proceed with the work and to complete the contract, and it appears from all the circumstances that he intended to remain in default.

Now, was the District Engineer empowered to make the changes in the plan and specification which he proposed to the contractor? While, I think, the District Engineer should have procured from the Chief Engineer authorization in writing directing the proposed changes, and in turn given the contractor directions in writing, thus expediting the work, and avoiding possible injustice to the contractor and needless litigation, still I cannot see how this can assist the contractor in establishing legal liability for damages against the respondent. According to para. 9 of what is called the General Conditions accompanying the specification at the time of tender, and forming a part of the contract, the work was to be done in accordance with the plan unless the Chief Engineer deemed alterations should be made, and para. 14 states that the contractor was not to make any change or alteration in the works or in the dimensions and character of the materials to be used without the consent and permission in writing of the Engineer, which there means the Chief Engineer. "Alterations" is defined in para. 15, and it seems to me that the alterations proposed were such as could only be authorized by the Chief Engineer, because, for example, the change proposed in the foundation of the pier was not of a trifling nature, but from the engineering standpoint was a fundamental change indeed, and it seems to me was one that the District Engineer could not possibly authorize. Then para. 37 of the General Conditions makes it quite plain that the District Engineer had no power to order changes which would entail an increase or decrease in the cost of the work without re-

ferring the matter to the Chief Engineer, and it is not shown that he did; he could only direct that the work be substantially carried out in accordance with the plan and specification. I do not think that the changes in the plan and specification that were proposed were in the nature of extras, as defined by para. 7 of the contract, and as claimed by the District Engineer; nor were the suggested changes matters of detail, but were changes of such a character as to require authorization in writing by the Chief Engineer. It seems to me therefore that the changes in the plan and specification proposed by the District Engineer, and which the contractor required be put in writing, were not authorized by the Chief Engineer, and I can only regard them as being just as ineffective as if they had never been proposed at all. Then the contract, the plan and specification, remain as they were. The Chief Engineer then resting on the contract, required the contractor to proceed to completion with the work, but he refused to do so. The notice was not, I think, unreasonable as to time, and it appears from the facts that the contractor had no intention to proceed to the completion of the contract; and the Chief Engineer apparently would not authorize the contractor to proceed with the work subject to the alterations in the plan and specification proposed by the District Engineer. So again, it seems to me that the contractor being in default under his contract his action is without ground.

The terms of the contract are exceedingly onerous so far as the contractor is concerned. It was evidently designed to meet the case where contracts entered into by the Crown at Ottawa, were to be executed at far distant places, and consequently the power and authority of local or district officers was designedly limited to the direction of the works as actually set forth in the contract, unless otherwise authorized in writing by the Chief Engineer. It seems to me that the controversy which arose between the parties here could have been avoided, and that the differences between the contractor and those representing the Crown might have been adjusted. In view of all the circumstances I am disposed to think that abstract right between the parties would entitle the contractor to some return of the moneys expended by him in the premises; but that is a matter for the grace and bounty of the Crown, and it must

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be left at that. While I find for the respondent there will be no order as to costs.

One point further is to be mentioned. While in the view I take of the case it is not perhaps now necessary to decide whether or not Voye should have been added as a suppliant, yet in the event of an appeal, I perhaps should express an opinion upon the point. A motion was made at the trial by counsel for the respondent to dismiss the petition for the non-joinder of Voye. To amend the petition by adding Voye does not involve any substantial alteration in the cause of action, and if the petition had originally been presented with the name of Voye added as a suppliant, it is improbable that the fiat would have been refused. I have considered the authorities cited to me by counsel, and I am inclined to the view, though not without some doubt, that it is proper that Voye should be added as a suppliant, and I understood him to say at the trial that he did not now object to this being done though he did at an earlier stage; I therefore grant leave to add Voye as a suppliant, but on the condition that the suppliant Boone indemnify Voye, if the latter so requires, against any costs to which he may be subjected by his being joined as a suppliant. This would dispose of the point to the satisfaction of both parties I should think, and it will entail no serious hardship upon the suppliant Boone, if indemnity is required of him on this account.

Judgment accordingly.