

difference in the spelling of the surname is not worthy of serious consideration, and would not be if the appellant had proved which spelling he preferred. The learned counsel for the appellant cited the St. Paul City Directory in support of the contention that "Big-e-low" is the proper spelling and pronunciation of the appellant's name, and that it is a different name from "Biglow." On a question of spelling and pronunciation, we think Professor Lowell and Webster's Dictionary are safer guides than the City Directory of St. Paul. Prof. Lowell spells the name "Biglow," (The Biglow Papers,) and when it is spelled with an "e" that letter is obscure or mute, (Webst. Dict.) It is the same name in law, whether spelled with or without the "e," and, if the appellant did not know this when he read the published summons, it was because he did not know his own name when he saw it.

The decree of the circuit court is affirmed.

GREEN v. CITY OF TACOMA *et al.*

(Circuit Court, D. Washington, W. D. August 10, 1892.)

EMINENT DOMAIN—ILLEGAL TAKING—EJECTMENT.

Where a city takes possession of private lands, and constructs a street and street railway thereon, in the absence of the owner and without her knowledge, consent, or acquiescence, she can thereafter maintain an action for the recovery thereof, notwithstanding the public use.

At Law. Action by Lillian I. Green against the city of Tacoma and others to recover possession of land occupied as a street. Demurrer to complaint overruled.

J. C. Stallcup, for plaintiff.

F. H. Murray, City Atty., and Crowley & Sullivan, for defendants.

HANFORD, District Judge. In her original complaint the plaintiff claimed damages equal to the value of a strip of land situated in the city of Tacoma, which without her consent the city has attempted to devote to public use as a street. Upon the authority of the decision of the supreme court of this state in *City of Tacoma v. State*, 29 Pac. Rep. 847, this court held that the attempt of the city to appropriate the said land was without legal authority, that the plaintiff had not been divested of her title, and therefore she could not exact compensation as if she had been deprived of said property; and on that ground sustained a demurrer to said complaint. The plaintiff then filed an amended complaint setting up her title to the land as owner in fee, and alleging ouster and wrongful withholding of possession by the city, and praying for a judgment that she recover the said premises, and for damages, including loss of rents and profits; and compensation for injuries done by grading the street and constructing a street railway therein, which acts of trespass

are alleged to have been committed in her absence, and without her knowledge or consent. The several street railway companies joined with the city as defendants now appear and demur to said amended complaint on the ground that the same does not state facts sufficient to constitute a cause of action. The laws of this state give to an owner of real property who is entitled to the immediate possession thereof a right of action against any person who, being in possession, holds the same against the owner's will, or who claims the title to, or an interest in, said property adversely to such owner. And in such action every question affecting the title and right of possession may be determined, and the owner may recover possession of the property, and damages. 2 Hill's Code, § 529.

The authorities cited in support of the demurrer are not in point. In the case of *Cincinnati v. White*, 6 Pet. 431, the supreme court of the United States held that, after the dedication of land to public use by an equitable owner, the holder of the legal title could not maintain ejectment to recover it. This was on the ground that the plaintiff in an ejectment case must have the legal title, and also a clear right of possession. Other authorities cited by counsel for the defendants are cases which were decided adversely to the plaintiffs therein on various grounds; the decision in each case being founded upon some general and familiar rule of law or principle of equity, as in the case of *Railway Co. v. Smith*, 15 N. E. Rep. 256, in which the supreme court of Indiana held that a landowner who stands by and acquiesces until a railroad company has expended money, and constructed its track across his land, so that the track at that point has become part of its line, cannot, in a court of equity, maintain an injunction suit against a corporation which has succeeded to its right and franchises, by purchase at foreclosure sale, without notice of any claim or objection on the part of such landowner. In the case at bar the amended complaint does not show that the plaintiff has ever acquiesced in the construction of a railroad across her property, or stood by and kept silent while the expenditure of money was being made, nor any facts from which an estoppel can arise. On the contrary, she alleges, as if anticipating such a defense, that she was not present when the trespasses complained of were committed, and not informed thereof until after they were committed. Mere failure on the part of a landowner to constantly guard his premises, and warn intruders not to trespass thereon, cannot be sufficient cause for denying him a right of action to recover his own. Lewis, Em. Dom. §§ 647, 648.

Demurrer overruled.

UNITED STATES v. BAXTER.

(Circuit Court of Appeals, Eighth Circuit. August 9, 1892.)

No. 118.

WRIT OF ERROR—TIME OF SUING OUT WRIT.

When a writ of error from the circuit court of appeals is allowed within the six months fixed by the statute, (26 St. at Large, p. 826, § 11,) but is not actually issued by the clerk until after the expiration thereof, it will be dismissed, for, in the legal sense, a writ of error is not brought until it is filed in the court below.

In Error to the Circuit Court of the United States for the District of Minnesota.

Action by George N. Baxter against the United States to recover moneys claimed to be due him as district attorney. Judgment for plaintiff. Both parties bring error. Plaintiff moves to dismiss defendant's writ of error. Dismissed.

George N. Baxter, for the motion.

Eugene G. Hay, opposed.

Before CALDWELL and SANBORN, Circuit Judges, and SHIRAS, District Judge.

SANBORN, Circuit Judge, delivered the opinion of the court.

The judgment in this case was rendered August 31, 1891; and while the writ of error was allowed by the acting circuit judge, February 8, 1892, it was, without fault of the district attorney, not actually issued until after March 6, 1892.

No judgment or decree of the circuit court can be reviewed in this court upon writ of error unless the writ is sued out within six months after the entry of the judgment. 26 St. U. S. p. 826, § 11. In *Brooks v. Norris*, 11 How. 207, the supreme court, speaking by Chief Justice TANEY, said:

"The writ of error is not brought, in the legal meaning of the term, until it is filed in the court which rendered the judgment. It is the filing of the writ which removes the record from the inferior to the appellate court, and the period of limitation must be calculated accordingly."

And in *Scarborough v. Pargoud*, 108 U. S. 567, 2 Sup. Ct. Rep. 877, that court expressly decided the very question presented in this case, and held that where the writ was allowed by the judge, but was not actually issued by the clerk within the time limited for suing it out, the writ must be dismissed. *Cummings v. Jones*, 104 U. S. 419; *Mussina v. Cavazos*, 6 Wall. 355, 360. It follows that the writ of error in this case was not brought within the time limited by law, and this court is without jurisdiction. For this reason the writ is dismissed.