301-357

No. K-334

In the Court of Claims of the United States

THE CHICKASAW NATION, PLAINTIFF

v.

THE UNITED STATES OF AMERICA AND THE CHOCTAW NATION, DEFENDANTS

BRIEF OF UNITED STATES ON MOTION FOR NEW TRIAL

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CITATIONS

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I

If the Chickasaws are to recover, they must recover upon technical legal principles, divorced from considerations of equity or good conscience, because no claim on moral grounds exists

The Government has stated its views on the construction of agreements between the parties hereto, as follows:

> In construing this treaty it must be noted first of all that the United States was not the grantor. The agreement was one between two Indian tribes, submitted to the United States for approval, but the Government itself was not a party to the treaty. Therefore, the Chickasaws are not able to invoke the rule which prevails when the

> United States is the grantor—that all grants are to be liberally construed in favor of a weak and defenseless people, or that all doubts are to be resolved against the guardian in favor of its wards. The 1837 agreement must be construed as an ordinary convention between sovereigns. (R. 290–291.)

In view of the extensive quotation from the *"Net Proceeds case", Choctaw Nation* v. *United States,* 119 U. S. 1, on pp. 18–20 of the opinion herein, however, it seems advisable to discuss in more detail the rule as applied to the case at bar.

The issue arises out of a conflict in interest between the Choctaw and Chickasaw nations. If the decision is that the Chickasaws acquired title to a share in the disputed strip, then it follows that the Choctaws parted with title. This is of more than academic importance, because the Choctaws would suffer a monetary loss. The fact that the United States has become entangled and may also suffer a loss does not alter the nature of the issue or permit doubts to be resolved in favor of one tribe against the other.

If, however, the decision is to be affected by a consideration which "looks only to the substance of the right, without regard to technical rules" (Op. p. 20), we submit that the Chickasaws did not suffer any moral wrong.

Assume that the Chickasaws meant to buy an undivided interest in the whole Choctaw country. What did they believe to be the whole Choctaw country? The Treaty of 1837, 11 Stat. 573, did not describe the eastern boundary of the Choctaw country; none of the letters of negotiation referred to it. The Treaty of 1837 refers only to the Choctaw "country", whose eastern boundary was described in the Treaty of 1825, 7 Stat. 234, by which the Choctaws ceded the eastern end of their country to the United States. The Chickasaws were not a party to that treaty, but if they had read the treaty—which is extremely doubtful—they could have formed no mental picture of the boundary so described, for it described a line yet to be marked. Contrasted with that, there was a visible line marked by Conway in 1825. They could see that line; they knew that the Choctaws were occupying the land to the west of it and that the whites were settling the land to the east of it. They believed that the line marked the eastern end of the Choctaw country.

They were not promised nor did they believe that the $530,000 consideration was in payment for any more land than they were viewing. The $530,000 consideration was not computed on a price per acre or per square mile—it could not have been so computed, because nobody then knew the extent of the country. No one had the vaguest idea of the distance to the western boundary.[1]

[1] Indeed the treaty of 1830, which promised a patent for the land previously granted, described the western boundary as being at the source of the Canadian Fork "if in the limits of the United States, or to those limits." Those limits were not determined until later.

It is extremely doubtful that the Chickasaws ever discussed the exact 1825 treaty description of the eastern boundary. There was no reason for them to do so and, certainly, there is no evidence that they did. They were cautious to specify natural monuments such as bayous, rivers, and ridges, as the dividing line between their district and the Choctaw districts, but if they gave serious thought to the paper location of the eastern boundary, they were content to let it be included in the vague reference to Choctaw "country." Even that description must be gleaned from the opening sentence of the treaty of 1837, which says, "It is agreed by the Choctaws that the Chickasaws shall have the privilege of forming a district within the limits of their country."

We repeat, even if they were buying an interest in common, they were not misled; they intended to buy nothing more than they saw; the Choctaws intended to sell nothing more. Even after the mistake was discovered, it was decades before the Chickasaws conceived the idea that they had a claim against the Choctaws, and it was years later still that they evolved the notion of a claim against the United States.

It cannot be denied that there was an actual physical taking of lands from the Choctaws by the United States. The moral right of the Choctaws to compensation never has been and is not now questioned by the Government. Even in the *Net Proceeds* case, the Government's defense was purely upon jurisdictional grounds.

If the Chickasaws are entitled to make the Government pay twice for one-fourth of the strip, it is not in settlement of a moral obligation or on account of a liberal interpretation of the treaty entered into by them as a weak and helpless nation. They may have been inferior in the science of law and the intricacies of conveyancing, but their eyes were as good as those of the whites, and their minds could equally comprehend the meaning of a line well marked upon the ground. If they are entitled to recover it is in the exaction of a technical right growing out of a mistake upon the part of draftsmen in attempting to adopt a well-known visible boundary, but including by the vaguest of reference, land the Chickasaws never thought they were buying.

The opinion (pp. 20–21) says that the Government had the right to make the Chickasaw Nation a party to the *Net Proceeds* case, but that it did not see fit to do so, implying that if the Government must pay twice for an undivided one-fourth of this land, the fault is its own for not having impleaded the Chickasaws in the earlier suit. Admittedly, such procedure would have been a happy solution, but the jurisdictional act under which that suit was tried did not confer jurisdiction on the Court to determine claims in which the Chickasaws were interested.[2] There was no provision authorizing the Court to bring in any other party necessary or proper to a final determination

[2] Act of March 3, 1881, 21 Stat. 504.

of the matters in controversy, as does the jurisdictional act in the case at bar.

With these considerations in mind, the legal issues are approached.

II

The court erred in holding as a matter of law that the lands in question were not legally taken until after the treaty of 1855 and that the lands were definitely and legally taken by the defendant by the Act of 1875

A. The doctrine of relation was not applied for the reason that at the time of the physical taking the officers of the United States did not intend a lawful taking

The doctrine for which defendant contended was stated in *Crozier* v. *Krupp,* 224 U. S. 290, 305 (cited herein, R. 265, 300):

> The adoption by the United States of the wrongful act of an officer is, of course, an adoption of the act *when and as committed,* and causes such act of the officer to be, in virtue of the statute, a rightful appropriation by the government, for which compensation is provided. [Italics supplied.]

This rule was applied to the taking of Indian tribal lands in *United States* v. *Creek Nation,* 295 U. S. 103, where the Court fixed the date of the disposals (the first positive exercise of dominion over the lands) as the time of the taking under the power of eminent domain, rather than the time of the subsequent ratification. The doctrine was applied also in *Shoshone Indians* v. *United States,* 299 U. S. 476, where *Crozier* v. *Krupp* was quoted with approval.

In the case at bar there is no question that Congress adopted and ratified the erroneous survey. That portion of the opinion (pages 13–16) which discusses the necessity of an intentional taking [3] and the importance of knowledge in connection with the act of taking [4] seems to hold, however, that the congressional ratification did not relate back to the date of the tortious physical taking because the officers who effected the physical taking erroneously supposed that the United States owned the land.

The opinion herein (pp. 15–16) distinguishes the *Shoshone* case from the case at bar, and seems to view the *Creek* case as authority denying the retroactive effect of ratification in cases where it appears that the agent erroneously assumed at the time of the physical taking that the property belonged to the Government (pp. 13–15).

It is submitted that none of the cases cited in the opinion held that the intent or knowledge of the officers at the time of the taking is material when Congress, with full knowledge and intent,

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[3] "On the question of the necessity that there shall be an intentional taking, see the following cases: *John Horstmann* v. *United States*, 257 U. S. 138, 145; *Tempel* v. *United States*, 248 U. S. 121, 129, 130, 131."

[4] "As to the importance of knowledge in connection with the act of taking see *United States* v. *Creek Nation*, 295 U. S. 103; *Shoshone Indians* v. *United States*, 299 U. S. 476."

has ratified the unauthorized acts of the officers. In the *Creek* and *Shoshone* cases, the Court applied the doctrine of ratification and relation back although at the time of the physical takings the officers who performed the acts had no knowledge of the fact that they were acting under erroneous suppositions. In the *Horstmann* and *Tempel* cases there was no intent on the part of either Congress or the executive officials which would imply a promise to compensate; the question of ratification and relation back was not involved.

The opinion herein quotes from the opinions of both the Court of Claims and the Supreme Court in the *"Net Proceeds case", Choctaw Nation* v. *United States,* 21 C. Cls. 59, 119 U. S. 1, but those opinions do not discuss the doctrine of relation, although, as will be shown later, the question of ratification and relation was actually decided and the rule was properly applied.

On the basis of the law of agency, which applies to the acts of public officers,[5] it is submitted that in cases involving the ratification of wrongful acts of agents, it is the intent and knowledge on the part

[5] 2 Am. Jur., Agency, § 221.

United States v. *Heinszen*, 206 U. S. 370, 382: "That the power of ratification as to matters within their authority may be exercised by Congress, state governments, or municipal corporations, is also elementary."

Larabee Flour Mills Co. v. *Nee*, 12 F. Supp. 395, 405. The power of ratification by Congress is governed by the law of agency.

of the ratifying power[6] which is important, and not the intent or knowledge of the agent so long as he is acting on behalf of the principal. The decisions cited as indicating a contrary view will be discussed separately.

1. The cases cited in the opinion do not support the proposition that intent by the officer at the time of physical taking is essential

a. *United States* v. *Creek Nation, 295 U. S. 103.*—The *Creek* case has been cited in support of the proposition that lack of intent on the part of the officers at the time of the physical taking by erroneous survey prevents a subsequent ratification from relating back to the date of such survey (see opinion in case at bar, pp. 13–14). An analysis of the facts shows that the reasons why the ratification in that case did not relate back to the *survey* were (a) there is no evidence that Congress intended it to relate back and (b) under the peculiar facts of the case, there was no physical dominion by the United States or its officers until the time of the disposals.

There never was any express congressional ratification of any taking in that case. The ratifica-

[6] 2 Am. Jur., Agency, § 221.

United States v. *Chemical Foundation*, 272 U. S. 1, 15–16.

Santa Ana Water Co. v. *Town of San Buenaventura*, 65 F. 323, 328.

McQuillan, Mun. Corp'ns, 2d ed., Sec. 1357, p. 958, 959, § 1361, p. 971, § 1363, p. 972.

Federal Eminent Domain, Sec. 31A, p. 228.

tion was gleaned by implication from the fact that, in the case of each individual sale or allotment, the United States had failed to cancel the patent and had retained the benefits. It, therefore, confirmed the "disposals." Congress did not confirm the erroneous *survey* and that is the reason the taking did not relate back to the time of the erroneous survey.

To test the correctness of this conclusion, suppose that Congress had passed an act expressly declaring that the survey be adopted as of the date of the survey, and that the lands acquired as a result thereof be deemed appropriated as of that time. Can there be any doubt that the Court would have fixed the date of the survey as the date of the appropriation?

If, in the hypothetical act, Congress had expressly adopted the survey, but failed to mention the particular time the appropriation was to be deemed effective, it would be necessary to determine the intent of Congress as to the date of the appropriation. Obviously, once that intention was determined, the date of the taking would be fixed just as effectively as if it had been expressly specified.

But as the *Creek* case stood, Congress had not affirmatively ratified and before plaintiff could recover the Court was obliged to reconcile that fact with the elementary principle that the power of eminent domain may be exercised only when, and

by agents to whom, authority for the purpose has been expressly or impliedly granted by previous act or subsequent ratification of Congress (Federal Eminent Domain, Sec. 2, page 7). The agents of the executive department were charged with the duty of making a correct survey of a specifically defined division line. They were not authorized by Congress, either by prior act or by ratification, to include any of the reserved Creek lands within the property of the Sac and Fox.

The suit was brought on the theory that there was an implied promise that the United States compensate the Creek Nation, but such a contract could not be implied in the absence of an intention to exercise the power of eminent domain. (Federal Eminent Domain, Sec. 25c, pp. 162–163.) Congress not having spoken, the Court was obliged, therefore, to determine what, if anything, it meant by its silence. In the absence of any expression from which congressional intent might be inferred, the Court looked to the only acts which showed an intention on the part of any officer of the United States to exercise dominion over the property.

Further, the making of the surveys was not deemed a taking because the limited physical activity of the officers of the United States was not an exercise of dominion but merely the marking of a line to indicate the physical boundary between the properties of third parties. The officers exercised no physical dominion and the United States

received no benefit as a result of the error until, many years later, its officers, on a false assumption of ownership, disposed of the land. In this respect the *Creek* case differs from the case at bar where physical dominion was an immediate result of the survey.

In the case of the Creek land, however, the disposals constituted a definite actual dominion on behalf of the United States. The officers intended to treat the property as that of the United States and the United States actually received and retained the benefits. After the disposals, the "United States" became aware of all the facts. It failed to cancel the patents and it retained the proceeds of the sales. In determining the elusive intent of the "United States," which had to be done because of the absence of congressional expression, it was reasonable to consider the intent of the officers with reference to the first acts which consummated a change of ownership. This consideration was only for the purpose of determining the intent of the United States as implied in the absence of congressional expression of intent. It seems clear, therefore, that the intent which is important is the congressional intent.

Some confusion undoubtedly has been caused by the use of the words "the United States" or "the Government" when the Supreme Court has referred to congressional knowledge or intent.

Since the executive department could not have ratified acts done under its own lack of authority, the intent or knowledge of Congress necessarily is meant.

Where, as in the case at bar, the congressional intent to ratify is expressed, the Court is not faced with the problem. Resort to the intent of the officer is not needed; it becomes important only in the absence of an expression by Congress, or in cases where the intent of the officer at the time of the taking is necessary to determine whether or not he is exercising a previously delegated congressional authority.

Not only does the *Creek* case fail to sustain the proposition that intent on the part of the officer at the time is essential to a taking by relation back, but, on the contrary, the Supreme Court applied the doctrine of relation to acts which were committed by officers who had no knowledge at the time of taking that the lands belonged to the Creeks. The ratification was by the inaction of the "United States." Precisely at what time this inaction crystallized into a confirmation is not stated, but it is self-evident that confirmation was subsequent to the disposals. Thereupon the matter stood "as if the act [of 1891] had distinctly directed the disposals" (295 U. S. 103, 111), and the plaintiff became entitled to recover "as of the date of the patents of the various parcels" (302 U. S. 620, 622).

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b. *Shoshone Tribe* v. *United States, 299 U. S. 476.*—Although the Government relied upon this case as supporting its contention that the ratification related back to the date of the unauthorized physical taking, the Court asserts that, properly analyzed, the case supports the opposite view. In its analysis of the case, the Court says (p. 13):

> * * * As to the importance of knowledge in connection with the act of taking see *United States* v. *Creek Nation,* 295 U. S. 103; *Shoshone Indians* v. *United States,* 299 U. S. 476.

That "knowledge" is the "knowledge of the rights of the Shoshone Indians" mentioned on page 16, the particular right involved being the right to undisturbed use and occupancy. It is not clear just what language in the Supreme Court's opinion creates the impression that the Supreme Court attached importance to the question whether the intruding officers realized that they were violating any rights, nor is it clear that the result would have been different had the invading officers not known at the time of the invasion that the Shoshones were entitled to undisturbed use and occupancy.

The opinion continues:

> * * * It will be noted that in the *Shoshone* case the Supreme Court did not fix the date of taking as of the date of a survey, but as of the date of entry under military escort * * * (p. 16).

If it is meant to infer by this statement that in the case at bar the force or severity of the intrusion was less than that in the *Shoshone* case, we suggest that the point is not material, since there is no dispute that there was an actual and complete physical possession.

The Court proceeds:

> * * * Naturally, when this land was taken in full knowledge of the rights of the Shoshone Indians it constituted, in the absence of proper consent, a legal taking of the land owned by the Shoshone Tribe, and that constituted the date of the taking rather than the later act of the Congress (p. 16).

As defendant understands the decision in the *Shoshone* case, the Supreme Court held that when the land was taken in the absence of proper consent, it was *not* a legal taking of the land; that the Court held it was a tortious taking of the land; and that it became legal only by virtue of a ratification which related back to the date of the tortious taking.

As we suggested in discussing the *Creek* case, the determination hinges on congressional intent. That intent may be manifested by prior legislation or it may be manifested by ratification. Where congressional intent is manifested by prior legislation authorizing officers in their discretion to take property, it becomes necessary for the officers to decide to exercise the power delegated to them, else they

would not be exercising the power. This decision, in turn, is the result of the officer's intent. Where, however, a taking has not been previously authorized by Congress, the taking is tortious; no matter what purpose the officer had in mind at the time, it is not a taking under the power of eminent domain. Nevertheless, the requisite congressional authority to take under the power of eminent domain can be supplied by later act of Congress. The ratification purges the tort of its illegality and makes the taking lawful under the power of eminent domain.

The Supreme Court had this principle in mind when, after asserting that the Commissioner of Indian Affairs continued to act on the assumption that the occupancy of the Arapahoes was permanent, it said: "What is more to the point, Congress did the same" (299 U. S. 476, 489). The Court then called attention to the Act of June 7, 1897, 30 Stat. 62, 93, 94, and to the Act of March 3, 1905, 33 Stat. 1016, which approved agreements with the Shoshone and the Arapahoe tribes, treating the two tribes as lawful occupants and equals. In describing the steps from which the Court concluded that the Government intended to confirm the occupancy of the Arapahoes as of the date of the intrusion, the Court said:

> * * * and most important of all, the statutes already summarized, recognizing the Arapahoes equally with the Shoshones as occupants of the land, accepting their deeds of cession, assigning to the tribes equally the privilege of new allotments, and devoting to the two equally the award of future benefits. * * *

Thus, Congress recognized and adopted the unwarranted acts of the officers, but it did not expressly assert an intention that the ratification relate back to the date of the actual taking. For the purpose of determining the congressional intent in this respect, and for no other apparent legal reason, the Court reviewed the history and commented upon the intent of the administrative officers. None of the language indicates any purpose to hold that there could be no retroactive ratification without an intent on the part of the administrative officers at the time of the tortious taking. Unless a holding to that effect can be discerned, the decision cannot support the plaintiff's position in the instant case, namely, that the act of Congress alone was the taking.

c. *John Horstmann* v. *United States, 257 U. S. 138.*—This case does not support the conclusion in the case at bar that there cannot be a retroactive taking under the power of eminent domain by subsequent legislation unless the officer at the time of the tortious taking had knowledge of the circumstances and intended a taking.

There was no curative legislation involved in the *Horstmann* case. In that case there was prior congressional authority to do the work which

the officers had done, namely, to construct an irrigation system. The question involved was whether damage from unforeseen and unpredictable percolation of water gave rise to an implied promise to pay for the damage. The Court held that it did not imply a promise to pay, but the holding was not predicated upon the fact that the officers were mistaken or did not intend the consequences of their intentional acts, but because the physical consequences were too remote to have been contemplated and authorized by the prior act of Congress. The Court said:

> We think the cases at bar are within the latter decisions, and it would border on the extreme to say that the Government intended a taking by that which no human knowledge could even predict. Any other conclusion would deter from useful enterprises on account of a dread of incurring unforeseen and immeasurable liability. This comment is of especial pertinence (257 U. S. 146).

The meat of the situation in that case is: The Court found there was no tortious taking; there was no admission of tortious taking; there was no intent to take; there was no ratification; therefore, the decision did not and could not have any bearing on the question of relation back.

d. *Tempel* v. *United States, 248 U. S. 121.*—In this case there was no legislative ratification. In fact, there was no invasion of plaintiff's rights

at all. The lands alleged to have been taken were part of a river bed which the Government possessed the right to improve for purposes of navigation without payment of compensation. At no time did officers take any property which they had no right to take and at no time did Congress purport to ratify any supposed tortious taking. The following language of the Court (248 U. S. 121, 131) shows the inapplicability of the decision:

> But here the government has contended since the beginning of the improvement that, at the time of the dredging in 1899 and in 1909, it possessed the right of navigation over the land in question; which right of navigation, if it existed, gave it the right to dredge further in order to improve navigation. The facts preclude implying a promise to pay. If the government is wrong in its contention, it has committed a tort.

The opinion does not intimate what might have been the result had there been a tortious taking and had Congress recognized the tortious taking and assumed responsibility for it. There being no taking, there was no issue as to the time of taking.

e. *Choctaw Nation* v. *United States, 21 C. Cls. 59, 119 U. S. 1 (Net Proceeds case).*—The opinion in the case at bar quotes from the opinion of the Court of Claims and from the opinion of the Supreme Court in the above-entitled case to sustain its holding that there was no taking until 1875. On page

16 the opinion of the Court of Claims is quoted as follows:

> By the Act of 1875 (18 Stat. 476), the line erroneously surveyed was fixed as the permanent boundary of the State of Arkansas and the Indian country; by force of the act, land belonging to the claimant was taken for the use and benefit of the defendants. * * *

Defendant urges that unwarranted inference is drawn from the phrase "by force of the act." While the land was legally appropriated by force of the Act of 1875, that does not deny the retroactive effect of the Act. In every case where a tortious act is made lawful by subsequent ratification, the "force of the act" of ratification makes it lawful. If the phrase causes doubt, the preceding paragraph in the opinion, which asserts that the Government made a mistake in the location of the boundary and that the land was appropriated by the United States because of such a mistake, removes that doubt.

The opinion (page 17) then quotes also from the opinion of the Supreme Court (119 U. S. 1, 41):

> It is found as a fact by the Court of Claims that, in the location of the line which was surveyed under the authority of the United States and fixed as the permanent boundary between the State of Arkansas and the Indian country by the Act of Congress of March 3, 1875, 18 Stat. 476, the government made a mistake whereby they embraced in the territory appropriated by the United States as part of the public lands 136,204 2/100 acres of Indian lands, the value of which, as ascertained by the Court of Claims, is $68,102. This is a just and valid claim, for which the petitioner is entitled to recover.

It is submitted that the sentence points to the time of the erroneous survey as the time of taking. The Supreme Court said "the government made a mistake, whereby they embraced in the territory appropriated by the United States as part of the public lands, 136,204 2/100 acres of Indian lands * * *." The mistake which appropriated the Indian lands was not the Act of 1875, for passage of that act was not a mistake; the act was passed intentionally. The only mistake pointed out by the Court was made "in the location of the line * * *," i. e., the survey of 1825. The line is identified as being a line (1) "which was surveyed under the authority of the United States," and (2) "fixed as the permanent boundary between the State of Arkansas and the Indian country by the act of Congress of March 3, 1875, 18 Stat. 476 * * *."

Any other construction is inadmissible in light of the history of the case and the law as to conclusiveness of judgments. The history of the case, to be found in defendant's brief (R. 300–306), will not be repeated. It merely emphasizes that both courts were completely advised of the transactions between the Choctaws and Chick-

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asaws, and that it was actually argued that the taking was by the erroneous survey, ratified by the Act of 1875.

Whether argued or not, before a judgment for the Choctaw Nation could be rendered, there had to be found that the Choctaw Nation owned the strip at the time of the taking. That it was so held must be accepted, not only because it is impossible to conceive of both courts having erred so grievously, but also because it is the law that a judgment is a conclusive adjudication of every matter, both of law and fact, the determination of which is essential to support it. Freeman on Judgments, 5th ed., Sec. 692, p. 1463; *Fayerweather* v. *Ritch,* 195 U. S. 276; *Holt County* v. *National Life Ins. Co.,* 80 Fed. 686, 25 C. C. A. 469. Matters which follow by necessary and inevitable inference from an adjudication because the judgment could not have been rendered without determining them are as effectually concluded thereby as though specifically and in terms adjudicated. *National Foundry & Pipe Works* v. *Oconto W. Supply Co.,* 183 U. S. 216; *Warburton* v. *Trust Co. of America,* 182 Fed. 769; 105 C. C. A. 201. The fact that it was not an issue raised by the pleadings is immaterial if it was a necessary premise for the judgment. *Bleakley* v. *Barclay,* 75 Kan. 462, 10 L. R. A. (N. S.) 230, 89 Pac. 906; *Farmers' & Fruit Growers' Bank* v. *Davis,* 93 Ore. 655, 184 Pac. 275; *Peoples' Water Co.* v. *City of Pittson,* 241 Pa. 208, 88 Atl. 503; *Wells* v. *Boston M. R. R.,* 82 Vt. 108, 71 Atl. 1103.

We do not contend that the *Choctaw* case is *res judicata* since the Chickasaw Nation was not a party to that action. But, even though the opinion does not discuss the point, the issue was before the Court and the case is controlling under the rule of *stare decisis.* Failure to discuss the matter gives rise to the inference the Court had no doubts that the taking occurred while the Choctaws were the sole owners. Cf. *Fidelity & Deposit Co.* v. *United States,* 187 U. S. 315.

2. The Chickasaws acquired no intervening right such as would prevent the operation of the doctrine of relation

It is not disputed that, if the Government insists upon the application of the general rule of relation, it must accept the limitation on the rule stated in *United States* v. *Heinszen,* 206 U. S. 370, 382:

> That where an agent, without precedent authority, has exercised, in the name of a principal, a power which the principal had the capacity to bestow, the principal may ratify and affirm the unauthorized act, and thus retroactively give it validity when rights of third persons have not intervened, is so elementary as to need but statement. That the power of ratification as to matters within their authority may be exercised by Congress, state governments, or municipal corporations, is also elementary.

And had the decision in the case at bar been confined to the question whether the Chickasaws had acquired an intervening right such as would prevent the retroactive operation of the Act of 1875, the Government's discussion of the decision (wherein it concerns the question of ratification) would be confined to the problem whether such a right had been acquired.

This brings us to a consideration, therefore, of the holding that by the Treaty of 1837 the Chickasaw Nation "purchased an interest" in the Choctaw lands (Op. pp. 8, 10) and that they "were given a full interest in all the lands that were conveyed to the Choctaws by the Treaties of 1825 and 1830"[7] (Op. p. 11).

a. *The Treaty of 1837 and the surrounding circumstances do not disclose the grant of an undivided interest in the strip.*—To be operative a conveyance must describe the property conveyed in sufficient terms that it can be identified. There is, of course, no general rule covering all cases as to what constitutes a sufficient description, and frequently evidence extrinsic to the document must be consulted. There is nothing in the Treaty of 1837 or in the surrounding circumstances which fixes the interest at one-fourth or any other undivided fraction of the whole.

[7] Should this language be retained, it is suggested that it read: "* * * were conveyed to the Choctaws by the Treaty of 1820, fee patent for which was promised by the Treaty of 1830."

The Treaty itself describes the rights granted as—

(1) "the privilege of forming a district, within the limits" of the Choctaw country, which district is described by the metes and bounds and is miles away from the land in dispute,

(2) "the Chickasaw People to be entitled to all rights and privileges of the Choctaws"; and

(3) "it is hereby declared to be the intention of the parties hereto, that equal rights and privileges shall pertain to both Choctaws and Chickasaws to settle in whatever district they may think proper * * *."

Certainly, if a grant of an undivided interest in the whole Choctaw country was made, it can only be found in the surrounding circumstances. There is no circumstance in the preliminary negotiations which indicates an intention to convey more than the privilege of settlement specifically stated in the treaty. On the contrary, the preliminary negotiations show a clear understanding that, at the time of the Treaty of 1837, the Choctaws would not part with any possible interest in their land (R. 293–294).

The earliest subsequent circumstance is the issuance of the patent in 1842 by the United States. This patent was issued to the Choctaws—and to the Choctaws alone. It is difficult to understand why the United States would issue a patent in fee

to the Choctaw Nation alone, if the Chickasaws had acquired an undivided one-fourth interest in 1837.

Support must be found, therefore, in subsequent transactions, the earliest of which is approximately 18 years after the Treaty of 1837. The first ascertainable grant by the Choctaws to the Chickasaws of a common interest in the Choctaw country was by the Treaty of 1855, for which grant the Chickasaws paid to the Choctaws the substantial sum of $150,000. Clearly, they would not have agreed to pay this money for property they already had bought and paid for.

The Government has never disputed that by the Treaty of 1855 the Chickasaws acquired an undivided one-fourth interest in the property the Choctaw Nation possessed at the time of that treaty. The Government contends only that the Chickasaws never acquired any interest in the wedge-shaped strip adjoining the eastern boundary, for the reason the Choctaws no longer had it to convey, to say nothing of a complete absence of intent to convey it. Therefore, allotments to tribesmen and passage of appropriation and other statutes 40 or more years later do not aid in determining the effect of the earlier transactions, since none of them affected or were intended to affect the strip in question. Moreover, the opinion (p. 13) points out that the lands in question are the exception to these transactions.

As confirming its view that the Chickasaws acquired no common interest until the Treaty of 1855, the Government attaches significance to the fact that the treaty itself makes a pointed distinction between land relinquished by the Choctaws alone and land leased by the two nations jointly. (Government's brief, pp. 295–296). The opinion no doubt speaks inadvertently when it asserts (p. 11) "under the Treaty of 1855 the Choctaws and Chickasaws released rights in certain of these lands and also agreed to lease certain other lands to the United States," when the Choctaws alone relinquished the lands west of the 100th meridian.

b. *The Choctaws, being out of possession, could convey no interest to the Chickasaws.*—Another reason why the Chickasaws acquired no intervening interest in the wedge-shaped strip is that the Choctaws, being out of possession, could convey no interest to the Chickasaws.

In 1825, the Choctaws were put out of possession of the wedge-shaped strip. Admittedly, this was wrongful and tortious. Nevertheless, by that act, the wrongdoers or "disseisors" were regarded under common law as having obtained a fee simple estate, even though the Choctaws, having been wrongfully ousted, had a right to repossession by re-entry within a limited period of time or by means of legal proceedings.[8] This wrongful pos-

[8] Tiffany Real Property, 2d ed., sec. 15, p. 31, J. B. Ames, The Disseisin of Chattels (1890), 3 Harvard Law Review, p. 23.

session was continued until it was made lawful by the Act of 1875. During that period the possessors, rather than the Choctaws, had the rights which ordinarily would be associated with the idea of ownership.[9] Any attempted transfer by the Choctaws without change of possession was ineffective.

The transactions involved are a century old and must be considered as of that time. There are no controlling statutes, so the rule of decision must be the common law or such other source as the Court may deem applicable. With this in mind, it should be noted that with few exceptions the common law rule was still in force even in the states which later have altered the rule because of their conception of modern needs, and there are still 7 states which make conveyances of land adversely held either void, invalid, or illegal.[10]

It may be urged that the common law rule should not be applied, but as quoted in the opinion herein (p. 20):

> 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.

[9] Tiffany, supra, sec. 15, p. 31; the patentees of such lands as were patented, also, obtained such rights, Ames, supra, p. 23.

[10] A list of the state enactments and decisions is attached as an appendix (R. 342).

There is much to be said for this view, and we call attention to a discussion in Lauterpacht, Private Law Sources and Analogies of International Law (1927), pp. 94–104, where it is shown that actual possession is an important element in the acquisition of title under the law of nations, and where it is suggested that the analogous rules of international law and private law on this subject arise from similar necessities. For the convenience of the Court, the discussion is reprinted in appendix, R. 346–351.

Under the common law the Choctaws were not deprived of all rights; they might have reentered within a limited time or they had a right of action to recover possession of the lands, which would not have been extinguished by any limitation of actions, there being no forum. But these rights, although rights *in rem,* were personal rights or choses in action and neither of them was assignable.[11] Therefore, giving the treaty of 1837 the widest possible application, it conveyed to the Chickasaws not even a right of action against the

[11] J. B. Ames, supra, 23, 377.

United States, its agents, or its patentees—whoever the possessor might be.

Naturally, the treaty did not contain any of the expedients which had been devised to relieve this rule, i. e., the constituting of the grantee as attorney in fact for the grantor to recover the land and to keep it for his own benefit if and when repossessed, or the authorizing of the grantee to recover the lands in the name of the grantor.[12] The Chickasaws are not in a position to claim under such an authority from the Choctaws nor do they assume to do so. They do not seek to recover the land under a power or in the name of the Choctaws. They seek to recover compensation for a taking of the land on the theory that they were seized with the land when it was taken.

While the well-settled rules of common law and analogous principles of international law solve the problem, the solution also may be reached "in the light of that larger reason which constitutes the *spirit* of the law of nations" by examining "the acts and conduct of the parties", together with the treaties and the situations contemplated by the treaties. (See Court's quotation from *Net Proceeds* case, op. herein, p. 20; italics supplied.)

Looking at the acts and conduct of the parties in this spirit, certain fundamental facts become

[12] J. B. Ames, supra, 23, 340–342.

accentuated. The land in the strip belonged to the Choctaws; the United States took it from them; the United States has paid them for it. The Chickasaws never occupied any portion of the strip; they never intended to acquire any share in it; the Choctaws never intended to sell them any share in it. Their claim is not based on the loss of land they intended to belong to them. Their claim is based upon the adoption by inference of a description in the treaty of 1825 upon the mistaken assumption that the treaty accurately described the visible intended boundaries of the Choctaw "country." It is doubtful that they ever read the description. If they read it or if it were translated to them, unquestionably they believed that the land described in the treaty was the same land which they could see marked on the ground. In the face of these actualities, can it be said that they were deprived of anything which in good conscience was theirs?

Looking at events in retrospect through the long vista of years we can see that from the outset the occupancy of the strip was intended to be permanent; that, however tortious in its origin, it has been permanent in fact; and that the Government of the United States through the action and inaction of its executive and legislative departments for half a century of time, has ratified the wrong, adopting the *de facto* appropriation by relation as of the date of the beginning. To see the facts

in true perspective we must view them in their totality and not in isolation.[13]

c. *If there is any liability by reason of the Treaty of 1855, it is on principles of contract, not for a taking under the power of eminent domain.*—Most of what has been said regarding the Treaty of 1837 is equally true of the Treaty of 1855. The discussion has been directed to the Treaty of 1837 because the Court has fixed that treaty as conveying an interest in common to the Chickasaws.

However, the Court attached significance to the guarantee in the first article of the Treaty of 1855 and rejected the Government's contention that, at the most, the United States would be liable to the Chickasaws only after they had exhausted their remedy against the Choctaws.

The Government cannot insist categorically that the Court was in error in attributing some effect to the comprehensive description and the guarantee in the first article. But in giving the guarantee effect, it should be recalled that the United States purported to make no grant nor did it receive any of the money paid for the grant; that the grant of common ownership flowed solely from the Choctaws to the Chickasaws.

[13] Except for substituting "strip" for "Reservation" in the third line, the language in this paragraph is identical with that of Justice Cardozo in *Shoshone Indian Tribe* v. *United States*, 299 U. S. 476, 495.

By taking only the language of the treaty of 1855, without regard to the knowledge or intent of the parties, it can be said that the Choctaws *attempted to convey* an interest in this strip to the Chickasaws. The Choctaws did not actually convey to the Chickasaws any share of the wedge-shaped strip because the Choctaws were out of possession, the strip being adversely held by the United States under a claim of right. Being unable to perform the agreement, the Choctaws became liable to the Chickasaws under the principles of contract. The Chickasaws and Choctaws evidently so believed, because, until this suit, the Chickasaws claimed only against the Choctaws. It can be urged with reason that, in assenting to that portion of the treaty by which the Choctaws attempted to transfer an undivided interest in common, the United States assumed an obligation to make good the Choctaws' failure, even though nobody knew about the wedge of land on the eastern boundary.

Upon such reasoning, the United States would have been liable to the Chickasaws upon its guarantee, under principles of contract, but not under principles of eminent domain. Such a determination would affect only the case at bar. It would not establish a precedent for eminent domain cases which denies the retroactive effect of ratification where it appears that the agent at the time of the physical taking was not aware of all the facts.

III

The court erred in holding that the facts in the case at bar do not bring the case within the rule that a visible boundary, long acquiesced in, becomes the true boundary and that any loss thus occasioned gives rise to no claim for compensation

A. The rule of liberal construction in favor of the tribes is inapplicable

The Court recognizes the force of the numerous cases cited in the Government's brief (R. 267–288). It points out:

> In most of these cases the underlying reason for invoking the doctrine of ancient boundaries is the tremendous upsetting of established conditions and intervening rights that would be occasioned by correcting a boundary error (Op. p. 17).

It recognizes also that the facts of the case at bar supply such underlying reasons, but declines to apply the doctrine on the ground that there is a philosophy which requires special consideration for Indians in litigation with the United States (Op. pp. 17–20).

The Supreme Court, however, rejected that philosophy in the case of *Stone* v. *United States,* 2 Wall. 525, 536–537, from which we quote:

> This survey was made in the presence of the agent of the Delawares. It marked the usual quantity of about three miles square, as appurtenant to the post and necessary for its use and subsistence, making the lines thereof the boundary of the grant to the Delawares,

> with the concurrence and consent of the agent of the nation. It was made in the year 1830, and since that time both parties have held possession and claimed up to the lines then established by the survey. In the case of private persons, a boundary surveyed by the parties and acquiesced in for more than thirty years, could not be made the subject of dispute by reference to courses and distances called for in the patents under which the parties claimed, or on some newly discovered construction of their title deeds. *We see no reason why the same principle should not apply in the present case,* notwithstanding the absence or loss of the document required by the resolution of the Senate. [Italics supplied.]

In that case the Indians' successor in interest argued that because of the peculiar relation of the United States to the Indian tribes, the lapse of time, the possession by the United States, and the acquiescence of the Indians could not be urged on behalf of the Government. He contended:

> The faith and dignity of the Government forbid that any claim should be made on its behalf to the lands in controversy by reason of occupancy and possession. In no case can the United States acquire title by preemption. Here the Indians could not sue—the Government could not be sued. The peculiarly fiduciary relations of the Government to the Indians, and their condition of absolute dependence, would in any event de-

> stroy the presumption of a grant which might in other cases arise from such possession unexplained (p. 531).

The problem involved in the case at bar is one of substantive law and, it is submitted, there is no philosophy or rule of decision which requires that questions of substantive law be resolved, if possible, in favor of the Indians.

The doctrine to which the opinion herein refers is a rule of construction and in no case which has come to our attention, has it been held to mean that the fundamental rules of substantive law are to be tempered in favor of a tribal litigant. An examination of the cases will disclose that where it has been applied, it was for the purpose of determining *what was intended* by a treaty, agreement, or legislation. In making such determination, the comparative ability for understanding and self-expression was considered, and the Indians were given the benefit of doubt because of their inferior ability to formulate and express their intention.

Throughout the decisions, we find the rule stated as in *Winters* v. *United States,* 207 U. S. 564, 577:

> By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians.

In the case of *Choctaw Nation* v. *United States,* 119 U. S. 1, 27–28 (Net Proceeds case), quoted in the opinion herein, it will be found that despite the generality of the language, the principle to be applied finally appears in its proper legal significance as a canon of construction, when the Court says (p. 28):

> *The rule of interpretation* already stated, as arising out of the nature and relation of the parties, is sanctioned and adopted by the express terms of the treaties themselves. [Italics supplied.]

The implicit limitation of the rule is more affirmatively shown in *United States* v. *Choctaw Nation,* 179 U. S. 494, 532, where, after reviewing the various cases which discussed the doctrine of liberal interpretation, the Court said:

> But in no case has it been adjudged that the courts could by mere interpretation or in deference to its view as to what was right under all the circumstances, incorporate into an Indian treaty something that was inconsistent with the clear import of its words.

The rule that a treaty should be interpreted according to the Indian intent takes cognizance also of instances where there is a lack of Indian intent. This is shown in *Kennedy* v. *Becker,* 241 U. S. 556, 564:

> It has frequently been said that treaties with the Indians should be construed in the sense in which the Indians understood them. But it is idle to suppose that there was any actual anticipation at the time the treaty was made of the conditions now existing, to which the legislation in question was addressed.

And where the subject matter did not involve the construction of a treaty or agreement, it has been held the rule does not prevail, as in *United States* v. *First Nat. Bank,* 234 U. S. 245, 259:

> The justice and propriety of this method of interpretation are obvious and essential to the protection of an unlettered race, dealing with those of better education and skill, themselves framing contracts which the Indians are induced to sign. But the legislation here in question is not in the nature of contract, and contains no provision that makes it effectual only upon consent of the Indians whose rights and privileges are to be affected.

It might be helpful to apply the reason behind the rule to the facts in the case at bar, even though the rule itself may have no application to a matter of substantive law.

The reason for the rule is obvious. As shown by the discussion of *Jones* v. *Meehan,* 175 U. S. 1, 11, treaties are construed liberally in favor of Indians because the superior force and knowledge and skill of the United States places it in a better position in making the treaties. So, too, it would be reasonable to favor the Indians when considering the effect of error and acquiescence, if the superior force had some relation to the erroneous survey and the long acquiescence.

But the erroneous survey was not the result of any superior force imposed upon the tribe by the United States. On the contrary, the United States was equally ignorant of the fact that any imposition was being practiced. As opposed to the

exertion of any undue pressure or superior knowledge for the benefit of the United States, the surveyor was directed to make a correct survey. There is no chain of causation whatever from the superior power of the United States to the error in the survey. The same error might have resulted had an independent surveyor been employed by the parties jointly or by the Choctaws alone.

Nor was the acquiescence of all parties over the long period of years due to the fact that the United States was "strong" while the Indians were "weak and helpless."

Therefore, even if the doctrine could be extended to the problem at hand, the facts do not satisfy the reason behind the rule.

The practical reasons for the doctrine are the same as in other cases, and it is not improbable that the question may occur more frequently in Indian tribal litigation than elsewhere. Although the case at bar is the first tribal claim to bring out the point, the question was raised in *Seminole Nation* v. *U. S.,* L–208, decided on other grounds May 5, 1941. It was present in *Red Lake Band of Chippewas* v. *United States,* No. 45148, voluntarily dismissed before briefing. It will be raised in *Quinaielt Tribe* v. *United States,* L–23, yet to be tried.

It is reasonable to suppose that, in many cases not yet known, it will prove a fertile field for dispute, since it is likely that most of the hundreds of reservation boundaries contain some error. The maps show that almost invariably some boundary of a reservation is marked with reference

to a meridian or parallel, and the prevailing straight lines bear witness to the tedious marking of courses and distances by surveyors long dead. To the practical impossibility of a truly accurate survey under the best of conditions, there must be added the fact that most of these surveys were made the better part of a century ago when equipment was less reliable; when established lines were few and sometimes incorrect.[14] The present case, therefore, is probably symptomatic of many disputes now dormant.

CONCLUSION

In conclusion the Government submits that:

1. The plaintiff's claim of loss is only technical rather than substantial, and that this is not a case in which good conscience or rules of liberal interpretation demand that all questions be resolved, if possible, in favor of the Indians.

2. In the absence of an intervening interest, the congressional ratification of a tortious taking relates back to the time of the physical taking; the intention of the officers at that time is not material; only the intent of the ratifying power is important.

3. The Chickasaws acquired no intervening interest because: (a) the Treaty of 1837 and surrounding circumstances did not convey any share

[14] Until the 1880's, for example, it was erroneously believed that the meridian of Washington, D. C., which was a guide for early map makers, lay exactly 77° west of Greenwich, whereas the true line lies 3′2.3″ east of the supposed location. This situation is the basis of a claim in *Sioux Tribe* v. *United States*, Court of Claims, No. C–431–(11). Since a number of boundaries were described with reference to meridians, the result may be far-reaching.

of the strip; (b) the Choctaws, being out of possession, had no interest to convey, and (c) whatever right the Chickasaws might have acquired in connection with the strip, would have been a right to damages for breach of the guarantee, not an interest in the land. Their cause of action, therefore, would be upon the contract and not for compensation under the principles of eminent domain.

4. Apart from the foregoing considerations, the visible boundary, long acquiesced in, became the true boundary, and there is no claim for compensation; the reasons behind the rule of liberal construction in favor of Indians have no relation to the circumstances which invoke this doctrine.

Failure to reserve the determination of the amount of the offsets for further proceedings, as provided in Rule 39 (a) is, of course, an inadvertence (Assignment 10, R. 299).

The several other assignments of error and motions for amendment of the findings are covered in the discussion of the above points.

Respectfully,

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APPENDIX

I

States which make conveyance of lands adversely held either void, invalid, or illegal

1. *Connecticut* (Gen. Stat. of 1930). Section 5020 provides:

> Any conveyance or lease, for any term, of any building, land, or tenement, of which the grantor or lessor is ousted by the entry and possession of another, unless made to the person in actual possession, shall be void.

Under this section, the court held in *Palmer* v. *Uhl,* 112 Conn. 125, 151 A. 355 (1930), that a grant of land by a disseisee was void.

2. *Florida* (Rev. Stat. of 1920): Section 3795 provides that a deed is not operative to transfer possession unless livery of seisin can lawfully be made at the time of the execution of the deed.

In accord, see *Farrington* v. *Greer,* 94 Fla. 457 (1927).

3. *North Dakota* (Comp. Laws of 1913): Section 9405 deals with "Buying lands in suit," and makes such offense a misdemeanor. The section is identical with section 2031 of the New York Penal Law.

Section 9406 relates to "Buying pretended titles" and makes it a misdemeanor. The section is very similar to section 2032 of the New York Penal Law.

Section 9407 excepts from the operation of the rule set forth in sections 9405 and 9406 mortgaging of property adversely held. This provision is substantially like section 2033 of the New York Penal Law.

4. *Oklahoma* (Stat. Ann.): Sections 547, 548 and 549 of Title 21 relate respectively to: "Buying lands in suit," "Buying or selling pretended right of title to land" and "Mortgage of land adversely held not prohibited." These provisions were taken almost verbatim from the New York Penal law (sections 2031, 2032 and 2033).

5. *Kentucky* (Carroll's Stat. Ann., Baldwin's 1936 Revision): All provisions relating to conveyance of lands in adverse possession are incorporated in Chapter 15—"Champerty and Maintenance."

Section 210 provides:

> All sales or conveyances * * * of any lands, or the pretended right or title to the same, of which any other person at the time of such sale, contract or conveyance, has adverse possession, shall be null and void. * * *

Section 211 provides:

> All contracts to prosecute a suit for the recovery of any lands in the adverse possession of another, for the whole or part of the land thus possessed, or for the whole or any part of the profits thereof, shall be null and void, and the parties to such contract shall forfeit all right, interest or claim in or to the land claimed under such pretended right or title; also all right to maintain any suit at law or in equity upon such pretended right or title, and such right, title, or claim shall vest in the Commonwealth, and inure to the benefit of the person in possession, without office found.

Sections 212, 213, 214, and 216 relate, respectively, to the following topics: "Champertous contract a defense to action to recover land," "Parties to champertous contract may be required to testify," "Adverse title may be purchased by party in possession," and "Right of action denied to parties to champertous contract."

6. *South Carolina* (Code of Laws, 1932):

> Section 397. Party in interest to sue. Action by Grantee of Land Held Adversely.—Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section 399, but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract. But an action may be maintained by a grantee of land in the name of the grantor, or his or her heirs or legal representatives, when the grant or grants are void by reason of the actual possession of a person claiming under a title adverse to that of the grantor at the time of the delivery of the grant, and the plaintiff shall be allowed to prove the facts to bring the case within this provision.

[NOTE.—This provision is substantially like the provision of section 111 of the New York Code of Procedure, as amended in 1862.]

Section 8885 provides that a "memorandum of delivery and seisin" shall be acknowledged and recorded at the same time as the deed itself.

7. *Tennessee* (William's Code, 1934): All provisions relating to conveyance of lands adversely held are incorporated in Chapter 13, Article 5, entitled: "Champerty and Maintenance" (sections 7823 to 7827).

Section 7823 provides:

> No person shall agree to buy, or to bargain or sell any pretended right or title in lands or tenements, or any interest therein.

Section 7824 provides:

> Any such agreement, bargain, sale, promise, covenant, or grant shall be utterly void, where the seller has not himself, or by his agent or tenant, or his ancestor, been in actual possession of the lands or tenements, or of the reversion or remainder, or taken the rents or profits for one whole year next before the sale.

Section 7825 provides that any such suits at law or in equity "shall be forthwith dismissed, with costs, by the Court * * *."

[NOTE.—But conveyance of the land in controversy pending litigation is no ground for dismissing the bill for the champerty, *Gheen* v. *Osborne,* 11 Heisk (58 Tenn.) 61 (1872).]

Section 7827 provides that sale of lands "adversely held by color of title" creates presumption of champerty.

II

Excerpt from Lauterpacht, Private Law Sources and Analogies of International Law, 1927

ACQUISITION OF TERRITORIAL SOVEREIGNTY. PRIVATE LAW RULES OF PROPERTY AND POSSESSION

§ 41. *The Requirement of Form in Acquisition of Territorial Sovereignty. The Requirement of animus and corpus.*—The analogy of legal relations existing between the conceptions of property and territorial sovereignty finds, *inter alia,* clear expression in the fact that the two main principles of the law of original acquisition of territorial sovereignty constitute at the same time a general rule of private jurisprudence. There is, first, the principle that the *forms* of acquisition of territory are regulated and defined by international law. The number of modes of acquisition of territory is limited, although it may be a matter of dispute whether, for instance, accretion or subjugation or prescription each forms a class by itself, or ought to be included as a subdivision of another group.[1] International law will not recognise acquisition of territory accomplished in disregard of the accepted forms. Not every acquisition is a lawful one. The dictum *"Besitzstand gleich Rechtszustand"* (possession is law) has no

[1] With regard to accretion, see Jerusalem, *Ueber volkerrechtliche Erwerbsgrunde*, 1911 (reprint from *Festgabe fur A. Thon*), p. 418. With regard to subjugation, Pradier-Fodere, vol. ii. p. 392; Twiss, vol. i. p. 227 (title by conquest resolves itself juridicially into title by cession); and p. 105, *infra.*

validity in international law.[2] Mere force unaccompanied by a legally recognized form of acquisition does not confer a legal title. Even the title by conquest is regulated by international law. The second principle, dominating the theory and practice not less to-day than a hundred or two hundred years ago, is that based on the Roman law rules of possession, *i. e.* on the connection of *animus* with *corpus,* of the bodily act with the mental attitude. From Grotius,[3] Vattel,[4] and Bynkershoek,[5] through the long series of disputes following the discoveries of new parts of the world, to the Berlin Declaration of 1885, which, in Articles 34 and 35, gave a modern formulation to the requirement of *corpus* and *animus,* it is the same principle which ultimately asserts itself both in the theory and in the practice of original acquisition of territory.[6] The history of nearly all modern boundary disputes and arbitrations could be written in terms of the recourse to and application of this set of rules by States and international tribunals. It was of the greatest importance as an ordering element in the development of international law and international relations in the period following the discovery of the New World.

[2] That mere facts are of constitutive value in acquisition of territorial sovereignty is maintained by Jerusalem, *op. cit.*, p. 423; by Liszt, p. 241; and Gareis, p. 88. See also Fischer Williams, quoted below, p. 105, n. 1.

[3] See passages in *Mare Liberum, quoted below.*

[4] Bk. i. § 208.

[5] *De Dominio Maris*, ch. i.

[6] See Westlake, i. pp. 111–113, for extracts illustrating the opinions of leading authorities on the question of effective occupation.

§ 42. *Its Historical Function. The Formative Period of International Law. The Modern Practice.*—Two opposing principles confronted governments and publicists in the two centuries following that period: that of full recognition of title given by mere discovery, and that of combination of *animus* and *corpus* as a condition of acquisition of title. Claims based on discovery pure and simple were soon abandoned, and governments sought to fortify them in a different way. Thus Pope Alexander VI granted in 1493 to Ferdinand and Isabella of Spain the territories lying farther west than a line drawn from north to south a hundred leagues west of the Azores, of which no Christian Power had taken possession before Christmas Day 1492, and to Portugal the lands east of that line; and the two States appealed frequently to that confirmation of their original right based on discovery. But even this was hardly sufficient. Vattel says that when explorers have discovered uninhabited land through which the explorers of other nations have passed, leaving some sign of their having taken possession, they have paid no more regard to such empty forms than to the regulations of Popes.[7] In fact, modern European history shows how great was the need for a comprehensive rule able to command the respect of navigators and statesmen in a greater degree than the regulations of the Popes and the principles of fictitious discovery. This rule has been found in private law. The principles of contiguity, of the middle distance, of the mouth of the river and of the watershed, are the

[7] Bk. i. § 208.

milestones which mark the way of the recognition of the requirement of effectiveness of occupation; they stand half-way between the doctrine of discovery and that of effectiveness of possession. They are the bridge leading from the arbitrariness of pure assertion towards the relatively well-defined principles of the Berlin Declaration; the State had to possess at least the basic territory in order to be entitled to claim the rights of contiguity. It is only natural that Roman law was not able to cope with all the contingencies arising out of the discovery of the New World, but this fact is of minor importance in comparison with the weight of the service it had rendered.[8]

It was in the nineteenth century, when the claims accumulated in the two preceding centuries had to be adjusted in arbitrations and protracted negotiations, that the value of effectiveness as a principle of order and moderation became generally recognised. The Oregon controversy, the Louisiana dispute, the two British Guiana arbitrations,[9] and the Delagoa Bay arbitration of 1875,[10] offer instructive instances of constant and successful recourse to this principle of private law. Lord Stowell had, it seems, no hesitation in applying it to questions of territorial sovereignty. He says in his judgment in *The Fama*:[11] "All concur * * * in

[8] It must not be forgotten that the question of effectiveness is also in private law a question of fact and, frequently, of legal fiction.

[9] For reference to these disputes, as well as for a lucid exposition of the question, see Hyde, vol. i, §§ 99, 101. See also pp. 229, 230, 275, 276, *infra*.

[10] For details, see Lindley, *The Acquisition and Government of Backward Territory*, 1926, pp. 135–136, 140, 142.

[11] 5 C. Rob. at p. 115.

holding it to be a necessary principle of jurisprudence, that to complete the right of property, *the right to the thing* and *the possession of the thing* itself should be united * * * this is the general rule of property, and applies, I conceive, no less to the right of territory than to other rights." In the course of the negotiations, in 1824, between the United States and Russia with regard to certain disputed territories in North America, the United States contended that "the dominion cannot be acquired but by a real occupation and possession, and an intention (*animus*) to establish it is by no means sufficient." [12] Thirty years later Twiss, a fairly positive writer, disapproves of a claim to territory based on mere discovery by simply stating that the latter is not recognized either by Roman law or by Grotius or Pufendorf.[13] [14] The principle of effectiveness is firmly embedded in the international law of today, and the great majority of writers do not hesitate to use the terms *corpus* and *animus* for the purpose of explaining the rules of occupation as a title of acquisition of territorial sovereignty.

[12] Lindley, *op. cit.*, 141.

[13] Vol. i, p. 197; *The Oregon Question*, 1846, p. 156.

[14] The Duke of Wellington demanded repeatedly, in the course of his negotiations with Russia, to be supplied with the opinion of civilians on the legal questions connected with the claims of Russia. This, it seems, was done, for he writes in a note to Count Nesselrode, in October 1822, referring to the claims put forward in the Russian Ukase of 1821: "Thus, in opposition to the claim founded on discovery * * * we have the undisputable claim of occupancy and use for a series of years, which all the best writers on the law of nations admit is the best founded claim to a territory of this description" (Appendix to the *Case* of the United States in the Alaska Boundary arbitration, pp. 113–117).

We see thus that the analogy to private law with regard to original acquisition of territory is not due merely to the prevalence of the patrimonial conception. It has been called into life by the necessities of international intercourse, and it is owing to these necessities and to the identity of the legal relations that a close analogy of rules has been established. To reproach international publicists, as some authors do,[15] with having taken over purely private law, is to disregard the fact that many of its rules are now an integral part of the practice of States. Even dogmatic positivists admit that the private law origin of a particular rule does not constitute an obstacle to its recognition as a part of international law, provided that its adoption has been sanctioned by custom and actual observance.[16]

[15] Henrich, *op. cit.*, p. 121.

[16] See Strupp, *Delikt*, p. 57, n. 1.

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