

14547

No. _____

Supreme Court of Illinois

White

vs.

Walker

71641  7

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division.

No. 239.

Reported 31 Feb

*2 May
1887*

*White
Kear*

①

UNITED STATES OF AMERICA,
STATE OF ILLINOIS, COUNTY OF COOK, SS.

Pleas, before the Honorable, the Judges of the Superior Court of Chicago, within and for the County of Cook and State of Illinois, at a regular Term of said Superior Court of Chicago, begun and holden at the Court House, in the City of Chicago, in said County and State, on the first Monday, being the third day of November in the year of our Lord One Thousand Eight Hundred and Sixty two and of the Independence of the United States of America the Eighty fourth.

Present, The Honorable John M. Wilson Chief Justice of the }
Superior Court of Chicago. }
Van H. Higgins } Judges.
Grant Goodrich }
Joseph Knox Prosecuting Attorney.
Anthony C. Hering Sheriff of Cook County.
Attest, Thomas J. Carter Clerk.

Do it Remembred that heretofore and not on the Eighteenth day of November in the Year of Our Lord. One Thousand Eight Hundred and fifty nine, there issued out of the Office of the Clerk of the Superior Court of Chicago in said County. The Paper Writ of Summons which said Writ with the Sheriff returned under seal and in words and figures following to wit

James J. White
County of Cook }
The People of the State of Illinois }
To the Sheriff of said County - Greeting }
That you command every that you Summon }
James J. White if he shall be found in your }
County to appear before the Court of said }
County on the first day of December next }
to answer to the Writ of Summons above }
written and to the Writ of Summons }
which shall be served on him by you }
and to the Writ of Summons which shall }
be served on him by you.

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County, personally to be read and appear before the Superior
Court of Chicago, of Said Cook County, on the first day
of the next Term thereof, to be holden at the Court
House in the City of Chicago in Said Cook County
on the first Monday of December next, to answer
unto Martin Q Walker in a plea of trespass on
the Case in promises, to the damage of Said Plaintiff
as he says in the Sum of Twelve Hundred Dollars
And have Upon them and them this writ with an
endorsement thereon in what manner you shall
have executed the Same

Witness Walter Kimball Clerk of said
Court and the Seal thereof at the City
of Chicago, in Said County the 18th
day of Nov AD 1859
Walter Kimball Clerk

And by reading to the within named defendant this
23rd day of November 1859 John Gray Sheriff
By A C Henry Deputy

And afterwards to wit on the Twenty fifth day
of May in the Year of our Lord One thousand Eight
Hundred and Sixty the Complaint herein by
J W Braughler his Attorney filed in the office of the
Clerk aforesaid his Certain Amended Declaration
in words and figures following to wit

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State of Illinois } Superior Court of Chicago of
Cook County } The June Term AD 1860

Martin O. Walker Plaintiff in this suit
by John W. Waughof his attorney complains
of Alexander White defendant in this suit of
a plea of trespass on the case or promises

For that whereas heretofore, to-wit: on the
Eleventh day of April AD 1857 at the County of
Cook aforesaid the said Plaintiff then being
possessed of certain premises, to-wit: lots twenty
one (21), twenty two, twenty three and twenty four
of Block Nine of Fort Dearborn addition to
Chicago in the County of Cook aforesaid and
the large frame building thereon being the same
lately occupied by Mrs. Wemple as a boarding
house, one William J. Napier applied to the said
plaintiff and requested him to rent the said
premises to him for the term of two years from
the first day of May AD 1857 and offered
the said Plaintiff as rent therefor the sum of
thirty hundred dollars (as rent for said premises)
to be paid in monthly payments of One hundred
dollars and an advance on the first day of each
and every month. But the said Plaintiff not
being willing to risk the chances of collecting
rent from the said William J. Napier declared
to rent the said premises to him unless he should

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gave the said Plaintiff security for the
payment of the rent thereof and thereupon
the said William J. Napier proposed to the
said Plaintiff that he would procure the
said Defendant to guarantee the payment
of the rent if the said Plaintiff would rent
the said premises to him on the terms and
conditions aforesaid and afterwards, to wit:
on the day and year aforesaid at the County
of Cook aforesaid the said Defendant
came to the said Plaintiff with the said
William J. Napier and then and there agreed
with ~~the~~ said Plaintiff that if he would lease the
said premises to the said William J. Napier on
the terms aforesaid that he ~~the~~ said Defendant would
become responsible for the payment of the rent
and would pay the same when due if the said
William J. Napier failed to pay the same when
due and the said Plaintiff then and there
agreed in consideration of the premises that he
would rent the said premises to the said
William J. Napier on the terms aforesaid.

The said Plaintiff avers that in
consideration of and confiding in the promises
and undertakings of the said Defendant the
said Plaintiff did on the day and year
aforesaid at the said County of Cook make
and execute under his hand and seal a

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written demise of the said premises to the said William J Napier for the full term of two years from the first day of May AD 1887 at and for the annual rent of twelve hundred dollars payable in monthly payments of one hundred dollars each on the first day of every month in advance - And afterwards to wit on the thirteenth day of April AD 1889 at the County of Cook aforesaid the said Defendant in pursuance of the agreement made by him to become responsible for the rent of the said William J Napier on the said written demise to become due to the said Plaintiff and in consideration of the premises did execute her guarantee in writing on the back of said written demise made by the said Plaintiff to the said William J Napier ^{and} delivered the same to the said Plaintiff and thereby then and there the said Defendant promised the said Plaintiff to pay him the sum of twelve hundred dollars for each year for the full term of two years in monthly payments of one hundred dollars each on the first day of each and every month in advance from the first day of May AD 1887 for and during and until and including the first day of April AD 1889 as the rent on the said demise of the said Plaintiff to the said

⑥ William J Napier of said premises as the same became ^{due} thereon in case the said William J Napier should fail or neglect to pay the same as aforesaid.

The Counterpart of which said written demise sealed with the seal of the said Plaintiff and of the said William J Napier is now in possession of the said Plaintiff with the said guarantee of the said Defendant written thereon and which he brings here into Court (a copy of which is already filed in this cause) as by said Indenture reference being thereunto had, with among other things more fully and at large appears and the said Plaintiff avers that upon the execution of the said guarantee by the said Defendant to him as aforesaid the said Plaintiff delivered to the said William J Napier the said written demise and in consideration of the premises and relying upon the promises and undertakings of the said Defendant in that behalf permitted the said William J Napier to have and enjoy the said premises for the full term of two years, to wit: for the full term of the said written demise, to wit: at the County of Cook aforesaid and by virtue of the said written demise said William J Napier entered into and upon all

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and singular the said premises to wit: on the first day of May AD 1887 at the County of Cork aforesaid and had and used and enjoyed the same for the full term of the said Indenture thereof to him granted as aforesaid. But the said William J Napier did not pay the rent as the same became due on the said written demise but failed to do so and made default therein and although often requested so to do did not nor would pay the same nor did not, any one pay the same for him but so to do neglected and refused and still do neglect and refuse to pay the same to the said Plaintiff. By means whereof and by force of the statute in such case made and provided the said Defendant then and there became liable to pay the said sum of money mentioned as rent to be paid on the said written demise according to the tenor and effect of the said Indenture and of the said guarantee. And being so liable the said Defendant in consideration thereof and in consideration of the premises aforesaid to wit on the thirteenth day of April AD 1887 at said County of Cork undertook and then and there faithfully promised the said Plaintiff to pay him the said several

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sums of money, when thereunto afterwards
required.

2^d Count - And whereas also herebefore, to-wit:
on the eleventh day of April A.D. 1857 at the
County of Cook aforesaid said Plaintiff being
possessed of certain lands and tenements, to-wit:
Lots twenty one, twenty two, twenty three and
twenty four, of Block Number nine of Fort
Dearborn Addition to Chicago with the large
frame building ^{thereon situated} in the County of Cook and
State of Illinois being the same lately
occupied by Mrs. Memphis as a
boarding house and being so possessed
of said premises one William J. Napier
applied to the said Plaintiff to have the
said Plaintiff rent to him, the said
premises for the term of two years from the
first day of May A.D. 1857 at the yearly rent
of twelve hundred dollars payable in monthly
payments of One hundred dollars each on
the first day of each and every month in
advance but the said Plaintiff not being
satisfied that the said William J. Napier
would pay his rent for said premises in the
event of the same being leased to him as aforesaid
the said Plaintiff declined to rent the said
premises to the said William J. Napier.

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He should give the said Plaintiff
for the payment of the rent thereof, and
thereupon said William J Napier proposed to
said Plaintiff that he would procure the said
Defendant to become responsible for the
payment of the rent of the said premises if
the said Plaintiff would let them to him on
the terms aforesaid, to which proposition the
said Plaintiff agreed, to wit: at the County of
Cook aforesaid.

And afterwards, to wit: on the day and
year aforesaid at the County of Cook
aforesaid the said Defendant and the said
William J Napier came to the said Plaintiff
and then and there agreed with the said
Plaintiff that he the said Defendant would
become responsible to the said Plaintiff for
his rent of the said premises if he should
rent the same to the said William J Napier
on the terms aforesaid and in the event that
the said William J Napier failed to pay him
his rent for said premises on such demise
that the said Defendant would pay the
rent himself when the same became due - And
in consideration of the promise and undertaking
of the said Defendant in that behalf the said
Plaintiff then and there agreed to rent the
said premises to the said William J Napier

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on the terms and conditions aforesaid
And the said Plaintiff avers that
Assisting in the premises and undertakings
of the said Defendant and in consideration
thereof the said Plaintiff did on the day
and year aforesaid at said County of Cook
make and execute under his hand and
seal a written demise on the said premises
to the said William J. Napier for the full
term of two years from the first day of May
A.D. 1887 at and for the annual rent of
twelve hundred dollars payable in monthly
payments of one hundred dollars each on the
first day of every month in advance; which
said Indenture was in the words and figures
following to-wit:

"This Indenture made this Eleventh
"day of April in the year of our Lord one
"thousand eight hundred and eighty seven
"Between Martin O. Walker by John H. Naughton,
"his attorney in fact of Chicago Ill party of
"the first part and W. J. Napier 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 has executed

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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 large two story
frame dwelling lately occupied by Mrs
Temple as a boarding house situated on lots
(21) twenty one, (22) twenty two (23) twenty three and
(24) twenty four in Block Nine (9) East Dearborn
and to Chicago. 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 seven
for and during and until the first day of
May, 1859 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 hereby grant 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 the said
demised premises the sum of twelve hundred
dollars per annum payable in monthly payments

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of one hundred dollars each in advance
and premises to be kept in repair at the
expense of said party of the second part.

And the said party of the second part
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 said
the term 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 less by fire or inevitable
accident or ordinary wear excepted and
also will keep said premises in good repair
during the lease at his own expense.

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 consent of said party
of the first part first had and obtained
therein. And the said William J. Napier for
himself and his heirs executors administrators
and assigns agree further to pay (in addition
to the rents above specified) all the water
rents and assessments taxes levied or charged
on said premises for and during the time

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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 healthy condition
in accordance with the Ordinances of the
City and directions of the Sewerage Commission.

It is expressly understood and agreed by
and between the parties aforesaid that if the
rent above reserved or any part thereof shall
be behind or unpaid on the day of payment
whereon the same ought to be paid as aforesaid
or if default shall be made in any of the
covenants or agreements herein contained to be
kept by the said party of the second part his
executors administrators and assigns it shall
and may be lawful for the said party of
the first part his 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 enter and the said party of the second
part or any other persons 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
be possessed and enjoyed as in his first and
former estate and to distrain for any rent

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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 law 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 execution 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 herein
before 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 execution administrators
or assigns as aforesaid or in any other way
the said party of the second part his
execution 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 execution

administrator and assigns immediately after
 the determination of said term as aforesaid
 and if he shall remain in possession of the
 same one day 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

Witness the hands and seals of the
 parties aforesaid

Martin O Walker (seal)

by J H Haughoff his atty in fact

Wm J Napier (seal)

And afterwards to wit on the thirtieth
 day of April A.D. 1857 at Chicago in said
 County of Cook said Defendant in consideration

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of the premises and in pursuance of the agreement made by him with the said Plaintiff or that behalf as aforesaid did execute and deliver to the said Plaintiff his written guaranty, which said guaranty is in the words and figures following, to wit:
I hereby guaranty the payment of the rent to become due on the within lease on the days the same becomes due

(Dated) Chicago April 13th 1887

And signed by the said Defendant by the name and description of Alex White (meaning and intending Alexander White the said Defendant) which said written guaranty was made upon the back of the said written demise made as aforesaid by the said Plaintiff to the said William J Napier and thereby then and there the said Defendant promised the said Plaintiff to pay him the rent according to the tenor and effect of the said written demise in case the said William J Napier failed to pay the same according to the tenor and effect thereof.

The counterpart of which said Indenture the said Plaintiff brings here into Court as by said Indenture reference being thereunto had will among other things show

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fully and at large appear.

And the said Plaintiff avers that upon the execution of the said guarantee by the said Defendant to him as aforesaid the said Plaintiff delivered to the said William J Napier the said written demise ^{and} in consideration of the promises & relying upon the promises and undertakings of the said Defendant in that behalf permitted the said William J Napier to have and enjoy the said premises for the full term of two years, to wit: for the full term of the said written demise, to wit: at the County of Cook aforesaid.

And the said Plaintiff avers that by virtue of said written demise the said William J Napier entered into and upon the said demised premises, to wit: on the first day of May A.D. 1857 and had and enjoyed the same for the full term of said written demise thereof to him granted as aforesaid but in the payment of the rent that became due on the said written demise to the said Plaintiff the said William J Napier made default and did not nor any one for him pay the same according to the tenor and effect of said demise, but so he do totally failed and refused so to do.

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By means whereof and by force of the statute in such case made and provided the said Defendant then and there became liable to pay the said sum of money to become due on the said written demise to the said Plaintiff according to the tenor and effect thereof and of the tenor and effect of the said guarantee by him made as aforesaid and being so liable he the said Defendant in Consideration thereof and in Consideration of the premises afterwards to wit: on the said thirteenth day of April A.D. 1857 at said County of Cook undertook and then and there faithfully promised the said Plaintiff to pay him the said several sums of money when thereunto afterwards requested if the said William J. Napier should fail to pay the same as aforesaid.

Yet the said Defendant not regarding his said promises & undertakings but contriving & although often requested so to do has not paid said Plaintiff either of said sums of money above mentioned or any part thereof but so to do has hitherto wholly neglected and refused and still does neglect and refuse to the damage of said Plaintiff of between hundred dollars and therefore he brings his suit to

John H. Haughof
Plf. Atty.

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And afterwards to wit on the Sixteenth day of
June in the Year aforesaid the Defendants herein
by Omer & Luby his Attorney filed in the office
of the Clerk aforesaid his Certain Plea and Notice
in words and figures following to wit

Alexander White } Superior Court of Chicago
at } June Term AD 1860
Martin O Walker }

Defn. Atty.

J W Haughefs
Plf. atty

That upon the trial of the above entitled
cause the said Defendant will rely upon
the following special matters for a defense to
said action of Plaintiff.

1st That the said Plaintiff ought not to recover upon the causes of action and promises in said amended declaration mentioned because he says - That the said promises of said Defendant in said Declaration mentioned were special promises to answer for the debt and default of another person in manner and form as in said declaration mentioned and set forth and that no agreement in respect of or relating to the said promises and supposed causes of action or either of them in said declaration mentioned or any memorandums or note thereof wherein the consideration for the said special promises or either of them was stated or shown was in writing and signed by the said Defendant or any person therunto by him lawfully authorized according to the Statute in such case made and provided.

2^d.

That there was no consideration for the promises and undertakings of Defendant or either of them in said declaration mentioned.

3^d Payment

11th etc

That after the making of said cause and some time in the fall or winter of the year 1857 at

Before that time the street in the City of
 Chicago adjoining the said demised premises
 was by said Plaintiff or by his said Plaintiff's
 consent raised to grade, that is to say, the
 said street was raised by adding and putting
 on of earth & stones several feet above the
 height and condition it was in when said
 premises were leased by Plaintiff to said Nipper
 as in said declaration mentioned whereby and
 by means whereof a nuisance was created by
 the water dirt and filth which flowed in
 and upon the basement story of the house situated
 upon said premises at all times and often times
 covering the basement floor of said house several
 inches with water - by reason of which nuisance
 caused by the conduct of said Plaintiff the
 said premises became untenable and the
 continued occupation of said premises
 by reason of the flowing in of said water dirt
 and filth upon said premises caused by the
 raising of said street became and was at
 great risk and danger to the health and
 comfort of said lessee said Nipper and his
 family and produced an eviction of said lessee
 by said Plaintiff which would have justified
 said lessee in vacating said premises and that at
 and about that time, to wit on or about the
 first day of December 1857 the said Plaintiff

he & with said Tenant Lessee in consideration of the foregoing facts and in consideration that said Lessee was deprived of the beneficial enjoyment of said premises by reason of the raising of said street to grade as aforesaid - and in consideration and because the said Lessee had for some months previous thereto lost his boarders (the said house having been rented for and used as a boarding house) because of the said nuisances and because of the failure of said Plaintiff to do certain repairs and make certain drains, which he Plaintiff agreed before with said Lessee to do and make - and for other good and sufficient consideration that the said Plaintiff would from and after that time, to wit: the making of said agreement, reduce said rent for said premises to eighty dollars per month and would from that time and for the remainder of said term accept and receive of and from said Lessee the sum of eighty dollars per month as and for full satisfaction and payment of the rent of said premises - and that this Defendant should not after that time be liable for or called upon to pay any additional rent he paid eighty dollars per month as agreed to be paid by said Lessee and agreed to be accepted by said Plaintiff as aforesaid and

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That at the time of the making of said last mentioned agreement as to said Eighty dollars per month between said Plaintiff and said lessee all the rent before that time due and payable on said lease had been paid by said lessee to said Plaintiff and that the said lessee did from and after the making of said agreement as to eighty dollars per month and until his said lessee's decease (which occurred some time in the Spring or Summer of the year 1858) pay to said Plaintiff and said Plaintiff did receive of and from said lessee the sum of and at the rate of Eighty dollars per month as and for full satisfaction and payment of all rent becoming due on said premises during said time to wit: from the making of said agreement to the decease of said lessee, and that after the decease of said lessee the widow of said lessee, she the said widow of said lessee not being administratrix or executrix of said lessee or having any right or authority to take possession of or control of the estate of the lease hold interest of said lessee in said premises which facts and also the fact of said decease was well known to said Plaintiff did take possession of and occupy said premises with the consent

& permission of said Plaintiff and did from
 and after the decease of her said husband
 and until the first day of August 1858 pay to
 said Plaintiff and said Plaintiff did
 accept from said Mrs Napier widow the
 sum of eighty dollars per month as rent of
 said premises - And that on or about the
 said first day of August the said premises
 having become still more unbeneficial
 untenable by reason of the said nuisance
 and in consideration thereof and for other good
 and sufficient considerations the said Plaintiff
 did agree to and with said Mrs Napier widow
 to accept and receive from her said Mrs Napier
 the sum of fifty dollars per month from
 said first day of August until the expiration
 of the term in said lease mentioned as rent
 for said premises and said Mrs Napier did
 pay to and said Plaintiff did receive from
 her the sum of fifty dollars per month for
 each and every month from said first day
 of August until the expiration of said
 term in said lease mentioned as and for
 and in full of the rent of said premises
 for said term. That from and after the
 decease of said lessee and until the expiration
 of the term of said lease in said declaration
 mentioned said premises were waste and of

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The value not to exceed fifty dollars per month of paid time which sum or part of fifty dollars has been fully paid to said Plaintiff.

Barker & Tully
Plfs Attys

And afterward to wit. on the Twenty third day
 of June in the Year of our Lord One thousand Eight
 hundred and Sixty two. Said day being one of the
 days of the June Term of Said Court the following
 Among the proceedings were had in said Court and
 entered of record to wit

Charles O'Walker

vs
 Henderson White Appraiser

This cause being this day
 Called for trial Comes Said plaintiff by John W. Waughp
 his Attorney And Said Defendant by Parker & Tuley his
 Attorney also Comes and issues being joined herein it is
 ordered that a jury Come. Whereupon Comes the jury
 of good and lawful men to wit John Russell Adams
 Amberg, William O. Snell, J. H. Gutter, James Thompson
 J. D. Hill, D. S. Smith, R. L. Turner, E. M. Tucker,
 L. M. Andrews, R. L. Chapman and D. T. Wood,
 who being duly elected and sworn to try
 the issues joined as aforesaid after hearing evidence
 Argument of Counsel and instructions of the Court
 Retire to Consider of their Verdict, And afterward
 return into Court. Submit their Verdict and Say
 We the jury find issues for Said plaintiff And assess
 his Damages herein Against Said defendant to the Sum
 of Eight hundred and Sixty three dollars and Sixty
 five Cents; And therefore Said Defendant Submit
 his Motion herein for a new trial in Said Cause

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And afternoon to wit on the Twenty fourth day of November in the Year aforesaid Said day being one of the days of the November Term of Said Court the following among other proceedings was had in said Court and in tend of record to wit.

Wm C. Waller

¹⁰
Alexander White

Motion for a New Trial in Appeal

This day againe Came Said plaintiff by John W. Waugh his Attorney and Said Defendant by Parker & Puley & Waller his Attorney also Came and the Cause Coming on now to be heard upon the Motion of Said Defendant heretofore Submitted herein at the Term Term A.D. 1862 for a new trial in Said Cause, and Counsel being heard thereon and the Court being fully advised in the premises it is Considered by the Court that the Motion of Said Defendant be and hereby is overruled and that a new trial be refused to Said Defendant. Wherefore Said plaintiff ought now to have judgment entered for his damages upon the Verdict of the jury rendered herein as aforesaid. Therefore it is Ordered that Said plaintiff do have and recover of and from Said Defendant his damages of Eight hundred and fifty three dollars and fifty five Cts in fairs aforesaid by the jury, how found and assessed and also his Cts and Charges in this behalf expended and how ascertained.

And therefore the Said Defendant prays an appeal herein to the Supreme Court of this State which

is allowed to him on Condition that he execute a bond here in twenty days in the penal sum of fifteen hundred dollars with Security to be approved by one of the Judges of this Court, Conditioned according to law and that like twenty days is also given him in which to file bill of exceptions

And afterwards to wit on the Ninth day of December in the Year aforesaid the Defendant here filed in the office of the Clerk aforesaid his Return Appeal Bond in words and figures following to wit

I know all men by these Presents, that we Alexander White of the City of Chicago County of Cook & State of Illinois and and William Weyman of the County of Cook and State of Illinois are held and jointly bound unto Martin O Walker also of the same County and State in the penal sum of Fifteen hundred Dollars, lawful money of the United States, for the payment of which well and truly to be made we bind ourselves, our heirs, executors and administrators jointly, severally and finally, by these presents Given our hands and Seals, this eighth day of December A D 1862.

The Condition of the above obligation is such, that when the said, Martin O Walker did on the 24th day of November A D 1862, in the Superior Court of

31 Chicago in and for said County of Cook, and State aforesaid
 and of the said Superior Court of said State recover a judgment
 against the above bounden Alexander White for the sum
 of eight hundred and fifty three dollars and fifty five
 Cents besides Costs of Suit; from which said judgment of the
 said Superior Court of Chicago, the said Alexander White
 has prayed for, and obtained an appeal to the Supreme
 Court of said State. Now Therefore, if the said
 Alexander White shall duly prosecute his said appeal
 with effect and moreover, pay the amount of the judg-
 -ment, Costs, interest and damages rendered, and to be ren-
 -dered, against him in case the said judgment shall be
 affirmed in said Supreme Court, then the above obligations
 to be void, otherwise to remain in full force and virtue

Taken and entered into
 before me, at my office in
 Chicago this _____ day of
 December A D 1862
 Van H. Higgins Judge

Alex. White Seal
 Wm. W. Wymore Seal
 C. R. B. McFarlane Seal

And afterwards to wit on the Eleventh day of
 December in the year aforesaid. the Defendant
 herein by Parker and Talley his attorneys filed in
 the office of the clerk aforesaid his Petition Bill of
 Exception in words and figures following to wit

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State of Illinois
Cook County }^{1st}In Superior Court of
Chicago

Martin O. Walker

November Term AD 1862

vs

Alexander White }

Be it remembered that heretofore to wit: on the 23^d day of June AD 1862 the same being one of the days of the June Term AD 1862 of said Court this cause coming on to be tried and a jury having been empaneled to try the issues joined, the Plaintiff to ascertain & prove the issues on his part, called as a witness John W. Haug of who being duly sworn testified:

I know the parties Plaintiff & Defendant and the premises in question on this suit - In the Spring of 1857 I was acting as Plaintiffs general agent, renting his houses, making leases, collecting rents &c. The premises in question were occupied up to May 1st 1857 by a Mad Wemple - The lease was executed by a Dr. Menzinger as security whom I knew to be good for the rent. I knew Wm J. Sapier at that time, he took a lease of the premises -

The Plaintiff by his Counsel then propounded to the witness the following question.
What circumstances was the lease to Sapier executed?

To which question the Defendant by his Counsel then & there objected on the ground that a consideration to the guaranty paid on in this cause could not be shown by parol, but the Court overruled the objection and permitted the question to be propounded to the witness - To which ruling and decision of the Court in overruling said objection & permitting said question to be put the Defendant by his Counsel then & there duly excepted.

The witness then proceeded as follows:

Dr. Monsinger had a lease the term of which extended to May 1st 1859. Napier wished to get the lease and Dr. Monsinger wished to let him have it. Napier applied to us to transfer the lease to him. We were satisfied with Monsinger & not with Napier. I informed Napier if he could give us satisfactory security we would make the change - Napier said he would give Alexander White - we told him we would be satisfied with White - I drew a lease to White - a lease in White's name. White objected to making the covenants - He wanted Napier to make the covenants. He White did not want to be held liable in the first instance, only in case Napier did not pay. White said he was willing to guarantee the lease. I then changed the lease from

White to Napier who came in afterwards and signed it. I kept both copies of the lease - The lease was drawn April 11th, Napier signed it - then saw White & he came in & signed the guaranty. I then gave Napier his copy & he went into possession in May 1857. I declined to deliver lease or let him in until the guaranty was signed - It was signed by White in my presence.

The Plaintiff by his Counsel then propounded to the witness the following question - Was the lease signed on the day it bears date? To which question the Defendant by his Counsel then and there excepted, objected, but the Court overruled the objection & permitted the question to be put. To which decision & ruling of the Court the Defendant by his Counsel then & there duly excepted.

The witness then proceeded as follows

My impression is that the lease was not Executed by Napier on the day it bears date. Both Copies remained in my possession until after the guaranty. I declined expressly to deliver the lease until guaranteed. I collected the rent - all that was paid. The payments were as follows, paid in full until & including the month of October 1857, six months afterwards there was paid November 1857 \$80. December

30--- 1857 \$50 January 1858 \$50 February 1858 \$50
March, April, May, June & July \$80 each
August \$45 September, October, November,
& December \$50 each January 1859 \$50 February
and March \$50 each, April \$20 and May \$40

The Plaintiff then offers in evidence the
lease spoken of by the witness which was in the
words and figures following, to wit:

This Indenture made this Eleventh
day of April in the year of our Lord one thousand
eight hundred and fifty seven Between Martin
O Walker by John W Maughp his Attorney in
fact of Chicago Ill party of the first part
and W J Napier of the same place party of
the second part, Witness 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 large two story
frame dwelling lately occupied by Mrs Temple
as a boarding house situated in Lot 24 Twenty

one (22) twenty two (23) twenty three (24) twenty four
in Block Nine (9) Fort Dearborn added to Chicago

To have and to hold, the said above described premises with the appurtenances unto the said party of the second part his executor administrators and assigns from the first day of May in the year of our Lord one thousand eight hundred and fifty seven for and during and until the first day of May 1859. 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 Twelve hundred dollars per annum payable in monthly payments of one hundred dollars each in advance, said premises to be kept in repair at the expense of the said party of the second part. And the said party of the second part further covenants with the said party of the first part that said second party has received said demised premises in good order and condition and that at the expiration of the term in this lease mentioned or some determination thereof by forfeiture he will yield up the said

37 premises to the said party of the first part in as good condition as when the same were entered upon by the said party of the second part less by fire or inevitable accident or ordinary wear excepted and also will keep said premises in good repair during the lease at his own expense.

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 the said party of the first part first had and obtained thereto.

And the said William J. Napier for himself and his heirs, executors, administrators and assigns agree further to pay (additional to the rents above specified) all water rents levied or charged on said premises for and during the time for which the lease is granted and save the said premises and the said party of the first part harmless therefrom and that he will keep said premises in a clean and healthy condition in accordance with the ordinances of the City and 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 when the same ought to be paid

as aforesaid or if default shall be made in
 any of the covenants or agreements herein
 contained to be kept by the said party of the
 second part his executor administrators and
 assigns it shall and may be lawful for the
 said party of the first part his heirs executor
 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 be exempt from execution and
 distress by law or not - and the said party
 of the second part in that case hereby
 waives all legal rights which he now has
 or 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

executor administrator or assigns as valid and
 first lien upon any and all goods chattels
 and other property belonging to the said party
 of the second part as security for the
 payment of ~~the~~ said rent in manner
 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
 heir executor administrator and assigns
 as aforesaid or in any other way ^{the} said
 party of the second part his executor
 administrator and assigns do hereby
 covenant and agree to surrender and deliver
 up said above described premises and
 property peaceably to the said party of the
 first part his heir executor administrator
 and assigns and immediately upon the
 determination of said term as aforesaid and
 if he shall remain in possession of the same
 one day 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 is now stated

23 And it is further covenanted and agreed by and between the parties that the party of the second part shall pay and discharge all cost and attorney fees and expenses that shall arise from enforcing the covenants of this Indenture by the party of the first part

Witness the hands and seals of the parties aforesaid

Merton O Walker (seal)

by J N Maughoff Attorney in fact

Wm J Napier (seal)

together with the guaranty thereon

I hereby guarantee the payment of the rent to become due in the within lease on the days the same become due

Chicago April 13. 1887

Alfred White

To the admission of which said lease & guaranty in evidence the Defendant by his counsel then & there objected on the grounds that the guaranty did not show a consideration therefor but the Court overruled the objection & admitted said lease & guaranty in evidence to which decision and ruling of the Court the Defendant by his counsel then & there duly excepted.

And thereupon the witness upon his cross-

Examination testified

46

I am attorney in this case and brought this suit - I have been in this case up to this trial alone - I am attorney in some of M O Walker's cases, I have no contingent fee in this case and did not pay the costs of the suit before this out of my own pocket, I don't know that the words "on account" in the receipts in this case were written in after the date of the receipts, I don't remember whether I endorsed on Mrs Napier's lease payments "on account" - when the rent was not paid in full I endorsed in every instance I received on account. The words "on account" may have been written on my copy of leases when this suit was commenced.

It is my impression that Wm J. Napier died February 1857. I could not say whether testate or intestate. I think there was no administration. I think I should have known if there had been. The house was rented for a boarding house - It was on Randolph between Wake's Avenue and State Street east of the alley and on the North side of Randolph. The grade was raised in the fall of 1857 - The Plaintiff did not petition for the raising of the grade. S B & M O Walker the Plaintiff & his brother who were partners.

did. The grade was raised fourteen inches higher by the City of Chicago. Several causes contributed to throw water in on the premises in question. The improvements on Lake Street across the alley helped. Those buildings are 170 feet deep North to South, & slope South & water from their roof is thrown back upon the premises described in the lease. Then the other buildings were raised to grade while these premises were left unimproved & this threw the water in on these premises - Then there was the raising of the grade, the tenants complained and we made a drain - I won't be certain whether that I do or the next Spring - Napier family remained in the house after Napier's death - His widow kept the boarding house, she remained to the end of the lease some of the boarders remained - she had the house about full of boarders all the time. On re-examination the witness said: S. B. & M. C. Walker were partners, S. B. had no interest in this lot. M. C. Walker has said that he did not know of the signing the petition.

The Plaintiff here rested his case & the Defendant to maintain the issues on his part called as a witness Mrs. Wm J. Napier who being duly sworn testified.

I reside in Chicago, I am the widow
 of William J. Napier - He died April 1st 1858
 I know the house in question here, we moved
 in at about the time specified in the lease
 a short time before the 1st of May, 1857, we
 used the house as a boarding house - we
 took it from the party who had the house
 I remember the raising of the grade - After
 that the water came in & the roof leaked
 I had to stand ankle deep in water for
 weeks to prepare meals for the boarders
 Green slime laid about every where - I
 appealed to Walter, appealed to his feelings
 told him he lived in a good house as I once
 had, though now forced to keep boarders, my
 boarders were all leaving and I told Walter
 so - Walter promised to have the house fixed -
 so did Wenglop - Nothing was done for me
 I wait be sure when the water first stood ^{there} - The
 raising the grade affected it - The stagnant
 water was always in the house - even in the
 depth of summer it was scarcely dry - I went
 to see Mr Walter with Mr Dyrenfurth - I
 told him it was impossible for me to stay there
 & pay \$100 per month - Walter said I need not
 be troubled I might pay what I could and go
 home & rest satisfied and he would not trouble me
 He said he had Mrs White - I said you must

understand that I am the party who is to pay
not Mrs White. I told him I would leave
the house if he did not do something it was
in such a condition. I offered him \$80 per
month. He then told me that that would do
and that I might pay that until he sent me
word - said I will you tell Naughop? he
said he would. Walter said I was to be
under the rent of \$80 per month until he Walter
let me know. I then paid \$80 - the rent before
was \$100 - He spoke of White before that and
I told him I was the one to be responsible. I
paid \$80 after the conversation of which I have
spoken for a number of months - my receipts are
all on the house - The place became so very bad
that all my boarders left me. I then went
to Naughop - I told him that \$50 per month
was all I could pay - that my furniture was
there & he might take that. This was some time
after my husband's death. When I was paying
\$80 I noticed Naughop receipted for that
amount and ~~not~~ asked him why not in
full - He said that would do - I asked
him again - he said it was all right, all the
same - I thought it was - I did not show
the receipt to my friends. I told Naughop
I could not stay there the house was in such
a condition, the water & stove was about so

45 and the check was cashed. Naughos said he
didn't know. I paid \$50 from that time on
I paid \$80 up to the time when I commenced
to pay fifty dollars and fifty dollars thereafter
I told Naughos at the house that White was
not to be held responsible - That I was alone
responsible - If he wanted more than \$50 per
month he could take my furniture.

The Defendant by his Counsel then propounded
to the witness the following question

What was the amount and value of the
furniture you had?

In which question the Plaintiff by his Counsel
then & there objected - The Defendant by his
Counsel then stated that he desired to prove by the
witness that she had at the time mentioned by
her two thousand dollars worth of unencumbered
furniture in the premises - But the Court sustained
the objection and refused to allow the question
to be put to the witness - In which decision
and ruling of the Court the Defendant by his
Counsel then & there duly excepted - The witness
then proceeded - I understood Mr Naughos
agreed to the \$50 I paid it from month to month
& he asked no more - He would not take the
furniture - I had told Mr White that he was
evicted by Walter - I informed White
that Walter was not to expect more than

\$80 per month at the term of that arrangement or a week or two after - At the time I made the agreement with Maughof to pay him \$50 and when Maughof refused to take my furniture White was with me - I have stated as nearly as I can remember what passed.

I was never notified to pay more than the \$80 at the time I paid that sum more than \$50 at the time I was paying that sum -

It is not true that my house was full after it became untenable - I lost all my best boards my house was not half full for a year before I left - I stayed because I expected from time to time the house would be repaired & fixed. The original lease with my husband ran two years - I wished to stay as long as the term ran and finish up the rent - After my husband died Maughof came and collected the rent of me - My husband's death was not mentioned though Maughof knew it - Dyrenfunt was present the time of the conversation with Walker - I offered Mr White a Chattel Mortgage on my furniture as security - This was I think after the conversation with Maughof I believed & understood the rent to be \$50 after the agreement with Maughof but I wished to secure White against loss even on that and so I offered the furniture, but he said "no"

47 That he understood it was all right with Walker & he was not liable"

On Cross examination the witness said

The conversation about the £80 was before Napier died - It was about the time that I had the first £80 - I think I lodged with Mr Steele the money to pay for the furniture and the first months rent but after that I gave him no money - I did not go to Mr Steele for assistance Miss Steele was at my house when Mr Dyrenfurth and I returned from Walker's she told her father what had passed and he said it was all right - He said however that the house wasn't fit for me to stay in - I haven't the slightest recollection of asking Steele for assistance - Mr Steele is a very particular friend of mine and I may have mentioned it to him but I have no remembrance of asking for assistance - He had some boarders left even after that time and I considered untenable

Mr Dyrenfurth then called as a witness Julius Dyrenfurth who being duly sworn testified:

I went on purpose to see Walker with Mr Napier at Mr Napier's request. Mr Napier explained about the house & sent to me & I went at his request to Mr Walter for the purpose of renting the house at a low rate - We went to see Walker

48 We both asked him to reduce the rent, as the sum could not be paid as matters were situated - we both told him the house was untenable - Walker asked what the cause was - I told him that I and other boarders had to leave because of the standing water and the stench - Walker said he had a guaranty on the lease - Mrs Napier said that £80 per month was all she could pay Walker said well he would take that - She then said "Will you hold White for the balance?" We said "Yes" She said "Then I will not pay" I told him from Mrs Napier that Mrs Napier had legal advice that he needn't stay in the place - Then Mr Walker argued to Mrs Napier that it made no difference to her but Mrs Napier said she wouldn't have White lose anything through them; that they had rather work till the blood ran out of their fingers - Thereupon Walker agreed to take £80 per month in full and inform his agent Maughoff thereof and that White should not be held - Mr Walker having agreed to that we left & reported to Napier Walker said the rent should be £80 per month until he sent Mr or Mrs Napier word that it was changed - I told Walker that I and some other boarders had been

69 Compelled to leave - The kitchen was under water - Pools of water standing all round covered with green slime &c - This resulted from raising the grade - This conversation was in November 1857 - I told Walker several had left and others were going to leave - The condition of the premises was very bad - The house stank very badly - This was so up to the time I left and afterwards.

It was here admitted by the parties by their counsel that Napier died intestate and that no letters of administration were taken out on his estate - Also that before the raising of the grade of Randolph Street citizens owning property along that street had petitioned the Common Council of Chicago to have the grade raised and that S B Walker the partner of Plaintiff had signed such petition in the firm name of S B & M C Walker.

The Defendant thereupon meted his case as the Plaintiff by his counsel moved to exclude from the consideration of the jury all the evidence given in behalf of the Defendant as to the condition of the premises in question and the alleged agreement with Wm J Napier by the Plaintiff for taking a lease

5th

monthly rent than that described in the said lease - also all the evidence of the alleged agreement between the Plaintiff & Mrs Wm J. Stapier to the same effect, also all the evidence tending to show the alleged surrender of the lease in question.

Which said several motions of the said Plaintiff were then & there sustained by the Court and all the Defendant's evidence on the points aforesaid was then & there excluded to which several decisions & rulings of the Court in sustaining said motions and excluding said evidence & such and every part thereof the Defendant by his counsel then & there duly excepted:-

This Court thereupon gave to the jury on behalf of the Plaintiff the following instructions, to wit:-

The jury in this cause will disregard all the evidence offered in this cause tending to show a discharge of the covenants to pay rent reserved in the lease offered in this cause as it would be improper for them to consider any proof for that purpose unless such proof is in writing and under the seal of the party.

Given

~~In the giving of which said instructions for the Plaintiff and each of them the Defendant by his~~

~~And then & this duty & severally excepted~~

~~The Court then gave to the jury the following instructions on the part of the Defendant.~~

In this cause the Plaintiff will be entitled to interest on all rents not paid from the time the same became due and remained unpaid at six per cent per annum.

All proof given in this cause showing the condition of the premises in consequence of the raising the grade of the Street by the City of Chicago in front of the said premises, offered for the purpose of avoiding the payment of full rent under the lease and guarantee in this suit will be disregarded by the jury.

To the giving of which said instructions for the Plaintiff and each of them the Defendant by his Counsel then & there duly & severally excepted.

The Court then gave to the jury the following instructions on the part of the Defendant.

If the jury believe from the evidence that the time of payment of the rent or any portion of the rent was extended by a valid agreement founded upon a valuable consideration between Walker & Napier such

52 agreement would discharge the Defendant from all liability upon his guarantee from the time of making of such agreement.

And was requested by the Defendant by his Counsel to give to the jury the following instructions to wit

Refused
In an action upon a guarantee of payment by a third person the Plaintiff must prove that payment has not been made by the Defendant such third person and therefore if the jury are not satisfied by the evidence that payment has not already been made to the Plaintiff by the Defendant they will find a verdict for the Defendant

Refused
It is for the jury to determine whether the Plaintiff accepted Mrs Napier as his tenant & if they believe from the evidence that such was the fact the Plf can not recover for any of the rent on the original lease after the commencement of such new tenancy

Refused
If the jury believe from the evidence that W J Napier from November 1857 to the time of his death & his widow after his decease to May 1859 occupied the premises in question at a different rate of rent and ~~under~~ a different agreement from that specified in the lease in question

Then they may infer a new leasing of said premises & the Defendant is thereby discharged upon his guaranty and he is entitled to a verdict in his favor,

But the Court refused to give said instructions or either of them, to which decisions & rulings of said Court in refusing to give said instructions & each of them to the jury, the Defendant by his Counsel then & there excepted -

The jury thereupon found a verdict for the Plaintiff & the Defendant by his Counsel then & there entered his motion for a new trial in the words & figures following to wit

State of Illinois
Cook County } ss

In Superior Court of Chicago
June 1 1862

M O Walker

vs
Hos White

Comes now before the said Defendant by and through his undersigned Counsel & duly his attorney & moves the Court to set aside the verdict and grant a new trial hereof for the following reasons to wit:

- 1st The verdict is against the law.
- 2d The verdict is against the evidence & the weight of evidence.
- 3d The Court erred in sustaining the motion of

54

Plaintiff to exclude Duff's testimony & in excluding the same.

4th The Court erred in refusing to admit testimony offered on behalf of the Defendants.

5th The Court erred in the admission of testimony on the part of the Plaintiff.

W. W. Fuller

Attorney & Solicitor

Deft's Atty

Which was afterwards to wit on the 28th day of November AD 1862 the same being one of the days of the November Term AD 1862 of said Court & was by the Court & judgment entered upon the Verdict. In which decision & ruling of the Court in overruling said Motion for a new trial by said Defendant & in entering judgment upon the Verdict the Defendant by his Counsel then & there duly excepted and prayed an appeal therefrom, which is granted.

And forasmuch as the Matters and things hereinbefore stated & set forth do not otherwise appear the Defendant prays that this his bill of exceptions may be signed and sealed and made a part of the records of this cause which is done this 11th day of December AD 1862

Grant Goodrich (seal)

State of Illinois }
County of Cook } ss

I Thomas O Carter Clerk
of the Superior Court of Chicago within and for
the County and State aforesaid do hereby Certify
that the foregoing is a full true and complete
transcript of all the pleadings on file in my office
since the filing of the Amended Declaration, the
order of Court and judgment entered of record
therein, together with the Bill of Exceptions and
Appeal Bond filed in a certain Cause wherein
Mary C Walker was Plaintiff and Abner
White was Defendant

In testimony whereof I witness my
hand and the Seal of said Court
at Chicago in said County this
third day of August A D 1863

T O Carter
Clerk



David C Strong
Christopher V Wiley
Benjamin B Wiley } appear before Superior Court of Chicago
John R King

And the said David C Strong, Christopher V Wiley & Benjamin B Wiley
of their attorney say that in the record and proceedings aforesaid
and in the verdict of the judgment aforesaid there is manifest error
in the verdict.

Errors Assigned

- 1st That the Court erred in overruling the objection of the defendant below to the admission of the testimony of the Witness Waybroff as to the Character and consideration of the guaranty on which this suit is brought and in admitting said testimony
- 2^d The Court erred in overruling the objection of defendant below to the admission of testimony of Witness Waybroff to show that the lease in question was signed ~~up~~ how a day different from its date and in admitting said testimony
- 3rd That the Court erred in overruling the objection of the defendant below to the admission of the lease and guaranty in evidence and in admitting the same
- 4th The Court erred in sustaining the objection of the Plaintiff below to the admission of testimony of witness Hapier to show that she Mrs. Hapier had unincumbered furniture on the premises to the value of Two Thousand Dollars at the time she offered her furniture to the Plaintiff's agent for the rent as stated by said Witness and in refusing to admit said testimony

5th That the Court erred in sustaining each and all of the several motions of plaintiff below to exclude from the Consideration of the Jury all the evidence given on the part of defendant - as to the untenable condition of the household premises - as to the alleged agreement with Wm. J. Chapin by Plaintiff for taking a less monthly rent than that specified in the lease - and all the evidence of the alleged agreement between Mr. Chapin to the same effect and also all evidence tending to show a surrender of the lease in question including said evidence and each and every part thereof from the Jury

6th That the Court erred in giving the instructions by the Court given on behalf of the Plaintiff and in giving each of them

7th That the Court erred in refusing to give the instructions asked by the defendant and numbered 1, 2, & 3 and each of them

8th That the declaration aforesaid and the matters herein contained are not sufficient in the law for the said Plaintiff below to have or maintain his aforesaid action hereof against said defendant below

q^d That the Court overruled the motion
for a new trial made by the defendant
below - Wherefore and in all other errors the said ap-
pellants pray that said judgment may be reversed

Barker & Truley

Attys for Appellants

State of Illinois

Third Grand Division

Martin O. Walker

vs

Alexander White

Supreme Court of Illinois

3^d Grand Division

April Term 1883

And now this first day of the said
Term of the said Court comes the said
Appellee by J. M. Wainwright his attorney
and says that there is no error either
in the record and proceedings aforesaid
or in giving the judgment aforesaid;
and he prays that the said Supreme
Court of Indications before the judges
thence, now here may proceed to ex-
amine as well the record and proceedings
aforesaid as the matters aforesaid above
assigned for error and that the judgment
aforesaid in form aforesaid given may be
in all things affirmed &c.

J. M. Wainwright
Attys for Appellee

82-239

Alexander White

~~Alexander White~~

Martin O. Walker

Record & Envs

Filed April 23^d 1873 -

L. Leland

W. H. Black & Son

Adm. & P. Attys

Supreme Court of Illinois
Third Grand Division
Alexander White April 1. 1863
Martin O. Walker

Argument for Appellants

Statement

April 11th 1857 Walker leased the premises in question to Rapier for two years from ^{Sept. 12th 1857} ~~April 12th 1857~~ at one hundred dollars per month for and to be used as a boarding house -

April 13th 1857 White guaranteed the payment of the rent by an agreement to that effect indorsed on the back of the lease - In the fall of 1857 by reason of the City of Chicago raising the grade of Randolph street, the building became entirely untenable & useless for the purpose for which it was rented Walker agreed to put repairs in his lot to do. He then agreed to take \$80 per month which was paid by Rapier

In April 1855 when Red and Walker was made acquainted with that fact short, after in the summer of 1858 Walker agreed with Mrs. Napier to receive from her \$50 per month as his servant (whether under the old lease or a new agreement was a disputed question on the trial until the Court ruled out all the Defr.'s testimony) The \$50 was regularly & duly paid

In the summer of '58 Mrs. Napier had circumscribed property to the value of \$2000 which she offered to White as security but White because of Walker's ~~refusal~~ White refused to take

The Court excluded evidence to admit all the Defendants evidence on these points, of an agreement with Walker, of a surrender of the old lease &c &c and in fact the jury as stated in the record & inter alia that Plf. was entitled to interest which was ~~admitted~~ followed by the jury

Argument

I

The Court erred in excluding the evidence as to the alleged new agreement between the lessee, Capier and the lessor, Walker, (plaintiff below) and in giving Ref's 1st instruction

It is a well established principle of the law, that the contract of a surety is to be construed strictly and he is not to be held responsible beyond the precise terms of his undertaking

Waters v Simpson, 2 Gilman, p. 570

Warner v Campbell, 26 Ill. 282

Flynn v Lundy 27 Ill. 323

Bethune v Bogies, 10 Georgia 255-

The case at bar seems however to be the case of a new agreement substituted for the lease in question and the finding of the Defendant

is that he is discharged by the
full & entire performance of
the new agreement, as well as
by the discharge of the old one
by the substitution of the new.

Taylor v Helary, 1 C. M. & R. 741
(Exchequer)

Bethune v Dozier (O'Leary) 2 B. & C. 255
4 Caus. 100

The evidence was excluded below
on two grounds:

1st That a parol agreement can
never be shown at law in defence
an instrument under seal

2nd That the alleged agreement
was without consideration & void

The 1st instruction (to them was, no other
qualifying it) put it broadly on
that "it would be improper" for the
any proof "to show a discharge of the
agreement" unless such proof
under the seal of the party."

A
We are therefore led to inquire in the first place whether a parol agreement can ~~ever~~ be shown at law in defence to an instrument under seal.

And the authorities establish the position that such agreement may be so shown when it is an executed agreement.

This is because it is not the agreement alone but the thing done under it that is relied on.

The case of Davey v Prendergast 5 Barn. & Ad. 187 which is the leading case to the contrary & upon which all the other decisions to that effect are bottomed, decides.

A. That it not appearing on the face of the bond that the defendants were sureties, it could not, as against the obligee be pleaded and shown that they were so.

This has been repeatedly overruled in this country.

Harris v. Brooks 1 Pick 100

Carpenter v King, 9 Met. 511
Archer v Douglass, 5 Denio 509

but it is inapplicable in any event
here since the Defendant is a
guarantor simply upon the instrument
in question and not a co-contractor
upon its face -

B. That a mere engagement not
to sue for a limited time even
supported by a good consideration,
is not a release in law of the
original debt, & therefore can not
operate to release the surety

This also is inapplicable as no
such state of facts is set up
in this cause but it may
be remarked that it is an
entirely unsound and untenable
proposition

Dickinson v Cummings, 6 Porter (Ind) 128

Pellous v Proutier, 5 Denio 512

Owen v Homan, 3 E. L. & E. R. 112

Flynn v Child, 27 Ill. 323 & cases

C. That an instrument under seal can not be released or discharged by a parol agreement

This is the proposition applicable here and it is undoubtedly the law that an instrument under seal can not be discharged or released by a mere parol agreement but the position of Appellant is that an executed parol agreement may be shown in defence because it is the acts done under it which have the effect of discharging the sealed instrument

Carpenter v King 9 Met. 511

Bank v Hope, 6 Ham. 17

Dickenson v Commissioners &c

6 Port. (Ind.) 128

This last is a case of in which the opinion is marked by great ability and a careful discussion of all the authorities

It was there held that the defence should have been made at law & the bill was dismissed for that reason

That the defense can be made
at law is decided in Flynn
v Mudd, 27 Ill. 323

Walker Judge says: "Yet a
diversity in the practice, as to
made in which the surety
may avail himself of the
defense exists in different
Courts. In some it is held
that the remedy is alone in chancery
unless it appears upon the
face of the instrument, that he
bears that relation to the contract,
whilst in others it is held that
the fact that he is a surety
may be averred & proved, although
he appears as a principal.

In Great Britain the former rule
appears to prevail, but on this
side of the Atlantic, every defense
which discharges the surety in
equity, has generally been
recognized as admissible in
court of law."

It is said in 2 Amer. Lead. Cases
p. 301. (I can not find this in the 3d ed. Library)

"No transaction with one contractor
can discharge another at Common
Law unless it amounts to an
extinguishment or satisfaction
of the contract, while a guarantor
is necessarily protected by everything
which shows a prevention or waiver
of the exact performance guaranteed."

L x The position of a surety
whether guarantor or co-contractor
is therefore nearly the same
in equity as that which a guarantor
not a surety, holds at law &c."

It may be stated as beyond question
that a guarantor may interpose
the defence at law however the
rule may be as to a surety
when a co-contractor -

The doctrine in question has arisen
from the general principle that a
contract can not be discharged even
by an instrument of equal dignity
with itself but this evidently
applies to executory agreements
only & is not the law in the
case at hand attempted to be
given it

Washington J. says U. S. v. Howell
4 Wash. 620 "I must be permitted
to dissent from such a doctrine
& to maintain that it is unsupported
by a single authority. Will not
performance in bars, by the
principle, discharge the surety?
May not the surety, and
may not even the principal,
discharge himself by acts
tending to excuse the nonperformance
by showing that it was occasioned
by the conduct of the creditor?"

Recd. of a. shall be sent by post 1991
Recd. of a. shall be sent by post 17 10 20

The Plaintiff below relied on the
Case of Chapman vs McGrew
20 Illinois R. 101.

It is proper for me to submit
some remarks in regard to this
case, because it has been supposed
decisive of the case at bar and
because in showing that it is not
I shall be enabled to strengthen
the positions already taken.

In the first place it is to be observed
that the principal point in
Chapman vs McGrew is the
decision that the lessor cannot
assign "a lease by indorsement
so as to give the assignee such
a legal interest as can be
enforced in his name, although
the assignee may, in that way
acquire an equitable title to
the rents."

In waiving this & assuming
the case to have turned upon the
other point considered in it, to wit,
that "a parol agreement to
vary a contract under seal

cannot be pleaded in a Court
of law to defeat a recovery on
the original undertaking; and such
an agreement will not discharge
a surety from liability; it
is demonstrated that it is
not decision of the question ~~involved~~
now being discussed in the case
at bar

(a) Because the agreement
in Chapman v McGrew was
an executory agreement & as
such the opinion of the Court
treated it in the principles
laid down

(b) Because the surety in
Chapman v McGrew was
a co. contractor and not
a guarantor simply.

(a) The evidence in the case at
bar (which was excluded) showed
a new agreement executed
that in Chapman v McGrew was
executory -

In the latter case the attempt

was not to show the parol
agreement and the acts done
under it but the parol agreement
simply. This is the very hinge
on which the whole distinction
turns. It is the point

The attention of the Court is however
earnestly invoked to the rather
general language used in the
opinion in Chapman v McGrew
p. 104 - The cases were cited
turn upon Davy & Pendergast
and nearly all of them
considered, discussed & distinguished
in Dickerson & Cummings v. Porter
(Indiana) p. 128

The distinction between executory
& executed agreement was
or adverted to ^{in Chapman & McGrew} because there
was no occasion therefor, but here
it is plainly presented fairly &
plainly.

Judge Walker says: "It is a principle
of the common law that a parol
agreement to vary a contract
under seal cannot be pleaded
in a Court of law to defeat

a recovery in the original undertaking.
Chit. Cont. 90" and then
it is no doubt that such is the
law & will be so long as the
common law doctrine in
relation to seals prevails, but
that, ^{rule} is applicable to executory
agreements only & can not
be made use of to exclude
evidence of acts done under
a parole agreement & which
are effectual in discharge of
the specialty.

U. S. vs Howell 4 Wash. 620.

(b) There is still another distinction
between Chapman & McEwen
& this case.

Shelby, the surety, was a Co-Contractor
Here the Defendant below was
a guarantor simply.

This is an important difference
as will readily be perceived
by examining Judge Walker's
opinion in Flynn v. Flynn
27 Illinois 325 - where he

holds that "every defense which discharges the surety in equity, has generally been recognized as admissible in courts of law" and says that the diversity of practice arises on the point whether or not the suretyship appears "upon the face of the instrument"

See as to difference between guarantor & surety when Co. maker, 2 Amer. L.C. 176 Commentary on 18 Wend. 377

It will be found on examining the doctrine laid down in the cases 2 Amer. Lead. 156 Title "Discharge of Surety"

& the numerous cases cited in the notes thereto. That the rule is definitely settled in this country that whatever will discharge the surety or guarantor in equity may be equally resorted to by him as a defense at law. and this is so in Illinois Davis v People 1 Gil. 409

People v McHaffon, 2 Gil 638

Flynn v Elmdorf, 27 Ill. 323

Hence we have pointed out the distinctions between Chapman & McGrew & this case as we saw

no necessity for asking the
Court to overrule that decision

And there is no difference
between making the defense
at law to a sealed instrument
and to a simple contract.

It can be made to a
sealed instrument it can at
law as well as in the case
of a simple contract

2 Amer. Lead. Cases 151

The foregoing authorities (and others
might be adduced) show conclusively
that the 1st instruction was clearly
erroneous & ought not to have
been given and that to exclude
the evidence in question on the
ground first stated that parole
agreements can never be shown at law
as a defense to sealed instruments is
equally erroneous. Let us examine
the second ground for exclusion, the ground
of consideration.

The position taken by the Pp. below
was that admitting the admissibility
of the evidence of the new agreement
so far as the principles previously
discussed are concerned, yet
that the agreement was without
consideration and void.

This is the question next to be
examined.

Firstly As to the consideration

If a benefit accrues to him who
makes the promise, or if any
~~loss~~ or disadvantage accrues to
him to whom it is made, although
without benefit to the promisee,
it is sufficient consideration

1 Parsons, Cont. p. 557

Also, ^{the} waiver of any legal right,
or of any equitable right

1 Parsons, Cont. p. 569

So giving up a suit to try a
question where result is doubtful

Id. p. 564

"Perhaps the best rule is that any
damage or any forbearance or
suspension of his right, or any
possibility of a loss occasioned
by the promise of another is binding

Consideration for such a promise
& vice versa in binding, altho
no actual benefit accrues to
the party undertaking

1. Sanders 211, c, note 2 (a)

Thus, hereby

claim in this case that
the premises having become
untenable by the raising the
grade by the city (to which
the P. & C. contributed) the lessee,
Waples, had the right in equity
to ~~recover~~ for the breach of
the implied covenant for
quiet enjoyment; the ^{deprivation} ~~destruction~~
of the beneficial use of the
premises, the destruction of the
particular use for which the
building was intended, to have
the rent abated, to quiet in that
notice is to recover damages &
that the waiver of his rights or
either of them furnished ample
consideration for the agreement.
It is sufficient if we show
the compromise of a doubtful right.
McKivley & Watkins 12-20-40

There is always a covenant for the quiet enjoyment of the lessee implied under the word "demise" or other word by which the term is granted by the lessor although there is no express covenant -

Woodfall's Land. & Ten. 98

A breach of the covenant for quiet enjoyment may occur either by a molestation arising from a suit at law or in equity relating to the title or possession, or by any act by which the lessee is evicted or disturbed in the possession.

Woodfall L. & Ten. 513, 514

Any description of annoyance to the occupation of the premises which prevents the lessee from enjoying his property in so ample a manner as he is entitled to by the terms of his lease amounts to a breach

Id. 514

Here the P/f. was lessee of a
colliery, at the rate of 20 cunch
per day, & the colliery became
not worth working. P/f. was
relieved by Court of Chancery
from further payment of rent
Alouis, 2 Bro. Ch. Ca. 511

The public invasion of the enjoyment
of an fee easement may be a
breach of the covenant of quiet
enjoyment

Gibson, C. J. 2 Jones 80

The destruction of the beneficial enjoyment of the estate granted has been frequently held equivalent to eviction.

8 Bac. Ab. Tit. Rent

It seems extremely reasonable that if the use of the thing be entirely lost to the tenant, the rent ought to be abated

Gibbert on Rents 147. 48

Halligan v Wade 21 Q.B.

We are claiming here not the disturbance amounting to eviction but a breach of covenant to quiet enjoyment

Peters v Gubb & Jones

9 Harris 455

This is a very interesting case and in point although it was held that the parties had the exercise by the State of its right in contemplation at the time the lease was executed

In Smith v Mannable, 11 Meeson
Owles 5 held to be an
implied condition in the letting
of a house that it should be
reasonably fit for habitation &
that if it be not as when it is
letly infected with bugs, the
tenant may quit it without
notice.

In Edwards v Etheington Ry. & M. 268
Same case 7 D. & R. 117 held that
tenant was not quit without
notice on the ground that the
walls were in so dilapidated a
state that it had become unsafe
to reside in it

In Collins v Barrow, 1 Mo. & R. 112
held that a tenant was justified
in quitting without notice premises
which were noxious & unwholesome
for want of proper repairs

It ought to be noted here
also that the premises in
question in the case at bar,

namely, a certain building, were
described in the lease as a
boarding house and were used
for that purpose as the agent
Warghop tells us in his testimony
thence while the doctrine laid
down in Smith & Mannable,
Edwards & Etherington & Collins
& Barrow & other cases of
similar character may not
be considered as the law
in reference to the leasing of
buildings if
you please, ordinarily, yet
the principles therein enunciated
are undeniably correct when
applied to a case like the
present where the project
of the contract was to be
devoted to a particular
purpose wholly defeated
by the destruction of the temporary
enjoyment in question

Again it appears by the
testimony of Plaintiff's witness
Warshop that S. B. & M. O.
Walker petitioned for the
raising of the grade which
occasioned the injury in
question - M. O. Walker, the
Plf. did not but the Partnership
did as representatives of their
own property & the argument
is worthy at least of a view
that it was unreasonably due
to the landlord
that the disturbance to the
tenant was effected -

We are not obliged however
to establish anything further
than that we had a fair claim
of some kind against the
lessor which we raised in
consideration of the parcel
agreement in question

"It has often been ^{said} ~~held~~" says Trumbull
J. "that the compromise of a
doubtful right is a sufficient
consideration for a promise;
and it is unnatural on whose
side the right ultimately turns
out, as it must always
be on one side or the other, because
there can be but one good
right to the same thing."

McKinley v Watkins, 13 Qb. 140
& cases cited

The head note fairly states the
principle of the case

"If a party threatens to sue,
honestly supposing he has a good
cause of action, it will uphold
a contract fairly entered into
in order to avoid the suit."

In the present case, Napier,
the lessee is dead. We can
not get at the entire facts
upon which he relied on Wallis's
promise. It is proved that
he took legal advice and was
advised that he had the right
to quit -

Did he not honestly suppose
he had, not doubtful but absolute
rights in the premises?

~~Napier advised~~

1000 I to quit in drains
to it. promised in
connection of the conditions
of the premises, the destruction
of the beneficial enjoyment, the
utter destruction of the building
for the purpose for which it
was leased, and in consideration
that he had failed to quit in
the drains, and in consideration
that Napier would not quit
to take \$80 per month -

And Napier accordingly waived
in consideration of this promise

on Walker's part, every legal
or equitable right he had arising
from the facts stated

It is submitted that there was full
& ample consideration

Again even if Napier was compelled
to pay the rent he was not obliged
to stay in the house - Walker might
and probably did have some reason
for desiring Napier to stay beyond
the mere trouble he anticipated
[redacted] if he showed him.
[redacted] did stay upon Walker's
promise & the damage to him
is consideration enough

Any act which is a detriment
is a sufficient consideration
for a promise

William v. Clement

1 Tammerton 523

The principle that unilateral promises
furnish consideration would
supply it here if nothing
else did

Staples promised to stay in
the house & give up all his
legal & equitable rights (if
any he has and both parties
supposed so) and Walker
promised to take \$80 per
month.

Parties agree to
vary the terms of a contract
or to rescind it altogether, the
unilateral of the agreement is
ordinarily sufficient for its support
and no extrinsic consideration
is necessary.

1 Smith's Lead. Cas. 465

A case cited

There is however a point wholly
disregarded by the Court below
which would seem to settle
the question in our favor.

We have been discussing the
~~last~~ question of consideration
as between Walker & Napier,
and the question of consideration
generally, we now call
the attention of the Court to
the principles of Equitable Estoppel
upon which however it might
be argued between Walker & Napier
there is no doubt upon
the facts, the said agreement
was binding as between Walker
and White.

When once the new contract
was acted on, the doctrine
of Equitable Estoppel comes
into play and supplies the
want of a consideration

1 Smith's Lead. Cas. p. 466

Where surety has been induced
by the creditor's assertions to
forbear obtaining security

which he might have got, it
operates as an estoppel on
the creditor

Carpenter & King, 9 Met. 511

Harrison Brooks, 24 Pick. 195

If the surety by the assurance
of the creditor has been induced
to neglect any of the means
which might have been used
for his indemnity, the promise
may acquire that effect as
an estoppel which it wants as
a contract and amount to

... L.C. p. 175

The mere presumption in favor of
the surety is sufficient for his
exoneration when the agreement
is supported by sufficient considera-
tion (2 Amer. L.C. p. 176) &
it seems from the language of
the cases cited that when the
part agreement is executed, then
whether the agreement was funded
or not, the surety need not show actual

injury -

Be this as it may, in the case at bar it was shown or attempted to be shown (for the evidence was excluded & in great measure not permitted to go in to by the Court below which was error) that the Defendant was injuriously affected by the Plaintiff's statements & agreement for he refused to rescind himself by reason thereof.

Mrs. [redacted] offered him \$2000.00 in encumbered furniture as security but relying upon Walker's promises he declined to accept it -

Now must it be supposed as asserted in Appellee's brief that White relied on Mrs. [redacted]'s statement as to what the agreement with Walker was. This was the second agreement when as we contend Walker accepted Mrs. [redacted] as his tenant, at which time White was present

2

Whenever a party makes a statement upon which another relies and ~~was intended~~ ^{had a right} to rely, the ~~fact~~ ^{former} shall not be permitted to take back his assertion when to do so would place the latter in a worse position than he occupied before. Recognizing ~~this~~ a principle like this how could a Court properly exclude the very evidence that established the

It may be said that Walker did not intend to mislead White & that this is a necessary element to ~~a~~ ^{an} ~~estoppel~~ ^{estoppel}. But this is not so for when a man makes an assertion under circumstances from which he is bound to know the other is misled by it, there the law presumes that he intended the result which follows the action of the other upon the statement, that is, ^{that} he intended to mislead.

We have then considered & shown
that the evidence ought to have
been admitted and the 1st instruction
for Ref. refused because the
paul agreement in question
was founded on ~~quite~~ sufficient
consideration and being executed
could be shown in defence.

And that if consideration as
between Staples and Walker were
lacking, yet the principle
of Estoppel obtains between White
& Walker & renders the agreement

are however other grounds
on which the evidence was
admissible

A. The paul agreement was a
waiver of performance of the
covenants of the lease

A waiver is presumption of the
performance of a contract by
one party & may be given in
evidence by the other in ^{answer to} an action
brought for its non fulfillment

1 Smith's L. C. 463 & cases

No one who waives or acquiesces
with the performance of a contract

can rely upon the failure to
perform it, either as a defence
or a cause of action, for no
one can complain of a default
which he has caused or sanctioned
Shaw v Thompson Cr. 2 Burr. 484
McKen v Miller, 4 Black. 6. 222

Such dispensation is essentially
revocable unless sustained by
a consideration or acted on
upon it is withdrawn -

1 Smith's L.C. 464

In the case at bar the dispensation
never revoked

we call the Court's
attention to the fact that Walker
treated the agreement as a revocable
dispensation for he was to give
lease notice when he owned
terminate the agreement & require
rent which never came)

(b) was an sufficient consideration

(c) was acted upon & never
withdrawn

B The Plf. claimed & got interest
& we shall show hereafter that

the allowance of it was enormous.
And the evidence in question
was admissible to defeat the
recovering interest.

II

We submit here also the proposition
that neither this nor any other
suit of a similar character
can be sustained without notice
prior to the commencement of
that the creditor looks
to the grantor for payment.

Cox v Brown, 6 Jones (Law) N. C. 111
+ cases cited

Levis v Bradley, 2 Ire. R. 303
+ cases cited

The undertaking in this case is
collateral and so counted on.

III.

The Court erred in refusing to allow Defendant below to prove the value and condition of the furniture -

The Deft. offered to prove that ^{value} ~~at~~ had \$2000 worth of furniture which was offered to White to secure him but which he refused to take because Walter had made the agreement in question which was ^{then} being and was finally fully discharged.

was admitted as

- (a) As furnishing consideration for the bond agreement in question
(b) By way of equitable estoppel as against the Plaintiff

It is well settled by numerous authorities that when a creditor who knows that one debtor is a surety, gives him notice that the debt is paid by the principal & such debtor in consequence changes his situation, as by becoming decedent or forfeiting

to obtain security when he
might, or otherwise suffers
loss by it he is discharged

9 March 511

Carpenter v King & Case

The value & situation of the security
offered and all the circumstances
attendant ^{upon} such offer were vital
elements to the defence and even
entirely admissible in view of
above stated

As we have before said ~~being~~
is it for the Court exclude the
evidence establishing the Estoppel
and then shut out the argument
of defective consideration?

IV

The Court erred in giving the 2^d instruction for Plaintiff that "In this cause the Plaintiff will be entitled to interest on ~~all~~ ~~the~~ ~~amounts~~ ~~not~~ ~~paid~~, from the time the same became due and unpaid, at six per cent. per annum".

Under this the Jury gave \$158⁶⁵ interest, the amount of balance claimed to be due on the lease being \$705 & the which \$863⁶⁵

~~_____~~, 13 Illinois 544 holds that interest can only be recovered in the cases specified in the statute, or where there has been an express promise to pay interest, or such a promise can be inferred from the circumstances.

Walker v. Hodges 14 Ill. 399 holds that a lessee is bound to pay interest on improvements rent from the time they become due.

It is not proposed to dispute the authority of either of these cases, and the objection to the

recovery of interest in this
case rests on entirely different
ground -

Interest except where provided
for in the agreement; note,
bond &c is recoverable as damages
for the delay in payment -

"It is a right to be an universal
maxim". Say the learned editors
of Smith's Leading Cases (1 vol. p. 463)
"that consent is incompatible
with the injury and that no one
can sanctions the
breach of an agreement can
recover damages for its non-
performance"

Now whether the parol agreement
in this case was binding or
not, this much is certain, it
sanctioned the then breach of
the covenants of the lease

The non payment of the full
sum at the time the instalments
matured was by consent

How then can interest be

recovered because of such
non payment?

Can a person be permitted
to ~~receive money~~ receive money
when it falls due & then
~~not damages~~ because it was
not paid?

The doctrine of Equitable Estoppel
certainly applies here if no
other else because through
the statements of Walker, White
was ~~induced~~ induced from prompt
payment it will work
great injustice on him
if ~~he~~ ^{Walker} be now permitted
to falsify his own agreement
& claim damages of White
for the non payment in
question.

And the evidence of the
agreement was ^{clearly} admirable
for this ^{if for no} ~~other~~ other reasons.

Walker says "I will pay him
\$80 per month" ^{and will look to White for any} White is thereby
thrown off his guard & does not
pay the remaining twenty
dollars. Then Walker ~~says~~

Lapse of a year or two, turns
round and brings suit for
the balance per note & interest
on that -

If ever the law required a
man to keep silent, who has
just spoken when he ought,
it is in a case like this.

At all events interest should
not be allowed except upon
notice & demand of payment

Brown

Jones (Law) St. C. R. 101

And for this cause the judgment
is enormous & should be reversed

V
We have not adverted to the fact that after the execution of the lease two agreements were made by Walker, one ~~for~~ at \$30 per month and one subsequent to Napier's death, with his widow to take \$50 per month.

The principles involved so far as the questions hitherto discussed are concerned ^{are} ~~will~~ precisely the same and hence we have treated the ~~case~~ case as if ~~it~~ one such agreement

It is sufficient here to remark that both agreements were scrupulously fulfilled and the rent paid accordingly by Napier & his wife

But the second agreement becomes important in view of the next point which we submit which is that

The Court below in excluding the evidence tending to show a surrender and in refusing to give the

Defendant's second instruction

This point has already been
ably argued by my brother, Judge,
and needs no further elucidation

In the more case however
which seems decisive of
the position that the facts
should have been left to
the determination of the
jury

Doe & Dow v. Crego

9 (6 M. G. H.) p. 89

particularly p. 99

In the case at bar the Plf.
knew of Stepien's death at
the time he made the agreement
for \$50. with Mrs. W. & received
that rent from her accordingly

That whether the rent was received
upon an old lease or a new
agreement the sole question
for the jury was the identical point
made in Crego's case just cited.

VI.

The points made by appellee
~~are~~ ^{are} the misapprehension
as it seems to us, of the
question, ~~the~~ issue ~~is~~ in
this case -

But it is not singular
since the Court from which
we prosecute this appeal
labored under ^a similar difficulty
in recovering what the
Appellant was laboring to

If there were no other point
in the case than the recovery
of the interest, that is alone
sufficient to reverse the judgment
and a perusal of the record
sufficient to satisfy this Court
that Appellee is deserving of
particularly lenient
consideration at its hands

J. M. [unclear]
Atty for Appellant

234 30
Gr. Supreme Court

White

✓
Walker

Argued
for appellant

Filed Apr May 2nd 1863

L. Leland

clerk

Mr. Fuller

of Counsel

745-

The defendant pleaded the general issue with notice of a special defence, ~~and~~ arising under the Statute of Frauds and Perjuries, which is not necessary further to state. ^{also} ~~the~~ want of full payment, and book H.H., the following:

746

~~2d. That there was no consideration for the premises and undertakings of defendant, or either of them.~~

3d. Payment.

~~4th.~~ That after the making of said lease, and sometime in the fall of the ~~the~~ year of 1857, or before that time, the street in the city of Chicago, adjoining the said demised premises, was by said plaintiff, or by his, said plaintiff's consent, raised to grade, that is to say, the said street was raised by adding and putting on of earth and stones several feet above the height and condition it was in when said premises were leased by plaintiff to said Napier as in said declaration mentioned, whereby and by means whereof, a nuisance was created by the water, dirt and filth which flowed in and upon the basement story of the house, situated upon said premises, at all times, and often times covering the basement floor of said house with several inches with water, by reason of which nuisance caused by the conduct of said plaintiff, the said premises became untenable, and the continued occupation of said premises by reason of the flowing in of said water, dirt and filth upon such premises caused by the raising of said street, became and was at great risk and danger to the health and comfort of said lessee, said Napier and his family, and produced an eviction of said lessee by said plaintiff which would have justified in vacating said premises, and that at and about that time, to wit: on or about the 1st day of December, A. D. 1857, the said plaintiff did agree ~~to~~ to and with said Napier, lessee, in consideration of the foregoing facts, and in consideration that said lessee was deprived of the beneficial enjoyment of said premises, by reason of the raising of said street to grade, as aforesaid, and in consideration and because the said lessee had for some months previous thereto lost his boarders, (the said house having been rented for and used as a boarding house), because of the said nuisance, and because of the failure of said plaintiff to do certain repairs, and make certain drains, which he, plaintiff, agreed before that time with said lessee to do and make. And for other good and sufficient considerations, that he, the said plaintiff, would from and after that time, to wit: the making of said agreement reduce said rent for said premises to eighty dollars per month, and would from that time, and for the remainder of said term, accept and receive of and from said lessee the sum of eighty dollars per month, as and for full satisfaction and payment of the rent of said premises; and that this defendant should not after that time be liable for, or called upon to pay any additional rent to said eighty dollars per month, so agreed to be paid by said lessee, and agreed to be accepted by ~~the~~ said plaintiff, as aforesaid, and that at the time of the making of the said last mentioned agreement, as to said eighty dollars per month, between said plaintiff and said lessee, all the rent before that time, due and payable on said lease, had been paid by said lessee to said plaintiff, and that the said lessee did from and after the making of said agreement as to eighty

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dollars per month, and until his, said lessee's decease, (which occurred some time in the Spring or Summer of the year 1858) pay to said plaintiff, and said plaintiff did receive of and from said lessee, the sum and rate of eighty dollars per month as and for full satisfaction and payment of all rent becoming due on said premises during said time, to wit: from the making of said agreement to the decease of said lessee, and that after the decease of said lessee, the widow of said lessee not being administratrix or executrix of said lessee, or having any right or authority to take possession of or control of the estate of the leasehold interest of said lessee in said premises, which facts, and also the fact of said decease was well known to ~~20~~ said plaintiff, did take possession of and occupy said premises with the consent and permission of said plaintiff; and did from and after the decease of her said husband, and until the 1st day of August, 1858, pay to said plaintiff, and said plaintiff did accept from said Mrs. Napier, widow, the sum of eighty dollars per month as rent of said premises, and that on or about the said 1st day of August, the said premises having become still more untenable and unbeneficial by reason of said nuisance, and in consideration thereof, and for other good and sufficient considerations, the said plaintiff did agree to, and with the said Mrs. Napier, widow, to accept and receive from her, the said Mrs. Napier, the sum of fifty dollars per month from said 1st day of August, until the expiration of the term in said lease mentioned as rent for said premises, and said Mrs. Napier did pay to and said plaintiff did receive from her the sum of fifty dollars per month for each and every month from said 1st day of August, until the expiration of said term in said lease mentioned, as and for and in full of the rent of said premises for said time. That from and after the decease of said lessee and ~~20~~ until the expiration of the said lease in said declaration mentioned, said premises were worth, and of the value not to exceed fifty dollars per month of said time, which sum or rate of fifty dollars has been fully paid to said plaintiff.

~~The record does not show that any issue~~
~~was made up as any of these should be.~~
 The cause was tried ^{on the general issue and issues} ~~on the issues~~, and
 the jury found "the issues" for the plaintiff,
 and assessed the damages at eight hundred
 and fifty three ⁶⁵ 100 dollars. A motion for a
 new trial was ~~made~~ ^{overruled} which was overruled
 and a bill of exceptions signed containing
 as the evidence in the cause. ~~from which it~~
~~appears that the case though being~~
 4 ~~extra~~ The case is brought here by ~~op.~~
 and the following errors are assigned and set
 on as grounds for the reversal of the judgment
 (12th p. 14)

The court erred in sustaining each and all of the several motions of plaintiff below, to exclude from the consideration of the jury all the evidence given on the part of defendant—as to the untenable condition of the leasehold premises—as to alleged agreement with William J. Napier, by plaintiff, for taking a less monthly rent than that described in the lease—and all the evidence of the alleged agreement between Mrs. Napier to the same effect, and also all evidence tending to show a surrender of the lease in question; in excluding said evidence, and each and every part thereof from the jury.

That the court erred in giving the instructions by the court, given on behalf of the plaintiff, and in giving each of them.

~~That~~ That the court erred in refusing to give the instructions asked by the defendant, and numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

That the court erred in overruling the motion for a new trial, made by the defendant below.

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The instructions were as follows for the plaintiff:

1st. The jury in this cause will disregard all the evidence offered in this cause tending to show a discharge of the covenants to pay rent reserved in the lease offered in this cause, as it would be improper for them to consider any proof for that purpose unless such proof is in writing and under the seal of the party.

2d. In this cause, the plaintiff will be entitled to interest on all rents not paid, from the time the same became due and remained unpaid, at six per cent. per annum.

3d. All proof given in this cause, showing the condition of the said premises in consequence of the raising the grade of the street by the city of Chicago in front of the said premises—offered for the purpose of avoiding the payment of full rent under the lease and guarantee in this suit, will be disregarded by the jury.

~~was not a material question and therefore was not to be considered.~~

After ~~hearing~~ testimony had been fully heard tending to establish such a case, the Court instructed the jury to disregard ~~it~~ all the evidence offered tending to show a discharge of the ~~rent~~ ^{the} to pay, ~~rent~~ ^{rents} ~~used in the case~~, as it would be improper for them to consider any proof for that purpose, unless such proof ^{was} in writing, and under the case of the party, and ~~the~~ ^{was} also instructed to disregard all the proof in the cause, showing the condition of the premises, in consequence of raising the grade of the street in front of the premises, which was offered for the purpose ^{as the Court held} of avoiding the payment of full rent under the lease and guarantee.

Why the Court should undertake to say, for ^{special and exclusive} what purpose, such proof was offered, we cannot discover, since, as we look at the case, it ^{might have been} ~~was~~ offered and received by the Court, as showing facts ^{calculated to} ~~operating~~ upon the ~~mind~~ ^{mind} ~~of~~ ^{of} justice of the ~~law~~ ^{law} to make a new agreement at a reduced rate of rent. At any rate, it was competent evidence to go to the jury for such purpose, and to be used by the respondent, to bring the mind of the jury to

that conclusion. It was not for the Court to say
 for what ^{special and exclusive} purpose such evidence was ~~to be~~ ^{ad-}
 mitted, if it could be legitimately applied to
 another and different purpose. The Court says
 it was offered for the sole purpose of avoiding the
 payment of full ~~value~~ in the case, when
 the defendant might ~~have~~ ^{insisted} it was for
 the purpose of showing ^{they were} ~~the~~ ^{the} ~~existence~~ of the
 inconsistency operating with the offer, not to
 reduce the debt, but to make a new agreement
 about the debt, and it was a fair question for
 the jury, ~~whether or not~~ The jury might have
 come to the conclusion, that ~~where~~ ^{fact in} the ~~evidence~~
~~established a new agreement~~ and concluded, so
 upon the offer, as to induce them to waive
 sealed bills, and claims only upon ^a ~~the~~ new sealed
 agreement. This brings us to the examination of
 the principal question in the cause, as presented
 by the first instruction.

It ^{was} ~~is~~ an old maxim of the ^{Cognate} law that an
 obligor could only be released, by an instrument
 of as high dignity, as that by which he was
 bound - being obligated by a seal, he could
 be released only by an instrument under seal.
 Technically, this ^{may be} ~~is~~ the rule of modern times,
 but practically, it is not enforced. Of how fre-
 quent occurrence is it, that in an action of
 debt upon a bond or other sealed instrument, the

defendant, under his plea of payment, ^{by the obligor} proves
by parol the actual receipt of the money ^{see} on
the bond, and which all County holds to be a
release and discharge of the bond. So with
a debt secured by mortgage, a release of
such debt need not ^{be} made. By an ex. Dec.
Cap et al., 17 M. 40. We are ^{to} done, but that in
every conceivable case, where parties are bound to
one another by writing under seal, the obligors
will be discharged, if ^{by} parol proof of fact
sufficient in themselves to constitute a discharge
And this more especially, in cases, where some
one or more of the parties are parties only. ^{The} ~~The~~
where one holds a bond against two others
one of whom is a surety only, and he informs
the surety that his principal has paid and
discharged the bond, or that he has made
another and different arrangement with him,
^{which the surety may have acted,}
the surety will be discharged, on proof of ^{such} ~~these~~
facts. ~~But, that a party cannot discharge another~~
~~by giving a release to the party by giving~~
~~up interest, for the purpose of that an assignee~~
~~that the release is with witnesses of both~~
~~parties. In personal contracts for personalty,~~
aided by sealed instruments, performance
in ^{generally} ~~par~~ will discharge all the parties to it.
So in a lease for rent at a stipulated term, and
for a certain, & in this case, who will ~~any~~ ^{any} parties

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that paid proof of payment of ~~the~~ ^{the} ~~stipulation~~ ^{stipulation} ~~will not discharge the guarantor?~~
If proof of payment will discharge him, ~~the~~
~~question~~ ~~is~~ ~~in~~ ~~this~~ ~~case~~, will not a
new parol agreement with the Epee, discharge
him, especially, if ~~the~~ ^{the} ~~agreement~~ ^{agreement} ~~is~~ ^{is} ~~fully~~
~~executed?~~ That is, the ~~question~~ ^{question} ~~made~~ ^{made} ~~here.~~
The evidence excluded by the Court tended
to prove, that in the life time of the Epee, on
~~the~~ ^{the} ~~reputation~~ ^{reputation} ~~of~~ ^{of} ~~annoyances~~ ^{annoyances} and dis-
forts occasioned by raising the grade of
the street opposite in front of the demised
premises, the Epee did some act, or made
some arrangement, which the defendant ~~claim~~ ^{with}
was a new agreement about the rent, and, which
the Epee had fully complied. Further, that
on the death of the Epee, his widow, but not his
personal representative, remaining in possession,
a new agreement was made with her, and
which has also been fully executed. The
object of the proof was not to change the
terms and conditions of the original lease,
but to show that its stipulations and covenants
had been waived by the Epee, and a new
and different agreement entered into, by which
the written agreement was superseded or discharged.
The plaintiff insists, however, if a new agreement
was made, it was not upon any sufficient

Squire

now as regards the subsequent
with the widow. On the death of ~~the~~ ^{the} ~~deceased~~ ^{deceased}, the
lease being a chattel, passed to his personal
representative, and no obligation rested upon
~~the widow~~ ^{her} to continue in possession. It was of interest
to the plaintiff, that ~~the~~ ^{the} ~~land~~ ^{land} should be occupied,
and, in the condition ~~of the~~ ^{of the} ~~land~~ ^{land}, he might
have supposed it difficult to procure a
tenant. ^{In these, consistent ~~the~~ considerations.} A new lease was made to her, at a
left rent, which was paid and accepted ^{by the plaintiff}, and
any objection, from month to month, or
later. ~~These~~ ^{These} whether these facts constituted a wa-
~~iver~~ ^{der} or surrender of the original lease, and so inter-
by the parties, should at least, have been left
^{In this view, the second instruction of defendant should have been}
to the jury. If they did, then the defendant
was discharged of his guaranty unquestionably.
~~There~~ ^{There} If, in ordinary cases, giving time for a long
day for a ^{reasonable} consideration, will discharge a surety,
though he is not in the least degree damaged thereby,
a falsely ~~claim~~ ^{claim} should he be discharged in this case,
~~then~~ ^{by} means of these new agreements, the defen-
dant has waived a security he might have had,
by a chattel mortgage upon two thousand dollars
worth of furniture which was afforded him by Mr.
Hopien. Here is a new agreement executed in
full, and in this, the case is distinguishable
from that of Chapman vs. M. Grew 20th H.
101. In that case M. Grew was not only a debtor

but a contract with Selby,
was unexecuted.

But if there was no consideration for the
new agreement, ~~it~~ still if it had been executed,
and by means thereof the defendant has been
led into a line of conduct which must be
prejudicial to his interests, and suspicious
of the plaintiff, an equitable estoppel
arises, which will prevent a recovery by
the plaintiff.

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The testimony shows, that the
defendant was present when the last agreement
was made to pay fifty dollars for two
cents, and that he was satisfied with it,
and on that account ^{declined} ~~refused~~ to taking
a chattel mortgage offered him by Mrs.
Napier, on the furniture after the
plaintiff had refused it. Defendant had
a right to rely on this ^{agreement} ~~statement~~ of plaintiff,
^{made} by his only authorized agent, and by it was induc-
ed to ~~refuse~~ decline a security tendered him.
The law, we believe it is, that a promise to forgive
a debt, or to forebear its collection, if either tempo-
rarily, or for an indefinite period, unsupported
by any consideration, though ineffectual as a
release, ~~yet~~ viewed merely as an agreement, yet
if the party has been induced by such an
appearance, to neglect any of the means

which might have been ^{have} been
denied, the promise may ^{be}
an estoppel, which it be
and amount to a defence a
separate action brought by
vs. Brooks, 21 Pick.
Comments on the
Case 175. The proof ^{offer} being
within this rule.

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It is urged by the appellants
~~for~~ being held as a guarantor only, ^{and}
entitled to notice of the default of the
before suit brought, and the case of Cox vs.
Thorn, 6 Jones (Law) N. E. 100, and Levin
Bradley, 2 Reddell 303, are relied on as
authority. This seems to be the rule in that
State, and it is in the last named case
said, that the rule of law appears to be,
that whenever the circumstance which is
alleged as the foundation of the defendant's
liability, is more properly within the knowledge
and priority of the plaintiff, than the defend-
ant then notice thereof should be accorded
in the declaration and proved on the trial.
Reference is made to Hemings's case, Cro. Jac. 432.
2 Sanders 62; Key vs. Holland, 5 T. R. 62;
Spencer vs. Parson, 16 Pick. 409. Here the
fact of non-payment, being entirely within the

plaintiff. The defendant was
only ~~by the declaration~~ ^{by the declaration} depending on the
answer, it ~~is~~ ^{was} then but could
be added have notice of the
the right to pay what was due
and paid by
~~the defendant~~
~~the defendant~~.

144 Another objection made
is, that the Court allowed interest
payments first due. In Walker vs. Walker, 14 M. 399, this Court held, that a bond was
bound to pay interest on instalments of rent,
the time they became due. ~~But in this case~~
~~where the defendant had not paid the instalments~~
~~the instalments as they became due in that case~~
nothing had been done by the defendant, to prevent
the regular payments of the instalments, but it
is insisted that in this case, the postponement
was by consent of the defendant, and as
interest is recoverable as damages only,
except when provided ^{for} in the bond, or agreement,
as damages could result to a consenting
party and such is the general rule of law.
Even admitting that
if then new agreements were not valid and
binding, ~~and~~ ^{and} ~~therefore~~, they, at least, sanctioned
the action of the Court, and by them, the defendant
consented to accept less than the instalments

provided for in the lease. The
upon this arrangement, and the
ought not to be permitted now to
certainly not without a ser-
and then interest from the tr.

The instruction
via we have taken
have been given.

Two ~~the~~ instructions a
defendant should have been
are as follows:

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~~It~~ It is for the jury to determine whether the plaintiff accepted Mrs.
Napier as his tenant, and if they believe from the evidence that such was the
fact, the pl^{ff} cannot recover for any of the rent on the original lease after
the commencement of such new tenancy.

~~If~~ If the jury believe, from the evidence, that W. J. Napier from No-
vember, 1857, to the time of his death, and his widow after his decease, to
May 1859, occupied the premises in question at a different rate of rent, and
under a different agreement from that specified in the lease in question,
then the jury may infer a new leasing of said premises, and the defendant
is thereby discharged upon his guaranty, and he is entitled to a verdict in his
favor.

These instructions follow as a corollary
to the propositions we have advanced. It
was a fit subject for the jury to ^{determine} ~~say~~ whether
there was, or not, a renewal of the old
lease, and the creation of a new tenancy.

The court gave an instruction to the
defendant in the following words - If the
jury believe from the evidence, that the
time of payment of ~~any~~ the rent on any portion
of the rent, was ~~extended~~ ^{extended} by a valid agree-

Next, founded upon a bond
between Weeks and I
agreement would discharge
from all liability upon
from the time of making
Next.

Thence

await to the degree in
to the reason that the Co
first in station for the
excluded from the jury, and
of any agreement

The judgment is reversed (and
the cause remanded. ~~With respect to the~~
~~plaintiff to show his damages~~
~~and to show his damages~~
~~and to show his damages~~
~~and to show his damages~~
~~and to show his damages~~

Judgment reversed.

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White

47

Walker

—

opinion by

Therese J.

Reedwell

12.7.191

IN THE SUPREME COURT

OF THE STATE OF ILLINOIS.

THIRD GRAND DIVISION—APRIL TERM, A. D., 1863.

ALEXANDER WHITE,	}	APPEAL FROM SUPERIOR COURT OF CHICAGO.
vs. <i>Appellant,</i>		
MARTIN O. WALKER,		
<i>Appellee.</i>		

ABSTRACT.

- 1 This was an action of Assumpsit commenced by summons issued Nov. 18th, 1859.
- 2 Amended declaration filed May 25th, 1860, consisting of two counts, as follows, to wit:
- 3 1st Count. For that whereas, heretofore to wit: on the eleventh day of April, A. D. 1857, at the County of Cook, aforesaid, the said plaintiff then being possessed of certain premises, to wit: lot twenty-one, (21) twenty-two, (22) twenty-three, (23) and twenty-four, (24) of block nine (9) of Fort Dearborn Addition to Chicago, in the County of Cook, aforesaid, and the large frame building thereon, being the same lately occupied by Mrs. Wemple as a boarding house, one William J. Napier applied to the said plaintiff and requested him to rent the said premises to him for the term of two years from the 1st day of May, A. D. 1857, and offered the said plaintiff as rent therefor the sum of twelve hundred dollars, (as rent for said premises) for each year, in monthly payments, of one hundred dollars each, in advance on the 1st day of each and every month. But the said plaintiff not being willing

to risk the chances of collecting his rent from said William J. Napier, declined to rent the said premises to him unless he should give the said plaintiff security for the payment of the rent thereof. And thereupon the said William J. Napier proposed to the said plaintiff that he would procure the said defendant to guarantee the payment of the rent if the said plaintiff would rent the said premises to him on the terms and conditions aforesaid. And afterwards, to wit, on the day and year aforesaid, at the County of Cook aforesaid, the said defendant came to the said plaintiff with the said William J. Napier and then and there agreed with the said plaintiff, that if he would lease the said premises to the said William J. Napier on the terms aforesaid, that he, the said defendant, would become responsible for the payment of the rent, and would pay the same when due if the said William J. Napier failed to pay the same when due, and the said plaintiff then and there agreed in consideration of the premises, that he would rent the said premises to the said William J. Napier on the terms aforesaid. The said plaintiff avers that in consideration of and confiding in the promises and undertakings of the said defendant, the said plaintiff did on the day and year aforesaid, at said
5 County of Cook, make and execute under his hand and seal a written demise of the said premises to the said William J. Napier for the full term of two years, from the 1st day of May, A. D. 1857, at and for the annual rent of twelve hundred dollars, payable in monthly payments of one hundred dollars each on the 1st day of every month in advance, and afterwards, to wit: on the thirteenth day of April, A. D. 1857, at the County of Cook aforesaid, the said defendant in pursuance of the agreement made by him to William J. Napier, became responsible for the rent of the said William J. Napier, on the said written demise, to become due to the said plaintiff, and in consideration of the premises did execute his guaranty in writing on the back of the said written demise made by the said plaintiff to the said William J. Napier, and delivered the same to the said plaintiff, and thereby then and there, the said defendant promised the said plaintiff to pay him the sum of twelve hundred dollars for each year, for the full term of two years in monthly payments of one hundred dollars each, on the 1st day of each and every month, in advance from the 1st day of May, A. D. 1857, for and during, and until, and including the 1st day of April, A. D. 1859, as the rent on the said demise, of the
6 said plaintiff to the said William J. Napier of said premises, as the same became thereon, in case the said William J. Napier should fail or neglect to pay the same as aforesaid, the counterpart of which said written demise, sealed with the seal of the said plaintiff, and of the said William J. Napier, is now in the possession of said plaintiff, with the said guaranty of said defendant written thereon, and which he brings into court, (a copy of which is already filed in this court) as by said indenture reference being thereto had will among other things more fully and at large appear. And the said plaintiff avers that from the execution of the said guaranty by the said defendant

to him as aforesaid, the said plaintiff delivered to the said William J. Napier the said written demise, and in consideration of the premises and relying upon the promises and undertakings of the said defendant in the behalf, permitted the said William J. Napier to have and enjoy the said premises for the full term of two years, to wit: for the full term of said written demise, to wit: at the County of Cook aforesaid, and by virtue of the said written demise, the said William J. Napier entered into and upon all and singular the said premises, to wit: on the 1st day of May, A. D. 1857, at the County of Cook aforesaid, and had, and used, and enjoyed the same for the full term of the said indenture thereof to him granted as aforesaid, but the said William J. Napier did not pay the rent as the same became due on the said written demise, but failed to do so and made default therein, and although often requested so to do, did not nor would pay the same, nor did any one pay the same for him, but so to do neglected and refused, and still so neglect and refuse to pay the same to the said plaintiff. By means whereof and by force of the Statute in such case made and provided, the said defendant then and there became liable to pay the said sum of money mentioned as rent, to be paid in the said written demise according to the tenor and effect of the said indenture and of the said guaranty, and being so liable, he, the said defendant, in consideration thereof and in consideration of the premises, afterwards, to wit: on the 13th day of April, A. D. 1857, at the said County of Cook, undertook, and then and there faithfully promised the said plaintiff to pay him the said several sums of money when thereunto afterwards requested.

2d Count. Substantially same as the first. Pages 8 to 16.

20 Plea, general issue, and notice of special matter in defence, filed June 16th, 1860, which notice is as follows:

"The above named plaintiff and his attorney, J. W. Waughop, will please take notice.—That upon the trial of the above entitled cause, the said defendant will rely upon the following special matter for a defence to said action of plaintiff:

21 1st. That the said plaintiff ought not to recover upon the cause of action and promises in said amended declaration mentioned, because he says that the said promises of defendant, in said declaration mentioned, were special promises to answer for the debt and default of another person, in manner and form as in said declaration mentioned and set forth, and that no agreement in respect of or relating to the said promises, and supposed causes of action, or either of them in said declaration mentioned, or memorandum or note thereof, wherein the consideration for the special promises, or either of them, was stated or shown, was in writing and signed by the said defendant or any person thereunto by him lawfully authorized according to the statute in such case made and provided.

one Madame Wemple. The lease was executed by one Dr. Honsinger as security, whom I knew to be good.

33 The plaintiff thereupon proposed to prove the circumstances under which the lease to Napier was executed, to which the defendant *objected on the ground that a consideration for the guaranty sued upon could not be shown by parol* which objection the court overruled, and permitted the evidence to be given, to which ruling of the court the defendants excepted.

The witness proceeded :

Dr. Honsinger's lease extended to May 1st, 1859. Napier desired to buy of Honsinger. Napier applied to us to transfer the lease to him. I consented to do so if he would give us satisfactory security. Napier said he would give Alexander White. I told him I would be satisfied with White. *I drew a lease to White—a lease in White's name. White objected to making the covenants. He wanted Napier to make the covenants. He White, did not want to be held liable in the first instance, only in case* 34 *Napier did not pay. White said he was willing to guarantee the lease, I then changed the lease from White to Napier. Napier afterwards came in and signed it. Then he saw White and White came in and signed it. I kept both copies until White signed, then gave Napier one copy, and he went into possession May, 1857.*

The plaintiff proposed the following question to witness: Was the lease signed on the day it bears date?

Defendant objected to the question, which objection the court overruled, and permitted the question to be asked, and defendants excepted.

Witness proceeded :

My impression is that lease was not executed by Napier on the day it bears date; I collected all the rents that were paid on the lease; rent was paid in full until and including October, 1857, and payments were afterwards made as follows: November, 1857, \$30 00; December, \$30 00; January, 1858, \$50 00; February, 1858, \$80 00; March, April, May, June, July, \$80 00 each; August, \$45 00; September, October, November and December, \$50 00 each; January, February and March, 1859, \$50 00 each; April, \$20 00; and May, \$40 00.

The lease and guaranty sued upon and spoken of by witness, was then offered in evidence by plaintiff.

The plaintiff then offered the lease and guaranty referred to, in evidence. To the admission of which, in evidence, the defendant, by his counsel, then and there objected, but the court overruled the objection and admitted said lease and guaranty in evidence. To which decision and ruling

of the court, in overruling said objection and admitting said lease and guaranty in evidence, the defendant, by his counsel, then and there duly excepted.

Plaintiff then offered, in evidence, the lease and guaranty mentioned in said 1st count of Narr. and set forth in full in 2d count, being a lease dated April 11th, A. D. 1857, of lots 21, 22, 23, 24, in block 9, Fort Dearborn Addition, by Walker to Wm. I. Napier, for two years from 1st of May, 1857, to 1st of May, 1859, at a rental of \$1200 00 per annum, payable monthly in advance, with covenants to keep the premises in a clean and healthy condition, in accordance with the ordinances of the city, and directions of sewerage commissioners, and also covenants in default of payment of right of lessor to re-enter, and to distrain and waiving exemption laws and giving a "valid and first lien to lessor upon any and all the goods, chattels and other prop-
erty of lessee, as security for payment of said rent," under seal.

Upon the back of which lease was written as follows :

"I hereby guaranty the payment of the rent, to become due on the "within lease, on the days the same becomes due. Dated, Chicago, April 13th, 1857.

(Signed,)

"ALEX. WHITE."

And upon cross examination testified :

I am an Attorney in this cause; I don't know that the words "on account," in the receipts, were written after the date of the receipts; I don't remember whether I endorsed on Mrs. Napier's lease payments "on account" when rent was not paid in full I receipted on account. *The words in receipt "on account," may have been written on my copy of lease when this suit commenced.*

My impression is that Napier died in February, 1858; could not say whether testate or intestate; I think there was no administration, and that I should have known if there had been; house was rented for a boarding house; the grade of Randolph street in front of the house was raised in the fall of 1857; M. O. Walker did not, but S. B. and M. O. Walker, (the plaintiff and his brother) who were partners, did petition the city common council for the raising of the grade; the grade was raised by the city of Chicago 14 inches; several causes contributed to throw the water in on the premises in question; improvement on Lake street, in rear of his, helped; adjoining buildings were raised to grade and this was not; this also helped, and then the raising of the grade helped; the tenants complained, and we made a drain that fall or the next spring; Napier's family remained after his death; they remained until the end of the lease; Mrs. Napier kept a boarding house; some of the boarders remained; the house was about full all the time.

On re-examination, testified: S. B. & M. O. Walker were partners; S. B. had no interest in the lot.

The plaintiff thereupon rested his case, and defendant, to sustain the issues on his part called Mrs. Wm. J. Napier, who, being duly sworn, testified :

43 I am the widow of Wm. J. Napier; he died April 1st, 1858; we moved into the house in question a short time before the 1st of May, 1857; we kept a boarding house there; *I remember the raising of the grade; after that the water came in and the roof leaked; I had to stand ankle deep in water to prepare meals for boarders; green slime laid about everywhere; I appealed to Walker, to his feelings, told him my boarders were all leaving; Walker promised to have the house fixed, and so did Waughop; nothing was done; even in the depth of summer, it was scarcely dry; stagnant water was always in the house; I went to see Walker with Mr. Dhyrenfurth; I then told Walker that it was impossible for me to stay there and pay \$100 00 per month. Walker said I need not be troubled; I might pay what I could and go home and rest satisfied, and he would not trouble me, that he had Mr. White.*

44 I said I am the party to pay, not Mr. White. *I told him I would leave the house if he did not do something, that it was in such a condition; I offered him \$80 00 per month; he then said that will do; that I might pay that until he sent me word. Said I: Will you tell Waughop? He said he would. Walker said I was to be under the rent of \$80 00 per month until he, Walker, let me know; I then paid \$80 00, after the conversation of which I have spoken for a number of months, my receipts are all on the lease; the place became so very bad that all my boarders left me; I went then to Waughop; I told him that \$50 00 a month was all I could pay; that my furniture was there, and he might take that; this was some time after my husband's death; when I was paying \$80 00, I noticed that Waughop receipted for that amount, and asked him why not in full? He said that would do; I asked him again; he said it was all right, all the same; I thought it was; I did not show my receipt to my friends; I told Waughop I could not stay, the water and slime were about so, and the stench was such.*

45 I paid \$50 00 from that time; on and up to that time, \$80 00; I told Waughop at the time that White was not to be held responsible, that I was alone responsible; if he wanted more than \$50 00 he *could take my furniture.*

The defendant thereupon propounded the question: What was the amount and value of the furniture you had?

To which question the plaintiff objected.

Defendant then stated that he desired to prove by witness that she had at time mentioned, \$2000 00 worth of unincumbered furniture on the premi-

ses, but the court sustained the objection, and refused to allow the question to be put, and defendant excepted.

Witness proceeded:

I understood Mr. Waughop to agree to the \$50 00; I paid it from month to month, and *he asked no more; he would not take the furniture; I had told Mr. Alex. White that he was exonerated by Mr. Walker; I informed White that Walker was not to exact more than \$80 00 per month at the*
46 *time of that arrangement, or a week or two after. White was with me at the time I made the agreement with Waughop to pay him \$50 00, when Walker refused to take my furniture.*

I was never notified to pay more than the \$80 00, at the time I paid that, nor more than \$50 00 at the time I was paying that sum.

My house was not full after it became untenable; was not half full for a year before I left.

Dhyrenfurth was with me at the conversation with Walker; *I offered Walker a chattel mortgage on my furniture as security; this was after agreement with Waughop, but I wanted to secure White against all loss, so I*
47 *offered the furniture, but he said no; that he understood it was all right with Walker, and he was not liable.*

On cross examination said:

Conversation as to \$80 00 was before Napier's death.

We had some boarders after house became untenable.

The defendant then called:

Julius Dhyrenfuth, who, being duly sworn testified: Mr. Napier explained about the house and the rent to me, and I went with his wife at his request, for the purpose of *renting the house at a lower rate*; we both told
48 him that the house was untenable. Walker asked the cause. I told him that I and other boarders had to leave because of the standing water and the stench. *Walker said he had a guaranty on the lease. Mrs. Napier said that \$80.00 per month was all she could pay. Walker said, Well, he would take that. She then said: Will you hold White for the balance? He said yes. She said: then I will not stay. I told him from Mrs. Napier that Napier had legal advice that he need not stay in the place. Then he, Walker, argued to Mrs. Napier that it made no difference to her; but Mrs. Napier said she would not have White lose anything through them. That they had rather work until the blood ran out of their fingers. Thereupon Walker agreed to take \$80.00 per month in full, and inform his agent, Waughop thereof, and that White should not be held. Walker said the rent should be \$80.00 per month until he sent Mr. or Mrs. Napier word that it was changed. We left*

49 and reported to Napier. The kitchen was under water—pools of water standing all round, covered with green slime, &c. This resulted from raising the grade. Conversation was in November, 1857.

It was admitted that Napier died intestate, and no administration was taken out. That the grade was raised upon petition of the property owners on street. That petition was signed S. B. & M. O. Walker by S. B. Walker, and that S. B. had no interest in the lot in question.

The defendant thereupon rested his case, and *pl'ff* by his att'y moved to exclude from the consideration of the jury all the evidence given in behalf of the defendant, as to the condition of the premises in question, and the alleged agreement with Wm. J. Napier, by the *pl'ff* for taking a less monthly rent than that described in the said lease. Also, all the evidence of the alleged agreement between *pl'ff* and Mrs. Wm. J. Napier, to the same effect. Also, all the evidence tending to show the alleged surrender of the lease in question. Which said several motions of the said *pl'ff* were then and there sustained by the court and all the defendant's evidence on the points aforesaid, was then and there excluded, to which several decisions and rulings of the court in sustaining said motions and excluding said evidence, and each and evry part thereof, the defendant by his counsel excepted.

On motion of *pl'ff* court gave the jury the following instructions:

would discharge the defendant from all liability upon his guarantee from the time of making such agreement.

The court was requested by def't to give the following instructions to the jury, on part of def't :

1st. In an action upon a guaranty of payment by a third person, the plaintiff must prove that payment has not been made by such third person, and therefore if the jury are not satisfied by the evidence that payment has not already been made to the plaintiff by the defendant, they will find a verdict for the defendant.

52



But the court refused to give said instructions, or either of them, to which decision and rulings of said court in refusing to give said instructions and each of them, the def't then and there excepted.

The jury thereupon found a verdict for pl'ff, and def't entered his motion for a new trial for the following reasons :

- 1st. The verdict is against the law.
- 2d. The verdict is against the law and the weight of the evidence.
- 3d. The court erred in sustaining the motion of plaintiff to exclude defendant's testimony, and in excluding the same.
- 4th. The court erred in refusing to admit testimony offered on behalf of the defendant.
- 5th. The court erred in the admission of testimony on the part of plaintiff.

25th November, 1862. Motion for new trial overruled, and judgment on verdict.

ERRORS ASSIGNED.

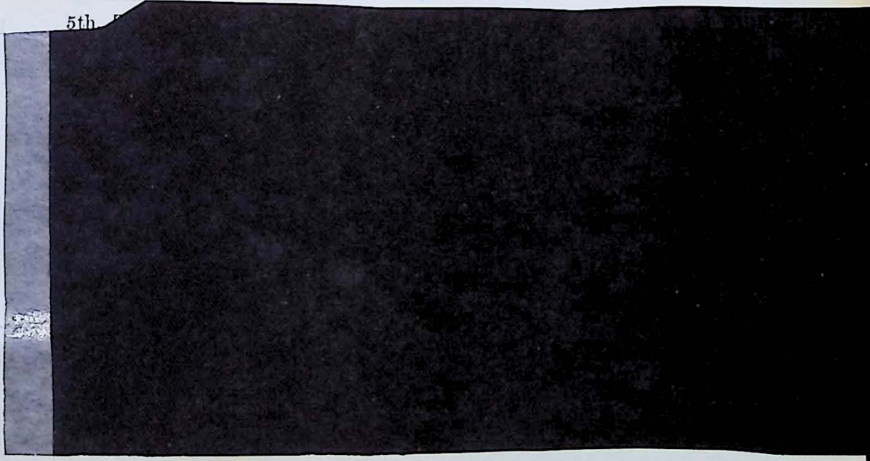
1st. That the court erred in overruling the objection of the defendant below, to the admission of the testimony of the witness, Waughop, as to the character and consideration of the guaranty on which this suit was brought, and in admitting said testimony.

2d. The court erred in overruling the objection of defendant below, to the admission of testimony of witness Waughop, to show that the lease in question was signed upon a day different from its date, and in admitting said testimony.

3d. That the court erred in overruling the objection of the defendant below, to the admission of the lease and guaranty in evidence, ^{and} in admitting the same.

4th. The court erred in sustaining the objection of the plaintiff below, to the admission of testimony of witness Napier, to show that she, Mrs. Napier, had unincumbered furniture on the premises of the value of two thousand dollars at the time she offered her furniture to plaintiff's agent for the rent, as stated by said witness, and in refusing to admit said testimony.

5th.



8th. That the declaration aforesaid, and the matters therein contained, are not sufficient in law for the said plaintiff below to have or maintain his aforesaid action thereof, against the said defendant below.

9th.



[12]

10th. That the court erred in entering judgment on the verdict.

11th. That the verdict was against the law and the evidence.

12th. That the verdict was excessive and included interest, which the defendant was not, by the law of the land, bound to pay.

13th. That the judgment aforesaid, in form aforesaid given, was given in favor of the said plaintiff below, and against the said defendant below, whereas, by the law of the land, the said judgment ought to have been given in favor of said defendant and against said plaintiff.

BARKER & TULEY,
and
M. W. FULLER,
Attorneys for Appellee.

22
Chas. H. White
V. 3
Chas. H. Walker

Abstract

Filed Apr 23-1863
L. G. Loring

IN THE
Supreme Court of the State of Illinois,
THIRD GRAND DIVISION,
APRIL TERM, A. D. 1863.

GALEN EASTMAN,
Appellant,
versus
 THOMAS BROWN,
Appellee.

} *Appeal from the Superior Court
 of Chicago.*

POINTS FOR APPELLANT.

The witness Teetzel had offered to sell Eastman his half interest in a boat for \$3,750. The offer had not been declined, but Eastman had gone to Michigan to make arrangements for closing the trade, as the conversation between the parties clearly contemplated he might do before answering. The offer of vendor had not been withdrawn, but was still open.

Eastman sent word to Merrill, his agent, to close the trade, when Brown, the owner of the other half and captain of the boat, professing to act by Teetzel's instructions, falsely stated that Teetzel would no longer sell for \$3,750, nor for less than \$4,500. Teetzel, on the contrary, swears that he never so stated, or instructed Brown, but was always willing to sell for \$3,750, and so stated to Brown. Eastman, believing Brown's false statements, and forced, by the arrangements he had made, to have the boat, made a written agreement in duplicate with Brown, or Teetzel's agent, (see Exhibit B in Record), for the purchase at \$4,500, *which agreement Brown pocketed and never gave or disclosed to Teetzel.*

Subsequently Teetzel prepared and gave to Brown for delivery to East-

man a written offer of sale, (see Exhibit A in Record,) *substantially renewing his original offer at \$3,750, which also Brown kept, and Eastman nor his agent never saw.*

Afterwards the parties (Teetzel & Eastman) met in Chicago to close the trade, *each supposing that the other had the paper executed by himself.* Eastman, therefore, supposing Teetzel had Exhibit B, calling for the extra \$750 note, and that that contract had been entered into under Teetzel's instructions, and *not being apprized of the contrary or of Brown's fraud,* made the note accordingly. It is true, Teetzel then stated that he was not "making the \$750," and on Merrill saying, "Then Brown makes it," he said, "yes," or nothing; but it was not then, nor until a year afterwards disclosed to him, that the contract under which he supposed himself to be making the note, and under which he supposed it to be *required* by Teetzel, although by his (Teetzel's) direction *made* to Brown, had in fact never come to Teetzel's possession, nor been made by his direction. The mere changing the direction of the money from Teetzel to Brown, by Teetzel's orders, or the statement that Brown was "making it," not stating how, could not undeceive Eastman of the false impression created by Brown, that the \$750 was required by Teetzel as a part of the purchase money under the contract. The facts and Brown's fraud never came to Eastman's knowledge till the fall of 1851, long after the interview mentioned by plaintiff's witness Murphy.

Upon these facts we claim—

I.

The note was void for fraud of Brown.

I. Fraud accompanied by damage is a good cause of action, and concealment where duty requires disclosure, is fraud.

14 Bart. S. C. 72. 22 do. 654.

3 Seld. 352.

II. The Party committing fraud need not, as here have received benefit, nor colluded with party benefited.

3 T. R. 51. 3 Scam, 171.

2 Meto. 374. 1 Scam. 344.

III. The false suggestion need not have been *the leading* motive to action; it is enough if it were *a* motive.

22 Pick. 48, 52.

IV. To make the fraud actionable, no relation of trust or confidence need exist.

22 Pick. 48.

V. Where the party guilty of fraud in an executory contract brings an action on it, the fraud may be set up in defense.

18 Pick. 104. 30 Vt. 139.

VI. The contract need not have been rescinded *in toto*.

30 Vt. 139. 1 Hill, 484. 1 Comst. 305.

2 Pars. Cont. 278. 1 Metc. 557.

VII. The loss of an advantageous bargain, or the making a worse one, by reason of willfully false statements, is sufficient damage.

2 Wend. 385. 4 Den. 189.

VIII. Here the vendor was not only in fact always ready to sell on the original terms, but the first negotiations were still open. An offer continues open for a reasonable time, to be determined by the words of the parties and the circumstances of the case.

1 Pars. Cont. 405 (bk. 2, ch. 2, sec. 2).

3 Cush. 224. 1 Foster, 41.

1 Fairf. 185. 21 Eng. L. and Eq. 591.

IX. Where the false representations are as here, such as reasonably to prevent further inquiries, they are a good defense.

18 Pick. 105. 1 Pick. 351.

X. False representations, by a third person, more unfavorably regarded than those of vendor, because he has apparently *no interest to deceive*.

6 Metc. 260.

XI. Courts always require the strictest candor, of a party who professes to act as a mere voluntary *negotiorum gestor*, and will not let him make a profit of either party who reposes confidence in him.

9 Paige, 241. Dunlap's Paley Ag. 33—37.

XII. Here is palpable effort of appellee to reap a reward from his own fraud. He has done nothing for either party, but by deceiving both, without benefiting either, attempts to recover \$750 for himself, as a compensation for inducing them to consummate a sale upon the precise terms of an offer already made and accepted.

II.

There was no consideration for the note.

I. It was not given as commissions for Brown. It was not so claimed by him, nor so intended by either party, nor had he earned any. He had neither found buyer or seller; they had found each other, and offered and accepted terms of sale.

II. It was not part of the purchase money of the boat.

It did not in fact go to the owner, nor for his benefit, nor was it, although erroneously supposed by Eastman to be so, required by the owner as a condition precedent to the sale.

III. The supposed consideration, viz.: the obligation on Eastman's part to carry out the contract (Exhibit B.) did not in fact exist, that contract being void for fraud, and never having come to or been acted on by Teetzel. "Where the cause for which the engagement is contracted is false, there is no consideration."

1 Poth. Obl. 123. 2 Taunt. 2.

"To make a valid contract, both parties must assent to the same thing in the same sense."

1 Pars. Cont. 399.

III.

To permit a recovery on this note, under the facts disclosed, is not only to tolerate, but sanction and reward a long continued course of premeditated fraud; to permit a third party who has learned of the negotiations of vendor and vendee, and that their minds have in fact met, to take

advantage of his position and knowledge, and of the mutual confidence of the parties in him, to interfere between them, and by false statements and fraudulent concealments, to extort from the vendee a further sum under the guise of higher compensation to the vendor, his principal, but in reality based upon no other consideration than his own treachery and deceit.

Falsehood is too cheap to be purchased at so high a price; and since vendor and vendee have completed and carried out the only contract between themselves required by vendor, and intelligently made by vendee, this exerescence added by fraud of appellee, growing out of no valid mutual agreement between the parties, and based on no real consideration, ought to be rejected and condemned.

WALKER & THOMAS.

Attorneys for Appellant.

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Eastman

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delivered this opinion of this Court.

Mr. Justice

Waller, ^{the} ~~the~~

It appears from the evidence, in this case, that the trustee left the state, and that this trust no attention was paid to the money had been due almost a year before he left. When this evidence was ascertained, and the request, by letter to proceed and sell the property, he failed to take any steps, or even to reply to the letter, for months; and then only said that he had sent the notice of sale to a friend, or to his attorney to be delivered to the attorney of complainant. If this notice was ever sent, it was not done. This would seem to be a neglect. On the part of a trustee, almost an amount to ^{denial} ~~denial~~ that when it is mentioned that Rose and Bill had advised complainant to hand the property sold, we are at a loss to account for such action, unless it is one of inattention, almost amounting to a disqualification.

If we were to judge how he would

The latter practice, however, would be to file a bill for a bill a piece of money, and on a decree require the trustee or a special commissioner to make the bill, & execute the trust.

✱

act in the future, by his past conduct, we may conclude a bill would not be made ⁱⁿ ~~a great while to come~~ ^{reasonable time}. A mere absence of a trustee from the state ~~which it might be anticipated~~ ^{but} of inconvenience, ^{will} not itself constitute a sufficient ground for ^{his} removal. He will still devote proper time and attention to the trust fund, to carry it out in good faith. But when in addition to his absence from the state, he gives no attention to his duties as trustee, a court is fully warranted in removing him, and appointing a suitable person, to carry the trust out. The wisdom of making such a bill fully warranted is shown in declining to remove the trustee until the bill is filed.

In this opinion the whole Court concurred.

Decree affirmed.

ppm Sill T. al
23 Feb 80

A. Macfie

Opinion by
Macfie

Review of
Pg 1