

MILLER *v.* MONCRIEF.

Opinion delivered April 13, 1931.

1. JUDGMENT—RES JUDICATA.—A judgment of a superior court of competent jurisdiction upon a certain issue, not appealed from, is conclusive upon the same issue in another case.
2. DAMAGES—REMOTENESS.—Damages for breach of an agreement to operate a store, as well as damages for breach of a contract to form a partnership, cannot be recovered, being too remote and speculative.
3. IMPROVEMENTS—RECOVERY BY GRANTOR.—No recovery can be had for improvements placed upon land by a grantor long after he had conveyed the land to his former wife, without any agreement for repayment of their value.
4. TRIAL—TRANSFER OF CAUSE.—Where no equitable question was involved, it was not error to transfer a cause to the circuit court for trial of questions of fact.

Appeal from Arkansas Circuit Court, Southern District; *W. J. Waggoner*, Judge; affirmed.

STATEMENT BY THE COURT.

This is the second appeal in this cause, a full statement of which appears in *Moncrief v. Miller*, 178 Ark. 1071, 14 S. W. (2d) 227. The court held there that a grantor in a deed could show what the consideration was, although not expressed therein, and also he may show

the value of this unexpressed consideration, but could not show, for the purpose of defeating the conveyance, that there was no consideration or that the consideration had failed, and said: "So here appellee may show what the consideration for the deed was and the value thereof, and may recover judgment for the value of such portion of the consideration as he failed to receive, but the deed stands as a valid conveyance of the title to the land. The decree of the court below will be reversed, and the cause will be remanded for further proceedings not inconsistent with this opinion."

Upon the remand of the cause appellee herein moved to transfer it to the circuit court, which was done over the objections of appellant. It was then retransferred to the chancery court upon appellant's motion, and finally on the court's own motion transferred again to the circuit court on the 24th day of March, 1930, and the circuit court refused to transfer it back.

Appellant filed an amendment to his answer after the cause was remanded setting up an agreement by appellee for continuing the business together, the failure to surrender his \$1,000 note, which was agreed to be done as a part of the consideration for the execution of the deed, and claimed large damages of appellee for breach of her contract, a part of the consideration for the conveyance.

The testimony was introduced, and the court instructed the jury that nothing could be recovered upon the claim of failure to deliver or return the \$1,000 note, which was agreed to be done as a part of the consideration for the deed, since the matter was *res judicata*, the liability having been determined in another suit. The court also limited the jury to the consideration of the amount of rent plaintiff was entitled to recover, if any, which should be offset against the amount of taxes the defendant had paid since 1920. Nine of the jurors by a signed verdict found in favor of the plaintiff for the property in controversy, and found that the taxes paid by the defendant equaled the rent due the plaintiff.

Judgment was entered accordingly for the possession of the land, describing it, and after 10 days that a writ of possession issue in favor of appellee, and from this judgment the appeal is prosecuted.

J. M. Brice, for appellant.

G. W. Botts, for appellee.

KIRBY, J., (after stating the facts). Appellant insists that the court erred in refusing to retransfer the cause to the chancery court and in the refusal to give certain instructions requested.

The undisputed testimony shows that appellee had refused to surrender the \$1,000 note that was claimed to be a part of the consideration, and also that she had brought suit thereon and recovered judgment therefor in a court of competent jurisdiction against appellant from which no appeal was taken, and that, as a defense in that suit, appellant here alleged the note was paid or satisfied by this conveyance. The court properly held this matter *res judicata* upon the plea setting it up, and declined to submit the question to the jury.

Of course, appellant could not recover damages for breach of or refusal to perform the contract for personal service, such damages being altogether remote and speculative, as well as any damage for breach of partnership agreement alleged to be a part of the unexpressed consideration for the deed, and no error was committed in the court's refusal to give the instruction requested on that point. Certainly appellant could not collect damages for value of improvements put upon the lands conveyed by the deed long after the conveyance was made and appellee had refused and declined to carry out the partnership agreement, and it is not even claimed that such improvements or the value thereof was any part of the unexpressed consideration for the deed or conveyance of the lands. The improvements were made upon the lands long after appellant had conveyed them and without any agreement for repayment of their value to him and any right on his part to expect such repayment under the circumstances of this case.

Since there were no questions for determination of exclusively equitable cognizance, no error was committed in transferring the cause to the circuit court for trial upon the questions of fact by a jury. Upon the whole record, the majority is of opinion that no errors were committed, and that the judgment must be affirmed. It is so ordered.
