UNITED STATES V. SAUCIER, 1891-NMSC-008, 5 N.M. 569, 25 P. 791 (S. Ct. 1891)

THE UNITED STATES OF AMERICA, Appellees,
vs.
FRANK SAUCIER and JOHN SAUCIER, Appellants

No. 414

SUPREME COURT OF NEW MEXICO

1891-NMSC-008, 5 N.M. 569, 25 P. 791

January 1891, Term

Appeal, from a Judgment for Plaintiff, from the Third Judicial District Court.

The facts are stated in the opinion of the court.

COUNSEL

Eugene A. Fiske and George C. Preston for appellees.

If the defendants in this case have lawfully cut the timber from the lands of the United States, they should show it as a matter of defense, bringing themselves clearly within the license of the act of June 3, 1878, and the regulations of August 5, 1866. 15 Opinions of Attorneys General, 191; Gould's Notes on Rev. Stats. U. S., sec. 3456; 103 U.S. 697; 12 Pac. Rep. 851.

JUDGES

McFie, J. O'Brien, C. J., and Seeds, Lee, and Freeman, JJ., concur.

AUTHOR: MCFIE

OPINION

*{*570}* **{1}** In this action the United States sued Frank and John Saucier in the district court of the Third judicial district, in an action of trover. The declaration was filed March 7, 1888, and contains two counts, the first charging that on the/--day of--- A. D. 1887, the defendants cut and appropriated to their own use five hundred trees of the value of $ 500; the second charging the appropriation of ten thousand feet of lumber of the value of $ 250 from the public lands of the United States. October 1, 1888, defendants filed a demurrer to the declaration, assigning the following causes of demurrer: (1) That the first count joins two separate causes of action -- trespass and trover -- and does not allege the date when committed; (2) the second count does not allege the date of the

*{*571}* wrong or injury complained of; (3) that the declaration does not allege that the lands were nonmineral from which timber was taken. The cause was continued by consent until March term, 1889, and on the eleventh day of March, 1889, the court overruled the demurrer. The defendants filed two pleas: (1) not guilty; and (2) that if any timber was converted by defendants it was taken from mineral lands; that they were bona fide residents of the territory of New Mexico; that no trees were cut more than eight inches in diameter, and that the lumber was sold to bona fide residents, for building, agricultural, mining, and other domestic purposes. Plaintiff joined issue on first plea, and filed two replications to second plea denying that the land was mineral in character. Trial was had upon issues thus formed, by jury, and resulted in a verdict for plaintiff for $ 375. Motions for new trial and in arrest of judgment were overruled, and judgment was entered on the verdict. The defendants, to review this judgment, brought the case to this court by appeal.

{2} The declaration alleges, and the proof shows, that the land from which the timber is alleged to have been taken, was sections 21 and 22, in township 11 south, of range 9 west, and situated in Sierra county, and in the Third judicial district of New Mexico. All of this land, with the exception of one forty acre tract (the S. E. of S. E. of sec. 21), is included in two preemption claims made at the Las Cruces land office by Mr. Austin Crawford and Mr. W. H. James. In fact the only attempt to locate the land from which the timber was alleged to have been taken was by witnesses testifying that the timber cut was upon these claims. There is no proof that there was any timber cut on the forty acre tract in section 21, not embraced in these preemption claims. A large number of errors are assigned, chiefly as to the admissibility of evidence, but there are two important questions presented by this record: *{*572}* (1) Did the court err in giving to the jury its seventh instruction? (2) Did the court err in excluding evidence offered by defendants as to the mineral character of the land? During the progress of the trial Mr. E. G. Shields, at that time register of the United States land office for the Las Cruces, New Mexico, district, and custodian of the records of said office, was called as a witness for the plaintiff. The records of the office were identified by him, and were competent evidence in the case. Bly v. U. S., 4 Dill. 464, 3 F. Cas. 767. Mr. Shields was recalled by the plaintiff, and testified as follows, as to whether the preemptors Crawford and James had paid the United States for the lands embraced in their preemption claims: Question. "State whether Mr. James and Crawford have paid for this land in pursuance of the requirements of law. Answer. Yes, sir." The record is silent as to final proof or the issuance of final receipt. In 1884 the commissioner of the general land office, in his instructions to registers and receivers, said: "There is no authority for receiving proofs in advance of action in allowing or rejecting an entry, and you have no authority to act upon entry applications until the party is prepared to consummate entry by making proof and payment. In other words, proof and payment must be made at the same time." 3 Land Office Decisions, p. 188. We must presume, therefore, in the absence of proof to the contrary, that the officers of the government did their duty, and that final proof, showing full compliance with the law by the settlers, was made when payment was made. In fact, the register was asked, and answered "that payment was made in pursuance of the requirements of law." If that be true, then the settlers had done all that the law required of them, and the further presumption must then be indulged that final

receipt was issued to these settlers for the land from which the *{*573}* timber, if any, was taken. Mr. Shields was asked, on page 56 of the record, when payment was made, and answered: "I have forgotten the date now. I think it was in June, 1886, I said yesterday." The declaration alleges that the timber was appropriated "on the/--day of/--, 1887." No date being fixed, it is limited to the year 1887. The preemptors had purchased and paid for the land prior to the alleged injury. The settlers having done all they could, and paid the government for the land, they, and not the United States, were the real parties in interest, and had a right to the damage, if the injury complained of had been done. If they had paid the government for the land, and received their final certificate, they had a right to sell the land, or mortgage the land; and it follows that they have the right to punish a trespasser upon their possessions. If the law has been fully complied with by the preemptor, and he has paid for the land, and received his final certificate, the certificate is as good as a patent; and until the patent issues, while the government had the naked legal title, it holds in trust for the settler, who is the real owner for all beneficial purposes. After compliance with the law, payment, and the issue of final certificate of entry, the land becomes segregated from the public domain. The secretary of the interior, on the nineteenth day of February, A. D. 1885, in case of timber trespass upon a homestead entry, which also segregates the land from the public domain, says: "But if it be conceded that Landrum has entered, and is holding the land in good faith, the tract covered by the entry is to be considered as being to all intents and purposes Landrum's land; and, if the McCombs have removed the timber therefrom without warrant the question is one between them and Landrum. The local courts have jurisdiction in such cases, and Landrum can apply to them for protection, or for reparation of any injury that may have *{*574}* been done him." 3 vol. p. Decisions Secretary of Interior, p. 421; 4 Id. 467, p. 467. Same as to preemption. While these decisions may not bind this court, they are very persuasive, coming as they do from the head of the land department of the government. In Carroll v. Safford, 44 U.S. 441, 3 HOW 441, 11 L. Ed. 671, Mr. Justice McLean said: "When the land was purchased and paid for, it was no longer the property of the United States, but of the purchaser. He held for it a final certificate, which could no more be canceled by the United States than a patent. It is true, if the land had been previously sold by the United States, or reserved from sale, the certificate might be recalled by the United States, as having been issued through mistake. In this respect there is no difference between the certificate holder and the patentee." Myers v. Croft, 80 U.S. 291, 13 Wall. 291, 20 L. Ed. 562; Smith v. Ewing, 11 Sawy. 56, 23 F. 741. The court below erred, therefore, in giving to the jury the following instruction: "(7) I charge you that the title to these lands, for the purposes of this suit, is in the United States." The fact that contests have been heard in the land office in August, 1886, does not alter the situation, for the reason that it is not shown when and how the contests were instituted; and, under rule 5 of practice in contest cases in the local land office, a contest may be instituted after the final certificate issues, as well as before; the only difference being that in that case the affidavit in contest must be forwarded to the commissioner of the general land office, who directs a hearing. From what has been said it follows that the lands from which the timber is alleged to have been taken were not public lands, and the plaintiff was not the real party in interest, as required by section 1882, Compiled Laws, which is as follows: "Every action must be prosecuted in the name of the real party in interest."

{3} If it was conceded that the lands belonged to the United States, there is still a reversible error disclosed *{*575}* by this record, in that the court refused to permit the defendants to prove that the lands were mineral lands, and compliance with the act of congress of June 3, 1878, under defendants' second plea. While it may be objected that the plea did not state all of the facts necessary to a complete defense, there was no demurrer to the plea, but issue was joined as to whether or not the lands in question were mineral lands. The court, in excluding the testimony as to the mineral character of the lands, practically excluded all of the defense, for, if the plea had been technically correct, it would have been unavailing for the defendants to have proven compliance with every other requirement of the law of June 3, 1878. The court permitted evidence to go to the jury as to the mineral character of lands outside the entries of Crawford and James, but not of the lands within the entries, holding, as the court is informed, that the fact of their being entered at the land office as agricultural lands precluded inquiry as to their mineral character. The entries at the land office were ex parte, and could not affect the defendants in this case. Whether the lands were mineral in character or not was a material issue, and a question for the jury. The court erred, therefore, in excluding the testimony. In view of the fact that we have indulged some presumptions that plaintiff may be able to rebut with testimony on another hearing in the lower court, the judgment of the lower court will be reversed, and cause remanded, with instruction to the lower court to sustain the motion for a new trial, and such further proceedings as may be deemed proper.