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Attorneys and Counselors,
Buffalo, N.Y.
GEORGE L. LEWIS. ADELBERT MOOT.
L. L. LEWIS, JR.

Feb. 27, 1890.

My dear Judge:-

Since sending my last letter to you to the post-office, I received your letter of to-day. The decision to which you refer was made by VanBrunt, at Special Term, in 1876. He is very good authority. It there appeared as a fact that Mr. Jones, publisher of the New York Times, was not owing anything to the defendant Lee. This was the reason the court would not punish for contempt, as I infer, although the judge did not put his decision upon this ground. The decision was put on the ground that the papers were ~~put~~ on information and belief. Of course, mere information and belief is not a sufficient basis upon which the court may arbitrarily order a third person before it, not as a witness, but as a party. Information and belief affidavits have been uniformly held to be insufficient to justify the court in making any order, or rendering any judgment.

Mowry vs. Sanborn, 65 N.Y., Opinion p. 534.

If I were in your place, I should make an ex parte application to the judge who granted this order, to vacate it, upon the ground that it is based on "information and belief affidavits", and void within the authorities to which I refer. If he should vacate it, I should put his order vacating it in my pocket and quietly sit still, let Mrs. Tourgee stay at home, and see what they would do next.

If they should move to punish her for contempt, they

would not only have to meet the authority of Day vs. Lee, 52 Howard, 95, but they would find the order on which their contempt proceedings stood, out of existence.

If the judge should refuse to vacate the order, no harm will be done. In that event, I am inclined to think I would have Mrs. Tourgee appear and simply say that she has no money or property of yours in her possession, and stop there. Nevertheless, she can disregard the order and stay away with perfect safety, on the authority of Day vs. Lee.

The only reason I would advise her to appear, would be this, - thereby the fact will appear in the case that she has no property or money of yours in her possession. Then too, her failure to appear, if the order is not vacated, might simply provoke fresh annoyance. They might simply get another order for her examination when it would be less convenient for her to appear and take this position. Since the question must be met sooner or later, if there is any substance to them, it is better to meet it, I think, now.

If she should appear and answer the question I suggest and refuse to go further, and they should then take proceedings for contempt, she will have a double answer to such proceedings. One, that the court did not acquire jurisdiction, because the papers are based on information and belief affidavits. Two, she has committed no contempt, because she has answered all they had a right to ask.

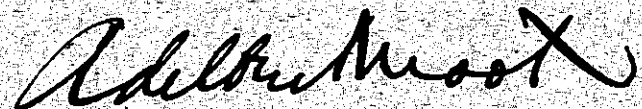
Taking this course, I should object at the beginning of the proceedings to any examination of Mrs. Tourgee, upon the ground that the papers are based on an information and belief affidavit, which gave neither the judge jurisdiction to make the order, nor the referee jurisdiction to examine under it.

I do not consider it necessary to take this objection, because questions of jurisdiction are said never to be waived by appearance; yet, they sometimes are waived, and it is well enough always to stand in the protesting position, etc.

You have my ideas, now do as you please, because you are bound to be right, whatever course you pursue.

Therefore, I will stand by you and wish you good luck. Give my regards to Mrs. Tourgee, and assurances of fighting friendship.

Sincerely your friend,



To

Hon. A. W. Tourgee,
Mayville,
N. Y.