Lowe, Samuel B. v. Currier, Warren 1862 St. Louis 4160/5

Old Box 614/12

32
203

L was to build 40 cattle cars
for North Mo Railroad Co.
C was to get ½ profits
arbitrator awarded C $ 1906.85 + ½ costs
L claims he didn't agree to abide by
award; not legal

LC = awarded C 2046.20

aff
Dupen
M62
F60

O = no error in ms.
can't make defense w/info
not in pleadings

1

State of Missouri
County of St Louis } ss

Be it remembered that on the 8th day of July 1859 there was filed in the Office of the Clerk of the Saint Louis Circuit Court a petition which is in the words and figures following to wit.

Petition

State of Missouri
Warren Currier
Plaintiff
vs
Samuel B. Lowe
Defendant

In the St Louis Circuit Court. St Louis County September Term 1859

The plaintiff states that heretofore to wit on the 28th day of February A.D. 1859 at the City of St Louis in said County the plaintiff and defendant agreed upon and appointed one James S. Roberts of said city and County to hear and determine all matters in difference between them arising out of a certain contract for the building of forty Cattle cars, bearing date the 21st day of August A.D. 1858 (eighteen hundred and fifty-eight) and also all matters of claim connected with said contract and arising thereunder and did then and there mutually promise each other to stand to, abide and perform the award of said Roberts touching the premises. The plaintiff states that said Roberts afterwards to wit. on the twenty second day of April A.D. 1859 having heard the parties and examined their respective proofs & exhibits did find and award that there was then due said Cur-

2

sier, under said contract a balance of nineteen hundred and six 85/100 dollars and did further award that said sum of nineteen hundred and six 85/100 dollars be paid to said Currier together with one half the arbitrators charges which amounts in all to one hundred dollars one half thereof being fifty dollars and making the whole sum awarded to said Currier in and by said award Nineteen hundred and fifty six 85/100 dollars and said Roberts then and there notified the plaintiff and defendant thereof. The plaintiff further states that said defendant has not paid said award or any part thereof though requested, but wholly neglects and refuses so to do.

Wherefore the plaintiff prays judgment against the defendant for said sum of nineteen hundred and six 85/100 dollars & said sum of fifty dollars together with the interest on said sums and for such other judgment as he may be entitled to.

W Currier Atty for pltff

Warren Currier the pltff in this cause, deposes and says that the foregoing petition and the matters therein as stated he believes to be true

Warren Currier

Sworn to and subscribed before me this the 2d day of July A.D. 1859.

S. Rice Clk

Upon the filing of which petition the following Summons was issued.

Summons

The State of Missouri
County of St Louis } ss To the Sheriff of St Louis County Greet

3

ing: We command you to Summon Samuel B. Lowe to appear before the Judge of our Circuit Court on the first day of the next Term thereof to be held in the city of St Louis within and for the county of St Louis on the last Monday of September next then and there to answer the complaint of Warren Currier as set forth in the annexed petition; and have you then and there this writ

Seal

Witness Stephen Rice Clerk of our said Court with the seal thereof hereto affixed at office, in the city of St Louis this 5th day of July in the year of our Lord eighteen hundred and fifty nine

S. Rice. Clerk

To which Summons the following Sheriff's return was made to wit.

Return

Executed this writ in the County of St Louis this 13th day of July 1859 by delivering a copy of this writ and petition as furnished by the Clerk to Samuel B. Lowe: the within named defendant

M. D. Cerre Sheriff
By J. A. Union Dept.

At the September Term 1859 on September 30. 1859 the following entry was made herein to wit - Demurrer filed

At the same Term on November 17th 1859 the following further proceedings were had to wit

The demurrer to the petition herein being heard and fully considered by the court is sustained: ten days is given plaintiff to amend: amended petition filed.

4

Am. Pet.

Said Amended Petition is as follows-

And now the Plaintiff by leave of the Court for that purpose had and obtained comes and files his amended petition as follows: The Plaintiff states that heretofore to wit:- on the 28th day of February A. D. 1857 at St Louis in the County aforesaid there were divers controversies then and there pending between the Plaintiff and defendant of and concerning a certain contract for the building by the defendant of forty cattle cars, for account of the North Missouri Rail road Company, bearing date therefor to wit, on the 21st day of August A.D. 1856 and which was then executed by and between the defendant and one William D. Sedgwick who thereafter to wit, on the 21st day of October A.D. 1856 for value received assigned and set over to the Plaintiff said contract and all the rights accruing to him said Sedgwick thereby; and of and concerning divers matters of claim connected with and arising out of said contract to wit among other things a claim in favor of the Plaintiff against the defendant of three thousand dollars, or thereabouts for one half the net profits accruing from the building and manufacture of the said forty cars in said contract mentioned as therein specified; and the said Plaintiff and defendant then and there did to wit on the said 28th day of February 1857 at said St Louis by their mutual agreement appointed one James S. Robert to hear and determine for them all the said controversies and matters of claim and did then and there mutually promise each other to stand to, abide by

5

and perform the award of said Roberts thereupon - and the said Roberts afterwards to wit on the 22nd day of April A.D. 1859 having fully heard the parties touching the premises, and examined their respective proofs and exhibits - adjuged upon the said premises and found and awarded that there was then due and owing to and in arrear to the plaintiff under said contract a balance of Nineteen hundred and six 85/100 dollars and did further then and there award that said sum of Nineteen hundred & six 85/100 dollars should be paid to the plaintiff by the defendant together with one-half the arbitrator's charges which were in all one hundred dollars one half thereof being fifty dollars & making the whole sum thereby awarded to the plaintiff nineteen hundred and fifty six 85/100 dollars and the said Roberts arbitrator as aforesaid then and there notified the parties thereof. The plaintiff states that said defendant though requested has not paid said sum of nineteen hundred and fifty-six 85/100 dollars or any part thereof but wholly neglects and refuses so to do. Wherefore the plaintiff prays judgment against the defendant for said sum of Nineteen hundred and fifty six 85/100 dollars and the interest thereon and for such other judgment as he may be entitled to.

Warren Currier pro se

Warren Currier the plaintiff in this suit on oath says that the foregoing petition and the matters therein as stated he believes to be true.

Warren Currier

6

Answer

On Nov. 22. 1859 the following answer was filed

Defendant, for answer to the petition of plaintiff denies that he and plaintiff agreed upon and appointed James P. Roberts to hear and determine the matters referred in said petition in manner and form as charged in said petition. He also denies that he and plaintiff mutually promised each other to stand to abide and perform the award of said Roberts as stated in said petition: but defendant says that he did agree with one Henry M. Woodward that said Roberts might adjust the differences between said Woodward & defendant by taking the books and accounts of both and by correcting and adjusting such erroneous entries or charges as might be found in either. Defendant denies that he ever gave said Roberts any other or greater power in the premises. Defendant further states that as he is informed and believes the plaintiff has not and never had any beneficial interest in the contract mentioned in said petition but is acting therein as the secret trustee of said Henry M. Woodward.

Defendant further states that said Roberts in making said pretended award did not comply with the terms upon which only defendant was willing that he might act at all, but wholly disregarded them. And defendant denies that said Roberts ever made any legal or valid award in the premises.

Defendant denies that he is liable to plaintiff in any sum whatsoever & prays to be hence discharged with his costs. Krum & Harding. Attys for Defts

7

Samuel B. Lowe the defendant makes oath and says that he believes the foregoing answer to be true

S. B. Lowe,

Subscribed and sworn to before me this 4th day of October 1859. As witness my hand & seal of office

Seal

E. W. Decker

Notary Public

At the September Term 1859 on Janry 26. 1860 the following further proceedings were had to wit

On award of Arbitrator, now come the parties, by their respective attorneys and waiving a jury submit this cause to the court upon the pleadings and proofs and the Court having duly heard and considered the same do find that certain matters in controversy were submitted to James L. Roberts as arbitrator, who proceeded to hear and decide the matters in controversy between the parties to this suit and awarded to the plaintiff the sum of nineteen hundred and six dollars and eighty five cents together with one half the arbitrators charges amounting to the sum of fifty dollars, that the same is still due and owing from defendant to plaintiff and that the interest on said sum to this date makes the sum total twenty hundred and forty six dollars and twenty cents. It is therefore considered by the court that the plaintiff

Judgment

recover of the defendant the sum of twenty hundred and forty six dollars and twenty cents the debt aforesaid as found and also his costs and charges in this behalf

Motion for New Trial.

Extended and have execution therefor. The defendants files a motion for a new trial

At the same Term on January 30. 1860 the following further proceedings were had to wit

The defendants motion for a new trial herein being heard and fully considered by the court is overruled.

At the same Term on February 2. 1860 the following further proceedings were had to wit.

The defendant files a bill of exceptions and also an affidavit for an appeal and on his motion an appeal is allowed him to the Supreme Court from the judgment herein rendered and he thereupon files an appeal bond in the sum of forty two hundred dollars, with himself as principal and Alfred C. Robertson and Chester Harding Jr as securities which bond is approved by the Court.

The following is said Bill of Exceptions -

Bill of Exceptions James A. Roberts

Be it remembered that at the trial of this cause the plaintiff called James A. Roberts who testified that he was the arbitrator who made the award sued on; that Lowe had executed a contract for the building of forty cars for the North Wisconsin Rail road Company and that Currier had acquired an interest in said contract; that it was assigned to him by Hedgewick who originally contracted with Lowe for the doing of said work; that there was a dispute between Currier and Lowe as to the costs of said cars, and he was called upon to ascertain the same; that an agreement or contract (which was proved by the witness) between Lowe and said

Q Sedgwick & which Sedgwick had assigned to the Plaintiff was placed in his hands; this was to be my guide so far as it had any application to the matters in dispute - the matter in dispute being the cost of said cars.

A paper marked Exhibit B was shown to the witness by defendants counsel in Cross Examination. Witness stated in regard thereto - this paper contains the items which I included in making up the total of the cost of said cars and I gave it to Lowe, several days after the award was made and delivered as he seemed dissatisfied and wanted to know how I came to such a decision, to show him what the items were, the item of "rent of shops $300.75" was for ground rent Currier and Lowe had a dispute as to whether ground rent and interest on the purchase money of the shops should both be allowed. I allowed the $300.75 as a fair compromise between the conflicting claims of the parties in respect to these items - Currier claimed that it would not be right to allow both - that he (the witness) did not overlook the requirement of the contract to allow interest on the purchase money of the shops but considered the $300.75 as an equivalent for the ground rent and interest

The submission was verbal and as recited in the Award which was in writing Award proved and read

Award Whereas Samuel B. Lowe & Warren Currier both of St Louis Mo. by verbal agreement on the 28th day of Feby 1859, Submitted to the undersigned all matters in difference between them arising out of the contract hereto annexed marked (A) and all matters of claim connected therewith & arising there

10 under for the final award and determination of the undersigned each agreeing to abide and perform such award. Now therefore having heard the parties and their respective proofs and exhibits and having duly considered the same do in pursuance of said submission find, award and determine that there is now due to said Currier under said contract, a balance of Nineteen hundred & six 87/100 Dollars and do further award and determine that the same be paid to him together with the arbitrator's charges amounting in all to One hundred Dollars. One half being fifty dollars. Published and delivered this twenty second day of April 1889

Jas. S. Roberts (Seal)

The contract between Lowe and Redgwick and the assignment thereof to Currier were read in evidence

(A)

Agreement These articles of agreement made and entered into this twenty first day of August 1888 by and between Lawrence B Lowe and William D. Redgwick both of the city & County of St Louis & State of Missouri Witnesseth - that whereas Henry M. Woodward of the county & State aforesaid has procured for said Lowe a contract with the "North Missouri Railroad Company" dated August 18th 1888, under which said Lowe is to build for said company forty cattle cars, at the price of Seven hundred and forty dollars each and whereas, in consideration of the services of said Woodward in the premises said Lowe has undertaken and agreed to pay to the said Woodward or to such person

11

as the said Woodward should transfer the rights and benefits accruing under said undertaking & agreement to one half the profits as hereinafter set forth and whereas the said Woodward has for a valuable consideration transferred the said rights and benefits to said William D. Sedgwick, now therefore the said Lowe, in consideration of the premises and of the sum of one dollar to him paid by said Sedgwick, receipt whereof is hereby acknowledged, agrees to and with the said Sedgwick that he will pay to him one half of all the net profits accruing from the manufacture & sale of said Cars under the Contract with the "North Missouri Rail Road Company as aforesaid upon the delivery of said cars or upon settlement on account thereof by said Lowe with said Company - And the said Sedgwick covenants and agrees that the interest on the purchase money of the shop occupied by said Lowe during the time when said cars are being delivered & acquired by him from Lindenau & Company shall be taken & regarded as a part of the cost of manufacturing said cars - and as such be deducted from the gross price paid for said Cars in ascertaining the amount of the net profits under said contract. - In witness whereof We have hereunto set our hands & seals the day and year first above written -

L. B. Lowe (L.S.)

William D. Sedgwick (L.S.)

Oct. 21, 1858. For value received I hereby sell assign and set over to Warren Currier of St. Louis the within and foregoing contract and all rights secured to me thereby

William D. Sedgwick (Seal)

12

Here the pltff rested.

The dependant then offered in evidence the paper marked Exhibit B as follows.

"Exhibit B."

320. 33 in Wheels	14.50	46.40.—
Fitting		160.—
46 267 2/3 lbs Castings	3	1388.—
160 Axles 49701 lbs	5 1/4	2609.30
480 Springs	4.50	2160.—
Freight		199.87
80.000 ft Oak & Pine Lumber	25-	2000.—
34 190 " Pine	30	1025.70
Coal		347.32
Labour a/c 40 cars	$75-	3000.—
Hauling		209.17
Paints Oils &c		412.45
Screws Nails &c		233.07
Iron 40 cars	$80	3200.—
Brass castings		776.55
Bolts		766.56
Chain Washers & small items		357.62
Rent Shop		300.75
		23.786.30

The plaintiff objected to this paper and to so much of Roberts testimony as related to the items thereof and to the allowance or disallowance of ground rent and interest. All this testimony was admitted when offered (subject to objections) but was subsequently ruled out on motion of the plaintiff to which ruling the dependant by his counsel excepted at the time

13

The defendant introduced a witness who proved that the cars were built at the shops of defendant and who testified that as he understood, it took three months to build them that he was present for only about a month and a half while the work was in progress and he understood from defendant that they had been at work on them about six weeks before he came; that while he was there the whole premises were given up to the building of said cars, and that no other work was done there during that time - That the ground rent was $1200 per annum, payable in Springfield, Massachusetts, and that the cost of exchange to place $300.- in Springfield was 75 cents - That the purchase money of said shops was $8000. On re examination witness stated he thinks from the state of the work when he came, it would take a month or a month and a half to prepare and get lumber to do the work and to do the work already done. The plaintiff then asks the following instructions which were given and defendant took due exception thereto

Plaintiff's instructions

The court is requested to charge for plaintiff

1st That if the court believes from the evidence that matters in difference between plaintiff & defendant were submitted to James A. Roberts by them for his decision, they agreeing to abide by and perform his award. And said Roberts did make an award in writing in accordance with the terms of said submission and delivered a copy thereof to the plaintiff & defendant then defendant is bound by said award, and plaintiff is entitled to recover the amount awarded to him as found in said award and interest

thereon from the date of said award.

The defendant asked the following instruction which was given.

Deefts Instructions

If it appear from the evidence that the contract between Lowe & Ledgewick read by plaintiff, was a material part of the terms of the submission, alleged by plaintiff, and if it further appear that the arbitrator in making his award wholly disregarded any material provision, for the benefit of defendant, therein contained, then the award was invalid and plaintiff cannot recover thereupon.

The Court rendered judgment for the plaintiff for the amount claimed by him. Within four days after said judgment the defendant filed his motion for a new trial as follows

Motion for a new trial

And now comes the defendant and moves the court to set aside the judgment rendered in this cause and for a new trial for the following reasons viz

1st The Court erred in excluding competent testimony offered by defendant

2nd The Court erred in admitting incompetent testimony offered by plaintiff

3d The Court erred in giving the instructions asked by plaintiff.

4th The judgment should have been for defendant.

Crum & Standing for deft.

which motion the court overruled and the defendant took due exception to the over ruling and prays that his bill of exceptions may be signed and sealed which is done.

S. M. Breckinridge (Seal)

15

Affidavit for Appeal

The following is the affidavit for appeal to wit

Samuel B. Lowe being duly sworn, says that his appeal in the case of Currier against him in the Circuit Court of St Louis County is not taken for vexation or delay but because he believes himself to have been aggrieved by the action of the court S. B. Lowe

Subscribed & sworn to before me this 2nd day of Feby 1860

D. Rice Clk.

The following is the Appeal Bond—

Appeal Bond

Know all men by these presents that we Samuel B. Lowe as principal and Alfred C. Robertson & Chester Harding jr as sureties are held and firmly bound unto Warren Currier in the sum of forty two hundred dollars, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals and dated at St Louis, this first day of February A.D. 1860.

The condition of the above obligation is such, that whereas said Samuel B. Lowe has appealed from the judgment rendered against him and in favor of said Currier in the St Louis Circuit Court for the sum of Nineteen hundred & fifty six dollars and — cents together with costs.

Now if the said appellant will prosecute — appeal with due diligence to a decision in the Supreme Court: and shall pay from such judgment as shall be given by the Supreme Court, and such as the Supreme Court may direct the St Louis Circuit Court to give: and shall if the judgment or any part thereof be affirmed, comply with and perform

the same so far as it may be affirmed: and pay all damages and costs which may be awarded against him by the Supreme Court then this obligation shall be void, otherwise it shall remain in full force and effect.

S. B Lowe (Seal)
A. C. Robertson (Seal)
Chester Harding jr (Seal)

Approved: Feby 2nd 1860
S. M. Breckinridge
Judge &c.

State of Missouri
County of Saint Louis } ss

I Stephen Rice Clerk of the Saint Louis Circuit Court within and for the county and State aforesaid certify the above and foregoing to be a true and complete transcript of the record and proceedings in the above entitled cause as fully as the same remains of record in my office

In testimony whereof I hereto set my hand and affix the seal of said Court at office in the City of St Louis this 1st day of March 1860

S. Rice Clk C. C

17.

Index

Petition	Page	1
Summons	"	2
Return	"	3
Amended Petition	"	4
Answer	"	6
Judgment	"	7
Motion for New Trial (Record)		8
Bill of Exceptions	"	8
James A. Roberts witness	"	8
Award	"	9
Agreement	"	10
Exhibit B	"	12
Plaintiffs Instructions	"	13
Defendant Instructions	"	14
Motion for a new Trial		14
Affidavit for appeal		15
Appeal Bond		15

124. (12)

March Term 1862

Warren Currier
respondent

vs

Samuel B. Lowe
appellant

Appeal from St Louis
Circuit Court.

M. S

Transcript for Supreme Court
To be filed as of the
3d day of March 1860
by consent - Krum & Harding
for appt

May 29 Geo. P. Strong
for appllee

Filed 3d March 1860.
Wm. S. Glanville
Cr.

Krum & Harding
Attys for appellee

G. P. Strong & W. Currier ~~[illegible]~~
$7.50

151

$10.00 paid by Mr. Harding. (a fee) (joindev)

1862 May 29 Argd rebtd
1862 June 5.
Affirmed Opinion filed Sp 70
1862 June 13. Motion for rehearing bd Sp 79

Warren Currier
respt
vs:
Samuel B. Lowe
Applt

IN SUPREME COURT,
TERM, 18

AND now come the said appellant and say, that in the record and proceedings of the Court below, in the above entitled cause, there is manifest error, and for error said appellant assign the following, to wit:

1. That said Court admitted improper and illegal testimony offered by plaintiff
2. That said Court rejected proper and legal testimony offered by defendant
3. That the Court gave ~~to the Jury~~ improper and illegal instructions.
4. That the Court refused to give ~~to the Jury~~ proper and legal instructions offered by .....
5. That the verdict was against the evidence.
6. That the verdict was against law.
7. That the verdict was against both law and evidence, and against the law under the evidence.
8. That the verdict was against the weight of evidence.
9. That the judgment was rendered in favor of the ~~appellant~~ respondent when it should have been rendered for the appellant
10. That said Court overruled the motion for a new trial, made by appellant

Kinn & Harding
for appellant

And now come the Respondent and for joinder in error say, that there is no error in the record and proceedings of said court in said cause, as assigned by said appellant

W. Currier, Prose

No. 312

March Term 1860

Supreme Court

Currier

vs

Lowe

Apigt. errors

Krum & Harding

for applt

Filed 20 March 1860.

W. S. Glanville Ck.

Warren Currier
Respondent
vs.
Samuel B Lowe
appellant

146
March Term 1862
Supreme Court
of Missouri

Statement by Appellant

This was an action upon a common law award, not under the Statute, brought by Respondent to recover the Amount claimed by him under an award made by James S. Roberts referee.

The amended petition states on the 28th day of February 1859 at St. Louis controversies pending between plaintiff and defendant concerning a certain contract for the building by defendant of forty cattle car for the North Mo R.R. Co. dated 21st August 1858 (contract is set out on p of Record) with Sedgwick, who assigns his interest to Woodward + he to plaintiff; by which contract Sedgwick, or his assignee was entitled to one half of the net profits arising from the building of said cars, that said controversy was referred to Jas. S. Roberts, by consent of both parties; that the referee heard the parties + their proofs and found that defendant was indebted to plff in the sum of $1906.85, which together with $50. one half of arbitraters fees, he awarded to plaintiff

Defendants answer contains a special denial of every allegation in petition + further sets up that Roberts in making said pretended award did not comply with the terms upon which only defendant

was willing that he might act at all, but wholly disregarded them - and defendant denies that Robert ever made a legal or valid award in the premisis.

Upon the trial the plaintiff called Arbitrator Roberts as a witness who testifies (p 8) to the contract; that there was a dispute between Currier and Love as to the cost of said cars & he was called on to ascertain the same; that the contract was placed in his hands; this was to be my guide so far as it had any application to the matters in dispute - the matters in dispute being the cost of said cars.

On cross examination - a bill of items made by witness containing the items by which he arrived at the cost of the cars was proved by him (the paper is copied on p 12) of Record) witness says - this paper contains the items which I included in making up the total of the cost of said cars (page 9) - the item of "rent of shop" 300.75 was for ground rent - (the last item in the paper) - Currier and Love had a dispute as to whether ground rent & interest on the purchase money of the shops should both be allowed. - witness continues I allowed the $ 300.75 as a fair compromise between the conflicting claims of the parties in regard to these items. - that he did not overlook the requirement of the contract to allow interest on the purchase money of the shops but considered the $ 300.75 as an

equivalent for the ground rent and interest on the shop -

The dft proved that the cars were built at dft's shop - + that it took 3 months to build them - the whole premises were given up to the building of said cars + no other work done there during that time - that the ground rent was $1200. payable in Springfld Mass. - that the cost of exchange to place $300. in Springfld was 1¼ cts - that the purchase money of the shop $8000.

All this evidence was ruled out - exception by defendant -

The Court gave the following instruction to which defendant objects + excepts.

If the Court believes from the evidence that matters in difference between plaintiff and defendant were submitted to James S. Roberts by them for his decision they agreeing to abide by + perform his award. and said Roberts did make an award in writing in accordance with the terms of said submission + deliver a copy thereof to plff + dft, then dft is bound by said award + plff is entitled to recover the amount awarded to him as found in said award and interest thereon from the date of said award -

For the defendant the Court gave the following instruction.

If it appear from the evidence that the contract between Lane + Sedgwick read

by plaintiff was a material part of the terms of the submission alleged by plaintiff and if it further appear that the arbitrator in making his award wholly disregarded any material provision for the benefit of defendant therein contained, then the award was invalid and plaintiff cannot recover thereupon.

Court rendered Jugmt for plff- Deft moved for new trial for error in excluding competent evidence offered by defendant, admitting incompetent testimony by plff- in giving plffs instruction, & for rendering Jugmt for plff-

The Case was tried by Court - Mo for new trial overruled and defendant files his bond, affidavit & perfects his appeal

1206

Comm's Report
&
Love appeal

Statement by
appellee

Krum & Decker
Counsel

Filed May 15. 1912
A. W. Mead
Clk

Isaac Currier
Respondent
v.
Samuel B. Lowe
Appellant

Supreme Court
March Term 1862.

Plaintiff's Statement.

This is an action on law in pursuance of a voluntary submission to arbitration award at common law. The petition alleges the pendency of certain controversies between the parties; their submission to arbitration by mutual agreement; and the making and promulgation of the award sued on in pursuance of the submission.

The answer denies the alleged submission; denies any agreement to abide the award of the alleged arbitrator; and denies that any legal and valid award was ever made in the premises. It does not allege any error or mistake in the award, or ask any correction therein, or allege fraudulently or mis-

conduct in the arbitration or the plaintiff or set up any affirmative defence.

The parties waived a jury and the cause was tried by the court

The award was in writing and was duly proved and read in evidence.

The oral testimony given on the trial was as follows:-

James L. Roberts, who was called by the pl'f. testified:- "That he was the arbitrator who made the award read in evidence; that Lowe had executed a contract for the building of forty cars for the North Missouri Railroad Company, and that Bunnell had acquired an interest in said Contract; that it was assigned to him

by Sedgwick who originally contracted with Lowe for the doing of said work; that there arose a dispute between Lowe and Lowe as to the cost of said cart, and he was called upon to ascertain the same; that the agreement or contract which was proved by the witness between Lowe and Sedgwick, and which Sedgwick had assigned to the plaintiff, was placed in his hands; that was to be my guide so far as it had any application to the matter in dispute; the matter in dispute being the cost of the cart."

On cross-examination a paper was shown to the witness marked Exhibit B. Witness stated in regard thereto:- "This paper contains the items which I included in making up the total of the cost of

coss, and I gave it to
Lowe several days after
the award was made
and delivered as he seemed

dissatisfied, and wanted to know how I came to such a decision, to show him what the items were. The item of "rent of shops $300.75" was for ground rent. Burnie and Lowe had a dispute as to whether ground rent and interest on the purchase money of the shops should both be allowed. I allowed the $311.75 as a fair compromise between the conflicting claims of the parties in respect to these items. Burnie claimed that it would not be right to allow both. That he (witness) did not overlook the requirement of the contract to allow interest on the purchase money of the shops, but considered the $300.75 as an equivalent for ground rent and interest".

The defendant introduced a witness who testified

"That the cars were built at the shops of the defendants and that, as he understood, it took three months to build them; that he was present for only about a month and a half while the work was in progress; and he understood from the defendant

that they had been at work about six weeks before he came; that while he was there the whole premises were given up to the building of said cars, and that no other work was done there during that time. That the ground rent was $1200. per annum payable in Springfield, Massachusetts, and that the cost of exchange to place $300. in Springfield was 75 cts; that the purchase money of said Shops was $5000. On re-examination witness stated that he thinks from the state of the work when he came, it would take a month or a month and a half to prepare and get lumber to do the work, and to do the work already done".

The contract read in evidence provided that the profits on the manufacture of said forty cars should be divided equally between the parties thereto. That provision of it which relates to interest is as follows:-

There was no provision for the allowance of ground rent

"And said Sedgwick covenants and agrees that the ~~purchaser~~ interest on the purchase money of the shops occupied by said Lowe during the

time when said cars are being delivered, and all gains by him from Doolittle & Co. shall be taken and regarded as a part of the cost of manufacturing said cars, and as such be deducted from the gross price paid for said cars in ascertaining the amount of net profits under said contract".

Exhibit B. referred to in the testimony of Roberts is as follows.—

320	33 in Wheels	14 50	4640.
	Fitting		160.
46247 3/5 lbs	Castings		1388.
160	Axles - 49701 lbs	5 1/4	2609.30
480	Springs	4 50	2160.
	Freight		199.89
80,000 ft	Oak & Pine Lumber	25.	2000.
34190 "	Pine	30	1025.70
	Coal		347.32
	Labor on 40 cars	75	3000.
	Hauling		209.17
	Paints, Oils &c.		412.45
	Screws, Nails &c.		233.07
	Iron. 40 cars	80	3200.
	Brass Castings		776.55
	Bolts		756.66
	Chain Wrenches & small items		357.62
	Rent Shop		300.75
			$23,786 30

The plaintiff objected to this paper, and to so much of the Roberts' testimony as related to the items thereof, and to the allowance or disallowance of ground rent and interest. All this testimony was admitted when offered (subject to objection) but was subsequently ruled out on motion of the plaintiff, to which ruling of the court the defendant excepted.

There was no evidence introduced or offered tending to show what testimony was submitted to the arbitrators in regard ~~to regard~~ to the length of time the shops were occupied with the car work; or whether the occupancy was exclusive or partial; or what conclusions the arbitrators reached in regard to such occupancy, other than his statement that he regarded the $300.75 as an equivalent for both ground rent and interest on the purchase money of the shops while the cars were building.

The court gave all the instructions asked by either party. They were as follows —

For the plaintiff this: —

"That if the court believes from the evidence that matters in difference between plf. and deft. were submitted to James S. Roberts by them for his decision, they agreeing to abide by & perform his award, and said Roberts did make an award in writing in accordance with the terms of said submission and delivered a copy thereof to the plf. & deft. then the deft. is bound by said award, & the plf. is entitled to recover the amount awarded to him as found in said award, and interest thereon from the date of said award".

For the defendant this: —

"If it appear from the evidence that the contract between Lowe and Sedgwick read by plf. was a material part of the terms of the submission alleged by plf.; and if it further appear that the arbitrator in making his award wholly disregarded any material provision for the benefit of the deft. therein contained, then the award was invalid, and plf. cannot recover thereon.

The court rendered judgment for the plaintiff for the amount of the award. The deft. filed his motion for a new trial which was overruled & the defendant excepted, and brings the case hereby appeal.

Warren Currier, Resp.

v.

Samuel B. Lowe
appellant

Supreme Court
March Term 1862.

Plaintiff's Statement

Filed May 17. 1862
A. W. Mead
Clerk

Warren Currier
Respondent
vs.
Samuel B. Lowe
Appellant.

No
March Term 1862
Supreme Court.

Lowe had a contract with the North Mo. R. R. Co to manufacture and deliver to said R.R. Co. forty cattle cars at the price of $740. each, which it appears Lowe obtained through the instrumentality of one Sedgwick - Lowe and Sedgwick had entered into a written contract (set out on page of the Record) by which for this consideration Lowe had become obligated to pay Sedgwick "one half of all the net profits accruing from the manufacture & sale of said cars under said contract with the N. Mo R R. Co. upon the delivery of said cars or upon settlement on account thereof". "And said Sedgwick" in the same contract "covenants & agrees that the interest on "the purchase money of the shop occupied "by said Lowe during the time when "said cars are being delivered and ac= "quired by him from T. Co. shall be "taken and regarded as a part of the "cost of manufacturing said cars"

Sedgwick assigned his interest in the contract to Currier the Respondent

Currier and Lowe did not agree as to the cost of said cars, and the matter was submitted to Jas. R. Roberts to ascertain the cost of the cars; in estimating these ~~cost~~ Roberts was to be governed by the contract between Lowe and Sedgwick so far as it had any application to the cost -

Roberts made a written award - the submission had been by parol. The written award appears at length on page of the Record - by which he adjudged that Lowe should pay Currier a certain sum of $1906.85 and also adjudged $50. as his own fees against him.

Currier brot suit on this award - Lowe in his answer denies the validity of the award; and avers that Roberts in making said pretended award did not comply with the terms upon which defendant only was willing that he might act at all, but wholly disregarded them &c.

The evidence which the defendant offered to prove this part of the answer was excluded, although after refusing to hear it this Court gave this instruction at his instance

~~He~~

that the refusal or neglect of the arbitrator to consider or award upon any material provision for the benefit of the defendant would invalidate the award.

The Appellant presents the consideration of the following points for a reversal of the judgment.

1st The exclusion by the Court of competent evidence offered by him to show that the Arbitrator omitted to award upon the amount of interest on the purchase money of the shop; and that in his award Roberts wholly disregarded this material provision in his favor.

2d The giving of the instruction for plaintiff which was unwarranted by the evidence in this.- 1. that the subject of arbitration was merely to fix the cost of certain articles, but did not give the plaintiff an action of debt.
2. that it permitted plaintiff to take judgment for $50. fees of arbitrator which he had no right to assess against defendant + certainly plaintiff was

not entitled to them, since he did not pay them.

3. that it permitted plaintiff to recover interest on this whole sum from the date of the award.

The submission and award in this case were not under the Statute; the ~~xxxxx~~ submission was by parol, the arbitrator was not sworn; nor was the award intended to be entered as a judgment in a Court.

It is governed then by the general principles of the common law.

Parol evidence, the item from which the net cost of the cars was ascertained, the amount of rent & of the purchase money, the time required to build the cars &c. these were all competent, and were excluded by the Court.

Prof. Greenleaf in his Com. on Law of Evidence says "In defence of an action on an award, or for not performing an award, the defendant may avail himself of any material error or defect, apparent on the face of the award - such as excess of power by the arbitrators, defect of execution of power, as by

omitting to consider a matter submitted, want of certainty to a common intent, or plain mistake of law as in allowing a claim of freight where the ship had never broken ground and the like. In regard to corruption or other mistake of the arbitrators in making their award, the common law seems not to have permitted these to be shown in bar of an action at law for non-performance of the award, but the remedy must be pursued in equity. But in this country in those States where the jurisdiction in equity is not general and does not afford complete relief in these cases, it has been held that if arbitrators act corruptly, or commit gross errors or mistakes in making their award, or take into consideration matters not submitted to them, or omit to consider matters which were submitted, or the award be obtained by any fraudulent practice or suppression of evidence, the defendant may plead & prove any of these matters in bar of an action at law to enforce the award. And though arbitrators are not bound to disclose the grounds of their award, yet they may be examined to prove that no evidence was given upon a particular

subject, or that certain matters were or were not examined or acted on by them or that there is mistake in the award.

Sec. 78 - 2d Vol. Greenleaf Ev. p 67 -
*further - sec. 81. - & cases cited -

A fortiori in our State, law & equity jurisdiction being blended can such a defence be made - especially as our Practice Act Art six. sec. 13 (p 1233) permits a defendant to make an equitable defence to an action at law in express terms.

Nor is it necessary that such defence appear on the face of the award - it may be proved by parol.

Buller v Mayor &c of New York - 7 Hill R 339

In our State, it has always been the practice to permit parol proof ~~to~~

Newman v LaBeaume 9 Mo. p 30
Wissell v Tickes 27 Mo. 557.

The paper containing the items of cost made by the arbitrator himself was then erroneously excluded - he was a competent witness himself to be interrogated not only upon the terms of the submission, also what items he allowed & what items he excluded, and by what rule he made the award.

His own calculation was admissible surely to show that he had not complied with the terms of submission, that he had omitted to include a material part of the cost, which by the very terms of the submission he was obliged to include.

Law may well agree to arbitrate the cost of the cars, provided the cost be computed upon the terms of the contract.

It was a conditional submission; the arbitrator refusing to follow these terms, or failing from ignorance or bias to follow the condition made an invalid award.

It was competent to prove that he had omitted to follow the condition - & failed to comply with the terms of the submission.

I understand the law of awards to be this - whatever competent parties choose to refer to a person & be bound by his judgment becomes final; for the reason that the question is to be determined by him, and if he determines the question erroneously it is by their own choice - but if he does not determine the question, or does not determine it upon the condition upon which it was to be judged, it is not final - If I agree that an arbitrator judge the amount of damages suffered by another upon a

contract, to be determined upon the basis of the contract, and he does calculate damages but, not upon the contract it will not be binding, because he acts without the scope of his authority and beyond it

If I agree to abide by the measurement of an arbitrator upon the basis of english measure & he applies french measure I will not be bound; for the arbitrator does not decide the matter as referred, but decides another.

- if it is to be decided by a certain rule & he adopts another rule, he transcends his power & the award will be bad.

Now it would be most unreasonable and unjust if the Court could not inquire into the award & see whether on such submission, the arbitrator had acted according to the terms of the submission - the Court below however so ruled, refused to hear any evidence except that there was an award & held it conclusive unless the award were made with a fraudulent intent.

If such were the law, it seems to me important that the evidence offered tended to show a fraudulent design.

In Tissell v Tickes 27 Mo. 557, this Court decided that upon a submission of the "amount of damages which Tissell might "to recover by law from said Tickes for the "taking of timber off the land of Tissell" an error of law vitiates the award.

The arbitrators awarded a certain sum which was ascertained to be treble damages - the Court ordered the arbitrators were mistaken upon a question of law and admitted evidence to show this error.

It was the last case bearing on this point in this Court - and was decided by Judge Scott with the assent of Judge Richardson.

The case may be explained thus: the arbitrators were to award damages according to the rule "of law"; and their error of judgment in thinking that by law Tissell was entitled to treble damages, was fatal to the award - they did not comply with the terms of submission - they adopted a different measure of damages than by law, thereby exceeding their power - but there was no pretence of fraudulent intent - it was an honest mistake on their part.

In the case at bar the Arbitrator was to ascertain the cost of the cars upon the contract - the contract was

to be his guide so far as it had any application - he exceeded his authority - he admits that he did not give plff the benefit of int. on purchase money - but made a compromise - he thought the appellant was not entitled both to ground rent & the interest on purchase money of shop - his award was necessarily invalid. - he departed from the terms of the submission - precisely the same principle governs as decided in case last cited.

The following cases further illustrate the rule.

Walker v City Council 1 Baily Ch. R 443 in which an award on submission with an agreement that certain persons should be present, was set aside because arbitrators decided in their absence - in good faith - no fraud pretended.

17 Vesey 9; in which a farm was to be valued at a certain standard, award set aside because not so valued -

An award delivered after day named in the submission, will be bad, because the terms of submission not complied with.

Smith v Spencer 1 McCord Ch. R. p. 93

Pratt v Hackett 6 Johns R. 14.

An award in which arbitrators exclude competent evidence by honest mistake of law, set aside

Severance v Hilton 32 N. H. 289.

In Hale v Chandler Mich. Reports 3 Gibbs p 524 - an award held invalid because arbitrators failed to take into consideration the value of a ~~for~~ water power in estimation of value of lands - an honest mistake - "it is unnecessary to impute any improper conduct to the arbitrators" —

In King v Armstrong 25 Georgia R. p. 264 an award set aside, because arbitrators omitted in the award to state a material part of ~~submission~~ a matter submitted to them -

The plaintiff was not entitled to recover the costs of $50. awarded against the defendant.

In a submission under the Statute, without express authority from the parties, the arbitrator is permitted to assess costs by sections 15 & 16.

On a parol submission under the general common law each party pays his own costs, the arbitrator has no power to assess them, & they cannot be noticed in the award.

197 Caldwell on Arbn. & cases there cited

13 Me. 104 was on submission & award under the Statute expressly authorizing the assessment of costs.

see 8 Mass. R. 399

Hanson v Weber 40 Maine 194

Voze v How 13 Metcalf R. 243 in which a new trial was granted merely for error in assessing costs.

The $50. which plaintiff received were merely the Arbitrators fees; and plaintiff could not recover these from defendant. He does not state that he paid them - nor is such evidence introduced -

For his services the Arbitrator may recover of defendant Hinman v. Hapgood 1 Denio 188.

And so defendant may be made liable twice for same thing; it would be no defence that he paid them to plaintiff, as plaintiff is not authorized by the arbitrator to receive or collect them.

Currier

v.

Love

Statement & Brief
of Appellant

Krum & Decker
for appt

Filed May 29th 1862
A M Keady
Clk

Warren Currier
Respondent
v.
Samuel B. Lord
Appellant

Supreme Court
March Term 1862.

Brief

I. The evidence ruled out was properly excluded because it went to the merits of the award which were not in issue, and were not open to investigation under the pleadings.

The merits of an award could not be inquired into under the general issue (R.S. Steph. pl. 160 - 1 Chit. pl. 520. 3 D. 776 Serg. & Rawle R. 243.) A fortiori the merits of an award cannot be inquired into under an answer which sets up no affirmative defence.

By his evidence the defendant sought to introduce "new matter" in avoidance of the award which the statute (R.S. 1855, 1232 § 12) expressly

requires to be stated in the answer, but which was not. The evidence excluded related to matter dehors the record and foreign to the pleadings.

III. The defence sought to be made at the trial was an equitable, and not a legal defence, and can only be made where properly stated in the answer, and in a court exercising chancery jurisdiction.

Taylor v. Carryell 12 Serg. & Rawle 243, 245, 251.
Newland v. Douglass 2 Johns. R. 61
Purdon v. Todd 3 Ib. 364
Cranston v. Kenny 9 Ib. 212
Phil. Ed. (Cowen & Hill notes) 3443.

The authorities all distinguish between awards made under a rule of court and awards in virtue of voluntary submissions at common law. The former can be corrected or set aside by the court granting the rule; the latter only in a court of equi-

civil & chancery jurisdiction.

While in this state the distinction between courts of law and equity is abolished; the distinction between legal and equitable claims and defences is not. The party seeking equitable relief must state the facts which entitle him to it, the same now as formerly.

Jones v. Binder 20 Mo. R. 87
Musgrave v. Ewing 24 Mo. 31

But the defendant has pleaded a purely legal defence, and having done so is not at liberty to abandon it on the trial and set up a defence not of a purely equitable

Kennedy v. Daniels 20 Mo. R. 104.

IIIII. The testimony of the arbitrator was properly excluded because he was not a competent witness to prove the facts sought to be established in avoidance of the award.

Elmaker v. Ruckley 16 Serg. & R. 72, 78
Kingston v. Kincaid 1 Wash C.C. 448, 450
Newland v. Douglass 2 Johns. R. 62
Efner v. Shaw 2 Wend. 567, 569.
1 Phil Ev. 166 in note by Cowen & H.
1 Gr. Ev. §236 & §249.

Even a court of equity will not compel an arbitrator to disclose the grounds of his award
Story's Eq. Pl. 458 Note 1 p. 459
Story's Eq. Juris. 680 (§ 1457)

Exhibit B. was made and delivered after the award was promulgated, and the powers of the arbitrator had been exhausted. Awards are of little value if they can be overturned by such documents.

The interest was an item which entered into the aggregate cost of the cars, and stood upon the same footing with the other items of cost. The allowance or disallowance of any particular item claimed to have entered into the cost of the cars was not a departure from the terms of the submission. It was for the arbitrator to judge of them all and reach as near as possible a just result.

The contract between the parties provided for the allowance of interest on the purchase money of the shops, but it did not provide for the allowance of ground rent. It was for the arbitrator to determine whether both these items should be allowed or only one. He knew that the $300.75 was allowed as a fair equivalent for both items. What evidence was submitted to him on the subject does not

appear; nor does it appear whether, no, found the fact to be that the shops were occupied partially, or exclusively, or for three months or less.

IV. The excluded testimony of [had no tendency to show that the] the arbitrators, either overlook or disallowed the interest. It shows the direct contrary of that

But if there were doubt upon the point all reasonable intendments are to be made in favor of the award. It is only gross errors clearly proved that the courts will notice.

Rowans v. Roberts 3 Yates R. 584.

V. The judgment should be affirmed with 10 pr. cent. damages R.S. 1855, 1301 § 336.

The amount involved in the defendant's objection to the award was trifling. It is a pretended error of $120. in the settlement of dealings amounting to some $25.000., only ½ of which fell upon the defendants, being but $60. The profits were divided equally and the addition of $120. to the cost would diminish the profits that amount, one half of which belongs to each party.

There was no ground for the appeal. It is a plain case of an appeal for delay.

Warren Currier, Respt.

v.

Samuel B. Lowe, Applt.

Supreme Court
March Term 1862.

Plaintiff's Brief

W. Currier, Atty. pro se

Filed May 29/62
A.W. Mead Clk

Warren Currier
Respondent
vs:
Samuel Lowe
Appellant.

} Supreme Court.

Mr Currier has placed in my hands a series of case reports in 14 Johns., 2 Cowen, 16 Serg & R. 2 N. H., 10 N. H. & 2 Conn. - the first two of which only I have seen; and he states that he would present them with his argument in writing to the Court. His "post-trial" argument of course I have not seen, but in anticipation of its contents beg leave to call the especial attention of the Court to the item of account made by the Arbitrator (not after the award as improperly stated without authority of the Record) upon which alone he based his award as competent evidence to impeach his award in showing beyond cavil or contradiction, the gross mistakes & errors committed by him, :

1. in omitting to credit even one cent for the amounts which Lowe expended for work and labor in the construction and delivery of 40 R. R. Cars during three months.
2. in omitting to give him benefit of interest on purchase money of shop

to which by the very terms of submission he was entitled.

The Court will be ready & eager to set aside such a monstrous injustice -

"It is the duty of a Judge when requisite to extend the limits of his jurisdiction" is a maxim of the Com. Law.

Broom's Leg. Max. (p. 56 margin)

"I commend the Judge", says Hobart (Hob. 125) "who seems fine and ingenious, so "it tend to right and equity; and I "condemn them, who, either out of pleasure "to shew a subtle wit, will destroy, or out "of incuriousness or negligence will not "labor to support the act of the party by "the art or act of the law"

To set aside this iniquitous award will not injure the plaintiff - his remedy on the contract remains ample and complete -

To support the award, will forever destroy the benefit of Law to the creditor to which he is entitled, to the moneys spent for his labourers & mechanics upon this work, the interest paid for shop hire - he has no remedy in Law or equity - the injustice binds him - in favor of

one a mere beneficiary without having incurred the expenditure of ~~money~~ money or labor -

Respectfully submitted
Krum & Decker

Col. Chester Harding now in the military service, appears to have been so confident of the error & of the reversal that he consented to become surety for the appellants as will appear from the appeal Bond in the Record.

Carrier

v

Lowe

Supplemental Brief
of appellant.

Krum & Decker
for appel

Filed May 30. 1862
A. M. Mead
Clerk

Cunard } Sup. Ct. March 5. 1862
v.
Lowe }

The point in regard to the allowance of costs by the arbitrator was not raised in the court below. The attention of the court was in no way drawn to it. It was not passed upon, and therefore, according to the uniform rulings of this court, will not be reviewed or looked into here. For aught that appears in the record the arbitrator had express authority to allow costs. Every reasonable intendment is to be made in support of the award and as of the action of the court below. Nothing is to be presumed against either.

But the arbitrator was entirely right in allowing costs, on general principles. He was liberal towards the deft. as the losing party, charging him with only one half the costs therein following the very common practice

In New York, Pennsylvania, Connecticut & New Hampshire it has long and uniformly been held that the award

to award costs is incident to the authority of arbitrators

Strong v. Ferguson 14 Johns. R. 161
Cox v. Sugar 2 Bowen R. 638
Hewitt v. Furman 16 Serg. & Rawle 135
Joy v. Simpson 2 N. H. Rep. 179
Stafford v. Stafford 10 Ib. 354
Allen v. Munson 2 Conn. R. 691

In the case in 16 Serg. & Rawle the court say. "It seems strange there was ever any doubt about the power of arbitrators to award costs."

The case cited by defendants counsel from 16 Metcalf stands alone and rests on Massachusetts usage.

But if the arbitrator was wrong in allowing costs, the court below did not pass on the question, it does not affect the general validity of the

award, but only that part of it awarding costs. It is a separate and independent matter. The judgment should be affirmed as to the residue of the award

Cox v. Jagger 2 Cowan R. 638
& see on pages 651-2.
Peters v. Pierce 8 Mass. 399.

This court should render such "judgment as the court below ought to have ~~rendered~~ given" (R.S. 1855, 1301 § 35) Even if the arbitrator is considered wrong in allowing 1/2 the costs against the defendant. The judgment should be affirmed as to the valid portion of the award, since even a mere pro forma reversal will be practically fatal to the plfs. rights, by reason of the bankruptcy of the defts. since the appeal was taken.

W. Currier Atty. pro se

No. 146

Currier

v.

Lowe

Supplemental Brief
for plf.

Supt. Ct.
March 5. 1862

Filed May 30, 1862
A. W. Mead
Clerk

Cannier
vs
Lowe

Appeal from the St Louis Circuit Court -

The defendant urges two grounds of complaint against the proceedings of the Circuit Court which we will notice in their order - 1st That the Court excludes the evidence which the deft had introduced to prove that the abitrator had improperly refused him credits in the award to which he was entitled - & 2nd That the Court gave an improper instruction at the instance of the Plaintiff - A third ground why the judgment of the Circuit Court should be reversed, viz That the arbitrator exceeded his authority in awarding costs in the case, is urged by the defendant, but the point not having been made in the lower Court by demurrer, answer, motion or otherwise, the practice of this Court has become so well settled, that whether there was error in the matter or not, we would not feel at liberty to disturb the judgment for that cause, and will therefore take no further notice of the question. -

1. An Examination of the answer will shew that it sets up no new matter constituting a defence - makes no objection to the award declared on, but spends its force in denying 1st the submission alledged, 2nd the mutual promise of the parties to abide the award, and 3d that an award was made - The defendant having staked his whole defence upon the denials of the allegations of the petition cannot be allowed on the trial to turn himself about and make a case by the Evidence not made by the pleadings - If such a practice were tolerated it would lead to inextricable confusion in the trial of causes and render pleading a mere cheat and snare - The Evidence excluded in this case was not only not applicable to any issue made in the cause but was in direct conflict with the State of case made by the answer.
The answer denied that an award had been made:- the excluded Evidence admitted the award, but sought to shew it was wrong - If the defendant meant to rely upon this proposed defence, he ought to have laid the foundation for the introduction of the Evidence to support it, by appropriate allegations in his answer, but having failed to do so whatever of merit there may be in it we cannot relieve him -

2. - As to the Second Error complained of we see nothing objectionable in the declaration of law in the nature of an instruction given by the Court -
Let the judgment of the Circuit Court

146

Currier

vs

Lowe

Opinion of the Court by

Dryden

Filed June 5. 1862

A. W. Mead Clk

affirmed

be affirmed - the other Judges Con=
Currency -

Dryden

Warren Currier
Respondent
vs:
Samuel B. Lowe
Appellant
} In Supreme Court.

The Supreme Court having affirmed the judgment of the Circuit Court for reasons not urged or intimated by the lower Court the appellant by his counsel respectfully moves a rehearing for the reasons following:

1st The instruction given by the Circuit Court which declares that an omission by the arbitrator to allow a material provision in favor of the defendant would avoid the award, proves conclusively that the Circuit Court considered the answer of defendant broad enough to admit of such a defence - the defence did not fail from any insufficiency of the answer in the opinion of the lower Court, but merely because the evidence offered was not sufficient in quantity or improper evidence.

Had such an objection, for which the judgment is here affirmed been made below, the Court would have been bound to permit the defendt to amend his answer under Sec. 1, 2 & 3 of Act 13 Practice Act. - even after trial and verdict —

2d By the reasons for the affirmance, in the opinion of this Court, now for the first time urgd - the defendant has been deprived of a just and meritorious defence.

The Appellee should not have been permitted now to make an objection to the answer which it was his duty to make in the Court below by demurrer or by motion to strike out parts of it. - if that had been done the defendant would have had leave to amend his answer of course (Sec. 40. Art. 6. Practice Act)

But this section is now invoked, to remand the cause.

This Court upon application of the plaintiff having adjudged the answer insufficient to admit of his meritorious defence the defendant asks leave to amend.

3d The first & second Sections Art 13. of Practice Act require the Court to grant new trials & permit amendments of pleadings (of answer as well as petition) in cases of total variance between proof and the answer, & the evidence shows a meritorious defence.

Where the proof is wholly at variance with the answer, & the Court is satisfied

from the evidence that a just defence does exist, it should grant a new trial - & (under Rec. 3) permit the pleadings to be amended.

The Appellant respectfully insists that for the reasons stated in the opinion of the Court, the case should be reversed to permit the appellant to amend his answer so that his meritorious defence, which appears on the face of the record, may be presented.

In Beck v Ferrara 19 No. 30. a case of total variance between the evidence & the pleading, is stated - the variance was no greater than in the case at bar. it was reversed to permit the plff to amend.

But if there was error, it was not the fault of defendant, only of the pleader - the answer does affirmatively state that the arbitrator failed to make an award upon the terms and conditions in which alone the defendant was willing to abide by the award. the answer does not deny that there was a submission & award - merely that there was such an submission & award as stated in the answer.

If there were inconsistent defences the plaintiff must avail himself of the error by motion to strike out, which is the only remedy allowed by the Practice Act -

The letter & spirit of the Code are opposed to a practice which operates as a snare & trap -

Its objects are to secure the administration of justice, & the Courts are invoked by Sec. 23. Art 9. so to construe its provisions "to secure parties from being misled, and to distinguish between form and substance".

Krum & Decker
of Counsel for
Appellants

Supreme Court

Warren Currier
Respondent

vs:

Samuel B Lowe
Appellant

Motion & reasons
for rehearing

Krum & Decker
Counsel

Filed June 12. 1862
A W Mead
Clk