No. K-376

IN THE

United States Court of Claims

THE CHICKASAW NATION OF INDIANS,
Plaintiff,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

PLAINTIFF'S MOTION FOR NEW TRIAL; AND REQUEST FOR AMENDMENT TO SPECIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW; AND BRIEF IN SUPPORT THEREOF.

Filed June 2, 1938.

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in support of

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In the United States Court of Claims

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THE CHICKASAW NATION OF INDIANS,
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THE UNITED STATES OF AMERICA,
Defendant.

PLAINTIFF'S MOTION FOR NEW TRIAL; AND REQUEST FOR AMENDMENT TO SPECIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Comes now the plaintiff, the Chickasaw Nation of Indians, and moves this Honorable Court to vacate the judgment for the defendant, the United States of America, entered herein on April 4, 1938, and, thereupon, to grant the plaintiff a new trial; and requests that the Special Findings of Fact and Conclusions of Law be amended, for the reasons and in the particulars, hereinafter set forth.

The plaintiff, the Chickasaw Nation, further moves that this Motion be sent to the Law Calendar for argument.

It is respectfully submitted:

(1) That the court erred in not holding, as conclusions of law:

(a) That the basic laws (Sections 27, 28 and 35, Choctaw and Chickasaw "Supplementary Agreement", Act of Congress of July 1, 1902; 32 Stat., 641), and Section 2 of the Act of Congress of April 26, 1906 (34 Stat., 137), providing for the enrollment of the citizens and members of the Chickasaw Nation, for the division and distribution of the tribal estate, and providing that only enrolled members of the Chickasaw Nation should, "in any manner", share in the tribal properties of the Chickasaw Nation, were the basic and governing laws upon that subject, and

(b) That, in the passage of Section 10 of the Act of Congress of April 26, 1906 (34 Stat., 137), authorizing and directing the Secretary of the Interior to assume the control and directions of the tribal schools of the Chickasaw Nation, and to expend tribal moneys therefor, and in the later acts extending the same, such basic and governing laws, limiting the enjoyment of tribal properties to enrolled members of the Chickasaw Nation, were, in no wise, repealed or amended; and

(c) That, in authorizing and directing the Secretary of the Interior to assume the control and direction of the tribal schools of the Chickasaw Nation, no additional powers and authority were thereby conferred upon the Secretary of the Interior to expend tribal moneys of the Chickasaw Nation for the use and benefit of persons who were not enrolled members of the Chickasaw Nation.

(2) The court erred in holding, as a conclusion of law, that moneys of the Chickasaw Nation, expended for the use and benefit of persons who were not enrolled members of the Chickasaw Nation, were expended for the benefit of the said Chickasaw Nation or Tribe, as a whole.

(3) The court erred in holding, as a conclusion of law, that the petition of the plaintiff, the Chickasaw Nation, should be dismissed.

Regarding proposed amendments to *Special Findings of Fact,* it is respectfully requested:

(1) That there is no objection to Special Finding of Fact numbered 1.

(2) That Special Finding of Fact numbered 2 be amended so as to read 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, in the operation of Carter Academy (formerly Bloomfield Seminary) and the Seven Contract Schools, for the education, support and accommodation of persons who were not upon the final rolls of members of the Chickasaw Nation, but who were children of members of that tribe who had been duly enrolled; and there was expended, for the same purposes, additional sums of moneys belonging to the Chickasaw Nation, as follows:

(a) The sum of $2832.32, being that percentage of total expenditures that the unenrolled pupils bear

to the total pupils, for various periods, for which the official records are missing; and

(b) The sum of $11,126.05, for Carter Academy (Bloomfield Seminary), for the year 1916-17 (before any pupils were admitted, but for which the total sum of $31,209.12 was expended, in preparation for the admission of pupils in 1917-18, and succeeding years, to and including the year 1929), being that percentage of total expenditures that the unenrolled pupils bear to the total pupils, for the year 1917-18; and

(c) The sum of $13,378.20, being that percentage of the total sum $16,500.00, expended in 1916 for the purchase of buildings and lands for Carter Academy (Bloomfield Seminary), that the unenrolled pupils bear to the total pupils, averaged throughout the entire period, from 1917 to 1929,

making the total sum of $815,758.27 so expended. This expenditure includes $275,530.15, expended for buildings and repairs to structures used for school purposes."

(3) That *Special Finding of Fact* numbered 3, be amended so as to read as follows:

"The expenditures of moneys belonging to the Chickasaw Nation for the use and benefit of persons who were not enrolled members of said Nation, were not expended for the benefit of the Chickasaw Nation, as a whole; and neither the Act of Congress of April 26, 1906 (34 Stat., 137), nor any later Act of Congress, extending the same, conferred upon the Secretary of the Interior the power and authority to expend money belonging to said Nation for the use and benefit of persons who were not enrolled members thereof.

(4) That there should be included a *Special Finding of Fact,* numbered 4, as follows;

"The plaintiff, the Chickasaw Nation, filed its original petition herein, under the Jurisdictional Act of Congress of June 7, 1924 (43 Stat., 537), limiting the time for filing petitions, by the Choctaw and Chickasaw Nations, to five years; and such Act was amended by the Act of February 19, 1929 (Public Resolution 88) extending the time for filing such petitions to June 30, 1930; and, on September 19, 1936, said plaintiff filed its Amended Petition, which was validated by the Act of Congress of August 16, 1937 (Public 296, 75th Congress, 1st Session)."

THE CHICKASAW NATION,

By WILLIAM H. FULLER,

and

MELVEN CORNISH,

Special Attorneys.

BRIEF

in support of

"Plaintiff's Motion for New Trial; and Request for Amendments to Special Findings of Fact and Conclusions of Law."

(Throughout this Brief, italics are ours.)

In the Argument which follows, we shall present our contentions, supported by authorities:

(I) That the court erred, in its conclusions of law, as set out in the foregoing *Motion for New Trial;* and

(II) That the *Special Findings of Fact* be amended, as set out in the same motion.

I.

***(a) The basic laws* which govern the division and distribution of the tribal properties of the Chickasaw Nation are that only those persons whose names appear upon the *tribal citizenship* rolls may share therein, *"in any manner"* whatsoever.**

For the convenience of the court, we shall again set out such *basic laws,* which, as we contend, were intended by the treaty makers, and by the Congress, to forever settle all questions as to *who should,* and *who should not,* share in the common lands and moneys of the Chickasaw Nation.

Sections 27, 28 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) * * *.",

and also

Section 28,

> "The names of all persons living on the date 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.*"

This, in brief, is the great scheme and plan, fixed and agreed upon between the United States and the

> *and Chickasaw tribes,* and those *whose names appear thereon shall participate in the manner set forth in this agreement.*"

Then, in Section 2 of the Act of Congress of April 26, 1906 (34 Stat., 137), it was provided that the final date for the enrollment of *"new born"* children of enrolled members of the Chickasaw Nation (which, in Section 28 of the "Supplementary Agreement", above

quoted, was fixed as of September 25, 1902), be extended to March 4, 1906, 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."

as set out in the foregoing *Motion for New Trial;* and

(II) That the *Special Findings of Fact* be amended, as set out in the same motion.

I.

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Then comes the *basic laws* as to what disposition shall be made of *all moneys of the Chickasaw Nation.*

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

> "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* (freedmen excepted) per capita, *to aid and assist them in improving their homes* and lands."

Then follows Section 14 of the "Supplementary Agreement" (Act of July 1, 1902), 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."*

This, in brief, is the great scheme and plan, fixed and agreed upon between the United States and the Chickasaw Nation, and carried into Acts of Congress, for finally and forever settling all questions relating to *enrollments,* and the *division and distribution of the tribal estates.*

It represents many years of tedious and painful labor, in the settlement of these vexatious and tremendously important and controversial questions, and the solutions reached, and expressed in the above quoted provisions, are the result of the application of the best

minds in the Indian Service, in the Chickasaw Nation and in the Congress; and the plans and purposes of all are equally clear, and not susceptible of misunderstandings and misconstructions.

Therefore we think it reasonable to contend that this great scheme and plan for the division and distribution of the tribal estates may not be upset, and overturned, unless it shall appear that such were the purposes and intentions of Congress.

It is not denied that the Congress had the power to alter and amend this great scheme and plan which was fixed and agreed upon for the division and distribution of the tribal estates, *provided it has seen fit to do so,* by the passage of appropriate acts of *administration,* within the Constitutional limitations.

For example: The "Supplementary Agreement" (Section 28, above quoted) provided that the rolls should be closed as of September 25, 1902; and that no child born thereafter should be enrolled, or share in tribal property.

Later it passed the Act of April 26, 1906, above quoted, providing that the final date for the enrollment of *new born children* of enrolled citizens be extended to March 4, 1906.

That was a legal and valid act of *administration,* and may not be questioned, since the making up of *tribal citizenship rolls,* as the *sole basis* for the enjoyment of *tribal property rights,* was an act of *administration,* and was validly exercised.

Likewise, if the Congress had seen fit to alter or

change the basis for the division and distribution of the tribal estates, as fixed and agreed upon in the provisions above set out, and had extended the final enrollment date, for the new born children of enrolled members, to 1916 or 1926 or 1936, that would have been a legal and valid act of *administration,* and the persons for whose use and benefit the moneys in controversy were expended would have been legally and validly enrolled, and they would have had conferred upon them *full citizenship and property rights;* but *the Congress did not do so.*

Nowhere has it been made to appear that the Congress ever had the slightest purpose or intention to depart from the *basic scheme and plan* originally fixed and agreed upon, that tribal enrollment conferred *full and equal rights* in common tribal properties, and that persons who were *not enrolled* had *no right to share, "in any manner" whatsoever,* in such properties.

Therefore, the sole and only question in the instant case is:

Did the Congress intend, in the passage of the Act of Congress of 1906, relating to tribal schools (and the later Acts of Congress extending the same), to repeal or amend the *basic laws,* above quoted, limiting the enjoyment of *Tribal properties* to the *enrolled members* of the Chickasaw Nation, and to confer upon the Secretary of the Interior, the legal power and authority to ignore such *basic laws* for the division and distribution of tribal properties, and to bestow upon a *favored class of unenrolled persons* (who had been

definitely and specifically *excluded* from participation, *"in any manner"* whatsoever) many hundreds of thousands of dollars of tribal moneys?

We say that the Congress had no such purpose and intention; and there is nothing in the Act of 1906, relating to tribal schools, and the later Acts extending the same, that so says, or infers or intimates.

We say, further, that the Congress intended, no more and no less, to confer upon the Secretary of the Interior, the power and authority to operate the *tribal schools,* and to expend tribal moneys therefor, for the use and benefit, only, of *enrolled members* of the Nation, under *existing basic laws* defining *who should,* and *who should not,* share in tribal properties; and that such *basic laws* limiting the enjoyment of *tribal properties* to *enrolled members,* (fixed and agreed upon, after many years of arduous and painful labor, in negotiations between the United States and the Indian Nations, to which the Indians reluctantly and finally agreed, in order that the program and plans of the United States for the creation of the new State of Oklahoma, might be consummated, and then ratified by solemn Acts of Congress) were *in no wise repealed or amended* by the Act of 1906, relating to *tribal schools,* and the later Acts extending the same, which merely continued *tribal schools* until such time as the State of Oklahoma should assume the burden of educating *all of its citizens,* whether White, Red or Black.

***(b)* Neither the Act of Congress of April 26, 1906, (34 Stat., 137), relating to *tribal schools,* nor any of the later Acts of Congress extending the same, repealed or amended the *basic laws* limiting the enjoyment of *tribal properties* to *enrolled members,* nor conferred upon the Secretary of the Interior the legal power and authority to bestow *tribal properties* of the Chickasaw Nation upon persons who were not *enrolled members* thereof.**

In the foregoing (a), we have shown the governing *basic laws* limiting the enjoyment of tribal properties to *enrolled members.*

In this sub-division (b), we shall show that such *basic laws* were never repealed nor amended, but governed the Secretary of the Interior, in the operation of *tribal schools.*

Such *basic laws might have been repealed or amended;* but *such was not done.*

Congress might have provided for the *enrollment* of the persons for whose use and benefit the moneys here involved were expended (by re-opening the tribal citizenship rolls to 1916 or 1926 or 1936, as was done, by Section 2 of the same Act of 1906, above quoted, in the enrollment of "new born" children of enrolled members born prior to March 4, 1906); and, in that event, they would not only have been entitled to enjoy the benefits of *moneys expended for tribal schools,* but would have been entitled to *full and equal shares of lands and moneys,* along with all other *enrolled citizens.*

But the Congress did not do so.

By the passage of the Act of 1906, it provided for the operation of *tribal schools,* under clearly defined restrictions and limitations, and, as we respectfully contend, there is no word or syllable in that Act (or in the later Acts extending the same) that says, or infers, or intimates, that the whole scheme and plan, agreed upon by the treaty makers, and ratified by the Congress, limiting the enjoyment of tribal properties to enrolled members, was to be upset and overturned.

Will it do to say that the Congress, by the passage of the Act of 1906, relating to schools, and the later Acts extending the same, meant to confer *limited property rights* upon a favored class of *unenrolled persons,* numbering less than 300 persons, out of a total tribal population of more than 6,000, when, in the *basic laws* above quoted, it has very meticulously, and very conclusively *excluded* them from participating in tribal properties, *"in any manner"* whatsoever?

If the Congress had intended to change or alter the basic laws governing property rights, it would have done so, in clear and unmistakable terms, by providing for their *enrollment,* as was done, in the *same Act of 1906,* in providing for the enrollment of "new borns", up to March 4, 1906.

It did not do so, and such persons were *never enrolled,* but were definitely and specifically *excluded from enrollment,* and from participation, *"in any manner"* whatsoever, in tribal properties; and no considerations of charity and benevolence can *make legal* the illegal acts of the Secretary of the Interior in bestowing tribal property upon them, so long as they are not *enrolled members* of the Chickasaw Nation.

They are out, because the *basic laws* governing the division and distribution of tribal properties so say, and provide; and such basic laws stand, and govern, unless repealed or amended by the Act of 1906, relating to schools, or the later Acts extending the same, and such Acts have no such meaning.

We shall now set out, and comment upon, such Acts, in order to determine whether or not they have, or were intended by the Congress to have, the tremendous and far reaching meaning which the defendant contends for.

We shall first refer to the *one and only Act of Congress* gauging and measuring the power and authority of the Secretary of the Interior in the matter of tribal schools; and setting out the restrictions and limitations laid down by the Congress. This Act of April 26, 1906 (34 Stat., 137), is supreme, throughout all the succeeding years, since all later Acts of Congress extending the same, merely say that the tribal schools shall be operated *"under existing laws";* that is, the Act of 1906.

That Act speaks for itself, 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*

But the Congress did not do so.

By the passage of the Act of 1906, it provided for the operation of *tribal schools,* under clearly defined restrictions and limitations, and, as we respectfully contend, there is no word or syllable in that Act (or in the later Acts extending the same) that says, or infers, or intimates, that the whole scheme and plan, agreed upon by the treaty makers, and ratified by the Congress, limiting the enjoyment of tribal properties to enrolled members, was to be upset and overturned.

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If the Congress had intended to change or alter the basic laws governing property rights, it would have done so, in clear and unmistakable terms, by providing for their *enrollment,* as was done, in the *same Act of 1906,* in providing for the enrollment of "new borns", up to March 4, 1906.

It did not do so, and such persons were *never enrolled,* but were definitely and specifically *excluded from enrollment,* and from participation, *"in any manner"* whatsoever, in tribal properties; and no considerations of charity and benevolence can *make legal* the illegal acts of the Secretary of the Interior in bestowing tribal property upon them, so long as they are not *enrolled members* of the Chickasaw Nation.

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That Act speaks for itself, 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 that moneys of the tribe shall be used for that purpose, and that,

> "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."

Can there be any doubt of the purposes and intentions of Congress, in the operation of *tribal schools* of the Chickasaw Nation, as set out, and made plain, by this Act in 1906. It means, and says, no more and no less, that the Secretary of the Interior shall operate the *tribal schools;* that is, the schools *attended by,* and *made up of,* the *citizens and members* of the Nation or Tribes, who, alone, have any rights in tribal moneys; and no where is it said, or inferred, or intimated, that *tribal moneys* are to be used for an *unenrolled class of persons* who had been definitely and specifically excluded from participation, *"in any manner"* whatsoever, in the benefits of tribal property.

No purposes or intentions of Congress, over and above its plain terms and provisions, may be read into it.

Those terms and provisions may not be misunderstood or misconstrued; and they were plainly set out in the Act. The scheme and plan of limiting the enjoyment of *tribal property* to *enrolled members* was *the law;* and that law stands, and governs, unless

changed by later laws, which plainly express the purpose and intention of the Congress so to do.

In fact, *any such expression* would have been without point or reason, since, *at that time,* all Chickasaw children were either *enrolled,* or *entitled to enrollment.* Therefore, the *"tribal schools"* or *"schools of the Chickasaw Tribe",* to which the Act relates, were those existing *tribal schools,* attended by children who were *enrolled members* of the Nation or Tribe, and who, alone had the legal right to share in common tribal property.

Will it do to say that if the Secretary of the Interior had seen fit, under the power and authority conferred by this Act of 1906, to admit to the tribal schools the children of *white tenant farmers,* or the children of *Chickasaw Freedmen,* or the children of *Creek or Seminole Indians,* that his acts in expending moneys of the Chickasaw Nation for their use and benefit, would have been legal, and that such moneys would not be recoverable?

In so far as having the legal right to share in the common and undistributed properties of the Chickasaw Nation, the *unenrolled* persons for whose use and benefit the moneys in controversy were expended, occupy *exactly the same status* as all other *unenrolled persons,* whoever they may have been.

In the passage of the Act of 1906, relating to tribal schools, and the later Acts extending the same, Congress had no purpose and intention other than that

the Secretary of the Interior should be governed by the *existing basic laws* limiting the use and benefit of *tribal moneys* to the *enrolled members* of the Nation or Tribe; and that such *existing basic laws* remained in full force and effect.

If the Congress had intended that these *unenrolled persons* were to share in *tribal moneys,* provision would have been made for their *enrollment,* and for their *full enjoyment* of *tribal properties,* just as was done in the enrollment of new born children, up to March 4, 1906. *It did not do so,* and they are out, just as all other *unenrolled persons are out,* in so far as the enjoyment of *tribal moneys* is concerned, and there was no legal authority to expend *tribal moneys* for their use and benefit; and nothing can be fairly read into the Act of 1906, relating to tribal schools, and the later acts extending the same, that can upset and overthrow the existing *basic and governing laws* limiting the enjoyment of tribal properties and moneys to the *enrolled members* of the Chickasaw Nation.

We have referred to "the later Acts extending the same"; that is, extending, from year to year, the power and authority conferred, by the Act of 1906, upon the Secretary of the Interior to operate the *tribal schools.*

There were no *"later Acts"* until the Act of August 24, 1912 (37 Stat., 497).

For the years 1907, 1908, 1909, 1910, and 1911, there were no Acts of Congress, upon the subject of *tribal schools.* The power and authority conferred upon the Secretary to operate *tribal schools,* and to expend *tribal moneys* therefor, was a *continuing* power and authority, and no legislation, except that contained in the Act of 1906, was deemed necessary.

Therefore, it is certainly not to be contended that the Secretary of the Interior was not wholly governed by the provisions and limitations of the Act of 1906, for the years 1907 to 1911, inclusive; and those provisions and limitations have been made plain, in the above quotations and comments.

Then, because of the feeling that the general and continuing power and authority, conferred by other Acts of Congress to expend *tribal moneys,* by the various agencies of the United States, without specific appropriations by Congress, was, perhaps, not good administration, the Act of August 24, 1912 (37 Stat., 497), was passed, which provided as follows;

> "That during the fiscal year ending June thirtieth, nineteen hundred and thirteen, no moneys shall be expended from the tribal funds belonging to the Five Civilized Tries without specific appropriation by Congress, except as follows: Equalization of allotments, per capita and other payments authorized by law to individual members of the respective tribes, *tribal and other Indian Schools* for the current fiscal year *under existing law,* * * *."

It will be seen that this Act of 1912, neither added to, nor detracted from, the power and authority of the Secretary of the Interior in relation to *tribal schools,* since they were *excepted* from its requirements as to *"specific appropriations* by Congress."

"The *tribal schools of the Chickasaw Nation*" were continued "*for the current fiscal year*", but "*under existing law*"; that is, the Act of 1906. The Secretary of the Interior was not relieved of any of the provisions and limitations of *that Act,* nor given any additional power and authority; and the Act of 1906 remained in full force and effect, and *was the governing law.*

Then came the Act of July 30, 1913 (39 Stat., 77).

It was identical, in all respects, with the Act of 1912.

Next came the Act of August 1, 1914. It was identical with the Act of 1913, in excepting *tribal schools* from the requirement as to "specific appropriations", and in continuing the tribal schools for the "current fiscal year", and "*under existing law*"; that is, the Act of 1906.

There was, however, inserted in this act a significant provision, as follows:

> "That, the Secretary of the Interior is hereby authorized to expend the sum of $16,500 from Chickasaw tribal funds for the purchase of the property known as Hargrove College or Ardmore College, situated at Ardmore, Oklahoma, to be reserved and used as a boarding school for the *Chickasaw Nation.*"

It is, of course, admitted that if the Secretary of the Interior could legally expend tribal moneys of the Chickasaw Nation for the *tribal schools,* he could

legally expend such moneys for providing necessary facilities, such as buildings, etc.

But here is a definite declaration by Congress that the Hargrove College properties shall be purchased "as a boarding school for the *Chickasaw Nation*".

This corresponds, in all respects, with the original power and authority conferred by the Act of 1906, that the Secretary of the Interior shall assume the direction and control of the "Schools of the * * * Chickasaw * * * Tribe" and to expend *tribal moneys* therefor.

We here repeat that there were no *citizens* or *members* of the *Tribe or Nation* except the *enrolled members;* and the *basic laws then in force,* and *always thereafter in force,* and *still in force,* were that *only enrolled members* might, "*in any manner*", share in tribal properties.

We also repeat that if Congress had intended, in the Act of 1906, or in any of the later Acts extending the same, to repeal or amend the *basic laws* limiting the enjoyment of tribal properties to *enrolled members,* it would have so provided, in clear and unmistakable terms; and *it did not do so.*

When the Act of 1906, relating to *tribal schools* was passed, *all pupils* in tribal schools were enrolled. All pupils, up to around 1912 and 1913, *were enrolled;* and then *unenrolled pupils* began to creep into the schools.

All moneys expended for *enrolled members* of the Chickasaw Nation were legal, and moneys expended for *unenrolled* persons were *illegal* and recoverable; and there is no word or syllable in the Act of 1906

relating to schools, nor in any of the later Acts extending the same, that says or infers or intimates that the Secretary of the Interior was not bound by the *basic laws,* above quoted, limiting the enjoyment of tribal properties to the *enrolled members* of the Nation.

All that we have said, in the above, applies to all the intervening years, down to 1930; and there can be no substantial difference between the plaintiff and the defendant, as to Acts applying to those years. No word or syllable, in any one of the Acts, from 1906 to 1930, could be said to add to, or take from, the *restrictions and limitations contained in the Act of 1906.*

The Acts all say that the *tribal schools* shall be continued *"under existing law".*

We now come to the Interior Department Appropriation Act of May 14, 1930 (Public 217).

Counsel for defendant, the United States, have stressed and commented upon the language therein of "for the support of Schools and for tuition".

They do not quote the whole provision, which is as follows:

> "For the support of schools and for tuition among Five Civilized Tribes, there may be expended from the tribal funds of such Nations * * * as follows * * * *Chickasaw Nation* $24,000."

Then they wholly overlook the fact that *no tribal moneys* were expended for Carter Academy (formerly Bloomfield Seminary) after the fiscal year 1929-30.

This appropriation of $24,000 was for pupils in the *Seven Contract Schools,* which were *not tribal schools,* and had never been. In the earlier years contracts had been made for the education and accommodation of pupils as early as 1913, in Contract Schools; and these contracts ran as late as 1932. Carter Academy (formerly Bloomfield) was the only *tribal school* ever operated; and the fact that the *Seven Contract Schools* were not *tribal schools,* and had never been, accounts for the fact that the word "tribal" was not used in this appropriation.

We have heretofore said that we might have questioned the legality of *all tribal moneys* expended for the *Seven Contract Schools,* since there was never any legal authority to expend *tribal moneys* except in *tribal schools;* but we have not raised that question, and have confined our contentions as to illegal expenditures only to moneys expended for *unenrolled persons,* who, as shown, had no legal right, at any time or under any circumstances, to share in tribal moneys of the Chickasaw Nation.

The above applies to 1931.

The same comments would apply to the years 1932 and 1933, where tribal moneys were expended for "tuition and other educational purposes".

We have thus shown (a), that *all tribal moneys* expended for *tribal schools,* from 1906 to 1930, were expended under the *limitations and restrictions contained in the Act of 1906,* since each Act, from year to year merely *extended the Act of 1906,* and required tribal moneys to be expended *"under existing law";* and, (b) that the language in the Acts of 1930, 31, 32 and 33 was changed for the purpose of covering the *Seven Contract Schools;* and (c), that in no one of the Acts, from 1906 to 1933, inclusive, was there a single word or syllable, that said or inferred, or intimated, that the *basic laws* (being a part of the great scheme and plan for the division and distribution of the tribal estates, worked out by the public officials of the United States, reluctantly agreed to by the Indian owners of the tribal estate, and ratified by the Congress, in order that the great work of dividing and distributing the tribal estate might be consummated) were to be repealed or amended.

We grant that the Congress had the plenary power and authority to repeal or amend such basic laws, if it had seen fit to do so; *but it did not do so.*

In that event, it would have provided for the *reopening of the rolls,* as was done for "new borns", in Section 2 of the Act of April 26, 1906 (34 Stat., 137); and, in that case, such of the *unenrolled persons* as were the children of *enrolled citizens,* would have been *enrolled,* and given *full shares* of *tribal properties;* but *this was not done,* and they stand just where they have always stood, without any legal right to share *"in any manner"* whatsoever, in the tribal properties of the Chickasaw Nation.

To say that the language of the Act of 1906, relating to tribal schools, and the later Acts extending the same, can be tortured into legalizing the acts of the Secretary of the Interior, in setting up a favored and limited class of less than 300 persons (and out of a total of more than 6000) and bestowing upon them moneys amounting to many hundreds of thousands of dollars, in the face of the *basic and governing laws,* very definitely and very specifically, excluding them from participating *"in any manner"* whatsoever, in the *very moneys* thus bestowed upon them, is so far from reason and justice and logic, that some way must be found, and, we pray, will be found, to correct the grievous errors which are threatened by the Opinion of this Honorable Court, in the instant case, and to which this Motion and Brief relate.

This Honorable Court refers to, and stresses, the case of *Gritts* v. *Fisher* (224 U. S. 640).

That case relates wholly to the rights of "new borns" who were *enrolled* under Section 2 of the Act of April 26, 1906 (34 Stat., 137).

Of course, the "new borns" therein referred to, had *full property rights,* because they were *legally enrolled.* (We have not deemed it necessary to burden this Brief with quotations from this decision, since an examination of its text will clearly show that the above analysis is correct.)

Likewise, the *same class* of persons in the Choctaw and Chickasaw Nations ("new borns", from September 25, 1902 to March 4, 1906), have *full property*

rights because they were *legally enrolled,* and under the same Act of 1906, passed upon in the *Gritts* v. *Fisher* case.

Likewise, the *unenrolled persons* who are the subjects of the instant case, would have *full property rights,* if the tribal citizenship rolls had again been re-opened to 1916, and 1926, and 1936, and such persons *had been enrolled;* but this was never done; and they stand, without the legal right to share in tribal properties, *"in any manner"* whatsoever, just as all other "new borns" of all the Five Civilized Tribes, who were born after March 4, 1906.

***(c)* While all *unenrolled persons* were excluded from *tribal property rights,* in order that the *division and distribution of the tribal estate* might be consummated, provision was made for their education in the *public schools* of Oklahoma, along with *all other citizens* of the state.**

As showing that all Choctaw and Chickasaw Indian children (whether *enrolled or unenrolled)* were made *citizens* of the *United States,* and, likewise, *citizens of Oklahoma,* (after the admission of that State to the Union), and therefore, eligible to *public school benefits,* along with all other citizens of Oklahoma (as a part of the great plan and scheme for the division of the tribal estates, as a prelude to Oklahoma Statehood), we quote that provision of the Choctaw-Chickasaw "Atoka Agreement" (30 Stat., 495), as follows:

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

We also quote from the Enabling Act of Congress of June 16, 1906 (34 Stat., 267), authorizing the organization of the State of Oklahoma, providing that,

> "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."

Then comes Section 1, Article 3, of the Constitution of Oklahoma, defining the right of suffrage, as follows:

> "The qualified electors of the State shall be male *citizens of the United States,* male citizens of the State, and male persons of *Indian descent,* native of the United States, who are over twenty-one years of age * * *."

It is thus made plain that the United States, the Chickasaw Nation and the Congress, in the passage of the *basic laws* providing that *only enrolled members* should share, *"in any manner" whatsoever,* in tribal properties, all had in mind, and provided for, the future education of the *very persons* for whose use and benefit the tribal moneys of the Chickasaw Nation were expended, and which are here involved.

It will not do to say that these persons were to be left without provision being made for their education, or that their educational welfare was not foreseen and provided for.

For reasons which were sufficient, in order that the great work of dividing and distributing the *tribal estate* might be consummated, all *unenrolled persons* were *excluded* from participating in *tribal properties.*

But all of this did not mean that children of Chickasaw blood, born after March 4, 1906, were to be denied *educational facilities.*

They were *citizens of Oklahoma,* with all the rights and privileges of *all other citizens* of the State (including school benefits), whether White, Red or Black.

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

Here, however, the question is one of the *legality* of the expenditures under consideration; and we respectfully contend, (a), that there is nothing in the Act of 1906, relating to tribal schools, nor in the later Acts extending the same, showing that the Congress ever had any intention or purpose to depart from the *basic laws* limiting the right to share in *tribal* properties to *enrolled members;* and (b), that the United States, the Chickasaw Nation and the Congress (all being responsible for the passage of such *basic laws)* were well aware that all children born after March 4, 1906, would be *excluded* from tribal *property rights,* in order that the division and distribution of the tribal estates might be consummated, and, in the light of a

full knowledge of this condition, they (being the very *same powers* that *excluded unenrolled persons* from the enjoyment of tribal properties) made provision for their education, by placing them upon an *exact equality* (in the matter of education in the *public schools* of Oklahoma), *with all other citizens* of that State; and the inference that they were to be ignored and lost sight of, in the matter of their future education, is shown by the facts to have been otherwise.

Not that any concern, or lack of concern, for their educational welfare, would affect *the law,* regarding their exclusion from *tribal property rights;* but the facts, as here shown, as to what foresight was exercised to insure their future educational welfare, by the very *same agencies* responsible for their *exclusion* from *tribal property rights,* throws considerable light upon some of the issues and considerations that have arisen, and been stressed, in the instant case.

We have shown that the children here involved had *exactly the same* educational advantages as all other citizens of Oklahoma, and *exactly the same* as all other children of Indian blood whether *enrolled* or *unenrolled.* They were entitled, in fairness and justice to no less; and certainly, under the law, which we have so earnestly endeavored to make plain, they were entitled to *no more.*

There is no room or place, in the instant case, for sentimental considerations which have crept into it, because schools, in some fashion, are under consideration.

Here the Indians owned certain lands and moneys, and they (in cooperation with United States officials, and the Congress) decided to divide and distribute it *in a certain way.* There is no contention that these agencies did not have the power to *validly act. They acted,* and certain persons were excluded; and it is difficult to understand how or why there should be any doubt or hesitation in carrying out the so-called *basic laws,* so plainly written.

There must be an exact *division,* among those persons *entitled to share,* if the tribal estates were to be equally divided.

Be that as it may, *that was the scheme and plan fixed and agreed upon* by the agencies having the power to act. Under this scheme and plan *some time* must be fixed for *closing the rolls.* The first date was fixed as of September 25, 1902; and then, for reasons deemed sufficient the rolls were reopened, and the *last and final date* fixed as of March 4, 1906. The rolls *were never thereafter reopened;* and no language could have been used, more positively and conclusively providing that *no persons born thereafter* should *"in any manner"* whatsoever, share in tribal properties.

(d)* The moneys here involved, belonging to the Chickasaw Nation, expended for the use and benefit of *unenrolled persons,* were not expended for the benefit of the *Chickasaw Nation as a whole.

There are so many reasons why the holding of this Honorable Court, in its Opinion, that the moneys here involved were expended *"for the benefit of the Chickasaw Nation, as a whole",* is erroneous that we find it difficult to marshal all of them.

Some of the most important are as follows:

(1) There was no *Chickasaw Nation* (except as Congress permitted it to function, in the consummation of the program of the United States, in the final division and distribution of the tribal estate), after March 4, 1906. The "Atoka Agreement" of June 28, 1898 (30 Stat., 495), had so provided, and the abolition of the National or Tribal Governments actually took place at that time.

(2) The *single objective* of the United States, in dealing with the Five Civilized Tribes, was to merge *tribal citizenship* into *United States citizenship* (and then into *Oklahoma citizenship* when it came), and to abolish the National or Tribal Governments, 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* of *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 facilities of the *public schools.*

(3) The failure to grasp these differences between the Five Civilized Tribes and the Western Reserva-

tion Tribes, has led to many misunderstandings and errors; and we respectfully suggest, has led to the errors in the Opinion herein, to which this Motion and Brief relate. 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 clearly defined and stated plan, were to have their Tribal Governments *abolished,* the *Tribal citizenship ended* (except that their prepared and approved rolls were to be the measure and division of all tribal property) and all *Indian citizenship* merged into *United States and Oklahoma citizenship;* and that all things *"Tribal"* should *"disappear from the face of the earth"*. This is all so clearly reflected from the Treaties and laws, and the history of the times, that the mere repetition here would seem to be superfluous.

Therefore, we would say (in pointing out and commenting upon, the error of this Honorable Court, in holding that the moneys here involved were for the benefit of the *Chickasaw Nation* as a whole") that, (a), there was no *"Chickasaw Nation"*, as such, since March 4, 1906, and the moneys here involved were illegally expended from 1913 to 1932; (b), there were no *citizens or members* of the Nations except the list of those persons, declared, by the *basic laws,* to be the owners of all tribal properties (referred to as the final and approved rolls), and *all Indian persons,* (irrespective of whether *enrolled* or *unenrolled),* have long since become United States and Oklahoma citizens, with all rights and privileges as such, including *public school* rights and privileges.

No benefits could accrue to a "Nation" (the Chickasaw Nation) when there was no *Chickasaw Nation,* as such, and had not been for some seven years before the first illegal dollar was spent.

The *Chickasaw Nation* was long since defunct, having responded to the *death sentence* of its original creators (the Indians), its guardian (the United States), and the Congress of the United States (the ruler of all).

The *former citizens* of the Chickasaw Nation had long since passed into *United States and Oklahoma citizenship,* and the only remaining vestige of *Indian citizenship* was the final and approved rolls, declared, by law, to be the rule and measure for the division and distribution of all tribal property.

In reaching its conclusion (which we contend to be erroneous) that the moneys here involved were "for the benefit of the Chickasaw Nation, as a whole", the court says:

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

While we shall be respectful, we must be firm and positive in our denial that we have ever conceded or admitted that the moneys here involved were "for the benefit of the Chickasaw Nation, as a whole".

Every word we have used has exactly the opposite meaning. In our "Reply Brief" (Page 354, Record), we say:

"While the sentiments of the Secretary of the Interior, in thus continuing this illegal use of *common tribal moneys,* may be commended, when gauged by the rule, and weighed in the balance, of *his own notions* of charity and benevolence, and *his own notions* of what good might thereby be accomplished, they certainly do not square with *the law,* which the *Indian owners* of the property agreed to, and which Congress passed, definitely and specifically limiting the benefits of *common tribal property* to the *enrolled members* of the tribe";

and also (page 358, Record):

"The fact that *each individual* must stand, or fall, upon his *own* legal rights (and not upon the rights of some relative) in the *enjoyment of common tribal property,* has been settled by *the law,* and upheld by the Supreme Court of the United States, in case of *Gritts* v. *Fisher* (224 U. S. 640), which is often referred to by the attorneys for defendant, in their *Answer Brief.*

"In that case (and in many other cited cases) it was held, generally, that the *enjoyment* of common tribal property depended wholly upon *tribal membership;* but in the *Gritts* v. *Fisher* case, it was held, definitely and specifically, that the *rights,* or *lack of rights,* of *each individual,* depended wholly upon *his own status,* as to whether *he* was an *enrolled member,* or not *an enrolled member,* of the tribe."

"The Supreme Court said:

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

and also (page 361, Record):

"In the first place, it is not a fact that the expenditure of common tribal moneys for the use of persons who were *not enrolled members* (and, therefore, *not members* of the tribe), was in the interest or for the *benefit of the tribe.* The enrolled members of the tribe *owned all common tribal property,* and none could be legally used for *persons not enrolled,* and *not members.* Therefore, the use of the money here complained of was detrimental to the tribe *(the enrolled members).*"

We now close this Argument, in support of our Motion for New Trial.

We have, all the way through, been earnest, and somewhat meticulous, but always respectful.

We have endeavored, as best we can, to stress the things that would bring to the minds of the court the actual things which the officials of the United States, the Indians and the Congress, had in mind, in the consummation of the great work that confronted them.

We have sought to stress the fact that the *final and approved rolls,* as the measure and divisor of all tribal properties, was the *foundation* of the whole scheme and plan for the division and distribution of the tribal estates; and that foundation was *never undermined or destroyed.*

II.

SPECIAL FINDINGS OF FACT.

(1)

There is no objection to *Special Finding of Fact* numbered 1.

(2)

(a) It is admitted by the defendant, the United States ("Evidence for Defendant" Record 11-73) that for certain periods, the records are *"missing"* or *"cannot be found"*. The periods are only a few scattering months, running through the years from 1913 to 1932. The evidence submitted is the *"Evidence for Defendant"*, the United States, and it undertook to establish the facts. If we should prevail, we are certainly entitled to prevail for the *whole period,* and there can be no denial that the schools were operated, and moneys expended for the *missing periods.*

The only feasible method is to average the *missing periods,* with the *preceding* and *succeeding* periods, which has been done.

(b) This is that part of moneys expended in 1916-17 (the year before any pupils were admitted at Carter Academy, formerly Bloomfield) represented by *unenrolled* pupils in 1917-18, the first succeeding year. All of the money was spent *in preparation* for what transpired in 1917-18 and later years; the admission, education and accommodation of both *enrolled* and *unenrolled* pupils.

(c) It is admitted that if moneys of the Chickasaw Nation may be legally expended for *enrolled members,* such moneys may likewise, be legally expended for educational facilities, such as buildings, etc.

The converse, of course, would be true; and the amount referred is that part of the *original purchase* of the Carter Academy (Bloomfield) property that was illegally used for unenrolled pupils, averaged throughout the year.

(3)

Special Finding of Fact numbered 3 will be amended as suggested, only in the event that the court amends its Conclusion of Law regarding benefits to the *Chickasaw Nation, as a whole.*

(4)

We are assuming that our request for proposed *Special Finding of Fact* numbered 4, will be readily granted.

We are sure that its omission was wholly inadvertent.

The Act of Congress of August 16, 1937 (Public 296, 75th Congress, 1st Session) was passed for the purpose of validating *Amended Petitions* theretofore filed, and permitting the filing of new Amended Petitions, based upon the evidence, following the decision of the Supreme Court of the United States in the *Seminole Case.*

Our Amended Petition comes clearly within the Act of 1937.

We, therefore respectfully request that existing *Special Findings of Fact* be amended, and that there

be added thereto proposed *Special Finding of Fact* numbered 4.

This concludes our Argument in support of "*Motion for New Trial; and Request for Amendment to Special Findings of Fact and Conclusions of Law*"; and the same, together with our request that the same be placed upon the Law Calendar for argument, is now

Respectfully submitted,

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and
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