Mansfield, McMurray & Cornish

Supreme Court of the United States.

OCTOBER TERM, 1899.

No.

Isaac Williams

vs.

The United States and the Comanche Tribe of Indians.

APPEAL FROM COURT OF CLAIMS.

BRIEF FOR APPELLANT.

HALBERT E. PAINE,
Of Counsel for Appellant.

WASHINGTON, D. C.
GIBSON BROS., PRINTERS AND BOOKBINDERS.
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APPEAL FROM COURT OF CLAIMS.

The counsel for the United States contends that the court of claims had no jurisdiction of this case, because the claimant was a citizen of the Chickasaw nation, and not a citizen of the United States, at the time when the depredations, set forth in the petition, are alleged to have been committed. Our reply is, that the claimant was then a citizen of the United States, and not a citizen of the Chickasaw nation.

1.

The claimant, who is of African descent and was born a slave, in the state of Mississippi, prior to 1837, *became a citizen of the United States, upon the ratification of the thirteenth amendment of the constitution, December* 9, 1865,

by virtue of the unwritten law of the United States, which made every free person, born within the United States, except children of subjects and ministers of foreign powers, and Indians not taxed, citizens of the United States.

The thirteenth amendment of the constitution was ratified on the ninth of December, 1865, in the following words:

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article, by appropriate legislation.

The claimant testifies that he was born a slave, in the state of Mississippi, prior to 1837. He was, therefore, emancipated by the thirteenth amendment, and became a free man on the ninth of December, 1865, on which day the thirteenth amendment was ratified. Upon the ratification of that amendment, the unwritten law of the land made him a citizen of the United States.

When the case of Scott *v.* Sanford, known as the Dred Scott case, was decided by the supreme court, the majority of the justices were citizens of southern states. The questions involved were political, as well as legal, questions; and it was not to be expected that the judges could, in that case, any more than in any other such cases, wholly resist the influence of their political opinions. Scott brought, in the United States circuit court for the district of Missouri, an action of trespass *vi et armis* against Sanford, for holding him in slavery. In his declaration, the plaintiff averred that he was a citizen of Missouri, and that the defendant was a citizen of New York. Sanford interposed a plea to the jurisdiction, based upon the alleged ground, that the plaintiff was not a citizen of the state of Missouri, because he was "a negro of African descent; his ancestors were of pure

African blood, and were brought into this country and sold as negro slaves." The plea contained no averment that Scott himself was, or ever had been, a slave. Scott demurred to this plea as insufficient in law, and the circuit court sustained the demurrer. The defendant then pleaded in bar that "the plaintiff was a negro slave, the lawful property of the defendant." A stipulation of parties was filed, to the effect that, in 1834, Scott was a slave, in the state of Missouri; that he was removed, by his owner, to the state of Illinois, in 1834, and held there, as a slave, until 1836; and that, in 1836, he was removed, by his owner, to Fort Snelling, in territory now included in the state of Minnesota, and held there, in bondage, until 1838, when he was returned, by his owner, to the state of Missouri. The jury found the facts alleged in the plea in bar to be true, and the court rendered judgment for the defendant. The plaintiff, in his writ of error, asked the supreme court to reverse the judgment of the circuit court on the plea in bar; but neither party sought, by writ of error, to reverse the judgment of that court on the plea in abatement.

It was earnestly contended that the writ of error did not carry the plea in abatement to the supreme court. It was also contended that, after the supreme court had sustained the plea in abatement and decided that the case should have been dismissed by the court below, it was not proper for the supreme court to adjudicate the questions raised by the plea in bar. But the majority of the justices were of a different opinion. They decided that no person of African descent, whether a slave or a freeman, was, or could be, a citizen of the United States. They reversed the judgment of the circuit court on the plea in abatement, and held that the circuit court had no jurisdiction of the action. But they then proceeded to

affirm the judgment of the court below on the plea in bar, and held that the removal of Scott, by his master, from the state of Missouri to the state of Illinois, did not result in his emancipation. They did not stop there. Upon this case, of which, in their opinion, the circuit court had no jurisdiction, they took occasion to hang a decision that the Missouri compromise was unconstitutional. And it may be that, if the Dred Scott case had not afforded an opportunity for this latter decision, the supreme court would have disposed of the case by affirming, in a few words, the judgment of the circuit court on the plea in bar, instead of covering 240 pages of the volume of reports with the opinions of the justices.

If, now, we consider the grounds upon which Chief Justice Taney based the opinion of the majority of the court, and also consider the dissenting opinions of Justices Curtis and McLean, and the decision of the circuit court, delivered by Mr. Justice Swayne, in United States *v.* Rhodes, 1 Abbott, U. S. Rep. 42, we must, I submit, conclude (1) that the chief justice's statement of facts, upon which the decision was mainly based, was erroneous, and (2) that, whether that statement was erroneous or accurate, all the reasons, assigned by the chief justice for the decision, were swept away by the thirteenth amendment of the constitution.

The grounds of the decision, that "a man of African descent, whether a slave or not, was not and could not be a citizen of a state, or of the United States," were stated by Chief Justice Taney, as follows:

> The words "people of the United States" and "citizens" are synonymous terms, and mean the same thing. They both describe the political body, who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the government, through their representatives. They are what we call the "sovereign people," and every citizen is one of this people and a constituent member of this sovereignty. The question before us is whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty. We think they are not, and that they are not included and were not intended to be included under the word "citizens," in the constitution, and can therefore claim none of the rights and privileges, which that instrument provides for and secures to citizens of the United States. On the contrary they were, at that time, considered a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, *yet remained subject to their authority*, and had no rights, or privileges, but such as those who held the power and the government might choose to grant them. * *
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> The question, then, arises whether the provisions of the constitution, in relation to the personal rights and privileges to which the citizen of a state should be entitled, embraced the negro African race, at that time in this country, or who might afterwards be imported, who had then or should afterwards be made free in any state; and to put it in the power of a single state to make him a citizen of the United States, and endue him with the full rights of citizenship, in every other state without their consent? Does the constitution of the United States act upon him, whenever he shall be made free, under the laws of a state, and raised there to the rank of a citizen, and immediately clothe him with all the privileges of a citizen in every other state and in its own courts? The court think the affirmative of these propositions cannot be maintained. * *
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> In the opinion of the court the legislation and histories of the times, and the language used in the declaration of independence, show that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument.
>
> They had, for more than a century before, been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior that *they had no rights which the white man was bound to respect;* and that the negro might justly and lawfully be reduced to slavery, for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal, in the civilized portion of the white race. It was regarded as an axiom, in morals, as well as in politics, which no one thought of disputing or supposed to be open to dispute; and men, in every grade and position in society, daily and habitually acted upon it, in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.
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> And in no nation was this opinion more firmly fixed, or more uniformly acted upon, than by the English government and English people. They not only seized them, on the coast of Africa, and sold them, or held them in slavery for their own use; but they took them, as ordinary articles of merchandise, to every country where they could make a profit on them, and were far more extensively engaged in this commerce than any other nation in the world.
>
> The opinion thus entertained, and acted upon in England, was naturally impressed upon the colonies they founded, on this side of the Atlantic. And accordingly a negro of the African race was regarded by them as an article of property, and held and bought and sold as such in every one of the thirteen colonies which united in the declaration of indepen-

dence, and afterwards formed the constitution of the United States. The slaves were more or less numerous in the different colonies, as slave labor was found more or less profitable. But no one seems to have doubted the correctness of the prevailing opinion of the time. * *

The language of the declaration of independence is equally conclusive: * * It is too clear for dispute, that the enslaved African race was not intended to be included, and formed no part of the people who framed and adopted this declaration: for if the language as understood, in that day, would embrace them, the conduct of the distinguished men who framed the declaration of independence would have been utterly and flagrantly inconsistent with the principles they asserted; and, instead of the sympathy of mankind, to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation. * *

The unhappy black race were separated from the whites, by indelible marks and laws long before established, and were never thought of, or spoken of, except as property, and when the claims of the owner, or the profit of the trader, were supposed to need protection. * *

The legislation of the states, therefore, shows, in a manner not to be mistaken, the inferior and subject condition of that race, at the time the constitution was adopted and long afterwards, throughout the thirteen states by which that instrument was framed: and it is hardly consistent with the respect due to these states, to suppose that they regarded, at that time, as fellow-citizens and members of the sovereignty, a class of beings whom they had thus stigmatized; whom, as we are bound, out of respect to the state sovereignties, to assume they had deemed it just and necessary thus to stigmatize, and upon whom they had impressed such deep and enduring marks of inferiority and degradation; or that, when they met in convention, to form the constitution, they looked upon them as a portion of their constituents, or designed to include them in the provisions so carefully inserted for the security and protection of the liberties and rights of their citizens. It cannot be supposed that they intended to secure to them rights and privileges and rank in the new political body, throughout the union, which every one of them denied within the limits of its own dominion. More especially it cannot be believed that the large slaveholding states regarded them as included in the word citizens, or would have consented to a constitution which might compel them to receive them in that character from another state.

Mr. Justice Curtis dissented from the opinion of the majority of the justices and said:

To determine whether any free persons, descended from Africans held in slavery, were citizens of the United States, under the confederation, and consequently at the time of the adoption of the constitution of the United States, it is only necessary to know whether any such persons were citizens of either of the states, under the confederation, at the time of the adoption of the constitution.

Of this there can be no doubt. At the time of the ratification of the articles of confederation, all free native-born inhabitants of the states of New Hampshire, Massachusetts, New York, New Jersey, and North Carolina, though descended from African slaves, were not only citizens of those states, but such of them as possessed the other necessary qualifications possessed the franchise of electors, on equal terms with other citizens.

The supreme court of North Carolina, in the case of the State *v.* Manuel (4 Dev. and Bat. 20) has declared the law of that state, on this subject, in terms which I believe to be as sound law, in the other states which I have enumerated, as it was in North Carolina.

"According to the laws of this state," says Judge Gaston in delivering the opinion of the court, "all human beings, who are not slaves, fall within one of two classes. Whatever distinctions may have existed, in the Roman laws, between citizens and free inhabitants, they are unknown to our institutions. Before our revolution all free persons, born within the dominions of the king of Great Britain, whatever their color or complexion, were native-born British subjects. Those born out of his allegiance were aliens. Slavery did not exist in England, but it did in the British colonies. Slaves were not, in legal parlance, persons but property. The moment the incapacity—the disqualification of slavery was removed, they became persons, and were then either British subjects, or not British subjects, according as they were or were not born within the allegiance of the British king. Upon the revolution no other change took place, in the laws of North Carolina, than was consequent on the transition from a colony, dependent on a European king, to a free and sovereign state. Slaves remained slaves. British subjects, in North Carolina, became North Carolina freemen. Foreigners, until made members of the state, remained aliens. Slaves manumitted here became freemen, and therefore, if born within North Carolina, are citizens of North Carolina; and all free persons, born within the state, are born citizens of the state. The constitution extended the elective franchise to every freeman, who had arrived at the age of twenty-one and paid a public tax; and it is a matter of universal notoriety, that, under it, free persons, without regard to color, claimed and exercised the franchise, until it was taken from free men of color, a few years since, by our amended constitution." * *

On the 25th of June, 1778, the articles of confederation being under consideration by the congress, the delegates from South Carolina moved to amend this fourth article, by inserting, after the word "free," and before the word "inhabitants," the word "white," so that the privileges and immunities of general citizenship would be secured only to white persons. Two states voted for the amendment, eight states against it, and the vote of one state was divided. The language of the article stood unchanged, and both by its terms of inclusion, "free inhabitants," and the strong implication from its terms of exclusion, "paupers, vagabonds, and fugitives from justice," who alone were excepted, it is clear that under the confederation, and at the time of the adoption of the constitution, free colored persons, of African descent, might be, and by reason of their citizenship in certain states were, entitled to the privileges and immunities of general citizenship of the United States.

Did the constitution of the United States deprive them, or their descendants, of citizenship?

That constitution was ordained and established by the people of the United States, through the action, in each state, of those persons who were qualified by its laws to act thereon, in behalf of themselves and all other citizens of that state. In some of the states, as we have seen, colored persons were among those qualified by law to act on this subject. These colored persons were not only included in the body of "the people

of the United States," by whom the constitution was ordained and established, but, in at least five of the states, they had the power to act and doubtless did act upon the question of its adoption. It would be strange if we were to find, in that instrument, anything which deprives of their citizenship any part of the people of the United States, who were among those by whom it was established.

I can find, in the constitution, nothing which deprives of their citizenship any class of persons, who were citizens of the United States, at the time of its adoption, or who should be native-born citizens of any state, after its adoption; nor any power enabling congress to disfranchise persons born on the soil of any state, and entitled to citizenship of such state, by its constitution and laws. And my opinion is, that, under the constitution of the United States, every free person, born on the soil of a state, who is a citizen of that state, by force of its constitution or laws, is also a citizen of the United States.

The circuit court of the United States for the seventh circuit held, in United States *v.* Rhodes, 1 Abbott, U. S. Rep. 42, that—

The emancipation of a native-born slave, by the thirteenth amendment, removed the disability of slavery, and made him a citizen of the United States; subject however to any lawful restrictions, imposed upon his right to vote, or other powers or privileges.

The act of April 9, 1866, known as the civil rights bill, is constitutional, in all its provisions. It is an appropriate method of exercising the power conferred on congress by the thirteenth amendment.

Mr. Justice Swayne, of the supreme court, delivering the opinion of the circuit court in this case, said:

The thirteenth amendment is the last one made. It trenches directly upon the power of the states. It is the first and only instance of a change of this character in the organic law. It destroyed the most important relation between capital and labor, in all the states where slavery existed. It affected deeply the fortunes of a large portion of their people. It struck out of existence millions of property. The measure was the consequence of a strife of opinions, and a conflict of interests, real or imaginary, as old as the constitution itself. These elements of discord grew in intensity. Their violence was increased by the throes and convulsions of a civil war. The impetuous vortex finally swallowed up the evil, and, with it, forever the power to restore it. Those who insisted upon the adoption of this amendment were animated by no spirit of vengeance. They sought security against the recurrence of a sectional conflict. They felt that much was due to the African race for the part it had borne, during the war. They were also impelled by a sense of right and by a strong sense of justice to an unoffending and long suffering people. These considerations must not be lost sight of, when we come to examine the amendment, in order to ascertain its proper construction. * *

All persons, born in the allegiance of the king, are natural-born subjects; and all persons, born in the allegiance of the United States, are natural-born citizens. Such is the rule of the common law; and it is the common law of this country, as well as of England. There are two

exceptions, and only two, to the universality of its application. The children of ambassadors are, in theory, born in the allegiance of the powers the ambassadors represent; and slaves, in legal contemplation, are property and not persons. 2 Kent Com. 1; Calvin's case, 7 Coke, 1; 1 Black Com. 366; Lynch *v.* Clark, 1 Sandf. Ch'y, 139.

Citizens, under our constitution and laws, means free inhabitants, born within the United States, or naturalized under the laws of congress. 1 Kent, Com. 292, note. We find no warrant for the opinion, that this great principle of the common law has been changed, in the United States. It has always obtained here, with the same vigor, and subject to the same exceptions, since as before the revolution. It is further said, in the note, in 1 Kent's Commentaries, before referred to: "If a slave, born in the United States, be manumitted, or otherwise lawfully discharged from bondage, or if a black man, born in the United States, becomes free, he becomes thenceforward a citizen, but under such disabilities as the laws of the several states may deem it expedient to prescribe to persons of color."

We cannot deny the assent of our judgment to the soundness of the proposition, that the emancipation of a native-born slave, by removing the disability of slavery, made him a citizen. If these views be correct the provision in the act of Congress conferring citizenship was unnecessary and is inoperative. Granting this to be so, it was well, if congress had the power, to insert it, in order to prevent doubts and differences of opinion, which might otherwise have existed upon the subject.

We are aware that a majority of the court in the case of Scott *v.* Sanford, arrived at conclusions different from those which we have expressed. But, in our judgment, these points were not before them. They decided that the whole case, including the agreed facts, was open to their examination, and that Scott was a slave. This central and controlling fact excluded all other questions, and what was said, upon them, by those of the majority, with whatever learning and ability the argument was conducted, is no more binding upon this court as authority, than the views of the minority upon the same subjects. Carroll *v.* Carroll, 16 How. 287. * *

This brings us to the examination of the thirteenth amendment. It is as follows:

Article XIII. Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article, by appropriate legislation.

* *

Without any other provision than the first section of the amendment, congress would have had authority to give full effect to the abolition of slavery thereby decreed. It would have been competent to put in requisition the executive and judicial, as well as the legislative power, with all the energy needful for that purpose. The second section of the amendment was added out of abundant caution. It authorizes congress to select, from time to time, the means that might be deemed appropriate to the end. It employs a phrase, which has been enlightened by well considered judicial application. Any exercise of legislative power, within its limits, involves a legislative and not a judicial question.

It is only when the authority given has been clearly exceeded that the judicial power can be invoked. Its office then is to repress and annul the excess; beyond that it is powerless.

The following are the substantive grounds assigned by the chief justice for the decision, in the Dred Scott case.

1. *No free persons of African descent were citizens of either of the original thirteen states prior to the adoption of the constitution.*

Mr. Justice Curtis, in his dissenting opinion, shows this statement to be in conflict with the facts of history. He shows that, when the constitution was adopted, free persons of African descent were citizens of five of the thirteen original states, viz: New Hampshire, Massachusetts, New York, New Jersey and North Carolina.

2. *Free persons of African descent were not ineended to be included among the people by the signers of the declaration of independence.*

It is impossible to believe that the signers of the declaration, who represented the states of New Hampshire, Massachusetts, New York, New Jersey and North Carolina, could have signed that instrument, intending that it should transform their colored fellow-citizens into creatures having no rights which the white man was bound to respect. If it be true that the signers from some of the states would have refused to affix their names to the declaration, if they had supposed it to involve the recognition of any free colored persons, as a part of the people, *a fortiori* must it be true that the signers from New Hampshire, Massachusetts, New York, New Jersey and North Carolina would have refused to sign it, if they had supposed it to involve a denial that their free colored citizens were a part of the people. It would have been no affront to morality, or christianity, or the cause of liberty, or humanity, for the representative of *any* state to sign a

declaration recognizing free colored persons as people and citizens. But for the representatives of the five states named to refuse to sign such a declaration would have been an act of unspeakable infamy.

3. *Free persons of African descent were not intended to be included under the word citizens in the constitution.*

To attribute to those men, who represented the five states above named, a deliberate purpose to frame a constitution, which should disfranchise their colored fellow-citizens, is to impute to them characters meriting the scorn of all honorable and high-minded men. It is easier to believe that they would have refused to sign the constitution, if they had understood that it disfranchised their colored fellow-citizens, than that representatives of other states would have refused to sign it, if they had understood that it did not disfranchise them.

4. *No free person of African descent can claim any of the rights or privileges, which the constitution provides for and secures to citizens of the United States.*

When the constitution was adopted, the free colored citizens of five states became citizens of the United States, and instead of being divested of the rights which they had held, under the confederation, became invested with any and all rights secured, by that instrument, to other citizens of the United States.

5. *Persons of African descent, whether emancipated or not, remained subject to the authority of the dominant race.*

Whatever may have been the social relations between the whites and blacks, prior to the adoption of the constitution, in the states of New Hampshire, Massachusetts, New York, New Jersey and North Carolina, it is certain that the free colored citizens of those states were not, so far as their civil and political rights were concerned, subjected to the authority of the whites, otherwise

than as all citizens were subjected to governmental authority.

6. *Free persons of African decent had no rights, or privileges, but such as those who held the power and the government might choose to grant them.*

If this means that the officers, or departments, of the government were not bound to recognize any rights of any colored citizens, as rights secured by the constitution, or by the unwritten law of the land, or by the principles of morality, but were permitted to confer, or withhold, rights and privileges, at their own discretion, it is evidently erroneous. Free colored persons were citizens of New York when the constitution was adopted. All citizens of New York then became citizens of the United States. What pretext could any officer, or department, of the government find for wresting from these persons any right, privilege, or immunity, secured, by the constitution, to citizens of the United States?

7. *At the time of the adoption of the constitution, it was universally regarded by the civilized portion of the white race, as an axiom in morals, as well as in religion, that negroes, whether slaves or freemen, had no rights which the white man was bound to respect.*

This was a mistake. It was not true in any part of the British empire; for all colored persons born in England, in the allegiance of the crown, were British subjects, entitled to all the rights, privileges and immunities of British subjects; and all free persons of African descent "born within the allegiance," in the British colonies, were British subjects. It was not true in New Hampshire, or Massachusetts, or New York, or New Jersey, or North Carolina, for all free persons of African descent "born within the allegiance," in those states, were citizens of those states, at the time of the adoption of the constitution, and then became citizens of the United States.

It may have been true in Spain, if Spaniards were then included in the "civilized portion of the white race."

8. *In no nation was this opinion more firmly fixed, or more universally acted upon, than by the English government and English people.*

If this moral and political axiom, that negroes had no rights which the white man was bound to respect, was of no more general acceptation in other nations than in England, the range of its operation must have been very narrow indeed; for all persons born within the allegiance, in England, whether black or white, were British subjects, and so were all free persons born within the allegiance in the British colonies. It is true that British subjects were kidnappers and slave-traders, and that slaves were regarded as property; but there were no slaves in England, and free negroes, in the colonies, were British subjects.

9. *The opinion, thus entertained and acted upon in England, was naturally impressed upon the colonies they founded on this side of the Atlantic.*

The answer to this is, that, so long as these colonies remained British colonies, every free person of African descent, born within their limits and within the allegiance of the crown, was a British subject. And this was true of every other colony of the British empire.

10. *Negroes were never thought of, or spoken of, except as property, and when the claims of the owner, or the profit of the trader, were supposed to need protection.*

On the contrary, free negroes in England, and in every British colony, including those which became the United States, were British subjects, invested by the British constitution with all the rights, privileges and immunities of British subjects. And Lord Mansfield, who was no mean thinker or speaker, in delivering the opinion of the Court of King's Bench, in Somersett's memorable case, 20

Howell's St. Tr. 79, decided before the revolution, spoke as follows:

> The state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral, or political, but only by positive law, which preserves its force long after the reasons, occasion and time itself, from whence it was created, are erased from the memory; it is of a nature that nothing can be suffered to support it but positive law.

The historical statement, on which Chief Justice Taney based the opinion that no free person of African descent could be a citizen of the United States, seems therefore to be, on all material points, inaccurate and unreliable.

But let us assume, for the purposes of the argument, that this statement was, on all material points, entirely accurate, and that it constituted, in law and morals, a substantial basis for the decision that no emancipated slave, of African descent, was eligible to American citizenship. Let us assume that, prior to the adoption of the constitution, no free person, of African descent, was a citizen of the United States, or of any state. Let us assume that, at the time of the adoption of the constitution, it was an axiom in morals and politics, of universal acceptation among the American people, that the black man, bond or free, had no rights which the white man was bound to respect, and that the American people accepted as true all the corollaries of this odious axiom. Let us assume, as a consequence, that our constitution must have excluded from American citizenship all free persons of African descent, and that this exclusion must have adhered to our constitution, through whatever changes in public sentiment, on this subject, may have occurred between the years 1788 and 1865, so that, although a vast majority of the white people of the United States repudiated this axiom, alleged to have been accepted in 1788, the cast-iron carbuncle still remained to be melted away in the fires of civil war.

Let us assume all these things to be true. How was it when, at the close of the civil war, the 13th amendment was adopted, in 1865? Did not the doctrine that the constitution excluded from American citizenship all persons of African descent instantly disappear? When the reasons for the rule were swept away, was not the rule itself annihilated? To ask these questions is to answer them. On the 9th of December, 1865, when the 13th amendment was adopted every person of African descent, born within the United States, became a citizen of the United States. On that day the claimant, who is of African descent, and was born a slave, in Mississippi, within the United States, became a citizen of the United States. It will soon appear that he has never parted with that citizenship, or acquired any other.

We now ask the court of claims and shall hereafter ask the supreme court to hold that a man of African descent, born a slave in the State of Mississippi prior to 1837, and emancipated by the thirteenth amendment, became, upon his emancipation, a citizen of the United States. If anything in the Dred Scott decision shall be inconsistent with such ruling, we ask the court of claims, and shall ask the supreme court, to overrule or disregard that decision to the extent of such inconsistency.

II.

If the claimant had not become a citizen of the United States, upon the adoption of the thirteenth amendment, on the ninth of December, 1865, *by virtue of the unwritten law of the United States, he would have been made a citizen, on the ninth of April*, 1866, *by the civil rights act approved on that day.* This act contains the following provision:

That all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States.

As we have already shown, the circuit court decided, in United States *v.* Rhodes, 1 Abbott U. S. Rep. 42, that:

The act of April 9, 1866, known as the civil rights bill, is constitutional in all its provisions. It is an appropriate method of exercising the power conferred on Congress by the thirteenth amendment.

III.

If the claimant had not become a citizen of the United States, upon the adoption of the thirteenth amendment, and had not been made a citizen by the civil rights act of April 9, 1866, *he would have become a citizen, on the twenty-eighth of April*, 1866, *by virtue of the last clause of Article* 3 *of the Choctaw and Chickasaw treaty, concluded on that day.*

The Choctaw and Chickasaw treaty of 1866 contained the following stipulation:

Art. 2. The Choctaws and Chickasaws hereby covenant and agree, that henceforth neither slavery nor involuntary servitude, otherwise than in punishment of crime whereof the parties shall have been duly convicted, in accordance with the laws applicable to all the members of the particular nation, shall ever exist in said nations.

When this treaty was proclaimed, the claimant had already been a free man for a period of seven months from the ninth of December, 1865, the day on which the vote of the legislature of Georgia consummated the ratification of the thirteenth amendment. He was emancipated, not by the treaty, but by the thirteenth amendment. So far as he was concerned, this stipulation amounted to nothing beyond a formal recognition of the actual condition created by the thirteenth amendment, except a promise not thereafter to attempt the impossible task of re-establishing slavery, in the Choctaw and Chickasaw nations.

But the last clause of Article 3 of the treaty of April 28, 1866, would have made the Chickasaw freedmen citizens of the United States, if they had not become citizens before that treaty was concluded. It has become an unquestioned principle of our government that it is competent for the treaty-making power of the United States to naturalize collectively classes of persons not previously citizens. And such naturalization can be effected by a declaratory article, operative in the future, as well as by an article importing an original grant of citizenship. The following is the last clause of Article 3 of the treaty:

And should the said laws, rules, and regulations not be made by the legislatures of the said nations, respectively, within two years from the ratification of this treaty, then the said sum of three hundred thousand dollars 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 in such manner as the United States shall deem proper—the United States agreeing within ninety days from the expiration of the said two years, to remove from said nations all such persons of African descent as may be willing to remove; those remaining or returning after having been removed from said nations to have no benefit of said sum of three hundred thousand dollars, or any part thereof, but shall be upon the same footing as other citizens of the United States in the said nations.

It expressly provides that those freedmen "*remaining, or returning after having been removed from said nations, * * shall be upon the same footing as other citizens of the United States in the said nations.*" Not only those who return, after having been removed, but also those who remain, not being removed, are to "be upon the *same footing as other citizens of the United States* in the said nations." The counsel for the government, in his brief, inadvertently restricts this provision to such freedmen as return, after having been removed by the United States. But it expressly applies to both classes, to those who return, after removal, and to those who remain, without removal. It is impossible to mistake the import of the words: "those remaining * * shall be upon the same

footing as *other* citizens of the United States." They mean that those who remain will become citizens of the United States, and will be on the same footing in the nations as other citizens of the United States. A different meaning can be given only by expunging the word "other" from the text of the clause.

Those inhabitants of Louisiana, Arkansas, Missouri, Texas, Utah, New Mexico and Florida, who became citizens of the United States, upon the acquisition of those territories, were naturalized collectively by the treaty-making authorities of the government, and not otherwise. The validity of their naturalization has been recognized by the legislative, executive and judicial departments of the government, as well as by the people of the United States. This practice of the government seems to us to have firmly established that interpretation of the constitution which recognizes the power of the treaty-making branch of the government to naturalize collectively classes of persons not already citizens of the United States.

IV.

If the claimant had not been made a citizen of the United States, either by the unwritten law of the land upon the adoption of the thirteenth amendment, December 9, 1865, *or by the civil rights bill on the ninth of April*, 1866, *or by the Choctaw and Chickasaw treaty on the twenty-eighth of April*, 1866, *he would have become a citizen by virtue of the fourteenth amendment of the constitution, which was declaratory and retroactive and would have carried the commencement of his citizenship back to the ratification of the thirteenth amendment, December* 9, 1865.

The declaration of the fourteenth amendment is that:

> All persons, born or naturalized in the United States and subject to the jurisdiction thereof, *are citizens* of the United States and of the state wherein they reside.

The declaration is not, what such persons "*shall be* citizens," but that they "*are* citizens." The meaning is not, that persons, previously born in the United States and subject to the jurisdiction thereof, shall be citizens, from and after the adoption of the fourteenth amendment, but that they *are citizens*,—that is to say that they were already citizens, when the fourteenth amendment was adopted. This amendment does not create citizenship. It recognizes its existence. When, in contemplation of the fourteenth amendment, did the citizenship of slaves, who were emancipated by the thirteenth amendment, commence? Obviously not at the date of the adoption of the fourteenth amendment; for that amendment did not create their citizenship, but recognized it as already existing.

The citizenship of these emancipated slaves commenced, we submit, at the date of the adoption of the thirteenth amendment. A different interpretation of the fourteenth amendment would lead to this absurdity: It was ratified July 21, 1868. If its effect upon the claimant was to create, and not merely to recognize, his citizenship, then, having been emancipated on the ninth of December, 1865, he was a citizen on the twenty-first of July, 1868, but was not a citizen on the twentieth of July, 1868, or on any other day between the ninth of December, 1865, and the twenty-first of July, 1868. And yet, during that period, the conditions, on which depended his right to citizenship, were not changed in the slightest degree. He was just as certainly and completely a freeman on the ninth of December, 1865, as on the twenty-first of July, 1868.

The first section of the fourteenth amendment does not import that citizenship is originally conferred, by the amendment, upon persons born within the United States. It does not mean that white persons, born free in the United States, were not citizens at birth. It does not

mean that persons of African descent, born free in the United States, before the ratification of the fourteenth amendment, were not citizens at birth. It does not mean that persons of African descent, born slaves, and emancipated by the thirteenth amendment, were not citizens as soon as they were emancipated. But it does mean that white persons, born in the United States, became citizens at birth; that persons of African descent, born free in the United States, became citizens at birth; that persons of African descent, born slaves in the United States, and emancipated by the thirteenth amendment, became, when emancipated, citizens of the United States.

Congress can enact a declaratory statute, operative in the future, but can not enact a retroactive declaratory law; for the constitution has invested the courts with the power to determine what the law has been and is. Congress can only declare what it shall be. But this is all different with declaratory amendments of the constitution of the United States. The power to adopt such amendments is vested exclusively and absolutely in the constitutional conventions and state legislatures. These conventions and legislatures, wielding the whole power of the people, can adopt retroactive amendments of the constitution. Such amendments may not affect cases previously decided. But they will impose upon the courts rules for the interpretation of the constitution, in cases arising before the adoption of such amendments, but submitted to the courts after their adoption.

On the 14th of April, 1873, Mr. Justice Miller, delivering the opinion of the supreme court, in the Slaughter-house cases, 16 Wall. 36, 72 said:

> The first section of the fourteenth article, to which our attention is more specially invited, opens with a definition of citizenship,—not only citizenship of the United States, but citizenship of the states. No such definition was previously found in the constitution, nor had any attempt been made to define it by act of congress. It had been the occasion of much discussion, in the courts, by the executive departments, and in the public journals. It had been said, by eminent judges, that no man was a citizen of the United States, except as he was a citizen of one of the states composing the union. Those, therefore, who had been born and resided always in the District of Columbia, or in the territories, though within the United States, were not citizens. Whether this proposition was sound, or not, had never been judicially decided. But it had been held by this court, in the celebrated Dred Scott case, only a few years before the outbreak of the civil war, that a man of African descent, whether a slave or not, was not, and could not be, a citizen of a state, or of the United States. This decision, while it met the condemnation of some of the ablest statesmen and constitutional lawyers of the country, had never been overruled; and if it was to be accepted, as a constitutional limitation of the right of citizenship, then all the negro race, who had recently been made freemen, were still not only not citizens, but were incapable of becoming so by anything short of an amendment of the constitution.
>
> To remove this difficulty primarily, and to establish a clear and comprehensive definition of citizenship, which should declare what should constitute citizenship of the United States, and also citizenship of a state, the first clause of the first section was framed.
>
> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state where they reside."
>
> The first observation we have to make on this clause is, that it puts at rest both the questions which we stated to have been the subject of differences of opinion. It declares that persons may be citizens of the United States, without regard to their citizenship of a particular state, and it overturns the Dred Scott decision, by making *all persons*, born within the United States and subject to its jurisdiction, citizens of the United States. That its main purpose was to establish the freedom of the negro can admit of no doubt. The phrase "subject to its jurisdiction" was intended to exclude from its operation children of ministers, consuls and citizens, or subjects, of foreign states, born within the United States.

The Dred Scott decision has never yet been expressly overruled by the supreme court. During the four years which intervened, between the rendition of that decision and the outbreak of our civil war, the membership of the supreme court continued to be such that a judicial overthrow of the doctrine, that no emancipated slave, of African descent, was eligible to citizenship, was out of the question. At the time of the delivery of the opinion, in the Dred Scott case, the supreme court consisted of nine justices, Taney, McLean, Wayne, Catron, Daniel, Nelson, Grier, Curtis and Campbell, all of whom, except

Justices McLean and Curtis, concurred in the decision of the court. During the December term, 1861, the court consisted of seven justices, Taney, Wayne, Catron, Nelson, Greer, Clifford and Swayne, all of whom, except Justices Clifford and Swayne, had concurred in the "Dred Scott decision." President Lincoln's proclamation, issued in 1862, covered most of the slave states; the thirteenth amendment, adopted four years after the commencement of the war, embraced the whole country in its operation; and the fourteenth amendment was adopted three years after the adoption of the thirteenth. The proclamation and amendments were operative at once upon emancipated slaves, of African descent, born in the states, and residing therein, and they were, therefore, not affected by the Dred Scott decision. With the slaves of the Chickasaws the case was different. It is probable that no occasion could have arisen, except in the Indian Territory, for asking the supreme court to establish a doctrine in conflict with the ruling in the Dred Scott case. It is possible that the cases now pending in the court of claims, at the suit of Chickasaw freedmen, furnish the first occasion for asking the supreme court to hold that all slaves, of African descent, born within the United States, when emancipated by the thirteenth amendment, became at once citizens of the United States.

If the court shall conclude that the claimant did not, by virtue of the unwritten law, become a citizen of the United States when emancipated by the thirteenth amendment, we ask the court to hold, that, by the act of congress approved April 9, 1866, all persons of African descent, born slaves in the United States, became citizens on the day of the approval of that act.

If the court shall conclude that the claimant did not become a citizen, either upon the ratification of thirteenth

amendment, by virtue of the unwritten law of the United States, or on the ninth of April, 1866, by virtue of the civil rights act approved on that day, we ask the court to hold that he became a citizen on the twenty-eighth of April, 1866, by virtue of the last clause of Article 3 of the Choctaw and Chickasaw treaty of 1866.

If the court shall conclude that the claimant was never made a citizen of the United States otherwise than by the fourteenth amendment, we ask the court to hold that amendment to have been declaratory of the unwritten law and retroactive, and to have carried the commencement of his citizenship back to the ratification of the thirteenth amendment.

V.

(*Chickasaw citizenship.*)

1. *The claimant was not a citizen of the Chickasaw nation, at the time when the depredations specified in the petition are alleged to have been committed.*

The third article of the treaty of 1866 secured to the Choctaws and Chickasaws, for a period of two years, an option to make, or not make:

> Such laws, rules and regulations as may be necessary to give all persons of African descent, resident in said nations at the date of the treaty of Fort Smith, and their descendants, heretofore held in slavery among said nations, all the rights, privileges and immunities, including the right of suffrage, of citizens of said nations, except in the annuities, moneys and public domain claimed by, or belonging to, said nations respectively, and also to give to such persons, who were residents as aforesaid, and their descendants, 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, as herein provided.

None of the rights, privileges or immunities mentioned in the treaty have been conferred upon the Chickasaw freedmen; nor have any grants of land been made to them, except the qualified grant made in the agreement

incorporated into the act of congress approved June 28, 1898.

2. Before the expiration of two years from July 10, 1866, the Chickasaws elected to withhold from their freedmen the "rights, privileges and immunities of citizenship" specified in the treaty. On the ninth of November, 1866, only four months after the proclamation of the treaty, an act of the Chickasaw legislature was approved in the following words:

Be it enacted by the legislature of the Chickasaw Nation, That whereas a treaty was concluded at Washington City on the 28th of April, A. D. 1866, by commissioners duly appointed on the part of the Chickasaws and Choctaws and the United States Government, which treaty was ratified with amendments by the United States Senate and confirmed by the President of the United States, the Chickasaw legislature do hereby give their assent to and confirm the said treaty and amendments made by the United States Senate.

Be it further enacted, That the Chickasaw legislature do hereby give their assent to the sectionizing and allotment of the lands in severalty under the system of the United States as is provided for in the treaty of April, 1866, and the President of the United States be requested to cause the same to be done as soon as practicable.

Be it further enacted, That the provision contained in article 3rd of the treaty of April 28th, 1866, giving the Chickasaw legislature the choice of receiving and appropriating the $300,000 therein named for the use and benefit of the Chickasaws, on passing such laws, rules and regulations as will give to all persons of African descent certain rights and privileges, be, and it is hereby, declared the unanimous consent of the Chickasaw legislature that the United States shall keep and hold said sum of $300,000 for the benefit of the said negroes, and the governor of the Chickasaw Nation be requested to notify the government of the United States that it is the wish of the legislature of the Chickasaw Nation for the Government to remove said negroes from within the limits of the Chickasaw Nation, according to said 3rd article of the treaty of April, 1866.

Be it further enacted, That the governor of the Chickasaw Nation be, and he is hereby, authorized and requested to appoint three commissioners to meet and confer with the Choctaw authorities and make known the wishes of the Chickasaw legislature in regard to the 3rd and 11th articles of the treaty of April, 1866, and to secure harmony and a union of action in the same. Said commissioners are hereby invested with powers to enter into all necessary preliminaries with said Choctaw authorities as will speedily settle the question in said 3rd and 11th articles harmoniously, and to report the same to the legislature of the Chickasaw Nation.

Be it further enacted, That the said commissioners shall be allowed three dollars per day while attending to said business and in going to and returning from the same meeting.

Passed both houses and approved November 9th, 1866.

CYRUS HARRIS,
Governor of the Chickasaw Nation.

3. On the seventeenth of August, 1868, the following official communication was presented to the commissioner of Indian affairs, by the Chickasaw commissioner and the attorney-general of the Choctaw nation:

WASHINGTON, *August* 17, 1868.

SIR: The undersigned respectfully call your attention to the provisions contained in article 3 of the treaty made and concluded at the city of Washington on the 28th day of April, A. D. 1866, between the United States, and the Choctaw and Chickasaw Nation of Indians, and to notify you that the Choctaws and Chickasaws have not made within the two years prescribed such laws, rules and regulations as are necessary to give all persons of African descent resident in the said nation at the date of the treaty of Fort Smith and their descendants heretofore held in slavery among said nations all the rights, privileges and immunities, including the right of suffrage, of citizens of said nations, respectively, and the right to 40 acres of land each, to be selected and held on the same terms as the Choctaws and Chickasaws are to select and hold their lands. On the contrary, as appears by the files of your office, the legislative councils of both nations have expressed a desire that the Government of the United States shall, with the least possible delay, carry into effect the stipulations contained in said third article of said treaty in reference to the removal of said persons of African descent from the limits of the Choctaw and Chickasaw country.

We are, sir, respectfully, your obedient servants,

HOLMES COLBERT,
Chickasaw Commissioner.
SAMPSON FOLSOM,
Attorney-General Choctaw Nation.

Hon. N. G. TAYLOR,
Commissioner of Indian Affairs.

4. A letter of the secretary of the interior addressed to the president pro tempore of the United States senate, on the 23d of July, 1868, contained the following paragraph:

Two years from the ratification of the treaty having expired, and the legislatures of the Choctaw and Chickasaw nations having failed to make such laws, rules, and regulations in regard to persons of African descent resident in said nations at the date of the treaty of Fort Smith as are contemplated by the foregoing article of the treaty of April 28, 1866, it becomes the duty of the United States, within ninety days from the expiration of the said two years, to remove from said nations all such persons of African descent as may be willing to remove.

Neither the Chickasaw nation nor the Choctaw nation, during the period of two years limited in the treaty, conferred upon the freedmen any of the "rights, privileges

and immunities" specified in the treaty, or reversed its own action withholding the same. So far as this option of the Choctaws and Chickasaws was concerned, the treaty expired on the tenth of July, 1868. Any law, thereafter enacted by the Chickasaw legislature, or by the Choctaw council, proffering to the freedmen the specified "rights, privileges and immunities," or any others, would not have resulted from an exercise of the option secured by the treaty; but would have constituted a new proposition, submitted by the legislative body enacting the law, to be accepted, or rejected, by the other parties concerned, at their discretion.

5. An act of the Chickasaw legislature, approved January 10, 1873, more than six years after the proclamation of the treaty of 1866, contained the following sections:

SECTION 1. *Be it enacted by the legislature of the Chickasaw Nation*, That all the negroes belonging to Chickasaws at the time of the adoption of the treaty of Fort Smith, and living in the Chickasaw Nation at the date thereof, and their descendants, are hereby declared to be adopted in conformity with the third article of the treaty of 1866 between the Choctaws, Chickasaws, and the United States: *Provided, however*, That the proportional part of the $300,000 specified in article third of the said treaty, with the accrued interest thereon, shall be paid to the Chickasaw Nation for its sole use and benefit: *And provided further*, The said adopted negroes of the Chickasaw Nation shall not participate in any part of the said proportional part of the said $300,000, nor be entitled to any benefit from the principal and interest on our invested funds or claims arising therefrom, nor to any part of our common domain, or the profits arising therefrom (except the forty acres per capita provided for in the third article of the treaty of 1866), nor to any privileges or rights not authorized by treaty stipulations: *And provided further*, That the said adopted negroes, upon the approval of this act, shall be 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.

SEC. 2. *And be it further enacted*, That this act shall be in full force and effect from and after its approval by the proper authority of the United States. And all laws or parts of laws in conflict with this act are hereby repealed.

This act was not passed within the period of two years limited in the treaty. It was not passed in the exercise of the option granted by the treaty. If not concurred in

by the Choctaws and by the United States, within a reasonable time, it must necessarily have fallen to the ground as a rejected proposition. But the Choctaws did not respond to this action of the Chickasaws until the expiration of a period more than eight years,—until long after the proposition had been withdrawn by the Chickasaw nation. The United States delayed action for twenty-one years.

6. On the eighteenth of October, 1876, the Chickasaw legislature adopted the following resolutions:

Whereas the governor of the Chickasaw Nation has recommended to this legislature that commissioners be sent, on the part of the Chickasaw Nation, to confer with commissioners on the part of the Choctaw Nation in relation to the freedmen in said nations, and to agree with the Choctaws upon some plan for the final settlement of all questions relating to said freedmen;

And whereas it is understood that the governor is in favor of the removal of all freedmen, former slaves of the Choctaws and Chickasaws, from the limits of the Choctaw and Chickasaw country, and is of the opinion that the same may be accomplished: Therefore,

SECTION 1. *Be it resolved by the legislature of the Chickasaw Nation*, That four commissioners, one from each county of the Chickasaw Nation, shall be elected by joint vote of the senate and house of representatives of the present session of the legislature, to visit the capital of the Choctaw Nation during the next regular session of the general council of said nation, with instructions to confer with commissioners on the part of the Choctaw Nation, and agree upon some plan *whereby the freedmen, former slaves of the Choctaws and Chickasaws and their descendants, shall be removed from and kept out of the limits of the Choctaw and Chickasaw country*.

SEC. 2. *Be it further resolved*, That the commissioners provided for in the foregoing section shall receive the same pay, while actually engaged on the business of their mission, as members of the legislature, and may appoint a secretary, who shall receive the same pay as one of the commissioners; and said commissioners shall make a full report of all their official proceedings to the legislature at the next meeting thereof.

Approved, Oct. 18th, 1876.

B. F. OVERTON, *Governor*.

The following act of the Chickasaw legislature was approved October 17, 1877:

SECTION 1. *Be it enacted by the legislature of the Chickasaw Nation*, That whereas a treaty was concluded at Washington City, on the 28th of April, 1866, by commissioners duly appointed on the part of the Chickasaws and Choctaws and the United States Government, which treaty was ratified with amendments by the United States Senate and confirmed by

the President, the Chickasaw legislature does hereby give its assent and confirm the said treaty and amendments made by the Senate of the United States.

SEC. 2. *Be it further enacted*, That the Chickasaw legislature does hereby give its assent to the sectionizing and allotment of the lands in severalty, under the system of the United States as provided for in the treaty of April, 1866, and the President of the United States is hereby requested to cause the same to be done as soon as may be practicable.

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, on passing such laws, rules, and regulations as will give all persons of African descent certain rights and privileges, be, and 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, 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.

Approved October 17, 1877.

B. F. OVERTON, *Governor*.

On the 6th of May, 1882, an act of the Chickasaw legislature was approved containing the following provision:

SECTION 1. *Be it enacted by the legislature of the Chickasaw Nation*, That Wm. L. Byrd and B. F. Overton, delegates of the Chickasaw Nation, are hereby fully authorized and directed to enter their protest in behalf of the Chickasaw Nation against the ratifying by Congress of the United States of an act passed by the general council of the Choctaw Nation adopting and granting to the freedmen of the Choctaw Nation full rights of citizenship without conferring with the Chickasaws, or obtaining their consent to said adoption; and said delegates are hereby fully authorized and directed to represent the Chickasaw people in any and all measures that might be presented before the Department and Congress of the United States affecting the interest of our people and country.

On the 22d of October, 1885, an act of the Chickasaw legislature was approved, containing the following:

SECTION 1. *Be it enacted by the legislature of the Chickasaw Nation*, That the Chickasaw people hereby refuse to accept the freedmen as citizens of the Chickasaw Nation upon any terms or conditions whatever, and respectfully request the governor of our nation to notify the Department at Washington of the action of the legislature in the premises.

10. The Indian appropriation act of August 15, 1894, contained the following provision:

SEC. 18. That the approval of Congress is hereby given to "An act to adopt the negroes of the Chickasaw Nation," and so forth, passed by the legislature of the Chickasaw Nation and approved by the governor thereof January tenth, eighteen hundred and seventy-three, particularly set forth in a letter from the Secretary of the Interior, transmitting to Congress a copy of the aforesaid act, contained in House Executive Document numbered two hundred and seven, Forty-second Congress, third session. (28 Stat., 336.)

The Chickasaw statute, relating to the adoption of the freedmen, was enacted five years after the expiration of the period of two years limited in the third article of the treaty of 1866. According to its terms, it was to take "effect from and after its approval by the proper authority of the United States." It was not enacted in pursuance of the scheme defined in the treaty of 1866, which limited the option, therein granted, to a period of two years from the date of the treaty. If it had been promptly approved by the United States, the result would not have been to secure to the Chickasaws any part of the sum of $300,000 mentioned in the treaty, unless the Choctaws had adopted their freedmen and the United States had extended the option which expired in 1868. The Choctaws did not adopt their freedmen until eight years after the passage of the Chickasaw act of 1873. Twenty-one years after its passage Congress enacted a law purporting to approve the Chickasaw act of 1873.

Every statute is, by implication, a repeal of all prior statutes, so far as it is repugnant thereto. Five years before the Choctaws adopted their freedmen, and eighteen years before Congress enacted the law of 1894, the Chickasaw law of 1873 was repealed by the repugnant act approved October 18, 1876. If the act of 1873 had not been repealed by the act of 1876, it would have been repealed by the repugnant act approved October 17, 1877. If it had not been repealed by the act of 1876, or by the act of 1877, it would have been repealed by the repugnant

act approved May 6, 1882. And, finally, if it had not been repealed by either of the three acts last mentioned, it would have been repealed by the repugnant act approved October 22, 1885. And yet, notwithstanding this repeal so strongly reinforced and emphasized, notwithstanding the vigorous protest made in the act of May 6, 1882, Congress, evidently in ignorance of the facts of the case, enacted the law of August 15, 1894, approving a Chickasaw statute, which had been dead and buried eighteen years.

By subsequent acts of the Chickasaw legislature, the proposition embraced in the Chickasaw statute of January 10, 1873, was withdrawn from the cognizance of Congress. It was not thereafter in the power of Congress to galvanize into life the dead Chickasaw statute. I am willing to concede, for the purposes of this case, that it was competent for Congress, on the fifteenth of August, 1894, to make the Chickasaw freedmen citizens of the Chickasaw nation by the mere exercise of the power vested in that body,—that Congress could do this not only without ascertaining the will of the Chickasaw legislature but even in defiance of the expressed will of that legislature. I am willing to concede for the purposes of the argument that the paramount dominion of the United States over the Chickasaw nation embraced in its scope the power of Congress to make or unmake citizens in the Chickasaw nation. I am willing for the purposes of the argument to concede that if Congress had said in the act of 1873, the Chickasaw freedmen shall henceforth be Chickasaw citizens, the Chickasaw freedmen would thereupon have become Chickasaw citizens.

But Congress said no such thing. Congress only meant to approve a proposition which the Chickasaws had made twenty-one years before the act of 1894 was passed, which

proposition Congress erroneously supposed to be still subsisting and open to its approval. Congress did not grant citizenship to the freedmen but only assented to a supposed grant thereof by the Chickasaw legislature. Congress did not intend by its own act to confer such citizenship but only intended to consent that the Chickasaw legislature should confer citizenship upon the freedmen. The act of August 15, 1894, was passed in profound ignorance of the fact that the Chickasaw act of 1873 had long before 1894 been repealed by repugnant legislation.

We submit that the act of Congress approved August 15, 1894, did not ratify or confirm anything. There was nothing in existence for it to ratify or confirm. It is hardly necessary to add that it was not and did not purport to be in itself a grant of Chickasaw citizenship to Chickasaw freedmen.

The secretary of the interior has had occasion to decide the question now under consideration. As an authority, it is possible that his decision may not have equal weight, in this court, with the decision of a judicial tribunal. But it certainly is legitimate and proper to present it for the consideration of the court. Its cogent reasoning and admirable lucidity of statement will not fail to challenge the attention of your honors. I will read the decision :

November 9, 1866, the Chickasaws, by act of their legislature, requested the United States to remove the freedmen from the limits of the Chickasaw nation, according to the alternative provision therefor in the third article of the treaty of 1866; but no action was taken upon this request. January 10, 1873, the Chickasaws, by an act of their legislature, adopted the freedmen "in conformity with the third article of the treaty;" but the act contained other provisions intended to explain and define the extent of the adoption, and, by its terms, was to have "force and effect from and after its approval by the proper authority of the United States." A copy of this last act was transmitted to congress by the secretary of the interior, as shown by House Ex. Doc. No. 207, 42d Cong., 3d Sess.; but no other action was taken thereon until August 15, 1894. In the mean time the Chickasaw legislature had passed the act of October 22, 1885, declaring "that the Chickasaw people hereby refuse to accept or

adopt the freedmen, as citizens of the Chickasaw nation, upon any terms or conditions whatever, and respectfully request the governor of our nation to notify the Department at Washington of the action of the legislature in the premises." This act of the Chickasaw legislature was both preceded and followed by memorials and other communications from the Chickasaws, entreating the United States to carry into effect the alternative provision of the third article of the treaty respecting the removal of the freedmen from the nation. See Senate Ex. Doc. No. 166, 50th Cong. 1st. Sess. and Senate Doc. No. 84, 55th Cong. 2d Sess.

The Indian Appropriation act of August 15, 1894, (28 Stat. 286, 336), contains the following:

"Sec. 18. That the approval of Congress is hereby given to 'An Act to adopt the negroes of the Chickasaw nation,' and so forth, passed by the legislature of the Chickasaw nation, and approved by the governor thereof January tenth, eighteen hundred and seventy-three, particularly set forth in a letter from the secretary of the interior, transmitting to congress a copy of the aforesaid act, contained in House Executive Document Numbered Two hundred and seven, Forty-second congress, third session."

The language of this provision is not such as would be appropriate to the enactment of original legislation, such as an adoption of the freedmen into the Chickasaw tribe by congressional enactment, against the consent of the tribe. The terms employed harmonize better with a purpose to merely assent to, or sanction, an act of the tribal legislature, supposed to be awaiting assent, or sanction, by congress. The words used are those of approval and acquiescence, and not those of creation or command. Furthermore, the adoption of the freedmen was not absolutely required by the treaty stipulations of 1866, but, by the terms of that treaty, was left to the option and discretion of the tribal legislature. If the tribe, by such laws, rules, and regulations as might be necessary, gave to the freedmen all the rights, privileges, and immunities, including the right of suffrage, of citizens of the tribe, except in the annuities, moneys, and public domain of the tribe, and also gave to the freedmen forty acres each of the land of the tribe, on the same terms as the Chickasaws, then certain money was to be paid, by the United States, to the Chickasaw nation, less such sum, at the rate of one hundred dollars per capita, as would be sufficient to pay such freedmen as, within ninety days after the passage of such laws, rules, and regulations, should elect to remove and actually remove from the nation. If such adoption was not made by the tribal legislature, within two years from the ratification of the treaty, the money was to be paid, by the United States, for the use and benefit of such of the freedmen as the United States should remove from the Chickasaw nation, and, in that event, the United States agreed, within ninety days after the expiration of said two years, to remove from the nation all such freedmen as were willing to remove, those remaining, or returning after having been removed from the nation, to have no benefit of said money, and to be upon the same footing as other citizens of the United States in said nation.

While a law of Congress is upon the same footing as a treaty, and will repeal provisions in a pre-existing treaty which are inconsistent therewith, still a repeal will not occur by implication, unless the inconsistency is such that the treaty provision and the act of congress cannot stand together. There is nothing in the act of August 15, 1894, which shows an intention to withdraw and take from the Chickasaw legislature the

option and discretion given by the treaty, respecting the adoption of the freedmen. There is no necessary repugnancy between the treaty and the later congressional enactment, and, therefore, there is no repeal.

Was the Chickasaw act of January 10, 1873, open to approval, when congress assented thereto on August 15, 1894, or had the Chickasaws repealed that act, and withdrawn the proposed adoption of the freedmen? The Chickasaws had not expressly repealed the adopting act; but the subsequent Chickasaw act of October 22, 1885, declared that the Chickasaws thereby refused "to accept or adopt the freedmen, as citizens of the Chickasaw nation, upon any terms or conditions whatever." Words could not have been employed, which would have been more repugnant to, or inconsistent with, the terms of the adopting act. The two acts are so completely at variance that both cannot exist together; and therefore the one which contains the latest expression of the legislative will controls and operates as a repeal of the other. When, therefore, congress passed the act of August 15, 1894, there was no act of the Chickasaw legislature upon which it could operate. The Chickasaw act of adoption was not to become effective until approved by the proper authority of the United States, and, since at the time of its repeal such approval had not been given, there seems to be no doubt of the authority of the Chickasaws to withdraw it.

I am, therefore, of opinion that the Chickasaw freedmen are not members of that tribe, within the meaning of the provision of the agreement submitting the amended agreement to a vote of the male members of the tribe qualified to vote under the tribal laws.

Very respectfully,

WILLIS VAN DEVANTER,
Assistant Attorney-General.

Department of the Interior, August 9, 1898.

Approved:

C. N. BLISS,
Secretary.

VI.

(*Opinion of the court of claims.*)

I venture to suggest that the court of claims erred on several points, which will be considered in the order in which they are presented in the opinion of that court.

1. In the opinion it is stated that by the treaty of July 28, 1866, "the Indians abolished slavery." The language of the treaty is not that, "slavery is hereby abolished," but that, "henceforth neither slavery nor involuntary servitude, * * shall ever exist in said nations." If slavery, in the Choctaw and Chickasaw nations, had been already abolished, either by the thirteenth amendment of

the constitution, or by the civil rights act of April 9, 1866, it was, of course, not abolished by the treaty of July 28, 1866; but the stipulation, of article 2 of that treaty, was merely an agreement that it should thenceforth never exist in those nations. If it was, in fact, abolished by that article, that fact did not limit the effect of the fourteenth amendment on the status of the negro.

2. The next statement of the court is, that the Indians,

> For a specified consideration, ceded lands to the defendants, and agreed to grant rights "to all persons of African descent, resident in said nations," at a certain date.

This is a mistake. No such agreement was made in article 3, or in any other article of the treaty of 1866. An option was given to the Choctaw and Chickasaw legislatures, to grant, or not to grant, certain rights to the freedmen; and it was agreed that certain consequences should follow if such rights should be granted, and certain different consequences if they should not be granted, within two years after the date of the treaty.

3. The next statement is that,

> The money, to be paid by defendants to the Choctaw and Chickasaw nations, was subject to a deduction for "such persons of African descent" as, within a period named, should remove from the nations.

The actual provision was that the money should not be the property of the Choctaws and Chickasaws, at all, unless both their legislatures should, within two years, grant the rights referred to above; and, if those rights should not be granted, and the freedmen should nevertheless remain in the Chickasaw nation, the money was to be the property of the United States.

4. The court next suggested that—

> Defendants further agreed, under certain contingencies, to "remove from said nations all such persons of African descent as may be willing to remove; those remaining, or returning after having been removed from said nations, to have no benefit" from the moneys paid to the Indians by defendants.

But the court evidently overlooked the most important part of this clause of the treaty. The following is the clause in full:

> Those remaining, or returning after having been removed from said nations, to have no benefit of said sum of three hundred thousand dollars, or any part thereof, but shall be upon the same footing as *other citizens* of the United States in the said nations.

In this provision, the United States and the Choctaw and Chickasaw nations did not merely *recognize* the American citizenship of the freedmen, but did, by implication, clearly *stipulate* that they were citizens of the United States.

5. The court quoted the Chickasaw act of January 10, 1873, entitled "an act to adopt the negroes of the Chickasaw nation," &c., and quoted also the act of congress of August 10, 1894, purporting to approve the aforesaid act; and the court said:

> Be this as it may, one point is fixed, that in 1894, by act of the Chickasaw legislature approved by defendants' congress, the freedmen became "subject to the jurisdiction and laws of the Chickasaw nation, and to trial and punishment for offences against them, in every case," as if the said negroes were Chickasaws.

But the court overlooked four acts of the Chickasaw legislature repugnant to and repealing the act of 1873, which four acts were passed, respectively, October 18, 1876, October 17, 1877, May 6, 1882, and October 22, 1885. The first was enacted eighteen years and the fourth nine years before the enactment of the law of 1894, which purported to approve the Chickasaw act of 1873. The court overlooked the fact that when Congress essayed to approve the act of 1873, that act had been a nullity many years.

The court also overlooked the following facts: That the treaty fixed a period of two years for the grant or refusal of the proposed rights by the Choctaw and Chickasaw legislatures; that the act of 1873 was not passed

within the period of two years limited by the treaty, or in the exercise of the option granted by the treaty; that the treaty, by its terms, was to secure to the Choctaw and Chickasaw nations no interest in the $300,000, unless the legislatures of both nations should adopt the freedmen within the period designated; that the Chickasaw act of 1873 constituted a new proposition, independent of the treaty of 1866, which could have no effect, unless accepted within a reasonable time, by both the United States and the Choctaw nation; that neither the Choctaws nor the United States responded to this proposition until many years after it had been withdrawn and become a nullity; that congress did not, in 1894, enact that the freedmen were Chickasaw citizens, or that they were subject to the jurisdiction and laws of the Chickasaw nation, but merely attempted to approve the act of 1873, in ignorance of the fact that it had been long before repealed by repugnant legislation.

It will be observed that the court did not, at this point, hold that, in 1894, the freedmen became citizens of the Chickasaw nation, but merely decided that they became subject to the jurisdiction and laws of that nation.

6. The court seems to have decided that the thirteenth amendment did not emancipate the Chickasaw freedmen, because the Chickasaws were not subject to the jurisdiction of the United States in the sense of that amendment. The position seems to be that because the Chickasaws were not subject to the jurisdiction of the United States, in such a sense that the fourteenth amendment was effective to make the Indians citizens of the United States, they could not have been subject to the jurisdiction of the United States, in such a sense that the thirteenth amendment was effective to emancipate the blacks who had been their slaves.

But if the supreme court had held that the fourteenth amendment made the Chickasaws citizens of the United States, it would, at one blow, have ended their national existence. This interpretation of the treaty would have led to an absurdity, which the accepted canons of interpretation manifestly required the court to avoid. On the other hand the emancipation of their slaves could have no effect whatever on their national existence. Their emancipation was not harmful, in any particular, to any class. Not only was it a benefaction to the freedmen, but it was as beneficent to the Chickasaws as was the emancipation of the slaves in the southern states to the people of those states. While there was the gravest reason for holding that the jurisdiction of the United States over the Chickasaws was not such that the fourteenth amendment made the Chickasaws citizens of the United States, there is no such reason for holding that the jurisdiction of the United States over the Chickasaws was not such that the thirteenth amendment was operative to emancipate their slaves. It seems to me to be an incontestible proposition, that, since the adoption of the thirteenth amendment, there has been no slavery within the exterior limits of the United States.

7. The court said:

> Plaintiff was born within the territorial jurisdiction of the United States, but also within another subsidiary semi-independent jurisdiction. He was born a slave within a nation whose members were not citizens of the United States and did not become citizens; a nation which was recognized, in very many political respects, as independent. * * The greater (less) is included within the less (greater), and the slave remaining with the master, in the Indian Territory, does not achieve citizenship in the United States by emancipation alone.

It seems to have been the opinion of the court that, after the emancipation of a Chickasaw slave, there existed, either between himself and his former master, or between himself and the Chickasaw nation, some political relation

which excluded him from American citizenship. But his political relation to his former master and to the nation, after his emancipation, seems to me to have been precisely what it would have been if he had never been the slave of an Indian or a resident of the Indian Territory. He did not become a member of the Chickasaw tribe. The instant he was emancipated he ceased to be subject to the jurisdiction of that tribe. And he never has been subject to the jurisdiction of the Chickasaw government since his emancipation. He would have become subject thereto if the Choctaw and Chickasaw legislatures had, within two years after the date of the treaty of 1866, enacted certain legislation therein proposed.

Whether emancipated by the thirteenth amendment of the constitution, or by the civil rights act, or by the treaty of 1866, his political status, so far as American citizenship is concerned, was precisely the same as that of an emancipated Carolina or Louisiana slave. The circumstance that he remained with his master, in the Indian Territory, until he was emancipated, had no more effect, to exclude him from American citizenship, than had the fact that Louisiana slaves remained with their masters until their emancipation, to exclude them from American citizenship.

After the emancipation of the Chickasaw slaves, the Chickasaws themselves still owed allegiance to two governments, that of the Chickasaw tribe, and that of the United States. But, after their emancipation, the Chickasaw slaves owed no double allegiance. The government of the United States was their only government. As to them, the Chickasaw nation had not a twofold nature. It was not, at once, a dependent Indian nation, and a part of the United States. As to them it was only an integral part of the United States.

8. The court said:

> While the fourteenth amendment to the constitution was under consideration, the treaty of 1866 was negotiated. This permitted the Chickasaws to retain the freedmen within the tribe, as members, or not to do so. No such course could have been pursued, were the freedmen citizens of the United States.

This is a mistake. The treaty did not purport to empower the Chickasaws to retain their freedmen as citizens, without the consent of the freedmen themselves. On the contrary it secured to the freedmen the option, either to remain as citizens, if adopted by the Chickasaws, or to receive one hundred dollars each and leave the nation. And the fact that the freedmen were citizens of the United States was not more an obstacle to their becoming citizens of the Chickasaw nation than was the fact that white men, who married Chickasaw women, were citizens of the United States, an obstacle to their becoming Chickasaw citizens.

9. The court added this statement:

> Further, in 1894 congress, ratifying the action of the Chickasaws, recognized these freedmen as Chickasaws.

If the import of this statement is that the Chickasaw freedmen are now Chickasaw citizens, it is disproved, I submit, by the considerations suggested on pages 23 to 33 of this brief.

10. The court said:

> We nowhere find them recognized, in treaty, or statute, as citizens of the United States; and, in questions of this nature, the course of the political department of the government is to be received, by the courts, with very high respect.

The court again overlooked these final words of the third article of the treaty of 1866, which manifestly present a recognition of the American citizenship of the freedmen, both by the Chickasaws and by the United States, viz: "Those remaining * * shall be upon the same footing as *other citizens* of the United States in the said nations."

The court also overlooked the civil-rights act of April 9, 1866, the words of which evidently not only imply that the Chickasaws were born in the United States, but also, by excluding Indians not taxed, and not excluding their former slaves, imply that those former slaves are citizens of the United States.

11. The following is the concluding statement of the court:

> We conclude that this plaintiff was, at the date of the alleged depredation, what he is and has been colloquially termed, a "Chickasaw freedman," entitled to the rights of the legally recognized class to which he belongs, and that he was not at that date a citizen of the United States.

But the significance of the term "Chickasaw freedman" is, in its utmost extent, only this: that the man was once the slave of a Chickasaw and is now a free man. It is not decisive of the question whether he is a citizen of the United States, or a member of the Chickasaw tribe, or a "man without a country." Indeed it seems to have no bearing whatever on that question.

I respectfully submit that the position that the claimant was a citizen of the United States, at the dates of the alleged depredations, is established by the facts, constitutional and legislative provisions, and judicial authorities already considered in this brief.

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Of Counsel for Appellant.