IN THE

United States Court of Appeals

IN THE INDIAN TERRITORY.

G. W. DUKES, ET AL., Appellants,

vs.

EDWARD McKENNA ET AL., Appellees.

No. 399.

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

BRIEF FOR APPELLANTS.

MANSFIELD, McMURRAY & CORNISH,
Attorneys for Appellants.

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That the nature of this action may be properly understood, we will quote in full the bill in equity filed by the appellants, and "Exhibit A" thereto.

"The plaintiffs, G. W. Dukes and D. H. Johnston, bring this action for themselves, in their individual capacity, and for all the other members, of the Choctaw, and Chickasaw, Nations or tribes of Indians, said Choctaw Nation, consist-

ing of about fifteen thousand members, and said Chickasaw Nation, of about six thousand members, and it, therefore, being impracticable, for all the members of said tribes, to be made parties plaintiff. The plaintiff, G. W. Dukes, is a member of the Choctaw Nation, or tribe of Indians, and is the duly elected, qualified, and acting, principal chief of said nation, and brings this action, also in his capacity as such principal chief. The plaintiff, D. H. Johnston, is a member of the Chickasaw Nation, or tribe of Indians, and is the duly elected, qualified, and acting, governor of the Chickasaw Nation, or tribe of Indians, and also brings this action in his capacity as the governor of said tribe; and said plaintiffs, for cause of action state:

That the members, of the Choctaw, and Chickasaw, nations or tribes of Indians, are the owners, in fee-simple, of the following described lands, to-wit.

"Beginning at a point on the Arkansas river, one hundred paces east of old Fort Smith, where the boundary line of the State of Arkansas crosses the said river, and running thence, due south to Red river; thence up Red river to the point where the meridian of 100 degrees west longitude crosses the same; thence north along said meridian to the main Canadian river; thence down said river to the place of beginning."

That under the laws of the United States of America, and the various treaties, entered into between the members, of the Choctaw, and Chickasaw nations, or tribes of Indians, and the United States of America, the members of said tribes, hold said lands, so that, each and every member, of either tribe, has an equal, undivided interest in the whole, and so that, no part of said lands, can be sold without the consent of both parties.

That, on the 11th day of March, 1901, upon the petition of the defendants, Edmund McKenna, and W. C. Page, an order was made by the United States Court, for the central

district, of the Indian Territory, sitting at Poteau, granting to said defendants, the exclusive right to erect, and operate a toll-bridge over the Poteau river, at Page Ferry, south of the Frisco railroad bridge, within the central district, of the Indian Territory, for a term of twenty years, and for that purpose to maintain all necessary causeways leading thereto, a certified copy of said order and judgment is herewith filed, marked "Exhibit A," and made a part of this bill. That said Poteau river is not a navigable stream, and that the site of said bridge is located upon the lands belonging to said tribes, and within the limits of the Choctaw Nation. That said privilege of maintaining said toll-bridge, and the approaches thereto, is of the value of $5,000.00; that the judgment or order of said court, granting said franchise to said defendants, is null and void, and was rendered without notice to either of said nations, or tribes; that the existence of said judgment, is a cloud upon the title of plaintiffs, and that the defendants will, unless restrained, proceed to take possession of said site, and such amount of the lands of the plaintiffs, as they may deem necessary for approaches thereto, without compensation to these plaintiffs, to their damage in the sum of $5,000.00, and in violation of their legal rights in the premises.

Plaintiffs further state that they have no remedy at law by which they can protect their legal rights as aforesaid.

Wherefore, plaintiffs pray judgment, that said judgment, or order, of said court be vacated and set aside; that a temporary injunction be issued, directing the defendants to refrain from taking any steps under the same, to construct or maintain said toll-bridge, and upon a final hearing, said injunction be made perpetual, and for all other proper relief, to which in equity they may be entitled.

G. W. Dukes and D. H. Johnston,

By Mansfield, McMurray & Cornish,

Attorneys."

"EXHIBIT A."

COPY OF ORDER OF COURT.

UNITED STATES OF AMERICA,
Indian Territory—Central District.

In the United States Court in the Indian Territory, Central District, at a term thereof begun and held at Poteau, in the Indian Territory, on the 4th day of March, A. D., 1901; present the Honorable Wm. H. H. Clayton, judge of said court.

The following order was made and entered of record:

In the Matter of Granting Privilege to Construct and Operate a Toll-bridge Over Poteau River.

On this 11th day of March, 1901, being one of the regular days of holding court at Poteau, Indian Territory, comes on for cosideration, the petition of Edmund McKenna and W. C. Page, praying that the privilege be granted them, to erect and operate a toll-bridge, over the Poteau river, at Page's Ferry, south of the Frisco railroad bridge, within this district, for the term of 20 years. And upon consideration of said petition, as well as evidence introduced by the petitioners, the court finds, that a bridge over said river, at said point, is necessary to accommodate the traveling public, and that to bridge the same at public expense is impracticable; and the court further finds that petitioners, Edmund McKenna and W. C. Page, are suitable and qualified persons to receive the privilege of erecting and operating a toll-bridge over said river at said point.

It is, therefore, considered and ordered, that the privilege of erecting a toll-bridge over said river at said point, together with all necessary causeways leading thereto, and of operating the same, and charging tolls therefor, for the term of 20 years, be and the same is hereby granted petitioners, Edmund McKenna and W. C. Page.

It is further ordered that work commence upon said bride and approaches within 90 days.

It is further ordered that the maximum rates of toll, which the proprietors of said toll bridge, and the approaches thereto, are entitled to charge for travel over the same, be and the same are hereby fixed, pending the further order of the court, as follows: Each four-horse team, 35 cents; each two-horse team, 25 cents; each horseman, 10 cents; each head of cattle, 5 cents; each head of sheep or hogs, 3 cents; each footman, 5 cents.

WM. H. H. CLAYTON,
Judge Presiding."

The defendants filed a formal answer (Tr. page 5), setting up that the order of the court was not void, and further, that W. C. Page, one of the appellees, is a member of the Choctaw Nation, and is in possession of the land where the bridge is to be located. The cause was submitted to the chancellor upon an Agreed Statement of Facts, which is as follows:

"It is agreed by and between plaintiffs and defendants, in the above entitled cause, now pending before the Honorable Wm. H. H. Clayton, Judge of the United States Court for the Central Listrict of the Indian Territory, that the following state of facts exists, to-wit:

That W. C. Page is a citizen of the Choctaw Nation, and is recognized as such by the Coctaw Nation, or tribe of Indians; that he is in possession of the land upon both banks of the Poteau river, where the bridge against the building of which the injunction is sought, is to be located, and claims the same as his prospective allotment; and that he is also in possession of the lands on each side of the road leading to said bridge on both banks of said river, and claims the same as his prospective allotment as a citizen of the Choctaw Nation.

That such bridge is sought to be located over said river at the site of the ferry now operated by said W. C. Page, and that a road has crossed said river at said point, and been continuously used as such for a period of twenty-five or thirty years, and perhaps longer.

The defendant, McKenna, is a citizen of the United States, and not a member of any Indian tribe.

We hereby agree that the above statement of facts shall be filed, and become a part of the record in the above entitled cause.

It is agreed by and between plaintiffs and defendants, in the above entitled cause, now pending before the Honorable Wm. H. H. Clayton, Judge of the United States Court for the Centrrl District of the Indian Territory, that, in addition to the statement of facts, already filed herein, the following state of facts exist, to-wit:

That the plaintiff, G. W. Dukes, is a member of the Choctaw Nation, or Tribe of Indians, and is the duly elected, qualified and acting principal chief of said nation; that the plaintiff, D. H. Johnston, is a member of the Chickasaw Nation or Tribe of Indians, and is the duly elected, qualified, and acting governor of the Chickasaw Nation, or Tribe of Indians.

That said Choctaw Nation consists of about 15,000 members, and said Chickasaw Nation of about 6,000 members, and that the members of the Choctaw and Chickasaw Nations, or Tribes of Indians, are the owners in fee simple, to them and their descendants, of the lands described in plaintiffs' complaint in equity, to inure to them, while they shall exist as a nation and live on it.

We hereby agree that the above statement of facts shall be filed and become a part of the record in the above entitled cause.

MANSFIELD, MCMURRAY & CORNISH,
For the Plaintiffs.

FREDERICK & FREDERICK,
For the Defendants."

The appellants demurred to the answer of appellees, but the court overruled said demurrer, to which the appellants excepted. The cause, having been submitted upon the

foregoing statement of facts, the decree of the chancellor was, that the bill in equity be dismissed, to which the appellants excepted, and prayed an appeal to this court, which was granted.

The question involved, is, in our opinion, one of the constitutionality of the Act of Congress of February 18th, 1901, which put in force in the Indian Territory, sections 504-509, inclusive, of Mansfield's Digest of the laws of Arkansas. These sections of the Arkansas Statute authorize the county courts of that State, to grant certain turn-pike, and toll-bridge privileges, where the court found that the public convenience demanded it, and to fix the rates, which may be charged by the grantee. These sections make no provision for compensation to the owner of the fee, because it was contemplated, that these privileges would only be granted, where public roads already existed in that state, and Congress, in seeking to adopt it for use in the Indian Territory, seems to have overlooked entirely, making any provision for compensation to the tribes, or individual Indians, who might be damaged thereby. We presented the bill upon this theory, to the chancellor below, but the decree dismissing the bill, was entirely upon another theory. The chancellor held that, wherever roads have been used by the public, in the Choctaw or Chickasaw Nations, for a sufficient period of time, that the public acquired the right by prescription, to such roads and highways, and therefore no compensation was required, and upon this theory, dismissed the bill.

We do not think that any such doctrine is applicable to an Indian reservation. And the lands held by the Five Civilized Tribes are Indian reservations, and still recognized as such both by the government of the United States, and the Courts. See Maxey vs. Wright, 54 S. W., 807, and cases there cited.

The lands known as the Choctaw, and Chickasaw Nations, belong to the members of the Choctaw and Chickasaw Nations, or tribes of Indiaus. The character of their holding is fixed by the following provision of Article 1, of the

Treaty of 1855, between said tribes and the United States, viz., "and pursuant to an Act of Congress, approved May 28th, 1830, the United States do hereby, forever secure and guarantee the lands embraced within the 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, udivided interest, in the whole, provided, however, no part thereof shall ever be sold. without the consent of both tribes; and that said lands shall revert to the United States, if said Indians and their heirs become extinct, or abandon the same." The United States government not only placed these Indians in possession of these lands, but has treated with them in reference thereto, continually, as one tribe or nation. This is not only evidenced by provisions of the Atoka agreement, but by the treaties of 1855 and 1856. The 43rd Article of the treaty of 1866, provides, that the United States promises and agrees that no white person, except certain officers and agents of the government, or persons travelling through, shall be permitted to go into said Territory, unless formally incorporated and naturalized by the joint action of the authority of of both nations, into one of said nations, according to their laws, customs, or usages. It was an Indian country, set apart for Indian use, and white persons had no right there, unless for the purpose of passing through, without the permission of the Indians. There was, within the Indian Territory, no public to acquire title by prescription, to the roads. The law could not recognize such a public, as existirg within the bounds of the Choctaw–Chickasaw nations. Only three classes of persons could be there: officers and agents of the government, persons traveling through, or temporarily there, and persons there under permit from the Indian authorities. This latter class, by far the most numerous, were for the most part, tenants of the Indians, and laborers for them, and were there under permission granted yearly, the payment of which, entitled them to ren ain within the nation. Persons who passed through the nations, could certainly acquire no

right by prescription to the road which they saw for the first and last time; persons residing within the nations upon permission, certainly could not be held to have rights there, except as fixed by the permit, which was to remain there, until the nation's permission to do so, was withdrawn.

To hold that the public has acquired title by prescription, to all the traveled roads across said lands, would seriously interfere with allotment to the individual members of said tribe. under the terms of the Atoka agreement. How is title acquired by prescription? Blackstone says that property is acquired by prescription, "when a man can show no other title to what he claims, than that he and those under whom he claims, have memorially used to enjoy it." Title by prescription was known to the Roman law, by the name of *usu capio*, so-called because one who gains title by prescription may be said *usu rem capere*. How can the public within the Choctaw Nation, be said to take the roads, traveled therein, by use? The members of the tribes could not take as against each other. Their rights are fixed by the treaty. The rights of all other persons within said nations, are also determined by the laws and treaties, which permit them to be there, and to say that they take the land by use, is, it seems to us, utterly untenable. Can we assume that congress, in adopting these sections of Mansfield's Digest, meant to seriously affect or repeal the provisions of existing laws, by which these lands are to be alloted in severalty? Further, a prescription must always be laid in him that is tenant of the fee, and cannot be for a thing which cannot be raised by grant. The Choctaw Nation could not have granted even a grain of sand to any person, or have made any use of the common property, which would have interfered with its use, by its co-tenants, or interfered with the purposes and ultimate designs of the United States government under the treaties.

There can be no title to public roads, by prescription, within Indian reservations.

One tenant in common cannot dedicate the common property to public use without the consent of his co-tenants. 9 S. W., 581.

Mere acquiescence in the use of a road is not sufficient to dedicate it to public use. 17 S. W., 520.

Where owners of the property have never ceased to exercise dominion over it, the public could acquire no prescriptive rights thereto. 26 S. W., 386. To acquire such prescriptive rights, the use must be under a claim of right, and not merely permissive. 37 S. W., 90. There cannot be a dedication to private use. 53 S. W., 668. It appears to us that in this there appears none of the elements necessary to make a title by prescription; that in view of the tenure of this land, its history, and the treaties of the government with these Indian tribes, no person could acquire any right in said lands, hostile to the purposes of the government, in said treaties. We submit that the decree of the chancellor should be reversed; that the order granting said franchise should be set aside, and the building of said bridge perpetually enjoined.

Respectfully submitted,

MANSFIELD, McMURRAY & CORNISH,

Attorneys for Appellants.