Dermott Vs. Jones

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Court : US Supreme Court

Decided On : 1864

Appeal No. : 69 U.S. 1

Appellant : Dermott

Respondent : Jones

Judgement :

Dermott v. Jones - 69 U.S. 1 (1864)
U.S. Supreme Court Dermott v. Jones, 69 U.S. 2 Wall. 1 1 (1864)

Dermott v. Jones

69 U.S. (2 Wall.) 1

ERROR TO THE FEDERAL COURT

FOR THE DISTRICT OF COLUMBIA

SYLLABUS

1. Performance of a contract to build a house for another on the soil of such person, and that the work shall be executed, finished, and ready for use and occupation and be delivered over so finished and ready to the owner of the soil at

a day named, is not excused by the fact that there was a latent defect in the soil in consequence of which the walls sank and cracked, and the house, having become uninhabitable and dangerous, had to be partially taken down and rebuilt on artificial foundations.

2. While a special contract remains executory, the plaintiff must sue upon it. When it has been fully executed according to its terms, and nothing remains to be done but the payment of the price, he may sue either on it or in *indebitatus assumpsit,* relying, in this last case, upon the common counts; and in either case the contract will determine the rights of the parties.

3. When he has been guilty of fraud or has willfully abandoned the work, leaving it unfinished, he cannot recover in any form of action. Where he has in good faith fulfilled, but not in the manner nor within the time prescribed by the contract, and the other party has sanctioned or accepted the work, he may recover upon the common counts in *indebitatus assumpsit.*

4. He must produce the contract upon the trial, and it will be applied as far as it can be traced; but if, by fault of the defendant, the cost of the work or material has been increased, insofar the jury will be warranted in departing from the contract prices. In such case, the defendant is entitled to recoup for the damages he may have sustained by the plaintiff's deviations from the contract, not induced by himself, both as to the manner and time of the performance.

Jones, *a mason and housebuilder,* contracted with Miss Dermott to build a house for her, *the soil on which the house was to be built being her own.* The house was to be built

according to very detailed plans and specifications, which *the "architect" of Miss Dermott had prepared* and which were made part of the contract. In the contract, Jones covenanted that he would procure and supply all matters requisite for the execution of the work

"in all its parts and details, *and for the complete finish and fitting for use and occupation of all the houses and buildings, and the several apartments of the house and buildings, to be erected pursuant to the plan of the work described and specified in the said schedule,* and that the work, and the several parts and parcels thereof, shall be executed, finished, *and ready for use and occupation,* and be delivered over, *so finished and ready,* "

at a day fixed. Jones built the house according to the specifications, except insofar as Miss Dermott had compelled him -- according to his account of things -- to deviate from them. Owing, however, to a latent defect in the soil, the foundation sank, the building became badly cracked, uninhabitable, and so dangerous to passersby that Miss Dermott was compelled to take it down, to renew the foundation with artificial "floats," and to rebuild that part of the structure which had given way. *This she did at a large expense.* As finished on the artificial foundations, the building was perfect.

Jones having sued Miss Dermott in the Federal Court for the District of Columbia, for the price of building, her counsel asked the court to charge that she was entitled to "recoup" the amount which it was necessary for her to expend in order to render the cracked part of the house fit for use and occupation according to the plan and specifications, an instruction which the court refused to give. The court considered, apparently, that even under the covenant made by Jones and above recited, he was not responsible for injury resulting from inherent defects in the ground, the same having been Miss Dermott's own; and judgment went accordingly. Error was taken here. Some other questions were presented in the course of the trial below, and referred to here, as, for example, how far, when a special contract has been made, a plaintiff must sue upon *it?* how far he may recover in a case where, as was said to have been the fact

here, the plaintiff had abandoned his work, leaving it unfinished? how far "acceptance" -- when such acceptance consisted only in a party's treating as her own a house built on her ground -- waives nonfulfillment, there being no bad faith

in the matter? and some questions of a kindred kind. The most important question in the case, however, was the refusal of the court to charge, as requested, in regard to the "recoupment," and the correctness of that refusal rested upon the effect of Jones' covenant to deliver, fit for use and occupation, in connection with the latent defect of soil upon which the foundation was built.

Page 69 U. S. 7

MR. JUSTICE SWAYNE delivered the opinion of the Court:

The defendant in error insists that all the work he was required to do is set forth in the specifications, and that, having fulfilled his contract in a workmanlike manner, he is not responsible for defects arising from a cause of which he was ignorant, and which he had no agency in producing.

Without examining the soundness of this proposition, it is sufficient to say that such is not the state of the case. The specifications and the instrument to which they are annexed constitute the contract. They make a common context, and must be construed together. In that instrument the defendant in error made a covenant. [Footnote 1] That covenant it was his duty to fulfill, and he was bound to do whatever was necessary to its performance. Against the hardship of the case he might have guarded by a provision in the contract. Not having done so, it is not in the power of this Court to relieve him. He did not make that part of the building "fit for use and occupation." It could not be occupied with safety to the lives of the inmates. It is a well settled rule of law that if a party by his contract charge himself with an obligation possible to be performed, he must make it good unless its performance is rendered impossible by the act of God, the law or the other party. Unforeseen difficulties, however great, will not excuse him. [Footnote 2]

Page 69 U. S. 8

The application of this principle to the class of cases to which the one under consideration belongs is equally well settled. If a tenant agree to repair and the tenement be burned down, he is bound to rebuild. [Footnote 3] A company

agreed to build a bridge in a substantial manner, and to keep it in repair for a certain time. A flood carried it away. It was held that the company was bound to rebuild. [Footnote 4] A person contracted to build a house upon the land of another. Before it was completed, it was destroyed by fire. It was held that he was not thereby excused from the performance of his contract. [Footnote 5] A party contracted to erect and complete a building on a certain lot. By reason of a latent defect in soil, the building fell down before it was completed. It was held (*School Trustees v. Bennett,* [Footnote 6] a case in New Jersey, cited by counsel) that the loss must be borne by the contractor. The analogies between the case last cited and the one under consideration are very striking. There is scarcely a remark in the judgment of the court in that case that does not apply here. Under such circumstances, equity cannot interpose. [Footnote 7]

The principle which controlled the decision of the cases referred to rests upon a solid foundation of reason and justice. It regards the sanctity of contracts. It requires parties to do what they have agreed to do. If unexpected impediments lie in the way and a loss must ensue, it leaves the loss where the contract places it. If the parties have made no provision for a dispensation, the rule of law gives none. It does not allow a contract fairly made to be annulled, and it does not permit to be interpolated what the parties themselves have not stipulated.

We are of opinion that the plaintiff below was entitled to recover, but that the court, in denying to the defendant the right of recoupment, committed an error which is fatal to the judgment.

We might here terminate our examination of the case, but as it will doubtless be tried again -- and the record presents several other points to which our attention has been directed -- we deem it proper to express our views upon such of them as seem to be material.

While a special contract remains executory, the plaintiff must sue upon it. When it has been fully executed according to its terms and nothing remains to be done but

the payment of the price, he may sue on the contract or in *indebitatus assumpsit* and rely upon the common counts. In either case, the contract will determine the rights of the parties.

When he has been guilty of fraud or has willfully abandoned the work, leaving it unfinished, he cannot recover in any form of action. Where he has in good faith fulfilled, but not in the manner or not within the time prescribed by the contract, and the other party has sanctioned or accepted the work, he may recover upon the common counts in *indebitatus assumpsit.*

He must produce the contract upon the trial and it will be applied as far as it can be traced, but if, by the fault of the defendant, the cost of the work or materials has been increased, insofar the jury will be warranted in departing from the contract prices. In such cases, the defendant is entitled to recoup for the damages he may have sustained by the plaintiff's deviations from the contract not induced by himself both as to the manner and time of the performance.

There is great conflict and confusion in the authorities upon this subject. The propositions we have laid down are reasonable and just, and they are sustained by a preponderance of the best considered adjudications. [Footnote 8]

Judgment reversed and the cause remanded for further proceedings in conformity with this opinion.

[Footnote 1]

See supra, p. 69 U. S. 2 .

[Footnote 2]

Paradine v. Jayne, Alleyn 27; *Beal v. Thompson,* 3 Bosanquet & Puller 420; *Beebe v. Johnson,* 19 Wendell 500; 3 Comyn's Digest 93.

[Footnote 3]

Bullock v. Dommett, 6 Term 650.

[Footnote 4]

Brecknock Company v. Pritchard, ibid., 750.

[Footnote 5]

Adams v. Nickols, 19 Pickering 275; *Bumby v. Smith,* 3 Ala. 123, is to the same effect.

[Footnote 6]

3 Dutcher 513.

[Footnote 7]

Gates v. Green, 4 Paige 355; *Holtzaffel v. Baker,* 18 Vesey 115.

[Footnote 8]

Cutter v. Powell, 2 Smith's Leading Cases 1, and notes; Chitty on Contracts 612 and notes.