

DAVIS V. JONES

254 F. 2d 696 (10th Cir. 1958)

BRATTON, Chief Judge.

John F. Davis, trustee of the estate of Cumseh Bear, a full-blood Creek Indian, hereinafter referred to as Cumseh, filed in the District Court of Okfuskee County, Oklahoma, a petition for the approval of his final report as such trustee. In the petition, the trustee sought approval and confirmation of the report and an adjudication of no liability to the trust estate except that disclosed by the report. The report was filed with the petition and it disclosed a balance due the trust estate in the sum of \$1,261.72. The trust was created in 1932, and it terminated upon the death of Cumseh in 1954. The surviving heirs of Cumseh filed in the proceeding objections and exceptions to the report; and as cross petitioners, they sought an accounting. Notice of the suit was served upon the United States under section 3 of the Act of April 12, 1926, 44 Stat. 239. The United States seasonably filed a petition for the removal of the proceeding to the United States Court under such section; and it was removed. A motion to remand was denied. Acting on its own behalf and on behalf of the heirs of Cumseh, the United States filed its complaint in intervention in which an accounting was sought. Some facts were stipulated and evidence was adduced. The court found among other things that during the existence of the trust period, the trustee received a total of \$57,958.26; that credits aggregating \$26,100 should be allowed; and that the trustee should be surcharged in the amount of \$31,858.26. Judgment was entered against the trustee for the amount of the surcharge, with provision that the proceeds of the judgment, when paid or collected, should be deposited in the office of the Area Director, Bureau of Indian Affairs, at Muskogee, Oklahoma, to be held for the benefit of the heirs of Cumseh and to be disbursed pursuant to the applicable rules and regulations of the Secretary of the Interior. The trustee appealed.

Error is predicated upon the denial of the motion to remand the proceeding to the state court. The substance of the argument is that in 1932 the trust agreement was approved by the County Court of Okfuskee County; that such approval operated to remove all federal restrictions upon the income accruing from the sale of oil and gas produced from the inherited land described in the trust agreement; and that therefore the proceeding was not subject to removal. Section 3 of the Act of April 12, 1926, *supra*, is a special statute relating to the removal of certain cases. It provides that in any suit in a state court of Oklahoma to which a restricted member of the Five Civilized Tribes, or a restricted heir or grantee of such Indian, is a party and claiming an interest in allotted lands or the income therefrom, notice of the pendency of such suit may be served upon the Superintendent of the Five Civilized Tribes; that the United States may then remove the suit to the United States Court in the manner and within the time therein specified; and that the United States Court may then hear and determine the suit. The fund constituting the trust estate

herein involved was derived from the sale of oil and gas produced from land allotted to Louisa Roberts, afterwards Louisa Bear, a full-blood enrolled Creek Indian. The allottee executed an oil and gas lease covering the allotted land, and oil and gas were being produced therefrom during her lifetime. The lease was executed with the approval of the Secretary of the Interior; and the income accruing therefrom prior to the execution of the trust agreement was paid to the Secretary in *699 trust for the allottee, or her heirs. The allottee died intestate in 1929, leaving as her sole and only heirs her husband, Cumseh, and her son Johnny Bear. Cumseh was a full-blood member of the Creek tribe. All of his heirs were and are full-blood restricted members of the Five Civilized Tribes; and they were parties to the proceeding in the state court. The interest in the allotted land, together with the income therefrom, which Cumseh acquired by inheritance from the allottee was subject to restrictions against alienation. *Chisholm v. House*, 10 Cir., 160 F.2d 632. Though approved by the County Judge of Okfuskee County, the trust agreement did not operate to free from restrictions the income derived from oil and gas produced from such land and placed in the trust estate. And the fund constituting the trust estate continued to be restricted after it passed by inheritance to the heirs of Cumseh. It is clear that in these circumstances, the proceeding was removable. *House v. United States*, 10 Cir., 144 F.2d 555, certiorari denied 323 U.S. 781, 65 S.Ct. 270, 89 L.Ed. 624.

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