

LEWIS *v.* ARNN.

Opinion delivered January 22, 1917.

ACCORD AND SATISFACTION—ACCORD WITHOUT SATISFACTION.—An accord without satisfaction does not bar the original cause of action.

Appeal from Sharp Circuit Court, Southern District; *J. B. Baker*, Judge; reversed.

*S. M. Bone* and *McCaleb, Reeder & McCaleb*, for appellant.

1. The court erred in giving instruction No. 2. There was no evidence to support it. An accord with-

out satisfaction is not a bar. 78 Ark. 304; 88 *Id.* 473; 115 *Id.* 339.

*Bledsoe & Ashley*, for appellees.

1. Instruction No. 2 was not erroneous. There was sufficient evidence on which to submit to the jury the question of whether or not there had been a settlement and an accord and satisfaction. 1 *Corpus Juris*. 567; 2 Ark. 226; 50 Oregon, 559; 4 J. J. Marsh (Ky.) 449; 110 N. Y. S. 391; 64 S. W. 746; 209 Pa. 368; 122 Ala. 269; 56 Me. 26; 7 Md. 259.

SMITH, J. Appellant was the plaintiff below and sued to recover judgment for the value of two cows which appellees had bought from one Conyers. After purchasing the cows appellees shipped them to St. Louis, where they were sold.

Upon the trial in the court below it was insisted, first, that the cattle belonged to Conyers and that he had the right to sell them. It was also insisted that appellant and Conyers had adjusted their differences. Conyers was arrested for the larceny of the cattle, but that case was never tried. Conyers testified that all differences between himself and appellant were adjusted. That he made an affidavit that he would give appellant notes for the agreed price of the cattle, but he admits that the notes were never given to nor accepted by appellant. Appellant admits that he agreed to take three notes, of \$100.00 each, payable one each year, in satisfaction of his demand, and that Conyers agreed to execute notes therefor, but he testified the notes were never executed.

Over appellant's objection the court charged the jury as follows:

"No. 2. You are instructed that if you believe from the evidence in this case that the plaintiff, J. J. Lewis, had a settlement with Mordy Conyers after the cattle in controversy were sold to the defendants, in which it was agreed by and between the said Lewis and Conyers that Conyers was to pay, or execute notes to the said Lewis, the sum of three hundred dollars in

consideration of full settlement of all claims or demands held by plaintiff against him (Conyers) to that date, then your verdict should be for the defendant.”

This appeal questions only the correctness of this instruction, and we think error was committed in giving it. The agreement to accept Conyers' notes was an accord; but there was no satisfaction, as the notes were never executed. An accord without satisfaction does not bar the original cause of action. *St. L. S. W. Ry. Co. v. Mitchell*, 115 Ark. 339, and cases there cited. *West v. Carolina Life Ins. Co.*, 31 Ark. 476.

For the error indicated the judgment is reversed and the cause remanded.

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