IN THE

United States Court of Appeals

FOR THE INDIAN TERRITORY.

HENRY L. DAWES ET AL., Appellants,

vs.

EUGENE R. BENSON ET AL., Appellees.

No. 389.

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

BRIEF FOR APPELLANTS.

MANSFIELD, McMURRAY & CORNISH.

Attorneys for Appellants.

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This is an application for a writ of mandamus to compel the Commission to the Five Civilized Tribes to enroll the appellees. The transcript presents two questions: First, the general proposition as to whether the Commission to the Five Civilized Tribes, sitting as a quasi judicial tribunal, can have its judgment reviewed, directly or indirectly, by the United States Court in the Indian Territory, and be compelled to place upon the allotment rolls of the Choctaw

and Chickasaw Nations, the names of these appellees, contrary to the judgment, previously rendered, of the Commission. All the questions presented by the transcript can be argued in the discussion of this proposition. The second question presented by the record is, whether or not the trial court erred in refusing to make the Choctaw and Chickasaw Nations parties defendant with the Commission to the Five Civilized Tribes, and permit them to plead.

At the time the appellees presented themselves to the Commission to the Five Civilized Tribes, and asked to be enrolled, the Commission, after hearing the testimony adduced, notified the appellees that their enrollment was refused for various reasons. As developed in the proof and by the pleadings (Tr. page 60), the Commission entered judgment refusing to enroll Eugene R. Benson, and it is disclosed by the petition and the affidavit of Eugene R. Benson (Tr. pages 1–6), that the Commission to the Five Civilized Tribes, had, upon application, formerly declined to enroll any of these appellees, and entered judgment denying their enrollment. It is further disclosed by the pleadings, and the statements contained in the petition, that their judgment was considered by the appellees to be erroneous; that the interpretation of the law by the Commission to the Five Civilized Tribes was not, what appellees considered it should be, so that, the real purpose of the petition in this case is not to compel the Commission to decide the cases of tbese appellees, but appellees are complaining that the Commission did decide their cases, and, by wrongfully interpreting the law, decided against them. The result of this contention, followed to its logical conclusion, would be that the United States Courts in the Indian Territory, have appellate jurisdiction, power to review the decisions of the Commission, and compel them to enroll those persons which the courts, upon a review of the facts and due consideration of the law, deem entitled to that privilege. No such power is lodged in the United States Courts for the Indian Territory. The only jurisdiction which such courts ever possessed over citizenship matters,

was conferred by the Act of June 10, 1896, which provided that the tribes or any person aggrieved by the decision of the tribal authorities or the Commission to the Five Civilized Tribes, might appeal from such decisions to the United States Court, provided the appeal should be taken within sixty days, and the judgment of the court should be final. This jurisdiction has been exercised, and at this time no such jurisdiction is vested in the court.

We think the case of Kimberlin vs. the Commission to the Five Civilized Tribes, decided by the Court of Appeals for the Indian Territory, and afterward affirmed by the Circuit Court of appeals, is decisive of this question. Mary Jane Kimberlin applied to the Commission to the Five Civilized Tribes to enroll her as an intermarried citizen of the Chickasaw Nation. The Commission rendered judgment refusing her enrollment, as in the case of the Appellees. She applied to the United States Court for the Southern District of the Indian Territory, at Ardmore, for a writ of mandamus to compel the Commission to enroll her; recited such facts as she relied upon to show her right to enrollment in said petition, showing a compliance with the Chickasaw marriage laws, and making out in her petition a prima facie case entitling her to enrollment. This court held in that case that the writ of mandamus would not lie, "as it was necessary for said Commission to act judicially in determining said application." The opinion discusses general principles applicable to the writ of mandamus, and refer to the fact that the Commission to the Five Civilized Tribes has very extensive powers granted by the different acts of congress, to take evidence and judicially determine what persons are entitled to enrollment; and concludes by stating that the court does not deem it necessary to go into the other questions raised, because it is so plain that the Commission was required to judicially determine the rights of the petitioner to be enrolled; that the determination of the question cannot be reviewed by this proceeding. (S. W. Reporter, Vol. 53, page 467). We take the position that the Commission to the Five Civilized Tribes, now

engaged in the work of making the final allotment rolls of the Choctaw and Chickasaw tribes of Indians, is a judicial tribunal, possessing at this time original jurisdiction to pass upon the rights of every person whose name may be presented to it to go upon that allotment roll and share in the final distribution of tribal property. That this right of judicial determination, does not apply to any one class of claimants, but extends to all who may present themselves; and that, when it appears from the pleadings, that the Commission has acted, either by enrolling the applicant, or refusing to enroll him, that their determination of that question cannot be controlled by the writ of mandamus.

We deem it unnecessary to do more than refer, in a general way, to the acts of congress conferring this jurisdiction upon the Commission, and to point out that the entire purpose of these acts would be defeated if it should be held that the courts in the Indian Territory can review the action of the Commission on appeal by the use of the writ of mandamus for that purpose, or in any other way.

That this view of the power and authority of the Commission was taken by congress, was evidenced by the course of the legislation. In the Act of July 1, 1898, it was provided that the work of the Commission should not be enjoined or suspended by any proceeding in, or order of, any court or any judge, until after final judgment in the Supreme Court; thus evidencing the desire of congress to leave the determination of these questions to the untrammeled judgment of the Commission. We contend that the Commission, in rejecting these appellees, did so in the exercise of such judgment and discretion, conferred upon them by law, as cannot be concontrolled by the writ of mandamus, or any other process.

Upon the second proposition, as to whether the court erred in refusing to make the Choctaw and Chickasaw Nations parties defendant, with the Commission to the Five Civilized Tribes, it is difficult for us to see upon what ground the court refused to grant the motion. (Tr. page 11).

The Nations, in making such motion, relied upon Section 2 of the Act of Congress of June 28, 1898, commonly

called the Curtis Act, which we quote in full:

"That, when, in the progress of any civil suit, either in law or in equity, pending in the United States Court in any District, in said Territory, it shall appear to the court that the property of any tribe is, in any way, affected by the issues being heard, said court is hereby authorized and required to make said tribe a party to said suit by service upon the Chief or Governor of the tribe, and the suit shall thereafter be conducted and determined, as if said tribe had been an original party to said action."

This statute is mandatory. The court is required to make the tribe a party where the property of the tribe is in any way affected by the issues being heard. Not directly affected; nor indirectly affected; but "in ANY WAY affected" by the issues being heard. This is but expressing by statute what natural justice would require.

To reach the conclusion of the trial court, to deny them the privilege of resisting this petition for writ of mandamus, and protecting the allotment roll from the imposition of these names, would require the court to hold that the property of the Choctaw and Chickasaw tribes of Indians is not in any way affected by the addition of the names of these four appellees, and if the addition of the names of the four appellees did not affect their interests, it logically follows that the addition of four million names would not affect their interests; although the practical affect of this, roughly stated, would be to reduce the patrimony of each Choctaw and Chickasaw from supposedly about five hundred acres to less than enough to decently bury him in. If this section of the Curtis Act does not grant to these tribes the right to be heard in the courts of the Indian Territory in their defense, in our opinion, it must be held upon the ground that congress can not do so. It has evidently done all it could do to bring that end about.

We deem it unnecessary to argue the further proposition that, since the constitution has been extended over the Indian Territory by an Act of Congress, and since large

property interests of these tribes are involved, they should be permitted to plead in every action involving their property rights, or they would be, necessarily, denied the protection which congress intended the constitution should afford them.

Respectfully submitted,

MANSFIELD, McMURRAY & CORNISH.

Attorneys for Appellants.