

**Lutz Vs. Linthicum**

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**Court :** US Supreme Court

**Decided On :** 1834

**Appeal No. :** 33 U.S. 165

**Appellant :** Lutz

**Respondent :** Linthicum

**Judgement :**

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**Lutz v. Linthicum**

**33 U.S. (8 Pet.) 165**

*ERROR RO THE CIRCUIT COURT OF THE UNITED STATES FOR*

*THE COUNTY OF WASHINGTON IN THE DISTRICT OF COLUMBIA*

## **SYLLABUS**

In the Circuit Court of the County of Washington, Linthicum instituted an action of covenant on articles of agreement by which Lutz covenanted that Linthicum should have peaceable possession of a certain house in Georgetown, and retain and

keep the same for five years. Linthicum was evicted by Lutz before the time expired. The articles were spread upon record, by which it appeared, that they were made "by and between John Lutz, of, &c.;, and agent for John McPherson of Fredericktown in the State of Maryland of the one part and Otho M. Linthicum of Georgetown, &c.;, of the other part," and it is witnessed, "that the said John Lutz ,agent as aforesaid, has rented and leased," &c.;, the premises to Linthicum, and on the other hand Linthicum covenants to pay the rent, &c.;

as stated in the declaration. There was no covenant in the lease by Lutz for quiet enjoyment as stated in the declaration, but the latter was founded upon

the covenant implied by law in case of demises. The articles concluded with these words:

"In witness whereof, we, the said John Lutz and O. M. Linthicum, have hereunto interchangeably set our hands and seals, day and date above. "

John Lutz agent for John M. Pherson [L.S.] O. M. Linthicum [L.S.].

The defendant Lutz pleaded performance without praying oyez, and issue was joined. Afterwards, the parties, by consent, agreed to refer the cause, and accordingly, by a rule of court it was ordered

"That William S. Nicholls and Francis Dodge be appointed referees between the parties aforesaid, with liberty to choose a third person, and that they or any two of them, when the whole matter concerning the premises between the parties aforesaid in variance, being fairly adjusted, have their award in writing under their hands, and return the same to the court here, and judgment of the court to be rendered according to such award, and be final between the said parties."

The referees so named, on 28 January, 1833, chose John Kurtz the third referee, and afterwards, on the same day, made their award in the following words:

"We, the subscribers, appointed arbitrators to settle a dispute between Otho M. Linthicum and John Lutz in which the executors of the late John McPherson of Frederick are interested, do award the sum of \$1,129.93, to be paid to the said

Linthicum in full for all expenses and damages sustained by him in consequence of not leaving him in quiet possession of the house at the corner of Bridge and High Streets, in Georgetown (the demised premises) for the full term of the lease for five years. Any arrear of rent due from Linthicum, to be paid by him."

Signed by all the referees. Judgment was given by the circuit court for the full amount of the award so made and costs.

The articles purport to be made by Lutz and to be sealed by him, and not to be made and sealed by his principal. The description of himself as agent does not under such circumstances exclude his personal responsibility. But this very liability was necessarily submitted to the referees, and came within the scope of their award.

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It was objected to the award that it was uncertain, not mutual and final; that it does not state whether the money is to be paid by Lutz or the executors of McPherson; that it does not find the arrears of rent due, and to whom due: that it does not appear to be an award in the cause; that the award and the proceedings thereon are not according to the laws of Maryland; that the appointment of the third referee ought not to have been made until after the other two referees had met and heard the cause and disagreed thereon. The court held all these objections invalid.

Without question, due notice should be given to the parties of the time and place for hearing the cause by the referees, and if the award was made without such notice, it ought, upon the plainest principles of justice, to be set aside. But it is by no means necessary that it should appear upon the face of the award that such notice was given. There is no statute of Maryland, whose laws govern in this part of the district, which requires such facts to be set forth in the award. If no notice is in fact given, and no due hearing had, the proper mode is to bring such facts, not appearing, on the face of the award, before the court upon affidavit and motion to set aside the award. But *prima facie*, the award is to be taken to have been regularly made where there is nothing on its face to impeach it.

The statute of Maryland requires that notice of an award shall be given to the party against whom it is made by service of a copy three days before judgment is moved, and judgment is not to be entered but on motion and direction of the court. It was alleged that a copy of the award was not delivered.

By the Court:

"How that may have been we have no means of knowing, for nothing appears upon the record respecting it, and there is no ground to say that it ought to constitute any part of the record or that it is properly assignable as error. It is a matter purely collateral and *in pais*. If no such copy had been delivered, the proper remedy would have been to take the objection in the court below upon the motion for judgment, or to set aside the judgment for irregularity if there had been no waiver or no opportunity to make the objections before judgment. But in the present case, sufficient does appear upon the record to show that the party had full opportunity to avail himself of all his legal rights in the court below. The cause was referred at November term, 1832, pending the term, to-wit, on 18 January, 1833, the award was filed in court; the cause was then continued until the next term, *viz.*, the fourth Monday in March, 1833, at which time the parties appeared by their attorneys, and upon motion and after argument of counsel, judgment was entered. We are bound to presume, in the absence of all evidence to the contrary, that all things were rightfully and regularly done by the court and that the parties were fully heard upon all the matters properly in judgment."

In the circuit court, Otho M. Linthicum, the defendant in error, instituted an action of covenant on a certain lease or article of agreement by which the defendant, John Lutz, demised to him a certain brick house in Georgetown for a term of five years at a rent specified in the same. Under this lease,

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the plaintiff, Linthicum, held possession of the premises according to the covenants in the said lease and made certain repairs. The declaration avers that before the end of the term for which the premises were so leased to the said

Linthicum, the defendant, John Lutz, evicted and dispossessed him from the premises, whereby he lost the benefit of the repairs done to the same, and claims damages for the breach of the covenants in the lease and for eviction, amounting to \$2,000.

The lease upon which the action was instituted was in the following terms:

"Articles of agreement made and concluded this 22 October in the year of our Lord 1828 by and between John Lutz, of Georgetown, in the District of Columbia, and agent for John McPherson, of Fredericktown, in the State of Maryland, of the one part, and Otho M. Linthicum, of Georgetown, and district aforesaid, of the other part, witnesseth that the said John Lutz, agent as aforesaid, has rented or leased to the said O. M. Linthicum all that brick house, with the appurtenances thereto belonging, situated on the corner of High and Bridge Streets in Georgetown aforesaid, with the alley thereto attached, of thirteen feet six inches, fronting on Bridge Street and running parallel with said house, now in possession and occupied by Jacob Carter, Jr., as a dry goods store, to have and to hold said house, and receive peaceable possession on 3 May next ensuing and continue for the space of five years from said time, which will terminate on 3 May, 1834. And the said O. M. Linthicum, on his part, doth hereby covenant and agree for himself, his heirs and assigns to pay to the said John Lutz, agent as aforesaid, or his successor the just and full sum of \$250 for each and every year for the aforesaid term of five years, the rent to be paid half yearly as the same may become due, and all repairs that may be done by the said O. M. Linthicum for his own convenience to be at his own expense, and any repairs done by him to be left on the premises as relates to the house; but in case he should erect a warehouse on the vacant ground, shall have the privilege to remove the same at his will and pleasure within said time and to leave the house in as good condition at the end of said term as when he gets possession, the usual wear and tear excepted. "

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"In witness whereof we, the said John Lutz and O. M. Linthicum, have hereunto interchangeably set our hands and seals, day and date above. JOHN LUTZ, Agent

for J. McPherson [L.S.]. O. M. LINTHICUM [L.S.]."

"Signed, sealed and delivered in presence of James Gettys, John White."

The defendant, John Lutz, pleaded performance, and afterwards the following agreement of reference was entered into by the counsel for the parties in the case. The record contains the following entries relative to the further proceedings in the case.

"Whereupon it is ruled by the court here that the said William S. Nicholls and Francis Dodge, gentlemen, be appointed referees between the parties aforesaid, with liberty to choose a third person, and that they or any two of them, when the whole matter concerning the premises between the parties aforesaid in variance being fairly adjusted, have their award in writing, under their hands, and return the same to the court here, and judgment of the court to be rendered according to such award and be final between the said parties, and afterwards, to-wit on 28 January, 1833, the said William S. Nicholls and Francis Dodge file in court here the following certificate appointing John Kurtz, with themselves, the referees in the premises, to-wit: "

"We certify that, pursuant to the terms of reference, in the case of Otho M. Linthicum v. John Lutz, and before proceeding to act therein or make any award, we, the referees, did nominate and appoint John Kurtz, whose name is subscribed to the within award, the third referee to act, together with ourselves, in deciding the controversy between the parties, and submitted to us. W. S. NICHOLLS. FRANCIS DODGE."

"And on the same day, the referees file in court here their award in manner and form following, to-wit: "

"We, the subscribers, appointed arbitrators to settle a dispute between Otho M. Linthicum and John Lutz, in which the executors of the late John McPherson, of Frederick, are interested, do award the sum of \$1,129.93 to be paid to the said Linthicum in full for all expenses and damages sustained by him in consequence

of not leaving him in quiet possession of the house at the corner of Bridge and High Streets, Georgetown, for the full term of the lease for five years -- any arrear of rent due from Linthicum to be paid by him. W. S. NICHOLLS. J. KURTZ. FRANCIS DODGE."

The circuit court gave judgment for the plaintiff on the award, and the defendant prosecuted this writ of error.

MR. JUSTICE STORY delivered the opinion of the Court.

The original suit was an action of covenant, brought by Linthicum against Lutz upon certain articles of agreement made between Lutz on the one part and Linthicum on the other part on 22 October, 1828. The declaration, after reciting that Lutz, by these articles, leased certain premises in Georgetown to Linthicum for five years from 3 May then next ensuing, and a covenant on the part of Linthicum to pay therefor an annual rent of \$250, the rent to be paid half-yearly, averred that, by the articles of agreement, Lutz bound himself to Linthicum that the latter should have peaceable possession of the premises and retain and keep the same for the said five years; that Linthicum entered into possession of the premises and held the same until 3 November, 1832, when Lutz evicted and dispossessed him, &c.; The articles are spread upon the record, by which it appears, that they were made

"by and between John Lutz of, &c.;, and agent for John McPherson of Fredericktown in the State of Maryland, of the one part, and Otho M. Linthicum of Georgetown, &c.;, of the other part."

And it is witnessed, "that the said John Lutz agent, as aforesaid,

has rented and leased, &c.;" the premises to Linthicum, and on the other hand, Linthicum covenants to pay the rent, &c., as stated in the declaration. But there is no covenant in the lease by Lutz for quiet enjoyment, as stated in the declaration; but the latter is founded upon the covenant implied by law, in cases of demises. The articles conclude with these words.

"In witness whereof, we, the said John Lutz and O. M. Linthicum, have hereunto interchangeably set our hands and seals, day and date above. John Lutz, agent for John McPherson [L.S.]. O. M. Linthicum [L.S.]."

The defendant, Lutz, without praying oyer of the articles (without which they could not constitute a part of the declaration), pleaded general performance of the covenants, upon which an issue was joined to the country. Afterwards, the parties, by consent, agreed to refer the cause, and accordingly, by a rule of court, it was ordered

"That William S. Nicholls and Francis Dodge be appointed referees between the parties aforesaid, with liberty to choose a third person, and that they, or any two of them, when the whole matter concerning the premises between the parties aforesaid in variance being fairly adjusted, have their award in writing under their hands, and return the same to the court here, and judgment of the court to be rendered according to such award and be final between the said parties."

The referees so named, on 28 January, 1833, chose John Kurtz the third referee, and afterwards, on the same day, made their award in the following words.

"We, the subscribers, appointed arbitrators to settle a dispute between Otho M. Linthicum and John Lutz, in which the executors of the late John McPherson of Frederick are interested, do award the sum of \$1,129.93, to be paid to the said Linthicum in full for all expenses and damages sustained by him in consequence of not leaving him in quiet possession of the house at the corner of Bridge and High Streets in Georgetown (the demised premises) for the full term of the lease for five years. Any arrear of rent due from Linthicum to be paid by him."

Signed by all the referees. Judgment was given by the circuit court for the full amount of the award so made and costs, and the present writ of error is brought to revise that judgment.

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The question whether the articles of agreement personally bound Lutz is not presented by the pleading in such a manner as that there might not be difficulty in deciding it if it constituted the only point in judgment. But if this difficulty were surmounted and the articles are to be deemed properly before us, we do not see how they can well be construed not to import a personal liability on the part of Lutz for the want of any obligations contained in them. The articles purport to be made by Lutz and to be sealed by him, and not to be made and sealed by his principal. The description of himself as agent does not, under such circumstances, exclude his personal responsibility. But this very liability was necessarily submitted to the referees and came within the scope of their award.

Several objections have been taken to the award. In the first place, it is said that the award is uncertain and not mutual and final; that it does not state by whom the money awarded is to be paid, whether by Lutz, or by the executors of McPherson; and that it does not find the arrears of the rent due, and to whom due; and that it does not appear to be an award made in this cause. We are of opinion that these objections are ill founded. The award is sufficiently shown to be an award in this cause, for no other cause directly appears to have been pending or in dispute between the parties, and the subject matter of this very suit is directly within the terms of the award. The award being made in this suit, and applicable in its terms to it, it is sufficiently certain that the money is to be paid by Lutz, for there is no other person on the record to whom it can be judicially awarded to be paid. The award is also mutual and final as to all the matters referred. It is not a general arbitration at the common law, of all matters in dispute between the parties, but a specific reference of the matters in dispute in the cause pending in court, under a rule of court. Now those matters were the damages and losses claimed by Linthicum, for the breach of the covenant, and the sum awarded is expressly

declared to be "in full, for all expenses and damages" so sustained. As to the arrears of the rent due from Linthicum, they constituted no part of the matters submitted. They were not in controversy in the suit. And the statement in the award as to any arrears of rent was

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merely an exclusion of a conclusion which might possibly have been drawn that the referees had deducted such arrears in making their award. It is therefore very properly stated that any arrears of rent due by Linthicum are, notwithstanding the award, to be paid by him.

Another objection is that the submission, the appointment of the third referee, the award itself, and the proceedings thereon have not been according to the acts of assembly of Maryland and to the order of the court. It is said that the appointment of the third referee ought not to have been made until after the two other referees had met and heard the cause and disagreed thereon, but we are of a different opinion. The submission under the rule of court did not contemplate the third referee to be a mere umpire in the case upon a difference of opinion of the other two, but an original referee, to be chosen by the other two, and when chosen to constitute a part of the board authorized to hear and decide the cause. How otherwise are we to understand the language of the rule? "They [that is, the three] or any two of them are to have their award in writing," &c., which words plainly contemplate the case of a hearing by all of them, and if the case were one in which an umpire was to be chosen, there is no impropriety, and on the contrary it has been thought that there is great propriety, in selecting the umpire before the other arbitrators have disagreed. This doctrine has been repeatedly held in England, \* and it was affirmed in the Court of Appeals of Maryland in *Rigden v. Martin*, 6 Harris & John. 403. It is so reasonable in itself that if the point were new, it would be difficult to displace it.

Then again it is said that no notice appears to have been given to Lutz of the appointment of the third referee or of the making or returning the award, and that these acts appear all to have been done on the same day. There is certainly no

objection to these acts' being done on the same day, if the parties had due notice and a due hearing before the referees and the award was made upon due deliberation. Without question, due notice should be given to the parties of

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the time and place for hearing the cause, and if the award was made without such notice, it ought, upon the plainest principles of justice, to be set aside. But it is by no means necessary that it should appear upon the face of the award that such notice was given. There is no statute of Maryland (whose laws govern in this part of the district) which requires such facts to be set forth in the award. The Act of 1779, ch. 21, sec. 8, merely authorizes submissions by a rule of court of causes pending in the court, and the act of 1785, ch. 80, sec. 11, provides only for cases where either of the parties dies pending the submission, and before the award. If no notice is in fact given and no due hearing had, the proper mode is to bring such facts (not appearing on the face of the award) before the court upon affidavit and motion to set aside the award. But *prima facie* the award is to be taken to have been regularly made where there is nothing on its face to impeach it. This very objection was made and overruled in *Rigden v. Martin*, 6 Harr. & Johns. 403.

Another objection is that the same Act of Maryland of 1785, ch. 80, sec. 11, requires that in all cases of awards made under a rule of court, the party in whose favor the award is made shall cause a copy thereof to be delivered to the adverse party or his attorney at least three days before judgment is moved for upon the award, and the clerk of the court is not to enter judgment upon any award without a motion to and direction from the court, and the court shall always have satisfactory proof that a copy of the award hath been so delivered before judgment shall be so directed to be entered, and it is said that there has not been a compliance with this requisite by a delivery of the copy. How that may have been we have no means of knowing, for nothing appears upon the record respecting it, and there is no ground to say that it ought to constitute any part of the record or that it is properly assignable as error. It is matter purely collateral and *in pais*. If no such copy had been delivered, the proper remedy would have been to take the objection in the court below upon the motion for judgment or to set aside the

judgment for irregularity if there had been no waiver or no opportunity to make the objections before judgment. But in the present case, sufficient does appear upon the record to show that the party had full opportunity

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to avail himself of all his legal rights in the court below. The cause was referred at November term, 1832; pending the term, to-wit on 18 January, 1833, the award was filed in court; the cause was then continued until the next term, viz., the fourth Monday in March, 1833, at which time the parties appeared by their attorneys, and upon motion, and after argument of counsel, judgment was entered. We are bound to presume, in the absence of all evidence to the contrary, that all things were rightfully and regularly done by the court and that the parties were fully heard upon all the matters properly in judgment.

Upon the whole, our opinion is that the judgment of the circuit court ought to be

*Affirmed.*

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia holden in and for the County of Washington and was argued by counsel, on consideration whereof it is ordered and adjudged by this Court that the judgment of the said circuit court in this cause be and the same is hereby affirmed with costs and damages at the rate of six percentum per annum.

\* See Watson on Awards, ch. 4, sec. 2, 56 to 58; Kyd on Awards 82 to 88, 2d edition; *Doe v. Doe*, 2 Term 644; *Harding v. Watts*, 15 East 556.