BLAKENEY *vs.* FERGUSON ET AL.

Where the complainants set up a title to land acquired under a sale for taxes, it is not sufficient to charge that the sheriff advertised and sold the land in due form of law, according to the the statute in such case made and provided; but every fact essential to show a clear legal title must be stated.

If a party enters into a verbal contract for the purpose of land, and enters upon the possession thereof solely under the contract and in reference exclusively to it, then the possession will take the case out of the operation of the statute of frauds —such possession under the contract being a part performance of it.

Appeal from Pulaski Circuit Court, in Chancery.

This was a bill in chancery filed in the Circuit Court of Pulaski county, by Mary Ferguson, as widow, and Moses Ferguson and others, as heirs of Joseph Ferguson, deceased, against Benjamin Blakeney and the heirs of Sampson Gray, deceased, and determined at the November term, A. D. 1845, of said court, by the Hon. JOHN J. CLENDENIN, Judge.

The bill states that, on the 5th day of November, 1827, the then sheriff of Pulaski county, in the then Territory, now State, of Arkansas, advertised and sold for taxes in due form of law, according to the Statute in such case made and provided, the south-west quarter of section seventeen, in township four north, of range nine west; that one Sampson Gray became the purchaser thereof at such sale and received from the sheriff a certificate of purchase; that he sold said land to Joseph Ferguson for the sum of —— dollars, paid by Ferguson, with the express agreement and understanding that he would convey the land when he received a deed therefor from the sheriff; but that said Gray departed this life without having received a deed from the sheriff, and without executing a deed to the said Joseph Ferguson: that by virtue of said agreement, Joseph Ferguson took possession of the land, and used and occupied the same, by putting his son, Moses Ferguson, in the quiet possession and enjoyment of the same; that by virtue of an execution against Moses Fer-

guson, the said land was sold by the sheriff of Pulaski county, and Benjamin Blakeney became the purchaser, and the said sheriff executed a deed conveying to said Blakeney all the title and interest of Moses Ferguson in said land. The bill prayed the court to decree to the complainants a good, valid and sufficient title in law and equity to the land, allotting to the widow her dower interest, and to Benjamin Blakeney the interest of Moses Ferguson, purchased by him at sheriff's sale.

The defendant, Blakeney, appeared and demurred to the bill, assigning for cause that the complainants showed no title, but a parol agreement between Gray and Ferguson, which is forbidden by the Statute of frauds; no facts to take the case out of the Statute; no money paid in part performance: that the agreement is without consideration and void in law; and that there is no equity on the face of the bill.

The court overruled the demurrer, and rendered a final decree in favor of the complainants, as to Blakeney, and an interlocutory decree, as to the heirs of Gray, who were duly summoned but did not appear. Blakeney appealed, and assigned for error the overruling of his demurrer.

S. H. HEMPSTEAD, for appellant. The tract of land in question is alleged in the bill to have been acquired at a tax sale, in 1827, by Sampson Gray. Great strictness was then required in a sale of land for taxes, and the validity of the sale must be determined by the law in force at that period. Like all tax sales, it was an ex-parte proceeding, conducted under a special authority. To divest a person of his property without his consent, it is no more than reasonable that every substantial requisite of the law should be complied with, nor will any presumption be raised in behalf of a collector who sells real estate for taxes, and proof of regularity devolves upon the person who claims under the collector's sale. *Parker* v. *Rule,* 9 *Cranch* 64. *Stead's Ex'r* v. *Course,* 4 *Cranch* 403. *Williams* v. *Peyton,* 4 *Wheat.* 77. *McClung* v. *Ross,* 5 *Wheat.* 117. *Thatcher* v. *Powell,* 6 *Wheat.* 119. *Corporation of Washington* v. *Pratt,* 8 *Wheat.* 682. *Ronkendorff* v. *Taylor,* 4 *Pet.* 358.

The indispensable requisites of a valid tax title in 1827, were, 1st. The regular assessment of the land for taxation according to the provisions of the law; 2nd. Non-payment of the taxes due thereon and a deficiency of personal property wherewith to procure satisfaction; 3d. Advertisements in the mode and manner designated as to time and place of sale, and the particular lands to be offered; 4th. Sale in a public manner at the time provided by law; and 5th. A certificate of purchase and deed founded thereon. *Ter. Digest, title "Revenue,"* 470, 471, 472.

All these prerequisites must be shown by the purchaser—must be alleged and proved. The bill contains none of them—but seizing hold of a mere deduction of law from facts, alleges generally that "the land was advertised and sold for taxes in due form of law," without stating any facts at all. *"In tax sales,"* says Marshall, C. J., in *Williams* v. *Peyton,* 4 *Wheat.* 77, *"where there is no proof (and the principle more strongly applies where there is no averment) the court will infer that the requisites have not been complied with, and will consider the case as if proof of the negative had actually been made."* All these prerequisites ought to have been alleged, for it is a rule without exception that every material fact to which the plaintiff means to offer evidence ought to be distinctly stated in the bill, for otherwise a party will not be permitted to prove it. *Story's Eq. Pl.* 24. *Smith* v. *Smith,* 4 *J. C. R.* 281. *James* v. *McKernon,* 6 *J. R.* 564. *Woodcock* v. *Bennett,* 1 *Cow.* 734. *Wright* v. *Dene,* 22 *Pick.* 55.

A general allegation in a bill that the complainant *"had done all that he was bound by the contract to do,"* is insufficient; the specific acts done should be stated. *Mitchell* v. *Maupin,* 3 *Mon.* 188. *Fugate* v. *Hansford,* 3 *Litt.* 262. So a bill averring, as this does, "that ——dollars was paid," was held too imperfect to bring the merits of the case before the court, and hence subject to dismissal. *Fowler* v. *Saunders,* 4 *Call.* 361. *Jasper* v. *Hamilton,* 3 *Dana* 283. Certainly in an agreement for the sale of lands, whether written or verbal, it is absolutely necessary that the price should be stated. *Davis* v. *Harrison,* 4 *Lit.* 262. *Hobart* v. *Frisbie,* 5 *Conn.* 592. *Steel*

v. *McDonald,* 2 *Bibb* 123. *Pennsbacker* v. *Wathan,* 2 *Marsh* 317. *Hood* v. *Inman,* 4 *J. C. R.* 437.

The sale by Gray to Ferguson was verbal and as such forbidden by the Statute of frauds, nor was there any such performance as to take the case out of the Statute. Acts of part performance must appear to relate unequivocally to the identical contract set up, and the whole terms of the contract must be clear and definitely ascertained. 4 *Kent* 451. 2 *Story's Eq.* 76. *Colson* v. *Thompson,* 2 *Wheat.* 336. 2 *Sch. & Lef.* 7, 554. Delivery of possession by the vendor to the vendee is generally considered as part performance. 4 *Kent* 451. *Keatts* v. *Rector,* 1 *Ark.* 418. *Lacon* v. *Mertius,* 3 *Atk.* 1 *Butcher* v. *Stapely,* 1 *Vern.* 365. Possession of land, however, if obtained wrongfully or wholly independent of the contract, will not be deemed part performance. But if possession be delivered and obtained solely under the contract, and in reference inclusively to it, possession will amount to part performance, and especially where the party has made repairs or improvements. *Keatts* v. *Rector,* 1 *Ark.* 419. *Phillips* v. *Thompson,* 1 *J. C. R.* 149. *Hawkins* v. *Holmes,* 1 *P. Wms.* 770. 2 *Story's Eq.* 68, 69. *Rawton* v. *Rawton,* 1 *Hen. & Munf.* 91. Payment of the purchase money will not take a case out of the Statute. 2 *Story's Eq.* 64 *to* 66. 4 *Kent* 451. 1 *Ark. Rep.* 421. The facts which amount to a part performance sufficient to justify the interference of a court of chancery always depend upon circumstances, nor will a specific performance be decreed unless it appears to be necessary to prevent the perpetration of fraud and injustice. 4 *Kent* 451. *Seymour* v. *Delancy,* 6 *J. C. R.* 222. 2 *Story's Eq.* 63.

The bill under consideration presents no case to which these principles, as it appears to me, can be applied, but if it does, still, the defects in the bill relative to the tax sale are insuperable, and upon which I rely most confidently for a reversal of the decree.

JORDAN, contra.

JOHNSON, C. J. The first point presented by the demurrer relates to the sufficiency of the general allegation that the sheriff "advertised

and sold the land in controversy in due form of law, according to the Statute in such case made and provided." Every fact essential to the plaintiff's title to maintain the bill and obtain relief must be stated in the bill, otherwise the defect will be fatal. For no facts are properly in issue unless charged in the bill; and of course no proofs can be generally offered of facts not in the bill; nor can relief be granted for matters not charged, although they may be apparent from other parts of the pleadings and evidence; for the court pronounces its decree *secundum allegata et probata.* The reason of this is, that the defendant may be apprised by the bill what the suggestions and allegations are, against which he is to prepare his defence. see *Story's E. P., p.* 214. True it is, that in a particular class of cases, the same strictness is not required in equity that would be necessary at law. The same author, when treating upon the subject at page 212, says, "But although a general charge is insufficient; yet it does not follow that the plaintiff in his bill is bound to set forth all the minute facts. On the contrary, the general statement of a precise fact is often sufficient; and the circumstances, which go to confirm or establish it, need not be (though they often are) minutely charged; for they more properly constitute matters of evidence than matters of allegation. Thus, for example, if a bill is brought to set aside an award, bond or deed for fraud, imposition, partiality, or undue practice, it is not necessary in the bill to charge minutely every particular circumstance; for that is matter of evidence, every part of which need not be charged. And general certainty is sufficient in pleadings in equity. Thus, for example, the statement of a feoffment without livery of seizin, or of a bargain and sale without a statement of the enrolment thereof, will be sufficient. So, in a bill for a specific performance of a contract, if it be alleged to be in writing, it is not necessary to allege it to be signed by the party; but it will be presumed to be signed. It will readily be perceived that the reason why a general statement of a precise fact is often sufficient, is, that the general statement of that precise fact consists of numerous circumstances, each of which have a nearer or more remote relation to it, and tends more or less to its establishment. To charge the general fact in such case would amount to general cer-

tainty, and that is sufficient for the purposes of equity. But the point to be determined here is, whether this is such a case as to come within the rule. If the sale set up in the bill, and under which the complainants claim title to the premises, be such a general fact as is composed of, and capable of being established by the proof, of particular circumstances, which preceded it in the order of time, it is then possible, that those circumstances need not be set out in the bill. We cannot so regard it. The sale may have taken place strictly in accordance with the averment, and yet not one of the prerequisites prescribed by the Statute complied with; and on the other hand every prerequisite required may have been scrupulously performed, and still the sale, which is the end and consummation of all, may not have taken place. The rule of law, that prevailed at the time of the alleged sale required great strictness in the proof, and required the party claiming under the collector's sale to show, and that fully, that every step prescribed as a prerequisite to such sale had been complied with. It is perfectly obvious that each and every step, from the assessment of the tax to the sale itself, is a separate and independent fact, and that the one has not the most remote connection with the other. It is, therefore clear, that, in this case, it was necessary to allege specially every fact essential to the consummation of the title, and that having failed to do so, they could not be permitted to support them by proof.

The next point presented, relates to the sufficiency of the acts on the part of Joseph Ferguson, to constitute such a part performance as to take the case out of the Statute of frauds. The complainants allege that Gray transferred his certificate of purchase to Joseph Ferguson, the person under whom they claim, and that said Ferguson, by virtue of the sale of the land and transfer of the certificate, took possession of said tract of land and used and occupied the same in all respects as if he had a good and valid title to it; that he did so by putting his son, Moses Ferguson, in the quiet possession and enjoyment of the same, and that the said Moses has had the possession ever since, without any adverse claim having been set up by any person whatever. The certificate is exhibited in the bill, but, upon an inspection, no transfer is discovered upon it. There being no memorandum in writ-

ing of the contract between the parties, the whole matter is consequently narrowed down to the question of part performance. The averment is, that Sampson Gray, who purchased the land at sheriff's sale, afterwards sold it to Joseph Ferguson; that Ferguson paid him the purchase money, and, by virtue of the contract, entered into the possession, by placing a son upon it, and that he has ever since held the possession. This court in the case of *Keatts* v. *Rector,* 1 *A. R. p.* 418, said "mere possession of the land, if obtained wrongfully and wholly independent of the contract, will not be deemed part performance of the agreement. But if possession be delivered and obtained solely under the contract, and in reference exclusively to it, then the possession will take the case out of the Statute: and especially will be held so to do, where the party has made repairs or improvements. And in such a case not to decree specific performance, would be to practice a fraud upon him. *Butcher* v. *Stapely,* 1 *Vern.* 365. *Pyke* v. *Williams,* 2 *Vern.* 455." The doctrine of part performance, as now recognized by all the courts, goes to the extent, that, where a party makes a purchase of land and enters upon the possession solely under the contract, and in reference exclusively to it, then the possession will take the case out of the operation of the Statute of frauds. The facts alleged in this case are fully sufficient, independent of any written contract, to take it out of the operation of the Statute. Though the facts set up are insufficient to take the case out of the operation of the Statute of frauds, yet as all the facts essential to the complainant's title were not alleged in the bill, it was therefore demurrable. The court below, therefore, erred in overruling the demurrer, and consequently the decree ought to be reversed. Decree reversed.