HELD *v.* MANSUR.

Opinion delivered May 19, 1930.

1. VENDOR AND PURCHASER—FRAUDULENT REPRESENTATIONS—REMEDIES.—A person induced to purchase land by the vendor's false representations concerning its quantity or quality may either cancel the contract and recover the payments, or he may elect to retain the property and sue for damages, measured by the difference between its real value and the agreed price, or he may plead the damages in an action for the purchase money and recoup same against the price he agreed to pay.
2. APPEAL AND ERROR—OBJECTION TO JURISDICTION—WAIVER.—Where no objection was made to equity's jurisdiction in the trial court, none can be raised on appeal.
3. EQUITY—ADMINISTERING COMPLETE RELIEF.—When equity takes jurisdiction of a matter cognizable in equity, it retains the case to administer legal as well as equitable relief.
4. FRAUD—FALSE STATEMENTS.—While generally statements as to the value of property is matter of opinion and cannot be made the basis of an action for fraud, such statements, if false and intentionally made to one ignorant of the value of property, and intended to be relied on where the purchaser had no opportunity to examine the property, *held* to be an affirmation of fact and fraudulent.
5. FRAUD—VENDOR'S KNOWLEDGE OF FALSITY OF STATEMENTS.—If a vendor, knowing the truth or in reckless disregard thereof, induces a buyer to rely on his false statements, he will not be heard to say that the buyer could have ascertained the truth.
6. FRAUD—PROOF.—False representations may be established by positive or circumstantial evidence.
7. FRAUD—SUFFICIENCY OF PROOF.—False representations as to the quality and value of land relied on by a purchaser *held* established by a preponderance of the evidence.
8. FRAUD—PERSONS LIABLE.—The transfer of a mortgage by a stockholder of a mortgage company *held* colorable and in effect a transfer from the company, entitled the transferee to sue the company for damages by fraudulent representation.
9. FRAUD—PERSONS LIABLE.—A foreclosure by a mortgage company after it had transferred the mortgage to another without disclosing the transfer to the court and without the transferee's knowledge *held* fraudulent, although the attorney foreclosing the mortgage had no knowledge of the fraud.
10. FRAUD—DAMAGES.—The damages to the transferee of a mortgage fraudulently induced to purchase the mortgage is the difference between the price for which the land was sold under the fore-

closure proceedings and the amount which the transferee paid for the note and mortgage with accrued interest and the taxes due on the land.

Appeal from Miller Chancery Court; *C. E. Johnson,* Chancellor; reversed.

STATEMENT OF FACTS.

William A. Held brought two suits in equity against Henry A. Mansur, the Security Mortgage Company, and others to recover damages for an alleged fraud on the part of the defendants in inducing plaintiff to buy certain real estate mortgages, and also to foreclose said mortgages. The plaintiff was awarded judgment in one of the cases against the Security Mortgage Company, and the decree in that case has been satisfied in full. The complaint in the second case was dismissed for want of equity, and that case is here on appeal. The two cases were consolidated and tried together in the chancery court, and we shall attempt only to set out the evidence relating to the 80-acre tract of land involved in the present appeal.

The evidence, as set out in full in the record, is very voluminous; but we think it may be reduced to a much shorter compass. The Dorsey Land & Lumber Company had large tracts of land in the Red River Bottom in Miller County, Arkansas, and operated a mill for the purpose of cutting into lumber the timber on said lands. About the year 1922, the company became insolvent, and decided to cut a block of land of 6,000 acres into small tracts, and sell them to purchasers for farms. A small house was to be erected on each tract and a part of the land cleared. Then the purchaser was to borrow money with which to pay the purchase price.

Pursuant to this plan, Henry A. Mansur, who had been in the employment of the Dorsey Land & Lumber Company as manager of one of its commissaries for several years, was induced to become the purchaser of the 80 acres of land in controversy. The president of the company told Mansur that it was in need of money.

Mansur made an application to the Security Mortgage Company of Texarkana, Arkansas, for a loan of $3,200 for a term of five years with interest at the rate of 6 per cent. per annum, payable semi-annually. In his application, he represented that the tract contained 80 acres, and was situated eight miles northwest of Garland in Miller County, Arkansas, and twenty miles southeast of Texarkana. The land was represented to be rich, and about one mile from a church and schoolhouse. The whole eighty acres was susceptible of cultivation and was fenced. Forty acres had been cleared, and was to be put in cultivation in 1923. It had a four-room house worth $500, and a barn worth $200 on the land. The applicant further represented that he owned 1,000 acres of bottom land which was worth $100,000, and that he was not in debt. His personal property was estimated to be worth $18,000. The value of the 80 acres in controversy was represented to be $9,700. The cultivated land was valued at $125 per acre, amounting to $5,000, and the uncultivated land at $100 per acre, amounting to $4,000. The Security Mortgage Company had the land inspected, and the inspector made a written report, in which he valued the land at $8,000, and said that it would readily sell at that price at any time. He reported that 40 acres of the land was cleared and ready for the coming year's crop. The loan in the sum of $3,200 was granted, and the money was paid to the Dorsey Land & Lumber Company. Mansur executed his note for the amount borrowed in compliance with the terms of his application, and gave a mortgage on the land to secure the payment of the same.

The Dorsey Land & Lumber Company and the Security Mortgage Company both had offices in the city of Texarkana, Arkansas, and for the most of the time during the period of the transactions in this case had offices in the same building. The officers of the Dorsey Company told the officers of the Security Mortgage Company that they were in need of money, and the latter company

paid to the former $3,200 which it had borrowed in the name of Mansur. The deed by the Dorsey Company to Mansur, and the mortgage by Mansur to the Security Company, were duly recorded, and the Security Company paid the fees therefor.

The Security Company transferred the note and mortgage from Mansur to Ralph B. Rosentiel of Freeport, Illinois. Rosentiel was a stockholder in the Security Company, and bought many mortgages from it on lands situated in the same locality in Miller County as the farm in question. Rosentiel signed and transferred the mortgage to William A. Held, an intimate friend, who also lived in Freeport, Illinois. The president of the Security Company has been a resident of Texarkana, Arkansas, for eighteen years, and had been raised in an adjoining county. He had been with the Security Company since 1912. The Security Company succeeded another company which had been in the business of selling farm loan mortgages since 1900. It owned an abstract company, and had been engaged in the business of making farm loans and selling them to bond brokers. It took farm loans secured by first mortgages, and took second mortgages to secure its commissions. The president of the company had known R. B. Rosentiel since 1912, and the latter had been engaged in the bond and mortgage business at Freeport, Illinois, during that time. He had handled $2,000,000 worth of mortgage loans for the security company, and had bought and sold them at a slight discount. According to their arrangements, their business relations ceased upon the sale of the mortgage securities, except that the Security Company collected the interest free of charge, and looked after the property generally, paying the taxes thereon.

The contract in the present case was made in September, 1922, and Rosentiel purchased it in March, 1923. The president of the Dorsey Company handled the loan for Mansur with the president of the security company. The Dorsey Company paid the interest on the loan; and,

having become delinquent in paying the interest and taxes in 1925, the security company employed a lawyer and instructed him to bring suit for the foreclosure of the mortgage loan. This was done by the lawyer presenting to the chancery court copies of the mortgage and the note secured by it. A decree of foreclosure was entered of record in the chancery court. In a short time thereafter the Dorsey Company was placed in the hands of a receiver.

In 1928, Held came to Texarkana and ascertained that the lands were comparatively valueless because of the high levee and drainage taxes, and the fact that they were subject to overflow to such an extent that they could not be cultivated. At the time the mortgage was executed, the land was in a levee district, but the construction of the levee never prevented the lands from being overflowed. Subsequently, a drainage district was also formed in aid of that purpose, but this did not prove to be a successful venture because of the cost of the same as compared to the value of the lands. The drainage district had not been established when the application for the mortgage loan was made in September, 1922. The applicant represented that it was drained by a drainage ditch in his application.

While the testimony is conflicting as to the value of the land at the time the application for the loan was made, we are of the opinion that a clear preponderance of the evidence establishes the fact that the land was not worth more than $5 or $10 per acre at the time the application for the loan was made. Other facts will be stated and discussed in the opinion.

H. M. Barney and *W. H. Arnold,* for appellant.

G. G. Pope and *Shaver, Shaver & Williams,* for appellee.

HART, C. J., (after stating the facts). A person who has been induced to enter into a contract for the purchase of property by the false representations of the vendor concerning its quantity or quality may, at his

election, pursue one of three remedies. First, he may cancel the contract and, by returning or offering to return the property purchased within a reasonable time, entitle himself to recover whatever he had paid upon the contract. In the second place, he may elect to retain the property and sue for the damages he has sustained by reason of the false representations of the vendor as to the land; and in this event the measure of the damages would be the difference between the real value of the property in its true condition and the price at which he purchased it. In the third place, to avoid a circuity of actions and a multiplicity of suits, he may plead such damages in an action for the purchase money, and is entitled to have the same recouped against the sum he had paid for the land. *Matlock* v. *Reppy,* 47 Ark. 148, 14 S. W. 546; and *Danielson* v. *Skidmore,* 125 Ark. 572, 189 S. W. 57.

In the present case, the purchaser of the real estate mortgage elected to pursue the second of these remedies. He might have sued for damages at law; but, under the authorities above cited, no objection having been made to the jurisdiction of a court of equity, none can be raised on appeal. Besides this, the plaintiff also asked for a foreclosure of the mortgage; and, in order to avoid a multiplicity of suits, it is settled in this State that when equity takes jurisdiction of a case for a matter cognizable only in equity, it retains the case to administer the legal after the equitable relief. *Short* v. *Thompson,* 170 Ark. 931, 282 S. W. 14.

While the general rule is that the statement of the value of the property is a mere matter of opinion and cannot be made the basis of an action for fraud, still there are exceptions to the general rule. The rule established in this State is that false statements of fact, intentionally made, to one who is ignorant of the quality or value of the property under consideration under such circumstances as indicate a purpose that such statements are to be relied upon, where the purchaser has no oppor-

tunity to examine the property, may be treated as an affirmation of fact and fraudulent. Where the vendor knows that the purchaser is wholly ignorant of the value of the property, and knows that he is relying upon his representations, the representations do not take the form of a mere expression of opinion, but are in the nature of a statement of fact. The reason is that the vendor knows that the statements he has made are untrue or are made in reckless disregard of the truth, and it cannot be doubted that he knows and believes that such statements will have a material influence upon the purchaser. *Carwell* v. *Dennis*, 101 Ark. 603, 143 S. W. 135; *Hunt* v. *Davis*, 98 Ark. 44, 135 S. W. 458; *Bell* v. *Fritts*, 161 Ark. 371, 256 S. W. 53; *Cleveland* v. *Biggers*, 163 Ark. 377, 260 S. W. 432; *Laney-Payne Farm Loan Co.* v. *Greenhaw*, 177 Ark. 589, 9 S. W. (2d) 19.

Under all these cases, and under many more which might be cited, this court is committed to the rule that if the vendor, having actual knowledge of the matter or in reckless disregard of the truth, induces the buyer to rely on his false statements, he will not be heard to say that the purchaser could have ascertained the truth. In the first place, the false representations relied upon may have caused the purchaser to forbear from making further inquiry; and in the second place, as is true in the present case, the purchaser may have lived in a distant State, and it was not practical for him to come to the county in which the land was situated and make an examination of it. There was nothing to put a person on notice that the representations were false. These cases all hold that, while ordinary statements of value of property are mere expressions of opinion on which the purchaser is not entitled to rely, yet statements of fact which affect the value of property, if false, and made for the purpose of inducing the purchaser to rely thereon, are false representations which will constitute fraud in law. The false representations may be established by positive and direct testimony, or by circumstantial evidence, or by both.

In the present case, we think the false representations were established by a preponderance of the evidence, and that there can be no doubt about the fact that the purchaser of the note and mortgage involved in this case relied upon the representations. Mansur admits in his testimony that he was a mere figurehead in the transaction, and that he acted for the Dorsey Company. The Dorsey Company and the security company which made the loan had offices in the city of Texarkana, Arkansas, and during much of the time covered by this transaction had offices in the same building. The security company was in the business of making farm loans, and in aid thereof had a set of abstract books. Mansur was introduced to the president of the security company by the president of the Dorsey Company. The money borrowed was paid to the Dorsey Company. The security company paid the recording fees for the deed from the Dorsey Company to Mansur, and for the mortgage from Mansur to the security company. The attendant circumstances and the relationship of the officers of these two companies all point to the fact that the officers of the security company knew that the representations as to the value of the land were false, or that they were made in utter disregard of the truth. The land was situated in Miller County, and, according to a clear preponderance of the evidence, was subject to overflow and has never been susceptible of cultivation. They were cut-over lands, and half of the tract was cleared and a small house was built on it for the purpose of securing the loan. The land was represented by the borrower to be worth $9,700, and the inspector sent out by the security company reported it to be worth $8,000. The inspector was an officer of the company. While there is a dispute over this point, we think a clear preponderance of the evidence shows that the lands were practically worthless because they were subject to overflow, and could not be drained except at a prohibitive cost. It is fairly inferable that the officers of the security company knew that Mansur was a mere figurehead, and had no property whatever. They

must have known that his representation in his application that he had 1,000 acres of land and $18,000 worth of personal property unincumbered was false.

It is true that the officers of the security company testified that they transferred the loan to Rosentiel and thereafter had no connection with it. In this respect, however, they are contradicted by the attendant circumstances. Rosentiel was a stockholder in the security company, and had been acquainted with its officers for a good many years. He was accustomed to buying these farm loan mortgages at a small discount and transferring them to other parties. By arrangement between the security company and Rosentiel, the former collected the interest, paid the taxes, and generally looked after the loans. In 1925, when the Dorsey Company ceased to pay the interest on the loan, and was about to be placed in the hands of a receiver, the Security Mortgage Company employed a lawyer to foreclose the mortgage. When all these facts and circumstances are considered together, we think that the assignment and transfer of the note and mortgage by the security company to Rosentiel was colorable merely, and that Rosentiel acted for the security company in selling and transferring the note and mortgage to Held. Rosentiel and Held were intimate friends, and Held did not discover the fraud which had been practiced upon him until the latter part of 1927, or the first part of 1928. Therefore, we are of the opinion that he had a right to sue for damages for false representations, which induced him to buy the note and mortgage in question, and that the chancery court erred in not so holding.

It is contended, however, by counsel for appellees, that the decree of foreclosure had in 1925 should not be set aside because no fraud was practiced upon the court in the foreclosure proceeding. We do not agree with counsel in this contention. It is true that it was held in *H. G. Pugh & Co.* v. *Ahrens,* 179 Ark. 829, 19 S. W. (2d) 1030, and the cases cited therein, that the fraud which

will justify the setting aside of a judgment or decree must be such as prevented the unsuccessful party from presenting his case fully, or which operated as a fraud or imposition upon the jurisdiction of the court, and that mere false testimony is not enough if the disputed matter was in issue in the case in which it was given. Held did not know anything whatever about the foreclosure proceeding which was had in 1925. The security company procured an attorney to institute the foreclosure proceedings, and Held was left in ignorance of the whole matter. The attorney presented a copy of the mortgage and note in question, and procured the court to grant the decree upon the reliance that he had authority to bring the suit, and the custody of the note and mortgage sued upon. No matter whether the attorney knew of the fraud practiced on Held by the Security Mortgage Company or not, he acted for the security company, and will be deemed in law to have participated in the fraud practiced by that company upon the court. It cannot be doubted that the chancery court would have refused a decree of foreclosure if it had been informed of the fact that Held, the holder of the note and mortgage, was in ignorance of the whole proceeding, and had no part in it. Therefore, we are of the opinion that the foreclosure proceeding in the chancery court in 1925 was obtained by fraud, and that the decree should be set aside on that account.

The result of our views is that the chancery court erred in not awarding damages to appellant for false representations in selling him the loan and mortgage, and in refusing to set aside the decree of foreclosure of the mortgage. From the authorities above cited, the measure of damages will be the difference between the price for which the land may be sold under the foreclosure proceedings, and the amount which Held paid for the note and mortgage, together with the accrued interest and the taxes due on the land. Therefore, the decree will be reversed, and the cause will be remanded for further proceedings in accordance with this opinion,

and not inconsistent with the principles of equity. It is so ordered.