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132 Md. 637, 104 A. 360

Court of Appeals of Maryland.
MAYOR AND **CITY COUNCIL** OF **BALTIMORE**
v.
POE et al.
POE et al.
v.
MAYOR AND **CITY COUNCIL** OF **BALTIMORE**.
Nos. 8, 9.

May 3, 1918.

Appeals from Superior Court of Baltimore City; John J. Dobler, Judge.

Action by Edgar Allan Poe and others, receivers of the Noel Construction Company of Baltimore City, a body corporate, against the Mayor and City Council of Baltimore, a municipal corporation. From a judgment for plaintiffs, both parties appeal. Reversed and remanded.

West Headnotes

Municipal Corporations 268 ⚷358(1)
268k358(1) Most Cited Cases
A provision in a contract for the construction of public improvements, making the engineer's certificate a condition precedent to payment for extra work, may be waived by the city.

Municipal Corporations 268 ⚷358(3)
268k358(3) Most Cited Cases
A contract for construction of a sewage pumping station, expressly leaving to the determination of the city engineer and architect the questions of quantity, quality, acceptability, and value of the work and material, and the number of working days consumed, makes their decision final and conclusive on the parties if within the scope of the submission, and is not subject to review in the absence of fraud or bad faith.

Municipal Corporations 268 ⚷374(1)
268k374(1) Most Cited Cases
In an action by the receivers of the contractor to recover a balance due under municipal contracts for the construction of a sewage pumping station, the receivers, acting for all the creditors, might recover damages suffered by subcontractors recognized by the city as the contractor's representatives.

Municipal Corporations 268 ⚷374(4)
268k374(4) Most Cited Cases
In an action by the contractor's receivers under a contract for the construction of a sewage pumping station, time sheets relating to the value of extra work performed by a subcontractor were erroneously excluded; the city being liable for the subcontractor's claim.

Municipal Corporations 268 ⚷374(4)
268k374(4) Most Cited Cases
In an action to recover a balance due under a contract for the construction of a sewage pumping station, it was not error to exclude evidence as to what labor was employed in removing a dumping pier for excavated material under orders by the city; the contract providing that the contractor himself was to dispose of such material.

Municipal Corporations 268 ⚷374(4)
268k374(4) Most Cited Cases
In an action by the receivers of a contractor to recover a balance due for the construction of a municipal sewage pumping station, extracts from the minutes of the sewage commission were inadmissible.

Municipal Corporations 268 ⚷374(5)
268k374(5) Most Cited Cases
In an action for a balance due on a municipal contract for the construction of a sewage pumping station, increased expense to the contractor in disposing of excavated material because his dumping pier was moved by order of the city was not recoverable.

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Municipal Corporations 268 374(6)
268k374(6) Most Cited Cases
Notwithstanding a provision in a contract for the construction of a sewage pumping station that certificates of the engineer and architect were a condition precedent to payment for extra work, the waiver of such provision was for the jury where it had been continuously and repeatedly ignored by the parties.

Municipal Corporations 268 374(6)
268k374(6) Most Cited Cases
In an action for a balance due upon a municipal contract to construct a sewage pumping station, items referred by the engineer without deciding them, to a committee of the sewage commission which did not act upon them, should have been presented to the jury.

Municipal Corporations 268 374(6)
268k374(6) Most Cited Cases
Where a municipal contract for the construction of a sewage pumping station provided that the city engineer should give all necessary lines and grades, levels, etc., for the contractor's guidance, and the contractor claimed that the engineer gave wrong lines, and the work had to be done over again, the question was one for the jury.

Argued before BOYD, C. J., and BRISCOE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Robert F. Leach, Jr., Asst. City Sol., and S. S. Field, City Sol., both of Baltimore, for Mayor and City Council of Baltimore.
J. Kemp Bartlett and Charles F. Harley, both of Baltimore (Robert D. Bartlett, of Baltimore, on the brief), for receivers of Noel Const. Co.

CONSTABLE, J.
There are cross-appeals in this case; each party appealing from the judgment rendered in favor of the receivers of the Noel Construction Company.

The case arose out of the contracts awarded to the Noel Construction Company by the city of Baltimore through the board of awards for the construction of the sewage pumping station near East Falls, in Baltimore city. It was proposed by the city to erect the station building by two separate contracts, one for the substructure or foundation, called contract No. 3, and the other for the erection of the superstructure, called contract No. 4, and invited bids for that work. The specifications for contract No. 3 provided that, if that contract was awarded to one bidder, and the contract for the superstructure was awarded to another bidder, the number of working days from the date of the commencement of the work to its completion would be limited to 200 days, but that, if the contracts for both the substructure and the superstructure were awarded to the same bidder, the number of working days from the date of commencement to completion would be limited to 420 days. The same provision as to limit of time for completing the substructure and the superstructure was made in the specifications for contract No. 4; 220 working days if different bidders, and 420 days if the same bidder was awarded both contracts. The Noel Construction Company, being the lowest bidder for each of the two contracts, was awarded both. Provision is made for computing what shall be working days under the terms of the contracts as follows:

> "Every day except Sundays and also except legal holidays on which no work is done shall be considered a working day, provided that it is not unfitted either by wind, rain, snow or temperature for working out of doors.
> The length of time (expressed in days and parts of days) during which the work has been delayed by any act or omission of the sewerage commission shall be allowed to the contractor and excluded from such computation."

Calvin W. Hendrick, chief engineer of the city, was in charge of contract No. 3, or the ***362** substructure contract, and Henry Brauns, an

architect, was in charge of contract No. 4, or the superstructure contract. Contract No. 3 contained this provision:

> "The engineer shall determine the number of working days that the contractor is in default in completing the work to be done under this contract, and shall certify the same to the commission in writing. *** His determination and certificate shall be final and conclusive."

Contract No. 4 contains the same provision, except the architect is substituted for the engineer. Provision is also made in the contracts that for each and every working day that the engineer or architect shall certify that the contractor is in default in completing the work to be done under the specifications, the contractor shall pay to the city the sum of $35, and that for each day the work may be completed before the time fixed in the contracts for such completion the contractor shall be allowed a premium of $35; also the following provision:

> "(53) The contractor shall do such extra work as may be ordered in writing by the architect or engineer with the authorization of the commission. No claims for extra work will be considered or allowed unless said work has been so ordered by the architect or engineer, nor unless the commission shall approve such claim for extra work and certify in writing that in its opinion such extra work was necessary for the public interest, stating in the certificate its reasons."

And the further provision:

> "(14) To prevent disputes and litigations, the architect or engineer shall in all cases determine the amount or quantity, quality, acceptability and value of the work and materials which are to be paid for under this contract, shall decide all disputes, questions, and doubts relating to the work and the performance thereof, and shall in all cases decide every question which may arise relative to the contract or to the obligations of the contractor thereunder. His determination and decision shall be final and conclusive upon the contractor and all whom he may employ to execute the various branches of the work, whether as subcontractors or otherwise, and upon all parties from whom materials may be purchased, either by the contractor or by any subcontractor. In case any question shall arise between the contractor and the city touching the contract, the estimate or certificate and decision of the architect or engineer shall be a condition precedent to the right of the contractor to receive any moneys under the contract."

Provision was also made that the contractor would be required to comply strictly with all the requirements of the building regulations and other ordinances of the city of Baltimore, and also the following provision was contained in both contracts:

> "(48) The commission reserves the right to suspend the whole or any part of the work to be done hereunder, if it shall deem it for the interest of the city of Baltimore to do so, without compensation to the contractor for such suspension, other than extending the time for completing the work as much as it may have been delayed by such suspension."

The purpose of this building was to receive by gravity all the sewage from South and West Baltimore, and after treating it there to force it by means of gigantic pumps to the disposal plant some miles away. It was necessary for carrying out this purpose to have the foundations unusually strong, and to insure that the following provision was made in contract No. 3.

> "(68) It is expected that satisfactory material for the foundations will be found at El. 23, but the contractor shall carry the excavation to a greater depth wherever, in the opinion of the engineer, such greater depth is necessary to secure a suitable foundation. If, on the other hand, a satisfactory foundation is found at a less depth

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than El. 23, the excavation shall be discontinued at that depth, if directed by the engineer."

The contracts and specifications are contained in printed books covering over 180 pages, and as it would be impossible to reproduce them in full, we have confined ourselves to quoting those which we consider most applicable to this controversy.

The work on the substructure was begun on June 29, 1908, and the whole building completed August 24, 1911, and under date of August 25 and September 11, 1911, the architect and the engineer respectively certified to the commission that the number of days the contractor was in default under the contracts was 1441/4 working days, at $35 per day, and therefore subject to damages of $5,083.75. The amount of money certified to be due under the contracts, less $5,083.75, was paid over to the contractor.

Receivers were appointed for the Noel Construction Company, and this action was commenced by them on the 6th day of January, 1916, for the recovery of the amount retained as damages for failure to complete the work within the specified 420 working days, for extra work performed, damages incurred by the company through interference with the work and for the recovery of $853.20 charged against the contractor for insuring the building after it had been accepted by the commission. The last item is conceded by the city to have been charged in error against the contractor and should be allowed to the plaintiff.

The trial court held that neither the certificate of the chief engineer nor the certificate of the architect was "technically a conclusive determination of the number of working days in which the Noel Construction Company was in default in completing the work to be done under the respective contracts in evidence," and under a prayer of its own left to the jury to determine whether the Noel Construction Company finished the contracts under or beyond the number of days limited by the contract. But also held that they were not entitled to recover for other claims other than the insurance, which was conceded.

From the ruling of the court, upon the prayers, in holding that the certificates of the engineer and architect as to the number of days in default were not binding and conclusive upon the contractor, the city excepted, and that question constitutes its appeal.

[1] At this date it cannot be questioned what is the effect of a provision in a contract expressly leaving to a third party the determination***363** of questions such as were left in these contracts to the determination of the engineer and the architect. The rulings of this state and the courts of all other states in the Union, with the exception of Indiana, are uniform as to the effect of such a provision as in these contracts; that the decision of such person shall be final and conclusive upon parties to the contract, provided the decision concerns matters within the scope of the submission, and is not subject to review by the courts, if made by the third party in the absence of fraud or bad faith. Mayor, etc., v. Ault, 126 Md. 423, 94 Atl. 1044; Mayor, etc., v. Talbott, 120 Md. 363, 87 Atl. 941; Hughes v. Model Stoker Co., 124 Md. 289, 92 Atl. 845; Pope v. King, 108 Md. 37, 69 Atl. 417, 16 L. R. A. (N. S.) 489, 15 Ann. Cas. 970; Lynn v. B. & O. R. R. Co., 60 Md. 414, 45 Am. Rep. 741; 6 Cyc. 40.

Indeed, the soundness of this principle of law is not questioned by either of the parties, but the plaintiffs contend that the determination of these questions bearing upon the number of actual working days consumed in the work was not made by those authorized to make the decision, but was the result of influence of others. There is, however, no claim made that fraud or bad faith was exercised either by the engineer or the architect. The work on the substructure started on June 29, 1908, and was finished on March 21,

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1910, covering a period of 632 days. The engineer certified that of that number of days 188 were charged against the contractor as actual working days. From June 29 to November 2, 1908, the work progressed satisfactorily, and 971/2 days of the 188 were charged against the contractor during that period. At that time serious difficulty arose, growing out of interference, justly so made, by the building inspector of Baltimore city, who claimed that the excavation should go lower than it was planned to go. The controversy between the engineer and the building inspector was referred by the sewerage commission to an arbitration board. Many tests were made on behalf of the arbitration board and on behalf of the building inspector by driving piles, etc.

Of course, during all of this period great delay was caused the Noel Construction Company in carrying out the contract, and on April 27, 1909, the company wrote the engineer requesting an extension of time between November 6th and April 23d in which he claimed of the 143 days included between those dates he should be allowed an extension of 101 days, or, in other words, that he should only be charged with 42 actual working days. The engineer decided that from November 2, 1908, to April 22, 1909, the contractor should only be charged with 40 working days. It was decided to carry the excavation a considerable distance below elevation 23, in fact, to carry it to elevation 31 in some instances; and because of this necessary extra work during the months of June, July, August, September, and October the engineer charged them with only 11/2 actual working days. During the delay the engineer was called upon to decide many questions. Some of these questions he himself decided; others he referred to committees or to the sewerage commission. On questions of time extensions, however, he decided all himself, with the exception that once, in his absence, when the Noel Construction Company asked for a 3-day extension in August, 1908, because of a storm, the acting engineer referred the determination to the sewerage commission, which granted the extension.

The engineer, as of June 12, 1911, wrote to a special committee of the sewerage commission explaining how he arrived at the 188 working days which he charged to the contract for the substructure as follows:

> "The foundations were completed and turned over to the architect for work on the superstructure on March 21, 1910, making a total of 632 days. Of this total period there would be deducted 102 days for Sundays and holidays, and 41 days lost on account of bad weather, making a total of 143 days to be deducted from the total time, leaving the possible number of working days 489. On account of delay due to the action of the building inspector and the removing of certain undesirable material encountered below 23, called for in paragraph 68 of the specifications, there was to be a further deduction of 301 days, leaving 188 working days chargeable to the contractor of the substructure. The contractor therefore is entitled to an extension of 301 days due to the reasons set forth, and I would recommend that this extension be granted. The superstructure being entirely under the jurisdiction of the architect, I have nothing to do with that matter."

As to the certificate of the architect the plaintiffs claim that it was invalid as to its binding effect because it was made up at the dictation of the city solicitor and others. We find from the record, however, that while it is true he had a conference with the city solicitor and members of the sewerage commission on October 26, 1911, and that a certificate was prepared for his signature to be antedated as of August 25, 1911, and that the architect practically rewrote and forwarded that as his certificate to the chairman of the sewerage commission, yet nevertheless the examination of

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the architect shows that he had no doubt as to the number of working days the contractor consumed on the superstructure, but that the doubt in his mind was caused by whether or not he could certify as to the number of days consumed on the substructure with which he had nothing to do. As supplementing his testimony on this point that he had no doubt as to the number of days consumed there was introduced a letter from him under date of July 1, 1911, long before he had filed any certificate, to the chairman of the sewerage commission as follows:

> "Dear Sir: Replying to your inquiry of June 29, 1911, I beg to state that I have charged up against the Noel Construction Company on account of their contract for the superstructure of the sewage pumping station on Eastern avenue from March 22, 1910, to June 30, 1911 ***364** (inclusive) three hundred and thirty-one and a quarter days."

The number of days appearing in this letter is exactly the number of days he certified to in his final certificate, and really the important thing in his certificate. The fact that there were two contracts and the engineer was in charge of one, and the architect was in charge of the other, and the two contracts were being executed by the same contractor, and the fact that the contract provided that the work on both contracts should be completed within 420 days, rendered it unnecessary that the engineer should know of his own knowledge the number of working days consumed in the erection of the superstructure, or that the architect should know of his own knowledge the number of working days consumed in the construction of the substructure, but the important thing was that each should know and be able to certify to the actual number of working days consumed in the work he had in charge and under his personal supervision. The number of days for which the contractor was subject to damages or entitled to premiums resolved itself into a mere calculation of addition and subtraction. We are of opinion, therefore, that these certificates should have been given the binding force to which they are entitled under the law, and that there was error in refusing the fourth prayer of the city and in granting the court's independent instruction.

Having disposed of the question involved in the city's appeal, we will now direct our attention to those arising in the receivers' appeal.

The trial began on the 2d day of April, 1917, and the verdict in favor of the receivers was returned on the 8th day of May, 1917. Naturally a great mass of testimony was taken with the result that the record in this case is a very large one; so, in order to keep this opinion within reasonable limits, we will confine ourselves to stating our conclusions as reached from a careful reading of the record rather than setting out at length the testimony.

The plaintiff offered two prayers, one of which only was granted. The defendant offered 45 prayers, 34 of which the court granted, refusing the other 11. The defendant also filed two motions, both of which were granted by the court. The eleventh to the forty-fourth (inclusive) prayers of the defendant dealt separately with each claim of the plaintiff, other than the claim for the money retained by the city as liquidated damages for delays, seeking to withdraw those claims from the consideration of the jury. All of these prayers were granted by the court, thus eliminating from the jury practically all of the claims of the plaintiff, other than the liquidated damages. From the number of these prayers it is readily seen that the plaintiff made many claims. Many of these claims are for extra work performed and for which the contractor had no certificate as provided in section 53, as follows:

> "The contractor shall do such extra work as may be ordered in writing by the engineer with the authorization of the commission. No claim for extra work will be considered or allowed unless

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said work has been so ordered by the engineer, nor unless the commission shall approve such claim for extra work and certify in writing that in its opinion such extra work was necessary for the public interest, stating in the certificate its reasons therefor."

The city's contention is that none of these claims can be allowed in the absence of a certificate from the commission approving such claims and stating its reasons for such approval.

The plaintiff contends that under section 14, where it is provided that in case of disputes between the city and the contractor the engineer's decision shall be final and conclusive upon the contractor, his reference of these questions to the sewerage commission for a decision made the conclusiveness of any such question inoperative. This proposition is not open to attack, as is shown in the cases we have cited above in reference to the city's appeal on the question of whether the certificates of the architect and engineer on the question of delays was admissible. But, although it is certain that these disputes about extra work were submitted by the engineer to the sewerage commission, it was his plain duty under section 53 to do so, for the claims could not be allowed without the commission should approve them, etc. Therefore to such a dispute as this we are of opinion that section 14 has no applicability.

[2] While, no doubt, the provision contained in section 53 was for the purpose of making the production of the certificate a condition precedent to the validity of any claim for extra work, yet in this case we do not think that it should be so held; for it is a well-recognized rule of law in this state and elsewhere that a provision of this character may be waived. Filston Farm Co. v. Henderson, 106 Md. 235, 67 Atl. 228; Weil Case, 129 Md. 487, 99 Atl. 661, L. R. A. 1917C, 929; Lynn v. B. & O. R. R., 60 Md. 404, 45 Am. Rep. 741; Pope v. King, 108 Md. 37, 69 Atl. 417, 16 L. R. A. (N. S.) 489, 15 Ann. Cas. 970; McEvoy v. Harn, 129 Md. 97, 98 Atl. 522; Reid v. Weissner, 88 Md. 237, 40 Atl. 877; 9 Corpus Juris, 760; 48 L. R. A. (N. S.) at page 576, notes under the heading "What Constitutes Waiver."

There is an abundance of evidence in the record tending to show that the course of dealing between the parties was on many occasions to ignore the provisions of section 53 about getting extra work orders before the commencement of the extra work. For instance, we will refer to testimony as to pumping, which was necessary because of the dispute between the engineer and the building inspector:

> "The pumping had to be done; and it was said to go ahead and do it and there would be extra ***365** pay for it, and not to wait for the order. We would often do that with extra work, and they would say that the order would come down and sometimes the order would come down and sometimes it would not. In this particular case I don't know whether they sent an order or paid for it or not."

[3] We are of opinion that, where the evidence tends to show that extra work was performed on the order of the engineer, or any of his subordinates, with the understanding that certificates would later be issued for such work, as we have said above was their course of dealing, there was a waiver of the provisions of section 53, and the issue should have been presented to the jury.

As we have pointed out above, it was necessary to carry the excavations much below that at first expected, and the engineer wrote to the Noel Construction Company on May 5, 1909:

> "Gentlemen: It will be satisfactory to us for you to proceed with the excavation below 23 feet, according to the specifications at cost plus 10 per cent. The absolute cost of the value of the pumping machinery employed in pumping below 23 feet, to be paid for at the cost, plus 10 per cent. The cost of pumping and excavation

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above 23 feet, to be paid for at the cost plus 10 per cent. The cost of pumping and excavation above 23 feet to be segregated from all pumping and excavation below 23 feet.

I will request the city to have electric light placed over the work so that you can proceed with your night work, which I wish you would do as promptly as possible."

[4] After the completion of that part of the work the inspector for the city omitted to include certain elements of actual cost. The contractor presented to the engineer itemized bills for these claims, but he referred them, without making any decision, to a committee of the sewerage commission, which never acted upon them. These items should have been presented to the jury.

[5] For the purpose of removing the excavated material the contractor had made arrangements with the harbor board for the use of Jones Falls, and had purchased from the city an old bridge which he removed to the edge of Jones Falls and placed in position there for the purpose of using it as a dumping pier of the material into scows. He used this method for some time, when he was notified by the harbor board that the position of the dumping pier interfered with the prosecution of another contract the city had, to wit, the erection of a sea wall along Jones Falls at the point, and was directed to cease that method of getting rid of the earth and mud. He immediately suspended this method and tried various other methods of disposing of the said material, but at increased cost. It is to recover this excess cost which constitutes one of his claims. We have been unable to discover any theory upon which this claim should be allowed. We find nothing in the record anywhere which even suggests that the city would provide or maintain ways and means for assisting the contractor in disposing of this material. It was solely a matter for the contractor himself to decide upon at his own risk.

[6] Section 27 provides:

"The engineer will give all necessary lines, grades, elevations, etc., for the general guidance of the contractor, who shall conform his work thereto. He shall provide the engineer with such materials and assistance (except engineering assistance), as may be required to properly perform the services mentioned, and shall carefully preserve and maintain in proper position all marks given. Any work done without lines, levels, etc., having been given by the engineer, may be ordered removed and replaced at the contractor's sole cost and expense."

The plaintiff offered evidence tending to show that the engineer or one of his assistants in giving lines to the contractor for excavation for the foundation gave wrong lines, and claimed that all of that work had to be done over. We think under the above section that should have been submitted to the jury, providing the engineer refused to give an independent decision as to that claim.

The plaintiff's second prayer was properly refused for the reason that it sought to instruct the jury that, if they found that the engineer referred the decision as to the validity of any of the plaintiffs' claims for allowance for extra work, etc., to the sewerage commission for decision, then the plaintiffs are not precluded from recovery. This instruction would have been erroneous under what we have said above as to the necessity of the engineer getting the approval of the commission.

The eighth prayer of the defendant was granted, and we think incorrectly, for it is at least misleading.

[7] The two motions made by the defendant and referred to above were for the purpose of striking out all evidence tending to prove damages suffered by two of the subcontractors of the Noel Construction Company and were improperly granted. The contractor had every right to sublet any part or all of his contract with the city. In

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every contract of this magnitude the general custom is to sublet portions of it. These subcontractors were recognized by the city as the representatives of the contractor. They were the agencies by whom most, it not all, of the extra work was performed, and the compensation for which work is now claimed by the receivers. They have filed their claims with the receivers, and they have been approved.

There was no privity of contract between the subcontractors and the city, so, of course, they could not entertain separate suits against the city, but we can see no reason why the receivers, who act for all the creditors, should not include the claims of their agencies, for whose compensation they were responsible, in a suit brought upon the original contract.

***366** [8] The first exception arises over the refusal of the court to admit in evidence time sheets relating to the value of extra work performed by one of the subcontractors. We think, following our ruling as to the liability of the city for the claims of the subcontractors, if it is shown that the extra work orders were on the promise that certificates would be issued, this evidence was admissible, and its rejection constitutes error. This is upon the assumption that the work for which the time sheets were offered were not in connection with the changed method of removing the earth. We say "assumption" because it is not very clear from the record exactly what character of work was shown by these time sheets.

[9] The second exception relates to the refusal of the court to permit a witness to state what labor was employed in removing the dumping pier. This, of course, was a proper ruling.

The third exception had to deal with the subject which we have heretofore discussed, that of depriving the contractor of the use of the dumping pier at the edge of Jones Falls. What we have already said upon that subject disposes of this exception, and we therefore hold that the exception should be overruled. The fourth exception should be overruled.

[10] The fifth exception relates to the introduction in evidence of extracts from the minutes of the sewerage commission. We do not see upon what theory their admission could stand.

The sixth and seventh exceptions relate to the motions made by the defendants to strike out all testimony showing damages suffered by the subcontractors and have already been discussed above.

We have not referred specifically to each of the prayers granted on behalf of the defendant for the reason that, since the case will have to be retried, the court in passing upon similar prayers will be governed by the principles which we have indicated control them.

Judgment reversed, case remanded for a new trial, each party to pay one-half the costs in this court, the costs in the court below to abide the final result.

Note Filed July 10, 1918.

A motion having been made for a modification of certain of the language contained in the foregoing opinion, it is deemed proper to add this note: The foregoing opinion does not, and was not intended to, hold that it lay in the power of every subordinate to vary the terms of a contract and bind the principal by such act; what the opinion does declare is, and is only, that where by a continued course of dealing the parties to a contract have ignored a provision of that contract not once, but repeatedly, the question of waiver is one proper to be submitted to a jury.

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