SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 880

THE CHICKASAW NATION,

Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT OF SAME.

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Counsel for Petitioner.

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Proceedings in the Court Below.

Your petitioner, the Chickasaw Nation of Indians, in support of its petition for writ of certiorari to review the judgment of the Court of Claims, upon the Transcript of Record accompanying this petition, respectfully represents:

That the original petition herein was filed in the Court of Claims on August 29, 1929 (R. 1), under the Jurisdictional Act of Congress, approved June 7, 1924 (43 Stat. 537), and the later Acts of May 19, 1926 (44 Stat. 568), and February 10, 1929 (Pub. Res. 88; 70th Congress, 2nd Session), amending the same;

That the amended petition herein was filed by leave of Court, on September 19, 1936 (R. 1), and the same was

validated by the Act of Congress, approved August 16, 1937 (Public 296; 75th Congress, 1st Session);

That the decision of the Court of Claims was rendered on April 4, 1938 (R. 10-14), dismissing the petition of the plaintiff;

That plaintiff's motion for new trial was filed on June 2, 1938 (R. 15), and the same was overruled on November 14, 1938 (R. 15);

That plaintiff's second motion for new trial was filed, by leave of court, on January 19, 1939 (R. 15), and on that date, the Court of Claims, in a memorandum opinion, overruled the same, and modified its decision of April 4, 1938, by holding as follows:

> (a) That plaintiff's Amended Petition, filed on September 19, 1936, was validated by the said Act of Congress, approved August 16, 1937; and
>
> (b) That the original decision of April 4, 1938, was not intended to hold that counsel for the plaintiff, in the argument, had admitted that the moneys involved "were expended for the benefit of the Nation"; and

That, upon the application of the plaintiff, the Court of Claims, on February 23, 1939, duly certified the Transcript of Record which is attached to this petition for writ of certiorari.

Summary and Short Statement of Matter Involved.

The following is a summary of the events, in the division and distribution of the *entire Tribal estate* of the Chickasaw Nation, out of which the instant case arises:

The passage of Section 16 of the Act of Congress of March 3, 1893 (27 Stat. 612), was the first step taken in the consummation of the comprehensive and far reaching plans of the United States, for the annihilation of the common ownership of the entire Tribal estates of the Five Civilized Tribes, and the abolition of all Tribal Governments and Tribal relationships, in preparation for the creation, and its admission to the Union, of the new State of Oklahoma.

That law provided for the creation of the "Commission to the Five Civilized Tribes", and directed that agreements be secured, if possible, to carry out these objectives of the United States.

The recorded history of those times shows that the Indians, relying upon the guaranties of the United States (in former treaties), that they would never be disturbed in the common ownership of their Tribal lands and properties, the enjoyment of their Tribal relationships and the operation of their Tribal Governments, were loath to accede to these demands of the United States.

Therefore, the negotiations continued, without results, for several years; and, in the Choctaw and Chickasaw Nations, finally resulted in the "Atoka Agreement", ratified by Act of Congress of June 28, 1898 (30 Stat. 495).

It was soon found that this agreement was not sufficient to fully accomplish these objectives; and it was followed, and made complete, by the "Supplementary Agreement" of 1902, ratified by Act of Congress of July 1, 1902 (32 Stat. 641).

In these two Agreements (ratified by Acts of the Congress), it was provided:

> (1) That citizenship rolls, containing the names of those members of the Tribes or Nations who were living on *September 25, 1902,* shall be prepared and approved;
>
> (2) That no child born *after September 25, 1902,* shall be entitled to enrollment; and no person whose name does not appear upon such *approved rolls* shall *"in any manner"* whatsoever, participate in the distribution of common property;
>
> (3) That each *enrolled citizen* shall receive an allotment of land, of equal value;

(4) That all surplus lands, after allotments, and all other common property, shall be sold, and the moneys resulting therefrom (together with all other moneys held by the United States), shall be paid out per capita; and

(5) That the Tribal Governments shall cease on *March 4, 1906;* and thereafter, all Choctaws and Chickasaws shall become citizens of the United States.

This great work under the plan thus agreed upon, began; but, apparently, because of its magnitude, could not be completed within the time fixed in the agreements (Acts of the Congress).

In the meantime, children continued to be born to enrolled members of the Tribes. Under the law then in force, children born *after September 25, 1902,* were excluded from enrollment, and from participation, "in any manner" whatsoever, in common property.

So, since the Tribal estate was still undergoing the process of division and distribution, and the consummation of the objectives of the United States would not thereby be retarded, and since there were still ample lands and moneys available for full and equal shares for such "new born" children, it was deemed advisable, by the Congress (and agreed to by the Indian Nations), that the citizenship rolls might be re-opened, *for a limited time,* for the enrollment of children born *after September 25, 1902.*

Accordingly, Section 2 of the Act of Congress of April 26, 1906 (34 Stat. 137), was passed, providing that children born to enrolled citizens, and living *on March 4, 1906,* might be enrolled, and further providing that the citizenship rolls be *finally and forever closed,* as of that date, and *fully completed* not later than *March 4, 1907.*

Then come the laws for allotments, and for the sale of all residue lands, after allotments, and for the per capita

distribution of the proceeds (together with all other moneys) among the *enrolled citizens* of the Nations.

(These basic and governing laws, providing for the division and distribution of the *entire Tribal estate* to *enrolled citizens,* and *excluding all other persons,* are set out in this petition for Writ of Certiorari, under the following caption of "RELEVANT PARTS OF STATUTES INVOLVED").

Notwithstanding the plain provisions of these laws, the Secretary of the Interior has bestowed partial shares of common moneys (amounting to a large total sum) upon persons *not so enrolled,* who were *excluded from enrollment,* and who had no legal right to share in common properties, *"in any manner"* whatsoever.

In doing so, the Secretary of the Interior has apparently acted under an erroneous construction of the intentions and purposes of the Congress, in the passage of Section 10 of the Act of Congress approved April 26, 1906 (34 Stat. 137), and the later Acts extending the same, authorizing him to merely "assume the control and direction" of the Tribal Schools of the Chickasaw Nation.

We contend that this Act was a part of, and subordinate to, the basic and governing laws limiting the enjoyment of common properties to *enrolled citizens,* and to none other; that it neither repealed nor amended the same; and that such expenditures for *unenrolled persons* were illegal, and are recoverable in the instant case.

(In our Brief which follows—Subdivision II—we shall quote that Act, and set out our contentions regarding the same.)

Relevant Parts of Statutes Involved.

The basic and governing laws providing for the division and distribution of the *entire Tribal estate* among the

enrolled citizens thereof, and to *none other,* and further providing that persons whose names do not appear upon the *approved rolls,* have no legal right to share therein, *"in any manner",* whatsoever, are set out below.

Sections 27, 28, 30 and 35, Choctaw and Chickasaw "Supplementary Agreement" (Act of July 1, 1902; 32 Stat. 641) are as follows:

Section 27:

> "The rolls of the Choctaw and Chickasaw citizens and Choctaw and Chickasaw freedmen shall be made by the Commission to the Five Civilized Tribes, in strict compliance with the act of Congress approved June 28, 1898 (30 Stat. 495), and the act of Congress approved May 31, 1900 (31 Stat. 221) * * *."

Section 28:

> "The names of all persons living on the date of the *final ratification of this agreement* (September 25, 1902) entitled to be enrolled as provided in section 27 hereof, shall be placed upon the rolls made by said Commission; *and no child born thereafter* to a citizen or freedman and no person intermarried thereafter to a citizen *shall be entitled to enrollment or to participate in the distribution of the tribal property of the Choctaws and Chickasaws".* (Italics ours.)

Section 30:

> "For the purpose of expediting the enrollment of the Choctaw and Chickasaw citizens and Choctaw and Chickasaw freedman, the said Commission shall, from time to time, and as early as practicable, forward to the Secretary of the Interior lists upon which shall be placed the names of those persons found by the Commission to be entitled to enrollment. The lists thus prepared, when approved by the Secretary of the Interior, shall constitute a part and parcel of the *final rolls of the citizens of the Choctaw and Chickasaw tribes* and of Choctaw and Chickasaw freedmen, *upon which allotment of land and distribution of other tribal property shall be made as herein provided.* Lists shall be made up and forwarded when contests of whatever character shall have been determined, and when there shall have been submitted to and approved by the Secretary of the Interior lists embracing names of all those *lawfully entitled to enrollment, the rolls shall be deemed complete* * * *" (Italics ours.)

Section 35:

> "No person whose name does not appear upon the rolls prepared as herein provided shall be entitled to *in any manner* participate in the distribution of the *common property of the Choctaw* and *Chickasaw tribes,* and those *whose names appear thereon shall participate in the manner set forth in this agreement."* (Italics ours.)

Then, for the reasons stated, and under the conditions then existing, the Congress (with the consent of the Nations) deemed it advisable to reopen the *citizenship rolls for a limited time.*

Accordingly, Section 2 of the Act of Congress of April 26, 1906 (34 Stat. 137), providing for the enrollment of such "new born" children, living *on March 4, 1906,* was passed, as follows:

> "That for ninety days after approval hereof application shall be received for enrollment of children who were minors *living March fourth, nineteen hundred and six,* whose parents have been enrolled as members of the Choctaw, Chickasaw, Cherokee, or Creek Tribes, or have applications for enrollment pending at the approval hereof." (Italics ours.)

Then, as its final act, and in order that there might be no deviation from the original plan limiting rights in *common*

properties to *enrolled citizens,* and no misunderstandings or misconstructions of the purposes and intentions of the Congress to finally and forever close the citizenship rolls, and to thus determine all questions as to *who should,* and *who should not,* be entitled to *enrollment,* and to the legal right to share in the Tribal estate, a *proviso* was inserted in the *same section of the same Act,* as follows:

> "*Provided,* That the rolls of the tribes affected by this act shall be fully completed *on or before the fourth day of March, nineteen hundred and seven, and the Secretary of the Interior shall have no jurisdiction to approve* the enrollment of *any person after said date.*" (Italics ours.)

The *entire Tribal estate* of the Chickasaw Nation was to be divided and distributed among the *enrolled citizens* thereof, and to none other; and each enrolled citizen was to receive his *full and equal share* of all lands and moneys.

As to the allotments of lands, the Choctaw and Chickasaw "Supplementary Agreement" (Act of Congress of July 1, 1902; 32 Stat., 641), provided:

Section 11:

> "There shall be allotted to each member of the Choctaw and Chickasaw tribes, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to three hundred and twenty acres of the average allotable land of the Choctaw and Chickasaw Nations * * *."

It was then provided (in Section 14 of the same Agreement and Act of Congress) that the residue of all lands, after allotments, should be sold, and the proceeds distributed, as follows:

> "When allotments as herein provided have been made to all citizens and freedmen, the residue of lands not herein reserved or otherwise disposed of, if any there be, shall be sold at public auction under rules and regulations and on terms to be prescribed by the Secretary of the Interior, and *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 per capita* as other funds of the tribes." (Italics ours.)

In the "Atoka Agreement" (Act of Congress of June 28, 1898; 30 Stat. 495), provision was made for the per capita distribution of *all moneys,* from whatever source; and this provision was not changed when the later "Supplementary Agreement" of 1902 (Act of July 1, 1902; 32 Stat. 641) came to be made, and has stood without repeal or amendment, throughout all the years.

Questions Presented.

The questions presented, and to be passed upon, in the event this petition for writ of certiorari to the Court of Claims shall be granted, are as follows:

I.

Did the laws quoted and relied upon, govern the division and distribution of the *entire Tribal estate* of the Chickasaw Nation to *enrolled citizens,* and to none other, and command that no person whose name does not appear upon the *approved citizenship rolls had* the legal right to share therein, "*in any manner*" whatsoever; and were they *valid laws,* and *were they binding upon the administrative officers of the United States?*

Were the acts of the Secretary of the Interior in bestowing shares of common moneys upon persons whose names did not appear upon the *approved citizenship rolls,* illegal;

and are the moneys so expended, recoverable in the instant case?

II.

Was Section 10 of the Act of Congress of April 26, 1906, merely authorizing the Secretary of the Interior to "assume the control and direction" of the Tribal Schools, only an integral part of, and subordinate to, the basic and governing laws limiting the enjoyment of common properties to *enrolled citizens,* and to none other?

Did that Act, or the later Acts extending the same, repeal or amend such basic and governing laws, or did it confer upon the Secretary of the Interior the legal power and authority to bestow shares of common properties upon persons whose names did not appear upon the approved citizenship rolls?

III.

Was there a Chickasaw Nation, as such, in so far as the division and distribution of common properties were concerned, and did the moneys involved in the instant case belong to *enrolled citizens,* and to none other; and, since such moneys were expended for persons whose names did not appear upon the *approved citizenship rolls,* and who had no legal right to share therein, "*in any manner*" whatsoever, were they expended "*for the benefit of the Chickasaw Nation as a whole?*"

Reasons Relied on for Allowance of Writ.

The reasons relied on for the allowance of the writ of certiorari herein prayed for, are that the Court of Claims has erred, as we respectfully contend, in its findings of fact and conclusions of law, in deciding the instant case, upon the questions arising herein, and set out in this petition, under the preceding caption of "Questions Presented."

Our further reasons are that the Court of Claims, in passing upon the issues in the instant case, has erred in not giving proper effect to the applicable decisions of this Honorable Court.

Wherefore your petitioner, the Chickasaw Nation of Indians, prays that a writ of certiorari shall issue to the Court of Claims, for a review and determination of the questions herein arising, and for such other and further relief as may be found to be appropriate.

The Chickasaw Nation of Indians,
By Melven Cornish,
William H. Fuller,
Special Attorneys.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

In the foregoing petition for writ of certiorari, the "Questions Presented" are set out under that caption; and, in the following argument, they will be restated, and our contentions thereon supported by authorities, will occur in the same order.

I.

The laws quoted and relied upon, governed the division and distribution of the entire Tribal estate of the Chickasaw Nation to enrolled citizens, and to none other, and commanded that no person whose name does not appear upon the approved citizenship rolls, had the legal right to share therein, "in any manner" whatsoever; and such laws are valid, and binding upon the administrative officers of the United States.

The acts of the Secretary of the Interior, in bestowing shares of common moneys upon persons whose names did not appear upon the approved citizenship rolls, were illegal.

Such moneys so expended are recoverable in the instant suit.

The basic and governing laws relied upon, and supporting the contentions above stated, are fully set out in the preceding petition for writ of certiorari (under the caption of "Relevant Parts of Statutes Involved"), and will be referred to, but not repeated here.

The plan fixed and agreed upon between the United States and the Chickasaw Nation (and ratified by Acts of the Congress), in the consummation of the objectives of the United States, was that the *entire Tribal estate* should be divided

and distributed among the *enrolled citizens*, and to none other, and that no person not so enrolled could share therein, "*in any manner*" whatsoever.

This plan arose out of the best minds in the Indian Service of the United States, in the Choctaw and Chickasaw Nations and in the Congress; and we respectfully submit, it is so plain and clear that there should be no misunderstandings or misconstructions.

All realized that, before this plan could be accomplished, the *entire Tribal estate* must be completely and finally divided and distributed; and that, for that purpose a *divisor* must be constructed and adopted.

Thus, the enrolled citizens, living on *September 25, 1902* (plus the "new born" children of enrolled citizens, living on *March 4, 1906*), was the divisor which was finally constructed and adopted.

The Congress might have again re-opened the citizenship rolls, for the enrollment of persons found entitled to enrollment, and born after that date; but *it did not do so.* The final date, of *March 4, 1906,* for enrollments and for sharing in the benefits of common property, stands, as the final word and Act of the Congress, from that day to the present time.

In determining *the law* governing the division and distribution of the Tribal estate, speculations as to what existing problems brought about its passage in that form, are not in order; but rather, the only justifiable inquiries are: What is *the law*; and is it *valid and binding*?

If, however, other inquires are permissible, it is not difficult to see what was in the minds of the parties to the Agreements, and the Congress.

Here was a tremendous and complicated undertaking, in the division and distribution of the *entire Tribal estate* which had to be performed, and finished, in order that the objectives of the United States might be consummated.

The interested parties, and the Congress, had the *power to act,* and *they acted,* and *they acted in this way;* and, we respectfully submit that the action thus taken, was final and valid, and the administrative officials of the United States are bound thereby.

It will be shown, in another part of this brief, that the parties who validly constructed and adopted this plan, providing that only *enrolled citizens* might share in the division and distribution of the *entire Tribal estate,* and finally and forever closing the *citizenship rolls* as of March 4, 1906, neither ignored nor neglected the educational welfare of the children of *enrolled citizens* born *after March 4, 1906.*

Such children (along with all other Indians) were made citizens of the United States and of the State of Oklahoma, with all rights and privileges, including the right to attend the *public schools;* and large sums of money were appropriated by the United States, from year to year, *"in aid of common schools",* for the special assistance and accommodation of Indian children attending the *public schools* of Oklahoma.

Under this law, the great work of the division and distribution of the entire Tribal estate has gone forward to completion, and the objectives of the United States have been accomplished, *with one exception.*

That exception is that the Secretary of the Interior has expended, for the use and benefit of persons who were *not enrolled citizens,* a large sum of common moneys, in which they had no legal right to share, "in any manner" whatsoever.

The Court of Claims finds (in Finding 2, R. 10), as follows:

> "During the years 1913 to 1932, inclusive, there was expended by the defendant out of tribal funds belonging to the Chickasaw Nation, the sum of $788,421.70 for the education of children who were not on the final rolls of that Nation * * *."

The Court of Claims then adds:

> "* * * but who were children of members of that tribe which had been duly enrolled."

Is it of any importance (even if that be the fact), in determining legal property rights, that such persons were the children of enrolled citizens?

They were born *after March 4, 1906* (the date when enrollments finally and forever ceased); and even if they had been otherwise eligible for enrollment, they were, definitely and specifically, excluded from enrollment, by Section 2 of the Act of April 26, 1906 (34 Stat. 137), and *all persons not enrolled* were without the legal right to share in common properties, "in any manner" whatsoever, under Section 35 of the "Supplementary Agreement" (Act of Congress of July 1, 1902; 32 Stat. 641).

It is a matter of public record that the *enrolled citizens* of the Chickasaw Nation numbered more than 6,000. Since March 4, 1906, several thousand children of enrolled citizens have been born. They are referred to as *"too lates";* and they claim and assert no rights, nor any one for them, in either *common lands* or *common moneys.*

The distinguished Governor of the Chickasaw Nation (who has served, in that capacity, for more than forty years) has two granddaughters, who are now twenty-four and twenty-two years old, respectively; and both were born *after March 4, 1906,* and are *not enrolled.*

They belong to the "too late" class; and neither they, nor any one for them, claim or assert any rights in the common lands or moneys.

The rights, or lack of rights, of the persons here involved, to share in *common lands and moneys,* differ, in no wise, from the children of the Governor of the State of Oklahoma!

Finding 2 of the Court of Claims (R. 10) sums up the persons and moneys involved in the instant case, by holding

that, from 1913 to 1932, the sum of $788,421.70 was expended for persons "* * * *who were not on the final rolls* * * *".

A mathematical calculation, applied to this finding (based upon the tabulations of official records) and to the dates established by the applicable Acts of Congress, will show how this sum of money, alleged to have been illegally expended, was arrived at, and how the instant case arose.

Unenrolled persons born *soon after March 4, 1906,* would be six years old, and of school age, in 1913; and then, and in the years immediately following, they began to be admitted to the Tribal Schools.

As the years progressed, and as the *enrolled citizens* passed beyond school age and out of the schools, *non-enrolled* persons increased, their percentage in the Tribal Schools, therefore, became greater.

Necessarily from 1906 to 1913, the Tribal Schools were attended wholly by *enrolled citizens;* and from 1913 to 1923 and 1924, by both *enrolled citizens* and *non-enrolled persons,* and during this time, the former *decreased* and the latter *increased.*

By 1923 and 1924, all *enrolled citizens* had passed from school age, and out of the Tribal Schools; and from 1923 and 1924, to the time when the use of Tribal moneys ceased (1932), the socalled Tribal Schools were attended *wholly* by persons who were *not enrolled!*

How, we inquire, do the rights of the persons involved in the instant case, upon whom the Secretary of the Interior, in violation of the basic laws governing the division and distribution of the Tribal estates, has chosen to bestow shares of *common moneys* belonging to the *enrolled citizens,* differ from the legal rights, or lack of legal rights, of the many thousands of persons similarly situated? Or of the children of the citizens of other Indian Nations, or the children of white tenant farmers?

Whence comes the power and authority of the Secretary of the Interior to nullify the solemn provisions of valid Acts of the Congress governing the division and distribution of the Tribal estate, and to bestow moneys belonging to *enrolled citizens* upon persons *not enrolled,* and definitely and specifically *excluded from enrollment?*

There are many decisions of this Honorable Court (and of other courts) holding that the approved rolls of the Chickasaw Nation (and the other Five Civilized Tribes) limit the enjoyment of *common properties* to *enrolled citizens*; and the holdings therein, which directly apply to the instant case will be quoted, and emphasized by us.

In the case of *Garfield* v. *Goldsby* (211 U. S. 249), involving enrollment in the Chickasaw Nation it is held:

> "Upon the approval of the Secretary of the Interior, these lists constitute a part and parcel of the final rolls of citizens of the Choctaw and Chickasaw Tribes * * * *upon which allotments of lands and distribution of tribal property shall be made.*"

In *Fleming* v. *McCurtain* (215 U. S. 56), involving enrollment in the Choctaw Nations, it is said:

> "The Circuit Court examined the Treaty and conveyance under which the plaintiffs claim and held that they did not confer the rights alleged in the bill; that the right to share in the distribution depended on *membership* in one of the two tribes, * * *; that who were members of the respective tribes, and entitled to enrollment as such, was *a matter for Congress to determine;* that Congress had adopted certain rolls when finally approved by the Secretary of the Interior; that the Secretary had acted and the *plaintiffs had been excluded;* that his action was final, and the court had no jurisdiction in the case."

In affirming the decision of the lower court, this Honorable Court held:

> "* * * by the Act of July 1, 1902 (32 Stat., 641) a further agreement was ratified, which again *excluded all except those whose names were on the roll* (Art. 35)";

and also,

> "They (the plaintiffs) disclose that their names were *not upon the rolls,* and they show no reason for our not accepting the rolls and decision as final *according to the terms of the distributing acts*"; (citing many cases to the same effect).

In the case of *Gritts* v. *Fisher* (224 U. S. 640), involving enrollment, and property rights in the Cherokee Nation (the laws and conditions being similar to those involved in the instant case), it was held that only *enrolled citizens* had the legal right to share in *common properties,* but that the Act of April 26, 1906 (34 Stat. 137), authorizing the enrollment of "new born" children of enrolled citizens, born and living on *March 4, 1906,* was valid; that such children might be enrolled, and receive full and equal shares of common property, along with all other enrolled citizens; and that such enrollment was not an interference with the vested rights of citizens already enrolled.

The instant case relates, solely and wholly, to persons *not enrolled,* and who were born *after March 4, 1906,* and who were *excluded from enrollment*; and the *Gritts* v. *Fisher* case has no application whatsoever to *that class* of persons.

The Court of Claims finds (Finding 2, R. 10) that the persons here involved were "children of members of that tribe which had been duly enrolled", and holds that, *therefore* (notwithstanding the fact that they were born *after March 4, 1906*), they were legally entitled to the common moneys expended for them, and here involved.

It is respectfully contended that the legal right of *each individual* to share in common properties, must stand or fall upon his *enrollment or non-enrollment,* irrespective of the enrollment of *any one else;* and this contention is fully sustained, in the *Gritts* v. *Fisher* case, now under consideration, as follows:

> "The right of each *individual* to *participate in the enjoyment* of such property *depended upon tribal membership*".

The case of *Sizemore* v. *Brady* (235 U. S. 441) follows, in the main, the holdings in the *Gritts* v. *Fisher* case, and uses precisely the same language, in holding that the right of *each individual* to enjoy common property, depends upon *tribal membership.*

In the case of *United States* v. *Wildcat* (244 U. S. 111), involving enrollment in the Creek Nation, where the laws and conditions were also similar, it is held:

> " 'The *rolls so made by said Commission'*, the Act continues, '*when approved by the Secretary of the Interior,* shall be the *final rolls of citizenship* of said tribe, upon which the *allotment of all lands* and the *distribution of all moneys and other property* of the tribe shall be made, and *to no other persons'.*"

In the case of *Ligon* v. *Johnston, et al.* (169 Fed. 670), involving enrollments in the Chickasaw Nation, the United States Circuit Court of Appeals for the Eighth Circuit, held:

> "The rolls so made were to be final, when approved by the Secretary of the Interior, and those whose names appear thereon *could alone participate in the distribution of tribal property.* The act of April 26, 1906 (34 Stat. 137) providing for the final disposition of the affairs of the tribes, required the rolls to be *fully completed* by March 3, 1907, and *deprived the Secretary*

> *of the Interior of jurisdiction to approve the enrollment of any person after that date. The rolls were completed and the time for change expired.''*

In *Henry Gas Company* v. *United States* (191 Fed. 132), involving enrollments in the Creek Nation, the same court held:

> ''The *enrollment within the time required,* and *as of the date fixed, determines the right of the citizen to an allotment.''*

In *Wadsworth* v. *Crump* (53 Okla. 728), involving enrollment in the Seminole Nation, and under laws and conditions identical with those involved in the instant case, the Supreme Court of Oklahoma held:

> ''Upon the construction of these provisions depends the correct determination of this case. It should be borne in mind that the result which Congress intended to secure was the allotment in severalty of the tribal lands and the distribution of other tribal property and moneys held by the Seminole Indians as a tribal property and moneys held by the Seminole Indians as a tribe, and the preparation of the rolls provided for by the above legislation was to *determine the number of individual Indians entitled to share in the distribution of such tribal property,* so that a basis could be found upon which to make such distribution.''

The Court of Claims relies upon the two cases of *Gritts* v. *Fisher* and *Sizemore* v. *Brady* (above cited), in holding that the *unenrolled persons,* born *after March 4, 1906,* and here involved, were legally entitled to the common moneys bestowed upon them.

In the opinion (R. 14) it says:

> ''The last case involved the construction of a *statutory agreement that parallels in every particular the statute upon which plaintiff relies* * * *.'' (Italics ours.)

Yes, but what ''statutory agreement''?

The answer is: Section 35 of the ''Supplementary Agreement'' (Act of Congress of July 1, 1902; 32 Stat. 641) which provides that no person not enrolled shall share in ''any manner'' in common properties.

Both the *Sizemore* v. *Brady* and *Gritts* v. *Fisher* cases, deal, solely and wholly, with ''new born'' children born and living on *March 4, 1906.*

Such children *were enrolled;* but these cases hold nothing as to children born *after March 4, 1906,* who are here involved, and who were *excluded from enrollment.*

How then we inquire, may the Court of Claims rely upon these cases?

The Court of Claims (relying upon the same cases, R. 14) further says:

> ''* * * Congress could 'adopt another mode of distribution or pursue any other course which to it seemed better for the Indians'.''

All agree as to what the Congress *could do,* in the matter of *administration,* under ''pertinent Constitutional restrictions'', and what it *may not do,* by way of *confiscation.*

The question here is: *What did the Congress do,* as to the *unenrolled* persons here involved?

It, finally and forever, *closed the rolls,* as of *March 4, 1906,* under the laws then in force, providing that no person *not enrolled,* should, ''in any manner'' whatsoever, share in common properties; and such laws have never been repealed or amended, and the rolls thus closed have never been reopened.

This Honorable Court has defined, and made plain, what may be done by the United States, under appropriate Acts of the Congress, in the matter of *administration,* and what may not be done, in the matter of *confiscation,* in dealing with the common and undistributed properties of Indian

Nations or Tribes, in a long line of decisions, beginning with the great cases of *Cherokee Nation* v. *Georgia* and *Worcester* v. *Georgia,* and extending on down to the present time.

The rules laid down, in the many cases decided throughout preceding years, regarding *plenary power to administer,* and the *lack of power to confiscate,* are summed up in the late case of *United States* v. *Creek Nation* (295 U. S. 103), in which leading cases, to the same effect are cited, and in which it is held:

> "While extending to all appropriate measures for *protecting and advancing the tribe,* it was *subject to limitations inhering in such a guardianship* and to *pertinent Constitutional restrictions.* It did not enable the United States to *give the tribal lands to others,* or to *appropriate them to its own purposes,* without rendering, or assuming an obligation to render, *just compensation* for them; for that 'would not be an exercise of guardianship, but an act of confiscation'." (Italics ours.)

By applying the law, as thus declared, to the issues in the instant case, it is respectfully contended:

> (1) That the passage of the particular Acts of the Congress under consideration, providing that only *enrolled citizens* may share, *"in any manner"* whatsoever, in common properties, was a valid exercise of the *plenary power* of the United States to *administer* the common and undistributed properties of the Chickasaw Nation or Tribe; and such Acts are valid and binding upon the administrative officials of the United States; and
>
> (2) That the acts of the Secretary of the Interior, in bestowing shares of common properties (belonging to *enrolled citizens*), upon persons who were *not enrolled,* and who had no legal right to share therein, were illegal; and the moneys so expended are recoverable in the instant suit.

In an apparent effort to escape the binding force of the basic and governing laws providing that *only enrolled citizens* may share in common properties, and that *unenrolled persons* may not share therein, "in any manner" whatsoever, the Court of Claims, as we contend, places an erroneous construction upon the word *"distribution"*.

In the opinion (R. 14), it is said:

> "We think the *'distribution'* referred to in the Act of 1902, referred to the distribution of the Chickasaw property which was *specified in the act* and was limited in its meaning." (Italics ours.)

What property, we inquire, was not *"specified in the Act"?*

We have set out (in the foregoing petition for writ of certiorari, under the caption: "Relevant Parts of Statutes Involved") the various Sections of the Choctaw and Chickasaw "Supplementary Agreement" (Act of Congress of July 1, 1902; 32 Stat. 641) providing that the *entire Tribal estate* (consisting of *all lands and all moneys*) were to be divided and distributed among the *enrolled citizens,* and to none other. Since the Sections of *"the Act of 1902"* distributed *all lands and all moneys,* constituting the *entire Tribal estate,* to the *enrolled citizens,* and to none other, what other property was there that might have been bestowed upon *unenrolled persons?*

We can do no more, by way of showing that this holding of the Court of Claims is erroneous, than to point to the plain provisions of these basic and governing laws.

Apparently, the Court of Claims, is, itself, not any too sure of the soundness of its holding, in this respect, for it adds:

> *"However this may be,* we are of the opinion that Congress did not intend, nor did the Indians understand, that the absolute control of the tribal funds was

to be so vested in the Indians by this legislation that *none of these funds* could be used for the benefit of the tribe as a whole''.

It is not contended that the ''absolute control of the tribal funds'' was to be ''vested in the Indians''.

Exactly the opposite. The control of the tribal funds *was taken away from the Indians,* in carrying out the objectives of the United States, and their Tribal Governments and Tribal relationships were abolished.

Does the Court of Claims mean to say, and to hold, that *unenrolled persons* may *not* legally ''participate'' in the ''distribution'', to the extent receiving *full and equal shares,* of lands and moneys, but *may participate,* to the extent of receiving *partial shares of moneys?*

It is respectfully contended that the laws relied upon ''say what they mean, and mean what they say''; and that the strained and narrowed construction of the Court of Claims is erroneous, and that it should not stand.

II.

Section 10 of the Act of Congress of April 26, 1906, relating to Tribal Schools, was only an integral part of, and subordinate to, the basic and governing laws limiting the enjoyment of common properties to enrolled citizens, and to none other.

Neither that Act, nor the later acts extending the same, repealed or amended such basic and governing laws, nor conferred upon the Secretary of the Interior the legal power and authority to bestow shares of common properties upon persons whose names do not appear upon the approved citizenship rolls.

In effect, the Court of Claims, in its opinion (R. 12-13), holds that, notwithstanding the plain provisions of the basic and governing laws, limiting the enjoyment of common properties to enrolled *citizens,* and that no person whose name does not appear upon the approved citizenship rolls may *''in any manner''* whatsoever, share in common properties, the Secretary of the Interior had the legal power and authority (under Section 10 of the Act of April 26, 1906; 34 Stat. 137) to bestow shares of common moneys upon persons who were not enrolled, and here involved.

For the information and use of the Court, we are here setting out the pertinent parts of that law, as follows:

> ''That the Secretary of the Interior is hereby authorized and directed to assume control and direction of the schools in the * * * Chickasaw * * * Tribe * * * *retaining tribal educational officers,* subject to dismissal by the Secretary of the Interior, and *the present system* as far as practicable, *until such time as a public school system shall have been established* under Territorial or State Government, and provision made thereunder *for the education of the Indian children* of said tribes, and he is hereby authorized and directed to set aside a sufficient amount of any funds, invested or otherwise, in the Treasury of the United States, belonging to said Tribes * * * and any of the *tribal funds* so set aside *remaining unexpended when a public school system under a future State or Territorial government has been established,* shall be distributed per capita among the *citizens of the Nations,* in the same manner as other funds.'' (Italics ours.)

In so holding, the Court of Claims says:

> ''Obviously Congress intended that the Chickasaw schools carried on by the Secretary with the funds of that tribe were to be attended by all Chickasaw children whether or not they were enrolled members of the tribe and this intention was carried out. The funds were used to educate these children whether or not they were enrolled and it is contended that this constituted a violation of the Choctaw-Chickasaw Supplementary Agreement referred to above.''

This squarely raises the decisive question in the instant case:

> Was Section 10 of the Act of April 26, 1906, a part of, and subordinate to, the basic and governing laws limiting the enjoyment of common properties to *enrolled citizens,* or did the Congress thereby intend to confer upon the Secretary of the Interior the power and authority to bestow shares of such common properties upon persons not enrolled?

We say that the Congress did not so intend; and that its intentions, in this respect, are best shown by the Act itself, considered in connection with other provisions of the *same act,* and passed at the *same time.*

The Act provided that the Tribal Schools should continue, only,

> "until such time as a *public school system* shall have been established under Territorial or State government * * * *for the education of the Indian children* of said tribes * * *."

The Congress thus foresaw that, in the future, there would be *unenrolled* Indian children, with no legal right to attend *Tribal Schools,* out of common moneys belonging to *enrolled citizens;* and what the Congress foresaw, actually transpired. When Oklahoma *public schools* were established, *all Indian children,* whether *enrolled* or *unenrolled,* had the same right to attend *public schools* as all other citizens of the State, as will be shown.

Both Section 10 (relating to Tribal Schools), and Section 2 (finally and forever closing the citizenship rolls) are parts of the *same act of April 26, 1906,* and the final Act of the Congress upon the subject of citizenship rolls.

Therefore Section 10 of the Act of 1906, namely relating to Tribal Schools, was a part of, and subordinate to, the basic and governing laws limiting the enjoyment of common properties to *enrolled citizens.*

Does Section 10 of the Act, merely continuing the Tribal Schools until State or Territorial public schools shall be available, evince any intention, upon the part of the Congress, to repeal or amend such basic and governing laws, defining *who should* and *who should not* share in common properties?

We say not; and to ascribe that intention to the Congress is to lose sight of the objectives of the United States, to divide and distribute the *entire Tribal estates,* and the abolition of the Tribal Governments and Tribal relationships, in preparation for the coming of the new State of Oklahoma.

Then, the authority conferred upon the Secretary of the Interior, in that Act, to "assume the control and direction" of the Tribal Schools, was a continuing authority, and until 1912, required no further Act of Congress to extend the same.

Then apparently, the Congress concluded that the annual expenditure of indefinite sums of Tribal moneys was not good administration.

Accordingly, the Act of August 12, 1912 (37 Stat. 497), was passed, providing that "no moneys shall be expended from tribal funds * * * without specific appropriation by Congress", but with the proviso that Tribal moneys might be expended for

> "* * * tribal and other Indian Schools, for the current fiscal year and under existing law * * *."

Then comes the second proviso of the Act, as follows:

> "That the Secretary of the Interior is hereby authorized to continue the Tribal Schools of the Choctaw and Chickasaw Nations, for the current fiscal year."

It will be noted that Tribal Schools were excepted, but that moneys might be expended "for the current fiscal year", and "*under existing law*"; that is, with all the limitations

and restrictions contained in Section 10 of the Act of April 26, 1906.

Therefore, if, under the former Act of 1906, the Secretary of the Interior was limited and restricted, in the expenditures of common moneys for Tribal Schools, to its *enrolled citizens,* the later Act of 1912 neither added to, nor subtracted from, his power and authority derived from the *"existing law"* of 1906.

The Court of Claims finds (Finding 2, R. 10) that the sum of $788,421.70 was expended for persons who were *not enrolled members* of the Chickasaw Nation.

Of this total sum, $587,301.63 was expended in the operation of Bloomfield Seminary (a Chickasaw Tribal School), and $201,120.07 was expended in *Seven Contract Schools;* that is, privately owned schools, and under contracts with the Secretary of the Interior.

That explains the use of the words, "tribal and other Indian Schools", in the Act of August 12, 1912.

There was no relaxation of the basic and governing laws that *only enrolled citizens* had the legal right to share in common properties, but the Secretary of the Interior was given permission to avail himself of the facilities of *private or contract schools,* provided, of course, that the persons for whom common moneys were expended were *enrolled citizens.*

It was of no importance as to *where* such moneys were expended.

The important inquiry is: Were they expended for *enrolled citizens,* or for persons *not enrolled,* and who had no legal right to share therein, *"in any manner"* whatsoever?

Our whole contention applies to the *persons* for whom the expenditures were made.

If they were *enrolled citizens,* and thereby entitled to share in common properties, the expenditures were legal, irrespective of *where expended.*

If they were *not enrolled citizens,* and without the legal right to share, then the expenditures were illegal, and are recoverable in the instant case.

From 1913 to 1933, the authority of the Secretary of the Interior to operate the Tribal Schools, from year to year, was continued; and the language employed varies somewhat.

Some of the Acts refer to "tribal schools"; others to "tribal and other schools"; others say "for the support of schools and for tuition"; and others "for tuition and other educational purposes".

Will it do to say that, in the mere use of these varying forms of expression, the Congress thereby intended to amend or repeal its basic and governing laws, so meticulously drawn and so solemnly passed, for the guidance and control of the administrative officials of the United States, as to *who should,* and *who should not,* share in common properties?

Of course the Secretary of the Interior was authorized to operate Tribal Schools, if and when attended by *enrolled citizens,* but did the Congress intend to relieve the Secretary of the Interior of these governing and controlling laws (which governed and controlled in all other matters relating to the division and distribution of lands and moneys), and to authorize him, when *enrolled citizen* pupils ran low, and finally ran out, to keep the so-called Tribal Schools filled up with persons who were *not enrolled citizens,* and who had no more legal right to share in the common moneys belonging to the *enrolled citizens* than the children of Seminole Indians, or the children of white tenant farmers?

If the Congress had intended that children born *after March 4, 1906,* were to share in common properties, it would have again reopened the citizenship rolls; and, if found entitled, they would have been enrolled, and would

have, thereby, become entitled to *full and equal shares* of common properties, along with all other *enrolled citizens.*

But the Congress did not do so; and its final acts, in limiting shares in common properties to *enrolled citizens,* and in closing the citizenship rolls as of *March 4, 1906,* stand, without repeal or amendment, to this day.

If our contentions that the basic and governing laws limiting the legal right to share in common properties to *enrolled citizens,* have not been repealed or amended, are sound; the Secretary of the Interior was bound thereby; and if, under his authority to merely "assume the control and direction" of the Tribal Schools, he has bestowed shares of common moneys upon persons *not enrolled,* and without legal rights thereto, his acts "would not be an exercise of guardianship, but an act of *confiscation*", in the bestowal of such common moneys upon "*others*", in violation of "pertinent Constitutional restrictions."

In that event, the United States should be required to respond, to the extent of the common moneys so expended, as prayed for in the instant case.

III.

There was no Chickasaw Nation, as such, in so far as the division and distribution of common properties were concerned, and the moneys involved in the instant case belonged to enrolled citizens, and to none other; and since such moneys were expended for persons whose names did not appear upon the approved citizenship rolls, and who had no legal right to share therein, "in any manner" whatsoever, they were not extended "for the benefit of the Chickasaw Nation as a whole".

The conclusions of the Court of Claims, in its opinion, are based upon its Finding 3 (R. 10), as follows:

> "The expenditures specified in Finding 2 were for the benefit of the Chickasaw Nation as a whole."

This finding, and the conclusions based thereon, are erroneous, for the following reasons:

(1)

There was no Chickasaw Nation, as such, except as Congress permitted it to function *for a limited time,* for the consummation of the program of the United States, in the final division and distribution of the tribal estate.

"The Atoka Agreement" (Act of Congress of June 28, 1898; 30 Stat., 495), has so provided, as follows:

> "It is further agreed, in view * * * of the necessity of the continuance of the tribal governments so modified, *in order to carry out the requirements of this Agreement,* they shall continue for a period of *eight years from the fourth day of March, eighteen hundred and ninety-eight.*"

They did continue, solely and only "*to carry out the requirements of this Agreement*" until *March 4, 1906,* and then they expired, for all time; and, since then, the Governor of the Chickasaw Nation has been continued, by Acts of Congress, from year to year, and only for the purpose of cooperating with the Secretary of the Interior in passing title to the remaining tracts of lands and other properties that are sold, from time to time, and for the performance of such duties as are required by such Acts.

(2)

The objectives of the United States, in dealing with the Five Civilized Tribes, was to fully divide and distribute the Tribal estates among their *enrolled citizens,* to merge Tribal citizenship into United States citizenship (and then into Oklahoma citizenship when statehood came), and to

abolish the National or Tribal Governments and Tribal relationships, to make way for the State Government of Oklahoma.

Tribal citizenship was ended with the making of the rolls, as the sole and only basis for the division and distribution of common tribal properties; and then all Indians (whether enrolled or not enrolled), were given all the rights and privileges of citizens of the United States and the State of Oklahoma, including the right to attend public schools.

(3)

The Court of Claims has failed to grasp the distinction between the Five Civilized Tribes and the Western Reservation Indians, and that has led to many misunderstandings and errors; and, we respectfully suggest, has led to the errors in the Opinion herein.

In a word, the Western Reservation Tribes were "to go on forever", as charges of their guardian government; whereas, the Five Civilized Tribes, under the plan which related only to them, were to have their Tribal governments and Tribal relationships abolished, Tribal citizenship ended (except that their final and approved rolls were to be the measure for the division of all tribal property), all Indian citizenship merged into United States and Oklahoma citizenship, and all things "*Tribal*" and "National", were to "disappear from the face of the earth".

There will be no denial that the foregoing is a fair statement of the plan agreed upon, and carried out, in the consummation of the objectives of the United States, as reflected in the agreements and acts of Congress, and official records of the Federal Government.

No "*benefits*" could accrue to the Tribe or Nation, "as a whole", when there was no Chickasaw Nation or Tribe, as such, and had not been for some seven years prior to

the expenditure of the first illegal dollar; and the "*citizens*" were merely those persons whose names appeared upon the approved *citizenship rolls,* as of March 4, 1906, as the *divisor* for the division and distribution of the *entire tribal estate.*

They were the sole and only owners of all common properties, and were designated as *citizens* only for the purpose of distinguishing them from all other persons who were *not enrolled* and who were *excluded from enrollment,* and from the legal right to share in common properties, "*in any manner*" whatsoever.

The Chickasaw Nation was long since defunct, having (on March 4, 1906) responded to the "death sentence" to pass into oblivion, in order that the objectives of its guardian (the United States) might be accomplished, in preparing for the birth of the new State of Oklahoma.

The moneys involved in the instant case were expended from 1913 to 1932 (Finding 2, R. 10), and before the illegal expenditures began, the enrolled citizens of the former Chickasaw Nation had long since become possessed of all the rights and privileges of citizens of the United States, and the State of Oklahoma.

Likewise, the persons here involved (born after March 4, 1906, and *not enrolled*) were also in the enjoyment of the same rights and privileges.

All Indians, whether *enrolled* or *not enrolled,* were entitled to the same rights and privileges, as citizens of the State of Oklahoma, and were entitled to attend the public schools, along with all other citizens of the State, whether White, Red or Black.

In its opinion (R. 14), the Court of Claims holds:

> "It must be conceded, as it was in fact conceded in the argument, that this use not only benefited the tribe, but was a reasonable and wise provision on the part of Congress."

It was not "conceded in the argument" that the expenditures of the moneys here involved "benefited the tribe".

We have shown that the Nation or Tribe was long since defunct; and the *unenrolled persons* were neither members of the Tribe, nor did they have any legal right to share in common property, since the *entire Tribal estate* was to be divided and distributed among the *enrolled citizens,* and to none other.

In our motion for new trial, which was overruled on November 14, 1938 (R. 15), we quote many paragraphs from our briefs, showing that we had always maintained that such moneys had not been expended "for the benefit of the tribe as a whole"; that we had not so "conceded in the argument"; and praying that the opinion be modified by omitting the language complained of.

This was refused; and a second motion for new trial was filed, by leave of court, and overruled, on January 19, 1939, with a memorandum opinion in which it was held that the original opinion, should not be understood to mean that counsel for the plaintiff had admitted that the moneys involved had been expended for the benefit of the Nation (R. 15-16).

In basing its conclusions that the moneys here involved were legally expended, upon its finding that they were expended "for the benefit of the Chickasaw Nation as a whole", the Court of Claims has lost sight of the whole scheme and plan for the division and distribution of the *entire Tribal estate,* demanded by the United States for the consummation of its objectives (reluctantly agreed to by the Indians and ratified by the Congress), and which we have endeavored to make plain.

If the Chickasaw Nation and its citizens, at the time the moneys here involved were expended, had occupied the same status that existed prior to 1898 (as to its Tribal

Government, Tribal relationships with each other and with the United States, and the common ownership of the Tribal estate) and if, under *those conditions* (and before *enrollment* had been, by Agreements and Acts of Congress, made the sole and only test for sharing in common properties), the moneys here involved had been expended for the operation of Tribal Schools, then such expenditures would have been "for the benefit of the Chickasaw Nation, as a whole"; and would have been legal.

That is the condition existing in the Western or Reservation Tribes; and, apparently, the Court of Claims has failed to distinguish between them and the Five Civilized Tribes (including the Chickasaw Nation).

Here, the Tribal Governments were abolished, and Tribal relationships and the common ownership of all Tribal properties were annihilated; and the *entire Tribal estate* (all lands and all moneys) were to be divided and distributed among the *enrolled citizens* (as of the final date of March 4, 1906), and to none other, under the basic and governing laws, meticulously drawn and solemnly passed by the Congress, providing that no person *not so enrolled* should share therein "in any manner" whatsoever.

Every acre of Tribal land, and every dollar of Tribal moneys, were "earmarked" for individual division and distribution among the *enrolled citizens* and to none other; and all subsequent reference to the *Chickasaw Nation* was merely for assisting and facilitating the consummation of the complete and comprehensive scheme and plan for finally and forever ending all things *"National"* or *"Tribal"*, in so far as concerned the former Tribal estate.

Therefore, the finding of the Court of Claims, that the moneys here involved were expended "for the benefit of the Chickasaw Nation as a whole", and the conclusions based thereon, are erroneous and should not stand.

IV.

All Indians were made citizens of the United States and of the State of Oklahoma and all Indian children were entitled to be educated in the public schools of the State.

What is here set out, under the above caption, does not bear directly upon the issues of fact and law, in the instant case; but it does, however, have a tremendous bearing upon the *intentions and purposes* of the Congress, in the passage of Section 10 of the Act of Congress of April 26, 1906 (34 Stat. 137), authorizing the Secretary of the Interior to merely "assume the control and direction" of Tribal Schools and the later Acts of Congress extending the same.

We contend that there was *no intention and purpose,* upon the part of the Congress, to amend or repeal its basic and governing laws limiting the enjoyment of common properties to *enrolled citizens,* and to authorize the Secretary of the Interior to follow his own notions as to *who should* and *who should not* share in common properties, or to legally operate *Tribal Schools* unless attended by *enrolled citizens,* and none other.

The "Atoka Agreement" (Act of Congress of June 28, 1898; 30 Stat. 495) provided:

> "It is further agreed that the Choctaws and Chickasaws, when their tribal governments shall cease shall become possessed of all the rights and privileges of citizens of the United States."

It is only necessary to say that, upon the admission of the State of Oklahoma in 1907, all citizens of the United States (including all Indians) become citizens of the State, with the legal right to attend the public schools.

Realizing that the new State would be assuming a heavy burden in providing *public schools* for Indian children, in that part of the State comprising the former Five Civilized

Tribes (some having land allotments which were not taxable for many years, and some having *no land at all*), the Congress made some provision for *that particular situation,* in the Enabling Act of June 16, 1906 (34 Stat. 267), as follows:

> "There is hereby appropriated * * * the sum of five million dollars for the use and benefit of the common schools of said State in lieu of Sections Sixteen and Thirty-Six and other lands of the Indian Territory."

That is not all the Congress did to be of help to the State of Oklahoma, in bearing this burden.

Beginning with the Act of Congress of April 21, 1904 (33 Stat. 189), and ending with the Act of March 3, 1909 (35 Stat. 781), *annual appropriations of United States moneys* (varying from $100,000.00 in 1904 to $150,000.00 in 1909), were made.

All of these Acts of Congress contained the following language:

> "For the maintenance, strengthening and enlarging of the tribal schools of the Cherokee, Creek, Choctaw and Chickasaw and Seminole Nations, *and making provision for the attendance of children of non-citizens therein* * * * (Italics ours.)

Tribal Schools were then in operation in the Chickasaw Nation, and there were no *public schools,* since the State of Oklahoma had not come into being.

At that time, all Indian children were *enrolled,* and had the legal right to attend *Tribal Schools,* supported by common moneys, since children born *after March 4, 1906,* were not then of school age, and would not be until 1912.

Therefore, the Tribal Schools needed no *United States moneys,* since they were taking care of all Indian children; and these United States moneys were provided to *strengthen and enlarge* the *Tribal Schools*, for *"making provision for*

the attendance of children of non-citizens therein" (that is, the children of *white people;* who were wholly without school facilities).

Under this plan, the *Tribal Schools* (supported by common moneys of *enrolled citizens*) were attended, partly, by *enrolled Indian children,* at *their own expense,* and partly by *white children,* at the expense of *the United States.*

It is most important to note that, in 1912, and the years following, the whole situation changed, and the language of the Appropriation Acts also changed to conform to these changed conditions.

By 1912, Indian children, *born after March 4, 1906* (and who were *unenrolled,* and excluded from sharing in common moneys), were beginning to arrive at school age.

They had no legal right to attend *Tribal Schools,* at the expense of the *enrolled citizens,* and besides, a well organized *public school system* of the State of Oklahoma was in operation.

Under these changed conditions, the Appropriation Act of August 24, 1912 (37 Stat. 518), provided that the sum of $300,000.00 should be used *"in aid of common schools"*.

Throughout the following years, and to the present time, approximately the same amount of *United States moneys* has been appropriated, annually, for that purpose; and all such Acts contain *precisely the same language* as above quoted.

The Congress concluded that the *public schools* of Eastern Oklahoma were deserving of *additional help* from the United States, because they were carrying the unfair burden of being required to educate all *Indian children* in the *public schools,* and none of such children had any allotments of lands or shares in the Tribal estates (since they were all *unenrolled*), which might ever contribute to the support of the *public schools.*

So, the new system and plan was to use these annual appropriations of *United States moneys* for paying the expenses of these *landless and moneyless* Indian children in the *public schools;* and that system and plan has been carried out, in the use of these *United States moneys,* from 1912 to the present time.

In carrying out that system and plan, the United States has expended, *out of its own moneys,* approximately $300,000.00 per year (or approximately $7,500,000, for the 26 years since 1912), for the education of *unenrolled* Indian children in the *public schools* of Oklahoma; and these are the *very persons* for whom the Secretary of the Interior has expended a large sum of moneys belonging to *enrolled citizens,* and who (and the moneys expended for them) are involved in the instant case.

If the Congress provided these *moneys of the United States* for the education of these *unenrolled* persons in the *public schools* of Oklahoma, upon the theory that they had *no property rights* in the Tribal estate, is it reasonable to say that it had any purpose or intention to sanction a fantastic system whereby the so-called *Tribal Schools* were to continue, at the expense of the *enrolled citizens,* for some 15 years after the *last enrolled citizen pupil* had passed beyond school age?

The best and strongest evidence of what the Congress *intended,* is what *it has actually done,* and that evidence shows that the Congress was well aware that these *unenrolled* Indian children had the right to be educated in the *public schools* of Oklahoma; and knowing the weight of the burden which the State had assumed, it actually acted upon the awareness, by providing and making available, many millions of dollars of *its own moneys* to lessen that burden!

Therefore, the *purposes and intentions* of the Congress, in passing Section 10 of the Act of April 26, 1906 (34 Stat. 137), and the later Acts amending the same, were to merely

authorize the Secretary of the Interior to "assume the control and direction" of Tribal Schools, "until such time as a *public school system* shall have been established under Territorial or State Governments"; and, if operated longer, then only when attended by *enrolled citizens,* who, alone, had the legal right to share in the common moneys used.

Conclusion.

We fully realize that, when schools and the education of children are under consideration, our hearts are touched, and we are inclined to resolve all doubts in favor of the legality of the acts that might seem to accomplish that worthy purpose.

In the instant case, we have endeavored to show that, under *the law,* there should be no doubts upon the *illegality* of the acts complained of.

We have also endeavored to show that considerations of sympathy and benevolence do not exist, since the officials of the United States and the Indian Nations (and the Congress) exactly foresaw that there would be a large number of Indian children (born after *March 4, 1906*), who were *excluded from enrollment,* and from sharing in the Tribal estates *"in any manner"* whatsoever; and ample provision was made for their educational requirements, in the *public schools* of Oklahoma.

They were thus placed upon exactly the *same level,* in that respect, with the children of all other citizens of the State of Oklahoma, including Governors, and Senators, and bankers, and merchants, and farmers, and laborers, in the full enjoyment of those rights and privileges, which, under our system of government, belongs to all, whether rich or poor, and whether White, Red or Black.

We have also shown that the Congress, for reasons which it deemed sufficient, saw fit to provide large sums of *moneys*

of the United States to assist the State of Oklahoma in bearing these burdens which it had assumed.

The persons here involved were entitled, in fairness and justice, to *no less;* and certainly, under *the law,* they were entitled to *no more.*

We now conclude this argument, in support of the petition for writ of certiorari for a review of the decision of the Court of Claims in the instant case, and respectfully pray that the same be granted.

THE CHICKASAW NATION OF INDIANS,
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