

HENRY SMITH, Jr., JOHN A. SMITH,  
and WILLIAM A. SMITH, Copartners  
trading under the name of

HENRY SMITH & SONS,

vs.

GEORGE JEWELL, and

THE UNITED STATES FIDELITY & GUARANTY  
COMPANY,

A body corporate.

:  
:  
:  
: IN THE  
:  
: SUPERIOR COURT OF  
:  
: BALTIMORE CITY  
:  
:  
:

Henry Smith, Jr., John A. Smith and William A. Smith,  
Copartners trading under the name of Henry Smith & Sons, by  
their attorneys, McComas, Gaither & Greenbaum and Bruner R.  
Anderson, sues George Jewell and The United States Fidelity  
& Guaranty Company, a corporation of the State of Maryland,

For that the Defendants, by their certain writing  
obligatory, under seal, bearing date the Twenty-first day of  
October, Nineteen hundred and two, acknowledged themselves  
to be justly indebted unto the said Henry Smith & Sons in  
the full sum of Four thousand Dollars (\$4,000.), to the pay-  
ment of which they bound themselves jointly and severally,  
their heirs, executors, administrators, successors and assigns  
which said writing obligatory recited that the said George  
Jewell would furnish all the labor and materials necessary to  
haul certain materials needed for the erection of the New  
State House Annex at Annapolis, Maryland; also to lay all  
bricks on the said new State House Annex in accordance with  
the plans and specifications therefor; and the condition of  
said writing obligatory was such that if the said George  
Jewell should faithfully and promptly furnish all the labor  
and materials necessary to haul certain materials needed for  
the erection of the New State House Annex at Annapolis, Mary-  
land; also to lay all bricks on the said New State House Annex  
in accordance with the plans and specifications therefor, and  
should in all respects faithfully perform all his duties to

the said Henry Smith & Sons, then the said writing obligatory should be void; otherwise it should remain in full force and operation in law. And the plaintiff says that the said George Jewell has not furnished all the labor and materials necessary to haul certain materials needed for the erection of the New State House Annex at Annapolis, Maryland, and he, the defendant, has not laid all bricks on the New State House Annex in accordance with the plans and specifications therefor, and he still refuses to do the same. And the plaintiff further says that by reason of the premises and the said breach of the condition of the said writing obligatory, a right of action has accrued to the plaintiff to have and demand the sum of Four thousand dollars from the said defendant.

And the plaintiff claims Four thousand dollars damage.

*Bruner R. Anderson*  
*McLemas, Guther, Freudenthal*  
*attorneys.*

TO THE DEFENDANTS: GEORGE JEWELL and The United States Fidelity and Guaranty Company:

TAKE NOTICE: That on the day of your respective appearances to this action in the above Court a rule will be entered requiring you to plead to the within declaration within fifteen days thereafter.

*McLemas, Guther, Freudenthal*



HENRY SMITH, JR., JOHN A. SMITH, :  
and WILLIAM A. SMITH, Copartners :  
trading under the name of : IN THE  
HENRY SMITH & SONS, :  
vs. :  
GEORGE JEWELL, and : SUPERIOR COURT OF  
THE UNITED STATES FIDELITY AND GUARANTY :  
COMPANY, a body corporate.: BALTIMORE CITY.  
:

TO THE HONORABLE THE JUDGE OF THE SAID COURT:

The Plaintiff elects to have this case  
tried before a Jury.

*Mc Comas Satchers Freeston  
attorneys.*

TO THE DEFENDANTS:

TAKE NOTICE: That the plaintiff elects to have  
the above entitled case tried by a Jury.

*Mc Comas Satchers Freeston*

263  
1904

(1) 36

IN THE SUPERIOR COURT OF  
BALTIMORE CITY.

HENRY SMITH, JR., JOHN A. SMITH,  
AND WILLIAM A. SMITH, Copartners  
trading under the name of

HENRY SMITH & SONS.

" 1445.1 "

GEORGE JEWELL, and

THE UNITED STATES FIDELITY &  
GUARANTY COMPANY, a  
body corporate.

*Declaration*

*Mr Clerk*

*Please file copy  
of this declaration with  
the clerk of the court  
and return  
to me at the  
address  
above.*

*Attorneys*

MCCOMAS, GAITHER & GREENBAUM  
BALTIMORE, MD.

*Filed 18<sup>th</sup> May 1904*

*2/25/15*



HENRY SMITH, Jr., :  
et al. :  
vs. : IN THE SUPERIOR COURT OF BALTIMORE  
GEORGE JEWELL and : CITY.  
The UNITED STATES FIDELITY & GUAR- :  
ANTY COMPANY. :

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PLEA.

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*J. Henry Boulton*  
The defendants, by John P. Poe & Sons and ~~L. B. Keene Claggett~~,  
their attorneys, for Plea says:

That the bond in the declaration mentioned was executed and delivered by the defendants to the plaintiffs as a security for the faithful performance by the defendant ~~and~~ George Jewell of a certain written contract, dated 16th day of October 1902, by and between him and the plaintiffs under their respective hands and seals and, to the Court now here shown, bearing date as aforesaid.

And the defendants say that by said written contract it was agreed by the plaintiff as a condition precedent to the continuance by said George Jewell in the performance of his agreement to haul and lay the bricks in said contract mentioned that payments for hauling said bricks were to be made monthly by said Henry Smith & Sons between the tenth and fifteenth of each month for the previous month's work, and payments for brick work every two weeks in the amount of eighty five per cent of the value of the work done.

And the defendants in fact say that the defendant George Jewell entered in good faith and with due diligence upon the performance of his obligations under said contract and regularly and continuously hauled and laid said bricks, but that the plaintiffs, though often requested, wrongfully failed and refused to keep and perform the condition precedent in said contract mentioned under which they were bound to pay to said defendant,

George Jewell, the contract price for hauling and laying said bricks and did not pay the said contract price, when such payments became due and payable and have hitherto utterly failed to pay the same or any part thereof; and so the defendants say that the said defendant, George Jewell, did not wrongfully fail and refuse to keep and perform said contract and did not commit any breach of his obligations under the bond sued on.

*John P. Poe Law*  
*Wm. B. Boreen*

Attorneys for Defendants.

TO THE PLAINTIFFS.....

Take Notice-, that upon the filing of the foregoing Plea a rule will be laid on you to reply thereto within fifteen days thereafter.

*John P. Poe Law*  
*Wm. B. Boreen*

Defendants' Attorneys.

IN THE SUPREME COURT OF MARYLAND  
WILLIAMSON CITY  
MEXICO STREET, D.C.  
AS  
GEORGE JEWELL and  
THE UNITED STATES BRICKS MANUFACTURING COMPANY  
vs.  
W. S. & B. REGENT LINE  
Mr. Chief Clerk  
and the English  
These files  
Attorneys for Defendants



George Jewell, the contract price for hauling and laying said bricks and did not pay the said contract price, when such payments became due and payable and have hitherto utterly failed to pay the same or any part thereof; and so the defendants say that the said defendant, George Jewell, did not wrongfully fail and refuse to keep and perform said contract and did not commit any breach of his obligations under the bond aforesaid.

Attorneys for Defendants.

TO THE PLAINTIFFS.....

Take Notice, that upon the filing of the foregoing Plea a rule

will be laid on you to reply thereto within fifteen days thereafter.

IN THE SUPERIOR COURT  
OF BALTIMORE CITY.

HENRY SMITH, Jr., et al.

vs.

GEORGE JEWELL and

The UNITED STATES FIDELITY &  
GUARANTY COMPANY.

PLEA.

Mr. Clerk:

Please file

and lay Rule Rep.

*John Lee Day*  
*Mano Barber*

Attorneys for Defendants.

Service of copy admitted,  
June 23, 1904

Send: Greenham  
Pl. 23 June 1904

21 36 163  
1904

(3)

IN THE SUPERIOR COURT OF  
BALTIMORE CITY.

HENRY SMITH, Jr. et al

vs.

GEORGE JEWELL and

THE UNITED STATES FIDELITY &

GUARANTY COMPANY.

*Replication*

*Mr. Clerk*

*Please file*

*Mem. of Greenbaum*

*for plaintiffs*

MCCOMAS, GAUTHER & GREENBAUM  
BALTIMORE, MD.

*Filed 27 June 1904*



HENRY SMITH, JR., et al	:	
	:	IN THE
vs.	:	
GEORGE JEWELL and	:	SUPERIOR COURT OF
	:	BALTIMORE CITY.
THE UNITED STATES FIDELITY &	:	
GUARANTY COMPANY.	:	

The Plaintiffs, by their attorneys, McComas, Gaither and Greenbaum, and Bruner R. Anderson, by way of replication say:

That the plaintiffs did not wrongfully fail and refuse to keep and perform the condition precedent in the contract of the Sixteenth of October, 1902, between the said plaintiffs and George Jewell, under which they were bound to pay the said defendant, George Jewell the contract price for hauling and laying bricks; and that they did pay the said contract price when payments became due and payable; and that they have not utterly failed to pay the same or any part thereof; and the plaintiffs say that the said defendant, George Jewell, did wrongfully fail and refuse to keep and perform said contract and did commit breaches of his obligations under the bond sued on as set forth in the declaration filed herein.

*McComas Gaither Greenbaum  
Bruner R Anderson  
for plaintiffs*

[FOREIGN SUMMONS.]

**Baltimore City, Sr.**

*THE STATE OF MARYLAND.*

To the Sheriff of \_\_\_\_\_ County, Greeting:

WE COMMAND YOU, That you summon \_\_\_\_\_

Walter L. Brady

Annapolis md

that he be and appear before the Judge of the SUPERIOR COURT of Baltimore City, at the Court House in the  
said city, on the 5<sup>th</sup> day in June inst ~~next~~, to testify for Jewell  
at Smith

Hereof fail not at your peril, and have you then and there this writ.

Witness the Honorable HENRY D. HARLAN, Chief Judge of the Supreme Bench of Baltimore City,  
the 13<sup>th</sup> day of May in the year of our Lord nineteen hundred and Seven

ISSUED the 3<sup>rd</sup> day of June 1907

Robt Ogle

Clerk.



No. ....

Su. Ct.

# SUMMONS

—FROM THE—

Superior Court of Baltimore City.

Smith

vs.

Jewell &c

Received the 4<sup>th</sup> day of

June

1907,

and forthwith delivered to SHERIFF of

A. A.

County.

Test:

Gen. Wills

Clerk.

J. P. Poe & Sons

Attorney. S

June 4/07  
Summons  
Joshua R. Lintner  
JRM

Shiff fee 40

[FOREIGN SUMMONS.]

**Baltimore City, Sr.**

THE STATE OF MARYLAND.

To the Sheriff of Anne Arundel County, Greeting:

WE COMMAND YOU, That you summon

Lacy Chinn Surveyor

Annapolis Md.

that he be and appear before the Judge of the SUPERIOR COURT of Baltimore City, at the Court House in the said city, on the 6<sup>th</sup> day in June <sup>inst.</sup> next, to testify for

Jewell & U.S. F. & G. Co. Ats. Smith Sons

Hereof fail not at your peril, and have you then and there this writ.

Witness the Honorable HENRY D. HARLAN, Chief Judge of the Supreme Bench of Baltimore City, the 13<sup>th</sup> day of May in the year of our Lord nineteen hundred and seven

ISSUED the 4<sup>th</sup> day of June 1907

Robt Ogle

Clerk.



No. ....

Su. Ct.

# SUMMONS

—FROM THE—

Superior Court of Baltimore City.

Henry Smith & Sons

vs.

George Jewell & the  
U. S. F. & G. Co.

Received the 5<sup>th</sup> day of

June 1907,

and forthwith delivered to SHERIFF of

A. A. County.

Test:

Geo. Mills  
Clerk.

J. K. Bartlett Esq.  
E. A. Fox Esq.  
Attorney.

*Summoned*  
*Joshua Lintneum*  
*Sheriff*  
*June 5/07.*

*Sheriff Lee 40 P*

IN THE CIRCUIT COURT FOR Anne Arundel COUNTY.

Henry Smith Sons

Subpoena for Walter L Brady

Annapolis md

vs.

Geo Jewell &c

RETURNABLE 5<sup>th</sup> day of June 190 7

I HEREBY CERTIFY, that on the 4<sup>th</sup> day of June

nineteen hundred and seven, I received under cover from the Clerk of the Superior Court of Baltimore City, process as above, and forthwith delivered the same to the Sheriff of A A County.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the

Seal of the Circuit Court for A A County,

on this 4 day of June

nineteen hundred and seven

Geo Mills  
Clerk of the Circuit Court for A A County





IN THE CIRCUIT COURT FOR Anne Arundel COUNTY.

My Smith Sons

vs.

George Jewell &  
U.S.F. & Co.

Sub. for Lacy Chinn  
to testify for debts

RETURNABLE 6<sup>th</sup> day of June 1907

I HEREBY CERTIFY, that on the 5<sup>th</sup> day of June  
nineteen hundred and seven, I received under cover from the Clerk of the Superior Court of Baltimore  
City, process as above, and forthwith delivered the same to the Sheriff of A. A. County.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the

Seal of the Circuit Court for A. A. County,  
on this 5<sup>th</sup> day of June  
nineteen hundred and seven

Geo. Waller  
Clerk of the Circuit Court for A. A. County

COUNTY

THE CIRCUIT COURT FOR

RECEIPTS FOR PROCESS.





# STATE OF MARYLAND.

BALTIMORE CITY, to wit:

To THE SHERIFF OF BALTIMORE CITY, GREETING:

You are hereby commanded to summon

*George Jewell and  
The United States Fidelity &  
Guaranty Company,  
a Corporation*

of Baltimore City, to appear before the Superior Court of Baltimore City, to be held at the Court House  
in the same City, on the second Monday of *June* next, to answer an action at

the suit of

*Henry Smith Jr. John A. Smith & William A  
Smith, Partners trading under the name of  
Henry Smith & Sons*

and have you then and there this writ.

WITNESS, the Honorable HENRY D. HARLAN, Chief Judge of the Supreme Bench of Baltimore

City, the

*9<sup>th</sup>* day of *May* 1904

ISSUED

*18<sup>th</sup>* day of *May* 1904

*Robert Oggle*

Clerk.

No. 36 Su. Ct.

Henry Smith J  
eral

vs.  
George Jewell &  
The United States  
Fidelity & Guaranty Co.

**WRIT OF SUMMONS.**  
*with copy of writ*

Copy of Nar. and notice to plead within  
to be served on Defendant.

McComas Gauthier & G  
Attorney. S

Filed 13<sup>th</sup> day of July 1904

Some admitted for defendant  
& to appear  
for report  
J. H. Forster  
J. H. Forster

Summoned George Jewell. Also  
Summoned The United States Fidelity and  
Guaranty Company, of Baltimore City, a  
corporation, by service on Richard D.  
Lang Rice President, and a copy of nar  
and notice to plead, with a copy of the  
process left with the defendants,  
(Fixed)  
William H. Beers,  
Shaw

# IN THE SUPERIOR COURT OF BALTIMORE CITY,

*May*

*Term, 1907*

SUMMON

*sd*  
 7 Frank E. Wise, 2308 E. Federal St.  
*sd*  
 11 C. J. Reed, 821 Woodward St.,  
*SP*  
 8 J. W. Reed, 1317 W. Franklin St.  
*sd*  
 8 R. L. McCauley, 530 N. Carrollton Avenue,  
*sd*  
 8 Charles Burke, 442 N. Fremont St.  
*sd*  
 7 Gus Jewell, 1623 Gilmore St.  
*sd*  
 7 P. L. Brooks, 603 or 605 Roland Avenue,

to testify for *Jewell at Smith*  
returnable on the *4<sup>th</sup>* day of *June* 190*7*, at 10 o'clock, A. M.

TO THE SHERIFF OF BALTIMORE CITY.

*Jno P. Parsons* COUNSEL.  
*Jno Robt Ogle* CLERK.

Issued *3<sup>rd</sup>* day of *June* 190*7*



Mess. Fox & Sons & Bartlett  
of the Attys.

1st—3 Weeks January Term, 1906.

Beginning Jan. 8th, 1906.

Docket.....

Page.....

Page.....No.

Trial Calendar.

# Superior Court of Baltimore City

## PART 2.

Nerry Smith Jr., John A. Smith  
vs. M<sup>rs</sup> A. Smith, Copartners Trading as  
Nerry Smith & Sons

George Jerrall vs. the United States  
Fidelity & Guaranty Co.

Jury Sworn..... 24<sup>th</sup> Jan. .... 1906

1 Robert J. Megary ..... Foreman.

~~AUGUST PLITT, Saloonkeeper, 1045 Hanover.~~

~~CHARLES B. BURDETTE, Builder, 236 N. Fulton ave.~~

~~ROBERT B. AILES, Manager, Wenona Apartments.~~

2 T. G. MARSHALL, Groceries, 535 Dolphin.

~~JOSEPH HEBRANK, Coal Dealer, 2033 E. Chase.~~

~~ROBERT B. HAYDEN, Oyster Dealer, 1362 Columbia ave.~~

3 GEORGE ADOLPH, Kiln-burner, 1520 Gough.

4 ANDREW SCHRUEFER, Confectioner, 924 Stirling.

5 THOMAS R. D. MYERS, Baker, 1439 W. Lanvale.

~~CHARLES T. MULES, Grocer, 120 S. Stricker.~~

~~GEORGE L. VOIGT, Cigar Mnfr., 15 N. Fulton ave.~~

6 J. B. PATE, Grocer, 1900 Kennedy ave.

~~ENOCH P. CALLOW, Real Estate, 2405 Linden ave.~~

7 JAMES L. HESSON, Grocer, 1713-15 Riggs ave.

ROBERT J. MEGARY, Butter and Eggs, 2500 Druid Hill ave.

8 FREDERICK KERSTING, Hatter, 1014 S. Charles.

9 GEORGE P. HEIL, Tailor, 521 E. Clement.

10 HENRY A. HENKEL, Candy Maker, 920 W. Lexington.

11 LOUIS GOLDMAN, Cigar Mnfr., 124 Aisquith.

~~HENRY J. ROHR, Manager, 1500 Linden ave.~~

12 HENRY S. THARLE, Produce Dealer, 44 S. Fulton ave.

~~HENRY KOHLBAUER, Machine Hand, 1751 N. Chester.~~

~~THOMAS J. FINGLES, Salesman, 1847 W. North ave.~~

~~J. HENRY MILLER, Contractor, 1515 E. North ave.~~

~~MICHAEL MUELLER, Plumber, 2601 Fairmount ave.~~

Albert Share, Plumber, 1040 N. Gay St.

Max Kaplan Merchant 9 N. High St.

Mess. Gaither, Greenbaum & Anderson  
Offs Attys

1st—3 Weeks January Term, 1906.

Beginning Jan. 8th, 1906.

Docket.....

Page.....

Page.....No.

Trial Calendar.

# Superior Court of Baltimore City

## PART 2.

Henry Smith Jr., John A. Smith &  
Wm A. Smith Partners trading as  
Henry Smith & Sons

vs.

George Jerrall & The United  
States Fidelity & Guaranty Co.

Jury Sworn..... 24<sup>th</sup> Jan..... 1906

1 Robert J. Megary..... Foreman.

~~AUGUST PLITT, Saloonkeeper, 1045 Hanover.~~

~~CHARLES B. BURDETTE, Builder, 236 N. Fulton ave.~~

2 ~~ROBERT B. AILES, Manager, Wenona Apartments.~~

T. G. MARSHALL, Groceries, 535 Dolphin.

~~JOSEPH HEBRANK, Coal Dealer, 2033 E. Chase.~~

~~ROBERT B. HAYDEN, Oyster Dealer, 1362 Columbia ave.~~

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~~THOMAS J. FINGLES, Salesman, 1847 W. North ave.~~

~~J. HENRY MILLER, Contractor, 1515 E. North ave.~~

~~MICHAEL MUELLER, Plumber, 2601 Fairmount ave.~~

~~Albert Share, Plumber, 1040 N. Gay St.~~

~~Max Kaplan, Merchant, 9 N. High St.~~

Henry Smith & Sons, Plaintiffs,  
vs.  
United States Fidelity & Guaranty Co.  
and George Jewell, Defendants.

*Additional*

Second Prayer on Behalf of U. S. Fidelity & Guaranty Co., Defendant

The Defendant, United States Fidelity & Guaranty Co.,  
prays the Court to instruct the jury that if they shall find  
from the evidence that the plaintiffs, Henry Smith & Sons, failed  
to retain in their hands, the retained percentage of fifteen  
per cent. of the value of any work which they jury shall find  
from the evidence was done by the defendant, George Jewell, in  
laying bricks for the said plaintiffs, until the time when the  
building mentioned in the contract between said Henry Smith &  
Sons and the said George Jewell, offered in evidence, had been  
completed to the satisfaction of the architects, Messrs.  
Baldwin & Pennington, <sup>and</sup> had been accepted by the State of Maryland,  
and that such failure to retain <sup>intentional</sup> said percentage (if the jury  
shall so find) was without the consent of the said United States  
Fidelity & Guaranty Company, then the legal effect of such  
failure on the part of the said Henry Smith & Sons to retain  
such percentage of the value of said work (if the jury shall so  
find) is to release the surety upon the bond of the said  
George Jewell, and their verdict must be in favor of the  
defendant surety.

*Expt. (U. S. F. & G. Co.) suggested offering <sup>an amended</sup> prayer during argument, offered it after close of argument and after all other prayers had been submitted to the Court. The Court declined to act upon it because it had been offered too late.*



FIRST PRAYER on behalf of Defendant JEWELL.

---

The Jury are instructed that if they shall find from the evidence that the plaintiffs discontinued during the week of May 11, 1903 the employment of the defendant Jewell in so far as said employment related to the laying of bricks of the State House Annex, then their verdict must be for nominal damages only as against said defendant, Jewell, inasmuch as the expenses incurred by said plaintiffs in completing the work covered by the contract with said Jewell were not audited and certified to by the architects or superintendent as required by said contract.

*Refused*



SECOND PRAYER on behalf of Defendant JEWELL.

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The Jury are instructed that before they can find a verdict for other than nominal damages against the defendant, Jewell, they must find that Jewell voluntarily and finally abandoned during the week of May 11, 1903 the entire contract between himself and the plaintiffs, introduced in evidence, and dated the 16th day of October 1902, relating to the State House Annex, and communicated his intention so to abandon it to the plaintiffs.

*Answer*

THIRD PRAYER on behalf of Defendant JEWELL.

---

The Jury are instructed that before they can find a verdict for other than nominal damages against the defendant, Jewell, they must find that Jewell voluntarily and finally abandoned during the week of May 11, 1903 the entire contract between himself and the plaintiffs, introduced in evidence, and dated the 16th day of October 1902, relating to the State House Annex.

*Advised*

Henry Smith & Sons, Plaintiffs

vs.

United States Fidelity & Guaranty Co.  
and George Jewell, Defendants.

First Prayer on Behalf of U. S. Fidelity & Guaranty Co., Defendant.

The Defendant, United States Fidelity and Guaranty Co., prays the Court to instruct the jury that if they shall find from the evidence that the plaintiffs, Henry Smith & Sons, departed from the manner of making payments for any work which the jury shall find from the evidence was performed by the defendant, George Jewell, as set forth in the agreement between the said Henry Smith & Sons and the said George Jewell, offered in evidence (if the jury shall so find); and paid to the said George Jewell sums in excess of the sums to which he was entitled under said contract; and that such departure or overpayment (if the jury shall so find) was without the consent of the said United States Fidelity & Guaranty Co.; that the legal effect of such departure or overpayment (if the jury shall so find) was to release the surety of the said George Jewell upon the bond offered in evidence, and their verdict must be in favor of the said defendant surety.

*Refused*



Henry Smith & Sons, Plaintiffs,  
vs.  
United States Fidelity & Guaranty Co.  
and George Jewell, Defendants.

Second Prayer on Behalf of U. S. Fidelity & Guaranty Co., Defendant

BERKSHIRE BOND

The Defendant, United States Fidelity & Guaranty Co., prays the Court to instruct the jury that if they shall find from the evidence that the plaintiffs, Henry Smith & Sons, failed to retain in their hands, the retained percentage of fifteen per cent. of the value of any work which the jury shall find from the evidence was done by the defendant, George Jewell, in laying bricks for the said plaintiffs, until the time when the building mentioned in the contract between said Henry Smith & Sons and the said George Jewell, offered in evidence, had been completed to the satisfaction of the architects, Messrs. Baldwin & Pennington, <sup>and</sup> had been accepted by the State of Maryland, and that such failure to retain said percentage (if the jury shall so find) was without the consent of the said United States Fidelity & Guaranty Company, then the legal effect of such failure on the part of the said Henry Smith & Sons to retain such percentage of the value of said work (if the jury shall so find) is to release the surety upon the bond of the said George Jewell, and their verdict must be in favor of the defendant surety.

*Refused*



Henry Smith & Sons, Plaintiffs,  
vs.  
United States Fidelity & Guaranty Co.,  
and George Jewell, Defendants.

Third Prayer on Behalf of U. S. Fidelity & Guaranty Co., Defendant.

The Defendant, United States Fidelity & Guaranty Co., prays the Court to instruct the jury that if they shall find from the evidence that the plaintiffs, Henry Smith & Sons, agreed to make payments to the defendant, George Jewell, for brick-work every two weeks in the amount of eighty-five per cent. of the value of the work done; and if they shall further find from the evidence that the defendant, George Jewell, performed the brick-work for the said plaintiffs for which the said plaintiffs paid him, in advance of the times stipulated in said contract, or paid him in excess of eighty-five per cent. of the value of such work, and shall further find from the evidence that the said United States Fidelity & Guaranty Co. did not consent to the making of payments in advance or in excess of eighty-five per cent, of the value of the work done by the said Jewell, then, as a matter of law, the said United States Fidelity & Guaranty Co. was discharged from liability under its bond offered in evidence (if the jury shall so find) and the verdict of the jury must be in favor of the said United States Fidelity & Guaranty Co.

*Refused*

Henry Smith & Sons

vs.

Jewell Amato

U. S. F. & S. Co.

— " —

Refused prayer

and an additional

prayer offered by the

U. S. F. & S. Co. and

not acted upon by the

Court.

## Defendants First Prayer

The defendants by their counsel  
pray the Court to instruct  
the Jury that the plaintiffs  
have offered no evidence legally  
sufficient upon the pleadings  
to ~~recover~~ entitle them to  
recover and that therefore  
their verdict must be for  
the defendants;

Refused



Defendant, read prayer

The defendant, by their Counsel pray the Court to instruct the Jury that the plaintiffs have offered no evidence legally sufficient, under the pleadings, to show that they have sustained any actual damage by reason of the alleged abandonment by the defendant George Jewell of the written contract between him and the plaintiff dated October 16 1902 (see in evidence) and that therefore the plaintiffs ~~are not entitled~~ verdict of the Jury must be for nominal damages merely.

Refused.



My Smith & Son

vs.

Small v the  
U. S. F. & S. Co.

— " —

Appts prayers  
refused.

HENRY SMITH JR. ET AL  
trading as  
HENRY SMITH & SONS  
VS.  
GEORGE JEWELL  
and the  
UNITED STATES FIDELITY & GUARANTY  
COMPANY.

:  
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IN THE  
SUPERIOR COURT OF  
BALTIMORE CITY.

MR. CLERK:

Please enter an appeal to the Court of Appeals  
of Maryland on behalf of the plaintiffs from the judgment  
rendered in this case.

*George R. Yaciter*  
Atty. for Plaintiffs

Atty. for Defendants.

(5)  
IN THE SUPERIOR COURT OF  
BALTIMORE CITY.

HENRY SMITH JR. ET AL.  
trading as  
HENRY SMITH & SONS  
VS.  
GEORGE JEWELL  
and the  
UNITED STATES FIDELITY &  
GUARANTY COMPANY.

*Mr Clerk,*

*Chancery Writ*

*appeal order.*

*Very Respectfully  
Atty for party*

*1421*

*Feb. 22 mch 1906*

HENRY SMITH JR. et al :  
vs. : IN THE  
GEORGE JEWELL : SUPERIOR COURT  
and the : OF  
UNITED STATES FIDELITY & GUARANTY COMPANY. : BALTIMORE CITY.  
:  
:

IT is hereby agreed that the time for signing the Bill of Exceptions in the above entitled case shall be extended until April 9th. 1906.

*George G. Gault*  
*atty for pt*  
*John B. B...*  
*atty for dft.*

ORDERED this 23<sup>rd</sup> day of March, 1906

on the foregoing agreement, that the time for signing the Bill of Exceptions in this case be extended to April 9th. 1906.

*W. H. H...*



(97)

Order  
Extension of time

2061  
23<sup>rd</sup> Mch. 1906

Instruction in lieu of Defts 1<sup>st</sup> + 2<sup>nd</sup> Prayers.

The Jury are instructed that the plaintiffs have offered no evidence legally sufficient under the pleadings, to show the amount of the damages, if any, sustained by them by reason of the alleged abandonment by the defendant, Jewell, of the written contract between him and the plaintiffs, dated October 16<sup>th</sup> 1902, offered in evidence, and that therefore the verdict of the jury must be for nominal damages only.

Henry Stockbridge

W<sup>g</sup> Smith & Son<sup>r</sup>

W.

Jennell & the  
U. S. S. & G. Co.

— " —

Instructions of  
Court.



263  
1904

HENRY SMITH JR. ET AL	:	In the
VS.	:	
GEORGE JEWELL AND THE UNITED STATES	:	Superior Court of
FIDELITY & GUARANTY COMPANY,	:	Baltimore City.
Defendants.	:	

IT IS HEREBY AGREED that the time for filing the bill of exceptions in this case shall be extended until March 24th., 1906.

*George H. Gaith*  
Attorneys for Plaintiff

*John A. Roe*  
Attorneys for Defendant.

IT IS HEREBY ORDERED this *twenty first* day of February, 1906, that the time for filing the bill of exceptions in the above case, be extended until March 24th. 1906.

*Nancy Stockbridge*



State Highway Com  
Washington D.C.  
(4) Smith et al.

b.

Source  
etc.

Specimens under  
existing time for  
reexamination

in case,

Plausibility,  
Seymour Smith  
etc. for papers

Pl. 21 July 1906

Smith  
vs.  
Lund  
et al

In the Superior  
Court of Malheur Co.

It is agreed that the above-entitled  
case be postponed for two weeks from  
this date, to March 30, 1905

Geny R. Gauthier  
atty for plaintiff

W. H. P. Roe  
for defendant

Barnes



HENRY SMITH, JR., JOHN A. SMITH :  
AND WILLIAM SMITH, co-partners, :  
trading as Henry Smith & Sons, :

IN THE SUPERIOR COURT

January 24th. 1906.

vs. :

BEFORE HIS HONOR JUDGE

GEORGE JEWELL, and THE UNITED :  
STATES FIDELITY ' GUARANTEE COMPANY. :

STOCKBRIDGE AND A JURY.

Bill of Exceptions in the above entitled case:

The Plaintiffs, to maintain the issues on their part joined, proved by John A. Smith, a competent witness, that in the Fall of 1902, the firm of Henry Smith & Sons, the plaintiffs in this case, entered into a contract with the State of Maryland to build the State House Annex at Annapolis, Maryland. That they commenced work on the said building and made a contract for laying the brick and hauling for the above building, with George Jewell, one of the defendants in this case. The agreement for such work, bearing date October 16th. 1902, was then offered in evidence, ( here insert agreement).

The said witness also testified that a bond was furnished by said Jewell for the faithful performance of the contract, in accordance with the agreement, which bond was executed by the defendants in this case and the execution of the same admitted. The said bond was then offered in evidence ( here insert bond). The said witness also testified that after said agreement and bond had been given, said defendant, Jewell, entered upon the work in accordance with the terms of the contract and after the excavation was ready, started to lay the brick for the said building; that he continued to lay the said brick until about the 6th. of May.

" Q. You say he continued under that contract to work under it about May 6th?

A. Yes, sir.

Q. Tell the Gentlemen of the Jury what happened at that time, whether you went to Annapolis for any purpose or not?

A. During the week of May 6th., we notified Mr. Jewell, as we had paid him up, more than what the contract called for,



that he should look elsewhere for his pay-roll, and not being able to pay the men on that Saturday, the men stopped work.

Q. The men stopped work on the Saturday of that week?

A. Yes, sir.

Q. Did you go down to Annapolis and meet Mr. Jewell about the matter?

A. The following Monday I was there and met him.

Q. Was there any work being done or was Mr. Jewell able to do any work at that time?

A. No sir.

Q. What did the men state to you in the presence of Mr. Jewell?

A. They demanded their pay.

Q. The men demanded their pay.<sup>p</sup>

A. Yes, sir.

Q. Were they employed by the Union there?

A. They were the Union men, yes, sir.

Q. Was there any discussion about what they should have, in order to proceed with the work?

A. They insisted upon being paid at that time and after talking the matter over I told them I would see my brother and talk with him, and the following Tuesday we sent a check down for their pay-roll, and after they had received that they stated we would have to pay them waiting time.

Q. They not only insisted upon the payment for the week, but they insisted they should be paid for the waiting time?

A. For the waiting time.

Q. What was the amount you paid at that time?

A. For brick-laying and repairs a little over Seven hundred dollars.

Q. After that time did you serve notice upon Mr. Jewell, did you say anything to Mr. Jewell or serve notice about the doing of his work?

A. Yes, sir.

Q. What was the date of that; did you speak to him personally or did you write to him about it?

A. We notified him in writing.

MR. GAITHER: I ask you gentlemen for the original paper.

(The paper is produced)

MR. GAITHER: We now offer in evidence this letter sent to George Jewell, dated May. 11th. 1903 (~~Copy letter~~ *Here insert letter.*)

Q. Did you get any reply from Mr. Jewell to that letter?

A. No, sir.

Q. Did Mr. Jewell proceed to do any work on the building after that?

A. No sir, he never made any attempt to do it.

Q. Did you at that time notify the U. S. Fidelity & Guarantee Co., his bondsmen?

A. We did.

MR. GAITHER: We offer this letter of May 12th., to the United States Fidelity & Guarante Company, in Evidence, Baltimore, May 12th. 1903, *(Here insert letter)* "~~we enclose herewith a copy of the notice we sent to Mr. George Jewell, Annapolis, Md., &c., &c., ( here follows the reading of the letter)~~" *copy*

MR. GAITHER: We offer the enclosure which was with it; ~~we also offer the enclosed letter which was in that letter addressed to Mr. George Jewell, "My dear sir; We hereby notify you &c., &c., ( here follows the reading of the enclosed letter)~~ *insert*

Q. That is an exact copy of the letter sent to George Jewell?

A. Yes, sir.

Q. Now there was a letter which you wrote of May 13th., the next day; we now offer in evidence the letter of May 13th., 1903, to the United States Fidelity & Guarantee Company, of Baltimore *(Here insert letter)* ~~(Copy letter) We hereby notify you &c., &c., ( here follows the reading of the letter, signed Henry Smith & Sons.)~~

Q. After these notices, what steps did you take to carry out and complete the contract for laying the bricks?

A. After waiting until that time (interrupted)

Q. After waiting till what time?

A. The time we notified them we would proceed with the work, we made efforts to have someone else do the work for us and we made a contract then with Mr. W. E. Feldmeyer.



Q. Who is he?

A. A bricklayer and contractor.

Q. Tell the gentlemen of the jury whether you endeavored to ~~make~~ any negotiations with him for the particular contract for a specific sum, did you make any negotiation for that purpose?

A. We tried to place all the contract on the 1000 basis, as is usually done, but no-one would take an uncompleted contract in that manner and the only thing we could do was to give it to him on a percentage, he charging the actual cost of the work and for his own profit and his labor he got a percentage of 7 - 1/2% on the net cost of the work.

~~MR. POE: Was it in writing?~~

A. Yes, sir.

Q. Is that contract in writing?

A. Yes, sir.

Q. Have you the contract?

A. It is here somewhere.

~~MR. GAITHER: It has been called for and we offer in evidence~~

~~the agreement with William E. Feldman, to do the bricklaying, was that the agreement you referred to?~~ *then offer in evidence (here must agreement).*

~~A. Yes, sir.~~

Q. Whose signatures are those?

A. Wm. E. Feldman <sup>over</sup> and my own.

Q. Do you know the handwriting?

A. Yes sir, I was there at the time he signed it.

~~MR. GAITHER: I will read this; "Wm. E. Feldman, agrees to superintend the laying of the brick work for 7 1/2% for superintending the laying of the same, &c. Dated the 18<sup>th</sup> day of May, 1903.~~

Q. Did Mr. Feldman <sup>over</sup> proceed to do the work?

A. He started, yes, sir.

Q. He started to work, did he?

A. Yes, sir.

Q. Under this agreement he was to pay the men, they were to be

notified Mr. Jewell about this matter, did they ever demand any certificate from you of the architect?

OBJECTED TO, Objection over-ruled and exception noted,

Q. Did they ever give you notice of any such demand?

A. Never.

Q. Who were the architects on this building.

A. Messrs Baldwin & Pennington.

Q. Had you any agreement by which they were to certify to any work done by you?

A. No sir."

The plaintiffs then offered to prove by the said witness that they, the plaintiffs, had no jurisdiction over, nor control or authority over the architects, Baldwin & Pennington in the matter of this work at Annapolis, at the time when this agreement was made in October, 1902, or subsequently, and that said architects were not in any way the agents or employees of the plaintiffs.

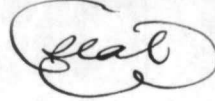
To which offer of evidence the defendants objected and said objection was sustained; and to the ruling of the court in sustaining said objection, <sup>and</sup> ~~or~~ in refusing to admit said evidence, the plaintiffs excepted, and prayed the court to sign and seal this, its second bill of exceptions, which is accordingly done this <sup>fourth</sup> day of <sup>April</sup> ~~February~~, 1906.

*Murray Sturbridge Seal*

And after offering the evidence set out in the foregoing first and second bills of exceptions, which are hereby made part hereof, the plaintiffs offered to prove by said witness, that the firm of Baldwin & Pennington were employed as architects by the State House Commission, for the erection of said State House Annex, and that the Defendant, Jewell, and the Defendant the United States Fidelity & Guarantee Company knew at the time of the making of the contract and the execution of



the bond offered in evidence, and upon which this suit is brought, that the said architects were employed by the said State House Commission for the erection of said building. To which offer of testimony the defendants objected and the objection was sustained. And to the ruling of the court in sustaining said objection, and refusing to admit said evidence, the plaintiffs excepted and prayed the court to sign and seal this, its third bill of exceptions, which is accordingly done this *fourth* day of ~~February~~ *April*, 1906.

*Henry Stuckridge* 

And after offering the evidence and the *offer* of ~~the~~ testimony set out in the foregoing first, second and third bills of exceptions, which are hereby made part hereof, the plaintiffs further proved by the said witness as follows:

"Q. Was there any superintendent of the building employed there?

A. Yes, sir.

Q. Who was he?

A. Mr. Marshall.

Q. Whp was he employed by?

A. By the State.

OBJECTED TO, objection over-ruled and exception noted.

Q. Did he or not die during the time this work was done?

A. yes, sir.

Q. When was the last work done in laying the bricks in that building or about that building under your contract?

A. By Mr. Feldm~~er~~<sup>er</sup>; it was in the latter part of 1903, but really the last part laid was here the past Fall.

MR. POE: The Fall of 1905, do you mean?

A. Yes, sir.

Q. What work was done at that time?

A. Some areaways and things like that which could not be done at the time Feldmeyer was doing the original work.

Q. When was the work of laying the porticos done?

A. That was done right after the sessions of the Legislature of 1904.

Q. After they had adjourned?

A. Yes sir."

The plaintiffs then offered to prove by the witness, John A. Smith and other competent witnesses, "that upon the abandonment of the work by the defendant Jewell and after the expiration of the period named and the notice given of the 11th. of May, 1903, the Plaintiffs entered into a contract with Wm. E. Feldmeyer for the laying of the bricks named in the contract of October 16th. 1902, and that the said Feldmeyer did complete the laying of said bricks and was paid therefor the actual cost of labor and material, together with a commission of 7 1/2%, as compensation for the use of his tools and personal service and supervision, and which was paid by these plaintiffs, and that the prices so paid to the said Feldmeyer were the reasonable and proper prices for the laying of such brick and said labor at the time when the same was severally furnished and done. And that the amount of such payments, after deducting the amount due for completing said work under the terms of the agreement of Oct. 15th., 1902, amounted to \$4,182.93, in excess of what would have been due to Jewell for the same work under the contract, and exclusive of the sum of \$700.00 paid to the men at the time of the abandonment of the contract by Jewell.

THE COURT: You say you do not expect to supplement that by any evidence tending to show that the amounts so paid were, at the time when the materials or supplies or work performed, audited or certified by Messrs Baldwin & Pennington, the architects named in the contract, or that there was an audit or certificate by them at any time prior to the institution of this suit?

MR. GAITHER: ~~No~~, sir. *Yes*.

OBJECTED TO.

THE COURT: With that understanding, the objection will be sustained.



And <sup>to</sup> the ruling of the Court in refusing to admit said evidence the plaintiffs excepted, ~~and~~ and prayed the court to sign and seal this, its fourth bill of exceptions, which is accordingly done, this *fourth* day of ~~February~~ *April*, 1906.

*Nury Flourisday Seal*

The plaintiffs thereupon closed their case, and the defendants, without offering any evidence, submitted the following prayers to the court.

(Here insert prayers)

And the court rejected the said prayers and granted the following instruction of its own in lieu thereof. ~~And to the~~ *of the court* ~~action in granting said prayer,~~ *the court with instruction* the plaintiffs excepted and prayed the court to sign and seal this, its fifth bill of exceptions, this ~~day of February, 1906,~~ which is accordingly done this *fourth* day of ~~February~~ *April*, 1906.

*Nury Flourisday Seal*

*The above bill of exceptions is in satisfactory form*

*Wm. Bartlett  
attys for defendants  
John A. Poe  
attly for George Sewell.*



263  
1904

(77)

9 2/2 64

Stated 4<sup>th</sup> April 1906.

Ex. J.

Remand

45 sides

Court of Appeals of Maryland

---

October Term, 1906.

---

Henry Smith & Sons,

vs.

George Jewell, et al.

---

Judge Pearce delivered the opinion of the Court.

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On October 16th 1902, the plaintiffs who were the successful bidders for the erection of the State House Annex at Annapolis, entered into a written agreement with one of the defendants, George Jewell, to haul all the material needed for the erection of said annex, and to lay all the bricks used therein for certain payments, and at certain prices set forth in said agreement, and by the terms of said agreement the said Jewell was to furnish, within ten days after its execution, to the plaintiffs, a corporate bond in the penalty of Four Thousand dollars, conditioned for the faithful performance of his agreement. On October 21st 1902, the required bond was executed by Jewell, and by his codefendant in this suit, The United States Fidelity and Guaranty Company, and was delivered to the plaintiffs, and thereupon in due course, the said Jewell began the performance of said contract, and continued therein until May 6th 1903, when he ceased to supply any brick layers for the prosecution of said work, and never afterwards did, or attempted to do any work under said contract. This action on his part grew out of the fact that on May 6th 1903 the plaintiffs notified Jewell that as they had then paid him more money than the contract called for at that time, he should look elsewhere for his pay roll, but as he did not provide <sup>for</sup> it, the men stopped work that night. On the following Tuesday however the plaintiffs paid the men up to May 6th, but they still refused to resume work until paid for waiting time. Thereupon, on May 11th, the plaintiffs sent a written notice to Jewell that as he had refused to

furnish the necessary labor to prosecute the work, and had notified plaintiffs of his intention to abandon the same, that they should proceed on Friday, May 15th at 8 A. M. to provide the necessary labor therefor, and that the cost of the same would be deducted from any money that should become due him. To this notice no reply was ever received. On May 12th 1903, the plaintiffs sent to the United States Fidelity and Guaranty Company a copy of the above notice to Jewell, and informed said company that as Jewell had failed to comply with his said contract, they should proceed to complete said work at his expense, holding said company as surety on said bond; and on May 13th 1903, a second written notice was sent said company by the plaintiffs, stating that Jewell had abandoned the work, and that plaintiffs should hold said company financially responsible for any losses, delays, or other expenses connected with his failure to abide by the terms of said contract. Receiving no reply, and nothing being done towards resuming said ~~work~~ work, the plaintiffs then made a new agreement for the performance of said work, ~~the plaintiffs~~ with Wm. E. Feldmeyer, by whom the same was fully performed at the expense of the plaintiffs, and upon the completion of said work, so performed, at reasonable and proper prices, the cost thereof, after deducting the amount due for completing the same under the terms of the agreement with Jewell, exceeded, by the sum of \$4,189.93, the sum which would have been due said Jewell for the same work under said contract, and this suit was brought on said bond to recover the penalty thereof, it being less than the cost of completing said work. The declaration was in the usual form, setting out the condition of the bond, and its breach by Jewell in not hauling the materials and laying the brick as required by the bond.

The defendants pleaded that the bond was given as a security for the faithful performance of the contract of Oct. 16th 1902; that by said contract it was a condition precedent to the continuance ~~by~~ Jewell in the performance of the work thereunder, that certain



specified payments should be made said Jewell by the plaintiffs at certain designated times, which payments the plaintiffs failed and refused to make as required by said contract, and that Jewell had not refused or failed to keep and perform said contract, and did not commit any breach of said bond. The plaintiffs replied that they did make all payments as they became due and payable under said contract, and that said Jewell did commit the breaches of his obligation as set forth in the declaration. Issue was joined on this replication, and a verdict was rendered in favor of plaintiffs for \$5.<sup>00</sup>/<sub>00</sub>, and from the judgment entered on this verdict, the plaintiffs appealed.

The whole case, and all the exceptions, turn upon the construction of the following clause in the agreement of October 16th 1902;

"And it is further agreed that should the said George Jewell at any time refuse or neglect to supply a sufficiency of properly skilled workmen to prosecute said work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified to by the architects, the said Henry Smith and Sons shall at liberty, after three days written notice to the said George Jewell, to provide any such labor, and deduct the cost thereof from any money then due, or that may thereafter become due to the said George Jewell under <sup>this</sup> ~~the~~ contract. And if the architects shall certify that such refusal, neglect or failure, is sufficient ground for such action, the said Henry Smith & Sons shall be at liberty to terminate the employment of the said George Jewell on said work, and to enter upon the premises, and to take possession for the purpose of completing said work under this contract, and to employ any other person or persons to finish the work. And in case of the discontinuance of the employment of the said George Jewell, he shall not be entitled to any further payments under this contract until the work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this

contract shall exceed the expenses incurred by the said Henry Smith & Sons in finishing the work, such excess shall be paid to the said George Jewell; but if the expenses shall exceed such unpaid balance, the said George Jewell shall pay the difference to the said Henry Smith & Sons. Such expenses shall be audited and certified to by the architects or Superintendent, whose certificate thereof shall be conclusive upon the parties".

The proof that Jewell abandoned the work deliberately, and without any valid excuse therefor, is positive and full, and due notice having been given by the plaintiffs of their purpose to complete the work at his risk, they are entitled to recover the difference between the reasonable cost of completion, and the balance of the contract price unpaid, unless there is something in the agreement in this case which forbids such recovery. *Davis vs. Ford*, 81st Md. 333. For the purpose of proving the cost of completing the work, the plaintiffs offered in evidence the receipts from Feldmeyer for payments made him by them for work done, and also to show by one of the plaintiffs that these payments were made, to which offer the defendants objected, unless the plaintiffs undertook to follow this with the certificate of the architects or Superintendent that such expenses had been audited and certified by the architects or Superintendent, and the plaintiffs refusing to do so, the Court sustained the objection and refused to admit the proffered testimony.

This constitutes the first exception.

The plaintiffs then offered to prove by one of them that they had no control of, or authority over the architects of the annex, when the agreement of October 16, 1902 was made, nor subsequently, and that said architects were not their agents or employees, to which the defendants objected, and the Court sustained the objection. This constitutes the second exception.

The plaintiffs then offered to prove by competent witnesses, the making of the contract with Feldmeyer to complete the work abandoned by Jewell, after due notice according to the agreement with

Jewell, the completion of the work by Feldmeyer; the payment to him of the actual cost of labor and material, with a commission of 7 1/2 per cent for use of tools and supervision according to the terms of the agreement with him; that all these payments were ~~such~~ reasonable and proper amounts for work and material furnished, and for supervision, and that the amount of such payments after deducting the amount due and unpaid for completing the work under Jewell's contract, amounted to \$4182.93 in excess of what would have been due Jewell for the same work, and exclusive of \$700 paid Jewell's men at the time he abandoned his contract, but the plaintiffs declined to furnish evidence that the amounts paid Feldmeyer were ever audited or certified by the architects named in their contract with the State, to which the defendants also objected, and the Court sustained the objection, and refused the offer of proof.

This constitutes the third ~~an~~ exception.

At the close of the plaintiffs case, the defendants, without offering any evidence offered two prayers; 1st That there was no evidence legally sufficient under the pleadings to entitle the plaintiffs to recover; and 2nd That there was no evidence legally sufficient under the pleadings, to show the plaintiffs had sustained any actual damages by reason of the alleged abandonment of the work by Jewell, and that the recovery could only be for nominal damages.

The Court refused these prayers, but granted the following instruction of its own in lieu of those offered;

"The jury are instructed that the plaintiffs have offered no evidence legally sufficient under the pleadings, to show the amount of the damages, if any, sustained by them by reason of the alleged abandonment by the defendant, Jewell, of the written contract between him and the plaintiffs, dated Oct. 16th 1902, offered in evidence, and that therefore the verdict of the jury must be for nominal damages only". The principal, and a controlling question, therefore, if decided in favor of the plaintiffs, is whether the



clause in question has any application to a right of action for breach of the agreement arising from the abandonment of the work by Jewell.

No case in this Court has been cited in which that question has been decided, but it is well settled that wherever one construction will sustain, and another will oust the jurisdiction of the Courts, the former will be adopted if it can be done consistently with the language of the agreement.

In *Lauman vs. Young*, 31st Pa. State 306, in deciding a very similar case, the Court said, "The right of trial by jury will not be taken away by implication merely, in any case. It must appear in all cases that the parties have agreed to dispense with it"; and it is equally true that the right of the jury, in any case submitted to them, to hear and weigh the evidence admissible under the rules of law, and under proper instructions from the Court, cannot be restricted by implication, merely, and that any restriction contended for, must clearly appear to have been imposed by the agreement of the parties.

In *Fontano vs. Robbins*, 18th Appeal Cases, Dist. of Columbia, 417, the Court said, "Special stipulations submitting the demands of a contractor to the adjudication of supervising architects and engineers, though enforceable, are in derogation of common right and the ordinary freedom of action, and must clearly appear to be within the intention of the contract. Construction, in case of doubt, is in favor of one resisting enforcement".

And in *Gibbons vs. Lautenschlager*, 74th Fed. Rep. 167, the Court said; "citation of authority is unnecessary for the legal proposition that contracts are not literally construed for the purpose of finding therein provisions debarring parties from access to the Courts for settlement of controversies".

With these principles in view, let us examine the paragraph of ~~the~~ agreement in this case which gives rise to the controversy.

An analysis of this paragraph will show that it is divisible into two clauses, providing for two distinct methods of procedure

in case of the contractors failure to prosecute the work in the manner prescribed by the contract, but making no provision for his abandonment of the contract.

The first clause provides that in event of his failure to supply a sufficiency of properly skilled workmen to prosecute said work with promptness and diligence, or in the performance of any of the agreements contained in said contract, such refusal, neglect, or failure, being certified to by the architects, the plaintiffs should be at liberty, after three days written notice to the contractor to provide any such labor and to deduct the cost thereof from any money then due, or thereafter to become due to said contractor. In such case, nothing else appearing, the contractor would be at liberty to proceed with the work, in the manner he deemed a compliance with his contract, while the plaintiff could supply the deficiency in skilled workmen, or perform the labor totally neglected by the contractor, at the expense of the contractor. The second clause provides that if the architect shall certify that such refusal, neglect or failure, is sufficient ground for such action, the plaintiffs shall be at liberty to terminate the whole employment of the contractor, and complete all the work either themselves, or by the employment of any other person for that purpose. And that in case of the discontinuance of the contractors employment by the plaintiffs, that he should be entitled to no further payments until the work was completed, when, if the unpaid balance under the contract should exceed the expenses incurred by plaintiffs in finishing the work, such excess should be paid him; but if such expenses should exceed such unpaid balance, the contractor should pay the difference to the plaintiffs. The paragraph then concludes. "Such expenses shall be audited and certified to by the architects or superintendent, whose certificate shall be conclusive between the parties." The expenses thus required to be audited and certified, are those, and those only, incurred under the two methods of procedure *above* stated. The plaintiffs took neither of these methods. The con-

tractor however took a course, which however satisfactory to him was not provided for by the agreement of the parties. He abandoned his contract altogether, of his own volition, and in doing so, he remitted both the plaintiffs and himself to the ordinary methods of procedure, and the ordinary rules of evidence in actions for the breach of contract. This we think is the plain and reasonable interpretation of the paragraph in question. The first clause provides for only a partial failure of performance by the contractor, not regarded by the architects as sufficient ground for discontinuing or terminating his employment. The second clause provides for such discontinuance or termination of employment, and it is obvious that such discontinuance for the purpose of bringing the parties within the terms of this clause, could only be worked by the act of the plaintiff. The remedy provided by this second clause is a summary and arbitrary remedy, and when exercised, it is only reasonable and just that some means of protection against unreasonable changes, should be provided for a contractor displaced against his will. But when, of his own volition, he abandons his contract, and forces upon the other party the necessity either of personally completing the work, or securing another contractor, the original contractor has no claim to such consideration.

We should be prepared to adopt the construction above given, as sound in principle, if there were no authority in its support, and we have found no decisions in this State upon the question, but there is ample and satisfactory authority for it elsewhere. In *Lauman vs. Young*, supra, there was a contract for the construction of a section of a railroad, which contract provided that the quantity of work to be done, and the amount of compensation at prescribed rates, should be determined by the engineer "who should decide all disputes arising  $\int$  under the contract", and that his decision should be final. The Court said. "In order to oust the jurisdiction of the Courts, it must clearly appear that the subject matter of the controversy is within the prospective



submission", and the submission was held not to embrace a claim for damages for refusing to permit the contractor to proceed with the execution of the work. In explaining the reasons for this conclusion, the Court said, "The words, 'all disputes', are clearly controlled by and limited to the distinctly enumerated grounds of anticipated dispute in the same sentence, which are so defined that these general words have no force or meaning, unless they relate to anticipated disputes arising out of the work to be done, and the compensation to be paid. The engineer was to decide every question that could arise as to the execution of the contract by the contractor. Why particularize if the matter is to be controlled by a general provision? The engineer had no jurisdiction if there was no execution of the contract by the plaintiff. In *Dobbling vs. York Springs R. R.* 203 Pa. St. 628 it was held that an arbitration clause in a contract for the construction of a railroad, which makes the decision of the engineer final "as to any dispute relative to, or touching the agreement", and which waives the right to sue at law, otherwise, does not apply where no claim is made for work done under the agreement, and the contract itself has been rescinded, and the contractor is claiming to recover for the loss of the contract. In that case the contractor was prevented by the defendant from beginning the work because of difficulties which arose concerning the right of way. The Court said, "the <sup>agreement</sup> ~~judgment~~ clearly could not include a claim for damages for abrogation of the contract".

In *McGovern vs. Bockins*, 10 Phil. 438, cited in *Dobbling vs. York Springs R. R.*, supra, where there was a similar contract, the Court said. "We cannot conceive that the language of this agreement contemplates that the estimate of the engineer should be given on the rescision of the contract. It would not be a natural construction of it. It was never intended that the engineer should usurp the province of the jury, and upon the rescision of the contract, determine the contractors damage for

the loss of his contract."

In Fuller & Co. vs. Doyle and the American Bonding Company, 87th Fed. Rep. 687 (Eastern District of Missouri) the language of the contract was almost identical with that before the Court, there being no material difference. It provided that if the contractor should fail to supply a sufficiency of properly skilled workmen, or materials of proper quality, or to prosecute the work with due diligence, the owner might upon securing a certificate from the architect to the fact of such failure, and upon three days notice to the contractor, enter upon the premises and complete the work; and it was held that such a provision contemplates a case when the contractor claims to be complying with his obligation, and not a case where the contractor absolutely abandons the work, and voluntarily surrenders the premises to the owner for its completion.

It is quite clear, as was said in Hamilton vs. Liverpool & London Ins. Co. 136 U. S. 242, that "Where the parties, in their contract, fix on a certain mode in which the amount to be paid shall be ascertained, the party that seeks an enforcement of the agreement must show that he has done everything on his part which could be done to carry it into effect. He cannot compel the payment of the amount claimed unless he shall procure the kind of evidence required by the contract, or show that by time or accident he is unable to do so". But in the later case of Hamilton vs. Home Ins. Co. of N. Y. 137th U. S. 370, the same Judge, Justice Gray, discriminated the former case from one in which the particular claim made did not come within the terms of the stipulation, but was collateral and independent, as in the case now before us; and even went to the extent of saying that where there was an agreement for submitting the amount to be paid to arbitration, but where there was no express or implied condition that no action could be maintained until an award was made, that such agreement, while it would support a separate action for its breach, could not be pleaded in bar to an action

on the principal contract.

We have examined all the cases cited by the appellees in support of their argument, and one of them does unequivocally sustain them, but the others, we think, can be plainly discriminated from the case at bar.

In DeMattos vs. Jordan, 15th Wash. 378, the language of the contract was that "In case the contractor should not complete the building, the owner may do so and charge the expense to the contractor, and the expense incurred by the owner as herein provided, either for furnishing materials or for finishing the work, shall be audited and certified by the architect, and his certificate shall be conclusive upon the parties". There not only was the certificate required in event of the contractors failure for any cause to complete the building, but it was required for work finished, by whomsoever done. Thus abandonment of the work by the contractor, and its completion by another, came directly within the terms of the stipulation for auditing and certifying. In Cement Co. vs. Biefeld, 173 Ill. 179, the language of the contract was the same as in DeMattos vs. Jordan, but no authority was cited to support the decision. The Court considered the case of Fuller vs. Doyle, supra, but held in the case before it that the ~~the~~ claim was upon the contract and not for damages independently of it, because, as the Court said, "when the plaintiff~~s~~ was called on for a bill of particulars, he filled the contract itself as part of the bill of particulars. The mode adopted by the appellee for establishing the amount due him, is in accordance with the terms of the contract, and the case was tried on the theory that the appellee was entitled to such damages as were provided by the contract, and not damages outside of the contract."

In Tally vs. Parsons, 131st Cal. 516, the contract was abandoned by the contractor, and the owner completed the work. The contract provided that "in such case" the expense should be audited and certified by the architect, and that such certificate



should be a condition precedent to recovery. The Court said, "the very contingency arose which provision was made to procuring the certificate".

The case of the American Bonding Company vs. Gibson County, 127 Fed. Rep. 671, decided in the West. Dist. of Tenn. was upon a contract identical with the present, and with that in Fuller vs. Doyle, 87 Fed. Rep. supra. There the contractor did all the work except that covered by the final payment, after which he abandoned the work, and the architects certificate was held necessary to a recovery by the owner. The Court attempted to discriminate that case from the Fuller case, on the ground that the contractor had nearly completed the work. That fact, however, cannot alter the legal principle governing the construction of the contract. The attempted discrimination is not satisfactory to us, and we prefer to follow the earlier decision in the Doyle case. The rulings upon the testimony, as well as upon the prayers, were all made upon the same erroneous construction of the contract, and the judgment must therefore be reversed.

Judgment reversed with costs to the appellants above and below, and new trial awarded.

Filed November 15th 1906.

COURT OF APPEALS OF MARYLAND.

October Term, 1906

No 25:

Henry Smith & Sons

vs

George Jewell et al

Appeal from the Superior Court of Baltimore City  
Judgment reversed with costs  
above and below and new trial awarded,  
by the Court on the 15<sup>th</sup> day of November,  
A. D. 1906

Appellant's Costs in the Court of Appeals of Maryland, including

\$10.00 Appearance Fee,

Record,  
Brief,  
Docket Entries,  
Appearance Fee,

\$33.75  
35.00  
7.05  
10.00

\$ 85.80

Appellee's Costs in the Court of Appeals of Maryland, including

\$10.00, Appearance Fee

Brief,  
Docket Entries,  
Appearance Fee.

\$15.00  
.75  
10.00

\$ 25.75

STATE OF MARYLAND, Sct.,

I, Thomas Parran, Clerk of the Court of Appeals of Maryland, do hereby certify that the foregoing is truly taken from the record of proceedings of the said Court of Appeals.

In testimony whereof, I have hereunto set my hand as Clerk, and affixed the

seal of the said Court of Appeals, this Twenty Seventh  
day of November A. D., 1906 .

Thomas Parran

Clerk Court of Appeals of Maryland.

299/1904

Henry Smith <sup>in</sup> Bone

no.

George Jennell and  
The N. S. S. Co.

— " —

1441

" 1847 "

Opinion of the  
Court of Appeals

3rd 10th Dec. 1906.

COURT OF APPEALS OF MARYLAND

THE BOOK





Miss Fox & Smith

2d—3 Weeks May Term, 1907

Beginning June 3d, 1907.

Docket.....

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Trial Calendar.

# Superior Court of Baltimore City

Smith vs. Fox

vs.

Jury v. U.S.F. 1907

Jury Sworn 4<sup>th</sup> June 1907

Harry S. Cox Foreman.

NATHANIEL B. STEWART, Clerk, 28 N. Gilmor.

~~LEWIS T. HEINER, Motorman, 2107 E. Lombard.~~

2 ARTHUR WALLENHORST, Jeweler, 11 and 13 S. Gay.

3 JAMES T. GREEN, Commission Merchant, 331 Presstman.

4 WINFIELD McCLINTOCK, Real Estate, 313 N. Broadway.

~~G. W. STEIN, Salesman, 1604 N. Wolfe.~~

ALBERT L. FANKHANEL, Ins. Broker, 128 S. Patterson Pk. av.

JOHN P. RUTH, Merchant Tailor, 1036 Hanover.

~~JOS. H. BREIDEN, Grocer, 1000 William.~~

E. M. LILLY, Accountant, 2001 Cromwell.

5 MILTON C. SLEMMER, Scene Artist, 1232 N. Broadway.

6 CHARLES H. GREEN, Produce Dealer, 820 Columbia ave.

7 H. S. GARDNER, Insurance Agent, 115 E. Lafayette ave.

8 FRANCIS B. UPSHUR, Clerk, 2030 N. Calvert.

9 JOHN C. PEAT, Stone Contractor, 711 E. Chase.

HARRY S. COX, Livery Business, Mt. Royal Apartments.

10 WILLIAM B. MYER, Merchant, 919 Harlem ave.

11 LAWRENCE THOMPSON, Merchant, 213 N. Chester.

~~HARRY SUSEMIHL, Cleaner and Dyer, 2117 E. Pratt.~~

12 ALBERT HILDEBRANDT, Musical Instruments, 2418 St. Paul.

~~H. A. SHEPHERD, Merchandise, Denmore Park, Baltimore Co. Md.~~

~~WILLIAM H. BERRYMAN, No Occupation, 1515 W. Fayette.~~

GEORGE W. EMMERICH, Clerk, 1431 W. Lombard.

JOHN H. ULRICH, Baker, 1851 W. Fayette.

NICHOLAUS HUCKE, Baker, 835 W. Lombard.

Mass. Smith & Anderson  
Office Atties

2d-3 Weeks May Term, 1907

Beginning June 3d, 1907.

Docket.....

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Page.....No.

Trial Calendar.

# Superior Court of Baltimore City

Nerry Smith Jr., Jno. A. Smith  
and Wm. A. Smith, Captains trading  
under the name of Nerry Smith & Sons  
vs.  
George Jamell and The United  
States Fidelity & Guar. Co. a body corporate

Jury Sworn 4<sup>th</sup> June 1907

1 Nerry S. Cox Foreman.

NATHANIEL B. STEWART, Clerk, 28 N. Gilmor.

LEWIS T. HEINER, Motorman, 2107 E. Lombard.

2 ARTHUR WALLENHORST, Jeweler, 11 and 13 S. Gay.

3 JAMES T. GREEN, Commission Merchant, 331 Presstman.

4 WINFIELD McCLINTOCK, Real Estate, 313 N. Broadway.

~~G. W. STEEN, Salesman, 1604 N. Wolfe.~~

~~ALBERT L. FANKHANEL, Ins. Broker, 128 S. Patterson Pk. ay.~~

JOHN P. RUTH, Merchant Tailor, 1036 Hanover.

JOS. H. BREEDEN, Grocer, 1000 William.

~~E. M. LILLY, Accountant, 2001 Cromwell.~~

5 MILTON C. SLEMMER, Scene Artist, 1232 N. Broadway.

6 CHARLES H. GREEN, Produce Dealer, 820 Columbia ave.

7 H. S. GARDNER, Insurance Agent, 115 E. Lafayette ave.

8 FRANCIS B. UPSHUR, Clerk, 2030 N. Calvert.

9 JOHN C. PEAT, Stone Contractor, 711 E. Chase.

10 HARRY S. COX, Livery Business, Mt. Royal Apartments.

WILLIAM B. MYER, Merchant, 919 Harlem ave.

11 LAWRENCE THOMPSON, Merchant, 213 N. Chester.

~~HARRY SUSEMIHL, Cleaner and Dyer, 2117 E. Pratt.~~

12 ALBERT HILDEBRANDT, Musical Instruments, 2418 St. Paul.

~~H. A. SHEPHERD, Merchandise, Denmore Park, Baltimore Co. Md.~~

~~WILLIAM H. BERRYMAN, No Occupation, 1515 W. Fayette.~~

~~GEORGE W. EMMERICH, Clerk, 1431 W. Lombard.~~

~~JOHN H. ULRICH, Baker, 1851 W. Fayette.~~

~~NICHOLAUS HUCKE, Baker, 835 W. Lombard.~~

JOHN P. POE.  
S. JOHNSON POE.  
EDGAR ALLAN POE.

Henry Hunter & Son }  
vs }  
Geo Jewell et al }  
The undersigned  
Superior  
Court of  
Baltimore City

It is agreed in Court  
convening that the time  
for signing the bill of  
exceptions in the above  
case be extended until  
Sept 23<sup>rd</sup> 1907

John P. Poe & Son  
attys for depts  
Sundry merchants  
attys for Pltts.

Ordered this 15<sup>th</sup> day of August 1907,  
that the time for signing the defendants'  
bills of exception in this case be and it is  
hereby extended until September 23 (1907)

Alfred S. Hill



(3)

Order out time

15<sup>th</sup> Aug. 1907

PLAINTIFF'S FIRST PRAYER.

The plaintiffs pray the Court to instruct the Jury that if they shall find from the evidence that the defendant Jewell stopped the work of bricklaying on the building in Annapolis, known as the State House Annex, on May 9th. 1903, under his contract with the plaintiffs offered in evidence, and that said Jewell was notified by the plaintiffs to continue said work, but failed to do so within a reasonable time, and that subsequently the said plaintiffs completed the work of bricklaying on said building; and shall further find that subsequently the said Jewell sued the said plaintiffs for a breach of the same contract as of the said date of May 9th. 1903, in the Baltimore City Court, and shall further find from the record of said case, that the verdict and judgment of said Baltimore City Court offered in evidence, was in favor of the plaintiffs in this case on trial, that then the said plaintiffs are entitled to recover.

*as against the defendant Jewell, such damages as the jury may find from the evidence said plaintiffs have suffered from the failure of said Jewell to complete said bricklaying under his contract.*

*Granted*

PLAINTIFFS' SECOND PRAYER.

The plaintiffs pray the Court to instruct the Jury that if they shall find from the evidence that the defendant, Jewell stopped the work of brick-laying on the building in Annapolis, known as the State House Annex, on May 9th. 1903, under his contract with the plaintiffs offered in evidence, and that said Jewell was notified by the plaintiffs to continue said work, but failed to do the same within a reasonable time, and that subsequently the said plaintiffs completed the work of brick-laying on said building; and shall further find that subsequently the said Jewell sued the said plaintiffs for a breach of the same contract as of the said date of May 9th. 1903, in the Baltimore City Court, and shall further find from the record of said case, that the verdict and judgment of said Baltimore City Court offered in evidence, was in favor of the plaintiffs in this case on trial, that then the said plaintiffs are entitled to recover as against the defendant, the United States Fidelity and Guaranty Company, ~~such damages as the jury may find from the evidence said plaintiffs have suffered from the failure of said Jewell to complete said brick-laying work under his said contract; unless the Jury shall further find from a preponderance of the evidence offered in this case~~ <sup>that the plaintiffs</sup> had not paid to the defendant Jewell at the time he stopped said work on May 9th. 1903, the sums of money to which said Jewell was then entitled under the terms of said agreement; and the jury are further instructed that the burden of proof of establishing the fact that said Jewell was not paid the sums of money to which he was entitled under said agreement on May 9th. 1903, is on said defendant, the United States Fidelity and Guaranty Company;

*Granted*



Henry Smith & Sons, Plaintiffs,  
vs.  
United States Fidelity & Guaranty Co.  
and George Jewell, Defendants.

Fifth Prayer on Behalf of U. S. Fidelity & Guaranty Co., Defendant

The Defendant, United States Fidelity and Guaranty Co., prays the Court to instruct the jury that if they shall find from the evidence that this action was instituted at a time subsequent to the expiration of three months from the date of the completion of the work, which they shall find from the evidence the defendant, George Jewell, undertook and agreed to perform for the said Henry Smith & Sons, then there can be no recovery against the said United States Fidelity & Guaranty Co, in this action, and their verdict must be in favor of the said defendant, United States Fidelity & Guaranty Company.

*Granted*

Henry Smith Brown

to

Smallville  
N. S. S. & S. Co.

Printed in England



1150

Henry Smith Jr.  
John A. Smith And  
William A. Smith  
Copartners/trading under the  
name of

IN THE

# SUPERIOR COURT

Henry Smith And Sons

vs.

—OF—

George Jerrell And the  
United States Fidelity  
And Guaranty Company  
a body corporate

BALTIMORE CITY.

We, the undersigned jurors duly impanelled and sworn in due form of law (affirmed) to try the issue joined in the above entitled case upon our oaths (affirmations), do say that we find our verdict for the Plaintiff, and we assess the damages by reason of the premises at the sum of \$ 2564 <sup>42</sup>/<sub>100</sub>  
~~Defendant~~.

And we do authorize and direct our Foreman to deliver this, our signed and sealed verdict, to the Court.

WITNESS our hands and seals this 6<sup>th</sup> day of

June 190 7.

<u>Henry S. East</u>	SEAL
<u>A. Wallinworth</u>	SEAL
<u>James T. Green</u>	SEAL
<u>Winfield McClinton</u>	SEAL
<u>Wilton C. Skinner</u>	SEAL
<u>Charles H. Green</u>	SEAL
<u>J. B. Gardner</u>	SEAL
<u>Francis B. Hyslop</u>	SEAL
<u>Geo C. Peat</u>	SEAL
<u>H. B. Meyer</u>	SEAL
<u>Lawrence H. Thompson</u>	SEAL
<u>Robert Hildbrandt</u>	SEAL



Docket.....

Page.....

5th. Ct.

*Henry Smith vs Stone*

vs.

*George Jewell etc*

*M. & G. v S. Co.*

**SEALED VERDICT.**

SUPERIOR COURT

Filed *10<sup>th</sup>* day of *June* 1907

RECORDED  
INDEXED  
MAY 15 1907  
CLERK OF COURT

HENRY SMITH & SONS                    ))                    IN THE  
          vs.                                   ((                    SUPERIOR COURT OF  
GEORGE JEWELL and                    ))                    BALTIMORE CITY.  
UNITED STATES FIDELITY & GUARANTY ((  
COMPANY,                               ))    ))

---

To the Honorable, the Judge of said Court:

The Petition of the Defendants respectfully shows:

1. That they desire to take an appeal from the judgment in the above entitled case and that the testimony taken in the case is now being written up and the bills of exception being prepared.
2. That the time for signing said Bills of Exception unless the same be extended will expire on Wednesday the 10th inst..

They accordingly pray that the time for preparing and signing the same be extended until September 1, 1907.

And as in duty etc.

*John P. Rose & Son*  
Attorneys for Defendants.

ORDERED this 9<sup>th</sup> day of July 1907, upon the foregoing petition that the time for signing the Bills of Exception in the foregoing case be and the same is hereby extended until the 1st. day of September 1907.

*Dan G. Wright*

IN THE  
SUPERIOR COURT OF  
BALTIMORE CITY.

HENRY SMITH & SONS  
vs.  
GEORGE TWIBEL and  
UNITED STATES FIDELITY & GUARANTY  
COMPANY.

For the Defendants  
Court of Appeals

Henry Smith & Sons

vs.

George Twibel et al

Am. Clara

Blaine his

John P. H. 80m

as in & under

1917

Ad. 9 July 1907

Attorneys for Defendants.

ORDERED this day of July 1907, upon the foregoing petition that the time for signing the bills of exception in the above case be and the same is hereby extended until the first day of September 1907.



PLAINTIFF'S THIRD PRAYER.

If the Jury shall find ~~for~~ the plaintiffs then in estimating the damages they shall ~~allow to the said plaintiffs~~ *ascertain and allow* such sums of money as they may find from the evidence the said plaintiffs reasonably and properly expended in completing the work of laying the bricks upon the State House Annex building, and shall then deduct from said amount such sums of money as they may find from the evidence said work would have cost had it been done by the defendant, Jewell, under his contract offered in evidence, and shall also deduct any sum or sums of money which the Jury may find from the evidence the said Jewell is entitled to as credits arising under said contract, and which are due by said plaintiffs, to the said defendant Jewell, under the terms of said contract offered in evidence; and the Jury are at liberty to allow interest upon said sum when so ascertained from the time when the said payments were finally made by said plaintiffs until the time of the rendering of this verdict.

*Granted*

Henry Smith & Sons, Plaintiffs,  
vs.  
United States Fidelity & Guaranty Co.  
and George Jewell, Defendants.

Fourth Prayer on Behalf of U. S. Fidelity & Guaranty Co., Defendant

The Defendant, United States Fidelity & Guaranty Co., prays the Court to instruct the jury that if they shall find from the evidence that the plaintiffs, Henry Smith & Sons, made default in the payment of an installment due to the said George Jewell for brick-work performed by the said George Jewell upon the State House Annex at Annapolis (if the jury shall so find) and shall further find from the evidence that in consequence of said default, said George Jewell withdrew his bricklayers and laborers from said work, and shall further find from the evidence, that the said Henry Smith & Sons have not made such payment to the said George Jewell; <sup>*The Plaintiffs are not entitled to*</sup> ~~then their verdict must be for the~~ *recover more than nominal damages* ~~defendants.~~ unless they shall further find from the evidence that the cost and expense incurred by the said Henry Smith & Sons in completing or procuring the completion of said brick-work (if the jury shall so find) has been audited and certified to by the architects or superintendent mentioned in the contract between the said Henry Smith & Sons and the said George Jewell, offered in evidence.

*Accepted*  
*[Signature]*



In the Superior Court of  
Baltimore City.

HENRY SLIGH AND SONS

VS.

GEORGE JEWELL AND THE UNITED  
STATES FIDELITY AND GUARANTEE  
COMPANY

Appeal Bond in the  
sum of  
\$6,000.00

Mr. Clerk:-  
Please file.

*John P. Poe*

*Henry Sligh*  
Attorneys for Defendant,  
United States Fidelity and  
Guaranty Company.

J. KEMP BARTLETT,  
ATTORNEY AND COUNSELLOR AT LAW,  
5. W. COB. CALVERT AND GERMAN STS.,  
BALTIMORE.

*PAID 30 July 1909*



KNOW ALL MEN BY THESE PRESENTS, That we, The United States Fidelity and Guaranty Company, a body corporate, of the State of Maryland, Principal, and The American Bonding Company, a body corporate, of the State of Maryland, Surety, are held and firmly bound unto Henry Smith and Sons in the full and just sum of Six Thousand Dollars (\$6000.00), current money, to be paid to the said Henry Smith and Sons, their certain attorney, executors, administrators and assigns; to the payment whereof, well and truly to be made and done, we bind ourselves, our successors and assigns firmly, by these presents.

WHEREAS, the said Henry Smith and Sons have recovered in the Superior Court of Baltimore City, at the May term thereof, A. D. 1907, a judgment in the sum of \$2564.42 against said United States Fidelity and Guaranty Company, from which judgment the said United States Fidelity and Guaranty Company has prayed an appeal to the next Court of Appeals, to be held for the State of Maryland.

NOW THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That if the said United States Fidelity and Guaranty Company aforesaid shall not cause a transcript of the Record and proceedings to be transmitted to the next Court of Appeals, within the time required by law, and prosecute said appeal with effect; and also, satisfy and pay to the said Henry Smith and Sons, their executors, administrators and assigns, in case the said judgment shall be affirmed, as well the damages and costs which may be awarded by the Court of

Appeals, aforesaid; then the said bond to be in full force and virtue, otherwise of no effect.

IN WITNESS WHEREOF our hands and seals this 29<sup>th</sup> day of July 1907.



UNITED STATES FIDELITY AND  
GUARANTY COMPANY, Principal

BY

*Wm. J. Foy*  
Secretary.

*Richard Lang* (SEAL)  
Vice President

AMERICAN BONDING COMPANY, Surety

BY

*Mellord Leonard*  
Cash Secretary.

*Chas. Kent* (SEAL)  
President.

Bond approved  
R. H. Ogden, Clerk



299/1904 (2)

In the Superior Court of  
BALTIMORE CITY.

HENRY SMITH AND SONS

V.S.

GEORGE JEWELL AND THE UNITED  
STATES PAPER AND STEEL  
COMPANY.

Order of Appeal and affidavit

Mr. Clerk:-

Please file.

*John P. Poe*  
*Henry Bartlett*  
Attorneys for Appellants.

J. KEMP BARTLETT,  
ATTORNEY AND COUNSELLOR AT LAW,  
5. W. COR. CALVERT AND GERMAN STS.,  
BALTIMORE.

*Pa 30 July 1907*



HENRY SMITH AND SONS	:	IN THE
VS.	:	SUPERIOR COURT
GEORGE JEWEL AND THE UNITED	:	OF
STATES FIDELITY AND GUARANTY	:	BALTIMORE CITY.
COMPANY	:	

Mr. Clerk:-

Please enter an appeal to the Court of Appeals on behalf of George Jewel and the United States Fidelity and Guaranty Company, the Defendants in the above entitled case.

John P. Poe & Sons  
John Barren  
Attorneys for Defendant.

STATE OF MARYLAND :  
: TO WIT:  
CITY OF BALTIMORE :

Before me, the subscriber, a Notary Public of the State of Maryland in and for the City of Baltimore, personally appeared Richard D. Lang, Vice President and Agent of the United States Fidelity and Guaranty Company, one of the Defendants in the foregoing suit, and made oath in due form of law that the appeal to the Court of Appeals in the above entitled case is not taken for the purpose of delay.

IN WITNESS WHEREOF my hand and Notarial Seal this 29<sup>th</sup> day of July 1907.

A. W. Patrick  
Notary Public.



4

In the Superior Court  
of Baltimore City.

Henry Smith & Sons

vs.

George Jewell and the  
U.S. Fidelity & Guaranty Co.

AGREEMENT OF COUNSEL FOR  
EXTENSION OF TIME.

J. KEMP BARTLETT,  
ATTORNEY AND COUNSELLOR AT LAW,  
S. W. COR. CALVERT AND GERMAN STS.,  
BALTIMORE.

8<sup>d</sup> 19<sup>th</sup> Sept. 1909

Henry Smith & Sons

vs.

George Jewell and the  
United States Fidelity & Guaranty  
Company.

In the Superior Court  
of Baltimore City.

IT IS HEREBY AGREED that the time for signing the Bill of Exceptions in the above entitled case be extended to the 10th day of November, 1907; and it is further agreed that the time for transmitting the record to the Court of Appeals, as required by Article 5, Section 6 of the Code of Public General Laws, is hereby waived and extended to the 10th day of November, 1907.

Dated this 19<sup>th</sup> day of September, 1907.

Georg Baeth

Attorney for Pliffs.

John P. Poeslar

Atty. for Geo. Jewell.

Henry Baeth

Atty. for U.S.F. & G.Co.

Ordered this 19<sup>th</sup> day of September 1907 upon the afore-  
going agreement that the time for signing the Bill of Exceptions  
and transmitting the record in the above entitled case be and the  
same is hereby extended unto November 10<sup>th</sup> 1907

Geo. W. Shart



Henry Smith & Son  
vs  
George Jewell  
et al

In the  
Superior Court  
of Holt Co.

It is hereby agreed that the  
time for signing the bills of  
exception in the above case  
be extended to the 30<sup>th</sup> day  
of Nov. 1907; and it is further  
agreed that the time for  
transmitting the record to the  
Court of Appeals is hereby  
convinced and extended to  
the 30<sup>th</sup> day of Nov. 1907

John C. Tor & Son  
attys & for Jewell  
Sam'l G. Chapman  
attys for Plff.

Ordered this 9 day of Nov. 1907  
upon the foregoing agreement  
that the time for signing the  
bills of exception & transmitting  
the record in the above case be  
extended until Nov. 30<sup>th</sup> 1907  
Geo. W. Clark

Dr (5) San Francisco  
Co of Boilers

Henry James  
12

550 Lowell  
The U. S. Trust  
of San Francisco

Agreement

In Witness  
Whereof

John P. Boyer  
agent for them

9th of Nov. 1907

First Appeal in this case was to October Term 1906  
and Transcript was made and sent per mail June  
6th, 1906.

DOCKET ENTRIES:

- 10th December, 1906. Opinion of Court of Appeals  
(Judge Pearce) reversing Judgment appealed from and  
remanding case for a new trial and certificate of clerk filed.
- 14th June, 1907. Jury sworn.
- 10th June, 1907. Verdict (sealed) in favor of the Plaintiff  
for \$2564.42.  
Judgment on Verdict Nisi.
- 12th June, 1907. Judgment on Verdict absolute in favor of the  
Plaintiff for \$4000.00 the penalty of the Bond sued  
on to be released upon the payment of \$2564.42  
the sum found by the Jury with interest until  
paid and costs of suit.

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PETITION AND ORDER OF COURT.  
Filed 9th July, 1907.

---oOo---

To the Honorable, the Judge of said Court:

The Petition of the Defendants respectfully shows:

1. That they desire to take an appeal from the judgment in the  
above entitled case and that the testimony taken in the case is  
now being written up and the bills of exception being prepared.
2. That the time for signing said Bills of Exception unless the  
same be extended will expire on Wednesday, the 10th inst.



They accordingly pray that the time for preparing and signing the same be extended until September 1, 1907.

And as in duty, etc.

John P. Poe & Sons,  
Attorney for Defendants.

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ORDERED this 9th day of July, 1907, upon the foregoing petition that the time for signing the Bills of Exception in the foregoing case be, and the same is hereby extended until the 1st day of September, 1907.

Danl. Giraud Wright.

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ORDER FOR APPEAL.  
Filed 30th July, 1907.

- - - -

Mr. Clerk:-

Please enter an appeal to the Court of Appeals on behalf of George Jewel and the United States Fidelity and Guaranty Company, the Defendants in the above entitled case.

John P. Poe & Sons,  
J. Kemp Bartlett,  
Attorneys for Defendant.

---

At the time for filing the order for appeal the defendant filed an affidavit that the appeal is not taken for delay and at the same time also filed a duly approved appeal Bond.

AGREEMENT AND ORDER OF COURT.  
 Filed 15th August, 1907.

---oOo---

It is agreed the Court consenting that the time for signing the bills of exception in the above case be extended until Sept. 23rd, 1907.

John P. Poe & Sons,  
 Attys. for defts.  
 Leon E. Greenbaum,  
 Atty. for Plffs.

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Ordered this 15th day of August, 1907, that the time for signing the defendants' bills of exception in this case be and it is hereby extended until September 23, 1907.

Alfred S. Niles.

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AGREEMENT OF COUNSEL &  
 ORDER OF COURT.  
 Filed 19th Sept. 1907.

---oOo---

IT IS HEREBY AGREED that the time for signing the Bill of Exceptions in the above entitled case be extended to the 10th day of November, 1907; and it is further agreed that the time for transmitting the record to the Court of Appeals, as required by Article 5, Section 6 of the Code of Public General Laws, is hereby waived and extended to the 10th day of November 1907.

Dated this 19th day of September, 1907.



George R. Gaither,  
 Attorney for Pliffs.  
 John P. Poe & Sons,  
 Atty. for Geo. Jewell.  
 J. Kemp Bartlett,  
 Attys. for U.S.F. & G. Co.

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Ordered this 19th day of September 1907 upon the  
 aforesaid agreement that the time for signing the Bill of Excep-  
 tions and transmitting the Record in the above entitled case  
 be, and the same is hereby extended until November 10th, 1907.

George M. Sharp.

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AGREEMENT OF COUNSEL AND ORDER OF COURT.  
 Filed 9th November, 1907.

---oOo---

It is hereby agreed that the time for signing the bills  
 of exception in the above case be extended to the 30th day of  
 November, 1907 and it is further agreed that the time for  
 transmitting the record to the Court of Appeals is hereby waived  
 and extended to the 30th day of Nov. 1907.

John P. Poe & Son,  
 Atty. for Jewell.  
 Leon E. Greenbaum,  
 Atty. for Plff.

---



Ordered this 9 day of Nov. 1907, upon the foregoing agreement that the time for signing the bills of exception and transmitting the record in the above case be extended until Nov. 30th, 1907.

George M. Sharp.

Appellant's Costs \$

Appellee's Costs \$

State of Maryland, City of Baltimore, Sct:-

I, Robert Ogle, Clerk of the Superior Court of Baltimore City, do hereby certify that the foregoing is truly taken from the record and proceedings of the said Superior Court in the therein entitled cause.

In testimony whereof I hereunto set my hand and affix the seal of the Superior Court of Baltimore City, this            day of November, in the year one thousand nine hundred and seven.

Clerk,

*Robert Ogle*  
Clerk,  
Superior Court of Baltimore City.



GEORGE JEWELL and  
THE UNITED STATES FIDELITY  
AND GUARANTY COMPANY,

IN THE  
COURT OF APPEALS  
OF MARYLAND.

vs.

APPEAL FROM SUPERIOR COURT  
OF BALTIMORE CITY.

HENRY SMITH, JR.  
JOHN A. SMITH,  
WILLIAM A. SMITH,  
co-partners trading as  
HENRY SMITH & SONS.

APPEAL TO JANUARY TERM 1908.

JOHN P. POE & SONS,  
J. KEMP BARTLETT,  
For Appellant.

GEORGE R. GAITHER,  
LEON E. GREENBAUM,  
For Appellee.

Filed.....1907.



## 2<sup>d</sup> Appeal

First Appeal in this case was to October Term 1906  
and Transcript was made and sent per Mail June  
6<sup>th</sup> 1906

Docket Entries: 10 Dec 1906 Opinion of Court of  
Appeals (Judge Pease) reversing Judgment  
appealed from and remanding case for a  
new trial & Cert. of Release for

4<sup>th</sup> June 1907 Jury sworn:

10 June 1907 Verdict (sealed) in favor of the  
Plaintiff for \$2564.42

Judgment on Verdict nisi

12 June 1907 Judgment on Verdict absolute  
in favor of the Plaintiff for \$4000.00  
the penalty of the Bond sued on to be  
released upon the payment of \$2564.42

the sum found by the Jury with interest until paid &

Petition

Order of Court

(1<sup>st</sup> 9 July 1907)

(1)

Order for appeal

(1<sup>st</sup> 30 July 1907)

(2)

at the time for filing the order for appeal the de-  
fendant ~~made~~ filed an affidavit that the appeal is  
not taken for delay and at the same time also  
filed a duly approved appeal Bonds

Order of Court  
(No 15 Aug. 1907)

(3)

Agreement of Council + Order of Court  
(No 19 Sept 1907)

(4)

Agreement of Council + Order of Court  
(No 9 Nov. 1907)

(5)

Bill of Exceptions  
No 1907

(6)

HENRY SMITH & SONS

VS.

GEORGE JEWELL ET AL.

)

)

)

IN THE

SUPERIOR COURT OF

BALTIMORE CITY.

DOCKET 1904 PAGE 299

MR. CLERK,--

Please enter the judgment in the above entitled cause "satisfied" as to the Defendant, the United States Fidelity & Guaranty Company, the Plaintiff reserving nevertheless said judgment to the extent of \$814.42, with interest from the date of judgment, against the Defendant George Jewell.

*George R. Gaither*  
\_\_\_\_\_  
Attorney for Plaintiffs.



Misses Superior's Cms  
of Baltimore City.

of  
H. H. Smith  
et al

vs.

Amice  
et al.

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Order to enter judgment  
adjudges as to me defendant,  
receiving same as to other.

Wm. Clark,

Clerk of the  
Court of Baltimore  
City for parts

Feb. 7. 1868