

No. 12724

Supreme Court of Illinois

Bayless

DENMAN vs.
~~Dunham~~

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Pleas Continued and held at the Court House in
Bloomington in and for the County of McLean in the
Eighth Judicial Circuit of the State of Illinois. before the
Hon. David Davis. Judge of said Court. in a certain case
wherein Augustus J. Bayless was plaintiff and John Denman
was Defendant.

Augustus J. Bayless

vs

In Debt.

John Denman

Be it remembered that heretofore to wit.
on the 29th day of October A.D. 1857. came said plaintiff by his
attorneys and filed in the office of the Clerk of the Circuit
Court of McLean County. a bond for costs and proceipe.
which said bond and proceipe were in words and figures as
follows. to wit.

State of Illinois

McLean Circuit Court. December Term. 1857.

Augustus J. Bayless

vs

In Debt.

John Denman

We do hereby enter ourselves security
for costs in this cause and acknowledge ourselves bound to pay
or cause to be paid all costs that may come in this action. either
to the opposite party or to any of the officers of this Court in
pursuance of the Laws of this State.

Dated this 14th day of October 1857.

Williams & Packard

The Clerk will please issue process in this case in Debt
returnable to the December Term. 1857 Debt \$960.⁰⁰/₁₀₀
Damages \$100.⁰⁰/₁₀₀ & oblige. Williams & Packard.
Pltffs. Atty.

Whereupon issued out of said Clerk's office a writ of
Summons which said Summons was in words and figures
as follows to wit.

State of Illinois }
McLean County }^{ss} The People of the State of Illinois
To the Sheriff of said County. Greeting. We Command you
to Summon John Denman if found in your County personally
to appear before the Circuit Court of said County on the
first day of the next term thereof to be holden at the Court
House in Bloomington on the second Monday in the month
of December next to answer unto Augustus J. Bayless in
a plea of Debt that he render unto him the sum of \$960.
which to him he justly owes and from him unjustly detains
to his damage one hundred Dollars. as he says.
And have you then and there this writ. and make return
thereon in what manner you execute the same.

Witness W^m. McCullough. Clerk of said
Circuit Court and the seal thereof hereto
affixed at Bloomington this 27th day of
October A.D. 1857

W^m. McCullough. Clerk.
By Jno. N. Larrimore. Deputy

which said Summons was by the Sheriff of said County. returned into said Clerks office. indorsed as follows. to wit.

Executed the within writ by reading it to the within named John Denman Oct. 30th. 1857.

Sec. 8 & R. 60. mileage .5. .65

J. B. Moore. Shff.
by Geo. Parke. Deputy.

And afterwards to wit on the 24th day of November. in the year last aforesaid came said plaintiff by his attorneys and filed in this cause a Declaration. which said Declaration was in the words and figures as follows to wit.

State of Illinois
Middlesex Circuit.

December term 1857.

Augustus J.

Sayles Plaintiff complained of John Denman defendant of a plea that he render to the said Plaintiff the sum of nine hundred and sixty dollars which he avers wrongfully detains from him. For that whereas certain differences having arisen and being depending between the said plaintiff and the said defendant the said plaintiff and the said defendant heretofore to wit on the 24th day of August A.D. 1857 at the Circuit and County aforesaid by a certain agreement to arbitrate under the hands and seals of the said plaintiff and defendant / the said plaintiff

signing the same by the name and style of Augustus J
Payless, and the said Defendant signing the same by the
name and style of J Denman) bearing date the day and
year aforesaid agreed to and with each other to abide
the award and determination of Samuel Watson and John
Hanson. The said John W. Hanson being named and
style in said written agreement under seal to arbitrate
John Hanson arbitrators elected and chosen as well
by and on behalf of the said Plaintiff as by and on behalf
of the said Defendant to arbitrate award order adjudge
and determine all matters of difference between the said
Plaintiff and the said Defendant then pending, and it
was further stipulated in said agreement to arbitrate
before described, that in case the said Watson and Hanson
could not agree as to the justice and equity of the matter
in controversy then they said arbitrators were empowered
by said agreement to select a third party whose casting
vote should be binding on the said Plaintiff and the said
Defendant. And the said Plaintiff further saith that the
said ^{Watson} Hanson having taken upon themselves the burden
of the of the said arbitration they the said Watson and
the said Hanson found themselves unable to agree and
thereupon the said arbitrators in accordance with the
power in them vested by the said written agreement sele-
cted John A. Dalmon as a third party and the Plaintiff
further saith that the said John A. Dalmon having
taken upon himself in connection with the said Watson
and the said Hanson the burden of the said arbitration
did in due time and manner make make and publish

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and by virtue of a certain submission before that
time made by the said plaintiff and the said defendant
to the award order and determination of the said John
A Dalmon. John W Hanson and Samuel Hanson of and
concerning all matters in difference then depending between
the said plaintiff and defendant and upon and by virtue
of which said reference the said John A Dalmon John
W Hanson and Samuel Hanson had then and there
awarded that the said defendant should pay a certain
sum of money to wit the last mentioned sum of money
to the said plaintiff to be paid by the said defendant
to the said plaintiff when the said defendant should
be hereunto afterwards requested wholly and by
reason of the said last mentioned sum of money being
and remaining wholly unpaid on action hath accrued
to the said plaintiff to have and demand of and from
the said defendant the said sum of two hundred
and forty dollars parcel of the sum above demanded.
And whereas also the said defendant afterwards to wit
on the day and year last aforesaid and at the Circuit
and county aforesaid accounted with the said plaintiff
of and concerning divers other sum of money before
that time and then due and owing and in arrear and
unpaid from the said defendant to the said plaintiff
and upon that account the said defendant was
then and there found to be in arrear and indebted
to the said plaintiff in the further sum of two hundred
and forty dollars to be paid by the said defendant

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to the said plaintiff when the said defendant should
be therunto afterwards requested wholly and by reason
of the said last mentioned sum of money being and
remaining wholly unpaid an action hath accrued to the
said plaintiff to have aid to demand of and from the
said defendant the said last mentioned sum of Two
Hundred and forty dollars part of the sum above
demanded. And whereas also the said defendant
was afterwards to wit on the day and year and at the
place last aforesaid indebted to the said plaintiff
in the further sum of Two Hundred and forty dollars
for work and labor before that time done and performed
by the plaintiff for the defendant at his special instance
and request to be paid by the said defendant to the said
plaintiff when the said defendant should be therunto
afterwards requested wholly and by reason of the said
last mentioned sum of money being and remaining wholly
unpaid an action hath accrued to the said plaintiff to have
aid to demand of and from the said defendant the said
last mentioned sum of two hundred and forty dollars
the residue of the sum above demanded.

yet the said
defendant (although after requested so to do) hath not
as yet paid the said sum of Nine Hundred and sixty
dollars above demanded. or any part thereof to the plain-
tiff. but he do do this hitherto wholly refused and
still doth refuse to the damage of Plaintiff, one hundred
dollars. and therefore he brings his suit.

Williams & Packard.
Pls Attys.

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And thereupon afterwards. to wit. at the December Term of said Court. to wit. on the seventeenth day of December. A. D. 1857. the following order was made in this cause as appears of record. to wit.

Augustus J. Bayless

In Debt

John Denman

This day on motion of said plaintiff by his attorney said Defendant is by the Court ruled to plead to the Declaration filed herein by Monday next. or judgment will be rendered against him by default.

And afterwards to wit. at said December Term. on the 22^d day of January in the year A. D. 1858. further proceedings were had in this cause as appears of record. to wit.

Augustus J. Bayless

In Debt.

John Denman

This day comes said Defendant by his attorneys. and moves the Court for leave to plead to the Declaration filed herein. and files herein his affidavit in support of said motion. And leave being granted him. thereupon comes said Defendant and files herein his plea. and now comes said plaintiff and here enters his Demurrer to the plea aforesaid. which Demurrer being heard by the Court. is overruled.

Which said plea so filed by leave of the Court on the
lay and year aforesaid, is in words and figures as follows

And the said Defendant comes and defends
the wrong and injury when &c and says *actio non*, because
he says that he was & is not intitled to the said plaintiff
in manner and form as the said plaintiff in his Declaration
hath alleged. and of this he puts himself upon the
Country.

Hanna & Scott.

for Deflt.

Attached to said plea was the following notice

The said plaintiff will take notice that under the above
plea that the Defendant will offer evidence & insist that
the award sued on and set up in said plffs Declaration
was made and had by collusion & fraud of the said
plaintiff & said Dolman &

majority of said arbitrators, or with some of them, and for
that reason that the same is not binding upon said Defendant.
That said Defendant had no notice of the time or place of
meeting of said arbitrators and no hearing of the matters
in difference (before them) between the said plff and said
Defendant. That said award sued on was never published
as the award of the arbitrators.

And afterwards. to wit. at the march term of said
Superior Court. to wit. on the 29th day of March. A.D.
1858. further proceedings were had in this cause as
appears of record. to wit

Augustus J. Bayless

In Debt.

John Denman

This day comes said Defendant
by his attorney and prays leave of the Court to amend his
notice filed herein. and leave is granted him

And afterwards at said March term. to wit. on the
fifth day of April A.D. 1858. this cause came on for
a final hearing. and judgment was rendered herein
in words and figures as follows. to wit.

Augustus J. Bayless

In Debt.

John Denman

This day come said parties by
their attorneys. and issue being joined herein. thereupon
appearing. to the good and lawful men to wit.
Jonathan Cheney. William C. Wallcut. Samuel H. Brown
Samuel P. Cox. David S. Lewis. William Bell. Isaac Mitchell
Ben N. White. Emanuel Mortimore. James Porter.
Abner Newcomb and Aaron Van Astin. who being duly
sworn. elected and sworn to well and truly try the cause
and a true verdict render according to the evidence

and the jury having heard the evidence produced
and the arguments of Counsel, retire to consider
of their verdict, and again coming into Court, upon
oath do say, that said Defendant is indebted
to said plaintiff in the sum of Two Hundred and
Forty Dollars, and they assess his damages by reason
of the detention thereof at One Cent. And now comes
said Defendant by his Attorney, and moves the Court for
a new trial herein, which motion is by the Court overruled.
It is therefore considered by the Court that said
plaintiff recover of said Defendant the sum of Two
Hundred and Forty Dollars, his said Debt, and also
the sum of One Cent his damages as assessed as aforesaid
and likewise his costs in this behalf expended, and that
he have execution therefor.

And afterwards, at said March Term, of said Court,
on the tenth day of April in the year last aforesaid
further order was made in this cause as follows, to wit.

Allegatus J. Baylies

In Debt.

John Dorman

And now again comes said Defendant
by his Attorney and prays an appeal to the Supreme Court
of this State, which is granted, and sixty days is allowed
said Defendant to file an appeal bond herein in the
penalty of five Hundred Dollars, with security to be
approved by the Clerk of this Court.

And thereupon comes said Defendant by his attorneys
and presents to the Court his Bill of Exceptions in this
cause and prays that the same may be signed, sealed
and made a part of this record. which is done.

Said Bill of Exceptions so signed, and sealed as
aforesaid is in words and figures as follows, to wit,

Augustus J. Bayless.
versus.
John Denman.

In McLean Circuit Court.

Be it remembered that on
the trial of this cause, the Plaintiff introduced the following
evidence, to wit; It proved by E. Hutchinson & Denison
the signatures of Augustus J. Bayless, John Denman
John W. Hanson, Samuel Watson and John A. Dolman
to the submission - appointment of umpire and award,
and the Plaintiff then gave in evidence, the submission,
written appointment of umpire and award,

This Agreement
made and entered into this 29th day of August A.D.
eighteen Hundred and fifty seven, by and between John
Denman of the one part and August J. Bayless of the
other part, Witnesseth that we the said Denman &
Bayless cannot agree as to a settlement between
them and have agreed to leave the matter of controversy
to disinterested persons, said parties to consist of
Samuel Watson on the part of Mr. Denman and Mr. John
Hanson on the part of Mr. Bayless, said Watson and

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Hanson being the mutual friends of both parties -
and by both of us, the said Denman & Bayless mut-
ually selected to arbitrate all matters of difference
between us, and in case the said Watson and Hanson
cannot agree as to the justice and equity of the matter
in controversy then they are empower to select a third
party whose casting vote shall be binding on us and
we further agree to abide by the decision of the said
arbitrators. In witness whereof we the said John
Denman and Augustus J. Bayless. have hereunto set
our hand and seal the twenty ninth day of August
AD 1857.

J. Denman. (seal)
Augustus J. Bayless. (seal)

In as much as we the said John Hanson and Samuel
Watson cannot agree we have selected John A. Dolman
as the third party as arbitrator -

John W. Hanson.
Samuel Watson.

We the undersigned Samuel Watson, John Hanson
and John A. Dolman have awarded unto Augustus
J. Bayless the sum of Two Hundred and forty Dollars.

John A. Dolman.
John W. Hanson.
Samuel Watson.

Plaintiff then proved by St. Denison that
the award was made in a Store in St. Joseph Missouri
that he was present, that the award was made up stairs

in a room. That he saw all the parties together (except Dolman) a short time before award was made that he was not present when award was finally made.

Plf then proved by Samuel Watson one of the arbitrators. That John A. Dolman, was the umpire and that he and the other arbitrators all signed the award which was all the evidence introduced by Plf. The said Watson on cross examination testified that Payless and Denman both appeared before the two arbitrators named in the submission and made then statements, that the two named in the submission could not agree that then Dolman was brought in by Payless that they selected him as the umpire, that Dolman was the most active in making out the award, that Denman was not present after Dolman was selected as umpire nor was he present when award was made. That no evidence was given before Dolman that the matter was talked over alone that they all three signed the award, and that he took it for the benefit of the parties and locked it up in his safe. Watson further testified on cross examination - That how the award was taken from his safe he don't know. That he never delivered it either to Payless, or Denman or any body for them. The Defendant then offered to prove by said Watson that he never intended to deliver said award, as the award of the arbitrators unless Denman was willing and assented to the award, and that he never delivered the award and never should have done it until he had seen Denman, & enquired of him about it

which he never did do to the offering of which testimony the said Plaintiff then and there objected which objection was sustained by the Court.

To which decision of the Court the Defendant then & there by his counsel excepted & prayed that his bill of exceptions be signed & sealed which is done. The above was all the evidence in the case—

David Davis (D)

And thereupon afterwards to wit. on the 14th day of May A.D. 1858. came said Defendant and filed his appeal Bond in this cause. which said appeal Bond is in words and figures as follows. to wit.

Know all men by these presents. that we John Denman & John Rouse of the County of McLean and State of Illinois are held and firmly bound unto Augustus J. Bayless in the penal sum of Five hundred Dollars for the payment of which well and truly to be made. we and each of us bind ourselves our heirs executors and administrators jointly and severally and firmly by these presents.

Signed with our seals and dated at Bloomington this 14th day of May Anno Domini One thousand Eight hundred and fifty eight.

The condition of the above obligation is such. that whereas the above named Augustus J. Bayless did on the fifth day of April One thousand Eight hundred and

and fifty eight at a term of the Circuit Court. then
being holden within and for the County of McLean
and State of Illinois obtain a judgment against the
above bounden John Denman for the sum of Two Hundred
and forty Dollars and Costs of suit. from which judgment
the said John Denman has prayed for and obtained an
appeal to the Supreme Court of said State.

Now if the said John Denman shall duly prosecute
said appeal. and shall moreover pay the amount of the
judgment. Costs. interest and damages. rendered and to be
rendered against him. the said John Denman. in case the
said judgment shall be affirmed in the said Supreme
Court. then the above obligation to be null and void. Otherwise
to remain in full force and virtue.

Taken and entered into before me
and approved this 14th day of May
A.D. 1858. W^m. McCullough. Clerk

By H. Bunn. Deputy

John Denman
John Rouse.

State of Illinois

McLean County

J. W^m. McCullough. Clerk of the Circuit.
Court in and for said County do hereby Certify that the
 foregoing is a correct transcript of the files and
 record pertaining to the foregoing cause. as the same
 appears in my office.

Witness my hand and the seal of said
Court hereto affixed. this 18th day of
April. A.D. 1859.

W^m. McCullough. Clerk
By Luman Bunn Deputy.

And the said Appellant comes and assigns
errors on the above record for the following
causes.

1st That the Court erred in not granting a
new trial

2nd That the Court erred in rejecting the testimony
offered by the Appellant - the defendant
below -

Pro M Scott
For Plaintiff in Error

And now comes the appellee by his Attorneys
and says that there are no such errors interve-
ning in the record and proceedings aforesaid
as appellant hath above complained And this
he prays may be enquired of by the Court &c

R. E. Williams
Atty. for Appellee -

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John Denman: Appellant.

vs

Augustus J. Bayless, Appellee

Record.

Filed April 24 1877.
Leland
Clerk

55-10-10

Drumman
vs
Bayless } Appeal from McLean.

This was action of Debt. Commenced by Bayless the Plaintiff below against Drumman. on an award made by John W. Hanson. Samuel Watson and John A. Dolman. The submission was made in writing. and authorized the said Hanson & Watson to adjust and settle the matters in dispute between Bayless & Drumman. and in the event that said Hanson & Watson. should not agree that they were authorized by the terms of the submission to call in a third party - who should have the casting vote - and whose decision should be binding on the parties - The declaration contains two special counts on the award and the common counts - To which declaration the defendant Drumman pleaded First - The General Issue - 2nd The defendant gave notice that the award was made by fraud and collusion of Bayless and Dolman the umpire chosen by Hanson & Watson - or with some of the arbitrators. that no evidence

was given before the Arbitrators, and that the said Award was never published.

The Court will see by inspection of the record that the declaration contains no averment in the declaration in either of the Special Counts, that the award was published before this Suit was brought. In order to enable the Plaintiff below to recover at all it is essential for him to aver - and prove on the trial that the Award was published. I Greenleaf on Ev. Sect 75 = 9 Mass 198 15 Johns 197 =

The Court will see by the evidence in the Bill of Exceptions, by the evidence of Watson one of the Arbitrators that the award was never published at all. That he took the award when the same was signed and locked upon the same up in his safe, and that he did not know how it was taken out - The presumption would be that the Award was wrongfully taken from the safe of Watson. There is no evidence in the record ^{that shows -} that Dorman ever knew until this Suit was brought, that any award

was ever made. The award was made as appears by evidence was at St Joseph Missouri, and that Drinnan lives in McLean County Illinois = Surely Drinnan cannot be bound by the award unless the same was published, and brought to his knowledge - before suit was brought 9 Mass. 198 -

The Dict below Drinnan offered to prove by Watson that he never intended to deliver the award unless Drinnan consented. That he should do so - and Watson never got Drinnan consent to do so and never even talk to Drinnan about it - which testimony was rejected by the Court. This testimony should show clearly that Watson never intended that this award should be delivered unless Drinnan consented and from the fact that Hanson & Dolman - the other arbitrators - allow Watson to take the award and keep it we may well argue that the arbitrators all agree that the award made by them should not be published as their award unless Drinnan would consent - There is also an other reason that supports

this supposition. It is this. That Demman
was not present as appears by the
evidence at the time the award was
made. Bayless was present - More than
this, no evidence^{was} offered before the
Arbitrators after Dolman was chosen
and brought in by Bayless himself
and there is no evidence to show
that Demman knew that Dolman had
been chosen - These facts show why
the award was taken by Watson
and locked up in his safe - If this
is not true why did the Arbitrators
allow Watson to take the award
and keep it. Why not publish it
once? The Court will see that there
was but one copy made - that the
award taken by Watson was the only
- one and only award made by
the Arbitrators -

If it is true then that the award was
not to be delivered until Demman
was seen and consented and that
Demman was not seen - and never
did consent then the law is clearly
for Demman and the Court well
in not allowing Demman the debt
below to prove this state of facts -

Wabson although one of the arbitrators
was a competent witness to prove
these facts. 2 Greenleaf on ev Sect 78
It is clear that this Award was never
published or delivered and never
intended to be unless Derrman
consented to it. Hence the Award
sued on was not binding on
Derrman, and the Court erred
in not allowing the Appellant-
to prove on the trial below that
such was the case -

For these reasons the Appellant
insists that the judgement of
the Court below ought to be
reversed -

Jos W Scott
For Appellant-

237-131
John Denman app't
vs

Aug 7 Bayless apper

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Appeal from Motion

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Argument for app't -
by John Scott

Filed April 22 1857
L Leland
Clerk

58-131

STATE OF ILLINOIS, SUPREME COURT,

APRIL TERM, 1859.

A. J. BAYLESS }
 ads. }
J. DENHAM. } *Appeal from McLean.*

Argument for Appellee.

BY W. B. SCATES.

Counsel for Appellee.

Filed May 11, 1859
L. Leland
clerk

STATE OF ILLINOIS, SUPREME COURT,

APRIL TERM, 1859.

A. J. BAYLESS }
 ads. }
J. DENHAM. } *Appeal from McLean.*

THIS was an action of debt upon an award for \$240, for which defendant recovered a judgment upon full proof.

In answer to the plaintiff's argument, I would make the following points:—

I.

The appellant cannot assign as error the insufficiency of the evidence to support the verdict, because the appellant took no exception to the opinion of the Court in overruling his motion for a new trial. There is no notice taken in the bill of exceptions, of the making or overruling the motion for a new trial. In the common entry of the trial and judgment, it is stated that a motion for a new trial was made and overruled, but no exception was taken to the judgment overruling it, even in that order.—So, even if the Court can take judicial notice that such a motion was made and overruled, yet, as no exception was ever taken to it, this Court cannot review the sufficiency of the evidence to sustain the verdict.

Therefore, whether the award was or was not published, still the submission and award were in evidence among other proofs, and the verdict must stand, where no steps were taken to open the merits of the question as to the sufficiency of the evidence before this Court.

And this Court can no more examine, review, and revise the judgment of the jury upon the facts, though the whole is set forth in the bill of exceptions, than if no part of it were set out in the record. Spreading the evidence on the record will not enable this Court to pass upon the evidence, unless the proper steps are taken to open the question of fact.—That can alone be done by making and preserving a motion for a new trial, and by excepting to the opinion of the Court in overruling it.

II.

The only question, then, is, did the Court err in excluding the testimony offered by appellant?

What is its character? It was, that one of the arbitrators, who agreed to and signed the award, and who took charge of it for the benefit of parties, never intended to deliver it as an award without the consent of appellant. That it never was delivered, and he never would have done so without that consent.

Surely there can be no great difficulty in determining that the private intentions and views of one of the arbitrators, after they have agreed upon, drawn up, and signed an award, and deposited it with one of the arbitrators for the parties—can have no weight or relevancy in defeating a recovery upon the award, or in nullifying it after it is made.

When an award is signed, sealed, and delivered by arbitrators to one of their number, or a stranger, for the parties or to the parties themselves, they become *functus officio*, and one of them cannot defeat the award, or change it, nor can he withhold it, except until his fees are paid for his services in making it. The Court would compel its delivery upon *mandamus*.

And can he, after it is delivered, defeat it by swearing that, although he made it, yet he never intended that the party should have any benefit from it? It leads to the absurdity that arbitrators may in all fairness and regularity make their award, and yet destroy its force between the parties by swearing that they never intended the party in whose favor it was made, should have any benefit or advantage of it, unless the unsuccessful party would agree to it.

Such a power in an arbitrator, and that after his functions had ceased, would annul and destroy the force, effect, and obligation of the submission bond.

This is surely a new ground for setting aside awards fairly made.

III.

But I may admit, for argument sake, that the Court can look at and pass upon these facts. The objection is that the award was not *published*, and appellant had no *notice* of it.

The publication of the award, and the giving the parties notice of it, are matters of conventional agreement in the submission, and unless it is so provided, it is not necessary either to publish the award or give notice of it to the parties. Neither is it requisite to make it in writing, sign or seal it; for, unless required to be in writing by the submission bond or agreement, a parol award will be good, and it may be made at any reasonable time.

"After the arbitrator has made his award, it is not necessary that the parties should have notice, to be bound to perform it, for it lies as much in the knowledge of the one party as the other; and where knowledge of a fact lies as much in one party as the other, to entitle one of them to maintain an action, it is not necessary to allege that the opposite party had notice of that fact.

"If, however, it be provided that the award should be notified to the parties, it is no award until notice be given."

Watson on Awards, 133-4, 140.

Russell on P. & D. Arb. 237-8, (38 Law Lib.)

Child *vs.* Horden, 2 Bulst. R. 144.

If not provided to be in writing, and to be made within a given time, the arbitrators may make an oral award, and at any time.

If one party apply to the arbitrator for information as to the award, and he refuse to tell him what the award is, it will be a good defence against an action upon it.

Watson on Awards 132, (34 Law Lib.)

Publication and delivery of the award depend upon the same principle—whether it has been provided for in the submission.

When it is so provided, it must be complied with.

Watson on Awd. 131-2, 18-9, 127.

Russell on P. & D. Arb. 239.

Billing on Awards 143, (26 Law Lib. 90.)

Brown *vs.* Vawser, 4 East. R. 584.

Musselbrook *vs.* Dunkin, 9 Bingh. 369, (23 Eng. C. L. R.)

McArthur *vs.* Campbell, 5 Barnw. & Adolph. 518, (27 Eng. C. L. R.)

Brooke *vs.* Mitchell, 5 Dowl. P. C. 395.

Same case, 6 Mees & Welsb. R. 478.

2 Greenleaf Ev., Sec. 75.

The parties expressly stipulated for an award in writing, ready to be delivered on or before a given day, in *Sellick et al. vs. Addams*, 15 John. R. 197.

The general proposition, as contended for by plaintiff, is laid down in *Kingsley vs. Bill et al.*, 9 Mass. R. 199, but it does not appear by the statement of the case, whether publication had been provided for by the submission or not. The presumption is very strong that it did, for the reporter adds a note that an averment of publication is not required, unless stipulated for in the submission, and cites—

Cald. on Arb. 195.

2 Saund. R. 62, a note 4.

So the appellant's authorities show most conclusively that his objection on this point is not well taken.

W. B. SCATES, *for Appellee.*

SUPREME COURT OF ILLINOIS,

Third Division—April Term, 1859.

DENMAN }
vs. } *Appeal from McLean.*
BAYLESS. }

POINTS AND AUTHORITIES.

The award, to make it binding on Denman, must have been published.

2 Greenleaf on Evidence, sec. 75.

Kingsly vs. Bill, 9 Mass., 198.

15 Johns, 197.

The award must be published, unless the parties expressly waive it; and the party suing on the award, must aver and prove that the award was published, before the suit is brought.

Kingsly vs. Bill, 9 Mass., 198.

15 Johns, 197.

An arbitrator is a competent witness to impeach the award.

2nd Greenleaf on Evidence, sec. 78.

JNO. M. SCOTT, for Appellant.

259-131
Dinner
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Bayless
Appellants Brief

Filed April 22. 1859
Leland
Clerk

SUPREME COURT OF ILLINOIS,

Third Division—April Term, 1859.

JOHN DENMAN, Appellant,
vs.
AUGUSTUS J. BAYLESS, Appellee. } *Appeal from McLean.*

Record, This was an action of debt, commenced by Bayless against Denman in
page 1 the McLean Circuit Court, on an award.

3, 4, 5, The declaration contains a special count on the award, and the common
6 & 7. counts.

To which declaration the defendant pleaded,

9 1st. The general issue;

2d. Defendant gave notice as follows:

The said plaintiff will take note that under the above plea that the defendant will offer evidence and insist that the award sued on and set up in
9 said plaintiff's declaration, was made up and had by collusion and fraud of
the said plaintiff and said Dolman and a majority of said arbitrators, or with
some of them, and for that reason, that the same is not binding upon said defendant. That said defendant had no notice of the time or place of
9 meeting of said arbitrators, and no hearing of the matters in difference
before them between the said plaintiff and the said defendant; that said
award sued on was never published as the award of the arbitrators.

10 Afterwards on the 5th day of April, A. D., 1858, this cause was submitted to a jury, who returned a verdict for plaintiff; whereupon the defendant moved for a new trial, which motion the Court overruled, and
11 entered judgment for the plaintiff below, for the sum of two hundred and forty dollars, debt, and one cent, damages.

On the 10th day of April, A. D., 1858, the defendant below prayed
11 for an appeal to the Supreme Court, which was granted.

Bayless, the plaintiff below, proved, on the trial of said cause, the signature of Augustus J. Bayless, John Denman, John W. Hanson, Samuel
12, 13 Watson, and John A. Dolman, to the submission, appointment of umpire, and award; and then the plaintiff gave in evidence the submission, written appointment of umpire, and award.

Plaintiff then proved by Samuel Watson, one of the arbitrators, that
13. John A. Dolman was the umpire, and that he and the other arbitrators all signed the award.

- The said Watson, on cross-examination, testified that Bayless and Denman both appeared before the two arbitrators, named in the submission, and then made statements that the two named in the award could not agree; that then Dolman was brought in by Bayless; that they selected him as umpire, that Dolman was the most active in making out the award; that Denman was not present after Dolman was selected as umpire, nor was he present when award was made; that no evidence was given before Dolman; that the matter was talked over alone; that they all three signed the award, and that he took it for the benefit of the parties, and locked it up in his safe. Watson further testified, on cross-examination, that how the award was taken from his safe he did not know; that he never delivered it either to Bayless or Denman, or any body for them. The defendant then offered to prove by said Watson, that he never intended to deliver said award as the award of the arbitrators, unless Denman was willing and assented to the award, and that he never delivered the award, and never should have done it until he had seen Denman and enquired of him about it, which he never did do, to the offering of which testimony the plaintiff then and there objected, which objection was sustained by the Court. To which decision the defendant then and there excepted.

ERRORS ASSIGNED.

- 1st. That the court erred in not granting a new trial.
- 2d. That the court erred in rejecting the testimony offered of the appellant, the defendant below.

JOHN M. SCOTT,
For Plaintiff in Error.

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Donnan
or

Bayless

Abstract

Filed April 22, 1889

Leland
clerk

SUPREME COURT OF ILLINOIS,

Third Division—April Term, 1859.

DENMAN }
vs. } *Appeal from McLean.*
BAYLESS. }

POINTS AND AUTHORITIES.

The award, to make it binding on Denman, must have been published.

2 *Greenleaf on Evidence*, sec. 75.

Kingsly vs. Bill, 9 *Mass.*, 198.

15 *Johns*, 197.

The award must be published, unless the parties expressly waive it; and the party suing on the award, must aver and prove that the award was published, before the suit is brought.

Kingsly vs. Bill, 9 *Mass.*, 198.

15 *Johns*, 197.

An arbitrator is a competent witness to impeach the award.

2nd *Greenleaf on Evidence*, sec. 78.

JNO. M. SCOTT, for Appellant.

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Brief of Gospel and

Filed April 22, 1859

Leland

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Abstract

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W. Ireland
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JNO. M. SCOTT, for Appellant.

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Dennan
vs

Bayless
Appellants Points
Brief
Dennan
vs
Bayless

Filed April 22, 1889
L. Leland
Clerk