IN THE

United States Court of Appeals

FOR THE

INDIAN TERRITORY,

AT

SOUTH McALESTER, INDIAN TERRITORY.

WM. J. THOMPSON, ET AL,
Appellants,

vs.

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

No. 394.

PATCHELL & PYEATT AND J. G. RALLS,
ATTORNEYS FOR APPELLANTS.

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BRIEF FOR APPELLANTS.

STATEMENT OF THE CASE.

This is an action of unlawful detainer pure and simple, as defined in Chapter 67 of Mansfield's Digest. For the year 1899 the plaintiff Thompson rented his farm in the Chickasaw Nation to one Robert Jones, and his pasture adjoining the farm to one John Garvin. Both tenants took possession of said lands under their rental contracts. Shortly after the commencement of his term on the farm Jones died and soon thereafter his widow and

administrator assigned his rental term to the defendants and they immediately took possession. Also in a short time after the commencement of his term on the pasture Garvin assigned the same to the defendants and thereafter defendants held possession of both farm and pasture. Not long after these rental contracts were made Thompson assigned an undivided interest in the lands to his co-plaintiffs, Samuel and Ellen Wall. After the expiration of the year of 1899 the defendants refused to comply with plaintiffs written demand for possession. The action was filed with bond for possession but defendants gave a cross bond and remained in possession of both farm and pasture.

At the spring term 1901 the trial Judge on his own motion ordered the Choctaw and Chickasaw Nations made parties to the action. They entered their appearance and filed an interplea. Their principal allegation is that the plaintiffs are not citizens of either of said Nations and therefore have no right to hold lands in said Nations or maintain such an action. This plea, however, admits that plaintiffs had obtained a decree in the United States Court at Ardmore on the 19th day of January 1898 holding that plaintiffs are citizens of the Choctaw Nation and as such are entitled to be enrolled by the so-called Dawes Commission, a certified copy of said decree being attached as an exhibit to their interplea. Plaintiffs filed a general demurrer to this interplea and also a motion to strike it out and dismiss said Nations from the action. The court over-ruled both demurrer and motion, and exceptions thereto were duly taken. The right or necessity of making the Nations parties to ordinary unlawful detainer actions is one of the questions we desire this court to rule upon in this appeal as a question of proper practice.

The last amended complaint sets out with perhaps unnecessary detail the facts constituting plaintiffs cause of action, and the facts showing their Choctaw citizenship, and their consequent right to occupy and enjoy their pro rata shares of the lands of the Choctaw and Chickasaw Nations. A certified copy of the decree of the United States Court at Ardmore adjudging plaintiffs to be citizens of the Choctaw Nation is attached as an exhibit to the complaint. (Tr. 3)

Plaintiffs also filed a comprehensive answer and reply to the tribal interplea in which specific denials are made of all the material allegations of fact.

Both defendants and the Nations interposed general demurrers to the complaint and these demurrers were sustained by the Court. An exception to this ruling was duly saved. A similar demurrer was made by the Nations to plaintiffs answer and reply to their interplea, and the Court likewise sustained it and to that ruling plaintiffs duly excepted. This in effect dismissed plaintiffs from the case, and the Nations conceding the Choctaw Citizenship of one of the defendants consented to judgment in his favor for possession of the lands sued for. Plaintiff excepted to this judgment. A motion for new trial was made in due season, and was over-ruled, exceptions thereto taken, an appeal granted, bill of exceptions allowed and filed, and all requirements to perfect an appeal have been in due time and manner complied with.

Appellants believe that by the adverse rulings mentioned, they have been denied justice, and respectfully bring this appeal for a reversal.

ASSIGNMENTS OF ERROR.

1. The Court erred in making the Choctaw and Chickasaw Nations parties to the suit.

2. The Court erred in over-ruling plaintiff's demurrer to

and motion to strike out the interplea of the Choctaw and Chickasaw Nations. (Tr.—4.;23)

3. The Court erred in sustaining the demurrers of defendants and Choctaw and Chickasaw Nations to plaintiffs' second amended omplaint. (Tr. 24-5)

4. The Court erred in sustaining the demurrer of the Choc- and Chickasaw Nations to the answer and reply of plaintiffs to the interplea of said Nations. (Tr. 24-5)

5. The Court erred in rendering judgment against the plaintiffs and in favor of the defendants. (Tr. 25.)

6. The court erred in adjudging possession of the lands sued for to the defendants. (Tr. 25.)

7. The court erred in over-ruling plaintiff's motion for a new trial. (Tr. 30-1.)

ARGUMENT.

Assignments of error, numbered 1 and 2, may be considered together. The Court of his own motion made the Nations parties to the action feeling that he was required to do so under Section 2 of the Act of Congress approved June 28th 1898, being the so called Curtis Bill. No exception was taken to this order when made, but if an error, it is of such a nature that it is shown by the record, and no exception is necessary to urge it here. However, the plaintiffs did save an exception to the Court's ruling on their motion to strike out the interplea and dismiss the Nations from the action. This question is not particularly important to the main issues involved in this appeal, but we raise it in order to give this Court an opportunity to rule upon and define the classes of actions in which it is neccessary under the Act of Congress to make the Nations parties. The principal objections to their being made parties when neither necessary nor proper,

are upon grounds of costs, delays, and general inconvenience to the real parties. The trial Court at the term mentioned went to the extreme of making the Nations parties to every action pending in that court wherein land of any kind was in any manner involved.

2. Errors numbered 3 and 4 bring us to the real issues in the case. In their Second Amended Complaint plaintiffs with full det5ils set out their ownership of the lands and premises sued for, their renting of the same to Jones and Garvin for the year of 1899, the delivery of possession to said tenants under their rental contracts, the death of Jones and the subsequent assignment of his rental term to defendants, and also Garvin's assignment of his lease to defendants, the failure and refusal of defendants to vacate at the end of their term, and the subsequent filing of the action. Also plaintiffs Choctaw Citizenship IS ASSERTED AS A MATTER OF FACT, and as evidence thereof a certified copy of the Court's decree so holding is attached as an exhibit. The facts stated certainly make a clear and well defined right of recovery by the plaintiffs and classifies the action as that of a landlord seeking to recover possessson from his tenant unlawfully holding over after the expiration of his term.

As a general rule the tenant is estopped to deny his landlords title and right of possession; and this rule is without exception when the landlord's title is the same at the termination of the tenancy as it was at the commencement and no fraud has been practiced. The defendants, then, are estopped to resist plaintiff's right of possession, even though plaintiffs are not, as a matter of law, citizens of the Choctaw Nation. There has been no change in the status of plaintiffs citizenship since those' rental contracts were made. It may be said however that such estoppel does not

extend to the Tribes. Admitted; but the Tribes cannot contest the plaintiffs' right of possession in this manner. Sections 5 and 5 of the Curtis Bill provides their course against persons unlawfully holding possession of tribal lands.

The real question in the case, and the sole one argued at length in the lower court, is the validity and effect of the decree holding plaintiffs to be citizens of the Choctaw Nation. Counsel for theTribes urged that all the Acts of Congress providing for the determination by the Dawes Commission and the U. S. Courts of rights of citizenship are unconstitutional and void; and that all the decisions of those tribunals are wholly void and establish nothing. They do not agree with the Supreme Court of the United States in its decision that Congress has the right to provide a reasonable manner to determine who are members of an Indian tribe, and that in the legislation referred to, Congress has constitutionally exercised that right. Their principal contention is that the effect of the decisions of the Dawes Commission and the Courts when in favor of the applicants for enrollment, was to give such persons a right to share in the ultimate division of tribal property; and that no notice having been given to the individual members of tribes of such applications for enrollment, that such decisions have the effect of depriving the members of the tribes, whose citizenship has never been disputed, of a part of their property; and that such a result is not due process of law, and therefore all the laws of Congress athorizing such an unholy conclusion, and the decision of the Commission and Courts where not in accordance with Tribal predjudices are unconstitutional and void.

Counsel for the Nations do not seem to realize that in these arguments they are threshing over old straw; that all their contentions were raised at the start by Messrs. Stuart, Gordon and

Hailey, the first of the distinguished line of legal talent which has represented the Tribes on these questions. This very matter was presented fully and with great force before the Supreme Court of the United States in the celebrated case of Stephens et al vs. Cherokee Nation et al, 174, U. S. Bk. 43. L. C. P. Ed. 1041, and was decided adversely to the tribal contentions. On page 20 of the transcript may be seen the original answer of the Choctaw Nation to plaintiffs' application for enrollment as Choctaw citizens before the Dawes Commission. The first paragraph reads: "Now comes the Choctaw Nation by it's lawful attorneys and says, First, That this Honorable Commission has no power and jurisdiction to hear and determine the issues herein involved, because the law creating such Commission is unconstitutional and void." The opinion of Chief Justice Fuller in the decision referred to shows that this contention was very carefully considered, and in fact was the prime point passed on in this case. The complaint that the law of Congress was unconstitutional and the rules made by the Commission and the Courts for notice and procedure were illegal, was urged at every stage of the Citizenship cases from the time they were first filed until they were finally affirmed by the Supreme Court. Appellant's application was one of those appealed to the Supreme Court and by it affirmed. It would seem that the matter of their citizenship ought to be considered RES ADJUDICATA. So again we say we are threshing over old straw, and unless this Court desires to over-rule the decision of the Supreme Court there is nothing here to consider but the gross errors of the trial Judge in refusing to follow the rulings of the highest court of our country.

Since the reasons for the rulings of the trial Court are not shown by the record we will take the liberty of saying that he in no respect agreed with the assertions of counsel of the Tribes that

the acts of Congress referred to are unconstitutional, or that the rules prescribed by the Commission and Courts did not amount to due process of law. The trial court stood upon the novel position that plaintiffs had no right to occupy or use the tribal lands until they are finally enrolled by the Dawes Commission and the roll with their names upon it is approved by the Secretary of the Interior. He in fact agreed with plaintiffs' counsel that the acts of Congress are constitutional and that the rules of Commission and Courts were legal and just, and that the decree in plaintiffs' favor has been affirmed by the Supreme Court. He claimed to find support for his peculiar theory in words of section 21 of the Curtis Bill. "The rolls so made when approved by the Secretary of the Interior when so made shall be final, etc." The trial Court in his oral opinion argued that the original application for enrollment was simply a petition for citizenship and that the applicants have no right to enjoy the benefits of citizenship until every step provided for by the acts of Congress is completed; and the approval of the Secretary of the Interior being one of such steps, that such approval must happen before the right of citizenship is fully established. This reasoning is more plausible than sound. In the first place, the applicants for enrollment did not seek the right of citizenship. The applicant averred that he was a citizen but the tribal authorities disputed that contention and said he was not a citizen. The issue made was, "citizen or not a citizen," as aptly expressed by Chief Justice Fuller in the opinion mentioned. It was not a petition for a right, but merely to settle a dispute between the citizen and the tribal authorities. This is certainly the fact in all cases where the applicant won out, for it must be deemed that the decision was correctly reached on the facts and law. Therefore when the final decision sustained the applicant's right

to enrollment, it must be taken that he was a citizen at the commencement, and therefore he acquired nothing by the decision that he did not as a matter of law already possess. It merely silenced the cavil of the tribal authorities that he was not a citizen. We admit that this manifest distinction has not always been made even in acts of Congress, the decisions of Courts and statements of counsel, for we often have heard talk of "admitting to citizenship, etc." It seems perfectly plain however that Congress never has intended to confer citizenship in one of these tribes on anybody, and we cheerfully concede that it has no power to do so. Wherever language has been used speaking of admitting to citizenship, it is plain that nothing more was meant than one's right of citizenship under a particular state of facts had been, or would be, ascertained under the treaties, laws, and customs of the tribe. Congress has not the power to confer tribal citizenship and it has never attempted to do so. It has however the absolute right of providing A DECENT, REASONABLE AND FAIR MANNER OF DETERMINING WHO ARE AND WHO ARE NOT MEMBERS OF THESE INDIAN TRIBES, and that is all that has been done by the legislation so vigorously condemned by tribal counsel. In effect these learned gentlemen say that the sole authority to determine the membership of any person in the Choctaw or Chickasaw Nation is vested in the tribal governments of those Nations. The unjust and fraudulent practices of those governments on citizenship questions was the preeminent cause for the creation of the Dawes Commission. The ctizenship tribunals of the tribes reeked with such fraud and corruption that Congress resolved by the Act of 1896 to provide a civilized and honorable tribunal to finally determine the numerous claims to citizenship of persons whose rights were denied by the tribal authorities, and wisely made the U. S. Courts in the Indian

Territory the final arbiters of the claimants' rights. The clear statement of an error is sometimes all that is necessary to refute it, and this is an instance. That the Government of the United States has not the right to determine who its wards are, who are tribal citizens and who not, is too palpably absurd to need argumeent to discredit it. To concede to the tribal governments the exclusive right to say who are and who are not, members of these tribes is to grant them absolute sovereignity. That authority has been denied by every decision of the Supreme Court of the United States in every case where the question was raised since the beginning of the Government. They are not soverign but domestic dependencies, whose political existence may be snuffed out at the will of Congress.

But the best answer to the trial Court's theory that the roll with plaintiffs names upon it, must be approved by the Secretary of the Interior before they can enjoy the rights and benefits of citizenship, is that the Honorable Secretary has no authority to disapprove plaintiffs' enrollment. He has no discretion as to approving their enrollment for he cannot question the decree of the Court. His act so far as our clients are concerned will be merely clerical, their rights are fixed by the decree and established beyond the Secretary's questioning. Why then should their exercise of citenship rights be dependent upon a mere clerical act and one about which the Honorable Secretary has no discretion whatever and can perform in but one way? We quote in support of this view from an opinion of Judge Vanderventer Assistant Attorney General dated March 17, 1899 and adopted by the Interior Department, as follows: " 'The rolls so made by the Commission are to be finalwhen approved by the Secretary of the Interior' This approval being required to give the quality of finality to the rolls, it

follows necessarily that the Secretary of the Interior is clothed with some legal discretion in granting or witholding his approval, and that he has a power of supervision and review over the action of the Commission in preparing the rolls. This power of supervision and review extends to everything done by the Commission in the way of placing names upon, or witholding names from the rolls, which depends for its final sanction and effect upon the approval of the rolls by the Secretary of the Interior, but does not include or authorize a re-examination of a decision of the Commission from which an appeal to the Court was provided for, and which therefore became final in the absence of such an appeal; nor does it include or authorize re-examination of a decision of the Court upon such appeal. It does however enable the Secretary of the Interior to see that any individual entitled to enrollment under any such final decision is placed upon the roll, and that any name placed thereon in disregard of any such final decision is striken therefrom.

"In those cases which are appealed to the supreme court under the act of 1896, supra, the decision of the supreme court, or such decision as may be rendered by the district court in pursuance thereof, becomes the final decision notwithstanding the provision in the act of 1896 giving finality to the original decision of the district court."

Two more objections were urged by tribal counsel on their lack of due process of law theory; first, that all the court decrees are void in citizenship cases because all the individual members of both tribes were not served with notice of the applications; and, second, because the tribal authorities of both Nations were not notified.

Answering these, we assert that in the first place it was not

strictly essential in making the rolls that special notice be given to anybody, not even to tribal authorities. That was merely a question of good policy. The passage of the act by Congress creating the Commission and authorizing it to entertain applications of claimants to citizenship of persons whose names were not on the confirmed rolls, was notice to everybody concerned. It was certainly the only notice claimants ever had, and if one failed to apply within the three months allowed he was forever barred. When the Commission opened office to receive applications anyone interested could have appeared and made all possible objections to all applications filed. If the individual members of the tribe failed to object to any particular applicant's enrollment when they had the fullest opportunity to do so why should they be heard now either personally or through learned counsel?

But actual notice was given to the Governor of the Nation in which each applicant claimed citizenship; able counsel appeared for each tribe and vigorously contested every objectionable application, and many applicants were determined not to be citizens both by the Commission and the Courts. Notice to the Governor was notice to the people whom he represented; notice to the agent is notice to the principal when given within the scope of the agency.

But as a matter of law and fact the individual members of the tribes have not been deprived of property by the citizenship decisions. In law the applicant who won out and proved himself to be a citizen must be deemed to have been the owner of his pro rata share of the tribal property when he made his original application. Therefore the value of any other citizens' share in the tribal property is not in the least degree diminished by the court decree. As before stated, the decree in favor of the applicant ac-

complished nothing except to set at rest the hue and cry of the tribal authorities.

Should both tribes have been notified? This question is as groundless as the other objections of tribal counsel. As a matter of common history it is well known by this court that, in admitting persons to citizenship either by legislative acts of adoption, or through marriage laws, or through the recognition of citizenship by special tribunals for that purpose, each Nation has always acted wholly independent of the other. If before one could acquire citizenship in either tribe both Nations must concur, then there is probably not an intermarried or adopted citizen in either tribe who is entitled to enrollment and to share in the allotment of the lands. This theory is contrary to over sixty years of tribal construction of their own powers.

The Commission and the Courts in their rules requiring notice to be given to the authorities of the Natious in which the applicant claimed citizenship, merely conformed to the uniform practice in such matters long indulged in by both tribes. Tribal authorities ought not now complain of a procedure identical with that long pursued by themselves on the same subject. They are estopped by their own practice. But this question like all the others now raised by tribal counsel either was, or might have been urged before the Supreme Court, and should therefore now be considered res adjudicata. They are all included in the validity and constitutionality of the acts of Congress so much complained of. The Supreme Court has decided the whole matter and this court has nothing to do but follow the command of its superior.

The other errors of adjudging the lands sued for to defendants, and over-ruling the motion for a new trial, are merely natural consequents of the chief error of holding that the complaint

does not state facts sufficient to constitute a cause of action.

We respectfully submit that the judgment should be reversed.

PATCHELL & PYEATT AND J. G. RALLS,
ATTORNEYS FOR APPELLANTS.