

DYER *v.* AMBLETON.

Opinion delivered May 7, 1892.

*Res judicata—Second appeal.*

Matters adjudged by the Supreme Court on appeal cannot be re-tried in the circuit court nor reviewed by the Supreme Court on a second appeal.

Appeal from Yell Circuit Court in Chancery, Danville District.

JORDAN E. CRAVENS, Judge.

This was a suit by the heirs at law of A. Ambleton against A. J. Dyer, the purpose of which was, among other things, to recover a tract of land known as the Mountain farm. The cause was before this court upon a former appeal (*Ambleton v. Dyer*, 53 Ark. 324), where it was decreed that John B. and George C. Ambleton, two of the heirs, each recover from Dyer a fourth interest in the land, and also a proportionate share of the rents and profits, the amount of which was fixed by the decree. The cause was remanded with directions to render judgment accordingly. Thereupon Dyer filed an amended answer and counter-claim in the court below against

John B. and George C. Ambleton, asking that he be paid for half of certain improvements placed by him upon the land and for half of the taxes paid by him. The Ambletons moved to strike the answer from the files because it was not filed in time, and because it set up matters that had formerly been adjudicated. The motion was sustained, and the answer stricken from the files. Dyer has appealed.

*H. S. Carter and Robert Toomer* for appellant.

Dyer's amended answer should not have been stricken from the files, because these matters were not litigated until after the cause was remanded. It is never too late for a court of conscience to do justice, and Dyer was certainly entitled to recover the taxes paid for Ambleton's one-half interest in the land and improvements. Mansf. Dig. sec. 2644 ; 45 Ark. 410 ; 46 *id.* 109.

*W. D. Jacoway* for appellees.

Appellant is bound by the directions of this court made in the decision of this case when here before. 53 Ark. 234. That decision was final. 1 Johns. Cases, 281 ; 1 Am. Dec. 113 ; 14 Ark. 307 ; 44 *id.* 383 ; 29 *id.* 174 ; 16 *id.* 181.

HEMINGWAY, J. The matters presented by the rejected answer were adjudged by this court upon a former appeal. If there was error in their determination, it might have been corrected on a motion for a rehearing presented within apt time. But the circuit court could not re-try issues determined here, and this court has no power to review upon a second appeal its former conclusions. We then found that the plaintiffs were absolutely entitled to recover a fixed sum for the use of the land ; and when the cause was remanded for judgment, it was not competent to reduce or extinguish that sum by setting off the value of improvements or amounts paid for taxes against it. If the defendant desired to claim

such offsets in this case, he should have presented his claim before the final hearing ; but when the rights of the parties had been determined without reference to it, it was not competent to change the conclusion reached by taking it into account.

Affirmed.

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