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Covenants--Breach of Warranty as to Incumbrances--Damages (McShane v. Kilpatrick, 110 So. 281 (Ala. 1926))

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case that an independent contractor or his employees were seamen. *The Hoquiam*, 253 Fed. 627 (C. C. A. 9th 1918); *Johnson v. American Hawaiian S. S. Co.* 14 Fed. (2nd) 534 (1926).

This decision brings about a drastic change in the law regarding maritime torts. The former rule was that by the general maritime law the vessel owner was liable only for the maintenance, cure and wages of a seaman injured by the negligence of a fellow servant. *Southern Pacific Co. v. Jensen*, 244 U. S. 205 (1917); *Chelentis v. Luckenbach Steamship Co., Inc.*, 247 U. S. 372 (1918).

The Jones Act of June 5, 1920, changed the rule so far as seamen were concerned and allowed them to recover compensatory damages. *Panama Railroad Co. v. Johnson*, 264 U. S. 375 (1924); *The Osceola*, 189 U. S. 158 (1903); *The Iroquois*, 194 U. S. 240 (1904); *Chelentis v. Luckenbach Steamship Co.*, *supra*.

Stevedores or longshoremen could not, before the principal case, hold their employers responsible if the negligent act which caused his injuries was that of a fellow servant. *Cassil v. United States Emergency Fleet Corporation*, 289 Fed. 774 (C. C. A. 9th 1923); *The Hoquiam*, *supra*; *The Daisy*, 282 Fed. 261 (C. C. A. 9th 1922); *Western Fuel Co. v. Garcia*, 257 U. S. 233 (1921); *Carstensen v. Hammond Lumber Co.*, 11 Fed. (2nd) 142 (C. C. A. 9th 1926).

In *The Hoquiam*, *supra*, in a very able opinion by Hunt, C.J., it was said, "when we consider that the only class of persons mentioned in the section (Sec. 20—Act of June 5, 1920) are seamen, it is proper to read and understand the whole section by its ordinary grammatical sense. The great purpose, the special need for protection of seamen, was carried out by the statute; but we find no safe ground for extension of its provisions to others not seamen." This seems to express the true intent of the statute, even in view of what the Supreme Court has laid down in the principal case. It is manifestly unsound to construe the "Jones Act" as applying to stevedores and longshoremen. The whole tenor of the Act is for the protection of seamen and has no reference in any of its provisions to other maritime employments. It is submitted that if Congress intended to include other employments, it would not have restricted its language to "seamen."

COVENANTS—BREACH OF WARRANTY AS TO INCUMBRANCES—DAMAGES.—This is an action by the plaintiffs to recover substantial damages for a breach of the defendant's covenant against incumbrances. The plaintiffs allege that the land in question was sold to them by the defendant with a full covenant and warranty deed, but that in fact, at the time of conveyance, there was an outstanding mortgage on the premises. It appears that the mortgage was thereafter satisfied of record by the defendant. Plaintiffs appeal from a judgment awarding them nominal damages. *Held*, judgment of nominal damages affirmed by a unanimous opinion on the ground that in a breach of a covenant against incumbrances the plaintiff may recover nominal damages only, unless he alleges and proves some special damage. *McShane v. Kilpatrick*, 110 So. 281 (Sup. Ct. Ala., 1926).

The important question that arises in event of a breach of covenant against incumbrances is the measure of damages to be awarded to the plaintiff. In the principal case it was held that the burden of proof is upon the plaintiff to show his damages and he must show the actual discharge of the prior incumbrance. It follows that if the alleged incumbrance was satisfied and removed by the moneys and properties of the grantors, in the conveyance in question, the plaintiffs are only entitled to recover nominal damages by reason of the breach that resulted from the execution and delivery of the conveyance. On the other hand, if the plaintiff does suffer some special damage, viz., is evicted from the premises or is compelled to protect his title in a direct attack against it, his recovery is not limited to nominal damages only; and this seems to be the view of the weight of authority in this country. *Seldon v. Dudley Jones Co.*, 89 Ark. 234, 116 S. W. 217 (1909); *re Hanlin's Estate*, 133 Wis. 140, 113 N. W. 411 (1907); *Copeland v. McAdory*, 100 Ala. 553, 13 So. 545 (1893); *Brantley v. Johnson*, 102 Ga. 850, 29 S. E. 486 (1897); *Richmond v. Ames*, 164 Mass. 467, 41 N. E. 671 (1895); *Hunt v. Hay*, 214 N. Y. 578, 108 N. E. 851 (1915). Prof. Williston in his work on contracts says, however, "this (view) is illogical and at variance with the rule governing covenants to remove specific encumbrances or to pay debts, but is practically convenient." 3 Williston Contracts (1920), Sec. 1402. But in the case of *Parkinson v. Woulds*, 125 Mich. 325, 84 N. W. 292 (1900), though the grantee's possession had not been disturbed he was permitted to recover the consideration he had paid.

So it has been held in *McHargue v. Calchina*, 78 Ore. 326, 153 Pac. 99 (1915), that an easement over land which was conveyed by a full covenant and warranty deed was tantamount to a constructive eviction and a recovery was permitted for the value of that part of the land in proportion to the purchase price. The same conclusion was arrived at by the New York Court of Appeals in the case of *Hunt v. Hay*, 214 N. Y. 78, 108 N. E. 85 (1915), which held that if a covenantee is kept out of possession by means of a superior title, it is equivalent to an eviction and gives effect to the covenant, and where there is a complete breach of covenant of warranty on the sale of real property the damage is the value of the property at the time of the covenant.

Now the question presents itself as to what should be the measure of damages in the case of an actual or constructive eviction. Logically the measure of damages should be the amount which would put the plaintiff in as good a position as he would have been had the warranty been kept. In fact, however, in most states he is allowed to recover for the total loss of the property only the consideration which he paid for it, with interest from the date of the sale. *Hunt v. Hay*, 214 N. Y. 579, 108 N. E. 851 (1915); *McCormack v. Marcy*, 165 Cal. 386, 132 Pac. 449 (1913); *Webb v. Holt*, 113 Mich. 338, 71 N. W. 637 (1897); *Coléman v. Lucksinger*, 224 Mo. 1, 123 S. W. 441 (1909); *Wetzell v. Rechcreek*, 53 Ohio St. 62, 40 N. E. 1004 (1895). Where such an action is brought by another than the immediate vendee of the warrantor the plaintiff's recovery is generally restricted to the amount received by the warrantor with interest. 2 Sutherland, Damages (4th Ed. 1916) 2125, Sec. 614. Under the prevailing rule, where the plaintiff is evicted from a part of the land only his damage is such pro-

portion of the consideration as the value of the land which he lost bears to the whole consideration.

But in Connecticut and Massachusetts, *Cecconi v. Rodden*, 147 Mass. 164, 16 N. E. 749 (1888); *Butler v. Barnes*, 61 Conn. 399, 24 Atl. 328 (1892), the plaintiff is permitted to recover the value of the improvements he put on the land; but it is submitted that this rule is illogical for, at the time of the conveyance of the land the records were open to both parties and a search thereof would have disclosed the true owner and in such case, of two innocent persons, neither should be made to suffer for the misfortune of the other.

MUNICIPAL CORPORATIONS—POLICE POWERS—ZONING REGULATIONS.

—The village of Euclid, a suburb of Cleveland, Ohio, passed the zoning laws in question which provided for use, height and area districts. Plaintiff attacks the constitutionality of the measure on the ground that it is in derogation of the 14th amendment of the United States Constitution in that the plaintiff is deprived of liberty and property without due process of law and is denied the equal protection of the law. *Held*, in the lower court judgment was rendered for the plaintiff, reversed on appeal to the Supreme Court, with three justices dissenting, on the ground that zoning regulations are within the police powers of the state and as such are valid when not arbitrary or unreasonable. *Village of Euclid v. Ambler Realty Co.*, 47 Sup. Ct. Rep. (U. S.) 114 (1926).

Zoning regulations are an outgrowth of modern civilization, called forth by the complexities of present day life. They may be divided into two classes, namely, those regulatory in their nature and those passed for aesthetic purposes. *Cochran v. Preston*, 180 Md. 220, 70 Atl. 113 (1908); 23 L. R. A. (N. S.) 1163; *Welch v. Swasey*, 193 Mass. 364, 79 N. E. 745, 214 U. S. 91 (1908). In the first class are included the provisions restricting the height, use and location of commercial and dwelling houses, in the second, regulations in reference to bill-boards, sky-signs, etc.

These ordinances, which twenty-five years ago, would have been rejected as unconstitutional as an arbitrary abuse of power, are now being generally sustained in most jurisdictions. In *re* Opinion of the Justices, 235 Mass. 597, 127 N. E. 525 (1920); *State v. City of New Orleans, et al.*, 154 La. 271, 97 So. 440 (1923); *Lincoln Trust Co. v. Williams Bldg. Corp.*, 229 N. Y. 313, 128 N. E. 209 (1920); *City of Aurora v. Burns, et al.*, 319 Ill. 84, 149 N. E. 784 (1925); *State v. Houghton*, 164 Minn. 146, 204 N. W. 569 (1925); *Miller v. Board of Public Works*, 195 Cal. 477, 234 Pac. 381 (1925); under the so-called "police powers" of the state. For what once was a lonely cow-path now is a broad highway, teeming with motor vehicles and other conveyances, all inherently dangerous instruments. What once was a small rural community now is a large city, pulsating with life and all its problems, requiring more and better fire, police and other protection. This rule is, therefore, not inconsistent with the former one, for, while it is true that the meaning of the constitution cannot be stretched, we must impart a certain sense of elasticity to its application, *Village of Euclid v. Ambler Realty Co.*, 47 U. S. Sup. Ct. 114 (1926). If the rule were otherwise, the original purpose