NAYLOR *v.* MCNAIR.

Opinion delivered November 15, 1909.

1. CIRCUIT COURTS—JURISDICTION OF LIEN ON LAND.—A suit for the recovery of a sum less than one hundred dollars is within the original jurisdiction of the circuit court if it involves the decision of the question whether the amount sued for is a lien upon land. (Page 349.)
2. NEW TRIAL—SUFFICIENCY OF EVIDENCE.—A motion for a new trial, because the verdict is contrary to the evidence, is sufficient to raise the question whether the verdict was sustained by sufficient evidence. (Page 349.)
3. COVENANTS FOR TITLE—COVENANT AGAINST INCUMBRANCES—EFFECT.—Where the owner of unincumbered land gave a bond for title, and subsequently executed a deed with covenant against incumbrances, he will not be held to have covenanted against liens on the land created by persons who purchased the land after the bond for title was executed and before the deed was executed. (Page 350.)

Appeal from Pulaski Circuit Court; Second Division; *John W. Blackwood,* Special Judge; reversed.

Carmichael, Brooks & Powers, for appellant.

1. McNair could have defended against Mrs. Green's suit in chancery on the ground that he was an innocent purchaser for value, and that the note was no lien as against him. As to Naylor, it was never a lien against the lot. He was not a party to the note given by Mrs. Crisman to Kissinger, nor to their contract. Clark on Contracts, 349; Lawson on Contracts, 422; 46 Kan. 246; 29 Mass. 554; 123 Mass. 28. McNair was bound

to take notice of all incumbrances against the equitable estate in the land. 29 Ark. 650; *Id.* 358.

2. There was no breach of warranty. The lien attempted to be created by the note was only an equitable right, based upon an equitable estate, which was of no force until judicially declared. It did not reserve title. 26 Ark. 382; Pomeroy's Equity, § § 1260-61-62. The lien, if it ever existed, was only from the date of the decree in the suit of Green *v.* McNair, which was subsequent to the deed from Naylor to McNair. There was no incumbrance when the deed was made. 65 Ark. 104; Marvell on Abstracts, § 191; Maupin on Marketable Title, § 122, p. 289.

3. The decree did not affect Naylor's rights. It shows that it was based only upon the note and contract. 85 Ark. 223. Neither was he bound to appear and defend against that suit. If there was any lien, it was created by McNair, and was personal to him.

Wiley & Clayton, for appellee.

1. If the motion for new trial alone can raise any question, it cannot be other than that the verdict is contrary to the law and the evidence, and a refusal to grant a new trial on that ground will not be reviewed by this court unless there is a total lack of evidence to support the verdict. 14 Ark. 202.

2. When notice of a suit and to defend against it is given to a covenantor by a convenantee, and the former fails to defend, the judgment against the covenantee is conclusive in a suit by him on the warranty against the covenantor. 19 Ark. 470; 52 Ark. 322; 88 Ark. 169; 8 Am & Eng. Enc. of L. 206.

3. If Naylor was not concluded by the decree in chancery, the evidence shows that there was an outstanding lien which breached his covenant. A vendee with title bond may sell his interest and retain a lien on the land to secure the purchase money. 29 Ark. 257; *Id.* 218; 14 Ark. 634; 84 Ark. 41. Kissinger's title bond to Crisman created a lien on the land, which accrued to Mrs. Green, the holder by assignment of Crisman's note. Naylor's subsequent deed to McNair, made after he had been advised of Mrs. Green's claim of a lien, contains the deliberate warranty, "I will forever warrant and defend the title to said lands against all claims whatever, and that said lands are free from all liens."