

13513

No. _____

Supreme Court of Illinois

White.

vs.

Walker.

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division.

No. 201.

White

vs

Walker

1251

United States of America
State of Illinois. Cook County, 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 the 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 third day of December
in the year of our Lord Eighteen hundred
and sixty two of the Independence of
the United States of America the Eighty
fifth.

Present The Hon: John M. Wilson. Chief Justice
of Superior Court of Chicago
Wm H. Higgins & Grant Goodrich. Judges
Carlos Haven . . . Prosecuting Attorney
Anthony C. Hessing.. Sheriff of Cook County

Attest

Walter Kimball .. Clerk

Be it remembered that heretofore to wit on the
fourteenth day of October A. D. eighteen hundred &
fifty nine came Martin O. Walker, plaintiff, by
A. H. Hancock his Attorney and filed in the Office
of the Clerk of said Superior Court his certain re-
ceipt for Summons against Alexander White;
Which said receipt is in words and figures as
follows to wit.

" Martin. & Walker } Superior Court of Chicago
 vs } Of the November Term
Alexander White } Co. D. 1859.

The Clerk will please issue a
Summons in the above cause- In action of
Assumpsit- Lay damages at \$1200.
Chicago L. H. Manghob
Sept 28th 1859 per City."

And thereupon accordingly on the eighteenth day of November in the year last-aforsaid Summons issued out of and under the Seal of said Court, Which said Summons, with the Sheriffs return thereon endorsed, is in words and figures as follows to wit.

"State of Illinois
County of Cook

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

He again commands you that you Summon ~~and~~
Alexander White if he 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 next term thereof to be holden at the Court House
in the City of Chicago in said Cook County on the
first Monday of December next to answer unto
Martin. O. Walker in a plea of trespass on the case
on promises, to the damage of said Plaintiff as he
pays in the sum of Twelve hundred dollars

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

Witness Walter Kimball Clerk of our said
Court and the Seal thereof at the City
of Chicago in said County this 18th
day of Novr A. D. 1859.

W. Kimball. Clerk."

"Served by reading to the within named
Defendant this 23^d day of November 1859,

Arthur Gray, Sheriff

By A. G. Keeling- Deputy

And thereafter to wit on the twenty fifth day
of May A. D. Eighteen hundred and sixty came the
said Plaintiff by his said Attorney and filed in the
Office of the Clerk of said Court his Amended
Declaration in said suit: Which said Declaration is in

words and figures following to wit.

"State of Illinois, Superior Court of Chicago
Cook County .. s. p. Of the June Term A. D. 1857

Martin G. Walker plaintiff in this suit by
John W. Mangroff his Attorney complains of Alexander
White defendant in this suit of a plea of trespass on
the case on promises.

For that whereas heretofore to wit on the
eleventh day of April A. D. 1857 at the County of
Cook aforesaid the said plaintiff then being possessed
of certain premises to wit Lots Twenty one (21) twenty
two, twenty three and twenty four of Block Nine of
Fort Dearborn Addition to Chicago in the County of
Cook aforesaid and the large frame building thereon
being the same lately occupied by Mrs Temple as
a Boardinghouse, one William J. Napier applied to
the said plaintiff and requested him to rent the said
premises to him for the term of two years from the
first day of May A. D. 1857 and offered the said
plaintiff as rent therefor the sum of Twelve hundred
dollars (as rent for said premises) for each year, in
monthly payments of One hundred dollars each in
advance on the first day of each and every month
But the said plaintiff not being willing to risk the
chances of collecting his rent from said William J.
Napier declined to rent the said premises to him, unless
he should give the said plaintiff security for the

payment of the rent thereof. And thereupon the said William J. Napier proposed to the said Plaintiff that he would procure the said Defendant to guarantee the payment of the rent, if the said Plaintiff would rent the said premises to him on the terms and conditions aforesaid. And afterwards to wit on the day and year aforesaid at the County of Cook aforesaid the said Defendant came to the said Plaintiff with the said William J. Napier, and there they agreed with the said Plaintiff that if he would lease the said premises to the William J. Napier on the terms aforesaid that the said Defendant would become responsible for the payment of the rent, and would pay the same when due and if the said William J. Napier failed to pay the same when due and the said Plaintiff then and there agreed in consideration of the premises that he would rent the said premises to the said William J. Napier on the terms aforesaid.

The said Plaintiff avers that in consideration of & confiding in the promises and undertakings of the said Defendant the said Plaintiff did on the day and year aforesaid at said County of Cook make and execute under his hand and seal a written demise of the said premises to the said William J. Napier for the full term of two years from the first day of May A.D. 1857 at and for the annual rent of Twelve hundred dollars payable in Monthly payments of one hundred dollars each on the first day of every month.

in advance. And afterwards to wit on the thirteenth day of April A. D 1857 at the County of Cook aforesaid the said Defendant in pursuance of the agreement made by him to William J. Napier became responsible for the rent of the said William J. Napier on the said written demise to become due to the said Plaintiff. And in consideration of the premises did execute his guarantee in writing on the back of the said written demise made by the said Plaintiff to the said William J. Napier and delivered the same to the said Plaintiff. And hereby then and there the said defendant promised the said Plaintiff to pay him the sum of Twelve hundred dollars for each year for the full term of two years in Monthly payments of One hundred dollars each on the first day of each and every Month in advance from the first day of May A. D 1857 for and during and until and including the first day of April A. D 1859 as the rent on the said demise of the said Plaintiff to the said William J. Napier of said premises as the same became thereon in case the said William J. Napier should fail or neglect to pay the same as aforesaid.

The counterpart of which said written demise sealed with the seal of the said Plaintiff and of the said William J. Napier is now in the possession of said Plaintiff, with the said guarantee of the said Defendant written thereon, and which he brings here into Court (a Copy of which is already filed in this

Court) as by said Indenture reference being thereunto
had will among other things more fully and at large
appear.

And the said plaintiff avers that upon the execution
of the said guarantee by the said Defendant John
as aforesaid, the said plaintiff delivered to the said
William J. Napier the said written demise And in
consideration of the premises and relying upon the
promises and undertakings of the said defendant in that
behalf, permitted the said William J. Napier to have &
enjoy the said premises for the full term of two
years to wit, for the full term of the said written
demise to wit, at the County of Cook aforesaid And by
virtue of the said written demise the said William J.
Napier entered into and upon also and singular the said
premises to wit on the first day of May A. D. 1857 at
the County of Cook aforesaid and had and used and
enjoyed the same for the full term of the said
Indenture thereof to him granted as aforesaid But the
said William J. Napier did not pay the rent as the
same became due on the said written demise but
failed to do so and made default therein, and altho'
often requested to do so did not nor would pay the
same, nor did any one pay the same for him, but so
to do neglected and refused and still so neglect and
refused to pay the same to the said plaintiff By means
whereof and by force of the Statute in such case
made and provided the said defendant then & there

became liable to pay the said sum of money mentioned as rent to be paid on the said written demise according to the tenor and effect of the said Indenture and of the said guarantee, and being so liable the said Defendant in consideration thereof, and in consideration of the premises afterwards to wit on the thirteenth day of April A. D. 1857 at said County of Cook undertook and then and there lawfully promised the said Plaintiff to pay him the said several sums of money when thereunto afterwards requested.

2nd Count

And whereas also heretofore to wit on the 11th day of April A. D. 1857 at the County of Cook afore said the said Plaintiff being possessed of certain lands and tenements to wit Lots Twenty one, Twenty two, Twenty three and Twenty four of Block Number Nine of Fort Dearborn Addition to Chicago with the large frame building thereon situated in the County of Cook in the State of Illinois, being the same lately occupied by Mrs. Thumple as a Boardinghouse. And being so possessed of said premises one William J. Napier applied to the said Plaintiff to have the said Plaintiff rent to him the said premises for the term of two years from the first day of May A. D. 1857 at the yearly rent of Twelve hundred dollars payable in Monthly payments of One hundred dollars each on the first day of each and every Month in advance But the said Plaintiff not being satisfied that the said William

J. Napier would pay his rent for said premises in the event of the same being leased to him as aforesaid the said Plaintiff declined to rent the said premises to the said William J. Napier unless he should give the said Plaintiff security for the payment of the rent thereof And thereupon the said William J. Napier proposed to the said Plaintiff that he would procure the said Defendant to become responsible for the payment of the rent of the said premises if the said Plaintiff would let them to him on the terms aforesaid, to which proposition the said Plaintiff agreed to wit at the County of Cook aforesaid.

And afterwards to wit on the day and year aforesaid at the County of Cook aforesaid the said Defendant and the said William J. Napier came to the said Plaintiff and there agreed with the said Plaintiff that the said Defendant would become responsible to the said Plaintiff for his rent of the said premises, if he should rent the same to the said William J. Napier on the terms aforesaid And in the event that the said William J. Napier failed to pay him his rent for said premises on such demise that the said Defendant would pay the rent himself when the same became due And in consideration of the premises and undertakings of the said Defendant in that behalf the said Plaintiff there and there agreed to rent the said premises to the said William J. Napier on the terms and conditions aforesaid.

And the said Plaintiff avers that confiding in the
promises and undertakings of the said Defendant and
in consideration thereof the said Plaintiff did on the
day and year aforesaid at said County of Cook make
and execute under his hand and seal a written demise
of the said premises to the said William J. Napier for
the full term of two years from the first day of May
A.D. 1857 at and for the annual rent of Twelve
hundred dollars payable in Monthly Payments of One
hundred dollars each on the first day of every Month in
advance Which said Indenture was in the words and
figures following to wit - " This Indenture made this
"Eleventh day of April in the year of our Lord one
"Thousand eight hundred and fifty seven Between
"Martin C. Walker by John W. Waughp his attorney
"in fact of Chicago, Ill. party of the first part and
"W. J. Napier of the same place party of the second part
"Witnesseth that the said party of the first part for and
"in consideration of the Covenants and agreements herein
"after mentioned to be kept and performed by the said
"party of the second part his executors administrators and
"assigns has demised and leased to the said party of
"the second part All those premises situate lying and
"being in the City of Chicago in the County of Cook &
"in the State of Illinois, known and described as follows
"to wit, The large two story frame dwelling lately occupied
"by Mrs Thumple as a boardinghouse situated on lots (21)

"Twenty one (21) Twenty two (22) Twenty three (23) Twenty four (24)
"Twenty four in Block 2100 (9) Fort Dearborn
"Addition to Chicago. To have and to hold the said
"above described premises with the appurtenances unto the
"said party of the second part his executors administrators
"and assigns from the first day of May in the year of
"our Lord one thousand eight hundred and fifty seven
"for and during and until the first day of May 1859
"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 with the said party of
"the first part his heirs executors administrators and
"assigns to pay the said party of the first part or
"rent for said demised premises the sum of Twelve
"hundred dollars per annum payable in monthly payments
"of One hundred dollars each in advance, said premises to
"be kept in repair at the expense of the said party of
"the second part.

"That 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 he will yield up the
"said premises to the said party of the first part in as
"good condition as when the same were delivered up by
"the said party of the second part, less by fire or inevitable
"accident, or ordinary wear excepted, and also will keep

said premises in good repair during this lease at his
own expense. It is further agreed by the said party of
the second part, that neither he nor his legal representatives
will underlet said premises or any part thereof, or assign
this lease without the written assent of said party of the
first part first had and obtained thereto. That the said
William J. Napier for himself and his heirs, executors
administrators and assigns agree further to pay (in
addition to the rents above specified) all water rents and
assessments taxes levied or charged on said premises for
and during the time for which this lease is granted, and
said said premises and the party of the first part
harmless herefrom, and that he will keep said premises
in a clean and healthy condition, in accordance with
the Ordinances of the City, and directions of the sewerage
commissioners. 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 his executors administrators
or assigns, it shall and may be lawful for the said
party of the first part his heirs executors administrators
agent attorney or assigns at his election to declare said
lease ended, and into the said premises or any part
thereof, either with or without process of law to present
and the said party of the second part, or any other

"person or persons occupying in or upon the same to expel
"removed 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 that may belong to 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 agree to waive all legal
"rights which he 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 thereby
"to give the said party of the first part his heirs
"executors administrators or assigns a valid or first lien
"upon any and all the goods chattels or other property
"belonging to the said party of the second part as security
"for the payment of said rent in manner aforesaid,
"anything heretofore contained to the contrary notwithstanding.
"And if at any time said term shall be ended at such
"Election of said party of the first part his heirs executors
"administrators or assigns, as aforesaid, or in any other
"way the said party of the second part his executors
"administrators and assigns do hereby Covenant & 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 he shall
"remain in possession of the same one day after notice

"of such default or after the termination of this lease, in any
"of the ways above named he shall be deemed guilty of a
"forcible detainer of said premises under the Statute and
"shall be subject to all the conditions and provisions 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 & expenses
"that shall arise from enforcing the covenants of this
"Indenture by the party of the first part.

"Witness the hands and seals of the parties aforesaid.

"Martin O. Walker (Seal)

by J. W. Thompson, Attorney in fact.

"Wm. J. Napier (Seal).

And afterwards to wit on the thirteenth day of April
A.D. 1857 at Chicago in said County of Cook the said
Defendant in consideration of the premises and in pursuance
of the agreement made by him with the said Plaintiff on
that behalf as aforesaid, did execute and deliver to the said
Plaintiff his written guarantee, which said guarantee is in
the words and figures following to wit "I hereby guarantee
"the payment of the rent to become due on the within
"year on the days the same becomes due -

"Dated Chicago April 13. 1857" and signed by the said
"Defendant by the name and description of Alex. White
(meaning and intending Alexander White the said defendant)
"Which said written guarantee was made upon the back of

the said written demise made as aforesaid by the said plaintiff to the said William J. Napier, and thereby then and there the said defendant promised the said plaintiff to pay him the rent according to the tenor and effect of the said written demise in case the said William J. Napier failed to pay the same according to the tenor and effect thereof

The counterpart of which said indenture the said plaintiff brings here into Court as by said indenture referred being therunto had will among other things more fully and at large appear

And the said plaintiff avers that upon the execution of the said guarantee by the said Defendant to him as aforesaid the said Plaintiff delivered to the said William J. Napier the said written demise and in consideration of the premises and relying upon the promises and undertakings of the said defendant in that behalf permitted the said William J. Napier to have and enjoy the said premises for the full term of two years to wit for the full term of the said written demise to wit, at the County of Cook aforesaid

And the said plaintiff avers that by virtue of the said written demise the said William J. Napier entered into and upon the said demised premises to wit on the first day of May A. D. 1857 and had and enjoyed the same for the full term of the said written demise thereof to him granted as aforesaid But in the payment of the rent that became due on the said written demise to the said plaintiff the said William J. Napier made default and did not nor any one for him pay the same according to the

know and effect of said demise but so to do totally failed
and refused so to do. By means whereof and by force of
the Statute in such case made and provided the said
Defendant then and there became liable to pay the said
sum of money to become due on the said written demise
to the said Plaintiff according to the tenor and effect thereof
and of the tenor and effect of the said guarantee by him
made as aforesaid and being so liable to the said
Defendant in consideration thereof and in consideration
of the premises afterwards to wit on the said thirteenth
day of April A. D. 1854 at said County of Cook
undertook and then and there faithfully promised the said
Plaintiff to pay him the said several sums of money
when thereunto afterwards requested if the said William
J. Napier should fail to pay the same as aforesaid

Yet the said Defendant not regarding his said
promises and undertakings but continuing to although
often requested so to do has not paid said Plaintiff either
of said sums of money above mentioned or any part
thereof but so to do has hitherto wholly neglected and refused
and still does neglect and refuse to the damage of said
Plaintiff of Twelve hundred dollars and therefore he brings
his suit -

John W. Thompson
Plffs Atty.

And hereafter to wit on the sixteenth day of
June A. D. Eighteen hundred and sixty came the said
Defendant by his Attorney and filed in the Office of the
Clerk of said Court his certain Plea & Notice in the
said Cause which said Plea and Notice is in the
words and figures following to wit.

'State of Illinois
Cook County . . . So

Alexander White
at
Martin. O. Walker } Superior Court of Chicago
June Term A. D. 1860.

And now comes the said defendant
by Barker & Tuley his Attorneys and defends the wrong
and injury when &c and says that he did not
undertake and promise in manner and form as the
said Plaintiff hath above thereof complained against
him and of this he puts himself upon the Country &c

Barker & Tuley

Defts Atty's

And the said Plaintiff doth the like

J. W. Staughop

Plffs Atty's

Between Martin O Walker . . . Plaintiff

and

Alexander White . . . Defendant

Superior Court of Chicago

The above named plaintiff and his Attorney J. W. Thompson will please take notice.

That upon the trial of the above entitled cause the said Defendant will rely upon the following special matters for a defense to said action of plaintiff.

1st

That the said Plaintiff ought not to recover upon the cause of action and promise in said amended Declaration mentioned because he says that the said promise of defendant in said Declaration mentioned were special promises to answer for the Debt and default of another person in manner and form as in said Declaration mentioned and set forth and that no agreement in respect of or relating to the said promise and supposed cause of action or either of them in said Declaration mentioned or any Memorandum or note thereof wherein the consideration for the said special promise or either of them was stated or shown was in writing and signed by the said Defendant or any person thereunto by him lawfully authorized according to the Statute in such case made and provided.

2nd

That there was no consideration for the promise and undertakings of defendant or either of them in said Declaration mentioned.

3rd

Payment.

4th

That after the making of said Sale and sometime in the fall or winter of the year 1857 or before that time the Street in the City of Chicago adjoining the said lands

premises was by said plaintiff or by his said plaintiff's
Conduct raised to grade, that is to say the said Street was
raised by adding and putting on of earth and stones
several feet above the height and condition it was in
when said premises were leased by plaintiff to said
Napier as in said declaration mentioned thereby and by
means whereof a nuisance was created by the water dirt
and filth which flowed in and upon the basement story
of the house situated upon said premises at all times
and oftentimes covering the basement floor of said house
several inches with water by reason of which nuisance
caused by the conduct of said Plaintiff the said premises
became untenable and the continued occupation of said
premises by reason of the flowing in of said water dirt
and filth upon said premises caused by the raising of
said Street became and was at great risk and danger to
the health and comfort of said lessee said Napier and
his family and produced an eviction of said lessee by
said plaintiff, which would have justified said lessee in
vacating said premises and that at and about that time
to wit on or about the first day of December A.D. 1854
the said Plaintiff did agree to and with said Napier
in consideration of the foregoing facts and in consideration
that said lessee was deprived of the beneficial enjoyment
of said premises by reason of the raising of said Street to
grade as aforesaid and in consideration and because the
said lessee had for some months previous thereto let his
boarders (the said house having been rented for & used

as a boarding house) because of the said nuisance and
because of the failure of said plaintiff to do certain repairs
and make certain drains which he plaintiff agreed before
that time with said lessee to do and make - and for
other good and sufficient considerations, that he said
plaintiff would from and after that time to wit, the
making of said agreement receive said rent for said
premises to eighty dollars per month and would from
that time and for the remainder of said term accept and
receive of and from said lessee the sum of Eighty dollars
per month as and for full satisfaction and payment of
the rent of said premises - And that this defendant should
not after that time be liable for or called upon to pay
any additional rent to said Eighty dollars per month
so agreed to be paid by said lessee and agreed to be
accepted by said plaintiff as aforesaid - and that at the
time of the making of said last mentioned agreement as to
said Eighty dollars per month between said plaintiff and
said lessee all the rent before that time due & payable on
said lease had been paid by said lessee to said plaintiff
and that the said lessee did from and after the making
of said agreement as to Eighty dollars per month and until
his said lessee's death (which occurred sometime in the
Spring or Summer of the year 1858) pay to said plaintiff
and said Plaintiff did receive of and from said lessee
the sum of and at the rate of Eighty dollars per month
as and for full satisfaction and payment of all rent
becoming due on said premises during said time to wit,

from the making of said agreement to the decease of said
lessee - and that after the decease of said lessee, the widow
of said lessee, not being administrator or executrix of
said lessee or having any right or authority to take or
possession of or control of the estate of the deceased interest
of said lessee in said premises which facts and also the
fact of said decease was well known to said Plaintiff
did take possession of and occupy said premises with
the consent and permission of said Plaintiff and did
from and after the decease of her said husband and until
the first day of August 1858 pay to said Plaintiff and
said Plaintiff did accept from said Mrs Napier Widow the
sum of eighty dollars per month as rent of said premises
And that on or about the said first day of August
the said premises having become still more untenable
& unbeneficial by reason of the said nuisance and in
consideration thereof and for other good and sufficient
considerations the said Plaintiff did agree to and with said
Mrs Napier Widow to accept and receive from her the said
Mrs Napier the sum of Fifty dollars per month from
said first day of August until the expiration of the term
in said lease mentioned as rent for said premises and said
Mrs Napier did pay to and said Plaintiff did receive from
her the sum of Fifty dollars per month for each and
every month from said first day of August until the
expiration of said term in said lease mentioned as for
and in full of the rent of said premises for said time
That from and after the decease of said lessee and until

the expiration of the term of said Lease in said Declaration mentioned said premises were worth and of the value not to exceed Fifty dollars per Month of said time which sum or rate of Fifty dollars has been fully paid to said Plaintiff.

Barker & Tuley

Defts Attys."

And afterwards to wit on the Eighth day of October (being one of the days of the October Term of said Court) in the year of our Lord Eighteen hundred and sixty, the following proceedings were had in said cause and entered of record in said Court to wit,

"Martin, O. Walker

(vs)

Assumpsit.

Alexander White . . .)

This day comes the said Plaintiff by John W. Thanghor, his Attorney and the said Defendant by Barker & Tuley his Attorneys also comes and issues being joined herein it is Ordered that a Jury come whereupon comes the Jury of good and lawful men to wit William Jones Jr. J. F. Hennessy, Adam Amberg, J. Mayler, John Tyler, S. S. Wilcox, W. H. Miner, A. S. Darrow, O. H. Salisbury, G. F. Phillips, Edward Williston & J. O. Hurstevant who being duly elected tried and sworn to try the issues joined as aforesaid after hearing evidence, arguments of Counsel, & instructions

of the Court retire to consider of their Verdict and the hour of adjournment having arrived it is Ordered upon agreement of the parties that when the jury have agreed upon a Verdict they shall reduce the same to writing sign and seal the same and afterwards separate and meet the Court again to morrow morning.

And afterwards to wit on the Ninth day of October (being yet of the said October Term of said Court) in the year of our Lord one thousand eight hundred and sixty, the following further proceedings were had in said cause and entered of record in said Court, to wit

Martin B. Walker	}	Plaintiff
(vs)		
<u>Alexander White</u>		

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 we the Jury find issues for the said Plaintiff and assess his damages herein to the sum of Seven hundred and eighty nine dollars and fifty six cents.

And thereupon defendant submits his Motion herein for a New trial.

And afterwards to wit on the twenty fourth day of November (being one of the days of the November Term of said Court) in the year of our Lord one thousand eight hundred and sixty, the following proceedings were had in said cause and entered of record in said Court to wit,

"Martin, G. Walker
vs
Alexander White } Assumpsit

And now again comes the said plaintiff by John M. Haughon his Attorney and the said Defendant by Barker & Tuley his Attorney also comes and defendants Motion for a New trial herein being heard and argued by Counsel is taken under advisement by the Court.

And afterwards to wit on the fifteenth day of December (being one of the days of the December Term of said Court) A. D. Eighteen hundred and sixty the following further proceedings were had in said cause and entered of record in said Court, to wit,

"Martin, G. Walker
vs
Alexander White } Assumpsit,
And now again comes the

said plaintiff by A. H. Mangrove his attorney and the
said Defendant by Barker & Tuley his Attorneys also
comes over the Court having taken the defendants motion
heretofore submitted herein for a new trial on the 24th
day of November instant of the November term last
last under advisement and being now fully advised
in the premises, ^{overrules} said defendants Motion for a new trial
herein Whereupon said defendant excepts to the ruling
and decision of the Court in overruling his said
Motion for a New trial and enters his exceptions
Wherefore plaintiff ought now to have judgment entered
on the Verdict of the Jury heretofore rendered herein

Therefore it is considered that said plaintiff do
have and recover of the said Defendant his damages
\$789.50 of Seven hundred and eighty nine dollars and fifty
pence in form aforesaid by the Jury here found
and assessed and also his Costs and charges in this
behalf expended and have execution therefor.

And Whereupon said defendant having taken and
entered his exceptions prays and Appeals herein to the
Supreme Court of the State which is allowed to him
upon the condition of filing his Appeals Bonds in the
penalty of Twelve hundred dollars to be approved by a
Judge of this Court and to be filed with his Bill of
exceptions during the present term of this Court.

And thereafter to wit on the twenty seventh day of December A. D. eighteen hundred and fifty came the said defendant and filed in the Office of the Clerk of said Court his Appeal Bonds in said cause: Which said Bonds is in the words and figures as follows to wit.

" Know all Men by these presents That we to—
Alexander White as principals and William Chapman as
Surety of the County of Cook and State of Illinois
are held and firmly bound unto Martin O. Walker
also of the same County and State in the penal
sum of Twelve hundred dollars, lawful money of
the United States, for the payment of which well
and truly to be made we bind ourselves our heirs
executors and administrators jointly severally & finally
by these presents

Witness our hands and seals this 27th day of
December A. D. 1860.

The condition of the above obligation is such
That whereas the said Martin O. Walker did on the
fifteenth day of December A. D. 1860 in the Superior Court
of Chicago in and for the County of Cook and State aforesaid
and of the December term thereof A. D. 1860 receive a
Judgment against the above bounden Alexander White
for the sum of Seven hundred and eighty nine dollars

and fifty six cents besides costs of suit, from which
said judgment of the said Superior Court of Chicago
the said Alexander White has prayed for and obtained
an Appeal to the Supreme Court of said State;

Now therefore if the said Alexander White shall duly prosecute his said appeal with effect and moreover pay the amount of the judgment - costs interest and damages rendered and to be rendered 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.

Taken and entered into before me at

3rd officer in Chicago this 21st day of
December A. D. 1860

December 20, 1860

Alexander White (Seal)
William Maynard (Seal)

William Mayman (Seal).

Walter Kinsale - Clerk "

Approved Wm H Higgins. Secy.

And afterwards to wit on the 29th day of December
(being yet of the said December Term of said Court)
A.D. Eighteen hundred and six, the following further
proceedings were had in said cause and entered of
record in said Court to wit—

" Martin, B. Hacker

UR

Alexander White

Assessment.

On motion Barker & Tracy
attorneys for the said Defendant it is ordered that time

for said Defendant to file his Bill of Exceptions herein
on Appeal to Supreme Court- he and is hereby
extended Twenty days from this day.

And hereafter to wit on the seventeenth day of -
January A. D. eighteen hundred and sixty one the said
^{Defendant}
~~Plaintiff~~ filed in the Office of the Clerk of said Court his
Bill of Exceptions in said cause: Which said Bill of
Exceptions is in the words and figures following to wit

State of Illinois
Cook County }

Martin G. Walker }

@

Alexander White ... }

In Superior Court of
Chicago.

Be it remembered that on the eighth
day of October A. D. 1860 the same being one of the
days of the October Term A. D. 1860 of the said Court
this cause coming on to be tried, a Jury was
impanelled to try the issues joined, and the plaintiff
to maintain and prove the issues on his part called
as a Witness, one,

J. H. Thompson who being duly sworn testified as
follows.

On the month of April A. D. 1854, the premises
in question were occupied by one Mrs. Temple -
Dr. Horeniger was the lessee and she was occupying on
his term - His term extended up to the first of May
A. D. 1859, the same as this Lease - Napier applied to
Horeniger to purchase his Lease and wanted Walker to
consent to an assignment or substitution of Napier in

the place of Horeniger and applied to me as Mr Walker's Agent - I stated to them that we were satisfied that Horeniger was good for the rent - that he had always paid his rent promptly and we could not take Napier in place of Horeniger - Napier offered security and proposed the name of Alexander White to guarantee the payment.

The Defendant by his counsel objected to any further statements by the witness (who was also the Attorney of the plaintiff and therefore gave his testimony without putting any questions to himself) as to the consideration of the guaranty upon which this suit is brought, on the ground that such evidence to show the consideration was inadmissible, but the Court overruled the objection and allowed the witness to proceed and admitted the evidence.

To which ruling and decision of the Court in overruling the objection of the said Defendant and in admitting the evidence of the witness as to the consideration of said guaranty - the Defendant by his counsel then and there duly accepted.

The witness then proceeded.

I stated to Napier if he would give White, I would give him a lease - I drew the lease and it was executed April 11th A. D. 1857 - It was signed on that day but not delivered, afterwards White came & guaranteed

it. The lease was dated April 11th 1857 but the term was for two years from May 1st A.D. 1857. It was occupied during the term by Napier and his family. White came before the Lease was delivered and guaranteed it, and I then delivered it to Napier. This is the lease and this the guarantee (The witnesses here identified the Lease and guarantee hereinafter inserted). and upon

Gross Examination, the witness testified as follows.

Both copies of the Lease remained in my possession. Did not deliver Napier's Copy to him until after the guaranty was made. Napier had not taken possession until after the lease was delivered. I know that Napier's Copy was not delivered until after the guaranty. I drew this Lease. He had drawn the Lease to Alexander White directly, wishing to make him make the Covenants. He would not do it, but would guaranty and die on the thirteenth of April A.D. 1857. The alteration was made on the 11th because White would not sign it as it was. Napier had taken the lease to White for his signature and returned it to me stating to me that White would call and guarantee. I stated the contents of the lease to White. He knew the rate and when it was to be paid. White may have read it when Napier took it to him, but I don't know. Think the street on which the house stood was raised to grade in the fall of 1857. The City raised the grade.

who paid for it I don't know. Supposed it was done
by an Assessment by the City - Not part of my duty
to pay for such things. I simply collect rents and
deposit them. I used to be at the house two or three
times a month - I know there was water standing
in the back yard - Walker constructed a drain there
I think it was in the fall of 1857 - that would be my
best recollection - My impression is that Mr. Napier
died in the Spring of 1858 - I cannot tell whether he
died intestate - His widow remained in the house to
the end of the term of the lease and then left - She
paid rent on this lease. No other person except the
widow after his death, paid rent - She continued paying
rent - The rent commenced falling behind before he
died - how long before I don't know. He paid
Eighty dollars per month which he paid was all he
could get together - I never enquired after any
administrator or executor of Napier. I knew the fact of
his death almost immediately - He commenced falling
behind in November A.D. 1857 for the rent that fell
due that month - He paid fifty dollars at one time in
November 1857 and thirty dollars at another making
eighty dollars - thirty dollars on rent of December 1857
on that month - fifty dollars on rent of January 1858
and then eighty dollars each month to July, A.D. 1858
Eighty dollars per month was what he paid he would
be able to pay - He paid January 1858 fifty dollars -

February, eighty dollars - March eighty dollars and the widow paid April eighty dollars - May eighty dollars - June eighty dollars - July eighty dollars - August Forty five dollars - September Fifty dollars - October Fifty dollars - November Fifty dollars - December Fifty dollars - January 1859 Fifty dollars - February Fifty dollars - March Fifty dollars - April Twenty dollars - May Forty dollars. The December 1857 rent was partly paid. In January 1858 Thirty dollars. On the month of December 1857 Fifty dollars - On the month of January 1858 was all that was paid on these months. Napier stated in November 1857 that he was unable to pay but eighty dollars per month - He hoped to bring it up when business revived - Hoping to make Walker reduce the rent & throw it off anyhow.

On the Examination the witness testified,

The amount of rent due on this lease is Seven hundred and five dollars - Napier said he was not able to pay his rent & if I would receive Eighty dollars on account he might bring it up. Mrs Napier said she could only spare me Fifty dollars per month I received it on account. She expressed herself very much disturbed lest Mr White would have to suffer I told her that Walker would not press her for any more than she could pay on account - Rents were lower at this time - Walker would not press her for any more than she could pay on account - as he had security for

the value,

On re Cross Examination the witness further testified

I think Mrs Napier was present when Napier stated that he would only pay eighty dollars per month as before stated. Nobody else I think. I do not know that Walker saw them at all except from Mrs Napier. I had the conversation with Napier. One or two days after Napier was buried I saw Mrs Napier. It was not then the spoke of Fifty dollars per month.

She paid eighty dollars per month for sometime.

I cannot remember whether she said at the time I met her first after his death that she would pay eighty dollars. I think she never said anything about it till August and when she dropped down to Fifty dollars. Nothing was said. She continued to pay the eighty dollars & nothing was said. Perhaps some of her children were about when I saw her. She and her husband had been complaining about the premises. She showed me through the back yard where the water came down and had been coming down. They constructed a drain which obviated the difficulty. I cannot tell how long after the Street was paved that we built the drain. Think as soon as the effect was discovered. All the rent for the first six months was punctually paid at One hundred dollars per month. It was in November 1857 that they first ran behind.

The Plaintiff then offered the lease and guaranty referred to in evidence.

To the admission of which in evidence the Defendant by his Counsel then and there objected but the Court overruled the objection and admitted said Lease and guaranty in evidence.

To which decision and ruling of the Court in overruling said Defendants said objection to said Lease and guaranty and admitting the same in evidence, the Defendant by his Counsel then and there duly excepted.

The lease and guarantee were then read in evidence and were as follows, to wit

" This Indenture made this eleventh day of April in the year of our Lord one thousand eight hundred and fifty seven between Martin G. Walker by John W. Naughton his attorney in fact of Chicago Ills party of the first part and W. J. Napier of the same place party 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 his executors administrators and assigns has demised and leased to the said party of the second part All those premises situate lying &

"being in the City of Chicago in the County of Cook and
"in the State of Illinois known and described as follows
"to wit. "The large two story frame dwelling lately oc-
"cupied by Mrs Temple as a boardinghouse situated
"on lots (21) Twenty one (22) Twenty two (23) Twenty
"three & (24) Twenty four in Block Nine (9) East
"Dearborn Ave: to Chicago To have and to hold the
"said above described premises with the appurtenances
"unto the said party of the second part his executors
"administrators and assigns from the first day of May
"in the year of our Lord one thousand eight hundred and
"fifty seven for and during and until the first day of
"May 1859 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 with 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 demise premises the sum of Twelve
"hundred dollars per annum payable in monthly
"payments of one hundred dollars each in advance
"said premises to be kept in repair at the expense of the
"said party of the second part.

"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 demise premises in
"good order and condition and that at the expiration

"expiration of the time in this Lease mentioned he 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 less
"by fire or inevitable accident or ordinary wear excepted
"and also will keep said premises in good repair
"during this Lease at his own expense

"It is further agreed by the said party of the
"second part that neither he nor his legal representatives
"will underlet said premises or any part thereof or assign
"this Lease without the written assent of said party
"of the first part first had and obtained thereto.

"Now the said William J. Napier for himself and
"his heirs executors administrators and assigns agree
"further to pay (in addition to the rents above specified)
"all water rents and assessments, taxes, fines or charges
"on said premises for and during the time for which
"this Lease is granted, and pass said premises and the
"party of the first part harmless therefrom, and that he
"will keep said premises in a clean and healthy
"condition, in accordance with the Ordinances of the City &
"directions of the Sewerage Commissioners.

"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 his 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 assigns 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
"in or upon the same to expel persons 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 distrels by law or not, and
"the said party of the second part in that case hereby
"agrees to waive all legal rights which he 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 the
"goods chattels or other property belonging to the said party
"of the second part, as security for the payment of said
"rent in manner aforesaid, anything heretofore contained
"to the contrary notwithstanding And if at any time said
"term shall be ended at such election of said party of the
"first part his heirs, executors, administrators or assigns

"as aforesaid, we in any other way the said party of the
"second part his 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 or
"administrators or assigns immediately upon the determination
"of said term as aforesaid, And if he shall remain in
"possession of the same one day after notice of such a
"default or after the termination of this lease, in any of
"the ways above named he shall be deemed guilty of
"a forcible detainer of said premises under the Statute and
"shall be subject to all the conditions and provisions 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 & expenses
"that shall arise from enforcing the covenants of this
"Indenture by the party of the first part.

"Witness the hands and seals of the parties
"aforesaid.

"Martin B. Walker (Seal)
by J. H. Waughon
Atty in fact "

"Wm. J. Napier. (Seal) "

"Thereby guaranteed the payment of the rent to
"become due on the within Lease on the days the

"same becomes due -

"Dated Chicago April 13th 1857,
(Signed) "Alex. White."

The Plaintiff then rested his case, and

The Defendant to maintain and prove the issues on his part called as a witness.

Julius Dyrenfurth who being duly sworn testified as follows.

I know the plaintiff. I knew William J. Napier in his lifetime. I resided with Napier on Randolph Street in November 1857

The Defendant by his Counsel then propounded to the witness the following questions.

Do you know of any agreement between William J. Napier and the plaintiff in this suit for or reduction by said plaintiff of the rent on the lease introduced in evidence, and for what said reduction, if any, was made? If yes, state the same.

To which question the plaintiff by his Counsel then and there objected on the ground that said evidence could not be introduced to discharge the guarantor of an instrument under seal and the Court sustained the objection and refused to allow the question.

to be put to the witness.

To which ruling and decision of the Court in sustaining the said Plaintiff's said objection and refusing to allow his question to be propounded, the Defendant by his Counsel then and there duly accepted.

The Defendant then offered to prove by the witness Dyrenfurth that William J. Napier the lessor in the lease in question, in the Month of November 1857 declared that he would vacate the premises in question on the ground that the same were wholly untenable and that Walker, the Plaintiff was liable to and had agreed, after the commencement of the tenancy by parol to put certain drains into the ~~and~~ ^{adjoined} premises rendered necessary by the City authorities having raised the grade of the Street; which he, Walker, had not done - that Walker agreed with Napier in order to settle the dispute as to his liability to put in these drains and in consideration of his failure to put in said drains and of Napier releasing him from his said agreement to reduce the rent to Eighty dollars per Month and that no more than that sum should be taken by Walker in satisfaction of the rent - and from that time on, the rent was received and paid at Eighty dollars per Month under that agreement - That this agreement was made after the November 1857 rent had become due and default had been made in the payment of it.

The defendant further offered to prove by the witness

that the premises became untenantable by reason of water standing in the basement, which was caused by raising the Street to grade by the City authorities - Also the value of the premises at the time of the death of Napier in April 1858 - and their value from thence to the termination of the term.

To the proving of each and all which above ~~is~~ enumerated facts and circumstances, the Plaintiff by his Counsel then and there objected and the Court sustained the objection and refused to allow the witness to testify thereto.

To which decision and ruling of the Court in sustaining said Plaintiffs said last mentioned objection and in excluding said testimony & refusing to allow said proof to be made - the defendant by his Counsel then and there duly accepted.

The witness then proceeded as follows.

I went to see Walker with Mrs. Napier in April 1858, after Mr. Napier's death. He agreed to take Eighty dollars per month from her if she would remain in the house and that he would send her notice if he should raise the rent from Eighty to One hundred dollars. It was Mr. Walker's words to Mrs. Napier and to me in her presence that he would reduce the rent and authorize a Waughop to send Notice if he Walker raised it. There

question - The house was in such a condition after the raising the grade as to make it suicidal to remain there all my boarders left - The water stood in the basement thick with slime - I remained in the house to protect Mr White - I am the widow of William J. Napier - He died in April 1858 - I was unable in the Summer of 1858 to pay more than I did - Tola Walker that the condition of the building was such and had been that my boarders had all left - Tola him in August that I must either pay at the rate of Fifty dollars per month, or I should leave - I was satisfied that the offer I made was accepted - I had paid eighty dollars per month & I paid Fifty dollars per month and made it - I was willing they should take my furniture or take the Fifty dollars - Tola Waughop he would have to take the furniture or Fifty dollars per month

The Defendant then offered to prove by this witness the same facts enumerated in ~~connection~~ ^{connection} with the testimony of the witness Dyerforth (to which reference is hereby made) and the Plaintiff by his Counsel objected and the Court sustained the objection and refused to allow said proof to be made.

To which ruling and decision of the Court in sustaining said objection & refusing to allow said proof to be made the defendant by his Counsel then & there duly excepted.

The witness on Cross Examination testified as follows

I do not remember ever having said that I couldn't do anything with Walker - I could not have paid so - I never expressed my fears that Walker would hold White - I always supposed that Walker would stand by his word - I do not recollect of saying that White was better able to pay this rent than I was - I don't recollect of ever having said that I was afraid White would have to pay the rent - I did not vacate the premises because I understood Mr Walker to accept the offer of fifty dollars - I never was notified that the whole rent was to be paid - I should not have stayed there at all had I been so informed.

The Defendant then introduced in evidence the original petition to the Common Council for the raising Randolph Street on which said building stood, to grade, signed "S. B. & M. O. Walker." among others - The petition was admitted to be the original petition ~~properly~~ filed for that purpose and the Defendant called as a witness

A. W. Waughorn who having been previously sworn in the cause, testified

That the signature to said petition was in S. B. Walker's handwriting and not in that of M. O. Walker.

The Defendant thereupon rested his case

That the Plaintiff by his Counsel thereupon moved the Court to exclude all the testimony given in the case in regard to the untenable condition of the building and the Court sustained the Motion and excluded all the testimony which had fallen from the witnesses in regard thereto from the consideration of the Jury.

To which decision and ruling of the Court in sustaining said Motion and excluding said testimony the defendant by his Counsel then and there duly excepted.

This was all the testimony introduced by either party in said cause.

That the arguments of Counsel on both sides being waived by them, the Court gave the following instructions to the Jury on behalf of the Plaintiff, to wit;

1. The Jury in this cause will disregard all the evidence offered in this cause tending to show a discharge of the covenants to pay rent reserved in the lease offered in this cause as it would be improper for them to consider any proof for that purpose unless such proof is in writing and under the Seal of the party.
2. All proof given in this cause showing the condition of the said premises in consequence of the raising of the grade of the Street by the City of Chicago in front of the said premises, offered for the purpose of avoiding the payment of full rent under the Lease and granted in

this suit will be disregarded by the Jury.

3. In this case the plaintiff will be entitled to interest on all rents not paid from the time the same became due & remained unpaid, at five per cent per annum.

To the giving of which instructions on behalf of the plaintiff and each and every of them the Defendant by his counsel then and there duly accepted.

And the Court gave to the Jury the following instructions on behalf of the Defendant.

" If the Jury believe from the evidence that the time of payment of the rent or any portion of the rent was extended by a valid agreement founded upon a valuable consideration between Walker & Napier, such agreement would discharge the Defendant from all liability upon his guarantee from the time of making such agreement."

And the Defendant by his counsel asked the Court to give to the Jury on his behalf the following instructions to wit.

- 1st " It is for the Jury to determine whether the plaintiff accepted Mrs Napier as his tenant, and if they believe from the evidence that such was the fact, the plaintiff cannot recover for any of the rent on the original lease after the commencement of such tenancy.

2. "If the Jury believe from the evidence that W. J. Napier from November 1854 to the time of his death, and his Widow after his death to May 1859 occupied the premises in question at a different rate of rent & under a different agreement from that specified in the Lease in question and they may give a new finding of said premises & the Defendant is thereby discharged upon his guaranty, they are entitled to a Verdict in his favor.
3. "In an action upon a guaranty of payment by a third person the Plaintiff must prove that payment has not been made by such third person, and therefore if the Jury are not satisfied by the evidence that payment has not already been made to the Plaintiff by the defendant they will find a Verdict for the Defendant."

But the Court refused to give to the Jury said three last enumerated instructions on behalf of the Defendant or either of them

To which several rulings and decisions of the Court in refusing to give said last mentioned instructions and each of them the Defendant by his Counsel then and there only and generally excepted.

The Jury thereupon rendered a Verdict for the Plaintiff for the sum of Seven hundred and eighty nine dollars and fifty six cents, and the Defendant by his

Counsel Thompson entered a Motion for a New trial of said case in words and figures following to wit:

'Alced: White

vs

Martin. A. Walker

} Superior Court of Chicago
Oct 5, 1860.

Now comes the deft by his Counsel Barker & Tuley & moves the Court for a New trial in above case for the following reasons.

- 1st The Court erred in admitting parol proof as to the consideration of the guaranty.
- 2^d The Court erred in admitting the Lease and guaranty in evidence.
- 3^d The Lease & guaranty show the guaranty to be an original promise and the Court erred in receiving parol evidence to show it to be a collateral undertaking.
- 4th The Court erred in excluding the evidence of Dyresforth and other proof offered by defendant from the Jury, in not permitting defendant to prove certain facts which he offered to prove.
- 5th The Court erred in giving plaintiffs instructions and refusing those requested by Defendant.
- 6th The Verdict of the Jury was contrary to the law of the case.
- 7th The Verdict of the Jury was contrary to evidence
Barker & Tuley &
Fuller for deft"

Which said Motion was by the Court, after hearing the arguments of Counsel thereon and after having examined and considered the same overruled and Judgment entered upon the Verdict in favor of the Plaintiff aforesaid.

To which ruling and decision of the Court in overruling the said Defendants said Motion for a new trial and 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 hereinbefore generally enumerated the Defendant by his Counsel then and there duly excepted and prayed an Appeal therefrom, which was granted.

And forasmuch as the several matters and things hereinbefore 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 record of this Cause - which is done.

(Signed) Ward St. Higgins (Seal)
Judge.

State of Illinois
Cook County .. } S.S.

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 the Process - Answered Declaration - Plea & Notice - Appeal Bond and Bill of Exceptions now on file in my Office, together with all orders and the Judgment entered of record in a certain cause heretofore pending in said Court, wherein Martin O. Walker was Plaintiff and Alexander White, Defendant -

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

Walter Kimball Clerk



State of Illinois }
Cook County .. }

Martin O. Walker }

— v^o — }

Alexander White }

Record.

def.
\$15-⁵⁰/₁₀₀ Paid by Jeffery
Huntrecker

In Supreme Court of Illinois
Third Grand Division
April Term, A.D. 1861

Alexander White
appellant

"

Martin O. Walker
appellee

} Appeal from
Superior Court of Chicago

Afterward, to wit, on the first Tuesday
after the Third Monday in April
A.D. 1861, at this same term before the
Judges of the Supreme Court of the State
of Illinois comes the said Alexander White
Appellant, by Melville W. Walker, his
Attorney, and says that in the
Record and proceedings aforesaid
and also in rendering the judgment
aforesaid there is manifest error, in
this, to wit,

1st That the Court erred in overruling
the objection of the Defendant below
to the admission of the testimony of the
witness, Warshop, as to the ^{character and} consideration
of the guaranty on which this suit was brought
and in admitting said testimony

6- That the Court erred in refusing to allow the witness, Mrs. Wm. J. Napier to testify to the facts detailed in the offer of proof in connection with the testimony of the witness, Dyrenfurth, when the Defendant below again offered to prove the same by Mrs. Napier, and in sustaining the objection of the Plaintiff below, thereto.

7- That the Court erred in sustaining the motion made by the Plaintiff below to exclude all the testimony in the case in regard to the untenable condition of the building in question and in excluding all the testimony which had fallen from the witnesses in regard thereto.

8- That the Court erred in giving the instructions by the Court given, on behalf of the Plaintiff and in giving each of them

9- That the Court erred in refusing to give the instructions asked by the Defendant and numbered "1", "2" & "3" and each of them

10- That the declaration aforesaid and the matters therein contained, are not

sufficient in law for the said Plaintiff
below to have or maintain his aforesaid
action there^y against the said
Defendant ~~in~~ ^{below} ~~from~~ ~~aforesaid~~

11. That the Court erred in overruling
the motion for a new trial made
by the Defendant below

12. That the Court erred in entering
judgment on the verdict

13. That the verdict was against the
law & the evidence

14. That the verdict was excessive
and included interest which the
Defendant was, not by the law of
the land, bound to pay -

15. That the judgment aforesaid in
form aforesaid given, was given in
favor of the said Plaintiff below against
the said Defendant below whereas by
the law of the land, the said judgment
ought to have been given in
favor of said Defendant and against
said Plaintiff -

And the said Alexander White, Appellant
prays that the judgment aforesaid
for the snore aforesaid and other
snore in the record and proceeding
aforesaid, may be reversed, annulled
and altogether held for nothing
and that he may be restored to
all things which he has lost
by occasion of such judgment &c
Melville W. Fuller
Attorney for ^{Appellant} ~~Respondent~~

In nullo est inatimus
J. W. Naugbop
April 20 1861 for left in error

201
Supreme Court of Illinois
Alexander White
~~Plaintiff~~
vs

Martin O. Walker
Appellee

Assignment of
Errors -
and Record

Filed April 16 1861
L. Leland
Clerk

State of Illinois

In the Supreme Court

April Term 1861

Alexander White

vs

Martin O Walker

State of Illinois

LaSalle County

James H

Roberts being duly sworn says That
on Friday afternoon the 19th instant
and on Saturday Morning the 20th
instant he examined the record in
a few minutes before the order of reversal was had
the above entitled cause, to see if
there had been a joinder in
Error by the Defendant in Error
in said cause and did not see
at either of said dates any joinder
therein. and this affiant very believes
That there was no joinder in Error
at the time he obtained the order
reversing said cause for non
joinder in Error. This affiant believes
he would have seen such joinder
at both of said times when he ex-
amined had such joinder been made

J. H. Roberts

Subscribed & sworn to this 23rd of April 1861

L. Leland Clerk
J. H. Roberts Deput

Supreme Court
Alex. White 201

M. O. Walker

App't on motion

Filed April 23, 1861
L. Leland
clerk

In Supreme Court of Illinois
Third Grand Division

Alexander White
Appellant

April 5, 1861

Martin D. Walker
Appellee

State of Illinois
La Salle County

Personally comes

B. F. Mitchell being duly sworn on
oath declares & says that he is
an operator in the telegraph office
at Ottawa - That on Saturday
the 20th day of April, A.D., 1861
a telegraphic dispatch was received at the
telegraphic office in Ottawa from J. W.
Wanghob at Chicago to W. B.
Scates at Ottawa, at twenty
minutes past two o'clock in
the afternoon of said 20th day
of April, A.D., 1861, and that no
other dispatch was received that
day from said Wanghob to said
Scates and that the copy appended
hereto is a correct copy of said dispatch

Subscribed and sworn to
before me this 28th day of
April A.D. 1861

B. F. Mitchell

D. H. Cameron
Notary Public

CATON LINES.

Illinois and Mississippi Telegraph Company.

IN CONNECTION WITH ALL OTHER LINES IN THE
UNITED STATES AND CANADAS.

TERMS AND CONDITIONS ON WHICH MESSAGES ARE RECEIVED BY THIS COMPANY FOR TRANSMISSION.

The public are notified, that, in order to guard against mistakes in the transmission of messages, every message of importance ought to be repeated, by being sent back from the station at which it is to be received to the station from which it is originally sent. Half the usual price for transmission will be charged for repeating the message. This Company will not be responsible for mistakes or delays in the transmission or delivery of unreported messages, from whatever cause they may arise; nor will it be responsible for damages arising from mistakes or delays in the transmission or delivery of a repeated message, beyond an amount exceeding two hundred times the amount paid for sending the message; nor will it be responsible for delays arising from interruptions in the working of its Telegraphs, nor for any mistake or omission of any other Company over whose lines a message is to be sent to reach the place of destination. All messages will hereafter be received by this Company for transmission, subject to the above conditions.

J. D. CATON, Pres't, Ottawa, Ill.

Ottawa 21th 18'61

By Telegraph from Chicago Apr 20th 18'61

To Judge Walter B. Seely

Please put in pounds
in error for me in cases of Walker
vs White vs Walker vs Wilson & Baker
I will settle this expense

J W Mayhew

Supreme Court
— 201

Alexander White

4

Martin O. Walker
—

affidavit of telegraph
operator

Filed April 23, 1861
L. Leland
Clerk

Supreme Court of Illinois
Alex. White } Third Circuit Division
" } April 17 1861
Martin O. Walker } Appeal

State of Illinois }
La Salle County }

Personally comes
Messrs. Fuller & being duly sworn, on
oath declares & says that he is the
attorney for Alexander White
Appellant in the above entitled
cause — That he took a rule
on the Appellee to join in error therein
by Saturday morning, April 20th/61
That on Friday noon, April 19th/61
error, had not been joined therein &
this affiant being obliged to leave
Ottawa, obtained the services of James
H. Roberts Esq. an Attorney practicing
at the bar of this Court, to have
said cause reversed for non joinder
in error if error should not be
joined on the morning of Saturday
April 20th/61 — That this
affiant went on to Chicago

the afternoon of Friday, April 19th/₆₁
That in the middle of the
forenoon of Saturday, the 20th
instant this affiant met
J. W. Wauchope of Chicago in the
streets of said city - That said
Wauchope is the attorney & was
the attorney of the appellee in
this cause - That said Wauchope
inquired of this affiant, in
the street in Chicago in the
middle of the forenoon of that
day & about half past ten
o'clock as near as this affiant
now remembers "whether anything
had been done in the cause
of White vs Walker?" That
this affiant informed said
Wauchope that a rule had
been entered on appellee to join
in error which had expired
that morning - Whereupon said
Wauchope inquired if this affiant
"designed to insist on that
rule" This affiant said

"yes" & the interview terminated -

This affiant further says that on the 2nd day of April instant said course was reversed for non joinder in error. That on the 22nd of April instant said order of reversal was set aside as this affiant is informed upon the statement by J. W. Mayhew Appellee's Attorney that "Errors had been joined ^{before the reversal} by Judge Seate" to whom ~~this~~ said Mayhew stated he had written to do so -

This affiant charges that errors were not joined ^{as he truly believes} before said order of reversal. That they were not joined on Friday known. That said Mayhew in the forenoon of Saturday after said course ~~was~~ had been reversed upon the conversation ^{begin} before detailed, asked this affiant if he intended to insist upon the rule aforesaid & this affiant charges that at that

as this affiant truly believe
time said Waughop had not
inter or otherwise communicated
with Judge Scates & that
he was not ~~joined~~ ^{joined}
until afterwards & after
said reversal and affiant
says that he this day asked the
said Walter B. Scates when he
filed the said motion in Error
and said Scates informs affiant that
he has received a telegraphic des-
patch from said Waughop requesting
him to join in Error in said cause
and that he had thereupon done so
that said Scates did not examine to
see if the order of removal for non-
joinder had been entered at this time
he filed the motion and that he
could not remember when he got the
said telegraphic despatch and could
not now find the same affiant
says he truly believes that said
despatch was sent and received
after the order of removal was entered
in said cause.

Melville W. Fuller

Subscribed & sworn
before me April 23, 1861

L. Leland Colk
by J. D. Rhea Deputy

Supreme Court
Alex. White 201

✓
Mr. O. Walker

Alford's in
motion

Filed April 1861
L. Leland
Clerk

In Supreme Court of Illinois
Third Grand Division

April 5, 1861

Alexander White

Appellant

vs

Martin O. Walker

Appellee

Personally comes M. W. Fuller
being duly sworn, on oath
declares & says that ~~he~~ ^{is}
the attorney, ~~for~~ for the appellee
in this cause, J. W. Wausley
means this affiant when he
^{in his affidavit} says "that" the attorney of the
Appellant has repeatedly said
that he did not expect success
on the merits ~~in~~ of said cause
that said Wausley is laboring
under a very gross mistake.
That as a matter of fact
(^{the reason for which} ~~as~~ this Hon. Court can at
once perceive by an inspection
of the record & abstracts in this
case,) this affiant has had
entire confidence in the defense
in this cause from the time he
agreed the motion for a

new trial in the Court below
& he believes entirely & completely
that the law of this case is
with his clients -

This affiant further says
that it is utterly untrue
& that said Warshop has
no foundation for his
belief, that this case was
appealed for the purpose of
"seeking some technical action
to defeat a recovery in this
Court" or that "the appellant's
attorney not having any merit
in his cause took the appeal
hoping by his astuteness and
sharpness in the practice
of this Court, well knowing
the want of knowledge of the
rules of this Court of ~~the~~
~~affiant~~ said Warshop, "of
delaying & defeating the remedy
of the said appellee" as
alleged in said Warshop's said
affidavit, but on the contrary
thereof this affiant declares
the charges of said Warshop
in that regard to be false
& slanderous and that

term to join in error and
that ~~no reason exists why the~~
~~Appellee~~ ~~as due~~ should not have joined
in error under that rule -

That as matter of fact
for the truth of which an
inspection of the record &
abstracts will satisfy, this
Court, this cause was one
of great hardship on the
Appellant & this Appiant
could not consent to waive
any legal rights of his client
under such circumstances -

That the reversal of said judgment
was ^{first} entered on the morning
of the 20th instant in the
application of said rule to join
error, upon the coming in
of the Court on the morning
of that day & when motions
were heard, as this Appiant
is informed & believes, long
before the errors were joined
which could not have been
until the afternoon of said
day when the Court was
not in session -

This Appiant further says

that she can not perceive
how the business avocations
of said Mayhew can be
supposed to interrupt the
business or change the rules
of this Court or that it
was not as easy to send
a telegraphic dispatch
on Tuesday, Wednesday,
Thursday or Friday of last
week as on Saturday &
if said Mayhew's business was ⁱⁿ of
Chicago was of more importance
than his business in this Court
he should, it appears to this
Court have employed someone
to attend to it for him -

Metellus W. Fuller

From W. H. Subscribers
this 23rd day of October
A.D., 1861, before me
L. Deland Clerk
J. J. Morris Deputy

Superior Court
201
Alexander White

✓
Mr. O. Walker

Comes attested
to Mr. Waynes
Com attested on
motion

Filed April 20. 1861
L. Leland
clerk

In Supreme Court of
State of Illinois
Third Judicial District
Alex. White April 7, 1861
Appellants

Marion O. Walker
Appellee

And now comes the said
appellant by M.W. Fuller, his
Atty. General, this Hon. Court
to vacate & rescind the order
heretofore entered to vacate
the reversal of the above
admitted Cause for non
joinder in error and that
said judgment of reversal
may stand for the reasons
stated in the affidavits herewith
filed, to wit,

1- Because errors were not
joined at the time of the
reversal of judgment in this
Cause -

2- Because the judgment
of reversal was authorized & entered
by virtue of the rules of this Court.

M.W. Fuller
Atty. Gen. Appellants

Supreme Court
White 201.

vs

Walker

Motion to set
aside over
opening judge's
of removal ~

Filed April 23 1861
L. Leland
clerk

State of Illinois

In the Supreme Court of April Term
A.D. 1861

Martin O. Walker appellee

vs

Alexander White Appellant }

John W. Wainwright being sworn
says That he is the Attorney of record
of the said appellee in the above
Cause. That he is not an ex-
perienced practitioner in
this Honorable Court.

That this affiant was the attorney
of the said appellee in the
Court below, and knows that
the said Appellee has a good
and meritorious claim in this action
that the Appellee recovered in
the Court below a judgment for
the sum of Seven hundred and
eighty nine dollars and fifty six
cents (\$789.56). The foundation
of the action was the guarantee
by ~~of~~ said Appellant of a Lease
upon which the lessee had and
enjoyed the premises but did not

pay the rent - and that rent was -
what was recovered in this action
below.

The Attorney of the said Appellant
has frequently said to this af-
fiant - That he did not ex-
pect to succeed on the merits
of said Cause but his client
was willing to take it up
and he was coming to this
Court with the Cause.

This affiant further says
that the Cause was strongly -
contested below and a
motion for a new trial was
heard before the full bench
of the Court below.

This affiant now believes
that the said Cause was ap-
pealed for the purpose of
seeking some ^{technical action to de-}
~~feat a recovery~~ ^{technical action to de-}
in this Court. That the Appellant's
attorney not having any
merits in his Cause took
the appeal hoping by his astute-
ness and sharpness in the practice
of this Court, well knowing
the want of knowledge of the
rules of this Court of this affiant

of delaying and defeating the
remedy of the said Appellate.

This affiant has to say
to this Court - that he was not
fully posted in the rules or
the practice of this Court al-
-lowing the reversal of a judgment
on a failure to join in error
without notice of the rules,
this Court was in its first
week and this Cause
was far down on the docket
and this affiant felt secure
until the beginning of this week.
~~This~~ affiant had intended to
be in Ottawa to attend to
said Cause by Wednesday of
the first week of the month
but was detained at Chicago
by urgent professional busi-
-ness connected with the
war which has been so sud-
-denly brought on the country
several of the clients of this
affiant were enlisted for
the war and expected to
start for the war ^{on short notice} and ap-
-plied to this affiant for

his services making their wills & closing business with this defendant. That as soon as this defendant had an intimation of the rule of this Court in this Cause to join in error he immediately telegraphed to Hon. Walter B. Sears who joined in error in the said Cause for him on the day to which the rule was made and for all that appears by the affidavits of the appellant filed on this motion before the order was made for the reversal of ^{the judgment in} this Cause.

The dispatch was sent from Chicago by this defendant in the forenoon of the twentieth Inst. and on that day and it must be presumed before the reversal of said Cause the finding in error was in error.

This defendant has acted in this Cause in good faith and the consequences of the application of the appellant

would be altogether to serious
for the ~~court~~ said Appellee
to hear and indeed it would
all be saddled on this
affiant.

J. W. Waugh

Subscribed & sworn
to before me this
23^d day of April

L. L. Clark Clerk

by J. B. R. Deputy

State of Illinois

Supreme Court of Illinois

of April Term A.D.

Martin O. Walker Appellee

1861

vs
Alexander White Appellant.

John W. Waugh being

sworn makes this Substantive
Supplemental Affidavit being
subsequent to the filing of
second affidavit by Mr. W.
Fuller for attorney for the
appellant. This Affiant says
that before the record was made

out by the Clerk of the Court below the appellant came to this affiant in person and said to this affiant that he would rather settle the damages in this case than to have the bother of taking the case up to the Supreme Court and offered to pay rent on the case at the rate of eighty dollars per month for the time it was he kind and close it up. He further stated that he was of the opinion that he was liable and expected to be made liable but that it would make all parties feel better if some compromise could be effected. He stated to this affiant further, that Mr. Fuller had agreed to attend to the case for nothing in the Supreme Court not so much that he expected to defeat the action as to make a good case for the books to settle some points of law.

And it is true Mr. Fuller's statement to the contrary notwithstanding that Mr. Fuller has told this affiant repeatedly on

the intercourse between counsel
that he did not expect to
succeed but he went to carry
it up and make the points and
settle the law. That he had the
labouring oar that he case in
the 2^d Illinois was hard to
overcome.

This affiant cannot be respons-
-sible for the ~~statement~~ modesty
of counsel in stating in his affd.
that he was not well posted
in the rules of this Court I know
that Mr. Fuller is a most astute
and ingenious lawyer and withal
an honourable gentleman and
he is the last man to insist on
an advantage of this nature when
he has confidence in the
merits of his cause.

That this affiant has acted
in perfect good faith and
what he has stated is true to
the best of his knowledge and
beliefs.

J. W. Mansfield

Subscribed & sworn to
sworn to before me
this 23^d day of April
1861. L. Leland Clerk
by J. W. Mansfield

201

Supreme Court
of Illinois

Walter

ads

White

app l. of Appellate
atty.

Filed April 20, 1861

L. Leland

Clk. H.

Restitute order
reversing non pro

Jameson & Morse, Printers, 14 La Salle Street.

IN THE SUPREME COURT

OF THE STATE OF ILLINOIS.

THIRD GRAND DIVISION,

APRIL TERM, A. D. 1861.

ALEXANDER WHITE,

APPELLANT,

vs.

MARTIN O. WALKER,

APPELLEE.

*Appeal from the Superior Court
of Chicago.*

ABSTRACT.

2 This was an action of assumpsit commenced by summons issued
Nov. 18th, 1859.

3 Amended declaration filed May 25th, 1860, consisting of two counts,
as follows, to wit:

4 1st. Court. For that whereas, heretofore to wit: on the eleventh
day of April, A. D. 1857, at the County of Cook, aforesaid, the said plaintiff
then being possessed of certain premises, to wit: lot twenty-one (21)
twenty-two, (22) twenty three, (23) and twenty-four, (24) of block nine
(9) of Fort Dearborn Addition to Chicago, in the County of Cook, aforesaid,
and the large frame building thereon, being the same lately occupied
by Mrs. Wemple as a boarding house, one William J. Napier
applied to the said plaintiff and requested him to rent the said premises
to him for the term of two years from the 1st day of May, A. D. 1857,
and offered the said plaintiff as rent therefor the sum of twelve hundred
dollars, (as rent for said premises) for each year, in monthly payments,
of one hundred dollars each, in advance on the 1st day of each and every
month. But the said plaintiff not being willing to risk the chances of
collecting his rent from said William J. Napier, declined to rent the
said premises to him unless he should give the said plaintiff security for
5 the payment of the rent thereof. And thereupon the said William J.
Napier proposed to the said plaintiff that he would procure the said defendant
to guarantee the payment of the rent if the said plaintiff would

rent the said premises to him on the terms and conditions aforesaid. And afterwards, to wit, on the day and year aforesaid, at the County of Cook aforesaid, the said defendant came to the said plaintiff with the said William J. Napier and then and there agreed with the said plaintiff, that if he would lease the said premises to the said William J. Napier on the terms aforesaid, that he the said defendant would become responsible for the payment of the rent, and would pay the same when due if the said William J. Napier failed to pay the same when due, and the said plaintiff then and there agreed in consideration of the premises, that he would rent the said premises to the said William J. Napier on the terms aforesaid. The said plaintiff avers that in consideration of and confiding in the promises and undertakings of the said defendant, the said plaintiff did on the day and year aforesaid, at said County of Cook, make and execute under his hand and seal a written demise of the said premises to the said William J. Napier for the full term of two years, from the 1st day of May A. D. 1857, at and for the annual rent of twelve hundred dollars, payable in monthly payments of one hundred dollars each on the 1st day of every month in advance, and afterwards, to wit, on the
6 thirteenth day of April, A. D. 1857, at the County of Cook aforesaid, the said defendant in pursuance of the agreement made by him to William J. Napier, became responsible for the rent of the said William J. Napier on the said written demise, to become due to the said plaintiff, and in consideration of the premises did execute his guaranty in writing on the back of the said written demise made by the said plaintiff to the said William J. Napier, and delivered the same to the said plaintiff, and thereby then and there, the said defendant promised the said plaintiff to pay him the sum of twelve hundred dollars for each year, for the full term of two years in monthly payments of one hundred dollars each, on the 1st day of each and every month, in advance from the 1st day of May, A. D. 1857, for and during, and until, and including the 1st day of April, A. D. 1859, as the rent on the said demise, of the said plaintiff to the said William J. Napier of said premises, as the same became thereon, in case the said William J. Napier should fail or neglect to pay the same as aforesaid, the counterpart of which said written demise, sealed with the seal of the said plaintiff, and of the said William J. Napier, is now in the
- possession of said plaintiff with the said guaranty of the said defendant written thereon, and which he brings into Court, (a copy of which is already filed in this Court) as by said indenture reference thereto
7 had will among other things more fully and at large appear. And the said plaintiff avers that from the execution of the said guaranty by the said defendant to him as aforesaid, the said plaintiff delivered to the said William J. Napier the said written demise, and in consideration of the premises and relying upon the promises and undertakings of the said defendant in that behalf, permitted the said William J. Napier to have and enjoy the said premises for the full term of two years, to wit: for the full term of said written demise, to wit: at the County of Cook aforesaid, and by virtue of the said written demise, the said William J. Na-

8 pier entered into and upon all and singular the said premises, to wit : on the 1st day of May, A. D. 1857, at the County of Cook aforesaid, and had, and used, and enjoyed the same for the full term of the said indenture thereof to him granted as aforesaid, but the said William J. Napier did not pay the rent as the same became due on the said written demise, but failed to do so and made default therein, and although often requested so to do, did not nor would pay the same, nor did any one pay the same for him, but so to do neglected and refused, and still so neglect and refuse to pay the same to the said plaintiff. By means whereof and by force of the Statute in such case made and provided, the said defendant then and there became liable to pay the said sum of money mentioned as rent, to be paid in the said written demise according to the tenor and effect of the said indenture and of the said guaranty, and being so liable he, the said defendant, in consideration thereof and in consideration of the premises, afterwards, to wit : on the 13th day of April, A. D. 1857, at the said County of Cook, undertook, and then, and there, faithfully promised the said plaintiff to pay him the said several sums of money when thereunto afterwards requested.

2d Count.

9 And whereas also, heretofore, to-wit : on the 11th day of April, A. D. 1857, at the County of Cook, aforesaid, the said plaintiff being possessed of certain lands and tenements, to-wit : lots twenty-one, twenty-two, twenty-three and twenty-four of block No. nine, of Fort Dearborn Addition to Chicago, with the large frame building thereon, situated in the County of Cook, and State of Illinois, being the same lately occupied by Mrs. Wemple as a boarding house, and being so possessed of said premises, one William J. Napier applied to the said plaintiff to have the said plaintiff rent to him the said premises for the term of two years, from the first day of May, A. D. 1857, at the yearly rent of twelve hundred dollars, payable in monthly payments of one hundred dollars each, on the first day of each and every month in advance. But the said plaintiff not being satisfied that the said William J. Napier would pay his rent for said premises, in the event of the same being leased to him as aforesaid, the said plaintiff declined to rent the said premises to the said Wm. J. Napier, unless he should give the said plaintiff security for the payment of the rent thereof; and thereupon, the said William J. Napier proposed to the said plaintiff, that he would procure the said defendant to become responsible for the payment of the rent of the said premises, if the said plaintiff would let them to him on the terms aforesaid ; to which proposition the said plaintiff agreed, to-wit : at the County of Cook, aforesaid, and afterwards, to-wit : on the day and year, aforesaid, at the County of Cook, aforesaid, the said defendant and the said William J. Napier came to the said plaintiff, and then and there agreed with said plaintiff that he, the said defendant, would become responsible to the said plaintiff for his rent of the said premises, if he should rent the same to the said William J. Napier on the terms aforesaid, and in the event that the said William

J. Napier failed to pay him his rent for said premises on such demise, that he, the said defendant, would pay the rent himself when the same became due, and in consideration of the promises and undertakings of the said defendant in that behalf, the said plaintiff then and there agreed to rent the said premises to the said William J. Napier, on the terms and conditions aforesaid.

- 10 And the said plaintiff avers, that confiding in the promises and undertakings of the said defendant, and in consideration thereof, the said plaintiff did, on the day and year aforesaid, at said County of Cook, make and execute under his hand and seal, a written demise of the said premises to the said William J. Napier for the full term of two years, from the first day of May, A. D. 1857, at and for the annual rent of twelve hundred dollars, payable in monthly payments of one hundred dollars each, on the first day of every month in advance, which said indenture was in the words and figures following, to-wit:

[Here follows a copy of the said indenture, which, as it hereafter appears in the testimony, is here omitted, and reference made to the copy appearing in the evidence.]

- 14 And afterwards, to-wit: on the thirteenth day of April, A. D. 1857, at Chicago in said County of Cook, the said defendant in consideration of the premises and in pursuance of the agreement made by him with the said plaintiff on that behalf, as aforesaid, did execute and deliver to the said plaintiff his written guarantee, which said guarantee is in the words and figures following, to-wit: "I hereby guarantee the payment of the rent to become due on the within lease on the days the same becomes due. Dated, Chicago, April 13th, 1857," and signed by the said defendant, by the name and description of "Alex. White," (meaning and intending Alexander White, the said defendant,) which said written
15 guarantee was made upon the back of the said written demise, made as aforesaid by the said plaintiff, to the said William J. Napier, and thereby then and there the said defendant promised the said plaintiff to pay him the rent according to the tenor and effect of the said written demise, in case the said William J. Napier failed to pay the same according to the tenor and effect thereof.

The counterpart of which said indenture, the said plaintiff brings here into Court, as by said indenture, reference being thereunto had, will among other things more fully and at large appear.

And the said plaintiff avers, that upon the execution of the said guaranty by the said defendant to him, as aforesaid, the said plaintiff delivered to the said William J. Napier, the said written demise, and in consideration of the premises, and relying upon the promises and undertakings of the said defendant in that behalf, permitted the said William J. Napier to have and enjoy the said premises for the full term of two

years, to-wit: for the full term of the said written demise, to-wit: at the County of Cook, aforesaid. And the said plaintiff avers, that by virtue of the said written demise, the said William J. Napier entered into and upon the said demised premises, to-wit: on the first day of May, A. D. 1857, and had and enjoyed the same for the full term of the said written demise thereof, to him granted as aforesaid. But in the payment of the rent, that became due on the said written demise, to the said plaintiff, the said William J. Napier, made default and did not, nor any one for him, pay the same according to the tenor and effect of said demise, but so to do, totally failed and refused to do. By means whereof, and by force of the statute in such case made and provided, the said defendant then and there became liable to pay the said sum of money, to become due on the said written demise, to the said plaintiff, according to the tenor and effect thereof, and of the tenor and effect of the said guaranty by him made, as aforesaid. And being so liable, he, the said defendant, in consideration thereof, and in consideration of the premises, afterwards, to-wit: on the said 13th day of April, A. D. 1857, at said County of Cook, undertook and then and there faithfully promised the said plaintiff to pay him the said several sums of money, when thereunto afterwards requested, if the said William J. Napier should fail to pay the same, as aforesaid.

Yet, the said defendant, not regarding his said promises and undertakings, but contriving, &c., although often requested so to do, has not paid said plaintiff either of said sums of money above mentioned, or any part thereof, but so to do, has hitherto wholly neglected and refused and still does neglect and refuse,—to the damage of said plaintiff of twelve hundred dollars, and therefore he brings this, his suit, &c.

17 Plea, general issue, and notice of special matter in defence, filed June 16th, 1860, which notice is as follows:

18 “The above named plaintiff and his attorney, J. W. Waughop, will please take notice.—That upon the trial of the above entitled cause, the said defendant will rely upon the following special matter for a defence to said action of plaintiff:

1st. That the said plaintiff ought not to recover upon the cause of action and promises in said amended declaration mentioned, because he says that the said promises of defendant, in said declaration mentioned, were special promises to answer for the debt and default of another person, in manner and form as in said declaration mentioned and set forth, and that no agreement in respect of or relating to the said promises, and supposed causes of action, or either of them in said declaration mentioned, or memorandum or note thereof, wherein the consideration for the special promises, or either of them, was stated or shown, was in writing and signed by the said defendant or any person thereunto by him lawfully authorized according to the statute in such case made and provided.

2d. That there was no consideration for the promises and undertakings of defendant, or either of them.

3d. Payment.

19 4th. That after the making of said lease, and sometime in the fall of the year of 1857, or before that time, the street in the City of Chicago, adjoining the said demised premises, was by said plaintiff, or by his, said plaintiff's, consent, raised to grade, that is to say the said street was raised by adding and putting on of earth and stones several feet above the height and condition it was in, when said premises were leased by plaintiff to said Napier as in said declaration mentioned, whereby and by means whereof, a nuisance was created by the water, dirt, and filth which flowed in and upon the basement story of the house, situated upon said premises, at all times, and often times covering the basement floor of said house several inches with water, by reason of which nuisance caused by the conduct of said plaintiff, the said premises became untenable, and the continued occupation of said premises by reason of the flowing in of said water, dirt, and filth upon such premises caused by the raising of said street, became and was at great risk and danger to the health and comfort of said lessee, said Napier and his family, and produced an eviction of said lessee by said plaintiff which would have justified in vacating said premises, and that at and about that time, to wit: on or about the 1st day of December, A. D. 1857, the said plaintiff did agree to and with said Napier, lessee, in consideration of the foregoing facts, and in consideration that said lessee was deprived of the beneficial enjoyment of said premises, by reason of the raising of said street to grade, as aforesaid, and in consideration and because the said lessee had for
20 some months previous thereto lost his boarders, (the said house having been rented for and used as a boarding house) because of the said nuisance, and because of the failure of said plaintiff to do certain repairs, and make certain drains which he, plaintiff, agreed before that time with said lessee to do and make. And for other good and sufficient considerations, that he, the said plaintiff, would from and after that time, to wit: the making of said agreement reduce said rent for said premises, to eighty dollars per month, and would from that time, and for the remainder of said term, accept and receive of and from said lessee the sum of eighty dollars per month, as and for, full satisfaction and payment of the rent of said premises; and that this defendant should not after that time be liable for, or called upon to pay any additional rent to said eighty dollars per month, so agreed to be paid by said lessee, and agreed to be accepted by said plaintiff, as aforesaid, and that at the time of the making of the said last mentioned agreement, as to said eighty dollars per month, between said plaintiff and said lessee, all the rent before that time, due and payable on said lease, had been paid by said lessee to said plaintiff, and that the said lessee did from and after the making of said agreement as to eighty dollars per month, and until his, said lessee's decease, (which occurred sometime in the Spring or Summer of the year 1858) pay to said plaintiff

21 iff, and said plaintiff did receive of and from said lessee, the sum and rate of eighty dollars per month as and for full satisfaction, and payment, of all rent becoming due on said premises during said time, to wit: from the making of said agreement to the decease of said lessee, and that after the decease of said lessee, the widow of said lessee, not being administratrix or executrix of said lessee, or having any right or authority to take possession of or control of the estate of the leasehold interest of said lessee, in said premises, which facts, and also the fact, of said decease was well known to said plaintiff, did take possession of and occupy said premises with the consent and permission of said plaintiff; and did from and after the decease of her said husband, and until the 1st day of August, 1858, pay to said plaintiff, and said plaintiff did accept, from said Mrs. Napier, widow, the sum of eighty dollars per month as rent of said premises, and that on or about the said 1st day of August, the said premises having become still more untenable and unbeneficial by reason of said nuisance, and in consideration thereof, and for other good and sufficient considerations, the said plaintiff did agree to, and with the said Mrs. Napier, widow, to accept and receive from her, the said Mrs. Napier, the sum of fifty dollars per month from said 1st day of August, until the expiration of the term in said lease mentioned as rent for said premises, and said Mrs. Napier did pay to, and said plaintiff did receive from her, the sum of fifty dollars per month, for each and every month, from said 1st day of August, until the expiration of said term in said lease mentioned, as and for, and in full of the rent of said premises for said time. That from and after the decease of said lessee and until the expiration of the said lease, in said declaration mentioned, said premises were worth, and of the value not to exceed, fifty dollars per month of said time, which sum or rate of fifty dollars has been fully paid to, said plaintiff.

23 Oct. 8th, 1860, trial, and verdict Oct. 9th, 1860, in favor of plaintiff below, for \$789.56, and motion for new trial by defendant.

24 Motion for new trial argued Nov. 24th, A. D. 1860, and taken under
25 advisement. Dec. 14th 1860, motion for new trial overruled and exceptions entered by defendant and judgment entered upon the verdict, appeal prayed and allowed, and bond and bill of exceptions thereafter filed in accordance with the orders of said Court.

29 On the trial the plaintiff to prove the issues on his part called as a witness, *J. W. Waughop*, who being sworn testified as follows:

30 In the month of April, A. D. 1857, the premises in question were occupied by one, Mrs. Wemple; Dr. Honsinger was the lessee, and she was occupying on his term. His term extended up to the 1st day of May, A. D. 1859, the same as this lease. Napier applied to Honsinger to purchase his lease and wanted Walker to consent to an agreement, a substitution of Napier in the place of Honsinger, and applied to me as Mr. Walker's agent; I stated to them that we were satisfied

that Honsinger was good for the rent, that he had always paid his rent promptly and we could not take Napier in place of Honsinger. Napier offered security and proposed the name of Alexander White to guarantee the payment.

The defendant, by his counsel, objected to any further statements by the witness, (who was also the attorney of the plaintiff, and therefore, gave his testimony without putting any questions to himself,) as to the consideration of the guaranty upon which this suit is brought, on the ground that parol evidence to show the consideration was inadmissible, but the Court overruled the objection, and allowed the witness to proceed, and admitted the evidence. To which ruling and decision of the Court in overruling the objection of said defendant, and in admitting the evidence as to the consideration aforesaid, the defendant, by his counsel, then and there duly excepted.

The witness then proceeded.—I stated to Napier if he would give White, I would give him a lease. I drew the lease, and it was executed April 11th, A. D. 1857. It was signed on that day, but not delivered. Afterwards White came and guaranteed it.

31 The lease was dated April 11th, 1857, but the term was for two years, from May 1st, A. D. 1857. It was occupied during the term by Napier and his family. White came before the lease was delivered and guaranteed it, I then delivered it to Napier. This is the lease, and this the guaranty. [The witness here indentified the lease and guaranty hereinafter inserted.]

On cross-examination, the witness said :

32 Both copies of the lease remained in my possession. Did not deliver Napier's copy to him until after the guaranty was made. Napier had not taken possession until after the leases were delivered. I know that Napier's copy was not delivered until after the guaranty. I drew this lease. We had drawn the lease to Alexander White directly, wishing to make him make the covenants. *He would not do it*, but would guaranty, and did on the 13th of April, A. D. 1857. The alteration was made on the 11th, because White would not sign it as it was. Napier had taken the lease to White for his signature, and returned it to me, stating to me that White would call and guaranty. I stated the contents of the lease to White; he knew the rate and when it was to be paid; White may have read it when Napier took it to him, but I don't know. Think the street on which house stood was raised to grade in the Fall of 1857. The city raised the grade; who paid for it I don't know; suppose it was done by an assessment by the city; not a part of my duty to pay for such things. I simply collect rents and deposit them. I used to be at the house two or three times a month. I know there was water standing in the back yard. Walker constructed a drain there.

Think it was in the fall of 1857. That would be my best recollection. My impression is that Mr. Napier died in the spring of 1858. I can not tell whether he died intestate. His widow remained in the house to the end of the term of the lease and then left. She paid rent on this lease. No other person except the widow, after his decease, paid rent. She continued paying rent. The rent commenced falling behind before he died. How long before I don't know. He paid \$80 per month, which he said was all he could get together. I never inquired after any administrator or executor of Napier. I knew the fact of his death almost immediately. He commenced falling behind Nov. A. D. 1857, for the rent that fell due that month. He paid \$50 at one time in Nov. 1857, and \$30 at another making \$80. \$30 on rent of Dec. 1857 in that month. \$50 on rent of Jan. 1858, and then \$80 each month to July 1858. \$80 per month was what he said he would be able to pay. He paid, Jan. 1858, \$50; Feb. \$80; March, \$80. And the widow paid April, \$80; May, \$80; June, \$80; July \$80; Aug. \$45; Sept. \$50; Oct. \$50; Nov. \$50; Dec. \$50; Jan. 1859, \$50; Feb. \$50; March \$50; April \$20; May \$40. The Dec. 1857 rent was fully paid in Jan. 1858; \$30 on the month of Dec. 1857, and \$50 on the month of Jan. 1858 was all that was paid on that month. Napier stated in Nov. 1857, that he was unable to pay but \$80 per month. He hoped to bring it up when business revived. Hoped to make Walker reduce the rent and throw it off anyhow.

On re-examination the witness testified :

The amount of rent due on this lease is \$705. Napier said he was not able to pay his rent, and if I would receive \$80 on account he might bring it up. Mrs. Napier said she could only spare me \$50 per month. I received it on account. She expressed herself very much disturbed lest Mr. White would have to suffer. I told her Walker would not press her for any more than she could pay on account. Rents were lower at this time. Walker would not press her for any more that she could pay on account for he had security for the value.

On re-cross-examination the witness further testified :

I think Mrs. Napier was present when Napier stated that he would only pay \$80 per month, as before stated. Nobody else, I think. I do not know that Walker saw them at all, except from Mrs. Napier. I had the conversation with Napier. One or two days after Napier was buried I saw Mrs. Napier. It was not then she spoke of \$50 per month. She paid \$80 per month for sometime. I cannot remember whether she said at the time I met her first, after his death, that she would pay \$80. I think she never said anything about it till August, and when she dropped down to \$50, nothing was said. She continued to pay \$80 and nothing was said. Perhaps some of her children were about when I saw her. She and her husband had been complaining about the premises. She showed me through the back yard where the water came down and had

been coming down. He constructed a drain which obviated the difficulty. I can not tell how long after the street was raised we built the drain.— Think as soon as the effect was discovered. All the rent for the first six months was punctually paid at \$100 per month. It was in November, 1859, that the first ran behind.

35 *The plaintiff then offered the lease and guaranty referred to, in evidence. To the admission of which, in evidence, the defendant by his counsel, then and there objected, but the Court overruled the objection and admitted said lease and guaranty in evidence. To which decision and ruling of the Court, in overruling said objection and admitting said lease and guaranty in evidence, the defendant, by his counsel, then and there duly excepted.*

The lease and guaranty were then read in evidence and were as follows, to wit :

“This Indenture made this eleventh day of April, in the year of our Lord, one thousand eight hundred and fifty-seven, between Martin O. Walker by John W. Waughop, his attorney in fact, of Chicago Ill., party of the first part and W. J. Napier of the same place, party of the second part :

36 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, his executors, administrators and assigns, has demised and leased to the said party of the second part, all those premises situate, lying, and being in the City of Chicago, in the County of Cook, in the State of Illinois, known and described as follows, to wit: The large two story frame dwelling, lately occupied by Mrs. Wemple as a boarding house, situated on lots (21) twenty-one, (22) twenty-two, (23) twenty-three, and (24) twenty-four, in block nine (9), Fort Dearborn Addition to Chicago. To have and to hold the said above described premises with the appurtenances unto the said party of the second part, his executors, administrators, and assigns, from the first day of May in the year of our Lord, one thousand eight hundred and fifty-seven, for and during and until the first day of May, 1859. 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 with 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 the said demised premises, the sum of twelve hundred dollars per annum, payable in monthly payments of one hundred dollars each in advance, said premises to be kept in repair at the expense of the said party of the second part.

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

37 premises in good order and condition, and that at the expiration of the time in this lease mentioned, he will yield up the 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, and also, will keep said premises in good repair during this lease, at his own expense.

It is further agreed by the said party of the second part, that neither he nor his legal representatives will underlet said premises or any part thereof, or assign this lease, without the written assent of said party of the first part, had and obtained thereto.

And the said William J. Napier, for himself and his heirs, executors, administrators and assigns, agrees further to pay (in addition to the rents above specified) all water rents, and assessments, taxes levied, or charged on said premises, for and during the time for which this lease is granted, and save said premises and the party of first part harmless therefrom, and that he will keep said premises in a clean and healthy condition, in accordance with the ordinances of the city and directions of the sewerage commissioners.

38 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, his 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 assigns, 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 re-enter, and the said party of the second part, or any other person or persons occupying in 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 re-possess 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 agrees to waive all legal rights which he 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 the goods, chattels or 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. And if at any time said term shall be ended, at such election of said party of the first part, his heirs, executors, administrators or assigns, as aforesaid,

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or in any other way, the said party of the second part, his heirs, executors, administrators, or 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 or assigns, immediately upon the determination of said lease, as aforesaid. And if he shall remain in possession of the same one day after notice of such default, or after the termination of this lease, in any of the ways, above named, he shall be deemed guilty of a forcible detainer of said premises, under the statute, and shall be subject to all the conditions, and provisions 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.

Witness the hands and seals of the parties aforesaid.

MARTIN O. WALKER, [SEAL.]

BY J. W. WAUGHOP,

Att'y in fact.

WM. J. NAPIER. [SEAL.]

40 "I hereby guarantee the payment of the rent, to become due on the
" within lease, on the days the same becomes due. Dated, Chicago,
" April 13th, 1857.

(Signed,) "ALEX. WHITE."

The plaintiff then rested his case, and the defendant called as a witness,

Julius Dyrenfurth, who being duly sworn testified as follows:

I knew the plaintiff. I knew William J. Napier in his life time. I resided with Napier on Randolph street, Nov. 1857.

The defendant, by his counsel, then propounded to the witness the following questions:

"Do you know of any agreement between William J. Napier and
"the plaintiff in this suit, for the reduction, by said plaintiff, of the rent
"in the lease introduced in the evidence, and for what said reduction, if
"any, was made? If yea, state the same."

To which questions the plaintiff objected, on the ground that parol evidence could not be introduced to discharge the guarantor of an instrument under seal, and the Court sustained the objection, and refused to al-

41 *low the questions to be put to the witness. To which decision and ruling of the Court, in sustaining said objection, and refusing to allow said questions to be put to the witness, the defendant then and there duly excepted.*

The defendant then offered to prove by the witness, Dyrenfurth, that William J. Napier, the lessee in the lease in question, in the month of November, 1857, declared that he would vacate the premises in question, on the ground that the same were wholly untenable, and that Walker, the plaintiff, was liable to, and had agreed, after the commencement of the tenancy, by parol, to put certain drains into the demised premises, rendered necessary by the city authorities having raised the grade of the street, which he, Walker, had not done. That Walker agreed with Napier, in order to settle the dispute as to his liability to put in these drains, and in consideration of his failure to put in said drains, and of Napier releasing him from his said agreement, to reduce the rent to eighty dollars per month, and that no more than that sum should be taken by Walker, in satisfaction of the rent. And from that time on the rent was received and paid at eighty dollars per month, under that agreement. That this agreement was made after the Nov. 1857 rent had become due, and default had been made in the payment of it.

42 The defendant further offered to prove by witness, that the premises became untenable by reason of water standing in the basement, which was caused by raising the street to grade by the city authorities. Also, the value of the premises, at the time of the death of Napier, April, 1858, and their value from thence to the termination of the term.

To the proving of each and all which above enumerated facts and circumstances, the plaintiff, by his counsel, then and there objected, and the Court sustained the objection and refused to allow the witness to testify thereto.

To which decision and ruling of the Court, in sustaining said plaintiffs' said last mentioned objection, and in excluding said testimony, and refusing to allow said proof to be made, the defendant, by his counsel, then and there duly excepted.

The witness then proceeded as follows :

43 I went to see Walker with Mrs. Napier, in April, 1858, after Mr. Napier's death. He agreed to take eighty dollars per month from her, if she would remain in the house, and that he would send her notice if he should raise the rent from eighty to one hundred dollars. It was Mr. Walker's words to Mrs. Napier and to me, in her presence, that he would reduce the rent and authorize Waughop to send notice if he, Walker, raised it. There was another conversation at the same time when Mrs. Napier told Walker that she could not pay any more, as the house was wholly untenable. Walker said it made no difference whether she

paid or not, as he had security. *Mrs. Napier said she would remove then, and Walker then replied that he would end it and take eighty dollars from her.* I was present at this interview, as a friend of Mrs. Napier's. I went there for the purpose of befriending her, as I had been warned of Mr. Walker's character as a hard man.

The plaintiff here objected to any further testimony of the witness, as to what transpired between Mrs. Napier and the plaintiff, at this or any other interview, in regard to the rent of the demised premises and the condition of the same, and the Court sustained the objection, and refused to allow the witness to proceed with his testimony in regard thereto. To which decision and ruling of the Court the defendant then and there duly excepted.

The defendant then called as a witness, *Mrs. William J. Napier*, who being duly sworn, testified as follows :

44 The lease in question, in this suit, was never assigned to me. I kept a boarding house in the building in question. The house was in such a condition, after raising the grade, as to make it suicidal to remain there. All my boarders left. The water stood in the basement thick with slime. I remained in the house to protect Mr. White. I am the widow of William J. Napier. He died in April, 1858. I was unable, in the summer of 1858, to pay more than I did. I told Walker that the condition of the building was such, and had been, that my boarders had all left. I told him in August that I must either pay at the rate of fifty dollars per month or I should leave. I was satisfied that the offer I made was accepted. I had paid eighty dollars per month, and I paid fifty dollars per month and ended it. I was willing they should take my furniture, or take the fifty dollars. I told Waughop he would have to take the furniture or fifty dollars per month.

The defendant then offered to prove by this witness the same facts enumerated, in connection with the testimony of the witness, Dyrenfurth, (to which, reference is hereby made) and the plaintiff, by his counsel, objected, and the Court sustained the objection, and refused to allow said proof to be made.

To which ruling and decision of the Court, in sustaining said objection, and refusing to allow said proof to be made, the defendant, by his counsel, then and there duly excepted.

45 *The witness, on cross-examination, testified as follows: I do not remember ever having said that I could not do anything with Walker. I could not have said so. I never expressed any fears that Walker would hold White. I always supposed that Walker would stand by his word. I do not recollect of saying that White was better able to pay this rent than I was. I don't recollect of ever having said that I was afraid White*

would have to pay the rent. I did not vacate the premises because I understood Mr. Walker to accept the offer of fifty dollars. I never was notified that the whole rent was to be paid. I should not have stopped there at all had I been so informed.

The defendant then introduced, in evidence, the original petition to the Common Council for the raising of Randolph street, on which said building stood, to grade, signed, "S. B. & M. O. WALKER," among others.

The petition was admitted to be the original petition filed for that purpose; and the defendant called as a witness,

J. W. Waughop, who, having been previously sworn in the cause, testified :

That the signature to the said petition, was in S. B. Walker's hand writing, and not in that of M. O. Walker.

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The defendant thereupon rested his case.

And the *plaintiff*, by his counsel thereupon, *moved the Court to exclude* all the testimony given in the case, in regard to the untenable condition of the building, and the Court *sustained the motion and excluded all the testimony which had fallen from the witnesses in regard thereto* from the consideration of the jury.

To which decision and ruling of the Court, in sustaining said motion and excluding the said testimony, the defendant by his counsel, then and there duly excepted.

This was all the testimony introduced by either party, in said cause.

And the arguments of the counsel on both sides being waived by them, the Court gave the following instructions to the jury, on behalf of the plaintiff, to-wit :

1. The jury in this cause will disregard *all the evidence* offered in this cause, *tending to show a discharge of the covenants to pay rent reserved in the lease offered in this cause*, as it would be improper for them to consider any proof for that purpose, *unless such proof is in writing, and under the seal of the party.*

2. *All proof given in this cause, showing the condition of the said premises in consequence of the raising of the grade of the street, by the City of Chicago, in front of the said premises, offered for the purpose of avoiding the payment of full rent under the lease and guarantee in this*

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suit, will be disregarded by the jury.

3. In this cause the plaintiff will be entitled to interest on all rents not paid *from the time the same became due and remained unpaid*, at six per cent per annum. ”

To the giving of which instructions, on behalf of the plaintiff, and *each* and every of them, the defendant by his counsel then and there duly *excepted*.

And the Court gave to the jury the following instruction on behalf of the defendant :

“If the jury believe from the evidence that the time of payment of the rent, or any portion of the rent, was extended by valid agreement, founded upon a valuable consideration between Walker and Napier, such agreement would discharge the defendant from all liability, upon his guarantee from the time of making such agreement.”

And the defendant, by his counsel, asked the Court to give to the jury, on his behalf, the following instructions, to-wit :

“1st, It is for the jury to determine whether the plaintiff accepted Mrs. Napier as his tenant, and if they believe from the evidence that such was the fact, the plaintiff cannot recover any of the rent on the original lease after the commencement of such tenancy.

48 “2d. If the jury believe from the evidence, that W. J. Napier, from November, 1857, to the time of his death, and his widow after his decease, to May, 1859, occupied the premises in question, at a different rate of rent and under a different agreement from that specified in the lease in question, then they may infer a new leasing of said premises, and the defendant is thereby discharged upon his guarantee, and he is entitled to a verdict in his favor.

“3d. In an action upon a guarantee of payment by a third person, the plaintiff must prove that payment has not been made by such third person, and therefore, if the jury are not satisfied by the evidence that payment has not already been made to the plaintiff by the defendant, they will find a verdict for the defendant.”

But the Court refused to give to the jury said last enumerated instructions on behalf of the defendant, or either of them.

To which several rulings and decisions of the Court, in refusing to give said instructions and each of them, the defendant duly and severally *excepted*.

40 The jury returned a verdict for plaintiff for \$789.56, and defendant entered his motion for a new trial, the grounds stated in which, are as follows :

1st. The Court erred in admitting parol proof as to the consideration of the guaranty.

2d. The Court erred in admitting the lease and guaranty in evidence.

3d. The lease and guaranty show the guaranty to be an original promise, and the Court erred in receiving parol evidence to show it to be a collateral undertaking.

4th. The Court erred in excluding the evidence of Dyrenfurth and other proof offered by defendant from the jury,—in not permitting defendant to prove certain facts, which he offered to prove.

5th. The Court erred in giving plaintiff's instructions, and refusing those requested by defendant.

6th. The verdict of the jury was contrary to the law of the case.

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Motion for new trial over-ruled, and defendant enters his exceptions, and judgment being entered upon the verdict, defendant prays appeal, &c.

ERRORS ASSIGNED.

1st. That the Court erred in overruling the objection of the defendant below, to the admission of the testimony of the witness, Waughop, as to the character and consideration of the guaranty on which this suit was brought, and in admitting said testimony.

2d. That the Court erred in overruling the objection of the defendant below, to the admission of the lease and guaranty in evidence, and in admitting the same.

3d. That the Court erred in refusing to allow the question set forth in the testimony of the witness, Dyrenfurth, to be put to that witness, and in sustaining the objection of the plaintiff below thereto.

4th. That the Court erred in refusing to allow the defendant below to prove the facts and circumstances by the witness, Dyrenfurth, which said defendant offered to do, and in sustaining the objection of the plaintiff below thereto.

5th. That the Court erred in refusing to allow the witness, Dyrenfurth, to proceed with his testimony as to what transpired between Mrs. Napier and the plaintiff at the interview spoken of by the witness in regard to the rent of the demised premises and the condition of the same, and in sustaining the objection of the plaintiff below thereto.

6th. That the Court erred in refusing to allow the witness, Mrs. William J. Napier, to testify to the facts detailed in the offer of proof in connection with the testimony of the witness, Dyrenfurth, when the defendant below again offered to prove the same by Mrs. Napier, and in sustaining the objection of the plaintiff below thereto.

7th. That the Court erred in sustaining the motion made by the plaintiff below, to exclude all the testimony in the case in regard to the untenable condition of the building in question, and in excluding all the testimony which had fallen from the witnesses in regard thereto.

8th. That the Court erred in giving the instructions by the Court, given on behalf of the plaintiff, and in giving each of them.

9th. That the Court erred in refusing to give the instructions asked by the defendant, and numbered "1," "2," and "3," and each of them.

10th. That the declaration aforesaid, and the matters therein contained, are not sufficient in law for the said plaintiff below to have or maintain his aforesaid action thereof against the said defendant below.

11th. That the Court erred in overruling the motion for a new trial, made by the defendant below.

12th. That the Court erred in entering judgment on the verdict.

13th. That the verdict was against the law and the evidence.

14th. That the verdict was excessive and included interest, which the defendant was not, by the law of the land, bound to pay.

15th. That the judgment aforesaid, in form aforesaid given, was given in favor of the said plaintiff below, and against the said defendant below, whereas, by the law of the land, the said judgment ought to have been given in favor of said defendant and against said plaintiff.

MELVILLE W. FULLER,

AND

BARKER & TULEY,

Attorneys for Appellant.

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Alexander C. White

v

Martin C. Walker

Abstract

Filed Apr 18. 1861

A. Leonard
Clerk

Jameson & Morse, Printers, 14 La Salle Street.

IN THE SUPREME COURT

OF THE STATE OF ILLINOIS.

THIRD GRAND DIVISION,

APRIL TERM, A. D. 1861.

ALEXANDER WHITE,

APPELLANT,

vs.

MARTIN O. WALKER,

APPELLEE.

*Appeal from the Superior Court
of Chicago.*

ABSTRACT.

2 This was an action of assumpsit commenced by summons issued
Nov. 18th, 1859.

3 Amended declaration filed May 25th, 1860, consisting of two counts,
as follows, to wit :

4 1st. Court. For that whereas, heretofore to wit : on the eleventh
day of April, A. D. 1857, at the County of Cook, aforesaid, the said plaintiff
then being possessed of certain premises, to wit : lot twenty-one (21)
twenty-two, (22) twenty three, (23) and twenty-four, (24) of block nine
(9) of Fort Dearborn Addition to Chicago, in the County of Cook, afore-
said, and the large frame building thereon, being the same lately occu-
pied by Mrs. Wemple as a boarding house, one William J. Napier
applied to the said plaintiff and requested him to rent the said premises
to him for the term of two years from the 1st day of May, A. D. 1857,
and offered the said plaintiff as rent therefor the sum of twelve hundred
dollars, (as rent for said premises) for each year, in monthly payments,
of one hundred dollars each, in advance on the 1st day of each and every
month. But the said plaintiff not being willing to risk the chances of
collecting his rent from said William J. Napier, declined to rent the
said premises to him unless he should give the said plaintiff security for
5 the payment of the rent thereof. And thereupon the said William J.
Napier proposed to the said plaintiff that he would procure the said de-
fendant to guarantee the payment of the rent if the said plaintiff would

rent the said premises to him on the terms and conditions aforesaid. And afterwards, to wit, on the day and year aforesaid, at the County of Cook aforesaid, the said defendant came to the said plaintiff with the said William J. Napier and then and there agreed with the said plaintiff, that if he would lease the said premises to the said William J. Napier on the terms aforesaid, that he the said defendant would become responsible for the payment of the rent, and would pay the same when due if the said William J. Napier failed to pay the same when due, and the said plaintiff then and there agreed in consideration of the premises, that he would rent the said premises to the said William J. Napier on the terms aforesaid. The said plaintiff avers that in consideration of and confiding in the promises and undertakings of the said defendant, the said plaintiff did on the day and year aforesaid, at said County of Cook, make and execute under his hand and seal a written demise of the said premises to the said William J. Napier for the full term of two years, from the 1st day of May A. D. 1857, at and for the annual rent of twelve hundred dollars, payable in monthly payments of one hundred dollars each on the 1st day of every month in advance, and afterwards, to wit, on the thirteenth day of April, A. D. 1857, at the County of Cook aforesaid, the said defendant in pursuance of the agreement made by him to William J. Napier, became responsible for the rent of the said William J. Napier on the said written demise, to become due to the said plaintiff, and in consideration of the premises did execute his guaranty in writing on the back of the said written demise made by the said plaintiff to the said William J. Napier, and delivered the same to the said plaintiff, and thereby then and there, the said defendant promised the said plaintiff to pay him the sum of twelve hundred dollars for each year, for the full term of two years in monthly payments of one hundred dollars each, on the 1st day of each and every month, in advance from the 1st day of May, A. D. 1857, for and during, and until, and including the 1st day of April, A. D. 1859, as the rent on the said demise, of the said plaintiff to the said William J. Napier of said premises, as the same became thereon, in case the said William J. Napier should fail or neglect to pay the same as aforesaid, the counterpart of which said written demise, sealed with the seal of the said plaintiff, and of the said William J. Napier, is now in the possession of said plaintiff with the said guaranty of the said defendant written thereon, and which he brings into Court, (a copy of which is already filed in this Court) as by said indenture reference being thereto had will among other things more fully and at large appear. And the said plaintiff avers that from the execution of the said guaranty by the said defendant to him as aforesaid, the said plaintiff delivered to the said William J. Napier the said written demise, and in consideration of the premises and relying upon the promises and undertakings of the said defendant in that behalf, permitted the said William J. Napier to have and enjoy the said premises for the full term of two years, to wit: for the full term of said written demise, to wit: at the County of Cook aforesaid, and by virtue of the said written demise, the said William J. Na-

8 pier entered into and upon all and singular the said premises, to wit : on the 1st day of May, A. D. 1857, at the County of Cook aforesaid, and had, and used, and enjoyed the same for the full term of the said indenture thereof to him granted as aforesaid, but the said William J. Napier did not pay the rent as the same became due on the said written demise, but failed to do so and made default therein, and although often requested so to do, did not nor would pay the same, nor did any one pay the same for him, but so to do neglected and refused, and still so neglect and refuse to pay the same to the said plaintiff. By means whereof and by force of the Statute in such case made and provided, the said defendant then and there became liable to pay the said sum of money mentioned as rent, to be paid in the said written demise according to the tenor and effect of the said indenture and of the said guaranty, and being so liable he, the said defendant, in consideration thereof and in consideration of the premises, afterwards, to wit : on the 13th day of April, A. D. 1857, at the said County of Cook, undertook, and then, and there, faithfully promised the said plaintiff to pay him the said several sums of money when thereunto afterwards requested.

2d Count.

9 And whereas also, heretofore, to-wit : on the 11th day of April, A. D. 1857, at the County of Cook, aforesaid, the said plaintiff being possessed of certain lands and tenements, to-wit : lots twenty-one, twenty-two, twenty-three and twenty-four of block No. nine, of Fort Dearborn Addition to Chicago, with the large frame building thereon, situated in the County of Cook, and State of Illinois, being the same lately occupied by Mrs. Wemple as a boarding house, and being so possessed of said premises, one William J. Napier applied to the said plaintiff to have the said plaintiff rent to him the said premises for the term of two years, from the first day of May, A. D. 1857, at the yearly rent of twelve hundred dollars, payable in monthly payments of one hundred dollars each, on the first day of each and every month in advance. But the said plaintiff not being satisfied that the said William J. Napier would pay his rent for said premises, in the event of the same being leased to him as aforesaid, the said plaintiff declined to rent the said premises to the said Wm. J. Napier, unless he should give the said plaintiff security for the payment of the rent thereof; and thereupon, the said William J. Napier proposed to the said plaintiff, that he would procure the said defendant to become responsible for the payment of the rent of the said premises, if the said plaintiff would let them to him on the terms aforesaid ; to which proposition the said plaintiff agreed, to-wit : at the County of Cook, aforesaid, and afterwards, to-wit : on the day and year, aforesaid, at the County of Cook, aforesaid, the said defendant and the said William J. Napier came to the said plaintiff, and then and there agreed with said plaintiff that he, the said defendant, would become responsible to the said plaintiff for his rent of the said premises, if he should rent the same to the said William J. Napier on the terms aforesaid, and in the event that the said William

16 years, to-wit: for the full term of the said written demise, to-wit: at the County of Cook, aforesaid. And the said plaintiff avers, that by virtue of the said written demise, the said William J. Napier entered into and upon the said demised premises, to-wit: on the first day of May, A. D. 1857, and had and enjoyed the same for the full term of the said written demise thereof, to him granted as aforesaid. But in the payment of the rent, that became due on the said written demise, to the said plaintiff, the said William J. Napier, made default and did not, nor any one for him, pay the same according to the tenor and effect of said demise, but so to do, totally failed and refused to do. By means whereof, and by force of the statute in such case made and provided, the said defendant then and there became liable to pay the said sum of money, to become due on the said written demise, to the said plaintiff, according to the tenor and effect thereof, and of the tenor and effect of the said guaranty by him made, as aforesaid. And being so liable, he, the said defendant, in consideration thereof, and in consideration of the premises, afterwards, to-wit: on the said 13th day of April, A. D. 1857, at said County of Cook, undertook and then and there faithfully promised the said plaintiff to pay him the said several sums of money, when thereunto afterwards requested, if the said William J. Napier should fail to pay the same, as aforesaid.

Yet, the said defendant, not regarding his said promises and undertakings, but contriving, &c., although often requested so to do, has not paid said plaintiff either of said sums of money above mentioned, or any part thereof, but so to do, has hitherto wholly neglected and refused and still does neglect and refuse,—to the damage of said plaintiff of twelve hundred dollars, and therefore he brings this, his suit, &c.

17 Plea, general issue, and notice of special matter in defence, filed June 16th, 1860, which notice is as follows:

18 “The above named plaintiff and his attorney, J. W. Waughop, will please take notice.—That upon the trial of the above entitled cause, the said defendant will rely upon the following special matter for a defence to said action of plaintiff:

1st. That the said plaintiff ought not to recover upon the cause of action and promises in said amended declaration mentioned, because he says that the said promises of defendant, in said declaration mentioned, were special promises to answer for the debt and default of another person, in manner and form as in said declaration mentioned and set forth, and that no agreement in respect of or relating to the said promises, and supposed causes of action, or either of them in said declaration mentioned, or memorandum or note thereof, wherein the consideration for the special promises, or either of them, was stated or shown, was in writing and signed by the said defendant or any person thereunto by him lawfully authorized according to the statute in such case made and provided.

2d. That there was no consideration for the promises and undertakings of defendant, or either of them.

3d. Payment.

19 4th. That after the making of said lease, and sometime in the fall of the year of 1857, or before that time, the street in the City of Chicago, adjoining the said demised premises, was by said plaintiff, or by his, said plaintiff's, consent, raised to grade, that is to say the said street was raised by adding and putting on of earth and stones several feet above the height and condition it was in, when said premises were leased by plaintiff to said Napier as in said declaration mentioned, whereby and by means whereof, a nuisance was created by the water, dirt, and filth which flowed in and upon the basement story of the house, situated upon said premises, at all times, and often times covering the basement floor of said house several inches with water, by reason of which nuisance caused by the conduct of said plaintiff, the said premises became untenable, and the continued occupation of said premises by reason of the flowing in of said water, dirt, and filth upon such premises caused by the raising of said street, became and was at great risk and danger to the health and comfort of said lessee, said Napier and his family, and produced an eviction of said lessee by said plaintiff which would have justified in vacating said premises, and that at and about that time, to wit: on or about the 1st day of December, A. D. 1857, the said plaintiff did agree to and with said Napier, lessee, in consideration of the foregoing facts, and in consideration that said lessee was deprived of the beneficial enjoyment of said premises, by reason of the raising of said street to grade, as aforesaid, and in consideration and because the said lessee had for
20 some months previous thereto lost his boarders, (the said house having been rented for and used as a boarding house) because of the said nuisance, and because of the failure of said plaintiff to do certain repairs, and make certain drains which he, plaintiff, agreed before that time with said lessee to do and make. And for other good and sufficient considerations, that he, the said plaintiff, would from and after that time, to wit: the making of said agreement reduce said rent for said premises, to eighty dollars per month, and would from that time, and for the remainder of said term, accept and receive of and from said lessee the sum of eighty dollars per month, as and for, full satisfaction and payment of the rent of said premises; and that this defendant should not after that time be liable for, or called upon to pay any additional rent to said eighty dollars per month, so agreed to be paid by said lessee, and agreed to be accepted by said plaintiff, as aforesaid, and that at the time of the making of the said last mentioned agreement, as to said eighty dollars per month, between said plaintiff and said lessee, all the rent before that time, due and payable on said lease, had been paid by said lessee to said plaintiff, and that the said lessee did from and after the making of said agreement as to eighty dollars per month, and until his, said lessee's decease, (which occurred sometime in the Spring or Summer of the year 1858) pay to said plaintiff

21 iff, and said plaintiff did receive of and from said lessee, the sum and rate of eighty dollars per month as and for full satisfaction, and payment, of all rent becoming due on said premises during said time, to wit: from the making of said agreement to the decease of said lessee, and that after the decease of said lessee, the widow of said lessee, not being administratrix or executrix of said lessee, or having any right or authority to take possession of or control of the estate of the leasehold interest of said lessee, in said premises, which facts, and also the fact, of said decease was well known to said plaintiff, did take possession of and occupy said premises with the consent and permission of said plaintiff; and did from and after the decease of her said husband, and until the 1st day of August, 1858, pay to said plaintiff, and said plaintiff did accept, from said Mrs. Napier, widow, the sum of eighty dollars per month as rent of said premises, and that on or about the said 1st day of August, the said premises having become still more untenable and unbeneficial by reason of said nuisance, and in consideration thereof, and for other good and sufficient considerations, the said plaintiff did agree to, and with the said Mrs. Napier, widow, to accept and receive from her, the said Mrs. Napier, the sum of fifty dollars per month from said 1st day of August, until the expiration of the term in said lease mentioned as rent for said premises, and said Mrs. Napier did pay to, and said plaintiff did receive from her, the sum of fifty dollars per month, for each and every month, from said 1st day of August, until the expiration of said term in said lease mentioned, as and for, and in full of the rent of said premises for said time. That from and after the decease of said lessee and until the expiration of the said lease, in said declaration mentioned, said premises were worth, and of the value not to exceed, fifty dollars per month of said time, which sum or rate of fifty dollars has been fully paid to said plaintiff.

23 Oct. 8th, 1860, trial, and verdict Oct. 9th, 1860, in favor of plaintiff below, for \$789.56, and motion for new trial by defendant.

24 Motion for new trial argued Nov. 24th, A. D. 1860, and taken under
25 advisement. Dec. 14th 1860, motion for new trial overruled and exceptions entered by defendant and judgment entered upon the verdict, appeal prayed and allowed, and bond and bill of exceptions thereafter filed in accordance with the orders of said Court.

29 On the trial the plaintiff to prove the issues on his part called as a witness, *J. W. Waughop*, who being sworn testified as follows:

30 In the month of April, A. D. 1857, the premises in question were occupied by one, Mrs. Wemple; Dr. Honsinger was the lessee, and she was occupying on his term. His term extended up to the 1st day of May, A. D. 1859, the same as this lease. Napier applied to Honsinger to purchase his lease and wanted Walker to consent to an agreement, a substitution of Napier in the place of Honsinger, and applied to me as Mr. Walker's agent; I stated to them that we were satisfied

that Honsinger was good for the rent, that he had always paid his rent promptly and we could not take Napier in place of Honsinger. Napier offered security and proposed the name of Alexander White to guarantee the payment.

The defendant, by his counsel, objected to any further statements by the witness, (who was also the attorney of the plaintiff, and therefore, gave his testimony without putting any questions to himself,) as to the consideration of the guaranty upon which this suit is brought, on the ground that parol evidence to show the consideration was inadmissible, but the Court overruled the objection, and allowed the witness to proceed, and admitted the evidence. To which ruling and decision of the Court in overruling the objection of said defendant, and in admitting the evidence as to the consideration aforesaid, the defendant, by his counsel, then and there duly excepted.

The witness then proceeded.—I stated to Napier if he would give White, I would give him a lease. I drew the lease, and it was executed April 11th, A. D. 1857. It was signed on that day, but not delivered. Afterwards White came and guaranteed it.

31 The lease was dated April 11th, 1857, but the term was for two years, from May 1st, A. D. 1857. It was occupied during the term by Napier and his family. White came before the lease was delivered and guaranteed it, I then delivered it to Napier. This is the lease, and this the guaranty. [The witness here identified the lease and guaranty hereinafter inserted.]

On cross-examination, the witness said :

32 Both copies of the lease remained in my possession. Did not deliver Napier's copy to him until after the guaranty was made. Napier had not taken possession until after the leases were delivered. I know that Napier's copy was not delivered until after the guaranty. I drew this lease. We had drawn the lease to Alexander White directly, wishing to make him make the covenants. He would not do it, but would guaranty, and did on the 13th of April, A. D. 1857. The alteration was made on the 11th, because White would not sign it as it was. Napier had taken the lease to White for his signature, and returned it to me, stating to me that White would call and guaranty. I stated the contents of the lease to White; he knew the rate and when it was to be paid; White may have read it when Napier took it to him, but I don't know. Think the street on which house stood was raised to grade in the Fall of 1857. The city raised the grade; who paid for it I don't know; suppose it was done by an assessment by the city; not a part of my duty to pay for such things. I simply collect rents and deposit them. I used to be at the house two or three times a month. I know there was water standing in the back yard. Walker constructed a drain there.

Think it was in the fall of 1857. That would be my best recollection. My impression is that Mr. Napier died in the spring of 1858. I can not tell whether he died intestate. His widow remained in the house to the end of the term of the lease and then left. She paid rent on this lease. No other person except the widow, after his decease, paid rent. She continued paying rent. The rent commenced falling behind before he died. How long before I don't know. He paid \$80 per month, which he said was all he could get together. I never inquired after any administrator or executor of Napier. I knew the fact of his death almost immediately. He commenced falling behind Nov. A. D. 1857, for the rent that fell due that month. He paid \$50 at one time in Nov. 1857, and \$30 at another making \$80. \$30 on rent of Dec. 1857 in that month. \$50 on rent of Jan. 1858, and then \$80 each month to July 1858. \$80 per month was what he said he would be able to pay. He paid, Jan. 1858, \$50; Feb. \$80; March, \$80. And the widow paid April, \$80; May, \$80; June, \$80; July \$80; Aug. \$45; Sept. \$50; Oct. \$50; Nov. \$50; Dec. \$50; Jan. 1859, \$50; Feb. \$50; March \$50; April \$20; May \$40. The Dec. 1857 rent was fully paid in Jan. 1858; \$30 on the month of Dec. 1857, and \$50 on the month of Jan. 1858 was all that was paid on that month. Napier stated in Nov. 1857, that he was unable to pay but \$80 per month. He hoped to bring it up when business revived. Hoped to make Walker reduce the rent and throw it off anyhow.

On re-examination the witness testified :

The amount of rent due on this lease is \$705. Napier said he was not able to pay his rent, and if I would receive \$80 on account he might bring it up. Mrs. Napier said she could only spare me \$50 per month. I received it on account. She expressed herself very much disturbed lest Mr. White would have to suffer. I told her Walker would not press her for any more than she could pay on account. Rents were lower at this time. Walker would not press her for any more that she could pay on account for he had security for the value.

On re-cross-examination the witness further testified :

I think Mrs. Napier was present when Napier stated that he would only pay \$80 per month, as before stated. Nobody else, I think. I do not know that Walker saw them at all, except from Mrs. Napier. I had the conversation with Napier. One or two days after Napier was buried I saw Mrs. Napier. It was not then she spoke of \$50 per month. She paid \$80 per month for sometime. I cannot remember whether she said at the time I met her first, after his death, that she would pay \$80. I think she never said anything about it till August, and when she dropped down to \$50, nothing was said. She continued to pay \$80 and nothing was said. Perhaps some of her children were about when I saw her. She and her husband had been complaining about the premises. She showed me through the back yard where the water came down and had

been coming down. He constructed a drain which obviated the difficulty. I can not tell how long after the street was raised we built the drain.— Think as soon as the effect was discovered. All the rent for the first six months was punctually paid at \$100 per month. It was in November, 1859, that the first ran behind.

35

The plaintiff then offered the lease and guaranty referred to, in evidence. To the admission of which, in evidence, the defendant by his counsel, then and there objected, but the Court overruled the objection and admitted said lease and guaranty in evidence. To which decision and ruling of the Court, in overruling said objection and admitting said lease and guaranty in evidence, the defendant, by his counsel, then and there duly excepted.

The lease and guaranty were then read in evidence and were as follows, to wit :

“ This Indenture made this eleventh day of April, in the year of our Lord, one thousand eight hundred and fifty-seven, between Martin O. Walker by John W. Waughop, his attorney in fact, of Chicago Ill., party of the first part and W. J. Napier of the same place, party of the second part :

36

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, his executors, administrators and assigns, has demised and leased to the said party of the second part, all those premises situate, lying, and being in the City of Chicago, in the County of Cook, in the State of Illinois, known and described as follows, to wit : The large two story frame dwelling, lately occupied by Mrs. Wemple as a boarding house, situated on lots (21) twenty-one, (22) twenty-two, (23) twenty-three, and (24) twenty-four, in block nine (9), Fort Dearborn Addition to Chicago. To have and to hold the said above described premises with the appurtenances unto the said party of the second part, his executors, administrators, and assigns, from the first day of May in the year of our Lord, one thousand eight hundred and fifty-seven, for and during and until the first day of May, 1859. 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 with 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 the said demised premises, the sum of twelve hundred dollars per annum, payable in monthly payments of one hundred dollars each in advance, said premises to be kept in repair at the expense of the said party of the second part.

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

37 premises in good order and condition, and that at the expiration of the time in this lease mentioned, he will yield up the 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, and also, will keep said premises in good repair during this lease, at his own expense.

It is further agreed by the said party of the second part, that neither he nor his legal representatives will underlet said premises or any part thereof, or assign this lease, without the written assent of said party of the first part, had and obtained thereto.

And the said William J. Napier, for himself and his heirs, executors, administrators and assigns, agrees further to pay (in addition to the rents above specified) all water rents, and assessments, taxes levied, or charged on said premises, for and during the time for which this lease is granted, and save said premises and the party of first part harmless therefrom, and that he will keep said premises in a clean and healthy condition, in accordance with the ordinances of the city and directions of the sewerage commissioners.

38 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, his 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 assigns, 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 re-enter, and the said party of the second part, or any other person or persons occupying in 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 re-possess 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 agrees to waive all legal rights which he 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 the goods, chattels or 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. And if at any time said term shall be ended, at such election of said party of the first part, his heirs, executors, administrators or assigns, as aforesaid,

39

or in any other way, the said party of the second part, his heirs, executors, administrators, or 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 or assigns, immediately upon the determination of said lease, as aforesaid. And if he shall remain in possession of the same one day after notice of such default, or after the termination of this lease, in any of the ways, above named, he shall be deemed guilty of a forcible detainer of said premises, under the statute, and shall be subject to all the conditions, and provisions 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.

Witness the hands and seals of the parties aforesaid.

MARTIN O. WALKER, [SEAL.]

BY J. W. WAUGHOP,

Att'y in fact.

WM. J. NAPIER. [SEAL.]

40 "I hereby guarantee the payment of the rent, to become due on the
"within lease, on the days the same becomes due. Dated, Chicago,
"April 13th, 1857.

(Signed,) "ALEX. WHITE."

The plaintiff then rested his case, and the defendant called as a witness,

Julius Dyrenfurth, who being duly sworn testified as follows:

I knew the plaintiff. I knew William J. Napier in his life time. I resided with Napier on Randolph street, Nov. 1857.

The defendant, by his counsel, then propounded to the witness the following questions:

"Do you know of any agreement between William J. Napier and
"the plaintiff in this suit, for the reduction, by said plaintiff, of the rent
"in the lease introduced in the evidence, and for what said reduction, if
"any, was made? If yea, state the same."

To which questions the plaintiff objected, on the ground that parol evidence could not be introduced to discharge the guarantor of an instrument under seal, and the Court sustained the objection, and refused to al-

41 *low the questions to be put to the witness. To which decision and ruling of the Court, in sustaining said objection, and refusing to allow said questions to be put to the witness, the defendant then and there duly excepted.*

The defendant then offered to prove by the witness, Dyrenfurth, that William J. Napier, the lessee in the lease in question, in the month of November, 1857, declared that he would vacate the premises in question, on the ground that the same were wholly untenable, and that Walker, the plaintiff, was liable to, and had agreed, after the commencement of the tenancy, by parol, to put certain drains into the demised premises, rendered necessary by the city authorities having raised the grade of the street, which he, Walker, had not done. That Walker agreed with Napier, in order to settle the dispute as to his liability to put in these drains, and in consideration of his failure to put in said drains, and of Napier releasing him from his said agreement, to reduce the rent to eighty dollars per month, and that no more than that sum should be taken by Walker, in satisfaction of the rent. And from that time on the rent was received and paid at eighty dollars per month, under that agreement. That this agreement was made after the Nov. 1857 rent had become due, and default had been made in the payment of it.

42 The defendant further offered to prove by witness, that the premises became untenable by reason of water standing in the basement, which was caused by raising the street to grade by the city authorities. Also, the value of the premises, at the time of the death of Napier, April, 1858, and their value from thence to the termination of the term.

To the proving of each and all which above enumerated facts and circumstances, the plaintiff, by his counsel, then and there objected, and the Court sustained the objection and refused to allow the witness to testify thereto.

To which decision and ruling of the Court, in sustaining said plaintiffs' said last mentioned objection, and in excluding said testimony, and refusing to allow said proof to be made, the defendant, by his counsel, then and there duly excepted.

The witness then proceeded as follows :

43 I went to see Walker with Mrs. Napier, in April, 1858, after Mr. Napier's death. He agreed to take eighty dollars per month from her, if she would remain in the house, and that he would send her notice if he should raise the rent from eighty to one hundred dollars. It was Mr. Walker's words to Mrs. Napier and to me, in her presence, that he would reduce the rent and authorize Waughop to send notice if he, Walker, raised it. There was another conversation at the same time when Mrs. Napier told Walker that she could not pay any more, as the house was wholly untenable. Walker said it made no difference whether she

paid or not, as he had security. *Mrs. Napier said she would remove then, and Walker then replied that he would end it and take eighty dollars from her.* I was present at this interview, as a friend of Mrs. Napier's. I went there for the purpose of befriending her, as I had been warned of Mr. Walker's character as a hard man.

The plaintiff here objected to any further testimony of the witness, as to what transpired between Mrs. Napier and the plaintiff, at this or any other interview, in regard to the rent of the demised premises and the condition of the same, and the Court sustained the objection, and refused to allow the witness to proceed with his testimony in regard thereto. To which decision and ruling of the Court the defendant then and there duly excepted.

The defendant then called as a witness, *Mrs. William J. Napier*, who being duly sworn, testified as follows :

44 The lease in question, in this suit, was never assigned to me. I kept a boarding house in the building in question. The house was in such a condition, after raising the grade, as to make it suicidal to remain there. All my boarders left. The water stood in the basement thick with slime. I remained in the house to protect Mr. White. I am the widow of William J. Napier. He died in April, 1858. I was unable, in the summer of 1858, to pay more than I did. I told Walker that the condition of the building was such, and had been, that my boarders had all left. I told him in August that I must either pay at the rate of fifty dollars per month or I should leave. I was satisfied that the offer I made was accepted. I had paid eighty dollars per month, and I paid fifty dollars per month and ended it. I was willing they should take my furniture, or take the fifty dollars. I told Waughop he would have to take the furniture or fifty dollars per month.

The defendant then offered to prove by this witness the same facts enumerated, in connection with the testimony of the witness, Dyrenfurth, (to which, reference is hereby made) and the plaintiff, by his counsel, objected, and the Court sustained the objection, and refused to allow said proof to be made.

To which ruling and decision of the Court, in sustaining said objection, and refusing to allow said proof to be made, the defendant, by his counsel, then and there duly excepted.

45 *The witness, on cross-examination, testified as follows: I do not remember ever having said that I could not do anything with Walker. I could not have said so. I never expressed any fears that Walker would hold White. I always supposed that Walker would stand by his word. I do not recollect of saying that White was better able to pay this rent than I was. I don't recollect of ever having said that I was afraid White*

would have to pay the rent. I did not vacate the premises because I understood Mr. Walker to accept the offer of fifty dollars. I never was notified that the whole rent was to be paid. I should not have stopped there at all had I been so informed.

The defendant then introduced, in evidence, the original petition to the Common Council for the raising of Randolph street, on which said building stood, to grade, signed, "S. B. & M. O. WALKER," among others.

The petition was admitted to be the original petition filed for that purpose; and the defendant called as a witness,

J. W. Waughop, who, having been previously sworn in the cause, testified :

That the signature to the said petition, was in S. B. Walker's hand writing, and not in that of M. O. Walker.

46

The defendant thereupon rested his case.

And the *plaintiff*, by his counsel thereupon, moved the Court to exclude all the testimony given in the case, in regard to the untenable condition of the building, and the Court sustained the motion and excluded all the testimony which had fallen from the witnesses in regard thereto from the consideration of the jury.

To which decision and ruling of the Court, in sustaining said motion and excluding the said testimony, the defendant by his counsel, then and there duly excepted.

This was all the testimony introduced by either party, in said cause.

And the arguments of the counsel on both sides being waived by them, the Court gave the following instructions to the jury, on behalf of the plaintiff, to-wit :

1. The jury in this cause will disregard *all the evidence* offered in this cause, *tending to show a discharge of the covenants to pay rent reserved in the lease offered in this cause*, as it would be improper for them to consider any proof for that purpose, *unless such proof is in writing, and under the seal of the party.*

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2. *All proof given in this cause, showing the condition of the said premises in consequence of the raising of the grade of the street, by the City of Chicago, in front of the said premises, offered for the purpose of avoiding the payment of full rent under the lease and guarantee in this suit, will be disregarded by the jury.*

3. In this cause the plaintiff will be entitled to interest on all rents not paid *from the time the same became due and remained unpaid*, at six per cent per annum."

To the giving of which instructions, on behalf of the plaintiff, and *each* and every of them, the defendant by his counsel then and there duly *excepted*.

And the Court gave to the jury the following instruction on behalf of the defendant :

"If the jury believe from the evidence that the time of payment of the rent, or any portion of the rent, was extended by valid agreement, founded upon a valuable consideration between Walker and Napier, such agreement would discharge the defendant from all liability, upon his guarantee from the time of making such agreement."

And the defendant, by his counsel, asked the Court to give to the jury, on his behalf, the following instructions, to-wit :

"1st, It is for the jury to determine whether the plaintiff accepted Mrs. Napier as his tenant, and if they believe from the evidence that such was the fact, the plaintiff cannot recover any of the rent on the original lease after the commencement of such tenancy.

48 "2d. If the jury believe from the evidence, that W. J. Napier, from November, 1857, to the time of his death, and his widow after his decease, to May, 1859, occupied the premises in question, at a different rate of rent and under a different agreement from that specified in the lease in question, then they may infer a new leasing of said premises, and the defendant is thereby discharged upon his guarantee, and he is entitled to a verdict in his favor.

"3d. In an action upon a guarantee of payment by a third person, the plaintiff must prove that payment has not been made by such third person, and therefore, if the jury are not satisfied by the evidence that payment has not already been made to the plaintiff by the defendant, they will find a verdict for the defendant."

But the Court refused to give to the jury said last enumerated instructions on behalf of the defendant, or either of them.

To which several rulings and decisions of the Court, in refusing to give said instructions and each of them, the defendant duly and severally *excepted*.

49 The jury returned a verdict for plaintiff for \$789.56, and defendant entered his motion for a new trial, the grounds stated in which, are as follows :

1st. The Court erred in admitting parol proof as to the consideration of the guaranty.

2d. The Court erred in admitting the lease and guaranty in evidence.

3d. The lease and guaranty show the guaranty to be an original promise, and the Court erred in receiving parol evidence to show it to be a collateral undertaking.

4th. The Court erred in excluding the evidence of Dyrenfurth and other proof offered by defendant from the jury,—in not permitting defendant to prove certain facts, which he offered to prove.

5th. The Court erred in giving plaintiff's instructions, and refusing those requested by defendant.

6th. The verdict of the jury was contrary to the law of the case.

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Motion for new trial over-ruled, and defendant enters his exceptions, and judgment being entered upon the verdict, defendant prays appeal, &c.

ERRORS ASSIGNED.

1st. That the Court erred in overruling the objection of the defendant below, to the admission of the testimony of the witness, Waughop, as to the character and consideration of the guaranty on which this suit was brought, and in admitting said testimony.

2d. That the Court erred in overruling the objection of the defendant below, to the admission of the lease and guaranty in evidence, and in admitting the same.

3d. That the Court erred in refusing to allow the question set forth in the testimony of the witness, Dyrenfurth, to be put to that witness, and in sustaining the objection of the plaintiff below thereto.

4th. That the Court erred in refusing to allow the defendant below to prove the facts and circumstances by the witness, Dyrenfurth, which said defendant offered to do, and in sustaining the objection of the plaintiff below thereto.

5th. That the Court erred in refusing to allow the witness, Dyrenfurth, to proceed with his testimony as to what transpired between Mrs. Napier and the plaintiff at the interview spoken of by the witness in regard to the rent of the demised premises and the condition of the same, and in sustaining the objection of the plaintiff below thereto.

6th. That the Court erred in refusing to allow the witness, Mrs. William J. Napier, to testify to the facts detailed in the offer of proof in connection with the testimony of the witness, Dyrenfurth, when the defendant below again offered to prove the same by Mrs. Napier, and in sustaining the objection of the plaintiff below thereto.

7th. That the Court erred in sustaining the motion made by the plaintiff below, to exclude all the testimony in the case in regard to the untenable condition of the building in question, and in excluding all the testimony which had fallen from the witnesses in regard thereto.

8th. That the Court erred in giving the instructions by the Court, given on behalf of the plaintiff, and in giving each of them.

9th. That the Court erred in refusing to give the instructions asked by the defendant, and numbered "1," "2," and "3," and each of them.

10th. That the declaration aforesaid, and the matters therein contained, are not sufficient in law for the said plaintiff below to have or maintain his aforesaid action thereof against the said defendant below.

11th. That the Court erred in overruling the motion for a new trial, made by the defendant below.

12th. That the Court erred in entering judgment on the verdict.

13th. That the verdict was against the law and the evidence.

14th. That the verdict was excessive and included interest, which the defendant was not, by the law of the land, bound to pay.

15th. That the judgment aforesaid, in form aforesaid given, was given in favor of the said plaintiff below, and against the said defendant below, whereas, by the law of the land, the said judgment ought to have been given in favor of said defendant and against said plaintiff.

MELVILLE W. FULLER,

AND

BARKER & TULEY,

Attorneys for Appellant.

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Alexander White

v

Martin O. Maher

Abstract

Filed Apr 16. 1861

at Salem

Mass