IN THE

UNITED STATES COURT OF APPEALS

FOR THE INDIAN TERRITORY.

APPEAL FROM THE UNITED STATES COURT FOR THE CENTRAL DISTRICT OF THE INDIAN TERRITORY SITTING AT SOUTH McALESTER.

No. 387.

HENRY L. DAWES, ET AL., Appellants.

VS.

NANCY LEE CUNDIFF, Appellee.

BRIEF FOR APPELLANTS.

This is one of three mandamus proceedings pending in this court on appeal from the judgment of the United States Court for the Central District of the Indian Territory, at South McAlester, to-wit: Numbers 387, 388 and 389, upon the docket of this court.

In our brief in number 389, we have discussed the general proposition as to whether the United States Court had power, by mandamus, to compel the Commission to the Five Civilized Tribes to correct what it deemed to be an erroneous judgment, and compel it to place the names of persons upon the allotment roll of the Choctaw and Chickasaw tribes.

We there pointed out that the Commission to the Five Civilized Tribes is a judicial tribunal; that in its hands, rested the property rights of the Choctaw and Chickasaw Indians, and the obvious danger of thus indirectly, by the exercise of the writ of mandamus,

exercising appellate control over it. The case at bar but further illustrates the dangers of departing from the safe and beaten judicial path. If the court can, by the writ of mandamus, say to the Commission to the Five Civilized Tribes: "You are guilty of a gross error in determining the rights of this applicant" in a case in which the Commission has committed a gross error, and compel the Commission to enter upon its record a different judgment, and enroll the party denied by the Commission, then the power of the Commission is taken away. It is subject to the superintending control of the courts. All its judgments may be reviewed. Every person who applies to that Commission, and who has applied and been rejected, consisting of thousands may come into the United States Courts, literally overwhelm the Commission with legal fights to sustain its jurisdiction and judgments, and absolutely cause a suspension of the proper work of the Commission by reason of the fact that it will be compelled to devote its whole time to answering and explaining its conduct in the higher courts, and, not only that, but would, in our opinion, be compelled to ask appropriations of congress and an additional clerical force and legal assistants to enable it to answer in the most imperfect manner one tenth of the mandamus proceedings which could be brought in these courts.

Now, to the present case:

Nancy Lee Cundiff, the appellee, applied to the Commission to the Five Civilized Tribes to be enrolled, and shows that she was admitted by the Commission on the 5th day of December, 1896, as a Choctaw Indian by blood, and that the records of the Commission will show that, at that time, she applied to the Commission, and was admitted under the provisions of the Act of June 10, 1896. That, on the 17th day of August, 1899, she appeared before the Commission for the purpose of being identified as the person formerly admitted by it, and to have her name placed upon the permanent allotment roll to be made by said Commission; but that the Commission denied her enrollment, giving as a reason for its judgment that the appellee was not a bona fide resident of the Choctaw Nation on the 28th day of June, 1898. (Tr. page 14). The act of June 28, 1898, further enlarged the powers of the Commission; virtually placed, taken in connection with subsequent Acts of Congress, the valuable estate of the Choctaws and Chickasaws in its hands as a judicial tribunal to determine, first, who are the heirs of this vast estate; and, secondly, to execute their judgment in determining the heirs, by actually placing them in possession of their rightful shares of the property.

In Section 21, of said Act the Commission is

"... directed to make correct rolls of the citizens by blood of all the other tribes, including the Choctaws and Chickasaws, eliminating from the tribal rolls such names as may have been placed thereon by fraud, or without authority of law, enrolling such only as may have lawful right thereto."

The Act of June 28, 1898, is very comprehensive and constitutes the Commission to the Five Civilized Tribes the sole judicial authority for determining every question connected with enrollment and allotment. Section 21, of said Act, further provides:

"No person shall be enrolled who has not heretofore removed to, and in good faith settled in, the nation in which he claims citizenship."

Now, to recapitulate: The Commission is required only to enroll those persons who have lawful right thereto, and Congress says no person shall be enrolled who has not, prior to June 28, 1898, removed to and in good faith established a residence in the Nation in which he claims citizenship. Now, it is clear that, if this legislation is constitutional, that the Commission must determine who has "Lawful right thereto," and the Commission must determine who has "removed to, and in good faith established a residence in the Nation in which he claims citizenship, prior to June 28, 1898," and their determination of this question cannot be controlled by mandamus.

As to the contention of appellees that the legislation is unconstitutional, we do not deem it necessary to present that question, as, whenever the constitutionality of such acts has been attacked by the Choctaw and Chickasaw Nations, or tribes of Indians, the United States Courts have, invariably, held that the powers of Congress over the Indian tribes were of such a large and extended nature, that this legislation was constitutional, and we will not indulge the presumption that it can be used as a sword against them and not as a buckler by the Indian tribes.

The contention of appellee is, simply, that the act is unconstitutional. The courts have heretofore upheld it. If the act is unconstitutional in this particular, it is in every particular.

We submit that, in any event, the court had no power, by mandamus, to direct the Commission to enroll appellee.

We call attention to the answer of the Commission to the Five Civilized Tribes, (Tr. pages 21-29). We also raise the same question as to the error of the court in refusing to make the Choctaw and Chickasaw Nations parties, which is presented in our brief in number 389, and there argued. The action of the court in this case will be found in the Transcript on page 23. As this point was fully presented in number 389, we deem it unnecessary to argue it at length here.

Respectfully submitted,

MANSFIELD, McMURRAY & CORNISH,

Attorneys for Appellants.