BRIEF

in Support of Claim

OF

Choctaws and Chickasaws

vs.

The United States

For Compensation for the Leased District

J. F. McMURRAY,
Attorney for the Claimants.

News-Capital Printing Co. McAlester, Okla.

BRIEF
IN SUPPORT OF CLAIM
OF
CHOCTAWS AND CHICKASAWS
VS.
THE UNITED STATES
FOR COMPENSATION FOR THE
LEASED DISTRICT.

The lands east of the Mississippi River, formerly owned by the Choctaw tribe of Indians were acquired long before the United States Government were in control of that part of our country. This is shown by a number o ftreaties made by the Choctaws with Great Britain and by the treaty between the United States and the Choctaws in 1786 which says:

> "One thousand seven hundred eighty-two while they (the Choctaws) were under the protection of the King of Great Britain."

The Choctaws acquired the land west of the Mississippi River under the treaty of October 18, 1820, by exchanging a small part of their land in Mississippi for a country beyond the Mississippi River.

TREATY OF 1820.

"WHEREAS, It is an important object with the President of the United States, to promote the civilization of the Choctaw Indians, by the establishment of schools amongst them; and to perpetuate them as a nation, by exchanging, for a small part of their land here, a country beyond the Mississippi River, where all, who live by hunting and will not work, may be collected and settled together. And whereas it is desirable to the state of Mississippi, to obtain a small part of the land belonging to said nation; for the mutual accommodation of the parties, and for securing the happiness and protection of the whole Choctaw Nation, as well as preserving that harmony and friendship which so happily subsists between them and the United States, James Monroe, President of the United States of America, by Andrew Jackson, of the State of Tennessee, Major General in the Army of the United States, and General Thomas Hinds, of the State of Mississippi, Commissioners Plenipotentiary of the United States, on the one part, and the Mingoes, Head Men, and Warriors, of the Choctaw Nation, in full Council assembled, on the other part, have freely and voluntarily entered into the following articles, viz.:

Art.1. "To enable the President of the United States to carry into effect the above grand and humane objects, the Mingoes, Head Men, and Warriors, of the Choctaw Nation, in full Council assembled, in behalf of thmselves and the said Nation, do, by these presents, cede to the United States of

America, all the land lying and being within the boundaries following, to-wit: —Beginning on the Choctaw boundary, East of Pearl River, at a point due South of the White Oak Spring, on the old Indian path; thence North to said Spring; thence northwardly to a black oak, standing on the Natchez road, about forty poles eastwardly from Doake's fence, marked A. J. and blazed, with two large pines and a black oak standing near thereto, and marked as pointers; thence a straight line to the head of Black Creek, or Bouge Loosa; thence down Black Creek or Bouge Loosa to a small lake; thence a direct course, so as to strike the Mississippi one mile below the mouth of the Arkansas River; thence down the Mississippi to our boundary; thence around and along the same to the beginning.

Art. 2. "For and in consideration of the foregoing cession, on the part of the Choctaw Nation, and in part satisfaction for the same, the Commissioners of the United States, in behalf of said States, do hereby cede to said Nation, a tract of country west of the Mississippi River, situate between the Arkansas and Red Rivers, and bounded as follows:—Beginning on the Arkansas River, where the lower boundary line of the Cherokees strikes the same; thence up the Arkansas to the Canadian Fork, and up the same to its source; thence due South to the Red River; thence down Red River, three miles below the mouth of Little River, which empties itself into Red River on the north side; thence a direct line to the beginning."

Thus we see that the Choctaws parted with "a small

part" of their territory in Mississippi and acquired the western territory included between the Arkansas and Red Rivers to 104 degrees 30 minutes West Longitude, the source of the Canadian Fork of the Arkansas River. This treaty was negotiated on the part of the United States by General Andrew Jackson, and on the part of the Choctaws by the great Choctaw chief, Apushimataha.

Notwithstanding the treaty of 1820 provides:

> Art. 4. "The boundaries hereby established between the Choctaw Indians and the United States, on this side of the Mississippi River, shall remain without alteration until the period at which said Nation shall become so civilized and enlightened as to be made citizens of the United States. * * *"

the treaty between the Choctaws and the United States of 1830, known as the treaty of Dancing Rabbit Creek, makes very serious changes in these boundaries, both as to the lands conveyed in Mississippi and as to the lands acquired in the west.

Under the treaty of 1830 we find the boundaries of the lands purchased west of the Mississippi River described as follows:

> Art. 2. "The United States under a grant specially to be made by the President of the U. S. shall cause to be conveyed to the Choctaw Nation a tract of country west of the Mississippi River, in fee simple to them and their descendants, to inure to them while they shall exist as a nation and live

> on it, beginning near Fort Smith where the Arkansas boundary crosses the Arkansas River, running thence to the source of the Canadian Fork; if in the limits of the United States, or to those limits; thence due south to Red River, and down Red River to the west boundary of the Territory of Arkansas; thence north along that line to the beginning. The boundary of the same to be agreeably to the treaty made and concluded at Washington City in the year 1825. The grant to be executed so soon as the present Treaty shall be ratified."

Thus we find that the Government of the United States acquired under the treaty of 1830 more than ten million acres of land that was not conveyed, or attempted to be conveyed, under the treaty of 1820. This is a matter of judicial determination. We find:

> Choctaws, et al, vs. U. S. et al, 34 Court of Claims, 89, 104.
>
> "By the treaty concluded September 27, 1830, called the treaty of Dancing Rabbit Creek, it was provided in the third article (7 Stat. L., 333) that the Choctaw Nation should and did thereby cede to the United States the entire country they then owned and possessed east of the Mississippi River, and that they would remove as early as practicable; and that the Choctaw Nation should and did surrender to the United States all the remaining lands at that time owned by them in Mississippi. Under this treaty the body of Choctaws removed from their possessions east of the river to the lands purchased and acquired by them west of the river under the terms of the

treaty of October 18, 1820, as modified in 1825, and as the limits were defined in the treaty of Dancing Rabbit Creek. Thus, there was no cession of lands east of the Mississippi River for lands west of that river by the treaty of 1830. The exchange made in 1820 left the Chotaws with 10,000,000 acres of land, which by the treaty of 1830 the United States got for nothing.

In the Net Proceeds case it was said that the treaty of 1830 was evidently and purposely executed not so much to secure to the Indians the rights for which they had stipulated as to effectuate the policy of their removal. (Choctaw Nation v. United States, 119 U. S. R., 38.) So, if the treaty of 1830 annulled that of 1820 for every purpose, we have the spectacle of the United States acquiring ten million acres of land in Mississippi for nothing and also extinguishing a title to several million acres west of the Mississippi without the payment of anything."

The title to the land purchased by the Choctaws in 1820 west of the 100th Meridian that was not included in the conveyance under the treaty of 1830, amounting in all to six and a half million acres, was made perfect in the United States by the treaty of 1855:

Art. 9. "The Choctaw Indians do hereby absolutely and forever quit-claim and relinquish to the United States all their right, title, and interest in, and to any and all lands, west of the one hundredth degree of west longitude.; * * *"

This brings the western boundary of the Choctaw-Chick-

asaw possessions down to the 100th Meridian of West Longitude.

In this same treaty the Choctaws and Chickasaws leased to the United States that part of their western possessions included between the 98th and 100th Meridians and the Canadian and Red Rivers:

Art. 9. " * * and the Choctaws and Chickasaws do hereby lease to the United States all that portion of their common territory west of the ninety-eighth degree of west longitude, for the permanent settlement of the Wichita and such other tribes or bands of Indians as the Government may desire to locate therein; excluding, however, all the Indians of New Mexico, and also those whose usual ranges at present are north of the Arkansas River, and whose permanent locations are north of the Canadian River, but including those bands whose permanent ranges are south of the Canadian, or between it and the Arkansas; which Indians shall be subject to the exclusive control of the United States, under such rules and regulations, not inconsistent with the rights and interests of the Choctaws and Chickasaws, as may from time to time be prescribed by the President for their government; PROVIDED, HOWEVER, The territory so leased shall remain open to settlement by Choctaws and Chickasaws as heretofore."

Since the treaty of 1855 the above part of the Choctaw-Chickasaw territory has always been known as the Leased District.

In 1866 another treaty between the Choctaws and Chickasaws on the one side and the United States on the other was made and included the following provisions as to the Leased District:

> Art. 3. "The Choctaws and Chickasaws, in consideration of the sum of three hundred thousand dollars, hereby cede to the United States the territory west of the 98° west longitude, known as the leased district, provided that the said sum shall be invested and held by the United States, at an interest not less than five per cent., in trust for the said Nations, until the legislatures of the Choctaw and Chickasaw Nations, respectively, shall have made such laws, rules, and regulations as may be necessary to give all persons of African descent, resident in the said Nation at the date of the treaty of Fort Smith, and their descendants, heretofore held in slavery among said Nations, all the rights, privileges, and immunities, including the right of suffrage, of citizens of said Nations, except in the annuities, moneys, and public domain claimed by, or belonging to, said Nations, respectively; and also to give to such persons who were residents as aforesaid, and their descendants, forty acres each of the land of said Nations on the same terms as the Choctaws and Chickasaws, to be selected on the survey of said land, after the Choctaws and Chickasaws and Kansas Indians have made their selections as herein provided; and immediately on the enactment of such laws, rules, and regulations, the said sum of three hundred thousand dollars shall be paid to the said Choctaw and Chickasaw Nations in the proportion of three-fourths

> to the former and one-fourth to the latter,—less such sum, at the rate of one hundred dollars per capita, as shall be sufficient to pay such persons of African descent before referred to as within ninety days after the passage of such laws, rules and regulations shall elect to remove and actually remove from the said Nations respectively. And should the said laws, rules, and regulations not be made by the legislatures of the said Nations, respectively, within two years from the ratification of this treaty, then the said sum of three hundred thousand dollars shall cease to be held in trust for the said Choctaw and Chickasaw Nations, and be held for the use and benefit of such of said persons of African descent as the United States shall remove from the said Territory in such manner as the United States shall deem proper,—the United States agreeing, within ninety days from the expiration of the said two years, to remove from said nations all such persons of African descent as may be willing to remove; those remaining or returning after having been removed from said nations to have no benefit of said sum of three hundred thousand dollars, or any part thereof, but shall be upon the same footing as other citizens of the United States in the said nations."

From the year 1820 to 1891 all departments and officials of the United States treated the Leased District as the property of the Choctaw and Chickasaw people. There was no suggestion through all these years coming from any official or branch of the Government of the United States that these lands were not the property of

the Choctaws and Chickasaws. The title to this property in the Choctaw and Chickasaw people was regarded as perfect until after Congress had negotiated with the Choctaws and Chickasaws and purchased the Cheyenne and Arapahoe country, a part of the Leased District. The act of Congress appropriating money to pay for this land follows:

> "And the sum of two million nine hundred and ninety-one thousand four hundred and fifty dollars be, and the same is hereby appropriated out of any money in the Treasury not otherwise appropriated, to pay the Choctaw and Chickasaw Nations of Indians for all the right, title, interest, and claim which said nations of Indians may have in, and to certain lands now occupied by the Cheyenne and Arapahoe Indians under executive order; said lands lying south of the Canadian River, and now occupied by the said Cheyenne and Arapahoe Indians, said lands have been ceded in trust by article three of the treaty between the United States and said Choctaw and Chickasaw Nations of Indians, which was concluded April twenty-eighth, eighteen hundred and sixty-six, and proclaimed on the tenth day of August of the same year, and whereof there remains, after deducting allotments as provided by said agreement, a residue ascertained by survey to contain two million three hundred and ninety-three thousand one hundred and sixty acres; three-fourths of this appropriation to be paid to such person or persons as are or shall be duly authorized by the laws of said Choctaw Nation to receive the same, at such time and in

> such sums as directed and required by the legislative authority of said Choctaw Nation, and one-fourth of this appropriation to be paid to such person or persons as are or shall be duly authorized by the laws of said Chickasaw Nation to receive the same, at such time and in such sums as directed and required by the legislative authority of said Chickasaw Nation; this appropriation to be immediately available and to become operative upon the execution by the duly appointed delegates of said respective nations specially authorized thereto by law of releases and conveyances to the United States of all the right, title, interest, and claim of said respective nations of Indians in and to said land (not including Greer County, which is now in dispute), in manner and form satisfactory (the) to the President of the United States; and said releases and conveyances, when fully executed and delivered, shall operate to extinguish all claim of every kind and character of said Choctaw and Chickasaw Nations of Indians in and to the tract of country to which said releases and conveyances shall apply." (26 Stat. L. 1025.)

This item was carried in the Indian appropriation bill in 1891. When it came to President Harrison for his signature, the first suggestion that was ever made that the title to this property was not perfectly in the Choctaws and Chickasaws came from him. The payment of this money was held up for many months and was not finally paid to the Choctaw and Chickasaw people until after Mr. Cleveland became president. Upon due con-

sideration the Government finally paid it. Deducting the Cheyenne and Arapahoe country from the Leased District, we have remaining a scope of country for which nothing has ever been paid to the Choctaw and Chickasaw people. The question of the payment for this land was referred to the Court of Claims under an act of Congress, as follows:

> "That as the Choctaw and Chickasaw nations claim to have some right, title, and interest in and to the lands ceded by the foregoing agreement, which claim is controverted by the United States, jurisdiction be, and is hereby, conferred upon the Court of Claims to hear and determine the said claim of the Choctaws and Chickasaws and to render judgment thereon, it being the intention of this Act to allow said Court of Claims jurisdiction, so that the rights, legal and equitable, of the United States, and the Choctaw and Chickasaw nations, and the Wichita and affiliated bands of Indians in the premises, shall be fully considered and determined, and to try and determine all questions that may arise on behalf of either party in the hearing of said claim; and the Attorney-General is hereby directed to appear in behalf of the Government of the United States, and either of the parties to said action shall have the right of appeal to the Supreme Court of the United States; PROVIDED, That such appeal shall be taken within sixty days after the rendition of the judgment objected to, and that the said courts shall give such causes precedence." (28 Stat. L. 898.)

This resulted in the filing in the Court of Claims the case of The Choctaw and Chickasaw Nations vs. The United States and the Wichita and Affiliated Bands of Indians. The Court of Claims, after much research and taking of a great mass of testimony including all Government maps and reports of officials of all the departments touching this question through all these years held with the Choctaws and Chickasaws on every point in the controversy.

From this decision the United Sattes Government appealed to the Supreme Court of the United States, Wichita and Affiliated Bands of Indians vs. Choctaw Nation, Chickasaw Nation, and United States. This Court held that under Article 3 of the treaty of 1866 the title to this land passed to the United States but this great Court was not content to leave the question without modification as we find in the following passages from their decision:

> "But in no case has it been adjudged that the courts could by mere interpretation or in deference to its view as to what was right under all circumstances, incorporate into an Indian treaty something that was inconsistent with the clear import of its words. It has never been held that the obvious, palpable meaning of the words of an Indian treaty may be disregarded, because, in the opinion of the Court, that meaning may in a particular transaction work

what it would regard as injustice to the Indians. That would be an intrusion upon the domain committed by the constitution to the political departments of the government. Congress did not intend, when passing the act under which this litigation was inaugurated, to invest the court of claims or this court with authority to determine whether the United States had, in its treaty with the Indians, violated the principles of fair dealing. What was said in The Amiable Isabella, 6 Wheat, 1, 71, 72, 5 L. ed. 191, 208, is evidently applicable to treaties with Indians. Mr. Justice Story, speaking for the Court, said: "In the first place this court does not possess any treaty-making power. That power belongs by the Constitution to another department of the government, and to alter, amend, or add to any treaty by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty. Neither can this court supply a casus omissus in a treaty, any more than in a law. We are to find out the intention of the parties by just rules of interpretation applied to the subject-matter; and, having found that, our duty is to follow it as far as it goes and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind. * * *"

"It is thus clear that the court of claims was without authority to determine the rights of the parties upon the ground of mere justice or fairness, much less, under the guise of interpretation, to depart from the plain import of the words of the treaty. Its duty was to ascertain the intent of the

parties according to the established rules for the interpretation of treaties. Those rules, it is true, permit the relations between Indians and the United States to be taken into consideration. But if the words used in the treaty of 1866, reasonably interpreted, import beyond question an absolute, unconditional cession of the lands in question to the United States free from any trust, then the court cannot amend the treaty or refuse to carry out the intent of the parties, as gathered from the words used, merely because one party to it held the relation of an inferior and was politically dependent upon the other, or because in the judgment of the court the Indians may have been overreached. To hold otherwise would be practically to recognize an authority in the courts, not only to reform or correct treaties, but to determine questions of mere policy in the treatment of the Indians. * *"

"It is said in the present case that the interpretation of the treaty in accordance with the views of the United States would put the government in the attitude of having acquired lands from the Indians at a price far below their real value. Even if this were true it would not authorize the court in determining the legal rights of the parties to proceed otherwise than according to the established principles of interpretation, and out of a supposed wrong to one party evolve a construction not consistent with the clear import of the words of the treaty. If the treaty of 1866, according to its tenor and obvious import, did injustice to the Choctaws and Chickasaws, the remedy is with the political department of the government. As there is no ground to contend in this case

that that treaty, if interpreted according to the views of the government, was one beyond the power of the parties to make, it is clear that even if the United States did not deal generously with the Choctaws and Chickasaws in respect of the lands in dispute—and we do not mean to say that there is any ground whatever for so contending—the wrong done must be repaired by Congress, and cannot be remedied by the courts without usurping authority that does not belong to them."

"* * While the dependent character of the Indians makes it the duty of the court to closely scrutinize the provisions of the treaty and to interpret them" in the light of the larger reason and the superior justice that constitute the spirit of the law of nations," (Choctaw Nation vs. United States, 119 U. S. 1, 28, 30, L. ed. 306, 315, 7 Sup. Ct. Rep. 75), the court must take care, when using its power to ascertain the intention of the parties, not to disregard the obvious import of the words employed, and thereby, in effect, determine questions of mere governmental policy. We may repeat, that if wrong was done to the Indians by the treaty of 1866, interpreted as we have indicated—and we are not to be understood as expressing the opinion that they were not under all the circumstances fairly dealt with—the wrong can be repaired by that branch of the government having full power over the subject."

Thus we see from the records that the Choctaw and the Chickasaw Indians in 1820 purchased the western land, and paid the Government dearly for them; that the

Government issued a patent therefore in 1842 signed by President John Tyler, and countersigned by Secretary of State, Daniel Webster; that now a large part of those lands have been taken from these Indians without consideration. The Government has sold these lands and realized large sums of money from same, and that this money is now in the Treasury of the United States, and that none of it has ever been turned over to the Choctaw and Chickasaw Indians, the rightful owners.

The Choctaw and Chickasaw people are now respectfully asking Congress to pay over to them this money which is theirs by every right known to civilized man.

Can this great, just and powerful Government under all these circumstances keep these funds and refuse to turn them over to the Choctaw and Chickasaw people, because they are the wards of our Government?

J. F. McMURRAY,
Attorney for the Claimants.