GREEN et al. v. TURNER et al.

(Circuit Court, E. D. Wisconsin. April 5, 1897.)

1. MORTGAGES—LIABILITY OF MORTGAGOR'S VENDEE—SUBROGATION.
A grantee of land is not directly liable to his grantor's mortgagee, at law or in equity; and the only remedy of the mortgagee against such grantee is by bill in equity, in the right of the mortgagor and grantor, by virtue of the right in equity of a creditor to avail himself of any security which his debtor holds from a third person for the payment of the debt.

2. SAME—SUBROGATION—DEFENSES BY VENDEE.
Complainants sold a tract of land to M. and H., retaining a vendor's lien for part of the purchase money. M. and H. sold the land to defendants. Subsequently complainants filed their bill against defendants, to which M. and H. were not parties, to obtain satisfaction of a deficiency arising on the foreclosure of their vendor's lien out of the indebtedness of defendants to M. and H. for the purchase money of the land. Defendants, in their answer, set up, as a defense to the enforcement of such indebtedness, false representations made by M. and H. to induce defendants to purchase the land, and notice given by them to M. and H. of a rescission of the contract. *Held* that, as against complainants seeking relief by subrogation to the rights of M. and H., defendants were entitled to avail themselves of such misrepresentations as a defense simply, and were not restricted to presenting the same by cross bill for affirmative relief, to which M. and H. would be necessary parties.

3. SUBROGATION—DEFENSES—DEBTOR'S FRAUD.
Where a creditor is seeking to obtain satisfaction of his claim through subrogation to the rights of his debtor against a third party, the utmost good faith on his own part will not entitle him to prevail, if it appears that his debtor has been guilty of such fraud as to defeat his rights against said third party.

4. VENDOR AND PURCHASER—MISREPRESENTATIONS.
The evidence discussed, and found to show misrepresentation in a sale of mining land.

On final hearing of a suit in equity to charge the defendants, upon their alleged purchase-money indebtedness to the complainants' grantees, with the liability of the latter to the complainants for the deficiency arising upon foreclosure of their vendor's lien on the same property in Virginia, called the "Glade Mountain Iron Ore Property."

The bill alleges substantially the following facts: The complainants owned the Glade Mountain Iron Ore property, and on August 23, 1890, entered into written contract to sell the same to Moore and Hibbert for the sum of $35,000, payable in installments; a deed to be executed upon payment of the second installment of $10,666.66, with reservation of a vendor's lien, according to the practice in Virginia. Moore and Hibbert made the first payment of $1,000, and on November 15, 1890, gave their three promissory notes for the installments subsequent to the second one. Before the payment of the second installment, Moore and Hibbert entered into contract, dated November 12, 1890, to transfer the contract of sale and all rights thereunder to the defendants for the sum of $55,000; the defendants agreeing to pay to the complainants the full amount payable under the contract of August 23, 1890. On November 22, 1890, a further contract was made between Moore and Hibbert and the defendants, which provided for certain contingent shares of Moore and Hibbert in the venture, and renewed the promise by defendants to pay the amounts due to the complainants. On December 12, 1890, the complainants deeded the property to Moore and Hibbert in accordance with the contract of August 23, 1890, retaining vendor's lien as provided. The defendants paid the second installment to procure such conveyance, and represented that they

had succeeded to all the rights, and assumed and would perform all the liabilities of Moore and Hibbert under the contract with the complainants, and thereupon directed the conveyance to Moore and Hibbert. The defendants entered into possession of the property and began work thereon, under the conveyance made by complainants and a subsequent deed of Moore and Hibbert to them, and became the owners thereof in fee. The complainants have fully performed on their part, and the remaining installments of purchase money, amounting to the sum of $23,333 and interest, have matured, and no payment has been made thereon, except the sum of $1,075.22. The answer concedes the making of the several written contracts and the deed by complainants as set forth in the bill, but denies any representations, requests, or promises on their part to the complainants respecting the making of conveyance to Moore and Hibbert, or otherwise. It avers conveyance from Moore and Hibbert to the defendants, after the execution of complainants' deed, by deed dated December 12, 1890, which recites only, respecting the complainants' claim, that it is "subject to vendor's lien thereon to Green, Main, and Brown," and thereupon avers that the previous contracts were merged, and that the contracts between Moore and Hibbert and the defendants were, in effect, for advances to be made by the latter upon a joint venture of both parties. The answer further sets up certain false representations by Moore and Hibbert, upon which the defendants relied, and which induced the making of these contracts for the sole purpose of mining for iron ore; that they expended $25,000 in endeavors to develop the property for that object; that no body of iron ore existed on the land, and the property was worthless; that immediately upon the discovery of the truth the defendants offered to Moore and Hibbert rescission of the contracts and conveyance, refused to proceed therewith, and immediately abandoned possession of the property; that Moore and Hibbert refused to accept rescission, but the defendants have never since had possession, nor asserted any rights in the premises; and that the complainants subsequently sold the entire property under certain foreclosure proceedings, to which these defendants were nominal parties, but without personal service or appearance. The answer also attempts to raise the question whether relief in equity is not excluded by adequate legal remedies. The evidence, so far as it is deemed material, is referred to in the opinion.

Haring & Frost, for complainants.
Van Dyke, Van Dyke & Carter, for defendants.

SEAMAN, District Judge (after stating the facts as above). Upon each side an objection is raised which must be determined before inquiry is open upon the merits: (1) By the defendants, that equitable jurisdiction is barred, because there is an adequate remedy at law; and (2) by the complainants, that the defenses of false representations or mistake can be heard only upon a cross bill for affirmative relief.

1. The first objection is met by the doctrine, which is established for this court, whatever may be the conflict in other jurisdictions, that:

"The grantee is not directly liable to the mortgagee, at law or in equity; and the only remedy of the mortgagee against the grantee is by bill in equity in the right of the mortgagor and grantor, by virtue of the right in equity of a creditor to avail himself of any security which his debtor holds from a third person for the payment of the debt. Keller v. Ashford, 133 U. S. 610, 10 Sup. Ct. 494; Willard v. Wood, 135 U. S. 309, 10 Sup. Ct. 831;" Insurance Co. v. Hanford, 143 U. S. 189, 190, 12 Sup. Ct. 437; Willard v. Wood, 164 U. S. 502, 519, 17 Sup. Ct. 176.

If, therefore, it be assumed that this point is well presented by the answer, it must be overruled.

2. The second contention, on behalf of the complainants, which

would debar any defense of fraud or mistake in the transaction arising between their grantees and mortgagors and the defendants as succeeding grantees, except through the affirmative and direct relief of rescission under a cross bill, for which Moore and Hibbert are indispensable parties, is, in my opinion, untenable. The authorities cited to that end would be applicable in an action of foreclosure by Moore and Hibbert, and it may be that their actual presence as parties here would authorize such course. But they are neither present, nor within the jurisdiction of the court. On the other hand, the complainants are in a court of equity, seeking subrogation to the rights of Moore and Hibbert, and no relief can be granted unless it accords with the principles of equity, which are "founded in benevolence, and administered to promote justice and right." They are strictly limited to such rights and benefits as Moore and Hibbert could enforce against the defendants. City Mission v. Brown, 158 U. S. 222, 227, 15 Sup. Ct. 833; Willard v. Wood, 164 U. S. 502, 521, 17 Sup. Ct. 176. So considered, the defendants are entitled to the full benefit of the rule which permits defensive relief in equity whereby any fraud or mistake which would defeat recovery as between the contracting parties may be set up by way of defense to defeat the enforcement of the apparent obligation or liability for the benefit of a stranger to the contract, as creditor or mortgagee. 2 Pom. Eq. Jur. § 872; Tarleton v. Vietes, 1 Gilman, 470; Benedict v. Hunt, 32 Iowa, 27. Rescission may be necessary for complete relief between the contracting parties, but when the creditor or mortgagee of one contractor is permitted to come in for its enforcement against the other party according to equity, he must be subjected to any showing of facts which would prevent recovery in a suit by the contracting party. To deprive the defendants of this right because the necessary party for a decree of rescission has not been brought in would close the doors of equity against the equitable considerations which are of the essence of the jurisdiction. In this view, the answer tenders a valid defense.

The allegations of the answer are, in my opinion, fully sustained by the testimony, as to the representations made by Moore and Hibbert, and the defendants' reliance upon them in entering into the purchase in question. Those representations were made in the written report of Capt. Hibbert, and in the oral statements by Moore and Hibbert, which are shown by the testimony of Timlin, Turner, and Burke. The testimony of Moore and Hibbert is in many respects evasive, and, upon the whole, cannot be regarded as materially contradicting the defendants' witnesses. Moore and Hibbert were well known by the defendants as men of large experience in iron mining; had been prospectors and operators in the Lake Superior mining district for many years; and their reputation in such matters gave good ground for assuming that their explorations would be well conducted, and their information reliable, as to the conditions found. Their representations appear of the following effect: That the property offered for sale consisted of about 1,000 acres, covering 4 miles in length; that on one

portion there was a trench showing an immense body of solid iron ore, 12 feet in width, and, if the trench were continued south, it would show a still greater width, because the ore extended under the ground in that direction; that at another place on the property there was an immense outcropping of manganiferous ore; that on the eastern end, at the bottom of the creek, there was solid ore 20 feet wide, and running under the earth, being from 150 to 250 feet lower than the exposed ore on the hillside; that on the west end of the property there was a large body of ore, solid and in place, to the width of 100 to 150 feet; that all of the foregoing deposits of ore were in one lead, and covered a distance of 4 miles; that they (Moore and Hibbert) had become familiar with the geological formations existing in Virginia, and assured the defendants that there was a continuous vein of ore in place on the property, of which they had found the foot wall and hanging wall, and the ore in place between them; that there was on the property a permanent deposit of ore of great depth, which had been found by them to be in place; that the iron ores in Virginia were of two kinds,—limonite or drift ore, which lay over the limestone strata, and iron ore in place, or regularly stratified, lying between the sandstone foot wall and the limestone hanging wall; that the deposits upon this property were of the latter class, which were always permanent and of great depth; that 3,000,000 tons of ore were in sight upon the property; that Moore and Hibbert had tested the vein in the creek bottom to the width of 20 feet; that there was a vein of ore 4 miles long, which they had tapped in several places and found continuous and in place; that every test pit upon the property was bottomed on a solid ledge of iron ore in place; that they had made sufficient explorations to establish the fact that the ore was in place between the foot wall and hanging wall, and regularly stratified, and in large quantities,—one end of the vein being at least 20 feet, and the other at least 100 feet,—and they had found and traced the foot wall the entire length of the property. The defendants assert that they entered into the contracts with Moore and Hibbert relying entirely upon these assurances, and there is no evidence which fairly raises a doubt upon this point. It is true that both Timlin and Turner made separate visits to the property before concluding the arrangement, but they were each informed by Moore and Hibbert that the owners had more favorable offers, and would not permit further explorations before purchase, and that the explorations which they had made as the foundation of their assertions could be relied upon for closing the purchase; and the testimony further shows that the inspection upon these visits could not have disclosed the true state of the previous explorations, or their results, without reopening the trenches and pits, for the reason that all of the alleged indications of ore were then covered by surface filling. The representations upon which the defendants relied were of existing facts; of conditions which were discoverable by an expert in the careful and systematic explorations, which were justly presupposed, both from the written report and the oral statements. They are clearly distinguishable in all essential features from the

mere expressions of opinion or judgment, or the justifiable "trade talk," which mark the line of cases cited on behalf of the complainants, of which Development Co. v. Silva, 125 U. S. 247, 8 Sup. Ct. 881, and Tuck v. Downing, 76 Ill. 71, are examples. Disregarding all estimates of the amount of ore "in sight," or of the daily output promised, the facts stated as to the vein of ore found in place, and of its discoverable extent and depth, if true, would give assurance of a valuable mining property, when taken in connection with the accessibility, and other patent elements. The testimony demonstrates that no such facts existed; that there was no body or vein of ore in place which fulfilled the representations in any substantial particular. Although some iron ore was found, it was largely of so-called "wash ore." There was no considerable body in any place, and none of the evidences were found which Moore and Hibbert specified as showing a body or vein of ore. It further appears from the testimony of Moore and Hibbert, introduced by the complainants, that no such explorations were made, either by them or under their direction, as were clearly implied by their report and were expressed in their oral statements, but that, resting upon assumptions from surface indications and hearsay, they imposed their mere deductions therefrom upon the defendants as facts ascertained by actual explorations.

The complainants urge that the proofs do not show that the property is worthless, in fact, for mining purposes, and that the efforts on the part of the defendants for its development were insufficient. But this objection is without force, as it appears that their actual expenditures to that end amount to over $16,000, aside from the payments for purchase money; that the work was conducted by mining experts; that it was prosecuted with diligence and skill, and to the utmost extent which could reasonably be required to divulge that there was no ore attainable in substantial quantity, and that the evidences of its existence specified in the representations were not present in the land. The bona fides of the complainants is also asserted as favoring their right to maintain this action, and they earnestly dispute the testimony which is introduced on behalf of the defendants as tending to show conduct on their part in aid of the deceit, and their information of the defendants' reliance upon the false representations; but the right of Moore and Hibbert is the vital issue, and the utmost of good faith on the part of the complainants cannot aid their recovery here, if Moore and Hibbert are without right. As above indicated, my conclusions are in favor of the defendants upon this issue, and the bill of complaint must be dismissed for want of equity. It is so ordered, with costs against the complainants.

TRENTON TERRA COTTA CO. v. CLAY SHINGLE CO.

(Circuit Court, D. New Jersey. April 20, 1897.)

1. REFORMATION OF CONTRACTS—MISTAKE.
A clerical mistake by one party in reducing the terms agreed upon to writing, which is either shared in or known to be a mistake by the other party at the time of executing the contract, is sufficient ground for decreeing a reformation.

2. SAME.
The owner of a patent for clay shingles proposed in writing to give to a manufacturer a license for certain states, and, among other provisions, stipulated that the licensee was to pay royalties upon at least 3,000 squares of the patented shingles each year. After some negotiations, resulting in modifications of other provisions, but without any objection by either party to this stipulation, the licensee by letter authorized the licensor to draw up a contract on the basis of the terms agreed upon. These terms were set forth in the letter, but with a statement that royalties were to be paid, in any event, on 30,000 squares per annum, instead of 3,000. *Held*, on the evidence, that this was a clerical error known to be such by the licensor at the time of executing the contract, and that a reformation should therefore be decreed.

Geo. W. Macpherson and John T. Bird, for complainants.
Linton Satterthwait, for defendants.

KIRKPATRICK, District Judge. This bill is filed to reform a contract entered into between the Trenton Terra Cotta Company, the complainants herein, and the Clay Shingle Company, the defendants, bearing date January 29, 1892. It appears from the evidence in the cause that the defendants, residents of the state of Indiana, were the owners of a patent for the manufacture of clay shingles, and were desirous of having their shingles manufactured and sold on royalty in the Eastern markets. To that end they entered into negotiations with the Trenton Terra Cotta Company, who owned a large plant in Trenton, N. J., suitable for the purpose, and some time in the latter part of the year 1891 submitted a form of agreement, in which it was, among other things, provided that the Clay Shingle Company should give the Trenton Terra Cotta Company the right to manufacture their patented tile at Trenton, N. J., and the exclusive right to sell and use the same in the states of New Jersey and Delaware, and the right to sell and use (not exclusive) in the state of New York; the Trenton Company to pay $2,000 as an advance on the royalty when the papers were executed. For this advance no condition was imposed as to the amount of tile to be made in 1892, but during every year after 1892 the said Trenton Company was to be required to make not less than 3,000 squares, or pay the royalty on that amount. The said proposed agreement also provided that the price of the tile sold by the Trenton Company should not be less than $6.50 per square delivered upon the cars or wagons at their factory, and that there should be paid the Clay Shingle Company a royalty of 50 cents per square for each 100 square feet of tiles made at their factory, and sold within the allotted territory. This proposition, as a whole, was not satisfactory to the Trenton Company. In a