city their interests in the gas works. Conclusion is, that the duties were properly assessed, and that there is no error in the record.

JUDGMENT AFFIRMED, WITH COSTS.

THE KANSAS INDIANS.

1. The State of Kansas has no right to tax lands held in severalty by individual Indians of the Shawnee, Miami, and Wea tribes, under patents issued to them by virtue of the treaties made with those tribes respectively in 1854, and in pursuance of the provisions of the 11th section of the act of June 30th, 1859 (11 Stat. at Large, p. 431).
2. If the tribal organization of Indian bands is recognized by the political department of the National government as existing; that is to say, if the National government makes treaties with, and has its Indian agent among them, paying annuities, and dealing otherwise with "head men" in its behalf, the fact that the primitive habits and customs of the tribe, when in a savage state, have been largely broken into by their intercourse with the whites,—in the midst of whom, by the advance of civilization, they have come to find themselves,—does not authorize a State government to regard the tribal organization as gone, and the Indians as citizens of the State where they are, and subject to its laws.
3. Rules of interpretation favorable to the Indian tribes are to be adopted in construing our treaties with them. Hence, a provision in an Indian treaty which exempts their lands from "levy, sale, and forfeiture," is not, in the absence of expressions so to limit it, to be confined to levy and sale under ordinary judicial proceedings only, but is to be extended to levy and sale by county officers also, for non-payment of taxes.

THESE were three distinct cases involving, however, with certain differences, essentially the same question, argued on the same day and by the same counsel.

The specific question was, whether the State of Kansas had a right to tax lands in that State held in severalty by individual Indians of the Shawnee, Wea, and Miami tribes, under patents issued to them pursuant to certain treaties of the United States; the tribal organization of these tribes having to a certain extent, as was alleged, been broken in upon by their intercourse with the whites, in the midst of

whom the Indians were, and by their enjoyment, to some extent, of the social and other advantages of our own people.

The question was raised on bills filed in equity in the county courts of Kansas, by different Indian chiefs,—Blue Jacket as representing the Shawnees; Yellow Beaver representing the Wea tribe, and Wan-zop-e-ah the Miamis—against the County Commissioners of Johnson County and Miami County, to restrain these commissioners from selling for non-payment of taxes lands held by these Indians in their individual characters. The county court dismissed the bills, conceiving that the lands were rightly taxed, and on an affirmance of such dismissals in the Supreme Court of the State, the cases were brought here. They were, respectively, thus:

I. CASE OF THE SHAWNEE TRIBE.

In 1817, a portion of the Shawnees were living in Missouri, others in Ohio; those in Missouri were upon lands given to them by the United States, and which, by treaty, was declared should *not be liable to taxes so long as they continued to be the property of the Indians.**

In 1825, the Shawnees in Missouri gave up their lands there to the United States, and in consideration for the surrender received for themselves, and such of their brethren in Ohio as might choose to follow them, a tract in Kansas—then a wild—of 50,000 square miles, or 1,600,000 acres.†

In 1831, the Shawnees in *Ohio* resolved to join their Missouri brethren who had gone to Kansas. A treaty was accordingly concluded in that year by the United States with the Ohio Shawnees. By the terms of it the President was to cause the said tribe from Ohio to be protected at their intended residence against all interruption or disturbance from any other tribe or nation of Indians, or from any other person or persons whatsoever, and he was to have the same care

* 7 Stat. at Large, 166.

† Id. 284.

and superintendence over them in the country to which they were to remove, that heretofore he had over them at their then place of residence. 100,000 acres of land within the 50,000 square miles, above mentioned, were granted to them in fee by patent, so long as they should exist as a nation. These lands were not to be ceded by them except to the United States, and *were never to be included within the bounds of any State or Territory, nor to be subject to its laws.**

The Ohio Shawnees were thus transferred to Kansas, and were there resident with the rest of their tribe from the time they went there, continuously, up to 1854. In the course of this term of years, the progress of civilization westward, carried numbers of white men *to*, around, among, and beyond them. They were thus in the midst of whites. In May of the year just mentioned, 1854, Kansas became a "Territory" of the United States, with an organic law from Congress. By this law, it was ordained "that all treaties, laws, and other engagements made by the government of the United States with the Indian tribes inhabiting the territories embraced therein should be faithfully and rigidly observed;" and also that all such "territory, as by treaty with any Indian tribe was not to be included within the territorial limits or jurisdiction of any State or Territory should be excepted out of the boundaries and constitute no part of the same until said tribe should signify their assent to the President of the United States to be included therein."

In November of this same year, 1854, the Shawnees—holding their lands in common in fee by patent, no partition having been made among themselves, and they proposing to divide them to the extent of 200 acres each, among themselves, but having no mode to effect this except by parole—ceded to the United States the whole tract of 1,600,000 acres. A retrocession of a part (200,000 acres) was made in the same instrument to carry out this purpose, with a stipulation that these retroceded lands should cover the lands where improvements of individuals had been made, and that the

* 7 Stat. at Large, 357.

restriction before annexed to their title should be as to the power of alienation, regulated as Congress might provide for. In one article of the agreement now made with these Indians, "the care and protection of the United States are invoked, and they agree to comply with the laws of the United States, and expect to be protected and have their rights vindicated by them."* A sum of $829,000 was agreed to be paid to the Shawnee Indians for the cession to the United States. One article of the treaty provides that this sum "shall be in full satisfaction not only of such claim, but of all others of what kind soever, *and in release of all demands and stipulations arising under former treaties.*" From this re-ceded or reserved tract 200 acres were to be selected *for each individual*, except as to certain bands, who were to have *their* lands in common and in a compact body. The lands assigned to individuals were to be patented, under such restrictions as Congress—or, as that body afterwards enacted†—such restrictions as the Secretary of the Interior might impose. This officer afterwards made rules; and patents were issued in fee simple, with the restriction that "the said lands shall never be sold or conveyed by the grantee or his heirs without the consent of the Secretary of the Interior."

In July, 1859, a constitution was formed for the State of Kansas, in which it was provided that all rights of individuals should continue as if no State had been formed, or change in the government made.

In January, 1861, an act for the admission of the State was passed by Congress.‡ In this it was provided "that nothing contained in this said constitution respecting the boundaries of said State shall be construed to impair *the rights of person or property now pertaining to the Indians of said territory*, so long as such rights shall remain unextinguished by treaty with such Indians." And also, "that no territory should be included which, by treaty with such Indian tribes, was not (without the consent of such tribe) to be included within the territorial limits or jurisdiction of any State or

* 10 Stat. at Large, 1053-63. † 11 Id. 430. ‡ 12 Id. 127.

Territory; but that all such territory shall be excepted out of the boundaries and constitute no part of the State of Kansas until said tribe shall signify their assent to the President of the United States to be included in said State."

No treaty had been made by this tribe in which such consent was given by them. Nor was such assent shown by the record to have been given to the President.

II. THE CASE OF THE WEA TRIBE

Was similar in the outlines to that of the Shawnees. It was a small tribe—a mere band—who joining with other small tribes surrendered to the United States, *by treaty of 10th August*, 1854,* lands which had been ceded to them in earlier times while the region was wild. One hundred and sixty acres were reserved for each individual, to be selected, not in a body, by the heads of families. Ten sections were reserved for the common property of the tribe, and one section for the American Indian Mission Association. The unselected lands were to be sold and the proceeds given to the Indians. The patents were like those given to the Shawnees.

III. THE CASE OF THE MIAMI TRIBE

Was, in its main aspect, like the others. By the treaty of 1854,† it was provided, "should difficulties at any time arise, that these Indians would abide by the laws of the United States, and as they expected to be protected and have their rights vindicated by those laws." And also in the 11th article of the same treaty it was provided, "that the President, with the advice and consent of the Senate, might adopt such policy in the management of their affairs as in his judgment might be most beneficent to them; or Congress might thereafter make such provision by law as expe-

* 10 Stat. at Large, 1082.

† Id. 1097.

rience should prove to be necessary." Like the Indians of the other two tribes, this tribe held their rights in severalty, with the conditions against alienation except on approval, &c. The patents, in the case of this tribe, declared, however:

"That the lands now patented shall *not be liable to levy, sale, or execution, or forfeiture:* PROVIDED, that the legislature of a State within which the ceded county may be hereafter embraced, may, with the assent of Congress, remove the restriction."

IN THE CASE OF THE SHAWNEE TRIBE, the Commissioners of the County of Johnson, which had laid the tax, answered the bill as follows:

"That the aggregate of the lands selected by the said Indians, and from which it is sought to enjoin the levy of taxes, is about one hundred thousand acres; that they do not lie in a contiguous body, but are scattered over the entire area of the lands ceded by said tribe of Indians to the United States; in fact, over the whole body of the said county of Johnson; that interspersed with the selected lands are farm lands and roads, and school districts and municipal townships (the said districts and townships exercising their jurisdiction and functions over the said lands) of the white citizens of the county; that the lands are traversed by the white citizens as well as by Indians in visiting each other, in going to mill and to various business centres of the county; that highways have been laid across the lands by different county tribunals, and frequently at the instance and request of the grantees of the lands; that since the lands have been patented to the Indians, many of them have sold to their white neighbors, and to each other, such portions as they were allowed to do by the Secretary of the Interior; that the Indians traffic and live with their white neighbors as they do with each other, and as such white neighbors do with each other; that many of the Indians have intermarried with their white neighbors and friends; that their marriage ceremony conforms to the laws of the State; that many of the members of the said tribe of Indians, and who are the complainants in the bill, and who are grantees of the selected lands, are white

men and women; that the said white men are entitled to, and do exercise the elective franchise at all elections; that the Indians appeal to the different courts of justice of the county to protect their rights, not only as against their white neighbors, but as against each other; that offenders among them are brought by them before the courts of justice for trial and punishment; that the Indians invoke the aid and shield of the laws, courts, and institutions of the State as administered and enforced in the said county to preserve order, maintain justice, protect rights, and redress wrongs among themselves as well as among their white neighbors and themselves; that they use the common schools established in said county, and their children are entitled to the benefit of the different school funds; that on the decease of any of the said Indians, their estates are subject to the laws of descent, inheritance, and distribution of the State, and are in fact administered upon and disposed of by their request and application in the Probate Court of said county; that many of the said Indians have paid the taxes levied upon their lands into the treasury of the county, and that commercial business and social intercourse prevail throughout said county between the complainants and the citizens and residents of said county."

AS RESPECTED THE WEA TRIBE, it was admitted in a case agreed on,

"That guardians are appointed by the Probate Court of said county for minors, and their lands sold by order of the Probate Court under the like regulations of the Secretary of the Interior; that the members of said tribe sue and are sued in the various courts in the said county of Miami; that the said Indians trade and traffic with the whites, and the whites with them—the same as the whites do with each other; that the tribe exercise no control over the head-rights, and do not punish for offences among themselves, but that the Indians go to the criminal courts for redress; that eight of the persons for whose use this suit is brought are white men, adopted into the said tribe, and own head-rights under the treaty; that some of the adopted whites exercise the elective franchise; that highways are laid out over and across said lands under the authority of the laws of Kansas; that farms of the whites are interspersed more or less among these Indian lands; that municipal townships of the county

embrace the said Indian lands, and have done so since the organization of the county. That annuities of the United States are not received by the chiefs, but are paid over to each Indian who signs the pay-roll. The chiefs only receive those funds that are used and expended for tribal purposes. The said tribe does not enforce the collection ef debts among the members of said tribe."

AS RESPECTED THE MIAMIS, the case was admitted to be essentially similar.

In 1860 a law was passed by the Territorial authorities of Kansas,* to the effect "that all Indians in Kansas Territory to whom lands have been set apart in severalty or by families, and who shall receive patents therefor from the United States, are hereby declared to be, *and are, made citizens of the Territory of Kansas.*"

Notwithstanding all this, however, it was plain that a tribal organization in all three of the tribes was, to a greater or less extent, kept up. Blue Jacket, who filed the bill on behalf of the Shawnees, was himself the Shawnee head-chief. There was also a second chief. These Indians had a council, elected for a year, and a clerk of council, and a sheriff, of their own. Also a place where the council and head-men met to transact business once in each month. The number of Indians belonging to the tribe was 860, not including absentees, of whom there were about 250.

The clerk of the council, a white man apparently, who was a member of the Shawnee tribe of Indians by *adoption*, gave the following account of them:

"I have resided among them since the year 1849. I was the head of a family. I got eight hundred acres of land as a headright. I have been clerk of the Shawnee council since 1856. I attend the meetings of the council regularly. I keep a record of the business transacted in the council. Any difficulties between members of the tribe they sit as a council to determine the same. Since I have been clerk there have been quite a num-

* Compiled Laws of Kansas, p. 602.

ber of difficulties settled by the council. Shawnees who die, the council appoint persons to sell the personal property and pay the debts. They appoint the men to sell; order the sale to pay the debts. We keep a record in the council in relation to all the transactions relating to orphans and the disposal of property of deceased persons, &c. The last estate settled in the council was the estate of Eliza Flint, a woman who died in the fall of 1864. She had but a few things to administer on. There is one estate which is not yet settled up. It is of a man who died in the fall of 1864. The council do not order the sale of real estate, and do not take control of our lands. I am administering, through the Probate Court of Johnson County, the estate of James Suggott, who was a member of the Shawnee tribe. There is one minor, and I am the guardian appointed by the Probate Court of Johnson County. I was curator of an incompetent Indian, appointed by the Probate Court of Wyandotte County, in Kansas. The council takes cognizance of offences committed by one Shawnee against another Shawnee. They determine the punishment for offences of Shawnees against Shawnees. The party found guilty is fined. He is fined the value of the thing stolen, which is paid to the owner, and a like value paid to the council, which goes into the council fund. There have been cases of this kind since I have been clerk, but not a very great many. The last man that was fined was in 1863; he had stolen something. Within the last five years there have been a number of persons punished. There was one case where a Shawnee was charged with manslaughter. The council found him guilty, and sentenced him to one hundred lashes, and to be expelled from the tribe, and to lose his annuity; but that sentence was not executed, owing to the opposition of some of the tribe. This took place in 1860 or 1861. It was just before the war, and the defendant went into the service. They have hung one man for murder since I was clerk. In the case of William Fish, arrested by the sheriff of Johnson County, for shooting Robert Bluejacket, the council directed me and the Shawnee sheriff to demand him of the sheriff of Johnson County, to be delivered over to the council for trial. We did so, and he was delivered up to us. Fish and Bluejacket were both Shawnee Indians. This took place in 1858; in the fall. He was tried before the council, and acquitted. The Shawnees have a custom of their own with regard to marriage. Some marry according to the

old custom, and some marry by the minister. Charles Bluejacket is our minister. The more enlightened portion go to him to perform the ceremony. He has a ceremony of his own. Some are still married according to the old custom. Each mode of getting married is considered by the Shawnees as valid. I never was present at an Indian marriage according to the old custom. The Charles Bluejacket who is minister is the same who is complainant in this case, and head chief. We are a church body alone. We are not connected to any other church. Charles Bluejacket is an exhorter, but nothing more. We sell head-rights to white men, according to the rules prescribed by the Secretary of the Interior. White men have bought parts of head-rights, made farms, and planted orchards on the lands they have bought. I know of two or three cases of this kind. I never voted but once, that I recollect of. A number of Shawnees voted at the election for county-seat in 1858. Shawneetown was a candidate. I was judge of township election in 1863. There are state and county roads and town roads leading out through Shawnee lands. There is a road laid out by the county through my land. I sent my children, at one time, to Mr. Bladget to school."

Blue Jacket himself testified:

"The sheriff of the Shawnees executed the sentence of death for the murder referred to by the last witness. This was in the year 1856 or 1857. They are still in the habit of punishing Shawnees for offences against Shawnees. We have a national school fund and a school fund of our own. The interest on the national school fund is about $5000 per annum. We have what is called the mission school, carried on under the direction of the Society of Friends or Quakers. There is a Sunday school for the Shawnees still kept up at the Quaker Shawnee mission. *The United States have a Shawnee Indian agent for the Shawnees, who resides amongst us. The Shawnees have a treaty now pending with the United States.* In 1863 the Shawnees, by their head men, signed a treaty with the United States, and it was sent to Washington City. It was signed by the men who were appointed by the nation to make a treaty. It has never been acted on by the Senate. This treaty was drawn up in 1864, and is still pending. I was one of the delegates from the Shawnee nation to make the treaty."

So in regard to THE WEA AND MIAMI TRIBES, it appeared that each tribe had its "head men," who represented it and transacted its business; receiving funds from the United States and disbursing them for tribal purposes; the government of the United States having an Indian agent for both tribes, who transacted business with them through their chiefs and head men at his office.

On the cases coming from the County Court to the Supreme Court of Kansas, the principal case, that of the Shawnees, was twice fully argued. And the court, through its chief justice, gave an extended and able opinion. No more of it can be here presented than short and much-mutilated extracts. Even these, however, will serve to convey some idea of the line of view had by that tribunal:

"What is the nature of the plaintiffs' title? Have the patentees but a portion of the title, the remainder being in the government, or have they the whole title?

"It is not material to inquire whether the title of the Shawnees would be correctly described by the technical term 'fee-simple.' The true test is, what was the *intention* of the parties, as derivable from the treaty and the provisions of the patent, all taken together, considered with reference to circumstances existing at the time they were made and issued.

"The policy of the government has been to induce the Indians to abandon their mode of life, as hunters and warriors, and to cultivate in them a taste for and aid them in adopting the pursuits and manners of civilization. To this end enlightened missionaries have been encouraged to live among them as teachers, and the vicious of the white race have, so far as was practicable, been excluded from their country. They have been furnished with agricultural implements and taught the use of them. Traders and merchants have been permitted to live among them and furnish them with supplies, so that they need not depend upon the spoils of war, or rely upon the uncertain success of the chase for the necessaries of life. The effect of this policy is seen in many instances. The nationalities of some of the tribes most ferocious in history have become extinct, the members thereof constituting a worthy portion of the great body politic, undistinguishable from the great mass, except in color or texture.

"The Shawnees, for the last third of a century, have lived upon the very borders of civilization, and much of the time in actual contact with the white race. Many of them have been gradually losing the distinctive characters of the red man, adopting the habits and modes of life of their fairer-skinned neighbors, and are, and have been for years, thrifty, substantial, industrious husbandmen. On the other hand, others of them still live the nomadic lives of their fathers, preferring to remain in habits, mode of life, and in name, Indians. In the country ceded by them by the treaty of 1854, the former class, under tribal regulations, were occupying particular portions of their country, having made thereon farms and other improvements pertaining to a fixed mode of life. Their reservation would soon be surrounded by white settlements, and be useless to the nomadic portion as hunting-grounds. There was vastly more of it than would be necessary for agricultural purposes if every member of the tribe were to become an independent tiller of the soil. Good policy dictated that the portion of these lands, which, under the circumstances, must soon become wholly useless to the Indians as homes, should be placed in a situation to be occupied by the whites. Upon consultation with the Indians, it was ascertained that their views and those of the government coincided, and immmediate steps were taken for an amicable arrangement.

"It was competent for the Indians, had they seen proper so to do, to have selected the whole in a compact body and held them in common. Had they done so no patents would have been issued to them, and their title would have been at least the 'Indian title.' But it was not expected that course would be taken by them. It is apparent from the provision of the treaty that some of them desired to hold their shares in severalty. Among the more civilized and thrifty of them such a desire was a very natural one. When the Indian, in pursuance of the treaty, made his selection of lands to be held by himself in severalty, the title of the tribe, so far as the lands selected were concerned, vested in him; that is, he took the right of perpetual use and occupation. Had it been the intention of the framers of the treaty that he should not acquire a greater title, further provision was wholly unnecessary, but further provision was in fact made. The tribe agreed that, under proper restrictions for the protection of the patentees, the government might issue pat-

ents for the lands. It was feared, probably, that some of the patentees might be overreached by their more shrewd and better-educated white neighbors, and be deprived of their lands without adequate compensation. Hence the stipulation. Nothing remained in the government but the ultimate titles, and the ordinary mode adopted by the government for conveying that to individuals is by patent in fee-simple. Must not the conclusion be that the object of these patents was to convey to the Indians the ultimate title? It seems so to the court. But the correctness of this conclusion is confirmed by the fact that, when any of these lands are sold by the grantees with the consent of the government, the whole consideration of the sale goes to the Indian.

"The effect of the restrictions in the patent remains to be considered.

"It need not be argued that it does not operate as a condition. An attempt by the Indian to convey without the assent of the Secretary of the Interior does not forfeit his right to the land.

"His act would be wholly void, not affecting his title in any way. It is not a limitation upon the title, because the whole title of the government passed when the patent issued.

"The conclusion of the court upon the first point is that the absolute title to the lands in question was intended to be, and is, in the Indians and not in the government, and that they must be held to be taxable if there be no other reason for adjudging them exempt.

"*Second.* Are these lands exempt from taxation on the ground that they belong to the Shawnees? For some purposes at least the tribal organization of the Shawnees is still maintained, but it nowhere appears that as a tribe they have a right to or that they attempt to control in any manner the lands held in severalty by the patentees. The lands not only do not lie in a compact body, but they are widely scattered, being thickly interspersed with the lands and settlements of white persons.

"There is no express prohibition against taxing these lands or the personal property of the Indians residing upon them. The treaty does not contain it, nor is it contained in any act of Congress to which our attention has been directed. In disposing of these lands to the Indians, it doubtless was competent for the proper branch of the government to have prohibited their

taxation by the State, at least so long as they might remain the property of the members of an Indian tribe. The exercise of such power in this instance must be sought elsewhere than in express provisions of law or treaty."

The court then distinguished the case from *Goodell* v. *Jackson*,* decided by Chancellor Kent, and from *The Cherokee Nation* v. *Georgia*, and *Worcester* v. *Georgia*, in this court;† which last cases went, the court below observed, on the ground that the Indians concerned were recognized by the general government as occupying exclusively a district of country, in the enjoyment of which they were promised the protection of the United States; the court, in the latter case, said (page 557): "The treaties and the laws of the United States contemplate the Indian Territory as completely separate from that of the States." His honor proceeded:

"The Shawnees do not hold their lands in common, nor are they contiguously located. It is difficult to conceive of a national existence without a national domain upon which to maintain it. It may be competent for the general government, for some purposes, to recognize the continued tribal existence of the Indians, but it never has recognized them as distinct nationalities, except in connection with the country they occupied. It never has treated with them, or legislated in regard to their affairs, except as the owners and exclusive occupants of a particular district of country. The Shawnees who own and occupy these selected and patented lands are in precisely the same situation they would have been in if, instead of giving them two hundred acres of land apiece, the government had given each two hundred dollars, which they had used in purchasing each a quarter of a section of the public lands wherever it could be found within the State."

On the whole case the conclusion of the Supreme Court of Kansas was:

"That the Shawnees who hold their lands in severalty under patents from the government have the abstract title thereto;

* 20 Johnson, 693.

† 5 Peters, 1; 6 Id. 515.

that the lands are subject to taxation, unless exempted specifically by the constitution of this State, or by some paramount law, and that they are not so exempt."

As respected the MIAMIS, that learned tribunal, on a comparison of the treaty made with them with treaties with other Indians made at about the same time and penned by the same person—in which last treaties it was stipulated that the lands should "not be liable to levy, sale, or execution or forfeiture," and at the same time stipulated that they should not be taxed for a certain term of years, &c.,—held that the words above quoted had reference to "judicial proceedings alone."

On the cases coming here, the whole three were argued by *Mr. T. A. Hendricks, for the plaintiffs in error, and by Mr. E. P. Stanton, contra;* the latter counsel enlarging upon and enforcing the arguments presented in the opinion of the Supreme Court of Kansas, and as respected the case of the Shawnees, more prominently, calling attention to the fact that there was no provision in the treaty of 1854, as there had been in that of 1831, exempting these lands from taxation, or withdrawing them from the State or Territorial jurisdiction; and so argued that it was plain, when the Indians ceded all their lands back to the United States, that the lands were divested of all conditions which had previously attached to them; and that when the government afterwards conveyed a part of them to the Indians in severalty, they were subject only to such conditions as were stipulated by the new treaty, or expressed on the face of the patents.

Mr. Justice DAVIS delivered the opinion of the court in all three of the cases; a separate opinion in each.

IN THE CASE OF THE SHAWNEES.

The sole question presented by this record is, whether the lands belonging to the united tribe of Shawnee Indians, residing in Kansas, are taxable?

The authorities of the county of Johnson asserting the right, and the highest court of the State having sustained it, the question is properly here for consideration. The solution of it depends on the construction of treaties, the relations of the general government to the Indian tribes, and the laws of Congress. In order to a proper understanding of the rights of these Indians, it is necessary to give a short history of some of the treaties that have been made with them.

In 1825 the Shawnee tribe was divided—part being in Missouri and part in Ohio. The Missouri Shawnees were in possession of valuable lands near Cape Girardeau, and in that year* ceded them, by treaty, to the United States, and, in consideration of the cession, received for their use, and those of the same nation in Ohio, who chose to join them, a tract of country in Kansas, embracing fifty square miles. In pursuance of the favorite policy of the government to persuade all the Indian tribes *east* of the Mississippi to migrate and settle on territory, to be secured to them, *west* of that river, in 1831,† a convention was concluded with the Ohio Shawnees—they being willing to remove West, in order to obtain "a more permanent and advantageous home for themselves and their posterity." In exchange for valuable lands and improvements in Ohio, they obtained, by patent, in fee-simple to them and their heirs forever, so long as they shall exist as a nation, and remain upon the same, one hundred thousand acres of land, to be located under the direction of the President of the United States, within the tract granted in 1825 to the Missouri Shawnees.

This treaty contained words of promise that the same care, superintendence, and protection, which had been extended over them in Ohio, should be assured to them in the country to which they were to remove, and also a *guarantee* that their lands should never be within the bounds of any State or Territory, nor themselves subject to the laws thereof. In obedience to the obligations of this treaty, they

* 7 Stat. at Large, 284.

† Id. 355.

removed and united with their brethren, who had preceded them from Missouri, but were soon met by the advancing tide of civilization. In view of the rapid increase of population in the Kansas country, and the small number of Shawnees—the tribe does not now contain over twelve hundred souls—it was deemed advisable to lessen their territorial limits.

Accordingly another treaty was concluded with them on the 2d day of November, 1854.* By this treaty the united Shawnee nation ceded to the United States all the large domain granted to them by the treaty of 1825. In consideration for this cession, two hundred thousand acres of these same lands were receded to them, and they also obtained annuities and other property. This treaty was peculiar in some of its provisions. It did not contemplate that the Indians should enjoy the whole tract, as the quantity for each individual was limited to two hundred acres. The unselected lands were to be sold by the government, and the proceeds appropriated to the uses of the Indians. It also recognized that part of the lands selected by the Indians could be held in common, and part in severalty. If held in common, they were to be assigned in a compact body; if in severalty, the privilege was conceded of selecting anywhere in the tract outside of the common lands.

The Indians who held separate estates were to have patents issued to them, with such guards and restrictions as Congress should deem advisable for their protection. Congress afterwards† directed the lands to be patented, subject to such restrictions as the Secretary of the Interior might impose; and these lands are now held by these Indians, under patents, without power of alienation, except by consent of the Secretary of the Interior. This treaty was silent about the guarantees of the treaty of 1831; but the Shawnees expressly acknowledged their dependence on the government of the United States, as formerly they had done, and invoked its protection and care. Prior to the ratification of this treaty

* 10 Stat. at Large, 1063.

† 11 Id. 430

(although not before it was signed) the organic act for the Territory of Kansas was passed, and on the 29th of January, 1861, Kansas was admitted into the Union; but the rights of the Indians, the powers of Congress over them, their lands, and property, and the stipulations of treaties, were fully preserved, and in the same words, both in the organic act and the act for the admission of Kansas.

The Ohio Shawnees, when they ceded their lands in Ohio, did it in pursuance of an act of Congress of May 28, 1830,* which assured them the country to which they were translated should be secured and guaranteed to them and their heirs forever. The well-defined policy of the government demanded the removal of the Indians from organized States, and it was supposed at the time the country selected for them was so remote as never to be needed for settlement. This policy was deemed advantageous to their interests, as it separated them from the corrupting influences of bad white men, and secured for them a permanent home. It is plain to be seen, that the covenants with the Shawnees in the treaty of 1861, that they should not be subject to the laws of organized States or Territories, nor their lands included within their boundaries, unless with their own consent, signified to the President, must have materially influenced their decision to part with their Ohio possessions and join their brethren in Kansas. They, therefore, removed under the assured protection of the government, to enjoy, as they expected, in perpetuity, free from encroachment, a home adapted to their habits and customs. But these expectations were not to be realized, for the spirit of American enterprise, in a few years, reached their country, and the same white population that pressed upon them in Ohio and Missouri followed them there.

The present and future wants of this population created the necessity for the treaty of 1854, and the segregation of lands allowed by it, in connection with the power to sell these unselected tracts, invited what followed—a mixed oc-

* 4 Stat. at Large, 411.

cupancy of the same territory by the red and white men—the very matter which dictated the removal of the Indians from the older States.

It is insisted, as the guarantees of the treaty of 1831 are not, in express words, reaffirmed in the treaty of 1854, they are, therefore, abrogated, and that the division of the Indian territory into separate estates, so changes the status of the Indians that the property of those who hold in severalty is liable to State taxation. It is conceded that those who hold in common cannot be taxed. If such are the effects of this treaty, they were evidently not in the contemplation of one of the parties to it, and it could never have been intended by the government to make a distinction in favor of the Indians who held in common, and against those who held in severalty. If the Indians thus holding had less rights than their more favored brethren, who enjoyed their possessions in common, and in compact form, would not good faith have required that it should have been so stated in the treaty? The general pledge of protection substantially accorded in this treaty, as in all the other treaties with this tribe, forbids the idea that government intended to withdraw its protection from one part of the tribe and extend it to the other.

But, it is not necessary to import the guarantees of the treaty of 1831 into that of 1854, in order to save the property of the entire tribe from State taxation. If the necessities of the case required us to do so, we should hesitate to declare that, in the understanding of the parties, the promises under which the treaty of 1831 were made, and the guarantees contained in it, were all abandoned when the treaty of 1854 was concluded. If the tribal organization of the Shawnees is preserved intact, and recognized by the political department of the government as existing, then they are a "people distinct from others," capable of making treaties, separated from the jurisdiction of Kansas, and to be governed exclusively by the government of the Union. If under the control of Congress, from necessity there can be no divided authority. If they have outlived many things, they have not outlived the protection afforded by the Con-

stitution, treaties, and laws of Congress. It may be, that they cannot exist much longer as a distinct people in the presence of the civilization of Kansas, "but until they are clothed with the rights and bound to all the duties of citizens," they enjoy the privilege of total immunity from State taxation. There can be no question of State sovereignty in the case, as Kansas accepted her admission into the family of States on condition that the Indian rights should remain unimpaired and the general government at liberty to make any regulation respecting them, their lands, property, or other rights, which it would have been competent to make if Kansas had not been admitted into the Union. The treaty of 1854 left the Shawnee people a united tribe, with a declaration of their dependence on the National government for protection and the vindication of their rights. Ever since this their tribal organization has remained as it was before. They have elective chiefs and an elective council; meeting at stated periods; keeping a record of their proceedings; with powers regulated by custom; by which they punish offences, adjust differences, and exercise a general oversight over the affairs of the nation. This people have their own customs and laws by which they are governed. Because some of those customs have been abandoned, owing to the proximity of their white neighbors, may be an evidence of the superior influence of our race, but does not tend to prove that their tribal organization is not preserved. There is no evidence in the record to show that the Indians with separate estates have not the same rights in the tribe as those whose estates are held in common. Their machinery of government, though simple, is adapted to their intelligence and wants, and effective, with faithful agents to watch over them. If broken into, it is the natural result of Shawnees and whites owning adjoining plantations, and living and trafficking together as neighbors and friends. But the action of the political department of the government settles, beyond controversy, that the Shawnees are as yet a distinct people, with a perfect tribal organization. Within a very recent period their head men negotiated a treaty with the

United States, which, for some reason not explained in the record, was either not sent to the Senate, or, if sent, not ratified, and they are under the charge of an agent who constantly resides with them. While the general government has a superintending care over their interests, and continues to treat with them as a nation, the State of Kansas is estopped from denying their title to it. She accepted this status when she accepted the act admitting her into the Union. Conferring rights and privileges on these Indians cannot affect their situation, which can only be changed by treaty stipulation, or a voluntary abandonment of their tribal organization. As long as the United States recognizes their national character they are under the protection of treaties and the laws of Congress, and their property is withdrawn from the operation of State laws.

It follows, from what has been said, that the Supreme Court of Kansas erred in not perpetuating the injunction and granting the relief prayed for.

In the Case of the Weas.

The opinion just rendered in the case of Blue Jacket, representing the united tribe of Shawnee Indians, controls the decision of this case. The relations of the general government to the Wea tribe, and their relations to the State of Kansas, are settled by the agreed statement of facts in the record, in connection with the treaty of 10th August, 1854.* This tribe being weak in numbers, united with three other tribes, equally weak, and ceded to the United States large possessions obtained under former treaties, reserving for each individual only one hundred and sixty acres of land, and ten sections for the common property of the united tribes, with one section in addition, for the American Indian Mission Association. The reservation of the limited quantity for each individual was not to be in a compact body. Indi-

* 10 Stat. at Large, 1082.

viduals and heads of families had the right of selection, as in the Shawnee treaty, and the lands were to be patented, with restrictions upon alienation, as the President or Congress should prescribe. The unselected lands were to be sold, and the proceeds paid over to the Indians. This policy produced, as in the case of the Shawnees, a mixed occupancy of the original Indian territory, and, in consequence, the same difficulties. These difficulties must have been foreseen by the people of Kansas and the general government, but could not have been within the apprehension of the limited intelligence of the Indians. The basis of the treaty, doubtless, was, that the separation of estates and interests, would so weaken the tribal organization as to effect its voluntary abandonment, and, as a natural result, the incorporation of the Indians with the great body of the people.

But this result, desirable as it may be, has not yet been accomplished with the Wea tribe, and, therefore, their lands cannot be taxed. It is conceded, that the tribal organization is kept up and maintained in the county of Miami, where they live, and where the annuities are paid to them, under the supervision of the Indian agent of the tribe. And it is further conceded, that the chiefs and head men of the tribe, represent it and transact its business, receive funds from the United States for tribal purposes and disburse it, and that an agent for the tribe resides in the county, where he transacts the business of the United States with the tribe through their chiefs and head men. These concessions place the Wea Indians in the same category with the Shawnees.

It is argued, because the Indians seek the courts of Kansas for the preservation of rights and the redress of wrongs, sometimes voluntarily, and in certain specified cases by direction of the Secretary of the Interior, that they submit themselves to all the laws of the State. But the conduct of Indians is not to be measured by the same standard, which we apply to the conduct of other people. Kansas is not obliged to confer any rights on them. Because a sound policy may dictate the wisdom of treating them, in some

respects, as she treats her own citizens, and thereby weaning them from the ancient attachment to their own customs, they are none the less a separate people, under the protection of the general government. This policy may eventually succeed in disbanding the tribe, but until it does, the Indians cannot look to Kansas for protection, nor can the general laws of the State taxing real estate within its limits reach their property.

But, it is said, the protection promised the Shawnees is not accorded to the Weas, in the treaty of August, 1854. Not so, for in the tenth article, they agree "to commit no wrong on either Indian or citizen; and if difficulties should arise, to abide by the laws of the United States in such cases made and provided, as they expect to be protected and have their rights vindicated by those laws." Did not the government accord to them the protection invoked, by executing the treaty? It surely did not need that the United States should say in words, we agree to protect you and vindicate your rights. But the 11th article fixes beyond dispute the reciprocal relations of the general government and these Indians. It declares the object of the treaty is to advance the interests of the Indians; and if it should prove ineffectual, "it was agreed that the President, with the advice and consent of the Senate, should adopt such policy in the management of their affairs as in his judgment should be proper, or Congress might make such provision by law as experience should prove to be necessary." How far the powers of the President or Congress extend under this article, it is unnecessary to discuss or decide. It is sufficient to say, that it leaves the Indians most clearly under the protection of the general government, and withdraws their property from the jurisdiction of Kansas.

IN THE CASE OF THE MIAMIS.

The principle of the foregoing cases of the Shawnee and Wea tribes of Indians, is also decisive of this controversy. The Miami tribe hold their head rights in severalty, by vir-

tue of the provisions of the treaty which was proclaimed by the President on the 4th of August, 1854.*

It is unnecessary to pursue the history of this tribe through the various treaties which have been concluded between them and the United States. It is sufficient to state that they are a nation of people, recognized as such by the general government in the making of treaties with them, and the relations always maintained towards them, and cannot, therefore, be taxed by the authorities of Kansas. Their tribal organization is fully preserved, and they are under the supervision of an agent, who resides in the county where their lands are situated. It is not necessary to decide, until the question arises, what powers have been conferred on Congress, or the President, by virtue of the 11th article of the treaty of 1854, being the same as the 11th article of the Wea treaty. There is, however, one provision in the Miami treaty—being in addition to the securities furnished the Shawnees and Weas—which, of itself, preserves the Miami lands from taxation. This particular provision exempts the lands from "levy, sale, execution, and forfeiture." It is argued, that these words refer to a levy and sale under judicial proceedings, but such a construction would be an exceedingly narrow one, whereas enlarged rules of construction are adopted in reference to Indian treaties. In speaking of these rules, Chief Justice Marshall says: "The language used in treaties with the Indians shall never be construed to their prejudice, if words be made use of which are susceptible of a more extended meaning than their plain import as connected with the tenor of their treaty."†

Applying this principle to the case in hand, is it not evident that the words "levy, sale, and forfeiture" are susceptible of a meaning, which would extend them to the ordinary proceedings for the collection of taxes? Taxes must be first levied, and they cannot be realized without the power of sale and forfeiture, in case of non-payment. The position, it seems to us, is too plain for argument. The object of the

* 10 Stat. at Large, 1093.

† 6 Peters, 582.

treaty was to hedge the lands around with guards and restrictions, so as to preserve them for the permanent homes of the Indians. In order to accomplish this object, they must be relieved from every species of levy, sale, and forfeiture—from a levy and sale for taxes, as well as the ordinary judicial levy and sale.

The judgment of the Supreme Court of Kansas in all three cases was REVERSED, and the causes remanded, with directions to enter a judgment in conformity with the opinions above given in the several cases.

THE NEW YORK INDIANS.

1. Where Indians, being in possession of lands, their ancient and native homes, the enjoyment of which, "without disturbance by the United States," has been secured to them by treaty with the Federal government, with the assurance that "the lands shall remain theirs until they choose to sell them," the State in which the lands lie has no power to tax them, either for ordinary town and county purposes or for the special purpose of surveying them and opening roads through them.—The case of *The Kansas Indians* (*supra*, p. 737), approved.
2. A statute of a State authorizing a sale of such lands for taxes so laid, is void, even though the statute provide that "no sale, for the purpose of collecting the tax, shall, in any manner, affect the right of the Indians to occupy the land."
3. Where Indians, under arrangements approved by the United States, agree to sell their lands to private citizens, and to give possession of them at the expiration of a term of years named, a taxation of the lands before the efflux of the term is premature; even though a sale for the non-payment of the taxes might not take place until after the time when, if they fulfilled their agreements, the Indians would have left the land; and even though any sale would be subject to the proviso named in the preceding paragraph.
4. A deed under a sale for taxes, and purporting to convey the lands to the purchaser, even with the qualification of such a proviso as that in the third paragraph, would, in law, be a disturbance of the Indian tribe.

ERROR to the Court of Appeals of New York; the case being thus:

In 1786, and before the adoption, therefore, of the Fed-