IN THE UNITED STATES COURT OF APPEALS

—FOR THE—

INDIAN TERRITORY.

OCTOBER TERM, 1901,

NO. 394.

WM. J. THOMSON, ET AL, Appellants,

vs.

WM. MORGAN, ET AL, CHOCTAW AND CHICKASAW NATIONS, Appellees.

BRIEF OF APPELLEES.

MANSFIELD, McMURRAY & CORNISH,
Attorneys for Appellants.

IN THE UNITED STATES COURT OF APPEALS

—FOR THE—

INDIAN TERRITORY.

OCTOBER TERM, 1901,

NO. 394.

WM. J. THOMSON, ET AL, Appellants,

vs.

WM. MORGAN, ET AL, CHOCTAW AND CHICKASAW NATIONS, Appellees.

BRIEF OF APPELLEES.

The assignments of error, made by appellants, are seven in number, but are really embraced in two general propositions, viz.

First. That the court erred in making the Choctaw and Chickasaw Nations parties to the suit.

Second. That the court erred in holding that the judgment, on which plaintiffs rely to establish their citizenship, could not be received for that purpose.

Before entering upon a discussion of these two propositions, we desire to correct a mis-statement of counsel for appellants, as to the ruling of the court below. Judge Thomas, in over-ruling the demurrer of plaintiffs to the

answer and interplea of the Choctaw and Chickasaw Nations, stated, in effect, that the most that could be claimed for the judgment in question, was that it conferred political citizenship, upon the claimants; that, however, even this citizenship could not become effective, until a roll containing their names was approved by the Secretary of the Interior, and that the alleged judgment established no rights by which they could maintain an action, as members of the tribe, for the possession of tribal property. He stated that in his opinion the Supreme Court of the United States, in the case of Stephens et al. vs. Cherokee Nation et al., U. S. Bk. 43, L. C. P. Ed. 1041, did not pass upon the question at bar, but rather avoided it. He further stated that it was not necessary for him to pass upon it in that case, but upon being pressed by counsel for appellants, he stated that if it was insisted that the appellants acquired an interest in the property of the two tribes, by virtue of the judgment exhibited by them, then his opinion was that the judgment was absolutely void and could not be enforced in that way.

We also feel constrained to correct another mis-statement of facts by counsel for appellants. They insist that the point involved in this case has heretofore been argued by counsel for the Nations, and as the result of the litigation at that time, the Supreme Court of the United States has, in effect, upheld these judgments. Nothing could be further from the truth. The invalidity of these judgments, as urged by us, was never passed upon by the Supreme Court. The judges of that Court never heard of the contention.

We will now examine, briefly, the first assignment of error by appellants.

The Court below required the Choctaw and Chickasaw

Nations to be made parties to this action, under section 2 of the Curtis Act, which is as follows:

"SEC. 2. That when in the progress of any civil suit, either in law or equity, pending in the United States Court in any District in said Territory, it shall appear to the Court that the property of any tribe is any way affected by the issues being heard, said Court is hereby authorized and required to make said tribe a party to said suit by service upon the Chief or Governor of the tribe, and the suit shall thereafter be conducted and determined as if said tribe had been an original party to said action."

We are unable to see how the Court below could have taken any other course without violating this section of the law. This proposition argues itself.

The remaining assignments of error will be covered by a discussion of the validity of the judgment, set out as an exhibit to plaintiffs' complaint.

The Choctaw and Chickasaw Nations contend that these judgments are absolutely void. Before commencing the discussion of this question from our standpoint, let us see what position is taken by counsel for appellants. As we understand, they contend that this question is res adjudicata, citing Stephens et al. vs. Cherokee Nation et al., supra; that Congress had power to determine who were citizens of said tribes in the manner provided in the legislation complained of; that the judgments are not void for lack of parties, because no notice was necessary; and, lastly, that the rendition of these judgments does not deprive any member of these tribes of property, because the applicants admitted must be deemed to have been the owners of a pro rata share of the tribal property at the time they made their original applications.

In fact, the effort of counsel to argue these questions

seems to us to be rather labored, and to practically amount only to an assertion that some way, or somehow, these judgments should be permitted to stand, and their clients to acquire this property.

Let us examine briefly the legislation that brought about this condition of affairs. Congress, by different acts, constituted the Commission to the Five Civilized Tribes, a tribunal exercising judicial powers, to determine who were the identical persons among whom should be divided this vast Indian estate. It provided no method of service upon the tribes, but the Commission adopted a rule, requiring applicants for citizenship to serve a copy of their application upon the Chief, or Governor, of the tribe of which they claimed to be a member. This rule was intended to apply to all of the Five Civilized Tribes. A fair construction of this rule, admitting its validity for the sake of argument, would require, in the Choctaw and Chickasaw Nations, where both tribes were equally interested in the lands to be divided, service upon the Governors of both tribes, and this was evidently intended by the Commission. We contend, however, that the Commission had no power to make such rules. As a judicial tribunal they were bound to proceed in accordance with the lex loci, and this requires all those united in interest to be joined as plaintiffs or defendants (Mans. Dig., Sec. 4941), provides explicitly the manner of service, (see chapter Pleading and Practice), and provides, that all judgments, orders, sentences and decrees, made, rendered or pronounced, without notice, and all proceedings thereunder, shall be absolutely null and void. (Mans. Dig., Sec. 5201.)

The judgment must show upon its face the proper jurisdictional facts to render it valid.

But this was not all the machinery provided by Con-

gress for the adjudication of these questions. The Act of June 10th, 1896, provided: "That if the tribe, or any person, be aggrieved with the decision of the tribal authorities, or the Commission provided for in this act, it, or he, may appeal from such decision to the United States District Court: Provided, however, That the appeal shall be taken within sixty days, and the judgment of the Court shall be final."

By what process of reasoning can we reach the conclusion that Congress, in establishing a judicial tribunal of such extended powers, and in providing for an appeal to the United States Courts, whose judgment was made final, did not intend the lex loci as to pleading and practice to apply?

Appellants say in their brief that Congress had "the absolute right of providing A DECENT, REASONABLE AND FAIR MANNER OF DETERMINING WHO ARE, AND WHO ARE NOT, MEMBERS OF THESE INDIAN TRIBES." We find ourselves unable to assent to this remarkable proposition, neither do we believe that counsel for appellants would consider judgments procured against them, without notice, either fair, reasonable or decent.

In closing, we desire to quote from our brief, filed with the Judge of the United States Court for the Southern District of the Indian Territory, at Ardmore, in the case of G. W. Dukes et al. vs. Wm. Goodall et al. This was a bill in equity, brought by plaintiffs to declare similar judgments void, alleging that defendants were proceeding, themselves, to execute said judgments, by forcibly taking possession of the lands of said tribes, alleging that the judgments were void and that the attempted enforcement of them, by defendants similarly situated, would cause a multiplicity of suits, and various other grounds of equitable relief. We quote:

"Defendants demur to the bill herein, and state that 'the same is not sufficient in law to require them to answer.' We should not have filed a bill in equity if we had not believed that we were unable to maintain an action at law. We presume, however, that defendants intend to challenge the sufficiency of the bill in equity. By demurring, defendants admit that the allegations of the bill are true; so that this virtually leaves no issue except that presented by the judgment attached to said bill; and the further proposition that, even though the judgments were valid, as the enrollment of defendants is being contested before the Commission to the Five Civilized Tribes, the rights of defendants will never be perfect, until a final roll of the Choctaws and Chickasaws is made and approved, and plaintiffs therefore contend, that, under the allegations contained in the bill, as to the unlawful entry upon and wasting of their lands by defendants, they would be entitled to an injunction.

Are the judgments exhibited with this bill good? The plaintiffs contend that these judgments are absolutely null and void; first, because the Act of Congress known as the Curtis Bill, under which the Commission to the Five Civilized Tribes, and the Courts assumed to act, is void, in so far as it attempted to clothe any one with authority to take any part of their lands, and bestow them upon applicants for citizenship; especially, as said Act makes no provision for giving notice, either actual or constructive, to the members of said tribes, that said rights would be adjudicated; second, because, admitting, for the sake of argument, that Congress had such power, and that, acting under the general law in force in the Indian Territory, necessary notice could be given, the judgments disclose, upon their face,

that only one of the Nations was sued, service being had upon the Governor thereof.

Plaintiffs contend that the Governor of one of these Nations could not be served in this way. Their powers are defined by a written constitution. The lands of the Choctaws and Chickasaws are not held in a political capacity, in trust, by either the Choctaw or Chickasaw Governors. Service upon the Governor was, therefore, void. Admitting, again, for the sake of argument, that Congress had this power, that service could be had upon the Governor of one of said tribes, and that such service would legally bind that entire tribe, still, plaintiffs contend that, before the judgments could be valid, they must show upon their face that both the Choctaw and Chickasaw Nations were parties to said proceedings, and judgment was taken against both. This, it is admitted, has not been done. Only that Nation has been sued in which the applicant claimed citizenship.

The Choctaws and Chickasaws hold their lands under Article 1 of the treaty of 1855, which provision is as follows:

"And pursuant to an act of Congress, approved May 28. 1830, the United States do forever secure and guarantee the lands embraced within said limits to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common; so that each and every member of either tribe shall have an equal undivided interest in the whole; Provided, however, that no part thereof shall ever be sold without the consent of both tribes."

This treaty provision is simply a re-affirmation of what preceded it, viz: the cession of the lands to the Choctaws in 1820, the promise of a patent by Act of Congress of 1830; the treaty providing for the purchase of an undivided interest by the Chickasaws in 1837; and, finally, the issuance of a formal patent in 1842.

The sole object of making the roll, and the sole purpose of these judgments, is to bestow upon the applicant an equal undivided share, with every other Choctaw and Chickasaw, of these lands. A claimant stands in the same attitude of one who claims to be an heir of an estate, but whose rights are contested by the other heirs. He goes into court to establish his right. He did this in this case by a proceeding upon the equity side of the docket. We know of no rule of law which would permit a judgment in his favor under which he could be put into possession of an equal share of the estate, unless all of the known heirs were made parties to said petition.

This judgment directly affected the share of every recognized Choctaw and Chickasaw. When an applicant's right was denied, all the members of said tribes had a right to be notified of his application before he could procure any judgment against them, which would reduce the share of property they would otherwise receive.

In passing upon this question, we desire to call the attention of the Court to the fact that our government, in dealing with these two Indian tribes, has always recognized the joint holding of this property by the members of said tribes, and the fact that their title, or right, to it, could not be affected or diminished, except by the joint action of both. This appears in all the treaties and proceedings between the government and these tribes, and it will be remembered that the Atoka Agreement provided, that it should not become effective until ratified by a majority vote of the members of both tribes. To hold that the joint property of the two tribes can be taken by the Dawes Commission and alloted to one of these claimants, by virtue of a judgment against only one tribe, is to assume the position that due process of law is not necessary in a proceeding to divest

the members of the Choctaw and Chickasaw tribes of the title to their lands, and vest it in individual allottees under the judgment.

The courts, in these cases, must have proceeded under the laws in force within their jurisdiction. Ordinarily, a judgment rendered where the Court had no jurisdiction, or in the absence of parties in interest, is absolutely void.

Am.-Eng. Ency. Pl. and Prac., Vol. 11, 842, Sec. 3.

(Ib., 856.)

The laws of Arkansas, as to pleading and practice, are in force in the Indian Territory. At common law the plaintiff was compelled to take judgment against all or none of the defendants; and, under the code practice in Arkansas, a several judgment is only proper, where a several suit might have been brought.

Park vs. Mayer, 27 Ark., 551.

4 Ark., 448, 517.

Upon the proposition that such judgments will be treated as nullities, see American-English Ency.; Pleading & Practice, Vol. 11, 858; 10 Arkansas, 555; Mansfield's Digest, Sections 4941-5167; 31 Arkansas, 175; L. R. A.. Book 3, 620.

Under a declaration charging a joint liability, even the admission of one defendant will not entitle the plaintiff to a judgment and verdict against him alone. State vs. Williams, 17 Arkansas, 371; Benton vs. Gregory, 8 Arkansas, 180.

In the case of Hanley vs. Donohue, 59 Maryland, 239, it was held that, on a judgment recovered in Pennsylvania against two defendants, only one of whom was summoned, there could be no recovery in Maryland against the defendant who was summoned in the original proceeding, as the judgment, being a nullity as to the party not summoned,

was a nullity as to both. The case at bar is stronger than this.

A decree is void in the absence of a party whose rights must necessarily be affected thereby.

Gregory vs. Stetson, 133 U. S., 579;
Shields vs. Burrow, 58 U. S., 130;
Coiron vs. Millandum, 60 U. S., 113;
Dandridge vs. Washington, 2 Peters, 370.

In the case of Coiron vs. Millandum, supra, the court holds that, in a proceeding in equity to set aside the sale of an estate by two of the heirs, the creditors of the estate interested in the proceeds of the sale were absolutely necessary parties, and that a decree rendered in their absence as parties, and not against them, is not valid, although the bill alleged, and it was not denied, that all of said creditors were out of the jurisdiction of the court.

In Ansley et. al. vs. Ainswerth et al., in which the question arose as to vested rights of a member of the Choctaw tribe to the coal under a certain area of Choctaw-Chickasaw lands, Judge Clayton, of the Central District of the Indian Territory, held, that any Choctaw law or provision of the Choctaw constitution, in conflict with Article 1 of the treaty of 1855 is void. He said:

"If the Choctaw constitution was intended to vest an indefeasible title to the coal mines in the discoverer, it would be in violation of two of the provisions of the treaty of 1855. First, it would be an appropriation and sale of the realty without the consent of the Chickasaws; and secondly, it would be in violation of that clause of the treaty which provides that the lands shall be held in common, so that each and every member of either tribe shall have an equal undivided interest in the whole."

In the same opinion he says:

"I hold it, (Congress), has no power to divest a vested right relating to their lands; rights heretofore accrued to them by Acts of Congress, solemn treaties and deeds from the United States, granting to them the lands, for a valuable consideration, and by a fee simple title....these Indian tribes are to be governed....by Congress, and that is, by law; and the highest law, both to congress and these Indians, is the constitution of the United States, which provides that 'no person shall be deprived of life, liberty or property without due process of law.'"

In the same opinion, in referring to the Curtis Act, he said:

"It was the evident intention of Congress, first to secure a partition of the lands of the two tribes to their individual members."

The Constitution has been extended by Congress over the Indian Territory. The laws of the United States are in force here, and courts have been established here, which have jurisdiction over all controversies which involve the ownership or possession of these Indian lands.

It is certainly true, as a legal proposition, that, in the absence of treaty stipulations to the contrary, the members of one tribe could not, themselves, in any manner, have increased the number who were to share in the lands by admitting persons to citizenship, and thereby decrease the share of the members of the other tribe. One joint owner can do nothing to take away from the other joint owner, a portion of his property, or to decrease its value. He has power only over his own interest in the property. The only attempt at an argument that we have ever heard made, is that each tribe had the right to admit to citizenship, and that, therefore, the United States Courts could do the same thing, where the tribe in which citizenship was