No. 12917

Supreme Court of Illinois

Sherwood

vs.

Kennicott

71641

ARGUMENT

IN THE CASE OF

PHILLIP SHERWOOD, APPELLEE,

ADS.

WILLIAM H. KENNICOTT, APPELLANT.

BEFORE THE

SUPREME COURT OF ILLINOIS,

MADE ON BEHALF OF THE APPELLEE.

At the April Term, 1858.

BY

PERKINS BASS AND JUNIUS MULVEY, ESQRS.

OF CHICAGO.

W. CRAVENS & Co.

BEN FRANKLIN JOB PRINTING OFFICE, 132 LAKE STREET.

1858.

IN THE SUPREME COURT.

PHILLIP SHERWOOD, APPELLEE,
ADS.
WILLIAM H. KENNICOTT, APPELLANT } Appeal from Cook County Circuit Court.

ARGUMENT FOR THE DEFENCE.

On the trial of this cause in the Court below, the defendant sought to establish that he had *kept* his covenant, the alleged breach of which is the cause of action in this suit, and we relied upon this as our defence to the suit. We claimed that the defendant had made a virtual surrender of the premises in compliance with the terms of his lease; that the plaintiff had accepted the same; that the defendant did all the law required him to do and all that he could do in the performance of his covenant.

We sought to establish the fact, that the plaintiff had authorized the witness, John Maynard, whose testimony appears in the case, to demand possession of the premises on the first day of May, 1856; that in accordance with his authority he *did* demand possession and that it was given him.

In support of our position we submit that the evidence shows that the plaintiff gave a lease of the premises to Maynard for five years, to commence on the first day of May, 1856, and by the testimony of Mrs. Van Buskirk and John Maynard it is is shown that prior to the first day of May, 1856, Maynard called at the house on the premises in question and instructed John Van Buskirk, who was living in the same, and was

Bright vs: *Eyon*, 1 Barrow 390.
Jackson vs. *Loomis*, 12 Wend. 27
Fowler vs. *Etna Insurance Company*, 7 Wend 270.

If upon the strength of what Maynard swore, this court is to reverse the judgment and set aside the verdict, may not the opinion of the court be founded upon testimony discredited by the jury and court below.

The jury saw him and heard him testify, and they may have seen that in his manner which induced them to disbelieve him either in whole or in part.

While the record may transmit to this court the actual words spoken by the witness, it can give no *fac simile* of his manner of testifying, the hesitation or partiality manifested on the trial.

Considerations like these always operate to determine a court to presume in favor of a verdict;—

Bennett vs- *Hardaway*, 6 Munf. 125.
Carrington vs. *Bennett*, 1 Leigh 340.

In the case of *Cunningham* vs. *Magoun* 18 Pick 13, Justice Shaw says;—"The great principle which is at "the basis of jury trials is not to be lost sight of, that to "matters of law the court are to answer to all con- "troverted facts to the jury."

The verdict of the jury is practically to be taken for the truth; and there is abundant authority to show that the sufficiency of evidence is the proper subject matter for the jury to determine, and if they are satisfied the court will not, unless there is manifest error intefere with their finding.

State vs. *Sartor*, 2 Strobhr 60.
Bennet vs. *State*, 8 Eng. 695.

We endeavored to establish the fact that Maynard entered upon the premises on the first day of May, 1855, for the purpose of taking possession; and has evidence of it, proved the acts and declarations of Maynard in relation to it, which we insist was proper.—1 Chitt. General Prac. 574, and was sufficient to warrant the jury in finding so.—*Holly* vs. *Brown*, 14 Conn. 255.

We also sought to show that Van Buskirk was made the agent or what amounts to the same thing, the ten-

ant of Maynard, and acted in this matter in that capacity.

And we submit that there is evidence to establish that fact; it is not *necessary* that positive evidence of it should have been aduced, even if the jury inferred the fact from circumstances which were not conclusively established, they were warranted in finding it.—Price Heirs vs. Evans & Co,, 4 B Munroe 389.

We tried to establish, that by the instructions and request made by Maynard to Mrs. Van Buskirk, two or three days before the first day of May, 1856, he created her his tenant, and as evidence of it, cited the conduct of the parties in reference to each other in respect to the premises:—*Rainy* vs. *Copps*, 22 Ala. 288.

A married woman is not incompetent to receive a lease, nor is the express assent of her husband necessary, for the estate vests till he dissents;—*Swaine* vs. *Holman* Hob. 204, Co. Lit. 3 a.

And if Mrs. Van Buskirk was made the tenant of Maynard. we argued that her possession was his possession, and his possession was the plaintiffs possession;—*Carter* vs. *Hammett*, 18 Barb. N. Y 608.

We submit that there was evidence to support all the positions we assumed, and that it was the province of the jury to determine the *sufficiency* of that evidence;—

Bennett vs. *State*, 8 Eng. 695

Johnson vs. *Moulton*, 1 Scam. 532.

If there was any legal and competent evidence before the jury to maintain and support their verdict, the court has no legal authority to grant a new trial on the ground that the verdict is *without* evidence;—*Warner* vs. *Robertson*, 13 Geo. 370.

We conclude our notice of the first point made by the plaintiff by observing that it is the uniform language of the courts, that in reviewing the verdicts of juries, if there is contradictory evidence, or evidence that might induce a finding either way, or that might leave a doubt which way they would find, the court, in all such cases, refuses to interfere by granting a new trial, when that is the only ground upon which it is sought.

The question is not whether the court would have given such a verdict, not whether they are satisfied with it, but whether the verdict may be supported by any evidence in the case;—

Lowry vs. *Orr*, et al, 1 Gilman 84.
Allen vs. *Garesche*, 13 Missouri 311.
Wendell vs. *Safford*, 12 N. Hamp. 171.

To the second point made the by plaintiff in this case, we reply, that though the lease to Maynard was only an executory contract at first, it became an *executed* contract, when, with his lease in his pocket, he went on to the premises on the first day of May, 1856, and permitted Mrs. Van Buskirk to remain in possession in accordance with the previous instructions he had given her.

He then had control of the premises, and it was optional whether he would occupy them, or permit another person to occupy them.

Any act of his on that day which could be construed into a taking of possession, would of itself, operate to vest his term in possession, and from that time his lease would cease to be an executory contract.

We submitted it to the jury, whether or not it was fairly inferable from his conduct, that he had taken possession, or done that which was equivalent to it. Very slight evidence is sufficient to establish this.

The taking a key of a house may be enough;—*Little* vs. *Martin*, 3 Wend. 219.

If the plaintiff or his tenant had possession, it was a sufficient surrender on the part of the defendant within the meaning of his covenant, unless it can be shown that he subseqsently re-entered and claimed them again; and this it is not pretended that the defendant did. We think that the evidence warranted the presumption that Maynard did acquire possession, and if so, his subsequent surrender does not discharge him from his liability, or shift it to the defendant, or divest the rights of Van Buskirk;—*McKenzie* vs. *Lexington*, 4 Dana 129.

In reply to the third point relied upon by the plaintiff. We claim that there is testimony upon every material and necessary element in our defence, a sufficiency of testimony to warrant the verdict in this case.

We sought simply to show that we complied with our covenant, and to adduce sufficient proof to establish it. And if the verdict is founded on only very slight evidence, that is not a sufficient reason for setting it aside:—*Goodman* vs. *Smith*, 4 Dev. 450. Nor merely because there is insufficiency of proof;—*Angus* vs. *Dickinson*, 1 Meigs 459.

Upon the fourth and fifth points made by the plaintiff, we submit that the case was fairly and fully submitted upon its merits, by the instructions given on the part of the defence: that such instructions contained no misdirection in matters of law. If the jury did not understand them, that is no reason why a new trial should be granted:—*Raymond* vs. *Nye*, 5 Metc. 151.

And if the instructions were *not full*, upon all the evidence, or even had they been ambiguous, as the plaintiff asked for nothing further, by way of explanation, that constitutes no cause for a reversal of the judgment.

If the question whether the defence was made out was not fairly submitted upon the instructions, it was the duty of the counsel for the plaintiff to ask the necessary and additional explanation;—*Rhodes* vs. *Sherrod*, 9 Ala. 63.

Mere omissions in the charge of a court afford no ground for a new trial, unless it is *manifest* that the jury erred through *want* of instructions and have found a verdict contrary to law;—*Den* vs. *Sinnickson*, 4 Halst. 149,

In reply to the last point of the plaintiff, we have to say, that it seems to us a strange application of the principles of justice to permit the plaintiff to empower a party to act for him in a specific capacity, and because while in that capacity that party does an act which operates injuriously to his interests, that he can make this a pretext for resorting to an entirely disinterested and innocent party for damages on account of it.

It is not pretended to be shown that the defendant

had any thing at all to do with the continuing in possession of Van Buskirk, but on the contrary, his entire good faith in the matter is shown by the testimony of Mrs. Van Buskirk, who testifies that he came there to enquire how it was she was remaining in possession, and she told him she was remaining at the instance and request of Maynard.

He had nothing at all to do with her or Maynard in the arrangement made between them, in reference to the continuing in possession.

Now to insist that he should be made the victim of the fraud perpetrated upon the plaintiff, by the plaintiffs own agent, is to claim that which shocks every man's sense of justice, and for the support of which we are confident no law can be produced.

The law is, that a principal is liable to third parties for the fraud or misconduct of his agent within the line of business entrusted to him, where such fraud operates injuriously to such parties.

Peto vs. *Hugen*, 5 Esp. 135.

Huckman vs. *Fernil*, 3 M. and W. 505

And we are not aware that the principal can have a remedy against an entire stranger for the recovery of damages for the misconduct of his own agent, when he himself is made to suffer by it.

We have confined ourselves thus far to noticing the points made by the plaintiff. Let us now look at the case upon its merits as presented by the record. The suit is brought against the defendant for the recovery of rent of premises occupied by a third party.

The plaintiff endeavored to establish that, that third party was placed there by the defendant.

The defendant sought to show that he was placed there by the plaintiff or his agent.

The defendant admits that Van Buskirk was originally admitted to possession of the premises by him, for the unexpired term of his lease of the plaintiff.

Now, it is in evidence, that near the time of the expiration of that term, John Maynard, a lessee of the plaintiff for the same premises, came to Van Buskirk

and gave him permission to remain, and that in consequence of such permission, Van Buskirk did remain. By consequence of this, Van Buskirk claimed to hold over, and did continue in possession of the premises, claiming under Maynard.

How could the defendant make a more complete delivery of the premises than he did? Now here was a new tenant of the plaintiff, with a lease to take effect immediately on the expiration of the defendants lease.

This new tenant says to the defendants under-tenant "you may remain on the commencement of my lease." Now, we insist that here was a virtual surrender of the premises by the defendant, and an acceptance of the same by the plaintiffs tenant, and that such surrender was as an effectual compliance with that covenant as if the same had been made to the plaintiff in person.

What more could the defendant do? Here was Van Buskirk upon the premises by the permission of Maynard. Maynard himself had the right to possession, and had also the right to permit any one else to have possession.

On the contrary the defendant had no right to possession, and had no right to disposess Van Buskirk.

He had no remedy to resort, to compel him to surrender up the premises; not having a right to possession he could not sustain an action of forcible entry and detainer, and not having title he could not bring ejectment

Now the continuance of Van Buskirk upon the premises was owing to the acts of Maynard, the plaintiffs own agent. He was the sole and exclusive agent in bringing it about, and the defendant had no complicity in the matter.

The verdict in this case does the plaintiff no injustice If he has been injured, he has his remedy, if he will pursue it against the proper person. He misconceived his rights when he brought this suit against the defendant.

Maynard is the only one who could have wronged the plaintiff, and is the one who should answer for his own acts.

He is undoubtedly liable for the use and occupation of the premises from which he *voluntarily* abstained. *Westlake* vs. *DeGraw*, 25 Wend 669.

Upon a review of the whole case we do not see how the court can come to any other conclusion, than that the cause has been fully and fairly tried upon its merits, and that no injustice has been done to the plaintiff by the verdict.

And unless the court should see some *strong probable* ground for believing otherwise, then there can be no reason why the verdict in this case should be disturbed.

Eldridge, et al vs. *Huntington*, 2 Scam. 535.

Wheeler vs. *Shields*, 2 Scam. 348.

Branch vs. *Doane*, 17 Conn. 402.

PERKINS BASS,
JUNIUS MULVEY,
Attorneys for Appellee.

~~168~~ 38

Filed May 3d 1858

L Leland

Clerk

ARGUMENT

IN THE CASE OF

PHILLIP SHERWOOD, APPELLEE,

ADS.

WILLIAM H. KENNICOTT, APPELLANT.

BEFORE THE

SUPREME COURT OF ILLINOIS,

MADE ON BEHALF OF THE APPELLEE.

At the April Term, 1858.

BY

PERKINS BASS AND JUNIUS MULVEY, ESQRS.

OF CHICAGO.

W. CRAVENS & Co.

BEN FRANKLIN JOB PRINTING OFFICE, 132 LAKE STREET.

1858.

IN THE SUPREME COURT.

PHILLIP SHERWOOD, APPELLEE,
ADS.
WILLIAM H. KENNICOTT, APPELLANT } Appeal from Cook County Circuit Court.

ARGUMENT FOR THE DEFENCE.

On the trial of this cause in the Court below, the defendant sought to establish that he had *kept* his covenant, the alleged breach of which is the cause of action in this suit, and we relied upon this as our defence to the suit. We claimed that the defendant had made a virtual surrender of the premises in compliance with the terms of his lease; that the plaintiff had accepted the same; that the defendant did all the law required him to do and all that he could do in the performance of his covenant.

We sought to establish the fact, that the plaintiff had authorized the witness, John Maynard, whose testimony appears in the case, to demand possession of the premises on the first day of May, 1856; that in accordance with his authority he *did* demand possession and that it was given him.

In support of our position we submit that the evidence shows that the plaintiff gave a lease of the premises to Maynard for five years, to commence on the first day of May, 1856, and by the testimony of Mrs. Van Buskirk and John Maynard it is is shown that prior to the first day of May, 1856, Maynard called at the house on the premises in question and instructed John Van Buskirk, who was living in the same, and was

the undertenant of the defendant, to remain in possession on the commencement of his lease from the plaintiff. Up to this point the testimony of the two witnesses agrees.

The language of Maynard when called by the plaintiff, as quoted in the record, in reference to what he said to Mr. Van Buskirk, after consulting with Mr. Mather, where he says;—"I then told Mr. Van Buskirk I would have nothing more to do with it," is considered by the plaintiff as a revocation of his permission to remain, given to Mr. Van Buskirk, which is at variance with Mrs. Van Buskirk's testimony.

We insist it is by no means clear, that what Maynard said amounted to a revocation.

We think it very doubtful, and claim the benefit of that doubt in the minds of the jury.

It is the only evidence on that point in the case; and if it is to be so construed, it is in direct conflict with all the subsequent acts of Maynard. But for the purpose of this argument, we will concede this to be as the plaintiff regards it.

Now, have we no testimony to show, that if he did then make a revocation of his permission to remain, he afterwards revived and renewed that permission? His own subsequent acts, shown by his own testimony, strongly warrant that presumption. The testimony of Mrs. Van Buskirk, we think, is *conclusive* that he did. She testifies that Maynard told her, *two or three days* before the first day of May, that he would demand possession on the first day of May, and *instructed* her to *say* that "she would not give up possession." Now Maynard himself testifies that he *did* demand possession on the first day of May, and after making the demand threw up the lease, and Mrs. Van Buskirk says she then remained there at *his* request; clearly negativing a revocation by him of his permission to remain. Now we insist that here was testimony sufficient to warrant a jury in presuming that Van Buskirk acted as agent for Maynard in this whole transaction.

Whether Van Buskirk knew or not, that Maynard

would surrender his lease after his taking possession is a consideration of no moment so far as the defendant is concerned. If Maynard permitted Van Buskirk to remain, and Van Buskirk did remain in consequence of such permission, although uncertain as to how long he could do so, that was sufficient for the purposes of this defence.

If he acted as agent, the relation of landlord and tenant was established between them.—*Farren* vs. *Edmundson*, 4 B, Monroe, 605.

Every relation in life may be presumed from circumstances and the conduct of the parties.—*Rainey* vs. *Copps*, 22, Ala, 291.

In regard to the variance between the testimony of Maynard and Mrs. Van Buskirk and the bearing it has upon the verdict in this case, we have to say that in a case like this the credibility of a witness is considered by the jury, presumptions are raised and inferences made from his testimony, viewing him in the relation in which he stands to the case. From the manner of his giving his testimony, a portion of what he says may be believed and other portions may be unworthy of credit, and if Maynard's testimony does not wholly go to establish the defence, and is in some respects inconsistent with it, it fell within the province of the jury to believe or disbelieve the whole or any portion of it, as they saw fit. And if the verdict in the case was irreconcilable with his testimony or any portion of it, but was warranted by the testimony of Mrs. Van Buskirk, that is not a sufficient ground to warrant this court in disturbing such verdict, but on the contrary, it is the constant policy of the courts in such cases to refuse a new trial;

Lowry vs. *Orr*, et. al, 1 Gilm. 84.
Wendall vs. *Safford*, 12 N. Hamp. 171.
Cunningham vs. *Magoun*, 18 Pick. 13.
Douglass vs. *Tousey*, 2 Wend. 352.
Coffin vs. *Phoenix Insurance Co.*, 15 Pick. 291.
Wait vs. *McNeil*, 7 Mass. 261.
Hammonds vs. *Wadhams*, 5 Mass. 353.

Bright vs: *Eyon*, 1 Barrow 390.
Jackson vs. *Loomis*, 12 Wend. 27
Fowler vs. *Etna Insurance Company*, 7 Wend 270.

If upon the strength of what Maynard swore, this court is to reverse the judgment and set aside the verdict, may not the opinion of the court be founded upon testimony discredited by the jury and court below.

The jury saw him and heard him testify, and they may have seen that in his manner which induced them to disbelieve him either in whole or in part.

While the record may transmit to this court the actual words spoken by the witness, it can give no *fac simile* of his manner of testifying, the hesitation or partiality manifested on the trial.

Considerations like these always operate to determine a court to presume in favor of a verdict;—

Bennett vs- *Hardaway*, 6 Munf. 125.
Carrington vs. *Bennett*, 1 Leigh 340.

In the case of *Cunningham* vs. *Magoun* 18 Pick 13, Justice Shaw says;—"The great principle which is at "the basis of jury trials is not to be lost sight of, that to "matters of law the court are to answer; to all con- "troverted facts, to the jury."

The verdict of the jury is practically to be taken for the truth; and there is abundant authority to show that the sufficiency of evidence is the proper subject matter for the jury to determine, and if they are satisfied the court will not, unless there is manifest error intefere with their finding.

State vs. *Sartor*, 2 Strobhr 60.
Bennet vs. *State*, 8 Eng. 695.

We endeavored to establish the fact that Maynard entered upon the premises on the first day of May, 1855, for the purpose of taking possession; and has evidence of it, proved the acts and declarations of Maynard in relation to it, which we insist was proper.—1 Chitt. General Prac. 574, and was sufficient to warrant the jury in finding so.—*Holly* vs. *Brown*, 14 Conn. 255.

We also sought to show that Van Buskirk was made the agent or what amounts to the same thing, the ten-

ant of Maynard, and acted in this matter in that capacity.

And we submit that there is evidence to establish that fact; it is not *necessary* that positive evidence of it should have been aduced, even if the jury inferred the fact from circumstances which were not conclusively established, they were warranted in finding it.—Price Heirs vs. Evans & Co., 4 B Munroe 389.

We tried to establish, that by the instructions and request made by Maynard to Mrs. Van Buskirk, two or three days before the first day of May, 1856, he created her his tenant, and as evidence of it, cited the conduct of the parties in reference to each other in respect to the premises:—*Rainy* vs. *Copps*, 22 Ala. 288.

A married woman is not incompetent to receive a lease, nor is the express assent of her husband necessary, for the estate vests till he dissents;—*Swaine* vs. *Holman* Hob. 204, Co. Lit. 3 a.

And if Mrs. Van Buskirk was made the tenant of Maynard. we argued that her possession was his possession, and his possession was the plaintiffs possession;—*Carter* vs. *Hammett*, 18 Barb. N. Y 608.

We submit that there was evidence to support all the positions we assumed, and that it was the province of the jury to determine the *sufficiency* of that evidence;—

Bennett vs. *State*, 8 Eng. 695

Johnson vs. *Moulton*, 1 Scam. 532.

If there was any legal and competent evidence before the jury to maintain and support their verdict, the court has no legal authority to grant a new trial on the ground that the verdict is *without* evidence;—*Warner* vs. *Robertson*, 13 Geo. 370.

We conclude our notice of the first point made by the plaintiff by observing that it is the uniform language of the courts, that in reviewing the verdicts of juries, if there is contradictory evidence, or evidence that might induce a finding either way, or that might leave a doubt which way they would find, the court, in all such cases, refuses to interfere by granting a new trial, when that is the only ground upon which it is sought.

The question is not whether the court would have given such a verdict, not whether they are satisfied with it, but whether the verdict may be supported by any evidence in the case;—

Lowry vs. *Orr*, et al, 1 Gilman 84.
Allen vs. *Garesche*, 13 Missouri 311.
Wendell vs. *Safford*, 12 N. Hamp. 171.

To the second point made the by plaintiff in this case, we reply, that though the lease to Maynard was only an executory contract at first, it became an *executed* contract, when, with his lease in his pocket, he went on to the premises on the first day of May, 1856, and permitted Mrs. Van Buskirk to remain in possession in accordance with the previous instructions he had given her.

He then had control of the premises, and it was optional whether he would occupy them, or permit another person to occupy them.

Any act of his on that day which could be construed into a taking of possession, would of itself, operate to vest his term in possession, and from that time his lease would cease to be an executory contract.

We submitted it to the jury, whether or not it was fairly inferable from his conduct, that he had taken possession, or done that which was equivalent to it. Very slight evidence is sufficient to establish this.

The taking a key of a house may be enough;—*Little* vs. *Martin*, 3 Wend. 219.

If the plaintiff or his tenant had possession, it was a sufficient surrender on the part of the defendant within the meaning of his covenant, unless it can be shown that he subseqsently re-entered and claimed them again; and this it is not pretended that the defendant did. We think that the evidence warranted the presumption that Maynard did acquire possession, and if so, his subsequent surrender does not discharge him from his liability, or shift it to the defendant, or divest the rights of Van Buskirk;—*McKenzie* vs. *Lexington*, 4 Dana 129.

In reply to the third point relied upon by the plaintiff. We claim that there is testimony upon every material and necessary element in our defence, a sufficiency of testimony to warrant the verdict in this case.

We sought simply to show that we complied with our covenant, and to adduce sufficient proof to establish it. And if the verdict is founded on only very slight evidence, that is not a sufficient reason for setting it aside:—*Goodman* vs. *Smith*, 4 Dev. 450. Nor merely because there is insufficiency of proof;—*Angus* vs. *Dickinson*, 1 Meigs 459.

Upon the fourth and fifth points made by the plaintiff, we submit that the case was fairly and fully submitted upon its merits, by the instructions given on the part of the defence: that such instructions contained no misdirection in matters of law. If the jury did not understand them, that is no reason why a new trial should be granted:—*Raymond* vs. *Nye*, 5 Metc. 151.

And if the instructions were *not full*, upon all the evidence, or even had they been ambiguous, as the plaintiff asked for nothing further, by way of explanation, that constitutes no cause for a reversal of the judgment.

If the question whether the defence was made out was not fairly submitted upon the instructions, it was the duty of the counsel for the plaintiff to ask the necessary and additional explanation;—*Rhodes* vs. *Sherrod*, 9 Ala. 63.

Mere omissions in the charge of a court afford no ground for a new trial, unless it is *manifest* that the jury erred through *want* of instructions and have found a verdict contrary to law;—*Den* vs. *Sinnickson*, 4 Halst. 149,

In reply to the last point of the plaintiff, we have to say, that it seems to us a strange application of the principles of justice to permit the plaintiff to empower a party to act for him in a specific capacity, and because while in that capacity that party does an act which operates injuriously to his interests, that he can make this a pretext for resorting to an entirely disinterested and innocent party for damages on account of it.

It is not pretended to be shown that the defendant

had any thing at all to do with the continuing in possession of Van Buskirk, but on the contrary, his entire good faith in the matter is shown by the testimony of Mrs. Van Buskirk, who testifies that he came there to enquire how it was she was remaining in possession, and she told him she was remaining at the instance and request of Maynard.

He had nothing at all to do with her or Maynard in the arrangement made between them, in reference to the continuing in possession.

Now to insist that he should be made the victim of the fraud perpetrated upon the plaintiff, by the plaintiffs own agent, is to claim that which shocks every man's sense of justice, and for the support of which we are confident no law can be produced.

The law is, that a principal is liable to third parties for the fraud or misconduct of his agent within the line of business entrusted to him, where such fraud operates injuriously to such parties.

Pelo vs. *Hugen*, 5 Esp. 135.

Huckman vs. *Fernil*, 3 M. and W. 505

And we are not aware that the principal can have a remedy against an entire stranger for the recovery of damages for the misconduct of his own agent, when he himself is made to suffer by it.

We have confined ourselves thus far to noticing the points made by the plaintiff. Let us now look at the case upon its merits as presented by the record. The suit is brought against the defendant for the recovery of rent of premises occupied by a third party.

The plaintiff endeavored to establish that, that third party was placed there by the defendant.

The defendant sought to show that he was placed there by the plaintiff or his agent.

The defendant admits that Van Buskirk was originally admitted to possession of the premises by him, for the unexpired term of his lease of the plaintiff.

Now, it is in evidence, that near the time of the expiration of that term, John Maynard, a lessee of the plaintiff for the same premises, came to Van Buskirk

and gave him permission to remain, and that in consequence of such permission, Van Buskirk did remain. By consequence of this, Van Buskirk claimed to hold over, and did continue in possession of the premises, claiming under Maynard.

How could the defendant make a more complete delivery of the premises than he did? Now here was a new tenant of the plaintiff, with a lease to take effect immediately on the expiration of the defendants lease.

This new tenant says to the defendants under-tenant "you may remain on the commencement of my lease." Now, we insist that here was a virtual surrender of the premises by the defendant, and an acceptance of the same by the plaintiffs tenant, and that such surrender was as an effectual compliance with that covenant as if the same had been made to the plaintiff in person.

What more could the defendant do? Here was Van Buskirk upon the premises by the permission of Maynard. Maynard himself had the right to possession, and had also the right to permit any one else to have possession.

On the contrary the defendant had no right to possession, and had no right to disposess Van Buskirk.

He had no remedy to resort, to compel him to surrender up the premises; not having a right to possession he could not sustain an action of forcible entry and detainer, and not having title he could not bring ejectment

Now the continuance of Van Buskirk upon the premises was owing to the acts of Maynard, the plaintiffs own agent. He was the sole and exclusive agent in bringing it about, and the defendant had no complicity in the matter.

The verdict in this case does the plaintiff no injustice If he has been injured, he has his remedy, if he will pursue it against the proper person. He misconceived his rights when he brought this suit against the defendant.

Maynard is the only one who could have wronged the plaintiff, and is the one who should answer for his own acts.

He is undoubtedly liable for the use and occupation of the premises from which he *voluntarily* abstained. *Westlake* vs. *DeGraw*, 25 Wend 669.

Upon a review of the whole case we do not see how the court can come to any other conclusion, than that the cause has been fully and fairly tried upon its merits, and that no injustice has been done to the plaintiff by the verdict.

And unless the court should see some *strong probable* ground for believing otherwise, then there can be no reason why the verdict in this case should be disturbed.

Eldridge; et al vs. *Huntington*, 2 Scam. 535.
Wheeler vs. *Shields*, 2 Scam. 348.
Branch vs. *Doane*, 17 Conn. 402.

PERKINS BASS,
JUNIUS MULVEY,
Attorneys for Appellee.

~~#8~~ 38

Filed May 3rd 1858
Edmund
Clerk

SUPREME COURT.

SUPREME COURT.

WILLIAM H. KENNECOTT, *Appellant*,
vs.
PHILLIP SHERWOOD, *Appelee*.

Appellant's Points.

This is an action of covenant upon a lease executed by the plaintiff, to the defendant of certain premises in the City of Chicago, from the first day of May A. D. 1855, for and during and until the first day of May A. D. 1856; in and by which lease the said defendant among other things, covenanted that he would yield up the said demised premises at the expiration of said term to the plaintiff; and it is for a breach of this covenant that this suit is brought.

It was not claimed or protended upon the trial in the count below, and we assume that it will not be disputed by the defendant in this court, but that the plaintiff in the first instance made out his case by testimony which established, that John Van Buskirk, who was an under tenant of the defendant, and let into possession of the demised premises by him, continued in the possession of the said premises, without the consent of the plaintiff after the expiration of said term, and until about the 22nd day of October 1856, when he died; and that his widow, Sophia Van Buskirk, continued after his death to possess said premises, without the consent of the plaintiff until the first day of May 1857, and that the defendant therefore failed to yield up said premises, by clearing the same of such under tenants and delivering possesion thereof to the plaintiff, as by his covenant he was bound to do.

But the defendant claimed as a defence and sought to establish upon the trial, that the plaintiff before the expiration of the term of said lease, to wit: on the 4th day of April 1856, executed another lease of the same premises to one John Maynard, for a term of five years, to commence and take effect from and after the said first day of May 1856; and that said Van Buskirk held said premises after said first day of May until his death, and his widow after his death until the end of the year, not under the defendant, but under and by virtue and authority of said Maynard's title derived from said lease from said plaintiff, and the said Van Buskirk and his widow after his death, having acquired the right to hold said premises after said first day of May, through a title thus derived from the plaintiff through the Maynard lease, the defendant was discharged from any obligation under the said covenant to remove them; and it is in relation to this defence that the questions made upon this appeal arise; and we insist.

I.—That this defence failed for want of proof; That there was an entire absence of proof tending to establish a necessary and indispensable element of the same.

The only witnesses who testified on the subject of this defence were John Maynard and Sophia Van Buskirk, witnesses called by the defendant himself. The testimony of these witnesses establishes that soon after Maynard received his lease, and some time in the forepart of April he became sick of his bargain, claiming that the premises were not as good as the plaintiff had represented, and desired to surrender his lease; he accordingly went to Van Buskirk and made known his desires and plans, and they soon hit upon a scheme which was considered mutually beneficial. Maynard agrees that Van Buskirk may remain after the first of May, and Van Buskirk agrees that Maynard may surrender his lease on the first of May, and it was agreed between them that Maynard should demand possession of the premises on the first of May and Van Buskirk should refuse possession, and that Maynard should go to the plaintiff and surrender his lease, on the ground that he could not get possession. Thus these parties hoped that they had succeeded in rendering a mutual service, and Van Buskirk indulged the vain delusion that he could acquire a right to hold these premises after the first of May, and yet agree to a surrender of the lease which was the very foundation of this right and without which it could not be for a moment supported. But afterwards and before the first day of May, the parties having some misgivings as to whether this scheme was not after all more cute than sound, they seek legal advice, and having, by consulting counsel, ascertained that this sort of legal legerdemain was by no means admissible, the whole thing is abandoned, and Maynard gives no further permission to Van Buskirk to remain on the premises after the first of May, and when the first of May came. Maynard did in fact surrender his lease to the plaintiff. And it is submitted, that the testimony of these witnesses does not in the least tend to establish a right in Van Buskirk to hold the premises under the Maynard lease, for one moment, as against the plaintiff or Sherwood. And if so, then it does not tend to establish the defence which depends entirely upon showing that Van Buskirk had such a right, such a title, under the Maynard lease that Sherwood could not remove him.

II.—But again the Maynard lease remained a mere executory contract until the term should commence, by actual possession taken of the premises thereunder. Until possession there was no privity of estate between the plaintiff and Maynard, nor did the relation of landlord and tenant exist between them. Maynard had no term —no estate in the premises, but a mere executory contract

for a term —an estate, at a future day. If therefore Van Buskirk, before the first day of May in good faith and without any agreement or understanding on his part, that Maynard should surrender his lease, had made an agreement with Maynard to hold the premises after the first of May as his under tenant, and Maynard had afterwards, but before his term and estate had vested in possession, surrendered his lease to the plaintiff without the consent or knowledge of Van Buskirk; even then Van Buskirk would have acquired no title or right to remain in the premises after the first of May. His rights would have fallen with the Maynard lease. How much less then could he have acquired any such right or title when he received his permission to remain, only with the express understanding and agreement on his part that Maynard should surrender his lease.

5 Barbour's Sup. Court Rep. 601–605.

III.—If there was an entire want of testimony upon a material and necessary element in the defence, the verdict sustaining such defence is erroneous as matter of law, and the motion for a new trial should have been sustained and for the error of the Circuit Judge in overruling the motion this count should reverse the Judgment.

Foot vs. Sabin, 19 John's Rep. 154.
Baldwin vs. Delevan, 2 Hill 125.
Teft vs. Teft, 4 Denio 175.
Felt vs. Williams, 1 Scam. 206.
Amos vs. Sinnott, 4 Scam. 447.
Phelps vs. Jenkins, 4 Scam. 51.
Davenport vs. Gear, 2 Scam. 496.

IV.—But in any view the plaintiff was at least entitled to have the case fully and fairly submitted to the Jury upon the testimony, for them to determine as a question of fact, whether the defence was made out. This we claim was not done, but submit that the first instruction for defendant as applicable to the case made by the testimony, was erroneous and calculated to mislead the Jury.

By this, the Jury were instructed peremptorily and unqualifiedly to find for the defendant, if they believed from the testimony that Maynard received a lease from the plaintiff, and if they also believed that Maynard instructed, requested or induced Van Buskirk to remain on said premises, and that he remained in con-

sequence; that is to say, if they should find these two propositions in the affirmative, a verdict for the defendant must follow, though they should find that it was arranged and agreed on the part of Van Buskirk, that Maynard should surrender his lease on the first of May, and that the lease was in fact surrendered, pursuant to such arrangement; and though they should find (as they clearly might from the testimony), that it was agreed that Van Buskirk should hold over after the first of May, not as subtenant of Maynard under his lease, but simply to assist Maynard to get rid of and surrender his lease by refusing possession, and thus enable Maynard to surrender, on the ground that he could not get possession; and even though they should find that Maynard and Van Buskirk, after taking counsel, abandoned and rescinded all arrangements and agreements by which Van Buskirk was to hold over after the first of May, and notwithstanding that they should find that the Maynard lease was finally in fact surrendered with the assent and agreement of the said Van Buskirk.

V.—We claim also that the second instruction given for the defendant was improper and calculated to mislead the Jury.

By it, the Court submitted to the Jury, as a question of fact, the proposition as to whether or no Maynard, on the first of May, claimed title to the premises under the lease from the plaintiff, when it appeared, from the undisputed testimony, that instead of his claiming title under this lease, he claimed the right to throw up and surrender the lease, and expressed a desire and intention to do so before this day; made an arrangement with Van Buskirk with a view to forward this intention, and did in fact surrender said lease on said first day of May.

VI.—It affords no defence to this action for the defendant to allege that he was misled and deceived, and induced to forbear any efforts to clear the premises and give the plaintiff possession after the first of May, by the false statement of Mrs. Van Buskirk, made to him on the second and third day of May, that she was holding by permission of Maynard, who then had a subsisting lease for five years from the plaintiff.

The plaintiff was in no wise a party or privy to this fraudulent statement, and if either of two innocent parties should suffer from the fraudulent conduct of Sherwood's own undertenant, whom he had let into possession of the premises, certainly Sherwood himself should be the victim, rather than the plaintiff.

GOODRICH, FARWELL & SMITH,
Attorneys for the Appellant.

38

Supreme Court

William H Kennedy
appellant

vs

Philip Sherwood
appellee

Appellants Points

Filed Apr 22, 1858
A Leland
Clerk

SUPREME COURT.

SUPREME COURT.

WILLIAM H. KENNECOTT, *Appellant*,
vs.
PHILLIP SHERWOOD, *Appelee*.
} *Appellant's Points.*

This is an action of covenant upon a lease executed by the plaintiff, to the defendant of certain premises in the City of Chicago, from the first day of May A. D. 1855, for and during and until the first day of May A. D. 1856; in and by which lease the said defendant among other things, covenanted that he would yield up the said demised premises at the expiration of said term to the plaintiff; and it is for a breach of this covenant that this suit is brought.

It was not claimed or protended upon the trial in the count below, and we assume that it will not be disputed by the defendant in this court, but that the plaintiff in the first instance made out his case by testimony which established, that John Van Buskirk, who was an under tenant of the defendant, and let into possession of the demised premises by him, continued in the possession of the said premises, without the consent of the plaintiff after the expiration of said term, and until about the 22nd day of October 1856, when he died; and that his widow, Sophia Van Buskirk, continued after his death to possess said premises, without the consent of the plaintiff until the first day of May 1857, and that the defendant therefore failed to yield up said premises, by clearing the same of such under tenants and delivering possesion thereof to the plaintiff, as by his covenant he was bound to do.

But the defendant claimed as a defence and sought to establish upon the trial, that the plaintiff before the expiration of the term of said lease, to wit: on the 4th day of April 1856, executed another lease of the same premises to one John Maynard, for a term of five years, to commence and take effect from and after the said first day of May 1856; and that said Van Buskirk held said premises after said first day of May until his death, and his widow after his death until the end of the year, not under the defendant, but under and by virtue and authority of said Maynard's title derived from said lease from said plaintiff, and the said Van Buskirk and his widow after his death, having acquired the right to hold said premises after said first day of May, through a title thus derived from the plaintiff through the Maynard lease, the defendant was discharged from any obligation under the said covenant to remove them; and it is in relation to this defence that the questions made upon this appeal arise; and we insist.

I.—That this defence failed for want of proof; That there was an entire absence of proof tending to establish a necessary and indispensable element of the same.

The only witnesses who testified on the subject of this defence were John Maynard and Sophia Van Buskirk, witnesses called by the defendant himself. The testimony of these witnesses establishes that soon after Maynard received his lease, and some time in the forepart of April he became sick of his bargain, claiming that the premises were not as good as the plaintiff had represented, and desired to surrender his lease; he accordingly went to Van Buskirk and made known his desires and plans, and they soon hit upon a scheme which was considered mutually beneficial. Maynard agrees that Van Buskirk may remain after the first of May, and Van Buskirk agrees that Maynard may surrender his lease on the first of May, and it was agreed between them that Maynard should demand possession of the premises on the first of May and Van Buskirk should refuse possession, and that Maynard should go to the plaintiff and surrender his lease, on the ground that he could not get possession. Thus these parties hoped that they had succeeded in rendering a mutual service, and Van Buskirk indulged the vain delusion that he could acquire a right to hold these premises after the first of May, and yet agree to a surrender of the lease which was the very foundation of this right and without which it could not be for a moment supported. But afterwards and before the first day of May, the parties having some misgivings as to whether this scheme was not after all more cute than sound, they seek legal advice, and having, by consulting counsel, ascertained that this sort of legal legerdemain was by no means admissible, the whole thing is abandoned, and Maynard gives no further permission to Van Buskirk to remain on the premises after the first of May, and when the first of May came, Maynard did in fact surrender his lease to the plaintiff. And it is submitted, that the testimony of these witnesses does not in the least tend to establish a right in Van Buskirk to hold the premises under the Maynard lease, for one moment, as against the plaintiff or Sherwood. And if so, then it does not tend to establish the defence which depends entirely upon showing that Van Buskirk had such a right, such a title, under the Maynard lease that Sherwood could not remove him.

II.—But again the Maynard lease remained a mere executory contract until the term should commence, by actual possession taken of the premises thereunder. Until possession there was no privity of estate between the plaintiff and Maynard, nor did the relation of landlord and tenant exist between them. Maynard had no term —no estate in the premises, but a mere executory contract

for a term—an estate, at a future day. If therefore Van Buskirk, before the first day of May in good faith and without any agreement or understanding on his part, that Maynard should surrender his lease, had made an agreement with Maynard to hold the premises after the first of May as his under tenant, and Maynard had afterwards, but before his term and estate had vested in possession, surrendered his lease to the plaintiff without the consent or knowledge of Van Buskirk; even then Van Buskirk would have acquired no title or right to remain in the premises after the first of May. His rights would have fallen with the Maynard lease. How much less then could he have acquired any such right or title when he received his permission to remain, only with the express understanding and agreement on his part that Maynard should surrender his lease.

5 Barbour's Sup. Court Rep. 601–605.

III.—If there was an entire want of testimony upon a material and necessary element in the defence, the verdict sustaining such defence is erroneous as matter of law, and the motion for a new trial should have been sustained and for the error of the Circuit Judge in overruling the motion this count should reverse the Judgment.

Foot vs. Sabin, 19 John's Rep. 154.
Baldwin vs. Delevan, 2 Hill 125.
Teft vs. Teft, 4 Denio 175.
Felt vs. Williams, 1 Scam. 206.
Amos vs. Sinnott, 4 Scam. 447.
Phelps vs. Jenkins, 4 Scam. 51.
Davenport vs. Gear, 2 Scam. 496.

IV.—But in any view the plaintiff was at least entitled to have the case fully and fairly submitted to the Jury upon the testimony, for them to determine as a question of fact, whether the defence was made out. This we claim was not done, but submit that the first instruction for defendant as applicable to the case made by the testimony, was erroneous and calculated to mislead the Jury.

By this, the Jury were instructed peremptorily and unqualifiedly to find for the defendant, if they believed from the testimony that Maynard received a lease from the plaintiff, and if they also believed that Maynard instructed, requested or induced Van Buskirk to remain on said premises, and that he remained in con-

sequence; that is to say, if they should find these two propositions in the affirmative, a verdict for the defendant must follow, though they should find that it was arranged and agreed on the part of Van Buskirk, that Maynard should surrender his lease on the first of May, and that the lease was in fact surrendered, pursuant to such arrangement; and though they should find (as they clearly might from the testimony), that it was agreed that Van Buskirk should hold over after the first of May, not as subtenant of Maynard under his lease, but simply to assist Maynard to get rid of and surrender his lease by refusing possession, and thus enable Maynard to surrender, on the ground that he could not get possession; and even though they should find that Maynard and Van Buskirk, after taking counsel, abandoned and rescinded all arrangements and agreements by which Van Buskirk was to hold over after the first of May, and notwithstanding that they should find that the Maynard lease was finally in fact surrendered with the assent and agreement of the said Van Buskirk.

V.—We claim also that the second instruction given for the defendant was improper and calculated to mislead the Jury.

By it, the Court submitted to the Jury, as a question of fact, the proposition as to whether or no Maynard, on the first of May, claimed title to the premises under the lease from the plaintiff, when it appeared, from the undisputed testimony, that instead of his claiming title under this lease, he claimed the right to throw up and surrender the lease, and expressed a desire and intention to do so before this day; made an arrangement with Van Buskirk with a view to forward this intention, and did in fact surrender said lease on said first day of May.

VI.—It affords no defence to this action for the defendant to allege that he was mislead and deceived, and induced to forbear any efforts to clear the premises and give the plaintiff possession after the first of May, by the false statement of Mrs. Van Buskirk, made to him on the second and third day of May, that she was holding by permission of Maynard, who then had a subsisting lease for five years from the plaintiff.

The plaintiff was in no wise a party or privy to this fraudulent statement, and if either of two innocent parties should suffer from the fraudulent conduct of Sherwood's own undertenant, whom he had let into possession of the premises, certainly Sherwood himself should be the victim, rather than the plaintiff.

GOODRICH, FARWELL & SMITH,
Attorneys for the Appellant.

No 38

Supreme Court

William H Kennedy
Appellant
vs
Phillip Sherwood
Appellee

Appellants Points

Filed Apr 21, 1858.
S. Leland
Clerk

Supreme Court
William H Kennicott
appellant
vs
Phillips & Sherwood
appellee

Assignment of Errors

And now on this twentieth day of April in the year of our Lord one thousand Eight hundred and fifty Eight comes the said William H Kennicott. at the April term of said Court before the said Justices of said Supreme Court, and says that in the record and proceedings and in the giving the Judgment aforesaid in this Cause. there are manifest Errors in this to wit: That the verdict of the jury upon which said Judgment was rendered is against law and unsupported and unwarranted by evidence — That the first instruction given on the party the defendant by the Circuit Judge was made Erroneous and calculated to mislead the jury — That the second instruction given by said Judge on the party said defendant was Erroneous and Calculated to mislead the jury — That the Circuit Court Erred in overruling the motion for a new trial upon the grounds upon which it was moved for; and the said William

H. Kennedy pray that the judgment aforesaid for the Errors aforesaid, and other Errors in the record and proceedings aforesaid may be reversed annulled and altogether held for nothing and that he be restored to all things which he hath lost by occasion of said Judgment &c

Goodrich Howell & Sinclair
Attorneys for said
Appellant

And the appellee says that there is no Error

Bass & Mulay
Attys for Appellee

United States of America } Pleas, before the Honorable George Manierre
STATE OF ILLINOIS, COUNTY OF COOK, S. S. }

Judge of the Seventh Judicial Circuit of the State of Illinois, and Sole Presiding Judge of the Circuit Court of Cook County, in the State aforesaid, and at a term thereof begun and held at the Court House in the City of Chicago, in said County, on the first Monday, (being the first day) of March in the year of our Lord one thousand eight hundred and Eighty Eight and of the Independence of the said United States the Eighty Second

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

Carter Harrison States Attorney.

John L Wilson Sheriff of Cook County.

Attest; W. J. Church Clerk.

Be it remembered that heretofore, to wit, on the 17th day of March in the year of our Lord one thousand eight hundred and fifty seven there was filed in the office of the Clerk of the Circuit Court of Cook County in the State aforesaid a certain precipe which is in the words and figures following to wit,

Circuit Court of Cook County

William H. Kennicott vs. Philip Sherwood } Covenant Damages $2000 &c

The Clerk of the Circuit Court of Cook County will please issue a summons in this case in favor of the above named William H. Kennicott plaintiff against the above Philip Sherwood defendant, directed to the Sheriff of the County of Cook and to be made returnable at the aforesaid term of this Court.

Dated March 17, 1857

Goodrich Farwell & Smith

Plaintiff's Attys.

And afterwards, to wit, on the day & year last aforesaid, to wit, on the 17th day of March A. D. 1857 there was issued out of the office of the Clerk of the Court aforesaid the People's writ of Summons directed to the Sheriff of said County and clothed in the words and figures following to wit,

State of Illinois
County of Cook } ss.

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

We command you that you summon Philip Sherwood if he shall be found in your County, personally to be and appear before the Circuit Court of Cook County, on the first day of the next term thereof, to be holden at the Court House, in Chicago in said County on the second Monday of April next to answer unto William H. Kennicott in a plea of Covenant to the damage of the said Plaintiff as is said, in the sum of Two thousand dollars.

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

Seal

Witness William L. Church, Clerk of our said Court, and the seal thereof at Chicago aforesaid this Eighteenth day of March A. D. 1857

Wm L. Church, Clerk

And afterwards, to wit, on the month & year last aforesaid said writ was returned into the Court aforesaid by said Sheriff endorsed as follows, to wit, Served by reading to the within named Philip Sherwood the 18th day of March 1857. Pd. by Sh'ff. Fees: 1 service, 50 - 2 Miles, 10 1 Return, 10 — 70 John L. Wilson Sheriff by George Anderson Dep'ty.

2

3

And afterwards
~~Be it remembered that heretofore~~, to wit, on the 21st
day of March in the year One Thousand eight hundred
and fifty seven the said plaintiff by his said Atty
filed in the office of the
Clerk of the Circuit Court of Cook County his certain
declaration which is in the words & figures following to wit

Circuit Court of Cook County
of the April Term in the year
of our Lord One Thousand
Eight hundred and fifty seven

State of Illinois }
County of Cook } ss.

William H. Pennimt plaintiff in this suit by Goodrich, Farwell & Smith his attorneys complains of Phillips Sherwood defendant therein being summoned pursuant to Statute &c. of a Plea of Breach of Covenant.

For that whereas heretofore to wit, on the twenty first day of March in the year of our Lord, one thousand eight hundred and fifty five at the City of Chicago, to wit, at the said County of Cook by a certain Indenture then and there made and executed by and between the said plaintiff of the first part and the said defendant of the second part under their respective hands and seals (which said Indenture sealed with the seals of the said plaintiff and the said defendant the plaintiff now brings here into Court, the date whereof is a certain day and year therein mentioned to wit, the day and year aforesaid) the said plaintiff

for and in consideration of the covenants and agreements hereinafter mentioned to be kept and performed by the said defendant, his executors, administrators and assigns did demise and and lease to the said defendant all those premises situate lying and being in the City of Chicago in the County of Cook and State of Illinois known and described as follows, to wit, The East third (⅓) of lot three (3) Block (95) in School Section of the Original Town of Chicago together with the buildings thereon situated, To have and to hold the above described premises with the appurtenances, unto the said defendant, his executors, administrators and assigns from the first day of May in the year of our Lord one thousand eight hundred and fifty five, for and during and until the first day of May in the year Eighteen hundred and fifty six, and the said defendant in consideration of the leasing of the premises aforesaid by said plaintiff to him did thereby covenant and agree with the the said plaintiff, his heirs, executors, administrators and assigns to pay to the said plaintiff as rent for the said demised premises the sum of six hundred Dollars payable in advance as follows - fifty Dollars on the first day of May in the year Eighteen hundred and fifty five, and fifty Dollars on the first day of each month thereafter until the said sum of six hundred dollars should be fully paid. And the said defendant thereby further covenanted with the said plaintiff that at the

expiration of the time in said lease mentioned he would yield up the said demised premises to the said plaintiff in as good condition as when the same were entered upon by the said defendant, loss by fire, or inevitable accident, or ordinary wear excepted as by the said Indenture reference being thereunto had will (among other things) more fully appear. By virtue of which said demise the said defendant afterwards to wit, on the said first day of May in the year Eighteen hundred and fifty five entered into and upon all and singular the said demised premises, with the appurtenances and became and was possessed thereof for the said Term so to him thereof granted as aforesaid

And although the said plaintiff hath always from the time of making the said Indenture hitherto well and truly performed, fulfilled and kept all things in said Indenture contained on his part and behalf to be performed fulfilled and kept according to the tenor and effect, true intent and meaning of said Indenture to wit, at the County of Cook aforesaid; yet protesting that the said defendant hath not performed, fulfilled or kept any thing in said Indenture contained on his part and behalf to be performed fulfilled and kept according to the tenor and effect, true intent and meaning of said Indenture the said plaintiff saith that the said

defendant did not nor would, at the expiration of the time in said lease mentioned to wit, on the said first day of May in the year Eighteen hundred and fifty six or at any other time yield up the said demised premises to the said plaintiff or any part thereof, but on the contrary thereof did on the said first day of May Eighteen hundred and fifty six continue in full possession of said demised premises with the appurtenances and every part thereof and withheld the same from said plaintiff, and has since hitherto continued to possess the same and to withhold the same from said Plaintiff, and still continues to possess the same and to withhold the same from said plaintiff contrary to the tenor and effect, true intent and meaning of the said Indenture and of the said covenant of the said defendant by him in that behalf made as aforesaid, to wit, at the said County of Cook. By means of the premises the said plaintiff has been since the expiration of said time & still continues to be deprived of the use and enjoyment of the said demised premises, and the gains and profits to be derived therefrom to wit, at said County of Cook. And so the plaintiff in fact says that the said defendant (though often requested so to do) hath not kept the said covenant so by him made as aforesaid, but hath broken the same and to keep the same with the said plaintiff hath hitherto wholly neglected and refused and still doth neglect and refuse,

7

And whereas also heretofore, to wit, on the said twenty first day of March in the year Eighteen hundred and fifty five at the City of Chicago to wit, at the said County of Cook by a certain other Indenture then and there made and executed by and between the said plaintiff of the first part and the said defendant of the second part, under their respective hands and seals (which said last named Indenture sealed with the seals of the said plaintiff and the said defendant, the plaintiff now brings here into Court, the date whereof is a certain day and year therein mentioned to wit, the day and year aforesaid) the said plaintiff did demise and lease to the said defendant, all those premises situate, lying and being in the City of Chicago, in the County of Cook and State of Illinois known and described as follows to wit, The East third (1/3) of Lot three (3) Block (95) in School Section of the Original Town of Chicago together with the buildings thereon situated, to have and to hold the above described premises, with the appurtenances unto the said defendant, his executors, administrators and assigns from the first day of May in the year One thousand eight hundred and fifty five, for and during and until the first day of May in the year one thousand eight hundred and fifty six, and the said defendant did in and by said Indenture, among other things covenant with the said plaintiff, that at the expiration of the time in said lease mentioned

contained on his part and behalf to be performed,
fulfilled and kept according to the tenor and effect
true intent and meaning of said last named
Indenture, the said plaintiff saith that at the
expiration of the time for which said premises
were demised to said defendant by said plain-
tiff, by said last named Indenture, to wit, on the
said first day of May Eighteen hundred and fifty
six at, to wit, the said County of Cook said plain-
tiff demanded and requested of the said defend-
ant that he yield up the said demised premises
to said plaintiff, that the said defendant did not
nor would then and there or at any other time
or place yield up the said demised premises, or
deliver possession thereof to said plaintiff, but on
the contrary thereof then and there withheld the same
and has since hitherto continued to withhold
the same and still withholds the same from the
said plaintiff contrary to the tenor and effect,
true intent and meaning of the said last named
Indenture and of the said covenant of the said
defendant by him in that behalf made as afore-
said, to wit, at the said County of Cook. By means
of the premises the said plaintiff has been since
the expiration of said term and still continues
to be deprived of the use and enjoyment of the
said demised premises and the gains and
profits to be derived therefrom to wit, at said
County of Cook. And so the said plaintiff in

fact says that the said defendant (though often requested so to do) hath not kept the said covenant so by him made as aforesaid but hath broken the same and to keep the same with the said plaintiff hath hitherto wholly neglected and refused and still doth neglect and refuse — all which is to the damage of the said plaintiff of Two thousand dollars and therefore he brings his suit &c.

Goodrich Farwell & Smith
Plffs attys

This Indenture made this twenty first day of March in the year of our Lord One thousand eight hundred and fifty five between William H. Rennicott of the City of Chicago, County of Cook & State of Illinois of the first part, and Philip Sherwood of the same place of the second part witnesseth, that the said party of the first part, for and in consideration of the covenants and agreements hereinafter mentioned, to be kept and performed by the said party of the second part, his 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 the State of Illinois, known and described as follows to wit, The East third (1/3) of Lot three (3) Block (95) in School Section of the Original Town of Chicago together with the buildings thereon situated — To have and to hold the said above

described premises, with the appurtenances, unto the said party of the second part, his executors, adminis-trators and assigns from the first day of May in the year of our Lord one thousand eight hundred and fifty five for and during, and until the first day of May A. D. Eighteen hundred & fifty six. 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, do 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 Six hundred dollars payable in advance as follows, fifty dollars on the first day of May A. D. Eighteen hundred and fifty five, and fifty dollars on the first day of each month thereafter until the said sum of six hundred dollars be fully paid.

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

It is further agreed, by the said party of the second part that neither he nor his legal representatives, will underlet said premises, or any part thereof, or assign this lease, without the written assent of said party.

of the first part, first had and obtained hereto.

It is expressly understood and agreed, by and between the parties aforesaid, that if the rent above reserved, or any part thereof, shall be behind or unpaid, on the day of payment, whereon the same ought to be paid as aforesaid, or if default shall be made in any of the covenants herein contained, to be kept by the said party of the second part, his executors, administrators and assigns, it shall and may be lawful for the said party of the first part, his heirs, executors, administrators, agent, attorney or assigns, at his election to declare said term ended, and into the said demised 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 exempt from execution and distress by law or not, and the said party of the second part, in that case, hereby agrees to waive all legal rights which he may have to hold or retain any such property, under any exemption laws now in force in this State, or in any other way; meaning and intending hereby to give the said party of the first part, his heirs, executors, administrators

In testimony whereof, the said parties have hereunto set their hands and seals, the day and year first above written.

(Seigned) Wm H. Kennicott (seal)
Philip Sherwood (seal)

Circuit Court of Cook County

William H. Kennicott
vs
Philip Sherwood

The within is a copy of the Instrument of writing upon which this action is founded

March 21, 1857

Goodrich Farwell & Smith
Pltffs. Attys.

And afterwards, to wit, on the 20th day of April A.D. 1857 the said defendant, by his attorney, filed in said Court, his certain Plea to the said Pltffs declaration; which Plea is in the words & figures following to wit,

Cook County Circuit Court
April Term A.D. 1857

Philip Sherwood
vs
William H. Kennicott

And now the said Philip Sherwood Defendant by counsel Jameson & Bass his attorneys comes &c. and says that he hath not broken the said Covenant in the said declaration mentioned or

15

15

any or either of them in manner and form as the said Plaintiff hath above thereof declared against him and of this he puts himself upon the Country.

And for further Plea &c. the said Philip Sherwood Defendant says that he the said defendant did pay to the Plaintiff as rent for the said demised premises in said declaration mentioned the sum of six hundred dollars in advance, to wit, fifty dollars on the first day of May Eighteen hundred and fifty five and fifty dollars on the first day of each month thereafter until the said sum of six hundred dollars was fully paid as in said indenture mentioned and of this the said Philip Sherwood puts himself upon the Country &c.

And for further Plea &c. the said Philip Sherwood defendant says that at the expiration of the time in said declaration mentioned he the said defendant yielded up to the Plaintiff the said demised premises in the said declaration mentioned in as good condition as when the same was entered upon by the said defendant, loss by fire, or inevitable accident, or ordinary wear excepted according to the form and effect of the said indenture, to wit, at &c. and of this he puts himself upon the Country.

And the said plaintiff doth the like.

And for further Plea &c. the said defendant says that at the expiration of the time in said declaration mentioned he yielded up to the said Plaintiff the said demised premises in the said

declaration mentioned in as good condition as when the same were entered upon by the said defendant, loss by fire, or inevitable accident, or ordinary wear excepted according to the form and effect of the said indenture, to wit, at the said County of Cook on the first day of May A. D. Eighteen hundred and fifty six and that since the said first day of May eighteen hundred and fifty six he has not continued in possession of said demised premises with the appurtenances nor any part thereof and has not withheld the same from said plaintiff and does not now continue to possess the same or any part thereof or withhold the same or any part thereof from said plaintiff according to the tenor and effect, true intent and meaning of the said indenture and of this he puts himself upon the Country. And the said plaintiff doth the like

Carnell, Jamieson & Bass
Attys. for Defendant

And afterwards, to wit, on the 28th day of April in the year last aforesaid, the said Plaintiff by his Attorney filed in said Court his demurrer to the said defendant's Pleas, which demurrer is in the words & figures following, to wit,

Cook County Circuit Court

William H. Kennett } April Term 1857
vs
Philip Sherwood }

17

17

And the said plaintiff, as to the said pleas of the said defendant by him firstly and secondly above pleaded, saith that the same and the matters therein contained in manner and form as the same are above pleaded and set forth are not sufficient in law to bar or preclude him the said plaintiff from having or maintaining his aforesaid action thereof against the said defendant, and that he, said plaintiff is not bound by law to answer the same; and this the said plaintiff is ready to verify; Wherefore by reason of the insufficiency of the said pleas in that behalf the said plaintiff prays judgment and his damages by him sustained on occasion of the said breach of covenant in said declaration mentioned to be adjudged to him &c.

And the said plaintiff according to the form of the statute in such case made and provided states and shows to the Court the following special causes of Demurrer to the said first plea that is to say—

1st That said first plea is too large and general and attempts to put into one issue all the several matters alleged by the plaintiff in the several breaches of covenant—

2nd That the plea is a negative pleaded by way of answer to a negative and attempts to make an issue out of two negatives.

3rd That if the defendant wishes to put in issue the alleged breaches in said declaration he can do so

18 only by a plea of performance and not by plea of non
infregit conventionem which is bad.

Goodrich Farwell & Smith

Plff's attys

And afterwards, to wit, at the April term of said Court, to wit, April 27th A. D. 1857 the following among other proceedings in said Court were had and entered of record, to wit,

1241 William H. Kennicott
vs.
Philip Sherwood } Covenant

This day come the said parties by their attorneys and the Court having heard counsel on the demurrer of the said plaintiff to the 1st Plea of the said defendant herein plead ed, and being fully advised in the premises sustains the same.

19

19

and afterwards, to wit, at the November Term of said Court, to wit, December 29th A. D. 1857 the following among other proceedings in said Court were had and entered of record therein, to wit,

564

William H. Rennicott
vs.
Philip Sherwood
} Covenant

This day comes the said Plaintiff by Goodrich Farwell & Smith his attorneys and issue being joined herein it is ordered that a Jury come. Whereupon come the Jurors of a Jury of good and lawful men, to wit, S. J. Geannis, P. Bojenot J. R. Barnes, W. Hough, J. S. Spears, J. Laraghan, M. S. Nichols, J. R. Reed, J. Lainben, P. Commerton H. H. Brown, R. S. Hicks. Who being duly elected tried and sworn well and truly to try the issue joined aforesaid, after hearing the allegation and evidence addduced, arguments of counsel and instructions of the Court, retire to consider of their verdict, and afterwards come into Court, and say, "We the Jury find for the defendant. Whereupon the said Plaintiff moves the Court for a new trial of this cause

And afterwards, to wit, at the January Special Term of said Court, to wit, January 29th A. D. 1858 the following among other proceedings in said Court were had and entered of record in this cause, to wit,

William H. Kennicott
vs.
Philip Sherwood
} Covenant

This day again come the said parties by their attornies, and by their agreement made here in open Court the hearing upon the motion for a new trial in this cause is continued to the next term of this Court.

And afterwards, to wit, at the March Term of said Court, to wit, March 5th A. D. 1858 the following among other proceedings in said Court were had and entered of record therein, to wit,

William H. Kennicott
vs.
Philip Sherwood
} Covenant

This day come the said parties by their respective attorneys, and the Court upon hearing counsel on the Plaintiff's motion for a new trial of this cause and due consideration being thereupon had & the premises fully considered & well understood, doth Order that the motion be and it hereby is overruled, to which ruling the said plaintiff by his counsel now here excepts.

Therefore it is considered that the said defendant do have and recover of and from the said Plaintiff his proper costs and charges by him about his defence herein expended and have execution therefor.

Whereupon the said Plaintiff prays an appeal to the Supreme Court of the State of Illinois, which is

granted, yet on condition that the said Plaintiff within 15 days execute & file his appeal bond in the penal sum of three hundred dollars with good & sufficient surety to be approved by the Clerk of this Court & conditioned as the law directs, And it is further ordered that said Plaintiff be allowed 15 days in which to file his bill of exceptions,

And afterwards, to wit, on the 15th day of March in the year last aforesaid the said defendant filed his certain appeal bond in the office of the Clerk of the Court aforesaid which is in the words and figures following, to wit,

Know all men by these presents that we William H. Rennicott and Louis Boudin of the County of Cook and State of Illinois, are held and firmly bound unto Philip Sherwood of the same County and State in the penal sum of three hundred dollars, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors, administrators, jointly and severally by these presents —

Witness our hands and seals this 15th day of March A. D. 1858. The condition of the above obligation is such that whereas Judgment was rendered against said William H. Rennicott and in favor of said Philip Sherwood, Defendant, on the 5th day of March A. D. 1858 in the Circuit Court of Cook County in the State of Illinois from which said Judgment of the said Circuit Court, the said William H. Rennicott, plaintiff prayed for and obtained an appeal to the Supreme Court of said State for the third Grand Division,

Now if the said William H. Kennicott shall duly prosecute his said appeal to effect, and moreover shall pay the judgment, costs, interest and damages, adjudged against him, according to the Statute in such case made and provided, in case the said judgment shall be affirmed, in the Supreme Court, then the above obligation to be void, and, otherwise to remain in full virtue and effect in law,

Taken and entered
before me this 15th day
of March A.D. 1858
And the surety approved
Wm L. Church
Clk

Wm H. Kennicott (seal)
L. Rowlin (seal)

And afterwards, to wit, on the 9th day of April in the year last aforesaid there was filed in the office of the Clerk of the Court aforesaid a certain stipulation which is in the words & figures following to wit,

Cook Co Cir Ct

William H. Kennicott
vs.
Philip Sherwood

We hereby stipulate & consent that the Plff. may have twenty days further time in which to prepare & file the Bill of Exceptions in this suit.

Dated March 20th 1858

Bass & Malory
Att'ys. for Defts.

23

And afterwards, to wit, on the day and year last aforesaid the said plaintiff filed in the office of the Clerk of the Court aforesaid his certain bill of exceptions which is in the words and figures following, to wit,

William H. Kennicott } Cook County Circuit Court
vs.
Philip Sherwood }

Afterwards, to wit, on the 29th day of December A. D. 1857 before the Honorable George Manning Judge of said Court come as well the said William H. Kennicott by Goodrich Farwell and Smith his counsel as the said Philip Sherwood by his counsel Bass & Malory and the Jurors of the Jury being called, likewise come, and after being elected, tried and sworn to try the several issues within joined, the counsel for the Plaintiff gave in evidence in his behalf to the said Jury a lease of which the following is a copy

This Indenture, made this twenty first day of March in the year of our Lord one thousand eight hundred and fifty five between William H. Kennicott of the City of Chicago, County of Cook & State of Illinois of the first part, and Philip Sherwood of the same place of the second part, Witnesseth that the said party of the first part, for and in consideration of the covenants and agreements hereinafter mentioned, to be kept and performed by the said party of the second part, his 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 the State of Illinois known and described as follows, to wit, The East third (⅓) of lot three (3) Block (95) in School Section of the Original Town of Chicago together with the buildings thereon situated, To have and to hold the said above described premises with the appurtenances, unto the said party of the second part, his executors, administrators and assigns from the first day of May in the year of our Lord One thousand eight hundred and fifty five for and during, and until the first day of May A. D. Eighteen hundred & fifty six. 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, do 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 Six hundred dollars payable in advance as follows fifty dollars on the first day of May A. D. Eighteen hundred and fifty five and fifty Dollars on the first day of each month thereafter until the said sum of six hundred dollars be fully paid.

And the said party of the second part further covenants with the said party of the first part, that at the expiration of the time in this lease mentioned he will yield up the said demised premises to the said party of the first part, in as good condition as

25

when the same were entered upon by the said party of the second part, loss by fire, or inevitable accident, or ordinary wear excepted.

It is further agreed by the said party of the second part, that neither he nor his legal representatives, will underlet said premises, or any part thereof, or assign this lease, without the written assent of said party of the first part, first had and obtained thereto.

It is expressly understood and agreed, by and between the parties aforesaid, that if the rent above reserved, or any part thereof, shall be behind or unpaid, on the day of payment, whereon the same ought to be paid, as aforesaid, or if default shall be made in any of the covenants herein contained, to be kept by the said party of the second part, his executors, administrators and assigns, it shall and may be lawful for the said party of the first part, his heirs, executors, administrators, agent, attorney or assigns, at his election to declare said term ended, and into the said demised 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, which may be on the same be exempt from execution and distress

by law or not, and the said party of the second part in that case hereby agrees to waive all legal rights which he may have to hold or retain any such property, under any exemption laws now in force in this State, or in any other way, meaning and intending hereby to give the said party of the first part, his heirs, executors, administrators or assigns, a valid and first lien upon any and all the goods, chattels, or other property belonging to the said party of the second part, as security for the payment of said rent, in manner as aforesaid, anything hereinbefore 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, his executors, administrators or assigns, do hereby covenant and agree to surrender and deliver up said above described premises and property peaceably, to said party of the first part, his heirs, executors, administrators and assigns, immediately upon the determination of said term as aforesaid, and if he shall remain in possession of the same five days after notice of such default, or after the termination of this lease, in any of the ways above named, he shall be deemed guilty of a forcible retainer 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. The

27

27

party of the first part agrees to deduct twenty dollars from the first months rent for repairs and further agrees that the party of the second part may take away at the expiration of this lease whatever improvements &c. additions he may make during the term.

In testimony whereof, the said parties have hereunto set their hands and seals, the day and year first above written.

(Signed) Wm H. Kennicott (seal)
Philip Sherwood (seal)

Circuit Court of Cook County

William H. Kennicott
vs
Philip Sherwood

The within is a copy of the Instrument of writing upon which this action is founded

March 21, 1857

Goodrich Farwell & Smith
Pltff's Atty.

And the counsel for the Plaintiff called as a witness Charles T. Bogue who being sworn testified as follows viz.

I am acquainted with Dr Kennicott the plaintiff in this suit. I was a constable in Chicago in the year 1856 and at the request of the Plaintiff I served a notice on John Van Buskirk requiring him to deli

ver up possession of certain premises then occupied by him, and situate on Madison Stret. I served the notice May 6. 1856. Von Buskirk said he was not ready to deliver up possession. He remained there until he died about 22nd October 1856. I know nothing of the occupation of the premises after his death. I know that the Plaintiff commenced proceedings against Von Buskirk for Forcible Entry and Detainer. The proceedings were before Justice De Wolf. I was present at the trial. Sherwood the defendant in this suit was also present.

On being cross-examined by the counsel for the defendant the witness testified as follows, viz;

I presume the date of the notice now shown me is the day I served it. I served it on Von Buskirk at the house where he resided. He said he would not give up possession. I dont recollect that he gave any reason.

The counsel for the Plaintiff also gave in evidence the notice shown to the last witness and of which the following is a copy viz.

Mr John Von Buskirk

Take notice that I demand immediate possession of the premises described as follows to wit, The East one third of Lot 3 in Block 95 School Section addition to Chicago known as number 174 on Madison Street in the City of Chicago. Mr. Charles J. Bogue the bearer of this is authorised to receive possession for me.

Wm H. Kennicott

Chicago May 6th 1856

29

The counsel for the plaintiff also introduced evidence showing that after the serving of such notice and on the 8th day of May 1856 the Plaintiff commenced proceedings against the said Von Buskirk before Calvin De Wolf Justice of the Peace of Cook County under the Statute of Forcible Entry and Detainer on the ground that the Plaintiff had leased the premises to Sherwood for the term of one year ending on the 1st day of May 1856, and Sherwood had underlet to Von Buskirk, but Von Buskirk wrongfully refused to deliver up possession although the year had expired and possession had been demanded by notice in writing; that on the trial before the Justice, the verdict of the Jury was in favor of said Plaintiff, and thereupon the Justice gave judgment that the Plaintiff should have restitution of the premises and his costs; from which judgment the said Von Buskirk appealed to the Circuit Court of Cook County, but the said Von Buskirk died before the appeal was brought to a trial, and the Court then dismissed the appeal for want of prosecution.

Asa Remmett a witness called by the Plaintiff being sworn testified as follows, viz;

I am acquainted with the premises in question I have resided in Chicago during the last 15 years & have some knowledge of what property would rent for. The rent of these premises was worth one thousand dollars for a year from May 1st 1856

Rents were high that season. I negotiated a lease of these premises that season, for one year from May 1st 1856 with the privilege of five years, at a rent of one thousand dollars a year. I dont know the name of the person with whom I negotiated. I think his name was Bodwell. This was in April 1856. My brother, the Plaintiff was out of the City at the time, and that was the way I came to have anything to do with it.

On being cross-examined by the Defendants' counsel the witness said —

I had no houses of my own at the time. I frequently talked with persons having buildings & from knowledge so obtained, and from the fact that the price required was so readily accepted, I form my opinion of the value. There were two other persons who wished to rent the premises at that time.

A. E. Wolcott, a witness called by the Plff. being sworn said —

I am an attorney at law. I came to Chicago on the 8th of January 1857 and since the 11th of January have been boarding with Mrs. Von Buskirk. During all that time she has occupied the premises in question. I negotiated a lease from the Plaintiff to Mrs Von Buskirk the term to commence on the 1st day of May 1857 and she has held under that lease since that time.

E. A. Bogue, a witness called by the Plff. being sworn said —

I am acquainted with the Plaintiff Dr. Rennicott have been in business with him during the last two or three years. I used to see Von Buskirk. Sometime in April 1856 I went with the Plaintiff to serve a notice on Von Buskirk to leave the premises on the 1st of May 1856. He, Von Buskirk was not at home and the Plaintiff served the notice on Mrs Von Buskirk.

On being cross-examined by the Defendants counsel the witness said —

Dr Rennicott, the Plaintiff served the notice on Mrs. Von Buskirk. I cant state the precise date.

John Maynard a witness called by the Defendant having been sworn testified as follows, viz;

I am acquainted with the premises in question Von Buskirk occupied the premises in April and May 1856. I had a lease to commence on the 1st day of May 1856 but I gave it up.

I demanded possession of Mrs. Von Buskirk. She said she would not give possession. Dont remember whether I had the lease with me at this time. I gave up the lease to the plaintiff after I made the demand and on the same day May 1st 1856.

The counsel for the defendant then requested the plaintiff to produce the lease mentioned by the witness Maynard, and the same being produced was shown to the witness, who said — The instrument now shown me is the lease of which I have spoken.

The counsel for the Defendant then offered in evidence said lease of which the following is a copy, viz,

This Indenture made this fourth day of April in the year of our Lord One thousand eight hundred and fifty six Between William H. Rennicott of Chicago Illinois party of the first part, John Maynard of the same place, party of the second part. Witnesseth, that the said party of the first part, for and in consideration of the covenants and agreements hereinafter mentioned, to be kept and performed by the said party of the second part, his 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 East one third part of Lot No. Three (3) in Block No. (95) School Sec. Addition to Chicago, with the buildings and improvements thereon, and said Rennicott is to repair the Roof of the Kitchen, the plastering and the underpinning at the right of the Hall. To have and to hold the said above described premises, with the appurtenances, unto the said party of the second part, his executors, administrators and assigns from the first day of May in the year of our Lord One thousand eight hundred and fifty six for and during, and until the first day of May A. D. 1861 at noon being a term of five years. 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, executors, administrators and assigns, to pay the said party of the first part, as rent for said demised premises, the sum of Ten thousand dollars per annum, payable in monthly sums of $83 33/100 each month in advance. Said Raynard is to have the right to build additions in front or rear of said building and at the end of said term said Rennicks agrees to pay the value of such improvements at that time and if the parties cannot agree upon such value the same may be determined by three arbitrators, one to be chosen by each party and the other by the two thus selected whose award shall be final.

And the said party of the second part for 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, he will yield up the said premises to the said party of the first part, in as good condition as when the same were entered upon by the said party of the second part, loss 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.

And the said John. Raynard executors, administrators and assigns, agree further to pay (in addition

to the rents above specified) all water rents and water assessments taxed, levied or charged on said premises, for and during the time for which this lease is granted, and save said premises and the party of the first part harmless therefrom, and that he will keep said premises in a clean and wholesome condition, in accordance with the ordinances of the City, and directions of the Sewerage Commissioners.

It is expressly understood and agreed, by and between the parties aforesaid, that if the rent above reserved, or any part thereof, shall be behind or unpaid on the day of payment whereon the same ought to be paid, as aforesaid, or if default shall be made in any of the covenants herein contained, to be kept by the said party of the second part, his executors, administrators and assigns, it shall and may be lawful for the said party of the first part, his heirs, executors, administrators, agent, attorney or assigns, at his election, to declare said term ended, and into the said premises, or any part thereof, either with or without process of law to 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 may be exempt from execution and

85

35

distress by law or not, and the said party of the second part, in that case, hereby agree to waive all legal right which he may have to hold or retain any such property under any exemption laws now in force in this State or in any other way. Meaning and intending hereby to give the said party of the first part, his heirs, executors, administrators or assigns, a valid and first lien upon any and all the 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 anything herinbefore 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 his executors, administrators and assigns do hereby covenant and agree to surrender and deliver up said above described premises and property peacably to said party of the first part, his heirs, executors, administrators and assigns, immediately upon the determination of said term as aforesaid and if he shall remain in possession of the same 3 days after notice of such default, or after the termination of this lease, in any of the ways above named he shall be deemed guilty of a forcible detainer of said premises under the Statute, and shall be subject to all the conditions 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. Said Rennicott shall have the right to subdivide said lot in his discretion but said Maynard shall have the right to occupy the whole or to sublet in his discretion

All interlineations & erasures before signing
C. D. Wolf

Wm H. Rennicott (seal)
John Maynard (seal)

Josline Von Buskirk, a witness called by the Defendant being sworn testified as follows, viz;
I am the widow of John Von Buskirk. We occupied the premises in question up to the first day of May 1856 under Mr Sherwood. My husband was not in the City May 1st 1856. In the fore part of April Maynard told me he wanted me to remain in the house as long as I chose, saying that he had a lease that he would give me permission to do so, that he had a lease in his pocket. We remained on account of this permission and request. We had supposed we were to have the premises of the Plaintiff for another year. Mr Sherwood made no demand of possession that I know of, but he came to me in regard to the matter the 2d or 3rd day of May & I told him I was remaining on the premises by

37

permission of Maynard who had leased the premises for five years.

On being cross-examined by the counsel for the Plaintiff, the witness testified as follows, viz.;

About the 1st day of April was the first I saw Maynard. He said he had a lease and said we could remain there. He said he should throw up his lease said the house was not as good as the Doctor had represented; said he would give us permission to remain.

On direct examination of witness being resumed by Defendant's counsel, the witness testified as follows, viz;

Maynard called two or three days before the 1st day of May and said he would demand possession on the 1st day of May and instructed me to say that I would not give up possession. I remained for that reason.

The witness Maynard being called by the Plaintiff testified as follows, viz;

Soon after I took the lease from the Plaintiff in the fore part of April I called at Von Buskirk's and we had the conversation Mrs. Von Buskirk has testified to. I told them that I would give them permission to remain in the house, and it was arranged that I should demand possession of them on the 1st day of May, that they should refuse to give possession & that I should then throw up my lease on the ground that I could not get possession

Afterwards and a week or two previous to the first day of May I went with Mr Von Buskirk to Mr. Mather, a lawyer of the firm of Mather & Taft to ascertain whether we could do as we had talked. Mr. Mather told us we could not do it, and I then told Mr. Von Buskirk I would have nothing more to do with it. After that I gave no permission to remain. I had no authority to permit them to remain and gave none.

Which is all the evidence given on the trial of said cause. At the request of the counsel for the Plaintiff the Court then and there instructed the Jury as follows, viz;

1st If the Defendant or his assignee Von Buskirk held over the possession of the premises and continued in possession during the year commencing May 1st 1856 and refused to deliver possession to the Plaintiff; then the Plaintiff is entitled to recover the value of the use of the premises for that time.

2nd If the Jury find for the Plff. then he is entitled to recover all the damage sustained by a breach of the Covenant in question, though a part may have accrued after the commencement of this suit.

And at the request of the counsel for the defendant the Court then and there gave to the Jury the following instructions in writing, viz;

1st If the Jury believe from the evidence that John

39

Maynard received a lease of the premises in question from the Plff. to take effect on the first day of May A. D. 1856 and that said Maynard instructed requested or induced the tenant Von Buskirk to remain on said premises after the expiration of the lease of said premises by the Defendant to her, and that she held over in consequence of such instructions or authority, or permission they will find for the Defendant.

2nd. If the Jury shall believe from the evidence that the defendant or his tenant Von Buskirk was ready and willing to deliver up possession of the premises at the expiration of the lease in question, but was prevented from so doing and was authorised to continue in possession, or was prevented and requested to remain by Maynard & that he was entitled to possession and claimed title under the plaintiff by a lease from him, then the Jury will find for the defendant.

In the giving of which Instructions and each of them on the part of the defendant, the Counsel for the Plaintiff then and there excepted.

And the cause having been submitted to the Jury under the instructions of the Court so given as aforesaid, the Jury rendered a verdict for the Defendant as appears by the record aforesaid.

And the counsel for the Plaintiff then and there moved the Court for a new trial on the grounds—

1st. That the verdict is against the evidence.

2nd That the instructions given by the Court on the part of the Defendant, were not warranted by the evidence but tended to mislead the Jury and were erronious

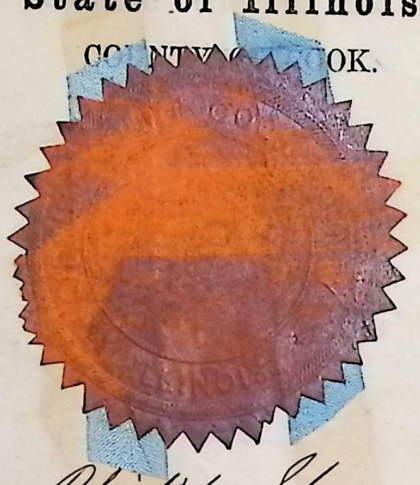
Which Motion came on for argument on the 5th day of March at the March term of said Court A.D. 1858. and the said Court then and there overruled the said Motion, to which decision of the Court, the Counsel for the Plaintiff then and there excepted

And inasmuch as the matters and exceptions aforesaid do not appear upon the record of the trial aforesaid the said Plaintiff prays that this his bill of Exceptions may be signed and sealed by the Court and made a part of the record herein which is done accordingly.

George Manierre (seal)
Judge of 7th Judicial
Circuit, Ills.

Chicago April 9th 1858

State of Illinois, } S. S.
COUNTY OF COOK.



I, WILLIAM L. CHURCH, Clerk of the Circuit Court of Cook County, in the State aforesaid, do hereby certify the above and foregoing, to be a true, perfect and complete copy of the Papers filed & Proceedings had & Entries of record in a certain cause lately pending in said Court on the Law side thereof, wherein William H Kunnecott was Plaintiff and Philip Sherwood was defendent

IN WITNESS WHEREOF, I have hereunto set my hand, and affixed the seal of our said Court at Chicago, this Sixteenth day of April A. D. 1858

Fees for Record $10.00 Wm L. Church Clerk.

William A Kennett
38. vs.
Philip Sherwood

Record

Verdict for Pltff

Pltff

Filed April 20, 1858
L. Leland
Clk.

Goodrich D & S. Pltff attys

Fees $ 10.00

SUPREME COURT.

WILLIAM H. KENNICOTT, Appellant,
vs.
PHILLIP SHERWOOD Appellee.

Abstract of Record.

This is an action of covenant upon a lease containing among other things, a covenant on the party of the defendant to yield up the demised premises to the plaintiff, at the expiration of the term of the lease. The plaintiff, in his declaration, assings a breach of this covenant, upon which the defendant takes issue. No questions arise on the pleadings, but all the questions in the case arose on the trial, and on motion for a new trial, and are all presented by the bill of exceptions which was settled and signed and sealed by the Circuit Judge.

The following is a copy of the bill of exceptions.

Page 3–10

23

COOK COUNTY CIRCUIT COURT.

WILLIAM H. KENNICOLT,
vs.
PHILLIP SHERWOOD

Afterwards, to wit: on the 29th day of December, A. D. 1857, before the Honorable George Maniere, Judge of said Court, came as well the said William H. Kennicott, by Goodrich, Farwell & Smith, his counsel, as the said Phillip Sherwood, by his counsel, Bass & Mulvey, and the Jurors of the Jury being called, likewise came, and after being elected, tried and sworn to try the several issues within joined, the counsel for the plaintiff gave in evidence in his behalf to the said Jury, a lease of which the following is a copy:

LEASE.

THIS INDENTURE, made this twenty first day of March in the year of our Lord one thousand eight hundred and fifty-five, between William H. Kennicott of the city of Chicago, county of Cook and State of Illinois, of the first part, and Phillip Sherwood, of the same place, of the second part, *witnesseth*, that the said

party of the first part, for and in consideration of the covenants and agreements hereinafter mentioned, to be kept and performed by the said party of the second part, his 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 the State of Illinois, known and described as follows, to wit: The east third (⅓) of lot three (3) block (95) in school section of the original town of Chicago together with the buildings thereon situated; *to have and to hold* the said above described premises, with the appurtenances unto the said party of the second part, his excutors, administrators and assigns, from the first day of May in the year of our Lord one thousand eight hundred and fifty-five for and during, and until the first day of May, A. D. eighteen hundred and fifty-six. 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, executors, administrators and assigns, to pay the said party of the first part, as rent for said demised premises, the sum of six hundred dollars, payable in advance, as follows: Fifty dollars on the first day of May, A. D., eighteen hundred and fifty-five, and fifty dollars on the first day of each month thereafter until the said sum of six hundred dollars be fully paid. And the said party of the second part further covenants with the said party of the first part, that at the expiration of the time in this lease mentioned, he will yield up the said demised premises to the said party of the first part, in as good condition as when they were entered upon by the said party of the second part, loss by fire, or inevitable accident, or ordinary wear excepted.

It is Further Agreed, by the said party of the second part, that neither he nor his legal representatives, will underlet said premises, or any part thereof, or assign this lease, without the written assent of said party of the first part, first had and obtained thereto.

It is Expressly Understood and Agreed, by and between the parties aforesaid, that if the rent above reserved, or any part thereof, shall be behind or unpaid, on the day of payment, whereon the same ought to be paid, as aforesaid, or if default shall be made in any of the covenants herein contained, to be kept by the said party of the second part, his executors administrators and assigns, it shall and may be lawful for the said party of the first part, his heirs, executors, administrators, agent, attorney, or assigns, at his election to declare said term ended, and into the said demised 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 exempt from execution and distress by law or not, and the said party of the second part in that case hereby agrees to waive all legal rights

which he may have to hold or retain any such property, under any exemption laws now in force in this State, or in any other way; meaning and intending hereby to give the said party of the first part, his heirs, executors, administrators or assigns a valid and first lien upon any and all goods, chattels or other property belonging to the said party of the second part, as security for the payment of said rent, in manner as aforesaid, anything hereinbefore 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, his executors, administrators and assigns, do hereby covenant and agree to surrender and deliver up said above described premises and property, peaceably, to said party of the first part, his heirs, executors, administrators and assigns, immediately upon the determination of said term as aforesaid, and if he shall remain in possession of the same, five days after notice of such default, or after the termination of this lease, in any of the ways above named, he shall be deemed guilty of 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. The party of the first part agrees to deduct twenty dollars from the first month's rent for repairs, and further agrees that the party of the second part, may take away at the expiration of this lease, whatever improvements or additions he may make during the term.

27

In testimony whereof, the said parties have hereunto set their hands and seals, the day and year first above written.

WM. H. KENNICOTT. SEAL

PHILLIP SHERWOOD. SEAL

And the counsel for the defendent called as a witness Charles S. Bogue, who, being sworn, testified as follows, to wit:

I am acquainted with Dr. Kennicott the plaintiff in this suit. I was a constable in Chicago in the year 1856, and at the request of the plaintiff I served notice on John Van Buskirk, requiring him to deliver up possession of certain premises then occupied by him, and situated on Madison Street. I served the notice May 6th, 1856. Van Buskirk said he was not ready to deliver up possession. He remained there until he died, about 22d October, 1856. I know nothing of the occupation of the premises after his death. I know that the plaintiff commenced proceedings against Van Buskirk for forcible entry and detainer.

28

The proceedings were before Justice De Wolf. I was present at the trial. Sherwood the defendant in this suit was also present.

On being cross-examined by the counsel for the defendent, the witness testified as follows, viz.: I presume the date of the notice now shown me is the day I served it; I served it on Van Buskirk at the house where he resided. He said

he would not give up the possession—I dont recollect that he gave any reason. The counsel for the plaintiff also gave in evidence the notice shown to the last witness, and of which the following is a copy, viz.:

Mr. John Van Buskirk:—

Take notice that I demand immediate possession of the premises described as follows, to wit: The east (⅓) one third of lot (3) three, block 95 school section addition to Chicago, known as number 174, on Madison Street, in the city of Chicago. Mr. Charles Bogue the bearer of this is authorized to receive possession for me.

Wm. H. Kennicott.

Chicago, May 6th, 1856.

29

The counsel for the plaintiff also introduced evidence showing that after the serving of such notice, on the 8th day of May, 1856, the plaintiff commenced proceedings against the said Van Buskirk, before Calvin De Wolf, Justice of the Peace of Cook County, under the statute of forcible entry and detainer, on the ground that the plaintiff had leased the premises to the said Sherwood for the term of one year, ending on the 1st day of May, 1856, and Sherwood had underlet to Van Buskirk. But Van Buskirk wrongfully refused to deliver up possession, although the year had expired, and possession had been demanded by notice in writing; that on the trial before the Justice, the verdict of the jury was in favor of said plantiff, and thereupon the justice gave judgment that the plaintiff should have restitution of the premises and his costs, from which judgment, the said Van Buskirk appealed to the Circuit Court of Cook County, but the said Van Buskirk died before the appeal was brought to a trial, and the Court then dismissed the appeal for want of prosecution.

Asa Kennicott, a witness called by the plaintiff, being sworn, testified as follows, viz.: I am acquainted with the premises in question—I have resided in Chicago during the last 15 years, and have some knowledge of what property would rent for. The rent of these premises was worth one thousand dollars, for a year from May 1st, 1856. Rents were high that season, I negotiated a lease of these premises that season for one year from May 1st, 1856, with the privilege of five years, at a rent of one thousand dollars a year. I dont know the name of the person with whom I negotiated—I think his name was Bodwell—this was in April 1856. My brother, the plaintiff was out of the city at the time, and that was the way I came to have any thing to do with it.

30

On being cross-examied by the defendant's counsel, the witness said.

I had no house of my own at the time, I frequently talked with persons having buildings, and from knowledge so obtained and from the fact that the price so required was so readily accepted, I form my opinion of the value. There were two other persons who wished to rent the premises at that price.

A. E. Woolcot a witness called for the plaintiff, being sworn, said

I am an attorney at law, I came to Chicago on the 8th of Janury, 1857, and

since the 11th of January, have been boarding with Mrs. Van Buskirk. During all that time she has occupied the premises in qustion. I negotiated a lease from the plaintiff to Mrs. Van Buskirk, the term to commence on the first day of May, 1857, and she has held under that lease since that time.

31

E. A. Bogue a witness called by the plaintiff, being sworn, said

I am acquainted with the plaintiff, Dr. Kennicott, have been in business with him during the last two or three years. I used to see Van Buskirk. Sometime in April 1856, I went with the plaintiff to serve a notice on Van Buskirk to leave the premises, on the 1st day of May, 1856. He, Van Buskirk was not at home, and the plaintiff served the notice on Mrs. Van Buskirk.

On being cross-examined by the defendant's counsel, the witness said Dr. Kennicott the plaintiff, served the notice on Mrs. Van Buskirk. I cant state the precise date.

John Maynard a witness called by the defendant, having been sworn, testified as follows, viz:

I am acquainted with the premises in question—Van Buskirk occupied the premises in May and April, 1856. I had a lease to commence on the 1st day of May, 1856, but I gave it up. I demanded possession of Mrs. Van Buskirk—she said she would not give possession. Dont remember whether I had the lease with me at the time—I gave up the lease to the plaintiff after I made the demand, and on the same day, May 1st, 1856.

32

The counsel for the defendant, then requested the plaintiff to produce the lease mentioned by the witness Maynard, and the same being produced, was shown to the witness, who said the instrument now shown me is the lease of which I have spoken. The counsel for the defendant then offered in evidence said lease, of which the following is a copy, viz.:

LEASE.

This Indenture, made the fourth day of April, in the year of our Lord, one thousand eight hundred and fifty-six, between William H. Kennicott of Chicago, Illinois, party of the first part, and John Maynard of the same place, party of the second part, *witnesseth*, that the said party of the first part, for and in consideration of the covenants and agreements hereinafter mentioned, to be kept and performed by the said party of the second part, his 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 east one third part of Lot No. three, (3) in block No. 95, school section addition to Chicago, with the buildings and improvements thereon, and said Kennicott is to repair the roof of the kitchen, the plastering and the underpinning at the right of the hall; *to have and to hold* the above described premises, with the appurtenances, unto the said party of the second part, his executors, administrators, and assigns, from the first day of May, in the year of our Lord one thousand eight hundred and fifty-six,

33

for and during and until the first day of May, A. D. 1861, at noon, being a term of five years. 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, executors, administrators and assigns, to pay the said party of the first part, as rent for said demised premises, the sum of one thousand dollars per annum, payable in monthly sums of $83 $\frac{33}{100}$ each month in advance. Said Maynard to have the right to build additions in front or rear of said building, and at the end of said time, said Kennicott agrees to pay the value of such improvements at that time; and if the parties cannot agree upon such value, the same may be determined by three arbitrators, one to be chosen by each party, and the other by the two thus selected, whose award shall be final.

And the said party of the second part further covenants with the said party of the first part, that the said second party has received the said demised premises in good order and condition, and that at the expiration of the time in this lease mentioned, he will yield up the said premises to the said party of the first part, in as good condition as when the same were entered upon by the said party of the second part, loss by fire, or inevitable accident, or ordinary wear excepted; and also will keep the premises in good repair during this lease, at his own expense.

34

And the said John Maynard, executors, administrators and assigns, agree further to pay (in addition to the rents above specified) all water rents and water assessments taxed, levied or charged on said premises, for and during the time for which this lease is granted, and save said premises and the party of the first part harmless therefrom, and that he will keep said premises in a clean and wholesome condition, in accordance with the ordinances of the city, and directions of the sewarage commissioners.

It is Expressly Understood and Agreed, by and between the parties aforesaid, that if the rent above reserved, or any part thereof, shall be behind or unpaid, on the day of payment, whereon the same ought to be paid, as aforesaid, or if default shall be made in any of the covenants herein contained, to be kept by the said party of the second part, his executors administrators and assigns, it shall and may be lawful for the said party of the first part, his heirs, executors, administrators, agent, attorney, or assigns, at his election to declare said term ended, and into the said demised 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,

35

whether the same be exempt from execution and distress by law or not, and the said party of the second part in that case hereby agrees to waive all legal rights which he may have to hold or retain any such property, under any exemption laws now in force in this State, or in any other way; meaning and intending hereby to

give the said party of the first part, his heirs, executors, administrators or assigns a valid and first lien upon any and all goods, chattels or other property belonging to the said party of the second part, as security for the payment of said rent, in manner as aforesaid, anything hereinbefore 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, his executors, administrators and assigns, do hereby covenant and agree to surrender and deliver up said above described premises and property, peaceably, to said party of the first part, his heirs, executors, administrators and assigns, immediately upon the determination of said term as aforesaid, and if he shall remain in possession of the same, three days after notice of such default, or after the termination of this lease, in any of the ways above named, he shall be deemed guilty of 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.

36

And it is further covenanted and agreed between the parties, that the party of the second part shall pay and discharge all costs and attorney's fees and expenses that shall arise from enforcing the covenants of this indenture by the party of the first part. Said Kennicott shall have the right to subdivide said lot on his discretion, but said Maynard shall have the right to occupy the whole, or to sub let in his discretion.

Witness the hands and seals of the parties aforesaid.

WM. H. KENNICOTT. SEAL

JOHN MAYNARD. SEAL

Sophia Van Buskirk a witness called by the defendant, being sworn, testified as follows, viz. :

I am the widow of John Van Buskirk. We occupied the premises in question up to the first day of May, 1856, under Mr. Sherwood—my husband was not in the city May 1st, 1856. In the fore part of April Maynard told me he wanted me to remain in the house as long as I choose—saying that he had a lease—that he would give me permission to do so—that he had a lease in his pocket. We remained on account of this permission and request. We had supposed we were to have the premises of the plaintiff for another year; Mr. Sherwood made no demand of possession that I know of, but he came to me in regard to the matter the second or third day of May, and I told him I was remaining on the premises by the permission of Maynard, who had leased the premises for five years.

37

On being cross-examined by the cousel for the plaintiff, the witness testified as follows, viz. : About the first day of April was the first I saw Maynard. He said he had a lease and said that we could remain there—he said he should throw up his lease—said the house was not as good as the Doctor had represented—said

he would give us permission to remain. On direct examination of witness being resumed by defendant's counsel, the witness testified as follows, viz.: Maynard called two or three days before the first day of May, and said he would demand possession on the first day of May, and instructed me to say that I would not give up possession—I remained for that reason.

The witness Maynard being called by the plaintiff, testified as follows, viz.:

Soon after I took the lease from the plaintiff in the forepart of April, I called at Van Buskirk's and we had the conversation Mrs. Van Buskirk has testified to. I told them that I would give them permission to remain in the house, and it was arranged that I should demand possession of them on the first day of May, that they should refuse to give up possession, and that then I should throw up my lease, on the ground that I could not get possession. Afterwards, and a week or two previous to the first day of May, I went with Mrs. Van Buskirk to Mr. Mather a lawyer, of the firm of Mather & Taft, to ascertain whether we could do as we had talked; Mr. Mather told us we could not do it. I then told Mrs. Van Buskirk I would have nothing more to do with it. After that I gave no permission to remain. I had no authority to permit them to remain, and gave none.

Which is all the evidence given in the trial of said cause. At the request of the counsel for the plaintiff, the Court then and there instructed the Jury as follows, viz.:

1. If the defendant or his assignee Van Buskirk held over the possession of the premises, and continued in possession during the year commencing May 1st, 1856, and refused to deliver possession to the plaintiff, then the plaintiff is entitled to recover the value of the use of the premises for that time.

2. If the Jury find for the plaintiff, then he is entitled to recover all the damage sustained by a breach of the covenant in question, though a part may have accrued after the commencement of this suit.

And at the request of the counsel for the defendant, the Court then and there gave the Jury the following instructions in writing, viz.:

1. If the Jury believe, from the evidence, that John Maynard received a lease of the premises in question from the plaintiff, to take effect on the first day of May, A. D. 1856; and that said Maynard instructed, requested or induced the tenant Van Buskirk to remain on said premises, after the expiration of the lease of said premises, by the defendant to her; and that she held over in consequence of such instructions, or authority, or permission, they will find for the defendant.

2. If the Jury shall believe from the evidence, that the defendant or his tenant Van Buskirk was ready and willing to deliver up possession of the premises at the expiration of the lease in question, but was prevented from so doing, and was authorized to continue in possession, or was prevented or requested to remain by Maynard, and that he was entitled to possession and claimed title under the plaintiff by a lease from him, then the Jury will find for the defendant. To the giving of which instructions, and each of them on the part of the defendant, the counsel for the plaintiff then and there excepted. And the cause having been

submitted to the Jury under the instructions of the Court so given as aforesaid, the Jury rendered a verdict for the defendant, as appears by the record aforesaid. And the counsel for the plaintiff then and there moved the Court for a new trial, on the grounds: 1st, That the verdict is against the evidence; 2d, That the instructions given by the Court on the part of the defendant, were not warranted by the evidence, but tended to mislead the Jury, and were erroneous.

Which motion came on for argument on the fifth day of March, at the March term of said Court, A. D. 1858; and the said Court then and there overruled the said motion, to which decision of the Court the counsel for the plaintiff then and there excepted.

And inasmuch as the matters and exceptions aforesaid do not appear upon the record of the trial aforesaid, the said plaintiff prays that this his bill of exceptions may be signed and sealed by the Court, and made a part of the record herein, which is done accordingly.

GEORGE MANIERE,
Judge of Seventh Judicial Circuit, Illinois. SEAL

GOODRICH, FARWELL & SMITH,
Attorneys for Appellant.

Chicago, April 9th, 1858.

S. P. ROUNDS, STEAM PRINTER, CHICAGO.

38 ~~108~~

Supreme Court

William H Kennett
appellant

vs

Phillip Sherwood
appellee

Abstract of Record

Filed Apr 21 1888
Le Lockwood
Clerk

12917

SUPREME COURT.

WILLIAM H. KENNICOTT, Appellant,
vs.
PHILLIP SHERWOOD Appellee.

Abstract of Record.

Page 3-10

This is an action of covenant upon a lease containing among other things, a covenant on the party of the defendant to yield up the demised premises to the plaintiff, at the expiration of the term of the lease. The plaintiff, in his declaration, assings a breach of this covenant, upon which the defendant takes issue. No questions arise on the pleadings, but all the questions in the case arose on the trial, and on motion for a new trial, and are all presented by the bill of exceptions which was settled and signed and sealed by the Circuit Judge.

The following is a copy of the bill of exceptions.

COOK COUNTY CIRCUIT COURT.

23

WILLIAM H. KENNICOLT,
vs.
PHILLIP SHERWOOD

Afterwards, to wit: on the 29th day of December, A. D. 1857, before the Honorable George Maniere, Judge of said Court, came as well the said William H. Kennicott, by Goodrich, Farwell & Smith, his counsel, as the said Phillip Sherwood, by his counsel, Bass & Mulvey, and the Jurors of the Jury being called, likewise came, and after being elected, tried and sworn to try the several issues within joined, the counsel for the plaintiff gave in evidence in his behalf to the said Jury, a lease of which the following is a copy:

LEASE.

THIS INDENTURE, made this twenty first day of March in the year of our Lord one thousand eight hundred and fifty-five, between William H. Kennicott of the city of Chicago, county of Cook and State of Illinois, of the first part, and Phillip Sherwood, of the same place, of the second part, *witnesseth*, that the said

party of the first part, for and in consideration of the covenants and agreements hereinafter mentioned, to be kept and performed by the said party of the second part, his 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 the State of Illinois, known and described as follows, to wit: The east third ($\frac{1}{3}$) of lot three (3) block (95) in school section of the original town of Chicago together with the buildings thereon situated; *to have and to hold* the said above described premises, with the appurtenances unto the said party of the second part, his excutors, administrators and assigns, from the first day of May in the year of our Lord one thousand eight hundred and fifty-five for and during, and until the first day of May, A. D. eighteen hundred and fifty-six. 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, executors, administrators and assigns, to pay the said party of the first part, as rent for said demised premises, the sum of six hundred dollars, payable in advance, as follows: Ffty dollars on the first day of May, A. D., eighteen hundred and fifty-five, and fifty dollars on the first day of each month thereafter until the said sum of six hundred dollars be fully paid. And the said party of the second part further covenants with the said party of the first part, that at the expiration of the time in this lease mentioned, he will yield up the said demised premises to the said party of the first part, in as good condition as when they were entered upon by the said party of the second part, loss by fire, or inevitable accident, or ordinary wear excepted.

It is Further Agreed, by the said party of the second part, that neither he nor his legal representatives, will underlet said premises, or any part thereof, or assign this lease, without the written assent of said party of the first part, first had and obtained thereto.

It is Expressly Understood and Agreed, by and between the parties aforesaid, that if the rent above reserved, or any part thereof, shall be behind or unpaid, on the day of payment, whereon the same ought to be paid, as aforesaid, or if default shall be made in any of the covenants herein contained, to be kept by the said party of the second part, his executors administrators and assigns, it shall and may be lawful for the said party of the first part, his heirs, executors, administrators, agent, attorney, or assigns, at his election to declare said term ended, and into the said demised 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 exempt from execution and distress by law or not, and the said party of the second part in that case hereby agrees to waive all legal rights

which he may have to hold or retain any such property, under any exemption laws now in force in this State, or in any other way; meaning and intending hereby to give the said party of the first part, his heirs, executors, administrators or assigns a valid and first lien upon any and all goods, chattels or other property belonging to the said party of the second part, as security for the payment of said rent, in manner as aforesaid, anything hereinbefore 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, his executors, administrators and assigns, do hereby covenant and agree to surrender and deliver up said above described premises and property, peaceably, to said party of the first part, his heirs, executors, administrators and assigns, immediately upon the determination of said term as aforesaid, and if he shall remain in possession of the same, five days after notice of such default, or after the termination of this lease, in any of the ways above named, he shall be deemed guilty of 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. The party of the first part agrees to deduct twenty dollars from the first month's rent for repairs, and further agrees that the party of the second part, may take away at the expiration of this lease, whatever improvements or additions he may make during the term.

27

In testimony whereof, the said parties have hereunto set their hands and seals, the day and year first above written.

WM. H. KENNICOTT. SEAL

PHILLIP SHERWOOD. SEAL

And the counsel for the defendent called as a witness Charles S. Bogue, who, being sworn, testified as follows, to wit:

I am acquainted with Dr. Kennicott the plaintiff in this suit. I was a constable in Chicago in the year 1856, and at the request of the plaintiff I served notice on John Van Buskirk, requiring him to deliver up possession of certain premises then occupied by him, and situated on Madison Street. I served the notice May 6th, 1856. Van Buskirk said he was not ready to deliver up possession. He remained there until he died, about 22d October, 1856. I know nothing of the occupation of the premises after his death. I know that the plaintiff commenced proceedings against Van Buskirk for forcible entry and detainer.

28

The proceedings were before Justice De Wolf. I was present at the trial. Sherwood the defendant in this suit was also present.

On being cross-examined by the counsel for the defendent, the witness testified as follows, viz.: I presume the date of the notice now shown me is the day I served it; I served it on Van Buskirk at the house where he resided. He said

he would not give up the possession—I dont recollect that he gave any reason. The counsel for the plaintiff also gave in evidence the notice shown to the last witness, and of which the following is a copy, viz.:

Mr. John Van Buskirk:—

Take notice that I demand immediate possession of the premises described as follows, to wit: The east ($\frac{1}{3}$) one third of lot (3) three, block 95 school section addition to Chicago, known as number 174, on Madison Street, in the city of Chicago. Mr. Charles Bogue the bearer of this is authorized to receive possession for me.

WM. H. KENNICOTT.

Chicago, May 6th, 1856.

29

The counsel for the plaintiff also introduced evidence showing that after the serving of such notice, on the 8th day of May, 1856, the plaintiff commenced proceedings against the said Van Buskirk, before Calvin De Wolf, Justice of the Peace of Cook County, under the statute of forcible entry and detainer, on the ground that the plaintiff had leased the premises to the said Sherwood for the term of one year, ending on the 1st day of May, 1856, and Sherwood had underlet to Van Buskirk. But Van Buskirk wrongfully refused to deliver up possession, although the year had expired, and possession had been demanded by notice in writing; that on the trial before the Justice, the verdict of the jury was in favor of said plantiff, and thereupon the justice gave judgment that the plaintiff should have restitution of the premises and his costs, from which judgment, the said Van Buskirk appealed to the Circuit Court of Cook County, but the said Van Buskirk died before the appeal was brought to a trial, and the Court then dismissed the appeal for want of prosecution.

Asa Kennicott, a witness called by the plaintiff, being sworn, testified as follows, viz.: I am acquainted with the premises in question—I have resided in Chicago during the last 15 years, and have some knowledge of what property would rent for. The rent of these premises was worth one thousand dollars, for a year from May 1st, 1856. Rents were high that season, I negotiated a lease of these premises that season for one year from May 1st, 1856, with the privilege of five years, at a rent of one thousand dollars a year. I dont know the name of the person with whom I negotiated—I think his name was Bodwell—this was in April 1856. My brother, the plaintiff was out of the city at the time, and that was the way I came to have any thing to do with it.

30

On being cross-examied by the defendant's counsel, the witness said.

I had no house of my own at the time, I frequently talked with persons having buildings, and from knowledge so obtained and from the fact that the price so required was so readily accepted, I form my opinion of the value. There were two other persons who wished to rent the premises at that price.

A. E. Woolcot a witness called for the plaintiff, being sworn, said

I am an attorney at law, I came to Chicago on the 8th of Janury, 1857, and

since the 11th of January, have been boarding with Mrs. Van Buskirk. During all that time she has occupied the premises in qustion. I negotiated a lease from the plaintiff to Mrs. Van Buskirk, the term to commence on the first day of May, 1857, and she has held under that lease since that time.

31

E. A. Bogue a witness called by the plaintiff, being sworn, said

I am acquainted with the plaintiff, Dr. Kennicott, have been in business with him during the last two or three years. I used to see Van Buskirk. Sometime in April 1856, I went with the plaintiff to serve a notice on Van Buskirk to leave the premises, on the 1st day of May, 1856. He, Van Buskirk was not at home, and the plaintiff served the notice on Mrs. Van Buskirk.

On being cross-examined by the defendant's counsel, the witness said Dr. Kennicott the plaintiff, served the notice on Mrs. Van Buskirk. I cant state the precise date.

John Maynard a witness called by the defendant, having been sworn, testified as follows, viz:

I am acquainted with the premises in question—Van Buskirk occupied the premises in May and April, 1856. I had a lease to commence on the 1st day of May, 1856, but I gave it up. I demanded possession of Mrs. Van Buskirk—she said she would not give possession. Dont remember whether I had the lease with me at the time—I gave up the lease to the plaintiff after I made the demand, and on the same day, May 1st, 1856. The counsel for the defendant, then requested the plaintiff to produce the lease mentioned by the witness Maynard, and the same being produced, was shown to the witness, who said the instrument now shown me is the lease of which I have spoken. The counsel for the defendant then offered in evidence said lease, of which the following is a copy, viz.:

32

LEASE.

This Indenture, made the fourth day of April, in the year of our Lord, one thousand eight hundred and fifty-six, between William H. Kennicott of Chicago, Illinois, party of the first part, and John Maynard of the same place, party of the second part, *witnesseth*, that the said party of the first part, for and in consideration of the covenants and agreements hereinafter mentioned, to be kept and performed by the said party of the second part, his 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 east one third part of Lot No. three, (3) in block No. 95, school section addition to Chicago, with the buildings and improvements thereon, and said Kennicott is to repair the roof of the kitchen, the plastering and the underpinning at the right of the hall; *to have and to hold* the above described premises, with the appurtenances, unto the said party of the second part, his executors, administrators, and assigns, from the first day of May, in the year of our Lord one thousand eight hundred and fifty-six,

33 for and during and until the first day of May, A. D. 1861, at noon, being a term of five years. 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, executors, administrators and assigns, to pay the said party of the first part, as rent for said demised premises, the sum of one thousand dollars per annum, payable in monthly sums of $83 33/100 each month in advance. Said Maynard to have the right to build additions in front or rear of said building, and at the end of said time, said Kennicott agrees to pay the value of such improvements at that time; and if the parties cannot agree upon such value, the same may be determined by three arbitrators, one to be chosen by each party, and the other by the two thus selected, whose award shall be final.

And the said party of the second part further covenants with the said party of the first part, that the said second party has received the said demised premises in good order and condition, and that at the expiration of the time in this lease mentioned, he will yield up the said premises to the said party of the first part, in as good condition as when the same were entered upon by the said party of the second part, loss by fire, or inevitable accident, or ordinary wear excepted; and also will keep the premises in good repair during this lease, at his own expense.

34 And the said John Maynard, executors, administrators and assigns, agree further to pay (in addition to the rents above specified) all water rents and water assessments taxed, levied or charged on said premises, for and during the time for which this lease is granted, and save said premises and the party of the first part harmless therefrom, and that he will keep said premises in a clean and wholesome condition, in accordance with the ordinances of the city, and directions of the sewarage commissioners.

It is Expressly Understood and Agreed, by and between the parties aforesaid, that if the rent above reserved, or any part thereof, shall be behind or unpaid, on the day of payment, whereon the same ought to be paid, as aforesaid, or if default shall be made in any of the covenants herein contained, to be kept by the said party of the second part, his executors administrators and assigns, it shall and may be lawful for the said party of the first part, his heirs, executors, administrators, agent, attorney, or assigns, at his election to declare said term ended, and into the said demised 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, 35 whether the same be exempt from execution and distress by law or not, and the said party of the second part in that case hereby agrees to waive all legal rights which he may have to hold or retain any such property, under any exemption laws now in force in this State, or in any other way; meaning and intending hereby to

give the said party of the first part, his heirs, executors, administrators or assigns a valid and first lien upon any and all goods, chattels or other property belonging to the said party of the second part, as security for the payment of said rent, in manner as aforesaid, anything hereinbefore 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, his executors, administrators and assigns, do hereby covenant and agree to surrender and deliver up said above described premises and property, peaceably, to said party of the first part, his heirs, executors, administrators and assigns, immediately upon the determination of said term as aforesaid, and if he shall remain in possession of the same, three days after notice of such default, or after the termination of this lease, in any of the ways above named, he shall be deemed guilty of 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.

36

And it is further covenanted and agreed between the parties, that the party of the second part shall pay and discharge all costs and attorney's fees and expenses that shall arise from enforcing the covenants of this indenture by the party of the first part. Said Kennicott shall have the right to subdivide said lot on his discretion, but said Maynard shall have the right to occupy the whole, or to sub let in his discretion.

Witness the hands and seals of the parties aforesaid.

WM. H. KENNICOTT. SEAL

JOHN MAYNARD. SEAL

Sophia Van Buskirk a witness called by the defendant, being sworn, testified as follows, viz. :

I am the widow of John Van Buskirk. We occupied the premises in question up to the first day of May, 1856, under Mr. Sherwood—my husband was not in the city May 1st, 1856. In the fore part of April Maynard told me he wanted me to remain in the house as long as I choose—saying that he had a lease—that he would give me permission to do so—that he had a lease in his pocket. We remained on account of this permission and request. We had supposed we were to have the premises of the plaintiff for another year; Mr. Sherwood made no demand of possession that I know of, but he came to me in regard to the matter the second or third day of May, and I told him I was remaining on the premises by the permission of Maynard, who had leased the premises for five years.

37

On being cross-examined by the cousel for the plaintiff, the witness testified as follows, viz. : About the first day of April was the first I saw Maynard. He said he had a lease and said that we could remain there—he said he should throw up his lease—said the house was not as good as the Doctor had represented—said

he would give us permission to remain. On direct examination of witness being resumed by defendant's counsel, the witness testified as follows, viz.: Maynard called two or three days before the first day of May, and said he would demand possession on the first day of May, and instructed me to say that I would not give up possession—I remained for that reason.

The witness Maynard being called by the plaintiff, testified as follows, viz.:

Soon after I took the lease from the plaintiff in the forepart of April, I called at Van Buskirk's and we had the conversation Mrs. Van Buskirk has testified to. I told them that I would give them permission to remain in the house, and it was arranged that I should demand possession of them on the first day of May, that they should refuse to give up possession, and that then I should throw up my lease, on the ground that I could not get possession. Afterwards, and a week or two previous to the first day of May, I went with Mr. Van Buskirk to Mr. Mather a lawyer, of the firm of Mather & Taft, to ascertain whether we could do as we had talked; Mr. Mather told us we could not do it. I then told Mr. Van Buskirk I would have nothing more to do with it. After that I gave no permission to remain. I had no authority to permit them to remain, and gave none.

38

Which is all the evidence given in the trial of said cause. At the request of the counsel for the plaintiff, the Court then and there instructed the Jury as follows, viz.:

1. If the defendant or his assignee Van Buskirk held over the possession of the premises, and continued in possession during the year commencing May 1st, 1856, and refused to deliver possession to the plaintiff, then the plaintiff is entitled to recover the value of the use of the premises for that time.

2. If the Jury find for the plaintiff, then he is entitled to recover all the damage sustained by a breach of the covenant in question, though a part may have accrued after the commencement of this suit.

And at the request of the counsel for the defendant, the Court then and there gave the Jury the following instructions in writing, viz.:

39

1. If the Jury believe, from the evidence, that John Maynard received a lease of the premises in question from the plaintiff, to take effect on the first day of May, A. D. 1856; and that said Maynard instructed, requested or induced the tenant Van Buskirk to remain on said premises, after the expiration of the lease of said premises, by the defendant to her; and that she held over in consequence of such instructions, or authority, or permission, they will find for the defendant.

2. If the Jury shall believe from the evidence, that the defendant or his tenant Van Buskirk was ready and willing to deliver up possession of the premises at the expiration of the lease in question, but was prevented from so doing, and was authorized to continue in possession, or was prevented or requested to remain by Maynard, and that he was entitled to possession and claimed title under the plaintiff by a lease from him, then the Jury will find for the defendant. To the giving of which instructions and each of them on the part of the defendant, the counsel for the plaintiff then and there excepted. And the cause having been

submitted to the Jury under the instructions of the Court so given as aforesaid, the Jury rendered a verdict for the defendant, as appears by the record aforesaid. And the counsel for the plaintiff then and there moved the Court for a new trial, on the grounds: 1st, That the verdict is against the evidence; 2d, That the instructions given by the Court on the part of the defendant, were not warranted by the evidence, but tended to mislead the Jury, and were erroneous.

Which motion came on for argument on the fifth day of March, at the March term of said Court, A. D. 1858; and the said Court then and there overruled the said motion, to which decision of the Court the counsel for the plaintiff then and there excepted.

And inasmuch as the matters and exceptions aforesaid do not appear upon the record of the trial aforesaid, the said plaintiff prays that this his bill of exceptions may be signed and sealed by the Court, and made a part of the record herein, which is done accordingly.

GEORGE MANIERE,
Judge of Seventh Judicial Circuit, Illinois. SEAL

GOODRICH, FARWELL & SMITH,
Attorneys for Appellant.

Chicago, April 9th, 1858.

S. P. ROUNDS, STEAM PRINTER, CHICAGO.

38

Supreme Court

William H Kennicott
appellant
vs
Phillips Sherwood
appellee

Abstract of Record

Filed Apr 21, 1858
L Leland
Clerk

Note respecting
opinion