

No. 13443

Supreme Court of Illinois

Leadbeater.

vs.

Roth.

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division.

No. 174.

Rath
vs
Leadbeater

Replevin

13442

SUPREME COURT OF ILLINOIS,

April Term, A. D. 1861.

THIRD GRAND DIVISION.

BRIEF OF DEFENDANT IN ERROR.

GEORGE H. LEADBEATER,
Plaintiff in Error,)
vs.)
JOHN G. ROTH,
Defendant in Error.)

The counsel for defendant in error submit to the honorable Court:

The first motion to dismiss, for want of security of costs, was properly overruled for insufficiency of the affidavit, which does not state that at the time of commencement of suit, the plaintiff below was a non-resident.

The second motion to dismiss, on the same ground, based on affidavit filed 12th May, 1859, was not made in due time, and properly overruled; because the motion is a dilatory motion, and had been waived, first: by appearance and filing an affidavit of merits; second: by allowing several terms to intervene before it was made.

Trustee vs. Walters et al., 12 Ill., 158.

Carpenter vs. Aldrich, 3 Metcalf, 58.

The affidavit on which the motion for a new trial was made is insufficient, and shows no ground for allowing the same.

The beneficial enjoyment of the premises continued to the defendant below during the whole period his under-tenants were in occupancy of the premises. The plaintiff below collected no rent of them, or of the defendant, whose liability continued.

Taylor, Landlord and Tenant, § 380.

The evidence does not show that the plaintiff below ever accepted the under-tenant as his tenant, nor does it show any legal surrender of the tenant's interest.

DAVIS & NISSEN,
Counsel for Defendant in Error.

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Ladbroke
vs

Roth

(1)

Filed Apr. 29 - 1861

G. Leland

clerk

United States of America }
State of Illinois. County of Cook } ss.

Pleas before the Honorable the Judges of
the Superior Court of Chicago within and
for the County of Cook and State of
Illinois at a regular term of said Superior
Court of Chicago, begun and holden at the
Court House in the City of Chicago in said
County and State on the first Monday being
the fifth day of November in the year of
our Lord one thousand eight hundred and
sixty and of the Independence of the
United States of America the Eighty fourth

Present - The Honorable John M. Nelson .. Chief Justice
of the Superior Court of Chicago,

Wm. H. Higgins }
Grant Goodrich } Judges.

Charles Haven Presenting Attorney

Anthony W. Hoising .. Sheriff of Cook County

Attest

Walter Kimball .. Clerk.

Be it remembered that heretofore to wit on
the sixth day of April in the year of our Lord one
thousand eight hundred and sixty, there was filed in
the office of the Clerk of said Court a certain
Stipulation in a suit pending in said Court, wherein
John H. Roth was Plaintiff and George H. Seadbeater
was defendant; Which said Stipulation is in words
and figures as follows, to wit,

State of Illinois	Superior Court
Cook County	of Chicago.
John H. Roth	
vs	At April Term A. D. 1861.
George H. Seadbeater	

It is hereby stipulated and agreed
by and between the parties to this suit that the above
entitled cause shall be heard and disposed of at the
April Term A. D. 1861 of the Supreme Court of Illinois
and that no advantage shall be taken of the delay
made in settling the Bill of Exceptions or in any other
matter where the late time of submitting the cause to
the Supreme Court might prejudice the hearing of the
said cause at the present April term of the said
Supreme Court.

And that the said cause shall be submitted to
the said Supreme Court upon the written arguments

of the Counsel in this cause, at next Term.

Chicago - April 3rd 1861.

A. J. C. Muller - Plffs atty

A. W. Mangrove - Defs atty.

State of Illinois
Cook County, ss.

I Walter Kimball Clerk of the
Superior Court of Chicago within and for the County
of Cook in the State of Illinois Do hereby certify
the above and foregoing to be a true and perfect
Transcript of a certain stipulation now on file in my
Office in a certain suit heretofore pending between said
Court wherein John G. Roth was Plaintiff and George
H. Leadbeater was defendant.



In testimony whereof I have hereunto
set my hand and affixed the Seal of
said Superior Court at Chicago in
said County the twenty fourth day of
April A. D. 1861.

Walter Kimball Clerk.

174
State of Illinois
Book County

John G. Roth . . .

— vs —

George W. Leadbeater

Certified Copy
Stipulation.

Filed May 8, 1861
L. Leland
Clerk

\$1.00

SUPREME COURT OF ILLINOIS.

APRIL TERM, A. D. 1861.

THIRD GRAND DIVISION.

ABSTRACT OF RECORD.

GEORGE H. LEADBEATER,	}	<i>Action of Assumpsit.</i> <i>Damages, \$500.</i>
<i>Plaintiff in Error,</i>		
<i>vs.</i>		
JOHN G. ROTH,	}	
<i>Defendant in Error.</i>		

This suit was commenced by summons, January 27th, 1859, in Cook County Court of Common Pleas, in assumpsit, returnable to February Term, 1859.

2 The declaration contained a single count for use and occupation.

13 On the second day of the said February Term of said Court, the defendant filed a motion to dismiss the said suit for want of security for costs, which motion was in the words and figures following:

13 "And now this day comes the said defendant, by his attorney, "etc., and moves the Court to dismiss this suit, for want of security "for costs, according to the statute in such case made and provided. "plaintiff being a non-resident."

13 And to support which motion the defendant filed his own affidavit, which is in the words and figures following, to wit:

13 "George H. Leadbeater, being duly sworn according to law, "says, that the said John George Roth is not a resident of the State

14 "of Illinois, but resides in Germany. That this affiant makes this
 "affidavit for the purpose of having this suit dismissed, no security
 "for costs having been filed by the plaintiff before commencing his
 "suit, according to the statute in such case made and provided."

15- At the May term of said Court, then having been changed to
 the Superior Court of Chicago, the said motion to dismiss was
 called up, before Hon. Grant Goodrich, one of the judges of said
 Court.

15- To sustain his motion, the defendant, by his counsel, read the
 aforesaid affidavit, and also introduced A. F. C. Mueller, the plain-
 tiff's counsel, as a witness, who testified as follows :

15- "That the said plaintiff is now, and has been for quite a number
 "of months, sojourning in Germany, but that the said plaintiff is a
 "citizen of the United States, and has a large amount of property
 "in the city of Chicago. That the plaintiff is a native of Germany,
 "but came to this country, was naturalized, and resided in the city
 "of Chicago, Illinois, a number of years; that he some time ago
 "went to Germany, and returned again to Chicago, but to gratify
 "his wife has returned again to Germany; has purchased property
 "in Germany, and now lives on said property, in Germany. But
 "witness cannot tell whether he has given up his residence in
 "Chicago. That witness was informed that said plaintiff intends
 "to return and continue his residence in Chicago, by his agent, Mr.
 "Charles Letz."

15- And no more testimony was offered on the said motion, when
 the same was submitted to the Court.

16 Whereupon the said Court overruled the said motion to dismiss
 the said suit, and refused to dismiss the same; and on cross-motion
 gave permission to the said plaintiff to file security for costs. And
 on the same day, the plaintiff's counsel filed security for costs in
 said suit.

3 And also, on the same day of the filing security for costs, the
 defendant made and filed his affidavit of merits. And also renewed

his motion to dismiss the said suit, by filing his motion, which is in the words and figures following :

17 " And now this day comes the said George H. Leadbeater, by
 " J. W. Waughop, his attorney, and renews the motion herein made
 " to dismiss this suit, because, he says, that the said plaintiff was
 " not a resident of this State at the time he commenced his suit
 " herein, and did not file security for costs in this cause."

17 To sustain his renewed motion to dismiss, the defendant filed
 his own affidavit, which was in the words and figures following :

17 " George H. Leadbeater, of said county, being duly sworn
 " according to law, says, that at the time of the commencement of
 " the above cause, the plaintiff, John George Roth, was not a resi-
 " dent of the State of Illinois. That he had purchased and occupied
 " property in Germany, for a long time prior to the commencement
 " of said suit, and still resides abroad, as this affiant is informed
 " and believes."

18 On the day following, to wit, the 12th day of May, the defend-
 ant, by his counsel, presented to said Court his said renewed motion
 to dismiss said suit, and asked leave to read the affidavit of said
 defendant filed therewith. Whereupon the said Court refused to hear
 the said affidavit read, and overruled said renewed motion to dismiss,
 and refused to dismiss said suit.

18 To which ruling of the said Court, in refusing to dismiss said
 suit, the defendant by his counsel then and there duly excepted.

18 On motion of defendant, the cause was then continued, for want
 of a bill of particulars.

18 At the succeeding term, the defendant filed a demurrer, which
 was on hearing sustained, and plaintiff took leave to amend his
 declaration.

18 At the December term, A. D. 1859, the defendant plead to the
 merits of said suit, by filing the general issue of non-assumpsit, and
 notice of his special matter of defense.

The said notice states : " That he (defendant) has paid up for all
 " the time he has occupied the said premises.

7 " That during the whole time for which rent is claimed in this
 " suit, the defendant did not himself occupy the said premises, but
 " occupied his own house.

7 " That the said plaintiff, by his agent, directly interfered with
 " the use of the said premises by the said defendant, in this, that
 " the said plaintiff forbade the undertenant of the said defendant in
 " the said premises paying his rent to the said defendant, and told
 " him that he should pay the rent to accrue and then due to the said
 " plaintiff, and not to the said defendant ; thereby taking the said
 " premises from the said defendant, and rendered him no longer
 " liable for the rent that should accrue on the said premises, as he
 " did not occupy the said premises himself."

19 Upon which the plaintiff took issue, and the case stood for trial.

19 At the September term, A. D. 1860, the cause was tried before
 Hon. Van H. Higgins, and a jury.

19 The plaintiff introduced as a witness, Chas. Letz, who testified
 as follows :

19 " I am the agent of the plaintiff for the management of his
 " real estate and collection of his rents I was appointed agent in
 " the summer of 1857. My brother, Jacob Letz, now deceased,
 " was agent until his death, in February, 1857. Upon taking the
 " agency, I found in my brother's rent book, the following entry :
 " ' Verbal lease to Geo. H. Leadbeater for house on Monroe street,
 " Lot --, B. --, S. S., at \$15 per month. All rents up to June 21,
 " '56, have been collected by J. G. Roth. Lease begins and ends
 " on the 21st day of each month.' To which were added the entries
 " for the receipts of rents up to January 5th, 1857.

19 " This is all I know about the lease. After receiving my power
 " of attorney from plaintiff, I went repeatedly to defendant to col-
 " lect the rents. He refused to pay the same, stating that he had
 " given up the lease, had nothing more to do with the premises, and

20 "that the person now in possession of the same, one George Ayers,
 "ought to pay the rent, defendant at the same time acknowledging
 "that he had rented the said premises to Ayers.

20 "In October, 1858, I commenced proceedings before C. D'Wolf,
 "justice of the peace in Cook county, against both the defendant
 "and George Ayers, to recover possession of said premises, and
 "obtained a judgment against them, in favor of said plaintiff, for
 "the recovery of the same; and in the beginning of December, of
 "the same year, I was put in possession by a constable. I consider
 "the sum of fifteen dollars a fair monthly rent."

20 *Cross-Examined.*—"After the defendant had refused to pay the
 "rents, I went to the occupant of the said premises, George Ayers,
 "and tried to collect the rent from him. He said he had rented
 "from defendant, Leadbeater, and had nothing to do with the plain-
 "tiff, and he refused to pay rent to Roth. Thereupon I told him
 "not to pay any more rent to Leadbeater (the defendant). This
 "was in the summer of 1857."

20 The plaintiff, by his counsel, then introduced Herman Benze,
 who testified as follows:

20 "I went several times, in the fall of 1857, and in 1858, to George
 "H. Leadbeater, at the instance of Charles Letz, to serve upon him
 "him some notices to quit the premises in question. Leadbeater
 "said that he had nothing more to do with the premises; that he
 "had tried to collect the rent from the tenant in possession, George
 "Ayers, but that Ayers would not pay; and that Ayers had driven
 "defendant from the premises with a butcher knife. Leadbeater
 "further said that Charles Letz ought to collect the rents himself."

21 Plaintiff offered no more proof, but closed his case.

21 The defendant introduced, as a witness, Farburn Leadbeater,
 who testified as follows:

21 "I live with the defendant; am a son of defendant; was in his
 "employment during all the time for which the plaintiff claims
 "rent in this suit, from December, 1856, to December, 1858; and

21 "from December, 1856, to December, 1858, the defendant did not
 "occupy, for his own business or place of residence, any part of the
 "said premises for which rent is claimed in this suit.

22 "The defendant had some things in the barn of said premises,
 "and had the key to said barn, and kept the same locked. The
 "other portions of the said premises, except the barn, were occupied
 "by person as tenants of the said defendant. The agent of the
 "plaintiff, Mr. Charles Letz, came to the store of the defendant,
 "where I was employed, in the spring of 1857, to collect of the
 "defendant the rents of said premises, and after some words about
 "the rent, the said Charles Letz said to the defendant, speaking of
 "the said premises for the rent of which this suit is brought, that
 "he must pay the rent; and the defendant refused, and said, 'you
 "must collect the rent of Ayers, the tenant in the house on said
 "premises;' that he would cut his arm off before he would pay any
 "more rent on the said premises; and the defendant derived no
 "more benefit from the said premises after that time, nor did he
 "have any more to do with the premises after that time. The
 "tenants, after that time, refused to pay any more rent to the de-
 "fendant for the said premises; and I saw the barn was broken
 "open, and some wood in the said barn." "This was in the early
 "part of the summer of 1857. The conversation occurred on a
 "failure to pay the rents by the defendant when asked by the said
 "Letz."

22 The defendant then introduced a receipt, showing the payment
 by him of fifteen dollars to Jacob Letz, in addition to what was
 credited in the rent book.

22 The testimony was here closed, and no more testimony was
 offered by either party. After argument, the plaintiff asked the
 following instructions, which were given:

22 *Plaintiff's First Instruction.*—After proof of occupation of the
 premises, occupation of the stable in the same enclosure may be
 regarded tenancy, to show a continuance of occupation of the whole
 premises.

23 *Plaintiff's Second Instruction.*—Occupation by Leadbeater's

tenants must be considered as his occupation, for the purposes of this action.

23 *Plaintiff's Third Instruction.*—It is necessary for the defense to show a surrender of the premises to the landlord, if defendant received possession from him.

23 The plaintiff asked for the following instructions, which were refused :

23 *Plaintiff's Fourth Instruction.*—A mere notice to the tenant by the plaintiff, (even if such were given,) not to pay rent to the defendant, is not enough to show determination of the defendant's occupation, unless the tenants consented to regard the plaintiff as their landlord.

23 *Plaintiff's Fifth Instruction.*—It is no evidence that the possession of the stable was surrendered, that the door was seen broken open.

23 The defendant asked a single instruction, which was refused, which is as follows :

23 *Defendant's Instruction.*—If the jury believe, from the evidence in this cause, that the plaintiff, by his agent, forbid the defendant having anything further to do with the premises, and told him he would take the premises into his own possession, and did in pursuance of such declared intention, forbid the payment of rent by the undertenant to the defendant, such acts on the part of the plaintiff will terminate the use and occupation of the premises.

24 The cause was then submitted to the jury, who returned a verdict for the plaintiff, and assessed the damages at \$345.

24 The defendant moved the Court for a new trial, and in arrest of judgment, and filed the following reasons :

24 1st. Because the verdict was not according to the evidence.

24 2d. The verdict of the jury is against the law in the case.

25- 3d. The defendant has discovered new testimony, bearing upon the merits of the cause.

25- 4th. The verdict was for more than the plaintiff was entitled to recover.

25- 5th. The Court refused instructions that should have been given to the jury.

25- 6th. The Court gave instructions that should have been refused.

25- In support of his motion for a new trial, the defendant filed his own affidavit, which is as follows :

25- " Says that he is the defendant in the above entitled cause, and that he has discovered, since the trial of this suit, other testimony, which he can produce on the rehearing of this action, which will be of material importance to his defense, as he is informed. The defendant depended on the testimony of George Ayers, a sailor by occupation, who was a tenant in the said premises after this affiant had moved from the same, to prove the eviction of this affiant from the premises by the landlord, but he was unable to see the said witness, by reason of his occupation, for a long time ; and when he did find him, he ascertained that he was not at home at the time ; but this affiant now learns, and since the trial of this cause has learned, for the first time, that he can prove by Mrs. Ayers, the wife of the said George Ayers, the following important facts : That the agent of the said plaintiff, Mr. Charles Letz, went to the said witness and forbade them paying any more rent to this affiant, stating to them that if they did they would be compelled to pay the rent again to him for the landlord. That he had forbidden the defendant having any more to do with the premises, and that from that time he took possession of the said premises, and they were his tenants, and not the tenants of the said defendant ; and that after that time, at the next interview with this affiant, the said witness refused to pay him any more rent, and agreed with said Charles Letz, that as soon as he produced his authority to act as agent, they would pay the rent to him, and would not pay any other person but him. That this act of the said Charles Letz, for the plaintiff, of taking charge of

the said premises, occurred in the month of June, 1857, since which time this affiant has not derived any benefit from the said premises, or had anything to do with the same.

"And this affiant can prove further, on a rehearing of this cause, that he occupied the said premises under an agreement to purchase the same, not in writing. That he did not know he could prove the agreement under which he entered the same, until since the trial of this cause. That he can prove the same by one Richard Thurman, who was present at the time the agreement was made."

27 At the November term, 1860, the motion for a new trial was heard before the said Court, in full bench.

27 The defendant, by his counsel, read his said affidavit, and after argument of counsel, the said motion for a new trial and in arrest was submitted to the said Court for their decision thereon.

27 Whereupon the said Court overruled the said motion for a new trial and in arrest, and refused to grant a new trial to the said defendant.

27 To which ruling and decision of the said Court the defendant then and there duly excepted.

Errors.

The defendant assigns the following causes of error :

1st. That the Court erred in not dismissing said suit, no security for costs having been filed when the suit was commenced, the plaintiff being at the time a non-resident of this State, on hearing the proofs on the first motion.

2d. That the Court erred in not hearing the proof in support of the renewed motion to dismiss said suit for want of security for costs, the plaintiff being a non-resident at the time the suit was commenced, the motion having been made in apt time.

3d. That the Court erred in refusing the instructions, offered by the plaintiff, which were given.

4th. That the Court erred in not refusing^a the instructions, offered by the plaintiff, which were given.

5th. That the Court erred in not giving a new trial, on the ground that the verdict is excessive in amount, and not authorized by the evidence in the cause.

6th. That the Court erred in not granting a new trial upon the ground of newly-discovered evidence.

7th. That the Court erred in not granting a new trial on the ground that the testimony did not authorize a verdict for the plaintiff.

J. W. WAUGHOP,
For Plaintiff in Error.

A. F. C. MUELLER AND
DAVIS & NISSEN,
For Defendant in Error.

Brief.

The plaintiff's counsel refers the Honorable Court to the following authorities:

Sec. 1st of Chap. 26 of Revised Statutes of 1845, and to the decisions on same:

Ripley vs. Morris, 2 Gilm. 381; *Hickman vs. Haines*, 5 Gilm. 20; *Smith vs. Robinson*, 11 Ill. R. 119.

Courts have no discretion if the motion is made in apt time. Where a plaintiff sues without filing bond for cost, suit must be dismissed. And what is apt time.

Adams vs. Miller, 14 Ill. R. 71; *Same vs. Same*, 12 Ill. R. 27; *Robinson vs. County Commissioners*, 5 Gilm. 559.

Courts may allow a new bond to be filed when a defective bond is filed; but when no bond for cost is filed when suit is brought, suit must be dismissed, when non-resident sues. *Shaw et al. vs. Henke*, 21 Ill. R. 127.

Eviction.

The principle on which a tenant is required to pay rent is, the beneficial enjoyment of the premises, unmolested in any way by the landlord; * * * It is wholly immaterial by what acts the failure of consideration has been produced, the only inquiry being, has it failed by the conduct of the lessor. Taylor's Landlord and Tenant, Sec. 380. *Pendleton vs. Dyett*, 4 Cow. R. 58; *Same vs. Same*, in Error, 8 Cow. R. 727; *Porton vs. Jones*, 2 Iredell R. 350; *Ogilvie vs. Hull*, 5 Hill (N. Y.) R. 52.

Surrender.

Where the tenant underlet the premises, and the landlord accepted the under-tenant as his tenant, and collected rent from him, which arrangement was assented to by the original tenant, the Court held that this amounted to a virtual surrender of the tenant's interest, by operation of law. Taylor's Landlord and Tenant, Section 514. *Thomas vs. Cook*, 2 B. & A. 119; *Whitehead vs. Clifford*, 5 Taunt. R. 518; *Grannan vs. Legge*, 8 B. & C. 324.

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Leakbeater

vs

Roth

Abstract ^{& brief} of Record

Filed April 22, 1881
L. Leland
clerk

UNITED STATES OF AMERICA,

STATE OF ILLINOIS, COUNTY OF COOK, SS.

Pleas, before the Honorable, the Judges of the Superior Court of Chicago, within and for the County of Cook and State of Illinois, at a regular Term of said Superior Court of Chicago, begun and holden at the Court House, in the City of Chicago, in said County and State, on the first Monday, being the Fifth day of November in the year of our Lord One Thousand Eight Hundred and Sixty and of the Independence of the United States of America the Eighty fifth

Present, The Honorable John M Wilson Chief Justice of the }
Superior Court of Chicago. }

Van A Higgins }
Samuel Fordick } Judges.

Calos Haven Prosecuting Attorney.

John Gray Sheriff of Cook County.

Attest, Walter Kimball Clerk.

Do it remembered that heretofore to wit on the 28th day of January in the year of our Lord One Thousand Eight hundred and Fifty nine Jno D Roth Plaintiff by A F C Mueller his Attorney Filed in the Office of the Clerk Of the ^{Cook} County Court of Common Pleas his certain declaration in words and figures as follows to wit

State of Illinois
Cook Co ss

Cook County Court of Common
Pleas of February Term A D 1859

John G Roth of said County of Cook Plaintiff in this writ by A F C Mueller his Attorney complains of George H Loebstrater Defendant in this writ of said County of Cook who has been summoned to answer of a plea of trespass on the case on premises

For that whereas the said Defendant hitherto to wit on the twentieth day of January in the year of our Lord One Thousand eight hundred and fifty nine at Chicago to wit in said County of Cook was indebted unto the said Plaintiff in a large sum to wit the sum of Five hundred dollars lawful money of the United States for so much money due to said Plaintiff from said Defendant for rent of certain premises of the said Plaintiff, and by him, said Defendant now and occupied for a long space of time to wit from the twentieth day of December AD one Thousand eight hundred and fifty six, for during and until the twentieth day of December AD one Thousand eight hundred and fifty eight at the monthly rent of Fifteen dollars payable on the twentieth day of each month, by the said Defendant to the said Plaintiff agreed to be paid for the use and occupation of the same to wit monthly on the twentieth day of each and every month, that the said Defendant should so use and occupy the same to wit in the County of Cook aforesaid and being so indebted the said Defendant in consideration thereof afterwards to wit on the said twentieth day of January AD Eighteen hundred and fifty nine undertook and then and there faithfully promised the said Plaintiff to pay him the aforesaid sum of money, when he the said Defendant should be thereto afterwards required

Nevertheless the said Defendant

although after requested so to do. has not yet paid the sum of money above mentioned or any part thereof to the said plaintiff. but to pay the sum or any part thereof to the said plaintiff. the said Defendant - has hitherto altogether refused and still does refuse, to the damage of the said plaintiff of Five hundred Dollars and therefore the said plaintiff brings suit &c

A. F. C. Mueller
Plt's Atty

Copy of a/c rend on
To rent from 20th Dec 1856 to 20 Dec 1858
24 m @ \$15.00 \$360.00

And afterwards to wit on the eleventh day of May in the Year aforesaid Geo H Leachbrater by Jno W Haughap his Attorney Filed in the Office of the Clerk of said Court his affidavit of merits in words and figures as follows to wit

State of Illinois } Cook County } Geo H Leachbrater advs John George Roth	} } } } }	Cook County Court of Com- mons Pleas of The February Term A.D. 1859 George H Leachbrater of said
---	-----------------------	---

County being duly sworn says that he is the Defendant
in the above cause. that he has a good and sub-
stantial defence on the merits of the above cause

Subscribed & Sworn {
to before me this 16th { J. A. Leadbeater
day February 1854 {
Walter Kimball Clerk

And afterwards to wit on the same day and year last
aforesaid said day being one of the days of the May Term
of the Superior Court of Chicago the following among other
proceedings was had and entered of Record in said Court
to wit

Ans G Rath

vs Plaintiff
George M Leadbeater

This day comes said plaintiff by
A. F. C. Mueller his Attorney, and the said defendant
by Ans M. Maughon his Attorney also comes. and said
defendant submits his motion to dismiss suit for want
of security for costs being filed. and said plaintiff there-
upon submits his cross motion for leave to file security for
costs instantly and the Court being advised resolves -
said defendants motion to dismiss suit and sustains
said plaintiffs motion. And thereupon said plaintiff

file his security for costs

And afterwards to wit on the ~~twelfth~~ day of May in the year aforesaid said day still being of the May Term of said Court the following among other proceedings was had and entered of Record in said Court to wit

Geo G Rath

vs

Appropriat

George W Seabrother

This day comes the said plaintiff by A F C Muller. His Attorney and the said Defendant also comes by his Attorney and submits his ^{for leave to file amended affidavit in support of his motion} motion to dismiss this writ want security for costs ~~for costs~~ being filed by said plaintiff. which motion to file amended affidavit upon said motion to dismiss this writ want security for costs is overruled by the Court to which ^{waile} Defendant enters his ^{petition} execution. - And thereupon said Defendant moves the Court continues this cause to next Term want copy account and on being filed by said plaintiff herein and the Court orders accordingly;

6
And afterwards to wit on the Seventh day of June
in the year aforesaid said George H Leadbeater Filed
in the Office of the Clerk aforesaid his demurrer in
words and figures following to wit

Superior Court of Chicago
George H Leadbeater { of the June Term A.D.
 ads 1859
Ino Geo Rath }

And the said defendant by
J H Maughof his Attorney comes and defends ~~the~~
the wrong and injury when &c and says that ~~the~~
said declaration of the and the matters and things
therein contained in manner and form as the
same are above stated and set forth are not sufficient
in law for the said plaintiff to have or maintain
his aforesaid action thereof against him the
said defendant. And he the said defendant
is not bound by law to answer the same.

And this he is ready to verify wherefore by -
reason of insufficiency of the said declaration
in this behalf the said defendant prays judgm-
ent, and that the said plaintiff may be bar-
red from having and maintaining his aforesaid
action thereof against him &c

And the said defendant
states and shows to the Court here the following

causes of demures to the said declaration that is to say. There is no venue to the said declaration no state or common wealth is laid as the location of the action

And it does not appear what the claim is on a written or verbal contract. And also that said declaration is in other respects - uncertain informal and insufficient &c

J A Maughop
Plffs Atty

And afterwards to wit on the tenth day of - September in the year aforesaid said George A Leadbeater Filed his plea and notice in words and figures following to wit

Superior Court of Chicago
George A Leadbeater } of the November Term AD 1859
ad }
John G Rath }

And the said defendant by John A Maughop his Attorney comes and defends the wrong and injury when &c and says that

He did not undertake or promise in the manner and form as the said plaintiff hath above thereof complained against him and of this he puts himself upon the Country &c

And the ^{paid} plaintiff doth the like

The plaintiff will please take notice that on the trial of the above cause the defendant will give in evidence and prove that he has paid up for all the time he has occupied the said premises of the said plaintiff as set forth in said plaintiffs declaration,

And the said defendant will further give in evidence and prove on the trial of the above cause that during the whole of the time that the said plaintiff charges in his declaration that the said defendant occupied the said premises the said defendant was residing in his own house on the north side of the Chicago River on Clark St and not in the house of the said plaintiff as alleged the premises of the said plaintiff being on the West side of the Chicago River

And the said defendant will also give in evidence and prove on the trial of the above cause that the said plaintiff by his Agents did directly interfere with the use of the said premises by the said defendant in this that the said

plaintiff forbade the undenant of the said defendant in the said premises paying his rent to the said defendant and directed that the undenant in said premises and told him that he should pay the rent to accrue and then due to the said plaintiff and not to the said defendant thereby taking the premises from the said defendant and rendered him no longer liable for the rent that should accrue on said premises, as he did not occupy ^{the} said premises himself. And therefore the plaintiff ought not to recover of the defendant as charged in his declaration

J. M. Maughon
Sef's Atty

And afterwards to wit on the fifth day of October in the year aforesaid said day being one of the days of the October Term of said Court, the following among other proceedings was had and entered of Record to wit

John G. Rath

vs

Appraisers

George H. Leadbrater

This day again comes the parties to this cause by their respective Attorneys as aforesaid and Counsel being heard on defendant's demurrer to plaintiff's declaration it is considered by the Court that that

Defendants demurer is sufficient to bar plaintiff from having & maintaining his action against said Defendant - the demurer is therefore sustained with leave to plaintiff to amend venue in declaration forthwith

And afterwards to wit on the sixth day September in the year Eighteen hundred and Sixty said day being one of the days of the September Term of said Court the following among other proceedings was had and entered of Record to wit

John E. Roth

vs

Apumpkin

George H. Leadbater

This day comes the said plaintiff by Davis & Nipen his Attorneys and the said defendant by John W. Mauphot his Attorney also comes and issues being joined herein it is ordered that a jury come whenever come the jury of good and lawful men to wit Waterman Reed - Geo. Wilder Geo. Whitney A. Ellison L. G. Smith James Jagers M. A. Russell Geo. O. Gardner A. E. Jenks, William Jackson, Alex. Roberts & Geo. Connally who being duly elected tried and sworn to try the issues joined as aforesaid after hearing evidence arguments of Counsel

and the instructions of the Court return to consider
of their verdict and the hour of adjournment having
arrived it is ordered upon agreement of the parties that
when the jury shall have agreed upon a verdict they
shall ~~read~~ the same to writing sign and seal the-
same and afterwards separate and meet the Court
tomorrow morning

And afterwards to wit on the seventh day
of September in the year aforesaid said day
being one of the days of the September Term
the following among other proceedings was
had and entered of record to wit

John G Rath

of Hampden
George A. Leabater

And now again comes the parties to this cause
by their respective Attorneys as aforesaid and
the Jury empanelled herein ^{on} yesterday for the
trial of this cause also come and submit
their verdict and say on the jury find if for
said Plaintiff and award his damages here-
in to the sum of three hundred and forty five
dollars

And therefore defendant submits his motion
herein for a new trial in this cause and
in arrest of judgment on said verdict

And afterwards to wit on the tenth day of November in the year aforesaid said day being one of the days ~~of the~~ days of the November Term of said Court the following among other proceedings was had and entered of Record to wit

Ans G Rath

vs

Applicant

George M Bradburn

And now again comes the said plaintiff by Davis & Nipen his Attorneys and the said defendant by John A. Waughat his Attorney also comes and defendants motion heretofore submitted herein for a new Trial being heard and the Court being fully advised overrules said motion for a new trial and defendant entered his exceptions whereupon plaintiff ought to have judgment entered on the verdict of the jury rendered herein as aforesaid

Therefore it is considered that the said plaintiff do
 have and recover of the said defendant his damages
 of three hundred and forty five dollars in form aforesaid
 by the jury here found and assessed and also
 his costs and charges in this behalf expended and
 now execution therefor. And therefore said defendant
 having entered his exceptions pray an appeal herein
 to the Supreme Court of this state which is allowed
 to him upon filing bond in the penalty of five
 hundred dollars with security to be approved by
 a Judge of this Court said Bond with bill of excep-
 tions to be filed in twenty days

State of Illinois }
 Cook County }

George A. Leavitt
 vs

John George Roth

Superior Court of
 Chicago of April Term
 A.D. 1861

Be it remembered that on

the 24th day of January A.D. 1854 the plaintiff—
commenced his suit herein by issuing a summons
from the Cook County Court of common Pleas in
and for said County of Cook in an action of
Assumpsit returnable to the February Term of said
Court A.D. 1854 commencing on the first monday
being the seventh day of the month He laid his
damages at \$500⁰⁰

On the 28th day of January A.D. 1854
the plaintiff filed his declaration containing a
single count which was in the words and figures
following to wit

For Copy of declaration see page No 1

On the second day of the said February Term of said
Court being the 8th day of the month the defendant
as his first action in said cause filed therein a
motion to dismiss the said suit for want of security
for costs Which motion was in the words and
figures following to wit

	Cook County Court of Common	
John George Cook	} Pleas of the February Term A.D.	
vs		} 1854
George H. Seabrook		

And now this day comes the said defendant

By John H. Haughop his Attorney and moves the Court to dismiss this suit for want of security for costs according to the statute in such case made and provided Plaintiff being a non resident

J. H. Haughop
Sexts Atty

To support which motion the said defendant — filed in said cause his own affidavit on the same day of filing his said motion which affidavit was in the words and figures following to wit

Cook County Court of Common
John George Rath } Pleas of the February Term
vs } A.D. 1859
George H. Seabroater }

George H. Seabroater being duly sworn according to law says that the said John George Rath is not a resident of the State of Illinois but resides in Germany affiant makes this affidavit for the purpose of having this suit dismissed on security for costs having been filed by the plaintiff before commencing this suit according to statute in such case made and provided

Subscribed and sworn to before me this 8th day of February 1859 Isaac Kelaftin Notary Public

At the day Term of the Superior Court of Chicago and on the eleventh day of the Month the aforesaid motion to dismiss was called up by the parties for a hearing before Honble Grant Goodrich one of the Judges of the Superior Court of Chicago which Court succeeded to the records of the said Cook County Court of common Pleas

To sustain his motion the defendant by his counsel read to the Court the affidavit of the defendant aforesaid and also introduced A F O Meuler the plaintiffs counsel as a witness who testified that the said plaintiff is now and has been for quite a number of months sojourning in Germany but that the said plaintiff is a citizen of the United States and has a large amount of property in the City of Chicago that the plaintiff is a native of Germany but came to this Country. was naturalized and resided in the City of Chicago Illinois a number of years, that he some time ago went to Germany and returned again to Chicago, but to gratify his wife has returned again to Germany has purchased property in Germany and now lives on said property in Germany. That witness cannot tell whether he has given up his residence in Chicago That witness was informed that said plaintiff intends to return and continue his residence in Chicago by his agent Mr Charles Setz. And no more testimony was offered on said motion but the same was then submitted to the Court for a decision thereon

Whereupon the said Court overruled the said

motion to dismiss the said suit and refused to dismiss the same and on Cross motion gave permission to the said plaintiff to file security for costs instantly - On the same day the plaintiff by his Counsel filed his security for costs in the said cause in pursuance of the law given him by the Court on his Cross motion which is in the words and figures following to wit

John G. Rath }
 vs } Superior Court of Chicago
 Geo H. Seabrook }

I do hereby enter myself security for costs in this - cause, and acknowledge myself bound to pay or cause to be paid, all costs which may accrue in this action, either to the opposite party or to any of the Officers of this Court, in pursuance of the laws of this State

Dated this eleventh day)
 of May AD 1859) H. D. C. Mueller

And on the same day and after the filing of said security for costs the Defendant made and filed his affidavit of merits in this cause and subsequently on the same day the Defendant renewed his motion to dismiss said suit for failure to file security for costs by said plaintiff when said suit was commenced the plaintiff being a non resident at that time which motion is

in the words and figures following to wit

Superior Court of Chicago

George A Leubratow } May Term A.D. 1859

and }
John George Rath }

J. H. Maughon
Depts. Atty

Superior Court of Chicago of the
George H. Bradshaw } May Term A.D. 1859
a vs }
John George Rath }
State of Illinois }
Cook County }

George H. Leachman of said County
being duly sworn according to law says that at
the time of the commencement of the above case.

the plaintiff John George Rath was not a resident of the State of Illinois That he had purchased and occupied property in Germany for a long time prior to the commencement of said suit and still resides abroad as the affiant is informed and believes

Subscribed and sworn to } J. A. Leadbrater
this 11th day of May 1859 }

Walter Kimball CLK

On the following day to wit May 12th the defendant by his Counsel presented his renewed ~~his~~ ~~renewed~~ motion to the Court and in support thereof asked leave to read the affidavit of the defendant, filed with his said renewed motion Whereupon the said Court refused to hear the said affidavit and overruled the said renewed motion to dismiss said suit, and refused to dismiss ^{the} said suit To which ruling of the said Court, in refusing to dismiss said suit the defendant by his Counsel then and there excepted, and on motion of the defendant for want of a bill of particulars the said suit was continued. At the succeeding Term of the said Court the defendant filed a demurrer to the plaintiffs declaration which was on hearing, sustained, and plaintiff took leave to amend, and on the Sixth day of the December Term A.D. 1859 the defendant pleaded to the merits of said suit by filing the general issue of non Assumpsit and notice of his special matter of defence

Which plea and notice are in the words -
and figures following to wit

For copy of Plea & notice see page 4

Upon which the plaintiff took issue and the cause stood
for trial at the September Term 1860 the said Suit was called
for Trial before Hon Vaut & Higgins and a jury was emp-
anelled to try the issues joined in the action

To sustain the issues on his part the plaintiff
by his Counsel introduced as a witness Charles Setz who
testified as follows I am the Agent for the Pl-
aintiff for the management of his real estate and col-
lection of his rents - I was appointed Agent in the
summer of 1857. my Brother Jacob now deceased was
agent until his death in February 1857 upon taking
the Agency I found in my Brothers Rent Book the fol-
lowing entry.

Verbal lease to Geo & Leubratow for
house on Monroe St on the half of Lot
D S. S. at \$15. per month all rents up to
June 21st 1856 have been collected by J. H. Rath
Lease begins and ends on the 21st day of each month
to which were added the entries for the receipts of
rents up to Jan 5th 1857 This is all I know about
the lease. After receiving my power of Attorney
from Plaintiff. I went repeatedly to defendant
to collect the rents. He refused to pay the same

stating that he had given up the lease had nothing more to do with the premises in question and that the person now in possession of the same one George Ayers ought to pay the rent Defendant at the same time acknowledging that he had rented the said premises to Ayers. In October 1858 I commenced proceedings before Justices of the Peace in Cook County against both the defendants and George Ayers to recover possession of said premises and obtained a judgment against them in favor of said plaintiff for the recovery of the same, and in the beginning of December of the same year I was put in possession by a Constable. I received ^{from} the sum of fifteen dollars a fair monthly rent.

Crop Examined by Defendants Counsel

After the defendant had refused to pay the rents, I went to the occupant of the said premises George Ayers and tried to collect the rent from him, he said he had rented from Defendant Leadrater and had nothing to do with the plaintiff and he refused to pay any rent to Rath. Thereupon I told him not to pay any more rent to Leadrater this was in the summer of 1857.

The plaintiff ^{by his Counsel} then introduced as a witness Herman Beyer who testified as follows

I went several times in the fall of 1857 & in 1858 to George H. Leadrater at the instance of Charles Letz to serve upon him some notices to quit the premises

in question Seabrooks said that he had nothing -
more to do with the premises. that he had tried to col-
lect the rent from the tenant in possession. George Ayers
but that Ayers would not pay. And that Ayers had
driven Defendant from the premises with a butcher -
knife. And Seabrooks further said that Charles Setz
ought to collect the rents himself. Plaintiff then
closed his case and no more testimony was offered by
him.

To prove his defence the defendant by his Counsel
thus introduced Fortm Seabrooks as a witness who
testified as follows

My name is Fortm Seabrooks and a son of
Defendant. I live with him was in his employment
during all the time for which the plaintiff claims
rent in this suit from & December 1856 to December 1858
& from December 1856 to December 1858 the defendant did
did not occupy for his own business or place of residence
any part of the said premises for which rent is claimed
in this suit. The Defendant had some things in
the barn of said premises ^{and} had the key to said barn
and kept the same locked. The other portions ^{the} of
said premises except the barn were occupied ~~by~~
by persons as tenants of the said Defendant. The
Agent of the Plaintiff Mr Charles Setz came to the
store of the Defendant when I was employed in the
Spring of 1857 to collect of the Defendant the rents of
said premises and after some words about the rent the said

Charles Setz said to the Defendant speaking of the premises for the rent of which this suit is brought said that he must pay the rent and the defendant refused and said you must collect the rent of Ayers the tenant in the house on said premises. That he would cut his arm off before he would pay any more rent on the said premises and the defendant desired no benefit from the said premises after that time nor did he have any more tools into the premises after that time the tenant after that time refused to pay any more rent to the defendant for the said premises and I saw the barn was broken apart and some wood in the said barn.

This was in the early part of the summer of 1854 the commotion occurred on a failure to pay the rent by the defendant when asked by the said Setz. The defendant introduced a receipt for the rent of said premises from the Agent Jacob Setz for fifteen dollars now there was audited in the book of the said Agent. This rent was paid by the defendant.

The testimony was here closed and no more testimony was offered by either party. After argument of Counsel the Plaintiff asked the Court to give the following instructions to the jury which were given.

After proof of occupation of the premises occupation of the stable in the same enclosure may be regarded tending to show a continuance of occupation.

of the whole premises

Occupation by Graduates tenants must be considered as his occupation for the purposes of this action

It is necessary for the defence to show a surrender of the premises to the Landlord if Defendant need possession from him

The plaintiff also asked the Court to give to the jury the following instructions which were refused

It is no evidence that possession of the stable was surrendered that the door was seen broken open

A mere notice to the tenants by the plaintiff (Even if such were given) not to pay rent to the defendant is not enough to show termination of the defendant's occupation unless the tenants consented to regard the plaintiff as their Landlord

The defendant by his counsel then asked the Court for a single instruction which was refused which is as follows

If the jury believe from the evidence in this case that the plaintiff by his agents forbade the defendant having anything further to do with the premises and told him he would take the premises into his own possession and did in pursuance of such declared intention forbid the payment of rent by the tenant to the defendant, such acts on the

part of the plaintiff will terminate the use and occupation of the premises

The case was then submitted to the jury who retired, and returned into Court a verdict finding thereby the issue for the plaintiff and assessed his damages at \$345.⁰⁰

Whereupon the defendant by his Counsel moved the Court for a new trial & in arrest of judgment which was entered & the reasons therefor filed which are in the words and figures following

Superior Court of Chicago of
 John George Rath } the September Term AD 1860
 vs }
 George A. Seabratw }

And now this day comes the said Deft by Naugbop his Attorney and moves the Court to grant him a new trial in the above cause and also to arrest the proceedings in this cause so that judgment may not be rendered on the verdict entered therein

The defendant Prays a new trial on the following reasons to wit

1st The verdict was not according to the evidence

2^d The verdict of the jury is against the law in the case

3^d The Defendant has discovered new testimony bearing upon the merits of the cause

4th The Verdict is far more than the Plaintiff was intitled to recover

5th The Court refused instructions that should have been given to the jury

6th The Court gave instructions that should have been refused

In support of his motion for a new trial the defendant filed his own affidavit, which is in the words and figures following, to wit

Superior Court of Chicago

State of Illinois	}	of the October Term A.D.
Park County		
George H Leadbrater	}	1860
advs		
John George Roth		

George H Leadbrater of said County being duly sworn says that he is the defendant in the above entitled cause and that he has discovered since the trial of this suit other testimony which he can produce on the rehearing of this action which will be of material importance to his defence as he is informed. The defendant depended on the testimony of George Ayer a Sailor by occupation, who was a tenant in the said premises after

this affiant had moved from the same to prove the
 eviction of this affiant from the premises by the
 Landlord but he was unable to see the said witness
 by reason of his occupation for a long time, and when
 he did find him he ascertained that he was not
 at home at the time, but this affiant now learns -
~~And~~ since the trial of this cause has learned -
 for the first time that he can prove by Mrs Ayers the
 wife of the said ^{George} Ayers the following important -
 facts - That the Agent of the said Plaintiff Mr Charles
 Setz went to the said witness and forbade them paying
 any more rent to this affiant stating to them that
 if they did they would be compelled to pay the rent
 again to him for the Landlord That he had forbidden
 the defendant having any more to do with the premises
 and that from that time he took possession of the said
 premises and they were his tenants, and not the tenants
 of the said defendants and that after that time -
 at the next interview with this affiant the said witness
 refused to pay him rent and agreed with said Charles
 Setz that as soon as he produced his authority to act
 as agent, that they would pay the rent to him and would
 not pay to any other person but him That this act
 of the said Charles Setz for the plaintiff of taking
 charge of the said premises occurred in the month of
 June AD 1857 since which time this affiant has
 not derived any benefit from the said premises or had
 anything to do with the same

And this affiant can prove further on a rehearing of this cause that he occupied the said premises under an agreement to purchase the same not in writing. That he did not know that he could prove the agreement under which he entered the same until since the trial of this cause. That he can prove the same by one — Richard Thurman who was present at the time the agreement was made.

And further Affiant did not
 subscribed and sworn to before } Geo H Seabrook
 me this 27th day of October A.D. 1860 }
 J Edwards Jay }
 Attorney Public }

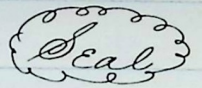
At the November Term A.D. 1860 the motion for a new trial and in arrest were heard before the said Court in full bench. The defendant by his counsel read to the said Court his affidavit in support of his motion for a new trial. And after argument of counsel the said motion for a new trial was submitted to the said Court for its decision thereon whereupon the said Court refused to give the defendant a new trial and overruled the said motion for a new trial and in arrest of judgment and ordered that a final judgment be rendered on the verdict of the jury. Therefore rendered in this cause.

To which ruling and decision of the Court in ~~order~~ ruling the said defendants motion for a new trial & entering judgment upon said verdict the said defendant by his Counsel then and there duly excepted

To all which rulings ^{and} decisions of the Court herein before verbally enumerated the defendant by his Counsel then & there duly excepted and prayed an appeal therefrom which was granted and for as much as the several matters and things herein before stated and set forth do not otherwise appear - the said defendant prays that this his bill of exceptions may be signed and sealed and made a part of the records of the same which is done accordingly

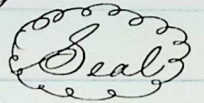
Grand Juror

Judge



Vaughan Higgins

Judge



State of Illinois }
Cook County } I Walter Kimball Clerk of
the Superior Court of Chicago within and
for said County do hereby certify that the
forgoing ~~testimony~~ is full true and complete -
transcript of all the pleadings on file in my
office and of the orders and judgment entered
of record in said Court together with the
bill of exceptions ^{in the case} wherein John G. Rath is Plain-
tiff and George H. Esabraton is defendant

I testimony whereof I hereunto
subscribe my name and affix
the seal of the said Court
at Chicago in Cook County
this 14th day of April AD
1861 (Walter Kimball) Clerk



G. H. Leadbeater
vs
John G. Rott

Supreme Court of Illinois
Errors. April Term
Grand Division

The defendant assigns the following causes of error: 1861

1st. That the Court erred in not dismissing said suit, no security for costs having been filed when the suit was commenced, the plaintiff being at the time a non-resident of this State, on hearing the proofs on the first motion.

2d. That the Court erred in not hearing the proof in support of the renewed motion to dismiss said suit for want of security for costs, the plaintiff being a non-resident at the time the suit was commenced, the motion having been made in apt time.

10

3d. That the Court erred in refusing the instructions, offered by the plaintiff, which were given.

4th. That the Court erred in not refusing the instructions, offered by the plaintiff, which were given.

5th. That the Court erred in not giving a new trial, on the ground that the verdict is excessive in amount, and not authorized by the evidence in the cause.

6th. That the Court erred in not granting a new trial upon the ground of newly-discovered evidence.

7th. That the Court erred in not granting a new trial on the ground that the testimony did not authorize a verdict for the plaintiff.

J. W. WAUGHOP,
For Plaintiff in Error.

174-51

George H. Leabrother

vs

John G. Roth

Record &

Abstract of Cases

Filed April 18, 1861

L. Leland
Clerk

Fees \$8.00 paid by

Depts atty. J. W. Mangrove

W. Kimball cash