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Simonton Vs. Winter and Bowman

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Court : US Supreme Court

Decided On : 1831

Appeal No. : 30 U.S. 141

Appellant : Simonton

Respondent : Winter and Bowman

Judgement :

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Simonton v. Winter and Bowman

30 U.S. (5 Pet.) 141

ERROR TO THE CIRCUIT COURT OF THE COUNTY

OF WASHINGTON IN THE DISTRICT OF COLUMBIA

SYLLABUS

Action of covenant on a charter party by which the owners of the brig *James Monroe* let and hired her to the plaintiff in error for a certain time, the money

payable for the hire of the vessel to be paid at certain periods and under circumstances stated in the charter party. After some time, and after the vessel had earned a sum of money, while in the employment of the charterer, she was lost by the perils of the sea. The declaration set out the covenants and averred performance on the part of the plaintiffs, and that the sum of $2,734.17 was due and unpaid upon the charter party. The defendant pleaded that he had paid to the plaintiffs all and every such sums of money as were become due and payable from him, according to the true intent and meaning of the articles of agreement. On the trial of the issue upon this plea, the court, at the request of the plaintiffs, instructed the jury that the plea did not impose any obligation on the plaintiff to prove any averment in the declaration, but that the whole *onus probandi* under the plea was upon the defendant to prove the payment stated in the same, as the plea admitted the demand as stated in the declaration. *Held* that there was no issue properly joined. The breach assigned in the declaration is special, the nonpayment of a certain sum of money for particular and specified services alleged to have been rendered. The plea alleges generally that the defendant had paid all that was ever due and payable according to the tenor of the agreement, and not all of the specified sum. This does not meet the allegations in the declaration or amount to an admission that the vessel had earned the sum demanded, and there was error in the court in instructing the jury that the plaintiffs were not bound to prove the allegations in the declaration.

The general rule of pleading is that when an issue is properly joined, he who asserts the affirmative must prove it, and if the defendant by his plea confesses and avoids the count, he admits the facts stated in the count.

An issue is a single, certain, and material point arising out of the allegations or pleadings of the parties, and generally should be made up by an affirmative and negative.

If matter is not well pleaded and is no answer to the breach assigned in the declaration, it cannot be considered an admission of the cause of action stated in the declaration.

It is laid down in the books that although the object of the action of covenant is the recovery of a money demand, the distinction between the terms damages and money *in numero* must be attended to.

In the circuit court, the defendants in error, the plaintiffs below, instituted an action of covenant on a charter party

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dated July 15, 1820, at Bath, Maine, by which they, the plaintiffs, let and hired to the defendant the brig *James Monroe* to proceed from Bath to Havana, thence to Mobile and elsewhere, as Simonton should direct, the dangers of the seas excepted, for the term of twelve months, from 7 July. The plaintiffs covenanted to keep the brig in good order and well victualled during the said term, the dangers of the seas excepted. The defendant, on his part, covenanted, *inter alia,* to pay to the plaintiff for the hire of the brig, $425 each and every month during the said term, in manner following, to-wit, $600 on the arrival of the brig at Havana, and then $600 from time to time, as often as the charter of the brig should amount to that sum; that is to say, when the brig should have earned $600 at the rate of the charter party, it was to be paid in Spanish dollars in the United States or in good and approved bills, &c.;

The declaration, after setting out the covenants and averring performance on the part of the plaintiffs, &c.;, in the usual form, avers that the brig was taken into service by defendant, on the said 7 July, 1820, sailed on the 16th from Bath to Havana, where she arrived, and continued under the control and in the employment of defendant, under said charter party, till 20 January then next ensuing, when, in the prosecution of a voyage under the direction of defendant, she was totally lost by the perils of the sea; that the brig, at the time of her loss, had earned the sum of $2,334.17 for her hire and affreightment from 7 July, 1820, to 20 January, 1821, at the monthly rate stipulated by the charter party. The refusal of the defendant to pay this sum or any part in any of the modes of payment stipulated in the charter party is the breach of covenant complained of.

The defendant pleaded four several pleas, upon the first of which issue was joined, and there was on this plea a trial and verdict, and judgment for the plaintiffs on the same. The plaintiffs demurred to the remaining pleas, and judgment was given for them. The first plea, after craving oyer of the charter party, which was granted, set forth that the plaintiffs ought not to have or maintain their action aforesaid against

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him, because he says that the said defendant hath paid to the said plaintiffs all and every such sums of money as were become due and payable from the said defendant, according to the tenor and effect, true intent, and meaning of the said articles of agreement, and of this he puts himself on the country, &c.;

The question presented to the court on the record of the proceedings of the court below on the trial of this issue is contained in a bill of exceptions taken by the counsel for the defendant.

The bill of exceptions, after stating certain matters of fact which were admitted to prove and did prove the payment of $210, by John W. Simonton to the agent of the plaintiffs, and for their use, proceeds to say:

"And the plaintiffs without giving evidence to the jury, prayed the court to instruct the jury as follows:"

" The plaintiffs insist before the jury, under the issue of fact joined in this cause, that the plea is no traverse of any averment in the declaration, necessary to establish the primary obligation to pay what is therein demanded, nor imposes on the plaintiffs any necessity in supporting the issue on their part above joined, to prove any averment in their declaration; but that the whole *onus probandi* under the affirmative plea of payment is on the defendant to prove such payment as he has allege. And the plaintiffs pray the court to instruct the jury accordingly."

"Which instruction the court gave, being of opinion, and so expressing it to the jury, that upon the issue joined in this case, and which the jury had been sworn to try,

the defendant had assumed upon himself the burden of proving that he had paid the hire of said vessel for the time stated in the declaration, at the rate of four hundred and $25 per month, to which instruction the defendant, by his counsel, excepted,"

&c.;

The second plea of the defendant alleged

"That the plaintiffs did not on their part keep and perform their covenants in the charter party; that the brig did not pursue the voyage and voyages ordered and appointed for her by the defendant, and did not carry on the legal trade on which the defendant employed her, but without sufficient cause deviated therefrom on 27 November, 1820, while under the control of the defendant

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under the charter party, omitted to proceed from Port au Prince to Crooked Island as ordered, and in violation of the agreement proceeded to the Havana against the orders of the defendant, by which great expense was sustained, and the voyage in which the brig was engaged was greatly delayed and defeated; and afterwards during the charter party, the brig, against the will of the defendant, sailed from Crooked Island to Rag Island, instead of to Mobile, where she was destined according to orders, whereby the voyage to Mobile was defeated, and that 20 January, 1821, the brig was wholly lost by shipwreck, and a cargo on board, of the value of $10,000, was wholly lost and destroyed. Wherefore, &c.;"

The third plea alleges

"That while the brig was lawfully subject to the orders of the defendant, she was dispatched in a lawful trade from Port au Prince to Crooked Island, and under such orders sailed on 27 November, 1820, on that voyage, and according to the tenor and effect of the agreement, it was the duty of the captain and crew of the brig, acting on behalf of the plaintiffs, to have carried the brig to Crooked Island; yet the captain and crew, in violation of the orders of the defendant, carried the vessel to

the Havana, to the great injury of the defendant, whereby the covenants in the charter party were wholly broken by the plaintiffs. Wherefore,"

&c.;

The fourth plea stated

"That on 30 December, 1830, the brig *James Monroe* was at Crooked Island for the purpose of taking on board a cargo of salt for the defendant, to carry the same from thence direct to Mobile, and the defendant, relying on the faithful performance of their duty by the captain and crew, caused insurance to be effected on the cargo of salt from Crooked Island to Mobile; yet the captain and crew, well knowing the same, did deviate from the voyage to Mobile without lawful authority or excuse, and proceeded from Crooked Island to Rag Island, in consequence of which, and after the said deviation, the brig and cargo were wholly lost by shipwreck on 20 January, 1821, and the policy of insurance became wholly void and of no effect; and the defendant thereby sustained damages to the amount of $10,000, whereby he became discharged from all further

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payments under the charter party and from the performance of any of the agreements contained in the charter party. Wherefore,"

&c.;

The defendant in the circuit court prosecuted this writ of error.

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MR. JUSTICE THOMPSON delivered the opinion of the Court.

The action is covenant on a charter party dated 15 July, 1820, by which the plaintiffs in the court below let and hired to the defendant the brig *James Monroe,* to proceed from Bath, in the State of Maine, to Havana, thence to Mobile, or elsewhere as the defendant might direct, for the term of twelve months from the

7th day of the said month of July, at and after the rate of $425 per month. And the plaintiffs covenanted on their part that the brig should be

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tight, stiff, staunch, and strong, well victualled and manned at their expense, during that period (the dangers of the seas excepted). And the defendant, on his part, covenanted among other things to pay to the plaintiffs for the hire of the brig, $425 each and every month during the said term, in manner following: to-wit, $600 on the arrival of the brig at Havana; and then $600 from time to time, as often as the charter of the brig should amount to that sum -- that is to say, when the said brig earns $600, at the rate of the charter party, to be paid in Spanish dollars in the United States, or in good and approved bills.

The declaration, after setting out the covenants covering performance on the part of the plaintiffs, &c.;, in the usual form, avers that the brig was taken into service by the defendant on the said 7 July, 1820, and sailed on the 16th of the same month from Bath to Havana, where she arrived and continued under the control and in the employment of the defendant, under said charter party, till 20 January then next, when in the prosecution of a voyage under the direction of the defendant she was totally lost by the perils of the sea. That the brig at the time of her loss had earned the sum of $2,734.17, for her hire and affreightment from 7 July, 1820, to 29 January, 1821, which sum or any part thereof, the defendant had refused to pay in any of the modes stipulated in the charter party.

The defendant pleaded four several pleas. The first of which, and the only one upon which issue is taken, is as follows:

"And the said John W. Simonton, by his attorneys, comes and defends the wrong and injury when, &c.;, and craves oyer of the said articles of agreement of charter party in the said declaration mentioned, and they are read to him in these words, &c.;, which being read and heard, the defendant says, as to the said breach of covenant in the said declaration assigned, that the said plaintiffs ought not to have or maintain their action aforesaid against him, because he says that the said

defendant hath paid to the said plaintiffs all and every such sums of money as were become due and payable from the said defendant, according to the tenor and effect, true intent and

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meaning, of the said articles of agreement, and of this he puts himself upon the country,"

&c.;

The plaintiffs demurred to the three other pleas, upon which the court gave judgment for them.

The question now to be decided arises upon a bill of exceptions taken at the trial.

It was admitted on the part of the plaintiffs that the defendant had paid $210 on account of the charter party, and thereupon, without giving any evidence, the plaintiffs prayed the court to instruct the jury as follows:

The plaintiffs insist before the jury, under the issue of fact joined in this cause, that the plea is no traverse of any averment in the declaration, necessary to establish the primary obligation to pay what is therein demanded, nor imposes on the plaintiffs any necessity in supporting the issue on their part above joined, to prove any averment in their declaration, but that the whole *onus probandi,* under the affirmative plea of payment, is on the defendant to prove such payment as he has alleged, and the plaintiffs pray the court to instruct the jury accordingly, which instruction the court gave, being of opinion, and so expressing it to the jury, that upon the issue joined in this case, the defendant had assumed upon himself the burden of proving that he had paid the hire of said vessel for the time stated in the declaration, at the rate of $425 per month. To which instruction the defendant excepted.

The only question arising upon this bill of exceptions is whether the defendant by his plea has admitted the caused of action as alleged in the declaration, so as to dispense with any proof on the part of the plaintiffs to establish such cause of

action. The instruction given by the court to the jury was that the defendant had, by his plea of payment, admitted the demand of the plaintiffs as stated in the declaration. The general rule undoubtedly is that when an issue is properly joined, he who asserts the affirmative must prove it, and if the defendant by his plea confesses and avoids the count, he admits the facts stated in the count. But these rules do not apply to this case. The answer of the defendant is not to the allegation in the declaration. There is no issue properly joined. The plea must not only be adapted to the nature and

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form of the action, but must also be conformable to the count. An issue is a single, certain, and material point, arising out of the allegations or pleadings of the parties, and generally should be made up by an affirmative and negative; the breach assigned in this declaration is special; the nonpayment of a certain sum of money, for particular and specified services, alleged to have been rendered. If the plea had been payment of the sums of money demanded in the declaration, it would confess and avoid the count, and the affirmative would rest upon the defendant to prove payment. But the plea, instead of alleging payment of the sum demanded in the declaration, alleges generally that the defendant had paid all such sums of money as were become due and payable from the defendant, according to the tenor and effect, true intent and meaning, of the said articles of agreement. This does not meet the allegation or breach in the declaration, or amount to an admission that the brig had earned the sum demanded, so as to dispense with the necessity of the plaintiff's proving it. The plea is certainly bad. It amounts to a general plea of performance, when the declaration contains an assignment of a particular breach. This cannot be done. The defendant was bound to meet the allegation of the particular breach. Issue cannot be taken on a general plea of performance, and the plaintiff, if driven to reply, would be obliged to repeat his declaration. When a particular breach is assigned, the defendant has an affirmative offered upon which he may take issue. 2 Johns. 413. Archbold's Plead. 233, and cases there cited.

If this matter is not well pleaded and is no answer to the breach assigned in the declaration, it cannot be considered an admission of the cause of action stated in the declaration. Suppose the plaintiff had demurred to this plea, and the court had given judgment for him upon the demurrer; a jury would have been necessary to assess the damages. The court could not have given judgment for the damages claimed in the declaration. Nor would the plea be evidence upon which the jury could assess the damages. This would be treating that as an admission of the demand, which the court had said was no answer to the allegation in the declaration. The plea being considered a nullity, the case would stand as if no plea had been put in, and the plaintiffs would be bound to prove their

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cause of action. Or if the plaintiff, instead of going to trial, had treated the plea as no answer to the declaration, and taken judgment as by *nil dicit,* the damages must have been assessed by a jury, and the plaintiffs would have been bound to prove their cause of action. This general plea of payment of all that was due amounts to no more than averring that nothing was due. Had the action been upon a bond or other instrument for the payment of money, the instrument itself would show what was due. But this is an action of covenant sounding in damages, and such damages depend upon matter *dehors* the instrument declared on, and must be ascertained by proof *aliunde.* It is laid down in the books, that although the object of the action of covenant is the recovery of a money demanded, the distinction between the terms, damages, and money in numero, is material to be attended to. Chitty's Plead. 113.

The court therefore erred in the instruction given to the jury that it was not necessary for the plaintiffs to prove any of the averments in their declaration.

It is not deemed necessary to express any definitive opinion upon the validity of the pleas to which the plaintiffs have demurred. It may not be amiss, however, to intimate that had it become material to decide those points, it is probable the judgment of the court below, upon the demurrers, would be sustained.

The judgment of the circuit court must be

Reversed and the cause remanded with directions to issue a venire facias de novo.

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 considered, ordered, and adjudged by this Court, that the judgment of the said circuit court in this cause be, and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said circuit court with directions to award a *venire facias de novo.*

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