In the Court of Claims of the United States

CONG. NO. 17641

THE CHOCTAW AND CHICKASAW NATIONS

v.

THE UNITED STATES

DEFENDANT'S MOTION TO DISMISS

(November 18, 1931)

Now comes the defendant by the Assistant Attorney General and moves that the petition in the above-entitled case be dismissed for the reason that the court is without jurisdiction to entertain it.

CHARLES B. RUGG,
Assistant Attorney General.
GEORGE T. STORMONT,
Attorney.

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BRIEF

This case comes before the court by virtue of Senate Resolution 478 of the 71st Congress, 3rd Session, passed on February 26, 1931. The defendant contends that the court is without jurisdiction of the reference or the petition filed thereunder for the following reasons:

I. The resolution does not refer a "bill * * * providing for the payment of a claim against the United States, legal or equitable, or for a grant, gift, or bounty to any person."

II. The claim attempted to be referred is barred by reason of the provisions of Section 153 of the Judicial Code.

III. The claim attempted to be referred, being *res judicata,* is barred by reason of the provisions of Section 5 of the Omnibus Claims act of March 4, 1915 (38 Stats. 962, 996), commonly known as the Crawford Amendment.

I

The resolution does not refer a "bill * * * providing for the payment of a claim against the United States, legal or equitable, or for a grant, gift, or bounty to any person"

In passing resolution No. 478 the Senate purported to act under the permission granted by Section 151 of the Judicial Code.

The pertinent portions of that section are:

> Whenever any bill, except for a pension, is pending in either House of Congress providing for the payment of a claim against the United States, legal or equitable, or for a grant, gift, or bounty to any person, the House in which such bill is pending may, for the investigation and determination of facts, refer the same to the Court of Claims. * * *

The first clause of the resolution reads:

> That the claim of the Choctaw and Chickasaw Nations of Indians for compensation from the United States for the remainder of their "leased district" land acquired by the United States under article 3 of the treaty of 1866 (14 Stat. L. 769), not including the Cheyenne and Arapahoe lands for which compensation was made to the Choctaw and Chickasaw Nations by the Act of Congress approved March 3, 1891 (26 Stat. L. 989), be, and the same is, hereby referred to the Court of Claims in accordance with the provisions of section 151 of the Judicial Code (U. S. C., sec. 257; 44 Stat. 898). * * *

Then follows directions to the court to disregard the statute of limitations and any former adjudication or release, to inquire into the claim for just compensation, to report the amount which in fairness and justice the United States should pay to the Choctaw and Chickasaw Nations, and to report its findings of fact and conclusions to the Congress, etc.

This latter clause in the resolution must of course be disregarded by the court as surplusage. In *Sampson* v. *United States* (42 C. Cls. 378, 385), where a bill was referred by resolution of the Senate under the terms of Section 14 of the Tucker act, now Section 151 of the Judicial Code, this court said:

> It is urgently contended by the claimant that the resolution of reference in this case broadens the jurisdiction of this court in making up its findings, and should be looked to for that purpose. We do not agree with this contention. This court gets its jurisdiction in this class of cases from the Tucker Act, and from that alone. The resolution of reference is but the vehicle by which the bill comes to this court and serves no other purpose; otherwise one branch of the Congress alone would be enabled to enlarge the jurisdiction of this court. When the case is in this court we look to the bill referred to us, and no further, to determine the matter before the court for investigation and report.

And in *State of Missouri* v. *The United States* (43 C. Cls. 327, 329) this principle was reiterated in the following words:

> The resolution is the medium or vehicle by which the bill is transmitted to the court and performs no other office.

It will be observed that the first clause of the resolution, quoted above, does not in terms refer a "bill * * * providing for the payment of a

Quoted Kinney from bill & resolution.

claim against the United States, legal or equitable, or for a gift, grant, or bounty to any person," but refers "the claim of the Choctaw and Chickasaw Nations of Indians for compensation," etc. On its face, then, the resolution, under the decisions of this court, is abortive.

But it appears that at the time of the adoption of the resolution there was pending in the Senate Bill No. 3163 "for the relief of the Choctaw and Chickasaw Tribes of Indians of Oklahoma, and for other purposes"; and under the decision of this court in *Dowdy's* case (26 C. Cls. 220, 225) the pendency of this bill is sufficient to enable the court to take jurisdiction of the reference—that is, provided the bill is of the kind which can be referred by one House of Congress under the provisions of Section 151 of the Judicial Code; and the plaintiffs in their petition rely upon this bill as being of that character.

But the defendant submits that the bill is not of that nature, in that it does *not* provide for the *payment* of a claim and would not carry an appropriation if enacted into law. The bill reads as follows:

> That the Secretary of the Interior be, and hereby is, authorized and directed to certify to the Secretary of the Treasury, an account of the proceeds derived from the sale of the territory in Oklahoma, known as the Leased District, including the territory known as Greer County, and excluding what was for-

> merly the Cheyenne and Araphoe Reservation, deducting therefrom the cost of survey and sale and for allotments of Indians therein at the rate of $1.25 per acre, and there is hereby authorized to be appropriated the amount so certified to the Secretary of the Treasury for the purpose of placing the same to the credit of the Choctaw and Chickasaw Tribes of Indians of Oklahoma, upon the books of the Treasury, the balance shown by said account, to be disbursed in accordance with existing law.

This, it is submitted, is not a "bill providing for the payment of a claim" and, if enacted into law, would not be an appropriation act within the meaning of Section 9 of the act of June 30, 1906 (34 Stat. 697, 764). The bill is in many respects very similar to the one under consideration in *White River Utes* v. *The United States* (43 C. Cls. 260). In that case the bill referred (p. 261) provided:

> That the Secretary of the Treasury be, and he hereby is, authorized and directed to adjust and pay, upon the administrative action of the Secretary of the Interior, all claims against the United States of the White River Utes, etc.

Construing the bill, this court said (Id. 263):

> The first division of the bill raises a different question and requires more consideration. It is in effect a direction to the Secretary of the Interior to audit the claim of the petitioners against the United States in compliance with the directions therein given,

> and thereafter the Secretary of the Treasury is directed to pay to the petitioners such sum as shall be found due them upon such audit.

In the instant case the bill is more indefinite. In the *White River Utes case,* as noted, after the audit the Secretary *was directed to pay.* Here, after the audit by the Secretary of the Interior, "there is hereby *authorized* to be *appropriated* the amount so certified." Who is "authorized to appropriate" the bill does not say; and inasmuch as Congress can not constitutionally delegate the power of appropriation, it is evident that further action by that body is contemplated should the bill become law.

The court in the *White River Utes case* then goes on to say (Id.):

> The bill does not provide for the payment of any definite sum, or, for that matter, for any sum whatever unless something may be found due by the Secretary of the Interior * * *. It is in fact but a bill to set in motion the Department of the Interior along certain lines prescribed by the bill.

Further (Id. 265) the court says:

> What is the court called upon to do by the present reference? There can be but one answer to the question, and that is, that it is asked to do just what it would have been the duty of the Secretary of the Interior to do in case the bill had become a law, and that is to try the lawsuit between the parties and determine the amount which shall be re-

covered. (Which is precisely the situation in the instant case.)

If Congress desires to give this court jurisdiction to try this lawsuit between these Indians and the Government and finally ajudicate the matter, it will do so by law conferring upon this court that jurisdiction. It will give this court just the same jurisdiction which the present bill seeks to confer upon the Secretary of the Interior.

Commenting upon this case in a decision rendered a few weeks thereafter, the court said:

> In the case of the *White River Utes et al.* (43 C. Cls. R.–) the bill referred was one directing the Secretary of the Treasury to adjust and pay all claims against the United States in their favor upon the administrative action of the Secretary of the Interior. The court declined to take jurisdiction on the ground that the bill did not provide for the payment of any definite sum, or of any sum whatever, unless something be found due by the Secretary of the Interior. In other words, under that reference the Court was asked to do what the Secretary of the Interior would have been required to do had the bill become a law.
>
> This question of jurisdiction in Tucker Act cases has been repeatedly brought before this court and has caused not a little expenditure of time both on the part of the bar as well as on the part of the bench. With so many cases coming before the court for adjudication, presenting so many questions which must necessarily be decided, neither the bar nor the bench have time to waste in needless discussion. *It must now be considered as settled that when a bill is referred by one of the Houses of Congress under Section 14 of the Tucker Act it must be expressly and explicitly for a grant, gift, or bounty or for the payment of a claim, and nothing else, which claim must be legal and equitable.* (*State of Missouri* v. *United States,* 43 Ct. Cls. 327, 330.) (Italics ours.)

To the same effect see *Meeha* v. *The United States* (48 C. Cls. 258.)

Under the rulings in these cases the defendant submits that the court is without jurisdiction of the reference and that the petition must be dismissed.

II

The claim attempted to be referred is barred by reason of the provisions of Section 153 of the Judicial Code

Section 153 of the Judicial Code provides:

> The jurisdiction of the said court shall not extend to any claim against the Government not pending therein on December first, eighteen hundred and sixty-two, growing out of or dependent upon any treaty stipulation entered into with foreign nations or with the Indian tribes.

The claim in this case grows out of the treaty of April 28, 1866, between the United States and the plaintiff tribes. (14 Stat. 769.)

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In the *Chase case* (50 C. Cls. 293, 305, 312) the court held that Section 5 of the Omnibus Claims act of March 4, 1915 (38 Stats. 962, 996), otherwise known as the Crawford Amendment, repealed *pro tanto* Section 151 of the Judicial Code and excludes from the court's fact-finding jurisdiction claims of the character mentioned therein and contemplated by it. The Crawford Amendment provides:

> That from and after the passage and approval of this act the jurisdiction of the court shall not extend to or include (certain classes of cases not necessary to mention here); nor shall said Court of Claims have jurisdiction of any claim which is now barred by the provisions of any law of the United States.

As stated, the claim in the instant case grows out of or is dependent upon a treaty between the United States and an Indian tribe. Section 153 of the Judicial Code bars treaty claims from the court's general jurisdiction; and by virtue of the Crawford Amendment the bar of this section is extended to include cases coming before the court under Section 151. Therefore this petition must be dismissed for want of jurisdiction.

This point is more fully developed in the defendant's brief upon the motion to dismiss a similar reference in *Creek Nation* v. *The United States,* Cong. 17640, and in the defendant's brief upon its motion for a new trial in *Wales Island Packing Company case,* Cong. 17340; and rather than repeat that discussion here, the court is respectfully referred to those motions, with the request that they be considered in the determination of this motion.

III

The claim attempted to be referred, being res judicata, is barred by reason of the provisions of Section 5 of the Omnibus Claims act of March 4, 1915 (38 Stats. 962, 996), commonly known as the Crawford Amendment

The claim in this case was subject of decision in 34 Court of Claims, page 17, where it was exhaustively considered on the merits and on the law by this court, and was determined on appeal in 179 United States, page 494. It is, therefore, *res judicata;* and by reason of the Crawford Amendment of Section 151 of the Judicial Code, which bars from the court's fact-finding jurisdiction "any claim which is now barred by the provisions of any law of the United States," the court is without jurisdiction to entertain it under the reference.

In the *Chase case* (50 C. Cls. 293) the Crawford Amendment and its effect was fully considered by the court. It was pointed out that the Crawford Amendment is practically a reenactment of Section 3 of the Bowman Act (22 Stat. 485) and consequently under the rules of statutory construction is to be given the same effect as Section 3 "unless the intention to use (it) in a different sense clearly appears" (p. 303), and (p. 313) that in *Hefflebower's case* (21 C. Cls. 228, 239) the court had held

that certain stated classes of cases were excluded from the court's fact-finding jurisdiction by reason of Section 3, the first class given being:

> (1) Of cases within the general or special jurisdictions of this court which were prosecuted to judgment and determined upon the merits. Revised Statutes, Sections 1092, 1093.

Which class, of course, is excluded because of the language of Section 3, repeated in the Crawford Amendment:

> Nor shall the said court have jurisdiction of any claim against the United States which is now barred by virtue of the provisions of any law of the United States.

And by the reference to Section 1093 of the Revised Statutes, now Section 179 of the Judicial Code, it is made certain that the Court had in mind the bar which arises out of the doctrine of *res judicata.*

In this aspect, in construing the meaning of the phrase quoted from Section 3, the *Hefflebower case* followed the earlier decision in the *Choteau case* (20 C. Cls. 250, 252), where the court, upholding the contention that Section 1093 of the Revised Statutes barred a claim from its jurisdiction under the Bowman act, said:

> A committee of either House of Congress can not, through the medium of the Bowman act, open a final judgment of this court, etc.

And in the earlier *Ford case* (19 C. Cls. 519, 524), the court, construing this same phrase from Section 3, stated:

> The point then is, whether the claim set up in the petition "is barred by virtue of the provisions of any law of the United States." This does not mean merely the provisions of any law of limitations, but of "*any* law." Nor does it mean any *express* law barring the claim in direct prohibitory terms, but "any law" which has the effect of barring it.

Other cases holding that the phrase "barred by virtue of the provisions of any law of the United States" comprehends the bar arising out of a former adjudication are *McClure* v. *The United States* (19 C. Cls. 18, 26) and *Dowdy* v. *The United States* (23 C. Cls. 97, 101). See also *Chieves* v. *The United States* (42 C. Cls. 21), *Hartiens* v. *The United States* (Id. 124), and *Daigle* v. *The United States* (Id. 124), holding generally that a former adjudication bars a reference under Section 14 of the Tucker act.

Summarizing this contention, the defendant shows that this court has held that the Crawford Amendment (now Section 251, Title 28, U. S. C.) repeals *pro tanto* Section 151 of the Judicial Code, is practically a reenactment of Section 3 of the Bowman act and is to be given the same construction as was given that Section; that as Section 3 of the Bowman act that part of it which excludes from

the court's fact-finding jurisdiction "any claim * * * which is now barred by the provisions of any law of the United States" was construed by the court to comprehend cases where there had been a former adjudication and that consequently the doctrine of *res judicata,* declaratorily stated in R. S. 1093, now Section 179 of the Judicial Code, operates to bar from the jurisdiction of the court any reference of an adjudicated claim to this court under Section 151 of the Judicial Code; and submits that this court is therefore without jurisdiction of the reference here and of the petition filed thereunder and that it should be dismissed.

CONCLUSION

The defendant prays the especial attention of this court to this motion, as it is a matter of genuine importance to the Government in that fundamentally the question involved is the power of one House of Congress to do, through the medium of Section 151, that which the whole Congress can only do with the approval of the President, or, failing such approval, by overriding the Presidential veto. In this particular case the Congress did refuse to pass over the President's veto the bill referring the claim to the court. If the court takes jurisdiction of the reference here, the anomalous situation is presented, as stated, of one House of Congress being able to do that which the whole Congress has refused to do without the approval of the President.

Attached to the petition in this case is Senate Report 652 of the 71st Congress, 2nd Session, upon S. 3165. That bill empowered this court "to hear and inquire into the claim of the Choctaw and Chickasaw Indian Nations that they have never received fair and just compensation for the remainder of their 'leased district' land" and "to report its findings to Congress notwithstanding the lapse of time or the statute of limitations and irrespective of any former adjudication upon title and ownership, as to whether the consideration paid or agreed to be paid for said remainder of said lands was fair and just, and if not, whether the United States should pay to the Choctaw and Chickasaw Nations additional compensation therefor, and if so, what amount should be so paid," etc.

This bill was passed by the Congress and submitted to the President for his approval. The President, on February 18, 1931, returned it without his approval in the following message (Senate Document 280, 71st Congress, 3rd Session):

> *To the Senate:*
>
> I return herewith without my approval the bill S. 3165, entitled "An act conferring jurisdiction upon the Court of Claims, to hear, consider, and report upon a claim of the Choctaw and Chickasaw Indian Nations or Tribes for fair and just compensation for the remainder of the Leased District Lands."
>
> This act undertakes, by indirection, to revive the claims of the Choctaw and Chicka-

saw Nations for compensation for parts of the so-called "Leased District."

The "Leased District" lands of these Indians comprised approximately 7,000,000 acres, lying between the ninety-eighth and one-hundredth degrees of west longitude in the State of Oklahoma. By treaty of June 22, 1855, the United States paid the Choctaws $600,000 and the Chickasaws $200,000 for the lease of this land to the United States in perpetuity, as well as for the cession to the United States of their land west of the one-hundredth degree of west longitude. By treaty of April 28, 1866, involving an additional payment of $300,000 the Choctaws and Chickasaws ceded the Leased District land to the United States, thereby parting with all rights of any kind in that land.

In 1891 Congress appropriated $2,991,450 to pay the Choctaws and Chickasaws for approximately 2,293,000 acres of the Leased District Land granted by Congress to the Cheyennes and the Arapahoes. In signing the general appropriation bill containing this item President Harrison protested at paying for land that already belonged to the Federal Government, saying in a message to Congress that he would have disapproved the bill because of this item were it not for the disastrous consequences that would result from the defeat of the entire appropriation bill. In December, 1892, Congress passed a resolution containing the following provisions:

Provided, however, That neither the passage of the original act of appropriation to pay the Choctaw tribes of Indians for their interest in the lands of the Cheyenne and Arapahoe Reservation, dated March 3, 1891, nor of this resolution shall be held in any way to commit the Government to the payment of any further sum to the Choctaw and Chickasaw Indians for any alleged interest in the remainder of the lands situated in what is commonly known and called the "Leased District."

In 1899 the Court of Claims decided that the title to the remaining acreage of Leased District land was in the United States in trust for the Choctaw and Chickasaw Indians. However, the United States Supreme Court, in its decision of December 10, 1890, reversed the Court of Claims, and held that the treaty of 1866 vested in the United States complete title to the Leased District land.

The present claim of the Choctaw and Chickasaw Indians is for 5,224,346 acres at $1.25 per acre.

The bill does not send this claim to the Court of Claims for adjudication and settlement, as is normally the case with respect to Indian claims. That would, indeed, be futile, since the Supreme Court has ruled that neither it nor the Court of Claims has jurisdiction to decide that the United States shall pay for lands that it already owns. The result of the bill would seem to be,

through a report to Congress from the Court of Claims, to create a lawful aspect to a claim which has no present legal standing.

This case raises a very wide issue of whether we are to undertake revision of treaties entered into in the acquiring of Indian lands during the past 150 years. The values of such lands have obviously increased, and the undertakings entered into at the time the agreements were made may naturally look small in after years. But the increased values have been the result of the efforts of our citizens in building this Nation.

This case would, I feel, create a dangerous precedent which could conceivably involve the Government in very large liabilities.

If it is the thought of Congress that justice requires the revision of Indian treaties in the light of subsequent events, then the whole of these treaties should be considered together not by incidental creation of precedents.

It is the purpose of the United States Government to do justice by the Indians and assist them to citizenship and participation in the benefits of our civilization. And in the case of these tribes the Government has during the past 18 years expended a total of approximately $3,500,000 out of the taxpayers' money and they will in a few years exceed the totals of these claims.

(Signed) HERBERT HOOVER.

THE WHITE HOUSE, *February 18, 1931.*

As bearing upon the importance of the question of jurisdiction in this case, it may be stated that defendant's counsel has been informally advised by the Indian Office that there are more than two hundred claims which may be similarly referred, if jurisdiction of the present reference is sustained.

Respectfully submitted.

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