

MATTHEWS *v.* POWERS.

4-8815

218 S. W. 2d 378

Opinion delivered March 21, 1949.

TRIAL—ACTION ON MOTION—QUESTIONS FOR JURY.—Where complaint stated a cause of action in unlawful detainer the plaintiffs were entitled to a jury trial. A motion of the defendants to dismiss should have been treated as a demurrer to the complaint, and, as such, overruled. It was error to hear testimony affecting merits of the controversy when the cause had not been set for trial.

Appeal from Pulaski Circuit Court, Second Division;
Jackson A. Weas, Judge; reversed.

Floyd Terral, for appellant.

G. W. Shepherd, for appellee.

GRIFFIN SMITH, Chief Justice. Archie and Essie Matthews, acting through their attorney, Floyd Terral, brought suit in unlawful detainer October 18, 1948, the statutory notice for three days having been served October 12. Pope's Digest, § 6035. Bond was executed, after which the defendant Powers continued to occupy the premises under a retaining bond.

October 20th Powers moved to dismiss the cause, asserting that after receipt of the notice and before expiration of the three-day period, an offer was made to pay the rent.

October 22d the Court, while endeavoring to ascertain the facts upon which the defense was based, allowed witnesses to testify. The plaintiffs objected to a procedure thought by Mr. Terral to be irregular and prejudicial, and when overruled he declined to participate further in the hearing.

Since the case had not been set for trial, the motion to dismiss should have been treated as a demurrer to the complaint, and as such overruled. A cause of action was stated and the plaintiffs were entitled to a jury trial. In the judgment the Court found "as a matter of fact" that Powers tendered all rents that were due. The record does not justify a determination that appellants waived a jury.

Reversed.
