DECISIONS

IN THE

SUPREME COURT OF THE UNITED STATES,

DECEMBER TERM, 1864.

DERMOTT *v.* JONES.

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 wilfully 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, in so far 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 house-builder*, 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 in so far 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 passers-by, 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

Argument for the builder.

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 non-fulfilment, 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's covenant to deliver, fit for use and occupation, in connection with the latent defect of soil upon which the foundation was built.

Messrs. Carlisle and Davidge for the builder: In all cases of *locatio operis faciendi*, where a workman undertakes to incorporate his work and materials with the property of another, and loss is sustained in consequence of some inherent defect in the property, the loss falls upon the employer. The maxim of *res perit domino* applies. Pothier, according to Story,* thus declares the law of France. It is also Scotch law. By it, if the workman is employed in working the materials, or adding his labor to the property of the employer, the risk belongs to the owner of the thing with which the labor is incorporated.† The employer, by the code of France, is the guarantor of the thing upon which the work and materials of the workman are to be expended: the code of Louisiana adopts the same rule: and the common law is the same. "If the loss in bad execution," says Kent,‡ "is not properly attributable to the *fault* or *unskilfulness* of the undertaker, or those employed by him, but arises from the inherent defect of the thing itself; in such a case the loss is to be borne by the employer, unless there is some agreement by which the risk is taken by the undertaker."

Undoubtedly the plaintiff *might* have assumed the extraordinary responsibility alleged; but, unless it be clearly shown that he did so, the presumption is that he contracted

* Bailments, § 426.

† 1 Bell, 456, 5th ed.

‡ 2 Commentaries, § 40.

for no more than the sort and degree of skill and diligence belonging to his trade. His covenant is not the stipulation of an insurer of anything, but is a stipulation to give his own skill, fidelity, and diligence in the prosecution of work undertaken in pursuance of *prescribed specifications and plans.* Miss Dermott purchased, by the contract, the skill and diligence of Jones, in supplying the work and materials stipulated, and also his judgment, so far as involved in the work and materials. But she never bought his judgment, as regarded the plans and specifications. He was never consulted about them. On the contrary, they were prepared by *her* architect, and put in his hands to work by. If he deviated from them, he was guilty of a breach of contract, for which he was responsible. His business was to work by, not to override them.

It is thus apparent that the present case is not one where an architect, employed to furnish plans and specifications, is guilty of neglect, and of not exercising that degree of skill and judgment which the employer prays; but is a case where a mechanic is employed to supply work and materials according to plans and specifications which he is bound to follow. The rule of law is that a party is responsible for the ordinary degree of skill belonging to his trade or profession. But Jones was not an engineer or architect, but, as the case states, "a mason and house-builder." Nor did Miss Dermott treat with him in any other character than that of a mechanic, competent, not to plan, but to carry out her plans. She employed an architect, by whom the plans and specifications were prepared. Her remedy, then, for any defects in the plans and specifications, was by suit against the architect, not by recoupment against Jones. The architect should have ascertained, if necessary, by boring or otherwise, whether they were practicable.

Messrs. Poe and Brent contra: The counsel of the other side do not cite one adjudged case in support of their view. The speculations of Pothier, the dicta of Story, or even the ab-

stract opinions of Bell and Kent, are not "authority" anywhere, and ought not to be cited.

The theory of the other side makes the proprietor of the ground an insurer to the builder of the stability and solidity of the soil on which such builder contracts to build work. We might deny the soundness of such a doctrine in any case of a contract to build a house, where the payment of the price is to be made when the work is done; because a man cannot be said to build anything which falls down before he completes it. But, whatever may be the general rule, we rely, in the case here, upon the *contract* that this plaintiff will furnish every material and thing requisite to complete and finish these buildings fit for use and occupation. He does not merely covenant (as contended on the other side) to execute these specifications, but he superadds the contract that he will, over and above executing these, furnish everything necessary to complete it fit for use and occupation, and will *deliver* it finished and ready for occupation. The law, in cases like this, is settled and reported law from at least A.D. 1670, and from the leading case of *Paradine* v. *Jayne*, given us by the old reporter Alleyn, in 23d Charles II. The defendant there had taken a lease, covenanting to pay rent. He pleaded "that a certain German prince, by name Prince Rupert, an alien born, enemy to the king and kingdom, had invaded the realm with a hostile army of men, and with the same force did enter upon the defendant's possession and him expelled, whereby he *could not* take the profits." On demurrer, the court resolved "that the matter of the plea was insufficient," and that "he ought to pay his rent." "And this difference," says Alleyn, "was taken: that where the *law* creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him. . . . . But where a party by his *own contract* creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. And, therefore, if the lessee covenant to repair a

house, though it be burnt by lightning or thrown down by enemies, yet he ought to repair it;" and the report ends by declaring that where there is a covenant to pay, "though the land be surrounded or gained by the sea, or made barren by wild-fire, yet the lessor shall have his whole rent;" and judgment went accordingly. This case has been always followed in England. American decisions are to the same general purpose, to wit, that a man *must* fulfil covenants deliberately made. Without citing earlier ones, or quoting at large even a late one in New York,* we refer to one of the very latest, where the best cases, both English and American, are collected. We mean *School Trustees* v. *Bennett*,† in New Jersey, a case which, like our own, was the case of building a house. This case is specially in point, or at least specially strong, for the house was there *twice* destroyed by natural causes. In the first instance, when it was half way towards completion, "a violent gale of wind arose suddenly, without any of the usual premonitory signs of a storm, and prostrated the building:" afterwards, and when rebuilt, "it fell, *solely* on account of the soil having become soft and miry;" though, at the time the foundations were laid, the soil was "so hard as to be penetrated with difficulty by the pickaxe," and its defects were latent; the softness having arisen, as was suggested, by the rising of springs; at any rate from "natural causes *wholly* beyond the control of the contractors." The court, however, was resolute, and decided that "if a person contract with the owner of a lot to build and complete a building on a certain lot, and, by reason of a latent defect in the soil, the building falls down before it is completed, the loss falls upon the contractor;" and decided even, as in the case in New York, that the owner of the soil may recover back payments which he has made on account. The court reviewed the authorities from *Paradine* v. *Jayne*, in old Alleyn, down; and say, finally, "No matter how harsh and apparently unjust in its operation the rule may occasionally be, it cannot be denied that it has its foun-

* Tomkins *v.* Dudley, 25 New York, 272. † 3 Dutcher, 515.

dation in good sense and inflexible honesty. He that agrees to do an act should *do it*, unless absolutely impossible. He should provide against contingencies in his contract. . . . . The cases make no distinction between accidents that could be foreseen when the contract was entered into, and those that could not have been; they all rest upon the simple principle, 'such *is* the agreement,' clear and unqualified, and it *must* be performed, no matter what the cost, if performance be not absolutely impossible."

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.* That covenant it was his duty to fulfil, 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.†

* See *supra*, p. 2.

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

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.* 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.† 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.‡ 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*,§ 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.‖

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.

* Bullock *v.* Dommett, 6 Term, 650.

† Brecknock Company *v.* Pritchard, Id. 750.

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

§ 3 Dutcher, 513.

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

Opinion of the court.

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 wilfully 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, in so far, 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.*

JUDGMENT REVERSED, and the cause remanded for further proceedings in conformity with this opinion.

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