IN THE

United States Court of Claims

No. K-334

THE CHICKASAW NATION OF INDIANS,
Plaintiff,

VERSUS

THE UNITED STATES OF AMERICA, *and*
THE CHOCTAW NATION OF INDIANS,
Defendants.

SUPPLEMENTARY BRIEF OF THE PLAINTIFF, THE CHICKASAW NATION, ON THE SUBJECTS OF: (1), THE VALUE OF THE LANDS INVOLVED AND AMOUNT OF JUDGMENT; AND (2), GRATUITY OFFSETS.

(Following oral arguments on December 6 and 7. 1943.)

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Leave of court has been granted for the preparation and filing of this Supplementary Brief, within 20 days after December 9, 1943, upon the two phases of the instant suit below referred to; and the reasons for such application for leave to file the same, and for the action of the court in granting such application, are as follows:

(1)

In the presentation and argument of the instant suit, in the first instance, the views and contentions of

the plaintiff the Chickasaw Nation, were not fully presented upon the issues of the value of the "Eastern Boundary" lands involved, and the amount of the judgment to which the plaintiff was entitled, if any, for the reason that Rule 39 (a) then in force, provided that,

> "* * * the hearing, in the first instance, shall be limited to the issues of fact and law relating to the right of the plaintiff to recover and the court shall enter its judgment adjudicating that right. If the court holds in favor of the plaintiff the judgment shall be in the form of an interlocutory order, reserving the determination of the amount of the recovery and the amount of the offsets, if any, for further proceedings",

Since, in its Opinion and Judgment of May 5, 1941, which followed, the court dealt with the value of the lands involved, and the amount of the judgment, without having before it a full expression of the views and contentions of the plaintiff the Chickasaw Nation upon those phases of the suit, it has been assumed that such an opportunity would be afforded, at a later date, and as the suit progressed, and in the "further proceedings" to which said Rule 39 (a) refers.

The hearing and oral argument on December 6 and 7, 1943, was upon Exceptions to the "Report of Commissions" (R. 557-64), which dealt only with "*Counterclaim*" and "*Gratuity Offsets*"; and counsel for the plaintiff, the Chickasaw Nation, was taken by surprise when the court announced that there would

be no "*further proceedings*" upon the value of the land involved, and the amount of the judgment, if any, but that all phases of the suit must be fully and finally presented at this time; and this is one of the subjects upon which leave has been granted to file a Supplementary Brief.

(2)

In the oral argument of December 6 and 7, 1943, (and in the printed Briefs heretofore filed), counsel for the plaintiff, the Chickasaw Nation, prayed for general definitions of what items expended by the United States, were *allowable* as "Gratuity Offsets", and what were *not allowable;* and also for an itemization of what items had been *allowed,* and what items had been *not allowed* (the total sum allowed being $1,326,651.37, out of a total of $5,724,587.63, set up and claimed), in the "Leased District" suit of *Choctaw and Chickasaw Nations vs. United States,* No. 17,641, Congressional (decided on January 9, 1939).

This prayer was earnestly made, in order that the plaintiff, the Chickasaw Nation, might have an opportunity to contend that the holdings of the court in the said "Leased District" suit, upon the *same items* now set up and claimed in the instant suit, should be *the same;* and that, thus the *confusions and conflicts and possibilities of double credits* (to which the Supreme Court of the United States has referred in the *Seminole Cases* which were cited and quoted), which threat-

en, in this and other suits, might be avoided, and substantial justice be thereby done to the contending parties, in the complicated and confusing matter of "Gratuity Offsets" in Indian cases, arising under the Act of Congress of August 12, 1935 (49 Stat., 571-96).

In the course of such oral argument the court announced that such prayer would not be granted, but that the views and contentions of the plaintiff, the Chickasaw Nation, must be confined to the *particular items* set up and claimed in the instant suit; and this is the other subject upon which leave has been granted to file a Supplementary Brief.

Therefore, this Supplementary Brief has been prepared and is being filed, under the leave thus granted; and in it will be discussed only those phases of the instant suit for which leave has been granted, and as above set out; and the views and contentions of the plaintiff, the Chickasaw Nation upon those two phases will not be set out.

I.

THE VALUE OF THE "EASTERN BOUNDARY" LANDS.

(A)

The Net Proceeds Case.

In rendering judgment, in the first instance (Opinion and Decision of May 5, 1941), for $17,025.50, in favor of the plaintiff, the Chickasaw Nation, and against the United States, as compensation for its One Fourth interest in the "Eastern Boundary" lands, the court adopted the valuation of 50 cents per acre, which had been fixed in the case of *Choctaw Nation vs. United States* (119 U. S., 1-44), known as the "Net Proceeds" case.

Before commenting upon how that valuation was arrived at, it should be made plain that the plaintiff, the Chickasaw Nation, was *not a party to that suit;* and is not, and should not, be bound or affected thereby.

That suit was: *"Choctaw Nation vs. United States".*

It was filed in the Court of Claims under the Jurisdictional Act of March 3, 1881 (21 Stat., 504) "* * * to try all questions of difference arising out of the treaty stipulations with the Choctaw Nation, and to render judgment thereon * * *"

This great case arose out of the complaints of that Nation over the manner the United States had handled its lands in the old Choctaw Nation *east of the Mississippi River,* under the Treaties under which it had been forced to cede such lands to the United States, and to remove to its newly acquired lands west of the *Mississippi River;* and resulted in a judgment against the United States, for approximately $3,000,000.00, which was appropriated and paid.

In the early stages of the controversy, nothing was considered except the grievances of the *Choctaw Nation* over how their old Eastern lands had been handled, under the Treaties of 1820, 1825 and 1830.

As the controversy progressed, some one learned that there had been an *erroneous survey* of the line between the Western lands of the Choctaw Nation and the State of Arkansas (which line was established by Treaty of 1825), which, if permitted to stand, would result in the loss of some 136,000 acres of land, which then belonged wholly to the *Choctaw Nation* (the Chickasaw Nation having acquired its *common interest* in all of the *Western lands* of the Choctaws, under the Treaties of 1837 and 1855).

As an "afterthought", and, in order to be on the safe side, a claim for this fragment of *Western lands* was included in the said "Net Proceeds" case, since the said Jurisdictional Act of 1881 was broad enough to authorize any and all claims which the *Choctaw Nation* might have against the United States.

It was under these conditions that the claim for compensation for the "Eastern Boundary" lands was included in the said great "Net Proceeds" case, which involved millions of acres of lands, and millions of dollars in moneys, as well as complicated problems and computations, and in all of which (except the "Eastern Boundary" claim), the Choctaw Nation was *solely* interested).

No further attention was paid to this insignificant item, and *no evidence* was taken as to the value of these "Eastern Boundary" lands or otherwise, since, apparently, the Choctaw Nation and its attorneys were engrossed in the more important phases of the case; and this accounts for the fact that they failed to give this small item necessary attention and permitted a judgment to be entered, fixing the value of these lands at 50 cents per acre, which now threatens the rights of the Chickasaw Nation, in the instant suit.

When the said "Net Proceeds" case was filed, and a claim for compensation for the "Eastern Boundary" lands was included, and when the same was tried and went to judgment, both the United States and the Choctaw Nation overlooked the fact that such lands were *commonly owned* by the Choctaw and Chickasaw Nations; and that situation did not, strangely, "come to light" until many years thereafter; and it was for the adjudication of the interest of the Chickasaw Nation in such lands (and for the adjudication of many other claims of the two Nations), that the said Jurisdictional Act of June 7, 1924 was passed, under which the instant suit has been filed.

The Chickasaw Nation was under disability, as a ward of the United States, and had no power and authority to intervene, or to sue, in the protection of its rights, unless authorized by the Congress; and no such authority was given.

While there is no denial that the Chickasaw Nation was not a party to the "Net Proceeds" case, (and the title and text of that case so shows), it is interesting to note that, in his Report upon the instant suit, dated February 12, 1934 (R. 19), the Secretary of the Interior rather significantly states:

> "The Chickasaw Nation, who was the owner of an *undivided interest* in the above-mentioned 136,204.02 acres appropriated by the Act of March 3, 1875, to the United States, was not a party to the above-mentioned suit of the *Choctaw Nation vs. The United States* decided by the Supreme Court on November 15, 1886, and does not appear to have been paid by the United States for its interest in said land."

Then, if the Chickasaw Nation was the *owner* of a One-Fourth interest in the "Eastern Boundary" lands (as is not denied, and as has been held by this court, in its Opinion and Decision of March 5, 1941), and if, such lands were *"taken"* by the United States by the said Act of March 3, 1875 (as has also been held by this court), how can it be said, in fairness and justice, that it should be bound by, or its interests affected by, the "hit and miss" methods adopted in the "Net Proceeds" case for fixing the value of its interest in the lands involved.

Need authorities be cited and quoted, to show that the plaintiff herein, the Chickasaw Nation, is not bound by, nor that its interests are affected by, the judgment in the said "Net Proceeds" case, to which it was *not a party*, and in which it had no opportunity to protect its interests in the lands here involved.

The instant suit has been filed against the United States, under the Jurisdictional Act of June 7, 1924 (43 Stat., 537), in which it has, for the first time, been afforded an opportunity to have its rights adjudicated; and that act expressly states that its claim shall be adjudicated,

> "* * * notwithstanding the lapse of time or the statutes of limitation."

It is no less than unthinkable that the great Government of the United States would now do less than face the situation fairly and squarely, and desist from its efforts to use against the Chickasaw Nation, the plaintiff herein, the grossly inadequate valuation of 50 cents per acre, for its interest in the "Eastern Boundary" lands, fixed in the "Net Proceeds" case, under the circumstances here set out; and to be willing to abide by the record herein, in ascertaining the fair value of the lands under consideration.

On Pages 18-20, inclusive, of the Opinion and Decision of this court of May 5, 1941, have been set out the language of the Supreme Court in the said "Net Proceeds" case, defining the obligations and

duties of the United States, in its relations with its helpless and dependent Indian wards; and, following the quoted language of the Supreme Court, this court adds:

> "The same philosophy applies to whatever interest the Chickasaw Nation had in this particular tract of land."

The plaintiff, the Chickasaw Nation, now again calls to the attention of the court these timely quotations, and prays that this philosophy and doctrine now have, in the instant case, a practical application; and that a value be placed upon its interest in these "Eastern Boundary" lands which is fair and just according to the evidence, and irrespective of what might have been fixed in the "Net Proceeds" case, to which is was *not a party*, and in which it had no opportunity to be heard in its own interests.

The circumstances and conditions under which the grossly inadequate value of 50 cents per acre was arrived at, in the said "Net Proceeds" case will now be set out.

How was the value of 50 cents per acre arrived at, in the "Net Proceeds case

In its "BRIEF ON BEHALF OF THE CHICK ASAW NATION" (R. 122-135) are found the views and contentions of the plaintiff, the Chickasaw Nation; and while not repeated here, they are again called to the attention of the court.

Therein, it has been shown, in brief:

(1) That *no testimony whatsoever* was taken upon the value of the "Eastern Boundary" lands;

(2) That the attorneys for the Choctaw Nation expressed a willingness to accept "the price at which the United States had offered *public lands of the United States,* under the reduced prices authorized by the "Graduation Act" of August 4, 1854 (10 Stat., 574);

(3) That, while the said "Graduation Act" of 1854 authorized the offering of *"public lands of the United States, at reduced prices,* from time to time, depending upon the length of time so offered, without sale, that Act could not, and did not, apply to *these "Eastern Boundary"* lands, because they were not *"public lands of the United States* (but were *Choctaw and Chickasaw Indian lands)* until they were appropriated and *"taken"* by the said Act of March 3, 1875;

(4) That the explanation of this error is furnished by the Commissioner of Indian Affairs, in his Report upon the instant suit, dated December 26, 1933 (R. 28), in which he says:

> *"This Act* (the Graduation Act of 1854) *may have been* a factor in the award of the Court of claims * * *"

in the "Net Proceeds" case, in which the value of these lands was fixed at 50 cents per acre.

The Commissioner of Indian Affairs was correct in saying that this *"may have been a factor;"* and it certainly was, since there was *no evidence or argument upon value,* and the court could do no less than to adopt *something,* and this was all that was offered.

The attorneys for the Choctaw Nation (according to their own statement) were "asleep upon the job", and the Chickasaw Nation was "not there at all", not being in the case; and because of that tragic situation, its rights are now imperiled in the instant suit.

It is repeated, and stressed, that these lands were not *public lands of the United States* (but were *Indian lands,* and belonged to the Choctaw and Chickasaw Nations, until they were appropriated and *"taken"* by the said Act of March 3, 1875).

Then, and then only did they become *public lands of the United States,* and the "Graduation Act" of 1854 did not, and could not, have any application to them, prior to that time.

After their appropriation and *"taking"* in 1875, the United States could do as it pleased with them; but was obligated to render just compensation to the Indian owners.

(B)

The "Taking"; and the Rule That Governs the Compensation to be Paid.

In its Opinion and Decision of May 5, 1941, this Honorable Court has found and held that the plaintiff, the Chickasaw Nation, owned a *common interest* (amounting to *One Fourth)* in the "Eastern Boundary" lands here involved; that such lands were

"taken" by the United States under the Act of Congress of March 3, 1875 (18 Stat., 476), and thus were added to and became a part of, the *"public domain of the United States";* and that it is entitled to compensation for its *common interest* in the same, according to the rule declared by the United States Supreme Court, in the case of *United States vs. Creek Nation* (295 U. S., 103); and much of the arguments heretofore made, in the first instance, need not be repeated here.

But in so holding, this court did not go far enough, in giving the plaintiff, the Chickasaw Nation, the full fruits of the decision in the *Creek Case,* supra.

In that case lands belonging to the Creek Nation had, by an erroneous survey, been included in the Sac and Fox Reservation, and, later, allotted and patented to them; and, by the Act of Congress of February 13, 1891 (26 Stat., 749-50) such allotments were confirmed, thus extinguishing the title of the Creek Nation, and establishing its right to compensation for the lands so *"taken".*

The situation regarding erroneous surveys, and the final *"taking"* by Act of Congress, parallels, in all respects, the situation regarding the "Eastern Boundary" lands here involved; and the questions which arose in that case, and which arise in the instant case are: *When* were such lands *"taken";* and *How* is the compensation therefor to be computed.

As to *when* the Creek lands were *"taken",* the Supreme Court held that they were *"taken"* by the

said Act of 1891 (just as the "Eastern Boundary" lands here involved were *"taken"* by the said Act of 1875); and, upon that point, the Supreme Court said:

> "* * * so the compensation should be based upon the value *at that time* * * *" (Italics ours)

But the Supreme Court, in the same case, went on and laid down, most explicitly, the rule that should govern, in arriving at the compensation to be paid, as follows:

> "But the *just compensation* to be awarded now should not be confined to the value of the lands *at the time of the taking* but should include *such addition thereto as may be required to produce the present full equivalent of that value paid contemporaneously with the taking.* Interest at a reasonable rate is a suitable measure by which to ascertain the amount to be added. The treaty of 1866, the Act of 1889, and other statutes show that 5 per cent, per annum is a reasonable rate as between the parties here". (Italics ours)

This, it would seem that, under the rule laid down by the Supreme Court, the plaintiff, the Chickasaw Nation, is entitled to a judgment, in the first instance, against the United States, not only for its One Fourth interest in the value of the "Eastern Boundary" lands, *at the time of the "taking"* (under the said Act of Congress of March 3, 1875); but is also entitled to interest thereon to the date of the judgment herein.

In its Opinion and Decision of May 5, 1941, it was

held that the plaintiff, the Chickasaw Nation, was entitled to a judgment for $17,025.50; and that interest should *begin to run from February 19, 1906.*

But, on October 6, 1941, that judgment was set aside, and an interlocutory order entered,

> "* * * reserving the determination of the amount of the recovery, and the amount of offsets, if any, for further proceedings"; and
>
> "The last paragraph of the Opinion, page 23, is modified as follows:
>
> > 'Plaintiff is entitled to recover, but the entry of judgment is suspended pending the determination of the amount of the recovery and the amount of offsets, if any (see Rule 39 (a); and the defendant, the United States, is entitled to recover over against the Choctaw Nation the sum of $16,033.97.' "

This order of the court became necessary: (1), because the said Opinion and Decision of May 5, 1941, went beyond the limitations of Rule 39 (a) authorizing only an interlocutory order, adjudicating the right of the plaintiff to recovery, and "reserving the determination of the amount of the recovery, and the amount of offsets, if any, for further proceedings"; and (2), because no "Gratuity Offsets", under the Act of Congress of August 12, 1935 (49 Stat., 511-96) had been set up and claimed by the defendant.

And so, all questions relating to the value of the lands involved, the amount of the judgment, and the amount of allowable "Gratuity Offsets", if any, are now before the court for its final consideration and judgment.

(C)

The evidence offered by the Plaintiff, The Chickasaw Nation, in the instant suit, upon the value of the "Eastern Boundary" Lands, at the time they were *"taken"* under the Act of March 3, 1875.

It should first be made plain that the plaintiff, the Chickasaw Nation, is not contending for the *present value* of the "Eastern Boundary" lands, nor for their *actual value* at the time they were *"taken"*, under the Act of 1875; for that would not be fair and just, nor permissible under the rule laid down in the *Creek Case,* supra, for *"just compensation"*.

While it may be contended, under the evidence contained in the record herein, that such lands were worth *more,* it has, from the inception of the instant suit, expressed its willingness to accept the *"Government Price"* of $1.25 per acre, as of the date of their *"taking,"* plus interest on that price from March 3, 1875 (the date upon which the Choctaw and Chickasaw Indian title was extinguished, and such lands were added to, and became a part of, the *public domain of the United States);* and all in strict conformity to the rule for "just compensation", laid down by the Supreme Court of the United States, in the case of *United States vs. Creek Nation,* supra (295 U. S., 103).

This evidence is contained in the following:

"EVIDENCE FOR DEFENDANT", (R. 14-31); and

"EVIDENCE FOR COMPLAINANT", (R. 33-93).

The *"Evidence for Defendant"* consisting of Reports and other Official Documents, was first filed; and bears upon the subject of the value of the lands here involved.

The *"Evidence for Complainant"* was filed on January 8, 1936, following the taking of evidence in the five Arkansas Counties of Little River, Polk, Sevier, Scott and Sebastian, in which the former "Eastern Boundary" lands now lie; and contain certified copies by various officials of those Counties of all available official records relating to *assessment values for advalorem taxation,* and *considerations of purchase and sale, and mortgage considerations,* for the year 1875, and for other years shortly before and after that year; and such *"Evidence for Complainant"* was filed under *"Stipulation and Agreement"* between Harry W. Blair, Assistant Attorney General, and Melven Cornish, Special Attorney for the Chickasaw Nation; and the same appears in such *"Evidence for Complainant"*, (R. 37-39).

Then, shortly thereafter, the "BRIEF ON BEHALF OF THE CHICKASAW NATION OF INDIANS" (R. 95-224), was prepared and filed; and contains (pages 182-213) a full and complete analysis of, and argument upon, such evidence.

That Brief is now before the court; and that part of the same (pages 182-213), are now again called to

the attention of the court, since they relate to the value of the "Eastern Boundary" lands, now under consideration.

It was prepared and filed some *two years* prior to the adoption and promulgation of Rule 39 (a); and, at that time, there was no inhibition against presenting the *whole case,* including the *"value of the lands"* and the "amount of the recovery", if any; but when the instant case came to be orally argued, Rule 39 (a) was in force, and counsel for the plaintiff, the Chickasaw Nation, refrained from presenting those phases of the case because, under said Rule, that was reserved for "further proceedings".

Now that such "further proceedings" are at hand, and counsel for the plaintiff, the Chickasaw Nation, has been granted leave to file this "Supplementary Brief" upon those phases of the case, he adopts the views and contentions heretofore set out in the said BRIEF ON BEHALF OF THE CHICKASAW NATION (R. 182-213), since the record would be burdened, and no good purpose would be served, by a repetition of the same.

In brief, it has been therein shown:

(1) That 653 tracts of former "Eastern Boundary" lands (in the Arkansas Counties of Little River, Sevier, Polk, Scott and Sebastian), totaling 39,686.11 acres were assessed for *advalorem taxation* for 1875 or for years shortly before or after, at an average value of $3.05 per acre; and

(2) That 172 tracts, totaling 29,394.61, were *purchased and sold* for an *average value* of $4.88 per acre, during approximately the same years.

It is further shown: (1), that the *average valuation or assessment* of such lands, for advalorem taxation of $3.05 plus, *per acre,* was approximately *Two* and *One Half times* the *claimed 1875 value* of $1.25 per acre; and (2), that the *average purchase and sale price of such lands, of $4.88 plus, per acre,* was *more than Three and Three Fourths times the claimed 1875 value of $1.25 per acre.*

It may also be said (and will not be denied), that the general custom, throughout the whole country, is to assess real estate, for *advalorem taxation,* at much less than its *actual value,* and, usually at approximately *one-half* of its actual value; and, that is confirmed by the valuations, as above set out, for by comparing the values for *advalorem taxation* (of $3.05 per acre) with the *purchase and sale* values (of $4.88 per acre), it will be seen that the *purchase and sale* values are approximately *60% higher* than the *advalorem tax values.*

In the Opinion and Decision of this court of May 5, 1941 (in considering the passing upon the value of the lands involved and "out of time" because of the inhibitions contained in Rule 39 (a), it refused to accept the record evidence as proving what it was intended to prove; that is: That the "Eastern Boundary" lands were worth, in 1875, as much, and more,

than the *"Government Price"* of $1.25 per acre, which is herein contended for.

It said:

> "The only additional evidence which the plaintiff offered was some tax valuations, and some sales of lands in this particular area during the period between 1870 and 1880. These records, however, are incomplete * * *"

They are rather complete as to 39,687.11 which were assessed for *advalorem taxation,* and as to 29,394.61 which were *purchased and sold;* but, fortunately, there is other evidence in the record that throws all the light that could reasonably be required, upon the *balance of such lands.*

In the *"Evidence for Defendant,"* (R. 14-31), appears the Report of the Commissioner of the General Land Office, reporting upon the instant case, dated December 26, 1933, in which is set out a Schedule showing the acreage of the "Eastern Boundary" lands disposed of by the United States, and the acreage *"remaining unsold"* as of August 1, 1881 (which was *five years* after such lands had been appropriated and *"taken"* by the United States under the Act of March 3, 1875, and after the same had become a part of the *public domain of the United States).*

This Report (R. 28) shows that, as of that date, there was *"remaining unsold"* a total 79,564.13 acres out of the original total of *136,204.02* acres; or a total of approximately *60 per cent* of all of the original "Eastern Boundary" lands.

Then there is also other evidence in the record bearing upon the value of the lands here involved.

In the same the *"Evidence for Defendant",* appears the Report of the Commissioner of the General Land Office (R. 29-31), dated April 4, 1878 (some *three years* after the "Eastern Boundary" lands were appropriated and *"taken"* by the Act of March 3, 1875) in which he reports upon the values of such lands then belonging to the United States, as follows (R. 30):

> *"In the matter of values,* I have to state that with the exception of a few tracts within the six-mile limits of a railroad land grant (as shown by the schedules submitted) the lands *not disposed of are held at single minimum valuation, i. e., $1.25 per acre;* and no value can be attached to the lands other than said government price without legislation."

There is also another official Report, which, while brief, throws a bright ray of light upon the element of value that attaches to the lands here involved.

In the "Annual Report of the Commissioner of the General Land Office", (Pages 22 and 23) for the fiscal year ending June 30, 1878, is contained a comprehensive review of the re-survey made under the Act of March 3, 1875; and also, at the end of the same, is a brief description of the general characteristics of the "Eastern Boundary" lands; and they are described as being "valleys of the principal streams", and some being "rocky and rough", and "in some cases moun-

tainous''; and that ''the country is supplied with pure water, and is regarded as healthy''; but, of most importance, bearing upon values, is the statement: ''The mountain regions *abound in pine timber* * * *''

It is well known that southern Arkansas and southeastern Indian Territory (now Oklahoma), *''abound in pine timber''*; and that is one of the principal sources of wealth in those regions.

While this timber might have not been accessible to markets at that time, it is a historical fact that the St. Louis and San Francisco Railway was built through that country between 1880 and 1890, running from Ft. Smith, Arkansas to Paris, Texas, and the Kansas City Southern Railway in 1896, running from Kansas City to Beaumont, Texas; and it was at that time that the United States *still owned* approximately 60 per centum of the original ''Eastern Boundary'' lands.

It is thought permissible to say, in this connection (and it cannot be denied), that the lumbering operations of corporations and individuals, *in this particular region,* have been quite as extensive and profitable, as in any other part of the whole country; and it may be fairly assumed that the pine timber which *abounded* upon these ''Eastern Boundary'' lands (which were then owned by the United States) either shared, or were in a position to share, in these extensive and profitable lumbering operations and activities which came along shortly after 1875.

The evidence offered upon the 1875 values of the lands here involved, does not establish the same with mathematical exactness, nor is that deemed necessary; but does it not show, in all fairness and justice, that such lands had an 1875 value of the ''Government Price'' of $1.25 per acre, and more; and that is all that is contended for, in the instant case.

And then, the Treaties with Indian Nations, the Statutes of the United States, and the decisions of the courts, are filled with references to *Indian lands,* and *''Government lands''*, at $1.25 per acre, and more; and the only exception that can be found is the said ''Graduation Act'' of 1854, in which the United States authorized the lowering of the ''Government Price'' upon *public lands of the United States,* where lands had not been sold within certain times; and evidently for the very laudable purpose of land acquisition and settlement by its citizens.

But it has been shown that there was, and could not have been, any application of that Act to these ''Eastern Boundary'' lands, so long as they belonged to the Choctaw and Chickasaw Indians; and that the *lowered values* authorized by that Act were applied to these lands, by the Court of Claims and the Supreme Court, in the said ''Net Proceeds'' case, supra, only because the attorneys for the Choctaw Nation had offered no evidence upon values, and had no other suggestion to offer.

119 U.S. 306 (Choctaw Eastern Boundary

In the "BRIEF ON BEHALF OF THE CHICKASAW NATION OF INDIANS" filed herein (R. 217-221) appears citations and quotations showing that the United States has paid the Choctaws and Chickasaws, Cherokees, Creeks and Seminoles, as additional compensations for their far Western lands, acquired under the Treaties of 1866, at values ranging from $1.25 to $1.42 per acre; and these lands were more inaccessible, and therefore, less valuable, than the "Eastern Boundary" lands here involved.

In the suit of *Choctaw and Chickasaw Nations vs. United States,* No. 17641, Congressional, this Honorable Court has rendered its Findings and Conclusions (Decided on January 9, 1939), that the United States has disposed of the balance of the "Leased District" lands (of some 5,000,000 acres) for the total net sum of in excess of $10,000,000, after deducting the expenses of surveys, allotments to other Indians, and lands for schools and other public purposes.

This concludes the evidence relied upon by the plaintiff, the Chickasaw Nation, to show that, in 1875, the "Eastern Boundary" lands were of the value of the "Government Price" of $1.25 per acre; and it prays for that value, with interest, according to the rule laid down by the Supreme Court, in the *Creek Case, supra.*

(D)

Attempted compromise and settlement between the Choctaw and Chickasaw Nations, out of the moneys paid the Choctaw Nation for the "Eastern Boundary" lands, in the "Net Proceeds" Case.

While this phase of the instant suit was considered by the court, in its Opinion and Decision of May 5, 1941, it is deemed permissible to express the further views and contentions of the plaintiff, the Chickasaw Nation, under the leave granted to file this "Supplementary Brief", since it enters into the "value of the lands" involved, and the "amount of the recovery" which, according to Rule 39 (a), is reserved for "further proceedings".

However, this phase has been rather fully presented in the "REPLY BRIEF OF THE COMPLAINANT THE CHICKASAW NATION" (R. 453-58); and since that Brief is before the court, that part of the same should not be repeated here, but is again called to the attention of the court.

In the Opinion and Decision, upon this phase of the instant suit, the law was declared as to the obligation of the United States to pay the Chickasaw Nation for its *One-fourth* interest in the "Eastern Boundary" lands; but, notwithstanding that holding, the fruits of the same were withheld.

After reciting the attempts made in 1905 and 1906, by the Choctaw and Chickasaw Nations, to arrive

at a *compromise settlement* of various matters of difference between them, it held:

> "The plaintiff urges that such agreement is not binding on the ground that the Chickasaw and Choctaw Nations, under the law prevailing at that time, had no right to make such a treaty or agreement. However, as the *warrant was never issued and the money was never paid to the Chickasaw Nation,* we cannot see how the defendant is in a position to invoke this understanding as a settlement of its obligations. *Brown v. Spofford,* 95 U. S. 474, 477." (Italics ours.)

It then holds, further:

> "The defendant had the right to make the Chickasaw Nation a party to the Net Proceeds case. It did not see fit to do so."

This much of the holding is not correct.

The full text of the Jurisdictional Act of March 3, 1881 (21 Stat., 504) has been examined; and it is found that *only the Choctaw Nation* was authorized to sue the United States, "on all questions of difference arising out of treaty stipulations with the *Choctaw Nation* * * *"

If the Congress had seen fit to include the Chickasaw Nation, either as a party plaintiff or defendant, or to be interpleaded, if and when it appeared that its rights were affected, well and good; but such Jurisdictional Act grants no authority whatsoever for the Chickasaw Nation to become, or to be made, a party to the "Net Proceeds" suit; and, as heretofore

contended it was not bound, and its rights were not, and could not be affected thereby.

But this Honorable court went on to hold, in even plainer language, as follows:

> "The fact that it (the United States) settled with the *Choctaw Nation* did not in any sense constitute a settlement with the *Chickasaw Nation.* While the Chickasaw Nation had indicated its willingness to accept a one-fourth interest in the money which the Choctaw Nation had received in payment of a judgment, *since it was not actually paid,* it certainly did not relieve the defendant of the *obligation to settle with the Chickasaw Nation for whatever rights it had in the premises.*" (Italics ours.)

That is exactly what the plaintiff, the Chickasaw Nation, has contended from the inception of the instant suit.

Throughout all the years, it has stood waiting, and hoping, and praying, that its guardian, the United States, would provide an opportunity for the adjudication of its rights and interests in these "Eastern Boundary" lands; and that opportunity was provided when the Congress passed the Jurisdictional Act of June 7, 1924 (43 Stat., 537), under which the instant suit has been filed.

In view of the above quoted holding, and the "clear as crystal" declaration of this Honorable Court, upon the rights of the Chickasaw Nation, will

it be further contended by counsel for the defendant, the United States, that it be relieved of its obligation to the Chickasaw Nation because of this *attempted compromise settlement,* and that this "wrangling" between those two wards of the United States, should be given any further serious consideration, in the regular and orderly progress and conclusion of the instant suit?

The *Choctaws* were paid the insignificant sum of $68,102.00 for its *Three-Fourths* interest in the Eastern Boundary" lands; and, since there were some 136,000 acres of these lands, their interest amounted to approximately 102,000 acres; and thus, they were paid at the rate of less than *70 cents per acre;* whereas, the evidence in the instant suit shows (as is herein contended), that *their 1875 value* was equal to, or more than, *$1.25 per acre.*

In 1905 and 1906 (some 37 years ago) when the "wrangling" over the *attempted compromise settlement* was under consideration, both the Choctaws and Chickasaws were confused by the avalanche of events into which the United States had plunged them, in being forced to abandon their Tribal "way of life", to accept the allotment and division of their lands and estates, and to abolish their Tribal Governments, to "make way" for the coming new State of Oklahoma.

They were not aware of their rights, or whether they had any rights at all, since they acted without counsel or legal advice, and were overwhelmed by the confusions and stresses of those tragic times.

Under these conditions, they "wrangled" between themselves over a *proposed compromise settlement,* about which they knew nothing, except that the *Choctaws* had received some $68,000 out of the "Net Proceeds" suit, for the "Eastern Boundary" lands, and the *Chickasaws* had received *nothing;* and they all proposed to "do something about it"; but *no money was paid,* and the *proposed* compromise settlement was repudiated, and the whole matter "fell to the ground", thus leaving the United States under its existing obligation (as held by this Honorable Court, and as is above quoted), *"to settle with the Chickasaw Nation for whatever rights it had in the premises";* and those rights were to receive, from the United States, "just compensation", for its *One-Fourth* interest in the value of the "Eastern Boundary" lands, appropriated and *"taken"* under the said Act of March 3, 1875, and computed according to the rule laid down by the Supreme Court, in the *Creek Case,* supra.

II.

GRATUITY OFFSETS.

(A)

Definitions of what items are *allowable,* and what *not allowable,* under the Act of Congress of August 12, 1935 (49 Stat., 571-96).

This is the second phase of the instant suit upon which leave has been granted to file a Supplementary Brief.

The prayer was that many of the *same items* of expenditures which had been set up and claimed and passed upon, in the "Leased District" case of *Choctaw and Chickasaw Nations vs. United States,* No. 17,641, Congressional (Decided on January 9, 1939), had been set up and claimed in the instant case; and that, by an *itemization and classification* of the items, *allowed and not allowed,* in the said "Leased District" case, the plaintiff, herein, the Chickasaw Nation, would have an opportunity to contend that the holdings of the court, upon the *same items* now set up and claimed in the instant case, would be *the same;* and thus, the *confusions and conflicts,* and the *possibility of double credits and charges,* in the final disposition of the complex and complicated subject of "Gratuity Offsets" which now exist, would thereby be avoided.

The court, during the progress of the oral argument, on December 6 and 7, 1943, announced that this prayer would not be granted; and that any views and

contentions of the plaintiff herein the Chickasaw Nation, must be confined to the *particular items* now set up and claimed in the instant case, and irrespective of any holdings, upon "Gratuity Offsets", in the said "Leased District" case; and leave was granted, for that purpose, to file a Supplementary Brief.

Therefore, it becomes necessary to again make plain (as was done in the said "Leased District" case), *what items,* as contended by the plaintiff herein, the Chickasaw Nation, are *allowable* as "Gratuity Offsets", and what items are *not allowable,* in the instant case, under the Act of Congress of August 12, 1935 (49 Stat., 571-96).

The definitions of what items are *allowable,* and what are *not allowable,* for which the plaintiff herein, the Chickasaw Nation, contended in the said "Leased District" case (and for which it now contends, in the instant case), are set out, in full, in the "RESPONSE OF THE PLAINTIFF, THE CHICKASAW NATION OF INDIANS, TO 'DEFENDANT UNITED STATES' SECOND AMENDED REQUEST FOR SUPPLEMENTAL FINDINGS OF FACT UNDER RULE 39 (a)' ", (R. 527-29); and, for the present convenience of the court, in the final consideration of the instant case, the same are herein again set out, as follows:

(1)

Where it is shown, by competent evidence, that moneys have been expended gratuitously by

the United States for the benefit of any claimant Indian Nation of the Five Civilized Tribes, and received and enjoyed by such Nation or Tribe, as such (that is, as a *"gratuity"* or *"gift"*, and *without consideration,* or *provision for payment),* and where the same has not been expended in the *administration* of its property or affairs which the United States has undertaken to *administer* any such property and affairs, in carrying out its plans and policies, under any Treaty, Agreement or Act of Congress, the same should be allowed, as a *"Gratuity Offset"*.

(2)

Moneys expended by the United States, and falling within any one of the following classifications and definitions, shall not be held to have been expended gratuitously for the benefit of any claimant Indian Nation or Tribe, and shall not be allowed as "Gratuity Offsets", where it appears:

(a) That such moneys were expended under any Treaty, Agreement or Act of Congress, in the *administration* of the property or affairs of any claimant Indian Nation or Tribe, where the United States has undertaken to *administer* the property and affairs of any such Indian Nation or Tribe, to prevent the intrusion of others who had no rights in the Indian country, and, generally, to protect it in the quiet enjoyment of the lands and homes of its members, as the consideration for its agreement to remove to, and to live upon, the new lands acquired west of the Mississippi River; and where, under later Treaties, Agreements or Acts of Congress, and as a further

consideration passing to any such Indian Nation or Tribe, it has cooperated with the plans and policies of the United States, both before and after the creation of the State of Oklahoma, by accepting the allotment of its lands and the division of its estate, and the abolition of its Tribal government, the United States has undertaken in pursuance of its own plans and policies, to *administer* any such Tribal estate, and has appropriated and expended, public moneys therefor, without any agreement or provision that any such Indian Nation would be required to repay such moneys so expended; and

(b) That such moneys were expended for conservation and protection of the allotment or estate of any *individual allottee* of any such Indian Nation or Tribe, after allotment, to whom title and ownership had passed, and in which the Indian Nation or Tribe, as such, had *no interest or ownership;* and

(c) That such moneys were expended in connection with the property and affairs of more than one Indian Nation or Tribe, unless and until it be shown, by competent evidence, *what part* of such moneys, if any, were actually expended for *administration,* as above defined, and received and enjoyed by the *particular Indian Nation or Tribe* against which such offset is claimed or asserted; and, in that case, the allowable gratuity offsets shall be confined to the moneys so received and enjoyed by the particular Indian Nation or Tribe sought to be charged; and

(d) That such moneys were expended for the benefit of persons who were *not enrolled* members of any such claimant Indian Nation or Tribe, and who had no distributable interest in its common properties or moneys, nor in the proceeds of any judgment in favor of such Indian Nation or Tribe.

The Act of Congress of August 12, 1935 (49 Stat., 571-96), authorizing "Gratuity Offsets" in Indian cases, merely stated that "all sums expended gratuitously by the United States for the benefit of the said tribe or band" of Indians, may be offset against any judgment rendered in its favor.

There were no definitions of *what items,* as to purposes for which expended, were *allowable,* and what were *not allowable,* thus throwing upon this Honorable court, the whole burden of definitions and classifications.

As stated, counsel for the United States were besought to cooperate with counsel for the Indians, to agree upon such definitions and classifications, but such cooperation was refused; and they chose to proceed, and to set up, and to claim *all items of expenditures,* as "Gratuity Offsets".

Under these conditions, counsel for the Indians proceeded, as best they could to lessen the burdens of the court, by furnishing *definitions and classifications* of what would seem to be fair and just to both the United States and the Indians, under the conditions under which such moneys were expended.

The *definitions and classifications* which are set out in the preceding sub-paragraph "A", were submitted for the assistance of the court in the said "Leased District" case, supra; and the same are now submitted, for the same purpose, in the instant case.

It will be shown that they were accepted, and applied, in the main, in the said "Leased District" case; and the plaintiff herein, the Chickasaw Nation, prays that they may likewise be accepted and applied in the instant case.

Along with such *definitions and classifications* thus submitted in the said "Leased District" case (and now again here submitted), legal definitions of *"gratuities"* (and supported by authorities, and by the cases cited by this court in the said "Leased District" case, supra; Decision of January 9, 1939, page 12, Finding 14) were furnished; and such conclusions are now here repeated,, for the present convenience of the court, in the instant case, as follows:

(1) A gratuity is a *gift;*

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

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

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

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

These conclusions are amply supported by authorities (including the holdings of this court), and their correctness will not be denied.

(B)

The conditions under which the moneys here under consideration, were expended.

If moneys were expended by the United States, as "gratuities" ("gifts") as above defined, they are *allowable;* and if for *administration,* in carrying out its undertakings to *administer* the property and affairs of the Indian Nation or Tribe, in pursuance of its own plans and policies, they are *not allowable* as "Gratuity Offsets"; and, as will be shown, an overwhelming percentage of such moneys were expended by the United States, for the latter purposes.

This situation was so fully presented to the court, during the oral arguments on December 6 and 7, 1943, that counsel for plaintiff, the Chickasaw Nation, hesitates to here repeat the same; but it may be that, for the present information and use of the court, in the final consideration of the instant case, some of the principal points should be restated; and the following comments will relate, particularly, to the Chickasaw Nation, to plaintiff, herein.

From a time running back of, and far beyond, the Revolutionary War, the Chickasaws had lived, happily and peacefully, upon their lands east of the Mississippi River; and their ownership, and quiet enjoyment of their lands, had been guaranteed under solemn Treaties, in the early years of the new United States Government.

Early in the last century, white settlers, moving westward, and being hungry for lands and homes, intruded upon, and surrounded, the lands of the Chickasaws.

As the years passed, the pressure for the "*opening*" of the Indian country increased; and this pressure became so great that it could no longer be withstood by the United States, and its officials and representatives.

Pressure was exerted upon the Chickasaws by the United States, which resulted in the Treaties of 1832 and 1834, in which they were forced to agree to cede their eastern lands to the United States, for "opening" and settlement; and to seek a "new home in the West": that is, west of the Mississippi River.

Prior thereto, the Choctaws, Cherokees, Creeks and Seminoles had been subjected to the same pressure; and, under a series of Treaties, they had also relinquished their eastern lands, and in exchange therefor, had acquired western lands, the boundaries of which correspond to the boundaries of the entire present State of Oklahoma.

The Chickasaws sent Commissioners to the West, to "look out" a new home, but found all lands of the United States suitable for their purposes, *already taken* by the other Nations.

Therefore, in 1837, they entered into a Treaty with the Choctaws (with the consent of the United States), under which they purchased, for a valuable money consideration, a *common interest* in the western lands of the Choctaws, lying between the Canadian and Red Rivers, on the north and south, and the 98th and 100th meridians of west longitude, on the east and west; and now comprising approximately the *southern one half* of the present State of Oklahoma.

Then, the Chickasaws traveled over the "Trail of Tears", and emigrated to, and established themselves upon, their "new home in the west" among the Choctaws.

By a later agreement with the Choctaws, they were permitted to establish their own political government upon approximately the *western one half* of the Choctaw Nation, proper; but the ownership of all the lands of the two Nations remained *in common,* and was never thereafter changed.

In the Patents issued by the United States to the Indian Nations of the Five Civilized Tribes (evidently intending to prevent a recurrence of the cruel experiences which these Indians had been forced to undergo, east of the Mississippi River), conveying to them the titles to their *Western lands,* it was provided that

their quiet enjoyment of these lands would never again be disturbed.

The "story books" say, in commenting upon Indian history: "So long as grass grows and water runs".

But the Patents, being legal documents, used language more dignified; for, they say that these Indian Nations shall never again be disturbed, "so long as they *exist as a Nation and live upon it";* and the Treaties, under which their title and ownership was guaranteed, say: "and the said land shall revert to the United States if said Indians and their heirs become extinct or abandon the same."

The Chickasaws, having established themselves upon the western half of the Choctaw-Chickasaw lands, organized the political government of the Chickasaw Nation, and located their capital at Tishomingo.

Their country was as fertile and attractive as any other region in the whole world; and, being peaceful, and intelligent, and industrious, they soon established a "way of life", that, likewise, has never been excelled anywhere else in the whole world.

But their contentment, and the guarantys of their guardian, the United States, was "short lived", and "was not to be".

The history of what had transpired east of the Mississippi River was soon repeated in the western Indian country.

Arkansas, and Texas, and the other surrounding states had been "settled up", and the white people, ever hungry for the "opening" of Indian lands, looked longingly at the fertile and attractive lands occupied by the Indians.

First, a few "ventured in", and the kindly Indians permitted them to stay.

Then, others, and still others, came; so that when the tragic events, between 1893 and 1898-1902 occurred, the white "intruders" outnumbered the Indian owners by approximately 10 to 1; and the United States, having done practically nothing to protect its Indian wards from this flood of immigration, found that it was powerless to cope with the situation, since this horde of white people were clamoring for the "opening" of the Indian country, and for a Territorial or State government.

First, Congress passed the Act of March 3, 1893 (27 Stat., 612), creating the Commission to the Five Civilized Tribes (Dawes Commission), and authorized it to "enter into negotiations" with the Five Indian Nations for the purpose of "the extinguishment of the National or tribal title" to their lands, or to secure their agreements for "the allotment and division of the same in severalty"; or "by such other method as may be agreed upon", that would "enable the ultimate creation of a State or States of the Union, which shall embrace the lands within said Indian Territory".

Thus the plans and policies of the United States

were made plain, and the Indians had received the same ultimatum that had confronted them in the east, and that had forced their removal to the west.

For *four long years,* the Dawes Commission held meetings through the length and breadth of the Indian Country.

The Indians remained courteous but firm, in the refusal to enter into new Agreements, since they were happy and contented in their "way of life"; and, besides, they had the guarantys of their guardian, the United States, that they would never again be disturbed.

But, as the years progressed, it began to dawn upon them that they would finally be "worn down", or that they would be "run over" by drastic Acts of Congress; and so, finally, on April 23, 1897, the Choctaws and Chickasaws entered into the *first tentative Agreement,* for allotment and division of their Tribal estates, in which they were given considerable voice in the settlement of their affairs.

That Agreement was sent on to Washington for ratification by Congress; and, on June 28, 1898 (30 Stat., 495), Congress passed the so-called "Curtis Act" (which was most drastic in its terms), and the "Atoka Agreement" of April 23, 1897 was attached to that Act (as Section 29), having first been rewritten by Congress, and according to its own notions, and without any further conference with the Indians; and, it was provided that, if the Indians accepted the rewritten "Atoka Agreement", by their votes, it was to

become the law, and that, if they rejected the same, the *Curtis Act* was to *become the law.*

Of course, under these conditions the "Atoka Agreement" was ratified, because the alternative was to accept the re-written "Atoka Agreement", which gave them some recognition, in the settlement of their affairs, or to have the *Curtis Act* govern their affairs, which gave them practically no representation.

And, then, within the next two or three years, the other Nations of the Five Civilized Tribes, entered into Agreements, for the allotment of their lands, and the division of their Tribal estates, under practically the same conditions that resulted in the "Atoka Agreement".

After a consideration of this chapter of the history of the relations between the United States and its Indian wards, the question that arises (and the question now under consideration in the instant case) is:

> *Who was to pay the expenses of allotments, and the division of these Tribal estates?*

If the Agreements contained *nothing* upon that subject, the conclusion could not be escaped that the United States undertook to *administer* the Tribal estates, in pursuance of its own plans and purposes, and at its own expense.

In none of the annual appropriation Acts of Congress, from the creation of the "Dawes Commission" in 1893, to the present time, is there contained a single word or syllable, providing, or intimating, that

these expenses of *administration* are to be paid by the Indians.

This court is very familiar with Appropriation Acts of Congress (and especially those which relate to the Western Reservation Indians), where, if there is good reason to require such Indians to reimburse the United States for some particular purpose or project, the word *"reimbursable"* is inserted in the Act; and that word is unknown in all the Appropriation Acts relating to the Five Civilized Tribes.

But, as to these expenses of *administration,* in the division of these Tribal estates, it is not necessary to *speculate and to conclude,* from the surrounding circumstances, what the parties *intended,* for they have *said* what they intended.

In the "Atoka Agreement" (Act of June 28, 1898; 30 Stat., 495), is contained the following provision:

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

The things which were to be done, under the said "Atoka Agreement" were named, and the *"no charge or claim"* provision applied to them; and it cannot be contended that the parties did not intend to include all the things the United States undertook to do, and all

that was necessary in *administering* the Tribal estates, according to the purposes of the Agreement.

It was soon found that this Agreement did not confer upon the United States sufficient authority for a full and complete *administration* of the Choctaw and Chickasaw Tribal estates, and those Nations were requested to enter into another agreement; and, since the work which the United States had undertaken was then underway that request was granted; and thus, the "Supplementary Agreement" of July 1, 1902 (32 Stat., 641) was made and ratified.

The work was begun under the Agreement of 1898, and completed under the Agreement of 1902.

While the *"no charge or claim"* provision in the Agreement of 1898 was not repeated in the Agreement of 1902, that was not necessary, since both constituted *one agreement* for the accomplishment of *one purpose:* That of the allotment and division of the Tribal estates.

And besides, all provisions of the Agreement of 1898, not inconsistent with the Agreement of 1902, remained in full force and effect.

Section 68 of the Agreement of 1902 is as follows:

> "No act of Congress or treaty provision, nor any provision of the Atoka agreement, inconsistent with this agreement, shall be in force in said Choctaw and Chickasaw nations".

It is deemed important to say, by way of corroboration, that the Agreements between the United States, and the Cherokee and Creek Nations, entered into at about the same time, and for the same purposes, contained practically identical provisions.

—(Cherokee Treaty, 31 Stat., 848; and Creek Treaty, 31 Stat., 861.)

(C)

Definitions and classifications, upon "Gratuity Offsets", in the "Leased District" case were substantially the same as those herein proposed; and the prayer of the plaintiff herein is that they be now adopted and applied to the items of claimed "Gratuity Offsets" in the instant case.

It has been said, and is now again said, that this Honorable Court must have adopted, in the main, in the said "Leased District" case, the *definitions and classifications* now proposed (in the preceding II, A), of what items are *allowable,* and what *not allowable,* as "Gratuity Offsets".

For in its Findings and Conclusions in that case (Decided January 9, 1939; page 12), it finds (in Finding 14), as follows:

> "In compliance with the Act of Congress of August 12, 1935, 49 Stat., 571, 596, the defendant has interposed a counterclaim for 'money which has been expended by the United States gratuitously for the benefit of said tribe or band.' The amount of money so gratuitously expended is $1,-

326,651.37. This sum does not include amounts which the Government agreed to expend by treaties or agreement and includes such items as agriculture aid, household equipment, education, Indian dwellings, medical attention and hospitals, provisions, and similar items which have been held to fall under the term 'gratuities' by this Court in the following cases''; (Citing many cases)

This conclusion is justified by what actually transpired, regarding ''Gratuity Offsets''.

In ''DEFENDANT'S STATEMENT SETTING FORTH GRATUITIES'' (R. 473-77), the defendant, the United States set up and claimed, in the ''Leased District'' case, against the Choctaw and Chickasaw Nations, a total of $5,724,587.63.

When the ''BRIEF OF THE CHICKASAW NATION ANSWERING 'DEFENDANT'S STATEMENT SETTING FORTH GRATUITIES''' (R. 505-615), and its ''Supplement'' thereto (R. 617-55) in which the same arguments were made as are now herein made, the defendant, the United States then filed its ''RESTATEMENT OF GRATUITIES'' (R. 657-62), in which the total was reduced to $4,062,838.07.

(In the ''SUPPLEMENT'' (R. 627-33), to the original Brief of the Chickasaw Nation upon ''Gratuity Offsets'', is set out, in full, the comments of the General Accounting Office, upon the conditions under which the moneys now claimed as ''Gratuity Offsets'' were expended, and that they were for the *administration* of the Tribal estates, and were to be borne by the United States.)

(This Report is the *very document* upon which the defendant, the United States, *must rely* for its evidence in support of *any* ''Gratuity Offsets''; and it was filed in the Chickasaw General Accounting Case (No. K-544), and the language below quoted was also contained in the Choctaw General Accounting Case No. K-260.)

(What evidence could have been of more weight, and of more tremendous probative force than that of the Government officials, without whose evidence *no* ''Gratuity Offsets'' could be established; and it is safe to say that the same had great weight with the court, upon what items were *allowable,* and what were *not allowable,* in the ''Leased District'' case, and should have the same weight in the instant case.)

(There could, also be no more powerful corroboration of what is herein contended for, that the expenses of *administering* the Tribal estates under the conditions herein so earnestly detailed, were to be borne by the United States.)

On pages 434-5, in its Report upon the financial transaction between the United States and the Chickasaw Nation, the General Accounting Office says:

''In accordance with this aforesaid Act (of March 3, 1893; 37 Stat., 765) Commissioners were appointed, who entered into separate Agreements with the aforesaid Tribes or Nations of Indians, including the Choctaw and Chickasaw Nations. Said agreements provided generally that the United States should bear the expense of the administration or division of the tribal estates, which involved the allotment of the lands in severalty; the survey, appraisement and sale of cer-

tain lands; the survey and sale of townsites; the leasing of certain mineral and oil lands.

"In carrying out said projects, there was also considerable expense incurred by the United States in the removal of objectionable persons from allotments; the removal of restrictions from the alienation of lands of certain allottees; the investigation of leases fraudulently obtained; and other expenses including pay of Commissioners, Superintendents, Inspectors, Attorneys and miscellaneous employees."

The Chickasaw Nation then filed its "Rejoinder Brief" (R. 673-747), still earnestly contending for the same *definitions and classifications;* and thereafter, the case was orally argued and submitted.

(The above record references to the *Statement and Restatement of Gratuities,* and *Briefs,* relate to the record in the "Leased District" case; and, by order of the court, in the instant case, leave has been granted to refer to, and to make use of, the record in that case.)

When the court came to render its Findings and Conclusions, on January 9, 1939, it *allowed,* as "Gratuity Offsets", only a total of $1,326,651.37, out of an original claimed total of $5,724,587.63.

It is proper to now call the attention of the court to the fact that, in the "Leased District" case, the defendant, the United States, set up and claimed *all* that could be set up and claimed against the Choctaw and Chickasaw Nations, since they were praying

for Findings and Conclusions of more than $10,000,000.00, as the "Net Proceeds" of the sale of the "Leased District" lands; and the court found such "Net Proceeds" to have been substantially the amount claimed; and, under the Act of August 12, 1935, was also required to find upon "Gratuity Offsets".

The court, in that case, could not have allowed only $1,326,651.37 (out of an original claimed total of $5,724,587.63) without having adopted and applied, in the main, the *definitions and classifications* therein prayed for by the Choctaw and Chickasaw Nations; and the plaintiff herein, the Chickasaw Nation, now prays that the *definitions and classifications* (now again set out and appearing in Sub-Division II, A, of this Supplementary Brief), be adopted and applied to the items now set up and claimed, as "Gratuity Offsets", in the instant case.

(D)

Classification of the particular items set up and claimed, as "Gratuity Offsets" in the instant case (and appearing in the "Report of Commissioner", R. 561-63), according to the definitions of items *allowable,* and *not allowable,* set out in sub-division "II, A" of this Brief.

The following are such items; and they are set out as "Groups (a), (b), (c) and (d), and each item is numbered (from 1 to 44, inclusive, and the pages of the "Report of Commissioner" upon which they appear

are given; and they will be referred to and commented upon, in that order:

Group (a), Chickasaw Nation, "Report of Commissioner" (R. 561).

No.	Purpose	Appropriations	Amount
(1)	Agricultural Aid	Agriculture and stock raising among Indians	$ 27.00
(2)	Automobiles and repairs	do	148.34
(3)	Household equipment	Support of Indians and administration of Indian property.	80.85
(4)	Indian dwellings	do	73.77
(5)	Medical attention	Conservation of health among Indians.	194.49
		Relieving distress and prevention etc., of disease among Indians.	
(6)	Miscellaneous agency expenses	Agriculture and stock raising among Indians.	859.84
		Contingencies, Indian Department.	
		Support of Indian and administration of Indian property.	
(7)	Presents	Support of Indians and administration of Indian property	30.00
(8)	Provisions	do	779.81
			$2,194.10

Group (b), Chickasaw Nation, "Report of Commissioner" (R. 562).

No.	Purpose	Appropriations	Amount
(9)	Board and tuition	Indian Schools, Five Civilized Tribes	$3,148.75
		Indian Schools, Five Civilized Tribes, surplus court fees.	
(10)	Books, stationery etc.	do	901.18
(11)	Clothing	Indian Schools, Five Civilized Tribes.	3,199.05

(12)	Erection and repair of school building	Indian Schools, Five Civilized Tribes, surplus court fees.	3,802.61
(13)	Fuel, light, and water	do	112.00
(14)	Furniture and equipment	do	2,119.60
		Indian Schools, Five Civilized Tribes.	
(15)	Hardware, glass, oil and paint	do	195.31
(16)	Hospital equipment at schools	do	91.64
(17)	Medical attention	Indian Schools, Five Civilized Tribes, surplus court fees	1.35
(18)	Pay of miscellaneous school employees	do	14.67
(19)	Pay of superintendents and teachers	Indian Schools, Five Civilized Tribes	3,402.34
		Support of schools not otherwise provided for	
(20)	Provisions	Indian Schools, Five Civilized Tribes, surplus court fees.	17.50
(21)	School farm	do	153.78
		Indian Schools, Five Civilized Tribes.	
(22)	Traveling expenses	do	43.76
(23)	Transportation, etc., of supplies	Purchase and transportation of Indian supplies.	
		Telegraphing, transportation, etc., Indian supplies	11,693.73
			$28,897.47

Group (c), Choctaw and Chickasaw Nations; "Report of Commissioner" (R. 562).

No.	Purpose	Appropriations	Amount
(24)	Education	Civilization fund	$10,358.53
		Support of schools not otherwise provided for	
(25)	General office expenses	Commission, Five Civilized Tribes.	827.65
(26)	Miscellaneous agency expenses	Contingencies, Indian Department.	258.75
			$11,444.93

Group (d), Choctaw and Chickasaw Nations; "Report of Commissioner" (R. 563).

No.	Purpose	Appropriations	Amount
(27)	Clothing	Conservation of health among Indians.	$ 129.83
(28)	Education	Purchase and transportation of Indian supplies	501.74
(29)	Feed and care of horses	Incidentals in Indian Territory, including employees	120.00
(30)	Fuel, light and water	Conservation of health among Indians.	151.63
(31)	General office expense	Administration of affairs of Five Civilized Tribes Commission, Five Civilized Tribes	230,221.12
(32)	Hardware, glass, oils and paints	Conservation of health among Indians	9.49
(33)	Incidental expenses	Incidentals in Indian Territory Incidentals in Indian Territory, including employees. Protection of the people of the Indian Territory.	694.90
(34)	Expenses of locating coal and asphalt land	Commission, Five Civilized Tribes	1,662.89
(35)	Miscellaneous agency expenses	Conservation of health among Indians. Support and civilization of Indians.	1,269.40
(36)	Pay of miscellaneous employees	Incidentals, inspectors office, Indian Territory, including employees. Incidentals in Indian Territory including employees. Protection of the people of the Indian Territory.	2,065.00
(37)	Per capita payment, expenses	Administration of affairs of Five Civilized Tribes	208.71
(38)	Preservation of records	Preservation of records, office of Superintendent of Five Civilized Tribes.	386.05
(39)	Probate expenses	Probate attorneys, Five Civilized Tribes.	540.77
(40)	Expenses of protecting property interests	Protecting property interest of minor allottees, Five Civilized Tribes.	356.50
(41)	Provisions and other rations	Conservation of health among Indians.	54.75
(42)	Expense of timber estimating	Administration of affairs of Five Civilized Tribes. Commission, Five Civilized Tribes.	7,035.45
(43)	Transportation, etc., of supplies	Conservation of health among Indians. Purchase and transportation of Indian supplies.	15,679.51
(44)	Traveling expenses	Incidentals in Indian Territory. Incidentals in Oklahoma, including employees. Protection of the people of the Indian Territory.	4.394.08
			$265,481.82

Item 31, for $230,221.12, for *"General Office Expenses"*, and *"Administration of the Affairs of the Five Civilized Tribes"*, and *"Commission, Five Civilized Tribes"* best illustrates, and proves, what has been contended for throughout Sub-Division II of this Supplementary Brief: That the United States undertook to *administer* the affairs of the Five Civilized Tribes, by the allotment of their lands, the sale of their "surplus" land and townsites, and to otherwise do all things necessary to a complete division and distribution of the Tribal estates, in pursuance of its own plans and policies, in order to "make way" for the coming new State of Oklahoma; and that the Indians reluctantly agreed to cooperate with such plans and policies, and that, as the consideration passing to them, the United States would *expend its own moneys* for

these purposes, and that *"no charge or claim"* would ever be made against them therefor.

This item proves itself, as falling under definition 2(a), set out in Sub-Division "IIA", above; and the same should *not be allowed.*

Items 6, 7, 8, 25, 26, 33, 34, 37, 38, 42 and 44, according to the designations of the General Accounting Office, are clearly proven to have been items of *administration,* and fall within the same classification as Item 31; and, for the same reasons, and under the same definition, they should *not be allowed.*

Items 39 and 40, designated as *"Probate Attorneys"* and *"Protecting property of minor allottees",* represent moneys expended not only in *administration,* but, in addition, expended in connection with the estates of *individual Indian allottees,* after allotment, in which the Nation, as such, had no interest whatsoever; and such expenditures are not a charge against the Nation, and the judgment herein, which is owned by *the Nation* and *all* the enrolled members of the Nation.

There was set up and claimed, in the "Leased District" case, an item for "Probate Expenses", of $1,053,120.71; and the *same item* was set up and claimed in the instant suit, in "DEFENDANT THE UNITED STATES' FURTHER ANSWER", (R. 507).

It is thought safe to say that the same was *not allowed* in the "Leased District" case; but while it has not been included in the "Report of Commissioner"

herein, "no findings are made" thereon, as shown by the footnote at the end of such Report.

These moneys represent the activities of the United States, in conserving (or attempting to conserve) the *individually owned* estates of Jackson Barnett, and many others of his like, upon whose allotments oil was found, and whose sudden fortunes have been headlined in the newspapers, for a generation.

The *Creek Nation,* as such, had no interest in the oil valuable allotment of Jackson Barnett; and likewise, the Chickasaw Nation, as such, has no interest in the *privately owned allotments* of its members; and it, and the judgments which belong to *all* of its members, should not be offset by moneys which, whether wisely or not, the United States saw fit to expend in connection with the *private estates* of *individual Indians.*

The above numbered items, therefore, should *not be allowed* as a "Gratuity Offset", for that reason, and under definition 2 (b), set out in Sub-Division "IIA" of this Brief.

Items 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, and 22, are designated as various expenses of "Indian Schools", but the further information furnished by the General Accounting Office, is most helpful in showing *where these moneys come from,* since it is said that they come from *"surplus court fees".*

By Acts of Congress, it was provided that certain fees, required to be paid to the United States courts should be collected, and used for the support of Indian Schools.

The moneys were paid into court by the litigants, and other persons having business with those courts; and then transferred, and made available for the uses and purposes designated.

Those moneys were not *moneys of the United States,* in the sense of being *public moneys,* but moneys which its salaried employes collected and disbursed, as directed by the law.

It is difficult, not to say impossible, to understand how anyone could contend that these moneys should now be "charged back" to these Indian litigants, as "Gratuity Offsets".

Such a contention would be no less than fantastic and preposterous; and the items above numbered should *not be allowed.*

Item 24 of $10,358.53, is designated as *"Education",* and is shown to have come from the *"Civilization Fund"* of the Osage Nation.

The history of that fund is well known to this Honorable Court, as being the fund provided by the Osage Nation of Indians, and used for the benefit of Indians *other than the Osages* under a misunderstanding of the provisions and purposes of the Osage Treaty of 1865 (14 Stat., 687), under which the fund was created.

At all events, the moneys here claimed, as "Gratuity Offsets" were *Osage moneys,* and not *moneys of the United States;* and the said item should *not be ollowed.*

(The views and contentions of the plaintiff herein, the Chickasaw Nation, have been fully set out in its "REPLY BRIEF OF THE CHICKASAW NATION TO 'BRIEF OF THE UNITED STATES ON COUNTER CLAIM AND OFFSETS'" (R. 613-15). which is now before the court, and need not be repeated here.)

The foregoing covers all items contained in the "Report of Commissioner" herein (R. 561-63), and claimed as "Gratuity Offsets", except Items 1, 2, 3, 4, 5, 23, 27, 28, 29, 30, 32, 35, 41 and 43, and the designations would seem to indicate that they may be allowable, as "Gratuity Offsets", *provided* that there is sufficient proof (which the record does not disclose) that these moneys were received by the Chickasaw Nation, as such *(all* of whose members are the owners of the judgment against which the offsets are claimed), and not for the health, and comfort, and convenience of *individual* Indians.

The United States has always been prone to regard *all Indians* as belonging to *one group,* and has very laudably recognized its obligation to take care of those who needed and expected help, by *lump sum appropriations,* leaving it to its officials to distribute these moneys where there was most need, and where it would do the most good.

In doing this, there has been no sufficient distinction between the *Indians of the Five Civilized Tribes* and the *Indians of the Western reservations.*

The Indians of the Five Civilized Tribes had their

own lands and homes, and ample moneys, both in their own Tribal treasuries, and in the Treasury of the United States; and they, therefore, neither needed, nor expected help, of the kind designated in these items.

The Indians of the Western Reservations, both needed, and expected, such help.

The General Accounting Office Report cites the Appropriation Acts under which such *lump sums of moneys* were provided.

If any of the moneys set out in the above numbered items, came out of *lump sum appropriations* for *all Indians*, then the strictest proof is demanded of *what sums* were *actually received* by the Chickasaw Nation, for the use and benefit of *all of its members.*

If these were *lump sum appropriations* for the *Five Civilized Tribes* for the support of Schools (such as the Cherokee Orphan Training School, to which Chickasaws might have been eligible) and for Hospitals (such as the Claremore Hospital, to which, also the Chickasaws might have been eligible), the strictest proof is demanded as to the percentage of the Chickasaws *admitted and served,* bore to the *total enrollment* of such institutions; and that the amount now set up, and claimed, as "Gratuity Offsets" should not be measured by the "hit and miss" method, which has been attempted, by using the percentage which the *Chickasaw population* bears to *the whole Indian population of the Five Civilized Tribes.*

There is good reason for stressing this situation.

In the "Leased District" case (R. 476 in that case) there were set up and claimed, as "Gratuity Offsets", the following items:

"Construction and maintenance: Claremore Hospital,	$ 77,127.98
"Education" (which was shown to be for the Cherokee Orphan Training School)	2,177,277.86

In that case, the United States claimed as "Gratuity Offsets", against the Choctaw and Chickasaw Nations, 36.62% of those sums, upon the theory that *all* the Indians of the Five Civilized Tribes were 100%, and that the Choctaw and Chickasaw Indian population was *that* percentage of the whole Five Civilized Tribes population; and there was no proof whatsoever, as to *how many,* or *what percentage* of Choctaws and Chickasaws had been actually admitted and served.

The Choctaws and Chickasaws furnished the proof.

From an examination of the records of those institutions and by the testimony of their officials, it was shown (and not denied) that, for the years under consideration:

> In the *Claremore Hospital,* the Choctaw and Chickasaw patients admitted and served was *5% plus,* of the total patients, and not 36.62% as claimed; and

In the *Cherokee Orphan Training School,* the Choctaw and Chickasaw pupils admitted and served was *6% plus,* of the total pupils, and not 36.62% as claimed.

It is not known what the holdings of the court were upon these items, but it is deemed safe to say that they were *not allowed.*

(That phase of the "Leased District" case was fully presented in the "REJOINDER BRIEF", R. 706-9, in that case.)

But, the *same items* were *again set up and claimed* as "Gratuity Offsets" against the Chickasaw Nation, the plaintiff in the instant case ("DEFENDANT UNITED STATES' FURTHER ANSWER"; R. 506).

Such items were not included in the said "Report of Commissioner", footnote, at the end of his Report; and they will probably "show up", in this, or other later cases, unless the whole subject of "Gratuity Offsets" can be made stable, and understandable by all, by the adoption, as herein prayed for, of *definitions* and classifications, of what items are *allowable,* and what are *not allowable,* under the said Act of Congress of August 12, 1935.

(E)

Confusions and Conflicts, upon the same items of "Gratuity Offsets", that have arisen in other cases, and that now arise in the instant case; and the necessity that uniform classifications and definitions be now adopted and applied, in order that such confusion and conflicts may be avoided, in the instant case, and in other cases that may follow.

Such items showing existing confusions and conflicts, upon items of claimed "Gratuity Offsets" are too numerous to set out in detail.

However, in the "RESPONSE OF THE PLAINTIFF, THE CHICKASAW NATION" (R. 532-36), tabulations of typical items are set out, sufficient to illustrate what is being contended; and the same is now before the court and now again called to its attention, for that purpose.

In the cases of *Seminole Nation vs. United States* (316 U. S. 286), and *Seminole Nation vs. United States* (316 U. S. 310), the same questions relating to *confusions and conflicts,* and the *possibility of double credits,* arose; and it is respectfully submitted that holdings of the Supreme Court, upon the subject of "Gratuity Offsets" will be helpful in passing upon the same questions that now arise in the instant case.

(Those cases have been cited and quoted, and commented upon, by the plaintiff herein, the Chickasaw Nation, in its same RESPONSE (R. 515-18); and the same are now again called to the attention of the court, in the final consideration of the instant case, in sup-

port of its prayer for the adoption and application of uniform definitions and classifications, governing "Gratuity Offsets" which are *allowable,* and *not allowable.*

CONCLUSION.

This concludes the "Supplementary Brief of the Plaintiff, the Chickasaw Nation", for the filing of which leave has been granted; and it prays:

First, That the value of the "Eastern Boundary" lands, as of the date of their "taking" on March 3, 1875, be fixed at the "Government Price" of $1.25 per acre; and that it have judgment against the United States, for *One Fourth* of their value so computed; and, in addition, that it may have a judgment for interest thereon from that date, according to the rule laid down by the Supreme Court of the United States, for "just compensation", in the *Creek Case,* supra (295 U S. 103), and other cited cases.

Respectfully submitted,

THE CHICKASAW NATION,
By MELVEN CORNISH,
Its Special Attorney.

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