PITMAN V. COMMISSIONER

64 F. 2d 740 (10th Cir. 1933)

* * * PHILLIPS, Circuit Judge.

This is an appeal from a decision of the Board of Tax Appeals. Petitioner is a fullblood member of the Creek Tribe of Indians, enrolled opposite No. 1833. She was married to Robert L. Pitman, Sr., a white man. There was born of this marriage a son, Robert Pitman, Jr. He was duly enrolled as a half-blood member of the Creek Nation. Petitioner was divorced from Pitman, Sr., in 1911. Pitman, Jr., was allotted 38.79 acres of land as a homestead, and 121.46 acres of land as a surplus allotment. Allotment deeds were duly executed and delivered therefor.

On October 14, 1919, Pitman, Jr., died intestate, unmarried, without issue, and seized of such allotted lands.

Pitman, Sr., claimed a one-half interest in such allotted lands as an heir of Pitman, Jr. Petitioner claimed the whole thereof as the sole heir of Pitman, Jr. On March 8, 1920, a compromise was effected pursuant to which petitioner paid Pitman, Sr., $30,000, and the latter executed and delivered to her a quitclaim deed to such allotted lands.

On March 30, 1921, the county court of Tulsa county, Oklahoma, in the matter of the estate of Pitman, Jr., entered a decree of heirship and distribution, which in part reads as follows:

"That upon his death the said Robert Pitman, Jr., deceased, was survived by his father, a white man, and noncitizen of the Creek Tribe of Indians, and by his mother, Lucinda Pitman, a full-blood member of the Creek Tribe of Indians, enrolled opposite roll number 1833. That by reason of the premises and of the law applicable thereto upon the death of the said Robert Pitman, Jr., all of his right, title, and interest in and to the lands hereinafter described as the allotment of the said Robert Pitman, Jr., * * * (the 160.25 acres here in question) * * * descended to and vested in his mother, Lucinda Pitman, as the sole heir thereto." * * *

The county court of Tulsa county by its decree of March 30, 1921, adjudged that the whole of the allotment, both homestead and surplus, descended to the petitioner as and sole heir of Pitman, Jr., deceased. This was in accord with the existing decisions of the Supreme Court of Oklahoma holding that the laws of descent and distribution of the state of Oklahoma made applicable to estates of decedents of the Five Civilized Tribes by sections 13 and 21 of the Oklahoma Enabling Act (34 Stat. 267, 275, 277) and section 9 of the Act of May 27, 1908 (35 Stat. 315), was subject to the proviso in section 6 of the Supplemental Creek Treaty (32 Stat. 501), which reads in part as follows:

"Provided, That only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation. * * *"

See Thompson v. Cornelius, 53 Okl. 85, 155 P. 602; Jefferson v. Cook, 53 Okl. 272, 155 P. 852; Hughes v. Bell, 55 Okl. 555, 155 P. 604; Privett v. Rentie, 75 Okl. 191, 182 P. 898; and Scott v. Ryal, 78 Okl. 12, 186 P. 206 Decided February 24, 1920.

It is true that in the case of In re Estate of Robert Pigeon, 82 Okl. 180, 198 P. 309, decided April 5, 1921, the Supreme Court of Oklahoma overruled the cases above referred to and held that such section 6 was repealed by sections 13 and 21 of the Oklahoma Enabling Act and section 9 of the Act of May 27, 1908. But the county court of Tulsa county had jurisdiction to enter the decree of heirship and distribution referred to above (sections 1384 to 1394, inc., C. O. S. 1921; Act of June 14, 1918, 40 St. 606, USCA, tit. 25, § 375), ans such decree has not been appealed from nor in anywise modified.

Proceedings of probate courts are usually in rem. Freeman on Judgments (5th Ed.) § 1537. A judgment ascertaining and adjudicating heirship and directing the distribution of the estate of a decedent is not a judgment inter partes but a judgment in rem, and is evidence of the facts adjudicated against all the world. McDougal v. Black Panther O. & G. Co. (C. C. A. 8) 273 F. 113; Ennis v. Smith, 14 How. 400, 430, 14 L. Ed. 472; Mulcahey v. Dow, 131 Cal. 73, 63 P. 158; Connolly v. Probate Court, 25 Idaho, 35, 136 P. 205; Ladd v. Weiskpf, 62 Minn. 29, 64 N. W. 99, 69 L. R. A. 785; McNamara v. Casserly, 61 Minn. 335, 63 N. W. 880; In re Piper's Estate, 208 Pa. 636, 57 A. 1118; Goodrich v. Ferris, 214 U. S. 71, 80, 81, 29 S. Ct. 580, 53 L. Ed. 914. See, also, Hilton v. Guyot, 159 U. S. 113, 167, 16 S. Ct. 139, 40 L. Ed. 95. It follows that such decree effectually adjudged petitioner to be the sole heir at law of Pitman, Jr., and entitled to inherit the whole of such allotted lands, and that it is binding on the parties to this proceeding. We conclude, therefore, that petitioner acquired the whole of the allotted lands by inheritance from Pitman, Jr.

Whether such allotted lands, and therefore the income therefrom (Bagby v. United States (C. C. A. 10) 60 F.(2d) 80, 81), became subject to taxation in passing to petitioner, must be determined from a construction of the applicable provisions of the Act of May 27, 1908, which follow:

Section 1 of the Act of May 27, 1908 (35 Stat. 312), in part reads as follows:

"All lands, except homesteads, of said allottees enrolled as mixed-blood Indians having half or more than half and less than three-quarters Indian blood shall be free from all restrictions. All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, * * * shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one."

Section 4 of such act in part reads as follows:

"That all land from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees

of the Five Civilized Tribes."

Section 9 of such act in part reads as follows:

"That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: Provided, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee."

The provisions of section 1 by the terms of the act became effective sixty days from its date. The period of restriction was extended 25 years from April 26, 1931, by the Act of May 10, 1928 (45 Stat. 495).

Pitman, Jr., being a half-blood, it follows that section 1, supra, removed all restrictions on that portion of his allotment other than the homestead. On the removal of such restrictions, such lands and the income therefrom became subject to taxation under the provisions of section 4 of such act. Section 9, supra, deals with lands restricted at the time of the allottee's death, and not with lands from which restrictions had been theretofore removed. It did not on the death of Pitman, Jr., reimpose restrictions upon the surplus lands from which restrictions had theretofore been removed.

The homestead portion of the allotment, however, remained subject to the restrictions provided by section 1, supra, until the death of Pitman, Jr., the original allottee. Upon his death it passed by inheritance to the petitioner, a full-blood Indian heir, and became subject to the qualified restrictions imposed by section 9, supra, and remained exempt from taxation. Parker v. Richard, 250 U. S. 235, 238, 39 S. Ct. 442, 63 L. Ed. 954; Marcy v. Board of Commissioners, 45 Okl. 1, 144 P. 611; United States v. Shock (C. C. Okl.) 187 F. 870.

We conclude, therefore, that the homestead remained restricted and exempt from taxation, and that the surplus allotment became freed of restrictions and subject to taxation from and after sixty days from May 27, 1908. * * *