DUNN v. GAMES et al.

Case No. 4,177.

{2 McLean. 344.}[1]

Circuit Court, D. Ohio. Dec. Term, 1840.

EJECTMENT—OCCUPYING CLAIMANTS' LAWS—ADMINISTRATION IN FEDERAL COURT—ASSESSMENT BY JURY—DEFECTIVE RETURN—COSTS.

{1. A return by a jury of an assessment made by them under the Ohio occupying claimants' law of 1831 will not be set aside in a federal court because the return is under their hands only, while the statute requires the addition of their seals, for the federal court will follow the statute in its substance only, and not in matters of form, where that is impracticable.}

{2. It is no ground for setting aside the return that it neither makes an assessment of waste, nor returns that there was no waste, for the absence of any assessment under this head authorizes the presumption that there was no waste.}

{3. The costs of the proceeding under the statute follow the judgment}

{This was an action of ejectment by the lessee of Dunn against Games and Gillet.}

At the last term, a judgment having been entered that the lessors of the plaintiff recover their term, &c., in the premises {see Case No. 4,146}, on motion of Mr. Hamer, on behalf of defendants, a venire was issued to the marshal, under the occupying claimant law of the state, of 1831, directing him to summon a jury in the neighborhood of the land, and cause them to go upon it, examine witnesses, &c., and estimate the value of the improvements made by the tenants, the rents, waste, &c., and the value of the land in its natural state, in all things as the statute requires; and that return be made of their proceedings to the present term.

And at this term the marshal made return of the proceedings of the jury, under their hands, from which it appears that the permanent and valuable improvements amount to twelve hundred and fifty dollars; that the rents amount to the sum of five hundred and forty dollars; and that the land, in its natural state, is worth the sum of two thousand one hundred and ninety two dollars.

Mr. Hamer, in behalf of the defendants, moved the court to set aside the proceedings of the jury: First: Because they did not return their assessment, under their seals, as the statute requires: Second: Because the jury assessed no damages for waste, nor have they returned that no waste was committed.

The statute requires the jury to return their assessment under their hands and seals; but in this return their seals are omitted. In every other respect the return conforms to the statute.

This statute is not made obligatory on this court by adoption under any act of congress, but it is adopted as a fit and proper mode of proceeding by the court. In every respect, however, this court can not conform to the statute, as in the selection of jurors, &c. But the mode of proceeding is conformed to, so far as the organization and powers of this

court will permit. And whilst, of necessity, the forms of procedure are somewhat different, effect is given to the principles of the statute.

The return of the jury is under their hands, but their seals are not annexed, as the statute requires. This we do not think material under the rule of the court. The objection does not go to the substance of the return, but to the form. And if this be sufficient to set aside the assessment, it will be impracticable for this court to proceed under the statute. For this court, as before remarked, have not the means of carrying out the formal parts of the statute. We carry into effect the principles of the statute, and that is all we can do. On this ground, therefore, the return will not be set aside.

Nor will the assessment be set aside on the second ground. If waste had been committed the jury were required to assess the amount of damages. But they have made no assessment under this head, and the fair presumption is that no waste has been committed. It is somewhat singular that the defendants should object to the report on this ground.

The lessors of the plaintiff then, by Mr. Wright their attorney, gave notice, that they would relinquish the title to the land in favor of the defendants, on their paying to them its value, in its natural state, as assessed by the jury. And this option is given to the lessors by the statute. They may thus relinquish the land, or take out their writ of possession on paying to the tenants the excess of the improvements over the rents.

And THE COURT directed that the defendants should pay the assessment of the jury aforesaid, to the lessors of the plaintiff, within six months; and, in default thereof, that the writ of possession may issue.

A motion was then made that the costs of the inquest be taxed to the lessors of the plaintiff. But THE COURT held that the costs of this proceeding follow the judgment. Had a judgment been entered against the lessors of the plaintiff for the improvements, as the statute authorizes, the costs of the inquest might have been taxed in that judgment.

[1] {Reported by Hon. John McLean, Circuit Justice.}