General Accounting

IN THE

United States Court of Claims

No. K-544

THE CHICKASAW NATION,

Plaintiff,

VERSUS

THE UNITED STATES,

Defendant.

PLAINTIFF'S ANSWER TO DEFENDANT'S OBJECTIONS TO PLAINTIFF'S REQUESTED FINDINGS OF FACT; PLAINTIFF'S OBJECTIONS TO DEFENDANT'S REQUESTED FINDINGS; AND PLAINTIFF'S REPLY BRIEF.

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THE CHICKASAW NATION,

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PLAINTIFF'S ANSWER TO DEFENDANT'S OBJECTIONS TO PLAINTIFF'S REQUESTED FINDINGS OF FACT; PLAINTIFF'S OBJECTIONS TO DEFENDANT'S REQUESTED FINDINGS; AND PLAINTIFF'S REPLY BRIEF.

PLAINTIFF'S ANSWER TO DEFENDANT'S OBJECTIONS TO PLAINTIFF'S REQUESTED FINDINGS OF FACT.

(I)

Plaintiff's Finding III (R. 18-19).

The defendant objects to the first paragraph of this finding because it contends that "the proof fails to establish that the treaty dated July 15, 1794, between plaintiff and defendant was ever ratified by the Senate or approved by the President." (Deft. Br. R. 79-80); and that, therefore, it is not a binding obligation of the United States.

It appears this Treaty is not now available to us, and the proof of its binding force upon the parties must be drawn from other sources.

As the Treaty was in the custody of defendant, the fact of its loss or misplacement is due solely to the inadvertence of defendant, and plaintiff is in no way responsible for that condition. Under these circumstances the presumptions of its existence and ratification, and binding force, as in the case of other like Treaties, are in favor of the plaintiff.

Fortunately, the *obligations of the United States* under this Treaty are set forth specifically in the Act of February 25, 1799 (1 Stat. 619; quoted in our original Brief, at R. 40); and those obligations are recognized by Congress in each of the *yearly appropriation acts from 1799 to 1901,* wherein $3,000.00 was annually appropriated to fulfill this treaty obligation of the United States.

Therefore, plaintiff's claim rests squarely upon this basic *treaty obligation of the United States,* which was recognized and acted upon by the United States for all of these years.

Although the annual appropriations were made by Congress to fulfill these treaty obligations, yet the defendant's own records show that payments were not made to the Chickasaw Nation for the years and in the amounts set forth in plaintiff's requested Finding III.

Are we to understand that counsel for the United States contend that notwithstanding the fact that for

more than 100 years the United States accepted and acted upon this Treaty, the plaintiff, the Chickasaw Nation should now have to come forward with affrmative evidence of the ratification of this Treaty, or be penalized? The Supreme Court of the United States, and this Honorable Court, have, in numerous decisions, laid down certain rules which shall govern the United States, in dealing with its Indian wards; and such rules fully answer any such contentions of opposing counsel.

The defendant stresses some statements in the General Accounting Office Report to the effect that during the period 1798-1811 certain goods were purchased in Philadelphia and shipped therefrom for the Chickasaws. The General Accounting Office Report, however, was careful to state that the records of that office fail to "disclose the disposition of the annual appropriations" to fulfill this treaty for these years (G. A. O. Rept. p. 20). The fact that some goods were purchased in Philadelphia and shipped therefrom, would not evidence payment to the Chickasaws of the annual sums which the Treaty calls for; and would not overcome the positive evidence contained in the G. A. O. Report.

The plaintiff, the Chickasaw Nation, accepts and relies upon the G. A. O. Report, pages 18-22, and page 633 (set out in its original Brief, R. 18-19) showing that payments were not made for the years 1794-1811, inclusive, amounting to $52,500.00; and that it was underpaid, for the years 1812-1852, inclusive (G. A. O. Report pages 33-43, and set out, in its original Brief, page 19),

by $10,722.19; and contends for judgment against the defendant, the United States, for $63,222.19.

Plaintiff's Findings IV and V (R. 19-20).

These claims are conceded by defendant (Deft's Objections, R. 82 and 106-107; and Deft's Br., R. 132).

Plaintiff's Finding VI (R. 21).

The defendant points out (Deft's Objections, R. 82-83; and Deft's Brief, R. 132-34) that the General Accounting Office Report, p. 306, shows that during the calendar years 1833 and 1836, the amount of $5,140.58 was disbursed for the education of Chickasaw youths, pursuant to Supplemental Article II of the Treaty of May 24, 1834 (7 Stat. 450), from the general appropriation "Education of Indian Youths", under the Act of March 3, 1835 (4 Stat., 780-781), and of June 14, 1836 (5 Stat. 36, 47).

Defendant is entitled to this credit, in addition to the $36,000.00 disbursed under this treaty provision, making a total disbursement of $41,140.58 on this $45,000.00 treaty obligation of defendant, leaving a balance of $3,859.42 due the Chickasaw Nation.

Plaintiff's claim should, accordingly, be reduced to $3,859.42 under this treaty obligation; and plaintiff's finding should be amended so as to include the $5,140.58 disbursement.

The other objection of defendant to this finding is a conclusion of defendant's counsel, and will be answered hereafter in our brief.

Plaintiff's Finding VII (R. 21-22).

The objections of defendant to this finding (Deft's Objections, R. 83-84; and Deft's Brief, R. 134-138), are not well taken, and without merit.

The Treaty of April 28, 1866 (14 Stat. 769), was a Treaty of *reconstruction,* and restored to the Choctaws and Chickasaws all rights existing prior to the Civil War; and Articles 5 and 10 of that Treaty merely restored these rights, and have no particular bearing otherwise on the claim herein presented. The contentions of the plaintiff, in support of this claim, will be more fully presented in that part of this "Plaintiff's Reply Brief", relating to the subject of *"Illegal Disbursements for Refugee Indians"* which follows.

Plaintiff's Finding VIII.

Counsel for defendant, the United States, admits that the plaintiff, the Chickasaw Nation, is entitled to recover a part of the moneys here involved; and that the United States illegally expended moneys for the salaries of the Mining Trustees of the Chickasaw Nation in excess of what could be legally expended; that is: the Chickasaw Nation was the owner of an undivided *one-fourth* interest in the coal and asphalt lands and deposits; and that is an admission, in principle, that whatever *the United States expended,* in excess of that ownership, was illegal.

But the admitted illegal expenditure is limited to expenditures *after the fiscal year 1925;* whereas, the *illegal expenditures began after the expiration of the*

Choctaw and Chickasaw Tribal Governments on March 4, 1906.

The Chickasaw Nation admits that the provision in the "Atoka Agreement" of June 28, 1898 (30 Stat., 495) empowering the Choctaw and Chickasaw Nations to, each, fix and pay the salary of its Mining Trustee, was binding upon the Nations, *during the life of the Tribal Governments;* and, *during that time,* whatever each saw fit to pay its Mining Trustee, cannot be questioned, since each Nation was expending *its own moneys.*

But the Tribal Governments expired on March 4, 1906; and, after that time, each, neither had, nor could it exercise, any control of, or direction over, its moneys; and whatever was done, after that date, was the sole and only responsibility of the United States, and at its peril, so far as the legality of these expenditures was concerned.

In the *administration* of the property and affairs of the Chickasaw Nation, the United States could only legally expend *that part* of its moneys which corresponded to its common ownership (which was *one fourth,* no more and no less); and when it used Chickasaw moneys, in excess of that ownership, and bestowed them "upon others" (the Mining Trustee of the Choctaw Nation), that was not *administration,* but was *confiscation,* which may not be done "without assuming an obligation to render just compensation" therefor (*United States* v. *Creek Nation,* 295 U. S. 103).

That the Choctaw and Chickasaw Nations own their common properties in the proportion of *Three Fourths* and *One Fourth* has been settled by this Honorable Court in the suit of *Choctaw Nation* v. *United States and Chickasaw Nation,* No. J-231 (83 Ct. Cls., 140), which decision became final upon the dismissal by the Supreme Court of the United States, of the petition of the Choctaw Nation for review by *certiorari.*

The views and contentions of the plaintiff, the Chickasaw Nation, will be more fully set out in that part of this "Plaintiff's Reply Brief", bearing upon this subject, which follows.

Plaintiff's Finding IX (R. 23-28).

The defendant's objection to the second paragraph of this requested finding of plaintiff is a conclusion of defendant's counsel (Objections, R. 86; Brief, R. 141-144).

The original report of the General Accounting Office, p. 555, shows that the total amount of moneys expended from the funds of the Chickasaw Nation, for the scholastic year ending June 30, 1905, was $20,871.88; and that this amount was the limit that the Secretary of the Interior could legally expend annually for Chickasaw schools, under Section 10 of the Act of April 26, 1906 (34 Stat. 137).

This law is so plain that it may not be misunderstood or misconstrued.

It says that the Secretary of the Interior may assume the control and direction of the Tribal Schools, and to use the moneys of the Indian Nations; but, in so doing, he was limited to "*not exceeding in any one year*

for the respective tribes the amount expended for the scholastic year ending June thirtieth, nineteen hundred and five.''

Under this ''yardstick'' thus furnished, what amount of moneys were expended for the scholastic year ending June 30, 1905?

The Report of the General Accounting Office furnishes the evidence as to what amount of Chickasaw moneys might be legally used *''in any one year''*; and that sum of money is $20,871.88; and this evidence is also so plain that it may not be misunderstood or misconstrued.

Later, when it developed that the Chickasaw moneys being used were far in excess of the amount authorized by law, and the Chickasaw Nation began to ask questions, followed by the passage of the Jurisdictional Act of June 7, 1924 (43 Stat. 537), under which the instant suit has been filed, there was filed herein, on July 18, 1935, a report of the Secretary of the Interior, purporting to show, under the caption of ''Money available for Maintenance of Schools of Five Civilized Tribes'', that $145,471.89 was ''available'' for Chickasaw schools.

This report, and the apologies which it contains upon its face, and in its body, and its lack of probative force, when compared with the positive evidence contained in the balanced report of the General Accounting Office, will be more fully discussed in Plaintiff's Reply Brief, upon this subject, which follows.

Plaintiff's Finding X (R. 29-32).

After a review of the new evidence filed by defendant (Supplemental Report of the G. A. O., which the Court has allowed to be filed), after plaintiff's original Brief was filed, and after carefully reviewing the Acts of Congress cited in defendant's brief, as authority for the disbursements listed in plaintiff's requested finding X, we feel that the claims for the following items cannot be sustained:

Advertising sale of Bloomfield Seminary
Appraising Bloomfield Seminary
Attorneys fees
Chickasaw warrants
Expenses of sale of timber lands, forest reserve
Expenses of collecting revenue
Expenses of sale of segregated coal and asphalt lands and deposits
Expenses of sale of unallotted lands
Payments in lieu of allotments
Payments for improvements
Per capita payment expenses.

The above items are withdrawn from plaintiff's claim, and the claim is confined to those items which defendant concedes (in its Objections, R. 122; and Brief, R. 155), were not specifically authorized by Congress.

Therefore, plaintiff's requested finding X is amended to read as follows:

Finding X.

Disbursements made by the Secretary of the Interior from Chickasaw tribal funds during the fiscal years 1913 to 1929, both inclusive, for purposes which were not specifically appropriated for by Congress:

Item	Fiscal Year	G.A.O. Report	Amount	Total
Choctaw-Chickasaw Hospital	1917	563	90.58	
	1923	591	.09	90.67
Insurance	1916	563	595.35	
	1921	591	1,525.45	2,120.80
Medical attention	1920	603	13.50	
	1924	603	13.50	
	1925	603	282.45	
	1926	604	18.00	
	1928	604	594.15	
	1929	604	168.00	1,089.60
Miscellaneous agency expenses including employees	1913	561	480.34	
	1914	561	180.00	
	1917	563	11.30	671.64
Pay of grazing fee collector	1914	269	93.75	93.75
Pay of miscellaneous employees	1915	269	25.00	25.00
Pipe line damages	1916	563	12.00	
	1917	563	59.48	
	1919	590	140.91	
	1920	590	33.60	
	1927	595	8.02	254.01
Protection of timber	1915	589	103.12	103.12

Item	Fiscal Year	G.A.O. Report	Amount	Total
Roads and bridges	1913	561	25.50	25.50
Timber investigation	1917	589	20.78	20.78
Total				$4,494.87

Plaintiff's Finding XI (R. 33-36).

The defendant's objections to this requested finding of plaintiff are mere conclusions of defendant's counsel, unsupported by the record (Deft's Objections, R. 98-102; Deft's Brief, R. 156-162).

The letter of April 14, 1933, referred to with respect to the $890.19 item is not made a part of the record in this case. Nor has defendant made the accounting reports in the *Choctaw* case, No. K-260, the *Creek* case, No. H-510, the *Cherokee* case, No. 268, and the *Seminole* case, No. L-51, a part of the record in this case. Therefore, they are not before the Court for consideration in this case.

The Chickasaw accounting report is the one here in question. Plaintiff has taken exception to certain items, in this report, and pointed out certain errors in handling Chickasaw funds, and has demanded of its guardian satisfactory proof of the correctness of such disbursements.

In the absence of satisfactory explanation by defendant the plaintiff is entitled to judgment for said items, and none has been given herein by defendant.

(II)

PLAINTIFF'S OBJECTIONS TO DEFENDANT'S REQUESTED FINDINGS

Defendant's Finding II (R. 103).

The plaintiff objects to the statement that "The agreement referred to in the Act appears never to have been formally ratified by the United States Senate", as a conclusion of defendant. While the text of this treaty appears lost, every official act of the United States confirms its execution and ratification; and that the amounts were annually appropriated to fulfill this treaty, and specific appropriations were so made, beginning with the Act of June 12, 1798 (1 Stat. 564), in which the obligation of the United States is plainly set forth; and these appropriations continued to be made up to the date of the Act of March 3, 1901 (31 Stat. 960, 1062), under which this permanent annuity was funded.

The plaintiff objects to the statement that "The only evidence tending to establish the obligation of said agreement is contained in the Act of February 25, 1799, supra," as not correct, for this treaty obligation of the United States was evidenced by every annual appropriation act made from 1798 to 1901.

The plaintiff objects to the statements quoted in defendant's Objections (R. 105-6), and in defendant's Brief (R. 126-32), as incompetent, irrelevant, and immaterial to the issues, and as not evidencing payment of said amounts to the Chickasaw Nation. For this reason also, the last paragraph of this requested finding is objected to as incomplete and incorrect.

We submit that plaintiff's requested finding III (R. 18-19) properly sets forth the material facts with respect to this claim.

Defendant's Findings III and IV. (R. 106-107).

Plaintiff has no objection to these findings.

Defendant's Finding V (R. 107-109).

The General Accounting Office Report, p. 306, shows that $5,140.58 was disbursed for the education of Chickasaw youths, instead of $5,150.58 as set forth in defendant's brief, R. 108.

Plaintiff objects to the last sentence of this requested finding of defendant because it is a conclusion of defendant.

Defendant's Finding VI (R. 109-111).

Plaintiff objects to defendant's requested finding as being misleading and incomplete, and does not specifically set forth the amounts disbursed during the Civil War period from Chickasaw funds for Indians other than Chickasaw Indians, which amounts are set forth in plaintiff's requested Finding VII (R. 21-22).

Defendant's Finding VII (R. 111-113).

Plaintiff objects to this requested finding of defendant for the reason that it is incomplete, in that it does not include a statement that the income from these coal deposits was owned and apportioned between said tribes on a basis of *one-fourth* to the Chickasaws and

three-fourths to the Choctaws; and that such moneys could be legally used, for *administration,* by the United States, after the Tribal Governments expired, on March 4, 1906, only in those proportions of ownership.

Defendant's Finding VIII (R. 113).

The plaintiff objects to the last sentence of the first paragraph of this requested finding of defendant, as a conclusion of defendant, not supported by the best evidence in the record.

While this figure is mentioned in the Report of the Secretary of the Interior to the Attorney General, filed herein by defendant July 18, 1935, pp. 6-7, yet this same report states (p. 14) that this figure *cannot be substantiated from the records of the Interior Department.*

The Supplemental Report of the General Accounting Office filed herein by defendant on June 26, 1943, does not substantiate the above figure claimed by defendant, as the limitation of the amount the Secretary of the Interior could expend for Chickasaw schools under the Act of April 26, 1906 (34 Stat. 137).

The best evidence of the amount that could be legally expended from Chickasaw funds for Chickasaw schools during the scholastic year 1905, is found in the accurate statement of accounts of Chickasaw funds in the original report of the General Accounting Office, filed herein by defendant on April 15, 1937.

This report (p. 555) shows that a total of $20,871.88 was expended for Chickasaw schools during the

scholastic year ending 1905; and under the decision of this Court in the *Creek* case (78 C. Cls. 474, 496-497), which involved this identical issue, the figure shown in the General Accounting Office Report is the correct source from which to determine the limitation for the yearly expenditure of Chickasaw funds by the Secretary of the Interior, under Section 10 of the Act of April 26, 1906.

The last paragraph of this finding of defendant is objected to by plaintiff as not material to the issue.

We discuss this claim fully in this Reply Brief, which follows.

Defendant's Finding IX (R. 114-122).

In view of plaintiff's concession and amendment of plaintiff's requested finding X, supra, all but the last paragraph of defendant's finding IX may be disregarded by the Court.

Plaintiff objects to the last sentence of this last paragraph as a conclusion of defendant, and as immaterial, incompetent and irrelevant to the present controversy.

Defendant's Conditional Finding X (R. 122-124).

Plaintiff objects generally to this requested finding of defendant as a conclusion of defendant's counsel, and unsupported by the evidence on file in this case. The last paragraph is irrelevant, incompetent and immaterial to the issues herein presented.

We have carefully reviewed the items claimed by

defendant, and have found but two of them supported by evidence, indicating that defendant is entitled to credit. These items are listed as follows:

Statement	Fund	G.A.O. Rept. Page	Item	Amount of Credit
80	Indian Moneys, P. L., Royalties	521	(b)	1,001.90
85	Indian Moneys, P. L., Unallotted land	530	(b)	79.14
	Total			1,081.04

With respect to these items the Chickasaw accounting report of the General Accounting Office (p. 522, note b), filed herein, it is shown that $1,001.90 of Choctaw, Creek, Cherokee and Seminole funds were erroneously deposited to Chickasaw funds; and on page 531, note (b), this report shows that Creek and Seminole moneys in the amount of $79.14 were erroneously deposited to Chickasaw funds. The defendant is entitled to credit for these items.

As to the other items, there is no showing by defendant that they were erroneous bookkeeping entries. For example, defendant has claimed an item of $3,801.09, when the Chickasaw report of the General Accounting Office, filed herein, shows clearly that $3800.00 was transferred from one Chickasaw fund to another, and $1.00 was transferred from a general fund of the Five Civilized Tribes, in which the Chickasaw Nation had an interest (G. A. O. Rept., p. 530, Item (e), and note (e), p. 532).

Although defendant has the sole custody of the accounting records explaining these entries, yet it has not endeavored to produce them in evidence in support of its claim for these items, and therefore defendant is not entitled to credit for said amounts claimed by it.

In the Choctaw and Creek accounting reports, some items which are claimed by defendant, are not before the Court in the case at bar; and any possible claims based thereon would be improperly presented. Had defendant put these reports in evidence, plaintiff would have felt justified in asking the Court to include in plaintiff's claims the amounts of Chickasaw moneys shown by these reports to have been erroneously deposited to the funds of these tribes.

(III)

PLAINTIFF'S REPLY BRIEF.

Since the filing of plaintiff's brief, defendant has filed in the record, new evidence, which was not before us when our original Brief was prepared and filed with the Court.

As a consequence, plaintiff's counsel in this Reply Brief, are now required to comment upon this new evidence, and to readjust plaintiff's claims, as well as to answer the contentions of defendant.

In our desire to aid the court in the decision upon these claims, we shall endeavor to clear up the resulting confusion, by readjusting our claims where necessary; and then to analyze below the several contentions of defendant.

Claim Under the Treaty of July 15, 1794 (Plaintiff's Finding III, R. 18-19)

The defendant's contention with respect to this claim of plaintiff is, in effect, that plaintiff cannot recover because the whole text of this Chickasaw treaty is now lost to us. This, in view of the fact that the treaty was in the sole custody of defendant, and the loss of the treaty can be attributable solely to the inadvertence of defendant. Certainly defendant's inadvertence would not create any advantage or presumption in favor of defendant and against plaintiff, under these circumstances, and under the rules laid down by the courts which shall govern the United States in dealing with its Indian wards.

While the text of the treaty is lost to us, yet the obligations of the United States to the Chickasaw Nation under it, are plainly and specifically set forth in the Act of February 25, 1799 (1 Stat. 618, 619), and the subsequent yearly Appropriation Acts providing $3,000 annually for the payment of this treaty obligation of the United States.

Thus this obligation was specifically recognized and acted upon by the United States, beginning with the Act of June 12, 1798 (1 Stat. 564), and thereafter, for each year, the amount of $3,000 was appropriated by Congress, up to the Act of March 3, 1901 (31 Stat. 960, 1062), under which this permanent treaty annuity was funded.

As the text of this treaty is lost to us, it is impossible to affirmatively prove that this treaty was ratified; but every official act shows that Congress recognized this treaty obligation, and treated it as a binding obligation of the United States under it, by appropriating $3,000 each and every year, from 1798 to 1901, to fulfill this known treaty obligation with the Chickasaw Nation; and, therefore, it must be presumed that this Treaty existed, and was binding upon the United States; and that it furnishes the basis for the claim of the plaintiff.

Defendant admits that during the period from 1812-1852, $10,722.19 is due plaintiff for the nonfulfillment of this treaty obligation (Deft. Br., R. 132), but defendant contends, with respect to the period from 1794-1811, that defendant has fulfilled this obligation, because the General Accounting Office Report states that during certain of these years goods were pur-

chased in Philadelphia and forwarded therefrom to the Chickasaws.

However, no evidence is presented by defendant to show that the goods ever arrived at their destination, or that they were received by the Chickasaws; and this, in the face of the positive finding of the Report of the G. A. O. that the Treaty was not complied with for these years.

In Bogert, Trusts and Trustees, Vol. 4, Sec. 962, p. 2783, it is stated as follows:

> "To keep an accurate account is one of the primary duties of a trustee. The general rule of law applicable to a trustee burdens him with the duty of showing that the account which he renders and the expenditures which he claims to have made were correct, just and necessary. * * * He is bound to keep clear and accurate accounts, and if he does not the presumptions are all against him, obscurities and doubts being resolved adversely to him." (Cases cited.)

And again, at page 2784, it is stated:

> "The principal penalty usually stated to apply to a trustee who fails to keep proper records of his trust is that 'all presumptions are against him' on his accounting, or that 'all doubts on the accounting are resolved against him.' * * *" (Cases cited.)

It is also well settled that the trustee has the burden of proving the credits claimed by him. *Talbot* v. *Automobile Identification Underwriters,* 43 S. W. (2d) 220, 221; *Smith* v. *Tolversen,* 252 N. W. 423, 425; *Florida Fruit Canners* v. *Walker,* 90 F. (2d) 753, 758; and *Smith* v. *Robinson,* 83 N. J. Eq. 384, 90 A. 1063.

If the trustee loses his accounts, he must bear any resulting damage, *Benbow* v. *Benbow,* 157 So. 512, 519; and the difficulty in making proof of expenses and disbursements by the trustee is no reason why the rule of strict accountability should be relaxed. *Bennett* v. *Weber,* 154 N. E. 105, 110, 323 Ill. 283.

As the statute of limitations is waived in the special jurisdictional act, we are to consider this claim as though it arose as of today; and any lapse of time cannot be used as an excuse for a plain failure of defendant to submit evidence of payment in satisfaction of this treaty obligation of the United States.

The defendant has submitted no justification for its failure to fulfill properly this treaty obligation for the years; and in the amounts set forth in plaintiff's finding III; and plaintiff is entitled to recover the amount shown by the record as not having been disbursed to the Chickasaw Nation.

Claims under the Treaties of September 20, 1816 and October 19, 1818.
(Plaintiff's Findings IV and V, R. 19-20.)

Defendant concedes that plaintiff is entitled to recover $2,000 and $1,000 respectively under these treaty obligations.

Claim under Supplemental Article II of the Treaty of May 24, 1834.

(Plaintiff's Finding VI, R. 1.)

The defendant has pointed out that it had disbursed $5,140.58 from the general appropriation "Education of Indian Youths", in addition to the $36,000 set up in plaintiff's requested finding VI (R. 21). We concede that defendant is entitled to credit for this amount also against this total treaty obligation of $45,000, making in all $41,140.58 disbursed by defendant to fulfill this obligation of the United States, leaving a balance due plaintiff in the amount of $3,859.42, for which defendant has failed to account.

Defendant argues that plainiff cannot recover because the record does not show that the parties designated by the treaty to "select and recommend" the particular children who should receive the benefit of this treaty provision, did so make the recommendation and selection (Deft. Br., R. 133). Under this treaty provision, the money appropriated was to be applied under the direction of the Secretary of War, and it was his duty to see that this treaty obligation was properly carried out.

The plaintiff has shown that the defendant did not so disburse all of the money appropriated by Congress to fulfill this treaty obligation, and that $3,859.42 is due the Chickasaw Nation.

Defendant makes the assertion that the record does not show that the children were so selected. If the defendant rests its defense on the premise that the children were not selected by the persons designated by the Treaty, defendant should have submitted proof in support of it, for the consideration of the court; and having failed to do so, furnishes one more reason for the recovery of the amount due the plaintiff.

The burden is on the party making an assertion to prove it. Having failed to submit the proof in support of this assertion, defendant's defense also fails, and plaintiff is entitled to recover this amount of $3,859.42.

The Treaty was a binding obligation of the United States; the money was appropriated and made available; and the Indians did not receive it. All of the presumptions, as have been shown, are in favor of the Indian plaintiffs.

The *Sioux* case (84 C. Cls. 16), cited by defendant, has no application to the question before us, for, in that case, the treaty obligation was for an indefinite and indeterminate amount; and the proof was not sufficient to permit the court to determine definitely the damages, if any, suffered by the Indians. In other words, the case turned upon the question of the proof of damages.

In the case at bar, the treaty obligation is definite, and the amount is fixed; and the defendant admits that it failed to disburse $3,859.42 of the amount appropriated by Congress to fulfill this treaty obligation to the Chickasaw Nation. Clearly the plaintiff is entitled to the balance due on this treaty obligation.

Claim for Illegal Disbursements for Refugee Indians (Plaintiff's Finding VII, R. 21-22.)

The claim of plaintiff is for Chickasaw moneys disbursed by defendant for Indians *other than Chickasaw Indian refugees,* during the Civil War period.

Plaintiff admits that *Chickasaw moneys* disbursed for *Chickasaw refugee Indians* in Kansas were authorized by the Act of July 5, 1862, 12 Stat. 528, and other similar acts; but claims that the disbursement of *Chickasaw moneys* for Indian refugees *other than Chickasaws* was unauthorized by said Act of July 5, 1862; and that any moneys *belonging to the Chickasaws* and bestowed *"upon others"* would amount to *"confiscation",* and would be recoverable *(United States* v. *Creek Nation,* 295 U. S. 103, and other cited cases).

Defendant argues, in effect, that Chickasaw annuities were confiscated and forfeited by the United States during the Civil Ward period, 1862-1866, because a portion of the Chickasaw Nation entered into a treaty with the Confederate States, and that because of said confiscation or forfeiture, the United States could legally disburse Chickasaw moneys for *Indians of other tribes.* Defendant has presented no evidence of confiscation or forfeiture in support of this contention.

In our original Brief (R. 44-48), we have pointed out that the Act of July 5, 1862, by its terms, did not become operative except during the *discretion and pleasure of the President,* and that President Lincoln withheld judgment in the matter; and this act never became effective as to the Five Civilized Tribes.

Furthermore, Congress annually appropriated for the payment of these annuities in the Act of July 5, 1862 (12 Stat. 512, 515); March 3, 1863 (12 Stat. 774-77); June 25, 1864 (13 Stat. 161, 165); and March 3, 1865 (13 Stat. 541, 544); evidencing the fact that these annuities were not suspended or postponed during the Civil War period.

Any statement made by treaty commissioners of the United States at the time the Treaty of April 28, 1866, was under consideration, to the effect that the Indians had forfeited their rights to these prior annuities would have no foundation in fact. As a matter of fact the statement of the treaty commissioners, quoted by defendant (R. 137-138) emphasizes the fact that the President did not act to forfeit these annuities, for they state (R. 138):

> "* * * The President, however, does not desire to take advantage of or enforce the penalties for the unwise actions of these nations."; and
>
> "The President is anxious to renew the relations which existed at the breaking out of the rebellion."

The Treaty of April 28, 1866 (14 Stat. 769, 774), does not evidence a forfeiture of any funds of the Chickasaws, but Article X provides that the United States reaffirm all treaty obligations with the Chickasaw Nation entered into prior to the Civil War, not inconsistent with said treaty, and further agrees to renew payment of all annuities from and after the close of the fiscal year ending June 30, 1866.

This treaty is not inconsistent with any of the prior treaty obligations of the United States owing to the Chickasaw Nation, and it contains no release for Chickasaw moneys diverted during the Civil War period for the relief of Indians *other than Chickasaw refugees.*

Therefore, the question before us resolves itself into whether or not the Act of July 5, 1862, and the subsequent similar acts, authorized the diversion of Chickasaw moneys for *other than Chickasaw Indian refugees* in Kansas.

Clearly the Chickasaw moneys disbursed under said acts for Chickasaw refugees in Kansas were authorized by law. However, a proper construction of these acts would not permit of the disbursement of Chickasaw moneys for refugees of *other tribes* not entitled to share in Chickasaw moneys. If said acts could possibly be construed so as to permit Chickasaw moneys to be disbursed for Indians *other than Chickasaws,* then we challenge the power of Congress to do so, without making the United States liable for the amounts so disbursed, as held by the Supreme Court of the United States (295 U. S. 103, and other numerous cases therein cited).

Counsel for the United States confuse the issues herein, by stressing the "*annuities*" of the Chickasaw Nation, which were *appropriated,* but *withheld,* during the Civil War period.

They overlook the fact that Chickasaw Nation had

other moneys (invested funds arising from the sale of their lands east of the Mississippi River and otherwise), and the *annuities* which were annually appropriated were only a small part of their *total moneys;* and some of the *annuities* may have, or may not have, been used for refugees who were *not Chickasaws.*

But that is beside the question. *Whatever moneys* were used for persons *other than Chickasaws,* were illegally used, since: *first,* the President never enforced the penalties which *might have been enforced* under the Act of 1862; and, *second,* when the Civil War was over, and the Treaty of 1866 (14 Stat. 769; Articles 5 and 10) come to be made, and the United States came to understand the circumstances and conditions under which the Choctaws and Chickasaws had been induced to adhere to the Southern Confederacy, it very generously "forgave their sins" (Article 10), by providing that:

> "The United States *re-affirms all obligations arising out of treaty stipulations or acts of legislation with regard to the Choctaw and Chickasaw Nations, entered into prior to the late rebellion, and in force at that time,* not inconsistent herewith; and further agrees to renew the payment of all annuities and other moneys accruing under such treaty stipulations and acts of legislation, from and after the close of the fiscal year ending on the thirtieth of June, in the year eighteen hundred and sixty-six.";

and, *third,* since there was no forfeiture of annuities or "other moneys" any use of such moneys for persons *other than Chickasaws* was illegal, and may be recovered.

Thus, the Treaty of 1866 was one of *reconstruction,* under which there was *reaffirmed* in the Indians all rights, in "*annuities and other* moneys" *which had never been forfeited,* but merely withheld during the Civil War period.

We, therefore, respectfully submit that plaintiff is entitled to recover the amount of $237,385.09, thus illegally diverted from Chickasaw funds for Indians *other than Chickasaws* during the Civil War period.

Claim for Moneys Disbursed for Salaries of Mining Trustees.
(Plaintiff's Finding VIII, R. 22-23.)

The defendant admits that plaintiff is entitled to to judgment for $312.28 of the amount of $42,586.11 claimed as an illegal disbursement from Chickasaw funds in excess of *one-fourth* of the total paid out of the tribal funds of both Choctaw and Chickasaw Nations for the salaries of Mining Trustees. This concession admits the correctness of the basis for plaintiff's claim, as is set forth in plaintiff's finding VIII.

The legal apportionment of this expense is *three-fourths* to the Choctaws and *one-fourth* to the Chickasaws, which is the manner in which the income from coal deposits owned by these tribes is owned, as has been shown.

Plaintiff admits that, if it can be shown that any part of the moneys herein claimed (in excess of the *one-fourth* interest of the Chickasaw Nation therein),

was expended by the *Chickasaw Nation, out of its own moneys,* and prior to the expiration of the Choctaw and Chickasaw Tribal Governments (on March 4, 1906), the claim herein presented should be reduced by the *amount of such excess;* but by no more.

The "Atoka Agreement" of June 28, 1898 (30 Stat. 495) did provide that *each Nation* should fix and pay the salary of its Mining Trustee; and that Agreement is binding; and whatever they saw fit to pay, during the life of the Tribal Governments, may not be questioned.

But counsel for the United States overlook the fact that the life of the Tribal Governments *expired on March 4, 1906;* and, after that time they had no power and authority over their own moneys; and, on that date, the United States "took over", and was charged with the duty of legally *administering* the affairs of the Nations, and incurred the perils of being required to account for any moneys *confiscated:* that is, illegally paid out "*to others*" who had no legal right to receive it.

So, *after March 4, 1906,* the United States was responsible for paying out, for the salaries of Mining Trustees or otherwise, any *common moneys* of the two Nations, in excess of their ownership of *three-fourths* by the Choctaw Nation and *one-fourth* by the Chickasaw Nation, as has been shown.

In their Defendant's Brief (R. 140), counsel for the United States (after referring to the provision of

the "Atoka Agreement" in which each Nation agreed to fix and pay the salary of its Mining Trustee) say:

> "These warrants [for salaries of Mining Trustees], issued by plaintiff, were paid by defendant from plaintiffs' funds"; and
>
> "This method continued until the fiscal year 1925.",

when the Mining Trustees were reduced, by Act of Congress, from *two* to *one*.

Also, in their Objections (R. 85), they say:

> "Pursuant to the aforesaid Agreement, the Chickasaw and Choctaw Nations selected and fixed the salaries of their respective Mining Trustees until the Act of June 5, 1924."

Nothing could be further from the facts.

The method set up by the Atoka Agreement *did not continue to 1925*. It did not continue for a day after March 4, 1906, when the Tribal Governments expired.

Not a single warrant was ever issued for any purpose, nor paid by the Nations, after that date.

After that date, as stated, the United States took over the whole responsibility of *administering* the moneys and affairs of the two Nations, and such Mining Trustees were thereafter appointed by the United States, and paid by the United States out of the moneys of the Nations; and, in doing so, it was required to conform to the law, as declared by the courts, in the matter of *administration* and *confiscation*.

Counsel for the United States admit that $312.28 of Chickasaw moneys were illegally expended, in excess of its *one-fourth* interest.

This is an admission, in principle, of the whole amount claimed (except what might have been paid by the Chickasaw Nation prior to March 4, 1906); and the Chickasaw Nation is entitled to recover such whole amount, unless, as stated, some part thereof can be shown to have been expended *prior to March 4, 1906*, and while the Tribal Governments were in existence.

Claim for Unauthorized School Expense.
(Plaintiff's Finding IX, R. 23-28.)

Plaintiff claims for the illegal disbursement of Chickasaw funds by the Secretary of the Interior for Chickasaw schools, in violation of the provisions of Section 10 of the Act of April 26, 1906 (34 Stat. 137), which expressly limited this yearly expenditure for schools to "not exceeding in any one year, * * * the amount expended for the scholastic year ending June 30, 1905."

The Report of the General Accounting Office, p. 555, shows that the amounts disbursed for Chickasaw schools during the scholastic year ending June 30, 1905, totaled $20,871.88.

The defendant's whole effort is directed to breaking down this $20,871.88 limitation shown by the General Accounting Office Report; and it relies upon statements contained in a Supplemental report of the General Accounting Office, filed herein by defendant on

June 26, 1943, and a report of the Interior Department to the Attorney General, filed herein by defendant on July 18, 1935. We will discuss these reports below.

The supplemental report of the General Accounting Office purports to show that certain Chickasaw warrants, totaling $155,522.19, issued during the fiscal year 1905, for educational purposes, were paid during the fiscal years 1906, 1907 and 1908.

This report shows on its face that it was requested by the Department of Justice after plaintiff's original Brief had been filed, and after a copy of the same had been transmitted to the General Accounting Office.

The statement is not supported by any corroborating facts, and it is to be noticed that no copies of the warrants accompany this report; and there is no evidence submitted in support of it, showing the dates said warrants were issued, and the purposes for which issued.

Such a statement is self-serving and surely has little force as evidence. This Court said in *Fain Grain Co.* v. *United States,* 68 C. Cls. 441, 445: "The Government is not exempt from the rules of evidence that apply to other litigants."

The above figure also varies from the figure set forth in the report of the Secretary of the Interior to the Attorney General, filed by defendant on July 18, 1935, in which $145,471.89 is given as the amount available for expenditure under the Act of April 26, 1906. However, this report shows that there is no basis for this figure.

On page 12 of this report it is shown that during the scholastic years 1904 and 1905, the Chickasaw schools were not in a very flourishing state, and the report goes on to state:

> "It would appear from the above reports for 1904 and 1905 that the Chickasaw schools were not in a very flourishing condition at this period, *and there is nothing to show how the amount of $145,-471.89 was computed.*" (Italics ours.)

And on page 14 of this report it is further stated:

> "From the records here it cannot be determined whether the amount said to have been spent for the support of schools in 1905 was all spent for education, or for construction, repairs and improvements of buildings, warrants and education.
>
> * * * * * * *
>
> "There is nothing in the records of this Department that would tend to confirm or dispute the correctness of the figures heretofore mentioned as being the maximum amount which could be used for school purposes subsequent to 1905, and statements from various agents at various times differ as to the actual amounts which would be available."

Thus the defendant has picked out, and now relies upon, one of the many figures shown in the various conflicting and inconclusive reports of the various officers of the Interior Department, as the limit for school expenditures under the Act of April 26, 1906, which the above mentioned report of the Interior Department expressly states cannot be substantiated.

On the other hand, plaintiff relies upon the balanced and unambiguous statements of the Report of the General Accounting Office, showing amounts expended from the funds of the Chickasaw Nation during the scholastic year 1905.

In the Creek accounting case, 78 C. Cls. 474-496-497, wherein this same issue was involved, this Court said:

> "The report of the Comptroller General shows that the amount expended for educational purposes for the Creek Tribe for the scholastic ending June 30, 1905, was $105,493.06. This amount therefore was the lawfully authorized sum that could be expended from the tribal funds for the purpose of education. The Secretary of the Interior made disbursements in excess of this amount during but one of the remaining years of the claim, the year 1907, in which year he disbursed $110,-669.03, or $5,175.97 in excess of the amount he was authorized to expend. * * *"

Thus this Court has held that the balanced statements of the General Accounting Office Report, furnishes the proper basis for determining the limitation for school expenditures under Section 10 of the Act of April 26, 1906. We submit that this is the only reliable source for determining this limitation, and it is shown by the record in this case to be $20,781.88.

Therefore, all yearly expenditures made by the Secretary of the Interior for Chickasaw schools over and above this $20,781.88 yearly limitation, fixed by the Act of April 26, 1906, would be illegal, and plaintiff is

entitled to recover the amount shown in plaintiff's Finding IX (R. 23-28).

Disbursements Made in Contravention of the Proviso in the Act of August 24, 1912, and Subsequent Annual Indian Appropriation Acts.
(Plaintiff's Finding X, R. 29-32.)

In view of the fact that plaintiff has withdrawn most of the items of this claim, and amended its requested Finding X so as to include only the items conceded by defendant, we need not further consider and answer the contentions of defendant set forth in its Objections (R. 144-156) and Brief (R. 114-22).

The defendant concedes (R. 122 and 155-6) that the items claimed by plaintiff were disbursed without authority of law.

Claims of Plaintiff for Losses as Shown by Balance Sheets of Chickasaw Funds in the G. A. O. Report.
(Plaintiff's Finding XI, R, 33-36, 56-77.)

The plaintiff claims the items and amounts shown on the balanced statements of various Chickasaw funds, in the said Report of the General Accounting Office, as having been lost to the Chickasaw Nation in the handling of these funds by the disbursing officers of defendant (R. 33-36, 56-77).

In outlining plaintiff's claim for these items, we have listed them under certain general classifications.

We will answer below defendant's contentions with respect to these classifications, as follows:

(a) *Unaccounted for balances of plaintiff's funds advanced to disbursing officers of defendant for disbursement to plaintiff, but which were not so disbursed, and never returned to plaintiff's funds by defendant* (R. 57-59).

Defendant concedes items for $8,257.62 and $1,259.98 (Deft's Brief, R. 156-157), but contests the item for $890.19, because defendant asserts that a purported letter dated April 14, 1933, from the Comptroller General to the Attorney General, shows that this amount of $890.19 was disbursed to the Chickasaws. This letter is not made a part of the record in this case, and without this proof defendant is not entitled to this credit.

(b) *Shortage in disbursing officer's accounts, which has not been returned to plaintiff's funds by defendant* (R. 60-61).

The defendant contends that plaintiff should not be allowed the amount of $6,585.82 claimed, because it asserts: (1), that the best evidence of the true amount of the shortage in the disbursing officer's account is the Act of August 30, 1852 (10 Stat. 43); and (2), that the United States is entitled to a gratuity offset for interest paid under the provisions of said Act of 1852 on that part of this shortage which was returned to Chickasaw funds, as these were annuity funds which bear no interest.

Our answers to these contentions are:

(1), The first contention of defendant is a mere assertion of defendant's counsel. The best evidence of

the amount of the shortage is found in the statement of accounts set forth in the General Accounting Office Report. On page 229, Item (bb) the amount of this shortage is set out as $31,568.21. The Act of August 30, 1852, appropriated $24,982.29 only of the $31,568.21 total shortage, leaving a balance of $6,585.92 which was never returned to Chickasaw funds. Defendant has submitted no evidence of compromise, or other reason for the failure of Congress to restore the total amount of this shortage to Chickasaw funds, and clearly plaintiff is entitled to judgment for the balance of $6,585.92.

(2), The second contention of defendant is very simply answered. Congress, by the Act of 1852, provided that interest was payable on that part of the shortage returned to Chickasaw funds, and when Congress decided that interest was payable on this claim of the Chickasaw Nation against the United States, such action makes interest a legal obligation of the United States, and we cannot now question the wisdom of Congress in this respect. When interest is made a legal obligation of the United States by Act of Congress, the payment of such interest would not constitute a gratuity offset under the Act of August 12, 1935 (49 Stat. 571, 596). Furthermore, the question of gratuity offsets is not involved in these present proceedings under Rule 39(a).

We submit that plaintiff is entitled to judgment for $6,585.92 under this item.

(e) Illegal disbursements for exchange fees made from Chickasaw funds without authority of law (R. 71).

(h) Chickasaw moneys erroneously returned to surplus by defendant (R. 76).

The defendant concedes these items (Deft's Brief, R. 160, 161).

(c) Unauthorized transfers of Chickasaw funds to funds of other tribes (R. 61-67).

(d) Unauthorized deposit of Chickasaw moneys to funds of other tribes (R. 67-71).

(f) Illegal disbursements of Chickasaw funds made by defendant for other tribes (R. 71-73).

(g) Errors of defendant in failing to credit Chickasaw funds with Chickasaw moneys (R. 73-75).

As to the items in the above classifications, defendant offers no defense, and has failed to submit any satisfactory answer. Clearly plaintiff is entitled to judgment for the amounts claimed under these classifications.

Items Claimed by Defendant in its Conditional Finding X (R. 122-123).

The defendant has requested the Court to find that it is entitled to certain credits set up in defendant's conditional finding X (R. 122-123).

It will be noticed that defendant has merely asserted a claim for these items, and has submitted no argument in support of them. With the two exceptions listed below, there is no evidence in the record to support a claim for these items. The defendant has seen fit not to introduce in the evidence in this case the accounting reports in *Creek* case, H-510, and *Choctaw* case,

K-260; and the items claimed from these reports are not properly before the Court for consideration in this case.

Had defendant introduced these reports in evidence in the case at bar, plaintiff would have felt justified in requesting the Court to permit it to amend its claims so as to include amounts of Chickasaw funds erroneously deposited to the funds of these tribes, and which never were deposited in funds of the Chickasaw Nation.

We have carefully checked the items claimed by defendant, and set forth in the Chickasaw accounting report now before the Court, and find but two items—one for $1,001.90 and the other for $79.14—which this report shows were funds belonging to other tribes, and were erroneously deposited to Chickasaw funds. Plaintiff admits that defendant is entitled to credit for these items.

As to all of the other credit items claimed by defendant, there is nothing in the Chickasaw general accounting report to support defendant's claim that these items were erroneous bookkeeping entries.

We have seen, *supra,* that the defendant has the burden of proving the credits claimed. Defendant has failed to sustain this burden, and clearly it is not entitled to credit for these items. We refer the Court to our comments on these items, under the caption of "Defendant's Conditional Finding X," *supra.*

CONCLUSION.

We hope that we have clearly outlined for the Court the claims and contentions of plaintiff; and we respectfully request judgment for the claims herein presented, in the amounts deemed by the Court just and proper.

Respectfully submitted,

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