

949

STATE OF ALABAMA

BALDWIN COUNTY

TO ANY SHERIFF OF THE STATE OF ALABAMA:

You are hereby commanded to summon Francis E. Harrell to appear within thirty days from the service of this writ in the Circuit Court, Equity Side, to be held for said county at the place of holding same, and then and there demur, plead to or answer the Bill of Complaint of Douglas E. Vieg, John C. Vieg, Victor G. Vieg, Charlotte Blair and Eva Fox.

Witness my hand this 28th day of May, 1943.



Register of the Circuit Court of
Baldwin County, Alabama, in Equity.

TO THE HONORABLE F. W. HARE, JUDGE OF THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA, SITTING IN EQUITY:

Your Orators, Douglas E. Vieg, John C. Vieg, Victor G. Vieg, Charlotte Blair and Eva Fox, present this Bill of Complaint against Francis E. Harrell, and thereupon your Orators complain and show unto the Court and your Honor as follows:

1. Your Orators are each over twenty-one years of age and are all non-residents of the State of Alabama. The Respondent, Francis E. Harrell is over twenty-one years of age and a resident of the State of Alabama, residing in Jefferson or Shelby County.

2. Your Orators jointly own as tenants in common the Southwest Quarter of the Southwest Quarter of Section Thirty-six (36), Township Six (6) South Range Four (4) East, in Baldwin County, Alabama, and were in the peaceable possession of said property until on or about the 1st day of November, 1941, when the Defendant went on the said property, took possession thereof and cut and removed valuable pine timber growing thereon after having been warned by the agent, servant or employee of your Orators not to trespass on the said property.

3. Your Orators further allege that the said Respondent claims title to the said property by virtue of a tax sale on May 26, 1930 for delinquent 1929 taxes assessed to Eva Fox, Administratrix and a tax deed from the State Land Commissioner to the Respondent dated September 10, 1941 and recorded in Deed Book 76 N. S. at pages 45-6, a copy of which is hereto attached, marked Exhibit "A" and by reference made a part hereof as though fully incorporated herein. The said tax sale under which the respondent claims title is void in that the Court ordering the sale of the said lands had no jurisdiction of the said cause because service had not been perfected in the manner prescribed by law in that the attempted service by publication was not completed more than ten days prior to the commencement of the term of the Probate Court of Baldwin

County, Alabama, in which the delinquent decree against the said taxpayer was rendered and further that notice of the alleged tax sale at which the said property was sold was not advertised for thirty days after the expiration of the term of the Probate Court of Baldwin County, Alabama, in which the alleged delinquent decree was rendered. Your Orators further allege that the said tax sale if valid did not convey the interest or interests of any reversioner or remainderman or any of the joint owners thereof other than Eva Fox, Administratrix and that the said tax deed which is recorded in Deed Book 76 N. S. at pages 45-6, Baldwin County Records, constitutes a cloud on your Orators' title to the said property, which cloud cannot be removed except by a proper decree of this Court as the Respondent has refused to negotiate with your Orators about the matter in any way. Your Orators further allege that they have been greatly damaged by the said Respondent, who entered upon the said lands without authority after having been warned not to do so by your Orators' agent and who cut and removed valuable pine timber growing on the said property.

4. Your Orators offer to do equity and pay all taxes, fees and costs necessary to redeem the said property from the said tax sale.

PRAYER FOR PROCESS


Your Orators respectfully pray for the following separate and several relief:

1. That this cause be referred to the Register of this Court with instructions to ascertain, determine and fix the amount of timber cut and removed from the above described property by the Respondent, the value thereof and the amount of damage done to your Orators thereby.

2. That the alleged tax sale under which the Respondent

claims title be decreed to be void and the tax deed conveying the property to the said Respondent be cancelled as a cloud on your Orators' title to the said property.

3. Your Orators further pray for such other, further and general relief as they may be equitably entitled to the premises considered.


Solicitor for Complainants.

THE STATE OF ALABAMA,)
 :
MONTGOMERY, ALABAMA.)

Mrs. Clay Willingham, a Notary Public in and for said County, in said State, hereby certify that John C. Curry, whose name is assigned to the foregoing conveyance as State Land Commissioner, and who is known to me, acknowledged before me on this day that, being informed of the contents of this conveyance, he, in his capacity as such State Land Commissioner, executed the same voluntarily on the day the same bears date.

Given under my hand this the 10th day of September, 1941.

Mrs. Clay Willingham, Notary Public.

STATE OF ALABAMA,)
 :
BALDWIN COUNTY.)

Filed in office this 22nd day of September, 1941 at 2:30 P. M., and duly recorded in Deed Book 76 at page 45-6, and I certify that 50¢ Deed Tax has been paid, as required by law.

G. W. Robertson,
Judge of Probate.

DOUGLAS E. VIEG ET ALS,
Complainants,
VS.
FRANCIS E. HARRELL,
Respondent.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA.
IN EQUITY. NO. 949.

DECREE

This cause coming on to be heard on this date, being the date heretofore set by the former orders of this Court for calling of the Equity Docket, is submitted on Complainants' motion to substitute a copy of the Amended Bill of Complaint originally filed in this cause, which has been lost or misplaced, from which motion it appears that the Amended Bill of Complaint, a copy of which is attached to and made a part of the motion filed in this cause by the Complainants on September 6, 1949, was filed on the 7th day of September, 1944; that it has been lost or misplaced and that a copy should be substituted therefor, WHEREUPON, it is, therefore, Ordered, Adjudged and Decreed by the Court as follows:

1. A copy of the Amended Bill of Complaint, filed by the Complainants in this cause on the 7th day of September, 1944, which reads as follows, to-wit:

"DOUGLAS E. VIEG, et als,
Complainants,
VS.
FRANCIS E. HARRELL,
Respondents.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA.
IN EQUITY. NUMBER 949.

AMENDED BILL OF COMPLAINT

Now come the Complainants, Douglas E. Vieg, John C. Vieg, Victor G. Vieg, Charlotte Blair and Eva Fox, and amend the original Bill of Complaint heretofore filed in this cause by amending the Prayer for Relief contained therein so that the said Prayer for Relief as amended will read as follows:

Your Orators respectfully pray for the following separate and several relief:

1. That this cause be referred to the Register of this Court with instructions to hold a reference, examine witnesses and ascertain and report the following:

(a) The amount of timber cut and removed from the property described in the Bill of Complaint by the Respondents, the value thereof and the amount of damage done to your Orators thereby be the amount that is due the Respondent, Francis E. Harrell, for taxes paid at the tax sale, the taxes subsequently paid by him on the said property and all other amounts to which the said Respondent is entitled as fixed by Title 51 Section 283 of the 1940 Code of Alabama.

2. That the alleged tax sale under which the Respondent claims title be decreed to be void and the Complainants be permitted to redeem from the said tax sale by paying to the Respondent the amounts due him as provided by Title 51, Section 283 of the 1940 Code of Alabama.

3. Your Orators further pray for such other, further and general relief as they may be equitably entitled to the premises considered.

(Signed) J. B. BLACKBURN

Solicitor for Complainants.

Filed September 7, 1944
(Signed) R. S. Duck, Register."

shall be and it is hereby substituted for the said original Amended Bill of Complaint.

2. Jurisdiction of this cause is reserved for such other and further orders or decrees as may be necessary and proper in the premises.

ORDERED, ADJUDGED AND DECREED on this the 6th day of September, 1949.

J. Fair J. Madhuburn, Jr.
Judge.

DOUGLAS E. VIEG, et als
Complainants,
VS.
FRANCIS E. HARRELL,
Respondents.

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IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA.
IN EQUITY. NUMBER 949.

MOTION

Now come the Complainants by their Solicitor and show
unto the Court as follows:

1. The Original Amended Bill Of Complaint filed in
this cause by the Complainants on September 7, 1944, has disappeared
from the court file, and has evidently been lost or been misplaced.

2. Attached hereto, marked "Exhibit A", and by reference
made a part hereof as though fully incorporated herein is a true and
correct copy of the said Original Amended Bill of Complaint which
was filed in this cause on September 7, 1949.

Wherefore Complainants move the Court to substitute a
copy of the said Original Amended Bill of Complaint for the said
paper which has been lost or misplaced. Complainants further pray
that such other orders be made and decrees rendered, as may be
requisite and proper in the premises.


Solicitor for Complainant

I hereby certify that I mailed a copy of the foregoing
motion to H. M. Hall, Solicitor for the Respondent on this the
second day of September, 1949.

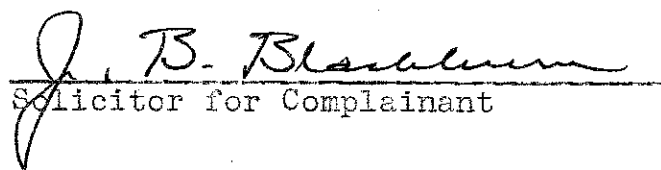

Solicitor for Complainant

EXHIBIT A

DOUGLAS E. VIEG, et als
Complainants,
VS.
FRANCIS E. HARRELL,
Respondents.

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IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA.
IN EQUITY. NUMBER 949.

AMENDED BILL OF COMPLAINT

Now come the Complainants, Douglas E. Vieg, John C. Vieg, Victor G. Vieg, Charlotte Blair and Eva Fox and amend the original Bill of Complaint heretofore filed in this cause by amending the Prayer for Relief contained therein so that the said Prayer for Relief as amended will read as follows:

Your Orators respectfully pray for the following separate and several relief:

1. That this cause be referred to the Register of this Court with instructions to hold a reference, examine witnesses and ascertain and report the following:

(a) The amount of timber cut and removed from the property described in the Bill of Complaint by the Respondents, the value thereof and the amount of damage done to your Orators thereby be the amount that is due the Respondent, Francis E. Harrell for taxes paid at the tax sale, the taxes subsequently paid by him on the said property and all other amounts to which the said Respondent is entitled as fixed by Title 51 Section 283 of the 1940 Code of Alabama.

2. That the alleged tax sale under which the Respondent claims title be decreed to be void and the Complainants be permitted to redeem from the said tax sale by paying to the Respondent the amounts due him as provided by Title 51, Section 283 of the 1940 Code of Alabama.

3. Your Orators further pray for such other, further and general relief as they may be equitably entitled to the premises considered.

(Signed) J. B. Blackburn
Solicitor for Complainants.

Filed September 7, 1944
(Signed) R. S. Duck, Register

LIS PENDENS NOTICE

STATE OF ALABAMA

BALDWIN COUNTY

TO WHOM IT MAY CONCERN:

Notice is hereby given that Douglas Vieg, John C. Vieg, Victor G. Vieg, Charlotte Blair and Eva Fox did file in the Circuit Court of Baldwin County, Alabama, Equity Side, on this date, their Bill of Complaint against Francis E. Harrell. The Complainants allege in their said Bill of Complaint that they jointly own as tenants in common the Southwest Quarter of Southwest Quarter of Section Thirty-six (36), Township Six (6) South Range Four (4) East, in Baldwin County, Alabama, and that they were in the peaceable possession of the said property on or about November 1, 1941, when the Defendant trespassed on the said property and cut and removed valuable timber growing thereon after having been warned not to trespass on the said property.

The Bill of Complaint further alleges that the said Defendant claims title to the said property under and by virtue of a tax deed from the State Land Commissioner dated September 10, 1941, and recorded in Deed Book Number 76 N. S. at pages 45-6, Baldwin County, Alabama Records, and alleges that the said tax sale under which the said tax deed was issued is void because the said tax sale was not conducted according to law.

The Bill of Complaint prays that a reference be held to ascertain the amount of damage done the Complainants by cutting and removing the said timber and that the said tax deed be cancelled as a cloud on their title to the said property.

All persons are cautioned against purchasing the said property except subject to the rights of the Complainants in this cause.

Dated this 28th day of May, 1943.

J. T. Blackburn
Solicitor for Complainants.

949

LIS PENDENS NOTICE

45-
DOUGLAS VIEG, et al

Prothon D. Vieg
John H. Vieg Complainants,
Charlottesville & Law 2
VS. *see top 28*

FRANCIS E. HARRELL, 53-

Respondents.

5-28-43

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA.
IN EQUITY.

STATE OF ALABAMA, BALDWIN COUNTY

Filed 5-28-43 10:00 AM

Recorded *last few* book *1* page *1002*
and I certify that the following Privilege Tax has
been paid.

Deed Tax _____

Mortgage Tax _____

[Signature]
Judge of Probate

By _____

W.S. Dudd

45

DOUGLAS E. VIEG
ET ALS,

Complainants,

VS.

FRANCIS E. HARRELL,

Respondent.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA
IN EQUITY. NUMBER 949

DECREE

This cause coming on to be heard on this date is submitted on Complainants' motion to dismiss this cause, from which it appears that this cause has been settled between the parties, that the property involved herein has been conveyed by the Complainants to the Respondent and that the Complainants have paid the court costs incurred herein; upon consideration of all of which, it is, therefore, Ordered, Adjudged and Decreed by the Court that this cause be and it is hereby dismissed with prejudice.

ORDERED, ADJUDGED AND DECREED on this the 29th day of January, 1951.

Jelfair G. Masliberry, Jr.

Judge.

DOUGLAS E. VIEG
ET ALS,

Complainants,

VS.

FRANCIS E. HARRELL,

Respondents.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA
IN EQUITY. NUMBER 949

MOTION

TO THE HONORABLE TELFAIR J. MASHBURN, JR., JUDGE OF THE CIRCUIT
COURT OF BALDWIN COUNTY, ALABAMA, SITTING IN EQUITY:

Now come the Complainants in this cause, by their
Solicitor, and show unto this Court and your Honor that this cause
has been settled between the parties, the property involved herein
conveyed by the Complainants to the Respondent and the court costs
have been paid by the Complainants.

WHEREFORE, Complainants move the Court to dismiss this
cause.


Solicitor for Complainants.

DOUGLAS E. VIEG, et al,
COMPLAINANTS,
VS.
FRANCIS E. HARRELL,
RESPONDENT.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA,
IN EQUITY.

And now comes the Respondent and for answer to the Complainants original and amended bill of complaint says:

1. He is not advised as to the ages or residences of the Complainants, but admits that he is over twenty-one years of age and a resident of Baldwin County, Alabama.

2. He denies the allegations contained in paragraph 2, and demands strict proof of the same.

3. He admits that he is the owner of the property described in the bill of complaint and that he holds under deed dated September 10, 1941, and of record in the office of the Probate Judge of Baldwin County, Alabama, in Deed Book 76 NS, pages 45-6; he denies all other allegations contained in paragraph 3 and demands strict proof of the same.

The Respondent for further answer to the Complainants bill of complaint, and praying that this be taken as his cross bill says:

(a) He adopts all of the allegations contained in his answer to the Complainants bill of complaint, and further says that he is the owner and in the actual possession of the land described in the bill of complaint to-wit:

Southwest quarter of Southwest quarter of Section 36,
Township 6 South, Range 4 East, Baldwin County, Alabama;

that he acquired title to the same by deed dated September 10, 1941 and of record in the office of the Probate Judge of Baldwin County, Alabama, in Deed Book 76 NS, pages 45-6; that the exhibits attached to the Complainants bill of complaint, marked Exhibit "A", is a true copy of the deed under which he holds; that immediately after acquiring title to the said property he went into the actual possession thereof and made extensive improvements thereon; that he has been in the actual possession of the said land from

the date he acquired title to the same to this date, ever claiming to own the same; that the deed under which he claims title is valid.

WHEREFORE the premises considered, Complainants pray that by proper process the Complainants be made cross Respondents hereto; that they be required to plead, answer or demur to this cross bill within the time and under the penalties prescribed by law and the practice of this Honorable Court.

The Respondent and cross Complainants further pray that upon a final hearing hereof, that your Honor will enter a decree that the Respondent and cross Complainants is the owner in fee simple of said land, and that the Complainants and cross Respondent have no right, title, interest in, or encumbrance upon the said land.

Complainant further prays that if he is not entitled to have a decree establishing his title to said land, then a proper decree be made and entered awarding to him damages for the purchase price he paid for said property, all subsequent taxes, together with interest thereon, and also for all improvements placed upon the said land.

The Respondent and cross Complainant prays for such other, further, different, or general relief that he may be in equity and good conscience entitled to receive and as in duty bound, he will ever pray.

BEEBE & HALL,

By: *R. M. Hall*

Solicitors for the Respondent
and cross Complainant.

DOUGLAS E. VIEG, et al

Complainants and
Cross Respondents,

VS.

FRANCIS E. HARRELL,

Respondent and Cross
Complainant.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA.
IN EQUITY.

DEMURRER TO CROSS BILL

Now come the Complainants and for demurrer to the Cross Bill filed in this cause set down and assign separately and severally the following:

1. There is no equity in the Cross Bill.
2. It does not allege that no suit is pending to enforce or test title to the property involved in this proceeding.
3. It affirmatively appears that the original and amended Bills of Complaint filed in this cause were filed for the purpose of testing Respondent's title to the property involved in this proceeding.
4. No facts are alleged to entitle Respondent and Cross Complainant to damages for the amount which he paid for the property involved in this proceeding and for the improvements erected thereon.

And now come the Complainants and Cross Respondents and demur to the following part of the said Cross Bill:

"Complainant further prays that if he is not entitled to have a decree establishing his title to the said land, then a proper decree be made and entered awarding him damages for the purchase price he paid for said property, all subsequent taxes, together with interest thereon, and also for all improvements placed upon the said lands,"

and for such demurrer sets down and assign separately and severally the following:

1. No facts are alleged to entitle the Respondent and Cross Complainant to damages for the purchase price he paid for the said property and for all improvements placed upon the said land.

J. B. Washburn
Solicitor for Complainant and Cross
Respondent.

DOUGLAS VIEG ET ALS,

Complainants,

VS.

FRANCIS C. HARRELL,

Respondent.

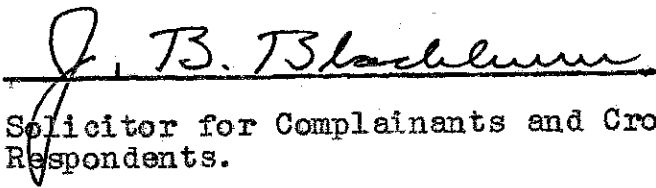
IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA.

IN EQUITY. NO. 949.

MOTION

Now come the Complainants, by their Solicitor, and respectfully represent unto the Court that on September 24, 1945 the Complainants' and Cross Respondents' Demurrer to the Respondent's and Cross Complainant's Cross Bill in this cause was sustained and there appears on the docket sheet in the handwriting of the Judge the following notation: "9/24/45 Demurrer to Cross Bill sustained". There is no decree in the file sustaining the demurrer to the Cross Bill.

WHEREFORE, Complainants and Cross Respondents move the Court to make and enter a decree nunc pro tunc sustaining their demurrer to the said Cross Bill. If Complainants and Cross Respondents are mistaken in the relief prayed for, then they move the Court to grant unto them such other, further and general relief as they may be equitably entitled to, the premises considered.


Solicitor for Complainants and Cross
Respondents.

THE STATE OF ALABAMA--JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

October Term, 19 44-45.

To the REGISTER of the CIRCUIT Court,
BALDWIN County-Greeting:

Whereas, the Record and Proceedings of the Circuit Court In Equity
of said county, in a certain cause lately pending in said Court between

Francis E. Harrell, Appellant,

and

Douglas E. Vieg, et al., Appellee s,

wherein by said Court, at the Term, 19, it was considered
adversely to said appellant, were brought before our Supreme Court, by appeal taken, pursuant
to law, on behalf of said appellant:

NOW, IT IS HEREBY CERTIFIED, That it was thereupon considered by our Supreme Court, on
the 10th day of MAY, 19 45, that said DECREE * * * * *
* * * * * of said Circuit Court be in all things
affirmed, and that it was further considered that the appellant -, and H. M. Hall and
W. C. Beebe, sureties on the appeal bond, pay * * * * *

the costs accruing on said appeal in this Court and in the Court below

Witness, J. Render Thomas, Clerk of the Supreme
Court of Alabama, at the Capital, this the
10th day of MAY, 19 45.

J. Render Thomas
Clerk of the Supreme Court of Alabama.

MAY 10 1945

THE STATE OF ALABAMA - - - - - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1944-45.

1 Div. 233.

Francis E. Harrell

v.

Douglas E. Vieg, et al.,

Appeal from Baldwin Circuit Court,
In Equity.

LIVINGSTON, Justice.

The appeal is from a decree of the Circuit Court of Baldwin County, Alabama, in equity, overruling demurrers to an amended bill of complaint seeking to redeem certain described lands from an alleged void tax sale.

In substance, the bill alleges that complainants are the owners of the lands described in the bill; that the respondent is in possession of said lands claiming to own the same by virtue of a sale to the State of Alabama for the payment of ad valorem taxes, and a deed to respondent from the State Land Commissioner of Alabama; that said tax sale was

2.

and is void. Complainants offer to do equity and to pay all taxes, fees and costs necessary to redeem the lands from said tax sale.

All of the questions here presented were decided contrary to the insistence of appellant in the recent case of Baker v. Farish, 244 Ala. 178, 12 So. (2d) 547.

Taking the averments of the bill as true, as we must do on demurrer, the tax sale was and is void. - Baker v. Farish, supra; section 259, Title 51, Code of 1940.

All that appellant acquired from the State Land Commissioner is a right to be reimbursed by one who has a right to redeem from such sale, for such amounts as the law allows under section 283, Title 51, Code of 1940: - Hester v. First National Bank, 237 Ala. 307, 186 So. 717; Kesser v. City of Birmingham, 243 Ala. 520, 10 So. (2d) 760; Baker v. Farish, supra.

The present amended bill is not a bill to quiet title under the statute, nor is it a bill to remove a cloud from title. It is simply a bill to ascertain the amount secured by a lien created under and by virtue of the provisions of section 283, Title 51, Code of 1940, and to pay such amount and discharge the lien. - Baker v. Farish, supra.

Under the bill as amended, possession of the premises at the time suit was commenced is immaterial. As stated in Baker v. Farish, supra:

3.

"If complainant, the owner, was in possession, clearly the bill is proper for the purpose of ascertaining the amount secured by the lien created by section 283, supra, and to have the same discharged. If respondent was in possession, an action of ejectment, or in the nature of ejectment, might or might not afford complete relief, dependent upon the invocation by respondent of the rights conferred by section 290, Title 51, Code of 1940. If such rights are not invoked, the lands would still be subject to the lien although complainant recovered possession. A remedy at law is not adequate and complete where its adequacy and completeness depend upon the will of the opposing party. - *Harden v. Barbaree*, 240 Ala. 455, 199 So. 689; 21 Corpus Juris p. 50, § 27; 30 Corpus Juris Secundum, Equity § 25."

The bill as amended was not subject to any ground of demurrer interposed. The cause is due to be and is affirmed.

Affirmed.

Gardner, C.J., Brown and Simpson, JJ., concur.

THE STATE OF ALABAMA---JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

1st Div., No. 233,

Francis E. Harrell, Appellant,

vs.

Douglas E. Vieg, et al., Appellee,^s

From Baldwin Circuit Court.
In Equity

The State of Alabama, }
City and County of Montgomery, }

I, J. Render Thomas, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing pages, numbered from one to t h r e e inclusive, contain a full, true and correct copy of the opinion of said Supreme Court in the above stated cause, as the same appears and remains of record and on file in this office.

Witness, J. Render Thomas, Clerk of the Supreme
Court of Alabama, this the 10th day of

May

19 45

J. Render Thomas

Clerk of the Supreme Court of Alabama.

SECURITY FOR COSTS

DOUGLAS VIEG, et al
Complainants

Vs.

FRANCIS E. HARRELL
Respondent

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA

IN EQUITY

NO. 949

We, Francis E. Harrell as principal, H. M. Hall, and W. C. Beebe as sureties, acknowledge ourselves security for the costs of the appeal taken to the Supreme Court of Alabama, by the said Francis E. Harrell from the said judgment in said cause.

Signed and sealed this the 29th day of January, 1945.

Francis E. Harrell (SEAL)
H. M. Hall (SEAL)
W. C. Beebe (SEAL)
W. C. Beebe (SEAL)

Taken and approved this the 29th day of January, 1945.

Register

Register

DOUGLAS VIEG, et al
Complainants

Vs.

FRANCIS E. HARELL
Respondent

NOTICE OF APPEAL

5

Filed this the 29th day of
January, 1945.

R. B. Baker
Register

(#949)

THE SUPREME COURT OF ALABAMA

October Term, 1944-45.

1st Div., No. 233

Francis E. Harrell

Appellant,

vs.

~~James~~ E. Vieg, et al.,

Appellee. s

From Baldwin Circuit Court.
In Equity

Certificate of Affirmance

The State of Alabama,
Baldwin County. } Filed

this 11th day of November 1945
Robert

949

Received this 31 day of Jan 1945

DOUGLAS VIEG, et al
Complainants

Vs.

FRANCIS E. HARELL
Respondent

[Handwritten signature]

CITATION OF APPEAL

7

Filed this the 29th day of
January, 1945.

[Handwritten signature]
Register

C E Garret.
Sheriff.

Executed this 31 day of Jan 1945
by serving a copy of this Citation
of Appeal on J E Blackburn.
Solicitor for Complainant

C E Ernest
C E Garret.
Sheriff.

By: *Fred Wally*
Deputy Sheriff

MOTION
RECORDED
DOUGLAS VIEG FT ALS,

Complainants,
VS.

FRANCIS C. HARRELL,
Respondents.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA.
IN EQUITY. NO. 949.

Filed
2-14-47
Marie L. Smith
Register

RECORDED

DEMURRER TO CROSS BILL

DOUGLAS E. VIEG, et al

Complainants and
Cross Respondents,

VS.

FRANCIS E. HARRELL,

Respondent and Cross
Complainant.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA.
IN EQUITY.

Filed

9-20-45-

*W. W. Weeks
Reig*

Original

RECORDED

Douglas E. Vieg, et al

vs

Francis E. Harrell

Answer

Filed this the 7 day of
August, 1945

R. J. [Signature]
Register

MOTION **RECORDED**

DOUGLAS E. VIEG ET ALS,

Complainants,

VS.

FRANCIS E. HARRELL,

Respondent.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA
IN EQUITY. NUMBER 949

Filed: January 29, 1951.

Walter J. Madlbury,
Atty. Gen.

JAN 29 1951
ALBI 10:00 AM

DECEMBER RECORDED
RECORDED
DOUGLAS E. VIEG ET AL
Complainants,
VS.
FRANCIS E. HARRELL,
Respondent.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA
IN EQUITY. NUMBER 949

FILED
JAN 29 1951
ALICE L. HARRIS, CLERK

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA
IN EQUITY. NUMBER 949

FRANCIS E. HARRELL
Respondent.

Complainants,

DOUGLAS E. VIEG ET AL
Complainants.

This cause arises out of a contract of sale of land in Baldwin County, Alabama, which was made between the parties on or about the 1st day of January, 1947. It appears that this cause has been settled between the parties and that the property involved has been conveyed to the Respondent. The Complainants have failed to file a bill of complaint in this court and the Respondent has been enjoined from consideration of all of the bills of complaint which have been filed and passed by the court. It is, therefore, the order of the court that this cause be and it is hereby dismissed with prejudice.

945 RECORDED

DOUGLAS E. VINEG, ET AL
COMPLAINANTS

VS

FRANCIS E. HARNELL
RESPONDENT

2

Judg July 7 1945

W. B. Luck

Received Sept 29. 1944

[Handwritten signature]

THE SUPREME COURT OF ALABAMA

October Term, 19 44-45

1st Div, No. 233

Francis E. Harrell

Appellant,

vs.

Douglas E. Vieg, et al.,

Appellees

From Baldwin Circuit Court.
In Equity

COPY OF OPINION

249

DOUGLAS VIEG, et al
Complainants

vs.

FRANCIS E. HARRILL
Respondent

SECURITY FOR COSTS

6

Filed this the 29th day of
January, 1945.


Registrar

COMPLAINANTS REPLY BRIEF

DOUGLAS E. VIEG, et al

Complainants,

VS.

FRANCIS E. HARRELL,

Respondent.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA.
IN EQUITY. NUMBER 949.

By

J. B. Blackburn
Solicitor for Complainants

STATEMENT OF THE CASE

This suit was filed by the Complainants who allege that they own the property involved in this suit as tenants in common; that the Respondent claims title to the property under and by virtue of a tax sale and tax deed, a copy of which is attached to the Bill of Complaint. The Bill of Complaint further alleges that the Respondent was warned not to trespass on the property; that he, after receiving such warning, went on the property and cut and removed timber therefrom.

The Bill prays, among other things, that the tax deed referred to in the Bill of Complaint be cancelled as a cloud on Complainants' title to the said property.

The Respondent demurred to the Bill, the principal ground of demurrer being that the Bill does not show that the Complainants were in the possession of the property in question at the time the suit was filed.

The case has been submitted on Demurrer, the Respondent has filed his Brief and this Brief is written in reply thereto.

ARGUMENT

Our authority for filing the Bill is the case of *Dunn v. Ponceler*, 235 Ala. 269, 178 So. 40 and the cases cited in this opinion.

In the *Dunn* case, as in the present case, an instrument had been recorded that was a cloud on the title to the property and in the *Dunn* case the Court held.

(3) This court, in the case of Lockett Adm'r, v. Hurt, et al., 57 Ala. 198, in an opinion by Brickell, C. J., announced the following rule, which seems to have been steadfastly followed by this court: "The power of a court of law to vacate a sale of land, made under its process, because of irregularity, or illegality, or fraud, injurious to the parties, or to their privies in estate, or in interest, has been frequently recognized and affirmed by the decisions of this court. Mobile Cotton Press Co. v. Moore, 9 Port. 679; Lee v. Davis, 16 Ala. 516; Abercrombie v. Connor, 10 Ala. 293; McCaskell v. Lee, 39 Ala. 131; Henderson v. Sublett, 21 Ala. 626; Lankford v. Jackson, 21 Ala. 650. If the sale is impeached because of irregularities merely, the jurisdiction of the court of law to vacate it, is exclusive. There must be fraud or collusion, or an inability of the court of law to furnish adequate relief, to justify the interference of a court of equity. The correction of errors or irregularities in the use of legal process, or in the judgments of courts of law, is not within the province of equity. Shottenkirk v. Wheeler, 3 Johns. Ch. (N.Y.) 275) 280; Cavanaugh v. Jakeway, Walk. Ch. (Mich). 344. If the sale has been followed by a conveyance, casting a cloud on the title, a court of law is incompetent to decree and compel the cancellation of such conveyance, and if the cancellation is necessary to quiet the title, and prevent future litigation, a court of equity will intervene because of the inadequacy of legal remedies. 2 Story's Eq. par. 692; Bromley v. Holland, 7 Vesey 18. "(Italics supplied)."

(4) As pointed out by this court, in the case of Hay's Adm'r. v. Womble, 56 Ala. 32: "The sale was followed by the execution of deeds by the sheriff, which are a cloud on the title, the cancellation of which is within the exclusive jurisdiction of a court of equity. The power of a court of law would be exhausted, when the sale was vacated. The deed would remain in the possession of the purchaser, and could, at any time, be used as evidence by him in an action for the recovery of the lands, compelling the complainant, or those claiming under him, to introduce the evidence of the vacation of the sale, to repel its operation and effect as evidence of title. The remedy at law is not, therefore, adequate, and a court of equity had jurisdiction of the case made by the original bill. - - Lockett v. Hurt, at the present term." (Italics supplied).

To the same effect is the holding in the case of Anniston Pipe Works v. Williams, 106 Ala. 324, 18 So. 111, 54 Am. St. Rep. 51.

Where, therefore, there has been a sale of property under judicial process, and a deed has been executed to the purchaser, and the circumstance attending the sale are such as render the sale voidable at the election of the execution defendant, a court of equity will entertain a bill to vacate the sale, and cancel the deed as a cloud upon the debtor's title.

But it is insisted that the court will only entertain such a bill when brought by one in possession. There is no merit in this contention as we shall attempt to demonstrate.

* * * * *

(9) From the foregoing it will be seen that we are of the opinion that a court of equity has jurisdiction of the cause of action stated in the bill and the fact that complainants are not in possession of the property will not constitute a barrier to relief."

This decision is directly in point and shows beyond any question of doubt that the Complainant does not have to be in the possession of property to cancel an instrument as a cloud on his title where its invalidity can only be shown by the introduction of extrinsic evidence. For the same reason the Complainant in the present case does not have an adequate remedy at law.

The test to determine whether a court of equity will assume jurisdiction to remove a cloud on real estate is: "Would the owner of the property in an action of ejectment brought by the adverse party founded upon the deed be required to offer evidence to defeat a recovery? If such proof would be necessary the cloud would exist. If the proof would be unnecessary no shade would be cast by the presence of the deed. If the action would fall of its own weight without proof in rebuttal, no occasion could arise for the equitable interposition of the Court." Lockett, Adm'r. v. Hurt, et al, 57 Ala. 198.

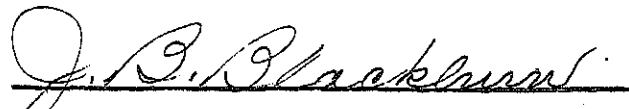
In the present case if the Respondent, Harrell, had brought an ejectment suit against the Complainants for recovery of the possession of the property involved in this suit and described in the tax deed to him which we are seeking to cancel, he would have been entitled to the general charge if the Complainants in this suit had offered no testimony in such ejectment suit because the deed is regular, complete and not void on its face, therefore this case comes directly within the provisions of the rule next above referred to. The only way that recovery could be defeated in such ejectment suit

would be to offer testimony to show that the tax sale under which Harrell claims title is void, therefore the Bill as written contains equity and is not subject to the Demurrer interposed by the Respondent.

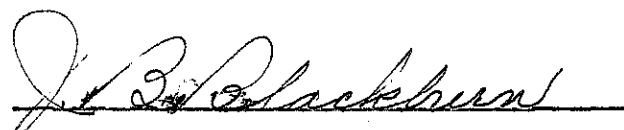
Where a voidable judicial sale is followed by a conveyance casting a cloud on title, a Court at law is incompetent to Decree and compel cancellation of such conveyance and a Court of Equity will intervene because of the inadequacy of legal remedy. Ray's Adm'r. v. Womble, 56 Ala. 32; Anniston Pipe Works v. Williams, 106 Ala. 324; 18 So. 111.

In conclusion we respectfully submit that the Bill of Complaint is not subject to the Respondent's Demurrer and that this Demurrer should therefore be overruled.

Respectfully submitted,


Solicitor for Complainant.

I hereby certify that I mailed a copy of the foregoing Brief to Messrs. Beebe and Hall, Solicitors for the Respondent, on this 1st day of June, 1944.


Solicitor for Complainant.

NOTICE OF APPEAL

DOUGLAS VIEG, et al
Complainants

Vs.

FRANCIS E. HARRELL
Respondent

IN THE CIRCUIT COURT OF

BALDWIN COUNTY, ALABAMA

IN EQUITY

NO. 949

Now comes Francis E. Harrell, the Respondent in the above styled cause by his Solicitors of record and appeals to the Supreme Court of the State of Alabama, from the decree of the Circuit Court of Baldwin County, Alabama, in equity rendered on the 10th day of January, 1945, over ruling Respondent's demurs to the original bill of complaint in this cause.

BEEBE & HALL

By:
Solicitors for the Respondent

DOUGLAS E. VIEG, et al
Complainants,
VS.
FRANCIS E. HAROLD,
Respondent.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA.
IN EQUITY. NUMBER 949.

DECREE ON DEMURRER

This cause coming on to be heard on this date is submitted by consent of the parties on the Respondent's Demurrer to the Complainants' Amended Bill of Complaint, upon consideration of all of which it is therefore ORDERED, ADJUDGED AND DECREED by the Court as follows:

1. That the Respondent's Demurrer to the Complainants' Amended Bill of Complaint be and it is hereby overruled.
2. The Respondent is allowed twenty days from this date to file his Answer.

ORDERED, ADJUDGED AND DECREED this 10th day of January, 1945.

J. T. L. Hare

Judge.

DOUGLAS E. VIEG, ET AL.,

Complainant

VS.

FRANCIS E. HARRELL,

Respondent.

IN THE

CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA

IN EQUITY.

In this cause it appearing from the Bench Note in the case that heretofore the Court in his own handwriting, wrote on the Docket sheet: "Demurrer to the Cross Bill is sustained" and it now appears that said order was improvidently entered and no decree being entered,

IT IS ORDERED that the Bench Note be corrected so as to show that the demurrer to the cross bill was overruled and the motion this day made by the Respondent is overruled.

This the 14th day of July, 1947.

J. W. Hare

JUDGE

The above and foregoing order is hereby suspended pending further consideration.

This 4th day of Aug 1947

J. W. Hare

RECORDED

DOUGLAS E. VIEG, ET AL.,

VS.

FRANCIS E. HARRELL

ORDER

Filed July 14, 1947.

Living & Revoked
JAMES R. RAYMOND

611b

949

RECORDED

DECREE ON DEMURRER

DOUGLAS E. VIEG, et al

Complainants,

VS.

FRANCIS E. HAROLD,

Respondent.

7

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA.
IN EQUITY. NUMBER 949.

Filed January 10, 1949
W. H. [Signature]
Register

RS Book

MAY 28 1943

BAY MINETTE, ALA., _____ 194

IN ACCOUNT WITH
G. W. ROBERTSON
JUDGE OF PROBATE, BALDWIN COUNTY

Please Return Bill With Remittance

Recording	from	to	Privilege Tax	Rec. Fee	Total
<i>JK</i>	<i>Douglas King</i>	<i>vs. Grace B. Harrell</i>			<i>45</i>
<p><i>Paid</i> MAY 28 1943 <i>[Signature]</i></p>					

CERTIFICATE OF APPEAL

STATE OF ALABAMA

BALDWIN COUNTY

I, R. S. Duck, as Register of the Circuit Court of Baldwin County, Alabama, do hereby certify that Respondent, Francis E. Harrell, in the cause of Douglas E. Vieg, et al, Complainants, vs. Francis E. Harrell, Respondent, in the Circuit Court of Baldwin County, Alabama, Equity Side, Number 949, has taken an appeal to the Supreme Court of Alabama from the Decree of the said Court rendered on January 10, 1945, overruling Respondent's Demurrer to the Amended Bill of Complaint. I further certify that the said appeal was taken on the 29th day of January, 1945.

Witness my hand this 29 day of February, 1945.

Register of the Circuit Court of
Baldwin County, Alabama.