No. 14441

Supreme Court of Illinois

Chicago South Branch Dock Company

---

vs.

Dunlap et al

71641

STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Division

No. 46

46

1863

14441

F. A. Pierce & Co., Printers, 120 Lake Street, Chicago.

SUPREME COURT.

THIRD GRAND DIVISION.

APRIL TERM, 1863.

THE CHICAGO SOUTH BRANCH DOCK COMPANY,
Plaintiff in Error,

vs.

GEORGE W. DUNLAP and BAYLOR H. GWATHMEY,
Defendants in Error.

Error to Superior Court of Chicago.

ABSTRACT OF RECORD.

1 Summons.

2 Returned Served.

3 Declaration in Assumpsit:

(1.) That certain premises of plaintiff's were demised to defendants at $1,000 per year rent, and that defendants held over under same terms.

6 (2.) Plaintiff demised certain other premises for $600 rent.

7 (3.) Defendants held under a demise from other parties, and continued in occupation and plaintiff notified defendants that if they continued to occupy the property of plaintiff it would charge them $600 for working season of 1860, and that defendants occupied premises but have not paid.

10 (4.) Agreement that defendants should pay $600 rent for the year 1860.

12 (5.) Indebitatus Assumpsit—use and occupation.

13 (6.) Indebitatus Assumpsit $1,000.

16 Plea. General Issue.

20 Trial.

21 Verdict for Defendants.

22 Motion for new trial by Plaintiffs.

Motion for new trial overruled.

23 Bill of Exceptions.

ABSTRACT OF TESTIMONY.

24 A. J. KNISELY, testifies, that he had entire charge of the plaintiff's business, as agent, since March 25, 1859. That defendants had occupied certain premises for brick making during the years 1859 and 1860.

26 That in the fall of 1859 he notified defendant Dunlap that if he occupied these premises the plaintiff would charge him rent.

That about the 20th of May, 1860, he served the following notice upon defendants, by delivering it to defendant Gwathmey, who read it and made no objection to it.

CHICAGO, MAY 22nd, 1860.

GENTLEMEN:

The lease of Brickyard in Greene's South Branch Addition to Chicago, to Geo. W. Dunlap & Co., having expired, you are hereby notified that if you wish to continue to occupy the said premises or any other property belonging to the Chicago South Branch Dock Company, you must enter into a new contract for the same, and that if you continue to occupy the said grounds of the said Company, without a written lease of the same, the said Company will charge you, as rent for said ground, for the present working season, the sum of six hundred dollars, payable three hundred dollars ($300) on the first day of August, 1860, and three hundred dollars ($300) on the first day of December, 1860.

[Signed] CHICAGO SOUTH BRANCH DOCK CO.
By A. J. KNISELY, Agent.

26 Shortly after serving this notice witness staked out the line to which Defendants were to dig. Presented bill for rent due August 1st, 1860, to one of defendants who referred him to the other defendant. Knows the value of the premises occupied by defendants. They were worth $600 each year.

Defendants dug from five to twenty feet beyond the line marked out, and their excavations have never been filled up. Know the value of the clay dug out. It was worth twenty-five cents a yard when dug out and from ten to thirteen cents a yard in the ground. From measurement I estimate that defendants excavated, in 1859 and 1860, to amount of 450 feet in length by 90 feet in width and 15 feet in depth.

27 On cross examination witness testified that he was the first agent of plaintiff. The premises occupied by defendants are about 2¾ miles from the Court House in Chicago; in the spring of 1859 the vicinity was unoccupied except for brick yards.

28 Witness formed his oppinion of the value of the premises occupied by defendants, from the rates paid by others for neighboring and similar situated brick yards, and among other leases described one of a neighboring lot made to William G. Rogers, dated March 31st, 1860, by which Rogers was to pay $1,350 rent for three years, and to do an amount of filling estimated by defendant Dunlap at $2,000.

29 On the re-examination witness identified the lease referred to by him in his cross examination and made to William G. Rogers, and testified that defendants executed in his presence the following endorsement on said lease, to wit:

"This lease being assigned to us this day by the within named William George Rogers, we hereby accept said assignment, and acknowledge ourselves bound by all the terms and conditions of the within lease, and hereby

covenent and agree with said Chicago South Branch Dock Company to pay them the rent stipulated and specified within, and to do the work and make the excavations and pay for the filling therein provided.

Witness our hands and seals this 13th day of Aug. A. D. 1860."

DUNLAP & GWATHMEY. [SEAL.]

Plaintiff's counsel then offered to read this endorsement in evidence, to the reading of which defendant's counsel objected, which objection was sustained and plaintiff by its counsel excepted.

30 HIRAM JOY, testified premises were worth about $550, per annum.

BENJAMIN WILSON, testified: $500 a year, would be a fair rent of premises occupied by defendants.

31 On cross examination witness testified that he was a tenant of plaintiff's and paid $500 a year and filled up ground.

The following question was then asked by defendant's counsel, to which plaintiff's counsel objected; objection overruled and exception taken.

"Without reference to what you and others have paid for portions of the same tract of land, but judging by your experience of brick making generally, wherever you have followed it, what is the just, fair value per year of the yard rented by defendants?"

In answer witness testified that he did not think the land was really worth anything.

32 HENRY W. ZIMMERMAN, testified that he leased grounds occupied by defendants, and their value, that he thought the use of them in 1859 and 1860 was worth from $1 25 to $1 50 per foot.

On cross examination witness said he did not know what land rented for in the vicinity, but based his judgment on the value of the land.

Defendant's counsel moved to exclude testimony of this witness, which motion was granted, and plaintiff's counsel excepted.

33 Admitted that premises occupied by defendants were property of plaintiff in 1859 and 1860.

DEFENDANT'S TESTIMONY.

33 JOHN GARTH, testified to amount of bricks made by defendants in 1859–60.

33 THOMAS CORWIN, testified that he thought the clay and ground were not worth more than the labor of excavation and filling ground.

35 He testified on cross examination that he knew nothing of the value or cost of brick.

C. SLATER, testified that he supposed ground was worth something in 1860.

PATRICK KEARNEY, testified that the clay was hard to dig.

JAMES SUTTON, testified that the clay seemed good enough, that he rented a few acres of land at $9 an acre and raised potatoes on it.

INSTRUCTIONS.

The plaintiff by its counsel asked the Court to give the following instructions which were refused, to which refusal the plaintiff excepted.

36. (1.) If defendants excavated and used clay from the lands of plaintiff without any special contract or agreement, but with the knowledge and assent of the plaintiff's agent, the law will imply a promise on the part of the defendants to pay for such clay as much as it was reasonably worth.

36 (2.) In determining the amount of damages, it is proper for the jury to consider the sum, fixed by plaintiff in the notice given to defendants, and the evidence that no objection was made to the said sum, by defendants, with the other evidence, as to the value of the use of the premises.

Motion for new trial and grounds.

34 ## ERRORS ASSIGNED.

1. Permitting defendant's counsel to ask of witness Wilson, question objected to by plaintiff.

2. Refusal to allow plaintiff to read in evidence, the written acceptance of the Rogers lease proved to have been executed by defendants.

3. Refusal of instruction asked for by plaintiff, and marked, (1.)

4. Refusal of instruction marked, (2.)

5. Exclusion of testimony of Zimmerman.

6. Overruling motion for new trial.

7. Refusing to set aside the verdict as against law and evidence.

8. The verdict is unsustained by evidence, and the Court erred in refusing to set it aside.

9. Giving defendants' instructions.

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46

The Chi. Co. Br. Dock Co.

vs

Geo. W. Dunlap

et al.

Abstract

Filed April 23. 1863

L. Leland Clk

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

To the Sheriff of Cook — County, GREETING:

Because, In the record and proceedings, and also in the rendition of the judgment of a plea which was in the Superior Court of Chicago, Cook County, before the Judge thereof, between The Chicago South Branch Dock Company

plaintiffs, and George W. Dunlap and Baylor H. Gwathney

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

as we are informed by its 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 George W. Dunlap & Baylor H. Gwathney

that they 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 ~~next~~ first, to hear the record and proceedings aforesaid, and the errors assigned, if they 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 Dunlap & Gwathney notice, together with this writ.

Witness, The Hon. John D. Caton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 10th day of April — in the year of our Lord One Thousand Eight Hundred and Sixty-two.

L. Leland

Clerk of the Supreme Court.

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Chicago S. B. Dock Co.

No. vs.

George W. Dunlap & Baylor A. Swathmey

SCIRE FACIAS.

Filed March 24 A. D. 1863

S Leland Clerk.

F. A. Pierce & Co., Printers, 120 Lake Street, Chicago.

SUPREME COURT.

THIRD GRAND DIVISION.

APRIL TERM, 1863.

THE CHICAGO SOUTH BRANCH DOCK COMPANY,
Plaintiff in Error,
vs.
GEORGE W. DUNLAP, AND BAYLOR H. GWATHMEY,
Defendants in Error.

Error to Superior Court of Chicago.

POINTS AND AUTHORITIES FOR PLAINTIFF IN ERROR.

This was an action in assumpsit for use and occupation of certain premises and for the value of certain clay dug on plaintiff's premises.

On the trial in the court below it was established beyond controversy, that the defendants with the plaintiffs consent used premises of the plaintiff during the years 1859 and 1860 for making bricks, and excavated and used a large amount of clay from plaintiff's premises.

If there was any value to the use of the premises, the plaintiffs were clearly entitled to recover; but the jury found a verdict in favor of the defendants.

The errors complained of are these:

I.

The question allowed to be put to the witness Wilson.

This witness was competent to testify to the value of the use of the premises, for he knew for what neighboring and similarly situated premises were rented. It does not appear that he had any other qualification which would enable him to form an opinion on the point. The question required him to dismiss from his mind the only grounds upon which he could form an opinion, and then say what was the value of the use of the premises. He might as well have been asked the "just and fair value of the premises," judging from his experience in the whale fishery business.

II.

The refusal to allow the endorsement on the Rogers lease to be read in evidence.

Defendant's counsel had brought this lease of neighboring premises to the attention of the Court; the endorsement was proved to have been executed by defendants. It was an admission of the most solemn kind that some neighboring premises in the same tract were worth a certain sum, and tended to show that the premises in question were of a certain value. It was just as competent evidence as a direct admission of the defendants that the use of the premises for which the suit was brought was worth a certain sum.

Morgan vs. *Morse*, 13 Gray, 150.

III.

The refusal of Instruction (1.)

An Implied contract is that which reason and justice dictate, and which therefore the law presumes a person has contracted to perform. 3 *Black. Com.*158.

When the plaintiff's property was taken by the defendants without any special contract, it would seem that the law would imply a promise on the part of defendants to pay what it was reasonably worth and if so this instruction should have been given.

1 *Black. Com.* 443.
Story on Sales 229.
Abbott vs. *Hermon*, 7 Greenl. 118.
Brackett vs. *Norton*, 4 Conn. 524.

IV.

Refusal of Instruction (2.)

This instruction merely called the attention of the jury to a fact proved, as proper to be considered with the other evidence. It did not instruct them that this was conclusive or even important. Why should it not have been given?

If defendants had expressly admitted that the premises were worth a certain sum it would surely have been competent evidence against them. If when notified that they would be charged $600 for the premises they had said it was not worth as much, no admission as to the value could have been claimed against them; that when notified they made no objection to the amount, is evidence tending to prove an admission that the premises were worth that sum. The weight to be given to the evidence was left entirely to the jury. Attention was merely called to the evidence as bearing on a material point, and if given the instruction might have changed the verdict.

Fogg vs. *Hill*, 8 Shep. 529.
Rich vs. *Flanders*, 39 N. H. 303.
Fenno vs. *Weston*, 31 Vt. 345.
Eaton vs. *Welton*, 32 N. H. 356.
Boston & Worcester R. R. Co. vs. *Dana*, 1 Gray 104.

V.

The exclusion of Zimmerman's testimony.

This witness had formed his judgment of the value of the use or rent from the value of the land. The value of the land is one ground on which to form an opinion of the rent to be paid for it. The amount for which a lot will rent is a test of its value, and conversely the value is a test of the amount of the rental.

VII.

Giving the following instructions for defendant's;

1. In the absence of a special agreement the defendants are chargeable for no more than the just value of the use of the premises over the amount of the labor performed by them upon the premises if such labor was done by the consent and with the knowledge the of plaintiff or his agent.

2. If the use of the premises was worth no more than the labor so performed by defendants, with the assent of plaintiff or his agent, the jury will find for defendants.

(1.) If defendants had performed labor on the premises for plaintiff they should have plead it or given notice of set off.

(2.) The labor performed by defendants on the premises was in digging out clay for their own purposes—not for the benefit of the plaintiff. To charge the plaintiff for this labor and off set it against the use of the premises, labor which enriching the defendants, made the plaintiff poor indeed, is a monstrous perversion of the doctrine of Law on which the instructions are based.

VIII.

The other errors assigned question the correctness of the judgment on the general grounds that the evidence did not authorize or justify the verdict.

We are aware that Courts are often reluctent to disturb a verdict, on the ground that questions of fact have been wrongly decided by a jury. Yet where a jury disregard well established facts, and through caprice or mistake pay no attention to the evidence, the suitor has no protection but in the Court. It would seem from the evidence that every fact was fully made out to entitle the plaintiff to recover, and where the jury were so manifestly misled, and so clearly overlooked the material facts of the case, we submit that the judgment ought not to be sustained.

THOMPSON & BISHOP,

Counsel for Plaintiff in Error.

35 46

Chi. So. Br. Dock Co.

vs.

Geo. W. Dunlap et al

Points & Authorities for Plff in Error

Filed Apl 23. 1863

J. Sloan
Clk

F. A. Pierce & Co., Printers, 120 Lake Street, Chicago.

SUPREME COURT.

THIRD GRAND DIVISION.

APRIL TERM, 1863.

Defendants in Error.

Error to Superior Court of Chicago.

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(1.) If defendants had performed labor on the premises for plaintiff they should have plead it or given notice of set off.

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The other errors assigned question the correctness of the judgment on the general grounds that the evidence did not authorize or justify the verdict.

We are aware that Courts are often reluctent to disturb a verdict, on the ground that questions of fact have been wrongly decided by a jury. Yet where a jury disregard well established facts, and through caprice or mistake pay no attention to the evidence, the suitor has no protection but in the Court. It would seem from the evidence that every fact was fully made out to entitle the plaintiff to recover, and where the jury were so manifestly misled, and so clearly overlooked the material facts of the case, we submit that the judgment ought not to be sustained.

THOMPSON & BISHOP,

Counsel for Plaintiff in Error.

25 46

Chi. S. Ry. Docket.

Geo. M. Dunlap
Clerk.

Points & authorities
for Plff in Error

Filed April 23. 1873
D Secord
Clk

Thompson & Bishop
for Plff in Error

Supreme Court of Illinois
Third Grand Division
April Term A D 1863

The Chicago South Branch
Dock Company
Pff in Error
vs
George W Dunlap &
Baylor W Gwathmey
Defts in Error
} Error to Cook

Now comes the defendants in error in the above entitled cause, by their attorneys Walker & Dexter, and say that there is no error in the record and proceedings aforesaid, and they pray that the judgment aforesaid may be in all things affirmed &c—

Walker & Dexter
Attys for Defts in Error

Supreme Court of Illinois
Third Grand Division
April Term 1863

The Chicago South Branch
Dock Company
Plffs in Error

vs

George W Dunlap &
Baylor McGwathmey
Defts in Error

Error to Cook

It is hereby stipulated and agreed by and between the parties to the above entitled cause by their attorneys, that said cause be submitted to said court for trial on written arguments to be furnished before the close of the said April Term of said court.

Walker & Dexter
Attys for Defts in Error

Thompson & Bunn
Attys for Plff in Error

46
Chicago S. Branch Dock Co
vs
Dunlap et al.
Brief & Stipln.

Filed Oct. 20, 1863
Clerk

F. A. Pierce & Co., Printers, 120 Lake Street, Chicago.

SUPREME COURT.

THIRD GRAND DIVISION.

APRIL TERM, 1863.

THE CHICAGO SOUTH BRANCH DOCK COMPANY,
Plaintiff in Error,

vs.

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covenent and agree with said Chicago South Branch Dock Company to pay them the rent stipulated and specified within, and to do the work and make the excavations and pay for the filling therein provided.

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DUNLAP & GWATHMEY. [SEAL.]

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Motion for new trial and grounds.

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9. Giving defendants' instructions.

25 46

The Chicago So Br. Dock Co.

vs.

Geo. W. Dunlop et al

Abstract

Leave not to argument of Dept.

Filed April 23. 1863

S Leland Clk

46

STATE OF ILLINOIS.

SUPREME COURT.

THE CHICAGO SOUTH DOCK COMPANY, Plaintiff in Error,
vs.
GEORGE W. DUNLAP and BAYLOR H. GWATHNEY,
Defendants in Error.

POINTS, AUTHORITIES AND ARGUMENT FOR DEF'T IN ERROR.

Filed May 7. 1862
S. Strong Clk

CHICAGO
JAMESON & MORSE, PRINTERS.
1862.

SUPREME COURT,

THIRD GRAND DIVISION.

APRIL TERM, 1863.

THE CHICAGO SOUTH DOCK COMPANY, Pl'ff. in Error,

vs.

GEORGE W. DUNLAP and BAYLOR H. GWATHNEY.

Error to Superior Court of Chicago.

POINTS, AUTHORITIES, AND ARGUMENT OF THE COUNSEL FOR THE DEFENDANTS IN ERROR.

This was an action of assumpsit for rent, use and occupation, and for the value of certain clay dug on the plaintiff's premises.

The declaration contained six counts.

First.—That certain premises of the plaintiff were demised to the defendants, at a rent of $1000 per annum, and that the defendants held over on the same terms.

Second.—That the plaintiff demised certain other premises to the defendants, at a rent of $600 per annum. See Record, page 6

Third.—That the defendants were the tenants of the plaintiff, of lots 129, 130, 133, 134, 135 and the south $51\frac{53}{100}$ feet of lot 132, in Green's South Branch Addition to Chicago, under a demise made 7

on the 15th day of May, A. D., 1856, between the plaintiff, that is to say, between the persons who afterwards constituted the South Branch Dock Company, and the assignors of the defendants; that the defendants occupied these lots under this demise until the 22nd day of May, A. D., 1860, without any written lease thereof; that on said 22nd day of May, 1860, the plaintiff notified the defendants in writing that if they continued to occupy said premises without a written lease, they should charge them $600 as rent for the same for the working season of A. D., 1860; that defendants occupied the premises, but have paid nothing.

10 *Fourth.*—That the defendants, by the sufferance and permission of the plaintiff, were joint tenants with the plaintiff of certain premises without any written lease, and that on the 22nd day of May, A. D., 1860, the following notice was served on the defendants, to-wit:

"CHICAGO, May 22nd, 1860."

"Messrs. GEO. W. DUNLAP and BAYLOR H. GWATHNEY:—

Gentlemen:

"The lease of brick-yard in Green's South Branch Addition to Chi-
"cago, to Geo. W. Dunlap & Co., having expired, you are hereby
"notified that if you wish to continue to occupy the said premises,
"or any other property belonging to the Chicago South Branch
"Dock Company, you must enter into a new contract for the same,
"and that if you continue to occupy the said grounds of the said
"Co. without a written lease of the same, the said Co. will charge
"you as rent for said ground for the present working season, the
"sum of six hundred dollars, payable, three hundred dollars on the
"first day of August, and three hundred dollars on the first day of
"December, A. D., 1860.

CHICAGO SOUTH BRANCH DOCK COMPANY,
BY A. J. KENSELEY,
Agent.

That the defendants agreed to the terms of this notice, and occupied the premises, but have not paid the rent.

12 *Fifth.*—Indebitatus assumpsit—use and occupation.

13 *Sixth.*—Indebitatus assumpsit, $1000.

surplus earth material from said docks as soon as the same are completed. Said canal is to be excavated at the bottom in such shape as shall be directed by said parties of the second part, averaging ten feet in depth, as aforesaid. Said canal to be completed on or before the fifteenth day of May, A. D. eighteen hundred and fifty-nine (1859); said work to be completed in sections of one hundred feet, commencing as aforesaid, and proceeding northward until finished.

Second. Said parties of the first part further agree to pay all taxes and assessments that may be levied or assessed upon any and all improvements, which they may put or cause to be put upon the tract hereinafter designated as a brick yard; and the said parties of the second part, in consideration of the agreements of the parties of the first part, hereinbefore mentioned, do hereby agree that said parties of the first part shall have the use of said land for 250 feet in width on each side of said canal for said term of from one to three years, ending on the fifteenth day of May, A. D. 1859, for a brick yard, and for other purposes connected therewith. Also that said parties of the first part are to have all the material that shall be taken from said canal, over and above the quantity necessary to be used in filling up and constructing said docks, and in levelling the ground, as aforesaid. Said parties of the first part to vacate said land as fast as the same shall be docked, as aforesaid.

It is mutually agreed that all the agreements herein contained shall extend to and be obligatory upon the executors, administrators and assigns of the respective parties; provided the parties of the first part are not to be required to fill in the slough on the west side of said tract.

In witness whereof the parties have hereunto set their hands and seals the day and year first above written."

R. McCLELLAND. [SEAL.]
R. GARRETSON. [SEAL.]
N. B. RAPPLEYE. [SEAL.]
ISAAC C. BOYD. [SEAL.]
AMOS G. THROOP. [SEAL.]
THOS. R. FERRIS. [SEAL.]
R. B. MASON. [SEAL.]
W. S. SAMPSON. [SEAL.]
C. L. STETSON. [SEAL.]
By W. L. SAMPSON,
Attorney.

This lease, by its terms, expired on the 15th day of May, A. D. 1859, at which time the defendants were in possession under the same, and so continued in the possession and occupancy of said premises, and to make brick and excavate the canal, in the same manner as they had previously done, through the entire year of 1859, and up to the 22d day of May, 1860, without any new understanding, agreement, or lease, and with the full knowledge, approbation and consent of the plaintiff. On the 22d day of May, A. D. 1860, the plaintiff, by its agent, A. J. Knisely served on the defendants the notice before mentioned, by handing it to Mr. Gwathney, one of the defendants, who read it, and said he (Mr. Knisely) must see the old man (Dunlop) about it. This is all that was said by Mr. Gwathney about it, and there is no evidence that it was ever served on Mr. Dunlop, or that he ever heard of it.

26

At this time, it is to be remembered, the defendants had already held over one year, with the knowledge, approbation, and consent of the plaintiff, and had commenced on the second year, seven days of which had already elapsed, before the service of this notice upon them. At this time their rights and liabilities for another year had become fixed, and they were entitled to the premises for that year, upon the same terms and conditions as they had previously held them. Both parties were bound by the terms of the old lease, and no notice, demand or desire on the part of the plaintiff to change or alter these terms were of any avail as against the defendants, at this late hour, without their consent or agreement to the change, and this they clearly did not have, as the evidence shows that all that was said by Mr. Gwathney, when the notice was handed to him, was, that he (Knisely) must see the old man (Dunlop) about it," which shows, as far as he was concerned, a want of assent or agreement to the same. The expression made use of clearly indicates a dissent to the notice on his part, and a reference to Mr. Dunlop, who, it does not appear, was ever served with the notice.

26

The rights and liabilities of the defendants for the year 1860, having become fixed, before the service of this notice upon them, by a holding over, which entitled them to the premises for that year, upon the terms and conditions of the original lease, nothing

short of an express agreement or assent on their part could divest them of those rights.

Taylor's Landlord and Ten., 51.
4 *Tenn. Rep.*, 361.
4 *Kent's Com.*, 112.

There being then no agreement or assent on the part of the defendants to this notice—no change of their rights or liabilities in relation to these premises—they were entitled to the use of them for the year 1860, free of rent. They vacated the premises in August, 1860, consequently, as far as the premises described in this written lease are concerned, the plaintiff is not entitled to recover any thing.

There are, however, certain other lots not expressly described in the above written lease, for the use and occupation of which the plaintiff claims the defendants are indebted to it. These lots lie immediately north of, and adjoining, the premises mentioned in the written lease, and on the line of the canal mentioned in the same, which the defendants were to excavate. The plaintiff avers that the defendants held possession of, and occupied those lots, under and by virtue of an unwritten or verbal lease with the plaintiff, bearing date the 15th day of May, 1856, which is the same day and year the written lease before mentioned bears date. The third count of the plaintiff's declaration particularly describes these lots, and avers as follows (we quote the language): "The defendants had become " and were the tenants of the said plaintiff of a certain other mes- " suage and premises, to wit: certain lots and parcels of land known " and described as lots number 129, 130, 133, 134, 135, and the " south 51.53 feet of lot 132, in Greene's South Branch Addition " to Chicago, under and by virtue of a certain indenture before " that time, to wit, on the 15th day of May, A. D. 1856, made be- " tween the persons who afterwards constituted the said Chicago " South Branch Dock Company, and the assignors of the de- " fendants."

That the defendants held possession of, and occupied these lots during the year 1859, and up to the month of August, A. D. 1860, is clearly shown by the evidence; that they occupied them for a brick yard, excavated the said canal running through the same, and

did leveling and filling on said lots, with the knowledge and consent of the plaintiff, appears equally clear; and it nowhere appears that the defendants did not have possession of, and occupy said lots during the whole length of time from the date of said lease, on the 15th day of May, 1856, up to, and until, the month of August, A. D. 1860. Mr. Kinseley, the plaintiff's agent, testifies that
27 they put their buildings on one of the lots—Lot 129—he does not state when, but it is to be presumed that this was done when they first took possession of the premises in 1856. And the presumption is, (the lease being established), that they did occupy all of said lots during the whole of the period above mentioned.

But how, and upon what terms and conditions, did the defendants hold and occupy these lots? The record shows, as far as it shows anything, that they held and occupied them upon the same terms and conditions as they held the premises particularly described in the written lease before mentioned. In the first place the plaintiff, as we have seen, declares on a verbal lease for these lots, as having been made on the same day and year with the written lease: the evidence that these lots lie immediately north of and adjoining the premises mentioned in the written lease, and on the line of the same canal, and the fact that the plaintiff, in all probability, had the same desire to have the canal extended through these lots as it did through the premises mentioned in the written lease, all goes to show that the terms upon which the plaintiffs were to hold these lots were the same as those mentioned in the written lease. There is still another thing that renders it extremely improbable that the defendants would, or did, at that time, agree to pay any rent for said lots, when they had leased the premises lying immediately south of them, paying no rent. The terms of their
Exhibit A, Record. written lease required them to commence this canal on the south side of the premises therein mentioned, and to extend the same north through said premises to the north line of the same, completing the canal as they progressed, in sections of one hundred feet; this being the order in which the excavation was to be made, it is clear that it must have been some time before these lots would be of any use to them at all; they rented the premises for the sole purpose of obtaining clay for the manufacture of brick; is it therefore at all probable that they would pay more for premises where a long

and indefinite time must elapse before they could obtain this clay, than for premises where they could obtain it at once? this certainly is highly improbable, to say the least. There is another fact which goes to show conclusively that the defendants, by the terms of that parol lease, were to pay no rent for the use of these lots, and that is, that during all this period from the 15th day of May, 1856, up to the service of the notice before mentioned upon the defendants, there is no evidence that the plaintiffs ever called on the defendants for rent for these lots, or that the defendants ever paid any rent for the same; had there been any rent paid, it would most surely have made its appearance somewhere in the record, but it is not there. There being then evidence that the defendants held these lots under a parol lease, for this length of time, and no evidence that any rent was ever called for, or received, by the plaintiff for the same, the presumption is, that the defendants, by the terms of that lease, were to pay no rent for these premises.

The statement of Mr. Kinseley, the plaintiff's agent, in his direct examination, goes to show that the defendants were to pay no rent for these lots. He says: "In the fall of 1859 I told Mr. Dunlap that we wanted an understanding with him, and that if he occupied those premises (the lots) the Company would charge him rent." The notice also which Mr. Kinseley served on the defendants on the 22nd day of May, 1860, shows most conclusively that the defendants were to pay nothing for the use of said lots; its language is, 'If you continue to occupy the said grounds of the said Company, without a written lease of the same, the said Company will charge you as rent for the said ground for the present working season, the sum of six hundred dollars, (see page 2). This notice also shows, beyond question, that there was a contract or lease for these lots. In terms, it admits that there was a lease either verbal or written, for all the lots of the plaintiff's occupied by the defendants, and must have included the lots in question. 26

Thus it appears beyond all question that there was a verbal lease for these lots, made and entered into at the same time the written lease before mentioned was executed, between the same parties, for the same object and purpose, on the part of both parties; and that the premises have been used and occupied for the same purpose and business; that the same canal mentioned in the written

lease has been extended and excavated, and filling and leveling done by the defendants on these lots, in the same way and manner, in all respects, as they were required to do by the terms of the written lease on the premises therein particularly described.

Taking all these facts and circumstances, together with the plaintiff's own evidence in the case, and it shows beyond all question, that the understanding of the parties was, that the defendants should pay no rent. There is an entire want of any evidence in the case showing, or tending to show, any agreement to pay rent on the part of the defendants, or that any rent was ever called for, paid or received, for, or on account of these lots, during the whole time they were so occupied by the defendants, a period extending over four years from the date of said lease; and the conclusion inevitably follows, that by the terms of that lease the defendants were to pay no rent for these premises.

It devolved upon the plaintiff, in order to maintain his action, to show that there was either an express or implied agreement on the part of the defendants to pay for the use and occupancy of these premises.

This, we contend, he has wholly and entirely failed to do, but has shown instead, and in place of such an agreement, one, whereby the defendants were to have the use and occupancy of these lots free of rent; one which, in view of all the facts and circumstances in the case, appears to be identical in its terms and provisions with the written lease before mentioned. There is no testimony tending to show that it is different, and much that shows beyond question that it is the same in all its terms and provisions.

The whole evidence in the case taken together shows most conclusively that this was the understanding of the parties at the time, that it was then and there understood and agreed that the terms and provisions of the written lease should be extended over, apply to, and control the possession and occupancy of these lots. The conduct of the parties since shows this; and we contend that in determining this case, the Court must presume that the jury so found the fact, as they might have done under the instructions given, as we shall show hereafter.

This fact being established, what were the rights of the defendants to these premises on the 22nd day of May, 1860, the day the notice above mentioned was served on them.

Although the parol agreement for a term of three years was void as a term, yet as the defendants took possession under it, it operated as a tenancy from year to year,

Clayton vs. Blakely, 8 *Tenn. R.*, 3.
Schuyler vs. Seggett, 2 *Cowen*, 660.
People vs. Rickert, 8 *Cowen*, 226.

which tenancy is to be regulated in every respect acoerding to the terms and conditions of the agreement, except as to its duration; all the other terms and conditions except the time it is to run, are as binding and obligatory upon the parties as though the agreement had been good and binding as a lease for the term.

Rigg vs. Bell, 5 *Tenn. R.*, 471.
Ld. Raymond's Rep., 136.
2 *Cowen*, 660.
4 *Cowen*, 350.
15 *John's Rep.*, 507.
Taylor's Land. and Ten., 34.

A tenancy from year to year, then, being established between the parties upon the terms and conditions of this agreement, it could only be terminated by the plaintiff, by giving to the defendants the proper and legal notice to quit, at a proper time before the expiration of the year. The law is well settled that if this notice is not given, and the landlord permits the tenant to enter upon the possession of a new year, there is a tacit renovation of the contract for another year, and the parties are bound by the terms and provisions of this contract in all respects as in the previous year.

4 *Kent*, 112.
3 *Salk*, 222.
4 *Wend.*, 2[illegible]7.
Taylor's Land. and Ten., 50, 45.

The facts in this case show that on the 22nd day of May, 1860, the time the notice before mentioned was served on the defendants,

they had already been in possession of these premises three years, under a tenancy from year to year, and had already occupied them several days on the fourth ; the last year's tenancy having expired on the 15th day of May previous.

At this time the rights of the defendants had become fixed for another year, and they weee entitled to the premises for that year at least, upon the same terms, in all respects, as they had held them during the previous years, and upon the terms and conditions of the agreement: no desire, request, or notice of the plaintiff at this time could, by any possibility, deprive them of their rights, except by a consent or agreement to the same on the part of the defendants.

Was there then a consent or agreement on the part of the de fendants to the terms of this notice? most certainly not. The testimony of the plaintiff's own witnesses shows this fact beyond all doubt.

26 Mr. Kinseley, the plaintiff's agent and the party who served this notice, testifies that Mr Gwathney took the notice, read it, and said he (Kinseley) must see the old man (Dunlap) about it; that this was all that was said.

30 Hiram Joy, also the plaintiff's own witness, testified that he saw Kinsely hand a notice to Mr. Gwathney, in the spring of 1860; that Gwathney told Kinseley that he (Kinseley) must talk with the old man.

This is all the evidence there is in the case in relation to this subject; there is no evidence that Kinseley ever saw Dunlap about it, or presented the notice to him, or that Dunlap ever saw or heard of this notice; and the expression made use of by Mr. Gwathney shows most unmistakeably that he did not consent or agree to it, but on the contrary that he did not, and would not consent to the same; that he would have nothing to do with it.

The evidence shows that the defendants vacated the premises in August, 1860, three months after the service of this notice on them by the plaintiff.

There is no evidence that the defendants occupied the premises expressly covered by the written lease during any part of the years 1859 and 1860.

affirmed.

But, admitting that the defendants did occupy the lots in question, without any agreement or lease for the same; still, we contend, that the plaintiff was not entitled to recover. The evidence shows that at that time, property in that vicinity was entirely unoccupied, except for brick yards, and it is not pretended by the plaintiff, that the use of these lots was of any value, except for the purpose of making brick. There is no evidence in the case tending to show that the use of them was of any value for any other purpose whatever. The testimony shows that the defendants occupied these lots during the year 1859 and up to the month of August, 1860, for a brick yard; that during that period they made brick, excavated clay from the canal, and did leveling and filling on these lots; there is no pretence that they occupied them for this purpose during any other or longer period. It also appears that during all this time, the defendants occupied and used these lots for that purpose, with the full knowledge and consent of the plaintiff. This is clearly shown by the testimony of John Grath, who testified that in 1859 and 1860, he kept a boarding house for the defendants about two hundred yards from the brick yard; that during this time he saw Kaseley, the plaintiff's agent, about the premises, sometimes once a week, and sometimes oftener. 33

This being the case, had the defendants merely excavated the

and the judgment of the Court below must be affirmed.

What does the testimony show on this point?

26 Mr. Knisely, the plaintiff's sole agent, testified that his opinion was, that the premises were worth six hundred dollars for the
28 year 1859, and the same for 1860; formed his opinion of the value of the premises from the rates paid by others for brick yards in the vicinity. There is no evidence that this witness had any knowledge of brick making or that he knew the cost or value of brick.

30 Hiram Joy testified that he thought the premises were worth about five hundred and fifty dollars a year. On his cross-examination, he stated that he was an ice dealer and knew nothing about brick making.

31 Benjamin Wilson, the plaintiff's own witness, testified that his business was that of a brick maker; that he knew the premises in question; that he was a tenant of the plaintiff, and paid $500.00 a year for about the same ground. On his cross-examination he testified that he supposed $500.00 a year was a fair rent when he leased his premises; that he understood that he came in on the same terms as others, but that he did not think the premises were really worth anything; had carried on the business of brick making in Chicago for six years; that the clay on the defendants' tract was poorer than on his; that a man could not afford to pay any rent,

the clay and the use of the premises, were not worth more than the labor of excavating, and filling up the ground.

C. Slater testified that he was a brick maker; knew the yards occupied by the defendants in 1859 and 1860; that there was more gravel in the clay, in defendants' yard, than in other yards. 35

Patrick Kearney testified that he had worked at brick making about seven years; worked for defendants in 1859; that the clay was pretty hard to dig, and more gravelly than any he saw in other yards.

James Sutler worked for defendants in 1859; the clay seemed to be good enough; heard them complain that it was full of gravel; had worked for Walker and Cutting; now worked for Wilson; was a bad judge of clay; there seemed to be more gravel in defendants' clay than in the others.

The evidence shows that the defendants did considerable filling on these lots. Mr. Knisely testified that they were all filled up except a strip from seventy-five to one hundred feet in width on the west side of the canal; that in some places they filled from six inches to a foot; that it was worth about $700 to fill up all the lots occupied by the defendants, six inches in depth.

From the foregoing evidence, it clearly appears, that the premises in question, during the time they were so occupied by the defendants, were worth nothing over and above the cost of the excavating and filling done.

This, we contend, is the just and fair inference or conclusion, to be drawn from all the evidence in the case, and it is but fair to presume that the jury so found the fact.

On this view of the case then, unless the Court below excluded evidence material to the issue, and which, if admitted, must necessarily have brought the jury to a different conclusion, the judgment of the Court below must be affirmed.

THE ERRORS ASSIGNED,

Other than those already considered, which question the correctness of the judgment, on the general grounds that the evidence did not authorize or justify the verdict, are as follows:

II.

That the Court erred in permitting the following questions to be put to the witness Wilson:

31 "Without reference to what you and others have paid for por-
"tions of the same tract of land, but judging from your experience
"of brick making generally, wherever you have followed it, what
"is the just, fair value per year of the yard rented by defendants."

This question is proper, for the following reasons:

First.—Because the plaintiff was seeking to recover upon an implied promise, for the use and occupation of premises, used for the particular business enquired of, and this question calls for an answer directly on the point in issue, viz: the value of those particular premises for a brick yard.

Second.—For the reason that the question involved is not, what the premises or similar ones might have rented for in that vicinity, at that time, but what were they really worth to the defendants; and as it appeared that the witness had every qualification necessary to enable him to form a just and correct opinion upon this point, viz: that he was a brick maker by profession, and knew the premises in question, and the quality of the clay; it called for the best evidence that could possibly be had.

Third.—Because it calls upon the witness to exclude all outside considerations and to express an opinion in a matter upon which, it appeared, he was fully qualified to speak, and upon the point directly in issue.

Fourth.—For the reason that this is one of those cases where testimony from necessity embraces a compound of fact and opinion. It is a question of the value of the use of certain property for a particular purpose. "This value is a matter of opinion, of estimate,

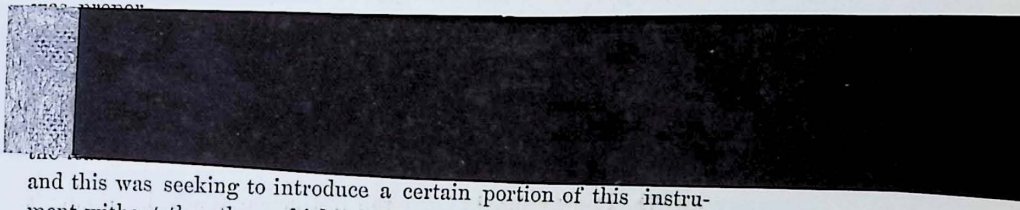
and it must be admitted as a matter of necessity, else the value cannot be proven, the law having no other standard to fix the value as a fact, than opinions of witnesses."

Butler vs. Mehrling, 15 *Ills.* 490.
Steamboat Clipper vs. Linus Logan, 18 *Ohio*, 396.

II.

The refusal to allow the endorsement on the Rogers lease to be read in evidence. (See Record, "Exhibit B.")

The refusal to allow this endorsement to be read in evidence



and this was seeking to introduce a certain portion of this instrument without the other, which is improper.

1 *Phil. Ev.*, 340, 341.

Third.—Because it has no relation to the question, or property in dispute, and tends merely to show an admission on the part of the defendants, that certain other property in the vicinity was worth a certain rent, when there is no evidence in the case, showing or tending to show, that the premises in question were of a similar or equal value.

Fourth.—For the reason that it has no tendency to show the value of the premises in question. As the learned Counsel for the plaintiff says: It is an admission that some neighboring premises were worth a certain sum; but that it tends to show that the premises in question were of any certain value, with all due deference to the learned Counsel, we deny; unless it is first shown that the premises are similarly situated, equally accessible to the market, and that the clay is similar in quality; neither of which facts are shown in this case.

The authority cited by the Counsel, in support of his position on this point, does not apply to this case. In that case the contract introduced in evidence, was one concerning the identical brick, the value of which the plaintiff was seeking to recover, and there was evidence tending to show that the amount specified in the contract, which he was to receive on final settlement, was the same he had agreed to pay the plaintiff.

III.

The third error assigned is that the Court refused to give the following instruction, viz:

[redacted]

The Court refused to give this instruction as asked, but gave it with the following words added, viz: "if that was the expectation and understanding of the parties."

This instruction as asked was properly refused, for the following reasons:

First.—Because it is not based on the facts and is not applicable to this case upon the facts shown.

Second.—Because it instructs the jury that in making up their verdict, if they shall find certain facts, they must find for the plaintiff, when those facts may have been proved in this case, and still the plaintiff not be entitled to a verdict.

Third.—For the reason that it allowed the jury to base their verdict upon certain facts, to the exclusion of others, which, it was absolutely necessary, should be taken into consideration in order to enable them to come to any correct or just conclusion.

IV.

The fourth error complained of is, that the Court refused to give the following instruction, viz:

"In determining the amount of damages, it is proper for the jury to consider the sum fixed by plaintiff in the notice given to defendants, and the evidence that no objection was made to said sum by defendants, with the other evidence as to the value of the use of the premises."

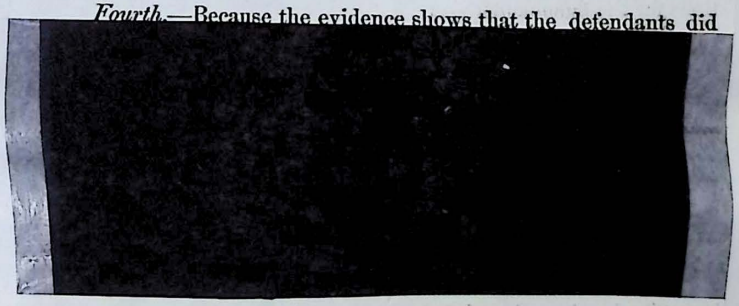
This instruction is clearly bad, and was properly refused for the following reasons:

First.—Because it had a tendency to mislead the jury.

Second.—For the reason that it is an instruction as to damages, on the count for use and occupation; and, as such, allowed the jury to take into consideration matters, which could have no tendency to show the real damage sustained, and was calculated to mislead them, by calling their attention to a point of evidence which could have no bearing upon the subject to which their attention was called.

Third.—Because it instructed the jury to take into consideration, in determining the amount of damages, evidence which had not the slightest bearing upon that question.

Fourth.—Because the evidence shows that the defendants did



Zimmerman testified that he knew the grounds occupied by the defendants, and their value; that he thought the use of them in 1859 and 1860 was worth from $1.25 to $1.50 per foot, each year.

On cross-examination, he testified as follows: "I don't know what land rents for in the vicinity, my judgment of the value of the rent or use is based upon the valuation of the land. I know the value of the land. I have known of sales made of lands in the vicinity, and have rented lands in the city."

This witness, it will be seen, had no knowledge, by which he was enabled to form any correct or just opinion of the value of the use of these premises; his opinion was formed solely from a knowledge of the value of the premises, which is no criterion by which to judge of their value for brick making, or for a brick yard. It does not appear that he knew anything about brick making or the value of the premises for that purpose. Premises of equal value in the immediate vicinity might not be worth a farthing for this purpose, others again, of much less value, might be worth double the premises in question for this particular business, consequently the testimony of this witness was properly excluded.

Jefferson Ins. Co. vs. Cotheal, 7 *Wend.*, 72.
Mayor of N. Y. vs. Pentz, 24 *Wend.*, 668.

VII.

The sixth error assigned, is the giving of the following instructions for the defendants, viz:

34

The law is well settled that "mutual demands arising out of the same subject matter, and capable of being balanced against each other, may be adjusted in one action. One demand is considered

as reduced or liquidated by the other, and the surplus is regarded as the real cause of action. The defendants' claim is deducted from that of the plaintiff, and the latter recovers the excess only. The defendant is not allowed to recover any balance, but he may recoup to the extent of the plaintiff's damages."

Stow vs. Yorwood, 14 *Ills.*, 424.

The labor performed by the defendants on the premises, was for the benefit of the plaintiff, and was done with the full knowledge and consent of the plaintiff's agent. The foregoing instructions simply ask that the value of the labor may be recouped, or set off by the defendants against the claim made for the clay taken, or for the use and occupation of the premises, which was perfectly proper. These instructions, therefore, were properly given.

VII.

The other errors assigned question the correctness of the judgment, on the general grounds that the evidence did not authorize or justify the verdict.

The law is well settled, that in trials by jury the weight of testimony is a question to be decided exclusively by the jury, and their decision cannot be assigned for error; and unless there be a plain and flagrant disregard of facts the court will not disturb the verdict, even though the evidence would seem to preponderate against the finding of the jury.

Johnston vs. Moulton, 1 *Scam.*, 532.
Douglas vs. Toveeg, 2 *Wend.*, 352.
Leigh vs. Hodges, 3 *Scam.*, 18. Hedges

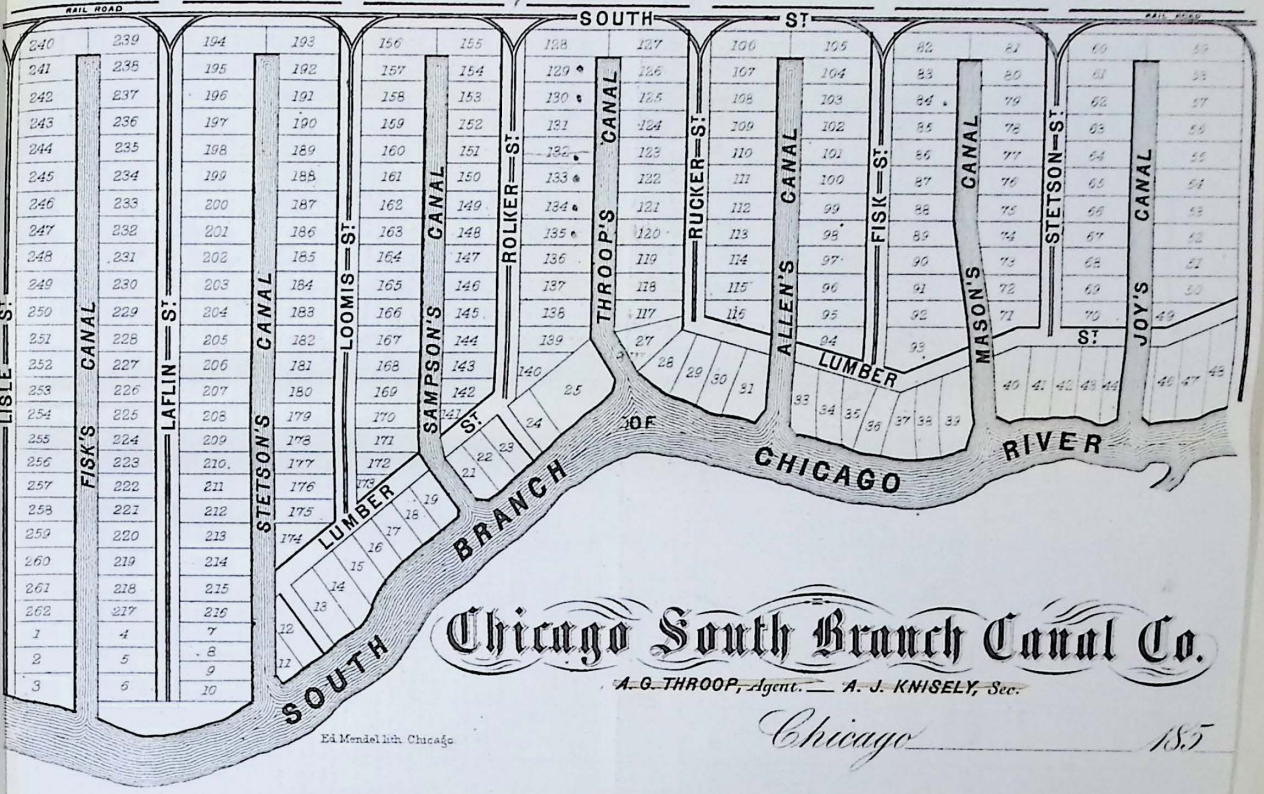
From all the facts in the case, it is very clear that the jury were fully justified in finding a verdict for the defendants, and although this Court should be of opinion that there are errors in this record, we submit that they are of such a nature as could not reasonably have affected the verdict.

The refusal of the above instructions of the plaintiff could not have done this, because the same principles of law, in another form, were given for the plaintiff in the other instructions asked. The exclusion of Zimmerman's testimony could not, because there was other and stronger evidence than his upon the same point. We submit, therefore, that substantial justice has been done, and that the judgment of the Court below should be sustained.

WALKER & DEXTER,

Attorneys for Defendants in Error.

"Exhibit A"



Chicago South Branch Canal Co.

A. G. THROOP, Agent. — A. J. KNISELY, Sec.

Ed. Mendel lith. Chicago

Chicago _____ 185

UNITED STATES OF AMERICA,

STATE OF ILLINOIS, COUNTY OF COOK, SS.

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

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

Van H. Higgins, Grant Goodrich } Judges.

Carlos Haven Prosecuting Attorney.

Anthony C. Hesing Sheriff of Cook County.

Attest, Thomas B. Carter Clerk.

Be it remembered that heretofore to wit on the Twenty third day of January in the year of our Lord One thousand eight hundred and sixty one, there was issued out of and under the Seal of said Superior Court of Chicago a Peoples Writ of Summons in a certain suit therein, wherein, The Chicago South Branch Dock Company was Plaintiff and George D. Dunlap and Baylor B. Greathouse, were Defendants: Which Summons, with the Sheriffs return thereon indorsed is in words and figures as follows, to wit,

"State of Illinois } ss. The People of the State of
County of Cook } Illinois, to the Sheriff of said County: Greeting.

We command you as we have before commanded you that you Summon George W. Dunlap and Baylor N. Swatbury, if they shall be found in your County personally to be and appear before the Superior Court of Chicago of said Cook County, on the first day of the next term thereof to be holden at the Court House in Chicago in said Cook County on the first Monday of February next to answer unto The Chicago South Branch Dock Company in a plea of Trespass on the case upon promises to the damage of the said plaintiff as is said in the sum of One Thousand dollars.

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

Witness Walter Kimball clerk of our said Court and the Seal thereof at Chicago aforesaid this 23rd day of January A. D. 1861.

Seal

Walter Kimball. clerk

(Sheriffs return) "Served by reading to the within named defendant Geo. W. Dunlap Jany 24th 1861, and also by reading to the other within named defendant this 25th day of February 1861.

O. C. Heming - Sheriff
By Wm Hayman - Deputy"

And hereafter to wit on the twenty eighth day of December A. D. Eighteen hundred and sixty, the said Plaintiff filed in the office of the Clerk of said Court its Declaration in said cause: Which declaration is in words and figures as follows to wit.

"State of Illinois } The Superior Court of Chicago
Cook County . ss. } Of the January term A. D. 1861.

The Chicago South Branch Dock Company plaintiff in this suit by Hampton & Bishop its Attorneys complains of George W. Dunlap and Baylor H. Swathmey defendants therein who were summoned &c of a plea of trespass on the case on promises.

For that whereas before the making of the promise and undertaking hereafter next mentioned to wit on the 22nd day of May in the year of our Lord 1860, to wit, at the County of Cook aforesaid the said Defendants were possessed of and in a certain Messuage and premises with the appurtenances, situate in said County of Cook, by virtue of a certain demise before that time made to the said defendants whereby for the considerations therein mentioned, the said Messuage and premises with the appurtenances were demised leased and set unto the said defendants for and during a certain term of years at and under a certain rent, to wit, the sum of One thousand dollars per each and every year of said term, thereby made payable from the said Defendants unto the said plaintiff avers that the said Defendants remained and continued possessed of the said Messuage & premises with the appurtenances until the separation of the said term as tenant thereof. And the said plaintiff further avers that at the separation of said term, it (the said plaintiff) was so possessed of the said Messuage

and premises and appurtenances in fee simple or otherwise as to have good and perfect right and power to convey and devise the same.

And the said Plaintiff further avers that thereupon afterwards and at and upon the expiration of the said term, to wit, on the 7th day of May A. D. 1860, to wit, at the County of Cook aforesaid in consideration that the said plaintiff at the special instance and request of the said defendants would permit and suffer the said Defendants to continue to occupy the said messuage and premises with the appurtenances and to become tenant thereof to the said plaintiff for and during a certain term, to wit, the term of One year then next ensuing, and so on from year to year as long as the said plaintiff and the said Defendants should respectively please, and in consideration that the said plaintiff, at the like instance and request of the said Defendants had undertaken and faithfully promised the said Defendants to perform and fulfil all things during the time the said Defendants should so continue such tenant from year to year to the said plaintiff as aforesaid, as had been promised and agreed on and to observe and fulfil all such promises and agreements as should been made and concluded upon in and under the aforesaid demise, to be duly performed and fulfilled during the continuance of the term first aforesaid, they the said granted on the part and behalf of the lessee or lessors thereof, they, the said defendants undertook and then and there faithfully promised the said plaintiff to do perform and fulfil during the time they should so continue tenants of the said messuage and premises and appurtenances to the said plaintiff from year to year as aforesaid, all such covenants and

undertakings as have been made and agreed upon in and by the aforesaid defendants to be done performed & fulfilled on the part and behalf of the said defendants during the continuance of the first aforesaid term of years thereby granted.

And the said plaintiff avers that it (the said plaintiff) confiding in the said promise and undertaking of the said Defendants afterwards to wit, on the VV nd day of March A.D. 1860, to wit, at Cook County aforesaid, did permit and suffer the said Defendants to continue to occupy the said Messuage and premises with the appurtenances and to become tenant thereof to the said Plaintiff for and during a certain term, to wit, the term of One year and so on from year to year so long as the said Plaintiff and the said defendants should respectively please upon the terms aforesaid.

And the said Plaintiff in fact says that the said Defendants by virtue of that permission, did continue such tenant for a long time, to wit. for a year, and from year to year as aforesaid of the said Messuage and premises with the appurtenances to the said plaintiff and from thence hitherto to wit, at the County of Cook aforesaid: yet the said defendants not regarding their said promise and undertaking, but contriving (and intending to injure and deceive the said plaintiff in this behalf, during the time they so continued such tenants from year to year as aforesaid, of the said Messuage and premises with the appurtenances as aforesaid, did not nor would at all times during the continuance of the said defendants said tenancy, pay to the said plaintiff, nor to any person for said plaintiff the aforesaid rent, nor any part thereof, according to their said promise and undertaking, but so to do have hitherto wholly neglected and refused, and still do

neglect and refuse, to wit, at the County of Cook aforesaid.

And for that whereas also heretofore to wit on the twenty second day of May in the year of our Lord one thousand eight hundred and sixty, at the County of Cook aforesaid the said Plaintiff demised to the said defendants a certain other messuage and premises with the appurtenances. To have and to hold the same to the said defendants for a certain term of time to wit, the working season then next ensuing, and fully to be completed and ended, Yielding and paying therefor during the said term to the said plaintiffs the rent of Six hundred dollars of lawful money of the United States: payable, three hundred dollars thereof, on the first day of August A.D. 1860, and three hundred dollars thereof on the first day of December A.D. 1860, and the said Plaintiff in fact says that previous to the said demise the said defendants had entered into the said demised premises, and that afterwards to wit on the 22nd day of May A.D. 1860, at the County of Cook aforesaid, in consideration that the said plaintiff had undertaken and faithfully promised the said defendants to permit and grant unto the said defendants the use, occupation and possession of said messuage and premises with the appurtenances thereto for the term aforesaid, under such demise as aforesaid, they the said defendants undertook and then and there faithfully promised the said plaintiff, to pay unto the said plaintiff as rent for the aforesaid premises, the aforesaid sum of Six hundred dollars, one half thereof upon the first day of August A.D. 1860, and the other half thereof on the first day of December A.D. 1860 And the said plaintiff avers that the said Defendants thereupon, to wit, upon the

22nd day of May A.D. 1860, remained in the said demised premises with the appurtenances and were possessed thereof from thenceforth until and upon the first day of December A.D. 1860, to wit, during the whole of the working season aforesaid. And the said plaintiff also avers that confiding in the aforesaid promise and undertaking of the said defendants, it (the said plaintiff) did permit and grant unto the said defendants the use occupation and possession of said messuage and premises with the appurtenances for and during said term, and hath fulfilled all and every undertaking and promise by it (the said plaintiff) in this behalf made. Yet the said Defendants, not regarding their said promise and undertaking, but contriving & did not nor would pay to the said plaintiff the aforesaid sum of five hundred dollars, nor any part thereof, but so to do hath hitherto wholly refused and neglected and still do neglect and refuse, to wit at the County of Cook aforesaid.

And for that whereas also before the time of the making of the promise and undertaking of the said Defendants as hereafter next mentioned, to wit on the 14th day of May A.D. 1859 at the County of Cook aforesaid the said Defendants had leased and were tenants to the said plaintiff of a certain other messuage and premises, to wit, certain Lots & Parcels of Land known and described as lots Nos. 129. 130. 133. 134. 135 and the South 5 53/100 feet of Lot 132 in Green Smith Branch Addition to Chicago and situate in said County of Cook, under and by virtue of a certain Indenture before that time, to wit, on the 15th day of May A.D. 1856 at the County aforesaid, made between the said Plaintiff (that is to say between the persons who afterwards constituted the said Chicago

South Branch Dock Company of the first part and the assignors of the said defendants of the other part, Whereupon and after the expiration of the tenancy so existing under said Indenture as aforesaid the said defendants remained and continued in occupation and possession of said Messuage and premises for a long time, to wit, for during and until the 27th day of May A.D. 1860 by and under the sufferance and permission of said plaintiff who was then and there the owner of said premises in fee simple and without any written lease therefor from said Plaintiff And the said plaintiff avers that afterwards and during the occupation and possession of said Messuage and premises by said defendants as last aforesaid, to wit, on the 27th day of May A.D. 1860 at the County of Cook aforesaid, it (the said plaintiff) did notify in writing the said defendants, that if and provided they the said defendants should thereafter continue to occupy said Messuage and premises as aforesaid without a written lease of the same, then and in such case the said plaintiff would charge and demand from said defendants as rent for such occupation of said Messuage and premises for and during the present (that is to say) the then ensuing) monthly season the sum of Six hundred dollars, payable, Three hundred dollars on the first day of August A.D. 1860 and Three hundred dollars on the first day of December A.D. 1860 - Whereupon afterwards to wit on the 27th day of May A.D. 1860 at the County of Cook aforesaid, in consideration that the said Plaintiff had permitted and suffered the said defendants to occupy possess and enjoy the said Messuage and premises so as aforesaid and in consideration that the said plaintiff, at the request of

said defendants, have undertaken and faithfully promised the said Defendants to permit and suffer the said defendants to occupy possess and enjoy the said Messuage during the working season then present, that is to say, during thenceforth and until the first day of December A.D. 1860, they the said defendants undertook and then and there faithfully promised the said Defendants to permit and suffer the said defendants Plaintiff well and truly to pay unto the said Plaintiff as fair and just rent therefor to wit, the sum of Three hundred dollars on the first day of August A.D. 1860, and the sum of Three hundred dollars on the first day of December A.D. 1860 And the said Plaintiff avers that it (the said Plaintiff) confiding in the said promise and undertaking of the said defendants afterwards, to wit, on the 23d day of May A.D. 1860, at the County aforesaid, did permit and suffer the said Defendants to occupy possess and enjoy the said Messuage and premises and hath fulfilled all (the said Plaintiffs) undertakings and promises in that behalf And the said Plaintiff also avers that the said Defendants there and continued in occupation and possession of the Messuage and premises aforesaid during the working season aforesaid, that is to say, from the 23d day of May A.D. 1860, during and until the first day of December A.D. 1860

Yet the said Defendants not regarding their said promise and undertaking, but contriving & fraudulently intending craftily and subtilly to deceive and defraud the said Plaintiff in this behalf, did not nor would pay to the said Plaintiff, nor to any person for the said Plaintiff, the said sum of Three hundred dollars, payable as aforesaid on the first day of December A.D. 1860, nor any part of either of said sums of Money but so to do have hitherto wholly refused and neglected and still do neglect & refuse

to wit, at the County of Cook aforesaid.

And for that whereas also before and at the time of the making of the promise and undertaking of the said Defendants as hereafter next mentioned, the said Defendants had become and were, under and by virtue of the Sufferance and permission of the said Plaintiff thereof, joint tenants to the said plaintiff of a certain other messuage and premises, with the appurtenances without any written lease thereof from the said Plaintiff and thereafter to wit, on the 3/2 day of May A.D. 1860 at the County of Cook aforesaid the said Defendants received from the said Plaintiff a Notice in writing in the words and figures following, that is to say,

"Chicago May 3d 1860

Messrs Geo. W. Dunlap (Jun) Baylor & Gwathney

Gentlemen,

The lease of Brick Yard in Greens South Branch Addition to Chicago to Geo. W. Dunlap & Co having expired, you are hereby Notified that if you wish to continue to occupy the said premises, or any other property belonging to the Chicago South Branch Dock Co. you must enter a New Contract for the same and that if you continue to occupy the said ground of the said Co., without a written lease of the same, the said Co will charge you as rent for said ground, for the present working season the sum of Six hundred dollars, payable Three hundred dollars ($300) on the first day of August 1860, and Three hundred dollars ($300) on the first day of December 1860.

Chicago South Branch Dock Co

By A. J. Kinsley - Agent.

Which said ground and premises in the said Declaration mentioned are the Messuage and premises so occupied as aforesaid by the said Defendants under the sufferance and permission of the said Plaintiff.

And thereupon afterwards to wit, on the 22d day of May A.D. 1860, at the County of Cook aforesaid, in consideration that the said Plaintiff, at the special request of the said Defendants would permit & suffer the said Defendants to continue to occupy the said Messuage & premises with the appurtenances and to be tenants thereof to the said Plaintiff for and during the term of the working season for brickmaking of the year 1860, they the said Defendants undertook & faithfully promised the said Plaintiff to pay the said Plaintiff as rent for said Messuage & premises with the appurtenances, the sum of Six hundred dollars for said term, in the manner and at the time indicated in the aforesaid notice in writing made as aforesaid from the said Plaintiff to the said Defendants.

And the said Plaintiff avers, that it (the said Plaintiff) confiding in the said promise & undertaking of the said Defendant afterwards to wit on the 23d day of May A.D. 1860 at the County of Cook aforesaid and during the said working season, did permit and suffer the said Defendants to continue to occupy said Messuage and premises with the appurtenances and to be tenant thereof to the said Plaintiff during the term of the working season for brickmaking of the year 1860 And the said plaintiff in fact says that the said defendants by virtue of said last permission and sufferance did continue to occupy said Messuage and premises with the appurtenances and to be tenant thereof to the said Plaintiff during the term of the

said working season to wit, from the 23d day of May A.D 1860 during and until the first day of December A.D 1860, to wit, at the County of Cook aforesaid.

Yet the said Defendants not regarding their said promise and undertaking but contriving &c. did not nor would pay to the said Plaintiff the said sum of Six hundred dollars in the manner and at the time indicated in said Notice, nor in any manner or at any time nor any portion thereof but so to do have hitherto wholly refused and neglected and still do neglect and refuse to wit at the County of Cook aforesaid.

And for that whereas also afterwards to wit, on the first day of December A.D 1860 at the County of Cook aforesaid, the said Defendants were indebted to the said Plaintiff in a large sum of money, to wit the sum of Six hundred dollars for the use and occupation of a certain other messuage and premises, with the appurtenances of the said Plaintiff, by the said defendants and at their special instance and request and by the sufferance and permission of the said Plaintiff, for a long time before then elapsed then and there occupied possessed and enjoyed. And being so indebted they the said defendants in consideration thereof afterwards, to wit, on the day & year last aforesaid, at the County of Cook aforesaid undertook and then & there faithfully promised the said Plaintiff, to pay it (the said Plaintiff) the said last mentioned sum of money, when they the said defendants should be thereunto afterwards requested.

And whereas also afterwards to wit, on the first day of December A.D 1860 at the County of Cook aforesaid, the said Defendants were indebted to the said

Plaintiff in the further sum of Money to wit, the sum of One thousand dollars, for that the said Plaintiff had before that time suffered and permitted the said Defendants to have and hold the occupy, possess and enjoy a certain other Messuage and premises with the appurtenances of the said Plaintiff, and that they, the said Defendants had, according to the said last mentioned sufferance and permission of the said Plaintiff, had, holden, used, occupied possessed and enjoyed the same for a long space of time then elapsed, they the said defendants undertook and then and there faithfully promised the said Plaintiff to pay it (the said Plaintiff) so much Money as the said Plaintiff therefor reasonably deserved to have of them the said Defendants when they the said Defendants should be thereunto afterwards requested And the said Plaintiff avers, that it (the said Plaintiff) therefore reasonably deserved to have of the said Defendant the further sum of One thousand dollars lawful Money to wit, at the County of Cook aforesaid whereof, the said defendants afterwards to wit on the day & year last aforesaid there had notice.

And whereas also the said defendants afterwards to wit on the day and year last aforesaid at the County of Cook aforesaid, accounted with the said Plaintiff of and concerning divers other sums of Money from the said Defendants to the said Plaintiff before that time due and owing, and then in arrear and unpaid, and upon such accounting the said defendants were then and there found to be in arrear and indebted to the said plaintiff in the further sum of One thousand dollars of like lawful Money and being so found in arrear and indebted they the said Defendants undertook and then and there faithfully

promised the said Plaintiff to pay it (the said Plaintiff) the said last mentioned sum of money, when they the said defendants should be thereunto afterwards requested.

Nevertheless the said defendants not regarding their said several promises and undertakings, but contriving to defraud the said several sums of money, or any or either of them, or any part thereof, to the said Plaintiff although often requested so to do, but the said Defendants to pay to it (the said Plaintiff) the same have hitherto wholly refused & neglected and still do neglect and refuse to wit, at the County of Cook aforesaid, to the damage of the said Plaintiff of One thousand dollars, and therefore the said Plaintiff brings this suit &c

Thompson & Bishop
Pltffs Attys.

(Copy of the Instrument)

"Chicago May 2nd 1860

Messrs Geo. W. Dunlap and Baylor & Gwathmey

Gentlemen,

The lease of Brick Yard in Grand South Branch Addition to Chicago to Geo. W. Dunlap &c having expired, you are hereby notified that if you wish to continue to occupy the said premises, or any other property belonging to the Chicago South Branch Dock Co. you must enter into a New Contract for the same, and that if you continue to occupy the said grounds of the said Co. without a written lease of the same, the said Co. will charge you as rent for said grounds for the present working season, the sum of Six hundred dollars. payable Three hundred dollars ($300) on

the first day of August A. D 1860 and Three hundred dollars ($300) on the first day of December A. D. 1860.

Chicago South Branch Dock Co
by A. J. Kinsley. Agent"

And afterwards to wit on the fourth day of February (being one of the days of the February term of said court) A. D. Eighteen hundred and sixty one, the following proceedings were had in said cause and entered of record in said Court to wit.

"The Chicago South Branch Dock Company . . . . .
vs
George W. Dunlap and Baylor H. Gwathney . .

} Assumpsit.

On Motion defendants Attorney it is Ordered that the rule to plead herein be and it is hereby extended to Monday Next.

And thereafter also on the said fourth day of February A. D. Eighteen hundred and sixty one came the said defendants and filed in the Office of the Clerk of said Court, their certain plea & Affidavit of Merits in said Cause, Which plea and Affidavit is in words and figures as follows, to wit

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

George W. Dunlap & Baylor H. Gwathney } Of the February
vs } Term A.D. 1861
The Chicago South Branch Dock Company }

And the said defendants by Walker Van Arman & Dexter their Attorneys come and defend the wrong and injury when &c and pay they did not undertake or promise in manner and form as the said Plaintiff has above thereof complained against them And of this they the said defendants put themselves upon the Country &c.

Walker. Van Arman & Dexter
Attys for Defts"

And the Plaintiffs do the like
Thompson & Bishop
Plffs Attys"

"State of Illinois }
County of Cook } ss

Baylor H Gwathmey of said County being duly sworn says that he is one of the Defendants in the above entitled cause & makes this affidavit for himself and for and on behalf of the other defendant therein That he is informed by his Counsel and verily believes that they have a good and sufficient defence thereto upon the merits.

Sworn to before me this 6th day of February A.D 1861
W. Kimball. Clerk".

B. H Gwathmey.

And thereafter to wit on the fourteenth day of April A.D. Eighteen hundred and Sixty one the said Plaintiff filed in the Office of the Clerk of said Court, Particulars of demand in said suit, which Bill of particulars is in words and figures as follows, to wit.

17

"The Chicago South Branch Dock Company . . . . .
vs
George W. Dunlap and Baylor H. Gwathmay . . . . . } Superior Court of Chicago.

Bill of Particulars of Plaintiffs claim in above entitled cause.

Messrs. Dunlap & Gwathmay
To Chicago So. Branch Dock Co. Dr

Dec. 1. 1860	To use and occupation of Lots Nos 129. 130. 133. 134 135. & South 51 53/100 feet of 132 . . .	$1200.00
Dec. 1, 1859.	To use & occupation of same premises from May 15. 1859 to Dec. 1. 1859 . . .	$1200.00
Dec. 1. 1860	To use & occupation of same premises from May 22. 1860 to Dec. 1. 1860 . . .	600.00
" "	To rent of same premises from May 22. 1860 to Dec. 1. 1860	600—

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

"The Chicago South Branch Dock Company . . . .
vs
George W. Dunlap and Baylor H. Gwathmay . . . . . } Assumpsit.

This day comes the said plaintiff by Thompson & Bisbee its Attorneys and the said defendants by Walker Van Arman and Dexter their Attorneys also come, And on their Motion it is Ordered that the said defendants have

leave to file their Plea of Set off herein on payment of all Costs to this date.

And thereafter to wit on the Seventeenth day of June A.D. Eighteen hundred and sixty one the said defendants filed in the office of the Clerk of said Court, their Plea to additional Counts filed by Plaintiff, in words and figures as follows, to wit.

"State of Illinois
The Superior Court of Chicago
G. W. Dunlap et als
vs
The South Branch
Canal Company.

And the said defendants for a further Plea to the additional Counts of the said Plaintiffs Declaration by him filed in said Cause comes and defends the wrong and injury when &c. and say that they did not undertake and promise in manner and form as in the said Counts of said Plaintiffs said Declaration supposed, and of this they put themselves upon the Country

Walker Van Arman & Dexter
Defts Attys.

And the plaintiffs do the like
Thompson & Bishop
Pffs Attys."

And afterwards to wit on the Seventeenth day of June (being yet of the said June term of said Court) A.D. Eighteen hundred and sixty one, the following further proceedings were had in said cause & entered of record in said Court, to wit.

The Chicago South Branch Dock Company . . . .
vs
George W. Dunlap and Baylor H. Gwaltney . .

Assumpsit

This day comes the said Plaintiff by Thompson & Bishop its Attorneys and the said Defendants by Walker Van Arman & Dexter their Attorneys also come, and issues being joined herein, it is Ordered that a Jury come Whereupon comes the Jury of good and lawful men to wit, A. D. Goodrich, Eber Woodruff, G. R. P. Wentworth, S. S. Whitney, W. H. Woodruff, A. W. Ecson, John Nash, H. Hoag, E. S. Hawley, Richard Griffith, Nathan Jackson, and N. B. Sabin who being duly sworn to try the issues joined as aforesaid, after hearing part of the testimony and the hour of adjournment having arrived, it is Ordered upon agreement of the parties that the Jury separate and meet the Court tomorrow morning.

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

The Chicago South Branch Dock Company . . . .
vs
George W. Taylor and Baylor H. Gwaltney . . . . .

Assumpsit

This day again comes

the said Plaintiff by Thompson & Bishop its Attorneys and the said Defendants by Walker Van Arman & Dexter their Attorneys also come and the Jury Empannelled herein on yesterday for the trial of said cause also come and all the testimony being heard, arguments of Counsel and instructions of the Court, the cause is submitted and the Jury retire to consider of their Verdict. and the hour of adjournment having arrived it is Ordered upon agreement of the parties, that when the Jury shall have agreed upon a Verdict, they shall reduce the same to writing, sign and seal the same and afterwards separate and meet the Court on coming in and opening thereof to morrow Morning.

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

The Chicago South Branch Dock Company . . . .
vs
George W. Dunlap and Baylor N. Gwathney . .

Assumpsit.

This day again comes the said plaintiff by Thompson & Bishop its attorneys and the said defendants by Walker, Van Arman & Dexter their Attorneys also come and the Jury Empannelled herein for the trial of this cause, and as on yesterday also come, and submit their Verdict and say We the Jury finds issues for the said

Defendants.

And thereupon the said Plaintiff submits its Motion herein for a New trial in said cause.

And afterwards to wit on the twenty second day of June (being yet of the said June term of said Court) A. D. Eighteen hundred and Sixty one, the following further proceedings were had in said cause, and entered of record in said Court to wit.

"The Chicago South Branch Dock Company vs George W. Dunlap and Baylor St. Heathney. } Assumpsit. } No. for New Trial

This day again comes the said Plaintiff by Thompson & Bishop its attorneys and the said defendants by Walker Van Arman & Dexter their Attorneys also come, and this cause coming on now to be heard upon the Motion of the said plaintiff heretofore submitted herein for a New trial in said cause, was argued by Counsel, and the Court being fully advised in the premises overrules the said Motion for a New trial to which ruling of the Court in overruling its said Motion for a New trial the said plaintiff excepts and enters Exceptions. Wherefore the said defendants ought to have and judgment entered on the Verdict of the Jury.

Therefore it is considered that the said defendants do have and recover of and from the said plaintiff their costs and charges about their defence in this behalf expended, and therefore have Execution.

And afterwards to wit on the twenty ninth day of June (being one of the days of the said June term) A. D. Eighteen hundred and sixty one, the following further proceedings were had in said cause and entered of record in said Court, to wit:-

"The Chicago South Branch Dock Company
vs
George W. Dunlap and Baylor H. Gwathney . . } Assumpsit

This day again comes the said Plaintiff by Thompson & Bishop its attorneys and on their Motion it is ordered that the time to file Bill of Exceptions herein on behalf of said Plaintiff, on Appeal to the Supreme Court be and is hereby extended until the tenth day of July next.

And thereafter to wit on the tenth day of July A. D. Eighteen hundred and sixty one the said Plaintiff filed in the office of the Clerk of said Court its Bill of Exceptions in said cause: Which said Bill of Exceptions is in the words and figures as follows to wit—

"In the Superior Court of Chicago
June Term A. D. 1861.

The Chicago South Branch Dock Company . . .
vs
George W. Dunlap & Baylor H. Gwathney . . }

Be it remembered that heretofore to wit on the 17th day of June (being one of the days of the June term of said Court) A. D. 1861, the following proceedings

were had in said cause, in said Court.

This day comes the said Plaintiff by Thompson & Bishop its Attorneys, and said defendants by their Attorneys Walker, Van Arman & Dexter also come and issue being joined herein, it is Ordered that a Jury come, Whereupon come the Jury of good and lawful Men to wit. J. E. Goodrich, E. Woodruff, Jr. R. J. Wentworth, S. S. Whitney, H. N. Woodruff, C. W. Eaton John Nash, J. Mc. Hoag. L. S. Hawley. Richard Griffith Nathan Jackson & N. B. Schram. who were duly Elected tried and sworn to try the issue joined as aforesaid.

Whereupon the Plaintiff in support of the allegations in his declaration contained, introduced the following testimony.

A. J. Kniseley. testified as follows:

I have been the Agent of the Plaintiff since March 25. 1859 & have had the general charge of Plaintiff's business, and no other person has been authorized to act for plaintiff during that time.

I know defendants. They have been Copartners since Spring of 1859. They occupied Lots 129. 130. 133. 134. 135. & South 51 53/100 feet of 132 in Lyons South Branch Addition to Chicago for Brickmaking during the years 1859 & 1860.

I had a conversation with defendant Dunlap in July 1858 - Dunlap had begun to excavate his Brickyard North and beyond the limits of his old Lease and upon the grounds of Plaintiff, and to make excavations on Company's land.

I asked him if he was not going over his Lease and encroaching on the Lots. He said he was aware

that he was, that in regard to digging the Lots outside of the Canal he intended to fill that up and make it all right, and in regard to extending Brickyard, he would do what was right - Expressed dissatisfaction but Dunlap said he would make it all right.

In the fall of 1859 I told Dunlap that we wanted an understanding with him, and that if he occupied those premises the Company would charge him rent. He said he had not time to talk about it then, but would make it satisfactory to the Company.

I served a Notice on Defendants by delivering it to Mr Gwathmay one of the Defendants about the 20th day of May 1859. I asked Mr Gwathmay if he was one of the firm of Dunlap & Gwathmay - he said he was. He took the Notice and read it, and said I must see the old man about it, referring to Mr Dunlap. This was all that was said - This is a Copy of the Notice.

Plaintiffs Counsel here introduced in Evidence the following Notice referred to.

Chicago. May 20th 1860.

Messrs Geo. W. Dunlap
(4) Baylor & Gwathmay

Gentlemen,

The lease of Brickyard in Ogdens South Branch Addition to Chicago to Geo. W. Dunlap & Co having expired, you are hereby Notified that if you wish to continue to occupy the said premises, or any other property belonging to the South Chicago Branch Dock Co. you must enter into a New Contract for the same, and that if you continue to occupy the said grounds of the said

for without a written lease of the same, the said Co. will charge you as rent for said ground for the present working season the sum of Six hundred dollars, payable Three hundred dollars ($300.) on the first day of August 1860, and Three hundred dollars ($300.) on the first day of December 1860.

(Signed) Chicago South Branch Dock Co
By A. J. Kuseley Agent.

This is the Lease referred to in the Notice. The premises described in the Lease never belonged to plaintiff, were South of three Lots occupied by Defendants in 1859 & 1860

(The plaintiffs Counsel here introduced in Evidence a Lease being the same identified by witness and a Copy of which is hereto annexed Marked "Exhibit A.")

A short time after service of notice I staked out the line to which defendants might dig. Some of defendants men at work in their yard requested me to do this. I presented a Bill for rent to Gwathmey August 1st 1860. He said I must see Mr Dunlap about it. Defendants dug from five to Twenty feet beyond the line marked out. This has never been filled up by them. It is necessary to fill up this before the Canal can be of any service. I know from other premises, the value of the premises occupied from Cars of other Lots by defendants. My opinion is that the use of the premises in 1859 was worth Six hundred dollars and that they were worth the same in 1860.

I know the value of clay. When dug out it is worth Twenty five cents a yard. In the ground it is worth from Ten to Fifteen cents per yard. I

have made measurements of the premises and estimate that the defendants in 1859 & 1860 excavated about 450 feet in length of an average width of 90 feet & of the depth of 15 feet.

The plaintiffs were incorporated in Febry 1859 There are from 35 to 40 Stockholders.

On the Cross Examination witness testified as follows.

I was the first Agent of the plaintiff - From May 23d 1855 to July 28th 1858. I was the Agent of the owners of these lands. I was then the Agent of R.B. Mason & others who had a contract for the land. These parties in December 1858 gave the land back to the Original owners Spreno, Sampson Arnold & Hance.

I was appointed Agent five days after lease marked "Exhibit A" was made. I knew about the Contract immediately after it was made. I did not hear anything said about the Losses digging the whole Canal. Dunlap put buildings on lot 129. He asked permission to put them there because it was more convenient to the Street.

In the Spring of 1859 Dunlap had gone over the line of his Lease upon the plaintiffs Land 50 or 100 feet. There were more than 150 feet dug after Spring of 1859.

I know nothing about the docking on the three acre tract described in Lease, marked "Exhibit A." The Company did not own and have nothing to do with that land.

The whole length of the Canal where defts made excavations was about 946 feet. About 200 feet is not yet excavated. About 746 feet excavated.

Mr Dunlap has done considerable filling on Hoopes land. He has done no filling on West side of Canal North of line of the old Lease, except that he filled just enough for his Brickyard. In some places he filled from six inches to a foot, in some places he did nothing & in some he levelled off.

These premises are about 2 3/4 Miles from this Court House.

In the Spring of 1859 the vicinity was unoccupied except by Brickyards - There were five Brickyards there then - There are four now.

The West side of the Lots from 75 to 100 feet in width is not filled up.

I know the cost of excavating - It is worth from ten to fifteen Cents a yard -

I know what property rents for in the vicinity of the premises occupied by defendants in 1859 & 1860. I make my Estimate from the rent paid by others for Brickyards similarly situated - The rent 600 feet on Stetsons Canal for $500 a year & the lessees do Several thousand dollars worth of filling besides.

The Lease was made October 24. 1858 & went into Effect - January 1, 1859. The Lease was to run four years and was made to Benjamin & Joseph Thilow.

The rents another Neighbouring Lot to Walker & Cutting Feb. 19. 1861 for five years from July 1. 1861. Walker & Cutting are to pay $1200 a year, and do about $10,000. worth of filling between Mason & Allens Canals - They have an old lease under which they were to do filling which they did not do.

Another lease was made to Wellcain G. Rogers

of a Neighbouring lot 600 by 314 feet dated March 31 1860 for three years. The lessee was to pay under this Lease $1350 for the three years and do in addition a quantity of filling which I have heard Dunlap one of the defendants and the present occupant of the premises, pay would cost $2000.

I think it would be worth about $400 to fill up all the lots occupied by defendants five inches in depth. It was about Three Months after the Notice was served on defendants that they stopped making brick. I think it takes from 4 to 10 days to burn a Kiln. I think they can furnish brick in three weeks after Commencing.

The building put on the premises by defendants is still there and occupied by them. There is some other property of defendants still on the premises.

Dunlap never told me he would leave when I wanted rent. He always said he would do what was right and put me off in that way.

Upon Re Examination witness testified.

That defendants had never given plaintiff any Notice that they would surrender up the premises occupied by them in 1859 & 1860.

The Plaintiffs Counsel then exhibited to witness a Lease made by plaintiff to William G. Rogers and asked if that was the Lease referred to by him in his Cross Examination Witness testified that it was.

Counsel then called the attention of witness to an indorsement on said Lease, a Copy of which is hereto annexed Marked "Exhibit B." & asked if it was executed in his presence & if so, by whom?

In answer, witness stated that it was executed in his presence and was signed by Mr Swathmay one of the defendants.

Plaintiffs Counsel then proposed to read said indorsement in evidence.

To the reading of which in evidence defendants by their Counsel objected, which objection the Court sustained - to which ruling of the Court, the plaintiff by its Counsel then and there excepted.

Hiram Ivy then testified as follows.

I know the general value of the premises occupied by defendants in 1859 & 1860. I think they were worth about One dollar a foot each year or $550 per annum.

On Cross Examination witness testified

That he was an Ice dealer and knew nothing about Brickmaking - that he formed his opinion of the value of the premises, from what he had rented land for in the vicinity for Brick Making - He had rented Land for One dollar a foot.

Benjamin Nelson testified as follows.

My business is that of a Brickmaker. I know the premises occupied by defendants in 1859 & 1860. I think that $500 a year would be a fair rent of the premises occupied by defendants. The paid $500 for about the same grounds.

The quality of the Material in the tract is good, probably better than any other in the City.

It takes about four weeks from the commencement to the finishing of a Brick Kiln.

I saw Mr Kinsely have a notice to Mr Gwathmay in the Spring of 1860. Gwathmay told Kinsely he must talk with the old man. Kinsley asked him if he was a partner. He said he was.

I know the defendants were on the land making Brick in 1859.

I saw Dunlap & Gwathmay at work on the premises in June & July 1860 making brick. I never saw much filling done by them.

On Cross Examination witness testified as follows

I am the tenant of Plaintiff - this is the 3d Summer we have occupied Land of Plaintiff - The leave off and fill up all the ground within our limits and pay besides $500 a year.

(The defendants Counsel then put the following question)

Without reference to what you and others have paid for portions of the same tract of land but judging by your Experience of Brick making generally, wherever you have followed it what is the just fair value per year of the yard rented by the defendants.

To this question the plaintiffs by its Counsel objected, but the Court overruled the objection

To which ruling of the Court the Plaintiffs by its Counsel then and there excepted.

In answer witness testified:

I supposed when I made my lease that it was a fair rent, but I do not think the land was really worth anything.

I have carried on the business of Brickmaking in Chicago six years. I never paid rent any where else. I understood when we went on the land of the Plaintiff that we came in on the same terms with the others, and that also paid rent. I was next Neighbour to defendants.

There is a difference in the clay on the tract The clay where defendants were was a little the poorest. A man could not afford to pay any rent going on land in Spring of 1859 & staying to August 1860. I do not think the land could have been rented for anything for that time.

The land in vicinity is unoccupied except for Brickmaking.

Dunlap was the first to commence Brick making on the premises.

On re-examination. witness stated.

That the reason why he thought the premises could not have been rented in Spring of 1859 was that there was no demand at that time.

Henry B. Zimmerman testified as follows

I know the grounds occupied by defendants and their value. I think the use of them in 1859 & 1860 was worth from $1.25 to $1.50 per foot Each year.

On Cross Examination witness testified

I do not know what land rents for in the vicinity. Any fragment of the value of the rent

or use is based on the valuation of the land. I know the value of the land. I have known of Sales made of lands in the vicinity & have owned and rented Lands in the City

Defendants Counsel then moved to exclude the testimony of this witness — The Court granted the Motion.

To which ruling of the Court, Plaintiff by its Counsel then and there excepted.

It was here admitted by Counsel for defendants that Lots 129. 130. 133. 134. 135 & So: 51 13/100 feet of 132 were in 1859 & 1860, the property of Plaintiff

The Plaintiff here rested.

The following testimony was then offered by the Defendants.

John Garth testified as follows.

I worked for defendant Dunlap & McClellan from 1856 to 1859. I kept a Boarding house for Defendants in 1859 & 1860, about 200 yards from the Brickyard.

Defendants employed about 60 men in 1859 & about 25 or 28 men in 1860. In 1860 they quit work in August. They made only Three kilns that year.

I worked in a Brickyard several years ago. The clay in Dunlap & Gwathmays yard was not of the best quality.

I saw Kinsely, Pefts agent about the premises, sometimes once a week & sometimes oftener.

About 470 feet of the Canal from Lumber

Strut was dug in Spring of 1859. 298 feet more dug in 1859 & 1860.

Defts did about a quarter as much in 1860 as in 1859. They got through burning Brick in the latter part of August in 1860. They made in 1860 10134440 bricks. They made pretty near 5.000.000 Bricks in 1859.

On Cross Examination witness testified.

In the Summer of 1860 it was sometime after the bricks were burned that they were taken away. I think it was in October that the last were taken away except a few. Some walls were left standing after that. The Canals dug by defendants is in some places 96 ft in some 114 feet wide.

Thomas Corwin testified as follows

I have been in the Brickmaking business but never carried on the business on my own book.

I burnt brick for Defendants in 1859 & 1860 & commenced work for them in 1856.

Where defendants worked the first three years the clay was full of stones & some of it was not worth anything. It was pretty good clay where they worked in 1859 & 1860. It was not as good as it is where we work now.

I think the clay and the grounds were not worth more than the labor of excavating & filling up grounds.

In 1860 we commenced to get ready the 26th of April. We quit in August. don't remember when. After commencing kilns, defendants could not quit

without loss.

They did very little in 1860 - They had put up one small kiln by June 1. & commenced another.

I think we had got 4 or 500 feet from North line of Lumber Street in Spring of 1859.

On Cross Examination witness testified.

That he knew nothing of the value or cost of brick.

C. Slater testified as follows

I am a Brickmaker & know Yards occupied by defendants in 1859 & 1860 - There were a little more Stones in the Clay where defendants were, than in other yards - don't know any other difference between defendants & other yards - I supposed ground was worth something in 1860

Patrick Kearney testified as follows

I have worked at Brickmaking about Seven years - I worked for defendants in 1859. It was pretty hard clay to dig - It was a little gravelly. Do not get some gravel in any clay I ever saw - It was more gravelly than any I see in other yards.

It is worth fifteen cents a yard to excavate clay

James Sutton testified as follows

I worked for defendants in 1857. 1858 & 1859 The clay seemed to be good enough - I heard them complain that it was full of Stones & gravel.

I have worked for Walker & Cutting & more work for Wilson.

I don't know which is best - am a good judge of clay - There seemed to be more gravel in Dunlap's

than in the others.

Spent a few acres of land on Blue Island Avenue at $9.00 an acre - paid potatoes on it.

The foregoing is all the testimony which was offered in evidence.

The plaintiff by its counsel requested the Court to give to the Jury the following instruction.

"If defendants occupied and used clay from the lands of plaintiff without any special contract or agreement, but with the knowledge & assent of plaintiffs agent, the law will imply a promise on the part of defendants to pay for such clay as much as it was reasonably worth."

Which instruction the Court refused to give as asked. To which refusal plaintiff by his counsel excepted, but gave with the addition of the following words

"if that was the expectation and understanding of the parties."

The Plaintiff also asked the Court to give the following instruction, which the Court refused. To which the plaintiff took exceptions.

"In determining the amount of damages it is proper for the Jury to consider the price fixed by plaintiff in the notice given to defendants, and the evidence that no objection was made to price given by defendants with the other evidence as to the value of the use of the premises."

The Court then gave the following instructions asked for by plaintiff.

37

Given.

"If the Jury find from the evidence that the defendants received notice from the Plaintiffs, that if they occupied plaintiffs premises, they would be charged therefor the sum of Six hundred dollars payable at some time or times prior to the commencement of this suit, and that defendants made no objection to the amount to be charged and occupied the premises with the consent of plaintiffs and made no objection to the bills for rent when presented these circumstances if proved tend to prove the relation of landlord and tenant, between the parties and warrant the Jury in finding a Verdict for the plaintiffs"

"If the Jury find that the defendants occupied the premises of the plaintiff as the tenants of and with the consent of the plaintiff but without any special agreement as to the amount of rent to be paid, the law implies a promise on the part of the defendants to pay the plaintiff so much as the use of the premises was reasonably worth and the plaintiffs are entitled to a Verdict for that amount, if there was no special agreement in the case."

Given.

The Court then gave the following instructions on the part of the defendants. To which the plaintiff by his Counsel then and there excepted.

1. "In the absence of a special agreement the defendants are chargeable for no more than the just value of the use of the premises and the amount of the labor performed by them upon the premises, if such labor was done by the consent and with the knowledge of the plaintiff or his Agent."

2 "If the use of the premises was worth no more than the labor so performed by defendants with the assent of plaintiff or his agent the Jury will find

for defendants"

Upon the foregoing testimony and with the above instructions the Cause was submitted to the Jury who thereupon returned a Verdict for the defendants on the 19th day of June A.D. 1861.

And thereupon the defendants moved that the Verdict be set aside, and a New trial granted for the following reasons.

1. The Court erred in permitting Counsel for the Defendants to ask of witness Wilson the following question

Qu: "Without reference to what you and others have "paid for portions of the same tract of land, but— "judging by your experience of ferrikulating generally, "wherever you have followed it, what is the just fair "value per year of the yard rented by the defendants".

2. The Court erred in refusing to allow plaintiffs Counsel to offer in evidence the written acceptance of the assignment of the lease to Rogers proved to have been executed by the defendants.

3. The Court erred in refusing the following instruction asked for by Plaintiff

"In determining the amount of damages it is proper for the Jury to consider the sum fixed by Plaintiff in the Notice given to Defendants and the Evidence that no objection was made to said sum by Defendants with the other Evidence as to the value of the use of the premises."

4. The Court erred in refusing the following instruction except as qualified by Court:

"If the defendants excavated and used clay from the lands of Plaintiff without any special contract

or agreement, but with the knowledge and assent of plaintiffs Agent, the law will imply a promise on the part of defendants to pay for such clay as much as it was reasonably worth."

5. The Court erred in ruling out the testimony of H. W. Zimmerman.

6. The Court erred in giving the instructions asked on the part of the defendants.

7. The Verdict is against the law and evidence

8. The Verdict is against Evidence."

The Court overruled this Motion and rendered judgment against Plaintiff for costs.

To which Judgment of the Court overruling said Motion the defendants by their Counsel then & there excepted.

To all which rulings and decisions of the Court hereinbefore severally ~~as~~ Enumerated the plaintiff by its Counsel then and there duly excepted.

And forasmuch as the several matters and things hereinbefore stated and set forth do not otherwise appear, the said plaintiff prays that this his Bill of Exceptions may be signed and sealed and made a part of the record of this Cause, which is done.

Wm H. Higgins
Judge Sup Ct. Seal

"Exhibit A."

"Articles of agreement made this 15th day of May A. D. 1856 by and between H. H. Dunlap, R. McClelland, Seb Murray, N. B. Ripley and Richard Garretson of Chicago in the County of Cook and State of Illinois, of the first part & R. B. Mason, Joseph

Fisk, Amos G. Throop and W. S. Sampson, and Jesse B. Boyce and Thomas R. Ferris of the City of Chicago in the State of Illinois and Charles Stetson and Wm S. Sampson of the City of Cincinnati in the State of Ohio of the second part Witnesseth:

That the said parties of the first part in consideration of the agreements hereinafter expressed of the parties of the second part do hereby agree as follows. to wit:

First - That they will perform all the work of excavating a canal, One hundred feet wide, and ten feet deep, below low water mark, on the premises in a certain tract of land lately purchased by said parties of the second part, of Wm Greene Esthers in Greens South Branch Addition to Chicago, said canal is to commence on the North side of Lumber Street, and West of Rucker Street about Two hundred and fifty (250) feet; thence to run North to the North line of the three acre tract of land lately purchased by said Boyce of W Greene and lying West of said canal. Said parties of the second part are to put in the woodwork for docks on the whole line of both sides of said canal; to wit, the said Means, Throop, Fisk, W S. Sampson, Stetson and W. S. Sampson are to put in said wood-work on the East side, and said Boyce on the west side, Said parties of the first part are to do all the excavating and filling in of Earth necessary to complete said docks, and to level off the ground back of the same in a plane with the top of said canal but above the natural level of said land to the centre of the Streets running west parallel to said canal. They are also to remove all surplus Earth material from said docks as soon as the same are completed

Said Canal is to be excavated at the bottom, in such shape as shall be directed by said parties of the second part, averaging ten feet in depth as aforesaid. Said Canal to be completed on or before the fifteenth day of May A.D. Eighteen hundred & fifty nine (1859) said work to be completed in Sections of One hundred feet commencing as aforesaid and proceeding Northwards until finished.

2. Said parties of the second first part further agree to pay all taxes and assessments that may be levied or assessed upon any and all improvements which they may put or cause to be put upon the tract hereinafter designated as a Brick yard.

And the said parties of the second part in consideration of the agreements of the parties of the first part hereinbefore mentioned, do hereby agree that said parties of the first part shall have the use of said land for 250 feet in width, on each side of said Canal, for said term of from one to three years, ending on the fifteenth day of May A.D. 1859, for a Brickyard, and for other purposes connected therewith

Also that said parties of the first part are to have all the material that shall be taken from said Canal over and above the quantity necessary to be used in filling up and constructing said docks, and in levelling the grounds as aforesaid. Said parties of the first part to vacate said land as fast as the same shall be docked as aforesaid.

It is mutually agreed that all the agreements herein contained shall extend to and be obligatory upon the executors administrators and assigns of the respective parties, Provided the parties of the first part are not to be required to fill in the slough on the West side of said tract. In witness whereof the

parties hereunto set their hands and seals the day and year first above written.

R. McClellan (Seal)
R. Garretson (Seal)
N. B. Kappley (Seal)
Jesse L. Boyd (Seal)
Chas. G. Hiroop (Seal)
Thos. B. Ferris (Seal)
R. B. Mason (Seal)
W. S. Sampson (Seal)
C. E. Stelson (Seal)
By W. L. Sampson. Atty's

"Exhibit B."

This lease being assigned to us this day by the within named William George Rogers we hereby accept said assignment and acknowledge ourselves bound by all the terms and conditions of the within lease, and hereby covenant and agree with said Chicago South Branch Dock Company to pay them the rent stipulated and specified within and to do the work and make the excavations and laying for the filling therein provided.

Witness our hands and seals this 13th day of Aug. A. D. 1860,

Dunlap & Gwathmey (Seal)"

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State of Illinois }
Cook County . } ss.

I Thomas. B. Carter Clerk of the Superior Court of Chicago, within and for the County of Cook and State of Illinois Do hereby Certify the above and foregoing to be a full true and correct Transcript of the Process, Declaration Pleas and affidavit of merits. Bill of particulars and Bill of Exceptions. Now on file in my Office, together with all orders and judgments entered of record in said Court, in a certain suit therein, wherein The Chicago South Branch Dock Company was Plaintiff and George. W. Dunlop and Baylor K. Wathman, Defendants.

In testimony whereof I have hereunto set my hand and affixed the Seal of said Court at Chicago in said County the Ninth day of April A. D 1867.

Thomas. B Carter Clerk

44

And now comes the said plaintiff by Thompson & Bishop its attorneys and assigns the following errors.

1. The Court erred in permitting defendants counsel to ask of Witness Nelson the question objected to & stated in foregoing Bill of Exceptions.
2. The Court erred in refusing to allow plaintiff to read in evidence the written acceptance of the assignment of the Rogers Lease proved to have been executed by defendants.
3. The Court erred in refusing the Instructions asked for by Plaintiff & marked No 1 & 2
4. The Court Erred in refusing the Instruction asked by Plaintiff & marked No 2
5. The Court erred in excluding the testimony of Henry N. Zimmerman.
6. The Court erred in overruling the motion to set aside the verdict & Grant a new trial.
7. The Verdict is against the law & evidence
8. The Verdict is unsustained by Evidence and the Court erred in refusing to grant it.
9. The Court erred in giving defts instructions

Thompson & Bishop
Attys

25 146 158

Chicago South
Branch Dock Co.
vs
George W. Dunlap et al.

Record & Errors

Filed Apl. 10. 1862.
L. Leland
Clk.

Fees
$13.00. Paid by Plff atty.
J. B. Bartlett

E. A. Pierce & Co., Printers, 120 Lake Street, Chicago.

SUPREME COURT.

THIRD GRAND DIVISION.

APRIL TERM, 1863.

THE CHICAGO SOUTH BRANCH DOCK COMPANY,
Plaintiff in Error,
vs.
GEORGE W. DUNLAP AND BAYLOR H. GWATHMEY,
Defendants in Error.

Error to Superior Court of Chicago.

ABSTRACT OF RECORD.

1 Summons.

2 Returned Served.

3 Declaration in Assumpsit:

(1.) That certain premises of plaintiff's were demised to defendants at $1,000 per year rent, and that defendants held over under same terms.

6 (2.) Plaintiff demised certain other premises for $600 rent.

7 (3.) Defendants held under a demise from other parties, and continued in occupation and plaintiff notified defendants that if they continued to occupy the property of plaintiff it would charge them $600 for working season of 1860, and that defendants occupied premises but have not paid.

10 (4.) Agreement that defendants should pay $600 rent for the year 1860.

12 (5.) Indebitatus Assumpsit—use and occupation.

13 (6.) Indebitatus Assumpsit $1,000.

16 Plea. General Issue.

20 Trial.

21 Verdict for Defendants.

22 Motion for new trial by Plaintiffs.

Motion for new trial overruled.

23 Bill of Exceptions.

ABSTRACT OF TESTIMONY.

24 A. J. KNISELY, testifies, that he had entire charge of the plaintiff's business, as agent, since March 25, 1859. That defendants had occupied certain premises for brick making during the years 1859 and 1860.

26 That in the fall of 1859 he notified defendant Dunlap that if he occupied these premises the plaintiff would charge him rent.

That about the 20th of May, 1860, he served the following notice upon defendants, by delivering it to defendant Gwathmey, who read it and made no objection to it.

CHICAGO, MAY 22nd, 1860.

GENTLEMEN:

The lease of Brickyard in Greene's South Branch Addition to Chicago, to Geo. W. Dunlap & Co., having expired, you are hereby notified that if you wish to continue to occupy the said premises or any other property belonging to the Chicago South Branch Dock Company, you must enter into a new contract for the same, and that if you continue to occupy the said grounds of the said Company, without a written lease of the same, the said Company will charge you, as rent for said ground, for the present working season, the sum of six hundred dollars, payable three hundred dollars ($300) on the first day of August, 1860, and three hundred dollars ($300) on the first day of December, 1860.

[Signed] CHICAGO SOUTH BRANCH DOCK CO.

By A. J. KNISELY, Agent.

26 Shortly after serving this notice witness staked out the line to which Defendants were to dig. Presented bill for rent due August 1st, 1860, to one of defendants who referred him to the other defendant. Knows the value of the premises occupied by defendants. They were worth $600 each year.

Defendants dug from five to twenty feet beyond the line marked out, and their excavations have never been filled up. Know the value of the clay dug out. It was worth twenty-five cents a yard when dug out and from ten to thirteen cents a yard in the ground. From measurement I estimate that defendants excavated, in 1859 and 1860, to amount of 450 feet in length by 90 feet in width and 15 feet in depth.

27 On cross examination witness testified that he was the first agent of plaintiff. The premises occupied by defendants are about 2¾ miles from the Court House in Chicago; in the spring of 1859 the vicinity was unoccupied except for brick yards.

28 Witness formed his oppinion of the value of the premises occupied by defendants, from the rates paid by others for neighboring and similar situated brick yards, and among other leases described one of a neighboring lot made to William G. Rogers, dated March 31st, 1860, by which Rogers was to pay $1,350 rent for three years, and to do an amount of filling estimated by defendant Dunlap at $2,000.

29 On the re-examination witness identified the lease referred to by him in his cross examination and made to William G. Rogers, and testified that defendants executed in his presence the following endorsement on said lease, to wit:

"This lease being assigned to us this day by the within named William George Rogers, we hereby accept said assignment, and acknowledge ourselves bound by all the terms and conditions of the within lease, and hereby

covenent and agree with said Chicago South Branch Dock Company to pay them the rent stipulated and specified within, and to do the work and make the excavations and pay for the filling therein provided.

Witness our hands and seals this 13th day of Aug. A. D. 1860."

DUNLAP & GWATHMEY. [SEAL.]

Plaintiff's counsel then offered to read this endorsement in evidence, to the reading of which defendant's counsel objected, which objection was sustained and plaintiff by its counsel excepted.

30 HIRAM JOY, testified premises were worth about $550, per annum.

BENJAMIN WILSON, testified: $500 a year, would be a fair rent of premises occupied by defendants.

31 On cross examination witness testified that he was a tenant of plaintiff's and paid $500 a year and filled up ground.

The following question was then asked by defendant's counsel, to which plaintiff's counsel objected; objection overruled and exception taken.

"Without reference to what you and others have paid for portions of the same tract of land, but judging by your experience of brick making generally, wherever you have followed it, what is the just, fair value per year of the yard rented by defendants?"

In answer witness testified that he did not think the land was really worth anything.

32 HENRY W. ZIMMERMAN, testified that he leased grounds occupied by defendants, and their value, that he thought the use of them in 1859 and 1860 was worth from $1 25 to $1 50 per foot.

On cross examination witness said he did not know what land rented for in the vicinity, but based his judgment on the value of the land.

Defendant's counsel moved to exclude testimony of this witness, which motion was granted, and plaintiff's counsel excepted.

33 Admitted that premises occupied by defendants were property of plaintiff in 1859 and 1860.

DEFENDANT'S TESTIMONY.

33 JOHN GARTH, testified to amount of bricks made by defendants in 1859–60.

33 THOMAS CORWIN, testified that he thought the clay and ground were not worth more than the labor of excavation and filling ground.

35 He testified on cross examination that he knew nothing of the value or cost of brick.

C. SLATER, testified that he supposed ground was worth something in 1860.

PATRICK KEARNEY, testified that the clay was hard to dig.

JAMES SUTTON, testified that the clay seemed good enough, that he rented a few acres of land at $9 an acre and raised potatoes on it.

INSTRUCTIONS.

The plaintiff by its counsel asked the Court to give the following instructions which were refused, to which refusal the plaintiff excepted.

36. (1.) If defendants excavated and used clay from the lands of plaintiff without any special contract or agreement, but with the knowledge and assent of the plaintiff's agent, the law will imply a promise on the part of the defendants to pay for such clay as much as it was reasonably worth.

36 (2.) In determining the amount of damages, it is proper for the jury to consider the sum, fixed by plaintiff in the notice given to defendants, and the evidence that no objection was made to the said sum, by defendants, with the other evidence, as to the value of the use of the premises.

Motion for new trial and grounds.

34 ## ERRORS ASSIGNED.

1. Permitting defendant's counsel to ask of witness Wilson, question objected to by plaintiff.

2. Refusal to allow plaintiff to read in evidence, the written acceptance of the Rogers lease proved to have been executed by defendants.

3. Refusal of instruction asked for by plaintiff, and marked, (1.)

4. Refusal of instruction marked, (2.)

5. Exclusion of testimony of Zimmerman.

6. Overruling motion for new trial.

7. Refusing to set aside the verdict as against law and evidence.

8. The verdict is unsustained by evidence, and the Court erred in refusing to set it aside.

9. Giving defendants' instructions.

25 46

The Chi. So. Pr. Dock Co.

vs

Geo. W. Dunlap

Oral

Abstract

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Filed Apl. 20, 1863

L. Lelan Clk

1863

F. A. Pierce & Co., Printers, 120 Lake Street, Chicago.

SUPREME COURT.

THIRD GRAND DIVISION.

APRIL TERM, 1863.

THE CHICAGO SOUTH BRANCH DOCK COMPANY,
Plaintiff in Error,
vs.
GEORGE W. DUNLAP AND BAYLOR H. GWATHMEY,
Defendants in Error.

Error to Superior Court of Chicago.

ABSTRACT OF RECORD.

1 Summons.

2 Returned Served.

3 Declaration in Assumpsit:

(1.) That certain premises of plaintiff's were demised to defendants at $1,000 per year rent, and that defendants held over under same terms.

6 (2.) Plaintiff demised certain other premises for $600 rent.

7 (3.) Defendants held under a demise from other parties, and continued in occupation and plaintiff notified defendants that if they continued to occupy the property of plaintiff it would charge them $600 for working season of 1860, and that defendants occupied premises but have not paid.

10 (4.) Agreement that defendants should pay $600 rent for the year 1860.

12 (5.) Indebitatus Assumpsit—use and occupation.

13 (6.) Indebitatus Assumpsit $1,000.

16 Plea. General Issue.

20 Trial.

21 Verdict for Defendants.

22 Motion for new trial by Plaintiffs.

Motion for new trial overruled.

23 Bill of Exceptions.

ABSTRACT OF TESTIMONY.

24 A. J. KNISELY, testifies, that he had entire charge of the plaintiff's business, as agent, since March 25, 1859. That defendants had occupied certain premises for brick making during the years 1859 and 1860.

26 That in the fall of 1859 he notified defendant Dunlap that if he occupied these premises the plaintiff would charge him rent.

That about the 20th of May, 1860, he served the following notice upon defendants, by delivering it to defendant Gwathmey, who read it and made no objection to it.

CHICAGO, MAY 22nd, 1860.

GENTLEMEN:

The lease of Brickyard in Greene's South Branch Addition to Chicago, to Geo. W. Dunlap & Co., having expired, you are hereby notified that if you wish to continue to occupy the said premises or any other property belonging to the Chicago South Branch Dock Company, you must enter into a new contract for the same, and that if you continue to occupy the said grounds of the said Company, without a written lease of the same, the said Company will charge you, as rent for said ground, for the present working season, the sum of six hundred dollars, payable three hundred dollars ($300) on the first day of August, 1860, and three hundred dollars ($300) on the first day of December, 1860.

[Signed] CHICAGO SOUTH BRANCH DOCK CO.
By A. J. KNISELY, Agent.

26 Shortly after serving this notice witness staked out the line to which Defendants were to dig. Presented bill for rent due August 1st, 1860, to one of defendants who referred him to the other defendant. Knows the value of the premises occupied by defendants. They were worth $600 each year.

Defendants dug from five to twenty feet beyond the line marked out, and their excavations have never been filled up. Know the value of the clay dug out. It was worth twenty-five cents a yard when dug out and from ten to thirteen cents a yard in the ground. From measurement I estimate that defendants excavated, in 1859 and 1860, to amount of 450 feet in length by 90 feet in width and 15 feet in depth.

27 On cross examination witness testified that he was the first agent of plaintiff. The premises occupied by defendants are about 2¾ miles from the Court House in Chicago; in the spring of 1859 the vicinity was unoccupied except for brick yards.

28 Witness formed his oppinion of the value of the premises occupied by defendants, from the rates paid by others for neighboring and similar situated brick yards, and among other leases described one of a neighboring lot made to William G. Rogers, dated March 31st, 1860, by which Rogers was to pay $1,350 rent for three years, and to do an amount of filling estimated by defendant Dunlap at $2,000.

29 On the re-examination witness identified the lease referred to by him in his cross examination and made to William G. Rogers, and testified that defendants executed in his presence the following endorsement on said lease, to wit:

"This lease being assigned to us this day by the within named William George Rogers, we hereby accept said assignment, and acknowledge ourselves bound by all the terms and conditions of the within lease, and hereby

covenent and agree with said Chicago South Branch Dock Company to pay them the rent stipulated and specified within, and to do the work and make the excavations and pay for the filling therein provided.

Witness our hands and seals this 13th day of Aug. A. D. 1860."

DUNLAP & GWATHMEY. [SEAL.]

Plaintiff's counsel then offered to read this endorsement in evidence, to the reading of which defendant's counsel objected, which objection was sustained and plaintiff by its counsel excepted.

30 HIRAM JOY, testified premises were worth about $550, per annum.

BENJAMIN WILSON, testified: $500 a year, would be a fair rent of premises occupied by defendants.

31 On cross examination witness testified that he was a tenant of plaintiff's and paid $500 a year and filled up ground.

The following question was then asked by defendant's counsel, to which plaintiff's counsel objected; objection overruled and exception taken.

"Without reference to what you and others have paid for portions of the same tract of land, but judging by your experience of brick making generally, wherever you have followed it, what is the just, fair value per year of the yard rented by defendants?"

In answer witness testified that he did not think the land was really worth anything.

32 HENRY W. ZIMMERMAN, testified that he leased grounds occupied by defendants, and their value, that he thought the use of them in 1859 and 1860 was worth from $1 25 to $1 50 per foot.

On cross examination witness said he did not know what land rented for in the vicinity, but based his judgment on the value of the land.

Defendant's counsel moved to exclude testimony of this witness, which motion was granted, and plaintiff's counsel excepted.

33 Admitted that premises occupied by defendants were property of plaintiff in 1859 and 1860.

DEFENDANT'S TESTIMONY.

33 JOHN GARTH, testified to amount of bricks made by defendants in 1859–60.

33 THOMAS CORWIN, testified that he thought the clay and ground were not worth more than the labor of excavation and filling ground.

35 He testified on cross examination that he knew nothing of the value or cost of brick.

C. SLATER, testified that he supposed ground was worth something in 1860.

PATRICK KEARNEY, testified that the clay was hard to dig.

JAMES SUTTON, testified that the clay seemed good enough, that he rented a few acres of land at $9 an acre and raised potatoes on it.

INSTRUCTIONS.

The plaintiff by its counsel asked the Court to give the following instructions which were refused, to which refusal the plaintiff excepted.

36. (1.) If defendants excavated and used clay from the lands of plaintiff without any special contract or agreement, but with the knowledge and assent of the plaintiff's agent, the law will imply a promise on the part of the defendants to pay for such clay as much as it was reasonably worth.

36 (2.) In determining the amount of damages, it is proper for the jury to consider the sum, fixed by plaintiff in the notice given to defendants, and the evidence that no objection was made to the said sum, by defendants, with the other evidence, as to the value of the use of the premises.

Motion for new trial and grounds.

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9. Giving defendants' instructions.

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The Chi. So. Br. Dock Co.

vs

Geo. W. Dunlap

et al

Abstract of Record

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Filed Aug. 23. 1873

L. Leland Clk

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IN THE

SUPREME COURT OF ILLINOIS,

Third Grand Division.

April Term, A. D. 1864.

Valentine H. Marshall,
James Dickson,
Appellants.

vs.

Elijay Barr,
Appellee.

APPELLANTS' POINTS.

This is an action of ejectment, tried before the court at the Warren county circuit.

The plaintiff's title was a deed from Valentine H. Marshall to him, of the premises in cor trovesy, for the expressed consideration of $4,000, dated —

Marshall's wife did not join in the deed, nor was there any release or waiver of the homestead right. At the time of the execution of the deed, Marshall was the owner and in the occupation of the premises, while his family, consisting of a wife and several children, some of whom were under the age of twenty-one years Marshall afterwards left the country, his wife and children in the meantime continuing in the occupancy of the property, claiming it as a homestead, and are still occupying the same; some of the children are yet minors.

The deed to Marshall, as appears by his answer in a chancery suit, was made for the security of the payment of about $600, and intended as a mortgage security, merely.

The only question which we propose to discuss, is, whether, under

Filed April 26. 1864
C. Cleaver Clk

the homestead exemption law of the State, the plaintiff under this state of facts, has shown such a title to the property, as will enable him to sustain ejectment.

The first section of the homestead act of 1851, after exempting from levy and forced sale under any process, or order from any court of law or equity in this State, for debts contracted from and after the 4th day of July, 1851, the lot of ground and the buildings thereon occupied as a residence and owned by the debtor, being a householder and having a family, also provides that such exemption shall continue after the death of such householder for the benefit of the widow and family, some or one of them continuing to occupy such homestead, until the youngest child shall become twenty-one years of age and until the death of such widow, and no release or waiver of such exemption shall be held valid, unless the same shall be in writing, subscribed by such householder and acknowledged in the same maner as conveyances of real estate are by law required to be acknowledged.

In 1857 this act was amended by requiring the wife to join in the release or waiver, and also declaring the object and intent of the act in these words: "It being the object and intent of this act, to require in all cases, the signature and acknowledgement of the wife *as conditions to the alienation of the hometead.*"

The exemption given by this statute is still in force; the property is still occupied as a residence by the wife of Marshall and her minor children, and claimed as a homestead. That homestead right has never been released or waived. Marshall's wife is not a party to the deed, and the language of the statute is most explicit upon that point; this release or waiver by the wife is a necessary condition to the *alienation* of the homestead, not merely of *her rights* but of the *homestead* itself. The word alienation, when applied to transfers of real property, is of the broadest and most comprehensive significence, it embraces not only the right to the possesion, but the *title* also. In *Bouvei's Law Dictionary*, page 92, it is thus defined, "Alienation is an act whereby one man transfers the *property and possession* of lands, tenements, or other things to another." The legislature has itself construed the act, so far as the necessity of the wife releasing or waiving her right is concerned, and declare that unless she does so release or waive that right, neither the *title nor*

the right to the possession shall be transferred by the deed, and hence under this construction of the act, thus made by the legislature, Elijah Barr, the grantee of Valentine H. Marshall, derived neither title to the property in question, *nor right to its possession*; the only condition upon which that title and right of possession could be conveyed, not having been complied with.

And this too is the construction placed upon the act by this court.

Thus in *Vanzant vs. Vanzant*, 23 Ills., 541, Mr. Justice Breese, after declaring that "the controlling consideration with the legislature, in passing the act, was the family of the householder; it was for their benefit, rather than for that of the householder;" that there must be "a writing expressly manifesting the intention to waive or release, and that writing must be signed by the party releasing, and it must be acknowledged as an ordinary deed is acknoowledged;" that as regards the wife, a fair construction of the act, taken in connection with the conveyance act, "would require that the officer taking the acknowledgment of the wife should certify, also that he fully informed her of her rights under the act, and that she voluntarily released or waived all right and benefit under it;" with reference to the mortgage in that case says; "The mortgage in this case, to Isaiah Vanzant, was executed in the ordinary way, and contains no release or waiver of the homestead act by John A. Vanzant, the householder, and then, in the actual occupancy of the premises, residing thereon, with his family. The benefits of the act not having been released or waived, *they remained in the family for their benefit*, and to continue up to, and after the death of the householder. Whilst he lives, the right exists so long as there remains a family to enjoy it; when he dies, the exemption continues after his death, for the benefit of the widow and family, some, or one of them continuing to occupy such homestead, until the youngest child shall become twenty-one years of age, and until the death of such widow. * * * * "As a home, and as their home, *it has never been granted away*, or the right to occupy it released or waived by any one competent to release or waive it." And again, "*The right to the property as a homestead*, has never been surrendered, released or waived.

Again, in *Green vs. Marks et al.*, 25 Ills. 222, Mr. Justice Walker, with reference to this statute, says: "By this enactment, the debtor

falling within its provisions, is required to perform no act, to discharge no duty, or even manifest any intention to avail himself of its benefits. *The law casts it upon him*, but at the same time, has provided the means, by which he may, if he shall choose, waive that benefit. *But until he does so, or until some one of the circumstances, which is essential to the operation of the statute, ceases to exist, the exemption continues by its own force.*"

The equities of this case are strongly against the appellee; and there is every reason why the statute should be enforced against him. To hold that, by the deed, under which he claims, he has acquired neither property in, nor right to the possession, of this homestead, is not only doing no injustice to the spirit of the statute, but is simply following the construction which the legislature has imperatively, and most unmistakably, placed upon it. The property has never yet been *alienated.* Neither *title* nor *possession* has ever been vested in the appellee. After Marshall has left the country, his wife and children remaining upon the property, which they have always occupied and claimed as a homestead; it is sought to drive them from that home, under an instrument which carries a falsehood upon its face, purporting to be an absolute conveyance of the title, for the consideration of $4000; when in fact, it was simply given as security for the payment of only about $600.

No stronger case can well be presented for the interposition of this court, nor a stronger argument afforded of the justice, wisdom and necessity of the homestead exemption. In this connection, the language of Mr. Justice Breese, in *Deere vs, Chapman*, 25 Ills. 612, is most apposite: "We regard," he says, "the statute as remedial in its nature; intended to remove grievances, under which the unfortunate labored, and to save them, amid all their losses and disasters, a shelter for the family—a home. Being remedial, it must be so construed as most effectually to meet the benevolent end in view, without departing, however, from the plain and obvious meaning of the language used in the act."

The question made at the Circuit, as to the right of a mortgagee to maintain ejectment, after condition broken, having been expressly decided in 26 Ills. 1, we do not propose to discuss it.

E. S. SMITH, For Appellants.