TIGER V. WESTERN INV. CO.

221 U.S. 286 (1911)

MR. JUSTICE DAY delivered the opinion of the court.

This case involves the validity of conveyances made by Marchie Tiger, plaintiff in error, a full-blood Indian of the Creek tribe, to the defendants in error, the Western Investment Company, and Ellis H. Hammett, R. C. Allan and J. C. Pinson, copartners under the name of Coweta Realty Company.

The lands in controversy were located in the Indian Territory, were allotted under certain acts of Congress, to which we shall have occasion to refer later, and were inherited by Marchie Tiger during the year 1903 from his deceased brother and sisters, Sam, Martha, Lydia and Louisa Tiger, also members of the Creek nation, and allottees of the lands which passed by inheritance to Marchie Tiger.

According to the law of descent and distribution, which had been put in force in the Indian Territory, Marchie Tiger was the sole heir at law of his deceased brother and sisters. 32 Stat. 500, June 30, 1902, c. 1323; Mansfield's Dig. Arkansas Stat., ch. 49, § 2522.

On August 8, 1907, Marchie Tiger sold and conveyed by warranty deed to the defendant in error, the Western Investment Company, certain of the said lands for the sum of $2,000.00, which was paid by the company. On July 1, 1907, Marchie Tiger sold and conveyed by warranty deed certain other of said lands to the Coweta Realty Company, and likewise sold and conveyed the same, in the same manner on July 26, 1907, on August 8, 1907, and on August 13, 1907, to the Coweta Realty Company, the consideration agreed to be paid by the company was $3,000.00, of which $558.00 was paid. The plaintiff in error offered to return the amounts paid by the respective purchasers, and made tender thereof which was refused, and this suit is brought to have the deeds in question cancelled, and the claim set aside as a cloud upon plaintiff's title.

Each and all of these conveyances were made without the approval of the Secretary of the Interior. The Supreme Court of Oklahoma held the conveyances valid and denied relief to the plaintiff in error. 21 Oklahoma, 630.

Two questions arise in the case. First: Could a full-blood Creek Indian, on and after the eighth day of August, 1907, convey the lands inherited by him from his relatives, who were full-blood Creek Indians, which lands had been allotted to them, so as to give a good title to the purchaser -- although the conveyance was made without the approval of the Secretary of the Interior. Second: If the legislation of Congress in question undertook to make such conveyances valid only when approved by the Secretary of the Interior, is it constitutional?

An answer to these questions requires a consideration of certain treaties and legislation concerning title to these lands. In 1833, the United States made a treaty with the Creek nation of

Indians, in consideration of which they were to move to a new country west of the Mississippi, and to surrender all the lands held by them east of the Mississippi, and the United States agreed to convey to them a tract of land comprising what is now a part of the State of Oklahoma.

On August 11, 1852, in pursuance of this treaty the United States issued a patent for the tract of country mentioned, in which it was recited that the grantor, "in consideration of the premises and in conformity with the above recited provisions of the treaty aforesaid, has given and granted, and by these presents does give and grant unto the Muskogee (Creek) Tribe of Indians the tract of country above mentioned, to have and to hold the same unto the said tribe of Indians so long as they shall exist as a nation and continue to occupy the country hereby assigned to them."

Upon this tract of land the Creeks became a settled people, and established a government. In 1893 the United States in pursuance of a policy which looked to the final dissolution of the tribal Government, took steps toward the distribution and allotment of the lands among the members of the tribe. On March 3, 1893, Congress passed an act (27 Stat. 645, chap. 209) which provides:

"SEC. 15. The consent of the United States is hereby given to the allotment of lands in severalty not exceeding one hundred and sixty acres to any one individual within the limits of the country occupied by the Cherokees, Creeks, Choctaws, Chickasaws and Seminoles; . . . and upon the allotment of the lands held by said tribes the reversionary interest of the United States therein shall be relinquished and shall cease."

Section 16 of the act provides for the appointment of commissioners to enter upon negotiations with the Cherokee, Choctaw, Chickasaw, Creek and Seminole Nations looking to the extinguishment of the tribal title to lands in the territory held by the nations or tribes, whether by cession of the same, or some part thereof, to the United States, or by allotment and division thereof in severalty among the Indians of such nations or tribes, or by such other method as may be agreed upon by such nations or tribes with the United States with a view to such adjustment on the basis of justice and equity, as might, with the consent of such nations or tribes, so far as might be necessary, be requisite and suitable to enable the ultimate creation of a State or States of the Union, which shall embrace the lands within the Indian Territory.

After negotiations and legislation looking to the enrollment of the tribes entitled to citizenship, an act of Congress known as the Original Creek Agreement was passed. (Act of March 1, 1901, c., 676, 31 Stat. 861.)

Section 7 of that act contains certain restrictions upon the title of individual Indians after the same had been conveyed to them by the Creek Nation, with the approval of the Secretary of the Interior. Section 7 of the act of March 1, 1901, was amended by the act of June 30, 1902, 32 Stat. 500, c. 1323, known as the Supplemental Creek Agreement.

Section 16 of the act superseded § 7 of the First Creek agreement, and, as it contains the restriction on alienation of allotted lands, important to be considered, so much of that section as contains such restrictions is here quoted:

"SEC. 16. Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation, nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment forty acres of land, or a quarter of a quarter section, as a homestead, which shall be and remain non-taxable, inalienable, and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear."

This agreement was ratified by the action of the Creek National Council, and approved by the President of the United States August 8, 1902.

It is thus apparent that the five-year limitation created by § 16 of the act of 1902, upon the alienation of lands by the Creek Indians had expired when the conveyances in controversy were made.

Within that five years, and about fifteen months before the expiration thereof, Congress passed the act of April 26, 1906 (34 Stat. 137, c. 1876), entitled an act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes.

Sections 19, 20, 22 and 23 of the act are important to be considered, and are given in full in the margin.*footnotes ommited*

Section 28 of the act provides for the continuance of the tribal governments of the Choctaw, Chickasaw, Cherokee, Creek and Seminole tribes or nations, but places certain restrictions upon their right of legislation, making the same subject to the approval of the President of the United States.

Section 29 of the act provides that all acts, and parts of acts, inconsistent with the provisions of the act be repealed.

As § 22 of the act is the one upon which the rights of the parties most distinctly turn, we here insert it:

"SEC. 22. That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory. And in case of the organization of a State or Territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

It is the contention of the defendants in error that this section, when read in connection with § 16 of the act of 1902, above quoted, has the effect to require conveyances made by full-blood Indian heirs during the period from the passage of the act, of which § 22 is a part, until the expiration of the five years period named in § 16, to be approved by the Secretary of the Interior, but does not interfere with the capacity of such full-blood Indian heirs to convey the inherited lands after the expiration of the five years. This was the view entertained by the Supreme Court of Oklahoma in deciding this case.

In support of that view, it is insisted that the last sentence of § 22 must be read as a proviso, limiting and qualifying that which has gone before in the same section; that without this proviso the first part of the section would enable adult heirs of full blood to convey their inherited lands notwithstanding the five years limitation provided in § 16 had not expired, and that the real purpose of this section was to place such full-blood Indian heirs under the protection of the Secretary of the Interior, so far as his approval was required, until the expiration of the five-year period named in § 16.

On the other hand, it is contended that the act of April 26, 1906, in the sections referred to, has undertaken to make new provision for the protection of full-blood Indians of the Five Civilized Tribes, and to place them, as to the alienation, disposition, and encumbrance of their lands, under restrictions such as shall operate to protect them, and to require the Secretary of the Interior to approve such conveyances, in order that such Indians shall part with their lands only upon fair remuneration, and when their interests have been duly safe-guarded by competent authority.

Previous legislation upon this subject differed as to the several nations.

As to the Seminoles, at the time of the passage of the act of April 26, 1906, the law forbade alienation prior to the date of the patent. The patent was to be made by the principal chief of the tribe when the tribal government ceased to exist. July 1, 1898, 30 Stat. 567, ch. 542.

The legislation concerning the Creeks we have already recited. Alienation was forbidden until expiration of the five-year period, to-wit: until August 8, 1907.

One section (14) of the Cherokee act provides there shall be no alienation within five years from the ratification of the act: another section (15) provides that Cherokee allotments, except homesteads, shall be alienable in five years after the issue of the patent. July 1, 1902, 32 Stat. 716, ch. 1375.

The Choctaw and Chickasaw act provided (§ 16) that:

"All lands allotted to the members of said tribes, except such land as is set aside to each for a homestead as herein provided, shall be alienable after issue of patent as follows: One-fourth of the acreage in one year, one-fourth acreage in three years, and the balance in five years -- in each case from the date of the patent; provided, that such lands shall not be alienable by the allottee or his heirs at any time before the expiration of the Choctaw and Chickasaw tribal governments for less than its appraised value." Act of July 1, 1902, 32 Stat. 641, 643, ch. 1362.

In this case we are concerned with the construction of the act of April 26, 1906, so far as it involves the Creeks, and other statutes are mentioned with a view to aid in the construction of that act. It is the contention of the plaintiff in error that the act of April 26, 1906, repealed all former legislation upon the subject, and intended to provide, as to full-blood Indians of the tribes, new and important protection in the disposition of their landed interests, and that, as the act provides that previous inconsistent legislation shall be repealed, so far as the same subjects are covered in the new act it was intended to given additional protection to full-blood Indians and to prevent them from being deprived without adequate consideration of their lands and holdings; and that the real purpose of § 22, in so far as the adult heirs of the deceased Indians of the Five Civilized Tribes are concerned, is to subject conveyances of such lands, when made by full-blood Indians, to the approval of the Secretary of the Interior.

We think a consideration of this act and of subsequent legislation in pari materia therewith demonstrates the purpose of Congress to require such conveyances by full-blood Indians to be approved by the Secretary of the Interior.

The sections of the act of April 26, 1906, under consideration show a comprehensive system of protection as to such Indians. Under § 19 they are not permitted to alienate, sell, dispose of, or encumber allotted lands within twenty-five years unless Congress otherwise provides. The leasing of their lands, other than homesteads, for more than one year may be made under rules and regulations prescribed by the Secretary of the Interior. And in case of the inability of a full-blood Indian, already owning a homestead, to work or farm the same, the Secretary may authorize the leasing of such homestead.

Under § 20 leases and rental contracts of full-blood Indians, with certain exceptions, are required to be in writing, subject to the approval of the Secretary of the Interior. Under § 23 authority is given "to all persons of lawful age and sound mind to devise and bequeath all his estate, real and personal, and all interest therein;" but no will of a full-blood Indian, devising real estate and disinheriting parent, wife, spouse, or children of a full-blood Indian, is valid until acknowledged before and approved by a judge of a United States court in the Territory or by the United States Commissioner.

Coming now to § 22, the first part of that section gives the adult heirs of any deceased Indian of either of the Five Civilized Tribes power to sell and convey the inherited lands named, with certain provisions as to joining minor heirs by guardians in such sales. This part of the statute would enable full-blood Indians, as well as others, to convey such lands as adult heirs of any deceased Indian, etc., but the last sentence of the section requires the conveyance made under this provision, that is, conveyances made by adult heirs of the character named in the first part of the section, when full-blood Indians, to be subject to the approval of the Secretary of the Interior. This construction is in harmony with the other provisions of the act, and gives due effect to all the parts of § 22. True, it has the effect to extend the requirement of the approval of the Secretary of the Interior as to full-blood Indians beyond the terms prescribed in § 16 of the act of 1902, and this, we think, was the purpose of Congress, which is emphasized in § 29 of the act wherein all previous inconsistent acts, and parts of acts, are repealed.

As to the argument that the last sentence of § 22 is to be construed as a proviso intended to limit the generality of the previous part of the section, and not to affect prior legislation upon the subject, it may be observed: the sentence does not take the ordinary character of a proviso, and is not introduced as such, and, even if regarded as a proviso, it is well-known that independent legislation is frequently enacted by Congress under the guise of a proviso. *Interstate Commerce Commission v. Baird*, 194 U.S. 25, 36, and previous cases in this court therein cited.

Had Congress intended not to interfere with full-blood Indian heirs in their right to make conveyances after the expiration of the five years named in § 16 of the act of 1902, it would have been easy to have said so, and some reference would probably have been made to the prior legislation. No reference is made to the prior legislation, but it is broadly enacted that all conveyances of the character named in § 22 made by heirs of full-blood Indians shall be subject to the approval of the Secretary of the Interior.

The construction contended for by the defendant in error places Congress in the attitude of requiring such conveyances to be made with the approval of the Secretary of the Interior for the time between the passage of the act of 1906 and the expiration of the period named in the act of 1902, with unrestricted power thereafter to make such conveyances without such approval. Such construction is inconsistent with subsequent legislation of Congress upon the same subject, and which proceeds upon the theory that, in the understanding of Congress at least, restrictions still existed so far as the inherited lands of full-blood Indians were concerned.

Section 8 of the Act of May 27, 1908, 35 Stat. 312, c. 199, provides:

"SEC. 8. That section 23 of an act entitled 'An act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes,' approved April 26th, 1906, is hereby amended by adding, at the end of said section the words, 'or a judge of a county court of the State of Oklahoma.'"

Section 9 of that act provides:

"SEC. 9. That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: Provided, that no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee;" etc., etc. (35 Stat. 312.)

The obvious purpose of these provisions is to continue supervision over the right of full-blood Indians to dispose of lands by will, and to require conveyances of interests of full-blood Indians in inherited lands to be approved by a competent court.

When several acts of Congress are passed touching the same subject-matter, subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject. *Cope v. Cope*, 137 U.S. 682; *United States v. Freeman*, 3 How. 556.

We cannot believe that it was the intention of Congress, in view of the legislation which we

have quoted, to leave untouched the five-year restriction of the act of 1902, so far as the inherited lands of full-blood Indians are concerned, or to permit the same to be conveyed without restriction from the expiration of that five-year period until the enactment of the legislation of May, 1908.

In passing the enabling act for the admission of the State of Oklahoma, where these lands are, Congress was careful to preserve the authority of the Government of the United States over the Indians, their lands and property, which it had prior to the passage of the act. June 16, 1906, 34 Stat. 267, c. 3335.

We agree with the construction contended for by the plaintiff in error, and insisted upon by the Government, which has been allowed to be heard in this case, that the act of April, 1906, while it permitted inherited lands to be conveyed by full-blood Indians, nevertheless intended to prevent improvident sales by this class of Indians, and made such conveyance valid only when approved by the Secretary of the Interior.

The further question arises in this case -- In view of the construction we have given the legislation of Congress, is it constitutional? It is insisted that it is not, because the Indian is a citizen of the United States and entitled to the protection of the Constitution, and that to add to the restrictions of the act of 1902 those contained in subsequent acts is violative of his constitutional rights and deprives him of his property without due process of law. It is to be noted in approaching this discussion that this objection is not made by the Indian himself; he is here seeking to avoid his conveyance. It is not made by the Creek Nation or Tribe, for it is stated without contradiction that the act of 1906 has been ratified by the council of that nation.

The unconstitutionality of the act is asserted by the purchasers from an Indian, who are the defendants in error here, and proceeds upon the assumption, that the Indian, at the time of the conveyance, August 8, 1907, had full legal title to the premises, which could not be impaired by legislation of Congress subsequent to the act of June 30, 1902.

Assuming that the defendants in error are in a position to assert such constitutional rights, is there anything in the fact that citizenship has been conferred upon the Indians, or in the changed legislation of Congress upon the subject, which marks a deprivation of such rights? We must remember in considering this subject that the Congress of the United States has undertaken from the earliest history of the Government to deal with the Indians as dependent people and to legislate concerning their property with a view to their protection as such. *Cherokee Nation v. Georgia*, 5 Peters 1, 17; *Elk v. Wilkins*, 112 U.S. 94, 99; *Stephens v. Choctaw Nation*, 174 U.S. 445, 484. We quote two of the many recognitions of this power in this court:

"The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that Government because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all tribes." *United States v. Kagama*, 118 U.S. 375, 384.

"Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the Government." *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565.

Citizenship, it is contended, was conferred upon the Creek Indians by the act of March 3, 1901, 31 Stat. 447, amending the act of February 8, 1887, 24 Stat. 390, c. 119, by adding to the Indians given citizenship under that act "every Indian in the Indian Territory." So amended, the act would read as to such Indian: "He is hereby declared to be a citizen of the United States and entitled to all the rights, privileges and immunities of such citizen." Is there anything incompatible with such citizenship in the continued control of Congress over the lands of the Indian?Does the fact of citizenship necessarily end the duty or power of Congress to act in the Indian's behalf?

Certain aspects of the question have already been settled by the decisions of this court. That Congress has full power to legislate concerning the tribal property of the Indians has been frequently affirmed. *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 308; *United States v. Rickert*, 188 U.S. 432; *McKay v. Kalyton*, 204 U.S. 458.

Nor has citizenship prevented the Congress of the United States from continuing to deal with the tribal lands of the Indians.* * *