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SUPREME COURT OF FLORIDA

CASE NO. 77,669

DON DAWSON, SR. and DORIS DAWSON, his wife,

Petitioners,

vs.

ABE SAADA and REGINA S. SAADA, his wife,

Respondents.

District Court of Appeal
4th District No. 90-0076

DISCRETIONARY REVIEW OF DECISION FROM
THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

INITIAL BRIEF OF PETITIONERS

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ORIGINAL

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PREFACE

Petitioners, DON DAWSON, SR., and DORIS DAWSON, his wife, were the appellees before the District Court of Appeal of Florida, Fourth District, and were the plaintiffs in the trial court, the Circuit Court for Broward County, Morton L. Abram, Circuit Judge (Retired). Respondents, ABE SAADA and REGINA S. SAADA, his wife, were the appellants in the appeal, and defendants and counterclaimants in the trial court.

The District Court of Appeal of Florida, Fourth District, may be referred to herein as the 4th DCA.

STATEMENT OF THE CASE AND OF THE FACTS

Petitioners brought action to quiet title to real property based on a tax deed. Respondents counterclaimed to set aside the deed. The evidence showed that the clerk performed all things preliminary to issuance of the deed except that of providing the sheriff with the additional notice as directed by §197.522(2), Fla. Stat. (1985). At trial, as a defense to the counterclaim, petitioners' attorney argued that respondents failed in their duty imposed by §197.332, Fla. Stat. (1985), and by the common law; and that as such are barred by §197.404, Fla. Stat. (1985), and §65.081(3), Fla. Stat. (1977) from interposing any defense other than that the taxes on the property were paid by them prior to issuance of the tax deed.

The trial judge, Morton L. Abram, entered judgment (Appendix II) upholding the validity of the tax deed. Judge Abrams states, on pages 90-91 of the transcript (Appendix III), his reasoning as being on equitable grounds: no fraud is imputed in the tax

collector [who acts for the clerk in Broward County]; he discharged his obligation to notify respondents on serveral occassions; and it was incumbent on petitioners to make sure their taxes were paid [duty imposed by §197.332, Fla. Stat.].

The Fourth District Court of Appeal reversed the trial court (Appendix I) for failure of the clerk to attempt personal service required by §197.522(2), Fla. Stat., [providing the notice to the sheriff], on the ground that tax deeds have been repeatedly held invalid where statutory procedures are not followed. However, the appellate court certified the following question to this Court as one of great public importance:

> WHETHER FAILURE TO COMPLY WITH THE REQUIREMENTS OF SECTION 197.522, FLORIDA STATUTES, INVALIDATES THE ISSUANCE OF A TAX DEED NOTWITHSTANDING THE LANGUAGE IN SECTIONS 197.404 AND 65.081(3), FLORIDA STATUTES.

SUMMARY OF ARGUMENT

The language in both §197.404 and §65.081(3) is clear and unambiguous. The provisions in §197.404 have been in existence early in Florida law, well prior to 1930. Subsection (3) was added to §65.081 under the laws of 1974 and restricts the jurisdiction of the courts in maintaining defenses and attacks on a tax deed to that of taxes having been paid by the former owner of the property before issuance of the tax deed.

The action to quiet title and respondents' counterclaim to render the tax deed void are matters determinable in equity. Petitioners are entitled to all their defenses to the counterclaim, including the defense that the tax deed was issued through the fault and negligence of respondents in failing to pay

their taxes in breach of their duty under §197.332 and the jurisdictional requirement for defenses and attacks on tax deeds imposed by §65.081(3).

Subsection (3) was attached to §65.081 in 1974. §65.081 specifies the jurisdictional requirements in quiet title actions under tax deeds. Prior to 1974, only subsections (1) and (2) were in effect: (1) the right of parties to bring such actions and (2) the requirements of deraigning title. By adding subsection (3) the legislature limited the jurisdiction of the courts on defenses and attacks on tax deeds to that of taxes assessed against the property having been paid by the former owner before issuance of the tax deed.

It cannot be imputed that the legislature, in passing subsection (3), had no knowledge of existing Florida law, including that of stare decisis wherein the courts have held that a tax deed is invalid if the sale on which it is based is invalid because of failure of the clerk to perform all of his essential duties of notice of the sale.

The procedure under which the sale and tax deed were issued was caused by the property owner failing to pay his taxes, a duty imposed by law. This contributory negligence defense cannot be denied to the petitioners. Respondents' defense to the quiet title action, that the clerk failed to provide the sheriff with the notice of sale, has been barred by the jurisdictional requirements of §65.081, Fla. Stat. To hold otherwise, this statute must be declared invalid. Statutes must be construed pari materia with other statutes, and can be declared invalid

only if unconstitutional.

The language of §65.081(3) is mandatory. To render the tax deed was void because the clerk failed in his duty to properly notice the sale, is to declare the statute a nullity because of the effect of §197.522. This is not a constitutional ground. Causes of action and defenses may be restricted at the discretion of the legislature. Statutes of limitation are examples of such restrictions.

§197.522, Fla. Stat., is directed to the clerk specifying his duties with respect to tax sales. The duties of the taxpayer are specified under §197.332. Courts in the past have found that the property owner may avail himself the defense of the clerk's not having performed the jurisdictional duties directed to him. It should be noted that receipt of any notices, including the notice to be given to the sheriff, is not required. This was at the discretion of the legislature and does not violate due process. The legislature has further discretion to bar all defenses (except payment of taxes prior to issuance of the tax deed) since the property owner is duty bound to know his taxes are due annually, to inquire and ascertain their amount and pay same within a designated time period: two years plus the time up to issuance of the deed. The notice requirements under §197.522 are a gratuity which can be restricted at the discretion of the legislature; and were restricted by §197.404 and/or §65.081(3), Fla. Stat., except for the property owner's performing his duty directed to him by §197.332, Fla. Stat.

ARGUMENT

Resolution of the question certified to this Court raises the following issues issues of law, to each of which petitioners present the following arguments.

> 1. IS THE HOLDER OF A TAX DEED PRECLUDED FROM THE DEFENSE THAT HE ACQUIRED THE DEED BECAUSE OF THE FAULT OR NEGLIGENCE OF THE PERSON SEEKING TO VOID THE DEED WHO THUS CANNOT AVAIL HIMSELF OF THE PROTECTION OF §197.522(2), FLA. STAT., OVER THE REQUIREMENTS OF §197.404 AND §65.081(2), FLA. STAT., WHICH PROTECT THE TAX DEED HOLDER?

The answer is in the negative. The defense of contributory negligence, failure to have "clean hands" in equity, has always been available. Further, before respondents could avail themselves of their counterclaim to void the tax deed, which is an equitable cause, they must show "clean hands". The duty of property owners to know their land is taxable and to pay their taxes when due has always been part of Florida law, and has been verified by §197.332, Fla. Stat.:

> * * * All owners of property shall be held to know that taxes are due and payable annually and are charged with the duty of ascertaining the amount of current or delinquent taxes and paying taxes before the date of delinquency.

To allow the former owners protection of the clerk's having inadvertently failed without fraud, as found by the trial court, on one of the directives to him imposed by §197.522, Fla. Stat., when the former owners have breached their duty imposed by common law and statute would render the defense of contributing fault and the doctrine of "unclean hands" a nullity in actions which involve tax deeds.

Statutes should be construed as in pari materia so as to give pari materia field of operation. Whittington v. Davis, 159 Fla. 409, 32 So.2d 158, 161 (1947). Both §197.404 and §65.081(3) Fla. Stat., impose payment of taxes, if the property is taxable, as a necessary element to attack of a tax deed. They impose the necessity of "clean hands", the satisfaction of the property owner's duty in order to get judgment voiding a tax deed. They work pari materia in operation with the affirmative equitable defense.

§197.522, Fla. Stat., is directed to the clerk. Although it has been repeatedly held that if the clerk fails in his duties under this statute, then the former owner can avail himself of such failure, this does not preclude the defense of breach of the former owner's duty. When the breach of such duty is brought as a defense, then the ruling is for the tax deed holder. Goodman v. Carter, 158 Fla. 112, 27 So.2d 748 (1946) where this Court reversed Judge Tedder, Sr., of Broward County, who set aside a tax deed. This Court quoted from §192.21, Fla. Stat. (1941) with wording almost identical to the present §197.404. In Thompson v. City of Key West, 82 So.2d 749 (Fla.1955), although the duties of the clerk were not challenged, the property owner claiming he had not received the notice, this Court upheld the tax deed on the defense of breach of the legislature's presumption that every property owner is on notice that his taxes are due annually and that this presumption is not unreasonable: "It is a common cliche that 'death and taxes are certain.'" Quotation is from the court.

It is not required that the property owner receive any notice which the clerk is required to give under §197.522. The property owner is held to know his taxes are delinquent without the necessity of notice, and the same has been held not to violate due process of law. This statute (§197.522) has its own field of operation merely as a gratuity to aid the property owner. He should not be permitted to avail himself of the clerk's failure when the property owner has breached his duties with respect to his property. See 85 C.J.S. Taxation §973 p. 452 n. 10, which states that he "must show that his predicament is not due to his own fault or negligence."

Southern Pine Co. of Georgia v. Murphy Inv. Co., 126 Fla. 531, 171 So. 325 (1936), on page 326:

> [I]t is no ground of complaint or defense to a delinquent taxpayer being sued as defendant in such foreclosure for him to attempt to set up that the clerk of the circuit court may have improperly or illegally transferred state certificates . . .

By the same token, why should respondent be permitted to set up the inadvertent misfeasance of the clerk to void the tax deed? Do we have a different standard of bringing matters in avoidance when it comes to setting aside tax deeds? Further, the trial judge, acting as chancellor, found that the tax collector [acting for the clerk] discharged his duties on notification. See his opinion on page 91 of the transcript (Appendix III). The trial judge's discretion on evidence in equity can be overruled only when it appears clearly and convincingly that he is in error.

According to 84 C.J.S. Taxation §695 (p.1373), compliance with statutory provisions for sale of property is necessary: "but substantial compliance is sufficient." The trial judge found compliance of notice sufficient. The clerk fulfilled his duty of contructive service by the clerk's attempts on many occassions (which respondents were not required to receive), but respondents were derelict in their duty imposed §197.332, Fla. Stat. The provisions of §197.404 and §65.081(3) should prevail over the provisions of §197.522(2); the latter statute being directed to the clerk, the others to the property owners.

2. IN ENACTING THE PROVISIONS OF §65.081(3), FLA. STAT., IN 1974, DID THE LEGISLATURE LIMIT JURISDICTION OF THE COURTS FOR ADJUDICATING ATTACKS ON A TAX DEED TO THE ISSUE OF WHETHER TAXES ON THE PROPERTY WERE PAID BY THE FORMER OWNER PRIOR TO ISSUANCE OF THE TAX DEED?

The answer is in the affirmative, the language of §65.081(3) being clear, unambiguous and mandatory:

> No defense to the action or attack upon the tax deed shall be make except the defense that the taxes assessed against the property had been paid by the former owner before issuance of the tax deed.

By adding subsection (3) to §65.081 in 1974, the legislature is imputed to be cognizant of its prior acts and the stare decisis of their interpetation. The courts have repeatedly interpeted §197.404 as non-effective on tax deeds if can be shown that the clerk substantially failed in his duties imposed by §197.522. This interpetation is based on the theory of law that if the clerk failed to perform necessary things required of him,

the sale would be ineffective and thus a suit to quiet title on a tax deed laid open the defense that the deed was void per se if the sale on which it is based is void.

§65.081, Fla. Stat., specifies jurisdictional requirements for quiet title actions on tax deeds. Prior to 1974 only subsections (1) and (2) were in effect: (1) the right of parties to bring action, and (2) the requirements of deraigning title. By adding subsection (3) in 1974, the legislature limited jurisdiction on attacks which could be heard by the courts, thus nullifying voiding a tax deed on any other grounds.

The legislature can limit the jurisdiction of the courts unless it can be shown that the limitation is unconstitutional. It has been repeatedly held that such limitations are constitutional. See 85 C.J.S. Taxation §984 on page 493:

> [A] statute limiting the time for bringing action to recover lands held uder tax deeds would serve no purpose if it could be invoked only where the tax deed is valid, and that its protection, therefore, extends to all instances in which the title is claimed under the deed.

If the legislature can limit jurisdiction if a cause of action is not brought timely, it certainly can limit the causes on which the action is brought.

Decisions of the courts apparantly have made exception as to causes on tax deeds, but the legislature, cognizant of this, enacted §65.081(3), Fla. Stat. We cannot impute any other intent of the legislature on the clear language of the statute. Please note the wording "prior owner" in the statute. This shows intent to make the deed voidable and not void per se. If a suit or

counterclaim is not brought attacking the deed, it would stand. A former property owner might not avail himself of action to void the deed. The legislative intent is clear that once a tax deed is issued, it can be voided only on showing the taxes were paid prior to issuance.

The Court is asked to consider its decision in Saunders v. Quantrell, 206 So.2d 645 (Fla.1968) wherein the Court totally adopted the dissenting opinion of Judge Wigginton in Gilliam v. Saunders, 200 So.2d 588, 591 et seq., (Fla. 1st DCA 1967) fully expressing this Court's views.

The decision and dissenting opinion is attached hereto as Appendix IV. On pages 592-593 discusses the "mandatory" provision of proof of publication and states that he assumes the legislature, in enacting the 1941 tax law, knew that the Supreme Court had held that provision mandatory and jurisdictional. He states that the legislature had some useful purpose in eliminating it, and that it did not intend it to be a useless or futile act.

By the same token, we cannot consider that the legislature intended §65.801(3) to be useless and futile. Obviously this is not the legislative intent.

Judge Wigginton further quotes from the Supreme Court of Arizona in Consolidated Motors, Inc. v. Skousen (1941), 56 Ariz. 481, 109 P.2d 41, 132 ALR 1040, 1045, as expressing the modern trend of both legislative and judicial thinking. The presumption was against the validity of a tax sale [and thus the deed] and it was necessary to prove in uttermost detail a compliance with the

statute for sale. This effect was to make titles almost impossible to establish hampering collection of taxes. The modern tendancy of courts is to regard many provisions heretobefore considered jurisdictional to be directive.

This attitude of protecting the former landowner would invalidate all legislative attempts to assure titles under tax deeds and improve tax collection. We must impute the legislature's intent on the clear language of its statutes. The courts cannot assume jurisdiction they do not have. §65.081(3) is another attempt of the legislature to deprive the courts of jurisdiction on hearing matters in voiding tax deeds other than that of the taxes having been paid before the tax deed was issued.

To ignore the clear language of a statute is to declare it invalid; and a statute to be invalid must be unconsitutional such as its denying due process of law.

§197.332, Fla. Stat., outlining property owners responsibilities to payment of taxes, and §197.404 and §65.081, limiting jurisdiction on attacks on tax deeds, have a mutual sphere of operation and are pari materia. The property owner is not denied due process in that he had ample time to redeem during the pendency of tax certificates and up to the time of the tax deed's issuance. He had a duty to know his taxes and that they were delinquent.

Panama City Airport Board v. Laird, 90 So.2d 616 (Fla.1956):

> Of course, a legislative act and its title should not be considered in isolation and without reference to other statutes necessarily involved.

City of Boca Raton v. Gidman, 440 So.2d 1277, 1282 (Fla.1982):

> A law should be construed together with any other law relating to the same purpose and such that they are in harmony. [citations omitted] Courts should avoid a construction which places in conflict statutes which cover the same general field. [citations omitted] The law favors a rational, sensible construction. [citations omitted].

If reasonably practical, a statute is to be explained in conjunction with other statutes to the end that they may be harmonious and consistent body of law. State v. Collier County, 171 So.2d 890 (Fla.1965). The court quotes from State v. Gadsen County, 63 Fla. 620, 58 So. 232 (1912):

> If the two may operate on the same subject matter without positive inconsistency or repugnancy in their practical effect and consequences, they should each be given the effect designed for them unless a contrary intent clearly appears.

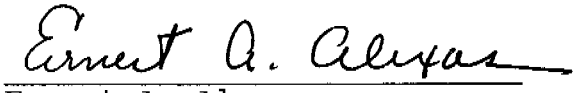
The statutes involved operate in complete harmony within the clear intent of the legislature. §197.332 specifies the duties of the property owner for which he must be held liable. §65.80 specifies the jurisdictional requirements for actions on tax deeds. §197.522 specifies the duties of the clerk on tax sales intended as a gratuity to the property owner. He is deemed to know, by the effect of §197.332, that he can lose his property. We cannot impute that the legislature intended not to limit the jurisdiction for attacking tax deeds beyond what is specified in §65.081(3). To impute that the legislature intended §197.522 to grant jurisdiction over what is specifically states in §65.081(3) is to render §65.081(3) ineffective and invalid which cannot be done unless declared unconstitutional.

I do not see the statutes to be in conflict. In §197.522 the legislature does not indicate specific intent to protect the property owner and it must be read in conjunction with §197.332 wherein the property owner's duties concerning payment of his taxes are specified. Any such intent is imputed by the courts and not by the legislature. By enacting §65.081(3), the legislature specifically deprives the courts further jurisdiction and authority to enforce the provisions of §197.522 as jurisdictional and mandatory, and changes the previous law of stare decisis. Conflict, if it exists, is caused by judiciary interpetation of the statutes.

CONCLUSION

This Court is urged to consider the above and its decision to adopt the dissent of Judge Wigginton. It is urged that the will and intent of the legislature be considered and this Court answer the question certified before it in the negative, thus affirming the judgment of the Circuit Court and reversing the decision of the District Court of Appeal, Fourth District.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I CERTIFY that copy of the foregoing initial brief of petitioners together with its appendix was furnished and served by mail on this May 6, 1991 to the following:

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