

amount demanded in damages, or the value of the thing in controversy, and must be considered broad enough to embrace this case.

Two witnesses were called as experts on the question of the heifer's breed, and another upon the heifer's age, as determined by the shedding of teeth. They all testified as to their knowledge and experience upon the subject; and the question of the qualifications of the witnesses to testify upon the subjects to which they were called was wholly for the referee, and his ruling admitting or excluding the evidence is not subject to revision here. *Dole v. Johnson*, 50 N. H. 452; *Goodwin v. Scott*, ante 112.

*Judgment on the report for the plaintiff.*

STANLEY, J., did not sit: the others concurred.

CROCKER v. HILL.

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168	11
61	345
71	424

The intention of the parties, found upon competent evidence, governs the construction of a written lease.

A lessor covenanted to make all necessary repairs upon the outside of the buildings upon the demised premises upon notice to him; and there were mutual covenants that, if the buildings should be destroyed or made untenable by fire, either party might terminate the lease upon notice to the other. Upon the destruction of the buildings during the term, and a demand by the lessee upon the lessor to rebuild them, and a refusal to rebuild in a reasonable time, neither party giving notice to terminate the lease, the lessee is liable for the damages in an action of covenant broken.

ACTION. for breach of the covenants of a lease. April 13, 1873, the defendant leased to the plaintiff the Phoenix hotel in Concord, with the northerly half of the stable and other outbuildings connected therewith, for the term of two years and eight months, and covenanted to make all necessary repairs on the outside of the buildings upon notice to him. The plaintiff covenanted that he would make all necessary inside repairs, keeping them in as good repair as they then were, and leaving them in as good condition at the end of the term, unavoidable casualties excepted. There were mutual covenants, that if the buildings should be destroyed or be made untenable by fire, the term should cease if either party should so elect and notify the other. The plaintiff occupied the premises, except the stable, to the end of the term, paying the stipulated rent, which was a percentage of the gross receipts. The stable was consumed by fire in May, 1873, after which time the

plaintiff did not occupy it. Soon after the fire he notified the defendant to rebuild the stable. The defendant did not rebuild the stable in a reasonable time, which is found to be six and a half months from the time of the fire. He rebuilt it so as to be fit for use by July, 1875, and thereafter occupied it himself, or by a tenant. He never offered it to the plaintiff, and the plaintiff, after notice to rebuild, made no request for it. The plaintiff was given no opportunity to finish the inside of the stable. The defendant excluded the plaintiff from the stable, understanding that he did not want it. The plaintiff assented to the defendant's occupation of the stable, after it was rebuilt, understanding that he could not have it himself. He would have occupied the stable had opportunity been given, and it had been rebuilt in a reasonable time. A referee found that the defendant was bound by the terms of the lease to rebuild the stable for the plaintiff's use in a reasonable time, and that a failure to do so was a breach of the covenant. Damages were assessed for the estimated profits of the stable from the time it should have been rebuilt at \$1,104, less what it would have cost the plaintiff to have finished the inside, \$654, making the sum awarded \$450. The plaintiff claims there should be no deduction on account of the expense of finishing the inside.

*Pike & Parsons* (with whom were *Page & Norris* and *Sanborn & Clark*), for the plaintiff.

*J. Y. Muiridge* and *Chase & Streeter*, for the defendant.

ALLEN, J. By an ancient rule of construction, the defendant's covenant to make all necessary repairs on the outside of the buildings, without express exception of loss by fire or other unavoidable casualty, required him to construct the outside of the stable in place of the one destroyed in a reasonable time after notice. *Earl of Chesterfield v. Bolton*, Comyns 627; *Bullock v. Dommitt*, 6 T. R. 650; *Brecknock v. Pritchard*, 6 T. R. 750; *Green v. Bales*, 2 Q. B. 225; *Myers v. Burns*, 35 N. Y. 269; *Leavitt v. Fletcher*, 10 Allen 121; *Wood Landlord and Tenant* 599, 600. So far as this rule of construction can be regarded as a mere arbitrary and technical mode of interpretation, it has become relaxed, as working injustice and unnecessary hardship in many cases, and does not prevail. In the construction of the covenants of a lease, as of other written instruments, the intention of the parties, to be gathered from the instrument itself, from their situation, and from the subject-matter of the contract, must control. *Houghton v. Pattee*, 58 N. H. 326; *Morse v. Morse*, 58 N. H. 391; *Corwin v. Hood*, 58 N. H. 401; *Brown v. Bartlett*, 58 N. H. 511.

The defendant's covenant to make repairs was general and unqualified, and did not expressly exclude an agreement to restore the buildings in case of destruction by fire or other unavoidable

casualty. In the absence of such an exception, the provision for a notice to terminate the lease in case of a loss of the buildings by fire exhibits an intention to rebuild if the notice were not given. No notice to terminate the lease was given by either party. The plaintiff's demand for repairs according to the terms of the lease, and his continued occupancy of the remaining buildings after the fire, show an intention to continue the lease. Occupancy of the stable by the defendant, and continued occupancy of the other buildings by the plaintiff, in the absence of an agreement to that effect, show an exclusion of the plaintiff from a part of the leased premises. Having made a covenant, which required him to rebuild the stable within a reasonable time after the fire, and which he did not perform, and having failed to excuse himself for non-performance by giving the plaintiff seasonable notice to quit the premises, the defendant is liable for the damages occasioned by his breach of the covenant. The defendant cannot complain of the hardship imposed upon him of repairing a loss for which he was not responsible and in no fault; for it was a hardship assumed by himself in his covenant, and against which he might have contracted, or from the burden of which he might have escaped by giving the notice provided for to terminate the lease. *Walton v. Waterhouse*, 2 Saund. 422, note; *Dermott v. Jones*, 2 Wall. 1, 7, 8.

The damages for the breach of the covenant to make necessary repairs was the actual loss to the plaintiff by reason of the breach. He is entitled to recover such a sum as will place him in as good a position as he would have been in if the defendant had performed his covenant. *Smeed v. Foord*, 1 E. & B. 602; *Alder v. Keighley*, 15 M. & W. 117; *Dunlop v. Higgins*, 1 H. L. 381; *Robinson v. Harman*, 1 Exch. 855; *Mack v. Patchin*, 42 N. Y. 167; *Hexter v. Knox*, 63 N. Y. 561. The defendant would have performed his covenant if he had constructed the outside of the stable for the plaintiff's use in a reasonable time. The plaintiff's loss for being deprived of the use of the stable for the remainder of the term is found to be \$1,104. This loss did not all arise from the breach of the defendant's covenant. Had he performed the covenant, the plaintiff could not have enjoyed the use of the building, nor received profit from it, without first reasonably finishing the inside at an outlay of \$654. Though the defendant gave him no opportunity to do this, the performance of the defendant's covenant by finishing the outside of the building would have left the plaintiff in no position to enjoy the benefits of the stable until he should first incur the expense of finishing the inside. The position the plaintiff would have had by the performance of the defendant's covenant measures the limit of the plaintiff's loss by non-performance, and that was the total loss from deprivation of occupancy, diminished by the expense of doing what was necessary to occupancy, and what the plaintiff had covenanted to do, namely, to

finish the inside. Making this deduction, there remains \$450 as the plaintiff's actual loss arising from the defendant's breach of covenant; and for that sum and interest there must be

*Judgment for the plaintiff.*

STANLEY, SMITH, and BLODGETT, JJ., did not sit: the others concurred.

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KIMBALL v. FARNUM.

When personal chattels are sold to remain the vendor's until paid for, and time is given for payment, which is extended on the understanding that the vendee may acquire a full title by subsequently completing payment, the vendee's possession of the property is lawful, and the vendor cannot reclaim it, nor maintain replevin without first having made demand for it.

REPLEVIN, of a portable steam-engine, boiler, and fixtures. Defence; denial of the plaintiff's title, and title in the defendant. The plaintiff's father owning the property, then in the possession of the defendant, sold it to him with the condition that the property was to remain the vendor's until paid for, and if not paid for in one year, the vendor should have the right to repossess himself of it. Payment not being made in a year, the time was extended with an understanding that the defendant might pay when he could. Part payment was made, and in a few months the vendor demanded the balance, but did not demand the property, nor give notice of an intention to enforce forfeiture. About the same time the vendor sold the property, or his interest in it, to the plaintiff. No delivery of the property was made, and the plaintiff received no possession of it until it was delivered to him by the officer, who took it on the replevin writ. The plaintiff notified the defendant that he could have the property by paying the balance due upon it, also a claim of the vendor's and another claim of his own against the defendant, who said nothing in reply. The defendant paid to the plaintiff a part of the sum due upon the property, and at a later day was ready and offered to pay the remainder, which the plaintiff would not receive unless the amount of the other two claims was paid. The plaintiff made no demand upon the defendant for the property. The referee found no conversion of the property, no forfeiture of the defendant's claim, and no unlawful detention, and assessed damages.

*N. Butler*, for the plaintiff. Both the vendor and his assignee the plaintiff had the property and the right of possession, and the