

467-475

Filed July 4/41

**No. K-334**

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IN THE  
**United States Court of Claims**

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THE CHICKASAW NATION OF INDIANS,  
*Plaintiff,*

*vs.*

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

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**Motion for New Trial  
and  
Plaintiff's Brief in Support of Motion for  
New Trial.**

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**MELVEN CORNISH,**  
*Special Attorney, Chickasaw Nation.*

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**MOTION FOR NEW TRIAL,**

**and**

**PLAINTIFF'S BRIEF IN SUPPORT OF  
MOTION FOR NEW TRIAL.**

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**MOTION FOR NEW TRIAL.**

Comes now the plaintiff, the Chickasaw Nation of Indians, by Melven Cornish, its Special Attorney, and files this, its Motion for New Trial, in the above styled and numbered case; and in support thereof, respectfully represents:

That Rule 39 (a), adopted on May 1, 1939, and governing the procedure "*in all Indian cases*" pending in this Honorable Court, is as follows:

“In every Indian case, unless otherwise ordered by the court or stipulated by the parties, 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 offsets, if any, for further proceedings.”

That, relying upon said Rule, and in the belief that the procedure in the instant case would be governed by the same, and that such procedure would be as follows:

That, “in every Indian case \* \* \* the hearing, in the first instance” would “be limited to the issues of fact and law relating to the right of the plaintiff to recover”, and that “the court shall enter its judgment adjudicating that right;” and that “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 \* \* \* for further proceedings;”

the attorney for the plaintiff, the Chickasaw Nation (when the instant case was orally argued, at the “hearing in the first instance”, on January 9-10, 1941), refrained from presenting any phase of the case relating to the “amount of the recovery”, since, under said Rule, that was reserved “for further proceedings” which were to follow the “interlocutory judgment” adjudicating the “right of the plaintiff to recover”;

That such “further proceedings” for a determination of “the amount of the recovery” will embrace a presentation, by the plaintiff, the Chickasaw Nation, of the facts and the law, upon those phases of the instant case, as follows:

- First, The date upon which the United States became liable for the payment of “just compensation” for the lands under consideration, because of their “taking”, and of their addition to the public domain;
- Second, The value of such lands, at the time of such “taking”; and
- Third, The rule and measure to be applied for arriving at the “present full equivalent of that value”, as defined and declared by the applicable decisions of this Honorable Court, and of the Supreme Court of the United States;

That, for the reasons stated, and under the conditions attending “the hearing in the first instance”, the plaintiff, the Chickasaw Nation, has had no opportunity to present the facts and the law upon that phase of the case relating to “the amount of the recovery”; and it is respectfully submitted that such opportunity should be afforded, in the “further proceedings” provided by said Rule 39 (a);

That the grounds relied upon by the plaintiff, the Chickasaw Nation, in support of this Motion for New Trial, are more fully set out in “PLAINTIFF’S BRIEF IN SUPPORT OF MOTION FOR NEW TRIAL”, which follows; and

That copies of this Motion for New Trial, and of the following Brief in support of the same, have been served, by Registered mail, upon the Attorney General for the defendant, the United States, and upon the Tribal Attorney for the defendant, the Choctaw Nation.

Wherefore, your movant prays that this Motion for New Trial be allowed; and that an Order be made and entered for "*further proceedings*" for the determination of "*the amount of the recovery*", in accordance with said Rule 39 (a), in order that the plaintiff, the Chickasaw Nation, may have an opportunity to present the law and the facts bearing upon that phase of the instant case; or, that, if the representations herein contained (and in the Brief in support of the same), are not found sufficient for its allowance, your movant prays that this Motion for New Trial be "sent to the law calendar for argument", under Rule 96 of this Honorable Court.

THE CHICKASAW NATION  
OF INDIANS,

By .....

MELVEN CORNISH,

*Its Special Attorney.*

**PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR  
NEW TRIAL.**

Rule 39 (a), governing the procedure "in all Indian cases", was adopted on May 1, 1939; and the same has been set out, in full, in the foregoing "MOTION FOR NEW TRIAL", and need not be repeated in this Brief.

The instant case was placed upon the January, 1941 Calendar of the Court for "*hearing in the first instance*"; and the same was orally argued on January 9-10, 1941.

Only those phases of the case permitted by Rule 39 (a), were presented; and such Rule was complied with by the attorneys for both the plaintiff and the defendants, in that respect.

It will be remembered that the attorney for the plaintiff, the Chickasaw Nation, called the court's attention to the fact that the Record ("Evidence for Complainant", which was filed on January 8, 1936), and the original "BRIEF ON BEHALF OF CHICKASAW NATION OF INDIANS" (which was filed in 1937), contained some references to those phases of the case which Rule 39 (a) excluded from consideration at that time.

He further called the court's attention to the fact that such Brief, and "Evidence for Complainant", had been filed some *two years prior to the adoption of said Rule 39 (a)*; and he was most careful to make this situation plain to the court, in order that he would not seem to be in conflict with said Rule.

With that explanation, the attorney for the plaintiff, the Chickasaw Nation, then proceeded with the presentation of only those phases of the case which were permitted by said Rule 39 (a); and none of those phases of the case which were not permitted by said Rule were either presented, or referred to, except by way of explanation, as above set out.

What were the phases of the case which said Rule *permitted* to be presented at that time; and what were the phases of the case which said Rule *excluded from presentation*, at that time?

It is deemed unnecessary to say more than to briefly refer to the Rule itself. It is most definite and explicit, in defining what the court will *consider and pass upon*, and what it will *not consider and pass upon*, "in the first instance", and "*in every Indian case*".

And that is: that the hearing "shall be *limited to the right of the plaintiff to recover*"; and that "the court shall enter its judgment adjudicating *that right*".

It is then provided that if the court shall hold in favor of the plaintiff, "the judgment shall be in the form of an *interlocutory judgment, reserving* the determination of the *amount of the recovery* \* \* \* for *further proceedings.*"

This is not to say, or to contend, that the court did not have the power, if it had seen fit to exercise that power, to hear and determine *all of the issues at one time, and at one hearing.*

Having adopted, and promulgated, Rule 39 (a), it certainly had the power to abrogate, and to set aside,

that Rule, and to adopt any other Rule which it might deem appropriate, as a matter of procedure, in the consideration of this and other cases.

But, *it did not do so*; and when the instant case was heard in January, 1941, Rule 39 (a) was in force; and the attorney for the plaintiff, the Chickasaw Nation, and the other attorneys, were justified in assuming that Rule 39 (a) would govern the procedure, in the presentation of the instant case.

If the attorney for the plaintiff, the Chickasaw Nation, had had any intimation that said Rule 39 (a), as to procedure, was not to govern, and that *all phases* of the case were to be considered, and decided, following the January, 1941 presentation "in the first instance", he would have prepared for, and would have presented, those phases of the case relating to the *value* of the lands, and the *rule and measure* for arriving at "*just compensation*" for the same, which are of such vital and tremendous importance in the final decision *upon all of the issues* in the instant case.

But, relying upon the Rule, and in the belief that it would govern, in the matter of procedure, the attorney for the plaintiff, the Chickasaw Nation, not only refrained from presenting those phases of the instant case which the Rule excluded, but most explicitly and meticulously explained to the court why the original *Brief* and "*Evidence for Complainant*" (filed some *two years* before Rule 39 (a) had been adopted) contained some references to the excluded phases of the case, in order that he might not be subject to reprimand by the court for having, in such original *Brief*

and Record, some subject-matters in direct conflict with said Rule.

It is respectfully submitted that the plaintiff, the Chickasaw Nation, is entitled to have its *day in court*, upon those important phases of the instant case which, for the reasons stated, it has never had an opportunity to present; and that can only be done in the "*further proceedings*" to which said Rule 39 (a) relates.

This Honorable Court rendered its decision on May 5, 1941, upholding, *in principle*, the *right* of the plaintiff, the Chickasaw Nation, to recover "*just compensation*" for its common interest in the so-called "Eastern Boundary" lands, "*taken*" from the Indians, and made a part of the public domain of the United States, by the Act of Congress of March 3, 1875.

In such "further proceedings", if this Motion for New Trial be allowed, and the instant case shall proceed to a final conclusion, according to the procedure outlined by said Rule 39 (a), the Chickasaw Nation will be enabled to present the facts and the law bearing upon "*the amount of the recovery*"; and that will embrace those subjects, above referred to, which said Rule excluded from consideration, at the January, 1941 hearing.

Nor, would the said Rule 39 (a) permit those phases of the case to be presented *now*, in this Motion for New Trial (and the Brief in support of the same), any more than the same would have been permitted at the January, 1941, hearing. If that should be done, or

attempted, at this time, by the attorney for the plaintiff, the Chickasaw Nation, he would be in direct conflict with the Rule, and subject to reprimand by the court, just as he would have been in conflict, and subject to reprimand, if he had attempted to present, in January, 1941, those phases of the case which the Rule then excluded from presentation at that time.

Said Rule is still in force, and will be in force, until and unless the same is abrogated or modified, and the litigants have notice of such abrogation or modification.

It is respectfully submitted that the relief for which the plaintiff, the Chickasaw Nation, so earnestly prays, can only be afforded by the allowance of this Motion for New Trial; and then, by an Order for such "*further proceedings*", under said Rule, as the court may deem appropriate.

It is further respectfully submitted that, if the representations contained in the foregoing Motion for New Trial (and this Brief in support of the same), are not found to be sufficient for its allowance, the same be "sent to the law calendar for argument", under Rule 96 of this Honorable Court.

Respectfully submitted,

THE CHICKASAW NATION  
OF INDIANS,

By .....

MELVEN CORNISH,

*Its Special Attorney.*

**HOWARD NESBITT LAW BRIEF PRINTERS  
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