No. K-334

IN THE

United States Court of Claims

THE CHICKASAW NATION OF INDIANS,
Plaintiff,

VERSUS

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

REPLY OF PLAINTIFF, THE CHICKASAW NATION, TO "DEFENDANT UNITED STATES' FURTHER ANSWER."

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

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Comes now, the plaintiff, the Chickasaw Nation, and for its reply to the "DEFENDANT UNITED STATES' FURTHER ANSWER", alleges and states:

(1)

That Article XLVI of the Treaty of 1866 between the United States and the Choctaw and Chickasaw Nation (14 Stat., 769), as follows:

> "Of the moneys stipulated to be paid to the Choctaws and Chickasaws under this treaty for the cession of the leased district, and the admission of the Kansas Indians among them, the sum of one hundred and fifty thousand dollars shall be advanced and paid to the Choctaws, and fifty thousand dollars to the Chickasaws, through their respective treasurers, as soon as practicable after the ratification of this treaty, to be repaid out of

said moneys or any other moneys of said nations in the hands of the United States * * * ",

under which it is claimed that the sum of Fifty Seven Thousand and Five Hundred Dollars ($57,500.00) was advanced and paid by the United States to the Chickasaw Nation, out of the moneys stipulated to be paid for the "Leased District" lands, is not allowable as a counterclaim in the instant suit, if so advanced and paid, for the reason that any right which the United States might have had and exercised under said Article XLVI of said Treaty of 1866 to have repaid to it any sums of money so advanced and paid, was relinquished and surrendered in that part of the Choctaw and Chickasaw "Atoka Agreement" (ratified as Section 29 of the Act of Congress of June 28, 1898; 30 Stat., 495), as follows:

> "It is further agreed that all of the funds invested, in lieu of investment, treaty funds, or otherwise, now held by the United States in trust for the Choctaw and Chickasaw tribes, shall be capitalized within one year after the tribal governments shall cease, so far as the same may legally be done, and be appropriated and paid, by some officer of the United States appointed for the purpose, to the Choctaws and Chickasaws (freedmen excepted) per capita, to aid and assist them in improving their homes and lands." (Italics ours)

Wherefore, the plaintiff, the Chickasaw Nation, contends that said counterclaim is without merit, and prays that the same be not allowed.

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

BRIEF

of the Plaintiff, The Chickasaw Nation, in support of its "Reply" to "Plaintiff United States' Further Answer."

On November 28, 1942, the defendant herein, the United States, filed its "DEFENDANT UNITED STATES' FURTHER ANSWER", demanding:

(1) That a judgment be made and entered against the plaintiff herein, the Chickasaw Nation, upon its counterclaim of $57,500.00, alleged to have been advanced and paid to the Chickasaw Nation, under Article XLVI of the Treaty of 1866 (14 Stat., 769), out of the moneys stipulated to be paid to the Choctaw and Chickasaw Nations for the cession of the "Leased District" lands (Article III of the same Treaty); and

(2) That there also be allowed herein, "Gratuity Offsets" amounting to $914,635.18, under the Act of Congress of August 12, 1935 (49 Stat., 571-92); and to such "FURTHER ANSWER" was attached "DEFENDANT UNITED STATES' SECOND AMENDED REQUEST FOR SUPPLEMENTAL FINDINGS OF FACT UNDER RULE 39 (a)".

To the second demand, the plaintiff, the Chickasaw Nation, has heretofore filed (on January 4, 1943) its "RESPONSE" (R. 511-537), setting out fully its views and contentions regarding the claimed "Gratuity Offsets" under the said Act of Congress of 1935; and this is its "REPLY" to the first part of said "FURTHER ANSWER", relating to the counterclaim, alleged to arise under said Article XLVI of the said Treaty of 1866.

This "REPLY" to that part of said "FURTHER ANSWER" relating to the counterclaim alleged to arise under Article XLVI of the said Treaty of 1866, could not be filed at the time for the reason that, as requested by the United States, it was conditionally filed, and its consideration was dependent upon what the Supreme Court of the United States might, or might not, hold in the suit of "*The Choctaw Nation vs. The United States and The Chickasaw Nation* (No. 80, October Term, 1942) then therein pending.

That suit was decided by the Supreme Court on March 8, 1943, and while, as will be shown, no word or syllable of its decision throws any light whatsoever upon the issues herein arising, yet the plaintiff, the Chickasaw Nation, assumes that it should now file an appropriate "REPLY" to that said part of "FURTHER ANSWER" which relates to the counterclaim alleged to arise under said Treaty of 1866.

The said counterclaim alleged to arise under said Treaty of 1866 is without merit, and should not be allowed.

Article XLVI of the Treaty of 1866 (14 Stat., 769) under which the counterclaim under consideration is alleged to arise, and that part of the Choctaw and Chickasaw "Atoka Agreement" ratified by the Act of Congress of June 28, 1898 (30 Stat., 495), which repeals the same, in so far as the moneys here involved are concerned, have been set out in the preceding "REPLY".

The Treaty of 1866 and the Agreement of 1898

were entered into between the same parties, and it is deemed unnecessary to stress that they are valid, and binding upon the parties thereto.

A comparison of these two provisions shows that any right the United States may have had, under Article XLVI of the Treaty of 1866, to "charge back" to the Chickasaw Nation any moneys which might have been "advanced and paid", was relinquished by that provision of the "Atoka Agreement" of 1898, which provided that "*all of the funds invested, in lieu of investment, or otherwise,* now held in trust by the United States" shall be capitalized and paid to the Choctaws and Chickasaws, "within *one year* after the tribal governments shall cease", in carrying out the plans and purposes of the United States, to require the Nations of the Five Civilized Tribes to accept a division of their tribal estates, and to abolish their tribal governments, in preparation for the "ultimate creation of a State or States of the Union which shall embrace the lands within said Indian Territory." (Act of Congress of March 3, 1893; 27 Stat., 612.)

Such tribal estates of the Choctaws and Chickasaws were so divided, by the allotment of the lands in severalty; by the sale of the townsites and surplus lands; by the abolition of the Tribal Governments on March 4, 1906; and by the per capita distribution of the moneys arising from all sources whatsoever; and all was done in pursuance of the plans and purposes of the United States, as expressed in the said Act of Congress of March 3, 1893.

(Choctaw and Chickasaw "Atoka Agreement", ratified by the Act of Congress of June 28, 1898, 30 Stat., 495; and Choctaw and Chickasaw "Supplementary Agreement", ratified by the Act of Congress of July 1, 1902, 32 Stat., 641.)

Under Article XLVI of the Treaty of 1866, the United States might have repaid itself the moneys "advanced and paid" the Chickasaw Nation, if it had found that such repayment was justified, and had exercised that right before the same was relinquished under the said "Atoka Agreement" of 1898; but it did not do so throughout all the intervening years, from 1866 to 1898—a period of some *thirty two years.*

Throughout all of those years, the subject of the rights of the Choctaw and Chickasaw Freedmen, and the "moneys stipulated to be paid the Choctaws and Chickasaws for the cession of the leased district" were matters of controversy, resulting in a complete *change of conditions* which existed when the later agreement of 1898 came to be made; and it is contended that the United States, acting in the light of those changed conditions, knew what it was doing, and acted in good faith with its Indian wards when, in the said Agreement of 1898, it relinquished and surrendered any rights it might have had under said Article XLVI of the Treaty of 1866, to repay itself out of the moneys so advanced and paid to them.

(These controversies and changed conditions have been fully set out, and made plain, in the suits in this Court of *Chickasaw Nation vs. United States and Choctaw Nation,* No. K-336, and *Choctaw and Chickasaw Nations vs. United States,* No. 17641, Congressional; and Motions have been allowed for leave to refer to, and to make use of, the pertinent parts of those suits, in the presentation of the instant suit.)

A summary of these changed conditions that resulted in the Agreement of 1898, for the information of the court, will be presently set out.

So anxious was the United States and its officials to have the Freedmen adopted, and given 40 acre allotments, out of the common lands of the Choctaw and Chickasaw Nations, that Article XLVI was inserted in the Treaty of 1866, providing that, out "of the moneys stipulated to be paid to the Choctaws and Chickasaws for the cession of the leased district", there "shall be advanced and paid", $150,000.00 to the Choctaws and $50,000.00 to the Chickasaws, *"as soon as practicable after the ratification of this treaty."*

The moneys "stipulated to be paid to the Choctaws and Chickasaws for the cession of the leased district" was the sum of $300,000.00; but this sum of money was not to be paid to the Indian Nations, unless and until they should, *within two years,* adopt the Freedmen, and give them 40 acre allotments, out of their common lands; and, upon their failure to do so, such moneys were to be held in trust for the *use and benefit of such Freedmen* (Article III, Treaty of 1866; set out in the "FURTHER ANSWER" of the United States, R. 491-3).

The Choctaw and Chickasaw Nations did not adopt the Freedmen *within the two years,* as required by said

Article III of the Treaty; and, therefore, they did not become entitled to receive such moneys; and such moneys were thereafter "held for the use and benefit of such of said persons of African descent (the Freedmen) as the United States shall remove from said Territory *in such manner as the United States shall deem proper.*"

As stated, under said Article XLVI, in order that the Choctaw and Chickasaw Nations might be induced to act, and to act quickly, in adopting the Freedmen, and in giving them 40 acre allotments, the United States agreed to advance and pay certain moneys to the Chickasaws, even *before the expiration of the two year period* within which they might act, in a regular and orderly manner; but, in doing so, the United States *risked and lost* its money, or rather, it *risked and lost* the moneys that *belonged to the Freedmen,* for, as shown by said Article III, if the Choctaws and Chickasaws failed to adopt the Freedmen and to give them 40 acre allotments, such moneys were to be held in trust "for the *use and benefit*" of the Freedmen; and they, thereby, became entitled to receive it, dependent only what the United States might do, in redeeming the obligations it had assumed to remove the Freedmen from the Indian country.

So, is it not reasonable to say, and to contend, that, as to the moneys under consideration, and here involved: the moneys thus *risked and lost* by the United States *are not owed by the Chickasaw Nation to the United States,* but *are owed by the United States to the Freedmen;* and while this conclusion points out a fantastic

situation, that situation was brought about by the United States, and should not result in penalizing the plaintiff herein, the Chickasaw Nation.

The plaintiff refrains from further comment upon this strange chapter of the history of the relations of the United States with its Indian wards, further than to say that the United States made its own bed and must lie upon it; and it is "poor sportsmanship", to say the least, to now attempt, at this late date, to extricate itself from a unique situation of its own making, by now seeking a "way out" by demanding a judgment upon the counterclaim here set up, and by ignoring its solemn relinquishment, as contained in the Agreement of 1898.

It may be that counsel for the United States, in the instant suit, are not aware of the facts of the history of those times; but that cannot be said of the officials of the United States who made the agreement of 1898, and the Congress that ratified it, for, in that part of the Agreement of 1898 (set out in the foregoing "REPLY" of the plaintiff, the Chickasaw Nation), they were aware of the complications and changed conditions which had arisen, and they "took a new start", and "wiped the slate clean", by providing that "*all of the funds invested, in lieu of investment or otherwise,*" held in trust by the United States, and all other moneys coming into its hands, should be capitalized and paid to the Choctaw and Chickasaw Nations; and all of such moneys *have been capitalized and paid out,* for the purposes therein stated; and thus the chapter has been

closed, as it was intended to be closed; and thus, any claim which the United States might have had, under said Article XLVI of the Treaty of 1866, was relinquished and surrendered and forever set at rest by the said Agreement of 1898.

A summary of the changed conditions which confronted the United States when the said Agreement of 1898 come to be made, and of what had transpired during the 32 year period from the Treaty of 1866 to the Agreement of 1898, regarding the Freedmen, and "the moneys stipulated to be paid to the Choctaws and Chickasaws for the leased district", is as follows:

(1)

Having failed to adopt the Chickasaw Freedmen within the *two year* period provided by Article III of the Treaty of 1866, the Chickasaw Nation, by a resolution of its Legislature passed in 1866 and 1868, requested the United States to remove the Freedmen, as provided by Article III of the Treaty of 1866; but nothing was done.

Then, apparently weakened and discouraged by the failure of the United States to remove the Freedmen, it passed another Act of its Legislature in 1873 attempting to adopt the Chickasaw Freedmen; but attached a condition that it was not to become effective until approved by the proper authorities of the United States; and no approval was given by the United States until 1894.

In the meantime, and before being approved by the United States, the Chickasaws, in 1876, repealed the Act of 1873, and again demanded that the United States remove the Freedmen, under Article III of the Treaty of 1866.

—*(United States vs. Choctaw Nation, et al,* 193 U. S. 115.)

(2)

Then, in an attempt to "clean up the mess" over the Freedmen, caused by the failure of all of the parties to comply with the Treaty of 1866, the Congress passed the Act of May 17, 1882 (23 Stat., 362-6) providing that said tribes (Choctaws and Chickasaws) might "adopt and provide for the Freedmen in accordance with the third article" of the Treaty of 1866; but this Act only added to the confusion, since the provisions of a Treaty (to which the United States and the Choctaw and Chickasaw Nations were parties), could only be repealed or amended by the *same parties,* acting in the form of another treaty or agreement, in order to affect the *common lands of the two Nations* (Article I, Treaty of 1855; 11 Stat., 611), which provided that the two tribes might never be divested of any part of the title thereto *"without the consent of both tribes."*

Wholly ignoring the safeguards contained in the said Treaty of 1855, the Choctaws, by an Act of the Choctaw Council of May 21, 1883, attempted to comply with the said Act of Congress of May 17, 1882, by adopting the Choctaw Freedmen, and by giving them 40 acre allotments; but, irrespective of the validity of that Act, nothing come of it, since the whole allotment plan contained in the Treaty of 1866, was never consummated, and, therefore, failed; and no allotment plan ever became effective until the Agreements of 1898 and 1902 were made and ratified.

—(Constitution and Laws of Choctaw Nation, 1894, pages 335-6.)

(4)

The Choctaw and Chickasaw Nations had always contended that the consideration of $300,000.00 stipu-

lated, under Article III of the Treaty of 1866, to be paid for the cession of the "Leased District" lands (even if the same had been paid outright, instead of payment being conditioned upon the adoption of the Freedmen, and on giving them 40 acre allotments) was grossly inadequate and unfair.

The "Leased District" lands comprised some 7,000,000 acres of rich and valuable land; and, out of them have been carved some 17 counties, comprising the southwestern one fourth of the present State of Oklahoma, and having a present value of hundreds of millions of dollars.

If this consideration of $300,000.00 had been paid outright it would have represented a value of some *four cents* per acre, whereas the ruling "Government price" for public lands, at that time, was $1.25 per acre.

So, as stated, because of this grossly inadequate consideration, they constantly implored the United States to pay to them an additional consideration that would be fair and just.

Their prayers were heeded, as to that part of the "Leased District" lands known as the "Cheyenne and Arapahoe Reservation" (of some 2,393,160 acres), when such lands were opened for settlement; and by the Act of Congress of March 3, 1891 (26 Stat., 589), there was appropriated and paid to the Choctaws and Chickasaws the sum of $2,991,450, or at the rate of $1.25 per acre.

Then, after having secured this partial relief, the Choctaws and Chickasaws continued their prayers for like relief for the balance of the "Leased District" lands (the Wichita, and the Kiowa, Comanche and Apache Reservations), and their prayers were answered, in part, by the passage of Senate Resolution No. 478, 71st Congress, 3d Session, on February 17, 1931, providing for a reference of the claim to the Court of Claims, for a report to the Congress of its findings of fact and conclusions, upon what amount, in fairness and justice the United States should pay to the Choctaw and Chickasaw Nations as fair compensation for said lands.

Under that Resolution, the suit of *Choctaw and Chickasaw Nations vs. United States,* No. 17,641 was filed; and, on January 9, 1939, the Court of Claims made its findings and conclusions, and reported to the Congress the net amount of money received by the United States from the sale of the lands under consideration; and Bills are now pending in the Congress for the appropriation of the sum of $8,095,863.31 to the Choctaw and Chickasaw Nation, which is the net amount (after the deduction of expenses, and lands set aside for public uses; and also after the deduction of the "Gratuity Offsets" allowed by the Court of Claims under the Act of Congress of August 12, 1935; 49 Stat., 571) found to have been received by the United States for the sale of the balance of such "Leased District" lands.

It is granted that the foregoing is somewhat tedious and complicated, but it is an accurate summary of the main events of that chapter of the history of the relations between the United States and two of its most important Indian Nation wards, which grew out of the strange Treaty of 1866; and such a summary is deemed necessary in order that it may be readily seen how necessary it was to "clean up the existing mess" in which the United States had become involved, throughout the preceding years (from the Treaty of 1866 to the Agreement of 1898); and that is exactly what was done.

In addition, the United States was interested in

the consummation of its plans and policies for "paving the way" for the creation of the State of Oklahoma, which had been outlined and charted by the said Act of Congress of March 3, 1893.

For those purposes, and in the consummation of those plans and policies, that part of the "Atoka Agreement" of 1898 which is set out in the preceding "REPLY", was drafted and made a part of the said Agreement of 1898; and it cannot be reasonably contended that the same did not have the meanings, and accomplish the purposes, as contended for by the plaintiff herein, the Chickasaw Nation.

The Supreme Court of the United States has rendered no decision (in the case of *Chickasaw Nation vs. United States and Choctaw Nation,* No. 80, October Term, 1942) that complies with the conditions attached to the filing of the counterclaim in the instant case.

In Section 5 of Paragraph I of the "FURTHER ANSWER" of the United States herein (R. 495), it is said:

> "The facts alleged above are connected with the subject matter of the case of *The Chickasaw Nation* v. *The United States and The Choctaw Nation,* No. K-336, now pending in the Supreme Court of the United States upon writ of certiorari under the name of *The Choctaw Nation of Indians* v. *The United States and The Chickasaw Nation of Indians,* No. 80. The counterclaim in the instant case is alleged as contingent upon a decision by the Supreme Court in the case above described which will not deny that the Chickasaw Nation is obligated to repay to the United States the sum alleged; but, if the Supreme Court should render a decision which would deny that the Chickasaw Nation is obligated to repay the sum alleged, then this allegation of a cause of action by way of counterclaim is to be deemed withdrawn."

Then, the prayer (page 496) is as follows:

> "*Wherefore,* in the event the Supreme Court renders a decision which does not deny that the Chickasaw Nation is obligated to repay to the United States the sum alleged by way of counterclaim defendant The United States demands judgment against plaintiff on said defendant's counterclaim in the sum of $57,500.00 * * *."

It is difficult for the plaintiff, the Chickasaw Nation, to understand the strategy of counsel for the United States, in the foregoing statement and prayer.

There is no connection whatsoever between the issues in the above cited cases, and the issues arising in the "FURTHER ANSWER" of the United States in the instant case.

The issues in the above cited cases were as to whether the Chickasaw Nation was entitled to compensation (from either the United States or the Choctaw Nation, or both) for its common interest in the land allotted to the Choctaw Freedmen; and the issues here arising are as to whether the United States is entitled to recover a judgment against the Chickasaw Nation for moneys alleged to have been advanced and paid to it, under said Article XLVI of the Treaty of 1866.

The Supreme Court, on March 8, 1943, held against the Chickasaw Nation, *upon that issue alone.*

The issues upon *counterclaims and offsets* were in no wise involved; and, of course, the Supreme Court did not, and could not, hold upon those issues; and the *conditional filing* of the counterclaim, based upon what the Supreme Court might, or might not, hold in the above cited cases, upon counterclaims and offsets, amounts to exactly nothing; and, in attaching such conditions to the filing of the counterclaim in the instant case, counsel for the United States have merely "marched up the hill and down again".

Of course, such counterclaim may be filed and passed upon in the instant case; and such has been done, and with that, the plaintiff, the Chickasaw Nation, has no quarrel.

The sole and only issue herein is: shall the same be allowed, as a counterclaim, or shall it not be allowed; and the decision of the Supreme Court in the above cited cases, throws no light whatsoever upon whether such counterclaim may, or may not, be filed and considered, or allowed or not allowed.

However, the Supreme Court did hold as follows:

> "The Atoka agreement provided for the allotment of all the land with the members of the tribes sharing equally, and the allotments to their freedmen were to be deducted from their portion so as to reduce their allotments *pro tanto.*"

The Chickasaw Nation contended that, in the Atoka Agreement of 1898, and the "Supplementary Agreement" of 1902, the allotments of *Choctaw Indian citizens* were to be *reduced* by the value of the allotments of *Choctaw Freedmen* as the compensation of the Chickasaw Nation for its common interest in such lands; and that, since that was not done, it was entitled to a money judgment for the value of that interest.

The Supreme Court held against that contention, and that any loss which the *Choctaw and Chickasaw Nations* sustained because of *Choctaw and Chickasaw Freedmen allotments,* was to be shared *pro tanto;* that is: not that the *Chickasaw Nation* was to be responsible for the land allotted to *Chickasaw Freedmen,* and the Choctaw Nation for the lands allotted to *Choctaw Freedmen;* but that both the *Choctaw and Chickasaw Nations* were responsible for *all the Chickasaw and Choctaw Freedmen, pro tanto.*

How does that holding bear upon the issues here arising?

The answer is: All of the complicated and involved transactions relating to the Choctaw and Chickasaw Freedmen would have to be computed, to ascertain *how much* of the moneys alleged to have been advanced and paid the Choctaws and Chickasaws should be "charged back" to the *Choctaws,* and *how much* to the *Chickasaws;* and all the auditors and mathematicians ever born would not be equal to the task of groping their way through the forest of complications and confusions that arise out of the subject of Choctaw and

Chickasaw Freedmen, and what was done, and not done, regarding them, throughout the 32 year period, from 1866 to 1898.

This situation is referred to only for the purpose of pointing out another of the many complications that confronted the makers of the "Atoka Agreement" of 1898, and the Congress that ratified it; and caused the insertion, in that Agreement, of the provision set out in the foregoing "REPLY" of the plaintiff herein, the Chickasaw Nation; and to repeat that the purpose of that provision has, as stated, to "take a new start" and to "wipe the slate clean" of all the complications which had theretofore accumulated, in an Agreement as solemn and binding as the Treaty as 1866; and that was what was intended to be done, and what was done.

Therefore, for the reasons stated, the plaintiff herein, the Chickasaw Nation, prays that the counterclaim alleged to arise under Article XLVI of the said treaty of 1866, be not allowed.

Respectfully submitted,

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