No. 14796

Supreme Court of Illinois

Gage

vs.

Lunn et al

71641

14796

STATE OF ILLINOIS,

SUPREME COURT,

THIRD GRAND DIVISION.

NO. 15

J. W. Middleton & Co., Stationers, 190 Lake St.

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 Sixth day of June in the year of our Lord One Thousand Eight Hundred and Sixty four and of the Independence of the United States of America the Eighty Eighth.

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

Van A Higgins } Judges.
Joseph E. Gary }

Joseph Knox Prosecuting Attorney.

David S. Hammond Sheriff of Cook County.

Attest, Thos: B. Carter Clerk.

Be it remembered that heretofore to wit on the twentieth day of November A.D. Eighteen hundred and Sixty three came George D. Gage (Plaintiff) by Hales & Williams his attorneys and filed in the office of the Clerk of said Superior Court of Chicago, a Precipe for Summons against William Lunn and William H. Lunn which Precipe is in words and figures as follows, to wit.

State of Illinois }
County of Cook } ss

Superior Court of Chicago.
Of the December Term A. D. 1863.

George D. Gage

vs

William Lunn & William H. Lunn } Covenant. Damages $2000.

The Clerk of said Court will issue a summons

in the above cause directed to the Sheriff of Cook County in a plea of Covenant returnable at the December Term of said Court A.D. 1863 To the damage of the plaintiff of Two Thousand dollars.

To
Thomas B. Carter Esq.
Clerk.

Kales & Williams
Plaintiffs Attorneys
Chicago. Nov 20. 1863"

And thereafter on the tenth day of December A.D. 1863 there was issued out of said Court in said cause, Peoples Writ of Summons; which Summons with the Sheriffs return thereon endorsed is in the words & figures as follows to wit:

"State of Illinois
County of Cook } ss.

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

We command you as we have before commanded you that you summon William Lunn and William H. Lunn, if they shall be found in your county, personally to be and appear before the Superior Court of Chicago, of said Cook County on the first day of the term thereof to be holden at the Court House in Chicago, in said Cook County on the first Monday of January next to

answer unto George H. Gage in a plea of Covenant, to his damage of the said plaintiff as is said in the sum of Two thousand dollars

Also have you there this Writ with an Endorsement thereon in what manner you shall have Executed the same.

Witness Thomas B. Carter, Clerk of our said Court and the Seal thereof at Chicago aforesaid this 10th day of December A. D. 1863.

(Seal)

Thomas B. Carter. Clerk".

Endorsed "Served by reading this Writ to the within named defendant Phillemon Lunn this 23rd day of December 1863, the other within named defendant not found in my County.

Daniel S. Hamilton. Sheriff

By John A. Nelson. Deputy".

And also on the twenty fourth day of November A. D. 1863, came the said plaintiff by his said Attorneys and filed in the office of the Clerk of said Court his declaration in said cause which declaration is in the words and figures as follows, to wit.

"State of Illinois
County of Cook } ss. Superior Court of Chicago
of the December term 1863.

George H. Gage of Chicago in said County, plaintiff by Hales & Williams his attorneys Complains of Phillemon Lunn and Philizon St. Lunn defendants in an action of Covenant. For that whereas heretofore to wit, on the 18th day of April A. D. 1861 at

Chicago aforesaid by a certain Indenture thereunto
there made by and between the said Plaintiff of
the first part and the said defendants of the
second part, Which said Indenture the said
Plaintiff now brings here into Court, the said
Plaintiff did demise and lease unto the said
defendants All those premises situate lying and
being in said County known and described as
follows, to wit, Lots Sixty five (65) Sixty six
(66) Sixty seven (67) Sixty eight (68) Sixty nine
(69) Seventy (70) Seventy one (71) Seventy two
(72) Seventy three (73) Seventy four (74) Seventy five
(75) Seventy six (76) Seventy seven (77) Seventy
eight (78) Seventy nine (79) and Eighty (80) in
the Town of Brighton being situate in the South
East Quarter of Section Thirty six (36) township
Thirty eight (38) North, range Thirteen East.
To have and to hold the said above described
Premises with the appurtenances unto the said
parties of the second part, their executors admin-
istrators and assigns from the first day of April
A. D 1861, for and during and until the first
day of April A. D 1866 And the said defendants
Covenanted and agreed therein with the said
Plaintiff to pay him as rent for the said premises
the sum of One Thousand dollars per year in
quarterly instalments.
And it was and is further Covenanted and
agreed in and by said Indenture that in case
said defendants should keep and retain the said
premises for and during the said term, to wit,
from the said first day of April A. D 1861, to the
first day of April A. D 1866. That then and in

5

that case the rent of said premises so leased should not commence until the first day of September A. D. 1861, but that in case the said defendants should vacate the said premises on or before the first day of April A. D. 1862, that then and in that case the rent of said premises was to commence on the first day of April A. D. 1861 at the said rate of One thousand dollars per year.

And this plaintiff says that said defendants vacated said premises before the said first day of April A. D. 1862. to wit on or about the 15th day of November A. D. 1861 And this plaintiff avers that said defendants by means of their said Covenants so made as aforesaid became and are liable to pay him rent for said premises from the said first day of April A. D. 1861 to on or about the 15th day of November A. D. 1861 And the plaintiff further says that said defendants, and each of them, have neglected and refused to pay the for said premises during the time aforesaid at the rate of One thousand dollars per year, or at any rate whatever, in manner and form as they have in and by said Indenture Covenanted to do. And so the plaintiff in fact saith that the said defendants (although often requested so to do) hath not kept the said Covenants so by them made as aforesaid, but hath broken the same, and to keep the same with the said plaintiff, hath hitherto wholly neglected and refused, and still do neglect and refuse, to the damage of the said plaintiff of Two thousand dollars, and therefore he brings his suit &c

Hale & Williams
Pltf's Attys"

And thereafter to wit on the twenty fourth day of December A. D 1863 came the said defendant William Lunn and filed in the office of the Clerk of said Court his affidavit of Merits in said Cause, in words and figures as follows to wit,

"In the Superior Court of Chicago
Of January term A. D. 1864.

George H Gage
Between Plaintiff
against
William Lunn impleaded with
William N. Lunn . . . .
Defendant

State of Illinois }
Cook County . } ss

William Lunn being duly Sworn Deposeth oath and say that he is one of the defendants in the above entitled Cause, and that he verily believes that he has a good defence thereto upon the Merits.
Subscribed and Sworn to } Wm Lunn.
before me December 24. 1863 }
Thomas B. Carter. Clerk."

And thereafter to wit on the twenty third day of January A. D 1864 came the said defendants by their Attorneys and filed in the office of the Clerk of said Court their Plea in said Cause, and which said plea is in the words and figures as follows, to wit.

7

"William Lunn and
William N. Lunn
vs
George D. Gage

Superior Court of Chicago.

And the said William Lunn and William N. Lunn defendants by Garrison and Blanchard their Attorneys come and defend the wrong & injury when &c and say that the said Indenture in the said declaration mentioned is not their deed Also of this they put themselves upon the Country &c

Garrison & Blanchard
And the plaintiff doth the like. Attys for Defts."

And afterwards to wit on the Seventeenth day of June (being one of the days of the June term of said Court) A. D. Eighteen hundred and Sixty four, the following proceedings were had in said Cause and entered of record in said Court, to wit

" George D. Gage
vs
William Lunn and William N. Lunn } Covenant

This Cause being this day called for trial comes said plaintiff by Hales & Williams his Attorneys and said defendants by Garrison and Blanchard their Attorneys also come and issue being joined herein, it is Ordered that a Jury come thereupon come the Jury of good and lawful men to wit William Lobdell, William Irvine, E B Rogers, S. Remington Jr Peter Dracon, A. B. Porter

Geo. A. Hamilton, L. C. Bathis. A. L. Smith. George Story. L. Clark and B. Burn who being duly Elected Tried and Sworn to try the issues joined herein as aforesaid, after hearing Evidence, arguments of Counsel and instructions of the Court retire to consider of their Verdict and the hour of adjournment having arrived, it is Ordered upon agreement of parties that when the Jury shall have agreed upon a Verdict they shall reduce the same to writing sign and Seal the same and afterwards Separate and be discharged.

And afterwards to wit on the Eighteenth day of June (being yet of the June term of said Court) A. D. Eighteen hundred and Sixty four the following proceedings were had in said Cause and Entered of Record in said Court to wit.

George W. Gage . . .
vs
William Lamm and William N. Lamm . . . . . } Covenant

And now at this day again come the parties to this Cause by their Attorneys respectively as aforesaid and the Jury heretofore Empannelled herein on yesterday for the trial of said Cause having agreed upon a Verdict say That the Jury find issues for said Plaintiff and asses his damages herein against said defendants to the sum of Two hundred and seventy five dollars.

And thereupon said defendants submit their Motion for a New trial in said Cause.

9

And afterwards to wit on the Nineteenth day of November (being one of the days of the November term of said Court) A. D. Eighteen hundred and sixty four, the following proceedings were had in said Cause and entered of record in said Court, to wit.

"George W. Gage
vs
William Lynn and William H. Lynn } Covenant.

And now at this day again comes as well the said plaintiff by Noles and Williams his attorneys as the said defendants by Garrison and Blackburn their attorneys and this Cause coming on now to be heard upon the Motion of the said defendants heretofore to wit on the Eighteenth day of June A. D. 1864 and of the June term last past of this Court, made and submitted herein for a New trial in said Cause, and Counsel being heard as well in support of said Motion as in opposition thereto, and due and careful deliberation being thereupon had by the Court, and being fully advised of and concerning the premises, it is Ordered and Considered by the Court that the said Motion of the said defendants for a New trial in said Cause be and the same is hereby overruled and that said defendants be and they are hereby refused a New trial in said Cause to which ruling and decision of the Court in overruling the said Motion for a New trial in said Cause the said defendants by their attorneys aforesaid then and there excepted.

Whereupon said plaintiff ought now to have

Judgment on the Verdict of the Jury rendered herein as aforesaid.

Therefore it is Considered that the said Plaintiff do have and recover of and from the said Defendants his damages of Two hundred and Seventy five dollars in form aforesaid by the Jury aforesaid, here found and assessed, together with his costs and charges by him about his suit in this behalf expended and have Execution therefor.

$275.00

Now thereupon the said defendants having entered their Exceptions herein, pray an Appeal herein to the Supreme Court of this State from the Judgment of this Court, which is allowed to them upon filing Bond in the penalty of Five hundred dollars with Security to be approved by one of the Judges of this Court, to be filed with their Bill of Exceptions in twenty days from this date.

11 And thereafter to wit on the sixth day of December A. D 1864 came the said defendants by their Attorneys and filed in the office of the Clerk of said Court, their Bill of Exceptions in said suit; Which Bill of Exceptions is in the words and figures as follows, to wit:

"State of Illinois, } ss. Superior Court of Chicago
Cook County. }

William Lunn and
William N. Lunn
vs
George W. Gage } Covenant

Be it remembered that on the 17th day of June A. D 1864 at the June Term of said Court the above cause came on for trial before the Honorable Van H. Higgins one of the Judges of said Court and a Jury duly impannelled for that purpose the issues being joined by the Plaintiff and Plea of defendant, together with a Stipulation signed by both parties: Which Stipulation is as follows

"George W. Gage } Superior Court of Chicago
vs
Wm Lunn and
Wm N. Lunn }

It is stipulated and agreed between the parties to this suit that the above named defendants and each of them may under the above plea make all and each of the defences and objections they could have done as if they had craved oyer and set out said Indenture

of Lease and plead to the same.

And it is further stipulated and agreed that upon the trial of this cause, the said defendants or either of them may under the above plea give any evidence under the same which they could give, or would be admissable under any well drawn plea, which the defendant would be entitle to file in this action.

January 31. 1861.

Harrison & Blanchard
Attys for Defts
Hales & Williams
Plts Attys."

Whereupon the plaintiff to maintain the issues on his part offered in evidence the following Lease, the execution of which was duly proved

"This Indenture made this Eighteenth day of April in the year of our Lord one thousand eight hundred and sixty one Between George H. Gage of Chicago, Cook County party of the first part and William Lunn and William A. Lunn parties of the second part. Witnesseth That the said party of the first part for and in consideration of the Covenants and agreements hereinafter mentioned, to be kept and performed by the said party of the second part their Executors administrators and assigns, has demised and leased to the said parties of the second part the House premises situate lying and being in the County of Cook and in the State of Illinois known and described as follows to wit:- Lots Sixty five (65) Sixty six (66) Sixty seven (67). Sixty eight (68) Sixty nine (69) Seventy ('70). Seventy one ('71) Seventy two

(72) Seventy Three (73) Seventy four (74) Seventy five (75) Seventy six (76) Seventy seven (77) Seventy eight (78) Seventy nine (79) and Eighty (80) in the Town of Brighton being situate in the South East Quarter of Section Thirty six (36) Township Thirty eight (38) North range Thirteen (13) East.

To have and to hold the said above described premises with the appurtenances unto the said party of the second part their executors administrators and assigns from the first day of April in the year of our Lord one thousand eight hundred and sixty one for and during and until the first day of April in the year Eighteen hundred and sixty six. And the said party of the second part in Consideration of the leasing of the premises aforesaid by the said party of the first part to the said party of the second part, does covenant and agree unto the said party of the first part his heirs executors administrators and assigns to pay the said party of the first part, as rent for said demised premises, the sum of One thousand dollars per year in quarterly instalments.

And the said party of the second part further Covenants with the said party of the first part that said second party has received said demised premises in good order and condition, and that at the expiration of the time in this lease mentioned they will yield up the said premises to the said party of the first part, in as good condition as when the same were entered upon by the said party of the second part, loss by fire, or inevitable accident, or ordinary wear excepted.

It is further agreed by the said party of the

Second part that Neither they nor their legal representatives will underlet said premises, or any part thereof, or assign this lease, without the written assent of the said party of the first part had and obtained thereto.

It is expressly understood and agreed by and between the parties aforesaid, that if the rent above reserved, or any part thereof, shall be behind or unpaid on the day of payment whereon the same ought to be paid as aforesaid, or if default shall be made in any of the Covenants or agreements herein Contained, to be kept by the said party of the second part their executors administrators and assigns, it shall and may be lawful for the said party of the first part his heirs executors administrators, agent, attorney or assign at his Election to declare said term ended, and into the said premises or any part thereof, Either with or without process of law, to reenter, and the said party of the second part, or any other person or persons occupying it or upon the same to expel remove and put out using such force as may be necessary in so doing, and the said premises again to repossess and enjoy as in his first and former Estate, and to distrain for any rent that may be due thereon upon any property belonging to the said party of the second part, whether the same be exempt from execution and distress by law or not and the said party of the second part in that case hereby waives all legal rights which they may have to hold or retain any such property, under any exemption laws now in force in this State, or in any other way. Meaning and

intending hereby to give the said party of the first part his heirs executors administrators or assigns, a valid and first lien upon any and all goods chattels and other property belonging to the said party of the second part, as security for the payment of said rent in manner aforesaid anything hereinbefore contained to the contrary notwithstanding. Also if at any time said term shall be ended at such election of said party of the first part his heirs executors administrators and assigns as aforesaid, or in any other way, the said party of the second part their executors administrators and assigns, do hereby covenant and agree to surrender and deliver up said above described premises and property peaceably to said party of the first part his heirs executors administrators and assigns immediately upon the determination of said term as aforesaid, and if they shall remain in possession of the same ten days after notice of such default or after the termination of this lease in any of the ways above named they shall be deemed guilty of a forcible detainer of said premises under the Statute, and shall be subject to all the provisions and conditions above named, and to eviction and removal forcibly or otherwise, with or without process of law, as above stated.

And it is further covenanted and agreed by and between the parties that the party of the second part shall pay and discharge all costs and attorneys fees and expenses that shall arise from enforcing the covenants of this Indenture by the party of the first part.

And it is further covenanted and agreed by and

between said parties that the said party of the first part shall paint the outside of the house situated upon said premises and known as the Brighton House - also to construct a privaee house place to occupy the position of the former one, and also to cause to be put down a picket walk upon said premises.

It is further understood and agreed that in case the said parties of the second part shall keep and retain the said premises above mentioned for and during the said term of five years from the first day of April A. D. 1861 that then and in that case the rent of said premises so leased shall not commence until the first day of September A. D. 1861 But in case the said parties of the second part shall vacate the said premises on or before the first day of April 1862, that then and in that case the rent of said premises to commence on the said first day of April 1861, at the said rate of $1000. per year.

It is further agreed by and between said parties that whatever permanent improvements shall be placed upon said premises by the said parties of the second part shall be taken at the expiration of said term of five years by the said party of the first part, at an appraisal to be placed upon them by any two disinterested persons to be named by the parties to this lease. Witness the hands and seals of the parties aforesaid.

Geo. W. Gage (Seal)
Wm Lunn (Seal)
Wm N Lunn (Seal)

(Signed)
Jas: W. Lowe.

17

To the reading of which the said defendants by their Counsel then and there objected, and then and there stated their objections as follows, to wit:

1st. Said lease is not properly nor truly set out in said declaration

2nd. There is a Material Variance between the lease offered, and the one declared on.

The Court overruled said objections and allowed said lease to be read in Evidence.

To the overruling of said objections and allowing said lease to be read in Evidence the defendants then and there Excepted.

Thereupon the plaintiff further to maintain the issues on his part offered

John Ring who being duly sworn testified.

I live at Brighton. I lived the next door to the Brighton House in 1861. I have known the parties to this suit since 1861. The defendants vacated the Brighton House in the fall of 1861. I don't know where they went to. Brought I live here to this place. The State Fair was held here in the fall of that year. It was after that defendants left the house.

Cross Examination.

I don't know when defendants took possession of the house, nor what lots are included in the lease. I have been here Eight years. The Brighton House was used for a Hotel. They were

quite a number of Cattle yards on the premises belonging thereto. There had been a horse shed attached prior to 1861. I don't know when it was burned down. There was no horse shed built there in 1861 and there is none there now. It was burned down as near as I know before 1861 and there was no shed there when the defendants occupied the premises. The Cattle yards were West of the Hotel. There was a railroad side track leading to the Fair grounds, which was taken up after the fair was over. The fair grounds were East of the Hotel. I saw the defendants move out. It was in the fall in October or November. I think about the first of November 1861. I think the fair was in September. I think I saw the old gentleman Mr Lunn at the house, but he did not stay there the Son Stan carried on the house. There was no railroad track to the grounds yards.

Hereupon the Plaintiff rested.

Hereupon the defendants to maintain the issues on their part called
James Michie who being duly sworn testified as follows to wit;

I live in Town of Lyons and know the parties to this suit and the Brighton House. I lived in Lyons in 1861. The Brighton House was constructed for a Drovers Hotel, and had a large number of cattle yards attached. I attended the State Fair in 1861. The only side track then constructed was on the opposite side of the Road

19

from the Hotel and for the accommodation of the Fair. There was no side track constructed for the Hotel or Cattle Yards in 1861.

I was at the Hotel several times during that year - There was no Horse Shed there in 1861. The defendants went into the house in the Spring of 1861. and furnished it for and kept a Hotel. The Hotel is on the South side of the Railroad one and a half or two miles from Bridgeport Slaughterhouses. I heard a conversation between the Plaintiff and William. N. Lyon in the fall of 1861 after the State Fair. Mr Lyon and myself went into the Tremont House Chicago (of which plaintiff was proprietor) to give the plaintiff the Key to said Hotel, said Brighton House. He handed the Key to the plaintiff and told him that he (Lyon) could not keep the premises as there was no side track constructed there nor any horse shed. Mr Page replied there had been a side track. Mr Lyon remarked "you have neglected to lay the track and build the shed, although I notified you to do it."

The track for the fair was not on the Brighton House premises but was off, on the other side of the road Mr Page said "a track have been laid" Mr Lyon replied "what benefit is that to the Hotel" The Hotel is constructed apparently to make a south head of it. The Cattle yards were built some years ago. The house is at the forks of the Archer Road and plank road. I well know the premises as the Archer road is one of the roads to Lyons. The house is of little use without the Cattle yards. The defendants left

because there was no Horse shed and side track and told the plaintiff so. A great many Cattle passed over the Chicago, Alton & St Louis road - formerly Cattle were drove in. But since they come by Railroad they can't be loaded nor unloaded without a side track at the yards.

I have owned and rented houses and have kept a Hotel and am acquainted with the business of Hotel Keeping.

A House like the Brighton House without a Horse shed and side track to the Cattle yards would hardly be worth Keeping. A great many Cattle passed over that Railroad in 1861. The Hotel Keepers get pay for yarding and keeping the Cattle and for boarding the men.

Cross Examination.

The track put down for the Fair did not come as near the Brighton House as the main track did. There was an entrance to the fair on the North side of the Fair grounds. The place where the Cars stopped at the fair was twenty rods from the Brighton House. Mr Gage took the Key when Mr Lunn offered it to him. The State Fair lasted the middle of September.

Direct Examination resumed.

The side track I spoke of did not touch the Brighton House premises. It was taken up again. Chatham road, the plank road, lay between it & the Brighton House."

The defendants then called

21

Daniel Christman who being duly sworn testified,

"I know the parties to this suit, in May 1861, defendant William H. Lamm asked Mr Gage when he was going to build the Side track, and said, The defendants furnished the Brighton House, but it is in order and removed it, in the Spring of 1861 and again put it in Repair a few days before the Fair. They plastered and painted it inside — There was no Horse Shed built there in 1861. I lived the road South of it."

The defendants then called as a witness. Edward Brandridge &c who being duly sworn testified as follows:

I keep the Brighton House. Am a Cattle Drover and have been in the business several years. The most convenient yards for the Alton & St Louis Railroad in 1861, were those at the Brighton House. I am acquainted with the business of keeping a Hotel, at a Cattle Yard. They charge ten cents each for yarding and one dollar & a quarter per week for keeping the Cattle and a dollar a day for boarding the men. A Side track must be constructed from which an inclined plane must lead into the yards. People would not patronize a house off from the yards. Drovers not take Cattle to the house and premises without a side track & plane to unload the Cattle by an inclined plane leading into the yards is worth nothing — drovers will not go there."

Cross Examination

"Can think drovers would patronize the house without the track, they would go to the most

convenient place, where the accommodations could be had & cattle unloaded.

Re-direct. The Brighton House 1861 was not patronized by Drovers at all - then or now."

The defend's then called

Simon Quinlan.

"I know George W. Gage, and am acquainted with the Brighton House. I went there Dec. 25th. 1861. I took care of the house for the rent. The cattle yards are 150 rods West of the House. There are nine. There was no horse sheds built there in 1861, nor any side track constructed there that year to the yards or house."

Cross Examination

"A track to the cattle yards would have to cross a highway, the Archer road, the railroad runs parallel to the premises in question and yards are back and west of the house. - Archer Road between yards and Railroad."

The Defendants then called

Patrick Bowers who being duly sworn testified

I know the parties. In 1861 I was foreman of Tracklayers on the Chicago Alton & St Louis R. R. I laid a side track for the State Fair, it took from 4 to 5 days. To lay a side track from the Chicago, Alton & St. Louis R. R. to the Brighton House Cattle Yards, would take 20 men about five days. Any track put off from the Main track is a side track. The track I laid was

40 rods from the Brighton House. It did not go West of the plank Road - the Brighton house and Cattle Yards are West of the plank roads. the track I laid for the fair grounds, in no ways went to the Brighton House or Cattle yards on the premises."

The defendants then called

Mr Mars; who being duly sworn, testified as follows;

I reside near the Brighton House. Have known it ever since it was built. The land about is smooth level prairie. Plaintiff did not build a fence there in 1861, nor was any track laid to the premises or Cattle Yards. The premises are triangular about 80 rods in length. I have been a Surveyor. The railroad runs within 40 rods of the house, and parallel till it crosses the plank road then it turns Northerly. The house used to do a good business - Since the Railroad was built, the business was not much. The house is a very large one. There is a good deal of travel on the road. The house is not patronized like Reynolds or Nichols's where they have side tracks. The house there would be a great advantage to the house."

[illegible] was all the testimony in the case.

Thereupon the Court gave the following instructions for the Plaintiff.

"Under the laws the defendants had the right to

24

Guess

vacate the premises the next day after they entered into possession, if they were dissatisfied therewith, or with the terms of the lease - and in such case the plaintiff could only recover at the rate of a thousand dollars a year, from the first day of April 1861. The written lease introduced in evidence fixes the rights of the parties; Once if the Jury believe from the evidence that the defendants vacated the premises mentioned in the lease on or about the first day of November 1861, then the defendants are chargeable under the lease at the rate of a thousand dollars a year from the first day of April 1861, until they vacated the premises, together with interest at the rate of Six per cent per annum from the time the defendants vacated the premises. Deducting therefrom the damages if any, sustained by defendants for the failure of plaintiff to fulfil the covenants made by him in said lease."

"If the Jury believe from the Evidence that the defendants have not notified the plaintiff to make the improvements specified in the lease prior to the time they vacated the premises, then under the Evidence in this case, the Jury may consider whether the defendants are Entitled to any reduction of damages by way of recoupment or offset."

To the giving of each of said instructions the defendants then and there objected.

The Court overruled said objection and to the decision of the Court in overruling said objection and giving said instructions the de-

25

Defendants then and there excepted.

Thereupon the defendants asked the Court to instruct the Jury as follows, to wit.

"1. And the Jury are instructed that in the question of damages they must examine all the facts, and it is for them to say from such facts what damages the defendants have sustained."

Given

"2. If the Jury believe from the evidence that plaintiff on the premises leased to defendants as covenanted in his lease to erect a shed from the house and build a pile track which he neglected to do for an unreasonable time, and that for the want of said improvements the defendants suffered damages, then the amount of damages is a proper offset to be allowed on the rent due, and if it equalled or overran the amount of rent due on the lease the Jury will find for the defendants.

Given

"3. The Jury are instructed that the consideration for the rent mentioned in the lease offered in evidence was the use of the premises therein mentioned with the alterations and improvements which the plaintiff was and by his said lease covenanted to make, and if they believe from the evidence that the plaintiff neglected or refused to perform his said covenants for an unreasonable length of time whereby the defendants suffered damages for want of such alterations or improvements, or that by that means the premises were of less value to the defendants in their business as

Given

26

lenants of the Plaintiff then such damage or decrease of value is a proper offset to the stipulated rent mentioned in said lease, and the consideration of said rent has failed to the extent of the damage so sustained".

Refused

"4. Looking at the law in this cause and its various terms and covenants, and the surrounding circumstances existing at the time of its Execution thereof. The Court instructs the Jury that if they believe from the evidence, and the terms of said Lease that the parties intended a side track should be built by Plaintiff from the Chicago Altm & St Louis Road to connect with Cattle yards on said premises, and that the same was not so built, or the Horse Shed - that the use of the said track and Horse Shed to be built in a reasonable time were a part of the Estate leased to defendants for the sum of $1000. per year as mentioned in said lease and part of the consideration for said defendants covenants and promises to pay said sum, then if they find such track or shed was not built the law is for the defendants and they are entitled to your Verdict."

Refused

"5. If the Jury believe from the Evidence that the Plaintiff did not at the time he executed the lease offered in evidence intend to perform his Covenants therein mentioned, then his Executing said lease was a fraud on the defendants which avoids the lease, and the Plaintiff cannot claim anything thereby".

27

"6. The Conditions in the Lease by which the Plaintiff was to Erect a suitable shed - to paint the house on the outside, and to Construct a Side track are Conditions precedent to the payment of rent & to be performed within a reasonable time taking into Consideration the Nature of the Contract, and before the time of payment of the $1000. mentioned in the Lease could be demanded; And the Plaintiff was bound to a full performance of the Conditions therein Contained and must prove such performance of the Conditions mentioned in the said Lease, in order to recover upon the Lease."

Refused

"4. If you believe from the Evidence That the Plaintiff leased the premises in question to the Defendants, and at the same time Covenanted with them to build thereon a Horse Shed - to paint the house - and Construct a Side track for their use during the Continuance of said Lease and that Plaintiff Neglected to build said Shed and Construct said track, and that a reasonable time for so doing had Elapsed then the Defendants were justified in leaving, and the Plaintiff is not Entitled to rent for the time Defendants occupied the premises."

Refused

"5. If you believe from the Evidence that the Plaintiff Covenanted in the Lease to build a Horse Shed, paint the house and Construct a Side track on the premises leased without any time of performance being fixed, such acts were Necessary to be done within a reasonable time and before the Plaintiff is Entitled to rent. And if you further believe from the Evidence that a reasonable time for the performance

28

of Plaintiff said Covenants had elapsed at the time the defendants left said premises, and that said Covenants of Plaintiff had not been performed then the Jury will find for the defendants."

Refused

"9. If the Jury believe from the Evidence that the Plaintiff at the time of the giving of the Lease retained in evidence that plaintiff Page should proceed at once with reasonable diligence to build a Side track and Horse Shed - that he did not do so prior to defendants leaving the premises in question, that he had sufficient time for such purpose then the law is for the defendants and they are entitled to the Verdict."

Refused

"10. If the Jury believe from the Evidence that the Plaintiff did not construct the Side track, and did not build the Horse Shed as he covenanted to do in said lease - and that plaintiff had sufficient time to do so before the time at which the defendants left the premises - then the law is for the defendants and they are entitled to the Verdict."

Refused

"11. If the Jury believe from the Evidence that the Plaintiff had up to the time of the defendants leaving the premises in question neglected and refused to build the Horse-Shed - and Side track as mentioned in the lease - then the defendants were justified in leaving the premises and is not entitled to recover."

The Court modified the second instruction of defendants instructions by striking out the following

29

words "and if it equals or overruns the amount "of rent due on the lease the Jury will find "for the defendants." and refused to give the 4th 5th 6th 7th 8th 9th 10th & 11th of defendants instructions

to the modification of the Court and the refusal to give such of the said 4th 5th 6th 7th 8th 9th 10th & 11th instructions of defendants the said defendants then and there excepted. To which of said refusals defendants excepted.

Thereupon the Jury retired and afterwards on the Eighth day of June aforesaid rendered a Verdict for the plaintiff for Two hundred and Seventy five dollars.

Thereupon the said defendants entered their Motion for a New trial. as follows, to wit.

"Superior Court of Chicago

William Lunn and
William H. [illegible]
vs
George P. Gage } Motion for New Trial.

Now come the above named defts by their Attorneys and move for a new trial upon the following grounds viz:

1. The Court erred in permitting plaintiff to read in Evidence the Lease so read in Evidence before the trial Jury on the trial of this Cause and in overruling defendants objections thereto

30

2. The Court erred in refusing instructions asked by defendants.

3. The Court erred in refusing, giving the instructions asked by defendants. Plaintiff - and the said instruction that defendants were bound to give is contrary to the law of the case, and the verdict was contrary the evidence and law of the case and not warranted by the same.

Garrison & Blanchard
Attys for Defts."

And afterwards on the Nineteenth day of November 1864 at the November terme of said Court and after argument of Counsel the Court overruled said Motion for a New Trial, and to the decision of the said Court in overruling said Motion for a New trial the said defendants by their Counsel then and there excepted.

Whereupon defendants prayed an appeal and tendered their Bill of Exceptions and prayed that the said Court would sign and seal the same; which is done accordingly.

Wm H. Higgins (Seal)
Judge Sup. Court.

20

31

And afterwards to wit on the Sixteenth day of December A. D. 1864 came the said defendants by their said Attorneys, and filed in the office of the Clerk of said Court, their Appeal Bond in said cause, in words and figures as follows to wit.

"Know all men by these presents That we William Lunn and Stephen White of the County of Cook and State of Illinois are held and firmly bound unto George W. Gage also of the same County and State in the penal sum of Five hundred dollars, lawful money of the United States for the payment of which well and truly to be made, we bind ourselves our heirs executors and administrators jointly severally and firmly by these presents

Witness our hands and Seals this 16th day of November A. D. 1864.

The Condition of the above obligation is such That whereas the said George W. Gage did on the 19th day of November A. D. 1864 in the Superior Court of Chicago, in and for the County of Cook and State of Illinois aforesaid and of the November term thereof A. D. 1864 recover a judgment against the above bounden and Plaintiff in Error for the sum of Five hundred and seventy five dollars and ~ cents, besides costs of suit; from which said judgment of the said Superior Court of Chicago the said William Lunn has prayed for and obtained an Appeal to the Supreme Court of said State.

Now Therefore if the said Wellcome Lunn shall duly prosecute his said appeal with effect and moreover pay the amount of the Judgment, Costs, Interest and damages rendered and to be recovered against him in Case the said Judgment shall be affirmed in said Supreme Court, Then the above obligation to be void, otherwise to remain in full force and virtue.

(Signed) Wm Lunn Seal
Stephen White Seal"

33

State of Illinois
Cook County } Ss.

I James B. Carter Clerk of the Superior Court of Chicago within and for the County and State aforesaid Do hereby certify the above and foregoing to be a true and correct transcript of the Pleadings and papers now on file in my office, together with the proceedings and Judgment entered of record in said Court in a certain suit, the pleadings wherein George W. Lyon is Plaintiff and William Lunn and William N. Lunn, defendants.



In testimony whereof I have hereunto set my hand and affixed the Seal of said Court at Chicago in said County this Ninth day of March A. D. 1865.

James B. Carter Clerk

Supreme Court of Illinois

April Term A.D. 1865 at Ottawa

William Lunn &
William H. Lunn
Appellants
vs.
Appeal from Superior Court of Chicago

And the said appellants by Garrison & Orchard their attorneys come and say that in the record and proceedings aforesaid there is manifest Error in this to wit

1 The Court Erred in admitting said Loan & Trust Co's Bill in Evidence

2 The Court Erred in giving Each of Plaintiffs Instructions.

3 The Court Erred in modifying the Defendant's second Instruction & in not giving it as asked.

4 The Court Erred in refusing to give the 4 5th 6, 7 10th & 11th Instructions

5 The court Erred in overruling the Motion for a new Trial

6 The court Erred in deciding that the building of a Side-Track and

shed by Plaintiff was not a condition precedent

7 The Verdict and judgement should have been for the Defendants

Wherefore the said appellants pray that the said judgement may be reversed annulled & held for nothing & that they may be restored to all that have lost by reason thereof

Garrison & Blanchard
attys for Appellants.

And now comes the said Appellee by F. H. Kalus and says that in the proceedings & judgment aforesaid there is no Error and said judgment ought in all things to be affirmed

F. H. Kalus
By Carr & Fuller

165 - 52

Superior Court.

George W. Gage

vs

William Lunn et al

Transcript

Filed Apl. 5. 1865.
Leland
Clk.

Fees. $10.00 paid J. B. Carter
Clerk