No. L–51

In the Court of Claims of the United States

THE SEMINOLE NATION, PLAINTIFF

v.

THE UNITED STATES OF AMERICA, DEFENDANT

DEFENDANT'S MOTION FOR NEW TRIAL AND REQUEST FOR AMENDMENTS TO THE SPECIAL FINDINGS OF FACT

HARRY W. BLAIR,
Assistant Attorney General.

GEORGE T. STORMONT,
CHARLES H. SMALL,
WILFRED HEARN,
Attorneys.

INDEX

CITATIONS

43535—36——1

Decisions and Authorities:

In the Court of Claims of the United States

No. L–51

THE SEMINOLE NATION, PLAINTIFF

v.

THE UNITED STATES OF AMERICA, DEFENDANT

DEFENDANT'S MOTION FOR NEW TRIAL AND REQUEST FOR AMENDMENTS TO THE SPECIAL FINDINGS OF FACT

Comes now the defendant by its Assistant Attorney General and moves the Court to vacate the judgment for plaintiff entered herein on December 2, 1935, and thereupon grant defendant a new trial, and amend the special findings of fact for the reasons and in the particulars as hereinafter set forth.

1. The Court erred in its conclusion of law that plaintiff was entitled to recover the sum of $61,563.42 under its Finding of Fact IV.

2. The Court erred in its conclusion of law that plaintiff was entitled to recover the sum of $154,551.28 under its Finding of Fact VI.

Defendant requests the Court to amend its Finding VI by incorporating therein a statement showing the total of all disbursements made and set forth in the report of the General Accounting Office as having been made by disbursing officers

whose accounts have been passed or approved; all payments made prior to 1874 on said account to the treasurer of plaintiff nation (Rpt. G. A. O., pp. 20–22); payments per capita shown to have been made on said account although the account of the disbursing officer is "suspended"; and moneys appropriated on said account for the years 1908 and 1909 and disbursed for "Administrative Expenses, Seminole Government" (Rpt. G. A. O., p. 309).

Defendant requests that this finding be amended by adding the following:

Disbursements shown by report of General Accounting Office to have been made, and accounts of disbursing officers approved, during fiscal years 1867 to 1907, inclusive (Rpt. G. A. O., pp. 151–164)	$962,090.00
Payments made to Seminole treasurer prior to 1874, settlement not approved because moneys not paid by defendant per capita (Rpt. G. A. O., pp. 20–22)	37,500.00
Disbursements per capita, disbursing officers accounts not approved for lack of certificate of interpreter and a witness (Rpt. G. A. O., pp. 20–22)	12,500.00
Disbursements shown to have been made to cover "Administrative Expenses, Seminole Nation" for years 1908 and 1909 and for "Fulfilling treaties with Florida Indians, or Seminoles" (Rpt. G. A. O., p. 309)	53,749.96
Total payments	1,065,839.96

3. The Court erred in its conclusion of law that plaintiff was entitled to recover the sum of $61,347.20 under its Finding of Fact IX.

4. The Court erred in its conclusion of law that plaintiff was entitled to recover the sum of $864,702.58 under its Finding of Fact XII.

Defendant requests the Court to amend Finding XII by adding thereto the following material statement of fact:

That subsequent to the passage of the act of June 28, 1898, known as the Curtis Act, no money was paid by defendant to the Seminole tribal treasurer until after a demand was made by the plaintiff tribe upon the Secretary of the Interior that moneys belonging to the Seminole tribe be paid into the Seminole tribal treasury, as had theretofore been done under the authority of the acts of Congress of April 15, 1874 (18 Stat. 79), and March 2, 1889 (25 Stat. 1004), and until after the Comptroller of the Treasury had rendered an opinion wherein it was held that section 19 of the Curtis Act did not prohibit the payment of moneys due the Seminole tribe to its tribal authorities for disbursement until such time as the tribal government shall be extinguished (Rec., p. 184; Rpt. Sec. of Int., pp. 832–841). The said sum of $864,702.58 is composed of moneys appropriated and paid on accounts as follows:

Article 8, Treaty of 1856 (11 Stat. 699), $212,500.00 (Rept., G. A. O., pp. 161–164).

Article 3, Treaty of 1866 (14 Stat. 755), $29,750.00 (Rept., G. A. O., pp. 197–200).

Act of March 2, 1889 (25 Stat. 1004), $622,458.58 (Rept., G. A. O., pp. 216–218).

5. The Court erred in its conclusion of law that plaintiff was entitled to recover the sum of $154,455.30 under its Finding of Fact XIII.

6. The Court erred in its conclusion of law that plaintiff was entitled to recover the sum of $9,068.24 under its Finding of Fact XI.

II

The defendant further moves that the judgment in this case be vacated and the case remanded to the general docket for the purpose of permitting the defendant to adduce and present the offsets which the Court is directed to consider by section 2 of the Second Deficiency Appropriation Act, fiscal year, 1935, approved August 12, 1935 (Public No. 260, 74th Congress).

HARRY W. BLAIR,
Assistant Attorney General.

GEORGE T. STORMONT,
CHARLES H. SMALL,
WILFRED HEARN,
Attorneys.

BRIEF

As its special Finding of Fact XII the Court found as follows:

> The Secretary of the Interior made the following payments of Seminole moneys to the Seminole tribal treasurer, as shown by the report of the General Accounting Office:

Year	Amount	Rep. G. A. O. pages
1899	$103,500.00	161, 197, 216
1900	103,788.00	162, 198, 216, 283
1901	103,433.75	162, 198, 216
1902	103,500.00	162, 198, 217
1903	103,507.71	163, 199, 217, 283
1904	103,500.00	163, 199, 217
1905	103,052.00	163, 199, 218
1906	103,500.00	164, 200, 218
1907	36,921.12	164, 200, 218
Total	864,702.58	

Upon this finding the Court held as a conclusion of law that plaintiff was entitled to recover the sum of $864,702.58. It appears from the opinion of the Court (pp. 14–17) that this recovery is based solely upon the payment by defendant of said sum of money into the treasury of the Seminole Nation, the plaintiff, notwithstanding the prohibition contained in section 19 of the act of Congress approved June 28, 1898 (30 Stats. 495, 502), known as the Curtis Act. Section 19 of said act is as follows:

> That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof *for disbursement,* but payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation. [Italics ours.]

Defendant contends that the conclusion of the Court is erroneous for the following reasons:

I. Section 19 of the Curtis Act did not prohibit the payment of moneys to a tribal government or any officer thereof unless such moneys be "for disbursement" to the members of the tribe.

II. That notwithstanding the payment of said moneys into plaintiff's treasury is in violation of the prohibition contained in section 19 of the Curtis

Act, the plaintiff is estopped from asserting a further claim to the same for the reason that plaintiff requested and demanded that payment of these moneys be made into plaintiff's tribal treasury.

III. A mere showing that moneys were paid into plaintiff's tribal treasury in violation of the prohibition contained in section 19 of the Curtis Act is not sufficient in law to justify a recovery in an amount equal to the sum of the moneys so paid. It is also necessary to show that actual damage was sustained by reason of the violation of said prohibition and the extent thereof.

IV. Assuming that the payments were made into plaintiff's tribal treasury in violation of the prohibition contained in section 19 of the Curtis Act, such payments were made as a result of a mistake of law on the part of an officer of defendant, and defendant is permitted, under section 3 of the jurisdictional act, to recover therefor.

I

Construction of section 19 of the Curtis Act

Section 19 of the Curtis Act does not prohibit payments of moneys to tribal governments or officers thereof unless the money is paid "for disbursements", such disbursement to be to the members of the tribe. The money paid into the treasury of the Seminole Nation pursuant to the act of April 15, 1874 (18 Stats. 29), was to be used as the council of said Nation should provide instead of

paying the same per capita. The money paid into the Seminole tribal treasury as interest money arising under the act of March 2, 1889 (25 Stats. 1004), was to be used by the tribe in such manner and for such purposes as the tribe should determine. Therefore, the money paid pursuant to both of said acts of Congress was not paid to the treasurer of the Nation "for disbursement", but for whatever use the Seminole tribal government might choose to make of the same. The Seminole government had the right under the acts to spend the money or to keep it in its treasury.

What has been said with reference to the meaning of the words "for disbursement" is fully supported by that part of the section of the act which follows:

> * * * but payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation.

Clearly, the act was intended to relate to money which was required to be paid to members of the tribes per capita and not to money which existing treaties and laws required should be paid to the tribal governments free from conditions or limitations as to its use.

43535—36——2

The Court will observe from the record that the payments of the money into the Seminole tribal treasury was in no sense a wilful disregard of the prohibition contained in the Curtis Act. After the passage of the Curtis Act the Secretary of the Interior sought the opinion of the then Assistant Attorney General for the Interior Department with respect to the question whether the Curtis Act applied to the Seminole Tribe. It was the opinion of the Assistant Attorney General that the act did apply to the Seminole Tribe. Thereupon the Seminole Tribe made a demand upon defendant for the payment of the moneys involved into its tribal treasury and in support of that demand submitted to the Secretary of the Interior a comprehensive brief. (Report of the Secretary of the Interior filed herein, pp. 832–841, yellow pencil.) Thereupon, the matter was again submitted to the Assistant Attorney General for the Interior Department for his opinion and in response thereto the Assistant Attorney General informed the Secretary of the Interior that:

> The matter involved in this reference and in your original request for an opinion, is of very difficult solution and requires a careful examination of the Seminole treaties and of the legislation by Congress relating to that tribe. *The real question intended to be presented is not simply whether section 19 of the act of June 28, 1898, applies to the Seminole tribe, but also whether that section is limited in its application to payments to members or per capita payments, or whether it includes and is applicable to the payment of the expenses of maintaining and conducting the tribal government.*
>
> * * * * *
>
> The Comptroller of the Treasury seems to be the final arbiter of questions of the character here involved. An opinion by me upon the question presented would not be conclusive, and since the statute provides the means of obtaining an authoritative decision from the Comptroller of the Treasury, *I respectfully suggest that my opinion of the 12th ultimo be withdrawn and that the matter be presented to the Comptroller of the Treasury for his decision.*
>
> I have personally prepared, and herewith submit for your consideration, a form of letter to the Comptroller which, it is believed, presents *the real question* involved and all matters necessary to its proper solution.
>
> (Report of the Secretary of the Interior, pp. 850, 851, yellow pencil.) [Italics ours.]

Thereafter the Comptroller of the Treasury rendered his opinion and concluded the same by saying:

> * * * I am of the opinion that the moneys due these Indians can be turned over to the tribal authorities for disbursement until such time as the tribal government shall be extinguished (R., p. 190).

From the opinion of the Assistant Attorney General for the Interior Department it is clear that

the words "moneys * * * for disbursement", as employed in the Curtis Act, were held therein to relate only to such moneys as were intended for per capita disbursement. In this opinion it is stated:

> The provision in the Seminole Act [July 1, 1898, ratifying agreement, 30 Stat. 567] that "all moneys belonging to the Seminole Indians * * * shall be paid *per capita* to the members of the Tribe", the first payment to be made after the "extinguishment of tribal government" "by a person appointed by the Secretary of the Interior", is the substantial equivalent of the language used in the general act that payments shall not be made "to any of the tribal governments or any officer thereof", but shall be made per capita direct to each individual, "under direction of the Secretary of the Interior by an officer appointed by him" (Rept., Secy. Int., pp. 823–824, yellow pencil).

The Court will observe that section 19 of the Curtis Act as it passed the House of Representatives did not contain the words "by the United States" following the words "hereafter be made" in the first part of the section. The section, however, as it passed the House did contain these words "all expenses incurred in transacting their business and of" which followed the words "but payments of" near the end of the section. It is plain, therefore, that in striking from the section the words "all expenses incurred in transacting their

business and of" Congress intended to limit the application of the section to moneys which were subject to per capita disbursement (R., pp. 181, 182).

That Congress intended that section 19 of the Curtis Act should relate only to moneys to be disbursed to the members of the tribes is further evidenced by the fact that during each of the years from 1899 to 1907, inclusive, the Secretary of the Interior made payments of Seminole moneys, not intended for disbursement among the members of the tribe, to the Seminole tribal treasurer, and although the annual reports of the Secretary of the Interior gave notice of such payments, Congress took no action indicating that the Secretary of the Interior had violated the intention of section 19 of the Curtis Act.

However, by act of Congress approved April 26, 1906 (34 Stats. 137, 148), Congress, among other things, directed the Secretary of the Interior to assume control and direction of the schools of the Seminole Nation and to conduct the same, but not to expend therefor in any one year an amount in excess of the amount expended for the scholastic year ending June 30, 1905.

It will be seen, therefore, that a certain part of the money paid into the Seminole treasury was expended by the tribal government for maintenance of schools for the scholastic year of 1905.

It appears from the record that the moneys paid into the treasury of the Seminole Nation during

the years 1899 to 1907, inclusive, held by the Court to have been paid in violation of the prohibition of section 19 of the Curtis Act, were used by the Nation for the purpose of maintaining its schools and its tribal government. It is very certain that had Congress intended by section 19 of the Curtis Act that these expenses were to be paid not by the tribe but by the Secretary of the Interior, then provision would have been made by Congress for the payment of said expenses by the Secretary of the Interior. But there is no such provision in the act, and its absence shows conclusively that moneys for the governmental expenses of the tribe were to be advanced or paid by the Secretary of the Interior as theretofore.

The funds in question were not paid "for disbursement" but were simply paid into the treasury of the Seminole Nation to be retained or used as the laws of the nation authorized. In no sense was the purpose of the payments "for disbursement."

The Act of 1889 (supra) provided that the interest on $1,500,000 be paid to the Seminole treasurer, not for any particular purpose and therefore not "for disbursement." That is to say, it was paid to the Seminole treasurer to be spent or used or held as the Seminole Nation or the Seminole government should authorize. Money paid for the purpose of disbursement is money to which is attached a limitation or direction as to its use, and an appropriation by Congress to carry out an obligation to pay

interest to the treasurer of the Seminole Nation due under the Act of 1889 (supra) is not an appropriation of money "for disbursement." Furthermore, the word "moneys" as used in the clause "no payment of any moneys on any account * * * for disbursement" relates to the identical money mentioned in the next clause of the act which is "but payments of all sums to members of said tribe shall be made under direction of the Secretary of the Interior." It is clear therefore that the words "for disbursement" would be meaningless and without significance if the act had intended that *no* money should be paid to the tribal government or an officer thereof.

For the reasons stated, it is submitted that section 19 of the Curtis Act was intended to relate only to moneys which were intended for disbursement among members of the tribes per capita and not to moneys which belonged to the Seminole Nation and which said Nation had the right to use for any purpose it should determine, or let the same remain in its treasury unexpended.

II

Estoppel

As heretofore shown, after the passage of the Curtis Act the Secretary of the Interior did not pay any money into the treasury of the Seminole Nation until after the Seminole Nation, the plaintiff, had requested and demanded that this be done,

and until after the Comptroller of the Treasury had rendered a decision upholding the contention of the Seminole Nation that the money should be paid to its treasurer. In these circumstances the Seminole Nation or tribe, the plaintiff, having demanded and received the money, is estopped from asserting a further claim therefor.

The record shows that the demand for the payment of the money to the treasurer of the Seminole Nation was made by the Seminole Nation, the plaintiff in this case. If the demand had not been made by the Seminole Nation or tribe the Secretary of the Interior would not have taken cognizance thereof.

In presenting the question to the Comptroller of the Treasury the Secretary of the Interior said:

> The Seminole tribe (the plaintiff) insist that all of said money can be, and should be, paid as heretofore, into the tribal treasury, to be applied and expended according to the laws of the tribe (R., pp. 174, 184).

The determination by the Secretary of the Interior and the Comptroller of the Treasury, that the contentions of plaintiff with respect to the meaning and scope of section 19 of the Curtis Act were well founded, was in effect an agreed construction of section 19 of the Curtis Act. No principle of law is more firmly established than that where parties to a contract have adopted a construction of the same and have acted upon that construction, they are estopped from asserting a different construction

although the construction adopted be erroneous. *Cranford and Hoffman* vs. *District of Columbia,* 20 Ct. Cls. 376; *District of Columbia* vs. *Gallaher,* 124 U. S. 504.

The same reasons and principles apply in the case of the construction of a law. In the case of *Daniels* vs. *Tearney,* 102 U. S. 415, 420–421, the Supreme Court said:

> Conceding the bond to have been wholly void in both aspects, it does not by any means follow that it could not thereafter, under any circumstances, be enforced as between the parties, or that there is such error in the judgment that it must necessarily be reversed.
>
> A corporation is liable for negligent and malicious torts, including libel, assault and battery, malicious prosecution, and false imprisonment. In such cases the plea of *ultra vires* is unavailing. The corporation is estopped from setting up such a defense. *National Bank* v. *Graham,* 100 U. S. 699.
>
> The same result is produced in like manner in many instances where a corporation, having enjoyed the fruits of a contract fairly made, denies, when called to account, the existence of the corporate power to make it. *Railway Company* v. *McCarthy,* 96 U .S. 258.
>
> The principle of estoppel thus applied has its foundation in a wise and salutary policy. It is a means of repose. It promotes fair

dealing. It cannot be made an instrument of wrong or oppression, and it often gives triumph to right and justice, where nothing else known to our jurisprudence can, by its operation, secure those ends. Like the Statute of Limitations, it is a conservator, and without it society could not well go on.

If parties are in *pari delicto,* the law will help neither, but leaves them as it finds them. But if two persons are in *delicto,* but one less so than the other, the former may in many cases maintain an action for his benefit against the latter. *White* v. *Franklin Bank,* 22 Pick. (Mass.) 181.

It is not necessary here to consider the extent and limitations of the rule. They are fully examined in the authority referred to. In the case in hand the obligee must be deemed wholly innocent, because the contrary is not alleged, and it does not appear. *Quod non apparet, non est. De non apparentibus et non existentibus, eadem est ratio.* "If the contract be executed, however, that is, if the wrong be already done, the illegality of the consideration does not confer on the party guilty of the wrong the right to renounce the contract; for the general rule is, that no man can take advantage of his own wrong, and the innocent party, therefore, is alone entitled to such a privilege." 1 Story, Contr., sect. 610; *Taylor* v. *Weld,* 5 Mass. 108.

It is well settled as a general proposition, subject to certain exceptions not necessary to be here noted, that where a party has

availed himself for his benefit of an unconstitutional law, he cannot, in a subsequent litigation with others not in that position, aver its unconstitutionality as a defence, although such unconstitutionality may have been pronounced by a competent judicial tribunal in another suit. In such cases the principle of estoppel applies with full force and conclusive effect. *Ferguson* v. *Landram,* 5 Bush (Ky.), 230. See *Ferguson* v. *Landram,* 1 *id.* 548; *Van Hook* v. *Whitlock,* 26 Wend. (N. Y.) 43; *Lee* v. *Tillotson,* 24 *id.* 337; *The People* v. *Murray,* 5 Hill (N. Y.), 468; *City of Burlington* v. *Gilbert,* 31 Iowa, 356; *B. C. R. & M. R. R. Co.* v. *Stewart,* 39 *id.* 267.

Since the treaty of 1866 the United States has dealt with the Seminole Tribe as a government. Likewise, the authority of duly elected officers of said government has been recognized by the United States. The agreement between the Seminole Nation of Indians and the United States of 1897, approved by act of July 1, 1898 (30 Stat. 567), recites that it is an agreement between "the Government of the United States of the first part * * * and the Government of the Seminole Nation, in Indian Territory, of the second part, entered into on behalf of said Government by its Commissioners duly appointed and authorized thereunto."

Under section 12 of the act of March 2, 1889 (25 Stat. 1004), interest on $1,500,000 was authorized to be paid to the Seminole Nation, "said interest to

be paid semi-annually to the treasurer of said nation."

When therefore money was paid to the treasurer of the Seminole Nation, it was a payment to plaintiff and under the circumstances the plaintiff will not be heard to dispute the authority of its treasurer to receive same.

In the case of *Gates* v. *United States,* 38 Ct. Cls., 52, 55–6, this Court said:

> Plaintiff participated in the judicial proceedings which resulted in the award of his distributive share as an ensign by filing his petition as an officer of that grade and permitting the roster showing his rating among the officers of the Castine to be an ensign to be transmitted and filed as a part of the record of the cause without objection. Upon the coming in of the report of the auditor he appeared in open court by counsel (the same counsel also representing the other petitioners) and obtained the entry of an order directing that the decisions, rules, and findings of this court relating to the bounty, together with the list prepared by the auditor, be transmitted to the Navy Department for the purpose of having distribution made of the individual shares of the officers and enlisted men severally entitled thereto, as determined by the court in respect to their several cases, or as decided under like conditions in other cases of naval bounty. Thus, by his own act, as well as by the act of the Department, it resulted that

plaintiff did not share in the bounty as a lieutenant of the junior grade, to which he was entitled to be promoted as of and preceding the day of the battle.

There is no question but that plaintiff was underpaid. (*In re Engagement at Manila Bay,* 36 Ct. Cls. R., 208.) But the United States have paid $11,600, the total amount of bounty due for the destruction of the enemy's vessel off the coast of Cuba. The distribution has been made and plaintiff took the part assigned to him as an ensign.

The jurisdiction of the court can be invoked after failure of the accounting officers of the Treasury to do more exact justice (*Medbury* v. *United States,* 173 U. S. R., 497), *but not where a creditor has contributed by his conduct to mislead the accounting officers, assented to a schedule apportioning unto him a distributive share smaller than that he was entitled to receive,* and afterwards accepting in payment a sum less than that which he might have obtained had he been more careful in the assertion of his rights, at the same time permitting the only fund available for payment to be applied to the settlement of claims against it aggregating enough, with the amount apparently due to him, to absorb the entire fund.

It would be difficult to find a more equitable case of estoppel *in pais.* It does not alter the situation to say that the error was the result of a clerical inadvertence, and that the auditor's report was never formally approved by the court. Nor does the inti-

> mation made at the argument that the report being on file only two days before its transmission to the Navy Department left plaintiff without adequate opportunity to object to the erroneously small award in his favor. Plaintiff's haste took the report to the proper department at the end of two days, where it lay some time before actual distribution of the fund. The report was based on the petition and roster, and was ratified by the action of the parties in interest as effectually as if the court had formally approved it. The Government having paid what it was legally required to pay cannot be made to pay a second time. [Italics ours.]

The doctrine of estoppel demands consistency of conduct in those instances where inconsistency would produce substantial injury to another party. In other words, where a party has acted in a particular manner upon the request or advice of another, the latter is estopped to take a position inconsistent with his own request and advice, to the injury of the person so induced to act. *Baker* vs. *Schofield,* 243 U. S. 114, *Lilenthal* vs. *Cartwright,* 173 Fed. 380, *Winslow* vs. *Baltimore, etc. R. Co.,* 188 U. S. 646.

Assuming that the Secretary of the Interior did violate the prohibition contained in section 19 of the Curtis Act, defendant contends that plaintiff is not entitled to a recovery for the reason that the money claimed has been paid to plaintiff and that

the payment thereof was made upon the request and demand of plaintiff.

In view of the failure of the Court to make a finding setting forth that the payments in the total sum of $864,702.58 were made by the Secretary of the Interior to the Seminole tribal treasurer upon the request and demand of plaintiff and subsequent to an opinion of the Comptroller of the Treasury that such payments would not be in violation of the prohibition contained in section 19 of the Curtis Act, and in view of the materiality of such a finding as bearing upon the question of estoppel, defendant has requested that the Court amend its Finding XII in the manner as set forth in the foregoing motion.

III

Measure of damages

Assuming again that section 19 of the Curtis Act prohibited the payment of any money into the Seminole tribal treasury, defendant contends that a mere showing that moneys were paid into the tribal treasury is not sufficient in law to justify a recovery in the sum of the amount of money so paid.

In the first place the section of the act involved was not a grant of a vested right. It did not create an obligation to pay money to plaintiff. The obligations to pay were created by former treaties, agreements, and acts of Congress; therefore, damages, if any, must flow from and be measured by the injury sustained on account of the violation of the obligations created thereby.

In this connection we invite the attention of the Court to the case of *Sac and Fox Indians of the Mississippi in Iowa* v. *Sac and Fox Indians of the Mississippi in Oklahoma, and the United States,* 220 U. S. 481, 483–484, wherein the court in its opinion says:

> * * * At this time, up to 1867, annuities were paid subject to the act of August 30, 1852, c. 103, § 3, (10 Stat. 41, 56), which forbade payment to be made to any attorney or agent and required it to be made directly to the Indians themselves or to the tribe per capita, "unless the imperious interest of the Indian or Indians, or some treaty stipulation, shall require the payment to be made otherwise, under the direction of the President." The policy and practice of the Government were to pay no annuities to Indians absent from reservations without leave, as were the Iowa band, and nothing to the contrary is implied by the act of 1852.
>
> We interrupt the recital of facts to dispose at this point of the first claim made by the plaintiffs. The act of 1852 gave no vested rights to individuals. It was not a grant to the Indians but a direction to agents of the United States, subject to other directions from the President. See *Wisconsin & Michigan Ry. Co.* v. *Powers,* 191 U. S. 379, 387. The Government did not deal with individuals but with tribes. *Blackfeather* v. *United States,* 190 U. S. 368, 377. See *Fleming* v. *McCurtain,* 215 U. S. 56. The promises in the treaties under which the annuities were due were promises to the tribes. Treaties of November 3, 1804, 7 Stat. 84; October 21, 1837, 7 Stat. 540; October 11, 1842, 7 Stat. 596. See treaty of October 1, 1859, 15 Stat. 467. So the treaty of February 18, 1867, in article 21, speaks of "the funds arising from or due the nation under this or previous treaty stipulations", and of payments to bands. 15 Stat. 495, 504. Moreover, when the Government decided to pay only at the tribal agency, and then paid the whole amount due, we must presume, at this distance of time, that its decision was made under the direction of the President.

A recovery can be had only upon a showing that the party entitled under the jurisdictional act to sue has been damaged. The claims permitted to be presented to the Court under the instant jurisdictional act are the claims of the "Seminole Nation or Tribe." It is obvious that the "Seminole Nation or Tribe" has sustained no damage by reason of a violation of the prohibition contained in the Curtis Act because it has received the money and used the same for its schools and governmental business. In other words, the plaintiff is suing to recover money which the plaintiff has admittedly received.

Suppose Congress should have passed an act prohibiting the payment of accrued interest to the Seminole Nation during any month other than January and in violation of that prohibition the Secretary of the Interior had made payments during a

prior month, what under those circumstances would be the damage?

Again, if the purpose of the act was to insure that the individual Indians received their proper share of the moneys, then the damage, if any, was sustained by the individual Indians and not by the Seminole Nation the plaintiff.

IV

Claims of the United States against plaintiff

The jurisdictional act in Section 3 provides:

> In said suit the court shall also hear, examine, consider, and adjudicate any claims which the United States may have against said Indian nation, but any payment which may have been made by the United States upon any claim against the United States shall not operate as an estoppel, but may be pleaded as an offset in such suit.

Assuming that the payments made into the Seminole tribal treasury were in violation of section 19 of the Curtis Act, such payments were made through a mistake of law and were in no sense gratuities. If, therefore, it is correct to hold as a conclusion of law that these payments can not apply to the defendant's obligations to the plaintiff, even though made with that intention by the defendant's officers out of moneys appropriated by the Congress for that purpose, because not made in the manner authorized and directed by the Congress, then the sums paid by the defendant to the

treasurer of the plaintiff tribe, having been made under a mistake of law, are recoverable from the plaintiff.

In the case of *Wisconsin Central R. Company* v. *United States,* 164 U. S. 190, 210–212, the Supreme Court said:

> * * * As a general rule, and on grounds of public policy, the government cannot be bound by the action of its officers, who must be held to the performance of their duties within the strict limits of their legal authority, where by misconstruction of the law under which they have assumed to act, unauthorized payments are made. *Whiteside* v. *United States,* 93 U. S. 247; *Hawkins* v. *United States,* 96 U. S. 689, and cases before cited. The question is not presented as between the government and its officer, or between the officer and the recipient of such payments, but as between the government and the recipient, and is then a question whether the latter can be allowed to retain the fruits of actions not authorized by law, resulting from an erroneous conclusion by the agent of the government as to the legal effect of the particular statutory law under or in reference to which he is proceeding.
>
> * * * * *
>
> It is unnecessary to go into a discussion of the exceptions which may exist between private parties to the rule that moneys paid through mistake of law cannot be recovered back.

This branch of the case was disposed of by the Court of Claims on the authority of *Duval* v. *United States,* 25 C. Cl. 46. It was there held that "the items of the several statements upon which the Sixth Auditor certifies balances due for carrying the mails ordinarily, and in the absence of special circumstances, may be regarded as running accounts, at least while the parties continue the same dealings between themselves; and that money paid in violation of law upon balances certified by the accounting officers generally may be recovered back by counterclaim or otherwise where no peculiar circumstances appear to make such recovery inequitable and unjust." The mistake was, indeed, treated as one of fact, the Post Office officials erroneously assuming through oversight that the road in question had not been aided by grants of land, but the governing principle in the case before us is the same.

* * * * *

The petition sets forth, among other things, that the Postmaster General wrongfully and unlawfully withheld the $12,532.43 out of moneys due petitioner, which was, therefore, entitled to recover the full amount; and to each and every allegation of the petition the government interposed a general traverse. It is now said that a counterclaim as set-off should have been pleaded, but the record does not disclose that this objection was raised below, while the findings of fact show that the entire matter was before the court for, and received, adjudication. Moreover, it has been repeatedly held that the forms of pleading in the Court of Claims are not of so strict a character as to require omissions of this kind to be held fatal to the rendition of such judgment as the facts demand. *United States* v. *Burns,* 12 Wall. 246, 254; *Clark* v. *United States,* 95 U. S. 539, 543; *United States* v. *Behan,* 110 U. S. 338, 347; *United States* v. *Carr,* 132 U. S. 644, 650.

This Court had a similar question in the case of *Maine* v. *United States,* 36 Ct. Cls. 531, 559 wherein the Court having referred to the case of *Wisconsin Central R. Co.* v. *United States* (*supra*), said:

> * * * And thus the court, in that case, ruled "that parties receiving moneys illegally paid by a public officer are liable *aequo et bono* to refund them." (See also *Whiteside* v. *United States,* 93 U. S. 247; *Hawkins* v. *United States,* 96 U. S. 689.) That holding materially modifies the well-known rule that as between individuals money paid in mistake of law cannot be recovered back. The ruling is based upon the theory that the Government should not suffer for the illegal acts of its officers, and if not, then should the State in her dealings with the greater sovereignty because some one of her officers mistook her legal rights and thereby omitted to discharge his duty? A citizen of the State would not be permitted to shield himself behind the negligence of one of her officers and thereby avail himself of it as a successful defense in an action against him.

Furthermore, defendant's right is a claim at law. It is a claim for money had and received—an action in assumpsit. In no sense does the enforcement of such a right depend upon principles of equity.

For the reasons stated defendant submits that if the payment of said moneys cannot be applied to the satisfaction of treaty obligations, or obligations arising under acts of Congress creating vested rights, as Congress directed they should be applied, then said moneys were paid to the plaintiff through mistake of law and are recoverable back by the defendant.

Finding IV

The Court concluded as a matter of law that plaintiff was entitled to recover the sum of $61,563.42 on the facts set forth in its Finding IV.

Defendant contends that the Court erred in its conclusion of law for the following reasons:

1. The obligations were annuity payments and the damage arising out of defendant's failure to make the same was waived through the release contained in article VIII of the treaty of 1866 (14 Stat. 755). An annuity is not necessarily paid in money; it may be paid in farming tools or it may be paid in services. The word "annuity" as used in connection with obligations of the United States to Indian tribes means an annual payment of money to the tribe or an annual expenditure for

the benefit of the tribe. If the expenditure is to be made annually then it is an annuity.

2. The action of the Secretary of the Interior, in failing to make annual expenditures during the period of the rebellion, was the action of the President, who was authorized by the Act of July 5, 1862 (12 Stat. 512, 528), a war measure, to suspend said annuity payments. In the case of *Belt* v. *United States* (15 Ct. Cls. 92, 107) this Court held:

> The action of the Commissioner of Indian Affairs must be presumed to be the action of the President, according to the well-settled principle adopted in practice and recognized by the courts, that the President acts in the performance of most of his duties through an appropriate department of the government and through the chief officers charged with the immediate supervision of the affairs of that department (*Wilcox* v. *Jackson,* 13 Pet. 498).

Furthermore, the President is presumed to have acted in the matter, as was held in the case of Sac and Fox Indians v. Sac and Fox Indians and United States (*supra,* pp. 326, 327) wherein the Court said:

> Moreover, when the Government decided to pay only at the tribal agency, and then paid the whole amount due, *we must presume, at this distance of time, that its decision was made under the direction of the President.* [Italics ours.]

3. During the period of the rebellion it was impossible for the United States to supply the annuity services. The plaintiff was in rebellion; thus the United States was prevented by the plaintiff itself from carrying out the obligations. The Court will take judicial notice of these facts.

Finding VI

Under this finding it appears that during certain years from 1867 to 1909 annual interest payments of $25,000 on the fund of $500,000 set-up under article VIII of the treaty of 1866 (14 Stat. 263, 264), although appropriated by Congress, were not disbursed in their entirety during such years. Evidently the Court has overlooked the fact that during other years amounts in excess of $25,000 were disbursed. For example, during the fiscal year of 1870 the sum of $37,500 was disbursed. During the year 1877, $36,971.50 was disbursed, and during the year 1880, $25,450 was disbursed. The account should be stated as a whole and credit given for all payments made applicable to the obligation.

Furthermore in 1874, $11,101.64 was disbursed out of the fund to pay drafts on the Seminole Nation, which disbursement was authorized by the general council of plaintiff. The plaintiff is therefore estopped from making a further claim therefor. The court has failed to credit said payment on the defendant's obligation (Rept. G. A. O., p. 153).

It further appears from the report of the General Accounting Office that prior to 1874 payments in the total sum of $37,500 were made on this account to the treasurer of plaintiff (Rpt. G. A. O. pp. 20, 26). These payments appear in the report of the General Accounting Office as "suspended" and are not therefore credited to the account, but plaintiff having received this money is estopped from asserting a further claim therefor. If, however, the doctrine of estoppel does not apply, then the defendant is entitled to a recovery for said amount because the same was paid to the treasurer of the Seminole Nation through a mistake of law made by an officer of the defendant.

It also appears that a payment was made in the sum of $12,500, but that this item is "suspended" in the account because of a lack of the certificate of an interpreter and a witness (Rpt. G. A. O., pp. 22, 27). Defendant contends that the weight of the evidence supports defendant's claim to a credit for said disbursement.

Again defendant contends that for the years 1908 and 1909 it appears from the weight of the evidence that defendant disbursed for "Administrative Expenses of Seminole National Government" during the years 1908 and 1909 the sums of $42,747 and $11,002.96, respectively, and that said disbursements were made to fulfill treaty obligations covering interest payments. Prior to 1908 the expenses of the Seminole National Government were

paid by the government of the Nation out of funds paid to its treasurer. Subsequent to the taking effect of the act of 1906 (34 Stat. 137), no moneys accruing to plaintiff as interest on its funds were paid to the tribal treasurer but the same were disbursed by the Secretary of the Interior. This expense could only be paid out of interest accruing on the Seminole General Fund of $1,500,000 set up under the act of 1889 (25 Stat. 1004) or interest on the fund of $500,000 set up under article VIII of the treaty of 1856 (11 Stat. 679). The report of the General Accounting Office shows that there was paid from interest accruing on the Seminole General Fund of $1,500,000 during the fiscal year of 1908 for "Administrative Expenses of Seminole Government" $10,481.05, and for the year 1909 for the same purpose, $5,962.50. If therefore the report of the General Accounting Office is correct with respect to the expenditures for said purpose out of interest accrued on the General Fund of $1,500,000, then it was absolutely necessary for payments made for said purpose in excess of said last mentioned amounts to have been disbursed out of some other account, and the only other account out of which said moneys could have been obtained is the account in question. Therefore, the evidence is conclusive that the appropriation of $25,000 for each of the years 1908 and 1909 on the instant obligation were disbursed by the Secretary of the Interior for the administrative expenses of plaintiff's government, and credit should be allowed therefor.

Finding IX

The Court has awarded a recovery under Finding IX, which includes items in the total sum of $57,000, all of which was paid by defendant, out of the moneys appropriated by Congress to cover a treaty obligation, to the treasurer of the plaintiff nation during the fiscal years of 1875 to 1898, inclusive. Said payments were not gratuities.

Defendant contends that the plaintiff, having received this money, is estopped from asserting a further claim thereto. If, however, the doctrine of estoppel does not apply, then the jurisdictional act authorizes a recovery in favor of defendant for said amount because the payments were made under a mistake of law by an officer of defendant.

The defendant's argument with respect to the conclusion of the court on its Finding XII is applicable to the questions here involved.

Finding XIII

Under Finding XIII the Court held that plaintiff was entitled to recover the sum of $154,455.30 because said amount had been expended from the principal of the "Seminole School Fund" without the authority of Congress.

The first two items going to make up said sum are shown to be per capita disbursements made in 1920 and 1921 in the total sum of $32,445.56. These disbursements were authorized to be made by act approved May 25, 1918 (40 Stat. 561, 580), which is in part as follows:

> That the Secretary of the Interior be, and he is hereby, authorized to pay to the enrolled members of the Seminole Tribe of Indians of Oklahoma entitled under existing law to share in the funds of said tribe, or to their lawful heirs, out of the *Seminole School Fund,* or any moneys belonging to said tribe in the United States Treasury or deposited in any bank or held by an official under the jurisdiction of the Secretary of the Interior, not to exceed $100 per capita. [Italics ours.]

It appears from the report of the General Accounting Office, page 296, that during the year 1919 per capita payments were made from the principal of the school fund in the total sum of $295,529.31. That amount was admittedly paid per capita by authority of the act of Congress of May 25, 1918 (*supra*). Where there is authority to make a per capita payment out of a specified fund it will be presumed that an officer of the Government who has made such a payment out of the specified fund has acted under such authority. The record fails to show that the per capita payments in the total sum of $327,974.87 exceeded the amount authorized to be paid by Congress, *i. e.,* $100 per member.

The Court erred, therefore, in failing to allow defendant credit for the per capita payments shown to have been made from the principal of the school fund.

We come now to those items under Finding XIII shown to have been expenditures for education

made from 1922 to 1930, inclusive. This finding shows an expenditure for education of $1.29 for the fiscal year of 1929, and an expenditure of $30,-031.82 for the fiscal year of 1930, and that said amounts have been included in the recovery on the theory that they were not specifically authorized by Congress. The failure of the Court to eliminate these items must have been due to an oversight, because Congress did specifically authorize the expenditure of $33,000 for each of said years from the tribal funds of plaintiff "for the support of schools and for tuition" (Acts of March 7, 1928, 45 Stat. 200, 216; 45 Stat. 1562, 1577).

Defendant also contends that the expenditures shown to have been made under this finding for the purpose of education during the fiscal years 1922 to 1928, inclusive, were specifically authorized to be made out of any fund belonging to the Seminole Tribe of Indians. The Court will observe that in 1919 the principal of the "School Fund" had decreased from $500,000 to approximately $175,000, and that the interest had decreased from $25,000 to approximately $10,000 (Rpt. G. A. O., p. 343).

The Court has held in this case that "Congress had the power to change the terms of the agreement" (Opinion, page 17). With respect to the expenditures for education during the fiscal years 1922 to 1928, inclusive, Congress authorized the expenditure of moneys out of the Seminole tribal funds for educational purposes. The language of

the various appropriation acts covering said years is practically the same with respect to this subject and is as follows:

> That the Secretary of the Interior is hereby authorized to continue during the ensuing fiscal year the tribal and other schools among the Choctaw, Chickasaw, Creek, and Seminole Tribes from the *tribal funds* of those nations within his discretion, * * *.

The acts referred to are as follows: May 24, 1922, 42 Stat. 552, 575; January 24, 1923, 42 Stat. 1174, 1196; June 5, 1924, 43 Stat. 390, 398; March 3, 1925, 43 Stat. 1141, 1148; May 10, 1926, 44 Stat. 453, 460; January 12, 1927, 44 Stat. 934, 948; March 7, 1928, 45 Stat. 200, 216.

As heretofore shown the appropriation acts for the fiscal years 1929 and 1930 (45 Stats. 200, 216; 45 Stats. 1562, 1577), limited the expenditures for Seminole schools to $33,000 for each of said years. It is very plain that Congress considered the language above quoted to be specific authority for the use of tribal funds of any kind for school purposes within the discretion of the Secretary of the Interior and that for the years 1929 and 1930 Congress removed the discretionary power of the Secretary of the Interior with respect to the amounts to be expended out of the funds of the Seminole and Choctaw nations.

For the reasons stated defendant submits that no recovery should have been awarded plaintiff under this finding.

FINDING XI

The Court allowed a recovery under this finding upon the theory that article VI of the treaty of 1866 (14 Stat. 755) required the United States to expend as much as $10,000 in the erection of agency buildings. But the treaty provision did not require the expenditure of any fixed amount for such purpose. The treaty did provide "that the United States shall cause to be constructed, *at an expense not exceeding $10,000,* suitable agency buildings." [Italics ours.] Therefore, if suitable agency buildings had been constructed for $7,500 or $5,000 or $2,500 or $931.76, the treaty obligation was fulfilled. The record fails to show that "suitable agency buildings" were not constructed out of the appropriation authorized.

Furthermore, article VI of said treaty also provides that "the Seminole Nation hereby relinquish and cede forever to the United States one section of their land upon which said agency buildings shall be directed [erected], which land shall revert to said nation when no longer used by the United States, upon said nation paying a fair value for said buildings at the time vacated." Thus it is seen that the buildings were to be the property of the United States until the Indians had paid the fair value of the same.

Gratuities

By section 2 of the Second Deficiency Appropriation Act, fiscal year 1935, approved August 12, 1935

(Pub., No. 260, 74th Cong.), the Court is directed, in all pending Indian cases, to consider and set off against any amount found due a tribe—"all sums expended gratuitously by the United States for the benefit of the said tribe."

It is obvious from the second proviso to the section that the purpose of the section was to provide for the setting-off against the claims of the Five Civilized Tribes, which are being prosecuted under acts which do not permit gratuity offsets, of all amounts expended gratuitously by the United States for their benefit, and thus make uniform the conditions under which Indian tribes have been permitted to sue.

It is true that section 2 says, "In all suits now pending in the Court of Claims by an Indian tribe or band which have not been tried or *submitted*", and it is true that the case at bar had been *submitted* more than two months prior to the passage of the act, to wit, on June 4, 1935; but it is so clearly the purpose of the section to make uniform the conditions imposed upon the tribes with respect to the prosecution of their claims that to give to the word "submitted" a technical or narrow meaning would be an evasion of the spirit of the section. There surely can be no sound reason in permitting one tribe to escape the imposition of gratuity offsets and in not permitting a second tribe to receive similar treatment merely because of the fortuitous circumstance that the first tribe had its case on submis-

sion a month or so prior to the passage of the act whereas the second tribe was delayed until after the passage of the act in securing a trial.

Nor does the section make clear what was intended by the word "submitted." In view of the purpose of the section, the Congress may have intended "submitted for appropriation" or some other meaning, and not "submitted for the decision of the Court."

For the reasons herein set forth defendant submits that a new trial of this cause be granted, that thereupon the findings of fact be amended as requested by defendant, that the errors of law complained of by defendant be corrected, and that the case be reopened in order that defendant may submit set-offs as authorized in section 2 of the Second Deficiency Appropriation Act, fiscal year 1935 (Pub., No. 260, 74th Cong.).

Respectfully submitted,

HARRY W. BLAIR,
Assistant Attorney General.

GEORGE T. STORMONT,
CHARLES H. SMALL,
WILFRED HEARN,
Attorneys.

U. S. GOVERNMENT PRINTING OFFICE: 1936