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Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 322.

THE UNITED STATES, APPELLANT,

vs.

THE CHOCTAW NATION AND THE CHICKASAW NATION.

No. 323.

THE CHICKASAW FREEDMEN, APPELLANTS,

vs.

THE CHOCTAW NATION AND THE CHICKASAW NATION.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES AND THE CHICKASAW FREEDMEN.

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This is an equitable proceeding brought in the Court of Claims by the United States under an agreement, approved by act of Congress July 1, 1902 (32 Stat., 649), to determine the relations of the Chickasaw Freedmen to the Chickasaw Nation and the rights of such freedmen, and also to determine the liability, if any, of the United States to pay for

lands allotted to the Chickasaw Freedmen in the territory owned by the Choctaw and the Chickasaw Nations and occupied by the Chickasaw Nation.

If the Chickasaw Freedmen have been adopted either by the voluntary act of the Chickasaw Nation or by the act of Congress, then the Chickasaw Freedmen have certain political rights in the Chickasaw Nation and are each entitled, without payment by the United States, to forty acres of land in the Choctaw-Chickasaw territory. If they have not been adopted, then it becomes the duty of the United States to pay the Choctaw and Chickasaw Nations for these lands at the price fixed by the Dawes Commission. There are about nine thousand of these freedmen. The freedmen's interest in this controversy is their political rights. The interest of the United States is the payment of the money involved, amounting to something over one million of dollars.

I.

STATEMENT OF FACTS.

1. By a treaty entered into January 17, 1837, the Chickasaw Nation or tribe of Indians became possessed of an undivided interest in the lands of the Choctaw Nation. These lands, by the treaty of June 22, 1855, the United States guaranteed "to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common." By the same treaty, the political connection that had theretofore existed between the Choctaws and Chickasaws was severed, and in accordance with the terms of said treaty, the Indians comprising the Chickasaw Nation formed a separate government, adopting a written constitution, by whose terms certain powers were bestowed upon its legislative body.

Prior to the Civil War certain people of African descent were held in slavery by the Indian nations constituting

what is known as the Five Civilized Tribes. At the outbreak of the Civil War these nations or tribes of Indians, disregarding their treaty relations with the United States, joined the Confederacy, entered into treaty relations with the same, and took up arms against the United States. These acts abrogated all treaties with the United States, forfeited all rights held thereunder, and the tribes became the enemies of the United States.

On the twenty-second day of September, 1862, the President of the United States issued a preliminary proclamation announcing that, in the event the war continued, all slaves would be freed as a war measure; on the first day of January, 1863, pursuant thereto, the President declared all slaves within a certain specified territory free. This action by the President was carried into full effect throughout the entire territory of the United States by the adoption of the thirteenth amendment to the Constitution, December 18, 1865.

2. On the tenth day of September, 1865, commissioners designated by the President of the United States, and persons representing the Five Civilized Tribes of Indians entered into a preliminary and general treaty known as the Treaty of Fort Smith, which recites the fact that these tribes forfeited all their rights by joining the Confederacy and expresses the desire of all parties that the relations between them and the United States be reinstated; the several tribes renew their allegiance to the United States and agree "that hereafter they will in all things recognize the Government of the United States as exercising exclusive jurisdiction over them."

In the subsequent treaties made with the said Indian tribes it was the policy of the United States to provide for the freedmen by securing their adoption as members of the tribes or nations. Separate treaties were entered into be-

tween the United States and the several nations constituting the Five Civilized Tribes, by the terms of each of which, save the treaty with the Choctaw and Chickasaw Nations hereinafter referred to, the ex-slaves or freedmen of these nations were adopted as members of the nations or tribes upon a political equality with the native-born members thereof.

3. April 28, 1866, a treaty was entered into between the United States and the Choctaw and Chickasaw Indians, by the terms of which treaty said tribes might within two years adopt their freedmen, and in consideration of such adoption receive certain moneys specified in the treaty. In the event of a failure of said tribes to adopt said freedmen provision was made that the United States might remove said freedmen willing to remove, within ninety days after the expiration of said period, in which event the moneys above referred to should be held in trust by the United States for said freedmen. During the said period of two years neither of said nations adopted its freedmen and the United States has not removed or attempted to remove said freedmen from the territory occupied by said tribes, but has permitted them to occupy and improve parcels of land within the territory of said tribes in accordance with the treaty of 1866, and has now provided for their permanent location there and is allotting them lands within the territory. Said freedmen have been denied and are still denied all political and educational privileges, and the provision in Article IV of the treaty of 1866 that " all laws shall be equal in their operation upon Choctaws, Chickasaws and negroes " has not been observed by the Chickasaw Nation.

4. In order to carry out the terms of the treaty of 1866,—that is, to bestow constitutional authority upon its legislature to adopt the freedmen in accordance with Article III of said treaty,—a new constitution was adopted by the Chickasaw Nation in 1867, which has been in full force and effect from

that day to this. In all matters within the jurisdiction of the nation neither the constitution of the nation nor the provisions of the treaty of 1866 require the approval of the United States to legalize enactments of the Chickasaw legislature relating to domestic affairs.

By an act of the Chickasaw legislature approved January 10, 1873, the Chickasaw Freedmen were adopted as members of the nation or tribe subject to the conditions contained in Article III of the treaty of 1866. This act by its terms was to take effect " after its approval by the proper authority of the United States." The act of adoption was complete in terms, but its operation was suspended until it should be approved by the United States.

5. On May 17, 1882, Congress appropriated ten thousand dollars out of the trust fund created by the third article of the treaty of 1866, for the purpose of educating freedmen in said tribes, to be expended under the direction of the Secretary of the Interior, one-fourth of this sum to be used for the Chickasaw Freedmen ; said act providing that either of said tribes may, before such expenditure, adopt and provide for the freedmen in said tribes in accordance with said third article. While this act of Congress did not in express terms refer to the act of adoption passed by the Chickasaw legislature, it in effect approved said act. This approval being questioned, however, Congress, by an act approved August 15, 1894, in express terms approved and gave full force and effect to the Chickasaw act of adoption of 1873 (28 Stat., 336, sec. 18).

In the interim the Chickasaw legislature had passed some resolutions and also an act expressing a desire that their freedmen be removed from the Chickasaw country. These legislative enactments, however, did not mention the act of

adoption, nor did they expressly repeal said act. These acts will be referred to later.

6. By an act of the Choctaw council, approved May 21, 1883, it was among other things provided "that all persons of African descent resident in the Choctaw Nation at the date of the treaty of Fort Smith, September 13, 1865, and their descendants, formerly held in slavery by the Choctaws or Chickasaws are hereby declared to be entitled to, and vested with, all the rights, privileges, and immunities, including the right of suffrage, of citizens of the Choctaw Nation, except in the annuities, moneys, and public domain of the nation." (Report of Com. of Ind. Affairs, 1884, p. XXXVII.)

By the third article of the treaty of 1866 it is provided that freedmen and their descendants shall have forty acres each of the land of said nation on the same terms as the Choctaws and Chickasaws.

7. The rights of freedmen under the treaty of 1866 and the several acts of Congress and the Chickasaw legislature being denied and refused them by the Chickasaw Nation, Congress conferred upon the Court of Claims, by an act approved July 1, 1902 (32 Stat., 649) jurisdiction and power "to determine the existing controversy respecting the relations of the Chickasaw Freedmen to the Chickasaw Nation and the rights of such freedmen in the lands of the Choctaw and Chickasaw Nations under the third article of the treaty of one thousand eight hundred and sixty-six, between the United States and the Choctaw and Chickasaw Nations, and under any and all laws subsequently enacted by the Chickasaw legislature or by Congress. * * * And any party feeling aggrieved at the decree of the Court of Claims * * * may * * * appeal to the Supreme Court." This act also provides for the allotment of the lands of the Choctaw and Chickasaw Nations, giving to the Chickasaw

Freedmen forty acres of average land *per capita*, and leaves to the Court of Claims the determination whether or not these lands should be paid for by the United States.

8. In 1865 at the conclusion of the war it is estimated that there were about 3,000 persons of African descent who had formerly been slaves in the Chickasaw Nation. The survivors of these, together with their descendants, number about 9,066, according to the Twelfth Census of the United States, and these people constitute the defendant in this suit designated as the Chickasaw Freedmen.

The facts bearing upon the issues in this case are set forth in the treaty of 1866, the subsequent legislation of the Chickasaw Nation and the several acts of Congress relating thereto, and by agreement the case was submitted thereon. The Court of Claims decided the case against the United States and the freedmen and both parties appealed to this court.

II.

QUESTIONS SUBMITTED TO THE COURT.

1. The status of the freedmen under the laws and treaty of 1866.

2. Have said freedmen been adopted by the voluntary act of the Chickasaw Nation?

3. Was adoption effected by act of Congress?

4. If they have been adopted into the Chickasaw Nation, what are their rights in lands and property?

5. If they have not been adopted, what are their rights, if any, to the moneys held in trust by the United States under the third article of the treaty of 1866?

III.

THE STATUS OF THE FREEDMEN.

The act of Congress under which this suit is brought directs (section 36) that the Court of Claims determine "the *relations* of the Chickasaw Freedmen to the Chickasaw Nation *and the rights of such freedmen*," etc., etc. To determine the relations of the freedmen to the Chickasaw Nation involves necessarily a discussion and a determination of their status: if they have not been adopted, what are their relations and rights as free men living under a treaty among these Indians; if they have been adopted, then what are their relations and rights as adopted citizens under the treaty and laws. We shall first discuss, under two heads, their status as free men.

1. When and how did they become free?

They did not become free by any act of the legislature of the Chickasaw Nation. The constitution of that nation prior to August 16, 1867, provides:

"The Legislature of this Nation shall have no power to pass laws for the emancipation of slaves without the consent of their owners, nor without paying their owners previous to such emancipation a full equivalent in money for the slaves so emancipated." (Constitution, Laws and Treaties of the Chickasaws, 1860, p. 22.)

Prior to the adoption of the constitution in 1867, which removed this limitation upon the power of the legislature, the freedom of slaves was recognized by the tribe in the treaty of 1866. The treaty did not emancipate them and no act of the legislature after that date undertook to give them freedom. We must look, therefore, to another source.

By the treaty of Fort Smith, entered into September 10, 1865, the Chickasaw Nation, with others, "covenant and

agree that hereafter they will in all things recognize the Government of the United States as exercising exclusive jurisdiction over them." (See pp. 16 and 17 of the Record or Rep. of Com. of Ind. Affairs, 1865.) This was but a declaration of the allegiance that was acknowledged long before the war. The Chickasaws have ever been recognized as a dependent nation living within the territory of the United States and under its general jurisdiction.

In Cherokee Nation *vs.* Southern Kansas R'y Company, 135 U. S., 641, 653, this court discussing the status of the Cherokees, one of the Five Civilized Tribes, says:

"From the beginning of the government to the present time, they have been treated as 'wards of the nation,' 'in a state of pupilage,' 'dependent political communities,' holding such relations to the general government that they and their country, as declared by Chief Justice Marshall in Cherokee Nation *vs.* Georgia, 5 Pet., 1, 17, 'are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory and an act of hostility.'"

The Chickasaw Nation joined the rebellion, their interests as a slaveholding tribe being identified with the Confederacy. As a war measure President Lincoln issued his proclamation emancipating slaves within certain specified districts (not including the territory occupied by this tribe). Later was adopted the thirteenth amendment to the Constitution of the United States—in effect December 18, 1865 (after the treaty of Fort Smith), providing that: "Neither slavery nor involuntary servitude, except as a punishment for crime, * * * shall exist within the United States, *or any place subject to their jurisdiction.*" By this amendment to the Federal Constitution slavery within the Chickasaw Nation was abolished.

In United States *vs.* Payne, 8 Fed. Rep., 883, 891, the court say:

"Colored people were held in slavery in all the civilized tribes of the Indian Territory. Slavery was abolished there, as well as elsewhere in the United States, by the emancipation proclamation of the President and by the thirteenth amendment to the Constitution, adopted the thirteenth (*eighteenth*) day of December, 1865, and such abolition of slavery was recognized by these tribes in the several treaties made with them in 1866."

2. What rights as residents in the Chickasaw Nation under treaty did they possess by reason of their being free men?

It must be borne in mind that these defendants are of African descent; they are not Indians. The provision of the Federal Constitution, therefore, which excludes "Indians not taxed" from the rights of citizenship does not apply to these defendants. They were born in the United States, and subject to its general jurisdiction. They are not, and never were, the subjects of a foreign power. They were only the slaves of what was at most a dependent nation within, and subject to the jurisdiction of, the United States (Cherokee Nation *vs.* Southern Kansas Railway Co., *supra*). By the thirteenth amendment "the system of slavery of the colored race * * * was abolished, and by subsequent amendments and by the Civil Rights Act the colored race was raised into perfect equality of civil and political rights with all other persons."

Ex parte Virginia, 100 U. S., 339.
Strauder *vs.* West Virginia, 100 U. S., 303.
In re Look Tint Sing, 21 Fed. Rep., 905.
In re Sah Quah, 31 Fed. Rep., 327.

By reason of this citizenship, and also by reason of the provision in the fourth article of the treaty of 1866 "that all laws shall be equal in their operation upon Choctaws, Chickasaws and negroes, and that no distinction affecting the latter shall at any time be made," the freedmen were, and are, entitled to the rights, privileges, and immunities of citizehs of the United States residing by treaty right within the boundaries of the Indian reservation. By Article IV of the treaty referred to, it is further agreed "that while the said freedmen, now in the Choctaw and Chickasaw Nations, remain in said nations, respectively, they shall be entitled to as much land as they may cultivate for the support of themselves and families, in cases where they do not support themselves and families by hiring, not interfering with existing improvements without the consent of the occupant, it being understood that in the event of the making of the laws, rules, and regulations aforesaid, the forty acres aforesaid shall stand in place of the land cultivated as last aforesaid." While Article III of this treaty provides for their adoption, and certain rights in case of adoption, and for their removal by the United States as stated, yet the language of Article IV above quoted is clear and comprehensive and fixes their rights, not during the two years' period, but for all the time that they shall "remain in said nations."

Generally speaking, then, these defendants, by reason of their status as free men and the terms of the treaty of 1866 (independently of the question of adoption), are entitled (1) to reside within the territory of the nation; (2) to occupy and cultivate lands and make improvements thereon; (3) to have all laws within the territory "equal in their operation upon Choctaws, Chickasaws and negroes," and (4) to stand upon an equality under the law with every other free man,—not including the political right of suffrage or the holding of office.

IV.

HAVE SAID FREEDMEN BEEN ADOPTED BY THE VOLUNTARY ACT OF THE CHICKASAW NATION?

1. As set forth above, the Chickasaw legislature passed an act, approved January 10, 1873, adopting the freedmen, substantially upon the terms of the treaty of 1866, which act was to take effect upon its approval by the United States.

If the freedmen had been adopted within two years after the ratification of the treaty of 1866, there could be no denial of the power of the Chickasaw legislature to adopt the ex-slaves. All parties in interest, namely, the United States and the Choctaw and Chickasaw nations, subscribed to the treaty. But as the period named in the treaty passed without any action being taken, it has been suggested that the Chickasaw legislature did not have the power to adopt the freedmen in 1873 upon the terms set forth in the act.

By Article III the nation was at liberty to adopt its freedmen or not to adopt them, as it saw fit. But if it did not adopt them during the two-year period, was it powerless to adopt them afterward? In the event of a failure to enact the proper legislation within the prescribed period, the United States agreed, within ninety days from the expiration of said two years, to remove, etc., all such persons (ex-slaves) "as may be willing to remove."

The limit of time contained in this article of the treaty is *mandatory* only as it relates to the United States, which agrees to remove the freedmen "willing to remove" within a specified time; it is purely *directory* in its application to adoption by legislative enactment on the part of the Chickasaw Nation. If the freedmen remained and the nation desired to adopt them subsequently, the only possible objectors would be the United States and the Choctaw Nation, the other parties to the treaty of 1866.

The constitution of the Chickasaw Nation, in force August 16, 1867, gives full power to its legislature to adopt the freedmen. It provides as follows:

"ARTICLE IV.—*Legislative Department.*—SEC. 25. In conformity with the treaty of April 28, 1866, the legislature shall have the power to enact any and all laws necessary to carry into effect the requirements specified in the said treaty.

"*General Provisions.*—SEC. 10. The legislature shall have power, by law, to admit or adopt, as citizens of this nation, such persons as may be acceptable to the people at large." (Constitution and Laws of the Chickasaw Nation, 1899, pp. 10 and 19.)

In denying the power of its legislature to adopt the freedmen in 1873, the Chickasaw Nation contends that the consent of the Choctaw Nation was necessary because the treaty of June 22, 1855 (11 Stat. L., 611), provides that of the lands "held in common" by the Choctaw and Chickasaw Nations "no part thereof shall ever be sold without the consent of both tribes," the Chickasaw Nation insists that the adoption of the freedmen into the tribe or nation would materially reduce the allotments of the native-born Choctaws and Chickasaws; therefore that adoption amounts to a sale of the land, and consent is necessary. This reasoning is unsound and the conclusion untenable; but if consent was necessary it would be a sufficient reply to say: (1) That such consent was given by the Choctaw Nation in the treaty of 1866; (2) that the Choctaw Nation at no time before or after the passage of the Chickasaw act of 1873 has objected to the adoption of the freedmen by the Chickasaw Nation; and (3) that the act of the Choctaw Nation adopting its own freedmen extended its operation in express terms to the Chickasaw freedmen. The two acts taken together,—the Chickasaws adopting their freedmen and the Choctaws adopting theirs, and each act referring to the treaty of 1866,—shows an agreement in reference to the matter.

The act of the Chickasaw legislature in 1873 adopting said freedmen in accordance with the terms of the treaty of 1866 was complete in itself, and a full exercise of the power possessed by that legislature. By the express terms of the act, however, it was not to become effective until approved by the proper authority of the United States. This last clause recognized the sovereignty of the United States over the nation; a sovereignty acknowledged in the treaty of Fort Smith and the treaty of 1866. The United States consented to and approved the act of adoption on May 17, 1882 (22 Stat., 72) and again August 15, 1894 (28 Stat., 336), and thus completed the agreement by all parties to the act of adoption. And thereupon the act of the Chickasaw legislature became operative and effected the adoption of the freedmen.

2. It is claimed, however, that by legislation relating to the freedmen subsequent to 1873 and prior to the approval of the act by the United States, the Chickasaw legislature repealed the act of adoption. October 17, 1876, the Chickasaw legislature passed an act ratifying the treaty of 1866, with the amendments made by the Senate of the United States, which provided, *inter alia*, as follows:

"SEC. 3. *Be it further enacted*, That the provisions contained in Article 3, of the said treaty, giving the Chickasaw legislature the choice of receiving and appropriating the three hundred thousand dollars therein named, for the use and benefit, or passing such laws, rules and regulations as will give all persons of African descent certain rights and privileges, be, and is hereby declared to be the unanimous consent of the Chickasaw legislature, that the United States shall keep and hold said sum of three hundred thousand dollars for the benefit of the said negroes, and the governor of the Chickasaw Nation is hereby requested to notify the Government of the United States that it is the wish of the legislature of the Chickasaw Nation that the Government of the United States remove the said negroes beyond the limits of the Chickasaw Nation, according to the requirements of the third article of the treaty of April 28, 1866." (Constitution and Laws of the Chickasaw Nation, 1899, p. 120.)

Other acts and resolutions, set forth on pages 11, 12 and 13 of the Record, were passed by the Chickasaw legislature. But none of these acts referred to the act of adoption of 1873, which was then a law, suspended in its operation, awaiting the approval of the United States. These acts, together with the act of adoption, placed the whole subject before the United States so that it could follow either of two courses. It could approve the act of adoption of 1873, or it could refuse to approve that act and remove the freedmen as requested by the act of 1876. The power of determining which course should be adopted rested wholly and exclusively with the United States.

An examination of the intermediate legislation of the Chickasaw Nation will show that it does not expressly refer to or repeal the act of adoption of 1873, unless it repeals it by implication.

In the case of Chew Heong *vs.* The United States, 112 U. S., 536, 549, this court says:

"The rule is well settled that repeals by implication are not favored, and are never admitted where the former can stand with the new act. *Ex parte* Yerger, 8 Wall., 85, 105. In Wood *vs.* The United States, 16 Pet., 342, 362, Mr. Justice Story, speaking for the court upon the question of the repeal of a statute by implication, said: 'That it has not been expressly or by direct terms repealed is admitted; and the question resolves itself into the narrow inquiry, whether it has been repealed by necessary implication. We say by necessary implication, for it is not sufficient to establish that subsequent laws cover some, or even all, of the cases provided for by it, for they may be merely affirmative, or cumulative, or auxiliary.'"

The intermediate legislation of the Chickasaw Nation did not, in a single act, expressly or by direct terms, repeal the act of adoption of 1873; therefore "the question resolves itself into the *narrow inquiry* whether it has been repealed by necessary implication."

An examination of the enactments of the Chickasaw legislature discloses either ignorance on the part of the legislature of the existence of the act of 1873 or a belief that it was inoperative. A *belief* that an act was inoperative, if shown to exist, does not constitute a repeal by implication. In the case of The United States *vs.* Claflin, 97 U. S., 546, 548, the court says:

"As a portion of the act of 1823 was carried into the Revised Statutes * * * and the second section was not, that section was covered by the repealing clause, unless it had been repealed before. But that clause indicates a belief on the part of Congress that it had been previously repealed. * * * This, however, although entitled to great respect, ought not to be considered as more than an expression of opinion or a recital of belief. It is not in the form of an enactment. It is not a declaration of congressional will. * * * *Whether a statute was repealed by a later one is a judicial, not a legislative question.*"

"It is necessary to the implication of a repeal that the objects of the two statutes are the same, in the absence of the repealing clause. If they are not, both statutes will stand, though they refer to the same subject" (Maxwell on the Interpretation of Statutes, 153).

The act of 1873 and the subsequent Chickasaw acts refer to the same *subject*, namely, the Chickasaw Freedmen. But the *object* of the act of 1873 and the *object* of each succeeding act are different. The object of the act of January 10, 1873, was to effect the adoption of the Chickasaw Freedmen in accordance with Article III of the treaty of 1866. On the other hand, the object of the subsequent enactments was to bring about, if possible, a removal of the freedmen. It remained for Congress to determine which should be done. The Chickasaw legislature could adopt the freedmen, but it could not remove them. The United States alone could do that, if the freedmen were willing to go. Under Article IV of the treaty of 1866 the Chickasaw

Nation was obliged to suffer the freedmen to occupy indefinitely lands within the Chickasaw country. In either event, considering the state of the legislation, it was solely in the power of Congress to determine whether the freedmen should be adopted or removed.

Congress deliberated upon these acts and petitions, all of which were before Congress, and approved the act of adoption, and by the agreement of 1902 the freedmen are to remain in the Chickasaw Nation and receive allotment of lands in this territory.

In Gabe Jackson *vs.* The United States, 34 Court of Claims, 441, 444, the court say:

"There was delay in all this and neglect to take advantage of technicalities; not impossibly because delay was thought to be wise and helpful under the most peculiar circumstances existing in the Indian Territory after the practical close of the war of 1865. Be this as it may, one point is fixed, that in 1894 by act of the Chickasaw legislature, approved by the defendants' Congress, the freedmen became 'subject to the jurisdiction and laws of the Chickasaw Nation and to trial and punishment for offenses against them in every case as if the said negroes were Chickasaws.'"

We respectfully submit that by the act of adoption, passed by the Chickasaw legislature and approved by Congress, these freedmen were adopted.

V.

WAS ADOPTION EFFECTED BY ACT OF CONGRESS?

No matter what effect the Chickasaw legislation subsequent to 1873 and prior to 1894 had upon the act of adoption, the fact remains that Congress by the act approved August 15, 1894, gave life and vitality to the Chickasaw act of January 10, 1873. The statute of 1894 so identifies the Chickasaw act of adoption as to re-enact its provisions and

embody them in the act of Congress. In other words, by act of the Congress of the United States approved by the President August 15, 1894, the freedmen became citizens of the Chickasaw Nation and "*subject to the jurisdiction and laws of the Chickasaw Nation and to trial and punishment for offenses against them in every case just as if the said negroes were Chickasaws,*" upon the terms and conditions named in the act of 1873.

That Congress has always possessed the power to determine citizenship in any Indian nation or tribe without restrictions is decided by this court in Stephens *vs.* Cherokee Nation, 174 U. S., 445. Under this title many cases were determined that arose under the acts of Congress conferring authority upon the Dawes Commission, beginning with the act of March 3, 1893 (27 Stat., 612, 645), and ending with the act of June 28, 1898 (30 Stat., 495). The opinion of the court recites (p. 483) the act of March 3, 1871 (16 Stat., 544, 566), which, it says, "was carried forward into section 2079 of the Revised Statutes," as follows:

"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."

Notwithstanding the restrictions upon legislative action of the concluding clause of section 2079 above quoted, the court says:

"The treaties referred to in argument were all made and ratified prior to March 3, 1871, but it is 'well settled that an act of Congress may supersede a prior treaty and that any questions that may arise are beyond the sphere of judicial cognizance, and must be met by the political department of the Government.' Thomas *vs.* Gay, 169 U. S., 264, 271, and cases cited."

In other words, there are no restrictions upon future Congresses. After discussing the general powers of Congress over the affairs of Indian tribes and quoting at length from The Cherokee Nation *vs.* Southern Kansas Railway Company, the court says (p. 488):

"We repeat that in view of the paramount authority of Congress over the Indian tribes, and of the duties imposed on the Government by their condition of dependency, we cannot say that Congress could not empower the Dawes Commission to determine, in the manner provided, who were entitled to citizenship in each of the tribes. * * * We are of the opinion that the constitutionality of these acts in respect to the determination of citizenship cannot be successfully assailed on the ground of the impairment or destruction of vested rights. The lands and moneys of these tribes are public lands and public moneys, and are not held in individual ownership, and the assertion by any particular applicant that his right therein is so vested as to preclude inquiry into his status involves a contradiction in terms."

The case just cited not only recognizes the power of Congress to determine citizenship, but it sweeps away the contention of the Chickasaw Nation in the case at bar that the consent of the Choctaws was necessary to perfect the adoption of the freedmen by the Chickasaw legislature.

In commenting upon Stephens *vs.* Cherokee Nation, above cited, this court in Cherokee Nation *vs.* Hitchcock, 187 U. S., 294, 306, says:

"That case involved the validity of the very act under consideration, and the precedent correlative legislation, wherein the United States practically assumed the full control over the Cherokees as well as the other nations constituting the Five Civilized Tribes, and took upon itself the determination of membership in the tribes for the purpose of adjusting their rights in the tribal property. The plenary power of control by Congress over the Indian tribes and its undoubted power to legislate, as it had done through the act of 1898, directly for the protection of the tribal property, was in that case reaffirmed."

The case of Lone Wolf *vs.* Hitchcock, 187 U. S., 553, presents a striking parallelism to the case at bar. The twelfth article of the Medicine Lodge treaty, negotiated in 1867 with the Kiowa and Comanche tribes of Indians, provided as follows:

"No treaty for the cession of any portion or part of the reservation herein described, which may be held in common, shall be of any validity or force as against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians occupying the same," etc.

On October 6, 1892, 456 adult male members of the confederated tribes signed, with three commissioners representing the United States, an agreement, which was in form a proposed treaty providing for a surrender to the United States of the rights of the tribes in the reservation, for allotments out of the lands to the Indians in severalty, and for other purposes. Before congressional action thereon a protest was made to Congress by 571 Indians in council assembled, who claimed that their assent to the agreement was obtained by fraudulent misrepresentation of its terms, and that the agreement was not binding upon the tribes because the necessary three-fourths of the adult male members had not assented thereto, as was required by the twelfth article of the Medicine Lodge treaty; further claim was made that the bills pending in Congress contained important modifications to the agreement which the Indians had not assented to.

The Senate called upon the Secretary of the Interior for information as to whether the signatures attached to the agreement comprised three-fourths of the adult males of the tribes, and he replied that *less* than the requisite three-fourths had signed. With this information and with the protest of the Indian tribes before it, Congress passed the act "to execute the agreement made with the Kiowa, Comanche, and Apache Indians in 1892." The Lone Wolf suit followed, in which this court says:

"Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the Government. Until the year 1871 the policy was pursued of dealing with the Indian tribes by means of treaties, and of course a moral obligation rested upon Congress to act in good faith in performing the stipulations entered into in its behalf. But, as with treaties made with foreign nations (Chinese Exclusion Cases, 130 U. S., 581, 600), the legislative power might pass laws in conflict with treaties made with Indians.

"The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the Government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should be so. When, therefore, treaties were entered into between the United States and a tribe of Indians, it was never doubted that the power to abrogate existed in Congress, and that in a contingency such power might be availed of from considerations of governmental policy. * * *

"In view of the legislative power possessed by Congress over treaties with the Indians and Indian tribal property we may not specially consider the contentions pressed upon our notice that the signing by the Indians of the treaty of October 6, 1892, was obtained by fraudulent misrepresentation and concealment; that the requisite three-fourths of adult male Indians had not signed, as required by the twelfth article of the treaty of 1867, and that the treaty as signed had been amended by Congress without submitting such amendments to the action of the Indians, *since all these matters in any event, were solely within the domain of the legislative authority, and its action is conclusive upon the courts.*"

The pronouncement of this court in the Lone Wolf case fits the facts of the case at bar. The act of adoption of the Chickasaw legislature was suspended awaiting approval by Congress. Before such approval was given the Chickasaw

legislature protested against the presence of the freedmen in the Indian country and asked their removal. But Congress, with the protesting acts and resolutions before it, ratified the act of adoption, thus giving full force and effect to said act, and the freedmen became, by virtue of the act of Congress of August 15, 1894, citizens of the Chickasaw Nation.

VI.

RIGHTS OF FREEDMEN IF ADOPTED.

The treaty of 1866 provides that the freedmen, upon adoption, are to be invested with "all the rights, privileges, and immunities, including the right of suffrage, of citizens of said nations," and that they are to receive "forty acres each of the land of said nations on the same terms as the Choctaws and Chickasaws, to be selected on the survey of said land, after the Choctaws and Chickasaws and Kansas Indians have made their selections."

Article II of the Constitution of the Chickasaw Nation of 1867, Section 3, provides that:

"All free male persons of the age of nineteen years and upwards, who are by birth or *adoption* members of the Chickasaw tribe of Indians, and not otherwise disqualified, and who shall have resided six months immediately preceding any election in the Chickasaw Nation, shall be deemed qualified electors, under the authority of this Constitution." (Constitution and Laws of the Chickasaw Nation, 1899, p. 6.)

It is clear from the provisions of the treaty and of the Chickasaw constitution that the freedmen, if adopted, are entitled to exercise the right of suffrage, which has always been denied them. It is also clear that included in the "rights, privileges, and immunities * * * of citizens" of the Chickasaw Nation is the right to enjoy the educational facilities afforded by said nation. Furthermore, the

right to an allotment of forty acres each of the land of the Choctaw and Chickasaw Nations accrued to the freedmen upon adoption, without any further payment by the United States.

VII.

RIGHTS OF THE FREEDMEN IF NOT ADOPTED.

If, however, the freedmen were not adopted, and are not citizens of the Chickasaw Nation, as decided by the court below, their rights are (1) personal rights, (2) rights in land, and (3) rights in moneys held in trust by the United States.

1. The personal rights of the freedmen are guaranteed by the Constitution of the United States and by Article IV of the treaty of 1866.

2. The Atoka agreement, confirmed by act of Congress of June 28, 1898 (30 Stat. L., 505) provides that the Chickasaw Freedmen are to receive allotments of land "equal in value to forty acres of the average land of the two nations," and by the agreement approved by the act of Congress of July 1, 1902 (32 Stat. L., 649), "there shall be allotted to each * * * Chickasaw freedman * * * land equal in value to forty acres of the average allotable land of the Choctaw and Chickasaw Nations * * * which land may be selected by each allottee so as to include his improvements."

3. The right to moneys held in trust by the United States is a right that accrued to the Chickasaw freedmen by virtue of the provisions of the treaty of 1866, provided the freedmen were not adopted in accordance with the terms of said treaty. In Article III the Choctaw and Chickasaw Nations cede to the United States the leased district "in consideration of the sum of three hundred thousand dollars, * * *

provided that the said sum shall be invested and held by the United States, at an interest not less than five per cent., in trust for the said nations until the legislatures * * * shall have made such laws * * * as may be necessary to give all persons of African descent, resident in the said nations at the date of the treaty of Fort Smith, and their descendants, * * * all the rights * * * of citizens of said nations. * * * And should such laws * * * not be made by the legislatures * * * within two years from the ratification of the treaty, then the said sum * * * shall *cease* to be held in trust for the said Choctaw and Chickasaw Nations, and *be held for the use and benefit of such of said persons of African descent as the United States shall remove from the said Territory,*" etc.

If the Chickasaw Nation has not, in the opinion of the court, adopted the freedmen, then clearly the said nation is no longer the beneficiary of one-fourth of the trust fund of three hundred thousand dollars and interest, and the said nation should repay to the United States the sum advanced to it out of said fund under Article XLVI of the treaty of 1866, together with interest erroneously paid to said nation, amounting in all to fifty-five thousand dollars. (See Senate Ex. Doc. No. 166, 50th Congress, 1st session.)

This position is conceded by the Chickasaw Nation in several legislative enactments, notably the act of October 17, 1876, *supra*, wherein "it is hereby declared to be the unanimous consent of the Chickasaw legislature that the United States shall keep and hold said sum of three hundred thousand dollars *for the benefit of the said negroes;*" also in the memorial of October 4, 1877 (see Senate Ex. Doc. No. 166, 50th Cong., 1st sess., p. 5,), wherein it is "resolved by the legislature of the Chickasaw Nation, that the nation shall refund to the United States the sum of $55,000."

If the Chickasaw Nation is not the beneficiary who is? Certainly not the United States; for the Government is the

trustee of the fund. True, the United States agreed to remove "all such persons of African descent as may be willing to remove; those remaining or returning * * * to have no benefit of said sum." But it never undertook to remove the freedmen. They, on their part, in memorials to Congress praying for a determination of their status, expressed a willingness to be removed, provided it should be adjudged that they were not members of the Chickasaw Nation by adoption. Therefore, the beneficiary of the trust, the freedmen, have done nothing to forfeit their right to the "use and benefit" of the trust fund.

The United States, as trustee, should not apply the fund to the purchase of lands from the Chickasaws for allotment to the freedmen, now that the Government and the Chickasaws have agreed to locate the freedmen permanently in the Chickasaw country. It was never intended that this trust fund should be used to purchase lands whereon to colonize the freedmen. In the event that the Chickasaw Nation did not adopt the freedmen, the United States had a home provided for them. By the third article of the treaty of March 21, 1866 (14 Stat. L., 755), the Seminole Indians cede to the United States "their entire domain," with authority to the United States "to locate other Indians and *freedmen* thereon." Discussing this article of the treaty, Judge Parker, in the case of The United States *vs.* Payne, *supra*, says:

"What did the government mean by locating 'freedmen thereon?' * * * The government was desirous of protecting these freedmen and of securing them homes. It was not known how well the several Indian tribes who had held them in slavery would observe their pledges to secure them the same rights they enjoyed. * * * The government had given them the boon of freedom, and it was in duty bound to secure it, in all that the term implied, to them. The government feared that to do this it might be necessary to settle them in a colony by themselves. This purpose of the government, should it become necessary, was manifested by

the terms of the Choctaw treaty of April 15 (*28*), 1866. Therefore, in making the treaty with the Seminoles, it sought to provide a home for such freedmen as had been held in slavery by the Indians in the Indian Territory, should that necessity occur, to secure them their rights."

A home was provided for the freedmen if they were removed, and the trust fund was not, therefore, to be applied to the purchase of lands whereon to colonize them. It was to compensate them for the rights of citizenship which might be denied them by the Choctaw and Chickasaw Nations, and aid them in making homes for themselves and earning a livelihood.

The court below says (Record, p. 30):

"The negroes have remained in the nation. It does not appear they, or any of them, were willing to remove from the nation, and the United States, not having obligated itself to do so, was under no duty to remove them without their consent. We must presume the freedmen voluntarily remained, and still so remain, in the nations. Their status is, therefore, plainly defined by the treaty itself. Their relation to the Chickasaw Nation is, as the treaty expresses, the same as citizens of the United States in the nation, and, that being true, they have no right or interest, under the terms of the treaty, independently of the agreement of March 21, 1902, in any of the property held in common by the members of the nation. Neither are those of the freedmen who remain within the nation entitled to any part of the funds in the control of the United States."

It is true that the freedmen have remained in the Chickasaw country. They preferred to continue in the land of their birth or adoption. They hesitated to abandon the improvements which they or their fathers had made on land occupied since the war. They had not the means to remove and make a home elsewhere. And the United States took no action whatsoever looking toward their removal. The attitude of the freedmen was well expressed in 1888 by the

then Commissioner of Indian Affairs. He said (Senate Ex. Doc. No. 166, 50th Congress, 1st session):

"During that year (1887) and the present, several complaints have been received from the freedmen relative to the denial of their rights, and particularly as to the utter lack of educational facilities. Recently Agent Owen held a conference with some of the leading freedmen, at which they expressed a desire to remain in the nation if their rights, especially in the matter of schools, could be accorded them, *but signified their willingness to submit to the decision of the Government.*"

The Commissioner of Indian Affairs quoted as above caused to be introduced in Congress a bill providing for the removal of the freedmen (Senate document last named), but the measure was never enacted into law.

That the freedmen have forfeited or prejudiced any of their rights under the treaty of 1866 because of indifference on their part, or because they were unwilling to remove from the Chickasaw country, is not well founded in fact. In 1866 the freedmen memorialized the United States Government, stating that the bitter feeling of the Chickasaws toward them rendered them anxious and willing to leave the nation, and to settle on any land designated by the Government, and they asked that the Government provide transportation for themselves and families, and supplies sufficient to enable them to make a start in their new homes. To this request the United States paid no heed. Two years later, in 1868, a memorial of similar purport was forwarded to Washington by the freedmen, and was laid before Congress. But no action was taken thereon. In February, 1869, a delegation of freedmen visited Washington and submitted a third memorial urging the fulfillment on the part of the Government of the stipulations in the treaty of 1866 relative to their people. From this effort nothing resulted. (See Report of Commissioner of Indian Affairs, 1887, page LIX.)

It does not follow, therefore, that the United States was relieved of its treaty obligations, and of its duty toward the freedmen, by a lack of consent on their part. There has been no failure on their part, no unwillingness to abide by the decision of the United States to remove or not to remove them. They have not forfeited their rights under the treaty of 1866, and if not adopted must be entitled to the benefit of the funds in the control of the United States as trustee. Certainly the Chickasaw Nation would not be entitled to it if there has been no adoption. The United States is a trustee and as such is not entitled to the fund. It may use the fund for the benefit of the freedmen, but, as stated, not for the purchase of land.

VIII.

GOVERNMENTAL POLICY.

In concluding this argument we desire to return to the original proposition, which seems to us the true position and one that solves all the questions involved in accordance with the well-defined policy of the United States in regard to the slaves that were freed by the emancipation proclamation and the amendment to the Constitution. Beginning with the reconstructed States of the Union and extending to the Five Civilized Tribes, the constitutions and treaties have provided for the incorporation of the ex-slave into the local government. The laws of the United States gave to the freedman citizenship and by virtue of the constitutions and treaties he became a part of the local political body in which he was born or lived at the time when he was given his freedom. If we examine the treaties with the Five Civilized Tribes we shall find that in all of them there is a provision for the adoption of the former slaves.

In the treaty with the Chickasaw Nation it was evidently felt that the holding of this trust fund of three hundred

thousand dollars conditioned upon the adoption of the former slaves, would result in a change of the local constitutions of the tribes and legislation would follow adopting the negroes. The constitutions were changed, but the succeeding legislatures of the Chickasaw Nation varied in their wishes upon the subject of adoption, and therefore all of the legislation by that nation has not been harmonious. The policy and legislation of the United States on the contrary has been consistent, with a single purpose in view, namely, the incorporation of the freedmen into the body politic to which they naturally belonged, with all the rights, privileges, and immunities, including the right of suffrage, of other citizens of the State or nation.

Holding that the freedmen were adopted will entitle the Chickasaw Nation to receive the money held in trust by the United States, part of which it has already received as an advance, thus settling this financial question. The United States will not be required to pay for the lands allotted to the freedmen upon which these freedmen have been living since the civil war.

By the agreement of 1902 these freedmen are to remain forever in the Chickasaw Nation, they are to receive forty acres of land each, allotted to them so as to give to each the improvements which they have themselves made upon the land. It is not a question of removal. By this agreement they are to remain and the question is, what shall their status be? Shall they remain in the deplorable condition set forth in many reports of the Indian agent of that Territory, in which it is shown conclusively that they have no school privileges whatever and no political rights accorded to them? Or shall the ruling be that they have been adopted and as such have the right to secure for themselves and their children a proper education at public expense? Their property is and will be taxed for these purposes, and there is every reason, moral and political, why these freedmen, like all others in every State and dependent nation within the United States, shall have those

political rights which will assure to them the common privileges of the citizen so dear to the American people and so essential to the development of the race. The United States by its Congress has spoken clearly upon this subject. It has provided for their adoption, in pursuance of its general policy, in an act which refers expressly to the act of adoption passed by the Chickasaw legislature. These Indian nations are dependent nations owing allegiance to the United States as the sovereign nation. They cannot defeat the will of the sovereign power. We therefore submit that such construction should be given these treaties, and acts of the local legislature, and the acts of Congress as will uphold and advance the wise and humane policy of the United States.

Respectfully submitted.

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