IN THE

UNITED STATES COURT OF APPEALS

FOR THE INDIAN TERRITORY.

JUNE TERM, 1904.

J. W. ZEVELY ET AL., Apellants,

vs.

W. G. WEIMER ET AL., Appellees.

APPEAL FROM THE UNITED STATES COURT FOR THE CENTRAL DISTRICT, SITTING AT SOUTH M'ALESTER, I. T.

BRIEF OF APPELLANTS.

J. H. WILKINS,
United States District Attorney,
Central District, Indian Territory.
MANSFIELD, McMURRAY & CORNISH,
Attorneys for Appellants.

IN THE

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JUNE TERM, 1904.

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. Holmes; 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; Cudahy Packing Company, a corporation; Swift & Company, a corporation, and Hammond Packing Company, a corporation, Appellee.

APPEAL FROM THE UNITED STATES COURT FOR THE CENTRAL DISTRICT, SITTING AT SOUTH M'ALESTER, I. T.

BRIEF OF APPELLANTS.

This is a Bill in Equity brought by the appellees to en-

join J. W. Zevely, Acting United States Indian Inspector, J. Blair Shoenfelt, United States Indian Agent, and other officers of the United States from carrying out an order of the Secretary of the Interior to close the places of business of plaintiffs, in the City of South McAlester, because said business was carried on without the permit of the legislative authority of the Choctaw Nation.

This action by the Executive Department of the United States is based upon the following provision of Article XXXIX. of the Treaty of 1866, between the Choctaws and Chickasaws and the United States, to-wit:

"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," etc.

And an act of the Choctaw Council, approved Oct. 30, 1888, which provides "that persons wishing to obtain such permit shall make application in writing to the Principal Chief, setting forth the county and place—signed by five (5) citizens of the county * * * and shall during the succeeding quarter pay to the district collector a compensation for the privilege * * * one and one-half per centum on the original cost and value of all such goods introduced for sale for and during the quarter next preceding * * * the introduction."

The bill challenges the right of the Choctaw Nation to require such a permit, and the right of the Interior Department to enforce the provisions of the Treaty and Act above quoted, and prays that the defendants be perpetually enjoined from so doing.

To this bill the defendants who are officers of the United States have demurred, and the defendant I. S. Lowery has answered that he is a member of the Choctaw Nation, and permit collector of said Nation, that he has not

tried to close any of said stores, but has only demanded the sums due the Choctaw Nation from the plaintiffs, and reported their refusal to pay the same to the proper authorities.

The demurrer has attached to it as exhibits the orders of the Interior Department, under which the defendants acted, and is as follows, omitting the exhibits:

In the United States Court for the Central District of the Indian Territory, at South McAlester.

W. G. Weimer et al., Plaintiffs,

vs.

J. W. Zevely et al., Defendants.

Demurrer.

Comes now the defendants, 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, and demur to the complaint of the plaintiffs and for grounds therefor state:

First: Because the bill in equity of the plaintiffs filed in this cause does not state facts sufficient to entitle them to the relief prayed for, and because the same states no cause of action.

Second: Because the defendants committed the acts complained of in their capacities as officials as stated in said bill, acting under the authority conferred on them by law as such officials and the direct orders of their superiors in office whom they are bound to obey; that the defendants in all the acts complained of were lawfully acting within the scope of the authority conferred upon them by law and their superiors in office as a co-ordinate branch of the government acting within the legitimate scope of its authority, that said action is in conformity with the long

established construction of the laws of the United States relating to Indian affairs and the treaties entered into between the United States and the Choctaw and Chickasaw Nations or Tribes of Indians. That in order that the authority under which defendants have acted may fully appear, the following letters and communications are hereto attached as exhibits, to-wit:

Marked "A." A letter from the office of the United States Indian Inspector to the United States Indian Agent, dated April 18th, 1903, advising him of the ruling of the Honorable Secretary of the Interior that stores should be closed for non-compliance with the tribal laws.

Marked "B." A letter from the United States Indian Inspector to the United States Indian Agent, dated April 20th, 1903, instructing him to personally notify certain persons and firms reported by the Principal Chief as having failed to pay the tribal tax.

Marked "C." A letter from the United States Indian Inspector to the United States Indian Agent, dated May 4th, 1903, transmitting report of the Principal Chief of the Choctaw Nation that certain persons and firms named still refused to pay the tax demanded and instructing him to close the places of business of such persons and companies unless such tax was paid.

Marked "D." A copy of an order of the United States Indian Agent, dated May 5th, 1903, to the Captain of the Indian Police directing him to close the places named.

Marked "E." A copy of notice served by the United States Indian Agent upon all persons named.

Third: Because, the premises considered, the court has no jurisdiction or power to control by injunction or otherwise the discretion vested by law in the defendants as a

part of a co-ordinate branch of the government, acting within the scope of its authority.

J. H. WILKINS,
United States District Attorney,
for the Defendants.
MANSFIELD, McMURRAY & CORNISH,
Attorneys for the Choctaw Nation.

The court below held that the segregation and sale of townsites under the terms of the Atoka Agreement had the effect of removing such townsites from the jurisdiction of the Interior Department as Indian country, and that the collection of Indian permit or tax therein was unauthorized by law, and granted a perpetual writ of injunction against appellants forbidding them from closing the stores of the appellees in the City of South McAlester for failure to comply with the tribal laws, or from any way interfering with the business of appellees.

ASSIGNMENT OF ERROR.

I.

The court erred in overruling the demurrer filed by appellants.

II.

The court erred in rendering judgment against appellants, perpetually enjoining them from carrying out the orders of the Secretary of the Interior to close the stores of the appellees in the City of South McAlester because of their failure to secure the legislative permit of the Nation to expose goods, wares and merchandise for sale.

BRIEF AND ARGUMENT.

At the hearing of the application for a temporary injunction in the court below, appellees relied wholly upon the case of Buster and Jones vs. Wright et. al., decided by the Indian Territory Court of Appeals, M. S. Op., but

at the final hearing they entirely abandoned that position and now urge that the adoption of the Atoka Agreement had the effect of repealing the provisions of the Treaty of 1866, above quoted, in so far as they related to townsites in the Choctaw and Chickasaw Nations. Both of these positions are utterly untenable. As pointed out by us in the course of argument, the case of Buster and Jones vs. Wright et al. is not in point. Admitting, for the sake of argument, that the decision in that case is authority and unassailable, the court based its decision in the case upon the fact that there was no provision in the Creek Treaty, or found in the law, authorizing the Interior Department to take such action; whereas, in the Choctaw and Chickasaw Nations, there is an express Treaty provision upon that point, that has for many years been enforced under the rules and regulations of the Indian office.

In view of the fact that counsel for appellees seem to have abandoned this contention we will not further discuss the case of Buster and Jones vs. Wright et al.

Counsel for appellees in the court below rested their case upon the proposition that by the terms of the Atoka Agreement the rights of citizens of towns within the Choctaw and Chickasaw Nations were recognized, and by the terms of that Treaty they were permitted to acquire title to one residence lot and one business lot, under certain conditions, for 50 per cent. of the appraised value thereof. That the bestowal of this privilege, and the settlement of towns in the Choctaw and Chickasaw Nations under its provisions, was so inconsistent with the continuance of tribal authority heretofore exercised in such towns that all parts of the treaty and laws authorizing the imposing of such conditions, or the exercise of authority thereunder, by the Interior Department, must be treated as repealed by implication. To

our minds this is a most extraordinary proposition. By the provisions of the Atoka Agreement the tribal government was continued for a period of eight years, and the whole instrument indicates an intention on the part of the contracting parties thereto directly contrary to the interpretation thus sought to be placed upon it. The language is not capable of such construction.

Repeals by implication are not favored, and we are sure that the court would be loath to hold that so violent a change had been wrought by this provision, especially in view of the fact that the department of the government charged with the duty of construing the various laws and treaties relating to Indian affairs has passed upon this question. We invite the attention of the court to the opinion of the Attorney General of the United States, dated September 7th, 1900, in which he passed upon this identical question; in which he holds that the act of June 28, 1898, does not have such effect, or exempt the purchasers of town or city lots from its operation. The Attorney General cites the case of Maxey vs. Wright, 54 S. W. Rep. 807, decided by the Indian Territory Court of Appeals, where it is held this is yet Indian country, and adds:

"But, however this may be, and even if the Indian title to the particular lots sold has been extinguished, and conceding that the statute authorizes the purchase of such lots by an outsider, and recognizes his right to do so, the result is the same, for the legal right to purchase lands within an Indian Nation gives the purchaser no right of exemption from the laws of such Nation, nor does it authorize him to do any act in violation of the treaties with such Nations. These laws requiring a permit to reside or carry on a business in the Indian country existed long before, and at the time this act was passed. And if an outsider saw proper to purchase a town lot under this act of congress, he did so with the full knowledge that he could occupy it for a residence or business only, by permission from the Indians. I do not say that Congress might not violate its treaty prom-

ises, and authorize the outside world to enter upon and occupy the lands of the Indians without their consent, but do say that provisions very different from any contained in this act would be required to justify the imputation of any such intention. All that this act does in this respect is to give the consent of the United States to such purchase, with the assumption that the purchaser, if he wishes to occupy, will comply with the local laws just as in other cases. The United States might sell land which it holds in a state but it would be a strange contention that this gave the purchaser any immunity from local laws or taxation. The case is much like that of a federal license to manufacture and sell spirituous liquors, which, while good against the United States, confers no right where such sale and manufacture are forbidden. This act was passed with a full knowledge of these laws of the Indian Nation, approved by the President, and having the full force of laws, and had congress intended to nullify these laws, or take away the power to enact them, or to exempt the purchaser of lots, or any other persons, from their operations, it is quite safe to say that it would have done so by provisions very different from those in the act of 1898."

We also cite 17 Op. Atty. Gen'l 134, and 18 Id. 34.

We might well rest the case upon this point upon the full and admirable reasoning of the Attorney General of the United States, whose duty it was to give this opinion, and which, it seems to us, should be entitled to much weight. But he is not alone in this holding. In the case of A. Kloski et al. vs. J. W. Ellis et al., Judge Townsend, of the Southern District of the Indian Territory, held that the Secretary of the Interior had the power to close the places of business of one who attempts to expose goods, wares and merchandise for sale without the permit of the legislative authority of the Nation.

Judge Raymond, of the Western District of the Indian Territory, has also, in a well considered opinion in the case of Buster and Jones vs. Wright et al., upheld the power of the Department in this respect.

The courts of the Indian Territory have repeatedly declined to interfere with the authority of the Interior Department exercised in excluding persons as intruders for refusing to comply with the tribal laws. This has been done repeatedly in cases arising since the Atoka Agreement. Counsel for appellees do not urge that the provisions of the Indian Appropriation Act, approved May 27, 1902, which provides, in substance, that no person can be removed as an intruder for non-payment of tribal tax who is in lawful possession of lots in any town or city in the Indian Territory which has been designated as a townsite under existing laws and treaties, affects this case, except as an indication on the part of Congress of a change in the policy hitherto exercised in the Indian country. We will, however, briefly notice this point.

It is not here sought to remove these persons from the Indian Territory as intruders, but to have them comply with the tribal laws, and secure the legislative permit of the Choctaw Nation before they could be permitted to expose goods, wares and merchandise for sale within the Nation. The Department of the Interior has passed upon this question, as will appear from the following communication from the United States Indian Inspector to the United States Indian Agent:

DEPARTMENT OF THE INTERIOR.
UNITED STATES INDIAN INSPECTOR FOR INDIAN TERRITORY.

D6223-1903.

Muskogee, Ind. Ter., April 18, 1903.

Mr. J. Blair Shoenfelt,
United States Indian Agent.

Sir:—

On April 10, 1903, the Honorable Secretary of the In-

terior considered the matter of the duty of the department relative to the enforcement of the tribal taxes of the Choctaw and Chickasaw Nations, and concurred in the opinion of the Honorable Acting Commissioner of Indian Affairs that the purchase of a lot within the limits of any town by any non-citizen does not carry with it the right to conduct business within the limits of the Nation in which such town is situated contrary to the laws of the Nations.

The department holds that the provisions of the Indian Appropriation Act, approved May 27, 1902, does not forbid the department from taking any action that it was authorized to take prior to the passage thereof, except only that it cannot remove the persons for non-payment of tribal taxes who, in the language of the proviso, are "in lawful possession of any lots or parcels of land in any town or city in Indian Territory which has been designated as a townsite under existing laws and treaties."

I have today advised the Principal Chief of the Choctaw Nation and the Governor of the Chickasaw Nation of the views of the department as herein expressed, and they have been informed that if persons from whom tribal tax is due refuse to pay the same, full report of the matter should be made to you in the usual manner.

The department closes its report with the following instruction:

"And upon the report of the executive officers of said Nations that parties refusing to pay the tribal tax due from them, action should be promptly taken in order that their stores and places of business may be closed, unless the tribal tax is paid."

Very respectfully,

J. W. ZEVELY,
Acting U. S. Indian Inspector
for Indian Territory.

D. H. K. (C.)

In view of the fact that this point has been thoroughly argued upon the preliminary hearing, and that counsel did not insist upon it below, we deem it unnecessary at this time to say anything further in regard to that contention.

We insist that the construction placed upon the law by the Secretary of the Interior is right.

Here it must certainly be conceded that the acts of the

Secretary of the Interior are, in contemplation of law, the acts of the President. It is so held and announced by our United States Supreme Court in Wilcox vs. McConnell, 13 Peters 498, and also in Woolsey vs. Chapman, 101 U. S. 755, in which the court says: "The truth is there can be no reservation of public lands from sale except by reason of some treaty, law or authorized act of the Executive Department of the Government, and the acts of the heads of Departments within the scope of their powers are in law the acts of the President."

It will also doubtless be conceded here, as in the court below, that the Choctaw Council had authority under the Treaty of 1866 (Article XXXIX.) to provide by act for the taxing of the privilege of selling goods as a merchant within the Choctaw Nation,

Durant Digest, page 237.

It is this provision of law, enacted by the Choctaw Council, authorized by the United States in the Treaty of 1866, recognized by the highest courts of our country for more than a quarter of a century, that appellants are seeking to enforce.

In very recent years the congress of the United States has recognized the rights of these legislatures or councils to enact laws. It is provided that their laws when enacted shall be submitted to the President of the United States for his approval before they become effective; and the United States by solemn treaty has agreed with these tribes that the courts should not interfere with their judiciary.

Treaty 1866, Article 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; pro-

vided, that the same shall not interfere with the local judiciary of either of said Nations.

And also in the Curtis act (30 Stat., page 504) it is provided: "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." Consequently this tax can be collected only by the Department of the Interior and without the aid of the courts.

Tribal organization shall not be interfered with.

Treaty 1866, Article 7.

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 persons 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 or Chickasaw Nations respectively.

We now come to the proposition: Have these laws been changed? Have they been repealed? Have they been abrogated? If they have not, then there can be no question that the Department of the Interior, or the President speaking through this department, has the power to collect this tax. He once had the power—now, has it been taken away?

We do not claim that the courts have no authority to review the acts of heads of departments and enjoin same in cases where the departments are clearly in error, as seems to be settled in the case of School of Magnetic Healing vs. McAnnulty, 187 U. S. 94; but our contention is that the Interior Department of our government is properly and legal-

ly endeavoring to enforce a law enacted by the Choctaw council, authorized by the treaty of 1866, in the one and only way left for its enforcement.

But the court below holds that the tax is not due the Choctaw tribe, nor can it be collected, for the reason that by virtue of the terms of the Atoka Agreement providing for sale of town sites the city of South McAlester ceased to be Indian country, unless by treaty under which they parted with their title, or by some Act of Congress, a different rule was made applicable to the case.

We believe that in this our contention is supported by the very terms of the Atoka Agreement which they invoke, to-wit: "It is further agreed, in view of the modification of legislative authority and judicial jurisdiction herein provided and the necessity of the continuance of the tribal government 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." In support of this contention we cite the case of U. S. vs. Forty-Three Gallons of Whisky, 93 U. S. 188.

Because of the peculiar condition of the non-citizen who might under the provisions of the said agreement become the purchaser and owner of a town lot, Congress has provided that the said owner of such lot shall not be removed from the Indian Territory for failure to comply with its tribal laws; and had Congress intended that such purchaser and owner of any town lot should be exempt from compliance with any tribal requirements, could it and would it not have simply said so? We cannot fairly presume and guess that it meant to do so.

Was it intended by the Atoka Agreement, in the organization of local towns and city governments, that the resi-

dents thereof should be considered outside the Choctaw Nation, and if so then where are they? Can it be said that we have a government within a government? A wheel within a wheel? Or is this not still Indian country and the residents thereof amendable to well known and old established requirements for certain privileges and rights to carry on business in the Choctaw Nation?

The court below seems to have been influenced by an apparent inconsistency of having an American town under an Indian sovereignty, but the whole situation here abounds in inconsistencies and anomalies and is merely temporary.

It certainly was as easy for Congress to say that the townsites should cease to be in the Choctaw Nation and in the Indian country as to say that the Secretary should not remove occupants of town lots, if it had had any intention to anticipate the final extinction of the tribal government as to townsites.

The idea that the townsites as such were to remain Indian country, but a town lot as soon as sold then to cease to be Indian country, while the adjoining lots should remain Indian country, attributes to Congress a grotesque plan to say the least.

The court seemed to make small things control great instead of the contrary. There is no inconsistency in an individual non-citizen or a number of Americans together owning lots under the Choctaw sovereignty. The ownership of a tract of land by an alien in France would hardly be thought to disturb the sovereignty of France.

Our government has recognized the sovereignty of the Choctaw Nation within a certain boundary. We have authorized certain specific things to be done within that boundary, without and within townsites, but if they are reconcilable with the continuance of the tribal sovereignty the

presumption should be in favor of its continuance until 1906. There is no more assertion of exclusive sovereignty in authorizing some non-citizens or non-citizens 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 tribal country.

The fact is, as to all Indian country, there are two sovereignties, one paramount and one subordinate. They are no more inconsistant in the townsites than in the rest of the Choctaw Nation.

The agreement of the Choctaws with the United States about townsites should be interpreted favorably to the Indians, and since it contains no provision for the cessation of sovereignty, any doubt should be resolved in favor of the Tribe.

Worcester vs. Georgia, 6 Pet. 582.
The Kansas Indians, 5 Wall. 760.
Choctaw Nation vs. U. S., 119 U. S. 27.
U. S. vs. Choctaw Nation, 179 U. S. 531.

In making a specific provision for the termination of the tribal authority nothing was said about having any part of it terminate before 1906. There was nothing to warn the Indians that such was the intention, and it has been held that Indian treaties are to be interpreted as the Indians would naturally understand them and not according to technical rules of which they know nothing.

Jones vs. Meehan, 175 U. S. 11.

The townsite people are in possession with the consent of the Indians, given by their agreement, and there is no reason why they should be less subject to Indian authority than individuals permitted to occupy other parts of the tribal territory. As the treaty forbids them to do business without the tribe's permission, and as repeals by implica-

tion, especially of treaties by statutes, are not favored, they still require permission to do business, and by doing business without such permission they violate the treaty and it is the duty of the President and the Secretary of the Interior to put a stop to such violation.

APPELLEES ARE ESTOPPED.

We also contend that the appellees are estopped from questioning the validity of the proceedings against them. The Atoka Agreement was negotiated for the non-citizens, and they were represented in the formation of that instrument by the government of the United States; mutual concessions were made, following the usual system of dealing with these Indian tribes. The provision in regard to townsites was a very generous one on the part of the Choctaws and Chickasaws, and was inserted at the solicitation of the non-citizens of these nations, and conferred very valuable rights upon them. They were enabled by its provisions to acquire title, or place themselves in an attitude to acquire title to valuable lands situated in cities and towns, by paying upon easy terms only 50 per cent of the appraised value thereof. The Choctaws and Chickasaws agreed to many violent changes, but enacted certain provisions to enable them to meet with the laws and wishes of the United States. Among the provisions, or stipulations, which, as appears from an examination of that instrument, were inserted for the benefit of the Choctaws and Chickasaws, is the following:

"It is further agreed, in view of the modification of legislative authority 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 a 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."

These plaintiffs, as appears from their bill, have and are accepting the benefits conferred upon them by this treaty, and cannot be heard to question the validity of these proceedings. See

Black's Constitutional Law, 2d Ed., p. 59.

Bigelow on Estoppel, 2d Ed., p. 509.

Ferguson vs. Landram, 5 Bush (Ky.), 230.

Todd vs. Kerr, 42 Barb., 319.

People vs. Murry et al., 5 Hill, 468.

Lindsay vs. Mullen, 176 U. S., 126-146.

O'Brien vs. Wheelock, 184 U. S., 450-491.

In Ferguson vs. Landram, supra., in deciding the case, the court, among other things, said (page 146):

"Upon what principle of exalted equity shall a man be permitted to receive a valuable consideration through a statute procured by his own consent, or subsequently sanctioned by him, or from which he derives an interest or consideration, and then question the consideration and repudiate the statute as unconstitutional?"

The above authority we cite from a brief prepared by Assistant Attorney General Willis Van DeVanter, in the case of Edwin T. Morris et al. vs. Ethan A. Hitchcock et al., in the Supreme Court of the District of Columbia.

We insist that upon every principle of equity and justice the plaintiffs are estopped from questioning the validity of the proceedings of the Secretary of the Interior in enforcing the provisions of the Treaty of 1866.

Upon the whole case we desire to call the attention of

the court to the decision of the Court of Appeals of the District of Columbia, in the case of Edwin T. Morris, et al. vs. Ethan A. Hitchcock et al., decided April 7, 1903. The case involved the identical questions presented by the case at bar, and the court there holds, in effect, that the provisions of the Curtis bill, embracing the Atoka Agreement, do not affect the power of the department over this as an Indian country, and refuses to disturb the action of the court below in declining an injunction to the plaintiffs against the action of the Secretary of the Interior in enforcing what is known as the Chickasaw Cattle Tax.

We have gone thus fully into the case because of its importance, but we might well have rested the entire discussion upon the proposition that this court has no jurisdiction in the case to issue a writ of injunction directed to the officers and agents of the executive department of this government. This proposition seems too plain to us to admit of argument.

The government of the United States is engaged in the Indian Territory in a work which, in the very highest sense of the term, is political and administrative in its nature, and which has for its object the extinguishment of the Indian government and the erection of the area embraced within the Five Civilized Tribes into a State of the Union. The duties required of the Interior Department are great enough and intricate enough to almost constitute a government itself; and at every point in the administration of this vast estate the Secretary of the Interior and his legal advisers, and frequently the Attorney General of the United States, are called upon to decide the most delicate questions involving the construction of statutes and the advisability of administrative measures. If their decision upon all these

matters can be reviewed, in the thousands of cases which will arise, by the United States courts in the Indian Territory, then the jurisdiction of the Interior Department has been destroyed, and the carrying out of the treaty obligations of the government will be an impossibility.

Before an injunction can issue restraining the Secretary of the Interior, or those acting under him, it must appear that he was not authorized to exercise discretion or judgment in the premises. How can this be said? In this very case the Secretary of the Interior, as was his duty, called upon the Attorney General of the United States for an opinion, which was rendered, and under which he was proceeding to act. Can it be said that action taken under these circumstances is not that calling for the exercise of the highest judgment and discretion.

It is certainly true that if such action can be taken it can only be done upon some principal not heretofore announced, and will constitute a departure involving the gravest consequences. If this can be done, then the executive department of the government can, on the varied matters committed to its care in the Indian Territory, only act under the directions of the United States Courts established within this jurisdiction.

In the case of Cherokee Nation vs. Hitchcock, 187 U. S. 294, the court says:

"We are not concerned in this case with the question whether the act of June 28, 1898, and the proposed action thereunder, which is complained of, is or is not wise and calculated to operate beneficially to the interests of the Cherokees. The power existing in Congress to administer upon and guard the tribal property, and the power being political and administrative in its nature, the manner of its exercise is a question within the province of the legislative branch to determine, and is not one for the courts."

We therefore ask that the injunction be disolved and that the bill of appellees be dismissed for want of equity.

Respectfully submitted,

J. H. WILKINS,
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Central District, Ind. Ter.

MANSFIELD, McMURRAY & CORNISH.
Attorneys for Appellants.