fraudulent certificates and the surrender of the securities fraudulently obtained. These propositions are so plain and familiar as to need no verification by the citation of authorities. It is true that there is a remedy at law, as there is in every case of fraud; but, the jurisdiction in equity and at law in relation to fraud being concurrent, a defendant has no right to complain if the complainant selects that tribunal where he can obtain the most ample and satisfactory relief.

The demurrer will be overruled, and the defendants allowed 20 days within which to prepare answers, and present them to the court, with application for leave to file.

HAZLEHURST COMPRESS & MANUF'G CO. *v.* BOOMER & BOSCHERT COMPRESS CO.

(Circuit Court of Appeals, Fifth Circuit. December 7, 1891.)

1. SALE—WARRANTY—EVIDENCE OF BREACH.
   A cotton-press was sold with certain warranties, and with the proviso that, "when it has performed its work in a successful manner, half cash is to be paid." The press was set up in November, 1887, and over 700 bales were pressed that season; and in the following January the cash payment was made, the purchaser giving a certificate recommending the press as a "practical machine in every respect." In November, 1888, the purchaser wrote that two nuts on the screw had broken, and that until that break the press had been doing good work, and asked an extension of time on the deferred payments, because of the small business done that year. Subsequently the request was repeated on the same ground, and an extension was granted. Over 1,100 bales were pressed in 1887-88, and over 4,000 in 1888-89. A further payment was made in 1889. No complaint of breach of warranty was made until January, 1890. *Held*, that this was almost conclusive against a claim of such breach as a defense to a suit for the balance of the purchase money, and its effect was not overcome by the testimony of unskilled workmen and unscientific persons that the press would not work to the guarantied pressure of 800 tons, such testimony being based mainly on the fact that the bands often broke from the expansion of the bales; especially as it appeared that the bands were tied by unskilled workmen, and that the press had been strained by careless management.
2. SAME.
   Evidence that two other presses of the same pattern failed to work satisfactorily was competent, but the weight thereof was much impaired by the fact that one of them was the first made of that pattern, and was inferior to the one in question, and that the weight of the bales compressed by the other was above the average weight of cotton bales.
3. SAME—CONSTRUCTION OF WARRANTY.
   A warranty that a cotton-press will press "at the rate of 60 bales per hour," is not a warranty that it will press at that rate for a day of 10 hours, but only for a limited time.

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

Suit by the Boomer & Boschert Compress Company against the Hazlehurst Compress & Manufacturing Company to foreclose a mortgage to secure the balance of the purchase price of a cotton-press. Decree for complainant. Defendant appeals. Affirmed.

R. N. Miller and *J. S. Sexton*, for appellant.

S. S. Calhoon, for appellee.

Before PARDEE, Circuit Judge, and LOCKE and BRUCE, District Judges.

BRUCE, J. This suit is for the foreclosure of a chattel mortgage executed January 4, 1888, by the Hazlehurst Compress & Manufacturing Company to the Boomer & Boschert Compress Company to secure the sum of $6,000, evidenced by two promissory notes, one for $1,000, and the other for $5,000, due at 6 and 12 months from date. The first note was paid; the other is unpaid, except $600, paid January 4, 1889.

The answer of the respondent company admits the allegations of fact in the bill, but says the note and mortgage in the suit were given for the purchase of a cotton compress and machinery, which was bought from appellee under a guaranty, which respondent charges has been broken, and—

"That said press will not work to a power of 800 tons without overstraining; * * * that by reason of the insufficiency of the power of said press the bands are constantly breaking on the cotton compressed in said press, and that a large proportion of it has to be run through the press at least twice to get the bands to remain on it; that the said press cannot bear the necessary power to compress a bale of cotton so as to kill the spring in the cotton; * * * and the defendant is compelled to recompress fully one-third of all the cotton handled in order to make it meet the requirements for domestic and export shipments."

Respondent charges—

"That said press will not press domestic cotton, hand-tied, at the rate of sixty bales per hour, and that it will not press export cotton, seven or eight bands, lever-tied, at the rate of fifty bales per hour to a density of twenty-two and one-half pounds per cubic foot, shipping bulk."

Respondent charges—

"That said outfit of said press and machinery is not a complete and practical machine for compressing cotton; * * * that the guaranty of said press and machinery by complainant to this respondent has wholly failed, * * * and by reason of such failure they have been damaged much more than complainants claim to be due them in the bill of complaint; and at least in the sum of seven thousand dollars, ($7,000;) and these respondents would have insisted upon a cancellation of this contract, and upon their rights, on the failure of such guaranty, and would not have paid complainant anything on said press,—for these failures of guaranty were apparent upon the outset of its operation,—but respondents, being anxious to retain said press and machinery, and to avoid doing complainants any injustice, supposed they were due to the fact that it was operated by inexperienced hands, and thus paid their money, and continued its operation, believing and hoping that the outfit would, in the hands of experienced operators, meet the full requirements of complainant's guaranty. But after the most full and satisfactory tests respondent finds that said guaranty has wholly failed as aforesaid, and prays to be dismissed with costs."

To this answer there was filed a general replication. The guaranty which the appellant claims has not been complied with is in these words:

"GUARANTY.

"*Power.* That the press will work to a power of 800 tons without overstraining or deterioration of any of its parts, except as to ordinary wear.

"*Capacity.* That it will press domestic cotton, hand-tied, 7 bands, at the rate of 60 bales per hour; and that it will press export cotton, seven to eight bands, lever-tied, at the rate of 50 bales per hour, to a density of 22 1-2 pounds or over per cubic foot, shipping bulk.

"*Range.* That the press will be perfectly adjustable to any sized bale within the ordinary limits of the business.

"*Safety.* That the power applied will be accurately shown by the pressure indicator, thus providing in the hands of the operator absolute security against breakage; that, when properly tied and packed, the cotton compressed by this machine will meet the requirements for export and domestic shipments; that the outfit is a complete and practical machine for compressing cotton."

The rule of law seems well settled as stated in 2 Benj. Sales, (1st Amer. Ed.) § 894, on the subject of remedies of the buyer on breach of warranty, where it is said:

"(1) He may refuse to accept the goods, and return them. * * * (2) He may accept the goods and bring a cross-action for the breach of warranty. (3) If he has not paid the price, he may plead a breach of warranty in reduction of damages in the action brought by the vendor for the price."

The compress in question was sold with express warranty by the appellee to the appellant; and the latter, after the machinery was received, set up, and operated, did not elect to rescind the contract on account of any breach of the warranty, and return the property, but retained it, and operated it; and, when sued for the unpaid purchase money, seeks now, in this suit, to recoup on an alleged breach of the warranty in the contract of sale of the press. This he may do; but he may not claim special or consequential damages. At section 898, Benjamin on Sales, says:

"Buyer may set up defective quality of warranted article in diminution of price, but not to claim special or consequential damages."

The same author states the general rule that an action for damages lies in every case of a breach of promise made by one man to another for a good and valuable consideration.

Before going into an examination of the testimony of the witnesses as to whether the alleged breach of warranty is established by the proof, we may look briefly at the case upon the acknowledged facts as they appear in the record. The sale of the compress and machinery was made on the 1st day of August, 1887, for the price of $12,000. In November of that year the press and machinery was put up under the direction of appellee, and operated by appellant; and 733 bales of cotton were compressed on it the fall of that year. On the 4th day of January, 1888, one-half the purchase money was paid in cash, and notes and mortgage given for the other half of the purchase money,—one note for $1,000 and one for $5,000,—due, respectively, in six months and one year, with interest at 7 per cent.; and on the same day the appellant company, through its president, gave the following certificate:

"HAZLEHURST, MISS., January 4th, 1888.

"This is to certify that we purchased a press from the Boomer & Boschert Compress Co., of Syracuse, N. Y., and we cheerfully recommend the same as being a practical machine for compressing cotton in every respect. We can also say that Mr. G. B. Boomer, president of said company, is a gentleman with whom it is a pleasure to do business.

"HAZLEHURST COMPRESS & MANUFACTURING CO.
"I. N. ELLIS, President."