591-618

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.

REPLY BRIEF OF THE CHICKASAW NATION TO "BRIEF OF THE UNITED STATES ON COUNTER-CLAIM AND OFFSETS"

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1939

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AUTHORITIES.

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General.

The plaintiff, the Chickasaw Nation, must apologize to the court for the filing of this Reply Brief, since the issues arising upon the "REPORT OF COMMISSIONER" (R.557-564) were thought to have been sufficiently discussed, and its views and contentions made plain, in its "EXCEPTIONS OF THE PLAINTIFF, THE CHICKASAW NATION, TO THE 'REPORT OF COMMISSIONER'" (R.565-585), but, upon an examination of the "BRIEF OF THE UNITED STATES ON CONTERCLAIM AND OFFSETS" (R. 587-590, it feels that there should be a reply to certain statements therein contained; and such is the purpose of this Reply Brief.

In all the experiences of counsel for the plaintiff, the Chickasaw Nation herein, in numerous suits and proceedings in this Honorable Court and in other courts of the United States, extending back over a period of more than forty years, there has never before been encountered such a cavalier attempt to arbitrarily brush aside, and to refuse to discuss, arguments and contentions which have been earnestly and respectfully presented for the consideration of the court, which so vitally affect the welfare and interests of a helpless ward of the United States Government.

It is with regret that counsel for the Chickasaw Nation is forced to conclude that, apparently, counsel for the defendant, the United States, assume that, merely because the United States is a party, they are relieved of the obligations that apply to other counsel, and that the arguments and contentions of the plaintiff, the Chickasaw Nation, may be safely ignored and dismissed; but, upon the other hand, the plaintiff the Chickasaw Nation is assuming otherwise, and it has no reason to doubt that such assuption is correct.

Further, is should be said that these observations are not made in any spirit of harsh criticism of the text and language of the *Brief of the United States,* to which that is a Reply, but merely to show the correctness of such observations, and this will appear from a more detailed examination of the same which will presently follow.

It is understandable that counsel for the United States may have succumbed to the human impulse of expressing their impatience with what counsel for the

Chickasaw Nation has so persistently said and done since the instant suit was first referred to the Commissioner, upon the subjects of "Counterclaim" and "Gratuity Offsets" *(Response,* R. 511-537; *Reply,* R. 539-556; and *Exceptions,* R. 565-585), in making plain the confusions and conflicts in which they have involved themselves upon the subjects under consideration; and it has also been made plain that those *conflicts and confusions* were not of the making of counsel for the Indian Nations (who besought them, in season and out, to agree upon a course of procedure that would have avoided the existing situation), but the responsibility for the existence of an impossible situation rests wholly upon counsel for the United States.

Therefore, the contention heretofore made, and now repeated, is that the time has come when the existing situation of *confusions and conflicts* should, and must be, squarely faced, if those that now exist are to be reconciled, and those that must inevitably arise hereafter are to be avoided; and that can only be accomplished by positive and effective action, upon the part of the court, in the instant proceeding.

The subjects and issues of "Counterclaim" and "Gratuity Offsets", arising in the *"Report of Commissioner"* (R. 557-564); and in *"Exceptions"* thereto (R. 565-585); and in the *"Brief of the United States"* (R. 587-590), will now be discussed, in the order in which they therein appear.

I.

COUNTERCLAIM.

(a) Treaty of 1866.

The Counterclaim set up by the United States in its *"Further Answer"* (R. 491-95), grows out of moneys *advanced and paid* to the Chickasaw Nation, under Article 46 of the Treaty of 1866 (14 Stat., 769.; R-560).

Under Article 3 of the same Treaty (R. 558-559), the "Leased District" lands of some 7,000,000 acres, were ceded to the United States for a *named consideration* of $300,000.00; but it was further provided that such consideration was not to be paid unless and until the Choctaw and Chickasaw Nations adopted their Freedmen, and gave them 40 acre allotments out of the commonly owned lands; and that, if such Freedmen be not adopted and given such allotments, *within two years,* the consideration of $300,000.00 *"shall cease to be held in trust for the said Choctaw and Chickasaw Nations, and be held for the use and benefit"* of such Freedmen.

Then under Article 46 (R. 560), it was provided that, *"of the moneys stipulated to be paid"* (under Article 3, and under the conditions above set out), $150,000 should be advanced and paid to the Choctaws, and $50,000 to the Chickasaws, *"as soon as practicable after the ratification of this treaty"*, thus evidencing the anxiety of the United States to influence the action of the Indians to adopt the Freedmen, and to give them lands, which, at the "Government price" then prevailing, were worth more than the whole *named consideration* of $300,000 for the cession of all of the "Leased District" lands.

This sordid and cruel chapter of the history of the relations between the United States and its helpless Indian wards is set out, and rather fully commented upon, in the "REPLY OF THE PLAINTIFF, THE CHICKASAW NATION TO 'DEFENDANT UNITED STATES' FURTHER ANSWER" (R. 539-542), and in the "EXCEPTIONS OF THE PLAINTIFF, THE CHICKASAW NATION, TO THE 'REPORT OF COMMISSIONER'", (R. 565-585); and the same are not repeated here, but are again called to the attention of the court.

It is not for counsel for the Chickasaw Nation to say why counsel for the United States have merely attempted to dismiss such contentions and arguments, and to brush them aside with an arbitrary flourish of generalities, and to make no answer to the same; and it is only noted that their "BRIEF FOR THE UNITED STATES" (R. 587-89), contains not a word or syllable of argument, for the assistance of the court, in answering the contentions and arguments of the plaintiff, the Chickasaw Nation, heretofore so earnestly and respectfully made.

(b) Filing Conditioned upon Decision of Supreme Court.

The counterclaim now under consideration was first set up in "DEFENDANT UNITED STATES' FUTHRER ANSWER" (R. 491-496); and its consideration was *conditioned* upon what the Supreme Court of the United States might hold upon such Counter-

claim, in the then pending suit of *Choctaw Nation vs. United States and Chickasaw Nation,* No. 80 (upon certiorari from the Court of Claims in the suit of *Chickasaw Nation vs. United States and Choctaw Nation* No. K-336) in which the *Chickasaw Nation* sought only to recover compensation from the *Choctaw Nation,* for its common interest in the lands allotted to the Choctaw Freedmen, under the "Atoka Agreement" of 1898 (30 Stat., 495), and the "Suplementary Agreement" of 1902 (32 Stat., 641).

This *condition* attached to the Counterclaim was both far fetched and fantastic, since the Counterclaim was not a part of that suit, in any way whatsoever; nor were any questions arising out of the Treaty of 1866 considered or decided.

That decision determined, solely and only, the question of whether, under the said later Agreements of 1898 and 1902, the *Choctaw Nation* should compensate the *Chickasaw Nation* for its common interest in the lands allotted to the Choctaw Freedmen; and, upon that question, the decision was adverse to the Chickasaw Nation.

The concluding paragraph of that decision is as follows (Decided by Supreme Court on March 8, 1943):

> "We conclude that allotments from the common tribal lands were to be made under the 1902 agreement to Choctaw freedmen, without deducting those allotments from the Choctaw Nation's share of the lands or otherwise compensating the Chickasaws for their interest in the lands so allotted. *Since no liability exists,* it is unnessary to consider whether the Choctaw Nation or the United States is primarily liable, or whether the Court of Claims had power under the jurisdictional Act (43 Stat. 537) to place liability upon the Choctaw Nations." (Italics ours.)

It is difficult to understand what counsel for the United States had in mind in *conditioning* the filing of the Counterclaim upon what the Supreme Court might, or might not, hold in the above cited case.

It may be admitted that the Counterclaim might have been filed at any time after the original suit (No. K-336) was filed in the Court of Claims, under the Jurisdictional Act of June 7, 1924 (43 Stat., 537), which authorized suits by the Indian Nations against the United States; and also authorized (in Section 3) the adjudication of "any claims which the United States may have against said Indian Nations."

It is not difficult therefore, to conclude that, in filing this Counterclaim on November 28, 1942 (which was nearly 13 years after the original petition was filed on August 5, 1929), and in attaching to such filing, at that late day, a *condition* that had no basis, in fact or reason, as has been shown, they chose to ignore the long and tortuous road which all had traveled, in dealing with the Choctaw and Chickasaw Fredmen, from the Treaty of 1866 to the later Agreements of 1898 and 1902; and were merely "shooting in the dark," in the hope that the Counterclaim might be lodged and allowed.

Here is how and why this Counterclaim came to be set up at this time: When the *Choctaw Freedmen* suit

(No. K-336 in the Court of Claims; and No. 80 in the Supreme Court, upon certiorari), was being argued in those courts, counsel for the Chickasaw Nation made the statement that, if the Chickasaw Nation *prevailed,* and received full compensation, either from the Choctaw Nation or the United States, for its common interest in the lands allotted to the Choctaw Freedmen, under the Agreements of 1898 and 1902, the Chickasaw Nation would not be entitled to retain the moneys advanced and paid to it, under Article 46 of the Treaty of 1866.

But the Chickasaw Nation *did not prevail* in the Supreme Court and that court held that the Choctaw Freedmen were legally given 40 acre allotments, under the Treaties of 1898 and 1902 (and not under the Treaty of 1866); and that, *for that reason,* and for that reason alone, its petition in the Court of Claims should be dismissed, both as to the United States and the Choctaw Nation; and no other questions or issues, arising out of the Treaty of 1866, or otherwise, were decided.

Thus, the Chickasaw Nation was left free to contend, and to argue, in the instant proceeding, upon the effect of what transpired, or did not transpire, during the period from the Treaty of 1866 to the Agreement of 1898 and 1902; and it is respectfully contended that, in the light of the transactions during that period, the Counterclaim now under consideration is without merit, and should not be allowed.

Counsel for the United States heard the statement of counsel for the Chickasaw Nation "the first time";

and, thereupon they filed "DEFENDANT UNITED STATES' FURTHER ANSWER" (R. 491-95); and that has resulted in the rather tedious contentions and arguments before the Commissioner, and this Honorable Court, upon that subject.

All of the foregoing, regarding the *manner,* and the *time,* in which this Counterclaim has been set up, is of no particular importance, except that it affords the plaintiff, the Chickasaw Nation, an opportunity to sum up, and to stress, the history of this transaction; and to respectfully and earnestly contend that the Counterclaim should not be allowed; and that will presently follow.

(c) Waiver and Laches.

In the final paragraph of their brief (R. 588), counsel for the United States say that the best they can make out of the argument of counsel for the Chickasaw Nation is that the United States has "waived its claim" because, for many years, no effort has been made to enforce it.

That statement is partly right, and partly wrong.

Then they say:

> "It would be gratuitious to cite authorities to show that a just claim of the United States may not be defeated upon the ground of laches."

Authorities in support of the Ten Commandments and the Lord's Prayer would be quite as superfluous.

It is granted that any "just claim" of the United

States may be enforced, irrespective of laches; but counsel for the Chickasaw Nation is endeavoring to show that the Counterclaim under consideration is not a "just claim", when measured by the transactions occurring between the Treaty of 1866 and the Agreement of 1898 and 1902; and that the makers of those solemn Agreements, to which the United States was a party, reached exactly that conclusion, when they came to insert those paragraphs in those Agreements in which it was provided that *all moneys* of every kind and character, arising out of the estates of the Choctaw and Chickasaw Nations, should be distributed per capita.

And then, counsel for the Chickasaw Nation, would prefer to state the contentions relied upon rather than to have them stated by opposing counsel; and that will now be done.

(d) Agreements of 1898 and 1902.

In the "REPORT OF COMMISSIONER" (R. 561), is set out that paragraph of the "Atoka Agreement" of 1898 (30 Stat., 495) which provided that *"all of the funds"* of the Choctaw and Chickasaw Nations were to be capitalized and paid out to the members of those Nations.

It is significant to note that the Commissioner merely set out this provision, and without comment or recommendation in his said Report.

Then, in Section 14 of the "Supplementary Agreement" of 1902 (32 Stat., 641) which provided for the allotment of the lands, the sale of the "surplus lands",

and the sale of townsites and all other properties of the two Nations, it was further provided that, when that shall have been accomplished, all moneys "shall be paid into the Treasury of the United States to the credit of the Choctaw and Chickasaws, and *distributed, per capita as other funds of the Tribes*".

The making of these Agreements was the end of an old era, which had extended from the Treaty of 1866 to 1898 and 1902, and the beginning of a new era in which the Indian Nations were forced to accede to the demands of the United States, that they accept the allotment of their lands, the division of all of their tribal properties, and the abolition of their Tribal Governments, to make way for the coming new State of Oklahoma.

Throughout the whole period of the old era (from 1866 to 1898 and 1902), the United States and the Indian Nations had been harassed and "bedeviled" by numerous problems growing out of the Treaty of 1866, as to whether the Freedmen had been adopted or not adopted, and as to whether the Freedmen were entitled, or not entitled, to 40 acre allotments.

With these problems both the United States Commissioners and the Indian Commissioners were sorely and painfully familiar; and it is easy to conclude that all were anxious to forever and finally set these problems at rest.

What were these problems arising under the Treaty of 1866?

(1) The Indians had ceded their "Leased District" lands (Article 3), but these moneys were

not to be paid until and unless the Indians adopted their Freedmen, and gave them 40 acre allotments *"within two years"*; and (2) it was further provided that, if the Indians failed to so act, the $300,000 was to be held for the "use and benefit" of the Freedmen; and (3) in order to induce the Indians to take action favorable to the Freedmen, the United States proposed (in Article 46), to advance and pay to the Indians, the sum of $200,000 ($150,000 to the Choctaws and $50,000 to the Chickasaws); and (4) the Indians failed and refused to so act, and the whole of the $300,000 was held for the "use and benefit" of the Freedmen.

And that was what was done, and not done, under the Treaty of 1866.

Years and years passed before anything further was done or attempted; and from 1866 to 1898 and 1902, other problems arose and added to the confusions relating to the Freedmen, as follows:

(5) In 1873, the Chickasaws attempted to adopt their Freedmen and to give them 40 acre allotments, but this action was several years after the expiration of the two year period within which the Nations could validly act, and besides, there was no joint action by the Choctaws, the other common owners of the lands, and this Act was repealed in 1877; and (6) in 1882, and many more years after the expiration of the same *two year* period of limitation, the Choctaws attempted to adopt the Choctaw Freedmen, but this attempt was likewise without the joint action of the Chickasaws, the other common owners of the lands. (These facts are all set out in the case of *United States vs. Choctaw and Chickasaw Nations and Chickasaw Freedmen;* 193 U. S., 115-127).

And so, when the Agreements of 1898 and 1902 came to be made (for the principal purpose of allotting the lands, the sale of townsites and surplus lands and all other tribal properties and the abolition of the Tribal Governments, to make way for the coming new State of Oklahoma), the United States and Indian Commissioners were confronted by problems regarding the Freedmen that amounted to no less than a "holy mess", and impossible of solution.

These acts and attempts, regarding the Freedmen, were all conflicting and at cross purposes, and none were in accordance with the plain provisions and requirements of the Treaty of 1866; and no one could determine, either exactly or approximately, the then status of the Freedmen, or whether they had or did not have any rights of adoption, or to 40 acre allotments.

All parties being present (the United States and the Indian owners), they very naturally and properly decided to make no further efforts to solve the existing impossible situation, but to "take a new start", and to "wipe the slate clean", in so far as the Freedmen were concerned; and that was done by incorporating into the Agreements of 1898 and 1902, new provisions for *giving* 40 acre allotments to the Freedmen; and, as held by the Supreme Court (in *Choctaw Nation vs. United States and Chickasaw Nation,* No. 80, decided on March 8, 1943, and above quoted) their rights to 40 acre allotments were *conferred by the Agreement of 1898 and 1902,* and *not by the Treaty of 1866.*

(e) Jurisdiction.

In volunteering to state what the contentions of the Chickasaw Nation are in the instant proceeding, counsel for the United States (R. 588), in *"Brief of the United States"*, say:

> "In view of the fact that plaintiff's judgment is based on an erroneous survey made in 1825, with a definite taking by the Act of March 3, 1875, 18 Stat., 476, this argument is little short of amazing. If by the Agreement of 1898, 'the slate is wiped clean', plaintiff had no claim in the first place."

It is again said that counsel for the Chickasaw Nation prefers to state what its contentions are, rather than to have them stated by opposing counsel.

This proceeding relates, solely and wholly, to the *"Counterclaim" for* moneys advanced and paid the Chickasaw Nation (under Article 46 of the Treaty of 1866); and has no relation, to the original claim for compensation for its common interest in the so-called "Eastern Boundary" lands; and suit upon that claim was authorized by the Jurisdictional Act of June 7, 1924 (43 Stat., 537), passed *twenty-six years* after the Agreement of 1898, and *twenty-two years after* the Agreement of 1902.

Of course, it has never been contended, and is not now contended, that the Act of June 7, 1924 is not a valid Act, not only authorizing suits, by the Indian Nations against the United States, but also authorizing the adjudication of any claims which the United States might have against such Indian Nations.

Under that Act, the "Eastern Boundary" suit was filed by the Chickasaw Nation, and judgment has been rendered in its favor. Also, under the same Act, the instant "Counterclaim" might have been filed almost a generation ago, and may be now filed and be adjudicated, and allowed, if found to be a "just claim", notwithstanding strange and fantastic *conditions* now attached to its filing.

That is the contention of the Chickasaw Nation; but the further contention is that the instant "Counterclaim" is not a "just claim", and should not be allowed, for the reasons herein before set out: That, in the Agreements of 1898 and 1902, by providing that all tribal lands should be allotted and the "surplus" lands, together with townsites, should be sold, and that all moneys arising therefrom, together with all other moneys then held by the United States ("invested in lieu of investment, treaty funds, or otherwise") should be paid out per capita to the members of the two Nations "to aid and assist them in improving their lands and homes"; and that has long since been done.

Therefore, there exists no contention that the instant "Counterclaim" is barred by laches; and as to whether, or how far, the United States is bound by the language of the Agreements of 1898 and 1902 (since those were solemn Agreements, ratified by Acts of Congress, and also ratified by the members of the two Nations), as the same bear upon the fairness and justness of the instant "Counterclaim", is for the court to say.

It is contended that, if the United States is not bound and barred by the Agreements of 1898 and 1902, then, in passing upon whether the instant "Counterclaim" is, or is not, a "just claim", this Honorable Court should reach the same conclusions that were reached by the United States Commissioners, and the Congress, in making and ratifying the Agreements of 1898 and 1902, and by the Indian Commissions and the Indian people, in ratifying the same: That the *"old era"*, in so far as the Freedmen were concerned, was superseded by the "new era"; and that all questions and issues relating to the Freedmen, from 1866 to 1898 and 1902 were impossible of solution; and that, as to such Freedmen, nothing could or should be done except to take as "new start", and to "wipe the slate clean", by *giving* them 40 acre allotments which, as held by the Supreme Court, constituted the sole and only basis of their rights to allotments.

(f) Where and how would the Chickasaw Nation "come out", in the matter of moneys and their interest in the Freedman lands here involved, if the instant "Counterclaim" should be allowed?

If the Chickasaw Nation, acting jointly with the Choctaw Nation, had adopted the Freedmen (under Article 3 of the Treaty of 1866), it would have been entitled to *one-fourth* of the *named consideration* of $300,000, or to $75,000.

There was advanced and paid to it (under conditions and circumstances heretofore set out), the sum of $50,000, under Article 46 of the same Treaty; and then,

in Note 2, page 6, of the "BRIEF OF THE UNITED STATES", in the Supreme Court suit of *Choctaw Nation vs. United States and Chickasaw Nation,* No. 80, upon certiorari to the Court of Claims in suit No. K-336 (which is the suit referred to by counsel for the United States, in the conditional filing the "Further Answer"; R. 491-96), it is said:

> "All except $17,375 of the Chickasaws' share of the $300,000 fund was paid to them, $50,000 being advanced in 1866, and other small amounts being paid later."

Then, this is confirmed by the Report of the Comptroller General, in the suit of *Choctaw and Chickasaw Nations vs. United States,* No. K-619, dated March 23, 1931; and also by the *same Report* filed in the suit of *Choctaw Nation, vs. United States,* No. K-260, which record in the latter case, has, upon Motion of the United States, allowed on March 17, 1943, been made a part of the record in the instant proceeding, upon the "Counterclaim" now under consideration.

This Report also contains the following item:

> "Unpaid balance (apparently forfeited by Chickasaw Nation because of failure to adopt its freedmen, $17,375."

If, as contended by counsel for the United States, in the "Counterclaim" under consideration, the moneys advanced and paid to the Chickasaws, under Article 46 of the Treaty of 1866, are to be now *"charged back"* to them, what about the $17,375 which they have *never received,* to make up the $75,000 to which they were

entitled (their *one-fourth* of the named consideration, Article 3 of the same Treaty)?

Then, what about their *one-fourth* interest in the lands allotted to the *Choctaw Freedmen,* since, under Article 1 of the Treaty of 1855 (11 Stat., 611), *all lands were held and owned in common?*

In the *Choctaw Freedmen case,* decided upon certiorari,by the Supreme Court, on March 8, 1943 (and above cited and quoted, and upon which the United States relied, in the *contional* filing of the instant "Counterclaim"), it was expressly held that the *Chickasaw Nation* could not recover from the *Choctaw Nation,* because the Agreements of 1898 and 1902 did not so specifically provide; but it was also expressly held that the *primary liability* of either the United States or the Choctaw Nation, was not decided.

For its *one-fourth* interest in such lands, the Chickasaw Nation has never received any compensation from any source whatsoever; and will it do to say that, in the maze of complicated and contradictory transactions regarding the Freedmen, in passing upon the instant "'Counterclaim", this condition should be ignored, and given no consideration?

All of the foregoing, under this paragraph "f", merely shows the other complications and contradictions that confronted the makers of the Agreements of 1898 and 1902 (and the Congress when it come to ratify those Agreements).

(g) Conclusion.

It is apparent that the makers of the Agreements of 1898 and 1902 (and the Congress which ratified them), reached the only feasible and practicable solution, and that was: That, if all the lawyers and mathematicians then living should be summoned, they could never compute "who was entitled to what", nor solve the complicated and contradictory legal problems that existed regarding the Freedmen.

They, therefore, concluded to end the *old era* (from 1866 to 1898 and 1902), and to "take a new start" and to "'wipe the slate clean", as to the Freedmen, by providing for 40 acre allotments to them (upon the terms and conditions contained in the new Agreements); and then, to dispose of all the balance of the tribal estimates, by allotments to the members of the two Nations, the sale of all the "surplus" lands, townsites and all other tribal properties, and by the distribution of all the moneys, and the abolition of the Tribal Government, to make way for the coming new State of Oklahoma, and by "forgetting and forgiving" all that has been done, or attempted, regarding the Freedmen, during the *old era;* and that is what was done, as has been shown.

And, it is respectfully submitted, that should be the conclusion of this Honorable Court, in passing upon, and disposing of, the "Counterclaim" now under consideration.

II.

GRATUITY OFFSETS.

(a) Specific Exceptions.

Counsel for the United States (Brief, R. 588), say:

> "Plaintiff does not except to any specific item in the gratuity offsets reported by the Commissioner."

This statement is another cavalier and arbitrary attempt to dismiss, and to brush aside, the contentions and arguments of the plaintiff, the Chickasaw Nation; and it is not correct.

In plaintiff's "EXCEPTION" II (R. 574-5), its "RESPONSE" upon "Gratuity Offsets" (R. 511-37) theretofore filed, is made a part of such exceptions, and again called to the attention of the court.

On Pages 534-36 of such "RESPONSE" appears a tabulation of some *nineteen items* which were set up as "Gratuity Offsets", in the instant proceeding; and they are therein shown to be the *identical items* set up, and passed upon, by the court, in the "Leased District" proceeding of *Choctaw and Chickasaw Nations vs. United States,* No. 17641, Congressional, in which Findings and Conclusions were rendered on January 9, 1939.

> (The record in that proceeding has been made a part of the record in the instant proceeding, upon Motion of the plaintiff, allowed on February 3, 1943.)

Many other items which are *the same* as those set up in the instant proceeding could have been included

in the tabulation, but these were deemed sufficient to illustrate the existing *confusions and conflicts* upon "Gratuity Offsets", and which will arise in this, and other pending suits, unless they be reconciled, as herein prayed for.

In the "REPORT OF COMMISSIONER", *fourteen* of such items (representing expenditures for the Choctaw, Chickasaw, Creek, Cherokee and Seminole Nations), were omitted; and, therefore, they need not be further excepted to; yet they are in the record, and continue to illustrate the existing *confusions and conflicts.*

But *five* of such items were included in the "Report *of Commissioner*" (Finding 9, R. 563); and these items represent expenditures for the Choctaw and Chickasaw Nations.

These *five confusing and conflicting items* will now be listed, and again specifically excepted to, together with the grounds for such expections, both general and specific.

The *general* ground (which applies to all of these items) is that they were set up and passed upon, in the "Leased District" proceeding above referred to; and before they are passed upon in the instant suit, there should be a determination, (by items, purposes, and page references to the G. A. O. Report), of whether they were *allowed,* or *not allowed,* in the "Leased District" proceeding, as well as a like determination upon all other items set up and passed upon in that proceeding.

The *specific* grounds for such exceptions, will now be set out, as follows:

(1) General Office Expenses, Administration of Affairs of Five Civilized Tribes Commission, Five Civilized Tribes ("Report of Commissioner"; R. 563). $230,221.12

The expenses of *administration* are not allowable, as "Gratuity Offsets", since they are not *gifts* (*"Gratuities"*), as defined by this court; and if and when the items *allowed* and *not allowed* in the "Leased District" proceedings, are determined, as herein prayed for, it will appear that this item was *not allowed,* and, therefore, the same should *not be allowed* herein, if the court shall adhere to its former Findings and Conclusions.

(2) Per Capita Payment Expenses; Administration of Five Civilized Tribes ("Report Commissioner"; R. 563), 208.71

Same grounds as in (1) above; and, in addition, per capita payments belonged to *individual members* of the Nations, and are not chargable to the *Indian Nation,* the plaintiff herein, of which the individual was a member, since the Nation, as such, has no interest in the estates of *individuals.*

(3) Preservation of Records; Office of Superintendent of Five Civilized Tribes ("Report of Commissioner"; R. 563), 386.05

Same grounds as in (1), above.

(4) Probate Expenses; Probate Attorneys, Five Civilized Tribes ("Report of Commissioner"; R. 563), 540.77

Same grounds as in (1) and (2), above.

(5) Expenses of Timber Estimating; Administration of Affairs of Five Civilized Tribes ("Report of Commissioner"; R. 563). 7,035.45

Same grounds as in (1) and (2), above; and in addition, commercial timber on *individual* allotments was separately appraised, and included in the allotable value of allotments, and thereby become the property of *individual allottees,* and could be sold by him without restriction; and, therefore, there could be no valid charge, as "Gratuity Offsets", against the Indian Nations, which, in this case, is the Chickasaw Nation, the plaintiff herein.

A further examination of the "REPORT OF COMMISSIONER" (Finding 8, R. 562), shows that there are *two other* items to which general and specific exceptions will be made.

(6) Education; Support of Schools not otherwise provided for ("Report of Commisioner"; R. 562), $10,358,53

The same *general exception* is made to this item as has been set out above: That it was set up and passed upon in the "Leased District", proceeding, and that, if and when there is a "break down" of the items therein *allowed and not allowed,* it will appear that it was therein not *allowed,* and that, therefore, it should not be allowed herein, if the court should adhere to its former Findings and Conclusions.

The *specific exception* to this item is that these

moneys thus expended were *not moneys of the United States,* but had been provided by the Osage Nation, for the creation "Civilization Fund," and that *the Osage Nation is now demanding reimbursement for such moneys so expended.*

Of course, a fair construction of the language of the Osage Treaty creating the "Civilization Fund" would be that the moneys placed therein were to be used for civilization and education of *Osage Indians,* and that the Osages never intended that these moneys were to be scattered, according to the notions and whims of the subordinate officials of the United States, among all the other Indian Nations throughout the United States!

On Pages 646-647 of the "SUPPLEMENT TO THE 'BRIEF OF THE CHICKASAW NATION, ANSWERING THE DEFENDANT'S STATEMENT SETTING FORTH GRATUITIES'" (in the said "Leased District" case), it is said:

> In the Osage Treaty of 1865 the Osage Indians conveyed certain lands to the United States for a consideration of $300,000; such lands were to be surveyed and sold; and, after reimbursing the United States for said moneys and the cost of survey, the "remaining proceeds" were to be placed to the credit of a "Civilization Fund" and used for the "civilization and education of Indian Tribes residing within the limits of the United States."
>
> An examination of the Osage Treaty of 1865 (14 Stat., 687; Kappler, 878), set out in the decision of this Honorable Court in *"Osage Nation v. United States",* No. B-38, (66 Ct. Cls., 64-82) shows (Article XII) that the Osages shall remove from the lands "ceded in Trust"; (Article XIII) that the lands *"hereby ceded in trust"* shall be surveyed and sold; and (Article XVI) that the reserved lands may be disposed of in the same manner as *"said trust lands."*

In commenting upon this strange transaction the court says:

> "There is no other instance in connection with Treaties by the United States with Indians where the United States has applied or undertaken to apply the proceeds of sales of lands of one tribe to the benefit of another."
>
> In view of this record, we are sure that it will not be seriously contended that the *United States* is entitled to recover these moneys, notwithstanding attempted findings and conclusions of the General Accounting Office, and notwithstanding the fact that they are set up as moneys of the United States, in is *"Statement"* upon Gratuities.

Yet, in the instant proceeding, the United States is demanding that these moneys be "charged back" to the Chickasaw Nation, as "Gratuity Offsets".

(7) General Office Expenses; Commission Five Civilized Tribes ("Report of Commissioner"; R. 562), $827.65

The general and sepecific exceptions to this item are the same as those set out under (1), above.

(b) The "Leased District" proceeding; and the Findings and Conclusions therein, upon "Gratuity Offsets".

The views and contentions of the Chickasaw Nation have been heretofore so fully set out (in its "Response"; R. 520-33; and "Exceptions", R. 574-583), that they should not now be repeated.

In the "Brief of the United States" (R. 588-90), counsel for the United States again, in a cavalier and arbitrary manner, ignore, and refuse to answer, and to brush aside, in a flourish of generalities, the contentions and arguments of the Chickasaw Nation.

They do rather correctly state such contentions of the Chickasaw Nation to be, that, in the "Leased District" proceeding, the United States set up a total of $5,724,587.63, as "Gratuity Offsets"; and that, out of this claimed total, the court allowed only $1,326,651.37, but without identifying the items that go to make up the allowed total; and that it is essential that such allowed items should be identified and set out, *"so as to make sure that allowance of the same items will not be duplicated in the present case"*.

But the only answer they make to such contentions and arguments is that the "Leased District" proceeding was Congressional Reference case, and that no *judgment* was rendered, and that any Findings and Conclusion of the court, upon "Gratuity Offsets", is immaterial, and of no importance.

It has already been contended (in the *"Response"* and *"Exceptions"* above referred to, by pages), and

it is now contended, that this Honorable Court gave the same consideration to the subject of "Gratuity Offsets", in that proceeding, that it would have given in a case wherein a judgment was rendered; and that it did not trifle with this great subject, but considered, and acted upon, the same, with all the solemn consideration which its importance merited; and that whatever it found and held, in the "Leased District" proceeding, would be *the same* in the instant proceeding.

The only thing lacking is that there was no determination of what items were *allowed,* and what *not allowed,* in that proceeding, so as to avoid *confusion and conflicts,* upon the *same items,* in this and other pending suits.

(c) Conclusion.

It is respectfully submitted that counsel for the Chickasaw Nation has pointed out *confusion and conflicts, upon* "Gratuity Offsets", far in excess of those that were before the Supreme Court of the United State (*"Response"*; R. 515-519), in the *Seminole Cases* therein cited and quoted; and it is also respectfully submitted that the holdings of the Supreme Court, in those cases, should be a great assistance in reconciling the *conflicts and confusions* which now threaten, in the instant case, and other pending cases.

Therefore, the prayer of the Chickasaw Nation has been, all the way through, and it now again prays that there be determination of what items were *allowed,* and what were *not allowed,* as "Gratuity Offsets" in

the "Leased District" proceeding, in order that it may have an opportunity to present and to urge, that such Findings and Conclusions, in that proceeding, be applied to the *same items* set up in the instant case, and in other pending cases; and this prayer is made in the firm belief that its Findings and Conclusions in the "Leased District" proceeding, upon "Gratuity Offsets", will be *the same,* when applied to the *same items* in the instant case; and that the *confusions and conflicts* which now threaten will thereby be avoided.

Respectfully submitted,

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