In the United States Court of Appeals

FOR THE INDIAN TERRITORY.

SEPTEMBER TERM, 1903.

J. W. ZEVELY, ET AL., *Appellants,*
vs
W. G. WEIMER, ET AL., *Appellees.*
No. 531.

APPEAL FROM THE UNITED STATES COURT FOR THE CENTRAL DISTRICT, SITTING AT SOUTH McALESTER, INDIAN TERRITORY.

SUPPLEMENTAL BRIEF OF APPELLANTS.

P. L. SOPER,
United States Attorney, Northern District, Indian Territory, and of Counsel for Appellants.

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SEPTEMBER TERM, 1903.

NO. 531

J. W. Zevely, Acting United States Indian Inspector; J. Blair Shoenfelt, United States Indian Agent, Union Agency; John West, Alf. McKay, J. F. Wisdom and D. H. Kelsey,

Appellants.

vs.

W. G. Weimer, S. G. Holms, Townsend Wholesale Grocery Company, a corporation; Arcade Dry Goods Company, a corporation; Herman Levin, Stewart & Nuckols, a partnership; The P. A. Vance Grocery Company, a corporation; The Chaney-Becker Trading Company, a corporation; Ben Durfee & Co., a partnership; Star Grocery Company, a partnership; Armour Packing Company, a corporation; Swift & Company, a corporation, and Hammond Packing Company, a corporation,

Appellees.

APPEAL FROM THE UNITED STATES COURT FOR THE CENTRAL DISTRICT, SITTING AT SOUTH MCALESTER, INDIAN TERRITORY.

SUPPLEMENTAL BRIEF OF APPELLANTS.

The *nisi prius* court, in its written opinion, mak

ing the temporary injunction perpetual, considered the issues raised by the bill of complaint and demurrer under the following headings:

First. "Under the present conditions, and the law as it now exists, is the tax sought to be collected a legal one?"

Second. "Is it founded on an existing, valid statute?"

An analysis of the opinion shows that the decision of the court is based upon the following assumptions:

1st. That the sovereignty of the Choctaw Nation is derived from and dependent upon its occupancy.

2nd. That the Choctaw Nation has ceded its right of occupancy in the town site of South McAlester, thereby losing its sovereignty thereover.

3rd. That the exaction sought to be enforced is predicated entirely upon the sovereignty of the Choctaw Nation.

4th. That the sovereignty of the Choctaw Nation over said town site being lost, this law of the Choctaw Nation cannot be enforced therein.

We do not concede that any one of these assumptions is correct, but, on the contrary, submit:

1st. That the sovereignty of the Choctaw Nation is not derived from nor dependent upon its right of occupancy, but was granted expressly by the United States.

2nd. That the Choctaw Nation has not lost its sovereignty over the South McAlester town site.

3rd. That the so-called tax sought to be collected derives a sufficient sanction from the provissions of Article 39 of the treaty of 1866, and is not dependent alone upon the sovereignty of the Choctaw Nation.

4th. That Article 39 is still the law in force in the Choctaw Nation, not having been repealed, either directly or by implication.

As the present status of the Choctaw Nation is, to a certain extent, important in this matter, we quote at some length from various treaties between the United States and the Choctaw tribe.

An examination of these treaties reveals plainly:

That the sovereignty of the Choctaw Nation is not derived from or dependent upon its occupancy of the Choctaw country.

What is generally termed "original Indian sovereignty" is based upon the original Indian title to the land, derived from the original right of occupancy as an Indian tribe.

This original Indian sovereignty, depending

upon the occupant rights of the tribe, necessarily ceases when the the tribe cedes its occupant right.

The sovereignty of the Choctaw Nation is entirely different, and the distinction should be remembered.

The original Indian right of occupancy and Indian sovereignty over the present Choctaw Nation were ceded to the United States by the Quapaw Indians by treaty of August 24, 1818 (U. S. Stat. at L., p. 176), and by the Osage tribe of Indians by treaty of June 2, 1825. (7 U. S. Stat. at L., p. 240.)

After the purchase of the land now known as the Choctaw Nation, a right of self-government and sovereignty was ceded the Choctaw Nation by the United States. This sovereignty extended over all the land included within the present geographical limits of the Choctaw Nation.

Prior to the adoption of the Constitution, a treaty was made with the Choctaw Nation of Indians, in 1786, by the provisions of which the Choctaw Nation acknowledged and placed itself under the protection of the United States of America, "and of no other sovereign whatsoever."

By Article IV of that treaty it was provided, in substance, that if any citizen of the United States, or other person not being an Indian, should attempt

to settle upon any of the lands set apart for the Choctaw Nation said Nation should have the right to punish him or them as they chose.

In Article VIII of said treaty it was provided:

"The United States, in congress assembled, shall have the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs in such manner as they think proper." (See 7 U. S Stat. at L., p. 21.)

The territory now within the limits of the Choctaw Nation was ceded by France to the United States, by treaty, in 1803.

By the treaty of August 24, 1818, the Quapaw Indians relinquished their claim to a large area, including the lands now within the limits of the Cohctaw Nation.

By the treaty June 2, 1825, between the United States and the Osages (see Revision of Indian Treaties, page 577) the Osages relinquished all their right and title to the land now occupied by the Five Civilized Tribes.

Congress, by an Act approved May 28, 1830, (see 4 U. S. Stat. at L., p. 411,) provided for an exchange of lands with the Indians residing in any of the states or territories, and for their removal west of the Mississippi river, setting aside the land acquired from the Osages as a permanent reservation for the Indian tribes.

Section three of this Act authorizes the President to solemnly assure the tribe or nation with which the exchange was made that the United States would forever secure and guaranty to them and their heirs or successors the country so exchanged with them, and if they preferred, the United States would cause a patent or grant to be made and executed to them for the same, "Provided, always, that such lands shall revert to the United States if the Indians become extinct, or abandon the same."

By treaty made September 27, 1830, proclaimed February 24, 1831, (7 U. S. Stat. at L., p. 333,) it is provided:

> "Article II. The United States under a grant specially to be made by the President of the U. S. shall cause to be conveyed to the Choctaw Nation a tract of country west of the Mississippi river, in fee simple to them and their descendants, to inure to them while they shall exist as a nation and live on it, beginning near Fort Smith where the Arkansas boundary crosses the Arkansas river, running thence to the source of the Canadian fork, if in the limits of the United States, or to those limits; thence due south to Red river, and down Red river to the west boundary of the territory of Arkansas, thence north along that line to the beginning. The boundary of the same to be agreeable to the treaty made and concluded at Washington City in the year 1825. The grant to be executed so soon as the present treaty shall be ratified."

In Article IV of said treaty, it was provided:

"Article IV. The government and people of the United States are hereby obliged to secure to the said Choctaw Nation of Red People the jurisdiction and government of all the persons and property that may be within their limits west, so that no territory or state shall ever have a right to pass laws for the government of the Choctaw Nation of Red People and their descendants, and that no part of the land granted them shall ever be embraced in any territory or state; but the U. S. shall forever secure said Choctaw Nation from, and against, all laws except such as from time to time may be enacted in their own National councils, not inconsistent with the Constitution, treaties and laws of the United States; and except such as may, and which have been, enacted by Congress to the extent that Congress, under the Constitution, are required to exercise a legislation over Indian affairs. But the Choctaws, should this treaty be ratified, express a wish that Congress may grant to the Choctaws the right of punishing by their own laws any white man who shall come into their Nation and infringe any of their national regulations."

It was provided further, in Article X thereof, as follows:

"Article X. No person shall expose goods or other article for sale as a trader, without a written permit from the constituted authorities of the Nation, or authority of the laws of Congress of the U S. under penalty of forfeiting the articles, and the constituted authorities of the Nation shall grant no license except to such persons as reside in the Nation and are answerable to the laws of the Nation. The U. S. shall be particularly obliged to assist to prevent ardent spirits from being introduced into the Nation."

Under this latter treaty, a patent was issued to

the Choctaw Nation, on the 23rd day of March, 1842, conveying a tract of land the boundaries of which were the same as contained in said treaty of 1830.

By a treaty proclaimed March 24, 1837, the Choctaw Nation granted to the Chickasaw Nation the privilege of forming a district within the limits of their country. (See Revision of Indian Treaties, page 1046.)

Article VII of the treaty of 1855, (Revision of Indian Treaties, page 277,) provided:

> "Article VII. So far as may be compatible with the Constitution of the United States and the laws made in pursuance thereof, regulating trade and intercourse with the Indian Tribes, the Choctaws and Chickasaws shall be secured in the unrestricted right of self-government, and full jurisdiction over persons and property within their respective limits, excepting, however, all persons, with their property, who are not, by birth, adoption or otherwise citizens or members of either the Choctaw or Chickasaw tribe; and all persons, not being citizens or members of either tribe, found within their limits, shall be considered intruders, and be removed from and kept out of the same by the United States agent, assisted, if necessary, by the military, with the following exceptions, viz: Such individuals as are now, or may be, in the employment of the government, and their families; those peacefully traveling or temporarily sojourning in the country or trading therein, under license from the proper authority of the United States, and such as may be permitted by the Choctaws or Chickasaws, with the assent of the United States agent, to reside within their limits, without becoming citizens or members of either of said tribes."

By Article XIV of this treaty, the United States obligated themselves to protect the said Indians from domestic strife, from hostile invasion, and from aggression by other Indians and white persons not subject to their jurisdiction and laws.

In Article XVI it was further provided:

> "Article XVI. All persons licensed by the United States to trade with the Choctaws or Chickasaws shall be required to pay to the respective tribes a moderate annual compensation for the land and timber used by them, the amount of such compensation, in each case to be assessed by the proper authorities of said tribe, subject to the approval of the United States agent."

Notwithstanding that under the terms of the treaties with the United States and the law of Congress of July 5, 1862, the Choctaw Nation forfeited and lost all its right to annuity and lands, yet in 1866 the government of the United States made another treaty with the Choctaw and Chickasaw Nations, which was proclaimed July 10, 1866. (See Revision Indian Treaties, pp, 285–303.)

In Article VII, it is provided:

> "Article VII. The Choctaws and Chickasaws agree to such legislation as Congress and the President of the United States may deem necessary for the better administration of justice and

the protection of the rights of person and property within the Indian Territory. Provided, however, such legislation shall not in anywise interfere with or annul their present tribal organization, or their respective legislatures or judiciaries, or the rights, laws, privileges or customs of the Choctaw and Chickasaw Nations respectively."

In paragraph eight of Article VIII it is provided:

"8. The Choctaws and Chickasaws also agree that a court or courts may be established in said Territory with such jurisdiction and organization as Congress may prescribe. Provided, That the same shall not interfere with the local judiciary of either of said nations."

By Article X it was provided:

"Article X. The United States re-affirms all obligations arising out of treaty stipulations or acts of legislation with regard to the Choctaw and Chickasaw Nations, entered into prior to the late rebellion, and in force at that time, not inconsistent herewith; and further agrees to renew the payment of all annuities and other moneys accruing under such treaty stipulations and acts of legislation, from and after the close of the fiscal year ending on the thirtieth of June, in the year eighteen hundred and sixty-six."

In Article XXXIX it was provided:

"Article 39. No person shall expose goods or other articles for sale as a trader without a permit of the legislative authorities of the nation he may propose to trade in, but no license shall be required to authorize any member of the Choctaw or Chickasaw Nations to trade in the Choctaw or Chickasaw country who is authorized by the proper authority of the nation, nor to authorize Choctaws or Chickasaws to sell flour, meal,

meat, fruit and other provisions, stock, wagons, agricultural implements or tools brought from the United States into the said country."

In Article XLV it was provided:

"Article 45. All the rights, privileges and immunities heretofore possessed by said Nations or individuals thereof, or to which they were entitled under the treaties and legislation heretofore made and had in connection with them shall be, and are hereby declared to be, in full force, so far as they are consistent with the provisions of this treaty."

ARTICLE 39 OF THE TREATY OF 1866 HAS NOT BEEN REPEALED.

It cannot be urged that recent legislation or treaty has directly repealed this Article 39. Nor do we believe that it has been repealed by implication.

Repeals by implication are not favored by the law.

The Supreme Court of the United States, in the case of Cope vs. Cope, 137 U. S. 686, held that whilst former statutes may be repealed or annulled by implication through the enactment of subsequent legislation, the doctrine is not a favored one, and, therefore, to work such repeal or annulment, the repugnancy between the one and the other, in relation to a particular subject-matter, must be so clear as to admit of no other reasonable construction.

As is said in IX of Opinions of Attorneys General, pages 46 and 47:

> "It must be carefully recollected that implied repeals are never to be favored. It is so easy for the legislature, in making *one law* to say that *another law* on the same subject is repealed, and when it is *meant*, it is so likely to be said, that we *never presume it when it is not said*, unless the two laws are in such palpable conflict that both cannot be executed."

See, also, ex-parte Crow Dog, 109 U. S. 556.
State vs. Stoll, 17 Wall, 425.
Tobacco Cases, 11 Wall, 616.

In the case of Bates vs. Clark, 95 U. S. 206, cited by the *nisi prius* court, the Supreme Court of the United States says:

> "It follows from this that all the country described by the act of 1834 as Indian country remains Indian country so long as the Indians retain their original title to the soil, and ceases to be Indian country whenever they lost that title, *in the absence of any different provision by treaty or act of Congress.*"

Does not the Atoka agreement clearly show the intent of Congress that conditions should remain as they were except as therein modified?

If it were not the intention of Congress that Article 39 of the treaty of 1866, and the Choctaw act passed in accordance therewith, concerning traders (which is the only issue involved in this case, notwithstanding the fact that the trial court has quoted the entire act, relating to many matters not pertinent to this case,) should remain in force throughout the Choctaw Nation would not Congress have said that when the title passed non-citizens should be freed from its provisions, and would not the same have been included in the Atoka agreement?

The continuance of the tribal government, and the failure to make an express provision excepting traders in the Choctaw Nation from such payments, are the strongest evidence that conditions should remain as they were while the tribal governments continue in force.

In the case of Chicago, Rock Island & Pacific Railway company vs. McGlinn, 114 U. S. 542, the Supreme Court of the United States, in the syllabus, says:

> "The general principle that when political jurisdiction and legislative power over a territory are transferred from one sovereign to another, the municipal laws of the territory continue in force until abrogated by the new sovereign, is applicable—as to territory owned by the United States, the exclusive jurisdiction of which is ceded to them by a state in a manner not provided for by the Constitution—to so much thereof as is not used by the United States for its forts, buildings and other needful public purposes."

See, also, American Insurance Co. vs. Carter, 1 Peters, 542.

In these cases political jurisdiction and legislative power were ceded in express terms, and yet the

municipal laws theretofore in effect prevailed "until abrogated by the new sovereign."

No such condition as that exists in the Choctaw Nation. There is in the Choctaw Nation the same as in the state of Missouri, a dual citizenship, always recognized, and a citizen of the Choctaw Nation who may purchase a town lot in an incorporated town in the Choctaw Nation could not be said by that act to have transferred his allegiance from the Choctaw Nation to the United States, to the exclusion of the Choctaw Nation.

The condition would have been just as effective if Article 39 of the treaty of 1866 had provided that no person should expose any goods for sale in the Choctaw and Chichasaw Nations withcut a permit from the President of the United States.

See XXII Opinions of Attorneys General, page 215.

The sovereignty of the Choctaw Nation has always been recognized within certain boundaries. Is the continued existence of that sovereignty rendered impossible by the establishment of townsites?

Town governments were established in the Cherokee Nation where towns had been surveyed and platted into lots, blocks, streets and alleys by the Cherokee Nation, prior to the Curtis Act, and any

subsequent treaty between the Cherokee Nation and the United States. The condition is not irreconcilable since the passage of the treaty, and it would seem as if the non-citizen owners of lots in the Choctaw Nation would bear practically the same relation to the Choctaw Nation, where it acts under authority from the United States, as the citizens of an incorporated town in Missouri do to the state of Missouri and the government of the United States.

There is no more assertion of exclusive sovereignty in authorizing citizens of the United States or citizens of the United States and Indians, to form a local town government and purchase town lots, with the consent of the tribe, given by its agreement, than in setting up courts throughout the Choctaw Nation. Non-citizens within a town are in possession of town lots solely by the consent and agreement of the Indian Nation, and there would seem to be no reason why they should be less subject to Indian authority than individuals permitted to occupy other parts of the tribal territory.

Recent legislation, from which we quote at length, strengthens the contention that Congress has not intended to repeal this prohibition.

The Acts of Congress of March 1, 1889, May 2, 1890, and March 1, 1895, establishing and relating to

In the Act of Congress known as the "Curtis Act," approved June 28, 1898, the provisions concerning municipalities, theretofore put in force in the Indian Territory by the Act of May 2, 1890, was extended, and in section fourteen it is provided:

> "And all inhabitants of such cities or towns, without regard to race, shall be subject to all laws and ordinances of such city or town governments, and shall have equal rights, privileges and protection therein."

Section twenty-six of this Act provided:

> "That on and after the passage of this Act the laws of the various tribes or nations of Indians shall not be enforced at law or in equity by the courts of the United States in the Indian Territory."

It might be inferred from this section of the Act that the courts of the United States had jurisdiction prior to that time to enforce the Indian laws; but this was never true of any penal law, and the courts in the Indian Territory only enforced contracts made in accordance with the law of the Nation between an Indian and a non-citizen upon the principle of comity, and never had jurisdiction to pass upon any civil law where the action was between two citizens of the same nation.

The reason for the passage of this section is well known in the Indian Territory.

Section twenty-eight of the "Curtis Act" declared that all Indian courts in the Indian Territory should be abolished on the first day of July, 1898: "Provided, That this section shall not be in force as to the Chickasaw, Choctaw and Creek tribes or nations until the first day of October, eighteen hundred and ninety-eight."

What is known as the "Atoka Agreement" is found in this Act, being an agreement between the Choctaw and Chickasaw Nations and the United States. In it a townsite commission was provided for, whose duties it should be to lay out town sites, have correct and proper plats of each town made and file one in the Clerk's office of the United States District Court in the district where the town was located and one with the Principal Chief or Governor of the Nation in which the town was located and one with the Secretary of the Interior. It provided how the lots should be sold, and among other things it was provided:

> "No tax shall be assessed by any town government against any town lot unsold by the commission, and no tax levied against a lot sold, as herein provided, shall constitute a lien on same till the purchase price thereof has been fully paid to the nation. * * *.
>
> "That no law or ordinance shall be passed by any town which interferes with the enforcement of or is in conflict with the laws of the United

States in force in said Territory, and all persons in such towns shall be subject to said laws, and the United States agrees to maintain strict laws in the *territory* of the Choctaw and Chickasaw tribes against the introduction, sale, barter or giving away of liquors and intoxicants of any kind or quality."

It is important to notice these two provisions, for the first recognized the existence of a town government prior to the passage of the "Curtis bill," or even its inception, as this Agreement was entered into on the 23rd day of April, 1897.

It is important, also, to notice the second paragraph, which provides that "all persons in such towns shall be subject to the laws of the United States in force in said Territory," and the language of the Act itself construes every town site as being within the territory of the Choctaw and Chickasaw tribes.

The jurisdiction of certain offenses was conferred upon the United States courts in the Chickasaw and Choctaw Nations.

It was further provided:

"In view of the modification of legislative authorities and judicial jurisdiction herein provided, and the necessity of the continuance of the tribal governments so modified, in order to carry out the requirements of this agreement, that the same shall continue for the period of eight years from the fourth day of March, eighteen hundred and ninety-eight. This stipulation is made in the belief that the tribal governments so modified will prove so satisfactory that there will be no need or desire for further change till the lands now occupied by the Five Civilized Tribes shall, in the opinion of Congress, be prepared for admission as a State of the Union. But this provision shall not be construed to be in any respect an abdication by Congress of power at any time to make needful rules and regulations respecting said tribes."

The Supplemental Agreement, of July 1, 1902, between the Choctaw and Chickasaw Nations and the United States in no manner affects the issue raised in this case. But it does provide that when the full amount has been paid for any town lot the chief executives of both Nations shall execute patent, conveying all right, title and interest of the Choctaw and Chickasaw tribes in and to said lot. (32 U. S. Stat. at L p. 653.)

By Act of Congress, approved May 27, 1902, (32 Stat. at L. 259,) the Secretary of the Interior was forbidden to remove any person from the Indian Territory "who is in lawful possession of any lots or parcels of land in any town or city of the Indian Territory which has been designated as a town site under existing laws and treaties."

The Choctaw Nation is a political entity and may, by permission of Congress, sue and be sued. It may be classed as a dependent nation.

Cherokee Nation v. Railroad Co. 135 U. S. 641.
Cherokee Nation v. Hitchcock, 187 U. S.
Choctaw Nation v. United States, 119, U. S. 27.

The treaty of 1786 gave to the United States of America the right to enact such laws as it might deem proper relating to the affairs of the Choctaw people.

The original Indian title, to which the court refers, was extinguished by the Act of Congress of 1825, hereinbefore set forth.

The Choctaw Nation took their lands in the Indian Territory by purchase, and not under an occupancy right.

Holden v. Joy, 17 Wallace, 211.

By the treaty of 1830, before quoted, a portion of the land set aside and reserved for Indian tribes was guaranteed to the Choctaw Nation, and for which a patent was issued. So that under the Intercourse Act, approved June 30, 1834, (4 Stat. at L. 729,) and under section 2258 of the R. S. U. S., this territory became an Indian reservation, or Indian country.

In Caldwell v. Robinson, 59 Fed. 653, the court held:

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

See United States v. Martin, 14 Fed. 823.
XVIII Opinions of Attorneys General, p. 237.
United States v. Leathers, 6 Sawyer, 17.
United States v. Payne, 8 Fed. 883-887.
Cherokee Nation v. Journeycake, 155 U. S. 196.

THE PROHIBITION UPON TRADERS IN THE CHOCTAW NATION IS IMPOSED BY A LAW OF THE UNITED STATES.

Article 39 of the treaty of 1866, hereinbefore quoted, absolutely prohibits any person from exposing goods or other articles for sale and trade without a permit from the legislative authorities of the Nation he may propose to trade in.

From that date it became the supreme law of the land that no person could engage in business as a trader in the Choctaw Nation without its consent.

A treaty with an Indian tribe, made under the

authority of the United States, becomes the supreme law of the land, and the courts can no more go behind it for the purpose of annulling its effect and operation than they can behind an Act of Congress.

Fellows vs. Blacksmith, 19 How. 372.
Wilson vs. Mason, 1 Cranch, 103.
United States vs. Arredono, 6 Peters, 735.
United States vs. Jeheil Brooks, et al, 10 How. 442.
Foster vs. Neilson, 2 Peters, 307.

A treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty.

Foster vs. Neilson, 2 Peters, 253.
Taylor vs. Martin, 2 Curtis, 454.
Thomas vs. Hay, 169 U. S. 264.
Cherokee Tobacco Cases, 11 Wall. 616.
Stephens vs. Cherokee Nation, 174 U. S. 445.
Head Money Cases, 112 U. S. 580.

It would seem that such a provision hardly needed any interpretation, but if so the Supreme Court of the United States in the case of United States vs. Choctaw, etc., Nations, 179 U. S. 531-532, has laid down the rule, that "all treaties with an Indian tribe must be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by an Indian."

The provisions of Article 39 impose a condition precedent upon any non-citizen who desires to carry on the business of a trader within the geographical limits of the Choctaw Nation. As the *nisi prius* court in this case has properly said:

> "If they grant the permit, they may unquestionably impose conditions, and the condition that they shall pay an occupation tax, or a tax upon the cost value of the goods they may introduce for sale, is not unlawful. They have the power to say, 'We will not permit traders to expose their goods for sale at all, or we will permit it to be done on conditions.' They have the power to make the tax as low or as high as they please, even to the exclusion of all trade. * * * Of course, this is not probable, but it is possible."

Inasmuch as no law of the Choctaw Nation can now become effective without the approval of the President of the United States, we apprehend that the specter conjured by the learned judge is purely a creature of fancy.

The court treats the action by the Choctaw Nation as a tax, and in his opinion quotes authorities concerning the power of taxation.

While we find no fault with the authorities quoted, we contend that the taxation sought to be collected is not a tax predicated upon the sovereign power of the Choctaw Nation. The argument of the learned *nisi prius* judge would be more potent if

Article 39 of the treaty of 1866 had never become the law. The United States is primarily responsible for this exaction upon traders, not the Choctaw Nation.

In the case of Morris, et al., vs. Hitchcock, et al, decided April 7, 1903, by the Court of Appeals of the District of Columbia, which was a case arising from the imposition of a permit fee by the Chickasaw Nation of twenty-five cents per head on cattle introduced or held by non-citizens within the limits of Chickasaw Nation, the court said:

> "We are inclined to the view that the charge imposed by the Indian legislature is to be regarded as a condition of the admission of cattle to graze upon Indian lands by way of a license fee or tax, and not as of the nature of a regular tax upon property of the kind. This intention is indicated in the act, which does not provide for the seizure and sale of the cattle for the tax, but merely for their removal; that is to say, the withdrawal of permission as the sole condition of nonpayment."

This court, in the case of Maxey vs. Wright, 54 S. W. 807, has held that, under a statute similar to article 7 of the Choctaw-Chickasaw treaty of 1855, the nation had the right to impose the condition and the Department of the Interior had the right to remove the individual as an intruder.

The *nisi prius* judge, in making the injunction in this case perpetual, conceded the power of the Choctaw Nation to pass the act and the government to impose it, under article 39 of the treaty, but maintains that it has been repealed, because it is claimed that the townsite of South McAlester has been segregated from the public domain of the Choctaw Nation, and all the right, title and interest of the Choctaw and Chickasaw Nations in and to the lots therein have been conveyed by patent to complainants, or a portion of them.

The court proceeded upon the assumption that by the 14th section of the "Curtis Act," (30 Stat. at L. 499,) and by the provisions of the Atoka agreement the possibility of any such condition was not considered to exist by the buyer or seller; that is, that the non-citizens in said incorporated towns would be amenable to article 39 of the treaty of 1866.

The court proceeded upon the assumption that the town lots were conveyed only to non-citizens, whereas it is a notorious fact that the largest property owner in South McAlester is a citizen of the Choctaw Nation.

The provision of section fourteen of the "Curtis Act," hereinbefore quoted, applies solely to the town governments, wherein the law says that "all inhabitants of such cities and towns, without regard to race, shall be subject to all laws and ordinances of such

city or town governments, and shall have equal rights, privileges and protection therein."

This provision certainly cannot relate to any other enactment than a municipal regulation.

The Act of Congress of May 2, 1890, adopted and put in force in the Indian Territory the Arkansas law upon municipal corporations, and such corporations were in existence and doing business in the Indian Territory long before the passage of the Curtis Act. Their authority was limited, it is true. But the Atoka Agreement, which was made on April 23, 1897, recognizes the existence of these municipal corporations, in the two paragraphs heretofore quoted. The very Agreement itself, in the last paragraph quoted, provides:

> "That no law or ordinance shall be passed by any town which interferes with the enforcement of or is in conflict with the laws of the United States in force in said Territory, *and all persons in such towns shall be subject to said laws.*"

Said laws! What laws? Why the answer is patent: The "laws of the United States in force in said Territory."

In Maxey v. Wright, 54 S. W. 807 this court held, in regard to section 15 of the Creek Treaty of 1856, that the requirement was valid. Section 7 of the Choctaw-Chickasaw Treaty is substantially the

same, and the position of appellants herein is much stronger, because that section is reinforced by the provisions of Article 39 of the Treaty of 1866, which is *not* in the Creek Treaty of 1856.

It is admitted by the *nisi prius* court that this was a valid requirement prior to the issuance of patents to town lots in South McAlester. It is presumed that this charge was theretofore paid by all non-citizen traders in the Choctaw Nation. The provision of the Atoka Agreement last quoted shows conclusively that the government as modified was to be continued until 1906.

The reasoning of the Supreme Court, in United States v. Halliday, 3 Wall. 415, would seem analogous to the case at bar.

Is not Article 39 of the Treaty of 1866 the supreme law of the land, a "law of the United States in force in said Territory,"and as much in force as section 7 of the Treaty of 1855 between the Choctaw and Chickasaw Nations and the United States, referred to by the Court of Appeals for the Indian Territory in its opinion in Maxey v. Wright.

Can it be said that the courts of the Choctaw Nation have lost jurisdiction of offenses committed by one citizen upon another citizen of the Choctaw Nation within the limits of the incorporated town of South McAlester?

The courts of the United States in the Central District of the Indian Territory have no jurisdiction over controversies between citizens of the Choctaw Nation, or crimes committed by one citizen against another, except in such cases where the Atoka agreement conferred it.

If the Choctaw Nation is deprived of all jurisdiction within the limits of the town of South McAlester, then it must necessarily follow that a robbery or burglary committed therein by one citizen of the Choctaw Nation upon another cannot be punished.

Certainly this was not the intention of Congress, and the burden lies upon the appellees in this case to establish the fact that it was the intention of Congress to take the town sites out of all jurisdiction of the Choctaw law and the provisions of Article 39, supra, upon which, in this case, its efficacy is based.

The Atoka agreement provides that the tribal governments shall continue to exist for a period of eight years from the fourth day of March, 1898. The very previous section of this treaty clearly establishes what the intent of Congress was, wherein it is provided:

> "It is further provided that no act, ordinance or resolution of the council of either the Choctaw or Chickasaw tribes, in any manner affecting the land of the tribe, or of the individuals. after

> allotment, or the moneys or other property of the tribe or citizens thereof (except appropriations for the regular and necessary expenses of the government of the respective tribes,) or the rights of any person to employ any kind of labor, or the rights of any persons who have taken or may take the oath of allegiance to the United States, shall be of any validity until approved by the President of the United States. When such acts, ordinances, or resolutions passed by the council of either of said tribes shall be approved by the governor thereof, then it shall be the duty of the national secretary of said tribe to forward them to the President of the United States, duly certified and sealed, who shall, within thirty days after their reception, approve or disapprove the same. Said acts, ordinances or resolutions, when so approved, shall be published in at least two newspapers having a bona fide circulation in the tribe to be affected thereby, and when disapproved shall be returned to the tribe enacting the same."

The trader in South McAlester does not deal with only citizens within the limits of the incorporated town, but his trade is drawn from all citizens of the Choctaw Nation within and beyond trading distance and outside of the limits of the incorporated town.

THE EXECUTIVE DEPARTMENT OF THE UNITED STATES HAS AUTHORITY TO PROHIBIT TRADERS FROM VIOLATING THE LAW.

The right of the Executive department to pre-

vent the violation of the law under Article 39 of the Treaty of 1866 and the Act of the Choctaw Nation founded thereon has not been seriously questioned until this litigation arose.

Can there be any doubt of the authority of the department prior to the recent legislation to act in the premises?

The Choctaw authorities never had any authority to enforce Article 39 of the Treaty of 1866. If any trader violated the law, all the Choctaw authorities could do was to report him to the Indian Agent. The Executive Department then stepped in and put an end to the violation.

The Constitution of the United States makes it the duty of the Executive to see that all laws are enforced.

The supreme law of the land, as expressed in Article 39 of the Treaty of 1866, says: that no person other than a citizen in the Choctaw and Chickasaw Nations shall expose goods for sale, without the consent of the Choctaw Nation in the Choctaw country; that is, within its geographical boundaries. Is that provision meaningless? The duty is imposed upon the Executive to see that the law is obeyed.

From the infancy of our government, the Executive department has had complete charge and con-

trol over affairs pertaining to the Indians, and courts very seldom attempt to interfere. Extensive power is given the President and the Department of the Interior, whose acts are the acts of the President, in all matters relating to Indian affairs.

See R. S. U. S. sections 158, 161, 462, 465, 2058, 2045, 2114:
See, also, on this doctrine, XIX Opinions of of Attorneys General, 519.
VI Opinions of Attornys General, page 10.
United States v. Mullins, 71 Fed. 682.
United States v. Halliday, 3 Wall. 416.
Robertson v. Downing, 127 U. S. 607.
In re Nagle, 135 U. S. 1.
United States v. Claypox, 35 Fed. 575.
United States v. McDaniels, 7 Pet. 13.
Wells v. Nickles, 104 U. S. 444.
XVIII Opinions of Attorneys General, 235-436.

This is especially upheld in a case from the Choctaw country, in Echols v. Tate, 53 Ark. 12.

See, also, United States v. Leathers, 6 Saw. 17.
Grisar v. McDowell, 6 Wall. 363.
United States v. Boyd, 68 Fed. 577.
United States v. Flournoy, L. S. & R. E. Co., 59 Fed. 886; 71 Fed. 576.
Crabtree v. Madden, 54 Fed. 426.
Maxey v. Wright, 54 S. W. 807.
Adams v. Freeman, 50 Pac. 135.
United States v. 43 Gallons of Whiskey, 93 U. S. 194

Section 2114 R. S. U. S. is as follows:

> "The President is authorized to exercise general superintendence and care over any Indian tribe or nation which was removed upon an exchange of territory under authority of the Act of May twenty-eighth, eighteen hundred and thirty, "to provide for an exchange of lands with the Indians residing in any of the States or Territories, and for their removal west of the Mississippi," and to cause such tribe or nation to be protected, at their new residence, against all interruption or disturbance from any other tribe or nation of Indians, or from any other person or persons whatever."

The closing of a store is but a method of preventing a violation of the treaty—stopping the unlawful act of trading without complying with the terms thereof. It is not a confiscation of the goods, nor even a seizure for the purpose of removal, such as is upheld in Echols v. Tate, 53 Ark. 12; Morris v. Hitchcock, Court of Appeals, District of Columbia.

Under section 2058 R. S. U. S., the Indian Agent is directed to superintend the intercourse with Indians, agreeably to law, and execute and perform such regulations and duties, not inconsistent with law, as may be prescribed by the President, the Secretary of the Interior, the Commissioner of Indian Affairs, or the superintendent of Indian affairs.

"The courts will take judicial knowledge of the rules and regulations of the Executive of the government," see Caha v. United States 152 U. S. 221.

Under the provisions of Section 2058 R. S. U. S., the Secretary of the Interior promulgated the following rule:

> "Sec. 558. Agents are enjoined to observe with care the laws, and the rules and regulations, thereunder, governing the business of all licensed traders, and to see that they are strictly complied with. If the persons carry on trade within a reservation with the Indians, without a license, or if persons who have received license and neglecting to renew the same, continue to trade after the expiration of the license, agents will close the stores of such traders, and immediately report the facts to the Indian Office, in order that legal steps may be taken to enforce the penalties of the law. Violations of the foregoing regulations in other respects must also be at once reported to the Indian Office by the agent in charge of the reservation where the violations occur."

The regulations under which appellants in this case are acting are set forth in the exhibits to the demurrer.

That the order of the Department of the Interior in this matter is a legal writ or process, and not in violation of Article V of the Constitution of the United States, see United States v. Mullin, 71 U. S. 682.

In Kloski v. Ellis, being a decision by the Honorable Judge of the United States Court for the Southern District of the Indian Territory, in a case

arising at Ardmore upon the question of the right of the Secretary to close a store, the court held:

> "The Secretary by his regulations has directed that 'Agents will close the stores' of traders without license, and section 39 of the treaty of 1866 provided that 'No person shall expose goods or other articles for sale as a trader without a permit.' It thus clearly seems to me that the foregoing Acts of Congress and regulations of the Secretary of the Interior and treaty of 1866, are strictly in compliance with and fully authorized by the constitutional provision to regulate commerce with the Indian tribes."

In this case, a court with equal authority of that of the Central District of the Indian Territory dissolved a temporary injunction and dismissed the bill; to which action of the court, so far as we are advised, no appeal has been taken.

In Pilgrim v. Beck, 69 Fed. 898, Judge Shiras says:

> "The management and control of these lands for the benefit of the Indian is in the hands of the Department of the Interior, and it is for the officials of that department to give weight to any equities or considerations of hardships that may exist in favor of any of the complainants herein. The Indian Agent, acting under the instructions of the department, is charged with the duty of protecting the interests of the Indians, *and it is not for the court to interfere with his action on the ground of hardship to the complainants.*"

It was maintained in the case of Buster & Jones v. Wright that the remedy must be pointed out by

law; otherwise, the Secretary of the Interior would have no authority to act. Such a position can hardly be tenable. Upon general principles and particularly when the relations of the government to the Indian Nations are considered, sections 2114 and 2058 R. S. U. S. are broad in their scope, and any regulation adopted in carrying out the intent of Congress under these sections, to affect the prohibition of the continuance of any unlawful act as declared in Article 39 of the Treaty of 1866, should be sustained.

The laws concerning trading in the Indian Territory have not been repealed, and the general power of guardianship as developed and exercised for a century still exists.

One of the greatest Attorneys General has said:

> "It is impossible for Congress to foresee, and circumstantially provide for all the possible future contingencies of executive business, either in respect to the business itself or the manner of conducting it. A necessary discretion must exist in thenature of things somewhere as to all such matters. And that ultimate discretion, when the law does not speak, must reside, as to all executive matters. with the President, who has the power to appoint and remove, and whose duty it is to take care that the laws be faithfully executed. Where the laws define what is to be done by a given head of department, and how he is to do it, there the President's discretion stops; but if the law requires an executive act to be performed, with-

out saying how or by whom, it must be for him to supply the discretion, in virtue of his powers under the Constitution, he remaining subject always to that, to the analogies of statute, and to the general rules of law and of right. And this view of the question has been followed, uniformly, in the practical administration of the government."

In IX Opinions of Attorneys General, Attorney General J. S. Black says: (Page 519.)

"The acts of Congress sometimes give the President a broad discretion in the use of the means by which they are to be executed, and sometimes limit his power so that he can exercise it only in a certain prescribed manner. Where the law directs a thing to be done without saying how, that implies the power to use such means as may be necessary and proper to accomplish the end of the legislature. But where the mode of performing a duty is pointed out by statute, that is the exclusive mode, and no other can be followed. The United States have no common law to fall back upon when the written law is defective. If, therefore, an Act of Congress declares that a certain thing shall be done by a particular officer, it cannot be done by a different officer. The agency which the law furnishes for its own execution must be used to the exclusion of all others."

Can it be possible, where the political department of the government has declared the doing of an act, without complying with the condition precedent, unlawful, and that condition has not been complied with, that a court can, by injunction, prevent the Executive from seeing that the law is obeyed,

where the provisions of the requirement under the act are just and reasonable and go only to the extent of fulfilling the duty imposed upon the Executive by the Constitution of the United States ?

As is said in the opinion of the Attorney General, hereinbefore quoted, if the provision is *just and reasonable*,—and the distinction between the provisions of a treaty and an act of Congress must be borne in mind, each being equally the supreme law of the land, and each repealing the other,—the question of hardships and questions of policy are not for the courts, but for Congress, which alone can remedy the hardships, if any, that may be imposod by the authority of the United States.

The rule is well established that courts follow the action of the political departments in Indian Affairs.

United States v. Holliday, 3 Wall. 407.
United States v. Boyd, 68 Fed. 590.
Pilgrim v. Beck, 69 Fed. 898.

The appellants in this case were acting strictly within the line of their official duty, in the execution of a supreme law of the land, made by "authority of the United States."

It would seem that good faith requires that the President, as guardian, and the Indians, should be

wholly exempt until 1906, except so far as Congress has distinctly otherwise provided, from interference by the courts through writs, remedies and proceedings, originally adopted from Mansfield's Digest and put in force in the Indian Territory to be used by white people against each other.

From the foregoing, it is evident:

First, that it was not the intention of Congress, or the understanding of the Indians under the Atoka agreement, in the construction of which every doubt should be resolved in their favor, that the town sites were to be taken out of the jurisdiction of the laws which had theretofore prevailed in them.

Second. That the question involved in this case is one not arising from the sovereign power of taxation, but a right in the Choctaw Nation to impose the condition, founded upon the supreme law of the land, which has not been repealed.

Third. That Article 39 of the Treaty of 1866 is a valid and existing statute and has never been repealed, and that the *nisi prius* court erred in holding otherwise.

Fourth. That the sovereignty of the Choctaw Nation is not dependent, nor derived, from its right of occupancy; but in the land known as the Choctaw

Nation the extent of the sovereignty of the Choctaw Nation is fixed by Congress.

Fifth. That it is the duty of the President to see that the laws of the United States are faithfully executed, and that under the laws and authorities hereinbefore cited, the Executive has a legal right to fix the means to prevent the violation of this supreme law of the land.

Sixth. That the plaintiffs in this case are violating the law when they seek to sell goods without permission required by the law. They do not come into court with clean hands, and the injunctive relief sought should not be granted, for they are asking the judicial department of the government to permit them to do that which the United States, in a treaty, has declared to be unlawful.

The appellees have no standing in a court of equity and clearly come within the rule laid down in Beck vs. Flournoy, L. S. & R. E. Co., 65 Fed. 38, wherein the court says:

> "It is not within the legitimate province of a court of equity to assist a wrong-doer, like the appellee, in retaining the possession of property which it has acquired in open violation of an Act of Congress, when the party against whom relief is sought is an officer of the United States, who is acting under the direction and control of the Secretary of the Interior."

This brief is respectfully submitted as simply supplementary to the brief filed by the District Attorney of the Central District of the Indian Territory and Mansfield, McMurray & Cornish, General Counsel for the Choctaw and Chickasaw Nations.

All of which is respectfully submitted.

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