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HENRY SMITH AND SONS

vs.

GEORGE JEWELL ET AL.

IN THE

Court of Appeals

OF MARYLAND.

October Term, 1906.

General Docket, No. 35.

BRIEF ON BEHALF OF APPELLEES.

STATEMENT OF FACTS.

In the fall of 1902 the appellants entered into a contract with the State of Maryland to build the State House Annex at Annapolis. On the 16th day of October, 1902, they engaged George Jewell, one of the appellees, to haul all of the material needed for the erection of said building, and to lay the bricks required in its construction, the bricks to be laid in strict accordance with the plans and specifications prepared by Messrs. Baldwin & Pennington, architects, and to their entire satisfaction, at and for the prices which were set forth in a written contract between the appellants and the said George Jewell, bearing date the 16th day of October, 1902. (See Record, pp. 5, 6 and 7). The payments to be made by the appellants to the said George Jewell, according to the terms of this contract, were to be made between the 10th and 15th of

each month for the previous month's hauling, and every two weeks for the brickwork, a retained percentage of 15 per ct. to be withheld by the appellants until the building was completed to the satisfaction of the said architects, and accepted by the State of Maryland. The contract further provided that in the event of a refusal or neglect on the part of the said George Jewell to supply a sufficiency of properly skilled workmen to prosecute said work with promptness and diligence, or in case he should fail in the performance of any of the agreements on his part to be performed, "*such refusal, neglect and failure being certified to by the architects,*" the appellants should be at liberty after three days notice to the said George Jewell, to provide the labor necessary to complete the work and deduct the cost thereof from any money due him, or that might thereafter become due him under the contract; and further provided that in the event that the said architects "*shall certify that such refusal, neglect or failure is sufficient ground for such action,*" the appellants were to have the right to terminate the employment of the said George Jewell and enter upon the premises and take possession for the purpose of completing the said work; and further provided that in case of the discontinuance of the employment of the said George Jewell, he should not be entitled to further payments under his contract until the work was wholly finished, at which time, if the unpaid balance of the amount to be paid under the contract should exceed the expenses incurred by the appellants in finishing the work, the excess should be paid to the said George Jewell, but if the expenses exceeded the unpaid balance, then said George Jewell should pay the difference to the appellants. The contract then provides as follows:— "*Such expenses shall be audited and certified to by the architects or superintendent, whose certificate thereof shall be conclusive upon the parties.*" (See Record, p. 6 bot-

tom). The contract further provided that the said George Jewell should furnish the appellants within ten days of the signing of the contract, a corporate bond in the penalty of $4,000, conditioned upon the faithful performance on his part of the contract in compliance with this last-mentioned provision of the contract, a bond in the penalty mentioned was executed by the said George Jewell and the said United States Fidelity and Guaranty Company, the other appellee, and delivered to the appellants on or about the 21st day of October, 1902. This bond will be found on pages 7 and 8 of the Record. It is in the usual form of such bonds, and is conditioned upon the performance by said George Jewell, the principal obligor, of the terms, covenants and conditions of the said contract on his part to be performed.

After the said contract and bond had been executed, the said Jewell entered upon the work in accordance with the terms of the contract, and continued to perform the work until the 6th day of May, 1903. (See Record, p. 9). During the week ending on this day the appellants notified the said Jewell that he should look elsewhere for the payment due him on that day, and made the claim that they had theretofore paid him more than the contract called for, and they told him that they would make him no payment that week. On May 6th, which was Saturday, receiving no payment, the said Jewell stopped work, having previously notified the appellants of his intention to do so if not paid the sum which he claimed would be due him on that day. Subsequently, to wit, on May 11th, 1903, the appellants notified the said Jewell by letter that they intended to proceed on May 15th, at 8 a. m., to provide such labor as they deemed necessary to complete said building, and that they would deduct the cost of same from any money then or thereafter due him.

(See Record, pp. 10 and 11). *They did not, however, obtain from the architects a certificate to the effect that the "refusal, neglect or failure is sufficient grounds for such action."* On the 18th day of May, 1903, the appellants entered into a contract with William E. Feldmeyer, by the terms of which they employed the said Feldmeyer to superintend the laying of the brickwork in the said building for the cost of the labor plus 7½% commission, (See Record, p. 13), and Feldmeyer started the work, but did not complete it, it being completed in the fall of 1905, by the appellants themselves. (See Record, p. 17).

The appellants offered in evidence the receipts from the said Feldmeyer for the work done and for the commissions on the same under the contract with Feldmeyer, and also offered to prove by the witness Smith, the payment of said sums of money to Feldmeyer, but declined to state to the court that they intended to follow up such proof with *a certificate from the architects or superintendent that such expenses had been audited and certified by such architects ar superintendent.*

ARGUMENT.

The appellants' first exception was taken to the ruling of the Court refusing to admit in evidence the receipts of William E. Feldmeyer for money paid to him for the wages of bricklayers and his commissions thereon, unless appellants' counsel would state that he intended to follow up such proof with a certificate from the architect or superintendent that such expenses had been audited and certified by such architect or superintendent. The question presented by the appellants' first bill of exceptions may be stated thus: Is a provision in a building contract to the effect that in the event of default the expenses of completion of the work shall be audited and certified to by the architect or his superintendent, whose certificate

thereof shall be conclusive upon the parties—binding upon the parties?

If such a provision is binding will either of the parties to such a contract, in the absence of proof of fraud or collusion on the part of the architects or superintendent be permitted to substitute in place of proof of such audit and certificate, some other proof of such expenses?

Such a provision in building contracts as is found in the contract in this case is by no means unusual. Such protection to the party who is to perform the work against being held responsible for a wasteful expenditure of the contract price, in the event of differences arising between him and his employer, which, as in this case, lead to a stoppage of the work, is quite as prudent and reasonable as the familiar clause in such contracts which protects the employer by providing that no payment shall become due until the architect has certified it to be due.

Under the contract in evidence (Record, pp. 5 and 6), Jewell, the sub-contractor, agreed to do certain work for the general contractors according to certain specifications. The surety guaranteed the faithful performance of this contract. Architects were named in the contract whose satisfaction with and approval of the work was a condition precedent to payment being made therefor, and the sub-contractor had to present their certificate before receiving his final payment. In case the sub-contractor failed to finish the work, the general contractors might take over the job by complying with certain provisions. But, if they did, they were obliged to complete the work in accordance with the specifications, and, before they could collect from the sub-contractor what it cost beyond the contract price, they had to have the certificate of the architects showing the expense and damage incurred. In each case, the certificate of the architect was a condition precedent as to the right to recover either the contract

price, or the additional expense incurred in finishing the work. The first certificate was, peculiarly, for the benefit of the general contractors, but the second was more particularly for the benefit of the sub-contractor and his surety. If a certificate was required to guard the rights of the general contractors, when the work was being done by the sub-contractor, a certificate was also required to protect the rights of the sub-contractor and his surety, when the work was done by the general contractors. The reason for requiring one certificate is the ground for demanding the other. The damages sought to be recovered are not damages outside the contract, but damages under the contract resulting from an alleged violation of its provisions. The surety is also sued. Now, the surety guaranteed the faithful performance of the contract, and the measure of the damages for which it can be held responsible must be found in the contract itself. If there be in the contract a provision for ascertaining the amount of damages incurred through a violation of any of its provisions, the surety has a right to insist, and so has the principal, on its observance before being held responsible. The general contractors,—the appellants—had a right to insist on a certificate from the architects before making the final payment to Jewell, had he completed the work, and, under the contract, Jewell and the surety, —the appellees—had a right to insist on a certificate from the architects before paying for work done by the appellants after they took over the job, even admitting that they took it over in accordance with the provisions of the contract.

The following cases support the contention of the appellees, and no cases have been found that in any way question or qualify the sound doctrine that requires a man to establish his right of action, if any he has, by that standard, and by that only, which he has agreed shall

constitute conclusive evidence, either for or against him, of its existence:

DeMattos vs. Jordan, 15 Wash., 378
Same case, 20 Wash., 315:
American Bonding & Trust Co. vs. Gibson County 127 Fed. Rep., 671:
International Cement Co. vs. Biefeld, 173 Ill., 179:
Talley vs. Parsons, 131 Cal., 516:
Scott vs. Texas Const. Co., 55 S. W., 37:
N. Y. Building & Improvement Co. vs. Springfield E. & P. Co., 56 N. Y. App. Div. 294:

The case of DeMattos vs. Jordan *supra* was an action upon a bond guaranteeing performance of a building contract. The clause in the contract which provided for completion of the work by the owner, in the event of default by the contractor, is in the precise words of that clause in the contract in the case at bar. The contractor entered upon the performance of the contract, but subsequently abandoned the work and absconded, leaving the building but partially constructed. The sureties declined to finish the work and disclaimed all liability. The owner then caused the building to be completed, and subsequently brought an action upon the bond to recover the amount alleged to have been necessarily expended in excess of the contract price in finishing the building. Upon these facts, it was held "that the appellant can, under the contract, only recover such expenses incurred by him in furnishing materials or finishing the work, as shall have been audited and certified by the architect. No estimates of the architect were required after the contractor abandoned his contract, but it was explicitly agreed that the expenses incurred by the owner for materials and labor should be audited and certified by the architect, and that his certificate should be conclusive upon the parties. The purpose of this provision was

to protect the surety against excessive and unjust charges for work and material, and it was agreed that the certificate of the architect should be conclusive as to the amount of expenses incurred by the owners."

This case was carried a second time to the Supreme Court of the State of Washington (DeMattos vs. Jordan, 20 Wash., 315). The question raised upon the second appeal being, as to whether it was necessary that the certificate of the architect should be in writing, it being proved upon the second trial, that he did examine the claims and orally approve them. Upon this point, the court said, at page 317: "But it seems to us that the contract fairly contemplated that the certificate should be in writing. The surety should not have been put to the trouble of attending from time to time when the architect examined these claims, in order to know what was done, but had a right to have them certified in writing. It does not appear that they did attend, or had any notice. The ordinary meaning of such a clause is, that the approval shall be evidenced by a writing, and this is the customary method of certifying. We are of the opinion that the proof was insufficient."

In American Bonding and Trust Company vs. Gibson County *supra* a building contract contained the identical provision. The contractor did all of the work except that covered by the final payment when on the certificate of the architect his work was discontinued and the building was completed by the owner. It was held that an action to recover from the contractor and his surety an excess of expenses over the contract price, was an action for damages under the contract resulting from a violation of its provisions, and hence the owner was not entitled to recover in the absence of proof that the architect had audited and certified the expenses and damages incurred, and issued a certificate therefor.

To the same effect is the case of International Cement Company vs. Biefeld *supra*, the clause in the building contract in that case being also in the exact language of the clause in the contract between the appellants and the said Jewell. The owner, Biefeld, testified to the expense incurred for furnishing materials and for finishing the work, and to the damages incurred through the alleged default of the contractor, without producing a certificate of the architect. The contractor moved to exclude such testimony, but the same was received over his objection. It was held on appeal that in view of the agreement that the architect should audit and certify the cost of finishing the work that "an action for the breach of the contract and for expenses of labor and materials thereunder, cannot be maintained without such certificate of the architect, and failure to present such certificate, or offer any explanation for not doing so, gives rise to the presumption that the claimant was not entitled to such certificate."

So in Talley vs. Parsons *supra*, where the meaning and effect of the same clause in a building contract was the subject of controversy, the Court said: "We deem it proper to observe that the appellant can, under the terms of the contract, only recover such of of the expense incurred by him for furnishing materials or finishing the work as shall have been audited and certified by the architect. The purpose of this provision was to protect the sureties from excessive and unjust charges for work and materials, and it was agreed that the certificate of the architect should be conclusive as to the amount of expenses incurred by the owner; * * * the condition was inserted in order to provide a method of arriving at the damage to the owner, in case the contractor abandoned or failed to perform his contract."

The rights and obligations of the parties are to be determined by the terms of the written contract of October

16th, 1902, and especially that clause thereof which provides what shall be done in the event that Jewell at any time should refuse or neglect to supply a sufficiency of properly skilled workmen to prosecute the work with promptness and diligence. (Record, p. 6). The terms of this clause are clear and explicit, and in no wise contravene any principles of public policy. The parties therein distinctly provide for the very contingency that the appellants claim has happened. Upon the alleged abandonment by Jewell of his work, the appellants entered into possession of the property and employed another to complete the job. The vital question now is, what is the amount of expenses thereby incurred. The contract provides that *such expenses shall be audited and certified to by the architects or superintendent, whose certificate thereof shall be conclusive upon the parties.*

Nothing short, therefore, of such certificate, will satisfy the requirements of the deliberate agreement of the parties.

If the expenses had been certified to and audited by the architects, the appellees would have been bound by the amount mentioned in the absence of proof of collusion and fraud. Manifestly, therefore, they have the right on their part to insist upon such an audit as the parties agreed in advance should be furnished, as a test of the amount of liability.

The object of the insertion of the provision is obvious. It was to do away with continuous disputes as to the reasonableness of the wages paid, and the reasonableness of the cost of material, and the correctness of the quantities of material used, and to leave such complicated questions to the determination of a disinterested, competent, third person, who would do justice to both parties.

It was like choosing an arbitrator before a disagreement between the parties had arisen.

Clearly, therefore, the Court should hold the parties to their deliberate engagements. The principle invoked here has frequently been recognized by this Court.

Brydon vs. B. & O. R. R. Co., 65 Md., 198.

Lynn vs. B. & O. R, R. Co., 60 Md., 404.

Moreover the precise point in dispute has, as shown above, been passed upon by many courts of other jurisdictions.

The rulings of the Court sustaining the appellees' objections to the proof of the expenses in any other manner than that provided for by the terms of the contract, constitute the first, fourth and fifth bills of exception. (Record, pp. 15, 18 and 19).

The second and third bills of exception relate to the refusal of the Court to allow the appellants to prove that they had no jurisdiction or control over the architects, Baldwin & Pennington, who were in charge of the work, and that said architects were employed by the State House Commission, to the knowledge of the appellees. (Record, p. 16).

If we are correct as to the necessity of the certificate of the architects, then these exceptions of the appellants are of no moment. It is not a question as to who controlled or paid the architects, but whether the parties agreed to leave a certain matter to the decision of the architects, and whether that decision was a condition precedent to the right of recovery.

The appellants did not offer to show that application had been made to the architects for the certificate, and that said certificate had been improperly withheld by them. Indeed, it is clear that no attempt of any kind was ever made to secure the certificate, or to furnish in any way, the only kind of evidence as to the amount of expenses and value of materials, that the parties regarded as sufficient to meet the situation that actually subsequently

arose. In so far as the question of control over the architects is concerned, it would have been most improper if the appellants had had any control over them or had had them in their pay.

The clear object of the clause in question was, to have an outsider settle the controversy, who, as between the parties, was unbiased and independent.

There being no error in the rulings of the lower Court, its judgment should be affirmed.

Respectfully submitted,

JOHN P. POE & SONS,

J. KEMP BARTLETT,

For Appellees.

HENRY SMITH & SONS

vs.

GEORGE JEWELL ET AL.

IN THE

Court of Appeals

OF MARYLAND.

OCTOBER TERM, 1906.

GENERAL DOCKET,

No. 35.

BRIEF FOR APPELLANTS.

STATEMENT OF CASE.

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. In furtherance of this work, they made a contract for the laying of brick and hauling materials for the said building, with George Jewell, one of the defendants in this case. The agreement for the same was made on October 16th, 1902. (Record, page 5.) The said Jewell furnished a bond of the United States Fidelity and Guaranty Company, the other defendant in this case, in the penalty of four thousand dollars, for the faithful performance of this agreement. Said Jewell then entered upon the work set out in the said contract, and continued to lay the brick for said building until the 6th of May, 1903. On that day the men employed by

Jewell quit work, and Jewell subsequently abandoned the work under the contract and never attempted to do any further work on the building. The plaintiffs, immediately upon the stoppage of said work, notified Jewell and his surety of the abandonment of the work, and after waiting for a week, proceeded to do the work necessary for the completion of the building. In order to finish the job, they made a contract with William E. Feldmeyer (Record, page 13) and under this contract the plaintiffs offered to prove

> "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 day of May, 1903, the plaintiffs entered into a contract with William E. Feldmeyer for the laying of the bricks named in the contract of October 16, 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 $7\frac{1}{2}$ per cent. as compensation for the use of his tools and personal service and supervision, 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. 16, 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 seven hundred dollars paid to the men at the time of the abandonment of the contract by Jewell."

They also offered the receipts of the said Feldmeyer, showing each of said payments week by week. (Record, pages 14 and 15.) The Court below refused to allow any of

this testimony to be offered on the ground that under the terms of the original contract with Jewell all of such expenditures should have been audited and certified by the architects of the building. The plaintiffs being deprived of any opportunity to show the actual damages which they had suffered by the breach of this contract and bond, were only given a verdict for five dollars, the Court below having granted an instruction (Record, page 18) that there was no evidence to show the amount of damages and that the verdict must be for nominal damages only. The plaintiffs being thus deprived of their right to show their losses, have taken this appeal, and all the exceptions are based upon the same ground and rest upon the construction of the same clause in the original agreement.

ARGUMENT.

First. The work under the contract having been abandoned by the defendant Jewell, on May 6, 1903, the plaintiffs had the right to proceed to complete the said contract and to recover any balance due in excess of the contract price from the defendant and his surety.

The undisputed evidence in this case proves conclusively that Jewell abandoned his contract. The testimony (pages 9 and 10 of the Record) proves this, as well as the notices of the plaintiffs to Jewell (Record, page 10) and to the surety company (Record, pages 11 and 12.)

There is not the slightest evidence that this abandonment of the contract was in any way caused by the plaintiffs, or that they in any way interfered with his work upon the contract, or requested him to stop work; on the contrary, they notified him of their intention to proceed several days after his abandonment of the work, and yet, during that period, he never made the slightest attempt to do any work whatsoever.

In the case of Davis vs. Ford, 81 Md. 333, Justice Fowler, delivering the opinion of this Honorable Court, said:

"The defendant failed, however, according to all the testimony, his own included, to furnish either labor or materials after the 7th of May."

"The plaintiffs having finished the building after notice to the defendant to resume work, are entitled to recover, unless the circumstances relied on by the defendant constitute a defence or valid excuse for his abandonment of the work."

The Court in this case also declared the prayer of the plaintiffs which was granted, to be objectionable, which prayer sets forth facts identical with those proven in the case at bar; and the law set forth in this prayer is epitomized in the syllabus of this case, as follows:

"Where a party who contracts to erect a building within a certain time fails to do so, and abandons work on the same, not wilfully, but without any valid excuse therefor, and the other party, after notice, proceeds to have the same completed, such party is entitled to recover from the contractor the value of the work and materials necessary to complete the building according to the contract, less any unpaid balance of the contract price."

It is therefore clear that all of the evidence offered by the plaintiff in this case should have been admitted as to proof of loss, unless there is something in the contract itself which prohibits the offering of such proof. The Court below interpreted the last clause of the agreement between Jewell and the plaintiffs, as applicable to any breach of the contract and prohibited any recovery except in the manner set forth in this clause. The clause referred to is the latter part of the last paragraph of the contract; this paragraph is as follows, (Record, page 6):

"And it is further agreed that should the said George Jewell at any time refuse or neglect to supply a suffi-

ciency 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 & Sons shall be at liberty, after three days' written notice to the said George Jewell, to provide any such labor and to deduct the cost thereof from any money then due or that may thereafter become due to the said Geore 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 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."

It is submitted that under a plain, reasonable interpretation of this clause, the last provision is only intended to apply to those cases in which the employment of the defendant Jewell had been "discontinued" by virtue of a certificate

from the architects to that effect. The language is:

> "And if the architects shall certify that such refusal, neglect or failure is sufficient ground for such action, the said Henry Smith & Sons Company shall be at liberty *to terminate the employment* of the said George Jewell on said work, etc., and *in case of discontinuance of the employment* of the said Jewell * * * 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, the excess shall be paid 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 expenses referred to are plainly those which may arise from a discontinuance of the employment of the said George Jewell, which discontinuance the plaintiffs were only authorized to make upon the certificate of the architects that there was sufficient grounds for such action. In the case at bar the cause of action was a *breach* of the contract by Jewell by his abandonment of the work, not a discontinuance of his employment by any act of the plaintiffs. "Discontinuance" by its very term implies some affirmative act of the party ending the employment. How can it be construed as synonymous with a breach of a contract made by the opposite party from the one who had the right to discontinue?

The very terms of this paragraph, providing specifically for the payments from one party to the other of balances under these conditions, show that this paragraph was intended to apply to such discontinuance. Otherwise a discontinuance by one party would be simply a rescission of the balance of the contract and would give no right of action. For this reason the elaborate terms of this last paragraph were inserted in the agreement.

The contingency provided for in this agreement, giving the right to the plaintiffs to supersede Jewell in his work and oust him from his contract, even though he was undertaking to comply with the same, is a very arbitrary one, and it is easy to see why the additional requirements should have been inserted, that under such circumstances, such expenses should be audited and certified to by the architects or superintendent. It is submitted that such a case is an entirely different one from the one arising from the facts in this case where the breach of the contract arises from the abandonment of the work by the plaintiffs and not from any certificate or action of the architects, or even of the plaintiffs themselves.

Moreover, the rule of construction applicable to all contracts where the effect of one construction would be to oust the jurisdiction of the Court, and the other to retain the cause, is to make every construction in favor of the theory of granting relief to the parties rather than one which will deny them their remedy in Court.

In the case of Gibbons vs. Lautenschlager, 74 Fed. Rep. 160, the Court says :

> "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 ; and where there is not present some condition precedent to demand of payment, the question for the Court to decide is, have the contract provisions been fulfilled ?"

In the case of Fontano vs. Robbins, 18 Dist. Ct. of Appeals, 414, Justice Sheppard says :

> "Special stipulations submitting the demands of a contractor to the adjudication of supervising architects, and engineers, though enforceable, as we have seen, are in derogation of common rights and the ordinary free-

dom 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.*"

This case quotes with approval the decision of the Supreme Court in Hamilton vs. Home Insurance Company, 137 U. S. 370. In that case, Justice Grey delivering the opinion of the Supreme Court, says:

> "A provision, in a contract for the payment of money upon a contingency that the amount to be paid shall be submitted to arbitrators, whose decisions shall be final as to the amount, but shall not determine the general question of liability, is undoubtedly valid. If the contract further provides that no action upon it shall be maintained until after such an award then, as was adjudged in Hamilton vs. Liverpool Insurance Co. (136 U. S. 242), and in many cases therein referred to, the award is a condition precedent to the right of action. But when no such condition is expressed in the contract, or necessarily to be implied from its terms, it is equally well settled that the agreement for submitting the amount to arbitration is collateral and independent; and that a breach of this agreement, while it will support a separate action cannot be pleaded in bar to an action on the principal contract."

Applying this universal rule of construction, that the jurisdiction of the Courts shall not be ousted by the construction of the terms of a contract, unless such construction must necessarily be implied from its terms, it would seem clear that to make the last clause of this paragraph of the contract refer to *any breach* of the preceding sections of the same, regardless of the fact as to whether said breaches arose from the wilful abandonment by the defendant of his contract, or from the act of some third party, is to give a forced importance to this section, and one which is not necessarily to be

implied from its terms.

The case of George A. Fuller Co. vs. Doyle and the American Bonding Co., 87 Fed. Rep. 687, is identical with the case at bar. In this case the suit was brought against the surety and the contractor, as in the case at bar, and the defence made by the surety company was that the plaintiff could only proceed in accordance with a provision in the contract. This provision was identical with the paragraph of the agreement in this case. The Court says (page 688):

> "It was provided in the contract between Doyle and the plaintiff that if Doyle (the contractor) at any time should fail, refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any agreements contained in said contract, *such refusal, neglect or failure being certified by the architect*, the plaintiff, after three days' written notice to said Doyle, should be at liberty to provide such labor and materials, and to deduct the cost thereof from any money due or thereafter to become due, to said Doyle under said contract, and that the plaintiff should be at liberty to terminate the employment of said Doyle for said work, and to enter upon the premises and take possession, for the purpose of completing the work comprehended under said contract, of all materials, tools and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor; and in case of *such discontinuance of the employment* of said Doyle, that he (Doyle) should not be entitled to receive any further payment under said contract until the said work should be wholly finished, at which time, if the unpaid balance of the amount to be paid under said contract should exceed the expense incurred by the plaintiff in finishing the work, such

excess should be paid by plaintiff to Doyle, but if such expense should exceed such unpaid balance, then said Doyle should pay the difference to the plaintiff."

The paragraph then concluded with a much broader provision as to the certificate of the architect than the case at bar, it being as follows (page 694) :

"The expense incurred by the owner, as herein provided, either for furnishing material or for finishing the work, *and any damages incurred through such default*, shall be audited and certified by the architect, whose certificate thereof shall be conclusive upon the parties."

The Court, in construing these provisions of the contract, said :

"A true construction of the provisions of Article 5 of the contract, in relation to the giving of the three days' notice to Doyle, and requiring the certificate of the architect, seems to me to be that when the owner, which in this case is the plaintiff, should at any time during the prosecution of the work by Doyle, become dissatisfied with it, and determine to take it out of his hands while he was proceeding to do the work, and claiming that he was conforming to the requirements of the contract in so doing, before taking it out of his hands, under such circumstances, it should have a certificate of the architect to the effect that Doyle was not conforming to the contract, and afterwards should give to him (Doyle), three days' notice before it (the plaintiff), should be at liberty to take possession of the work and proceed to finish it. The facts as disclosed by the pleadings and the proof do not fall within the provisions of the contract as so construed. The pleadings show, and the evidence proves beyond question, that there was no dispute between the plaintiff and Doyle in

relation to the non-peformance of the contract. He scarcely began work under it. He says in his testimony that he only did five or six days' work. *He voluntarily abandoned the performance of his contract.* Under such circumstances the requirement of a certificate by the architect of a failure to do the work in accordance with the requirements of the contract was inapplicable, and the three days' notice on the part of the owner to Doyle that the owner would proceed with the work was not required. * * * It is contended in argument that, in this suit on a bond to secure the faithful performance of this contract, there can be no recovery against Doyle or the Trust Company as surety on the bond, without an averment that the damages incurred by Doyle's default had been audited and certified by the architect. *This stipulation of the contract relates to the amount of recovery, and not to the right of recovery.* It is that kind of a stipulation which the plaintiff, if it desired to avail itself of it as a right conferred upon it by the contract, should have pleaded, and alleged the award made by the architect, and relied upon this award as its measure of damages. The plaintiff having failed to do so, the defendants might have pleaded this stipulation, and claimed under it, but in doing so must have pleaded the facts as the basis of the right. In this case neither party by their pleadings claim under this stipulation. On the contrary, a distinct and positive issue is tendered by the plaintiff as to reasonable value of the work required to be done by the plaintiff to perform Doyle's contract. This issue was accepted by the defendants in and by their general denial, and was insisted upon by their counsel as the issue at the trial of this case. Each and both of the parties, by their pleadings and conduct at the trial, must be held, therefore, to have waived the benefits of this stipulation. This was the view entertained by the Court at the trial,

> and in harmony with it *the objection of the defendant's counsel to plaintiff's offer to prove the award of the architect was sustained*, and plaintiff was required to stand on the issue of reasonable value, as then insisted upon by defendant's counsel."

The Federal Court in deciding this point was not called upon to consider the question as to whether the clause providing for the audit and certificate of the architect applied only to expenses arising from a discontinuance of the employment of the contractor, but the decision is, it is submitted, a conclusive one as to whether this stipulation is a condition precedent to the right of recovery, and as to whether it can be availed of by the defendants under the pleadings in the case at bar, upon both of which points it will be referred to hereafter. Moreover, the words used in the case at bar, "such expenses," are much more limited than the language in the stipulation in the earlier Missouri contract, and the present form of the clause in controversy may be properly inferred to have been used for the purpose of limiting the stipulation to expenditures resulting from a discontinuance of the employment, which is its obvious meaning from the context.

Again, in the recent case of Dobbling vs. Railway Co. 203 Pennsylvania State, 628, the Supreme Court of Pennsylvania ruled upon this very point. In deciding this case, which was an action by the contractor, but in which the same principle is involved, the Court said :

> "The plaintiff brings this suit to recover for damages resulting from the stoppage of the work and the rescission of the contract. He makes no claim in this action for any compensation for work done under the contract, but seeks to recover for the loss of the contract.
>
> "The defendant rests upon a clause in the agreement, under which it contends that the plaintiff waived any right to recover in any action at law, and agreed

that all disputes should be decided by the engineer. The provision in question is that commonly used in contracts for railroad construction work, and is as follows: 'The decision of the engineer shall be final and conclusive in any dispute which may arise between the parties to this agreement relative to or touching the same, and each and every of said parties do hereby waive any right of action, suit or suits, or any other remedy in law or otherwise, by virtue of the covenants herein contained, so that the decision of the engineer shall, in the nature of an award, be final and conclusive on the rights and claims of said parties.'

"Such a contingency as the entire stoppage of the work by the defendant company, or the rescission of the contract, was not apparently anticipated by either of the parties, and no provision was made in contemplation of any such occurrence. The agreement to submit to the decision of the engineer was limited to disputes relative to or touching the agreement itself, and the waiver of the remedy in law only extended to that which might be exercised by virtue of the covenants contained in the agreement. It did not cover questions outside the contract and clearly could not include a claim for damages for the abrogation of the contract."

During the progress of the trial, in ruling upon an offer of evidence, the learned judge of the Court below construed this clause in the following language:

"The words relative to this agreement clearly distinguish the clauses, and it does not seem to us that this dispute between the parties as to damages for the breach of the agreement was either in the comtemplation of the parties to the contract that was signed, or within the provisions of the clause of the contract in regard to the decision by the engineer being final and conclusive." But at the close of the testimony the trial

judge was constrained to change his opinion as to the right of the plaintiff to recover in this action, and directed a verdict for the defendant. We think that the Court below was correct in the first impression, and that it should have adhered to the ruling made thereunder. * * *

"The question here involved is also squarely ruled by Lauman vs. Young, 31 Penna. 306. In that case the submission clause was worded differently, but the principle there established covers the case in hand. There, as here, the plaintiffs did not sue to recover for work done in performance of the contract, but to recover damages from the defendant *for refusing to permit them to perform it.* The engineer was to determine in regard to work done, but had nothing to do with a dispute between the parties arising from a claim for damages for not being permitted to do the work. As was there said with emphasis: '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.'

"In the present case the submission clause in the contract cannot be properly construed to constitute the engineer the final umpire to determine the plaintiff's right to recover damages for the loss of the contract."

It is, therefore, submitted, that the clause requiring such expenses as are incurred, in the event of the discontinuance of the employment of the defendant, Jewell, by the certificate of the architect, to be audited and certified by the same architect or his superintendent, can have no application to a right of action for breach of the agreement arising from the abandonment of the work by the defendant, Jewell; and that the plaintiffs are clearly entitled to prove by the evidence offered by them the extent of the damages which they have sustained from this breach of the contract.

Second. Assuming, for the sake of the argument, that this last clause regarding expenses applies to any breach of the contract, yet it does not prevent the right of the plaintiffs to recover, *because such certificate is not made by the express terms of the contract, a condition precedent for any payment of losses.* By the express language of the clauses the certificate is only made "conclusive upon the parties;" it is not made a condition precedent to any payment. It may be one of the methods devised for the ascertainment of liability, and it could be invoked by either of the parties to this action, but it is not made in express terms or by necessary implication, the sole basis of any cause of action under the contract.

In the case of Hamilton vs. Home Ins. Co., *supra,* there was a provision that either party to the policy of insurance might demand arbitration after a disagreement. The Insurance Company demanded this arbitration, but in disregard of its provisions the suit was brought. The Supreme Court, after quoting the language referred to above, added this sentence:

> "Applying this test, it is quite clear that the separate and independent provision for submitting to arbitration the amount of the loss is a distinct and collateral agreement, and was wrongly held by the Circuit Court to bar this action."

In the case of Gibbons vs. Lautenschlager, *supra,* 74 Fed Rep. 167, the Court in construing a provision in a contract requiring the approval of the superintendent for all work, says:

> "Defendants now claim that the acceptance by the superintendent of the work done and material furnished is a condition precedent to the right of the plaintiff to recover herein. In my judgment it is not necessary to enter into a discussion of the legal propositions appli-

cable where payment is by the contract made conditional on an express approval or acceptance by the superintendent * * * After all, the final test is the contract of the parties, and looking to the contract herein, I find no provisions requiring such express approval or acceptance by the superintendent as a condition precedent to payment."

And to the same effect is the decision of this Honorable Court in the old case of Allegre vs. The Maryland Insurance Company, 6 Harris & Johnson, 408, Justice Dorsey saying:

"An agreement to arbitrate does not oust the Courts of Justice of their jurisdiction."

The decision in the case of Fuller Co. vs. Doyle, 87 Federal Reporter 687, referred to above, would seem conclusive on this point. In considering an almost identical clause the Court said:

"*This stipulation of the contract relates to the amount of recovery and not to the right of recovery.* It is that kind of a stipulation which the plaintiff, if it desired to avail itself of it *as a right conferred upon it by the contract*, should have pleaded, and alleged the award made by the architect, and relied upon this award as its measure of damages. The plaintiff having failed to do so, *the defendants might have pleaded this stipulation, and claimed under it, but in doing so must have pleaded the facts as the basis of the right.*"

The clause requiring the certificate of the architects, and declaring that certificate to be conclusive, is the last sentence in the contract, and stands entirely by itself. There is no language in the contract that such expenses shall be paid only upon such certificate, and the effect of the certificate, as stated in the contract itself, is only that it shall be conclusive upon the parties. It is entirely different from the

numerous cases arising from building contracts in which the payments are expressly made payable on the presentation of the certificate of the architects. It is also to be noted that in the case at bar the architects or superintendent were not the agents of the plaintiffs, but were employed by the State. It was as much in the power of Jewell to request the architects or superintendent to certify to all expenses in finishing the work, as it was in the power of the plaintiffs to request the same. The architects or superintendent were as much the agents of the defendant as of the plaintiffs. Moreover, immediately after the abandonment of the work by Jewell on May 13, 1903, the Banking Company was notified of the fact (Record, page 12), and informed that it would be held liable for losses. This Surety Company could have then requested the architects to act under the terms of the agreement in certifying to the expenditures. Their failure so to do, and their absolute inaction must be construed as a waiver of any rights which they might otherwise have had under this provision of the contract.

The provision was equally for the benefit of the defendants and of the plaintiffs and could have been invoked by Jewell or the Bonding Company, had they so desired. Its effect, as stipulated, if invoked and offered in evidence, would be that it would be "conclusive upon both parties."

It is therefore submitted that, if neither party required such certificate, but relied upon ordinary proof of expenses, subject to dispute as to the reasonableness of the charges, it would be a forced construction to declare that this clause was intended as a condition precedent to any right of action and thereby oust the jurisdiction of the Court. At the very best it would seem that this was an *additional* method of determining the damages afforded by the contract, just as an agreement to arbitrate ordinarily is in an insurance policy, which could have been made conclusive on both parties if invoked and carried out by either, but that it was not intended to be, and

is not to be construed as an exclusive method. For this additional reason it is urged that the testimony offered by the plaintiffs should have been admitted, and that they should not have been deprived of this evidence necessary to establish their case.

Third. Under the pleadings in this case the defendants had no legal right to object to the proof offered in evidence.

This is an action of covenant on the bond of the defendants. There is no general issue plea interposed by either of the defendants. Both of them rely upon a special defence which is pleaded by them jointly with great particularity. (Record, page 2.) This plea says nothing whatever of the failure of the plaintiffs to furnish either of the defendants with the certificate of the architects terminating the contract, or of the certificate of the architect or superintendent as to the reasonableness of the charges. If their contention is correct now, that these certificates are conditions precedent to the maintenance of this action, they were entitled to demand them before suit was instituted, and they were as cognizant of the fact that they had not received them on June 20, 1904, when they filed their pleas, as they were at the trial; and yet, in their plea there is not the slightest reference to that defence.

On the contrary, the only defence set up in the plea, is 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."

Upon this defence the plaintiffs joined issue by their replication (Record, page 3). Such being the sole ground of defence set forth by the plea, it is submitted that any objec-

tion to the admission of evidence must be based upon the facts contained in this plea and not upon other matters which have not been availed of by the defendants in their plea. By omitting to plead any other defence they have waived any requirement of proof upon other grounds set forth in the contract and must be confined to such facts in the trial of this case.

In the Encyclopedia of Pleading and Practice, volume 11, page 420, the doctrine is laid down as follows:

> "The Courts incline to restrict the scope of the general issue in actions on insurance policies. In such case, although the application and all the statements therein are expressly incorporated in the policy by reference, a breach thereof, or a defence based thereon going to avoid the insurance, cannot be proved under the general issue, but must be pleaded specially."

In the case of Cohen vs. Travelers' Insurance Co., 145 Mass. 228, the Court says:

> "Where a defendant intends to rest his defense upon a fact which is not included in the allegations necessary to the support of the plaintiff's case, he must set it within the precise terms in his answer."

Muley vs. Mohawk Valley Ins. Co., 5 Gray, 541.
O'Neill vs. Hampden Ins Co., 13 Gray, 431.
Pierce vs. Cohasset Ins. Co., 123 Mass. 572.

In Copeland vs. Assurance Co., 43 S. Car. 28, the Court says in stating the rules to be deduced from the authorities:

> "Where the defendant claims that the plaintiff has not a right of recovery on the policy of insurance by reason of the fact that he failed to comply with the requirements of the policy, such objection must be set up in his answer to the complaint."

Again, in the case of Gubbins vs. Lautenschlager, 74 Fed. Rep., referred to above, on page 176, the Court says:

> "It is insisted in argument by counsel for defendants that plaintiff is not entitled to the final payment herein, because, (1) He has not shown in a good and sufficient manner that there are no claims for material or labor furnished, which claim may be a lien upon the buildings or premises; (2) He has not furnished a good and sufficient bond and guaranty to protect defendants from any loss from defects in any part of the machinery. There will be no question but that the defendants may, if they desire, waive the two provisions just named. They were inserted in the January 7th contract for protection to defendants. If defendants did not desire to insist upon these provisions, no one else could insist on them. We look in vain in the different pleadings herein filed by defendants for any insistence on these two points. In the answer filed January 7, 1893, to the original bill, as well as in the answer, January 30, 1894, to the bill as amended, no insistence is made on either of the two points named, but the defence interposed is stated with extended and amplified detail on other and different points. The Court is justified in holding that defendants have waived the observance of these two contract conditions."

Again, as has been stated before, the case of Fuller Co. vs. Doyle et al., 87 Federal Reporter, 687, establishes this position, the Court saying:

> "In this case neither party by their pleadings claim under this stipulation. On the contrary a distinct and positive issue is tendered by the plaintiff as to the reasonable value of the work required to be done by the plaintiff to perform Doyle's contract. This issue was accepted by the defendants in and by their general

> denial, and was insisted upon by their counsel as the issue at the trial of this case. *Each and both of the parties*, by their pleadings and conduct at the trial, must be held, therefore, to have waived the benefits of this stipulation."

The case at bar is a bond which guarantees the plaintiffs against any losses from the breach of the contract made with the defendant Jewell. The contract is incorporated into the bond just as the stipulations of an insurance application are incorporated in the insurance policy. It would seem clear, therefore, that any defence which is based upon a violation of the stipulations of the agreement should have been especially pleaded in order to become available to the defendants. In fact, this was done by the defendants in the plea which they set up regarding the failure to make proper payments for the work done, and this is the sole reason given for their failure to carry out the terms of the contract.

Surely such a defence waives any defence on other conditions and must be considered as raising the sole issue between the parties which is to be decided.

When the defendant admits his refusal to perform the contract and attempts to avoid liability on the ground of non-payment by the plaintiffs to Jewell, it is most apparent that no defence is made on the theory that the plaintiffs have discontinued the contract by the certification of the architects, or that there is any necessity for the auditing of the expenses incurred in the completion of the work.

It is therefore submitted that, under the pleadings in this case, the objection to the testimony offered by the plaintiffs should have been overruled and the evidence admitted.

In conclusion, the plaintiffs submit that, for any one of the three grounds set forth in this argument, the action of

the Court below in refusing to admit the evidence of the damages suffered by the plaintiff from the breach of this contract should be reversed, and the evidence admitted, so that this meritorious claim can be properly established.

Respectfully submitted,

GEORGE R. GAITHER,
LEON E. GREENBAUM,
Attorneys for Appellants.

Record. No. 35

Henry Smith & Sons

vs.

George Jewell et. al.

GAITHER & GREENBAUM,
For Appellant.

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

IN THE

COURT OF APPEALS

OF MARYLAND.

Appeal from the Superior Court of Baltimore City.

Filed June 7th, 1906.

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 COURT OF APPEALS OF MARYLAND.

APPEAL FROM SUPERIOR COURT OF BALTIMORE CITY.

APPEAL TO OCTOBER TERM 1906.

GAITHER & GREENBAUM, For Appellants.

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

FILED..... ... .1906.

Action commenced on the 18th day of May, 1904.

Declaration.

Filed 18th May, 1904.

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 payment 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, Maryland 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, 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,

McCOMAS, GAITHER & GREENBAUM,

Attorneys.

Attached to the declaration is an Election for a Jury Trial.

Plea.

Filed 23rd June, 1904.

The defendants, by John P. Poe & Sons and J. Kemp Bartlett, their attorneys, for Plea say:

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 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 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 & SONS,
J. KEMP BARTLETT,
Attorneys for Defendants.

Rule Rep.

Replication.

Filed 27th June, 1904.

The Plaintiff, 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.

Issue joined short.

Docket Entries.

24th January, 1906; Jury Sworn.

25th January, 1906; Verdict in favor of the Plaintiffs for $5.00.

Judgment on Verdict Nisi.

29th January, 1906; Judgment on Verdict absolute in favor of the Plaintiff's for $4,000.00 the penalty of the bond sued on to be released upon the payment of $5.00 the sum found by the Jury with interest from date until paid and Costs of suit.

Order of Court.

Filed 21st February, 1906.

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

GEORGE R. GAITHER,

Attorneys for Plpintiff.

JOHN P. POE,

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.

HENRY STOCKBRIDGE.

Order for Appeal.

Filed 22nd March, 1906.

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. GAITHER,

Atty. for Plaintiffs.

Order of Court:

Filed 23rd March, 1906.

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 R. GAITHER,

Atty. for Pltffs.

J. JEMP BARTLETT,

Atty. for Dfdts.

ORDERED this 23rd day of March, 1906, on the aforegoing agreement, that the time for signing the Bill of Exceptions in this case be extended to April 9th, 1906.

CH. E. PHELPS.

Bill of Exceptions.

Filed 4th April, 1906.

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.

THIS AGREEMENT, made this Sixteenth day of October, in the year nineteen hundred and two, by George Jewell, of Annapolis, Anne Arundel County and State of Maryland, of the first part, and Henry Smith & Sons, of Baltimore City and State aforesaid, of the second part:

WITNESSETH, that the said George Jewell does hereby mutually agree with the said Henry Smith & Sons to haul all material needed for the erection of the New State House, Annex at Annapolis, at the following prices:

All common brick dumped at the building, fifty cents per thousand; for hauling and piling the same at building sixty cents per thousand; for hauling and piling front brick and enamel brick, one dollar per thoussnd; for hauling said, four dollars per car; crushed stone, five dollars per car; for hauling cement, one cent per bag; for excavating twenty-five cents per cubic yard; one thousand loads of dirt are to be delivered to John Wirt Randall at such place as the said Randall may direct, free of expense of hauling to the said Henry Smith & Sons; and the remainder delivered to such place or places as the said Jewell may see fit.

IT IS FURTHER MUTUALLY AGREED between the parties hereto that the said Jewell will lay all bricks on the said New State House Annex, in strict accordance with the plans and specifications prepared by Messrs. Baldwin and Pennington, Architects and to their entire satisfaction at the following prices: common brick, five dollars per thousand; front brick and enamel brick, twenty dollars per thousand.

IT IS FURTHER AGREED, that payments for hauling are 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 brickwork every two weeks in the amount of eighty-five per cent of the value of the work done. The final payments to be made when Building is completed to the satisfaction of the Architects, Messrs.

Baldwin and Pennington and has been accepted by the State of Maryland.

IT IS FURTHER AGREED, that the said George Jewell shall within ten days after the signing of this agreement, furnish to the said Henry Smith & Sons a corporate bond in the penalty of Four Thousand Dollars, conditioned to the faithful performance of his contract.

IT IS FURTHER AGREED, that the said George Jewell will supply a sufficient number of Bricklayers and Laborers to lay at least twenty-five thousand brick per day when possible and to wholly finish all brickwork in the present contract on or before May first, nineteen hundred and three.

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 & 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 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 Geerge 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 said parties for themselves, their heirs, executors, administrators and assigns, do hereby agree to the full performance of the covenants herein contained.

IN WITNESS WHEREOF, the parties to these pres-

ents have hereunto (in duplicate) set their hands and seals, the day and year first above written.

GEORGE JEWELL, (SEAL.)

HENRY SMITH & SONS, (SEAL)

Witness:

CHARLES HERBOLD.

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.

Bond No. 223,894.

Capital Paid in Cash, $1,500,000.

Total Resources over $3,500,000.

THE UNITED STATES

FIDELITY AND GUARANTY COMPANY,

HOME OFFICE, BALTIMORE, MD.

KNOW ALL MEN BY THESE PRESENTS, That GEORGE JEWELL, of Annapolis, Maryland, (hereinafter called the principal), and THE UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation created and existing under the laws of the State of Maryland, and whose principal office is located in Baltimore City, Maryland (hereinafter called the Surety), are held and firmly bound unto HENRY SMITH & SONS, (hereinafter called the Obligee), in the full and just sum of FOUR THOUSAND ($4,000.00) Dollars, lawful money of the United States; to the payment of which sum, well and truly to be made, the said Principal binds himself, his heirs, executors and administrators, and the said surety binds itself, its successors and assigns jointly and severally firmly by these presents, signed, sealed and delivered this 21st day of October A. D. 1902.

WHEREAS, said Principal has entered into a certain written contract with the Obligee dated October the 16th, 1902, to 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;

NOW THEREFORE, The condition of the foregoing obligation is such that if the said Principal shall well and truly indemnify and safe harmless the said obligee from

any pecuniary loss resulting from the breach of any of the terms, covenants and conditions of the said contract on the part of the said Principal to be performed, then this obligation shall be void: otherwise to remain in full force and effect in law: PROVIDED however, that this bond is issued subject to the following conditions and provisions:

FIRST.—That no liability shall attach to the Surety hereunder unless, in the event of any default on the part of the Principal in the Performanae of any of the terms, covenants or conditions of the said contract, the Obligee shall promptly upon knowledge thereof, and in any event not later than thirty days after the occurrence of such default, deliver to the surety at its office in the City of Baltimore written notice thereof with a statement of the principal facts showing such default and the date thereof; nor unless the said Obligee shall deliver written notice to the Surety at its office aforesaid before making to the Principal the final payment provided for under the contract herein referred to.

SECOND.—That in case of such default on the part of the Principal, the Surety shall have the right, if it so desire, to assume and complete or procure the completion of said contract; and in case of such default, the Surety shall be subrogated and entitled to all the rights and properties of the Principal arising out of the said contract and otherwise, including all securities and indemnities therefore received by the Obligee, and all deferred payments, retained percentages and credits, due to the Principal at the time of such default. or to become due thereafter by the terms and dates of the contract.

THIRD.—That in no event shall the Surety be liable for a greater sum than the penalty of this bond, or subject to any suit, action or proceeding thereon that is instituted later than three months from the date of the completion of the contract.

FOURTH.—That in no event shall the Surety be liable for any damage resulting from, or for the construction or repair of any work damaged or destroyed by, an act of God, or the public enemies, or mobs, or riots, or civil commotion, or by employees leaving the work being done under said contract, on account of so-called "strikes" or labor difficulties.

IN TESTIMONY WHEREOF, the said Principal has hereunto set his hand and seal, and the said Surety has caused these presents to be sealed with its corporate seal,

duly attested by the signature of its 2nd Vice-President and its 2nd Ass't Secretary the day and year first written.

Signed, sealed and delivered
in the presence of

JULIAN BREWER.

GEORGE JEWELL. (SEAL).

THE UNITED STATES FIDELITY AND GUARANTY COMPANY.

By.

Attest: EDW. J. PENNIMAN, 2nd Vice-President.

H. V. D. JOHNS, 2nd Ass't Secretary.

(SEAL OF U. S. FIDELITY) (AND GUARANTY CO.)

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 and 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?

A Yes, sir.

Q Were they employed by the Union there?

A They were 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 any 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 payroll, 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 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.

"Baltimore, Md. May 11, 1903.

Mr. George Jewell,

My Dear Sir:

We hereby notify you that in accordance with the provisions of your contract to do the brickwork at the State House Annex, you having refused to furnish the necessary skilled workmen to prosecute the said work, and having

notified us of your intention to abandon said work, that we shall proceed to Friday, May 15th, at 8 A. M. to provide such labor as we deem necessary to complete said Building, and the cost of same will be deducted from any money which (if any) is now due, or may become due you.

Very respectfully,

HENRY SMITH & SONS.

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 & Guarantee Company, in evidence, Baltimore, May 12th, 1903.

"Baltimore, May 12, 1903.

U. S. Fidelity & Guaranty Company,

Baltimore, Md.

Dear sirs:

We enclose herewith copy of Notice we sent to Mr. George Jewell at Annapolis, Maryland, who having failed to comply with the terms of his contract, we will proceed to complete the said work at his expense, holding you as surety on said Jewell's Bond.

Very respectfully,

HENRY SMITH & SONS,

MR. GAITHER: We offer the enclosure which was with it;

"Annapolis, Md., May 11th, 1903.

Mr. George Jewell,

My Dear Sir:

We hereby notify you that in accordance with the provisions of your contract to do the brickwork at the State House Annex, you having refused to furnish the necessary skilled workmen to prosecute the said work, and having

notified us of your intention to abandon said work, that we shall proceed to Friday, May 15th, at 8 A. M. to provide such labor as we deem necessary to complete said Building, and the cost of same will be deducted from any money which (if any) is now due, or may become due you.

Very respectfully,

HENRY SMITH & SONS.

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.

"Baltimore, May 13, 1903.

U. S. Fidelity & Guaranty Company,

Baltimore, Md.

Gentlemen:

We hereby inform you, that Mr. George Jewell of Annapolis, Maryland, whom you bonded to us, incident to his contract an Annex to State House has abandoned the work, and we again notify you, that we shall hold your Company financially responsible for any losses, delays and other expenses, connected with his failure to abide by the terms of his contract.

Very Respectfully,

HENRY SMITH & SONS.

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 to 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 was to give it to him on a percentage of 7½ per cent on the net cost of the work.

The agreement with William E. Feldmeyer to do the bricklaying was then offered in evidence.

THIS AGREEMENT, Made this eighteenth day of May, in the year 1903, by and between William E. Feldmeyer, of Annapolis, Maryland, party of the first part and Henry Smith & Sons, of Baltimore City and State of Maryland, of the second part:

WITNESSETH, That the said William E. Feldmeyer agrees to superintend the laying of the brickwork on the Stats House Annex at Annapolis, Maryland, for seven and one-half per cent of the cost of laying the same. Seventy-five per cent of which is to be paid to the said Feldmeyer, monthly as the Building progresses, and twenty-five per cent. to be retained by the parties of the second part until the Building is completed. The actual wages of the workmen to be paid each week to the said Feldmeyer, who is to pay the men. The said Feldmeyer Agress to furnish all the tools and implements necessary to prosecute the work, and to put as many bricklayers to work as the said Henry Smith & Sons may require to advance the work with dispatch.

AND IT IS FURTHER AGREED by and between the parties hereto that the right to terminate this agreement is reserved to the parties of the second part on one day's notice to the party of the first part, and settlement to be made up to the time of termination of contract.

Given in duplicate the day first above written.

WM. E. FELDMEYER, (SEAL),

HENRY SMITH & SONS, (SEAL).

WILLIAM H. MOSS

WITNESS:

CORDELA WESTON.

Q Did Mr. Feldmeyer 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 paid and every week he was to get 7 1 — per cent. for superintending?

A For superintending and furnishing the necessary tools to go on with the work.

Q From that time on did you receive from week to week an account from Feldmeyer for the amount to pay the men for the work of laying these brick?

A Yes, sir, he furnished at the end of the week the amount of the pay-roll, which was sent him down on Friday evening.

Q When did you pay him his percentage?

A Whenever he asked for it."

The *defendant* then offered in evidence the receipts from the said Feldmeyer to the plaintiffs for work done and for commissions on the same, under the above contract and also offered to prove by the witness, Smith, the payments of said sums of money to the said *Feldman*. To this offer the defendants objected, unless the plaintiffs should state that they intended to follow up such proof with a certificate from the architect or superintendent that such expenses had been audited and certified by such architect or superintendent. The plaintiffs' counsel refused to give assurance of such additional proof, whereupon the court sustained the objection of the defendants, and refused to permit said testimony to be offered by the plaintiff's.

C & P Telephone 159, D.

Statement.

WM. E. FELDMEYER,

GENERAL CONTRACTOR,

124 College Avenue.

Brick, Plastering Stone, and Concrete Work.

To HENRY SMITH & SONS,

Baltimore, Md.

Annapolis, Md., April 14th, 1904.

Pay Roll for	May	23-1903	$ 236.17
	"	29	777.01
	June	12	1062.62
	"	5	958.68
	"	20	1054.73
	"	26	541.83
	July	3	584.50
	"	11	471.36
	"	18	415.31
	"	25	436.98
	"	31	549.36

Aug.	8	348.06	
"	15	358.01	
"	22	298.92	
"	28	243.78	
Sept.	5	144.45	
"	11	189.10	
"	19	210.24	
"	26	355.41	
Oct.	2	289.31	
"	9	198.56	
"	16	203.74	
		$9928.13	
	Br't. For'd.	$9928.13	
From Oct. 16-03 to March 30-04		160.00	
		$10088.00 a 7 1-2%	$756.60

Paid on acct.

June	24,	$250.00	
Aug.	3,	104.40	
Sept.	22,	89.62	
Nov.	5,	114.43	558.45
		Balance due	$198.15

And to the ruling of the Court refusing to admit said receipts and said offer of evidence in their behalf, the plaintiffs excepted, and prayed the court to sign and seal this, its first bill of exceptions, which is accordingly done this fourth day of April 1906.

HENRY STOCKBRIDGE, (SEAL).

And after offering the evidence set out in the aforegoing bill of exceptions, which is hereby made part hereof, the plaintiffs further proved by said witness that:

"Q After you notified the Bonding Company, and after you 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 and in refusing to admit said evidence, the plaintiffs excepted, and prayed the court to sign and feal this, its second bill of exceptions, which is accordingly done this fourth day of April 1906.

HENRY STOCKBRIDGE, (SEAL).

And after offering the evidence set out in the aforegoing 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 & Guaranty 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 accordinglp done this fourth day of April 1906.

HENRY STOCKBRIDGE, (SEAL).

And after offering the evidence and the offers of testimony set out in the aforegoing 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 Who 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. Feldmeyer; 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 day 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 ½ per cent., 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: Yes.

OBJECTED TO.

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

And to the ruling of the Court in refusing to admit said evidence the plaintiffs excepted, and prayed the Court to sign and seal this its fourth bill of exceptions, which is accordingly done, this fourth day of April, 1906.

HENRY STOCKBRIDGE, (SEAL).

The Plaintiffs thereupon closed their case and the defendants, without offering any evidence, submitted the following prayers to 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 entitle them to recover and that therefore their verdict must be for the defendants.

REFUSED.

Defendants' Second Prayer.

The defendants, 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 damages by reason of the alleged abandonment by the defendant, George Jewell of the written contract between him and the plaintiffs dated October 16, 1902 read in evidence and that therefore the verdict of the Jury must be for nominal damages merely.

REFUSED.

And the Court rejected the said prayers and granted the following instruction of its own in lieu thereof.

Instruction in Lieu of Defts' 1st and 2nd 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 16th 1902, offered in evidence, and that therefore the verdict of the jury must be for nominal damages only.

HENRY STOCKBRIDGE.

And to the action hf the Court in granting said prayer, the plaintiffs excepted and prayed the court to sign and seal this, its fifth bill of exceptions, which is accordingly done this fourth day of April, 1906.

HENRY STOCKBRIDGE, (SEAL).

The above bill of exceptions is in satisfactory form.

J. KEMP BARTLETT,

Attys. for defendants.

JOHN P. POE & SONS,

Attys. for George Jewell.

Appellant's Costs, $24.90

Applee's Costs, $ 7.25

State of Maryland, City of Baltimore, Set:—

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
(SEAL) of Baltimore City this 31st day of May in the year one thousand nine hundred and six.

ROBERT OGLE,

Clerk.

Superior Court of Baltimore City.