UNITED STATES v. PAYNE.

Case No. 16,014.
{4 Dill. 387.}[2]

Circuit Court, D. Kansas. 1877.

JURISDICTION OF PROBATE COURT—PROPERTY OF POTTAWATOMIE INDIANS—ACTION FOR MONEY HAD AND RECEIVED.

1. Without the assent of the general government, the probate courts of a state have no jurisdiction to administer upon the property or credits of Indians who were members of a tribe which maintains towards the United States its tribal relations.

2. The grant of administration on the estate of a member of the Pottawatomie tribe of Indians, by a probate court in Kansas, by virtue of the treaty of 1867 (15 Stat. 536, art. 8, of senate amendments), when such member is in fact alive, is void as respects the administrator, and money paid to him by the United States in that capacity may be recovered back.

This cause is submitted to the court upon the facts set forth in the petition, answer, and reply, which are severally admitted to be true. The petition states that, on June 10th, 1871, the defendant {Benjamin T. Payne} was indebted to the plaintiff in the sum of $6,111.84, for money before that time had and received by the defendant, to and for the use of the plaintiff. The answer states, "that, in January and May, 1871, the defendant was duly appointed by the probate court for Wabaunsee county, Kansas, administrator of the following named deceased persons: In-kuh-da-o-ks, Go-she-was-kpa-zo-mah, etc. (naming several other Indians having like names), and as such duly qualified; that said several persons were Pottawatomie Indians, and were, at the times of their several deaths, members of the Pottawatomie Tribe or Nation of Indians, and each owned real estate in said county, and was entitled to receive from the government of the United States, under treaty stipulations, $661.18, amounting in all to $6,611.80; that said sum was duly paid by the United States to this defendant, as such administrator; that defendant has duly accounted to the said probate court, and paid out under its direction, of the said moneys received from the United States, the sum of $4,271.22, and holds the balance subject to the orders of jurisdiction of the said probate court; that defendant has never received any other moneys of the United States." The replication states that the said Indians mentioned in the answer were alive, and members of the said tribe, at the time the defendant was appointed as administrator. The senate amendment to article 8, of the treaty of 1867, with the Pottawatomie tribe of Indians, is as follows: "Where allottees, under the treaty of 1861, shall have died, or shall hereafter decease, such allottees shall be regarded, for the purpose of a careful and just settlement of their, estates, as citizens of the United States, and of the state of Kansas; and it shall be competent for the proper courts to take charge of the settlement of their estates, under all the forms, and in accordance with the laws of the state, as in the case of other citizens, deceased," etc. 15 Stat. 536.

George R. Peck, U. S. Dist. Atty.

Martin & Case, for defendant.

DILLON, Circuit Judge. It is admitted that the several Indians for whose estates the defendant was appointed administrator by the local probate court, were, at the time of such appointment, in full life, and members of the Pottawatomie tribe of Indians, and that the money received by the defendant of the United States was due to them by the United States under treaty stipulations with the tribe.

Where Indians maintain the tribal relations, their property is not subject to the laws of the state, or their estates to be administered upon in the probate court of the state, unless by the assent of the general government. The Kansas Indians, 15 Wall. [82 U. S.] 737, 757, 759; Mackey v. Coxe, 18 How. [59 U. S.] 100; Mungosah v. Steinbrook [Case No. 9,924]; Gray v. Coffman [Case No. 5,714].

It will be conceded, for the purposes of this case, that the senate amendment to article 8 of the treaty of 1867, gave the probate court the authority to appoint administrators and settle the estate of deceased allottees of the

tribe. But it gave the probate court no authority to appoint administrators of an Indian, unless he had been an allottee under the treaty, and was dead.

The weight of judicial opinion would seem to be in favor of the proposition, even if the Indians and their property were subject to the probate jurisdiction of the courts of Kansas, that the court had no jurisdiction, and could have none, to make an appointment of an administrator of a person who, at the time, was alive. Jochumsen v. Suffolk Sav. Bank, 3 Allen, 87; Griffith v. Frazier, 8 Cranch [12 U. S.] 9, 23; Fisk v. Norvel, 9 Tex. 13. Contra, by the court of appeals of New York, in Roderigas v. East River Sav. Inst. [63 N. Y. 460], 15 Am. Law Reg. (N. S.) April, 1876, p. 205, where the note in disapproval, by the late Judge Redfield, may be found. Much may be said on both sides of the general proposition last stated. Roderigas v. East River Sav. Inst., just cited, may, possibly, be distinguished on solid grounds from such a case as the one before us. It was there held that a payment by a debtor in good faith to an administrator was valid, and would protect the debtor against a second payment, although the supposed intestate was alive at the time, and the letters of administration were subsequently revoked for this reason. The debtor was innocent, and acted on the faith of the grant of administration of the proper court. It may be a different question when it arises between an innocent third party and the administrator himself, which is the present case. It is possible that the case in the court of appeals of New York may be sustained on this ground, but we need not express any opinion on this point. We place our judgment in the case at the bar on the ground that under the treaty the probate court had no jurisdiction to make an appointment of an administrator for Indians who were alive at the time, and that its decision that it had jurisdiction, evidenced by the grant of letters of administration, is not conclusive in favor of the administrator, who, perhaps, had himself appointed, and who, at all events, voluntarily assumed that character, and held himself out to the world as sustaining that relation.

As the government owed this money to these Indians; as the defendant had no right to receive it; as the payment to the defendant did not absolve the government from the liability or duty to pay the amount to the Indians entitled thereto; and as the defendant, if he did not, indeed, apply for, voluntarily accepted and undertook to act as administrator, and does not claim that he has paid the money to the Indians entitled, or that the latter have ever ratified or confirmed the receipt of the money or its disposition by him, our judgment is that the United States may maintain this action to recover back the amount unlawfully received by the defendant.

Judgment for the plaintiff.

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