FISHER, ADOLPH V GOEBEL, GERT MARCH 1867 COUNTY OF ST. LOUIS

583/7

FOLDER 1 OF 2

OLD 661/8 REVERSED AND REMANDED

INVOLVED:

DAMAGES - COVENANT - LANDLORD AND TENANT

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State of Missouri
County of St Louis } ss Be it remembered that heretofore, to wit on the 31st day of Oct 1860 there was filed the Office of the Court of Common Pleas a Petition which is in the words and figures following, to wit:-

Petition

Adolph Fisher
Vs.
Gert Goebel } In the St Louis Court of Common Pleas. November Term. 1860. County of St Louis

The Plaintiff states on the 25th day of January A. D. 1855 the defendant by lease of in writing duly acknowledged and recorded did demise and lease unto the plaintiff and one Adolph Benrodt for the term of five years from the first day of March 1855 with the privelidge of renewal for the further term of five years, the following described real estate situate in the City of St Louis County aforesaid, being part of the place known as the Flora Garden ~~to~~ beginning on the South East Corner of Fulton street and Geyer Avenue thence running east 167 feet more or less, thence running North 162 1/2 feet, thence running West 167 feet more or less to the Eastern line of Fulton Street thence running South 162 1/2 feet to the place of beginning. Also the then entrance to said Flora Garden from 7th street being 20 feet wide up to the premises demised. Ah and for the yearly rent

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of One thousand dollars payable in equal monthly installments; that among other Covenants in said lease Contained the said defendants did Covenant and agree with plaintiff and said Benrodt to build under the South Side of said demised premises a rock wall and fence and also that he would not without their permission build houses before the first day of March 1860 more than forty feet on front of 7th street and those to be South of ~~of~~ said entrance And also that if from any cause whatsoever the said Plaintiff and said Benrodt should be compelled against their will and without their fault to leave the leased premises aforesaid before the time of the expiration of said lease that he defendant would make good and pay the loss which said plaintiff and said Benrodt should thereby sustain.

Benrodt assigns to Fisher Mar 30/55

Plaintiff further states that afterwards, to wit on the 30th day of March 1855 said Adolph Benrodt by his assignment in writing duly acknowledged and recorded assigned and transferred the lease aforesaid and all the covenants aforesaid to plaintiff.

Plaintiff further states that the building of the wall upon the South side of said demised premises was necessary for the protection and safety of said premises and the building and im=

provements thereon, and that said premises were not tenantable without a substantial and sufficient wall supporting said South side of that deft did erect a wall upon said South side of said premises said premises, but that said wall was built of insufficient material, in an unworkmanlike manner and was wholly unfit for the purpose for which it was intended; that said wall stood until about January 1857 when it fell by reason of its insufficiency, that thereupon Defendant was notified by plff of the falling of said wall and requested to erect a substantial wall in a workmanlike manner to protect said property which defendant has wholly refused and neglected to do. Plaintiff further states that subsequent to the 30th of March 1855 and prior to the falling of said wall, he erected valuable improvements upon said premises, viz: of the value of ten thousand dollars that in consequence of there being no wall on the South side of said premises said buildings were and are in great danger of falling and became and are in so precarious a condition that they are untenantable and wholly useless to Plaintiff.

Notice Jany 1857

Plaintiff further states that the said Flora Garden was leased and used by him for the purpose of carrying on the sale of refreshments and while said wall was standing and while his said

buildings could be safely used said business was a source of great profit to him, but after said building became unsafe to use his customers were forced to cease frequenting said garden by reason of the insecurity aforesaid and plaintiff has been thereby deprived of the benefit of his said outlays and expenditures

Plaintiff further states by reason of defendants ~~further states by reason of defendants~~ failure to put up a sufficient wall as aforesaid, he was on the 15th day of July 1859 obliged to leave and abandon said premises without any fault on his part and against his will whereby his said buildings became wholly lost to him.

And plaintiff says that prior to said 15th day of July 1859 defendant without the permission and against the express dissent of Pltff. commenced building north of said entrance to said Garden and also upon the 20 feet reserved to him by said lease as aforesaid whereby the access to said Garden was greatly impeded. And pltff. says that by reason of the matters and things aforesaid he has sustained damages to the amount of fifteen thousand dollars. And pltff. alleges that the defendant has not kept and performed his said several covenants, in this, to wit; that he never built a sufficient wall along said South

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side of said premises; that he has neglected and refused to build any wall there since the old one fell; that he has commenced buildings upon the north side of said entrance without plaintiff's permission, and that he has failed and refused to make good to plaintiff the damages which he has sustained by reason of being obliged to leave said premises as aforesaid.

Plaintiff further says that he has faithfully kept and performed the covenants in said lease by him to be kept and performed.

Plaintiff therefore prays judgment for the sum of $15000.00 his damages and his costs &c.

Krum & Harding

Attys for pltff.

Adolph Fischer, the plaintiff, makes oath and says that he believes the foregoing petition to be true

A. Fischer

Subscribed & Sworn to before me this 31st day of Oct A. D. 1860

Leon J Papin clk

Whereupon on the same day the following summons was issued to wit:-

Summons

County of St Louis ss.

The State of Missouri

To the Sheriff of the County of St Louis - Greeting:-

We Command you to Summon Gert Goebel to appear before the Judge of our Court of Common

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Pleas, on the first day of the next Term thereof to be held in the City of St Louis, within and for the County of St Louis on the Third Monday of November 1860, then and there to answer to the complaint of Adolph Fisher as set forth in the annexed petition; and have you then and there this writ. Witness, Leon J. Papin Clerk of our said Court with the seal thereof hereto affixed, at office, in the City of St Louis this 31st day of October in the year of our Lord eighteen hundred and Sixty

(Seal)

Leon J Papin, Clerk

I acknowledge myself bound for all the costs that have or may accrue in the case of Adolph Fisher against Gert Goebel.

Witness my hand and Seal at St Louis this 26th day of November 1860

Approved by Court Nov 26, 1860
Leon J Papin, Clk

F. W. Noel (seal)

Sheriff's Return

5963 Carondelet Ave

Executed this writ in the County of St Louis State of Missouri on the 1st day of Novr 1860 by delivering a copy of the writ and petition to the defendant Gert Goebel, as furnished by the Clerk

John H Andrews Shff
B. Fr. Schaefer Deputy

fee $1.00

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Answer

And afterwards, to wit, on January 10th 1861 the following Answer was filed, to wit:-

In the St Louis Court of Common Pleas

Adolph Fisher
Vs.
Gert Gaebel } The defendant denies that the building of the said wall on the South side of said premises was necessary to the protection of the same in the condition the same was in when the same was leased to said Fisher and Benrodt, or that the same was necessary to protect the buildings and improvements then thereon

The defendant denies that said premises were untenantable without said wall. The defendant says that the wall built by him was built of sufficient material in a workmanlike manner and was wholly fit for the purposes for which it was intended.

The defendant admits that a portion of said wall fell about January 1857; but he says a large portion of it stood for about two years afterwards. He denies that any portion of the wall ever fell from its own insufficiency; on the contrary he avers that it fell by and on account of the wrongful acts and negligent conduct of the plaintiff The Defendant avers that the wall erected by him was substantial and was built in a workmanlike manner. The defendant avers that said wall was thrown down by the wrongful acts

and negligent conduct of the plaintiff.

The defendant further avers that some time in January 1859, the plaintiff and defendant in order to obviate or settle all disputes between them agreed as follows:- The said defendant agreed to build a new wall as soon as and whenever the plaintiff would make a sewer sufficient to, and which would conduct all the water from the houses and improvements erected by plaintiff on said premises into the Geyer Avenue Sewer so as to prevent the said water from settling behind said wall.

And the defendant says that said Plaintiff commenced said sewer, but did not finish it until some time in June 1859. That as soon as said sewer was finished, the defendant immediately commenced tearing down the portion of the old wall which was then standing and was proceeding as rapidly as possible to erect the new wall in accordance with said agreement, when he received the notice from the plaintiff stated in the petition.

Notice admitted

The defendant avers that by the said agreement the said parties settled and compromised all difficulties and disputes then existing between them, and that he has faithfully kept and performed his part of said agreement and was proceeding in good faith to erect said wall

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when he received said Notice from plaintiff. The defendant denies that the improvements erected upon said premises by the plaintiff were of the Value of ten thousand Dollars. He has no knowledge or information sufficient to form a belief as to the Value of the same, nor is he sufficiently acquainted with matters of that kind to form a correct estimate of the Value thereof. The defendant denies that said premises were, or are, in great danger of falling, or became or are, in so precarious a condition that they are untenantable or wholly useless to the plaintiff. The defendant denies that the plaintiff was obliged to leave and abandon said premises on account of the insufficiency of said wall, and if he was so obliged to leave and abandon the same he denies that it was without any fault on the part of the plaintiff.

The defendant denies that he commenced building prior to the 15th July 1859 without the permission and against the consent of the plaintiff, north of the entrance to said garden or upon the 20 feet reserved to the plaintiff or that the access to said Garden was thereby greatly impeded.

The defendant denies that the plaintiff has sustained any damage as charged in the petition. The defendant says that he has

Kept and performed all the covenants on his part in said lease contained. He says the wall built by him was sufficient. He denies that he neglected or refused to build any wall there since since the old one fell down, or that he commenced building on the North side entrance without the plaintiff's permission.

He denies that the plaintiff was obliged to leave said premises or sustained any loss thereby or that he was bound to make good any loss to the plaintiff as charged.

The defendant denies that the plaintiff faithfully kept and performed the covenants in said Lease by him to be kept and performed.

The defendant further says that the plaintiff in and by said lase covenanted and agreed to pay the defendant one thousand dollars per year for said premises. the same to be paid in monthly installments at the expiration of each month, and it was stipulated in said lease, that if the plaintiff should fail to pay the rent as aforesaid punctually at the expiration of each every month and should so fail for two successive months the defendant after giving ten days notice thereof in writing might lawfully reenter on said leased premises and retain the possession thereof. The defendant alleges that the plaintiff failed to pay the rent for the months of June & July 1859

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though he was specially requested on the 1st August 1859 to pay the same and thereupon the defendant on the 2d August 1859 notified the plaintiff in writing of his said default, that the said lease had become forfeited, and that the defendant would reenter &c.: so that the defendant says the said lease has become forfeited

notice to Fisher to forfeit lease aug 2/59

The defendant says that he has a Counter claim against the plaintiff connected with the subject of the action set forth in the Petition filed by the plaintiff in this cause and which is as follows:- The defendant avers that the plaintiff by a certain Indenture of Lease dated January 5th 1855 made by the defendant to the plaintiff and one Benroth for certain premises in the city of St Louis known as "Flora Garden" being the same Lease and premises described in the Petition in this cause, covenanted and agreed with the defendant among other things in said Lease contained:-

1st That he the plaintiff would not fell, cut down or carry away any of the trees and shrubs growing on said premises at the time of the execution of said Lease

2d That he the plaintiff would pay all the taxes on the improvements and buildings, they said lessees should or might make or erect on said premises during said term.

3°. That he, the plaintiff would keep and surrender to the defendant, the said premises in as good order, state and condition as the same were received by the said Lessees, ordinary wear and tear excepted.

4th. That he, the plaintiff would pay to defendant one thousand Dollars per annum payable in monthly installments, as rent for said premises, during the term of five years next ensuing and thereby created.

The defendant avers that the plaintiff has failed to keep and perform each and all of the said covenants and agreements, in this, to wit:

First. He did fell, cut down and carry away many trees and shrubs belonging to the defendant and on said premises at the time of the Execution of said Lease, and of great Value to him, the defendant; and he asserts that the same was of the Value of three thousand Dollars. The plaintiff also destroyed a fine pump belonging to the defendant of the Value of sixty five Dollars by his negligence and imprudence

2°. The plaintiff caused a certain stone wall of the Value of seven hundred Dollars, erected by the defendant on the Southern side of said premises to fall down, it being the same wall mentioned in the petition.

3°. The plaintiff tore down and carried off

13 a certain frame house on said premises and belonging to the defendant of the value of four hundred dollars.

4th. The plaintiff failed to pay the rent reserved in said lease for the months of June July and August 1859 amounting to two hundred and eight Dollars. The plaintiff failed to pay and the defendant did pay, and the plaintiff has failed to refund to the defendant the taxes to the city of St Louis and to the County and State for the years 1858 & 1859, for the improvements erected by the plaintiff on said premises amounting to one hundred dollars. The defendant avers that he has faithfully kept and performed all the covenants and agreements on his part in said lease contained. The defendant asks for judgment against said plaintiff for the said sums of money, amounting in all to four thousand four hundred and thirty Eight Dollars ($4438)

Glover & Shepley & Gilson, pd

St Louis County

Gert Gobel, being sworn says he believes the above answer and the matters therein stated are true Gert Goebel

Sworn to and subscribed before me this 12th day of December 1860

Liberty Waite, Justice of the Peace

And afterwards, to wit on april 12th 1861 the fallowing reply of Plaintiff to Defendants Counter claim was filed to wit

Plaintiff's Reply to Counter Claim

Adolph Fisher
vs.
Gerh Gaebel } In the St Louis Court of Common Pleas.

Plaintiff by way of reply to the Counter claim of defendant, denies that he has failed to keep or perform any of the covenants contained in said Lease and says that the provisions thereof are not correctly set forth in said Counter claim.

Plaintiff denies 1st. That he cut down felled carried away, any trees and shrubs as alleged in said Counter claim and denies the value as alleged He denies that in any way destroyed a pump of defendant and denies the alleged value. Plaintiff further alleges that the subject matter of the first specification of said Counter claim is such that it cannot lawfully be set up as a counter claim herein.

2d. Plaintiff denies that he caused the stone wall mentioned in said Counter claim to fall down & he denies the alleged value thereof

3d. Plaintiff tore down the frame house mentioned in the Counter claim and built another on its site, but alleges that he did so with the full consent and express permission of defendant

and that defendant was greatly benefitted thereby. Plaintiff denies that he carried off said frame house, and denies that it was of any Value.

4th Plaintiff denies that he has failed to keep his covenant to pay rent or taxes or to refund taxes paid by defendant. He denies that he is liable for any rent or taxes, or to refund any taxes paid by defendant. He avers that he has refunded to defendant the taxes of 1858 in full; and all of 1859 that he plaintiff was ever liable for.

Plaintiff denies that defendant has kept and performed the covenants and agreements on his part to be kept and performed as alleged, and prays judgment as prayed in his petition

Krum & Harding
for pltff.

Adolph Fisher being sworn says that he believes the foregoing counter claim to be true

A. Fischer

Subscribed and sworn to
before me this 12th day
of April 1861
Leon J. Papin clk

Whereupon, this cause being continued till the November Term 1863 of sd court, the following proceedings

were then had, to wit:-

Wednesday January 13. 1864

Trial begun

Adolph Fisher
vs.
Gert Gaebel

Now at this day come the parties by their respective attorneys and thereupon come also a Jury consisting of eleven good and lawful men, to wit:- D. A. Winter, E. M. Tisson. Henry Hafler, J. Mahoney, Patrick Sullivan. Thomas Burk, P. Caeser, J. T. Walter, Anton De Harte, Charles Muller & Frederick Diedrick who by Consent of parties are duly elected, tried and sworn the matters in controversy between the parties well and truly to try, the trial of this cause progressed, but not being finished is laid over until tomorrow morning at ten o'clock"

And afterwards, to wit; on Thursday January 14, 1864, the following further proceedings were had, to wit: "Now at this day come again the said parties by their respective attorneys and the Jury empanneled and sworn herein, also come and the trial of this cause progressed, but not being finished is laid over until tomorrow morning at Ten o'clock"

And afterwards, to wit on January 15th 1864 the following proceeding was had, to wit:-

Now at this day come again said parties by their respective attorneys and the jury empanneled

17 and Sworn herein also come, and the trial of this cause progressed, but not being concluded is laid over until tomorrow morning

And afterwards, to wit on Saturday January 16th 1864 the fallowing further proceedings were had, to wit:-

Judgment $4750.

"Adolph Fisher
Vs.
Gert Goebel

Now come again said parties by their respective attorneys and the Jury Sworn and impanneled herein also come and the trial of this cause progressed and being now concluded, the Jurors aforesaid upon their oaths aforesaid find the issue herein joined in favor of the said plaintiff and asses his damages at the sum of Four thousand seven hundred and fifty dollars. It is therefore considered by the Court that said plaintiff recover of said defendant the sum aforesaid in form aforesaid as assessed by the Jury and his costs and charges herein expended and have thereof execution"

4750
2375
2375

And afterwards, to wit on Wednesday March 2d 1864 the fallowing further proceedings were had, to wit:-

$2375 Remittitur

Adolph Fisher
Vs.
Gert Goebel

Now at this day comes the Plaintiff by his attorney and remits the sum of Two thousand Three hundred and Seventy five Dollars from the judgment hereinbefore rendered. Therefore it is considered by the Court that the plaintiff recover of said defendant the sum of Twenty three hundred

Dollars and seventy five cents (being amount of original judgment less remittitur) together with his costs and charges herein expended and have therefor execution"

And afterwards to wit on April 2d 1864 the following proceedings were had, to wit:

Motion for New trial overruled

"The Court having heard and fully considered defendants motion for new trial herein doth overrule the same":

affidavit for appeal & filed Bill of Exceptions.

"Now at this day comes the defendant and files an affidavit for an appeal and on his motion an appeal is allowed him to the Supreme Court from the decision herein rendered. Bill of Exceptions filed":

which affidavit for appeal is in the words following to wit

affidavit for Appeal

Adolph Fisher Pltff
Vs.
Gert Geobele Deft } In St Louis Court of Common Pleas.

And now at this day comes Gert Goebel defendant in the above cause and prays an appeal to the Supreme Court of the State from the final judgment rendered therein. Glover & Shepley for deft.

State of Missouri
County of St Louis } Gert Goebel the said Deft being sworn states that his appeal is not made for vexation or delay but only because he believes that he the appellant is aggrieved by the said judgment of the Court in said cause

Gert Goebel

19 Sworn to and subscribed before me Apl

2, 1864 Leon J. Papin Clk

The Bill of Exceptions filed on April 2d 1864 is in the words and figures following to wit

Bill of Exceptions

Adolph Fisher Pltff
against
Gert Gaebel Deft

In the St Louis Court of Common Pleas. Nov. 7. 1863

Be it remembered that on the trial of the above entitled cause the plaintiff introduced the following testimony Viz:

Testimony of Julius Ropp

Julius Ropp, produced sworn and examined on part of pltff said he was 24 years old, an engineer. Knew Flora Garden, Went there almost daily while Fischer lived there. It was 15 to 20 feet above the grade. Geyer Ave was on the South side of it 1/2 of it Cut out Gaebel Cut out the other half. The cut at different points was from 8 to 15 to 20 feet. Saw the wall when built, as it was in the line of my business: looked at the way they were building it and I told the men they were not building it well; that it would not stand a year; but I was mistaken about that: it did stand for two years, it was not built right, it leaned up against the dirt, the water flowing from the lot would throw it down; they put a little fence on the top of it to keep people from falling down the

bank; without a wall the bank would fall down.

Question by pltff's atty

Do you know whether Mr. Fisher put up any buildings on the leased premises?

The defendants atty. objected to any evidence in relation to the putting up of improvements by Fisher or the value thereof as irrelevant and incompetent but the Court overruled the objection and the defendant at the time excepted to the ruling of the Court. And the witness proceeded The wall was from 80 to 100 feet in length. Fisher's Buildings were put up within four or five feet of the wall. Fisher put up a two story brick 25 X 40 feet, Another building was 75 X 40 feet. I am not certain as to the measurements. I saw the wall two or three days after its fall. The first part fell and afterwards the second part fell. The people said, it may go down: The people, in my opinion staid away. The first part fell down in Spring of 1858 or 1859 The second part fell a year afterwards. The soil was a clay soil: the rain will wash away any clay bank. A heavy building will press with heavy effect, it will make the bank crumble and give way. At 4 feet distance it would have no effect. Geyer St. was only half open, Geobel removed the earth on the North half of Geyer

Ans. The top of the sewer was 4 feet wide, as the city left it: the cut was almost straight up Should think Goebel excavated 20 to 25 feet The house was not tenantable, after the wall fell

Question by Plff's atty

If proper substantial wall had been made there what would the lease have been worth. Estimate the Value of the Lease with such a wall. also estimate the Value of the lease with the wall down? The defendants atty. objected to the question as incompetent and irrelevant insisting that the Value of such a lease with a proper, substantial wall was not in issue: that the Value of the lease with the wall down was not in issue, and the question was improper as not truly referring to the legal measure of damages

(The Court overruled defendants objection and he excepted to the ruling of the Court)

The witness proceeded. I am qualified to fix the Value of the lease; but I cannot fix it without referring to the business which Mr. Fisher carried on in the premises: I think leaving Mr. Fisher to use the premises as he pleases, the property with a good substantial wall there would be worth $3000 per annum. I know Mr Fisher's improvements there and the ground I value at $5000 and I think a man ought to make 8 per cent per annum on the capital and in=

provements and this is what I consider to fix $3000 per annum 8 per per cent on the Value of ground and improvements.

The defendant objected to all the above statement of the witness in relation to the Value of ground and improvements and 8 per cent thereon, and the Court sustained the objection and excluded all said statements from the jury.

Question

What effect did the falling of the wall have on the plaintiffs Custom in his business at the Garden?

The defts atty objected to the question and it was excluded

Cross Examined by defendants' atty

The witness said that he could not say how much of the earth had crumbled: he could not say one foot crumbled in, nor if six inches crumbled in, nor how much nor how far down the side of the cut if any the earth crumbled in.

The plaintiff offered in evidence the following notice dated February 21, 1857 which was objected to by defendant as incompetent and irrelevant, but the Court overruled defendants objection and Admitted said notice:—

Notice of Feb. 21/57

Gert Goebel:— You are hereby notified that the excavations you are now making, preparatory to

25 and the defendant excepted to the opinion of the Court in admitting same. and it was read to the jury.

The plaintiff read in evidence the lease to Fisher and Benrodt also the assignment by Benrodt to Fisher.

Lease "This Indenture made and entered into this twenty fifth day of January, Eighteen hundred and fifty five between Gert Gaebel of the County of St Louis and State of Missouri, party of the first part and Adolph Benrodt and adolph Fischer of the County and State aforesaid parties of the second part, witnesseth that the said party of the first part has letten and by these presents doth grant demise and let unto the said parties of the second part, the fallowing described property it being a part of the place known as the "Flora Garden" situate lying and being in the city of St Louis, to wit: Beginning on the South east corner of Fulton street and Geyer avenue; thence running east 167 feet more or less; thence running North 162 1/2 feet, thence running West 167 feet more to the eastern line of Fulton street, thence running South 162 1/2 feet to the place of beginning. Also the present entrance to said Flora Garden from 7th Street being 20 feet wide up to the premises hereby demised with all and singular the improvements and buildings thereon for the

term of five years, to wit, from the first day of March Eighteen hundred and fifty five, to the first day of March eighteen hundred and sixty for the yearly rent of one thousand dollars payable in equal monthly payments with the privilege however hereby expressly granted to the said parties of the second part that if desired by them they can have the said above specified premises for five years longer to wit from the first day of March eighteen hundred and sixty to the first day of March eighteen hundred and sixty five for the yearly rent of twelve hundred and fifty dollars likewise payable in equal monthly payments, and it is agreed and stipulated by and between the parties of this Lease as follows: 1st. The said party of the first part lets only the surface of the above described property with the improvements and buildings thereon to the said parties of the second part and that the said party of the first part is at perfect liberty to build under ground (as for instance a cellar) and do as he chose provided however that he will do so without any injury to the garden and buildings thereon.

2nd The said party of the first part Covenants to and agrees with the said parties of the second part to build on the South side of the above leased premises a rock wall and fence and also a fence

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on the west side thereof with an entrance and gate so soon as Fulton Street shall be open at his own expense.

3d. The said party of the first part covenants to and agree with the said parties of the second part without permission of said parties of the second part not to build houses before the first day of March eighteen hundred and sixty, more than forty feet on front of Seventh Street and those only and not over two stories high South of the above mentioned entrance to Flora Garden from Seventh Street and also not to build a fence North of said entrance.

4th. The said party of the first part agrees with and covenants to the said parties of the second part not to keep in the houses he may build or erect on Seventh Street as before mentioned nor on his property west of said leased premises and with the same addition, a dram shop coffee house or any public entertainments during the continuance of this lease, nor suffer other persons to do so.

5th. The said party of the first part further agrees with and covenants to said parties of the second part in case from any cause whatsoever the said parties of the second part should be compelled against their will and without their fault to leave the above leased premises before the time this

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Lease shall expire that he will make good and pay the loss they shall thereby sustain.

6th The said parties of the second part covenants and agrees with the said party of the first part to let the party of the first part have the undisturbed use of the three Green houses now standing on the above leased ground up to and during the month of May eighteen hundred and fifty five after which time, the party of the first part agrees to surrender the same to the parties of the second part with the exception of the Glass and worden parts thereof which the party of the first part may retain for himself, the balance of the said three Green houses said parties of the second part may convert to their own use and benefit during the term of this Lease, and if the said parties of the second part shall find it to their interest to remove or break up said Green houses they may use the building rocks and bricks from the same to other building they may erect on said premises, but in case they should otherwise dispose of or sell said buildings, rocks and bricks, they shall pay the Value thereof or proceeds of sale to the said party of the first part.

7th The said parties of the first part covenants to and agree with the said party of the first part to have all necessary repairs on the above leased property and the buildings thereon at their own expense, and keep and surrender the said demised

29 premises in as good state and condition as reasonable use and wear thereof will permit damages by the elements excepted.

8" Said parties of the second part covenants and agree to and with the said party of the first part to pay all taxes on the improvements and buildings they shall or may make and erect during the term of this Lease out of their own money all other taxes on said leased property, the said party of the first part is to pay and the parties of the second part further agree to leave at the expiration of this lease all improvements and buildings whether made or erected by themselves or now on said premises.

9" The said parties of the second part covenant and agree not to sell during the term of this lease any flowers whatever.

10" The said parties of the second part further agree and covenant without permission of the party of the first part not to fell, cut down, or carry away any of the trees and shrubs now growing on said premises.

11" The said parties of the second part further agree to and with the party of the first part that if they should fail to pay the rent as above agreed upon punctually at the expiration of each month and after the failing of the parties of the second part to pay said monthly rent for two

successive months, the said party of the first part after having given ten days notice thereof in writing may lawfully re-enter the said leased premises and have, retain, repossess and enjoy the same as if the same never had been leased to said parties of the second part.

12. The said parties of the second part agree and covenant to and with said party of the first part ~~of the first part~~ to build make and erect on the above leased premises within one year from the first day of March eighteen hundred and fifty five improvements for the value of about eight hundred dollars which improvements and buildings shall be and remain on said premises for the benefit the use and ownership of said party of the first part, in case the said parties of the second part should not truly perform the engagements entered into by these presents: and it is also agreed and understood that in case the said parties of the second part should transfer this lease to some other person or persons that said new party to this lease is to be held to give good and sufficient bond with approved security in the sum of five hundred dollars to said party of the first part for the true performance of the stipulations agreed upon by these presents.

13" It is further agreed and understood between the parties to these presents that if, after

31 the expiration of five years the parties of the second part shall quit and surrender the above leased premises to the party of the first part and the buildings on said premises put up by the parties of the second part should be worth the sum of three hundred dollars and over to be ascertained by disinterested persons, the said party of the first part is to pay the one half of said appraisement to the said parties of the second part but in case the parties of the second part should keep the premises for further ~~five~~ five years as agreed above, then after the expiration of the ten years the party of the first part is to pay the real worth of the material on or about said buildings erected by parties of the second part likewise to be ascertained by disinterested persons to said parties of the second part always provided that none of said buildings shall be torn or taken down, but it is understood between the parties to these presents that nothing for tables benches and bowers is to be paid by the said party of the first to the said parties of the second part.

14 It is further agreed and understood between the parties to these presents that the Counter and Shelves and other fixtures now on said leased premises with the exception of the beer pump shall remain thereon for the use of the parties of the second part. N. B. The words "not over two stories high" to come in after the word "only" in the thirteenth

line of page two. Also the word "property" on same page, line nineteen to come in after the word "this" and the words "and within the same addition" in the same line after the word "premises" Also the words "five hundred" at the end of line twenty eight page four of this copy inserted previous to execution. In witness whereof the said parties have hereunto interchangeably set their hands and seals the day and year first above written

Gert Goebel (seal)
Adolf Lenwodt (seal)
A. Fischer (seal)

State of Missouri } ss Personally appear before
County of St Louis } me the undersigned a Justice of the Peace within and for the County aforesaid Gert Goebel Adolf Bendrodt and Adolph Fischer who are personally known to me to be the same persons whose names are subscribed to the foregoing instrument of writing as parties thereto and severally acknowledged the same to be their act and deed for the purposes therein mentioned and expressed. Taken and certified the twenty sixth day of January 1855

Fr. Flach Justice of the Peace

Filed and Recorded January 26. 1855

C. Keemle, Recorder

State of Missouri } I the undersigned Recorder
County of St Louis } for said County certify the

33 foregoing to be a true copy of a Lease from Peter Goebel to A. Fischer et al together with the certificate of acknowledgment and of the date of filing and recording thereof as fully as the same remains of Record in my Office in Book 161 page 135 Witness my hand and official seal this 2d day of June 1859

Seal

C. Keemle, Recorder

pr J. Conrad Dy.

Assignment

37 The plaintiff offered in evidence the following notice, dated June 7th 1859, it was objected to by the defendant as incompetent and irrelevant, but the Court overruled defendants objection and admitted said notice, and defendant excepted to the opinion of the Court in admitting the same, and it was read to the jury :—

Notice of June 7th 1859

Gert Gaebel,

You are hereby notified that the excavations you are now making, preparatory to building a stone wall, on the premises, situate on the Northwest Corner of Seventh Street and Geyer Avenue is a trespass on my rights; said excavations being too far South and an encroachment on my "right of way" to my premises. I claim a "right of way" of the width of twenty feet to my premises ten feet for a passage, and five feet on both sides for planting as the same was when I leased of you in March A. D. 1865 on the premises aforesaid from Seventh Street, running back to my leased premises.

Also, you are hereby notified not to build any houses or make any other improvements, on Seventh St on said premises unless you obtain permission from me, prior to so doing, according to your indenture made with me at the time aforesaid.

If you persist in proceeding contrary to this Notice, I will proceed with you according to law

Yours &c

St Louis June 7th 1859 A. Fischer

The plaintiff offered in evidence the following notice dated June 22, 1859 which was objected to by defendants atty as incompetent & irrelevant but the Court overruled Defendants objections and admitted said notice in evidence and it was read to the jury:— "To Gert Goebel: By reason of your failure & refusal to build a good & substantial wall along the South side of the premises you leased to me by your lease, dated January 25th 1855. & by reason of the falling of the wall that you did put up along the South side of said premises; & by reason of your failure & refusal to perform your covenants & undertakings in said lease; the said premises have become untenantable & unsafe to occupy. I therefore hereby notify you that unless you forthwith perform all your covenants & undertakings in said lease & put up a good & substantial wall along the South side of said premises in conformity with your undertaking in said lease. I shall vacate & abandon said premises & claim damages of you.

St Louis June 22d 1859 A. Fischer

Notice dated June 22. 59

And defendants excepted to the opinion of the Court in admitting same

Testimony of Abraham McHose

Abraham McHose, produced sworn and examined on part of plaintiff testified, that he knew the leased premises as Flora Garden in 1855 & 1855 that Fisher was a tenant there in 1854 & that he has seen the wall there on the North side of Geyer Av. but he never knew the wall had fallen. Question by Plaintiff.

What is the Value of the whole premises there occupied by Fisher?

The question was objected to by defendants as incompetent and irrelevant and excluded by the Court. The witness was then asked to say what was the Value of the premises and improvements thereon not exceeding 800 dollars, to which he answered, I can not tell, on further examination witness said the shortest distance from the buildings of Fisher to the cut North side of Geyer Av. was from six to eight feet

Testimony of John C. Miller

John C Miller produced sworn and examined for plaintiffs stated. he was a brick mason by trade knew parties to this suit. Knew Flora Garden in 1855 helped to put up Fisher's Buildings. One corner was five or six feet from the cut, the wall was 18 inches in thickness at the top and of unequal thickness elsewhere according to the excavation, can not say if the wall was perpendicular. never plumbed it.

Question by Plaintiff. What were those premises worth per annum with a good substantial wall on the south side with improvements put up by Fisher thereon, not exceeding $800 in Value?

Ans. One thousand dollars per annum. That would be a fair rent for the premises. Some businesses would realize more than that, some less.

Question by plaintiff. What would those premises

be worth to Fisher with his lease and a good substantial wall on the South side.

(Objected to by plaintiff as incompetent and irrelevant and excluded by the Court.)

The witness proceeded. I can not tell what Fisher could have sold his lease for; nor can I estimate its Value on a sale by him after putting his improvements on it. I dont Know what Fisher could have realized. I never took tickets at his gate. After the wall fell down, the premises were worth some less. I cannot say how much less The cut was nearly perpendicular. It was not exactly safe after wall fell down. In course of time it was liable to slide down. Dont Know if it caved much. A portion of the ground fell with the wall. I noticed the foundation of the wall and did not think it good. Mr. Goebel thought it sufficient. It was made with mortar lime and sand; but it was not sunk deep enough in the ground. It was not safe towards the last It looked unsafe, before Fisher left. I would not have lived in that room with my family. I think the wall was down when Fisher left Mr. Goebel put up some buildings on the North side of the entrance. They came near to the entrance

Question by plaintiff. Did Goebels buildings occupy any part of the entrance?

Ans. It might have been on part of the

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entrance. The entrance may have been a little more South than at first but I dont Know that Gaebel's buildings actually closed up any of the entrance. I think Gaebel built six houses, the rear of which looked to Flora Garden.

Cross Examined

I cannot say that Gaebel's buildings intruded a foot on Fisher's entrance. I am not certain they intruded on it at all; but I think may have done so: the entrance may have been pushed a little south Gaebel put up a good wall along the South side of Flora Garden afterwards. I am not certain if it was not built before Fisher left. Know the Value of ground rents near Flora Garden. In 1857, 1858, 1859 and 1860 grounds near Flora Garden based for $1 1/4 per front foot. But Flora Garden grounds was more Valuable, say $2 1/2 per front foot.

A tenement worth 800 $ in that neighborhood in those years would rent for 150 to $200 per year

It would have cost to put up a good wall at the time it fell say $600 to $800; the present wall put up by Gaebel cost about $800: from $600. to $800. I suppose 800. I think so.

Fullon street is not yet opened. I judge the part of the wall next 7th Street fell first. I am not certain as to this. The work I did on Fisher's buildings put up on the Flora Garden premises

cost some $2500 to $3000. I give my opinion of the cost of the wall: I never measured the perchs on the ground

Testimony of Stumps

Mr. Stumps produced sworn and examined for plaintiff stated, he knows Flora Garden. has known it for twenty years. Fisher went there in 1854 or 5 has seen the wall. Knows the first part of it fell down. Cant tell when it was. Think it was the west part that fell first. has seen the building that Fisher put up near the wall, the corner of Fishers Building was five six, seven or eight feet off from the wall. The last part of the wall that fell, fell in the fall. If there was a good wall there, and a house on the premises not exceeding $800. in Value, the premises would be worth to Fisher 2000 $ per annum. There were trees flowers and Shrubs on the ground. There were arbors there before Fisher went there, there was one round building there and two frames before Fisher went there. The entrance was changed a little south the entrance was 18 to 20 feet wide. The entrance was changed by the houses from 35 to 40 feet. The entrance passes the houses some 60 feet from Geyer Av. There was a door way and steps when Fisher went there. They have been moved 35 to 40 feet moved South. I have seen the present wall. It was put up after Fisher left, did not consider the building safe. Cross Examined.

43

Mr Gaebel had not begun to build new wall when Fisher left. The estimate I made of 2000 $ per annum was based upon the lease and all improvements thereon. I have no idea of the value of ground rents. I have no idea of the value of annual rents aside from the business Mr. Fisher carried on there.

Testimony of Alexander Wumiller

Alexander Wumiller, produced sworn and examined for the plaintiff stated that he had been at work for Fisher three years when the West end of the wall fell. he went to Fishers in 1856. the wall fell down in 1859. Dont know how long till Second part fell. I know it fell in 1859, and dont know anything else about it. Cant say how far it was from the house to the wall. I noticed the wall but dont know any thing about that business. When Fisher went there, there were on the grounds shrubs and trees. Fisher made walks there thinks he planted some things. I dont know much. lived in another part of the town

Question by pltff. After the wall fell down, how much were the premises worth less than before?

Ans. I can not tell. I say two or three thousand dollars less

Cross Examined

Question by deft. How were they worth $2000. or 3000 $ less?

Ans. On account of what Mr. Fisher made on

business. He sold beer and cakes and had balls and dances.

Question by Deft. Can you estimate the value of the lease for me without reference to Mr. Fisher's business.

Ans. No. I can not. (Re-examined)

Question by Plaintiff. Did not many persons go there before the wall fell who ceased to go there as customers after Mr. Fisher the wall fell?

This question was objected to by Defendant as incompetent and irrelevant and excluded by the Court

John Gerke produced sworn and examined stated he had known Flora Garden for 12 or 13 years, has seen the wall. Saw it when it fell down in 1858 or 9 Dont know the season of the year. Fisher was at the place then. I was there not many times. I noticed the building Fisher put up. It was 6 or 8 feet from the wall. I put up the building. After the fall of the wall opposite the building it was unsafe. If good wall, then the premises would be worth more: how much I dont know. I dont know if the present wall was up there while Fisher was there. Goebel built houses on 7th St. in Summer of 1859, June or July. There were two buildings there when Fisher went there and trees shade and walks already made there.

Question by Plaintiff. Was it a place of public resort for amusements?

This question was objected to by Defendants Atty

45 as incompetent and irrelevant, and the Court excluded the question

Testimony of Jacob Allemon

Jacob Allemon produced sworn and examined on the part of plaintiff stated that he had known premises 8 or 9 years and while Fisher was there superficially. Fisher there some time. Occupied under Goebel in Sept. 1859. Fisher then left I dont know the date Fisher left the premises. I noticed the wall on the south side when I went there part was then up and part down; the west part was down, the East part standing The wall had fallen at the highest point. I do not know how far it was from the building to the wall, should think not over 12 feet more or less. I passed round there several years ago. Goebel put up a new wall Commenced to build it while I was there. I left the premises because I could not get along with my partner

Question by Plaintiff. Were the premises worth more or less while wall was down?

Ans. I can not see how they were worth less tho' some might think so. I was to pay Goebel $1500 per annum for the Flora Garden and he was to put up the wall. There were trees and shrubs there and several houses on the premises when I went there, one or two standing apart and two or three connected together

Cross Examined by defendants' Atty.

I cannot tell that while Fisher was there he gave parties and balls. I do not know that. While I occupied Flora Garden, I gave balls and Mr. Fisher and his family were there. I dont know how long they stand at the party.

Re examined in Chief

Question by plaintiff's atty. Did not the company break up and leave on account of the dangerous condition of the building?

Ans. No. The company brake up from quarels raised there. The gentlemen and ladies left on account of the quarels. I cannot say that any one complained of the wall being down or the buildings unsafe

[It was admitted that heretofore the plaintiff in this suit commenced a suit in the Land Court of St Louis County on the same cause of action against the same defendant, and on the trial one Cline was sworn as a witness and testified and that said Cline is now dead]

Testimony of Chas. Gibson

Charles Gibson produced sworn and examined on part of defendant stated. I can state what Cline said on the trial in the Land Court. He said he said he had been a contractor extensively for the city. That he built the wall for Goeble the first wall and that it was sufficient for the purpose it was intended for that the wall in his opinion was suffered to fall down by water flowing on it from Fishers buildings. He repeated more than once the wall he built

47 was sufficient. Materials good Know the Value of Real Estate in neighborhood of Flora Garden in 1857-8-9 & 1860. You could get ground there then for the taxes, plenty of it. It would not lease for more than $1.00 per foot. I mean naked ground the whole of that time. I can not estimate the Value of the houses. The Bank was solid clay and no drain on the bank from the house when Fisher went there

Cross. Examined. Did not Cline simply say the wall was a good wall?

Ans. I think he used the word sufficient. That is my recollection. I cannot state the Value of the premises per annum. It was a well known place of resort More Valuable than one not so well known The wall fell into Geyer Av. the east end stood the wall fell at the highest point. Cline said the foundations were sufficient and were sunk below the street.

Testimony of H. Crawser

Herman Crawser produced sworn & examined on the part of the plaintiff, stated I was employed on part of plaintiff at Flora Garden when wall fell. I saw a hole washed in behind the wall by the water which ran in behind the wall and Mr. Fisher notified Mr. Goebel to come and stop up the hole and Goebel did so. This hole was two or three feet deep, one or two feet wide and five feet long.

Testimony of Joseph Hercules

Joseph Hercules

Joseph Hercules, on part of Defendant stated: the wall was all put up before the houses of Fisher were built. I think so. I know it. I lived right opposite and saw it. I judged the water ran behind the wall. I mean the first wall. There were spouts where the water ran through but they got filled up. There had not been much giving away of the bank when Fisher left. There were parties there afterwards. I paid no attention They seemed to be well attended. It would have cost about $600 to make a good wall when the wall fell

Cross Examined by Plaintiff

I am Carpenter by trade and not a Stone Mason but I know what the wall would cost. I could rebuild it in a month with sufficient number of hands. I have had walls built. I would have built it myself when it fell down for $600, a good wall. There was no difficulty in rebuilding the wall. Could easily have been done

Testimony of John Lind

John Lind sworn for deft. I built the present wall for Goebel. Was engaged about five or six weeks. It cost somewhat over $800. The old materials were used in the wall. I put up the whole wall charged $800 The water flowed from the back house of Fisher on the wall that fell down. Never knew anything of any sewer

49 The plaintiff called Judge Krum in rebuttal who being sworn, testified as follows:- He heard Mr Cline's testimony in the Land Court and that he Cline said the wall was put up by him and was a good wall

Testimony of Judge Krum

53 And this was all the evidence given in the cause by either party, and thereupon the plaintiff moved the Court to instruct the jury as follows:

Instruction for pltff given by Court

"No. 1 If the jury find from the evidence that the defendant neglected and failed to build a suitable and sufficient wall and fence along the South side of the demised premises as provided for in the Lease, read in evidence, and if the Jury further find from the Evidence that by reason of the failure of the defendant to build such wall and fence the plaintiff sustained damage and injury then the plaintiff is entitled to recover in this action". Which instruction was given to the jury and the defendant excepted to the ruling of the Court in giving the same at the time.

The defendant moved the Court to give to the jury instructions numbered 2, 3, 4 and 5 all of which the Court gave

Instructions Given for defendant

"No. 2 The plaintiff admits in his petition that he abandoned the premises the 15th July 1859. The jury therefore in estimating any damages the plaintiff has sustained by the neglect or improper acts of the defendant cannot consider any benefit or advantages the plaintiff may have derived from the lease if he had continued in possession until the end of the term" Glover & Shepley for Deft.

No. 3 The Jury cannot in estimating the plain=

tiffs damages, take into Consideration the cost or Value of the improvements made by him on the leased premises beyond 800 dollars nor aught they to consider the fact that the plaintiff abandoned and left the buildings and improvements he had made thereon." Glover & Shepley for Deft.

No 4 If the wall put up on the South side of the leased premises by Goebel fell down not by any fault of the said Goebel but by reason of negligent conduct of the plaintiff in not protecting it against the water which flowed from the buildings he had erected, then plaintiff cannot recover damages on account of the falling of said wall Glover & Shepley for Deft.

No 5 The defendant is entitled to recover on his counter claim the rent secured by the Lease remaining unpaid, prior to the abandonment of the premises by the plaintiff

Glover & Shepley for Deft.

The Court then on his own motion gave instruction No. 6 to the Jury

Instruction No. 6 Given by Court

No. 6. If the jury find for the plaintiff the measure of Damages is the difference between what would have been the Value of the rent or use of the leased premises in case the defendant had fully kept and performed the covenants in the lease, and what was the Value of the rent

or use of the same premises in the condition they actually were by reason of the failure of Defendant to keep or perform any of said covenants. But the jury cannot allow the plaintiff any thing in respect to the value of the use of improvements, put upon the premises by him beyond $800 worth of such improvements."

And defendant excepted at the time to the opinion of the Court in giving said instruction No. 6.

The defendant moved the Court to instruct the jury as follows:-

Defendants Instructions Refused

No. 7 The Jury is instructed that if they find the defendant has violated any of the covenants contained in the lease as stated in the petition it is their duty in ascertaining the damages to be governed by the evidence, and they can only allow in their verdict such actual damages as resulted directly to the plaintiff from the defendants neglect in relation to the stone wall or from his conduct in relation to the entrance and buildings erected on Seventh street, for the plaintiff is not entitled to damages for any loss of profits in his business, or for any loss of customers or visitors to his garden

Glover and Shepley for Deft.

No. 8 If the jury find from the evidence in the cause that the wall which defendant put up on

South side of the leased premises was not a good and sufficient wall, defendant was bound to make it so, and if said defendant failed to make it so, then it became the duty of the plaintiff for his own protection to make said wall good and sufficient; and if the jury find from the evidence that plaintiff might easily have made said wall good and sufficient, before any appreciable injury would have been sustained by want of a good and sufficient wall to the grounds or buildings of the Leasehold premises and would not do so he can not recover in this action any damages in respect to said wall, beyond the cost and expense of making the same good and sufficient

Or if the jury shall find that notwithstanding prompt and diligent action on the part of plaintiff to make said wall good and sufficient after it fell, some injury to the buildings or grounds of the Leasehold premises would have been sustained before plaintiff could have made said wall good and sufficient, then plaintiff cannot recover in this action any damages beyond the amount of such injury to said grounds and buildings and the cost and expense of making said wall good and sufficient

Glover & Shepley
for Deft

No. 9 The Jury are instructed that if they find from the evidence in the cause that Fulton

street has not been opened, the defendant was not bound to build any wall on the South side of the leased premises and no damages can be recovered against him in respect to his not building such wall in a proper manner or not repairing the same Glover & Shepley for Deft.

No. 10 The plaintiff is liable to pay rent from the commencement of the lease until Goebel re-entered, and if the jury find Goebel did not re-enter until month of September 1859 defendant is liable to pay rent for the three months of June, July and August 1859 and they should so find on the counter claim with interest on that amount Glover & Shepley for Deft"

But the Court refused to give said instructions and each of them, and the defendant at the time excepted to the opinion of the Court in refusing to give each one of said instructions No 7, 8, 9 & 10. The jury found a Verdict for the plaintiff - 4750 Dollars in damages.

Afterwards, in due time the defendant filed his motion for a new trial :-

Motion for a New Trial

Adolph Fisher
Vs.
Gert Goebel

In the St Louis Court of Common Pleas
November T. 1863

And now at this day comes Gert Goebel by his attys and moves the Court to set aside the Verdict

of the jury in this cause and grant a new trial for the fallowing reasons :-

1st. The Verdict is against law

2d. The Verdict is against evidence

3d. The Verdict is against the weight of evidence.

4th. The Court gave an improper instruction to the jury for plaintiff

5th. The Court refused a proper instruction to the Jury moved by defendant

6th. The law of the case was not properly put before the Jury.

7th. The Court excluded evidence offered by Defendant

8th. The Court allawed illegal evidence to go before the jury

9th. The damages are excessive and whally unauthorized by the evidence in the cause

Glover & Shepley for deft Goebel

which motion, being under Consideration the plaintiff offered to remit and did remit 2375 Dollars of the plaintiff's Verdict, but the defendant Continued, notwithstanding the remittiter to insist on his motion for new trial but the Court caused the remittiter of 2375 dollars to be entered on the Verdict and overruled the motion for new trial and rendered final judgment accordingly, and to the opinion of the Court in refusing to grant a new trial

59 the defendants at the time excepted and prayed the Court to allow and seal his said several exceptions which is done

Saml. Reber (Seal)
Judge &c.

State of Missouri
County of St Louis } ss I F. A. H. Schneider Clerk of the Circuit Court, within and for the County aforesaid certify the foregoing to be a true and complete transcript of the records and proceedings in the said cause of Adolph Fisher Vs. Gert Goebel, as fully as the same remain on file and of record in my office.

In testimony whereof I hereto set my hand and affix the seal of said Circuit Court at Office in the city of St Louis this 17th day of September A. D. 1866.

F. A. H. Schneider Cl C

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78 (8) 78

March Term 1867

Adolph Fisher
Defendant in Error

Vs. Transcript

Gert Goebel
Plaintiff in Error

Error from St Louis
Court of Common Pleas

Filed Sept 29th 1866
C. F. Fishback

Krum & Decker
for deft in Error

Glover & Shepley
for Plff in Error

$30.00
$10 pd. by Glover & Shepley

1866. Oct 15th Assignments of Error filed
1867 May 1st Arg & Sub. Stmt & brief of Ar & Stmt & brief
of Res filed
" C. Brown & Remanded

Adolph Fisher
v. D.E.
Gert Goebel
P.E.

In the Supreme Court.
March T. 1847.

Opinion of the Court.

The plaintiff had leased from the defendant the premises called the "Flora Garden", situated on the corner of Seventh Street and Geyer Avenue, in 1835. There was a end some fifteen or twenty feet deep on Geyer Avenue, and the lessor covenanted in the lease that he would build at his own expense a rock wall and fence on that side; ~~to and~~ the lessee covenanted to keep the leased property in a state of repair. Some two years after this wall was erected, it fell down by parts by the action of the elements. The defendant was called upon to rebuild it, but before this was done, the plaintiff abandoned the premises and surrendered his lease.

The plaintiff proceeds on the assumption that the covenant of the lessor had been broken by the falling down of this wall, and that it belonged to the lessor, and not

to himself, to rebuild it. The case appears to have been tried on this theory, and the principal matters submitted for decision concern the instructions of the court on the measure of damages.

The jury were instructed for the plaintiff upon the basis that the proper measure of damages was the difference between the rent and value of the leasehold premises, with a good and permanent wall standing, and their value ~~to the lessee in the~~ condition in which they were left without such wall.

The defendant's instructions were predicated upon the rule that only the actual damages resulting directly from the defendant's default in relation to the stone wall, to be measured by what it would cost to rebuild the wall, together with any loss that may have been sustained as the direct and immediate consequence of the insufficiency of the wall and the breach of the covenant, could be recovered.

The jury found a verdict for the plain-

tiff for $4750. damages, and upon a remittitur of $2375., the defendant's motion for a new trial was overruled, and a judgment rendered for the balance.

Under these covenants, it might admit of serious question, whether the plaintiff, after he had accepted the wall without remonstrance, and safely occupied the premises for two years, was not bound, under the covenant for repairs, to rebuild the wall himself, or attempt to put and keep it in a state of repair, charging the defendant with damages only for the original deficiency of the structure. But it appears to have been left to the jury under the instructions to say, whether the covenant for the building of a wall had been complied with, and whether the plaintiff had sustained damage in consequence of a breach thereof; and the case will be considered here only on the question of the damages.

Upon the facts of the case, we think the instruction given for the plaintiff allowed a larger latitude and measure of damages than the justice of the law of the case will warrant, and that

the rule given in the defendants' instructions should have been adopted.

In Vivian v. Champion (2 Ld. Raym., 1125) it was said that the proper measure of damages on a breach of such covenants was what it would cost to put the premises in repair. This rule appears to have been slightly modified in some modern cases, on covenants by tenants for repairs, but, as we conceive, not to the extent implied in this instruction for the plaintiff. (Smith v. Read, 9 Excheq., 165; Penley v. Watts, 7 Mees. & W., 601; Worcester v. Rowlands, 9 Car. & P., 739; Walker v. Swayzee, 3 Abb. Pr. R., 186). It has been said to cover such damages as are direct and immediate, but not remote, speculative, or contingent damages, or such as might have been avoided by the other party. (Damon v. Lorer, 17 Pick., 288). It has been allowed to include such losses, in addition to the actual cost of repair, as were necessarily sustained, during the period required for making repairs, and some compensation for any loss of the use of the premises, while they were undergoing repairs. (Middlekauf v. Smith, 1 Md., 329). But we find no

satisfactory authority for the position that the tenant in such case may wholly neglect to make the necessary repairs himself, allow his leasehold to depreciate in value, & his business to be broken up, and abandon his lease, and then claim for his damages the whole loss so incurred. The greater part of such damages as these might have been avoided, and are to be attributed to his own fault; and for that he must be content to bear the loss himself. (Thompson v. Shattuck, 2 Met., 615). As a general rule, we think it may be said, that the recovery must be confined to the actual damages which are the direct, immediate or proximate, and unavoidable consequence of the breach of the covenant. (Sedgw. Dam. 195-199).

The evidence shows that this wall might have been rebuilt at a cost of some six or eight hundred dollars, and we are inclined to think that the plaintiff has recovered a larger amount than he was justly entitled to claim, notwithstanding the remittitur.

For these reasons, the judgment will be reversed, and the cause remanded.

The other judges concur.

N. Holmes.

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C

Adolph Fisher
D.E.
v.
Gert Goebel
D.C.

Opinion
Reversed & remanded.
Holmes.

Filed May 6th 1867
O. J. Fishback clk
per E. M. Early Dep.