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United States Court of Claims  
MOSES WHITMIRE, TRUSTEE FOR THE  
CHEROKEE FREEDMEN

v.

THE CHEROKEE NATION AND THE UNITED  
STATES

No. 17209

Decided March 4, 1895

On the Proofs.

This case is identical with that of the *Delaware Indians v. The Cherokee Nation* (28 C. Cls. R., 281), with this difference: the Delawares entered into an express agreement with the Cherokees, and paid for the homesteads which they acquired; the rights of the freedmen depend exclusively upon the constitution of the Cherokee Nation and the treaty of 1866.

West Headnotes

**Indians 209** 

209 Indians

209k2 k. Status of Indian Nations or Tribes. Most Cited Cases

The Cherokee Nation has, as a sovereign power, the right to administer its own affairs in its own way, and to regulate the rights of its citizens by its own laws. But the legislative authority of the national council is not absolute, being limited and defined by the constitution, and the acts of the council can not control or abrogate the treaty obligations of the Nation to the United States.

**Indians 209** 

209 Indians

209k2 k. Status of Indian Nations or Tribes. Most Cited Cases

The Cherokee council cannot authorize a distribution of a common fund derived from the sale of its lands to the federal government among “Cherokees by blood” alone.

**Indians 209** 

209 Indians

209k2 k. Status of Indian Nations or Tribes. Most Cited Cases

When the national council changed the common property of the Nation into money, the fund took the place of the lands, and under the constitution was

subject to the same limitations and existed for the same beneficiaries. The national council could not divert the common property from the general welfare and transmute it into a communal fund belonging to a class of citizens, viz., “Cherokees by blood.”

**Indians 209** 

209 Indians

209k2 k. Status of Indian Nations or Tribes. Most Cited Cases

There may still be in the Cherokee Nation property which is communal but not common; i. e., property which is held for a portion of the people and not for national purposes.

**Indians 209** 

209 Indians

209k2 k. Status of Indian Nations or Tribes. Most Cited Cases

Payment per capita, or the right to payment per capita, must be regarded as the badge or recognition of an individual communal interest. Funds payable per capita are trusts for the benefit of designated individuals or communities. Over them the Cherokee government has no control, and in them the freedmen have no estate or interest.

**Indians 209** 

209 Indians

209k9 Lands

209k11 k. Cession by Treaties. Most Cited Cases

Under the Cherokee constitution of 1866, providing that “all nativeborn Cherokees, all Indians and whites legally members of the nation by adoption, and all freedmen,” “shall be taken and be deemed to be citizens of the Cherokee Nation,” and “the lands of the Cherokee Nation shall remain common property,” freedmen are equally entitled with Cherokees to share in the per capita distribution of moneys derived from the sale of lands to the federal government.

*The Reporters'* statement of the case:

The essential facts of this case will be found in the decree which is set forth at the foot of the second opinion, *post*.

*Mr. R. H. Kern* and *Mr. F. W. Lehman* for the claimant:

**(Cite as: Not Reported in Ct.Cl.)**

This treaty, as plainly as can be made manifest by words, recognizes that the rights of these persons who are in this suit generally designated as freedmen, are, first, to inhabit the country; second, to occupy the land; third, to exercise all the political functions of citizenship; fourth, to representation in the national council according to their numbers; fifth, to be subject only to laws of uniform operation throughout the nation; sixth, which is inclusive of everything that has gone before and of everything that may not have been enumerated, all the rights of native Cherokees.

It is said, however, that nothing either in the specific enumeration of rights conferred upon the freedmen and not even anything in the general declaration that they shall have all the rights of native Cherokees, has the effect to give to the freedmen any right in the land which was the common property of the nation, or in the proceeds thereof, when rented, leased, or sold.

The nature of the title by which the Cherokee Nation held its domain has been fully considered by this court in the case of *Charles Journeycake v. The Cherokee Nation*. The land is held in common. It belongs to all the members of the nation as such. Any Cherokee who should expatriate himself would part with his right to these common lands. The right of each individual is a right incident to his citizenship or membership of the nation, beginning with that citizenship or membership and ending with it. It is a right that he can not transfer any more than he can transfer his citizenship. It is not the subject of barter or sale by the individual members of the nation. The nation itself could sell them or dispose of them only under the sanction and with the consent of the General Government. Nor could any allotment of these lands among individuals be made except by authority of the General Government. Leaving out of view the supervisory power of the General Government, growing out of its relation of guardianship to the Cherokee people, it is manifest that, so far as the action of the Cherokee Nation itself is concerned, there could not, consistently with the provisions of this treaty, be made any disposition of any of the public domain or of the proceeds of its sale, or lease, or renting, which discriminated against the freedmen. Any division or allotment of the lands, any appropriation of the proceeds of either the sale or use of such lands to individual use; in other words, any change of the common property at all, making it the exclusive property of individuals, could be accomplished only by an act of law, and every law must be uniform in its operation.

The individual right of Cherokees by the blood was a

right of use and occupancy only. That right is plainly conferred upon the freedmen, because, while not required to do so, they are specifically given a right to settle in a particular territory, and the extent of this territory is so defined as to allow at least 160 acres for the use of each person settling in it. How could this right of use and occupancy, plainly conferred, be terminated and upon what conditions? As it can be done only by an act of law, and as all laws must be of uniform operation, it follows from this provision of the treaty alone that the right of occupancy given to the freedmen could be determined only like the right of occupancy enjoyed by native Cherokees, that is, by selling or otherwise disposing of the public domain, and devoting the proceeds of it either as the lands had been devoted, to the common welfare, or else by distributing its proceeds among the people and among them all alike. Very evidently, however, it was intended there should be no doubt upon the question. Article 9 fixes it beyond the possibility of doubt. It determines that every person of color who had been a slave to any Cherokee and who had been liberated by voluntary act of his owner or by act of law, and every free colored person who had been in the country at the commencement of the rebellion and was at the time of the treaty a resident therein, or who should return within six months, and the descendants of all these persons, that is, of former slaves and free persons of color, should have the right to inhabit the land, and that they should have all the rights of native Cherokees.

The contention of the Cherokee Nation sums itself up in this, that all does not signify all, but that it means something less, and so much less indeed that one practical result of the interpretation insisted upon by the nation would be to destroy every right conceded to have been granted by this treaty; for it is not possible for the freedmen to acquire by purchase or barter any right in the land. Their right is simply a right of use and occupancy; and if the Cherokee Nation may sell this land and so terminate that right of use and occupancy without making any compensation therefor, then is the tenure of the freedmen, their tenure of use and occupancy, simply by the will or by the sufferance of the Cherokees. They may be ousted at any time. And when their right of occupancy ceases their remaining rights are barren, for the persons to whom the land is sold could of course eject them from the country.

The greater includes the lesser always. If the Cherokee Nation may sell this land and appropriate the proceeds exclusively to native Cherokees, surely it may provide for the use and occupancy of the land

in like manner; that is, by native Cherokees only.

Subsequently to the conclusion of the treaty of July 19, 1866, and in consequence of that treaty, the constitution of the Cherokee Nation was amended. Section 5 of the amendments to article 3 provides:

“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 admitted to be citizens of the Cherokee Nation.”

Section 2 of article 1 of the constitution, which relates to the lands of the nation, was amended to read as follows:

“The land 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 20 of the treaty of 19th of July, 1866, between the United States and the Cherokee Nation; but the improvements made thereon and any 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.

“Moreover, the national council shall have power to adopt such laws and regulations as its wisdom may deem expedient and proper to prevent citizens from monopolizing improvements with the view of speculation.”

The act of the Cherokee council of May 18, 1883, making distribution of proceeds of sales of lands among Cherokees by the blood, excluding Shawnees, Delawares, and the freedmen from participation, was vetoed by Principal Chief Bushyhead, and in his veto message he discusses the question involved with rare force and ability. He says:

“By this treaty (referring to the treaty of 1866), 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 now refer you to that part of the constitution which makes acknowledged treaties the supreme law, and authorizes the national council solely to construe treaty stipulations. On page 83, Compiled Laws, you will find the names of the president of the then national council committee, the speaker of council, and principal chief signed to the construction of the treaty of 1866 by the national council, and the construction of the several parts of said treaty was formally ratified by a convention of the people as permanent amendments to our constitution. Of these amendments, section 5, page 31, Compiled Laws, adds to ‘nativeborn Cherokees’ who had alone composed the nation; before that time three other classes of persons, making them all citizens of the nation alike, colored, liberated persons of specified classes, whites by adoption, and Indians by adoption. Of these, the colored class and Indians settled east of 96 degrees have all the rights of native Cherokees by operation of the nation’s treaty. Other Indians by adoption, and whites legally adopted, are joined with the others named, and made citizens by the constitution.

“What, then, are the rights of Cherokee citizenship? I refer you to section 2, article 1, of the constitution. The lands of the nation are the common property of the nation. Who compose the nation? What other answer is possible to the question, except the citizens of the nation compose the nation. The lands of this nation, therefore, being the common property of the nation, are the common property of whomever are made citizens by the constitution. \* \* \*

“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.

It needs no argument to show that the Cherokee Nation can not violate its treaty obligations. The United States, not only as a party to the treaty, but as guardian of the rights and interests of those affected by the treaty, will insist upon and secure the observance of all the treaty stipulations. That is the force and effect of the act of Congress authorizing this suit to be brought, and conferring jurisdiction upon this court to determine, according to the very right of the matter, the questions involved. In the case in this court already referred to, that of *Charles Journeycake* against *The Cherokee Nation and The United States*, the treaty of 1866 was under construction. It is true that the cases are not in every respect similar, but the decision in that case does not rest upon the points of difference, but rather upon the points of similarity, and we cite it as a comprehensive and a conclusive adjudication in favor of the freedmen of the Cherokee Nation.

*Mr. George S. Chase* for the Cherokee Nation:

By reference to the ninth article of the treaty of 1866 it will be observed that all free colored persons who were in the Cherokee country at the commencement of the rebellion, and who were then residents therein, or who might return within six months, were given the same rights as the freedmen who had been liberated by their owners or by law. The Cherokee Nation was certainly under no obligation to provide for this class of persons, and this fact lends much force to the contention that the purpose was to confer upon the colored people in the Cherokee Nation, and all who might become residents thereof, such rights, and such rights only, as were conferred upon the colored people in other parts of the United States.

All the several treaties made with the Five Civilized Tribes in 1866, and all the contemporaneous facts, circumstances, and history, bear out this proposition. It was so understood by the Cherokees at the time, and the history of the reconstruction period shows

conclusively that such was the intent and object of the Government. Any other construction would place a penalty upon the Cherokee Nation not imposed upon any other people within the broad domain of the United States and one with no parallel in its history.

During the negotiations which resulted in the treaty of 1866 the Cherokee people were led to believe that the desire of the Government was to secure to the freedmen there such rights only as were enjoyed by the freedmen in the States and Territories, and this is manifest not only from the address presented to the commissioners hereinbefore referred to, but from the entire history of the reconstruction period. In this connection we call especial attention to the testimony of S. H. Bengé, filed herein, who is the only surviving signer of the treaty of 1866, on the part of the Cherokees.

It must not be forgotten that these negroes were the slaves not of the Cherokee Nation as a nation, but of certain individual members of that nation. As in the Southern States, some individuals held one slave, or a few, while others held many, and many held none.

If a punishment were to be imposed on account of the holding of these people in bondage common justice would dictate that it should be imposed with some regard to the degrees of guiltiness for the commission of the wrong, and not that the innocent should be made to suffer equally with the guilty. If these freed persons were to be allowed to participate in the property and wealth of their former masters then that participation should relate to such persons as were masters, and in proportion to their respective holdings. But if the compensation shall be taken from the common, till then the burden will rest equally upon all without reference to any equitable distribution, while under said treaty, hordes of colored persons will be spawned upon the Cherokee Nation, without its consent, who were never in bondage there, to absorb its vitality and consume its inheritance.

The Cherokee people being an enlightened and intelligent people and fully conversant with all the public affairs at the time, it seems the conclusion must be irresistible to any fairminded person that the Cherokees understood that the provisions of ninth article of the treaty of 1866 were intended simply to give their freedmen such rights, and such rights only, as were given to and enjoyed by the freedmen in the several States and Territories under the Constitution and laws of the United States; and it should be borne in mind that these several amendments to the

Constitution had been adopted and the civil-rights act of 1866 had become a law prior to the consummation of the Cherokee treaty of 1866. This was the understanding of the Cherokee people at the time the treaty was negotiated, and it has ever since been so understood by them, and was so construed by an act of the national council approved April 27, 1886.

A treaty calls for the same interpretation as a statute, only in a larger sense is the intent to be considered where any possible ambiguity exists. And this is particularly so where one of the parties is dependent, and especially an Indian tribe or nation. As Chief Justice Marshall said: "How the words of the treaty were understood by these unlettered people, rather than their critical meaning, should form the rules of construction. (6 Peters, 582.)

That the Cherokees possess the sole and exclusive right to manage their own internal affairs, and of control of the persons and property of their citizens, there has been no question for more than half a century; and this right has been recognized by the Government of the United States by an unbroken current of precedents through all this time.

The object of the Cherokee treaty of 1835 (7 Stat. L., 478), as recited in the preamble thereto, was to reunite their people in one body and secure a permanent home for themselves and their posterity in the country selected by their forefathers without the territorial limits of the State sovereignties, and where they could establish and enjoy a government of their choice and perpetuate such a state of society as might be most consonant with their views, habits, and conditions, and might tend to their individual comfort and advancement in civilization.

The fact is that for more than a half century the right has been recognized in the Cherokee Nation to make such laws for the government of persons and property within its jurisdiction, and to make such disposition of its public funds, as it may see fit. That right has never been questioned, but, on the other hand, has been sanctioned by the Executive Departments of the Government, and the principle recognized by the Supreme Court of the United States. (5 Pet., 1; 6 Pet., 515; 18 How., 100; 20 C. Cls. R., 449; 117 U. S., 288.)

The Secretary of the Interior (Mr. Teller), in speaking of the right of the Cherokee Nation to control and dispose of its property in such manner as it may see fit, in a letter to the President pro tempore of the Senate, dated January 13, 1885, says:

"The rights reserved to the United States are clearly expressed in the several treaties, and the right of the United States to control the Cherokee property and prevent the nation from having the full and absolute control of the product of these lands is not even suggested."

On the contrary, the Government guarantees, in article 26, as follows:

"The United States guarantee to the people of the Cherokee Nation the quiet and peaceable enjoyment of their country and protection against domestic feuds and insurrections, and against hostilities of other tribes. They shall also be protected against interruptions or intrusions from all unauthorized citizens of the United States who may attempt to settle on their lands or reside in their territory. In case of hostilities among the Indian tribes the United States agree that the party or parties commencing the same shall, so far as practicable, make reparation for the damage done."

The Department has not considered it the duty of the Commissioner of Indian Affairs or the Secretary of the Interior to interfere with the affairs of the Cherokee Nation, except in the case expressly provided by treaty with that nation. (See Senate Ex. Doc. No. 17, Forty-eighth Congress, second session, p. 6, and approvingly referred to by the Court of Claims in the case of *The Eastern Band of Cherokees v. The United States and The Cherokee Nation*, 20 C. Cls. R., 449.)

The Cherokee Nation has a right to stand upon its contracts and its treaties, and no acts of Congress and no proceedings of the political departments of the Government can take away its vested rights guaranteed by such treaties (20 C. Cls. R., 481) and confirmed by the Supreme Court. (117 U. S., 288, hereinbefore referred to.)

This rule was applied in the same decision to the funds received by the Cherokee Nation on account of the sale of a portion of its lands by article 17 of the treaty of 1866.

This same principle was recognized by the legislative branch of the Government by an item in the Indian appropriation bill of March 3, 1875, which provides:

"\* \* \* and the United States assistant treasurer at St. Louis Mo., be, and he hereby is, authorized to open and keep accounts with the duly constituted treasurers of the Cherokee, Creek and Choctaw, and

Chickasaw nations of Indians, the same as with the Government agents and disbursing officers.” (18 Stat., 448.)

So, if we admit, for the sake of argument, that the freedmen, under the treaty of 1866, have an interest in all the common property of the Cherokee Nation, that nation, under the decisions of this court and the Supreme Court, the opinions of the Attorney-General and Secretary of the Interior, has a perfect right to make such disposition of its lands and moneys as it may see fit and proper, whether affecting members by blood or adoption, and there is no right or power vested or reserved in the United States to interfere. As a matter of fact, if we apply the principles laid down by the courts, the Attorney-General, and the Secretary of the Interior, which recognize the absolute unrestricted right of self-government in the Cherokee Nation as to its internal affairs, and the right guaranteed to that nation “to make and carry into effect all such laws as they may deem necessary for the government of the persons and property within their own country belonging to their own people or such persons as have connected themselves with them,” then the United States Government has no more control over the public property of that nation or the action of its legislature in connection therewith than it has over the public property or legislative acts of a State or Territory.

The relation of the United States to the funds now in the Treasury belonging to the Cherokee Nation is simply that of trustee, but as to funds that may come into possession of that nation, and not thus held, the disposition thereof is a matter over which the United States have no control whatever, either as trustee or otherwise.

With all deference to the accomplished gentlemen who have so ably presented the case of the freedmen, we can not but regard as mere sophistry the proposition, asserted with so much vigor, that unless the liberated slaves of the Cherokees acquired rights in the soil--to the lands--of the Cherokees “their freedom is a mockery.” What rights to the lands or wealth of their masters did the liberated slaves acquire in Georgia? Georgia was “the land of their birth.” “Whatever of knowledge of life they had was knowledge of life” in Georgia. “Whatever of knowledge of men they had was knowledge” of the Georgians. Yet they did not acquire a foot of land without buying it, which they had no means of doing, nor could they occupy an acre of land without paying rental for it.

In the Cherokee Nation the freedmen did enjoy this important privilege. The privilege to use and occupy, free of cost, all the land they can improve and till has never been denied them. They have enjoyed it from the day of their emancipation, and they enjoy it today. Their right to vote, to sit on juries, to sue and be sued, to receive the benefits of public schools and charities, has never been questioned or abridged in the slightest, and whenever the lands belonging to the Cherokees shall be offered for sale, if they are possessed of the requisite means and wish to do so, they can purchase lands for homes and other purposes, just as freedmen in Georgia or Mississippi who have like means and like inclination. Even if we grant that had Georgia possessed public lands its liberated slaves would have become entitled to share in them (which might or might not have been the case), it does not follow that Cherokee freedmen would take the same benefits.

*Mr. Assistant Attorney-General Dodge* appeared for the United States.

NOTT, J., delivered the opinion of the court:  
In the case of the *Delaware Indians v. The Cherokee Nation* (28 C. Cls. R., 281; 155 U. S. R., 196) three things were determined. The first was that the lands of the nation are public property in the same sense that the lands of the United States are public property, and not communal property of native Cherokees. The second was that the Delawares were entitled as citizens by adoption to participate in the distribution of the proceeds of the public domain equally with native Cherokees. The third was that statutes enacted by the national council which discriminate against Delawares by distributing the proceeds of the public domain exclusively among “Cherokees by blood” are to that extent and as against the Delawares unconstitutional and void.

The present suit represents another class of adopted Cherokee citizens--the freedmen of the nation. Their case varies somewhat from that of the Delawares, but rests on the same constitutional provisions, those adopted in 1866, which are in these words:

“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 of 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.”

But there were two elements in the case of the Delawares which were considered in connection with the above provisions, and may have affected the interpretation given to the constitution. The first was the *Treaty 19th July, 1866* (14 Stat. L., p. 799), between the United States and the Cherokee Nation which preceded and induced the constitutional amendments above set forth; the second, the treaty or agreement, 8th April, 1867, between the Cherokee Nation and the Delawares, by virtue of which the latter entered into and became a part of the nation.

At the close of the civil war the Cherokee country was virtually conquered territory, and the Cherokee Nation at the mercy of the United States. As a condition to peace and the continued existence of the nation as a government, the United States insisted, among other things, that certain Indian tribes might be incorporated into and form a part of the body politic, or at least be removed into the Cherokee country. This condition was agreed to and embodied in the treaty. But at the same time there were limitations set upon the obligation--the “civilized Indians friendly with the Cherokees” who were so to be brought in were to pay “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 sustained to the whole number of Cherokees” then residing in the Cherokee country; and their settlement in the Cherokee country was not to be altogether a matter of right, but “on such terms as may be agreed upon by any such tribe and the Cherokees, subject to the approval of the President of the United States” and consistent with the terms of the treaty.

Pursuant to the intent of the treaty, the Cherokees and the Delawares did enter into such an agreement 8th April, 1867. The Cherokees agreed “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 160 acres for each individual of the Delaware tribe who has been enrolled upon a certain register made February 18, 1867.” And they further agreed that “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.” The Delawares on their part agreed to pay for these lands “a sum of money equal to \$1 per acre for the whole amount of 160 acres of land for every individual Delaware.” They also agreed “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.”

The treaty also provided that the “friendly Indians,” who might abandon their tribal organization and remove into the Cherokee country, “shall be incorporated into and ever after remain a part of the Cherokee Nation, on equal terms in every respect with native citizens.” And the agreement with the Delawares went still further and provided:

“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.”

The freedmen did none of these things. In 1866 they were, or had been, inhabitants of the Cherokee country. The treaty created for them new rights, “the right to settle in and occupy,” with others, a designated district; the right with the other inhabitants of the district “to elect all their local officers and judges” and “to control all their local affairs” not inconsistent with the constitution of the nation; and to representation in the national council. The treaty also secured for them the guaranty that “all laws of the Cherokee Nation shall be uniform throughout said nation” and that the freedmen “and their descendants shall have all the rights of native

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Cherokees.” The freedmen entered into no agreement; they were not parties to the treaty; they paid nothing for the homes they acquired and they contributed nothing to the national fund in the custody of the United States. Neither did the Cherokees enter into an express agreement with them, as with the Delawares, that they should become members of the Cherokee Nation “with the same rights and immunities,” and “the same participation in the national funds as native Cherokees,” and that their children thereafter born “should in all respects be regarded as native Cherokees.”

The freedmen now seek a decree awarding to them their proportionate share in the avails of the “public domain” as if they were native Cherokees and “in and to all and singular the moneys, lands, and other property of the Cherokee Nation.” The counsel for the defendants contend that a distinction can be drawn between this case and that of the Delawares; that the rights of the freedmen in the Cherokee Nation are political and not communal; that they acquired no right of property under the treaty except that of possessing 160 acres each.

Here it should be noted that when the treaty was made there had long been a peculiar class of citizens in the Cherokee country--white men who became citizens by intermarriage. Concerning them Cherokee law had declared that if one be left a widower he should continue to enjoy the rights of citizenship unless he should marry a person “having no rights of Cherokee citizenship by blood.” Also, that if one should abandon his wife he should “thereby forfeit every right and privilege of citizenship and be removed from the nation.” There was also a significant provision attached to the law allowing citizenship by intermarriage, which was in these words:

*“Provided, also, That the rights and privileges herein conferred shall not extend to right of soil or interest in the vested funds of this nation, unless such adopted citizen shall pay into the general fund of the national treasury a sum of money, to be ascertained and fixed by the national council, equal to the ‘pro rata’ share of each native Cherokee in the lands and vested wealth of the nation, estimated at five hundred dollars.”* (Code, p. 224.)

The idea therefore existed, both in the mind and in the laws of the Cherokee people, that citizenship did not necessarily extend to or invest in the citizen a personal or individual interest in what the constitution termed the “common property,” “the

lands of the Cherokee Nation.” In accordance with this idea the national council, by an act approved April 27, 1886, entitled “An act of construction of the rights of Cherokee citizenship as designed to be conferred upon the freedmen and friendly Indians by the ninth and fifteenth articles of the treaty of 1866,” enacted and declared as follows:

“That the phrase ‘all the rights of native Cherokees,’ as used in the 9th and 15th articles of the treaty of July 19th, 1866, between the United States and this nation, is hereby construed to mean the individual rights, privileges, and benefits enjoyed by white adopted citizens of this nation before and at the making of said treaty, and who had been by law admitted to ‘all the rights of a native Cherokee, civil, political, and personal,’ as subjects of the Cherokee Nation of Indians, without acquiring any right or title to the Cherokee domain, or to the proceeds thereof, when made subject to a division among those to whom such domain had been conveyed, all the rights of the lands held and owned by this nation, and to the principal of the proceeds thereof when realized, being reserved by and to the original Cherokee owners, as in the case of white adopted citizens aforesaid, subject to be conveyed or granted only at the option of said owners or for value received, according to agreements provided to be made with friendly Indians in conformity with the 15th article of said treaty.”

The fact is that from the constitution of 1837 to this statute of 1886 there were two inconsistent principles operating in the affairs of the Cherokee people. The common mind clung to the hereditary idea that the lands of the Cherokees are communal, and, like all communal lands, heritable, descending with the blood of the owners. And the constitution left the communal character of the lands, so far as individual ownership was involved, unchanged. No titles in fee simple existed or could exist; the citizen had but the right of occupation; the right of occupation was heritable, but inalienable; when occupancy ceased the right of occupation expired. So far as appearances went the lands continued to be the common property of the Cherokee people--of the people who had inherited them from their Cherokee fathers--of the people who were “Cherokees by blood.” That alien tribes admitted within the bounds of Cherokee territory would thereby become joint owners in their own common property in their lands, occupied or unoccupied, was unanticipated by the mass of the people. Still less was it anticipated in 1866 that their former servants and bondmen, then admitted to free homes within the Territory would one day claim that

by virtue of that admission they had become coequal owners with the Cherokees who were Cherokees by blood in the vast domain of their unoccupied lands. It was no more thought that these strangers would be admitted to share in the unoccupied lands of the Cherokees than in their cultivated fields. To allow them to dwell within their Territory and vote and be called Cherokee citizens and enjoy political rights was one thing; to give them an equal share with themselves in their own exclusive, though undivided, property was another. The communal idea, too, had been kept alive until 1866 by the national fund in the Treasury of the United States. Had not Cherokees by blood, and by blood only, received annuities? Was not that fund derived from the sale of their lands? If they had sold all of their unoccupied lands before the intrusion of the Delawares and freedmen would not the national fund have been immensely larger and would not their annuities have been proportionately greater? Moreover, had there not been strangers in the Cherokee country ever since the time when the nation was forcibly brought from its territory in Georgia--white men who were allowed to live and occupy and intermarry--but had it ever been asserted by these intruders, or by the United States on their behalf, that they could share in the annuities or lay claim to the proceeds of the lands?

Nevertheless, a conflicting principle had been embodied in the supreme and statute law of the Cherokees. By the adoption of the constitution in 1837 the title of the common property passed from the communal owners and became vested in the newly founded government of the nation. The character of the communal owners also changed. They became, and thenceforth were to be, simply "citizens;" citizens whose rights were defined and limited by their constitution and their laws. The constitution does indeed declare that "the lands of the Cherokee Nation shall remain common property," but other provisions show that this one meant that the soil, whether occupied or unoccupied, was never to become individual property, and that the estate of the citizen in the realty which he possessed was always to be limited to a right of occupancy. Communal property and communal owners gave place to "the public domain" and to "citizens of the Cherokee Nation."

The counsel for the defendants have pressed upon the court with great force and earnestness the argument that the idea of communal property is and always has been inborn with the Indian, and that the Cherokees never could have intended to admit the freedmen to other than political rights. It is said:

"There is and can be no analogy between the Cherokee Nation and the United States or a State in respect to the public national possessions. We can not imagine such a thing as a sale of our public domain for the purpose of distributing the proceeds pro rata among the 'citizens.' No such transaction was ever dreamed of. But it always has been, and is to-day, the central idea of the Indian, whether wild, half civilized, or civilized. There has not been a session of Congress in a century that legislation has not been enacted looking to the purchase of Indian lands or extinguishment of Indian titles and payment, in some form, to the individual members of the tribe or tribes making the cessions. Some payment, per capita, is the almost invariable accompaniment of the transaction, down to the present movement, and so tenacious are they of this idea that without it the effort to negotiate treaties would be a futile undertaking.

"Holding these ideas of their common lands and property, following the traditions of centuries, as well as being prompted by self-interest, it is incredible that the Cherokees intended to give away interests equal with their own, in all their lands and wealth, the inheritance of their fathers, and this not only to the former slaves of some of their citizens, but to all colored persons who happened to be in their country at the close of the war."

But the court carefully considered this question of communal property in the previous case of the Delawares, and that decision has been affirmed by the Supreme Court. It was there held that while all Indian lands were originally communal, the fee being vested in the community as such with a mere right of occupancy in members of the community regulated and restricted by custom, in the Cherokee country the control has passed from the communal owners and become lodged in the State, and the unoccupied lands or "public domain," analogous to the public lands of the United States, is held absolutely by the Government as a trust for governmental purposes and the general welfare. The facts that the freedmen did not pay for the homes which they acquired; that they did not contribute to the national fund; that they did not come into the nation by virtue of an express agreement; that their foothold was acquired exclusively through the interposition of the United States, and exclusively by virtue of the treaty of 1866, are facts which operate against the equity of their case, but do not take their legal rights out of the safeguard of the constitution, or the obligations of the treaty. When the Cherokee people wrote into their constitution in 1866 "all nativeborn Cherokees, all

Indians and whites legally members of the nation by adoption, and all freedmen," "shall be taken and be deemed to be citizens of the Cherokee Nation," they fixed the status of the freedman and raised him to the same rank of citizenship which they themselves enjoyed. Thenceforth he was to be equal with themselves under the constitution, governed by the same laws, enjoying the same rights, possessed of the same immunities, and entitled to the same protection. If the common property was to be retained for the general welfare, he was to share equally in its benefits; if it was to be sold and its proceeds divided, the constitution made it as much his as theirs.

The court appreciates the earnest argument of the counsel for the defendants that this result could not have been anticipated by the Cherokees when they ratified the treaty of 1866, and the court has heretofore anticipated the counsel in an expression of the same opinion (28 C. Cls. R., 317). The result indeed was not anticipated. If the Cherokee Nation had grown and the national territory had been filled according to the ordinary law of empires, by natural increase and immigration, this vexed question would never have been heard of; or if a portion of the public domain had been sold and the proceeds had been applied to governmental purposes, the freedmen sharing with the Cherokees equally in the benefits accruing therefrom, no one would have quarreled with the result. The trouble has come from the fact that, to quote the language of the previous opinion, "the Cherokees are selling the heritage of their fathers and the patrimony of their children, and dividing the money among the present generations--that is, among themselves--instead of funding it as a part of their national resources for the welfare of those who are to come after them." The Cherokees did not foresee that this radical change of conditions would take place; neither did the Delawares and the freedmen. If it had been foreseen, the one party might have stipulated that the proceeds of the property should go exclusively to themselves who were Cherokees by blood. But the other party might also have stipulated that the public domain of the nation of which they were about to become citizens should not be squandered in this way, and should remain what it then was, the common property of all.

It is also urged by the counsel for the defendants and with great force that the sovereignty of the Cherokee Nation has always been and is now recognized by the United States; and that as a sovereign power it has the inherent right to administer its internal affairs in its own way and to regulate the rights of its citizens by its own laws. It is said:

"That the Cherokees possess the sole and exclusive right to manage their own internal affairs and of control of the persons and property of their citizens there has been no question for more than half a century, and this right has been recognized by the Government of the United States by an unbroken current of precedents through all this time.

"So, if we admit for the sake of argument that the freedmen, under the treaty of '66, have an interest in all the common property of the Cherokee Nation, that nation, under the decisions of this court and the Supreme Court, the opinion of the Attorney-General and the Secretary of the Interior, has a perfect right to make such disposition of its lands and moneys as it may see fit and proper, whether affecting members by blood or adoption, and there is no right or power vested or reserved in the United States to interfere. As a matter of fact, if we apply the principles laid down by the courts, the Attorney-General and the Secretary of the Interior, which recognize the absolute unrestricted right of self-government in the Cherokee Nation as to its internal affairs, and the right guaranteed to that nation 'to make and carry into effect all such laws as they may deem necessary for the government of the persons and property within their own country belonging to their own people or such persons as have connected themselves with them,' then the United States Government has no more control over the public property of that nation or the action of its legislature in connection therewith than it has over the public property or legislative acts of a State or Territory."

These propositions are in the abstract sound--are indeed incontrovertible. But the trouble with their application to the present case is, first, that the legislative authority of the national council is not absolute, but is limited and defined by the constitution of the nation; second, that its action can not control or abrogate the treaty obligations of the nation to the United States.

The United States did not, it may be conceded, stipulate for more than that the freedmen should become citizens "with all the rights," that is, political rights, "of native Cherokees," and that "all laws of the Cherokee Nation shall be uniform throughout said nation," and that the President of the United States should have the power to secure to the freedmen "a fair and equitable application and expenditure of the national funds;" but the constitution of the Cherokee Nation then came into the case and defined what citizenship was, and in express terms ranked

“freedmen” with “native-born Cherokees,” and the lands of the nation as “common property.” If those lands had remained common property, unsold, and held for governmental purposes, it seems incontrovertible that all classes of citizens, Cherokees by blood and Cherokees by adoption, would have been, as citizens, equally and mutually entitled to the national benefits which might be derived from them. And to the court it seems equally incontrovertible that when the national council saw fit to change the lands into money, the fund took the place of the lands and was subject to the same limitations and existed for the same beneficiaries. Primarily it existed for national purposes, the construction of roads, the erection of public buildings, the endowment of schools, and the abatement of taxation—for those objects which are comprehended in the term “the general welfare.” The national council did not and could not divert the common property of the nation from the general welfare and transmute it, at will, into a communal fund belonging to a class of citizens. If the fund retained the characteristic of the lands, that of common property, it necessarily was the common property of all.

It is possible that there still exists, or hereafter may be revived, a species of property which is an exception to the previously expressed conclusions of the court. To prevent future misapprehension and complication this will now be noted.

The United States have repeatedly recognized in their transactions with the Cherokees the dual character of the people, sometimes national, sometimes communal. They have also recognized portions of the people as distinct communities. In 1835 they so dealt with the Georgia Cherokees as communal owners, setting apart a portion of the purchase money of their lands for national purposes, but paying part to them per capita. In 1846 they so dealt with the Western Cherokees, segregating them from the mass of their countrymen and paying them individually, a community within a community. In 1866, and by the very treaty which lies at the foundation of this suit, they recognized the Delawares as communal owners of a fund in the Treasury. For though the Delawares were to be merged in the Cherokee Nation and become Cherokee citizens, and contribute to the Cherokee fund, nevertheless there was to remain in the Treasury a portion of the Delaware fund which would not pass to the nation for national purposes, but would continue to be the separate property of a people who were no longer to be a body politic, a nation, but who, so far as the ownership of the fund was concerned, were still to be communal owners.

Still later the United States have recognized the continued existence of these communities by allowing them to bring actions in this court in regard to their communal property. (*Eastern Cherokees v. The United States*, 20 C. Cls. R., 449; *Western Cherokees v. Same*, 27 id., 1; *Shawnees v. Same*, 28 id., 447; *Delawares v. Cherokee Nation*, 28 id., 281.) The claimants now ask the court to decree that the freedmen are entitled to participate with all the other members of the nation in all of the remaining common property upon equal terms with the other members of the nation. The court is not informed whether there still exists funds or annuities which were originally treated as communal by distribution per capita and not as national by being set apart for school purposes, charitable uses, etc. If there should be such a fund, it is the opinion of the court that its original character continues, and that it must be regarded as belonging to that community or portion of the Cherokee people who are or were entitled to be paid its proceeds per capita, whether they were those formerly known as Western Cherokees, Delawares, and Shawnees, or those now known as “Cherokees by blood.” Payment per capita must be regarded as the badge or recognition of an individual communal interest as distinguished from a governmental or national ownership. Such funds are not “common property” within the intent of the Cherokee constitution, but trust estates in the custody of the United States for the benefit of designated individuals or communities. Over them the Cherokee government has no legitimate control, and in them the freedmen have no estate or interest.

The agreed statement of facts upon which the case has been considered sets forth the various funds which have been distributed in whole or in part among those who are “Cherokees by blood,” but does not inform the court of the number of persons who were entitled to participate, or of the number of persons who constitute the body of the present claimants. Until that information is spread before the court a final decree determining definitely the rights and liabilities of the parties litigant can not be entered. The court will entertain the suggestions of counsel as to how the requisite information shall be obtained; and in the meantime, and until the further order of the court, the entry of judgment is suspended.

Ct.Cl., 1895

Whitmire v. Cherokee Nation

Not Reported in Ct.Cl., 30 Ct.Cl. 138, 1895 WL 708 (Ct.Cl.)

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