

12980

No. _____

Supreme Court of Illinois

Church

vs.

Noble

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STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division.

24a. ~~242~~
No. 197

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197-177

SUPREME COURT OF ILLINOIS, THIRD GRAND DIVISION.
APRIL TERM, 1860.

WM. CHURCH
vs.
GEO. W. NOBLE. } *Error to the Superior Court of Chicago.*

POINTS AND AUTHORITIES FOR PLAINTIFF IN ERROR.

WALTER B. SCATES,
Of Counsel for Plaintiff.

Filed May 14, 1860
L. Leland
clerk

SUPREME COURT OF ILLINOIS, THIRD GRAND DIVISION.

APRIL TERM, 1860.

WM. CHURCH

vs.

GEO. W. NOBLE.

} *Error to the Superior Court of Chicago.*

The defendant leased the American House, a public hotel, to defendant at \$5,000 per annum.

In the lease, defendant reserved the right to pull down and rebuild the well-wall covenanting to rebuild the same "as speedily as possible," and "that he shall repair any damage that he may do said premises in taking down said wall as speedily as possible; and shall, in addition, pay to said party of the second part the sum of _____."

This action is brought upon this last covenant, averring he was deprived of the use of thirty rooms in said hotel for the space of six months, by reason of the pulling down and rebuilding said wall, and that said rooms were reasonably worth, for said space of time, the sum of fifteen hundred dollars, which defendant refuses to pay.

The Court sustained a demurrer to this declaration on the ground that that part of the covenant is void for uncertainty.

The action is based upon a construction of the covenant being an undertaking to pay whatever may be the reasonable worth of the use of the rooms rendered untenable by the alteration. This construction finds an *intention*, and gives such reasonable effect as to carry that reasonable intent into effect. It was impossible to fix a gross sum as the value, because, until pulled down, the parties could not tell how many rooms would be rendered useless or untenable; nor could they fix the precise, definite period that they would so remain. It was, therefore, both a natural agreement under the circumstances, and indeed the only one that would both arrive at a just rule of compensation and protect each party against random estimates of value.

Courts never declare contracts void for patent ambiguities or for unmeaning indefiniteness if they can arrive at any fair and reasonable intention and meaning, reading the contract in the light of surrounding circumstances, and first putting themselves in the situation of the parties, and ascertaining their intention as read through those circumstances, as seen from the stand point of the contracting parties at the time of making it.

Now, I ask the Court to take that stand point in this case and take the surrounding circumstances into view, and then say if the true *intent* and meaning is not most patent and unmistakable.

Here we note, then, that the plaintiff rented the whole house for a large rent,—\$5,000 per annum, its full value as a public house.

But, as the adjoining proprietor intends building and defendant wishes to join in building the party-wall, he stipulates for the right to resume possession of so much of the premises as may be necessary to do so.

Then we have the chief object on each side. Plaintiff wished to use the house as a public hotel, and to make money out of such use. Defendant wished to get a fair rent, and yet to embrace the opportunity of putting up a permanent party-wall with the adjoining proprietor.

What could be more business-like and natural than to ask defendant to enter into covenant that he would cause the improvement to be made as speedily as possible? But would any lessee agree to pay full rent, and yet give up the use of a large part of the rooms without any compensation or rebatement of the rent, except upon his proving negligence as to the time or manner of doing the work?

No: no one would expect or believe that the lessee would be content or willing to hazard so large a loss as must be sustained by being deprived of the use of 30 rooms, and that might last, too, for a long space of time, as was the fact, owing to the impossibility of a speedy completion of the improvement on account of incessant rains.

It was, therefore, required that defendant should, as was reasonable, pay, in *addition* to the damage for neglect in doing the work properly and speedily, whatever might be the reasonable worth of the rooms that might be rendered useless by pulling down the wall.

How could this be ascertained? No one could tell how many rooms would be so rendered useless; nor could any one tell how long they would so remain. Under this uncertainty and impossibility of fixing upon the exact amount, the parties agreed upon the next nearest approach to it, and that was, an agreement to pay a fair and reasonable rent or value for the rooms of which he might be actually deprived.

So it was agreed in the language of the covenant sued on. No one could doubt it without resorting to technical sophistry to blot out what the common sense of every man, at first blush, would say was the evident intent and meaning.

This case is very similar in this respect to the case of *Denn ex dem. Jacklin vs. Cart-right*, 4 East. 29. B., on purchasing certain premises from A., agreed to continue C. as tenant, not only for one year, but from year to year.

Afterwards A. and B. reduced the agreement for the purchase to writing, without any provision about C.'s tenancy. It was held that this agreement for C.'s tenancy was good, and might be proved by parol, being collateral to the written agreement.

Held further that the agreement operated as a tenancy for two years certain, though it did not fix the amount of rent to be paid, but which was left to be settled afterwards.

Here the agreement was not held to be void by construction for want of a price being agreed on.

The parties could afterwards agree on a price, or C. would be held to pay what the use of the premises were worth.

So where a deed is silent as to the consideration, parol evidence is admissible to show what the consideration was, or that none was paid.

Davenport vs. Mason, 15 Mass. R. 85, 91-2.
Gerrish vs. Washburn, 9 Pick. R. 340.

Now the rules of construction require that a favorable and liberal construction be put upon the language used, both to ascertain, carry out, and give effect to the intention of the parties.

2 Parsons on Cont. 6 to 11.
 Chit. on Contr. 79.
 Comyn on Cont. 30.

And the Court will, if possible, construe an agreement so that it may have some operation and effect.

Chit. Contr. 80, 84, and note 1.
 Comyn on Cont. 29.
 2 Parsons on Cont. 15-18.

And it will all be viewed and taken together, and by the situation and circumstances surrounding the parties and the property, always taking the terms most strongly against the grantor.

Chitt. on Contr. 83 to 90.
 Comyn on Contr. 30.

Now, these are simple, general rules, and in carrying them into practical effect,—

Thus, "If a party to a contract promise payment, without saying to *whom*, it shall be understood that he promised payment to him from whom the consideration moved."

Chit. on Cont. 75.
Jones vs. Owen, 5 Ad. and Ell. 222.
 See *Banks vs. Campbell*, 9 Brigh. 604.
 Comyn Cont. 31.

So, "If he promise that *quod parceret illum*, it shall be intended that he would forbear the debt, or to sue him."

"If he promise payment *upon Easter-day*, if *A. do not pay the same*, A. has all the day for payment, and, therefore, it shall be intended of a payment afterwards upon request."

"To pay £100 if he marries, and has a son within a year then next following, shall be intended within a year after the marriage, and not after the promise."

Chit. on Cont. 75-6.
 Comyn Dig. "Action upon the case upon Assumpsit," A. 5.
 Comyn on Cont. 31.

"A bond was given with a condition to pay £100 by six equal instalments of £16 13s. 4d., on certain days "until the full sum of *one* pounds should be paid."

Held that the word "hundred" might be supplied.

Chit. Cont. 76.
Waugh vs. Russell, 7 Taunt. R. 707.
 S. C., 1 Marsh. R. 214, 311.

So it has been held, that the word *pounds* might be supplied where that had been omitted, and was necessary to carry out the intention of the parties.

Chit. on Cont. 76.
Coles vs. Hulme, 3 M. and R. Rep. 86.
S. Case, 8 B. and C. R. 568, note a 574,
Cleveland vs. Smith, 2 Story C. C. R. 278.
Ferguson vs. Harwood, 7 Cranch R. 414.
Worthington vs. Hyler, 4 Mass. R. 205.
Butterfield vs. Cooper, 6 Cow. R. 481.
Stebbins vs. Eddy, 4 Mason R. 414.

Thus where a note was intended for *eight hundred dollars*, and was endorsed by the payee for the accommodation of the maker, and by mistake the words "*hundred dollars*" were omitted so that it purported to be a note for *eight* —, the maker without the assent of the endorser inserted the words "*hundred dollars*." Held that the endorser could not object to the insertion of these words, and the question as to the sum intended to be put in was properly submitted to the jury.

Boyd vs. Brotherson, 10 Wend. 93.
 Chit. on Cont. 76.

Where there is so great uncertainty that it cannot be known what is contracted for, it is void for uncertainty. But where there is doubt, the construction must be against the grantor.

Comyn on Cont. 32-3.
 2 *Parson on Cont.* 18-22.

The Court in sustaining the demurrer has annulled the contract or declared that it cannot perceive any intention in the language used.

This conclusion should never be admitted if any meaning can be gathered.

Now here, in previous provisions and covenants, defendants had not only reserved the right to render a part of the premises untenable, but had secured the plaintiff against any injury from an unskillful or dilatory manner in making the alteration in the premises.

But this covenant did not meet the whole injury.

The work might be done both speedily and skillfully and still the plaintiff would be injured by being deprived of the use of a large part of the premises during the making these alterations.

Now this covenant was to provide a compensation for that injury.

Defendant therefore agreed that beside the speedy and skillful making of these alterations and the restoration of the premises—repairing any damages he might do—he would "in addition pay the said party of the second part the sum of —"

Here the intent is clear enough that he would pay in addition to all that had been provided and specified. Pay what? That he would pay the fair value of the premises of which he might be deprived by the alteration, for the time so deprived.

WALTER B. SCATES,
Of Counsel for Plaintiff in Error.

United States of America
State of Illinois Cook County SS

Pleas before the Honorable the
Judges of the Superior Court of Chicago within and
for the County of Cook and State of Illinois at a
regular term of said Superior Court of Chicago begun
and holden at the Court House in the City of Chic-
ago in said County and State on the first Monday
being the second day of April in the year of our
Lord Eighteen hundred and sixty and of the Indepen-
dence of the United States of America the Eighty
Fourth

Present The Honorable John M. Wilson Chief
Justice of the Superior Court of Chicago
Van H. Higgins^{2nd} Grant Goodrich Judges
Carlos Haren Prosecuting Attorney
John Gray Sheriff of Cook County

attest

Walter Kimball Clerk

Be it remembered that ^{heretofore} to wit on the twentieth day of December in the year of our Lord one thousand eight hundred and fifty nine came the Plaintiff to this suit by Scates Mc Allister and Jewett and filed in the office of the Clerk of the Court aforesaid his certain Amended Count to his ^{Declaration} which is in words and figures following to wit:

For that whereas heretofore to wit on the twenty second day of March 1858 at Cook County State of Illinois by a certain indenture then and there made between the said defendant of the one part and the said plaintiff of the other, the said defendant by the name and abbreviation of Geo. W. Noble - and the said plaintiff by the name and abbreviation of Wm Church - a duplicate of which said indenture sealed with the seals of the said parties the said plaintiff now brings here into Court, the date whereof is a certain day and year therein mentioned to wit the day and year aforesaid the said defendant did demise & lease unto the said plaintiff a certain mesuage & dwelling house tenements & premises with the appurtenances particularly mentioned and described in the said indenture, situate in the City of Chicago and known and described as the "American House" and situate on the North West corner of Lake Street and Wabash Avenue together with all the outhouses connected therewith and the

lots of ground on which the same are situated and also the frame building in the rear of said American House - to have and to hold the same mesuages and premises, dwelling house and tenements with the appurtenances unto the said plaintiff his Executors and administrators from the first day of April Eighteen Hundred and fifty eight for, and during & until the first day of April 1859 fully to be completed and ended.

The said plaintiff yielding and paying therefor the sum of Five Thousand and four hundred dollars payable in monthly payments of Four Hundred and fifty eight $33\frac{1}{3}$ Dollars at the end of each month at the office of said defendant in Chicago - and that he will further pay all assessments for water rents & rates.

And after reciting therein to the effect "And it is further expressly understood and agreed by and between the parties hereto that said party of the first part, the said defendant herein may at any time during the term hereby created take down or cause to be taken down the West Wall of said premises for the purposes of rebuilding the same, provided that he shall cause the same to be rebuilt as speedily as possible and that in rebuilding said wall he may construct the same of such dimensions and thickness as he shall deem expedient and either in whole or in part upon said demised premises as he shall judge most for his interest" The said defendant

covenanted and agreed in substance, and to the effect
 "that he shall repair any damage that he may do said
 premises in taking down said wall as speedily as
 possible:- and shall in addition pay the said party
 of the second part (the said plaintiff the sum of

and
 said plaintiff avers that he entered and took possession
 of the said premises under the said indenture of
 lease, & had and held the same for a long space of
 time - to wit for the space of six months then next
 ensuing the date of said lease -

And the plaintiff further avers that after the
 making of the said indenture and said covenants
 by the said defendant - and after the said plain-
 tiff so entered & took possession thereof under the said
 indenture, to wit, on the first day of April 1858 - the
 said defendant by his servants, and employees en-
 tered and took possession of so much of the said premises as
 was necessary to the taking down and rebuilding the
 said West Wall of the said demised premises and
 the said plaintiff avers that the said defendant did
 then & there commence taking down said West Wall
 and did then and there take down the same for the
 purpose of rebuilding the same in connection with
 the owner of the adjoining lot as a party wall -
 and said plaintiff avers that the said defendant was
 engaged for a long time in taking down, and rebuild-
 ing the same to wit for the space of six months

then ^{next} following - and the said plaintiff further avers that during all the said time the said plaintiff was deprived of the use of divers to wit thirty rooms in the said premises of great value, to wit, of the value of Fifteen Hundred Dollars, during said time, by reason of the same being opened exposed & rendered unsafe and unfit to be occupied & used as a hotel during the taking down & rebuilding said west wall - and the said plaintiff further avers that the use of the said rooms during the said time &c was worth the said sum of Fifteen Hundred Dollars - and the said plaintiff deserves to have of & from the said defendant the said sum of Fifteen Hundred Dollars therefor under the provisions of the said Covenant of the said defendant in this behalf as hereinbefore recited and alleged - of all which the said defendant then, & there had notice.

And although the said plaintiff hath kept all things in the said indenture on his part to be kept, & performed, from the date of said indenture hitherto, yet the said plaintiff in fact saith, that the said defendant did not nor would during the continuance of the said demise and his possession of the said premises for the purpose of taking down the west wall, & rebuilding the same - nor at any other time since hitherto pay to the said plaintiff the said sum of Fifteen Hundred Dollars, or any part or portion of the same, or any other sum of money whatsoever for and on account of the

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taking down the said west wall & rebuilding the same according to the tenor and effect true intent and meaning of his said covenant in that behalf in the said indenture mentioned to wit at the county aforesaid.

And so the said plaintiff in fact saith that he the said defendant although after requested so to do - hath not kept the said covenant by him made as aforesaid - but hath broken the same & to keep the same with the said plaintiff hath hitherto wholly neglected & refused to the damage of the said plaintiff of Fifteen Hundred Dollars, & therefore he brings his suit.

Scales Mc Allister & Jewett

Attorneys for Plaintiff

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Copy of Instrument upon which suit is brought

This Indenture made this twenty second day of March A.D. 1858 between George W. Noble of the City of Chicago in the County of Cook and State of Illinois party of the first part and William Church of the same place party of the second part, Witnesseth -

That said party of the first part for and in consideration of the covenants agreements and conditions hereinafter mentioned to be kept and performed by the said party of the second part, his executors, administrators and assigns, has demised & leased to the said party of the second part all those premises situate - lying and being in the City of Chicago known & described as the "American House" situate on the north west corner of Lake Street and Wabash Avenue, together with all the outhouses connected therewith & the lots and grounds on which the same are situated and also the frame building in the rear of said "American House" being the same premises now occupied by said party of the second part: To have and to hold the said premises unto the said party of the second part his executors & administrators, from the first day of April in the year of our Lord One Thousand Eight Hundred and Fifty Eight for and during and until the first day of April in the year One Thousand Eight Hundred and Fifty Nine. And the said party of the second part in consideration of the leasing of the premises afore

said by the said party of the first to the said party of the second part, does covenant and agree with the said party of the first part his heirs, executors, administrators and assigns to pay the said party of the first part as rent for said demised premises the sum of five thousand five hundred dollars, payable in monthly payments of four hundred and fifty eight dollars and thirty three one third cents each, at the end of each month during said term at the office of said party of the first part in Chicago. And also does covenant and agree to and with said party of the first part his heirs executors, administrators and assigns that he will cause all the furniture and personal property in said "American House" to be insured in some safe and responsible insurance company to the satisfaction of said party of the first part for the sum of not less than five thousand five hundred dollars and that he will cause the policy of said insurance when obtained to be assigned to said party of the first part and to be delivered to him so assigned as security for the payment of said rent. And that he will at all times during the continuance of this lease keep said insurance good and valid, and in the event of a renewal of this lease as hereinafter provided, that he will keep said property insured as aforesaid and the policy thereof assigned as aforesaid during the whole period of said renewal. And the said party of the second part

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further covenants with the said party of the first part that at the expiration of the time in this lease mentioned (unless this lease shall be renewed as hereinafter provided) he will yield up said demised premises to the said party of the first part his heirs or assigns, in as good condition as when the same were entered upon by said party of the second part, less by fire or inevitable accident and ordinary ^{wear} excepted, and in the event of its being renewed as hereinafter provided that then he shall so as aforesaid yield up said premises at the expiration of said renewal term

And the said party of the second part doth in consideration as aforesaid covenant with the said party of the first part that he will pay or cause to be paid promptly as soon as the same comes due each and every assessment for water rents or rates that may be levied upon said demised premises, or any part thereof during the continuance of this lease by the board of Water Commissioners of the City of Chicago, or any other constituted authority and that in case of default in the payment of any water rent or rate levied upon said premises during said term that he will pay unto the said party of the first part as liquidated damages for such breach of covenant double the sum of such rent so assessed upon said premises aforesaid and he doth further covenant in consideration as aforesaid with the said party

of the first part that he will not, and this lease is made upon the express condition that he shall not underlet said premises or any part thereof, or assign this lease without the written assent of said party of the first part, first had and obtained thereto. And it is expressly understood by and between the parties hereto, that said party of the second part is to take said houses & said premises as they are and that any and all repairs and alterations (if any are made) shall be at his said party of the second part's sole cost, charge and expense. And the said party of the first part doth covenant and agree to and with the said party of the second part that he will extend this lease for a period of one year from said first day of April A.D. 1859 at a rent of six thousand Dollars payable monthly in payments of five hundred dollars each, provided that said party of the second part shall give him ^{written} notice of his intention & desire to have the same so extended at least sixty days (60) before the said first day of April 1859 and shall at the time of giving him such notice pay to him the sum of five hundred dollars as and for a bonus for such extension - said sum of five hundred dollars being paid exclusively as such bonus, and entirely independent of the rent reserved & to be paid for said premises. And provided further that said party of the second shall at once on being applied to sign a

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written extension of this lease for such period, ^{which} extension shall provide that it is made subject to all the provisions, covenants, and conditions of this lease except as to the amount of rent agreed to be paid and as to said renewal clause.

And it is further expressly understood & agreed by & between the parties hereto that said party of the first part may at any time during the term hereby created take down or cause to be taken down the West Wall of said premises for the purpose of rebuilding the same (provided that he shall cause the same to be rebuilt as speedily as possible) and that in rebuilding said wall he may construct the same of such dimensions & thickness as he shall deem expedient & either in whole or in part upon said demised premises, as he shall judge most for his interest. But that he shall repair any damage that he may do said premises in taking down said wall as speedily as possible and shall in addition pay to said party of the second part the sum of

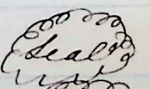
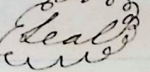
And it is further expressly understood & agreed by & between the parties hereto, that if the rent herein reserved or any part thereof shall be behind or unpaid on the day of payment whereon the same ought to be paid as aforesaid, or if default shall be made in any of the covenants herein contained to be kept by the said party of the second part his heirs, executors, administrators or assigns, it shall

and may be lawful for said party of the first part his heirs, executors, administrators, agent, attorney or assigns at his or their election to declare said term ended and into the said demised premises or any part thereof either with or without process of law to re-enter, and the said party of the second part, or any person or persons occupying in or upon the same to expel, remove & put out, using such force as may be necessary in so doing & the said premises again to re-possess and enjoy, as in his first & former estate, & to distrain for any rent that may be due thereon upon any property belonging to said party of the second part, whether the same be exempt from execution or distress by law or not and the said party of the second part in that case hereby agreed to waive & does waive all legal right which he may have to hold or retain any such property under any exemption laws now in force in this state or in any other way - meaning & intending hereby to give to said party of the first part his heirs, executors, administrators & assigns a valid & first lien upon any & all the goods, chattels & property belonging to said party of the second part as security for the payment of said rent in manner aforesaid, anything herein before contained to the contrary notwithstanding - and if at any time said term shall be ended at such election of said party of the first part his heirs, executors

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administrators, or assigns as aforesaid or in any other way the said party of the second part his executors administrators & assigns do hereby covenant and agree to surrender and deliver up said above described premises & property peaceably to said party of the first part his heirs, executors, administrators or assigns immediately upon the determination of said term as aforesaid and if they or he shall remain in possession of the same two days after notice of such default, or after the termination of this lease, in any of the ways above named, they shall be deemed guilty of a forcible detainer of said premises under the statute, & shall be subject to all the conditions & provisions above named & to eviction and removal forcibly or otherwise with or without process of law as above stated

In Witness whereof said parties of the first and second part have hereunto set their hands and seals the day and year first above written

Geo W Noble 
Wm Church 

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cravesayer of the said averring mentioned in the
Amended Count of Plaintiffs Declaration and the
same is read to him in the words and figures following
to wit (same as instrument sued on) which being read
and heard said Defendant

And afterwards to wit on the second day of April in
the year of our Lord One Thousand Eight Hundred
and Sixty came Geo. W. Noble by his attorneys and
filed in the office of the Clerk of the Court
aforesaid his certain Demurrer to Amended Count
of Plaintiff which ^{is} in words and figures following
to wit:

William Church

vs

Geo. W. Noble

In Superior Court of Chicago
Cook County, Illinois. as of
March Term A.D. 1860.

Demurrer to the Amended
Count of Plaintiffs Declaration.

And now comes the said Defendant and [#]says
that the Amended Count to Plaintiffs Declaration
above filed is not sufficient in law to entitle Plff.
to maintain his action aforesaid against Defen-
dant and he the Defendant is not bound by law
to answer the same. And this he is ready to verify
wherefore by reason of the insufficiency of said
Amended Count Defendant prays judgment &c.

By his Attornies

Scammon, Mc Cagg & Fuller

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And afterwards to wit on the ninth day of April A.D. Eighteen Hundred and Sixty- said day being one of the days of the April Term of the Superior Court of Ohio ago the following among other proceedings was had and entered of record in said Court to wit:

William Church

vs

Geo. W. Noble

This day comes said plaintiff by Scates Mc Allister and Jewett his attorneys and said Defendant by Scammon Mc Cagg and Fuller his attorneys also comes and Counsel being heard on Defendant Demurres herein pleaded in bar to plaintiffs amended declaration filed in this cause and due deliberation being thereupon had and the premises being fully understood it appears to the Court that the demurres herein pleaded in bar to plaintiffs Amended Declaration in this cause is sufficient in law to bar said plaintiff from having and maintaining his action against said defendant the demurres is therefore sustained and it is considered that defendant have judgment on his Demurres. Therefore it is considered that said defendant do have and receive of said plaintiff his costs and charges about his demurres in this behalf expended and have execution therefor

State of Illinois }
Cook County } ss

I Walter Kimball Clerk of
the Superior Court of Chicago within and for the
said County in the State aforesaid do hereby certify
that the foregoing is a true copy of certain amended
count. Demurrer and judgment on Demur-
er in a certain cause wherein William Church
is Plaintiff and Geo. W. Noble is defendant.



Witness my hand and the seal
of said Court at the City of Chic-
ago this 23rd day of April A.D.
1860 Walter Kimball Clerk

Supreme Court

April Term 1860

William Church }
vs

George W Noble

And now before the justices of the
Supreme Court at Ottawa comes the said
William Church by Scates McAllister & Jewett
his attorneys and says that in the record and
proceedings aforesaid and in giving the judg-
ment aforesaid there is manifest error
in this that it appears that the said
declaration was sufficient for the said
Plaintiff to have and maintain his action
aforesaid and the said Court erred
in sustaining the defendants demurrer ther-
to, and that the judgment aforesaid
should have been given for the Plff
Wherefore for the errors aforesaid and other
errors in the record & proceedings aforesaid
the said William Church prays that
the said judgment be reversed &c
Scates McAllister & Jewett
Attys for Plff

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Wm Church

S. M. Noble

Recd April 24. 1860
L. L. Leland
Clerk

Two \$4.⁰⁰ paid