

No. 12348

Supreme Court of Illinois

Nolte

vs.

Lowe, et al

71641  7

Be it remembered that on the tenth day of April in the Year of our Lord one thousand eight hundred and fifty-six, there was filed in the office of the clerk of the circuit court in and for the county of Peoria in the state of Illinois, a "declaration" in words and figures following to-wit:-

"Circuit Court Peoria County, State
of Illinois - To the May Term
A.D. 1856.

State of Illinois } ss.
Peoria County }

Henry Kalte, the plaintiff in this suit complains of William W. Low and John P. Chapin the defendant in this suit in a plea of debt - For that whereas heretofore to-wit: On the twentieth day of January A.D. 1854, at Peoria, to-wit- at the county aforesaid- the said defendant and the plaintiff made and entered into their certain contract and agreement in writing - which said contract and agreement in writing was and is substantially in the words and figures following, to-wit:-

State of Illinois } ss.
County of Peoria }

Whereas divers disputes and controversies have arisen between Henry Kalte of Chillicothe, Peoria County, Illinois of the one part, and William W. Low and John P.

Chapin of the firm of Low & Chapin of Chicago Illinois of the other part in relation to a certain contract dated Oct. 2nd 1852, a copy whereof marked "A" is hereto attached and made part of this agreement; And whereas certain suits and controversies arising out of or connected with alleged violations of said contract or matters and transactions of the parties in relation thereto, to-wit: a certain suit of Replevin of

William W. Low &
John P. Chapin

vs.

Henry Nolte

Commenced, June 18th 1853.

Also a suit in Chancery of

William W. Low &
John P. Chapin

vs.

Henry Nolte

Commenced & bill filed,

June 9th 1853.

And also a suit in Trespass on the case upon promises of

Henry Nolte

vs.

William W. Low
John P. Chapin

Commenced the 22^d of August
A. D. 1853.

Have been commenced and are now pending and undetermined in the circuit court of Peoria, Illinois; now therefore it is agreed between the said parties that the said suit and all and singular the matters

and things pending between the parties in said suit and properly and legitimately connected with them or either of them and also all matters and things in difference between said parties arising out of and connected with the said contract be and the same are hereby by the mutual agreement of the said parties submitted to the final arbitrament, awards and determination of William C. Boileau, William Kellogg, Horace G. Anderson, arbitrators mutually chosen and agreed upon between said parties and whose award and determination shall be final and conclusive between said parties; - said arbitrators shall meet at the court house in Peoria on the 28th day of February A.D. 1854, and after being duly sworn shall proceed to hear the parties and their testimony - they the said arbitrators or a majority of them shall have power to adjourn from time to time for the purpose of obtaining material testimony, or for any other cause satisfactory to said arbitrators or a majority of them and in case it shall so happen that any one of the said arbitrators above chosen by the parties shall die, refuse or for any reason cannot serve as such arbitration - then if the parties cannot agree upon an arbitrator to serve in the place of the one thus dying, refusing, or being unable to serve, the remaining arbitrators shall appoint one to fill the vacancy

thus occasioned, and the decision and determination of the arbitrators herein agreed upon or appointed in cases of a vacancy as before stated or of a majority of them shall be final and conclusive to the parties, and the said arbitrators shall decide who shall pay the costs of each and every the suits before named and their award when made shall at the next term of the circuit court of Peoria County or at any subsequent term thereafter be entered and become a judgment in the circuit court of said county upon which execution may issue as in case of judgment at law in said court. The party seeking to enter said award as a judgment giving to the opposite party ten days notice of the time of making his motion for judgment on said award. The said arbitrators are to make out their award and give to each party a copy thereof on or before the 1st day of June A.D. 1854 unless the time is extended by agreement of the parties. This agreement shall not operate to dismiss or discontinue any of said suits before mentioned in the circuit court of Peoria County, but the same shall remain on the docket until final judgment shall be entered on the award under this submission or the award shall have been otherwise paid or complied with by the parties, but neither party shall make any further costs

in said suits until the party against whom the said
award shall be made shall fail to comply with
the same or the arbitrators shall fail to
make their award within the time before
limited. The said arbitrators shall also
determine who shall pay the costs of this
arbitration. It is also further stipulated
and agreed by and between the parties that
neither of the parties will in any event revoke
or annul this agreement of submission
and they bind themselves each to the other
that they will abide by the said submission
and the award made under the same, in the
penalty of one thousand dollars as stipu-
lated damages to be paid by the party de-
linquent to the party complying. In wit-
ness whereof the said parties have hereto
set their hands at Peoria this 20th day of
January A.D. 1854

Wm. W. Low
John P. Chapin by
Wm. W. Low

Henry Nolte."

And the plaintiff avers that afterwards and
long prior to the said first day of June
A.D. 1854 to-wit:- on the third day of March
A.D. 1854 to-wit:- at the county of Peoria
aforesaid the said William Kellogg, William
C. Boilevin and Horace G. Anderson, the ar-
bitration in said agreement in writing named-

after having complied with all the agreements of law and of the said agreement of submission and after having duly heard the proofs and allegations of the said parties in said agreement of submission named did make and publish their certain award under and by virtue of the said agreement of submission and in accordance with the provisions thereof and did then and there give to each of the parties to the said agreement of submission a copy of the said award - which said award was and is substantially in the word and figures following to-wit:- "We the undersigned, arbitrators mentioned & agreed upon in the contract of submission hereto annexed do certify that pursuant to the terms and conditions of the said submission, we met at the Court house in the city of Peoria on the 28th day of February A. D. 1854 and the parties and their attorneys being present after being duly sworn according to law - proceeded to hear in part the proofs and allegations of the parties and the evidence not having been concluded we adjourned the further hearing of the said cause until the next day at nine o'clock A. M. being the first day of March 1854 at which time we again proceeded further to hear the evidence of the said parties and the evidence having been closed we again adjourned for consideration and deliberation until the 2nd day of March A. D. 1854 at which

time we again met and after mature consideration and deliberation have decided and awarded and do decide and award as follows to-wit:

First- That the costs of the suit of Henry Nolte vs. Wm. W. Low and John P. Chapin - trespass on the case on promises be paid by the said William W. Low and John P. Chapin,

Second - That the costs of the chancery suit of William W. Low & John P. Chapin vs. the said Henry Nolte be paid by the said William W. Low and John P. Chapin,

Third - That the cost of the Replevin suit of William W. Low and John P. Chapin vs. Henry Nolte be paid by the said William W. Low and John P. Chapin - and that upon the payment of the ^{said} costs ^{as} aforesaid, which shall be done at the next term of the circuit of Peoria county, each of the said suits shall be dismissed - the residue of the terms and conditions of this award having been first complied with by the parties respectively,

Fourth - We do further decide and award that there is due from and ought to be paid by the said William W. Low and John P. Chapin to the said Henry Nolte for and on account of advances and commissions made, and ^{accruing} ~~according~~ to him under the contract attached to said submission, and for and on account of damages by him sustained on account of the violation of said contract

on the part of the said Low and Chapin and for damages sustained by reason ~~of reason~~ of the said Low & Chapin wrongfully suing out the said writ of Replevin the sum of five thousand eight hundred and seventy-six dollars and forty-six cents, and we do award that the same be paid by the said Low and Chapin to the said Henry Natta within ten days after they shall have been served with a copy of this award,

With— We do further decide and award that the said William W. Low and John P. Chapin pay the costs of this arbitration which we claim—
ed and taxed as follows:—

Arbitration Fees:

William Kellogg	4 days	\$8.00
Wm. C. Boileau	4 "	8.00
H. G. Anderson	4 "	8.00
Cost A. R. Kidwell serving subpoenas on 14 witnesses & travel		14.77

Natta's witnesses

J. C. Philley	2 days	1.00
P. F. Matthews	2 do	1.00
J. H. Temple	" "	1.00
J. W. Brown	" "	1.00
Geo. W. Hakes	" "	1.00
J. C. Pratt	" "	1.00
O. W. Young	" "	1.00
Wm. Shaw	" "	1.00

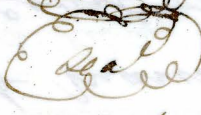
Thomas Falkner	"	"	1.00
J. H. Batchelder	"	"	1.00
J. B. Keff	"	"	1.00
A. J. Murry	"	"	1.00
F. R. Gurn	"	"	1.00

Wm. M. Davenport, Marshall county 3 days 3.00

In witness whereof we the said arbiters have hereunto set our hands and seals this 3^d day of March A. D. 1854

Wm. Kellogg 

W. C. Boileau 

H. G. Andersson 

And the plaintiff avers that afterwards to-wit: on the fourth day of March A. D. 1854, and before the said first day of June 1854 to-wit: at the county aforesaid the said defendant William W. Low was duly served with a copy of the said award and afterwards to-wit: on the eighth day of March A. D. 1854, and before the ^{said} first day of June A. D. 1854, to-wit: at the county aforesaid the said defendant John P. Chapin was duly served with a copy of the said award, of all which the said defendant then and there had notice to-wit: at the county of Peoria aforesaid;

And the plaintiff avers that the defendants did not nor would abide by the said submission and the award made under the same according to the true intent and meaning thereof, and

did not nor would comply with or perform the said award in any manner whatever - but to abide by, comply with - keep or perform the same did wholly neglect and refuse to do.

And the plaintiff further avers that the said defendant did not nor would they or either of them within ten days after they were severally served with a copy of the said award, pay to the plaintiff the said sum of five thousand eight hundred and seventy-six dollars and forty-six cents or any other sum whatever according to the true intent and meaning of the said award - but on the contrary wholly neglected and refused so to do.

And the plaintiff further avers that the said defendants did not nor would abide by the said submission and the said award made under the same in this to-wit:- That afterwards to-wit; on the twenty-second day of March A. D. 1854 at a term of the circuit court of the said county of Peoria in the state of Illinois to-wit:- at the March term 1854 thereof, then being held at the court house in said county - the same being the next subsequent term of the said court after the making of the said award - the plaintiff having first given the said defendants more than ten days previous notice thereof - entered his motion in said court for judgment on the said award according to the terms and conditions of the said submission

and the award made under the same - But the said defendants refusing to abide by the said submission and award opposed the entering of the judgment in said court upon the said award; And such proceedings were thereupon to wit: at the said term of the said court had that judgment upon the said award was entered in said court; But the said defendant still refusing to abide by the said award and the said submission afterwards to wit: on the thirtieth day of March A.D. 1854, and at the said term of the said court prayed for and obtained an appeal from the said judgment of the said circuit court to the Supreme court of the state of Illinois - And the said defendants prosecuted their said appeal to the said Supreme court of the state of Illinois, and afterwards to wit: - on the day of A.D. 1854 at a term of the Supreme court then being held at Ottawa to wit: - at the June term thereof, A.D. 1854. - Such proceedings were had in said cause then pending in said Supreme court, that the said judgment of the said circuit court of Peoria County was reversed. By reason whereof the said Plaintiff was greatly hindered and delayed in the collection of the moneys due him by and by virtue of the said award and was put to great expense and trouble and was greatly damaged to wit: - to the amount of one thousand dollars.

2^d count

And also for that whereas afterwards to-wit: on the twelfth day of January AD 1853 at Peoria to-wit: at the county of Peoria aforesaid the said plaintiff of the one part and the said defendant of the other part made and entered into their certain contract and agreement of submission in writing which was and as substantially the same contract and agreement of submission as is set out in the first count of this declaration. And the plaintiff avers that afterwards to-wit: - on the third day of March AD 1854 to-wit: - at the county of Peoria aforesaid, the said William Kellogg, William C. Boilevin and Horace B. Anderson the arbitrators mentioned in the said agreement and contract of submission - after having complied with all the requirements of law and of the said submission made and published in due form of law their award, which said award was and is substantially the same award as is set out in the first count of this declaration - and afterwards to-wit: - on the eighth day of March AD 1856 to-wit: - at the county aforesaid the said defendants were duly served with a copy of the said award. And the plaintiff avers that the said defendant did not nor would abide by the said submission and the award made under the same - And did not nor would within ten days after the

award was served on them nor at any other time pay to the plaintiff the said sum of five thousand eight hundred and seventy six dollars and forty-six cents - the amount of the said award - nor the sum of One thousand dollars stipulated damages for the non performance of and non-compliance with the said award according to the true intent and meaning of the said contract of submission, but on the contrary wholly neglected and refused so to do.

By reason thereof an action hath accrued to the said plaintiff to have and demand of the said defendants the said sum of one thousand dollars his debt aforesaid stipulated to be paid as aforesaid to the said plaintiff and the said defendants then and there became liable and agreed to pay the same upon request - yet the said defendants though often requested have not paid the same, nor any part thereof, but have hitherto refused and still refuses to the damage of the said plaintiff, One thousand dollars and thereupon he brings suit &c. And the said plaintiff avers that the contract hereinbefore set forth was made - and the cause of action hereinbefore stated accrued to the said plaintiff in the county of Peoria which is the county of the said plaintiff

Purple & Pratt

Plffs attys

The contract declared on in this suit is

set out in full in the first count of the declaration.

Henry Kalte
vs.
Wm. W. Low &
John P. Chapin

In the circuit Court of Peoria
County, May Term 1856.

Issue summons in this
cause to the Sheriff of Cook & LaSalle
counties returnable to next term -
Debt \$1000 - dam. \$1000.

Jacob Gale, Esq, Att
April 10, 1856.

Purple & Pratt
Pltfs Attys.

And afterwards, to wit:- On the twenty-seventh
day of February, A. D. 1857, there was filed in the
office of the circuit court clerk, aforesaid, an in-
strument of writing entitled "Agreed Case," which
is in words and figures following, to-wit:-

Henry Kalte
vs.
William W. Low &
John P. Chapin

In the circuit Court of Peoria
County, to May term A.
D. 1856 - - Debt.

The parties to this suit agree that
they made the agreement and submission set forth
in the declaration, and that the arbitrators made

the award as therein stated of which said award the defendants had due notice and copies thereof were duly delivered to them as required by the terms and conditions of the said submission and award;

More than ten days previous to the March term AD 1854 the plaintiff gave the defendants due notice as required by the submission that he would at said term apply to the circuit court of Peoria county for judgment on said award.

Said application was made according to the notice and the rendition of the judgment thereon was opposed by the defendants the circuit court sustained the motion and entered judgment for the amount found due by the arbitrators & costs. The defendants appealed to the supreme court at the June term of the supreme court held at Ottawa in 1854 the judgment of the circuit court of Peoria county in said cause was wholly reversed and the plaintiff was compelled to pay and did pay the costs of said suit in said Supreme Court amounting to the sum of fifty-eight dollars and cents and also the costs of said motion for judgment on the award in the circuit court of Peoria county amounting to the further sum of four dollars and fifty-five cents. That in the prosecution of said

motion in the circuit court of Peoria county and said appeal in the Supreme court and in subsequent proceedings to recover the amount of said award said plaintiff paid attorneys fees amounting to three hundred and seventy dollars which was a reasonable compensation for such attorneys services in said several suits which several payments were all made before the commencement of this suit (after the said judgment of the circuit court of Peoria county was reversed as aforesaid in the said Supreme court the said defendants still neglected to pay said award or any part thereof or in any manner to comply with the same.

At the Sept. Term A.D. 1854 of the Peoria Circuit Court plaintiff commenced suit at common law on said award and at the March term 1855 of said court judgment was rendered in his favor or against the defendants for the sum of five thousand nine hundred and thirty seven dollars sixty-six cents debt and three hundred and sixty one dollars and fifty cents damages being the amount due him by said award and interest thereon from the date of said award, and costs of suit.

From this last mentioned judgment the defendants appealed to the Supreme court of the state of Illinois and at the June term thereof

A. D. 1856, said judgment was affirmed.

That afterwards execution was issued upon said judgment on which land was sold and the judgment was paid in full before the commencement of this suit. Said judgment included the whole amount of said award and all the costs in each case mentioned in said award awarded against the said defendants.

The record and all the papers in said last named suit so far as the same can be properly used as evidence are made part of this agreed case, and are to constitute a portion of the record in this case.

This suit is brought to recover the sum of one thousand dollars or whatever damages the plaintiff may be legally entitled to recover under the following clause of the submission:

"It is further stipulated by and between the parties that neither of the parties will in any event revoke or annul this agreement of submission and they bind themselves each to the other that they will abide by the said submission and the award made under the same in the penalty of one thousand dollars as stipulated damages to be paid by the party delinquent to the party complaining."

Now if in the opinion of the court the plaintiff is entitled to recover, judgment shall be entered in his favor for such sum

his debt or damages or both as the court shall decide; otherwise judgment shall be entered for the defendant for costs. Either party may appeal or prosecute a writ of error in the same manner as if this agreement had not been made.

But it is hereby expressly agreed that no part of the foregoing statement shall be taken and considered as a part of this case unless the court shall be of the opinion that the same is competent and legal testimony and might have been admitted on the trial of the cause if no agreement had been made (I.E) if any part above agreed to could not be received in evidence on the trial if objected to, the same is to be excluded from the consideration of the court.

J. M. Purple
Plaintiffs atty

A. M. Wead

Attorney for Deft.

And afterwards to-wit: On the twelfth day of March A.D. 1857, there was filed in the the clerks office of the circuit Court aforesaid, an agreement in words and figures following to-wit:-

Henry Kolte
vs.
Lowe Chapin

In circuit Court of Peoria County

This case is submitted to the court - the Hon. David Davis, presiding, to be decided by said judge. Either party may appeal to the Supreme Court without giving bond and no execution shall be issued in favor of the successful party until the case is decided by the supreme court - said appeal to be taken to the next term of the supreme court

N. H. Purple, Petitioner

March 12, 1857.

Wm. W. Read, atty for deft.

Proceedings at a term of the ^{circuit} Court begun and held at the court house, at the city of Peoria in and for the county of Peoria and state of Illinois, on the first Monday of March in the year of our Lord one thousand eight hundred and fifty-seven, it being the second day of said month. Present - Honorable David Davis, judge of the eighth judicial circuit by interchange with the judge of the sixteenth judicial circuit, in the state of Illinois, presiding:-
To wit:-

Wednesday March 18, 1857.

Henry Nolte

vs.

Debt.

William W. Lowe

John P. Chapin

This day this cause came on to be heard and the plaintiff by his attorney N. H. Purple and the defendants by H. M. Weed, their attorney waived trial by jury and agreed that all questions of law and fact arising in this cause shall be submitted to the court. The court having heard the evidence and the statements of counsel in the case, do find the issues for the defendant. It is therefore ordered that the said William W. Lowe and John P. Chapin, defendants have and recover of the said Henry Nolte, plaintiff, their costs by them about their defence in this behalf expended, and that they have execution therefor; - Whereupon the said plaintiff prayed an appeal to the supreme court of the state of Illinois, which is granted upon the terms and conditions agreed upon by the parties herein.

State of Illinois }
Peoria County }

I, Enoch Floan, clerk of
the circuit Court in and for the coun-
ty and state aforesaid, do certify that
the forgoing is a true and complete
transcript of the "declaration", "agreed case"
and "agreement" filed among the papers in the
cause wherein Henry Stotte is plaintiff and
William W. ~~Low~~ Lowe and John P. Chapin are de-
pendants, and also the judgment of the court,
as the same appears of record in my office.

In testimony whereof I hereto
set my hand and affix the seal
of said court at Peoria, this
21st day March A.D. 1857.

Enoch Floan, clk

Clerks fees \$4.80

Henry Holte	}	Appellants	}
and William M. Lowe			
John P. Chapin	}	Appellee	}

Appeal from Iowa.

And now comes the said Appellant and says that in the Records and proceedings and in the rendition of the Judgment aforesaid there is manifest error in this to wit.

1st The Circuit Court Erred in rendering Judgment in favor of the Defendants & against the Plaintiff

For this and other Error in the Records and proceedings aforesaid he prays that the said Judgment may be reversed, annulled set aside & held for naught.

J. M. Chapple

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Henry Holt

Mr. M. Lloyd.
John P. Chapin

Records

Filed April 2, 1857

L. Leland
Clerk

Henry Stille }
vs } In the Supreme Court
W W Low tal } April T. 1857

Defendants Brief

It is Wended for Defendants

The case shows a performance of the award, payment in full by defendants, by a sale of their property.

But it is said the performance was not in season; ~~but~~ The Plaintiff accepted the money, and after getting that, it does lie in his mouth to say that it was too late. If he wished to sue for a non performance of the award, he should have refused the money.

Suppose, before the suit was brought, the defendants had tendered to the Plaintiff all the money awarded, damages for its detention (interest) and all the cost he was entitled to recover, & that Plaintiff had accepted it, would not this have been a satisfaction of the Bond?

And if he gets the same by suit is not the legal effect the same?

Time is not material, where a contract is substantially performed, but if it was material, it was waived by

plaintiff accepting the money

Having brought suit on the award
& recovered & got his pay, he cannot
now sue on the Bond

Titus vs Scamling 4 Blackford 90

Thompson vs Childs 7 Redell Rep 435

As to the question of liquidated damages
See *Beale vs Hayes* 5 Sandford & Ry Rep 643

Arley vs Weldon 2 Bos & Pul 346

Stumble vs Farnen 6 Bingham 141

Bays vs Ansell 5 Bingham N.C. 390

Lindsay vs Ansell 6 Redell 186

Baird vs Talner 6 Bingham 186

There can be no stipulated damages
for the non payment of money
except legal interest

Sepson vs Richmond 1 Rhode Island 298

Henry Rolle
vs
Wm W Low del

Defendants Brief

Memorandum

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Henry Walte
& Co

William W. Lowe et al

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