No. 12281

Supreme Court of Illinois

Cunningham.

---

vs.

Lewis, et al.

Circuit Court Cook County

William R Loomis and
Chauncey Lewis
vs
James Cunningham

} Agreed Case

This Case having been submitted to the Circuit Court of the County of Cook held by and before the Hon George Manierre Judge of the Seventh Judicial District at the May term A D 1856 of said Court upon the agreed Case bearing date the 23d day of November 1855 and hereto annexed, upon the question whether the plaintiffs were entitled to recover upon the facts therein stated, And the said Court having decided and adjudged that said plaintiffs are entitled to recover upon said facts and rendered Judgment in favor of the said plaintiffs and against the said defendant for damages and costs; And the respective parties to this suit having agreed as to the question a point of law arising in the said Case, Now therefore we the undersigned, the attorneys and counsel for the respective parties above named do certify that the question of law so agreed upon and which arises in this Case, and which the said parties respectively desire to submit to the Supreme Court is the same as that submitted to said Circuit Court viz Whether upon the facts stated in the Case hereto annexed, the plaintiffs are entitled to recover against the said defendant And also whether the Judgment of said Circuit Court should be reversed or affirmed

Witness our hands this 6th Day of June A D 1856

Anderson & McAllister
attys for Defts

Beattie & Owen
Plffs attys

[12281-1]

Circuit Court Cook County

Lewis & Loomis
vs
James Cunningham

} A pumpsit.

It is hereby mutually stipulated and agreed by and between the attorneys for the respective parties to this suit that this case shall be submitted to the Court upon the following statement of facts And if the Court shall decide upon the same that the plaintiffs are entitled to recover, then the damages are to be ascertained by a jury in said Court according to the evidence and rule of damages applicable to such case, Each party respectively having a right to call witnesses on the subject of damages if the plaintiffs are entitled to recover,

The plaintiffs in this action reside in the city of Chicago - the defendant resides in the city of Rochester New York and carries on at that place city the business of manufacturing Carriages: that on or about the 10th day of March 1853 Mr Loomis one of the plaintiffs Called at the shop of defendant at Rochester aforesaid and ordered four top buggies and four open buggies, to be made for the plaintiffs of the following description viz: They were severally to be made of the best materials and in a workman like manner. The axels of the top buggies were Each to be one and one quarter inch in diameter. The open buggies were to have Each axel one inch in diameter

The defendant then & there promised to make the said buggies according to the above order and description and to have them done and

S12281-87

delivered about the first of May thereafter at the following prices:- for the top buggies one hundred and fifty five dollars each;- for the open ones, one hundred and thirty dollars for one for two one hundred and fifteen each and the remaining one one hundred and ten dollars, which Mr Loomis then and there for himself and on behalf of Mr Lewis his Co plaintiff and partner promised to pay by giving them promissory notes payable in four, six and eight months and directed the defendant to send said buggies to them (the plaintiffs) by railroad to Chicago when made,

The buggies were made within the term fixed by the parties as aforesaid and sent by the railroad to the plaintiffs at Chicago as directed,

The said notes were given by the plaintiffs and severally paid at maturity,

After the plaintiffs had had the said buggies in their possession for some considerable time they discovered that they did not answer the description in their order which the defendant promised to fill as aforesaid, but were constructed of inferior materials in part, and not made in all respects in a workmanlike manner, The defects were not apparent, but latent and not discovered till they had been put to use by the plaintiffs. But the plaintiffs have never returned or offered to return any of said buggies to the defendant or given him notice to take them back, or any of them, and have retained

Continued down them to the present time.

There was no fraud or Express Warranty on the part of the defendant, but this action is brought to enforce the said Contract and to compel the defendant to pay the difference in value between the buggies furnished and such buggies as were described in said Contract and such other damages as the plaintiffs may in law be entitled to ~~except on the foregoing~~ which (if the plaintiffs are entitled to recover on the foregoing facts) are to be proved by the plaintiffs and assessed by the jury as above stated

This Stipulation shall give the same rights to the respective parties as if the foregoing facts were proved in open Court,

Chicago Nov 23 1885

Anderson & McAllester
Attys for defts

Beattie & Owen Attys
for Plffs

[12281-3]

State of Illinois }
County of Cook } ss. I do hereby certify that I have compared the foregoing Copy of Stipulation and Certificate of Counsel, and of the agreed Case now remaining on file in my office, with the original Stipulation Certificate and agreed Case as on file, and that the same are true and correct transcripts of such originals and of the whole thereof.

And I do further certify that said cause was submitted to the said Court at the May term thereof A D 1856 upon the said agreed Case, and the said Court rendered judgment thereon in favor of the plaintiffs and against the said defendant.

Witness my hand and the seal of said Court at Chicago this 7th day of June A D 1856 at the City of Chicago.

L. D. Board Clk

And now comes the said James Cunningham plaintiff in Error by Anderson & McAllister his attorneys before the Justices of the Supreme Court of the State of Illinois and says that in the Record and proceedings aforesaid also in the giving the Judgment aforesaid there is manifest Error in this that the said Circuit Court upon the facts submitted as aforesaid should have given judgment for the defendant in said Court and the said James Cunningham prays that said Judgment for the Error aforesaid and for other Errors in the said Record & proceedings may may be reversed annulled &c

Anderson & McAllister
Attys for Plff in Error

[12281-4]

Supreme Court

James Cunningham
Pltff in Error
vs
William R Loomis
& Chauncey Lewis
Defts in Error

Copy Record &c

State of Illinois } Supreme Court 3d Division
County of Cook } of the June T. A.D. 1886

Chauncey Lewis et al
vs
James Cunningham } Error from Cook County

Agreed Case

The Counsel for the defendants in error submits the following authorities to your Honors with no intention to enter into the arguments of the same ~~this case~~ as fully as they would did they not apprehend that the Counsel for the Plffs had mistaken the applicability of cases cited by him to the real points involved in this case It will be noticed that Counsel has treated the case in terms as one of "Sale" Yet it is be called as in fact it is an "Executory Contract" to do certain things to wit, to build certain carriages according to certain Specifications, & how Easy is the application of the true rule in case of breach thereof. Then we are entitled to damages to the extent of the value of the defects -

1 The case does not show a warranty of any kind Strictly so called

The opinion of Lord Abinger in Chanter vs Hopkins 4 M & W 399 quoted in 1 Smith L.C. Cases 218 & 219 covers the ground and disposes

$1228.15

the mist ~~the~~ in which cons of this character are involved - The law will be found
discussed in 1 Smiths L.d Cases. Case of
Chandelor vs Sopus 4th p 207 & thereafter 4th Ed
See also 15 Massachusetts Conner vs
Henderson - 2d Maine 139 Henderson vs
Lenny Con ~~sing~~ originating in same State
of facts as Massachusetts case brought in
accordance with suggestion of Judges
in the Mass Case & action maintained
9d ~~Defendant~~ Vendor is liable for defects
in quality & Construction if latent
4 Mees & W 399 - 4 Gillman 69 Minnesota
vs Granger involves the principal of fitness
of objects for purchasers uses & consequent
liability of vendor for breach
Olivant vs Bailey 5 Queens Bench 1288
Howard vs Hoey 23d Wend 350 -
Warranty cannot be implied Save when
Contract is wholly or partially executory
then not strictly a warranty but implied
Stipulation forming part of Contract because
then is no opportunity for inspection, Same
See 9 Wend 20. 1 Bailey 29. 2 Alabama 181
Case as bar is stronger from the facts there
then mere express stipulations as to quality &c
See also 1 Smiths L.d Cases p 222 as bottom of
page & 223 -
Perhaps the strongest Case is found in
14 Connecticut 411 Kellogg vs Dunlop -

See 6 Wharton 299

Dudley S.C. 180. The rule is reasonable that in executed contracts the doctrine of caveat emptor should apply but that in executory contracts the rule should be caveat venditor - 23 Wendall 350

The cases analagous to case as for the vendee need not return or offer to return the goods

Borman & al vs Jenkins & al 12 Wendall 566 & 579. King vs Paddock 18 Johnson 143 18 Wendall 426

The reason of the rule is apparent for by another fundimental rule that a party shall not rescind his contracts unless he can put the other party in status quo forbids him the use of goods to return or offer to return the same and in case of the defendants in Error were precluded from an attempt at rescission of contracts upon delivery from the fact that the defts were latent and even compelled to accept because in apparent conformity to contracts

Defts in Error now simply asks damages for the breach not a rescission of contracts and recovery of the purchase money -

The cases cited demonstrate also that fraud is not a necessary element of our rights to recover for upon sales of latent

[12281-4]

per bale although defective bale defect unknown to vendor the vendee has been permitted to return or rescind if the circumstances of the case would warrant it.

If this were not the doctrine the rule that there is no wrong in law without a remedy would be in point — A vendors workmen without his knowledge or even in ignorance themselves may conceal defective timber between plaster & siding and the house may fall with the first wind, yet shall the vendee whether accepted it in apparent good condition be precluded in an action by the vendor for the purchase money to set up the defect as a defence Such a rule would be outrageous — Yet such is the question at issue — If permitted to defend in an action for purchase money it is idle to ~~say~~ argue that he may not fall back upon his cross action particularly when he has paid the purchase money in ignorance of the defects —

See Smith on Contracts 3d American Ed 445 & 353 & 354 old Ed. 7 East 410 Broom & Davis Basten & Butler 7 East 484. Thornton & Place 17 E.C.L.R or 1 M & R 288. Grouell & Lamb 1 M & W 352 —

The case of Lee is very distinguishable

as in the absence of direct authorities in this State at least it must be consid a leading case —

Beattie & Owen
Attys for Defts in Error

Chicago

Lewis et al
vs
Cunningham

Brief of Defts in
Error

Beatties & Owen
Attys

Supreme Court

James Cunningham
vs
Plff in Error

William R Loomis &
Chauncey Lewis
Defts in Error

This case is one of an Executory Contract for the Sale of goods, which were discovered not to answer in all respects the order given for them; but the purchasers have not returned or offered to return any of them, or given the vendor notice to take them or any of them back; and have continued to use them from ~~July~~ May 1853 to the present time or at least to the time of agreeing upon the case the 23d Nov 1855;

The Plff in Error therefore insists that they are presumed to have acquiesced in the quality of the Carriages, and are not entitled to recover,

Finlay vs Sanuda 1 Camp 190
Grimaldi vs White 4 Esp 95
Gyoning vs Meekam 1 Stark R 257
2 Kents Com 479.
Hargous vs Stone 1 Seld (NY) 86
Sprague vs Blake 20 Wend 61.
Hart vs Wright 17 Wend 227
Chit on Contracts 462

W. K. McAllister
for Plff in Error

122818

Sup Court

Cunningham

vs

Lewis & Loomis

Brief

W. H. McAllister

for Plff

WRIT OF ERROR.

STATE OF ILLINOIS, Supreme Court, } ss. **The People of the State of Illinois,**

To the Clerk of the Circuit Court for the county of Cook **Greeting:**

BECAUSE in the record and proceedings, as also in the rendition of the judgment of a plea which was in the circuit court of Cook county, before the Judge thereof, between William R. Loomis & Chauncey Lewis

plaintiff, and James Cunningham

defendant it is said manifest error hath intervened, to the injury of the aforesaid Defendant

as we are informed by his complaint, and we being willing that error, should be corrected if any there be in due form and manner, and that justice he done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly withot delay, send to our Justices of the Supreme Court the record and proceedings of the plaint, aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at Ottawa, in the county of La Salle, on the Second Monday in June next, that the record and proceedings, being inspeted, we may cause to be done therein, to correct the error, what of right ought to be done according to law;

WITNESS, the Hon. **SAMUEL H. TREAT,** Chief Justice of our said Court, and the Seal thereof, at Ottawa, this day of in the Year of Our Lord One Thousand Eigh. Hundred and Fifty-

Clerk of the Supreme Court.

S2281-D

State of Illinois } Supreme Court 3d Division.
County of Cook } — Of the June T. A.D. 1886

Chauncey Lewis & Co
vs
James Cunningham } Error from Cook Co

Agreed case, The Counsel for defendants in Error submits the following authorities to your Honors with no intention to enter into the arguments of the same at as fully as they would did they not believe that the Counsel for the Pff in Error had wilfully mistaken the application of the authorities cited by him to the real points involved in the case - It will be noticed that Counsel has treated in terms as one of "Sale" - Sale it be called as it properly is an "Executory Contract, to do certain things terms: to build certain carriages after certain Specifications and how easy is the application of the rule in case of breach thereof, then are we certainly entitled to damages to the extent of the value of the defects -

1st. The case does not show a warranty of any kind strictly so called -

The opinion of Lord Abinger in Chanter vs Hopkins 4 M & W 399 quoted in Smith's Leading Cases 218 & 219 covers the whole ground

[illegible]

and disposes the mistake in which this case is involved. The whole law will be found digested in 1 Smiths L. Cases Case of Chandelor vs Lopus pp 207 & the notes (4 Ed.) See also 15 Massachusetts Reports Henderson — 2 Maine 139 Henderson vs Lenny, Case originating in same state of facts brought in accordance with suggestion of Judges in the Massachusetts Case & action maintained

2 Upon state of facts presented defendants will be liable for defects in quality or construction of bulwarks —
4 Mees & W 399, ~~4 Gibson~~ 4 Gillman 69 Brown vs Granger involves the same principle of fitness of objects for purchasers use and consequent liability of vendor for breach — Oliverans vs Bailey 5 Queens Bench 1288 — Howard vs Hoey 23 Wendall 350 Warranty cannot be implied as to fitness against vendor save when contract is wholly or partially executory then only a warranty strictly but an implied stipulation forming a part of Contract because there is no opportunity for inspection Same Law 9 Wend 20 1 Bailey 29 2 Alabama 181. The case at bar is stronger from the fact that there were express stipulations as to quality — See also 1 Smith's L. Cases pp 222 bottom of pp & pp 223 — But perhaps the strongest case is found in

Kellogg vs Dunbar
14 Connecticut 411 which is directly in
point here.

See also 6 Wharton 299.

Dudley S.C. 180

The rule is reasonable that in Executed Contracts
the doctrine of Caveat emptor should, but
that in Executory Contracts the rule should
Caveat Venditor — 23 Wendall 350 —

In cases analagous to ~~case~~ case as for
the vendee need not return or offer to
return the goods

Burrmans et al vs Jenkins et al 12 Wendall
576 & 577 King vs Paddock 18 Johnson 143
18 Wendall 426 —

The reason of the rule is apparent
for by the other fundimental rule, that
a party shall not rescind his contract
unless he can put the other party in
Statu quo — forbids him after use of goods
to return to return or offer to return, and
in case as for ~~Defr~~ self Error was precluded
from an attempt at rescission of Contract
upon delivery from the fact that the defects
were latent & was compelled to accept
because apparently in accordance with
Contract, ~~and not seeks~~ the self in Error now seeks
simply remuneration not the rescision of
Contract & recovery of the purchase money
but damages for the breach of Contract —

[22814]

The cases cited demonstrate also that fraud is not a necessary Element of our rights to recover for upon sale of cotton per bale although defective but concealed and defects unknown to vendor, the vendee has been permitted to recover or if warranted by circumstances of sale to return — If this even was the rule the doctrine that there is no warranty without a remedy would be but a satire in law. A vendor workman may conceal without his knowledge defective timbers (or defects in timber may be latent) between laths & siding and the house may fall with the first wind, yet shall the vendee who has accepted it in apparent good condition be precluded in an action by vendor for purchase money to set up defects as a defence - or the non-performance of the contract. Such a rule would be outrageous. Yet such is the question at issue. If permitted to defend in an action for purchase money it is idle to argue that he may not fall back upon upon his cross action, particularly when he has ~~been~~ paid the purchase money in ignorance of the defects —

See Smith on Contracts 3 American Ed. p. 456 or 353 & 354 old Ed. 7 East 480 Broom & Davis Baston & Butler 7 East 484 Thornton vs Place 1 Y. C. L. R or 1 M & R. 288 Grouvill vs Lamb 1 M & W 352 —

The case at bar is a very interesting one from the fact that in the absence of direct authorities it will necessarily become a leading case for this State at least and we recommend it to the careful consideration of your Honors error thus our brief has not done its justice

Beattie & Queen
Attys for Defts in Error

Dicups

Lewis et al
vs
Cunningham

Brief of Points
in Error

Battin & Queen
attys.

State of Illinois } Supreme Court 3d
County of Cook } ss. Division of the June T. 1856

Chauncey Lewis et al
vs
James Cunningham } Error from Cook Co

Case Agreed case. Counsel for the defendants in error submit the following authorities to your Honors with no intention to enter into the argument of the same as fully as they would did they not believe that the Counsel for Plff has entirely mistaken the application of the authorities cited by him to the real points involved in this case. It will be noticed that Counsel has treated ~~the~~ the case in terms as one of "Sale" - Tho it be called as in fact it is an "Executory Contract" to do certain things to wit, to build certain ~~carriages~~ carriages after certain specifications and how easy is the application of the true rule in ~~such~~ in case of breach thereof, then are certainly are entitled to damages to the extent of ~~the~~ value of the defects

1st The case does not show a warranty of any kind strictly so called -

The opinion of Ld Abinger in Chanter as Hopkins 4 M & W 399. quoted ~~in~~ in 1 Smith L Cases 218 & 219 covers the ground and disposes the whole question

this case is involved. The whole law will be found condensed in 1 Smith's Lead Cases Case of Chandelor vs Lopus pp 207 & thereafter 4th Ed.
See also 15 Massachusetts. Commw vs Henderson
2d Maine 139 Henderson vs Lowry Case originating in same State of facts as Massachusetts case brought in accordance with suggestion of Judges in the Mass case & action maintained.

2d ~~Defendant~~ vendor will be liable for defects in quality or construction of articles.
4 Mees & W 399 — 4 Gillman 69. Misner vs Granger involves the principle of fitness of objects for purchasers uses and consequent liability of vendor for breach —
Olivant vs Bailey ~~5 Q.B.~~ 5 Queens Bench 1288 — Howard vs Hoey 23 Wend 350
Warranty cannot be implied as to fitness against vendor save when Contract is wholly or partially executory then not a warranty but implied ~~&~~ stipulation forming parts of Contract because there is no opportunity for inspection Some law 9 Wendall 20
1 Bailey 29 — 2 Alabama 181 — ~~Harman~~
The case of Carr is stronger from the fact that there were express stipulations as to quality
See also Smith's leading cases 222 bottom of page ~~222~~ & p 223.
But perhaps the strongest case is found in Kellogg vs Denslow
14 Connecticut 411 which in point law

See also 6 Wharton 299-

" Dudley S.C. 180

The rule is reasonable that in Executed Contracts the doctrine of Caveat emptor should apply, but that in executory Contracts the rule should be caveat vendidor

23 Wendall 350

In cases analogous to con as bar the vendee must not return or offer to return the goods-

Borman et al vs Jenkins et al 12 Wendall 566 & 577- King vs Paddock 18. Johnson 141 & 18 Wend 426

The reason of the rule is apparent for by the other fundimental rule, that a party shall not rescind his contract unless he can put the ~~vendor in~~ other party in statu quo forbids him after use of goods to return or offer to return and in case of bar ~~Defendant~~ was forbidden precluded from an attempt at rescission of Contract ~~by~~ upon delivery from the fact that the defects were latent & was compelled to accept because in apparent good Condition ~~plff~~ Defendant now seeks remuneration simply, not the rescision of the Contract and recovery of purchase money but damages ~~simply~~ for breach of Contract-

SJ2281-IN

The cases cited demonstrate also that fraud is not ~~the~~ a necessary element of our right to recover for upon sales of cotton per bale although defection has concealed and customary to vendor the vendee has been or rescind if warranted by circumstances of sale permitted to recover. If this were not the rule the doctrine that there is not a warranty existing in a sale, would be but a name in law.

A vendors workmen may conceal within his knowledge defective timbers between lath & ~~plaster~~ siding, and the house may fall upon the first wind, yet shall the vendee who has accepted it in apparent good condition be precluded in an action by the vendor for purchase money to set up the defects as a defence? Such a rule would be outrageous. Yet such is the question at issue. If permitted to be defend in an action for purchase money it is idle to argue that he may not sue full back upon his cross action, particularly when he has paid the purchase money in ignorance of the defects.

See Smith on Contracts 3d American Ed 456 & 353 & 354 old Ed. 7 East 480 Brown vs Davis Boston vs Butler 7 East 484. Thornton vs Place 1 7 E.C.L.R or 1 M & R 288. Emmell vs Lamb 1 M & W 352.

The case of Cox is a very interesting one from the fact that in the absence of direct authorities it will necessarily become a leading case for this State as it is and we recommend it to the careful consideration of your Honors assured that our brief has run down its justice—

Beattie & Owen

Chicago

Attys for Defts in Error

[1221-15]

Lewis et al
vs
Cunningham

Brief of
Defts in Error

Beattie & Davis
Attys

82

James Cunningham

vs

William R Loomis

89

122-81

1850