Congressional No. 17641

IN THE

United States Court of Claims

THE CHOCTAW AND CHICKASAW NATIONS OF INDIANS,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

BRIEF

of

THE CHICKASAW NATION OF INDIANS,

Answering

"Defendant's Statement Setting Forth Gratuities"

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OUTLINE OF BRIEF.

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A complete "OUTLINE OF BRIEF" (together with citations of *Treaties, Laws, Court Decisions* and *Official Records and Reports),* appears upon the preceding lettered pages, showing the arrangement of subjects, by divisions and sub-divisions, with appropriate references to the pages of the Brief where such subjects are treated and such citations appear.

(Throughout this Brief, certain parts of quotations from Treaties, Laws, Court Decisions and Official Records and Reports, have been *italicized,* for emphasis; and such *italics are ours).*

I.

How the issues relating to so-called "gratuities" arose in the instant case.

On May 5, 1936, the instant case was argued and submitted upon the main issues therein arising.

On May 28, 1936, the defendant, the United States, filed its Motion requesting the Court to withhold its report and findings of fact until it is able to present a "Statement" of "Gratuities", under the Act of August 12, 1935 (49 Stat., 571-96), from the Report of the Comptroller General.

On June 1, 1936, the Court made and entered its Order as follows:

> "On May 28, 1936, the defendant filed a motion requesting the court to withhold its report and findings of fact in this case and to grant it permission to submit a certain statement prepared from a report of the Comptroller General yet to be filed. On consideration thereof, IT IS ORDERED, this 1st day of June, 1936, that said motion be and *the same is sustianed in so far as to permit the defendant to file the report of the Comptroller General referred to in its motion;* and the plaintiff is given leave to show the net amount the Government received for the lands involved in this case. * * *"

That part of the Order relating to "the net amount the Government received for the lands involved in this case" (the remainder of the "Leased District" lands) will be presented separately, and will comprise the report of the General Land Office, together with our comments thereon; and this *Answer Brief* is confined to that part of the Order relating to so-called "Gratuities".

The Attorney General has filed "Defendant's STATEMENT SETTING FORTH GRATUITIES", on behalf of the United States, and contends that the items and totals therein set forth, should be allowed and included in the report of the Court, in the instant case, as moneys "expended gratuitously by the United States for the benefit of said tribe or band" (the Choctaw and Chickasaw Nations).

It is contended by the plaintiffs, the Choctaw and Chickasaw Nations, that many, if not all, of such items should not be so allowed, as "Gratuities" or "Gratuity Offsets", and so reported; and this Answer Brief is a summation of the arguments upon which the Choctaw and Chickasaw Nations rely, in opposition to such allowance.

II.

How the issues relating to so-called "gratuities" have been presented by the defendant, the United States, in the instant case.

(a) *Section 2 of the Second Deficiency Act of Congress of August 12, 1935 (49 Stat., 511-596).*

This Act provided that, in pending Indian suits in the Court of Claims,

> "* * * the court is hereby directed to consider and to offset against any amount found to be due said Indian Tribe or band all sums *expended gratuitously* by the United States for the benefit of the said Tribe or Band * * *";

and in the instant case (and in similar cases) it was provided that,

> "* * * in all cases now pending * * * in which an Indian Tribe or Band is party plaintiff, wherein the duty of the court is merely to report its *findings of fact and conclusions* to Congress, the said Court of Claims is hereby directed to include in its report a statement of the amount of money which has been expended by the United States *gratuitiously* for the benefit of said Tribe or Band * * *."

This Act was retroactive, in that *it changed the issues in pending cases,* since the issues were defined by the original Jurisdictional Acts (the Act of June 7, 1924, 43 Stat., 537, as to *suits;* and Senate Resolution of February 26, 1931, invoking Section 151 of the Judicial Code, governing the instant case), and the instant case has been heretofore argued and submitted

upon the issues therein arising. However, it is not contended that the Act is invalid, in the instant case, since it is not a *suit for judgment,* but only for *findings and conclusions.*

The Act was an "afterthought" of those who were hostile to Indian suits and claims, was evidently prompted by the fear that the Indians might prevail, and recover substantial *judgments or findings;* and that such suits or proceedings might be won by *later legislation* instead of upon the merits of the main issues which were originally defined.

It was a "rider", and *new legislation* in an appropriation Act, and was passed in violation of the rules of both Houses of Congress, upon that subject.

It was hurriedly passed, without any opportunity being given to the Five Civilized Tribes (to whom, *alone,* it applied, all other Tribes being excluded) to appear and urge the binding force of the *Treaty obligations and undertakings* of the United States to make *"no charge or claim"* against the Choctaw and Chickasaw Nations for moneys expended for the division and distribution of their Tribal estates, and also the binding force of the *general Treaty guarantys* (in all the Treaties from 1820 to 1902, inclusive) to supervise and protect the Tribal affairs of these Indians, *at its own expense,* based upon *good and valuable considerations* passing between the parties to such Treaties.

The Act makes no *definition or clarification* of what shall constitute "Gratuities" and "Gratuity Off-

sets", and merely refers to *"moneys expended gratuitously"* thus leaving the Nations or Tribes at the disadvantage of *disproving* what the United States merely *asserts,* as to so-called "Gratuities", in violation of every rule of regular and orderly procedure.

The passage of the Act was resisted by the Commissioner of Indian Affairs (the direct representative of the United States, in its capacity as the *guardian of the Indians);* and he sets out (in the Senate Hearings upon the "Second Deficiency Appropriation Bill for 1935", pages 102-9) his reasons why the legislation should not be passed in the form proposed; and his reasons were that the setting up of "Gratuities" and "Gratuity Offsets" should not be authorized in *general terms,* but that the proposed legislation, if passed at all, should define and clarify so-called "Gratuities", in the light of the *Treaties and laws* applying to *each Nation or Tribe;* and that to do otherwise, was unfair and unjust to the Indians.

However, the Act was passed, and we must now assume the burden of *disproving* what the United States has merely *asserted,* in the matter of "Gratuities" and "Gratuity Offsets", in so far as the Choctaw and Chickasaw Nations are concerned; and that we have endeavored, and shall endeavor to do, in this Brief and by oral argument, when the instant case shall be further considered by the court.

(b) *"Defendant's Statement Setting Forth Gratuities."*

By authority of the order of the court (dated June 1, 1936, and above referred to) the United States filed its "DEFENDANT'S STATEMENT SETTING FORTH GRATUITIES", having previously filed the *"General Accounting Office Supplemental Report"* upon that subject.

The "Statement" filed by the United States consists of *five printed pages,* running from pages 473 to 477, inclusive; and it merely sets out *tabulations of items and totals* of what it *asserts* to be allowable "Gratuities" and "Gratuity Offsets", taken from the General Accounting Office Report.

This *five page "Statement"* contains no word of *proof or argument* as to why the items and totals therein set up, should be allowed as "Gratuities" or "Gratuity Offsets" against the Choctaw and Chickasaw Nations.

It would seem, therefore, that it is expected that, because the *United States asserts* the same to be *allowable "Gratuities" and "Gratuity Offsets",* they should be allowed.

We had expected that, since the United States is seeking an *offset finding* (against any finding that may be rendered in favor of the Indians), based upon law and facts having no relation to the original issues, it should *"assume the burden"* of these later issues, and *prove its case,* and support its proof by arguments, in accordance with the rules of regular and orderly pro-

cedure. Instead, as stated, it seems to expect the plaintiffs (the Choctaw and Chickasaw Nations) to assume the burden of *disproving,* by evidence and argument, what it has merely *asserted.*

It may be that it is taking the position that the General Accounting Report has *proven its case;* and if so, we must earnestly oppose that position, for reasons and upon grounds which shall be set out.

It will be shown, we think, that the General Accounting Office Report *proves nothing,* although it attempts to go *beyond its legitimate powers and functions;* and that it is for *the court and the court alone,* to determine if the items therein contained *do, or do not, constitute allowable "Gratuities" or "Gratuity Offsets", under the applicable Treaties and laws.*

In saying this, it is not our intention to adversely criticize the methods pursued by the United States.

We are merely setting out the facts that exist, (and that we have, thereby, been placed in a position that is cruelly unfair and unjust), for the purpose of saying that we are forced to assume the burden of *disproving* what the United States has merely *asserted,* in explanation of the volume and length of this Brief, which we have deemed it necessary to prepare and file, in justice to our Indian clients.

(c) *The "General Accounting Office Report".*

We have said that this Report, upon which the United States seems to wholly rely, *proves nothing,* in the matter of allowable "Gratuities" or "Gratuity Offsets"; and that it has gone beyond its powers and functions in attempting *to decide* what items constitute allowable "Gratuities", by arrogating to itself powers and functions belonging, solely and wholly, to the court.

We have said that the only power and authority which the General Accounting Office possesses, or which it has any right to exercise, is to furnish the court with a *true picture* of the accounts and records, which may have any possible bearing upon the issues of "Gratuities" or "Gratuity Offsets", by setting out the dates and amounts of expenditures, and the purposes for which expended; and that it is for *the court to decide* what items are, or are not, allowable, by the use of *this picture,* and by the application of the pertinent provisions of Treaties and laws thereto.

Has the General Accounting Office, in the Report referred to, exceeded its legitimate powers and functions? We think so, as will be shown.

This Report comprises some 471 typewritten pages.

It contains numerous tabulations of moneys expended, showing dates, amounts, totals and purposes.

These tabulations are correct, so far as we know or can show, since the United States is the custodian of the accounts and records; and to that extent, we have no objection.

But, beyond that, it has exceeded its powers and functions; and to that, we most strenuously object.

The only power and authority which the Attorney General possessed, and the only power and authority which the General Accounting Office could exercise upon request of the Attorney General, was derived, solely and wholly, from the *Order of this Honorable Court,* of June 1, 1936, and above quoted.

Did that Order empower either the Attorney General or the General Accounting Offices to arrogate unto themselves the power and authority *to decide* what did, or did not, constitute allowable "Gratuities"? We say not.

Nowhere, in the Order or elsewhere, was the Attorney General given any power and authority to do more than file a "Statement", (presumably, to be accompanied by proof and argument in support of the same) of what it *contended to be allowable "Gratuities";* nor was the General Accounting Office given any power and authority except to prepare *a Report for the consideration and final action of the court.*

Then, having shown that the General Accounting Office went farther than it had any right to go, under the Order of the court or otherwise, in attempting to report *what items constituted allowable "Gratuities",* let us examine the Report for the purpose of determining whether its *attempted conclusions,* upon the law and the facts, are worthy of acceptance.

It *says,* in its letter of transmittal, that the items listed are "disbursements made by the United States, for the benefit of the plaintiffs *under other than Treaty*

appropriations * * *"; yet it has listed *twenty-one items* of more than a *million dollars,* for *"allotting", "appraising", "surveying"* and *"townsites",* which are *plainly and clearly excluded* by the *"no charge or claim"* paragraph of the "Atoka Agreement", which will be referred to, more in retail (and quoted), later on in this Brief. There are other items of *several millions* of dollars, such as *"enrolling", "general office expenses", "miscellaneous employees"* etc., which are necessary incidental expenses, and quite as clearly excluded as the above items. These appropriations were certainly made by Congress, in pursuance of its *"no charge or claim" Treaty obligation,* yet the General Accounting Office, wholly ignoring the applicable provisions of Treaties and laws, reports these items as *"other than Treaty appropriations".* If it has arrogated unto itself the powers and functions of the court, it ought, at least, to have made some serious effort to act as the court would have acted, in the circumstances.

Then, it has listed, as allowable "Gratuities Offsets", the items of nearly $400,000.00 for *"Removal of Intruders"* and *"Pay and Expenses of Indian Police",* yet, in practically every Treaty, from 1820 to 1902, inclusive, are contained *solemn Treaty guarantys that the United States will remove "Intruders" and keep them out of the Indian country.*

Then, it has listed an item of "Probate Expenses" of more than a *million dollars,* whereas the Acts of appropriation definitely and specifically state that these services are to be rendered to *"Restricted Indians",* who were in possession of their *individual allotments,*

under *Patents and fee simple title,* and to whom the Nations (the plaintiffs in the instant case) owed no duty whatsoever, in connection with their allotments *individually owned.* These *"Restricted" Indians* and *individual allottees* were beset and surrounded by the "Grafters", and the United States very generously afforded them protection; but, we inquire, what has that to do with the *Nations,* the plaintiffs in this case? All of this could have been ascertained by an examination of applicable Treaties and laws, and no effort was made to that end, yet it would have *us (and the court)* accept its *conclusions* that these items constitute *allowable "Gratuities".*

Then, it lists an item of $11,735.57 for "Education", as having been *expended by the United States,* whereas an examination of the Osage Treaty of 1865 (14 Stat., 687) will show that these moneys belonged to the *Osage Indians* and not to the *United States,* and that the United States was merely the *disbursing agent* of the fund for the benefit of *all Indians in the United States.* The Report shows that practically all of the moneys making up this item, came out of the *Osage moneys* and not out of *United States moneys,* yet the Report, without examination of the law and the facts, says that they were *expended by the United States,* and are allowable, as "Gratuity Offsets", in *favor of the United States.*

Then, there is set up an item of $2,177,277.86 for "Education" for the Five Tribes; and the Choctaw and Chickasaw Nations are arbitrarily charged with 36.62% of this total, upon a *population basis,* without

any showing or proof whatsoever as to *what part,* if any, of this total was *actually received* by those *Nations.* The Report shows that $1,708,028.95 of the above total was expended for the maintenance of the "Cherokee Orphan Training School" at Tahlequah. An examination of the law (Act of June 30, 1913; 38 Stat., 77, and later similar Acts) would have shown that these moneys were expended for *individuals (orphan children* of the *"Restricted" class)* and not for the *Nations,* the plaintiffs in the instant case, and against whom a *counter judgment or counter finding* is demanded. A further examination of the Treaty of 1902 (32 Stat., 641, and later Acts of Congress upon the same subject), relating to *enrollment,* would have shown that *no child born after March 4, 1906,* is entitled to be enrolled or entitled to share in *Tribal properties or moneys, to any extent whatsoever.* Further, a child born just prior to March 4, 1906 (and entitled to enrollment and Tribal benefits), would be 18 years old in 1924, 16 years old in 1922 and 14 years old in 1920. Therefore, after 1924, *no child* of *school age* could have been an *enrolled member of the Nations,* and prior to that time, only a *part of such children* could have been *enrolled citizens;* and all will certainly agree that *only enrolled members,* upon any theory of the case, could *share in Tribal benefits,* and those *not enrolled* are no more entitled to share than white people. Yet this condition has been wholly ignored by the Attorney General and the General Accounting Office, and the whole *tremendous total* has been set up as "Gratuities" or "Gratuity Offsets" against the *Nations,* and without

any supporting proof or argument, and without any examination whatsoever of the applicable Treaties and laws. Why did they not cover the whole subject, by referring to such governing Treaties and laws, and thus give *us and the court* the benefit of these examinations, instead of arbitrarily setting them up as "Gratuities" and "Gratuity Offsets", apparently in the hope that such Treaties and laws would never be applied, and that such *asserted* "Gratuity Offsets" would be allowed.

We could cite many other instances of the hasty and ill advised conclusions of the General Accounting Office, but the foregoing would seem to support our contentions that it *ought not to have reached any conclusions whatsoever,* but ought to have limited its Report to the *facts and figures,* as shown by the accounts and records in its custody, *leaving to the court the determination of the legal effect of the same.*

We do not wish to seem to be facetious, for there is too much tragedy in these issues to justify levity or lightness, but since the General Accounting Office has so readily furnished a tremendous total of moneys *which it deems allowable,* as "Gratuity Offsets" in the instant case, we wonder why it did not go farther and include many other items that could have swelled the total, with quite as much reason and logic as most of the items included in its Report.

Why, we inquire, did it not include a part of the moneys expended by the Indian Office and the Interior Department at Washington, since those offices expended much money there, in connection with the affairs of

the Choctaw and Chickasaw Nations. That would have been quite as reasonable and logical as the 36.62% of the total of $12,267,989.26 expended in connection with the Five Civilized Tribes, amounting to $4,492,537.26 which the Attorney General (in his "Statement", page 477) has charged against the Choctaw and Chickasaw Nations, without any showing whatsoever, by either proof or argument, as to *just what part,* if any, of these moneys the Choctaw and Chickasaw Nations *did actually receive.* Would that showing, or lack of showing, support a judgment or finding (or counter-judgment or counter-finding, as is demanded in the instant case) in any court in the civilized world?

Then, to go further, we inquire: Why was not a part of the salaries and expenses of Senate and House of Representatives of Congress, and a part of the salary and expenses of the President of the United States, not charged against the Indians, since a considerable part of their energies were applied to Indian affairs?

The foregoing instances are given for the purpose of showing that, irrespective of the question of the assumption of power and authority, by the General Accounting Office, it has not exercised this *assumed power and authority* in such a way as to be worthy of acceptance; and that, as is basic and primary, it is for *the court, only,* to act finally upon the *law and the facts.*

We say that the regular and orderly procedure (and the only procedure that would have been fair and

just to the Indian plaintiffs) would have been for the United States to have included in its "Statement" (using the Report as the basis of the same) the items it *deemed to be allowable* as "Gratuity Offsets", and to have supported its contentions by *proof and argument,* thus *assuming and bearing the burden* which rightfully rested upon it (which it has not done), instead of merely *asserting* that its case *has been proven,* and attempting to throw upon the Indian plaintiffs the burden of *disproving* what it has *asserted.*

We would, we think, be within our rights if we took the position that, as to "Gratuities" or "Gratuity Offsets" in the instant case, the *proof has failed,* and that the prayer of the United States for their allowance, should be denied, upon the record filed. However, we are well aware that this Honorable Court is disposed to reach a full and complete understanding of the whole case, in order that justice may be done, and irrespective of technicalities. Therefore, we have not taken that position, for the reason below stated.

For a considerable time, we were undecided as to the best course to pursue to overcome this unfair and unjust situation; but we finally decided to lose no further time in an effort to force *the burden* to where it rightly belonged, but to go into the whole subject, irrespective of where the burden rested, and to meet the issues squarely, by an analysis of all applicable provisions of Treaties and laws; and that is what we are endeavoring to do.

III.

The plaintiffs, the Choctaw and Chickasaw Nations, rely upon the provisions of the treaties between them and the United States, in support of their contentions that so-called "gratuities", set up by the defendant, the United States, in its "defendant's statement setting forth gratuities", should not be allowed, as "gratuity offsets", in the instant case, because of the treaty obligations and undertakings of the United States, based upon considerations passing between the Choctaw and Chickasaw Nations and the United States, to perform such treaty obligations and undertakings, at its own expense and without charge or claims against the Indian Nations.

THE TREATIES REFERRED TO ARE AS FOLLOWS:

Choctaw Treaty, 1820 (7 Stat., 210; 2nd Kappler, 191);

Choctaw Treaty, 1825 (7 Stat., 234; 2nd Kappler, 211);

Choctaw Treaty, 1830 (7 Stat., 333; 2nd Kappler, 310);

Chickasaw Treaty, 1832 (7 Stat., 381; 2nd Kappler, 356);

Chickasaw Treaty, 1834 (7 Stat., 450; 2nd Kappler, 418);

Choctaw-Chickasaw Treaty, 1837 (11 Stat., 573; 2nd Kappler, 486);

Choctaw-Chickasaw Treaty, 1855 (11 Stat., 611; 2nd Kappler, 706);

Choctaw-Chickasaw Treaty, 1866 (14 Stat., 769; 2nd Kappler 918);

Choctaw-Chickasaw Treaty, 1898 (30 Stat., 495; 1st Kappler, 646);

Choctaw-Chickasaw Treaty, 1902 (32 Stat., 645; 1st Kappler, 771).

It has been the fixed and settled policy of the United States, for more than one hundred years, based upon Treaty obligations to, and undertaking with, the Choctaw and Chickasaw Nations:

1. *To establish and maintain Indian Agents and Indian Agencies to supervise and protect Tribal affairs, in their relations with the United States, and with other Tribes and with the whites; and to employ all necessary assistance, and to expend necessary moneys, at the expense of the United States;*

2. *To do all things necessary, at the expense of the United States, to remove "Intruders" from the Nations and to prevent their return; to overcome strife and dissension between the Nations and among their members; and to protect the Nations from all enemies, foreign and domestic;*

3. *To pay over to the Nations, at the expense of the United States, all moneys due the Nations, under all Treaties and laws;*

4. *Then, under the later and final Treaties of 1898 and 1902, to survey and appraise the lands and townsites; to make up final and approved rolls of citizenship; to sell the "surplus" or unallotted lands, townsites and other common properties; to lease the coal and asphalt deposits (under the Treaty of 1898), and to sell the coal and asphalt deposits (under the Treaty of 1902); to pay out, per capita, all moneys to the individual members of the Nations; and to do all things necessary to divide and distribute the entire Tribal estates and to abolish the Tribal Governments, in preparation for the creation of a State to embrace the lands of the Five Civilized Tribes (Act of Congress of March 3, 1893; 27 Stat., 612, and 1st Kappler, 498-9), all to be done at the expense of the United States and without charge or claim against the Choctaw and Chickasaw Nations.*

In support of the contentions, as above set out, we give the text in many instances, and the substances, in other instances, of the various provisions of the various Treaties (and cite the same) between the United States and the Choctaw and Chickasaw Nations, bearing upon the subjects referred to.

It is granted that the following synopsis and analysis of the applicable provisions of these various Treaties will be somewhat lengthy and tedious, but, in no other way can the court have the whole picture of the particular and peculiar relations existing, throughout all the years, between the United States and the Choctaw and Chickasaw Nations; and thus be enabled to fully understand the strength and force of the contentions which the Choctaw and Chickasaw Nations so earnestly urge, in the instant case, that the moneys which the United States has expended, from time to time, were not "Gratuities", in any sense whatsoever, but were expended in pursuance of its *solemn Treaty obligations and undertakings,* and based upon *good and valuable considerations* passing between the United States and the Choctaw and Chickasaw Nations; and that the same should not be allowed, as "Gratuity Offsets", in the instant case.

CHOCTAW TREATY OF 1820.

(7 Stat., 210; 2nd Kappler, 191.)

This Treaty was the first step taken, in the consummation of the plans and policies of the United States to remove the Choctaw Indians from their homes (which they had occupied for a time long antedating the birth of the United States, as a Nation), because of the pressure of white civilization, and the encroachments of white settlers from the surrounding states east of the Mississippi River, and to settle them upon Far Western lands.

This the United States deemed necessary, in order that the problems and difficulties which beset it might be lessened.

These conditions, and the objects sought to be attained by the United States, are set out in the Preamble, as follows:

> "*Whereas,* it is an important object with the President of the United States, * * * to perpetuate them as a Nation, *by exchanging for a small part of their lands* here, a country beyond the Mississippi River * * *"; and
>
> "*Whereas,* it is desirable to the *State of Mississippi to obtain a small part of the land belonging to said Nation;* for the *mutual accommodations of the parties,* * * *",

the following Articles were entered into.

Thus, the *Preamble* sets out the *good and valuable considerations* passing between the United States and the Choctaw Nation, and supports the *obligations and undertakings* which the United States assumed, in entering into the Treaty.

The language of the *Preamble,* (as well as the following Articles of the Treaty) while diplomatic and kindly, had a meaning which is plain, and may not be misunderstood, in substance as follows:

> "Our problems and difficulties (those of the United States) must be solved and overcome. We can no longer hold back the tides of the white man's encroachments. You must agree to give up your lands, and remove to the Far Western country. Cede *a part* of your lands now, and get ready to move."
>
> "If you (the Choctaw Nation) will agree, we (the United States) will do likewise, and assume and agree to perform, the *obligations and undertakings* herein set out."

(The balance of the lands of the Choctaws, comprising *all* of their remaining Eastern lands, were ceded to the United States, *without any additional considerations,* by the later Treaty of 1830, which will be presently referred to.)

> ARTICLE 1 describes the ceded lands of the Choctaws, and cedes the same to the United States.
>
> ARTICLE 2 describes the Far Western lands, and cedes the same to the Choctaw Nation, "for and in consideration of the foregoing cession, and *in part satisfaction* for the same.

This being *in part satisfaction* to the Choctaws, it is clear that the *whole satisfaction* was made up in

the *other things* which the United States obligated itself to perform in the other Articles of the Treaty.

ARTICLE 3 provides that the boundaries of the ceded Eastern lands shall be "ascertained and distinctly marked" *by the United States;* and that the Commissioners shall be accompanied by "such persons as the Choctaw Nation select", and to be *paid by the United States.*

ARTICLE 5 provides that the Choctaws shall be given subsistence whilst traveling to the country (the Far Western lands) above ceded to the Choctaw Nations.

ARTICLE 6 provides that "The Commissioners of the United States further covenant and agree, on the part of said states, that an *Agent* shall be appointed, in due time, for the benefit of the Choctaw Indians who may be permanently settled in the country ceded to them *beyond the Mississippi River.* * * *"

ARTICLE 13 provides for the organization of "a corps of *Light-Horse", to be paid by the United States,* through the *Agent* of the United States; and that such corps of Light-Horse shall be used "in maintaining good order, and compelling bad men to remove from the Nation, who are not permitted to live in it by a regular *permit from the Agent."*

It is thus established, we respectfully submit, that in this first and basic Treaty between the United States and the Choctaw Nation, *mutual obligations and undertakings* were assumed by both the United States and the Choctaw Nation, constituting *good and valuable considerations,* and that the United States agreed

to perform its obligations and undertakings *at its own expense;* that they included, among other things, the establishment and maintenance of an *Indian Agency and an Indian Agent,* and the organization of a *corps of Light-Horse* (corresponding to the *Indian Police* of later years); that these activities of the United States were the beginnings of the activities of later years, for which the United States expended considerable sums of moneys which are now set up as "Gratuity Offsets", in the instant case; and that they are not "Gratuities", and not allowable as "Gratuity Offsets", but merely the performance of *Treaty obligations and undertakings,* based upon *good and valuable considerations* passing between the United States and the Choctaw Nation.

CHOCTAW TREATY OF 1825.

(7 Stat., 234; 2nd Kappler, 211.)

The *Preamble* to this Treaty fully supports the contention that the cession of the Far Western lands, in the Treaty of 1820, was only in *part satisfaction* for the cession of the Eastern lands to the United States, by the Choctaw Nation, and that the *obligations and undertakings,* by the United States to perform the *other things* set out in the Treaty made up the *full satisfaction.*

The *Preamble* definitely states that the cession of the Far Western lands was *"in part satisfaction"* for lands ceded by said Nation, in the Treaty of 1820.

It then goes on to recite that the cession of such lands,

"* * * embraces a large number of *settlers, citizens of the United States;* and it being the desire of the President of the United States to *obviate all difficulties* resulting therefrom, and also, to *adjust other matters* in which *both the United States and the Choctaw Nations are interested,* the following Articles are agreed upon * * *."

ARTICLE 1 then describes and cedes, to the United States, all that part of the Far Western lands, ceded to the Choctaw Nation, "lying east of a line" running from Fort Smith (Arkansas) "due south to Red River." The same Article also provides that the United States shall "*remove such citizens* as may be settled on the west side, to the east side of said line, and *prevent future settlements from being made on the west thereof.*"

It is important to note that, in the cession of these lands *back to the United States,* by the Choctaw Nation, (comprising several counties of the then Territory, and later the State of Arkansas) the Choctaw Nation helped the United States out of the difficulties which confronted it because of the cession of 1820.

"ARTICLE 9. It is further agreed that, immediately upon the Ratification of this Treaty, or as soon thereafter as may be, an *Agent* shall be appointed for the *Choctaws West of the Mississippi,* and a Blacksmith be settled among them, in conformity with the stipulation contained in the 6th Article of the Treaty of 1820."

It is thus shown that the United States, in making up the *full satisfaction* to the Choctaw Nations, reiterated its *obligations and undertakings* (1) to appoint

and maintain an *Agent and Agency* in the Far Western Country, and (2) to expel all "Intruders" in the Choctaw Country, and to prevent their return; and it is clear that all of these things were to be done *at the expense* of the United States, in the fulfillment of its *Treaty obligations.*

CHOCTAW TREATY OF 1830.

(7 Stat., 333; 2nd Kappler, 310.)

This Treaty was a "follow-up" of the Treaty of 1820.

In the Treaty of 1820, the Choctaw Nation agreed to cede to the United States, *a part* of its lands east of the Mississippi River, and to get ready to remove to the Far Western Country.

Time passed. The Indians were loath to leave their homes, and to encounter the hazards of the Western wilderness.

The pressure for Choctaw lands, and the tides of the white man's civilization, demanding the removal of the Choctaws to the Far Western country, grew greater, and so great that the United States could no longer hold back these tides. The time had come when it had to act.

Therefore, in the Treaty of 1830, it "applied the pressure" and "got the job done".

The Choctaws still owned some 10,000,000 acres of lands east of the Mississippi River. All of those lands were, by the Treaty of 1830, ceded to the United States; and it is shown by the "Wichita Case", (de-

cided by this Honorable Court) that the Choctaw Nation received *no additional consideration,* in lands or moneys, for this final "clean up" cession.

In that case, and upon that point, it was held (in the "Wichita Case", 34 Ct. Cls., 17-168, at page 89):

> "The exchange made in 1820 left the Choctaws with 10,000,000 acres of land, which by the Treaty of 1830 the United States *got for nothing.*"

We say that there was no additional consideration, *in lands or moneys,* for this final tremendous cession.

That is true, as held by this Court.

But, we maintain, the Choctaw Nation did receive *additional good valuable considerations,* in securing from the United States *Treaty obligations and undertakings,* to do and to perform the *other things* which all the Treaties required of it, running through all the years from 1820 to the present time.

> The *Preamble* sets out that the *laws of the State of Mississippi extended to all persons and property;* that the President of the United States *cannot protect the Choctaw people from these laws;* and that, in order that the Choctaws may live under their own laws, in peace with the United States and the State of Mississippi, they have determined to *sell their lands east of the Mississippi* and have accordingly agreed to the following Articles of the Treaty.
>
> ARTICLE II provides that a Patent shall be executed by the President, conveying the Far Western lands to the Choctaw Nation, "in *fee simple* to them and their descendants, to inure to them while they shall exist as a Nation and live on it."

> "ARTICLE III. In consideration of the provisions contained in the several Articles of this Treaty, the Choctaw Nation of Indians consent and *hereby cede* to the United States, the *entire country they own and possess east of the Mississippi River* * * *."
>
> It is then provided that the Choctaws shall *remove beyond the Mississippi River* "as early as practicable"; one half to depart in the falls of 1831 and 1832, and the residue in the fall of 1833; and that the *Government shall extend to them comforts and facilities in moving to their new homes.*
>
> ARTICLE IV provides (among other things) that,
>
> "* * * no Territory or State shall ever have the right to pass laws for the government of the Choctaw Nation of Red People and their descendents; and *no part of the land granted them shall ever be embraced in any Territory or State.* * * *"
>
> ARTICLE V provides that the United States is obliged *to protect the Choctaws from domestic strife and foreign enemies.*
>
> ARTICLE VII provides that violence against persons and property of the Choctaws, by United States citizens or neighboring Tribes shall be referred to the *Agent,* and by him to the President, *to see that justice is done.*
>
> ARTICLE VIII provides that offenders against the laws of the United States shall be delivered

to authorized authorities; but application must be made to the *Agent* or Chiefs, and *expense to be paid by the United States.*

ARTICLE IX provides that any citizen of the United States ordered from the Nation by the *Agent* or refusing to obey, or return, shall be subject to penalties.

ARTICLE XII. "*All intruders shall be removed from the Choctaw Nation and kept without it* * * *."

ARTICLE XIII, provides that "It is consented that a qualified *Agent shall be appointed for the Choctaws* every four years"; that such *Agent* shall fix his residence convenient to the great body of the people; and that the wishes of the Choctaw Nation, in the selection of such *Agent* shall be entitled to great respect.

ARTICLE XIV provides that those Choctaws, not wishing to move to the Far Western country, and to remain and become citizens of the States, shall be permitted to do so by signifying their intentions to the *Agent;* and, thereupon, shall be entitled to certain reservations of lands; and that such persons shall not lose the privilege of Choctaw citizens.

(These reservations of lands have no relation to the *considerations* passing between the United States and the Choctaw Nation, under the Treaty. They were *Choctaw lands,* owned by the *Choctaw Nation;* and the reservees were merely selecting *their own lands* in preference to moving to the Far Western country.)

Then follow the "*Supplementary Articles to the preceding Treaty.*"

"ARTICLE III. The Choctaw people now that they have *ceded their lands* are solicitous to get to their new homes early as possible and accordingly they wish that a party may be permitted to proceed this fall to ascertain whereabouts will be most advantageous for their people to be located."

It was then agreed that three or four persons be sent for that purpose; that their compensation be paid *by the United States;* and that pilots acquainted with the country be furnished "when they arrive in the West."

It is thus made plain that the *other things* which the United States agreed to do, and to perform, including the appointment and maintenance of *Agents and Agencies,* the removal of "Intruders" and various other things which the United States agreed to do, *at its own expense,* made up the *full consideration* passing between the United States and the Choctaw Nation.

CHICKASAW TREATIES OF 1832 AND 1834.

These two Treaties parallel, very largely, the two Choctaw Treaties of 1820 and 1830.

The Chickasaws confronted practically the same conditions that confronted the Choctaws.

They occupied lands and homes in the northern part of Mississippi and the southwestern part of Tennessee; and had occupied them almost from time immemorial.

The pressure for their lands, and for their expulsion from those areas of rapidly developing settlements of the whites, became so strong that the United States could no longer withstand it.

It was, therefore, made plain to them, by the United States, that they must get ready to move.

Necessarily, they must move West, for there were no available locations except in the then Far Western country.

The Choctaws had already been dealt with, by being required to cede all of their lands, east of the Mississippi, to the United States, and to agree to move to the Far Western country, and to the lands which they had received, in exchange.

The Treaties of 1832 and 1834 were "to get ready"; and the Choctaw and Chickasaw Treaty of 1837 (which will be presently referred to) was "to go".

CHICKASAW TREATY OF 1832.

(7 Stat., 381; 2 Kappler, 356.)

The *Preamble* sets out that the Chickasaws *feel themselves oppressed,* in being subject to the *laws of the States* in which they reside, being ignorant and unable to understand them; that, rather than submit, they prefer to seek a home in the West; that, believing they can procure such a home, provided they have the means to contract and pay for the same they agree to *sell their lands* and hunt a new home; that the President has heard their complaints and agrees with them, and being desirous of relieving them, has sent

his Commissioners to enter into the following Articles of the Treaty, "*which shall be binding upon both parties.*"

ARTICLES I to VIII, inclusive, provide for the survey and sale of the ceded lands, and for the payment of the net proceeds to the Chickasaw Nation.

ARTICLE IX sets out the fear of the Chickasaws that "*the United States may withdraw from them*", and they "request that the *Agent* may be continued with them, while here, and *wherever they may remove to and settle.*"

It is then provided that

"It is the earnest wish of the United States Government to see the Chickasaw Nation prosper and be happy, and so far as is consistent they will contribute all in their power to render them so—therefore *their request is granted.* There shall be an *Agent kept with the Chickasaws as heretofore,* so long as they live within the jurisdiction of the United States as a nation, either within the limits of the States where they now reside, *or at any other place.* And whenever the office of *Agent* shall be vacant, and an *Agent* to be appointed, the President will pay due respect to the wishes of the nation in selecting a man in all respects *qualified to discharge the responsible duties of that office.*"

ARTICLE XV relates to "*Intruders*" and provides that "in all cases of a person settling on any of the ceded lands contrary to this express understanding, they will be *intruders,* and must be treated as such, and *put off the lands of the Nation.*

It is thus made plain that the appointment and maintenance of an *Agent and Agency,* not only east of the Mississippi River, but *"wherever they may remove to and settle",* to supervise the affairs of the Chickasaws including dealing with "Intruders", and conserving and protecting the Tribal affairs of the Chickasaws, was solemnly *undertaken by the United States,* at its own expense and became a *Treaty obligation,* based upon *good and valuable considerations,* from which the United States may not escape.

CHICKASAW TREATY OF 1834.
(7 Stat., 450; 2 Kappler, 418.)

ARTICLE II sets out that the Chickasaws are *about to abandon their homes* so long loved and cherished; that "though hitherto unsuccessful, they still hope to find a country * * * somewhere west of the Mississippi River and within the United States;" that, should they do so,

> "the Government of *the United States hereby consents to protect and defend them against the inroads of any other Tribe of Indians, and from the whites;* and agrees to keep them without the limits of any State or Territory."

ARTICLE III sets out that the Chickasaws are *beset by "intruders";* that they are unwilling to ask for military aid; and that they agree to forbear such a request,

> "with the understanding, *which is admitted,* that the *Agent of the United States* * * * will resort to every legal civil remedy (at the expense of the United States) *to prevent intrusions upon the ceded country, and to restrain and remove trespassers* * * *; and it is also agreed that the United States will continue *some discreet person as Agent.* * * *"

ARTICLE VII provides that certain property rights, as between white husbands and Indian wives, shall be adjusted by the *Agent of the United States.*

ARTICLE VIII relates to the *"removal of restrictions",* in certain instances, and provides that the proceeds of the sales of restricted lands may be released, and paid over to the beneficiary only upon the certificate of the *Agent of the United States.*

This Treaty contains substantially the same provisions as the preceding Treaties, regarding the establishment and maintenance of *Agents and Agencies,* dealing with *"Intruders"* and otherwise supervising and conserving the Tribal affairs of the Chickasaws, all at the expense of the United States, and in pursuance of its *Treaty obligations and undertakings.*

CHOCTAW-CHICKASAW TREATY OF 1837.
(11 Stat., 573; 2 Kappler, 486)

Under this Treaty, the Chickasaw Nation acquired from the Choctaw Nation *(with the assent and approval of the United States),* an undivided interest in the Far Western lands of the Choctaw Nation, ceded to it, by the United States, under the Treaties of 1820 and 1830, *"to be held on the same terms as the Choctaws now hold it."*

ARTICLE 1 sets out and defines the property and political rights of the Chickasaws, in the lands and government of the Choctaw Nation.

ARTICLE 2 describes, by boundaries, that part of such lands which the Chickasaws shall occupy as the "Chickasaw District".

ARTICLE 3 provides that the Chickasaws shall pay the Choctaws the sum of $530,000.00 for the rights acquired under the Treaty.

ARTICLE 4 provides that, in the future adjustment of complaints and dissatisfaction between the Choctaws and Chickasaws,

> "it is hereby agreed by the parties that all questions relative to the construction of this agreement shall be referred to the *Choctaw Agent to be by him decided;* reserving, however, to either party, should it feel itself aggrieved thereby, the rights of appealing to the *President of the United States,* whose decision shall be final and binding. But as considerable time might elapse before the decision of the President could be had, *in the meantime the decision of the said Agent shall be binding.*"

The far reaching powers of the *Agent and Agency,* to be appointed and maintained by the United States, and at its expense, in the supervision and conservation of the Tribal affairs of the Choctaws and Chickasaws, and that this was a *Treaty obligation and undertaking,* which the United States assumed, based upon *good and valuable considerations,* is here again reiterated.

CHOCTAW-CHICKASAW TREATY OF 1855.

(11 Stat., 611; 2 Kappler, 706.)

The primary purpose of this Treaty, as shown by the *Preamble,* was to compose the

> "* * * *unhappy and injurious dissensions and controversies* among them (the Choctaws and Chickasaws) which render necessary a readjustment of their relations with each other and to the United States * * *",
>
> "Now, therefore, the United States of America, by their commissioners * * * do hereby *agree and stipulate as follows:*

ARTICLE 1 restates the boundaries of the Far Western lands owned by the Choctaw and Chickasaw Nations.

ARTICLE 2 describes and sets out the boundaries of the "Chickasaw District", which the Chickasaws may occupy, and upon which they may set up their separate political government.

ARTICLE 7 relates to *Agents and Agencies* and to the removal of "Intruders" as follows:

> "* * * and all persons, not being citizens or members of either tribe, found within their limits, *shall be considered intruders, and be removed from, and kept out of the same, by the United States Agent,* assisted if necessary by the military, with the following exceptions, viz: Such individuals as are now, or may be in the employment of the Government, and their families; those peacefully traveling, or temporarily sojourning in the country or trading therein, under license from the *proper authority of the United States,* and such as may be permitted by the Choctaws or Chickasaws, *with the assent of the United States*

Agent, to reside within their limits, without becoming citizens or members of either of said tribes."

ARTICLE 14 sets out the general *obligations and undertakings* of the United States to *supervise and protect the Tribal affairs of the Choctaws and Chickasaws, as follows:*

"The *United States* shall protect the Choctaws and Chickasaws from *domestic strife, from hostile invasion,* and from *aggression by other Indians and white persons* not subject to their jurisdiction and laws; and for all injuries resulting from such invasion or aggression, full indemnity is hereby guaranteed to the party or parties injured, out of the *Treasury of the United States,* upon the same principle and according to the same rules upon which white persons are entitled to indemnity for injuries or aggressions upon them, committed by Indians."

"ARTICLE 16. All persons *licensed by the United States* to trade with the Choctaws or Chickasaws shall be required to pay to the respective tribes a moderate annual compensation for the land and timber used by them; the amount of such compensation, in each case, to be assessed by the proper authorities of said tribe, *subject to the approval of the United States Agent.*"

ARTICLE 17 provides that the United States may establish military posts, post roads and *Indian Agencies* within the Choctaw and Chickasaw country, using sufficient lands and timber for those purposes,"; and that,

"* * * Only such persons as are, or may be in the employment of the United States, or subject to the jurisdiction and laws of the Choctaws,

or Chickasaws, *shall be permitted to farm or raise stock* within the limits of any of said military posts or *Indian Agencies.* And no offender against the laws of either of said tribes, shall be permitted to take refuge therein."

ARTICLE 18 provides that railroad and telegraph companies may have right of ways through the Choctaw and Chickasaw country, and that,

"* * * any property taken or destroyed in the construction thereof, full compensation shall be made to the party or parties injured, to be ascertained and determined *in such manner as the President of the United States shall direct.*"

ARTICLE 19 provides that *the United States* shall define and permanently mark the Eastern and Western boundaries of the Choctaw-Chickasaw country, and likewise, the Western boundary of the "Chickasaw District".

ARTICLE 20 provides, among other things that,

"And in order that their relations to each other and to the United States may hereafter be conducted in a harmonious and satisfactory manner, *there shall be but one Agent for the two tribes.*"

"ARTICLE 22. It is understood and agreed that the expenses of the respective commissioners of the two tribes, signing these articles of agreement and convention, in coming to, and returning from this city (Washington), and while here, *shall be paid by the United States.*"

This Treaty follows the other Treaties regarding the *Treaty obligations and undertakings* of

the United States to supervise and protect, at its own expense, the Tribal affairs of the Choctaws and Chickasaws.

Up to this time (1855) no plans had ever been conceived or suggested for the allotment of lands and for the division and distribution of Tribal properties.

Therefore, the *Treaty obligations and undertakings* of the United States were confined in all Treaties from 1820 to 1855, inclusive, largely and almost wholly, to the general supervision and protection of the Tribal affairs of the Choctaws and Chickasaws, through the establishment and maintenance of *United States Indian Agents and Agencies,* and the employment of such assistants, clerical and otherwise, and expenditure of such moneys, as might be necessary for that purpose.

After 1855 (and beginning with the Treaty of 1866, which will be presently referred to) the activities of the United States widened; and, under that Treaty (and the later and final Treaties of 1898 and 1902, and which will also be presently referred to), the United States undertook to survey, appraise and allot the lands, and to make up final and approved citizenship rolls, in preparation therefor; to survey, appraise and sell the townsites; to appraise and sell all other common properties of the Nations; to administer the coal and asphalt deposits (by, first *leasing* the coal and asphalt deposits, under the Treaty of 1898, and then, by segregating, appraising and selling the same, under the Treaty of 1902); to pay out, percapita, to the individual members of the Nations, *all the moneys* in the Treasury of the United States that had been placed to the credit of the Nations; and to abolish the Tribal Governments.

All of this was to be done, by the United States, *at its own expense,* in pursuance of its plans and policies to fully and completely *close out and bring to an end all common ownership* of Tribal property and the existence of all Tribal organizations, in the fulfillment of its *Treaty obligations and undertakings;* and to all of this the Choctaw and Chickasaw Indians had agreed that all of these things would be done *at the expense of the United States,* and they reluctantly agreed, only after the United States had made plain to them the objectives it started out to attain, to-wit:

> "* * * to enable the *ultimate creation of a State or States* of the Union which shall embrace the lands within said Indian Territory."
>
> (Section 16, Act of March 3, 1893; 27 Stat., 612, 1 Kappler, 498).

In our synopsis and analysis of the Treaties of 1820, 1825, 1830, 1832, 1834, 1837 and 1855, it has been made plain, we respectfully contend, that the *Treaty obligations and undertakings* of the United States were to supervise and protect the Tribal affairs of the Choctaws and Chickasaws, *at its own expense,* through the establishment and maintenance of *Indian Agents and Agencies* and otherwise, and based upon *good and valuable considerations* passing between the United States and the Choctaw and Chickasaw Nations.

These *Treaty obligations and undertakings* were carried out, and are still binding and are being carried out, even to this day, since they have *never been abrogated nor repealed.*

Then, as stated, these *Treaty obligations and undertakings* were immensely widened and extended, under the Treaties of 1866, 1898 and 1902, in the manner and for the purposes above referred to and commented upon, for the purpose of showing, (1), that the *obligations and undertakings assumed in the earlier* Treaties were continued and reiterated, and, (2), that the widened and extended *Treaty obligations and undertakings* of the United States, in the division and distribution of the Tribal estates, *at its own expense, were made plainer and stronger,* by the inclusion in the later Treaties, of definite and specific language that *"no charge or claim"* for the moneys expended for those purposes, *would ever be made against the Choctaw and Chickasaw Nations.*

We shall now refer to, and comment upon the Treaties of 1866, 1898 and 1902, in support of the contentions, as above set out.

CHOCTAW-CHICKASAW TREATY OF 1866.
(14 Stat., 769; 2 Kappler, 918.)

As stated, it was in the Treaty of 1866, that a plan for the allotment of the lands of the Choctaws and Chickasaws and the division and distribution of the Tribal estates, was first conceived and incorporated into a Treaty.

There was, also, in the same Treaty, a plan for the organization of a *"Council,* consisting of delegates" from all of the Five Civilized Tribes, which was to be an Indian Government of the Indian Territory.

Neither of these extensive and comprehensive plans was ever carried out; and the plan for the allotment of the lands of the Choctaws and Chickasaws and the division and distribution of the Tribal estates, remained in abeyance from 1866 to 1898; and was actually carried out under the later and final Treaties of 1898 and 1902.

We shall now set out the applicable provisions of the Treaty of 1866, (1) bearing upon a continuation of the *Treaty obligations and undertakings* of the United States to supervise and protect the Tribal affairs of the Choctaws and Chickasaws, *at its own expense,* by the establishment and maintenance of *United States Indian Agents and Agencies,* and otherwise, as in all former Treaties; and, (2) to divide and distribute the Tribal estate, likewise at the expense of the United States.

ARTICLE VI provides that right of ways shall be granted to railway companies duly authorized by Congress to construct railways "through the Choctaw and Chickasaw Nations from the North to the South and from the East to the West"; that property taken or destroyed shall be paid for *"in such manner as the President of the United States may direct";* that the employees of such companies *"shall be subject to the laws of the United States relating to intercourse with In-*

dian Tribes'', and also to *''such rules and regulations as the Secretary of the Interior may prescribe''*; that the Nation may subscribe for stock, payable in alternate sections of lands, at an agreed price per acre, *''subject to the approval of the President of the United States''*; that employes of such companies shall not be excluded, *''they being subject to the Indian intercourse laws, and such rules and regulations as may be established by the Secretary of the Interior;''* and that the lands so acquired may be disposed of as herein provided, *''subject to the approval of the Secretary of the Interior.''*

ARTICLE VIII relates to a plan for the organization of a Council, consisting of Delegates from each Nation of the Five Civilized Tribes; and the substance of those portions, bearing upon the issues in the instant case, is as follows:

(a) *The Secretary of the Interior* shall make a ''census of each Tribe'', under the supervision of the Superintendent of Indian Affairs, by competent persons appointed by him, *''whose compensation shall be fixed by the* Secretary of the Interior and *paid by the United States;''*

(b) Sessions may be called by the *Secretary of the Interior when ''the interests of the Tribes require it;''*

(c) All laws shall take effect when provided, *''unless suspended by the Secretary of the Interior or the President of the United States.''*

(d) The *Secretary of the Interior* shall appoint a Secretary of the Council; and ''he shall be paid Five Hundred Dollars, as an annual salary, *by the United States;''*

(e) The members of the Council *''shall be paid by the United States* four dollars per diem while in actual attendance thereon, and four dollars mileage for every twenty miles going and returning;''

(f) The Superintendent of Indian Affairs shall be the Executive of said Territory with the title of ''Governor of the Territory of Oklahoma;'' and he shall appoint a Secretary, Marshal and Interpreter;

(g) The Salaries of Secretary, Marshal and Interpreter to be Five Hundred dollars per annum, and *''to be paid by the United States'';*

(h) Each House of the Council shall choose its presiding officer and Clerk; and the Clerks shall receive ''the same per diem as Members of the respective Houses, and the presiding officers to double that sum.''

ARTICLES 11 to 39, inclusive, relate to the plan for the allotment of the lands, the laying out and disposal of townsites and the disposition of the ''unselected portions'' of the lands; and the substance of those parts, which bear upon the issues, in the instant case, is as follows:

(a) That ''the land occupied by the Choctaw and Chickasaw Nations'' be surveyed and allotted ''in severalty'' to their individual members; and for that purpose, a *Land Office* to be established at Boggy Depot; and that,

''* * * in making the said *surveys and conducting the business of the said office, including the appointment of all necessary agents and surveyors,* the same system shall be pursued which has heretofore governed in respect to

the *public lands of the United States,* it being understood that the said surveys shall be made *at the cost of the United States and by their agents and surveyors,* as in the case of *their own public lands,* and that the *officers and employees* shall receive the *same compensation as is paid to the officers and employees in the land-offices of the United States in Kansas;*

(b) That "every Choctaw and Chickasaw, whether male or female, adult or minor" shall have the right to select one quarter section of land;

(c) That the United States may select tracts not exceeding one mile square for a Military Post or *Indian Agency;*

(d) That all records of all allotment selections shall be kept by the *Register of the Land Office;*

(e) That *Townsites* may be laid out and sold;

(f) That all disputes as to the right of selection shall be settled by the *Register of the Land Office;*

(g) That, (upon the insistence of the United States) the Choctaw and Chickasaw Nations agreed that Kansas Indians, not to exceed 10,000 in number, might settle among them;

(h) That all records shall, by *"the officers of the Land Office",* be delivered to the Executive Departments of the Choctaw and Chickasaw Nations, and copies sent to the *Commissioner of the General Land Office;*

(i) That "grants of lands and patents therefor" may be issued for the "unselected portions"

of the land, "in such manner as the legislative authorities of said Nations may provide."

ARTICLE 43 provides that "the United States promise and agree that *no white person* (with the exception of certain permitted persons) *shall be permitted to go into said Territory."*

ARTICLE 47 provides that,

"As soon as practicable after the lands shall have been surveyed and assigned to the Choctaws and Chickasaws in severalty as herein provided, upon application of their respective legislative councils, and with the assent of the President of the United States, *all the annuities and funds invested and held in trust by the United States* for the benefit of said nations respectively shall be capitalized or converted into money, as the case may be; and the aggregate amounts thereof belonging to each nation shall be equally divided and paid percapita to the individuals thereof respectively."

It has been said that neither the plan for a *"Council",* nor the plan for the *allotment and division of the lands* of the Choctaws and Chickasaws, was carried out.

That is true; but they were extensive and comprehensive plans, designed for what was thought to be for the best interests of the Choctaws and Chickasaws, and they were, of course, designed and presented by the Commissioners for the United States; and it clearly appears that these plans were to be carried out *at the expense of the United States, plainly and clearly stated in the Treaty.*

In no paragraph of the Treaty is there any statement or intimation that the moneys to be expended by the United States, in the consummation of these plans, was ever to be *claimed or charged against the Choctaw and Chickasaw Nations.*

These plans, whether wise or unwise, were to be carried out, *by the United States, at its own expense,* in pursuance of its *Treaty obligations and undertakings,* to supervise and protect the Tribal affairs of the Choctaws and Chickasaws, based upon *good and valuable considerations* passing between the United States and the Nations.

It is interesting to note that these plans for the allotment of lands, and the division and distribution of the Tribal estates, was the forerunner (and largely parallels) the plans which were actually carried out, *some thirty-five years later,* under the final Treaties of 1898 and 1902 (which will be presently referred to).

It is also interesting to note that the *definite and specific guarantys,* contained in the Treaty of 1866, that these things shall be done, *by the United States and at its own expense,* are practically identical with the *definite and specific guarantys,* for the same purposes and to the same ends, which were carried into the later and final Treaties of 1898 and 1902, under which the United States actually carried out these long delayed plans.

CHOCTAW-CHICKASAW TREATY (Atoka Agreement) OF 1898.

(Section 29, Act of June 28, 1898; 30 Stat., 495, 1 Kappler, 646.)

This Treaty was ratified by Congress as Section 29 of the "Curtis Act" of June 28, 1898 (30 Stat., 495, 1 Kappler, 90).

The time had come to apply sufficient pressure to require the Choctaws and Chickasaws to enter into, and to ratify, a Treaty, providing for the allotment of their lands, for the division and distribution of all Tribal property and the abolition of their Tribal Governments in pursuance of the plans and policies of the United States to bring this about, in preparation for Oklahoma statehood, in accordance with those plans and policies, as expressed in the Act of Congress of March 3, 1893, which provided in part, as follows (27 Stat., 612; 1 Kappler, 498-9):

> "Sec. 16. The President shall nominate and, by and with the advice and consent of the Senate, shall appoint three commissioners to enter into negotiations with the Cherokee Nation, the Choctaw Nation, the Chickasaw Nation, the Muscogee (or Creek) Nation and the Seminole Nation, for the purpose of the extinguishment of the national or tribal title to any lands within that Territory now held by any and all of such nations or tribes, either by cession of the same or some part thereof to the United States, or by the allotment and division of the same in severalty among the Indians of such nations or tribes, respectively, as may be entitled to the same, or by such other method as may be agreed upon between the sev-

eral nations and tribes aforesaid, or each of them, with the United States, with a view to such an adjustment, upon the basis of justice and equity, as may, with the consent of such nations or tribes of Indians, so far as may be necessary, be requisite and suitable *to enable the ultimate creation of a State or States of the Union* which shall embrace the lands within said Indian Territory."

Immediately after the passage of this Act, the Commission (the "Commission to the Five Civilized Tribes", generally known then and thereafter as the "Dawes Commission") sought a Treaty with the Choctaw and Chickasaw Nations, as directed by said Act.

These Indians, well aware of the solemn Treaty guarantys of the United States, set out and reiterated in all preceding Treaties, that, after their forced removal from their homes east of the Mississippi River to the Far Western country, they would never again be disturbed *in the occupancy and enjoyment of their lands in common,* and *in the operation of their Tribal Governments,* and that *no part of their lands would ever be included in a Territory or State,* were loath to enter into a Treaty which would deprive them of these rights and privileges.

Therefore, *for five long years,* from 1893 to 1898, they stood firm and refused to enter into any Treaty.

The United States was beset by the influences of the whites who had moved into the Indian country, and by others in the surrounding States, all of whom were hungry for Indian lands, and determined to convert the

Indian country into a *New State*—the same influences that had beset the United States nearly a *Hundred years* before, when the Indians held lands East of the Mississippi River, and which influences resulted in driving them from their eastern homes to the Far Western country.

These influences became so strong that the United States could no longer withstand them.

It tried, from 1893 to 1898, to secure a Treaty to carry out its objectives, and had failed.

What to do next was the problem.

In 1898, it succeeded in having the Choctaw and Chickasaw Nations enter into a *tentative Treaty,* to become effective only when ratified by Congress and by a vote of the members of the Nations.

All agreed that there was slight chance for its ratification, when submitted to the members of the Choctaw and Chickasaw Nations.

To overcome this situation, it resorted to *"persuasion"* which was no less than force.

It passed the "Curtis Act" of June 28, 1898, entitled:

> "An Act for the protection of the people of the Indian Territory, and for other purposes", (30 Stat., 495; 1 Kappler, 90.)

That Act also contained a comprehensive plan for the allotment of the lands of the Five Civilized Tribes and for the division and distribution of all Tribal properties.

All agreed that its validity and Constitutionality was doubtful, in view of the fact that the Tribes owned their lands under *Patent and fee simple title;* that the United States lacked the legal power and authority to carry its plans and policies into effect; and that it could legally act only by authority of a *Treaty,* duly ratified by Congress and the Indian owners of the lands.

The Indians were alarmed because of the threat of the exercise of the arbitrary power contained in the "Curtis Act".

This alarm was the opportunity of the United States to force a ratification of the Treaty, by the Indians, which it so sorely needed.

Therefore, the *tentative Treaty* which had previously been made, was included in the "Curtis Act", as *Section 29 thereof.*

Then, it was provided, in the first paragraph of the Treaty that it

> "* * * shall be in *full force and effect if ratified before the first day of December, eighteen hundred and ninety eight,* by a majority of the whole number of votes cast by the *members of said Tribes* at an election held for that purpose * * *";

and that,

> "* * * if said agreement as amended be so ratified, the provisions of this Act (the "Curtis Act") shall then apply to said Tribes where the same do not conflict with the provisions of said agreement * * *"

Then, when submitted to the members of the Tribes, at an election held for that purpose, it was accepted and ratified, *under threat of the more drastic provisions of the "Curtis Act".*

After acceptance and ratification of the Treaty, the United States had secured the *Treaty authority* to do the things necessary to carry out its plans and purposes, and without having to exercise the doubtful authority given it by the "Curtis Act".

The history of these events is set out for the purpose of showing that the *cooperation of the Choctaws and Chickasaws* (though reluctant and under pressure) was one of the main *considerations* passing between the United States and these Indians, in their agreement to confer upon the United States the *legal power and authority* which was so necessary in carrying out its plans and policies; and, also, for the purpose of showing the tremendous bearing this *consideration* has upon the issues of so-called "Gratuities" and "Gratuity Offsets", in the instant case.

We shall now set out, and comment upon, the applicable provisions of the Treaty of 1898 ("Atoka Agreement").

> (This Treaty is not divided into separate Sections, but the whole Treaty is included in "Section 29" of the "Curtis Act". Therefore, in the various parts referred to, and commented upon, the pages of Vol. 1, Kappler, upon which they appear, will be given.)

(1 Kappler, 648)

All coal and asphalt deposits were reserved from allotment, and to be *leased* for the benefit of all the members of the Tribes; and that damages occasioned by mining operations "shall be ascertained under the direction of the *Secretary of the Interior.*"

(1 Kappler, 648)

"That the appraisement and allotment shall be made *under the direction of the Secretary of the Interior,* and shall begin as soon as the progress of the surveys, *now being made by the United States Government* will admit."

(1 Kappler, 649)

"That all controversies arising between the members of said Tribes as to the right to have certain lands allotted to them shall be settled by the *Commission* making the allotments."

(1 Kappler, 649)

"That *the United States* shall put each allottee *in possession of his allotment and remove all persons therefrom objectionable to the allottee.*"

(1 Kappler, 649)

"That *the United States* shall survey and definitely mark and locate the ninety-eight (98th) meridian of West longitude between Red and Canadian Rivers before allotment of lands, herein provided for shall begin."

(1 Kappler, 649)

It is provided that Patents shall be executed and delivered to allottees; and that,

"* * * the acceptance of his patents by such allottee shall be operative as an *assent on his part* to the allotment and conveyance of all the lands of the Choctaws and Chickasaws, in accordance with the provisions of this agreement, and as a *relinquishment* of all his right, title and interest in and to any and all parts thereof except the lands embraced in said patents * * *"

In this provision, the United States made *legal and valid,* beyond any question or doubt, its acts in bringing about the allotment of the lands of the Choctaws and Chickasaws, theretofore held and owned by Patent and *under fee simple title;* and is one of the *main considerations* passing between the United States and the Indians.

(1 Kappler, 651)

"*The money paid into United States Treasury for the sale of all town lots* * * * shall be for the benefit of the Choctaw and Chickasaw Tribes, and * * * *the funds so accumulated shall be divided and paid* to the Choctaws and Chickasaws * * * each member of the two Tribes to receive an equal portion thereof."

(1 Kappler, 651)

"That *no charge or claim shall be made against the Choctaw or Chickasaw Tribes by the United States* for the expenses of surveying and platting the lands and townsites, or for grading, appraising, and allotting the lands, or for appraising and disposing of the town lots as herein provided."

This is *the most important paragraph* in the two Treaties of 1898 and 1902, under which the Tribal estates were actually allotted, divided and distributed, in pursuance of the plans and policies of the United States, to that end.

It has been shown that, under the later and final Treaties of 1898 and 1902 (as well as under all preceding Treaties), the United States assumed the *obligations and undertakings* to supervise and protect the Tribal affairs of these Indians, along with the cession of the Far Western lands. Those things constituted one of the main *considerations* passing from the United States to the Indians.

The Indians, upon the other hand, agreed to do the things required of them, by the United States, these things being: (1), the cession of all of their lands east of the Mississippi River; (2) the removal to the Far Western country; (3) the allotment of their lands and the full and final division and distribution of their Tribal estates; and (4) the abolition of their Tribal Governments, in preparation for Oklahoma Statehood.

These agreements, upon the part of the Indians, constituted the *considerations* passing from the Indians to the United States.

We say that *all of the Treaties* make it plain, and leave no room for doubt, that the United States assumed these *Treaty obligations and undertakings* to do all of the things which the Treaties required of it, *at its own expense,* based upon the *mutual agreements* of the parties, and constituting the *good and valuable*

considerations passing between the United States and the Indians.

The Indians "delivered", by doing all the things they agreed to do; and is there any reason why the United States should not, likewise, "deliver", by being willing to consider that part of the bargain "done and performed".

Should the United States, under any rule of fair dealing and fair play, now insist upon "rueing the bargain" (after *more than 100 years* from the date of the first transactions), and now insist that the moneys expended (and which it agreed to expend) amount only to an "Indian gift", to be "taken back", whereas they were not gifts, but were expended in pursuance of solemn *Treaty obligations and undertakings?*

Should it now be permitted to set up, and have allowed, these expenditures as "Gratuities" and "Gratuity Offsets", at this late day, as the basis of *counter judgments or counter findings* against any *judgments or findings* which may be rendered in favor of the Indians, upon their legitimate claims and under Acts of Congress, or the Resolution of the Senate invoking Section 151 of the Judicial Code (as in the instant case) which contained no reference whatsoever to so-called "Gratuities" or "Gratuity Offsets"?

As stated, all of the above, relates to the general *Treaty obligations and undertakings* of the United States, under *all of the Treaties.*

We shall now comment upon the *"no charge or claim"* paragraph of the Treaty of 1898 ("Atoka Agreement") above quoted.

It sets out, definitely and specifically, and in terms which may not be misunderstood or misconstrued, that *"no charge or claim"* will be made against the Choctaw and Chickasaw Tribes, for the moneys expended in the division and distribution of the Tribal estates.

It may be said (and the General Accounting Office Report, filed herein, will show) that an overwhelming percentage of the moneys expended in the actual division and distribution of the Tribal estates, were expended under the Treaties of 1898 and 1902; and the *Treaty of 1898* contains the particular provision under discussion.

This provision *was the law* when the work of division and distribution of the Tribal estates, (and for which most of the moneys were expended) began; and it *was the law* during the whole period of the activities of the United States, in this respect; and it is *still the law,* even to this day, since it *has never been changed or repealed.*

We wish it understood that we are, by no means, relying wholly upon this paragraph for relief against the allowance of so-called "Gratuities" and "Gratuity Offsets", in the instant case.

We are relying, quite as much, upon the provisions of *all the Treaties* referred to, from 1820 to 1902, inclusive, which establish, and reiterate, in the numerous provisions cited, quoted and commented upon, that the United States assumed *Treaty obligations and undertakings* to supervise and protect the Tribal affairs of the Choctaws and Chickasaws, based upon the *mutnal Treaty agreements,* between the United States and the Indians, constituting *good and valuable considerations* passing between the parties; but we have deemed it important to cite, comment upon and stress, *this particular provision,* not only because of its plainness and force, but because it is in addition, a plain and unequivocal reflection of what was in the mind of the United States, throughout similar transactions extending through a period of *nearly 100 years,* and that was that, in this instance, it deemed it advisable to further guarantee and re-assure the Indians that it proposed to continue what it had always agreed to do, and had always done, to-wit: to render the Indians the services which the Treaties required of it, and to render those services *at its own expense.*

Then, there may have been, and perhaps was, another reason for the inclusion of this definite and specific language, in the Treaty of 1898.

It has been shown that the Indians reluctantly entered into the tentative Treaty of 1898; that they were strongly opposed to its ratification; and that it was ratified and accepted, by their votes, only as an alternative between accepting and ratifying the Treaty, or having forced upon them the more drastic "Curtis Act". Under these conditions, they had serious doubts that they were being fairly and justly dealt with.

Is it, therefore, not reasonable to infer that they made it plain to the Commissioners of the United States that, unless *this provision* was included in the Treaty (requiring the United States to "spell out" its *existing Treaty obligations* as to expenses, and to make "assurances doubly sure", in that respect), they would reject the Treaty, at the polls, and take steps to resist the enforcement of the "Curtis Act" as to their property and affairs, the legality of which, in its application to their *fee simple lands,* the United States, itself, doubted.

That inference is reasonable; and, as a matter of actual fact, that is exactly what happened; and that is the history of the paragraph to which the above comments relate.

(1 Kappler, 652)

> The coal and asphalt deposits were reserved and "shall remain the common property of the Choctaw and Chickasaw Tribes * * *"

Such coal and asphalt deposits were to be leased, "under the supervision and control of two Trustees", to be appointed by the President, one to be a *Choctaw by blood,* and one to be a *Chickasaw by blood;* and that "Their salaries shall be fixed and paid by their respective Nations."

This provision, as to payment of salaries is referred to because it is the *only instance in all of the Treaties* providing for the payment of salaries *by the Nations.*

The United States agreed that these Trustees

were to be *members, by blood,* of the Nations. The Nations were then operating their Tribal Governments and had revenues and income *of their own,* for that purpose.

Therefore, for the privilege of filling these important offices by members by blood of the Tribes, they agreed, as the price of that privilege, to pay the salaries. As stated, throughout all the Treaties, this is the *only instance of payment by the Tribes.*

Would it not seem that this exception "proves the rule" that, in all other instances, the United States agreed to pay, and did pay, all salaries and expenses, *out of its own moneys;* and in *no other instance* or case was there any statement that the moneys expended would ever be *"claimed or charged"* against the Nations, nor that the United States was doing more, or less, than carrying out its *Treaty obligations and undertakings.*

(1 Kappler, 652-3)

> The Secretary of the Interior was authorized to "reduce or advance the coal and asphalt royalties"; and *"No royalties* shall be paid except into the *Treasury of the United States."*

(1 Kappler, 653)

> "That whenever the members of the Choctaw and Chickasaw Tribes shall be required to pay taxes for the support of schools, then *the fund arising from such royalties shall* be disposed of for the *equal benefit of their members* * * * in such manner as the Tribes may direct."

(1 Kappler, 654)

It was provided that the Tribal Governments, as modified, should continue for a period of eight years from March 4, 1898.

(1 Kappler, 654)

It was provided that "in view of the modification of the Tribal Governments, and the necessity for the continuance of the same, as modified, the same shall continue for a period of eight years * * * in the belief that the Tribal Governments so modified will prove so satisfactory that there will be no need or desire for further change till the lands now occupied by the Five Civilized Tribes shall, in the opinion of Congress, *be prepared for admission as a State of the Union.*"

This provision is a reiteration of the main objective of the United States, to do all the things it had undertaken, in pursuance of its plans and purposes to "pave the way" for *Oklahoma Statehood.*

(1 Kappler, 654)

"That all per capita payments hereafter made to the members of the Choctaw or Chickasaw Nations, shall be paid directly to each individual member by a *bonded officer of the United States, under the direction of the Secretary of the Interior,* which officer shall be required to give strict account for such disbursements to *said Secretary.*"

(1 Kapper, 655)

"It is further agreed that *all of the funds* invested, in lieu of investment, treaty funds, or *otherwise,* now held by the United States in trust for the Choctaw and Chickasaw tribes, shall be

capitalized within one year after the tribal governments shall cease, so far as the same may legally be done, and be appropriated and paid, by *some officer of the United States* appointed for the purpose, to the Choctaws and Chickasaws per capita, to aid and assist them in improving their homes and lands."

This concludes our references to, and comments upon, the most important of all the Treaties; and we deem no further comments necessary in addition to those already made upon the various provisions of the Treaty.

"CURTIS ACT" OF JUNE 28, 1898.

(30 Stat., 495; 1 Kappler, 90)

While this Act of Congress is not a Treaty, and has not the force and effect of *Treaty obligations and undertakings,* yet it bears, with tremendous force, upon the issues in the instant case, as will be shown.

This is the Act of which the Treaty of 1898 (the "Atoka Agreement") *was Section 29.*

This is the Act that forced the acceptance and ratification of the Treaty of 1898, because it was made plain to the Indians that, unless they accepted and ratified the Treaty, they would have to undergo its harsher and more drastic provisions.

This Act contains a full and complete plan for the allotment of lands and the division and distribution of the Tribal estates. It was to take the place of the Treaty of 1898, if not accepted and ratified, by the Indians; and we are justified, in analyzing and scruti-

nizing its provisions as though the Act were a Treaty, in so far as they relate to the issues in the instant case, since it was passed at the *same time* the Treaty of 1898 was ratified by Congress, and it was relied upon by the United States to carry out its plans and policies, in the event the Treaty failed.

Therefore, in the passage of this Act, the United States certainly had in mind exactly the same things it had in mind when the Treaty was negotiated and ratified by Congress, in so far as dealing with the Tribal estates and the expenditure of moneys, were concerned; and it is referred to, for such bearing as it may have upon those issues.

SECTION 11 provided that "all persons known as *intruders*" shall be dealt with in the manner therein set out.

SECTION 12 provided that reports of allotments should be made to the *Secretary of the Interior,* and that, upon confirmation of allotments, "the allottees shall remain in *peaceable and undisturbed possession* thereof, subject to the provisions of this Act."

SECTION 13 provided that the *Secretary of the Interior* should lease all *oil, coal, asphalt and other minerals;* and that damages for mining operations "shall be ascertained by the *Secretary of the Interior* and paid to the allottee or owner of the lands * * *"; and that "the rate of royalty to be paid by all lessees shall be fixed by the *Secretary of the Interior.*"

SECTION 14 provided for preventing the introduction of intoxicating liquors into said Territory, or their sale, through the *District Attorneys of the United States.*

SECTION 15 provided for the survey, appraisement and sale of Townsites, by Commissions of three members; and that *all moneys* paid for town lots shall be paid per capita to the members of the tribes.

SECTION 16 provided that *all royalties and rents* hereafter payable to the Tribe shall be paid "into the *Treasury of the United States* to the credit of the Tribe to which they belong."

"SECTION 19. 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."

"SECTION 20. That the commission hereinbefore named *shall have authority to employ, with approval of the Secretary of the Interior, all assistance necessary for the prompt and efficient performance of all duties herein imposed, including competent surveyors to make allotments, and to do any other needed work, and the Secretary of the Interior may detail competent clerks to aid them in the performance of their duties.*"

This section bears, with more force, upon the issues in the instant case, than any other Section in the Act.

The "Commission" referred to was the Commission to the Five Civilized Tribes (the so-called "Dawes Commission"). Upon it rested practically the whole responsibility of carrying out the plans and policies of the United States, in the division and distribution of the Tribal estate, subject only to the approval of the *Secretary of the Interior.*

Here, in plain and unequivocal language, it is authorized to employ *"all assistance necessary for the prompt and efficient performance of all duties herein imposed."*

This section is the same as corresponding sections in the Treaties under which the United States assumed *Treaty obligations and undertakings* to do exactly the *same things* and *at its own expense;* but this language, reiterated in this Act of Congress, would seem to be strong corroborating evidence of what the United States had in mind regarding the use of *its own moneys* in carrying out its plans and policies in the division and distribution of the Tribal estates, *whether under Treaties or Acts of Congress.*

> SECTION 24 provided that *"all moneys paid into the United States Treasury,* under the provisions of this Act shall be placed *to the credit of the Tribe to which they belong* * * *"*
>
> "SECTION 27. That the *Secretary of the Interior* is authorized to locate *one Indian inspector* in Indian Territory, who may, under his authority and direction, *perform any duties required of the Secretary of the Interior by law,* relating to affairs therein."

As the work of the division and distribution of the vast Tribal estates progressed, the duties of the United States Indian Inspector tremendously increased, since he was the direct representative of the Secretary, upon the ground; and he remained in Indian Territory throughout all the years, assisted by numerous employees and assistants, in the performance of his duties.

This concludes our analysis of the "Curtis Act" of June 28, 1898, and we deem no comments necessary, in addition to those made upon its various sections.

CHOCTAW-CHICKASAW TREATY ("SUPPLEMENTARY AGREEMENT") OF 1902.

(32 Stat., 641; 1 Kappler, 771)

We have referred to the Treaties of 1898 and 1902 as the *"later and final Treaties".* They are complementary to each other, and cover the *one general subject* of the full and final division and distribution of the Tribal estates.

The Treaty of 1902 is the *last and final Treaty,* and is *"Supplementary"* to the Treaty of 1898, merely amending, amplifying and extending the provisions of that Treaty, wherever necessary.

Therefore, the two Treaties should be considered as *one Treaty;* and all of the provisions of the Treaty of 1898 remained in *full force and effect,* except wherever amended by the Treaty of 1902.

It was found that certain parts of the Treaty of 1898 were unworkable and unsatisfactory, in certain particulars: (1) it was found impracticable to *allot all of the lands,* and it was provided, in the Treaty of 1902, that each enrolled member of the Nations would be given an allotment of 320 acres, and that the balance of "surplus" or unallotted lands were to be sold, and the moneys distributed, percapita; (2) it was found that the *leasing plan* for coal and asphalt deposits, in the Treaty of 1898, was unsatisfactory, and a new plan for their *"segregation" and sale* was incorporated in the Treaty of 1902; and (3) it was found necessary to confer upon the United States new and additional powers in the disposition of Townsites; and (4) for completion of final and approved *citizenship rolls, in preparation for, and as a necessary part of,* the plan of allotment and division of the Tribal estates.

The relations of these *two Treaties,* each to the other, are shown, for the particular purpose of stressing the fact that the provision in the Treaty of 1898 (that *"no charge or claim"* would be made against the Choctaw and Chickasaw Tribes, by the United States, for doing all of the things relating to the division and distribution of the Tribal estates, begun under the Treaty of 1898 and completed under the Treaty of 1902) was not changed by the Treaty of 1902, *remained in force and effect* throughout the period of its administration, and is *still in force, and binding upon the United States,* as a *Treaty obligation and undertaking,* based upon the *mutual agreements* between the United States and the Indians, constituting *good and valuable considerations* passing between the parties to the Treaties.

We shall now refer to, and comment upon, the provisions of the Treaty of 1902 bearing upon the issues of so-called "Gratuities" and "Gratuity Offsets", in the instant case.

The *Preamble* would seem to confirm what we have said, in all of the preceding comments, regarding the *Treaty obligations and undertakings,* of the United States, based upon sufficient considerations passing between the parties.

In the concluding paragraph of the Preamble, it is provided:

> "Witnesseth, in *consideration* of the *mutual undertakings,* it is agreed as follows:"

(Then follows the 74 Sections of the Treaty.)

> "SECTION 4. The term *'Atoka Agreement'* shall be held to mean the agreement made by the Commission to the Five Civilized Tribes with the Commissioners representing the Choctaw and Chickasaw tribes of Indians at Atoka, Indian Territory, and embodied in the Act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight. (30 Stats., 495)"

This Section supports our contention, as above set out, that the two Treaties of 1898 and 1902, are each complementary to the other, and deal with the *same general subject* of the division and distribution of the Tribal estates.

SECTION 10 provides that all lands shall be *appraised,* in preparation for allotment; and

SECTION 11 provides that such appraisement shall be made by the *"Commission to the Five Civilized Tribes",* and that each of the Choctaw and Chickasaw Tribes shall have a representative, to be appointed by the Chief Executives, *"to co-operate with said Commission".*

It will be noted that there was no provision for the payment of these "representatives" by the Choctaw and Chickasaw Nations, as in the *one single instance,* in all of the Treaties, where the Nations undertook to pay their appointees as *Mining Trustees,* for the privilege of appointing their own *members by blood* to those positions.

These "representatives" were paid by the United States, as a part of the general plan to allot, divide and distribute the Tribal estates, under the *Treaty obligation and undertaking* of the United States, in the Treaty of 1898 (which has been quoted and stressed); and, obviously and manifestly, that was the *mutual agreement* of the parties, constituting the *considerations* passing between the parties to the Treaties.

SECTION 14 provides that the "residue of lands" not allotted *"shall be sold at public auction,* under rules and regulations and on terms prescribed *by the Secretary of the Interior"*; and that,

" * * so much of the proceeds as may be necessary for equalizing allotments* shall be used for that purpose, and *the balance* shall be paid into the *Treasury of the United States to the credit of the Choctaws and Chickasaws, and distributed percapita as other funds of the Tribes."*

This section accounts for *all of the moneys* resulting from the sales (amounting, as shown by the General Accounting Office, to have run well above $30,000,000).

There was no authority whatsoever, to deduct *any part of these moneys* for any purpose except for *"equalizing allotments".* The *whole balance* was to be paid out, percapita to the Indians.

SECTION 17 provides that if any member of the Tribes shall fail to voluntarily select his allotment, *"* * * it shall be the duty of said Commission* to make said selection and designation."

SECTION 23 contains the following:

" * * and the United States Indian Agent at the Union Agency* shall, upon the application of the allottee, *place him in possession of his allotment, and shall remove therefrom all persons objectionable to such allottee* and the acts of the *Indian Agent* hereunder shall not be controlled by the writ or process of any court."

Here is conclusive evidence, in the *"last and final Treaty",* that the *"United States Indian Agent"* is continuing to function (just as *Indian Agents and Agencies* had functioned, throughout all the years from 1820 to the close, and under every Treaty ever made between the United States and the Choctaws and Chickasaws) in the supervision and protection of the Tribal affairs of the Indians, and *at the expense of the United States.*

"SECTION 24. Exclusive jurisdiction is hereby conferred upon the *Commission to the Five Civilized Tribes to determine, under the direction of the Secretary of the Interior,* all matters relating to the allotment of land.

SECTION 25 further refers to the selection of "arbitrary allotments", where members of the Tribes fail to make selections; and provides that,

"* * * then the *Commission to the Five Civilized Tribes* may immediately proceed to select an allotment, including a homestead for such person, said allotment and homestead to be selected *as the Commission may deem for the best interest of said person,* and the same shall be of the same force and effect as if such selection had been made by such citizen. * * *"

SECTION 27 provides that "the *rolls of the Choctaw and Chickasaw citizens* shall be made by the *Commission to the Five Civilized Tribes.* * * *"

SECTION 30 provides the *citizenship rolls,* when made by the *Commission to the Five Civilized Tribes* and approved by the *Secretary of the Interior,* shall constitute the *"final rolls of citizens,"*

and

"* * * *upon which allotment of land* and *distribution* of Tribal property shall be made, as herein provided."

This part of the Treaty is quoted and stressed for the purpose of showing a *Treaty declaration* that the *making up, and approval,* of *citizenship rolls* was a *necessary part of,* and a *prerequisite to,* the general

plan for the *allotment of the lands,* which the United States assumed, as one of the most important Treaty obligations and undertakings, and that moneys expended therefor were definitely and specfically excluded as "Gratuities" and "Gratuity Offsets", along with its other activities mentioned in that paragraph of the Treaty of 1898, wherein it was agreed that the United States would never make any *"charge or claim"* against the Choctaw and Chickasaw Tribes.

SECTIONS 31 to 33, inclusive relate to the *"Choctaw and Chickasaw Citizenship Court".*

There were some 4,000 applicants for citizenship whose claims had, for many years, been bitterly resisted by the Choctaw and Chickasaw Nations.

Their claims were originally filed before the *Commission to the Five Civilized Tribes,* under the Act of Congress of June 10, 1896 (29 Stat., 321); and practically all of them were denied. The same law provided for appeals to the United States District Courts. Upon appeal, practically all were admitted.

The Tribes still resisted, and the Choctaw and Chickasaw Citizenship Court was created, in the Treaty of 1902, and empowered to retry such cases; and upon retrials, practically all were denied, and the applicants were finally barred from enrollment, allotment and distributive shares of the Tribal estates.

This court consisted of three Judges, a Clerk, Stenographer, Bailiff and other employees; and *Section 33* provided that,

"The compensation of all of these officers shall be *paid by the United States* * * *"

The duties of this court were the same as those of the *Commission to the Five Civilized Tribes,* namely: *to admit or reject citizenship claimants,* in the preparation of *citizenship rolls,* as a necessary incident and prerequisite to the allotment of the lands and the division and distribution of the Tribal estates.

The moneys expended by the Commission to the Five Civilized Tribes, in the matter of *enrollments and allotments,* are set up as "Gratuities" and "Gratuity Offsets", in the instant case.

The moneys expended by the Citizenship Court are not set up, because the *Treaty says they are to be paid by the United States.*

The moneys expended by the Commission, in all of its allotment and enrollment activities (and in all of its other activities) are just as definitely and specifically excluded by that *"no charge or claim"* paragraph in the Treaty of 1898, which has been quoted and stressed.

SECTIONS 45 to 54, inclusive, relate to Townsites, and confer upon the United States the additional powers and authority to deal with the whole subject, which was lacking in the Treaty of 1898; and, as to the Board of Appraisers to determine the value of the improvements upon any land occupied by a member of the Tribes, and needed for a Townsite, it is provided:

"Said Board of Appraisers shall be paid such compensation for their services as may be determined by the *Secretary of the Interior,* out of any *appropriations* for the surveying, laying out, platting and selling townsites."

Here is a definite *Treaty guaranty* that the salaries of this particular Board shall be paid out of "appropriations"; and a like Treaty admission that *all other expenses of all Townsite activities* are *being paid out of Congressional appropriations.*

SECTIONS 56 to 63, inclusive, confer the additional powers and authority, upon the United States, which were lacking in the Treaty of 1898, to deal with coal and asphalt deposits; and changes the plan from *leasing* to *"Segregation" and sale.*

SECTION 59 provides for a Commission of three members, one to be appointed by the *President,* one by the Principal Chief of the Choctaw Nation (to be a *"Choctaw by blood")* and one by the Governor of the Chickasaw Nation (to be a *"Chickasaw by blood").*

The salaries of the Choctaw and Chickasaw members were to be paid by the Nations, respectively.

These are the *same Commissioners,* dealing with the *same subject,* to which the Treaty of 1898 referred; and, as stated, the Nations undertook to pay their Commissioners, evidently for the privilege of appointing their own *members by blood* to important official positions.

Also, as stated, the payment of the salaries of these Commissioners is the *only instance,* in *all of the Treaties,* where the Nations agreed to pay any part of the expenses of dividing and distributing their Tribal estates.

They did not agree to pay the Commissioner appointed by the President.

As to that, it was provided (in Section 59):

"* * * and the third Commissioner *to be paid by the United States*",

just as was done for *all the activities of all the officers and employees of the United States,* in the division and distribution of the Tribal estates, in pursuance of its various *Treaty obligations and undertakings.*

SECTION 64 relates to "Sulphur Springs" Reservation.

It is provided that 640 acres be selected and set aside "under the direction of the *Secretary of the Interior*", to be owned and controlled by the United States, and that the adjoining Townsite shall be disposed of "in the manner provided in the 'Atoka Agreement';" and that the lands so ceded shall be paid for "from the unappropriated moneys of the United States", at $20.00 per acre, which shall be "full compensation for the lands ceded"; and that,

"* * * *such moneys* * * * shall be be divided percapita among the members of the Tribes * * * as the other moneys of the Tribes."

SECTION 66 provides that Patents to allotted lands "shall be recorded in the *office of the Commission to the Five Civilized Tribes* * * * *without expense to the allottee* * * *"

"SECTION 68. No Act of Congress or Treaty provision, nor any provision of the Atoka agreement, inconsistent with this agreement, shall be in force in said Choctaw and Chickasaw Nations."

Whatever other provisions of the Treaty of 1898 ("Atoka Agreement") are amended or repealed by this Treaty of 1902, it certainly cannot be contended that the paragraph in the "Atoka Agreement", providing that *"no charge or claim"* shall be made, by the United States, against the Choctaw and Chickasaw Nations, for moneys expended by the United States, in the division and distribution of the Tribal estates, was amended or repealed by this Treaty of 1902.

"SECTION 69. All controversies arising between members as to their right to select particular tracts of land shall be determined by the *Commission to the Five Civilized Tribes.*"

SECTION 72 provides for percapita payments to the citizens of the Chickasaw Nation, of *Forty dollars* each, "under the direction of the Secretary of the Interior", out of the appropriation of $558,520.54 for "arrears of Interest", and that,

"* * * *so much of such moneys as may be necessary* for such payment is hereby appropriated and made available for that purpose, and *the balance,* if any there be, *shall remain in the Treasury of the United States,* and be distributed percapita with the other funds of the Tribes."

SECTION 73 provides that "This Agreement *shall be binding upon the United States and upon the Choctaw and Chickasaw Nations"* when ratified by Congress, and by the votes of the Choctaws and Chickasaws, in the manner therein provided.

We have, in all of the foregoing, scrutinized and analyzed *every provision of all of the Treaties* between the United States and the Choctaw and Chickasaw

Nations, from the *first Treaty* of 1820 to, and including, the *last and final Treaty* of 1902; and, in this, we have set out either the substance or the text of every Section and Article of these various Treaties which have any bearing upon the issues of "Gratuities" or "Gratuity Offsets", in the instant case.

We have endeavored to do this work most carefully and most meticulously; and while the results may seem to be somewhat tedious, we feel that we are justified in the methods pursued, when it is considered that the allowance of the tremendous total sum of $5,724,587.63 of so-called "Gratuities" or "Gratuity Offsets" which the United States has seen fit to set up, (or any considerable part thereof) would have the effect of depriving the Choctaw and Chickasaw Nations of the benefits of a claim which they so very earnestly feel to be meritorious.

We, therefore commend the results of this work to the attention and consideration of this Honorable Court, in support of our contentions that such so-called "Gratuities" and "Gratuity Offsets" should not be allowed, for the following reasons, and upon the following grounds:

First,

In all of the Treaties, from 1820 to 1902, inclusive, the United States assumed *Treaty obligations and undertakings* to supervise and protect the Tribal affairs of the Choctaw and Chickasaw Nations, based upon *mutual Treaty agreements*, and constituting *good and valuable considerations* passing between the United States and the Choctaw and Chickasaw Nations, *at its own expense,*

by appointing and maintaining *United States Indian Agents and Agencies,* and otherwise; and

Second,

In the Treaty of 1866 (when a plan for the allotment of lands and the division and distribution of the Tribal estates was first agreed upon, but which was never carried out), and in the Treaties of 1898 and 1902 (under which such a plan was agreed to and actually carried out), the United States assumed *Treaty obligations and undertakings* to allot the lands and to divide and distribute the Tribal estates, *at its own expense,* not only in pursuance of its *general Treaty obligations and undertakings,* (appearing in *all the Treaties),* but under definite and specific *Treaty obligations and undertakings* that *"no charge or claims"* would be made against the Choctaw and Chickasaw Nations, by the United States, for the moneys expended for those purposes.

IV.

It is contended that the moneys expended by the United States and set up as "Gratuities" or "Gratuity Offsets" in "defendant's statement setting forth gratuities", filed herein, are not allowable as such, in the instant case.

We have shown, as we contend, (in the preceding subdivision III of this Brief) that *an overwhelming percentage* of such moneys were expended by the United States, in pursuance of its *Treaty obligations and undertakings,* (1), *to divide and distribute the Tribal estates* of the Choctaw and Chickasaw Nations, *at its own expense* (evidenced by the *definite and specific "no charge or claim" provision* in the Treaty of 1898, ("Atoka Agreement", 30 Stat., 495, 1st Kappler. 646); and (2), to *supervise and protect the Tribal affairs* of the Choctaw and Chickasaw Nations, by the appointment and maintenance of *United States Indian Agents and Agencies* and to do all things necessary to that end, *at its own expense* (evidenced by numerous Articles and Sections *in all of the Treaties* from 1820 to 1902, inclusive, which Treaties have been cited and quoted); and (3) that such *Treaty obligations and undertakings* were based upon *mutual agreements,* constituting *good and valuable considerations* passing between the parties to the Treaties.

We have also shown, as we contend, that, as to *the balance* of such moneys claimed as "Gratuities" or "Gratuity Offsets", they were expended by the United States for the benefit of *individuals,* and not

for the benefit of the Choctaw and Chickasaw *Nations,* the *plaintiffs* in the instant case.

In some instances as to the *balance* of such moneys claimed, the United States expended moneys to conserve and protect the *individually owned and Patented* allotments of land, through "Probate Attorneys" and otherwise; and, in other instances, it expended moneys for support and educational assistance of *individuals* belonging to a *certain class* ("Restricted" Orphans).

To none of these *beneficiaries of United States moneys* did the Choctaw and Chickasaw *Nations,* as such, owe any duty whatsoever, in connection with their *individually owned property* or their *personal support and education;* and even if such beneficiaries were *enrolled citizens* (and many of them were not, as has been shown) the *Nations* owed them no duty whatsoever, except perhaps to "stand by" and to insist that the United States give to *enrolled members* their *distributive shares* of the *common properties* of the *Nations,* then being divided and distributed by the United States, under Treaties and laws which provided for the *full and complete division and distribution* of the *Tribal estates;* and this only prior to the abolition of the Tribal Governments in 1906.

As showing when and how the Choctaw and Chickasaw Nations *"went out of the school business",* we quote the governing provision of the Treaty of 1898 ("Atoka Agreement", above cited).

Under that Treaty, the royalties from the mining of coal and asphalt were set aside for the *maintenance of schools.*

It was then provided:

> "That whenever the members of the Choctaw and Chickasaw Tribes shall be required to *pay taxes for the support of schools,* then the fund arising from such royalties shall be disposed of for the *equal benefit of their members* in such manner as the tribes may direct."

This was a *Treaty obligation and undertaking* of the United States, and takes its place along with others of a similar nature.

The members of the Tribes were *"required to pay taxes"*, upon the organization of a *public school system* by the State of Oklahoma, which was admitted in 1907.

It may be said that certain lands of the Indians were exempt from taxation, for a limited time and under certain conditions, under the *same Treaty;* but that is beside the point, since those exemptions were *agreed to* by the United States and *accepted* by the new State. The Indians enjoyed some exemptions upon lands, but they had *other property* subject to taxation, and not exempt, and paid quite as much taxes upon their *non-exempt property* as did hundreds of thousands of white citizens of the new State.

The fact remains, as stated, that they *"went out of the school business"*, in 1907, under solemn *Treaty guarantys* of the United States; and all of this was a part of the plans and policies of the United States to *divide and distribute the Tribal estates* and to *abolish the Tribal Governments,* in preparation for Oklahoma Statehood.

The motives of the United States, in expending moneys for the assistance of these *individuals* is to be commended; but how, we inquire, may the *Nations,* be charged, as "Gratuities" or "Gratuity Offsets", with these moneys, since *they* did not receive the benefits, and since they are the *sole plaintiffs* in the instant case?

The instant case was authorized by Senate Resolution 478, 71st Congress, 1st Session (passed February 26, 1931), invoking Section 151 of the Judicial Code for report of "findings of fact and conclusions to the Congress."

The Senate Resolution provides that "the claim of the Choctaw and Chickasaw *Nations* may be filed in the Court of Claims, in accordance with Section 151 of the Judicial Code.

Section 151 of the Judicial Code provides "any pending Bill, * * * in either House of Congress" may be referred to the Court of Claims, setting out certain exceptions and definitions, as to procedure.

The "pending Bill" was Senate 3163, 71st Congress, 1st Session, and provides that moneys received by the United States growing out of the sale of the "Leased District" lands, be placed to the credit of "the Choctaw and Chickasaw *Tribes of Indians"*.

(All citation of the above measures appear in our Brief, heretofore filed, at pages 93-97.)

"Gratuities" or "Gratuity Offsets" may be set up, and allowed or disallowed, *only* by authority of Section 2 of the Second Deficiency Act of 1935 (49

Stat., 571-596); and that Act, *very definitely and very specifically,* limits any allowance of the same to "cases * * * in which an *Indian Tribe or Band* is the party *plaintiff* * * *."

Therefore, the issues are between the *Nations, Tribes or Bands* as *parties plaintiff,* and the *United States* as the *party defendant,* and there is no place in any of the suits or cases, for the consideration of the *individually owned property,* or of *personal assistance to individuals;* and in view of this, there would be no more power and authority to allow "Gratuities" or "Gratuity Offsets" for moneys the United States saw fit to expend for the *assistance of individuals* in their private property or personal affairs, than there would be power and authority to *grant judgments or findings in favor of such individuals.*

Our views in opposition to the allowance of moneys expended for *assistance to individuals,* as "Gratuities" or "Gratuity Offsets" (our views as to "*Treaty obligations and undertakings* being set out in sub-division III of this Brief) are here set out rather fully, because there are two tremendously large items to which they apply to-wit: "Probate expenses" (Item 87) of $1,053,120.71, and "Education" (Item 68) of $2,177,277.86; and we wish to establish the proposition that *such moneys so expended* should not be allowed, as "Gratuities" or "Gratuity Offsets", so that these Items (and other like Items) may be placed within that classification, by numbers, when we come to consider and classify all Items appearing in the "Statement" of the United States.

We hope we have shown that practically all the Items set up by the United States as allowable "Gratuities" or "Gratuity Offsets" fall within *one of the Three* proposed *Findings and Conclusions* set out immediately below, (and any Item not so classified will be separately referred to and commented upon).

Then, there are many Items that will fall into *more than One* of the *Three* classifications. For example: Item 74 for "General Office Expenses" of $4,353,284.99 would necessarily fall within *all Three* of the classifications, since the United States officers were functioning in *all activities* to which all the Items of expenses relate; and these expenses were *incidental and necessary* in these activities, and are, we respectfully contend, quite as fully excluded as "surveying", "allotting", "Pay of Indian Agents", "Removing Intruders", Sale of "Town lots", etc.; and the same would be true of Item 52, "Miscellaneous Agency expenses"; Item 88, "Pay of Clerks"; Item 43, "Preservation of records", and many other like Items.

The General Accounting Office Report is not sufficiently clear, in all instances, as to just *what activities* these expenses applied to, and we must conclude that they apply to either *One or All* of the activities under consideration; and we have, therefore listed them under *all three* of the classifications. It is immaterial as to where they fall, since they, being incidental and necessary, are not allowable, any more than are the *main Items* to which they may relate.

We, therefore, respectfully request this Honorable Court to find and conclude as follows:

PROPOSED FINDINGS AND CONCLUSIONS.

(1) Any moneys expended by the United States in pursuance of its *definite and specific Treaty obligations and undertakings,* to divide and distribute the Tribal estates of the Choctaw and Chickasaw Nations, *at its own expense,* as guaranteed by the *"no charge or claim"* provision in the Treaty of 1898 ("Atoka Agreement" 30 Stat., 495; 1st Kappler, 496) are not allowable as "Gratuities" or "Gratuity Offsets";

(2) Any moneys expended by the United States in pursuance of its *Treaty obligations and undertakings* to generally supervise and protect the Tribal affairs of the Choctaw and Chickasaw Nations, by the appointment and maintenance of *United States Indian Agents and Agencies,* to maintain law and order, to protect the Indians from the encroachments of other Indians and whites, to expel "Intruders" and otherwise, (as guaranteed by *all Treaties* from 1820 to 1902, inclusive) *at its own expense,* are not allowable as "Gratuities" or "Gratuity Offsets; and

(3) Any moneys expended by the United States for the use and benefit of *individuals* in connection with their *individually owned* allotments and other property, and for their personal support and accommodation, were not expended for the benefit of the Choctaw and Chickasaw *Nations,* the *plaintiff* herein, and are not allowable as "Gratuities" or "Gratuity Offsets".

For the convenience of the court, we are setting out, immediately below, tabulations of Items of so-called "Gratuities" or "Gratuity Offsets", which the United States has set up in its "Statement" filed herein, and which it asks to be allowed, in the instant case.

We have numbered the Items (running from 1 to 116) inclusive; and, in classifying the same, as falling within *One of the Three* "PROPOSED FINDINGS AND CONCLUSIONS", we shall refer to such Items by number.

There are four of such tabulations; and we have identified them as Table A, Table B, Table C and Table D.

Table A, relates to moneys claimed to have been "gratuitously expended" for the benefit of the *Chickasaw Nation;* Table B for the *Choctaw Nation;* Table C for the *Choctaw and Chickasaw Nations;* and Table D for the *Choctaw, Chickasaw, Creek, Cherokee* and *Seminole Nations.*

Such Tables are as follows:

TABLE A, CHICKASAW NATION.

Purpose	Amount	Rept. G. A. O. page
1 Agricultural aid	$27.00	8.
2 Automobiles and repairs	148.34	8.
3 Education	29,137.08	27, 30, 39-41, 46-50, 58, 60, 64, 65.
4 Expense of delegations	200.00	57.
5 Household equipment	80.85	63.
6 Indian dwellings	73.77	63.
7 Medical attention	194.49	11, 60.
8 Miscellaneous agency expenses.	1,653.34	21-6, 27, 28, 60, 62-3.
9 Pay of interpreters	3,149.99	55.
10 Presents	30.00	63.
11 Provisions and other rations	779.81	63.
12 Transportation, etc., of supplies	97.83	65.

TABLE B, CHOCTAW NATION.

Purpose	Amount	Rept. G. A. O. page
13 Automobiles and repairs	$236.59	73.
14 Burials of Indians	350.75	91.
15 Education	94,230.64	76, 88, 89, 108, 112, 120, 121, 126-8, 130-1, 145-6, 151, 155, 161.
16 Expense of delegations	200.00	143.
17 Medical attention	30,949.22	91, 145-6, 152.
18 Miscellaneous agency expenses.	3,324.30	73, 91, 102-6, 107, 111, 133, 146-8, 153, 154.
19 Pay of interpreters	3,299.99	139.
20 Pay of miscellaneous employees	237.00	152.
21 Provisions and other rations	43.30	148.

TABLE C, CHOCTAW AND CHICKASAW NATIONS.

Purpose	Amount	Rept. G. A. O. page
22 Agency buildings and repairs	$5,056.50	190, 193, 211.
23 Agricultural implement and equipment	230.50	211.
24 Allotting	14,591.77	185, 202-4.
25 Appraising	213,230.19	201-3.
26 Clothing	129.83	207.
27 Education	11,735.27	194, 230, 243.
28 Equalization of allotments	1,846.60	185, 204.
29 Feed and care of horses	120.00	216.
30 Feed and care of livestock	956.88	210-1.
31 Fuel, light and water	823.20	192-3, 208, 209-11.
32 General office expenses	231,048.77	185-8, 199, 201-5.
33 Hardware, glass, oils, and paints	11.99	207, 211.
34 Incidental expenses	694.90	215, 216-20, 228.
35 Livestock	345.00	211.
36 Locating coal and asphalt lands.	1,662.89	202.
37 Medical attention, Choctaw-Chickasaw Hospital	179,531.61	221-2, 231-5.
38 Miscellaneous agency expenses.	13,489.90	191-3, 195, 208, 209-11, 212-4, 240, 241-242.
39 Pay of interpreters	200.00	223.
40 Pay of miscellaneous employees	2,065.00	217, 220, 228.
41 Pay of surveyors	500.00	228.
42 Per capita payment expenses	208.71	185.
43 Preservation of records	386.05	224.

44 Probate expenses	540.77	226.
45 Protecting property interests	356.50	227.
46 Provisions and other rations	202.25	207, 229.
47 Removal of intruders	578.96	236-7.
48 Sale of town lots	741.58	186, 196-8, 202-3, 220.
49 Sale of unallotted lands	12,855.24	185-238-9.
50 Surveying	186,243.14	201-3.
51 Surveying and allotting	9,315.37	189.
52 Surveying. platting, appraising town sites	119,624.29	244-6.
53 Surveying unallotted lands	47.79	185.
54 Timber estimating	7,035.45	185, 201, 204.
55 Transportation, etc., of supplies.	16,331.01	191, 207-8, 209, 211.
56 Traveling expenses	4,394.08	215-8, 220, 228.
57 Enrolling	26,473.68	185-6, 200-3.

TABLE D, CHOCTAW, CHICKASAW, CREEK, CHEROKEE AND SEMINOLE NATIONS.

Purpose	Amount	Rept. G. A. O. page
58 Agency building and repairs	$130,794.22	283, 307-9, 322, 335, 340-1.
59 Agricultural aid	24,331.81	279, 412-4.
60 Agricultural implements and equipment	152.20	307-11.
61 Allotting	36.65	272-3.
62 Appraising	18,665.01	299-302.
63 Appraising and selling lands	205,959.07	272-6.
64 Appraisal and sale of restricted land	24,999.20	282.
65 Automobiles and repairs	23,799.99	278-0, 306, 321, 413-6.
66 Construction and maintenance Claremore Hospital	77,127.98	305, 335 343, 397.
67 Copying allotment records	14,648.72	320.
68 Education	2,177,277.86	284-92, 305, 332-65, 391-414, 424.
69 Equalization of allotments	207.88	270, 272, 302.
70 Examining records in disputed citizenship cases	26,105.59	299-300.
71 Feed and care of horses	3,371.96	325-30, 389.
72 Feed and care of livestock	1,396.28	307-11.
73 Fuel, light, and water	899.70	307-14, 315-6, 322.
74 General office expenses	4,353,284.99	270-5, 297, 298-303.
75 Hardware, glass, oils, and paints	11.24	307, 310.
76 Household equipment	2,625.33	412-3.
77 Incidental expenses	30,115.98	317-8, 325-31, 389.
78 Investigating leases	29,955.95	367-8.

79 Leasing of mineral and other lands	4,514.39	270-2, 302.
80 Livestock	1,837.50	307-10, 413.
81 Medical attention	1,638.06	306, 307-10, 399, 401, 417, 426.
82 Miscellaneous agency expenses	219,738.88	278-80, 305-6, 307-14, 315-23, 400, 418, 420.
83 Oil and gas expenses	7,028.28	272-3, 275, 277.
84 Oil and gas mining supervision allotted lands	85,703.40	369-0.
85 Pay and expenses of farmers	327,793.63	279-0, 310, 332-4, 366.
86 Pay and expenses of field matrons	6,217.32	332, 366.
87 Pay and expenses of Indian police	255,843.73	310, 314-5, 322, 332-3, 374-5.
88 Pay of clerks	4,721.62	371.
89 Pay of Indian agents	67,639.53	372.
90 Pay of Indian inspectors	22,381.97	330, 373.
91 Pay of interpreters	125,783.64	332-4, 410-4.
92 Pay of miscellaneous employees	1,761,043.55	279, 306, 307-14, 315-9, 324, 325-34, 371, 389-0, 410-4.
93 Pay of skilled employees	415.80	307-11.
94 Pay of superintendents	11,220.25	413-4, 376.
95 Per capita payment expenses	111.43	270.
96 Preservation of records	8,886.62	378.
97 Probate expenses	1,053,120.71	323, 332-4, 379-86, 413-4.
98 Protecting property interests	386,847.59	387-8.
99 Protecting property interests of restricted members	4,741.70	270, 2.
100 Provisions and other rations	139.27	413.
101 Purchase of horses	720.00	328, 390.
102 Removal of alienation restrictions	88,346.12	406-8.
103 Removal of intruders	145,582.60	402-5.
104 Sale of allotted lands	265.12	271.
105 Sale of restricted lands	1,577.09	271.
106 Sale of town lots	36,931.37	271-6, 303, 330.
107 Sale of town sites	416.71	302.
108 Sale of unallotted lands	53,538.80	271, 409.
109 Surveying	49,695.31	271, 3, 4, 299-303.
110 Surveying and allotting	7,331.24	281.
111 Surveying, allotting, sale, etc., of lands	80,809.05	322, 410-3.
112 Surveying, platting, and appraising town sites	235,105.36	421-3.
113 Surveying segregated coal and asphalt lands	6.76	272.
114 Timber estimating	33,776.10	271, 299.

115 Transportation, etc., of supplies	8,349.60	307-13, 315-6, 322. 391-8, 412-13, 420, 424.
116 Traveling expenses	22,401.55	317-8, 325-31, 359, 425.

Before classifying the numerous Items (under the "PROPOSED FINDINGS AND CONCLUSIONS", above set out), we deem it advisable, in order that the court may be advised of our reasons for such classifications, to separately comment upon each of such Items (running from 1 to 116) as follows:

Item 1: Expended under Act for "Agriculture and Stock raising among Indians". Clearly for benefit of *individuals* and not for benefit of *Nations.*

Item 2: Same act and same purposes.

Item 3: This Item is for "Education" and the total amount is $29,137.08. Page 27 of the G. A. O. Report refers to *another subject.* Page 30 refers to "Indian Boarding Schools", under Acts of 1930, 31 and 32. *At that time,* there could not have been any *enrolled Indian pupils.* A child born prior to March 4, 1906, would have been 24 years old in 1930. Any child of *school age* in 1930, would have been a *"too late"*, and have no right to share in the *common properties* of the *Nations.* Pages 39-41 refer to Appropriation Acts providing moneys for "making provision for the attendance of the children of non-citizens therein" (in Tribal schools). Clearly for the benefit of *white children.* The captions to pages 40 and 41 state: *"Aid of common schools"*. Pages 46-50 say: *"Aid of common schools"*. It cannot be contended

that the *plaintiff* Choctaw and Chickasaw *Nations* have any responsibility for moneys expended for the benefit of *white children* or for *common schools* of Indian Territory or Oklahoma.

Item 4: This Item is for "Expense of delegations", 1867 (G. A. O. Report page 57). Article 48, Treaty of 1866 (14 Stat., 769; 2nd Kappler, 930), shows that Choctaw and Chickasaw Commissioners were paid $25,000 each, *out of Indian moneys,* "to discharge obligations * * * and other incidental expenses" in making the Treaty. Apparently all expenses were taken care of *by the Nations.*

Item 5: For "Support of Indians". For benefit of *individuals* and not of *Nations.*

Item 6: Same.

Item 7: For "Health among Indians". For benefit of *individuals* and not of *Nations.*

Item 8: For "Miscellaneous Agency expenses". Clearly *Treaty obligations* under Treaty of 1820. Also not allowable under Act of 1935, because made "prior to * * * Treaty * * * under which claim arose" (Act of 1935, relating to "Gratuities").

Item 9: "For pay of Interpreters", $3,149.99 (G. A. O. Report). Report shows (page 458) series of Acts running from 1829 to 1873. If prior to 1867, not allowable because prior to Treaty under which claim arose (Act of 1935). If later, *still not allowable* because of *Treaty obligation,* in all Treaties.

Item 10: "Presents", $30.00, Act of 1933 for "Support of Indians". For benefit of *individuals*

and not *Nations.* Then, how, we inquire, can it be contended that a $30.00 *present* to some individual could bind the *Nations,* when there was never any such obligation, *at any time,* and the Tribal Governments had been "out of business" and abolished for nearly 30 years?

Item 11: Same as preceding.

Item 12: *Incidental and necessary* expenses for activities of United States officers, acting under *Treaty obligations.*

Item 13: Same comment as on Items 1 and 2.

Item 14: "Burial of Indians", Act of 1933 for "Conservation of health". Same comment as on Item 10.

Item 15: That part of this Item on page 76 G. A. O. Report, ($1031.97) was *not United States moneys,* but moneys of the *Osage Indians,* made available for *all Indians of the United States* (Osage Treaty, 1867; 14 Stat., 687). If the Nations owe anyone, they owe the *Osages* and *not the United States.* Pages 88 and 89 set up moneys arising under Act of March 3, 1819, some *48 years* prior to Treaty under which instant claim arose (Act 1935). Page 112, See comments on Item 3. Pages 120, 121, 126, 127 and 128, 130 and 131 refer to Annual Appropriations by Congress, "In Aid of common schools", that is in aid of *white children.* (See comments on same subject on Item 3). Pages 145-6 for "Relieving distress", clearly for *individuals.* The moneys set up on Page 151 were for *individuals,* and those on Page 155

were incidental and necessary to activities of United States officers, acting under *Treaty obligations.*

Item 16: See comments on Item 4.

Item 17: See comments on Item 7.

Item 18: Expended by United States officials, under *Treaty obligations* as incidental and necessary in performance of Treaty duties.

Item 19: See comments on Item 9.

Item 20: See comments on Item 18.

Item 21: See comments on Items 10 and 11.

Item 22: Expended under *Treaty obligations,* in *all Treaties,* to appoint and maintain *United States Indian Agents and Agencies.*

Item 23: For benefit *individuals* and not *Nations.*

Item 24: Not allowable under *"no charge or claim"* provision in Treaty of 1902 ("Atoka Agreement", 30 Stat., 495, 1st Kappler, 646).

Item 25: Same.

Item 26: For benefit of *individuals* and not *Nations.*

Item 27: Moneys referred to on page 194 of G. A. O. Report were *Osage moneys* and not *United States moneys.* (See comments on that subject on Item 15). All moneys in this Item were for benefit of *individuals* and not *Nations.*

Item 28: See comments on Item 24.

Item 29: See comments on Item 12.

Item 30: Same.

Item 31: Same.

Item 32: Same.

Item 33: For benefit of *individuals* and not *Nations.*

Item 34: See comments on Item 18.

Item 35: See comments on Item 23.

Item 36: See comments on Item 24.

Item 37: In this Item, the United States sets up $179,-531.61 for "Medical attention" Choctaw-Chickasaw Hospital. Throughout the years, the United States has expended moneys for maintenance, including "Medical attention". The rules and regulations of the Secretary of the Interior limited the attendance to the "Restricted" class of Indians. This was charitable and generous upon the part of the United States, but it cannot be reasonably contended that the *Nations* (the *plaintiffs* in the instant case) are bound by these acts. Whatever was done, or however done, the moneys were expended, for the benefit of *individuals,* and have no relation whatsoever to the issues in the instant case, which are as to whether moneys have been "gratuitously expended" for the benefit of the *plaintiffs,* the Choctaw and Chickasaw *Nations.* Then, in addition, it must be shown *what part,* if any, of such moneys were expended for *enrolled members* of the Nations, who, *alone,* have any interest in the *common properties and moneys* of the *Nations.* The youngest *enrolled member* of the Nations (who must have been born prior to March 4, 1906) would now be over *31 years old.* What proof is there as to what percentage of those persons admitted to the Hospital were *enrolled members* of the *Nations;* and

it will certainly not be contended that the *Nations* should be charged with moneys enjoyed by persons *not enrolled.* Nor can it be reasonably contended that the United States should have a *counter judgment* or *counter finding* except where the proof justifies it. We contend that these moneys were expended by the United States for *individuals* to whom it saw fit to render *personal assistance,* and not for the benefit of the *plaintiff Nations;* and, upon any theory, it is not entitled to a finding of "Gratuities" or "Gratuity Offsets" because its *proof has failed.*

Item 38: See comments on Item 18.

Item 39: See comments on Item 9.

Item 40: See comments on Item 18.

Item 41: See comments on Item 24.

Item 42: All moneys expended by the United States, in the division and distribution of the Tribal estates, would be excluded, as "Gratuities" and "Gratuity Offsets" by the "*no charge or claim*" provision of the Treaty of 1902 ("Atoka Agreement", 30 Stat., 495, 1st Kappler, 646) since the sale of the "surplus" or unallotted lands and other common property, and the percapita distribution of the moneys resulting therefrom, was as much a part of "allotment" as the allotment of the lands. Then, in addition, the sale of the lands and the percapita payment of the moneys, was a *Treaty obligation and undertaking* of the United States, under the Treaties of 1898 (above cited) and

the Treaty of 1902 ("Supplementary Agreement", 32 Stat., 641; 1st Kappler, 771).

Item 43: See comments on Item 18.

Item 44: "Probate expenses". Every dollar of United States moneys for "Probate Attorneys" and expenses was limited to the benefit of "*Restricted*" Indians, in the possession of their *individually owned lands,* under *Patent and fee simple title.* The United States learned that these owners were beset by the so-called "Grafters" who sought to deprive them of their own lands, and the lands of *deceased owners* which had passed to their heirs (and known as "Dead Claims"). The United States very charitably and kindly offered assistance to such *owners,* and to the heirs of *deceased owners,* by furnishing the assistance of "Probate Attorneys". The *Nations,* the *plaintiffs,* never owed any obligations, in this respect, to the individual owners or heirs of allotted lands; and could not have done so, since the Tribal Governments were abolished in 1906. It is difficult to understand how, or why, it can be contended that these moneys, thus expended, are a charge against the plaintiff *Nations.*

Item 45: Same.

Item 46: See comments on Items 10 and 11.

Item 47: "Removal of Intruders". No *Treaty obligation* of the United States is made plainer, in practically *all the Treaties.*

Item 48: See comments on Item 24.

Item 49: See comments on Item 42.

Item 50: See comments on Item 24.

Item 51: Same.

Item 52: Same.

Item 53: Same.

Item 54: Same.

Item 55: See comments on Item 12.

Item 56: Same.

Item 57: See comments on Item 24. The *"no charge or claim"* provision in the Treaty of 1902 ("Atoka Agreement") expressly excludes expenses for *"Allotting"* the lands. The expenses for *"enrolling"* would clearly be included in *"allotting"*, since no allotments could be made until the *citizenship rolls* were made up and approved, as a necessary prerequisite to "allotting". Then, in addition, *enrollment* is made a *Treaty obligation and undertaking* of the United States, in the Treaty of 1902.

Item 58: See comments on Item 22.

Item 59: See comments on Item 1.

Item 60: Same.

Item 61: See comments on Item 24.

Item 62: Same.

Item 63: Same.

Item 64: Any "appraisal" expenses would be excluded by the *"no charge or claim"* provision of the Treaty of 1902 (See comments on Item 24). However, these moneys were expended for the "appraisal and sale" of *"Restricted"* lands; that is, lands allotted and patented to individual allottees, *individually owned,* and would be excluded upon that ground.

Item 65: Page 278, G. A. O. Report shows moneys expended, making up a part of this Item, for "Administration of Indian Forests". How, we inquire, could the Choctaw and Chickasaw Nations be charged with these moneys, since there are no "Indian Forests" in those Nations, and *have never been.* Every acre of the lands, under the Treaties (except certain definite reservations for Tribal buildings, townsites, rights of ways, etc.,) were to be *allotted* and the balance *sold,* and the *moneys distributed percapita.* That *was done,* and "Indian Forests" were never heard of in those *Nations.* The absurdity of this Item is apparent. The other moneys making up this Item are for "Conservation of Health" (page 306) and for "Support of Indians" (page 413). Clearly for benefit of *individuals* and not for *plaintiff Nations.*

Item 66: "Construction and maintenance, Claremore Hospital". See our comments on Item 37 ("Choctaw-Chickasaw Hospital"). Whatever moneys the United States expended for both Hospitals were for the benefit of *individuals,* and not for the *Nations.* We again stress the fact that, irrespective of our principal contention as to benefits to *individuals,* there is *no showing* as to whether any of the inmates of this Hospital are *enrolled members* of the *Nations,* and entitled to share in the *common properties* of the *Nations,* and that, upon that ground the *proof has failed.*

Item 67: See comments on Item 57. We repeat that *"Enrolling"* was a necessary prerequisite of *"Allotment"* (Also see comments on Item 24).

Item 68: We have rather fully covered this Item, in commenting upon the General Accounting Office Report (under (c) of sub-division II of this Brief). Of this tremendous total of $2,177,276.86, (for the Five Tribes), an overwhelming percentage ($1,708,028.95) was expended for orphan children of the *"restricted"* class. When we consider what all will agree to, that no person *not enrolled* is entitled to share in the *common properties and moneys* of the *Nations,* and when we further consider that the rolls were fully and finally closed on March 4, 1906, and that the youngest *enrolled member* would be *28 years* old in 1934, it will be readily seen that there were *no enrolled* children in that school in 1934. Nor for any year back to 1924, allowing 18 years as the maximum school age. Then, running on back through the years, the percentage of *unenrolled* children would be practically 100 percentum for 1923, and would decrease on back to, or about, the year 1912, allowing *6 years* as the minimum school age. What showing is there, by proof or argument, as to what percentage of *enrolled members* of the Nations, ever attended this School. None whatever; and how, then, can it be contended that the United States is entitled to a finding in its favor, upon "Gratuity Offsets", upon any theory of the case. It is contended that, even if any *enrolled members* attended this school

the benefits went to *individuals* and not to the *Nations,* since the Tribal Governments had been abolished, and, necessarily "out of the school business", under all Treaties and laws, since 1906. As to the balance of the total of this Item for "Education", we rely upon the general contention of *individual* benefits and not benefits to the *Nations.*

Item 69: See comments on Item 24.

Item 70: See comments on Items 57 and 67.

Item 71: See comments on Item 12.

Item 72: Same.

Item 73: Same.

Item 74: Also see comments upon Item 12. In veiw of this tremendous total of $4,353,284.99 for "General Office Expenses" (for Five Tribes) we deem some further comment should be made. The various amounts making up this total are set out on pages 270-5, 297 and 298-303, G. A. O. Report. Page 270 clearly shows that the expenses come under the *"no charge or claim"* provision of the Treaty of 1898, (and we refer to our comments on Item 24), such as "Pay of Commissioner", "Equalization of Allotments" and "Per Capita payment Expenses". The other amounts listed on that page come under other *Treaty obligations* of United States (See comments upon Item 18). The same is true of moneys appearing on pages 271-6, 297-303. However, on page 270, there is an item of $3256.48 for "Protecting property interests of *Restricted* members", and on pages 272, 273 and 275 are various items

of "oil and gas expenses", which would not be allowable against the Nations, since "*Restricted* members" *individually owned* their lands, under *patents and fee simple titles,* and all oil and gas lands were, likewise, *individually owned,* in the same way, since no oil and gas rights were ever reserved and owned by the *Nations.* Therefore, these moneys were expended for the benefit of *individuals* and not for the *Nations,* and are not allowable. Practically all of these moneys listed as "General Office Expenses" were spent in connection with the division and distribution of the Tribal estates, under *Treaty obligations,* and the balance for the benefit of *individuals,* and none are allowable as "Gratuity Offsets".

Item 75: For benefit *individuals* and not *Nations.*

Item 76: Same.

Item 77: The Report (pages 317-18) lists moneys spent for "Miscellaneous Agency Expenses". (See comments on Item 22.)

Item 78: For "Investigating leases". Evidently "Oil and Gas leases". All such leases were upon *individually owned and patented lands.* The Nations never reserved or owned any oil and gas lands or rights. Therefore, these moneys were for benefit of *individuals* and not *Nations.*

Item 79: Same.

Item 80: See comments on Item 18.

Item 81: For benefit of *individuals* and not *Nations.*

Item 82: See comments on Items 8 and 18.

Item 83: See comments on Item 78.

Item 84: Same.

Item 85: See comments on Item 1.

Item 86: For benefit of *individuals* and not *Nations.*

Item 87: If all Treaties make any one thing plain, it is that "*Intruders*" would be expelled and kept out of the Indian country, and that *all allottees would be placed in possession of their allotments.* The "Indian Police" were used for that purpose. These moneys were expended by United States officials under *Treaty obligations.*

Item 88: See comments on Item 18.

Item 89: *Treaty obligations,* in all Treaties, to appoint and maintain *Indian Agents and Agencies.*

Item 90: United States Indian Inspector was located in Indian Territory to perform any duties *required of the Secretary of the Interior.* These duties were rendered in connection with all other United States officers, in the division and distribution of the Tribal estates, and moneys so expended were incidental and necessary for that purpose, and quite as necessary as moneys expended for "*Appraising*", "*Allotting*" etc. under the "*No charge or Claim*" provision of the Treaty of 1898. See comments on Item 24.

Item 91: See comments on Items 9 and 22.

Item 92: See comments on Item 18.

Item 93: Same.

Item 94: Under *Treaty obligations* in all Treaties.

Item 95: See comments on Item 42.

Item 96: Incidental and necessary to performance of *Treaty obligations.* See comments on Item 24.

Item 97: See comments on Item 44.

Item 98: For "Protecting property interests of minor Allottees". Clearly for benefit of *individual owners* of property and not for benefit of *Nations.*

Item 99: Same.

Item 100: See comments on Item 10.

Item 101: Incidental and necessary expenses and excluded under *"no charge or claim"* provision of Treaty of 1902. See comments on Item 24.

Item 102: This Item refers to moneys expended for "Removal of Restrictions" from *individually owned* and patented lands. For benefit of *individuals* and not *Nations.*

Item 103: See comments on Item 47.

Item 104: "Allotted land" was *individually owned* and *patented.* For the benefit of *individuals* and not the *Nations.*

Item 105: Same.

Item 106: See comments on Item 24.

Item 107: Same.

Item 108: Same.

Item 109: Same.

Item 110: Same.

Item 111: Same.

Item 112: Same.

Item 113: Same.

Item 114: Same.

Item 115: See comments on Item 18.

Item 116: See comments on Item 12.

We feel that the foregoing will give the Court a true picture of the history and nature of the Items set up as "Gratuity Offsets", as shown by the Genereral Accounting Office Report, and upon which the United States *solely and wholly relies* in presenting the same to this Honorable Court. We respectfully submit, as heretofore asserted, that, upon the issues arising out of "Gratuities" and "Gratuity Offsets", it *proves nothing;* that (without intending to be harshly critical) we think it apparent that it has been hastily thrown together without the care demanded by the importance of the subject, and without any consideration whatsoever of the applicable and governing Treaties and laws; and that its *attempted conclusions* (which are wholly beyond its power and authority) may not be relied upon to support the contentions of the United States for the *counter finding* which it is demanding.

We are presuming to suggest that the Attorney General, (in fairness to the Indians and as showing a spirit of fairness upon the part of the United States, the *Guardian of the Indians)* should have ignored the *attempted conclusions* of the General Accounting Of-

fice, and, in the light of the applicable Treaties and laws, eliminated the Items which are clearly excluded under the *Treaty obligations and undertakings* of the United States; and then, should have set up the items, if any, *which are debatable,* supporting the same by proof and argument.

Instead, he has set up *practically the whole Report,* offering neither proof nor argument to support the same, thus placing upon the Nations the cruelly unfair burden of *disproving* what he has merely *asserted.*

As stated, we have thus been forced to assume a burden which does not rightly rest upon us, *but upon the United States,* but we know no other course to take except to assume this burden; and, in this Brief, we have done the best we could to bear it, well knowing that this Honorable Court, in the exercise of the power and authority legally vested in it, *alone,* will reach a correct understanding and solution of the issues arising in the instant case, in such a way as to be fair and just to all.

We shall now classify all of the Items appearing in the "Statement" of the United States setting up so-called "Gratuities" or "Gratuity Offsets", *by numbers,* which we have given them, according to the "PROPOSED FINDINGS AND CONCLUSIONS", numbered (1), (2) and (3), as follows:

Items falling within "PROPOSED FINDING AND CONCLUSION" numbered (1):

Items 9, 12, 13, 18, 19, 20, 22, 24, 25, 28, 29, 30, 31, 32, 34, 35, 38, 39, 40, 41, 42, 43, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 61, 62, 63, 65, 67, 69, 70, 71, 72, 73, 74, 77, 80, 82, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 101, 103, 104, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116.

Items falling within "PROPOSED FINDING AND CONCLUSION" numbered (2):

Items 8, 9, 12, 13, 18, 19, 20, 22, 29, 30, 31, 32, 34, 35, 38, 39, 40, 43, 47, 49, 55, 56, 57, 58, 63, 65, 70, 71, 72, 73, 74, 77, 80, 82, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 101, 103, 115, 116.

Items falling within "PROPOSED FINDING AND CONCLUSION" numbered (3):

Items 1, 2, 3, 5, 6, 7, 9, 10, 11, 14, 15, 17, 21, 23, 26, 27, 33, 37, 44, 45, 46, 59, 60, 64, 66, 68, 75, 76, 78, 79, 81, 83, 84, 85, 86, 97, 98, 99, 100, 102, 105.

Items not falling within either of the *Three* "PROPOSED FINDINGS AND CONCLUSIONS", but separately referred to and commented on:

Items 4, 16.

V.

THE LAW.

We have not set out citations of, or quotations from, text books and court decisions declaring the established law relating to "Gratuities", being sure that there will be no denial that all authorities are unanimous in support of the following general propositions:

(1) A gratuity is a *gift;*

(2) A *gift* (gratuity) is a voluntary transfer of property, by one to another without any *consideration* or *compensation* therefor;

(3) A *gift* (gratuity) not only does not require a *consideration,* but *there can be none;* and if there be a *consideration* for the transaction, it is not a *gift (gratuity);*

(4) A *gift* (gratuity) is dependent upon no *agreement,* but upon the voluntary Act of the donor;

(5) On account of the want of *consideration* a *gift* (gratuity) does not come within the legal definition of a contract.

The only applicable decisions bearing upon "Gratuities" to Indian Nations or Tribes, by the United States, are the decisions of this Honorable Court.

In numerous cases of Western or Reservation Indians, it has considered and passed upon "Gratuities"; but in no case of the Five Civilized Tribes can we find that so-called "Gratuities" have been considered, except in the case of "Western or Old Settler Cherokees *vs.* The United States", No. 42078, decided on

February 3, 1936. In that case, the main issues were decided against the Cherokees, and the petition was dismissed. Therefore, it may be assumed that the consideration of claimed "Gratuities" was incidental and unimportant. Furthermore, we do not find any record of any resistance by the Cherokee plaintiffs to the allowance of so-called "Gratuities" which were set up by the United States.

We have carefully examined all the cases of the Western Tribes wherein "Gratuities" have been considered, and allowed or disallowed, and feel justified in saying that the sum total of these decisions is that "Gratuities" were allowed only where found to conform to the definitions, as above set out; and that moneys expended by the United States under its *Treaty obligations and undertakings* were not "Gratuities", and not allowed.

We shall refer to a few of these cases, and our citations will be to the "Pamphlet" decisions, by dates and pages, since we have no available volumes of the decisions of the United States Court of Claims.

In the case of "The Osage Tribe of Indians *vs.* The United States", No. B-38, decided May 28, 1930 (Pamphlet, pages 1-14, inclusive) it is held (page 13):

> "We are of the opinion that the Act did not contemplate that the court should *consider* or *make allowance* for *counter claims* where the conclusion of the court was against the claim of the *Osage Tribe* of Indians, and therefore, as the conclusion is against the claim, no further consideration should be given to the counter claims * * *";

and also (pages 13 and 14):

> "It may, however, be well to state that, as to the counter claims, the special act directed considerations only to counter claims against the *Osage Tribe,* and not against *individuals of the Tribe.*"

This would seem to support our contentions that any findings upon so-called "Gratuities" (as in the Western Old Settler Cherokee case), are not of any importance where the decisions, upon the main issues, were against the Tribes; and that conclusions, whatever they may be, are confined to the *Nations or Tribes,* (the plaintiffs) and not to *individuals* of the *Nations or Tribes.*

In "Kansas or Kaw Tribe of Indians *vs.* United States", No. F-64, (Pamphlet, pages 1-42, inclusive) decided December 3, 1934, it was held (page 42):

> "During this period the United States expended for the joint benefit of the Tribes attached to these Agencies, *over and above the amount it was obligated to expend by Treaty or otherwise* * * *",

thus supporting the contention as to *Treaty obligations and undertakings* in the expenditure of moneys.

In "Crow Nation or Tribe *vs.* United States", No. H-248 (Pamphlet, 1-31), decided March 4, 1935, the court makes a very definite distinction between moneys expended in pursuance of *Treaty obligations)* and *"non-obligatory"* and *"non-Treaty"* expenditures.

In "The Duwamish (and others) *vs.* The United States", No. F-275, decided June 4, 1934 (Pamphlet, 1-59), it was held (page 57):

> "* * * we are of the opnion that in this case it was the intent and purpose of Congress to charge the plaintiffs with all sums disbursed for their benefit *over and above those provided for in Treaty or other obligations.*"

We have furnished no authorities upon the contention that where the *Nations,* as such are the *plaintiffs,* no "Gratuity Offsets" may be allowed except as to moneys expended for the benefit of *such plaintiffs;* and that moneys expended for the benefit of *individuals,* in connection with properties *individually patented to, and owned by,* them, are not allowable "Gratuity Offsets" against the *plaintiff Nations;* and we are assuming that such contentions are so plainly and obviously correct that they will not be opposed.

We feel sure that this Honorable Court will differentiate the Choctaw and Chickasaw Nations from the Western or Reservation Indians, and take into consideration that the former owned their lands *by Patent and under fee simple title,* and that they were careful to insert in all the Treaties with the United States, from 1820 to 1902, inclusive, specific provisions defining the *Treaty obligations and undertakings* of the United States, in the supervision of Tribal affairs; and for the division and distribution of the Tribal estates and the abolition of the Tribal Governments, in preparation for Oklahoma Statehood, in the later and final Treaties of 1898 and 1902; and that all such *Treaty ob-*

ligations and undertakings were based upon *agreements,* by both parties, to do and to perform certain things, constituting *good and valuable considerations* passing between the parties to the Treaties.

In the case of the Western or Reservation Indians, they had no ownership of their lands such as the Choctaw and Chickasaw Nations had; and they were to remain and continue as *Tribes or Bands* for an indefinite period.

In the case of the Choctaw and Chickasaw Nations, all the plans and policies of the United States (from and after the Treaties of 1898 and 1902) were to fully and completely divide and distribute the Tribal estate, and to abolish the Tribal Governments and to "go out of business", as *Nations or Tribes,* all in *preparation for Oklahoma Statehood.*

Finally, we call the attention of the court to the fact that we have carefully examined all Acts of Congress appropriating the moneys which are now set up by the United States as "Gratuities" or "Gratuity Offsets", in the instant case, and *in no one of such Acts* is there a single word or syllable that says or implies, in any manner whatsoever, that the moneys thus appropriated and expended would ever be claimed or charged against the Choctaw and Chickasaw Nations. This we respectfully submit gives tremendous support to our construction of the various Treaties which have been cited and quoted, and that the United States,

throughout the whole period, had the *same understanding* regarding its *Treaty obligations and undertakings.*

We are not contending that "Gratuities", as such, and when properly defined, are not allowable, as offsets, under the Act of 1935.

The whole question is: "What are 'Gratuities', and what, if any, are allowable?"

We contend that the moneys set up by the United States, in the instant case, are not "Gratuities", when fairly considered in the light of the *Treaty obligations and undertakings* of the United States; and that they should not be allowed.

VI.

CONCLUSION.

In conclusion, we can add nothing further to what has been set out in the foregoing Brief.

We have been earnest in expressing our views upon the tremendously important issues now arising; and have endeavored to be useful to the Indian plaintiffs, and helpful to the court in reaching a correct understanding of the issues in this long pending and complicated case.

Having done this as best we can, the case is now respectfully submitted for the final consideration and decision of this Honorable Court.

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and
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