

5. If I am mistaken in my view of the law, and this decree ought to be reversed, yet the order to dismiss the bill at plaintiff's cost for want of jurisdiction seems to me to be erroneous. This order deprives the circuit court of the power to permit an amendment of the bill, a plea to the jurisdiction, and a trial of the issue whether or not the plaintiff's claim is fictitious and colorable. An opportunity should be given to the appellee to try this issue in the forum of his choice. This is the practice in the supreme court and in the other circuit courts of appeals in cases of this character, and, if the decree is to be reversed, the circuit court should be instructed to permit the complainant to amend his bill, to permit the defendant to interpose a plea to the effect that this claim of \$2.25 is fictitious and fraudulent, to try that issue, and, if the plea is sustained, to dismiss the bill, and, if it is not, to enter the former decree. *Stuart v. City of Easton*, 156 U. S. 46, 15 Sup. Ct. 268; *Robertson v. Cease*, 97 U. S. 646, 651; *Hartog v. Memory*, 116 U. S. 588, 6 Sup. Ct. 521; *Ashley v. Board*, 16 U. S. App. 656, 8 C. C. A. 455, 468, and 60 Fed. 55.

ALLIS et al. v. STOWELL.¹

(Circuit Court, E. D. Wisconsin. June, 1880.)

1. REHEARING—REQUISITES OF PETITION AND AFFIDAVIT.

A petition for rehearing must be signed by counsel. Neither it nor the affidavits in its support should be verified before a notary public who is also counsel for petitioner. The affidavits should, by distinct and positive allegations, be made a part of the petition.

2. SAME—NEWLY-DISCOVERED EVIDENCE.

A petition for rehearing, on the ground of newly-discovered evidence, must fully state, independently of the accompanying affidavits, the nature of the new evidence relied on, that it was not known to the petitioner until after the decree, and when it did first come to his knowledge. It must further disclose with particularity and detail sufficient facts to show that, with reasonable diligence, the new evidence could not have been known before the hearing on the merits.

This was a suit in equity by Edward P. Allis and others against John M. Stowell. The cause was heard upon a petition and accompanying affidavits for a reopening of the case and for leave to amend the answer in certain particulars.

W. G. Rainey, for complainants.

E. H. Bottum, for defendant.

DYER, Circuit Judge. After some delay, which has seemed unavoidable on account of the pressure of other duties, I have carefully considered the application of the defendant for a reopening of this case and for leave to amend his answer in respect of the matters which are made the basis of such application; and, to enable me to

¹ This case has been heretofore reported in 5 Ban. & A. 458, and is now published in this series, so as to include therein all circuit and district court cases elsewhere reported, which have been inadvertently omitted from the Federal Reporter or the Federal Cases.

form a correct judgment upon the question discussed at the argument, I have looked with care into the authorities cited by counsel which bear upon and point out the true practice, in matters both of form and substance, upon applications of this character. As a result of such investigation, I have come to the conclusion that, if I were to entertain the present petition, I should sanction a practice which was not approved by Mr. Justice Story and other eminent judges who have expressed opinions upon the practice to be pursued, in applications for rehearing, after decree, based upon newly-discovered evidence. An examination of the authorities clearly shows that the courts proceed, in the consideration of applications like the present, with great caution, and are controlled in their action by stringent rules. These rules I feel bound to observe, and, without elaborating upon the subject, I must hold that the present petition is defective in the following particulars: (1) It is not signed by counsel. (2) It is sworn to before Mr. Bottum as a notary public, he being also counsel for the petitioner in the case. (3) The affidavit of the defendant, Stowell, intended to accompany the petition, is also sworn to before Mr. Bottum as notary public. (4) The various affidavits which are presented for consideration, in connection with the petition, are not, distinctly and positively, by apt allegation, made part of the petition. (5) The petition does not state with sufficient fullness, independently of the affidavits, the nature of the alleged newly-discovered evidence. (6) It does not state, as it should, positively and unequivocally, that the alleged newly-discovered evidence was not known to the petitioner until after the decree, nor when it did first come to his knowledge. (7) It does not state with requisite particularity and detail what search was made, before the hearing of the cause, for evidence, what diligence was exercised, and wherein and how it was exercised. Particular and sufficient facts should be disclosed to show that, with reasonable diligence, the alleged newly-discovered evidence could not have been found or known before the hearing on the merits. (8) The petition does not sufficiently disclose the circumstances under which the new evidence was discovered. Dates, particular circumstances, and written correspondence, if any, are not shown, and the allegations in relation thereto are very general.

It is to be borne in mind that the present application is one, not only to reopen the case for further hearing after interlocutory decree, but also to amend the answer and introduce new subject-matter for purposes of defense; and, although it is my view that such an application as the present may at this stage of the case be made in the form of petition and affidavit, I am of opinion that, for the reasons and in the particulars above stated, this petition must be held defective. In the light of the authorities, no good grounds are stated for reopening the case as to the Beckwith patent, and the defendant's application will be denied absolutely, so far as it relates to that patent.

His application to vacate the decree and amend his answer with reference to the Selden patent will also be denied; but, as the alleged newly-discovered evidence seems to bear upon the merits of the

complainant's claim under the Selden patent, and as some of the grounds upon which the present petition is held defective are technical, the petitioner's application, to the extent that it relates to the Selden patent, will be denied, without prejudice to his right to file, on or before the 10th day of August, 1880, an amended or substituted petition for a rehearing, to the extent indicated, and for leave to amend his answer as heretofore prayed, with the right to use the affidavits and exhibits now on file with the present petition, except the affidavit of the defendant, Stowell, in the present form of verification. In case, however, such amended or new petition shall be filed, it must be on condition that the defendant pay the taxable costs thus far incurred in his application for a rehearing, and that he also pay the necessary traveling and other expenses of the complainant's solicitor, incurred by him in attendance upon the former hearing of the defendant's application, together with \$30 solicitor's fees.

GILLIS v. DOWNEY.

(Circuit Court of Appeals, Eighth Circuit. February 28, 1898.)

No. 979.

1. SUIT TO QUIET TITLE—OWNERSHIP OF TITLE—MINING LANDS.

While, as applied to ordinary claims of real estate in nonmining states or territories, the rule is general that to entitle the claimant to maintain an action to quiet title he must be the owner of the title to the land, yet, in respect to claims to mining lands in the Western states and territories, a system of mining customs, wages, and rights has developed taking the form and sanction of prescriptive laws of universal recognition, which national and state legislatures later crystallized into written statutes, and in which ownership of the title is not essential to the maintenance of such an action.

2. LOCATION OF MINING LANDS—PATENT.

So long as the locator of mining lands complies with the statutory requirements and performs \$100 worth of work in each year, he is entitled against all the world, subject to the paramount sovereignty of the United States, to hold and enjoy his possession, even though he never apply for nor take out a patent. Rev. St. 1878, §§ 910, 2322, 2324.

3. EQUITY JURISDICTION—STATE STATUTE.

Where the requisite diverse citizenship exists, a suit may be brought on the chancery side of the federal court in a given state by a person in actual possession of real estate therein to quiet his title as against an adverse claimant, predicated the suit upon the state statute extending to such cases the jurisdiction of the state courts.

4. MINING CLAIMS—ADVERSE CLAIM—SIXTY DAYS' NOTICE.

The fact that the 60 days prescribed in Rev. St. 1878, § 2325, for publication of notice of an application for a patent has expired before the application is advertised, does not preclude a contest of the applicant's right to a patent, where the adverse claim does not arise until after the expiration of the 60 days, and where the applicant has let his application lie dormant for years without either paying the purchase money or doing the required \$100 worth of work each year.

5. SAME—ABANDONMENT—RELOCATION.

The filing of an application for a patent does not suspend the obligation to keep up the required annual work where, without paying the purchase money, the claimant permits his application to sleep for years; and upon such failure to comply with the conditions the claim is open to relocation in the same manner as if no location had ever been made.