Dent, Fredrick vs Morrison, William 1821 3rd D/St Louis Co 136/13

31 Covenant

State of Missouri } Sct
County of St. Louis }

Be it remembered that heretofore (to wit on the second day of November in the year of our Lord one Thousand eight hundred and Twenty, William Morrison by Cook his attorney filed in the office of the clerk of the Circuit Court for the County of St. Louis his Declaration against Frederick Dent of a plea of covenant broken, which declaration is in the words and figures following to wit St. Louis County Sct circuit court December Term 1820. William Morrison by Cook his attorney complains of Frederick Dent of a plea of covenant broken. For that on the Twentieth day of May in the year of our Lord one Thousand eight hundred and nineteen, at the county of St. Louis aforesaid by a certain Indenture made and entered into by and between the said William Morrison (by his agent for that purpose duly authorised Guy Morrison) of the one part and the said Frederick Dent of the other part and signed by the proper name of the said Guy Morrison and by the said Frederick Dent by the name and description of F. Dent and sealed with their seals and now to the court here shewn the date whereof is the same day and year aforesaid, it was covenanted and agreed by and between the parties aforesaid amongst other things as follows to wit That for and in consideration of the rent covenants and agreements in said Indenture there after mentioned, reserved and contained on the part and behalf of the said F. Dent his executors administrators and assigns to be paid observed done and performed, hath granted, demised leased let and to farm letten and by these presents doth lease set and to farm let unto the said Dent his executors administrators and assigns all that stone house Messuage or Tenement with all and singular its appurte-

=nances situate standing and being in a certain street or place called or commonly known by the name of Main Street in the Town of St Louis aforesaid making a corner of a street op=
=posite corner with Farrar & Walkers Apothicary Store together with all and singular the cellars chambers rooms. garrets, lights, patio, profits, commodities and appurtenances whatso=
=ever to the said house and lot & premises belonging or in any wise appertaining to have and to hold the said stone House Mesuage or Tenement and all and singular other the premises herein before granted and demised or mention=
=ed or intended to be with the appertenances unto the said Dent his ~~heirs~~ Executors administrators and assigns from the day of these presents for and during and until the full end and Term of four years from this day ensuing and fully to be complete and ended. yeilding and paying there=
=for yearly and every year during the said Term unto the said William Morrison his executors administrators and assigns the yearly rent of four hundred Dollars a year of lawful money of the United States. Provided always and it is the true intent and meaning of these presents and of the said parties hereunto that if it shall happen that the said yearly rent of four hundred dollars to be paid at the end of each year, herely reserved to be behind and unpaid by the space of three months over the expiration of each year of payment whereon the same ought to be paid as aforesaid (the same being first lawfully demanded) that then and from thence forth it shall and may be lawful for the said William Morrison his executors administra=
=tors and assigns unto and upon the said premises so demised and every or any part or parcel thereof with their appurtenances in the name of the whole to reenter and the same to have again repossess and ~~and~~ enjoy as in his or their first or former estate or Estates and him the said Dent his executors administrators and assigns and all and every

other the occupier or occupiers of the said demised premises from thence utterly to expel remove and put out, any thing in these presents contained to the contrary thereof in any wise Notwithstanding and the said Dent his executor administrators and assigns do further covenant and agree to and with the said William Morrison to have and to hold the house messuage and tenements from the date of these presents for and during the full term of four years from thence next ensuing and fully to be complete and ended yeilding and paying therefor yearly and every year during the said term unto the said William Morrison his heirs or assigns the yearly rent or sum of four hundred Dollars lawful currency of the united states to be paid at the expiration of each year and that the said Dent his executors administrators and assigns shall and will from time to time and at all times hereafter during the said term of four years herein before granted at his or their own proper costs and charges well and sufficiently repair, uphold, support, maintain, sustain, amend and keep the said demised premises with their and every of their appurtenances and also the glass windows pavements privies gutters sinks &c. belonging to the same in by and with all manner of needful and necessary reparations and amendments whatsoever when and as often as the same shall require (damages of fire not beginning in the premises only excepted) and the same premises with all and singular their appurtenances being in and by all things so well and sufficiently repaired upheld supported sustained and kept at the end expiration or other sooner determination of the said term of four years, hereby granted shall well and quietly and peacibly leave surrender and yield up unto the said William Morrison his Executors administrators and assigns and that the said

Dent his executors administrators and assigns may from time to time during the said Term of four years build erect or raise any other building or buildings on the said Tenement or premises at his or their own proper costs and charges and such Building or buildings so erected built or raised shall in like manner at the end and expiration or other sooner determination of said Term of four years - hereby granted shall well and quietly and peacibly leave surrender and yield up unto the said William Morrison or his heirs or assigns and also all and every the doors locks keys bolts staples shelves chimnies chimney pieces sashes and glass of and belonging to the same premises now existing or that may hereafter exist in any other buildings. that the said Dent or his assigns may hereafter build as in this covenanted in good and sufficient repair and condition (reasonable use and wearing thereof and damage of fire only excepted. And also that the said Dent his executors administrators and assigns shall and will from time to time and at all times hereafter during the said term hereby granted bear pay and discharge all taxes, charges, impositions and parish duties as Town taxes which shall be taxed charged imposed or assessed upon the said messuage or tenement or premises or any part thereof at his or their own proper costs and the said Guy Morrison as and in his said capacity of agent for said William Morrison doth for himself and the said William Morrison his heirs executors administrators & assigns that he the said Dent his executors administrators and assigns paying the rent and performing all and singular the covenants and agreements made and in and by these presents comprised, reserved and contained on his or their part and behalf to be paid - done performed and kept shall and lawfully may peacibly and quietly have hold occupy possess and

enjoy the piece or parcel of ground herein before granted and demised, together with the said house buildings or Tenements to be, or may be thereon erected and built as aforesaid with the appurtenances for and during the said Term of four years herein before granted without the lawful let, suit trouble molestation eviction expulsion or interruption of or by him the said William Morrison his heirs executors administrators and assigns or by any other person or per=sons whomsoever lawfully claiming or to claim by-from or under him them or any of them or by or with their or any of their privity assent consent or procurement all of which by the said Indenture (refference being thereunto had) will amongst other things more fully and at-large appear by virtue of which said Indenture the said Frederick Dent afterwards to wit on the Twentieth day of May in the year of our Lord one Thousand eight hun=dred and nineteen entered into and upon all and singular the said demised premises with the appurte=nances and became and was possessed thereof for the said Term as to him thereof granted as aforesaid. And although the said William Morrison hath always from the time of the making of the said Indenture hitherto well and truly performed fulfilled and kept all things in the said Indenture contained on his part and behalf to be performed fulfilled and kept according to the tenor and effect true intent and meaning of the said Indenture to wit at the County of St. Louis aforesaid Yet protesting that the said Frederick Dent hath not performed fulfilled or kept any thing in the said In=denture contained on his part and behalf to be per=formed fulfilled and kept according to the tenor and effect true intent and meaning thereof the said William

saith that after the making of the said Indenture and during the said Term thereby granted to wit on the — Twentieth day of May in the year of our Lord one Thou= =sand eight hundred and Twenty at the county of St. Louis aforesaid a large sum of money to wit the sum of four hundred dollars of the rent aforesaid for one year of the said Term then elapsed became due and was and still is in arrear and unpaid to the said William con= =trary to the tenor and effect true intent and meaning of the said Indenture and of the said covenant of the said Frederick by him in that behalf so as aforesaid made to wit at the County of St. Louis aforesaid. And so the said William in fact saith that the said Frederick Dent (although often requested so to do) hath not kept his said covenant so by him made as aforesaid, but hath broken the same and to keep the same with the said William hath hitherto wholly neglected and refused and still doth refuse to the damage of the said William eight hundred dollars and therefore he brings his suit &c Book ally for plt. upon which said declaration the nature of the action was endorsed in the words following to wit. "This is an action of bre breach of covenant. And attached to said declaration there was a bond for costs in the words following to wit " Know all men by these presents that I John Hook of the county of St. Genevieve am held and firmly bound unto Frederick Dent in the penal sum of Sixty Dollars for the payment of which well and truly to be made I bind myself my heirs executors and administrators firmly by these presents sealed with my seal this 20th day of October 1820. The Condition of the above obligation

is such that whereas William Morrison is about to in=
=stitute an action of Covenant on Indenture of lease
in the Circuit court of the county of St Louis against
the said Frederick now if the said William shall well
and truly prosecute the said suit with effect or in
case he fail therein, then if he shall well and truly
pay all costs that may accrue in said suit then
the above obligation to be void otherwise to be and
remain in full force and effect J. D. Cook (Seal) on
the day of filing said declaration the clerk of our said court
endorsed thereon a writ of summons in the words and figures
following to wit "County of St Louis Ss The State of Missouri
To the sheriff of St Louis County Greeting We command you to
summon Frederick Dent that he be and appear before the
Judge of our Circuit court at the next term thereof to be
held at the Town of St Louis within and for the county of
St Louis on the first monday in December next then and
there to answer unto William Morrison of a plea of cove=
=nant broken to the damage of the said William Eight
hundred Dollars and have you then there this writ.
(Seal) Witness Archibald Gamble clerk of our said court
at office this second day of November Eighteen hundred
and twenty. Archibald Gamble clerk. And afterwards
to wit on the return day of said writ the sheriff to
whom the same was directed returned the same into
court with his return thereon in the words and figures
following to wit "Served this writ on F. Dent by reading
it to him on the 4th November 1820 in St Louis Township
John H. Walker Shff. Whereupon this cause was con=
=tinued until the first monday of April in the year of
our Lord one thousand eight hundred and twenty one
upon which said first monday of April came the said
plaintiff by his attorney aforesaid and the said defendant

although solemnly called comes not but makes default nor hath he pleaded to the action aforesaid of him the said plaintiff whereby the said plaintiff remains therein undefended against him wherefore the said William ought to recover his damages by him sustained by reason of the premises and the action aforesaid being founded on written covenants and it manifestly appearing to the court that the said William hath sustained damages by reason of the breach of said covenant to the sum of Four hundred and twenty four dollars and sixty six cents. Therefore it is considered that the said William Morrison recover against the said Frederick Dent his damages aforesaid in form aforesaid by the court assessed and also his costs and charges by him about his suit in this behalf expended and that he have thereof execution.

State of Missouri }
County of St. Louis } S.S.

I Archibald Gamble clerk of the circuit court within and for the county of St. Louis, do hereby certify the foregoing to be a true transcript of the record and proceedings in the suit of William Morrison against Frederick Dent as on file in my office.

Given under my hand and seal of office this Thirteenth day of July one thousand eight hundred and twenty one.

Archibald Gamble Clerk

State of Missouri }.

Before me John D Cook one of the judges of the supreme court of the State of Missouri is personally came William H Ashley who being sworn says that he is the agent of Frederick Dent the defendant in the suit, of the proceedings in which the foregoing is a copy. and that he does not apply for a supersedeas in said suit for the sole purpose of delay

Wm H Ashley

Taken and sworn to
this 14th day of July A. D.
1821 — John, D, Cook

Octr Term 1821

No. 2 (31) (120)

210

William Morrison

against Transcript

Frederick Dent

210

Transcript	$2.62
Fees & certificate	1.50
	$4.12

Supreme Court
Third Judicial District } The State of Missouri to the Sheriff of the County of St. Louis -

Greeting - Because in the Record and Procep and also in the rendition of Judgment in a certain plaint which was in our circuit Court for the County of St. Louis before the Judge thereof by our Writ between William Morrison Plaintiff and Frederick Dent Defendant in a certain action of Covenant, as it is said manifest Error hath intervened to the great Damage of the said Frederick Dent as by their complaint we are informed, a Transcript of the Record and proceedings of which said Judgment have been lately ordered before our Judges of the Supreme Court for the Third Judicial District for certain causes of Error, and we being willing that the said Error if any there be should be duly corrected and full and speedy Justice done to the parties aforesaid as is Just, do command you that by good and lawful men of your Bailiwick you make Known to the said William Morrison that he be and appear before our Judges of the Supreme Court for the third Judicial District at St. Louis on the fourth monday of October next to hear the Record and proceedings and the errors thereupon assigned if to him shall seem fit, and further to do and receive what our said Court shall consider in this behalf, and have you then and there the names of those by whom you shall make the same Known to him and this Writ -

In testimony whereof I Arthur Nelson Clerk of the Supreme Court for the third Judicial District have hereunto affixed my seal of office at office in St. Louis this Fourteenth day of July, one Thousand eight Hundred and Twenty one and of the Independence of the United States of America the [illegible]

Arthur Nelson

William Morrison
vs
Frederick Dent

Sci Fa
to hear
Errors

Clk Fees S.C. $1.00

Wm. Morrison
not found in
my County
6th Octo 1821
J. K. Walker
D Shff

Non Est 50 cts

Frederick Dent — In error, In the Supreme Court
vs
William Morrison — October term 1821.

And the said Frederick Dent comes and says that in the record and proceeding aforesaid, as also in the rendition of the said judgment there is manifest error, in this, that by the record & proceeding aforesaid it appears that a final judgment was rendered in favor of the said Morrison against the said Dent, when by the law of the land the judgment should have been interlocutory and not final. In the record & proceedings aforesaid there is also manifest error, in this, that by the said record and proceedings it appears that the cause of action sounded in damages, that the Court rendered judgment for a specific sum without any assessment of damages.
In the record & proceedings aforesaid there is also manifest error in this, that by the record and proceedings aforesaid it appears, that judgment was rendered against the said Dent, in the terms the Circuit ~~to~~ which the writ in that action was returnable, and immediate execution thereof awarded, when by the law of the land the judgment should have been interlocutory, not final,

and a writ of enquiry should have been awarded to be executed at the next term thereafter.

In the record and proceedings aforesaid there is also manifest error in this, that by the record & proceedings aforesaid it appears that the Circuit Court, without the intervention of a jury, and without the assent of the parties, assessed the damages sustained by the said Morrison, by reason of the said breach of Covenant, and rendered judgment therefor, when by the law of the land, the damages ought to have been assessed by a jury

Barton & Hates

for pltf.

And the said William comes and says that in the record aforesaid ~~and also~~ in the rendition of judgment aforesaid there is no error - and this he is ready to verify wherefore he prays judgt &c -

Lech

for pltff

Frederick Dent
vs Errors
assigned
Wm Morrison

J Spence

filed 24th octr 1821
A. Nelson Ck

Reaction Sued Ret in April 1822

Morrison vs Dent

State of Missouri
Third Judicial District } Sct.

Be it remembered that on this fourteenth day of July in the year of Our Lord one thousand eight hundred and twenty one at St Louis in the said third district, William H. Ashly personally appeared before the undersigned a Judge of the Supreme Court of the said State, and acknowledged himself to stand indebted to William Morrison (the plaintiff in a certain action of Covenant lately pending in the Circuit Court of St Louis County against Frederick Dent, wherein judgment has been rendered against the said Dent for four hundred twenty four dollars sixty six cents, and which is now about to be removed into the Supreme Court by a Writ of Error) in the sum of nine hundred dollars to be paid to the said William Morrison his Executors or administrators.

But this Recognizance is to be void if the said William H Ashly do shall satisfy & pay the judgment or such part thereof as may be affirmed, costs together with damages at the rate of ten per centum per annum thereon, from the time such judgment was rendered until the affirmance thereof, in whole or in part; and legal interest on the amount thereof until paid; or do shall perform in all things the decree judgment or final order of the Supreme Court in case the said judgment should be affirmed in whole or in part. Taken and acknowledged before me this day & year above written —

John D. Cook

Bond —

Filed Oct. 1 1821 —

A. Mihonsk

State of Missouri
Third Judicial District } The State of Missouri to the Honourable the Judge of the Circuit Court for the third Judicial District - Greeting -

For as much as in the Record and process and also in the Rendition of Judgment on a certain plaint which was in our Circuit Court for the County of St Louis by our Writ before you between William Morrison Plaintiff and Frederick Dent Defendant in a certain action of Covenant as it is said manifest Error hath happened to the great damage of the said Frederick Dent as by his complaint We are informed, and being willing that the Error if any there be should be duly amended and full and speedy Justice done to the parties aforesaid, do command you that if Judgment be thereupon given, then a Transcript of the Record of the Judgment aforesaid and this Writ you certify to our Judges of our Supreme Court at a Supreme Court to be held in and for the third Judicial District at the Town of St Louis on the fourth monday of october next, that our Judges of our said Supreme Court inspecting the Transcript of the Record of the Judgment aforesaid may cause to be done therein for correcting the said errors what to them of right and according to law shall seem meet to be done -

In testimony whereof I Arthur Nelson Clerk of the Supreme Court for the third Judicial District have hereunto affixed my seal of office at St Louis this Fourteenth day of July in the Year of our Lord one thousand eight Hundred and twenty one and of the Independence of the United States of America the Forty sixth.

Arthur Nelson Clk

State of Missouri } ss
3rd judicial Districk } Application being made to the undersigned a judge of the supreme court for a supersedeas in this case and the oath having been made and the recognizance entered in to agreeably to law, It is ordered that this writ of Error be taken, and opperate, as a supersedeas in the case therein mentioned given under my hand this 14th day of July A. D. 1821 John D. Cook

William Morrison
vs
Frederick Dent } Writ of Error.

Fees Cl. Sup. Ct $1.00
A. Nelson Cl.

Filed Oct. 1 1821
A. Nelson Cl.

writ of error — $1.00
Safe — — — 1.00
filing papers 20
entry — 10
Aug't Error 10
Mo. File 20
Pender 25
Mo. File 20
Recontrial 50
Judgt — 25
Execution 1.00
Fees 80
Sheriff 70
atty
Fees 80
Sheriff 70
24.66
Oct 46

State of Missouri
Third Judicial District } ss. The State of Missouri To the Hon'ble the Circuit Court for the County of St. Louis Greeting

For as much as in the record and process as well as in the rendition of Judgement on a certain plaint which was in our Circuit Court of our County of St. Louis before our Judge thereof, between William Morrison Plaintiff and Frederick Dent Defendant in a plea of Covenant, as it is said manifest error hath happened to the great damage of the said William Morrison, as by his complaint we are informed. And we being willing that the error, if any there be, should be duly amended, and full and speedy Justice done to the parties aforesaid in this behalf. Do Command you, that if Judgement be thereupon given - Then a transcript of the record of the Judgement aforesaid, with all things touching the same, and this writ, you certify, and send to our Supreme Court for the third Judicial District at the Town of St. Louis on the first Monday of May next, that our Judges of our said Court, inspecting the record of the Judgement aforesaid, may cause to be done therein, for correcting the said error, what to them of right and according to Law shall seem meet to be done.

Witness Arthur Nelson Clerk of the Supreme Court for the Third Judicial District

In testimony whereof I have hereunto set my hand and seal of office at office this thirteenth day of April in the year of our Lord One thousand eight hundred and twenty two, and of the Independence of the United States of America the forty sixth. —

A. Nelson Clk. By
H. Douglass Depy. Clk.

No. 4 -

William Morrison

vs

Frederick Dent } Writ of Error

Writ $1.00
Tax — 1.00

210

filed May 7th 1822

Th Douglass Clk P.T.

William Morrison
vs
Frederick Dent } assignment of errors -

And the said William by attorney comes and says that in the record and proceedings aforesaid and likewise in the rendition of the judgment aforesaid there is manifest error in this to wit that by the record aforesaid it appears that ~~by~~ the judgment aforesaid in form aforesaid given was given for the said defendant when by law that judgment ought to have been given for the said plaintiff

There is error also in this to wit for that by the record aforesaid it appears that the said Circuit Court decided that it was not necessary for a party claiming under a sale of the sheriff by execution to produce or shew any judgment, authorising the execution - In this therefore there is manifest error -

There is error also in this to wit for that by the record aforesaid it appears that the said Court decided that the

sheriff's sale of real estate upon an execution (fi. fa) against the lessor for a term of years and before the expiration of the term passed also to the purchaser at such sale, the right to the immediate possession of the premises so sold as against the lessee, and also the right to receive the rents and profits of the said lease for the said term — and this though the said lease was by deed and the rents and profits secured ~~upon sale~~ to be paid by covenant, in this therefore there is manifest error.

There is error also in this that by the record aforesaid it appears that the said court decided that such sale was a good bar to the plaintiffs action of covenant upon such lease by indenture — in this therefore there is manifest error —

There is error also in this for that by the record aforesaid it appears that the said court decided that a chose in action was the subject of a sheriff's sale — in this therefore there is there is manifest error —

There is error also in this for that by the record aforesaid it appears that

the said Court decided that the property sold upon execution could not appear to have been levied upon. In this therefore there is manifest Error.

There is error also in this for that by the record aforesaid it appears, that the said Court decided that the sale of the right and interest of the lessee (in the said lease declared on) in and to the premises leased by the Sheriff upon execution was a sale of the right of the lessee to demand the rents secured to be paid by said lessee and that this need not be further averred by said defendant in his plea than by shewing that there was a sheriff sale of the premises leased. in this therefore there is manifest error.

There is error also in this for that by the record aforesaid it appearing that the said Court decided that the rents and profits secured to be paid by the indenture mentioned in the declaration, could be sold by sheriff upon a fieri facias. and that the sale

in the said plea mentioned was a sale of the same rents &c - In this therefore there is manifest error -

There is error also in this for that by the record aforesaid it appears that the said Court decided that the said defendant could go into the consideration in the said indenture and shew that the same had failed - In this therefore there is manifest Error -

For these Errors and others in the record and proceedings aforesaid appearing the said plaintiff prays that the said judgment may be annulled reversed and for naught held and esteemed and that he may be restored to all things which he hath lost thereby, and that the said Court may render ~~such~~ such judgment in the premises as the said Circuit Court ought to have rendered -

James H. Peck
Atto for plff

In nullo est erratum
Wash & Pettis

Wm Morrison
vs
Frederick Dent

assignment of
Errors

filed May 7th 1872
H Douglas Clk P.J.

William Morrison
agt
Frederick Dent — } In Error from St Louis Circuit Court

This was an Action of Covenant brought by the plaintiff below and also plaintiff in Error agt the Deft. for the nonpayment of Rent of a house and lot in St Louis reserved by Indenture of lease dated 12th may 1819 — Breach nonpayment of $400 one years Rent due on 20th may 1821

Plea, That after making of said lease and before one years Rent had accrued, to wit on 2d october 1819 a certain writ of Execution was issued from the Clerk's office of the supreme Court at St Louis in favor of one James Morrison against the said William — That by virtue of the said Execution the Sheriff of the County did on 12th novemr 1819 advertise for sale and on the 10th December next following did sell all the right &c of said William in and to the (demised) premises, which were purchased by one William Stokes to whom the said Sheriff on 4th may 1820 did execute a Deed of Conveyance thereof — That the Deft afterwards paid to the said Stokes $400 the first years Rent and delivered up and surrendered the balance of the term — To this plea there was a general Demurrer and Joinder — The Circuit Court overruled the Demurrer and gave Judgmt for the Deft, to reverse which the plaintiff brought his writ of Error.

The first Error assigned is, That the Circuit Court decided it was not necessary for a party claiming under a sale of the Sheriff by Execution to produce or shew any Judgment authorising the Execution —

Several other Errors were assigned which need not be mentioned, as the preliminary Question made, was, as to the sufficiency or Insufficiency of the Defts plea in Bar.

The plaintiff's Counsel argued that the Defts plea was insufficient for not alledging and shewing ~~and shewing~~ the Judgment on which the Execution was said to have issued, and in support of their position have cited 2d East 575, 1st Chitty 162.

The Counsel for the Defendant contended that Certainty to a common Intent only was necessary in pleadings, and that this plea was sufficiently certain, so as to inform the ~~Deft of the nature of~~ Plaintiff of the nature and Extent of his the Defts Title, for which he cited 1st Chitty 168. 9th ny Term Repts 294. And

he further contended for the validity of the plea on the Ground that in actions agt Sheriffs, they ~~might~~ may ~~justify~~ justify under an Execution issued from a Court of Record, without shewing the Judgment 2d Chitty's pleadings 355, 1 Espinasse Np 412.

It is true that Sheriffs may justify ~~under~~ by pleading the Execution without shewing the Judgment, but this is only allowed to the officer, and not to the party or a mere stranger, who cannot ~~justify under an Execution~~ do so unless they shew a Judgment as well as an Execution — 1st Esp Np 411 — Comyns in his Digest Vol 5 Page 402 Title Pleader, E 18 lays it down that a party in pleading an Execution by a Court at Westminster ought to alledge an Ejectment &c, upon which taliter processum fuit that the pff had Judgment and thereupon sued out Execution, and it is not sufficient to alledge an Execution without shewing the Judgment and he cites 1 Lev 83 as his Authority.

We regret that the ~~real points of law that was intended to be decided in this Case~~ several other points which presented themselves in the Case, cannot, on the state of the pleadings, be either discussed or determined, as we are of opinion the defendants plea in bar is insufficient

The Judgment of the Circuit Court sustaining the plea and overruling the demurrer ~~be and the same~~ is hereby reversed — and the plaintiff's demurrer sustained

Let the Cause be remanded to the Circuit Court with Instructions to give the defendant leave should he ask ~~leave~~ it to amend his plea which done the said Court will ~~to proceed therein to Judgment~~ — And let the deft pay the Costs as well in this Court as in the Court below, subsequent to the declaration — And if the deft should not ask leave to amend his plea, the Circuit Court will enter Judgment according to law for the Plaintiff

Mathias McGirk } Judges
Jno Lee Jones

No 12

William Moomison

vs

Jacob Dent

Opinion filed Nov 15th

1822 Th Douglass Clk

210

Frederick Dent
agt
William Morrison } Error from the Circuit Court of St Louis County

This was an Action of Covenant brought in that Court by the Defendant in Error against the plaintiff therein.

The declaration states that by Indenture dated 20th May 1819 made between the said William Morrison (by his agent for that purpose duly authorised Guy Morrison) of the one part and the said Frederick Dent of the other part and signed by the proper names of the said Guy and Frederick & sealed with their seals and shewn to the Court, ~~the said~~ it was covenanted and agreed between them among other things, that in consideration of the rents and covenants thereafter mentioned on the part of the said Dent to be paid and performed, said lease and to farm let to said Dent, a certain stone house & premises in St Louis for the term of four years from that day - yielding and paying therefor yearly and every year to the said William Morrison, the yearly rent of $400 a year, to be paid at the expiration of each year - ~~It then states~~ And the said Dent therein covenanted with said William Morrison to hold the premises for the said term of four years and pay therefor yearly and every year during said term to the said William Morrison the yearly rent of $400 ~~at the expiration of each~~ to be paid at the expiration of each year

It is then averred that Dent on the same day entered upon the demised premises and was possessed thereof ~~during~~ for the said term - and assigns for breach the non payment by Dent to said William Morrison of the sum of $400 of the rent aforesaid for one year which became due on the 20th May 1820, to the damage of the said William Morrison of $800 -

The writ of Summons issued in the said Cause was tested 2d November 1820 & made returnable to the December term of following, of the said Circuit Court, which ~~being~~ was returned executed, whereupon the Cause was in that term continued until the first Monday of April then last, when Judgment by Default for want of a plea was entered against the Deft, whereupon the Court, considering that the said action being founded on written Covenant assessed the plaintiff's damages by reason of the breach of said Covenant to $424.66 and rendered Judgment for the plaintiff against the Defendant for that sum with Costs, to reverse which Judgment this writ of Error was brought.

The Errors assigned in this Court are

1st That final Judgment was rendered for Morrison agt Dent when by the law of the land that Judgment should have been interlocutary & not final.

2d That as the ~~action~~ the Cause of Action sounded in Damages and that the Court rendered Judgment for a specific sum - without any assessment of Damages

3d That Judgment was rendered in the term of the Circuit to which

the writ was returnable, & immediate Execution awarded when by law the Judgment ought to have been interlocutory and not final, and a writ of Inquiry should have been awarded to be executed at the next term thereafter

4 , That the Circuit Court without the Intervention of a Jury and without the assent of the parties assessed the Damages by reason of said breach of Covenant and rendered Judgment therefor, when by law, the damages ought to have been assessed by a Jury.

The Court will consider of the arguments of the Counsel for the plaintiff in Error and the Authorities cited in support of them in the order in which they occurred, and give their opinions on them respectively — It was contended by them that by the common law, it was not competent for the Court below, on a Judgment by Default or Demurrer to assess Damages without the Intervention of a Jury, and in support of their position have cited 2 Selw Np 464, 1 Chitty 113 and 2d Dallas 303, — which go to show that in England, Damages in such Cases are generally ordered to be assessed by a Jury on writs of Inquiry — there are however many authorities which prove that the Courts may and indeed frequently do assess those Damages themselves; such for Example as in Actions upon promisory Notes, bills of Exchange, Covenants for payment of specific sums, and some others 8 Term Rep 326 & 410, 2d Wils. 372, 4. 3d Wils. 61, 2. 1 H Black 262, 532, 529. Doug. 315, 16 & 7 Term Rep 446, 7 — And it is laid down in 1st Tidd's prac. 514 that a writ of Inquiry is a mere Inquest of office to inform the Conscience of the Court, who may if they please themselves assess the Damages. — Independent however of these Authorities or the practice of the English Courts, we have a statute of our own, which is decisive on the point — this statute (Geyer's Digest 251) provides that in all Cases where the demand is liquidated and reduced to writing, the Clerk may upon a Judgment by Default calculate the principal and Interest really due and indorse the amount on the Execution. — The practice under this act, which passed in 1807 has, to the knowledge of the ~~Clerk~~ Court uniformly been for the Clerk in open Court to calculate the principal and Interest appearing to be due on such written Instruments, for the whole amount ~~of which~~, ~~if found correct by~~ the Court, rendered Judgment accordingly ~~Judgment was rendered by the Court~~ — ~~and the~~ After such a long acquiescence under this practice, we do not wish, nor do we think we would be justifiable in making a Decision directly repugnant to it.

It was then objected by the plaintiff, that as by our statute (Digest 251) all writs of Inquiry are directed to be executed at the next succeeding term after interlocutory Judgment rendered, the assessment of Damages and the rendition of the Judgment at the term in which the Default was made was premature, and therefore erroneous.

This objection might be sustainable in some cases where the damages to be assessed are in themselves uncertain and depending on opinion, but as the breach assigned in this case was for the non payment of $400 for one year's Rent, which sum, by suffering Judgment by default ~~amounted in law~~ was admitted to be due, and as that sum with the legal Interest thereon thereon from the time it ought to have been paid were the only damages that could have been legally assessed, we are of opinion that ~~the Cou~~ it was competent for the Court below, as well under the practice of the English Courts, as under that of ours, to have done so.

As to the objection that a writ of Inquiry ought actually to have been issued to the Sheriff and executed before in term time, but ~~of~~ out of Court, it will be sufficient to observe that the uniform practice in all our Courts of Record has under our statute been otherwise — In no Instance, as far as has come to our knowledge has such a writ issued, and were the Court now to sustain the objection, it would amount to a declaration that all final Judgments heretofore taken by default were erroneous

An objection was made, that the Judgmt was rendered in the term of the Court to which the writ was returnable and therefore erroneous — this objection is not founded in fact — It was not rendered untill the second term, having been continued at the first — It was then contended that the Cause ought not to have been continued at the first term, and that it was Error to do so — we are not of this opinion; and we are further of opinion that it is not competent for the plaintiff in this Court to assign ~~such~~ such an Error, it being a maxim that none can be so that ~~we~~ not prejudicial to him — And this Error were it one tended to his Advantage

Another objection was made, at the Bar, to the Declaration — the want of an Averment that the Defendant the lessee entered and was possessed — This objection would not have been raised had the record been carefully examined —

~~Some other minor objections were made~~

Two other objections were made — one that the damages were assessed without the assent of the parties, and the other that it was irregular to ~~take~~ have taken the Default at any other than the last Day of the Court

It is well established that on a Judgmt by Default the Defendant has no Day in Court, and it is as much so, that the assent of the plaintiff is only necessary for the assessment of damages by the Court, which he virtually did in this Case —

As to the other objection, now constat by

the record at which day of the term, the Judgment was entered up — And the Court is bound to infer that every thing was regularly done which ought to have been done, unless the contrary appeared.

The Court is of opinion, there is no Error in the Judgment of the Circuit Court

Jud^t affirmed with Costs

Mathias McGirk
Judges
Jno Que Jones

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Frederick Dent
against
William Morrison
Opinion