FENWICK v. GRIMES.

Case No. 4,733.

{5 Cranch, C. C. 439.}[1]

Circuit Court, District of Columbia. March Term, 1838.

ACTION ON THE CASE—BREACH OF CONTRACT—JUSTIFICATION—ARREST OF JUDGMENT—GENERAL VERDICT—COUNTS OF THE DECLARATION.

1." An action upon the case for deceit will not lie for a breach of promise.

2. If the owner of a female slave sell her for less than the market price upon the purchaser's representation that he wished to have her for his own use, and that she should not be removed out of the District of Columbia, nor sold to any person to be by him transported out of the District, and that she should live in the District, near her friends; and the purchaser afterwards sell her to a negro-trader living in the District, by means whereof the slave is removed out of the District; it is no justification of the defendant, in an action for the deceit, that after he had purchased the slave, he was persuaded by a friend, that she was unfit for his use, and that he ought to sell her; although the purchase was originally made by the defendant in good faith.

3. If the verdict be general, and one of the counts is bad, the judgment must be arrested; and the court will not, after the verdict has been recorded, order it to be amended, by applying it to the good count only, unless the evidence given was applicable only to that count.

4. An action upon the case for deceit will not lie unless there was a false affirmation of some fact. A non-performance of promises is not sufficient. The declaration must charge that the defendant averred some fact to be true, and that it was false.

{Cited in Banque Franco-Egyptienne v. Brown, 34 Fed. 192.}

This was an action upon the case, for deceit by {Guy Grimes} the purchaser of a female slave, by which the vendor {Edward Fenwick} was induced to sell her for less than the market price. The declaration contained two counts.

1. The first count stated, that in conversation between the plaintiff and defendant concerning the purchase of the plaintiff's slave Henny, it was agreed between the plaintiff and defendant that she should not be removed out of this District of Columbia, nor sold to any person to be transported out of the said District, but that she should live, as a slave, in this District, so as to be near and convenient to her friends and acquaintances; and that the defendant, upon that conversation, falsely, fraudulently, and deceitfully affirmed to the plaintiff that the said slave should, after the defendant's purchase of her from the plaintiff, reside in this District during her lifetime; and the plaintiff, believing the affirmation to be true, sold her to the defendant for $400, a price much less than the value of the slave if there had been no such understanding or agreement as to her residence; yet the defendant, not regarding his said promise and undertaking, but contriving and fraudulently intending, craftily and subtly to deceive and defraud the plaintiff, sold and delivered the said slave to a negro-trader living in this District; by means of which said last sale and delivery the said slave has been removed out of this District to foreign parts, there to reside at a great distance from her friends and relatives; "and so the said plaintiff saith

that the defendant him the plaintiff then and there falsely and fraudulently deceived and defrauded."

2. The second count stated that on the 1st of June, 1833, the plaintiff was possessed of another valuable woman slave, named Henny, who had been brought up in the plaintiff's family and service, but for whose services he had no further use, and was willing to dispose of said woman slave for a sum far less than her real value to a master who resided, and who would keep her in the neighborhood,

and would engage that she would not be sold away to the southern negro-traders, and the defendant, well knowing the same, fraudulently came and represented that he desired her for his own private use, wanting such a slave to be kept and employed in the neighborhood aforesaid, and thereupon falsely, fraudulently, and deceitfully declared and protested that he would engage that the said slave should not be transported or sold away to traders in negroes, but should be kept and employed in this District; by reason of which false and deceitful representations, the plaintiff was imposed upon and prevailed with to sell to the defendant the said slave for the sum of $400, a sum far less than her real value, which the plaintiff avers was at least $600.

The plaintiff further avers, that he would not have sold the said slave but for the consideration of her being within this District, for any sum of money whatever, and the defendant well knew the same; and the plaintiff being so imposed upon as aforesaid, and relying upon the said representations, and promise, and engagement of the defendant, did sell and deliver to him the said woman slave. And the plaintiff further declares, that the said representations, declarations, and promises of the defendant, were utterly false and deceitful; and that at the time he thus gave himself out, and imposed upon the plaintiff, as wishing to purchase the said woman slave upon the conditions and considerations aforesaid, for his own use and employment within the District, he had engaged to sell this woman slave to a negro-trader, a certain James Burch, who he well knew wanted to transport the said woman slave beyond the limits of this District; and the defendant, having, as aforesaid, by fraud and deceit, bought the said woman slave intendedly for his own use, and possessed himself of the said woman slave, sold and delivered her to the said negro-trader, who took her and transported and carried her out of this District to foreign parts, unknown to the plaintiff; and so the plaintiff saith, that by reason of the fraudulent, false, and deceitful representations as aforesaid, he was imposed upon to sell and dispose of the said woman slave for a much less sum than her real full value, and thereby lost the value of the said slave; and was otherwise greatly injured by the said several promises, and hath damage to the sum of $1,000.

Upon the trial, Mr. Key, for defendant, moved the court to instruct the jury, that if they should believe from the evidence, that the defendant bought the woman for his own use, and intending bona fide to keep her according to the said agreement; and was afterwards persuaded by his friend that she was unfit for his use, and that he ought to sell her as aforesaid, and that he did, on such persuasion, sell her, then there was no deceit, and then the plaintiff is not entitled to recover."

But THE COURT (MORSELL, Circuit Judge, not giving an opinion, having been absent at the commencement of the argument) refused to give the instruction.

Verdict for the plaintiff, $115.53.

Mr. Key moved in arrest of judgment, contending that the first count was bad for want of a scienter; that is, an averment that the defendant knew that the person to whom he sold the slave, was a negro-trader. In the case of Price v. Read, 2 Har. & G. 291, which has been cited by the opposite counsel as the precedent for the present case, the sale was averred to have been made to a negro-buyer, living out of Maryland, and in one of the southern states.

R. J. Brent, contra. The declaration is drawn from that in Price v. Read. The averment is, that the defendant sold her to a negro-trader. The inference is, that she was to be taken out of the district. Adams v. Anderson, 4 Har. & J. 558. This objection comes too late after verdict. The jury could not have found the verdict for the plaintiff, unless it had been proved that the defendant knew he was a negro-trader; or that the sale was with the intent that she should be removed out of the district At most, the ground of action is defectively stated, which is cured by verdict Rushton v. Aspinall, Doug. 681, 683.

Mr. Key, in reply. The ground of action is not defectively set out; but the first count states no cause of action.

CRANCH, Chief Judge. In the case of Price v. Read, 2 Har. & G. 291, from which this declaration was drawn, there was no question made as to the validity of the counts in that declaration; nor did the counsel for the defendant argue the case before the court of appeals; and therefore the case is of little weight upon that question. The substance of the first count is, that the plaintiff was induced to sell the slave for less than her value, by the defendant's agreement that she should not be removed from the District of Columbia; yet the defendant sold her to a negro-trader, living in the District, by means whereof she has been removed from this District; and so the defendant deceived and defrauded the plaintiff. Here is no false affirmation of a fact, but, at most, only a breach of promise. No deceit is averred previous to the sale by the defendant; and the deceit, if any, was subsequent to the sale, and consisted only in a disregard of the agreement; and was only that kind of deceit which every debtor practices when he refuses to pay his debt according to his promise. Even if it had been an action of assumpsit, instead of deceit, there is no cause of action alleged. The promise was, that she should not be removed from the District; the breach is, that the defendant sold her to a negro-trader living in the District, by means of which sale she was removed; but it is not averred that this last sale was made by the defendant with intent that the slave

should be removed, or that the defendant caused the removal. There was no engagement on the part of the defendant that he would not sell the slave within the District, nor to a negro-trader. This count may be true, and yet the defendant may have taken an obligation from his vendee that the slave should not be removed. I think the count is bad, and that, as the verdict is general, the judgment must be arrested.

THRUSTON, Circuit Judge, absent MOR-SELL, Circuit Judge, concurred.

Mr. Brent then moved to amend the verdict so as to make it applicable to the second count only; and cited Barnard v. Whiting, 7 Mass. 358; 2 Tidd, 770; Williams v. Breedon, 1 Bos. & P. 329.

Mr. Key, contra. In the case of Williams v. Breedon, 1 Bos. & P. 329, there was a certificate of the judge that the jury gave their verdict for damages upon evidence applicable only to the good count; and therefore the court had a right to alter the verdict, which was general, so as to apply it only to the good count, and to enter a verdict for the defendant upon the other count. But in the present case there was no such certificate, nor any other means of knowing on which count the jury found their verdict; and in the same case of Williams v. Breedon, the court said that as there was evidence applicable to both counts, if there had been no other evidence to show on what ground the damages were given by the jury, it would not be competent for the court to alter the verdict Stevenson v. Hayden, 2 Mass. 406; Barnes v. Hurd, 11 Mass. 57, 58; Sheely v. Biggs, 2 Har. & J. 364. But the second count is as bad as the first. There is no scienter that the defendant sold the slave with intent that she should be carried out of the District.

CRANCH, Chief Judge. The only misrepresentation of fact, stated in this second count, is, that the defendant represented that he "desired" the slave "for his own use;" but that representation is not averred to be false; it is not averred that the defendant did not desire the slave for his own use. The other supposed misrepresentations are only breaches of promise or contract for the performance of which, the plaintiff relied upon the credit of the defendant. It is true, that the plaintiff "declares that the said representation, declarations, and promises, were utterly false and deceitful." and that "at the time the defendant gave himself out as wishing to purchase the slave upon the conditions," &c, "and for his own use," &c, he had engaged to sell the slave to a negro-trader who he knew wanted to transport her, &c; but this is no direct denial that the defendant desired the slave for his own use." If this could it is to be considered a count for money obtained by false pretences, the pretence should have been distinctly averred, and its truth denied in terms. The mere non-performance of a promise is not such a deceit as will support an action of deceit. The remedy is an action of assumpsit, to which the general issue is not not guilty, but non assumpsit I am, therefore, of opinion, that the second count as well as the first is bad, and that judgment must be arrested upon both.

The other judges concurred.

Judgment arrested upon both counts.

Mr. Brent then moved for leave to amend the declaration, and for a venire de novo; and cited the case of Golding v. Good {Case No. 5,514}, in this court, at December term, 1821, and Sberburne v. Semmes, at December term, 1825 {Id. 12,760}, in which case it is said judgment was arrested for a fault in the declaration, and the court gave leave to amend on payment of the costs of the term; but I have no note of the point, and no note of the case of Golding v. Good.

Cur. ad. vult.

THE COURT (nem. con.), at November term, 1838, refused leave to amend.

{NOTE. For further proceedings, see Case No. 4,734.}

[1] {Reported by Hon. William Cranch, Chief Judge.}