

Bender Vs. Fromberger

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Appeal No. : 4 U.S. 441

Appellant : Bender

Respondent : Fromberger

Judgement :

BENDER v. FROMBERGER - 4 U.S. 441 (1806)

U.S. Supreme Court BENDER v. FROMBERGER, 4 U.S. 441 (1806)

4 U.S. 441 (Dall.)

BENDER

v.

FROMBERGER

Supreme Court of Pennsylvania.

December Term, 1806

THE case now came before the court, on the point submitted by the verdict; and this turned upon the question, whether in an action of covenant, founded upon a deed, in which the grantor covenants, that he has a good title to the land conveyed, the grantee, being evicted, is entitled to recover the price of the

premises

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at the date of the deed, or the improved value, at the time of the eviction? For the plaintiff, it was contended, that the measure of damages, on all covenants, is the amount of the loss actually sustained, and though it would seem from the old books, that, in cases of warranty, the recovery is to be according to the value of the land, at the time of the warranty; it was a recovery, in those cases, of land only, and not (as in this case) of money for damages. This position was illustrated and supported by an elaborate argument, and these authorities: 2 Bl. C. 299, 300. 304. 22 Vin. 145, 146. 'Vouchee.' 3 Bl. C. 156. 1 Bac. Abr. 526. 3 Woodes. 91. 2. 1 Ld. Raym. 107. 2 Ld. Raym. 1126. T. Raym. 77. 30 Ed. 3. 14. 6. 19 H. 6. 45. 6. 19 H. 6. 61. Sayre on Dam. 3, 4, 5, 6. 2 Caines 111. New-York. Bay's Rep. 18. 263. South Carolina. For the defendant, it was taken as conceded ground, that on a warranty, strictly speaking, the value of the land, at the date of the warranty, could alone be recovered, according to the law of England; and, it was contended, that there was no legal, or equitable, distinction between that case, and the general case of covenant, further than the enlargement of the remedy; which was limited, by the former, to a recovery in land; but, by the latter, the personal estate, also, becomes liable. 2 Bl. C. 304. Godb. 152. Johns. N. Y. Rep. 379. The opinion of the court, upon great consideration, was delivered, at an adjourned session, on the 17th of January 1807. The chief justice, after stating the facts, proceeded in the following terms:

TILGHMAN, Chief Justice. The question submitted to us by the jury, has never been decided in this court. It is of importance, and has been well argued. It may be taken for granted, that on a strict warranty, where the remedy for the party who loses the lands, is either by voucher, or writ of warrantia chartae, the recovery is only according to the value of the land at the time the warranty was created. This is conceded by the plaintiff's counsel, and very properly; for, many authorities were cited directly to the point. But this kind of warranty, which is a covenant real, has long ceased, and has been succeeded by the covenants personal, introduced into modern conveyances. The latter have two advantages: the remedy by action of

covenant is more easy in its form, and more comprehensive in its effects; for, it extends to the personal property of the warrantor in the hands of his executors; whereas the ancient recovery, in value, was confined to land. I know of no case in England, where it has been decided, whether a recovery in an action of covenant, could be carried so far as to include damages, for improvements made after the purchase; but, I must suppose, that Sir William Blackstone was of opinion, that such damages could

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not be included, otherwise he ought certainly to have mentioned it, when he was comparing the ancient warranty with the modern covenants, which, he says, have superseded them. His expressions are these: 'If he covenants for his executors and administrators, his personal assets, as well as his real, are pledged for the performance of the covenant, which makes such covenant a better security than any warranty, and it has, therefore, in modern practice, totally superseded the other.' A general warranty, is as comprehensive in its expressions, as any words made use of in modern covenants. It undertakes to defend the land to the warrantee, his heirs and assigns, against all persons whatever. It is in its nature a covenant real; and since the recovery on it extended no farther than the value of the land, at the time of the warranty made, the inference is very strong, that in these personal covenants, which have succeeded to it, the extension shall be no greater. But the plaintiff's counsel contend, that the reason why the recovery in value, on the ancient warranty, was confined to the value, at the time of its creation, is, because in real actions no damages can be recovered. This reason is unsound. The value, at the time of the voucher, might have been recovered, without recovering damages; and this is evident, from some of the cases which have been cited; particularly, the case of *Ballet v. Ballet*; where it is decided, that in a *warrantia chartae*, if there be new buildings, of which the warranty is demanded, which were not at the time of the warranty made, the defendant must take care to shew the special matter, and enter into the warranty, only for so much as was at the time of the making of the deed, otherwise the plaintiff will recover, according to the value, at the time of entering into the warranty. The true reason,

therefore, appears to be, that the intention of the parties was so understood, that the warranty should be limited to the value of the land, at the time of executing the deed.

The plaintiff's counsel cited a case from 22 Vin. Ab. 145. pl. 5. in order to prove, that upon the implied warranty, which arises on an exchange of land, the recovery in value, after eviction, is according to the actual loss sustained. As this seemed to be at variance with the general principles of warranty, I have examined it since the argument of the cause, and find that the case was not properly explained. The words of the abridgment are as follow: 'If a man recovers in value upon a warranty in law, on an exchange, he shall have in value, according to the value which he has lost.' In support of this, the case of Bustard, 4 Coke 121. is cited. In the first place, it is to be remarked, that in the marginal note to pl. 6. in the same page of Viner, it is said, that the same case is reported in Croke Elizabeth, Moore, and Yelverton, in neither of which is such point mentioned; and it is certain, from my Lord Coke's report, that the decision must have been extra-judicial; for Bustard's case turned on a different point.

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Bustard, being evicted of the land received by him in exchange, entered upon that which he had given in exchange, by virtue of the implied condition in law, which is annexed to an exchange; and a re-entry was made on him; in consequence of which he brought an action of trespass; and whether he could recover in that action, was the question: so that the court had nothing to do with the value of the land. But according to my Lord Coke's account of it, what they did decide concerning the value, is not applicable to the point now before the court. The decision is, -that if A. who has received three acres in exchange, is impleaded for one acre, and vouches B. from whom he received them, and then the demandant recovers the one acre, A. shall recover in value from B. according to the loss, that is one acre; but not a word is said concerning the time, to which the value of this acre is to relate. And that is the only question now under consideration.

It has been contended, that the true measure of damages in all actions of covenant, is the loss actually sustained. But this rule is laid down too generally. In an action of covenant for non-payment of money, on a bond, or mortgage, no more than the principal and legal interest of the debt can be recovered, although the plaintiff may have suffered to a much greater amount by the default of payment. The rule contended for by the plaintiff's counsel, in its utmost latitude, applied to covenants like the present, would, in many instances, produce excessive mischief. Indeed, the counsel have, in some measure, given up this rule, by confessing, that when buildings of magnificence are erected to gratify the luxury of the wealthy, it would be unreasonable to give damages to the extent of the loss; but the ruinous consequences would not be less to many persons, who have sold lands, on which no other than useful buildings have been erected. The rise in the value of land, not only in towns on the sea coast, but in the interior part of the United States, is such, that it can hardly be supposed any prudent man would undertake to answer the incalculable damages, which might overwhelm his family, under the construction contended for by the plaintiff. I have taken pains to ascertain the opinion of lawyers in this state, prior to the American revolution, and I think myself warranted in asserting, from the information I have received, that the prevailing opinion, among the most eminent counsel, was, that the standard of damages, was the value of the land at the time of making the contract. The title of land rests as much within the knowledge of the purchaser as the seller; it depends upon writings, which both parties have an equal opportunity of examining. If the seller makes use of any fraud, concealment, or artifice, to mislead the purchaser in examining the title, the case is different, he will then be answerable for all losses which may ensue.

Cases have been cited from the civil law; but I throw them out of view, because this case can be decided only on the principles of the common law.

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Cases have, also, been cited from law reports, in the states of South- Carolina and New-York. Though they are not authority in this Court, yet we shall always be happy to receive information of the opinions of the learned judges, in our sister

states, and always treat them with due respect. Upon the point now in question, it seems there is a difference of opinion. In South-Carolina it has been held, that the plaintiff is entitled to recover, according to the value at the time of the action: In New-York, that he can only recover according to the value at the time of the contract. On these cases I will only remark, that the opinions of the judges in South-Carolina, having been given during the hurry of a jury trial, do not appear to have been founded on such mature deliberation as those of the New-York judges, who made their decision in the Supreme Court, sitting in bank.

Upon the whole, I am of opinion, that by the true construction of the covenants in the case before us, the plaintiff is not entitled to recover the value of the improvements made by him, after he purchased of John Fromberger, and, therefore, that judgment be entered for 2979 dollars 14 cents, and costs. I am authorised to say, that judge Yeates, whose absence is occasioned by sickness, concurs in this opinion.

SMITH, Justice. The question now to be decided by this Court is of great importance. I understand that it has long been discussed among the most eminent counsel in Pennsylvania, and opinions have been given by some of them; but that it never has received a judicial decision. I believe, on inquiry, that it never came before any Court in Pennsylvania, until the 24th of May 1804, when it came before the Circuit Court, holden for the county of Northumberland, by judge Brackenridge and myself, in the case of William Bonham v. John Walker's a lministrator. We said that 'it is an important question, and it is proper that it should receive a solemn decision in bank; we therefore propose, that the measure of damages should be left to the jury, on each of these grounds, which is done accordingly.' The jury found 'a verdict for the plaintiff, for 1092 dollars 17 cents damages, on the ground of the original purchase money; and on the ground of the value of the land at the time of the execution, (eviction) 1602 dollars 21 cents.'

After my return, I was induced to make diligent inquiry, whether the point had ever been decided, and what had been the general opinion of eminent counsel on it, and the result was that expressed by the chief justice. Upon a very attentive

perusal of the cases on the subject; the notes of which, taken by me then, and annexed to that case, are now before me; they did not, in my opinion, warrant me in drawing a different conclusion; but I saw difficulties, whether the question was decided one way or the other, which made me anxious to hear it deliberately argued: ready to

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alter my opinion, if I should discover, that it was not well founded; or if the opposite opinion should be supported by law, be more conducive to the general interest, and be more agreeable generally to the intentions of the parties to such contracts.

I have heard it very well argued. If the very well arranged and able argument of the ingenious young gentleman who began (Mr. Sergeant) has not been able to shake the opinion which I had formed, I am induced to believe that it is well founded, on solid principles of law. I must, therefore, adhere to it upon the present occasion; it not being suggested that there was any fraud or concealment on the part of the vendor, nor any knowledge when he sold, of any defect in his title. Had any of these circumstances occurred, I should be of opinion, that he would be liable to the amount of the loss.

Although the vendor, on a covenant like that in question, be liable to damages only to the value at the time of the deed; yet, he may enter into such a special express covenant, as will make him liable to the value at the time of eviction, and so much will the vendee on such event be intitled to. In the present case I agree, that judgment be entered for the plaintiff for 2979 dollars 14 cents.

BRACKENRIDGE, Justice.

I concur in the decision of the other judges, for the reasons which have been assigned.

Judgment to be entered in favour of the plaintiff, for 2979 dollars 14 cents, and costs.

Lewis, Rawle, and J. Sergeant, for the plaintiff.

M'Kean (Attorney-General) and Ingersoll, for the defendant.

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