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No. _____

Supreme Court of Illinois

Otto

vs.

Jackson

71641  7

STATE OF ILLINOIS,
SUPREME COURT,
THIRD GRAND DIVISION.

No.

198

J. W. Middleton & Co., Stationers, 196 Lake St.

198

IN THE

Supreme Court of the State of Illinois,

THIRD GRAND DIVISION,

April Term, 1864.

AUGUSTUS P. OTTO AND HERMAN BAER,

Appellants,

v.

JAMES JACKSON, APPELLEE.

BRIEF AND ARGUMENT FOR APPELLEE,

By B. F. AYER.

CHICAGO:
BEACH & BARNARD, PRINTERS, 14 SOUTH CLARK ST.
1864.

Filed April 30 1864.
J. L. and R. C. B.

BRIEF FOR APPELLEE.

This was an action of covenant brought by Jackson against Otto and Baer, upon their agreement, under seal, to guaranty the punctual performance of all the covenants, on the part of the lessees, contained in a certain lease from Jackson to Edward Zitsche and Frederick Roth.

The lease was dated April 1st, 1858. The premises described in it were demised to Zitsche and Roth for the term of one year from that date; "the term, however, to be extended one year longer at the same rent and stipulations, that is, if the said party of the first part shall at that time obtain from the owner of the land an additional lease for one year; but in such case the party of the second part shall give thirty days' notice of wishing such extension, to the party of the first part."

The lessees' covenants were as follows:

"And 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, &c., to pay the said party of the first part, as rent for said demised premises, the sum of \$1200 per annum, payable monthly in advance—that is, one hundred dollars on the first day of April, 1858, and one hundred dollars on the first day of each succeeding month for and during the term of this lease.

"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 demised premises in good

“ order and condition, and that at the expiration of the
 “ time in this lease mentioned, they will yield up the
 “ 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, &c.”

(Signed,)

JAMES JACKSON, [SEAL.]

By C. TUNNICLIFF.

EDWARD ZITSCHÉ, [SEAL.]

FREDERICK ROTH,

By EDWARD ZITSCHÉ.

The guaranty on which this action is founded, was indorsed upon the lease, and is of the following tenor :

“ For and in consideration of the sum of one dollar, to
 “ us in hand paid, the receipt of which is hereby acknowl-
 “ edged, we do hereby guarantee the punctual performance
 “ of all the within covenants in every particular, on the part
 “ of the lessees. Witness our hands and seals at Chicago,
 “ this 13th day of April, A. D. 1858.”

(Signed,)

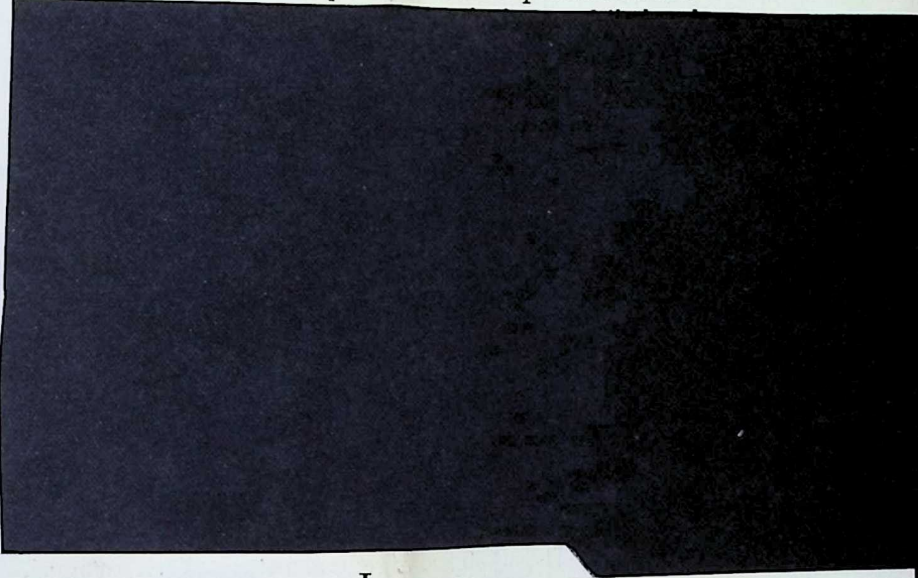
AUGUSTUS P. OTTO, [SEAL.]

HERMAN BAER. [SEAL.]

The action was commenced (see amended record) on the 2d day of August, 1859, and the summons was returnable to the September term. The declaration was filed August 26th, 1859, but was afterwards amended and refiled on the 20th of December, 1861. By a clerical mistake it was entitled of the September term, 1858, instead of 1859, but no objection was raised to it on this account in the court below.

The declaration contains three counts, the last of which

sets forth the execution of the lease, the covenant of the lessees to yield up possession of the premises at the expiration of the term, and the agreement of the defendants to guaranty the performance of the lessees' covenants. It avers that the lessees took possession of the premises under



I.

The first exception taken by the appellants, was to the admission of the lease in evidence at the trial, on the ground that there was no proof of its execution by Roth.

The evidence respecting the execution of the lease was the testimony of Charles Tunnicliff, who produced a power of attorney from Jackson authorizing him to execute the lease in his name. Tunnicliff testified, "that he executed the lease as agent for Jackson, and that Mr. Zitsche handed it to him signed by himself and acknowledged his

"handwriting. Zitsche said Roth was his partner, and
"lived in Wisconsin."

This witness further testified "that he refused to accept
"the lease until this guaranty was executed by the de-
"fendants."

Such being the general nature of an estoppel,
"it matters not what is the fact thereby admitted, nor
"what would be the ordinary and primary evidence of
"that fact, whether matter of record, or speciality, or writ-
"ing unsealed, or mere parol; the fact may in each case be
"proved, the ordinary evidence rendered unnecessary by
"an estoppel; and this is no infringement on the rule of
"law requiring the best evidence, and forbidding second-
"ary evidence to be produced till the sources of primary
"evidence have been exhausted, for the estoppel professes,
"not to supply the absence of the ordinary instruments of

“evidence, but to supersede the necessity of any evidence
“by showing that the fact is already admitted.”

2 Smith's Lead. Cases, 437.

On the principal question, the case of *McLaughlin v. McGovern*, 34 Barb., 208, is exactly in point. That was an action upon a special contract of guaranty indorsed upon a lease. McLaughlin leased a farm to Reynolds and Tague. The defendant signed the following agreement or guaranty:

“For value received, I hereby guaranty the fulfillment,
“on the part of said Reynolds and Tague, for the part of
“this agreement to be performed or kept by them; as
“witness my hand and seal.”

The complaint alleged that the two lessees promised by the lease to pay the rent reserved, and had not paid as they agreed, and that the defendant by virtue of his covenant became thereby obliged and liable to pay the same. The evidence failed to show that Tague executed the lease, and his assent to be bound thereby as a party thereto was not proved. The question was, whether the plaintiff had sustained his cause of action by the proofs. On this question the court say:

“The instrument signed by the defendant is an under-
“taking that the lessees shall fulfill their part of the agree-
“ment, and is indorsed upon the instrument, which stipu-
“lates for the performance of certain engagements in their
“behalf. Is not this a good undertaking, although the
“principal contract is imperfectly executed, or even con-
“ceding that it could not be fully enforced against the
“principal parties? It seems to me that it is. Nothing is
“clearer than that a collateral contract may sometimes be
“recovered upon when the principal one, to which it is
“auxiliary, is entirely incapable of enforcement. Thus, in

“ an action on the guaranty of a promissory note, it is unnecessary to prove the signature of the maker, and the reason, as given by STORY, is that such guaranty or indorsement, by implication, imports that the antecedent names on the note are genuine. and that the party subsequently indorsing and transferring the paper, has a good title, which he transfers.

“ Story on Bills of Exch., § 225.

“ If, consequently, it should turn out that the name of the maker was forged, this, I apprehend, will not discharge the indorser or guarantor. Indeed, this precise proposition is affirmed by SELDEN, J., in *Erwin v. Downs*, 15 N. Y. R., 576, on the authority of *Coggill v. Am. Exch. Bank*, 1 Comst., 113. This last case does not, however, hold this precise proposition; but it does declare what is, perhaps, in principle, equivalent to it, to wit, that if the maker of a note puts it in circulation, with a forged indorsement of the name of the payee upon it, a *bona fide* holder may sue and recover against the maker, as upon a note payable to bearer. The principle which will allow a recovery against the guarantor of a forged note, will surely permit a recovery against the guarantor upon this imperfectly executed lease. The case of the note is much the strongest of the two, for a name forged is no name whatever, and the note, as to any legal operation, is no better than blank paper, and yet the party indorsing it is held to the liability he, by the mere act of indorsing, has assumed.

“ Then, again, there is a class of cases where a guarantor may be held, although no suit whatever can be maintained on the original debt, and not unfrequently where the guaranty was obtained for the very reason that the principal debt could not be enforced by law. Such are

II.

A second exception was taken by the appellants, at the trial, to the plaintiff's instructions. The instruction now assigned for error in appellants' brief is the following:

"4. If the jury believe, from the evidence in this cause, "that the tenants Roth and Zitsche covenanted to yield up "the premises in question at the end of their term, in as "good condition as when they entered upon them, and "they failed to keep said covenant, then their sureties became liable for all the damages which the plaintiff sustained by reason of such failure. The amount of rent "stipulated in the lease, is presumptively the true measure "of damages sustained, the same to be computed by reference to the time during which the plaintiff is shown to "have been kept out of possession."

To determine whether this instruction was appropriate and pertinent, and whether the jury could possibly have been misled by it, to the prejudice of the defendants, it will be necessary to consider the breach of covenant assigned in the declaration and relied on by the plaintiff at the trial, and the evidence introduced in proof of it. The particular breach relied upon was that assigned in the third count, namely, the failure of the lessees to yield up possession of the premises at the expiration of the term. All the evidence in the case was directed to this point. No breach of the covenant *to repair* was assigned in the declaration, and no attempt made in the proof to establish any such ground of action.

The evidence upon this point was the testimony of Mr. Tunnicliff. He testified "that he had the charge of collecting rents under the lease. The rent was paid up to "April, 1859. Mr. Otto (the defendant) paid him one "month's rent under the lease during the year 1858. The

" lessees did not yield possession of the premises April 1,
 " 1859. Witness went to the premises on that day and de-
 " manded possession on the premises. He found one
 " Meyer in possession of the house, and went to Mr. Otto
 " and Mr. Baer (the defendants) on the same day, and de-
 " manded the possession of the premises from them. Mr.
 " Otto ordered witness out of the store when he made the
 " demand on him. Mr. Baer said he was very deaf and
 " could not hear. Witness did not obtain possession—did
 " not see either of the lessees, Zitsche and Roth. It was
 " between five and six months after the 1st of April, 1859,
 " before he got possession. Witness sued Otto and Baer
 " before a justice of the peace and got judgment, but an
 " appeal was taken and the suits dismissed for want of
 " jurisdiction. Neither of the lessees gave him any notice
 " that they desired an extension of the term. On the con-
 " trary, Zitsche told him he should have the possession of
 " the premises. Witness collected no rent after April 1st,
 " 1859."

On cross-examination, this witness testified " that he
 " knew Zitsche but never knew Roth. Zitsche left posses-
 " sion of the premises in the fall of 1858, and witness did
 " not know that he was in possession after that time.
 " Witness heard that he left the city. Gustavus R. Meyer
 " was in the occupation of the premises when witness de-
 " manded them. The saloon was occupied by him for four
 " or five months. When witness got possession he agreed
 " with Meyer not to ask any rent of him afterwards, and
 " *Meyer went with witness to see Otto, (the defendant), and*
 " *Otto agreed to it.* Meyer went out in October or No-
 " vember, 1859. Witness was on the premises as many as
 " twenty-five times after April 1st, 1859, but did not recol-
 " lect that he demanded possession after that time. He
 " did ask him several times to move out. Meyer carried

" on business in a saloon there two or three months after
 " the first of April, but did not use the lower room the last
 " part of the time he was in possession. *Otto and some*
 " *one else had a mortgage on the saloon fixtures, which was*
 " *foreclosed and the property taken.* When witness de-
 " manded possession of Otto on the first of April, he would
 " not have anything to say to witness, but ordered him out
 " of his store. Baer said he could not hear him. His
 " manner was very insulting. Witness knew he was not
 " deaf. Witness brought five suits against defendants for
 " the rent before Esquire De Wolf, and all the suits were
 " dismissed. The lease from plaintiff to Zitsche and Roth
 " was never assigned by the tenants or underlet *that wit-*
 " *ness knows of.* Meyer paid part of the rent before the
 " first of April, 1859, but never paid any after. Witness
 " went to Meyer and proposed to release him for any fu-
 " ture rent if they would give up possession of the prem-
 " ises. *He went with witness to Otto, and Otto assented to*
 " *it, and witness then got the possession.* Otto did not pay
 " a whole month's rent. Zitsche paid part and Otto the
 " balance. This was before the first of April, 1859."

This was all the testimony in the case, and upon this evi-
 dence the court gave to the jury the instruction in ques-
 tion.

The principal objection taken to it is, that it directs the
 attention of the jury to a different breach from the one as-
 signed in the declaration, and in reference to which there
 was no proof, to-wit: a breach of the covenant to yield up
 the premises *in as good condition as when the lessees entered*
upon them, instead of simply the covenant to surrender
 possession at the expiration of the term.

But few instructions are so drawn that a captious or hy-
 percritical reader may not find some fault with them. But the
 question is, not whether the form of expression used in this

instruction was the best that could have been adopted, but whether there is any such inaccuracy as would have been likely to mislead the jury, to the injury of the appellants.

When the instruction is considered in connection with the case sought to be established at the trial, and the evidence introduced to prove it, it is evident that it could have suggested to the jury no such idea as the appellant's counsel contrives to extract from it.

It follows, in its phraseology, the language of the covenant, and in its obviously intended sense and meaning, the instruction is correct and pertinent. The evidence shows that the lessees decided not to take an extension of the term. They were, therefore, bound by their express covenant, to yield up the possession of the premises at the expiration of the year. This covenant could be fulfilled only by giving to the plaintiff actual and complete possession. Having permitted Meyer to occupy during their term, it was their duty to get him out; for the plaintiff could not be compelled to accept him as tenant after the termination of the lease. Not having done this, they remained liable, under their covenant, for rent while the plaintiff was kept out of possession.

Taylor's Landlord and Tenant, § 524.

The statement, twice repeated in the appellants' brief, that Meyer obtained possession of the premises without the authority of the lessees, is wholly unsupported by any evidence in the case. The only thing in the case tending to give the slightest countenance to the assertion, is the testimony of Tunnicliff, that the *lease* was never assigned or under let to *his knowledge*. It does, however, affirmatively appear that Meyer was in possession with the knowledge and approval of these defendants. One of them had a mortgage upon his saloon fixtures; and before Meyer would

consent to relinquish possession, the defendants had to be consulted and their assent obtained by the plaintiff's agent. The mere fact that Meyer was found in possession, raises a presumption that he entered with the consent and by the authority of the lessees. Had the fact been otherwise, it could easily have been shown by the defendants, for Meyer was a competent witness, and, of course, knew all about it.

The court instructed the jury, that the rent stipulated in the lease was presumptively the true measure of damages sustained, to be computed for the time the plaintiff was kept out of possession. The following authorities show that this ruling was sufficiently favorable to the defendants.

III.

The instructions asked by the defendants were properly refused. This court has frequently decided that it will not reverse a judgment for refusal of the court below to give instructions unless they correctly state the law, and have some legitimate evidence for their foundation.

Coughlin v. The People, 18 Ill., 266.

Newkirk v. Cone, 18 Ill., 454

Riley v. Dickens, 19 Ill., 29.

Chi. B. & Q. R.R. Co. v. George, 19 Ill., 510.

Gal. & Chi. U. R.R. Co. v. Jacobs, 20 Ill., 478.

Hosley v. Brooks, 20 Ill., 116.

County Court v. Buck, 27 Ill., 440.

The instructions in question, were objectionable on each of the grounds above referred to. *First*. They were erroneous in point of law, inasmuch as they assume that the lessees were under no obligation to get Meyer out of possession at the end of the term, if he entered without their authority. It is clear that this fact alone, if proved, would not excuse the lessees from the performance of their cove-

ment. Unless it were further shown that Meyers was put in possession of the premises, he would be liable. *Sec-*ondly, the instructions are irrelevant to the case. The court would authorize the jury to find against the authority of the lessees, but the authority of the court is not affected on the rejection of the instructions. It is, unnecessary

to add anything farther to what is above suggested.

IV.

The record clearly shows that substantial justice has been done by the verdict, and the court, therefore, would not disturb it, even if errors were committed at the trial, on account of instructions having been incorrectly given or refused.

Newkirk v. Cone, 18 Ills., 449.

Dishon v. Schorr, 19 Ills., 59.

Elam v. Badger, 23 Ills., 498.

Schwarz v. Schwarz, 26 Ills., 81.

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION, }
APRIL TERM, A. D. 1864. }

Augustus P. Otto, and	}
Herman Baer,	
Appellants,	
V S.	
James Jackson,	}
Appellee.	

POINTS FOR APPELLANTS.

JACKSON, the plaintiff below, sued Otto and Baer, the defendants below, in covenant. The declaration, containing three counts, sets out the cause of action substantially thus: That on the 1st day of April, A. D. 1858, by indenture made between the plaintiff and Edward Zitsche and Frederick Roth, sealed with their seals, and shown to the court, the plaintiff demised to Zitsche & Roth certain premises in Chicago (describing them), for the term of one year from that date, for the rent of \$1,200 per annum, payable monthly. That Zitsche & Roth, by said indenture, covenanted to and with the plaintiff to pay said rent; that they had received said premises in good order and condition, and that at the expiration of the term thereinbefore mentioned, they would yield up the said premises to the said plaintiff. The first and second counts allege that the lease provided that Zitsche & Roth should have the said premises for a second year, at same rent, and under same stipulations; the said extension was, however, only to take effect by virtue of the provisions and

covenants aforesaid, in the event that the plaintiff should obtain from the owner of said property, at the expiration of the first mentioned term, an additional lease for one year ; and the said Zitsche & Roth, if they desired such extension, should give the plaintiff thirty days notice of their wishing to take such extension.

These two counts respectively aver that the plaintiff did obtain *such additional lease of the owner* of the premises at the end of the first mentioned term, and that Zitsche & Roth *gave the thirty days notice of their wishing the extension.*

AVERS, that Otto & Baer, the defendants below, on the 13th of April, 1858, by their covenant, to and with the said plaintiff, sealed with their seals, and shown to the court, for the consideration of one dollar paid them, did covenant to and with the plaintiff, that they would and thereby did guarantee the punctual performance of all the covenants in every particular, which Zitsche & Roth had made, and were bound to fulfill, perform, and keep on their part, in and by the indenture first aforesaid. And assigns, for breaches of the covenant of defendants, 1st. That Zitsche & Roth did not yield up the possession of the demised premises at the expiration of the first mentioned term. 2nd. That they continued in the possession of the premises after such expiration, and failed to pay any of the rent from April 1st, 1858, to the time of the commencement of the suit.

The THIRD COUNT is based upon the same demise to and covenants by Zitsche & Roth, and same covenant of guarantee by defendants, and alleging for breach that Zitsche & Roth did not yield up the possession of the demised premises to the plaintiff at the expiration of the first mentioned term.

So that the case of the plaintiff, as made by his declaration, presented two grounds of recovery, only :

First. That the plaintiff obtained the additional lease of the owner of the demised premises ; that Zitsche & Roth gave the thirty days notice of their wishing the extension of the lease for another year ; their failure to pay the rent during either the first or second year, and the liability of the defendants therefor under their covenant of guarantee.

And *Secondly.* That Zitsche & Roth did not yield up the possession

of the demised premises to the plaintiff at the expiration of the first mentioned term, whereby the plaintiff was deprived of the use thereof, and sustained damages. No other breaches were assigned.

The defendants, pleading separately by their pleas, put in issue all the material allegations of the declaration, and especially the allegation that Zitsche & Roth covenanted with the plaintiff in manner and form as alleged; and to the allegation of the covenant of guarantee of defendants with the plaintiff, *non est factum*. Also, a plea of performance of covenants.

On the trial, the plaintiff's counsel introduced Charles Tunnicliff, plaintiff's agent, who was the only witness sworn in the case. A paper, purporting to be a lease from Jackson to Zitsche & Roth, dated April 1st, 1858, was offered in evidence without proof of its execution. To this, the defendants' counsel objected on that ground; but the court overruled the objection, and the same was read to the jury, and exception (Abs. Rec., p. 7).

The plaintiff's counsel then read in evidence a paper, purporting to be signed and sealed by the defendants, as follows:

"For and in consideration of the sum of one dollar to us in hand paid, the receipt of which is hereby acknowledged, we do hereby guarantee the punctual performance of all the within covenants, in every particular, on the part of the lessees.

"Witness our hands and seals, at Chicago, the 13th day of April, 1858.

"AUGUSTUS P. OTTO, [SEAL.]

(Abs., p. 9.)

"HERMAN BAER, [SEAL.]"

The last mentioned is the only pretended covenant purporting to be made by the defendants, which was given in evidence.

It appeared in the evidence that Zitsche alone went into the occupation of the premises; that the witness Tunnicliff never knew Roth; that Zitsche occupied the demised premises until the Fall of 1858; that having promised the witness (plaintiff's agent) to give up the premises to him (witness), Zitsche quit them in that Fall, never was in possession of them afterwards, but left the city; that after that, one Gustavus R. Meyer, somehow got into the possession of them, but not with the authority of either Zitsche or Roth—was there on the 1st day of April, 1859,

and some months afterwards; that the witness took one months' rent of Meyer before the 1st of April, 1859 (but how much does not appear), and none afterwards; that witness made no effort to get Meyer removed, or to collect rent of him, but, on the contrary, expressly agreed with him not to charge him any rent if he would move out, which was assented to, and he went out (Abs., p. 10) under that arrangement (Abs., p. 10); that neither Zitsche or Roth ever gave any notice that they desired an extension of the lease, but, on the contrary, Zitsche told witness that he (witness) should have the possession of the premises (Abs., p. 7). It did not appear that the plaintiff ever got an additional lease of the demised premises, for one year from April 1st., 1859, of the owner. It does appear that he got a lease of one H. H. Magee; but there is no evidence that Magee had any interest in them (Abs., p. 9). The witness testified that all the rent of the premises, from April 1st, 1858, to April 1st, 1859, was paid (Abs., p. 7).

Under this evidence (and there was no other witness), and the state of the pleadings as aforesaid, the court, in the fourth instruction given on behalf of the plaintiff (Abs., p. 11), instructed the jury as follows :

4. " If the jury believe, from the evidence in this cause, that the tenants, Roth & Zitsche, covenanted to yield up the premises in question, at the end of their term, *in as good condition as when they entered upon them*, and they failed to keep said covenant, then their sureties became liable for all the damages which the plaintiff sustained by reason of such failure. The amount of rent stipulated in the lease, is *presumptively the true measure of damages sustained*, the same to be computed by reference to the time during which the plaintiff is shown to have been kept out of possession."

To the giving of which instruction by the court, the defendants, by their counsel, excepted (Abs., p. 11).

The bill of exceptions sets forth all the evidence given on the trial (Abs., p. 10).

The jury found for the plaintiff, and assessed his damages at \$500 (Abs., p. 12). The defendants counsel moved for a new trial; which was over-

(5)

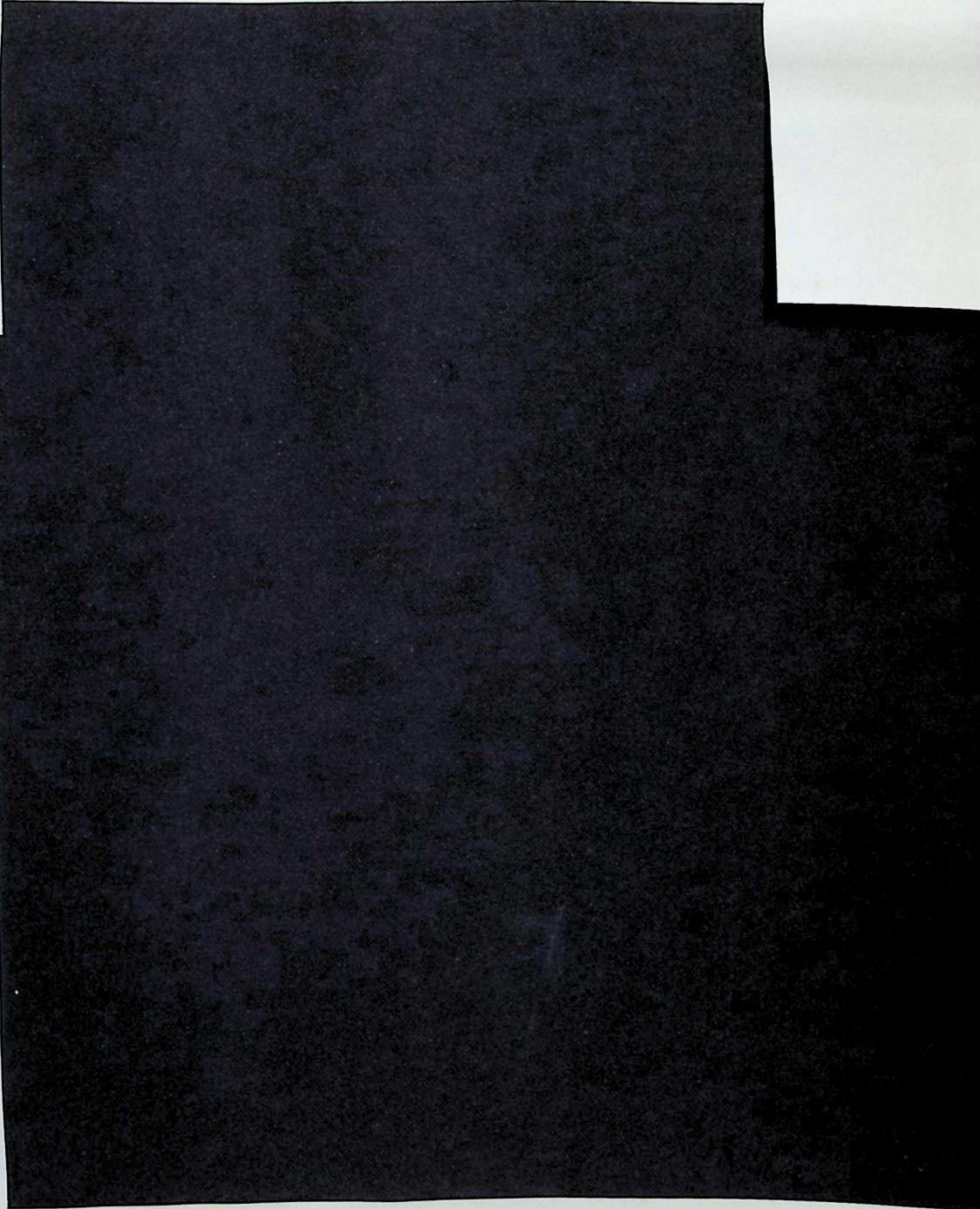
ruled by the court, and exceptions by defendants (Abs., p. 12), and judgment was given for plaintiff, for that amount.

We now ask for a reversal of that judgment of the Superior Court of Chicago, for the following reasons :

I .

2d. There being no evidence as to the condition of the premises, aggravates, instead of mitigating or avoiding the error in that behalf. The court told the jury that if the tenants failed to keep *said covenant*, viz: that they "would yield up the premises at the end of their term, *in as good condition as when they entered upon them*," then their *sureties* became liable *for all the damages* which the plaintiff sustained by reason of *such failure*. Here the court, as if aware that there was no evidence on the subject, supplies the defect by the application of a rule most glaringly erroneous, viz: that "*the amount of rent stipulated in the lease, is presumptively the true measure of damages*." Supposing there had been such a *breach*, assigned, as that submitted by the court to the jury, could there be a more unreasonable rule of damages conceived of, than that fixed by the court below? If that rule is warranted by the law of the land, it is time tenants became aware of it. A tenant takes a store in good condition, under a lease with a similar covenant, at a rent of five thousand dollars for a year. By accident, paint becomes marred, and windows broken; twenty-five dollars might repair all, except natural wear. He pays all the rent, and quits, but neglects to make the repairs. He will be surprised to learn that such neglect keeps alive the covenants of the lease, as to the rent, and the penalty of such neglect is presumptively the five thousand dollars.

(7)



2d. There was no cause of action established by the evidence, because

the rent was fully paid for the whole term of the lease, and there was no breach of the covenant, to yield up the premises at the expiration of the term, shown. Zitsche promised the witness to quit the premises, and he did quit them. No notice to witness was necessary.

James v. Pope, 19 New York R., 324.

The plaintiff had the affirmative of proving the breach of the covenant, and it was for him to show that Meyer was in possession without his consent.

Taylor, Land and T., sec. 684.

Why did Tunnicliff not explain when, and under what circumstances, Meyer went into the occupation of these premises? It appears, affirmatively, that Zitsche & Roth neither assigned any lease or under let to Meyer; and Meyer will not be presumed to have committed a trespass or forcible entry. Besides the presumption that he did not, the circumstances all tend to show, that his remaining there four or five months, when Tunnicliff was so frequently on the premises, and when if not there by authority, he could have been removed summarily under the statute, that Meyer's occupation was a mere contrivance, whereby the defendants might be harrassed and oppressed. Instead of proceeding to remove Meyer under the statute, Tunnicliff instituted half a dozen suits against the defendants, who were mere sureties, if they were under any relations whatever to the plaintiff.

III.

There being no evidence in the case of any damage to the plaintiff, the jury must have based their verdict upon the amount of rent stipulated in the lease, for the longest time mentioned by Tunnicliff, during which he says Meyer was in occupation of the premises after April 1st, 1859.

Witness said it was between five and six months after the 1st of April, 1859, before he got possession (Abs., p. 7). The rent was just \$100 per month. This evidently was the basis of the verdict. Now, by recovering this rent, the plaintiff has, by the perversion of the law by the court below, been enabled to do indirectly, what he could not do directly. If the

defendants' covenant had been such that an action could have been maintained upon it, and the lease to and covenants by Zitsche & Roth been established by competent proof, and Zitsche & Roth had held over, still the defendants, as *sureties*, would not have been liable for the rent.

Brewer v. Knapp, 1 Pick. R., 332 ;

Kennebec Bank v. Turner & Chase, 2 Greenl. R., 42 ;

and much less would the sureties be liable for the rent, when the premises were occupied by another, who did not hold under or through Zitsche & Roth.

Newman v. Mackin, 13 Smedes & M., 383.

McALLISTER, JEWETT & JACKSON,

Att's for Appellants.

Supreme Court

Augustus P. Otto &
Herman Baer
vs appllts

James Jackson
Appellee

Filed April 20. 1864
L. Leland Clerk

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION, }
APRIL TERM, A. D. 1864. }

Augustus P. Otto and
Herman Baer,

v s.

Appellants. }

James Jackson,

Appellee. }

ABSTRACT OF RECORD.

R. p. 2 **The Record** in this case shows, that on the 20th of December, A. D. 1861, the appellee, Jackson, filed in the Superior Court of Chicago, an amended declaration in covenant against Otto & Baer, appellants, the first count of which, and the substance of the other counts, are as follows, viz :

Superior Court of Chicago, }
SEPTEMBER T., 1858. }

3 ILLINOIS, }
COOK COUNTY. } ss.

JAMES JACKSON,
vs.
AUGUSTUS P. OTTO, & } IN COVENANT.
HERMAN BAER. }

James Jackson, plaintiff, by E. W. McComas, his attorney, comes and complains of Augustus P. Otto and Herman Baer, defendants

of a plea of breach of covenant: For that whereas, heretofore to wit., on the first day of April, 1858, at the said county of Cook, by a certain indenture then and there made, between the said plaintiff and Edward Zitsche and Frederick Roth, sealed with their seals, and to the court now here shown, the date whereof is the day and year last aforesaid, the said plaintiff did demise and lease unto the said Edward Zitsche and Frederick Roth, the following described property, to wit.: the two-story frame house known and called No. 162 Randolph street, situate, lying and being in the city of Chicago, and State of Illinois, and in the said county of Cook, together with the use of the yard belonging and all the appurtenances thereunto belonging, to have and to hold said property and premises unto the said Edward Zitsche and Frederick Roth, and their executors, administrators and assigns, *from* the first day of April, 1858, *for and during, and until the first day of April, 1859*; and the said Edward Zitsche and Frederick Roth then and there, to wit., on the day and year first aforesaid, to wit., at the county of Cook, by the aforesaid indenture, covenanted to and with the plaintiff, that they would pay him as rent for the said premises, the sum of (\$1,200) twelve hundred dollars per annum, payable monthly in advance, that is, one hundred dollars on the first day of April, 1858, and one hundred dollars on the first day of each succeeding month, *for and during the said term of the lease*; and that they had received the said demised premises in good order and condition, *and that at the expiration of the term hereinbefore mentioned they would yield up the said premises to the said plaintiff*; and by the said indenture, it was then and there further covenanted by and between the said plaintiff and the said Edward Zitsche and Frederick Roth, that the term aforesaid, to wit., from the 1st day of April, 1858, for and during, and until the 1st day of April, 1859, should be extended one year longer, to wit., one year from the termination of said term; and the said Edward Zitsche and Frederick Roth thereby then and there covenanted to and with the said plaintiff to pay him for the premises and property hereinbefore mentioned, during such extension, the same rent, and comply with the same stipulations as they had in said indenture covenanted and agreed to, and as hereinbefore set out for the term first aforesaid; *the said extension was, however, only to take effect by virtue of the provisions and covenants aforesaid, in the event that the said plaintiff should obtain from the owner of said property and premises at the expiration of the said first mentioned term, an additional lease for*

one year ; and it was thereby then and there further covenanted and agreed between the said plaintiff and the said Edward Zitsche and Frederick Roth, that in case the said Zitsche and Roth should take an extension of the first mentioned term, they should give to the said plaintiff thirty days notice of their wishing to take such extension.

6 And the plaintiff avers that afterwards, to wit., on the 13th day of April, 1858, at the said county of Cook, by a certain covenant made by the said defendants, to and with the said plaintiff, sealed with the seal of the said defendants, and to the court now here shown, the date whereof is the day and year last aforesaid, they, the said defendants, for and in consideration of one dollar then and there to them in hand paid, did covenant to and with the said plaintiff, that they would, and thereby did, guarantee the punctual performance of all the covenants in every particular, which the said Edward Zitsche and Frederick Roth had made, and were bound to fulfill, perform, and keep on their part, in and by virtue of the indenture first aforesaid.

7 And the plaintiff avers that said Edward Zitsche and Frederick Roth, by virtue of the demise and lease aforesaid heretofore, to wit., on the 1st day of April, 1858, at said county of Cook, entered into and upon all and singular, the said demised premises with the appurtenances, and became and was possessed thereof for the term first aforesaid, and then and there did continue to hold, use, and occupy the said premises from thence hitherto, to wit., from the 1st day of April, 1858, to the time of instituting this suit ; and did at the expiration of the said term first mentioned, *the said Edward Zitsche and Frederick Roth and their assignees, and those holding under, through, and by them*, by virtue of said indenture, *did take an extension* of said first mentioned term as provided for in said indenture, *for the term of one year after the expiration of said first mentioned term ;* and the said plaintiff did, at the expiration of the said first term, *obtain from the owner of said property* and premises, *an additional lease for one year ;* and the said Edward Zitsche and Frederick Roth *did give thirty days notice of their wishing to take such extension*, to the said plaintiff, and have continued to hold and occupy, use and enjoy the said premises and appurtenances, by virtue of said extension of said de-

mise and term, from thence hitherto, and saith that he did obtain *from the owner* of said demised premises, *an additional lease therefor* for one year; and the plaintiff avers that although he hath in all things hitherto, faithfully, well and truly performed, kept, and fulfilled all things in said indenture contained, on his part to be fulfilled, kept, and performed, according to the true intent and meaning of said indenture, to wit., at the county of Cook, aforesaid.

And the said plaintiff further avers that the said Edward Zitsche and Frederick Roth have not, nor hath either of them, or their assigns or those holding under them, yielded up the said demised premises to the said plaintiff at the expiration of the term first mentioned, or at any time since, but have, and each of them hath, wholly failed and refused, although often requested so to do.

8 Nor have the said Edward Zitsche and Frederick Roth, or their assigns, or those holding under them, paid to the said plaintiff one hundred dollars per month for rent of said premises during said term or since, nor have they paid any rent or any sum of money to the plaintiff, whatever, but on the contrary, have wholly refused to do so; and the said rent aforesaid, and every part thereof, from the first day of April, 1858, to the institution of this suit, remains and is wholly unpaid.

And the said plaintiff avers that the said defendants have, and each of them hath, wholly failed and refused, and still do fail and refuse to yield up or cause to be yielded up to the plaintiff the said demised premises at the end of said term first mentioned, or at any time since, although requested so to do; and have heretofore, and do still fail and refuse to pay to the plaintiff any portion or part or all of the rent accruing, or which accrued during the term first aforesaid, or since the said expiration of said term as aforesaid, in and by virtue of said demise and indenture aforesaid, nor have they or either of them ever kept or performed, or caused to be kept or performed, any or all of the covenants in said indenture, on the part of the said Edward Zitsche and Frederick Roth to be performed.

9-10 **The Plaintiff** below, in his SECOND COUNT, described the lease
12 to Zitsche & Roth, and their covenants with him, the same as in the first
11 count, and the same covenant of guarantee by the defendant, except
12 that it was made upon consideration of *one hundred dollars*; alleges
11 that plaintiff obtained the addition lease from the owner of the property
for another year from April 1st, 1859, and that Zitsche & Roth gave him
the thirty days notice of their wishing the extension for another year,
assigning for breach the non-payment of all rents on the 1st day of April,
12 1858, and thereafter to the time of instituting the suit by Zitsche & Roth,
and that defendants had failed to keep and perform their covenant of
guarantee.

14 **The Third Count** describes the lease and covenants, and also
15 the guarantee of the defendants, the same as the other counts, and assigns
for breach, that Zitsche & Roth wholly failed and refused to yield up the
possession of the premises to the plaintiff at the expiration of the term,
although often requested so to do; by reason whereof the plaintiff alleged
that he had been deprived of the use of said premises from thence hith-
erto, had lost certain large sums of money, and so the defendants had
16 failed and refused to keep and perform any or all of their covenants, but
have broken the same to the damage of plaintiff, of \$2,000.

20 **The Appellants**, Otto & Baer, appeared and pleaded separately.

1. Denying that Zitsche & Roth covenanted or agreed with the
plaintiff in manner and form as alleged—concluding to the country.

2. Denying that the lease set out in the declaration, was the deed of
Zitsche & Roth, as alleged—concluding to the country.

3. To the covenant of guarantee, *non est factum*—concluding to the
country.

21 4. Denying that Zitsche & Roth failed to pay the rent, but alleging
payment of all the rent—and concluding to the country.

5. Denying that Zitsche & Roth failed or refused to yield up posses-

sion of the premises described in the declaration—concluding to the country.

6 **6.** Denying that the plaintiff obtained any lease from the owner of the demised premises, in manner and form as alleged—and concluding to the country.

7. Denying that Zitsche & Roth gave any such thirty days notice in manner and form as alleged—concluding to the country.

23 **8.** A plea of payment of all the rents in said indenture mentioned, by Zitsche & Roth, and that they yielded up to plaintiff the possession of the premises according to the form and effect of said indenture—and concluding to the country.

24-28 **The Defendant,** Otto, filed the same pleas.

30-32 **The Plaintiff** took issue upon all the pleas.

Bill of Exceptions.

39 At the January Term, 1863, the case was tried before the Hon. VAN H. HIGGINS, one of the judges of said court, and a jury.

Charles Tunnicliff

41 Was called as a witness on behalf of plaintiff, and being sworn, testified: That a paper then shown to him, purporting to be signed by James Jackson, and to be a power of attorney from Jackson to witness, bearing date the 1st day of January, 1858, was in Jackson's handwriting, and which was read in evidence.

A paper purporting to be a lease from the plaintiff, by Tunnicliff, his agent, to Edward Zitsche and Frederick Roth, dated April 1st, 1858, for one year from date, of premises described therein, was then shown to said witness, who testified: That he executed the lease as agent for Jackson, and that Mr. Zitsche handed it to him signed by himself, and

acknowledged his handwriting. Zitsche said Roth was his partner, and lived in Wisconsin. Witness stated that he refused to accept the lease until this guarantee was executed by the defendants. Witness further said, that he had the charge of collecting rents under said lease. *The rent was paid up to April, 1859.* Mr. Otto paid him one month's rent under the lease, during the year 1858. The lessees did not yield possession of the premises April, 1st, 1859; witness went to the premises on that day and demanded possession on the premises. He found Mr. Myer in possession of the house, and went to Mr. Otto and Mr. Baer on same day and demanded possession of them. Mr. Otto ordered witness out of the store; when witness made the demand on him, J. M. Baer said he was very deaf. Witness did not get possession of premises; did not see either Zitsche or Roth. It was between five and six months after the 1st of April, 1859, before witness got possession of the premises. Witness sued Otto and Baer before a justice of the peace, and got judgment, but an appeal was taken and the suits dismissed for want of jurisdiction. Witness further said, *that neither of the lessees gave him any notice that they desired an extension of the term in the lease; but on the contrary, Zitsche told witness that he, witness, should have the possession of the premises.* Witness collected no rent accruing after the first of April, 1859.

The Plaintiff's counsel then offered the said lease from plaintiff to Zitsche & Roth in evidence, to which the counsel for the defendants objected, on the ground that there was no proof of Roth's signature to the same. The court overruled the objection, and the same was read in evidence to the jury. To which ruling of the court, the defendants' counsel then and there excepted. The said lease and guarantee were then read in evidence. So much of said lease as is material, is as follows:

" This Indenture, made this first day of April, 1858, between James Jackson, of the city of Buffalo, and State of New York, of the first part, and Frederick Roth, of Washington county, and State of Wisconsin, and Edward Zitsche, of the city of Chicago, State of Illinois, of the second part, Witnesseth, That the said party of the first part, for and in consideration of the covenants and agreements hereinafter named 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 the city of Chicago, &c., known and described as follows, to wit. : the two story frame house known as and called No. 162 Randolph street, situate, lying and being in the city of Chicago, &c., together with use of yard belonging, and all the appurtenances thereto belonging, to have and to hold the said above described premises, with the appurtenances, unto the said party of the second part, their executors, &c., from the first day of April, in the year A. D. 1858, for and during and until the first day of April, 1859; the term, however, to be extended one year longer at the same rent and stipulations, that is, if the said party of the first part shall at that time obtain from the owner of the land an additional lease for one year; but in such case the party of the second part shall give thirty days notice of wishing such extension, to the party of the first part.

“ And 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, &c., to pay the said party of the first part, as rent for said demised premises, the sum of twelve hundred dollars per annum, payable monthly in advance—that is, one hundred dollars on the first day of April, 1858, and one hundred dollars on the first day of each succeeding month for and during the term of this lease.

“ 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 demised premises in good order and condition, and that at the expiration of the time of this lease mentioned, they will yield up the 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, &c., &c.

JAMES JACKSON, [SEAL.]
By C. Tunnickliff.

EDWARD ZITSCHKE, [SEAL.]
FREDERICK ROTH,
By Edward Zitsche.

48 “ For and in consideration of the sum of one dollar, to us in hand paid,
the receipt of which is hereby acknowledged, we do hereby guarantee
the punctual performance of all the within covenants, in every particular,
on the part of the lessees.

“ Witness our hands and seals, at Chicago, this 13th day of April,
A. D. 1858.

AUGUSTUS P. OTTO, [SEAL.]
HERMAN, BAER, [SEAL.]”

The said witness Tunnicliff here was shown a lease from H. H. Magee, to the plaintiff, of the ground in question, dated April 1st, 1859, to April 1st, 1860 ; and witness said he knew this lease was executed—he received it from Magee on the 1st April, 1859, and sent it to Buffalo to get Jackson’s signature ; Jackson sent it back in a few days, signed by him ; which said lease was read in evidence without objection.

On Cross-Examination,

49 Witness, Tunnicliff, said : That he knew Zitsche, who was in possession
of the premises in question part of the term in his lease, but never knew
Roth. Zitsche *left possession of the premises in the Fall 1858*. Wit-
ness *don’t know that he was in possession after that time*, and heard that
he left the city. Gustavus R. Meyer was in the occupation of the
premises when witness demanded them ; the saloon was occupied by him
for four or five months ; by Meyer and his family. When witness got
possession, *he agreed with Meyer not to ask any rent of him afterwards*.
And he, Meyer, went with witness to see Otto, and Otto agreed to it.
Witness thought Meyer went out in October or November. Witness
don’t know that anybody objected to his taking possession. Witness knew
that on the 1st day of April, 1859, Meyer was occupying the premises on
first story as a saloon ; there were four or five rooms up stairs. Knew
that Meyer occupied the rooms up stairs on the 1st of April, 1859. Wit-
ness was there as much as twenty-five times afterward, but don’t recollect
that he demanded possession after the 1st of April ; but did ask him sev-
49 eral times to move out. There were several persons there when witness
demanded possession on the 1st of April, 1859 ; that he did not recog-
nize any of them as tenants.

50 Witness was pretty certain that Meyer carried on business there two or three months, but thinks he did not use the lower room the last part of the time.

 The lease from plaintiff to Zitsche & Roth was never assigned by the tenants, or under let, that witness knew of. *Meyer paid part of the rent before the 1st of April, 1859, but never paid any after.*

51 Witness went to Meyer and proposed to release him from any future rent if they would give up possession of the premises. He went with witness to Otto, and Otto assented to it, and witness then got the possession. Otto did not pay a whole month's rent. Zitsche paid part and Otto the balance. This was before the 1st of April, 1859.

 The foregoing is all the evidence given on said trial.

At the request of the plaintiff's counsel the court instructed the jury in behalf of the plaintiff as follows :

1. If the jury believe from the evidence that the defendants guaranteed the punctual performance of all the covenants in every particular on the part of the lessees contained in the lease in question, and that those covenants were violated by the lessees, the defendants are liable to the plaintiff in this action for all the direct damages he sustained thereby.

2. If the jury believe from the evidence that the plaintiff's agent went upon the premises on the 1st day of April, 1859, and demanded possession of the parties found there in possession, and that on the same day possession was also demanded by the plaintiff's agent of the said defendants, but that possession was refused or not yielded up to the plaintiff, that would constitute a breach of the covenant contained in the lease, and the defendants would be liable in this action for all damages sustained by the plaintiff in consequence of such breach of covenants.

3. The court instructs the jury that as a matter of law, whatever the tenants in their lease were bound to do, their securities, in case of their default, were bound to do for them.

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52

To the giving of which said several instructions by the court, and each of them, the said defendants, by their counsel, then and there excepted.

Whereupon the counsel for the said defendants requested the court to instruct the jury on behalf of the defendants as follows :

1. The jury are instructed that if they believe, from the evidence in this case, that all the rent provided for in and by the lease given in evidence, was fully paid for the whole term in said lease, and that before the end of the term in said lease, both the lessees, Roth and Zitsche, had quit the possession of said premises, and that no person had been authorized by either of said lessees, Roth and Zitsche, to occupy the same, after they had so quit the same, the law is for the defendants.

53.

2. The jury are instructed, that although the jury may believe from the evidence, that Meyer was in possession of the premises in question, with the cognizance and even consent of one of the defendants, Otto, yet if the lessees, Roth and Zitsche, never authorized Meyer to enter into possession of the same, but if Meyer was in occupation thereof without right and unlawfully, then both Otto and Meyer might be liable in some other action, but such facts will not authorize a recovery by the plaintiff in this suit.

But the court refused to give either of said instructions so asked as aforesaid in behalf of said defendants. To which refusal the said defendants then and there excepted.

And the said defendants, by their counsel, then and there asked the court further to instruct the jury as follows :

3. Although the jury may believe from the evidence in this cause, that one Meyer was in occupation of the premises in question, on and after the first day of April, 1859, yet if the said Meyer was not so occupying under the authority of either Roth or Zitsche, but was a mere trespasser or interloper, then the law is for the defendant.

But the said court then and there refused to give said instruction as asked, and added to the same by writing thereunder these words, viz :
" This is so if the lessees, *at the end of their term*, did surrender, or offer
" to surrender up said premises ; but they were bound to restore possession to the plaintiffs *at the end of their term*, or pay damages."

With which addition and amendment as aforesaid, the court then and there gave the said instruction. To which refusal of the court to give the said instruction as asked, and making said addition, and giving the same to the jury with said addition, the counsel for the defendants then and there excepted.

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The Jury, after retiring, returned a verdict whereby they found the issues for the plaintiff, and assessed his damages at five hundred dollars.

55

The Defendants moved for a new trial, which was overruled, and exception.

37

The Court gave judgment on the verdict, and defendants prayed an appeal to this court, which was allowed ; and now make the following

37-38

(13)

ASSIGNMENT OF ERRORS.

Page 1
United States of America
State of Illinois Cook County SS.

Came before the Honorable Judges of the
superior Court of Chicago, within and for the
County of Cook and State of Illinois, at a regular
term of the said superior Court of Chicago began
and holden at the Court House in the City of
Chicago, in said County and State on the first
Monday being the fifth day of October in the year
of our Lord Eighteen Hundred and sixty three, and
of the independance of the United States of America
the Eighty eighth, —

Present The Honorable John M Wilson Chief Justice
Of the Superior Court of Chicago
Wm H Higgins and Grant Goodrich, Judges
Joseph Knox Prosecuting Attorney
David Hammond Sheriff of
Cook County
Attest
Thomas B Carter Clerk

2

Be it remembered that heretofore to-wit
on the Twentieth day of December in the Year
of our Lord One Thousand Eight Hundred and
Sixty one James Jackson by McComas and
Clements his Attorneys filed in the Clerk's Office
of the Superior Court of Chicago his Amended
Declaration, which is in the following words and
figures to-wit, —

Illinois
Cook County ^{ss} Superior Court of Chicago
September 5 1858

James Jackson
vs ^{vs} Vm Covenant
Augustus P Otto and
Herman Baer

James Jackson Plaintiff by E. M. McCombes
his attorney comes and complains of Augustus
P Otto and Herman Baer Defendants of a ^{plea of} breach
of Covenant, For that whereas heretofore found
on the first day of April 1858 at the said
County of Cook by a certain Indenture then
and there made between the said Plaintiff
and Edward Zitschke and Frederick Roth
sealed with their seals, and to the Court now
here shown, the date whereof is the day and
year last aforesaid, the said Plaintiff did
demise and lease unto the ^{said} Edward Zitschke
and Frederick Roth the following described
property to wit, The two story frame house, known
as and called No 169 Randolph Street situate, lying,
and being in the City of Chicago and State of
Illinois and in the said County of Cook, together
with the ^{use of} yard belonging and all the appurte-
nances thereto belonging. To have and to
hold said property and premises unto the said
Edward Zitschke and Frederick Roth and their

Executors, administrators and assigns from the first day of April 1838 for and during and until the first day of April 1839 and the said Edward Zitschke and Frederick Roth then and there bound on the day and year first aforesaid bound at the County of Cook by the aforesaid Indenture covenanted to and with the Plaintiffs that they would pay him as rent for the said premises, the sum of (\$1200) Twelve hundred Dollars per annum payable monthly in advance, that is, One hundred dollars on the first day of April 1838, and One hundred Dollars on the first day of each succeeding month, for and during the said term of the lease, and that they had received the said demised premises in good order and condition, and that at the expiration of the term therein before mentioned, they would yield up the said premises to the said Plaintiffs, and by the said indenture, it was then and there further covenanted by and between the said Plaintiffs and the said Edward Zitschke and Frederick Roth that the term aforesaid bound from the 1st day of April 1838 for and during and until the 1st day of April 1839 should be extended one year longer bound one year from the termination of said term, and the said Edward Zitschke and Frederick Roth thereby then and there covenanted to and with said Plaintiffs to pay him for the premises and property herein before mentioned

5 during such extension the same rent, and comply
with the same stipulations, as they had in said
indenture covenanted and agreed to, and as herein
before set out for the term first aforesaid, the
said extension was however only to take effect
by virtue of the provisions and covenants aforesaid
in the event, that the said Plaintiff, should
obtain from the owner of said Property and premises
at the expiration of the said first mentioned term
an additional lease for one year, and it was thereby
then and there further covenanted and agreed between
the said Plaintiff, and the said Edward Zetschke and
Frederick Roth, that in case they the said Edward
Zetschke and Frederick Roth should take an extension
of the said first mentioned term, they
should give to the said Plaintiff, thirty days
notice if they wished to take such extension,
And the Plaintiff avers that afterwards to wit
on the 13th day of April 1858 at the said County
of Cook, by a certain Covenant made by the said
Defendants to and with the said Plaintiff, sealed with
the seals of the said Defendants, and to the Court now
here shown, the date whereof is the day and year
last aforesaid. They the said Defendants for and
in consideration of one dollar, then and there to them
in hand paid, did Covenant to and with the said
Plaintiff, that they would and thereby did, guar-
antee the punctual performance of all the

covenants in every particular, which the said Edward Zitschke and Frederick Rott had made, and were bound to fulfill, perform & keep on their part in and by virtue of the indenture first aforesaid. And the Plaintiff avers that said Edward Zitschke and Frederick Rott by virtue of the demise and lease aforesaid, hereupon went on the 1st day of April 1858 at said County of Cook entered into and upon all and singular the said demised premises with the appurtenances and became and was possessed thereof for the term first aforesaid, and then and there did continue to hold use and occupy the said premises from thence hitherto to wit, from the 1st of April 1858 to the time of instituting this suit, and did at the expiration of the said term first mentioned the said Edward Zitschke and Frederick Rott and their assigns, and those holding under, through, and by them, by virtue of said indenture, did take an extension of said first mentioned term as provided for in said indenture for the term of one year, after the expiration of said first mentioned term, and the said Plaintiff did at the expiration of the said first term obtain from the owner of said property and premises an additional lease for one year, and the said Edward Zitschke and Frederick Rott did give thirty days notice of their wishing to take such extension

to the said Plaintiff, and ^{have} continued to hold and occupy, use, and enjoy, the said premises and appurtenances, by virtue of said extension of said demise and term from thence hitherto, and saith that he did at the expiration of said first mentioned term obtain from the owner of said demised premises an additional lease thereof for one year. And the Plaintiff avers that although he hath in all things hitherto faithfully, well and truly performed kept and fulfilled, all things in said indenture contained, on his part to be fulfilled kept and performed according to the true intent and meaning of said indenture made at the County of Cook aforesaid, —

And the Plaintiff further avers that the said Edward Zitschke and Frederick Roth have not, nor hath either of them, or their assigns or those holding under them, yielded up the said demised premises to the said Plaintiff at the expiration of the term first mentioned, or at any time since, but have, and each of them hath wholly failed and refused, although often requested so to do. Nor have the said Edward Zitschke and Frederick Roth or their assigns or those holding under them, paid to the said Plaintiff One hundred Dollars per month per rent for said premises during said

§ term or since, nor have they paid any rent or any sum of money to the Plaintiffs whatever, but on the contrary have wholly refused to do so, and the said rent aforesaid, and every part thereof, from the first day of April 1838 to the institution of this suit, remains and is wholly unpaid. —

And the Plaintiffs avers that the said Defendants have and each of them hath wholly failed and refused, and still doth fail and refuse to yield up, or cause to be yielded up to the Plaintiffs the said demised premises at the end of the term first mentioned, or at any time since, although requested so to do, and have heretofore and do still fail and refuse to pay to the Plaintiffs any portion or part or all of the rent accruing or which accrued during the term first aforesaid, or since the said expiration of said term as aforesaid on and by virtue of said demise, and indenture aforesaid, nor have they (or either of them) ever kept or performed, or caused to be kept or performed, any or all of the covenants in said indenture on the part of the said Edward Zitzelike and Frederick Roth to be kept and performed, —

2nd And for that whereas also heretofore to wit on the first day of April 1838 at the said County of Cook by a certain other indenture

9

and lease made between the said Plaintiff and Edward Zitschke and Frederick Roth sealed with their seals, and to the Court now there shown, the date whereof is the day and year last aforesaid, the said Plaintiff did demise and lease to the said Edward Zitschke and Frederick Roth a certain other two story house known as, and called No 162 Randolph Street situate lying and being in the City of Chicago County of Cook and State of Illinois together with the use of the yard, and all the appurtenances thereto belonging, To have and to hold unto the said Edward Zitschke and Frederick Roth their Executors administrators and assigns from the first day of April 1858 for and during and until the 1st day of April 1859, and the said term last aforesaid, was to be extended one year longer at the same rent and stipulations, as was in the said last mentioned indenture provided for on the last mentioned term, The said last mentioned extension however was to take effect only on the event that the said Plaintiff should at the expiration of the last mentioned term obtain from the owner of the last mentioned premises, an additional lease for one year, and then in such case the said Edward Zitschke and Frederick Roth should and bound themselves

to give thirty days notice of wishing such extension to the said Plaintiffs.

And the said Edward Zetzsche and Frederick Roth by the said last mentioned indenture covenanted to and with the said Plaintiffs to pay as rent for the said last mentioned premises, for and during the term last aforesaid the sum of Twelve hundred Dollars \$1200. per annum payable monthly in advance, that is to say \$100 on the first day of April 1858 and \$100 on the first day of each succeeding month thereafter for and during the term of said last mentioned lease and that at the expiration of the said last mentioned lease, they would yield up and deliver possession to the Plaintiffs of the said last mentioned premises. And the Plaintiffs saith that the said Edward Zetzsche and Frederick Roth by virtue of the lease last aforesaid, took possession of the said premises on the said first day of April 1858 and by themselves their assigns, and those holding under them by virtue of the lease and indenture last aforesaid, have held used and occupied the same from thence until the institution of this suit.

And the Plaintiffs saith that he did on the expiration of the term last aforesaid obtain from the owner of the last mentioned

11 premises, an additional lease therefor for one year, —

And the said Edward Zitschke and Frederick Poth did then and there give thirty days notice of their wishing to take an extension of said lease for the term of one year to the said Plaintiff, and did take such ^{extension} for the term of one year after the expiration of the term last aforesaid, —

And the Plaintiff further saith that the said Edward Zitschke and Frederick Poth ~~have~~ ^{have} not nor hath either of them, or any other person or persons paid the Plaintiff, one hundred Dollars per month the rent on said premises last mentioned in and since the first day of April 1858: or any sum of money whatever as rent for the same at any time. But that the said rent remains and is wholly unpaid and every part thereof, accruing by and in virtue of the said last mentioned demise and indenture from the 1st day of April 1858: up to the institution of this suit, although same has been often demanded,

And the Plaintiff avers that after the making of the Indenture last aforesaid at and in the 13th day of April 1858: at said County of Cook, the said Defendants made executed and delivered with and to the said

12 Plaintiffs, their certain Covenant sealed with
their seals, and now here to the Court shown
the date whereof is the day and year last
mentioned, by which last mentioned Covenant
the said Defendants covenanted and agreed
to and with the said Plaintiffs, that for and
in consideration of the sum of One Hundred
Dollars to them then and there paid, that they
would, and then and there did guarantee
the punctual performance of all the Covenants
in every particular on the part of the said
Edward Zitschke and Frederick Roth to be
kept and performed in and by virtue of the
indenture last aforesaid, —

And the Plaintiff saith that notwithstanding
ing he has faithfully kept and performed
all the Covenants upon his part to be kept
and performed, in the said last mentioned
indenture, and notwithstanding that the
said Edward Zitschke and Frederick R
Roth have as herein before stated wholly
failed to pay the rent herein before in this
Count mentioned or any part thereof, and ^{that}
the whole and every part of said rent from
the first of April 1858 to the date of
instituting this suit on said premises at
the rate of \$100 per month, remains and
is wholly unpaid, yet that the said

Defendants have and each of them, have wholly failed to pay or cause to be paid all or any part of said rent in that count mentioned, and have and do wholly paid & refuse to keep and perform their said covenant and guaranteed last aforesaid to pay the same, although often requested so to do.

3^d Count

And for that whereas also heretofore to wit on the 1st day of April 1858. at the said County of Cook by a certain other indenture then and there made between the said Plaintiffs and Edward Zitschke and Frederick Roth, sealed with their seals which the said Plaintiffs now here brings into Court, the date whereof is the day and year last aforesaid, the said Plaintiffs did demise and lease unto the said Edward Zitschke and Frederick Roth certain other the following described property to wit, two story frame house known as and called No. 162 Randolph Street situate lying and being in the City of Chicago, County of Cook and State of Illinois together with all the appurtenances therunto belonging, and the use of the yard belonging, to have and to hold the said premises unto them their Executors

14 administrators and assigns from the first day of April 1858 for and during and until the first day of April 1859 for a certain rent in said last mentioned indenture reserved, and the said Edward Zitschke and Frederick Roth in and by said last mentioned indenture covenanted to and with the said Plaintiffs that at the expiration of the last mentioned lease and term they would yield up the said premises to the said Plaintiffs, -

And for that whereas afterwards to-wit on the 13th day of April A D 1858 at the said County of Cook the said Defendants made and delivered to the said Plaintiffs for the consideration of one Dollar to them by the said Plaintiffs then paid, their certain other Covenants sealed with their seals and now here by the said Plaintiffs bro't into Court, by which last mentioned covenant the said Defendants covenanted to and with the said Plaintiffs that they would, and then and there did, guarantee the punctual performance of all the Covenants in every particular, which the said Edward Zitschke and Frederick Roth had made to and were bound to fulfill, keep and perform by virtue of the indenture in this Court first

mentioned. And the said Plaintiff
15 saith, that the said Edward Zitschke and
Frederick Roth did herebefore towit on the
said first day of April 1858. at the said
County of Cook, take possession of the said
premises last mentioned, and became and
was possessed of the same for and during
the term last aforesaid, —

And the Plaintiff saith that although
he has fully kept and performed all the
covenants upon his part to be kept and
performed, in and by virtue of the indenture
last mentioned, — Yet the said Edward
Zitschke and Frederick Roth, have and
each of them, hath wholly failed & refused
to yield up or deliver the said last mention-
ed premises to the said Plaintiff, at the expi-
ration of term and lease last aforesaid, or
at any time since, but have wholly refused
so to do, although often requested so to do,
and the Plaintiff further saith, that the
said Defendants have and each of them
hath wholly failed to yield up or deliver
the said premises last mentioned to the
said Plaintiff, at the expiration of the said
last mentioned term or lease or at any
time since, or cause the same to be done,
But on the contrary have wholly refused

so to do, and still do so refuse, although
 often requested so to do. By reason
 whereof, the Plaintiff saith that he has been
 wholly deprived of the use of said premises
 last mentioned, from thence hitherto, and
 hath lost certain large sums of money
 which he would have otherwise received for
 the rent of said premises to wit the sum
 of \$1200. - and so the said Plaintiff saith
 the said Defendants have wholly failed and
 refused to keep and perform any or all of
 their covenants by them made as herein before
 mentioned, but have broken the same, to the
 damage of the Plaintiff \$2000. and therefore
 he brings this suit, -

McComas Clements
 P. P.

17

And afterwards Nowit on the 9th day of January
in the year of our Lord One Thousand Eight Hun-
dred and Sixty two, said day being one of the days
of the January term of the Superior Court of
Chicago,

"James Jackson

vs

Covenant

Augustus F Otto, and
Herman Baer

This day again comes the parties to this cause
by their respective attorneys as aforesaid, and on
motion Seales, McAlister, & Jewett. Defendants attorneys,
It is ordered that the said Plaintiffs file copy of
instrument sued upon by first day of the next term
of this Court, —

And afterwards Nowit on the Third day of ^{February} ~~March~~
~~now~~ in the year of our Lord One Thousand Eight
Hundred and Sixty two, said day being one of the
days of the February term of said Court, in the
year aforesaid,

James Jackson

vs

Covenant

Augustus F Otto and
Herman Baer

This day again comes the parties to this

cause by their respective attorneys as aforesaid, and on motion Solicitors McMillister & Jewett Defendants attorneys, It is ordered that rule to plead herein be, and is hereby extended, ten days from this date.

And afterwards now on the 12th day of February in the year aforesaid, the Defendant Augustus J Otto by Thomas Shirley his attorney filed in the Clerk's Office of said Court, his Demurer, which is in the following words and figures to wit.

State of Illinois	Of the February term of the
Cook County. ss	Superior Court of Chicago
	A D 1862.

James Jackson

vs

Augustus J Otto &
Herman Baer

And the said Augustus J Otto impleaded as aforesaid by Thomas Shirley his attorney comes & defends the wrong and injury where to, and says that said Declaration, and each separate count thereof, and the matters therein contained in manner aforesaid as the same are above stated and set forth ^{are} ~~are~~ not sufficient in law for said Plaintiff, to have or maintain his aforesaid action, thereof against the said Defendants, and that he is not bound by law to answer the same, and this he is ready to

19 verify. Wherefore by reason of the insufficiency of
said Declaration, and each separate Count thereof, in
this behalf, the the said Defendant prays Judgment
and that the said Plaintiff may be barred from
having and maintaining his aforesaid action thereof
against him &c

Thomas Shirley
Attorney for Otto.

And afterwards to wit on the Thirteenth day of
February in the year of our Lord One thousand
Eight hundred and sixty two, the Defendant Her-
man Baer by Seals, McAllister, & Jewett his
attorneys filed in the Clerk's Office of the Superior
Court of Chicago his several pleas, which are
in the following words and figures to wit,

Superior Court of Chicago
 Herman Baer impleaded
 with Augustus P. Otto
 ads
 James Jackson

And the said Defendant Herman Baer impleaded as aforesaid by Seales, McAllister & Jewett his attorneys comes and Defends the wrong and injury when se and say that the said Edward Zitschke and Frederick Rott did not covenant or agree with the said Plaintiffs in manner and form as the said Plaintiffs hath above in his said Declaration alledged and of this the said Defendant impleaded as aforesaid, puts himself upon the Country to

And for a further plea in this behalf the said Defendant impleaded as aforesaid says actio non because he says, that the said supposed Indenture in the said Declaration mentioned is not the Deed of the said Zitschke & Rott and of this the said Defendant puts himself upon the Country to, —

And for a further plea in this behalf the said Defendant impleaded as aforesaid, says actio non because he says, that the said supposed agreement of guarantee in the said Declaration mentioned in manner and form se is not his Deed, and of this the said Defendant

impleaded as aforesaid, puts himself upon the country to

And for a further plea in this behalf the said Defendant impleaded as aforesaid says *actio non* because he says that the said Zitschke and Roth did pay to the said Plaintiff the said sum of Twelve Hundred Dollars in the said indenture mentioned, and of this the said Defendant impleaded as aforesaid, puts himself upon the country to

And for a further plea in this behalf the said Defendant impleaded as aforesaid, says *actio non* because he says that the said Zitschke and Roth did not fail or refuse to yield up the possession of the said premises in the said Declaration mentioned, and of this the said Defendant impleaded as aforesaid puts himself upon the country to

And the said Defendant impleaded as aforesaid for a further plea in this behalf, as to the said breach firstly and thirdly in the first Count of Plaintiff Declaration assigned, and to the third Count of said Declaration, says *actio non* because he says, that the said Zitschke and Roth did hold over and continued in the possession of the said ~~of the~~ demised premises, in said several breaches mentioned, by the leave and license of the said Plaintiff, to whom the said

22 Zitschke and Roth for that purpose first given and granted writ in the first day of March A D 1839. writ at said County, and this the said Defendant is ready to verify, wherefore he prays Judgement of said Plaintiffs, ought to have or maintain his aforesaid action thereof against him &c.

And the said Defendant impleaded &c for a further plea in this behalf says actio non because he says that the said Plaintiffs did not obtain any lease from the owner of the said demised premises in manner and form as in said Declaration alledged, and of this the said Defendant impleaded as aforesaid puts himself upon the Country &c

And for a further plea in this behalf, the said Defendant impleaded &c says actio non because he says, that said Zitschke and Roth did not give any such thirty days notice in manner and form as in Declaration alledged, and of this the said Defendant puts himself upon the Country &c

And for a further plea in this behalf, the said said Defendant impleaded as aforesaid, says actio non because he says that said Zitschke & Roth did pay the said Plaintiffs all and singular the rents in the said indenture mentioned, and yield and surrender up to Plaintiffs the possession of said demised premises, according to the form and effect of the said indenture, and of the

28 said Covenants of the said Zetzsche & Roth by
them in that behalf made as aforesaid Court
at the County aforesaid, and of this the said
Defendant puts himself upon the County to

Seals, McAllister & Jewett

Attys for Baer

And afterwards Court on the 17th day of March
in the year aforesaid, said day being one of
the days of the March Term of said Court, the
following amongst other proceedings was had Entered of Record Court
James Jackson

vs

Covenants

Augustus F. Otto and
Ferdinand Baer

And now at this day again comes the parties
to this cause by their attorneys, and on motion it
is ordered that Defendants have leave to withdraw
Remuner for said Defendant Augustus F. Otto
with leave to file pleas instantly, —

And afterwards Court on the day and year
last aforesaid, the Defendant Augustus F. Otto
by Thomas Shirley his attorney filed in the
Clerks Office of the Court aforesaid, his thirteen
several pleas, which are in the following words
and figures Court, —

24

Superior Court of Chicago

Augustus F Otto impleaded

with Herman Baer

Nov 1862

ad

Garnet Jackson

And the said Augustus F Otto impleaded as aforesaid by Thomas Shirley his attorney comes and defends the wrong and injury where to and says that the said supposed indenture in the said Declaration mentioned is not the deed of the said Zitschke and Roth. And of this he puts himself upon the Country to

Thomas Shirley p.d.

And for a further plea in this behalf the said Defendant says actio non because he says, that the said supposed Agreement of guarantee in the said Declaration mentioned is not his deed, and of this he puts himself upon the Country to

Thomas Shirley p.d.

And for a further plea in this behalf the said Defendant says actio non because he says, that the said Edward Zitschke and Frederick Roth did not covenant or agree with the said Plaintiff in manner and form as he hath above in his said Declaration alleged, and of this he puts himself upon the Country to

Thomas Shirley p.d.

And for a further plea in this behalf the said

28- Defendant says actio non because he says that
he did not covenant and agreed to and with
the said Plaintiff, in manner, and form as
he hath above in his said Declaration alledged,
and of this he puts himself upon the country to
Thomas Shirley p.d

And for a further plea in this behalf, the said
Defendant says actio non because he says, that
the said Zitschke and Roth have not broken the
said covenants in the said Declaration mentioned, or
any or either of them in manner and form as the
Plaintiff hath above thereof in his Declaration
alledged, and of this he puts himself upon the country to

Thomas Shirley p.d

And for a further plea in this behalf, the said
Defendant says actio non because he says, that always
after the sealing and making of the said supposed
Indenture to the day of the commencement of
this action, the said Zitschke & Roth have fulfilled,
performed, and kept all and singular the covenants
payments and agreements on their part, to be fulfilled
performed and kept, according to the form and effect
of said supposed Indenture, and of this the said
Defendant puts himself upon the country to

Thomas Shirley p.d

And for a further plea in this behalf, the said Defend-
ant says actio non because he says, that the said
Zitschke and Roth before the commencement of

this suit to wit on

paid and satisfied to the said Plaintiff the said sum of Twelve Hundred Dollars in the said Indenture mentioned, and of this the said Defendant puts himself upon the Country &c

Thomas Shirley p d

And for a further plea in this behalf, the said Defendant says actio non because he says, that before the commencement of this suit, to wit

the said sum of Twelve Hundred Dollars in the said Indenture mentioned was paid and satisfied to the said Plaintiff, and of this the said Defendant puts himself upon the Country &c

Thomas Shirley p d

And for a further plea in this behalf, the said Defendant says actio non because he says, that as to the breach of covenant aforesaid above supposed to be made in this writ, that the said Zitschke & Roth did fail and refuse to yield up the possession of the premises in Declaration mentioned at the determination of said term, the said Zitschke & Roth did not fail or refuse to yield up the possession of the said premises in the said Declaration mentioned, and of this he puts himself upon the Country &c

Thomas Shirley p d

27 And for a further plea in this behalf the said Defendant says actio non because he says, that the said Plaintiff, did not obtain any lease from the owner of the said demised premises, in manner and form as in the said Declaration alledged and set forth, and of this he puts himself upon the Country to

Thomas Shirley p.d.

And for a further plea in this behalf, the said Defendant says actio non because he says that said Zitschke and Rott did not give any such thirty days notice in manner and form as in the said Declaration alledged, and of this he puts himself upon the Country to

Thomas Shirley p.d.

And for a further plea in this behalf the said Defendant says actio non because he says, that before the Commencement of this suit to wit the said Zitschke & Rott did pay unto the said Plaintiff all and singular the rents in the said indenture mentioned, and did yield and surrender up to the said Plaintiff the possession of the said demised premises according to the form and effect of the said Indenture, and of the said covenants of the said Zitschke & Rott by them in that behalf made as aforesaid to wit at the County of Cook

aforsaid, and of this the said Defendant putt
himself upon the Country to.

28

Thomas Shirley p d
And for a further plea in this behalf, as to
the said breach firstly and thirdly in the first
Count of the Plaintiffs Declaration assigned, and
to the third Count of said Declaration, the said
Defendant says actio non because he says, that
the said Zischke & Roth did hold over and continue
in ^{the} possession of the said demised premises
in said several breaches mentioned by the leave
and license ~~of the said Plaintiffs to them~~ ^{of the said Plaintiffs to them} the said Zischke & Roth
for that purpose first given and granted nowit on
the first day of March A D 1859. Nowit at the
County aforsaid, and this the said Defendant
is ready to verify. Whereof he prays Judge-
ment if the said Plaintiffs ought to have
or maintain his aforsaid action thereof
against him &c.

Thomas Shirley p d

29 And afterwards nowit on the 22nd day of May in
^{the year} 1851, aforesaid the Plaintiff James Jackson by
Ira W. Buell his attorney filed in this cause his
Replikations, which are in the following words
and figures nowit.

Superior Court of Chicago
 James Jackson

vs

Herman Baer and
 Augustus F. Otto

May Term All 1862

And the said Plaintiffs, as to the plea of the said Herman Baer by him firstly, secondly, thirdly, fourthly, fifthly, seventhly, eighthly and ninthly above pleaded, and whereof he hath put himself upon the country, doth the like.

Alfred W. Buell

Plaintiffs atty

And the said Plaintiffs, as to the said plea of Defendant Herman Baer by him sixthly above pleaded, saith that the said Plaintiffs by reason of anything by the said Defendant Baer in that plea alleged ought not to be barred from having and maintaining his aforesaid action thereof against the said Defendant, because he says that the said Zitschke & Roth did not hold over or continue in possession of the said demise premises as aforesaid, by the leave or license of the said Plaintiffs to them the said Zitschke and Roth first given and granted, and that the said Plaintiffs prays may be enquired of

by the Country to

Geo W Buell

Plaintiffs atty

Dependant Bar doth the like

Seals M^d & Jewett

10pts attys. -

Superior Court of Chicago
James Jackson

31

vs

May Term A D 1862

Herman Baer and
Augustus F Otto

Memorandum

And the said Plaintiffs as to the plea of
the said Defendant Augustus F Otto by him
firstly, secondly, thirdly, fourthly, fifthly, sixth-
ly, seventhly, eighthly, ninthly, tenthly, eleventh-
ly above pleaded, and whereof he hath put himself
upon the Country doth the like.

Gra & Buel Plaintiffs

Thomas Shirley

attly

And the said Plaintiffs as to the said plea of
the said Defendant Augustus F Otto by him
twelfthly above pleaded, saith that the said
Plaintiffs by reason of anything by the said
Defendant Otto in that plea alleged, ought
not to be ~~barred~~ ^{barred} from having and maintaining
his aforesaid action thereof against the
said Defendant, because he says that the said
Zetschke and Roth did not hold over or continue
in possession of the said demised premises
as aforesaid, by the leave or license of the
said Plaintiffs to them the said Zetschke &
Roth for that purpose first given and
granted, and that the said Plaintiffs

32 prays may be engrued of by the Country
to

Or W Buell

Pliffs attys

And the said Defendant Otto impleaded
to doth the like.

Shirley p d

And afterwards nowit on the Eightth day off
January in the year of our Lord One thousand
Eight hundred and sixty three, said day being one
of the days of the January term of said Superior
Court of Chicago, the following among other pro-
ceedings were had and entered of Record nowit
James Jackson

vs

Covenant

Augustus F Otto and
Herman Baer

This cause being this day called for trial
comes said Plaintiff by Buell & Meyer his
attorneys, and said Defendant Augustus F Otto
by Thomas Shirley his attorney, and said Defendant
Herman Baer by W R McAllister his attorney
also comes, and issues being joined herein, It is
ordered that a Jury come, whereupon comes the Jury
of good and lawful men nowit John Lessender,
Henry Walth, John Sticks, Henry Mills, Joel
Wood, & Marvinilled, Charles Bergh, Benjamin

33 Hall, David Miller, J. G. Carr, A Southward,
J R Stotbrook, who being duly elected tried and
sworn to try the issue joined herein as aforesaid,
after being hearing evidence, arguments of counsel
and instructions of the Court, retire to consider of
their verdict, and the hour of adjournment having
arrived, it is ordered upon agreement of the
parties that when the Jury shall have agreed
upon a verdict they shall reduce the same
to writing, sign and seal the same, and afterwards
separate, and meet the Court tomorrow morning,

And afterwards nowit on the 9th day of January
in the year last aforesaid, said day being one of
the days of the January term of said Court
the following among other proceedings were had and
entered of record to wit:
James Jackson

vs
Covenant
Augustus F Otto and
Herman Baer

And now again comes the parties to this
cause by their attorneys respectively as aforesaid
and the Jury empaneled herein on yesterday
for the trial of said cause, also come and submit
their verdict, and say, that the Jury find issues
for said Plaintiff, and assess his damages herein
against said Defendants to the sum of Five

34 hundred Dollars.— And thereupon said
Defendants submit their motion herein for
a new trial in said cause, and also their motion
in arrest of Judgment on said verdict of
the Jury as aforesaid.—

And afterwards to-wit on the 10th day of January
in the year aforesaid the Defendant Herman &
Baer by W. H. McAllister his attorney filed in
this cause his motion for a new trial, which is
in the following words and figures to-wit.—

Superior Court of Chicago
James Jackson

vs

Herman & Baer (unpleaded &c)

And the said Defendant comes and moves
the Court to set aside the verdict, and for a
new trial on the following grounds.—

1st The Court gave improper instructions on
behalf of Plaintiff

2nd The Court refused proper instructions on
the part of Defendants, and improperly mod-
ified instructions.—

3rd The Court established and adopted an
improper rule of Damages.—

4th The verdict is against the law, and

The evidence, -

W H McAlister
of Counsel for Deft

And on the same day & year last aforesaid
The Defendant Augustus F Otto by Thomas
Shirley his attorney filed in this cause his
reasons for a new trial, which are in the
following words and figures to-wit, -

State of Illinois
Cook County &

In the Superior Court of
Chicago
January Term A.D. 1863

James Jackson

vs

Augustus F Otto and
Herman Baer

And Comes the said Augustus F Otto
impleaded with the said Herman Baer by
Thomas Shirley his attorney, and moved the
Hon Court for a new trial in said cause
based upon the following reasons, that is to
say, That the verdict is contrary to law
That it is contrary to evidence, -
That the Court erred in giving each and
every of the Plaintiffs instructions, -
That the Court erred in refusing certain
instructions offered by the Defendants, -
That the Court erred in modifying or

3^d

altering the instruction given on behalf
of the Defendants.

That the Court erred in its instructions
on behalf of the Plaintiffs respecting the
measure of Damages.

That the Court erred in giving its inde-
pendent instructions to the Jury on behalf
of the Plaintiffs.

New and important evidence discovered
since the trial.

Thomas Shirley & Co

And afterwards tried on the 24th day of October
in the year last aforesaid, said day being one
of the days of the October term of the Superior
Court of Chicago, the following among other pro-
ceedings were had and entered of record to-wit

"James Jackson

vs
Mo for new trial in Covenant
Augustus F Otto and
Herman Baer

And now again comes the said parties to this
cause by their attorneys respectively as aforesaid,
and this cause coming on now to be heard, upon
the motion of said Defendants heretofore submitted
herein, on the ninth day of January tried at the
January term of this Court A D 1863 for a new
trial in said cause, as well in arrest of Judgment

37

and Counsel being heard on said motion for a new trial, and the Court being fully advised in the premises, It is considered by the Court that said motion for a new trial be and is hereby overruled, and that a new trial be refused to said Defendants in said cause, and the Court in like manner overrules the motion in arrest of Judgement, to which ruling of the Court, said Defendant Herman Baer then and there excepted, and thereupon enters his exceptions.

Wherefore said Plaintiff ought to have Judgement entered against said Defendants for his damages upon the verdict of the Jury rendered herein at said January term of this Court as aforesaid.

Therefore it is considered that said Plaintiff do have and recover of and from said Defendants his Damages of Five hundred Dollars in form aforesaid by the Jury at said January term of this Court here aforesaid assessed, together with his costs and charges in this behalf expended, and have execution therefor.

And thereupon said Defendant Herman Baer having entered his exceptions herein, prays an Appeal hereof to the Supreme Court of the State, from the Judgement of this Court, which is allowed to him upon filing his Appeal Bond in the penalty of Twelve hundred Dollars, with security to be approved by one of the Judges

of this Court, and to be filed with his Bill of exceptions within thirty days from this date.

And thereupon also comes said Defendant Augustus T. Oth, and prays an Appeal herein to the Supreme Court of this State from the Judgment of this Court, which is allowed to him, on filing bond in the penalty of Five Hundred Dollars with security to be approved by one of the Judges of this Court, and to be filed with his Bill of Exceptions, within thirty days from this date.

And afterwards to wit on the Twenty third day of November in the year of our Lord One thousand Eight hundred and sixty three, the said Defendants by McAllister, Jewett, & Jackson, their Attorneys filed in this cause their Bill of Exceptions, which is in the following words and figures to wit

Superior Court of Chicago
James Jackson

39

vs

Verdict

Bill of Exceptions.

Augustus P Otto
and Herman Baer

Be it remembered that at the January term A D 1863 this cause came on to be tried, before the Hon Wm M Higgins one of the Judges of said Court and a Jury, that the Plaintiff, to sustain the issues on his part, called as a witness on his behalf Charles Sunnicliff, who being sworn testified as follows. Witness was shown a Power of attorney.

Know all men by these presents that I James Jackson of the City of Buffalo in the State of New York, have, and by these do make, constitute, and appoint Charles Sunnicliff of the City of Chicago in the State of Illinois my true and lawful attorney for me and in my name to lease the Lot and the building known as number One hundred and sixty two in Randolph Street in said City of Chicago, with the appurtenances now occupied by Miller & Grapp, and also, all and singular such other lots, buildings, and tenements with the appurtenances situated in the said City of Chicago belonging to me or of which I am possessed in said City of Chicago, to such person

or persons, and for such term or terms of years or
 for one year or less, and at and for such yearly or
 other rents as he shall think fit, and said lot or lots
 building or buildings and tenements with the appurte-
 nances, may be so leased by him severally or collectively
 and upon any conditions which he my said
 attorney shall or may think fit, and proper, and
 also for me and in my name, and as my act and
 deed to sign, seal execute and deliver such Leases
 Deeds and Conveyances for the leasing thereof or
 any part thereof, with such clauses, covenants and
 agreements to be therein contained as my said attorney
 shall think fit and expedient, hereby ratifying and
 confirming all such leases, which shall at any
 time hereafter be made by my said attorney touching
 or concerning the premises. — Witness my hand
 and seal at the City of Buffalo, this 12th day of January
 1857.

The word "fit" interlined before James Jackson Seal
 Execution.

Signed Sealed & delivered in presence of

Wiram Dunton

W W Trobridge

This Power of Attorney was executed by the Plain-
 tiff, Jackson to wit, James Jackson's hand writing,
 and the hand writing of Dunton one of the attesting
 witnesses, says that Dunton lives in Buffalo New York

where the power of attorney was executed, and witness thought Trevelbridge, the other attesting witness also resided there, that he does know him, but that Bartons signature to the power of attorney is genuine, - Thereupon the said Power of attorney was read in evidence by the Plaintiffs counsel, A paper purporting to be a lease from the Plaintiff, by Junnieliff, his agent to Edward Zitschke and Frederick Roth dated April 1st 1858 for one year from date, - of premises described therein, was then shown to witness, who stated that he executed the lease as agent for Jackson and that Mr Zitschke handed it to him signed by himself, and acknowledged his hand writing, - Zitschke said Roth was his partner and lived in Wisconsin, witness stated that he refused to accept the lease until this guarantee was executed by the Defendants, witness further said that he had the charge of collecting rents under said lease, the rent was paid up to April 1859. Mr Otto paid him one months rent under the lease during the year 1858, The lessees did not yield possession of the premises April 1st 1859, witness went to the premises on that day and demanded possession of the premises, I found Mr Myer in possession of the house, and went to Mr Otto and Mr Baer on same day and demanded the possession of the premises from them, Mr Otto ordered him witness out

of the Store, when witness made the demand on him, Vm Baer said he was very deaf, and could not hear, Witness did not obtain possession of the premises, witness did not see either of the lessees Zilschke and Roth, It was between five and six months after the first of April 1859 before witness got possession of the premises, - Witness sued Otto and Baer before a Justice of the Peace, and got Judgement, but an Appeal was taken, and the suits dismissed for want of jurisdiction, - Witness further said that neither of the lessees gave him any notice that they desired an extension of the term in the lease, but on the contrary Zilschke told witness, that the witness should have the possession of the premises, - Witness collected no rent accruing after the first of April 1859.

The Plaintiffs Counsel offered in evidence the said lease from Plaintiffs to Zilschke and Roth, and the guaranty on the back thereof, to which the Counsel for the Defendants objected on the ground that there was no proof of Roth's signature to the same, the Court overruled the objection, and said lease and guaranty were read in evidence.

113 This Indenture made this first day of April in the year of our Lord One Thousand Eight Hundred

4) 3

and fifty eight between James Jackson of the City of Buffalo and State of New York of the first part and Frederick Roth of Washington County and State of Wisconsin, and Edward Zitschke of the City of Chicago State of Illinois of the second part Witnesseth, that the said party of the first part for and in consideration of the covenants and agreements hereinafter named 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 the City of Chicago in the County of Cook, and in the State of Illinois known and described as follows to wit: The two story frame house known as and called No 162 Randolph street, situate lying and being in the City of Chicago and State of Illinois together with use of yard belonging, and all the appurtenances thereto belonging. 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 April in the year of our Lord One thousand Eight hundred and fifty eight, for and during, and until the first day of April - 10 1859 the term however to be extended one year longer at the ^{second} Went and Stipulations that is of the said party of the first shall at that time

them from the corner of the land an additional lease
 per one year, but in such case the party of the
 second part shall give thirty days notice of
 wishing such extension to the party of the first part,
 and 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
 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 demised premises the sum of Twelve hundred
 Dollars per Annum payable monthly in advance
 that is, One hundred Dollars on the first day of
 April A D 1858, and One hundred Dollars upon
 the first day of each succeeding month, for and
 during the term of this lease, - 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 demised premises in good order
 and condition, and that at the expiration of the
 time of this lease mentioned, they will yield up the
 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 also will keep said
 premises in good repair during this lease at his
 own expense, -

It is further agreed by the said party of the

45. second part, that neither they, nor their legal
representatives will
underlet said premises or any part thereof, or assign the
lease, without the written assent of the said party
of the first part first had and obtained thereto,
And the said Frederick Roth and Edward
Zilschke party aforesaid part and their 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 they will keep said premises in a
clean and healthy condition, in accordance
with the ordinances of the City, and directions
of the sewerage Commissioner, —

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 afore-
said, or if default shall be made in any of
the covenants herein contained, to be kept by
the said party of the second part, their execu-
tors Administrators and assigns, it shall and
may be lawful for the said party of the first
part his heirs, ~~executors~~ administrators, agent
attorney or assigns as his election to declare

said term ended, and into the said premises, or any part thereof, either with or without process of law to re-enter, 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 whether the same be exempted from execution and distress by law or not, and the said party of the second part, in that case, hereby agree to waive all legal rights which they 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 or other property belonging to the said party of the second part as security for the payment of said rent in manner aforesaid any thing 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 or assigns as aforesaid, or in any other way, the said party of the second part

It being hereby further agreed by and between the parties aforesaid that in case the house aforesaid
be consumed by fire or be so impaired thereby that the said house can not be repaired agreeably to the City
ordinances in relation thereto, the said lease is hereby terminated,

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their Executors, administrators and assigns do hereby
covenant and agree to surrender and deliver up said
above described premises, and property peacefully to
the 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, ten 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.

James Jackson
By W. Summichiff Seal
Edward Zilschke Seal
Frederick Roth
by Edward Zilschke

For and in consideration of the Sum of One dollar
to us in hand paid, the receipt of which is hereby ac-
knowledge, we do hereby guaranteed the punctual
performance of all the within Covenants in every
particular on the part of the lessees,-

Witness our hands and seals at Chicago this 15th
day of April A.D. 1858.

Augustus S. Otto Esq
Herman Paer Esq

To which, ^{said} ruling of the Court the said Defendants by
their Counsel then and there excepted,-

The said witness Tunnickliff there was shown a lease
from H. H. Magee to the Plaintiffs of the ground in
question dated April 1st 1859. to April 1st 1860. and
witness said he knew this lease was executed, he received
it from Magee on the 1st April 1859. and sent it
to Buffalo to get Jacksons Signature, Jackson
sent it back in a few days signed by him, which
said lease was read in evidence without objection,-

On Cross examination of said witness Tunnickliff, he
said that he knew Zetschke who was in possession of the
premises in question, part of the term in his lease, witness
never knew Roth, Zetschke left possession of these
premises in the fall of 1858, witness don't know
that he was in possession after that time, and
witness heard that he left the City, Gustavus
R Meyer was in the occupation of the premises

when witness demanded them, the saloon was occupied by him for four or five months by Meyer and his family. When witness got possession he agreed with Meyer not to ask any rent of him afterwards, and he Meyer went with witness to see Otto, and Otto agreed to it. Witness thought Meyer went out in October or November 1859. Witness thought Meyer lived up stairs but did not occupy it as a saloon all this time, witness don't know that any body objected to his taking possession, witness knows that on the 1st day of April 1859. Meyer was occupying the premises on the first story as a saloon, there were four or five rooms up stairs, knew that Meyer occupied the rooms up stairs, but did not go into every room, but knew he and his family were there on the 1st of April 1859. Witness was there as much as twenty five times afterwards but don't recollect that he demanded possession after the first of April, but did ask him several times to move out. When witness went there and demanded the possession on the 1st of April 1859. there were several persons present, that he did not recognize any of them as tenants, Meyer carried on a saloon there some time after the 1st of April 1859. there was a show of business, there was stuff in the bar, tables there and persons sitting around there. Witness

was pretty certain that Meyer carried on business there two or three months after the 1st of April 1859, but thinks he did not use the lower room the last part of the time he was in possession, Otto and some one else had a mortgage on the Saloon fixtures which was foreclosed, and the property taken. When witness demanded the possession of Otto on the 1st of April 1859, he would not have anything to say to witness, but ordered witness out of his store. Baer said he couldn't hear me, his manner was very insulting, witness knew he was not deaf, Witness brought five suits against Defendants for the rent before Esquire De Wolf, and all the suits were dismissed in this court. Witness instituted this suit by direction of the Plaintiffs, and don't expect to get a cent out of it, and have never been promised anything. Witness was the only agent that the Plaintiffs had, here for these premises. The lease from Plaintiffs to Zitschke and Polth was never assigned by the tenants, or under let, that witness knows of, on his part. Meyer paid part of the rent before the 1st April 1859, but never paid any after.

Witness went to Meyer and proposed to release him for any ~~present~~^{future} rent, if they would give up possession of the premises, he went with witness to Otto, and Otto assented to it, and witness then got the possession, Otto did not

pay a whole months rent, ~~Get the~~^{said} part, and
 (Otho the balance), this was before the 1st April
 1859. The foregoing is all the evidence
 given on the trial of said cause.

Whereupon the Court at the request of the
 Plaintiffs counsel gave the Jury the following
 instructions on behalf of Plaintiff,

1st If the Jury believe from the evidence
 that the Defendants guaranteed the punctual
 performance of all the covenants in every par-
 ticular on the part of the lessees contained in
 the lease in question, and that these covenants
 were violated by the lessees, the Defendants
 are liable to the Plaintiffs in this action for
 all the direct Damages he sustained thereby,
 2^d If the Jury believe from the evidence
 that the Plaintiffs agent went upon the premises
 on the 1st day of April 1859. and demanded
 possession of the parties found there in possession
 and that on the same day possession was also
 demanded by Plaintiffs agent of the said
 Defendants, but that possession was refused
 or not yielded up to the Plaintiffs, that would
 constitute a breach of the covenants contained
 in the lease, and the Defendants would be
 liable in this action for all Damages sustained
 by the Plaintiffs in consequence of such breach.

52 of covenants.

3 The Court instructs the Jury that as a matter of law, whatever the tenants by their covenants in the lease were bound to do their securities in the case of their default were bound to do for them.

4 If the Jury believe from the evidence in this case that the tenants Roth and Zetschke covenanted to yield up the premises in question at the end of their term in as good condition as when they entered upon them—and they failed to keep said covenant, then their securities became liable for all damages which the Plaintiff sustained by reason of such failure.

The amount of rent stipulated in the lease is presumptively the true measure of damages sustained. The same to be computed by reference to the time during which the Plaintiff is shown to have been kept out of possession.

To the giving of which said several instructions by the Court, and each and every thing the said Defendants by their respective Counsel did then and there except.

Whereupon the Counsel for the said Defendants requested the Court to instruct the Jury on behalf of the Defendants as follows

33 The Jury are instructed that if they believe

3-3

from the evidence in this case, that all the rent provided for in and by the lease given in evidence was fully paid for the whole term in said lease, and that before the end of the term in said lease, both of the lessees Roth and Zitschke had quit the possession of said premises, and that no person had been authorized by either of said lessees Roth & Zitschke to occupy the same after they had so quit the possession of the same, then the law is for the Defendants,

The Jury are instructed that although the Jury may believe from the evidence, that Meyer was in the possession of the premises in question with the cognizance and even consent of one of the Defendants Otto, yet if the lessees Roth & Zitschke never authorized Meyer to enter into possession of the same, but Meyer was in the occupation thereof without right and unlawfully, then both Otto & Meyer might be liable in some other action, but such facts will not authorize a recovery by the Plaintiff in this suit.

But the Court refused to give either of said instructions so asked as aforesaid in behalf of the said Defendants, to which refusal the said Defendants by their Counsel, then and there excepted,

And the said Defendants by their Counsel

Then and there further asked the Court to instruct the Jury as follows:-

Although the Jury may believe from the evidence in this cause that one Meyer was in occupation of the premises in question on and after the first day of April. A.D. 1859. yet if the said Meyer was not so occupying under the authority or consent of either Roth or Zitschke, but was a mere Trespasser or interloper, then the law is for the Defendants, -

But the said Court then and there refused to give the said instruction, as asked, and added to the same by writing thereunder these words viz, "This is so if the lessees at the end of their term did surrender or offer to surrender up said premises but they were bound to restore the possession to the Plaintiff at the end of their term or pay the Damages,"

with which addition and amendment as aforesaid, the Court then and there gave the said instruction asked on behalf of the Defendants last above mentioned. To which refusal to give the said instruction as asked, and making the said addition and amendment thereto, and giving the same to the Jury with said addition and

amendment, the said Counsel for the Defendants then and there excepted,~

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The Jury then retired to consider of their verdict, and returning into Court rendered the same, whereby they found the issues for the Plaintiff and assessed his Damages at Five Hundred Dollars,~

Whereupon the said Defendants made a motion for a new trial ^{which} at the October Term 1863 of said Court ~~which~~ was overruled by the Court, and to which ruling and decision overruling said motion, the said Defendants by their Counsel then and there excepted.

And because none of said matters appear in the record so the said Judge on the prayer of said Defendants has to this Bill of Exceptions set his hand and seal this 23rd day of November 1863.~

Van H. Higgins 
Judge

And on the Fourteenth day of November in
the year last aforesaid, the said Defendants filed
in this cause their certain Appeal Bond, which
is in the following words and figures to-wit,

57

Know all men by these presents, that we Augustus F Otto, Hermann F Baer and Frederick Letz of the County of Cook and State of Illinois, are held and firmly bound unto James Jackson also of the same County and State, in the penal sum of Twelve 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 ~~and~~ severally and firmly by these presents. Witness our hands and seals this fifth day of November A D 1863.

The Condition of the above obligation is such that whereas the said James Jackson did on the twenty fourth day of October A D 1863 in the Superior Court of Chicago in and for the County of Cook and State aforesaid and of the October term thereof A D 1863 recover a Judgement against the above bounden Augustus F Otto and Hermann F Baer for the sum of Five hundred Dollars besides costs of suit, from which said Judgement of the said Superior Court of Chicago, the said Augustus F Otto and Hermann F Baer have prayed for and obtained an Appeal to the Supreme Court of said State, Now Therefore

of the said Augustus F Otto and Hermann
 F Baer shall duly prosecute their said
 Appeal with effect and moreover pay
 the amount of the Judgement costs, interest,
 and damages rendered and to be rendered
 against them, in case the said Judgement
 shall be affirmed in said Supreme Court.
 When the above obligation to be void, other-
 wise to remain in full force and virtue
 Taken & entered into Augustus F Otto Seal
 before me at my Office Herman F Baer Seal
 in Chicago this Fred Lutz Seal
 day of November
 A D 1863. —

And on the same day and year last aforesaid
 said day being one of the days of the November Term
 of the Superior Court of Chicago the following among
 other proceedings were had and entered of record to-wit
 James Jackson

vs

Augustus F Otto and
 Herman Baer

This day comes said Defendants and present
 and file their Appeal Bond, on Appeal herein to
 the Supreme Court, which is approved by the Court,
 and ordered to be filed. —

State of Illinois
County of Cook } ss.

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I. Thomas B. Carter, Clerk of the
Superior Court of Chicago, within and for the County
and State of said, do hereby certify that the above
and foregoing is a full, true and complete transcript
of all the pleadings on file in said office, and
of all orders and judgment entered of record
in said Court, together with the Bill of Exceptions
and the Appeal Bond in a certain cause
wherein James Jackson is plaintiff, Augustus
F. Otto and Herman Baer defendants.

In testimony whereof, I hereunto
subscribe my name, and affix the
Seal of said Court, at the City of
Chicago, in said County, this 12th
day of January A.D. 1864
Thos. B. Carter, Clerk



Jackman Co. Collected

1892



Dec. 2.50

Supreme Court - State of Illinois

Third Grand Division

Augustus P Otto &

Herman Baer

Appellants

James Jackson

Appellee

And now come the said Appellants before the Justices of said Court at Ottawa and say that in the record and proceedings aforesaid and in giving the judgment aforesaid there is manifest error in the verdict:

1st The Court erred in admitting the lease ~~as~~ purporting to be executed by Edward Zitschke and Frederick Roth, in evidence, without proof of the execution thereof by Roth.

2nd The Court erred in giving the several instructions asked on behalf of the plaintiff below.

3^d The Court erred in ~~the~~ relation to the measure of damages established in and by the instruction in that behalf given to the jury.

4th The Court erred in refusing instructions asked on behalf of the defendants below and in making ^{giving} the addition appended to the ~~last~~ instruction asked for defendants,

5th There is error in said Record because it appears that the Amended Declaration of the plaintiff and the Declaration in the Cause is Entitled as of the September term AD 1848 and which term is anterior to the time of the alleged breach of Covenant for want yielding up the possession of the premises in question, must have occurred,

6th The Court Erred in overruling the Motion made by appellants for a new trial.

Wherefore for the Errors aforesaid and other Errors appearing in the said Record and proceedings, the said appellants pray that the said judgment may be reversed and they be restored to all things which they have lost by reason of the same.

McAllister Jewett & Jackson

Attys for Appellant.

And The said James Jackson, appellee, now comes and says that there is no error in the said judgment or in the record and proceedings above mentioned, in manner and form as the said appellants have above alleged, Wherefore he

B. T. Clegg

Attys for Appellee

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Supreme Court
Augustus Potter
Herman Baer
vs. app't

James Jackson
Appellee

Record

Filed Apr 20, 1864
L. Seland
Clerk.

State of Illinois }
County of Cook J. S. S.

The People of the State of Illinois,
To the Sheriff of said County - Greeting:

We command you that you summon
Augustus F. Otto & Herman Baer, if they
shall be found in your County, personally to be
and appear before the Superior Court of Chicago
of said County, on the first day of the next Term
thereof, to be holden at the Court House in the
City of Chicago, in said County, on the first Monday
of September next, to answer unto James Jackson
in a plea of Covenant, to the damage of said
plaintiff as he says in the sum of Six hundred
Dollars.

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

Witness Walter Kimball, Clerk
of our said Court, and the Seal thereof
at the City of Chicago, in said County,
this 2nd day of August. 1857.

Walter Kimball Clerk

Served by reading to the within named defendants
Augustus F. Otto & Herman Baer this 5th day
of August. 1857 John Gray Sheriff
By H. C. Keeney Deputy

State of Illinois
County of Cook J. S. S.

I. Thomas B. Carter Clerk of the
Superior Court of Chicago, within and for the County
and State aforesaid, do hereby certify that the
 foregoing is a true copy of the Summons issued
out of my office together with the Sheriff's return
thereto endorsed, in a certain cause lately pending
in said Court. wherein James Jackson is plaintiff,
Augustus P. Otto & Herman Baer defendants.

And I further certify that the Declaration in
said cause was filed in my office on the 26th day
of August 1859. and refiled as amended on the
24th Day of December 1861.

I do Witness whereof I hereunto subscribe
my name, and affix the Seal of
said Court, at the City of Chicago, in
said County, this 31st day of March
A.D. 1864.

Thomas B. Carter Clerk



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Augustus P. Otto
& Herman Baer
vs.

James Jackson.

Amended Record.

Filed April 20. 1864
L. Leonard Clerk

This amended record
is filed by consent of
the parties.

W. White, Solicitor of State
att'y for appellee

B. F. Apple,
att'y for appellant

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION, }
APRIL TERM, A. D. 1864. }

Augustus P. Otto, and	}
Herman Baer,	
v s.	
James Jackson,	

Appellants, }
Appellee. }

POINTS FOR APPELLANTS.

JACKSON, the plaintiff below, sued Otto and Baer, the defendants below, in covenant. The declaration, containing three counts, sets out the cause of action substantially thus: That on the 1st day of April, A. D. 1858, by indenture made between the plaintiff and Edward Zitsche and Frederick Roth, sealed with their seals, and shown to the court, the plaintiff demised to Zitsche & Roth certain premises in Chicago (describing them), for the term of one year from that date, for the rent of \$1,200 per annum, payable monthly. That Zitsche & Roth, by said indenture, covenanted to and with the plaintiff to pay said rent; that they had received said premises in good order and condition, and that at the expiration of the term thereinbefore mentioned, they would yield up the said premises to the said plaintiff. The first and second counts allege that the lease provided that Zitsche & Roth should have the said premises for a second year, at same rent, and under same stipulations; the said extension was, however, only to take effect by virtue of the provisions and

covenants aforesaid, in the event that the plaintiff should obtain from the owner of said property, at the expiration of the first mentioned term, an additional lease for one year ; and the said Zitsche & Roth, if they desired such extension, should give the plaintiff thirty days notice of their wishing to take such extension.

These two counts respectively aver that the plaintiff did obtain *such additional lease of the owner* of the premises at the end of the first mentioned term, and that Zitsche & Roth *gave the thirty days notice of their wishing the extension.*

AVERS, that Otto & Baer, the defendants below, on the 13th of April, 1858, by their covenant, to and with the said plaintiff, sealed with their seals, and shown to the court, for the consideration of one dollar paid them, did covenant to and with the plaintiff, that they would and thereby did guarantee the punctual performance of all the covenants in every particular, which Zitsche & Roth had made, and were bound to fulfil, perform, and keep on their part, in and by the indenture first aforesaid. And assigns, for breaches of the covenant of defendants, 1st. That Zitsche & Roth did not yield up the possession of the demised premises at the expiration of the first mentioned term. 2nd. That they continued in the possession of the premises after such expiration, and failed to pay any of the rent from April 1st, 1858, to the time of the commencement of the suit.

The THIRD COUNT is based upon the same demise to and covenants by Zitsche & Roth, and same covenant of guarantee by defendants, and alleging for breach that Zitsche & Roth did not yield up the possession of the demised premises to the plaintiff at the expiration of the first mentioned term.

So that the case of the plaintiff, as made by his declaration, presented two grounds of recovery, only :

First. That the plaintiff obtained the additional lease of the owner of the demised premises ; that Zitsche & Roth gave the thirty days notice of their wishing the extension of the lease for another year ; their failure to pay the rent during either the first or second year, and the liability of the defendants therefor under their covenant of guarantee.

And *Secondly.* That Zitsche & Roth did not yield up the possession

of the demised premises to the plaintiff at the expiration of the first mentioned term, whereby the plaintiff was deprived of the use thereof, and sustained damages. No other breaches were assigned.

The defendants, pleading separately by their pleas, put in issue all the material allegations of the declaration, and especially the allegation that Zitsche & Roth covenanted with the plaintiff in manner and form as alleged; and to the allegation of the covenant of guarantee of defendants with the plaintiff, *non est factum*. Also, a plea of performance of covenants.

On the trial, the plaintiff's counsel introduced Charles Tunnicliff, plaintiff's agent, who was the only witness sworn in the case. A paper, purporting to be a lease from Jackson to Zitsche & Roth, dated April 1st, 1858, was offered in evidence without proof of its execution. To this, the defendants' counsel objected on that ground; but the court overruled the objection, and the same was read to the jury, and exception (Abs. Rec., p. 7).

The plaintiff's counsel then read in evidence a paper, purporting to be signed and sealed by the defendants, as follows:

"For and in consideration of the sum of one dollar to us in hand paid, the receipt of which is hereby acknowledged, we do hereby guarantee the punctual performance of all the within covenants, in every particular, on the part of the lessees.

"Witness our hands and seals, at Chicago, the 13th day of April, 1858.

(Abs., p. 9.) "AUGUSTUS P. OTTO, [SEAL.]
"HERMAN BAER, [SEAL.]"

The last mentioned is the only pretended covenant purporting to be made by the defendants, which was given in evidence.

It appeared in the evidence that Zitsche alone went into the occupation of the premises; that the witness Tunnicliff never knew Roth; that Zitsche occupied the demised premises until the Fall of 1858; that having promised the witness (plaintiff's agent) to give up the premises to him (witness), Zitsche quit them in that Fall, never was in possession of them afterwards, but left the city; that after that, one Gustavus R. Meyer, somehow got into the possession of them, but not with the authority of either Zitsche or Roth—was there on the 1st day of April, 1859,

and some months afterwards; that the witness took one months' rent of Meyer before the 1st of April, 1859 (but how much does not appear), and none afterwards; that witness made no effort to get Meyer removed, or to collect rent of him, but, on the contrary, expressly agreed with him not to charge him any rent if he would move out, which was assented to, and he went out (Abs., p. 10) under that arrangement (Abs., p. 10); that neither Zitsche or Roth ever gave any notice that they desired an extension of the lease, but, on the contrary, Zitsche told witness that he (witness) should have the possession of the premises (Abs., p. 7). It did not appear that the plaintiff ever got an additional lease of the demised premises, for one year from April 1st., 1859, of the owner. It does appear that he got a lease of one H. H. Magee; but there is no evidence that Magee had any interest in them (Abs., p. 9). The witness testified that all the rent of the premises, from April 1st, 1858, to April 1st, 1859, was paid (Abs., p. 7).

Under this evidence (and there was no other witness), and the state of the pleadings as aforesaid, the court, in the fourth instruction given on behalf of the plaintiff (Abs., p. 11), instructed the jury as follows :

4. " If the jury believe, from the evidence in this cause, that the tenants, Roth & Zitsche, covenanted to yield up the premises in question, at the end of their term, *in as good condition as when they entered upon them*, and they failed to keep said covenant, then their sureties became liable for all the damages which the plaintiff sustained by reason of such failure. The amount of rent stipulated in the lease, is *presumptively the true measure of damages sustained*, the same to be computed by reference to the time during which the plaintiff is shown to have been kept out of possession."

To the giving of which instruction by the court, the defendants, by their counsel, excepted (Abs., p. 11).

The bill of exceptions sets forth all the evidence given on the trial (Abs., p. 10).

The jury found for the plaintiff, and assessed his damages at \$500 (Abs., p. 12). The defendants counsel moved for a new trial; which was over-

ruled by the court, and exceptions by defendants (Abs., p. 12), and judgment was given for plaintiff, for that amount.

We now ask for a reversal of that judgment of the Superior Court of Chicago, for the following reasons :

I .

The said fourth instruction given by the court on behalf of the plaintiff below, was manifestly erroneous, absurd and illogical; calculated to mislead the jury, and without it, the court should presume that the verdict of the jury, wholly unsupported, as it was, by the evidence, would not have been found.

1st. The action of covenant is defined to be "a remedy provided by law, for the recovery of *damages* for the breach of a covenant, or contract, under seal."

1 Chit. Pl., 115.

The plaintiff must assign the breach, and show, on the face of his declaration, that he has sustained damages.

Gould v. Allen, 1 Wend., 182.

The *breach*, also, must be proved as laid in the declaration.

2 Greenleaf, Ev. sec. 236.

"Upon a *covenant to repair*, and issue joined on a general traverse of the breach, the plaintiff must prove the actual state of the premises, so as to show that they were substantially out of repair; and in doing this, *he will be confined to the matters expressly alleged as constituting the breach.*"

2 Greenleaf, Ev. sec. 245, *a*.

The breach, for not yielding up the possession of demised premises to the landlord, at the expiration of the term, and that of failing to yield

them up *in as good condition as when the tenant entered upon them*, are totally distinct in nature and character ; the former involving an inquiry as to the *possession* of the premises, merely, the latter into their state and condition. The former is specified in the declaration ; the latter is not even alluded to.

It was, therefore, a palpable error for the court to submit to the jury the consideration of a breach, not assigned, and in reference to which, there was no evidence.

2d. There being no evidence as to the condition of the premises, aggravates, instead of mitigating or avoiding the error in that behalf. The court told the jury that if the tenants failed to keep *said covenant*, viz: that they "would yield up the premises at the end of their term, *in as good condition as when they entered upon them*," then their *sureties* became liable *for all the damages* which the plaintiff sustained by reason of *such failure*. Here the court, as if aware that there was no evidence on the subject, supplies the defect by the application of a rule most glaringly erroneous, viz: that "*the amount of rent stipulated in the lease, is presumptively the true measure of damages*." Supposing there had been such a *breach*, assigned, as that submitted by the court to the jury, could there be a more unreasonable rule of damages conceived of, than that fixed by the court below ? If that rule is warranted by the law of the land, it is time tenants became aware of it. A tenant takes a store in good condition, under a lease with a similar covenant, at a rent of five thousand dollars for a year. By accident, paint becomes marred, and windows broken ; twenty-five dollars might repair all, except natural wear. He pays all the rent, and quits, but neglects to make the repairs. He will be surprised to learn that such neglect keeps alive the covenants of the lease, as to the rent, and the penalty of such neglect is presumptively the five thousand dollars.

3d. But the amount of rent stipulated in the lease is not *presumptively* the true measure of damages, for the breach of not yielding up the premises, at the expiration of the term. The true rule is the value of the use of the premises during such time as the plaintiff was deprived of them. That was the rule given to the jury in the case of *Kennicot v. Sherwood*,

measured by the rent agreed to be paid ?

Yes ?

22 Ills., 194, by the first instruction on behalf of the plaintiff in that case, and upon appeal, this court said, "The instructions given by the court, " both for the plaintiff and defendant, presented the law arising on the " facts in evidence, as we believe, correctly," and no other rule could with reason, and ~~was~~ supported by authority, be adopted.

Bramley v. Chesterton, 2 C. B. (N. S.) 592.

12 *Mees & Nelsby* 318

II.

No cause of action was shown by the evidence in this case, and the court erred in overruling the motion for a new trial.

1st. Because the plaintiff is not named in the covenant sued upon.

" But, though covenant lies as well on a deed poll, as upon a deed indented, yet the *parties must be named* therein; and, therefore, when " in covenant, the plaintiff declared that J. S., being arrested at his suit, " and in the custody of the bailiff, the defendant promised and engaged " to bring in the body of J. S. into the custody of the bailiff, on such a " day, on demurrer it was holden, that the action would not lie, *the* " *plaintiff not being named* in the agreement, and no averment *dehors* " could avail him."

2 Bac. Abr., 555.

Green v. Horn, 1 Salk, 197.

De Bolle v. The Pennsylvania Ins. Co., 4 Wharton, Rep. 68, 14 Vesey, 187.

Keatly v. McLeagherty, 4 Missouri R., 221.

Harris et al. v. Campbell, 4 Dana, R. 587.

How v. How, 1 New H., Rep. 49.

Hinckly v. Fowler, 15 Maine, R. 285.

It is alleged, in the declaration in this case, that the defendants covenanted *with the plaintiff*; but this allegation is not supported by the proof, and, therefore, the verdict cannot be sustained, and a new trial should have been granted.

2d. There was no cause of action established by the evidence, because

the rent was fully paid for the whole term of the lease, and there was no breach of the covenant, to yield up the premises at the expiration of the term, shown. Zitsche promised the witness to quit the premises, and he did quit them. No notice to witness was necessary.

James v. Pope, 19 New York R., 324.

The plaintiff had the affirmative of proving the breach of the covenant, and it was for him to show that Meyer was in possession without his consent.

Taylor, Land and T., sec. 684.

Why did Tunnicliff not explain when, and under what circumstances, Meyer went into the occupation of these premises? It appears, affirmatively, that Zitsche & Roth neither assigned any lease or under let to Meyer; and Meyer will not be presumed to have committed a trespass or forcible entry. Besides the presumption that he did not, the circumstances all tend to show, that his remaining there four or five months, when Tunnicliff was so frequently on the premises, and when if not there by authority, he could have been removed summarily under the statute, that Meyer's occupation was a mere contrivance, whereby the defendants might be harrassed and oppressed. Instead of proceeding to remove Meyer under the statute, Tunnicliff instituted half a dozen suits against the defendants, who were mere sureties, if they were under any relations whatever to the plaintiff.

III.

There being no evidence in the case of any damage to the plaintiff, the jury must have based their verdict upon the amount of rent stipulated in the lease, for the longest time mentioned by Tunnicliff, during which he says Meyer was in occupation of the premises after April 1st, 1859.

Witness said it was between five and six months after the 1st of April, 1859, before he got possession (Abs., p. 7). The rent was just \$100 per month. This evidently was the basis of the verdict. Now, by recovering this rent, the plaintiff has, by the perversion of the law by the court below, been enabled to do indirectly, what he could not do directly. If the

defendants' covenant had been such that an action could have been maintained upon it, and the lease to and covenants by Zitsche & Roth been established by competent proof, and Zitsche & Roth had held over, still the defendants, as *sureties*, would not have been liable for the rent.

Brewer v. Knapp, 1 Pick. R., 332 ;

Kennebec Bank v. Turner & Chase, 2 Greenl. R., 42 ;

and much less would the sureties be liable for the rent, when the premises were occupied by another, who did not hold under or through Zitsche & Roth.

Newman v. Mackin, 13 Smedes & M., 383.

McALLISTER, JEWETT & JACKSON,

Att's for Appellants.

¹⁹⁸
Supreme Court

Augustus P. Otto
vs

James Jackson

Point for Appellate

Filed Apr. 20. 1864

L. Secord. Ckr