

14544

No. 14544

Supreme Court of Illinois

Bentley

vs.

Lill

STATE OF ILLINOIS,
SUPREME COURT,
THIRD GRAND DIVISION.

No. 67

J. W. Middleton & Co., Stationers, 126 Lake St.

1865-1866

Regard,

Bentley

Lill

14514

X

67

SUPREME COURT.

THIRD GRAND DIVISION, AT OTTAWA—APRIL TERM, A. D. 1863.

CYRUS BENTLEY,

VS.

WILLIAM LILL,

Impleaded with Joseph H. Martin.

} Appeal from Cook County
Circuit Court.

POINTS FOR ~~PLAINTIFF~~ IN ERROR.

appellant

BEACH & BARNARD'S Print, 14 South Clark Street

Filed April 25. 1864
L. Leland
Clerk

SUPREME COURT.

THIRD GRAND DIVISION, AT OTTAWA—APRIL TERM, A. D. 1863.

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vs.

WILLIAM LILL,

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} Appeal from Cook County
Circuit Court.

STATEMENT OF CASE.

On the first day of May, A. D. 1858, the plaintiff demised to the defendant a four story brick building, in the City of Chicago, about ten feet in width to a certain distance, and then narrowing to a width of six feet, which narrow part runs in the rear of the building adjoining on the north, and is an outlet to an alley which runs into the main street. The said building stands upon the rear end of plaintiff's lot, back of two buildings which front on Dearborn street, and is inclosed on the north, west and south by brick walls, and on the east by studding set up against the brick wall of an adjoining proprietor's building. The roof rests upon the top of the studding, on the east, and was attached to the wall of the eastern proprietor by a roof board, covering the crevice between the studding and the wall, and covered by felt and composition cement.

The demised building was used in connection with the building adjoining on the north—a hotel—known as the McCardel House, and was occupied for purposes of a laundry, servants' sleeping rooms, etc., for the McCardel House.

The building was demised to the defendant, William Lill, (and to Joseph H. Martin, with whom the defendant Lill is impleaded in this suit,) at a rent of \$500 per annum, payable in monthly instalments of \$41 67.

About three months after the building was demised, the lessee, Joseph H. Martin, who kept the McCardel house, broke up in business, left the McCardel house, and abandoned the demised building, which immediately, in consequence, went into general dilapidation.

No one took any care of the building, the windows were blown in, the rain poured in and flooded the floors and basement, and the whole soon presented a scene of desolation and ruin.

In October, A.D. 1859, more than a year after the building had been abandoned, the proprietor of the building on the east, J. Young Scammon, (whose west wall supplied the inclosure of the demised building on the east, as above stated,) raised his building some six feet, and in doing so, toppled off the top of the chimney of the demised building, which before ran up above the wall, but afterwards was left some six feet below; and also separated from said wall the roof board, which covered the crevice between the said wall and the building in question, some three or four inches, to a distance of several feet.

The adjoining proprietor, before raising his wall, took pains to notify the lessees that he was about to do so, and called upon them to protect the building. They paid no attention to it, did not appear upon the premises during the time of raising, nor was any one present occupying or having the charge or care of the building. After the building on the east was raised, repairs were made upon the demised building, at an expense of \$74, and the same was left in as good condition as before the raising, except the few feet of chimney which had been toppled off were not replaced, neither was the roof board covering the crevice as aforesaid replaced.

Subsequent to the raising (October 1859) the lessees continued to pay the rents, as before, until the month of September, A.D. 1861, (about two years); but the rents for September and October, 1861, not being paid, this suit was brought before a Justice of the Peace, to recover the same, and judgment was rendered for the amount claimed, \$83 34. An appeal was taken to the Cook County Circuit

Court, and the cause having been submitted to the court, without the intervention of a jury, a verdict was rendered, *pro forma*, for the defendant, and the case is now before the court for its final determination.

The defense to this action is, that the rent is suspended, and the plaintiff is not entitled to recover, on the ground that the raising of the Scammon wall (whereby the chimney was toppled off a few feet, and the roof board separated from the wall a few inches,) has caused an eviction of the tenant; or occasioned such a breach of the covenant for quiet enjoyment, as to constitute in effect an eviction.

POINTS.

I.

If there has been an eviction in this case, it was occasioned, not by the landlord, but by a stranger, viz.: J. Y. Scammon, the adjoining proprietor.

In making a distinction between an eviction by the landlord, and an eviction by a stranger, the law is well stated by this court in the case of *Halligan vs. Wade*, 2 Ill., 479, thus: "An eviction may be occasioned either by the landlord himself, by entering without title, or by a third person under paramount title. When the eviction is of the whole of the demised premises, under paramount title, such eviction has the effect to discharge the rent. But an eviction of only a part of the premises, if by a stranger, the rent will be apportioned; but if by the landlord himself, and the tenant is kept out of possession of that part, the whole rent will be discharged."

And the court cite, 3 Kent, 464; 1 Saunder, R. 204, Note 2; and 1 Ld., Ray. 370.

This distinction is necessary to be borne in mind, because, if evic-

tion in this case, by a stranger, is made out, it becomes material to enquire, whether the same was of the whole or only a portion of the demised premises; and if only of a portion, what proportion of the rent should be abated.

II.

But there has been no eviction whatever, either of the whole, or any portion of the demised premises.

Three things are essential to constitute an eviction :

First. An entry.

Second. An ouster.

Third. Keeping the tenant out of possession.

1. There has been no entry in this case, into or upon the premises of the lessees.

No one has entered into the possession of the whole, or a part of said premises, and occupied, either permanently or temporarily. They were unoccupied before the raising of the Scammon wall, for more than a year, the tenants having abandoned the premises 14 months previously; and the witness, Hollingsworth, who raised the wall, says, "the inside of the building showed that it had not been occupied for a long time prior to the raising," and the same condition continued subsequently. The most that can be said is, that a stranger has injured the premises—broken the chimney and the roof board. As well might it be said that if a stranger should throw a stone and break out a pane of glass, or even the whole window, he has entered upon the premises injured. Such is not the entry contemplated by the law, as one of the essential elements of eviction.

2. There has been no ouster in this case. Ouster signifies a driving out, or expulsion of the tenant. Was the defendant expelled, by these acts of Scammon, from the premises in question, or any part of them? The evidence is, that the lessees abandoned the premises more than a year previous to the acts complained of. How, then, were they ousted?

In *Harrison's case*, Clayton's Rep. 34, the court say: "This was

"no such re-entry into the house as will make an extinguishment of the rent, for that must be a continuance of possession, and *putting out the lessee.*"

In Lord Raymond, 370, the court say: "Whether the plaintiff entered by virtue of any power, or whether he was a mere trespasser, *if the defendant was not evicted*, it will be no suspension of rent."

"Unless the tenant *leaves in consequence* of the disturbance, it is no eviction."

1 E. D. Smith, 47.

In case of *Hazlett vs. Powell*, 30 Penn. State Rep. 293, the tenant claimed eviction, because adjoining proprietor erected a party wall, which darkened 18 windows of his premises; but he did not leave. Held no eviction.

See, also—

- 1 Cowp., 242;
- 3 Johns., 471;
- 5 Ibid, 120;
- 1 Saund. Rep., note, page 204;
- Styles, 446;
- 13 Johns., 236;
- 7 Ibid, 259;
- 7 Wendell, 281;
- 8 Cowen, 727.

3. But there must be not only an entry and expulsion, but also a keeping out of possession.

- Clayt., 34;
- Hob. 326;
- Styles, 432;
- Lord Raymond, 370;
- 1 Saund., 204, note 2.

In the case of *Jones vs. Bodinger*, Comb., 380, the court say, in speaking of the case in Hob., 326, "The entry is no bar. Expulsion makes the first part, and *holding out* the rest."

If the lessee, having been evicted, re-enters and possesses again the demised premises before the rest becomes due, it is thereby revived.

Page vs. Parr, Styles, 432;

1 Selwyn, N. P. 433; 500;

Cibels vs. Hills, 1 Leon., 110.

In the case at bar, has there been a keeping of the lessees out of possession of the whole or any portion of the demised premises? There has been no evidence offered, and there could be none, to show that the plaintiff, or any other person, whether J. Y. Scammon or any one else, has usurped any possession whatever, of any portion of the premises in question. The wall that was raised has not been removed, but remains as before, only having been elevated a few feet. The roof has not been removed—only one board has been displaced a few inches. And no room in the building was, at the time of the raising, or since has been, occupied by any person whomsoever.

There has been, then, no actual eviction in this case. No entry upon any portion of the premises in question; no expulsion, and no keeping out of the tenant from the demised premises, or any portion thereof.

III.

But it is said, although there was no actual eviction, there was a constructive one, to wit: a breach of the covenant for quiet enjoyment, to the extent that the defendant has lost the beneficial use of the premises, which constituted an eviction in effect.

Three questions arise here—

First. What was the disturbance complained of?

Second. Was it such as to expel the tenant, or necessarily deprive him of the beneficial enjoyment of the premises?

Third. Has it kept the tenant out of possession until the rent, for which this action was brought, accrued?

1. What was the disturbance?

In the first place, it is said the chimney has been left six feet below the top of the Scammon wall, and it will not draw.

Whether the chimney left in that position will draw, or not, can only be determined to the satisfaction of a jury, under the rules of evidence, by the testimony of experts, who have tested chimneys similarly situated; or by the testimony of one who has actually tried the experiment upon the chimney in question. No such evidence was offered in this case. The only testimony that the chimney would not draw, was that of D. N. Burnham, a lawyer, one of the counsel for the defendant, who merely looked at the chimney in its present condition; did not try it to see whether it would draw, but who only guessed it would not draw.

In the second place, it is said the roof board that lay against Scammon's wall, and covered the crevice between Scammon's wall and the demised premises, was displaced so as to leave an opening four or five inches for the rain to fall through.

This displacement of the roof board, then, constitutes the length and breadth of the disturbance. For although considerable testimony was introduced, as to the filthy and dilapidated condition of the premises, still, such condition, not being the result of the plaintiff's acts or negligence, but of the abandonment of the premises by the lessees, who had covenanted to keep the same in a clean and wholesome condition, was not a disturbance of the quiet enjoyment by the plaintiff or a stranger.

2. Was this displacement of the roof board such a disturbance of the quiet enjoyment of the tenants as to compel him to leave the premises? Who can answer this question in the affirmative, while the fact remains that the tenant was not only not expelled by reason of this disturbance, but actually left for other reasons more than a year previous?

But the defendant claims that although he was not in actual possession, and not actually expelled, by reason of the disturbance aforesaid, yet he was in constructive possession, inasmuch as he was paying rent; and being in constructive possession, there was a constructive eviction. That is to say, supposing the tenant to have

been in possession, the disturbance was such as would have compelled him to leave.

What a person would do or would not do under certain circumstances, is not the province of a jury to determine. If the jury can thus speculate, they might, supposing the tenant in possession, suppose he would be desirous of remaining in possession, (for such supposition is only consistent with the original leasing), and that he would replace the roof board, or suggest the displacement to the party who raised the wall, and who expended \$74 to replace the premises in the condition they were before the raising, and that the tenant would never have left the premises for the reason assigned.

It must appear from the most cursory glance at the facts in this case, that there could be no eviction, in consequence of the trivial disturbance alleged, and that the plea of eviction now urged, is the merest pretext to avoid the payment of rent.

3. But in the third place, supposing for the sake of argument that the tenant had a constructive possession, and that he was constructively ousted, has he been *kept out* of possession?

For if he has resumed possession and has not been kept out until the rent has accrued, the plaintiff is entitled to recover, even conceding there was an original entry and expulsion.

Reynolds vs. Buckle, Hob. 326.

Page vs. Parr, Styles, 432.

Bushell vs. Lechmore, 1st Ld. Ray, 370.

Jones vs. Bodinger, Comb., 380.

1 Selwyn, N. P., 432, 500.

Cibel vs. Hills, 1 Leon, 110.

Did the defendant resume possession? What is the evidence that he was in possession prior to the raising of the wall? The answer is the same—he for about two years subsequent to the alleged eviction occupied the premises as much as he did before, and paid rent the same as he did before.

The defendant then was not kept out of possession until the rent accrued, but the evidence shows he was as much in possession, and had the same enjoyment before as after the alleged eviction.

The payment of rent subsequent to eviction is evidence of restoration of possession.

Taylor's Landlord and Tenant, Secs. 22, 308

IV.

The alleged eviction, or breach of covenant for quiet enjoyment, was not made out by the evidence; it was a mere pretext to avoid the payment of rent. There had been a voluntary abandonment of the premises. In the case of *Dyett vs. Pendleton*, 8 Cowen, 727, Senator CRARY remarked as follows: "And whether it was an *unnecessary* and *voluntary* abandonment of the premises on the part of the tenant, or compelled by the moral turpitude of the landlord, is the only question material to be considered."

In the celebrated case of *Smith vs. Arrable*, 11 M. & W., 5, Lord ABINGER left it for the jury to say whether, under all the circumstances, the alleged grievance amounted to a nuisance, "or was merely made a pretext by the defendant for leaving the house."

Who can question, for a moment, that this complaint—that the top of the chimney was broken off, and the roof board displaced—is "made merely a pretext by the tenant for leaving the house."

Was the disturbance complained of any greater than that occasioned by the blowing in of the windows, and the water flooding the basement, previous to the raising of the wall; but as these did not expel the tenant, can we say that the former would?

V.

The disturbance was the result of the defendant's own negligence.

No principle is better settled, and none more salutary, than that a man shall not take advantage of his own wrong.

Neither the defendant nor any one under him, was in possession, occupancy or care of the building, at the time of the raising of the Scammon wall. He was specially notified that the wall would be

raised, and requested to come and protect his building. He paid no attention to it. Had he been in possession, where he should have been, and where the law supposed him to be, he might have prevented the disturbance. He made no objection to the displacement of the roof board; nor did he suggest that it be replaced. We have a right to infer that inasmuch as Hollingsworth (the party who raised the adjoining building) took so much pains to prevent a disturbance, and actually expended \$74 to repair and put back the building in the same condition that it was prior to the raising; he would, at the merest suggestion of the defendant, extend the repairs to the replacement of the roof board, and topping out the chimney.

Shall not the defendant use ordinary care to prevent the disturbance? Shall he be allowed to stand aloof and wink at the disturbance, and then come in and make it the pretext for the non-payment of rent?

VI.

All that can be said of the result of Scammon's raising his building, is, that he has (not entered into the demised premises, by paramount title, and evicted the tenant; but) thrown the building in question, in a very slight degree, out of repair. Does this fact, that the building is out of repair, extinguish the rent? In the absence of any covenant to that effect, the landlord is not bound to repair. *Peck vs. Ledwidge*, 25 Ill., 109. The court in that case say; "the lessee was at liberty to make the repair at his own cost, and then enjoy the premises, beneficially, to the end of his term; or he might let them lay idle to the end of the term, and surrender them up in their damaged state; but he must pay rent the same as if the accident had not happened."

But it may be said that the tenant could not repair—attaching the roof board to the Scammon wall as it was before—without committing trespass.

If Scammon should assent to such repairs, it could be no trespass. Assent may be express or implied. In this case it is clearly

implied, from the previous user of the wall, and from the \$74 repairs made by him, or his agent Hollingsworth, in the replacing of the building in its previous condition.

VII.

The title of the Scammon wall being in Scammon, constitutes no breach of quiet enjoyment or eviction.

The covenant for quiet enjoyment has reference merely to the undisturbed possession, and not to the grantor's title.

Waldron vs. McCarty, 3 Johns. Marg., p. 471.

Kortz vs. Carpenter, 5 Ib., 120, and cases therein cited.

Kerr vs. Shaw, 13 Johns., 236.

Kent vs. Welch, 7 Ib., 259.

VIII.

If the covenant for quiet enjoyment was broken in this case, before the rent could be discharged, it was the duty of the defendant to surrender possession of the premises to the plaintiff.

Prior to the bringing of this suit, the plaintiff had no intimation that the defendant would not pay the rent, as he had previously, and continue to hold the premises as before. And there is no evidence in this case that the defendant did at any time surrender up the possession of the premises to the plaintiff, or that he ever offered to do so.

IX.

The plaintiff did not demise the Scammon wall by his lease, nor undertake to do so. Nor did the lessees so understand it. The lessees took the building, subject to the hazard of being disturbed by the raising of the Scammon wall. The Scammon wall was a wall covering the west side of a store, and was 140 feet long, more

or less. The building demised was set up against this wall, and it was plain to be seen by any one occupying it that it was so built. The defendants at the time of making this lease were occupying the premises, as the lease itself states, and they well knew the situation of the building. They did not lease the Scammon wall or any easement in it, and did not so understand it. They leased the building as it stood, subject to all contingencies that might arise in consequence of its leaning against the Scammon wall.

Banks et al v White 1 Sneed 613.
Cleves v Willoughby X Hill 86

Considerable testimony has been taken by the defendant, concerning the present filthy and dilapidated condition of the premises. All the evidence shows that this condition has ensued in consequence of the abandonment of the premises, by the defendant, long before the Scammon wall was raised.

Hart v Winsor 12 Meadon & Welby 68

XI.

The defendant has not shown himself entitled to even an apportionment of the rent. For if an eviction has been caused by the acts of Scammon, it is only *pro tanto* to the extent of the building injured. And as no evidence has been introduced, showing the value of the part injured, or taken, no amount of deduction from the rent can be fixed.

XII.

The determination of this case involves not only the rents for the months of September and October, 1861, but also the subsequent months up to and including the month of April, A. D. 1863.

CYRUS BENTLEY,
Plaintiff pro pers.

No 67

Supreme Court of Illinois.

AT OTTAWA.

April Term, A. D. 1864.

CYRUS BENTLEY, }
 vs. } *Appeal from*
WILLIAM LILL. } *Cook Circuit Court.*

BRIEF FOR DEFENDANT.

BURNHAM & MARTIN,

Attorneys for Appellee.

Filed May 2. 1864
L. L. Lusk ckr

SUPREME COURT OF ILLINOIS

AT OTTAWA.

APRIL TERM, A. D. 1864.

CYRUS BENTLEY, }
vs. } *Appeal from Cook Circuit Court.*
WILLIAM LILL, }

BRIEF FOR DEFENDANT.

CASE.

In 1858 Plaintiff demised to one Joseph H. Martin, (with William Lill as his surety,) a four storey building in Chicago, to be used for sleeping rooms, at the rent of \$500 per annum, payable monthly.

At the time of the demise, this building consisted (among other things) of four walls; it now appears that the east wall belonged to J. Y. Scammon, the west wall belonged in part to Steele and in part to Bentley, and the short end walls on the north and south belonged to Plaintiff.

The studding to support the roof of the demised building was spiked into the Scammon wall, that wall also formed the east side of our chimney; the roof of the demised building was of board covered with tar or gravel, and the whole firmly annexed to the Scammon wall by cement.

It is in evidence that the lessor had no right to use the Scammon wall for any purpose whatsoever; that the user was without Mr. Scammon's knowledge or consent; and that McCardell (the grantor of the lessor and the party who put up the demised building) applied to Mr. Scammon for his consent, which he offered to give at a price, but McCardell refused to pay it, and said he would build up his own walls himself.

After the demise and before the rent sued for had accrued, Mr. Scammon raised up his whole building, and thereby lifted up our east wall some six feet. In doing so his agents necessarily broke the roof of the demised building, tore down a part of the north wall (but rebuilt that); destroyed the use of the chimney; and as the proof shews (without any attempted contradiction from the plaintiff), rendered the building untenable and wholly unfit for the purpose for which it was demised.

It seems that the outlay of some fifty dollars or less would have restored the roof and made the building as tenantable as it was when Mr. Scammon commenced his operations. Mr. Bentley insists that the injury occasioned by Mr. Scammon was a mere dilapidation which the tenant was bound to repair; Mr. Lill submits that it amounted to a partial eviction by the lawful act of a third party, and that the lessor was bound to restore the building to us, as it was at the time of Scammon's entry, before he can ask for his rent.

The defendant insists: 1st. That the term "Demise" in his lease, implies a covenant for quiet enjoyment, to wit: that he shall and may have, hold, use, occupy, possess, and enjoy all and singular, the said demised premises, and every part thereof, with the appurtenances, without any let, suit, trouble, eviction, interruption or disturbance whatsoever from the lessor or any other person lawfully claiming or to claim the same or any part thereof. 2d. That the thing demised was not a mere open shed, but a "Four Story Building to be used for Sleeping Rooms," and worth for that purpose \$500 a year.

Building means inclosure.

Bouvier's Dic.: *Building*.

Message means all the rooms as occupied.

2 Stark: 408.

The Scammon wall formed a component and permanent part of the demised building, the roof was cemented to it so securely that it could not be detached without making such a rent as to amount to an untenable leak; our studding was spiked into it; our north wall so rested on it, as to be thrown down by lifting it, and it was also one side of our chimney.

It is a false position to assume that the Scammon wall would not be included in a sale of the Bentley building; and therefore it is not included in a lease of it; upon a sale in fee the soil and freehold is understood to be the principal thing sold, the building a mere incident. But if the building were the

principal thing agreed to be sold it would be an element of the sale, and on a contract to sell a building having a stated number of rooms, and for a specific purpose, at an adequate price, and a third party should lawfully remove one wall, it is submitted that the vendor could not enforce a specific performance. Again, on a sale in fee, before we could infer that the use of the Scammon wall was included on the grant, we should have to presume an easement in that wall co-extensive with the grant, *i. e.*, in fee. But on a demise for a short term, we are not required to make any such extreme presumption, an easement co-extensive with the term, or a license, or a sufferance, or even a trespass by our lessor would be sufficient, for he assumes the risk of eviction and indemnifies us against it.

If the tenant could be affected by notice of Mr. Scammon's rights, we say no such notice is proved either actually or constructively in this case. How could we presume that Mr. Bentley did not own some sufficient right to use this wall? he spikes his studding into it, cements his roof to it, leans his north wall on it, and uses it for a side to his chimney, and delivers it to us as part of the sleeping rooms, for which he charges us \$500 a year. He cannot now insist that we were to presume that he was an unlawful trespasser, therefore he is driven to admit, that we were entitled to presume a right in him to use this wall, and to demise to us the entire messuage, as it stood at the date of the lease.

If we lay aside the use of the Scammon wall, our roof is surely part of the "Demised Building," now that roof is torn and rendered useless, by the lawful act of Mr. Scammon, and the proof is, that he did no more injury to the roof than was necessary to accomplish his own lawful purpose.

By his lease the lessor says in effect, take the building as it is for sleeping purposes, and I will not ask you for the \$500 rent, if your enjoyment of the building, as it is, is lawfully diminished by any third person.

The argument that the tenant had abandoned the building is equally untenable, his right to enjoyment during the term is granted by the lease. Does it lay in the landlord's mouth, in a suit for rent, to say, that because the tenant was not at home to keep him out, therefore he was justified in entering and tearing down the premises, or suffering, or permitting any act, which diminishes the right of enjoyment; it is for the tenant to say whether he will occupy or not, but the landlord can't lock him out and continue the eviction, as in this case, to

the end of the term, without giving the tenant a right to say, I stay put just where you have placed me, that's outside.

There is no just reason why Mr. Lill should not have the benefit of his legal defence in this case; he is merely a surety, his principal rights have been prejudicially affected by the lawful acts of those against whom the creditor covenanted to protect him. At the time of the demise the premises had a doorway into and through the McCardell House, that doorway has been closed, the roof is a sieve, the only approach a filthy sewer, the premises themselves so rotten that beggars would not use them, and Bentley has at last been compelled, from very shame, to tear them down. From the time of the eviction the premises have been unoccupied, and wholly worthless to Mr. Lill and his principal.

POINTS.

The performance by the lessor of the implied covenant for quiet enjoyment is a condition precedent to his right to receive our rent.

Taylor Land. and Ten. § 304 note.

The diminution of our right of enjoyment, occasioned by the act of Mr. Scammon was an eviction which *pro tanto* suspended our rent.

II.

To amount to eviction the act must be done under colour of right, as contra-distinguished from an unlawful trespass.

If the use of the wall in question was part of the demised premises, and it was removed by a person having the right to remove it, that amounts to eviction.

Lucky v. Franzkee, 1 E. D. Smith 47.

III.

An actual expulsion is not necessary, it's sufficient if the tenant's right of enjoyment is diminished.

Taylor L. & E., § 380.

Halligan v. Wade, 16 Ill., 507.

S. C., 21 Ill., 470.

This rule of law is well established at this day and cases cited by plaintiff do not sustain the contrary doctrine.

There may be a constructive eviction, as of an accommodation railroad side track running into the demised premises.
24 Barb. 178,

or of an easement where it constitutes (as in the case at Bar,) a part of the demised premises.

Blair v. Claxton, 18 N. Y., 533.

IV.

If the eviction is by the landlord, the rent is suspended *in toto*; but if by a third party, it only suspends rent *pro tanto*.

Taylor L. T. § 378.

Halligan v. Wade, *Supra*.

The suspension of rent only continues during the eviction.

Ogden v. Sanderson, 3 E. D. Smith, 166.

But a continued eviction is a continuing defence.

2 E. D. Smith, 210.

In determining whether this eviction should be deemed the act of a third party directly, or of the landlord constructively, "it might be material to enquire how far in the present case "the landlord is bound to protect his tenants' enjoyment by "protecting the building during the neighbouring work, and if "such neglect was not tantamount to an actual disturbance by "himself," and also, "whether the interruption rendered the "premises so unsuited for the purposes for which they were "let, as to be tantamount to an eviction from the whole."

Hegeman v. McArthur, 1 E. D. Smith, 168.

Defendant proves, that with the roof in its present state the building is absolutely worthless. Plaintiff does not offer any proof to the contrary, and he expressly proves that the tenants have never enjoyed any possession since the eviction.

The plaintiff in person now cries that the eviction is a mere pretext for refusing his rent. But if it was his duty to protect the tenant from such eviction, and if he had the right by restoring the building, to put us in statu quo, and if, as he insists, Mr. Scammon's agent, (Hollingworth,) would, at the

merest suggestion, have replaced and re-fixed the roof, and topped out the chimney ; how could he excuse his own penurious obstinacy and folly in refusing to lay out a few dollars, or his willful folly in neglecting even to request Mr. Scammon to incur the needful expense to secure that protection to Bentley's tenant, which the law required and which Bentley by his lease had covenanted to give.

V.

There was no necessity for a surrender by the tenant, in order to claim an eviction,

Anderson v. Chicago Fire & Marine Ins. Co., 21 Ill. 601.

On the other hand, no surrender short of delivery will justify eviction.

Flaherty v. Andrews, 2 E. D. Smith, 520.

VI.

The determination of the law of this case may indirectly affect the other ten or twelve cases which Mr. Bentley has commenced for subsequent installments of rent, by deciding the law, but there is no stipulation or understanding that these cases are to abide the event of this suit.

BURNHAM & MARTIN,

Attorneys for Appellee.

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 judgments of a plea which was in the Circuit
Court of Cook County, before the Judge thereof, between

Cyrus Bentley

plaintiff....., and

William Lill inpleads as

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

Cyrus Bentley

as we are informed by his

complainant..... the record and proceedings of
which said judgments 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

William Lill

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

William Lill

notice, together with this writ.

Pinckney W. Walker

Witness, The Hon. John W. Caton, Chief Justice of our
said Court, and the Seal thereof, at Ottawa, this 24th
day of February in the year of our Lord One
Thousand Eight Hundred and Sixty-four,

L. Island

Clerk of the Supreme Court.

240 ✓

Cyrus Bentley
No. 67 vs.
William Lill

SCIRE FACIAS. To
Cook Co. ✓



FILED... April 11..... A. D. 1864

L. Leland Clerk.

Served this writ by
Reading to the within
named William Lill
the 11th Day of March 1864

for J. 50 Pbbys
for 10 Pbbys
for 10 Pbbys
70

David S. Hammond Sheriff
by Wm. Mayman Deputy

101. 1601. 101. 999. 97. And in Sabbath n'l the congregation to the great church

THIRD GRAND DIVISION, }
APRIL TERM, A. D. 1863. }

vs.

Impleaded with JOSEPH H. MARTIN.

ABSTRACT OF RECORD.

9 And afterwards, to wit: at the April term of said Court, to wit: on
the 14th day of April, A. D. 1863, the said cause was submitted to the
Court, for trial, without the intervention of a jury; and judgment was
10 rendered, *pro forma*, for the defendant; to which the plaintiff then and

there excepted; and he was allowed one week to file his bill of exceptions.

10 And afterwards, to wit: on the 16th day of April, in the year last aforesaid, said plaintiff filed in said court, his bill of exceptions, as follows:

IN THE CIRCUIT COURT OF COOK COUNTY---APRIL TERM, A. D. 1863.

CYRUS BENTLEY,	}	<i>Appeal from a Justice of the Peace.</i>
vs.		
WILLIAM LILL, Impleaded		
with J. H. Martin.		

STATE OF ILLINOIS, } ss.
COOK COUNTY.

Be it remembered that, on the 14th day of April, A. D., 1863, at the April term of said court, for that year, this cause was submitted for trial by the court, without a jury, and tried before the Honorable GEORGE MANNIERRE, judge of said court.

And in support of his case, the plaintiff produced and read the following lease:

THIS INDENTURE, made the first day of May, in the year of Our Lord one thousand eight hundred and fifty-eight, between Cyrus Bentley, of Chicago, of the first part, and Joseph H. Martin and William Lill, of the same place, of the second part, WITNESSETH: That the said party of the first part, for and in consideration of the covenants and agreements hereinafter mentioned, to be kept and performed by the said party of the second part, their executors, administrators and assigns, has demised and leased to the said party of the second part, all those premises situate, lying and being in Chicago, in the County of Cook, and State of Illinois, and known and described as follows, to wit: One four-story brick building, situate on the rear of the main buildings, erected on the front part of lot five, in block sixteen, of the original town of Chicago, owned by said party of the first part, and bounded on the north by premises owned by Jonathan W. Steele, and on the south by premises owned by Jabez K. Botsford; the said building hereby demised being about thirty feet

long, north and south, and extending through the alley six feet in width, in the rear of said Steele's building, and, with the exception of said extension, about ten feet in width east and west; the same being separate and detached from said main buildings, and now used by said party as a work room, servants' sleeping rooms, and for porters' rooms, in communication with said Steele's kept as a hotel; but not for purposes of cooking, or for any other purpose that may be offensive to the tenants of the main building, in front of said building. To have and to hold, etc., from the first day of May, 1858, for and during, and until the first day of May, A. D. 1863. And the said party of the second part, in consideration of the leasing, etc., covenant and agree to pay as rent for said demised premises \$2,500, in manner following: \$41 67 on the first day of each month, until the whole is paid.

And the said party of the second part further covenants, that at the expiration of the time in the lease mentioned, or any earlier termination of the lease, they will yield up the said demised premises to the said party of the first part, in as good condition as when the same were entered upon by the said party of the second part; loss by fire or inevitable accident, or ordinary wear, excepted.

And the said Martin and Lill agree further to pay all water rents and assessments, and that they will keep said premises in a clean and wholesome condition.

(Here follow the usual covenants of leases.)

- 16 The foregoing was all the proof offered by the plaintiff in chief; and he stated to the court, that the amount claimed was for the two month's of September and October, A. D. 1861.

And in support of his case, the defendant produced the following witnesses, who testified as follows:

- 17 **Jonathan W. Steele** said: He knew the premises in question; the adjoining building of J. Young Scammon enclosed the said premises on the east; there was no other wall on that side. The roof of these premises was connected with the Scammon wall, to keep it from leaking. Scammon raised his building some two years since, and in doing so, the

18 roof of the premises in question was cut away, so as to loosen it from the Scammon wall, which left an opening some three or four inches wide, all along the roof. Before the raising, the roof was tight. When I saw the premises, in August last, they were not habitable. I spoke to Bentley about hiring them. He said he had nothing to do with them, they were rented to Lill. At that time the windows were blowing in, and I took them out. The court way was in a very bad state. Filth was thrown from Bentley's front building by his tenants, into this court. The basement had two or three feet of water in it. I cleaned it out. This was after Martin had left the premises. The north wall over the doorway, (I mean the little wall about six feet wide,) was so rotten I was afraid to stand under it. The effect of raising the Scammon wall was to loosen the chimney of the premises in question. The last time I saw the building it was not tenatable as a habitation, because the roof was so bad by the raising of the other building. At the time the premises were leased it had communication with the McCardel house in the rear thereof.

19 And, on his cross-examination, witness said : It was in the fall of 1858 that Martin left the McCardel house ; and the premises in question, after he left the said premises, went into general dilapidation.

21 The witness then gave the following diagram, showing the *locus in quo* of the premises in question. [See page 21 of Record.]

23 **Dyer N. Burnham**, on his direct examination, said he took a view of the premises two or three days since. There seemed to be no way of getting into the premises from the alley ; there was a rough door in that end of the building, but it was fastened up. The windows were all out of the building ; it was desolate, deserted and dirty. The Scammon building had been raised about six feet. The raising had apparently left an aperture through which water would leak for several feet north and south. The roof board was taken out three or four inches—I mean the board under the felting—this is nearly half the length of the building. At least several feet of it appeared to have been split off on the raising of the building. The aperture all along the building was sufficient to let in the water, snow and storm. The top of the chimney of the demised premises was knocked off by the raising of the adjoining building, and is now several feet below the top of the Scammon wall. In its

present condition it could not draw as a chimney. There was no eastern wall to the demised building except the Scammon wall. The court was very filthy ; not decent to use as a walk. The premises, in their present condition, are not habitable.

24 On his cross-examination, the witness said, the building is not habitable, because it is without windows, and leaky, and appears to be inaccessible, or nearly so. I went to examine the premises at the suggestion of Mr. Martin, who is my law partner. The management of the case is in our office. Mr. Lill is an annual client of ours ; we do all his business at a stipulated salary.

24 **Leander Reed**, on his direct examination, said : I know the premises ; McCardel built it in 1854 or 1855. I looked through the building in December or January last. Its condition was as bad as could be. The roof is leaky ; I am inclined to think was so down the whole building. I got my impression about the leaking from the looks of the building. I got my impression about the leaking from the looks of the building that it did. The east wall of Bentley's building was the west wall of Scammon's building ; that's my impression. The court is just as bad as any place can be where no one has access to it—filled up with truck, unless it has been cleaned out since I saw it. The Scammon building was raised six or seven feet.

26 On his cross-examination the witness said : I don't know as I knew the demised premises while Martin was there. I think the only time I was in there was last winter ; I went at the request of Mr. Martin. I went to see it, as there was to be a law suit. There was a justice's suit at the time. Defendant Lill is a brewer ; I sometimes buy of him. I am in the wholesale liquor business. And the defendant produced and read the following admission, which was signed by plaintiff:

" Admitted by Mr. Bentley, that in 1859, at the time it was raised, J. Young Scammon owned the property adjoining the property in controversy and abutting thereto on the east side thereof ; that Mr. Scammon built the west wall of his own building on his own property at his own cost, and he has not, by any positive act, authorized the use thereof by Mr. Bentley, or those from whom he claims ; nor has he in fact in any manner granted or conceded any easement in or to said wall by any posi-

27 tive act, and that the roof of the Bentley building was attached to the Scammon wall without his knowledge or expressed consent ; and that he had full power and lawful authority, as the owner thereof, to raise said wall in the manner and at the time it was raised. This admission is not intended to prejudice Mr. Bentley's right to urge, as a conclusion of law, all his rights arising from the use in fact of the wall as the east wall of the property in controversy. The Scammon building was erected in 1852.

[Signed]

C. BENTLEY.

J. Young Scammon, on his direct examination, said: McCardell applied to me for the use of this wall, to build up a kitchen against it. I offered to permit it at a price which he refused to give, and said he would build up his own walls, himself. This was all the conversation we ever had upon the subject.

28 **James A. Marshall**, on his direct examination, said: I have known the property in question five years. The roof is in awful state; with that roof, the building is not tenantable. I should think the property is worth a hundred dollars a year. As it now stands, there is no roof to it; it leaks all along the east side, as it is. In its present condition, it is not worth any thing. The court was in a bad condition. Edward Martin requested me to go and examine the building to-day; he said he wanted me to give him an honest expression of opinion of their present condition. With its present entrance, it is worth \$50 a year to hire, and the tenant fix the roof.

29 Here the defendant closed his case, and as rebutting testimony, the plaintiff produced a witness—

30 **James Hollingsworth**, who testified as follows: I have resided in Chicago sixteen years, and have been raising buildings for the last five years. We raised the Scammon building in October, 1859. I found the building in question had been built against the Scammon building, all the way up, in two end walls, and then studding from that to the other walls to hold floors and roof joists. There had been a chimney built up against the Scammon wall, all the way up from the cellar. There was no evidence that the building had been occupied for some

time. There was some cooking utensils in the basement, and straw mattresses in all the stories above. The roof (gravel) of the building was, of course, attached to the Scammon building, to prevent leakage. It was attached in the usual way, a piece of lath in the cement, then cement on the top of that again. The studding was spiked into the Scammon wall. Before it was raised, I went to Bentley, to see what was to be done with it. He refused to give any consent that anything should be done with it. It was under rent, and out of his hands. I then went to Scammon's agent. He said they used the wall, but had no privilege there. I then stopped the work, and spent two days to find Lill and Martin. I gave them all the notice I could. Martin I could not find. Lill I left a written notice for. I found it was going to cost me a \$100 to take care of the building; to cut it loose not to damage it. I called on Bentley to know if he would pay any portion of that expense. He refused to do so. I then went on and took as much care as I could, and shored it up, and did no more damage than was possible in raising it. I then rebuilt the mason's work at an expense of \$74; put the building in as good condition as I found it, except the roof. The first board next the Scammon building was taken out, so as not to tear the roof. We moved the cement from the Scammon wall. The opening was four or five inches, more or less. Probably, if the board was a very wide one, we split some off so as not to take no more than we could. The chimney was not topped out, I think. Except those things the building was as it was. I acted under Scammon. The chimney came, originally, to the top of the wall. Its east wall was the Scammon wall.

It was also admitted, on the trial, that the rents had all been paid up to the month of September, 1861.

The foregoing was all the evidence introduced by either party, and a judgment was rendered *pro forma* for the defendant, to which the plaintiff then and there excepted.

234 67
Supreme Court of
State of Illinois

Cyrus Bentley

vs
William Lill

Implicated re

Abstract

Filed May 9. 1863

L. L. Carter
clerk

UNITED STATES OF AMERICA,

STATE OF ILLINOIS, COUNTY OF COOK, SS.

Plas, before the Honorable George Manierre Judge of the Seventh Judicial Circuit of the State of Illinois, and sole presiding Judge of the Circuit Court of Cook County, in the State aforesaid, and at a term thereof begun and held at the Court House in the City of Chicago, in said County, on the Second Monday, (being the thirteenth day) of April in the year of our Lord One Thousand Eight Hundred and Sixty three and of the Independence of the said United States the Eighty seventh

Present, Honorable George Manierre Judge of the 7th Judicial Circuit }
of the State of Illinois. }

Joseph Knox States Attorney.

David J. Hammond Sheriff of Cook County.

Attest, William L. Church Clerk.

Be it remembered, that heretofore to wit: on the twenty third day of December in the year of our Lord One Thousand Eight Hundred and Sixty One there was filed in said Court a certain Transcript from Justice Court together with a Summons and the endorsement thereon and an Appeal Bond, which are respectively in the words and figures following to wit:

Transcript

20420.

Justices Fees	
Doc.	20
Sum.	25
Order	25
Copy	25
1 st ad	5
judg.	25
Sal	10
Ent appeal	25

Cyrus Bentley

vs

Joseph H. Martin

William Lill

Demand \$83.34

Nov. 11/61

Sum. issued to
Chilson Const.

ntd Nov. 18th 61 at

10 A. M. returned, served by reading to the

2

Deft. W. Lill and leaving a copy with him Nov. 11/61
Martin not found. Cont. to Nov. 19th 61 at 2 P.M.
when case called, parties present with sev. Suit for
rent, after hearing the evidence, judgment rendered
in favor of Plff. and against the Deft. W. Lill
impl. &c for the amount of

to F. Chilson } Judgment \$83.34

C. Bentley } & costs

Appeal fees pd. } Dec. 9/61 Deft. appeals to
Const. Chilson } Circuit Court and files Bond
1.00 } with Edward Martin a Sec.

State of Illinois }
Cook County } p. I certify the foregoing is
a true Transcript of all the proceedings before me
in the above entitled cause from my docket and
the papers herewith transmitted to said Court
contain a full and perfect statement of all the
proceedings before me.

Witness my hand and seal this 9th day of
December A.D. 1861.

C. D'Wolf (seal)
Justice of the Peace.

Summons

State of Illinois }
Cook County } p. The People of the
State of Illinois to any
Constable of said County Greeting.

You are hereby commanded to summon
Joseph M. Martin & William Lill to appear
before me at my Office in South Chicago on the

18th day of November A. D 1861 at 10 o'clock
A. M. to answer the complaint of Cyrus Bentley
for a failure to pay him a certain sum not exceed-
ing one hundred dollars and hereafter make due
return as the law directs.

Given under my hand and seal this 11th day
of November A. D 1861.

Calvin D'Wolf (seal)
Justice of the Peace.

The foregoing Summons is endorsed as follows
to wit:

Served by reading to the within named Deft.
W. Lill. J. H. Martin not found & a copy
left with the Deft. Lill this 11th day of Nov.
1861.

Fee 1.00

C. F. Chilson, Const.

Appeal Bond.

Know all men by these presents, that we
Joseph H. Martin & William Lill & Edward
Martin of the County of Cook in the State of
Illinois are held and firmly bound unto Cyrus
Bentley in the penal sum of One Hundred
and Eighty dollars lawful money of the United
States, for the payment of which, well and truly
to be made, we bind ourselves, our heirs, executors
and administrators, jointly, severally and firmly

by these presents.

Witness our hands and seals this 9th day of December A D 1861.

The condition of the above obligation is such, that whereas the said Cyrus Bentley did on the 19th day of December A D 1861 before Calvin D'Wolf a Justice of the Peace for the said County of Cook recover a judgment against the above bounden William Lill impleaded with Joseph H. Martin for the sum of Eighty Three $34/100$ dollars and costs of suit, from which judgment the said William Lill has taken appeal to the Circuit Court of the County of Cook aforesaid and State of Illinois. Now if the said Lill shall prosecute his appeal with effect and shall pay whatever judgment may be rendered by the Court upon dismissal or trial of said appeal, then the above obligation to be void, otherwise to remain in full force and effect.

Approved by me at my Office this 9th day of December 1861.

C. D'Wolf

Justice of the Peace

William Lill (seal)
Edward Martin (seal)

And thereupon afterwards to wit: On the 23^d day of December in the year aforesaid there was issued out of said Court and under the

3
seal thereof the ⁵ Peoples Writ of Summons directed
to the Sheriff of Cook County to execute, which
writ is in the words and figures following to wit:

State of Illinois

Cook County } p. The People of the State
of Illinois to the Sheriff of said County
Greeting:

We command you, that you summon Cyrus
Bentley, if he shall be found in your County
personally to be and appear before the Circuit
Court of Cook County on the first day of the
next term thereof, to be holden at the Court House
in Chicago in said County on the first Monday
of January next to answer unto William Lill
impleaded with Joseph H. Martin on an appeal
from the judgment of C. D'Wolf Esquire, a
Justice of the Peace within said County.

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

Witness William L. Church, Clerk of our
said Court and the seal thereof at
Chicago aforesaid this 23^d day of
December A D 1861.

(L.S.)

Wm. L. Church, Clerk

And afterwards to wit, on the seventh day
of January in the year of our Lord One thousand

Eight hundred and sixty two the said Defendant
filed in said Court his certain Affidavit of
merits in the words and figures following:

In the Circuit Court of Cook County
Of January Term A.D. 1861

Between

Cyrus Bentley, Plaintiff

against

William Lill, impleaded with

Joseph N. Martin Defendants

} Appeal

State of Illinois

Cook County

} P. William Lill being duly
sworn, maketh oath and says that he is one of
the Defendants in the above entitled cause and
that he is informed by his counsel and verily believes
that they have a good defence thereto upon the
merits.

Subscribed and sworn to
before me this 7th day of
Jan'y 1862.

Wm. L. Church
Clerk

} William Lill.

And afterwards, to wit: On the ninth day
of January in the year last aforesaid Bunham
& Martin filed their Appearance for Defendant

7

Lill in the words⁷ and figures following to wit:

In the Circuit Court of Cook County
January Term a D 1862.

Cyrus Bentley

vs

William Lill et al

} We hereby enter our
appearances as Attorneys
for Defendant Lill
Burnham & Martin.

And afterwards to wit: on the fifteenth
day of January in the year last aforesaid
the writ of Summons heretofore issued in this cause
was returned by said Sheriff into said Court
endorsed as follows to wit:

Served by reading to the within named
Cyrus Bentley the 4th day of January
1862.

Fees: Service	\$	—	50
Mileage			5
Return			10
			65.

A. C. Hesing
By W. Lockbiller Deputy.

And afterwards to wit: On the eighth day
of May in the year last aforesaid a
certain Motion for continuance was filed in

said Court, in words and figures following to wit:

In the Circuit Court of Cook County
April Term 1862.

Lill impleaded to
ads

Bentley

} And now comes Defendant
William Lill and moves for
the continuance of this cause for want of appellees
appearance of Record.

Burnham & Martin
Defts Attys.

And afterwards to wit: at the April Term
of said Court, to wit: On the eighth day of
May A D 1862, the following among other
proceedings were had in said Court and
entered of record to wit:

Cyrus Bentley

vs

William Lill impleaded
with Joseph H. Martin

} Appeal

This day comes the
said Plaintiff in his own proper person and the
said Defendant by Burnham and Martin his
Attorneys also come and by oral consent of said
parties now here given in open Court said cause
is submitted to the Court for trial upon the

issues joined therein⁹ and the intervention of a jury waived and the Court after hearing the evidence and arguments of counsel as well on the part of the Plaintiff as of the Defendant and not being sufficiently advised in the premises doth take said cause under advisement.

And afterwards to wit: at the April Term of said Court to wit: on the fourteenth day of April A.D. 1863 the following among other proceedings were had in said Court and entered of record to wit:

Cyrus Bentley

vs.

William Lill impleaded
with Joseph H. Martin

} Appeal.

This day comes the said Plaintiff in his own proper person, the said Defendant by Burnham and Martin his Attorneys also come and by oral consent of said parties now here given in open Court said cause is submitted to the Court for trial upon the issue joined therein and the intervention of a jury waived and the Court after hearing the evidence and arguments of counsel as well on the part of the Plaintiff as of the Defendant and being fully advised in

the premises doth find the issues for the Defendant and being fully advised in the premises doth find the issues to which decision of the Court the Plaintiff by his counsel now here excepts and on his motion one week is allowed him in which to prepare and file his Bill of Exceptions in said cause.

Therefore it is considered that said Defendant do have and recover of the said Plaintiff his costs and charges by him about his defense in this behalf expended and have execution therefore.

And afterwards, to-wit: on the sixteenth day of April in the year last aforesaid, said plaintiff filed in said Court his Bill of Exceptions in this Cause, which is in the words & figures following to-wit:

In the Circuit Court of Cook
County, April Term, A.D. 1862

Cyrus Bentley
vs
William Lill im
pleaded with J W
Martin } Appeal from a justice of the Peace

State of Illinois }
Cook County } Be it remembered that
on the 14th day of April A.D. 1863 at the April Term of
said Court for that year this cause was submitted for
trial by the Court without a jury and tried before
the Honorable George Manierre Judge of said Court.
And in support of his case the Plaintiff pro-
duced and read the following Lease

This Indenture, Made this First day of May in the year
of our Lord one thousand eight hundred and fifty
eight Between Cyrus Bentley of Chicago, State of
Illinois of the first part and Joseph W Martin &
William Lill of the same place of the second part -
Witnesseth, That the said party of the first part for
and in consideration of the covenants and agree-
ments hereinafter mentioned to be kept and performed
by the said party of the second part this execution
administration and assigns has demised and leased
to the said party of the second part, all those premises

situate lying and being in the City of Chicago in the County of Cook and in the State of Illinois known and described as follows, to-wit: The four story brick building situated in the rear of the main building erected on the front part of Lot five, in Block sixteen of the Original Town of Chicago owned by said party of the first part and bounded on the North by premises owned by Jonathan M Steele and on the South by premises owned by Perez R Batteford. The said building hereby devised being about thirty feet long, North and South & extending through the alley six feet in width in the rear of said Steele building and with the exception of said extension about ten feet in width East & West the same being separate and detached from said main building and now used by said party of the second part as waste room, servants sleeping room & for Porter's room in connection said Steele building, kept as a Hotel but not for the purpose of cooking or for any other purpose that may be offensive to the tenants of main building in part of said building To have and to hold the said above described premises with the appurtenances unto the said party of the second part their executors administrators and assigns from the first day of May in the year of our Lord One thousand eight hundred and fifty eight for and during and until the first day of May A.D. 1863 And the said party of the second part in consideration

13

13

of the leasing of the premises aforesaid by the said party of the first part to the said party of the second part does covenant and agree with the said party of the first part his heirs executors administrators and assigns to pay the said party of the first part as rent for said premises the sum of Twenty five hundred Dollars in manner following viz: Forty one and $\frac{67}{100}$ Dollars ($41\frac{67}{100}$) on the first day of each and every month, commencing on the first day of June A.D. 1858, and continuing until the whole of said sum is paid.

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

And the said Joseph W. Martin & William Sill their executors administrators and assigns, agree further to pay (additional to the rents above specified) all rates rents levied or charged on said premises for and during the time for which the lease is granted and save the said premises and the said party of the first part harmless therefrom, and that

14
he will keep said premises in a clean and healthy condition in accordance with the Ordinances of the City and direction of the Sewerage Commissioners, And the said party of the second part will keep the front walls of said Building constantly white by ^{hand or} white wash,

It is expressly understood and agreed, By and between the parties aforesaid, that if the rent above reserved or any part thereof shall be behind or unpaid on the day of payment whereon the same ought to be paid as aforesaid, or if default shall be made in any of the covenants or agreements herein contained to be kept by the said party of the second part this executors administrations and assigns it shall and may be lawful for the said party of the first part his heirs executors administrations, agent attorney or assign at election to declare said term ended; and into the said premises or any part thereof, either with or without process of law to reenter; and the said party of the second part or any other person or persons occupying in or upon the same to expel, remove and put out, using such force as may be necessary in so doing, and the said premises again to repossess and enjoy as in his first and former estate and to distrain for any rent that may be due thereon upon any property belonging to the said party of the second part

15

whether the same be ¹⁵exempt from execution and distress by law or not, and the said party of the second part, in that case, hereby waives all legal rights which he now has or may have to hold or retain any such property under any exemption laws now in force in this State or in any other way. Meaning and intending hereby to give the said party of the first part his heirs executors administrators or assigns a valid and first lien upon any and all goods chattels and other property belonging to the said party of the second part as security for the payment of said rent in manner aforesaid anything heretofore contained to the contrary notwithstanding. And if at anytime said term shall be ended at such election of said party of the first part his heirs executors administrators and assigns as aforesaid or in any other way the said party of the second part his executors administrators and assigns do hereby covenant and agree to surrender and deliver up said above described premises and property peaceably to said party of the first part his heirs executors administrators and assigns immediately upon the determination of said term as aforesaid, and if they shall remain in possession of the same twenty days after notice of such default or after the termination of this lease in any of the ways above named

they shall be deemed guilty of a forcible detainer of said premises under the Statute and shall be subject to all the conditions and provisions above named, and to eviction and removal forcibly or otherwise with or without process of law as above stated.

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

Witness, the hands and seals of the parties aforesaid
 Cyrus Bently Seal
 of H. Martin Seal
 Wm Lill

The foregoing was all the proof offered by the plaintiff in chief and he stated to the Court that the amount claimed was for two months rent for the month of September and October A D 1861.

And in support of his case the defendant produced the following witnesses who testified as follows:

Jonathan M Steele on his direct examination said: I know the property in question, it was used by Martin. The adjoining building was

raised as much as ¹⁷two years ago - it enclosed the Martin property, there was no other wall, - it was raised probably four feet. I should think the roof connected with that wall to keep it from leaking, - it was water tight before the building was raised. + they had to cut all the roof away or loosen it from the wall - this left an opening 3 or 4 inches wide all along the roof and it remained in that condition the last time I saw it which was in August last - The demised premises were not habitable when I saw them in August last - It was used for a laundry and servant bed rooms, The width was 10 feet wide for about 30 feet in length and 10 feet wide for about 27 feet. - I told Mr Bentley that if it could be fixed my Tenant thought he could use it - Mr Bentley said he had nothing to do with it: it was Mr Sill's business to do. - a good many of the windows were out - when I spoke about hiring the windows were blowing in I took them out, there were about twenty windows Mr Bentley told me I could clean it out.

The entrance is in the alley in the rear of the building I own - the only other entrance was from the McCordell House. There was a door from the alley through a narrow passage the whole width of my building

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thence into a court way 5 or 6 feet wide - at the south end of the building you enter the door way to go up stairs - the first door spoken of is at the North end - The court way was in a bad state. The floor of it a good deal broken. This was after Martin ceased to occupy the premises. The basement had about two feet of water in it. I cleaned it out and filled it up about 2 or 3 years ago the Spring - The tenants in the Back of Mr Bentley's front building threw it out in that court way. The people in those offices would do a job in paper and throw it out there - I very frequently had to clean it away - I used to keep the door of the premises fastened as well as I could, I nailed it up and put on a clasp I nailed it up and fixed it up a number of times this was after Martin left. The north wall over the door was so rotten I was afraid to stand under it - I mean the little wall ^{about} six feet wide. I don't recollect saying anything to Bentley about closing the door. Occasionally I put a little wood in the building and some Barrels it rained in on them ^{all the time} when it rained - Bentley did not authorize me to do this.

Mr Mc Cardell built the chimney - took out a good many bricks from an old wall

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in my building - The Cardell built the building
in controversy. The chimney sets part on Bentley
& part on the Mc Cardell House property. The
effect of the raising was to loosen that chimney
I did not notice it broken. I and Bentley
formerly owned the ground in common, 68
feet by 80 feet running back from Martown
Street to the Scammon property. - We divided
by Commissioners, I got thirty 3.1 feet on the
Alley by 74 feet, the 6 feet in the rear went
to Bentley - The East wall belongs to Mr
Scammon's Building, there was up and down
studding all along that wall to hold the
Roof and the floors they rested on the stud-
ding - The Building the last time I saw it was
not tenatable as a Habitation because the
Roof was so bad by the raising of the other
building - at the time it was leased it had
communication with the Mc Cardell House
in the rear thereof - the door was on the Office
floor of the Mc Cardell House - When I
was there that door way was not closed - I
have since sold my property there. - when
I sold I did not reserve to Bentley or any
parties the right of easement through that door
There was no door till I put one there it was
used as a
passage way.

And on his cross examination witness said

I think it must be more than two years since the Beaumont Building was raised - you can tell by the man that raised it - it must be three years - The studding would barely set right against the wall - I cannot say positively whether the studding was done while Martin was there or whether it was soon afterwards.

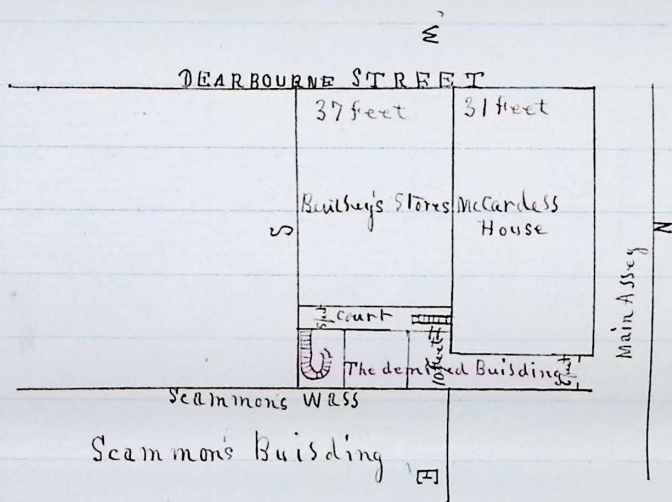
I saw them raising the building. I think it was before I took hold of it and put Ward brook in there - I should think it was in the fall of 1858 that Martin left there I could not be positive - at the time I saw it there was no one about the premises to take any care of it.

In the Spring 1858 Martin was a tenant of mine of the Mc Cardell House. I think he quit in August 1858 & at the same time ceased to occupy the premises in question.

After Martin left there was no one there to take care of it, it went into general dilapidation except what care I took of it. I cleared it out some. - After Martin left the Mc Cardell House it was run as a Hotel ^{of} 6 or 8 months by me then I rented for a year and my tenants run it some 5 or 6 months during that time, we did not occupy it except by putting in some little wood and some

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Barvull as above, I thought I took care enough of the Building for all the use I had of it. And on reexamination said witness said: Since I testified in chief I have heard Mr Bentley explain the locus in quo it is as follows



Oyer St Burnham on his direct examination said: I have owned some houses and do now - and have bought and sold some - I took a view of the premises in controversy 2 or 3 days ago I first went up the Alley leading from Dearbourn Street and looked at the North end - there appeared to be no way of getting in from the Dearbourn Street Alley, there was a rough door in that end behind the Mc Cardell House - the door appeared to be fastened up, I did not take hold of it. I understood it was nailed up. I then went through the building I supposed to

He Mr Bentleys on Dearborn Street and from the rear mindorn examined the premises in question. I saw the mindorns all out - it looked desolate deserted and dirty. I went up stairs raised the rear mindorns of Mr Bentleys front Building laid a board from the mindorns and went on to the roof of the demised Building. The Building called the Seammon Building adjoining East had been raised about six feet right up which apparently had detached the ^{junction} addition of the roof. It was one of these tar and gravel roofs - The marks of the tar and gravel as originally attached to the Seammon wall are still visible on it six feet above the Roof of the demised Building. This raising apparently had left an aperture which there was all along Seammons wall into which water would leak for the space of several feet north and South - The Roof Board appeared to have been taken out 3 or 4 inches of Board - I mean the board under the felting this is nearly half the length of the building, At least several feet of it that appeared to have been split off on the raising of the Building, the aperture all along the Building was sufficient the whole length to let in the water snow and storm.

The chimney right against the Seammon wall appeared to be the chimney of the demised

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premises - in the upper part of the Roof the top appeared to have been knocked off the Bricks laid about on the Roof of the demised Building - The top of the chimney is now several feet below the top of the Seammon wall and the print of the chimney is visible on the Seammon wall. In the present condition it could not draw as a chimney.

I opened a scuttle on the top of the demised Building and looked down into it - I saw there was no Eastern wall to the demised Building except the Seammon wall - up and down stepping was in the Building standing against the Seammon Wall to support the roof of the Demised Building as I suppose. The little Court was very filthy and dirty not decent to use as a walk to enter the Door of the demised premises. The premises in their present condition are not habitable.

On cross examination the witness said, "The building is not habitable because it is without windows and leaky and appears to be inaccessible or nearly so - there is no decent way of approaching it - I don't know whether the door from the main Alley leads in here or not, I did not go in that door it appeared to be fastened, I don't know where it leads to."

I went to examine these premises at the suggestion of Edward Martin he is my Law partner. The management of the case is in our Office but more particularly under his charge. Mr Lill is an annual client of ours we do all his business at a stipulated salary.

Assuming the door from the Alley does communicate with this Building it would not be habitable for a wash room, servants sleeping room nor for any other purposes in its present condition. It is not worth much if anything to rent for any purpose which might not be offensive to the tenants of the main and adjoining buildings.

Clauder Reed on his direct examination said:- my place of business is no 13 Dearborn Street - it has been in that immediate neighborhood since 1851. I know the property in controversy, Mc Cardell built it about 1854 or 1855. I recollect the raising of the Beaumont Building adjoining the Mc Cardell Building on the East. I looked through the Demised Building in December or January last went from top to bottom. Its condition is just as bad as any building could be. its like a vacant country School house where the boys had free access. The roof is leaky, I am inclined to think it

was so down the whole building. Its not tenant-
able for a decent Hog. I got my impression
about the leaking from the looks of it - not pos-
itive it did leak but judge from the looks of the
Building that it did. I occupied no 92 Lake
I think the Scammon Building was raised in
1858 or 1859 dont know who raised them.
All I can say is that in its present condition
the Building is not tenantable for anything;
I dont think its worth any thing to rent in its
present condition.

The East wall of the Bentley Building was the
West wall of the Scammon Building that my im-
pression I am not positive. The Court is just as
bad as any place can be where no one has
access to it, filled up with truck. Unless it has
been cleared out since I saw it. The Scammon
Building was raised six or seven feet. My im-
pression there were no windows there, if there was
any there, there was not all that were originally put
there.

On his cross examination the witness said:
I dont know that I know the demised premises while
Martin was there, I think the only time I was in
there was last Winter. I went then at the request of
Mr Martin. I dont think he stated any object
except he wanted me to see the condition of the
property.

I went to see it as there was to be a law suit,
 was to be or was. I should not be positive which
 I am inclined to think there was one. There was
 a ~~Police~~ ^{Justice} Court at that time, he wanted me to see
 it to testify in that suit. I can see the rear
 part of it from my premises this is the only
 time I went into it, I could see the North end
 and that was in bad repair. I am in the whole
 sale wine and liquor Business. Defendant Sell
 is a Brewer. I sometimes buy of him.
 At the time I made the examination I don't know
 whether the Mc Cardell House was occupied or
 not. I got in through George Dunbar's Stone

And the Defendant produced and read the fol-
 lowing admission which was signed by Plaintiff
 "admitted by Mr Bentley that in 1859 at the
 "time it was raised if Young Scammon owned
 "the property adjoining the property in controversy
 "and abutting thereto on the East side thereof.
 "That Mr Scammon built the West wall of
 "his own Building on his own property at his
 "own cost. And he has not by any positive
 "act ~~acknowledged~~ ^{authorized} the use thereof by Mr Bentley
 "or those from ^{whom} he claims - nor has he in fact
 "in any manner granted or conceded any
 " easement in or to said wall by any posi-
 "tive act and that the Roof of the Bentley

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Building was attached to the Seammon Wall
"without his knowledge or expressed consent,
" And that he had full power and lawful au-
"thority as the owner thereof to raise said wall
" in the manner and at the time it was raised, this
" admission is not intended to prejudice Mr Bent-
" ley ^{might} urge as a conclusion of law all his
" Rights arising from the user in fact of the
" wall as the East wall of the property in con-
" tiguity the Seammon Building was erected
" in 1852 Signed "G. Bentley"

of Young Seammon on his direct examination
said

Mr Mc Cardell applied to me for the use of
this wall to build up a kitchen against it
I offered to permit this at a price which he
refused to give and said he would build up
his own wall himself. This was all the conversa-
tion we ever had upon the subject.

James A Marshall in his direct examination
said:

I have known the property in question say
for five years - the Roof is in an awful
state - with that Roof the Building is not now
tenantable. The Wall of the adjoining Building
on the East shows it has been raised all

the line, I have had no experience in house raising of any consequence. I should think the property is worth a hundred dollars a year as it now stands there is no roof to it, it leaks all along the East side as it is I should not think it worth any thing. I mean \$100 a year with the Roof repaired. In its present condition it is not worth any thing. In its present condition of the Roof I don't think the building is habitable. If the Roof were fixed I think it might be. I occupied the two front Rooms of Bentley's Building in 1858-9.

The Court was in a very bad condition. Mr Bentley accused me of an act of nuisance committed by throwing filth into it — he complained about it and wished me to see it stopped. The nuisance must have come from Mr Bentley's Building but he was decidedly opposed to it in every particular so far as I know — I don't know that I ever heard him talk to others about it — all I know about his opposition is what he told me himself. Edward Martin requested me to go to examine the Buildings. To day he said he wanted me to give him an honest expression of my opinion of their present condition. If the Roof was repaired the Building would be worth not to exceed a hundred dollars a year.

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I don't know how much it would cost to repair the Roof
 I don't know anything about it - assuming it would
 cost \$10, \$20 or \$50 to repair the Roof and when
 repaired the Building would be worth \$100 per annum
 it would not in its present condition be worth
 anything to occupy but with the Roof fixed it
 would be worth to him \$100.

With its present entrance its worth \$50 a year
 to him and the tenant fix the Roof, I don't know
 whether this Building was occupied when I oc-
 cupied Butler's Store I think not. I think Martin
 must left the Mc Cardell House before then,
 I think Steele was there in the Mc Cardell House.
 I don't know that any body occupied the premises
 in question. I don't know who the filth in the Court
 annoyed - not me for I was in a front Room
 I rather think I heard Edison complain of the
 filth; I'm not sure but I am sure I heard
 Bentley, Edison occupied one of the stores,
 Now the defendant closed his case and as Res-
 helling testimony the Plaintiff produced as a witness
 James Hollingsworth who testified as follows,
 I have resided in Chicago for 16 years and have
 been raising buildings for the last 5 years, Brown
 & Hollingsworth raised the Beaumont building,
 I am of that firm, We raised it in or about Oc-
 tober 1859, I found the building had been built
 against the Beaumont building all the way up.

ice bro end walls & then stridding from that to the other walls to hold floors and Roof joists, There had been a chimney built up against the Scammon Wall all the way up from the cellar. The condition of the Building was there was no evidence that it had been occupied for a long time, There were some cooking utensils in the basement - hair & straw mattresses in all the stories above, The roof (gravel) of the Building was of course attached to the Scammon Building to prevent leakage, It was attached in the usual way a piece of lath in the cement then cement on the top of that again, The stridding was spiked into the Scammon wall, I don't think Steele's Building was occupied as a Hotel, but some one had charge, We got into the building through the Steele building there was no other way, Before it was raised I first went to Mr Bentley to see what he would do with the Building or what was to be done with it, he refused to give any consent that any thing should be done with it, it was under rent and out of his hands while it was under rent, I then went to Mr Forsythe, Mr Scammon's agent, he said they had used the wall but had no privilege there, I might raise the wall and if it damaged it it was their business as they had paid nothing for it - I then stopped the workmen & spent two days to find Sill & Martin I gave them all the notice I could, Martin

I could not find, till I left a written notice for
 I found it was going to cost me \$100 to take care
 of the Building to cut it loose not to damage it.
 I called on Buttry to know if he would pay any
 portion of that expense, he refused to do so. I
 then went on and took as much care as I could
 & showed it up and did no more damage than
 was possible in raising it, I then rebuilt the mason's
 work at an expense of \$74 put the Building in as
 good condition as I found it except the Roof.
 The first board next the Scammon Building was taken
 out so as not to tear the Roof. We moved the cement
 from the Scammon Wall the afternoon was 25 inches
 more or less, probably if the board was a very
 wide one, we split some off so as not to take no
 more than we could, the chimney was not topped
 out I think, except those things the building was
 as it was. I acted under Scammon, the chimney
 came originally to the top of the wall, its East
 wall was the Scammon wall, It was also
 admitted by both parties on the trial that the
 rents had been all paid to the month of September
 1861. The foregoing is all the evidence introduced
 by either party on the trial of this cause and
 thereupon a verdict was found and entered
 pro forma for the defendant ^{to which defining the said plaintiff then & there objected} and for as much
 as the matters aforesaid do not appear
 in the Records of this cause. the plaintiff

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Cyrus Bentley has prayed the aforesaid Judge to
sign and seal this Bill of Exceptions which he has
accordingly done this 16th day of April A.D. 1863

George Manierre (Seal)
Judge of the 1st Judicial Circuit
Illinois

Cornet C Bentley

I, WILLIAM L. CHURCH, Clerk of the Circuit Court of Cook County, in the State aforesaid, do hereby certify the above and foregoing, to be a true, perfect and complete copy of All papers & proceedings in a certain cause pending in said Court, on the Common Law side thereof, wherein George Benth is plaintiff and William Lill Impleaded with Joseph M. Martin Defendant

In Witness Whereof, I have hereunto set my hand, and affixed the Seal of said Court, at Chicago, this twentieth day of April A. D. 1863.



Wm L Church Clerk.

deposited 880

Supreme Court
Of the State of Illinois
Third Grand Division

Cyrus Bentley
vs
William Lill

And the plaintiff now comes in Propria Persona and assigns the following errors, upon the foregoing record

1. The verdict ^{adjudgment} rendered by the Court upon the trial aforesaid ~~was~~ contrary to law.
2. The said Verdict ^{adjudgment} ~~was~~ contrary to the evidence

Joined in Error C. Bentley Pro Per
Edward Martin
Per J W Helleu

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Supreme Court of the
State of Illinois
Third Grand Division
Cyrus Bentley
vs.
William Lill
appellee &c

Filed Apr. 23, 1863,
Leland
Clk.