IN THE

United States Court of Appeals

FOR THE INDIAN TERRITORY.

HENRY L. DAWES ET AL., Appellants,
vs.
MRS. REBECCA HARRIS ET AL., Appellees.

No. 388.

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

BRIEF FOR APPELLANTS.

MANSFIELD, MCMURRAY & CORNISH,
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This is one of three mandamus proceedings, now pending on appeal in this court, and brought by different plaintiffs against the Commission to the Five Civilized Tribes. There are some questions common to all of them, and, assuming that the court will consider these three cases together; we have taken the liberty of referring in the brief in No. 387 to certain points as fully argued in No. 389; and may, in the discussion of this case, omit argument here which has been fully presented in the briefs in the other two.

The appellees in this case, sought a writ of mandamus from the United States Court for the Central District of the Indian Territory, to compel the Commission to the Five Civilized Tribes to enroll the appellees. The transcript discloses that the Commission to the Five Civilized Tribes, were applied to by appellees to enroll them, and that appellees presented to the Commission, what they claimed to be a judgment of the United States Court, for the Central District of the Indian Territory, against the Choctaw Nation. This judgment is filed as "Exhibit A," with the petition, and will be found on page 6 of the transcript. The Commission refused to enroll appellees, and rendered judgment rejecting them. Upon the hearing of said petition, the appellants filed a second amended demurrer as follows:

"Come the defendants, and for cause of demurrer to plaintiffs' petition state:

That the roll upon which plaintiffs, ask that these defendants place their names, is a list of persons who are members of the Choctaw and Chickasaw Nations, or tribes of Indians, among whom, under existing laws, these defendants are to proceed to divide the lands embraced within the area of the Choctaw and Chickasaw Nations, belonging to said tribes, by allowing an equal portion thereof, quantity and quality alike considered, to each and every member thereof;

That plaintiffs claim a right to be placed upon said roll, and to be given a share of said lands, by virtue of a judgment of the United States Court, a certified copy of which is filed herewith, marked "Exhibit A" and made a part of this demurrer; that it appears by an examination of said judgment, that the same only purports to be against the Choctaw Nation, or tribe of Indians; and thus not purporting to be agoinst the Chickasaw Nation or tribe of Indians; that the members of said last named tribe have an equal interest in the land of the Choctaws, and that said judgment, which is exhibited with plaintiffs' complaint, is, therefore, void.

That said complaint, therefore, states no grounds upon

which the relief sought can be granted, and states no cause of action."

The Commission to the Five Civilized Tribes,
By MANSFIELD, McMURRAY & CORNISH.
Attorneys."

The record in this case, therefore, presents only one question: Has the Court authority to compel the Commission to the Five Civilized Tribes, to enroll the names of these appellees, by reason of the alleged judgment. set-forth as "Exhibit A?" The Commission has judicially determined that the evidence upon which these appellees seek enrollment is insufficient for that purpose; that the alleged judgment which they present does not come up to the requirements of the law; that, by reason of the fact that the entire membership of the Chickasaw Nation, who have an equal, undivided interest, in the lands sought to be affected, were not made parties to said action, and, as appears from the record, had no notice of it, that for the purpose of securing enrollment and securing a share of the lands of these tribes, said judgment is void. We maintain that the judgment of the Commission is right. That they cannot be compelled to enroll upon said judgment, because it is void; and that, if they so find, there is no power to coerce them to place the names of these appellees upon the allotment roll.

This question of the invalidity of these judgments, we shall only present briefly, and for this purpose, will 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 the defendants were proceeding themselves to execute said judgments, by forcibly taking possession of the lands of the 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 judgments 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 allotted 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. & 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. Ainsworth 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 ao 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 in-

creased the number who were to share in the lands by admitting persons to citizenship, and thereby decrease the share of 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 bave 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 claimed, was properly served. It would not follow that the courts could do all the tribe could do, and neither proposition is correct. As held by Judge Clayton, the tribes had no such power. If the tribes had no such power, could Congress clothe the court with that power? That is: with the power of admitting to citizenship, when only one tribe was in court. But Congress did not attempt to do this. Congress attempted to provide for the adjudication of contested citizenship cases after due and lawful notice to all parties in interest; but failed to provide the necessary machinery for that purpose. We would be glad if it could be pointed out to us, by what sort of legal legerdemain the property of an Indian can be taken from him, by a proceeding of which, admittedly, he had no notice, either actual or constructive. This has never been done with reference to any man's property before, in all the history of this government.

We submit that these judgments are void. They are not judgments. They cannot be treated as such by the courts. They constitute, however, a cloud upon the title of these plaintiffs, and stand as an insuperable bar to the further execution of the Atoka Agreement.

We desire to call attention, briefly, to another phase of the case: In the cases of Harvey B. Moore, John S. Layman, and D. C. Wigand, judgments purporting to admit them to citizenship were rendered by this court after the passage of the Act of Congress of June 28, 1898, known as the Curtis Act. Section 2, of this act, is mandatory, and declares that whenever the property of the tribes is involved

in any proceeding pending in the courts, that the tribes shall be made a party to said suit, and provides for the manner of service. In all the other cases, so far as we are advised, judgments were rendered before the passage of this Act.

We submit that the demurers should be overruled."

We regard the arguments in the foregoing brief, as applicable to the present case, and shall, therefore, add nothing to what is therein stated, except to say that, in the argument of this question, which involves a vast amount of property belonging to these tribes, and upon the right decision of which depends, whether or not, in our opinion, the most grievous wrong ever perpetrated by judicial machinery, shall be consumated or averted, we have never heard, by attorneys representing persons having these judgments, any valid or legal argument setting-forth why they should be recognized. In fact, the position taken by them is that, ordinarily, our position is right; that, ordinarily, the judgments are void, but that, for some mysterious reason, and under the circumstances of this particular case, their clients should be permitted to loot this Indian estate unhindered by the judiciary and unrestrained by the constitution.

We respectfully submit this cause inthe firm belief, that it is not true, that either the stress of political conditions, or the clamor of unlawful claimants, to share in this rich Indian heritage, will cause the courts of the United States of America to go to a length in depriving persons of property rights, unknown to the entire history of jurisprudence and unparalelled by the action of any court or tribunal heretofore.

Respectfully submitted,

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Attorneys for Appellants.