

U.S. Supreme Court

CHEROKEE NATION v. JOURNEYCAKE, 155 U.S. 196 (1894)

155 U.S. 196

CHEROKEE NATION et al.

v.

JOURNEYCAKE.

No. 619.

November 19, 1894

On July 19, 1866, the United States and the Cherokee Nation entered into a treaty (14 Stat. 799), the fifteenth article of which is as follows:

'The United States may settle any civilized Indians, friendly with the Cherokees and adjacent tribes, within the Cherokee country, on unoccupied lands east of the ninety-sixth degree, on such terms as may [155 U.S. 196, 197] be agreed upon by any such tribe and the Cherokees, subject to the approval of the president of the United States, which shall be consistent with the following provisions, viz.: Should any such tribe or band of Indians setting in said country abandon their tribal organization, there being first paid into the Cherokee national fund a sum of money which shall sustain the same proportion to the then existing national fund that the number of Indians sustains to the whole number of Cherokees then residing in the Cherokee country, they shall be incorporated into and ever after remain a part of the Cherokee Nation, on equal terms in every respect with native citizens. And should any such tribe, thus settling in said country, decide to preserve their tribal organizations, and to maintain their tribal laws, customs, and usages, not inconsistent with the constitution and laws of the Cherokee Nation, they shall have a district of country set off for their use by metes and bounds equal to 160 acres, if they should so decide, for each man, woman, and child of said tribe, and shall pay for the same into the national fund such price as may be agreed on by them and the Cherokee Nation, subject to the approval of the president of the United States, and in cases of disagreement the price to be fixed by the president.

'And the said tribe thus settled shall also pay into the national fund a sum of money, to be agreed on by the respective parties, not greater in proportion to the whole existing national fund and the probable proceeds of the lands herein ceded or authorized to be ceded or sold than their numbers bear to the whole number of Cherokees then residing in said country, and thence afterwards they shall enjoy all the rights of native Cherokees. But no Indians who have no tribal organizations, or who shall determine to abandon their tribal organizations, shall be permitted to settle east of the ninety-sixth degree of longitude without the consent of the Cherokee National Council, or of a delegation duly appointed by it, being first obtained. And no Indians who have and determine to preserve their tribal organizations shall be permitted to settle, as herein provided, east of the ninety-sixth degree of longitude without such consent being first obtained, unless the president of the United- [155 U.S. 196, 198] States, after a full hearing of the objections offered by said council or delegation to such settlement, shall determine that the objections are insufficient, in which case he may authorize the settlement of such tribe east of the ninety-sixth degree of longitude.'

Prior to that time, and in 1839, the Cherokee Nation had adopted a constitution, section 2 of article 1 and section 5 of article 3 being in these words:

'Sec. 2. The lands of the Cherokee Nation shall remain common property; but the improvements made thereon, and in the possession of the citizens of the Nation, are the exclusive and indefeasible property of the citizens respectively who made or may rightfully be in possession of them: Provided, that the citizens of the Nation possessing exclusive and indefeasible right to their improvements, as expressed in this article, shall possess no right or power to dispose of their improvements, in any manner whatever, to the United States, individual states, or to individual citizens thereof; and that, whenever any citizen shall remove with his effects out of the limits of this Nation, and become a citizen of any other government, all his rights and privileges as a citizen of this Nation shall cease: Provided, nevertheless, that the national council shall have power to readmit, by law, to all the rights of citizenship, any such person or persons who may, at any time, desire to return to the Nation, on memorializing the national council for such readmission.'

'Sec. 5. No person shall be eligible to a seat in the national council but a free Cherokee male citizen, who shall have attained to the age of twenty-five years.

'The descendants of Cherokee men by all free women, except the African race, whose parents may have been living together as man and wife, according to the customs and laws of this Nation, shall be entitled to all the rights and privileges of this Nation as well as the posterity of Cherokee women by all free men. No person who is of negro or mulatto parentage, either by the father's or the mother's side, shall be eligible to hold any office of profit, honor or trust, under this government.' Const. & Laws Cherokee Nation (Ed. 1892), pp. 11, 12, 14. [155 U.S. 196, 199] Immediately following the treaty, the Cherokee Nation amended these sections, first adopting the following preamble:

'Whereas, by the treaty executed at Washington, on the 19th day of July, A. D. 1866, between the United States and the Cherokee Nation, through its delegation, ratified by the senate and officially promulgated by the president of the United States, August 11, 1866, certain things were agreed to between the parties to said treaty, involving changes in the constitution of the Cherokee Nation, which changes cannot be accomplished by the usual mode; and,

'Whereas, it is the desire of the people and government of the Cherokee Nation, to carry out in good faith all of its obligations, to the end that law and order be preserved, and the institutions of their government maintained.'

The sections, as amended, read as follows:

'Sec. 2. The lands of the Cherokee Nation shall remain common property until the national council shall request the survey and allotment of the same, in accordance with the provisions of article 20th of the treaty of 19th July, 1866, between the United States and the Cherokee Nation.'

'Sec. 5. No person shall be eligible to a seat in the national council but a male citizen of the Cherokee Nation, who shall have attained to the age of twenty-five years, and who shall have been a bona fide resident of the district in which he may be elected, at least six months immediately preceding such election. All native-born Cherokees, all Indians, and whites legally members of the Nation by adoption, and all freedmen who have been liberated by voluntary act of their former owners or by law, as well as free colored persons who were in the country at the commencement of the Rebellion, and are now residents therein, or who may return within six months from the 19th day of July, 1866, and their descendants, who reside within the limits of the Cherokee Nation, shall be taken and deemed to be citizens of the Cherokee Nation.' Const. & Laws Cherokee Nation (Ed. 1892) pp. 31-33.

In pursuance of this treaty, and under this amended constitution, the Cherokees and Delawares came together, and [155 U.S. 196, 200] entered into an agreement of date April 8, 1867, which, after referring to certain treaties, among them this of July 19, 1866, and reciting that a 'full and free conference has been had between the representatives of the Cherokees and the Delawares, in view of the treaties herein referred to, looking to a location of the Delawares upon the Cherokee lands, and their consolidation with said Cherokee Nation,' stipulates as follows:

'Now, therefore, it is agreed between the parties hereto, subject to the approval of the president of the United States, as follows:

'The Cherokees, parties of the first part, for and in consideration of certain payments, and the fulfillment of certain conditions hereinafter mentioned, agree to sell to the Delawares, for their occupancy, a quantity of land east of the line of the 96 west longitude, in the aggregate equal to one hundred and sixty acres for each individual of the Delaware tribe who has been enrolled upon a certain register made February 18, 1867, by the Delaware agent, and on file in the office of Indian affairs, being the list of Delawares who elect to remove to the 'Indian Country,' to which list may be added, only with the consent of the Delaware council, the names of such other Delawares as may, within one month after the signing of this agreement, desire to be added thereto, and the selections of the lands to be purchased by the Delawares may be made by said Delawares in any part of the Cherokee Reservation east of said line of 96, not already selected and in possession of other parties; and, in case the Cherokee lands shall hereafter be allotted among the members of said Nation, it is agreed that the aggregate amount of land herein provided for the Delawares, to include their improvements according to the legal subdivisions when surveys are made (that is to say, one hundred and sixty acres for each individual), shall be guaranteed to each Delaware incorporated by these articles into the Cherokee Nation; nor shall the continued ownership and occupancy of said land by any Delaware so registered be interfered with in any manner whatever without his consent, but shall be subject to the same conditions and restrictions as are [155 U.S. 196, 201] by the laws of the Cherokee Nation imposed upon native citizens thereof:

'Provided, that nothing herein shall confer the right to alienate, convey, or dispose of any such lands, except in accordance with the constitution and laws of said Cherokee Nation.

'And the said Delawares, parties of the second part, agree that there shall be paid to the said Cherokees from the Delaware funds, now held or hereafter received by the United States, a sum of money equal to one dollar per acre for the whole amount of one hundred and sixty acres of land for every individual Delaware who has already been registered upon the aforesaid list, made February 18, 1867, with the additions theretofore provided for.

'And the secretary of the interior is authorized and requested to sell any United States stocks belonging to the Delawares to procure funds necessary to pay for said lands; but in case he shall not feel authorized, under existing treaties, to sell such bonds belonging to the Delawares, it is agreed that he may transfer such United States bonds to the Cherokee Nation, at their market value, at the date of such transfer.

'And the said Delawares further agree that there shall be paid from their funds, now or hereafter to come into possession of the United States, a sum of money which shall sustain the same proportion to the existing Cherokee national fund that the number of Delawares registered as above mentioned and removing to the Indian country sustains to the whole number of Cherokees residing in the Cherokee Nation; and, for the purpose of ascertaining such relative numbers, the registers of the Delawares herein referred to, with such additions as may be made within one month from the signing of this agreement, shall be the basis of calculation as to the Delawares; and an accurate census of the Cherokees residing in the Cherokee Nation shall be taken under the laws of that Nation within four months, and properly certified copies thereof filed in the office of Indian affairs, which shall be the basis of calculation as to the Cherokees.

And that there may be no doubt hereafter as to the [155 U.S. 196, 202] amount to be contributed to the Cherokee national fund by the Delawares, it is hereby agreed by the parties hereto that the whole amount of the invested funds of the Cherokees, after deducting all just claims thereon, is \$678,000.

'And the Delawares further agree that, in calculating the total amount of said national fund, there shall be added to the said sum of \$678,000 the sum of \$1,000,000, being the estimated value of the Cherokee neutral lands in Kansas, thus making the whole Cherokee national fund \$1,678,000; and

this last-mentioned sum shall be taken as the basis for calculating the amount which the Delawares are to pay into the common fund:

'Provided that, as the \$678,000 of funds now on hand belonging to the Cherokees is chiefly composed of stocks of different values, the secretary of the interior may transfer from the Delawares to the Cherokees a proper proportion of the stocks now owned by the Delawares of like grade and value, which transfer shall be in part of the pro rata contribution herein provided for by the Delawares to the funds of the Cherokee Nation; but the balance of the pro rata contribution by the Delawares to said fund shall be in cash or United States bonds, at their market value.

'All cash, and all proceeds of stocks, whenever the same may fall due or be sold, received by the Cherokees from the Delawares under the agreement, shall be invested and applied in accordance with the 23d article of the treaty with the Cherokees of August 11, 1866.

'On the fulfillment by the Delawares of the foregoing stipulations, all the members of the tribe registered as above provided shall become members of the Cherokee Nation, with the same rights and immunities, and the same participation (and no other) in the national funds, as native Cherokees, save as hereinbefore provided.

'And the children hereafter born of such Delawares so incorporated into the Cherokee Nation shall in all respects be regarded as native Cherokees.'

In pursuance of this agreement, which was approved by the president of the United States, as stipulated in article 15 of the treaty, 985 Delawares removed to the territory of the [155 U.S. 196, 203] Cherokees, paid \$157,600 for the lands set apart for them, contributed \$ 121,824.28, their share of the national fund as provided, and became incorporated into the Cherokee Nation.

At the time of this treaty the Cherokee Nation was possessed of the following tracts or bodies of lands:

Acres. Strip lands in Kansas (about) 400,000 Neutral lands in Kansas (about) 1,000,000 Lands west of 96 ϕ , Indian Territory (about) 8,000,000 Lands east of 96 ϕ , Indian Territory, Home Reservation (about) 5,000,000

By article 17 of the treaty the strip lands and the neutral lands were ceded to the United States, to be sold for the benefit of the Cherokee Nation. The sum expected to be realized from the sale of the neutral lands was, by the agreement between the Cherokees and the Delawares, considered as already received and a part of the Cherokee national fund. The proceeds of the sale of the strip lands were subsequently appropriated to the uses of the Cherokee Nation as a Nation, and not for the benefit of the native Cherokees alone, leaving as still the property of the Cherokee Nation the two bodies of land in the Indian Territory (sometimes known as the 'Home Reservation' and the 'Cherokee Outlet'). Certain sums of money were received by the Cherokee Nation for the rental of the Cherokee outlet. These sums the Cherokee council determined belonged wholly to the native Cherokees, to the exclusion of the Delawares. This brought about a controversy between the native Cherokees and the Delawares, involving not merely the right to share in these proceeds, but also the interest of the Delawares in the reservation and the outlet. On October 1, 1890 (26 Stat. 636), an act of congress was passed providing for a reference to the court of claims of that controversy. Thereupon on October 29, 1890, this suit was brought, the United States being made a party defendant, not as having any adverse interest, but as trustee, holding the funds of the Indians. The Opinion of that court was filed April 24, 1893 (28 Ct. Cl. 281), the conclusion being that the [155 U.S. 196, 204] Delawares were incorporated into the Cherokee Nation, and, as members and citizens thereof, were entitled to equal rights in these lands and their proceeds. On May 22, 1893, a decree was entered in accordance with these views, from which decree the Cherokee Nation and the United States have appealed to this court.

Chas. A. Maxwell and Geo. S. Chase, for the Cherokee Nation.

Asst. Atty. Gen. Dodge, for the United States.

Thos. C. Fletcher and J. H. McGowan, for appellee.

Mr. Justice BREWER, after stating the facts in the foregoing language, delivered the opinion of the court.

This case hinges on the status of the individual Delawares as members and citizens of the Cherokee Nation, and the rights secured to them by the agreement of April 8, 1867. In order to a correct understanding of this agreement, it is necessary to refer to the provisions of article 15 of the treaty of 1866. That article contemplated the settlement of other Indians within the limits of the Cherokee country east of the ninety-sixth degree of longitude, and provided for such settlement in two ways: One in which the Indians settled should abandon their tribal organization, in which case, as expressed, they were to 'be incorporated into, and ever after remain a part of, the Cherokee Nation, on equal terms in every respect with native citizens.' The other was where the removal of the tribe to the Cherokee country should involve no abandonment of the tribal organization, in which case a distinct territory was to be set off, by metes and bounds, to the tribe removed. The one contemplated an absorption of individual Indians into the Cherokee Nation; the other, a mere location of a tribe within the limits of the Cherokee Reservation. If the removed Indians were to be absorbed into the [155 U.S. 196, 205] Cherokee Nation, they were to be absorbed on equal terms in every respect with native citizens.

In this connection reference may be had to article 16 of the treaty, which authorized the government to settle friendly Indians in any part of the Cherokee country west of the ninety-sixth degree of longitude. This article differs from article 15, in that it contemplated a location of any friendly tribe as a tribe, authorized the government to place it anywhere within the reservation west of the ninety-sixth degree of longitude, on a tract in compact form, and provided for a conveyance of such tract in fee simple to the located tribe. It thus provided for taking a body of land out of this part of the Cherokee Reservation, and removing it wholly from the jurisdiction of the Cherokee Nation, making a new reservation for the occupancy of the tribe to whom it was conveyed; while in the case of Indians removed under the provisions of article 15, even though the tribal organization was preserved, the general jurisdiction of the Cherokee Nation over the territory occupied by the removed tribe was not disturbed.

Turning now to the agreement itself, its purpose, as expressed in its preliminary language, was 'a location of the Delawares upon the Cherokee lands and their consolidation with the said Cherokee Nation.' There is no provision for the setting apart of a distinct body of land in any portion of the reservation for the Delaware tribe, but the agreement is to sell to them for their occupancy a quantity of land equal in the aggregate to 160 acres for each individual Delaware who may 'elect to remove to the Indian country,' and 'the selection of the amounts to be purchased by the Delawares may be made by said Delawares in any part of the said Cherokee Nation east of said line of 96 degrees, not already selected and in possession of other parties.' This contemplates personal selection of separate tracts by individual Delawares. Further, there is a guaranty 'to each Delaware incorporated by these articles into the Cherokee Nation' of the lands thus by him purchased, and that his ownership and occupancy shall not be interfered with in any manner without his consent,-not the consent of the Delaware tribe,-and also that it shall be sub- [155 U.S. 196, 206] ject to the 'same conditions and restrictions as are by the laws of the Cherokee Nation imposed upon native citizens thereof.' But we are not limited to the plain inferences to be drawn from these expressions. The positive provision at the close of the agreement is as follows:

'On the fulfillment by the Delawares of the foregoing stipulations, all the members of the tribe registered as above provided shall become members of the Cherokee Nation, with the same rights and immunities, and the same participations (and no other) in the national funds, as native Cherokees, save as hereinbefore provided.

'And the children hereafter born of such Delawares no incorporated into the Cherokee Nation shall in all respects be regarded as native Cherokees.'

If nothing were presented other than the language of the agreement, the conclusion would seem irresistible that the registered Delawares—that is, those of the tribe who chose to remove from Kansas to the Indian Territory—were not only to become members of the Cherokee Nation, but also to stand equal with the native Cherokees in all the rights springing out of citizenship in the Cherokee Nation. Whatever rights the Cherokees had the registered Delawares were to have, and it was an equality not limited to the living Delawares; but, to guard against any misconception, there was the express declaration that the children of the registered Delawares should in all respects be regarded as native-born Cherokees. This last clause was not inserted with the view of giving additional rights to such children, but to prevent any question as to their inheritance of all the rights which their fathers received under the agreement.

That the thirteen million of acres, whether appropriately styled its 'common property' or its 'public domain,' belonged to the Cherokee Nation as a nation, is beyond dispute. By the treaty of May 6, 1828 (7 Stat. 311), it was provided in article 2 that 'the United States agree to possess the Cherokees, and to guaranty it to them forever, and that guaranty is hereby solemnly pledged, of seven million acres of land, to be bounded as follows : ... In addition to the seven [155 U.S. 196, 207] million of acres thus provided for, and bounded, the United States further guaranty to the Cherokee Nation a perpetual outlet, west, and a free and unmolested use of all the country lying west of the western boundary of the above described limits, and as far west as the sovereignty of the United States and their right of soil extend.'

By subsequent treaties, of February 14, 1833 (7 Stat. 414), and December 29, 1835 (7 Stat. 478), certain changes were made in the boundaries of the reservation and the outlet; and by article 3 of the latter treaty it was provided that 'the United States also agree that the lands above ceded by the treaty of February 14, 1833, including the outlet, and those ceded by this treaty, shall all be included in one patent executed to the Cherokee Nation of Indians by the president of the United States according to the provisions of the act of May 28, 1830.'

Under these treaties, and in December 1838, a patent was issued to the Cherokees for these lands. By that patent, whatever of title was conveyed was conveyed to the Cherokees as a nation, and no title was vested in severalty in the Cherokees, or any of them. The constitution of the Cherokee Nation, both as originally adopted in 1839 and as amended in 1866, declares in article 1, 2, that 'the lands of the Cherokee Nation shall remain common property'; and, while the amendment contemplates a time at which these lands shall cease to be common property, it is only when, by article 20 of the treaty of 1866, the national council shall request that they be surveyed and allotted in severalty to the Cherokees. Not only does the Cherokee constitution thus provide that the lands shall be common property, but also the legislation of the Cherokee Nation from 1839 on to the present time abounds with acts speaking of these lands as 'public domain' or 'common property' of the Cherokee Nation. Quite a number of these acts are collected in the opinion of the court of claims in this case. [155 U.S. 196, 208] Now, if these lands be the public domain, the common property of the Cherokee Nation, all who are recognized as [155 U.S. 196, 209] members and citizens of that Nation are alike interested and alike entitled to share in the profits and proceeds thereof. [155 U.S. 196, 210] Given, therefore, the two propositions that the lands are the common property of the Cherokee Nation, and that the registered Delawares have become incorporated into the Cherokee Nation, and are members and citizens thereof, it follows necessarily that they are, equally with the native Cherokees, the owners of, and entitled to share in the profits and proceeds of, these lands.

As against this conclusion, the argument of the counsel for the Cherokees runs along these lines: First, that the terms 'rights and immunities' refer only to political rights and immunities, and do not include property rights; second, that as it is specifically provided that the registered Delawares shall have equal participation in the national funds, while no [155 U.S. 196, 212] mention is made of these lands which constituted the bulk of the Cherokee property, it is to be taken that no interest therein was intended to be transferred; third, that this is strengthened by the fact that there was a stipulation for the purchase of certain lands at one dollar per acre; and, fourth, that the contribution of the Delawares to the national property was so small, and the value

of these lands so great, that it could not have been in the contemplation of the parties that the Delawares were to receive any interest in them.

Commenting generally upon this line of argument, it is rather an endeavor to induce the court to reconstruct the contract, and frame one more in accord with what, from the present standpoint, would seem to have been equitable, than to interpret the contract which the parties made, in accordance with the plain import of the language which they used.

It is true that 'rights and immunities' are often used as descriptive of only political rights and immunities, and do not necessarily include property rights; so that, if these were the only words by which the intent of the contracting parties was to be determined, there would be room for the argument that only political rights and immunities were intended to be granted. But it must be borne in mind that the rights and interest which the native Cherokees had in the reservation and outlet sprang solely from citizenship in the Cherokee Nation, and that the grant of equal rights as members of the Cherokee Nation naturally carried with it the grant of all rights springing from citizenship. So far as the provision in the agreement for the purchase of homes is concerned, it will be perceived that no absolute title to these homes was granted. We may take notice of the fact that the Cherokees, in their long occupation of this reservation, had generally secured homes for themselves; that the laws of the Cherokee Nation provided for the appropriation by the several Cherokees of lands for personal occupation, and that this purchase by the Delawares was with the view of securing to the individual Delawares the like homes; that the lands thus purchased and paid for still remained a part of the Cherokee Reservation. And, as a further consideration for the payment of this sum [155 U.S. 196, 213] for the purchase of homes, the Delawares were guaranteed, not merely the continued occupancy thereof, but also that, in case of a subsequent allotment in severalty of the entire body of lands among the members of the Cherokee Nation, they should receive an aggregate amount equal to that which they had purchased, and such a distribution as would secure to them the homes upon which they had settled, together with their improvements; so that if, when the allotment was made, there was for any reason not land enough to secure to each member of the Cherokee Nation 160 acres, the Delawares were to have at least that amount, and the deficiency would have to be borne by the native Cherokees pro rata. In other words, there was no purchase of a distinct body of lands, as in the case of the settlement of other tribes as tribes within the limits of the Cherokee Reservation. The individual Delawares took their homes in and remaining in the Cherokee Reservation, and as lands to be considered in any subsequent allotment in severalty among the members of the Cherokee Nation. All this was in the line of the expressed thought of a consolidation of these Delawares with, and absorption of them into, the Cherokee Nation as individual members thereof. If it be said that all of the Delaware trust funds were not turned into the national fund, it will be remembered that there was no impropriety in the reservation of a part thereof, in order to enable the Delawares to make such improvements as they might desire on the tracts that they selected for homes, and also that there was no certainty that all the members of the Delaware tribe would elect to remove to the Cherokee country, and that those who remained in Kansas were entitled to their share in the Delaware national funds.

With regard to the claim that the Delawares paid an inconsiderable sum, if it was the intent that they should share equally with the native Cherokees in this vast body of lands included in the reservation and outlet, it will be borne in mind that the alleged gross inadequacy depends largely upon the value of these 13,000,000 of acres. Counsel for the Cherokees place this value at \$1.25 per acre,-the minimum price for government lands,-and upon that valuation base [155 U.S. 196, 214] their claim of inadequacy of consideration. They point to the fact that the neutral lands in Kansas were estimated in the agreement to be worth \$1. 25 an acre, and infer therefrom that the lands in the Indian Territory were of like value. But that is a mere inference, and over against it may be placed such facts as these: On June 14, 1866, only about a year before this agreement, the Creeks, by treaty, sold to the government a tract in the Indian Territory, estimated to contain 3,250,560 acres, at the price of 30 cents per acre. 14 Stat. 786. The Seminoles, on March 21, 1866, likewise ceded a tract estimated at 2,169,080 acres, at the rate of 15 cents an acre (Id. 756); and on April 28, 1866, the Choctaws and Chickasaws ceded a large tract, also in the territory, for the gross sum of \$300,000,-a sum which, as

counsel for the appellee stated, was only at the rate of about 5 cents an acre (Id. 769). The significance of these figures is not destroyed by the fact that in 1889 congress appropriated a large sum for both the Creeks and Seminoles,-to wit, to the Creeks the sum of \$2,280,857.10, and to the Seminoles the sum of \$1,912,942.02 (25 Stat. 758, 1004),-apparently in further payment of these lands; for, while this may tend to show that congress then felt that the Creeks and Seminoles had not received a full price for their lands, it is not inconsistent with the claim that in 1866 the contracting parties considered the lands to be worth only the stipulated price. Further than that, in pursuance of the provisions of the fifth section of the act of May 29, 1872 (17 Stat. 190), an appraisalment was made of the Cherokee lands west of the ninety-sixth meridian, which appraisalment, approved by the president, fixed the value of a portion of such lands (230,014.04 acres) at 70 cents, and the balance (6,344,562.01 acres) at 47.49 cents, per acre. It may well be that land within the limits of a rapidlygrowing state were worth at the time of this agreement \$1.25 per acre, while lands within the Indian Territory, situate as these were, were of much less value. Neither should too much weight be given to the fact that the Delawares were to pay for their homes at the rate of \$1 an acre, for by that purchase they acquired no title [155 U.S. 196, 215] in fee simple, and it is not unreasonable to believe that the price thus fixed was not merely as compensation for the value of the lands (to be taken in the eastern portion of the reservation, where the body of the Cherokees had their homes, and therefore probably the most valuable portion of the entire reservation), but also as sufficient compensation for an interest in the entire body of lands, that interest being, like that of the native Cherokees, limited to a mere occupancy of the tracts set apart for homes, with the right to free use in common of the unoccupied portion of the reserve, and a right to share in any future allotment. At any rate, with the uncertainty that exists as to its value, it cannot be said to be clear that there was such gross inadequacy of consideration as is urged by the counsel for the Cherokees; certainly nothing which would justify a court of equity in setting aside the contract on the ground of inadequacy.

But, further, the thought of sale-at least of an early sale-was evidently not in contemplation of the parties, or in line with the then policy of the government. This Indian Territory was looked upon as the permanent home of the Indians. The government was making the effort to bring within its limits all the Indians from all parts of the land, and it was not in the contemplation of the government, or of these contracting parties, that at any early day these lands would be thrown open to settlement and sale, but rather the idea was that they were to be continued as their permanent place of abode. Considered as such, so long as each individual Indian, whether Delaware or Cherokee, had his particular tract for occupancy as a home, it was not unnatural or unequal that the vast body of the lands not thus specifically and personally appropriated should be treated as the common property of the nation, in respect to which all who were members thereof, whether by birth or adoption, should be entitled to equal rights and privileges. That there might come a time when an allotment in severalty would be advisable was something that was contemplated and provided for; and while, if allotment had been made at the time among the 13,573 Cherokees, there would have been enough land to have given each nearly 1,000 acres, [155 U.S. 196, 216] yet, with the expected coming in of other tribes, either to take certain selected portions of the reservation as tribes by an absolute title, or to enlarge the numbers of the Cherokee Nation by adoption (as in the case of these Delawares), it was foreseen that the time might come when the allotment might not secure even 160 acres to each individual, and so was added the express guaranty that the purchasing Delawares should obtain at least that amount in the allotment. True, the course of events has not been what was then contemplated, but, in order to determine the meaning of this contract, we must place ourselves in the circumstances of the parties at the time, with their surroundings and expectations. In that light we see nothing in the matters suggested by counsel sufficient to overthrow the plain import of the language used in the agreement, and must conclude that by such agreement the Delawares became incorporated into the Cherokee Nation, became members thereof, and, as such, entitled equally with the native Cherokees to all their rights in the reservation and outlet.

Further, it may be remarked that the action of the Cherokee Nation up to the year 1882 was in the line of the construction we have placed upon this contract, for up to that date there was no distinction made between the native Cherokees and these Delawares in the distribution of funds, from whatever source obtained. Out of the

moneys received by the Cherokee Nation on account of lands west of the ninety-sixth degree set apart for the Osage Indians, under the act of June 5, 1872, \$200,000 was distributed per capita, in which distribution the Delawares shared equally with the native Cherokees; and, again, when, on account of sales west of the ninety-sixth degree, congress, on June 16, 1880, appropriated \$300,000, such sum was also paid out per capita, the Delawares sharing equally with the native Cherokees. Such action is of significance in determining the understanding of the parties to the contract. It is a practical interpretation by the parties themselves of the contract they made. It is also worthy of note that when, in 1883, a bill passed the national council for the payment to the native Cherokees alone of a certain sum of money received as rental from the Cherokee Strip Live-Stock Association, which, [155 U.S. 196, 217] so far as appears, was the first manifestation of a claim of a difference between the native Cherokees and the registered Delawares as to the extent of their interests in the lands or the proceeds thereof, it was vetoed by D. W. Bushyhead, the then principal chief of the Cherokee Nation, on the ground that such action was in violation of the agreement of 1867. It is true the bill was passed over his veto. While the veto message is too long to quote in full, these extracts sufficiently disclose the reasons upon which it is based:

'(3) The 'patent' was made to the 'Cherokee Nation' in 1838, and the Cherokee Nation was then composed of citizens by right of blood, and so continued to be until the exigencies of the late war arose, when, in 1866, it became necessary to make a new treaty with the United States government. By this treaty, made by and with this Nation, other classes of persons were provided to be vested with all the rights of 'native Cherokees' upon specified conditions. These conditions have been fulfilled as regards the acknowledged colored citizens of this Nation and the so-called Delaware and Shawnee citizens. I refer you to article 9th of said treaty, in regard to colored citizens, and article 15th, first clause, as regards Indians provided to be settled east of 96 . The language is, they shall have all the rights of native Cherokees, 'and' they shall be incorporated into, and ever after remain a part of, the Cherokee Nation, on equal terms in every respect with native Cherokees.

...

'(6) If the lands of the Nation were and are the common property of citizens, then no citizen can be deprived of his or her right and interest in the property without doing an injustice, and without a violation of the constitution, which we are equally bound to observe and defend. While the lands remain common property, all citizens have an equal right to the use of it. When any of the land is sold under provisions of treaty, all citizens have an equal right to the proceeds of their joint property, whether divided per capita or invested.

'Senators, such is the treaty and such is the constitution. I have referred you to them, and stated their evident meaning in the premises 'to the best of my ability,' as is my duty. To [155 U.S. 196, 218] the classes of citizens this bill would exclude, attach 'all the rights and privileges of citizenship according to the constitution.' To three of these classes attach also all the rights of 'native Cherokees,' according to treaty.'

Further comment on this case is unnecessary. We see no error in the conclusions of the court of claims, and its decree is affirmed.