

LAW CASE.

The following opinions delivered by the judges of the supreme court of this state, at an adjourned court held 17th January, 1807, are of importance to all concerned in the purchase and sale of real estates. The cause was argued at December term last, by Messrs. J. Sergeant and Lewis for the plaintiff, and Messrs. J. B. McKean, and Jager, for the defendant.

Opinion of chief justice Tilghman. Lewis Bander, vs. John Fromberger's, Ex'rs.

This case comes before the court upon a point submitted to them by the jury who tried the cause. Fromberger sold to Bander about 2 acres of land in the northern liberties of this city, and in his deed of conveyance, dated September, 1797, covenanted "that he was lawfully seized of a good, sure and indefeasible state of inheritance in fee simple in the said land, and good right, full power and authority in his own right, to grant and convey the same to Bander in fee simple."

Bander entered upon the premises & improved them considerably by fences, buildings and otherwise; he remained in possession on till the latter end of the year 1801, when he was evicted by one Hilton, who recovered against him in the circuit court of the U. States.

Bander then brought the present action of covenant, and the jury found a verdict in his favor for \$2979.40-100, but if the court should be of opinion, that he was not entitled to recover the value of the improvements made by him, after he purchased of the defendant, then they find damages only to the amount of \$2979.40-100, (the purchase money and interest from the time of the eviction.)

The question submitted to us by the jury has never been decided in this court. It is of importance and has been well argued. It may be taken for granted, that on a strict warranty, where the remedy for the party who loses the lands, is either by voucher or writ of warranty a charter, there recovery is only according to the value of the land at the time the warranty was created.

This is conceded by the plaintiff's counsel and very property, for many authorities were cited directly to the point. But this kind of warranty, which is a covenant real, has long ceased and has been succeeded by the covenants personal, introduced into modern conveyances. The latter has two advantages, the remedy by action of covenant is more easy in its form, and more comprehensive in its effects, for it extends to the personal property of the warrantor in the hands of his executors; whereas the ancient recovery in value, was confined to land. I know of no case in England where it has been decided whether the recovery in an action of covenant, could be carried so far as to include damages for improvements made after the purchase; but I must suppose that Sir Wm. Blackstone was of opinion, that such damages could not be included, otherwise he ought certainly to have mentioned it, when he was comparing the ancient warranty with the modern covenants, which he says have superseded them; his expressions are these: "If he covenants for his executors & administrators, his personal assets, as well as his real, are pledged for the performance of the covenant, which makes such covenant a better security than any warranty, and it has therefore in modern practice, totally superseded the other." A general warranty, is as comprehensive in its expressions, as any words made use of in modern covenants. It undertakes to defend the land to the warrantee, his heirs and assigns against all persons whatever. It is in its nature a covenant real, and since the recovery on it extended no further than the value of the land, at the time of the warranty made, the inference is very strong, that in these personal covenants which have succeeded to it, the extension shall be no greater. But the plaintiff's counsel contend that the reason why the recovery in value on the ancient warranty was confined to the value at the time of its creation, is because in real action no damages can be recovered. This reason is unsound—the value at the time of the voucher might have been recovered, without recovering damages; and this is very evident from some of the cases which have been cited; particularly the case of Ballew v. Ballew, where it is decided, that in a warrantia charta, if there be new buildings, of which the warranty is demanded, which were not at the time of the warranty made, the defendant must take care to shew the special matter and enter into the warrantia only for so much as was at the time of the making of the deed, otherwise the plaintiff will recover according to the value at the time of entering into the warranty.

The true reason, therefore, appears to be, that the intention of the parties was understood to be, that the warranty was to be limited to the value of the land at the time of executing the deed. The plaintiff's counsel cited a case from 22 Vin. Ab. 145, pl. 8, in order to prove, that in case of the implied warranty which arises on an exchange of land, the recovery in value in case of eviction, is according to the actual loss sustained. As this seemed to be at variance with the general principles of warranty, I have examined it since the argument of this cause, and found that the case was not properly explained. The words of the abridgement are as follows: "If a man recovers in value upon a warranty in law on an exchange, he shall have in value according to the value which he has lost." In support of this, the case of Bursfeld v. Coke (121), is cited. In the first place it is to be remarked, that in the marginal note to pl. 6, in the same page of Vinier, it is said that the same case is reported in Cro. Elizabeth, Moore and Yelverton, in neither of which is such point mentioned—and it is certain from my lord Coke's report that the decision must have been extrajudicial, for Bursfeld's case turned on a different point—Bursfeld being evicted of the land received by him in exchange, entered upon that which he had given in exchange by virtue of the implied condition in law which is annexed to an exchange; a re-entry was made on him, in consequence of which he brought an action of trespass, and whether he could recover in that action, was the question—so that the court had nothing to do with the value of the land. But according to my lord Coke's account of it, what they did decide concerning the value is not applicable to the point now before the court.

—the decision is that if A, who has received three acres in exchange, is impleaded for one acre, and vouches B, from whom he received them, and then the defendant recovers the one acre, A. shall recover in value from B. but according to the loss, that is but one acre—but not a word is said concerning the time to which the value of this acre is to relate. And that is the only question now under consideration.

It has been contended, that the true measure of damages in all actions of covenant is the loss actually sustained. But this rule is laid down too generally. In an action of covenant for non payment of money on a bond or mortgage, no more than the principal and legal interest of the debt can be recovered, altho' the plaintiff may have suffered to a much greater amount by the default of payment. The rule contended for by the plaintiff's counsel in its utmost latitude, applied to covenants like the present, would in many instances produce excessive mischief. Indeed the counsel have in some measure given up this rule, by confessing that when buildings of magnificence are erected to gratify the luxury of the wealthy, it would be unreasonably to give damages to the extent of the loss—but the ruinous consequences would not be less to many persons, who have sold lands, on which no other than useful buildings have been erected. The rise in the value of land not only in towns on the sea coast, but in interior parts of the United States, is such, that it can hardly be supposed any prudent man would undertake to answer the incalculable damages which might overwhelm his family, under the construction contended for by the plaintiff. I have taken pains to ascertain the opinion of lawyers in this state, prior to the American revolution—and I think myself warranted in asserting from the information I have received, that the prevailing opinion among the most eminent counsel was, that the standard of damages was the value of the land at the time of making the contract. The title of land rests as much within the knowledge of the purchaser as the seller; it depends upon writings which both parties have an equal opportunity of examining. If the seller makes use of any fraud, concealment or artifice to mislead the purchaser in examining the title, the case is different, he will then be answerable for all losses which may ensue.

Cases have been cited from the Civil law; I throw them out of view, because this case can be decided only on the principles of common law.

Cases have also been cited from law reports in the states of South-Carolina and New-York. Though they are not authority in this court, yet we shall always be happy to receive information of the opinions of the learned judges in our sister states, and always treat them with due respect. Upon the point now in question, it seems there is a difference of opinion. In South-Carolina it has been held, that the plaintiff is entitled to recover according to the value at the time of the action. In New-York that he can only recover according to the value at the time of the contract. On these cases I will only remark, that the opinions of the judges in South-Carolina having been given during the harry of a jury trial, do not appear to have been founded on such mature deliberation as those of the New-York judges, who made their decision in the supreme court, sitting in bank.

Upon the whole, I am of opinion, that by the true construction of the covenants in the case before us, the plaintiff is not entitled to recover the value of the improvements made by him after he purchased of John Fromberger, and therefore that judgment be entered for \$2979.40-100 and costs.

I am authorised to say, that judge Yates, whose absence is occasioned by sickness, concurs in this opinion.

Opinion of Judge Smith.

The question now to be decided by this court is of great importance. I understand that it has long been discussed among the most eminent counsel in Pennsylvania, and opinions have been given by some of them, but that it has never received a judicial decision—I believe on inquiry, that it never came before any court in Pennsylvania, until the 24th May, 1804, when it came before the circuit court, holden for the county of Northumberland, by judge Brackenridge and myself, in the case of Wm. Bonham vs. John Walker's adm'r. We said that "It is a vexatious question, and it is proper that it should receive a solemn decision in bank—we therefore propose that the measure of damages should be left to the jury, on each of these grounds, which is done accordingly." The jury found "a verdict for plaintiff for \$1092.17-100 damages, on the ground of the original purchase money—and on the ground of the value of the land at the time of the execution (eviction)"—\$1602.21-100.

After my return, I was induced to make diligent inquiry whether the point had ever been decided, and what had been the general opinion of eminent counsel on it, and the result was that expressed by the chief justice. After a very extensive perusal of the cases on the subject; the notes of which taken by me then, and annexed to that case, are now before me, they did not in my opinion, warrant me in drawing a different conclusion; but I saw difficulties, whether the question was decided one way or the other, which made me anxious to hear it deliberately argued; ready to alter my opinion, if I should discover that it was not well founded, or if the opposite opinion should be supported by law and more conducive to the general interest, and more agreeable generally to the intention of the parties to such contracts.

I have heard it very well argued—If the

very well arranged and able argument of the ingenious young gentleman who began, has not been able to shake the opinion which I had formed, I am induced to believe that it is well founded on the solid principles of law, and must therefore adhere to it upon the present occasion. It not being suggested that there was any fraud or concealment on the part of the vendor, nor any knowledge when he sold, of any defect in his title. Had any of these circumstances occurred, I should be of opinion that he would be liable to the amount of the loss.

Although the vendor on a covenant like that in question, be liable to damages only to the value at the time of the deed, yet he may enter into such a special express covenant as will make him liable to the value at the time of eviction, and so much will the vendor on such event be entitled to. In the present case I agree, that judgment be entered for the plaintiff for 2979.40-100, dollars.

Judge Brackenridge was present and expressed his concurrence.

The three following Bulletins complete our series to the 42d.

GRAND ARM Y.

THIRTY-FIFTH BULLETIN.

Posen, November 28.

The emperor set off from Berlin on the 25th, at two in the morning, and arrived at Custrin, on the same day, at ten in the morning. He arrived at Messeritz on the 26th, and at Posen on the 27th, at ten in the evening. On the following morning his majesty gave audience to the different orders of the Poles. The marshal of the palace, Durce, went as far as Osterode, where he had an interview with the king of Prussia, who declared to him that a part of his states was occupied by the Russians, and that he was entirely in their dependence; and that in consequence he could not ratify the suspension of arms which had been concluded by his plenipotentiaries, because he could not execute its stipulations. His majesty was going to set off for Königsberg.

The grand duke of Berg, with a part of his reserve of cavalry, and the corps of marshals Davoust, Lanues and Augereau, have entered Warsaw. The Russian genl. Beningsens, who had occupied the town before the approach of the French, had evacuated it, on learning that the French army was marching against him, and wished to come to an engagement.

Prince Jerome, with the corps of Bavarians, was at Kalitsch.

All the rest of the army was arrived at Posen.

Marshal Mortier is on his march to Anklam, Rostock and Swedish Pomerania, after having taken possession of the Hanse towns.

The surrender of Hameln was attended with some strange events. Besides the garrison entrusted with the defence of that fortress, some Prussian battalions appear to have taken refuge there after the battle of the 14th. Anarchy prevailed in this numerous garrison. The officers shewed marks of insubordination against the generals, and the soldiers against the officers. During this time the garrison was in a state of insurrection, and the last act of secession was to hasten to the brandy magazines, break them open and drink without measure. In a short time, animated by this spiritous liquor, they fired upon each other in the streets, soldiers against soldiers, officers against officers, and soldiers against citizens, the disorder was at its highest pitch. Gen. Von Schoeler sent courier after courier to gen. Savary, to instent him to come and take possession of the place before the moment fixed on for delivering it up. Gen. Savary immediately hastened to march into the town, which he entered amid a shower of balls, made all the soldiers of the garrison lie through one of the gates, and shut them up in a meadow. He afterwards assembled all the officers, acquainted them that what had happened arose from want of discipline, made them sign their cartel, and re-established order in the town. Several of the inhabitants are said to have been killed in the streets.

THIRTY-SEVENTH BULLETIN.

Posen, December 2.

The fort of Czentoschan has capitulated. Six hundred men who formed the garrison, thirty cannon, and some magazines are fallen into our power. There is a treasure formed of several precious objects, which the devotion of the Poles had offered to an image of the Virgin, who is regarded as the patroness of Poland. This treasure had been put under sequestration, but the emperor has ordered it to be returned.

The part of the army which is at Warsaw continues to be satisfied with the spirit which animates that large capital.

The town of Posen gave a ball to-day to the emperor. His majesty spent an hour at it.

There was a Te Deum to-day for the anniversary of the emperor's coronation.

THIRTY-EIGHTH BULLETIN.

Posen, December 5.

Prince Jerome, commander of the army of the allies, after closing the blockade of Glogau and raising batteries round the place, marched with the Bavarian division Wrede and Deroy towards Kalitsch to meet the Russians, and left genl. Vandamme and the Witemberg corps to carry on the siege of Glogau. Some mortars and several pieces of cannon arrived on the 29th November. They were immediately formed into batteries, and after a few hours bombardment, the place surrendered by capitulation.

The allied troops of the king of Witemberg have behaved very well. Two thousand five hundred men, considerable magazines of biscuit, corn and powder, with

about 200 pieces of cannon, are the result of this important conquest, especially from the goodness of its fortifications and situation. It is the capital of Lower Silesia.

The Russians having refused battle before Warsaw, re-crossed the Vistula. The grand duke of Berg crossed it after them; he took possession of the suburbs of Praga. He is pursuing them along the Bug. The emperor has in consequence, ordered prince Jerome to march on his right against Breslaw and to surround that place, which will ere long fall into our power. The seven places of Silesia will be successively attacked and blockaded. Considering the composition of the troops which are in them, none of them give reason to presume a long resistance.

The small fort of Culmbach, named Plasenburg, had been blockaded by a Bavarian battalion; being provided with provisions for several months, there was no reason for its surrendering. The emperor got pieces of artillery prepared at Cronach and Forchem for the purpose of battering that fort and obliging it to surrender. On the 24th November, 22 pieces were mounted, which determined the commandant to deliver up the place. M. de Becker, colonel of the 6th regiment of Bavarian infantry of the line, and commander of the blockade, displayed activity and knowledge upon this occasion.

The anniversary of the battle of Austerlitz and of the emperor's coronation, was celebrated at Warsaw with the greatest enthusiasm.

NEW-YORK, February 21.

We noticed in yesterday's Mercantile Advertiser that the son-in-law of colonel Burr had published a relation of the charges alleged against him in the cyphered letter to general Wilkinson. The following is a copy of this relation, addressed to his excellency Charles Pinckney, governor of the state of South Carolina:

OAKS, February 6, 1807.

Dear Sir,

I have received and read the president's message with deep mortification and concern. But the letter annexed to it, stated to be a communication in cyphers from colonel Burr to general Wilkinson, excites my unfeigned astonishment. I solemnly avow that, when the letter was written, I had never heard, directly or indirectly, from col. Burr or any other person, of the mediated attack on New-Orleans; nor had I any more reason to suspect an attack on that place or any other part of the United States, than I have at this moment to suspect that our militia will be forthwith ordered on an expedition against Gibraltar. On the other hand I had long and strong grounds for believing that colonel Burr was engaged by other objects, of a very different nature from those attributed to him, and which I confess the best sentiments of my heart approved. I need not add that these objects involved not the interests of my country. Without adverting to that integrity of principle, which even my enemies, I trust, have allowed me, can it be supposed that a man situated as I am, descended from a family which has never known dishonor, happy in the affection and esteem of a large number of relations and friends, possessed of an ample fortune, and standing high in the confidence of his fellow-citizens, could harbor for an instant, a thought injurious to the country which was the scene of these blessings? The supposition would be monstrous. No sir, it was but a short period before the impression became general, that I apprehended the possibility of Mr. Burr's intentions being hostile to the union; and the moment which gave birth to that apprehension, gave birth to the resolution which became a citizen. I confess, however, there are times even now, when, in spite of the strong facts which have been exhibited, I am almost inclined to believe my suspicions injurious. What ever may be the thought of the heart of Mr. Burr, his talents are great beyond question—and to reconcile with such talents, the chimerical project of dismembering the union, or wresting from it any part of its territory is difficult indeed. I travelled through a part of the Western Country, during the last summer, and have no hesitation in saying, that either of those projects would have been as much reprobated there as in the Atlantic States. With respect, however, to the communication annexed to the president's message, which occasions you the trouble of this letter—after my solemn assurances to you, that I had never given Col. Burr or any other person the smallest reason to imagine that I could be induced to engage in any project against my country—it would be infinitely satisfactory to me, could I explain to you with the same certainty, the motive which led him to introduce my name as he did. But here unfortunately all is conjecture. Two motives only suggest themselves. He imagined perhaps, which by the way he had no right to do, that his influence would be sufficiently great to induce my assent, and thought, therefore, he might as well consider it already obtained: Or, which is more probable, he might have imagined, that by the apparent concert of a number of persons from different states, a stronger impression would be made upon his correspondent. Considerable effect, too, was no doubt anticipated by Mr. Burr's discernment from the perfect self-confidence which would have been manifested by his taking with him his daughter, receiving my co-operation, and thus embarking in the scene the fortunes of his infant grandson—the only relative except his daughter that he has. But, whatever the motive, which drew from col. Burr the assertions contained in his letter to general Wilkinson; facts, incontrovertible facts, prove that he had no authority for making them. His daughter did not go with him; the navy of the United States is still faithful to its duty; commodore Truxton, I am told, at the very moment he was said to have gone to the West-Indies, was in Phil-

adelphia, which I know not whether he has ever left; and I, instead of following with a corps of worthies, am now at my usual residence, where I have been ever since the adjournment of the legislature, peaceably directing the ploughing of my rice fields and preparing my lands for the ensuing crop. This is conclusive.

A conspirator against the happiness or liberties of his country would at this moment have been very differently employed. Conspirator! the blood burns my cheek as I write the word—but I meant to confine myself simply to the disavowal, I have made you, of a single action or thought hostile to my country. To feel even that disavowal necessary, is sufficiently painful: I have yielded however to circumstances, and made it. My unequivocal manner of making it, I trust, will not leave a doubt upon one candid or honest mind. Still I am aware that the common interchange of good offices with a man with whom I have been long nearly connected, may have given rise to circumstances, which however innocent in themselves, malignity will delight in distorting, and the libel among my political adversaries result in disseminating. I am aware that there will be men less scrupulous than I and I have not long since seen proofs of it—to whisper even the circumstance of my connection by marriage with col. Burr, as a circumstance warranting suspicion. About the opinions of such men I am indifferent. To the more ingenious and better part of my fellow-citizens, of whatever sect or party, I can only solemnly repeat, as I have done to you, sooner would I have perished than harbored a thought subversive of the liberties, the happiness, or the integrity of my country. Let me always be judged by my own acts and I shall be satisfied. If Mr. Jefferson or general Wilkinson ever find any thing to urge against me, let it be adduced. My residence is well known, and I shall never shrink from investigation. Nay more, presumption, where I cannot repel it by positive proof, shall be received as good evidence, and the slightest suspicion, which I cannot satisfactorily explain, shall be admitted as guilt. I remain, my dear sir, with much respect and regard, your's always,

JOSEPH ALSTON.

PHILADELPHIA, February 23.

Arrived, ship Piscataqua, Kennedy, Hamburg; schr. Thomas Jefferson, Grant, St. Jago, via Charleston; Eunice, Maxwell, Portland.

Cleared, ships Fair American, Frailly, Marsailles; Fabius, Cole, St. Pierre, Martinique; brig Spanish Lady, Holt, Kingston, Jam. schr. Trial, Foster, Leghorn.

A ship and schooner below, names unknown.

Schr. Sea Horse, Tulley, hence, at Matanzas in 14 days.

Brig Union, Johnson, from New-Orleans, was ground on Reedy Island Bar on Saturday morning.

TRENTON (N. J.) Feb. 16.

Another example for Farmers. A letter from a gentleman at New-Mills, Burlington County, after noticing the handsome crop of pork raised by Mr. Baker, of Hopewell as worthy of applause, gives the following instance of success in the raising of pork in Burlington county, which he says "rather over-tops the Hopewell Farmer:"

"Mr. John Campin, of Northampton township, fattened and killed the present season, a single litter of spring pigs from one sow, which together weighed at 10 months and 5 days old, the round number of 2458 pounds—the heaviest weighed 319 and the lightest 234."

RICHMOND, Feb. 18.

Natural Curiosity. On Thursday morning was exhibited in Richmond market, what may be truly called a mammoth hog. We have heard of larger animals of this species, but the equal of this we have never before seen. His weight after cleaning was 650 lbs. length from nose to tail 9 feet—girth six feet one inch and a half—the fore arm 22 inches and a half in circumference—the ears 11 1-2 inches broad and 12 1/2 long. This astonishing animal was raised by col. John Mayo of this city, and we are told, the same gentleman has killed several this season that would weigh from 4 to 500 lbs.

Just Received,

Per the schooner Three-Friends, Edward Harvey, from Marseilles, Barcelona, and Malaga, 105 casks Claret, iron hoops 16 pipes Brand, 4th and 5th proof 100 boxes Frontignion Wine, of 12 bottles each 20 boxes Gruyere Cheese 3 hogheads Moler Almonds 3 ditto Half-fine Almonds 3 ditto Walnuts An assortment of Perfumery, Sattin Ribbons, Taffetas, Silk Stockings and Gloves, Elastic Garters, Silk Shawls, Embroidered Druggist, Thread, Umbrellas, Lace, one box Florence Cadrell, one box Silk Stuff Biscuits.

65 bales Writing Paper 41 qr. casks Malaga Wine 500 boxes Bloom and Muscal Raisins.

For sale, by HENRY MESSONNIER.

German Evangelical Reformed Church Lottery.

500 Tickets drawn two last days. Prizes of 20 dollars No. 5429 6237 7394. Prizes of 5 dollars Nos. 3546 3947 8999 8732 8983 9079 9166 1152 140 1071 2118 3053 5427 8622 10238 11448. And 481 three dollar prizes. Total gain of the wheel 1668. Tickets may still be had at the original price of the managers, & of Mr. John Schultz, German-street, and Messrs. Warner & Hanna, Baltimore-street. The Lottery will continue drawing at Meyer's Hotel, on Monday next, the 2d of March, at 3 o'clock, P. M.

February 24. 43t.

GOOD PHILADELPHIA Printing Ink FOR SALE AT THIS OFFICE.