
Mathews v. Marks,

MATHEWS V. MARKS.

CHANCERY PRACTICE: *Removing cloud from title.*

A party who sues in equity to remove a cloud upon his title to land must be in possession unless his title be merely an equitable one, or the land be wild and unoccupied.

APPEAL from *Dorsey* Circuit Court in Chancery.

Hon. J. M. BRADLEY, Circuit Judge.

Compton & Fuller for appellant.

The demurrer admits that appellant is the owner of the land, and that the sheriff's deed is a cloud upon his title, and that said deed was procured by fraud and misrepresentation. This makes a case for a court of chancery. It is the only forum to afford the relief prayed. 24 *Ark.*, 431; 29 *Ib.*, 612; see also 19 *Ark.*, 139, *which we think is conclusive.*

SMITH, J. This was a bill to remove a cloud from the title to lands. The plaintiff alleges that he is the legal owner in fee of the lands, and the cloud he complains of is cast by a sheriff's deed based upon a judgment and execution against him. He avers the nullity of said judgment on account of the non-service of process in the action, whereby he had no day in court. It is not disclosed who is in possession of the lands, or whether they are occupied at all.

The bill was dismissed upon demurrer, the plaintiff having declined to amend.

Removing cloud from title.

A party who sues in equity to remove a cloud upon his title must be in possession, unless his title be merely an equitable one. For where the title is a purely legal one and the defendant is in possession, the remedy at law is plain, adequate and complete, and an action of ejectment cannot be maintained under the guise of a bill in chancery. In such case the adverse party has a constitutional right to a trial by jury. *Bryan v. Winburn*, 43 Ark., 28; *Lawrence v. Zimpleman*, 37 Ark., 643, and cases cited; *Lewis v. Cocks*, 23 Well., 466; *Hipp v. Babin*, 19 Howard, 271; 3 Pomeroy Eq. Jr., sec. 1399.

The decree is affirmed without prejudice to the plaintiff's right to bring ejectment if he is out of possession, or to file another bill if he is in possession or the lands are wild and unoccupied. But no costs are allowed him for this modification.
