No. 11901

Supreme Court of Illinois

Kiser & Kiser

vs.

Kennedy

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George Rieu et al.

vs

Michael Kennedy

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11901

Prepared

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George & Daniel Kiser,
vs.
Michael Kennedy

Trespass — ~~Appeal~~ Error ~~from~~ to Bureau —

Abstract of the record —

The appellants commenced an action of Trespass ~~qu~~ de bonis asportatis, against the appellee in the Bureau Circuit court, at the May Term 1848 —

The declaration contains two counts —

1. That on March 15. 1847, Deft. took & carried away 1000 bushels of wheat the property of the Plffs of the value of $1000 —

2 — The same in substance as the first —

To this declaration the Deft. pleaded,

1. not guilty. =

2 — Actio non. Because the Plffs. for a long time, to wit, from Nov. 25/45 till March 1/46 held & enjoyed a certain dwelling house, buildings &c & land, known as the "Lost Grove farm" at Port Arlington in Bureau County, in which as tenants thereof to Deft. under & by virtue of a certain demise thereof heretofore made at & under the yearly rent of of $600 payable as follows, $400 on the first day of December 1846 & two hundred dollars in improvements to be made on said premises, & said Deft. for the things, that on the day & year aforesaid

[11901-1]

a large sum of money, to wit, the sum of $32.70
of the rent aforesaid, for one year of said term
ending on the first day of March 1847, & then
last elapsed, became due & payable to Deft.
& at the said time when &c. was in arrear
& unpaid - whereupon the Deft. in his own right
did, on the said first day, when &c. enter into
upon said premises & seize, take & distrain
to wit, forty hundred & fifty one & one third
bushels of wheat part of the wheat in
said declaration mentioned, as & for a dis-
tress for the rent so due & owing, & in arrear,
as aforesaid, & took & seized the same thereon
as such distress as aforesaid, according to the
form of the statute &c. which are the same
supposed trespasses in the introductory part
of this plea mentioned, & a verification =

To this plea, the Plffs. demurred generally, & also
shewed for special cause of demurrer,
1. that the plea does not state whether the tenancy
was created by special agreement in writing or other-
wise. -
2 - No time stated when the distress was made,
nor whether the distress was made before or
after the rent became due - nor is it stated
that the distress was made during the continu-
ance of the tenancy.
And because plea is otherwise informal insufficient.
The court overruled the demurrer -
& the Plffs. abided by the demurrer - & then

court rendered judgt. against the Plffs. for costs.

[11901-2]

Kiser et al
vs.
Kennedy
Abstract

Keeze vs Kennedy

1. According to the course of the common law a Landlord could not distrain for rent after the term expired nor could he distrain for rent on the day in which it is reserved and made payable. for it is not due until the last minute of the day. 1 Saunders Reports 287. 2 Saunders 284 b. 10 Rep. 127 b. Coke Litt 47 b. 1 Roll Abr. 672 Pl 8.

And it was the same thing though the lessee held over after the determination of the term by sufferance or wrong for he was not in possession in privity of the lease 1 Roll Abr. 672 Pl 10. 2 Bac Abr. 107.

2. One of the objections taken to the plea is that no time is stated when the distress was made, nor whether made before or after the rent became due

The plea in this respect is clearly bad. It should have stated that the distress was made during the term to be a bar to the action

It is a principle in pleading that every thing shall be taken most strongly against the party pleading. 1 Chitty Pl. 272.

The plea not stating that the distress was made during the

[11901-3]

term it is to be intended that it was not to made or until after the term had expired

3. Our Statute is only in affirmance of the common law on the subject of distress and only adds to or diminishes rights as its provisions expressly provide As for example the 6 S Revised Stat of 1845 p. 331. requires the party distraining to obtain a judgment or a certificate from a court of the amount due before the property distrained can be sold.

By the 7 S. of the same act it is provided that the landlord may distrain for rent any personal property of his tenant in the County, But does not allow the property of any other person to be taken although found on the premises

Now at common law the landlord could only distrain property on the demised premises, and he could take even the property of a stranger if found on the premises.

Thus it will be seen that the common law in this particular has been changed by this act. And I conclude that it was the intention of the legislature not to alter the common law in any thing but what

the Statute expressly provides. And that the law of distress in other respects remains as at Common Law. Hence hence that the distress must be made during the continuance of the tenancy.

The decision of the circuit was based on the case of Penny vs. Little et al. 3 Scam. R. 301 — We do not think that case applicable or at all decisive of this case. — In that case, the court merely settle the question that the landlord may distrain for rent, when no power of distress is contained in the lease. — We suppose that the court will not now overturn that decision, though it is confessedly based not on the principles of the common law, or the provisions of any Statute — but solely upon a supposed expansiveness & flexibility of the common law — an expansiveness & flexibility, unknown in the land where that law had its birth & growth, & where the courts pretty fully recognize the rule stare decisis, & leave it to the omnipotent power of Parliament to make & change the law. — If this court, however, now feels at liberty to revise that decision, (a decision which has been more assailed by the Bar for its incorrect doctrines than any other that has been made by this court) we ask that it shall be done. — And we refer this court to the opinion of Eaton J. in the case of Lesley vs. Peters 5 Gil. 154-5 & 6 — for a clear, forcible & we apprehend, unanswerable argument against the decision in the case of Penny vs. Little. —

But that case does not decide, that all rules & restraint relative to distress, are abrogated. — The right to distrain is against common right. It is the exercise of

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an arbitrary power, by one individual over another, to seize his property, without judgment or process of law. Such a power ought to be exercised, only in the most guarded manner, & he who undertakes to exercise it, should be held to the most rigid rules. He claims his pound of flesh & he must take it at his peril. —

The plea does not shew, in fact, when the distress was made — it alleges that the deft. did "on the said first day & year &c" — was this the first day of Decr 1846 or March 1. 1847? — it may refer to either — & the demurrer will reach this defect. —

Though a portion of the rent is a certain money rent, the residue, i.e. $200 in improvements" &c is uncertain as to the mode or time of payment, no kind of improvements being specified — nor does the plea specify whether the $327.70 alleged to be in arrear, was that which was due as rent in money, or in improvements. — nor does it allege or shew whether the improvements had been made or not. —

3 Com. Dig. Tit. Distress A. 2. —
When distress is made, in England, for rent after the term expired, it is by Statute, as 8 Ann, or by special local customs &c — but not by common law. —

O Peters &
E. N. Powell for
Plffs. in Error

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Weir et al. vs Kennedy
Argt & brief of Plffs in error

Filed July 12. 1850
J. Leland Clk.

Kaiser & Kaiser
vs
M Kennedy } Error to Bureau

For defendant the following points are made

1st The Counsel for the plaintiff in error are mistaken upon a question of fact it is not true ~~either~~ that the plea alledges that the distress was made either on the day when the rent became due nor after the determination of the tenancy this can be demonstrated from the plea

2 It is not true that that the plea does not alledge the time when the distress was made I ask the attention of the Court to the language of part of the plea as follows

And the said defendant further says that on the day and Year last aforesaid a large sum of money to wit the sum of three hundred and twenty seven dollars & seventy cents of the rent aforesaid for one Year of said term ending upon the first day of March 1847 & then last elapse became due and was due and payable to said defendant and at the said time when &c was in arrear and unpaid Wherefore the said defendant in his own right did on the said first day when &c enter distrain &c,

This form is given 3 Chitty pl 1094.

[1801-5]

What time do the words "said first day" alledged to be the time when the distress was made refer to, clearly to the first day of March 1847, which is the first day next aforesaid and to which by every rule of legal construction the words "said first day" refer

1st Was then the first day of March 1847, the day on which the rent became due and payable clearly not. The plea alledges that the rent became due on the first day of December AD 1846.

2d Was the first day of March 1847 after the expiration of the term as the counsel for the plaintiff in error insists.

To determine this let us ask what is the language of the plea in relation to the duration of the term,

"from the 25th day of November 1845 & from that time and for and during the space of one year from the first day of March 1846 clearly including the 1st day of March 1847

Again the plea has this language the sum of $327.70 of the rent aforesaid "for one year of said term ending on the first day of March 1847,

The plea then alledges that the rent which was distrained for became due Dec 1st 1846 & the distress was made March 1st 1847. the last day of the tenancy

J. B. C. Cook
for defr

Kaiser & Kaiser
v
Kennedy
Points for defs in
error

[11901-4]

State of Illinois, } SS.
Supreme Court, }

The People of the State of Illinois

TO THE SHERIFF OF Bureau County.

Because in the record and proceedings, and also in the rendition of the judgment, of a plea which was in the circuit court of Bureau county, before the Judge thereof, between George Kiser & Daniel Kiser plaintiffs & Michael Kennedy defendant it is said that manifest error hath intervened to the injury of the said plaintiffs as we are informed by their complaint, the record and proceedings of which said judgment, we have caused to be brought into our Supreme Court of the State of Illinois, at Ottawa, before the justices thereof, to correct the errors in the same, in due form and manner, according to law; therefore we command you, that by good and lawful men of your county, you give notice to the said Michael Kennedy

that he be and appear before the Justices of our said Supreme Court, at the next term of said Court, to be holden at Ottawa, in said State, on the second Monday in June next, to hear the records and proceedings aforesaid, and the errors assigned, if he shall think fit; and further to do and receive what the said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said Kennedy notice, together with this writ.

WITNESS, the Hon. Samuel H. Treat Chief Justice of our said Court, and the seal thereof, at Ottawa, this 11th day of April in the year of our Lord, one thousand eight hundred and fifty

S. Leland
Clerk of the Supreme Court.

[11901-7]

~~The within named Michael Kennedy is not found in my Co~~

Executed this writ by reading the within in the presents and hearing of Michael Kennedy

May 29th 1850

J. C. Thompson Sheriff

By Cyrus Langworthy Deputy

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George Kian et al.

vs

Michael Kennedy

Dec. Fa.

To June Term 1850.

Filed June 6. 1850.

D. Allen Clk.

Sheriff's fees	
Serving writ	50
12 miles travel	75
Return writ	12½
Sheriff's fees	1.37½
Clerk's fees	
Issuing writ	.50
Entering appeal	60
Return	10
	$1.21

Peoria July 8/50

L. Leland Esq.

Dear Sir,

Enclosed please find Abstract & brief in the case of Kiser et al. vs. Kennedy —

Please place it on file with the papers in the case, & let the counsel for Defts in Error know it is filed, & oblige, yours &c —

Peters & Powell
Attys. for Pltf. in Error —

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State of Illinois }
Bureau County } ss

June Term of the Supreme Court for the Division to be held at Ottawa A.D. 1854

George ~~Kiser Deceased~~
David Kiser
vs
Michael Kennedy } Error to Bureau

On filing a transcript of the record of the court below in this cause the Clerk will please issue a Writ of Error to said Defendant directed to the Shff of Bureau County — returnable at said Term —

M. Rendall Pltffs Atty —

[11901-2]

23

George Kiser et al.
vs
Michael Kennedy

Praecipe

Filed Apl. 11. 1850.
Cleland Clk.

Clerk of Supreme Court
Ottawa Lasalle Co Ills

State of Illinois, Sct.

WRIT OF ERROR.—FREE TRADER, OTTAWA.

The people of the State of Illinois,

To the Clerk of the circuit court for the county of Bureau — Greeting:

BECAUSE in the record and proceedings, as also in the rendition of the judgment of a plea which was in the Circuit Court of Bureau — county, before the Judge thereof, between George Kiser & Daniel Kiser

plaintiff and Michael Kennedy

defendant it is said manifest error hath intervened to the injury of the aforesaid Plaintiffs as we are informed by their complaint, and we being willing that error, if any there be, should be corrected in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly without delay, send to our Justices of the Supreme Court the record and proceedings of the plaint aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at Ottawa, in the county of La Salle, on the Second Monday of June next — ~~next~~, that the record and proceedings, being inspected, we may cause to be done therein, to correct the error, what of right ought to be done according to law.

WITNESS, the Hon. Samuel H. Treat Chief Justice of our said Court, and the seal thereof at Ottawa, this 11th day of April in the year of our Lord one thousand eight hundred and ~~forty-~~ fifty.

C. Leland

Clerk of the Supreme Court.

23

George Kier et al.

v.

Michael Kennedy

Writ of Error

Filed April 11. 1860.

Leland Clk.

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Kiser & Kiser

vs.

Kennedy

and the said Pltffs. say, that in the record & proceedings aforesaid, & in the rendition of the judgment aforesaid, there is manifest error - in this, to wit, that the judgment of the circuit court should have been in favour of the Pltffs. & against the Deft.

They also assign the following, as additional errors -

1. The circuit court erred in ~~sustaining~~ overruling the ~~the~~ demurrer to the Pltffs. demurrer to the Defts. second plea. -

2. The court erred in rendering a judgment against the plaintiffs upon their demurrer to the Defts second plea. -

3. The court erred in rendering any judgment against the pltffs. & in favour of Defts. in said cause.

Wherefore for the errors aforesaid, & for other errors in the record & proceedings aforesaid, the Pltffs. pray that the said judgment of said circuit court, may be reversed, annulled & for nothing esteemed, & they restored to what they have lost by reason thereof &c.

By their Atty, Gustave Peters

And the said defendant says that in the record & proceedings & judgment aforesaid there is no error & he prays that said judgt. be affirmed

R. Leckow for deft

[11901-11]

Pleas before the Hon. Hugh Henderson Judge of the circuit Court of the eleventh circuit of the State of Illinois who exchanged for the present term with the Hon. Theophilus L. Dickey Judge of the circuit court of the Ninth judicial circuit of said state; at the May term of the circuit Court in and for the County of Bureau begun and held at the court House in Princeton in said county on Monday the fourteenth day of May in the year of our Lord one Thousand Eight hundred and forty nine

Present Hon. Hugh Henderson Judge
Justin H. Orth Clerk
Joseph Thompson Sheriff
B. C. Cook State atty

State of Illinois }
Bureau County } ss. The People of the state of Illinois, to the sheriff of said County Greeting:

We command you as we have heretofore oftentimes commanded you, to summon Michael Kennedy if he may be found in your county, to appear before our Circuit Court, on the first day of the term thereof, to be held at Princeton, within and for the said County of Bureau, on the second Monday of May next, then and there to answer unto George Kisir & Daniel Kisir in a plea of trespass vi et armis to the damage of the said plaintiff in the sum of ~~$~~ One thousand dollars as they say, and make return of this writ, with and endorsement of the time and manner of serving the same on or before the first day of the term of the said Court to be held as aforesaid

[11901-127]

Witness David Brown clerk of our said court and the seal thereof at Princeton this fifteenth day of November in the year of our Lord One thousand Eight hundred and forty Eight

David Brown Clerk
by C. Bryant deputy Clerk

May 2 1848 Plaintiffs filed their declaration in the words and figures following to wit:

State of Illinois } In the circuit court to the may term
Bureau County } " thereof A D 1848

Michael Kennedy the defendant in this suit was summoned to answer unto George Kiser and Daniel Kiser the plaintiffs in this suit of a plea of trespass. Once thereupon the said plaintiffs by their attorney complain for that the said defendant heretofore to wit on the fifteenth day of March A D 1847 at the county of Bureau aforesaid with force and arms seized, took, and carried away certain goods and chattels to wit One thousand bushels of wheat of the property of the said plaintiffs of great value to wit of the value of One thousand Dollars, there, then found and being and sold, disposed of and converted the same to his own use.

And also for that the said defendant heretofore to wit on the day and year aforesaid and on divers other days after that time and before the commencement of this suit, with force and arms &c at the county aforesaid seized took and carried away other goods and chattels of the said plaintiffs to wit: One thousand bushels of wheat of the like quality and value of the said goods and chattels in the said first count in this declaration mentioned, of the property of the said plaintiffs then there

found being, and converted the same to his own use, and other wrongs to the said plaintiffs there and there did to the damage of the said plaintiffs the sum of One thousand dollars and therefore they sue &c

W Kendall for plaintiffs

Be it on the first day of said term

George Kizer and Daniel Kizer
vs
Michael Kennedy } Trespass

This day came the defendant by Chumasero & Leland his attorneys and filed his plea to the said plaintiffs declaration in the words and figures following to wit:

1st "And the said defendant by William Chumasero his attorney comes and defends &c When &c & says he is not guilty of the said supposed trespasses above laid to his charge or any or either of them or any part thereof in manner and form as the said plaintiffs hath above thereof complained against him and of this he puts himself upon the country

William Chumasero & Leland
Defts atty

And the plaintiffs do the like
Kendall & Powell for Pltffs

2 And for further plea in this behalf as to the first and second counts of said plaintiffs declaration the said defendant says Actio Non because he says that said plaintiffs for a long time to wit: from the 25th day of November 1845 & from that time and for and during the space of one year from the first day of march 1846

[211901-13]

held and enjoyed a certain dwelling house buildings &c & land known as the East grove farm at Fort Arlington in Bureau County in which as tenants thereof to the said defendant under and by virtue of a certain demise thereof heretofore made at and under the yearly rent of six hundred dollars payable as follows four hundred dollars on the first day of December 1846 and two hundred dollars in improvements to be made on said premises and the said defendant further says that on the day & year last aforesaid a large sum of money to wit the sum of three hundred and twenty seven dollars and seventy cents of the rent aforesaid for one year of said farm ending on the first day of March 1847 and then last elapsed became due & was due and payable to the said defendant and at the said time when &c was in arrear and unpaid wherefore the said defendant in his own right did on the said first day when &c enter into and upon said premises and seize take and distrain to wit: Four hundred and fifty one & one third Bushels of wheat parcel of the wheat in said declaration mentioned as and for a distress for the rent so due and in arrear as aforesaid and took and seized the same thereon as such distress as aforesaid according to the form of the statute &c which are the same supposed trespasses in the introductory part of this plea mentioned — and this he is ready to verify &c wherefore

Chumasero & Leland
for deft

To wit: on the second day of said term

George Kiser & Daniel
vs } Trespass
Michael Kennedy

This day came the plaintiffs by Kendall and Powell their attorneys and the defendant by Chumasero his attorney and the said plaintiffs file their demurrer to the said defendants second plea in the words and figures to wit:

And the said plaintiffs as to the said plea of the said defendant by him secondly above pleaded say precludi non because they say that the said plea and the matters and things therein stated and set forth in manner and form as the same are pleaded and set forth are insufficient in law to bar the said action. And this they are ready to verify. Wherefore for want of sufficient plea in this behalf the said plaintiffs pray Judgment &c

And for cause of demurrer the said plaintiff states and shows

1st It is not stated in or by said ~~plea~~ plea whether the tenancy was created by a special agreement in writing or otherwise

2 The time when the distress was made is not stated and whether the distress was made before or after the rent became due. Nor is it stated that the distress was made during the continuance of the tenancy

And because said plea in other respects is informal & insufficient

Kendall & Powell
attys for Plffs

[11901-14]

And the said defendant by his said attorneys filed his affidavit and thereupon moved the court for a continuance; and it was ~~thereupon~~ considered by the court that said motion be sustained and that this cause be continued to the next term of this court and that the said defendant pay all the costs accruing herein during the present term

Pleas before the Hon.d Theophilus L. Dickey Judge of the circuit Court of the Ninth judicial Circuit of the State of Illinois at the October Term of the circuit Court in and for the county of Bureau begun and held at the court house in Princeton in said county on Monday the first day of October in the year of Our Lord One Thousand Eight Hundred and forty nine

Present Theophilus L. Dickey Judge
Justin H. Ogle Clerk
Joseph D. Thompson Sheriff
D. C. Cook States atty

To wit on the 3d day of said term

George Kiser & Daniel Kiser
vs
Michael Kennedy } Trespass

This day came the plaintiffs by Ster and Kendall their attorneys and the defendant by Chumasero his attorney, and after argument of counsel the said demurrer to said defendants second plea was by the consideration of the court overruled

To wit on the fourth day of said term

George Kiser & Daniel Kiser
vs } Trespass
Michael Kennedy

This day came the parties by their attorneys aforesaid, and the said plaintiffs choosing to abide by their demurrer, It is considered by the court that the said defendant have and recover of the said plaintiffs all his cost and charges in and about his defence in this behalf expended & that he have execution therefor

State of Illinois }
Bureau County }

I Justin H Olds clerk of the circuit court in and for said county do certify that the foregoing transcript contains true copies of the summons and the sheriffs return thereon, the plaintiffs' declaration, the defendants plea, the plaintiffs demurrer to defendants second plea, and all the orders of the court in the above entitled cause as the same appear of Record and on file in my Office

Witness my hand and the seal of said court at Princeton in said County this Eighteenth day of March in the year of Our Lord One Thousand Eight hundred and Fifty

Justin H. Olds
Clerk

Clerks fees = Copy of Record 18 fol 1.80
Cert & Seal 25
Rec my fees of Kiser $2.05
J. H. Olds

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George Rise et al.
vs
Michael Kennedy

Transcript

Filed Apl. 11. 1850.
L. Leland Clk.

Joinder in error filed
July 12. 1850.
L. Leland Clk.