CUMMINS' ADM'R *vs.* HARRELL & SCOTT.

Where complainant seeks to enjoin a judgment upon his bond, under a general allegation that it was obtained from him by fraud, and does not call upon defendant to answer in what manner he obtained the bond from him, or what consideration he gave for it, he is not bound to answer further than simply to admit, or deny, that he obtained the bond as charged in the bill.

If, in such case, the defendant, denying the fraud alleged in the bill, state the circumstances under which he obtained the bond, and the consideration which he gave for it, he is not bound to prove them, until the charges in the bill are sufficiently established to authorize a decree for complainant, in the absence of testimony on the part of defendant.

Where complainant seeks to avoid his bond upon the grounds of fraud, and defendant positively denies the allegation of fraud, his answer is conclusive evidence, if uncontradicted by any witness in the case.

And it is a general rule that the answer of a defendant, under oath, must be taken as true, unless contradicted by two witnesses, or one witness with probable circumstances.

It is a well established rule, that he who seeks to avoid his bond on the grounds of fraud, must establish the fraud, by testimony, upon the final hearing, unless it is admitted by defendant's answer, to entitle him to relief.

The execution of the bond by complainant, and its possession by defendant, is *prima facie* evidence that it was obtained in good faith for a valuable and adequate consideration,, and the *onus probandi* is upon complainant to show that it was obtained fraudulently and without consideration.

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

THIS was a bill in chancery, to injoin a judgment at law, filed by William Cummins against Harrell and Scott, determined in the Pulaski circuit court, at the November term, 1843, before the Hon. J. J. CLENDENIN, judge.

The bill was filed in August, 1839, after which Cummins departed this life, and the cause progressed in the name of his administrator, E. Cummins, to final decree.

The judgment sought to be injoined, was obtained against Wm. Cummins by Harrell, for the use of Scott, in the Pulaski circuit court, at the November term, 1838. On the filing of the bill, an injunction was granted, and, on the final hearing, the court dissolved it, and decreed against complainant. He excepted, took a bill of exceptions, setting out the evidence, and appealed. The substance of the allegations, in the bill, answers, and of the testimony, sufficiently appears in the opinion of this court.

E. CUMMINS, *pro se,* as adm'r. Harrell, having admitted in his answer the execution of the deed, which contained an express statement of the price agreed to be given for the donation claim, was estopped from denying that to be the true consideration, or setting up a different one; unless upon an allegation of *fraud, ac-*

cident, or *mistake. Stevens vs. Cooper,* 1 *J. R.* 425. *Botsford vs. Burr,* 2 *J. Ch. R.* 405.

In no instance can a written instrument be contradicted or varied by parol, unless there be fraud or mistake. 5 *Mod.* 59. *Exp. Glendining, Burk,* 517. *Clowes vs. Higginson,* 1 *V. & B.* 524. *Blake vs. Murrell,* 2 *Ball. & B.* 35. (4 *Dow P. R.* 248.) 2 *Ball & B.* 47. *Cambridge vs. Row* 8 *Ves.* 22. *Hare vs. Shearwood* 1 *Ves. jr.* 241. *S. C.* 3 *Bro. C. C.* 168. *Reeves vs. Newenhorn,* 2 *Ridg. P. C.* 11. *Portmore vs. Manis,* 2 *Bro. C. C.* 219. *Townsend vs. Stangroom,* 6 *Ves.* 332-3. *Baugh vs. Ramsy,* 4 *Monroe* 158. *Fitzpatrick et al vs. Smith,* 1 *Dessau.* 340. *Dupee vs. McDonald,* 4 *Dessau.* 209. *Leinster vs. Benkhart,* 2 *Bibb* 28. *Elden vs. Elder,* 1 *Fairfield's R.* 80. *Parker vs. Vick,* 2 *Dev. & Batt.* 195. *Mead vs. Lansingh,* 1 *Hopkins* 124.

A deed is conclusive between the parties as to facts recited in it. *Mitchell vs. Munphin,* 3 *Monroe* 187. *King vs. Baldwin,* 2 *J. Ch. R.* 557. 1 *J. Ch. R.* 429.

Where a party, in his answer, admits facts imposing an obligation upon him, and attempts in the same answer to relieve himself by setting up new matter in avoidance, he is bound to prove such new matters, and the answer itself is no evidence of the facts *Hart vs. Ten Eych,* 2 *J. Ch. R.* 62. *Green vs. Hart,* 1 *John Rep.* 580. *Thompson vs. Lambe,* 7 *Ves.* 587. *Boardman vs. Jackson,* 2 *Ball & Beatty* 382. *Beckworth vs. Butler,* 1 *Wash. R.* 224. *Paynes vs. Coles,* 1 *Munf. R.* 373. *Bush vs. Livingston & Townsend,* 2 *Caines' Cas. in Eq.* 66. *McDaniels vs. Barnum,* 5 *Vermont Rep.* 279. *New England Bank vs. Lewis,* 8 *Pick.* 113. *Gordon vs. Sims,* 2 *McCord's R.* 156. *Purcell vs. Purcell,* 4 *Hen. & Munf.* 511. *Chenoworth's heirs vs. Williamson,* 2 *Bibb* 38. *Paynes vs. Coles et al.* 1 *Munf.* 373. *Boone vs. Ex'rs of Durand,* 1 *Dessau.* 588. *Haythorp vs. Hook's adm'r,* 1 *Gill & John.* 272. *Cocke vs. Trotter,* 10 *Yerg.* 213. *O'Brien vs. Elliott,* 15 *Maine R.* 125.

In the case of *Hart vs. Ten Eych,* above cited, which was a bill against an administrator for account of assets of the deceased in his hands, the answer admitted the receipt of money and property, and, by way of avoidance, set up the payment of sundry claims

against the deceased. The court held the answer to be *no avoidance of those payments.*

In the case of *Green vs. Hart,* referred to above, Hart charged in his bill that he had paid a full and valuable consideration for the note endorsed to him by Green. Green answered that part of the consideration was usurious. The court, upon this, remark, "I view the appellant's answer charging usury as insisting on a distinct fact by way of avoidance. The respondents having replied and given him an opportunity to prove the fact, and he having failed to so, his answer is no evidence of the fact."

It is manifest that the attempt of the party to avoid the effect of his deed by alleging fraud or an agreement to insert less than the real consideration, falls within the above rule, and the facts alleged should have been proven; which is not done or attempted.

But even supposing the party could have avoided the operation of his deed in his answer. the inferior court erred. In that case the court would have been bound to consider the answer as true, unless disproved by two witnesses, or one witness and strong corroborating circumstances. *Roman Watson et al vs. Allen, Arks. Rep. Sturtevant vs. Waterberry,* 1 *Edwards* 442. *East Ind. Co. vs. Donald,* 9 *Ves.* 275. *Hart vs. Ten Eych,* 2 *J. Ch. R.* 91, 2, 3. *Norwood vs. Norwood,* 2 *Har. & John.* 328. *Hopkins vs. Stump, id.* 304. *Smith vs. Brush,* 1 *J. Ch. R.* 461. *Walton vs. Hobbs,* 2 *Atk.* 19. *Bember vs. Mathers,* 1 *Bro.* 52.

Where there is the testimony of but one witness against an answer, in weighing circumstances, equal credit is to be given to each; but it is not to be forgotten that one is a disinterested witness." *Sturtevant vs. Waterberry, above.*

In this case five witnesses swear that the price specified in the deed was the ordinary price of such claims, and there was no conflicting testimony. This testimony, taken in connection with the staleness of the demand and the recitation in the deed, (The answer itself may afford the corroborating circumstances to sustain the witnesses: *East Ind. Co. vs. Donald,* 9 *Ves.* 275. *Hart vs. Ten Eych,* 2 *J. Ch. R.* 91, 2, 3,) was abundantly sufficient to overthrow the answer.

There is a privity of title and interest between Harrell and Scott, and they are both subject to the same equities in respect to the bond. The answer therefore of Harrell is binding upon Scott, and is good evidence for complainant against both defendants. *Osborn vs. The Bank of the United States,* 7 *Wheaton* 738.

But even if this were not so, the answers of defendants, stating a sale and transfer of the bond, are not responsive to the charges in the bill, and must have been proven *aliunde,* and this not having been done, Scott shows not even an equitable title to the bond.

If these facts have been proven, however. the maxim would have applied, "*in a equali jure, melior est conditio possidentis.*"

That Scott stands in the shoes of Harrell, and is subject to the same equities, see *Turton vs. Benson,* 1 *Pr. Wms.* 479 *S. C.* 2 *Vernon* 764. *Pre. ch.* 522 10 *Mod.* 455. 1 *Stra.* 240. More especially, if the bond was sold after it became due, *Young vs. Forgery,* 4 *Haywood,* 10.

We insist, moreover, that the decree for *payment of the judgment at law,* was erroneous: there being no prayer for such decree, and the party having complete remedy at law. *Johnson's Ex'r. vs. Clark,* 5 *Ark. Rep.*

The decree for costs against the administrator individually is erroneous, and directly in conflict with our statute.

WATKINS & CURRAN, contra.

Upon an allegation of fraud, so general as that contained in the bill, and without any other or further specification, whatever, chancery cannot decree for the complainant, and this defect is fatal in every stage of the cause. *Story's Equity Pleading* 24, 28, 206, 210, 211, *Rev. Stat. Ark Title 'Chancery,' sec.* 29.

If the bond sued on was obtained by fraud, and was wholly without consideration, Cummins had a good defence at law upon two distinct grounds, and was bound to have made it there, and failing to do so, he cannot have relief in equity: 1 *Story's Com. on Equity,* 194. *Rev. Stat. Ark. Title 'Practice at Law,' sec.* 74, 75. *Rev. St. Ark. Title 'Chancery,' sec.* 1 *Smith vs. McIver,* 1 *Wheaton* 532. *Cunningham vs. Caldwell, Hardin's Rep.* 123. *Andrews vs. Fenter,*

1 *Ark. Rep.* 186. *Edwards vs. Hanley, Hardin's Rep.* 607. *Williamson vs. King,* 1 *McMullon* 41. *Green vs. Robinson,* 5 *Howard* 80. *Le Guer vs. Governour and Kemble,* 1 *John. Cases* 496. *Brown vs. Swan,* 10 *Peters* 505.

The answer of Harrell must stand as true unless positively disproved by two witnesses, or one and strong corroborating circumstances. There is not a particle of proof impeaching his answer and the circumstances proved by the complainant himself go far to sustain it.

The delay of the original complainant below to seek his remedy by injunction, for several years after suit brought and judgment obtained, and not until the last delay on forfeited delivery bond was about to expire would throw a shade over his right to relief in a court of equity, where laches and neglect are always discountenanced, supposing the bill in other respects showed a proper case for relief. *Smith vs. Clay, Bro. Ch. R.* 640. *Stackhouse vs. Barnston,* 10 *Ves.* 466, *Ex parte Devodney,* 15 *Ves.* 496. *Beckford vs. Wade,* 17 *Ves.* 96. *Kane vs. Bloodgood,* 17 *John. Ch. R.* 93. *Decouche vs. Savalier,* 3 *John. Ch. R.* 190. *Murray vs. Costar,* 20 *John. Ch. R.* 596. *Prescott vs. Gratz,* 6 *Wheat.* 481, *Hughes vs. Edwards,* 9 *Wheat,* 480. *Elmendorf vs. Taylor,* 10 *Wheat.* 168, *Williamson vs. Mathews,* 3 *Peters,* 44, *Miller vs. McIntire,* 6 *Peters* 61. *Sherwood vs. Sutton,* 5 *Mason's R.* 143: *but as against Scott,* the *bona fide* holder of the bond, in the usual course of trade, for a full and valuable consideration, without notice of any supposed fraud or want of consideration so that he could have recourse on Harrell, the *laches* of the complainant undoubtedly destroys his equity.

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

This was a bill, filed by William Cummins in his life time, praying to injoin a judgment recovered against him by Harrell, for the use of Scott. The bill alleges that the bond was fraudulently and surreptitiously obtained by Harrell, from the complainant and John Dillard as his security, but the manner and means by which it was obtained are not stated by the bill. It is also stated in the bill, that at the time that Harrell thus fraudulently and surreptitiously obtained

the bond upon which the judgment sought to be enjoined was recovered, Cummings purchased from him a Lovely donation claim for three hundred and twenty acres of land, for which he paid him one hundred dollars in cash, and gave his bond, with John Dillard as his security, for two hundred and fifty dollars, the balance of the purchase money of the donation claim, payable at a future day. A copy of the bond and also of Harrell's deed are exhibited by the bill. Scott, in his answer, denies all knowledge of the transaction between the original parties, and states that he came to the possession of the bond in the usual course of business and trade. Harrell, in his answer, positively denies the charge that the bond was fraudulently and surreptitiously obtained, and then alleges that it was received as a part of the consideration for the donation claim, which he had sold to Cummins, the price of which was five hundred and fifty dollars, that is, fifty dollars in cash, and the two bonds, spoken of in the bill, of two hundred and fifty dollars each; and not three hundred and fifty dollars as charged in the bill.

The only allegation contained in the bill, upon which relief is prayed, is that the bond was fraudulently and surreptitiously obtained: and all the facts stated concerning the purchase, and consideration of the donation claim are not charged, and seems to have no connection whatever with the bond in question, but are only related as circumstances which transpired at the time the bond was fraudulently and surreptitiously obtained, and can only be regarded as an attempted denial, by anticipation, of the matters which it was supposed might be set up as a defence, by Harrell in his answer.

The bill does not call upon Harrell to answer in what manner he obtained the bond from Cummins and Dillard, or what was the consideration he gave for it: and he was not bound to answer further than simply to admit or deny that the bond was obtained by him as charged in the bill.

We do not conceive it necessary to determine whether an allegation of fraud so general as that contained in the bill is sufficient; but will proceed to examine whether the allegation was sustained by testimony. The bill seeks to avoid the bond of Cummins, upon grounds of fraud, and Harrell having answered positively, denying

that allegation, his answer is conclusive evidence, if uncontradicted by any witness in the cause. His denial of the fact directly alleged by the bill is entitled to full credit until contradicted by legitimate proof. *Lenox vs. Prout,* 4 *Con. Rep. Sup. court, U. S.* 312. And it is a general rule that the answer of a defendant, under oath. must be taken as true, unless contradicted by two witnesses, or one witness with probable circumstances. The reason is, that the plaintiff, having called upon the defendant to answer the allegations of the bill, thereby admits it to be evidence. If it is testimony, it is equal to the testimony of any other witness, and the plaintiff, to prevail upon a balance of testimony in his favor, must have the testimony of two witnesses, or one witness with probable circumstances. *Clark's Ex'rs vs. Van Rumsdyk,* 3 *Con. Rep.* 319.

The evidence, in no particular tends to establish the allegation of fraud; no witness examined, knew anything of the execution of the bond except Edmondson, the subscribing witness, and his evidence tends to establish the truth of the answer rather than the bill. There is no circumstance whatever, established by the testimony, calculated to cast the slightest shade of suspicion upon the bond. The evidence taken in relation to the price for which donation claims were selling, does not prove that the bond was fraudulently and surrepititously obtained, but only tends to disprove by circumstances, the statements of Harrell's in answer relation to the price for which he sold the claim to Cummins: allegations he was not bound to have made. and, having made them, was not bound to prove them, until the charges in the bill were sufficiently established to authorize a decree for the plaintiff, in the absence of testimony on the part of the defendant.

It is true, as contended on the part of the plaintiff, that "no rule in proceedings in chancery is more firmly established or better sustained by reason and authority than the one which requires a party, who in answer admits facts which impose a duty or obligation upon him, in the same answer sets up new matter to relieve himself from such charge or obligation, to prove on the final hearing by testimony, the new facts alledged by way of avoidance;" and it is a rule equally well established and sustained by reason and authority, that he who seeks to avoid his bond upon the grounds of

fraud, must establish the fraud, by testimony, upon the final hearing, unless it is admitted by the defendant in his answer, to entitle him to relief.

Harrell's answer does not admit any charge or allegation whatever, contained in the bill, and seek to avoid it by new facts by way of discharge, but contains a positive denial of the facts contained in the bill and relied upon for relief. The issue is not whether the deed executed by Harrell to Cummins, for the donation claim was in consideration of three hundred and fifty, or five hundred and fifty dollars, but whether the bond executed by Cummins and Dillard was fraudulently and surreptitiously obtained by Harrell.

The case of *Green vs. Hart*, 1 *J. R.* 580, cited and relied upon by the plaintiff is strong authority against him. Hart filed his bill against Green and others, and unnecessarily stated that he paid a valuable consideration for the mortgage, and Johnson's note which Green had endorsed to him; Green sought to avoid his endorsement on the ground of usury. The court held "that the fact that Hart was in possession of the note as endorsee, and the fact of the absolute endorsement by Green, was *prima facie* evidence of a full and adequate consideration paid for the note. That Hart was under no necessity of inquiring into it, but that he did allege that the consideration was a full and valuable one. This, Green might have denied, and had it been incumbent on the plaintiff, he must have proven the allegation or failed in his suit, but that the burden of proving that the consideration was illegal or inadequate rested upon the opposite party."

Cummins in this case seeks to avoid his bond upon the ground of fraud. The execution of the bond by him, and its possession by Harrell, is *prima facie* evidence that it was obtained in good faith and for a valuable and adequate consideration. The burden rested upon Cummins to prove that it was obtained fraudulently and without consideration. Harrell was under no necessity to state the consideration of the bond, and having stated it, was under no obligation to prove it. The decree must be affirmed.