No. 13513

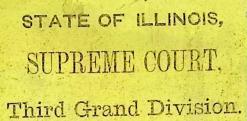
Supreme Court of Illinois

White.

VS.

Walker.

71641



No. 201.

Marte

United States of Obnerica & State of Allinois book County &.

Pleas before the Thin woodle the Tuesques of the Superior Coint of Chicago within and for the Seventy of Cook and State of Allieris, at a regular term of the Superior Court of Chicago lugue and holden at the Court House in the City of Chicago in Daid County and State on the first monday being the third day of December in the year of our Sord Eighteen hundred and Diochy cure of the Sudependence of the United States of Chicago the United States of Chicago the United States of Comercia the Eighty fifth.

Present The How; John. M. Wilson. Chief Justice of Superior Court of Chienger New Stational Governor Sucress Staven . . Prosecuting Ostonicy Charles Staven . . . Prosecuting Ostonicy Charlest

Walter Kimball .. Clerk

The it restrestileted that heretofore to wit on the fourteenth day of Getoleer Co. D highteen hundred & fifty mine came marken, Or, Walker, planitiff, buy I the Clerk of paid Superior bourt his certain a freeign for Summons against Obescauser Hill; Which said precipe is in words and figures as foleows to wit.

Martin. As Walker Superior Court of Chicago

Of the Drowender Term

Observator White & Co.D. 1859.

The Clerk will please usine a

Summond in the above Course. In action of

Oussumpsit. Lay damages at \$1200.

Chicago & M. Waughop

Sept 2849 1859 plss Othy."

Med therefor accordingly on the eightenth day of November in the year last-aforeraion Summers is such the seas of said bourt; Which said Summers, with the Sheriffo rehow thereon budoes on is in words and figures as follows to with

"State of Allinois & So

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

The again Command you that you Summon wo Celescander White if he shall les found in your County personally to be and appear before the Superior Court of Chicago of Daid book bounty on the first day of 160 west forw thereof to be holden at the Court Storese wi the City of Chicago in sond levole Country on the firest Monday of December nesct to auswer unto marliw. D. Walker in a pleas of buspars on the cale ow promises, who damage of said leautiff as hel pays in the sund of Tuelus hundred dollars Oluce have you there and there this April with an Judorsement thereon in what manuer you shale have escerted the same.

Thimers Walter Kuiball Clerk of our paid Court and the Seas thereof at the City Seul) of Chicago mi paid leventy this 18 th/ day of Drown a. D1859,

M. Kimball. Clark!"

" Servew by reading to the within named Defendant this 230 day of Drouencles 1859, John Gray, Sheriff By a. lo, Seeing - Deply

Chnot thereafter to wit in the twenty fifth day of May Ov. O. Rightered hundred and procty camo the paid planiliff by his Daid altorney and filed in the Office of the Clerk of said bourt his amended Declaration in paid puit: Which paid Declaration is in "State of Allinois Superior Court of Chicago Cook County ... & of the June Town W. D. 181,00 Martin G. Walker plaintiff wi this puit by Ishw It. Dranghop his attenuty complains of alexander White defendant in this puit of a plea of tresposes on the case on promises.

For that whereas heretoford to wit ow the Cleventh day of april Co. D 1854 at the Country of loook afores aid the paid plaintiff thew being possessed of certain presnices to wis Lot Tuenty ord (21) twenty Iwo, Iwerty Hered and twenty four of Block nine of Fort Dearborn addition to Chie ago in the Country of book afnes ain and the large frame building theren bung the pame lately occupied by mrs Hemple as do Boardinghouse, one Thelliam & Trapier applica to the said Manihiff and prequested him to rent the sate premises to him for the lever of two years from the first day of May Co. D 1867 aux offered the Daix plainliff as real therefor the pum of Justie hundred dollars (as rent for said premises) for each year, in monthly payments of and hundred delears each in advanced on the first day of each and every month But the said plaintiff not being willing to rich the chances of collecting his rent from paid Philliam f. Napur declined to peut the said promises to him, unless to should give the Dard plantiff Decerity for the

payment of the rent thereof Chow Hurselon the Daid William & napier proposed to the said planisif that to would procure the said Defendant to quarantee rent the paid premises to him on the terms and Conditions aforesaid Oliva afterwards to wit on the day and year afores and at the bounty of book afore Daid the said Defendant came to the said Illantiff with the paice William of Nature, and thew there agreed with the said planiff that if to would leave the paid fruises to the Theliam of Mafrier on the Terms afores and that he the said Defendant would been responsible for the paperent of the rent, and would pay the pame when and if the Daia William I. Mapier Sailed to pay the Danie when due and the Said plansiff them and there agreed in consider alwar of the premises that Iw would rent the paid premises to the paid Mulliam J. Mapier ow the torus aforesaid Ho paid plaintiff avers that in consideration of & confidency in the promises and undertakings of the Paid Defendant the paid planitiff dia ow the day and year aforesaid at paid Country of Cooks make and execute under his hand and Deal a written deniese of the Daia premised to the paid Philliam of Mafrier for the full herew of hurd years from the first day of may a. D. 1857 at and for the annual rent of Timeluo lundred dollars payable in monthly payments of One hundred dollars each ow the first day of every month

in advance. One afterwards to wit on the Murhereth day of april a. & 1857 at the Country of book afore said the said Defendant in Jurs would of the agreement mado ley Sum le Hallesian f. Raprier beavure Cellonille for the rent of the paid Philliam of Napier on the said written demiss to been a due to the said Itanity Chao in Consideration of the premuses dia escente his guaranted in writing on the back of the para written denue made by the paia Claritiff to the paid William . J. napier was delivered the paus to the Daia Plaintiff and Honoley How and Huro His Daia defendant promised the said plaintif to fray lund the pun of Queles Sumared dollars for each year for the full horw of his years in monthly payments of and hundred dollars each ow the first day of each and enony month wi 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 penton the Daid durine of the said plaintiff to the Sara William J. Mapier of paid premises as the pour because Hereon in caso the paid William of Naprier should fail or reglect to hay the pame as aforesaid The bounterpart of which said written demise Dealed with the peal of the paid plaintiff and of the Daid William of . napier is now in the pursers was of Daia Marietiff, with the para quarantes of the paix Defendant written Huren, and which he bruigo here

wito bourt (a) Copy of which is already filed in this

/,

Court as by paid Indenture reference hung theremulo had will among other thungs more fully and at large appear.

Oluco the paice plaintiff overs that upon the execution of the para quarante by the said Defendant to him as aforescia, the said planifif delivered to the said Philliam J. Mapier the Daid written durise and in Consideration of the premises and pelying whow the prouves and undertakings of the said defendant in that behalf, permitted the said Philliain of Majuer to have & enjoy the paid premises for the full term of two years to unit, for the full term of the said written device to wit, at the Country of book aforesaid and by united of the paid written demiso the Dara Melleain f. napier sutered into and upon als and Surgular the vais premises to wit ow the first day of may a. D 1857 at The Country of book oforesaid and had and used and injoyed the same for the full term of the said to Quaenture Mercof la him granted as afresaid But the Daid William of Napier did not pay the rent as the pand became dus on the paia written demise hut failed to do Do and made default therein, and altho often pequested Doto do dia not now would pay the pause, nor ded any one hay the paus for him, but de to do Dreglested and refused and till so heglet and reful to pay the paux to the Daw plaintiff By many whereof and by force of the Statute in Such case made and priviledow the said defendant their there

because hable to pay the said sun of money mentioned as put to be paid ou the said written domined to the fraid our the said written domined to and of the said of the formules afterwards to witten the thirteenth day of the frances afterwards to witten the thirteenth day of Copie and there and there are beauty of book underlook and then and there are there sends fully promised the said of money when the pay him the said of money when there exists afterwards periods pures of money when there exists afterwards pequested.

Ind Count And whereas also heretofore to wit ow the 11the day of april a. D. 1854 at the Country of book aford Daid the paid planitiff being possessed of certain lands and lenements to wit Lots Twenty me, Tuesty two, Twenty there and Tuenty four of Block Tumber Phino of Fort Dearborn addution to Chicago with the largo framo building thereon situation in the Country of book un the State of Allinois, lang the Dames lately occupied by mrs Huntle as a Boardinghoute, and lung to polsessed of paid premises one William. f. Napur applied to the paid plaintiff to have the orion. planishiff rent to him this Daid promises for the lerent of two years from the first day of may a & 185 j'al The yearly rent of Tuelue hundred dollars payable in Moushly payments of One hundred dollars each on the first day of early and every mouth in advance But the paid Maritiff not being satisfies that the said Helliam

f. Napier would hay his peut for Daid frameso in the went of the Dame hair have a fores and the said plaintiff declined to peut the paid framises to the said William of Napier unless he should give the oas Plaintiff December for the fragment of the tent thereof Cha Herenford the paid William of Napier proposed to the Daid Plaintiff that he would proceed the paid Defendant to be come performible for the fragment of the tent of the paid Let the want of the fragment of the tent of the paid from the paid framish would be the paid from the paid for t

Olum afterwards to wit on the day and year afresaid at the bounty of looks afresaid the said Defendant and the saw Thellain J. Drapier Camo to the Daia Planitiff and How and those agreed with the paid Maritiff that to the paid Defendant would become to responsible to the Daix Plaintiff for his pert of the said trucises, if his should peut the same to the said William of Napier on the terms afores aid and in the Event-Mat-100 paid William J. Majner failed lo fray him his pour for said premises on such devine that he the paid Defendant would hay the rent hunself when the same became due Olud in Consideration of the francis and undertakings of the Daia Defendants in That behalf the said Plantiff thew and there agreed to rent the Daid premies to the saw Milliam & Drapier on , the terms and Conditions aforesaids.

And the vaio Waintiff overs that confiding in the promises and under La Kings of the paid Defendant and w Consideration Hurreof the said planing dia on the day and year aforesaid at paine bounty of book make and each de under his hance and dead a written denise of the Daico premises to the Daico Shellain of Napur for the full lerus of two years from the first day of may (& 1854 at and for the anual ful of Vineles Sumaruce dollars hayable in mouthly hayments of Core hunared dollars each on the first day of every month in advance Which said Indenture was in the works and higures following to wit " His duanture made this "Toleveush day of april in the year of our sono me Thousand light hundred and fifty seven Between to "Duartin. G. Halker by John. H. Wanghof his afformer "wi last of Chicago, Allo. harty of the first part and "M. J. Mapier of the saw place harty of the second hart "Theineseeth What the Daio harty of the first for and w correideration of the Covenants and agreements herein "after mulinia le les kept and furforme a fey les said Trarty of the perono hart his executors administrators and "assigns has demised and leased to the said party of "The perond frant all those promises situate lying and being in 140 loity of Chicago in the bounty of look & " in the State of Allinois, Known and described as follows To wit, Hw large how Stry frame duelling lately recepted Juy mrs) kunpled ers en boardughouse situated on lots (21)

Junity one (22) Junity Leve (23) Turnety Heres + (24) Junity four in Block Time (9) Fort Dearborn a Olddissin la Clucago Toliano auco la hola the paiso above described Tremuses with the appurpulaces untolke Daid farty of the Deeve a lant his executors acuministrating "aua assigns how the first day of may in the year of "our Low ow Housand eight hundred and fifty Deven "for an a during and with the first day of nay 1859 "and the paid party of the Decoud part un consideration "of-the leaving of the tremises afores ain by the paid "party of the first part to the Daia harty of the Decoud " hart does command and agree with the paid harty of "The first fast his heves precutors administrators and "assigns to lay the paid party of the first part as "rent for Jana denneed premises the pun of Juden Sunared dollars for amount hayable in mouthly fragments of the hundred dollars lack in advance, paid premisesto to kept in perfair at the expense of the paid party of "Hew Desource frant.

"Ouenauts with the Daia harty of the first frant that Daia "Overlow harty has preceived Daid during frances in "of the first princes in "of the first princes in "of the fine will distain the prepriation of the fine will yield up the Daire frances to the frost frant will go for the forest frant will go on the first frant will go on the pane were entered by the Power forms he will prince by the paid from hy the paid franty of the first frant will be paid from the paid from from the paid from from the paid franty of the prince or inevitable "oleraint, or order any wear exception, and also will keep

said premuses un good pepair during this leave at his own expused this further agreed by the paid party of the person hant, that weither he now his legal topresentatives will inderled paid screwises or any hart thereof, or alsign "this lease wethout the written assent of paice franty of the Scrot frast loss have and obtained thereto Chias the vain "Welliam J. " 10 por for hurself and his heirs executors administratores and assigns agree further lopay (in addition to the rents above phecifica) all water peuts and "assessments lascea leured or charged on paia frances for and during the time for which this least is granted, and pano said premies and the party of the first front harmeless Hurefrow, and that he will keep paid frances "in a clean and healthy Condition, in a coordance with "The aramances of the City, and directions of the periorage "Sommes innero. It is expressly understood and agree by "auco between the parties afores aios, that if the peut about pelerwiso un any hand thereof phato les behind no impaid ow the day of payment whereon the pauce ought to be fran as aforesaid, or if default shall be made in any of the "Coverants or agreements herein contained to be Kept by "The Daw frarty of the Decount feart his exceptors actions "or assigno, it shall and may be lawfut for the paid harty of the first hart his heirs foresetors administrating "agent attorney or alsigns at his election to declare saw "herew ended, and into the paid primises or any part Thereof, litter with or without process of law to presenter "and the said farty of the second hart, or any other

person or persons occupying in wo upon the pains to sochet "remove and but out using such force as may be "recessary in Do doing, and the Daw primises again to perposses and enjoy as in his first and former Estate, and le distrant for any part that may be due thereon upon any property Heat way belong to paid party of the Decond part, whether the pour be except from execution and distreto by law or not, and the said party of the "peens part in that case hereby agree to waive all legal jughts which tw may have to brolow on retain any queh firsturty under any exemption laws now in force in this "plate on un'any offer way, meaning and when any herely To quie the paid harty of the first hart his heirs "locators administrators or assigns a valid or first lien whow any and all the goods chattels or other property belonging to the ocion party of the peered frant as security "for the payment of paid rent in manuer afresaia, "aughting bereinbefore contained to the contrary notwithstanding Mux if at any him paid here phall he ended at Ruch Election of said party of the first hart his hurs executors "administrators or assigns, as aforesaw, we in any other way the paid harty of the pecond parthis executors a "administrators and assigns de hereby Conenant & agree "To Surrender and deliver up said about describts premise and proporty heaceably to paid party of the first parthis "heirs executors administrators and assigns unnediately upon The deformulation of paid term as aforesais, and if he shall Tremain in hossession of the same one day after notice

of twel default on after the termination of this lease, in any of the ways above ramed the shall be demied quilty of a forcible detainer of paid premises under the Statute and phale he publied to all the Conditions and provisions above ramed and to evident on thermise "ramed and to evident and personal, forcibly or otherwise "with on without proveds of law as above plated,

"between the parties that the harty of the second hy and "between the parties that the harty of the second hart shall "hay and discharge all costs and attorneys fees been been "that shall arise from enforcing the consuments of this "Luct shall arise from enforcing the consuments of this "Luctual we by the first part.

"Whitness the hands and Seals of the parties aforesain.

'Martin O, Walker Seul)

by L. W. Wanghofe, attyin fact."

"How. & Mapier Scul)."

And afterwards to wit on the thinkenth day of april 0. D. 1854 at Chiengs in said leonty of Cook the said Defendant in consideration of the frames and in pursuase, of the agreement made by him with the said plaintiff on that behalf as afores aid, did execute and deliver to the said flaintiff his written quarante, which said quaranter is in the words and figures following to wit "I herby quaranter" the payment of the pent to become due on the within "Jean on the days the said becomes due on the within

Defendant by the rance and description of allow that the paid (nuaning and intending alexander White the said defendant Much said written quarante was made upon the back of

The paid written during made as aforesain by the paid thereby then and thereby the paid their the paid written demiss in Calo the paid William f. Mapier failed before the paid written demiss in Calo the paid William f. Mapier failed before the paid the counter trart of which said during the paid plaintiff bruige here into bourt as by said dudenture the paid plaintiff bruige here into bourt as by said dudenture references being there into bourt as by said dudenture references being there into bourt as by said dudenture references being there into bourt as by said dudenture.

more fully and at large appear

Ohno the Daid plantiff avers that upon the execution of the paid of the paid of the paid believed to the paid Wilhaim of Maprier the paid written denite and in Consideration of the function and peliping upon the furnishes and undertaking of the paid definant in that behalf term it so the vaid Whiliam I Dapin to have out unjoy the soid furnishes for the full term of two years to wit for the full term of the said written denies to wit for the full term of the said written denies to wit for the full term of the

And the said plaintiff over that by wirter of the said written denies the paid Thilliam of Mapier entered wito and whom the paid denies of brunses to wit on the first day of May a. D 1857 and had and enjoyed the said for the full term of the said written duried thereof to him granteer as aforesaid but in the hayment of the paid that became due on the said written denies to the said plaintiff the said The said written denies to the said than tiff the said The said the most of the said the said

len or and effect of soud denies but to to do totally failed and refused so to do. 134 means whereof and by force of the Statute in puch case made and promoted the paid Defendant then and there became hable to pay the said pun of money to become du ou the said written denise to the said Marchife according to the know and Effect thereof and of the levor and Effect of the said quarante by him Inado as aforesaido auco being po hable ho the oxide to Defendant lu consideration blured aux in Consideration of the primises afterwards to wit ow the said thinteenth day of april a. D 1854 at pain bounty of book as undertook auxo thew auxo there fallefully promised the oaid Maritiff Is fray him the Daw Reveral pune of money when thereunto afterwards prequested if the Dava Philliain J. Matuer phoula fail la fray l'u pour as afores aix

Vel 1he said Defendant not pegaraning his said to promises and undertakings but continuing to although often pequelles to lo do has not paid paid plaintiff either of paid dunes of money about medience or auch frant Hurrof but to 10 do has hither to wholey reglected and refuse and phile does neglect and refuel lother damage of Daio Southiff of Tinches hundred dollars and therefore he brings

his puil-fo Jeffo alty "

And thereafter to wit on the posterith day of Chur a. D. Sightew hundred and picty cand the ocid Defendant by his afformer and filed in the Office of the Clerk of down bourt his Certain Ilea X notice in the paid Cause Which paid hear and notice is in the words and bigures following to wit.

Stato of Alluvis; So

Ollescander White & Superior bourt of Chicago Marliw. Q. Walkers dune Terus W. D18ho.

Clud now comes les said defendant by Barker & Tuly his attorneys and defends the wrong and injury when the aux days that he chow not undertate and from us un manuer and form as the said Clauitiff halls ahour thereof complained against Suin auco of this he his hundelf upon the Country to Barker & July

Defto altys "

Ohow the paid Maintiff dotte the like J. Ho Woughop Deffo Cuty"

Between Marlin a Walker Planings

alexander White ... Defendant Superior Court of Chicago

He allows named plaintiff and his afformer &. It. Haughop will please take notice.

That whow the bual of the above entitled cause the paid Defendant will pely upon the following Meial mathers for a defense to paid action of planitiff.

Heat the paid Claustiff ought not to recover whom the cause of action and firmised in Paid amended to Doelar ation mentioned because he parp that the paid formules of defendant in said Declaration mentiones were Aceial feromises le aus mer for the Debt and défault of another herson in manner and found as in said Declaration multimes and fet forth and that no agreement in respect of wo relating to the said promises and fuffreed causes of action or either of them in paid Declaration muchoses or any Memorandum or note thereof where in the consideration for the said Special promises or willow of them was elation or shown was in writing and Digned by Hos paid Defendant or any person Hereundo by huis la vfully authorized according to the statute in such Caso made and provided.

Heat there was no consideration for the promises and unvertakings of defendant wo either of them in Daid Declaration mustined.

That after the making of Daio Late and Comehine in the fall or writer of the year 1864 or before that hime the Street in the City of Chicago adjoining the said demiss

premies was by paid plantiff or by his point plantiffs Coulent power to grade, that is to pay the paid Sheet was railed by adding and pulking ow of earth and stones Denoral feet about the height euro condition it was in when paid premiles were leaved by planning to paid Diafrier as in pouce declaration mentioned Whereby and by Treans whereof a nuisques was created by the water dist and felsh which flowed in and whom the balement story of the house pituated whom paid frumes at all times. and oftenhines covering the balement floor of said house Deveral wishes with water by reason of which miscure Caused by the conduct of Daid Planitiff the Daid premises became unterportable and the continued readiation of paid brunises by realow of the flowing in of said water dist and felle whom paid tremees caused by the raising of Dava Street because and was at great kish and danger to the health and comfort of paid lesser paid Prapier and his family and produced an smelwin of paid lessely Said planitiff, which would have fuetified said leese in Vacaluig paia premiers and that at and about that him to wit on or about the first day of December and 1864 the said Claviliff did agres to and with said Mapier lefe the consideration of the frequity facts and in consideration that para belles was defrued of the hereficial Enjoyment of paid previews by reason of the raising of said Street to grace as afores aix and in Consideration and because the paid lesse had for some months previous fliereto lues his ho arders (the Daise have having her pented for & used

as a boarding house) beauto of the Daw Truis and cure because of the failure of vaice plaintiff to do Certain refrains and makes Certain drains which he plantiff agence before that hime with said feeled to do and make - and for Other good and sufficient considerations, that he ocid planitiff would from and after that line to wit, the malling of said agreement provide said rent for said Trunces to lighty dollars for month and would from that line and for the remainder of paid term acceptant preserve of and from paice lesse the pun of lighty dollars for month as and for full patisfaction and fragment of the peut of Daid premises - and that this defendant shows not after that line les hable for un called upon to fray any additional peut 10 paid Eighty dollars hir mith le agreed to lie frain by said ferre and agreed to be accepted by paid plantiff do afordado- and that at the luis of the making of Daw last mentioned agreement asto Daia Lighty dollars for month between Daw plaintiff and pard felle all the just before that him due thougable on Said lease has been paid by Daid lessel to Paid plainty and that the paid lessed die trous and after the making of para agreement as to lighty dollars frer month and until his paid letters de evale (which occurred Disnetures in the String or Summer of the year 1858) pay to oard plainty and para Plaintiff did receive of and trong para lesse the pun of and at the firete of lightly dollars her month as and for full palistaction and payment of all tent becoming due ou sava premies during sand have lo wit,

from the making of said agreement to the decease of said leesed - and that after the decease of said leese, the widow of paid lesses, not being administration or execution of Daid lesses or having any right or authority to lake to proceession of wo control of the Relate of the leasehold interest of said lesses in said presmess which facts and also the fact of said decrace was well known to said Clanity did lake proceession of and vecupy said premises with the consent and permession of said plantiff and did from and after the decate of her said hueband and until The first day of Chiques 1858 pay to Daw Mainty and Daid planitiff ded accept from Saw mrs Mapier Thidow les Duw of highty diollars her month as real of paid firewises lun that on or about the paid first day of august The Daid premises having become still more underantable Purbueficial by peacon of the said misance and in Consideration thereof and for other good and Sufficient Couliderations the said Slautiff dia agree to and with paid Mrs napur Thidow to accept and poceus from her the saw mrs Mafrier the owns of Sifty dollars her month from Said first day of august with the experiation of the lener ni paid lease mentioned as rent for paid premises and said no napier dia pay lo and said Claimbiff dico recente from how the sum of crifty dollars for month for each and Every months from Daix first day of August until the Rochiration of said berus us said leaves muitines as Hor and in full of the junt of said premises for said line That from and after the decease of Said lesses and with

the expiration of the term of Daier Leave in said Declaration mentioned paid premises were worth and of the value not to exceed difty dollars for month of Daico line Which Own or rate of Fifty dollars has been fully paid to Oded Claviliff.

Barker & Tuley Dels altys!

Child afterwards to wit on the Eighth day of actober (being one of the days of the actolier Verus of said Cony ui the year of our Low lighteen hundred and lesety, the following proceedings were had in said cause and luterior of record in Said Court to with

John It. Transfirt his altorney and Uso Daid Defendant ly Barker & Tuley his astornes also Comes and claves being formed hering it is ardered that a dury come whorougen corres the dury of good and lawful men to wit William Jones I? J. F. Hervierry, adam andrerg, J. mayber, Orlin Tyler, S.S. Willow, Ov. M. Miner, Ov. S. Darrow, Oth Salisbury 4. F. Phillips, bow and Williston & S. D. Hur Levant who lowing chilis els clos trued au a promo la try the issues formed as aformand after hearing Swidence, arguments of Coursel, Vinstructions

of the bourt retire to condicted of their Verdiet and the hour of adjournment having arrived it is Ordered whom agreement of the parties that when the fury have agreed whom a Verdict they shall peduced the pame to writing sign and Seve the same and afterwards represent our meet the bound again to morrow morning.

Anot afterwards to without the Druth day of Getolier (bung yet of the vaid Getolier Lerson of paid Court) in the speak of our Lord one thousand eight hundred and picty, the following further proceedings were had in Paid Cause and entered of record in said bount-to wif

Martin, a. Halker

The Clesurpoir

Clescander While

Inco row again comes the parties Inthis cause by their respective attorneys as aforesaice and the diny suffacional horses or yesterday for the hiab of this cause also comes and Juliet their Verdiet and Day the the third way find when for the paid Plaintiff and agas his damages herein to the sund of Severe hundred and eighty rive dollars and fifty dies cents.

Cua Hurenfron défendant dubiniels his motion herein for a New buil.

As 100 afterwards to witors the twenty fourth day of Trouveraber Chemist one of the days of the Trouverber Term of said bourt) in the year of our Low no thousand eight hundred auxo bixty, the following proceedings were had in Daw Course and intered of record in paid bourt to well

"D) lar liw, a Halker, Cles unifis is Ses unifis is

Cluco wow again comes the paice Manififf by Arlun It. Tranghop his astorney and the paid Defendant by Barker & July his attorney also Corres aux defendants motion for a new bial herein hain heard and arguest by levures is taken under to advisement by the bowet.

Chron afterwards to wit on the fifteenthe day of December (buing one of the days of the December Verus of David Round D. D. lighteen hundred and pischy the following further proceedings were had in said cause and enteress of persona in Said Gourt, lo wit

Morlin, B. Halker, as While ...

Chia now again comes the

saw planifif by d. H. Wanglufe his afformer and the said Defendant by Barker & Vulue his altorneys also annes and the lourt having taken the asfendants intim houtofore Dubuither herin for a 3 un trace on the 24th day of November witant of the newwher here last l'ast under ciduisement au a lienig now fully admised in the premises, said defendants notions for a new trial herein Whereufen paid defendant escoepe to 10 1100 ruling and decision of the bourt in overruling his paid Motion for a New hiab and enters his parefiliais Ibherefore planetiff ought now to have pragnent entered ow the Herdiet of the Jury heretofore underew herein Herefore it is considered that paid plaintiff do have and reconer of the para Defendant his damages \$'189.5h of Deven humared and lighty mine dollars and fifty Disò Cents in form aforesaion by the chury here form no

Chudo Hierenjion paid defendant having laken and enteres his bocaeptions trays and appear herein to the Outreme Court of the State which is allowed to him! upon the Coudition of filing his appeal took in the fundity of Justin humared dolears to les approved luja duago of this lower- and to be filed with his Bill of rocceptions during the present Lower of this Court.

and alsesso and also his Corts and charges in this

behalf exprended and have pour ention Horefor.

of December a. D. Righten hundred and fixty came the said defendant and blea in the Office of the Clerk of said bourt his Ceppeal Bond in Paid Course. Which said Bond is the words and figures as follows to wit.

"There wall mew by these presents That we to Clercanous White as principals and Indicain Prayman as durely of looks and State of Alinois are held and firmly bound unto Martin. O: Walker also of the pame bounty and State in the penal from of Turber hundred dollars, famful money of the Vinited States, for the proposent of which well and truly to be made up hind ourselves our heirs laveled and truly to be made up hind ourselves our heirs laveled fresents

This was hands and peals this 2/7 to day of

Decurber a, & 18/10.

Hw Condition of the above obligation is fuch Hat whereas the paid martin. a Walker did on the fifteenth day of December a. D 18/10 in the Superior Court of Chicago in and for the Country of Books and State africain and of the December terms thereof as & 18/10 prevuer a chargement against the above hounder Alescancer Ithinks for the pune of Jenus hundred and eighty Inne dollars

and fifty eise cento besides Corto of Juit, from which Daia fuagment of the Daia Superior Court of Chicago the said alexander White has trayed for and obtained are appeal to the Supreme Court of paiso State;

Now Hureford if the paid alescander White Hall due problemter his para appeal with Effect and moreover / any the amount of the Judgment- Costo wherest and damages penderes and la les penderes aganist-bien in case the said judgment shall be affirmed in said Supreme lours, How the above obligation to be voice otherwise to remain in fulo force and winteres,

MION afterwards to witton the 29ths day of December (hourd yet of the pain December Terms of paid bourt) (Dighteen hundred and lise h, the following further Tur cuamigo moro liado mi Daido Canto and entered of record in paid bowet to wit

Marin, B. Haller | Cheeningsit.

Alexander White |
Ou motion Barker & July altorning for the Dain Defendant it is ordered that line for paia Defendant la file his Bile of Exceptions hereing on applicab to Supreme Court-les and is levely societies Junety days from His day.

And thereafter to wit on the Seweten the day of - claumany a. Desighteen hundred and siscer me the oat a Definition of the Clerk of oard bours his Chanately a filia in the Office of the Clerk of oard bours his Bile of borres, trio Bile of borres, trios in said cause : Which paid Bill of borres to the words and figures following to my

State of Ollurois & So Cook County & Sk Markin O. Walker We Olless curson White ...

Ou Sujurior bourt of
Chicago

Be it persentered that on the highth day of Perober a. D 1840 the saw hency one of the days of the Detoler From a. D 1840 of the Daid Court the Daws coming on to be tried, a dury was to hujamelled to try the wines joined, and the planify to maniform and prove the usues on his part called as a Thitries, one.

d. It. Trought of who having duly swored tellified as

On the months of April a. D 1854, the firewese in quastion were occupied by ow mrs WentlerDo Horewigen was the leeve and ohe was occupiquizen his term - this term extended up to the first of may and 1859, the paine as this Leave - Mapier applicable there injure to funchase his Leave and wanted Walker to consult to an assignment or pulstitution of Mapier in

The place of Housinger and applied to me as Mr Walkers agent - I stated to them that we were patisfied that the stronger was good for the tent - that he had always have his tent promptly and no could not take nappear unifered by the promptly and offered becaute and proposed the transmit and fronters the transmit by his formers objected to any further statements by the witness (who was also the attendant of the framity and therefore gave his lecturing without fulting any questions to hunself) as to the consideration of the guaranty when which this puit is brought, on the ground that passes buildeness to show the Consideration was middinessible, but the locart ownered the objection and allowed the witness to proceed and admits a the laideness.

To which ruling and decision of the Court in overruling the objection of the paid Defendant and in admitting this luidence of the Witness as to the Consideration of David guaranty - the Defendant by his bounces there and there duly accepted.

The witness thew proceeded.

delated to Drapier if he would give White, I would give White, I would give him a lease - I drew the lease and it was concented appril 11th a. D. 1857 - It was kigned on that day but not debuered, afterwards White came & guarantees

it. Ho have was dated april 11th 1887 hut the lerus was for two years from May 10th as I, 1867- of was veenfried during the born by Naprier and his family. White lamb before the Seaso was delivered and quaranties it, and I then delivered it to Matier This is the lease and this the quarantee (The mitness here identified the Seaso and parameter hereinafter unierled). and upon

bross Examination les witness testifica as follows. Both Copies of the Seals remained in my to Livasession- Did not deliver Mapiers Copy to him until after the quaranty was made. Mapier had not taken poesession until after the leases were delivered. Alarow that Mapiers boyy was not delivered until often the quaranty. I drew this Leave - The had drawn the Leade 10 alexander White directly, wishing to make him Inako He Couenauso- He would not do it, but would quaracty and dia on the Hurteuth of april QD 185% The alteration was made on the 11th herause White to would not props it as it was Prajuer has laken the base 10 Iblite for lus proprature auch returned it la me plating 10 mm that White would cale and quarantee. Plateas the Continto of the base to Hite the Knew the rate and when it was to be pain. While may have reactif when Mafrier look it to him, but I don't know Huito Hw 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. Suppose it was done by aw aleesment by the City - Drot frant of my eluty to pay for Duel things to champly collect jouls and depusit- thew. I usew to be at the house two or Hereo hures a month - I know there was water standing no 110 back your Walker constructed a draw there Fluit it was no the Salo of 1857 that would be my best jueollession - My mijeression is that mr. Mapier died in the Spring of 1858. I cannot tell whether he died witestate - His unidow permanned no the house to the wa of the Lerm of the lease and thew left. She fraid peut on this Lease. no other person except the Thedow after his death, paid rent - She continued praying Kent - Ho Kent Commence of falling behind before he died - how loug before I don't laww. He paid to Orighty dollars her month which he said was all he Onular get logether - d'rener luquired after any no administrator or excelletor of Plafier. Office the fact of his death almost unwecliately - Ho Commenced falling behuw in November a & 1854 for the peut that fell duo Hias) nouth : The paid lifty dollars at one time in November 1857 and Hirty dollars at another making lighty dollars. Herry dollars on peut of December 1867 oro that months - fifty dolears on peut of damary 1858 auco thew highty dollars pack month to duly a D1858 Diglity dolears her month was what he said he would be able to pay - Ho paino January 1858 fifty dollars -

February, Righty delears. Moreh Righty delears and the wiciow pain aprile Righty delears. May highty delears. Surgest delears. Surgest delears. Detated delears. Delearly delears. Detated delears. Described delears. The Described 1867 rest. was paintly paint of Described 1857 y delears. On the Mounth of Described 1857 y delears. On the Month of Described 1857 y delears. On the Month of Described in November 1857 thather was marked to proy and highly delears per month. He hoped to bring it up when his views thereon. He hoped to brung it up when his views there is not found to make Walker reduced the peut of thirow it off anythous.

On re Escamulation His witness testified.

The august of rent due on this Seaso is School hundred and fine dollars. Majuir vain his was not able to hay his rent & if I would be seein dighty dollars on account he might bring it-up, mrs nopush para ohe could only spare we Tifty dollars for month I received it on account. The confreed herself wry much disturbed lest mr White would have to puffer of low hun that Walker would not press her for any more than this line. Walker would not press her for any more this line. Walker would not press her for any more than the could hay on account as he had security for

On re broes oxamination the witness further testifica I think mrs Mapier was present whow napier States that he would only pay righty dolears for month as before stated. Toboay else I think . I do not know that Walker faw thew at all coccept from mes natures I have the Coursalion with Majure Que we two days after Matier was burier & saw mrs Matier. At was not thew the spoke of Fifty dollars her months. His pain lighty dollars per nonth for pometries. I carried premender whether the Daid of the hims of Inst two first after his death. Heat she would fray Eight, dolears. It think the never said any thing about it till august and when she dropped down to Fifty dollars - Nothing was Said - Sho continued to pay the toight, delears & nothing was said - Perhaps forms of how children were about when I saw her. The and hur hueband had how Confilaining about the premised The showed up through the back yard where the water Come down and had been coming down. The Constructed a draw which obvious the difficulty, I Cound lell how long after the Freet was paised Heat we built the drain - Hunto as from as the Effect was discovered - all the kent for the first disc months was fund wally fraid at One hundred dollars for month. - It was in nounceles 1857 that they first now behind.

The Plantiff thew offered the lease and quaranty referred la in luidence.

To the admission of which in lucience the Defendant by his bounded there and there objected by the Clours overruled the objection and admitted paid

Lease and quaranty in huideness.

To which decision and Juling of How Bury u overreluig paia Defendants paid Objection la Daia Lease and quaranty and acumillaring the pours in luidence, the Defendant by his Counsel there and there duly excepted,

The lease and quaranter were then read in huidence ana une as follows, lo wit

" This dridenture made this therewith day ofapril in the year of our Lord on thousand eight hundre on and fifty deven between narling. C. Walker by " John It. Woughop his assorney in lost of Chicago ells learly of the first hart wa W. f. Diafrier of the some

Those limites of the period lant,

"Witnesseth that the Daid party of the first hant for and in Correderation of the Commando and agreements "hermiafter mentiones le les l'éfet and forforme co by les " paid franky of the second frant his socienters administrators and alligno has demised and leased to the daid party of the Decord frant all those premises Disnote lying of

being in the letty of Chicago in this Country of Cook and " wi The Glate of Allinois Rus were and described as follows lo wit, "Ho large two Story frame duelling lately to "vacupiea by mrs Memple as a hoardwighouse Dituation tow lots (21) Twenty one (28) Twenty have (213) Twenty Here V (24) Durety four in Blook Dring (9) For 'Decerborio ados lo Chiengo To have and lo hola the Paid above desarrhed premises with the appurlenances "unto the paice party of the second frant his consentrat administratoro and accions from the first day of may in the year of our Lind one thins and eight hundred and "lifty persent for and during and until the first day of "Dray 1859 and the said harty of the fever a part-in "Consideration of the balling of the previles afores and by This paid party of the first part to the said party of the " Desource fant dues Conunant and regies with the said "ficulty of this first frank his heir's executors administrating "and resigns to hoy the paid lidrity of this first hart as " just for paid denised primised this Dum of Tuelus fundrea dellars fre amun fragable in monthly Traymouts of bu hundred dollars each in advances " paid firmises to her Kefit in perfour at the expense of the "Said party of this second part,

"Commants with the said party of the second frant further "Commants with the said party of the first frant that said "Decord party has provided pend demised francies in "good draw and and condition and that at the experience

"sochwidion of the live in this Leader mentioned he will "quited up the paid previoused to this said party of the first part in as gived condition as whom the same were "sulered upon by the said party of the seems from by the said party of the seems from by the said party of the seems from by by fire or inevitable secretary or ordinary une as excepted "and also will keep said premises in force repair to "during this Lease at his own expense."

"become frant that neither he now his paid frants of the "become frant that neither he now his pegal Expresentatives" will underlet paid premises or any frant thereof or a fright "this Seals without the written about of said party "of the first hart first have and obtained thereto.

"Ino hours executors administrators and resigns agree"

"Inther to hour (un'addition to the pents about specifies)

"all water feels and alselsmints, tooces, bured or charges

"ou paid premised for and during the limit for which

"this Seales is granted, and paus orion from ries and the

"thus first fract harmles therefrom, and that he

"under leep paid fremies in a clean and healthy to

"and leep paid fremies in a clean and healthy to

"and diriction, in accordance with the Ordinances of the City of

"dirictions of this penerages bornwissions.

"Interes of proceedy understood and agreed by and "hetween this parties afored aid, that if the peut about Esterned to any frant thereof phale he behind on unfraid on the day of fragment whereon the same oright to be fraid as "afored aid, or if default shall be made in any of the "Commands or agreements herein Contained to be hefet

by the said farty of the Second faut his executors to "administrators and assigns, it phalo and many he wo "Lawful for the Dain tractif of this first fourt his heirs "execution administrators agent alterney un altignes offis "electori la declare paido lerus luded, auro into the said forenices no any hart thereof-lither with no wishout "fire ces of law to recules and the sound frantes of the "focus hart we any other herson or fursons veculiying "u'ar upor the pame to exclud remove and furtout "usung puele force as may be recessary in do doing, and "The Daw premises again to repossess and enjoy as unhis "Suroit and former cetale, and to distrain for any rent "that way be due thereon, upon any furofurty belonging To the paid fanty of the Deavid fant whether the samelie "exempt from localism and distress by law or not, and His paid liarty of the polono last in that case hereby agree la mant all ligal people which he may have to hold no petom any puch property under any exemption "Laws now in force in this plate or in any other way meaning and inherding hereby to gue the said farty of the first fart his here executors administration or assigns a valid and first hew upon any and all the govers chattels or other property belonging to the paid printy of the seemed hart, as believity for the payment of said "peut ui mouner afores ain, aughting liveuilefore Containes "To the contrary notwithstanding and if at any time one leren shall be ended at Juch election of said learty of the "Ters't front his heirs, escretters, administrators are assigned

"os aforesaid, wo vir only others way the said party of the "previous flast his essention, administrators and advigors do "hereby Counsul and agree to furrender and abdigor up "paris above deserbled fremies and brother by freezewally to "oaid franky of the first hard his hours presentors and "administrators or assigns uninectially upon the determinations" of said brom as aforesaid, and offer trotied of such a "frollets int of the same one day after trotied of such a "deforts on often the boundary of this feale, in any of "the ways above tramed his phale for dunced quilty of "the ways allower tramed his phale for dunced quilty of "or able detainer of said frames under the statute and "frames under the statute and "frames under the statute and "frames on the statute and "frames and forceby or otherwise." I ramed to be publicated to all the conditions one from the without to without to such framed forceby or otherwise. "instead or without to without to be so of low as above stated

"Lucio is is firstlus Communica and agreed by and "hatmen the frantis that the franty of the Secred hart shall "hay and discharge all costs and attorneys few texpurses "that phall write from inforcing the Community of this" "Chide the by the harty of the frist frant.

Abitrees the hands and Deals of the parties

"aforesaid.

"Martin, B. Halker Soul)

ley d. W. Waughofi

Aty in fact"

"Him f. Mapier. Seal)"

"become due on the unthin Sealed on the days the

"Dalea Solvierge afril 13 16 1857,

(Riopra) " alea: "While."

The Plaintiff there pested his case, and

The Defendant to maintain and proud the isomes on his part-called as a Writnes.

duluis Dyrenfurth who hering duly sworm testifica

Daprier ui his lifetuire. I resider with Mapier on Randolph Street in November 1857

The Defendant by his bounded thus propounded to the witness the following questions.

Do you know of any agreement between William of.

Diaprier and this plaintiff in this suit for a peduction by paid plaintiff of the junt on the base withoduced in twideness, and for what said peduction, if any, was made of year, plate the same.

Here and there objected on the ground that parol hurdiner could not be introduced to discharge the squaranter of an instrument under Scal and the Courtpursance the objection and refuled to allow the question to be put to the witness.

To which ruling and decision of the Court in pustaining the Daid plaintiffs said objection and refusing to allow his question to be propounded, the Defendant by his Counted then and there duly excepted.

Ho Defendant there offered to prove by the witness Dyrenfurth that William f. Mapier the lesses in the lease in question, in the Month, of November 1857 declared that he would vacate the prenices in question in the grown that the Darue were wholey with antable and thing Walker, the Maritiff was liable to and had agreed, after the Commencement of the lancurery by parol to put certain chrains into the as dunised presmises rendered mesesary by the City authorities having naised the yeads of the Freet; which he , Walker, had not done - that Walker agreed with Mafrier in order to Detto the despute as to his liability to put in these drains and in consideration of his failure to fut in said drawis and of Mafrier releasing line from his paid agreement to pedice the rent to Eighty dollars per morth and that no more than that ound should be taken by Walker in Sales faction of the rent and from that him on, the rent was received and france at Orghly dollars for Month wider Hiat agreement - That this agreement was made after the nousuber 1857 rent hod beense due and default had been made in the payment of it.

His defendant further offered to proud by the witness

that the premises became indemantable by reason of water estanding in the batesment, which was caused by raising the officet to grade by the City authorities - also the value of the premises at the him of the death of Mapier in africe 1858 - and their value from thence to the termination of the length.

Lo 1800 prowing of each and all which above to humen aled facks and circumstances, the planity by his boursel than and there objected and the Court oustanced the objection and refused to allow the witness to lestify thereto.

To whof decision and ruling of the Court in sustaining said Planiffs said lastminutured objection and in excluding said lesturiony & refusing to allow said proof
to be made - the defendant by his Courted then and there duly excepted.

The withers thew proceeded as follows.

I went to Den Walker with Ins Inapier in

Cyrie 1858, after Im Dapier's death. The agreed to take

Eighty dultars her month from her if the would remain in

the Proces and that he would send her notice if he should

raise the peut from Eighty to One hundred dollars. It

was m. Walker's words to mrs nopier and home in her

presence that he would reduce the peut and authorize a

Wanghop 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 purcidal to runain theres all my boarders left - The water stood we the basement thick with pluie - I remained in the house to protest mr White - I am the widow of William of Mafrier -He deed in april 1858. I was mable in the Summer of 1858 lo hay more than I dia - Hola Walker that The condition of the building was such and have been that my boarders had all left - Hola live in august That I must either fray at the rate of Fifty dollars her mouth, or I should leave . I'was datisfied that the offer I made was accepted - I had paid Eighty dollars for month & & paid Tifty dollars for month and ence it I was willing they should take my furniture or take Hu Fifty dollars. Tola Wangled he would have to take the furnishme or Fifty dollars for month

The Defendant then offered to firme by this withofs the pance facts enumerated in correction with the lestimany of the initires Dyrenfurth (10 which reference is hereby made) and the plaintiff by his bounded objected and the Court pustained the objection and refused to allow paid proof to be made.

To which ruling and decision of the Court in pustaining paid objection & refusing to allow daid proof to be unado the defendant-liphis Courses then & there duly excepted.

The webreed on brood Eccamunation feetified as bottoms of do not punewher over having Daid that I could not have I couldn't do anything with Walker - I could not have para that Walker would hold White - I always puffice that Walker would plance by his word - I do not problect of paying that White was bether able to hay this part than I was. I don't resolved of ever having paid that I was afraid White would have to fray the tout - I did not valent the francis breake of uncerstood my Walker to accept the offer of fifty dollars. I was was notified that the whole peut was to be fraid, I should not have ploffed that the whole peut was to be fraid, I should not

The Defendant the introduced in Suidence the viriginal period to the paising Randolph of trust on which paid building stood, to grade, signed " S. B + M. O. Walker." and ong others - His petition was admitted to be the original fetition projects filed for that Interpolate and the Defendant called as a witness of Many of Many

The cause, lestified

Heat the projecture to said petition was in S. B. Walkers handwriting and not its that of m. Q. Walker.

The Defendant Hereufun restea his Case

Ohnor the plaintiff by his bounsel thereufon more of the love to case in prograd to the unternamentable condition of the building and the bourt surtained the motion and escaluded all the betimenty which had follow from the witnesses in prograd thereto from the witnesses in prograd thereto from the witnesses in prograd

So which doeision and ruling of the bount in pustaining said moing the coludary said less is now the defendant by his lovured them and there duly soccepted.

This was all the testimony witroduced by wither tourly in said cause.

henrig wained by Hom, the bours gave the following to wishine tions to the dury on behalf of the planiff, to wit;

Hw Twy ui this cause will distreofered all the luidence offered in this cause lending to show a discharge of the coverants to finy rent reserved in the leave offered in this cause as it would be unfroper for them to consider any proof for that two passed will such proof is no writing and muder the Deal of the party.

Old proof given in this cause showing the endition of the said humisis in correspond of the raising of the grade of the raising of the grade of the street by the bity of Chiengo in front of the said humises, of the furtions of avoiding the fragment of full real under the Seaso and quarantee in

Huis puit will be disregarded by the Jury. 3. On this cause the planififf will be entitled to universet on all rents not paid from the line the pany became due & remained inflaid, at dise fur out for

> To the giving of which instructions on behalf of the plaintiff and lack enco every of them Hw Defendant by his bounced then and there, duly escepted.

Class the Court gave to the Jury the following uisturetions on behalf of the Defendant.

" If Hw Jury believe from the Endence that the line. of payment of the pent or any provious of the pents was Excluded by a valid agreement founded whom a valuable Consideration between Walker & Majuer, such agreement woute discharge the Defendant from all liability whow his quarantee from the hime of making such agreement.

Oluce the Defendant by his Coursed asked the Course to give to the dury on his behalf, the following instructions

1" It is for the dury to determine whether the plaintiff accepted Mrs Mapier as his buand, and if they believe from The hindered that Juch was the last, the plaintiff cannot recover for any of the feel ow the original lease after the Communerment of Duch lending,

I Af the dway believe from the huidened that It of Mapier from November 1854 to the trine of his death, and his Arapier What is decease to May 1859 value piece the fremis, in question at a different pato of peut & under a different agreement from that spraified in the Leas in question thus they may infer a new feating of said fremises & the Defendant is thereby discharged upon his quaranty the is distilled to a Nordiet in his favor.

3. " On our celion whom a quarachy of fragment has not been made by such third person, and therefore if the Jury are not palistica by this suidence that fragment has not characty been made to the flaintiff by the defendant they will find a Verdiet for the Defendant."

But the Sourt perfuse to give to the clury said House last humerated wistructions in behalf of the u-Defendant or either of them

To which sources pulmage and decisions of the bount in refusing to give deno last mulioned visiones and last and lack of them the Defendant by his bounded thew and there duly and penerally exectled.

The duny thereupon pendered a Verdiet for the Plaintiff for the Dune of Benew hundred and eighty mine dollars and fifty Dioc Cents, and the Defendant by his

Coursel throughow entered a motion for a new trial of paia cause in words and figures following to wit. "Aleon: White

als Superior Court of Chieago

Marlin. a. Walker Sep J. 1860. Now downed this deft by his bonned Barken & Tuley Amoues this bourt for a new brial in abone Cauco for the following reasons. 120 Aw bourt erreco in admitting parol proof do lo Hu consideration of the quaranty. V. The bours erred in admirthing the Lealer and quaranty in huderer. 30 The Vence & quaranty show the quaranty to be aw Original promise and the lovert erred in pereining parol huidence lo storio it lo be a collatera o undertaking 4th, The Court erred in faceluding the huidence of Dyructurth and other proof offered by defendant from the Que, in not furnishing defendant tenfinere Certain facts which he offered to prove. De bourt erred in giving plaintiffs withvolvins and refusing those prequested by Defendant. 11 The Werenist of the Jury was contrary to the law of His case. 7th The Neracit of the Jury was contrary to Suidence Barker & Ouley P

While paid Motion was by the Court, after hearing the cirquiredo if lorincel thereon and after having examines and considered the dand ourruled and Chargement-Intered whow Hw Werdies in favor of the Mansiff aforesais To which pulsing and decisions of the Court in overruling the paid Defendants paid Motion for a Drew fried and butering fredegment upon Daid Werdict, Mr Daia Defendant by his Council thew and there duly excepted.

To all which pulsings and decisions of the Burt hereulefore Jenerally ennuerated the Defendant by his bounsel their and there duly excepted and project an appeal Monefrom, which was granted.

Chua foraemuel, as the feweras unthers and Unide personsefore flater and get forth do und other wise apprear, the paid Defendant prayo that this his Bile of-Exampliones many he pigner and Dealer and made a frantof the previor of this Cause - which is done.

(Righter) Naw Stoffingsino (Sul)

luage.

State of Allinois , S.s.

I Walter Kimball Clark of the Superior Court of Chicago within and for the County of Cook w the State of Villivois Dohnceby artify the above and foregoing to be a true and forfeet Chancrifit of the Process. Amended Declaration- Plan & Motion Oppeal Bond and Bile of Exceptions Drow or file in my Office, logether with all orders and the Chagney lutered of record in a Certain vance heretofine pending in Said Court, wher in Martin. Q. Walker was Mariliff and, alescander While Defendant -In lestimory whereof I have Surevilo get-my hand and affixed the Seal of Daid Superior bourd at Chicago in paid lounty the Seand day of March Ov. D. 1861. Walter Kimbre Clark

State of Allinois book bounty ... } Martin O. Walker \
-v = -v = \
Alexander White \ Record. \$ 15 50 Paid by Fift aug

he Inframe Court of Illinois Third haw Division April Term, 40, 1861 Alexander White of appellant Martin O. Walker Sappeal from Superior Come of Chicago Afterward, to int, on the fish overday after the This Monday in April AD, 1861, at this same term before the Judges of the Supreme Count of the State of Almois comes the said Alexander while appellant, by Melille W. Maller, his attorney, and days that in the recordand proceedings: afresand and also in rendering the folyment aforesaid there is belanifest enor, in then, to wit, 1's That the Court ever in overruling the objection of the Webendant belove intrees, Wangloop, as to the consideration of the suaranty on which this out was brught and in admitting sais testemony

6- that the Court erred in refusing ballow the cituen, mis. mm g. Aspier blestily to the fact, detailed in the offer of proof in consection with the testimony of the witness, Dyren fuetto, when the Dewand below again offered to prove the same by Men. tapier, and in Duskaming the objection of the Plaintiff below, thereto-7- That the Coul ened in Rustaming the motion war by the Mantily below locaclude all the testunony in the case in regard to the unternantable Soudition of the building in question and in excluding all the testimony which had fallen from the intresses in aspard thereto. 8- That the Court erred in giving the instructions by The Court siven, on behalf of the Plaintiff and in swing each of them 9- that the Court eved in refusing to give the instructions asked by the Alfandant and numbered "1", "2" + 1 5" and each of them

10- That the declaration aforesaid and the matter, Therein contained, are not

Rufficient in low for the said Planting below when or maintain his aforesaid defendant me forming 11. That the Court eved in overelying the working for a new trial made by the Defendant below fritpuent on the vertel 13. That the verded was against the law of The endence 14- Heat the verdict was excessive and included interest which the Dependant was not by the law of the land, bound to tray -15 - That the firefuence afores and in form oforesaid given, was siven in favor of the said Plaintiff below sugarust the said Defendant below whereas by the law of the land, the said propularly onght Whan been given in favor of laid Dependant andapand Said Maintiff

And the said slegender White, applicant of prays that the proposed and proceeding for the enors aporesaid and proceeding aporesaid, may be reversed, sumilled and altogether held for nothing and that he may be restored to all things which he has loose by accasion of such judgment to delible M. Thelee applications of the little M. Thelee applications

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I. W. Waughop

Joseph 20 (Ke) for hoft in error

Suprema Court of Mining Hepande White Martin O. Walker appellee assignment and Record Frew April 16 1861 Li Leland blush

State of Meiners in the Supreme Court april Jesu 1861 Alexander White

Martin a Macker

Martin a Macker State of Illinois & Samuel Sounds & James At Roberts being only server Dago That on knowy afternoon the 19th metanh and on Saturday morning the 20 motant he examined the record in a few Incording before the order of reversal was had the above tulitted cause to see if There had been a governou in Error by the Defendant in Error on but cause and did not see ah Either of said dates any jointer Therein and This affant reng believes That There was no joinner in Errors at the Time he obtained the order Mutry Back cause for non journe on Errors. This affect believes he und: I have been such jointh at both of said times when he or up = anund had buch jours been made de A Rebuts Interned bethe this 23 of April 1861

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he Supreme bound of Illinoise Third Grand Division Alexander hite April 5.7861 le autier O. Walker ? State of Illinois SSS
La Falle County SSS
Personally comes B. J. hitchell bleing dely snow on outh declare drags that he is an operation in the telegraph office at attawa - That on Latinday the 20th day of April, AD, 1861 telesvaphic and was received at the telegrific in obtains from J. W. Noughop at Chicago to M. B., Scales at ottawa, at twenty minutes hast two or clock in the afternoon of Laid 20th day of Apail, A.D. 1861, another no other disported was received that day from Pair Wanghow to Pair Scales and that the come appended Lubocrites and soon & B. P. Mutchell Lubo criter and Swam & before me this 28 day of april ar 1861 A folantaken

FORM 2.1 UNITED STATES AND CANADAS. 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 or delivery of unrepeated 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. OATON, Pres't, Ottawa, Ill. By Telegraph from Chrea

Alpantu Mili Hartin D. Walker affidails of telepaper Operator

Film April 23, 1861. L. Leland blush Aux Suppleine Court of Illmore aller Shirts Search Division Annie 7.7861

State og selvois La Salle County 38 Permally Comes M. Fuller deing Ing Irom, on oath declare, that he is the attomey for alexander White appellant in the above entitled cause - that he took a rule on the appellee to join in enor therein by Daturday moning, Avil 2 onfles Mat on Friday woon, Amil 19/6, enor, had not been juried therein to the affiants being obliged wheave OHawa, abrained the services of lawing H. Wobert Esq., an attomy practicing at they bar q this Court, to han dans' cause revened for non formour in einer is enous Marko hor beg Joined on the morning of Sakuday april rom/61 - That their affiant went on to Chicago

the afternoon of Friday, april 19 hy That in the middle of the forewoon of Entirolay, the 20th mistant this afficult men y.M. Wangloop of Chicago in the Theety of said city - that said wanghop is the advancy sway The attorney of the appelles in This cause - That said wayhon in given of this affinit, in the etect in Chicago in This middle of the prenon of that day of about half post ten O'clock as wear on the askant now remembe "Whether ceything had been done in the Cause of white is walker?" That this afficient informed said houghof that a rule har heer lutured on deppellee to join he know which has expired that morning - Whereigh Lair Warphop in grined if this alkant "designed winsish on that Wele " I this afficient Land

yes" & the internew terminated -This afficients bruther Days that on the 20 though of april rustant pair come way reversed for non joiner in luon- That on the 22 of I april water and order q reversal was set ande as this affiant is informed upon the statement by In, mughon Appellee's attomes that "Enous had been joined, by Judy Scales! Inhom this said wayle states he had nieten to do so -This official colonyes that enous were not formed , lefter said rules of assercal. That they were nor joined on Trivay hnon - That taid wangen on the Jorsmon of Faturday Lafter Lais course monathan Conser, a tion, he four detailed, a stee this afficient is he intended to inside upon the rule aforesaid" of this affiaut changes that at that

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Subsculed I Swom befor me April 23, 1821 Letelan Colh Abr. Mit 2,01 Mr. O. Malle

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In Supreme Court of Illewood This Grand Division Heparder White

appellant

Martin O. Walker appella 5 Personally Come, M. W. Giller Shing buly Inom, on outle declares tres that he is the attorney, go for the appelle in the cause, you wang lide means the afficients when he in his altoning of the abbellant has preparety want That her did nor spleach lituccied an the went sin of faid Counter that said Wangley is Colory huden a very grown wintake. That ag a maker of Jack ou this Hon. Court can bet once percein by an inspection of the record tableacts in their case,) their altiants has had lettre Confedence in the Referen in this cause from the time he

agued the motion for a

new tral in the Courthland I he believes lutily or compiled that the law of this can is with his cleans -This afficient frutten fays that is utterly untine or that find Waight has no formedation ber lis belief, that this care was appealed but the propose of Die King Down technical action to defeat a recovery in this Coul" or that "the appelanti attony no having any ment in his cause took the appeal hoping by his arbuteress and Thatpues in the mactice of this court, well Kny the want of Knowledge of the rules q this court q' this afficiones Dais Warylande, " of delaying Adefrating the remedy of the said abbeller as alleger in said transportes said affidail, but an the Contrary Therey this affiant declares the changes of taid wayhou in that regard love balse Houserous and that

that the reason spirts alegation appelles showed not han joined in enver under that aule-That as reston 2 back for the trulle quilicle an un hection of the record abstracts will falls by This Court, their cause was our of frest hand think on the abbellant this afficient could not consent lowains any legal rights of his client under In Ch Cirkunstances-That the reverse of taid projund was the entered on the recoins of the 2000 instant in The Expiration of tail and lo fois lever, when the Coming in I the Court on the riving of that day tuber instrong were heard, as their affiant ti, informed Holeins, Hong before the knows were points her hour being her hours been have been until the agternoon glass day When their Cours was not in dession -This appiant frutter days

That the can not perceive how the business asveation I taid warphop can be Influed to interript The business or Change the wells I they could or that in was nor as early to send à telegraphic chi parch on Twesday, Ovednesday, Thursday as Friday of loss Weell as on farming a in it of it dais maybe business was a Chicago was q missa importance Than his business in this Court he slund, is appears to their africant how employed rouse in Walkers with for him -Melielle W. Tuller From Wotherward this 23 yay gocloten 8.20, 1861, below me Le Lelais Elk \$ 1. B. Prin Deput

Alexante White Se. O. Walker Country affectach Dur. Waghow's d'A Con affilian on Field April 29, 1861

In Supreme Como of State of Ellinis Abo. White april 1,1861 Marsin de Waller appelle auturn come to said appellant by MMAnlles his alty, Aneda, They Char. Come to racate frescient the order hereibefor lettred bracate In reversal of the alross institled Course for non frinte he mor audited. Jaid judgment & reserval may then for the leaving states in the agridants heranthe 1- Because Enon were Eus fried at the time of the reveral of prosperent in his Cause 2 - Because the majurent frement was authorized & entered by intone of the well of the Court. MM, Juller ary, for appellants

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State of Allinois In the Supreme Ce out of While Term AD. 1161 Martin O. Walter appeller & add White appealant John W. Wanghop big swom Jayo That he is the attany of second Cause. That he is not an experionced practicioner in This Honoroble Cambo That this affiant was the attany of the said appealer in the Court helow, and Knows that The soid appealle has a good and nieritorion Clair in This action that the appeallie recovered in The Court below a judgment for the sum of Seven hundred and eighty nine bollows and fifty ding Cents (\$7 89,56). The foundation by of Join appeallant of a Lease Whom which the leaser had and enjoyed the premises but theid not

pay the rent and that lent was what was becovered in Misaction telow. The altany of the Faid appealed has friegrenist and to this ofspect to succeed on the mints of Daid Course but this Claims was willing to take it up and he was coming to this Court with the cause This afgrant further my That the cause was strongly -Contested below and a motion for a new trick was heard before the full lunch of the Count Culow, This affrant now believes That the buil course was ap-Seeking some technical action gre-ful a yester to me That the appealling allong not having any ments in his Cause look The appeal hoping by his astute ness and Sharpness in the proclice of This Court, well knowing The want of Knowledge of the Rules of this Court of this affect

of delaying and defeating The remedy of the said appealted This afficient has to day to this court that he was not July posted in the tell as The produce of this Countal-- lowing the Reverse of a pident on a foilunt o join in error withant notice of the rule, This Court was in its first week and This Course was for down on the docker and this affect felt deane while the luging of this weeks he in Ollawa to altered to Sand Course by Wednesday of the furt week of the court but was detained at Chiens by urgent profestioner lusines connected with The warnshich has been so had= -denly brought on the Country Severol of the Oliante of This affinist were enlisted for the war and expected to felied to this officient for

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out by the click of the Court helow the appeallant came to this afficient in person and said to this afficient that he would rather dettle the damages In This Cause than to have the bother of taking the cause whe to the Supreme Court and Offered to pay rent on the Case at the rate of Eighty Sollans per month for thetime it was he hind and clase it up, he fulter stated that he was of The opinion that he was liable and enflicted to be made liable but that it would make all parties feel better if some compromise Could be effected. He stilled to. This afgrant further Mother Hun Faller had agreed to attend to the Case for nothing in the Lupreme Court not so much that he effected to defeat the action as to matte a good case for the books. to Lettle some fount of Law. and it is true how Fallers Statement to The contray not withstanding That hu. Faller has lold this afficient resealedly on

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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.

Appeal from the Superior Court of Chicago.

MARTIN O. WALKER,

A PPELLEE.

ABSTRACT.

- This was an action of assumpsit commenced by summons issued Nov. 18th, 1859.
- Amended declaration filed May 25th, 1860, consisting of two counts, as follows, to wit:
 - 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 plainttiff 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 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 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-

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.

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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, twentytwo, 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. And the said plaintiff avers, that confiding in the promises and under-10 takings 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.]

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 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

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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.

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

"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.

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

3d. Payment.

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 untenantable, 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 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 plaint-

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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 untenantable 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.

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

Motion for new trial argued Nov. 24th, A. D. 1860, and taken under 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.

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:

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

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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, Λ . D. 1857. It was signed on that day, but not delivered. Afterwards White came and 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, 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:

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. 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.

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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

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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.

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:

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

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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, excutors, 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.

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, exccutors, administrators, or assigus, 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.]

"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 untenantable, 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.

The defendant further offered to prove by 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, 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:

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 untenantable. Walker said it made no difference whether she

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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:

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 snicidal 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.

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

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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.

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 untenantable 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 suit, will be disregarded by the jury.

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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.

"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.

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:

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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. Motion for new trial over-ruled, and defendant enters his exceptions, 50 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 untenantable condition of the building in question, and in excluding all the testimony which had fallen from the witnesses in regard thereto.

Sth. 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.

alexander Mohrte Martin C. Walher alshaer Filed Spr 18.1861 A. Xeland Elich 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.

Appeal from the Superior Court of Chicago.

ABSTRACT.

- This was an action of assumpsit commenced by summons issued Nov. 18th, 1859.
- Amended declaration filed May 25th, 1860, consisting of two counts, as follows, to wit:
 - 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 plainttiff 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 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 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-

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.

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, twentytwo, 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

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.

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

"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.

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 untenantable, 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 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 plaint-

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 untenantable 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.

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

Motion for new trial argued Nov. 24th, A. D. 1860, and taken under 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.

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:

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

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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, Λ . D. 1857. It was signed on that day, but not delivered. Afterwards White came and 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, 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:

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.

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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:

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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.

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:

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

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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, excutors, 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.

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,

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,

Atty in fact.

WM. J. NAPIER. [SEAL.]

"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.

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(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-

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 untenantable, 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.

The defendant further offered to prove by 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, 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:

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 untenantable. Walker said it made no difference whether she

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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:

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.

The witness, on cross-examination, testified as follows: I do not re member 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.

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 untenantable 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 suit, will be disregarded by the jury.

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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.

"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.

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:

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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. Motion for new trial over-ruled, and defendant enters his exceptions, 50 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 untenantable condition of the building in question, and in excluding all the testimony which had fallen from the witnesses in regard thereto.

Sth. 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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