

*Some have held with us  
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Dist. Ct.*

*Brief in all cases*

**IN THE SUPREME COURT OF THE UNITED STATES.**

**OCTOBER TERM, 1898.**

**Nos. 453 and others.**

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THE CHOCTAW NATION, APPELLANT,

*vs.*

F. R. ROBINSON ET AL., APPELLEES.

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Appeals from the United States Court in the Indian Territory.

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**BRIEF OF APPELLEES.**

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**Statement.**

The appellant, Choctaw nation, has had the records printed in above cause No. 453, and has filed brief therein. The contents of records in causes Nos. 582, Choctaw Nation *vs.* Martha Jones *et al.*; 583, Do. *vs.* Charles Goodall *et al.*; 584, Do. *vs.* Z. T. Bottoms *et al.*; 586, Do. *vs.* L. L. Blake *et al.*; 588, Do. *vs.* Robert Goins *et al.*; and 589, Do. *vs.* Henry Dutton *et al.*, are agreed to and agreement is on file, which agreement is hereafter designated as A. This brief is intended to apply only to said last named causes on behalf of the appellees therein. *In 582*, the record shows all the applicants are Choctaw Indians by blood, except a few therein mentioned as members of the tribe by intermarriage; and the court, upon the evidence and master's report, decreed that all those shown to be blooded Choctaws, and

those who had married into the family prior to the passage of the Choctaw marriage laws, and those who subsequently married into said family in compliance with said laws, were members of the tribe of Choctaw Indians, and as such were entitled to be enrolled. Most of the applicants in this cause were, and for many years had been, residents of the Chickasaw nation prior to the filing of application for enrollment, but a few of them were non-residents at the time. (A.)

*In cause No. 583*, the record is substantially the same. (A.)

*In cause No. 584*, the record is substantially the same. (A.)

*In cause No. 588*, the court, upon the master's report and the evidence, decreed that all the appellees except three are members of the tribe of Choctaw Indians by blood, and that three of them, having married into the family prior to the Choctaw marriage laws, were members of said tribe by intermarriage. Some of appellees were residents and others were non-residents of the Chickasaw and Choctaw nations, when application for enrollment was filed, and the court decreed that all the appellees, Choctaws by blood, and three others, members of the tribe by intermarriage, were entitled to enrollment. (A.)

*In cause No. 589*, the court, upon the evidence in the cause, held that all the applicants are members of the tribe of Choctaw Indians by blood, except Henry Dutton and J. G. Buck, which were held to be members thereof by intermarriage, and decreed they were entitled to be enrolled as members of said tribe. All the applicants are residents of the Chickasaw nation.

*In cause No. 586*, the applicant, L. L. Blake, in 1866, in the State of Texas, was married to Virginia Wall, a Choctaw woman by blood, and soon thereafter moved into the Indian Territory, where his wife died in June, 1867. August 12, 1869, said Blake married a Miss Thedia Crowder, a citizen of the United States and a resident of Arkansas, and

thereafter lived in the Indian Territory where he raised a family. Two of his daughters married white men, Graham and Coleman, in accordance with the laws of the Chickasaw nation. The court decreed that Blake and his second wife, their children, sons-in-law and grandchildren, are members of the tribe of Choctaw Indians and as such were entitled to be enrolled. All applicants for many years have been, and are yet, residents of the Chickasaw nation, and all are white persons. (A.)

*In cause No. 587*, all of the applicants were admitted as citizens of the Choctaw nation by blood, and as lineal descendants of Giles Thompson, a Choctaw by blood, except a few of the applicants, who were admitted as members of said tribe, by reason of their marriage into said family. Under the rules of the court, construing the Indian marriage laws, copied in the Roff record, all the applicants by marriage were admitted, and the proof shows all the other applicants beyond question are Choctaws by blood.

In all of the cases appealed to this Court from the U. S. Court in the Indian Territory, Southern District, wherever the question of the applicants residence was involved, that question was made an issue and was passed upon by the master and the court, but when no such defense was interposed by the nation, and no question of residence was raised, the master's reports and the final judgments of the court are *silent as to the question of residence*. To be more plainly stated, the master in his report, and the court in its final judgment, made no reference to the question of residence, where the evidence affirmatively showed that the applicants were residents of the nation to which they claimed citizenship. In all others the question was specially passed upon.

All the judgments in the foregoing causes were, by the court below, rendered and made final prior to the 1st day of July, 1898. And, although not disclosed by the record, it

is a fact the term of court at which said judgments were rendered had finally adjourned prior to July 1, 1898. The Indian appropriation bill, approved July 1, 1898, among other things, provided: "Appeals shall be allowed from the United States courts in the Indian Territory direct to the Supreme Court of the United States to either party *in all citizenship cases*, and in all cases between either of the Five Civilized Tribes and the United States involving the *constitutionality or validity* of any legislation *affecting citizenship* or the allotment of lands in the Indian Territory, under the rules and regulations governing appeals to said court in other cases: Provided, that appeals in cases decided prior to this act must be *perfected in one hundred and twenty days from its passage*; and in cases decided subsequent thereto, within *sixty days from final judgment*; but in no such case shall the work of the Commission to the Five Civilized Tribes be enjoined or superseded by any proceeding in, or order of, any court, or of any judge, until after *final judgment* in the Supreme Court of the United States. In case of appeals, as aforesaid, it shall be the duty of the Supreme Court to advance such cases on the docket and dispose of the same as early as possible." (U. S. Stat., 2nd session, 1897-1898, p. 591.)

Appellees contend that no appellate jurisdiction of said causes have attached to this Court, and therefore said causes should be dismissed from the Court's docket for the following reasons:

1st. Because the judgments appealed from were final and vested in the appellees the *vested and valuable right of Indian citizenship*, and as the act of Congress cited *supra*, was passed since the rendition of said judgments and is an attempt to confer upon this Court the power to reopen and retry said causes, said act is unconstitutional and void.

2nd. Because if said act confers upon this Court appellate

jurisdiction to pass upon said causes in any respect it gives to the Court the right only to enquire into, pass upon and determine the *constitutionality or validity* of the act of Congress of June 10, 1896, conferring upon the commission to the Five Civilized Tribes the right to pass upon and determine the citizenship of such tribes, and as such questions of law are not certified to this Court for its consideration, they cannot be considered by the Court.

3rd. Because the records herein were not filed with the clerk of this Court within one hundred and twenty days from July 1, 1898, and therefore the appeals herein were not perfected in accordance with said act of Congress.

In a recent opinion rendered by this honorable Court involving the question of citizenship, it was in effect held that the citizenship of a citizen of the United States is a vested right which cannot be impaired or divested by act of Congress or judicial decree. (U. S. vs. Wong Kim Ark.)

(If that be the law, *a fortiori*, the citizenship of a Choctaw or Chickasaw Indian is beyond question a vested and valuable right, for the reason that such citizenship and the right of property are dependent the one upon the other and to destroy the one is a destruction of the other.)

Prior to the act authorizing the Dawes Commission to make up a roll of citizens of the Five Tribes, the citizenship of such tribes was passed upon and determined by tribal courts, or committees, and from their decision appeals were taken to the Secretary of the Interior, whose decision, or that of the Attorney-General, seems to have been treated as final: In passing on the citizenship of a Cherokee citizen, whose right of citizenship had been passed upon by the chief justice of that tribe and decided in the applicant's favor, and wherein pursuant to an act of the Cherokee council a citizenship committee attempted to reopen and readjudicate the citizenship of such applicant, Attorney-

General Garland in an able opinion held the decision of the chief justice to be final and conclusive, and as Cherokee citizenship is a vested right the question could not be reopened and retried. (19 Opinion Attorney-General, 229.)

There being no fraud or mistake in the rendition of the judgments by the court below, in these cases, we submit the doctrine announced in the opinion of this Court in case of *Samperyac vs. U. S.* (7 Pet., 222), has no application herein.

But if this honorable Court should hold that the act in question is constitutional, then the query arises to what extent does the revisory jurisdiction of this Court go. Does it confer upon the Court the right to review the merits or evidence introduced in the court below, or does it extend only to the right of this Court to pass upon the *validity and constitutionality* of the act of June 10, 1896 (cited *supra*), conferring upon the Dawes Commission the right to make up a roll of citizens. If the language employed in the act, viz: "And in all cases between either of the Five Civilized Tribes and the United States," be eliminated from the act, or is followed by a comma, then the language of the act infallibly indicates that by such act Congress conferred upon this Court the right only to inquire into the *constitutionality or validity of legislation* affecting citizenship. But let the punctuation and the act remain as it is, then what does the act mean? But two classes of cases are mentioned, viz: (1) a case involving the constitutionality or validity of citizenship wherein the Indian nation and the applicant for citizenship are the only necessary parties, and (2) a case wherein the constitutionality or validity of legislation affecting the allotment of lands is involved wherein the United States is one and one of the tribes is the other necessary party. In the first case if either the nation or the applicant (the losing party) doubts the validity or constitutionality of the act of 1896, under

which a final judgment is rendered either granting or denying citizenship he or it may, by appeal, obtain the opinion of this Court upon such question.

Under the act of Congress, approved June 28, 1898, entitled "An act for the protection of the people of the Indian Territory, and for other purposes," (U. S. Stat., 2nd Session 1897-1898, p. 495,) the allotment of the lands of the Five Civilized Tribes was provided for.

Section 11 of said act (*Id.*, p. 497) reads: "That when the roll of citizenship of any one of said nations or tribes is fully completed as provided by law, and the survey of the lands of said nation or tribe is also completed, the commission heretofore appointed under acts of Congress, and known as the 'Dawes Commission,' shall proceed to *allot* the exclusive use and occupancy of the surface of all the lands of said nation or tribe susceptible of allotment among the citizens thereof, as shown by said roll, giving to each, so far as possible, his fair and equal share thereof, considering the nature and fertility of the soil, location, and value of same," etc.

The effect of this act of Congress was to coerce these tribes into an allotment of their lands in severalty without the assent of the tribes, unless the Choctaw and Chickasaw tribes should ratify the agreement theretofore entered into by the Dawes Commission and their commissioners which provided for allotment, Section 29, *Id.*, 505. So, therefore, on the 1st day of July, 1898, these five tribes were confronted by two conditions: 1st, to submit to the making of a complete roll of their citizenship by the Dawes Commission pursuant to act of Congress June 10, 1896; and 2nd, to submit to a coercive allotment of their lands pursuant to act of June 28, 1898 (*supra*), or to enter into agreements with said commission to allot the same. Under the first act by its express terms the judgment of the court granting or denying citizenship

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 was final, and the last act purported to allot lands through the Dawes Commission, and neither expressly or by implication recognized the right or power of the tribes to settle questions of citizenship or to allot their lands, but by these acts of Congress (this "legislation") the Dawes Commission, to the exclusion of the tribes, was given the right to pass upon and determine who were citizens or members of these tribes, and to allot their lands.) The power or right of Congress to pass this legislation affecting the citizenship or the allotment of the lands of these tribes was questioned by the tribes, hence it is plain Congress, to settle the question of the constitutionality or validity of its said acts affecting the citizenship of these Indians and the allotment of their lands, attempted to refer the question to this Court for its consideration and final adjudication.

The records in these Choctaw cases were not filed with the clerk of the Court within 120 days from the passage of the act of July 1, 1898, and as the judgments in the court below were rendered prior thereto, we earnestly insist that none of the appeals herein have been "perfected in 120 days" from the passage of the act attempting to confer the right of appeal. (U. S. Stat., 1897-1898, 2nd Sess., 591.)

Paragraph 3, Rule 8 of this Court reads: "No case will be heard until a complete record containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing in this court, shall be filed." It is no answer to the contention to say a writ of error or appeal allowed by the court perfects the appeal, but we submit the rules of this Court show such appeal is not recognized (not perfected) until a complete record is filed with the clerk. For the reasons stated we seriously but earnestly insist that these cases should be dismissed from the docket of the Court.

## II.

Counsel for the nation in his brief presents to this Court the question, "Can the United States determine who shall be a citizen of the Choctaw nation, or is that a right that rests exclusively in that nation?" And states the "Choctaw nation contends that the United States has not the right to determine who shall be citizens of that nation, but that this is a right that vests in that nation exclusively as the sovereign."

Without rehearsing the history of the Choctaw tribe, we submit that this and the remainder of the Five Tribes, and all other tribes, of Indians in the United States, have at all times been under the direct supervision and control of the United States Government, and the history of Choctaw citizenship shows that appeals have been allowed from the Choctaw and Chickasaw citizenship, courts or committees, direct to the Secretary of the Interior, and the decision of the Secretary has been treated as final.

In the Indian appropriation act of June 7, 1897 (U. S. Stat., 1897, 1st Sess., p. 83), the Dawes Commission is directed "to examine and report to Congress whether the Mississippi Choctaws, under their treaties, are not entitled to all the rights of Choctaw citizenship *except an interest in the Choctaw annuities;*" and the jurisdiction of the tribal courts are taken from the Five Tribes and conferred upon the United States Court in the Indian Territory, and said United States Court is given original and exclusive jurisdiction to "try and determine all civil causes in *law and equity* \* \* \* and all *criminal causes* for the punishment of any offense committed after January 1, 1898, by any person in said territory \* \* \* and the laws of the United States and the State of Arkansas in force in the Indian Territory" is made to "apply to all persons therein, *irrespective of race,* \* \* \* and *any citizen of any one of said tribes* otherwise

qualified who can speak and understand the English language may serve as a juror in any of said courts." In the act of June 27, 1898 (commonly called the Curtis Bill, see p. 495, U. S. Stat., 2nd Sess., 1897-8), in section 2 it is provided: That in the progress "of any civil suit, in law or equity, pending in the United States Court in any district in the Indian Territory, if it shall "appear to the court that the property of any tribe is in any way affected by the issues being heard, said court is hereby authorized and required to make said tribe a party to said suit by service upon the chief or governor of the tribe, and the suit shall thereafter be conducted and determined as if said tribe had been an original party to said action."

Section 3 (same act, p. 496): "That said courts" (meaning U. S. Courts) "are hereby given jurisdiction in their respective districts to try cases against those who may claim to hold as members of a tribe and whose membership is denied by the tribe, but who continue to hold said lands and tenements notwithstanding the objection of the tribe; and if it be found upon trial that the same are held unlawfully against the tribe by those claiming to be members thereof, and the membership and right are disallowed by the commission to the Five Tribes, or the United States Court, and the judgment has become final, then said court shall cause the parties charged with unlawfully holding said possessions to be removed from the same and cause the lands and tenements to be restored to the person or persons, or nation or tribe of Indians, entitled to the possession of the same."

Section 11 same act (497): "That when the roll of citizenship of any one of said nations or tribes is fully completed as provided by law, and the survey of the lands of said nation or tribe is also completed, the commission heretofore appointed under acts of Congress, and known as the 'Dawes Commission' shall proceed to allot the exclusive use and occupancy of the surface of all the lands of said nation or

tribe susceptible of allotment among the citizens thereof, as shown by said roll, giving to each so far as possible, his fair and equal share thereof, considering the nature and fertility of the soil, location and value of the same," and providing that said commission after allotting said lands shall make full report thereof to the Secretary of the Interior for his approval."

Section 27 (same act, 504): "That on and after the passage of this act *the laws* of the various tribes or nations of of Indians shall not be enforced at law or in equity by the courts of the United States in the Indian Territory."

Section 28: "That on the 1st day of July, 1898, *all tribal courts in Indian Territory shall be abolished,*" and conferring jurisdiction upon the United States Court in the Indian Territory to try and determine all civil and criminal cases pending in the tribal courts after dates in the act mentioned.

Section 29 (same act, p. 505): "That the agreement made by the commission to the Five Civilized Tribes with commissions representing the *Choctaw and Chickasaw tribes* of Indians on the 23d day of April, 1897, as herein amended, is hereby ratified and confirmed, and the same shall be of full force and effect if ratified before the 1st day of December, 1898, by a majority of the whole number of votes cast by members of said tribes at an election held for that purpose; \* \* \* and if said agreement as amended be so ratified, the provisions of this act shall then only apply to said tribes where the same do not conflict with the provisions of said agreement."

To the act of Congress last cited said amended agreement is subjoined. (Same act, pp. 505 to 513.)

It will not be denied but that the Choctaw and Chickasaw tribes by a majority vote adopted and ratified said amended agreement within a few months after the act of Congress of June 28, 1898 (cited), was passed. This agreement provides for a complete allotment of "all the lands

within the Indian Territory belonging to the Choctaw and Chickasaw Indians to the *members* of said tribes so as to *give to each member \* \* \** as far as possible a fair and equal share thereof." (*Id.*, 505.) It gives to each member the preferred right to select his allotment upon lands where his improvements are situated, which improvements are not to be valued or estimated. (*Id.*, 507.)

It expressly states, "That *all controversies arising between the members of the said tribes as to their right to have certain lands allotted to them shall be settled by the commission making the allotments.*" (*Id.*, 507.)

"That the *United States shall put each allottee in possession of his allotment and remove all persons therefrom objectionable to the allottee.*" (*Id.*, 507.) This agreement provides, "that as soon as practicable, after the completion of said allotments, the principal chief of the Choctaw nation and the governor of the Chickasaw nation shall jointly execute, under their hands and the seals of the respective nations, and deliver to each of said allottees patents conveying to him all the right, title, and interest of the Choctaws and Chickasaws in and to the land which shall have been allotted to him in conformity with the requirements of this agreement, excepting all coal and asphalt in or under said land." (*Id.*, 507.)

"That the *United States shall provide by law for proper records of land titles in the territory occupied by the Choctaw and Chickasaw tribes.*" (*Id.*, 508.)

This agreement provides for the laying out, mapping, and establishing town sites in the Choctaw and Chickasaw nations, and sale of town lots in said towns, the work to be done by an Indian commission to be appointed by the executive of each of said nations, and commission to be appointed by the President in each of said nations; the purchase money of such sales to be deposited in the Treasury of the United States; said moneys to be deposited for the ben-

efit of the members of the Choctaw and Chickasaw tribes. (*Id.*, 508-9.) All royalty upon mines is to be paid into the United States Treasury, and shall be drawn therefrom subject to the rules and regulations to be prescribed by the Secretary of the Interior. (*Id.*, 510.)

It confirms all leasehold interests "in any oil, coal rights, asphalt, or mineral *which have been assented to by act of Congress.*" (*Id.*, 510.) It gives to the Secretary of the Interior the right to increase or diminish royalty on coal, etc. (*Id.*, 510), and the following stipulations are found therein: "It is further agreed that the *United States Courts* now existing, or that may hereafter be created, in the Indian Territory, *shall have exclusive jurisdiction of all controversies growing out of the titles, ownership, occupation, possession or use of real estate, coal, and asphalt in the territory occupied by the Choctaw and Chickasaw tribes \* \* \** and in all said civil suits said courts shall have full equity powers; and whenever it shall appear to said court, at any stage in the hearing of the case, that the tribe is in any way interested in the subject-matter in controversy, it shall have power to summon in said tribe and make the same a party to the suit and proceed therein in all respects as if such tribe were an original party thereto." (*Id.*, 511-12.) "It is further agreed, in view of the modification of *legislative authority and judicial jurisdiction* herein provided, and the necessity of the continuance of the tribal governments so modified, in order to carry out the requirements of this agreement, that *the same shall continue for the period of eight years from the fourth day of March, 1898.* This stipulation is made *in the belief that the tribal governments so modified will prove so satisfactory that there will be no need or desire for further change till the lands now occupied by the Five Civilized Tribes shall, in the opinion of Congress, be prepared for admission as a State to the Union.* But this provision shall not be construed to be in



*any respect an abdication by Congress of power at any time to make needful rules and regulations respecting said tribes."* (*Id.*, 512.)

The commission to the Five Tribes (now known as the "Dawes Commission") was created by the Indian appropriation bill of March 3, 1893 (27 Stat., 645), and were authorized by said act to visit the Five Civilized Tribes and negotiate with them for the allotment of the lands in the Indian Territory between the members or citizens of such tribes. Acting under said appointment said commission visited said Five Tribes, and after repeated efforts to negotiate with them did on November 20, 1894, and on November 15, 1895, make reports to the Congress of the United States of their progress and of the condition of affairs existing in said tribes as to the manner in which lands were held by the members, and the manner in which the citizenship of said tribes was dealt with.

In their report of November 20, 1894, this commission reported to Congress the condition of affairs in the Indian Territory (see Miscellaneous Senate Document No. 24, 53d Congress, 3d Session).

And on November 15, 1895, said commission made another report to Congress, and among other things said :

"It can not be possible that in any portion of this country government, no matter what its origin, can remain peaceably for any length of time in the hands of one-fifth of the people subject to its laws. Sooner or later violence, if nothing else, will put an end to a state of affairs so abhorrent to the spirit of our institutions. But these governments are of our own creation, and rest for their very being on authority granted by the United States, who are therefore responsible for their character. It is bound by constitutional obligations to see to it that government everywhere within its jurisdiction rests on the consent of the governed. There is already painful evidence that in some parts of the

Territory this attempt of a fraction to dictate terms to the whole has already reached its limit, and, if left without interference, will break up in revolution. The Chickasaw nation, in its zeal to confine within the narrowest limits and to the smallest number all privileges and rights, as well as participation in the government, and to weed out as many as possible of the uneasy, has enacted the following confiscation law :

"AN ACT to amend an act in relation to United States citizens procuring license to marry citizens of this nation.

"SECTION 1. *Be it enacted by the legislature of the Chickasaw Nation*, That an act in relation to United States citizens procuring license to marry citizens of the Chickasaw Nation be amended thus :

"SEC. 2. *Be it enacted*, That all United States citizens who have heretofore become citizens of the Chickasaw Nation or who may hereafter become such by intermarriage and be left a widow or widower by the decease of the Chickasaw wife or husband, such surviving widow or widower shall continue to enjoy the rights of citizenship, unless he or she shall marry another United States citizen, man or woman, as the case may be, having no right of Chickasaw citizenship by blood ; in that case all his or her rights as citizens shall cease and shall forfeit all rights of citizenship in this nation.

"SEC. 3. *Be it further enacted*, That whenever any citizen of this nation, whether by birth or adoption or intermarriage, shall become a citizen of any other nation or of the United States or any other Government, all his or her rights of citizenship of this nation shall cease, and he or she shall forfeit all the land or money belonging to the Chickasaw people.

"SEC. 4. *Be it further enacted*, That the rights and privileges herein conferred upon United States citizens by intermarriage with the Chickasaws shall not extend to the right of soil or interest in the vested funds belonging to the Chickasaws, neither the right to vote nor hold any office in this nation. All parts of acts coming in conflict with this act are hereby repealed, and that this act take effect from and after its passage.

“ ‘ Approved, October 1, 1890.

“ ‘ I hereby certify that the above is a true and correct copy of the original act now on file in my office.

“ ‘ Given under my hand and seal this the 18th day of October, 1895.

“ ‘ L. S. BURRIS,

“ ‘ *National Secretary, Chickasaw Nation.*’

“ It will be observed that among the other penalties here imposed the third section forbids on pain of confiscation any Indian citizen to apply under existing United States laws for United States citizenship, and thus gain a right to enter United States courts for vindication of his rights or avail himself of any anticipated authority conferred on that court to partition the common lands of the nation.

“ The anticipated enforcement of this act has caused great consternation and excitement among a considerable number of residents in the Chickasaw nation who were, up to its enactment, admitted citizens, enjoying all the rights accorded to any citizen, and possessed, some of them, of very large property interests in the nation. Preparation is being made by the authorities of the nation for its enforcement, and notice to quit is being served upon those to whom it applies. In the meantime threats of open resistance are rife. The resolutions of a secret organization among those whose property is by this act confiscated have been laid before the Commission, in which the determination is avowed ‘ in the event that Indian officials undertake to carry out this law to exterminate every member of this council from the chief down.’ The commission is appealed to for relief, but without power to interpose they can only bring this critical condition of affairs to the attention of the United States Government as one among the many reasons for immediate Congressional action.

#### “ CHEROKEE CITIZENSHIP.

“ Citizenship in these nations has been left by the National Government entirely under the control of the authorities in the several existing governments.

“ The citizenship roll of the Cherokees has dealt with a larger number than any of the others, affecting as it does

all North Carolina Cherokees who desire to become a part of the nation, and a more liberal policy of adoption by intermarriage and otherwise than exists in the other tribes.

“ A tribunal was established many years ago for determining the right of admission to this roll, and it was made up at that time by judicial decision in each case. Since that time and since the administration of public affairs has fallen into present hands, this roll has become a political football, and names have been stricken from it and added to it and restored to it, without notice or rehearing or power of review, to answer political or personal ends and with entire disregard of rights affected thereby. Many who have long enjoyed all the acknowledged rights of citizenship have, without warning, found themselves thus decitizenized and deprived both of political and property rights pertaining to such citizenship. This practice of striking names from the rolls has been used in criminal cases to oust courts of jurisdiction depending on that fact, and the same names have been afterwards restored to the roll when that fact would oust another court of jurisdiction of the same offense. Glaring instances of the entire miscarriage of prosecutions from this cause have come to the knowledge of the Commission and cases of the greatest hardship affecting private rights are of frequent occurrence. This practice is persisted in, in defiance of an expressed opinion of the Attorney-General of the United States forwarded to this nation on a case presented that it was not in their power to thus decitizenize one who has been made a citizen by this tribunal clothed by law with the authority. There is no remedy but an interference of the United States.

“ The ‘ intruders’ roll’ is being manipulated in the same way. This ‘ intruders’ roll’ is the list of persons whose claim to citizenship is denied by the nation, and who by the agreement in the purchase of the ‘ Cherokee Strip’ the United States are to remove from the Territory by the 1st of January next. This roll is now being prepared for that purpose by the Cherokee authorities, in a manner most surprising and shocking to every sense of justice, and in disregard of the plainest principles of law. The chief assumes to have authority to ‘ designate’ the names to be put upon

the intruders' roll, and names are, by his order, without hearing or notice, transferred from the citizens' roll to that of intruders, so that, on January 1, 1896, the United States will be called upon to remove from the territory, by force if need be, thousands of residents substantially selected for that purpose by the chief of the nation. It has been made clear to the Commission that the grossest injustice and fraud characterize this roll. Persons whose names have been upon the citizens' roll by the judicial decree of the tribunal established by law for that purpose for many years, some of them for twenty or more, persons who have enjoyed all the rights of citizens, unquestioned by anyone until distribution per capita of the strip money, have been by the mere 'designation' of the chief stricken from the citizens' roll and put upon that of intruders, with notice to quit before January next. Children of such parents, born in the nation, now of age, with families and homes of their own, are receiving this notice to leave forever all they have earned and the homes they have built for themselves, and this at the will of the chief alone. If the United States Government removes such persons it will become a participant in this fraud and injustice, for which ignorance alone can form any excuse. The Commission feel it a duty to call attention to these facts, and invoke the direct intervention of the Government to prevent the consummation of this great wrong.

"These remarks apply specially to the Cherokee Nation, with which the United States has recently entered into obligations in respect to 'intruders.' But much of what is here said is applicable also to the condition of affairs in the other nations. In these nations many persons coming to the territory by invitation of the governments themselves, or under the provisions of the laws enacted by them, and acquiring citizenship, with homes and property, in conformity to such laws, have been in many instances stricken from the rolls of citizenship by those in power, for political and personal purposes, and laws enacted and other means resorted to to deprive them of the homes and property acquired.

"The Commission is of the opinion that if citizenship is

left, without control or supervision, to the absolute determination of the tribal authorities, with power to decitizenize at will, the greatest injustice will be perpetrated, and many good and law-abiding citizens reduced to beggary."

(See Senate Document No. 12, 54th Congress, 1st session, pp. 14 to 17.)

Under the condition of affairs, as reported by this commission, we submit it was not only the right but the duty of Congress to confer upon it, as was afterwards done, the power to make a correct roll of the citizenship of each of the Five Civilized Tribes to the end that each member thereof would be protected in this his valuable right of citizenship. As the relation of the United States to these tribes is that of guardian to ward, when the Government was advised of the palpable frauds committed by those of political preferment among the tribes in the way of decitizenizing its own citizens, and thus forfeiting their interest in the joint estate, to our minds it was high time the guardian, through the agency of Congress, should have interposed its objection and arranged an adjustment of these gross wrongs, as it afterwards attempted to do.

### Jurisdiction of Lower Courts.

Counsel for appellee, Choctaw nation, orally argued that the United States Court in the Indian Territory, Southern District, had no jurisdiction upon appeal from the Dawes Commission to pass upon and finally decide the applications of Choctaws to be enrolled, because he insisted the Choctaw nation is situated in the Central and the Chickasaw nation the Southern District of the Indian Territory.

That portion of the act granting the right of appeal from the decision of the Dawes Commission in citizenship cases reads: "*Provided*, that if the tribe, or any person, be aggrieved

with the decision of the tribal authorities or the commission provided for in this act, *it or he* may appeal from such decision to *the United States District Court*: *Provided, however, that the appeal shall be taken within sixty days, and the judgment of the court shall be final.*" (U. S. Stat., 1st Sess., 54th Cong., 1895-6, p. 339.)

This act prescribed no rules of practice or procedure to govern either the commission or the "*United States District Court*" in the trial of these citizenship cases. At the date of its passage there was no *United States District Court* in this Territory, nor was there such a court in the States of Texas or Arkansas by that technical and literal name. The United States Court held at Fort Smith, Ark., is the "*United States District Court for the Western District of Arkansas*," and the court held at Paris, Texas, is the "*United States District Court for the Eastern District of Texas*," and the court in the Indian Territory is the "*United States Court in the Indian Territory*." Now, what did Congress mean by the term, "the United States District Court"?

March 1, 1889, Congress by act then passed, entitled "An act to establish a United States Court in the Indian Territory, and other purposes." (25 Stat., 783.)

Section 1. "That a *United States court is hereby established, whose jurisdiction shall extend over the Indian Territory*" (defining boundaries), and providing for appointment by the President of a judge, marshal and attorney for said court.

Section 7 provides that *two terms* of said court shall be held each year at *Muskogee*, in said Territory, on *first Monday in April* and *September*, and such *special sessions* as may be necessary for the dispatch of business in said court at such times as the judge may deem expedient. (*Id.*, 784.)

May 2, 1890, Congress on that date passed an act entitled, "An act to provide a temporary government for the

territory of Oklahoma, to enlarge the jurisdiction of *the United States Court in the Indian Territory*, and for other purposes." (26 Stat., 81.)

Section 30 of which reads:

"That for the purpose of *holding terms of said court*, said Indian Territory is hereby *divided into three divisions*, to be known as the *first, second and third divisions*;" defining each of the said divisions; naming places in each division where court shall be held, and provides the "*judge of said court shall hold at least two terms of said court each year in each of the divisions aforesaid, at such regular times as such judge shall fix and determine.*" (*Id.*, 94.)

March 18, 1895, Congress passed an act entitled "An act to provide for the appointment of additional judges of *the United States Court in the Indian Territory.*" (28 Stat., 693.)

Section 1. \* \* \* "That the territory known as the Indian Territory, now within the jurisdiction of the United States Court in said territory, is hereby divided into three judicial districts, to be known as the Northern, Central and Southern Districts, and at least two terms of the United States Court in the Indian Territory shall be held each year at each place of holding court in each district at such regular times as the judge for each district shall fix and determine. The Northern District shall consist of all the Creek country, all of the Seminole country, all of the Cherokee country, all of the country occupied by the Indian tribes in the Quapaw Indian Agency, and the townsite of the Miami Townsite Company. \* \* \* The Central District shall consist of all the Choctaw country. \* \* \* The Southern District shall consist of all the Chickasaw country." This act, also, provides for the appointment of two additional judges for said court, giving to each district a judge. In the Indian appropriation bill of June 7, 1897,

Congress made provision for the appointment of still another judge for this court, and this judge under the act is judge of none of the districts, but is required to hold court in any of the districts, at any place of holding court therein, to which the Court of Appeals of that territory may assign him. (U. S. Stat., 1st Sess., 55th Cong., 1897, p. 84.)

By the acts of Congress (cited above) it is seen that the court in this territory is designated as the "United States Court in the Indian Territory;" that this court consists of four judges, one for each district, and a *supernumerary* judge, any one of whom has the power or right to hold terms of court in any of the three districts in said territory.

It will not do to say that the *venue of the nation* (the *territory embraced by it*) entitled the nation, or requires the applicant for citizenship, to appeal to a United States court held in *that* nation. Because no provision has ever yet been made by Congress for holding a term of the United States Court in the Indian Territory in the *Seminole nation*—one of the nations of the Five Civilized Tribes. It will not do to say that Congress, by the appeal clause, intended to require the appellant to take his case to that branch of the said United States Court held where the *nation* resides. Because by said act of Congress the *residence of the nation or applicant* does not determine the jurisdiction of the court to which these appeals were taken.

The records, will show that all who applied to the commission to be enrolled as Choctaw citizens (except non-residents of the Indian Territory), and who appealed from the decision of the commission to the United States Court in the Indian Territory, *Southern District*, were *bona-fide* residents of the Chickasaw nation. The rules of practice established by the Dawes Commission (which were followed by us) required that all claiming the right to be enrolled as mem-

bers of the tribe and embraced in one family, *should be included in one application*. In many of these applications the residence of applicants necessarily was not the same. Some resided in the Chickasaw, some the Choctaw nation, whilst others resided without the limits of the Territory. In construing what Congress meant by the "*United States District Court*" we take it that the technical construction insisted on by counsel for appellant will hardly receive the serious consideration of the Court when the question is viewed in the light of the doctrine announced in—

*Ex parte Cooper*, 143 U. S., 239; *Do.* 138 U. S.; 997;  
*Mackey vs. Cox*, 18 How., 299;  
*Boudinot vs. U. S.*, 78 U. S., 227.

#### Classification of Choctaws and Chickasaws.

- A. Citizens by intermarriage and by adoption.
- B. Citizens by blood (resident and non-resident).

We will first consider the citizens by intermarriage and adoption.

The latter portion of article 1 of the treaty of 1855, between the United States and the Choctaws and Chickasaws, reads:

"And pursuant to an act of Congress approved May 28, 1830, the United States do hereby forever secure and guarantee the lands embraced within said limits to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common; so that each and every member of either tribe shall have an equal, undivided interest in the whole: Provided, however, That no part thereof shall ever be sold without the consent of both tribes; and that said land shall revert to the United States if said Indians and their heirs become extinct or abandon the same." (11 Stat., 612.)

Article 2 of the same treaty reads:

"A district for the Chickasaws is hereby established, bounded as follows, to wit: Beginning on the north bank of

Red river, at the mouth of Island bayou, where it empties into Red river, about twenty-six miles on a straight line, below the mouth of False Wachitta; thence running a northwesterly course along the main channel of said bayou, to the junction of the three prongs of said bayou, nearest the dividing ridge between Wachitta and Low Blue rivers, as laid down on Captain R. L. Hunter's map; thence northerly along the eastern prong of Island bayou to its source; thence due north to the Canadian river; thence west along the main Canadian to the ninety-eighth degree of west longitude; thence south to Red river, and thence down Red river to the beginning: *Provided, however,* If the line running due north, from the eastern source of Island bayou, to the main Canadian, shall not include Allen's or Wapanacka academy, within the Chickasaw district, then an offset shall be made from said line, so as to leave said academy two miles within the Chickasaw district north, west and south from the lines of boundary." (11 Stat., 612.)

Article 4 of the same treaty reads:

"The government and laws now in operation and not incompatible with this instrument, shall be and remain in full force and effect within the limits of the Chickasaw district, until the Chickasaws shall *adopt a constitution and enact laws, superseding, abrogating, or changing the same.* And all judicial proceedings within said district, commenced prior to the adoption of a constitution and laws by the Chickasaws, shall be conducted and determined according to existing laws." (11 Stat., 612.)

Article 7 of the same treaty reads:

"So far as may be compatible with the Constitution of the United States and the laws made in pursuance thereof, regulating trade and intercourse with Indian tribes, the Choctaws and Chickasaws shall be secured in the unrestricted right of self-government, and full jurisdiction, over person and property, within their respective limits; excepting, however, all persons with their property, who are not by birth, adoption or otherwise citizens or members of either the Choctaw or Chickasaw tribe, and all persons, not being citizens or mem-

bers of either tribe, found within their limits, shall be considered intruders, and be removed from, and kept out of the same, by the United States agent, assisted if necessary by the military, with the following exceptions, viz: Such individuals as are now, or may be in the employment of the Government, and their families—those peacefully traveling or temporarily sojourning in the country or trading therein, under license from the proper authority of the United States, and such as may be permitted by the Choctaws or Chickasaws, with the assent of the United States agent, to reside within their limits, without becoming citizens or members of either of said tribes."

It will be seen that under the treaty of 1855 the Chickasaws were granted the right to establish and maintain a government of their own when they should, pursuant to such treaty, adopt a constitution and enact laws for that purpose, and, pursuant to such treaty, in the year 1856 the Chickasaws did adopt a constitution, section 11 of which reads:

"SECTION 11. The legislature shall have the power, by law, to admit, or adopt any person to citizenship in this nation, except a negro or descendant of a negro: *Provided, however,* That such an admission or adoption shall not give a right further than to settle and remain in the nation and to be subject to its laws."

Pursuant to this treaty and this constitution thus adopted on the 17th day of October, 1856, the legislature of the Chickasaw nation, at its first term, passed an act as follows:

"AN ACT granting citizenship to the heirs of Wm. H. Bourland.

"SECTION 1. *Be it enacted by the legislature of the Chickasaw nation,* That the right of citizenship is hereby granted to the following-named children and nephews of Wm. H. Bourland: Nancy, Amanda, Matilda, Gordentia and Run Hannah. Approved October 17, 1856. C. Harris, governor."

After the treaty of 1855 and the adoption of the Chickasaw constitution of 1856, and the passage of the act of October 17, 1856, adopting the Bourland heirs as citizens of the Chickasaw nation, the United States Government, on April 28, 1866, entered into a new treaty with the Choctaw and Chickasaw Indians, article 38 of which reads:

"Every white person, who, having married a Choctaw or Chickasaw, resides in the said Choctaw or Chickasaw nation, or who has been adopted by the legislative authorities, is to be deemed a member of said nation, and shall be subject to the laws of the Choctaw and Chickasaw nations according to his domicile, and to prosecution and trial before their tribunals, and to punishment according to their laws in all respects as though he was a native Choctaw or Chickasaw." (14 Stat., 779.)

Article 11 of the same treaty provides for surveying and dividing the lands of the Choctaws and Chickasaws in severalty; the establishment of a land office. Article 12 provides for the mapping and surveying of the lands. Article 13 provides for notices to be published to those interested to the end that they may appear at the land office and examine such maps, etc., and articles 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, and 25, all pertain to the allotment of the Choctaw and Chickasaw lands and the granting to each member of the tribe his interest therein in severalty; and article 26 of said treaty reads:

"The right here given to Choctaws and Chickasaws, respectively, shall extend to all persons who have become citizens by adoption or intermarriage of either of said nations, or who may hereafter become such." (11 Stat., 777.)

Pursuant to the treaty of 1866, the Chickasaw nation, on August 16, 1867, adopted a constitution, section 7 of which under the head of "General Provisions," reads:

"All persons, other than Chickasaws, who have become citizens of this nation, by marriage or adoption, and have

been confirmed in all their rights as such by former conventions, and all such persons as aforesaid, who have become citizens by adoption by the legislature, or by intermarriage with the Chickasaws, since the adoption of the constitution of August 18, A. D. 1856, shall be entitled to all the rights, privileges and immunities of native-born citizens. All who may hereafter become citizens, either by marriage or adoption, shall be entitled to all the privileges of native-born citizens, without being eligible to the office of governor." (See page 15, Constitution, Laws, and Treaties of the Chickasaws, as published in 1878.)

Under the head of "Bill of Rights," in the same constitution, on page 5 of the same book, we find section 14, which reads:

"The legislature shall pass no retrospective law, or any law impairing the obligation of contracts."

On November 9, 1866, the legislature of the Chickasaw nation passed an act confirming the treaty of 1866 between the United States and the Choctaws and Chickasaws, section 1 of which reads:

"*Be it enacted by the legislature of the Chickasaw nation,* That whereas a treaty was concluded at Washington city on the 28th of April, 1866, by commissioners duly appointed on the part of the Chickasaws, Choctaws, and the United States Government, which treaty was ratified with amendments by the United States Senate and confirmed by the President, the Chickasaw legislature does hereby give its consent to and confirm the said treaty and amendments made by the Senate of the United States."

On October 7, 1876, the legislature passed another act with reference to the Bourland heirs in language as follows:

"AN ACT granting citizenship to the heirs of William H. Bourland.

"SECTION 1. *Be it enacted by the legislature of the Chickasaw nation,* That the right of citizenship is hereby granted to the following-named children and nephews of William H.

Bourland : Amanda, Matilda, Gordentia, and Run Hannah. Approved Oct. 7th, 1876. B. F. Overton, governor." (Constitution, Laws, and Treaties of Chickasaws, page 76, as published in 1878.)

This act of October 7, 1876, is but a confirmation of the act of October 17, 1856, adopting the heirs of William H. Bourland as citizens of the Chickasaw nation. In effect, it is a declaratory statute.

Long after the treaty of 1866 and the adoption of the Chickasaw constitution pursuant thereto, in 1867, and the passage of the declaratory statute by the Chickasaw legislature in 1876, and on October 11, 1883, the legislature of the Chickasaw nation passed an act which reads :

"SECTION 1. *Be it enacted by the legislature of the Chickasaw nation*, That the right of citizenship granted to the following-named children and nephews of Wm. H. Bourland : Amanda Matilda, Gordentia and Run Hannah, approved October 7, 1876, the same is hereby repealed and annulled.

"SECTION 2. *Be it further enacted*, That the Governor is hereby directed and required to remove said parties and their descendants beyond the limits of this nation and that this act take effect from and after its passage."

In construing the last-named act of the Chickasaw legislature, this honorable Court in *Roff vs. Burney*, 168 U. S. (L. Ed.), 442, said :

"Now, according to this complaint, plaintiff was a citizen of the United States. Matilda Bourland was not a Chickasaw by blood, but one upon whom the right of Chickasaw citizenship had been conferred by act of the Chickasaw legislature.

"*The citizenship which the Chickasaw legislature could confer, it could withdraw.* The only restriction on the power of the Chickasaw nation to legislate in respect to its internal affairs is that such legislation shall not conflict with the Constitution

or laws of the United States, and we know of no provision of such Constitution or laws which would be set at naught by the action of a political community like this in withdrawing privileges of membership in the community once conferred. The Chickasaw legislature, by the second act, whose meaning is clear, though its phraseology may not be beyond criticism, not only repealed the prior act, but canceled the rights of citizenship granted thereby, and further directed the governor to remove the parties named therein and their descendants beyond the limits of the nation. This act was not one simply taking effect as of the date of its passage, and then withdrawing rights admitted to have been theretofore legally granted, but was retroactive in its scope, and purported to annul and destroy all that has ever been admitted to be done in respect to the matter. *Whether any rights of property could be taken away by such subsequent act need not be considered. It is enough to hold that all personal rights founded on the mere status thus created by the prior act fell when that status was destroyed.*"

In this case property rights of Roff were not presented to and considered by this honorable Court in connection with his right of citizenship.

If it be true that the right of Chickasaw citizenship is a personal and not a valuable and vested right, then the language of this Court indicating that the Chickasaw legislature had the right to withdraw and abrogate Chickasaw citizenship is unquestionably true ; but we must respectfully submit that under the treaty of 1866, articles 26 and 38, above referred to, and under the constitution of the Chickasaw nation of 1867, that he who acquired Chickasaw citizenship by legislative adoption or by intermarriage, not only became a member of the tribe of Chickasaw Indians, but became a tenant in common with the balance of the tribe in the lands of the Chickasaw Indians held in common with the Choctaw Indians and situated in the Choctaw and Chickasaw nations, and that to destroy the right of citizen-



ship is a destruction of the right to occupy and use the lands as a tenant in common with the balance of the tribe.

It is a destruction of his right to take his portion of the land in severalty when the lands are divided in accordance with the treaty of 1866, or the more recent treaty of the Choctaws and Chickasaws, entered into by their legislatures and confirmed by vote, cited above. We contend that the right of Chickasaw and Choctaw citizenship and the right of property, and the right to allotment are inseparable rights, and that the destruction of the right of citizenship absolutely destroys the right of property, a vested right; that the two rights cannot be separately treated, and we do not understand from the opinion of this Court in the Roff case that it was its intention to destroy any property right of Roff, acquired by virtue of his Chickasaw citizenship, but simply to destroy a personal right.

It will be seen that prior to the treaty of 1866, the status of an adopted Chickasaw or Choctaw Indian and one who acquired his citizenship by intermarriage with a member of the tribe, are entirely different to the status of a Chickasaw or Choctaw Indian since the treaty of 1866. The constitution of the Chickasaws of 1856, section 11 of which is quoted above, confers upon the adopted Chickasaw a right only to reside in the Chickasaw nation; but when the Government of the United States treated with the Chickasaws and Choctaws in 1866 they required of them an express stipulation, as contained in article 38 of said treaty, that the white person who has married into the tribe and resides in the Choctaw or Chickasaw nation, or who has been adopted by the legislative authorities is to be deemed a member of said nation in all respects as though he was a native Choctaw or Chickasaw, and in article 26 of the same treaty it required these tribes of Indians by express stipulation to give to the intermarried

Chickasaw or Choctaw, or to the adopted Chickasaw or Choctaw, the same right of allotment as granted to the native Choctaw or Chickasaw, and we take it that the right thus granted to the intermarried or adopted citizen by the treaty is a valuable and vested right, and after it has once attached it cannot be divested by legislation or judicial decree. It is not simply a personal right to which there is no value attached, but it is a right upon which, or by virtue of which, the citizen acquires a vested right in property as a tenant in common with the balance of the tribe, and the vested right to take his portion of the land in severalty when such lands are divided among the members of his tribe, and on account of the treatment of the Indian tribes in refusing to recognize the treaty and vested rights of the intermarried and adopted Indian, the Congress of the United States provided that the commissioners of the United States to the Five Civilized Tribes of Indians, known as the Dawes Commission, "is further authorized and directed to proceed at once to hear and determine the application of all persons who may apply to them for citizenship in any of said nations, and after such hearing they shall determine the right of such applicant to be admitted and enrolled."

Under this act of Congress above quoted all *bona fide* members of the tribe of Chickasaw or Choctaw Indians, who acquired their membership or citizenship by legislative adoption or by intermarriage, had the right to apply to the Dawes Commission to have their names enrolled as members of the tribe to which they belong, and if the evidence showed that they were members of the tribe in accordance with the laws and treaties, then the commission should enroll their names as members of such tribe; if the application was denied, the applicants had the right under this law to appeal to the United States court in the Indian Territory and there present his application and evidence for the decision and adjudication of such court.

It is contended by counsel for appellant that the citizenship of A. B. Roff by virtue of the act of 1883, being but a personal right, was withdrawn by that act.

To our minds there can be no question but that the right of Chickasaw citizenship, under the treaties and under the constitution above quoted and the laws of the Chickasaw nation, is a vested and valuable right, and carries with it a property right, which is inseparable from the right of citizenship, and that the destruction of the right of Chickasaw or Choctaw citizenship *ipso facto* is a destruction of the right of property granted to the intermarried and adopted Chickasaw or Choctaw citizen by the terms of the treaty of 1866 and confirmed by the constitution of the Chickasaws of 1867; but if it be admitted that the right of citizenship thus acquired by Roff by intermarriage with Matilda Bourland can be withdrawn by the Chickasaw legislature, we would respectfully call this Court's attention to the Chickasaw constitution of 1867, cited above, which reads:

"The legislature shall pass no retrospective law, or any law, impairing the obligation of contracts."

The record in the Roff case shows his wife died long prior to act of 1893.

Then what did the Chickasaws mean by this section of the Constitution? Evidently it was intended that the legislature of the Chickasaw nation could not pass any retroactive law. In defining the word "retrospective" and "retroactive" it is said that retroactive or retrospective means affecting what is past; operating upon a past event or transaction. Retrospective is the more common. Any statute which takes away or impairs vested rights acquired under existing laws, or creates a new law imposes a new duty, or attaches a new disability in respect to transactions or considerations already passed must be treated as retro-

spective. (Anderson's Dictionary of Law, page 897, and authorities cited.)

So it will be seen that not only was the act of 1883 of the Chickasaw legislature contrary to and in violation of the terms of the treaty of 1866, but it was directly in contravention with the Chickasaw constitution of 1867, and void for that reason. The treaties between the United States Government and the Choctaw and Chickasaw tribes must be treated as a statute of the United States, because none of them are effective until they are enacted into a law. It would, indeed, be a harsh and unjust decision to hold that the white man who came to the Chickasaw nation upon invitation of the Chickasaw Indians and pursuant to the treaty of 1866, and who married a member of the tribe in 1867, and acquired the right of citizenship by virtue of such marriage, and who has resided continuously in the Chickasaw nation since said dates and acquired property rights and varied interests as the result of his energy and enterprise, by an act of the Chickasaw legislature is to be deprived of his right of citizenship and his right of property thus acquired upon such right of citizenship, and that, too, without the consent of the United States Government, a party to the treaty, under the terms of which he was granted a right of Chickasaw citizenship which carried with it all the rights of a member of the tribe of Chickasaw Indians by blood.

We do not contend that the opinion of this Court in the Roff-Burney case can be construed to mean that Roff by reason of such act of the legislature is deprived of any right except a personal right; but for the reason that Roff in said cause alleged in general terms that his right of Chickasaw citizenship was acquired under the treaties made by the Chickasaws and Choctaws and under the constitution and laws of the Chickasaw nation, we take it that this honorable Court in said cause did not consider those portions

of the treaties and the constitution of the Chickasaws which showed plainly that Roff's right of Chickasaw citizenship and right of property are inseparable, and to withdraw and abrogate the one is an absolute destruction of the other. It may be, and as far as our researches have gone it is a fact, that this question of vested rights, as applied to the right of Chickasaw and Choctaw citizenship, was never before presented to this tribunal for its consideration and adjudication; but until recently questions of this kind under the law were settled by decisions rendered by the Attorney-General of the United States, at instance of Secretary of Interior and in a letter written by Attorney-General Garland and addressed to the Secretary of the Interior, dated January 23, 1889, a full discussion of the right of Cherokee citizenship is found, and in that letter the Attorney-General says:

"I find from the papers submitted no authority to supervise this act of the Chief Justice, and I certainly think there is none. The right of citizenship is determined in this proceeding and becomes an adjudicated matter, and to leave it an open question for review by the legislature, or the counsel or other authority, would be to unsettle every right of citizenship established under that act.

"In this, as in all other things, there must be a termination and ending somewhere. A proper construction of this act is that the judgment of the Chief Justice rendered according to the terms of such act is the final determination and serves nothing for review. *These principles of law would apply, if possible, with more force here than in ordinary cases, because it appears from the papers submitted that the Cherokee council invited the North Carolina Cherokees to come to the Cherokee nation and to become identified therein as citizens, and this plan of making them citizens was adopted to carry out the purpose of an invitation; and it therefore follows as a consequence, in reply to your second inquiry, that the Department of the Interior is under no laws to respect the decision of the Cherokee authorities in pursuance to the right of a*

commission established by the Cherokee legislature to inquire into the claims of citizenship of those persons *adjudged to be citizens as designated in the first-named inquiry. The right of citizenship cannot be forfeited by legislative act, directly and indirectly, no more than can be the right of property.*" (19 Opinions Attorney-General, page 233.)

On pages 45 to 59 of brief filed in case No. 496, Chickasaw Nation *vs.* Wiggs, the Hon. Halbert E. Paine, attorney for the Chickasaws, calls the attention of this Court to cause No. 469, Chickasaw Nation *vs.* A. B. Roff *et al.*, who were adjudged to be members of the tribe of Chickasaws by the court below. On page 46 of his brief he copies *ex parte* affidavit of Overton Love filed against Roff's application for citizenship, and states this affidavit shows the facts connected with the adoption of the Bourland heirs (to one of whom Roff was married years ago), but to this statement we must dissent.

September 7, 1896, A. B. Roff, for himself and two minor children (Walter and Mabel), and his two married daughters (Mrs. Clary and Mrs. Williams), and their husbands and children, and Leon, his adult son, filed application with Dawes Commission to be enrolled as members of the tribe of Chickasaw Indians, as follows (see printed Record, 3 to 5):

*Application of A. B. Roff and His Children and Grandchildren to Have Their Names Placed upon the Roll of Citizenship as Members of the Tribe of Chickasaw Indians.*

The undersigned petitioners, A. B. Roff, and Walter Roff and Mabel Roff, minors and children of A. B. Roff, by A. B. Roff as next friend, and Mrs. Matilda Clary and G. E. Clary and Leonard B. Clary and Emma Fay Clary, minors, by their mother and next friend, Matilda Clary, and Mrs. Alice Williams and her husband, George Williams, and Inez Williams, a child of Alice and George Williams, by her mother and next friend, Alice Williams, and Leon Roff,

represent and show to this honorable commission that they and each of them are members of the tribe of Chickasaw Indians, and that they and each of them are of right entitled to have their names enrolled on the roll of citizenship to be prepared by this honorable commission; for these petitioners say:

First. That on the 17th day of October, 1856, the legislature of the Chickasaw nation passed the following act:

“An act granting citizenship to heirs of Wm. H. Bourland.

“SEC. 1. Be it enacted by the legislature of the Chickasaw nation, That the right of citizenship is hereby granted to the following-named children and nephews of William H. Bourland, Nancy, Amanda, Matilda, Gordentia, and Run Hannah.

C. HARRIS, *Governor.*”

Approved Oct. 17, 1856.

And these petitioners say that by reason of said act of said legislature that Matilda Bourland became and was a member of the tribe of Chickasaw Indians, as much so as if she had been a native-born citizen of the Chickasaw nation.

Second. That on the 24th day of January, 1867, the said Matilda Bourland was duly and legally married to the petitioner A. B. Roff, and that they lived together as husband and wife up to the time of the death of the said Matilda, and that by reason of the said marriage to said A. B. Roff, under the laws, treaties, and constitution, as they existed and as they now exist, petitioner A. B. Roff became and ever since has been a member of the tribe of Chickasaw Indians as much so as if a native-born citizen of the Chickasaw nation, with all the rights, privileges, and immunities of a native-born Chickasaw.

Third. That petitioner Matilda Clary is the legitimate daughter of A. B. Roff and Matilda Roff, and that Leonard Clary and Emma Fay Clary, minors, are the legitimate children of G. E. Clary and Matilda Clary.

Fourth. Petitioner further states that after the death of the said Matilda Roff that the said A. B. Roff was again legally married on the 11th day of November, 1869, to Hen-

rietta Davenport, and that he continued to live with his said wife up to the time of her death, and that during the time they lived together as husband and wife there was born unto them four children and petitioners herein, to wit: Alice Roff, now Mrs. Alice Williams; Leon Roff, Walter Roff, and Mabel Roff.

Fifth. Petitioners state that the said Matilda Roff, the daughter of A. B. Roff, a petitioner herein, by virtue of a marriage license issued by W. H. Duncan, county and probate judge of Pickens county, Chickasaw nation, was on the 12th day of February, 1890, duly and legally married to the petitioner G. E. Clary, and that by reason thereof the said G. E. Clary became and was and ever since has been a member of the tribe of Chickasaw Indians, and that since their marriage there was born unto them two children, namely, Leonard B. Clary and Emma Fay Clary, minors and petitioners herein.

Sixth. The petitioners further state that the said Alice Roff, the daughter of A. B. Roff and Henrietta Roff, on the — day of —, 1895, was duly and legally married to George Williams and that the said Williams by reason thereof became and was and ever since said date has been a member of the tribe of Chickasaw Indians, and that since their marriage there was born unto them a child, namely, Inez Williams, a petitioner herein.

Seventh. Petitioners further show that an act of the legislature of the Chickasaw nation passed October 17th, 1856, adopting said Matilda Bourland and others, as aforesaid, has been ratified and confirmed by a vote of the Chickasaw Indians, and that for a long time after the marriage of the said A. B. Roff and Matilda Bourland, and until a few years ago, said A. B. Roff was recognized and treated as a member of the tribe of Chickasaw Indians by said tribe of Indians.

In support of the foregoing statements the petitioners herewith file affidavits, record evidences, copies of law, &c., and further show by indorsement hereon that the principal chief or governor of the Chickasaw nation has been duly and legally served with a true copy of this application and with a true copy of the evidence herewith filed.

Wherefore, the premises considered, these petitioners pray

that their names be duly enrolled upon the roll of citizenship to be prepared by this honorable commission as members of the tribe of Chickasaw Indians, and will ever pray.

FURMAN & HERBERT,  
*Attorneys for Petitioners.*

The answer filed by the Chickasaw Nation does not attempt to controvert the facts alleged in this application (Record No. 459, pp. 5 to 11), but sets up as a defense, 1st, That the Chickasaw act of 1856 adopting the Bourland heirs (one of whom Roff married), was repealed by act of that nation passed in 1857; 2nd, That the Chickasaw constitution of 1855 only authorized the legislature, by legislative adoption, to confer upon the Bourland heirs the right to *reside* in the Chickasaw Nation, and that said act adopting them was unconstitutional. This answer is lengthy but a careful reading of same will show we correctly state the issues.

The master, upon the whole evidence, held that the act of 1856 adopting the Bourland heirs was not repealed by the *alleged* act of 1857; that Matilda Bourland was an adopted Chickasaw; that her marriage to A. B. Roff (with whom she resided in the nation up to the time of her death) under the treaty of 1866 and constitution of 1867 (cited *supra*) made Roff a member of the tribe with all the rights, privileges and immunities of a *native* or *blooded* Chickasaw; that his children by his first and second wives are members of the tribe, and that the husband of his daughter, Matilda Clary, having married according to tribal laws, is a member of the tribe; that the husband of his daughter, Alice Williams, is not a member, because his marriage did not conform to the tribal laws; that the children of his married daughters are members of the tribe (*Id.*, Rec., pp. 13 to 17). This man Roff *has resided in the Chickasaw nation* since his first marriage, January 24, 1867 (Rec., p. 3).

The court, upon the *evidence* and master's report, decreed that all applicants (ten in number) except George Williams are members of the tribe of Chickasaw Indians, and are entitled to be enrolled as such (Rec., p. 23).

We submit that if articles 38 and 26 of the treaty of United States with Choctaws and Chickasaws mean anything, it decides in favor of appellees in the Roff case the question of citizenship.

Even if the Chickasaw nation in 1857 had the right to

1889 he was summoned to serve as a juror in the Indian District Court of said nation (Rec., p. 44), and as late as March 19, 1896, the nation granted to him and other members of the tribe a mining charter. (Rec., p. 42.) A prominent Choctaw lawyer in 1897, in discussing the rights of an intermarried Choctaw, said to the United States Court that this class of people have but *one* right *under the treaties* and that is "a right to be whipped!" And it does appear to us that the Chickasaw nation is trying to apply that rule to Roff and insist upon it as the law. But as was shown

by the report of the Dawes Commission to Congress (quoted herein) this is a fair way to state the disposition of these tribes to fritter away the citizenship of its white members and thus confiscate their fortunes acquired as the result of thirty years hard work. No restrictive marriage laws existed in the Chickasaw Nation at the time Roff was married to Matilda Bourland, nor at the time he married the second time—hence, it must be held, his marriages were in conformity with article 38 of the treaty of 1866.

The marriage law of the Chickasaw nation of October 19, 1876, is as follows:

“SECTION 1. Be it enacted by the legislature of the Chickasaw nation, That all non-citizens shall remain in any one county of this nation for a period of two years, and be of good moral character and industrious habits, before they can procure a license to marry a citizen of this nation; Provided, further, they be recommended by at least five good and responsible citizens of this nation, and of the county wherein they resided, the county judge being satisfied with the petition shall grant a license to marry under existing

laws, and the non-citizens so applying for license shall pay fifty dollars, five of which shall be retained by the county judge and forty-five dollars to be placed in the national treasury for national purposes.

“SEC. 2. Be it further enacted, That such member of the Chickasaw nation shall be competent to contract marriage, or shall have the consent of his or her parents or guardian to marry such citizen of the United States, *and hereafter no marriage between a citizen of the United States and a member of the Chickasaw nation shall confer any right of citizenship, or any right to improve or select lands within the Chickasaw nation, unless such marriage shall have been solemnized in accordance with the laws of the Chickasaw nation:* and all marriages between citizens of the United States and members of the Chickasaw nation shall be duly certified by the officer or minister of the gospel who shall have performed the marriage ceremony, to the clerk of the county court of the county where such marriage took place, who shall record the same, and every such officer or minister of the gospel (if a citizen of the Chickasaw nation) who shall marry a citizen of the United States to a member of the Chickasaw nation without such license, shall be subject to a fine of fifty dollars, to be imposed by the county court and collected as other fines, for county purposes; and if such minister be a citizen of the United States, he shall be removed from the nation.

“SEC. 3. Be it further enacted, *That no marriage heretofore solemnized, or which may hereafter be solemnized, between a citizen of the United States and a member of the Chickasaw nation, shall enable such citizen of the United States to confer any right or privilege, whatever, in this nation, by again marrying a citizen of the United States, or upon such other citizen of the United States or their issue, and in case any citizen of the United States shall have married a member of the Chickasaw nation, and shall have heretofore abandoned her, or should hereafter voluntarily abandon or separate from such member of the Chickasaw nation, such citizen of the United States shall forfeit all right acquired by such marriage in this nation, and shall be liable to removal, as an intruder, from the limits thereof.*

“SEC. 4. Be it further enacted, That all acts or parts of

acts coming in conflict with the provisions of this act are hereby repealed, and that this act take effect from and after its passage."

This marriage law should not be sustained, because it is in conflict with the treaty. It is not uniform in its application. It discriminates against the white member of the tribe in favor of the blooded member. Article 38 of the treaty of 1866 places the white member on the same plane as the blooded Indian and gives to him all the rights, privileges, and immunities of an Indian by blood. This law treats the marriage of a *blooded Chickasaw to a white person* as a civil contract. It gives to him the right to divorce himself from his wife and to marry as many white women as he desires and can get, and thereby confer Chickasaw citizenship upon each of his said wives and the issue of all of said marriages. The white member of the tribe, if his Indian wife dies, or if he abandons her for adultery, forsooth, cannot treat the marriage relation as a civil contract; but if he would not become an *intruder—an exile*—if he desires to marry again he *must confine his marriage contracts* to the dusky maiden, wherein one drop of Indian blood "the surging sea outweighs!"

Will it be assumed that this great Government must look to these tribes of Indians to determine what is meant by the marriage relation? Is the language employed in article 38 of the treaty of 1866 ambiguous and susceptible of more than one construction? Not so, although counsel for appellant in his oral argument attempted to show that the language "having married" does not mean "who is married," but means who had theretofore married into the tribe and, therefore, he insisted that marriages, subsequent to this treaty, conferred no right upon the white person, and that, too, in the face of article 26 of the same treaty which amounts to a flat contradiction of his theory.

Mr. Blackstone said :

"Our law considers marriage in no other light than as a *civil contract*. The *holiness* of the matrimonial state is left entirely to the *ecclesiastical law*. And such contract is good and valid if the parties, (1) were at the time of making it *willing to contract*, (2) *able to contract*, and (3) *actually did contract in the proper forms and solemnities required by law*."

1 Black, Com. 439.

Stewart's Marriage and Divorce, Ch. 11.

14 Am. and Eng. Ency. Law (old ed.), 470.

No better definition of a marriage can be given than is given by Mr. Blackstone. Suppose, in lieu of these laws, the tribes had said a "white person by marrying a member of the tribe shall not become a member of the tribe," or by saying "he shall not be entitled to an allotment of the lands," or that "he shall marry according to the rules of the common law—the statutory laws of Texas, Kansas, or Arkansas"—could such rule be sustained in the light of the treaty? Suppose we look to the treaty above to determine the status of the white man who has married a member of the tribe, would not a marriage contract consummated under the rules of common law, or under any statute, valid where consummated, be sustained as a valid marriage in this Territory? We submit, if the parties are competent to contract marriage, and they legally consummate such marriage contract under the forms of law, the marriage is valid the world over, even though the male spouse had not been previously *recommended* to his affianced in particular and the nation in general as to "good morals," financial standing, &c. Bad morals might be, and doubtless is, a ground for divorce; but do they inhibit the consummation of a marriage contract?

Not only does appellant contend that the white person must continuously marry a Chickasaw or Choctaw by blood

to perpetuate his nationality (as a member of the tribe), but that if he marries a white person even in accordance with the tribal laws he, *ipso facto*, decitizenizes himself. Judges Townsend and Clayton *stretched* the doctrine far enough to hold that the local marriage laws of these tribes must be complied with or citizenship by marriage could not be acquired, but held that a white person acquiring citizenship by marriage became a member of the tribe for all purposes and could confer such citizenship by again marrying in compliance with the tribal marriage laws. (Clayton, Opinions 38 and 41, and Townsend's Opinion, Roff Case No. 469, docket this Court, p. 18.)

#### **B. Citizens by Blood (Residents and Non-Residents).**

The right of the Chickasaw or Choctaw who resided in either nation of said tribes when he applied to the Dawes Commission for enrollment regardless of the *quantum* of Indian blood is not disputed, but as Judge Clayton held an absentee did, and Judge Townsend held he did not, expatriate himself by reason of his absence the right of the non-resident is presented to this Court for its decision. Article 14 of the treaty of 1830 between the Choctaws and the United States reads (7 Stat., p. 333):

"Article 14. Each Choctaw head of a family being desirous to remain and become a citizen of the States, shall be permitted to do so, by signifying his intention to the agent within six months from the ratification of this treaty, and he or she shall thereupon be entitled to a reservation of one section of six hundred and forty acres of land, to be bounded by sectional lines of survey; in like manner shall be entitled to one-half of that quantity for each unmarried child which is living with him over ten years of age; and a quarter section to such child as may be under 10 years of age, to adjoin the location of the parent. If they reside upon said lands intending to become citizens of the States for five years

after the ratification of this treaty, in that case a grant in fee-simple shall issue; said reservation shall include the present improvements of the head of the family or a portion of it. *Persons who claim under this article shall not lose the privilege of a Choctaw citizen, but if they ever remove, are not to be entitled to any portion of the Choctaw annuity.'*

After the treaty of 1855 (cited *supra*) between the Choctaws and Chickasaws and the United States, and under the terms of which the Chickasaws, by purchase, acquired an undivided one-fourth interest in and to the Choctaw nation, and the right to carve out and establish the *now* Chickasaw nation, the treaty of 1866 between these tribes and the United States was entered into (14 Stat., 774), article 13 of which provides for surveying, sectionizing, and mapping the lands of these tribes.

Article 12 reads:

"The maps of said surveys shall exhibit, as far as practicable, the outlines of the *actual occupancy* of members of the said nations, respectively; and when they are completed shall be returned to the said land office at Boggy Depot for inspection by *all parties interested*, when notice for ninety days shall be given of such return in such manner as the legislative authorities of the said nations, respectively, shall prescribe, or, in the event of said authorities failing to give such notice in a reasonable time, in such manner as the register of said land office shall prescribe, calling upon all parties interested to examine said maps—to the end that errors, if any, in the location of such occupancies, may be corrected."

Article 13 of same treaty reads:

"Article 13. The notice required in the above article shall be given, *not only in the Choctaw and Chickasaw nations, but by publication in newspapers printed in the States of Mississippi and Tennessee, Louisiana, Texas, Arkansas and Alabama, to the end that such Choctaws and Chickasaws as yet remain out-*



side of the Choctaw and Chickasaw nations may be informed and have opportunity to exercise the rights hereby given to resident Choctaws and Chickasaws. Provided, That before any such absent Choctaw or Chickasaw shall be permitted to select for him or herself, or others, as hereinafter provided, he or she shall satisfy the register of the land office of his or her intention, or the intention of the party for whom the selection is to be made, to become bona fide resident in the said nation within five years from the time of selection. And should the said absentee fail to remove into said nation and occupy and commence an improvement on the land selected within the time aforesaid, the said selection shall be cancelled, and the land shall thereafter be discharged from all claim on account thereof."

On November 5, 1886, the Choctaw council passed an act (Clayton Opinions, pp. 22 and 23) as follows:

"AN ACT entitled An act defining the quantity of blood necessary for citizenship."

"SEC. 1. *Be it enacted by the General Council of the Choctaw nation assembled*, That hereafter all persons, non-citizens of the Choctaw nation, making or presenting to the general council, petitions for rights of Choctaws in this nation, shall be required to have one-eighth Choctaw blood, and shall be required to prove the same by competent testimony.

"SEC. 2. *Be it enacted*, That all applicants for rights in this nation shall prove their mixture of blood to be white and Indian.

"SEC. 3. *Be it further enacted*, That no person convicted of any felony or high crime shall be admitted to the rights of citizenship within this nation.

"SEC. 4. *Be it further enacted*, That this act shall not be construed to affect persons within the limits of the Choctaw nation, now enjoying the rights of citizenship.

"SEC. 5. *Be it further enacted*, That this act shall take effect and be in force from and after its passage."

On December 24, 1889, the general council of the Choctaw nation passed the following resolution:

"Whereas, there are large numbers of Choctaws yet in the States of Mississippi and Louisiana, who are entitled to all the rights and privileges of citizenship in the Choctaw nation; and,

"Whereas, they are denied all rights of citizenship in said States; and,

"Whereas, they are too poor to immigrate themselves into the Choctaw nation: Therefore,

"*Be it resolved by the general council of the Choctaw nation assembled*, That the United States Government is hereby requested to make provisions for the emigration of said Choctaws from said States to the Choctaw nation," etc.

(Clayton's Opinions, p. 14.)

In the light of the foregoing treaties and laws we respectfully but earnestly insist that Choctaw and Chickasaw citizenship is divided into three classes, viz:

- 1st. The citizen by blood, resident or non-resident, and that the *quantum* of blood is immaterial.
- 2d. Citizens who have legally married members of the tribe, and
- 3d. Citizens by legislative adoption; and that, once a member of either of these tribes the citizen is always a member unless he decitizenizes himself pursuant to act of Congress.

*Elk vs. Wilkins*, 112 U. S., 94.

*Raymond vs. Raymond*, 28 C. C. A., 38.

The courts below gave much attention and time to the investigation of these cases, and their conclusions of fact, we submit, will not be inquired into by this honorable Court and that

all the cases herein referred to should either be dismissed for want of jurisdiction, or affirmed upon the lower court's findings of fact.

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