In the Supreme Court of the District of Columbia.

OCTOBER TERM, 1902.

EDWIN T. MORRIS ET AL.
v.
ETHAN A. HITCHCOCK ET AL.

No. 23477. Equity Docket No. 52.

APPLICATION FOR AN INJUNCTION.

BRIEF FOR DEFENDANTS IN SUPPORT OF DEMURRER.

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BRIEF OF DEFENDANTS.

EFFECT OF THE DEMURRER.

The rule as to the effect of a demurrer and as to the matters which are admitted thereby to be true is so clearly and concisely stated in the recent decision in *Maese* v. *Herman* (17 App. D. C., 52, 59) that we quote it here. The statement is:

> It is a well-settled principle in the law of demurrer that, while the demurrer admits as true, for the purposes of the decision invoked by it, all facts well and sufficiently pleaded, yet it does not admit as true mere matters of law which the pleader may think proper to state in his pleadings, nor the conclusions drawn from the facts stated therein. That is for the court exclusively. Nor does the demurrer in any manner admit the correctness of an allegation as to the construction of a statute, or of a grant, or other document, or official act that may be insisted upon by the pleader as the foundation of his claim and title, or that

may be set up in opposition thereto. That is a matter of law for determination by the court. These propositions are too clear to require citations of authority for their support.

The averments in this bill, which amount to statements of the legal effect of any law or document or act of an officer of the Government, of which the court takes judicial notice, are not admitted. There are also facts of which the court takes judicial notice in the absence of any allegation, or even in the face of an allegation setting forth a different state of things. (Daniels's Chancery Pleading and Practice, vol. 1, p. 522, 5th ed.)

The dealings of the Government with the Indian tribes within the geographical limits of the United States, but no part of the body politic, form such an important phase of the political history of the country and its development that the courts will take judicial notice of those dealings, as shown by acts of Congress, public documents printed by authority of Congress, orders and proclamations of executive officers, and the records of the Interior Department.

I.

The bill of complaint should be dismissed for the reason that upon its face it shows that the Chickasaw Nation has such an interest in the subject-matter of the controversy as makes it an indispensable party to the suit.

The general rule in chancery is that all those whose presence is necessary to a determination of the entire controversy must be made parties.

Section 737 of the Revised Statutes and the equity rules do not have the effect of permitting the court to proceed in the absence of an indispensable party.

"It remains true," says the court in *Shields* v. *Barrow* (17 How., 130, 141), "notwithstanding the act of Congress and the forty-seventh rule, that a circuit court can make no decree affecting the rights of an absent person, and can make no decree between the parties before it which so far involves or depends upon the rights of an absent person, that complete and final justice can not be done between the parties to the suit without affecting those rights."

While the above decision was rendered prior to the passage of the act of Congress which is now incorporated into the Revised Statutes as section 737, yet the ruling so made was, in the language used, approved in *Greeley* v. *Lowe* (150 U. S., 58, 70). See also *Chadbourne's Ex.* v. *Coe* (10 U. S. App., 78, 83; s. c., 51 Fed. Rep., 479).

The complainants are seeking to enforce a claimed right to graze or range their cattle over lands which are the property of the tribe (*Stephens* v. *Cherokee Nation*, 174 U. S., 445, 488), without payment of the permit fees which are exacted by the tribe under its tribal laws, and which constitute a source of revenue to the tribe and are its property.

That the Chickasaw Nation is an indispensable party is amply illustrated by authority. In *Swan Land and Cattle Co.* v. *Frank* (148 U. S., 603, 610) the complainant company, a British corporation, instituted suit

in the United States circuit court for the northern district of Illinois against Frank and others, stockholders of certain Wyoming corporations, alleging, among other things, that complainant company had purchased all the assets and properties of the Wyoming corporations; that the vendors had fraudulently misrepresented the amount and value of the property; that the defendants, as stockholders, had received their proportionate shares of the proceeds of the sale; that since the sale the vendor companies had ceased to exercise their franchises; and prayed that each of the defendants be required to account for and pay to complainant so much of the assets of said respective companies as may be necessary to satisfy its demand. The vendor corporations were not made parties to the bill, and only such stockholders were made parties as were within the district. The bill was demurred to, one of the grounds being "that the vendor corporations are necessary and indispensable parties to the suit." The demurrer was sustained. Upon this question the circuit court said (39 Fed. Rep., 456, 461);

> The complainants are, in effect, by this bill seeking to compel these defendant stockholders to try a case in this court against corporations who are not parties to the suit. The first and fundamental question in the complainant's case is, has there been a breach of the covenants of these vendor corporations, and what amount of damage has the complainant sustained by reason of such breach? It would be anomalous and unjust, it seems to me, to try this question

> in a suit to which the corporations were not parties and where they could not be heard.
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> These vendor corporations, being Wyoming corporations, can not be brought into this court, and hence the bill is not only fatally defective as it stands, but can not be amended in that respect. The demurrer is therefore sustained and the bill dismissed.

The Supreme Court, in affirming that decision (148 U S., 610, 611), among other things, said:

> Now, it is too clear to admit of discussion that the various corporations charged with the fraud which has resulted in damage to the complainant are necessary and indispensable parties to any suit to establish the alleged fraud and to determine the damages arising therefrom. Unless made parties to the proceeding in which these matters are to be passed upon and adjudicated, neither they nor their other stockholders would be concluded by the decree. The defendants can not be required to litigate those questions which primarily and directly involve issues with third parties not before the court.
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> The general rule that suits in equity can not be entertained and decrees be rendered when necessary or indispensable parties, whether corporations or individuals, are not brought before the court, is not affected by section 1 of the act of February 28, 1839, c. 36, reenacted in section 737 of the Revised Statutes of the United States, as this court has repeatedly held. (*Shields* v. *Barrow*, 17 How , 130, 141; *Coiron et al.* v.

Millaudon, 19 How., 113, 115; *Ogilvie* v. *Knox Ins. Co.*, 22 How., 380; *Barney* v. *Baltimore*, 6 Wall., 280; *Davenport* v. *Dows*, 18 Wall., 626.)

In *New Orleans Water Works Co.* v. *New Orleans* (164 U. S., 471, 480) complainant company, under an act of the legislature of Louisiana passed in 1877, secured the exclusive privilege, for the period of fifty years, of supplying the city of New Orleans and its inhabitants with water, but later the city council assumed to make and promulgate ordinances conferring upon individuals and corporations the right to lay pipes, etc., through the streets and public ways of the city for the purpose of conducting water to certain premises and inhabitants. The New Orleans company brought a suit against the city, asking, among other things, that these ordinances of the city granting to persons and corporations the right to lay pipes, etc., in the streets, be declared null and void, and that the city be restrained from passing ordinances of like character. Among other things the court (p. 480) said:

> None of the parties for whose benefit the ordinances above referred to were passed were brought before the court or given an opportunity to be heard. Nevertheless, the plaintiff seeks a decree not only declaring those ordinances to be null and void, but requiring the city, within a named time, to recall, expunge, repeal, and cancel each ordinance that does not relate to premises contiguous to the Mississippi River; and if the city does not, within such time and in some public way, cancel and annul

> those ordinances, then that the court in this suit shall adjudge and decree them to be null and void, as illegally interfering with the rights of the plaintiff.
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> We do not suppose that any precedent can be found that would justify a court of equity in giving such relief. A decree declaring the ordinances in question void would have no effect in law upon the rights of the beneficiaries named in the ordinances, for in the absence of the parties interested and without their having an opportunity to be heard the court would be without jurisdiction to make an adjudication affecting them. Such a decree would appear, upon the very face of the record, not to be due process of law, and could be treated everywhere as a nullity. (*Windsor* v. *McVeigh*, 93 U. S., 274, 277; *Pennoyer* v. *Neff*, 95 U. S., 714, 733; *Scott* v. *McNeal*, 154 U. S., 34, 46.)

The latest expression of the Supreme Court upon this question is found in *Minnesota* v. *Northern Securities Co.* (184 U. S., 199, 235–8). It is therein held (syllabus) that—

> When it appears to a court of equity that a case, otherwise presenting ground for its action, can not be dealt with because of the absence of essential parties; and it further appears that necessary and indispensable parties are beyond the reach of the jurisdiction of the court, or that, as in this case, when made parties, the jurisdiction of the court will thereby be defeated, it would be useless for the court to grant leave to amend.

Litchfield v. *Register and Receiver* (9 Wall., 575, 578) is especially applicable here, and the following authorities also sustain our contention: *Sioux City Terminal R. & W. Co.* v. *Trust Co. of N. A.* (49 U. S. App., 523, 530—s. c. 82 Fed., 124, 126); *Northern Ind. Rd. Co.* v. *Michigan Cent. R. Co.* (15 How., 233, 244, 245); *State of Kansas* v. *Anderson* (5 Kans., 90, 114); *McCarthy* v. *Walsh* (41 *Id.*, 17, 19); *Union Terminal Co.* v. *Board of Railroad Commissioners* (52 *Id.*, 680—s. c. 35 Pac. Rep., 224–5); *Beasley* v. *Shively* (20 Ore., 508–10—s. c. 26 Pac. Rep., 846); *Gregory* v. *Stetson* (133 U. S., 579, 586); *Donovan* v. *Campion* (85 Fed., 71–2—s. c. 56 U. S. App., 388, 390); *California* v. *S. P. R. Co.* (157 U. S., 229, 251); *Maese* v. *Hermann* (17 App. Cases, 52, 60–6).

Within the principle of the above decisions the court can not proceed in the absence of the Chickasaw Nation. The Indian agent and Indian inspector reside within the jurisdiction of the United States court for the Indian Territory, and suit may be brought in said court against them and also against the Chickasaw Nation. It is not true, as contended by counsel for complainants, that the Chickasaw Nation can not be sued. Section 2 of the so-called "Curtis bill" (30 Stat., 495) contains the following provision for bringing into court the Chickasaw Nation:

> That when, in the progress of any civil suit, either in law or equity, pending in the United States court in any district in said Territory, it shall appear to the court that the property of any tribe is in any way affected by the issues being heard, said court is hereby authorized and required to make said tribe a party to said suit by service upon the chief or governor of the tribe, and the suit shall thereafter be conducted and determined as if said tribe had been an original party to said action.

See unpublished opinion in *Buffington et al.* v. *Henry L. Dawes et al.*, United States court, northern district Indian Territory, a copy of which is among the papers in this cause.

II.

The bill should be dismissed for the reason that it seeks to enjoin officers of the executive department of the Government from discharging duties imposed upon them by Congress and which duties require the exercise of judgment and discretion.

This is shown by sections 441, 463, 2058, 2147, 2149, Revised Statutes; *Brown* v. *Hitchcock* (173 U. S., 473, 477); *Gaines* v. *Thompson* (7 Wall., 347, 353); *The Secretary* v. *McGarraghan* (9 *id.*, 298, 312); *Litchfield* v. *Register, etc.* (*id.*, 575, 577–578); *New Orleans* v. *Paine* (147 U. S., 261, 264); *Cruickshank* v. *Bidwell* (176 *id.*, 73, 80); *Wilbourne* v. *Baldwin* (47 Pac. Rep., 1045).

In *Brown* v. *Hitchcock* (*supra*, p. 477), it is stated:

> As a general rule, no mere matter of administration in the various Executive Departments of the Government can, pending such administration, be taken away from such departments and carried into the courts; those departments must be permitted to proceed to the final accomplishment of all matters pending before them, and only after that disposition may the courts be invoked to inquire whether the outcome is in accord with the laws of the United States.

This decision further declares that such litigation should generally proceed "in the locality where the property is situate, and not here, where the administrative functions of the Government are carried on."

In *Noble* v. *Union River Logging Railroad Company* (147 U. S., 165) proceedings by injunction were sustained against the Secretary of the Interior; but in *Cruickshank* v. *Bidwell* (*supra*, p. 80), the court, in commenting on that case, said:

> In *Noble* v. *Union River Logging Railroad Company* (147 U. S., 165) the jurisdiction was sustained, but the Government raised no point as to the form of the remedy, and deprivation of a vested legal right of property, acquired before any suggestion that it could be taken away, was there threatened. And it appears that the only remedy was through equity interposition. (*New Orleans* v. *Paine*, 147 U. S., 261, 264.) But we are unwilling to extend that precedent.

III.

The bill should be dismissed for the reason that, even if complainants' contention be otherwise correct, they have a complete and adequate remedy at law by an action for damages against those who may, by order of the Secretary of the Interior, remove complainants' live stock from the nation.

This is shown by *Cruickshank* v. *Bidwell* (*supra*, p. 81); *Beck* v. *Flournoy L. S. and R. E. Co.* (27 U. S. App., 618, 630–631; s. c., 65 Fed. Rep., 30, 37–38; affirmed in 163 U. S., 686).

In *Cruickshank* v *Bidwell* (*supra*) it was held (syllabus) that—

> The mere fact that a law is unconstitutional does not entitle a party to relief by injunction against proceedings in compliance therewith, but it must appear that he has no adequate remedy by the ordinary processes of the law, or that the case falls under some recognized head of equity jurisdiction.

In *Beck* v. *Flournoy* (*supra*), a case of similar import, both as to law and facts, as the case at bar, the circuit court of appeals (65 Fed., 30, 37; s. c., 27 U. S. App., 618, 630–1) said:

> Under these circumstances, it is clear, we think, that a court of equity should not interfere, at the instance of the appellee, to arrest any action that the Government of the United States may take to vindicate its rights. It should leave the appellee in the condition in which it has deliberately placed itself, and require it to seek redress in a court of law for whatever damage it may sustain in consequence of any wrongful act committed by Government officers in ejecting it from the demised premises, if any such wrongful act is in fact committed.

IV.

The bill should be dismissed for the reason that upon its face it appears that the defendants, as public officers, have acted and are acting within the scope of their authority.

COMPLAINANTS' CONTENTIONS.

Plaintiffs claim, in effect, that defendant, Hitchcock, is but a mere ministerial officer (bill, par. 6); that he

has transcended his authority in prescribing and promulgating the regulations in question (bill, Ex. A); and that the same are void and of no effect. In support of the claims asserted by them they contend as follows:

1. That the act of the Chickasaw national council approved by the governor of the nation May 3, 1902, *and approved by the President of the United States* May 15, 1902 (see Exhibit A to bill), is, in effect, a law which provides for the imposition of a tax upon property situated within said nation and belonging to citizens of the United States not members of the Chickasaw tribe, and that said council is without power to enact any law intended to affect citizens of the United States not members of said tribe or to pass any act intended to affect the property of citizens of the United States not members of said tribe, irrespective of the fact that such citizens may reside or their property may be situated within the limits of the Chickasaw Nation.

2. That the so-called "Curtis bill" (30 Stat., 495) in effect deprives the Interior Department of the supervision and control of the Chickasaw Indians and their affairs; and that said bill confers upon any citizen of the United States the right to reside and take and keep his property within the Chickasaw Nation without and against the consent of said nation, and that neither the President of the United States, nor any officer of the Government, acting under his orders, has power or authority to remove such citizen or his property from said nation.

3. That the act of March 3, 1901 (31 Stat., 1447), amending section 6 of the act of February 8, 1887 (24 Stat, 388, 390), which confers upon the Chickasaw Indians the rights of citizenship, thereby deprives the Secretary of the Interior, the Commissioner of Indian Affairs, and all officers of the United States Government of all supervision and control of the Chickasaws and their affairs.

4. That the herds of live stock of the plaintiffs are rightfully within said nation by reason of permission given to plaintiffs by individual Indians through contracts entered into between the plaintiffs and individual members of the Chickasaw Nation.

5. That the act of the Chickasaw Nation in question does not provide for the collection of the permit fee imposed thereby; hence the Secretary of the Interior is without authority to prescribe rules and regulations for the enforcement of the act.

6. That the rules and regulations of June 3, 1902, are invalid for the reason that they violate the provision of the fifth amendment to the Constitution of the United States requiring that no person shall be deprived of property without due process of law.

POSITION OF DEFENDANTS.

It is conceded that the act of the Chickasaw Nation imposes a license or permit fee upon plaintiffs' live stock, and that no provision is made in the act for its enforcement by the tribal authorities.

It is not conceded that the Chickasaw Nation is without power to pass the act, or that the Indian Bureau is without authority to enforce it.

The officers of the Interior Department charged with the administration and supervision of Indian affairs have full power and authority to remove from the Chickasaw Nation the live stock belonging to plaintiffs, and this contention is based upon the following propositions:

1. The Chickasaw Nation is a distinct political society, possessing, by reason of Congressional delegation, power and authority to regulate its own domestic affairs and to enact its own laws, though such laws can not be in conflict with the Constitution of the United States nor in conflict with the laws of Congress.

2. The act of the Chickasaw national council, in question, neither conflicts with the Constitution of the United States nor with any act of Congress; and even though it does so conflict plaintiffs are estopped from denying its validity, for the reason that they have accepted its benefits.

3. The Secretary of the Interior is vested with full power and authority, and it is his duty, to prescribe appropriate rules and regulations for the enforcement of the act of the Chickasaw Nation in question.

4. The rules and regulations prescribed by the Secretary of the Interior for the enforcement of said act are not in conflict with any provision of the Constitution of the United States or of any law of Congress, nor do they violate the rights of the plaintiffs.

5. Plaintiffs acquired no right to pasture their live stock within the boundaries of the nation by reason of any permission given by, or by reason of any contract or contracts made with, individuals of the nation.

6. By treaty stipulations the Government is solemnly obligated to remove all "*intruders*" from the Chickasaw Nation; the question of who are intruders is a political one, to be determined by the Interior Department, and when determined can not be examined or reviewed by the judicial department in injunction or mandamus proceedings, for the reason that the determination of the question involves the examination of facts and the construction of laws.

7. The power to prescribe rules and regulations for the protection of those rights of the Indians which are guaranteed them by treaties or by acts of Congress belongs exclusively to the political department of the Government, and such power can not be controlled by the courts.

FIRST PROPOSITION OF DEFENDANTS.

The Chickasaw Nation is a distinct political society, possessing, by reason of Congressional delegation, power and authority to regulate its own domestic affairs and to enact its own laws, though such laws may not be in conflict with the Constitution of the United States nor in conflict with the laws of Congress.

Prior to the passage of the act of March 3, 1871 (16 Stat., 566; sec. 2079, Rev. Stat.), all negotiations between the Government and the Indian tribes were conducted by way of treaties in an international sense. (*Lone Wolf et al.* v. *Hitchcock*, 30 Wash. L. R., 166–8; *United States* v. *Kagama*, 118 U. S., 375, 382.)

Since 1871 the Government has dealt with the Indians by direct legislative enactment or by way of convention or contract, as Congress may authorize or

approve. (*Choctaw Nation* v. *United States*, 119 U. S., 1, 27; *Stephens* v. *Cherokee Nation*, 174 U. S., 445, 483; *Lone Wolf et al.* v. *Hitchcock*, *supra*.)

Since the decision of the Supreme Court of the United States, rendered in 1831 (opinion by Chief Justice Marshall, *Cherokee Nation* v. *State of Georgia*, 5 Peters, 1), the Indian tribes have been regarded and treated by the United States as separate dependent nations. (*United States* v. *Kagama*, *supra*, 375, 382–4; *Lone Wolf et al.* v. *Hitchcock*, *supra*.)

TREATIES BETWEEN THE GOVERNMENT AND THE CHICKASAW TRIBE OF INDIANS.

September 27, 1830 (7 Stat., 333), a treaty was negotiated between the Government and the Choctaw Nation, which provided, among other things, that—

> The United States shall forever secure said Choctaw Nation from and against all laws except such as from time to time may be enacted in their own national councils not inconsistent with the Constitution, treaties, and laws of the United States. [Article 4, p. 334.]

Articles 9 and 11 (pp. 334 and 335) provide against intrusion by citizens of the United States and make it the duty of the Government to remove intruders.

It seems that at the time the above treaty was negotiated the Choctaws and Chickasaws were living together, the Chickasaws not having a separate council, but having a voice in the council of the Choctaws.

The first treaty made directly with the Chickasaws is dated October 20, 1832 (7 Stat., 381). In the preamble it is recited, among other things, that "they prefer to seek a home in the West, *where they may live and be governed by their own laws*."

January 17, 1837 (7 Stat., 605; 11 Stat., 573), "Articles of convention and agreement" were entered into between the Choctaw tribe and the Chickasaw tribe, which agreement was, on February 25, 1837, approved by the Senate and on March 24, 1837, approved by the President. Article 1 of this agreement provided for the formation of a district for the use of the Chickasaws within the limits of the Choctaw Nation, said district to be held in common by said tribes. Said article further declared "the Chickasaw people to be entitled to all the rights and privileges of Choctaws," with certain exceptions. Article 2 defined and bounded the Chickasaw district.

June 22, 1855 (11 Stat., 611), another treaty was entered into between the United States and the Choctaw and the Chickasaw tribes, the twenty-first article (p. 615) expressly providing that it should "supersede and take the place of all former treaties between the United States and the Choctaws and also of all treaty stipulations between the United States and the Chickasaws" inconsistent therewith.

The preamble to this treaty recited in part that the political connection theretofore existing between the Choctaws and the Chickasaw tribe of Indians had given rise to unhappy and injurious dissensions and controversies among them, which rendered necessary

an adjustment of their relations to each other and to the United States.

Article 1 defined the boundaries of the Choctaw and Chickasaw nations. Article 2 established within these boundaries a district for the Chickasaws. Article 3 provided that the remainder of the land should constitute the Choctaw district.

Articles 7 and 14 were as follows:

> ARTICLE 7. So far as may be compatible with the Constitution of the United States and the laws made in pursuance thereof, regulating trade and intercourse with the Indian tribes, the Choctaws and Chickasaws shall be secured in the unrestricted right of self-government, and full jurisdiction over persons and property within their respective limits; excepting, however, all persons, with their property, who are not by birth, adoption, or otherwise citizens or members of either the Choctaw or Chickasaw tribe, and all persons, not being citizens or members of either tribe, found within their limits, shall be considered intruders and be removed from and kept out of the same by the United States agent, assisted, if necessary, by the military, with the following exceptions, viz: Such individuals as are now or may be in the employment of the Government, and their families; those peacefully traveling or temporarily sojourning in the country or trading therein, under license from the proper authority of the United States, and such as may be permitted by the Choctaws or Chickasaws, with the assent of the United States agent, to reside within their limits, without becoming citizens or members of either of said tribes.
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> ARTICLE 14. The United States shall protect the Choctaws and Chickasaws from domestic strife, from hostile invasion, and from aggression by other Indians and white persons not subject to their jurisdiction and laws; and for all injuries resulting from such invasion or aggression full indemnity is hereby guaranteed to the party or parties injured, out of the Treasury of the United States, upon the same principle and according to the same rules upon which white persons are entitled to indemnity for injuries or aggressions upon them, committed by Indians.

Subsequently to the making of the treaty of 1855 and until the beginning of the civil war the relations between the Government and the Choctaws and Chickasaws were apparently harmonious, but during the civil war these tribes cooperated with the Confederate forces, making war upon other Indians adhering to the United States. (*United States* v. *Choctaw and Chickasaw Nations*, 179 U. S., 494, 522.)

After the civil war, and on April 28, 1866 (14 Stat., 769), another treaty was negotiated between the Government and the Choctaws and Chickasaws by the terms of which local self-government was recognized in each of said tribes (see arts. 3, 7, and 9), article 7 specifically providing that—

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

of the rights of person and property within the Indian Territory: *Provided, however*, Such legislation shall not in any wise interfere with or annul their present tribal organization, or their respective legislatures or judiciaries, or the rights, laws, privileges, or customs of the Choctaw and Chickasaw nations, respectively.

Article 43 of that treaty (p. 779) provided as follows:

> The United States promise and agree that no white person, except officers, agents, and employees of the Government, and of any international improvement company, or persons traveling through or temporarily sojourning in the said nations, or either of them, shall be permitted to go into said territory unless formally incorporated and naturalized by the joint action of the authorities of both nations into one of the said nations of Choctaws and Chickasaws, according to their laws, customs, or usages; but this article is not to be construed to affect parties heretofore adopted, or to prevent the employment temporarily of white persons who are teachers, mechanics, or skilled in agriculture, or to prevent the legislative authorities of the respective nations from authorizing such works of internal improvement as they may deem essential to the welfare and prosperity of the community, or be taken to interfere with or invalidate any action which has heretofore been had in this connection by either of the said nations.

LAWS OF CONGRESS AFFECTING THE CHICKASAW NATION.

No further treaties were made with either of said tribes prior to March 2, 1871, at which time Congress

enacted what has since been incorporated into the Revised Statutes as section 2079, which section is as follows:

> 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.

The act of Congress of May 2, 1890 (26 Stat., 81, 94–98), providing a temporary government for the Territory of Oklahoma, contained a provision extending the jurisdiction of the United States courts in the Indian Territory and determining the jurisdiction of said courts within said Indian Territory. This provision, however, recognized the rights secured by the last-mentioned treaty. (*Raymond* v. *Raymond*, 55 U. S. App., 89, 93; s. c. 83 Fed. Rep., 721, 723.)

June 28, 1898 (30 Stat., 495), Congress passed an act, commonly known as the "Curtis Act," entitled "An act for the protection of the people of the Indian Territory, and for other purposes." Said act incorporated, as section 29, with certain amendments, what is known as the Atoka agreement. By said section the legislative power of the Chickasaw Nation was recognized, the provision to that effect (p. 512) being as follows:

> It is further agreed that no act, ordinance, or resolution of the council of either the Choctaw

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

From the aforesaid treaties and acts of Congress, it is plain to be seen that the National Government has always recognized the Chickasaw tribe of Indians as a domestic dependent nation, and has given it power to legislate with respect to its own members and with respect to its own property.

Upon a question of similar import as the one here under consideration, involving similar provisions in

other Indian treaties, and the same provision in the act of May 2, 1890, *supra*, the United States circuit court of appeals for the eighth circuit, in *Crabtree* v. *Madden* (12 U. S. App., 159, 165; s. c., 54 Fed. Rep., 426, 429), says:

> These treaties and this legislation demonstrate that this Creek tribe has carefully preserved its separate political identity, and that it is still managing its own affairs, and exercising, through officers of its own selection, legislative, executive, and judicial functions within its territorial jurisdiction.

In support of this view see also *Mehlin* v. *Ice* (12 U. S. App., 305, 315–316; s. c., 56 Fed., 12, 17); *Maxey et al.* v. *Wright* (54 S. W. Rep., 807); *Alberty* v. *United States* (162 U. S., 499, 502–504; *Nofire* v. *United States* (164 *Id.*, 657, 662); *United States* v. *Choctaw and Chickasaw Nations* (179 *Id.*, 494, 520); *Beecher* v. *Wetherby* (95 *Id.*, 517, 526); *Exendine et al.* v. *Pore* (56 Fed., 777–778).

SECOND PROPOSITION OF DEFENDANTS.

The act of the Chickasaw national council in question neither conflicts with the Constitution of the United States nor with any act of Congress; and even though it did, plaintiffs are estopped from denying its validity, for the reason that they have accepted its benefits.

That the act of the Chickasaw national council complained of is valid, and not in contravention of any constitutional inhibition or in violation of any law of Congress, is plainly apparent from an inspection of the

act and from the foregoing decisions, as also from the following additional authorities:

Opinion of Attorney-General MacVeagh (17 Op. of Attys. Gen., 134, 136); Opinion of Acting Attorney-General Phillips (18 *Id.*, 34, 37); Opinion of Attorney-General Griggs (23 *Id.*, 214, etc.); Opinion of Attorney-General Knox (*Id.*, 528).

The treaties entered into between the United States and each of the Five Civilized Tribes of Indians, namely, the Cherokees, Choctaws, Chickasaws, Creeks, and Seminoles, are substantially alike respecting the right of self-government of each tribe; and the provisions of the acts of Congress enacted since 1871 affecting each of said tribes, as to the right of self-government, are identical.

In *Beecher* v. *Wetherby* (*supra*) the Supreme Court (p. 526) held "That the right of the Indians to their occupancy is as sacred as that of the United States to the fee." In *United States* v. *Choctaw and Chickasaw Nations* (*supra*) it was held that the provisions of article 7 of the treaty of 1855, *supra*, were still in existence, and "secured to each tribe the unrestricted right of self-government, and, with certain exceptions not necessary to be here stated, full jurisdiction over personal property within their respective limits."

In the case of *Crabtree* v. *Madden* (*supra*), which arose before the abolition of tribal courts by the Curtis bill, a suit had been brought in the United States court in the Indian Territory by the Creek Nation, and Crabtree, as the national tax collector for that nation, to

collect a permit fee imposed by a law of the nation upon Madden, as a licensed trader, whose business was that of a builder of houses and dealer in furniture in the nation. Madden, the defendant, being a citizen of the United States and not a member of the tribe, filed a demurrer to the complaint. The demurrer was sustained. Plaintiffs sued out a writ of error to the United States circuit court of appeals for the eighth circuit. In that court it was said (p. 165): "The tax which it is sought to collect by this action was imposed by the laws of this [Creek] tribe. If the tribe had lawful authority to impose it, it had equal powers to prescribe the remedies and designate the officers to collect it. The presumption is that it has done so, and that it has provided some of the remedies usually prescribed for that purpose."

In *Mehlin* v. *Ice*, *supra* (p. 315), the court, among other things, said: "The right of self-government has always been claimed and exercised by the Cherokee Nation. Their rights in this regard, so far as relate to their own country and people, have never been questioned by the United States. *Nor is it true that the United States has always denied to the Cherokees jurisdiction over white intruders in their country.*"

October 17, 1876, the Chickasaw council passed the following act, which is similar in principle to the one here in question:

PERMIT LAW OF THE CHICKASAW NATION.

SECTION 1. *Be it enacted by the legislature of the Chickasaw Nation*, That citizens of any State

or Territory of the United States wishing to hire or rent land, or be otherwise employed in this nation, shall be required to enter into contract with a citizen; said contract to be reported by the citizen to the county clerk of the county where said citizen resides.

SEC. 2. *Be it further enacted*, That any citizen who shall employ any noncitizen shall apply within fifteen days after entering into contract to the clerk of the county where said noncitizen wishes to reside for a permit for male noncitizen over the age of eighteen years in his employ, and for each permit so obtained the non-citizen shall pay to the clerk issuing the same the sum of twenty-five dollars, and the clerk shall retain for each permit issued twenty-five cents for his services, and shall report to the auditor and treasurer quarterly, of all money received by him for permits, and after deducting out his fee, shall pay the balance over to the treasurer for national purposes.

SEC. 3. *Be it further enacted*, That every foreigner who shall come into this nation for the purpose of farming or being otherwise employed, without the proper authority of the United States Government, shall be deemed an intruder by virtue of section 2134 of the Revised Statute of intercourse law.

SEC. 4. *Be it further enacted*, That all licensed merchants and traders (noncitizens) shall, in addition to the tax paid on goods, be required to procure from the county clerk of the county in which they wish to trade, and all physicians, noncitizens, wishing to practice their profession, shall procure from the county clerk of the

county in which they wish to trade, a permit, for which they pay each twenty-five dollars, conditioned upon the faithful observance of the laws of this nation, and the clerks shall dispose of the funds in the manner prescribed in section two of this act.

SEC. 5. *Be it further enacted*, That no permit shall be granted for a longer time than twelve months; and in case of violation of any law of this nation, the offender shall be ordered out of the limits of the Chickasaw Nation. And any citizen who shall employ any noncitizen for a longer time than fifteen days without procuring a permit for the same shall be deemed guilty of misdemeanor, and be subject to a fine of twenty-five dollars before the county court having jurisdiction; and all fines collected under this act shall go to the county treasury for county purposes.

SEC. 6. *Be it further enacted*, That any noncitizen having entered into contract with any citizen of this nation and obtained a permit under his employ and shall leave the employ of said citizen without his knowledge and consent, shall forfeit his permit, and no other permit shall be granted any noncitizen forfeiting the same by either clerk of either county of this nation.

SEC. 7. *Be it further enacted*, That any person living in this nation under permit shall not be allowed to bring into or hold more than five head of milch cows, and shall have no hogs outside of inclosure, but shall be allowed all the work horses, mules, and cattle as may be necessary to work said farm, and shall be

allowed to feed surplus crop to beef cattle under fence.

SEC. 8. *Be it further enacted*, That all freedmen not owned by Chickasaws or Choctaws at the date of the treaty of Fort Smith shall be required by the sheriffs of the respective counties of this nation to procure permits, as provided in this act.

SEC. 9. *Be it further enacted*, That all acts and parts of acts in conflict with this act are hereby repealed, and this act take effect and be in force from and after its passage.

The Senate Committee on the Judiciary, having under consideration the validity of these permit laws, through Senator Davis, of Illinois, on February 3, 1879, reported that the same were not invalid. (See Senate Reports of Committees, vol. 2, 45th Congress, third session, pp. 1–4.)

Attorney-General MacVeagh, in his opinion given to the Secretary of the Interior (17 Att. Gen. Op., *supra*), in reply to the inquiry as to whether the aforesaid Choctaw and Chickasaw laws were valid, replied that they were.

July 9, 1884, the Secretary of the Interior again referred to the Attorney-General the question of the validity of these permit laws, and also asked his opinion upon the question whether, conceding that they were valid, the Interior Department had power to revise them so as to secure reasonableness in the amount of the fees which they required from persons who applied for permits.

In reply to the first question, Acting Attorney-General Phillips (18 Op. Att. Gen., *supra*) held that said laws were valid.

In reply to the second question, it was, among other things, stated by him (see p. 39) as follows:

> In conclusion I have to say that my attention has not been called to any statute by which Congress has delegated to a Department or officer of the United States its power to control such taxation. I therefore conclude that no Department or officer has such power.

In *Maxey* v. *Wright* (*supra*) the question of the validity of an act of the Creek Nation imposing an annual license fee or permit tax of $25 upon all attorneys, citizens of the United States, not members of said tribe or of the Seminole tribe, practicing their profession in the Creek Nation, was raised by the record and determined by the court. The United States court for the Indian Territory, in an able and elaborate opinion delivered by Chief Justice Clayton, held that the act of the Creek Nation imposing said tax or license fee was valid. This case was appealed to the United States circuit court of appeals for the eighth circuit and affirmed (no opinion being rendered) on November 22, 1900. (See 105 Fed. Rep., p. 1003.)

In the above case (p. 809, 54 S. W. Rep.) the Indian Territory court of appeals quoted, with approval, the opinions of Attorney-General MacVeagh and Acting Attorney-General Phillips, and in this connection said:

> Article 7 of the treaty between the United States and the Choctaw and Chickasaw nations

(11 Stat., 613) is, upon the question here involved, identical with article 15 of the Creek treaty; and the question as to whether these nations had the power to enforce their permit laws was passed upon by Attorney-General Wayne McVeagh in 1881. He says: "The validity of such permits is recognized by the concluding clause of article 7 of the treaty of June 22, 1855, which is not inconsistent with the terms of the later treaty." (17 Ops. Attys. Gen., 134.) Upon the same subject Attorney-General Phillips, in 1884, says: "In absence of treaty or statutory provision to the contrary, the Choctaw and Chickasaw nations have power to regulate their own rights of occupancy, and to say who shall participate, and upon what conditions, and hence may require permits to reside in the nations from citizens of the United States, and levy a pecuniary exaction therefor. The clear result of all the cases, as restated in *Beecher* v. *Wetherby* (95 U. S., 526; 24 L. Ed., 442), is: 'The right of the Indians to their occupancy is as sacred as that of the United States to the fee.' I add that, so far as the United States recognize political organizations among Indians, the right of occupancy is a right in the tribe or nation. It is, of course, competent for the United States to disregard such organizations and treat Indians individually, but their policy has generally been otherwise. In such cases, presumptively, they remit all questions of individual right to the definition of the nation as being purely domestic in character. The practical importance here of this proposition is that in the absence of express contradictory pro-

> visions by treaty or by statutes of the United States, the nation, and not a citizen, is to declare who shall come within the boundaries of its occupancy, and under what regulations and conditions. * * * (*a*) Article 7, 1855, secured to the Choctaws and Chickasaws, among other things, 'the unrestricted right of self-government and free jurisdiction over persons and property within their respective limits, excepting, however, all persons or their property who are not by birth, adoption, or otherwise citizens or members of either tribe,' etc. I submit that whatever this may mean it does not limit the right of these tribes to pass upon the question who (of persons indifferent to the United States, *i. e.*, neither employees, nor objectionable) shall share their occupancy, and upon what terms."

December 14, 1898, the council of the Chickasaw Nation passed an act entitled "An act to provide for a more equitable permit tax, and for other purposes." (See Constitution, Treaties, and Laws of the Chickasaw Nation, 1899, pp. 440–442.) This act was also similar in principle to the one here in question. Sections 1, 2, 3, 9, and 10 of said law are as follows:

> SECTION 1. *Be it enacted by the legislature of the Chickasaw Nation*, That hereafter all adult males, over the age of eighteen years, who are noncitizens and now residing in the Chickasaw Nation, or who may hereafter move to this nation, for the purpose of residing in the same, shall be required to pay an annual permit tax of one dollar each for the privilege of residing in this nation.

SEC. 2. That any noncitizen who owns horses, jacks, jennets, mules, or other cattle, and who holds them upon the public domain or within the Chickasaw Nation, shall be required to pay an annual permit tax of twenty-five cents per head for each horse, jack or jennet, mule or bovine, and five cents per head for each sheep and goat so held within this nation.

Provided, That two cows and calves, and two horses, or two mules or one horse and one mule, or two work oxen, belonging to each head of a family shall be exempt from the provisions of this act; and that the owner of any cattle subject to taxation under this act shall be required to make oath, before some notary public, or other officer authorized to administer oaths, as to the number of cattle named herein and owned and held by him in the Chickasaw Nation, before any permit collector shall deliver to him a clear receipt for the year for which he shall have paid; and all said affidavits shall be turned over to the national auditor by the permit collector with his quarterly report hereinafter required.

SEC. 3. That all taxes or permits, under the provisions of this act, shall be paid annually, in advance, to the permit collector of each county in the Chickasaw Nation, and each collector shall receive twenty per centum of all amounts collected by him for his services.

SEC. 9. That 'any noncitizen subject to a permit tax under the provisions of section 1 of this act, and who shall refuse to pay his permit tax, after due notice for thirty days, shall be deemed an intruder by virtue of the intercourse

law of the United States of America and subject to removal; and such intruder shall be reported to the United States Indian agent (or inspector) to the Five Civilized Tribes, and shall forthwith be removed from the Chickasaw Nation, under the direction of the said United States Indian agent or inspector.

SEC. 10. That when any horse, jack, jennet, or other cattle subject to a permit tax under section 2 of this act shall be found within the Chickasaw Nation for sixty days, and upon which the permit tax herein required has not been paid, the same shall be reported straightway to the United States Indian agent (or inspector) to the Five Civilized Tribes, and advertised and sold to the highest bidder at public sale under his direction, to pay said permit tax due and for the cost of advertising and selling same; that the amount over and above said tax and costs shall be deposited with the said United States Indian agent (or inspector) to be paid to the owner of said horse, jack, jennet, or other cattle so sold.

August 13, 1900, the Secretary of the Interior referred this act to the Attorney-General for an opinion thereon, and in that connection submitted to him the following questions:

> Have these nations the right to require noncitizens to pay a permit tax or license fee for the privilege of engaging in business within their boundaries?
>
> Can a noncitizen be lawfully permitted to hold and pasture cattle upon the lands of such

nation without paying the tax prescribed by the nation for such privilege?

Did the Indian Territory, by reason of the provisions of the act of June 28, 1898, authorizing the sale of town lots to noncitizens, cease to be Indian country so that the provisions of sections 2147–2150, Revised Statutes, do not apply there?

In reply, Attorney General Griggs (Vol. 23, Ops. Attys. Gen., pp. 214, 216), among other things, says:

> Without referring specially to the different treaties with these Indian nations, it may be stated that they provide that all persons not citizens of such nations or members of any Indian tribe found within the limits of such nation should be considered as intruders, and be removed from and kept out of the same by the United States. From this class of intruders are excepted the employees of the Government and their families and servants; employees of any internal improvement company; travelers and temporary sojourners; those holding permits from any of the Indian tribes to remain within their limits, and white persons who, under their laws, are employed as "teachers, mechanics, or skilled in agriculture."
>
> It is apparent, therefore, that, save the excepted classes, no one not a citizen or member of a tribe can be lawfully within these limits without Indian permission, and equally apparent that all may be so with such permission; and it follows that the same power that can refuse or grant such permission can equally impose the terms on which it is granted.

> So far as concerns the Choctaw and Chickasaw nations (and the same rule applies to the others), this question was passed upon by my predecessor, Attorney-General Wayne MacVeagh, who held (17 Opin., 134) that such permit and license laws, with their tax, were valid and must be enforced. The same doctrine was held by Acting Attorney-General Phillips, in 18 Opinions, 34. Both these opinions are cited by the court of appeals of Indian Territory in *Maxey* v. *Wright* (54 S. W. Repr., 807), which distinctly affirms the validity of this legislation. I quite agree with these opinions, and have no doubt that it is competent for those Indian nations to prescribe the terms, here being considered, upon which they will permit outsiders to reside or carry on business within their limits.
>
> Nor does the act of June 28, 1898 (30 Stat., 495), either deprive these nations of the power to enact such legislation or exempt purchasers of town or city lots from its operations.

September 20, 1901, Attorney-General Knox, in an opinion given to the Secretary of the Interior, *supra* (pp. 528, 529), among other things, says:

> I have the honor to reply to your note of August 27, 1901, in which you request my official opinion whether your Department has authority under existing laws to collect the tribal tax imposed by the laws of the Cherokee Nation of Indians upon the exportation of prairie hay from that nation.
>
> The situation is this: Under the right of self-government conferred by Congress, the

Cherokee Nation has its own constitution, government, and laws, not inconsistent with the Constitution or laws of the United States. By act of Congress these laws are first approved by the President. When so approved they have, in all respects, the force and effect of laws. This autonomy carries with it the unquestionable right of taxation. Under this power the Cherokee Nation imposes a tax of 20 cents per ton upon all prairie hay shipped out of and beyond the limits of that nation. (Laws of the Cherokee Nation, sections 374, 375.) In my opinion, there can be no question of the right or power of that nation to impose such a tax.

For reasons satisfactory to both nations, the United States collects the tribal taxes imposed and the royalties and rents from the public domain and deposits them in the United States Treasury to the credit of the Indian nation. The power and right to do this, by and through the Interior Department, is agreeably affirmed by the United States court of appeals, Indian Territory, in *Maxey* v. *Wright* (54 S. W. Repr., 807), under existing treaties and acts of Congress. While that decision was rendered with reference to the Creek Nation, it is just as applicable to the Cherokee Nation also, for similar treaties and laws exist as to that nation.

COMPLAINANTS ESTOPPED FROM DENYING VALIDITY OF THE ACT.

Even though it should be held that the act of the Chickasaw council complained of is invalid, it is plainly manifest that only by its provisions were

plaintiffs permitted to take and keep their live stock within the limits of the nation. They have accepted the benefits conferred by the act, and will not now be heard to deny or question its validity. (Black's Const. Law, 2d ed., p. 59; Bigelow on Estoppel, 2d ed., 509; *Ferguson* v. *Landram*, 5 Bush (Ky.), 230; *Todd* v. *Kerr*, 42 Barb., 319; *People* v. *Murray et al.*, 5 Hill, 468; *Lindsay* v. *Mullen*, 176 U. S., 126, 146; *O'Brien* v. *Wheelock*, 184 *Id.*, 450, 491.)

Ferguson v. *Landram* (*supra*) was a case where, to avoid the draft in 1864, a large portion of the people of Gallatin County, Ky., met at the county seat and resolved to raise $20,000 as a military fund to be distributed among those who should thereafter volunteer, in addition to the bounty offered by the Federal Government, and appointed a committee to borrow the money and to obtain an act of the legislature to authorize the county court to issue bonds and to levy a tax to reimburse the money so expended. The money was borrowed, the volunteers obtained, the draft prevented, the necessary act of the legislature passed, the bonds issued, and the tax was levied by the court. Subsequently a number of the taxpayers of the county instituted injunction proceedings to prevent the levying of the tax under said act upon the ground that the act was unconstitutional. Held (1) that the act was unconstitutional; (2) that the following persons were estopped from denying its constitutionality: All persons who were themselves liable to draft, or had minor sons or slaves so liable; all who had participated in

the procurement of the law or afterwards voluntarily ratified it, especially such as had relatives liable to be conscripted. In deciding the case the court, among other things, said (p. 146):

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

People v. *Murray* (*supra*) involved the validity of a statute which, after authorizing certain persons to erect a dam across a river, provided that they should execute a bond to the people, conditioned to pay such damages as each and every person might sustain in consequence of the erection of the dam; that any person conceiving himself aggrieved might apply to a county judge for the appointment of a justice of the peace to inquire and ascertain whether such person had sustained damages by reason of the dam; that the assessment of the justice of the peace should be signed by him and filed in the office of the county clerk; that if the damages assessed were not paid within a specified time the person entitled thereto might prosecute the bond, and that a certified copy of the assessment should be conclusive evidence of the amount of the damages. Held, in an action upon the bond, that the assessment was conclusive as to the amount of damages and also of the fact that they were caused by the erection of the dam. Held, further,

that the defendants, having acted under the statute by building the dam, were not at liberty to question the constitutionality of the provision relating to the mode of assessing the damages. In answer to the suggestion that the provision of the act which made the assessment of the justice conclusive upon the parties was unconstitutional, the court (p. 472) said:

> The short answer is, that the defendants took the grant to build the dam with this condition attached to it; and they are not now at liberty to make the objection, though under other conditions it might have been effectual.

A person who avails himself of the benefits conferred upon him by a particular statute thereby agrees to comply with the condition annexed to the benefit and will not be heard to complain that the conditions are illegal. (*Lindsay* v. *Mullen*, *supra*.)

Says the court, through Fuller, C. J., in *O'Brien* v. *Wheelock*, *supra* (p. 491):

> Although a law is found to be unconstitutional, a party who has received the full benefit under it may be compelled to pay for that benefit according to the terms of the law. This is upon the theory of an implied contract, the terms of which may be sought in the invalid law, and which arises when the full consideration has been received by the party against whom the contract is sought to be enforced.

THIRD AND FOURTH PROPOSITIONS OF DEFENDANTS.

The Secretary of the Interior is vested with full power and authority, and it is his duty, to prescribe appropriate rules and regulations for the enforcement of the act of the Chickasaw Nation in question.

The rules and regulations prescribed by the Secretary of the Interior for the enforcement of said act are not in conflict with any provision of the Constitution of the United States or of any law of Congress, nor do they violate any rights of the plaintiffs.

The Indian appropriation act of June 7, 1897 (30 Stat., 62, 83), contains a proviso which, amended by the Curtis Act, section 28, has the effect of abolishing the tribal courts of the Chickasaw Nation on and after October 1, 1898. Prior to that time the Chickasaw council could have provided that the collection of a permit or license fee similar to the one here in controversy could be enforced in the tribal courts. (*Crabtree* v. *Madden*, *supra*, 165.) Since then the enforcement must be otherwise effected, and in view of section 26 of the Curtis Act, they can not be effected through the United States courts. That section provides that—

> the laws of the various tribes or nations of Indians shall not be enforced at law or in equity by the courts of the United States in the Indian Territory.

Inasmuch as the Curtis Act (see sec. 29, 30 Stat., 512) expressly continues the legislative authority of the Chickasaw Nation "for the period of eight years from the fourth of March, eighteen hundred and ninety-eight," of necessity, the power to administer and enforce the laws which may be enacted by the nation in

the meantime is lodged somewhere. As there is no specific provision in the Curtis Act to the contrary, the administration and execution of such laws fall within the jurisdiction of that branch of the Government which has the supervision and management of the Indians and their affairs. *Bishop of Nesqually* v. *Gibbon* (hereinafter cited and quoted); Indian Allotments (28 L. D., 564, 567).

The act of the Chickasaw Nation in question (approved by the Chickasaw governor May 3, 1902, *and by the President of the United States* May 15, 1902—see Exhibit A to bill), provides:

> SEC. 2. That such privilege or permit taxes shall hereafter be payable to such person or persons, and collected under such rules and regulations, as may be prescribed by the Secretary of the Interior.
>
> SEC. 4. That such privilege or permit taxes shall be due and payable annually, upon demand, and if such taxes are not paid when demanded, the live stock upon which such taxes are due shall be held to be in the Chickasaw Nation without its consent, and *unlawfully* upon the land of the Chickasaws, and the presence of such live stock and owners or holders thereof within the limits of said nation shall be deemed detrimental to the peace and welfare of the Chickasaw Indians.

The Chickasaw National Council having declared that the nonpayment of the permit fees would render the further presence in the nation of the live stock and the holder or owner unlawful, etc., it became the duty

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The Chickasaw National Council having declared that the nonpayment of the permit fees would render the further presence in the nation of the live stock and the holder or owner unlawful, etc., it became the duty

of the Interior Department, under its general power over Indians and their affairs, to determine whether those who failed or refused to pay the fees so imposed were intruders, as that term is used in the treaty of 1855. (*Maxey* v. *Wright, supra; Buster & Jones et al.* v. *J. George Wright et al.*, a copy of opinion submitted by complainants; Opinion Attorney-General Knox, *supra*, p. 529.)

That Department was also clothed with power and authority to prescribe rules and regulations for the enforcement of said act by removing from the nation the intruders and their property. (Opinion Attorney-General MacVeagh, *supra*; Opinion Acting Attorney-General Phillips, *supra*; Opinion Attorney-General Griggs, *supra.*)

The approval by the President of this Chickasaw act made it a regulation prescribed by the President within the meaning of sections 463, 2058, and 2114 of the Revised Statutes, hereinafter quoted, and therefore specially imposed upon the Secretary of the Interior and the other defendants the duty of administering and executing it according to its terms.

Section 8, Article III, of the Federal Constitution provides that "Congress shall have power * * * to regulate commerce * * * with the Indian tribes."

Section 2114 of the Revised Statutes provides:

> The President is authorized to exercise general superintendence and care over any tribe or nation which was removed upon an exchange

> of territory under authority of the act of May twenty-eighth, eighteen hundred and thirty, "to provide for an exchange of lands with the Indians residing in any of the States or Territories, and for their removal west of the Mississippi," and to cause such tribe or nation to be protected at their new residence against all interruption or disturbance from any other tribe or nation of Indians, or from any other person or persons whatever.

Section 441, Revised Statutes of the United States, provides that—

> The Secretary of the Interior is charged with the supervision of public business relating to the following subjects:
>
> * * * * *
>
> Third. The Indians.
>
> * * * * *

Section 463 is as follows:

> The Commissioner of Indian Affairs shall, *under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe*, have the management of all Indian affairs and of all matters arising out of Indian relations.

Sections 2058, 2147, and 2149 of the Revised Statutes are as follows:

> 2058. Each Indian agent shall, within his agency, manage and superintend the intercourse with the Indians, agreeably to law; and execute and perform such regulations and duties, not inconsistent with law, *as may be prescribed by*

the President, the Secretary of the Interior, the Commissioner of Indian Affairs, or the Superintendent of Indian Affairs.

2147. The Superintendent of Indian Affairs, and the Indian agents and subagents, shall have authority to remove from the Indian country all persons found therein contrary to law; and the President is authorized to direct the military force to be employed in such removal.

2149. The Commissioner of Indian Affairs is authorized and required, with the approval of the Secretary of the Interior, to remove from any tribal reservation any person being therein without authority of law, or whose presence within the limits of the reservation may, in the judgment of the Commissioner, be detrimental to the peace and welfare of the Indians; and may employ for the purpose such force as may be necessary to enable the agent to effect the removal of such person.

By section 2150, Revised Statutes, the military power of the United States may be employed—

> in preventing the introduction of persons and property into the Indian country contrary to law, which persons and property shall be proceeded against according to law.

The word "commerce" as employed in the Constitution means something more than traffic; it means intercourse. (*United States* v. *Holliday*, 3 Wall., 407, 417.) The Congressional legislation recited in this subdivision was enacted in the exercise of the constitutional authority of Congress to regulate intercourse with the Indians, and also in discharge of the duty

described by the Supreme Court (see *United States* v. *Kagama*, 118 U. S., 375, 383; *Choctaw Nation* v. *United States*, 119 U. S., 1, 22; *Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U. S., 641, 653; *Stephens* v. *Cherokee Nation*, 174 U. S., 445, 484, 488) as devolving upon Congress to protect the Indians and their property. In speaking of legislation relating to public lands, which is almost identical with sections 441, 463, 2058, etc., quoted above, the Supreme Court says:

> Under this provision the sale of the public lands was placed by statute under the control of the Secretary of the Interior. To aid him in the performance of this duty a bureau was created, at the head of which is the Commissioner of the General Land Office, with many subordinates. (*United States* v. *Schurz*, 102 U. S., 378, 395.)
>
> It is obvious, it is common knowledge, that in the administration of such large and varied interests as are intrusted to the Land Department, matters not foreseen, equities not anticipated, and which are therefore not provided for by express statute, may sometimes arise, and, therefore, that the Secretary of the Interior is given that superintending and supervising power which will enable him, in the face of these unexpected contingencies, to do justice. (*Williams* v. *United States*, 138 U. S., 514, 524.)
>
> The phrase "under the direction of the Secretary of the Interior," as used in these sections of the statutes, is not meaningless, but was intended as an expression in general terms of the power of the Secretary to supervise and

control the extensive operations of the Land Department, of which he is the head.

* * * * *

The Secretary is the guardian of the people of the United States over the public lands. (*Knight* v. *United States Land Association*, 142 U. S., 161, 177, 181.)

It may be laid down as a general rule that in the absence of some specific provision to the contrary in respect to any particular grant of public land its administration falls wholly and absolutely within the jurisdiction of the Commissioner of the General Land Office, under the supervision of the Secretary of the Interior. It is not necessary that with each grant there shall go a direction that its administration shall be under the authority of the Land Department. It falls there unless there is express direction to the contrary. (*Catholic Bishop of Nesqually* v. *Gibbon*, 158 U. S., 155, 167.)

In *United States* v. *Macdaniel* (7 Pet., 1, 15) it is said:

> A practical knowledge of the action of any one of the great departments of the Government must convince every person that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law, but it does not follow that he must show a statutory provision for everything he does. No government could be administered on such principles. To attempt to regulate by law the minute movements of every part of the complicated machinery of government would evince a most unpardonable ignorance on the subject. Whilst the great outlines of its movements may be marked out and limitations imposed on the exercise of its powers, there are numberless things which must be done that can neither be anticipated nor defined, and which are essential to the proper action of the Government.

The rules and regulations in question, promulgated by the Secretary of the Interior, are, in contemplation of law, the acts of the President. In *Wilcox* v. *Jackson* (13 Pet., 498, 513) it is said:

> Now, although the immediate agent in requiring this reservation was the Secretary of War, yet we feel justified in presuming that it was done by the approbation and direction of the President. The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties. Both military posts and Indian affairs, including agencies, belong to the War Department. Hence, we consider the act of the War Department in requiring this reservation to be made as being in legal contemplation the act of the President; and, consequently, that the reservation thus made was in legal effect a reservation made by order of the President, within the terms of the act of Congress.

To the same effect are *Marbury* v. *Madison* (1 Cranch, 137, 166); *Wolsey* v. *Chapman* (101 U. S., 755, 769, 770); *In re Neagle* (39 Fed. Rep., 833, 860).

We submit that the authorities hereinbefore cited

clearly show that the Chickasaw National Council has the power to pass the act in question. In the exercise of its power said council has declared that live stock belonging to noncitizens may be allowed to enter and remain within the limits of the nation upon certain conditions. Except with the consent of the tribe, noncitizens would have no legal right whatever to bring their live stock within the nation or to keep it there, and it would be the duty of the Government, under the provisions of articles 7 and 14 of the treaty of 1855, *supra*, the provisions of article 43 of the treaty of 1866, *supra*, and the provisions of section 2114, *supra*, to summarily remove such live stock from the nation. (Opinion Attorney-General McVeagh and opinion of Acting Attorney-General Phillips, *supra; Eells et al.* v. *Ross*, 64 Fed. Rep., 417; s. c., 29 U. S. App., 59, 65, 66, 67; *Beck* v. *Flournoy Live Stock and Real Estate Co.*, 65 Fed. Rep., 30; s. c., 27 U. S. App., 618; s. c., affirmed, 163 U. S., 686; *United States* v. *Flournoy L. S. & R. E. Co.*, 69 Fed. Rep., 886; *Pilgrim* v. *Beck*, 69 Fed. Rep., 895). The power to say whether the live stock of noncitizens may be brought within the nation necessarily carries with it the power to prescribe the terms or conditions upon which entrance may be obtained and maintained.

Among the questions submitted to Attorney-General MacVeagh, June 22, 1881, by the Secretary of the Interior, were—

> First. Has the Department of the Interior the power, and is it its duty, to remove from the lands of the Choctaw and Chickasaw Indians in the Indian Territory all intruders?
>
> Second. In view of article 13, treaty of October 18, 1820 (7 Stat., 213), articles 7 and 14, treaty of June 22, 1855 (11 Stat., 612, 613, 614), articles 38 and 43, treaty of April 28, 1866 (14 Stat., 779), and the laws of the United States relating to the subject, who are to be deemed intruders?

In answer to these questions the learned Attorney-General said (17 Op., 135):

> The seventh section of the treaty of June 22, 1855 (11 Stat., 612–613), stipulates that intruders shall be removed from and kept out of the Territory by the United States agent (a subordinate of the Interior Department), assisted, if necessary, by the military. See also article 14 of the same treaty. (*Id.*, 614, bottom.)
>
> While article 43 of the treaty of April 28, 1866 (14 Stat., 779), defined anew the meaning of the word "intruders," the forty-fifth section (*ib.*) preserves to the Indians, as toward those coming within the existing definitions, "all the rights, privileges, and immunities heretofore possessed by said nations or individuals, or to which they were entitled under the treaties and legislation heretofore made and had," which are "declared to be in full force, so far as they are consistent with the provisions of this treaty." (*Id.*, 779, 780.)
>
> The method of removal provided in the earlier treaty is strictly in harmony with the provisions of the later. It may be observed that, on

the contrary, article 21 of the treaty of June 22, 1855 (Statutes, 615), expressly declares that it supersedes all prior negotiations, so that of October 18, 1820, will not come directly under consideration in answering your inquiries.

(2) All persons (other than Choctaws or Chickasaws by birth or adoption) not comprised within some one of the excepted classes described in article 7 of the treaty of June 22, 1855 (11 Statutes, 612, 613), or article 43 of the treaty of April 28, 1866 (14 Statutes, 779), are intruders. Those excepted are: (1) The employees of the Government and their families and servants; (2) employees of any internal improvement company; (3) travelers or temporary sojourners; (4) those holding permits from one of these Indian tribes to reside within their limits, or white persons who (under their laws) are employed as "teachers, mechanics, or skilled in agriculture."

Everybody else is an intruder, to be removed as aforesaid.

In *Maxey* v. *Wright* (54 S. W., 807, 810-12) the court says:

> And inasmuch as the Government of the United States, in the treaty, had declared that all persons not authorized by its terms to reside in the Creek Nation should be deemed to be intruders, and had obligated itself to remove all such persons from the Creek Nation, the remedy to enforce this provision of the treaty was a removal by the United States from the Creek Nation of the delinquent as an intruder. Whether the Creek Nation, since the establishment of courts in the Indian Territory, and of the passage of the so-called "Curtis bill," could recover the amount specified by the Creek statute by a proper action in the courts, is not necessarily now a question for us to decide, *because the treaty provides a remedy;* and whether this remedy is exclusive of the courts or only cumulative, is not material. The superintending control of the Interior Department over the Creeks is nowhere abolished, but, on the contrary, all recent legislation has confirmed and even enlarged it, leaving all of the powers of that Department of the Government to remove from the Indian Territory for the cause specified by the treaties and the statutes as they existed before that time. The act of Congress approved June 7, 1897 (30 Stat., 83), provides "that on and after January 1, 1898, the United States courts in the Indian Territory shall have original and exclusive jurisdiction and authority to try and determine all civil causes in law and equity thereafter instituted, * * * ; and the laws of the United States and the laws of Arkansas in force in the Territory shall apply to all persons therein, irrespective of race, the said courts exercising jurisdiction thereof as now conferred upon them in the trial of like causes." While it is true that this act had the effect of abolishing the courts of the Indian tribes, which of course included those of the Creek Nation, and of relegating all causes of actions to the United States courts for trial, yet the executive and legislative departments of the Indian governments were retained, and the treaty

provisions and intercourse laws and other statutes relating to the Indian Territory remained in full force. The full control of the Indian Department over these Indian tribes, as they then existed, was not interfered with, nor were the Indian statutes annulled, except in so far as that all jurisdiction was taken from their courts, and transferred to those of the United States. The power to remove intruders for the causes assigned by treaty provisions or statutory law still remains, as before, in the Interior Department of the Government; and the act of Congress approved June 28, 1898, entitled "An act for the protection of the people in the Indian Territory, and for other purposes" (30 Stat., 495; Ind. T. Ann. St., 1899, secs. 67q–57z91), commonly called the "Curtis bill," from beginning to end recognizes this continued authority of the Interior Department, and in many instances enlarges it. * * * We are of the opinion, however, that the Indian agent, when directed by the Secretary of the Interior, may collect this money for the Creeks. The intercourse laws (Rev. St U. S., sec. 2058; Ind. T. Ann. St., 1899, sec. 4268) provide that "each Indian agent shall, within his agency, manage and superintend the intercourse with the Indians, agreeably to law, and execute and perform such regulations and duties, not inconsistent with law, as may be prescribed by the President, the Secretary of the Interior, the Commissioner of Indian Affairs, or Superintendent of Indian Affairs." In this case the Indian agent was acting in strict accordance with directions and regulations of the Secretary of the Interior, in a matter clearly relating to intercourse with the Indians.

In the opinion of Attorney-General Griggs (*supra*), he says, on pages 218, 219, 220, Ops. Attys. Gen., vol. 23:

> The treaties and laws of the United States make all persons, with a few specified exceptions, who are not citizens of an Indian nation or members of an Indian tribe, and are found within an Indian nation without permission, intruders there, and require their removal by the United States. This closes the whole matter, absolutely excludes all but the excepted classes, and fully authorizes these nations to absolutely exclude outsiders, or to permit their residence or business upon such terms as they may choose to impose, and it must be borne in mind that citizens of the United States have, as such, no more right or business to be there than they have in any foreign nation, and can lawfully be there at all only by Indian permission; and that their right to be or remain or carry on business there depends solely upon whether they have such permission.
>
> As to the power or duty of your Department in the premises there can hardly be a doubt. Under the treaties of the United States with these Indian nations this Government is under the most solemn obligation, and for which it has received ample consideration, to remove and keep removed from the territory of these tribes all this class of intruders who are there without Indian permission. The performance of this obligation, as in other matters concerning the

Indians and their affairs, has long been devolved upon the Department of the Interior This power and duty are affirmed in the two opinions referred to and, as directly, in *Maxey* v. *Wright* (*supra*).

* * * * *

That the United States has the power to perform its treaty stipulations in this regard can not be doubted, and, as already said and in the opinions referred to and above quoted, the execution of that power and duty devolves upon the Interior Department.

* * * * *

Your last question asks, "What is the full scope of the authority and duty of the Department of the Interior in the premises under the treaties with these nations and the laws of the United States regulating trade and intercourse with the Indians?"

As applicable to the cases here in hand, which is as far as I am authorized to answer the question, and which is designed also as a comprehensive answer to all the other questions save the one last referred to above, it may be said generally that the authority and duty of the Interior Department is, within any of these Indian nations, to remove all persons of the classes forbidden by treaty or law who are there without Indian permit or license; to close all business which requires a permit or license and is being carried on there without one; and to remove all cattle being pastured on the public land without Indian permit or license, where such license or permit is required; and this is not intended as

an enumeration or summary of all the powers or duties of your Department.

In *United States* v. *Kagama*, *supra* (pp. 383–384), it was stated by the court:

> These Indian tribes *are* wards of the nation. They are communities *dependent* on the United States, * * * dependent for their political rights. They owe no allegiance to the States and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court whenever the question has arisen.

In *Eells* v. *Ross* (*supra*), Ross, complainant, applied for and procured an injunction against Eells, Indian agent, and other officers of the United States, restraining them from interfering with the building of a railroad across certain lands within the Puyallup Indian Reservation, State of Washington. The lands in question, part of a reservation, had been allotted to John Cook and Susan Cook, Indians, under the provisions of the act of February 8, 1887 (24 Stat., 388), known as the Dawes Act. The patent to the lands allotted to Cooks contained a provision against alienation. They had power to lease the lands on certain contingencies, under regulations of the Secretary of the Interior, etc.

They had given permission to Ross to occupy the lands for six months, with his tents, camps, etc., for the purpose of locating a railroad. Eells, the Indian agent, and his codefendants, United States Army officers, in pursuance of instructions from the Indian Bureau, went upon the said lands with the purpose of ejecting Ross and the men in his employ. Upon appeal by Eells and his codefendants, the judgment of the lower court granting the injunction was reversed and the bill dismissed. Among other things the United States circuit court of appeals, McKenna, C. J., said:

> If the land was an Indian reservation, the agent had a right to remove all persons found there contrary to law. (64 Fed. Rep., 417, 419; 29 U. S. App., 59, 65.)

In *Pilgrim* v. *Beck* (*supra*) the United States circuit court for the district of Nebraska, among other things, held (pp. 898–899):

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

COMPLAINANTS TRESPASSERS AB INITIO.

By refusing to pay the license fee or permit tax plaintiffs are trespassers *ab initio*. They are intruders in the Chickasaw Nation, as that term is employed in the seventh section of the treaty of 1855, *supra*, and their live stock is unlawfully within the nation. (Hilliard on Torts, 4th ed., vol. 1, p. 113 and note; Waterman on Trespass, vol. 11, secs. 790, 791; *Wendell* v. *Jackson*, 8 N. H., 220; 42 Barb., 319.)

FIFTH PROPOSITION OF DEFENDANTS.

Plaintiffs acquired no right to pasture their live stock within the boundaries of the nation by reason of any permission given by, or by reason of any contract or contracts made with, individual members of the nation.

Plaintiffs base their claim to the contrary upon the provisions in sections 16 and 23 of the so-called "Curtis law" which recognize the right of a member of the tribe, pending allotment, to occupy and use his proportionate share of the land, to lease the same, and receive the rental; the amendment to the sixth section of the act of February 8, 1887 (24 Stat., 388, 390), by the act of March 3, 1901 (31 Stat., 1447), which section as amended declares "every Indian in the Indian Territory to be a citizen of the United States;" and the case of *Buster & Jones* v. *Wright*, decided since *Maxey* v. *Wright*, *supra*.

The Chickasaw lands have not been allotted to individual members of the tribe. The lands are public lands, in that they are the property of the Chickasaw tribe. (*Stephens* v. *Chickasaw Nation*, 174 U. S., 445,

488.) Individual members of the Chickasaw Nation or tribe have no more right to give authority to a nonmember to enter the nation, or to remain there, than has a citizen of the United States to authorize a Chinaman to enter and remain within the boundaries of the United States. When a nonmember of the tribe is within the boundaries of the nation lawfully—that is, by permission of the tribe—a member of the tribe may rent his proportionate share of the tribal lands to such nonmember. To this extent, and no further, does the proviso in said sections 16 and 23 go.

While not asserting an express repeal, counsel for complainants contend that the "Curtis bill," by implication, repeals the treaty provisions and the sections of the Revised Statutes conferring upon the Interior Department the power and duty of supervising and managing the Chickasaw Indians and their affairs That treaty stipulations between the Government and the Indians, and express provisions of law enacted for the protection of the Indians and their rights, will not hastily or lightly be held to be repealed by implication, and that the uniform policy of the Government in dealing with the Indians will not be construed to have been repudiated or abolished by statute, unless there are apt words in the statute to that effect, seems too evident a proposition to admit of serious discussion. (*Choctaw Nation* v. *United States*, 119 U. S., 1, 27–8; *United States* v. *Choctaw, etc., nations*, 179 Id., 494, 531–3; Black on Interpretation of Laws, p. 112; Sutherland on Stat. Const., sec. 145, p. 196.)

The act itself contains provisions clearly showing that it was not the intention to abrogate articles 7 and 14 of the treaty of 1855, or article 43 of the treaty of 1866, or to repeal the laws conferring authority upon the Interior Department over the Chickasaw Indians and their affairs, or to abolish the established governmental policy in dealing with said Indians. (See secs. 12, 13; par. 4 of sec. 14; secs. 16, 23, 27; pars. 12, 13, 39, and 40 of sec. 29.)

That the amendment to the sixth section of the Dawes Act of February 8, 1887, passed March 3, 1901 (*supra*), declaring the Chickasaw Indians citizens of the United States, does not in any way alter or abridge the right of the Interior Department to manage and control the Chickasaw Indians and their affairs has been repeatedly declared by the courts. *State* v. *Columbia George et al.* (65 Pac. Rep., 604, 610); *Beck* v. *Flournoy* (65 Fed. Rep., 30, 35; s. c., 27 U. S. App., 618); *Farrell* v. *United States* (110 Fed. Rep, 942, 947–8, 950–2).

In *State* v. *Columbia George* (65 Pac. Rep., 610), the court says:

> It would seem, therefore, that citizenship, such as extends within the purview of the Dawes Act to Indian allottees, is neither inconsistent nor incompatible with the status of a tribal Indian; that the Government, while it has bestowed citizenship, has not thereby relinquished the guardianship of the tribes, indulging them yet a little while, but with greatly restricted authority, in their primitive government; and until the Gen-

eral Government has taken its hands off and relinquished supervision over its Indians, the State courts can not assume jurisdiction touching the criminal acts of one against another.

The case of *Farrell* v. *United States* (*supra*) is a complete answer to the contention of complainants that because the Chickasaw Indians are now citizens of the United States the supervision of their affairs no longer exists in the Interior Department.

BUSTER & JONES ET AL. v. WRIGHT NOT IN CONFLICT WITH MAXEY v. WRIGHT.

It is admitted by plaintiffs that the case of *Maxey* v. *Wright* supports the position of the defendants herein, but they contend that that decision has been reversed by the later case of *Buster & Jones et al.* v. *Wright*. As the decision in the former case was affirmed by the United States circuit court of appeals for the eighth circuit, and thereby became the decision of that court, it is difficult to understand upon what principle it is claimed that such decision has been reversed or modified by the decision of the Indian Territory court of appeals in the later case. The law as laid down by an appellate court is certainly in force until declared otherwise by the same tribunal or by a higher one.

It should not be understood that the Government acquiesces in the Buster & Jones decision. In the trial court the decision was for the Government, but in the Indian Territory court of appeals, where the attorney for the Government failed to file a brief, the decision below was reversed. Since then the Attorney-General has taken steps to have that decision reviewed

in the United States circuit court of appeals for the eighth circuit. However, an examination of the opinion of the court in *Buster & Jones* v. *Wright* renders it doubtful whether the rulings therein made are in anywise in conflict with any of the rulings set forth in *Maxey* v. *Wright*. In the Buster & Jones case, the bill alleged, among other things, that defendants notified plaintiffs "that unless they paid a certain sum demanded, * * *" their places of "business would be closed;" and that "it was the intention of the Secretary of the Interior to prevent them from doing business any further until they paid the sum demanded, which it is claimed is a tax on merchants levied by the authorities of the Creek Nation for the privilege of doing business in the Creek Nation." The defendants' counsel filed a demurrer to the bill, alleging "that said complaint does not state facts sufficient to constitute a cause of action'.' From the record in that case it appears that the license or permit fee demanded was regarded by both parties to the suit and treated by the court as a *debt*. In reversing the decree of the lower court sustaining the demurrer, the court of appeals for the Indian Territory held that the collection of a *debt* could not be enforced by closing the debtor's place of business.

It is settled law that taxes are not debts, much less permit or license fees. (Cooley on Taxation, 1st ed., p. 13; *Meriweather* v. *Garrett*, 402 U. S., 472, 514.) Had this point been made, together with the further point that the payment by plaintiffs of the amount demanded was a condition precedent to their right to transact business within the nation, it is doubtful

whether the court would have declared as it did, "that the only method left for the collection of the *debt* is through the ordinary channels of the courts."

While it is true that the court held that the collection of permit fees could not be enforced by the closing of the places of business of merchants from whom such fees were due, yet it distinctly asserted that the—

> Secretary of the Interior may find the fact that a man is an *intruder* * * * because he fails to comply with the conditions upon which he was permitted to enter, and put him out.

It is evident from the opinion of the court in the Buster & Jones case that had defendants threatened merely to remove plaintiffs and their property from the nation, for the reason that they had failed to comply with the conditions of the permit laws, the ruling of the lower court would have been affirmed and the demurrer of the defendants sustained. This is clear from the following language taken from the opinion:

> As to the power of the Interior Department of the United States Government to remove white men from the Indian Territory who refuse to pay such amounts as may be required by the laws of the Creek Nation for the privilege of being permitted to come into the nation and to engage in business therein, we simply refer to the case of *Maxey* v. *Wright*, heretofore decided by us, and which was affirmed by the United States circuit court of appeals for the eighth district (54 S. W., 807). In that case we decided the question against the contention of the plaintiffs; and if these were the only grounds alleged in the complaint for an injunction, the action of the court below in sustaining the demurrer would be upheld. But the threat to remove the plaintiffs from the Indian Territory was not the principal ground set up in the complaint. * * * The penalty for their nonpayment, or for their having been found to be intruders, was not that they should be removed from the Territory, as provided by the treaty and the law, but that their business houses should be closed until payment should be made.

The case of Buster & Jones gives quite as much support to the position of defendants herein as to that of plaintiffs. The case at bar does not involve closing one's business. The opinion of the court does not overcome, or attempt to do so, that part of the opinion of Attorney-General Griggs (*supra*, p. 220) wherein he advises the Secretary of the Interior as follows:

> The authority and duty of the Interior Department is, within these Indian nations, * * * to remove all cattle being pastured on the public lands without Indian permit or license.

DUE PROCESS OF LAW.

Plaintiffs allege that the method prescribed for the removal of their live stock from the nation does not provide for previous notice to them, nor for a hearing in court previous to removal, and therefore contend that it is not "due process of law."

The plaintiffs' live stock is unlawfully within the nation—*i. e.*, without its permission; hence, no notice is necessary to be given to plaintiffs before proceeding to

turn their cattle out. "A person, upon finding an animal trespassing in his field, may turn the beast out, using no more force than is necessary." (Waterman on Trespass, vol. 2, sec. 889.)

The method complained of is the administrative process for the execution of a power conferred by Congress, and is as much due process of law as judicial process. (*Weimer* v. *Bunbury*, 30 Mich., 201, 214.) In the case just cited, Judge Cooley, at page 215, says:

> A day in court is a matter of right in judicial proceedings, but administrative proceedings rest upon different principles. The party affected by them may always test their validity by a suit instituted for the purpose, and this is supposed to give him ample protection. To require that the action of the Government, in every instance where it touches the right of the individual citizen, shall be preceded by a judicial order or sentence after a hearing, would be to give to the judiciary a supremacy in the state, and seriously to impair and impede the efficiency of executive action.

Any legal process which is founded in necessity, has been consecrated by time, and approved and acquiesced in by universal consent is due process of law. (*State* v. *Allen*, 2 McCord, 55; *Murray* v. *Hoboken*, etc., 18 How., 272; *Lovell* v. *Seeback*, 45 Minn., 463.)

The method complained of is founded in necessity. It was approved by the judicial department of the Government as early as 1858. (See *New York* v. *Dibble*,

21 How., 366, 370.) It has been uniformly followed by the executive department. (See Ops. Attys. Gen., already cited; *Eells* v. *Ross*, *supra;* *Flournoy* v. *Beck*, *supra;* Proclamation of President Cleveland, 24 Stat., 1023.) It has been sanctioned by the legislative department (see Senate Reports of Committees, 45th Cong., third session, vol. 2, Rept. No. 698, pp. 1–4) and it has been acquiesced in by universal consent.

That the method is due process of law, see also *Mehlin* v. *Ice*, *supra;* *Lindsay* v. *Mullen*, *supra* (p. 146); *Kloski et al.* v. *Ellis et al.* (unreported); opinion by Townsend, J., filed herewith.

In *New York* v. *Dibble* (*supra*), it was held (p. 370) that a statute which provided for the summary removal of white men who intruded upon lands set apart for the use of an Indian tribe was not invalid.

In *Mehlin* v. *Ice* (*supra*, p. 313) it was held that a law of the Cherokee Nation prescribing a summary method of ejecting an unlawful occupant of land is not to be regarded as in conflict with the provision of the fifth amendment relative to due process of law.

In *Lovell* v. *Seeback* (45 Minn., 465, 467) a statute authorizing the chairman of the board of county commissioners to order the removal to the county of their legal settlement of poor persons who have applied for public support in another county, and are likely to become chargeable thereon for support, and who, after warning to depart therefrom, are unable or have refused to do so, was held to be constitutional and to

justify removals where the facts are such as are specified in the statute.

In the course of the opinion it was stated as follows:

> It is to be taken as admitted that the facts were such as the statute contemplates as justifying an order of removal; and the question is whether it is within the power of the legislature to enact a law to the effect that when a poor person, having a legal settlement in some county in this State, but temporarily being in another county, applies for public support therein, and, being in destitute circumstances, is likely to become chargeable for public support in that county, the county commissioners of that county, or their chairman, may lawfully cause such person, after he shall have refused to depart, to be removed to the county of his legal settlement, without judicial proceedings, without notice to such person of the contemplated removal, and without opportunity to be heard in respect thereto. Would this be an interference with the right of personal liberty "without due process of law?"
>
> We shall confine our decision strictly to the case here presented, which, as it will be observed, does not involve an inquiry as to the power of the county commissioners, by their ex parte proceedings, to conclude the person removed in regard to any fact upon which the order of removal may be based. We do not decide whether under this statute the county commissioners have any power to finally determine any such questions. Though it be conceded that they have not, it would not follow

> that the statute may not be sustained in its application to a case where the facts are shown or admitted to be such as are specified in the law as reasons justifying removal. Many illustrations may be given of cases where the law, either common or statute, justifies an act or course of conduct by a private person or a public officer, under particular circumstances, which would be illegal except under such circumstances. In such cases the person or officer must accept whatever risk there may be of being held responsible if the facts should not prove to be such as to legally justify his conduct. The abatement of nuisances by a private person, although attended with an interference with or even the destruction of the property of another; the levy of distress for rent at common law and under statutes; the distress of goods for taxes; the taking up and disposing of estrays; the arrest without warrant of one engaged in the commission of a felony; a traveler on a public highway going upon the adjacent land when necessary to avoid an obstruction rendering the highway impassable, are some of the many instances in which the principle referred to prevails. Whether in such case the interference with the person or property of another, without any previous adjudication concerning his rights, is justified by the law or not, depends upon the facts, among others, as to whether a nuisance exists; whether rent is due or taxes unpaid; whether animals taken up as estrays are in fact such; whether the person arrested is in fact committing a felony; whether

> the highway is impassable. Such illustrations, and others which might be mentioned, especially cases involving the exercise of the general police power of the State, show that, both according to the ancient principles of the common law and by statute, a person may, under some circumstances, be lawfully deprived of his property, or temporarily restrained of his liberty, without any previous adjudication concerning his rights. The meaning of the phrase "due process of law" in the Constitution is not strictly limited to judicial process or proceedings.

In *Lindsay* v. *Mullen* (*supra*) the plaintiff had availed himself of a boom for the purpose of sending his logs down the river. The logs were seized, under summary process, for the enforcement of the payment of the charges for the use of the boom. In answer to plaintiff's contention that such seizure was not due process of law, the Supreme Court of the United States said:

> When he decides to avail himself of the boom, it can not be said that he is deprived of his property without due process of law if he is compelled to subject it to the conditions which the legislature prescribes for the use of such boom.

SECTION 2, ARTICLE IV, OF FEDERAL CONSTITUTION NOT APPLICABLE.

During the argument, the court suggested the question whether the act of the Chickasaw Nation involved herein is invalid by reason of not providing for a tax on live stock belonging to the nation or members thereof, and being thereby a discrimination against nonresidents, citizens of States. The query rested

upon section 2, Article IV, of the Federal Constitution, which reads:

> The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

This provision is a limitation upon the power of the States, and not upon the Federal Government. Its purpose is to prevent the *States* from discriminating in favor of their own people as against those of other States. (*Williams* v. *Bruffy*, 96 U. S., 176, 188.) The provision has no application to Territories, or to the Indian nations.

The Constitution (Art. IV, sec. 3, par. 2) declares:

> The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or of any particular State.

This provision has been fully considered in the following cases: *Mormon Church case* (136 U. S., 1, 42–44); *Clinton* v. *Englebrecht* (13 Wall., 434, 441, 447); *National Bank* v. *County of Yankton* (101 U. S., 129); *Murphy* v. *Ramsey* (114 Id., 15); *Shively* v. *Bowlby* (152 Id., 48); *United States* v. *Kagama* (118 Id., 379); *Hornbuckle* v. *Toombs* (18 Wall., 648, 655).

Congress has full legislative power over the Territories, unrestricted by the limitations of the Constitution, which are only obligatory upon the States, and

this power may be exercised through a local government. (*Endleman* v. *United States*, circuit court of appeals, ninth circuit, 86 Fed. Rep., 456, 459.)

The Indian nations in the Indian Territory derive their power to legislate from the same source as Territories created by Congress, and the laws enacted by the respective councils of said nations should be placed upon the same footing as those of Territories. (*Mehlin* v. *Ice*, 12 U. S. App., 305, 318–319; *s. c.*, 56 Fed. Rep., 12.)

Congress having full power, unrestricted by section 2, Article IV, of the Constitution, to legislate for the Chickasaw Nation, and also authority to exercise this power through the local legislature of the Chickasaw Nation, the act in question is not invalid.

But if it be conceded that the last-mentioned provision of the Constitution applies to and is a restriction upon the power of Congress and of the legislature of the Chickasaw Nation, the act in question can not be held to be in conflict therewith, for the reason that the lands involved, and the grass thereon, are the property of the Chickasaw Nation; i. e., of all the members of said tribe. The nation may (just as a State under the same circumstances might) exclusively control said property, and, in controlling it, declare that its own citizens shall be entitled to a preference right of enjoyment as against the citizens of other States and Territories having no interest therein. The nation owns the lands and grass just as a farmer owns his farm, and it has the same right to say who may and

who may not pasture their cattle in the reservation, and to prescribe the terms, as the owner of a farm, to say who may pasture cattle upon his lands and to prescribe the terms for such pasture.

The query suggested by the court must be answered in the negative.

Section 2 of Article IV of the Constitution does not permit citizens of the several States to participate on equal terms with citizens of the Chickasaw Nation in the right of pasturing live stock on the lands belonging to it. These lands are the common property of the nation. The individual Indians, members of the nation, are tenants in common. They are, as a nation, so exclusively entitled to the lands, and the grass thereon, that the lands and grass can not be enjoyed by others without the permission of the nation. (*Corfield* v. *Coryell*, 4 Wash. C. C., 371; s. c. Fed. Cas., vol. 6, No. 3230, pp. 546, 552.) The above case involved the validity of a law of the State of New Jersey which provided, among other things—

> That it shall not be lawful for any person who is not at the time an actual inhabitant and resident in this State to rake or gather clams, oysters, or shells in any of the rivers, bays, or waters in this State, on board of any canoe, flat, scow, boat, or other vessel not wholly owned by some person inhabitant of and actually residing in this State; and every person offending herein shall forfeit and pay $10, to be recovered, etc.; and shall also forfeit the canoe, flat, etc., employed in the commission of

such offense, with all the clams, oysters, shells, rakes, tongs, tackle, furniture, and apparel in and belonging to the same.

It was contended, in opposition to its validity, that the above provision infringed said section 2, Article IV. In disposing of the contention, the court said:

> But we can not accede to the proposition, which was insisted on by the counsel, that under this provision of the Constitution the citizens of the several States are permitted to participate in all the rights which belong exclusively to the citizens of any other particular State merely upon the ground that they are enjoyed by those citizens; much less, that in regulating the use of the common property of the citizens of such State the legislature is bound to extend to the citizens of all the other States the same advantages as are secured to their own citizens.

McCready v. *Virginia* (94 U. S., 391) involved the validity of a statute of Virginia prohibiting any person other than a citizen of that State from taking or catching oysters or shellfish, or planting oysters, in waters in that State. The court, at page 394, says:

> The precise question to be determined in this case is whether the State of Virginia can prohibit the citizens of other States from planting oysters in Ware River, a stream in that State where the tide ebbs and flows, when its own citizens have that privilege.
>
> The principle has long been settled in this court that each State owns the beds of all tide waters within its jurisdiction, unless they have been granted away. * * * In like manner

> the States own the tide waters themselves and the fish in them so far as they are capable of ownership while running. For this purpose the State represents its people, and the ownership is that of the people in their united sovereignty. (*Martin* v. *Waddell*, 16 Pet., 410.) The title thus held is subject to the paramount right of navigation, the regulation of which in respect to foreign and interstate commerce has been granted to the United States. There has been, however, no such grant power over the fisheries. These remain under the exclusive control of the State, which has consequently the right, in its discretion, to appropriate its tide waters and their beds to be used by its people as a common for taking and cultivating fish, so far as it may be done without obstructing navigation. Such an appropriation is in effect nothing more than a regulation of the use by the people of their common property. The right which the people of the State thus acquire comes not from their citizenship alone, but from their citizenship and property combined. It is, in fact, a property right and not a mere privilege or immunity of citizenship.

After referring to the contention of the plaintiff in error that the Virginia statute was in violation of that clause of the Federal Constitution which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States," the court (p. 395) proceeds:

> We think we may safely hold that the citizens of one State are not invested by this clause

of the Constitution with any interest in the common property of the citizens of another State. If Virginia had by law provided for the sale of its once vast public domain, and a division of the proceeds among its own people, no one, we venture to say, would contend that the citizens of other States had a constitutional right to the enjoyment of this privilege of Virginia citizenship. Neither if, instead of selling, the State had appropriated the same property to be used as a common by its people for the purposes of agriculture, could the citizens of other States avail themselves of such a privilege. And the reason is obvious; the right thus granted is not a privilege or immunity of general, but of special citizenship. It does not "belong of right to the citizens of all free governments," but only to the citizens of Virginia, on account of the peculiar circumstances in which they are placed. They, and they alone, owned the property to be sold or used, and they alone had the power to dispose of it as they saw fit. They owned it not by virtue of citizenship merely, but by citizenship and domicile united; that is to say, by virtue of a citizenship confined to that particular locality.

The planting of oysters in the soil covered by water owned in common by the people of the State is not different in principle from that of planting corn upon dry land held in the same way. Both are for the purposes of cultivation and profit; and if the State, in the regulation of its public domain, can grant to its own citizens the exclusive use of dry lands, we see

no reason why it can not do the same thing in respect to such as are covered by water. And as all concede that a State may grant to one of its citizens the exclusive use of a part of the common property, the conclusion would seem to follow that it might by appropriate legislation confine the use of the whole to its own people alone.

SIXTH PROPOSITION OF DEFENDANTS.

By treaty stipulations the Government is solemnly obligated to remove all "intruders" from the Chickasaw Nation; the question of who are intruders is a political one, to be determined by the Interior Department, and when determined can not be examined or reviewed by the judicial department in injunction or mandamus proceedings, for the reason that the determination of the question involves the examination of facts and the construction of laws.

Articles 7 and 14 of the treaty of 1855, article 43 of the treaty of 1866, and section 2114 of the Revised Statutes, make it the duty of the Government to remove all intruders and their property from the Chickasaw Nation. The question of who are *intruders* is to be determined by the Interior Department. (*Maxey* v. *Wright* (*supra*); *Buster & Jones* v. *Wright* (*supra*). The determination of this question involves the investigation of facts and the examination and construction of laws, hence is judicial and not ministerial in its nature, and its determination is not subject to review by the courts in injunction proceedings. In *Dunlap* v. *Black* (128 U. S., 40, 48) it is said:

> The court will not interfere by mandamus with the executive officers of the Government

in the exercise of their ordinary official duties, even where those duties require an interpretation of the law, the court having no appellate power for that purpose; but when they refuse to act in a case at all, or when, by special statute, or otherwise, a mere ministerial duty is imposed upon them—that is, a service which they are bound to perform without further question—then, if they refuse, a mandamus may be issued to compel them.

Judged by this rule the present case presents no difficulty. The Commissioner of Pensions did not refuse to act or decide. He did act and decide. He adopted an interpretation of the law adverse to the relator, and his decision was confirmed by the Secretary of the Interior, as evidenced by his signature of the certificate. Whether, if the law were properly before us for consideration, we should be of the same opinion, or of a different opinion, is of no consequence in the decision of this case. We have no appellate power over the Commissioner, and no right to review his decision. That decision and his action taken thereon were made and done in the exercise of his official functions. They were by no means merely ministerial acts.

See also *Mississippi* v. *Johnson* (4 Wall., 475, 498); *Gaines* v. *Thompson* (*supra*); *United States* v. *The Commissioner* (5 Wall., 563).

SEVENTH PROPOSITION OF DEFENDANTS.

The power to prescribe rules and regulations for the protection of those rights of the Indians which are guaranteed them by treaties or by acts of Congress belongs exclusively to the political department of the Government, and such power can not be controlled by the courts.

The power and authority to prescribe rules and regulations for the protection of the Chickasaw Indians, and the rights guaranteed them under treaty stipulations or by acts of Congress, belong exclusively to the Executive Department of the Government, and the exercise of this power can not be controlled by the courts. The acts of the heads of the Executive Departments of the Government in the line of their duties are, in contemplation of law, the acts of the President himself. This being true, before the courts should declare any rule or regulation prescribed by the head of an Executive Department illegal it should be made clearly to appear that it is so.

In view of the authorities cited herein, and especially the opinion of Attorney-General Griggs (23 Op. Attys. Gen., p. 220), wherein he says—

> that the authority and *duty* of the Interior Department is, within any of these [Five Civilized] Indian Nations, * * * to remove all cattle being pastured on the public land without Indian permit or license—

and in view of the usage and policy of the Government toward the Chickasaw and the other civilized tribes of Indians, which has prevailed ever since said civilized tribes have resided west of the Mississippi River,

which policy is in harmony with and sustains the acts of the officers of the Interior Department complained of herein, it can not be claimed that it clearly appears that the rules and regulations promulgated June 3, 1902, by Acting Secretary Ryan are without legal warrant or authority.

In effect, the theory of the complainants' bill is that they "are entitled to the aid of a court of equity for their protection, as against the efforts of the Government to carry out its duty to these. Indians." (*Pilgrim* v. *Beck*, 69 Fed. Rep., 898.)

To sustain the bill, the court, in addition to holding that the Chickasaw Nation has no interest in the subject-matter of the controversy, and that the act and rules in question are invalid, must further hold that it has the power and authority, in injunction proceedings, to review the action of the Secretary in determining who are *intruders* within the Chickasaw Nation, and further, to reverse and set aside the finding of the Secretary on that question, that the policy of dealing with these Indians, which is as old almost as the Government itself, has been abolished, and that the strong arm of the Government can no longer be invoked to protect them and their property against the machinations of those whom Justice Miller, in the Kagama case, said, "are often their deadliest enemies." To justify the court in such a course, complainants rely upon the claimed fact that there are now within the Chickasaw Nation over 130,000 white citizens of the United States and only 8,000 Indians, and upon the

law known as the "Curtis bill." The fact, if it be such, that the white people in the nation so far outnumber the Indians would seem to be a strong argument against the policy of withdrawing the protection of the Government.

The purpose of the "Curtis bill," as is evident, taken as a whole, was the same as the purpose of the act of February 7, 1887 (*supra*), which purpose, as was well stated by Judge Shiras in *Pilgrim* v. *Beck* (69 Fed. Rep., 895, 897), "was to carry out its treaty stipulations with the Indians, and, further, to develop the Indians in civilization; to educate them into habits of industry; and, by teaching them to properly cultivate the soil and draw their living therefrom, to give the lands allotted in severalty such a practical value in their eyes that ultimately they might be safely invested with the right to dispose of their holdings." The relief prayed for by the bill, if granted, would conflict with and nullify that purpose, practically resulting in placing the complainants, and others similarly situated, in charge of the lands within said nation, and ousting the United States from all control over the same. (*Pilgrim* v. *Beck*, 69 Fed., 898.)

The complainants knew when they made the leases with the individual members of the Chickasaw tribe that the authority to permit noncitizens to bring and keep their live stock within the nation could only be given by the tribe, and that it was the duty of the Government to remove from the nation all persons who are there without the permission of the tribe, together with the property of such persons.

We respectfully submit that the demurrer is well taken, and that the bill should be dismissed.

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