

## PLACE v. STATE OF ILLINOIS ex rel. WILKINSON.

(Circuit Court of Appeals, Seventh Circuit. June 14, 1894.)

No. 167.

## REMOVAL OF CAUSES—CITIZENSHIP—QUO WARRANTO—CORPORATIONS.

A quo warranto suit to test the defendant's title to office in a corporation organized under the laws of the state in which the suit is brought is not removable on the ground that the defendant and the relator are citizens of different states.

Quo warranto by the state of Illinois on the relation of Reuben Wilkinson against Orrin F. Place to determine defendant's title to the office of president of the Crowned King Mining Company, a corporation organized and existing under and by virtue of the laws of the state of Illinois. The suit was begun in the circuit court of Christian county, Ill., and was removed on petition of the defendant on the ground that defendant was a citizen of Arizona, and relator a citizen of Illinois. There was judgment of ouster. Defendant brings error.

J. C. McBride and Crawford & Blair, for plaintiff in error.

Taylor & Abrams and John G. Drennan, for defendant in error.

Before HARLAN, Circuit Justice, WOODS, Circuit Judge, and BUNN, District Judge.

No opinion. Reversed, with instructions to remand to state court.

## LA CHAPELLE v. BUBB, United States Indian Agent, et al.

(Circuit Court, D. Washington, E. D. April 19, 1895.)

## 1. PUBLIC LANDS—HOMESTEAD RIGHTS—JURISDICTION OF COURTS—INJUNCTION.

A homestead settler whose land has been included by the government in allotments made to Indians in fulfillment of treaty stipulations, but who has not perfected his right by making proof in the land office of full compliance with the law, is not entitled, in a suit against certain Indians and an army officer, who threatens to put them in possession, to a decree declaring him to be the owner of the land, and quieting his title. But, as a bona fide settler and owner of the improvements, he is entitled to an injunction protecting him in his possessory rights until the questions of law involved can be determined in a court of competent jurisdiction.

## 2. INJUNCTION—TRESPASS BY ARMY OFFICER.

Injunction may issue from a federal court to restrain an army officer from committing a trespass on lands, where he justifies his proposed action on the ground that he is simply obeying the orders of his superiors.

This was a bill by Alfred W. La Chapelle against Capt. John W. Bubb, United States army, as Indian agent of the Colville Indian Agency, in the state of Washington, and certain Indian defendants, for an injunction to restrain said Indian agent from forcibly ousting the complainant from certain lands, which he claims as a settler under the homestead laws. The lands in question had been included by the government in allotments made to the Indians in fulfillment of treaty stipulations.

T. M. Reed, Jr., for complainant.  
 Wm. H. Brinker, U. S. Atty., and F. C. Robertson, Asst. U. S. Atty., for defendants.

HANFORD, District Judge. After due consideration of the pleadings, evidence, and arguments on final hearing, I have concluded that the complainant's prayer for a decree declaring him to be owner of the land in controversy, and quieting the title in him, must be denied, for the reason that the legal title is in the United States, and complainant's right to the land as a settler under the homestead law has not been perfected by making proof in the land office of full compliance with the law. The government is not a party to this suit, and cannot be brought into court to answer the bill of complaint. *U. S. v. Jones*, 131 U. S. 1, 9 Sup. Ct. 669. Therefore, the court is without jurisdiction to render any decree affecting the title, or the complainant's rights, other than his right of possession.

As a bona fide settler, and owner of the improvements which he has made on the land, he is entitled to protection in his possessory rights until the questions of law involved in the dispute between him and the Indian defendants can be determined by the judgment of a court of competent jurisdiction. *Colwell v. Smith*, 1 Wash. T. 92; *Ward v. Moorey*, Id. 104. For the reasons given in the opinion of this court filed at the time of granting an injunction pendente lite in this case (62 Fed. 545), the use of force by Indian Agent Bubb, outside the limits of an Indian reservation, without process of law, is unwarranted, and contrary to the express provisions of the constitution of the United States and the laws of this state. Under ordinary circumstances, this court would not grant an injunction to prevent a trespass; but the defendant Bubb justifies his proposed action on the ground that he is an officer of the United States government, acting only in obedience to orders from his superior officers in the Indian department, and, for that reason, I deem it entirely proper for this court to restrain him from committing a tort while assuming to act in his official capacity. Let there be a decree making the injunction perpetual, but without prejudice to the right of the defendants to bring an action in any court of competent jurisdiction to recover possession of the land.

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PENNSYLVANIA CO. FOR INSURANCE ON LIVES AND GRANTING ANNUITIES v. PHILADELPHIA & R. R. CO. et al.

(Circuit Court, E. D. Pennsylvania. July 18, 1895.)

No. 9.

1. RAILROAD MORTGAGES—RIGHT TO FORECLOSE FOR INTEREST.

Where a railroad mortgage is expressly to secure interest as well as principal, and both are equally within the positive terms of the condition, a default in payment of the interest gives the mortgagee a right to bring a foreclosure suit, especially where, by the express terms of the instru-

ment, he is forbidden to proceed for the collection of interest by ordinary judgment and execution at law.

2. SAME—DEMAND.

It seems that a paper addressed to a railroad company, and reciting that payment of certain interest coupons of its mortgage bonds had been demanded and refused, and that the holder would look to the company for payment thereof, is substantially a "demand made in writing," within the meaning of a provision in the mortgage.

This was a foreclosure bill brought by the Pennsylvania Company for Insurance on Lives and Granting Annuities against the Philadelphia & Reading Railroad Company and others. Defendants demur to the bill.

John G. Johnson, F. W. Whitridge, and George L. Rives, for complainant.

C. Stuart Patterson, Samuel Dickson, and Thomas Hart, Jr., for defendants.

ACHESON, Circuit Judge. The paper of July 1, 1893, addressed to the Philadelphia & Reading Railroad Company, after reciting that payment of 418 coupons of the company's general mortgage bonds, that day due, had been demanded and refused, declared that the holder would look to the company for payment thereof. I strongly incline to the opinion that this was substantially a "demand made in writing," within the fair meaning of article 4 of the mortgage. It certainly was an explicit warning that the holder expected the company to pay these matured coupons, and it fulfilled the purpose—to guard against inadvertence and surprise—which that provision was intended to subserve.

If, however, it were to be conceded that the paper was technically deficient for lack of a present demand formally expressed therein, still, in my judgment, these demurrers cannot be sustained. The bill is not one exclusively in aid of the powers conferred upon the plaintiff by the mortgage. The bill shows that the default in the payment of the interest upon the company's general mortgage bonds which occurred on July 1, 1893, has been followed by like default with respect to the interest thereon which fell due at the end of each half year thereafter, and that none of this overdue interest has been paid; that on February 20, 1893, under a decree of this court, the railroads and all the property of the company passed into the hands of receivers, who are still acting; that the receivers have repeatedly announced their inability, for want of funds, to pay this accrued interest; and that the company itself is without means to pay it, and, under the restraining order of the court, would not be at liberty to do so, even if it had the means. The prayers for relief contained in the bill are appropriate to this state of facts. Now, the declared purpose of the mortgage is the securing the payment of the interest, as well as the principal, of the bonds, and both interest and principal are equally within the positive terms of the condition of the mortgage. Upon sound reason, then, a default in the payment of a half year's interest on the appointed day is as much a breach of the condition of

the mortgage as would be a like default in the payment of the principal of the bonds. In support of this view, and of its sequence,—that upon such a failure to pay interest the mortgagee has a right to bring a bill for a foreclosure,—we have decisions of great weight. *Gladwyn v. Hitchman*, 2 Vern. 135; *Burrowes v. Molloy*, 2 Jones & L. 521, 526; *Edwards v. Martin*, 25 Law J. Ch. 284. To deny to a Philadelphia & Reading general mortgage bondholder the right to proceed by bill to enforce his mortgage security upon default in the payment of the semiannual interest might work the greatest injustice, for, by the provisions of the mortgage, a bondholder is precluded from levying upon, taking in execution, or selling, under an ordinary judgment at law, for interest, any part of the mortgaged premises. Now, the bonds run until the year 1958. Therefore, if a bondholder cannot resort to a bill for a foreclosure upon the nonpayment of interest, he might be, and, unless he could procure the co-operation of the bondholders, representing the requisite amount, surely would be, left practically remediless. A construction of the mortgage involving consequences so unreasonable is not to be accepted.

And now, July 18, 1895, the demurrer of the Philadelphia & Reading Railroad Company and the Philadelphia & Reading Coal & Iron Company, the demurrer of Thomas McKean, and the demurrer of Robert M. Gallaway, Isaac N. Seligman, David G. Legget, Simon Wormser, and Emmanuel Lehman are overruled, with leave to the named defendants to answer the bill of complaint on or before the first Monday of September, 1895.

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THOMSON v. SHIRLEY.

(Circuit Court, D. Oregon. July 31, 1895.)

No. 2,112.

**FORECLOSURE OF MORTGAGES—APPOINTMENT OF RECEIVERS—RENTS AND PROFITS.**

Under a statute declaring that a mortgage of real property shall not be deemed a conveyance so as to enable the mortgagee to recover possession without foreclosure and sale (Gen. Laws Or. 1845-64, p. 228, § 323), the mortgagee has no right to take the rents, profits, and crops before he has secured possession by actual foreclosure and sale according to law; and it is not in the power of the parties, even by express stipulation, to give him such right. Therefore, a provision in a mortgage of farm lands that, in case foreclosure proceedings are instituted, a receiver may be appointed to take the rents, profits, and crops, and apply them on the debt, in no wise enlarges the mortgagee's rights. In a proper case, the court will appoint a receiver without any such stipulation; and, in any other case, it will not appoint one, whatever the parties may have agreed.

This was a bill by William Thomson, Jr., against James Q. Shirley, to foreclose a mortgage on certain farming lands.

John H. Woodward, for plaintiff.

John J. Balleray and J. L. Rand, for defendant.