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 co-defendant 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 1st 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 1st 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 so vote for it, the men stopped work that night. On the following Thursday however the plaintiffs paid the men up to May 1st, 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, ~~[illegible]~~ ~~him~~ 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 15th 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 18th 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, the plaintiffs then made a new agreement for the performance of said work, 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 having 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 entire ability Jewell in the performance of the work there under, 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 $35.00/100, 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 by the architects, the said Henry Smith and Sons shall be 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 this 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 take possession for the purpose of completing said work under this contract, and to employ any other persons or firms 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 some thing in the agreement in this case which forbids such recovery. Davis v Ford 81 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 6. 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 in proper 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 5% percent for use of tools and supervision according to the terms of the agreement with him; that all these payments were 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 Jewells contract, amounted to $4182.93 in excess of what would have been due Jewell for the same work, and exclusive of $200 paid Jewells men at the time he abandoned his contract, but the plaintiffs declined to furnish evidence that the amounts paid Feldmeyer were audited or certified by the architects named in their contract with the State, to which the defendants also objected, and the Court was sustained the objection, and refused the offer of proof.

This constitutes the third 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 2d 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 where ever the effect of one construction will sustain, and the other will oust the jurisdiction of the Court, the former will be adopted if it can be done consistently, with the language of the agreement.

In Lawman 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 binding the parties by provisions debarring parties from access to the Courts for settlement of controversies."

With these principles in view, let us examine the paragraphs 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 by the architect, 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 plaintiffs 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 themselves, or by the employment of any others for that purpose - and that in case of the discontinuance of the contractor employment by the plaintiffs, the

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 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 contractor 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 omitted both the plaintiffs and himself to the ordinary methods of procedure, and to 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 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 its obvious that such discontinuance ~~could only be effected by the~~

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 Lawman 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 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 executing 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 were 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. Was particular of 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 Dolling v York Springs R.R. 203 Pa St. 628 it was held that an arbitration clause in a contract for the construction of a R.R. 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 agreement clearly could not include a claim for damages for abrogation of the contract".

In McGovern v Rockhill, 10 Phila. 438, cited in Dolling v York Springs RR 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 rescission 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 receiving of the contract, determine the contractor damage for the loss of his contract."

In Fuller vs Doyle and the American Bonding Company, 80th Fed. Rep. 389 (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 after 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 where 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 an 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. 137 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, hitherto 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 appellee in support of this argument, and are of them does unequivocally sustain them, but the others we think, can be plainly distinguished from the case at bar.

In de Matteo v. Jordan 15th Wash 378, the language of the contract was that "In case the contractor should not complete the building, the owner may draw and change the same 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". Here not only was the certificate required in event of the contractor's 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 & certifying.

In Cement Co vs Brefeld 173 Ill. 179, the language of the contract was the same as in the matter in question - Extraneous 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 claim was upon the contract and not for damages independently of it, because, as the Court said, "when the plaintiff was called on for a bill of particulars he pleaded the contract itself as part of the bill of particulars - The mode adopted by the appellee for establishing the amount due him was 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 131 Cal 576, 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 such certificate should be a condition precedent to recovery - The Court said, "the only contingency prior to which provision was made as 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 84 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.

45 sides

No. 25.

Henry Smith & Sons.

vs

George W. Jewell et al.

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argued before all the Judges except Page J.

Opinion by Pearce J.

We reported

Filed November 15/06