

**Re NOTICE FROM THE PRESIDENT OF THE REMOVAL OF ASSOCIATE  
JUSTICE McCANTS-STEWART.**

STATEMENT OF FACTS. ARGUED APRIL 20, 1915. DECIDED APRIL 26,  
1915.

Dossen, C. J., and Johnson, J.

1. The remedy for restoring a person to office of which he has been unjustly deprived, or from which he has been illegally ousted, is by proceedings or information in the nature of a quo warranto.
2. The remedy by mandamus will sometimes lie, but not in a case where there is a *de facto* officer.
3. Quo warranto informations are of two kinds, those filed *ex officio* by the Attorney General, in behalf of the Government; and those allowed by the court to be filed on the relation of some private individual.
4. Courts will not draw into consideration constitutional questions, collaterally, unless the consideration is necessary to the determination of the point in controversy.
5. Where there is a color of lawful title, the doings of an officer as it respects third persons and the public must be respected until he is ousted on a quo warranto..

Mr. Justice Johnson delivered the opinion of the court:

This matter grows out of the action of the National Legislature in passing at its September Session, A. D. 1914, a Joint Resolution authorizing and directing the President to remove from office T. McCants-Stewart, one of the justices of this court and to appoint another in his stead.

The following synopsis of the history of the case constitutes the main facts:

On the 29<sup>th</sup> of October last the complainant who was then a justice of the Supreme Court *de facto* and *de jure* was served with the following notice, to wit:

"Executive Mansion,  
Monrovia, Liberia,  
October 29th, 1914.

Sir—

I have the honor to inform you that you are hereby removed from the office of Associate Justice of the Supreme Court of Liberia, in keeping with a Joint Resolution of the Legislature passed at their present session, a copy of which is herewith enclosed.

Your obedient servant,  
(Sd) D. E. Howard,  
President, R. L.

Hon. T. McCants-Stewart,  
Monrovia."

Accompanying this notice was the following Resolution, to wit:

"JOINT RESOLUTION REMOVING T. McCANTS-STEWART, ASSOCIATE JUSTICE OF THE SUPREME COURT, FROM OFFICE.

It is resolved by the Senate and House of Representatives of the Republic of Liberia in Legislature assembled.

Sec. 1. That from and immediately after the passage of this Joint Resolution, the President is hereby authorized and directed to remove T. McCants-Stewart, Associate Justice of the Supreme Court of the Republic of Liberia, from office, and appoint another in his stead.

Any law to the contrary notwithstanding.

Passed by two-thirds vote of both Houses of the Legislature, Approved October 28, 1914."

Under the caption: "Statement of Facts," complainant addressed to the bench the following statement in which is set forth certain facts relating to his said removal from office.

We deem it proper to quote this document *in extenso* constituting as it does the entire record filed by the complainant and the whole case brought before us to consider and dispose of.

"Re NOTICE OF REMOVAL OF MR. JUSTICE McCANTSSTEWART FROM OFFICE.

#### STATEMENT OF FACTS.

"1. I have been as you know and as the record shows Associate Justice without dispute from the month of January, A. D. 1911, to October 29, 1914.

"2. From said October 29, 1914, without any notice having been given me and without allowing any information to reach the public prior to October 27, 1914, that my removal from office was under consideration, by the legislative and executive branches of the Government, I was served by the President with Notice of Removal from the office of Associate Justice of this court, the following being a true copy of the contents thereof. (See Notice of Removal, p. 5.)

"3. That previous to said October 29, 1914, there had been no dispute or controversy, or trouble of any kind between myself and the Legislature, or between myself and the executive ; but on the contrary there existed, so far as I know, the most cordial relations between the President and myself, and about a week immediately preceding said October 29, 1914, in company with Mr. Justice Johnson (the Chief Justice being absent from the city) I visited the Senate and the House of Representatives and we were cordially received by both bodies, the Vice-President inviting us to address the Senate, and a response to our addresses was made by a member of the Senate who was

appointed to convey to us the Senate's appreciation of our visit and he did so in language most friendly and complimentary.

"4. That in view of the facts aforesaid, no explanation can be given by me of the proceedings against which I complain except that which I base upon information and belief, namely, that they were the result of a plan agreed upon by certain political leaders to provide a place on our bench for Hon. Amos Witherspoon so as to satisfy a political promise to make him Vice-President of the nation, which said promise said leaders abandoned because of the subsequent decision to make another person the beneficiary of their influence in connection with the Vice-Presidency, the source of my information and grounds of my belief being common report and a conversation held by me with a political leader in connection with the doings of a political convention held in the month of October aforesaid in which the matter of the Vice-Presidency was disposed of by the leaders aforesaid.

"5. That on November 2, 1914, I served the President with my answer to said Notice of Removal, the following being a true copy of the contents, to wit:

`Judiciary Department,  
Supreme Court of the Republic of Liberia,  
Associate Justice's Chambers,  
Monrovia, Oct. 30th, 1914.

His Excellency—  
Hon. D. E. Howard,  
President of the Republic of Liberia, Monrovia.

Sir:

I beg to acknowledge the receipt of your communication of the 29<sup>th</sup>, inst., informing me that I am removed from the office of Associate Justice of the Supreme Court of the Republic of Liberia in keeping with a Joint Resolution of the Legislature passed at their present session in which said communication you enclosed a copy of the said Joint Resolution:

And I beg to state that after an examination of the Constitution of the Republic

of Liberia I am compelled to treat your said communication as a nullity on the ground that it does not comply with the provisions of the said Constitution.

Respectfully,

T. McCantsStewart,  
Associate Justice of the  
Supreme Court of Liberia.

"6. Upon information and belief I state that no vote upon the passage of said Joint Resolution of Removal was recorded in the Senate, and that Hon. Amos Witherspoon voted in favor of said Joint Resolution knowing at the time he so voted that he was to be appointed by the President to fill the vacancy on our bench which the Senate was endeavoring to create by their passage of said Joint Resolution, the source of my information and ground of my belief being conversations held with Senator Parker and Hon. Amos Witherspoon himself.

"7. Upon information and belief I state that only eight votes of the total membership of fourteen were recorded on the Journal of the House of Representatives in favor of the passage of said Joint Resolution, the source of my information and the grounds of my belief being conversations held with the Honorable, the Speaker of said House.

"8. That said Joint Resolution of Removal was not based upon 'two-thirds of both branches of the Legislature' as required by the Constitution of Liberia.

"9. That the Notice of Removal aforesaid was not based upon an address to the President by two-thirds of both Houses as required by the Constitution, but was based upon a law passed by the Legislature authorizing and directing the President to remove a judicial officer holding office under the Constitution during good behavior, which was a legislative Act *ultra vires* as the power to remove public officers is vested by the Constitution in the hands of the President and a law authorizing and directing him to remove an officer is a nullity and of no force and effect, and the President can perform no function under or by virtue of such an Act.

"10. That the legislative and executive proceedings aforesaid in seeking to arbitrarily interfere with the tenure of a judicial officer, especially judges of the Supreme Court, and to make such tenure subject to the will and pleasure of the legislative and executive branches of the Government is in violation of the Constitution, article I, section 14, creating coordinate branches of the Government by providing that 'the powers of the Government shall be divided into three distinct branches, legislative, executive, and judiciary, and no person belonging to one of these departments shall exercise any of the powers belonging to each of the others,' and is in further violation of the Constitution, article IV, section 1, providing in addition to removals by impeachment that 'Judges of the Supreme Court, and all other judges of courts shall hold their office during good behavior, but may be removed by the President on the address of two-thirds of both Houses for that purpose,' it having already been provided in the Constitution, article III, section 6, that in a removal upon address of both Houses the particular reason must be stated.

"11. That because of the foregoing facts I am continuing to it as Associate Justice of our court regarding myself as such Justice *de facto* as well as *de jure*, and I shall continue so to act until you direct me otherwise. I have repeatedly occupied my desk at Chambers and, because 'what is not legally done is not done at all,' I shall continue to discharge my official duties subject only to your determination of this controversy.

"12. That there is no remedy for the correction of the unconstitutional proceeding aforesaid outside of this court because the validity of the appointment and removal of the members of our bench can not be the subject of inquiry on the part of any inferior tribunal, nor be at the pleasure or under the control of any other department of the Government, as this court is the Supreme branch of the judiciary.

"13. I have requested Dr. Arthur Barclay, member of our bar, to act in this matter as *amicus* and he has consented so to do, and I have served Hon. Witherspoon by registered mail with a copy of this statement of facts.

"Wherefore I submit to your judgment the issues involved in this unfortunate controversy which affects the" constitutional status of the entire Judiciary

Department and involves the organization of our -court with the request that you declare the proceeding aforesaid unconstitutional and null and void ; and I further request that considering (1) my relation to our bench; (2) the unprecedented issues involved in said proceeding for which no form of procedure can be found; (3) that forms are only secondary instruments for attaining the end of justice and considering (4) that this controversy affects the organization of our court and should be disposed of without delay, that you will from Chambers or otherwise make such suggestions as may appear to you to be just to both Mr. Witherspoon and myself if any further step is necessary to be taken to bring this matter to a hearing and decision immediately upon the meeting of our court in April next. Dated : Monrovia, January 12, 1915."

A brief has been filed, and a hearing of the matter had *ex parte* and the court will now proceed to dispose of same.

The document, which is unsupported by affidavit is brought under no specific form of remedy prescribed by the statute law of Liberia, nor any form of remedy clearly defined and recognized by the common law; and this leads us to a consideration of the manner in which rights are enforced and remedies obtained. Bouvier in his Law Dictionary (vol. I) under actions, defines an action as a specific mode of enforcing a right before the courts of law while the statute of Liberia emphatically declares that "every complaint must contain a distinct and intelligible statement of a sufficient cause of action within the scope of the form of action chosen," which leads us to the conclusion that every action must be brought under some form of remedy.

Now, the remedy for restoring a person to an office of which he has been unjustly deprived or from which he has been illegally ousted, is by proceedings or information in the nature of a quo warranto and sometimes by mandamus The later remedy will not however answer, in a cause where there is a *de facto officer*.

In ancient times the writ of quo warranto was in the nature of a writ of right for the king against the usurpation of some office or franchise, to inquire by what authority he supports his claim. There was therefore, no remedy unless there was an actual usurpation upon the crown. The practice under the old writ has

fallen into disuse and has led to the introduction of a proceeding in the nature of a quo warranto. "This," says Mr. Bouvier, "though in form a criminal is in substance a civil proceeding to try the mere right to the franchise or office."

The proceeding by means of the old writ was a purely civil one and a judgment against the defendant involved only the seizure of the franchise into the king's hands to be granted out again to whomsoever he pleased or if it were not such a franchise as might subsist in the hands of the crown there was mere judgment of ouster to turn out the party who usurped it. The procedure by information on the other hand was at first regarded as a criminal proceeding, involving fine and imprisonment as well as ouster of the defendant from the franchise he had usurped. It has, however, since ceased to possess this character, and is now as already stated only used to settle a question of civil right. (Vide Shortt on Information, p. 138.)

We quote again from the same author as follows :—"The procedure by quo warranto information is appropriate wherever there has been a usurpation of any office, whether created by charter alone or by the crown with the consent of parliament; provided the office be of a public nature and a substantive office, not merely the function or employment of a deputy or servant held at the will and pleasure of others." (*Ibid\**, p. 121).

We find by reference to other text books on the subject that quo warranto informations are of two kinds (1) those filed *ex-officio* by the Attorney General in behalf of the Government ; and (2) those allowed by the courts to be filed on the relation of some private individual. (*Idem.*, p. 140.)

Now in considering the mode of action applicable to the matter at bar, we must not lose sight of the fact that there existed at the time of the filing of the Statement of Facts by Justice McCants-Stewart, a *de facto* justice who had been commissioned and sworn by the President, and had even taken his seat on the bench, a fact well known to Justice McCants-Stewart; and yet in the records we find nowhere filed, a writ of summons requiring the said *de facto* justice, to wit: The Honorable Amos Witherspoon, to appear before the court to defend this suit.



In *Fowler v. Bebee* (9 Mass. 231) it was held that as a color of lawful title, the doings of an officer, as it respects third persons and the public must be respected until he is ousted on a quo warranto.

In settling constitutional questions the court does not go to meet the question; it waits for the question to come to it, and it only acts at the instance of a party who invokes its aid for the enforcement of a right.

We must here observe, however, that in invoking its aid for the recovery of constitutional or legal rights, parties must conform to recognized forms and legal principles ; and we would also remark that in cases between parties, this court can not give aid and assistance to either party without laying itself open to a charge of unfairness and partiality.

In view of the foregoing facts, we are of the opinion that the matter before the court is irregular and informal, and is not brought under any form of remedy recognized by the laws of Liberia.

And further that even supposing the matter had been properly and legally brought, under consideration the facts constituting the violation of the constitutional provision upon which this case hangs have not in any of the forms governing evidence, been established or even attempted to be established. "It shall be the duty of every party alleging the existence of a fact to prove it. The burden of proof rests on the party who maintains the affirmative." (Lib. Stat., pp. 51-2, sec. 1.) We would here remark, that although the court would like to hand down an opinion on the constitutional question involved in this matter—a question which is to a certain extent novel and at the same time of national importance, affecting as it does the prerogatives and rights of the judicial officers of the country, upon whose wisdom, stability and integrity, personal security and private property rests, we find ourselves unable to do so under the circumstances; as courts will not draw into consideration constitutional questions collaterally, unless the consideration is necessary to the determination of the point in controversy (Bouv. L. D., vol. I, under Constitutional Interpretation).

This case must be distinguished from the question which this court decided at

its April term, 1914, relative to the "Constitutionality of the statute making it part of a committee to prepare Rules of Practice for the Circuit Courts, etc." There the court, as such, was required to do an Act repugnant to the Constitution and was, therefore, competent to declare the Act unconstitutional without waiting for any action to be brought thereupon; the case at bar is obviously not analogous and therefore the opinion of the court in the said matter of said Circuit Court rules has been unsuccessfully cited in support of this cause.

In view of the foregoing this case must crumble and should be dismissed; and it is hereby so ordered.