

No. **12226**

Supreme Court of Illinois

Stewart, et al

vs.

Lapointe

71641  7

The State of Illinois } In Supreme Court
 John Lapointe } In error
 vs. } From Cook County
 John T. Temple } Court of Common
 & c for the use of } Pleas
 And now comes the said John Lapointe
 by his Attorneys. and says that there
 are errors in said record and
 proceedings in this Court.

- 1st The Court below erred in refusing to
~~order~~ sustain the motion to dis-
 miss said case for want of security for
 costs
- 2 The Court below erred in refusing to
 dismiss said case for informality
 in said writ of habeas corpus as asked for
 by the said John Lapointe
- 3 The Court below erred in overruling the
 motion of said John Lapointe to
 dismiss the writ
- 4 The Court below erred in sustaining the
 motion ~~the motion~~ of the defendants
 in error to strike the notice of the
 said Plaintiff in error of set off, compen-
 sation and account of set off ^{of each of them} from
 the fees in the Court below.
- 5 The ^{judgment or each of them} verdict below is not in accordance
 with the issue or the law of the case
6. The Court below erred in overruling

the motion for a new trial.

- 7 The Court erred in refusing to permit the plaintiff in error sustaining the plea defendants in error objections to the testimony of John Pellet,
 - 8 The Court below erred in their decisions of law during the trial of said Cause
 - 9 The Court below erred in refusing to sustain the plaintiff in error motions to dismiss said suit below
 - 10 That the Court erred in their decisions of law during the progress of said Cause
 - 11 That the Court below erred in sustaining the defendant in error motions to strike the plaintiffs in error notices, reach every of them from the files
 - 12 That there is no judgment on the finding of the jury in the case - nor disposition of the finding of the jury in the Case
 - 13 That the judgment was in favor of the plaintiff below, when it should have been in favor of the defendant
- For these and other causes he prays that said judgment may be reversed, and he be restored to all that he has lost in the premises; and that your Honors would grant a

not of superseded &c

18. F. W. W. W.

Atty for the Plaintiff no
Died

And now comes the said Defendant
in Error by C. H. H. H. his atty and
says there is no Error in said Record
and proceedings as is alleged and
prays that the said case be affirmed as
found by the Court below May be
affirmed with costs -

C. H. H. H.
n n

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

Shas before the Honorable John W. Wilson
Judge of the Cook County Court of Common Pleas
within and for the County of Cook and State of Illinois
at a regular term of the Cook County Court of Common
Pleas begun and holden at the Court House in the
City of Chicago in said County on the second Mon-
day being the Eleventh day of September in the
Year of our Lord one thousand eight hundred
and fifty-four and of the Independence of the
United States the seventy-ninth

Present

The Honorable John W. Wilson Judge
Cyrus P. Bradley Prosecuting Attorney
Cyrus P. Bradley Sheriff
Walter Kimball Clerk

Attut

Let it Remembered, that heretofore, to wit
on the Thirty-first day of August in the Year of our Lord
One thousand Eight hundred and fifty-three, Alphe-
us Stewart and John A. Temple for the use of Stephens
Stewart, by Warren & Stebbins their attorneys filed
in the office of the Clerk of the Cook County Court
of Common Pleas a copy of a Distress Warrant for
Rent, which said copy is in words and figures
as follows to wit,

To Messrs Warrs of
Cook County Greeting

Whereas John Lapoint of
Chicago Cook County is justly indebted to Stephens
Stewart of New York and John A. Temple of Chicago
for the use of the said Stephens Stewart in the Sum
of three hundred (\$300) Dollars for three Quarters
Rent of the premises known as a portion of Lot 2
in Block Seventy (70) School Section addition to
Chicago, being that portion of said Lot in the Rear of
the Steam Planing Mill occupied by said Temple on
said Lot No 2, fronting west on Canal Street in the
City of Chicago, accruing from the first day of Novem
ber 1852 to the first day of August 1853,

Now Therefore I do hereby authorize
you to make distress according to Law for said
Rent of the goods and chattels of the said John La-
point to be found in your County.

In witness whereof I have hereto set my
hand this 12th day of August 1853

Stephens Stewart

Land Lord

By John A. Temple (his agent)

In Compliance with the foregoing Warrant I have
this day distrained upon the following articles of Property
found in the possession of John Lapoint.

- 1 Building in the rear of and adjoining the Engine House.
- 3 Work Benches in said Building
- 2 Mortising Machines " "
- 2 Slicking Machines " "
- 1 Crop cut Saw frame & Saws " "
- 1 nipping Saw frame & Saws " "
- 1 Side Shaft. Pulley and Belts. " "

6 Circular Sams " "
 13, 4 Panel doors
 24 Pieces 9 + 12 Sash & lights
 13 " 9 x 14 " " "
 39 " 10 + 16 " " "
 201 " 9 x 12 " " "
 46 " 10 x 12 " " "
 93 " 8 x 10 " 9 "
 94 " 8 x 10 " 3 "
 20 " 8 x 10 " 6 "
 6 " 8 x 12 " 6 "
 8 " 14 x 17 " 3 "
 12 " 8 x 10 " 6 "
 16 " 12 x 14 " 1 "

Quantity of Door, Sash & Blind Materials & Lumber
 Main Driving Pulley & belt

1 Sanframe, Shaft, Pulley & Belt in the Planing Mill.
 Moses Hanks

Chicago August 27. 1853.

And on the said thirty-first day of August in the Year
 aforesaid, a Summons issued out of the office of the
 Clerk of said Court, which said Summons is in words
 and figures as follows, to wit:

State of Illinois &
 Cook County & S.S.

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

We Command You, that you summon John
 Lapoint if he shall be found in your County, personally
 to be and appear before the Cook County Court of
 Common Pleas 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 Second Monday
of September next to answer unto Stephen Stewart
and John A Temple for the use of Stephen Stewart
in a plea of Distress for Rent on a portion of lot two in
Block Seventy School Section Addition to Chicago to
the damage of said plaintiff as he says in the sum of
Three Hundred Dollars. And have you then and
there this writ with an endorsement thereon in what
manner you shall have executed the same.

Walter Wallen Kimball Clerk of our said
Court and the Seal thereof at the City of Chicago
in said County this 31st day of August A.D. 1853
Walter Kimball Clerk

Which said summons was afterwards returned into
the office of the Clerk of said Court by the Sheriff of
said County, endorsed as follows to wit,

Served by reading to the within named John
LaPoint Augt 31st 1853

C. P. Brady Sheriff
By M. Regan & Deputy

And afterwards, to wit, on the Twentieth day of Sep-
tember in the year aforesaid, said day being one of the
days of the September Term of said Court in the year
aforesaid, the following proceedings were had
in said cause, and entered of Record to wit,

Stephen Stewart & John A Temple
for the use of Stephen Stewart

John LaPoint

} Distress for Rent.

This day comes the said defendant
by N. A. Waite his attorney and on his motion it is Ordered
that the time to plead in this cause be extended to

saturday Morning next,-

And afterwards to wit on the fourteenth day of September in the year aforesaid the said defendant filed in said cause a motion to dismiss said cause, which said motion is in words as follows to wit,

Cook County Court of Common Pleas.
The State of Illinois }
County of Cook ss. }
John Lapointe
vs }

Stephens Sternut & John A. Temple
who sue for the use of Stephens Sternut }

And now comes the said John Lapointe
and moves to dismiss this suit for want of security- having been given for costs

H. F. Waite Attorney
for Defendant

And afterwards to wit on the sixteenth day of September in the year aforesaid the said defendant filed in said cause an affidavit of Merits, which said affidavit is in words as follows to wit,

The State of Illinois } Cook County Court of
County of Cook, ss. } Common Pleas
John Lapointe
vs }

Stephens Sternut et al
for the use &c

The said John Lapointe
being duly sworn says, that
he has stated the facts of this case to his counsel, and he is
advised by him that he affiant, has a good and meritorious
defence to a portion if not all of said action in said district
warrant,
John Lapointe

Sworn to & Subscribed before me
this 16th day of September A.D. 1853
W Kimball Clerk.

And afterwards to wit, on the Nineteenth day of
September in the year aforesaid said Defendant filed
in said Cause an affidavit, and motion to dismiss,
which said affidavit and motion are in words &
figures as follows to wit:

The State of Illinois County of Cook, ss. John Lapointe at Stephens Stewart et al for use &c.	} Com Pleas
--	-------------

H. J. Waite being duly sworn
says, that he is informed and verily believes, that Stephens
Stewart for whom now this action is brought, is a non res-
ident of this State, and is a resident of the State of
New York - He further says that he is the attorney of the
defendant in this case
H J Waite

Sworn to, & Subscribed before me
this 19th day of September A.D. 1853
W Kimball, Clerk

John Lapointe at Stephens Stewart et al use &c.	} Cook County Court of Common Pleas
--	--

And now comes the said John
Lapointe and moves to dismiss these proceedings for the
following informalities, to wit:
1st. That the return warrant is informal

2nd It does not show a tenancy: or the nature of the contract of tenancy.

3^o It is not in the name of the Land lord.

4th The Land lord does not authorize the distress to be made.

5th The return is not sworn to & is informal

6th It does not show when the rent was due, or that it is due.

For these and other reasons the defendant moves to dismiss this suit.

W. J. Waite, defendant's Atty.

And afterwards to wit on the twenty ninth day of September in the year aforesaid said day being one of the days of said September Term of said Court in the year aforesaid the following further proceedings were had in said cause and entered of Record.
H. Wick.

Stephens Stewart & John A. Sample
for use of Stephens Stewart

John La Pointe.

} Distress for Rent

And now comes the said plaintiff by C. Warren his attorney and the defendant by W. J. Waite his attorney also comes, and the Court after argument heard on the said defendant's motion herebefore entered herein to dismiss this suit, being fully advised thereon overrules said motion, to which decision of the Court overruling said motion the said defendant enters his exceptions.

And afterwards to wit on the said twenty Ninth day of September in the year aforesaid, said defend

and filed in said cause his Bill of Exceptions, in words
and figures as follows to wit;

The State of Illinois	~	Cook County Court of
Cook County ss.	~	Common Pleas within &
Stephens Stewart	~	for Cook County aforesaid
John H. Temple who sue	~	
for the use of Stephens Stewart.	~	

John Lapointe

Be it Remembered that
at the September Term of the Cook County Court of
Common Pleas, begun and holden in the County of Cook
& State of Illinois in the Year of Our Lord Eighteen Hun-
dred Fifty-three the Defendant by his Counsel on the
fourteenth day of September in the Year aforesaid, filed
in said Court the following Motion to wit:

The State of Illinois		
Cook County ss.	~	Cook County Court of
John Lapointe	~	Common Pleas.
at,		Distress Warrant
Stephens Stewart John H. Temple	~	
who sue for the use of Stephens	~	
Stewart	~	

And now comes the said John Lapointe and
moves to dismiss this suit, for want of Security - having
been given for costs.

Signed W. H. Waite.

Atty for Defendant.

And in Support of which Motion the Defendant filed
an affidavit in the words & figures following to wit

The State of Illinois	~
County of Cook ss.	~

John Lapointe
at
Stephens Stewart et al
vs &c,

Court Pleas

H. H. Waite being duly sworn, says he is informed and verily believes that Stephens Stewart for whose use this action is brought is a non resident of this State, & is a resident of the State of New York. He further says he is the attorney of the defendant in this case.

Signed H. H. Waite.

Sworn to & Subscribed before me
this Nineteenth day of September A.D. 1853.

Signed W. Kimball CLK.

On the back of which
is this endorsement "Filed 19th Sept 1853. W. Kimball CLK."
and which Motion came on to be heard and was argued
by counsel, and the Court being fully advised, overruled
said Motion deciding that in this case no Security for
Costs was necessary."

Whereupon the Defendant filed a Motion in the words
& figures following, to wit.

John Lapointe
at
Stephens Stewart
et al, vs &c

Cook County Court
of Common Pleas

And now comes the said John
Lapointe, and moves to dismiss these proceedings for the
following informalities, to wit.

First. That the Distress Warrant is informal.

Second. It does not shew tenancy, or the nature of
the Contract of tenancy.

Third. It is not in the name of the Land lord.

Fourth. The Landlord does not authorize the Distress to be

made.

Fifth, The return is not sworn to, & is informal.

Sixth, It does not show when the rent was due,
or that it is due.

For these and other reasons
the defendant moves to dismiss this suit.

H. A. Waite.

Defendant's atty.

On the back of which motion is endorsed. (Filed 19th
of Sept 1853. W. Kimball clk.

which motion coming on for hearing was argued
by counsel, and the Court being fully advised in
the premises, do overrule said motion, and to
which ruling and decisions and in overruling
said motions the defendant in due time excepted,
and asked that his bill of Exceptions be
signed, sealed, and made a part of the records in this
case, which accordingly has been done, according
to the Statute in such case made & provided.

John M. Wilson. *Seal*

And afterwards to wit, on the thirtieth day of
September in the year aforesaid, said defendant
filed in said cause his Plea, notice and account
of setoff, in words and figures as follows to wit,

The State of Illinois }

Cook County, ss. }

John Lapointe }

vs. }

Stephens Stewart et al }

And now comes the defend-
ant by Horace A. Waite his attorney, and defends
and says he does not owe the said plaintiff the sum

of Money in said distress warrant contained, and did not assume & promise in manner and form as the plaintiff hath alleged against him, and of this he puts himself upon the country, & the Plaintiff does the like &c.

By H A Hall

Defendants Atty,

And the plaintiff will take notice that the Defendant will on the trial of this cause offer evidence to prove and will insist, that on the trial of this cause that the plaintiff entered into an agreement with the Defendant, and which agreement was about the 20th day of October A.D. 1853. by which they agreed to let to the Defendant Steam power sufficient to drive all the Machinery the Defendant had for three days each and every week till the spring, and that the plaintiff agreed to furnish the Defendant with all the power (Steam power) he might need; every day in the week for the term of three years from that time, for which the plaintiff was to pay at the rate of four thousand Dollars, rent per annum; and in said Contract of lease, it was further agreed that the said Defendant was to have all the sawing to do, which was done in the establishment or sent to that establishment, carried on by the plaintiff, for which he was to pay therein the sum of twenty five cents on every thousand he sawed for the privilege of sawing, and he the said Defendant was to have the amount paid for sawing; The Defendants Machinery to be attached to that of the plaintiffs works, and to have the privilege of erecting buildings to use adjoining that of the plaintiffs, and the defendant says that during the winter and till spring the plaintiff wholly neglected to furnish power to run the Defendants Machinery three days in the week, on the contrary

did not furnish it more than one day in the week, by which the defendant suffered great damage, to wit, One Thousand Dollars in the loss of wages; and expenses of his shop while his hands were lying idle; and in the same sum for loss of the use of his machinery while the steam power was not so furnished, that he suffered other damages by loss of profits, use of Capital employed, and that after the spring & from thence forth the plaintiffs utterly failed to furnish the power agreed upon, whereby the defendant suffered One Thousand Dollars damage in wages paid to men, and in the same sum for loss of the use of machinery and profit, and damage suffered by the defendant thereby; and that the plaintiffs did not give the defendant the privilege of doing all the Lanning done at their works but took possession of the Lannings of the plaintiffs, and done it themselves, to the damage of the defendant of One Thousand Dollars; and which damages the defendant will seek to recover against any sum the plaintiffs may prove to be due for rent in his distress Warrant contained.

W. H. Waite, Defendant, says,
The plaintiffs will also take notice that the defendant on the trial of this cause will give in evidence and insist that the plaintiff at the commencement of this suit was and still are indebted to the defendant in the sum of One Thousand Dollars for the price and value of goods before that time bargained and sold by the defendant to the plaintiffs at their request; and also in the sum of One Thousand Dollars for the price and value of goods before that time sold and delivered by the defendant to the plaintiffs at their request, and also in the sum of One Thousand Dollars for the price and value of work before that time done

and materials for the same provided by the defendant for the plaintiffs at their request; And also in the sum of One Thousand Dollars for money before that time lent by the defendant to the plaintiffs at their request; And also in the sum of One Thousand Dollars for money before that time received by the plaintiffs for the use of the defendant; And also in the sum of One Thousand Dollars for moneys found to be due from the plaintiffs to the defendant on an account before that time stated between them; and that the defendant will set off on said treat, so much of the said several sums of money so due and owing from the said plaintiffs to the said defendant against any demand of the said plaintiffs to be proved on the said treat, as will be sufficient to satisfy and discharge such demand; and will also then and there demand judgment against the said plaintiffs for the balance of said several sums of money due to the said defendant according to the statutes in such case made and provided.

H. J. Waite

Defendants Atty,

Summit & Simplex

In ac with John Lapointe & Co		
1852, 28. Do	Saving done for you to date	16.20
1852 Dec 11	" " " " " "	45.01
1853 Feb 23	" " " " " "	38.48
" March 21	" " " " 4 3/4 feet lumber	11.33
" " " " " "	" " " " " "	11.09
April 1	" " 568 feet Saming	4.12
" 14	" " 2000 feet Saming	15.00
" 15	" " 550 " " 3 cut	11.25
" 25	" " 400 " "	3.00
" "	" " 2 hands Saming 10 ft.	2.50

May 26	21 light Sash	3c	. 63
June	1 Days work for Ames	14/-	1. 75
"	36 Cords Wood	26/-	117. 00
Aug 27	Damages left Siding		468. 00
"	Work done on Shed and		
	Materials found		30. 00
	Damages for loss of Steam Power		300. 00
			<u>1075. 36</u>

And afterwards to wit on the Thirteenth day of October in the year of Our Lord One thousand eight hundred and fifty four. Said day being one of the days of the September Term of said Cook County Court of Common Pleas. in the year aforesaid the following proceedings were had in said Cause and entered of Record in said Court to wit,

Stephens Stewart & John J.
Temple for the use of
Stephens Stewart

Distress for Rent

John Lapointe

And now upon this day comes the said plaintiffs by C. Haven their attorney and enter their motion herein to strike the said defendants Notice of Set off and recoupment and account of off Set from the files herein. And thereupon also comes the said defendant by H. A. Waite his attorney and the Court after hearing the argument of Counsel, being now fully advised in the premises sustains said motion and doth Order that the same be Stricken from the files in this Cause.

And thereupon issue being joined herein, it is
Ordered that a Jury come, and thereupon come a
Jury of good and lawful men to wit,

J. H. Gramis. Jacob Chaney. J. B. Bridges
William Cooper. S. W. Pender. C. Mc Mahon
Seymour Wilson. A. W. Enas. John Green
James Polk. Martin Braman. & Edward Paulin
who being duly elected tried and sworn well and
truly to try the issue joined as aforesaid, after hearing
the testimony adduced argument of Counsel and in-
structions of the Court, retire under charge of an
officer of the Court to consider of their Verdict,
And afterwards come into Court and say to the
Jury find the issue for the plaintiffs, and we assess
the amount due from said Defendant to said
plaintiffs to the sum of Two Hundred & Sixty
two Dollars and fifty cents.

And the said Defendant thereupon enters his
motion herein for a new trial in this cause.

And afterwards to wit on the Eighteenth day of
October in the year aforesaid, at yet of the said
September Term of said Court, the following
further proceedings were had in said Cause
and entered of Record to wit.

Stephens Stewart & John A.
Temple for use of Stephens Stewart

John Lapointe

Distress for Rent

And now again
come the said parties by their said attorneys and
the Court after having heard the argument of Counsel
on the said defendant's motion for a new trial in

this cause and being now fully advised in the premises
Omnibus said Motion.

And thereupon the said defendant enters his
Exceptions herein to the opinion of the Court in over-
ruling his said Motion, and prays an appeal to
the Supreme Court of the State of Illinois which
is allowed, upon his filing his appeal bond with
the usual conditions, to be approved by the Judge
of this Court. said bond and Bill of Exceptions to
be filed within ten days from this day.

And afterwards to wit on the Twenty first day
of October in the year last aforesaid, the said de-
fendant filed in said cause a Bill of Exceptions
in words and figures as follows to wit,

Alpheus Stewart
John C. Temple for the
use of Stephens Stewart

Cook County Court
of Common Pleas

John Lapointe

Be it Remembered,

that on the trial of this cause the plaintiffs to maintain
the case on their part proved substantially as follows.

Cheney, testified, I know the premises
described in the warrant. I made a survey of block
70 School Section addition to Chicago, and I know
that the defendant occupied premises in the rear
of the plaintiffs planing mill, the same described
in the warrant. Defendant went into the possession
of the premises in latter part of October 1852, by put-
ting up building - and he commenced operating ma-
chinery about November 1st 1852. & so continued
to occupy nine or ten months, till sometime

in August 1853. I was then in Charge of the Machine
ery inside of plaintiffs mill most of the time Lapointe
Occupied.

The plaintiff then proves that the defendant exe-
cuted the following instrument in writing

(Copy) It is agreed between Stephens Stewart and
John St Temple of the first part, and John Lapointe
of the second part, that the parties of the first part
shall allow the party of the 2^d to construct a
building for a Sash, Door, & blind factory in the shape
of an L, 48 feet long north & south, 36 feet east & west,
& thirty feet wide - at his own expense, immediately in
the rear & adjoining the engine house on said premises
he shall have the privilege of using 2 Sash shakers, one
beveling machine, 2 Circle Saws & 1 tenantry machine
in said shop & to put up & run a ripping saw in the
shed below. He is not to consume to exceed 6 Horse
power at the time. He agrees to saw for 50¢ flooring
into siding or fencing or panel stuff for 60¢ per m & to
give our work the precedence over any other & also to
pay a bonus of 50¢ per M on any custom sawing that
he may do for others. shall do our work when wanted.
S & T shall not be bound to run the Engine steadily
but if during any week they should run less than
two days they shall deduct 1/2 of the current rent of
such time. All the fuel made by the 2 party shall
belong to the first party, except fuel for shop. The
rent shall be \$400 payable quarterly. All fixtures
necessary to carry on the above business put up on
Lapointe's expense, shall be allowed to use a machine
for making mouldings & preparing stuff but no other
planing

Signed John Lapointe

(Oct 30 1852)

(Assigned). I hereby assign all my right title and interest in the within Contract for Lease to Alphonse Stewart

Signed

John J Temple

In giving which Contract or Lease in evidence in this case the defendant then objected, which objection was overruled by the Court, and the defendant then accepted, and Lease was read in evidence -

The Plaintiff then rested their case.

The Defendant then proved by John Shank, that he worked for Lapointe when he was at Stewart & Temple. Engine was idle frequently whole weeks, machinery was idle half the time. I went about a month after Lapointe went there, & remained as long as Lapointe did. Lapointe had his belt on Stewart & Temple's shaft. There was two or three weeks they did not run at all, this was in the middle of the winter. Craft Examined, Worked nearly all the time with Lapointe Machinery on.

Frank Monagan, Knows the parties, commenced work for Lapointe Jan'y '55. - worked five weeks raised the steam at about 9 O'clock in the morning & ran till four or five in the afternoon. One week they did not run at all.

John Pelote, Testified that he worked all the time, began when Lapointe began at Stewart & Temple, & quit when Lapointe died, sometimes Plaintiff's furnished 2, 2 1/2 & 3 days steam in a week. Stopped 3 or 4 weeks at a time once. They did not furnish 2 days steam in a week half the time.

The defendant then offered to prove by this

witness while on the stand - that the defendant had done Saming for the plaintiffs under the Contract, and the amount of such Saming was due the defendant, and that it had been done under the Contract, to the giving of such testimony the plaintiffs attorneys objected on the ground that it does not appear by said Contract that the Saming was done to apply on the Rent. But the Court held that defendant might prove any Saming done by the defendant which the plaintiffs had agreed to apply on Rent, but that the defendant had no such right under the Contract, and the objection was sustained.

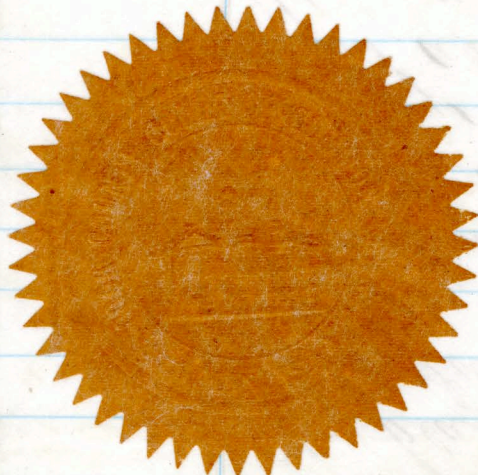
Crap Examined, It was four weeks they stood still they did not go three days in the week.

The Defendant then rested.
The Plaintiff then recalled Mr Cleary who testified. I was at Stewart & Temples while Laporte was there, about 3 weeks, did not run two days in the week & about 3 weeks the engine stopped entirely. The rest of the time the engine run two days in the week. He usually fired up at eight A.M. & sometimes earlier & sometimes later - and rested there case,
and the Jury leaving, brought in a verdict for the Plaintiff. The Defendant in due season moved for a new trial, and which motion was overruled by the Court, and to all which rulings and decisions. The defendant in due time then and there excepted, and prayed that this his bill of Exceptions may be signed & sealed & made part of the Record of this case, which is accordingly done according to the Statute in such cases made & provided.
John W Wilson Secy

State of Illinois
County of Cook & S.S.

I Walter Kimball Clerk of the Cook
County Court of Common Pleas within & for the County
and State aforesaid do hereby Certify that the
foregoing is a full and correct transcript of the
papers filed in my office, and also of the Records of
said Court, in the case of *Alpheus Stewart & John
J. Temple* for the use of *Alpheus Stewart* plaintiffs
and *John Lapointe* defendant.

In Testimony Whereof I have here-
unto subscribed my name & affixed
the Seal of said Court at the City of
Chicago in said County this 14th day
of May A.D. 1855.

Walter Kimball, Clerk


Alpheus Stewart &
 John J. Temple
 for use of
 Alpheus Stewart
 or
 John Lapointe

submitted
 Transcript.

Filed July 4. 1855.
 L. Leland Clk.

Dec. Grant West of 6.00

H. J. Waite
 & Dep't Atty.

John F. Temple &
Alpheus Stewart &c
as
John Lapoint

Supreme Court of the
State of Illinois
July Term 1855.
at
Attarra

And now comes the said Deft
in Error by C. Haven his atty and
files herein the following written argu-
ment.

May it please the Court

It will be seen from
the Transcript of Record that this is a
Distrip for Rent. The Plff in Error
Specifies 13 several errors in the
proceedings below. Not having the
benefit of my brother Waites argu-
ment. We shall not notice in detail
all the assignments of Error And there-
fore invite the attention of the Court to the
1st 2^d 4th & 7th assignments of Error
as attached & signed upon the said Record.

1. First: "The Court erred in refusing
to dismiss for want of security for costs"
This assignment of Error raises the
Simple question

Is Distrip for rent
"a case at Law or Equity" within the statute

Ch 26. Sec. 1. R.S. 45. requiring Security for costs. When the person for whose use the distrip is made is a non resident?

a It is conceded that Non residence constitutes a disability to be removed by giving Security for costs, as a condition precedent to the Commencement of any Suit or case within the above State by such Non resident.

b And it is claimed
That Distrip for Rent
at Common Law is the taking of the tenants goods without legal process, by the Landlord for rent due and in arrears
And that the Land Lord might at Common Law sell the same without the aid or interference of the Courts - the tenants only remedy being an action for an illegal distrip or of Replevin.

c And also That the Statute (Landlord & Tenant) Ch. 50. Secs. 6 & 7. R.S. by implication recognizing the Com. Law Remedy has only so far modified the proceedings as to require the Land Lord to Establish his right to distrain and to fix the amount of rent due

After the tenants goods have been
Seized by virtue of a warrant prima-
ry issued and before the interference
of the courts.

The foregoing positions we believe to be too well settled to require either argument or authority.

It follows therefore first that non-residence constitutes no disability to commencing a distrip for rent.

And secondly that the uniform construction of the Statute Ch 26. Sec 1. necessarily excludes the proceedings in distrip.

And accordingly such proceedings are not within the statute requiring draw-
ing for costs. and the Court did not err in overruling saia motion to dismiss.

Again

But we see at all events, that the proceedings of distrip, ^{being} under the statute and at Com Law, is anomalous in character

And the question may well be asked in view of the fact, whether the person, be he "landlord, agent, or attorney," who seizes the tenants goods, is not liable for costs? And for the simple reason that it is not a suit. Certainly "The Warrant" is no protection to the person who executes it, in the

Seize that the "Writ" is a Shield to him engaged in the service of legal process. It is by virtue of the warrant that the goods are seized. The summons is but notice to the tenant that the distress is made - and security for costs on the summons would furnish but half a remedy - and to dismiss the suit would not restore the tenant to the custody of his property. The agent or bailiff is certainly liable to the tenant in damages for an illegal distress and would find no defense in getting behind a landlord in a foreign State. And if so why not liable for putting in motion the process of Court which is but a step in the proceedings? Prima facie this must seem to be so.

And we submit to this Hon Court whether the better practice would not be to rule the Plff to show Cause why he should not give security for costs in conformity with the 2^d Sec of Chap 26. rather than to dismiss where from an oversight or misapprehension of the Landlord his warrant is filed without giving security for costs.

Finally In conclusion of this point:

It will be seen that this case is unlike any case heretofore before this court in other respects than those noticed.

The Warrant is in the names of "Stewart & Temple" for the use of Stewart. and signed "Alpheus Stewart landlord by A. F. Temple his agent." Now independent of the imperative language of the statute and its operation upon cases within its provisions - the reason of requiring the party for whose use the suit is instituted to give security for costs lies in this: viz the party beneficially interested in the judgment not being in a situation to maintain a suit in his own name, as in the case of the holder of a note unendorsed, is allowed to make use of a nominal Plaintiff, lest a just claim should fail for want of a competent Plaintiff - though not to charge such nominal plff with liability for costs without his consent.

But in the case at Bar the nominal plff Temple is acting as agent for Stewart has voluntarily and by his own act instituted the proceedings in his own name jointly with Stewart. And as we have seen that he would be liable for the distrip-

So now in filing the Warrant and causing
Summons to issue thereon in his own name
as nominal Plaintiff by this act is
estopped from denying that his name is
there merely as nominal Plaintiff.

Besides the assignment in
this case was operative only as between
Stewart and Temple and in no way
affected the rights of Lapointe as to
payment of rent to either S. or T. and
both are and are liable to Lapointe
for all costs - because both are the
original parties to the instrument,
and both, one as principal and the other
as agent, instituted the distress - and
therefore no matter what disposition the
Plffs may have made of the Rent as between
themselves - to Lapointe and the officers of
Court in this proceeding they are
alike liable for costs.

We say then:

1st That distress is not a "case at
Law or Equity" requiring decree for
costs.

2^d That the proceedings are
anomalous in character & the better
practice would be to order the Plff in
distress to show Cause &c.

3^d That in this case the nominal Plaintiff
is acting as the agent of the Landlord
is liable for costs.

Second "The Court below erred in refusing to sustain
the motion to dismiss said Cause for infor-
malities in the distress Warrant as alleged
by the said John Lapoint"

In support of this motion six
several Causes are specified - a notice of
which in detail is not regarded as
essential - And we dispose of 1st 2^d
5th & 6th Causes of informality alleged
with the simple denial that the warrant
is obnoxious to the informality in that
behalf alleged.

In proof however we beg
to refer the Court to the warrant itself and
to the Case of "Bigelow & Whipple vs Anderson"
19th Wend. 227. In which it is held by
Arleson Ch. J. "That no particular form
is required. If the Warrant substantially
indicate the object so as to enable the
officer to execute it must be sufficient."

The 3^d & 4th informalities specified are
"That the Warrant is not in the Name of the
Landlord" And "that the Landlord does not

Authorize the distrip to be made."

Per the Warrant, when strictly and literally construed liable to these objections the Authority of the case last cited viz- 19 Wend. 229- would be sufficient to show that it did not invalidate the warrant. A similar- I might say the precise objection was made to the mode of executing the warrant as is made by the Plff in error to this Warrant- "The Warrant was signed "R. Cooper agent for George & Ann Clark"- And the objection was "that the warrant was in the name of ~~Cooper~~ whereas it ought to have been in the name of his principals" Another Court say "There is ^{no} pretence for such an objection. I think therefore the authority has been well executed by Cooper. though in his own name as agent for the landlord." See et cetera

But Secondly We contend that the Warrant is strictly formal and in conformity with the facts as they appeared in Evidence and as shown by the Transcript of Record.

It will be seen that Temple had assigned his interest in the instrument offered in Evidence to Stewart-

The position of Stewart then, is that of owner of one moiety of the rent as original lessor to Lapoint and of the other moiety by assignment of Temple's interest.

Now Stewart sustains the relation to Lapoint of lessor and assignee of Temple. & While it may be questionable whether Stewart could distrain in his own name alone, there certainly can be no doubt of the propriety of distraining in the name of Stewart & Temple for the use of Stewart.

Stewart being entitled to the rent when collected, is alone authorized to put in motion the proceedings. but as the assignment is operative only as between Stewart and Temple; so the proceedings should run in the joint names of Stewart & Temple for the use of Stewart.

We conclude then that the Court did not err in this behalf because First There is no particular form of Warrant prescribed and therefore none required.

Second. The Warrant is executed strictly and in conformity with the facts of the case.

4th

"The Court below erred in sustaining the Motion of the defendants in Error to strike the notice of the Plaintiff in Error of set off. Recoupment and account of set off and each of them from the files in the Court below"

It is sufficient to remark on this head, that this is a "distress for rent" in which there are no pleadings. And the simple inquiry is whether the defendant below owed rent and how much to the plff. The Landlord is restricted in his recovery to the amount of Rent due, as the right to distress is confined to the non payment of Rent. So the tenant is confined in his defense to the proof of actual payment of rent, or the proof of some offset, agreed by the land lord & tenant to be applied on account of rent.

The doctrine of recoupment and set off has no application to distress for rent. It will be seen from the notice of set off & recoupment" as copied into the bill of exceptions - do not profess to be of either character as above, i.e. of actual payment or of anything agreed to be applied on account of rent.

But the general issue as pleaded by the
def't below was not stricken from the file
and the Court expressly held on the trial
that def't might show "any saving" done
by def't for Plff below which the Plffs
had agreed to supply on rent.

As we shall see more fully in considering
the following & the 7th assignment of error.

7th

"The Court erred in sustaining the defendants
in error's objection to the testimony of John Pitote"

It will be seen from the second
bill of exceptions that def't below proposed
to show by the witness Pitote the amount of
saving done by def't below under the contract
and claimed the right to offset such saving
on the Rent - To this Plff objected -

The ruling of the Court on this testimony
involves a construction of the
instrument referred in evidence -

The ground of objection to
the testimony offered, is this, that it
does not appear by the instrument
that the rent was to be paid in saving -

A brief analysis of the main features
of the contract will serve to show
that the ruling of the Court was
proper -

1. The plffs were to allow Lapoint to erect a building on the rear of their Mills on their lot.

2^d Plffs were to furnish "Steam power"

3^d Plffs were to pay Lapoint \$1.00 M. for sawing -

And Lapoint was

1st To give Plffs work the "presidential"

2^d To "pay a tariff of one dollar per M. on all custom sawing done by him, to plaintiffs"

3^d To pay \$400. but "payable quarterly"

Hence Mutual accounts would arise between the Plffs and the deft on this Contract.

The Plffs had a claim against the deft for the "Tariff of one dollar" and the deft may have had a claim against the Plffs for sawing - But the deft also owed Rent - Now as the Plffs could not distrain for their claim for "the tariff" so the deft could not offset his claim against the Plffs on account of rent and leave the Plffs claim "for tariff" unadjusted - But the Court held that deft might then any sawing done under the Contract, which the Plffs had agreed to apply on account of rent

Again.

The rent was to be \$400. "Payable quarterly." While the sawing done by debt for plf's was to be "when called for."

Now we submit that nothing short of an express agreement in writing or verbal to the effect that the rent was to be paid for in sawing would render the testimony proposed competent.

And for the reason that the right of distrip exists in all cases between landlord & tenant when the amount of rent is certain. And to allow set off or recoupment of any thing not specifically in payment of rent would defeat the remedy of distrip entirely. A remedy as valuable & necessary to the rights of landlords, although summary in its operating & anomalous in its character, as any process, which jurisprudence can afford.

The other errors assigned upon this record are either trifling in themselves or are but a rehash of those already considered. At least so they seem.

And with a brief summary of the points we have indicated

to establish we submit the case to this Hon Court on the part of the deft in error with a degree of assurance that it will require at least some ingenuity on the part of the Plffs Counsel to show affirmatively the error assigned to be well taken.

We have endeavored to show that the 1st 2^d 4th & 7th assignments of errors are no errors.

1st 1. Because "distrip for Rent" is not a "Case at Law or Equity" requiring security for costs.

2^d That the proceedings are anomalous in character and the better practice would be to rule the Plff in distrip to show cause why he should not give security for costs.

3^d That in this case the nominal plff is acting as the agent of the landlord is himself liable for costs.

2^d Motion to dismiss for informality in warrant.

1. No particular form required.

2. The warrant is conformity with the facts of the case as proved.

4th In striking Notice of Setoff & Recoupment

1. There are no pleadings in distrip.
- 2^d Set off and Recoupment not applicable to distrip for Rent
- 3^d The plea of general issue allowed & proof under it.

7th In rejecting the testimony of Lapointe -

1. The testimony offered was admiss^{ble} only upon the principle of Setoff & Recoupment -
- 2^d No such right existed under the Contract.
- 3^d Mutual accounts existed between the parties growing out of the Contract but in no way affecting the question of Rent -

All of which is most respectfully submitted

L. Hearn
For the Defl^{or} in Error

^{122.}
Supreme Court

Alpheus Stewart &
J. F. Temple for us &c
as
John Lapoint

Written Argument

Co. Haven atty
for depts in Amer

John Laporte

Supreme Court
In Error

Alpheus Stevens

Now comes the defendant
in error and his appearance in the
case, and it is agreed that this case be
submitted to the Court on written briefs which
are herewith submitted.

Chicago July 53

Shumway Barto & Torne
Atty for the Plaintiff in Error

C. Havron for the Defendant
Error

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Stipulation

Filed July 27. 1858.
L. Celand Clerk.

In the Supreme Court
John Lapointe

John F. Temple et al } Prof per the Plaintiff
vs } in error

The first error assigned is that the Court refused to dismiss the case for want of security for cost.

The Statute and Reports state in all cases in law or equity, when the party suing or for whose use the action is brought is a non resident - security for cost is required, otherwise the suit will be dismissed.

Revised Statute Page 126 Sec 1.

Due to the peculiarity of the distress warrant it may be hard to determine whether this action is brought in the name of a non resident or for the use of a non resident as will be seen by reference to the next question raised on the record. We find by turning to the statute the words to be "and in all cases in law or equity" and the enquiry is, does that include this case? It is therefore simply a question of construction in construing a statute we are to ascertain the object of the Law and the evil to be remedied.

Drawn on Statutes Page 694

The object was to insure the officers and the opposite party the collection of their costs and to prevent parties who are out of the reach of fee bills issued to the Sheriffs of this State and to insure the collection of their costs, & to prevent parties who are out of the reach of fee bills from sending to the Sheriffs of this State, making costs without having a responsible party within the State; to insure the collection.

of the costs, and in an ~~order~~ to ~~infer~~ that the so construed the statute that the intentions of the makers can be carried out.

Duane on Statutes Page 690. Says on this subject whenever the intention that the makers of the statute entertained can be ascertained, it ought to be followed in its construction.

The inquiry then remains, is this "a case in law or equity?" or within provisions of the law.

We have shown that it is within the object of making the law - Court; to insure the collection of cuts and make someone responsible thereof who resides within the State. It is within the letter & phraseology of the law. It is the words "all cases in law or equity", is as broad and comprehensive as language possibly can be.

But says the defendant in error this is not a case in law or equity? We say it is.

Case is defined to be, by Webster, "a cause or suit in Court", "a question a state of facts requiring a decision." Brewster's Law Dictionary defines case to be a suit or action.

This proceeding has the following characteristics in common with any other proceeding at law.

1st Cuts are made

2nd Witnesses are sworn & ~~examined~~ examined

3rd A Court is required to try the case as well as a jury.

4 The party is required to be summoned and the amount found due shall be certified to the person making the disbursements.

Now although the proceeding be a special one, yet

It bears all the distinctive marks of a case
at law in which security for cost would
be required

landlord

4th The landlord does not authorize
the distress to be made

5 The return is not sworn to & is
informal

6. It does not show where the rent
was due

This motion was overruled by
the court below - which is one of the errors
complained of

The distress warrant should have been
in the name of Tenant & Temple, and
not in the name of Alpheus Tenant for
whose use the distress is made. The
distress warrant commences "John Deponette
is partly indebted to John & Temple &
Alpheus Tenant for the use of Alpheus
Tenant - and the order of distress is I
do hereby authorize, & sign "Alpheus Tenant"
the order to distress is in the name of
of the person for whose use the action is
brought. It is This cannot be done -
Revised Statute Chap 334 Sec 6.

We assume these propositions that the
right to distress is a personal one, resulting
from the relation of landlord & tenant.
and the assignment of the debt does
not authorize or transfer the right to

dischain.

Dayles Landlord v. Tenant R. 383

When a lessor assigns his reversion, the assignee may for the priority of contract which subsists is by the 32 Henry 8, c 34 transferred from lessor to lessee; which law is adopted by the New York Statute. 1 R 8747 sec 28; yet in order to subvert an assignee to dischain the assignment must carry lease land. and the transfer of the rent will not carry with it the right to dischain.

Stocum v. Clark 3^d Hill R 446

Nor can it be said in answer to this, that the lease was with John & Benjamin Alpheus Stenard, and either can dischain. tho in deny. - one might be willing only for the sake of argument ^{to concede} that one of the joint tenants might authorize a dischain but he must do it in the name of all the landlords. This is settled in Hedman v. Bates & Salke R 390, which case, is in upholding the defendant made conscience as to the Court of Salisbury, for rent arrears, for that it was assigned, and made a lease &c, and did and reversion descends to the same Court of Salisbury and therefore in law. the Court held the conscience

might, for both sisters must join; both take
as heirs by descent, and make but one
heir to whom cent descends as an
entail inheritance

Distress does not ^{lie} ~~lie~~ ^{rest} at Common Law, but
only by Statute, ^{in this state} one Statute is, As shall be
lawful for the landlord by himself or his
agent, to seize for rent; now who was
the landlord? Tenant & Sample; who is
authorized to distress? - ^{does} to whom the cent
was going and who was landlord? This
is shown by the fact that the distress
warrant is to be filed in Court; and who
ever heard of one person suing for a
joint claim - the distressing is preliminary
to or is setting in motion a suit.

The Statute solves this question & shows
that the agent to distress is personal
to the landlord & must be done in
the name of the landlord - which is
not done in this case.

again. We say the Court was in striking the
note given in this case, from the
files and secondly the Court was
in refusing to receive the testimony
that Laporte had a claim for
sawing done under the contract of lease.
The Court struck the notes from
the files and refused to receive the
testimony under the decision of
Stuber vs. Ellis 14 DWR 75.

Now we submit that that case and this
is different; We claim that by a proper
construction of the contract the sawing
is payment on the cent. that the
contract is indivisible, and that Stewart &
Temple cannot distrain for cent while
they are owing ~~to~~ Laporte for sawing
under the same contract were there
the amount of cent, as was actually
the case in this instance. He was bound
to do their sawing, and to give their
work the preference. That the sawing
and cent was part of a parcel of the same
transaction. and inseparable. and shows
errors to ~~the~~ have been committed
Shumway, Harto. & Fome
Attys for Plaintiff
in error

John Lapointe

vs

Alphens Stuart

Bruf for the Plaintiff
in sum

Sherrinway. Wante
Torne

122

John Lapointe
Alpheus Steward del.

1855

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