BAUGHMAN *v.* OVERTON.

Opinion delivered April 6, 1931.

1. JUDGMENT—EFFECT OF DISMISSAL.—A judgment dismissing a suit without prejudice is not *res judicata* in a subsequent suit involving the same parties and issues.
2. DISMISSAL AND NONSUIT—RIGHT TO TAKE.—The court should permit a plaintiff to dismiss a suit without prejudice, although testimony had been heard.
3. JUSTICES OF THE PEACE—JURISDICTIONAL AMOUNT.—By recovering in a justice's court on an entire claim which exceeded the justice's jurisdiction, omitting the excess, a litigant waves his right to recover such excess.
4. ACTIONS—SPLITTING CAUSE OF ACTION.—That a tenant's assignee knew that only certain portions of the crop had been sold at the time his first suit was brought did not justify splitting his cause of action for the value of his share of the crop.
5. JUSTICES OF THE PEACE—REMANDING CASE IN CIRCUIT COURT.—The circuit court could remand a case to the justice's court for proper service on defendant.

Appeal from Mississippi Circuit Court, Chickasawba District; *G. E. Keck,* Judge; reversed in part.

STATEMENT OF FACTS.

These suits, consolidated for trial only in the circuit court, were brought to enforce a laborer's lien for the value of a share crop produced by appellee upon the lands of appellant.

Appellant rented a certain portion of his farm on a share crop agreement to W. A. Mohan, who planted and partly cultivated the crop, and about July the first of that year the parties fearing a destruction of the crop because of high water and a break in the levee, the landlord refused to advance any other supplies, and the tenant could not proceed with the cultivation of the crop. He then sold it to Overton, appellee, who agreed to bring the crop to maturity and pay appellant, the landlord, the amount due him from Mohan for supplies furnished. He proceeded with the cultivation of the crop, and, when it was ready to gather, appellant claimed that he had purchased Overton's right to the crop and refused to

allow him to gather it. Thereupon Overton brought suit in the chancery court to enjoin the landlord from interfering with his gathering the crop. This cause came to a hearing and was dismissed without prejudice. The landlord gathered the crop, and Overton brought suit to enforce his lien for labor performed, claiming $300 in the first suit and $150 in the second. The second suit was brought against appellant and his guardian. Upon the trial in the justice court, judgments were rendered in each suit in favor of appellee herein, and the causes were appealed to the circuit court, where they were consolidated for trial only.

It appeared from the testimony in the circuit court that the probate court had appointed a guardian for appellant before the suits were brought as a person of unsound mind. Upon the hearing much testimony was introduced to show that, without regard to the judgment of the probate court, all the transactions between the parties were had without any mention or knowledge on the part of appellee that appellant was a person of unsound mind, and the preponderance of the testimony shows that such was not the fact. The jury returned a special verdict, answering the two questions submitted to them, "No" to the first question as to whether he had sold the crop back to Baughman, and to the second question, "How much does Baughman owe Overton?" on the first account for cotton sold $300, and on account for the second cotton sold $50, it being agreed that all other questions should be determined by the court. Appellant objected to the jurisdiction of the court, claiming that the cause of action was wrongfully split up; that the court was without jurisdiction to consider and determine the second suit, because of a failure to summon the guardian of appellant; that the court was also without jurisdiction in the first suit, and pleaded *res judicata* to both.

The circuit court held that, appellant's guardian not having been summoned in the first suit, no judgment could be rendered against him, and sent back or re-

manded the case to the justice court for proper service; denied the plea of *res judicata* and rendered judgment in the second suit for $50, the amount found to be due thereon by the jury, and from this judgment the appeal is prosecuted and also a cross-appeal.

Claude F. Cooper, Neil Reed and *T. J. Crowder,* for appellant.

Cecil Shane, for appellee.

KIRBY, J., (after stating the facts). There is no merit in appellant's contention that the court erred in not sustaining his plea of *res judicata,* the suit for injunction against appellant to prevent his interfering with the gathering of the crop by appellee, although testimony therein was heard, was dismissed "without prejudice." The court had the power to make such disposition of the case and order therein, and, having done so, the judgment was not *res judicata. Gosnell Special School District* v. *Baggett,* 172 Ark. 681, 290 S. W. 577; *Carpenter* v. *Dressler,* 76 Ark. 400, 89 S. W. 89; *Moss Tie Co.* v. *Miller,* 169 Ark. 657, 276 S. W. 586; *Mutual Benefit Health & Accident Assn.* v. *Tilley,* 174 Ark. 932, 298 S. W. 215; and § 1261, C. & M. Digest.

The majority is of opinion, however, that the court erred in not holding that it was without jurisdiction in the second case, because of the splitting of appellee's cause of action, the first suit being for the full amount of the jurisdiction of the justice of the peace. There is no doubt but that appellee was entitled to the value of his share of the crop produced by his labor less the amount due by him to the owner of the land, and to a lien therefor on the crop produced. The first suit was for $300 on this cause of action, the full amount of which the justice court had jurisdiction, and, although a litigant can bring suit in the justice court on a cause of action and a claim amounting to more than $300, by doing so and recovering thereon he waives or surrenders all right to recovery of any amount thereon beyond the jurisdiction of the justice court.

The fact that appellee knew of only a certain portion of the crop having been sold at the time the first suit was brought, his share of the value thereof amounting to $300, for which amount suit was brought, would not permit him later to bring suit for the value of his share of other portions of the crop subsequently discovered to have been disposed of by the owner or landlord, since it would be a splitting of his cause of action, he being entitled to the whole amount of the value of his share of the entire crop, which could constitute but a single cause of action. This is not a case of a new cause of action allowed to be maintained upon the same contract or transaction whenever, after the first action brought, a new cause of action has arisen therefrom as provided in the statute. Section 1083, Crawford & Moses' Digest.

The court had the right to remand or send back the case first appealed for proper service on appellant and his guardian, and, since it was brought for the full amount of the jurisdiction of the justice court on the single cause of action, the testimony having shown that the laborer was entitled to recover that amount, the value of his share of the crop being greater than the amount sued for, it could not then render judgment in the second case for $50 more than such amount, even though it was shown that appellee was entitled thereto, had it not been beyond the jurisdiction of the justice court under the circumstances.

The judgment of the circuit court for $50 in the second suit is therefore reversed, and the cause must be dismissed, said court having acquired no jurisdiction to hear the cause which was beyond the jurisdiction of the justice court wherein it originated. Otherwise the judgment of the circuit court is affirmed.