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Green Clay Smith.

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GREEN CLAY SMITH.

JUNE 4, 1880.—Laid on the table and ordered to be printed.

Mr. ROBINSON, from the Committee on the Judiciary, submitted the following

REPORT :

[To accompany bill H. R. 4069.]

The Committee on the Judiciary, to whom was referred the bill (H. R. 4069) providing for the relief of Green Clay Smith, and for other purposes, have had the same under consideration, and now submit the following report :

Green Clay Smith was appointed superintendent of Indian affairs in Montana Territory, and as such officer gave a bond with sureties, on the 30th day of April, 1867, in a penalty of \$50,000, to the United States. Upon settlement of his accounts he was found to be in default to the Government in the sum of \$28,854.58. Suit for the recovery of this sum was commenced against the principal in the United States circuit court for Kentucky September 13, 1876.

In answer to an inquiry made by the committee, Hon. Kenneth Raynor, Solicitor of the Treasury, makes the following statements in reference to the suit against Mr. Smith :

By section 957, the court is required to grant judgment at the return terms, upon motion, unless the defendant shall make oath that he is equitably entitled to credits which have been submitted to and rejected by the accounting officers. Without doing this the case was continued, upon the request of the defendant, by this office at the October terms 1876, '77, '78, and '79.

On the 25th of February, 1879, I refused a further request made by Mr. Smith for a continuance for one year. The reason assigned by him was that he had not been advised of the rejection by the accounting officers of certain claims made by him for credits. I consented to another continuance for one term, and subsequently I had a statement of differences in the account and a copy of all rejected items sent to the United States attorney for Kentucky for delivery to Mr. Smith, to prevent the defendant setting up this reason at the October term, 1879. The United States attorney acknowledged their receipt and stated that he had notified Mr. Smith's attorney to call and obtain same, but no attention was paid to the notice; that every opportunity had been given defendant to examine papers; that no defense will be made to the suit; and that, in his opinion, Mr. Smith wished only for delay.

On the 29th of September last, in compliance with a request of Mr. Smith, on the ground that a bill was pending in Congress for the relief of said Smith, I authorized the United States attorney to continue the case till the April term, 1880.

On the 25th of February last the United States attorney telegraphed, asking if he should continue the case again. I replied, instructing him to try the case without further delay.

On the 25th of June 1875, suit was commenced in the United States circuit court for the eastern district of Michigan against George A. Fitch, surety, and resulted in a judgment by default for \$37,501.31. Execution was issued and returned "*nulla bona.*"

On the 21st of January, 1879, a suit was also commenced in the United States circuit court for the southern district of Ohio against Thomas McCullough, assignee of Thomas N. Stilwell, surety, which is now pending. Prior to its institution the attorney for McCullough requested that the suit in Kentucky be pressed to a judgment, and no steps taken against his client.

Reference of his request was made to the United States attorney for that district, who replied, stating that "if the suit pending in Kentucky would determine all matters in controversy between the government and the assignee, there would be good reason for awaiting its result, instead of instituting an additional suit. The only reason for awaiting would be because the one suit would determine all matters, and a judgment in Kentucky would secure a settlement of the claim. I do not understand that anything can be realized on execution against General Smith in Kentucky, and unless Mr. McCullough proposes to pay any judgment recovered there, so far as he has funds in his hands, I can see no reason for waiting until that suit is decided. As I understand the case, the government can realize nothing on the claim except from the estate of Mr. Stilwell, and I do not understand from his attorney that those representing the estate propose to settle any judgment recovered in Kentucky, but would still litigate the claim. No judgment recovered in the Kentucky suit can be enforced against the estate of Stilwell, and unless assurances are given of no further litigation in case of a favorable result there, I do not think the delay requested should be granted.

"Not only is there no offer to submit to the result in the Kentucky suit, but the suggestion is made that if judgment be recovered against General Smith in Kentucky, the claim to priority in distribution of the fund held by Mr. McCullough shall then be submitted to the State courts of Indiana, and, if disputed, shall be litigated there instead of in the United States courts.

"If this claim must ultimately be litigated with Mr. McCullough, there is no reason for delay, but if Mr. McCullough will agree to apply the funds of the estate to the payment of any judgment recovered against General Smith in Kentucky, there would be no occasion for an additional suit here."

As Mr. McCullough's attorney refused to comply with the conditions required by the United States attorney, the suit above referred to was instituted.

While there is no doubt that on the facts the whole amount of the large claim of the government can be collected from the assignee of the surety, it is clear that the suit against him for this purpose cannot be pressed while continuances are granted to the principal, time and again, upon grounds which upon examination are now shown to be hardly tenable.

My opinion, therefore, is that this case should be left to be tried as directed by this office, at the next term of the court.

In view of the foregoing facts, the committee are of the opinion that Congress should not interfere in this matter, but leave the liability of the principal and sureties to be determined in the courts of justice.

They therefore report adversely upon the bill.