EX PARTE FORBES ET AL.

Case No. 4,921.
{1 Dill. 363.}[1]

Circuit Court, D. Kansas. 1870.

NATIONAL AND STATE COURTS—JURISDICTION—HABEAS CORPUS—PARTITION—INDIAN LANDS.

1. Federal courts or judges cannot discharge persons from custody under process for contempt, issued by a state court in the course of a suit pending therein, even though it relates to property of Indians, over which, under special treaties and acts of congress, such state court has no jurisdiction.

{Cited in U. S. v. Van Fossen, Case No. 16,607; U. S. v. McClay, Id. 15,660; Ex parte Young, 50 Fed. 528.}

2. A state court has no jurisdiction over a partition suit in relation to lands of the Shawnee

Indians, which have never been conveyed with the approval of the secretary of the interior.

This was an application to the district judge of the United States for the district of Kansas, for the discharge, from the custody of the sheriff of Wyandotte county, of the aboveuamed petitioners [Forbes and Pucket]. A writ was allowed, directing the persons named to be brought before him, which was returned with the bodies of the relators. The material facts are these: In November, 1854, a treaty was made between the Shawnee Indians and the United States, wherein it was stipulated that two hundred acres of the "Shawnee reservation" of lands, should be allotted to each member of the tribe; and where the allottees were minors, the shares of such minors were to be patented to the head of the family, for their benefit The treaty also provided that the patents should be issued with such restrictions, for the benefit of the Indians, as congress might provide. In pursuance of this provision, in 1859, congress enacted that the restriction referred to should be such as might be prescribed by the secretary of the interior; and, as such restriction, that officer directed that the patents should contain a clause providing that the Indians or their heirs should never alienate lands so allotted and patented to them, without the consent of the secretary of the interior. Under this treaty, certain of said Shawnee lands were allotted to Mary McLane, and patented to Sophia McLane, as the head of the family of which said Mary was a member. The petitioners were in possession of portions of said lands, under supposed conveyances from said Mary, which were executed in the presence of the agent of the United States for the Shawnees, and were paid for to his satisfaction. The conveyances were forwarded to the secretary of the interior for his approval, but it does not appear that they ever have been approved by that officer. One of the heirs of Sophia McLane, claiming to own an undivided half of the lands patented to her, commenced a proceeding in the district court of Wyandotte county, for the partition thereof, denying that the petitioners herein had any rights therein, and alleging that the petitioners were committing waste thereon. Upon that petition the said court made an order restraining the petitioners herein from committing waste upon said lands, pending the suit for partition. For an alleged violation of that order, the petitioners were, by order of that court, committed to the custody of the sheriff of Wyandotte county, as for contempt; which is the imprisonment from which they seek to be discharged.

Glick & Todd, for petitioners.

Scroggs & Sharp, opposed.

DELAHAY, District Judge. If it were necessary to a decision in this proceeding, that the jurisdiction of the state court of the subject matter in controversy, In the proceedings before it, should be inquired into, it would be sufficient, in my opinion, to refer to the case of the Kansas Indians, 5 Wall. [72 U. S.] 737, in which the supreme court of the United States, speaking of the Shawnees, says: "As long as the United States recognize their national character, they are under the protection of treaties and the laws of congress,

and their property is withdrawn from the operation of state laws." There can be no question of the applicability of this language to the suit in Wyandotte county, as it is made clearly to appear that the Shawnees still maintain their tribal relation to the United States, and are still recognized by the government as an Indian tribe or nation; and that the secretary of the interior never has approved the conveyances under which the petitioners claim. The deeds are entirely void until approved by that officer; and, until they are so approved, the lands of the Shawnees are as wholly beyond the jurisdiction of the state courts as if they were situated without its geographical limits, as will be seen by reference to the peculiar provisions of the act admitting Kansas as a state. See, also, U. S. v. Ward [Case No. 16,639].

But that is not a question to be inquired into in this proceeding. The first question that it is necessary to consider, is whether a judge of a federal court has jurisdiction in the premises; and the legislation of congress, happily, has left no room for doubt upon that subject. The judiciary act of 1789 (1 Stat 81, § 14) gave the general power to issue the writ, but, in a proviso, declared "that it in no case shall extend to prisoners in jail, unless when they are in custody under, or by color of, the authority of the United States; or are committed for trial before some court of the same; or are necessary to be brought into court to testify." The act of 1833 (4 Stat. 634, § 7) provides that the federal judges shall have the power to grant writs of habeas corpus in all cases of a prisoner or prisoners in jail or confinement, where he or they shall be committed or confined, on or by any authority or law, for any act done or omitted to be done, in pursuance of a law of the United States, or any order, process or decree of any judge or court thereof. The act of 1842 (5 Stat. 539) extended the power to courts where aliens were confined, under state authority. The act of February 5, 1867 (14 Stat 385), gave power to grant the writ "in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States."

To be unmistakably explicit, it will be observed that congress did not stop with providing in what cases the writ might be issued by federal courts and magistrates. Certain cases are mentioned in which it shall not be allowed, conspicuous among which is the case where the applicant is in confinement under the laws of a state, by order of a court

thereof. If he be confined contrary to the constitution and laws of the United States, the federal authorities may issue the writ. But the proofs in this case show distinctly and clearly that the petitioners were not in that category. They are in confinement, illegally perhaps, under the order of a state court, in a matter, it may be, over which it had no jurisdiction; but that does not necessarily give them access to the federal judiciary, since they can administer no relief unless the case is provided for by federal legislation. Very manifestly, this case is not such an one; I am, therefore, obliged to set aside the writ heretofore allowed, and leave the petitioners in the custody of the sheriff of Wyandotte county.

Ordered accordingly.

NOTE. As to jurisdiction over Indians, see Karrahoo v. Adams {Case No. 7,614}; U. S. v. Yellow Sun {Id. 16,780}; U. S. v. Tobacco Factory {Id. 16,528}. Respecting non-interference of state and national courts with the process and operations of each other, see Ex parte Holman, 28 Iowa, 88.

[1] {Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.}