JORDAN AD. *vs.* BRUNOUGH.

In the final decretal order it appears that the case was heard and determined in the court below on bill and answer only, but the record shows that at the previous term, a replication was entered in short by consent of parties—HELD, that this court would supply the omission of the replication in the final decretal order by intendment, and not allow defendant the benefit of the rule that when a cause is heard on bill and answer without replication, the answer must be taken as true.

Where a bill is filed against two, and one answers denying the material allegations of the bill, a decree *pro confesso* against the other does not entitle the complainant to final decree against the party answering without proof of the allegations of the bill.

Bill to enjoin a judgment at law obtained on a note made to A. and assigned to B., on the grounds of payment to A. before judgment, and that he was the equitable owner of the note and judgment notwithstanding the assignment—HELD, that a decree *pro confesso* against A. on default, being an admission after the assignment, did not entitle complainant to a decree against B. who answered denying the allegations of the bill, but that complainant was bound to prove the allegations to entitle him to a decree against B.

Appeal from the Chancery Side of the Montgomery Circuit Court.

Bill by Henry Bronough against Fleming Jordan and Donaldson Walker. The bill alleged in substance, that in December, 1846, complainant executed his note to Walker for $700. That at the time the note was executed, it was agreed between complainant and Walker that complainant should pay the note by taking up sundry debts which Walker owed in the neighborhood, he being about to leave the State. That Walker, before leaving the State, endorsed the note in blank, and left it in the hands of defendant, Jordan, as an attorney, to settle with complainant. That complainant took up the debts of Walker as agreed, but that Jordan had refused to allow them in payment of the note, had filled up the blank endorsement on the note with an assignment to himself, sued complainant thereon, and obtained judgment. Prayer for injunction of the judgment.

Decree *pro-confesso* against Walker. Jordan answered and died. His administrator was made party, answered, and on the hearing a perpetual injunction of the judgment at law was decreed. The other material facts appear in the opinion of this court.

JORDON, for appellant. When a case is heard upon the bill and answer alone, the answer must be taken as true whether responsive to the bill or not. (*Lowry vs. Armstrong,* 2 *Stew. & Port.* 297. *Cheny vs. Belcher,* 5 *ib.* 134. *McGowen vs. Young,* 2 *ib.* 161. 2 *Cowen* 118. *Danl. Ch. Pr.* 984.) But in this case the answer was responsive to and a denial of all the material allegations in the bill, and the complainant was bound to make full proof. (*Pierson vs. Cutler,* 5 *Verm.* 272. *Dunham vs. Gates,* 1 *Hoff. Ch. Rep.* 181. 2 *Danl. Ch. Pr.* 983 *and note* 1.) And this, although the bill was taken *pro-confesso* against one of the defendants. *Cunningham vs. Steele,* 1 *Litt.* 58. *Timberlake vs. Cobbs,* 2 *J. J. Marsh.* 136. *Blight vs. Banks,* 6 *Mon.* 192. 2 *Danl. Ch. Pr.* 1210 *and note. Singleton vs. Gale,* 8 *Port.* 270. *Wilkins vs. Wilkins,* 8 *ib.* 245. 4 *Hen. & Munf.* 476.

Mr. Justice SCOTT delivered the opinion of the Court.

Although it appears by the final decretal order that this case was heard and determined in the court below on the bill and answer only, we do not think that the appellant is entitled to any benefit from the rule, that when a case is so heard the answer must be taken as true, whether responsive to the bill or not. Because, inasmuch as at the term next preceding that of the final hearing the record shows that a replication in short by consent was actually filed; and therefore we should supply its omission in the final decretal order by intendment.

All the material allegations of the bill were denied by the answer of Fleming Jordan filed in his lifetime, except that which sets up the equitable interest of Donaldson Walker in the judgment at law and to this a demurrer was interposed. After the death of Fleming Jordan his demurrer was overruled and the

answer of the appellant as his administrator was filed. This, although evasive and liable to exception, is nevertheless sufficient in connection with that of his intestate to put the appellee appropriate proof of this alleged equitable interest.

All the material allegations of the bill then were at issue, and it was consequently incumbent upon the complainant to sustain his case by proof to entitle him to any relief. He failed however to offer or produce any evidence whatsoever, resting his claim alone, as to evidence, upon the decree in his favor, *pro-confesso,* against Donaldson Walker, the non-resident defendant, taken upon proof of publication under our statute. The most that can be made of this decree *pro-confesso* is, that it is an admission by Walker that all the allegations, which compose the gravamen of the complainant's bill, are true. But this can avail nothing against the defendant Jordan, because his admission is not made before but after the assignment by Walker of the promissory note which is the foundation of the judgment at law. *State vs. Jennings, use of Bettison,* 5 *Eng. at p.* 447. *Turner ad. vs. Macksberry,* 3 *J. J. Marsh. at p.* 627. 3 *Randolph* 214. 3 *Munf.* 136, and the case of *Cunningham's heirs vs. Steele,* 1 *Litt. Rep. p.* 52, which latter is strongly in point.

Although such admissions might affect Walker as between him and complainant, they could not affect the interest of Jordan, who had so answered as to require proof as to the matters so admitted by Walker. Because it would be unjust that even the statements of a party (much less his silence when he had no actual notice of the proceedings against him) should be evidence against one who had had no opportunity for cross examination. (12 *Ves.* 355. 2 *Tuck. Lec.* 494.) For a like reason, if a bill be taken *pro-confesso* against a fraudulent grantor, yet no inference can be drawn (from that implied admission of the fraud) against the grantee. (2 *John. C. C. R.* 43.) In such cases the complainant may avail himself of the evidence of such defendants, to be taken by order of court on due notice and subject to all just exception, unless such defendants demur as to matters in

which they may be interested. *Ambler* 583. *Gilmer Rep.* 149. 2 *Atk.* 228. 3 *Atk.* 401. 2 *Mad.* 316.

The final decree then in this case rests upon no foundation at all and must be reversed. And as the complainant seeks no relief against Donaldson Walker, otherwise than through his alleged superior equity to that of the defendant Jordan, and having wholly failed to show such, his bill of complaint must be dismissed with costs (without prejudice however as to his alleged demands against the defendant Walker) that the defendant Jordan may have the benefit of his judgment at law.