

R. L. KIRKLAND,

Complainant,

VS.

C. B. MITCHELL, Individually, and
MITCHELL NAVAL STORES COMPANY, a
Partnership composed of R. F. Mitchell,
Jr., C. B. Mitchell and J. L. Tucker,

Respondents.

IN THE CIRCUIT COURT OF BALDWIN COUNTY,

ALABAMA. IN EQUITY.

BRIEF AND ARGUMENT

OF

RESPONDENTS.

B Y:

HYBART & CHASON,
Bay Minette, Alabama.

The bill of complaint in this cause appears to have been filed under the Statute relative to quieting titles to real estate, and ~~in~~ its allegations should conform to the requirements of the Statute.

The complainant, in the second paragraph of the bill of complaint sets out that he is the owner and in the peaceable possession of the lands described therein. In the fifth paragraph of the bill of complaint as last amended, it is set up that respondents are claiming title to said property by virtue of a tax deed from the State of Alabama, which was based on the sale of the property involved in said suit, on May 28, 1928, which was assessed to his vendor, C. O. Windecker and purchased and bought in by the State of Alabama at said tax sale and that the State of Alabama, on April 8, 1936, sold the same to C. B. Mitchell, one of the co-partners in the Mithhell Naval Stores Company. That it is not shown therein that Windecker was not the owner of said land at the time that it was assessed; that it is not shown therein that said taxes were not paid nor that the lands were not subject to taxation; that from aught appearing, the tax collector of Baldwin County, Alabama, had an absolute authority of law to sell and convey said property to the State of Alabama for the failure of the owner thereof to pay the taxes on the same and it does not appear in said bill of complaint that the State of Alabama has not complied properly with the law in selling and conveying the same to C. B. Mitchell, one of the

respondents in this case. That the complainant contents himself with saying that said tax sale is void and of no effect, but in no way does he set forth in his bill of complaint as last amended wherein said tax sale is null and void, and his allegations as to this are but a mere conclusion of the pleader and falls largely short of the requirement of equity pleading relative to such matters, all of which is elementary.

"Bills in equity must set forth with certainty and clearness facts essential to show the asserted right; otherwise, it is subject to demurrer."

Heflin vs. Heflin,
208 Alabama, 69.

"Under equity rules complainant must show with clearness and certainty rights warranting protection."

Mosley vs. Ritter,
224 Alabama, page 58.

"Equity pleading requires reasonable certainty as to material matters and such certainty that the Court may ascertain complainant's rights and render proper decrees should relief be awarded."

Watson vs. Watson,
229 Alabama, 570.

We respectfully contend that the grounds of demurrer, taking the point mentioned, should be sustained, as it is not permissible for the pleader to allege a conclusion in such a material matter affecting his interest in the premises. If the deed is void, he should set forth in what particular it is; otherwise, it is nothing more than a mere conclusion, and certainly leaves the Court out of his confidence as to wherein this deed is a nullity, matters

that the Court should properly know about. The only way for the Court to acquire this knowledge is through the proper pleading.

"Matters essential to complainant's rights to relief must appear not by inference, but by direct and unambiguous averment."

Duckworth vs. Duckworth,
35 Alabama, 70.

Another reason why complainant is not entitled to the relief prayed for is this: According to the averments of the fifth paragraph, construing the pleading strictly against the pleader, as the law requires the Court to do, the mind is forced to the conclusion that the tax proceedings and the tax deed under which respondents are holding is absolutely valid and binding, but if it was otherwise, the complainant in the seventh paragraph of the bill of complaint shows that the respondents were in possession of the property involved in this suit at the time that the bill of complaint was filed. In this paragraph he clearly alleges that the "respondents are cutting and removing timber from the lands and turpentining the trees thereon", showing at least that there was a scrambling possession in existence at the time that he resorted to this court.

In the case of White vs. Cotner, 170 Alabama, page 327, Justice Sayre said:

"The leading purpose of the bill is to quiet title, as we have said. Incidentally it is sought to restrain waste by one of the defendants pending the determination of the title. The bill alleges in a general way that complainants are in possession, that they are in the open, notorious and adverse possession of the premises. But

The evidence in this case shows acts of possession on the part of the defendant, and the fact that he has been prosecuted for trespass does not change the fact that the possession is claimed by the respondent and that the possession of the complainant is disputed and not peaceable, and that consequently, the complainant could not maintain a bill to quiet title."

In Buchmann Abstract & Investment Company vs. Roberts, 213 Alabama, page 520, the Court said:

"To maintain bill to quiet title under Code, 1923, proof must show peaceable possession in complainant as distinguished from contested, disputed or scrambling possession".

See also Screws vs. Heard, 217 Alabama, page 14; Randall vs. Daughdrill, 142 Alabama, page 490.

We respectfully contend that the several grounds of demurrer to the bill of complaint should be sustained.

Respectfully submitted,

Hyatt & Chason
Solicitors for Respondents.

We hereby certify that we have this day forwarded to Messrs. Beebe, Hall & Beebe, Solicitors for Complainant, copy of the foregoing brief and argument, postage prepaid.

This 1st day of November, 1937.

Hyatt & Chason
Solicitors for Respondents

R. L. KIRKLAND,

Complainant,

vs.

C. B. MITCHELL, individ-
ually, and MITCHELL NAVAL
STORES COMPANY, a partner-
ship composed of R. F.
Mitchell, Jr., C. B. Mitch-
ell and J. L. Tucker,

Respondents.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA.

IN EQUITY.

CASE NO. 334.

BRIEF OF COMPLAINANT ON DEMURRERS
FILED BY RESPONDENTS TO ORIGINAL
BILL OF COMPLAINT AS AMENDED.

BEEBE, HALL & BEEBE,
Bay Minette, Alabama,

Solicitors for Complainant.

In replying to Brief and Argument of respondents, in asking your Honor for a ruling on demurrers filed by them, the complainant wishes to inform the Court that he filed a bill in the statutory form to quiet title, with the further allegations contained therein asking for a right to redeem from a tax sale, all of which is set out in the original bill of complaint as amended. The brief of the respondents dwells merely on that part of the bill which is in statutory form as to quieting the title, and goes upon the assumption that the complainant must have actual peaceable possession of the property before his bill can be maintained. If the bill only was for the purpose of quieting title, then unquestionably the complainant must have peaceable possession. This of course is elementary. However, the complainant's bill goes further and proceeds under Section 3108 of the 1923 Code, which section was amended by an Act of the Legislature of 1935, as shown by their General Acts at page 366, Section 261. The only change the 1935 Legislature made in the Act was reducing the interest from fifteen per cent. (15%) to eight per cent. (8%) per annum.

The complainant's original bill as amended sets out the fact that the complainant holds a record title to the property and is in possession of the same, and asks the Court to ascertain the amount paid by the purchaser at the tax sale and of any subsequent taxes paid by the purchaser, together with eight per cent. (8%) interest thereon, and offers to pay such sum as the Court shall law-

fully determine in redemption thereof, and places himself in the jurisdiction of the court, etc. This of course gives the bill what is commonly known as a double aspect.

The Supreme Court of the State of Alabama, in the case of Georgia Loan & Trust Company vs. Washington Realty Company, 87 So., page 794, has this to say:

"The law does not require the owner, his heir, devisee, vendee or mortgagee of land in possession, when it is sold for taxes, to wait for purchaser to file ejectment suit, but they may file suit in equity under Code 1907, Section 2312, as amended by Acts 1915, page 475, Section 240."

The respondents seek in their brief to shift the burden of proving the invalidity of the tax sale to the complainant. In the case of Georgia Loan & Trust Company vs. Washington Realty Company, supra, Justice Miller has this to say:

"But the bill does not aver that the tax sale and tax deed were based on a valid decree of sale by a court of competent jurisdiction after the lot was properly assessed, and that notice was given the owner of the application to sell for non-payment of taxes, and that the lot was legally advertised for sale after the decree. These matters are essential to a valid decree and to a sale thereunder. The burden of proving them rests on him who claims under them, the defendant in this case. Under the averments of the bill we think complainant has the right to have the liens, incumbrances and taxes, penalties and interest of the defendant, if any, specified and declared; and the tax deed, whether valid or invalid, removed as a cloud on the title on payment of the amount lawfully due the defendant."

But the owner, his heir, devisee, vendee or mortgagee of the land at the time of the tax sale, or the person against whom the taxes were assessed, being in possession, may file bill like in this cause and force the defendant, the purchaser at the tax sale, to propound his tax claim, lien or tax title, whether valid

or invalid, so it can be paid as said Act (Section 240) requires and the tax deed removed as cloud on the title to the lot. Section 2312 Code of 1907 as amended, Acts 1915, Section 240, page 475; Green vs. Stephens, 198 Ala. 325, 73 So., 532."

As the original amended bill will show, the complainant was forced to resort to an injunction restraining the respondents from committing waste on the property described in the bill of complaint pending outcome of the cause, and by this injunction the complainant did not admit that he was not in possession of the property, but that there was in the nature a scrambling possession between both parties, which complies with Section 3108 of the Code of 1923, and the cases cited herein by the Supreme Court of the State of Alabama construing Section 3108.

In the case of Bell vs. Propst et al., 127 So., pages 212-13, the Supreme Court says:

"Where owner of land has such possession as would necessitate some kind of suit by purchaser at tax sale to recover possession, owner need not wait to be sued under Code 1923, Section 3108, which authorizes right of redemption applicable when suit is against person assessed for taxes or against owner of land at time of sale, but he may institute suit in equity to enforce his right of redemption notwithstanding fact that he is scrambling for possession with purchaser."

"Appellant claims that the suit is not of such nature as to make the right of redemption declared by that statute applicable. It will be noted that it is applicable 'when the suit is against the person against whom the taxes were assessed, or the owner of the land at the time of the sale.'"

It is not dependent upon the invalidity of the tax sale. Green vs. Stephens, 198 Ala. 325, 73 So. 532. In that case it was

held, however, to be conditioned upon the owner of the land remaining in possession. We take this to mean such possession as that the purchaser must sue for its recovery in order for him to gain its possession. But it was held by this Court that the owner in possession need not wait until the purchaser sues him, but may institute a suit to quiet the title or remove a cloud and exercise this right of redemption. Georgia Loan & Trust Company vs. Washington Realty Company, 205 Ala. 288, 87 So. 794.

"To justify a suit in equity to exercise this right, the complainant must have such possession as will require some nature of suit by the purchaser at tax sale to recover it of him. It need not be that peaceable possession which will justify statutory bill to quiet the title. However, if the original owner be and remain in such possession as that it will require some nature of suit to oust him, though his possession be a scrambling one, he need not wait to be sued to stimulate an exercise of the right conferred by Section 3108, but may, as was done in Georgia Loan & Trust Company vs. Washington Realty Company, supra, institute a suit in equity to enforce the right. Of course he could not, as a decree in this case stated, have the statutory relief to quiet the title unless he had peaceable possession. But if he is in possession and the purchaser is scrambling with him as to its retention, such situation should not deprive him of this right to file a bill for an exercise of his right of redemption, whether it deprives him of relief under the statute to quiet the title or not." Citing Montgomery vs. Spears, 218 Ala., 160, 117 So. 753.

It is the interpretation of the law by the complainant in a proceeding of this nature, that he may bring a bill in the Chancery Court to quiet the title, and also allege in the same bill facts that would enable him under the law to redeem from a tax sale.

We submit that there are sufficient allegations in the orig-

inal amended bill of complaint to entitle him to the right of redemption, and under the Supreme Court decisions cited herein we respectfully ask the Court to overrule the demurrers filed by the respondents.

Respectfully Submitted,

Burke, Hall & Beebe

Solicitors for Complainant.

We hereby certify that we have forwarded to Messrs. Hybart & Chason, Solicitors for respondents, copy of the foregoing brief, postage prepaid, this the 2nd day of November, 1937.

Burke, Hall & Beebe

Solicitors for Complainant.

R. L. KIRKLAND,

Complainant,

vs.

C. B. MITCHELL, Individually, and
MITCHELL NAVAL STORES COMPANY, a
partnership composed of R. F. Mitchell,
Jr., C. B. Mitchell and J. L. Tucker,

Respondents,

IN THE CIRCUIT COURT OF

BALDWIN COUNTY,

ALABAMA.

IN EQUITY.

Now comes the Respondents in the aforesaid cause and files this additional demurrer to the complaint as last amended, and assigns the following additional grounds therefor separately and severally:

(a) That said bill of complaint shows upon its face that the complainant is not in the peaceable possession of the lands mentioned therein.

(b) That said bill of complaint on its face shows not more than a scrambling possession between the complainant and respondents to the lands involved in this suit.

(c) That said bill of complaint shows on its face that the respondents are in the possession of the lands involved in this suit.

(d) that said bill of complaint shows that the respondents were cutting and removing timber from the lands involved in this suit and turpentineing the trees thereon, which are acts of possession and were in such possession at the time that the bill of complaint was filed in this cause.

(e) That the said complainant admits that at the time of the filing of the bill of complaint, in paragraph seven thereof, respondents possession of the lands involved in this: That Respondents were cutting and removing timber from said lands, and were turpentineing the trees thereon, clearly showing that the complainants were not in the actual, peaceable possession of said lands at the time

that this suit was filed. That at most complainant's possession was a scrambling one.

Robert & Chas
Solicitors for Respondents.

STATE OF ALABAMA.

BALDWIN COUNTY.

TO ANY SHERIFF OF THE STATE OF ALABAMA, GREETING:

We command you that without delay you execute this writ, and due return thereof how you have executed the same make to us immediately to C. B. Mitchell, individually, and Mitchell Naval Stores Company, a partnership;

Whereas, R. L. Kirkland has this day filed a bill of complaint in said Court against C. B. Mitchell, individually, and Mitchell Naval Stores Company, a partnership, praying among other things that the said C. B. Mitchell, individually, or Mitchell Naval Stores Company, a partnership, or either of them, be restrained or enjoined from either directly or indirectly cutting and removing timber or turpentine on the trees thereon, on the following described property situated in Baldwin County, Alabama, to-wit:

The North half of the Southeast quarter of Section 32, Township 6 South, Range 5 East;

And Whereas, on said bill of complaint being exhibited to the Hon. F. W. Hare, Judge of the Circuit Court of Baldwin County, Alabama, on the 20th day of May, 1937, he did order that, upon complainant entering into bond with sureties in the sum of Two Hundred (\$200.00) Dollars, payable to the defendants and approved by the Clerk of said Court, and conditioned according to law, a writ of injunction issue out of said Court according to the prayer of said bill;

And Whereas, bond has been given as required by said order;

These therefore are to command and strictly enjoin you from either directly or indirectly cutting timber from or turpentine trees thereon, on the following described property in Baldwin County, Alabama, to-wit:

The North half of the Southeast quarter of Section 32, Township 6 South, Range 5 East;

until further order of this Court. And this you will in no wise

omit under penalty.

In Witness Whereof, I have hereunto set my hand and seal
on this the 20 day of May, 1937.

R. E. Deen
Clerk.

The State of Alabama, }
Baldwin County } Circuit Court of Baldwin County, In Equity

To Any Sheriff of the State of Alabama—GREETING:

WE COMMAND YOU, That you summon C. B. MITCHELL, Individually,
and MITCHELL NAVAL STORES COMPANY, a partnership composed of
R. F. Mitchell, Jr., C. B. Mitchell and J. L. Tucker,

of BALDWIN County, to be and appear before the Judge of the Circuit Court
of Baldwin County, exercising Chancery jurisdiction, within thirty days after the service of Sum-
mons, and there to answer, plead or demur, without oath, to a Bill of Complaint lately exhibited by

R. L. KIRKLAND,

against said C. B. MITCHELL, individully, and MITCHELL NAVAL STORES
COMPANY, a partnership composed of R. E. MITCHELL, Jr., C. B.
MITCHELL, and G. L. TUCKER,

and further to do and perform what said Judge shall order and direct in that behalf. And this the said
Defendant shall in no wise omit, under penalty, etc. And we further command that you return this writ with
your endorsement thereon, to our said Court immediately upon the execution thereof.

WITNESS, Robert S. Duck, Register of said Circuit Court, this 21st day
of May 1937

Robert S. Duck

Register

N. B.—Any party defendant is entitled to a copy of the bill upon application to the Register.

The State of Alabama, {
Baldwin County } Circuit Court of Baldwin County, In Equity

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MITCHELL, and J. L. TUCKER,

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Register

N. B.—Any party defendant is entitled to a copy of the bill upon application to the Register.

R. L. KIRKLAND,

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-vs-

C. B. MITCHELL, Individual-
ly, and MITCHELL NAVAL STORES
COMPANY, a partnership com-
posed of R. F. Mitchell Jr.,
C. B. Mitchell and J. L. Tucker,

Respondents.

IN THE CIRCUIT COURT--IN EQUITY

STATE OF ALABAMA

BALDWIN COUNTY.

Now come the Respondents in the aforesaid cause, and without waiving the Demurrers heretofore filed to the Bill of Complaint, file this, their Answer to said Bill of Complaint, and say in answer thereto as follows:-

FIRST:

Respondents admit the first paragraph of the Bill of Complaint with the exception that they are residents of Seminole, Baldwin County, Alabama, and respectfully show that they are residents of Escambia County, Florida.

SECOND:

In answer to the second paragraph of the Bill of Complaint Respondents emphatically deny that the Complainant is the owner of and in the peaceable possession of the lands mentioned in said paragraph No. 2; that instead of the Complainant being the owner of said lands the Respondent, C. B. Mitchell, is the owner of said lands, and the Respondents are in the peaceable possession of the aforesaid lands, and at the time of the issuance of the injunction in this cause were turpentineing the pine trees on said lands and had been turpentineing them and obtaining the crude turpentine therefrom for something like a year, last past. That in addition thereto said C. B. Mitchell has been assessing and paying the taxes on said lands.

THIRD:

In answer to Paragraph Three, Respondents say that C. B. Mitchell has a fee simple title to said lands, and that he, together with the Mitchell Naval Stores Company, a partnership composed of R. F. Mitchell, C. B. Mitchell and J. L. Tucker, are in the possession

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to redeem said land from the said C. B. Mitchell. Respondents deny that they are committing any waste on said property by the cutting and removing of the timber, or by the turpentineing of the trees thereon; in brief, that the said C. B. Mitchell, under and by whom they are operating, is the owner of said lands and in the possession of the same, and the cutting and removing of the timber or the turpentineing of the said trees thereon is but by virtue of his legal rights to use his said property as he sees fit in that respect or in any other lawful manner. Respondents deny that it is necessary that an Injunction issue against them, and say that the Complainant's action of obtaining an injunction was in violation of their legal and equitable rights in the premises, and a wrongful interference with the operation of their business and the using of said property by the said C. B. Mitchell, for the reason that said property is the property of the said C. B. Mitchell, and that the things complained of in said seventh paragraph of the Bill of Complaint were but prerogatives of the true owner of the aforesaid lands.

Having answered said Bill of Complaint the Respondents respectfully ask that your Honor will now discharge them and let them go hence with their costs.

Deputy & Reason
Solicitors for Respondents.

Florida
STATE OF ~~ALABAMA~~,
Escambia
~~BALDWIN~~ COUNTY.

Before me, J. J. Brooks, a Notary Public in and for said State and County, personally appeared C. B. Mitchell, who is known to me and who, being duly sworn, deposes and says:-

That the allegations or averments contained in the foregoing answer are true and correct.

C. B. Mitchell

Sworn to and subscribed before me, a Notary Public whose seal is hereto affixed, this 22nd day of June, 1937.

J. J. Brooks
Notary Public, ~~Baldwin~~ County,
State of ~~Alabama~~.

R. L. KIRKLAND,

Complainant,

-vs-

C. B. MITCHELL, Individual-
ly, and MITCHELL NAVAL STORES
COMPANY, a partnership com-
posed of R. F. Mitchell Jr.,
C. B. Mitchell and J. L. Tucker,

Respondents.

IN THE CIRCUIT COURT--IN EQUITY

STATE OF ALABAMA

BALDWIN COUNTY.

Now come the Respondents in the aforesaid cause and file this, their Demurrer, jointly and severally, to the Bill of Complaint, and assign, separately and severally, the following grounds therefor:-

1st. That said Bill of Complaint lacks equity.

2nd. It is not alleged that at the time that Theo. Windecker assessed said lands that he was not the owner of the same.

3rd. It is not alleged that said lands were improperly assessed.

4th. It is not alleged that said lands were not sold in accordance with said assessment by the said Theo. Windecker and according to law.

5th. For aught appearing the tax authorities of Baldwin County and State of Alabama sold said lands strictly in accordance with the requirements of the law to the State of Alabama.

6th. It is not alleged that Complainant was the owner of said lands at the time said lands were assessed for taxes.

7th. That the allegation contained in said Bill of Complaint that Complainant believes that the said tax title of the defendants is void is but a conclusion of the pleader.

8th. That no reason is set forth in said Bill of Complaint as to why the alleged tax title of Defendants is not valid and binding and a conveyance by the State of the fee simple title to the Defendants.

Robert A. Ransom
Solicitors for Respondents.

(page two)

of said lands and operating the same for turpentine and using said lands, which are chiefly valuable for the timber thereon, in every way that they are susceptible of, under an agreement with the said C. B. Mitchell, the owner of said lands; that the said C. B. Mitchell acquired said lands by purchase from the State of Alabama something over a year ago; that the State of Alabama had the legal title to said lands and so conveyed the same to the said C. B. Mitchell, who immediately went into the open, notorious and exclusive and adverse possession of said lands, claiming to own the same, and that the Mitchell Naval Stores Company, a partnership composed of the aforesaid partners, has been operating said lands by and through a contract with the said C. B. Mitchell, the owner of the same.

FOURTH:

The Respondents admit that no suit is pending relative to the title to said lands so far as they are advised.

FIFTH:

In answer to the fifth paragraph of the Bill of Complaint Respondents say that the said C. B. Mitchell claims the title to the aforesaid lands by virtue of a Deed from the State Land Commissioner to the State of Alabama, dated on, to-wit, April 8th, 1936, which said Deed conveys to him all the right, title and interest of the State of Alabama in and to said lands by virtue of a tax sale of said lands under an assessment to one Theo. Win-decker. Respondents deny that the Complainant was the owner of said land at the time of the aforesaid tax sale, and that the Complainant is now the owner of said land, but state the facts to be that the said C. B. Mitchell is the owner of said lands and is now in the possession of said lands.

SIXTH:

In answer to Paragraph Six of the Bill of Complaint, Respondents deny that said tax title or the title of the Respondent, C. B. Mitchell, is void.

SEVENTH:

Respondents deny that the said Complainant has any right

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