Speers, Theresa v. Flach, thomas

34 Mo. 101

507/8

630/18

Action of Unlawful detainer

Plaintiffs leased property to

Unknown for 19 years

who built building on it

and leased to the def.

App	Resp
Speers, th.	Flach
Farish, E.T.	Hudgins, P.L.

Order: reversed & remanded

The State of Missouri, ss.

The State of Missouri, to the Honorable the St Louis Land Court **in said State Greeting:**

WHEREAS, In the record and proceedings in a certain cause lately pending in the said St Louis Land Court

wherein Theresa Speers was Plaintiff and Thomas Flack was Defendant

in a action of Unlawful Detainer manifest error hath intervened, to the great damage of said Theresa Speers as by her complaint we are informed.

NOW, being willing that the error, if any there be, should be corrected, and full and speedy justice done to the parties aforesaid, in that behalf, COMMAND YOU, that you send to us, certified under your seal, the record and proceedings in the cause aforesaid, as fully as the same remain of record before you in said Court, so that we may have them before us at our Supreme Court, to be begun and held in the City of St. Louis, in the County of St. Louis, in said State, on the Third Monday in March next, so that our Judges of our Supreme Court, on inspecting the record and proceedings aforesaid, may cause to be further done therein, for correcting the error, what of right, and according to law, ought to be done.

WITNESS, WILLIAM S. GLANVILLE, Clerk of our said Supreme Court, at office in the ~~City~~ of Saint Louis, the 8th day of February in the year of our Lord one thousand eight hundred and ~~fifty~~ Sixty one.

W S Glanville

CLERK.

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

I, Edward N. Tracy Clerk of the St. Louis Land Court in and for said County, in obedience to the within writ herewith furnish a true and complete transcript of the record and proceedings in the case therein named as fully as the same remains in my office.

In Testimony whereof, I hereto set my hand and affix the seal of our said Court, at office in the City of St. Louis, this Twentieth day of February A. D. 1861

Edward N. Tracy Clerk

Page 1

State of Missouri }
County of St. Louis } SS

Be it Remembered that on the Ninth day of March in the year of our Lord One thousand eight hundred and fifty nine there was filed in the Office of the Clerk of the St. Louis Land Court a copy of a Complaint in a certain cause of action brought before Rudolph Herckenrath Esquire a Justice of the Peace in the Township of St Louis County aforesaid, also an - application for a Writ of Certiorari on said Justice, and Bond.

(For Copy of Complaint See pages 4 and 5 of this Transcript. Clerk)

Which application for Writ of Certiorari and Bond are in the words and figures following, to wit:

Aplctn for Writ of Certiorari

State of Missouri }
County of St Louis } SS

To Charles A. Mantz Clerk of the St. Louis Land Court.

Thomas Flacks states that one Theresa Speers has sued out before Rudolph Herckenrath a Justice of the Peace of Saint Louis County a summons against him for an alleged Unlawful detainer of the following described premises to Wit: a lot or parcel of ground lying in the City and County of St Louis being thirty seven feet on fifth street running back seventy two feet more or less bounded North by a lot owned or occupied (in 1839) by a Mrs Spencer on the South by a lot owned by said Theresa Speers East by Fifth St. and being same on which is erected a bake shop used by said Thomas Flacks and the said Flacks further says that the complainant is not entitled to recover possession of the said premises described in the complaint before said Justice and prays for a writ of Certiorari to issue directed to the said Rudolph Herckenrath Justice of the Peace as aforesaid commanding and

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requiring him to stay all further proceedings in said case and certify a complete transcript of his and all proceedings had before him together with the original papers filed in said cause and file the same in the Office of the Clerk of the St. Louis Land Court as provided for by the Statute in such cases made and provided.

Said applicant herewith files a true and perfect copy of the complaint.

Thomas Flack

Thomas Flack, the applicant in the above case and Defendant in the complaint before Justice Herckenrath being duly sworn upon his oath says that he believes the above and foregoing application and the matters therein as stated are true.

Thomas Flack.

Sworn to and subscribed before me this 9th day of March A. D. 1859

Chas. A. Mantz Clerk

Bond

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

We Thomas Flacks as principal and John Cox as surety acknowledge ourselves indebted to Theresa Speers in the sum of One thousand dollars upon this consideration That whereas Thomas Flacks has this day besought the Clerk of the St. Louis Land Court a writ of Certiorari to Rudolph Herckenrath Justice of the Peace in St. Louis County requiring him to certify up to said Land Court a certain cause pending before said Justice Herckenrath being an action of Unlawful detainer at the complaint of Theresa Speers against Thomas Flacks. Now if the said Thomas Flacks will not commit or suffer any waste or damage to be committed on the premises sued for and that he will pay all rents and profits, damages and costs that may be adjudged against him and otherwise abide the judgment of the St. Louis Land Court then ~~then~~ this bond to be ~~used~~ void and of no effect otherwise to be in full force and effect.

Thomas Flack (Seal)
John Coy (Seal)

Upon the filing of the copy of Complaint application and Bond, the Clerk then issued to the Justice a Writ of Certiorari.

Which Writ of Certiorari, is in the words and figures following, to wit:

Writ of Certiorari

State of Missouri.

To Rudolph Herchenrath Esq. one of our Justices of the Peace within and for the County of St. Louis . . . Greeting:

Whereas it has been represented to our St. Louis Land Court, within and for the County of St. Louis aforesaid, that there is now pending before you a suit for an unlawful detainer, wherein Theresa Speers is Complainant and Thomas Flacks defendant, and the said Thomas Flacks, the defendant, having filed the affidavit and bond with the Clerk of our said St. Louis Land Court, which the law requires: You are therefore commanded to stop all further proceedings in said cause, certify to our said St. Louis Land Court, a complete transcript of your docket, and all proceedings had before you, together with the original papers filed in the cause aforesaid, and file them in the office of the Clerk of our said St. Louis Land Court, within ten days after the service of this Writ, and certify hereon how you have obeyed our commands.

In Witness, whereof, I Charles A. Mantz, Clerk of the St. Louis Land Court aforesaid have hereunto signed my name and affixed the seal of said Court, at office in the City of St. Louis, this Ninth day of February A.D. 1859.

(Seal)

Charles A. Mantz, Clerk.

Upon which Writ the Sheriff made his return in the words and figures following, to wit:

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Shff's Return

Executed this Writ in St. Louis County on the 9th day of March 1859 by delivering a copy of this Writ as furnished by the Clerk to Rudolph Hergenrath. Michael S. Cerre Shff By Eugene Alcan dp

And afterwards the following proceedings were had in the St. Louis Land Court, in this cause, to wit:

March Term 1859.

Saturday April 2nd 1859

Transcript from Justice filed

Theresa Speers vs Thomas Flack } Transcript from Justice Herckenrath, filed in this cause.

Which Transcript is in the words and figures following, to wit:

Justice's Transcript

(For Writ of Certiorari See Page 3 of this Transcript. Clerk)

Upon which Writ is endorsed the following, to wit:

See annexed Transcript

B. W. Herckenrath Justice.

(Complaint)

Theresa Speers. Complainant vs. Thomas Flack. Defendant } Before Rudolph Herckenrath Justice of the Peace —

Theresa Speers Complains to Rudolph Herckenrath a Justice of the Peace within and for the County of St. Louis, that on the twenty seventh day of September A.D. Eighteen hundred and fifty eight, she had the legal right to the possession, a lot or parcel of ground lying in the City and County of St. Louis, being thirty seven feet on Fifth street, running back seventy two feet more or less, bounded north by a lot owned or occupied (in 1839) by a Mr. Spencer, on the South by a lot owned by said Theresa Speers, East by Fifth street — and being same on which is erected a Bake shop used by said Thomas Flack — and that said Thomas Flack wilfully, and without force holds over the possession of the same premises, after the termination of the

5 time for which they were demised or let to Frederick Ongelbeck and Henrick Linkemeyer, (the persons under whom the said Thomas Flack claims)

The Complainant further states, that she has sustained damages, by the reason of the unlawful detainer aforesaid, in the sum of two hundred dollars, and that the value of the monthly rents and profits of said tenements is fifty dollars, Wherefore the Complainant prays judgment of restitution, and for her damages, and the value of the monthly rents and profits, of the premises aforesaid.

Edw. T. Farish
Atty. of Complainant Theresa Speers.

State of Missouri }
County of St. Louis } ss. Be it Remembered that on this fourteenth day of February 1859 - before me the undersigned came Theresa Speers, who being duly sworn makes oath and says that the foregoing complaint and the matters and facts as therein stated are true.

Theresa her mark Speers

Subscribed & sworn to before me the day and year last above written.

Boud Herckenrath Justice of the Peace.

(Docket entries) No. 68 Febry 16 3 February 1859

Theresa Speers
vs
Thomas Flack } Unlawful Detainer

Upon Complaint filed verified by affidavit, summons and venire is issued by the Justice returnable February 23d 1859 at 3 O'Clock P. M. returned by Constable Thos H. McVicker executed. Both parties appear being not ready for trial the case is continued by consent of parties until March 8th at 3 o'clock P. M. On that day parties appear the justice continues the case by consent indefinitely.

A Writ of Certiorari is served upon the justice; whereupon he stops all further proceedings in the case and hereby transfers the papers to the St. Louis Land Court.

Justice $1.85
Constable .75
$2.60

State of Missouri } I, Rudolph Herckenrath a Justice of the
County of St. Louis } within and for said County, do hereby certify that the foregoing is a true correct and full transcript of all proceedings had before me in the above entitled cause as the same appears from my docket and that the papers annexed comprise all the original papers in said cause.

Given under my hand the 21st day of March 1859.
Rud Herckenrath Justice

And afterwards the following further proceedings were had in this cause, to wit:

March Term 1860
Friday April 27th 1860

Trial by Court
Judgmt

Theresa Speers
vs
Thomas Flack } Judgment.

Now at this day come said parties by their respective attorneys, and thereupon no jury being required, the cause is tried by the Court, upon the evidence adduced, and the Court having heard, and being fully advised of and concerning the premises, doth find the issues herein joined in favor of the Defendant. It is therefore Ordered and adjudged by the Court, that the Plaintiff take nothing by her suit in this behalf, but that the defendant go hence without day and recover of said Plaintiff his costs and charges herein expended and have Execution therefor.

And afterwards the following further proceedings were had in this cause, to wit:

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Monday April 30th 1860.

Mo for New Trial filed

Theresa Speers
vs.
Thomas Flack

Motion for New Trial, filed in this cause.

(For which Motion for New Trial See Bill of Exceptions. Clerk)

And afterwards the following further proceedings were had in this cause, to wit:

Saturday - May 26th 1860.

Mo for New Trial Overruled

Theresa Speers
vs
Thomas Flack

Now at this day the Court being fully advised of and concerning the motion heretofore filed in this cause, for a New Trial, doth Order and adjudge, that said motion be overruled.

And afterwards the following further proceedings were had in this cause, to wit:

Monday June 11th 1860.

Bill of Exch & filed

Theresa Speers
vs
Thomas Flack

Bill of Exceptions filed in this cause.

Which Bill of Exceptions, is in the words and figures following, to wit;

Bill of Exch &

Theresa Speers, Pltff.
vs.
Thomas Flack, Deft.

In St. Louis Land Court,
St. Louis County,
March Term 1860.

Be it Remembered that on the trial of the above entitled cause the following proceedings were had:

Plaintiff read and offered in evidence a lease from George Spears and Theresa Speers his wife to Frederick Angelbeck and Heinrich Linkemeyer and the assignment thereof to Defendant, which is as follows.

8

Lease from Geo & Theresa Speers to Fred Angelbeck & al.

&

Assignment of same to Deft.

This Indenture made this twenty sixth day of September in the year of our Lord One thousand eight hundred and thirty nine between George Speers and Therese his wife of the City of St. Louis of the first part, and Frederick Angelbeck and Henrich Linkemeyer of the same place of the second part, witnesseth; that the said parties of the first part in consideration of seven hundred dollars to them in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, do hereby grant, demise lease and to farm let unto the said parties of the second part a lot or parcel of ground lying in the City of St. Louis being thirty seven feet front on fifth street, running back seventy two feet more or less bounded north by a lot owned or occupied by a Mr Spencer and on the south by a lot owned by the said parties of the first part. To have and to hold the said lot of ground with all rights and privileges thereto belonging unto them the said parties of the second part their heirs executors administrators and assigns for and during the term of nineteen years from the date hereof fully to be completed and ended. and the said parties of the first part covenant that they will cause the said parties of the second part and their representatives to have quiet possession and enjoyment of said premises during the said term, and it is agreed between said parties that if any buildings shall be and remain on the said premises at the expiration of said term which shall have been erected by the said parties of the second part, the same shall be appraised by five disinterested persons two of whom are to be selected by each of the said parties and the fifth by those first chosen. And the said parties of the first part or their representatives are to allow and pay to the said parties of the second part, or their representatives the appraised value of the said buildings. And the said parties of the second part or their representatives shall during said term pay all taxes assessed on said premises.

In Testimony whereof the said parties have hereto set their hands

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and seals the day and year first above written.

George his X mark Speers (seal) Therese her X mark Speers (seal)
Frederick Angelbeck (seal) Henrich Senkenmyer (seal)

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

Be it Remembered that on the September term of the County Court within and for the County of St. Louis in the State of Missouri in the year one thousand eight hundred and thirty nine held at the Court house of said County on the twenty sixth day of September in the year and at the term aforesaid personally appeared in open Court George Speers and Therese his wife and Frederick Angelbeck all of whom are personally known to the Justices of said Court to be the 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 she the said Therese being by the Court first made acquainted with the contents of said instrument of writing and examined separately and apart from her said husband acknowledged that she executed the same freely and without compulsion or undue influence of her said husband, which said acknowledgment is entered on the Records of the Court of that day.

In Testimony whereof I Henry Chouteau Clerk of said County Court hereto set my hand and affix the seal of said Court at office in the City of St. Louis in the County and State aforesaid this twenty seventh day of September in the year of our Lord one thousand eight hundred and thirty nine

(Seal)

Henry Chouteau Clerk

State of Missouri }
County of St Louis } SS. I, John Ruland Clerk of the Circuit Court and ex officio Recorder for the County aforesaid, certify that the

foregoing instrument of writing was filed for record in my office, on the first day of October 1839 and is truly recorded in Book I No 2 page 595.

Seal Given under my hand and seal of office this fifth day of October A. D. 1839.

Jno Ruland Recorder

For and in consideration of the sum of six hundred dollars to us in hand paid by Thomas Flack the receipt of which sum is hereby acknowledged, we the undersigned Frederick Angelbeck and Henry Linkemeyer hereby grant assign, transfer and set over unto said Thomas Flack his heirs administrators and assigns, all our right title interest and leasehold estate of in and to the lot of ground and premises described in the foregoing Indenture of George Geers and wife to us dated September 26 1839, recorded in the Recorder's office of St Louis County in Book I No 2 page 575. also all our right title and interest to and in the buildings upon said premises: Subject to the payment of the yearly assessments and taxes and the fulfillment of the claims and obligations therein specified. To have and to hold the same with all rights privileges and appurtenances thereunto belonging unto him said Thomas Flack his heirs administrators and assigns from the day of the date hereof until the full expiration of the term or period above mentioned in manner and form aforesaid.

In witness whereof we the said Frederick Angelbeck and Henry Linkemeyer have hereunto set our hands and seals this fifteenth day of June Eighteen hundred and fifty.

Frederick Angelbeck Seal Henry Linkemeyer Seal

Executed in presence of Fred. Kretschmar.

State of Missouri }
County of St. Louis } SS, Be it remembered that on this fifteenth day of June Eighteen

11 hundred and fifty before me the undersigned Justice of the Peace in and for said County came Frederick Angelbeck and Henry Linkemeyer who are both personally known to me to be the same persons whose names are subscribed to the foregoing instrument of writing as parties thereto and they severally acknowledged the same to be their act and deed for the purposes therein mentioned.

Taken and certified the day and year last aforesaid.

Fred Kretschmar Justice of the Peace.

Filed and Recorded July 1st 1850.

S. D. Barlow Recorder.

State of Missouri }
County of St Louis } SS. I the undersigned Recorder for said County certify the foregoing to be a true and complete copy of an instrument of writing from G. Speers to F. Angelbeck and H. Linkemeyer and from F. Angelbeck et al to J. Flack, and also of the certificates of acknowledgment and of the date of filing and recording thereof as fully as the same remains of record in my office in Book L5, P. 533.

Witness my hand and official seal this 20 Sept. 1858

Seal

C. Keemle Recorder.
pr. J. Conrad Dy.

Bill of Excpt. The following facts were then admitted as proven.

1st That the value of the monthly rents and profits of the premises including the buildings is from forty to fifty dollars -

2d That at time suit was instituted Defendant was in possession of premises and so continues to hold the same and that after demand made in writing by Plaintiff for deleverance of possession thereof -

3d That after Execution of the lease and before termination of term mentioned therein - George Speers died -

In behalf of defendant, subject to exception that the testimony was irrelevant, it was admitted that the lessees put improvements upon the premises and that at expiration of the lease the same were duly appraised at the sum of two hundred and fifty dollars, which is not paid or tendered.

The Court made the following declaration of law

Instruction. Given Apl 29. 1880 C. B. Lord

Until the Plaintiff paid, or tendered to the Defendant, the amount at which the improvements on the leased premises were appraised, she is not entitled to maintain this action.

To which the Plaintiff then and there excepted

Judgment was rendered for Defendant —

Plaintiff in due time moved for a new trial, which motion is as follows,

Mo. for New Trial

Theresa Speers Plaintiff
vs.
Thomas Flack Defendant

In St. Louis Land Court,
St. Louis County.

The Plaintiff moves the Court to set aside the judgment rendered in (the) above entitled cause, because the Instruction given by the Court is illegal and improper —
and because from the law and evidence judgment should have been for Plff.

Edw T. Farish Atty for Plff.

Bill of Excp.

which coming on to be heard was overruled by the Court, to which action of the Court Plaintiff then and there Excepted, and now at same term tenders this bill of Exceptions and prays that the same may be allowed, signed and made part of the record of this cause, which is done.

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C. W. Lord.

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

I, Edward N. Tracy, Clerk of the St. Louis Land Court, within and for said County, certify the foregoing Transcript, to be a true and correct copy of the papers (except the summons and Venire) from Justice Herckenrath and of the Record and proceedings had in the St. Louis Land Court (as required) in the case of Thereva Speers plaintiff and Thomas Flacks defendant, as fully as the same remains of Record in my Office.

In Testimony, whereof, I hereto set my hand and affix the seal of our said Court, at Office in the City of St. Louis, this Twentieth day of February A. D. 1861.

Edward N. Tracy Clerk

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Aplctn. for Writ of Certiorari & Bond. . Page 1. 2 & 3.
Writ of Certiorari & Shffs Return. . " 3 & 4.
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Bill of Exceptions filed. . . . " 7.
Bill of Excps. (Embodies the following, viz;) " 7 to 13 inclusive
Lease from Geo. & Theresa Speer to Fred Angelbeck & assignmt. of same to Deft. } " 8 to 11 in.
Instructn. & Mo. for New Trial . . " 12.

4200 words $61.30
Certificates 1.00
$7.30

36 March Term 1863

~~258.~~

(10)

Theresa Speers,
Pltff. in Error

vs.

Thomas Flacks,
Deft. in Error.

Error to St. Louis Land Court.

Land Court.

E.M

E. T. Farish Atty for Pltff

A Hamilton Atty for Dft.

Filed 21st Febry. 1861.
W. J. Glanville
Ch.

The [illegible] 30 paid by Peter Cox

$10.00 paid by Peter Cox / assgt.

1863 May 28. Submitted on brief
1863 June 3. Reversed & Remanded Opinion filed Dp 183

Theresa Speeds Plff. in Error } In Supreme Court
vs
Thomas Flacks Deft. in Error } March 3. 61

The Plaintiff in Error says that in the record and proceedings of the Court below there is manifest Error, and for Error, assigns the following:

1st The declaration of law made by the Court is illegal & improper —

2 That judgment was rendered in favor of Defendant when it should have been for Plff —

Gorsche & Gorsche & Farish
Attys of Appellants

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Theresa Spears

v

Thomas Flacks

---

assignment of Errors

Filed March 25. 1861.
Wm. S. Glanville
Clk.

Theresa Speers Plff in Error
v.
Thomas Starks — Deft. in Error

In Supreme Court.
March Term 1863

This was an action of "unlawful detainer" instituted before a Justice of the Peace, and transferred to Land Court by "Certiorari", where on trial ~~had~~, the following proceedings were had.

It was stipulated as proven that the value of the monthly rents & profits of the premises including the buildings ~~for~~ was from forty to fifty dollars — ~~At~~ That at time suit was instituted Defendant was in possession of the premises, and so continued to hold the same, and that after demand made in writing by Plff for delivery of possession thereof —

And that after Execution of lease & before termination of term therein mentioned, George Speers died —

And thereupon Plaintiff to sustain the allegations in her complaint, that on 27th of September 1858 she had the legal right to the premises therein described, and that Defendant wilfully & without force held our same, after the termination of the time for which they were demised or let to Frederick Angelbeck & Henrietta Linkemeyer (the persons under whom said Defendant claims) offered and read in Evidence, a lease, dated 26th Sep. 1839 for 19 years, to Angelbeck & Linkemeyer, and assignment thereof to Defendant (to be found on Page 8 of transcript) wherein occurs the following clause: "

"And it is agreed between said parties that if any buildings shall be and remain on the said premises

at the Expiration of said term, which shall have been Erected by the said parties of the second part, the same shall be appraised by five disinterested persons, two of whom are to be selected by Each of the said parties, and the fifth by those first chosen - And the said parties of the first part or their representatives are to allow and pay to said parties of the second part, or their representatives, the appraised value of said buildings -"

The Court in construing this provision declared the law to be: "That until the Plaintiff paid, or tendered to the Defendant the amount at which the improvements on the leased premises were appraised, she is not Entitled to maintain this action"

The whole question turns upon the construction of the above clause in the lease. The only point raised is the correctness of the interpretation placed upon it by the Lower Court.

Edw. T. Parish
Atty. for Plff. in Error.

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Theresa Speers
v
Thomas Flack

Statement

Filed April 23d 1863
A.W. Mead
Clk

[34]

Thomas Speers P.E.
v.
Thomas Flack D.E.

In Sup. Court,
March Term
1863.

The instruction given by the Court is clearly erroneous; by it, the Court instead of interpreting the agreement between the parties, undertakes to make a contract for them. There is nothing in the lease ~~was~~, which warrants or authorizes the lessee to hold over the possession of the premises until he was paid for his improvements — The lease was for a term certain, which having determined, the lessor was entitled to possession, and the lessee had his claim against the lessor for value of improvements, to enforce collection of which, he could institute proper proceedings, and might during pendency of same invoke the Equity Power of the Court to prevent the lessor from removing or otherwise disposing of said improvements.

This action was brought under sec 3. of act concerning Forcible Entry & Detainer p. 787. Rev. Statutes of 1855. which provides "When any person shall willfully, and without force, hold over any lands, tenements or other possessions, after the termination of the time for which they were demised or let to him, or the person under whom he claims, such person shall be deemed guilty of an unlawful detainer —"

The lease read in Evidence expired on the 26th of September 1858, and the party holding over the premises thereby demised after that date was clearly guilty under the law above cited.

The lessor covenanted merely to pay the ~~value~~ appraised value of improvements, but did not agree that the lessee should be or remain in possession until he was paid for the same. If the provision had been that the lessor should either pay for the improvements or grant a further lease, it might be inferred that the lessee would be entitled to retain possession until he was paid for his improvements or the lessor granted a new lease for term agreed upon — so it was decided in 2 Duer — p. 446. But in the absence of any such provision, and upon a mere agreement that the lessor at the expiration of the lease was to pay the appraised value of the improvements, for the court to decide that the lessee is entitled to remain in possession of premises, until he is paid the appraised value of improvements, is interpolating an agreement into the lease, and giving it a construction which neither in language or spirit it will bear.

In the case of Van Rensselaer's heirs v. Penniman 6 Wendell p. 569 — there were two leases, one made in 36 and the other in 96. In the 1st there was this covenant on the part of the lessor, that if the heir at law, or any other person having lawful authority, <u>chose</u> to expel, remove or dispossess the lessee, he is to pay him for his improvements according to valuation by appraisement, and if said heir did not pay him, that he said lessor would pay him —

In the 2d Lease, which was a lease for three lives, was this covenant. That if at the Expiration of said three lives, the Lessor or any other person having lawful authority, should choose to remove or dispossess the Lessee, he the said Lessor or said other person are to pay said Lessee for his buildings and improvements, according to appraised value, and on the payment of what the buildings & improvements shall be so valued at, the said Lessee shall yield up the possession thereof.

The court says: That by the first lease the Defendant is Entitled to compensation for all his improvements, but is not Entitled by virtue of that lease to retain possession until paid for his improvements. But that by the second lease the Defendant is Entitled to compensation for all his buildings & improvements, and that he is Entitled to retain possession until he is paid for those improvements. –

The foregoing ~~decision~~ case should regulate the decision of this cause.

Edw. N. Davis
Atty. Wolff in Error

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C

Theresa Spears. P.E.

v.

Thomas Flack D.E.

Plffs. Brief.

Filed April 24. 1863
A.W. Mead
Clk

[24]

Theresa Speers, Plaintiff in Error
vs
Thomas Flack Defendant in Error
April Term 1865
In the supreme Court of
Mass Orin

Defendant comes by his counsel
and denies that there is any error
in the court below in the trial of
this case

P L Headquist & Son
Attorneys for Defn

Thomas Spencer P.E.

Thom. Flaxton

Filed May 27. 1863

A W Mead
Clk

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E T Farish, 120 A Hamilton.	Theresa Speers, P E, vs Thomas Flacks, D E.	Error to Land Court.

Speers
v.
Flack

This was an action of unlawful detainer to recover possession of a lot of ground in the City of St Louis which the defendant held over after the [redacted]termination of the time for which the same was demised to the defendant's assignors - The case was taken to the Land Court by Certiorari where a trial was had resulting in a verdict and judgment for the defendant. -

It appeared on the trial that on the 26th of Sept: 1839 the Plff and her husband who has since died based the property in dispute to Angelbeck and Linkemeyer for the term of nineteen years next thereafter - The lease contains the following stipulation on the part of the lessors, viz "It is agreed between said parties that if any buildings shall be and remain on the said premises at the Expiration of said term which shall have been erected by the said parties of the second part, the same shall be appraised by five disinterested persons two of whom are to be selected by each of the said parties and the fifth by those first chosen. And the said parties of the first

part or their representatives are to allow and pay to the parties of the second part or their representatives the appraised value of the said buildings".

The lessees assigned the lease and their rights thereunder to the defendant Flack who was in possession of the premises at the expiration of the term and also at the commencement of the suit - ~~[illegible]~~ - It was also shewn that the lessees put improvements on the premises which at the expiration of the term were appraised as provided in the lease at the sum of 250 dollars which had neither been paid nor tendered at the commencement of the suit. - The Court then declared the law of the case to be that "Unless the pltff paid or tendered to the deft the amount at which the improvements on the leased premises were appraised she is not entitled to maintain this action". -

The only point in the case is as to the propriety of this declaration of the law -

The lease was for a fixed and determinate period of time, at the expiration of which the lessors became entitled by operation of law to the possession of the demised premises. There is nothing in the deed, express or implied by which the right of the lessors to a return of the possession, was made to depend upon the previous performance of the covenant to pay for improvements. The agreement to pay is a covenant the non-performance of which entitled the lessees or their assignee to an action for damages, but nothing more. The lessees did not see fit to reserve the right in the deed, as they might have, to retain possession of the leased premises as security for the performance of the lessors' covenant to pay; and we have no power to supply the omission. The defendant must therefore look to his remedy by action. He has none other left him — The Land Court erred in its declaration of the law and for this reason its judgment is reversed and the cause remanded. The other judges concur.

John D. L. Dryden

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Spears
vs
Flack

Opinion of the
Court by
Dryden

Filed June 3rd 1863
A.W. Neal
Clk

Reversed & Remanded