BYRD *vs.* SABIN AS ADM'R.

If a cause is set down for final hearing upon the bill, neither the answer nor testimony is properly before the court.

A cause cannot be set down for final hearing when leave is granted to the defendant to file his answer at the next term.

If the defendant file a cross bill alleging new matter, the complainant must answer the allegations and interrogatories therein, or his bill will be dismissed or the cross bill taken for true.

A cause cannot be set down for hearing on bill and cross bill.

Appeal from Pulaski Circuit Court, in Chancery.

This cause was determined at the April term, A. D. 1846, of the Pulaski Circuit Court, before the Hon. JOHN J. CLENDENIN, Judge, on a bill in Chancery, filed therein by Aaron N. Sabin, as adm'r. of Belding, v. Richard C. Byrd, and on cross bill filed by Byrd v. Sabin, as adm'r.

The Circuit Court rendered a decree in favor of Sabin, as administrator, from which Byrd appealed to this court. The decision of this court was not pronounced upon the merits of the controversy, but upon the irregularity of the proceedings below, which, it is conceived, sufficiently appear in the opinion of the court.

RINGO & TRAPNALL, for the appellant.

Three points are presented by the record, on which this case must turn: 1st. The case was set down for final hearing by consent of parties, upon the original and cross bill alone: 2d. No replication was filed to either answer: 3d. The answer to the cross bill never was filed.

The setting down a cause is the designation by the parties with the consent of the court, of that part of the proceedings on which the cause is to be tried. It is done sometimes by the complainant, and

at others by the defendant, and sometimes by both, as in this case. The effect is to exclude that part of the proceedings not embraced in the order setting down a cause. *Dale* v. *McEvers,* 2 *Cowen,* 118. *Scott* v. *Clackston,* 1 *Bibb* 277. *Jones* v. *Mason,* 5 *Rand.* 577. *Pane* v. *West's ex'r,* 1 *Peters C. C.* 351. *Kennedy* v. *Baylor,* 1 *Wash.* 132.

If this rule should be adopted, a decree should have been rendered on the bills as confessed, and in favor of Byrd, for the difference between the amount claimed by him and the one set forth in the original bill. But it may be doubted whether this rule would operate to the exclusion of answers already on file, and the more reasonable course would be to conclude that it was not intended to deprive either party of the benefit of his answer, and was a clerical mistake in setting down the order of the court.

The original case then stood on the bill and answer, denying the whole claim: in such a case the answer is to be taken as true, and no evidence can be admitted in opposition to it. *Rev. St.* 164, *sec.* 48. *Dale* v. *McEvers,* 2 *Cow.* 118. And no decree could be rendered in favor of the complainant against the answer.

The answer to the cross bill never was filed, and ought not to have been noticed, 2 *Marsh.* 124. *Baldwin* v. *Love,* 2 *J. J. Marsh.* 493; and the setting down the cause by consent of parties on the cross bill, shows that it was not to be considered on the trial.

Without replication to the answer on the cross bill, should it be considered as filed, the defendant was not entitled to a decree.

FOWLER, contra. On the part of Sabin, adm'r, it is insisted that the depositions cannot be considered in the cause at all (and the court below did not consider them in it,) and that the decree must stand or fall by the bills and answers alone.

Because, 1st. No replications having been filed, the answers, so far as they are responsive to the allegations of the bills, must be taken as true, and cannot be contradicted by evidence. *Rev. Stat. p.* 164, *sec.* 47, 48, 49. *Payne et al.* v. *Frazier et al.,* 4 *Scammon's Rep.* 56.

2. "When a replication is filed, the cause shall be at issue and

stand for trial at the next term of the court, &c.," *Rev. Stat. p.* 164, *sec.* 47.

3d. If the replication be not filed within three days after the filing of an answer, the cause shall be set for trial on bill and answer, in which case the answer shall be taken as true, and no evidence shall be received unless it be matter of record referred to in an answer. *Rev. Stat. p.* 164, *sec.* 48. 4 *Scammon's Rep.* 56.

4th. The answer shall not be conclusive, but if replication be filed, may be contradicted. 4 *ib. sec.* 49.

5th. When a cause is set down for hearing upon bill and answer, no evidence can be gone into. *DeI'eyster* v. *Calden et al.*, 1 *Edwards, Ch. Rep.* 63.

6th. The cause being set down for hearing on bill and cross bill, the meaning of that order of course comprehended the answers, as they were on file legitimately in the cause; but it could mean or comprehend nothing more, as no replications were filed.

7th. The depositions copied into the transcript form no part of the record, as there is no showing that they were read in evidence; they were not incorporated by bill of exceptions; and Byrd's depositions do not even appear to have been filed in the cause. And even if filed, there is nothing for them to stand upon, as no replications were in.

Again. The matter set up in avoidance by Byrd, in his answer to the original bill, not responsive to the allegations of the bill, could avail him nothing, as he was bound to prove them, and did not. *Atwater* v. *Fowler*, 1 *Edward's Ch. Rep.* 418. *Flagg* v. *Mann et al.*, 2 *Sumner's C. C. Rep.* 507. *Wilson* v. *Carver et al.*, 4 *Hayw. Rep.* 92. *U. S. Bank* v. *Beverly et al.*, 1 *Howard's Rep.* (*U. S.*) 151.

Tested by these rules of law and equity, the decree must stand (as it is for less than Sabin claimed and proved by his exhibits and Byrd's admissions.)

As Sabin's answer denies the material allegations of the cross bill, Byrd can take nothing by that proceeding; and as he failed to prove the matter set up by his answer in avoidance of the original bill, he must fail there also.

JOHNSON, C. J. This whole proceeding is marked by an extraordinary degree of irregularity and error. The cause was set for final hearing the first time, before the coming in of the answer to the original bill, and it was also set down a second time upon the original and cross bills, and that without any mention whatever of either answer, and also without a replication having been filed to either. If it was intended to set down the two causes upon the bills alone, and without any reference to the answers, the course adopted was most clearly erroneous, as they both stood confessed and should have been treated accordingly; but if, on the other hand, it was designed to include the answer or either of them, in the hearing, it should have been expressly stated upon the record, and in the absence of such statement, the legal intendment is, that they were wholly disregarded, and that the record means precisely what it says, and that both causes were actually set down for final hearing upon the bills alone. The *Revised Code, sec.* 47, *of chap.* 23, expressly declares that, "When a replication is filed the cause shall be at issue, and stand for trial at the next term of the court, after replication filed," and that "if the replication be not filed within three days after the filing of an answer, the cause shall be set for trial on bill and answer, in which case the answer shall be taken as true, and no evidence shall be received unless it be matter of record, referred to in the answer." It is contended that the court below was not at liberty to hear the evidence, as no replication was filed to either answer, and several authorities are cited to that point. It is unnecessary here to decide that question, as, from the state of the pleadings and the order of the court, setting down the causes for final hearing, even the answers themselves were not legitimately before the court or entitled to any consideration whatever. It appears that the defendant to the original bill had interposed an answer, which, by some means, was lost, and the court upon his application extended the time to the next succeeding term, for him to file a new one, and at the same time and by the same identical order, set down the cause for final hearing. It was a palpable error, after giving the defendant in the original suit until the succeeding term of the court to file his answer, at the same time to set the cause down for final hearing. It was utterly imprac-

ticable to foresee whether there would be any thing to try or not, before the answer was filed. It was equally erroneous to set down both causes for final hearing upon the bills alone. The 34th and 35th sections of the chapter already referred to, are plain and explicit as to the course which should have been pursued, in case the complainant in the original bill did not see proper to insist upon his answer to the cross bill. They provide that "Any defendant may in his answer introduce any new matter which he may deem material for his defence, and may exhibit interrogatories and call on the complainant to answer the same on oath, and the complainant shall file his answer in such time as may be prescribed by the rules of the court," and that "if the complainant shall fail to answer such interrogatories, his bill or petition shall be dismissed with costs, or the new matter set out in the defendant's answer shall be taken as confessed, and a decree entered accordingly." All these provisions seem to have been overlooked or wholly disregarded in the present case. We are clear, therefore, that there is error in the decree of the Circuit Court, for which it ought to be reversed. It is, therefore, ordered, adjudged, and decreed, that the decree of the Circuit Court, herein rendered, be, and the same is hereby, reversed, annulled, and set aside, and it is further ordered, that the cause be remanded to said Circuit Court, with instructions to permit both parties to amend their pleadings, if they desire to do so, and further to proceed in the same according to law, and not inconsistent with this opinion.