No. 12276

Supreme Court of Illinois

Haywood, et al.

---

vs.

Harmon, et al.

Folio 1

State of Illinois }
Cook County } S.S.

Pleas before the Honorable George Manierre Judge of the seventh judicial Circuit of the State of Illinois and presiding Judge of the Circuit Court of the County of Cook in said State, at a term thereof begun and held at Chicago in said County of Cook on the third Monday (being the nineteenth day) of November in the year of our Lord One thousand eight hundred and fifty five and of the Independence of the United States the eightieth.

Present:

The Honorable George Manierre, Judge of said Court

David McIlroy, Esqr. States Attorney

James Andrew, Sheriff of Cook County

Attest Lewis D. Hoard Clerk of said Court.

Be it remembered that heretofore to wit on the sixth day of August in the year of our Lord one thousand Eight hundred and fifty five, there was filed in the Office of the Clerk of the Circuit Court of Cook County in the State of Illinois the following Precipe which was in words and figures as follows to wit:

S1237(-1)

2

Cook County Circuit Court
the October Term A.D. 1855

Isaac D. Harmon &
Charles L. Huntoon
v.
Rufus Haywood &
Benjamin Sirous

The Clerk of said Court will issue Summons in the above entitled suit in a Plea of Assumpsit, directed to the Sheriff of Cook County returnable to said Term of Court, Damages $4000.

August 6th 1855 Yours

C. B. Kosmer
Pltfs Atty.

And afterwards to wit on the sixth day of August in the year last aforesaid, there issued out of the Office of the Clerk of the Circuit Court of County aforesaid & State aforesaid, the Peoples writ of summons directed to the Sheriff of Cook County, aforesaid, clothed in the words and figures as follows to wit:

State of Illinois
County of Cook } S.S.

The People of the State of Illinois,
to the Sheriff of said County, Greeting:

We command you that you summon, Rufus Haywood and Benjamin Sirous, if they shall

3

be found in your county, personally to be and appear before the Circuit Court of Cook County, on the first day of the next term thereof, to be holden at the Court House, in Chicago, in said county, on the Fourth Monday of October next, to answer unto Isaac D Harmon & Charles L Huntoon in a plea of Trespass on the case on promises, to the damage of the said Plaintiffs as is said, in the sum of Four Thousand Dollars

And have you then and there this writ, with an endorsement thereon, in what manner you shall have executed the same

L. S.

Witness, Louis D. Hoard, Clerk of our said Court and the seal thereof, at Chicago aforesaid this sixth day of August A.D. 1855

L. D. Hoard Clerk

And afterwards to wit, on the 29th day of Septbr, the year last aforesaid, the said Sheriff returned into the Office of the Clerk aforesaid the said summons with his endorsement thereon in the words & figures following to wit:

Served by reading to the within named Benjamin Pierce the 21st day of August 1855, also by reading to Rufus Haywood the 29th day of September 1855.

Fees 2 Services $1,00 2 Miles 10 Cts. 1 Return 10 Cts = $1.20.

James Andrew Sheriff

C. B. Hosmer Dff. Atty By Ezra Snow Deputy

And afterwards to wit on the 30th day of August

[12274-2]

4

the year last aforesaid comes the said plaintiffs by their Attorney and file in this cause this certain declaration, which is in the words & figures following to wit:

State of Illinois } Cook Circuit Court of the
Cook County } ss. October Term A. D. 1855

Isaac D. Harmon and Charles L Huntoon under the name and firm of Isaac D Harmon & Company plaintiffs in this suit by C B Comstock their Attorney complain of Rufus Haywood and Benjamin Giroux under the name & firm of Haywood & Co defendants in this suit in a Plea of Trespass on the case on promises.

For that whereas, before the making of the promise and undertaking of the said Defendants hereinafter next mentioned, certain differences had arisen & were then depending between the said plaintiffs and the said defendants, and one John P. Chapin touching and concerning a certain contract for the sale of thirty thousand bushels of corn, by the said plaintiffs to the said defendants on or about the 27th day of August A. D. 1853 and guaranteed by the said John P Chapin at Belvidere, to wit at Cook County aforesaid. And thereupon for the putting and end to the said differences, the said plaintiffs and the said defendants and the said John P Chapin here before to wit on the 28th day of April A D. 1854. at Chicago in Cook County aforesaid, respectively submitted themselves to the award of J. George Steele, J L Lyon and H H Carpenter arbitrators chosen and selected by the said parties under and in accordance with their submission, to be made between them of and concerning the said differences; and

5

on consideration thereof, and that the said plaintiffs at the special instance & request of the said defendants had then and there undertaken & faithfully promised the said defendants to perform & fulfill the award of the said Arbitrators so chosen & selected as aforesaid, to be so made between the said plaintiffs and the said defendants and the said John F. Chapin of & concerning the said differences in all things therein contained, on the said plaintiffs part to be performed & fulfilled, they the said defendants undertook & then & there faithfully promised the said plaintiffs to perform & fulfill the said Award in all things therein contained on the said defendants part and behalf to be performed and fulfilled. And the said plaintiffs in fact say, that the said George Steel Y E Lyon & H H Carpenter, arbitrators chosen & selected as aforesaid by the said parties to the submission aforesaid, having taken upon themselves the burthen of the said Arbitrament afterwards, to wit: on the Twelfth day of October A D 1854 at Chicago in Cook County aforesaid made their certain award between the said parties to the said submission of & concerning the said differences, and did thereby award that the said defendants should pay to the said plaintiffs the sum of Three Thousand, four hundred & twenty five Dollars & ninety one cents, in full satisfaction & discharge of the said matter in difference. And although they, the said defendants afterwards to wit at Cook County aforesaid, were often requested, by the said plaintiffs to pay them the said sum of three thousand, four hundred and twenty five Dollars and ninety one cents, according

[12276-3]

to the tenor and effect of the said Award & their said promise & undertaking. Yet the said defendants not regarding their said promise & undertaking, but contriving & fraudulently intending to deceive & defraud the said plaintiffs in this behalf did not nor would when they were so requested as aforesaid or at any other time pay the said sum of. Three thousand, four Hundred & twenty five Dollars & ninety one cents, or any part thereof to the said plaintiffs, but have hitherto wholly neglected & refused & still neglect, and refuse so to do to wit at Cook County aforesaid.

And whereas also, the said defendants afterwards to wit, on the day and year last aforesaid at Cook County aforesaid were indebted to the said plaintiffs in a large sum of money to wit, in the sum of Four Thousand Dollars upon & by virtue of a certain award made by George Steele J L Lyon & H H Carpenter upon & by virtue of a certain submission before that time made by the said plaintiffs and the said defendants and one John T Chapin whereby the said parties agreed to submit themselves to the arbitration of three persons, - one to be chosen by the said plaintiff Harmon or said Chapin, - one by the Defendant Piron or Haywood & the other by the two persons so selected, all differences arising or growing out of a certain contract for the sale of thirty thousand bushels of corn as therein stated made in August A D. 1853, whereupon the said George Steele, J L Lyon & H H Carpenter were duly chosen & so acted arbitrators

7

under said submission by & with the consent & approbation of the said plaintiffs & defendants & Chapin, and upon & by virtue of which said reference & submission, the said George Steele, J L Lyon & H H Carpenter had then & there awarded that the said Defendants should pay a certain sum of money to wit the sum of Three thousand four Hundred & twenty five Dollars & ninety one cents to the said plaintiffs, & being so indebted, they the said defendants in consideration thereof, afterwards to wit, on the twelfth day of October A. D. 1854 at Cook County aforesaid undertook, & then & their faithfully promised the said plaintiffs to pay them the said last mentioned sum of money, when they the said defendants should be thereunto afterwards requested.

And whereas also the said defendants afterwards to wit on the day and year last aforesaid at Cook County aforesaid were indebted to the said plaintiffs in the sum of Four thousand Dollars for money before that time lent and advanced to, and paid, laid out & expended for said defendants by said plaintiffs at said defendants request: and for money before that time had & received by said defendants to & for the use of said plaintiffs: and also in the like sum for money found to be due from the said defendants to the said plaintiffs on an account then & there stated between them, & being so indebted, said defendants in consideration thereof, then & there undertook & promised to pay said plaintiffs said last mentioned sum of money, when

thereunto afterwards requested. Yet the said defendants not regarding their said promises & undertakings, but contriving & although often requested so to do, have not paid said plaintiffs either of said sums of money or any part thereof, but so to do, have hitherto wholly neglected & refused & still do neglect & refuse to the damage of said plaintiffs of Four Thousand Dollars & therefore they bring suit &c.

C. B. Hosmer
Plaintiffs Atty

Copy of Award & as above declared on:

We the undersigned chosen & selected arbitrators under the submission hereto annexed to arbitrate all differences between the parties to said submission, arising under or growing out of a certain contract for the sale of thirty thousand bushels of corn as therein stated, a copy of which said contract submitted to us as such arbitration, and agreed by all the parties to said submission to be a true and correct copy of said contract, is also hereto annexed, do award and determine as follows

That Messrs Harmon & Co. shall allow Messrs Haywood & Co. six cents a bushel more for all the corn shipped and sold for their account than said corn netted as shown by bills submitted, as we find that would not be far from the price corn was selling at in Chicago at the time the shipment was made, and we find the amount due Messrs Harmon & Co. from Haywood & Co. after

9

deducting said six cents per bushel to be the sum of. Three thousand four Hundred and twenty five Dollars and ninety one cents ($3425,92.) as per Statement also hereto annexed.

We further award and determine that the corn remaining on the river shall belong (after the payment of the said sum of. three Thousand four hundred and twenty five dollars and ninety one cents, to said Harmon &C) to said Haywood &C subject to the payment of such charges as shall have accrued on the same, after the time the same was to have been received by Messrs Haywood &C, as per contract

Chicago October 12 1854

Fees $15

Signed. Jno Steel
Y L Lyon
W W Carpenter

R Haywood &C to J. D. Harmon &C Dr.

For Money Lent	$4000
" Money paid, laid out & expended	" 4000
" Money had & received for use of Plffs	" 4000
" For Balance due on Settlement	" 4000

And afterwards to wit on the 24th day of October of the year last aforesaid, there was filed in the Clerks Office of the Court last aforesaid, in said State & County aforesaid the following plea: in the words as

[12276-57]

10

as follows to wit

In the Cook Cir Court
Isaac D. Harmon
& Charles Hunboon
v.
Rufus Haywood
& Benjamin Giroux

And the said Haywood by his Attorney Farnsworth & Burgess impleaded &c comes & defends the wrong & injury whenever & says that he did not undertake & promise in manner & form as the said Plaintiff hath above thereof declared against him & he denies that he was a partner of, or jointly with said Giroux undertook & promised in manner & form as the said Plaintiffs have above thereof declared against him & of this he puts himself upon the country &c.

Farnsworth & Burgess
for Deft Haywood

And the said Plaintiff do the like &. C B Hosmer
Pltff Atty

State of Illinois
County of Cook } ss. William T. Burgess Atty for said Haywood doth depose & say that the said Haywood as this Deponent believes has a good defence upon the merits in this cause

W T. Burgess

Subscribed & sworn to before me this 24th day of October A D 1855.

L. D Heard Clk.

11

And afterwards to wit on the 5th day of December of the year aforesaid, being a day of the November Term of said Circuit Court the following among other proceedings were had and entered of record in this cause to wit.

Isaac D Harmon & al

v. Asst.

Rufus Haywood & al

This day comes the said defendant Rufus Haywood by his Attorney and moves the court that this cause be continued to the next Term of this Court, and that the plaintiff file a full copy of the submission and award in this case

And afterwards to wit on the 7th day of December of the year aforesaid, being a day of the November Term of said Circuit Court the following among other proceedings were had and entered of record in this cause to wit

Isaac D. Harmon et al

v. Asst.

Rufus Haywood et al

This day come the said plaintiffs by C B Cosmer their Attorney, and it appearing to the Court that the said Defendant Giroux has been served

[12276-6]

with process and he being three times solemnly called comes not, nor any one for him but herein fails and makes default which is ordered to be entered

And afterwards. to wit on the 8th day of December in the year last aforesaid the same being one of the days of the November Term of said Circuit Court the following among other proceedings were had and entered of record in this cause to wit.

Isaac D. Harmon &
Charles L. Huntoon
v.
Rufus Haywood &
Benjamin Perry
} Assumpsit

This day again came the said plaintiffs by Hosmer their Attorney & the said defendant Rufus Haywood by Farnsworth

13

& Burgess his Attorneys also come, and the court having heard the arguments of counsel upon the said defendants motion to continue & for a copy of submission and award and being now fully advised thereon orders that the said motion to continue be overruled and the motion for a full copy of award & submission be sustained and that the said plaintiffs file the same which is done

And afterwards to wit on the 14th day of December of the year last aforesaid, it being a day of the November Term of said Circuit Court the following among other proceedings were had and entered of record in this cause to wit

Isaac D Harmon
Charles L Huntoon
v.
Rufus Haywood &
Benjamin Pirou
} Assumpsit

This day comes the defendant Haywood by his Attorney and moves the Court for leave to withdraw his plea filed herein and for leave to plead De novo which motion is overruled by the Court

And afterwards to wit on the 27th day of December of the year aforesaid, it being a day of the November Term of said Circuit Court the following among other

[12376-7]

proceedings were had and entered of record in this cause to wit

Isaac D. Harrison &
Charles L. Hunstoon

vs. Act

Rufus Haywood & Benj: Pirou

This day come the said Plaintiffs by Hosmer their Attorney and the said Defendant Haywood by Farnsworth & Burgess his Attornies also come & the having filed his plea herein & issue being joined thereon and it appearing to the court that the default of the defendant Pirou for want of a plea has been heretofore entered. It is Ordered that a Jury come & thereupon come the jurors of a Jury of good and lawful men, to wit: Alfred Lambert, C Nelson Asa Paines, I R Chapman, Flavel Mosely, I W Irwin Asa Fitch, C K Fanning, C A Spring Junr P. G. Chilcote, A C Lewis and Hiram Eddy, who being duly elected tried and sworn well and truly to try the issue joined between the said plaintiffs and the Defendant Haywood & well & truly to enquire and true assessment make of the damages as to the said defendant Pirou accordin to law and the evidence & they hearing the testimony of witnesses, arguments of counsel and instruction of the Court retire under charge of an Officer of the Court to consider of their verdict and afterwards come into Court and say, we of the Jury find the issue for the plaintiffs & assess the damages against

15

the said defendants at the sum of Three Thousand six hundred and seventy four Dollars & twenty eight cents & thereupon the defendant Haywood moves the Court for a new trial of this cause.

And afterwards to wit on the 29th day of December of the year aforesaid, there was filed in the Clerks Office of said Court aforesaid the following Motion which is in the words as follows to wit:

In the Cook Circuit Court

Haywood impleaded &c
ads
Harrison & Huntoon
&c.

The Defendant moves for a new trial in this cause

1st Because the court permitted improper testimony to go to the jury.

2d Because the submission & award as introduced & read were variant from that declared on.

3d Because the court refused the instructions asked for by the Defendant.

4th Because the court refused to construe the Award to the jury.

5. Because the verdict of the jury was without evidence

6th Because it was contrary to the evidence & against

[1276-8]

the ruling of the court and the law of the case.

Farnsworth & Burgess
for Defts.

And afterwards to wit on the twenty fourth day of March in the year of our Lord. One Thousand Eight Hundred and Fifty six, said day being a day of the March Term of the said Circuit Court, the following among other proceedings were had and entered of record in this cause to wit

Isaac D Harmon et
Charles Haughton
Rufus Haywood
Benjamin Strong } Assumpsit.

And now at this day come the said plaintiffs by their attorneys, and the said defendant Haywood by his attorneys also comes and the court having heard the arguments of counsel on the motion for a new trial of this cause, entered herein at the last term of this court by the defendant Haywood, orders that the same be overruled and that judgment be entered herein on the verdict to which decision of the court in overruling the motion for a new trial of this cause the said defendant Haywood by his attorneys excepts.

Therefore it is considered by the court that the said plaintiffs do have and recover of the said defendants their damages of

17

3. 674. 28. Three Thousand Six Hundred and Seventy Four Dollars and twenty Eight cents by the Jury aforesaid assessed, together with their costs and charges by them about their suit herein expended and have execution therefor.

And it is further ordered by the court that the said defendant Haywood have until Saturday next, to file his bill of exceptions.

And afterwards to wit: on the 1st day of April of the year last aforesaid, there was filed in the Clerks Office of said Court aforesaid the following Bill of Exceptions, which is in words & figures as follow. viz:

In the Cook Circuit Court

Isaac D Harrison &
Charles L Huntoon

v.

Rufus Haywood &
Benjamin Piron

Be it remembered that on the 6th day of December 1855 & during the November Term of said Court the said Defendant Haywood by his Counsel moved to continue the cause to the next Term of the Court for the reason as alledged by him that a copy of the Instrument in writing declared on, had not been filed with the Clerk of this Court ten days before

[2276-9]

the first day of the present Term, which Motion was overruled by the Court & the Defendant Haywood then & there excepted. The Court thereupon on motion of the Defendant Haywoods' Counsel ordered the Plaintiffs to file a copy of the submission together with the Award declared on which was done as follows viz:

" We the undersigned chosen & selected arbitrators under the submission hereto annexed, to arbitrate all differences between the parties to said submission, arising under or growing out of a certain contract for the sale of thirty thousand Bushels of corn as therein stated a copy of which said contract submitted to us as such arbitrators and agreed by all the parties to said submission to be a true and correct copy of said contract is also hereunto annexed do award & determine as follows

That Messrs Harmon & Co shall allow Messrs Hayward & Co six cents a bushel more for all the corn shipped & sold for their account than said corn netted as shown by Bills submitted, as we find that would not be far from the price corn was selling at in Chicago at the time the shipment was made, and we find the amount due Messrs Harmon & Co from Hayward & Co, after deducting said six cents per bushell, to be the sum of Three Thousand four hundred and twenty five Dollars and Ninety one cents ($3425.91) as per Statement also hereunto annexed.

We further award and determine that the

corn remaining on the river belongs (after the payment of the said sum of. Three thousand four hundred and twenty five Dollars and ninety one cents, to said Harmon & Co.) to said Haywood & Co subject to the payment of such charges as shall have accrued on the same after the time, the same was to have been received by Messrs. Haywood & Co as per contract

Fees $15.00

Chicago Oct 12 1854 Signed D. W. Steel
P L Lyon
H H Carpenter

Filed Dec 7. 1855.

20

Miss Haywood & Co

Bot of I D Harmon & Co

30000 Bushels of Corn in the Ear at 70 ℔ to the Bushel or its equivalent in Corn shelled at 56 ℔ to the Bushel to be delivered and received at Henry and Hennepin on the Illinois River or Ports this side upon the order of the above purchasers within sixty days from this date, subject however to delivery whenever ordered and free of charge upon Canal Boats, except for shelling, which for portion shelled the above purchasers, or their assigns, are to pay the shelling at the actual cost, not exceeding 2½ ¢ pr Bushel.

Thirty Thousand Bushels @ 48 ¢ $ 14.400.00

Receive Payment as follows —

Cash in hand $ 5000.00

R Haywood acpt B Piroux 60 ds dfs. 4700.00.

" " " 30 ds. 4700.00 $ 14.400.00

Both Payable at I Smith & Co

Signed Isaac D. Harmon & Co

Belvidere Ills Augt 27/1853.

Chicago April 28th 1854.

The undersigned mutually agree and bind themselves by these presents as follows,

To submit to the arbitration of three persons, one to be chosen by Isaac D Harmon or John T Chapin, one by Benj. Piroux or Rufus Haywood and the other by the two persons so selected, all differences arising under or growing

12276-18

out of a certain contract for the sale of Thirty thousand bushels of corn, as therein stated, made last August, and when so submitted, they hereby agree and bind themselves to abide by the decision of said arbitrators, as a full & final settlement of the whole matter in dispute in the premises, and to faithfully execute and carry out the awards of said arbitrations.

The arbitration shall take place without unnecessary delay, and the parties hereto shall have their papers and evidence ready for the arbitrators when called upon so as to promote an early decision of the case

signed Isaac D. Hammond
John P Chapin
Rufus Haywood
Benjamin Perry

Dr. R Irving (for Haywood & Co. a/c)

1853							
Nov:	22.	To Amt paid H. Norton & Co. Bal. this a/c	10%	10 20	140.95	1585	75
"	"	" Frt. on 181 45 Bu Corn "Kansas"	"	"	1.61	18	16
"	14	" Same 1171 " " "Empire State"	"	10 28	10.87	119	10
"	"	" Amount Canal frt. 5¢ Same	"	"	5.38	58	55
"	24	" Freight on 3055 Bu corn @ 15¢	"	10 18	40.38	458	35
"	25	" Same " 567 " " "Erie"	56.70				
		Less 11 05 Bu short	4.95	10 17	4.55	51	75
"	29	" Additional Frt. to "Illinois"	"	10 13	2.15	24	36.
"	"	" Frt. on 2066 Bu corn	"	"	27.02	311	82
"	30	" Same 4872 " "	"	10 12	63.32	730	70
		" Same 2314 " "	"	"	27.30	315	08
Dec	9	" Elevating 1060 " 14 Lbs ulla	"	10 03	.44	5	30
"	19	" Lake Frt. on $ 1500 "Excelsior" 2½%		9 23	3.05	37	50.
"	"	" Same $ 3000 "Miranda" 3%		"	7.33	90	00
"	"	" J. O. Harmon & Co. Bill of chgs.	"	"	102.90	1264	28
"	"	" Storage 9320 02 Bu Corn shipped	"	"	7.59	93	20
1854							
Feb	22	" Amt. p. Policy Ins.	"	7 20	07.	1	00
"	"	" Amt. drft. on R. Haywood of Aug. 27/53					
		" at 60 days acc. (but not paid)	6%	11 15	270.25	4700	00
"	"	" Com. on $ 5164 20 advanced at 2%					
		Insurance after 30 days 10%	10%	6 18	6.99	129	12
"	"	" Winter Storage on 5803 35 Bu Corn	5¢	7 20	17.85	290	18.
Oct	12	" Balance of Interest this date				383	28.
					740.00	10667	48
		To Balance due Jno. P. Chapin Pres. down				3425	91.

{12276-11}

22

In A/C Current with John P. Chapin Cr

1853							
Nov.	30.	By Nett Sales 2924 25/100 Bu com "Excelsior"	10 %	10 12/100	129.26	1491	44.
"	"	" Advances of 6¢ pr Bu by Arbitrators	"	10 12/100	15.20	175	47.
Dec	19	" Overcharge in Frt by "Illinois"	"	9 24/100	88	10	81
1854							
May	16	" Nett Sales 6396 25/100 Bu Corn "Miranda"	"	4 26/100	103.28.	2546	66
"	"	" Advance 6¢ pr Bu by Arbitrators	"	"	18.88	383	79.
June	10	" Nett Sales 5803 25/100 Bu Corn By					
		Wadsworth & Sheldon (Cash this date)	"	4 02/100	77.42.	2285	18
"	"	" Advance of 6% pr Bu by Arbitrators	"	"	11.80	348	22.
	"	Bal of Int, to debit of a/c Proper			383 28.		
Oct.	12	Balance due J. P. C. Carried down				3425	91.
						$40 06	$1066 48.

(13376-18A)

corn remaining on the river belongs (after the payment of the said said sum of Three thousand four hundred and twenty five Dollars and ninety one cents, to said Harmont & Co) to said Haywood & Co subject to the payment of such charges as shall have accrued on the same after the time the same was to have been received by Messrs Haywood & Co as per contract

Fees $15,00

Chicago Oct 12 1854. Signed J. W. Steele
J L Lyon
H H Carpenter

Filed Dec 7/1855.

L. D. Board Clk

And thereupon the said defendant Piroux by W T Burgess his attorney came & moved the Court to set aside his default herein at the previous Term of this Court, which had been entered up against him & for leave to plead, which motion being resisted by the Plaintiffs was overruled by the Court & the defendant Piroux then & there excepted. And the said defendant Haywood upon filing the copy of the submission & award as above, renewed his motion to continue the cause, to the next Term which motion was overruled by the Court & the said defendant Haywood then & there excepted. And the said defendant Haywood also moved for leave to withdraw his plea of the general issue & plead over, which motion being resisted by Plaintiffs was overruled by the Court & the said Haywood then & there excepted.

And thereupon on the 27th day of December

1855 the same being one of the days of the said November Term this cause came on in its order for Trial and a Jury being duly empannelled & sworn: The plaintiffs introduced as a Witness Albert Neely who being sworn, testified that he was acquainted with the parties to this suit, & thereupon the said plaintiffs showed said Witness the written submission of said parties & said Witness testified that he was acquainted with the handwriting of said Harmon, Haywood, Pirony & John P Chapin & that the signature of J. P. Harmon & to said submission was in the handwriting of J. P. Harmon, also the signature of Chapin to said Submission was in his handwriting, also the signature of Rufus Haywood to said submission was in his handwriting also the signature of Pirony to said submission was in his handwriting. On cross-examination said Witness testified that he was acquainted with the business of said defendants at the time of the submission, & that he believed Pirony was at that time engaged in the produce business & Haywood was engaged in buying & selling Real Estate. Said Witness was then interrogated by Defendants Counsel as to wether Haywood & Pirony were then Partners, to which Plaintiffs objected on the ground that the Question of Partnership was not at issue, by the Pleadings, which objection was sustained by the Court & the Witness not permitted to testify as to the partnership of the Defendants to which defendants then & there excepted.

25

Said submission was then read to the Jury by the Plaintiffs counsel, the Defendants, then & there objected to the reading, which objection was overruled, paper read & Defendants then & there excepted. Said Plaintiffs then called as a Witness George Steel who being duly sworn, & the Award & submission in this case being shown to him, testified that he was one of the arbitrators who made said Award, that he signed said Award & that F. L Lyon & H H Carpenter, were the other arbitrators & that their signatures to said Award were the genuine & proper signatures of said Lyon and Carpenter. Said Witness further testifies that J. D. Harmon. J. S. Chapin & B. Giroux were present before them the arbitrators at and during the hearing and making of said Award, but he believed said defendant Haywood was not present; on cross examination said Witness testified that he did not know wether Haywood knew that they had been chosen Arbitrators, or the time and place of their meeting, but as he understood from what occurred there he was represented before the Arbitrators by his Partner Giroux. — The Plaintiffs then offered to read said Award to the Jury, which was objected to by Defendant Haywood and the objection overruled by the Court & the Defendant then & there excepted. & the said Award was then read to the Jury.

"We the undersigned chosen and selected arbitrators under the submission hereto annexed to arbitrate all differences between the parties to said submission arising under or growing

[2276-14]

out of a certain contract for the sale of thirty thousand bushels of corn as therein stated, a copy of which said contract submitted to us as such Arbitrators, and agreed by all the parties to said submission to be a true and correct copy of said contract is also hereto annexed: do award and determine as follows:

That Messrs Harmon & Co shall allow Messrs Haywood & Co six cents a bushel more for all the corn shipped and sold for their account than said corn netted, as we find that would not be far from the price corn was selling at in Chicago at the time the shipment was made, and we find the amount due Messrs Harmon & Co from Haywood & Co after deducting said six cents per bushel to be the sum of. Three Thousand four hundred and twenty five dollars and ninety one cents ($3425.91) as per statement also hereto annexed.

We further award and determine that the corn remaining on the river shall belong, (after the payment of the said sum of. Three thousand four hundred and twenty five Dollars and ninety one cents, to said Harmon & to said Haywood & Co subject to the payment of such charges as shall have accrued on the same after the time the same was to have been received by Messrs Haywood & Co as per Contract"

Chicago, Oct: 12 1854.

Fees $15 00

Geo. H. Steel
I. D. Lyon
H. H. Carpenter

~~The above was all the evidence given in the cause.~~

27

Chicago April 28th 1854.

The Undersigned mutually agree and bind themselves by these presents, as follows:

To submit to the Arbitration of three persons. One to be chosen by Isaac D Harmon or John F Chapin one by Benj: Pirsons or Rufus Haywood and the other by the two persons so selected. All differences arising under or growing out of a certain Contract for the sale of Thirty Thousand bushels of Corn as therein stated, made last August. And when so submitted they hereby agree and bind themselves to abide by the decision of said Arbitrators, as a full and final Settlement of the whole Matter in dispute in the premises, and to faithfully execute and carry out the Award of said Arbitrators

The Arbitration shall take place without unnecessary delay & the parties hereto shall have their papers and evidence ready for the Arbitrators when called upon so as to promote an early decision of the case.

Isaac D. Harmon & Co
John F Chapin
Rufus Haywood.
B. Pirsons

over

[12276-15]

28

Messrs Haywood & Co

Bot of I D Harmon & Co

30,000 Bush of Corn to be Cor at 70# to the Bushel or its Equivalent in Corn Shelled at 56# to the Bushel to be delivered & received at Henry & Hennipin on the Illinois River or points this side upon the order of the above purchasers within Sixty days from this date, subject however to delivery whenever ordered & free of charge upon Canal Boats, except for shelling, which for portion shelled, the above purchasers or their assigns are to pay the shelling at the actual cost not exceeding 2½¢ pr bushel

Thirty Thousand Bushel @ 48¢ $14,400.00

Rec Payment as follows

Cash in Hand $ 5000.00

A Haywood acpt @ 3 mons 4700.00 Sept 27 Oct 53.

Do " Do 30 ds " 4700.00. $14,400,00

both payt & Jno Smith & Co

signed Isaac D. Harmon & Co

Belvidere Ills Augt 27/53.

Dr R. Sioux (for Hayward & Co. Com. Pc)

					mo	Int.	
1853 Nov.	22	For Amt Pd. H. Norton & Co. Bal their Pc	10%	10 20/30	140.95	1585	75
"	"	" Frt on 181 45/56 Bu Corn "Kansas"	"	"	1.61	18	16
"	14	" Same 1171 " do "Empire State"	"	10 25	10.87	119	10
"	"	" Amount Canal Frt 5¢ Same	"	"	5.38	58.	55
"	24	" Freight on 3055 Bushels Corn @ 15¢	"	10 18	40.38	458	35
"	25	" Same " 567 " do "Erie" 10¢ 56.70					
		Less 11 5/56 Bu short 4.95¢		10 17	4.55	51	75
"	29	" Additional Frt to C. B. "Illinois"	"	10 13	2.15	24	36.
	"	" Frt on 2,066 Bush Corn "	"	"	27.02	311	82
"	30	" Same 4,872 " do	"	10 12	63.32	730	70
	"	" Same 2,314 " do	"	"	27.20	315	08
Dec.	9.	" Elevating 1060 Bu do 14 & unno	"	10 3	.44	5	30
	19	" Lake Ins on $1500 "Excelsior" 2½%	"	9 23	3.05	37.	50
	"	" Same " $3000 "Miranda" 3%	"	"	7.33	90	00
	"	" I. D. Harmon & Co Bill charges	"		102.90	1264	28
	"	" Storage 9320 58/60 bush Corn shipped	"	7.20	7.59	93	20
1854 Feb.	22	" Amt paid for Policy of Insurance	"	7.20	.07	1	00
"	"	" Amt dft on R Hayward of May 27/53 at					
		60 days Accp. (but not paid)	6%	11 15	270.25	4,706	00
	"	" Com. on $5164 20/100 advances at 2½%					
		Int. after 30 days 10%	10%	6. 12	6.99.	129.	12.
	"	" Winter Storage on 5803 35/56 Bush Corn 5¢	"	7 20	17.85	290	18
Oct.	12	" Balance of Interest this date				383	28
					74.00	10.667	48.
		To Bal due J. F. Chapin Bro't down				3,425	91

Chicago Oct 12/54.

Correct H. Quigg Accountant

Charge $1,500.

[13276-16]

29

In a/c Current with John T. Chapin Cr

					mo	Int		
1853								
Nov:	30.	By Nett Sales 2924 25/35 Bu Corn "Excelsior"	10%	10 17/30	129.26	1491	44.
	"	" Advance of 6¢ per Bu by Arbitrators	"	10 27/30	1520	175	47.
Dec 1854	19	" Overcharge in Frt by "Illinois"	"	9 24/30	.88	10	81
May.	16	" Nett Sales 6396 26/35 Bu corn "Miranda"	"	4 26/30	103.28	2546	66
	"	" Advance 6¢ pr Bu for Arbitrators	"	"	18.88	383.	79.
June	10	" Nett Sales 5,803 35/35 Bu Corn by Wadsworth & Sheldon (cash this date)	"	4 2/30	77.42	2285	18
	"	" Advance allowed by Arbitrators 6¢ pr bushel	"	"	11.80	348	22.
		Bal Int to Debit of a/c proper			383.28		
Oct	12	" Balance due J.T.C. carried down.				3,425	91.
						740,00	10,667 48.

30

The above was all the evidence given in the cause.

The reasons assigned by the Defendants for objecting the reading of said submission and award, was, that no copy had been filed thereof ten days before the first day of the term that they were variant from the instruments declared upon & the award itself upon its face was a nullity.

The Defendant then requested the court to instruct the Jury in writing as follows:

1st Unless the Jury shall believe from the evidence in the cause that the arbitrators mentioned in the award were selected by the persons and in the manner & within the time required by the submission, they will find for the defendant.

which was given by the court as written & so marked

2d That the selection of the arbitrators and making the arbitration was by the submission to be made within a reasonable time & unless there is proof before the jury to show that the said Haywood agreed to extend the time for making the award or was present & submitted to their award, then the award is not made within a reasonable time & they should find for the Defendants.

which the court refused to give & the Defendants then & there excepted.

3d That to entitle the plaintiffs to recover, proof must be given that the Defendant Haywood had notice of the time & place of, or attended upon the arbitrators at the making of it - & the jury are not at liberty to presume this, if there is no proof on the subject.

which the Court refused to give as written, but

amended the same by adding as follows: but if the jury shall find that the defendants were partners at the time the submission & award was made, then it will be sufficient to charge Haywood under this instruction, if the proof shows that the defendant Perry had notice of the time and place or attended before the arbitrators.

to the giving of which as amended & refusing it as originally written the said Defendants then & there excepted.

The Defendants then asked the Court, if he would give instructions to the jury to the effect - That the award in evidence before them was a nullity & did not entitle the Plaintiffs to recover thereon" and also" that the plaintiffs were not entitled to recover upon the award in this case unless the had shown that before the commencement of this suit they were ready & willing to deliver the cow specified in the said award, as thereby required" - which the court declined giving to the jury, which instructions were not presented in writing & the Court did not require that they should be so.

And said Defendants then & there excepted to the refusal of the court to give the jury such last above instructions as asked above.

The Jury retired to consider of there verdict & afterwards came into court & rendered their Verdict. & the Defendant Haywood thereupon moved for a new trial and filed his motion therefor. as follows:

32

In the Cook Circuit Court.

Haywood impleaded &c
ads. } And
Harmon & Hunton

The Defendant moves for a new trial in this cause

1st Because the Court permitted improper testimony to go to the Jury.

2. Because the submission & award as introduced & read were variant from that declared on

3d Because the Court refused the instructions asked for by the Defendant

4. Because the Court refused to construe the award to the Jury.

5. Because the verdict of the Jury was without evidence.

6 Because it was contrary to the evidence & against the ruling of the Court & the law of the case

Farnsworth & Burgess
for Defts.

which motion was denied by the court and the defendant Haywood then & there excepted.

And in asmuch as the matters aforesaid and the several & various exceptions taken the rulings & decisions of the court aforesaid do not appear of record the counsel on behalf of said Haywood and Pirouy have prayed the court to sign & seal this Bill of exceptions according to the form of.

[12274-18]

33

the Statute in such case made & provided, by agreement of parties, done as of the 24th day of March A. D. 1856.

George Manierre
Judge of the 7th Judicial
Circuit, Illinois.

State of Illinois
Cook County } ss.

I Louis D Hoard Clerk of the Circuit Court in and for said County do hereby certify that the foregoing contains a full, true and perfect Transcript of all the proceedings and papers filed in my office, in the case wherein J. D. Harmon et al are Plaintiffs and Rufus Haywood et al are Defendants so far as the same appear to have been had and entered of Record

Given under my hand and the seal of said Court at Chicago in the County aforesaid this second Day of May A.D. 1856

L. D. Hoard
Clk

Fee $9.00 for trans. pd. by Deft. Haywood atty.

34

In the Supreme Court of the State of Illinois
June Term A.D. 1856

Rufus Haywood &
Benjamin Giroux Plffs
vs
Isaac D. Harmon &
Charles L Hunton Defts

Error to Cook Circuit Court—

And the said Plaintiffs by their Attorneys Farnsworth & Burgess come and say that in the judgment record & proceedings aforesaid there is manifest and material error appearing of record therein in this—

1 That the court below overruled and denied the several motions for a continuance made by the defendants below—

2 Also in denying leave to said Haywood to plead Nil Nova

3 In refusing to open the default of Giroux—

4 In refusing to hear testimony as to the fact of partnership or not between said Haywood & Giroux—

5 In allowing submission award & accompanying papers &c had before jury

6 In refusing to give the 2d & 3d instructions as asked giving the 3d as amended— and in refusing to give instructions that the

[illegible]

35

7
8

Award was a Nullity, & that the Pffs ~~in error~~
below are not entitled to recover without
showing readiness to deliver corn -

In refusing motion for a new trial
& rendering judgment for said
Stanton & Hunton, against said Hay=
wood & Givens, whereas the same ought to
have been for said Haywood & Givens and
against said Stanton & Hunton -

Wherefore & for such errors said
Plaintiffs in error pray said judgment
may be reversed & restitution awarded
&c

Farnsworth & Bruce
for Pffs

Sup. Ct.

Haywood & Giroux
vs
Harmon & Hunteon

Transcript.

Filed June 11 1856.
L Leland
Clerk.

Farnsworth & Burgess
Pffs Attys

Sup Court

Haywood et al
vs
Harrison et al

Error to Cook
Argt for Pff in error

1st Error — The refusing 4 Continuances —

With the Rark in this case was filed that part of the papers constituting the award contained in the original Record from page 18 to 21 only that part of it from the words "We the undersigned Chosen" to signatures of arbitrators ~~was filed~~ and that without being verified by the signature of the Pff or his atty.

We contend that this is not a compliance with the Statute

1st There must be something to conclude the party by — When papers are filed by a party in a cause he should by notice or in some other way under his signature conclusively that the paper is a copy of what he intends to rely on — in the same manner as he has notice in an — and not file a loose paper or one as attached to the declaration without any thing of the Kind —

2. The copy set out was so clearly defective that the court ruled the party to file a copy but refused a continuance because the motion was not made at the vacation term

At the vacation Term no trial could be had The copy of the instrument declared on is filed for two purposes — one for pleading & one for trial In this case as we claimed the defence of Haywood so far as pleading was concerned could be made under the plea of the general issue as

5/2276-21

so that until the trial term he did not rule him did not plead so that for the purposes of pleading or trial he did not admit anything - The party Plffs was not entitled to a default against him upon these counts in his suit proceeding upon a written instrument until a copy thereof had been filed ten days upon the first day of the term - (His default was not in fact entered until the November Term -) The language of the statute clearly entitles the party to a continuance & copy must both be filed - R.S. p.

This brings us to the

P Error assigns - denying him to plead de novo - The Plff under the rule of the court file a full copy of the award - It will be seen that this is the deed of third parties, so that the defendants may or may not have been aware of its contents always - but the necessity for a copy is clearly much stronger than when the parties themselves make the instrument - The copy filed and the original are not alike in this that reference is made directly to facts as appearing by documents annexed to the award forming part of it and necessary to the understanding of it which are not given in the copy filed - Consequently so far as the copy filed was a guide & service to the Deft. Having in drawing up his plea its tendency was to mislead him - He was entitled to a full copy and when that was filed he ought to have had leave to plead de novo - especially as the court below held upon the trial that for the want of certain pleas the defendants were excluded

pon objection to the award - If the original was filed in the condition that the copy was and like it in fact lacked the accompanying documents it was clearly defective and would not authorize a recovery - We had the right to plead upon the record as the party had put himself upon them and when he charged fraud in should have been allowed to sustain it -

Thirdly Levins default should have been opened. The Pffs are not entitled to it until they had filed a copy of the instrument declared on - How is a party left who admits the making of an instrument to the plaintiff and only asks to contest the amount of damages, preserving the right given him by the statute to be prepared for trial -

We claim that the proper construction of Sec 8. of the practice act requires a copy of the instrument to be filed ten days before the term at which the cause can be called for trial - Suppose a party files his answer and no copy at the first term is not the party entitled to a continuance of course - Then a second term comes & yet no copy filed - is not the defendant again entitled to a continuance, if not the mere laches of the Pff deprives the defendant of a right secured by statute - In this case the defendant upon the cause is placed for trial notice to the Pff of the defect the cause it - Shall the defendant be driven to trial the same as though the record had always been perfect & the Pff return in court

[12276-21A]

Fourthly The court erred to hear any testimony from the testimony upon the question of Partnership.

This question of partnership arises upon this record not as a matter upon which the suit could be abated but merely as to the effect to be given to the acts of one joint promisor affecting the rights of his co-promisor. The parties thus could not deny joint liability that existed independent of partnership. Persons are sometimes liable to third persons as partners in the eye of the law, when in fact as between themselves no joint liability exists and again there may be a joint liability and yet no partnership. The statute is designed for cases of joint liability & to plea being plea in abatement and not for cases when the liability ~~is~~ originationally is joint, but is sought to be made that of a partnership by evidence. That is this case we could not plead in abatement of the suit for we are jointly liable but not liable as partners & bound by the acts of each other as partners are.

But how is the record in this case admitting that when there is a clear joint liability ~~from~~ yet it is necessary to plead no partnership specially & verify it by affidavit. Haywood pleads the general issue incorporates in that plea an averment that they were not partners concluding to the country. The Pltfs file a similiter in fact. When the defendant comes prepared at the trial with evidence upon the issue as presented by the record

The first instruction is based upon the facts as they appear by the submission - The parties to that are "Isaac D. Hammond" - "John P. Chapin" - Rufus Hayward" - "Benjamin Pierce" - each being a party to it by his signature separately - Who the partners appear only by the signatures & commences "The undersigned & there is nothing in the body of it to identify the parties - It is signed by one party by their firm name & as to them it is a partnership obligation under such name - by all the others by their individual names So that so far as Hayward & Pierce are concerned, there is by the submission no partnership existing between them at the time of ~~submission~~ making the same, but each in submitting himself to the arbitrators that may be chosen, speaks for himself There is nothing upon the face of the submission in any manner to identify the contract as a contract between "Hammond & Co." a firm & "Hayward & Co." a firm

Then the submission being by each party for himself, though he might be liable as a partner upon the contract submitted yet that submission calling for a notice to the parties evidently showed upon its face that Hayward & Pierce in that matter were not acting as partners or be bound by the act of the other - So that conceding that these persons Hayward & Pierce are in fact partners at the time of the submission, yet each having made for himself a separate

he is not for the first time with the objection that the state of the pleadings do not admit of the evidence which he hereby has given to the county on that issue - He was in that stage of the case too late with his exception - If he designed objecting to the plea for the want of an affidavit he should either have demurred or stricken it from the files, he did neither but waits until the trial - Again whether or not there was an affidavit in support of the plea does not appear, whatever affidavit there was was no part of the record & is not preserved in the ~~record~~ Bill of Exceptions - - And the Plff could not be called to prove in the issue to the county without such affidavit being filed & his having done so - is sufficient for this court to say he either waived it or the affidavit was sufficient -

5 ly

The allowing the Submⁿ & award to be read to the jury —

1st Because a copy not filed —

2ᵈ They were variant from the instruments declared on —

The 1st & 2ᵈ counts are upon an award made by J. G. Lyon Steele & ~~carp~~ carpenter while the award produced is by I. G. Lyon &c If a party see fit to describe a man by initials he must be compelled to have those initials correct J. May stand Jay, Jerry, Jonah, I. May be Isaac Iverson &c the initials are entirely different, there is no idem sonans about it, they are two distinct letters in our alphabet —

Then the award set out in 1st & 2ᵈ counts & the one introduced in evidence are entirely different in their legal effect — The Pleader in these counts undertakes to give their legal effect and to ascertain that the whole award must be taken together — In the 1st count the allegation is "That H & G. should H & Co $3425⁰⁰ in full satisfaction & discharge of said matters in difference —" when upon the face of the award the Pff Hammond Co were to deliver H & G. corn how much it does not appear — the allegation there is not as broad as the award the payment & acceptance of the money would not have satisfied the award. the allegation is that it would —

So in the 2ᵈ count the allegation is of a general indebtedness without any clause of qualification whatever —

party to the submission & claiming notice
to be made obviously it was not competent
for the arbitrators to act without giving
such notice —

That the award is a nullity upon its
face —

When an award directs one party
to do an act & therefor to receive from the
other party a compensation or equivalent
each part is dependent upon the other
so much so that if either is uncertain
in its terms both must fail. and this
entirely independent of the question
whether by the award they are ~~dependent~~
~~and or independent~~ concurrent precedent
or subsequent — so long as one is the consider-
ation for the other each must sufficiently
appear by the award and not require to be
helpen by matter aliunde —

In this case the Plaintiffs are to be
paid $3475.94 as a balance due them for
all the corn sold to H&G. whether it had been
delivered or not under the contract — & they
H&G. are to have the balance of the corn
not delivered. upon paying charges that
might have accrued upon it from the
time it was to have been received —
These are dependent — Clearly H&G.
are not to pay this money without
getting some equivalent for it — The
award undertakes to give them the

equivalent but does it do it - Suppose H+G. come with their money have they not a right to say upon they pay it over deliver us ~~this case~~, the corn remaining on the rick, How much can they to receive & when is it is it 5000 or 50 bushels & what charges are these for us to pay. Now who shall decide these things the arbitrators have not done it, and there is nothing in the whole case to enable the parties to do it

That both these things are matters in dispute between the parties growing out of the contract is palpable Harrison & Co had the corn on hand had delivered some Haywood & Co did not pay up - they would not deliver the balance & kept it in store disputes arise & the whole matter is submitted to arbitration - they find on side of the case but do not settle the rights of the other party one has his money in dollars cents awarded & him the other has not their corn in quantity or by any other description by which it can be identified and are required to pay charges without saying how much or what for.

The award should be mutual each party should be able to recover upon it without going out of it behind it - In this case the party may say, the corn is the corn not already delivered - but how much is that - they dont help it by averment in the declaration or proof on the trial

either that they have delivered it or been ready to deliver it — When we pay this judgment they can refuse to deliver the coal — & we have got to go through a litigation reaching behind this award in order to get what the arbitrators in terms say we should have —

Then again the amount of these charges if we are left to recover on the award we must receive these charges as well as pay or offer to pay the sum awarded. But we cannot receive them by the award if we receive a reasonable sum in our judgment & sum than we have got to go into evidence going over the very ground occupied by the arbitrators — 1 Pet. R. 229. Karthaus vs Ferver

The attention of the Court is particularly called to this case.

The last instruction asked was refused on account of the pleadings — The court holding that that question should have been raised by plea — and to that point quoted 2 Saunders 62 b —

Note the diversity — That was upon demurrer to declaration in debt upon the award — as to what was necessary for the Plff to aver in that form of action and every case there cited is debt upon an award — This is assumpsit — and the Plff clearly recovers upon the equity of his case — The same page recognizes the doctrine that in an action upon the bond when the Plff must set out the whole award in his application, there the award must be set

5/2224-28

entire & must upon its face be valid -
but now the cases quoted by the author
merely say that the declaration is
not demurrable in an action of debt for
the money because it does not show
the award mutual. & now the cases
do not show that upon the trial
advantage may not be taken of its
nullity in that form of action -

What can the defendant do in
that case to raise the question - either
that the ply himself has not performed
or the award is a nullity in the cir-
cistances undoubtedly by pleading
plene the Pff has failed - ~~in the~~
setting out the whole award - but if
the award is a nullity the defendant
pleads nil debet - & he sets out the
award he must demur - because
his only answer is or can be that it is
insufficient in law - that would
be a speaking demurrer -

In this case in assumpsit
the Pff recovers upon the strength & equity
of his own case as proved upon the plea
the general issue putting him upon
proof of all the ~~facts~~ averments in
his declaration - his declaration avers
that this money was awarded in satis-
faction of all matters in difference -
a sufficient averment for his declar-
ation but not for his proof -

But admitting the award to be
sufficient they were not bound to produce it

to recover

The party there should have been required upon a readiness to deliver this coal upon him paid the charges that it is evident he could not do - for neither of these was settled by the award

That injustice is done the defendants in this case particularly to Haywood the only responsible man of the two - he is required to pay his money out upon an award upon which he can sustain no action and ~~is denied~~ of the making of which he had no notice & was not heard -

W. Y. Boyd

construction of award -

12 W Va 591.

~~not~~ upon the 3d Instruction Am 23 W 632

as to conditions dispensed &c

1 Saunders 320 b c d e

The

Haywood et al

vs

Harrison & Huntoon

Pff's Exh.

Filed June 18. 1856

L. Leland

Clerk

Isaac D. Vanmurs &
Charles L. Hunters, Defts in Error
als
B. Hayward &
B. Grove Pffs in Error

Supreme Court
at Ottawa
June Term A.D. 1856

Error to Cook Circuit Court.

This is an action on an Award. The Award is plain & as it appears to me no doubt can be raised as to its terms or meaning.-
The plaintiffs below proved the submission & the Award & of course were entitled to recover the amount of the Award & interest, the only error being that the Judgment was entered at the March Term A.D. 1856 for the amount of the verdict rendered at the November Term 1855, whereas Plaintiffs were entitled to Judgment for amount of verdict & accruing interest, but of this, defendants below cannot complain.-

The Defendants below contested the suit, 1st on the ground that they were entitled to a Continuance at the November Term 1855, because a copy of the Instrument declared on, was not filed ten days before the Nov. Term of Court.

This Motion was properly overruled by the Court below, 1st Because one Term of Court having intervened, & the Defendant Hayward having pleaded & issue joined on his Plea at the previous Term & the other Defts, Grove in default at the previous Term, it was too late to raise the objection, even had it been otherwise well taken. But 2d the plaintiffs had in fact filed with their declaration in August a copy of the Award declared on, & on which, suit was brought, & consequently had strictly complied with the Statute.- The fact is, the submission of the parties was

[12276-87]

no part of the Award, the Instrument declared on, the suit was upon the Award, not the submission, & therefore the submission was only a link in the chain of evidence which the plaintiffs below were bound to prove on the trial, & as well might the Defendants below insist that the plaintiffs below should furnish a copy of all their evidence that they intended to introduce on the trial, as that they should give a copy of a part of their evidence, viz, the submission of the parties, & such it is manifest was the view the Counsel for the Defendants below took of the case at the October Term of Court or else they would have raised this objection before pleading.

The 2d objection taken by the Defendants below was the refusal of the Court below to permit them to raise the question of Partnership between the Defendants Hazzard & Chroux.

That this question was properly decided by the Court below under the state of the pleadings, we think is perfectly well settled. This Court will see by reference to the Declaration, that the plaintiffs below declared against the Defendants below as Partners & by the Plea of the general issue by Hazzard without verification under oath, the question of Partnership of the Defendants below was not in issue & therefore the decision of the Court below was correct, vid Statutes "Evidence & Depositions" Sect. 8. 2d Gilman 715-16. 17th 12th Ill. R. 127. - Indeed, it is clear by the foregoing decisions that the question of Partnership of the Defendants below in this case could only have been raised by a Plea in Abatement, the suit in this case being upon an Instrument not executed by the Defendants below.

The 3d objection of the Defendants below, is to the giving & refusing Instructions by the Court below. For this, we think there was no error. -
The 2d Instruction asked by the Defendants below without qualification was properly refused. -
At any rate, the Defendants below cannot complain, as the same in substance is embodied in the 3d instruction, which as amended by the Judge below, contains the Law on the subject. -

There can be no question, that if Haywood & Sivous were Partners, which fact is shown not only by the submission & Award in the Case, but also admitted by the Pleadings, that the Court below very properly refused to instruct the jury, that it was necessary that Haywood should be notified of the meeting of the Arbitrators, it was sufficient as stated in the 3d instruction, if the the Partner of Haywood was notified & attended upon the Arbitrators, the award was binding upon both Partners & this Court will see that by the submission Haywood & Sivous acted together & the Arbitrators were to be chosen by either Haywood or Sivous. -
Besides the simple fact that they were Partners & so admitted to be by the Pleadings, was sufficient to make notice to one, notice to both.
We contend, that the instruction as given, was more favorable to the Defendants below, than what they were legally entitled to; for the instruction left it to the jury to find that the Defendants below were at the time of submission &c. Partners, whereas the fact that they were Partners was admitted & need not therefore have been left to the jury, but of this error in favor of the Defendants below they cannot complain. -

1 2276-28

As to the statement of Defendants Counsel to the Court below about giving instructions which were not reduced to writing, I know nothing, & deem it a sufficient reply, to say that by the Statute, they cannot be revised on error, by this Court, not having been asked in writing. - I also deem it a sufficient answer, to the objection, that the Court below refused to permit the Defendants below to plead de novo at the 2d Term after the cause had been at issue one term, to say that it was a matter of discretion with the Court below & its decision cannot be assigned for error. -

Another objection raised by the Defendants below was that the submission & Award introduced in evidence to the jury, were variant from those declared on. - But how variant, the Defendants below did not at the time of trial, attempt to point out, & we have looked over the Pleadings in vain to discover the discrepancy. - It is true the plaintiffs below did not set out the whole Award in their declaration, & perhaps this is the variance complained of, but the Court will find upon an examination of the Authorities, that the plaintiffs below were bound to set out no more of the Award, than was what they complain'd there had been a breach of. - This, they have done. They set out in their declaration the non-payment by the Defendants below of the sum of money awarded to them & this is the breach they complain of.

As to the other part of the Award, it is manifestly no condition precedent to the payment of the money, & therefore properly not noticed by the plaintiffs below in their declaration. The Court will see upon examination of the

5-Ow

Award, not only that the plaintiffs below were not bound by the terms of the Award to deliver the Corn to the Defendants below as a condition precedent to the payment of the money to them, but that in fact by the very terms of the Award the plaintiffs below had nothing to do with the delivery of the corn — the Corn was in store on the Illinois River ready for the Defendants below, they first paying the sum of money awarded to the plaintiffs & the charges on the corn. — That the Arbitrators did not intend that the plaintiffs below should deliver the Corn as a condition precedent, is evident not only from the language used by them in the Award, but also from the fact that the defendants below were adjudged to pay the charges on said corn. — The plaintiffs below could not deliver the Corn without first paying the charges, which would be in direct violation of the Award that the Defendants below should pay them. The bare statement of the proposition proves its absurdity. —

Besides, the Defendants below were not in condition to raise this objection —— if they intended to rely upon a condition precedent they should have pleaded it. —

Authorities.

That no more of the Award should be stated than what the plaintiffs complain of the breach of, vid 1st Saunder's Pleadings 296, Watson on Arbitrations 288. — Caldwell on Arbitrations 395. — 2d Chitty Pleading 243 Note a.

That plaintiffs need not prove the tender of the Corn 1st Saunder's Pleading 304, title "Breach". —

[2276-79]

If the Defendants rely on nonperformance of condition precedent, they must plead it. 3 Chitty Pleas 978 at bottom of pgs. – 2d Saunders Reps 183 to 188. Dv 327. Note b. – Caldwell on Arbitrations 405. –

When no time is limited by the submission within which to make the Award, the Arbitrator may defer doing so, to what period he pleases: but if requested by either party, he ought to make award, either party may revoke his submission &c – Caldwell on Arbitrations 128. –

A party cannot allidge as a valid reason for nonperformance, that the Award itself was not made within a reasonable time; the proper course is to revoke the submission. Caldwell on Arbitrations 328. –

The Award in suit, being for the payment of money only, was admissible under the Common Counts 1st Chitty Pleas, title, "Common Counts". –

In construing an Award, every reasonable intendment will be allowed to uphold it. 1st Peters 222. 1st Hill 489. 2d New Hamp. 179. – 22d Pickering 144. 20th Vermont 132. – Caldwell on Arbitrations 279. 11th Ill. R. 567. 14th Ill. R. 62. McDonald v. Arnot. – In short, this rule of construction obtains universally.

C. B. Hosmer
Atty for Dfts in Error

Supreme Court.
June Term 1856.

A. D. Harman et al
vs.
B. Maguire et al

Brief & Argument
for Defts in error

C. B. Norman
Dept. Atty

In the Supreme court of the State of Illinois

Rufus Haywood &
Benjamin Givins
vs
Isaac D. Harmon
& Charles L. Hunton

Error to Cook
circuit court.

I do hereby enter myself security for costs in this cause & acknowledge myself bound to pay or cause to be paid all costs that may accrue hereon in relation to the opposite party or to any of the officers of this court under the laws of this state.

Dated Chicago April 14 1856

O. L. Wells.

On filing the above the clerk of the Supreme court for the 3rd Grand division at Ottawa will issue Writ of Error & Sci-fa. in the above entitled cause & send the Sci-fa. to Sheff of La Salle Co.

Farnsworth & Bross
for Appellants

Sup court -

Haywood & Givens
vs
Hannon & Huntoon

Secy costs & Precipe

Filed April 3, 1856
L Leland Clerk
By J. B. Rice

Farnsworth & Briggs
for Pltff

58

Rufus Hayward
& Benjamin Gerow
Jr
Isaac D. Hamm
& Charles L. Hartshorn

d-8

1-2-26

1856

#1