See marked sections

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OCTOBER TERM, 1898.

Nos. 469, 470, 471, 472, 473.

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See brief on appellant's

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These five cases are appeals from the judgment or decree of the United States court in the Indian Territory, and together present all the principal questions which arise in all of the cases now pending in this court from that Territory

involving the claims to citizenship in the five civilized tribes of Indians.

In some of these cases the applications were first made to the "Dawes commission," and were denied by that commission. From the findings of the commission appeals were taken to the United States district court in the Indian Territory. The district court, under the rules of practice and procedure adopted by the court for its government in this class of appeals, referred these cases severally to a master, "with instructions to take the testimony and report upon the *law* and facts presented in the record, pleadings, and service" (Record, p. 2). In each case the master returned his report, made in accordance with the instructions, and made a recommendation that the applicants be enrolled as members of the Chickasaw nation of Indians, except that in cases 470 and 472 the master reported *against* the applications.

In these cases, 470 and 472, the district court disapproved the findings and recommendations of the master, and in *all* the cases made a decree or judgment that the applicants be enrolled.

Exceptions appear to have been duly taken to the report of the master in each case, and assignments of error in the decree or judgment of the court are fully set out in each of the transcripts of the records.

Before considering these cases as to those features which distinguish them from each other and are peculiar to each, we will dispose of the general questions that are common to all of them.

JURISDICTION OF THE "DAWES COMMISSION" AND OF THE DISTRICT COURT IN THE INDIAN TERRITORY IN CITIZENSHIP CASES.

In *The Cherokee Nation vs. The State of Georgia*, 5 Peters, 15, Mr. Chief Justice Marshall said:

> "A people once numerous, powerful and truly independent, found by our ancestors in the quiet and uncontrolled possession of an ample domain, gradually sinking beneath our superior policy, our arts, and arms, have yielded their lands by successive treaties, each of which contains a solemn guarantee of the residue, until they retain no more of their formerly extensive territory than is deemed necessary to their comfortable subsistence. * * * So much of the argument as was intended to prove the character of the Cherokees as a State, as a distinct political society, separated from others, *capable of managing its own affairs and governing itself*, has, in the opinion of the majority of the judges, been completely successful."

They have been allowed by the United States to make all laws and regulations for the government and protection of their persons and property, not inconsistent with the Constitution and laws of the United States.

United States vs. Rogers, 4 Howard, 567.
Mackey et al. vs. Coxe, 18 Howard, 100.

Treaties have been made by the United States with the Indian tribes ever since the Union was formed, of which numerous examples are to be found in the seventh volume of the public statutes. Indian tribes are States in a certain sense, though not foreign States or States of the United States.

> "They are not States within any of those clauses of the Constitution, and yet, in a certain domestic sense, and for certain municipal purposes, they are States, and have been uniformly so treated since the settlement of our country and throughout its history, and numer-

ous treaties made with them recognize them as a people capable of maintaining the relations of peace and war, of being responsible, in their political character, for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community. Laws have been enacted by Congress in the spirit of these treaties, and the acts of our Government, both in the executive and legislative departments, plainly recognize such tribes or nations as States, and the courts of the United States are bound by those acts."

Holden vs. Joy, 17 Wallace, 242.

The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in their latter sense.

Worcester vs. Georgia, 6 Peters, 582.

Choctaw Nation vs. United States, 119 U. S., 28.

The policy of the United States in their dealings with the Indian nations was changed by the act of March 3, 1871, now section 2079, Revised Statutes:

"SEC. 2079. No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty; *but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March third, eighteen hundred and seventy-one, shall be hereby invalidated or impaired.*"

U. S. vs. Kagama, 118 U. S., 375.

All of the treaties with the Choctaw and the Chickasaw tribes of Indians, under which the right to make and administer the laws for their municipal government were secured to them, were made and ratified prior to March 3, 1871.

By acts of Congress of March 3, 1893, and of March 2, 1895 (27 St., 645, and 28 St., 939), commissioners to negotiate with the five civilized tribes in the Indian Territory were provided for, the object being only to arrange for the allotment of the lands of the Indians in severalty, but no powers were by these acts conferred upon the commissioners beyond those of negotiation and report.

By the act of June 10, 1896 (29 St., 321), entitled "An act making appropriations for current and contingent expenses of the Indian Department and fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June 30, 1897, and for other purposes," it was enacted:

"And said commission is directed to continue the exercise of the authority already conferred upon them by law and endeavor to accomplish the objects heretofore prescribed to them and report from time to time to Congress. The said commission is further authorized and directed to proceed at once *to hear and determine the applications of all persons who may apply to them for citizenship in any of said nations, and after such hearing they shall determine the right of such applicant to be so enrolled and admitted.*"

And after providing for the confirmation of existing rolls of citizenship, and for power to the commission to compel the attendance of witnesses, &c., the act further said:

"*Provided*, That if the tribe, or any person, be aggrieved with the decision of the tribal authorities or the commission provided for in this act, it or he may appeal from such decision to the United States district court."

The court here referred to is the United States court in the Indian Territory, established by act of March 1, 1889 (1 Supplement to Revised Statutes, pages 670 and 731–738).

By the act of July 1, 1898, Indian Department appro-

priations, it was further enacted, page 591, second session of Fifty-fifth Congress:

> "Appeals shall be allowed from the United States courts in the Indian Territory direct to the Supreme Court of the United States, to either party, in all citizenship cases, and in all cases between either of the five civilized tribes and the United States involving the constitutionality or validity of any legislation affecting citizenship, or the allotment of lands, in the Indian Territory, under the rules and regulations governing appeals to said court in other cases."

If, as was said by Chief Justice Marshall, speaking in Cherokee Nation *vs.* Georgia, "so much of the argument as was intended to prove the character of the Cherokees as a State, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, was successful, and if, as this court has since repeatedly held, the United States have always recognized those Indian tribes with whom they had entered into treaty relations "as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements * * * as States," then surely to such tribes or nations must be accorded the right of determining for themselves who shall be their citizens.

> "Nor can it be doubted that it is the inherent right of every independent nation to determine for itself, and according to its own constitution and laws, what classes of persons shall be entitled its citizenship."
> United States *vs.* Wong Kim Ark, 169 U. S., 668.

The constitutions and laws which the Cherokees and Choctaws have adopted for their government, under the provisions of the treaties with the United States, were all in force long prior to the enactment of section 2079, Revised Statutes of the United States, which provides, "But no obligation of any treaty lawfully made and ratified by any such

Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired."

Under what power, then, can the Congress of the United States take away from these Indian tribes or nations the inherent right, which has been recognized to exist in them, of determining these questions of citizenship in their own communities and confer it upon a commission or court of the United States, either in original or appellate jurisdiction?

We submit that no such power should be recognized by this court as residing in Congress, at least while the treaties now subsisting between the United States and these nations continue unrepealed by some plain and unequivocal action of Congress which shall be held to have not only a prospective, but a retroactive, operation. If Congress had power to confer such jurisdiction upon the Dawes commission and the district court in the Indian Territory, it could, of course, extend such jurisdiction to the Supreme Court; but we deny that it had the power to diminish or impair in any degree the exclusive power and jurisdiction enjoyed by these tribes of determining all questions affecting the citizenship of the several nations.

Talton *vs.* Mayes, 163 U. S., 376.

IN ORDER TO CONFER THE RIGHT OF CITIZENSHIP BY MARRIAGE IN THE INDIAN NATIONS, THE MARRIAGE MUST HAVE BEEN UNDER AND ACCORDING TO THE PROVISIONS OF THE LAWS OF THAT NATION INTO WHICH THE APPLICANT HAD MARRIED.

If a nation is recognized as "self-governed," if it makes and executes the laws by which its municipal affairs are conducted and its autonomy preserved, it alone can prescribe the terms, conditions, and status upon which membership of its body may be acquired and enjoyed. To it must be conceded the exclusive power of determining who

shall be admitted and who shall be excluded from the privileges and benefits of such membership.

An act of Congress of February 10, 1855 (10 St., 604), confers the privileges of citizenship upon women married to citizens of the United States if they are of the class of persons for whose naturalization the previous acts of Congress provide (*Kelly vs. Owen*, 7 Wallace, 496), and so the laws of the Choctaw and Cherokee nations confer the rights of citizenship upon white persons who marry Choctaws or Cherokees in accordance with the laws of those nations. Indian persons of these nations may contract and celebrate marriage with citizens of foreign nations in accordance with the laws of such other nations, and such marriages may be valid for all purposes, but there will not attach to them the privileges that belong to those marriages which are celebrated under the laws of the Indian nations.

So, too, is it the prerogative right of each nation to determine for itself the conditions upon which the validity of all marriages celebrated within its jurisdiction shall depend.

As a rule of construction, courts have usually held a marriage good at common law to be good, notwithstanding the statutes regulating marriages, unless such statutes contain express words of nullity; but where a statute declares that no marriages shall be valid unless they are solemnized in a prescribed manner, a disregard of such prescribed manner in any essential particular will render the marriage void (*Meister vs. Moore*, 96 U. S., 79).

It is not to be expected that a State, when it adopts a specific matrimonial policy, and in pursuance thereof imposes certain restrictions, should permit this policy to be defeated by citizens stepping over the line between itself and a State where no such policy is established, marrying in such State, and then returning to their home to defy the home law by the daily exhibition of a condition that that law condemns.

Wharton on Conflict of Laws, section 181.

By the seventh article of the treaty of 1855, which is still in force, it is provided that—

> "So far as it 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 rights of self-government, and the 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 tribes."

By the treaty of 1866, article 38, it is provided that—

> "Every white person who, having married a Choctaw or Chickasaw, resides in the said Choctaw or Chickasaw nation, or who has been adopted by the legislative authorities, is to be deemed a member of said nation, and shall be subject to the laws of the Choctaw and Chickasaw nations, according to their domicile, and to prosecution and trial before their tribunals, and to punishment according to their laws in all respects as though he were a native Choctaw or Chickasaw."

It is sought to sustain these applications for citizenship under article 38 by imposing upon that article a construction which its structure and obvious intent plainly repels. It is claimed that its true import is that every white person who marries a Choctaw or Chickasaw and resides in the nation is to be deemed a member of that nation "as though he were a native Choctaw or Chickasaw." Manifestly this latter clause refers to the qualifying clause of the section beginning "and shall be subject to the laws," &c., and does not relate to the first clause conferring membership. It means, not that every white person who marries an Indian shall be deemed a member, as though he were a native, but that every such person shall be subject to the laws, to prosecution, trial, and punishment, as though he were a native Choctaw or Chickasaw.

Further, the premise that every white person "who, having married a Choctaw or Chickasaw," imports a marriage according to the laws of the Choctaws and Chickasaws, and not merely a common-law marriage or a marriage according to the laws of some other State or nation; for what would be a valid marriage under the laws of such other State or nation would not be a valid marriage according to the laws of the people with whom the United States was making the treaty, and the rule already stated for the construction of these treaties with Indians requires:

> "If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in their latter sense" (*Worcester vs. Georgia*, 5 Peters, p. 582).

Citizenship by marriage is placed upon the same footing with citizenship by adoption, both alike to depend upon the laws of the nation into which the person married or adopted is admitted.

The provisions of these two treaties plainly confer upon the Choctaws and Chickasaws the right and power to prescribe by law for the admission to citizenship and for the regulation of marriage. Without these powers no political society can pretend to autonomy or to the efficient administration of its domestic affairs. They tend to the conservation of order and law in society and to harmony and virtue in domestic life.

The acts passed by the Choctaw and Chickasaw nations pursuant to these treaties afford ample illustration of their understanding of the intent and effect of these provisions. That of 1875, of the Choctaw nation, provides that—

> "Any white man, or citizen of the United States, or of any foreign government, desiring to marry a Choctaw woman, citizen of the Choctaw nation, shall be and is hereby required to obtain a license for the same from one of the circuit clerks or judges of a court of record,

> and make oath or satisfactory showing to such clerk or judge that he has not a surviving wife from whom he has not been lawfully divorced; and unless such information be freely furnished, to the satisfaction of the clerk or judge, no license shall issue; and every white man or person, applying for a license as herein provided, shall, before obtaining the same, be required to present to the said clerk or judge a certificate of good moral character, signed by at least ten respectable Choctaw citizens by blood, who shall have been acquainted with him at least twelve months immediately preceding the signing of such certificate; and before any license as herein provided for shall be issued, the person applying shall be, and he is hereby, required to pay to the clerk or judge the sum of twenty-five dollars, and be also required to take the following oath: 'I do solemnly swear that I will honor, defend, and submit to the constitution and laws of the Choctaw nation, and will neither claim nor seek from the United States Government, or from the judicial tribunals thereof, any protection, privilege, or redress, incompatible with the same as guaranteed to the Choctaw nation by the treaty stipulations entered into between them, so help me God.'
>
> "2. Marriages contracted under the provisions of this act shall be solemnized as provided by the laws of this nation, or otherwise shall be void.
>
> "3. No marriage between a citizen of the United States or of any foreign nation, and a female citizen of this nation, entered into within the limits of this nation, except as hereinbefore authorized and provided, shall be legal, and every person who shall engage and assist in solemnizing such marriage shall upon conviction, be fined fifty dollars, and it shall be the duty of the district attorney in whose district such person resides to prosecute such person before the circuit court, and one-half of all fines arising under this act shall be equally divided between the sheriff and the district attorney.
>
> "4. Every person performing the marriage ceremony under the authority of a license provided for herein, shall be required to attach a certificate of marriage to the back of the license, and return it to the person in

whose behalf it was issued, who shall, within thirty days therefrom, place the same in the hands of the circuit clerk, whose duty it shall be to record the same and return it to the owner.

"5. Should any man or woman, a citizen of the United States, or of any foreign country, become a citizen of the Choctaw nation by intermarriage as herein provided, and be left a widow or widower, he or she shall continue to enjoy the rights of citizenship; unless he or she shall marry a white man or woman or person, as the case may be, having no right of Choctaw citizenship, by blood; in that case all his or her rights acquired under the provisions of this act shall cease.

"6. Every person who shall lawfully marry, under the provisions of this act, and afterwards abandon his wife or her husband, shall forfeit every right of citizenship and shall be considered an intruder, and removed from this nation, by order of the principal chief."

The Chickasaw constitution provides:

"SECTION 11. The legislature shall have the power, by law, to admit or adopt any person to citizenship in this nation, except a negro or descendant of a negro; *Provided, however*, That such an admission or adoption shall not give a right, further than to settle and remain in the nation and to be subject to its laws."

By an act of the Chickasaw nation approved October 19, 1876, it is provided that:

"SECTION 3. *Be it further enacted*, That no marriage heretofore solemnized, or which may hereafter be solemnized between a citizen of the United States and a member of the Chickasaw nation, shall enable such citizen of the United States to confer any right or privilege whatever in this nation, by again marrying a citizen of the United States, upon such other citizen of the United States or their issue, and in case any citizen of the United States shall have married a member of the Chickasaw nation and shall have heretofore abandoned her, or should hereafter abandon her voluntarily, or separate from such member of the Chickasaw nation,

such citizen of the United States shall forfeit all rights acquired by such marriage in this nation, and shall be liable to removal as an intruder from the limits thereof."

Every civilized people prescribe by their statute laws the regulations under which marriages within their jurisdiction may be solemnized. These fix the degrees of relationship within which marriages are prohibited; they define with strictness the terms and conditions on which alone the license may be issued to the person authorized by law to perform the ceremony of marriage, and they affix penalties for the violation of these requirements. With how much greater propriety should these Indians—these "wards of the nation"—who are in the leading strings of civilization and are being trained and educated under the guidance of those principles and forms which long experience have commended to the white race, be scrupulously careful in keeping the sources of their civil and social life clear and undefiled. How can they do this more effectually than by contriving and enforcing such tests of fitness as will secure for them none, as members of their society, but those whose personal character affords some guarantee of their usefulness as citizens, and how can they so surely guard against the intrusion into their number of those who for the sake of the loaves and fishes are willing to sacrifice the happiness of Indian women and defile the marriage relation than by prescribing the most rigorous terms for entrance into their citizenship through that sacred door?

If a white man wishes to marry an Indian woman of either of these nations, he knows in advance the laws which they have provided for the regulation of such marriages, and the civil and social consequences which, under those laws, such marriages involve. If he wishes, in good faith, to become a citizen of the nation to which his proposed wife belongs, and to participate in the property rights which attach to such marriage, he will have the marriage solem-

nized within the limits of that nation and according to its laws. If, on the other hand, he desires only the wife, and not the citizenship, he can do as so many of these applicants for citizenship have done, by going over into Texas and being married according to the laws of that State. His marriage will be none the less valid and legal, but he cannot then claim the benefit of citizenship in the nation whose laws he has avoided, nor claim the property rights which attach only to such citizenship.

The great object of the laws of these nations regulating citizenship and marriage was for *their* protection, certainly not for the advantage and benefit of the white men who might come among them. So far from intending to offer inducements of wealth in lands and money to white adventurers who sought citizenship through marriage, the laws of these nations, as we have seen, do in the most express terms repel such notion by prohibiting to any white man who marries an Indian woman title to land in his own name, but requires that such title shall be and remain in the wife, and denies to the white widower the right or the power to acquire any such title or interest as he may transmit to a second wife or to his children by her.

All this notion that the white husband acquires by his marriage with the Indian wife a VESTED right in her lands, or in any lands of that nation, rests upon a wholly mistaken view of the true status of the Indian possessions.

The members of the nation are not tenants in common of the lands owned by the nation. No allotment in severalty has ever been made of these lands, and no member of the nation has any present right of exclusive enjoyment of any certain portion of them. (This point is fully considered in the brief of Gen. Halbert E. Paine in United States *vs.* Wiggs, No. 496, and need not be further dwelt upon here.)

The marriage laws of these nations are fully recognized and approved by the United States in the act of Congress

of May 2, 1890 (29 St., 81, and First Supplement to Revised Statutes, p. 737), which is as follows:

> "*Provided*, That all marriages heretofore contracted under the laws or tribal customs of any Indian nation now located in the Indian Territory are hereby declared valid, and the issue of such marriages shall be deemed legitimate and entitled to all inheritances of property or other rights, the same as in the case of the issue of other forms of lawful marriage.
>
> "*Provided further*, That said chapter 103 of said Laws of Arkansas shall not be construed so as to interfere with the operation of the laws governing marriage enacted by any of the civilized tribes, nor to convey any authority upon any officer of said court to unite a citizen of the United States in marriage with a member of any of the civilized nations until the preliminaries to such marriage shall have first been arranged according to the laws of the nation of which such Indian person is a member.
>
> "*And provided further*, That where such marriage is required by law of an Indian nation to be of record, the certificate of such marriage shall be sent for record to the proper officer, as provided in such law enacted by the Indian nation."

So here is the distinct recognition, not only of the power of these Indian nations to make laws for their own government, but also a recognition and adoption of the laws of those nations for the regulation of marriages of their members.

THE CHICKASAW NATION *vs.* A. B. ROFF ET ALS. } No. 469.

The petition in this case was filed on behalf of A. B. Roff, Walter Roff, and Mabel Roff, infant children of A. B. Roff; Mrs. Matilda Clary and her infant children, Leonard B. Clary, Emma Fay Clary, and her husband, G. E. Clary, and Mrs. Alice Williams and her husband, George Williams,

and their child, Inez Williams, and Leon Roff. It avers that they and each of them are members of the tribe of Chickasaw Indians and are of right entitled to have their names enrolled on the roll of citizenship to be prepared by this honorable commission (the Dawes commission).

This petition was filed on the 3d day of February, 1897. It appears from the report of the master in chancery (Record, pp. 13 *et seq.*) that one William H. Bourland had married a "citizen of the United States," and by this marriage had children, viz., Nancy, Amanda, Matilda, Gordentia, and had also as a member of their family a nephew, Reece Hannah; that, this wife having died, Bourland afterwards married "a member of the Chickasaw nation by blood."

That he and his children resided in the Indian Territory, with the exception of short intervals, until 1860, at which time he died in Cooke county, Texas.

That after the death of her father Matilda continued to reside in the State of Texas until the 24th of January, 1867, at which time she married the petitioner, A. B. Roff, according to the laws of Texas, and shortly afterward they moved from Texas to the Chickasaw nation, and located on Red river, from which time the said A. B. Roff has "continually asserted his Indian citizenship."

That on March 1, 1868, Matilda Roff died, leaving one child, Matilda Roff, who married G. E. Clary, one of the petitioners.

That on the 11th day of November, 1869, A. B. Roff, the widower, married, according to the laws of Texas, Henrietta Davenport, a citizen of the United States, and of this marriage were born four children, viz., Alice, Leon, Walter, and Mabel.

It is averred in the petition that Alice married one George Williams, and that by reason of that marriage he also became a member of the tribe of Chickasaw Indians; but as to this there is no finding whatever in the report of the master.

The "Dawes commission," before whom this petition was

filed, denied the prayer that the petitioners be enrolled as members of the Chickasaw tribe of Indians on the facts alleged and proven.

The master in chancery, to whom the matter was referred by the United States district court for the Indian Territory, "to take the testimony and report upon the law and facts presented in the record, pleadings, and service," recommended that the applicants be enrolled as members of the Chickasaw nation of Indians, and the said district court overruled the exceptions of the Chickasaw nation to the report of the master, and adjudged—

> "That all of the plaintiffs herein, except George Williams, are members of the tribe of Chickasaw Indians, that the decision of the commission be, and the same is hereby reversed; that the report of the master be, and the same is hereby confirmed, and that the plaintiffs and applicants A. B. Roff, and Walter Roff and Mabel Roff minors, by their next friend A. B. Roff, and Mrs. Matilda Clary and G. E. Clary and Leonard B. Clary and Eula Fay Clary minors, by their next friend Matilda Clary, and Mrs. Alice Williams and Inez Williams, minor by Mrs. Alice Williams as next friend, and Leon Roff, be, and the same and each of them are hereby decreed to be members of the tribe of Chickasaw Indians, the said A. B. Roff and G. E. Clary as members thereof by intermarriage and the other applicants as descendants of the said A. B. Roff are and as such are entitled to have their names enrolled as members of said tribe of Indians, and the application of the said George Williams to be enrolled as a member of said tribe be, and the same is hereby denied."

So the decision complained of is that A. B. Roff and G. E. Clary are entitled to be enrolled as members of the Chickasaw tribe "by intermarriage," and the other applicants are entitled to be enrolled "as descendants of said A. B. Roff." The argument upon which this decision rests appears to be that Matilda Bourland was a Chickasaw citizen; that by reason of her marriage with A. B. Roff on the 24th of Janu-

ary, 1867, the said Roff became also a citizen of that nation, and that, being himself a citizen by reason of his marriage with Matilda, her death and his subsequent marriage with Henrietta Davenport, in November, 1869, made Henrietta a citizen, and all the children of that marriage became in like manner citizens. This structure rests upon the assumption, as its foundation, that Matilda Roff was a citizen of the Chickasaw nation. The master, to whom the case was referred, to "report upon the law and facts," finds that by an act of the legislature of the Chickasaw nation passed October 17, 1856, the right of citizenship was granted to William H. Bourland and to his children, by name, and that the said Matilda was one of the children. He does not find that the right so granted was ever at any time accepted by the said Matilda, but, on the contrary, does find that Matilda, at the time of the death of her father in 1860, was residing with him in the State of Texas, and that she continued to reside in that State until her marriage with A. B. Roff, in, January, 1867, in the said State and according to its laws and that shortly after that marriage she moved with him into the Indian Territory, from which time "the applicant, A. B. Roff, has continually asserted *his* Indian citizenship."

There is no finding that Matilda ever asserted any claim to be a citizen of the Chickasaw or of any other Indian nation or tribe, and no finding that her husband, A. B. Roff, ever asserted citizenship in any particular tribe or nation, but only that he "asserted Indian citizenship." Whether he was, indeed, a citizen of the Cherokee nation or not we have no means of knowing, and that is altogether beside this case. The first assertion of citizenship in the Chickasaw nation was on the 7th of September, 1896, when he and his family jointly filed "an application before the commission from the United States to the five civilized tribes of Indians to be enrolled as Indians of the Chickasaw nation" (Record, p. 14).

If, however, the findings of the master, and the judgment

of the court, and the reasoning upon which both rest should be held to assume or import that the act of October 17, 1856, *proprio vigore*, conferred or imposed upon Matilda the status of a Chickasaw citizen, did it follow as matter of law that any husband she might thereafter acquire became, on account of marriage, also a citizen, and that any wife he might acquire, after Matilda's death, became in like manner a citizen? If this reasoning is sound, where is this limit? Husbands and wives might alternately die, and the survivor marry, to the remotest generations, and if by such deaths and marriages the status of citizenship was so consecutively transmitted, it would become as universal as original sin. The statement of the proposition betrays its sophistry.

The constitutions and laws that have been in force in the Chickasaw nation have all evinced the marked difference existing between natural citizenship, as by birth from native Chickasaw citizens, and artificial citizenship, as by legislative adoption or marriage.

At the time of the act of the legislature of October 17, 1856, the Chickasaw nation had a constitution which provided how, and in what manner, and what should be given by the adoption of persons belonging to races other than the Chickasaw. The provision is as follows:

> "SEC. 11. The legislature shall have the power, by law, to admit or adopt any person to citizenship in this nation, except a negro; *Provided, however*, That such an admission or adoption shall not give a right, further than to settle and remain in the nation, and to be subject to its laws" (Record, p. 7).

So the citizenship conferred by the act of October, 1856, was no more than permission to live in the Indian Territory with the Chickasaw tribe.

But the legislature of 1856 was the first that had assembled in the Chickasaw nation. It was the first attempt that these people had made in the direction of law-making, and

the results appear not to have been satisfactory to themselves. The acts of this legislature were not printed or collected in a permanent form, and the next session of their legislature, by act of November 25, 1857, repealed all the acts of 1856 not expressly re-enacted.

The master in chancery, who had been required "to report upon the law and the facts presented in the record," recites the repealing act in his report, as follows (Record, p. 15):

> "*Be it enacted by the legislature of the Chickasaw nation*, That from and after the passage of this act that all the certified copies of the laws that was passed in the legislature in the year 1856, that is not adopted by the legislature of 1857, is hereby declared to be repealed."

Now, while this cannot be commended for the elegance of its style, yet there can be hardly room for serious doubt as to the intent which it was employed to convey. The learned master in chancery, however, who had been charged with the rather perilous power of reporting upon the *law* as well as the facts of the case, appears to have been demoralized by the uncouth phraseology of the act, and to have suffered his reasoning powers to become disturbed. After commenting on the terms of the act and the expression "certified copies of the laws," he says: "It does not appear as a fact or arise as a conclusion of law that the act adopting the Bourland heirs was a 'certified copy of the law.' If, as a matter of fact, the legislature did intend to repeal all former statutes, the language employed does not convey to the legal mind the faintest semblance of such an intention."

But we need not linger long over these or the other acts referred to in the master's report, for we find that notwithstanding the large power given him of reporting upon the "law" of the case, his researches do not appear to have extended as far as the act of October 11, 1883, which was as follows:

> "*Be it enacted by the legislature of the Chickasaw nation*, That the right of citizenship granted to the following named children and nephews of W. H. Bourland, Amanda, Matilda, Gordentia and Run Hannah, approved October 7, 1876, the same is hereby repealed and annulled.
>
> "*Be it further enacted*, That the governor is hereby directed and required to remove said parties and their descendants beyond the limits of this nation, and that this act take effect from and after its passage."

The act of 1876, referred to here, was a declaratory act, passed after all the persons named in the act of 1856 were dead, save one.

The repealing act of October, 1883, was considered by this court in the case of *Roff vs. Burney*, 168 U. S., page 218, which came from the district court of the United States for the Indian Territory on a certificate as to jurisdiction. The plaintiff in that case is the same A. B. Roff who is one of the petitioners here. In that proceeding, as in this, the object of the plaintiffs was to be enrolled as citizens in the Chickasaw nation. Mr. Justice Brewer, speaking for the whole court, said:

> "Now, according to this complaint, plaintiff was a citizen of the United States. Matilda Bourland was not a Chickasaw by blood, but one upon whom the right of Chickasaw citizenship had been conferred by an act of the Chickasaw legislature. The citizenship which the Chickasaw legislature could confer it could withdraw. The only restriction on the power of the Chickasaw nation to legislate in respect to its internal affairs is that such legislation shall not conflict with the Constitution or laws of the United States, and we know of no provision of such Constitution or laws which would be set at naught by the action of a political community like this in withdrawing privileges of membership in the community conferred.

> "The Chickasaw legislature, by the second act, whose meaning is clear, though its phraseology may not be beyond criticism, not only repealed the prior act, but canceled the rights of citizenship granted therein, and further directed the governor to remove the parties named therein and their descendants beyond the limits of the nation. * * * Whether any right of property could be taken away by such subsequent act need not be considered. It is enough to hold that all personal rights founded in the status created by the prior act fell, when that act was destroyed. The tie which bound him (A. B. Roff) to the nation, was his wife's citizenship. That tie the nation destroyed. Its destruction released him."

So it has been ascertained by the judgment of this court that Matilda Roff was not a citizen of the Chickasaw nation after October, 1883, and also that the repeal of the act conferring citizenship upon her severed the tie which bound her husband, A. B. Roff, to the nation.

Now, the petition filed in 1897 prayed that the plaintiffs therein might be enrolled as citizens of the Chickasaw nation because of their right of citizenship then existing; and the judgment of the United States district court of the Indian Territory was that the petitioners "be, and the same and each of them are hereby, decreed to be members of the tribe of Chickasaw Indians. The said A. B. Roff and George E. Clary as members thereof by intermarriage, and the other applicants as descendants are and each of them are entitled to have their names enrolled as members of said tribe of Indians."

This court, in Roff *vs.* Burney, said:

> "The validity of the act withdrawing citizenship from the wife of plaintiff, and the consequent withdrawal from plaintiff of all the rights and privileges of citizenship in the Chickasaw nation, has been practically determined by the authorities of that nation, and that determination is not subject to correction by any direct appeal from the judgment of the Chickasaw courts."

Now, if the only tie that connected Roff and his wife with the Chickasaw nation was severed by this act of 1883, such severance must have extended to the children of that marriage. They ceased to be members of the Chickasaw nation by reason of that marriage, and any claim on their part to citizenship must depend upon their adoption into the tribe or nation by some other legislative act embracing them as individuals. No such act of adoption is shown in this record and none such is pretended. This disposes of the claim of George E. Clary, who married Matilda Roff, the only child of the marriage of A. B. Roff and Matilda Bourland.

As to the claims of the children of the marriage of A. B. Roff and his second wife, Henrietta Davenport, it may be enough to say that their claim rests only on the claim of A. B. Roff to citizenship by virtue of his former marriage with Matilda Bourland. This claim having been disposed of adversely to his contention by the reasoning of this court in Roff *vs.* Burney, the claim of these children by his second marriage must fall with it.

Should it be suggested that the act of October 11, 1883 was prospective in its operations and should not be construed to defeat rights that had already vested in the children of A. B. Roff and Matilda Bourland—that if such children had already become citizens of the Chickasaw nation by reason of their birth, the act depriving their parents of citizenship could not affect the rights of their children who had reached the age of manhood and had then exercised in their own right the privileges of such citizenship—it may be replied that the act of 1883 was in effect only declaratory of an existing status; that it did not import or operate to deprive or rescind any rights then existing. The act of October 17, 1856, was the only act that actually operated to confer citizenship upon the children of W. H. Bourland. This act was repealed by the act of 1857 (Record, p. 15), and the subsequent act of 1876 "can only be considered as a

declaratory act and not one creating any rights as an original one" (Record, pp. 15, 46, 53). It declared the legal effect of the act of 1856 without adverting to the repealing act of 1857. The act of 1883 was intended and had only the effect of removing the cloud which the act of 1876 had cast over the transaction by further declaring that the act of October 7, 1876, was repealed and annulled, and so remitting the parties to their status under the previous acts, and what their status was we have already seen. This court has held that the effect of the act of 1883 was that it "not only repealed the prior act, but canceled the rights of citizenship granted thereby," &c.—that is, it canceled all the rights of citizenship conferred by the act of 1856 and subsequently declared by the act of 1876. So that its operation extended back to the original act under which Matilda Bourland claimed those rights of citizenship which her husband claimed not only extended to him, but also reached to his children by a second marriage.

THE CHICKASAW NATION
vs.
JESSE L. TROUP. } No. 470.

The applicant in this case made his application on the — day of November, 1896, "to the governor of the Chickasaw nation and the legislative committee on rolls."

It was found as a fact by the master in chancery to whom the case was referred—

> "That the applicant, Jesse L. Troup, presented his application for enrollment as an intermarried Chickasaw to a committee of the legislature of the Chickasaw nation in the fall of 1896; that said committee refused to entertain the same or to take any action whatever thereon" (Record, p. 8).

It appears that on December 8, 1896, the applicant filed his petition in the United States court, southern district of the Indian Territory, in which he "asks that an

appeal to this court be granted him from the tribal authorities of the Chickasaw tribe of Indians."

The United States court entertained this petition, assumed jurisdiction over the case presented by it, and proceeded to set aside the master's report and order that the applicant be enrolled as a member of the Chickasaw tribe of Indians (Record, pp. 5 and 14).

The fundamental error here is that the United States court, from whose decree this appeal is taken, was wholly without jurisdiction in the premises.

The act of June 10, 1896 (29 Statutes, 321), provided as to the Dawes commission—

> "That said commission is further authorized and directed to proceed at once to hear and determine the application of all persons who may apply to them for citizenship in any of said nations, and after such hearing they shall determine the right of such applicant to be so admitted and enrolled.
>
> "*Provided*, That if the tribe or any person be aggrieved with the decision of the tribal authorities or the commission provided for in this act, it or he may appeal from such decision to the United States district court."

No original jurisdiction in this class of cases was conferred upon the United States courts. They were clothed only with appellate jurisdiction to review the "decisions of the tribal authorities or the commission provided for" in the act of Congress.

No application whatever was made to the Dawes commission, and none, so far as this record discloses, to "the tribal authorities" of the Chickasaw nation. The master ascertains as a fact that the application for enrollment was presented "to a committee of the legislature of the Chickasaw nation" (page 8), and the bill of exceptions states (page 21) that the application was afterward made to the legislature of the Chickasaw nation; "that the said legislature likewise refused to take notice of said application."

But surely an appeal from the judgment or order of a court of record, and the legislature is a court of record when acting in the exercise of such judicial functions as this, will not be entertained by any court of review in the absence of some record evidence of the judgment or order complained of. What evidence is there here to warrant this court in condemning by its disapproval an act, or even an improper failure or refusal to act, on the part of the Chickasaw legislature in the matter of this application? There is nothing here to show the form or the substance or the manner of presenting, or indeed any of the circumstances attending the presentation of, this alleged application to that legislature.

Any irresponsible person unwilling to undergo the scrutiny of the Dawes commission might present his petition for appeal from the failure or refusal of the legislature to act and upon his unsupported allegation that he had made such application and it was not acted upon by the legislature, and upon such allegations obtain a review of what in fact had never been viewed or heard of by the legislature.

An appeal is allowed only from a "decision." A mere failure to act is not a refusal to act. The legislature is entitled to the benefit of the presumption of good intentions. A "refusal" must be evidenced by some explicit and direct expression of purpose on the part of the legislature, which must be matter of record. The journals of the proceedings of the legislature are the best and only evidence of such expression.

The unexplained and unrecorded refusal of the legislature of the Chickasaw nation to act upon the particular application of Jesse L. Troup in the manner and form in which such application may have been presented cannot be taken as such an adverse decision of the matter as will support the appellate jurisdiction of the United States court.

THE CHICKASAW NATION
vs.
MRS. A. J. LOVE. } No. 471.

The record in this case presents an inexplicable and altogether irreconcilable statement of facts.

The petition of the applicant (page 3) was filed September 9, 1896, before the Dawes commission, and prays that petitioner be enrolled as a member of the Chickasaw tribe of Indians, on the ground that she was married to Overton Love, who was a Chickasaw by blood; that Overton Love had filed a bill against her for divorce, and a decree had been made in accordance with the prayer of the bill, granting the divorce. It further appears, from the agreed evidence of all parties (Record, pp. 23–26), that the ground of the divorce was the abandonment by the petitioner of her husband.

Now, we have already seen that by the act of the Chickasaw legislature approved October 19, 1876, it was required that all marriages in that nation should be solemnized only under the authority of such license as the act prescribes, and it also provides that—

> * * * "In case any citizen of the United States shall have married a member of the Chickasaw nation, and shall have heretofore abandoned her, or should hereafter voluntarily abandon or separate from such member of the Chickasaw nation, such citizen of the United States shall forfeit all rights acquired by such marriage in this nation, and shall be liable to removal as an intruder from the limits hereof."

Now, Mrs. Love is shown to be a citizen of the United States and to have voluntarily abandoned her husband and separated herself from him, and to have come within the letter and spirit of the act.

But, beyond all this, which relates to the merits of the controversy, there lies the further question as to whether

any such case is presented in this record as entitles the petitioner to relief under any circumstances.

The petition states that the parties were married on the 2d day of September, 1878, and that "she continued to reside with said Overton Love in the Chickasaw nation, Indian Territory, until the 3d day of September, 1878, when, owing to mistreatment, she was compelled to abandon the said Overton Love."

The master in chancery ascertains and reports as a fact in the case that—

> "On the 2d day of September, 1878, applicant herein married one Overton Love, a Chickasaw Indian by blood, and lived with him as his wife about three weeks, and there was a separation" (Record, p. 9).

The petitioner herself, in her own affidavit in support of her petition, says:

> "That on the second day of September, 1878, she was married to Overton Love, in the Chickasaw nation, Indian Territory; that the said Overton Love is a member of the Chickasaw tribe of Indians by blood; * * * she was compelled to abandon him, the said Overton Love, on the 3d day of October, 1878."

With her petition she exhibits a marriage license in proof of the allegation that "they were married according to the law in force in the Chickasaw nation." The license is marked "Exhibit A" for identification. It will be found on page 23 of the record and is as follows:

OVERTON LOVE TO AMANDA HIGGENS.

This is to certify that on the second day of December, 1878, I did unite in marriage the above-named parties, to wit, Overton Love and Amanda Higgens, at the residence of Overton Love, in Pickens county, Chickasaw nation.

WILLIAM J. TENNISON,
Ordained Minister of the Gospel.

So it appears from this certificate that the marriage performed by this minister was on the third day of December, 1878, while the marriage alleged and proven by the petitioner was on the second day of September, 1878; that the abandonment and separation by the petitioner from her husband is alleged in her petition to have been on the third day of September, 1878, while in her affidavit it is shown to have been on the 3d day of October, 1878.

How the United States court reconciled the marriage certificate with the dates given in the pleadings and proof does not appear.

We submit, on the whole case, that—

> "1. It was not shown that the marriage was solemnized according to the laws of the Chickasaw nation, and that the evidence in the record repels such conclusion.
>
> "2. That the official certificate of marriage produced by petitioner in support of her petition shows on its face that the marriage was actually performed two months after the date given in the petition and affidavit.
>
> "3. That the evidence and findings show that the divorce granted on the prayer of the husband, Overton Love, was upon the ground of the abandonment of him by the petitioner, and this, under the statute law of the tribe, deprived her of any rights under the marriage."

THE CHICKASAW NATION
vs.
ANDREW B. HILL AND OTHERS. } No. 472.

This case presents the question whether persons who are citizens and residents of several States of the Union should be enrolled as citizens of the Chickasaw Nation on the single ground that they are descendants of two Chickasaw Indians who had themselves resided in the State of Tennessee and had never resided in the Indian Territory.

The application had been made to the Dawes commission, who denied the prayer of the petition. On appeal to the

United States district court the case was referred to a master in chancery to report upon the facts and the law, who reported that—

> "While Charlie Matlock (the ancestor) was a Chickasaw Indian, there is no proof to show that he or his descendants within the last seventy-five years, with the exception of Evans Hill, a brother of the applicant, had any connection with the Chickasaw tribe of Indians."

Subsequently, on the motion of the applicant, the case was "re-referred" to another master in chancery, who made a voluminous report (Record, pp. 9–14) and recommended "that all of the above parties who are Indians by blood and all the intermarried parties married before 1876 be admitted to citizenship in the Chickasaw tribe or nation of Indians be enrolled as members thereof," and this report was confirmed by the court and judgment entered accordingly (Record, p. 18).

Under article 38 of the treaty of 1866 only those white persons who having married Choctaw or Chickasaw "resides in the said Choctaw or Chickasaw nation, or who has been adopted by the legislative authorities, is to be deemed a member of said nation, and shall be subject to the laws," &c. The acts of the legislature of the Chickasaw nation, as we have seen, follow the requirements of the treaty.

The judgment of the United States court is plainly in disregard of both the treaty and the acts of the Chickasaw nation, and can be sustained only by accepting the theory of the applicants in most of these cases, that Indian blood, in whatever degree, is of itself sufficient to entitle one to membership and citizenship, without regard to the terms of any treaty or any act of the legislative authorities of the nation.

An examination of the evidence adduced in support of this application discloses that it is of a character which would forbid its admission or consideration by any court

in the United States in a case involving title to real estate by descent.

THE CHICKASAW NATION
vs.
WILLIAM P. THOMPSON AND OTHERS. } No. 473.

This case presents the very *reductio ad absurdam* of the argument adduced in support of the claim made for enrollment.

The application was denied by the Dawes commission (Record, p. 7), and this on appeal to the United States court was referred to a master, who recommended that certain of the parties be enrolled as citizens (page 10), and the United States court decided and ordered that all the parties be enrolled.

A white man married an Indian woman; she died; he then married a white woman; he then died, and this second wife, a white woman and citizen of the United States, married a white man, also a citizen of the United States, and the claim here made, and sustained by the court, is that this white man and this white woman and their children should be enrolled as Chickasaw citizens because the first wife of the first husband was a Chickasaw.

If the statement of the case does not answer the claim based thereon, then no argument which can be constructed can do so.

HOLMES CONRAD,
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