THOMAS v. SPIRES.

Opinion delivered December 23, 1929.

1. TAXATION—VALIDITY OF TAX SALE.—A sale of land in 1922 for nonpayment of the taxes of 1921, including the school tax for the district in which the land was situated, was void where the records in the county clerk's office fail to show that the result of the school election was certified to the county board of education or that the county board certified such result to the county court, as required by Crawford & Moses' Dig., §§ 8878, 8955.

2. EVIDENCE—RESULT OF EXAMINATION OF RECORDS.—Where land was sold in 1922 for nonpayment of school taxes, as well as other State and county taxes due on it, testimony of a deputy county clerk, who had been in office 14 years, that he knew that there had been no certificate filed showing that the school tax had been voted in the district for the year for which the taxes were due *held* competent.

3. EVIDENCE—MATTERS NOT OF RECORD.—While matters of record must be proved by exemplification of the record, negative matter may be proved by those familiar with the record.

4. PLEADING—AMENDMENT TO CONFORM TO PROOF.—Pleadings will be treated as amended to conform to proof where no objection to its introduction and no claim of surprise was made.

5. EJECTMENT—TITLE.—Plaintiff in ejectment, being privy in estate to his grantor, must fail if, under the facts proved, the grantor would fail if he were plaintiff.

6. ESTOPPEL—AVAILABILITY AT LAW.—As a general rule, an estoppel *in pais* may be set up in actions at law as well as in suits in equity.

7. ESTOPPEL—ELEMENTS.—A party who, by his acts, declarations, or admissions, either deliberately or with willful disregard of the interests of another, induces him to conduct or dealings which he would not otherwise have entered upon is estopped to assert his rights afterwards to the injury of the party so misled.

8. ESTOPPEL—BASIS.—The underlying principle of estoppel *in pais* is that the conduct of the party misleading another involves fraud, and the remedy is available for protection of the party induced to act to his injury by reason of the fraudulent conduct and declarations of the other party.

9. APPEAL AND ERROR—CONCLUSIVENESS OF COURT'S FINDING.—Where an action of ejectment was tried before the court sitting as a jury, its finding of facts for plaintiff must be upheld, where there was evidence of a substantial nature to support it.

10. ESTOPPEL—EVIDENCE.—Testimony of plaintiff's grantor *held* to warrant a finding that he was not estopped to assert title to land.

Appeal from Pulaski Circuit Court, Third Division; *Marvin Harris,* Judge; affirmed.

STATEMENT BY THE COURT.

This is an action of ejectment by Freed G. Spires against G. W. Thomas and Mrs. G. W. Thomas to recover 160 acres of land. The defendants denied that the plaintiff was the owner of and entitled to the possession of the land, and also claimed that the plaintiff was barred by an estoppel *in pais.*

The record shows that Gilbert Lee Jr., was the owner of the land. On the 7th day of August, 1928, he conveyed it by warranty deed with relinquishment of dower to Freed G. Spires, and the deed was duly acknowledged and filed for record on the same day. Gilbert Lee, Jr., did not live on the land at the time the deed was executed, but lived in the neighborhood thereof with Frank Jones.

L. W. Adams, deputy county clerk, was a witness for the plaintiff. According to his testimony, he was familiar with the books and tax records in the office of the county clerk, and is familiar with the description of the land involved in this suit. According to the records in his office, the land was sold in 1922 for the nonpayment of taxes for 1921. The land is situated in School District No. 22, and the records in the county clerk's office did not show that the land was certified by the county board of education for the school taxes for the year 1921. The first certification of school taxes is for those accruing in 1922. No record in the county clerk's office shows that any school taxes were voted for the year 1921 in District No. 22, being the school district in which the land in controversy is located. The witness testified that he had searched the records thoroughly, and failed to find any such certification. Witness also testified that the delinquent tax list required to be published and posted in the county clerk's office by § 10084 of Crawford & Moses' Di-

gest was not posted. He was in the office during the time the delinquent list was required to be posted, and knows that they failed to post it as required by the section of the statute above referred to.

G. W. Thomas was a witness for himself. According to his testimony, he received a donation certificate for the land in controversy on the 30th day of January, 1926. Before donating the land, witness went to Gilbert Lee, Jr., and asked him about it. Lee told him that he did not intend to redeem the land himself, and that anybody could take it that wanted it. Lee said that he was not able to pay the taxes on the land and make a living on it. Lee lived on the land at the time, and continued to live on it for two months after Thomas donated it. Thomas made improvements on the land by building a house and clearing a part of the land after he donated it. About two months after Thomas moved on the land, the house in which Lee lived was burned, and then Lee moved off the land. He still continued to help Thomas clear the land and cut wood on it. Thomas moved on the land on the 28th day of April, 1926, and has been living on it ever since.

The wife of G. W. Thomas was offered as a witness in their behalf, and the attorney for the plaintiff agreed that she would testify to the same things as her husband.

Armand Ellison was also a witness for the defendants, and corroborated their testimony in every particular. He was present when Lee told Thomas that he could donate the land if he wanted it, and said that he was not going to pay taxes on it any more and did not intend to redeem it.

Gilbert Lee, Jr., was introduced in rebuttal by the plaintiff. According to his testimony, he was living on the land at the time G. W. Thomas donated it and moved on it. He knew the land had been forfeited for taxes at the time Thomas donated it and moved on it, but he thought that anybody had a right to donate it. It was his intention at that time to try and get some one to re-

deem the land for him. It was not his intention to give the land to Mr. Thomas. He was asked if, when Mr. Thomas moved on the land, he told him that he could have it for his, and answered, "No sir. We never did have any talk about it." On the cross-examination he admitted telling Thomas that he could not work the land and make enough money to pay the taxes on it, but said that he told Thomas that, if he could get some one to redeem the land, he would keep it. Further on in his cross-examination he was asked if he did not tell Thomas that he could donate the land, and that he did not intend to redeem it, and he answered, "It seems like to me—I don't know—it has been so long. I don't know if I told him that or not." On redirect examination he again stated that he would not have moved off the land if his house had not burned down, and that it was his intention to keep on living on the place. He stated further that, after Thomas found out that he had executed a deed to Spires to the land, he, Thomas, offered him, Lee, a second-hand automobile if he would also give him a deed.

The case was submitted to the circuit court without a jury, and the court found in favor of the plaintiff, and rendered judgment accordingly. The case is here on appeal.

Fred A. Isgrig, for appellant.

Taylor Roberts, for appellee.

HART, J., (after stating the facts). The record shows that Gilbert Lee, Jr., was the owner of the land, and that he executed a warranty deed to the land to Freed G. Spires. It is true that the record also shows that the land was sold in 1922 for the nonpayment of taxes for the year 1921, but this sale was void because the records in the county clerk's office do not show that the result of the school election for the school district in which the land was situated was certified as required by § 8955 of Crawford & Moses' Digest, and the results of the election certified by the county board of election as required by § 8878 of Crawford & Moses' Digest. This rendered

the sale void. *Worthen* v. *Badgett,* 32 Ark. 496, and *Alexander* v. *Capps,* 100 Ark. 488, 140 S. W. 722.

The proper proof was made by L. W. Adams, deputy county clerk, who said that he had been employed in that office for about fourteen years, and was familiar with the land and the tax records of the office for the years 1921 and 1922. He testified that he had made a thorough examination of the records in the office, and knew that the delinquent list had not been posted as required by the statute, and that there had been no certificate showing that a school tax had been voted in the school district in which the land was situated, and that the record showed that the land was sold for the nonpayment of such school taxes as well as for the other State and county taxes due on it. This was sufficient. While matters of record must be proved by exemplification of the record, negative matter may be proved by those familiar with the record and papers. *Hendry* v. *Willis,* 33 Ark. 833.

But it is insisted that the plaintiff only put the defendants on notice that the tax forfeiture was for the sale under taxes for the year 1921. This does not make any difference. The evidence of the deputy county clerk showed that there had only been a sale of the lands in 1922 for the nonpayment of the taxes of 1921. The defendants did not claim any surprise, and the trial court had a right to treat the pleadings as amended to conform to the proof, in the absence of objections made at the time by defendants on the ground of surprise. *Bennett* v. *Snyder,* 147 Ark. 206, 227 S. W. 402.

Thus we see that the record shows that the paper title to the lands in controversy is in the plaintiff, and that he is entitled to the possession of the lands, unless he is barred of relief by the facts proved on the plea of estoppel *in pais* by the defendants. In this connection it may be stated that the plaintiff, as grantee of Gilbert Lee, Jr., the original owner of the land, is his privy in estate and must fail if, under the facts proved, Gilbert Lee would fail if he were a party plaintiff. *Ripley* v.

Kinard, 155 Ark. 172, 244 S. W. 3, and *Straughan* v. *Bennett,* 153 Ark. 254, 240 S. W. 30.

As a general rule an estoppel *in pais* may be set up in actions at law as well as in suits in equity. 21 C. J. 1118, § 121, and Pomeroy's Equity Juris. (3 ed.), vol. 2, § 801; *Dickerson* v. *Colgrove,* 100 U. S. 578, and *Barnard* v. *German-American Seminary,* 49 Mich. 444, 13 N. W. 811. In that case the Supreme Court of Michigan, speaking through Mr. Justice Cooley, held that estoppels *in pais* are called equitable estoppels because they arise upon facts which render their application, in the protection of rights, equitable and just, and that they are just as readily and fully recognized in courts of law as in courts of equity.

The principle invoked is that a party who, by his acts, declarations or admissions, either deliberately or with willful disregard of the interests of another, induces him to conduct or dealings which he would not have otherwise entered upon is estopped to assert his rights afterwards to the injury of the party so misled. *Jowers* v. *Phelps,* 33 Ark. 465, and *Merchants' & Planters' Bank* v. *Citizens' Bank,* 175 Ark. 417, 299 S. W. 753.

Many other cases laying down the principle might be cited, but we do not deem such action necessary in the present case. The underlying principle is that the conduct of the party misleading the other involves fraud, and the remedy is available for the protection of the party induced to act to his injury by reason of the fraudulent conduct and declarations of the other.

If it be conceded that the conduct and declarations of Gilbert Lee, Jr., to G. W. Thomas, as shown by the evidence for the defendants, were sufficient to operate as an equitable estoppel or an estoppel *in pais,* still the judgment must be affirmed. The reason is that the case was tried before the court sitting as a jury, and its finding must be upheld, for there is evidence of a substantial nature to support it. The evidence of Gilbert Lee was of such a substantial character as to warrant the court

in finding that he was not estopped from asserting title to the land. It is true that on cross-examination he testified that he did not remember whether or not he had told Thomas that he was not going to redeem the land, and that he could donate it, still in other portions of his testimony he said that he told Thomas that, if he could get anybody to redeem the land, he would keep it. In his direct examination he denied having any talk with Thomas about donating the land. He testified that he allowed Thomas to move on the land because he thought anybody had a right to donate it, and that he could not help himself. Again, he stated that the reason he moved off the land was that the house he lived in had burned down, and stated several times that it was his intention to keep the land if he could get any one to redeem it for him. Thus it will be seen that the court was justified in finding that the admissions he made to Thomas were made in ignorance of his own rights, because the record showed that the forfeiture for the nonpayment of taxes and the sale thereunder were void. It will be remembered that Lee testified that he permitted Thomas to move on the land because he thought he could not prevent it, and that any one had a right to donate the land. Under these circumstances the court was justified in finding that whatever declarations he made to Thomas were not made with the full knowledge of his own rights, and that he was not estopped to claim title to the land.

No other issue is raised by the appeal. The parties agreed that the claim of the plaintiff for rent and damages should be offset by the claim of defendants for taxes and improvements.

Therefore, the judgment will be affirmed.