In the United States Court of Claims.

No. 25,021.

J. HALE SYPHER

vs.

THE CHOCTAW NATION OF INDIANS.

BRIEF ON BEHALF OF THE CHOCTAW NATION OF INDIANS.

The respondent objects to the several requests for findings of fact on behalf of claimant because the same are based upon the assumption, first, that a valid contract and agreement existed between claimant and respondent; second, that claimant rendered and performed service for respondent under said alleged agreement for which he is entitled to receive compensation; and, third, that the value of said alleged service, upon the principles of a *quantum meruit*, is the same named in said alleged contract, namely, $220,698.75.

Respondent contends, and the evidence so establishes, first, that no valid contract or agreement existed between claimant and respondent, even irrespective of the provisions

of section 2103, R. S. U. S.; second, that claimant rendered no service to respondent for which he is entitled to receive compensation; and, finally, if he did render any such service, (which is denied,) there is no evidence in the case as to the value thereof, the amount named in said alleged contract or agreement not being any evidence in respect of that matter upon which any finding of fact or report can be based or made.

The respondent respectfully submits that the report to Congress, under the reference herein, should be that nothing is due claimant from the respondent.

BRIEF.

I.

The Alleged Agreement of November 7, 1891.

The Choctaw and Chickasaw Nations of Indians had a community of interest in certain lands, designated as the "Leased District," in respect of which they asserted claim to compensation from the United States. In the prosecution of that claim, both before Congress and the departments, from its inception to the actual collection of the money, the Choctaws were represented by one J. S. Standley, and certain associates, and the Chickasaws by Halbert E. Paine. The interest of the Choctaws was three-fourths, and the Chickasaws the remaining one-fourth (*R., 141–2*).

The claim was so pending for several years, and required a vast amount of detailed labor, time, and attention.

Finally, by act of Congress, approved March 3, 1891, the sum of $2,991,450 was appropriated in payment of said claim, (in the proportions above stated,) the same "to be immediately available and to become operative upon the

"execution * * * of releases and conveyances to the "United States * * * in manner and form satisfactory "to the President of the United States" (*R., 83–4*).

On March 17, 1891, the principal chief of the Choctaw Nation addressed a letter to the President, requesting information as to what form of release and conveyance would be satisfactory. That letter was referred to the Department of the Interior, was considered by the Office of Indian Affairs, and the report of the latter office, dated April 29, 1891, was forwarded by the Secretary of the Interior to the President May 6, 1891 (*R., 69*).

In that report and letter it was stated that a certain arrangement had been entered into providing for the payment of 25 per cent. of the appropriation; and it was recommended that all action by the President be postponed until the matter could be laid before Congress and due investigation made of the facts (*R., 70*).

The evidence discloses that President Harrison was opposed to the payment of the appropriation, mainly because of the amount of fee to be paid to the attorneys representing the Choctaws (*R., 142*).

It is here proper to call attention to the fact disclosed by the record, (and not denied by claimant,) that upon two separate occasions, prior to the appropriation referred to, claimant approached Gov. Samuel J. Crawford, (who was associated with Standley on behalf of the Choctaws,) and solicited an employment therein, representing that he was an ex-member of Congress and could be of assistance. The witness declined, however, to so intercede with Standley, as requested. After the appropriation was made by Congress, he renewed his solicitation for an employment, claiming that he had influence with the President; he made a proposition that was not proper, and said witness dismissed him then for good (*R., 122–3*).

It seems that one George S. Thebo, a merchant, of Paris, Texas, had a contract with the Choctaws providing for a

payment to him of 5 per cent.; Thebo attended the council of the nation, in October, 1891, "with a pocket full of letters recommending J. Hale Sypher," and represented that he could get the money. The result of his mission and intercession on claimant's behalf was the alleged act of the Choctaw council, passed October 19, 1891 (*R., 129*).

This action was followed by the introduction to claimant by Thebo, in Washington, of Wilson N. Jones, Green McCurtain, and Thomas D. Ainsworth (*R., 24*).

Claimant testifies that he then refused to accept the proffered employment until he had investigated the status of the case, and the views of the President of the United States (*R., 24*).

The evidence above briefly referred to hardly sustains claimant's idea of his then willingness to be employed.

He asserts that he called upon the President, ascertained his views, made an appointment to introduce the Indians to the President, and, furthermore, was satisfied to accept the employment, and so reported to them (*R., 24*).

Claimant further testifies that he made an appointment to introduce the persons above named to the President the next day, November 4, 1891, which he did accordingly; and that, at that interview, the President stated his objections to the appropriation (*R., 12*).

Upon returning to claimant's office, a letter to the President was drafted and presented (*R., 12–13*).

This was followed by the execution of the paper constituting the alleged contract or agreement with claimant, dated November 7, 1891 (*R., 13–15*).

The paper professes to have been executed in pursuance of the authority of an alleged act of the Choctaw council of October 19, 1891, *supra*, which latter was in express terms thus limited:

> "and to take necessary steps to procure said money before the 1st day of December, 1891" (*R., 3*).

The alleged contract with claimant contained a like limitation:

> "*This agreement* is limited by the provisions of the act of the Choctaw Council of October 19, 1891, 'requiring necessary steps to be taken to procure said money before the 1st day of December, 1891'" (*R., 5*).

If the act of the Choctaw council of October 19, 1891, had any validity, its provisions were limited to December 1, 1891. It is testified that this matter was thoroughly understood by the parties, including claimant (*R., 93–4*).

True, claimant now undertakes to assert that the time limitation referred to in both act and agreement referred merely to the *initiation* of action before the date named, and not the *result* itself therein expressly stated in positive terms, namely "to procure said money before the 1st day of December, 1891."

Inasmuch as claimant contends that he actually took such preliminary steps in the matter of seeing the President, discussing the case with him, arranging an interview with the persons named for the following morning; introducing these persons to the President, and sending letter to the President, November 4, 1891, all antedating the alleged contract of November 7, 1891; it would seem quite unnecessary to have inserted a provision in that instrument to make obligatory the *initiation* of action merely before December 1, 1891, when, if claimant is correct, he had then commenced such action.

The conclusion is irresistible that the time limitation in both act and agreement has reference to the procuring of the money, and was so understood by all parties connected with the transaction.

It is unnecessary to add in this connection that the appropriation was not actually procured to be paid until long after the expiration of said time limitation, namely, June 2, 1893 (*R., 73*).

Aside from this feature of the case, the alleged act of the Choctaw council of October 19, 1891, was a nullity, because not approved by the principal chief of the nation, as required by its constitution and laws.

That alleged act being void, the alleged agreement entered into with claimant, under the supposed authority thereof, was likewise void, and of no effect to bind the Choctaw Nation.

The national attorney of the nation, to whom the matter had been submitted, rendered an opinion, October 30, 1891, that the act was invalid, and forwarded copy of his opinion to the President of the United States (Exec. Doc. 42, 52d Cong., 1st sess).

Under article 3, section 8, of the constitution of the nation, every bill which shall have passed both houses of the legislature is required to be presented to the principal chief. Under article 5, section 4, (*Id.*), the president of the senate is authorized to exercise the duties of the principal chief *only* when a vacancy occurs on account of inability of the latter to discharge his duties.

At the time of the passage of the alleged act of October 19, 1891, Wilson N. Jones was principal chief of the nation and D. W. Hodges was president of the senate.

There was then no vacancy in the office of the principal chief, nor any inability of that officer to discharge his duties. Said alleged act, however, purports to be signed by J. H. Bryant, as acting principal chief of the nation—an office not authorized by its constitution or laws.

Article 7, section 23, (*Id.*) declares that any law passed contrary to the provisions thereof shall be null and void; and article 1, section 21, prohibits the passage of any law impairing the obligation of contracts.

Said alleged act of October 18, 1891, was invalid and a nullity under each and every of the constitutional provisions above referred to.

As above stated, the national attorney of the Choctaws

rendered an opinion, October 30, 1891, to the effect that said alleged act was invalid, and copy of that opinion was forwarded to the President shortly after its date (*R., 5, 95*).

It appears that when claimant first took the delegation to call upon President Harrison, an appointment was made for a further visit about a week later. At that time, the President advised them that their national attorney having rendered an opinion denying the authority of the delegates, he had submitted the matter to Attorney General Miller (*R., 94, 95*).

The delegates again saw the President, some four days later, and he then told them that he could not recognize their authority; that their national attorney had disputed their right, and that the Attorney General of the United States had concurred in that opinion; and he, accordingly, declined to recognize the delegation (*R., 95*).

The record discloses that thereupon claimant requested the delegates to return to his office, and enter into a new contract; which, however, they declined to do, stating that they did not feel that they had any further authority, and that they could not do it (*R., 95*).

The delegates departed for the nation the next day, and, upon their arrival, made report to the principal chief, who called a meeting of the council; and that meeting resulted in the passage of the act of December 11, 1891 (*R., 96*).

It cannot be denied by claimant that he was fully advised of the matters to which reference has just been made. In his letter of November 27, 1891, addressed to the President, he expressly refers to an interview had with the President two days before, at which said opinion of the national attorney had been brought to his attention (*R., 16*).

The result of all the foregoing, and which it is respectfully submitted cannot be successfully controverted, may be thus summed up: Claimant, a considerable time before the passage of the appropriation act was desirous of securing an employment by the delegation which represented the Choc-

taws from first to last, and solicited Gov. Crawford to intercede for him, and, after the passage of the appropriation act, he renewed his efforts in that behalf, but he met with refusal upon each such occasion. Thereafter, Thebo appeared in the nation with letters recommending the employment of claimant, and represented that he could get the money for the nation, (objection having been made to its payment, as above;) and then followed the passage of the alleged act of council, of October 19, 1891, the manifest and only purpose of which was to carry through the enterprise set on foot by the petitioner herein of ousting the regular delegation of 1889, and creating a new one in order that he might be employed.

The delegates named in that act came to Washington, were introduced to claimant by Thebo, and, thereupon, entered into the alleged agreement, above referred to. Some three interviews took place with the President, with the result that the latter advised them that they were not lawfully constituted, and he could not recognize them as possessing any lawful authority to act. They were then solicited by claimant to enter into a new contract with him, the time limitation contained in said alleged agreement being about to expire; but they declined, and the next day left for the nation.

But for the enterprise of the claimant and his associate, Thebo, he would never have had any connection, real or assumed, with the "Leased District" transaction. The claimant by his own efforts and those of Thebo was projected into the matter only long enough to be told by the President of the United States that there was nothing which either he or his specially constructed delegation could legally do.

It is submitted that, even irrespective of the provisions of section 210*e*, R. S. U. S., there was no lawful contract of any kind entered into between claimant and any persons possessing the lawful authority of the nation, or which could, in any way, create a liability on the part of the nation.

II.

Did Claimant Render Any Services to the Choctaw Nation?

Having established that no lawful agreement was entered into with claimant by any persons possessing the lawful authority of the nation, (even irrespective of the section of the Revised Statutes referred to,) and that, therefore, no liability could have been or was incurred, so far as the nation is concerned, it is proper to consider, briefly, what, if anything, claimant actually did on behalf of the nation in respect of securing payment of the appropriation.

Without here repeating what has been already referred to, it appears that claimant made an appointment for an interview with the President; that three such interviews took place, resulting in the latter declining to recognize or treat with them, because not possessing the lawful authority of the nation; that claimant addressed three letters to the President (November 4, 14, and 27, 1891, *R. 12–17*); and entered into an alleged agreement, in writing, with the persons hereinabove named, providing for the payment to him of a contingent fee, amounting to $220,698.75. These several matters covered some three weeks, and then the delegates departed for the nation; and, from that time, there is absolutely nothing in the case, in the way of any physical fact or thing that can be pointed to, showing any further action by claimant on behalf of the nation. True, claimant asserts that he succeeded in removing the objections of President Harrison. That assertion will be considered later on; but certain it is there is nothing to show that, from the time the delegation departed from Washington for the nation, in the latter part of November, 1891, the nation ever had the slightest idea that claimant considered himself, or that it considered him, as possessing its authority.

On the other hand, the record does show that the nation, having been advised of the invalidity of the attempted legislation of October 19, 1891, passed a lawful act, on December 11, 1891, under which proper delegates of the nation were appointed, and the latter continued the prosecution of the rights of the nation until the payment of the appropriation, June 2, 1893.

It is proper to note in this connection that the work of pressing the claim of the Choctaws for compensation for the "Leased District" lands was performed by the "delegation of 1889," and that the delegation created by the act of December 11, 1891, recognized the rights of the original delegation, and acted to the end in harmony with it.

Claimant contends that he succeeded in removing the objections of President Harrison; it is quite evident, however, that he did not.

His visits to the President, and his letters, occurred in November, 1891. By message of the President, dated February 17, 1892, the latter expressed to Congress his views, at considerable length, stating that had the section providing for the payment in question been submitted to him as a separate measure, he would have disapproved it; but that he would postpone any executive action until the facts could be submitted to Congress; which he accordingly then proceeded to do, not, in any sense, favorable to the payment of the appropriation (vol. IX, Messages and Papers of the Presidents, pp. 229–234).

On May 10, 1892, the Senate adopted a resolution, expressing the opinion that, notwithstanding the facts stated in said special message of the President, the money should be paid over (*Id.*, *327*).

The President, however, still declined to so direct; and, on December 6, 1892, sent a further message to Congress, calling attention to a mistake in acreage resulting in an excess in the appropriation (*Id.*, *327*).

This resulted in the adoption of a joint resolution by by Congress, January 18, 1893, reducing the former appropriation by the sum of $48,800, in order to correct the above mistake (*R.*, *18*).

Thus Congress expressed its continued direction that the amount of the appropriation be paid to the Indians, notwithstanding the facts stated by and the adverse recommendations of President Harrison; but the latter simply adhered to his determination, and, so far from claimant having brought about any change in the views and attitude of the President, the undisputed fact is that he continued in his refusal to direct and approve the payment of the appropriation; and so the matter was passed over, in that shape, to his succeesor in office, President Cleveland.

Claimant asserts that he then contemplated the employment of some attorney who might have influence with the President, and finally solicited the aid of Mr. Dickinson, whom, he claims, did see the President, although he did not accept any employment or fee (*R.*, *38*).

It seems, however, that claimant discovered that the President had approved the necessary releases and conveyances, on May 23, 1893, preliminary to the payment of the appropriation (*R.*, *34*); and, thereupon, he proceeded to send the President a letter, dated May 29, 1893, which he designates as an "appeal," wherein he describes himself "attorney and representative of the Choctaw Nation of Indians, in the matters shown by the letter of attorney attached hereto," (being the letter of November 4, 1891, signed by the unauthorized and illegally constituted delegates, hereinabove referred to;) and in which so-called appeal or letter he makes general charges of fraud and corruption, suggests a distribution *per capita* to the citizens of the nation, by an army paymaster, to be detailed therefor; and thus concludes:

> "While the adoption of these suggestions would involve the loss of my own fee, which I have honestly earned and cannot afford to lose, I prefer to make

that sacrifice rather than submit to the robbery of my clients and the dishonor of the Government.

"Very respectfully, J. HALE SYPHER,
"*Attorney of Record for the Choctaws under Act of March* 3, 1891."

(*R., 19.*)

That letter and appeal not being productive of results, the claimant sent a further communication to the President, dated June 6, 1893, in which he enclosed newspaper clipping from a local newspaper of that date; and he again made protest against the payment (*R., 20*).

It is perhaps unnecessary to here remark that each of those letters proceeded from claimant upon his individual responsibility, and entirely without consultation with or instructions from any one representing the Choctaw Nation (*R., 32*); and, as will be below pointed out, the conclusion is irresistible that these extraordinary efforts on the part of claimant proceeded from the fact that the nation had declined to recognize his claim for compensation.

The attitude of claimant to the nation is well illustrated, not only in the two letters addressed to President Cleveland, above referred to, but in others.

Take, for example, the printed pamphlet, which he describes as being his *final report*, which, while not dated, he testifies was between June 6 and 10, 1893 (*R., 39*). That report sufficiently explains itself.

Take, further, the letter of Silas Hare, to Governor Jones, dated June 13, 1893, suggesting trouble from claimant, and also suggesting an equitable settlement with him (*R., 97–8, 108–9*).

Again, draft of proposed joint resolution to suspend the execution of the act making the appropriation above referred to, and which was handed to Governor Jones, along with the letter (*supra*), as one that claimant proposed to have passed unless he was paid (*R., 98, 109–111*).

Also, the further letter to Governor Jones from Silas

Hare, dated June 23, 1893, suggesting trouble from claimant, and great damage from a congressional investigation (*R., 111*).

Also, letter to Governor Jones from G. H. Giddings, dated June 28, 1893, in which, "as attorney for J. H. Sypher, Esq., of Washington, D. C.," he submitted a proposition of compromise for the claim of the latter, under the alleged contract, upon payment of the sum of $10,000 (*R., 112*).

The testimony of Green McCurtain and Thomas D. Ainsworth establishes conclusively that they left Washington upon being advised by President Harrison that he could not recognize them as possessing any lawful authority from the nation, and from thenceforward they had no relations of any kind with him.

Governor Crawford, who was assisting Standley, the attorney for the nation in connection with the prosecution and collection of the claim, never knew that claimant rendered any services in connection with the claim; although he did know that claimant solicited him, upon three separate occasions, to help him secure an employment in the case from the Choctaws.

Halbert E. Paine, the attorney for the Chickasaws, was in constant association with Standley during the entire prosecution of the claim, and until its payment; and he never knew of any professional relation or connection of claimant with the case. It may be here remarked that General Paine performed a great deal of detail work and labor in connection with the claim, both before and after the passage of the appropriation act; and, afterwards, he saw President Harrison; he, also, prepared and printed an extended argument, covering nearly 150 pages, which he presented to Representatives and Senators (*R., 142–3*); in none of which work, however, did claimant participate.

It is shown by the evidence of Samuel J. Crawford and Halbert E. Paine that the conveyances required by the act of Congress to be executed by the nations were prepared by

the regular attorney of the nations, chief among whom was Standley for the Choctaws and Paine for the Chickasaws; that these two attorneys performed most of the work in connection therewith, with occasional advice and assistance from the others, including such modifications and changes as were required by the law officers of the Government; and that claimant had no connection whatever therewith. This is referred to as absolutely contradicting and negativing the contention of claimant that he prepared data which was made use of in drafting the conveyances of release.

It seems strange, to say the least, that if claimant, during the months from December 1, 1891, to June 2, 1893, did any work in aid of the payment of the appropriation, there should be nothing produced in the way of physical evidence to support his contention.

No letters, correspondence, briefs, arguments, data, etc., are produced: he was expressly notified to produce any physical evidence of the kind referred to, and his omission to do so is significant (*R.*, *46*, *53*).

His chief activity, subsequent to November 27, 1891, as shown by the letters and other papers above referred to, seems to have been in his own interest, and decidedly hostile and *adverse* to the nation that he claims to have then represented as its attorney.

It is submitted that the evidence utterly fails to establish the rendition of any service by claimant for which he is entitled to any finding in his favor.

III.

Measure of Compensation.

The jurisdictional act in this case requires the hearing and determination of the claim upon the principles of a *quantum meruit* (*R.*, *1*).

The petition filed by claimant asks a finding and report

in his favor in the sum of $220,698.75, (*R.*, *8*,) being the exact amount named in the alleged contract entered into by him with the illegally constituted delegation.

The requests for findings of fact and brief on behalf of claimant make claim in the same amount. If the amount named in said illegal and unauthorized contract is to be adopted as the true and only standard and measure of recovery, (assuming that claimant is otherwise entitled to recover, which, however, is denied,) it was quite unnecessary for Congress to have required this court to hear and *determine* said claim upon the principles of a *quantum meruit.*

Such direction and requirement means simply and only to determine, first, if claimant rendered any service of value to the nation; and, if he did, how much were those services fairly and reasonably worth.

It is submitted that he did not render any service of value to the nation for which he is entitled to be paid anything; but, if he did (which is not admitted, but expressly denied,) there is nothing whatever in the record upon which the court can make any finding or report as to the fair and reasonable value thereof.

This claim is to be considered and determined precisely as if no measure of compensation had been stated or mentioned in the alleged agreement.

It is somewhat strange that claimant should have felt so indignant and outraged because other attorneys were to receive 20 per cent. or 25 per cent. for services covering several years of hard labor, and should protest that that compensation was extortionate and corrupt; and yet contend that his own charge of 10 per cent., amounting to almost a quarter of a million of dollars, simply to secure the payment of an appropriation already made, was a perfectly proper agreement, and a reasonable and proper fee; and he now invites this court to report that the same amount is right, reasonable, and proper upon the principles of a *quantum meruit.*

It would have been an outrageously excessive fee even if

claimant had himself actually accomplished that which he undertook to do under his alleged contract.

But, under all the undisputed facts and evidence in this case, it is most surprising that it should be contended that that amount should be now found as the true standard and measure of recovery.

The true rule of law and decision in cases of this kind is, that it is incumbent upon the claimant to show, not only that he has *performed* the services for which he lays claim, but also affirmatively show the *value* thereof.

Thus, in Wyatt *vs.* Herring, (*90 Mich., 581,*) the plaintiff proved that he had rendered service, but he failed to prove the value thereof: held, that he was entitled to nominal damages only.

In Stone *vs.* Hamlin, (*11 How. Pr., 452,*) it was held, that where there was no express agreement as to compensation between attorney and client, the former must prove, not only the service rendered, but the value thereof.

The question of value necessarily includes the element of skill and ability of the attorney in cases of the kind under consideration, the extent of his knowledge, experience, ability, etc., as well testimony of those competent to judge of the value of the particular service for which a recovery is sought.

See, generally,

Eggleston *vs.* Boardman, 37 Mich., 14.
Lungerhaus *vs.* Crittenden, 103 *Id.*, 173.
Phelps *vs.* Hunt, 40 Conn., 97.

It is, however, a somewhat novel proposition to take the unsupported opinion and estimate of the value of his own services by a claimant, as conclusive of the fair and reasonable value thereof upon the principles of a *quantum meruit*.

It is respectfully submitted that there is *no* evidence in the case upon which any finding in this behalf can be based,

even were it conceded that claimant is entitled to a report in his favor for any amount, which, however, it is not.

Finally, and in conclusion, it is respectfully submitted that claimant did not perform any service of value for the Choctaw Nation of Indians; and that he is, therefore, not entitled to recover anything upon the principles of a *quantum meruit*, or otherwise; and that report to that effect should be made to Congress.

Respectfully submitted by

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A. A. HOEHLING, JR.,
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