

APPLETON et al. v. SMELSER et al.

(Circuit Court of Appeals, Fifth Circuit. February 20, 1894.)

No. 198.

APPEAL—DECISION—MODIFICATION OF DECREE.

A demurrer for want of equity and for multifariousness, which, in the opinion of the appellate court, should have been sustained, and the bill dismissed without prejudice, was overruled by the court below, and thereafter a hearing was had, in which complainants produced evidence, indicating equities which entitled them to the relief prayed. The court, however, instead of permitting an amendment, then entered a decree sustaining the demurrer, and finally dismissing the bill. *Held*, that the only relief to be afforded on appeal was to cause the decree to be amended so as to dismiss without prejudice.

Appeal from the Circuit Court of the United States for the Eastern District of Texas.

In Equity. Bill brought by Minnie M. Appleton, T. J. Appleton, and James M. Strong against J. H. Smelser, B. T. Estes, and the Bowie Lumber Company to recover the value of timber alleged to have been wrongfully cut from lands in which complainants have an interest, and for partition of such lands. The demurrer was at first overruled, but after evidence was taken, and a hearing had, the demurrer was sustained, and the bill finally dismissed, from which decree the complainants appeal.

F. M. Henry and E. B. Kruttschnitt, for appellants.

Charles S. Todd and H. C. Hynson, for appellees.

Before PARDEE and McCORMICK, Circuit Judges.

PARDEE, Circuit Judge. The appellants, complainants in the court below, brought their bill against the defendants, J. H. Smelser, B. T. Estes, and the Bowie Lumber Company, wherein they allege that the complainants were the legal and equitable owners of one undivided two-thirds of a large tract of land; that the defendant B. T. Estes was the legal owner of the remaining undivided third; that the defendant J. H. Smelser unlawfully entered upon the said tract of land, and sold to the defendant the Bowie Lumber Company all the timber standing and growing upon the same, and unlawfully entered into a conspiracy with the said lumber company for the purpose of wrongfully cutting down, and carrying away from and off the said tract of land, all the said timber; and that, in pursuance thereof, the said defendants Smelser and the Bowie Lumber Company had cut down and carried away from said tract of land an aggregate amount of 21,000,000 feet of timber, which they had converted to their own use. In said bill, complainants further allege that they have a right to recover judgment against the said Smelser and the Bowie Lumber Company for two-thirds of the value of said 21,000,000 feet of timber; that the said Smelser and the Bowie Lumber Company are now in possession of said tract of land, and are continuing to commit waste by cutting down and carrying away timber, etc.; and, finally, that the said defendants Smelser and the Bowie Lumber Company are setting up some pretended claim of own-

ership to said tract of land, and a right to cut and carry away the timber. The prayer of the bill is for a partition and division of all the said tract of land between the complainants and the defendant B. T. Estes, in accordance with their respective rights and title; that commissioners be appointed to make such division and partition; and, further, that an account be taken and stated of the value of the trees and timber cut and carried away from off said tract of land by the defendants Smelser and the Bowie Lumber Company, and for a judgment and decree against the said Smelser and the Bowie Lumber Company for two-thirds of the value of the timber cut and carried away from said tract of land.

The defendants Smelser and the Bowie Lumber Company filed a demurrer to the bill for want of equity and multifariousness. This demurrer, on argument, was overruled, and thereupon the defendant B. T. Estes answered, admitting himself to be the legal owner of one undivided one-third of the tract of land in question, and further admitting that he had been paid for his share of the timber removed. The defendants Smelser and the Bowie Lumber Company answered, setting up title to the one undivided two-thirds of the tract of land claimed by complainants, and putting at issue all the material averments of the bill. Replication was duly filed, an examiner appointed, and evidence taken. The evidence taken shows that any title which the complainants may have to the land in controversy is equitable, and develops a case in which, if the complainants maintain their equitable title, they are, in equity, entitled to relief as against all the defendants to the bill. On final hearing, the court entered the following decree:

"This cause coming on to be heard upon the defendants' demurrer to plaintiffs' bill, and after hearing arguments of counsel and duly considering said demurrer, the court is of the opinion that the demurrer should be sustained. It is therefore ordered, adjudged, and decreed by the court that the defendants' demurrer to plaintiffs' bill be in all things sustained, that plaintiffs' bill filed in this cause be dismissed, that the defendants recover their costs, and that the plaintiffs be adjudged to pay all costs incurred in this cause, for which let this execution issue."

From this decree the appellants prosecute this appeal, assigning numerous errors attacking the decree on the evidence, not necessary to recite.

In our opinion, the demurrer, when first heard, should have been sustained on the ground assigned, and the bill, unless amended under leave of the court so as to present a case entitling the complainants to equitable relief, should have been dismissed without prejudice. As this was not done, but, on the contrary, the demurrer was overruled, and evidence was taken which, as we have noticed, developed equities in the complainants, the court, on the hearing, might still have permitted the complainants to amend on such terms as to the court seemed just, or have dismissed the complainants' bill, with costs, but without prejudice. As the case is presented in this court, the only relief which, in our opinion, can be granted to the appellants, is to cause the decree appealed from to be so amended as not to prejudice the complainants in the future prosecution of any rights

they may have in the premises. See *Buzard v. Houston*, 119 U. S. 347, 7 Sup. Ct. 249.

The decree appealed from is reversed, and the cause remanded to the court below, with instructions to enter a decree dismissing the complainants' bill for want of jurisdiction, and without prejudice.

WOOD et al. v. COLLINS et al.

(Circuit Court of Appeals, Fifth Circuit. February 13, 1894.)

No. 186.

1. APPEAL—SUFFICIENCY OF EVIDENCE—FINDINGS OF COURT.

On a bill to restrain an action of trespass to try title it is immaterial whether complainant did actually admit that respondent was the owner of a certain patent title to the land, as it stated in the findings that he did, when there is sufficient evidence in the case to show that respondent was the owner of such title.

2. PUBLIC LANDS—PRE-EMPTION—PROOF OF OCCUPANCY.

Under the Texas land laws, the pre-emptor of land loses his right there to, as against a subsequent patentee, where he fails to file the required proof of his occupancy in the land office before such patentee locates his certificate.

3. EQUITY—DECREE—CROSS BILL.

On a bill to restrain an action at law to try title to land, where the court dismisses the bill and dissolves the preliminary injunction granted in the cause, it is error to decree further that respondent should recover the land in question from the complainant, and should have a writ of possession for the same, in the absence of a cross bill praying such affirmative relief.

Appeal from the Circuit Court of the United States for the Northern District of Texas.

In Equity. Bill filed by J. F. Wood and others against John S. Collins and others. There was a decree for respondents, and complainants appeal.

This suit was brought by appellants by bill in equity to restrain prosecution of a suit at law instituted by appellees on the law side of the docket against appellants to recover 320 acres of land in McLennan county, Tex., patented to the heirs of W. P. Johnson, December 12, 1872, upon a location and survey made in 1871. Appellants allege in their bill that they have the equitable title to the same land, derived by regular chain of transfer from J. D. Bivens, who settled the same as a pre-emptor in January, 1853, under the pre-emption laws of Texas, at the time when it was vacant, and subject to pre-emption; that Bivens, and those succeeding him by transfer from him, occupied, improved, and cultivated the land the time required by law to entitle him to a patent; that they had the land surveyed, field notes recorded and returned to and filed in the land office at Austin, made proof of occupancy, etc., February 14, 1857, which was filed in the land office January 25, 1875, and did every act required by law to entitle him to patent, but that patent did not issue because of the said Johnson patent. They prayed for cancellation of said Johnson patent, and that complainants' title be decreed to be a good, equitable title to said land, and that it be perfected into a legal title, and for a writ of injunction in the form prescribed by law enjoining and restraining the defendants herein and plaintiffs in said suit at law, and each of them, from further prosecuting said suit at law against complainants, and from offering, using, or introducing in evidence in said suit at law the said patent, until the rights of complainants in the premises can be fully inquired into. Appellees herein answered said bill, denying all the allegations therein;