In the

Supreme Court of the United States

No. 80, October Term 1942.

THE CHOCTAW NATION OF INDIANS,
Petitioner,

VERSUS

THE UNITED STATES AND THE CHICKASAW NATION OF INDIANS.

ON PETITION OF THE CHOCTAW NATION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

SUPPLEMENTAL BRIEF ON BEHALF OF THE CHOCTAW NATION OF INDIANS.

WILLIAM G. STIGLER,
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In addition to the reasons set forth in our petition for a writ of certiorari and brief filed in support thereof and reply brief why the judgment of the Court of Claims should be reversed with directions to dismiss, we respectfully request the Court in considering the case on its merits to consider the following propositions:

1. Each of the Legislatures of the Choctaw and Chickasaw Nations created a Commission in 1904 to adjust ALL differences existing between the two Nations and the record does not show any claim of the Chickasaw Nation for compensation for a one-fourth interest in the land allotted to the Choctaw freedmen to have been among those considered or adjusted.

2. The rights of Choctaw freedmen to lands were definitely settled by the Choctaw-Chickasaw Treaty of April

28, 1866, 14 Stat. 769, and the Chickasaws consented unequivocally to the allotment to Choctaw freedmen out of common-owned lands.

3. The "Supplemental" Agreement of July 1, 1902 (32 Stat. 641) between the Choctaws and Chickasaws contained no provisions that allotments to Choctaw freedmen were to be at the expense of the Choctaw Nation.

4. There were no "guarantys" in the "Atoka" or "Supplemental" Agreements, but if there were the matter of enforcement rested wholly in the hands of the United States, and the Choctaw Nation could not possibly be liable.

ARGUMENT.

We shall discuss these propositions in the order named.

PROPOSITION I.

In 1904 the General Council of the Choctaw Nation at its Regular Session passed Bill No. 13, which was an "Act Providing for the appointment of a Commission to negotiate with the Chickasaws or their Representative, a Settlemen of ALL existing differences between the Choctaws and Chickasaws, and an adjustment of ALL OTHER MATTERS of joint interest between the Tribes", which bill reads as follows:

> "BE IT ENACTED BY THE GENERAL COUNCIL OF THE CHOCTAW NATION ASSEMBLED:
>
> "Section 1. That the Principal Chief be, and he is hereby authorized, to appoint a Commission composed of three persons, of which he shall be a member and act as Chairman, for the purpose of effecting a settlement upon the part of the Choctaw Nation of ALL EXISTING MATTERS BETWEEN THE CHOCTAW AND CHICKASAW NATIONS, and for the adjustment of all matters of joint interest between said Tribes." Approved October 27, 1904, Acts and Resolutions of the General Council of the Choctaw Nation, Regular Session, 1904, page 16.

Similar legislation was passed by the Legislature of the Chickasaw Nation on November 19, 1904.

On March 9, 1905, an agreement was entered into by and between the Commissioners on the part of the Choctaw Nation and Chickasaw Nation adjusting all the differences existing between said Nations, which agreement was ratified and affirmed on June 30, 1905, by the General Council of the Choctaw Nation in Extraordinary Session assembled in the form of Bill No. 1, Acts and Resolutions of the General Council of the Choctaw Nation, 1905, page 1, and by the Legislature of the Chickasaw Nation on the 9th day of November, 1905. Nowhere in this agreement does there appear any reference to any claim or contention of one that the Chickasaws were claiming any compensation for lands allotted to the Choctaw freedmen.

It is very obvious, we think, if the Chickasaw Nation ever thought it had a just claim against the Choctaw Nation to compensation for the lands allotted to the Choctaw freedmen and that claim was protected by any so-called "guarantys" in the form of "saving clauses" in the "Atoka" Agreement of June 30, 1898 (30 Stat. 495), and the "Supplemental" Agreement of July 1, 1902 (32 Stat. 641), as decided by the Court of Claims, full advantage would have been taken by the Chickasaw Commissioners of the legislative authority given to the Chickasaw and Choctaw Commissioners to effect a settlement of "ALL EXISTING MATTERS BETWEEN THE CHOCTAW AND CHICKASAW NATIONS."

Certainly there can be no doubt as to the Choctaw and

Chickasaw Commission having full authority under the legislative acts of the two Tribes to adjust this claim, if there was any. The creation and function of this Commission should also remove any doubt that the concluding phrase of Section 40 of the "Supplemental" Agreement, which reads as follows:

> "Provided, That nothing contained in this paragraph shall be construed to affect or change the existing status or rights of the two tribes as between themselves respecting the lands taken for allotment to freedmen, or the money, if any, recovered as compensation therefor, as aforesaid,"

contained any "guaranty" to the Chickasaw Nation that the allotments to the Choctaw freedmen would be made at the expense of the Choctaw Nation, as concluded by the Court of Claims. If the terms of this proviso, which is under the sub-heading "Chickasaw Freedmen", was not confined strictly to the dispute over allotments to Chickasaw freedmen, as we heretofore have contended, we most earnestly submit that this question of so-called "guarantys" and "saving clauses" would have been recognized and disposed of by the Joint Commission of the Choctaws and Chickasaws, which was created for the very purpose of settling "ALL EXISTING MATTERS BETWEEN THE TWO TRIBES AND ADJUSTING ALL MATTERS OF JOINT INTEREST." Can it be doubted but what the settlement of this late claim of the Chickasaws would have come within the category of "ALL EXISTING MATTERS BETWEEN THE TWO TRIBES", if it were in existence in 1902 when the "Supplemental" Agreement, *supra*, was entered into by both Tribes, or even as late as 1904 when the Commission was created? We think not.

In view of this, we think the Court of Claims committed grave error in concluding that at the time of the negotiation

for the "Supplemental" Agreement in Washington, D. C., in February and March, 1902, the Chickasaws insisted that the agreement contain some provision saving their rights to have the allotments made at the expense of the Choctaw Nation in the commonly owned land and further concluding it was agreed that the proviso to Section 40 set out in its Finding 8 be included to protect their interest.

The fact that the Chickasaw Nation in its brief filed in the Court of Claims under the heading "JURISDICTION" on page 100, said,

> "The instant suit filed by the Chickasaw Nation and against the United States of America as the sole party defendant, by authority of the Jurisdictional Act of Congress of June 7, 1924,"

is further evidence that even as late as then, the Chickasaws did not believe it had any claim against the Choctaws for its alleged interest in the lands allotted to the Choctaw freedmen.

PROPOSITION II.

We take issue with the court below in its opinion that the rights of the Choctaw freedmen in the commonly owned lands was not regarded as settled, and was not settled by the treaty of 1866.

The fact that no allotments were actually made until after 1902 would make no difference in the interpretation of the treaty if the right to such allotments was conferred by the treaty and the adoption in 1883 of the Choctaw freedmen pursuant thereto.

As the Court said in the case of *The Chickasaw Freedmen*, 193 U. S. 115:

> "The main, if not the crucial question is, were the freedmen adopted by the Chickasaw Nation as provided in the treaty?"

They were declared adopted by the act of 1873 upon certain conditions, but the act was only to have force and effect "from and after approval by the proper authority of the United States." The United States did not approve until 1894.

The Chickasaw Legislature passed an act in 1873 adopting their freedmen, "responding in the main to the treaty of 1866" but as early as 1876, the Chickasaws passed another act "by which it was declared to be the unanimous consent of the Chickasaw Legislature" that the United States exercise the right given to it for the benefit of the freedmen by the treaty of 1866, *supra.*

"If the adoption act of 1873 had force in 1894, when it was approved by Congress, the adoption of the freedmen was complete," so said Mr. Justice MCKENNA in the above case. But in 1885—nine years before Congress acted—another act was passed. Its terms were unmistakable. Its declaration was "that the Chickasaw people hereby refuse to accept or adopt the freedmen as citizens of the Chickasaw Nation upon any terms or conditions whatsoever." Mr. Justice MCKENNA, speaking further said, "These two acts must be construed to work a repeal of the act of adoption if it could be repealed by the Chickasaw Nation. It follows from these views that the freedmen were not adopted into the Chickasaw Tribe, and necessarily did not acquire the rights dependent upon adoption." The Court held that the freedmen were not independently of that agreement (Treaty of 1866) entitled to allotments in Choctaw and Chickasaw lands and accordingly affirmed the judgment of the court below.

As to the Choctaw freedmen, we have an entirely different state of facts. After Congress passed the act of May 17, 1882, 22 Stat. 68, 73, providing that EITHER the Choctaw or Chickasaw Nation might, within a specified time, adopt and provide for the freedmen of said tribes, in accordance with the terms of Article III of the treaty of 1866, the General Council of the Choctaw Nation, by legislative enactment, which was never repealed as was in the case of the Chickasaws, approved May 21, 1883, Acts of General Council, adopted into said tribe the freedmen and descendants thereof of said Nation. This they had a right to do under the act of Congress, and treaty of 1866.

Accordingly, at a subsequent date under treaties and acts of Congress, the Choctaw freedmen were duly enrolled and given allotments of land out of common owned lands of the Choctaw and Chickasaw Nations.

By Article III of the treaty of 1866 both tribes agreed

> "Also to give such persons (freedmen) who were residents as aforesaid, and their descendents, forty acres each of the land of said Nations on the same terms as the Choctaws and Chickasaws,"

and by Article XXVI agreed to extend

> "The right here given to Choctaws and Chickasaws, respectively, shall extend to ALL persons who have become citizens by adoption or intermarriage of either of said Nations, OR WHO MAY HEREAFTER BECOME SUCH."

By the terms of these articles, can there be any doubt that the Chickasaws agreed without any qualifications, restriction or limitation that forty-acre allotments to Choctaw freedmen might be made out of common owned lands?

The fact that Article III was not complied with in the two-year period, as provided by the treaty, by either the Choctaws or the Chickasaws does not invalidate the adoption of the Choctaw freedmen. *United States* v. *Choctaw and Chickasaw Nations*, 193 U. S. 115-17.

Moreover, by the subsequent acts of both Nations with reference to adopting their freedmen, it is very evident that the tribes, as well as the United States, considered the adoption provision of the treaty still effective. If this were otherwise, the Choctaws would never have been paid $150,000.00 and the Chickasaws $50,000.00. By the act of July 26, 1866, c. 266, 4 Stat. 255-259, an additional sum was paid. By the act of March 3, 1885, c. 341, 23 Stat. 366, the balance of the Choctaws' share of the $300,000.00 fund provided in the 1866 treaty was appropriated as a trust fund for them.

The records further show that all except $17,375 of the Chickasaws' share of the $300,000.00 fund was paid to them. Act of July 26, 1866, c. 266, 14 Stat. 255, 259; Act of April 10, 1869, c. 16, 16 Stat. 13, 39; Act of May 17, 1882, c. 163, 22 Stat. 68, 73.

We, therefore, earnestly submit that the rights of the Choctaw freedmen to lands were definitely settled by the Choctaw-Chickasaw treaty of 1866, and the Chickasaws consented unequivocally to the allotment to Choctaw freedmen out of common owned lands.

PROPOSITION III.

The court below in its opinion said:

> "The Supplemental Agreement of 1902 is, therefore, the determining factor. That agreement, as we have said above, provided for permanent and unqualified allotments to both Choctaw and Chickasaw freedmen. It omitted the provision of the Atoka Agreement for deduction from allotments to members. As to the Chickasaw freedmen, it provided for determination in the Court of Claims as to whether they were entitled to allotments from tribal lands, or whether the United States should supply those allotments at its expense. In Section 68 it repealed inconsistent provisions of the Atoka Agreement."

It will be here noted that at the time of the Supplemental Agreement, the Chickasaws carefully preserved their claim for compensation for land allotted to unadopted freedmen, but did not preserve any claim for the allotment to Choctaw freedmen. If the Chickasaws were contending in 1902 that it was entitled to compensation for lands allotted to Choctaw freedmen, which position the court below said it had maintained consistently for so long, is it not indeed strange that similar provisions, with reference to a determination in the Court of Claims as to whether the Choctaw freedmen were entitled to allotments, were not inserted in the Supplemental Agreement like the provisions regarding the Chickasaw freedmen?

Since the court below said

> "The Supplemental Agreement of 1902 is, therefore, the determining factor,"

let us examine its pertinent contents further.

As time passed it became apparent that a new agreement, more specific in its provisions than the "Atoka" Agreement, was required. As a result, on March 21, 1902 (32 Stat. 641), the Chickasaw Nation, the Choctaw Nation, and the United States entered into such further agreement, which became known as the "Supplemental" Agreement. It was approved and ratified by Congress on July 1, 1902, and by the citizens of the Choctaw and Chickasaw Nations on September 25, 1902.

As the court below said,

> "The 'Supplemental' Agreement contained detailed provisions for the enrollment of the members and freedmen of the Choctaw and Chickasaw Nations, the appraisement and allotment of the common lands in severalty to the members and freedmen of the two Tribes, the sale of the residue of such lands after al-

lotments had been made and equalized, and reservation and sale or disposition otherwise of the common properties of the two Tribes, and the distribution of all moneys arising therefrom."

Accordingly, no allotments to Choctaw citizens and freedmen were ever made under the "Atoka" Agreement but all under the provisions of the "Supplemental" Agreement, which the Court of Claims held in *Choctaw Nation* v. *United States, et al.* (83 C. Cl. 140, 160, 164), "superseded" the provisions of the "Atoka" Agreement.

In paragraph 11 of the "Supplemental" Agreement, *supra,* it was mutually agreed between the Choctaws and Chickasaws that

> "There shall be allotted * * * to each Choctaw and Chickasaw freedman * * * land equal in value to forty acres of the average allottable land of the Choctaw and Chickasaw Nations."

This provision, unlike that regarding allotments to the Chickasaw freedmen, was unconditional. There were no restrictions or qualifications on the consent and permission granted and agreed to in this paragraph by the Chickasaws in respect to allotments to Choctaw freedmen. There was no requirement in the "Supplemental" Agreement as in the "Atoka" Agreement that allotments to Choctaw freedmen be deducted from allotments to Choctaw members. This provision was completely changed by the "Supplemental" Agreement, which is controlling.

So far as the Chickasaw freedmen are concerned, however, the "Supplemental" Agreement further provided in Sections 36 to 40, inclusive, for a suit in the United States Court of Claims, with the right of appeal to the Supreme Court, to test the rights of the Chickasaw freedmen to the

commonly owned lands. Suit in the Court of Claims was filed and the Court of Claims and Supreme Court, as heretofore stated, held against the United States in favor of the tribes for the value of the land allotted to the Chickasaw freedmen.

The court below in the case at bar in construing Section 40 of the "Supplemental" Agreement takes the position that this proviso was inserted, in part, to protect the Chickasaws from contributing to the allotments for Choctaw freedmen.

We have heretofore quoted this proviso but for convenience sake will again quote it. The proviso reads as follows:

> "Provided, That nothing contained in this paragraph shall be construed to affect or change the existing status or rights of the two tribes as between themselves respecting the lands taken for allotment to freedmen or the money, if any, recovered as compensation therefor, as aforesaid."

Earlier in our brief we called the Court's attention to the fact that if this proviso contained any "guarantys" or "saving clauses", the same would have been recognized by the Joint Commission of the Choctaws and Chickasaws.

Again we say, this paragraph being under the subheading "Chickasaw Freedmen", the conclusion appears inescapable that it is confined strictly to the dispute over allotments to Chickasaw freedmen, which already has been settled. We wish further to emphasize the fact that there is not a word in this paragraph that relates to Choctaw freedmen; nor is there a word in the entire subdivision of which this paragraph is a part which mentions Choctaw freedmen. This paragraph is under a distinctive subdivision and constitutes special jurisdictional legislation for the determination of the rights only of CHICKASAW FREED-

MEN to allotments. In view of this, we are unable to see how the court could possibly reach the conclusion it did.

It seems incredible to us that the Chickasaw Nation should now, forty years after the date of the agreement, be permitted to set aside its plain and specific promise and consent for allotments to Choctaw freedmen.

PROPOSITION IV.

In the case of *U. S.* v. *Kagama,* 118 U. S. 375, 383 S. C. 6 Sup. Ct. Rep. 1109, the Supreme Court of the United States held:

> "These Indian Tribes are the wards of the Nation. They are communities dependent on the United States; dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection and with it the power. This has always been recognized by the executive, by Congress, and by this Court, whenever the question has arisen."

It has accordingly been said in the case of *Worcester* v. *Georgia,* 6 Pet. 582:

> "The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense. * * * How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction."

Mr. Justice MATTHEWS in the case of *Choctaw Nation* v. *United States,* 119 U. S. 1-44, said:

> "The recognized relation between a superior and inferior, whereby the latter is placed under the care and control of the former, and which, while it authorizes the adoption on the part of the United States of such policy as their own public interest may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons equally subject to the same laws.
>
> "The rules to be applied in the present case are those which govern public treaties, which, even in case of controversies between nations equally independent, are not to be read as rigidly as documents between private persons governed by a system of technical law, but in the light of that larger reason which constitutes the spirit of the law of nations."

We most respectfully urge that we have shown there were no "guarantys" in the "Atoka" or "Supplemental" Agreements, but if there were, the matter of enforcement rested wholly in the hands of the United States, and the Choctaw Nation, being a ward of the government, should not be penalized for the failure of the government to act in a matter where it was guardian. Therefore, the Choctaw Nation should not be held liable.

CONCLUSION.

It is therefore respectfully submitted that the judgment of the Court of Claims should be reversed with directions to dismiss.

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