# OREGON SUPREME COURT DECISIONS

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**Elgin v. Snyder and Snyder, Marion County**

Decided, October 17, 1911.

Charles F. Elgin, appellant, S. H. Snyder and Laura Snyder, respondents. Appeal from the circuit court for Marion county. The Hon. Wm. Galloway, judge. Argued and submitted, September 26, 1911. M. E. Pogue, (W. M. Kaiser, on brief) for appellant. John H. McNary, (Charles L. McNary, on brief) for respondents. Bean, J. Affirmed.

This is a suit to rescind a contract, whereby plaintiff conveyed to defendant, S. H. Snyder, 46 acres of land valued at $2,000, in consideration of 35 shares of stock in the Salem Box and Lumber company, a corporation, of the par value of $100 per share, on the ground of fraud. From a decree in favor of defendants, plaintiff appeals.

Plaintiff alleges, as the gist of his complaint, that said defendant, his agents, servants and associates, who were the officers and stockholders of the corporation for the purposes of cheating, wronging and defrauding plaintiff, knowingly and falsely represented to the public, and to plaintiff, that said stock was of the value of 75 to 80 cents on the dollar, knowing that said shares were of no value whatever, and that the corporation was then insolvent, all of which is set out at length and with minute detail. For this purpose property of the value of about $3,500 was turned over to the company by Mason & Snyder, two of the incorporators, for $11,000 in stock.

That on October 19, 1907, plaintiff, having no knowledge or means of knowledge of the falsity of such representations, believing them to be true and relying thereon, made the trade, caused the land to be conveyed to Snyder, and received the certificates of stock. "The said plaintiff did not discover the nature and extent of such fraud, and the evidence by which the same could be proven until long after March 16, 1908, when the petition had been filed in the United States court for the purpose of throwing said corporation into bankruptcy."

Defendants, S. H. Snyder and wife, admit that the contract and exchange were made, but deny the alleged fraud and false representations to plaintiff, concerning the stock, and aver that plaintiff knew the exact value of the stock at the time, and that it was of equal value to the premises conveyed. Plaintiff, by his reply, denies the new matter of the answer.

Upon the trial, plaintiff testified in substance, that prior to the making of the deal, he asked Mr. Hoefer, one of the stockholders who was looking after the matter for Snyder, if the stock was worth 75 or 80 cents on the dollar. Hoefer said, "perhaps it would be". He made the exchange with defendant, and was chosen manager of the company, acting as such from October 25th to November 28th, 1907. In a short time, finding out that the company did not amount to anything and had no money to pay its bills, he told the directors that he would not serve in a firm that could not pay its bills, and resigned. He knew the company was in bad shape, but did not know that it was insolvent until March 16, 1908. While manager, he found statements of indebtedness contracted the summer previous, and entered them in the books. He and Mr. Hoefer were appointed as a committee to examine the books kept while Mr. Snyder was manager, but as it was such a tedious job, they simply accepted Snyder's work without examination. On cross examination, plaintiff further stated that he did not look at the plant before making the contract. Some one told him there was about $1900 of the company's indebtedness when he took the stock. He made practically no inquiry before concluding the bargain. He supposed Mason thought he was doing him a good turn, by asking him to buy this stock. Plaintiff also said that he never offered the stock back to Snyder until the amended complaint was filed in December, 1909, though he did try to sell it to Mr. McGilchrist. Finding the material on hand, machinery, etc., appraised too high, was one of the causes that made him wish to sell out.

George F. Mason, witness for plaintiff, testified to the effect that he was formerly in partnership with defendant Snyder, in the box business, for five or six months, doing very fairly. Not having money enough to carry on the business, they incorporated the company and turned the property over to the corporation at $11,000 in stock. By purchasing the Voget property for $2000, and Hurst lot for $150, by building warehouses and additions to the buildings and improving the plant generally, they placed themselves in debt about $9,000.

Wiley A. Moores, brother-in-law of plaintiff, testified in identification of the records of the directors' meetings. He stated that he was secretary of the company, that Snyder was manager from September 9th, 1905, until plaintiff bought in; and further, that he advised Elgin, before the deal was made, to make a thorough investigation of the business.

Defendant Snyder in giving his version of the matter, stated that at the time the company was organized, they took an inventory of the Mason-Snyder property and put what they thought a fair price on it; new machinery, at cost, old, at a depreciated value, lumber at cost laid down at the factory, finished products at estimated cost. In March, 1907, the plant was moved from South, to East Salem. October 7th, 1907, he, as manager, represented liabilities of the company to be $8223.91 including part of the costs of improvements. He then thought that if they could get a little money to tide them over until they could collect in, they would be able to carry the business through. He considered the stock, at that time, worth 60c on the dollar. Snyder stated in substance, that the only conversation he had with plaintiff in reference to the purchase, was a telephone message, in which Mr. Elgin asked him if he had some stock in the box factory to trade for land. He, Snyder, answered that he had, and Elgin asked him to call at his real estate office. Authorizing Mr. Hoefer to act for him, he first offered 30 shares, and Mr. Elgin offered to exchange for 35 shares. He made no false representation and authorized none to be made. The farm was worth, or represented to be worth, in the neighborhood of $1800. After trading with plaintiff, he lived here until the next August, but knew nothing about the business that winter.

A. F. Hofer, witness for defendant, stated that he and Wiley A. Moores checked over the inventory and invoices of the property turned over to the company, and considered $11,000 a fair valuation. Mr. Elgin, as manager, had access to the books and could have obtained the books of Mr. Moores before he purchased. Acting for defendant, he traded "so much stock for so much land." The value of the stock was then somewhere between 60 and 70 cents. Plaintiff assumed the management of the company, and never made his dissatisfaction known to him until plaintiff and his friends ran it into bankruptcy. "Then he commenced to squeal".

Robert McGilchrist testified in part that he bought three shares of stock in the company, January 1st, 1907. In October, 1907, when he was one of the directors, stock was reputed to be worth about 75 cents on the dollar. Three weeks after Elgin became manager, the latter offered him his stock for 75 cents and later for 50 cents. He came near selling his farm and buying the stock as he considered the company solvent at that time. The business was a success during the time he was employed to run it. McGilchrist said, "these holidays hit us pretty hard,"—referring to the financial panic in this state which occurred soon after plaintiff entered into the business. It appears that for about six weeks, legal holidays, known as bank holidays, were declared and banks were closed. During that time boxes were shipped in from other factories and sold for less than they could be manufactured in Salem. The property of the company was appraised in the bankruptcy proceedings at $5027.50 and sold for $3000. The stockholders realized nothing on the stock.

Bean, J. From the evidence it appears that the Salem Box and Lumber Company was an infant industry. Its parents, the incorporators, seemed to have had faith in its future development. Its success depended in a great measure upon faith and credit. The capital was limited, and instead of growing to huge proportions, the industry pined away and died.

This contract, in controversy for the exchange of stock for land, was made about October 19, 1907. Plaintiff entered into active management of the business, assisted in increasing the debts of the company, and as he states, found out in a short time that the concern did not amount to anything, and had no money to pay its bills with. For that reason, after about a month, he was unwilling to serve as manager. Notwithstanding this fact, he retained his stock, treated it as his own, speculated on the chance of the business improving, and the stock increasing in value, and did not offer to rescind the contract, or return the stock to defendant Snyder, until the complaint was filed in this suit, March 6th, 1909, the tender of the stock being long after that date.

It is a well settled principle of law, and so held in this state, that one who desires to rescind a contract must act promptly upon the discovery of the accident, fraud, or mistake which affords grounds for the relief sought, and place the other party in statu quo, returning or offering to return that which has been received: Vaughn v. Smith, 34 Or. 54; Sievers v. Brown, 36 Or. 218; Clarno v. Grayson 30 Or. 111.

It was held by this court in Scott v. Walton, 32 Or. 460, that a party induced by fraud to make a contract, has upon the discovery of the fraud, an election of remedies, either to affirm the contract and sue for damages, or disaffirm it and be reinstated in the position in which he was before it was consummated. The adoption of one of these remedies, which are wholly inconsistent, is the exclusion of the other. If he desires to rescind, he must act promptly, and return or offer to return what he has received under the contract. He cannot retain the fruits of the contract, awaiting further developments, to determine whether it will be more profitable for him to affirm or disaffirm it. Any delay on his part, especially in remaining in posession of the property by him under the contract, and dealing with it as his own, will be evidence of his intention to abide by the contract.

The conduct of the plaintiff in this case, in regard to this contract, does not measure up to the standard of the rule laid down in either of the above cases, for one who desires to rescind a contract on the ground of fraud. It was plaintiff's duty, when he became dissatisfied, found that the concern did not amount to anything, and would serve no longer as manager, if he desired to rescind the contract, to do so then, inform defendent S. H. Snyder, and return or offer to return the certificates of stock which he had received. He had no right to retain the same and await future developments, in order to ascertain whether, under favorable conditions, the venture of the company would be a success, or under adverse circumstances, a failure. It was no excuse for plaintiff's failure to return the stock that it afterwards became valueless: Crossen v. Murphy 31 Or. 119. Neither does the allegation in the complaint that he did not discover the evidence of the transaction, for a long time thereafter, constitute an excuse for his delay of about two years. During this time he retained the consideration he had received, which was an evidence of his intention to abide by the contract, and he is not entitled to maintain a suit in equity to rescind such contract: Scott v. Walton, supra.

As to the original transaction, it would seem from the evidence which we have set out quite fully, that while the figures placed upon the property of the company, represented in part by the certificates of stock transferred to plaintiff, were high, plaintiff was, to say the least, negligent in making no examination of the property, especially the real estate, and no investigation in regard to the value of the stock.

It is recognized by law to be characteristic of human nature, for the owner to set a high value on his property, for the purpose of enhancing it in his purchaser's estimation. Hence, when the parties are dealing on an equal footing, it does not help the purchaser, who relies upon the vendor's statement as to value, when no warranty is intended, and when the language used does not affirm some specific fact, but is a mere expression of opinion: Scott v. Walton, supra; Pomeroy's Equity Jurisprudence, Sec. 878.

The trial court found for defendant in regard to the validity of the contract, and under all the evidence and circumstances of the case, we think the decree of the circuit court was right and should be affirmed, and it is so ordered.

**Kuratli v. Jackson, Washington County.**

Decided, October 17, 1911.

E. I. Kuratli, respondent, v. J. W. Jackson, appellant. Appeal from the circuit court for Washinton county. The Hon. J. U. Campbell, judge. Argued and submitted Sept. 21, 1911. S. B. Huston, Benton Bowman and (H. T. Bagley, on brief) for respondent. W. G. Hare (Bagley & Hare, on brief) for appellant. Eakin, C. J. Reversed.

On July 27, 1908, defendant entered into an agreement with plaintiff whereby he sold and agreed to convey to him certain real property known as the "Chenette Row Buildings" in Hillsboro, Oregon, for $3,000, upon which purchase price plaintiff paid $20, and defendant executed to him his receipt therefor in the following words:

"Hillsboro, Ore., July 27, 1908.

"Received of E. I. Kuratli, Twenty and no-100 dollars in part payment on property known as the Chenette Row Buildings on Main St. bet. 1st and 2nd St., Hillsboro, Ore. for $3,000. Bal. to be paid when good title is furnished by Aug. 1st, 1908.

"J. W. JACKSON."

At this time the property was occupied under Jackson by various tenants, of whom plaintiff was one. Defendant, a married man, was the owner of the property, subject to a life estate in a part thereof, namely: the dower estate of Lucinda C. Jackson, the mother of defendant. On July 31, plaintiff tendered to defendant the balance of the purchase price and defendant refused to convey. Plaintiff brings this suit for specific performance of the contract and sets up the defect in the title of the defendant, namely: the dower interest of Lucinda G. Jackson, alleged to be of the value of $300, as well as the inchoate dower interest of defendant's wife, Maria Jackson, of the alleged value of $500; and asks an abatement of the price equal to the value of such dower interests. He deposited with the clerk of the court the balance of the purchase price—$2980.

Upon the trial the court rendered a decree for specific performance as follows: "The clerk of this court is hereby directed to pay to said J. W. Jackson the sum of $1400 and the said plaintiff is hereby ordered and directed to make, execute, acknowledge and deliver to the clerk of this court, within 70 days from the date hereof, for delivery to the defendant, J. W. Jackson, a first mortgage upon the real property herein described, conditioned as follows: that upon the death of the said Maria Jackson, or whenever the said Maria Jackson shall release and convey to the said E. I. Kuratli, his heirs or assigns, her interest in said real property, the said E. I. Kuratli, will pay to the said J. W. Jackson the sum of $1420, with interest thereon at the rate of six per cent per annum, interest payable annually, and in the event of the death of J. W. Jackson, before the death of Maria Jackson, that the said E. I. Kuratli will pay to the estate, representatives, heirs or assigns of the said J. W. Jackson, upon the death of Maria Jackson, or whenever the said Maria Jackson shall release and convey to the said E. I. Kuratli, his heirs or assigns, her interest in said real property, the said sum of $1420, less such sum or sums as the said E. I. Kuratli, his heirs or assigns shall have previously paid to the said Maria Jackson as dower in and to said real property."

Defendant appeals.

Eakin, C. J. Assuming without deciding, that the receipt given by Jackson was such a memorandum of the agreement as fulfils the requirements of the statute of frauds, the important question is, whether plaintiff is entitled to the specific performance of it in this suit under the facts disclosed. The court adjudged the value of Lucinda C. Jackson's interest to be $160, and that Maria Jackson's interest to be of the possible value of $1420; and also adjudged that plaintiff is the owner of the land in fee, and provided that, if Lucinda C. Jackson and Maria Jackson refuse to join in a conveyance, the purchase price be abated by the value of Lucinda C. Jackson's dower interest—$160; and that the possible value of Maria's interest—$1420—shall be secured by a mortgage to defendant payable to his estate, after the death of both defendant and wife, if Maria survives him, less the amount that may have been paid by plaintiff to Maria as her dower. Lucinda C. Jackson has a right at any time, unaffected by this decree, to have her dower in the property assigned; and Maria will have the same right if she survives her husband. If her estate should hereafter be assigned, the damages suffered by plaintiff by reason thereof can only be assessed after the death of Maria as the value of the use of such interest during the time it shall have been so occupied by her or her assigns and not, as specified in the mortgage, which seems to contemplate a payment of money to Maria by plaintiff.

It must be conceded that the value of Maria's inchoate dower interest, which is a contingent life estate in one-half of the land, cannot possibly be equal to one-half of the value of the property. By any theory of the case Jackson is entitled to the present cash value of his interest, which the complaint admits is $2200. However, the decree of the lower court gives relief to the plaintiff very different from that prayed for or contemplated by the contract, and it is not likely that plaintiff would now consent to it if it were not for the possibility that the decree will coerce the wife to join in a deed to him, as the court cannot give him a title free from the dower estate.

According to "Glaque & McClure's Value Tables," the value of Lucinda C. Jackson's interest at the time of the decree, if her dower became consummate subsequent to May 18, 1893, was $311.49; and if defendant were now dead and the dower of Maria consummate, its present value computed at 6 per cent would be $869.70—the value of the property being $3000 and the wife being 52 years of age at the time of the trial. But the husband and wife being of the same age and assuming them to be equally in good health, the expectation of life of the husband is approximately equal to that of the wife; and there is nothing upon which to estimate the value of the wife's dower. Glauque & McClure's Present Value Tables, at page 192, gives the expectancy, at the age of 52 years, of males 19.84 years, and of females 19.87. Therefore, the wife's prospective dower is for less than eleven days, and it is purely a gamble that she will not outlive her husband. According to the same author the present value of the inchoate dower of the wife is $175.59; and the plaintiff has not the privilege or right to cut off the wife's dower by payment of that amount, nor does that sum become the maximum of the liability of the property hereafter. When a court attempts to determine the present value of an inchoate dower interest, the result is most unsatisfactory and unreliable. Computations based on mortality tables are a rule of values in law, in actions for damages, or other cases where questions arise dependent on the expectation of life, but it seems to be a very doubtful basis upon which to compute a value to be substituted for a price fixed by contract. These mortality tables are no doubt approximately correct as an average of many cases, yet in any individual case reliance thereon would be a mere speculative hazzard.

Glauque's "Settlement of Estates," at page 816, says that the present value of the contingent dower during the husband's life may be ascertained with reasonable certainty from established tables of mortality aided by evidence in reference to the health and vigor of the husband and wife. Nothing is given in this case upon those matters, nor can we conceive in what manner or by what rule the effect of the present condition of the health or vigor of the husband or wife upon their longevity can be computed with mathematical certainty to affect the value of the inchoate dower in such a case. Plaintiff in this case knew at the time he took the receipt that defendant was married, and if he desired the contract to include the wife's dower he knew how to secure it, and now he is not in a position to ask the court to make a new contract for him.

In Sternberger v. McGovern, 56 N. Y. 12, 19, the court say: "Under such a contract, to require the defendant to convey the Mott Haven property to the plaintiffs and pay such compensation as the court should determine its market value was impaired by the outstanding inchoate right of dower, or such sum as the real value of such right ascertained by the tables of mortality, would be harsh and oppressive. The defendant never made a contract to do this. To charge him with the difference in the market the title would impair that to a much greater extent than the real value of the right. To compel him, in effect, to purchase the right, by paying the plaintiff therefor, its value determined by the tables of survivorship and mortality, would in a case like this be unjust. He as we have seen, contracted for an exchange of his property for that of the plaintiffs; loss which the application of those tables to this particular case might subject him. These tables when applied to a great number of cases will, in the aggregate, show correct results; hence, they may be used yb life insurance companies with safety in fixing their rates, and are resorted to by courts when the probable duration of life must be determined in adjusting the rights of parties. But to determine the value of the inchoate right of dower in this way, for the purpose of enforcing the specific performance of a contract for the exchange of real estate, with compensation, would be unsustained by precedents or sound principle." And in that case plaintiff was relegated to his remedy for damages.

In Cowan v. Kane, 211 Ill. 576 (Oct. 1904) it is said: "In attempting to support the decree, counsel say that a computation can be made upon the basis of the mortality tables. Such tables are used more from necessity than because they are a reliable guide in fixing the probable duration of any individual life, being mere averages of many lives, but we know of no tables by which the value of an inchoate right of dower can be approximately estimated * * * It would be carrying the use of mortality tables to an unwarranted extent to apply them in such a case to determine substantial rights."

As to whether a court of equity will enforce a specific performance in such a case by ascertaining the present value of the inchoate dower of the wife, and abating the price to that amount, the authorities are quite at variance. This may be partially accounted for by the fact that the courts, holding that performance will be decreed in such cases and the price abated to the extent of the value of the dower, are those in states where law and equity are administered by the same court and all distinction in procedure between them is abolished, while those refusing to enforce them are courts in states where the procedure in law and equity cases is kept distinct. Upon this point compare the classification as to procedure in 16 Cyc. 24 and note, with the cases cited in the opinion by Woodson, J., in the case of Aiple-Hemmelmann Real Est. Co. v. Spelbrink, 211 Mo. 671, and note to that case in 14 A. & E. Ann. C. at 671.

There is no dissent from the statement that plaintiff is entitled to a decree of specific performance if he is willing to accept a deed from the vendor alone, with covenants as broad as those called for in the contract, and he may then resort to his legal remedy, if he has one, against the vendor. If, however, the vendor's interest in the land is subject to a contingent estate, and specific performance of the contract is asked with abatement of the price to the amount of the value of such contingent interest to be determined by the court it is beyond the province of equity to adjust such value and substitute a price for that one fixed by the parties. This court has decided that a contract for the sale of land by the husband in which the wife has not joined is not mutual and, therefore, not enforcible in equity: Whiteacre v. Vanschoiack, 5 Or. 113, 118. This case is cited with approval in Deitz v. Stephenson, 51 Or. 596, 606.

Specific performance in such a case does not rest on the same principle involved where the vendor owns only an undivided part of the fee, in which case the vendee, if willing to accept it, may tender the proportionate amount of the price, it being unnecessary for the court to determine its value: See Moore v. Gariglietti, 228 Ill. 143, and note to this case in 10 A. & E. A. C. 560. It is said in Riesz's Appeal, 73 Pa. St. 491, that the dower right of the widow is of such a contingent nature, depending as it does upon her surviving her husband, as well as her continuing in life after his death, that no abatement in the price can be made which would be just to both parties without in effect making a new contract for them, a contract which perhaps in the first instance neither party would have agreed to, certainly not the vendor. This is the holding in Aiple-Hemmelmann, etc., Co. v. Spelbrink, supra, in which the opinion is exhaustive and is supported by the authorities which are there collated. The following cases supporting that view: Reilly v. Smith, 25 N. J. Eq. 158; Riesz's Appeal, supra; Fortune v. Watkins, 94 N. C. 304, 315; Cowan v. Kane, 211 Ill. 572; Sternberger v. McGovern, supra; Lucas v. Scott, 41 Ch. St. 641; Graybill v. Brugh, 89 Va. 895, 899; Barbour v. Hickey, 2 App. Cas. 207; 24 L. R. A. 763; Plum v. Mitchell, (Ky.) 26 S. W. 391 In Aiple-Hemmelmann Real Est. Co. v. Spelbrink, supra, there is a dissenting opinion by Lamm, J., following the lead of the courts in Iowa, Indiana and Wisconsin.

Pomeroy on Specific Performance (1879) at Sec. 460 sharply criticises Judge Sharswood's reasoning on this question, in Riesz's Appeal, 73 Pa. St. 490, as utterly untenable. But we find an array of comparatively recent cases following and sustaining the rule, as laid down by the courts of Pennsylvania and New Jersey, which seems to be the better and safer rule.

The case of Bostwick v. Beach 103 N. Y. 422, relied on by plaintiff is not in point as the widow signed the contract of sale, and the ascertainment of the value of the dower was that it might be paid to her out of the purchase price, and she was required to convey her dower interest. Some courts grant such relief only in case the refusal of the wife to join in the deed was by fraudulent collusion with the husband. Others hold that, if the vendee had knowledge that the vendor was married, specific performance with abatement will not be decreed: Lucas v. Scott, supra; Savings Bank Co. v. Parisette, 68 Oh. St. 450; Downer v. Church, 44 N. Y. 647; Fortune v. Watkins, supra.

It is said in Watermon on Spec. Perf., Sec. 511, "If the purchaser, when he enters into the contract, knows that the vendor has a wife, he of