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Court of Errors and Appeals

OF NEW JERSEY.

WILLIAM W. WATSON,
Appellant,

agst.

THE CITY OF ELIZABETH,
Appellee.

Appellant's Points.

This is an appeal from a decision of the Chancellor, sustaining a demurrer to complainant's bill.

His opinion appears at page 10 of the case.

The appellant alleged that an assignment had been laid by the appellee upon his lands, and, that he, upon demand, and to save his lands, paid this assessment. That he had discovered that the as-

sessment was not as it purported to be, "a just and equitable" one, but wholly unjust, inequitable and excessive; and that, as he had no means at law of recovering his money, he prayed that the assessment, as such, be declared void, and that an accounting be had between himself and the city; that they retain all that in equity they should retain out of the money paid them, to-wit: the equivalent of the benefit they had done him by paving the street in question, and return him the balance, it any.

I.

So far as this appeal is concerned, the appellant might rest his case, upon the second and third averments of the bill [Case page 7], the allegations therein—all of which were admitted by the demurrer—give him a certain right to an accounting. If the statements therein are true, and the city by demurring admitted their truth, then the complainant was entitled to a decree.

II.

The learned Chancellor looked beyond the pleadings, and gave judgment, not on the facts as admitted, but on such facts as he thought might have been shown had the city answered and had testimony been taken—and although, as the appellant claims,

he is not bound to answer statements or to discuss questions which, so far as this appeal is concerned are simply hypothetical, yet he asserts that, even if the city had answered fully and had proven how and why in their opinion the complainant's money was received by them, nevertheless he would be entitled to the relief demanded in his bill.

The learned Chancellor misconceived the real question at issue between the parties to this action, and the authorities cited in his opinion do not determine the complainants right or remedy under the admitted state of facts in this case:

The Dusenbury, Leibstein & Lewis cases, like that of Bond vs. Newark, which preceded and governed them, concerned only the irregular or defective exercise of an admitted power while the complainant's bill charges and the city's demurrer admits that the assessment in question was made under an unconstitutional statute, and that the whole procedure resulting in the charge upon his land was absolutely void. Until the supplement to its charter in 1872, the city of Elizabeth was utterly without power to assess for a street pavement. It could proceed therein only in the mode directed by its charter, and that mode, if followed, resulted in a nullity—"a shadow which if held for half a century would be a shadow still."

Moreover the decisions cited by the chancellor were based upon a theory of the relation between a city and a citizen concerning municipal improvements which has since been entirely overthrown. It was then supposed that a city in such matters acted as the land owner's agent, and that the principles of the law of agency determined the rights and liabilities of the parties. But this was a mistake. The city of Elizabeth did not act as the servant of its citizens. As a municipal corporation it

had power to act when in the opinion of its city council the *public good* required it. If the action taken was a street improvement then this court has declared that "the cost of the improvement is to be paid out of the municipal treasury, and the municipalty is to be reimbursed by assessment on the land owners whose lands front on the improvement if the extent of benefit will permit. If not the deficiency is to be raised by general taxation as in justice it ought to be."

Village of Passaic vs. D. & L. R. R. Co., 8 Vroom, 538.

But it may be said that even while this doctrine of agency was thought to be the law, it was nevertheless decided that unless a city's proceeding was authorized by law it did not in any sense become the land owner's agent.

Schumm vs. Seymour, 9 C. E. G., 143.

III.

The power to improve a street and the power to assess individuals therefor are separate and distinct.

The fact that a city has made a costly improvement, while it has sometimes prevented a court of law in a discretionary proceeding upon *certiorari*, from looking into the validity of an assessment, has not been held to be a ground for upholding such assessment if it came directly in question. On the contrary, there are numerous decisions that lawful expenditure was no excuse for an unlawful tax.

See House vs. City of Rochester, 15 Barb., 517.
In re Phillips, 60 N. Y., p. 23.

If an assessment be set aside, the courts will restore his money to the citizen, although the city has paid it to those who did the work.

Riker vs. Jersey City, 9 Vroom, 225.

IV.

The learned chancellor gives two reasons for denying relief to the complainant:

1. [Case page 12]. That "an extensive field of litigation will have been discovered." It is scarcely a reason for denying a just claim that others who have unjust claims may attempt to press them. There is no tribunal by which the various subjects connected with these mistaken assessments could be so properly considered as that court wherein "he who asks equity must do equity." If it shall be found that the suitor is one of those at whose request the work was done and the city's money spent it will not avail him that the proceeding was not strictly in accordance with the law, and even the honest complainant must waive his right to demand of a city a strict compliance with statutory formalities in order to charge him with any sum and offer to pay the just equivalent for the benefit his land received.

2. The chancellor states that the complainant had a remedy at law and lost it by his *laches*.

[1.] It does not appear by the pleadings that he had a remedy at law, or that he was guilty of *laches*.

[2.] That one remedy has been lost by *laches* is not a bar to another unless the situation of the defendant has been altered by the delay.

Platt v. Platt, 58 N. Y., 464.
Hoxey vs. Patterson, 8 Vt., 419.

[3.] The doctrine that the loss of a remedy at Law shuts the doors of a Court of Equity applies only where the subject matter was originally cognizable only by a court of law and the suitor beseiges the Court of Equity to avoid the statute of limitations. In the case at bar the complainant sues for an accounting—a subject whereof the jurisdiction of a Court of Equity is concurrent with that of a court of law and which is inherently of so equitable a nature that questions concerning it are brought almost always before Courts of Equity.

[4.] The "remedy at law" was the writ of *certiorari*. The chance of obtaining that is not such a "remedy" as to debar a suitor in a case as this from resorting to a Court of Equity.

[*a.*] A "remedy" must be a matter of right—nothing that rests in discretion—whether it be the discretion of a judge to review an an assessment or that of a city council to adjust an assessment is a "full, complete and adequate" remedy.

"The remedy by *certiorari* is not adequate. It is dilatory and rests in the discretion of the court * * * the plaintiff's property has been forcibly taken from it in violation of law and it would be discreditable to the proper administration of justice not to give it an effectual remedy."

Bank of Chemung vs. City of Elmira, 53 N. Y., 59.

[*b.*[Irregularities are properly reviewable by *certiorari*, but when the city acts without jurisdiction the citizen is not bound to resort to *certiorari*.

Bogert vs. Elizabeth, 12 C. E. E, p. 570.

[*c.*] The writ of *certiorari* provides a means of appeal from the decision of a subordinate tribunal, but when that tribunal acts without jurisdiction it is not necessary to appeal.

City of Baltimore vs. Porter, 18 Maryland, 295.
Williamson vs. Beasley, 8 How., 543.
Mitchell vs. Milwaukee, 18 Wis., 92.

V.

In New York and many other States if a land owner pays an assessment which is absolutely void he may sue at law to recover his money, although the assessment remains unvacated.

Van Horn vs. New Lots, 83 N. Y., 100.
City of Detroit vs. Martin, 34 Mich., p. 172.

But he nevertheless can resort to a court of equity.

Seely vs. Westport, 47 Conn., 294.

In New Jersey it has been held that the assessment must be vacated before a suit at law can be maintained.

The complainant has *now*, therefore, no remedy at law, and "if he cannot *immediately* protect or maintain his right by any course of proceeding at law, equity will intervene."

2 Story Equity, § 601.

VI.

It is not a sufficient answer to his bill in equity that he may have paid his money under a "mistake of law."

The bill alleges, and the demurrer admits, that there was a "mistake of fact." But even if there was a mistake of law the ancient narrow-minded doctrine that *ignorantia juris neminem excusat* is not the prevailing rule to-day. Both in England and America the modern decisions favor Lord Mansfields rule, as laid down in Bize vs. Dickason, 1 T. R., 285, that if a man has paid what the law would not compel him to pay, but what in equity and good conscience he should have paid, he cannot recover it. But where money is paid under mistake of law, which in good conscience there was no right to claim, it can be recovered.

See note to Black vs. Ward, 15 Am. Rep. 171.

As matter of public policy it would seem that the courts should encourage the idea that if an assessment be imposed on a land owner, he should pay the claim, having his remedy thereafter in equity, for a recovery of any balance above what was his proper due, rather than refuse to pay anything, and by a resort to law throw the whole cost of the improvement upon the general taxpayers.

VII.

The theory of this action is in accordance with the rule laid down by this court in a late case.

Mayor of Newark vs. Shuh, 7 Stew,, 263.

That the payment of what is justly due, even when the city's action has been taken under an unconstitutional statute, is indispensable, if he would gain relief.

This the complainant offers to do, and it is surely not to his disfavor that he has chosen to bring his cause before a legitimate court of the State, rather than one of those irregular and partisan tribunals, city councils or board of assessment—which late legislation has endeavored to establish.

VIII.

The decree of the Court of Chancery should be reversed.

GEO. PUTNAM SMITH,
Of Counsel for Appellant.

Clerks Table 17

Court of Errors and Appeals

OF NEW JERSEY.

Between WILLIAM W. WATSON, Appellant, *and* THE CITY OF ELIZABETH, Appellee.	On Appeal.

GEO. PUTNAM SMITH,
Solicitor of Appellant.

FRANK BERGEN,
Solicitor of Appellee.

To the Honorable, the Chancellor of the State of New Jersey;

In Chancery complaining your orator, William W. Watson, of New York, showeth:

1. That your orator is the owner and also seized and possessed of a certain tract of land situate in the City of Elizabeth, and bounded and described as follows :

Beginning on the west side of South Broad street 310 feet south of the southerly line of Grove street, thence westerly 200 feet ; thence southerly 155 feet, thence easterly 200 feet, to South Broad street aforesaid ; and thence along the same northerly line, 155 feet, to the point or place of beginning. *Also all that certain other tract of land, Beginning* at a point on the easterly side of South Broad street aforesaid, 320 feet south of Grove street ; thence easterly 200 feet ; thence southerly 85 feet ; thence westerly 200 feet, to South Broad street ; and thence northerly, along the same, 85 feet, to the point or place of beginning.

2. That in and by Section 92, Article III, of a Public Act of the Legislature of New Jersey, entitled : "An Act to revise and amend the Charter of the City of Elizabeth," approved March 4, 1863, it was enacted, that it should be lawful for the City Council of the City of Elizabeth, whenever in their opinion the public good might require it, by ordinance, to order and cause any street or section of street to be graded, gravelled, paved, flagged, macadamized or otherwise improved and regulated in such a manner as they might deem advisable, under the supervision and direction of the Street Commissioner or Street Commissioners, at the expense of the owners of lands and real estate on the line of said street or section of a street so improved.

3, That in and by the one hundred and fifth section of said Act it is enacted, that the whole amount of costs and expense of regulating, grading, and paving any street or section of a street, or grading, gravelling, flagging, macadamizing, or otherwise

improving any street or section of a street, should be assessed upon the owners of lands and real estate upon the line of said street or section of a street so improved; and, whenever such improvement should have been made under the provisions of that Act, the City Council should ascertain the whole amount of the costs and expenses of said improvement in any street or section of a street, and should cause the same to be assessed upon the owners of lands and real estate on the line of said street or section of a street, by the City Surveyor, which should be and remain a lien thereon, from the time when said improvement should have been made—which date of attachment of such lien was afterwards changed by section 6 of an Act of the Legislature of said State, approved April 1st, 1869, so that such assessment should be a lien on the lands and real estate, whereon the same is assessed, from the day the same was ratified by the City Council, and not before.

4. That in and by the said Act entitled, "An Act to revise and amend the Charter of the City of Elizabeth," approved March 4, 1863, it was among other things enacted, that whenever any assessment should be ratified by the City Council, a certificate thereof should be delivered to the City Treasurer, who upon receipt thereof should among other duties give notice as therein mentioned, and requiring the owners of lands and real estate assessed to pay the amount to him with interest, as in said Act provided, within sixty days from the first publication of the notice, or within the said time deliver to him a bond, of said owner or owners to said city, conditioned as therein set forth; and that if such assessment should not be paid, or such bond should not be delivered within the time appointed in said notice, the City Council of said city might order and direct the City Treasurer to collect such assess ment or amount by public sale at auction of the

lands and real estate whereon such assessment was imposed or might be a lien. And that public notice of the time and place of sale should be given by said treasurer, and published as in said Act provided, and that if any assessment remain unpaid on the day specified in such notice, the City Treasurer should proceed to sell by public auction at the time and place appointed therein, the lands and real estate on which such assessment should have been imposed, or might be a lien for the lowest term of years for which any person would take the same and pay the amount of such assessment with the interest thereon, and all costs, fees, charges and expenses; and that such lands and real estate as should not be bid for when offered for sale, should be struck off to the city for such term, and that a certificate of the sale of each lot, tract or parcel of land and real estate sold as aforesaid should be made by the Treasurer and delivered to the purchaser, and that every certificate of sale should be presumptive evidence of the facts therein staed, and should be recorded in the office of the City Clerk, and should constitute a lien upon the lands and premises therein described after the same should have been so recorded; and that if the city became the purchaser of any lands and real estate upon any such sale, the certificate of sale should be assignable, and all the provisions of that Act in relation to such sale should apply to the city as to any other purchaser; and if any lands and real estate so sold should not be redeemed, as by that Act provided, the City Council should execute to the purchaser, his legal representatives or assigns, a declaration of sale under the common seal, signed by the Mayor and attested by the City Clerk, containing a description of the premises, the fact of assessment, advertisement and sale, the date of the sale and the period for which the premises were sold, which declaration should be recorded in the office of the County Clerk. And it is further pro-

vided in and by said Act, that such declaration of sale should be presumptive evidence in all courts and places that such sale and proceedings were regularly made and had according to the provisions of that Act; and such purchaser or purchasers, and his or their legal representatives should by virtue thereof lawfully hold and enjoy such land and real estate with the rents and issues thereof for his or their own proper use, against the owner or owners thereof, and all persons claiming under him or them until the term should be completed for which said purchaser or purchasers might have agreed to take the same.

5. It was further provided by said act that unless such assessment should be paid as herein directed, said city might sue the owner or owners of the land whereon said assessment remained unpaid as for so much money laid out and expended for the use of such owner or owners.

And your orator further shows that on the day of , 18 , the City Council of said city, having determined that the public good required such improvement, did by ordinance order and cause South Broad street, from South street to Williamson street, to be paved with Nicholson pavement; that afterwards, to wit, on the 13th day of April, 187). an assessment of the whole amount of the costs and expenses of said improvement having been made by the City Surveyor, was ratified by said City Council, and the same thereupon became, according to the provisions of said act, a lien on the lands whereon the same was imposed--the amount so imposed on the said lands of your orator being $3,300.38, whereof $1,930.42 was assessed on tract No. 1 and $1,369.96 on tract No. 2.

6. And your orator avers that the said assessment on his said lands was not for the amount of any ascertained benefit derived by said lands or by your orator from said improvement, and that no investigation or inquiry was made by the authorities of said city or any public officer into or as to the amount of such benefit; and your orator avers that said assessment greatly exceeded and exceeds any benefit to him on said lands from said improvement.

7. And your orator shows that said assessment not being paid, said city sold said lands under the provisions of said charter, and executed a certificate of sale therefor, which sale and certificate created a cloud on the title to said lands, and threatened to execute a declaration of sale, whereby the purchaser of said lands shall "lawfully hold and enjoy said land against the owner and all persons claiming under him," which declaration of sale would still further cloud such title and impair the value of said lands.

8. That under fear of such threats and to remove said cloud on the title to said lands, your orator paid to defendant on or about December 20, 1872 the sum of $3,723.07, which defendants claimed to be due them for principal and interest of said assessment.

9. That your orator has requested the authorities of said city to examine into the benefit conferred to his said lands by said improvent, and to retain so much of the money paid them by your orator as shall fully equal such benefit, which your orator avers to be all that in equity and good conscience they are entitled to retain, and to return the surplus, if any, to your orator, but said city authorities refuse so to do.

II.

And your orator further avers that after the completion of the improvement hereinbefore mentioned your orator, at the request of defendant, paid to defendant the sum of $3,723.07 hereinbefore mentioned, with the understanding and upon the agreement that said defendant should retain so much thereof as it might be entitled to as your orator's proper share of the costs of such improvement, and return to your orator the balance, if any there might be.

That your orator has frequently and in a friendly manner requested defendant to ascertain the benefit to your orator from such improvement and the amount which your orator should be charged therefor, and to account with your orator concerning the same, but said defendant refuses so to do, but on the contrary, pretends that the whole sum so delivered to it was lawfully and justly due by your orator.

III.

And your orator further avers, that after the completion of said improvement the defendant directed the City Surveyor to make a "just and equitable assessment" therefor upon the owners of lands on the line of said improvement, and an assessment being made by such City Surveyor, the defendant represented to your orator that the sum of $3,723.07 charged against him was, with the interest thereon, a just and equitable assessment and a fair proportion of the cost of such improve

ment, and that relying on such representation and statement of defendant, and being induced thereby, your orator paid to defendant said sum of $3,723.07.

That your orator has discovered that the statements of defendant were untrue, and that the amount charged against him was not a just and equitable assessment, nor did defendant or any of its agents ever attempt to make such assessment. and he avers that the money collected from him by defendant by means of such false statements as aforesaid was and is greatly in excess of a just and equitable assessment, and that defendant, though often requested, refused and still refuses to make such assessment or to return any portion of the money so collected.

In tender consideration whereof, and inasmuch as your orator is remediless in the courts of law, and can have adequate relief only in a court of equity, and to the end

1. That the City of Elizabeth, the defendant in this suit, may according to law, full, true, perfect and distinct answer make, but not under oath, (an answer under oath being expressly waived,) to each and all of the matters aforesaid, and that as fully and particularly as if the same were here again repeated, and said defendant thereto interrogated paragraph by paragraph.

2, That the aforesaid assessment on the lands of your orator may be adjudged to be illegal and void.

3. That an accounting may be had between the City of Elizabeth and your orator, and that thereupon it may be ascertained both how much benefit was done to said lands of your orator by said

improvement and how much money the said City received from your orator on account of the assessment made therefor, and that if it be found that the sum so paid exceeds the amount of such benefit, said City may be decreed to return to your orator the surplus with interest.

That your orator may have such other or further relief as the nature of his case requires and as may be just and equitable.

May it please your Honor the premises considered to grant unto your orator the State's writ of subpœna issuing out of this honorable Court commanding the defendant at a time and place and under a penalty therein mentioned to be and appear in this Court to answer this your orator's Bill of Complaint and to stand to and abide by such order and decree in the premises as shall be agreeable to equity and good conscience.

And your orator, &.,

GEO. PUTNAM SMITH,

Solicitor of Complainant.

W. J. MAGIE,

Of Counsel.

To this bill defendant filed a general demurrer.

The cause was heard before the Chancellor on bill and demurrer, and the following opinion was delivered therein:

WILLIAM W. WATSON

v.

THE CITY OF ELIZABETH.

BILL FOR RELIEF—ON GENERAL DEMURRER.

Mr. R. E. CHETWOOD and Mr. B. WILLIAMSON for the Demurrant.

Mr. G. P. SMITH and Mr. W. J. MAGIE for Complainant.

THE CHANCELLOR:

The bill states that the complainant is the owner of a lot of land in the city of Elizabeth; that the charter of the city provides for the assessment of the costs and expenses of regulating. grading and paving said street or section of a street in the city, or grading, gravelling, flagging, macadamizing, or otherwise improving any street or section of a street upon the owners of land and real estate on the line of the street or section of the street so improved, and for enforcing payment by sale of the property for a term of years, as well as by suit against the owner; that an assessment of a specified sum of money was laid upon the complainant's property mentioned in the bill, for an improvement of part of a street on the line of which the property was situated, and that for non-payment of it the property

was sold under the charter, and a certificate of the sale was given, which sale and certificate the bill alleges created a cloud upon the complainant's title. The bill further states that the city threatened to execute a declaration or sale whereby the purchasers would have been under the charter lawfully entitled to hold and enjoy the land against the owner and all persons claiming under him; that under fear of such threats and to remove the cloud on the title the complainant paid to the defendants on or about the twentieth of December, 1872, the amount claimed to be due for principal and interest on the assessment and that the complainant has requested the municipal authorities to examine into the benefit conferred on his land by the improvement, and to retain so much of the money so paid by him to them as should be equal to the benefit, and return to him the rest. The bill then avers that the money was paid with the understanding and on the agreement that the city should retain so much thereof as it might be entitled to as the complainant's proper share of the cost of the improvement and return to him the balance, if any there should be, and that he has requested the city to ascertain the amount chargeable to him for the benefits and to account with him accordingly; but that it has refused to do either, and claims the whole of the money as its lawful and just due. The bill contains further averment that after the improvement was completed the City directed the City Surveyor to make an equitable and just assessment therefor upon the owners of lands on the line of the improvement, and an assessment having been made, the City represented to the complainant that the sum charged against him was with interest thereon a just and equitable assessment and a fair proportion of the cost of the improvement, and the bill that avers that relying on such representation and statement and induced thereby the complainant paid the money, but has discovered that the repre-

sentation and statement were untrue and that the amount charged against him was not a just and equitable assessment, and that neither the City nor its agents ever attempted to make such assessment; that the money which he so paid was and is greatly in excess of a just and equitable assessment, and that the defendant refuses to make such an assessment or return any part of the money. The bill prays that the assessment may be judged to be llegal and void ; that an account may be had of the payment and benefits, and that the surplus if any of the payment over the benefits, may be repaid to the complainant with interest, and there is also the genera prayer for relief.

The design of the pleader evidently was to present the claim of the complainant in three different phases after the manner of the courts in a declaration in a suit at law. The first is that it arose out of the stress of some illegal demand under which a cloud had been created on his title and an additional one was threatened. The second, that money was paid on an agreement to repay so much as should be in excess of the actual benefits ; and the third that it was paid upon a misrepresentation that a just and equitable assessment had been made. It is merely a bill for relief against the assessment filed to obtain a return of part of the money paid. It was filed more than six years after the money was paid. It is almost needless to remark that if such a method of reviewing assessments and recovering back money paid on account of them is open to those who have in time past paid their assessments, an extensive field of litigation will have been discovered. As to the first aspect of the claim, it presents nothing but the ordinary case of the payment of an assessment which the person assessed preferred to pay rather than litigate, or the case of payment of an assessment which the person assessed might have litigated

successfully, but which, for want of knowledge that it was illegal, he did not litigate. If, under such circumstances, the money can be recovered back, there is no reason for a resort to equity, the remedy is at law. As to the second phase that there was an agreement that the city would return all the money paid over and above the complainants share of the cost and expense of the assessment, it appears by the bill that the city did, in fact, make an improvement. The bill states that the property was sold under the assessment, and it prays that the assessment may be set aside as illegal and void. If there was an assessment the claim for the excess if any of the money paid was the amount of the assessment is cognizable at law. But it is urged on this point, that though there was an assessment, it was not just and equitable. For this grievance, whatever remedy there is, is at law, and if the remedy at law be lost through laches there is no remedy in equity.

Lewis *v.* City of Elizabeth, 10 C. E. G., 298.

Dusenbury *v.* City of Newark, Id., 295.

The third aspect of the case is under the averment, that there was misrepresentation that the assessment was just and equitable. This averment, like the others, was undoubtedly made with a view of enabling the complainant, under it to contest the fairness of the assessment. But it is hardly necessary to say that this Court will not enter upon the inquiry as to the fairness of a municipal assessment, whether it is just and equitable in its proportions—on the mere allegation that it is unjust and inequitable.

Liebstein *v.* City of Newark, 9 C. E. Gr., 200.

Jersey City *v.* Lembeck, 4 Stew., 238.

The demurrer will be allowed with costs.

A decree was thereupon entered dismissing complainant's bill with costs.

The complainant appealed therefrom to this Court and filed the following petition.

To the Honorable the Court of Errors and Appeals in the last resort in all causes:

The humble petition of William W. Watson the appellant in the above stated cause, respectfully shows that your petitioner finds himself aggrieved by a final decree made in the Court of Chancery by his Honor Theodore Runyon, Chancellor of New Jersey, bearing date the 12th day of September, in the year eighteen hundred and seventy-nine, wherein tfie said William W. Watson was complainant and the said "The City of Elizabeth" was defendant in this respect, to wit:

That the said decree adjudges that the demurrer of the said defendant to the complainant's bill be sustained, and the said bill be dismissed with costs.

And your petitioner humbly appeals from that part of the deeree of the Chancellor which decrees as aforesaid, on the ground that the same is erroneous, for that the said decree should have overruled the demurrer of the said defendant and granted your petitioner relief in accordance with the prayer of his bill.

Your petitioner therefore prays that the said decree of the Chancellor may be in the particulars aforesaid reversed, set aside and for nothing holden.

And that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

GEO. PUTNAM SMITH,

Solicitor for Appellant.

T. D. HODGES,

Of Counsel with Appellant.

To this petition the defendant filed the usual answer.