

13369

No. _____

Supreme Court of Illinois

Asay

vs.

Spar^R~~x~~

71641  7

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division.

No. 180.

Asay
vs
Span

13369

Pepper

SUPREME COURT
OF THE
STATE OF ILLINOIS.

Appeal from the Superior Court of Chicago.

EDWARD G. ASAY,)
APPELLANT.)
versus
JOHN H. SPARR,)
APPELLEE.)

This is a proceeding in distress for rent by John H. Sparr, the landlord, to recover five hundred dollars claimed to be due him by his tenant, Edward G. Asay, the appellant.

2 The distress warrant commands the Sheriff, or any Constable of the County of Cook to distrain of the goods, &c., for the sum of five hundred dollars, for ten months' rent.

3 By virtue of this warrant a levy was made by J. Courtright, a Constable, and the warrant and certificate of levy was filed in the Superior Court of Chicago.

4 A summons was thereupon issued out of said Court in said proceedings, in which damages were laid at five hundred dollars.

5 On the 22d of May, 1860, the Court entered a default, and assessed the rent due under said warrant in the sum of \$519.66.

5 13 On the same day the defendant below moved the Court (filing his motion, and the reasons
14 therefor in writing), to set aside said assessment.

6 On the 25th of May, 1860, being one of the days of said May term, said motion was
14 overruled, and judgment rendered in favor of said landlord for \$519.66, to which overruling, and entering said judgment the defendant below excepted and prayed an appeal to this Court, which was allowed.

Points and Authorities.

The record shows that the amount of rent due and distrained for was \$500, and that judgment was rendered for \$519.66, being the amount of rent due together with interest thereon.

A distress can only be taken for rent, and not for damages for the delay of payment, and therefore interest cannot be included.

Lansing vs. Rattoone, 6 Johnson's R. 43.

2 Binney, 153.

Dennison vs. Lee, 6 Gill & Johnson, 383.

Veghte vs. Brownell, 8 Paige, 212.

Sherry vs. Preston, 2 Chitty, 245.

The judgment was rendered for a greater sum than the *ad damnum* in the writ of summons and the bill of particulars.

Brown vs. Smith, 24 Illinois, 196.

Walcott vs. Holcomb, 24 Illinois, 331.

180 - 60

Edward L. Day

no

John H. Spear

Abstract

Filed Apr 18. 1861

A. Deland
Clerk

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180

Edward L. Asay

vs

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Abstract

Filed Apr 18. 1861

A. Leland
Clerk

United States of America }
State of Illinois. Cook County. ss.

Pleas before the Honorable the Judges of the
Superior Court of Chicago within and for the
County of Cook and State of Illinois at a regular
term of 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 twentieth day of May in the year of our Lord
one thousand eight hundred and sixty 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.
Nathan Higgins and Grant Goodrich, Judges
Charles Hansen Prosecuting Attorney
John Gray Sheriff of Cook County.

Attest

Walter Kinsale . . . Clerk

Be it remembered that heretofore to wit on the twenty eighth day of March A.D. Eighteen hundred and sixty came John H. Sparr and filed in the Office of the Clerk of said Court a certain Distress Warrant in words and figures as follows to wit.

" State of Illinois }
Cook County . . . }

To the Sheriff or any Constable of the County of Cook.

You will distrain the goods and chattels of Edward L. Gray which are liable to be distrained wherever they may be found in the County of Cook where the said Edward L. Gray resides for the sum of Five hundred dollars - being ten Months rent due to me from the Ninth day of May A.D. 1859 until the Ninth day of March A.D. 1860 for the premises now in his possession devised to him by me and situated in said County of Cook and described as follows Viz: " North Fifty four feet of Lot Five (5) in Block Four (4) in Clark's Addition to the City of Chicago fronting on Wabash Avenue, together with the improvements thereon consisting of a Two Story frame Dwellinghouse and Barn "

Dated the 24th day of March A.D. 1860.

John H. Sparr

By H. F. Nelson - Attorney in fact
 and at law.

3

By virtue of the Warrant hereto attached I have dishanded
on the following good and chattes as the property of
E. G. Gray, viz.

- (800) Note of Law Books.
- (15.) F. Shew Chairs
- (1) One Desk Table.
- (1) One " " with Shelves
- (1) One Secretary.
- (1) One book case.
- (1) One lounge
- (2) Two Stoves & Pipes
- (2) Two Carpets.

Chicago

J. Courtwright.

March 28th 1860.

Constable "

Edward G. Gray

To John H. Starr Dr

March 9
1860.

To rent of house for 14 Months as per lease
at \$50 per Month from Jan'y 9. 1859
to March 9. 1860

\$700.00

Credit By amount agreed upon for State

200.00

Balance due March 9. 1860.

\$500.00

And thereupon also on the said twenty eighth day of
March A.D. Eighteen hundred and sixty there was issued
out of and under the Seal of said Superior Court, People's
Writ of Summons against the said Edward G. Gray, which
said Summons with the Sheriff's return thereon enclosed

in words and figures as follows to wit:

State of Illinois }
County of Cook }

The People of the State of Illinois
 to the Sheriff of said County, Greeting
 We command you that you summon Edward L. Gray
 if he shall be found in your County personally, to be and
 appear before the Superior Court of Chicago of said Cook County
 on the first day of the next term thereof to be holden at the
 Court House in the City of Chicago in said Cook County on
 the first Monday of May next to answer unto John H.
 Sparr in a plea of Distress for Rent to the damage of
 said Plaintiff as he says in the sum of Five hundred
 dollars.

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

(Seal)

Witness Walter Kimball Clerk of our said
 Court and the Seal thereof at the City of
 Chicago in said County this 28th day of
 March A.D. 1860.

Walter Kimball, Clerk

(Endorsed)

"Served by reading this Writ to the
 within named defendant the 29th day of March 1860.

John Gray, Sheriff

By J. Lumbard Deputy

And afterwards to wit on the twenty second day of May (being one of the days of the May term of said Court) in the year of our Lord one thousand eight hundred and sixty, the following proceedings were had in said Court and entered of record in said Court-book

" John B. Sparr

vs

Edward G. Bray

Debtors for Rent.

This day comes said Plaintiff by Helen & Clark his attorneys and due personal service of process of Summons issued in this Cause having been had on said defendant and being three times solemnly called in open Court comes not nor does any person for him but herein he makes default Which is on Motion Ordered to be taken and is hereby entered of record Wherefore said Plaintiff ought to have and recover of said defendant the amount due him for rent of the premises described in the Warrant filed in this Cause And the Court now hereafter hearing evidence allegations and proofs and being fully advised in the premises finds defendant indebted to said Plaintiff and the amount due him for rent of the premises described in Debts Warrant to be the sum of Five hundred and nineteen dollars and sixty two Cents.

And thereupon comes said defendant in person and moves the Court to set aside the said assessment.

And afterwards to wit on the twenty fifth day of May
(being yet of the said May term of said Court) A.D.
Eighteen hundred and sixty the following further
proceedings were had in said Cause and entered of record
in said Court to wit,

" John St. Sparr
 " " } Deiners for Resp.
Edward H. Deay }

And now again comes said plaintiff
by Helen V. Clark his attorney and said defendant in his
own proper person also comes and defendants Motion hereto-
fore submitted herein to set aside the assessment in this case
being heard and the Court being fully advised overruled
defendants said Motion to set aside the assessment made
in this case Thompson defendant enters his exceptions

Therefore it is considered that the finding of the
Court in this cause be duly Certified under Seal of the
Clerk of this Court to Jervis Courtwright the plaintiffs
Bailiff who made and returned the levy and distress in
this cause and that he proceed thereupon forthwith to
make the said sum of Five hundred and sixteen dollars
\$519.66 and sixty six Cents together with the Costs of this proceeding
out of the property distrained according to the Statute in such
case made and provided and that he make due return of
his proceedings thereon according to law.

And Thompson said defendant prays an Appeal herein

7 to the Supreme Court of this State which is allowed on filing Bond in Eight hundred dollars with Security to be approved by a Judge of this Court in Twelve days with his Pile of Exceptions.

And thereafter to wit on the fifth day of June A.D. Eighteen hundred and sixty, came the said defendants and filed in the Office of the Clerk of said Court his Appeal Bond in said Cause: Which said Bond is in words and figures as follows to wit,

" Know all Men by these presents That we Edward G. Osay and Francis Brackus of the County of Cook and State of Illinois are held and firmly bound unto John H. Sparr of the City of St. Louis and State of Missouri in the sum of Eight hundred dollars lawful money of the United States, for the payment of which well and truly to be made we bind ourselves our heirs executors and administrators jointly severally and firmly by these presents.

Witness our hands and seals this 25 day of May A. D. 1860.

The Condition of the above obligation is such that whereas the said John H. Sparr did on the 25 day of May A. D. 1860 in Superior Court of Chicago in State aforesaid and of the May term thereof A. D. 1860 recover a judgment against the above bounden Edward G. Osay for the sum of Five hundred and nineteen dollars and sixty

8 And unto besides Costs of Suit from which said judgment of the said Superior Court of Chicago the said Edward L. Asay has prayed for and obtained an Appeal to the Supreme Court of said State.

Now therefore if the said Edward L. Asay shall duly prosecute his said Appeal with Effect and moreover pay the amount of the judgment Costs interest and damages rendered and to be rendered against him in case the said judgment shall be affirmed in the said Supreme Court then the above obligation to be void otherwise to remain in full force & virtue.

(Signed) Edward L. Asay
Francis Bracken."

" Approved by me June 2nd 1860
Wm H. Higgins."

And thereafter to wit on the fifth day of June A.D. Eighteen hundred and sixty the said defendant filed in the Office of the Clerk of said Court his Bill of Exceptions, Which said Bill of Exceptions is in words & figures as follows to wit.

" Be it remembered that in a proceeding under a distress for rent between John H. Sparr, Landlord, and Edward L. Asay, tenant, then pending in the Superior Court of Chicago holden at Chicago in County of Cook John M. Wilson, Wm H. Higgins and Grant Goodrich being Judges of said Court on the twenty second day of May A.D. 1860 it being one of the days of the May term

9 1860, Van St. Higgins one of said Judges then presiding as Judge of said Court the said Landlord appearing by Helms and Clark his attorneys and said defendant by J. H. Bracken Esq. his attorney, the said proceeding came on to be heard for an assessment of the amount of rent due: by agreement a Jury was waived and said cause submitted to said Court. (said Van St. Higgins) for trial and thereupon to prove his demand said Landlord by his said Attorneys offered in evidence a Lease, of which the following is a Copy.

" This Indenture made this sixth day of September in the year of our Lord one thousand eight hundred and fifty eight Between John H. Sparr of St. Louis, Mo. of the first part and Edward J. Gray 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 executing administrators or assigns has demised and leased to said party of the second part, All those premises situate lying & being in the City of Chicago in the County of Cook and in the State of Illinois known and described as follows to wit: The North Fifty four feet of Lot five (5) in Block four (4) in Clark's Addition to the City of Chicago, fronting on Wabash Avenue, together with the improvements thereon consisting of a Two Story Frame Dwelling house and barn.

" To have and to hold the said above described premises with the appurtenances unto the said party of the second part - executors administrators and assigns from

"The Ninth day of September in the year of our Lord one
 "thousand eight hundred and fifty eight for and during
 "and until the first day of May in the year of our Lord
 "one thousand eight hundred and sixty One the said
 "party of the second part in consideration of the leasing
 "of the premises aforesaid by the said party of the first part
 "to the said party of the second part does covenant and
 "agree with the said party of the first part his heirs
 "executors administrators and assigns, to pay the said
 "party of the first part, as rent for said leased premises
 "the sum of Fifty dollars per month - it being further
 "agreed by the party of the first part, that the party of the
 "second part may reserve from said rents the sum of
 "Two hundred dollars commencing with the rent of January
 "1859 with which he shall erect a stable to cost the said
 "sum of Two hundred dollars.

"And the said party of the second part further covenants
 "with the said party of the first part, that said second party
 "has received said leased premises in good order & condition
 "and that at the expiration of the time in this lease
 "mentioned he will give up the said premises to the said
 "party of the first part in as good condition as when the
 "same were put into use by the said party of the second part
 "less by fire or inevitable accident or ordinary wear
 "excepted, and in case of fire then the term of this tenancy
 "is ended and the said party of the second part shall no
 "longer be liable to pay Rent.

"And the said Edward L. Orey executors administrators

" and assigns, agree further to pay additional to the rents
"above specified, all water 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 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.

" It is expressly understood and agreed by and
"between the parties aforesaid, that if the rent above reserved
"or any part thereof shall be behind or unpaid on the day
"of payment whereon the same ought to be paid as aforesaid
"or if default shall be made in any of the Covenants or
"agreements herein contained to be kept by the said party
"of the second part his executors, administrators and assigns
"it shall and may be lawful for the said party of the
"first part his his executors administrators agent attorney
"or assign at his Election to declare said term ended and
"into the said premises, or any part thereof either with or
"without process of law to enter, and the said party of
"the second part, or any other person or persons occupying
"in or upon the same to expel persons and put out using
"such force as may be necessary in so doing, and the said
"premises again to repossess and enter as in his first and
"former Estate, and to disclaim for any rent that may be
"due thereon upon any property belonging to the said party
"of the second part, whether the same be exempt from
"execution and distress by law or not, and the said party

"if the second part in that case hereby agrees to waive all
 "legal rights which he may have to hold or retain any
 "such property under any exemption laws now in force in
 "this state, or in any other way, meaning and intending
 "hereby to give the said party of the first part his heirs
 "executors administrators or assigns a valid and first lien
 "upon any and all goods, chattels and other property ~~to~~
 "belonging to the said party of the second part as security
 "for the payment of said rent in manner aforesaid anything
 "heretofore contained to the contrary notwithstanding.
 "And if at any time said term shall be ended at such
 "election of said party of the first part his heirs executors
 "administrators 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 ~~thereon~~
 "to said party of the first part his heirs executors administrators
 "and assigns immediately upon the determination of said term
 "as aforesaid, and if he shall remain in possession of the
 "same ten days after notice of such default or after the termination
 "of this lease, in any of the ways above named he shall be
 "deemed guilty of a forcible detainer of said premises under the
 "Statute and shall be subject to all the conditions 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.
 " E. C. Dodge. John H. Starr (Seal)"

Said tenant by his said Attorney admitting the execution
 thereof.

Thereupon said Court assessed the amount of rent due
 at Five hundred nineteen $\frac{66}{100}$ dollars (\$519 $\frac{66}{100}$), being for
 the Months of May, June, July, August, September, October
 November and December A. D. 1859 - January and February
 A. D. 1860 and interest on said rent reserved in said Lease.

To which said assessment the said Tenant
 by his said Attorney excepted.

And thereupon moved said Court to set aside said assessment
 and grant a New trial and to pass the amount of rent
 due on said Lease and filed his Motion and the grounds
 therefor in writing as follows.

" Superior Court of Chicago
 May term 1860

" John H. Starr
 " " } Distress for Rent.
 " Edward H. Gray }

" Now comes the said Edward H. Gray
 " by John H. Bracken his Attorney and moves the Court to
 " set aside the assessment made this term in said ~~no~~
 " proceeding upon the following grounds

" First - Because the Court erred in allowing interest on
 " the rent.

"Second - Because the Court erred in assessing a greater sum than \$500 as due and recoverable in this proceeding.

"Third - Because the Court erred in allowing the said John H. Sparr to assess the sum of \$519 ⁶⁶/₁₀₀.

"Fourth - Because the Court had no power to allow a great sum than \$500 in this proceeding.

" John H. Brackley

Atty for Edward L. Gray,

And afterwards to wit on the Twenty fifth day of May A. D. 1840, it being one of the days of the May term, said Court overruled said Motion and judgment was entered in favor of said Sancerd in the sum of Five hundred & nineteen ⁶⁶/₁₀₀ dollars (\$519 ⁶⁶/₁₀₀)

To which overruling of said Motion and rendering said Judgment said Tenant by his said Attorney then and there excepted.

And prayed an Appeal to the Supreme Court of this State which was allowed and Twelve (12) days given to said Tenant to file a Bill of Exceptions and a Bond in the sum of Eight hundred dollars (\$800) with security to be approved by the Court.

This is all the testimony and also the proceedings had in the case.

In testimony whereof said Judge at the prayer of said Tenant doth sign and seal these Exceptions to the end that this Bill may become a part of the record in this

15 cause.

June 5th 1860.

Wm St. Higgins (Seal).

State of Illinois }
Cook County } ss.

I Walter Kimball Clerk of the Superior Court of Chicago within and for the County of Cook in the State of Illinois Do hereby certify the above and foregoing to be a true and correct Transcript of the papers now on file in my Office, together with all orders and judgments entered of record in said Court in certain proceedings under a Distress for rent pending in said Court, wherein John St. Sparr is Landlord and Edward L. Asay, Tenant.



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

Supreme Court of the State of Illinois
April Term 1861 at Ottawa.

Edward G. Asay Appellant }
John H. Sparr Appellee } Appraal from Superior
Court of Chicago

And now comes
said Edward G. Asay Appellant before the
said Supreme Court of the State of Illinois, by
Asay & Bracken his attorneys, and says that in
the foregoing record and proceedings, and in giving
the judgment aforesaid there is manifest error in this, to wit:
That said Superior Court erred in assessing against
said appellant in favor of said appellee a greater
amount than Five Hundred Dollars: and that
there is also error in this, to wit: That said Superior
Court assessed an amount in said proceedings in
favor of said appellee and against said appellant
including interest on the amount of rent reserved in
said lease: and that there is also error in this to wit:
That said court in said proceeding assessed the
sum of Five hundred nineteen dollars and sixty
six cents in favor of said appellee and against said
appellant: and that there is also error in this, to wit:
That said court refused to set aside said
assessment and overruled said appellants
motions for a re-assessment: and that thus

is also error in this to wit: That said court overruled said appellants motion for a new trial in said proceedings: and that there is also error in this to wit: That said Court rendered judgment in said proceedings in favor of said appellee and against said appellant for a greater amount than the sum of five hundred dollars: and that there is also error in this to wit: That said court rendered judgment in said proceedings in favor of said appellee, and against said appellant for an amount including interest upon the rent reserved in said lease: and that there is also error in this to wit: That said Court rendered judgment in said proceedings against said appellant, and in favor of said appellee for said sum of five hundred ninety seven dollars and sixty six cents: And therefore the said Edward G. Avey prays that the judgment aforesaid, for the errors aforesaid, and other errors in the record and proceedings aforesaid may be reversed, annulled and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of said judgment &c

Asay & Bracken

attys for appellant.

And the said appellee comes and
defends and says that there is no
error in the ^{said} record and proceedings as
above alleged.

April 17th 1861

Heim & Clark
for appellee

1860
State of Illinois
Cook County

John H. Sparr

vs

Edward G. Asay

Record

Filed April 15. 1861
L. Leland
Clerk

Asay & Brecken
Attys for Appellant

\$5-00
"