JOHNSTON & JOHNSTON *vs.* ALEXANDER, SURVIVOR OF MORSE.

Where complainants have taken the necessary steps to expedite their cause, and procure the answers of all the defendants, an injunction will not be dissolved until the defendant, upon whom the *gravamen* of the charge is made, has answered, and if all the defendants are implicated in the charge, not until all have answered.

It is erroneous to dismiss the bill upon dissolving the injunction: the complainants have a right to proceed to a final hearing of the cause, as if no injunction had been prayed or granted.

Appeal from the chancery side of the circuit court of Yell county.

BILL in chancery, to enjoin a judgment at law, by John B. Johnston and Thomas Johnston against John J. Morse and Isaac Alex-

ander, determined in the circuit court of Yell county, chancery side, at the August term, 1844, before the HON. R. C. S. BROWN, judge.

The bill was filed at the August term, 1843, and alleged, that, on the 4th of February, 1841, complainants purchased of Morse three tracts of land, lying in Yell county, amounting to 360 acres and 45-100 of an acre, for which they agreed to give him $2,700. That in pursuance of the agreement, they paid him in cash $1,500, paid to his creditors $600, and executed to him their bond for the remaining $600. That they received from Morse, at the time of the purchase, a fee simple deed to the land, with covenants of warranty. That prior to their purchase, one tract of the above land, containing 120 acres and 45-100 of an acre, had been entered by Frederick Saugrain at the land office at Fayetteville, Arkansas; that it was more valuable than the other tracts, had improvements on it, fronted upon the Arkansas river, and was worth $2,000. That before they purchased the lands of Morse, he fraudulently represented to them that he had a good title, and right to convey the whole, but for which they would not have executed their bond to him, &c. —and they believed at the time, they were purchasing a valid title.

Complainants further alleged that after their purchase of Morse, Saugrain obtained a patent from the United States, to the tract above mentioned, and had ousted them by action of ejectment: that Morse had become wholly and hopelessly insolvent, and left them without remedy upon the covenants of his deed to them.

That after the execution of the bond by complainants to Morse, for the balance of the purchase money, as above stated, he, combining with Isaac Alexander to cheat and defraud complainants in the premises, fraudulently assigned the bond to Alexander without consideration. That he had sued, and recovered judgment against them on the bond in the Yell circuit court, at the October term, 1842, for $600 debt, $26 damages, and costs. That at the time Alexander obtained judgment against them, they thought their title to the tract of land, last mentioned, good and valid—they had not understood that Saugrain had obtained a patent for it, but were informed that the Commissioner of the General Land Office had re-

ported favorably to his claim, and that he had a petition before Congress for relief.

The bill further alleged that Alexander was threatening to sue out an alias execution, (one having been returned not satisfied) and to subject the property of complainants to its satisfaction. That they had been, and would be compelled to expend much money in defending their title to said land, so purchased by them, and they believed a perpetual injunction of the "sum of money specified in said bond, according to its tenor and effect, would not more than indemnify them for money so expended by them, and to be expended."

Complainants further alleged that they were without remedy at law—prayed that Morse and Alexander might be made parties to the bill, &c.—for a writ injoining and restraining the collection of the judgment at law, on the bond, and for general relief, &c.

The bill was sworn to by one of the complainants in open court, and an order was made granting a writ of injunction, &c.

Subpœnas were issued against the defendants, returnable to the second Monday of February, 1844,—was executed upon Morse 16th Jan. 1844, and upon Alexander, on the 2d day of the same month.

At the August term, 1844, Alexander filed his answer. He admitted the purchase of the lands by complainants from Morse, the price, payments, execution of the bond for the balance, and deed to them by Morse, as stated in the bill. Admitted that prior to the purchase, Saugrain had entered one of the tracts, that it was situated, contained the number of acres, improved, and of greater value than either of the other tracts, as charged by complainants, but denied its value to be more than $800, and positively averred that it was not worth $2000, as stated in the bill.

Respondent further answered that he did not believe it to be true, as alleged by complainants, that Morse, before the purchase of the lands of him by them, fraudulently represented to them that he had a good and valid title thereto, and right to convey—averred that he was informed and believed that it was not true that complainants were induced to execute the bond, in question, by the false

representations of Morse in regard to his title, and that he was informed and believed that it was false that complainants believed at the time they executed the bond to Morse, and took deed from him, that they were obtaining a valid title. He admitted that subsequent to complainants purchase, Saugrain had obtained a patent, and ousted them, by ejectment, from the tract previously entered by him, as charged in the bill, but denied the insolvency of Morse as alleged, or that, by reason of his supposed insolvency, complainants were without remedy upon the covenants of his deed.

Respondent further denied that the bond was fraudulently assigned to him, by Morse, without consideration, but averred that he received it from him in payment of $600, which he had previously obtained of respondent. He admitted that he had recovered judgment against complainants on the bond, as alleged in the bill, but that he believed it to be false that at the time he obtained the judgment against them, they supposed they had a good and valid title to the land as charged by them.—Admitted that one execution had been issued on the judgment.

Respondent averred that at the time complainants purchased of Morse, and executed the bond, they were apprized that they had no title to the land entered by Saugrain, and that they were cognizant of the fact of Saugrain's entry—that the bond was assigned to him by Morse for a valuable consideration—and denied combination, confederacy, &c. The answer was verified by affidavit.

After filing his response, Alexander moved the court to dissolve the injunction, on the grounds "that the bill was not verified by affidavit of complainants, and that it showed no cause of injunction, or relief as to him." The court accordingly dissolved the injunction, dismissed the bill, and gave judgment for damages and costs in favor of Alexander against complainants.

Morse had failed to answer.

The complainants appealed: after which, Morse departed this life, and his death was suggested upon the record of this court.

TRAPNALL & COCKE, for appellants. A motion to dissolve will not be entertained when there are several defendants, and some

have not answered. *Jones vs. Magil,* 1 *Bland* 190. *Stewart vs. Barry, id.* 192, 194, 197, 199. *Noble vs. Wilson,* 1 *Paige,* 164— The rule, however, is subject to this exception, that if the defendants, who have not answered, are formal parties and not implicated in the same charge, the injunction may be dissolved. *Depeyster vs. Graves,* 2 *John. Ch. Rep.* 148. *Higgins vs. Woodward, Hopkins* 342. Morse was the important party in the case: his answer would conclude Alexander, who had his interest through him. *Ward vs. Davidson,* 2 *J. J. Marsh.* 445. The complainant was entitled to a decree *pro confesso* against him, which would admit the equity in the bill.

On the dissolution of the injunction the complainant has a right to continue his cause as an original suit; and if the chancellor, without his consent, dismiss the bill at the same time that he dissolves the injunction, it is error. *Radford's Ex'rs vs. Jones' Ex'rs,* 1 *Hen. & Munf.* 8

No motion is necessary to retain a bill after an injunction is dissolved. *Cole vs. Sands,* 1 *Tenne. Rep.* 196.

PIKE & BALDWIN, contra. It seems to us that the court properly dissolved the injunction. The granting and continuing injunctions lies in the sound discretion of the court. *Roberts vs. Anderson,* 2 *J. C. R.* 202.

It is not an universal rule that an injunction will not be dissolved until all the defendants have answered. If the defendant, on whom the *gravamen* of the charge rests, has answered, that may be sufficient. *Depeyster vs. Graves,* 2 *J. C. R.* 148. So, where those who have not answered, are mere formal parties. *Higgins vs. Woodward, Hopk.* 342. See *Goodwin vs. The State Bank,* 4 *Desaus.* 389.

And under our practice it is impossible that such a rule could exist. If a defendant does not answer within the time fixed by the rules, the bill may be taken *pro confesso.* When that is done, can it prevent a motion to dissolve by another defendant, the judgment creditor? If so, no motion to dissolve could be made: and the injunction must wait the hearing. And if the plaintiff does not choose to take the bill as confessed, can he, by thus omitting to pursue his

own right, interfere with the rights of the defendant, who is not in default.

No doubt, the bill should have been dismissed: but we submit that in reversing the decree, the injunction ought by no means to be reinstated .

OLDHAM, J., delivered the opinion of the court.

It is a settled rule that if all the defendants are implicated in the same charge, the answer of all will in general be required before the injunction will be dissolved, but if the defendant, on whom the *gravamen* of the charge is made, has fully answered, that may be sufficient. *Depeyster vs. Graves,* 2 *J. C. R.* 148. *Jones vs. Megee,* 1 *Bland* 190. *Stewart vs. Barry, id.* 192. *Noble vs. Wilson,* 1 *Paige* 164. *Eden on Injunction,* 117. This rule, it was said in the case *Depeyster vs. Graves,* is subject to the exception, that, the answer of formal parties will not be required, and also, when the plaintiff has not taken the necessary steps to expedite his cause, and to procure the answer of the other defendants, a motion to dissolve will be entertained. From the authorities the rule may be thus declared, that where the plaintiff has taken the necessary steps to expedite his cause, and to procure the answers of all the defendants, an injunction will not be dissolved until the defendant, upon whom the *gravamen* of the charge is made, has answered, and if all the defendants are implicated in the charge, not until all have answered.

All the charges of fraud, contained in the bill, and set up as a defence against the collection of the judgment at law, recovered by Alexander as assignee of Morse, are made against Morse. From the very circumstance of the case, Alexander could not know whether the charges were true or not, and it was error to dissolve the injunction until the coming in of Morse's answer. The complainants have taken the necessary steps to obtain his answer, by causing a subpœna to be issued and served upon him, and having failed to answer, they were entitled to have their bill taken as confessed against him. The defendant, then, upon whom the charges are made by the bill, so far from denying by his answer, verified by affidavit, the charges thus made against him, by failing to answer,

according to the rules and practice in chancery, admitted them to be true.

By the assignment of the note by Morse to Alexander, the rights and liabilities of the makers were not changed. They were not deprived of any defence against the note either in law or equity, which they possessed against the assignor before the assignment. *Rev. Stat., ch.* 11, *sec.* 3. By the assignment, Alexander acquires all the rights and interest of Morse, created by the note, and became subject to the same defences as his assignor. Under such circumstances it was irregular and erroneous to dissolve the injunction before the coming in of Morse's answer.

The circuit court also erred in dismissing the bill upon dissolving the injunction. The complainants had a right to proceed to a final hearing of the cause, as if no injunction had ever been prayed or granted. For these errors, the judgment and decree of the circuit court must be reversed, and this cause remanded to the circuit court of Yell county, with instructions that the injunction be reinstated, and that the court proceed to a final hearing and decree herein according to the rules and practice in chancery, and not inconsistent with this opinion.