

BRODIE ET AL. vs. SKELTON.

An order of publication against a non-resident defendant in chancery, under sections 13 and 16, of ch. 28, *Digest*, should state the names of the parties to the bill, and, in general terms, the nature of the complaint.

In this case, the bill sought to correct a mistake in the description of lands conveyed in trust, to appoint a trustee, and to divest titles acquired by some of the defendants subsequent to the execution of the trust deed; the order of publication set forth the first two, but not the latter object of the bill: HELD, Not sufficient to base a decree upon, by default, against non-resident parties.

The affidavit of the publication of such order, under sec. 1, ch. 8, *Digest*, should show that it was made by the printer or publisher of the paper; and how many times it was published, and the date of the papers in which it was published.

Where the requisite affidavit of publication does not appear to have been filed,

the want of it is not cured by the recitals in an interlocutory decree, taken *pro confesso*, that proper proof of such publication was made.

A decree upon an implied confession, must be taken strictly; the facts upon which the decree is based, should be distinctly alleged, and the decree should be confined to the facts so alleged.

No intendment of a fact not with the allegations, can be made to support such a decree; the legal presumptions, drawn from the *pro confesso* state of a bill, must be confined to the distinct allegations therein; and the proofs, when any are thought necessary, must be made out conformably to the general rules of evidence.

One feature of this bill was to divest the title of one who purchased subsequent to a trust deed; but there is no allegation in the bill that he had actual notice of the trust deed, or that it was acknowledged and recorded before his purchase: HELD, That a decree *pro confesso* divesting his title, was unwarranted by the allegations of the bill.

In such case, where the bill does not allege that a defendant, who is charged as a subsequent purchaser, had actual or constructive notice of the trust deed, and in his answer he denies any notice, but the decree recites that it was proven on the hearing that he had notice, such recital will not support the decree, there being no allegation in the bill to base proof of notice upon.

Where complainant relies upon an acknowledgment and registration of a deed, a failure to exhibit a certified copy thereof, is ground of demurrer. *Sec. 48, ch. 28, Digest.*

The bill charged that R., after conveying land in trust, conveyed it to B., he to P. and he to L., and sought to divest the title of L: HELD, That no decree could be rendered against L., without making his vendor P. a party, and that the omission to make P. a party, was cause for reversal.

HELD, That though L. had notice of the trust deed, yet if his vendor purchased without notice, his title would be good.

The general rule as to the proper parties in equity declared.

Appeal from the Chancery side of the Washington Circuit Court.

William Skelton filed a bill, in the Washington Circuit Court, Chancery side, against Lodowick Brodie, Reuben W. Reynolds, William McK. Ball, William Ledford, and William Barrington, alleging that, on the 7th of October, 1840, Reynolds executed a note to the Bank of the State for \$1,567, with Brodie and complainant securities, payable 4th December thereafter. That, on the same day, Reynolds, in order to save his said securities harmless, made a deed of trust to defendant Ball, conveying to him

thereby the n. w. $\frac{1}{4}$ of the n. w. $\frac{1}{4}$ of sec. 18, in T. 15 N. of R. 30 W., containing 52 1-100 acres; also the s. e. $\frac{1}{4}$ of the n. w. $\frac{1}{4}$ of sec. 7, in T. 15 N. of R. 30 W., containing 40 acres; and also lots No. 13 and 14 in Block 28, in the town of Fayetteville. That it was intended, by and between Reynolds and Ball, that Reynolds was conveying to Ball the n.w. fr. $\frac{1}{4}$ of the s. w. fr. $\frac{1}{4}$ of sec. 7, in T. 15 N. of Range 30 W., containing 52 66-100 acres: but that, through mistake, Reynolds conveyed to Ball the s.w. fr. $\frac{1}{4}$ of sec. 7, in said T. and R., to which he had no title.

That Reynolds also conveyed to Ball, by said trust deed, five slaves, which are described in the bill; and all the household and kitchen furniture which was then in possession of defendant Brodie, belonging to Reynolds, which is likewise described and the value alleged. That said real and personal property was conveyed to Ball in trust, with power to sell the same, on failure of Reynolds to discharge the said Bank debt when due, and apply the proceeds of sale in part to the payment of said debt, and partly to the discharge of a debt of \$1,000 which Reynolds owed Brodie. A copy of said trust deed is alleged to be exhibited, and made part of the bill. Complainant also avers that the deed, and acknowledgment thereof by Reynolds, was regularly recorded: but the time when is not alleged.

It is further alleged, that, after Reynolds had made said conveyance, on the 6th April, 1841, he and his wife conveyed, by absolute deed, [but to whom is not alleged,] the n.w. $\frac{1}{4}$ of the n. w. $\frac{1}{4}$ of sec. 7, in T. 15 N. of R. 30 W. and the n.w. fr. $\frac{1}{4}$ of the s.w. fr. $\frac{1}{4}$ of sec. 7, in T. 15 N. of R. 30 W. And that, on the same day, Reynolds and wife conveyed to defendant Brodie both of the town lots aforesaid; that, on the 15th of February, 1843, Brodie conveyed one of said lots [No. 14] to one R. P. Pulliam, who, on the 28th August, 1845, conveyed it to defendant Ledford.

That, on the 10th May, 1844, defendant Brodie conveyed to defendant Barrington the n.w. $\frac{1}{4}$ of the n.w. $\frac{1}{4}$ of sec. 18, in T. 15 N. of R. 30 W., and the s.e. $\frac{1}{4}$ of the n.w. $\frac{1}{4}$ of sec. 7, in T. 15

N. of R. 30 W., and the n.w. fr. $\frac{1}{4}$ of the s.w. fr. $\frac{1}{4}$ of sec. 7, in T. 15 N. R. 30 W.: the same being part of the lands above mentioned, and that Barrington was in possession thereof.

That defendants Reynolds, Ball and Brodie, contriving and confederating together, for the express purpose of defrauding complainant out of his just rights, and to cause him to pay off said Bank debt without any relief at law in the premises, and without deriving any benefit whatever from the property embraced in said deed of trust, the said Brodie, upon the application of Reynolds, gave up to him the household furniture aforesaid, and permitted him to remove it to parts unknown.

That said Reynolds and Ball, on the 7th October, 1840, having learned that the mistake above shown (in refer nce to the lands conveyed in the trust deed) existed, informed the said Brodie of the fact, who, confederating with them, for the purpose of more effectually defrauding complainant in the premises, received and accepted the deed from Reynolds, conveying him the lands hereinbefore mentioned.

That said Ball, for the purpose of more fully consummating said fraud, after taking upon himself said trust, and before the time had arrived for its execution, left the State of Arkansas, and went to Texas, where Reynolds had gone a short time before, and where he had since remained, without having paid any part of said bank debt; and that complainant was compelled and had paid the same.

That Barrington pretended that he had a good title to the lands conveyed to him, as aforesaid; but complainant alleges that they were subject to the trust deed.

That Brodie, in pursuance of said confederacy, conveyed said town lots as aforesaid.

That Ball, in pursuance thereof, permitted his confederate, Reynolds to remove said slaves to Texas.

Complainant then propounds to defendants specific interrogatories, covering the allegations in the bill, and concludes with a prayer that the mistake in reference to the lands conveyed in the deed of trust be corrected, a trustee appointed in the place of

Ball, that all the property named in the deed be sold for the benefit of complainant, and for general relief.

Complainant filed with the bill an affidavit that defendants Ball, Reynolds and Brodie were non-residents.

The copy of the deed of trust exhibited with the bill, is attested by two witnesses, but there are no certificates appended showing that it was acknowledged or recorded.

When the bill was filed, (20th February, 1846,) a subpoena was issued for defendants Barrington and Ledford, and the following order of publication was made as to the other defendants:

“This day came the complainant, &c., and filed his bill of complaint herein, with his affidavit that defendants Reuben W. Reynolds, Lodowick Brodie and William McK. Ball, are non-residents of this State; and the object of this bill being to correct a mistake in the deed of trust mentioned therein, and the appointment of a trustee in the place of defendant Ball, who was made trustee by his co-defendant Reynolds, by deed, on the 7th day of October, A. D. 1840, for the purpose of carrying out the trust in said bill mentioned, for the use and benefit of said complainant and said Brodie, which said trust was never consummated by said Ball: It is, therefore, on motion of complainant, ordered that said non-resident defendants be notified, by publication of this order in the *Intelligencer*, a newspaper published in the town of Van Buren, in the State of Arkansas, by two successive weekly insertions, the last thereof to be at least four weeks before the first day of the next term of this court, notifying said defendants that, unless they appear before our said circuit court on or before the first day of said term, to be holden at the court-house in the town of Fayetteville, on the 4th Monday after the 4th Monday in April next, and then and there plead, answer or demur to said bill, or that the same will be taken as confessed, and a decree entered accordingly.”

Afterwards, the order of publication, as printed, was filed with the following account and affidavit appended thereto:

“*Van Buren, June 23, 1846.*”

WILLIAM SKELTON,

To WASHBURN & PRYOR,

Dr.

To advertizing annexed order, as per directions,

\$7.00

STATE OF ARKANSAS, }
County of Crawford. }

This day personally appeared before me, Reuben P. Pryor, an acting and duly commissioned Justice of the Peace in and for the State and county aforesaid, Cornelius D. Pryor, who, being duly sworn, says that the annexed advertizement was inserted according to instructions given.

C. D. PRYOR,

Sworn to and subscribed before me, this 23d June, 1846.

R. P. PRYOR, *J. P.*”

At the return term, Barrington filed an answer, in which he admits that Brodie conveyed to him the lands described in the bill, but avers that he had no knowledge of its having been conveyed to Ball by Reynolds, nor of its having been included in any deed of trust, or intended to have been included in such deed to any person; which was verified by his affidavit, and to which plaintiff filed a replication.

At the return term, the court rendered an interlocutory decree, as follows:

“And now on this day came the defendant Barrington, and filed his answer, &c., and thereupon came said complainant and filed his replication thereto; and it appearing that defendant Ledford has been regularly served with process, &c., thirty days next before the first day of this term of this court, and that the order heretofore made in this case has been published for two weeks next before the commencement of this court, in the Arkansas Intelligencer, a newspaper published in this State, notifying the said Reynolds, Brodie and Ball of the pendency of this bill in this behalf against them, and requiring them to appear here and plead, answer, or demur to said bill, or that the same

would be taken as confessed and true against them, and that they have wholly failed to do so; and, it further appearing to the court that, among other things, it is alleged that said bill," &c., &. ; then follows a recitation of the matters alleged in the bill—and then: "It is therefore ordered, adjudged, and decreed, by the court here, that all and singular the allegations in said bill contained be and the same are hereby taken as confessed and true as to the said defendants Reynolds, Ball, Brodie and Ledford; and it is ordered by the court that this cause stand for final hearing at the next term of this court, and that it stand continued until that time."

At the December term, 1847, defendant Brodie appeared and filed a motion, supported by affidavit, to set aside the interlocutory decree rendered against him at a previous term, and for leave to answer, on the grounds that he had not been legally served with process, that the decree was irregular, and that he had a meritorious defence, which was overruled.

At the same term, a final decree was rendered, in substance, as follows:

"And now on this day this cause came on to be heard, &c., upon bill, answer, replication, exhibits and evidence; and it appearing to the court that the land and property mentioned in said bill was, on the 7th day of October, 1840, deeded in trust to the said defendant Ball, and that said deed was, on the 31st day of December, 1840, filed for record in the office of the clerk of the circuit court of the county of Washington, and that the defendant Barrington had due notice thereof. And it also appearing to the court here that an interlocutory decree has heretofore been rendered in this case, declaring all the facts alleged in said bill to be true as against defendants Reynolds, Ball, Brodie and Ledford, and that they wholly failed to appear, &c., &c., and show cause, &c., &c.:

"It is therefore ordered, adjudged, and decreed, by the court, that, inasmuch as said Barrington had notice of said deed of trust, and that the lands therein described were thereby conveyed to defendant Ball for the purposes therein set forth, that

he, the said Barrington, be, and he is hereby, divested of all right and title to the n.w. $\frac{1}{4}$, &c., &c., [*the lands alleged to have been conveyed to Barrington by Brodie,*] the same being the land conveyed by said deed of trust from Reynolds to Ball.

“And it is further adjudged, by the court, that the deed of conveyance made to defendant Ledford to the lots No. 13 and 14, described in said deed of trust, be, and the same is hereby, set aside and held for nought, and that he be divested of all right and title in and to said lots.

“And it is also adjudged by the court, that defendant Ball be, and he is hereby, divested of all right, title, and interest, in and to the following tracts of land and town lots, situate, &c., [*here follows a description of the land and lots,*] the same being the land and lots hereinbefore mentioned; and also all right to the following slaves and personal property, to wit: [*here follows a description thereof.*] And it is adjudged and decreed that Hugh F. Thompson be, and he is hereby, invested with all right, title and interest in and to said real and personal property and slaves, for the purposes of the trust mentioned in said deed of trust.”

It was further decreed that the property be sold by Thomason, as such trustee, and that he apply the proceeds, after paying expenses, first to the re-payment to complainant of the money paid by him to the Bank for Reynolds, and that he hold the balance subject to the claims of Brodie and Reynolds.

It does not appear of record that any depositions were taken in the case. Defendants appealed from the decree.

FOWLER, for the appellants: The complainant having failed to file with his bill a copy of the acknowledgment and registration of the deed of trust, on which he relied, and make profert of the original deed, his bill should have been dismissed. *Sec. 48, ch. 28, Digest.*

The mere fact of fraud being charged upon Brodie, in receiving the deed and making the subsequent conveyance, neither amounts to a charge of fraud on Ledford or Barrington, or of notice of the deed of trust. A charge of actual notice cannot

be by implication. (2 *Powell on Mort* 560, &c. 5 *Mason's C. C. R.* 265.) Nor can a derivative purchaser, without notice, be affected by notice to, or the fraud of him under whom he claims. (3 *Ala. R. (N. S.)* 475. 8 *Term R.* 392. 2 *Bro. Ch. R.* 66.) The interrogatory to Barrington, as to his knowledge of the deed of trust when the land was conveyed to him, cannot supply the want of an express charge of notice or fraud upon him; nor can an interrogatory be propounded that is not based upon some fact charged in the bill. (6 *J. R.* 564. 2 *Marsh. R.* 124. 6 *Munf. R.* 44. 3 *Litt. R.* 371.) Notice and fraud being indispensable to charge Barrington and Ledford, and such charge being omitted, no relief can be granted were such facts apparent from other pleadings or evidence. 2 *Eng.* 519. 3 *Litt. R.* 67. 1 *Bro. Ch. R.* 94.

The Bank and Pulliam were necessary parties. 2 *Mad. Ch.* 191, 173, 186. 3 *Ark. R.* 381. 3 *Bibb.'s R.* 11. 7 *Blackf. Rep.* 297. 4 *B. Monroe's Rep.* 309.

The order for notice of publication as to the non-resident defendants, was insufficient, in not stating the nature of the complaint, (sec. 13, ch. 28, *Digest*); nor was the proof of publication sufficient. (Sec. 16, ch. 28. Sec. 1, ch. 8, *Digest*.) The recital in the decree that such publication was made is not sufficient; the evidence of the fact must appear of record, (*Green's hrs. vs. Breckenridge's hrs.*, 4 *Mon. Rep.* 544. 3 *J. J. Marsh. R.* 105. 4 *Litt. R.* 270. 16th *Rule of Court*); and it must appear that all the requisites of the statute have been complied with. *Wilkinson vs. Pervine*, 7 *Mon. Rep.* 217. *Ib.* 419, 658. 2 *J. J. Marsh.* 486, 463.

Where a bill is taken as confessed, the facts upon which it is based must not only be distinctly alleged in the bill, but the proof to sustain them must appear. 2 *Marsh. R.* 124, 125.

The bill charging upon Barrington notice of the deed of trust and knowledge of the alleged mistake in the lands, and these facts being positively denied by the answer, the charge must be proven by two witnesses, or one witness and strong corroborating circumstances. (*Sug. on Ven.* 550. *Clason vs. Morris*, 10 *J.*

R. 540. 5 *Cond. R.* 136. 5 *Pet. R.* 111. 1 *Story's Eq. Ju.*, sec. 406, p. 394.) And, to establish fraud against him, as a subsequent purchaser, not only the mistake must be proved, but notice of such mistake and of the existence of the deed of trust. (*Curtis vs. Lunn*, 6 *Munf. R.* 44. 2 *Pow. on Mort.* 560 to 563. 1 *Story's Eq. Ju.*, sec. 404, 406. 2 *J. C. R.* 190.) The deed, unless duly acknowledged, or proved, and registered, is not constructive notice. *Shults' lessee vs. Moore*, 1 *McLean R.* 527. 3 *Yerg. R.* 84. *Richards et al. vs. Randolph*, 5 *Mason C. C. R.* 115. 2 *Binn. Rep.* 44. 1 *Cond. R.* 478.

A fact essential to maintain a decree in favor of the plaintiff, must be alleged in the bill, or proof of such fact is inadmissible. 6 *Cond. R.* 240. *Booth vs. Booth*, 3 *Litt.* 67. 4 *Hayw. Rep.* 114. 6 *John. R.* 564.

E. H. ENGLISH, contra.

Mr. Chief Justice JOHNSON delivered the opinion of the Court.

The first error assigned relates to the sufficiency of the notice upon the defendants, Brodie, Ball and Reynolds. This assignment involves two distinct questions. The first respects the sufficiency of the order of publication itself; and the second, the proof going to show that it had been made in accordance with the statute.

The 13th and 16th sec. of ch. 28, *Dig.* provide that "If any complainant, or some person for him, shall file with his bill or petition an affidavit, that part, or all, of the defendants are non-residents of the State, the court, or clerk thereof in vacation, shall make an order, directed to the non-resident defendants, notifying them of the pendency of the suit: in which order and notice it shall not be necessary to state the substance of the bill or petition, but the names of the parties and the nature of the complaint shall be stated in general terms, which shall be sufficient; which notice shall require the non-resident defendants to appear on a day therein named, allowing sufficient time for publication, or the bill or petition will be taken as confessed": and that "Every order against non-

resident or absent defendants shall be published in some newspaper printed in this State for two weeks successively, the last insertion to be at least four weeks before the commencement of the term at which the defendants are required to appear." And the 1st sec. of ch. 8, further declares that "When any notice or advertisement shall be required by law, or the order of any court, to be published in any newspaper, the affidavit of the printer or publisher, with a copy of such advertisement annexed, stating the number of times and date of the papers in which the same was published, or the production of the papers containing such advertisement in accordance with the law or order of court, shall be evidence of the publication therein set forth." The statute, it is admitted, does not even require that the substance of the bill should be set out in the order of publication, but it does require expressly that the names of the parties and the nature of the complaint shall be stated in general terms.

The object of the bill, as set forth in the order in this case, was to correct a mistake in the deed of trust and also to appoint a new trustee. It will be perceived upon an inspection of the bill that the objects, stated in the order, formed but a small part of those contemplated by the bill. If the whole scope and purpose of the bill was to correct a mistake in the deed of trust, and to substitute a new trustee in the place of Ball, it would not follow by any means that the defendants would desire to make any resistance to it; but when it is made to appear that it also seeks to divest titles and to correct deeds, the case assumes a much graver aspect. If their rights were sought to be thus vitally affected, there can be no doubt but that they were entitled to be apprized of it, so that they could be prepared to make their defence, and if possible prevent so great a calamity. The object of the bill, as set forth in the order was well calculated to mislead and lull them into a false security, and consequently could not be sufficient to meet the requirements, and answer the end of the law.

The proof of the notice is equally unsatisfactory. It does not appear to have been made either by the printer or the publisher

of the paper; nor is it stated how many times it was published or what were the dates of the particular numbers of the paper which contained the order. These are requisites prescribed by the statute, and the court below had no authority to dispense with them.

The recital in the interlocutory decree, even upon the supposition that it was conclusive upon the non-resident defendants, shows in itself that the order had not been published in such a manner as to affect the parties therein named with constructive notice of the pendency of the bill. The recital is that it appeared to the court that the "order heretofore made in this case has been published for two weeks next before the commencement of this court." Such, however, is not the effect of recitals in a decree in chancery. The court of appeals of Kentucky, in the case of *Green's heirs vs. Breckenridge's heirs*, (4 Mon. Rep. 544,) held the following: "The recitals of the decree are relied upon as showing that the court below had the proper proof before them and acted right. This presumption is a general and necessary one. But a recital of facts in a decree in chancery, where the evidence thereof must be filed, and the evidence does not appear in the record, cannot be taken as true; and this holds with regard to the service of process in the case of decrees by default, as held by this court in the case of *Peers vs. Carter's heirs*, (4 Litt. Rep. 228)," and in discussing the same point further they said that "Now actual service here is not pretended, but the application is to amend and uphold and heal defects in a service, which, if perfect, could at best be constructive; and to conclude the rights of the appellants by force of law, while that law was not complied with. Such ex parte proceedings must be substantially complied with, and cannot be held to less strictness, before they can have any force. We perceive no sensible point at which we can stop, short of dispensing with publication altogether, if we once commence a dispensation, first with one, and then with another requisite of law; and the best rule is to require a compliance with every requisite or let all other acts and substitutes stand for nothing in a case where the rights of parties are liable

to be taken away without any actual notice of the proceeding. Such proceedings in the case of lands are, at best, of doubtful policy and may be attended with momentous consequences, and if carried too far by construction upon construction and one dispensation of law after another, might start constitutional scruples how far the Legislature could authorize any court to revoke a defendant's grant by ex parte proceedings, especially as it has been held, by high authority, that the Legislature cannot do so by direct legislation. We therefore cannot dispense with any requisite of the law in making publication; and until it is shown that all the requisites are complied with, we must treat this, as well as every other decree, as void and inoperative on the rights of the parties concerned." This authority is directly in point and conclusive of the whole question. The result therefore is that the non-resident defendants, Reynolds, Ball and Brodie, were under no legal liability to appear to the bill, and, consequently, any steps taken against them were unauthorized.

It is also contended that the decree is erroneous, so far as it concerns those defendants who were regularly served with process. Ledford and Barrington are the only defendants who seem to have been served with actual notice: the former of whom made default, but the latter appeared at the return term and filed his answer to the charges made against him. Ledford having been actually served with notice and having made default, there can be no doubt but that all the material allegations in the bill, so far as they point to him, stand confessed upon the record. The inquiry arising here, then, is as to what those allegations are.

It was held in the case of *White et al. vs. Lewis*, (2 Marshall, 124, 125,) that a decree upon an implied confession, must be taken strictly, that the facts, upon which the decree is based, should be distinctly alleged, and the decree should be confined to the facts so alleged. No intendment of a fact not within the allegations, can be made to support such a decree: that the legal presumption, drawn from the pro confesso state of a bill, must be confined to the distinct allegations therein, and that the

proofs, when any are thought necessary, must be made out conformably to the general rules of evidence.

The bill contains no distinct allegation charging Ledford with notice of the deed of trust, and without the existence of that fact it is utterly unjust and illegal that his rights should be affected by the decree. It is admitted that the bill recites the deed of trust, and states that it was with acknowledgment regularly recorded in the record of deeds in the proper county. This might all have taken place, and yet not until after the conveyance from Pulliam to Ledford. It does not therefore amount to an averment of notice even by implication. The bill is equally silent as to any specific charge of fraud against the defendant Ledford, nor is it pretended in the recitals in the decree that any fraud was found against him. The only charge made against him in the bill, is that he purchased of Pulliam, and then he is interrogated to say whether he was not then in the possession of the lot thus purchased. The recital in the interlocutory order is that it appeared that he had been regularly served with process, and upon this fact alone he was formally divested of his title by the final decree. It is clear, therefore, that the bill contained no such allegations as would authorize the decree rendered against him; if indeed it could be said to contain any equity whatever as against him.

Barrington, the other resident defendant, appeared and filed his answer, in which he admitted that he had purchased of Brodie as charged, but distinctly and positively denied any knowledge of the conveyance in trust to Ball. This answer must be taken as true unless overturned by the testimony on the other side. If it was intended to rely upon constructive notice the answer could have been overturned by direct proof of the acknowledgment and record of the deed of trust, anterior in point of time to his purchase; but if on the other hand, it was proposed to fix actual notice upon him, nothing less than two witnesses, or one witness and strong corroborating circumstances would have been sufficient. The record is wholly at fault in respect to both kinds of proof, and in the absence of the proof, the

presumption is that it was not adduced upon the hearing. The court of appeals of Kentucky in the case of *Hammon and wife vs. Pearl*, reported in 6 *Mon. p* 413, said, "The evidence to sustain a decree must appear: the appeal in equity cases is upon matters of fact, as well as matters of equity founded on the facts. In general parol proof is not admissible in our courts of equity, unless it be merely to prove an exhibit or such like. We must take such facts as true and those only which are sustained by the proofs and exhibits sent up on appeal." It is clear therefore that, in case the bill shall be considered as containing equity as against Barrington, the proof is totally wanting to authorize the decree that has been rendered against him. The bill contains no direct charge of notice either actual or constructive against Barrington. The allegation in respect to him is that Brodie conveyed certain lands to him and that he was then in possession of the same; and that, although he then claimed to have a good and *bona fide* title to said lands irrespective of said deed of trust, yet the complainant charged that his title was subject to that conveyed by the deed of trust. There is most unquestionably nothing in all this that can call into exercise the powers of the chancellor. Nothing short of fraud in Barrington, either in purchasing with actual notice of the deed of trust, or with constructive notice can so operate as to authorize the decree rendered against him. He is not charged with notice either actual or constructive; consequently the decree reciting that he had notice of the deed of trust is wholly inoperative as the bill had laid no foundation for the introduction of evidence tending to establish that fact. See *Baraque & Mason, use Woodruff, vs. Manuel* (2 *Eng.* 516,) and *Harding vs. Handy*, and *Handy vs. Harding*, (6 *Pet. Cond. Rep.* 240.) In the latter case it was laid down that, "If indeed it were true in fact, that the bill does not allege this incompetency so as to put it in issue, the objection would be conclusive; for it is well settled that the decree must conform to the allegations of the parties." The case of *Wilks and wife vs. Rogers et al.* (6 *J. R. p.* 564,) is to the same effect. It was there said by KENT, C. J., that, "The general rule is, that no interrogatories

can be put that do not arise from some fact charged in the issue: (*Gilbert's Forum Romanorum*, 218) and that, in *Irnham vs. Child*, (1 Bro. C. C. 94) Lord Thurlow would not listen to any evidence that went to prove a deed fraudulent, because there was no allegation of fraud in the bill. It is not a sufficient answer to the objection in this case, that it must be deemed to have been waived, because not raised upon the hearing. The counsel might well have presumed that the testimony which looked to that point, would not have been taken into consideration. True it is that the decree recites that Barrington had notice of the deed of trust, yet such recital is not conclusive upon him, since he was not charged with such knowledge by the bill. A party cannot make one case by his bill and establish another and distinct one by his proof. The *allegata* and *probata* must strictly correspond. This doctrine is borne out by all the authorities upon the subject.

It is also insisted that the bill is demurrable for want of equity so far as it relates to Ledford and Barrington, upon the ground that it fails to exhibit a copy of the acknowledgment and registration of the deed of trust. The bill avers that the deed with the acknowledgment thereof, was regularly recorded in the record of deeds in the county. The 48th *sec. of ch. 28* of the *Digest*, declares that "If either party shall rely on any record, deed or writing, the substance thereof shall be stated in his bill, answer or plea in the same manner as is required in pleading at law, and he shall file with his bill, answer or plea as exhibits an authenticated copy of such record and a true copy of such deed or writing and hold the original subject to the order of the court and inspection of other parties in term time, if within his power. The complainant in his bill has most unquestionably declared upon a record, and consequently he was bound by the statute cited to have filed an authenticated copy of the same with his bill, and more especially so in order to affect the rights of those who were entire strangers to the deed. Here is a variance between the allega-

tion and the proof which undoubtedly would have been fatal upon a demurrer.

It is likewise contended, by the counsel for the defence, that the bill is fatally and vitally defective for a failure to make Pulliam a party defendant. The charge is, that Reynolds sold to Brodie, that Brodie sold to Pulliam, and that Pulliam sold to Ledford. A court of equity aims to do complete justice by deciding upon and settling the rights of all who are interested, either legally or beneficially, in the subject matter in dispute: that a decree when made may be fully performed, further litigation prevented; and at the same time that no injustice be done by a partial view only of the real merits of the case. In the case of *Wood vs. Dummer*, (3 *Mason R.* 317,) the rule and the exceptions are summed up thus: "The general rule is that all parties materially interested, either as plaintiffs or defendants, are to be made parties. There are exceptions just as old and well founded as the rule itself. When the parties are beyond the jurisdiction, or are so numerous that it is impossible to join them all, a court of chancery will make such a decree as it can without them. Its object is to administer justice; and it will not suffer a rule founded on its own sense of propriety and convenience to become the instrument of a denial of justice to the parties before the court, who are entitled to relief." Lord ELDON, in the case of *Cockburn vs. Thompson*, (16 *Ves.* 329,) spoke to the same effect in regard to the general rule, and further remarked that "All these exceptions, however, are so qualified that it must be apparent to the court that, by waiting to join all persons interested, the delay and inconvenience would obstruct and probably defeat the purposes of justice; and by dispensing with them, their rights would not be prejudiced: for, otherwise, such is the solicitude with which the interests of absent persons, not made parties, are watched and protected in equity, the court would not make a decree." "It is often proper to make persons parties, and yet if they are not, the suit may proceed without being on that ground defective, but it is indispensably necessary that all persons who have a clear right to disengage the property

from all incumbrances, in order to make their own claims beneficial or available, should be joined; for, unless all the mortgagers, or their representatives are made parties, a complete decree, embracing the whole subject matter and declaring the rights of all who are interested in the estate, could not be made: and if the want of proper and necessary parties is apparent on the face of the bill, the defect may be taken advantage of on demurrer. If the defect is vital to the character of the bill or to the relief asked, the objection may be insisted upon at the hearing; and if the court proceed to make a decree, it may be reversed for error on that account. (See *Porter et al. vs. Clements*, 3 A. R. 382, and the cases there cited.) In *Curtis vs. Turner, ex. of Jones*, (6 Mun. R. 44,) the court said: "The court (not deciding whether the appellant, at the time he purchased the land in controversy, had such notice of the equity now set up against it as would have postponed him had he been the first or original purchaser) is of opinion that he is protected in his said purchase, if those from whom he claims had no such notice. While a derivative purchaser with notice is protected by the want of notice in him from whom he claims, it is important to ascertain the ground on which the original purchaser is himself postponed in equity. That ground is that the taking the legal estate after notice of a prior purchase or equity, makes the party a *mala fide* purchaser and amounts to a fraud. In order to fix this fraud, however, the proof of notice must be clear. If it be merely doubtful, a presumption of fraud will not be made." The principle to be extracted from this decision is that, although it should be clearly proven that a derivative purchaser had a knowledge of the prior equity, yet he could not be affected in his rights, unless notice should also be brought home to him under whom he claimed. Let us apply this principle to the facts in this case, as disclosed upon the face of the bill, and then see how the parties would stand affected. It might be admitted, for the sake of argument, that Ledford did actually appear and file his answer, and that upon the trial it was fully and clearly proven that he had notice of the equity secured by the deed of trust. That fact,

clearly established, would not authorize the decree rendered against him unless it also appeared that Pulliam had notice also. Pulliam was not charged with notice, nor was he made a defendant. This decree presents the strange anomaly of a deed to a remote and derivative purchaser being canceled and set aside whilst that of the party under whom he claims is left untouched, and in full force and effect. It would be difficult to conceive of a case where the necessity of bringing in a party could be greater in order to afford him a protection in his rights. Under the decree rendered in this cause, Pulliam's vendee, and to whom he is liable in case of a failure of title, is absolutely divested of all right and title to the property concerned, and that too without the vendor ever having had any opportunity afforded him to show cause against it. Pulliam's rights cannot possibly be affected by such a decree, and, as a necessary consequence, the court below, without bringing him before it, could not proceed to make a decree. This is such a defect, therefore, as is vital to the character of the bill, and consequently could be taken advantage of upon the hearing, and, if remedied, it is good cause for a reversal of the decree.

From every view that we have been able to take of this case, we are clearly of opinion that the decree ought to be reversed and set aside. It is therefore ordered, adjudged and decreed that the decree herein rendered be, and the same is, hereby, for the errors aforesaid, reversed, annulled, and set aside; and it is further ordered that the cause be remanded to the circuit court of Washington county, with instructions to proceed herein according to law, and not inconsistent with this opinion, and to permit both parties to amend their pleadings, and procure testimony if they shall desire to do so.

Mr. Justice WALKER did not sit.