

1073

Thos. S. McCaleb,

Complainant,

-vs-

Edward Worcester, et al,

Respondents.


(1

IN THE CIRCUIT COURT


OF BALDWIN COUNTY, ALABAMA.

IN EQUITY.

Now come the Respondents for the special purpose of making this motion, and move the Court to dismiss the bill of complaint filed in this cause and for grounds of said motion, show the Court that in August last it made an order requiring the complainant to furnish security for costs in the amount of \$150.00, complainant being a non-resident, and complainant has failed to comply with said order.


Solicitors for Respondents.

Above motion set for hearing at Bay Minette,
Alabama on January 12th, 1933, at 11:30 A.M.


Judge.

In Equity. **RECORDED**
IN CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA.

Thos. S. McCaleb,

1073

Complainant,

vs

Edward Worcester, et al,

Respondents.

MOTION TO DISMISS
For Failure to pay Costs.

Filed December 29, 1932

D. M. Richardson
Registrar

Gaillard & Gaillard

THOS. S. MCCAULEB,

Complainant,

vs

EDWARD WORCESTER, ET AL,

Respondents.

IN CIRCUIT COURT OF

BALDWIN COUNTY, ALABAMA.

In Equity.

Now come the respondents and appearing solely for the purpose of making this motion, move the Court to require the complainant to give security for costs in this cause, upon the following grounds:

1. The bill of complaint shows complainant to be a non-resident of the State of Alabama.

2. It appears from proceedings in this Court referred to in the bill of complaint that the costs in said former suit amounted to over Three Hundred (\$300.00) Dollars, the pending cause being based upon the same subject matter and making it probable that the costs in this cause will be equally as much.

Respondents therefore move the court to require a deposit of not less than \$150.00 as security for costs.

Samuel D. Gaudard
Solicitors for Respondents.

RECORDED

In Circuit Court of
Baldwin County, Alabama.

In Equity.

Thos. S. McCaleb,

Complainant,

vs

Edward Worcester, et al.,

Respondents.

MOTION TO DEPOSIT
SECURITY FOR COSTS.

Filed Aug 25, 1932
A. W. Hare
Judge

Gaillard and Gaillard.

STATE OF ALABAMA
BALDWIN COUNTY

Before me, G.E. PERKIN,

Notary Public, in and for said County and State, personally appeared Joseph T. Worcester, who, being by me first duly sworn, on oath says that Edward Worcester, Joseph T. Worcester, Warren O. Worcester, George H. Worcester, Rosa Worcester, Oliver M. Worcester and Veva L. Pickens are in the actual, physical possession of the Southwest Quarter (SW $\frac{1}{4}$) of Section Ten (10) Township Seven South, Range Two (2) East, Baldwin County, Alabama, and have been in such actual, physical possession thereof since April 7th, 1932; that until said date said lands were wild open lands, but that affiant and his above named co-owners and those under whom they claim title, were and had been in such actual possession for several decades as the nature thereof would permit, claiming to own the same and that those under whom affiant, and those under whom his said co-owners claim, have been vested with the legal title to said described lands ever since the same were patented by the United States to George E. Sherwin on the 1st day of February, 1860; that affiant and his said co-owners, and those under whom they claim, hold the said lands by deeds of record, by will and by descent, in an unbroken chain up to this date, and they claim to own the same in fee simple against all the world; that their present possession is actual, open, notorious and adverse to all the world.

Affiant further says that in order to protect their possession and property against trespass they, on the 7th day of April, 1932, enclosed the same by wire fence and such wire fence, joining on to fences of adjoining property owners, actually encloses the said described property; that said property is bounded on the East by lands of James Yager, on the South

by lands of Tony Pizzotti, and on the North by lands of C.O. White, and the fencing placed around said lands by affiant joins on to the fences of abutting property owners under permission from them.

Affiant further says that in converting the legal constructive possession of himself and his co-owners into actual physical possession he did not in any wise enter upon said lands fraudulantly or by force, but went upon the same peaceably, as he had been doing regularly for many years past, in order to protect the same from trespass by others, and peaceably and as a matter of right enclosed the same by so erecting a wire fence around it as that taken in connection with the fences of abutting property owners, the said lands were completely enclosed, and are now completely enclosed, and are in the actual possession of affiant for himself and his co-owners aforesaid, and affiant denies that said fence was so erected merely for the purpose of deceiving the Court by simulating possession of said land, but was done as aforesaid to protect their title and possession of the lands that had been claimed by them and those under whom they hold, uninterruptedly since the year 1860.

Affiant further says that Thomas S. McCaleb is a non-resident of the State of Alabama, and that neither he, nor anyone for him, now has or ever had possession of said lands, unless it be that for a period of about four months in the year 1917 he could be considered as being in possession of the same by having erected a temporary structure of cloth and other temporary material, but which remained on there only for a period of about four months.

Affiant further says that being in the actual physical possession of said lands, claiming to own the same, he and his said co-owners had the right to cut, and did cut,

a number of pine trees off the same for the purpose of paying the costs of Court in a proceeding heretofore pending in this Court, relating to said lands, and said cutting was neither forcibly nor fraudulantly done, but was done peaceably and as a matter of right; and although they claim and have the right to use said lands as they see fit they have no intention for sometime to come of making further use of the timber thereon, or turpentineing the same, as nearly all of such timber is too small for such purpose.

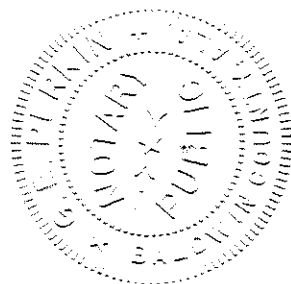
Affiant further says that one of said owners of said lands, namely, Rosa Worcester, owns other lands in Baldwin County in fee simple, aggregating about two hundred (200) acres and she and the other above named co-owners of the Southwest Quarter of Section Ten aforesaid also own another tract of land, containing one hundred sixty (160) acres, all lying in Baldwin County, and are duly assessed for taxes; and affiant says that said lands so owned by Rosa Worcester and the said 160 acres owned by her and her other co-owners exceeds in value the Southwest Quarter of Section Ten aforesaid, and all timber thereon; and affiant and his said co-owners of said Southwest Quarter of Section Ten are not insolvent.

Affiant further says that he and his said co-owners have regularly assessed and paid taxes on said Southwest Quarter of Section Ten and have been paying such taxes from about the year 1921, according to affiant's best recollection.

Joseph T. Worcester

Subscribed and sworn to before
me this 22nd day of August,
1932.

J. E. Perkins



In Circuit Court of Baldwin
County, Alabama.

In Equity.

Thos. S. McCaleb,

Complainant,

vs

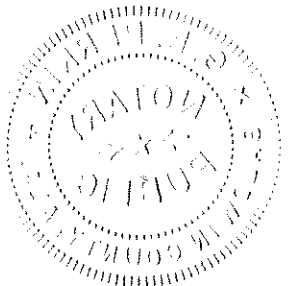
Edward Worcester, et al,

Respondents.

Affidavit in Opposition to
Preliminary Injunction.

Filed Aug 25, 1932
W. H. Ware
Judge

Gaillard & Gaillard



TO THE HONORABLE FRANCIS W. HARE, JUDGE OF THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA,

SITTING IN EQUITY:

comes now your Orator, Thomas S. McCaleb, who is over the age of twenty-one years, and is a resident of Washington, District of Columbia, and exhibits this his bill of complaint against Edward Worcester, Joseph E. Worcester, Warren O. Worcester, George H. Worcester, Rosa Worcester and Olive M. Worcester, ^{and L. P. Richards} and respectfully shows unto your Honor as follows, viz:

FIRST: That your Orator is the owner of the Southwest quarter of Section 10, Township 7 south, Range 2 east, Baldwin County, Alabama; that said lands were patented by the United States to George E. Sherwin, on the 1st day of February, 1860; that the said George E. Sherwin conveyed said lands to F. J. McCoy by a warranty deed dated the 7th day of April, 1858; that the said F. J. McCoy conveyed said lands to Allen and James R. Grist by deed dated the 28th day of June, 1858, although said land through ^{a mutual} mistake was described in said deed as the Southeast quarter of said section 10, but the said F. J. McCoy owned no lands in the southeast quarter of said section 10, nor did he own any land in said section 10 other than said southwest quarter; that the said F. J. McCoy did not deal with said Southwest quarter after the execution of his deed to Allen and James R. Grist, and it was the intention of the said F. J. McCoy to convey by said deed said southwest quarter. Your Orator further avers that by mesne conveyances and a deed executed by Charles Torrey, as the executor of the estate of John Bowen dated the 2nd day of January, 1903, and recorded in Deed Book 5 N.S. pages 635-636, Probate Records of Baldwin County, the title to said land became vested in George C. Black, and the said George C. Black and wife conveyed said land to Joseph Keller, Sr. by a warranty deed, dated the 26th day of April, 1904, and recorded in Deed Book 7 N.S. page 344; that the said Joseph Keller and wife conveyed said land to Oscar O. Kimmell by a deed, dated the 19th day of December, 1904, and recorded in Deed Book 8 N.S. page 103, Probate Records of Baldwin County; that the said Oscar O. Kimmell and wife conveyed said lands to your orator by a deed, dated the 30th day of April, 1912, and recorded in Deed Book 19 N. S. page 198, Probate records of Baldwin County, Alabama.

SECOND: Your Orator further shows that the said George C. Black had possession of said land continuously, from the time of the execution and delivery of said deed from Charles Torrey, as Executor until he conveyed the same to Joseph Keller, Sr., upon to-wit, the 26th day of April, 1904; that the said Joseph Keller, Sr. had possession of said land continuously from the 26th day of April, 1904, to the execution and delivery of said deed to Oscar O. Kimmell dated the 19th day of December, 1904, and recorded in Deed Book 8 N.S. page 103, Probate records of Baldwin County, Alabama; that the said Oscar O. Kimmell had possession of said land continuously from the said 19th day of December, 1904, up to the execution and delivery of his deed to your Orator upon to-wit, the 30th day of April, 1912, and that your Orator has had possession of said land continuously ^{ever} since said 30th day of April, 1912.

THIRD: Your Orator further says that the said George C. Black, Joseph Keller, Sr., Oscar O. Kimmell and your Orator, each having color of title as aforesaid, assessed and paid the taxes on said land during their periods of their respective ownership of said land, and that no one else assessed and paid the taxes on said land, other than your Orator and his predecessors in title, for the years 1900 to 1924, both inclusive, and that from the year 1925 to date, both your Orator and the said Joseph F. Worcester have paid the taxes on said land, and that said respondents, and those through whom they claim stood by from the year 1900 to the year 1924, both inclusive, and did not assert any claim to said land while your Orator, and ~~they~~ through whom he claims, assessed and paid the taxes on said land continuously during said period of time, as hereinabove set out, Your Orator further shows that at the time he bought said lands from Oscar O. Kimmell and wife, as aforesaid, there was nothing on the records of Baldwin County to charge him with notice that the respondents, and they, through whom they claim, were asserting an adverse claim to said land; and that your Orator paid \$1760.00 for said land without having any knowledge or notice of any adverse claim; and that Respondents are now estopped from asserting any claim to said land.

FOURTH: Your Orator further shows that Warren W. Worcester, the ancestor of Joseph T. Worcester, et al., upon to-wit, the 24th day of June, 1930, filed a bill to quiet title to said land in the Circuit Court of Baldwin County, Alabama, against your Orator and D.P. Bestor, Jr., the latter having heretofore conveyed to your Orator any right, title or interest that he might have had in said lands, and who disclaimed having any interest therein; and that the respondents herein intervened and became parties complainant in said former suit; and that a decree having been rendered in said cause against your Orator, he carried the same by appeal to the Supreme Court of Alabama, and that said court reversed the cause on the ground that the complainants in that suit had failed to show that they were in possession of said land, and said Supreme Court found that your Orator, and those under whom he claimed, had color of title, and had been exercising acts of ownership over the property for sometime before the bill was filed by building a tent or shack on said property, sinking a well, keeping off trespassers, occupying the same by tenant or agent, and clearing part of the land and assessing and paying taxes thereon; and that the complainants in that suit, who are the respondents herein, and ~~they~~ under whom they claim, had not assessed the lands for taxes for more than twenty years, and that they were not in the actual possession of said land, and that the Supreme Court taxed all of the costs of said litigation against the complainants therein.

FIFTH: Your Orator further shows that after said decree was rendered by the Supreme Court on said appeal, Joseph T. Worcester, one of the Respondents named herein, unlawfully and by force entered upon said land fraudulently, and he committed waste thereon by cutting ^{more or less,} down 150 trees and sold the same to H. England of Mobile, Alabama, for piling, and received the purchase price therefor, the exact amount of which complainant does not know, nor does he know the reasonable value of said piling, but he is informed and believes and upon such information and belief avers. that the said Joseph T. Worcester received \$150.00 for said piling, and that the respondents used said money to pay the costs that have been taxed against them in said former suit. Your Orator further avers that Respondents strung two strands of smooth wire on sapling poles along the west side of said

land, and also along ~~the~~ a portion of the east side of said land; that said construction is merely temporary, that it does not enclose said lands; that it is of no value to the land or to its use, and that its erection was unlawful and fraudulent and merely for the purpose of deceiving the court by simulating possession of said land designed to build up a stale claim that had been allowed to slumber for nearly seventy-five years.

SIXTH: Your Orator further says that said lands are wild, cut over lands, that there is a heavy growth of young timber thereon, except ten or twenty acres in the southwest corner which has been cleared; that in a few years said timber will be valuable for lumber and for turpentine and that your Orator desires to hold said land in its present condition until said timber has grown large enough to be used for timber and for turpentine.

SEVENTH: Your Orator further says that the trespass committed by the said Joseph W. Worcester as hereinabove set out, has resulted in irreparable injury to said lands by the cutting and removal of said trees, and that said temporary fence, if allowed to remain, might in the future embarrass your Orator in the assertion of his title to said lands; that it would entail considerable expense on the part of your Orator to remove said fence, and that the removal of said fence by your Orator would tend to provoke violence

EIGHTH: Your Orator further avers that the respondents intend to trespass upon said lands in the future in total disregard of your Orator's title and possession of said lands, and that they intend to cut said timber and turpentine the same as soon as it shall grow large enough to be so used.

NINTH: Your orator further shows that the said Respondents are each of them ^{ex Sept Rose and Olive Worcester,} insolvent, and the collection of any judgment for damages could not be enforced against them; that none of them has ^{ex Sept said Rose and Olive Worcester,} real estate assessed in his own name, or any money or assets known to your orator out of which said damages, if adjudged in favor of your Orator, could be collected.

TENTH: Your Orator further shows that the respondents claim some right, title or interest in said land under and by virtue of a quit-claim deed from John W. Lea to George H. Hoyle dated August 9th, 1906, and recorded in Deed Book 10 M. S. page 694, Probate

Records of Baldwin County, Alabama, but that said deed was inoperative for that said John W. Lea had no title to said land.

Your Orator prays that your Honor will confirm the title of your Orator in and to said lands, and will cancel said deed from John W. Lea to George H. Hoyle dated August 9th, 1906, and recorded in Deed Book 10 N. S. page 694, Probate records of Baldwin County, Alabama; and that your Honor will order the Register of this Court to hold a reference to ascertain the amount of waste that the Respondents have committed on said land, and will render a decree against said Respondents for the amount of said waste.

And if your Orator has not asked for the proper relief, your Orator further prays that he may have such further and other relief in the premises as the nature of his case shall require, and as to your Honor may seem meet.

And the Complainant submits himself to the jurisdiction of the court and offers to do whatever the court may consider necessary to be done on his part towards making the decree which he seeks just and equitable with regard to the other parties to the suit.

And may it please your Honor to grant to your Orator a writ of summons of the state of Alabama to be directed to the said respondents, viz: Edward Worcester, Joseph T. Worcester, Warren O. Worcester, George H. Worcester, Rosa Worcester and Olive M. Worcester, ^{and J. L. Pickens} thereby commanding them and every one of them personally to appear before your Honor in this Honorable court, as required by law, and then and there to answer all and singular the premises, and to stand to and abide such order and decree therein as to this Honorable Court shall seem meet; and he further prays your Honor to grant unto your Orator the writ of Injunction of the state of Alabama, to be directed to the said Respondents, viz: Edward Worcester, Joseph T. Worcester, Warren O. Worcester, George H. Worcester, Rosa Worcester and Olive M. Worcester, ^{and J. L. Pickens} restraining them and either of them from maintaining said temporary fence around said land, and from cutting and removing any timber therefrom, and from trespassing upon said lands and from committing waste thereon, until the further order of this Honorable court.

And your Orator shall ever pray, etc.


Solicitor for Complainant

STATE OF ALABAMA,
COUNTY OF MOBILE.

Before me, K. C. Cuthbert, a Notary Public in and for said County in said State, personally appeared Jesse F. Hogan, who is known to me, and who being by me first duly sworn deposes and says; that he is the solicitor of record for the complainant in the foregoing cause; that he is authorized to make this affidavit, and that the complainant has no personal knowledge of the foregoing facts; that he is now in Norfolk, Virginia, convalescing from a serious accident. Said affiant further says that he has read the foregoing bill of complaint, and knows the contents thereof, and that the same are true of his own knowledge, except as to matters which are thus stated to be on his information and belief, and as to these matters he is informed and believes them to be true.

Jesse F. Hogan

Subscribed and sworn to before me
on this the 11th day of August, 1932.

K. C. Cuthbert
Notary Public, Mobile County, Alabama.

Filed this August 25th, 1932, and
complainant allowed 30 days to give
security for costs in the sum of \$150.00
Upon consideration of the foregoing sworn
bill and affidavits it is ordered and
adjudged that the prayer for temporary
injunction be, and same is, denied.
J. W. Hare
Judge

BOOKEND

Filed Aug 25/932

J. M. McElwain

Rejits

Thomas McCaleb
vs
Joseph Worchester & al

~~Comes~~ Before me

personally
appeared Jesse F. Hagan, who is known
to me, who being by me first duly sworn,
deposes and says that he visited the
lands involved in this suit about
three weeks ago and he saw where a
temporary fence had been erected along
the west side of said lands, that it
consisted of two strands of smooth
wire along sapling poles, that said
fence did not join to any other fences
and did not enclose said lands, that
said lands were open to the public, who
were driving along said lands and inside
said fence, that the fences along the south
side of said lands and along the north
side of said lands were erected by the
adjoining owners and not by the
respondents; that the respondents
had no visible evidence of possessing
other than said temporary fence,
hereinabove described.

subscribed and sworn to
before me this 24th day of April 1932
at Worcester, Mass. at Ct.

Jesse F. Hagan