

No. 12726

Supreme Court of Illinois

Anderson

vs.

Chicago Marine & Fire Ins.Co.

170 65

Jonathan P. Anderson
et al vs

The Chicago Marine
Fire Insurance Company

170

12726

1859

State of Illinois }
 County of Cook } ss.

I, *John M. Wilson*, Judge of the Cook County Court of Common Pleas, within and for the County and State aforesaid, at a Special term of said Cook County Court of Common Pleas, begun and held at the Court House in the City of Chicago, on the second Tuesday, being the Eighth day of June, in the year of our Lord one thousand Eight Hundred and fifty Eight, due notice of the time and place of holding said term of Court having been printed and published in the "Daily Democrat" the Corporation Newspaper of the City of Chicago, said notice having been printed and published twenty days previous to the holding of said Court in accordance with the Statute in such case made and provided, and in pursuance of an order made by the Judge of said Court, on the twenty sixth day of April A.D. Eighteen Hundred and fifty Eight,

Present *The Honorable John M. Wilson Judge*
Charles Marcus Prosecuting Attorney
John L. Wilson Sheriff
Walter Kimball Clerk

Attest

Be it Remembered, That heretofore, to wit, on the Twenty second day of May in the year of our Lord one thousand Eight hundred and fifty seven. The Chicago Marine and Fire Insurance Company by Shumway, Waite & Towne its Attorneys filed in the office of the Clerk of the Cook County Court of Common Pleas its Amended Declaration, which is in the words and figures following. To wit,

Cook County Court of Common Pleas.
Of the September Term A.D. 1856.

State of Illinois }
Cook County ss. }

Chicago Marine & Fire Insurance Company, Plaintiff in this suit by Shumway, Waite & Towne his Attorneys, complain of Jonathan R. Anderson & William H. McAllister, Defendants who are summoned &c. in a plea of trespass on the case on promises. For that whereas the said defendants heretofore, to wit, on the Ninth day of April in the year of our Lord one thousand Eight hundred and fifty six, at _____ to wit, in said County of Cook made their certain promissory note: in writing, bearing date the day and year aforesaid, and then and there delivered the same to one Frank Parmelee, in and by which said note, said defendants by the name style and description of J. R. Anderson, W. H. McAllister promised to pay to the order of the said Frank Parmelee, sixty days after the date thereof, which period hath now elapsed, at the Marine & Fire Insurance Company's office in the City of Chicago, the sum of Three

Hundred Dollars at ten per cent interest, for value received.

And the said Frank Parnellee to whom or to whose order said note was payable, afterwards, to wit, on the day and year aforesaid, at Chicago, that is to say, at Chicago in the County of Cook aforesaid, Endorsed said note in writing, by which said endorsement the said Frank Parnellee then and there ordered and appointed the said sum of money in said note mentioned to be paid to said plaintiffs, and then and there delivered said note so endorsed, to the said plaintiffs.

By means whereof and by force of the Statute in such case made and provided, the said defendants became liable to pay said plaintiffs said sum of money mentioned in said note, and being so liable, in consideration thereof, then and there undertook and promised to pay the same to the said plaintiffs, according to the tenor and effect, true intent and meaning of the said note and of the endorsement aforesaid, to wit, at the place aforesaid.

And the said plaintiff aver that the said cause of action accrued in the County of Cook and State of Illinois, and that the said plaintiff did at the commencement of this suit, and still do reside in said County & State.

And also, for that whereas, heretofore, to wit, on the Ninth day of April, in the year of our Lord one thousand eight hundred and fifty six, to wit in said County, the defendants made their certain promissory note in writing, bearing date the day and year aforesaid, and then and there delivered the same to one Frank Parnellee, in and by which note the defendants promised to pay to the order of Frank Parnellee, sixty days after the date thereof, which period has now elapsed, at the Marine & Fire Insurance Co office

in the City of Chicago, Three Hundred Dollars, at ten per cent interest, for value received, and the said Frank Turnelle to whose order said note is payable, then and there Endorsed said note to the plaintiff in writing, by which Endorsement the said Frank Turnelle then and there ordered said note to be paid to the plaintiff, according to its tenor and effect and the effect of said Endorsement, and then and there delivered said note to the plaintiff, so endorsed. By means whereof the Defendants became liable to pay said plaintiff said sum of money mentioned in the note, according to the tenor and effect thereof and of said Endorsement, to wit, at Cook County aforesaid.

And whereas also the said defendants afterwards to wit, on the first day of August, in the year of our Lord one thousand Eight Hundred and fifty six, to wit, at Chicago in said County became and were indebted unto the plaintiff in a large sum of money, to wit, Six hundred dollars for money before that time lent and advanced to said defendants by said plaintiff at said defendants request, and also in the like sum for money before that time paid, laid out and expended for said defendants by the said plaintiff, at the like special request of said defendants, and in the like sum for money before that time had and received by said defendants, to and for the use of said plaintiff, and also in the like sum for goods, wares and merchandise, before that time sold and delivered by said plaintiff to said defendants, at the like special instance and request, and also in the like sum for the labor, care and diligence of said plaintiff before that time done and performed by said plaintiff for said defendants, and at the like instance and request of said defendants. And also in the like sum,

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then and there found to be due and owing to said plaintiffs on an account stated between them, and being so indebted said defendants in consideration thereof, then and there undertook and promised to pay said plaintiffs said several sums of money above mentioned, when thereunto afterwards requested.

Yet the said defendants, not regarding their said promises and undertakings, but contriving &c. although often requested so to do have not paid said plaintiffs either of said sums of money above mentioned, or any part thereof, but so to do have hitherto wholly neglected and refused, and still do neglect and refuse, to the damage of said plaintiffs of Six Hundred Dollars, and therefore it brings this suit &c.

Shumway, Waite & Bond
Plaintiffs Attorneys,

Copy of Instrument and Account sued on.

\$300⁰⁰ Sixty days after date for value rec^d me promised to pay to the order of Frank Parmelee at the Marine & Fire Insurance Co's office in the city of Chicago, Three Hundred dollars, at ten per cent interest.

April 9th 1856. (Signed) J. R. Anderson.

H. K. McAllister

Endorsed. Frank Parmelee

on which appears the following endorsement

\$18. Rec^d hereon Eighteen Dollars August 13. 1856.

J. R. Anderson & W. H. McAllister

To Chicago Marine Fire Ins Co.

Dr

To money lent and advanced	\$ 600.
To money paid laid out and expended	\$ 600.
To money had & received to & for the use of said plaintiff	\$ 600.
To Goods, Wares & Merchandise sold & delivered	\$ 600.
To Labor & Services	\$ 600.
To balance due on account stated	\$ 600.

And afterwards, to wit, on the Fifth day of June in the year last aforesaid, the said defendants by W. H. McAllister their attorney filed in the office of the Clerk of said Court their Pleas, which are in the words and figures following.

To wit.

Cook County Court of Common Pleas

Jonathan R. Anderson et al

vs

The Chicago Marine Fire Ins. Company

1st Plea

And the said defendants by W. H. McAllister their attorney, come and defend the wrong and injury whereof, and say that they did not undertake and promise in manner and form as the said plaintiff hath above thereof complained against them and of this they put themselves upon the Country.

2nd

And for a further plea in this behalf as to the said first and second counts in the aforesaid declaration the said defendants say actio. non. because they say that on to wit, the 31st day of March A.D. 1855. to wit, at Chicago, aforesaid.

7 the said. The Chicago Marine and Fire Insurance Company by a lease in writing under the seal thereof and the hand of its president, (which said lease the date whereof is the day and year aforesaid, the said defendants now bring here into Court) demised and leased to the said defts the Room looking West numbered nine in the Third story above the basement of the Marine Bank Building, corner of Lake & La Salle Streets in the City of Chicago, together with the closets, safe and inner room connected therewith, to have and to hold the said premises, with the appurtenances from the first day of April A.D. 1855, for and during and until the first day of April A.D. 1857, the said defts rendering yearly rent therefor of four hundred dollars, payable one hundred dollars on the first days of July and September A.D. 1855, January, April and July & October A.D. 1856, & January and March A.D. 1857, respectively. By virtue of which said demise, they the said defts, on or about the said first day of April A.D. 1855, entered as well into the said room numbered nine, and the said safe and inner room connected therewith as into the said closets connected therewith, and were thereof possessed. And being so thereof possessed, they the said defts say that the said plaintiff afterwards and before the first day of July A.D. 1855, to wit, on the first day of April A.D. 1855, entered into the said closets parcel of the said premises so demised to said defts as aforesaid upon the persuasion of the said defendants thereof, and expelled and removed them the said defendants from the possession thereof, and kept out them the said defts from the possession thereof always from thence until ^{after} the first day of April A.D.

1856. and after the time of the giving of said promissory notes in said counts mentioned and described.

And the said defendants further say that the said promissory notes mentioned and described in said first and second counts in said declaration are one and the same note, and the said cause of action mentioned in said second count is identically the same as that mentioned in the first count of said declaration. That the said promissory note in said counts mentioned, was made by the said defendants, endorsed by the said Frank Parmelee and delivered by defendants to the plffs. for the supposed rents payable under and by virtue of said lease on the first day of September A.D. 1855, on the first day of January A.D. 1856, and on the first day of April A.D. 1856, and being one hundred dollars each as aforesaid, and for or upon no other consideration whatever, of all which the said plaintiff at the time of the making of said note, to wit, at Chicago, had notice. And this the said defts are ready to verify. Wherefore they pray judgment if the said plaintiff ought to have or maintain its aforesaid action thereof against them &c.

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And for a further plea in this behalf, as to said first and second counts the said defendants say actio non, because they say that the said plaintiff on the day and year in the foregoing plea mentioned by lease in writing under seal demised and leased to the said defts the said premises in the said plea mentioned and described for the term and for the rents payable as therein stated and set forth, which said term was to commence on the first day of April A.D. 1855. That by virtue of said demise so made

as aforesaid, it became and was the duty of the plff the said Chicago Marine & Fire Insurance Company on said first day of April A.D. 1855, to give up to and put the said depts into the possession as well of said rooms number nine and the safe and inner room connected therewith, as of the aforesaid closets connected therewith, and to permit the said depts to possess, use and enjoy the said closets without let or hindrance on the part of the said plaintiff during the aforesaid term.

Yet the said plaintiff, well knowing the premises but contriving and fraudulently intending to injure the defendants in that behalf, would not although often requested so to do, give up the possession of said closets to said defendants nor put them into the possession thereof, nor permit them to possess, use, or enjoy the same without any let or hindrance on the part of said plaintiff, but then and there refused and neglected to give up the possession thereof on the said first day of April A.D. 1855 to the said defendants, and kept and retained the possession of said closets, parcel of said premises so demised as aforesaid, and excluded the said defendants therefrom always from said first day of April until after a long period of time, to wit, until the 10th day of July A.D. 1856. And the said defendants further say that by means of said wrongful acts on the part of said plaintiff, they were deprived of the use of said closets, and being so deprived thereof did very much impair and diminish the value of the use of the residue of said premises for all said period, and that they sustained damages in the sum of Three Hundred and twenty five dollars in consequence thereof.

which damages exceed the damages sustained by the said plaintiff by reason of the nonperformance by them of said several supposed promises and undertakings, in said Count mentioned, and more due and owing to these defendants, at the time of the commencement of this suit and still are. And the said defendants further say that the said promissory note in said Count mentioned was given for the said supposed instalments of rent payable in and by said Lease, on the first day of September 1855, on the first days of January & April A.D. 1856, in manner and form as aforesaid in said first special plea stated, and for no other consideration, of all which said plaintiff then and there had notice. And out of said sum so due and owing from the said plaintiff to said defts, for said damages, the said defts are ready and willing and hereby offer to set off and allow to the said plaintiff the full amount of damages sustained by it by reason of the nonperformance of of the promise and undertaking aforesaid according to the form of the statute in such case made and provided; and this the said defendants are ready to verify, wherefore they pray judgment, if the said plaintiff ought to have or maintain its aforesaid action thereof against them &c.

4th

And for a further plea in this behalf as to the said first and second counts, the said defendants say actis now, because they say that the said plaintiff on the day and year in said first special plea mentioned, made and sealed the said Lease in writing, and delivered the same to the defendants (which said lease, the date whereof is the day and year aforesaid, the said defts now bring here into Court) by which said Lease the said ^{Plaintiff} ~~defendants~~ did demise and

leave unto said defendants, the ^{said} premises in said special plea
 described to have and to hold the same, as in said plea mentioned
 and for the term, and at the rents therein stated, as aforesaid.
 And the said defendants further say that by the said demise
 the said plaintiff, did covenant, promise and agree to and with
 the said defendants, that they might and should quietly and peace-
 ably take possession of the said rooms, as well also of the aforesaid
 closets at the time of the commencement of said term, and that
 they the said defendants might and should thereafter quietly and
 peaceably, have, hold, occupy, possess and enjoy the said premises
 with the appurtenances thereto belonging, for and during the
 said term, without the let, suit, trouble, denial, interruption or
 molestation of the said plaintiff or from any other person or
 persons lawfully claiming or to claim by, from or under said
 plaintiff its acts, means, defaults or procurement, by the said
 lease, reference being thereunto had, will more fully appear.
 By virtue of which said demise and lease, the said defend-
 ants afterwards, to wit, on said first day of April A.D. 1855,
 to wit, at Chicago aforesaid, entered into said room No. nine,
 the inner room and safe connected therewith, and the defen-
 dants aver that the said plaintiff would not permit the said defendants
 to take possession of said closets, parcel of said premises so
 demised as aforesaid, at the commencement of said term as aforesaid,
 but kept and excluded them always therefrom, to wit,
 from the day of the commencement of said term in said lease,
 and always thereafter, from having, holding, enjoying, possessing
 or occupying said closets, parcel of said demised premises,
 until after a long period of time, and until, to wit, the 15th
 day of July A.D. 1856, and during said term the said plaintiff

by its agents and servants kept and contralled, used, possessed and occupied the said closets, and locked up and barred the same, against the said defendants. That by reason of the premises, the said defendants were greatly injured, deprived of the use & enjoyment of the said closets, parcel of the said demised premises, and sustained damages to the amount of Three Hundred and fifty Dollars, which sum was due and owing to the said defendants by the said plaintiff, at the time of the commencement of this suit, and is still due and owing, and exceeds the the damages sustained by the said plaintiff by reason of the non performance by them the said defendants of said supposed premises &c. in said count mentioned, and out of which said sum, so due and owing from the said plaintiff to the said depts, they the said depts are ready and willing and hereby offer to set off and allow to the said plaintiff the full amount of the damages sustained by it by reason of the non performance of the premises and undertakings aforesaid according to the forms of the statute in such case made and provided. And the defendants further say that the consideration for said note in said counts mentioned, was and is the said supposed indentments of Reck, and was made and indented & delivered to plff, in manner and form as in said first special plea mentioned, and not otherwise, of all which the said plaintiff then and there had notice, and this they are ready to verify, wherefore they pray judgment if said plff ought to have or maintain its aforesaid action thereof against them &c.

Jth

And for a further plea as to said first and second counts, the said depts say actio non, because they say that said plff

having made the said Lease in writing, as in the said foregoing pleas mentioned, did afterwards, to wit, on the first day of April A.D. 1855, after the commencement of said term, to wit, at Chicago aforesaid, with force and arms by itself and its agents and servants break and enter into said clorets described as aforesaid, parcel of said premises so demised, into and upon the possession of the said defendants, and did from thence for the period of more than one year deep, control, use and have the possession of the said clorets, parcel of said demised premises, and for all said time did expel and keep the said debts out of the use and possession thereof, and by reason of the said wrongful acts, the said defendants were deprived of the use of said premises, and the value of the use thereof was and is the sum of Three Hundred Dollars, and the said debts sustained damages by reason of the said wrongful acts of the plaintiff in said sum, which exceeds the damages due and owing to plaintiff by reason of the nonperformance by the said debts of said supposed promises and undertakings in said count mentioned, which damages were due and owing by said plaintiff to said debts at the time of the commencement of this suit, and still are due and owing, and out of said sum so due and owing from the said plaintiff to the said debts, the said defendants are ready and willing & hereby offer to allow the said plaintiff the full amount of damages sustained by it by reason of the nonperformance of the promise and undertaking aforesaid by the said debts. And the said debts further say that the said promissory note in said counts mentioned given for the said supposed installments of rent as aforesaid, under said demise, in manner and form as in

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said first special plea is stated, and for no other consideration
 whatever, of all which the said plaintiff then and there had
 due notice. And this the said depts are ready to verify
 wherefore they pray judgment if the said plaintiff ought to have
 or maintain its aforesaid action thereof against them &c.

W. H. McAllister

Atty for Depts.

Chicago W. & F. Ins. Co.

J. Anderson & McAllister

Dr.

To use & occupation of closets & damages

\$3.50

The above is a copy of Depts. offset.

And afterwards, to wit, on the Fourth day of June in
 the year of our Lord one thousand eight hundred and fifty
 eight, the said plaintiff by its said Attorneys filed in the
 office of the Clerk of said Court, its Replications, which are
 in the words and figures following To wit.

The State of Illinois }
 Cook County ss.

Chicago Fire & Marine Insurance Co.

Jonathan R. Anderson et al

And now comes the plaintiff
 as to the first plea by the defendants above pleaded, wherein
 the defendants put themselves upon the Country, does the like &c.

1st Repl
to 1st Plea

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And now comes the said plaintiffs and for replication to said second plea by the defendant above pleaded, and say that they ought not to be barred from having and maintaining their said action by anything in said plea contained, because they say they did not effect, Expel and Remove the said defendants from the possession of said closets demised to said defendants in manner and form as in said plea alleged, and this they pray may be enquired of by the Country &c. and the defendant does the like &c.

2^d Repln to
2^d Plea

And for further replication to said plea secondly above pleaded Special leave of the Court for that purpose first had and obtained now comes said plaintiffs and say they ought not to be precluded from having and maintaining their said action against the defendants by anything in said plea contained because they say that after the defendants had been evicted from said closets as in said plea alleged; the said defendants settled up the rents of said premises, and gave the note in said ^{first} second count mentioned for the same, and this the plaintiffs are ready to verify, wherefore they pray judgment &c.

3^d Repln to
Second Plea

And for further replication to said second plea by the defendants above pleaded, Special leave of the Court for that purpose first had and obtained, now comes the plaintiffs and say that they ought not to be precluded from having and maintaining said action, by anything in said second plea contained, because they say that that after the defendants were expelled and removed from the water closets as alleged in said second plea, they continued to use, occupy and enjoy the rest of

said premises, and after so occupying the said they settled up with the plaintiffs for said rent before and after said eviction from said closets as in said plea alleged and gave the plaintiffs said note in the first & second counts of said declaration described, and this they are ready to verify. Wherefore they pray judgment &c.

1st Repl to
3rd Pleas

And now comes the plaintiffs, and for replication to said third plea by the defendants above pleaded, special leave of the Court for that purpose first had and obtained, now comes the plaintiffs and say that they ought not to be barred from having and maintaining their said action by anything in said third plea contained, because they say that they are not indebted to the defendants as in manner and form as is said third plea contained and alleged, and this they pray may be enquired of by the Country &c.

2^d Repl
to 3rd Pleas

And for further replication to said third plea, special leave of the Court for that purpose first had and obtained now comes the ~~said~~ plaintiff and say that they ought not to be barred from having and maintaining their said action by anything in said plea contained, because they say that defendants gave the note in said first and second counts mentioned on settlement of the rent of said premises and this they are ready to verify, wherefore they pray judgment &c.

3rd Repl to
3rd Pleas

And for further replication to said third plea, special leave of the Court for that purpose first had and obtained, now comes the plaintiffs and say that they ought not to be barred from

having and maintaining their said action by anything in said plea contained, because they say that possession was given to & the said defendants after the eviction from the closets part of said demised premises as in said plea alleged, the defendants continued to occupy and enjoy the rest of said premises so demised, and after so occupying and enjoying the same said defendants settled up for said rent, and gave the notes in said first and second Counts of said declaration mentioned, and this the plaintiff is ready to verify, wherefore the plaintiffs pray judgment &c.

4th Replew
to 2nd Plea.

And for further replication to said second plea by the defendants and above pleaded, special leave of the Court for that purpose first had and obtained, now comes the plaintiffs and say they ought not to be barred from having and maintaining their said action, by anything in said plea secondly above contained because they say that the defendants continued to occupy use and enjoy all the rest of said demised premises in said plea mentioned after they were evicted from said closets as in said plea alleged; and ^{this} they are ready to verify wherefore they pray judgment &c.

5th Replew to
2nd Plea

And for further replication to said second plea by the defendants above pleaded special leave of the Court for that purpose first had & obtained now comes the said plaintiffs and say they ought not to be barred from having and maintaining said action by anything in said second plea contained because they say that the consideration of said note was not the rent of said premises as in plea alleged but another and different consideration

and of this they put themselves upon the country & the defendants do the like &c.

6th Replen to
2^d Plea

And for further further replication to said second plea special leave of the court for that purpose first had & obtained here comes the plaintiffs & say they ought not to be barred from having & maintaining their said action by anything in said plea contained because they say the defendants did take possession of the closets in said plea mentioned as well as the rest of said demised premises and of this they put themselves upon the country & the defendants do the like &c.

1st Replen
to 4th Plea

And now comes the plaintiffs and as to the further plea of said defendants above pleaded for replication say that they ought not to be barred from having & maintaining said action against said defendants, because they say that they were not indebted to the plaintiffs in manner & form as in said fourth plea alleged and this they pray may be enquired of by the country &c.

2^d Replen to
4th Plea

And for further replication to said fourth plea of said defendants above pleaded, now come the said plaintiffs by their attorneys aforesaid by special leave of court first had & obtained & say precludi non because they say that the said note in said plea mentioned & set forth was not given for the rest of the said premises & closets therein mentioned and of this they put themselves upon the country &c & the defendants do the like.

3^d Replen
to 4th Plea

And for further replication to said fourth plea of said defendant by special leave of court first had and obtained ^{now} come the said plaintiffs

by their said attys & say "precludi non" because they say that they did not by themselves or any other person expel & keep the said defendants out of the use & possession of said closets described as aforesaid, in manner & form as the said defendants in said plea have alleged and of this they put themselves upon the country &c & the defendants: do the like.

4th Replen
to 4th Plea

And for further replication to said fourth plea of said defendants by special leave of court first had and obtained now come said plaintiffs by their said attorneys & to said plea say precludi non, because they say, that after the alleged eviction of said defendants from said closets as in said plea alleged the said defendants settled up the rents of said premises and gave the note in said first and second count mentioned for the same and this the plaintiffs are ready to verify wherefore they pray judgment &c.

5th Replen
to 4th Plea

And for further replication to said fourth plea by special leave of court, now come said plaintiffs & say precludi non because they say that after the defendants had been evicted from said closets as in said plea alleged the said defendants continued to occupy and enjoy the rest of said premises so demised and after so occupying & enjoying the same; the said defendants settled up for said rent & gave the note in said first & second count mentioned for the same and this the plaintiff is ready to verify wherefore the plaintiffs pray judgment &c.

Shumway White & Paine.

Plffs Attys.

And as to the third replication of the said plaintiff to the said second plea the said depts say action because they say that they did not settle with the said plff for the rent before and after the said eviction from the said closets and give the said note for the same, but the said defendants aver that on to wit the first day of July 1855 they paid to the plff all the rent payable at that time by the terms of the aforesaid Lease in said second plea mentioned, to wit the sum of One hundred dollars, and that the said note was given for the supposed rent of said premises from and after the said first day of July 1855 during and up to the first day of April 1856 And that during all of the time of the accruing, of the said supposed rents the said eviction from the said closets continued and until after the time of the giving of the said note and this they are ready to verify wherefore they pray judgment &c.

And as to the fourth Replication of the plff to the depts said second plea the said depts say that the said replication is the matter and things therein contained are insufficient in law for the said plff to have or maintain the aforesaid action &c and that they are not bound to answer the same wherefore they pray judgment &c

And now comes the plaintiff & join in demurrer and say that said replication is sufficient in law to be replied to &c.

J. L. & Poore.

Plaintiffs attys.

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and as to the third replication to the defts third plea and the fifth replication to defts 4th Plea the said defts demur to the same severally and say that the said third replication is insufficient in law in manner & form &c and that they are not bound to answer the same and that the said fifth replication is likewise insufficient in manner & form &c and they are not bound to answer the same wherefore they pray judgment &c

W. R. Mc Allister,
Atty for Defts.

And now comes the plaintiffs and join in demurr & say said replications are sufficient to be replied to &c

Shumway Waite & Paine,
Plffs Attnys.

And afterwards to wit on the same day and year as aforesaid the plaintiff filed in the office of the clerk of said court his Demurrer in the words and figures following to wit,

State of Illinois	}	Cook County Court of Common Pleas,
Cook County ss		
The Chicago Marine & Fire Insurance Company	}	
vs		
Jonathan R Anderson et al		

And now comes the plaintiffs by their attys and say that they ought not to be barred from having

& maintaining there said action by any thing in said first rejoinder to said plaintiffs replication secondly pleaded to the defendants second plea because they say that said rejoinder and the several matters and things therein contained are insufficient to be replied to & therefore they demur and this they are ready to verify wherefore he prays judgment &c and they assign this cause of demur that said rejoinder should have ended with a confession &c.

And as to the defendants rejoinder to the third replication to the defendants second plea now comes the plaintiff and says that he ought not to be barred from having & maintaining his said action by anything in said rejoinder contained because he says that the said rejoinder and the several matters and things therein contained in manner & form as pleaded are not sufficient to bar the plaintiff of their said action and they ought not to be called upon to answer the same and this they are ready to verify wherefore they demur &c
 Sherrinway Drake & Powne,
 Plaintiffs Attys.

And afterwards to wit on the Eleventh day of June in the year aforesaid said day being one of the days of the June Special Term of the Court leventy leant of Common Pleas the following among other proceedings were had and entered of record in said leant to wit.

Chicago Marine and Fire
Insurance Company.

Jonathan R. Anderson &
William R. McAllister

Assumpsit.

This day comes the said plaintiffs by Shumway White & Towne their attorneys and the said defendants by McAllister their attorney also comes and the court having heard arguments of counsel on the said defendants demure to the said plaintiffs several replications to the several pleas of the said defendants herein pleaded overrules said demure & thereupon the said defendants file their rejoinder to the second & third replications of the said plaintiffs to which the said plaintiffs to which the said plaintiffs file their demure and the court being fully advised sustains the demure of the said plaintiffs to the rejoinder of the said defendants thereupon the said defendants elect and stand by their pleadings and issues being joined herein by agreement of the parties the trial of the issues herein as submitted to the court, without intervention of a jury and the court having heard the allegations and proofs submitted and arguments of counsel thereon, being fully advised in the premises for to the issues herein for the said plaintiffs and assesses their damages to the sum of Three hundred seventeen dollars and seventy nine cents.

Therefore it is considered said plaintiffs do have and recover of the said defendants their damages of Three hundred seventeen dollars and seventy nine cents in form aforesaid by the court assessed and also their costs and charges

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in this behalf. expended and have execution therefor.

And thereupon comes the said defendants and pray an appeal of this cause to the Supreme Court of the State of Illinois which is allowed them on their filing their appeal bond in the sum of five hundred dollars with Frank Parmall as security thereon such appeal bond to be filed in thirty days -

And afterwards to wit on the Twentieth fifth day of June in the year aforesaid the defendants filed in the office of the clerk of said court their appeal bond in the words and figures following to wit.

Know all men by these presents that we William K McAllister Jonathan R Anderson and Franklin Parmall are held and firmly bound unto the Chicago Marine and Fire Insurance Company, in the penal sum of five hundred dollars lawful money &c for the payment of which well and truly to be made we bind ourselves our heirs Executors and administrators jointly severally & firmly by these presents. Witness our hands and seals this 22nd day of June A.D. 1858.

The consideration of the above obligation is such that Whereas the above named obligee as plaintiff, on the Eleventh day of June A.D. 1858 in the Cook County Court of Common Pleas in and for the County of Cook and State of Illinois secured a judgment against the above named William K McAllister and Jonathan R Anderson for the sum of three hundred and Seventy dollars and seventy nine cents, besides costs from which the said William K McAllister & Jonathan R

Anderson have made an appeal to the Supreme Court of said State. Now therefore if the said Appellants shall well and duly prosecute their said appeal and shall pay what ever judgments costs interest and damages may be rendered awarded and assessed in case the aforesaid judgment shall be affirmed in and by the said Supreme Court then the above obligation to be void otherwise to remain in full force and virtue.

William K. McAllister,
J. R. Anderson.
Franklin Parmelee.



State of Illinois
County of Cook. J. S.

I, Walter Kimball Clerk of Cook County Court of Common Pleas, in and for said County, do hereby certify that the foregoing transcript contains, full and true copy of the Declaration. Pleas. Replications Rejoinders & Demursers. & Finders In Demursers. The Appeal Bond. and all the proceedings entered of Record in said Court in the case of The Chicago Marine & Fire Insurance Company plaintiff and Jonathan R. Anderson and William K. McAllister. Defendants in an action of Appeal.



In Testimony Whereof I hereunto
subscribe my name and affix the Seal of said
Court at Chicago in said County this
14th day of January A.D. 1859
Walter Kimball Clerk

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Supreme Court

William K M Allister &
Jonathan R Anderson

vs

The Chicago Marine and
Fire Insurance Company

April Term. A.D. 1859

Afterwards to wit at the
April Term before the Justices of the Supreme Court of the
State of Illinois at Ottawa came the said Plaintiffs in
Error by W K M Allister their attorney and say that in
the Record and proceedings aforesaid there is manifest
Error in this to wit that the Court overruled the
demurs of the said William K M Allister & Jonathan
R Anderson to the replications of the said The
Chicago Marine & Fire Insurance Company the plaintiffs
below and sustained the demurs of the
said plaintiffs below to the rejoinders of the defen-
dants aforesaid in the said Cook County Court of
Common Pleas. because and also in this to wit that
the fourth replication to the defts second plea - the
third replication to the defts third plea and the fifth
replication to defts fourth plea were and each of
them insufficient in law for the said plff to have
or maintain its said action and the defts
rejoinder to the plffs second Replication to defts
second plea. and also their rejoinder to the third
Replication to the same plea were in law a sufficient
bar avoidance and answer to said replications
And also in this that it appears by said Record, ^{that judgment} was given
for the plaintiff whereas against the said defts

Whereas the said judgment by the law of the land
 should have been given for the defendants against the plaintiff
 And the said plaintiffs in error pray that the judgment
 aforesaid for the errors aforesaid and other errors in the record
 & proceedings aforesaid may be reversed annulled
 and altogether held for nothing and that they may be
 restored &c

W. H. McAllister

atty for Pltfs
 in error

Copy of Ct. of Com. Pleas

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Chicago, W. H. McAllister

Anderson & McAllister

Transcript

Filed April 13, 1859

L. Leland
 Clerk

Fees for Transcript \$4.00
 paid by W. H. McAllister
 W. H. McAllister

In the Supreme Court
Johnathan R. Anderson et al

is
The Chicago Marine & Fire Insurance Co
And now comes the said
defendants in error and says
that there is no error in said
records and proceedings,
As is alleged and, this they
pray impertinently & the records,
and they pray an affirm-
ance of the judgment or
By Shumway W. B. Bond
Atty for Defendants in Error

SUPREME COURT.

JONATHAN R. ANDERSON,	}	Appellants' Points.
AND ANOTHER,		
vs.		
THE CHICAGO MARINE AND FIRE	}	
INSURANCE COMPANY,		
Respondent.		

I.

The defendants second plea alleges a demise under seal, by plaintiff to defendants, of certain premises, for the term of two years from the first day of April, 1855, at a yearly rent of four hundred dollars, payable on the first days of certain months, by installments of one hundred dollars each; viz: the first days of July and September, 1855, and the first days of January and April, 1856, &c.; that defendants went into possession on first of April, 1855; that before the first day of July, 1855, they were wrongfully evicted, by plaintiff from a part of said premises, which eviction continued until after the first day of April, 1856; that the Note sued on, was given for the supposed installments of said rent, payable on the first day of September, 1855, and the first days of January and April, 1856, and for no other consideration whatever.

To this plea the plaintiff replied, that although the defendants were so evicted from a part of said premises, yet they continued to occupy and enjoy the residue thereof.

The Court held this replication good and overruled defendants' demurrer; thus deciding that a wrongful eviction from part of the demised premises of the lessee, by the lessor, does not extinguish the rent, unless the lessee quit the possession of the remainder.

When this case was tried, the decision by a court of another state, upon this question, was wholly unknown to the defendants' counsel, at least.

The plaintiff's counsel cited the *nisi prius* case of *Smith vs. Raleigh*, 3 Camp, 513, and upon the authority of that case, and the note to it, referring to the case of *Stokes vs. Cooper*, the court below decided that remaining in possession of the demised premises, after the eviction, made the lessees liable upon a *quantum meruit*.

The general principle has always been that the wrongful eviction of the lessee, by the lessor, from a portion of the demised premises, extinguished the entire rent during the continuance of the eviction.

Salmon vs. Smith, 1 *Saund. R.* 204 (Note 2.)

8 *Bac. Abr.* 519, 3 *Kent's Com.* 464.

2 *Platt on Leases* 127, *Taylor's Landlord and Tenant Sec.* 379

Dyett vs. Pendleton, 8 *Cow. R.* 730—1

Buggs vs. Hale, 4 *Leigh R.* 484.

1 *Gale* 119, 1 *Mees & Welsby* 747.

1 *Yeates R.* 175.

Ogilvie vs. Hull, 5 *Hill R.* 52.

7th *Harrison Dig.* 879.

In *Brady on Distress* 43, is the following: "But if the lessor tortiously enter upon the lessee for life or years, and put out or disseize him of part of the land, there, the rent is suspended for the whole, and shall not be apportioned for any part; for this, says Lord Hale, would be for a man to apportion his own wrong."

But the decision of this question, in consonance with these recognized principles, has at length been made by a court of great learning and ability, in which this court, no doubt, will concur.

Christopher vs. Austin, 1st *Kernan R.* 216.

Briggs vs. Hall & Leigh 484
2 *E. D. Smith R.* 204

The Authorities Cited by Dept in Error have no Application
to this Case This is not a Case where a Legal right is
barred by some positive rule of law, But it is a case
simply, where a party by his own wrongful act has
discharged his tenant from all obligation at law or
in equity to pay him the supposed installments of rent
for which the note was given, See 2 E D Smith
Rep (Note) 209

The distinction between a discharge by the act
of the party and a bar effected by the act of the
law is well settled

Warren vs Whiting 24 Mass R 381
Valentine vs Foster 1 Metcalf 520
Snevely vs Read 9 Watt R 396

There is no moral obligation upon a tenant to pay rent
when he is tortiously evicted by his lessor.

If there was, at the time of giving the note sued upon, no liability on the part of defendants for the supposed installments of rent for which the note was given, then there was a want of consideration.

Crozer vs. Wolf, 2 *Monroe* 89.

Cabot vs. Haskins, 3 *Pick.* 83.

Hill vs. Buckminster, 5 *Pick.* 391.

Clement vs. Reppard, 15 *Penn.* 111.

Cobb vs. Arnold, 8 *Metcalf* 403.

Geiger vs. Cook, 3 *Watts & Sergeant* 266.

Kinzie vs. Trustees Chicago, 2 *Scam.* 187.

Bullock vs. Agburn, 13 *Ala.* 346.

II.

But this judgment should be reversed, for the decision of the court sustaining the plaintiff's demurrer to the defendant's rejoinder to the plaintiff's second replication to said second plea.

The cause of demurrer shown, was, that said rejoinder should have concluded with a verification.

This rejoinder is a mere traverse and contains no matter in avoidance.

III.

The defendants fourth plea contains matter which is proper subject of set off or recoupment, and a good defence. It arises out of the same transaction as that which constitutes the consideration of the note, if there is any consideration, therefore, said fifth replication was no answer thereto.

The Mayor of New York vs. Mabie, 3d *Kernan* 151.

There is nothing in said replication showing that anything was given up, or that there was a compromise of the said damages.

120-69
J R Anderson
etal or 170

The Chicago Marine
x Findus Co
Applt's Points

Jonathan R. Anderson et al. }
vs }
Chicago, Marine & Fire Insurance Co. }

Appeal from Cook.

The question in this case is raised on the pleadings. But for the better understanding of the case we will state the facts:

The ~~Marine~~ Chicago, Marine & Fire Insurance Co. rented to Anderson & Mc Allister, Attorneys at Law an office with water closets intended for the use of the same. They entered into the occupancy of the office and continued to occupy the same during the period of the demise. A derangement occurred with the water closets and the officers of the Insurance Co fastened them up till a change in the weather would permit them being fixed. This and this only constituted the eviction complained of.

The suit is brought upon a note given to settle up the rent of the office during the time of the pretended eviction. It is payable to the order of Frank Parmelee, and by him endorsed to the Insurance Co. and is dated April 6. 1856. we say:

I. There is no justness in the defence, on the contrary it is the most inequitable that can be imagined, it will not be favored by the Court.

II. We do not propose to discuss the question whether a partial eviction by the Landlord destroys all right to rent

during the time of the ~~transaction~~ eviction. The necessities of the case do not demand its decision. Sufficient unto the day is the evil thereof

We know that this Court will hesitate long before they will engraft such a doctrine into our jurisprudence. it was in keeping with the Spirits of the age when the land lords were all powerful and constantly encroaching and the tenant weak & powerless. When the Court were compelled to throw their shield around the weak and defenceless. The times have changed, the necessity that demanded that course of reasoning have passed and with the times departs the rule.

We say the question need not be settled - for our suit is brought on a note given for the use of the demised premises during the time of the eviction given after the eviction.

I. The law presumes that the note was given at the time it bears date, and hence by its date it appears to have been given after the alleged eviction.

II. It is admitted to be given after the eviction by the plar.

III. The giving of a note by Anderson & Mc Allister to the Insur. Co. is prima facie evidence that it ended and closed all claims they had against the Insurance Co.

5. Denio R. 304.

IV. By the rigid rule claimed by Plaintiffs the eviction worked a suspension or forfeiture of the rent during the

time of such eviction; it was optional with Anderson & McAllister to have this forfeiture and the giving of the note is deemed a waiver.

V. Money paid by mistake of law can never be recovered back, it is otherwise with a mistake of fact. The giving of the note as we have shown is deemed in law a settlement of the claim, the fact of the eviction must have been known to the plaintiff in error; there could therefore be no mistake of fact and it therefore must be deemed that they gave the note in question under a mistake of law as to the question of their liability and even if they did mistake the law they cannot claim that as ground for avoiding their contract.

1. Wend. 355.

VI. A questionable legal right is a sufficient consideration for a note.

VII. The plaintiff in error are attorneys, ~~whose~~ whose ~~but~~ keenness and acuteness their defence in this case attest, they cannot claim to be released from their contract on the ground of their mistaking their liability when they gave the note in question.

VIII. The rent of the demised premises during the time of the partial eviction constitute a good consideration for the note in question.

IX. A moral obligation constitutes a valid consideration to support an express promise, when the moral obligation is connected with a prior legal or equitable liability which is suspended by some legal maxim or statutory provision 13 Barb'h. 369. 3 Bos'y Pull. 249. Note.

Shumway Warts & Bonine
Her Defendants in Error

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John R Anderson
slab

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Chas Cap Marnie
Fire Insurance
Co.

Thos J. L. Lufkin
in care