DILLARD'S AD'R *vs.* MOORE.

In cases where appeals are allowed from the judgment of the probate court, the party has during the term at which the appeal is asked to present his bill of exceptions to the decision of the court, and is not bound to present it at the time of the trial. *Rev. Stat. ch.* 4, *sec.* 180.

The same legal strictness cannot be observed or enforced in the proceedings before the probate courts as in the circuit courts, and their proceedings, as to technical accuracy, must be reviewed with indulgence. Hence where a bill of exceptions, taken to the decision of a probate judge, does not state, in so many words, that it contains all the evidence given on the trial, yet states that but one witness was introduced, and sets out his testimony, it is sufficient to authorize the circuit court, on appeal, to review the proceedings of the probate judge.

M. presented a bond to the probate court for allowance against an estate; the ad'r impeached the consideration of the bond for fraud, and the court rejected it. M. excepted and appealed to the circuit court, where the judgment of the probate court was set aside, the cause tried *de novo* on the same issue, and the claim allowed by the court. The ad'r excepted, took a bill of exceptions purporting to set out all the evidence, and brought error. The bill of exceptions does not state that the bond in dispute was read in evidence to the court on the trial, and this is urged for reversal. Held that inasmuch as the bond constituted the foundation of the action, and was sent up from the probate court as part of the record of the case, it was necessarily before the court, and the administrator having taken upon himself the burthen of proof by impeaching the bond for fraud, it was unnecessary for the bill of exceptions to show that it was formally read to the court as evidence by the claimant.

Fraud consists in the misrepresentation or concealment of a material fact calculated to deceive and mislead the opposite party.

The law requires each contracting party to be vigilant, and exercise a due degree of caution.

Bond sued on impeached for fraud. Evidence, that it was given for a horse which was unsound, but that the unsoundness was such that any person of ordinary understanding might have discovered it upon inspection—held that the court would not avoid the contract where the unsoundness of the horse was so plainly perceivable, and no undue means used by the vendor to conceal it.

Writ of Error to the Circuit Court of Crawford County.

AT the July term of the probate court of Crawford county 1845, on the 12th of the month, James H. Moore presented for allowance against John J. Dillard as administrator of William H. Dillard dec'd, a bond for $350, executed to Moore by Dillard's intestate, which had been exhibited to the administrator for allowance, properly authenticated, and rejected. The court refused to allow the claim, and rendered judgment against Moore for costs. On the 14th of July, Moore filed an affidavit for an appeal to the circuit court, and took a bill of exceptions as follows:

"This day came the said plaintiff and tenders the following ex-

ceptions to the judgment of the court rendered in this case on a former day of the present term, to-wit: 1st, because said judgment is contrary to evidence: 2d, it is without evidence: 3d, it is contrary to law.

John Dillard, sen'r, the father of William H. Dillard deceased, was introduced as a witness for the defendant, and the only witness examined in the case. He stated that his son William purchased a mare from the plaintiff for $500, that he paid him $150, and gave him the writing obligatory sued on to secure the balance of the purchase money. That he was not present when the mare was purchased, and does not know what took place between the parties. He stated that he saw the mare a week or ten days before the purchase—she was at his house—he believed from her appearance that she was unsound, and thought that any person of ordinary understanding would readily, on inspection, discover her unsoundness. He stated that he told the plaintiff that she was unsound, and that the plaintiff admitted that she was—he stated that the mare died a short time after the purchase, but does not know how long, thinks it did not exceed two or three weeks, and that if she had been sound she was not worth more than $500. The foregoing is signed, sealed, and made part of the record in this case."

The appeal was granted, and the cause was determined at the August term 1845, before BROWN, judge. On inspection of the transcript and papers from the probate court, the circuit court sustained the exceptions to the judgment of the probate judge, and proceeded to try the cause *de novo*. It was submitted to the court, sitting as a jury, by consent of parties, and the court found in favor of Moore, and allowed and classed the claim.

By a bill of exceptions taken by Dillard, it appears that the case was submitted to the court upon the statement of John Dillard sen'r as made by him before the probate court, and set out in the bill of exceptions above, which the parties used as an agreed state of facts, and which the bill of exceptions states was all the evidence introduced on the trial before the circuit court. Dillard brought error.

W. WALKER, for the plaintiff. The circuit court erred in sustaining the exceptions taken by the defendant in the court of probate and trying the cause *de novo.*

Before the circuit court can try and determine the matters in controversy between parties in appeal from the court of probate, anew, it must appear, first, that an appeal was taken; secondly, that the party appealing filed his exceptions, and lastly, that the court of probate erred in relation to some material question of law or fact. The points made to the decision to which exceptions have been taken, must first be determined, and unless it appear that the court of probate has erred, the circuit court acquires no jurisdiction, and the appeal must be dismissed. See *Rev. Stat. page* 96, *sec's* 180, 181 and 182.

Did the court of probate err? This question is to be determined by the bill of exceptions filed in that court. According to the decisions of this court in the case of *Pelham vs. The State Bank,* 4 *Ark. R.*, this bill of exceptions forms no part of the record. The record shows that it was filed after the trial and after the application for an appeal, and it is not shown that the defendant saved his points at the trial, and had leave to file his bill of exceptions afterwards, or that it was filed by consent. See *Byrd vs. Tucker,* 3 *Ark. R. Lenox vs. Pike,* 2 *Ark. R.*

If however this court should regard it as a part of the record, it can avail nothing because it does not state that the facts therein contained was all the evidence adduced on the trial; and even admitting that all the evidence adduced was set out in the bill of exceptions, it falls far short of establishing his claim.

The bill of exceptions being disposed of the conclusion is that the court of probate did not err in relation to any material question of law or fact, and that, consequently, the judgment of the circuit court is *coram non judice.*

The circuit court erred in giving the judgment in favor of the defendant upon the evidence adduced upon the trial. It certainly devolved upon the defendant to establish his claim on the trial anew in the circuit court, and his claim being predicated upon a writing obligatory executed to him by the plaintiff's intestate, it was ne-

cessary that he should read it in evidence on the trial; but the bill of exceptions filed by the plaintiff shows that he failed to produce it on the trial or read it in evidence.

The evidence adduced on the trial shows that the writing obligatory was executed for a fraudulent consideration. The mare was unsound—the obligee was aware of it, and the exorbitant price given for her is a circumstance from which it may be inferred that the obligor, at the time of the purchase, was ignorant of her unsoundness. The witness states that any person of ordinary understanding might have discovered that the mare was unsound, but he does not say that the defect was such as could be seen.

OLDHAM, J. The first objection made by the plaintiff in error to the decision of the circuit court is, that the bill of exceptions presented by the defendant in error to the decision of the probate court in rejecting his demand, was not presented at the time of the trial but on a subsequent day of the term. In all cases where appeals are allowed from the judgment of the probate court, the party has during the term at which the appeal is asked to present his bill of exceptions to the decision of the court, specially setting forth each item, the allowance or rejection of which is objected to. *Rev. St. ch.* 4, *sec.* 180.

The next objection is that the bill of exceptions does not state that it contains all the evidence adduced on the trial. This it does not do by express words. That same legal strictness cannot be observed or enforced in the proceedings before the probate courts as in the circuit courts. Men intimately acquainted with legal proceedings do not usually preside there, parties are not represented by men of law knowledge; and consequently, the proceedings of these courts, as to technical accuracy must be viewed with indulgence. A different course would in many cases result in a total perversion of the ends of justice.

Although the bill of exceptions does not, in so many words, state that it contains all the evidence, yet it states that but one witness was introduced, and also sets out his testimony; which, in no respect whatever, is calculated to defeat the right of recovery of the

plaintiff below. The bill of exceptions, we are of opinion, is amply sufficient to authorize the circuit court to take jurisdiction of the case and review the proceedings of the inferior court.

Another objection urged by the plaintiff in error is that the defendant in error should have produced upon the trial anew in the circuit court the writing obligatory presented for allowance and read the same in evidence to establish his claim. The writing obligatory duly probated, was the foundation of the action, and was upon the appeal sent up to the circuit court as a part of the record in the case. The defence set up by the plaintiff in error did not deny the existence, or the execution of the writing obligatory, but sought to avoid it upon the ground of fraud. He thus took the onus upon himself and dispensed with proof on the part of his opponent. Although the writing may not have been formally read in evidence, it was a paper in the cause, was already before the court, and was necessarily taken into consideration in rendering the judgment. It was therefore useless for the party to go through the formality of reading the writing to the court.

Having disposed of these preliminary questions, we will now proceed to the determination of the main question, that is, whether the evidence shows such fraud on the part of the plaintiff below as will avoid the writing presented for allowance to the probate court.

Fraud consists in the misrepresentation or concealment of a material fact calculated to deceive and mislead the opposite party. Of neither does the evidence show that the defendant in error was guilty. The evidence shows that the mare, for which the writing obligatory was executed, was unsound, and that the witness told the defendant in error so, and he admitted the fact, but that the unsoundness was such that any person of ordinary understanding might have discovered it upon inspection. It is expected and required by courts of justice that each contracting party shall be vigilant and exercise a due degree of caution. *Chitty on Con.* 681. Courts will not avoid a contract because the consideration for which it was executed possessed such defects or unsoundness as were plainly perceptible to a man of ordinary judgment and understand-

ing and where no undue means were used by the opposite party to conceal the same. Under the evidence as set out by the bill of exceptions, the judgment of the circuit court is correct and is accordingly affirmed.