

12674

No. _____

Supreme Court of Illinois

^U
Waxghop

vs.

Carter et al

71641  7

120 - 157

John W. Wangkop

47

William H. Carter

Opinion

120

12674

1858

~~XX~~ Referred

United States of America }

STATE OF ILLINOIS, COUNTY OF COOK, S. S. }

Pleas, before the Honorable

Judge of the Seventh Judicial Circuit of the State of Illinois, and Solo' Presiding'
Judge of the Circuit Court of Cook County, in the State aforesaid, and at a term thereof
begun and held at the Court House in the City of Chicago, in said County, on the

Thirteenth Monday, (being the Thirteenth day) of
November in the year of our Lord one thousand eight hundred and
Fifty Seven and of the Independence of the said United States the
Eighty Second

Present, Honorable

George Manierre Judge of the 7th Judicial
Circuit of the State of Illinois. }

Charles Haven States Attorney.

John L. Wilson Sheriff of Cook County.

Attest;

Paul Church Clerk.

1st- Be it remembered that on the seventh day of October, in the year of Our Lord, One thousand Eight hundred and fifty seven, Messrs Thompson and Bishop, Attorneys for William H. Carter Et al, filed in the office of the Clerk of the Circuit Court, in and for the county of Cook, in the State aforesaid, a certain agreement of submission, and award thereto attached, which agreement and award are in the words and figures following, to wit:-

This Indenture, made this 24th day of September, A.D. 1837, by and between William H. Carter, and Henry Miller, of the one part, and John W. Waughop of the other part, all of said parties being of the City of Chicago, County of Cook, and State of Illinois, Witnesseth

That it is hereby mutually agreed and understood by and between the said parties, that all claims of the said Carter and Miller upon said Waughop, for payment for work and labor done, and materials furnished in and about the erection and completion of three dwelling-houses built in the years 1833 & 1836. In said Waughop, and situated on Washington street, in said city of Chicago, and all claims of said Waughop upon said Carter and Miller, for any alleged defects in said work upon said houses, shall be, and the

mission, before proceeding to hear any testimony in the cause therein mentioned, made oath that they would faithfully and fairly hear, examine and determine the cause, according to the principles of equity and justice, and make a just and true award to said Court, according to the best of their understanding—



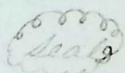
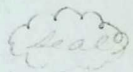
Given under my hand and notarial seal, this 24th day of September, A.D. 1837.

J. Howland Thompson
Notary Public—

Award.

We, the subscribers, arbitrators appointed by submission hereto annexed, having notified and met the parties, and heard their several allegations, proofs and arguments, and duly considered the same, do award and determine that the said Carter and Miller should receive the sum of Seven hundred and Forty two 79/100 dollars in full satisfaction for contract and extra work of Houses, built for the said Waughop on Washington st. in Chicago, and the said Waughop should pay the said Carter and Miller the aforesaid sum of Seven hundred and Forty two ~~dollars~~ 79/100 dollars, the same

to be in full satisfaction of all differences between the parties as submitted to the undersigned—

Councils Price	
Levi. H. Waterhouse	
Ed. Burling	

Arbitrators charges— Thirty Dollars— to be paid equally by both parties—

And afterwards to wit, on the day and year aforesaid (to wit, October 7th 1837) the said attorney also filed in the office of the Clerk of the Circuit Court, aforesaid, a certain notice with an affidavit of service thereof attached, which notice and affidavit are in the words and figures following, to wit—

To John W. Waughop Esq—

Sir— Take notice that the award of Councils Price, Levi. H. Waterhouse, and Edward Burling, arbitrators appointed by submission dated Sept. 24th A. D. 1837. made and executed by the undersigned, William H. Carter and Henry Miller of the one part, and you, John W. Waughop, of the other part, together with said submission, has been filed in the Clerk's office, of the Circuit Court, of Cook County, and that the undersigned,

intend at the next Term of said Circuit Court, to be begun and held on the second Monday of October next, to have final judgment thereon, for the sum specified in said award to be due, together with the costs of arbitration and of the court, and you are hereby notified that the undersigned desires to have the said matter disposed of at said Term of said Court—

Dated this 7th day of October, 1837.

William H. Carter

Henry Miller

By Thompson & Bishop

Their Attorneys—

State of Illinois }
County of Cook } ss.

John H. Thompson, being duly sworn, says that he delivered a copy of the foregoing notice to John W. Waughop, above named, on the 7th day of October, A.D. 1837.

John H. Thompson—

Subscribed and sworn to
this 7th day of October
A.D. 1837. Before me,

Wm. L. Church

Clerk—

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And afterwards, to wit— at the October term
of said Court, C. D. 1857. to wit— on the nineteenth
day of October, in the year last aforesaid, the
following proceedings among others, in said
Court, were had and entered of record on said
award, to wit—

William H. Carter	} Judgment on Award.
Henry Miller	
John W. Waughop.	

And now come the said
plaintiffs, *By* Thompson and Bishop, their
Attorneys, and files the award of the arbitrators
to whom this cause was referred, by the agreement
of the parties, to ascertain and determine the
amount, if anything, due the plaintiffs from
the said defendant, and it appearing to the Court,
that due notice has been given said defendant
of the time of filing said award for confirmation
thereof, and a judgment thereon, and it further
appearing to the Court, on reading said award,
that said arbitrators have fixed the amount
due from the said defendant to the said
plaintiffs, at the sum of \$742.74/100, and no
objection being made to said award, or to the
confirmation thereof, on motion it is ordered
that said award be, and it hereby is, in all
things confirmed—

Therefore it is considered that said

~~said~~ plaintiffs do have and receive of said defendant their damages of \$ 7,42, 79/100, in said award, mentioned, together with their costs and charges, as well of the arbitrament as in this Court, by them in this behalf expended, and have execution therefore—

And afterwards to wit— on the thirty first day of October, in the year last aforesaid, the said defendant in his own proper person, comes and files his certain motion in said Court, which motion is in the words and figures following, to wit—

John W. Waughop	} Cook County Circuit Court—
Ads	
William A. Carter	} Of the October term, 1857. Judgment on award—
& Henry Miller	

And now this day comes the said defendant in his own proper person, and moves the Court to set aside the judgment rendered in this cause for the following reasons—

1st Because the award of the arbitrators in this Cause filed, was made on matters and things not submitted to them, but expressly excluded from their consideration by agreement before entering into the arbitration—

2nd Because matters and things that were excluded by agreement from the arbitrators, was in bad faith, afterwards presented and urged, and actually considered by the arbitrators, in making up the award upon which this judgment was rendered—

3rd Because evidence was received and considered by the arbitrators, which had been excluded, from the arbitration by express agreement—

4th Because the award is in fact a fraud on the rights of the defendant—

J. W. Waughop.
In Pro. Per—

And afterwards to wit— at the term of said Court, last aforesaid, to wit— on the thirty first day of October in the year last aforesaid, the following proceedings among others in said Court, were had and entered of record therein, to wit—

William. H. Carter, &

Henry Miller

vs

John W. Waughop—

Motion to vacate judgment

1576

And now at this day comes the said defendant in his own proper person, and moves the Court for an order vacating the judgment of this Court entered at a former

day, upon the award of arbitrators filed herein for reasons set forth in his motion filed in this cause—

And afterwards to wit—on the 28th day of November, in the year last aforesaid, the said defendant filed in said Court, a certain affidavit in support of his said motion, which affidavit is in the words and figures, following to wit—

State of Illinois	}	Cook County Circuit
Cook County		St. Court, of the November Term. A.D. 1837.

Cornelius Price and Edward Burling, of said County, being each severally duly sworn, say that they were of the board of arbitrators to determine matters of difference between William H. Carter & Henry Miller, assessors, and John W. Waughop, growing out of the construction of their certain stone front dwellings, on Washington street, near Walash Avenue—

That in making the award in this case, we considered that the delay in furnishing the cut stone by the said Waughop, was the real cause of the damage to the work on the buildings of the said Waughop—That testimony to that effect was given by said Carter and Miller, and objected by said Waughop—

Subscribed and sworn to
before me, this 27th day
of November, A.D. 1857.



William W. Stewart - Cornelius Price
Ct. Pub. - Ed. Burling-

And afterwards, to wit - on the 3rd day of
December, in the year last aforesaid, the said
defendant filed his certain other affidavit
in said Court, which affidavit is in the words
and figures following, to wit -

John W. Waughops } Cook County Circuit
ads } Court, of the 1st Premier
William H. Carter & } Term A.D. 1857.
Henry Miller -
State of Illinois }
Cook County }

John W. Waughops of said
County, being duly sworn according to Law, says
that in the month of September last, he was
brought by John H. Thompson Esq. Attorney for
the plaintiffs in this suit, to submit to arbitra-
tion certain matters of differences between them,
growing out of the erection of 3 dwelling-houses
on Washington street -

That a submission was drawn up, and
during the treaty of agreement, it was asserted

that the delay of the cut stone in the work which was to be finished furnished by this ~~defendant~~ ^{affiant}, would be set up as an excuse for the imperfections in the work, and that damage would be charged for the delay, which would be equal to my damages for imperfections in the work under the contract - This affiant claimed an amount of damage more than equal to the balance, which would have been due if the work had been properly done - And the architects of this affiant withheld their certificate because the work was not done according to contract -

That this affiant objected to going into the question of the delay in the cut stone, and the submission was re-drawn for the purpose of excluding all reference to the delay occasioned by the non-delivery of the cut stone, and the damage consequent there^{upon}, and it was expressly agreed that that subject should be excluded -

That on the hearing before the arbitrator, the plaintiffs proved that the work under the contract had all been done, and also proved some extra work, and by a witness introduced by them this affiant proved that the work was so imperfectly done as that the architects refused them their certificate, which by the terms of the contract was necessary before payment could be demanded.

And by other witnesses this affiant proved that the damage to one of the buildings was such as to impair its value some \$300. and that they were all then very much alike. But contrary to the agreement at the submission, they offered to show that the cause of the damage to the work was the failure to furnish the cut stone of this affiant, the very subject that had been excluded by the submission, and by special agreement to that effect—

That they did insist on showing, and witnesses did actually swear on the subject of the delay in furnishing the cut stone, before the said arbitrators, notwithstanding the agreement and protestations of this affiant to the contrary—

That the delay in furnishing the cut stone was considered by the arbitrators in making up their award, and they in effect set off the damage for failure to deliver the cut stone, against the damage for imperfections in the work, and thereby decided what was not submitted to them, but expressly withheld by agreement—

That the plaintiffs claim that they now still have their remedy against this affiant for damage for failure to deliver the cut stone.

That the contract of this affiant with the stone dressing company, contained a clause

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which precluded any damage for delays caused by strikes by workmen, or Epidemics - and said Plaintiffs were aware of the clause in the contract - That the delay, if any was from strike of that season among workmen

That this affiant was not prepared with testimony to show the delay and other things tending to mitigate the damage for alleged delay, because the whole ~~was~~ subject of cut stone and delay in furnishing same, had been excluded by agreement -

That the claim of this affiant before the arbitrator was not for a delay in the time under the contract between him and the said Carter and Miller, but was for imperfection in the work -

That the defects in the work were not of a character to be produced by the delay in furnishing the cut stone, and if they had been, it would have been improper under the submission, as all such damages was excluded, and the effect of the proof given before the arbitrator was to make a case of damages, for delay in cut stone, which made an offset -

That the best evidence offered before the arbitrator was to the effect that the cold weather had nothing to do with the defects in the work, that frost would not so affect work -

That this ^{affiant} evidence is made to obtain an

order to vacate the judgment in this cause, that the whole subject may be tried on its merits, and not be allowed to stand as a record of bad faith, in insisting on matters already excluded by agreement - no prejudice except the delay can accrue, and further affiant saith not -

Subscribed and sworn to } J. W. Waughop.
before me, this 5th day }
of December, 1837 }
Wm L. Church }
Clerk -

And afterwards to wit on the 5th day of December, in the year last aforesaid, the said plaintiffs, by their attorneys, filed in said Court, a certain affidavit, which is in the words and figures following, to wit -

State of Illinois }
County of Cook } ss

William H. Carter, being duly sworn, says that he is a member of the firm of Carter and Miller - that in September last, said firm had claims against John W. Waughop Esq. for a balance due upon a contract for the masonwork upon three houses on Washington street, and for extra work done on said houses, but not included in said contract, and for

damages for the failure of said Waughop to deliver the cut stone used in the erection of said houses, at the time he was required by said contract to deliver the same - and that said Waughop claimed damages from said Carter and Miller for defective work in said houses -

And this affiant further says that all matters of controversy in relation to said houses, between said parties, except the claim of said Carter and Miller, for damages for said alleged failure to deliver said cut stone, were submitted for decision to the arbitrator, upon whose award the judgment has been heretofore rendered in the Cook County Circuit Court, in favor of said Carter and Miller and against said Waughop -

And this affiant further says that upon the hearing in said cause before said arbitrator, the said Waughop claimed that said Carter and Miller had not complied with said contract, and were not entitled to recover under it, and also claimed damages for defective work in and upon said buildings, and that said Carter and Miller then offered evidence to show that ^{the} said Waughop's failure to deliver the cut stone as he was required by said contract to deliver the same, had prevented the said Carter and Miller from complying with the said contract, and that the said Waughop

delay in delivering said stone was the cause of all the defects complained of by said Waughop, and for which he sought to recover damages in said arbitration -

And this affiant further says that upon the hearing of said cause before said arbitrators the counsel of said Carter and Miller distinctly and repeatedly stated to the said arbitrators, that the said Carter and Miller did not claim to recover in said arbitration any damages for the failure or delay of said Waughop in delivering said stone, but that the evidence in relation to the delivery of said stone, was offered to show that the said Waughop prevented the said Carter and Miller from complying with said contract, and that the delay of said Waughop in furnishing said stone was the cause of the defects for which said Waughop sought to recover damages -

And this affiant further says that upon said hearing, evidence was offered, showing or tending to show, that by his delay in furnishing said cut stone, the said Waughop prevented said Carter and Miller from complying with said contract, and made it impossible for said Carter and Miller to complete said buildings before cold weather, and that it was impossible to avoid the defects complained of by said Waughop at that time

and that but for the acts of said Waughop the said work would have been done and completed before the cold weather, and the contract would have been kept, in each and every particular—

And this affiant further says that the sum awarded to the said Carter and Miller by said arbitrator was less than the sum claimed by them for their work done under said contract, and for extra work and interest thereon, and that nothing was claimed or allowed for damage suffered from the failure of said Waughop to deliver the said cut stone, at the time specified in said contract—

And this affiant further states says that he is informed and believes that the said arbitrator considered the delay of said Waughop in furnishing said cut stone, only so far as it might legally furnish an excuse to said Carter and Miller for non-compliance with the contract, and might be a good defence against the claims of said Waughop for damages, by showing that the defects he complained of were the consequences of his own acts.

Subscribed and sworn to }
before me, this 1st day of }
December A. D. 1857 }

W. H. Carter—

Wm L. Church

Clerk

And afterwards, to wit - at the November term of said Court, to wit, on the fourth day of January, A.D. 1858. the following proceedings among others in said Court, were had and entered of record, therein, to wit -

2113. William H. Carter
 & Henry Miller,
 as } Motion to vacate judgment
 John W. Waughop.

This day comes the said plaintiffs, by Thompson, of counsel, and the said defendant in his own proper person, also comes, and the Court, on reading the affidavits filed in support of the defendant's motion to vacate the judgment entered by this Court, at a former term hereof, upon an award filed in this Court, as well as the conculi affidavit filed by said plaintiffs in opposition to said motion, and upon hearing counsel in that behalf, and being now fully advised in the premises, doth order that said motion be, and it hereby is overruled, and it is further ordered that the said defendant pay the costs of his said motion, and that execution issue therefore -

And the said defendant hereupon excepts to the ruling of the Court, and prays an appeal. To the Supreme Court of the State of Illinois, which is granted, on condition that he file a bond in the penal sum of

twelve hundred Dollars, with H. B. Hurd as surety, conditioned according to law, within twenty days, and also his bill of exceptions—

And afterwards, to wit—on the fourteenth day of January, in the year last aforesaid, the said defendant filed in said Court, his certain appeal bond, which is in the words and figures following to wit—

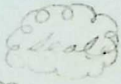
Know all men by these presents that we, John W. Waughop and Harry B. Hurd, of the County of Cook and State of Illinois, are held and firmly bound unto William H. Carter and Henry Miller of said county, in the penal sum of twelve hundred Dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs and administrators, jointly, severally and firmly by these presents—

Witness our hands and seals, this Twelfth day of January A.D. 1838.

The condition of the above obligation, is such that whereas the said William H. Carter and Henry Miller did on the nineteenth day of October A.D. 1837. before the Honorable George Manierre, Judge of the Cook County Circuit Court, in and for the County of Cook, and State of Illinois, recover a judgment on an award for the ^{sum} ~~same~~ of seven

hundred and forty two Dollars and seventy nine cents, against him, from which judgment and the ruling of the said Circuit Court in refusing to vacate the said judgment, the said John W. Waughop has taken an appeal to the Supreme Court of the State of Illinois—

Now therefore if the said John W. Waughop shall duly prosecute his appeal herein, and in case the judgment of the said Circuit Court, shall be affirmed, shall pay the said judgment, interest, damages and cost thereon, then the above obligation to be void, otherwise to remain in full force and effect—

John W. Waughop 
 W. B. Reed 

And afterwards, to wit— on the day and year last aforesaid, (to wit, January 14. A.D. 1858) the said defendant filed in said Court, his certain bill of exceptions, which is in the words and figures following, to wit—

State of Illinois }

Cook County }

Cook County Circuit Court

John W. Waughop }

vs

of the 2^d December

term, A.D. 1857.

William H. Carter & }

Henry Miller }

Be it remembered that on the Twenty-fourth day of September, 1857, William H. Carter and Henry Miller of the one part, and John W. Waughop of the other part, all of Chicago, Illinois, entered into an agreement of submission of entire difference between them, under, and in pursuance of the statute in such case made and provided which said submission is in the words and figures following—

Copy of submission—

This Indenture made this 24th day of September A.D. 1857, by and between William H. Carter and Henry Miller of the one part, and John W. Waughop of the other part, all of said parties being of the city of Chicago, County of Cook, and State of Illinois, Witnesseth—That it is hereby agreed mutually agreed and understood by and between the said parties, that all claims of said Carter and Miller upon said Waughop, for payment for work and labor done, and materials furnished in and about the erection and comple-

tion of three dwelling houses built in the years 1855 & 1856. for said Waughop, and situated on Washington street in said city of Chicago, and all claim of said Waughop upon said Carter and Miller for any alleged defects in said work upon said houses, shall be, and the same hereby are submitted and referred to the arbitrament and award, and determination of Cornelius Rice, Levi H. Waterhouse and Edward Burling, all of said city of Chicago—

And the said arbitrators shall make and publish their award in writing, under their hands and seals, and deliver the same to the said parties, or to either of them, on or before the first day of October next, and it is hereby further agreed and understood by and between the said parties that judgment of the circuit court of Cook County aforesaid, shall be rendered upon the award made pursuant to this submission—

In witness whereof, the said parties have hereunto set their hands and seals the day and year first above written—

signed and sealed }
in the presence of }
J. H. Thompson }

W. H. Carter Seal

J. W. Waughop Seal

H. Miller Seal

Here follows the oath taken by the said arbitrators—

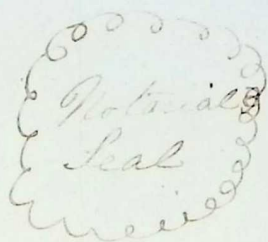
State of Illinois }
County of Cook } ss.

I, J. Howland Thompson, a
notary public, in and for the city of Chicago, in
said County, do hereby certify that Cornelius Price,
Lori A. Waterhouse, and Edward Burling, named
as arbitrators in the foregoing submission, before
proceeding to hear any testimony in the cause
herein mentioned, made oath that they would
faithfully and fairly hear, examine and deter-
mine the according, to the principles of equity
and justice, and make a just and true a-
ward to said Court, according to the best of their
understanding—

Given under my hand and notarial
seal, this 24th day of September, A.D. 1857.

(Signed)

J. Howland Thompson
Notary Public

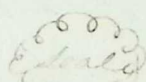


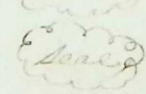
In pursuance of the said submission
the parties met the said arbitrators, and offered their proofs to
the said arbitrators, on the evening of the 24th
day of September, A.D. 1857, and after a hearing
of the said case, the said arbitrators returned as
their award, the paper, which is in the words
and figures following—to wit—

(Copy of the award made by the undersigned Arbitrators, pursuant to a submission made by William H. Carter and Henry Miller of the one part, and John W. Waughop of the other part, and dated Sept. 24. 1837.)

Award.

We, the subscribers, Arbitrators appointed by submission, hereto annexed, having notified and met the parties, and heard their several allegations, proofs and arguments, and duly considered the same, do award and determine that the said Carter and Miller should receive the sum of seven hundred and forty two $\frac{7}{100}$ Dollars, in full satisfaction for contract and extra work of Houses built for the said Waughop on Washington street, in Chicago, and the said Waughop should pay the said Carter and Miller, the aforesaid sum of seven hundred and forty two $\frac{7}{100}$ Dollars, the same to be in full satisfaction of all differences between the parties, as submitted to the undersigned -

Cornelius Price 

Ed. Bueling 

L. H. Waterhouse 

That on the seventh day of October, 1837. after notice to the appellant, the said award was filed in the Circuit Court, of Cook County Illinois, and a motion made to have the same

entered of judgment; after hearing of which, the said Court ordered that a judgment be entered for the amount of the award, and the cost against the appellant, on the nineteenth day of October 1857. The appellant filed by leaving the Court his motion to set aside the judgment rendered on the said award, which motion is in the words and figures following—

John W. Waughop ads William H. Carter & Henry Miller	} }	Cook County Circuit Court Of the October Term. 1857. Judgment on award.
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And now this day comes the said defendant in his own proper person, and moves the court to set aside the judgment rendered in this cause, for the following reasons—

1st Because the award of the arbitrators in this cause filed was made on matters and things not submitted to them, but expressly excluded from their consideration by agreement, before entering into the arbitration—

2^d Because matters and things that were excluded by agreement, from the arbitrators, was in bad faith afterwards presented and urged and actually considered by the arbitrators in making

up the award, upon which this judgment was rendered—

3rd Because evidence was received and considered by the arbitrators, which had been excluded from the arbitratas by express agreement—

4th Because the award is in fact a fraud on the rights of the defendant—

J. W. Waughop
For Res Rec.

That to sustain the motion to vacate the judgment rendered on the said award, the appellants filed the following affidavits. Here follows the affidavit of the appellant—

John W. Waughop	} Cook County Circuit Court of the November term A. D. 1857.
ads	
William H. Carter &	
Henry Miller	
State of Illinois)	
Cook County	} ss.

John W. Waughop, of said county, being duly sworn, according to laws, says that in the month of September last, he was besought by John H. Thompson Esq. Attorney for the plaintiff in the suit to submit to arbitration, certain matters of difference between them growing out of the erection of 3 dwelling houses on Washington street. That a submission was drawn up, and

during the treaty of agreement, it was asserted that the delay of the cut stone on the work, which was to be furnished by the said affiant, would be set up as an excuse for the imperfections in the work, and that damage would be charged for delay, which would be equal to ~~any~~ ^{my} damage for imperfection in the work under the contract. This affiant claimed an amount of damage more than equal to the balance which would have been due if the work had been properly done - and the architects of this affiant withheld their certificate because the work was not properly done according to contract. That this affiant objected to going into the question of the delay in the cut stones, and the submission was so drawn for the purpose of excluding all reference to the delay occasioned by the non-delivery of the cut-stones, and the damage consequent thereupon - And it was expressly agreed that that subject should be excluded. That on the hearing before the arbitrators, the plaintiffs proved that the work under the contract had all been done, and also proved some extra work, and by a witness introduced by them, this affiant proved that the work was so imperfectly done, as that the architects refused them their certificate which by the terms of the contract was necessary before payment could be demanded. And

by other witnesses, this affiant proved, that the damage to one of the buildings was such as to impair its value some \$300. and that they were all then very much alike - But contrary to the agreement at the submission, they offered to show that the cause of the damage to the work, was the failure to furnish the cut-stone. By this affiant, the very subject that had been excluded by the submission and by special agreement to that effect - That they did insist on showing, and witnesses did actually swear on the subject of the delay in the furnishing the cut-stone before the said arbitrators, notwithstanding the agreement, and the protestations of this affiant to the contrary - That the delay in the furnishing the cut-stone was considered by the arbitrators, in making up their awards, and they in effect set off the damage for failure to deliver the cut-stone against the damage for imperfections in the in the work - and thereby decided what was not submitted to them, but expressly withheld by agreement - That the plaintiff claims that they now still have their remedy against this affiant for damage for failure to deliver the cut-stone - That the contract of this affiant with the stone-dressing company, contained a clause which precluded any damage for delays, caused by strikes, by workmen, or epidemics, and

said plaintiffs were aware of the clause in the contract - That the delay, if any, was from strike of that season, among the workmen -

That this affiant was not prepared with testimony to show the delay and other things tending to mitigate the damage for alleged delay, because the whole was subject of cut-stone, and delay in furnishing same, had been excluded by agreement - That the claims of this affiant before the arbitrator, was not for a delay in the time under the contract between him and the said Carter and Miller, but was for imperfections in the work -

That the defects in the work were of a character to be produced by the delay in furnishing the cut-stone, and if they had been, it would have been improper under the submission, as all such damage was excluded - and the effect of the proof given before the arbitrator was to make a case of damage for delay in cut-stone, which made an offset -

That the best evidence offered before the arbitrator, was to the effect that the cold weather had nothing to do with the defects in the work, that frost would not so affect work -

That this affidavit is made to obtain an order to vacate the judgment in this cause, that the whole subject may be tried on its merits.

and, not be allowed to stand as a record of bad faith, in insisting on matters already excluded by agreement. No prejudices except the delay can accrue, and further affirm faith not-
 Subscribed and sworn to.

Before me, this 3rd
 day of December, 1837.

J. W. Waughop.

Wm B. Church

Clerk

He follows the affidavit of Edward
 Bowling and Cornelius Price, two of the said
 arbitrators - which is in the words and figures
 following, to wit -

State of Illinois } Cook County Circuit Court
 Cook County } ss of the 1st Term A.D. 1837.
 Cornelius Price and Edward

Bowling of said county, being each duly several-
 ly duly sworn, say that they were of the board
 of arbitrators to determine matters of difference
 between William H. Carter and Henry Miller,
 masons, and John W. Waughop, growing out of
 the construction of three certain stone front
 dwellings on Washington street ~~near~~ ^{near} Wabash
 Avenue.

That in making the award, in this case, we
 considered the delay in furnishing the cut-
 stone, by the said Waughop, was the real

cause of damage to the work on the building of the said Waughops - That testimony to that effect was given by said Carter and Miller, and objected by said Waughops.

Subscribed & sworn to } Caroline Rice
before me, this 27th day } (Signed) Edward Burling
of Illinois. A.D. 1837. }

Wm. M. Stewart

Not. Pub.



And to resist the said motions to set aside the judgments rendered on the said award, the defendants filed the following affidavit of William H. Carter, one of the said appellees, to wit -

State of Illinois }
Cook County } ss.

William H. Carter, being duly sworn, says that he is a member of the firm of Carter and Miller - that in September last, said firm had claims against John W. Waughop Esq. for a balance due upon a contract for the mason-work upon three houses on Washington street - and for extra work done on said houses, but not included in said contract, and for damages for

the failure of said Waughop to deliver the cut stone used in the erections of said houses at the time he was required by said contract to deliver the same and that said Waughop claimed damages from said Carter and Miller for defective work in said houses—

And this affiant further says that all matters of controversy in relation to said houses between said parties, except the claim of said Carter and Miller for damages for said alleged failure to deliver said cut stone, were submitted for decision to the arbitrator, upon whose award, the judgment has been heretofore rendered, in the Cook County Circuit Court, in favour of said Carter and Miller, and against said Waughop. And this affiant further says that upon the hearing in said cause, before said arbitrator, the said Waughop claimed, that said Carter and Miller had not complied with said contract, and were not entitled to recover under it, and also claimed damages for defective work in and upon said buildings, and that said Carter and Miller then offered evidence to show that the said Waughop's failure to deliver the cut stone as he was required by said contract to deliver the same, had prevented the said Carter and Miller from complying with the said contract, and that the said Waughop's delay in delivering said cut

stone, was the cause of all the defects complained of by said Waughop, and for which he sought to recover damages in said arbitration—

And this affiant further says that upon the hearing of said cause before said arbitrators, the counsel of said Carter and Miller distinctly and repeatedly stated to the said arbitrators, that the said Carter and Miller did not claim to recover in said arbitration any damages for the failure or delay of said Waughop in delivering said stone, but that the evidence in relation to the delivery of said stone, was offered to show that the said Waughop prevented the said Carter and Miller from complying with said contract, and that the delay of said Waughop in furnishing said stone, was the cause of the defects for which said Waughop sought to recover damages—

And this affiant further says that upon said hearing, evidence was offered, showing, or tending to show, that by his delay in furnishing said cut stone, the said Waughop prevented said Carter and Miller from complying with said contract, and made it impossible for said Carter and Miller to complete said buildings before cold weather, and that it was impossible to avoid defects complained of by said Waughop at that time, and that

but for the acts of said Waughop, the said work would have been done and completed before the cold weather, and the contract would have been kept in each and every particular. And this affiant further says that the sum awarded to the said Carter and Miller by said arbitrators, was less than the sum claimed by them for work done under said contract, and for extra work, and interest thereon, and that nothing was claimed or allowed for damage suffered from the failure of the said Waughop to deliver the said cut-stone at the time specified in said contract.

And this affiant further says that he is informed and believes that the said arbitrators considered the delay of said Waughop in furnishing said cut-stone, only so far as it might legally furnish an excuse to said Carter and Miller for non-compliance with the contract, and might be a good defence against the claims of said Waughop for damages, by showing that the defects he complained of, were the consequences of his own acts—

Wm H. Carter

Subscribed and sworn to }
 this 1st day of December }
 A.D. 1837. before me,

Wm. L. Church. Clerk.

That on the hearing of the motion to vacate the judgment rendered on the said award, the reading of affidavits and arguments of counsel, the said Court refused to make an order vacating said judgment, but made an order overruling the said motion, but confirmed the order rendering a judgment on the said award - to which ruling of the said Court, the appellant took exception, and prayed an appeal to this Court -

Given under my hand and seal, this Eighth day of December A.D. 1857.

George Mariner ^(Seal)
Judge of 7th Judicial
Circuit, Ills.

State of Illinois, }
COUNTY OF COOK. } s. s.



I, WILLIAM L. CHURCH, Clerk of the Circuit Court of Cook County, in the State aforesaid, do hereby certify the above and foregoing, to be a true, perfect and complete copy of the papers filed & orders made & entered of record in a certain cause lately pending in said Court on the Law side thereof, wherein William Mc Carter & Alwen Plaintiffs and John W. Mayhew defendant

IN WITNESS WHEREOF, I have hereunto set my hand, and affixed the seal of our said Court at Chicago, this 26th day of March A. D. 1858

fees for Recd \$ 8 50 Paid

W. L. Church
Clerk.

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[12674-11]
Superior Court

J. W. Vaughan
vs

Carter & Miller

Attorneys of Error

Filed April 27, 1858.
L. Leland
Clerk

Supreme Court of Illinois

John W. Wauprop } Of the April Term
vs } A. D. 1858
William H. Carter }
& Henry Miller }

And now this day comes
the said Plaintiff in error in his own
proper person and says that there
is error in the record in this cause.

The judgment should have been for
the appellant & not for the appellee.

And says that the Court erred
in overruling the motion to set aside
the judgment rendered herein for the
following reasons

1st That the arbitrators who made the
award herein, heard and determined
matters and things not submitted to them.

2^d That the arbitrators heard and con-
sidered subjects that were on purpose
excluded from the submission.

3^d That the arbitrators heard, and
considered testimony on subjects that
had been by agreement excluded from
the submission and considered such
testimony in making their award herein.

4th Because the plaintiff was deceived by
the agreement to exclude subjects afterwar

in bad faith introduced and considered
by the arbitrators, contrary to objections
made at the time.

For these and other reasons the
appellant prays for a reversal of
said judgment.

J. W. Mangrove
In Pro. P.

And now the said defendants in error
come and say that there is
no such error in the record or pro-
ceedings in this cause as is above
alleged by the plaintiff in error.
And these defendants pray that
the judgment rendered in said
cause may be affirmed.

Thompson & Bishop
Attorneys for
Def'ts. in error.

April 27, 1858.

SUPREME COURT OF ILLINOIS.

JOHN W. WAUGHOP, *Plff. in Error*
~~Appellant,~~

vs.
WILLIAM H. CARTER, *et al.*,
~~Appellees.~~ *Defrs. in Error*

Appeal from Cook Circuit, April Term, 1858.

J. HOWLAND THOMPSON,
HENRY W. BISHOP, JR.,

~~Appellees' Attorneys~~ *of Defrs. in Error*

POINTS OF ~~APPELLED~~ *Defrs. in Error*

I.—The Appellant's objections to the award upon which judgment was rendered in the Circuit Court, were made too late, and could not be considered by the Court on the hearing of Appellant's motion to set aside the judgment.

Rev. Stat., chap. vii, sec. XII. Claypool vs. Miller, 4 Blackf. 163. Ewing, admr. vs. Beauchamp, 2 Bibb. 456.

II.—This Court cannot go back of the award, or consider any objections to it except those apparent on its face.

McDonald vs. Arnout, 14 Ill., 58. Merritt vs. Merritt, 11 Ill., 565. Smith vs. Douglass, 16 Ill., 99. Rogers vs. Holden, 13 Ill., 293.

III.—Everything is to be presumed, and every reasonable intendment made in favor of an award—*a fortiori* in favor of a judgment upon an award.

McDonald vs. Arnout, 14 Ill., 58. Root vs. Renwick, 15 Ill., 461. Strong vs. Strong, 9 Cush., 461. Rigelow vs. Newell, 10 Pick, 354. Karthaus vs. Ferrer *et al.*, 1 Pet. 228. Burchell vs. Marsh, *et al.*, 17 How., 344.

IV.—The affidavit of the arbitrators, Price & Burling, is not admissable to impeach the award.

Newland vs. Douglass, 2 Johns. 61. Ward vs. Gould, 5 Pick-
291. Worthington vs. Warren, 10 Met. 431. Bigelow vs.
Maynard, 4 Cush., 317.

V.—The Appellant's motion is based upon the allegation that the Appellees offered and the arbitrators considered evidence of the Appellant's failure to deliver certain cut stone. This evidence was proper, if it tended to show that the Appellees were entitled to recover for their work, labor and materials, or that the Appellant was not entitled to recover for the defects alleged in said work.

Submission, Transcript, page 1st.

VI.—The evidence tended to show that the Appellees were prevented by the Appellant from fulfilling the contract, and were therefore entitled to recover for the work actually performed under the contract.

Coke Litt. 206 b. Mains vs. Haight, 14 Barb. Sup. Ct. R. 76.
Bank of Columbia vs. Hagner, 1 Pet. 467. Risinger *et al.*
vs. Cheney, 2 Gil. 90. Frazier vs. Cushman, 12 Mass. 279.
2 Smith's Leading Cases, p. 21, Notes on Am. Cases.

VII.—The evidence also tended to show that the defects for which Appellant claimed damages were the consequence of his own act, and that therefore he could not recover damages for these defects.

Green vs. Brown, 3 Barb. Sup. Ct. R. 119. 2 Parsons on
Contracts, 187, 188, 189. Aurora Br. R. R. Co. vs. Grimes,
13 Ill., 585.

Wm Carter Esq
H⁷ vs 120.

John W. Mayhew

Recd

Recd April 9 1818
Leland
Clerk

Recd 8 50

Argument for
Def't. in error.

Supreme Court

John N. Naugbors Pltff. in Error	} Error to <u>Cook</u>
vs William H. Carter Def't. in Error	

Statement. The Parties to this Suit submitted certain differences to three arbitrators, who heard the evidence offered by the parties & made & published their award. The Submission provided that judgment should be rendered upon the award in the Circuit Court of Cook County and in pursuance of the Submission and the Statute the Submission and award were filed in said Court in vacation. At the following Term of the Court, notice having been duly served, a judgment was rendered on the award against the ~~plaintiff~~ plaintiff in error for the amount found due the defendants in error by the arbitrators. Up to this time and for two weeks after the rendition of the judgment, no objection was made to the award

or to any of the proceedings of the
arbitrators or of the Circuit Court.
On the 31st of October, two weeks after
final judgment on the award in the
Circuit Court, the Plaintiff in
Error filed a motion to set aside
the judgment. He did not found
his motion upon any alleged error
apparent on the face of the award
or any error in any of the pro-
ceedings in the Circuit Court.
Going back of the judgment & back
of the award the Pltff. in Error based
his motion upon the act of the other
party in offering & of the arbitrators
in considering certain evidence
which he claims was inadmissible.
In support of his motion the Plaintiff
in Error filed his own affidavit and
the affidavits of two of the arbitrators,
and one of the Defendants in Error
filed a counter affidavit. Upon
hearing, the motion was overruled
and the Pltff. in Error now assues
for error, that the judgment should
have been for him instead of the Dfts. in
Error.

Answer to
the ^{2nd} ^{and} ^{4th} ^{and} ^{5th}
Error. As there has never been any
pretence that there was any error
in any of the proceedings in the Circuit
Court, as the record shows that
the submission was made under
and in accordance with the statute,
that the arbitrators were sworn,
that the submission was strictly fol-
lowed, that the submission and award
were filed in the Court named in
the submission, that notice was
duly served, and no legal objections
appearing to the award that final
judgment was rendered upon it
at the next term after it was
filed, I am at a loss to under-
stand upon what ground this
error is assigned. The submission
award following the statute and
no objection whatever being made
to the rendition of the judgment and
the award being valid on its face,
it is difficult to see how the Court
could have done otherwise than
render judgment upon the award.
Nor was the judgment ever excepted to or any
appeal from it ever prayed.

Overruling
motion to set
aside judgment.

The Pltff in Error assigns for error
the overruling of his motion to set aside
the judgment. Did the Circuit Court
err in overruling this motion?

Rev. Stat.
Chap VII. Sec XII

Too late to set
aside the award
much more the
judgment?

The Statute on Arbitration & Awards
provides that awards, made as this
was under the Statute, may be set
aside & amended for certain causes,
but it provides expressly that
application to set aside or amend must
be made before final judgment on
the award. In this case no application
to set aside the award has ever been
made. The Plaintiff in Error had the
opportunity to make application and
he offers no excuse or apology for
not making it. If he had valid
objections to the award he should have
made them at the proper time or
forever after held his peace. How
strictly the Statute should be construed
may be judged from the decisions of
the English Courts upon the Statute
of the 9 & 10 W. 3 c 15 which provided
that an arbitration might be set
aside for "corruption or undue practice"
2 L.R. 781 within a certain time, and upon

Lowndes Which it was held that whatever the
Lowndes ²⁷ nature of the objection to the award
1 East-276 might be, it must be made within
the time limited by that act.

The Plaintiff in error could not have
moved to set aside the award when
he made his motion to set aside the
judgment. Can he then move to set
aside the judgment for objections
which go to the award and which
it is too late for him to take ad-
vantage of? Can he thus defeat the
end and object of the statute? Can he
move to set aside the judgment
^{for objections} which nothing but his own fault
prevented him from making to the
award? Can he thus preserve his
rights by sleeping upon them?
If the award could not be set aside
for the fault or mistake of the arbitrator
still less can a judgment rendered
upon the award.

If it should be claimed that
the Court had the right to set aside
the judgment or the award at Com-
mon Law I submit,

1/1 That at Common Law an
award was conclusive unless

Marritt v. Marritt
11 Dec 568

fraud or misconduct was shown on the part of the arbitrators. A mistake is no defence to an action on an award. The law does not presume that the parties intended to have their case decided by the strict rules of the law. If they had they would have naturally gone into Court for trial. They must abide by the judgment of the judges they have selected.

Clayton v. Miller
4 Blackf. 163

121 Objections to the award must be apparent on its face or they are not entitled to be considered at Common Law.

If the plaintiff in Error has any remedy it is in Chancery. Not only was the Court below not bound to set aside the judgment but it had no right to do it, & if any error was committed it was in considering the motion made by the Pltff in error.

Affidavit of
Price & Burling
inadmissible
2 Johns 61
5 Pick. 291
10 Met. 431
4 Cash 317
7 N. H. 344
4 Com. 574

It would seem that the affidavits
of the two arbitrators, Price &
Burling were inadmissible, so far
as they tend to impeach their
award. Courts will not permit an
arbitrator after his award has been
published to impeach it by declara-
tions or affidavits or testimony. To
do this would open a wide door for
tampering with arbitrators, and
would unsettle adjustments of this
kind, & would make an arbitration
the beginning of strife instead of
an end of controversy.

But if, passing by all objections
the Court shall come to consider
the case as presented by the affi-
davits and the record, I submit
that by the strictest rules of the
Law there is no error in the case
and that the arbitrators never
considered and the Defendants
in error never offered any evi-
dence which was not perfectly
competent & proper and that no
subjects were heard or considered except
those properly submitted.

A plain Statement of the facts is a sufficient answer to the assignment of errors made in this case.

The matters submitted in the arbitration were the claims of Carter & Miller, the defts. in error for work & labor done upon three houses built under a contract for Waughops and the claim of Waughops, the Plff in error for damages for defective work. It is admitted that Carter & Miller had a claim against Waughops for damages for Waughops's failure to deliver certain cut stone at the time he was required by the contract to deliver it and that this claim was not submitted to the arbitrators. Was this claim for damages presented or considered by the arbitrators?

- (1) The award does not show that it was.
- (2) The affidavit of the two arbitrators does not show it. They say that they considered that the delay in furnishing the cut stone was the real cause of the damage to the work on the buildings. This damage was one of the matters submitted and whatever evidence showed the cause of it was proper & admissible.

(3) The affidavit of Waughp does not of itself show that the claim for damages for the failure to deliver the cut stone was presented or considered. He evades the subject & complains that "the subject of the delay" was introduced & considered. He had never agreed we never intended to exclude the subject of the delay so far as it bore upon the matter submitted. Even the Pleading in error does not pretend that the claim for damages was presented or considered.

(4) The affidavit of Carter shows that the claim for damages was not presented and that his counsel distinctly stated to the arbitrators that Carter & Miller did not offer or present any claim for damages for such delay.

On the hearing before the arbitrators Carter & Miller proved that they had done the work and labor, but it appeared in evidence that the work and labor were done under a special contract and that the contract had not been strictly complied with. If they had stopped there they would not have been entitled to recover.

So they offered evidence showing, or tending to show, that by the contract with Naughop, certain cut stone was to have been delivered by Naughop at a certain time, that the work could not be done until the cut stone was delivered, that the stone was not delivered at the time required by the contract, that the delay in delivering the stone made it impossible for Carter & Miller to comply with the contract and that in this way Naughop had prevented Carter & Miller from complying with the contract. They also offered evidence to show that the defects for which Naughop claimed damages before the arbitrators were the consequence of the delay to deliver the cut stone, that the stone was delivered so late that it was impossible to finish the work before cold weather & that the defects complained of were unavoidable when the work was done at that time.

The evidence in regard to the cut stone was offered for two purposes.

1. To show that Naughop prevented Carter & Miller from complying with

the contract and that they consequently were entitled to recover as if they had strictly complied with it on the ground that prevention or refusal is equivalent to performance. The evidence was competent for this purpose. It was necessary to enable Carter & Miller to recover for their work. They had never agreed not to offer evidence in support of their claim. Is it to be conceived that they would have agreed to exclude the very evidence without which they could not show that they were entitled to recover?

2. The evidence was also offered to show that the defects for which Fraughop sought to recover damages in the arbitration were the consequence of his own acts. It cannot be doubted that the evidence was proper & competent for this purpose.

Now are we to be excluded from proving the delay in the delivery of the cut stone where it is material and important as regards the matters submitted because we did not submit to the arbitrator our claim for damages for such delay?

2 Smith L. C. p 21
Notes on Mr. Case
18th Litt 2066.
14 Barb. Sup. Ct. R.
76.
1 (Rt. 467
2 Gil. 90
12 Mass 279

2 Parsons on
Con. 187, 188, 189
13 Ill 684
3 Barb Sup. Ct. R.
119.

The act of the Plff. in Error, like the
grave digger's in Hamlet, had a three
fold nature. (1) It prevented us from
complying with a contract; (2) It caused
damage to the Plff. in Error; & (3) It
caused us damage. Now our claim
for the damage caused by this act was
not submitted in the arbitration. But
our claim to recover under the contract and
a claim the Plff. in Error set up for the
damage caused to him by his own act
were submitted to the Arbitration and
it is a monstrous doctrine that
we are not to be allowed to prove
this act upon the trial of these two
matters. Our claim for damages is
independent of them and not affected by
either of them.

In a suit for damages brought
by us we could not recover for the de-
fects in the buildings for they belonged
to Waughp, and Waughp could
not recover of us unless we had the
right to recover back the very sum
recovered. This would lead to a
multiplicity of suits which the
law abhors.

The Plaintiff in Error complains that he was deceived but it is obvious that if there was any deception or attempt to deceive it was on his part. He seems to have intended to lead us into an agreement which would bind us hand & foot and deliver us over to his mercies. He would have led us into an agreement which would have rendered it impossible for us to sustain our claim or make any defence to his although we had a perfectly good claim or a perfect defence to his. We have not been led into any such trap but it is not his fault that we have escaped.

In submitting this case I have only to call the attention of the Court to the uniform disposition of the Courts to sustain awards.

They have always been regarded with favor. Everything is presumed & every reasonable intendment is made in favor of an award. This doctrine is fully sustained & repeatedly referred to in our decisions. And where a judgment has been rendered upon the award

9 Cush. 461
10 Pick. 334
1 Pet. 228
17 How. 344
14 Ill.

14 Dec. 58
15 Dec. 461

where it is sought to overturn the judgment
surely the Court will require that the
clearest case should be made out
to entitle the attempt to any consideration.
No such case is made out here and there
is hardly a shadow or suspicion cast
upon the correctness of the award.

Respectfully submitted

J. Howland Thompson
Counsel for Defs. in Error.

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John W. Maughop
vs
William H. Carter
et al.

Argument for
Defts in Error

Filed 21st May 1858
L. Nelson

J. Howland Thompson
Atty. for Defts in Error

SUPREME COURT OF ILLINOIS.

JOHN W. WAUGHOP,
Appellant,

vs.
WILLIAM H. CARTER, *et al.*,
Appellees.

} Appeal from Cook Circuit, April Term, 1858.
}

J. HOWLAND THOMPSON,
HENRY W. BISHOP, JR.,
Appellees' Attorneys.

POINTS OF APPELLEES.

I.—The Appellant's objections to the award upon which judgment was rendered in the Circuit Court, were made too late, and could not be considered by the Court on the hearing of Appellant's motion to set aside the judgment.

Rev. Stat., chap. vii, sec. XII. Claypool vs. Miller, 4 Blackf.
163. Ewing, admr. vs. Beauchamp, 2 Bibb. 456.

II.—This Court cannot go back of the award, or consider any objections to it except those apparent on its face.

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565. Smith vs. Douglass, 16 Ill., 99. Rogers vs. Holden,
13 Ill., 293.

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461. Strong vs. Strong, 9 Cush., 461. Rigelow vs. Newell,
10 Pick, 354. Karthaus vs. Ferrer *et al.*, 1 Pet. 228
Burchell vs. Marsh, *et al.*, 17 How., 344.

IV.—The affidavit of the arbitrators, Price & Burling, is not admissable to impeach the award.

Newland vs. Douglass, 2 Johns. 61. Ward vs. Gould, 5 Pick. 291. Worthington vs. Warren, 10 Met. 431. Bigelow vs. Maynard, 4 Cush., 317.

V.—The Appellant's motion is based upon the allegation that the Appellees offered and the arbitrators considered evidence of the Appellant's failure to deliver certain cut stone. This evidence was proper, if it tended to show that the Appellees were entitled to recover for their work, labor and materials, or that the Appellant was not entitled to recover for the defects alleged in said work.

Submission, Transcript, page 1st.

VI.—The evidence tended to show that the Appellees were prevented by the Appellant from fulfilling the contract, and were therefore entitled to recover for the work actually performed under the contract.

Coke Litt. 206 b. Mains vs. Haight, 14 Barb. Sup. Ct. R. 76.
Bank of Columbia vs. Bagner, 1 Pet. 467. Risinger *et al.*
vs. Cheney, 2 Gil. 90. Frazier vs. Cushman, 12 Mass. 279.
2 Smith's Leading Cases, p. 21, Notes on Am. Cases.

VII.—The evidence also tended to show that the defects for which Appellant claimed damages were the consequence of his own act, and that therefore he could not recover damages for these defects.

Green vs. Brown, 3 Barb. Sup. Ct. R. 119. 2 Parsons on
Contracts, 187, 188, 189. Aurora Br. R.R. Co. vs. Grimes,
13 Ill., 585.

ABSTRACT.

Supreme Court of Illinois.

JOHN W. WAUGHOP
vs.
WILLIAM H. CARTER & HENRY MILLER. } Of the April Term, 1858

- 1st page. This cause came into the Cook County Circuit Court, at the October term, 1857, on a motion for a judgment on an award.
- 1st page. The agreement of submission was entered into by and between the parties on the 24th Sept., 1857.
- Ditto. The claims of said Carter & Miller upon said Waughop for payment of work and labor done, and materials furnished, in and about the erection and completion of these dwelling houses built in the years 1855 and '56, in said city of Chicago.
- And all claims of said Waughop upon said Carter & Miller, for any alleged defects in the said work upon said houses, were submitted to the arbitrament and award of Cornelius Price, Levi H. Waterhouse and Edward Burling, that their award when made should be entered of judgment in the said Circuit Court.
- 11th page. The submission was drawn in such a manner as to intend by agreement to exclude all reference to the subject of the damage claimed by the said Carter & Miller, for an alleged delay by said Waughop to furnish the cut stone which was to be left for future adjustment.
- 15th page. Aff. Waughop. The arbitrators found as their award, that the said Waughop pay the said Carter & Miller the amount of their claims in full, to-wit: \$742 79 in full satisfaction for contract and extra work of houses in full for all differences submitted.
- 3d Page.
- 4th page. The award was filed, together with a notice to said Waughop, October 7, 1857.
- 6th page. At October Term, 1857, a judgment was rendered on said award, for the amount thereof, to-wit: \$742 79.
- 7th page. On the 31st of October, 1857, said Waughop, by leave in his own proper person, filed his motion to set aside the judgment for following reasons assigned in said motion.
- 7th page. 1st. Because the award of the arbitrators in this cause filed, was made on matters and things not submitted to them, but expressly excluded from their consideration by agreement before entering into the arbitration.
- 8th page. 2d. Because matters and things that were excluded by agreement from the arbitration, were in bad faith, afterwards presented and urged, and actually considered by the arbitrators, in making up the award upon which this judgment was rendered.
- 3d. Because evidence was received and considered by the arbitrators, which had been excluded from the arbitration by express agreement.
- 4th. Because the award is in fact a fraud on the rights of the defendant.
- 9th page. To support his motion, said Waughop produced affidavit of two of said arbitrators, Price and Burling, which state:
- Aff. Price & Burling. That in making the award in this case, they, as arbitrators, considered that the delay in furnishing the cut stone by said Waughop, was the real cause of the damage to the work on the buildings of the said Waughop. That testimony to that effect was given by said Carter & Miller, and objected to by said Waughop.
- 10th page. The affidavit of the said Waughop, in support of his motion, states:
- That during the treaty of agreement, it was asserted that the delay of the cut stone on the work which was to be furnished by said Waughop, would be set up as an excuse for the imperfections in the work, and that damage would be charged for the delay, equal to damage for imperfections in the work.
- 11th page. Said Waughop claimed damage to more than equal a balance due on the contract, if work had been accepted by architects. The work was not accepted, but certificate refused by architects of said Waughop.
- Ditto. That said Waughop objected to going into the question of the delay in the cut stone, and the submission was redrawn for the purpose of excluding all reference to the delay occasioned by the non-delivery of the cut stone, and the damage consequent thereupon, and expressly agreed that that subject should be excluded.
- 11th page. Also 15th. Aff. Carter. That the work was proven before the arbitrators to have been imperfectly done, and the architects refused their certificate which was required by the contract before payment could be demanded.
- 12th page. That proof was given before the arbitrators that the damage to one of the buildings was such as to impair its value some \$300, and that they were all three very much alike.
- Ditto. That witnesses on the subject of the delay in the cut stone, were introduced and sworn, and testified on that subject before the said arbitrators.

- That the subject of the cut stone was actually considered in making the award.
- 12th page. That such testimony was admitted, over the objection of the said Waughop.
- 9th page. That the said Carter & Miller still have their remedy for the delay in the cut stone.
- 12th page. The contract for the cut stone was such that it would exclude damage for delay in case of strike or epidemic, and said Carter & Miller were aware of the clause.
- 13th page. That said Waughop was not prepared with proof on the subject of the cut stone, as that subject had been excluded.
- Ditto. That said Waughop set up no claim for delay in the completion of the work under the contract, but for bad work.
- Ditto. That the defects in the work done for said Waughop were not of a kind to be produced by any delay in the cut stone.
- The effect of the proof before the arbitrators was such as to make a case of damage for failure to deliver cut stone, in shape of off-set.
- 13th page. The best proof given before the arbitrators was to the effect that the cold weather had nothing to do with the defects in the work, that frost would not so effect work.
- 15th page. Affidavit of said Wm. H. Carter states that they had claim for balance due for extra work, and for damages for a failure to deliver the cut stone used in the erection of said houses. That said Waughop claimed damages for defective work in said houses.
- 15th page. That all matters in controversy in relation to said houses were submitted to decision to arbitrators, except the claim of said Carter & Miller for damages for said alleged failure to deliver said cut stone.
- 15th page. That said Waughop claimed that said Carter & Miller had not complied with the said contract, and were not entitled to recover under it, and also claimed damages for defective work upon said buildings.
- That said Carter & Miller offered evidence to show that the said Waughop's failure to deliver the cut stone as he was required by said contract to deliver the same, had prevented the said Carter & Miller from complying with the said contract, and that the said Waughop's delay in delivering said stone, was the cause of all the defects complained of by said Waughop, and for which he sought to recover damage in said arbitration.
- 16th page. That upon the hearing, his attorney stated that said Carter & Miller did not claim to recover in said arbitration any damages for failure or delay of Waughop in delivering said stone, but that the evidence in relation to the delivery of said stone was offered to show that the said Waughop prevented the said Carter & Miller from complying with said contract, and that the delay of said Waughop in furnishing said stone was the cause of the defects for which said Waughop sought to recover damages.
- 16th page. That testimony was offered showing, or tending to show, that by his delay in furnishing said cut stone the said Waughop prevented said Carter & Miller from complying with said contract, and made it impossible for said Carter & Miller to complete said buildings before cold weather, that it was impossible to avoid the defects complained of by said Waughop at that time, and that but for the acts of the said Waughop, the said work would have been done and completed before cold weather, and the contract would have been kept in each and every particular.
- 17th page. That the amount awarded was less than the amount claimed by them for work done under said contract, and for extra work and interest, and that nothing was allowed for damages for from failure of said Waughop to deliver the said cut stone.
- That he is informed, and believes, that the said arbitrators considered the delay of said Waughop in furnishing said cut stone, only so far as it might legally furnish an excuse to said Carter & Miller for non-compliance with the contract, and might be good defense against the claims of said Waughop for damages, by showing that the defects he complained of were the consequences of his own acts.
- 18th page. On a hearing, the motion was overruled and an exception taken and appeal awarded to the Supreme Court of the State of Illinois, security approved, and approved bond filed.

120-18
abstract

J. W. Waughop

vs

Carter & Miller

Filed April 22, 1858

L. Leland
Clerk

STATE OF ILLINOIS, }
SUPREME COURT, ss.

To the Clerk of the

Verdict Court for the County of *Cook* Greeting:

Because, In the record and proceedings, as also in the rendition of the judgment of a plea which was in the *Verdict* Court of *Cook* County, before the Judge thereof, between *William H Carter & Henry Miller*

plaintiff, and *John W. Weinghoff*

defendant, it is said manifest error hath intervened, to the injury of the aforesaid *Defendant*

as we are informed by *his* complaint — and we being willing that error should be corrected, if any there be, in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly, without delay, send to our Justices of the Supreme Court the record and proceedings of the plaint aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at Ottawa, in the County of La Salle, on the first Tuesday after the third Monday in ^{AD 1858} ~~April~~ next, that the record and proceedings, being inspected, we may cause to be done therein, to correct the error, what of right ought to be done according to law!

Witness, The Hon. John D. Caton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this *8th* day of *April* — in the Year of Our Lord one thousand eight hundred and fifty-eight.

J. B. Rice
Clerk of the Supreme Court.
by *J. B. Rice*

John W. Wainhop¹²⁰
vs
William H. Carter et al

Writ of Error

Filed April 9, 1838
S. Le Land
Clerk

Supreme Court of Illinois
John W. Waughner } 3^d Division
vs } April Term
Wm. H. Carter & Henry Miller } 1858.

The Clerk will have the kindness
to issue a Scire-facias to hear
errors in the above cause. To Cook
County

Arnold Larned & Lay
& John W. Waughner

In Pro Per
Atty. for Pff
In error

Precipe

Filed April 8, 1858
Leland
RKR

John W. Wainwright } Supreme Court of Arkansas
vs }
Carter & Miller } Considerations for the Court.

The Plaintiff in error, in this cause would submit to the Court for their consideration, and as reasons why the judgment of the Circuit Court in this cause should be reversed the following considerations,

First. The plaintiff would urge to the Court that in the course of his connexion with this case he has been impressed with the belief that the favour that Courts in this State have been accustomed to give to awards of Arbitrators has in many instances and manifestly in this case been productive of wrong.

Because Arbitrators are more loose in their acts than a jury, they decide for themselves all law points, may assume unchecked oppressive authority, whereas a jury is directly under the control of the Court, and their verdicts more likely to be correct, and at the same time they are reviewed with a great deal more strictness than awards of arbitrators.

In the case before the Court I will state one fact which appears on the record, as the principal point in the case. The submission in this was drawn on purpose and by intention to exclude a certain subject from the Arbitrators to wit delay in out-stow. This as proved by the affidavits of both parties see page 11 & 15 of record must be concussive. And on the face of the award the naked question submitted was then claim for work and materials, and my claim for defects in the

work and materials furnished. But regardless of this the arbitrators override the objection of the plaintiff and admit proof on the excluded subject of cutstone. Which to my mind is a clear step beyond their jurisdiction and renders their award void.

That to consider this subject for any purpose was clearly wrong and erroneous the plaintiff urges 1st That any subject not clearly submitted could not be considered for any purpose without prejudice to the case of the party sought to be affected by the testimony on the subject excluded. If it could be introduced for one purpose it might for another, and in either or any aspect in which it could have been considered it operates as an offset of the damages for the delay against the imperfections in the work, which of course is a full consideration of the whole subject of the delay.

2^d The plaintiff in error is left liable for the damages for the delay in a separate action when at the same time the damages have in fact been ~~collected by the~~ recovered in the award by the arbitrators letting in the subject after it had been excluded, thus creating a duplicate obligation, he cause the arbitrators have exceeded their jurisdiction.

3^d The introduction of excluded matter was error for the reason that it does the plaintiff injustice by way of surprise and will not afford him the means of to answer the testimony on those parts of his case. Thus by the action of the arbitrators the plaintiff has not had a fair trial.

4th That it was a fraud on the rights of the

plaintiff for the defendant to introduce and pass matters to the Arbitrator, which had by agreement been excluded in forming the ~~award~~ submission, as the case was prejudiced and corrupted by the act, and the cause should have been opened by the Circuit Court, and heard de novo. These views are sustained by the Court in the case of McCormick vs Gray et al. 13 Howard Page 39. & are right.

The arbitrators assert in their affidavit that in making their award they did consider the subject of the cut stone, and that the testimony on that subject was objected by the plaintiff.

It is asserted that the only purpose for which the proof was offered was to show that the delay in the cut stone was my act and caused the defects in the work. Now this is the very light in which alone it was excluded for because to all intents and purposes they get the benefit of the excluded matter leaving the plaintiff at the same time liable to a separate action for the damage for the alleged delay in the cut stone, and I conceive that the plaintiff will in such consideration be estopped from setting up the imperfections in the work, giving the defendant an advantage by their own unfair act which I think this Court will not countenance. ~~As~~ The Circuit Court did wrong ~~then~~ the cause should by all means be remanded for a fair and impartial trial and on its true merits. With these brief considerations the case is submitted.

J. W. Vaughan
In Plo Person

120 = 151

Wanghop
vs

Carter & Muller

Consideration for
the Court.

Wanghop
vs

Carter et al

Filed May 27 1858
L. Leland
clerk

Submitted May 21st