IN THE UNITED STATES COURT OF APPEALS

FOR THE INDIAN TERRITORY.

JUNE TERM, 1899.

No. 267.

N. B. MAXEY, ET AL, APPELLANTS,

vs.

J. GEORGE WRIGHT, UNITED STATES INDIAN INSPECTOR FOR THE INDIAN TERRITORY, ET AL, APPELLEES.

BRIEF ON BEHALF OF APPELLEES.

The scope of the oral argument of attorneys for appellant upon the hearing of this case, opened up almost the entire question of recent Federal legislation regarding the Indian Territory. Under the record in the case but few points present themselves for argument except as incidently throwing light upon the status of existing laws and their relation to the residents of the Indian Territory.

Acting under the direction of the Honorable Secretary of the Interior, the United States Indian Inspector for the Indian Territory demanded of certain attorneys at law residing in the incorporated town of Muskogee, Indian Territory, the payment of the license or occupation tax required by the act of the Creek Council, approved March 23, 1893, and which said act was also approved by the United States Indian Agent for the Five Civilized Tribes on March 28, 1893. (*See pages 4 and 5 of Record.*)

This occupation or permit tax was demanded under rules and regulations of the Secretary of the Interior, under and by virtue of the provisions of Section 16, of the Act of Congress, commonly known as the Curtis Bill, approved June 28, 1898.

To prevent the collection of this tax appellants filed in the United States Court a bill in equity praying for an injunction against the United States Indian Inspector and the United States Indian Agent. (*See pages 1 and 3 of Record.*)

To this bill in equity defendants filed a demurrer, and upon hearing the Court denied the writ of injunction, dismissed the bill of complaint, whereupon they appealed to this Honorable Court.

The legal questions presented might be grouped under the following heads:

First: Has the Creek Nation the right to prescribe an occupation or permit tax against lawyers?

Second: Is the Creek Nation an Indian reservation?

Third: Has the Commissioner of Indian Affairs, with the approval of the Secretary of the Interior, authority to remove persons from the Creek Nation, whose presence, in his judgment, may be detrimental to the peace and welfare of the Indians, and can such discretion be controlled by the Court?

Fourth: Has the United States Indian Inspector for the Indian Territory any authority to demand the payment of any permit or occupation tax, which by regulations of the Secretary of the Interior is to be paid to the United States Indian Agent for the Five Civilized Tribes for the benefit of the Creek Nation?

Counsel regret that the volume of business in the Northern

District is so great that they have been unable to make a more exhaustive research than will be hereafter presented upon these questions, which are of vital importance to the inhabitants of the Cherokee and Creek Nations.

FIRST: HAS THE CREEK NATION THE RIGHT TO PRESCRIBE AN OCCUPATION OR PERMIT TAX AGAINST LAWYERS?

The Creek Nation for many years has been recognized as an independent political community—as a nation with full powers of government.

See:

Cherokee Nation vs. State of Georgia, 5 Peters, 1.

Worchester vs. State of Georgia, 5 Peters, 515.

See also note *2nd Stats. at Large, 146.*

Counsel for appellants have cited the opinion of Attorney General Wirt on the right of the Cherokee Nation to impose a tax on traders, (*1 Opinions of Attorney General, 645,*) as sustaining the contention that the Creek Nation has no right to impose this license or occupation tax.

A careful perusal of this opinion, however, shows that the Cherokee Nation had debarred itself from imposing any tax under previous and existing treaties at the time of the rendition of this opinion, to-wit, April 2, 1824.

In this opinion the Attorney General says:

"The time has passed away in which it would be tolerated to treat these people as we please, because we are Christians and they are heathens If the tax is to be resisted we must find some solid ground for that resistence, which law and reason will support, and which we can justify both towards God and man. If, by the treaties into which they have entered with us, *they have debarred themselves from imposing this tax*, they cannot justly complain if we insist on the fulfillment of these treaties, and the withdrawal of the tax as far as it shall be found in conflict with their own stipulations. * * * * * * * * * * * *

"Now the stipulation of the treaty of 1785 is, that 'the United States in Congress assembled shall have the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs in such manner as they think proper.' The right thus conferred on the United States is sole and exclusive; consequently, neither the Cherokees nor any other nation had the right thereafter to touch the subject which was thus solely and exclusively given to the United States. What was the right thus solely and exclusively given to the United States? The right of regulating the trade with the Indians. What does this mean? The right of regulating the conduct of the citizens of the United States in carrying on this trade? This cannot be the meaning, because this right the United States had before, and it required no treaty to give it to them. *The treaty meant to give a right which did not exist before;* and this could only be the right to prescribe the whole system of regulations, on both sides, under which the trade should be carried on. * * * * * * *

"But if it were conceded that the Cherokee Nation might prohibit this trade altogether, it would not follow that they might, under these treaties, tolerate it under such regulations as they might institute; for, whether the power of entire prohibition has been given to Congress or not, the sole and exclusive power of regulation has been given to them; *and, so long as these treaties remain in force*, it seems manifest that the Indians have no power to interfere with those regulations, either by addition or subtraction; and what is a tax upon persons authorized by Congress to trade without it, but a new and distinct regulation superinduced upon the regulations provided by Congress?"

No such abrogation of rights has been made by the Creek tribe of Indians, in fact Article 15 of the treaty between the Creeks and the United States, proclaimed August 28, 1856, (*Revision of Indian Treaties, page 111,*) and which is still in force, provides:

"Article 15. So far as may be compatible with the Constitution of the United States, and the laws made in pursuance thereof, regulating trade and intercourse with the Indian tribes, the Creeks and Seminoles shall be secured in the unrestricted right of self-government, and full jurisdiction over persons and property, within their respective limits; excepting, however, all white persons, with their property, who are not by adoption or otherwise, members of either the Creek or Seminole tribe; and all persons not being members of either tribe, found within their limits, shall be considered intruders, and be removed from and kept out of the same by the United States agents for said

tribes, respectively; (assisted, if necessary, by the military;) with the following exceptions, viz, such individuals, with their families, as may be in the employment of the government of the United States; all persons peaceably traveling, or temporarily sojourning in the country, or trading therein under license from the proper authority of the United States; *AND SUCH PERSONS AS MAY BE PERMITTED BY THE CREEKS OR SEMINOLES, WITH THE ASSENT OF THE PROPER AUTHORITIES OF THE UNITED STATES, TO RESIDE WITHIN THEIR RESPECTIVE LIMITS WITHOUT BECOMING MEMBERS OF EITHER OF SAID TRIBES.*"

It seems to be clear that under the last provision of exceptions contained in Article 15 above quoted, that authority is conferred, even were such authority necessary, upon the Creek Nation to provide under what terms and conditions persons, not members of the tribe, with the assent of the United States, may remain in the Indian Territory and who may not be traders therein under license as otherwise provided.

The same question arose in the construction of the latter clause of Article 7 of the treaty with the Choctaws and Chickasaws, approved June 22, 1855, (*11 Statutes at Large, page 613,*) which is as follows:

"Article 7. So far as may be compatible with the Constitution of the United States and the laws made in pursuance thereof, regulating trade and intercourse with the Indian tribes, the Choctaws and Chickasaws shall be secured in the unrestricted right of self-government, and full jurisdictions, over persons and property within their respective limits; excepting, however, all persons with their property, who are not by birth, adoption, or otherwise citizens or members of either the Choctaw or Chickasaw tribe, and all persons not being citizens or members of either tribe found within their limits, shall be considered intruders, and be removed from and kept out of the same, by the United States Agent, assisted, if necessary by the military, with the following exceptions, viz: Such individuals as are now, or may be in the employment of the government, and their families; those peaceably travelling or temporarily sojourning in the country or trading therein under license from the proper authority of the United States, and such as may be permitted by the Choctaws or Chickasaws, with the

assent of the United States Agent, to reside within their limits, without becoming citizens or members of either of said tribes."

On June 25, 1881, Honorable Wayne MacVeagh, then Attorney-General of the United States, held that the permit laws of the Chickasaws and Choctaws were valid, and said:

"The validity of such permits is recognized by the concluding clause of Article 7 of the treaty of June 22, 1855, (*11 Statutes 613*), which is not inconsistent with the terms of the later treaty."

See 17 Opinions of Attorneys General, 134.

The subject was again called to the attention of the Honorable Attorney-General, and an opinion rendered by Honorable S. F. Phillips, Acting Attorney-General, on July 19, 1884, in which the Department of Justice held that:

"In the absence of treaty or statutory provisions to the contrary, the Choctaw and Chickasaw Nations have power to regulate their own rights of occupancy, and to say who shall participate therein and upon what conditions; and hence may require permits to reside in the nation from citizens of the United States, and levy a pecuniary exaction therefor."

In the body of the opinion the Attorney-General says:

"In the absence of a treaty or statute, it seems that the power of the nation thus to regulate its own right of occupancy, and to say who shall participate therein and upon what conditions, cannot be doubted. The clear result of all the cases, as restated in *95 United States Reports, at page 526*, is, 'the right of the Indians to their occupancy is as sacred as that of the United States to the fee.'

"I add, that so far as the United States recognize political organizations amongst Indians the right of occupancy is a right *in the tribe or nation*. It is of course competent for the United States to disregard such organizations and treat Indians individually, but their policy has generally been otherwise. In such cases presumptively they remit all questions of individual right to the definition of the nation, as being purely domestic in character. The practical importance here of this proposition is that in the absence of express contradictory provisions by treaty, or by statutes of the United States, the nation (and not a citizen) is to declare who shall come within the boundaries of its occupancy, and under what regulations and conditions. * * * *

"(a) Article 7, 1855,) secured to the Choctaws and Chickasaws, amongst other things, 'the unrestricted right of self-government and free jurisdiction over persons and property within their respective limits, excepting, however, all persons or their property who are not by birth, adoption, or otherwise citizens or members of either tribe,' etc.

"I submit that whatever this may mean it does not limit the right of these tribes to pass upon the question, who (of persons indifferent to the United States, i. e., neither employes, not objectionable) shall share their occupancy and upon what terms. That is a question which all private persons are allowed to decide for themselves; and even wild animals, not men, have a certain respect paid to the instinct which in this respect they share with man. The serious words 'jurisdiction' and 'self-government' are scarcely appropriate to the right of a hotel-keeper to prescribe rules and charges for persons who become his fellow-occupants. It is therefore improbable that the above proposition in the treaty of 1855 has any relation to this plain natural right and natural instinct of an Indian nation."

See *18 Opinions of Attorneys General, pages 36-37.*

That the Creek Nation is an Indian reservation, and as such is Indian country, there seems to be, in my mind, no doubt, and as such the provisions of *2134 R. S., U. S.*, are applicable.

As to the method of enforcing such occupation tax see concluding paragraph of opinion of Judge Sanborn in *Crabtree vs. Maddin, 54 Federal Reporter, page 431.*

It is claimed by appellants, however, that Section 14 of the Act of Congress approved June 28, 1898, known as the Curtis Act, has segregated the land within the confines of the towns from the Indian reservation, and that therefore all laws relating to the Indian reservations or Indian country, do not apply.

I do not so understand the decisions of the Supreme Court of the United States wherein it has repeatedly been held that the

laws relating to Indian country are in force until the Indian title has been extinguished.

See *ex parte Crowdog, 109 U. S., 570.*
Kagama vs. United States, 118 U. S., page 375.
United States vs. Perryman, 100 U. S., 235.

The right to establish municipal corporations was not initiated by Section 14 of the Curtis Act; it had previously been put in force by Act of Congress approved May 2, 1890, extending the laws of Arkansas over the Indian Territory. Section 14 of the Curtis Act simply remedied defects in the matter of taxation and in providing for schools, and provided the machinery for the levy and collection of taxes which had not been provided for in the Act of Congress approved May 2, 1890.

Under the decisions heretofore cited, it seems to be clear that the Creek Nation had the right, at least since 1856, of imposing permit taxes on non-citizens of the tribe, and, on application to the United States, have them removed from said Creek Nation as intruders under Article 15 of said treaty.

It cannot be presumed that simply because an attorney at law is in one sense an officer of the Court which is established within the Indian Territory by treaty and by Act of Congress, that he would not comply with the existing treaties between the United States and the Creek Nation of Indians; rather is it to be presumed that an attorney at law will himself first obey the law, and that he will comply with the requirements of the treaty before he is admitted to practice.

Blanchard vs. State, 18 L. R. A., 409.

It was claimed by Col. Marcum in his oral argument before the Court that the enforcement of such a provision would deprive

the Court of its officers, and deprive defendants in jail of counsel, and the same question was raised in *Ex parte Williams, 31 Texas Criminal Reports, 262; 21 L. R. A., 783*, wherein the Court says:

"But, conceding them to be officers, still that would be no ground for exemption from taxation. * * * *

"But in the second place, the contention that the legislature may cripple or destroy the judicial department is more plausible than sound. * * * *

"The objection goes to the existence of the power, rather than to any probability of its exercise. It is, indeed, an objection that could be urged against any exercise of the taxing power. Thus, the legislature ought not to have the power to tax land, for fear it might confiscate; nor personal property, because the tax imposed might exceed its value; nor any occupation, business, or persuit, because they could be taxed out of existence, and the livelihood of many be destroyed. * * * *

"There is certainly no force in the proposition that by the imposition of this tax some defendant may be deprived of counsel. The presumption is absolute, says Judge Dederick, in the Tennessee 'Lawyers Tax Cases,' that all good citizens will obey their State's laws, and pay the taxes imposed. There will always be lawyers who obey the law, and pay their occupation taxes. The person accused of crime will always be within reach of lawyers in a position to defend him by reason of having paid their tax. Until the criminal can show that he has actually been deprived of legal counsel by reason of this occupation tax, the lawyer cannot interpose this plea, that can only inure to the benefit of the defendant. It is a defense peculiarly personal, and this Court would not declare the occupation tax law unconstitutional on the ground that some criminal might be deprived of counsel by reason of the law, although no such case arose, or ever will arise. This contention is utterly without foundation, for the reason that this provision was put in the bill of rights not to operate under contingencies, but upon actual occurences; and we have none such here. Many reasons could be urged against this position, but it is deemed so frail that it is not necessary to deal with it further than to draw a plain parallel. We might with equal propriety charge the legislature with murder because some person gets snake bitten, and can get no whiskey to drink for it, and dies on account of the legislature imposing an occupation on liquor dealers, as to say that a criminal is deprived of the right of appearing by counsel on account of the legislature placing an occupation tax on lawyers, or might with some propriety accuse the legislature

with murder because some person dies on account of a tax on travelling physicians. The cases are about on a par."

In *ex parte Yale, 25 Cal., 241*, the Supreme Court held that an attorney at law is not an "officer" and does not hold a "public trust" in a constitutional sense of this term. As said by the Court:

"An officer, as defined by Webster, is 'a person who performs any public duty.' An attorney at law is not such an officer, and in our opinion, he is not an officer in the constitutional sense of the term and does not hold a public trust. On this point we agree with Justice Crocker and Norton in *Cohen vs. Wright, 22 Cal., 293.*"

In the matter of oaths to be taken by attorneys and counselors, *20 Johns, 492*, Mr. Justice Platt said:

"The point is simply whether an attorney or counselor holds an office of public trust in the sense of the constitution. * * In my judgment, an attorney or counsellor does not hold an office, but exercises a privilege or franchise. As attorneys or counsellors they perform no duties on behalf of the government—they execute no public trust."

See also note in

Chelby vs. Alcorn, 72 Am. Dec., 179–189.

That an occupation tax may be lawfully imposed even by municipal corporations upon lawyers, practicing in the state courts within the limits of the corporation, is conclusively decided in the case of the *City of St. Louis vs. Sternberg, 4 Mo. Appeals, 453.* The Court says in the course of its opinion that even though it be true "that municipal corporations may levy no tax, general or special, unless the power be unmistakably conferred. But this need not mean that it must be specifically granted in set terms, it is a question of intention."

Colley on taxation, page 576, says:

"Practicioners of law and medicine are not uncommonly taxed a specific sum upon the privilege of pursuing their calling

for a year or other specified time. Such a tax is not a poll tax, and may therefore be levied when poll taxes are forbidden. Some times the tax is graded by the supposed value of the privilege. The right to impose an occupation tax on practicioners of law has been much contested, as being in effect a tax on the privilege of seeking justice in the courts; but it has, nevertheless, been sustained without only faint dissent."

See also cases cited.

To the same effect see:

Langille vs. State, 4 Texas Appeal, 312.

Simmons vs. State, 12 Mo., 271.

State vs. Hibbard, 3 Ohio, 63.

Young vs. Thomas, 17 Fla., 170.

Cousins vs. State, 50 Ala., 115.

Wright vs. Atlanta, 54 Ga., 645.

Stuart vs. Potts, 49 Miss., 749.

Tideman on Police Powers, sections 84 and 101.

Weeks on Attorneys, section 41, page 88, second edition.

It would seem, therefore, that a license tax imposed by the Creek law referred to, which has not been repealed by any act of Congress, is valid. It was imposed under the last paragraph of Article 15 of the treaty between the Creek Nation and the United States, which remains in full force and effect and unrepealed, and was imposed with the assent of the United States, as said law shows that the same was approved by the then United States Indian Agent. It is true that this law cannot be enforced in any court of the United States, nor is any provision made for such enforcement, but the law does provide a remedy which has heretofore been in existence for years—the penalty for its violation being removal from the Creek Nation.

See *Crabtree vs. Madden, 54 Federal Reporter, page 431.*

II.

Is the Creek Nation an Indian Reservation?

The Creek tribe of Indians moved to their present reservation from the state of Alabama, and the country which they occupy as a reservation is a part of, and was included in the purchase from France, in what is known as the Louisana Purchase. The United States of America acquired such title to the vast area of property known as the Louisana Purchase as France then held, and the title of France, of Great Brittain and Spain to America is ably discussed and set forth in the monograph entitled "Indian Treaties," being preface to *Volume Seven, United States Statutes at Large.*

Under this purchase the United States acquired title subject to the recognized right of occupancy in the Indian tribes which was extinguished either by purchase under treaty or by conquest. Prior to 1830 it had long been the desire of the Government to locate the Indian tribes east of the Mississippi river in a country to be set apart for them west of the Mississippi. As early as the year 1824 the Creek Indians then living in Alabama and Georgia agreed to move west of the Mississippi and by the 6th article of the treaty of January 24 of that year (*7 Statutes at Large, 287*), it was agreed that a deputation of five persons should be sent by them to examine the country west of that river, and the United States stipulated to purchase for them a country whose extent should, in the opinion of the President, be proportioned to their numbers.

By the treaty of December 30, 1825, between the United States and the Osages, (see *Revision of Indian Treaties, page 577*) the Osages relinquished all their right and title to all the land now occupied by the Five Civilized Tribes. After the cession of this

title of the Osages, which was the "Original Indian Title," the country now occupied by the Creeks ceased to be Indian country. Congress by an Act approved May 28, 1830, (see *4 United States Statutes at Large, page 411*) provided for the exchange of lands with the Indians residing in any of the states or territories, and for their removal west of the River Mississippi. The first paragraph of which act is as follows:

"That it shall and may be lawful for the President of the United States to cause so much of any territory belonging to the United States, west of the River Mississippi, not included in any state or organized territory, and to which the Indian title has been extinguished, as he may judge necessary, to be divided into a suitable number of districts, for the reception of such tribes or nations of Indians as may choose to exchange the lands where they now reside, and remove there; and to cause each of said districts to be so described by natural or artificial marks, as to be easily distinguished from every other."

By the third section of said Act it was provided that the President should solemnly assure the tribe or nation which should remove, that the United States would forever secure and guarantee to them, and their heirs or successors, the country so exchanged with them; and if they prefer it, that the United States will cause patent or grant to be made and executed to them for the same.

Sections six and seven of said Act are now embraced in Section 2114 of the Revised Statutes of the United States, which makes it the duty of the United States to protect the Creek tribe of Indians from any interference or unlawful instrusion by any other Indian tribe or any other person whomsoever.

By treaty between the United States and the Creek tribe of Indians approved February 14, 1833, the land which they now occupy was set aside for a permanent home for them, and which is described in the second Article of said statute. (See 7 *Statutes*

at Large, 417). A patent to this land was issued by the Government in accordance with said Act of Congress and said treaty or August 11, 1851.

Subsequent to this treaty and the setting aside of this land Congress passed what is known as the Intercourse Act approved June 30, 1834, (*4 Statutes at Large, page 729.*) The first Section of which is as follows:

"That all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi river, and not within any state to which the Indian title has not been extinguished, for the purposes of this Act, be taken and deemed to be the Indian country."

This provision remained the law until the revision of 1878 when all the land west of the Mississippi except the Indian Territory, was included in states or territories and the reason therefor had ceased to exist, and hence it was omitted from the compilation of the laws of the United States, and the reason therefor is set forth in the decisions in cases hereinafter cited.

Clearly the Act of Congress approved May 28, 1830, set aside the country south of Kansas and west of the Territory of Arkansas, for Indian reservations. The country was to be divided in districts, the boundaries were prescribed, and all the qualifications of a reservation were provided for and existed. The original Indian title, the title of occupancy, had been extinguished by the treaty between the United States and the Osages in 1825, and the land set apart for the Creek tribe or nation of Indians was reserved by the Government of the United States to them and their descendants forever, so long as they should exist as a nation.

The inquiry naturally arises, what is a reservation and how

many kinds of reservations are there known to the Government of the United States?

In *United States vs. Martin, 14 Federal Reporter, page 823*, the Court says:

"In the progress of time what are known as 'the Indian reservations' have come to be the only country so occupied by them, and these now constitute the Indian country of the United States, and there is no other; and they are such in both law and fact. In *43 Gallons of Brandy, 11 Fed. Rep., 47*, Mr. Justice McCrary held that Section 1 of the Intercourse Act of 1834, *supra*, was repealed by Section 5596 of the Revised Statutes, and that in his judgment the phrase 'Indian country' as used in the Revised Statutes, now only includes 'that portion of the public domain which is set apart as a reservation, or as reservations, for the use and occupancy of the Indians, and not the whole vast extent of the national domain to which the Indian title has not been extinguished.' Upon the rehearing of this case (*14 Fed. Rep., 539*), the learned Judge said: 'An Indian reservation is a part of the public domain set apart by proper authority for the use and occupancy of the tribe of Indians. It may be set apart by an Act of Congress, by treaty, or by executive order.' See, also, upon this point, *United States vs. Bridleman*, *United States vs. Leathers*, and *United States vs. Sturgeon, supra*."

By the tenth Section of Chapter Sixteen of the Act of Congress approved September 4, 1841, which is now known as Section 2258 of the Revised Statutes of the United States, Congress declares what should be a "reservation." The first provision is as follows:

"Lands included in any reservation by any treaty, law, or proclamation of the President, for any purpose."

The government reserves land for many purposes; for forts, arsenals, and docks, and other purposes, as well as for Indian tribes. The tract of land set apart for the exclusive use of the Creek Nation of Indians under the law of 1830 and agreement of the Creeks to have the same as provided in the treaty of 1833, was a solemn reservation of said tract of land which is now occupied by the Creek tribe of Indians as an Indian reservation.

There must be a distinction made between an Indian reservation and Indian country. All Indian reservations are Indian country, but all Indian country may not be an Indian reservation. This distinction is plainly shown in the case of *Caldwell vs. Robinson, 57 Federal Reporter, page 654*, and I cannot refrain from quoting fully from this decision:

"The defendant claims that Craig's settlement was void, because at the time made the 'Indian title' to the land had not been extinguished. That title was only such as attached to the unsettled and unoccupied public domain which had not been designated by Congress for some special purpose, for, so far as appears, the land in question had not been designated prior to such settlement.

"It is unnecessary to now indulge in any reflection upon the system of ethics which governed the Christian world in the acquisition of this country. Our aggressions upon the rights of the native race may continue to be, as they have been, a subject for pathetic song, and for the cauist's pen, but not one for present consideration. It has long been settled that the Indians had no title to this continent which we felt bound to consider during the process of its acquisition. When the Christian princes of Europe commissioned their subjects upon voyages of discovery, it was not doubted that all lands founds by them in the possession only of the heathen could lawfully be taken by the discoverer, and from then until now the Indian heritage has been transferred from one government to another, and to their subjects, in total disregard of any claim or title thereto by the natives. From the Mississippi river to the 'South Seas' the country was claimed under an absolute title by the Government of France and Spain. Their title passed to the United States by treaties with France in 1803 and with Spain in 1819. The only right ever conceded to the Indian was that of occupancy, which has generally proven to be the merest shadow of a right when it became inconvenient to the dominant race.

"This question is fully reviewed by Chief Justice Marshal in *Johnson vs. McIntosh, 8 Wheat.*, where, upon *page 585*, it is said: 'It has never been doubted that either the United States or the several states had a clear title to all the lands within the boundary lines described in the treaty, (with Great Britain, 1783,) subject to the Indians' right of occupancy, and that the exclusive power to extinguish that right was vested in that Government, which might constitutionally exercise it.''

And on page 587:

"The United States then have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold and assert in themselves the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indians' title of occupancy, either by purchase or conquest; and gave also a right to such a degree of sovereignty as the circumstances of the people would allow them to exercise. The power now possessed by the government of the United States to grant lands resided, while we were colonies, in the crown, or its grantees. The validity of the title given by either has never been questioned by our courts. It has been exercised uniformly over territory in possession of the Indians. The existence of this power must negative the existence of any right which may conflict with and control it.

"The land in controversy having never, prior to its settlement in 1846, and, as we shall see, never prior to 1855, been within any government reservation, it would seem clear that the only title the Indians had to it was that of such occupancy as they had to unoccupied public lands in general, and that this right they held only by the voluntary consent of the Government, which it might modify or extinguish, as it desired.

"Attention has been called to the intercourse act of June 30, 1834, (*4 Stat., 729*) defining the country west of the Mississippi river as 'Indian country.' By Section 11 it prohibits all white persons from settling upon 'any lands belonging, secured or granted by treaty with the United States to any Indian tribe.' It does not exclude other lands from such settlement, but, on the contrary, the reservation of certain lands from settlement would imply authority to occupy those not so reserved. Moreover, the act contemplates the residence of whites in the Indian country, for its chief object seems to be to so regulate their intercourse with the Indians as to prevent strife and disorder between the two races.

"The two cases (*U. S. vs. Cook, 19 Wall., 591*, and *Leavenworth, L. & G. R. Co. vs. U S., 92 U. S., 733*) cited by defendants counsel are concerning lands within Indian reservations and cannot be considered controlling in this case. This right of general occupancy to the public domain is quite different from that given the Indian when a special reservation is by law or treaty assigned to them; this the Government treats as something tangible, and of it they are never deprived until they relinquish their claim. As public lands, including any Indian title thereto, being under the control of the Government, it must follow that any right which Craig may have obtained to the land must have

been through the laws of the government, and any laws which granted him such right must at the same time have operated to extinguish the Indian title thereto. It remains, then, to inquire by what, if any, laws or authority Craig's settlement was made."

The attention of the Court is respectfully invited to the paragraph preceeding the last paragraph cited. The Creek Nation clearly comes within the terms of land which is "secured to them by a law of the United States."

The contention of counsel that the term "reservation" is confined solely to lands within the territorial limits of a state or territory, cannot be maintained, for Congress at the time of the passage of the act which is now section 2149 of the *Revised Statutes of the United States*, in 1858, had become convinced that sumary action was necessary frequently to be taken by the Department at Washington, and by the Commissioner in charge of Indian Affairs, to remove from all reservations persons whose presence in the judgment of the Commissioner, with the approval of the Secretary, might be detrimental to the peace and welfare of the Indians.

The Cheyenne and Arapahoe Reservation was carved out of a portion of the lands originally given to the Creeks, and on September 1, 1864, when it was not within the limits of any state or territory (it now being included in the Territory of Oklahoma, which territory was created by Act of Congress, approved May 2, 1890,) the Attorney General of the United States held that section 2149 of the *Revised Statutes of the United States* applied to said reservation and that parties might be removed therefrom under its provisions.

See *14 Opinions of Attorneys General, 402.*

Attorney General Garland in an opinion rendered July 21, 1885, held that the Cherokee Nation was an Indian reservation.

This opinion was given in construing the right of the Interior Department to authorize Indians to lease their lands for grazing purposes, and in construing Section 2116 of the *Revised Statutes of the United States*, the Attorney General says, referring to Section 2116, *R. S. U. S.:*

"This statutory provision is very general and comprehensive. Its operation does not depend upon the nature or extent of the title to the land which the tribe or nation may hold. Whether such title be a fee simple, or a right of occupancy merely, is not material; in either case the statute applies. It is not therefore deemed necessary or important, in connection with the subject under consideration, to inquire into the particular right or title to the above mentioned reservations held by the Indian tribes or nations respectively, which claim them. Whatever the right or title may be, each of these tribes or nations is precluded by the force and effect of the statute, from either alienating or leasing any part of its reservation, or imparting any interest or claim in or to the same, without the consent of the Government of the United States."

See:

18 Opinions of Attorneys General, page 237.

United States vs. Leathers, 6 Sawyer, 17; S. C. 26 Fed. Cases, page 897, being case number *15,581.*

United States vs. Payne, 8 Fed., 883, and see particularly *page 887* where the subject is very fully discussed.

9 Opinions of Attorneys General, page 499.

See also note to

43 Cases Cognac Brandy, 14 Fed., 546, and cases cited:

United States vs. Perryman, 100 U. S., 235.

United States vs. Crook, 5 Dillion, 453; S. C. 25 Fed. Cases, 695.

Proclamation of President Hayes, 21 Stat. at L., 797.

In the case of the *Cherokee Nation vs. Journeycake, 155 U. S., 196*, in which was involved the right of the Delawares to claim their shares of the Cherokee lands and participate in the distribution of money received from the sale of its lands, the Supreme Court of the United States takes up and discusses the subject of land tenure and occupation of this property, and the Court says;

"But it must be born in mind that the rights and interest which the native Cherokee had in the *reservation* and outlet sprang solely from citizenship in the Cherokee Nation, and that the grant of equal rights as members of the Cherokee Nation naturally carried with it the grant of all rights springing from citizenship. * * * *

"We may take notice of the fact that the Cherokees in their long occupation of this *reservation* had generally secured homes for themselves; * * * * and that the Delawares were admitted to citizenship, and in other words there was no purchase of a distinct body of lands, as in the case of the settlement of other tribes as tribe within the limits of the Cherokee *reservation*."

Clearly it seems that Congress so far back as 1830, and even prior thereto, before the idea was crystalized into a law, had in mind reserving a certain area or tract of land for the exclusive use and occupancy of the various Indian tribes of the United States, and which for many years was known as Indian Territory and out of which the Territory of Oklahoma was carved.

If this land is not a reservation by most solemn guarantees, if it has not all the attributes of an Indian reservation, reserved by law in accordance with Section 2258 of the *Revised Statutes of the United States*, and coming within its provisions, what is it? Clearly there can be but one answer, and that is that the Creek Nation is an Indian reservation, in which today there is located an Indian Agent.

See Act 39 Pr. 1866 as amended p. 577 Chic Laws. viz: "no person shall expose goods or other articles for sale as a trader without a permit"

III.

Has the Commissioner of Indian Affairs, With the Approval of the Secretary of the Interior, Authority to Remove Persons From the Creek Nation Whose Presence, in His Judgment, May be Detrimental to the Peace and Welfare of the Indians? And Can Such Discretion be Controlled by the Court?

Upon this proposition there can be but one answer, and that is that no Court can interfere with the Commissioner in the exercise of such discretion, by mandamus or injunction.

See:

Adams vs. Freeman, 50 Pacific Rep., 135.
Marquez vs. Frisbie, 101 U. S., 473.
Litchfield vs. Register and Receiver, 9 Wall., 575.
United States vs. Crook, 5 Dillion, 453; S. C. 25 Fed. Cas., 695.
United States vs. Sturgeon, 6 Sawyer, 29.

The attention of the Court is respectfully invited to the case of *Adams vs. Freeman*, cited above, in which the subject is very ably discussed, and which in my opinion, settles the question. In this case the Court says:

"Under the express provisions of the Constitution and laws of Congress, we do not consider the question open for discussion as to whether or not it was a wise measure to entrust the discretion of the matter to the Commissioner of Indian Affairs. It is plainly given by the statute. In order to subvert and declare that it did not exist in this case, we should be compelled to hold either that the Commissioner had not given plain and explicit direction to the agent, the defendant here, for the removal of all unauthorized persons from the reservation, or that, in his judgment, the continuance of the plaintiffs upon the reservation was not detrimental to the peace and welfare of the Indians at the time specified; or that Congress had no power to enact the laws which it did, or that the rules and regulations adopted by the Commissioner of Indian Affairs which were promulgated and the

conduct of the agent under the circumstances were nugatory and void.

"We cannot take either position, and can see no escape from the clause which, beginning with the authority of Congress given in the Constitution of the United States, and by Congress committed to the President and the Commissioner of Indian Affairs, and through the direction given by the Commissioner of Indian Affairs to the agent, made it his plain duty, in obedience to the full discretion reposed in the Commissioner, and authorized by the rules and regulations of the Department and the express authority which is given, to remove the plaintiffs from the reservation; and this Court is not empowered to review the decision and discretion of the Commissioner."

IV.

Has the United States Indian Inspector in the Indian Territory any Authority to Demand the Payment of any Permit or Occupation Tax, Which by Regulations of the Secretary of the Interior is to be Paid to the United States Indian Agent for the Five Civilized Tribes for the Benefit of the Tribe?

Appellees herein are acting under the rules and regulations made by the Honorable Secretary of the Interior under Section 16 of the Act of Congress approved June 28, 1898, and entitled, "An Act for the protection of the people in the Indian Territory, and for other purposes." (*30 U. S. Stats. at L., 495.*)

This section reads as follows:

"Section 16. That it shall be unlawful for any person, after the passage of this Act, except as hereinafter provided, to claim, demand, or receive, for his own use or for the use of anyone else, any royalty on oil, coal, asphalt, or other mineral, or on any timber or lumber, or any other kind of property whatsoever, or any rents on any lands or property belonging to any one of said tribes or nations in said Territory, or for any one to pay to any individual any such royalty or rents of any consideration therefor whatsoever; and all royalties and rents hereafter payable to the tribe shall be paid, under such rules and regulations as may be prescribed by the Secretary of the Interior, into the Treasury of the United States to the credit of the tribe to which they belong; *Provided*, That where any citizen shall be in possession of only such amount of agricultural or grazing lands as would be his just and reasonable share of the lands of his nation or tribe and that to which his wife and minor children are entitled, he may continue to use the same or receive the rents thereon until allotment has been made to him; *Provided further*, That nothing herein contained shall impair the rights of any member of a tribe to dispose of any timber contained on his, her, or their allotment."

It is claimed by counsel for appellants that this section does not authorize the Secretary of the Interior to make any rules or regulations for the collection of any tax whatsoever, whether in the nature of a permit, license or direct tax, imposed by a tribe, and that the authority of the Secretary of the Interior is confined strictly to royalties and rents.

It is further claimed that Section 16 simply follows the idea of Congress set forth in Section 13 of said Act.

That Section 16 was an inhibition upon the individual and that the terms, royalties and rents for the payment of which the Secretary of the Interior was authorized to provide rules and regulations, simply relates to that property in which the title is in the tribe, or which pertains to its sovereignty.

Counsel claim that the Century Dictionary defines royalty and rent as follows:

"Royalty: That which pertains or is proper to a king of sovereign; a sovereign right or attribute; regal dominion or prerogative; a manifestation or an emblem of kingship. A royal due or prerequisite; especially a seigniorage due to a king from a manor of which he is lord; a tax paid to the crown or to a superior as representing the crown, as on the produce of a royal mine.

"Hence (a) a compensation paid to one who has a patent for the use of a patent, or for the right to act under it, generally at a certain rate for each article manufactured.

"(b) A proportional payment made on sales, as to an author or an inventor for each copy of a work or for each article sold.

"Rent: In law: (a) A compensation or return made periodically, or fixed with reference to a period of time, for the possession and use of property of any kind.

"(b) Technically, a definite compensation or return reserved by a lease, to be made periodically, or fixed with reference to a period of tenure, and payable in money, produce, or other chattels or labor, for the possession and use of land or buildings."

It is further claimed that the defendant, the United States Indian Inspector for the Indian Territory, had no authority to demand or cause to be demanded the payment of any sum of money which was purely a tax, or a permit or a license and not connected with the use of property of the tribe.

This raises a very serious question which I deem the duty of the Court to pass upon, notwithstanding the fact that counsel for appellants in open court waived this question stating that if the Court found that the license to tax was properly imposed and that the Creek Nation was an Indian reservation, that the tax would be paid, notwithstanding the fact that the Tax Collector of the Creek Nation had not demanded the tax in the first instance.

In 1893 Congress established what is known as the "Dawes Commission" and three commissioners were appointed to treat with the Five Civilized Tribes in order to wind up the affairs of the tribes and allot the property in severalty. The Dawes Commission has been continued from year to year and has made treaties with three tribes which have been ratified by Congress, to-wit: the Seminoles, Choctaws, and Chickasaws.

The Cherokees and Creeks refused to treat and on June 7, 1897, Congress passed the first stringent legislation concerning the tribes in the Territory. By this Act (*30 U. S. Statutes at Large, page 83*) Congress provided:

"That on and after January 1, 1898, the United States Courts in said Territory shall have original and exclusive jurisdiction and authority to try and determine all civil causes in law and

equity thereafter instituted, and all criminal causes for the punishment of any offense committed after January 1, 1898, by any person in said Territory, and the United States Commissioners in said Territory shall have and exercise the powers and jurisdiction already conferred upon them by existing laws of the United States as respects *all persons and property in said Territory; and the laws of the United States and the laws of Arkansas in force in the Territory shall apply to all persons therein, irrespective of race*, the said courts exercising jurisdiction thereof as now conferred upon them in the trial of like causes; and any citizen of any one of said tribes otherwise qualified who can speak and understand the English language may serve as a juror in any one of said courts."

It was further provided in said Act:

"That on and after January 1, 1898, all acts, ordinances, and resolutions of the councils of either of the aforesaid Five Civilized Tribes, shall be certified immediately upon their passage to the President of the United States and shall not become effective if disapproved by him, or until thirty days after their passage: *Provided*, that this Act shall not apply to resolutions, or ordinances with reference to negotiations with commissioners heretofore appointed to treat with said tribes."

This act left in full force and effect all tribal laws over all offenses up to January 1, 1898. It is claimed that the putting in force and effect of all laws of the United States and of the State of Arkansas as to all persons irrespective of race, practically repealed tribal laws after January 1, 1898, but such has not been the ruling of the courts in the Northern District of the Indian Territory, nor the ruling of the Department of the Interior thereon, it having been held by the court that the laws remain in full force and effect, but without a legal forum to enforce them as to offenses committed after the first day of January, 1898.

The laws of the Creek Nation and of the Cherokee Nation provide for various taxes to be collected by officers of each tribe designated by law, and upon failure or refusal of any citizen of the nation to pay the tax imposed by the law of his nation action was brought in the tribal courts to enforce the penalty for the violation of said law.

On June 28, 1898, Congress passed what is known as the Curtis Act (see *30 U. S. Stats. at Large, page 495.*) Section 26 of said act forbade the enforcement of any law of the various tribes or nations of Indians in the courts of the United States in the Indian Territory. Section 28 of said act provides as follows:

"That on and after the 1st day of July, 1898, all tribal courts in the Indian Territory shall be abolished, and no officer of said court shall thereafter have any authority *to do or perform any act theretofore authorized by any law in connection with said courts*, or to receive any pay for the same."

At that time there was pending and incorporated in this act treaties between the Choctaws, Chickasaws and Creeks, and this section was suspended as to them until the 1st day of October, 1898.

By the provisions of the treaty between the Choctaws and Chickasaws the local governments were extended for a period of eight years. The Creek treaty in said act failed of ratification, and there is no treaty between the United States and the Creek tribe of Indians except the treaty of 1856 and 1866, except wherein changed by act of Congress.

Under existing laws the rights of the Choctaws, Chickasaws and Seminoles to collect all taxes, except royalties on coal, has been reserved to these nations, and they are exercising these functions at the present time.

The record shows (see *Record, pages 6–10 and 12*) that the Department of the Interior has construed the words royalties and rents as set forth in Section 16 of the Curtis Act to include all revenue prescribed by the Indian laws derivable from any person or any source whatever. If this Court, however, shall hold that this construction of Section 16 of said act, is erroneous and that no such authority has been conferred upon the Department of the

Interior, we still maintain that Section 2058 of the *Revised Statutes of the United States*, which reads as follows:

"Section 2058. Each Indian Agent shall, within his agency, manage and superintend the intercourse with the Indians, agreeably to law; and execute and perform such regulations, and duties, not inconsistent with law as may be prescribed by the President, the Secretary of the Interior, the Commissioner of Indian Affairs, or the Superintendent of Indian Affairs."

And Section 2114 of the *Revised Statutes of the United States*, which reads as follows:

"Section 2114. The President is authorized to exercise general superintendence and care over any tribe or nation which was removed upon an exchange of territory under authority of the Act of May 28, 1830, 'to provide for an exchange of lands with the Indians residing in any of the states or territories, and for their removal west of the Mississippi;' and to cause such tribe or nation to be protected, at their new residence, against all interruption or disturbance from any other tribe or nation of Indians, or from any other person or persons whatever.", confer ample authority upon the Department of the Interior to enforce the tribal laws of the Indian tribes, which are not inconsistent with the Constitution of the United States or any law of Congress, and which in the judgment of the Commissioner of Indian Affairs shall be for the interest of the Indian tribes and for their protection.

As said by the United States Court of Appeals in the case of *Crabtree vs. Madden, 54 Federal Reporter, 431:*

"The claim that the authority of the Interior Department and the Indian agents to remove from the Territory of the Indian tribes licensed traders who refuse to pay taxes lawfully levied upon them by the tribes, and thus to enforce their payment, which was exercised before the establishment of the court below, has been withdrawn, because jurisdiction was conferred upon that court to enforce the collection of such taxes, is unfounded, because no such jurisdiction was conferred upon that court, and the remedy for the enforcement of lawful taxes through the Indian agents remains in the same condition in which it was before that court was created."

It is clear that every right, which the Indian tribes had to

enforce the collection of any tax lawfully imposed, whether a permit tax in the nature of an occupation tax imposed under the last Section of Article 15 of the treaty between the Creeks and the United States, promulgated in 1856, has been preserved. In no Act has Congress ever conferred any jurisdiction upon the United States Courts in the Indian Terrritory to enforce the collection of any tribal tax. The remedy for the enforcement of every tax has always rested in the Department of the Interior and the only remedy therein provided was and is removal. For the reason as hereinbefore set forth the Indian nations have the right to prescribe who may occupy the territory with it and may impose conditions upon that occupancy, and when those conditions are not complied with it becomes the legal duty of the Department of the Interior to see that the parties so refusing are removed as intruders, and the faith of the Government has been pledged to this action.

A careful reading of Section 2058 of the *Revised Statutes* will show that the action of the Honorable Secretary of the Interior in this respect is in conformity with the recent legislation of Congress. The Curtis Act provides for the establishment of an Indian Inspector in the Indian Territory as a personal representative of the Secretary of the Interior and who is empowered to act in the name of the Secretary. The same Act prohibits the payment of any money except by an officer of the United States to any individual members of any tribe.

The tendency of congressional legislation is to take away from the tribes the management of their affairs on account of alleged corruptness in their legislation and financial dealings. The language of *Section 2058, R. S., U. S.*, which provides that each Indian agent shall execute and perform such rules and duties *not*

inconsistent with law as may be prescribed by the President, Secretary of Interior, or the Commissioner of Indian Affairs, is not in conflict with this view. It is evident that the term "inconsistent with law" refers solely to a directory law of the United States and the Department of the Interior being charged with the control and welfare of the Indians can make such rules and regulations as will be conducive to that end, and that in doing this the Department has authority to make rules and regulations in compliance with treaty stipulations, and may, if it deems proper take the matter into its own hands where the same will better subserve the interests of justice and the protection of the Indians.

All of which is respectfully submitted.

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