

No. 12777

Supreme Court of Illinois

Halligan

vs.

Wade

71641  7

Thomas J. Wade

31

1859

12777

31-14,8
Patrick Malligan
vs

Thomas J. Wade

Argument

W. Co. Cook
for Appellant

Supreme Court - 3^d Division - April Term

Patrick Halligan
vs.
Thomas J. Wade }

Now comes the said
Plaintiff in error by Leland & Leland his
attorneys. & says, that in the record &
proceedings in said cause, there is
manifest error, in this, to wit;

- 1st The Court erred in giving the defendants
instructions & each of them.
- 2^d The Court erred in refusing the plaintiffs
instructions, ^{each of them} ~~refused~~, & in qualifying them &
each of them qualified -
- 3^d The verdict & judgment were against
the law & evidence.
- 4th The Court erred in overruling the motion
for a new trial.

Wherefore, for these & other errors apparent
on the face of the record, said Plaintiff in
error prays that the judgment of the Court
below be ~~reversed~~, annulled, set aside & held
for nought & that the said Leland & Leland
cause be remanded - for plff. in error -

State of Illinois }
Jas. Sullivan }
County of }
Pleas before the Honorable Edwin
S. Shaw presiding judge of the
month judicial circuit of the State of Illinois at a
term of the Circuit Court in and for said Jas. Sullivan
County commenced and held at the Court House in
Uttawa on Monday the fourteenth day of November
A.D. 1833 the term being the second Monday in
said month of November is the seventy eighth year
of American Independence
Present

The Honorable Edwin S. Shaw Presiding Judge
John S. Sweeney Clerk
W. H. S. Wallace State Attorney
Richard Smith Sheriff

But remembered that in the 26th day of July 1833
a certain distress warrant was filed in the office
of the Clerk of said Court in the words and figures
following to wit:

"State of Illinois }
Jas. Sullivan }
County of }
To the Sheriff of said County or any
of his deputies or to any Constable
Deputies;

Distress the goods and chattels of Thomas J. Mack
and which are liable to be distrained which you
may find in the County of Jas. Sullivan, for two hundred
dollars being the amount of a quantum rent due
to me on the 26th day of July 1833 for the premises in
the City of Peoria in said County, formerly known
as the United States Hotel and now known as the City
Hotel (excepting three rooms for stores) which are
demised of me, and for your so doing this shall be
your sufficient warrant and authority. Dated at
Peoria this 20th day of July A.D. 1833
P. Mulligan"

On the back of said warrant was the officers return in the words and figures following to wit:

"An Inventory of the Personal goods and chattels of Thomas J. Mack distrained from J. B. Gay Constable on the 22^d day of July 1853 in the County of LaSalle where the said Thomas J. Mack makes by return of the return master and authority under Wholly of Patrick Malligan the Sheriff for the sum of two hundred (\$200) dollars being an greater sum due to the said Sheriff on the first day of July '53 for the premises in the warrant mentioned to wit:

Two Black horses, one set of two horse harness, one omnibus, twenty two arm chairs, fifty common chairs one oval stool, one reading room table, one settee, one lounge, one looking glass, one wash stand, one shawlcase with two glasses, one knee with looking glass, one sofa, one center table, one cruet set, one oval table, one looking glass, two oval pattern chairs

By Josiah L. Gay Constable = fees \$3.00"

This cause having been tried in this court and appealed to the Supreme Court, afterwards to wit on the 7th day of July A.D. 1856 a certified copy of the judgment in the Supreme Court was filed in said Clerk's office in the words and figures following to wit:

"At a Supreme Court begun and held at Ottawa on Monday the 11th day of June in the year of our Lord one thousand eight hundred and fifty five within and for the third Annual Session of the State of Illinois

Present the Honorable Walter B. Sears Chief Justice
 " " " John J. Leaton Associate Justice
 " " " J. C. Skinner " "

Saturday August 4, 1855

Thomas J. Wade

vs. Appeal from LaSalle

Patrick Malligan

On this day came again the said parties, and the Court having diligently examined and inspected with the record and proceedings aforesaid as the matters and things therein assigned for Error, and being now sufficiently advised of and concerning the premises are of opinion that in the record and proceedings aforesaid and in the rendition of the Judgment aforesaid, there is manifest Error: Therefore it is considered by the Court, that, for that Error, and others in the Record and Proceedings aforesaid, the Judgment of the Circuit Court in this behalf rendered be reversed, annulled, set aside, and wholly for nothing esteemed, and that this cause be Remanded, to the Circuit Court for such other and further proceedings as to law and justice shall appear. And it is further considered by the Court, that the said Appellant recover of and from the said Appellee his costs by him in this behalf expended, and that he have Execution therefor.

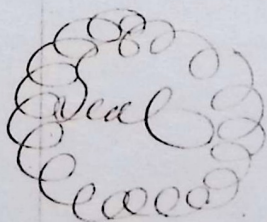
I, Lorenzo Deland, Clerk of the Supreme Court of the State of Illinois, do hereby certify that the foregoing is a true Copy of the final order of the said Supreme Court, in the above entitled cause, of record in my Office.

In testimony whereof I have set my hand and affixed the Seal of the said Supreme Court, at Ottawa, this 8th day of July in the year of Our Lord one thousand eight hundred and fifty-six

L. Deland

Clerk of the Supreme Court

By J. B. Rice Deputy



And afterwards to wit on Friday September 13th 1837
the same being one of the days of the September term
of said Court for the year 1837 an order was
made and entered of record in said cause in the
words and figures following to wit:

"Patrick Halligan
vs
Thomas J. Wade } Distress for rent
This day the defendant comes
by John Clark his attorney and
moves the Court for a continuance of this cause
which motion is sustained by the Court. It is
therefore considered by the Court that this cause be
continued at the end of the defendants of this term
to wit.

And afterwards to wit at the February term of said
Court for the year 1838 from record order was
entered of record in said cause in the words
and figures following to wit:

"Wednesday February 24th

"Patrick Halligan }
vs } Distress for Rent
Thomas J. Wade }
This day the plaintiff comes
by Leland & Cavarly his attorneys
and the defendant by Glover & Cook his attorneys and
thereupon come the following jurors of a jury to wit:
S. W. Rogers, A. A. George, Varnell Cooper, John
Boyle, James Prescott, Irons Brewer, Thomas H.
Medell, Benjamin Fleming, William E. Bell, Jacob
Reigart, Sales Austin and Philip Watts, who are
duly elected tried and sworn to well and truly try the
issues herein, according to the evidence, and after hearing
the testimony the further hearing of this cause is postponed
until the coming in of the Court tomorrow morning."

"Thursday February 25th"

"Patrick Halligan

vs

Thomas J. Wade

Distress for Rent.

This day again come the parties hereto by their attorneys together with the jury sworn herein, and after hearing the arguments of Counsel, the jury retire to consider of their verdict."

"Friday February 26th"

"Patrick Halligan

vs

Thomas J. Wade

Distress for Rent.

This day the parties hereto again come by their Counsel together with the jury sworn herein, who return into Court with the following verdict to wit: "We the jury find the issues joined in favor of the defendant."

Plaintiff's attorneys move the Court for a new trial, which motion is overruled by the Court.

It is therefore considered by the Court that the defendant have and recover of the Plaintiff his costs and charges by him herein expended, and that he have execution therefor."

"Saturday February 27th"

"Patrick Halligan

vs

Thomas J. Wade

Distress for Rent.

On motion of Plaintiff's Counsel it is ordered by the Court that they have ten days to prepare and tender a bill of exceptions in this cause, the same when so tendered to be filed nunc pro tunc."

And afterwards to wit on the 8th day of March 1858
a Bill of exceptions was filed, by the Plaintiff, in the office
of the Clerk of said Court, in the words and figures following
to wit:

"State of Illinois } Circuit Court of said County
La Salle County } February Term A.D. 1858.

Patrick Calligan }
vs }
Thomas J. Wade }

Be it remembered that on the
trial of this cause, the Plaintiff
to maintain the issues on his part, introduced in evidence
a lease in the words & figures following, viz: "This
indenture made this 1st day of October in the year
of our Lord 1857, by and between Patrick Calligan
and Samuel Brown, and Richard Lamsterly,
witnesseth that the said party of the first part
do hereby lease and demise unto the said parties of
the Second part all the house usually known as the
United States Hotel and out houses, with the exception
of three stores and the rooms now occupied by the three
Masons and Sons of Temperance and privilege of the
Yard for the three stores for five years, payments to be
made in the following manner, viz: Six hundred
and fifty dollars each year for the two first years
and seven hundred and fifty dollars each year
for the three last years rent to be paid quarterly
in advance, and if not paid in advance the parties
of the Second part to give up to the party of the first
part the possession of the premises, the parties of the
Second part to pay all the taxes thereon, of their
furniture, that they will not assign this lease to any
person whatsoever and at the termination of the term
aforesaid they will deliver up quietly the premises to the
said lessor in as good order or condition as the same
now are or may be hereafter put into, necessary

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now excepted, after the termination of the lease of the
Hall room, held now by the Three Messrs and Sons
of Imperance it shall be returned into the hands
of Brown and Lonsberry they paying fifty dollars
a year payable as the above rent until ~~until~~ the
expiration of their own lease.

In Testimony whereof the Said parties have
set their hands and Seal on the 1st day of October
1850.

Peru La Salle Co. Mc

P. Halligan *Edw*

S. A. Brown *Edw*

R. Lonsberry *Edw*

and also an agreement in the words & figures
following:

"It is agreed between P. Halligan &
Thomas J. Wade as follows viz: In full settlement
of all claims and demands for repairs which said
Wade claims that Halligan should make on the
City Hotel, said Halligan agrees that said Wade
shall retain Sixty Dollars from the rent now due
from said Wade to said Halligan, said Wade
agrees to pay the balance of said rent on demand
and it is agreed that said Wade shall have the
privilege of terminating the lease executed by said
Halligan, to Lonsberry & Brown & by them sold to
said Wade at the expiration of one year from this
date, by giving to said Halligan three months notice
of his intention so to terminate said lease said Wade
to pay rent for said house during the time he shall
occupy it at the rate and in the manner prescribed
by the terms of said Halligan's lease to said Lonsberry
& Brown

January 1st 1853

Thos J. Wade
P. Halligan

The plaintiff then introduced Thomas P. Halligan who testified that the defendant Wade in the Winter of 1851 & 1852 went into possession of the premises described in the lease to Brown & Conners having purchased their interest under the lease and that he continued to occupy the premises until the Eleventh day of September 1853, when Wade went out & one Bosley came in under Wade. While Wade occupied the premises the name of the Hotel was changed from that of the United States Hotel to that of the City Hotel. Wade got possession of the room occupied by the Free Masons & Sons of Temperance in October 1852. He had been paying rent at the rate of \$200 per quarter since the lease of the room, to the Free Masons had expired.

Witness stated that as the agent of the Plaintiff his father, he, witness, on the first day of July 1853 in the Evening made a demand of the quarters rent due that day.

Wade objected to paying & said he would consult his Counsel.

On Monday or Tuesday said witness called again & Wade refused to pay his rent - and a short time afterwards the proceedings in this case were commenced - Witness also stated that all the previous rent, except a balance of fifteen dollars had been paid by Wade - Witness said he only demanded the \$200 - did not demand the \$15 - There had before this demand been a Suit before a Justice of the Peace for the \$15, to which Wade had set up a defence, that he was disturbed by the occupants of the rooms under the Hotel.

There were on the first floor four rooms - one was the Office or bar-room of the hotel & liquor was sold there at retail by Wade - the other three were

Stores & occupied during the time Wade was there for various purposes. - Above Judge occupied one for a grocery Store where a general assortment of groceries were sold & among other things liquor was sold there. - Judge also had a bake oven out of doors & baked bread which was sold in the room he occupied - this Establishment continued all the time that Wade occupied the premises & was there before Wade went into possession - Another room was occupied by one Birkel for a Saloon or Eating house where oysters & other eatables were sold, also liquors, beer, cigars &c at retail. Birkel went into possession in February 1853, and continued till Wade went out.

In the other room below there was in 1852 a tin Shop where tin & Sheet Iron ware were manufactured & sold. In 1852 Mr. Wade remonstrated with father about the noise occasioned by the manufacture of the tin & iron & father procured another place on another lot where the articles were made, which when made were sold in the Store. The manufacture of these articles was carried on in the room under the Hotel for about two weeks only - This witness stated that the business carried on under the Stores was carried on as orderly as that kind of business usually is, & that the order in Birkel's Saloon & in the grocery of Judge was about the same as in Wade's bar-room - He had seen one quarrel in Wade's bar-room & one in the grocery. The Plaintiff here rested his case

The defendant to maintain the issue on his part introduced Bosley who testified as follows:

I know the Hotel - did when Brown & Lumstrey & Wade occupied it - Wade left the house in the Summer of 1853 in month of August - I think in the fore part - Mr Caldwell & myself bought Wade out - I believe Mr. Calligaw said he could not recognize the lease - Wade had assigned his lease to us. - he afterwards said if he could get the rent regularly in advance he did not care who occupied it - I think we paid the rent from the time we went in - always take receipts & file them away - without referring to them I can not state certainly, but think we paid the rent shortly after we took the house - think we paid after the time we took the house, & paid no back rent, but paid rent quarterly in advance. The Store was on first story & Hotel above - Over the East Store the front part was occupied by Wade as a family room - the back part as a reading room - Next to Wade's room was the ladies parlor - under this was the tin Shop used both for sale & manufacture of tin & Sheet iron - the dining room was over both the West Stores - the tin Store was not plastered - it was a loose ceiling - don't remember of being directly over the tin Store while it was there - know there was a bakery there - think the oven was outside of the house, immediately against the hotel - think they used a machine for pounding crackers - there was liquor sold by the glass by Judge - not positive that I was in dining room when cracker machine was being used. - In the dining room one could hear an ordinary conversation in Saloon below - The body of the barn on the premises was a very good one - When I took it, it was in no condition to receive animals - Stone bars - dirt floor - it was very

wet, caused, I think by railroad cutting off part of barn - road cut off about eight feet on North west corner & run about half way down Side - they had to put in a floor before I could use it - think we kept the hotel over 9 months & went out about 1st of July - paid in advance \$200, a quarter - \$600 in all - & paid on the first day of the month - don't think we paid Wade anything for assignment of the lease, we bought his furniture for \$350 & took assignment of the lease - it might have been as late as the 11th of September that I went in - Should think the tin shop was there about three months - think was in 1852. It was while Wade was there - I went immediately on Wade's going out, I think we were there 9 months or over. I believe we only paid Halligan \$600. The bakery was moved about the time when I went in - The bakery & grocery were there for three months prior to the time I went into the hotel - Wade kept a bar in the office - I paid Wade \$2500, in all - I did not pay him except the value of the furniture -

The defendant then introduced Zimari Lewis, who testified as follows; I know the hotel & stores while Wade kept the hotel - The West store was occupied by a grocery & bakers shop - the next by a clothing store & a grocery & the East one by a tin shop where they worked up iron & tin, manufactured stoves &c - When they were pounding iron you could hardly hear in the reading room & ladies sitting room - have heard it as far as upper story - have kept a hotel nearly 40 years - 15 years in Peru - The building & furniture were calculated for a first rate hotel - the noises in tin shop would be a great damage to a hotel. I know about this barn - it was in good condition - dry & good before railroad cut off the corner -

after that it was a perfect mud hole - Birrell's grocery was a low drinking Saloon - very noisy - I was there twice when they came out late at night - hallowing "bloody murder" - it was a place where a noisy, drinking crowd were in the habit of assembling - there was gambling there - the whole was a damage to the Hotel - The defendant asked the witness the following question; If the rent of this hotel with the barn as good as before it was cut off and without these disturbances, was worth \$800 a year, how much was it worth with the disturbances & barn out of order?

The witness then answered the question as follows: "about \$300."

This witness further testified: I was there when the barn was being taken off - Halligan was there assisting - Wade kept a bar in the office - never saw any gambling there - I was shot at in the bar-room once - the shot was through a door & hit me in the breast - the person who shot was I suppose, crazy from taking opium - Wade didn't see opium - I never was in Wade's when there was any shouting & hallowing - he kept a quiet, respectable bar - never knew him to let any one have liquor if he had enough - there was much noise & hair pulling in the Saloon next to the office - Wade objected to Halligan's taking down the barn - they had some other conversation - don't remember what it was - barn was cut off in 1852 - Wade occupied in 1853 - they were taking down the barn for railroad to pass there - Halligan was there taking the barn down himself - he continued taking it down till Wade objected - he took off two double stalls west - barn was 80 feet long - he commenced about 20 feet from west -

It was taken off on a gate to the door on west side - this let the water right in on the floor - it would be better to pay \$100 a month than not have it

in connexion with a hotel of that kind - it would take away all the learning, travel & at that day, that was worth as much as all the rest - Some of the Stalls were left good - it wouldn't be worth one half as much as it was before - the barn to draw custom to a house like that would be worth \$100 a month - I wouldn't keep a hotel with that tin Shop & grocery & no good barn - I mean that this barn, if good, would draw \$100 a month to the house & not that the rent of barn is worth \$100 a month. The great wear & tear in such a hotel is upon the furniture & not upon the buildings -

A paper was then shown to witness Calligan who stated that it was a copy made by him of the original agreement signed by his father & Birkel & that the witness made the copy & that the names were copied by him - not signed by the parties - He gave the copy to Birkel & it was under this lease that Birkel held the premises. The paper was in the words and figures following:

"This Indenture, made this fifteenth day of February A.D. 1853 between Patrick Calligan of Pine & LaSalle County & State of Illinois of the first part and Conrad Birkel of LaSalle County & State of Illinois of the Second part Witnesseth. The said party of the first part do by these presents demise, let and lease unto the said party of the Second part for the term of three months with the privilege of One Year the following described premises viz: The Middle Store situate under the city Hotel being that which was lately occupied by Robert Sharp. The said party of the first part also agrees that the said Birkel may have the privilege of taking down the Shelves on the East Side of said Store and also

of cutting the Counter which is now in said Store into two parts. Provided that the Shelves and Counter be kept safe and returned to the Said party of the first part at the expiration of this lease and if said Shelves and Counter are not returned safe then others equally as good are to be returned in their place.

The party of the Second part agrees to pay at the rate of one Hundred & fifty dollars per year payable in the following manner viz: Twelve Dollars and fifty cents monthly in advance for the first three months, and thirty Seven dollars and fifty cents quarterly in advance for the ensuing part of the year.

The party of the Second part also agrees that if at the expiration of this lease he does not wish to keep said Store any longer, he will have all partitions which he may put up, in consideration of the Expenses which the party of the first part may be at in repairing said Shelves and Counter before mentioned.

He also agrees to leave said Store at the expiration of this lease in as good repair as it is at present, and also that he will give up said Store unto said Halligan or his agent quietly and without any process of law.

All windows put by said tenant in the partitions he can take away and also the partitions provided the Shelves are replaced.

(Signed)

P. Halligan

(Signed)

G. Birkel "

Plaintiff objected to the introduction of the paper - the objection was overruled by the Court & the paper read to the jury & the defendant excepted thereto -

John Hoffman was then introduced by the defendant & testified as follows; "Now the premises in question - did while Wade occupied - I have been engaged in keeping public house in Peru - I was one of the apprentices at the time when Wade

went into the hotel - these Stores were under the hotel - the bar-room was on the first floor - one of the Stores was occupied by Sharpe as a grocery store - think Mr Sharpe kept clothing also - this was on the West side - On the East Side was a clothing Store - there were no liquor Establishments there at that time - that is, when Wade went in - there were two whiskey Shops in the basement, one on each side of the bar room during the last six months, Wade was there. I was keeping a house on the Bluff - Many persons came from Wade's & stopped with me (saying that there was so much noise there that they could not stay there) - the making of Store furniture & tin ware would injure a hotel very much - I carried on tin & sheet iron manufacture Eleven years myself - it cannot be carried on as that was without injuring a hotel - the business of it - I think the Saloons spoken of, carried on as they were would injure the business of a hotel materially, the damage might be \$2, - might be \$5, - a day. Poor that year was a good place to make money on hotel purposes - the best year I ever knew there - the cars stopped there - Six months in 1853 was better than the whole of 1852 - I would not have kept the house under the circumstances that Wade did, with those Saloons each side of him - acquainted with the barn before the construction of the railroad - a tavern barn is about as necessary as the kitchen - it was a good barn before corner was cut off - I was in afterwards - it was in a very bad condition - the water came in very much - a barn like that was first ought to bring \$100 a month, custom to the house - A landlord could afford to pay a considerable for a barn with such a house - he had better keep up the barn if the barn itself did not pay.

Wade & I are good friends - were old tavern keepers together - don't think Mr Wade made very much money there - think Judge kept one of these groceries on the West side I think - I believe he was there when Wade went in there - I kept liquor in my bar - it did not hurt my house, but groceries kept as these were, would be very bad for a house, Judge kept a crackers Shop - had peaches & flour & cakes, I think - a good deal like many establishments in Port & Ottawa - I consider a good, well regulated bar, a lounge fit to a hotel - I have known people to come away from Wade's to my house in consequence of the appearances about Wade's house - a grocery & a whiskey Shop are two different things - think Judge kept a grocery & a liquor Establishment also - I did not consider these Shops under Wade's house well regulated concerns -

C. A. Holmes was then introduced on the part of the defendant & testified as follows; Have a faint recollection of hearing a talk between Wade and Halligan in regard to leasing the Stock Bunkel - to the best of my recollection Wade offered his coming in there in account of his keeping a Eng Ship there - I was agent for Smith & Walker at one time & stopped at Wade's occasionally - think I heard Wade say that he should have to give up the house on account of the nuisances, in presence of Halligan - Halligan replied that he did not care if he did, or words to that effect - I was about there a good deal - Wanted Smith & Walker to change to Hoffman's on account of these Soup Shops - never saw any liquor sold in Wade's bar room improperly - the class of men that were seen about there were not in the habit of frequenting

ing his bar-room - Some of the drivers were hard cases & many of them as good drivers as ever I saw - Mr Wade remarked that he should have to leave the hotel on account of the nuisances & Halligan replied that he did not care if he did - I was there when the cars stopped there - It was during the time I was Frink's agent when this conversation occurred - my mind was not on this subject before Wade spoke to me of it - and I am not positive about it.

The defendant then introduced Hawley
who testified as follows; Am acquainted with the parties to this suit - was a butcher in Peru at that time - Supplied the house with meat - generally delivered it at the house once a day - there was a tin shop there during the last part of the time Wade was there - One store was a dry goods store when Wade went into Hotel - Birkel went into there afterwards & kept a grocery - Saw gambling going on in there - have seen fighting about there - Heard Wade & Halligan talking once about these groceries - Wade said he would have to leave the house & it would ruin him if they were allowed to go on - Halligan said he did not care - have seen Wade's bar-keeper taking up a load of passengers from the depot, & when within 10 feet of the house, have seen them go away because fights were going on in Birkel's -

Richard Thorne was then introduced by defendant & testified as follows; knew parties - knew premises in 1852 & 1853 - was Sheriff then - have been engaged in hotel keeping - frequently stopped with Wade - one night there was a disturbance in one of these groceries - the cry of "Murder" started me out - it was a fight - between H and J. O'Clock - ate dinner there one day alone & heard plainly

the hammering in ^{the} Shop below - from what I know of this tin shop & these greenies, I should think it would be impossible to keep a first class hotel - Spoke to Wade about the annoyance of the tin Shop - think Owen Judge occupied a Shop below - think this row originated in one of the Saloons below - know that Wade got up & went after the Marshall & several travellers got up - should think that the carrying on of the tin & Sheet Iron business would injure a hotel very much - this was in the fall of 1852, I think -

Theron D. Brewster was then introduced by the defendant & testified as follows: I was one of the Directors of the Chicago & Rock Island Railroad Company & agent for procuring the right of way - the Engineer made the lines in the barn & then Calligan & I went & examined it, & he was to take down the barn & put it back on the line for \$400, and if he did not do so by a certain day the Railroad Co were authorized by the agreement to take it down themselves - for some reason he did not do it - A day was set for him to do it; & if he did not do it, then we were to do it - I directed the contractor in the employment of the Railroad Company to take it down, & he did it by my order. I paid the \$400 & took a receipt - Calligan agreed that if he did not take it down by a certain day, I could do it - The conversation with Calligan & the taking down part of the barn were in the Spring of 1852 - this lot was not assessed to my knowledge - about 10 feet were taken off the west end & diagonally about two thirds of the way down. If Calligan did not take the barn down by a certain day, the Company might do so - never knew that Calligan refused to take the barn down - don't think there ever was an assessment of this barn - There may have been conversation about the assessment, but I do not recollect it.

The defendant here rested his case -

The Plaintiff then recalled Thomas P. Malligan who testified that the barn was situated on lot six (6) in Block Sixteen (16) in Peru, and the north side of the barn was on the north line of the lot.

The Plaintiff then introduced the following petition, order of the Judge & award, which, so far as relates to this lot are in the words & figures following:

To the Hon-
Edwin S. Ireland, judge of the Ninth Judicial Circuit in the State of Illinois and presiding judge of the LaSalle County Circuit Court.

Your petitioners the Chicago and Rock Island Rail Road Company respectfully present unto your honor that the said Chicago and Rock Island Rail Road Company have surveyed, located and commenced the construction of a Railroad, from the town of Rock Island in the County of Rock Island, to the Illinois River, at the terminus of the Illinois and Michigan Canal, thence by way of Ottawa and Joliet, to Chicago in the State of Illinois in pursuance of the following described acts, of Incorporation viz: An act to incorporate the Rock Island and LaSalle Rail Road Company, Approved, February 27, 1847, and "an act to amend an act to incorporate the Rock Island and LaSalle Rail Road Company, approved February 7, 1851; to which acts and the several provisions thereof reference is hereby made; and that they are duly organized as a company under and pursuant to the provisions of the above recited acts: And your petitioners further show that in the prosecution and construction of the said Rail Road, as aforesaid, it will be necessary, to pass over and lay down the track of said Rail

Road on the lands of the persons herein after mentioned, and your petitioners are not able to obtain the title to said land, through and upon which said Road is located by purchase gift grant or voluntary conveyance of the same, from the respective owners of the same, nor can they agree with the proprietors of the same relative to the damage or Compensation that ought to be paid to the owners respectively, nor can they mutually agree upon some persons to appraise the same, Your petitioners further Show that the Chicago and Rock Island company are under the necessity of appropriating the following described pieces of land amongst others situate and being in the County of LaSalle and owned by the persons hereinafter named for the right of way, construction and use of said Rail Road, and your petitioners further Show that under and in pursuance of the provisions of said acts, and the acts amendatory of said last mentioned acts, entitled "An Act to amend an act entitled an act to amend an act to incorporate the Rock Island and LaSalle Rail Road, Company approved February 7, 1851, approved June 22 1852, Your petitioners have by their Engineers and agents located the line of their said Road through the County of LaSalle.

And your petitioners further Show that they have made diligent inquiry to ascertain the names of the owners and parties interested in the several pieces and parcels of land and town lots herein after mentioned and described by searching the proper records and have set forth the same according to the best information and belief of your petitioners, and they pray leave to make other owners and parties interested when discovered, parties to this proceeding. Your petitioners further Show that the several described pieces and parcel of land and town lots hereinafter, described are required for the right of

way and material for construction of the Road and for such additional purposes connected with said Road as are hereinafter specified and that the same are described as follows to wit:

No 128 also that portion of Lot twelve in Block twelve in the Town of Pomfret lying North a line drawn from a point in the center of the North line of said lot to a point on the West line thereof nine feet South of the North West corner, belonging to George B. Willis.

No 138 also that portion of lot six in Block six in the town of Pomfret lying north of a line drawn from a point on the West line of said lot eighteen feet from the North West corner to a point on the East line of said lot three feet from the North East corner belonging to Patrick Calligan.

That the said above described pieces and parcels of land and town lots are Situate in said County aforesaid and are necessary and indispensable for the construction and use of said Rail Road and the appendages and accommodation requisite thereto as aforesaid.

Your petitioners therefore pray the aid of said Court in the premises, and that the said Circuit Court may Cause to be ascertained the Compensation to be made to the several owners and persons interested in said above described pieces and parcels of land and town lots required by your petitioners as aforesaid, that Commissioners ^{may} be appointed to fix such compensation and assess the damages of the said owners and persons interested as aforesaid and that upon the payment of the compensation and damages so assessed the said several owners and persons interested in the said several pieces and parcels of land and town lots may be required to convey or release the same to your petitioners for the purposes aforesaid or that by an order or orders of the said Circuit Court upon the pay-

ment of the said compensation by your petitioners as aforesaid the right and title in and to the said several pieces and parcels of land and Town lots to be invested in your petitioners to be applied and used for the purposes aforesaid

Morris & Fisher, Rice & Hollister
attys for C & R. I. R. R Co

Pursuant to the prayer of the petition filed in the Office of the Clerk of La Salle County Circuit Court of which the within is a copy on this 15 day of December A.D. 1852 at 1 O'clock P.M. of that day at my Chambers in the Town of Ottawa, before me, the petitioners of the Chicago & Rock Island Rail Road Company, by Morris & Fisher their attorneys and made application for the appointment of Commissioners pursuant to the prayer of the said petition, and it appearing that due Service of notice of the filing of said petition and of the time and place of making this application has been made upon Archibald Long, Charles C. Case, Mary Felt, Thomas Felt, Mathew Eagan, Isaac Hardy, Enoch Fay, Joseph Gay, Geo. C. Cooper, John Reuske and the Trustees of the Illinois and Michigan Canal and George Hartley, and William Renske, John Allen, Richard Cady, George E. Walker, William Hickling, John Smith, Patrick Calligan, Mary Ann Lynch, E. Winslow, the Mokena Lodge, Elmer Higgins, George D. Mills, Margaret Behrend, Philip H. Nelson, John Eastman, Henry S. Beck, Henry D. Brewster, Cornelius Cokley, Isaac Abraham, Erasmus, Charles Leno, John H. McMillan, John Morris, Edmund S. Holbrook, Henry A. Sullivan, George W. Wilson, O. H. Hartley, Isaac C. Day, Frederick S. Day, James Cahill, Joseph P. Turner, Hagar, Thomas Foster and James M. Hugh,

having appeared before me, and after hearing the allegation of the parties so appearing, It is ordered that Charles H. Sutcliffe, William Cullen, and Elmer Baldwin, three disinterested freeholders of said County be and they are hereby appointed Commissioners to fix the compensation and assess the damages to be paid to the parties interested for the right of way and other purposes in the said petition specified for the several tracts and parts of tracts of land, and Town Lots and parts of Town Lots in the said petition mentioned ~~mentioned~~ and particularly described and which in the margin of said petition are numbered as follows viz:

138 Patrick Halligan

128, 134 + 135 Geo. B. Willis

And it is further ordered, that the said Commissioners, do meet at the Hardy House in the City of La Salle on Monday the 20th day of December A.D. 1852, at One O'Clock P.M. of that day.

In witness whereof I have hereunto set my hand this 15th day of December A.D. 1852.

E. S. Leland

Judge of 9th Jud-Cir Ills.

To the Hon Edwin S. Leland Judge
of the 9th Judicial Circuit of the
State of Illinois and presiding
Judge of La Salle County Circuit Court

The undersigned commissioners appointed by your Honor to assess the damages that may arise to the several owners of and parties interested in certain lots and lands and parts of lots and lands, required by the Chicago and Rock Island Rail Road Company, for the purposes hereinafter mentioned,

respectfully report, that pursuant to the foregoing
 order of appointment a copy of which is hereto at-
 tached and made part of this report, the under-
 signed Elmer Baldwin & William Cullen, two of the
 Commissioners in the said order named did convene
 at the Hardy House in the city of LaSalle on
 Monday the 20th day of December A.D. 1852 and
 were there and there each duly sworn by and before
 John P. Simpson Esq an acting Justice of the
 Peace in and for said County, to faithfully and
 impartially execute the duties required of us accord-
 -ing to our best judgments and understandings
 did to make all our estimates and assessments
 according to law, and Charles H. Sutphen the
 other Commissioner named in said order not ap-
 -pearing, we the said Elmer Baldwin and William
 Cullen, did continue in session without ad-
 -journment at the place aforesaid, (no application
 for adjournment having been made by any of the
 parties interested) until Tuesday the 20th day of
 December A.D. 1852 at 10 O'clock P.M. when
 the undersigned Charles H. Sutphen Commissioner
 appeared at the place aforesaid and was there and
 there duly sworn by and before Daniel Cosgrove an
 acting Justice of the Peace in and for said County
 to faithfully and impartially execute the duties
 required of him according to his best judgment and
 understanding and to make all his estimates and
 appraisements according to law, and after being
 sworn as aforesaid we the undersigned did proceed
 without delay to view and inspect, and did view and
 inspect the several pieces and parcels of land and
 town lots and parts of town lots hereinafter mentioned
 and to hear all the allegations and testimony
 offered by such of the parties interested as ap-
 -peared before us either in person or by agents

or attorney, and after having so viewed & inspected, the premises & heard the said proofs and allegations, we did proceed to assess the damages and fix the compensation to be paid to the Several parties, interested, by reason of the appropriation of the said Several pieces and parcels of land, town lots and parts of town lots, required by said Chicago & Rock Island Rail Road Company for the purposes herein after mentioned and also the damages sustained by reason of the construction & use of said Road and we do award and fix such compensation and damages as follows, viz:

128

To Patrick Halligan for all that part of lot Six in Block Sixteen in the Town of Peru described in said petition and numbered on the margin thereof 128 the sum of four hundred dollars for the right of way and material for the construction of said road.

128

To George B. Willis for all that part of lot twelve in Block twelve in the Town of Peru described in the said petition and numbered on the margin thereof 128 no damage for the right of way and material for the construction of said Road.

And we do further certify and report that the following named parties interested, appeared before us in person or by counsel and produced their proofs and allegations, viz:

John Morris, Edmund S. Holbrook, James Cahill, Joseph P. Turner, Ezra McHenry, Charles Love, Armistead Hogan, Thomas Norton, George B. Willis, Margaret Behrend, Philip A. Behrend, Georow Eastman, Cornelius Cokerly, George E. Walker, William Hickling, Patrick Halligan, Richard Cody, John Elliot, Archibald Long, Charles C. Case, Enoch H. Gay, Joseph Gay, James McHugh, John Smith, George Barker,

Thomas Fell, Mary Fell, Isaac Hardy, Don
C. Cooper, Mary Anne Lynch, William Rolshke,
Isaac Shabams, and we do further certify and report
that before proceeding to execute the duties required of
us as commissioners we also took and Subscribed the
Several affidavits hereto annexed.

Commissioners E. H. Sutphen
Elmer Baldwin
William Callow

The plaintiff then introduced Thomas P. Halligan
who testified that his father started from home one
day in the Spring of 1853 to take down part
of the barn to make a way for the railroad.
I had heard of the appraisal before this - About
half an hour after father left home, I went down
to the house - father had commenced taking
down the Stalls & took down one or two - Made object-
ed to its being done & father put back the Stalls,
& had nothing further to do with it - The Railroad
Company afterwards took down part of the barn com-
mencing on the north line of the barn about fifty ^{feet} East
of the north west corner - The portion taken off, would
be that North of a line running west & coming out
Eight feet South of the north west corner of the barn
- It took about fifteen days to take down &
build up again & after the Change two Stalls at
the north west corner, were destroyed, & one other was
lengthened, by Extending it a little into the passage-
way - The only injury was the loss of two Stalls -
The Barn was Eighty feet long, East & West, and
about forty feet wide North & South - Wesley
never paid me any rent that accrued before the
first day of October A.D. 1853, I acted as
the agent of my father & would have been likely to
have known it, if he had paid rent accordingly
October first - He paid quarterly in advance -

27 Owen Judge was then introduced & testified as follows:
had a Store under the City Hotel four years from
1851, - I rented that place to buy grain - The
business I carried on was, buying & Sacking grain
for about three years - As soon as Wade came
there I got out of the grain business & went in with
Sharp. Shortly after, he, Sharp, advised me to go
into the Grocery business - I got coffee, beans,
clothing, potatoes & whiskey at one time. I had
some clothing there & had a raffle for the clothing
& made some noise - Saw a disturbance at Wade's
door once - don't remember of any other disturbance
- I told them I would go and get the police,
if they did not go out - they were making too much
noise - I had been drinking & the boys had too -
Only sold by the pint or quart - drunk men often
came in there - I would give them whiskey if they
had a bottle - Don't recollect if Selling Wade any
liquor - used to go into Wade's bar-room & drink -
did not notice any disturbance in Wade's bar-room
- Barker came into the other Store after Sharp died -
Kept a Saloon.

~ This was all the evidence ~

The Plaintiff requested the Court to give the following
instruction in writing -

1st That although the Plaintiff Halligan may dur-
-ing the time that the hotel was occupied by the
defendant Wade, & before the quarter's rent due July
1st 1853 became due, have rented the three Stores
under said hotel & in the same building to other
tenants, and although one of said Stores may have
been used by the occupant as a place for the ma-
king & selling bread & groceries, also for the sale of
liquor by retail, another of said Stores may have
been used as a Saloon in which, cyders & other
Cattells & liquor by retail were sold & and another

Refused

of said Stores may have been used, as at place of business for the Manufacture & Sale of tin ware & Stores, and although said business though carried on properly or by reason of its being carried on in an improper & disorderly manner by said other tenants may have operated to annoy & disturb said Wade in the occupation of the hotel, yet if the said Wade continued to occupy said hotel until the said quarters rent became due, and was occupying the same when said rent became due, such annoyance and disturbance would not excuse the said Wade from his liability to pay said quarters rent, nor would he be entitled to any deductions.

2nd If after the said hotel & appurtenances were let by said Calligan to said Wade & before said quarters rent due July 1st 1853, became due, the Chicago and Rock Island railroad Company caused the said Calligan's damages to be assessed therefor, & afterwards, in order to make track for the said road, took down a portion of the barn on said leased premises. Said railroad Company did not thereby acquire the right of way as to said Wade, and said railroad Company is liable to said Wade for the injury done him, unless his damages have been assessed and paid by said Railroad Company - and the fact that said railroad Company under such circumstances took down a part of said barn, though with Calligan's consent is no reason why said Wade should not pay said quarters rent to said Calligan - And if the disturbances of the said Wade in his said possession of said leased premises were only those mentioned in the first and second instruction also the jury should allow the quarters rent due July 1st 1853,

29.

3^d

If the Jury allow said quarterly rent, they should also allow interest at the rate of six per cent per annum thereon from the first day of July A.D. 1853 till the present time.

4th

Even though the Chicago & Rock Island Rail Road Company may, for the purpose of making a track for their road, have taken down a part of the barn on the leased premises, this alone would not entitle the defendant to a deduction on his rent, — nor would he be entitled to such deduction if the railroad Company, ~~having~~ ^{& having} claiming the right to make a track for their road, did make it, & Halligan knowing they were making it, acquiesced in its being made, or at the request of the Railroad Company assisted in taking down & removing a portion of the barn.

5th

If the business in the Store under the hotel was a business which might be lawfully carried on in them, and the defendant did not leave the premises rented to him, but actually remained in possession of them till the rent became due, then although he may have been disturbed by said business the jury should make no deduction from the rent on account of such disturbance — and the jury are instructed that the business transacted in said Store was not, unlawful in its character.

6th

If after the disturbances mentioned in the 1st and 3^d instructions the defendant made continued to remain in the possession of the leased premises & after said disturbances occurred, paid rent for said premises, he would not by reason of said disturbances be entitled to a deduction on his rent.

Spec

- 7th Although the jury may believe from the evidence that the defendant Wade may have assigned his lease to Borley & left the premises before the quarter commencing on the first day of July A.D. 1853 had ended, he should not for this reason alone, be excused from the payment of any portion of the rent for the full quarter.
- 8th If the defendant Wade instead of Surrendering the possession of said premises to Halligan after the disturbances in the first & Second instructions mentioned, without the consent of Halligan, sold or gave his interest in the lease to Borley & let Borley into possession of the premises under him, he is not entitled in law by reason of said disturbances to any deduction on the rent which had before that time become due from him to Halligan -
- 9th The fact that Halligan leased premises of his own, other than those occupied by the defendant, to other tenants who carried on a business which was lawful, although such lawful business may have annoyed and disturbed the defendant Wade in the quiet enjoyment of his premises would not excuse Wade from the payment of any portion of his rent, unless Halligan intended when he leased such other premises, to disturb Wade or unless the business if properly conducted would necessarily disturb Wade. Nor knew then unless the disturbance rendered the premises occupied by Wade wholly valueless -
- 10th If the jury believe from the evidence that in order to make a track or way for the railroad of the Chicago & Rock Island railroad company it was required that a portion of the barn should be taken down, and if, in 1852, & after the tenancy under the lease commenced, the damages occasioned thereby to Halligan, were appraised by Commissioners appointed by the

Judge of the Circuit Court at four hundred dollars, and if, in 1853, it was agreed between Brewster acting for said Company & Halligan, that Halligan should, in consideration of four hundred dollars, take down the portion of the barn necessary, himself, and if Halligan commenced to take down the Stalls in the barn & at the request of Wade assisted, & put back the Stalls, & the company afterwards took down part of the barn without objection on the part of Halligan & against the consent of Wade these facts would not entitle the defendant to any deduction on his rent.

11th If under the petition & award \$400 were awarded to Halligan for the right of way & this sum was afterwards paid to Halligan & accepted by him, this would entitle the Rock Island Rail Road Company to the rights of way across the Halligan lot as to him, & a taking of the part of the lot under these circumstances by the company for their road though Halligan did not object to the taking would not excuse Wade from the payment of rent.

The Court refused to give the first and Eleventh instructions, modified the second so as to make it read as follows;

2^d "If after the said hotel & appurtenances were let by said Halligan to said Wade, & before said quarterly rent due July 1st 1853, became due, the Chicago and Rock Island rail road Company caused the said Halligan's damages to be assessed therefor & afterwards, in order to make a track for the said road took down a portion of the barn on said leased premises, said Rail Road Company did not thereby acquire the right of way as to said Wade, and said Rail Road Company is liable to said Wade for the injury done him,

unless his damages have been assessed and paid by
Said Rail Road Company - and the fact ^{that} Said
Railroad Company under such circumstances took
down a part of Said barn, is no reason why Said
Wade should not pay Said quarter's rent to Said
Halligan - and if the disturbances of the Said Wade
in his Said possession of Said leased premises
were only those mentioned in this instruction, the jury
should allow the quarter rent due July 1st 1853 "

Gave the fourth instruction as asked, modified
the fifth by adding at the end of it these words;
"This is the law unless the jury believe that such
disturbances destroyed the beneficial enjoyment of
the leased premises" - Modified the Sixth
so as to make it as follows: "6th. If after the
disturbances mentioned in the 2^d instruction, the de-
fendant Wade continued to remain in the possession
of the leased premises & after said disturbances oc-
curred paid rent for said premises, he would not
by reason of said disturbances be entitled to a deduction
on his rent", Gave the Seventh - Modified
the Eighth by erasing the word "first &" & changing
the word "instructions" to "instruction" - Modified the
Ninth by striking out the words "rendered the premises
occupied by ^{Wade} wholly valueless" and inserting in lieu
thereof the words "destroyed the beneficial use by
Wade of the premises" - Modified the tenth by strik-
ing out the words "objection in the past" and in-
serting in lieu thereof the words "the consent" -
and refused the Eleventh.

And to the opinion
of the Court in refusing said first & Eleventh,
instructions & each of them and in modifying said
other instructions and each of them, the plaintiff
at the time excepted -

The defendant requested the Court to instruct the Jury as follows:

If Halligan rented the premises in question to Wade under the leases read in Evidence, and if after Wade took possession of them under such renting, Halligan sold a substantial and valuable portion of said premises to the Rail Road Company and put said Rail Road Co. in the actual possession thereof, thereby turning Wade out of possession of that portion of the premises, and if said Rail Road Company has ever since held the actual, exclusive possession thereof, under said sale, then Halligan has no right to recover rent for any portion of the premises so rented to Wade from the time that Wade was so turned out of possession of a portion of the same.

2nd The proceedings offered in evidence do not show any legal condemnation of any portion of Lot six (6) in Block Sixteen (16) in Peru, for Railroad purposes, and the Railroad Company acquired no right to take possession of the land in question or any portion thereof by virtue of such proceedings.

3rd If the Jury believe from the Evidence that Halligan rented a Hotel to Wade, and afterwards rented the rooms under said Hotel for such purposes that Wade was necessarily disturbed in his quiet and peaceable possession of said premises, by the business carried on in said Hotel, with the consent of the Plaintiff, - then the Jury should deduct from the rent of said premises the amount that the rent was worth less, by reason of such disturbance.

4th Under the lease which has been given in Evidence the law will imply covenants against such acts of the Landlord as destroy the beneficial enjoyment

Green

of the lease, and if after Wade took possession of the premises in question under such lease, Halligan did do acts that destroyed the beneficial enjoyment, he can not recover of Wade the rent for the premises, for the time Wade was so disturbed.

3th

Green

If the premises were leased by Halligan to Wade to be used as a Hotel, and if after such leasing, Halligan did such acts as destroyed the beneficial enjoyment by Wade of said premises for the purposes for which they were leased, Halligan thereby forfeited his right to collect rent of Wade for the time Wade was so disturbed in the enjoyment of the premises.

4th

Green

If Halligan rented the premises in question to Wade to be kept as a Hotel and afterwards rented the Stores under said Hotel to be used in business, which if carried on as it lawfully might be and as such business ordinarily was conducted in that place, would necessarily destroy the beneficial use of said premises by Wade, and said business was carried on in the ordinary way of doing such business, and did thereby deprive Wade of the beneficial use of said premises as a Hotel, then Halligan can not recover rent for said premises during such disturbance.

The Court refused the third & gave all the others - and to the giving of the instructions given, & each of them, the plaintiff at the time Excepted -

The Jury found a verdict for the defendant - the plaintiff entered a motion for a new trial, the Court overruled the motion - and to the decision of the Court in overruling said motion, the plaintiff then and there excepted & prayed the Court to sign & seal this his bill of exceptions, which is done in open Court

M. E. Hollister Esq. n
Judge.

State of Illinois } J. F. Nash Clerk of the
Adair County } Review's Court in and for
said County and State do
hereby certify that the above foregoing comprises
a true full perfect and complete record of all
the orders of Court and papers on file in the case
of Patrick Halligan vs Thomas J. Nash - distress
for rent - as the same appear of record and on
file in my office.

On Testimony Whereof These Records set
my hand and the seal of said Court at
my office in Adair County this 31st day of
March A.D. 1858

J. F. Nash Clerk

~~123~~
Patrick Halligan
No 31-148
Thomas J. Wade
Reena & Mrs.

Filed April 9 1858
L. Leland
Clerk

Fees \$15.00 paid
by J. H. H.

State of Illinois---In the Supreme Court.
April Term, 1858.

PATRICK HALLIGAN, }
 ^{vs.}
THOMAS J. WADE. }

POINTS AND AUTHORITIES.

1st. In order to excuse the defendant from the payment of rent to the plaintiff, there should have been an eviction—and although, by some authorities, it appears that this may be accomplished by annoyances and disturbances by the landlord of the tenant, yet, unless such annoyances and disturbances cause the tenant to vacate the premises, he is not excused from the payment of rent.

Bennett, vs. Bittle, 4 Rawle, 339.

Pendleton, vs. Dyett, 4 Cowen, 581.

“ “ 8 Cowen, 727.

Olgivie, vs. Hall, 5 Hill, 52.

Waldron, vs. McCarty, 3 Johns, 471.

Salmon, vs. Smith, 1st Saund. 204, note 2.

Allen, vs. Pell, *et al.*, 4 Wind, 505.

Cohen, vs. Dupont, 1 Sandf, 260.

Gilhooly, vs. Washington, 3 Sand, 330.

Jackson, vs. Eddy, *et als.*, 12 Mis. 209.

The peculiar hardship of the case undoubtedly contributed to produce the decision in the 8th of Cowen—and it is one of those cases where it may well be questioned whether a good, general rule of law has not been made to yield to the particular circumstances of the case. And it may well be doubted whether the violation of the general rule may not produce more mischief than would have been caused by the adherence to it.

There is certainly much force in the dissenting opinions. But, be that as it may, that case differs materially from the case at bar, and the verdict would hardly have been sustained, had the disturbance, alleged to have produced the eviction, been the same as in the case at bar. See the case of Palmer, vs. Wetmore, 2. Sandf. 316. The business in the case, in 8th Cowen, was unlawful, and an eviction was actually produced thereby. In this case all the annoyances were by the transaction of lawful business, and not only no eviction was caused thereby, but the tenant assigned his lease to a third party. The occupation of a baker, tinman, or saloon keeper, is lawful in its character. One usually, indeed almost always, necessarily carried on in towns and cities, and in the thronged and busy parts thereof; and if the lessor of hotel cannot collect his rent because he has leased other premises in the neighborhood, for the above purposes, it is difficult to imagine a case where the lawful business of one tenant may not prevent the landlord from collecting rent from the occupant of another tenement. There is almost always some disturbance or annoyance to others, occasioned by the carrying on the various trades and occupations of life. Such things are among the necessary evils and inconveniences of a social state of existence; and the well being of society requires that they should be submitted to.

Would the fact that the defendant kept a bar room where ardent spirits was sold at retail, producing those evils and annoyances which are necessarily incident to it, or the arrival and departure of guests of the defendant at late hours of the night, with the attendant noises of omnibus drivers, &c., excuse the baker and tinman from the payment of their rent to the plaintiff?

Suppose a mere disturbance by the lawful occupation of the landlord's other tenants, which does not cause the tenant to leave, can be proved to reduce the amount of the rent, what would be the rule of damages? How much would a tin shop across a street, used as tin shops usually are, where an average quantity of noise is made daily, reduce the rent of a hotel on the opposite side of the street?

Would there be no rule, or would all be left to the caprice of the jury? If the disturbance is enough, in the opinion of the jury, where the tenant has left, to warrant them in finding that the tenant was thereby evicted, (and this would seem to be the only rule in the 8th of Cowen,) there would be no difficulty in ascertaining what should be the amount of the recovery, if any.

Again, there would be great difficulty in determining to what extent the landlord should be responsible for the acts of his tenants, and for the conduct of those who transact business with his tenants, and in ascertaining what portion of the disturbance is caused by the proper, and what by the improper manner of transacting the business. Indeed, how does it appear in this case that the plaintiff contributed to the production of the alleged disturbance any more than the plaintiff did in the case in the 3d of Sandf. 330.

The rule of the Court below, that the rent cannot be recovered during the time the disturbance continues, still further complicates the matter.

Suppose the hammering of tin, continued one hour in each twenty four, and quiet reigned in the tin shop during the other twenty three, would this defeat the recovery of all the rent, or only one twenty fourth part thereof? and how loud and how near must the noise be, to abate the rent one twenty fourth part? Would either the tin shop, saloon or bakery alone, have defeated a recovery, or would it require the joint disturbance of two or more to do it? or was it a question for the jury to determine the damages occasioned by the annoyances and to deduct them from the rent, or if the damages exceeded the rent, to find for the defendant?

Suppose the annoyance was by an indecent exposure of the person of the landlord, or by indecent language, profanity, and the like on his part, or by practicing on musical instruments, singing inharmoniously, &c., how are these and the like injuries to be estimated by the jury? I think no case can be found, where such acts of disturbance have been held a breach of the covenant of quiet enjoyment or where damages have been allowed for them by way of set off or recoupment against rent, accruing while the premises were actually occupied.

The Court below, by refusing the defendant's ~~their~~^{read} instruction, and by giving the sixth, gave the jury to understand that such a defence must either defeat the plaintiff's claim entirely, or that he must recover this whole rent, and took from them the right to recoup or diminish in part, the plaintiff's claim for rent. This was wrong, because if a defence at all it might be a partial, not a total one.

2d. The fact that the Rock Island Rail Road Company after an assessment of damages, and upon payment of the amount to Halligan, and with Halligan's consent and agreement that they might do so, took down part of the barn to make way for their road, does not constitute a defence on the part of Wade.

Elias vs. Welch, 6 Mass., 246.

Parks vs. Boston, 15 Pick. 198.

Patterson vs. Boston, 20 Pick., 159.

Frost vs. Earnest, 4 Whart., 86.

Footo vs. Cincinnati, 11 Ohio, 498.

While it is conceded that an eviction by the landlord of the tenants from part of the leased premises, suspends the collection of the whole rent, as laid down in Christopher vs. Austin, 1 Kernan, 216, yet it is denied that the taking possession by the Railroad Co, with the consent of the plaintiff, under the circumstances of this case, could possibly amount to an eviction of the tenant by the plaintiff from the portion of the lot and barn taken for the railroad track. Suppose instead of an assessment of his damages, and a consent on his part to take the money, and permit the company to occupy the land necessary for the way, he had, without any assessment, agreed to release his damages for \$400, and had executed a release to the company, who had the right to occupy upon making compensation, and had consented to the possession being taken; surely this would not be such a tortious interference with the possession of his tenants as would in law constitute an eviction which would discharge the tenant from the payment of his whole rent.

The Railroad Company by their charter, had the right to take the land upon making compensation and whether that compensation is ascertained by the adjudication of commissioners, or by agreement of the parties, is a matter of no consequence. As to the defendant, the railroad company committed an injury for which there is a liability on their part to him. The plaintiff being recompensed for his injury, ought to have acquiesced in the possession being taken as against him, and this is all that he has done. The refusal of the plaintiff's 11th instruction was clearly wrong.

Again, the reversioner may sell part of the leased premises, and if after a sale of a part the grantee of that part being so advised by the grantor should evict the tenant from the land so sold him, this would only suspend the portion of rent belonging to the grantee who would be entitled to a portion of the rent in the proportion that the part sold him was in value to the whole. Red vs Ward, 10 Harris 144. So that if the evidence showed a conveyance of part of the lot to the railroad Co. by Halligan, and the question of their right to take under their charter was not in the case. The eviction by the Company, though Halligan may have assisted therein, would only operate to diminish the rent, pro rata; therefore the defendant's first instruction is erroneous.

LELAND & LELAND,
for Pl'ff in Error.

SUPREME COURT OF ILLINOIS,

Third Division—April Term, 1859.

PATRICK HALLIGAN, }
 ^{vs.} } *Appeal from La Salle.*
THOMAS J. WADE. }

APPELLEE'S BRIEF.

An eviction by a landlord of a tenant from any substantial portion of the demised premises, suspends the collection of the whole rent.

Wade vs. Halligan, 16 Ill., 507, (this case.)

Watts vs. Coffin, 11 Johns R., 495.

Bonnett vs. Bittles, 4 Rawle, 339.

Lewis vs. Payne, 4 Wend., 429.

See, also, the cases cited upon 2d point.

2d. If the landlord do such acts as destroy the beneficial use of the premises leased, he forfeits his right to collect rent for the time the tenant is so disturbed in the enjoyment of the premises.

Wade vs. Halligan, 16 Ill., 512.

Briggs vs. Hall, 4 Leigh, 484.

Ogilvie vs. Hall, 5 Hill, 52.

Cohen vs. Dupont, 1 Sandf. 260.

Jackson vs. Eddy, 12 Mis., 209.

1 Starkie's R., 94.

Dyett vs. Pendleton, 8 Cow. R., 727.

Tomlinson vs. Day, 6 Eng. C. L. R., 327.

Edwards vs. Heatherington, 16 Eng. C. L. R., 271.

Conie vs. Goodwin, 38 Eng. C. L. R., 162.

3d. Whether there were acts done by Halligan which destroyed the enjoyment of the demised premises, was peculiarly the province of the jury to determine.

See

Cohen vs. Dupont, 1 Sandf., 260.

Bonnett vs. Bittles, 4 Rawle, 339.

4th. If Halligan, after leasing to Wade, alienated some portion of the demised premises, and Wade lost the use of such part: if Halligan had any claim for the rent of the remainder, he had no right to distrain, but must sue for use and occupation under a *quantum meruit*.

Tomlinson vs. Day, 6 Eng. C. L. R., 327.

Lawrence vs. French, 25 Wend., 443.

5th. When an eviction from some portion of the premises is shown, such eviction will be presumed to have continued until the contrary appears.

Lewis vs. Payne, 4 Wend., 423.

See written argument.

B. C. COOK, for Appellee.

31-148

Woolly as well

appellus Brief

STATE OF ILLINOIS, } ss. The People of the State of Illinois,
SUPREME COURT,

To the Sheriff of the County of *La Salle* Greeting :

Because, In the record and proceedings, and also in the rendition of the judgment of a plea which was in the *Circuit* Court of *La Salle* County, before the Judge thereof, between *Patrick Halligan*

plaintiff, and *Thomas J. Wade*

defendant, it is said that manifest error hath intervened, to the injury of the said

Plaintiff

as we are informed by *his* complaint, _____ the record and proceedings of which said judgment we have caused to be brought into our Supreme Court of the State of Illinois, at Ottawa, before the Justices thereof, to correct the errors in the same, in due form and manner, according to law; Therefore, We Command You, That by good and lawful men of your County, you give notice to the said

Thomas J. Wade

that *he* be and appear before the Justices of our said Supreme Court, at the next term of said Court, to be holden at Ottawa, in said State, on the first Tuesday after the third Monday in April *1888* to hear the records and proceedings aforesaid, and the errors assigned, if *he* shall see fit; and further to do and receive what said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said *Thomas J. Wade*

notice, together with this writ.

Witness, The Hon. JOHN D. CATON, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this *9th* day of *April* in the Year of Our Lord One Thousand Eight Hundred and Fifty-*Eight*

S. Leland
Clerk of the Supreme Court.

by J. B. Rice, Deputy

122

Patrick Halligan

by

Thomas J. Wade

scrier

Derived by sealing the within
with Thomas J. Wade

This 13th day of April 1858

Here - \$2.00

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and Matthew \$5.00

Adm. \$2.00

Filed April 13, 1858

L. Deland

Wade

Patrick Halligan

vs

Thomas J Wade

3 The first error assigned is the giving of the instructions asked by defendant.

The first instruction asserts what we deem to be good law that an eviction by the landlord of the tenant - from a part of the demised premises suspends the collection of the whole rent. For authorities see printed brief -

We claim that Halligan transferred a portion of the premises to the R.R.co & kept them in possession of the same. The question was whether the evidence showed a legal condemnation of those lands for Rail Road purposes or whether the Rail Road acquired their right from Halligan. The 2d instruction which was given for deft is that the proceedings offered in evidence did not show a legal condemnation of that portion of the farm lot taken by the R.R.co so that the alienation took place by act of law and not by act of Halligan

The proceedings were not sufficient to give the R.R.co the right to take the lot for several reasons,
First. No Award was made by the commissioners on that portion of the lot at all.
Their report is as follows.

To Patrick Halligan for all that part of lot

lot in Block sixteen in the town of Pond described in said petition and numbered on the margin thereof 128. the sum of four hundred dollars, see record page 23. that portion of said lot including these premises is not described in the petition under the No 128 in the margin but another portion is. Therefore the les had never condemned this lot. The abstract says there is doubt whether the figure is not 138 in the report, we deny it. The circuit court held it upon inspection to be 128. The original paper is not before this Court therefore this Court, therefore this Court cannot review the decision of the circuit court upon that question. The record shows in this Court that it was 128.

Second. The proof all shows that neither the R.R. Co or Halligan treated the land as condemned. Brewster swears page 18. that he agreed with Halligan for the right to take down that barn and that he directed the Contractor to take it down and that he acted by the express authority of Halligan. and Wade was evicted from a portion of the premises by Halligan's act. It was a valuable and substantial portion of the premises. see testimony of Bosley page 11. see also the testimony of Lewis page 12. Lewis also swears that Halligan himself assisted in taking down the barn. Wade objecting thereto. We insist then that it is clear from this record that Halligan did evict Wade from a substantial portion of the demised premises, at

any rate, it was a question upon which we had the right to have a jury pass, therefore the 2^d instruction was rightly given.

The 3rd instruction we asked was refused. The 4th 5th & 6th present this proposition.

If after leasing the premises to Wade, Halligan did such acts as destroyed the beneficial enjoyment by Wade of the premises, he forfeited his right to collect rent of Wade for the time he was so disturbed in the enjoyment of the premises, This is the law.

This point has been fully decided by this Court in this case

Wade vs Halligan 16 Ill 512 & cases there cited

The second error assigned is the refusal of the Court to give the 1st & 11th instructions asked by plff modifying the 2nd instruction asked by plff -

The 1st instruction assumes that if Halligan rented a portion of this hotel for such purposes that if they were properly carried on they would destroy Wades beneficial use of the premises. Yet if Wade continued to accept the premises until the quarters rent became due and was occupying when the rent became due he must pay the rent and would be entitled to no deduction.

The Court will see from the record that the rent was payable in advance. Wade left shortly after the quarter day, did not stay through the quarter and by

the terms of the instruction although he left that
very day and was justified in leaving he must pay
three months advance rent, this certainly is not the law.
This court says in this case when it was before the Court
16 Ills 512. "The law is well settled that an eviction in
" fact or in effect which destroys & renders the premises
" valueless may be set up against the recovery of rent
" and this extends to such acts of disturbance as affect
" the same thing

The case of Briggs vs Wall, 4th Leigh 484
is precisely in point. So also is Edwards vs Weatherington
16 Eng C.L.R. 271 also Conie vs Goodwin 38 Eng C.L.R. 162

So also Cohen vs Dupont 1 Sandf 262
and many of the other cases on my brief.

This instruction was in direct conflict with the rule
settled by this court in this very case upon the very
principles contended for by the appellant. This instruction
was wrong because if it be law and Wade was compelled
to leave and did leave the 2nd day of the quarter yet he
would not be entitled to any reduction, the rent being
in advance. The law says that the rent would be suspen-
ded by such acts of disturbance. If this instruction be
law Wade would be turned out & compelled to pay rent
not due, and which the law would enable him to
collect back. It amounts to just this, that he must pay
the whole quarters rent though he rightfully vacate the
premises on the 2nd day of the quarter. no case can
be found which says this. I ask the Court to see the

affect of the last clause of that instruction.

The modification of the second instruction asked by ptff presents the same question. it was only modified as to strike out an endorsement of the first instruction which it contained.

The only remaining point under this assignment of error is upon the 11th instruction asked by ptff.

To this I answer the law was correctly laid down by the Court upon this point in the 2nd instruction asked by ptff as modified and given and also in the 10th instruction asked by ptff and given. if this instruction means the same thing it was correctly refused upon the authority of the following cases

May vs Tallman 20 Ills 443

Curtis vs Martin 20 Ills 557

If this instruction contained a proposition of law different from the others it was correctly refused. If Walligan not under legal constraint but of his own mere motion granted to any body the right to enter upon & occupy a portion of the demised premises and such part was taken away from Wade by virtue of such grant then the acts done by Walligan's authority are his acts and the eviction was by him. will the Court observe that the state of facts assumed by the instruction is that the \$400. were received by Walligan for the right of way not for his revisionary interest merely, it means a sale and transfer of the right of way through that

barro if it differs from the other instructions named,
The Court will see that the law was laid down by the
Court as strongly against us as the law would possibly
warrant.

The 3rd & 4th assignments of error are the same
& will be considered together.

In the first place the questions submitted were peculiarly
within the province of the jury to determine

Bonnet vs Bittles 4 Rawle 339

Cohen vs Dupont 1 Sandf 260

2^d Many cases are cited to show that where part of demised
premises are taken by law for streets the rent continues.
I have nothing to say about that question for it is not in
this case. There was no condemnation of the right of way
across this lot

There was no adjudication that any part of this
lot was necessary to be taken for R.R. purposes.

It was never claimed by the Rail Road that they acquired
any right under these proceedings. Brewster was the agent
of the road. he swears record page 18. That Walligan
agreed with the Co to take down the barn by a day
certain or they might for him, they did by his authority,
he says the lot was not condemned to his knowledge,
Lewis says page 12. Walligan assisted in taking down the
barn. ~~Walligan contract with the Co was,~~ Walligan

was taking down the barn himself, Wade objected, This shows what Walligans contract with the Co was. It was to give them a present right of way through that barn, and he did it and thus he and they acting under his authority evicted Wade from a substantial portion of the premises, on this ground the verdict was rightfully for deft. The jury found the fact they had evidenced enough to do so. The Court will not disturb their verdict.

The evidence also shows that Walligan let people into that house to carry on business that destroyed Wade's beneficial enjoyment of it. Bosley swears (page 10. that a bakery & a tin shop were put in right under the dining room & parlors of the hotel, they were there three months prior to Wade's leaving. I Lewis (page 11. swears there were two groceries & a shop for the manufacture of tin & sheet iron ware, when they were passing one could not in the reading room & Ladies sitting room have heard it in the upper story - The building & furniture were calculated for a first rate hotel. the noises were a great damage, one of the groceries was a low drinking saloon very noisy. I was there twice late at night when they came out hollering bloody murder, a noisy drinking crowd were in the habit of assembling there. Hoffmann (page 13. swears. There were two whiskey shops in the basement, that the tin shop and whiskey shops must necessarily infer the business of a hotel. Many persons came from Wade's to his house

on that account.

E. A. Holmes page 16 testifies to same facts & also that Wado Biskil's coming in. That he told Halligan that the disturbances were ruining him and that he would have to give up the house to which Halligan replied that he did not care -

Mawley page 19 testified to the same facts. Saw gambling & fighting in the groceries, heard Wado remonstrate with Halligan & tell him it would ruin him & he must give up the house if these things were not stopped. Halligan said he did not care. Have seen a load of passengers go away at a time for that reason -

Richard Thome testified that there was fights & cries of murder in these whiskey shops at midnight, also as to the disturbances in the dining room caused by the tin shop. Thinks it impossible to keep a good hotel there under the circumstances.

It seems to me that the jury not only had a right to find but they were bound to find that Wado lost the beneficial enjoyment of this Hotel by the acts of Halligan & those acting under his authority -

But it is said that Wado did not lease the premises, that he transferred his lease to Bosley. It is true he transferred the lease, but none of the parties understood that Bosley took any rights under the transfer. The lease was not transferable. Bosley swears he bought Wado's furniture

And paid him for it but he gave him nothing for
the lease. He swears that Walligan refused to recognize
the transfer but made a new bargain with him,
that he paid rent for all the time he was there.
The distress was for a quarters rent in advance, of
course if he could collect this with the \$600. paid by
Bosley he would be much over paid. Bosley swears
expressly that he only paid Wad for the furniture &
that Halligan said he could not recognize the lease

B. C. Cook

For Appellant