

"*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."

And again, in letter of November 27, 1888, Ellis, president of appellant company, says:

"Two nuts on the screw of the press have broken. Our press, up to this break, has been doing good work, but, owing to yellow fever in the early part of the season, and short cotton crops, we have not done the business we expected. * * * Owing to these causes, we will not be able to pay you more than \$2,500 on the notes we owe, and ask that you favor us and extend balance to January, 1890. I hope you will be able to accommodate us in this matter, as I feel sure you will get your money at the end of another year."

The request for extension was repeated in letter of December 24th, upon same grounds, and granted in letter of appellee of December 28th. The note for \$1,000 was paid; the other remains unpaid, except as to \$600 paid on January 4, 1889. It was not until January 28, 1890, in letter of that date, addressed to appellee, that the appellant gave any notice or made any claim that the guaranty in the contract of the sale of the property had not been made good, and that it claimed any thing as damages for breach of the guaranty. Now, in the face of such facts, can a court of equity do otherwise than look with some distrust upon such a defense, coming under such circumstances, and at such a time? The appellant had full opportunity to make any test of the compress it desired, and there is no suggestion of deceit or fraud on the part of appellee to prevent a test. During the season of 1887-88, 1,156 bales of cotton were compressed on the press; during the season of 1888-89, 4,031 bales were compressed on it; and, as we have already seen, in the fall of that year, and before any part of the purchase money was paid and the notes and mortgage given, there were compressed upon it 733 bales of cotton. The contract of sale between the parties seems to contemplate a test and trial, for it provides: "When the press has performed its work in a successful manner, half cash is to be paid, and the balance in two equal payments." Making the payment of half the purchase money and giving notes and mortgage for the other half is, in effect, saying that the press had performed its work in a successful manner; and, to say the least, raised a presumption, more or less weighty, that there was no counter-claim for breach of warranty. This presumption is made stronger when an extension of the time of payment of the balance due was afterwards asked by the appellant, and granted, with no notice or suggestion of any claim that the warranty of the press had not been complied with, or that the appellant had a claim for breach of warranty. This would seem little short of conclusive against the claim of the appellant here in this case; and yet the courts have not held it to be conclusive, but have allowed parties to explain and show why it is that they kept back their claim, and performed acts which, without explanation, are inconsistent with the existence of such claim. *Aultman v. Wheeler*, 49 Iowa, 647. The burden is upon appellant, not only to show by proof the alleged breach of the warranty, but also to explain its conduct in the particulars named, and show why it should not be taken to be conclusive against it.

Passing now to the terms of the guaranty, and the evidence relied on to establish its alleged breach, the first is that the press is deficient in power, and will not work to a power of 800 tons, as guaranteed. There were a number of witnesses who testified for appellant upon this subject. None of them seemed to be men of scientific knowledge and experienced in mechanics; and the mere opinion of such witnesses is not entitled to great weight. It is put rather by way of argument that the power is not sufficient, and would not kill the spring in the cotton, as it is called, and the rebound would break the ties on the bale, and therefore the alleged want of power. It is not shown that this breaking of the ties was not the result of unskillfulness in the persons employed as tiers, and in the want of skill and care in the handling of the press by the manager. The evidence shows that Trotter, in charge for appellant at the beginning of the operation of the press, did not handle it carefully and skillfully, but that he ran it together with great force, and "locked the nuts," as it is called; and Cook, who operated the press as engineer and manager in 1888, speaking of the marks on the indicator, says:

"Mr. Boomer impressed upon me that the upper mark, which indicated 900 tons of pressure, was the limit of absolute safety; that you could go there a thousand times with absolute safety, but not beyond that."

Then to the question, "Did you ever run it beyond the point that he indicates as the point of safety?" he answered, "Sometimes I did, though to a very slight extent." So that this compress of 800 tons' pressure was operated at its maximum, 900 tons, and above, which must have resulted in overstrain and injury to the press. It must be borne in mind that this was a light, and comparatively a cheap, press; that it required careful and skillful handling; and it is not established by the proof that it had a fair and just trial in the hands of those whom the appellant put in charge to operate it.

The same may be said as to the adjustability of the press, and as to its capacity to compress cotton at the rate of 60 bales an hour. Appellant's proposition is that the press, to meet the guaranty, should compress cotton at the rate of 60 bales an hour for a day of 10 hours. But such is not the guaranty in terms; and, considering the circumstances in proof,—the contemplation of the parties when it was agreed to put up this compress at Hazlehurst,—it is but a reasonable construction of this part of the guaranty that, under favorable conditions, it would compress cotton at the stipulated rate for a limited period of time. And it is not established by the proof that it has not and will not do so; in fact, there has been no test of the press in this respect to this day. Much of the testimony is in relation to other presses,—one put up in Demopolis, Ala., and one in Greenville, Miss.,—and this testimony is not incompetent when it is shown that these presses were of the same make and pattern, and were operated under similar circumstances and conditions. Boomer, however, testifies that the press put up for Webb at Demopolis, and about which he (Webb) testifies, was the first press made by his company of that pattern; and was an inferior press to those put up and operated in Hazlehurst and Greenville, Miss. A number of witnesses testify about

the Greenville press, as to its want of power and capacity to compress cotton at the rate guaranteed; but it is shown also that the demand at that point was for a compress that would compress cotton bales much above the average weight,—some of them running over 750 pounds in weight. Manifestly the press was not adapted to cotton bales of such size and weight, and the parties took that view of it themselves, and procured from the appellee a heavier press of 1,500 tons' pressure, better adapted to the size of the bales and the volume of business at that place. It is clear from the testimony that the parties contemplated a comparatively light-made press, and it is vain and unreasonable to expect from such a compress the service obtained from heavy presses of great power, costing two and a half times as much money. The evidence does not satisfactorily establish the alleged breach of warranty, nor does it establish the *bona fides* of the claim for breach of warranty, but leaves it to the imputation that it was an after-thought. It follows that the judgment and decree of the court below is affirmed, with costs; and it is so ordered.

PARLIN *et al.* v. STONE *et al.*

(Circuit Court, W. D. Missouri, W. D. June, 1880.)

1. ESTOPPEL IN PAIS—FALSE REPRESENTATIONS—MORTGAGES.

An owner of lands who induces his creditor to accept as security a mortgage thereon from a third person, by representing that the third person is the owner, is estopped to claim the lands as against the lien of the mortgage.

2. EQUITY—REFORMATION OF INSTRUMENTS.

When a mortgage shows on its face that the consideration moved from a certain person, and it appears that his name as mortgagee was omitted by mistake, equity will reform the instrument by inserting his name.

In Equity. Bill to reform and foreclose a mortgage.

Waters & Winslow, for plaintiffs.

Botsford & Williams, for defendants.

McCRARY, J. This cause has been argued and submitted for final decree upon the merits. The plaintiffs bring their suit in equity to reform and foreclose a mortgage. The following are the material facts established by the proof: (1) Defendant John L. Stone was indebted to plaintiffs in the sum of about \$1,600, part of which was his individual debt, and the balance was the debt of John L. Stone & Co. (2) This indebtedness was partially secured by collateral notes turned out by defendants. (3) Plaintiffs called upon said John L. Stone for additional security, and after some negotiation it was agreed that they were to have a mortgage on two tracts of land. (4) The defendant John L. Stone represented to the plaintiffs that one of the said tracts of land was defendants' property, and that the other tract was the property of his son Jeremiah Stone, and of record in his name. (5) Relying upon these