

GORDON ET AL. vs. CHURCH ET AL.

Bill in chancery: defendants served by publication as non-residents: at the return term complainants moved for a decree for want of an answer or demurrer: whereupon defendants entered their appearance to the bill, and asked leave until the next term to plead, answer or demur, which was granted: HELD, That, on the failure of defendants to make defence at the next term, complainants were entitled to a final decree, *pro confesso*, against them.

The 19th, 20th, and 21st secs. of ch. 28, *Digest*, in reference to interlocutory and final decrees in chancery, construed.

In a bill to set aside a tax sale, complainants admitted the payment of the purchase-money, and made a tender of it to defendants—decree, *pro confesso*, reversed because payment of the purchase-money was not decreed to defendants.

Appeal from the Chancery side of the Pulaski Circuit Court.

This was a bill filed by Church and wife against Gordon et al., in the Pulaski circuit court, to set aside a sale and conveyance of certain lots in the city of Little Rock, for taxes, made by the Auditor to Gordon, and to quiet title, &c.; determined before the Hon. WILLIAM H. SUTTON, Chancellor, in April, 1848. The material facts are stated in the opinion of this Court.

BERTRAND, for the appellants.

RINGO & TRAPNALL, contra.

Mr. Justice WALKER delivered the opinion of the Court.

It appears, from the record, that the appellants were served by publication as non-resident defendants. At the return term, the complainants moved the court for a decree for want of answer or demurrer to the bill, and thereupon the defendants entered their appearance to the action, and asked leave until the next suc-

ceeding term to plead, answer or demur to the bill, which was granted them. At which time they failed to interpose any defence whatever, and the bill was taken for confessed, and a final decree entered against them. They contend that this was error: that their case came within the provisions of the 19th sec. Dig. 228. That section requires the defendants who have been served with process thirty days previous to the return term, to plead, answer or demur, on or before the 4th day of such return term, and, in default thereof, that the bill be taken as confessed, and an interlocutory decree entered against them. It is contended, for the appellees, that the case does not come within the provisions of the 19th section, but the 20th section, which provides that where the case is continued a term, because the writ has not been served thirty days before the return term, such defendant shall appear and plead on or before the 2d day of the next succeeding term thereafter, or the bill will be taken as confessed, and a decree entered against him accordingly.

It will be perceived that there is a marked difference between the 19th and 20th sections in regard to the effect of a default. Under the 19th, the defendant is allowed until the 4th day of the return term to appear and defend, and a failure to do so entitles the complainant to an interlocutory decree; whilst, under the 20th, he must enter his appearance and answer on or before the 2d day, and, on his failure to do so, a decree, not an interlocutory decree, as provided for by the 19th section, is rendered against him. The 19th section, which authorizes the defendant to file his petition for leave to plead to the merits at the next succeeding term after the interlocutory decree is rendered, by express terms, refers to interlocutory decrees, and seems to have been intended to apply exclusively to such decrees as were contemplated by the provisions of the 19th section.

In the case before us, the case was continued a term at the instance of the defendants, with leave to plead, answer, or demur, at the next term thereafter, at which time, upon their failure to do so, a final decree was rendered against them. The court, in its discretion, at the instance of the defendants, having fixed

the time for them to interpose their defence, upon such failure, we think the final decree properly entered.

It is next contended, on the part of the appellants, that, admitting the decree to have been in other respects correct, still the court erred in decreeing a rescission of their contract for the purchase of the lots without decreeing also that the appellees should pay the amount expended in the purchase. The lots were bound for taxes. Whether sold or not, the complainants held them subject to the payment thereof. They aver in their bill that the appellants did pay for them and tender the amount so paid. The decree, however, is silent on this subject. It was, under the circumstances, error to render the decree without providing therein for the payment of the purchase money. For this error, we think the decree should be reversed and the cause remanded, with instructions to render a decree in conformity with this opinion.

Let the decree be reversed.