Supreme Court of the United States.

OCTOBER TERM, 1902.

Ex Parte: In the Matter of U. S. Joins, Petitioner

12
Hx Orig?

Brief in Support of Motion for Leave to File Petition for Writ of Prohibition, and for Certiorari, against the Choctaw and Chickasaw Citizenship Court and Brief in Reply to Brief Filed Herein by the Choctaw and Chickasaw Nations Against Said Motion.

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SAXTON PRINTING CO., WASHINGTON.

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In the matter of the Motion of U. S. Joins for leave to file Petition for Writ of Prohibition and Certiorari against the Choctaw and Chickasaw Citizenship Court.

Brief in Support of Said Motion, and in Reply to Brief Filed by the Choctaw and Chickasaw Nation against the same.

STATEMENT AND BRIEF OF THE PETITIONER, U. S. JOINS.

June 10, 1896, the Congress of the United States passed an act, by the terms of which it conferred upon the Commission of the United States to the Five Civilized Tribes of Indians hereafter called the "Dawes Commission."

The power and authority to "hear and determine the

application of *all* persons who may apply to to them for citizenship in any of said nations, and after such hearing *to determine the right* of such applicant to be admitted and enrolled." The act required all applications to said Commission for enrollment to be made withiu three months from date of its passage, and required the Commission to decide all such applications within ninety days after the same were made. It also required said Commission in "determining all such applications to respect all *laws* of the several nations or tribes, not inconsistent with laws of the United States, and all *treaties* with either of said nations or tribes, and to give due force and effect to the *rolls*, *usages* and *customs* of each of said nations or tribes"; and provided that the rolls of citizenship of the said several tribes then existing should be confirmed, and that "any person who shall claim to be *added* to said rolls as a citizen of either of said tribes, and whose right thereto has neither been *denied* or *not acted upon*, or any citizen who may, within three months from and after the passage of this act, desire such citizenship may apply to the legally constituted court or committee designated by the several tribes for such citizenship, and such court or committee shall determine such application within thirty days after the application therefor." The act conferred upon said Commission the power to administer oaths, to issue process for and compel the attendance of witnesses and to send for persons and papers, and all depositions and affidavits and other evidence in any form whatever heretofore taken where the witnesses giving said testimony are dead, or living beyond the limits of said Territory, and to use every fair and honorable means within their reach for the purpose of determining the *rights* of persons *claiming such citizenship*, or to *protect any of said nations from any wrong*, and the rolls prepared by them shall be hereafter held and considered to be the *true and correct rolls of persons entitled to the rights of citizenship in said several tribes;*

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 *judgement of the court shall be final.*" This act did not provide for *notice* of applications for enrollment to said Commission to be given to the tribe or nation in which the applicant sought recognition as a member, nor did it require notice to be given to said nation or tribe of an appeal to the court from the decision of the Commission. See act copied on page 3, *et seq.*, of petition for writ attached to motion.

The Dawes Commission by rules by it made and promulgated did require the applicant to "furnish *the Governor of the nation in which citizenship is sought* a copy of such *application*, and *evidence*, and furnish to the Commission evidence of such fact," and require the governor or chief of the nation so served, within thirty days thereafter to *answer* said application *under oath*, and to accompany the same by such evidence in the form of affidavits, depositions or record evidence as he may desire the Commission to consider in support of his answer—See rules of Dawes Commission, page 5 et seq. of the petition. The petition further shows that the petitioner, U. S. Joins, in compliance with the act of June 10, 1896, *supra*, and the rules by said Commission, made and promulgated thereunder, made application to said Commission to be identified and enrolled as a member of the tribe of Chickasaw Indians by blood; that he did serve the Governor of the Chickasaw Nation with a literal copy of the said application and the evidence in support thereof, and in all things complied with the said act of June 10, 1896, and the rules of the Commission thereunder; that the Chickasaw Nation appeared before said Commission and denied petitioner's right to be enrolled as a member of the tribe of Chickasaw Indians; that the said Commission heard

the evidence offered for and against his application, and passed upon the same and *denied* the application of the petitioner to be enrolled as a member of said tribe; that the petitioner appealed from the decision of the Commission to the United States Court for the Southern District of the Indian Territory, sitting at Ardmore, and that said appeal was perfected within the time provided for under the act of June 10, 1896; that at a regular term of said court at Ardmore, to wit: on the 8th day of March, 1898, petitioner recovered judgment in said court against said nation, wherein said court rendered and caused to be entered a decree that the petitioner, U. S. Joins, and his daughter, Virgie Joins, should be admitted as members of the tribe of Chickasaw Indians by blood, and directed that a certified copy of said decree be transmitted to said Commission, and directed the Commission to place the names of petitioner, and his daughter, Virgie, upon the roll of Chickasaw citizenship, to be made by said Commission in accordance with the act of June 10, 1896. See petition, pp. 6–7, and Copy of Judgment attached as "Exhibit A."

The petition further shows that subsequent to the rendition of the judgment in petitioner's favor, to wit: July 1, 1898, Congress passed an act allowing an appeal by the aggrieved party from all final judgments rendered by the United States Courts in the Indian Territory, pursuant to said act of June 10, 1896, directly to this honorable court. U. S. Stat., 2 Sess. 1897–8, p. 591. That under the provisions of said act an appeal was taken by the Chicasaw Nation directly to this honorable court from the decision in favor of petitioner, cited *supra*, and that this court, in the case, Stephens *vs.* Cherokee Nation, 174 U. S., 445, expressly passed upon the act of June 10, 1896, and held the same to be valid and constitutional, and that all the legislation affecting Indian citizenship, under which the United States courts in the Indian Territory acted, was valid and constitutional, and that the judgments rendered by said courts were final; and in said cause this court expressly decided that the said Dawes Commission possessed only *quasi judicial* powers, and that the cause in the court below upon *appeal* from said Commission were properly tried *de novo*. See Petition 8–9. The petition further shows that in a cause filed in the United States Court for the Southern District of the Indian Territory on November 22, 1900, wherein G. W. Dukes, Green McCurtain, and others, members of the Choctaw and Chickasaw Indians, for the entire tribes of Choctaw and Chickasaw Indians were complainants, and William Goodall and many others, who claimed to be members of the Choctaw or Chickasaw tribe, (by virtue of decrees of the courts under said act of June 10, 1896,) were complainants, the question and issue was directly raised that said judgments were invalid and void because *but one* and not *both* the Choctaw and Chickasaw Nations were served with notice of the *application* to the Dawes Commission to be enrolled prior to the rendition of the judgments in said courts. That said issue by said court was directly passed upon and adjudicated *adverse* to the complainants in said proceeding, and from the decision of said court an appeal was taken to the United States Court of Appeals of the Indian Territory, where the same is now pending and undetermined. See Petition, pp. 9, 10, 11.

The petition further states:

5th. "Your petitioner further represents and shows to this honorable Court that he is a member of the tribe of Chickasaw Indians by blood, and that since the decree was rendered by the United States Court for the Southern District of the Indian Territory, as aforesaid, recognizing and identifying the petitioner as a member of said tribe, he has made lasting and valuable improvements upon a tract of land situated in the Chickasaw Nation, Indian Territory; that he has expended upon said land fifteen thousand dol-

lars in the way of building a stone residence, reducing said land to cultivation, building fences, etc., etc.

6th. Your petitioner further represents and shows to this honorable Court that on the 21st day of March, 1902, and after your petitioner had obtained said decree against the Chickasaw Nation, as aforesaid, and after this honorable Court had, upon appeal, passed upon and affirmed said decree, and after your petitioner had expended said monies in improving said land, as aforesaid, and while said cause of Dukes *et al. vs.* Goodall *et al.* was still pending in the United States Court of Appeals for the Indian Territory, that the Commission to the Five Civilized Tribes, known as the 'Dawes Commission,' and the Choctaw and Chickasaw Indians, by their duly accredited delegates, entered into an agreement or treaty, which was subsequently ratified and confirmed by the Congress of the United States and by a majority vote of the members of the tribes of Choctaw and Chickasaw Indians; that sections 31 and 32 of said treaty read as follows:

> 31. "It being claimed and insisted by the Choctaw and Chickasaw Nations that the United States Courts in Indian Territory, acting under the Act of Congress approved June 10, 1896, have admitted persons to citizenship, or to enrollment as such citizens in the Choctaw and Chickasaw Nations, respectively, without notice of the proceeding in such courts being given to each of said nations; and, it being insisted by said nations that in such proceedings notice to each of said nations was indispensable, and it being claimed and insisted by said nations that the proceedings in the United States Courts in Indian Territory, under the said Act of June 10, 1896, should have been confined to a review of the action of the Commission to the Five Civilized Tribes, upon the papers and evidence submitted to such Commission,

and should not have extended to a trial *de novo* of the question of citizenship; and, it being desirable to finally determine these questions, the two nations jointly, or either of said nations acting separately, and making the other a party defendant, may, within ninety days after this agreement becomes effective, by a bill in equity filed in the Choctaw and Chickasaw citizenship court hereinafter named, seek the annulment and vacation of all such decisions by said courts. Ten persons so admitted to citizenship or enrollment by said courts, with notice to one but not to both of said nations, shall be made defendants of said suit as representatives of the entire class of persons similarly situated, the number of such persons being too numerous to require all of them to be made individual parties to the suit; but any person so situated may, upon his application, be made a party defendant to the suit. Notice of the institution of the said suit shall be personally served upon the chief executive of the defendant nation, if either nation be made a party defendant as aforesaid, and upon each of said ten representative defendants, and shall also be published for a period of four weeks in at least two weekly papers having general circulation in the Choctaw and Chickasaw nations. Such notice shall set forth the nature and prayer of the bill, with the time for answering the same, which shall not be less than thirty days after the last publication.

"Said suit shall be determined at the earliest practicable time, shall be confined to a final determination of the questions of law here named, and shall be without prejudice to the determination of any charge or claim that the admission of such persons or for enrollment by said United States courts in the

Indian Territory was wrongfully obtained as provided in the next section. In the event said citizenship judgments or decisions are annulled or vacated in the test suit hereinbefore authorized, because of either or both of the irregularities claimed and insisted upon by said nations as aforesaid, then the files, papers and proceedings in any citizenship case in which judgment or decision is so annulled or vacated, shall upon written application therefor, made within ninety days thereafter by any party thereto, who is thus deprived of a favorable judgment upon his claimed citizenship, be transferred and certified to said citizenship court by the court having custody and control of such files, papers and proceedings, and upon the filing in such citizenship court of the files, papers and proceedings in any such citizenship case, accompanied by due proof that notice in writing of the transfer and certification thereof has been given to the chief executive officer of each of said nations, said citizenship case shall be docketed, in said citizenship court, and such further proceedings shall be had therein in that court as ought to have been had in the court to which the same was taken on appeal from the Commission to the Five Civilized Tribes, and as if no judgment or decision had been rendered therein."

"32. Said citizenship court shall also have appellate jurisdiction over all judgments of the courts in the Indian Territory rendered under said Act of Congress of June tenth, eighteen hundred and ninety-six, admitting persons to citizenship or to enrollment as citizens in either of said nations. The right of appeal may be exercised by the said nations jointly or by either of them acting separately at any time within six months after this agreement is finally

ratified. In the exercise of such appellate jurisdiction said citizenship court shall be authorized to consider, review and revise all such judgments, both as to findings of facts and conclusions of law, and may, whenever in its judgment substantial justice will thereby be subserved, permit either party to any such appeal to take and present such further evidence as may be necessary to enable said court to determine the very right of the controversy. And said court shall have power to make all needful rules and regulations prescribing the manner of taking and conducting said appeals and of taking additional evidence therein. Such citizenship court shall also have like appellate jurisdiction and authority over judgments rendered by such courts under the said act denying claims to citizenship or to enrollment as citizens in either of said nations. Such appeals shall be taken within the time hereinbefore specified, and shall be taken, conducted and disposed of in the same manner as appeals by said nations, save that notice of appeals by citizenship claimants shall be served upon the chief executive officer of both nations: Provided, that paragraphs thirty-one, thirty-two and thirty-three hereof shall go into effect immediately after the passage of this act of Congress."

That under Section 33 of said treaty a court was created, known and designated as the Choctaw and Chickasaw Citizenship Court; and that pursuant to the terms of said treaty the President of the United States appointed as judges of said court the Honorable Spencer B. Adams, chief judge, and the Honorables Walter B. Weaver and Henry S. Foote, associate judges.

And your petitioner represents and shows to this honor-

able Court that under the terms of Section 31 of said treaty, copied *supra*,

The Choctaw and Chickasaw nations or tribes of Indians filed in said Choctaw and Chickasaw Citizenship Court their bill in equity against J. T. Riddle, D. S. Riddle, L. A. Riddle, Elizabeth Casey, Joshua Casey, Andrew B. Hill, L. T. Hill, James W. Balthrop, T. D. Arnold and John H. Bratcher, for themselves, and as representatives of all persons similarly situated, claiming to be members of the Choctaw or Chickasaw nations or tribes of Indians by virtue of alleged decrees of the United States Court for the Central and Southern Districts of the Indian Territory, sitting respectively at South McAlester and Ardmore, and commonly known as "Court Claimants." A duly authenticated copy of said bill in equity is hereto annexed and identified as "Exhibit B," and made a part of this petition.

That the said Choctaw and Chickasaw Nation in said bill in equity sought to cancel, set aside and vacate all the judgments rendered by the United States Courts for the Central and Southern Districts of the Indian Territory in favor of the ten persons named in said bill and in favor of your petitioner and divers and sundry other persons not named therein.

That the ten persons named in said bill were personally served with process and summons, but your petitioner was not named therein, and was not served with notice of said suit other than a general notice by publication in a newspaper, although he permanently resided and had his domicil in the Chickasaw Nation, Indian Territory, and within the reach of the process of said court.

And your petitioner represents that in said suit of the Choctaw and Chickasaw Nations against J. T. Riddle *et al.*, the defendants named in the bill filed therein appeared and demurred to said bill, and that their demurrer by said court was overruled and denied, and that thereupon they filed an

answer to said bill wherein they denied that notice of the proceedings in the court of the Central and Southern Districts to both the Choctaw and Chickasaw Nations was indispensable to the validity of the judgments rendered by said courts, and denied that a trial of said causes in said courts *de novo* was such an irregularity as made said judgments invalid or void; that said Citizenship Court on December 17, 1902, in said cause, entitled and styled "The Choctaw and Chickasaw Nations or Tribes of Indians *versus* J. T. Riddle *et al.*," and numbered No. 1 on the docket of said court, held that the judgments rendered by the United States Courts for the Central and Southern Districts of the Indian Territory, in favor of the defendants named in said bill in equity and all those not named but similarly situated were void, and held that notice to each of the Choctaw and Chickasaw Nations or Tribes of Indians of the proceedings in the United States Courts in the Indian Territory, acting under the Act of June 10, 1896, admitting persons to citizenship, or to enrollment as such citizens in the Choctaw or Chickasaw Nations respectively, was indispensable; and that the proceedings and trial of said cases *de novo*, in said courts rendered said judgments void and on said date, to wit, the 17th day of December, 1902, said Citizenship Court, in said cause No. 1, entitled and styled as aforesaid, ordered, adjudged and decreed that all of said judgments, decrees and decisions rendered by the United States Courts in the Indian Territory, acting under the Act of Congresss approved June 10, 1896, admitting persons to citizenship, or to enrollment as such citizens, in the Choctaw and Chickasaw Nations, respectively, upon appeal from the Commission to the Five Civilized Tribes, in favor of the ten defendants named in the bill in said proceeding, as well as those who have come in and made themselves parties thereto, and the judgments rendered, as aforesaid, in favor of all persons similarly situated, by said decree of said Citizenship Court

and by the express terms of the decree were attempted to be set aside, annulled, vacated and held for naught.

That petitioner was not a party defendant in said proceedings in said Citizenship Court and did not appear or answer therein in person or by attorney.

That Julia London and others filed an answer in said cause in said Court and denied that said Choctaw and Chickasaw Citizenship Court had the power or jurisdiction to inquire into and pass upon the validity of said judgments sought to be cancelled, as aforesaid, under and by virtue of the terms of said treaty.

But petitioner states that said plea to the jurisdiction of said court was by said court overruled and denied. A copy of said answer is hereto annexed, marked "Exhibit C," and made a part hereof, and a copy of the original decree of said Citizenship Court is hereto annexed, marked "Exhibit D," and made a part hereof, and a copy of the amended decree of said court is hereto annexed, marked "Exhibit E," and made a part hereof.

Your petitioner further represents and shows to this honorable Court that under the terms of said treaty your petitioner cannot review the decision of said Citizenship Court by Appeal or Writ of Error, and under no other law can he review same by appeal or writ of error, and that the effect of said decision is to destroy the validity of the judgment of petitioner recovered in the United States Court, as aforesaid, and that said Citizenship Court is about to certify to said decree by it rendered, and deliver same to the said Commission to the Five Civilized Tribes for its observance, which will in effect prevent said Commission from enrolling the name of petitioner as a member of the tribe of Chickasaw Indians, and thereby destroy the property rights of this petitioner, as aforesaid.

Wherefore, your petitioner states that the said Citizenship Court had not the power or jurisdiction to render, and acted

under an assumed jurisdiction in rendering said decision, in said cause against J. T. Riddle *et al.*, as aforesaid, for the following reasons:

1st. Because said section 31 of said treaty, *supra*, is unconstitutional in that it is an attempt on the part of the legislative branch of the Government to cancel, annul and set aside final decrees of a court of competent jurisdiction.

2. Because at the date of the passage and ratification of said treaty both the questions of law named therein had been submitted to, passed upon and adjudicated by courts of competent jurisdiction in a controversy between the same parties, as hereinbefore shown.

3d. Because under section 31 of said treaty decrees rendered by the United States Courts of the Central and Southern Districts of the Indian Territory, upon appeal from the Dawes Commission, have been by said Citizenship Court set aside, cancelled and held for naught because *notice* of the proceedings in said court had not been given to both the Choctaw and Chickasaw Nations prior to the rendition of said decrees; whereas decisions rendered by the Dawes Commission, under Act of June 10, 1896, admitting persons to Choctaw or Chickasaw citizenship with *notice to one* of said nations only and *not to both* are binding upon both said nations, and petitioner therefore says said section 31 discriminates between persons in exactly the same status and is class legislation and unconstitutional.

4th. Said section 31 of said treaty attempts to confer upon said Citizenchip Court the power to set aside and cancel judgments in favor of petitioner and others without notice to those to be affected thereby, and attempts without process of law to destroy said judgments and the petitioners' property rights.

Wherefore, and by reason of the premises aforesaid, your petitioner prays:

First. That this honorable Court do grant to him a writ of certiorari directed to said Choctaw and Chicasaw Ciitizenship Court, and each of the judges thereof, and James B. Cassada, the clerk of said court, commanding and requiring them to at once forward to and file with the clerk of this honorable court in this proceeding, a true and correct copy, under the seal of the clerk thereof, of all the pleadings, evidence, judgments, orders and decrees, and the opinion of said court, filed or lodged with said clerk, or recorded upon the journals of said Choctaw and Chickasaw Citizenship Court in said cause No. 1, lately pending on the docket of said court and entitled and styled the Choctaw and Chickasaw Nations or Tribes of Indians *versus* J. T. Riddle *etal.*

Second. And by reason of the premises aforesaid, your petitioner prays for a writ of prohibition against the said Choctaw and Chickasaw Citizenship Court, and all the judges thereof, prohibiting and restraining it, and each of said judges from giving further effect to the decree rendered by said Court, as aforesaid, and prohibiting and restraining said court and each of the judges and the clerk thereof from certifying and delivering to the said Dawes Commission a copy of said decree for its observance and prays for such other and further relief to which he may be entitled.

See Petition, pp. 11 to 20, and Exhibits "B," "C," "D" and "E" attached thereto.

The opinion of the Choctaw and Chickasaw Citizenship Court rendered by it in the case of the Choctaw and Chickasaw Nations or Tribes *vs.* J. T. Riddle et al., under section 31 of said supplemental treaty, has been printed in pamphlet form, and in this opinion said court had attempted to assign reasons for the judgment by it rendered in said court of which petitioner complain. We lodge with the clerk of this honorable court a copy of this opinion, and invite the court's attention to the reasons assigned therein for rendering said judgment. We attempted to have this opinion

authenticated by the certificate and seal of the Clerk of the Court. On February 14, 1903, in the city of South McAlester, Indian Territory, Mr. C. L. Herbert, of counsel for petitioner, called at the office of Mr. James B. Cassada, Clerk of said Citizenship Court, and requested him to authenticate a copy of said court's printed opinion, which he declined to do until he had conferred with Judges Foote and Weaver, two of the three judges composing the court; after leaving his office he returned and stated to Mr. Herbert that in his opinion the said opinion of the Citizenship Court was no part of the record, whereupon Mr. Herbert went in person to see Judges Foote and Weaver (Judge Adams being absent), and advised them of the clerk's refusal to authenticate the document, and was advised by said Judges that the opinion of the court in their opinion was no part of the record in said cause, and they did not think the clerk authorized to certify to it. After trying to argue the question with the Judges stated, and, failing to convince them that the opinion of the court was a material part of the record, Judge Foote suggested that a written stipulation might be procured from counsel representing the Choctaw and Chickasaw Nations, under which the said printed opinion would be recognized as the correct opinion by the court rendered. Acting upon the suggestion, counsel requested Mr. Melville Cornish, of counsel for said nations, to enter into a stipulation whereby the authentication of said opinion would be waived, but Mr. Cornish declined to enter into the agreement, because he said it was a "very extraordinary case." The printed copy filed with the clerk is a true and literal copy of the opinion of said court rendered by it, and, if need be, counsel for petitioner will verify the above statement and make oath that the copy lodged with the clerk is the opinion of said court, admitted so to be by both Judges Foote and Weaver and by counsel for said nations. Quoting from the said opinion of the Choctaw and Chickasaw Citizenship Court,

pp. 10–11, the learned Court said:

> "It will be seen, by reference to *Section 31* of the said act, set out in the statement of the case, that so far as this suit is concerned, this Court is limited to the consideration of *two legal propositions*, and two alone, and it is expressly confined to these two propositions, to wit: Whether, under the Act of Congress, approved June 10, 1896, *notice* to *each* of said nation was *indispensable:* and, second, whether or not the proceedings had in the United States Courts in the Indian Territory, under said act of *June 10, 1896*, should have been confined to a review of the acts of the Commission to the Five Civilized Tribes, upon the papers and evidence submitted to such commission. The pleadings and arguments admit there was but *one* nation served with notice, and also that the trials were *de novo.* Then we come to the consideration of the question, was it *indispensable*, under the act of June 10, 1896, to give *both* nations notice, and should the trials have been *de novo*, or confined to the action of the Dawes Commission:"

On the question of *notice*, after reviewing the creation, and the purpose of creating the Dawes Commission, and after rehearsing treaties between the Federal Government and the Choctaw and Chickasaw Indians, to show that the members of the tribes of Choctaw and Chickasaw Indians were and are joint tenants, or tenants in common, of the estate known as the Choctaw Nation and the Chickasaw Nation, the learned Citizenship Court, on page 27 of its printed opinion, say:

> "Here is a large body of land belonging to these two tribes. Congress, in its various acts, *supra*, said that it desired to allot this lands in severalty. Was the Choctaw Nation interested in who was made a Chickasaw citizen? Or was the Chickasaw Nation interested in who was made a Choctaw citizen?
>
> Most assuredly it seems to us that they were. The natural effect of these judgments was to deprive them of a part of their lands. Then, under the well-established principles of law, was it not necessary, when the applicant came and presented his application and an allowance of same, putting him on the rolls, had the effect of his sharing in the distribution of these lands? Then, naturally, why was he not interested in these proceedings so vital to his rights?"

After discussing the *de novo* question the learned Citizenship Court, in its opinion (page 44), say:

> "In the determination of the question raised by the pleadings in this proceeding, we have confined ourselves to the two legal propositions raised by the bill, in accordance with section 31 of the Act of July 1, 1902, under which this proceeding was instituted, deeming it unnecessary to go into the other questions that are raised by the several answers, because we consider a determinatlon of the two propositions as decisive of all. So, in consideration of all the various aspects of the case, and being of the opinion that owing to the manner *in which the lands are held by the two tribes, notice to both tribes was indespensable;* and being further of the opinion that proceedings in the United States Courts in the Indian Territory, under the Act of June 10, 1896, should have been confined to a review of the action of the Commission to the Five Civilized Tribes upon the papers and evidence submitted to such Commission, and should not have extended to trials *de novo* of the questions of citizenship, we are of the opinion, on account of the errors pointed out, that the

> judgments rendered by the United States Courts for the Indian Territory, under the Act of June 10, 1896, upon appeal from the Commission to the Five Civilized Tribes, in favor of the *ten defendants named in the bill* as well as to those who have come in and made themselves parties defendant, and all persons so situated, should be annulled and vacated, and it is, therefore, so ordered."

Admitting that the Act of Congress conferred upon the Citizenship Court the power to inquire into the two *law questions* therein named, and to re-open final judgments rendered by courts of co-ordinate jurisdiction, is it constitutional and due process of law for said court, without service upon petitioner, and without naming him in the bill or the judgment, to enter up a decree cancelling and annulling the judgment in his favor, rendered in March, 1898, by the United States Court for the Southern District of the Indian Territory, pursuant to the Act of Congress, June 10, 1896, *supra?*

If the judgment which we are pleased to call an *omnibus* judgment, rendered against Joins, without naming him, and without service of processs upon, and without his voluntary appearance in the case of Choctaw and Chickasaw Nations *vs.* Riddle *et al.*, and under the terms of which the judgment in favor of Joins, rendered by the U. S. Court for the Southern District of the Indian Territory, is cancelled is to be treated as an action *in personam*, then we submit the rendition of the judgment against him was not due process of law and was void, and that section 31 of the treaty, under which the procedure was had, was, and is, void. That the proceedings to set aside, cancel and annul the judgment in his favor, was an action *in personam*, we have no doubt, and therefore assume that counsel for respondents cannot but assent to this proposition.

In Penoyer *vs.* Neff, 95 U. S., 726, speaking through Mr. Justice Field, this honorable Court said:

> "If without personal service, judgments *in personam*, obtained *ex parte* against nonresidents and absent parties, upon mere publication of process, which in the great majority of cases, would never be seen by the parties interested, could be upheld and enforced, they would be the constant instruments of fraud and oppression. Judgments for all sorts of claims upon contracts and for torts, real or pretended, would be thus obtained, under which property would be seized, when the evidence of the transactions upon which they were founded, if they ever had any existence, had perished."

And after rehearsing the doctrine that the property of a nonresident may be siezed and appropriated in an action *in rem*, this learned jurist said:

> "But where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely *in personam*, constructive service in this form upon a nonresident is ineffectual for any purpose. Process from the tribunals of one state cannot run into another state, and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the state where the tribunal sits cannot create any greater obligation upon the nonresident to appear. Process sent to him out of the State, and process published within it, are equally unavailing in proceedings to establish his personal liability."

And again, in the same case, this honorable court said:

"Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted on the ground that proceedings in a court of justice to determine the *personal* rights and obligations of parties over whom that court has no jurisdiction do not constitute *due process of law.* Whatever difficulty may be experienced in giving to those terms a definition which will embrace every permissable exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning when applied to *judicial* proceedings. They then mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; and, if that *involves* merely a determination of the *personal* liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance * * * As stated by Cooley in his Treatise on Constitutional Limitations, 405, for any other purpose than to subject the property of a non-resident to valid claims against him in the State, 'due process of law would require appearance or personal service before the defendant could be personally bound by any judgment rendered."

In the case of Coirore *vs.* Millandon, 60 U. S. 113, quoting from the syllabus this honorable court said:

"Neither the act of Congress nor the 47th rule of

this court enables the Circuit Court to make a decree in a suit in the absence of a party whose rights must necessarily be effected by such decree, and the objection may be taken at any time upon the hearing in the appellate court."

In Galpin *vs.* Page, 85 U. S. 18 Wall. 368, Mr. Justice Field, speaking for this honorable court, stated the true doctrine to be:

"Whenever, therefore, it appears from the inspection of the record of a court of general jurisdiction that the defendant, against whom a *personal* judgment or decree is rendered, was at the time of the alleged service without the territorial limits of the court, and thus beyond the reach of its process, and that he never appeared in the action, the presumption of jurisdiction over his person ceases, and the burden of establishing the jurisdiction is cast upon the party who invokes the benefit or protection of the judgment or decree."

Further: "It is a rule as old as the law, and never more to be respected than now, that no one shall be *personally* bound until he has had his day in court, by which is meant until he has been *duly cited* to appear and has been afforded an opportunity to be heard. Judgment without such ciation and opportunity wants all the attributes of a judicial determination; it is a judicial usurpation and oppression, and never can be upheld where justice is justly administered."

See also Furgeson *vs.* Jones (Oregon), 3 Law Rep., 620, on page 500, Cooley's Const. Lim., 5 Ed., Mr. Cooley has correctly stated the rule:

"But such notice is restricted in its legal effect, and

cannot be made available for all purposes. It will enable the court to give effect to the proceedings so far as it is one *in rem*, but when the *res* is disposed of, the authority of the court ceases. The statute may give it effect so far as the subject-matter of the proceeding is within the limits, and therefore under the control of the State; but the notice *cannot* be made to stand in the place of process, so as to subject the defendant to a valid judgment against him *personally*. In attachment proceedings, the *published* notice may be sufficient to enable the plaintiff to obtain a judgment which he can enforce by sale of the property attached, but for any other purpose such judgment would be ineffectual * * * The fact that process was not personally served is a conclusive objection to the judgment as a *personal* claim, unless the defendant caused his *appearance* to be entered in the attachment proceeding. Where a party has property in a State, and resides elsewhere, his property is justly subject to all valid claims that may exist against him there; but beyond this, *due process of law* would require appearance or personal service before the defendant could be *personally* bound by any judgment rendered."

And this learned auther, on page 502, of the same work, in speaking of the the power and jurisdiction of courts of general and special jurisdiction, says:

"Some courts are of *general* jurisdiction, by which is meant that their authority extends to a great variety of matters, while others are only of *special* and limited jurisdiction, by which it is understood that they have authority extending only to certain specified cases. The *want* of jurisdiction is equally fatal in proceedings of each; but different rules prevail in

showing it. It is not to be assumed that a court of general jurisdiction has in any case proceeded to adjudge upon matters over which it had no authority; and its jurisdiction is to be presumed, whether there are recitals in its records to show it or not. On the other hand, no such intendment is made in favor of the judgment of a court of *limited* jurisdiction, but the recitals contained in the minutes of proceedings must be sufficient to show that the case was one which the law permitted the court to take cognizance of, and that the parties were subjected to its jurisdiction by *proper process*." Citing numerous authorities.

Is the effect of section 31 of the treaty, cited *supra*, and under which the Citizenship Court attempted to proceed unconstitutional, in that it is an attempt on the part of the legislative branch of the Government to cancel, annul and set aside final decrees of a court of competent jurisdiction? In the case of Stephens *vs.* Cherokee Nation, 175 U. S. 445, this honorable court, speaking through Mr. Chief Justice Fuller, said:

"And while it is undoubtedly true that legislatures cannot set aside the judgment of courts, compel them to grant new trials, order the discharge of offenders, or direct what steps shall be taken in the progress of a judicial inquiry, the grant of a *new remedy* by way of review has been often sustained under particular circumstances," citing Calder *vs.* Bull, 3 Dallas, 356; Sampeyare *vs.* United States, 7 Pet., 223; Freeborn *vs.* Smith, 2 Wall., 160; Garrison *vs.* New York, 21 Wall., 196; Freeland *vs.* Williams, 131 U. S., 405; Essex Public Road Board *vs.* Skinke, 140 U. S., 334.

We submit that section 32 of the treaty is, and that section 31 is not, in keeping with the rule thus announced. Under section 32 appellate jurisdiction is conferred upon the said Citizenship Court over all judgments of the courts in the Indian Territory rendered under said Act of Congress of June 10, 1896, "admitting persons to citizenship or to enrollment as citizens in either of said nations," and under said section said court is authorized under the appellate jurisdiction thus conferred, to "consider, review and revise all such judgments, both as to findings of fact and conclusions of law." Under this section an appellate court is given the power to review the said judgments, but under section 31 it is attempted to confer upon said court original jurisdiction to entertain a suit at the instance of the nations, and pass upon two alleged questions of law, alleged to have existed at the time the judgments sought to be cancelled were rendered by courts of equal dignity and jurisdiction, and made so by the act of June 10, 1896. Should there ever be an end to litigation? Has the Congress the power to confer upon a court of its own creation the right to cancel and nullify final decrees and judgments of courts of co-ordinate jurisdiction who have exercised a discretion and a jurisdiction given to them by former Acts of Congress? Is it not a fundamental principle that there shoud be harmonious action in the courts, and that one court should not usurp the powers of another? Is it not also a fundamental principle of this Government that a judgment shall not be annulled, vacated or set aside by other courts except for fraud in the procurement thereof? We most respectfully submit these questions must be answered in the affirmative. See United States *vs.* Throckmorton, 98 U. S., 61.

In the case of U. S. *vs.* Throckmorton, cited, *supra*, this honorable Court, speaking through Mr. Justice Miller, said:

> "There are no maxims of the law more firmly established, or of more value in the administration of justice, than the two which are designed to prevent repeated litigation between the same parties in regard to the same subject of controversy, namely, *interest rei publicæ' ut sit finis litium* and *nemo debet bis vexori pro una et edam causa.*
>
> "If the court has been mistaken *in the law* there is a remedy by writ of error. If the jury has been mistaken in the facts the remedy is by motion for new trial. If there has been evidence discovered since the trial, a motion for a new trial will give appropriate relief. But all these are parts of the *same* proceeding, relief is given in the *same suit*, and the party is not vexed by another suit for the same matter. So in a suit *in chancery*, on proper showing a rehearing is granted. If the injury complained of is an erroneous decision an appeal to a higher court gives opportunity to correct the error. If new evidence is discovered after the decree has become final a *bill of review* on that ground may be filed within the rules prescribed by law on that subject. Here, again, these proceedings are all part of the *same suit*, and the rule framed for the repose of society is not violated."

Again, quoting from the same opinion, it is said:

> "In all these cases, and many others which have been examined, relief has been granted on the ground that, by some fraud practised directly upon the party seeking relief against the judgment or decree, that party has been *prevented* from presenting *all* of his case to the court,"

and quoting from Wells on *Res Adjudicata*, section 499, the court say:

> "Likewise there are few exceptions to the rule that equity will *not* go behind the jndgment to interpose in the cause itself, but only when there was some hindrance besides the negligence of the defendant in presenting the defense in the legal action."

We invite the court's attention to the doctrine announced in the Throckmorton case. See also Henderson *vs.* Bradley, 29 C. C. A., Rep. 303.

Is not said section 31 of said treaty class legislation and unconstitutional and void for that reason? It must be observed that under the Act of June 10, 1896, all persons who applied to the Commission to be enrolled as Chocktaws or Chickasaws and gave notice to *one* and *not both* said Nations of his said application, and whose application was granted by the Commission, and no appeal taken therefrom to the United States Court, his *status*, as thus fixed by the Commission cannot be interfered with or enquired into by the Citizenship Court on account of either of the questions of law named in said section 31, whereas, the applicant in exactly the same status, whose case may have been appealed by the Nation to the court, and by the court his status judicially enquired into and fixed by the court's decree, is to have his final decree cancelled by the omnibus judgment attempted to be rendered by the Citizenship Court December 17, 1902. Under this section the Citizenship Court is not given the power to enquire into the question of notice to the tribes of the application to the Commission of persons claiming to be members of the tribes, and the question of notice or no notice is wholly immaterial so far as the said section 31 is concerned. If he who answers an appeal of the Nation or himself appeals from the decision of the Commission and by the court is decreed to be a member of the tribe, then by the omnibus decision of the Citizenship Court under said section his status is to be destroyed.

In the case of the Bank of the State *vs.* Cooper, 24 Am. Dec., 517, the Supreme Court of Tennessee said:

> "By the law of the land is meant a general and public law operating equally on every individual in the community. Such is the opinion of Judge Caton in the case before referred to, and such was the opinion of Lord Coke upon the consideration of Magna Charter. In his commentaries on this instrument he says that the terms 'law of the land' were used that the law might extend to all, and he informs us that Parliament, by the act in the eleventh year of Henry VII violated the principles of the great charter in this particular, and that under the authority of this act Empson and Dudley committed horrible oppressions and exactions to the undoing of many people. But that in the first year of Henry VIII this act was repealed on the avowed ground that it was a violation of the charter. And the ill success hereof (he adds) and the fearful end of these two oppressors should deter others from committing the like, and would admonish parliaments that instead of the ordinary and precious trial *per legeni terœ*, they bring not in absolute and partial trials by discretion."

Upon which the Supreme Court of Tennessee remark:

> "If the construction here contended for be not the true rule, it seems to me that an edict in the form of *legislative enactment*, taking the property of A, and giving it to be, might be regarded as the law of the land, and not forbidden by the constitution; but such a proposition is too absurd to find a single advocate. This provision was introduced to secure the citizens against the abuse of power by the government. Of what benefit is it, if it impose no res-

> traint upon legislation? Was there not as just ground to apprehend danger from the legislative as from any other quarter. Legislation is always exercised by the majority. Majorities have nothing to fear, for the power is in their hands. They need no written constitution defining and circumscribing the powers of the government. Constitutions are only intended to secure the rights of the minority. They are in danger. The power is against them, and the selfish passions often lead us to forget the right. Does it not seem conclusive, then, that this provision was intended to restrain the legislature from enacting *any law* affecting injuriously the rights of any citizen, unless at the same time the rights *of all persons* in similar circumstances were equally affected by it. If the law be general in its operation, affecting all alike, the minority are safe, because the majority who make the law are operated on by it equally with the others."

The petitioner further insists that at the date of the treaty, *supra*, both the questions of law named therein had been submitted to, passed upon and adjudicated by courts of competent jurisdiction in controversies between the same parties.

In the case of Stephens *vs.* Cherokee Nation, 174 U. S. 445, this honorable court said:

> "These appeals are from decrees of the United States Court in the Indian Territory, sitting in first instance, rendered in cases pending therein involving the right of various individuals to citizenship in some one of the four tribes named, most of them came to that court by *appeal* from the action of the so-called Dawes Commission, though some were from decisious of tribal authorities. * * * The

> act of June 10, 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. * * * Since it is *objected* in the *outset* that no *appeal* from the decisions of the Dawes Commission or of the tribal authorities could be granted to any United States Court; and, furthermore, that at all events it was not competent for Congress to provide for an appeal from the decrees of the United States Court in the Indian Territory after such decrees had been rendered and the term of court had expired, and especially as they were made final by the statute. As to the *first* of these objections, conceding the constitutionality of the legislation otherwise, we need spend no time upon it, as it is firmly established that Congress may provide for the review of the action of *commissions* and *boards* created by it, exercising only *quasi* judicial powers, by the *transfer* of their proceedings and decisions, denominated *appeals* for want of a better term, to judicial tribunals for examination and determination *de novo*, and as will be presently seen, could certainly do so in respect of the action of tribal authorities."

We therefore respectfully submit the *de novo* question was passed upon and settled by this honorable Court in the Stephens case prior to date of the said treaty creating the Citizenship Court.

Quoting further from the Stephens case this court said:

> "In its enactment Congress has not attempted to interfere in any way with the judicial department of

the Government, nor can the act be properly regarded as destroying *any vested right*, since the right *asserted to be vested* is the *exemption* of these *judgments from review*, and the mere *expectation* of a share in the *public lands* and moneys of these tribes, *if hereafter distributed*, if the applicants are admitted to citizenship, *cannot be held to amount to an absolute right of property* that the original cause of action, *which is citizenship or not*, is placed by the judgment of a lower court beyond the power of re-examination by a higher court, though subsequently authorized by general law to exercise jurisdiction."

And in the Stephens case, *supra*, this court said:

"It may be remarked that the legislation seems to recognize, especially the act of June 28, 1898, a distinction between *admission to citizenship* merely and the *distribution of property* to be subsequently made, as if there might be circumstances under which the right to a share in the latter would not necessarily follow from the concession of the former. But in any aspect, we are of opinion that the constitutionality of the acts in respect of the *determination of citizenship* cannot be successfully assailed *on the ground of the impairment or destruction of vested rights.* The lands and moneys of these tribes are *public* lands and *public* moneys, and *are not held in individual ownership*, and the assertion by any particular applicant that his *right* therein is *so vested* as to preclude inquiry into his *status* involves a contradiction in terms."

After quoting from the Stephens case, this honorable Court, in the case of Cherokee Nation *vs.* Hitchcock (decided October 23, 1902, and reported in Adv. Sheets Law, Cop. Pub. Co., January 15, 1903) said:

"The *holding* that Congress had power to provide a *method* for *determining membership* in the Five Civilized Tribes, *and for ascertaining the citizenship thereof preliminary to a division of the property of the tribe among its members*, necessarily involves the further holding that Congress was vested with authority to adopt measures to make the tribal property productive and secure therefrom an income for the benefit of the tribe. Whatever *title* the Indians have is *in the tribe*, and *not* in the *individuals*, although held by the tribe for the common use and equal benefit of all the members."

To the same effect see later case of this court, Lone Wolf *vs.* Hitchcock, reported page 216, *et seq.*, Adv. Sheet Law, Co-op. Pub. Co., February 1, 1903.

The doctrine of *res adjudicata* is so firmly embedded in our system of jurisprudence, as to make it one of the fundamental principles of our government. Any act of Congress, which undertakes to unsettle judgments that have become final, is violative of the provisions of the Constitution of the United States requiring "due process of law," for the reason that, when the Constitution was adopted, with its various amendments, it inherently embraced within its provisions certain well-known and fundamental maxims of the common law. Section 500, of the second volume of Black on Judgments.

It is stated that:

"The solemn and deliberate sentence of the law, pronounced by its appointed organs, upon a disputed fact or state of facts, should be regarded as a final and conclusive determination of the question litigated, and should forever set the controversy at rest. It is more than a mere rule of law. It is more

> even than an important principle of public policy. It is not too much to say that this maxim is a fundamental concept in the organization of every jural society."

This rule is founded upon the principal that there must be an end to litigation. If Congress had the right to open these judgments in the manner in which it did, it clear that another Act of Congress may be passed authorizing some other court to set in judgment upon the action of the Citizenship Court, and thus on *ad infinium.*

The doctrine of *res judicata* applies also to bills of review as well as to the trial in the first instance. That is to say, there can be but one bill of review in each case. We have shown that in the Goodall case, a "bill of review" was filed in the United States Court for Southern District of the Indian Territory which raised the very question of notice that has been decided by the Citizenship Court. This action is now pending in and undetermined by the Court of Appeals of Indian Territory. The doctrine of *res judicata* applies as much to the bill of review as to the original trial, and the Indian governments having failed to prevail in their bill of review, we do not believe that Congress has the right to permit a second bill of review for the purpose of testing this question. Besides, the Act of Congress does not authorize what is, technically speaking, a "bill of review." It authorizes an independent court to entertain an original suit for the purpose of vacating the judgment of another court. This, in our judgment, is violative of the constitution.

In the first volume of Black on Judgments, sections 297 and 298, the doctrine is clearly announced, that

> "The power to vacate judgments is an entirely different matter from the power to reverse judgments. It is a power inherent in and to be exercised by the court which rendered the judgment, and to that court and no other application to set aside the judgment, should be made * * * The power to open or vacate judgments is essentially judicial. Therefore, on the great constitutional principle of the separation of the powers and functions of the three departments of government, it cannot be exercised by by the legislature. While a statute may indeed declare what judgments shall in future be subject to be vacated, or when or how, or for what causes, it cannot apply retrospectively to a judgment already rendered, and which had become final and unalterable by the court before its passage."

Counsel for the Choctaw and Chickasaw Nations have filed a brief herein in opposition to the motion of petitioner, and say the petition for prohibition and for *certiorari*, should not be filed persuant to said motion.

1st. Because the Choctaw and Chickasaw Citizenship Court in rendering the judgment complained of proceeded in strict conformity to the Act of Congress, or treaty referred to.

2d. Because it appears from said petition said legislation was enacted, and said court created by Congress in the exercise of its power in administering the affairs of the Choctaw and Chickasaw Nations and its constitutional.

3d. Because it appears from the petition that the proceedings in said court in said cause complained of ended by the final judgment of the court, and that nothing remains by the court in respect thereto.

4th. Because the acts of said court are political and not judicial, and its acts cannot therefore be inquired into by this honorable court.

In support of this contention they have cited the decisions of this court to the effect that the Congress of the United

States possess legislative power over treaties with Indians, and Indian tribal property, etc., but we most respectfully insist that when Congress by the act of June 10, 1896, conferred upon the Dawes Commission and the United States Courts in the Indian Territory the right to pass upon the claims of those asserting a right to Indian citizenship, that by such Act of Congress conferred upon the tribunal designated in the act the power to judicially pass upon and determine such questions to be submitted, and that by a subsequent Act of Congress the adjudications of the said tribunal cannot be obliterated nor inquired into, except in the usual and ordinary way.

The power of Congress to designate a commission, board or court to make up a roll of Indian citizenship is not questioned, but when the court thus designated have inquired into, passed upon and adjudicated the questions to it relegated by said act of Congress, the power of Congress to destroy such decrees on the ground that the acts of the court are political is seriously questioned. No case cited, and we have discovered none which goes to the extent of saying acts of the judiciary pursuant to an act of Congress are political, because forsooth, the Congress had the right to settle the same questions through the executive branch of the Government.

We most respectfully submit there can be nothing in this contention of counsel worthy the serious consideration of this honorable court.

Counsel, in their brief, also insist that the writ of prohibition should not be allowed, because the test case of the Citizenship Court decided by it December 17, 1902, under said section 31 of said treaty; that the law does not require the exercise of further jurisdiction by said court as regards the power conferred by said section 31; that the case thus decided is finally ended, and a writ of prohibition could not, therefore, issue to said court.

We submit the rule to be, if it appears upon the *face* of the proceedings that the court below had no jurisdiction, a prohibition may issue at any time, either before or after judgment and sentence, because it is a nullity; it is *coram non judice.*

Lloyd's Law of Prohibition, p. 13.
In re Hugudey Mfg. Co., 184 U. S., 549, 2 ed., Bat., p. —.

And we submit the writ of prohibition is a proper remedy where an inferior court either entertains a proceeding in which it has no jurisdiction, or where, having jurisdiction, it assumes to exercise an unauthorized power.

Hawes Jurisdiction of Courts, Sec. 156.
High Ext. Leg. Rem., 767.
Thompson *vs.* Tracey, 60 N. Y., 34.
Appo *vs.* People, 20 N. Y., 540.
Sweet *vs.* Hulburt, 51 Barb, 314.
Coker *vs.* Supreme Court, 58 Cal., 177.
Zyesta *vs.* Charleston, 1 Bay., 387.
State *vs.* Mitchell, 2 Ball, 228.

We have lodged with the clerk of this court a certified copy of the record and briefs of counsel in the case of Dukes *et al. vs.* Goodall *et al.*, now pending in the United States Court of appeals for the Indian Territory referred to, *supra*, and which shows that the question of notice had been passed upon by the United States Court for the Southern District of the Indian Territory, adverse to complainants, and the cause had been appealed to said appellate court (where it is now pending), prior to the date of the treaty, in which section 31 attempts to reopen the question of notice.

We do most earnestly insist that section 31 of said treaty is unconstitutional and void and conferred upon the said Choctaw and Chickasaw Citizenship Court no power or

jurisdiction to set aside and cancel the judgment in favor of petitioner and others—and especially petitioner as he has not had his day in court; has not been served with process, is not named in the bill of complaint, the judgment or other proceeding in said court, and for the reasons stated in the petition, and the motion for permission to file the same, and in this brief we respectfully request that the petitioner be allowed to file his said petition, and that the prayer for relief therein prayed for be granted.

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