No. K-334

IN THE

United States Court of Claims

THE CHICKASAW NATION OF INDIANS,
Complainant,

VERSUS

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

Reply Brief of the Complainant The Chickasaw Nation of Indians.

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OUTLINE OF BRIEF.

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uary, 1941, Calendar of this Honorable Court, for oral argument and final submission.

> Since the Briefs heretofore filed in the instant case contain not only the usual Statement, Arguments and Proposed Findings of Fact, but also numerous quotations from official reports and court decisions; and since such Briefs are included in, and made a part of, the *entire printed record,* (by consecutive page numbers throughout), where the contents of such Briefs are herein referred to, such references will, for the convenience of the court, be by page numbers, as the same occur in such *entire printed record,* thus: *"Our Brief, R.* 151;" *"Defendant's Answer Brief, R.* 289"; *"Reply Brief of the Choctaw Nation,* R. 384", and so on, as the case may be; and this Brief will be referred to as *"Our Reply Brief".* (Where we have herein emphasized quoted matter, *the emphasis is ours.)*

In Our Brief, heretofore filed (R. 95-224), we have contended that the *basic facts and law,* relating to *these particular "Eastern Boundary"* lands, have long since been established and settled by the applicable decisions of the United States Court of Claims and the Supreme Court of the United States, and by the Reports of those responsible officials of the United States who have the direction and control of Indians and Indian Affairs.

Such reports and court decisions upon which we have relied, are as follows:

The Decision of the United States Court of Claims in the "Net Proceeds Case" of *Choctaw Nation* v. *United States* (19 Ct. Cls., 243; and 21 Ct. Cls., 58-117);

The Decision of the Supreme Court of the United States, upon appeal, in the same case (119 U. S., 1-44);

The Report of the Secretary of the Interior, dated February 12, 1934 (Evidence for Defendant, R. 15-20);

The Report of the Comptroller General of the United States, dated March 10, 1931 (Evidence for Defendant, R. 14-15);

The Report of the Commissioner of the General Land Office, dated December 26, 1933 (Evidence for Defendant, R. 25-29);

Assuming that *such basic facts and law* have been so established and settled, our contentions were set out, as follows:

1.

That the lands to which the instant case relates, (known as the "Eastern Boundary" lands) were owned *in common,* by the *Choctaw Nation of Indians,* and the *Chickasaw Nation of Indians,* under the various applicable Treaties or Agreements, relating to the Western lands of said Nations;

2.

That such lands, (comprising some 136,955.05 acres) were *"taken", and "appropriated to its own purposes",* by the United States, in the passage of the Act of Congress of March 3, 1875 (18

Stat., 476), by which the *erroneous survey* lines were *"declared to be the permanent boundary line between the (said) State of Arkansas and the Indian Country";*

3.

That the United States thereby became liable for the payment, to the Indian owners, of *"just compensation"* for the "taking" of such lands; and its liability for such payment, has been established and settled by the decisions of the United States Court of Claims and the Supreme Court of the United States, in the so-called "Net Proceeds Case" of *"Choctaw Nation* v. *United States",* (19 Ct. Cls., 243; 21 Ct. Cls., 58-117; and 119 U. S., 1-44);

4.

That, in that case, the *Choctaw Nation* recovered judgment against the United States, for compensation for its *common interest* in such lands; and that such compensation as the courts awarded, was paid and received;

5.

That the *Chickasaw Nation* was not a party to that suit, and its *common interest* in such lands was not affected by any judgment or award therein, in favor of the *Choctaw Nation;* and the *Chickasaw Nation* has never been afforded an opportunity to recover, and to receive, *"just compensation"* for its *common interest* in such lands, until the passage of the Jurisdictional Act of Congress of June 7, 1924 (43 Stat., 537), under which the instant suit has been filed;

6.

That the interests of the Choctaw Nation and the Chickasaw Nation, in the moneys arising from the sale, or disposition otherwise, of *commonly owned lands,* has been fixed and determined, by applicable Treaties, laws and court decisions, as *Three-Fourths* of such moneys to the Choctaw Nation, and *One-Fourth* to the Chickasaw Nation; and, therefore, the *"just compensation"* due the Chickasaw Nation would be *One-Fourth* of the *fair value* of such lands at the time they were *"taken"*, by the United States and *"appropriated to its own purposes"* on March 3, 1875, and such further sum of money *"as may be required to produce the present full equivalent of the value paid contemporaneously with the taking";*

7.

That, at the time such "Eastern Boundary" lands were so *taken and appropriated,* by the United States, by the passage of the said Act of Congress of March 3, 1875, their *fair value* was not less than the "Government price" of $1.25 per acre; and

8.

That, in its Amended Petition, filed herein on January 19, 1937, the Complainant, the Chickasaw Nation of Indians, has prayed for judgment against the Defendant, the United States of America, for the *principal sum* of $42,798.45 (which is *One-Fourth* of the total value of such "Eastern Boundary" lands of 136,955.05 acres at $1.25 per acre, as of March 3, 1875); and also for judgment for such further sum of money *"as may be required to produce the present full equivalent of the*

value paid contemporaneously with the taking" (measured by interest, at the rate of 5% per annum, from March 3, 1875, to the date of the judgment herein).

It has also been assumed that the *basic facts and law,* as thus established and settled, would be accepted by the attorneys for the defendant, the United States; and that the issues arising in the instant case would be confined to those questions upon which differences of views might reasonably arise, such as:

> Whether the Chickasaw Nation has received *"just compensation"* for its interest in such "Eastern Boundary" lands; and
>
> If not, the *fair value* of the same, at the time of such "taking", and *"appropriation to its own purposes",* by the United States, under the said Act of Congress of March 3, 1875; and
>
> What sum of money should be *added to such fair value,* as of March 3, 1875, so as *"to produce the present full equivalent of that value paid contemporaneously* with the taking".

But this assumption, upon our part, seems to have been incorrect.

In Defendant's Answer Brief (R. 237-358), no importance whatsoever is attached, and no binding force is given, to the *basic facts and law,* as so established and settled; but practically all questions and contentions which might arise, if no official reports had ever been made, and no court decisions had ever

been rendered, have been raised, upon the subject of the "Eastern Boundary" lands.

So, because of this situation, we can do no less, in this Our Reply Brief, than to follow the lead of opposing counsel, and to show that such questions now raised, upon the *basic facts and law* relating to the "Eastern Boundary" lands, have long since been established and settled, and may not now be raised as issues in the instant case; and, in doing so, we express the hope that the patience of the court will not be tried, since the situation is not of our making.

With this preliminary statement, we shall now reply to the questions raised by the attorneys for the defendant, the United States.

I.

Plaintiff's Reply to Defendant's contention (Defendant's Answer Brief, R. 289) that,

"The Chickasaws are not entitled to compensation because the 'taking' occurred before they acquired any rights in the Choctaw country."

That is: It is contended that the *"taking"* occurred when the *first erroneous survey line* was run, in 1825 (and prior to the time the Chickasaw Nation acquired its interest in the Choctaw lands, in 1837).

This is a fair statement of the contention, because, further along in Defendant's Answer Brief (R. 296), it is contended:

> *"The Chickasaws are not entitled to compensation for the 'taking' which occurred in 1825 before they acquired any interest in the Choctaw Reservation";*

and, in the same Brief (R. 300), it is further contended:

> *"The taking occurred prior to the time the Chickasaws acquired any common ownership in the Choctaw Country."*

The complainant, the Chickasaw Nation, contends that the *"taking"* occurred upon the passage of the Act of Congress of March 3, 1875 (18 Stat., 476), under which the title and ownership of the "Eastern Boundary" lands passed from the Indian owners to the United States, and became a part of the public domain of the United States.

The full text of that Act is set out in Our Brief (R. 151-2); and the following is a brief summary of its provisions:

> The boundary line between Arkansas and the Indian country, as originally surveyed and marked, "is *hereby declared to be the permanent boundary line between the State of Arkansas and the Indian country";* and
>
> The "boundary line, *as fixed in the foregoing section*", shall be "traced and marked in a distinct and permanent manner", under the direction of the Secretary of the Interior; and if that line *"shall be found to differ, in any respect, from what the boundary line would be if run in accordance with the treaties establishing the eastern boundary line"*, the surveyors shall compute the area of lands falling between the two lines, "which in that case would be *taken from the State of Arkansas or the Indian country,* as the case may be."

The official records (in evidence in the instant case), and the applicable court decisions, show the area and acreage of the "Eastern Boundary" lands, thus *"taken"* from *"the Indian country"*.

These court decisions and official reports, which will now be cited and quoted, and commented upon, relate to *these particular "Eastern Boundary" lands;* and while it would not be permissable to here again set them out in full, yet we must be permitted to make use of such parts of them as are necessary to refute the contentions of the attorneys for the defendant, the

United States, as to *when the "taking" occurred,* and as to *legal effect of such "taking".*

The whole question here and now under discussion, is: "When did the *'taking'* of the 'Eastern Boundary' lands occur; and what was the *legal effect* of such *'taking';* and have the *facts and law* been established and settled."

(a) *Decisions of the United States Court of Claims and the Supreme Court of the United States, in the "Net Proceeds Case".*

In the so-called "Net Proceeds Case" of *Choctaw Nation* v. *United States* (19 Ct. Cls., 243; and 21 Ct. Cls., 58-117), the United States Court of Claims, after recounting the history of the two *earlier and erroneous surveys* (in Finding XXXI), *found* upon *the facts:*

> "In the year 1877, A. G. McKee, employed as surveyor by the Secretary of the Interior for that purpose under authority of *the Act of Congress approved March 3, 1875,* entitled 'An Act to Establish the Boundary Line Between the State of Arkansas and the Indian Country', retraced and marked the boundary line between the State of Arkansas and the Indian Country as originally surveyed and marked, and upon which the lines of the surveys of the public lands in the State of Arkansas were closed, and *found the same to run westward from what he found the boundary line would be, if run due south to Red River* from the point on the Arkansas River 100 paces east of old Fort Smith, where the Western boundary line of the State of Arkansas crossed the said river, and *noted the variations and made his return of said survey,* from which and other data in the land office, that office has computed *the area of land taken from the Choctaw country* by the original boundary line, retraced and marked by said McKee as aforesaid, to be 136,204.02 acres * * *." (Our Brief, R. 100-1.)

* * * * * * *

Then, upon these facts thus found, and after reciting Article I of the Treaty of 1855 (11 Stat., 611), which defines what shall *constitute and remain the Choctaw and Chickasaw Country* (and that the Eastern boundary line of the Indian country shall begin where the Western boundary line of the State of Arkansas crosses the Arkansas River, and *"running thence due south to Red River"*) and after stating the allegations of the petition of the plaintiff, the Choctaw Nation, as follows:

> "It is alleged that the United States, in fixing the boundary between the east line of the land of the claimant and the western line of the State of Arkansas, *did not establish the same according to the requirements of the treaty of 1855;* but upon the contrary, *did so establish it as to encroach on the territory of the petitioner;* that the amount lost to the claimant by such encroachment is 136,-204.02 acres; that *by the Act of 1875, the said land became a part of the public domain of the United States without the consent of the petitioner* * * *." (Our Brief, R. 108-9);

* * * * * * *

the Court of Claims, in declaring *the law, held:*

> "Finding XXXI shows that the government made a mistake in the location of the boundary, *substantially as alleged in the petition* * * *" (Our (Our Brief, R. 108-8); and

* * * * * * *

and that,

> *"By the Act of 1875* (18 Stat. L. 476) the line *erroneously surveyed* was *fixed as the permanent boundary of the State of Arkansas and the Indian country; by force of the act,* land belonging to the claimant *was taken for the use and benefit of the defendant.* * * *" (Our Brief, R. 109);

and that,

> "The record shows not only an *appropriation in fact of a large part of the land,* but *in law there is an appropriation of the whole by the legal establishment of the boundary as provided for in the statute"* (Our Brief, R. 109).

Then, upon appeal, the Supreme Court of the United States, in the same case *(Choctaw Nation* v. *United States,* 119 U. S. 1-44), *found the facts,* and *declared the law,* upon the *"taking"* of the "Eastern Boundary" lands, and the *legal effect* of such *"taking"*.

Upon *the facts,* it found:

> "It is alleged in the petition that, *by the treaties* of January 20, 1825, 7 Stat. 234, of September 27, 1830, 7 Stat. 333, and of June 22, 1855, 11 Stat. 611, the boundary line between the lands of the United States and the Choctaws west of the Mississippi River *was established,* but that the United States, in fixing and causing to be surveyed the said boundary line, *did not pursue the line in accordance with the provisions of the said treaties,* but encroached upon and took from the lands ceded to the Choctaw Nation a quantity of land amounting to 136,204.02 acres, *which by the legislation of the United States,* in violation of these

provisions of the treaties, *became a part of the public domain of the United States.*'' (Opinion, 119 U. S. 41.)

Then upon *the law,* the Supreme Court *held:*

> ''There is, however, another controversy arising under the Treaty of 1855. The first article of that Treaty *fixed definitely the boundary of the territory ceded to the Choctaw Nation by the Treaty of 1820.* It is *found as a fact* by the Court of Claims, that, in the location of the line which was surveyed under the authority of the United States, *and fixed as the permanent boundary between the State of Arkansas and the Indian country by the Act of Congress of March 3, 1875,* 18 Stat. at L. 476, the Government made a mistake, whereby they embraced *in the territory appropriated by the United States as part of the public lands,* 136,204.02 acres of Indian lands. * * * This is a just and valid claim, for which the petitioner is entitled to recover.'' (Our Brief, R. 110);

and in the concluding paragraph of the opinion, it further *held:*

> ''The final result is that the Choctaw Nation is entitled to a judgment against the United States for the following sums:
>
> ''First (so much for items not here involved); second (also items not here involved); third, for lands *taken* in *fixing the boundary between* the *State of Arkansas and the Choctaw Nation.* * * *'' (Opinion, 119 U. S. 41);

and, the last sentence of the concluding paragraph of the Syllabus of the opinion (and the only reference,

in the Syllabus to the subject of the ''Eastern Boundary'' lands), is as follows:

> ''* * * and (2), for land *taken from them in locating the boundary of Arkansas under the Act of March* 3, 1875, 18 Stat., 476'' (Syllabus of Opinion, 119 U. S. 2).

(b) *Official reports.*

It is shown by the Reports of the responsible officials of the United States, in the due and regular discharge of their official duties, that the *facts and law,* regarding the *taking* of the "Eastern Boundary" lands, and the *legal effect of such "taking"* as *found and held* by the United States Court of Claims and the Supreme Court of the United States, have been accepted, and acted upon, throughout all the years, since the passage of the said Act of Congress of March 3, 1875.

Such parts of the Reports of these officials of the United States as bear upon the particular questions under discussion, will now be set out.

The Report of the Secretary of the Interior to the Attorney General, dated February 12, 1934 (Evidence for Defendant, R. 15-20), is a detailed and comprehensive summation of *the facts and law,* relating to the subject of the "Eastern Boundary" lands, and to the instant case, since that official of the United States has the direct supervision and control of Indians and Indian Affairs.

The Report states:

> "Reference is again made to the suit of the *Chickasaw Nation* v. *The United States,* Case No. K-334, in the United States Court of Claims and to your Department request to be furnished with all *facts, circumstances, and evidence* in the possession or knowledge of the Department of the Interior relative to the claim of the Chickasaw Nation and the matters involved" (Evidence for Defendant, R. 15-16);

* * * * * * *

and also,

> "It appears that in 1825, under direction of the then Secretary of War, the eastern boundary of said Indian country, as fixed by the Treaty of 1825, was surveyed and marked. It was later discovered *that the line as surveyed and marked was erroneous."*
>
> "The *erroneous line* was subsequently (in 1857 and 1877) retraced and marked, and *under the Act of March 3, 1875* (18 Stat. L. 476) *became the boundary line between said Indian country and the State of Arkansas."*
>
> "It has been found that by said erroneous survey and *the above-mentioned Act of March 3, 1875,* a total of 136,204.02 acres *was taken from the above-mentioned Indian country and appropriated as public lands of the United States."*
>
> "The strip of land so taken was one of the matters involved in the suit of the *Choctaw Nation* v. *The United States* (case No. 12742 in the Court of Claims, 19 Ct. Cls. 243; 21 Ct. Cls. 59). In the decision rendered by said Court on January 25, 1886 (21 Ct. Cls. 59; 71, 72 85, 109, 110) the matter was fully discussed and the *court found that the Government made a mistake in the location of the boundary.* * * *" (Same, R. 18);

* * * * * * *

and also,

> "On appeal, the Supreme Court of the United States considered the matter and in its decision of November 15, 1866, held that the claim of the Choctaw Nation to compensation for said land was a *just and valid claim.* * * *";

and that the said Indian Nation was entitled to recovery (Same, R. 19);

* * * * * * *

and also,

> "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* v. *The United States*, decided by the Supreme Court on November 1, 1886, and *does not appear to have been paid by the United States for its interest in said land.*" (Same, R. 19).

The Report of the Comptroller General of the United States dated March 10, 1931 (Evidence for Defendant, R. 14-15), states that,

> "* * * the land forming the basis of the claim presented (the instant case, No. K-334) appears to be *identical to that which was the subject-matter of the suit of The Choctaw Nation* v. *The United States*, 119 U. S. 1";

and that the Choctaw Indians were awarded compensation for such lands; and that such compensation was duly paid.

The Report of the Commissioner of the General Land Office, is response to the request of the Indian Office, dated December 26, 1933 (Evidence for Defendant, R. 25-29) states that,

> "This suit involves a strip of land formerly in Oklahoma, but now in Arkansas, between the old Choctaw boundary and a line running due south from Ft. Smith, Arkansas, to a point on the Red River. This strip of land was the subject of a suit in the Court of Claims (No. 12742, 19 Ct. of Cls., 243-254) and in the United States Supreme Court (119 U. S. 1-41), known as the 'Net Proceeds' case * * *".

The Report then sums up, and tabulates, what the records of the General Land Office show, regarding the lands under consideration.

We now conclude our quotations from, and comments upon, the applicable court decisions and official reports, establishing *the facts* and settling *the law,* that the "Eastern Boundary" lands were *"taken"* by the United States, and *"appropriated to its own purposes"*, upon the passage of the said Act of March 3, 1875; and, in doing so, we shall only say that the contentions of the attorneys for the defendant, the United States, that the *"taking"* occurred when the *first erroneous survey line was run in 1825,* are, to say the least, *not well taken,* and *without merit.*

II.

Plaintiff's Reply to Defendant's contention (Defendant's Answer Brief, R. 289) that,

"The Chickasaws had no common interest in the Choctaw country prior to the Treaty of 1855";

and, later on, in the same Brief (R. 290), this same contention is stated, in somewhat different form, as follows:

"The Chickasaws acquired no title to land near the eastern boundary by the Treaty of 1837."

The sum total of these contentions is that, under the Treaty of 1837, the Chickasaw Nation acquired *only political rights,* and not *common rights in the ownership of the Choctaw lands;* and that novel contention is argued for some seven pages (Defendant's Answer Brief, R. 290-6).

If, as we have shown, the *"taking"* of the "Eastern Boundary" lands, by the United States, and their *"appropriation to its own purposes",* occurred in 1875; and if (as admitted in the contention first above set out), that the Chickasaw Nation *did acquire a common interest in the Choctaw lands under the Treaty of 1855,* of what importance are the provisions of the Treaty of 1837, in discussing the issues in the instant case?

But the Chickasaw Nation *did acquire a common interest in the Choctaw lands,* under the Treaty of 1937, and this *common interest* thus acquired, along with the

common interest of the Choctaw Nation, was merely restated, and reaffirmed, by the Treaty of 1855; and we must defend the Chickasaw Nation from this strange attempt to destroy the very foundation stone of its *common ownership* in the Choctaw lands: *The Treaty of 1837.*

In contending otherwise, the attorneys for the defendant, the United States, have undertaken to question, and to contradict, the settled policy of the United States (based upon the applicable Treaties, laws and court decisions) for more than one hundred years, in the administration of the lands and moneys of the Choctaw and Chickasaw Nations.

In Our Brief (R. 143-150), we have set out the pertinent paragraphs of the various Choctaw and Chickasaw Treaties which evidence the title to, and ownership of, these Western lands, by the Choctaw and Chickasaw Nations; and such Treaties may not again be fully set out herein.

The *Choctaw Nation* was the *sole owner* of these Choctaw and Chickasaw lands, until 1837; and the *Choctaw Nation and the Chickasaw Nation* were the *common owners,* after the Treaty of 1837; and every acre of land which has been allotted, and every dollar of money distributed out of the proceeds of the sale or disposition otherwise, of such *common lands,* has been upon this basis of *common ownership,* starting with the Treaty of 1837, and coming on down to the present time.

In support of this novel contention that the Chickasaw Nation acquired *no interest in the Choctaw lands, under the Treaty of 1837,* the attorney for the defendant, the United States, go so far as to say (Defendant's Answer Brief, R. 290-291):

> "In construing this treaty it must be noted first of all that the United States was not the grantor. The agreement was one between two Indian tribes, submitted to the United States for approval, but the Government itself was not a party to the treaty. Therefore, the Chickasaws are not able to invoke the rule which prevails when the United States is the grantor—that *all grants are to be liberally construed in favor of a weak and defenseless people, or that all doubts are to be resolved against the guardian in favor of its wards.* The 1837 agreement must be construed as an ordinary convention between *sovereigns.*"

In this instance, the Chickasaw Nation needs to invoke no rule in its favor, against its guardian, the United States, because its guardian "stood by", and assisted the Chickasaws in obtaining a "home in the West", by purchase from the Choctaws, for the valuable consideration of $530,000, of a *common interest* in their Western lands, as will be shown; but this admission, by the attorneys for the defendant the United States, is especially pleasing and useful, since it will be invoked, with such force as we are able to command, further along, in replying to another one of their contentions.

An examination of the Treaty of 1837 (11 Stat. 573; and "Indian Affairs, Laws and Treaties", Kappler, Vol. II, pages 486-7-8), will show that, at the convention of the Choctaw and Chickasaw Commissioners, which resulted in the Treaty of January 17, 1837, "at Doaksville, near Fort Towson, in the Choctaw Country", that the Treaty was signed "*In the presence of,* Wm. Armstrong, *Acting Superintendent Western Territory;* and Henry R. Carter, *Conductor of the Chickasaw Delegation;* and Daniel McCurtain, *United States Interpreter;* and Thomas Laffloor, *Lieutenant U. S. Marine Corps.*"

This Treaty was thus made, *under the direction of the United States,* in pursuance of Article II of the Treaty of May 24, 1834, between the United States and the Chickasaw Nation (7 Stat., 450; and "Indian Affairs, Treaties and Laws", Kappler, Vol II, pages 418-423), under which the United States solemnly agreed to assist the Chickasaws in procuring a home West of the Mississippi River, and to protect and defend them in the possession and enjoyment of the same, as follows:

> "The Chickasaws are about to abandon their homes, which they have long cherished and loved; and though hitherto unsuccessful, they still hope to find a country, adequate to the wants and support of their people, somewhere west of the Mississippi and within the territorial limits of the United States; should they do so, the Government of the United States, hereby consent to protect and defend them against the inroads of any other tribe of Indians, and from the whites; and agree to

keep them without the limits of any State or Territory."

The United States Court of Claims has passed upon, and settled, the question of *what rights* the Chickasaw Nation acquired, under the Treaty of 1837, in purchasing a *common interest in the lands* of Choctaw Nation.

In Case No. J-231 of "*The Choctaw Nation* v. *The United States and The Chickasaw Nation*" (83 Ct. Cls. 140), decided on April 6, 1936, wherein the issues were as to *how, and in what proportions,* the *common lands* were owned, as between the two Nations, and the basis for the distribution of the *common moneys* arising from the sale, or disposition otherwise, of such *common lands,* this court reviewed the earlier Choctaw Treaty of 1830 (7 Stat., 333), under which the Western lands were acquired by the Choctaws, in exchange for their lands East of the Mississippi River; and it then reviewed the Chickasaw Treaty of 1832 (7 Stat., 381), under which the Chickasaw Nation ceded all of its lands East of the Mississippi River, and agreed "to remove therefrom to such Territory west * * * as may later be determined", as the basis for its Finding of Fact, upon the Chickasaw Treaty of 1837 (11 Stat., 573), and then (in Finding 5), *found:*

> "On January 17, 1837, the Choctaw Nation and Chickasaw Nation entered into a treaty (11 Stat. 573), *to which the United States assented,* under the terms of which the Chickasaw Nation

> for a consideration of $530,000, *bought an interest in the lands west of the Mississippi River* * * *",

which had been previously ceded to the Choctaw Nation, by the United States.

The contention of the attorneys for the United States, that the interest purchased by the Chickasaws was merely *political,* and not a *common interest in the lands owned by the Choctaws,* is further answered by the court, in its discussion of the Supplemental Choctaw-Chickasaw Treaty of 1854 (10 Stat., 1116), in which the *political* differences between the Choctaws and Chickasaws were composed, by a revision of the boundaries of the *Chickasaw political district,* and *finds,* further:

> "* * * *otherwise (says the court), the Treaty of January 17, 1837, remained in full force and effect.*"

The court then reviewed the Treaty of 1855 (11 Stat., 611), the Preamble of which provides that "the *political connection* heretofore existing between the Choctaw and Chickasaw tribes of Indians, has given rise to unhappy and injurious dissensions and controversies among them, which render necessary a readjustment of their relations to each other and to the United States", and that "*all subsisting treaty stipulations be embodied in one comprehensive instrument.*"

In Article 1 of that Treaty it is provided that,

> "The following shall *constitute and remain* the boundaries of the *Choctaw and Chickasaw*

Country'' (repeating the same description, by metes and bounds, that occur in all preceding Treaties);

and the Eastern boundary of the Indian country is again defined as follows:

> 'Beginning at a point on the Arkansas River, one hundred paces east of old Fort Smith, where the western boundary line of the State of Arkansas crosses the said river, and running thence *due south to Red River* * * *.' '';

and, in the last paragraph of this Article, and upon the ownership of the lands, *in common* (as in all *''subsisting treaty stipulations,''* which would, of course, include the *''subsisting''* Treaty of 1837), it was procided:

> ''* * * the United States do forever *secure and guarantee the lands embraced within said limits,* to the members of the Choctaw and Chickasaw tribes, their heirs and successors, *to be held in common,* so that each and every member of either tribe shall have an equal, undivided interest in the whole;''

and, in Article 2, the *Chickasaw district* was re-defined; and in Article 4, the Chickasaws were permitted to organize and maintain their own *separate political government.*

There was no confusion in the minds of either the Indian Nations or the United States, regarding the *political rights,* and *common rights in the ownership of the lands;* and this *''comprehensive instrument''* (Treaty of 1855) merely reiterated, and confirmed,

both the *political rights* and *common rights in the Choctaw lands,* which the Chickasaws had bought and paid for, under the *''subsisting''* Treaty of 1837.

This insistence, by the Chickasaws, that they be given *political rights,* as well as *common rights in the ownership of the Choctaw lands,* was merely an expression of their natural wish to dwell close together, so far as possible, and thus continue to enjoy the cherished relations of kinship and friendship, which they had formed and enjoyed in their old homes ''East of the Mississippi'', and before they had been forced to set their feet upon the tragic ''Trail of Tears'', in journeying to their new ''home in the west''.

With these things in mind, they not only paid their $530,000 for *common rights in the lands,* but they demanded, and secured, the right to set up their own *political Chickasaw District;* and this district corresponded, no more and no less, to the other *political districts* which the Choctaws had set up, for the same reasons; for, in Article 3 of the same Treaty of 1855, it is provided:

> ''The remainder of the country, *held in common by the Choctaws and Chickasaws,* shall constitute the *Choctaw district.* * * *'',

and in ''Laws of the Choctaw Nation, 1869'', the *Constitution of the Choctaw Nation* is therein set out, and it is shown therein (on page 24) that the *Choctaw District* was further subdivided into the *Apukshanubbee*

District, the *Pushmataha District* and the *Mosholatubbee District.*"

So, it seems that both the Choctaws and the Chickasaws had the same ideas, as to *political districts,* but neither the Indians, nor the United States, ever failed to write into every Treaty that the lands of the *whole area were owned in common;* and upon that basis, practically the whole Choctaw and Chickasaw common estate has been divided, by the allotment of many millions of acres, by the sale of many other millions of acres, and by the distribution, per capita, of many millions of dollars.

We shall now conclude our comments upon what the Court of Claims *found and held,* upon *what rights* the Chickasaw Nation acquired in the Western lands of the Choctaws, under the Treaty of 1837, in the above cited case of "*Choctaw Nation* v. *United States and the Chickasaw Nation,* No. J-231 (83 Ct. Cls. 140).

As the basis for its holding upon *the law,* the court set out Articles I and V of the Treaty of 1837, under which the Chickasaw Nation acquired *common rights,* both *political,* and in the *ownership of the lands of the Choctaws,* and *held:*

> "On January 17, 1837, the Choctaw Nation and the Chickasaw Nation made and entered into a treaty (11 Stat., 573) under the terms of which the Chickasaw Nation, for a consideration of $530,000, *bought an interest in the lands in Indian Territory occupied by the Choctaw Nation*";

and the court further *held:*

> "This Treaty, pursuant to its terms *was approved by the President and Senate of the United States.*"

This decision of the Court of Claims, in the above cited and quoted case, became final, and is *the law,* since the Supreme Court of the United States dismissed the petition of the plaintiff, the Choctaw Nation, for *writ of certiorari* to the Court of Claims.

Upon *the facts, as found,* and *the law, as held,* may we not again say that the contentions of the attorneys for the defendant, the United States, that the Chickasaw Nations acquired only *political rights,* and no *common rights of ownership in the lands of the Choctaw Nation,* under the Treaty of 1837, are to say the least, *not well taken,* and *without merit.*

III.

Plaintiff's Reply to Defendant's contention that,

"A visible boundary, long acquiesced in, becomes the true boundary, and any loss thus occasioned gives rise to no claim for compensation," *(Defendant's Answer Brief, R. 267).*

The situations considered and passed upon by the court in the numerous cases cited and quoted in support of the above contention, are wholly different from the situation in the instant case, relating to the *"taking"*, and *"appropriation"*, by the United States, of these "Eastern Boundary" lands; and such decisions have no application here.

In those cases, the parties were *Sovereign States,* and upon *an equal footing;* and exercising their Constitutional right to invoke the jurisdiction of the Supreme Court of the United States.

The issues were the *determination, and the definition,* of what constituted the *legal boundaries* (that is, the *political boundaries,* for *Governmental purposes)* between such *Sovereign States;* and *proprietary rights,* and the *private ownership of lands and properties* were, in no wise, involved, except a possible transfer, from one State *jurisdiction* to another, for *political and governmental purposes.*

It is now apparent that the attorneys for the defendant, the United States, were laying the basis for the strange contention that these Indian Nations were *Sovereigns* as the litigant States were Sovereign (and

were, therefore, barred from recovery) when, in discussing the Choctaw and Chickasaw Treaty of 1837, by which the Chickasaw Nation (under the direction, and with the approval of the United States), purchased a *common interest* in the lands of the Choctaw Nation, they said (Defendant's Answer Brief, R. 291):

> "The 1837 Agreement must be construed as an ordinary convention *between Sovereigns.*"

Were these Indian Nations *Sovereign,* in that sense, or in any other sense?

Sovereigns, indeed!

That the Indian Nations or Tribes are the *wards,* and the United States is their *guardian;* and that the Indians may not invoke the jurisdiction of the courts for the enforcement of their rights and the redress of their wrongs, *except with the permission of their guardian, the United States,* expressed by the passage of special Jurisdictional Acts of Congress; and that they are not on an *"equal footing"*, either with their *guardian* or with the *Sovereign States* that surround them, or with others, has been uniformly held by all the courts, from the earliest years of our Government down to the present time.

Those decisions were summed up, and that doctrine was restated, in language as strong as the court could command, by the Supreme Court of the United States, in the "Net Proceeds Case" of *Choctaw Nation vs. United States* (119 U. S., 1-44), which relates to *these particular "Eastern Boundary" lands,* to which the instant suit also relates.

The language of the Supreme Court is so much more comprehensive and conclusive than any we can employ, that we shall quote rather liberally from the Opinion in that case, and without further Argument upon that phase of the instant case.

The Court *held:*

"In reviewing the controversy between the parties presented by this record, it is important and necessary to consider and dispose of some preliminary questions. The first relates to the *character of the parties, and the nature of the relation they sustain to each other.* The United States is a *sovereign nation,* not suable in any court except by its own consent, and upon such terms and conditions as may accompany that consent, and is not subject to any municipal law. Its government is limited only by its own Constitution, and the nation is subject to no law but the law of nations. On the other hand, the Choctaw Nation falls within the description in the terms of our Constitution, *not of an independent state or sovereign nation,* but of an Indian tribe. As such, it stands in a peculiar relation to the United States. It was capable under the terms of the Constitution of entering into treaty relations with the government of the United States, although, from the nature of the case, *subject to the power and authority of the laws of the United States when Congress should choose,* as it did determine in the act of March 3, 1871, embodied in Paragraph 2079 of the Revised Statutes, to *exert its legislative power.*"

"As was said by this court recently in the case of the *United States* v. *Kagama,* 118 U. S. 375, 383: 'These Indian tribes are the *wards of the nation;* they are communities *dependent on the*

United States; dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the State and receive from them no protection. Because of the local ill-feeling, the people of the State where they are found are often their deadliest enemies. From their very *weakness and helplessness,* so largely due to the course of dealing of the Federal Government with them, and the *treaties in which it has been promised,* there arises the *duty of protection,* and *with it the power. This has always been recognized by the Executive, and by Congress, and by this court, whenever the question has arisen.*' "

"It has accordingly been said in the case of *Worcester* v. *Georgia,* 6 Pet. 515, 582: 'The language used in treaties with the Indians should *never be construed to their prejudice.* If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense. * * * How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.' "

"The recognized relation between the parties to this controversy, therefore, is that between a *superior and an inferior,* whereby the latter is placed *under the care and control of the former,* and which, *while it authorizes the adoption on the part of the United States* of such policy as *their own public interests may dictate,* recognizes, on the other hand, such an interpretation of their *acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection.* The parties are *not on an equal footing,* and that in

equality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of *private persons, equally subject to the same laws.*

"The rules to be applied in the present case are those which govern public treaties, which, even in case of controversies between nations equally independent, are not to be read as rigidly as documents between *private persons* governed by a system of technical law, but in the light of that larger reason which constitutes the spirit of the law of nations. And it is the treaties made between the United States and the Choctaw Nation, holding such a relation, the assumption of fact and of right which they presuppose, *the acts and conduct of the parties under them, which constitute the material for settling the controversies which have arisen under them.*"

(a) *The cited case of OKLAHOMA vs. TEXAS* (272 U. S. 9).

This was a suit between the States of Oklahoma and Texas, invoking the Constitutional jurisdiction of the Supreme Court of the United States, to settle the boundaries between them.

There arose in that case, no questions of *proprietary rights or the private ownership of lands;* and the boundary to be settled (and which was settled), related to *State jurisdiction, for political and governmental purposes.*

Neither was there involved any question of the adoption of an *erroneous survey line* as the *legal boundary;* and the only question that arose, and was settled, was as to the *actual location of the true 100th meridian of west longitude, running north from Red River.*

The attorneys for the defendant, the United States, have cited *only the Opinion of October 11, 1926,* and have not followed the case through to the end (which was pending for several years thereafter, and extended through several volumes of the Supreme Court Reports); and have made no reference to the several *later Orders and Decrees.*

The *Southern boundary* of Oklahoma and the *Northern boundary* of Texas (which "followed the course of Red River westward to the 100th degree of west longitude"), was not involved, since, as held by the court, *that boundary* had been settled in the "Greer County Case" of *United States vs. Texas* (162 U. S., 1).

Therefore, the only boundary line to be settled in the cited *Oklahoma vs. Texas* case was the *Western boundary* of Oklahoma and the *Eastern boundary* of the panhandle of Texas.

The court stated that this was the *same boundary,* as fixed and agreed upon as the *Western boundary* of the United States territory, and the *Eastern boundary* of Spanish territory, in the Spanish Treaty of 1819; and also the *same boundary,* as fixed and agreed upon as the *Western boundary* of the lands owned by the Choctaw and Chickasaw Nation, whose ownership was guaranteed by the Treaty of 1855.

That part of the boundary line involved in the cited *Oklahoma vs. Texas* case (after finding that the Red River constituted the North and South boundaries *westward to the 100th degree of west longitude),* was found by the court to be:

> "* * * and *crossing the Red River,* ran *thence due North* to the Arkansas River";

and the *same boundary,* constituting the Western boundary of the Indian country, under the Choctaw and Chickasaw Treaty of 1855, was found to be:

> "* * * running *north from Red River along the 100th meridian* to the main Canadian River."

In its Opinion of October 11, 1926 (272 U. S., 9), the court *held:*

> "* * * the boundary is *the line of the true 100th meridian extending north from its intersection with Red River";*

and that *this line* should now "*be accurately located and marked",* by a Commissioner appointed by the court.

Then on January 3, 1927, the court entered its Decree (273 U. S. 93) again declaring the line constituting the Western boundary of Oklahoma and the Eastern boundary of the panhandle of Texas, to be,

> "* * * *the true 100th merdian of longitude west* * * * *extending north* from its intersection with the north bank of Red River * * *";

and appointing Samuel S. Gannett, its Commissioner, to "*run, locate* and mark the boundary between the States, *as determined by this decree."*

Then, on March 5, 1928, the court entered its Decree (276 U. S., 596), against declaring such boundary to be,

> "* * * *the true 100th meridian of longitude* west from Greenwich, *extending north* * * * *from* * * * *Red River,* to its intersection with the northern boundary line of the State of Texas as surveyed and marked on the ground by John H. Clark, United States Commissioner, under the Act of Congress of June 5, 1858 (11 Stat., 310)".

Here the court *found and held,* that the Clark survey line *was* along the *true 100th meridian of west longitude;* and it is also clear that the survey line, as run by Commissioner Gannett, under the direction of the court, *coincided,* in all respects with the Clark line, as shown by the next Decree.

Then, on February 24, 1929, the court made and entered its Decree (281 U. S. 689) relating to the services and expenses of Samuel S. Gannett, Commissioner,

> "* * * in running, locating and marking *the boundary line between the States of Texas and Oklahoma, along the one hundredth meridian of longitude west from Greenwich* * * *",

and providing how the same should be paid.

Then, on March 17, 1930, the Supreme Court entered its Final Decree upon the Oklahoma - Texas boundary (281 U. S., 694). by again declaring that such boundary was,

> "* * * *along the true 100th meridian of longitude west* from Greenwich * * *",

and the report was confirmed, and the boundary made final, as follows:

> "The boundary line delineated and set forth in said report and on the accompanying maps is established and declared to be the *true boundary* between the States of Texas and Oklahoma *along said meridian.*"

So, throughout the whole case, the court *found and held* what constituted the *legal boundary* between the States of Oklahoma and Texas, as the line *"running along the true 100th meridian of west longitude"*, as defined in the Spanish Treaty of 1819, and in the Choctaw-Chickasaw Treaty of 1855.

That line was run, and located, and marked, by Commissioner Gannett under the direction of the

court; and it was declared, in its Final Decree, to be the *legal boundary* between the States of Oklahoma and Texas.

This was wholly a suit between *Sovereign States,* to establish the *legal boundary* between them, for *political and governmental purposes;* and *"proprietary rights"*, or the *private ownership of lands or other property,* were in no wise, involved.

We have, perhaps, here devoted more effort and space than the importance of the case demands; but we have deemed it advisable to make a careful analysis of the same, because the boundary line under consideration touched a part of the original Choctaw and Chickasaw Indian lands; and, further, because it has been stressed, and largely relied upon, by opposing counsel, upon this phase of the instant case.

The *Oklahoma vs. Texas* case has no application to the issues arising in the instant case.

(b) *Other cited cases.*

The attorneys for the defendant, the United States, have also cited the case of *The State of Missouri vs. The State of Iowa* (7 Howard, 660).

The sole issue in that suit between the Sovereign States of Missouri and Iowa, was as to what constituted the *legal boundary line* between the two states.

The line which the Supreme Court *found and held* to be the *legal boundary line,* had been run by the United States in 1816, under its Treaty with the Osage Indians.

Iowa contended for *that line,* and Missouri contended for *another line;* and the question of the adoption of an *erroneous survey line* as the *legal line* did not enter into the case.

The court found and held *that line* to be both the *true Treaty line,* and the *legal boundary* line between the two States.

We can add nothing to what the Supreme Court *found and held* as follows:

> "We are therefore of opinion that the northern boundary of Missouri is the *Osage line, as run by Sullivan in 1816,* from the northwest corner made by him to the Des Moines River; and that a line extended due west from said northwest corner to the Missouri River is the proper northern boundary on that end of the line. And this is the unanimous opinion of all the judges of this court."

Throughout the case, there was no question or discussion, either by the litigant States, or by the court,

as to *proprietary rights,* or the *private ownership of lands* or other property; and the issues were solely the matter of the transfer of the disputed area from one State *jurisdiction* to another, for *governmental purposes.*

In Defendant's Answer Brief (R. 286), it is admitted that,

> "Where an *erroneous survey* is eventually recognized as the *de jure* boundary, 'the line so established takes effect *not as an alienation of territory,* but as a definition of the true and ancient boundary' ",

and that such is the sum total of the decisions in the cited and quoted cases relied upon.

It is further said (Defendant's Answer Brief, R. 288) that,

> *"While it is true that the chief question before the court in most of the foregoing cases was one of JURISDICTION rather than OWNERSHIP, the latter question was indirectly involved.";*

and it is then contended that, in the cited case of *Maryland vs. Virginia* (217 U. S., 1), *proprietary rights were involved;* but a careful examination of that case discloses that this conclusion is not justified by the decision.

On the contrary, it was in *that case* that the court held "that the line so established takes effect, *not as an alienation of territory,* but as a definition of the *true and ancient boundary.*"

We are obliged to the attorneys for the defendant,

the United States, for these admissions, for it now becomes easy to show how dissimilar are the situations in those cases, from the situation in the instant case; and that, therefore, such decisions have no application whatsoever to the instant case.

In the instant case, there *was* an *"alienation of territory"* belonging to the Indian owners, *not by the first erroneous survey line of 1825,* but by the *"taking"* and *"appropriation"* under the said Act of March 3, 1875.

True, the *"alienation"* was not voluntary upon the part of the Indian owners, since they could not prevent the passage of that Act by the United States, in the exercise of its *plenary power* in the *"taking"* of such lands; and their only hope for redress lay in the obligation of the United States to pay *"just compensation"* to the Indian owners for the lands so *"taken"* and their *"appropriation"*.

Then, there was no *"definition"* of the *"true and ancient boundary"*, in what was done under the said Act of March 3, 1875.

It became necessary for the United States to *declare and fix* the *legal boundary* between the State of Arkansas and the Indian Country; and, in doing so, to *"take"* and to *"appropriate"* such lands, by the said Act of 1875, and for the reasons which it deemed sufficient; but *that Act* very fairly and frankly admitted that the *legal boundary* line thus fixed, *was erroneous,* by directing that a computation be made of the lands

falling between the *legal line* thus *declared and fixed,* and the *"true Treaty line"*, for future use in dealing with the Indian owners; and the United States Court of Claims and the Supreme Court of the United States have *found and held* (in the "Net Proceeds Case") that the *legal line* thus *declared and fixed*, was an *erroneous line,* and not the *true Treaty line;* and that such lands were thereby *"taken"* and *"appropriated"* by the United States; and that the United States thereby became liable to pay the Indian owners "just compensation" therefor.

For the reasons stated, none of the cited cases have any application here.

(c) *"Lapse of Time and the Statutes of Limitation."*

In Defendant's Answer Brief throughout, upon that phase of the instant case now under discussion, it is contended:

> That the Choctaw Nation had the right to select some person to accompany the United States surveyors when the first survey line of 1825 was run;
>
> That such line was viewed as the *true boundary* line, by the Choctaw Nation and its successors, for more than 33 years; and
>
> That, when the Chickasaws arrived in 1837, they too, abided the 1825 survey line.

All of these statements laid the basis for the main contention of the attorneys for the defendant, the United States, which is, in effect, that the Indians *acquiesced*

in the original *erroneous survey line* of 1825 for such a number of years as would bar them from questioning its finality, and from receiving compensation for the lands which they have lost.

To state the contention in another way: It is contended that Indians are bound by *the lapse of time and the statutes of limitation,* and may not now recover.

Before giving the final and complete reply to this contention, let us first say that the Choctaw and Chickasaw Indians were more deeply concerned, just at that time, with the problems of life and death, and survival; and it never occurred to them that they were obligated to follow around after the surveyors of the United States, and to see to it that the boundary lines of this vast area of lands were correctly surveyed.

The Choctaw and Chickasaw Indians had, with great reluctance, given up their lands and homes "East of the Mississippi River", in exchange for a new "home in the West"; and, with the same reluctance, had undertaken to travel over the "Trail of Tears", in order to reach that new home.

Therefore, their problems were as to whether they would ever arrive there alive; and as to how they would be able to sustain themselves and their families in that unknown and unbroken Western wilderness!

It was the duty, and responsibility, of the *guardian,* the United States, to correctly survey the ceded lands; and the Indians had every reason to rely (and

they did rely) upon the solemn Treaty guarantys that their *guardian* would safeguard the rights of its *wards,* in that and other respects.

The *erroneous survey line of 1825* was run *by the United States,* the *guardian* of these *Indian wards.*

Has it ever been contended before, and can it be seriously contended now, that guardians may take advantage of their own *wrongful acts,* in dealing with property of their wards?

That is the law of the land where *wards* have access to the courts for redress from the wrongful acts of their *guardians;* but where Indians are the *wards,* and have no access to the courts except by permission of the *guardian,* the United States, the obligation of the guardian is stronger, as declared by the Supreme Court in the above cited "Net Proceeds Case" of *Choctaw Nation vs. United States* (119 U. S., 1-44).

We now give our complete reply to these new and strange contentions of the attorneys for the defendant, the United States.

By the Jurisdictional Act of Congress of March 3, 1881 (21 Stat., 504), the Choctaw Nation was given the right to have adjudicated, certain claims against the United States (including the claim for "just compensation" for its interest in the "Eastern Boundary" lands).

By the Jurisdictional Act of Congress of June 7, 1924 (43 Stat., 537), the Choctaw and Chickasaw Nations, or either of them, were given the right to have

adjudicated, any and all claims which they might have against the United States, growing out of any Treaty or Agreement, or of any Act of Congress, relating to Indian Affairs; and, under that Act, and amendments thereto, the Chickasaw Nation has filed the instant suit.

In that Act, it is definitely and specifically provided that such claims shall be adjudicated, and judgment rendered,

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

The quotation of the above provision of the Jurisdictional Act of Congress, is deemed to be the strongest argument that can be made, in refutation of the contention of the defendant, the United States, upon that phase of the instant case now under discussion.

May we again say that the contentions of the attorneys for the defendant, the United States, that the Indian owners of the lands here involved acquiesced in the *first erroneous survey line of 1825,* and are thereby barred from recovering compensation therefor, and that the cited and quoted cases have any bearing, whatsoever, upon the issues arising in the instant case, are *not well taken,* and are *without merit.*

IV.

The circumstances and conditions under which the "Eastern Boundary" lands were "taken" and "appropriated" by the United States under the Act of March 3, 1875.

By the passage of the Act of March 3, 1875 (18 Stat., 476), the United States saw fit to *declare and fix,* in pursuance of its own purposes, a *legal boundary line* between the State of Arkansas and the Indian country, which differed from the *true Treaty line;* and, *by that Act,* the "Eastern Boundary" lands (falling between the *legal line* and the *true Treaty line)* were *"taken"* by the United States and *"appropriated" to its own purpose,* by adding them to the *public lands of the United States.*

It is not denied that the United States, in the exercise of its *plenary power,* in the administration of Indian property and Indian Affairs, had the legal right to so *"take"* and *"appropriate"* such lands; but, in doing so, it thereby became liable to pay the Indians *"just compensation"* for the lands so taken and appropriated.

The record shows that the United States had permitted a situation to develop where it probably could do no less than to pass the said Act of March 3, 1875, and to *"take"* and to *"appropriate"* the "Eastern Boundary" lands.

When the first *erroneous boundary line* was run, in 1825, it was reasonable to assume that the *true*

Treaty line had been run; and, upon that assumption, the survey lines of what was thought to be the *public lands* in the then Territory of Arkansas, were extended up to that *erroneous line.*

Later, some Patents to Arkansas settlers were issued by the United States, upon the assumption that the lands on the East side of the *erroneous boundary line* were *public lands of the United States.*

However, the Report of the Commissioner of the General Land Office (Evidence for Defendant, R. 25-29) shows that, *as late as August 1, 1881,* a total of such lands *"remaining undisposed of"* was 82,161.95 acres, or approximately 60% of the whole area; and the same Report shows that a large part of this *remaining area* was disposed of, by the United States, from time to time, *as public lands;* and that, as late as August 5, 1929 (when the instant suit was filed), the lands *"remaining undisposed of"* amounted to 10,562.09 acres.

Therefore, in 1875, *the United States had outstanding Patents* for about 40% of such lands, and the holders of such Patents became alarmed about the goodness of their titles.

The record further shows that the Senators from the State of Arkansas became active (Defendant's Answer Brief, R. 287), and *these titles were quieted,* by the passage of the said Act of March 3, 1875; and *the United States thus validated its outstanding Patents* to about 40% of the area, and the balance became a part of the *public domain of the United States.*

As has been shown, in the so-called "Net Proceeds case" of *Choctaw Nation vs. United States* (19 Ct. Cls., 243; and 21 Ct. Cls., 55-117), the United States Court of Claims *found and held* that, *by said Act of March 3, 1875, these particular "Eastern Boundary" lands were "taken from the * * * Indian country, and appropriated as public lands of the United States";* and that *"in law* there is *an appropriation of the whole* by the *legal establishment* of the boundary *as provided for in the statute";* and this case was affirmed, upon appeal, by the Supreme Court of the United States (119 U. S., 1-44).

All of this might have been good administration, and perhaps was, but, in the transaction, the United States and its Arkansas Patentees *gained,* and the Indian owners *lost;* and there can be no denial that the United States thereby became liable to pay the Indian owners *"just compensation"* for the *"taking",* and the *"appropriation"* of such lands; and that is exactly what has been decided by the United States Court of Claims and the Supreme Court of the United States, in the cited and quoted "Net Proceeds Case".

V.

Plaintiff's Reply to Defendant's contention (Defendant's Answer Brief, R. 313) that,

"The Choctaws, and not the United States, are primarily liable for the satisfaction of any claims which the Chickasaws may have had in the lands in question."

The plaintiff, the Chickasaw Nation, contends that the United States is solely liable; the defendant, the United States, has interpleaded the Choctaw Nation, and contends that it is liable; and the Choctaw Nation denies liability.

It is true that, in 1905, the Choctaw and Chickasaw Nations *attempted to make a compromise settlement* of various matters of controversy between them; and, as the *consideration* for the same, the Chickasaw Nation sought to have the Choctaw Nation pay *One Fourth* of the moneys awarded to, and received by, the Choctaw Nation, for the *"taking"* of the "Eastern Boundary" lands, in the so-called "Net Proceeds" case of *Choctaw Nation vs. United States* (119 U. S., 1-44); but such *proposed compromise settlement* is of no force and effect, and is not binding upon the parties, for reasons which will be shown.

The attorneys for the defendant, the United States, contend that, because of that *attempted compromise settlement,* the United States should now be relieved of its liability to pay the Chickasaw Nation "just compensation" for the *"taking"* of its interest in the

"Eastern Boundary" lands, by requiring the Choctaw Nation to pay to the Chickasaw Nation *One Fourth* of the meager moneys so awarded and paid to it.

In Our Brief (R. 95-224), we have shown, as to the Choctaw Nation, in that case:

The Choctaw Nation was the *sole party plaintiff;* and

No evidence was taken and introduced upon the *fair value* of the lands, at the time of the *"taking"* in 1875; and

No contention was made for "such *addition thereto* as may be required to produce the *present full equivalent of that value* paid contemporaneously with the taking"; and

In the *absence of such evidence and contentions,* the court fixed the value of such lands, under the "Graduation Act" of August 4, 1854 (10 Stat., 574), providing for offering *public lands* at *reduced prices,* following each offering, upon the theory that *these* were *public lands;* and the *reduced price* thus fixed upon these lands was 50 cents per acre, which was only 40% of the "Government price" of $1.25 per acre, at which they *were offered* when they *did become public lands,* upon being *"taken"* by the United States, in 1875.

(Also see Report of Commissioner of General Land Office in "Graduation Act" of 1854; R. 25-29.)

As to the Chickasaw Nation, we have shown, in the same Brief:

The Chickasaw Nation was *not a party* to that case; and

It had, therefore, no opportunity to present *evidence upon the value of the lands* in which it owned an interest, nor to present its contentions and arguments upon the *measure of the "just compensation"* to which it was entitled; and

It is, therefore, not bound by the judgment in that case; and is now entitled to its *"day in court"*, for an adjudication of its rights and interests.

It is assumed that it is not necessary to present authorities upon these basic propositions of *parties and judgments.*

Yet, in view of all of this, and, after admitting (Defendant's Answer Brief, R. 314), that,

> *"While it is true that the Chickasaws were not originally bound by the judgment or the valuation in the 'Net Proceeds' case inasmuch as they were not a party to that proceeding* * * *",

they further say (R. same page):

> "* * * they have by their subsequent conduct *acquiesced* in that judgment."

The complete reply to that contention is that they importuned Congress, year in and year out, to pass a Jurisdictional Act for the adjudication of this and other claims, and at last, the Jurisdictional Act of June 7, 1924, was passed, under which the instant suit was filed; and *that Act* directs the adjudication of all claims,

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

They then ask this Honorable Court to hold valid and binding, this blundering and bumbling *attempt to compromise and settle* certain matters of dispute between the two Nations, by having the Chickasaw Nation agree to accept the trifling sum of money therein named, as the consideration for foregoing certain claims against the Choctaw Nation (which named *consideration* was *never paid);* and which agreement, affecting the *lands and moneys* of the Tribes, they had no *legal capacity* to enter into, as will be shown.

They further ask the court to "breathe the breath of life" into this *proposed compromise and settlement,* (which was never alive, for reasons hereinafter set out), and which has lain dead and buried for more than 35 years, during which time practically the entire Choctaw and Chickasaw estates have been allotted and distributed.

They further ask the court to hold that the burden of settling with the Chickasaw Nation be placed upon the Choctaw Nation; and that the great *guardian* Government of the United States go *"scot free"* of its obligation to pay "just compensation" to the Chickasaw Nation for its interest in the "Eastern Boundary" lands.

Before pointing out the reasons why this *attempted compromise* would not be binding, even between *those who have enforcible rights under the laws of the land, and in the courts,* in any subsequent litigation over the subject matter, let us inquire:

Is the defendant, the United States, in thus attempting to relieve itself of its liability to the Chickasaw Nation, by passing that liability burden over to the Choctaw Nation, acting as a *superior guardian* should act toward its *inferior ward?*

It is dealing fairly with its *ward,* the Chickasaw Nation, when it contends that it should be required to accept, as *"just compensation"* for its interest in the "Eastern Boundary" lands, *One Fourth* of the small sum of money awarded and paid to the Choctaw Nation, in a suit in which *it alone* was the plaintiff, and to which the Chickasaw Nation *was not a party,* and without any opportunity to present evidence and argument upon the *fair value* of the lands in which it owned an interest, and upon the *measure* of the *"just compensation"* to which it is entitled?

In all of this, is the United States acting according to the rules governing its conduct in dealing with the property and affairs of its *Indian wards,* as laid down in that great decision of *Choctaw Nation vs. United States* (119 U. S., 1-44), and in all the other decisions of our courts, upon that subject?

We are sure the court will give due consideration and weight to our contentions here set out, in passing upon this strange and strained contention of the defendant, the United States.

(a) *The PROPOSED COMPROMISE AND SETTLEMENT, between the Choctaw and Chickasaw Nations, FAILED, and is not binding upon the parties, because the MONEY CONSIDERATION, supporting the same WAS NEVER PAID.*

In Defendant's Answer Brief (R. 314), and in the Reply Brief of the Choctaw Nation (R. 398), it is admitted that the *money consideration* mentioned in the *proposed compromise and settlement,* was *never paid.*

Even as between parties upon an *equal footing* before the laws of the land, and having access to the courts of the land, the *proposed compromise and settlement* would fail, and not be enforcible, because of the *failure of consideration.*

Paragraph Four of the *proposed compromise and settlement* here involved (R. 325), provides:

> "* * * and upon the Chickasaw Nation's *accepting said amount* * * * it shall forever abandon any and all claims against the Choctaw Nation."

> "As in the case of other contracts, a consideration is essential to support a compromise." (Compromise and Settlement, *Corpus Juris,* Vol. 12, paragraph 15, page 322; citing cases.)

> "A promisor either receives the consideration he has bargained for or he does not.

> "If he does not, there is no *enforcible agreement,* for there is *no consideration."* (Contracts, *Corpus Juris,* Vol. 13, paragraph 242, page 367; citing cases.)

(b) *The PROPOSED COMPROMISE AND SETTLEMENT has been RESCINDED AND ABANDONED by the parties.*

In the Reply Brief of the Choctaw Nation (R. 397), it said:

> "* * * the Choctaw Nation has no interest in the instant suit, and irrespective of the basis upon which compensation was arrived at in the 'Net Proceeds' case, the moneys so adjudged and paid were in satisfaction of the *sole interest* of the Choctaw Nation in the land involved."

Every act of the Chickasaw Nation shows its rescision and abandonment of the same, including its activity in urging the passage of the Jurisdictional Act of June 7, 1924 (43 Stat., 437), and the filing of the instant suit thereunder.

> "The parties to a compromise agreement may by mutual consent rescind or abandon it, and where this is done it is *not binding,* and the parties are *restored to the position occupied before such compromise.*
>
> "Any conduct inconsistent with an intention to rely upon the compromise agreement *constitutes an abandonment.*
>
> "Thus, if the plaintiff notwithstanding the compromise, sues on the original cause of action, he thereby repudiates the compromise agreement and destroys its consideration and cannot thereafter recover on it." (Compromise and Settlement, *Corpus Juris,* Vol. 12, pages 344 and 345; and cases cited.)

(c) *The PROPOSED COMPROMISE AND SETTLEMENT was entered into by parties under LEGAL DISABILITY, and without the LEGAL CAPACITY to perform any act "in any manner, affecting the land * * * or money of the tribe", without the approval of the President of the United States; and there was no such approval.*

The attorneys for the United States have, apparently, overlooked that solemn provision of the Choctaw and Chickasaw "Atoka Argeement" (Act of Congress of June 28, 1898), which forever withdrew from the two Nations the *legal capacity* to perform any act (when *acting alone,* and without the cooperation and approval of their *guardian,* the United States) which might "*in any manner*" affect their *lands or moneys.*

The recorded history of Indian Affairs, preceding the making of the "Atoka Agreement", is filled with the reasons which caused the *guardian,* the United States, to take this drastic step to safeguard the *lands and moneys* of the two Nations.

It was charged (and, perhaps, was true), that, from time to time, Acts had been passed by the Nations, proposing to cede large areas of the tribal lands to projected railways, and other promotional ventures; and to improvidently appropriate large sums of money, for various purposes.

The United States, therefore, decided that the time had come to *put an end* to these attempts to dissipate the tribal *lands and moneys;* and, accordingly, the following provision (in addition to the allotment of

the lands, the distribution of the moneys, and fixing the time for the dissolution of the Tribal Governments), was made a part of the said "Atoka Agreement", which was ratified by the votes of the *citizens of the two Nations:*

> "It is further agreed that no act, ordinance, or resolution of the council of the Choctaw or Chickasaw tribes, *in any manner* affecting *the land* * * * or the *moneys or other property* of the tribe * * * (except appropriations for the regular and necessary expenses of the government of the respective tribes), * * * shall be of *any validity* until approved by the President of the United States."

Therefore any and all Acts of the legislative bodies of the two Nations, which sought to authorize, or to approve, the *proposed compromise settlement* (which clearly affected both lands and moneys), were *without any validity,* unless and until approved by the President.

What does the record show, in this respect?

In the Appendix to Defendant's Answer Brief (R. 322-326), appears the Act of the Choctaw Council, attempting to ratify the *proposed compromise and settlement.*

It was approved by Green McCurtain, Principal Chief of the Choctaw Nation, on June 30, 1905; but *it was neither submitted to, nor approved by, the President of the United States.*

Then, this Act merely attempts to approve an

Agreement, made by Commissioners appointed under a *preceding Act,* authorizing their appointment and defining their duties.

The *proposed compromise and settlement* Agreement so states, as follows (R. 322,323):

> "The Commission created under *an act of the General Council of the Choctaw Nation,* appointed on the 27th day of October, 1904, have made and concluded an Agreement with a like Commission on the part of the Chickasaw Nation, created under an Act of the Chickasaw Legislature approved on the 19th day of October, 1904 * * *."

These Acts do not appear in the record; and, certainly, there is no evidence that they were ever *submitted to, or approved by, the President.*

The first Choctaw document appearing in the Appendix (R. 321-2), is the Act of the Choctaw Council, attempting to appropriate the money named in the *compromise and settlement* Agreement; and *this Act* was approved by the President.

This was merely the *last Act,* following the *several preceding Acts,* extending over a period of some two years, relating to the subject; and, certainly, it will not be contending that this Act *legalizes and validates* all preceding Acts, and all transactions thereunder.

And then (as shown by the record, and as admitted by opposing counsel), nothing was ever done thereunder, and *the money was never paid.*

May it not be reasonably assumed that the law officers of the United States reached the same conclusions that are now being reached: That the whole series of transactions upon the *proposed compromise settlement,* was an attempt to *escape the plain inhibitions of the law,* as above set out (Atoka Agreement; Act of June 28, 1898), as affecting the *lands and moneys* of the Nations; and, therefore, the whole series of transactions were of *no validity,* and that no money could be *legally paid* thereunder.

We respectfully submit, for the reasons stated, that the contentions of opposing counsel, that the *proposed compromise and settlement* should relieve the defendant, the United States of its liability to pay the Chickasaw Nation "just compensation" for its interest in the "Eastern Boundary" lands, are also *not well taken* and *without merit.*

VI.

The Chickasaw Nation is entitled to recover "just compensation" for its interest in the "Eastern Boundary" lands; and such "just compensation" should be measured according to the applicable decisions of the Supreme Court of the United States.

We have proven the *fair value* of the "Eastern Boundary" lands, at the time they were *"taken"* and *"appropriated",* by the United States in 1875 (Evidence for Complainant, R. 33-93).

Our contentions and comments upon that subject, are set out in Our Brief (R. 182-223); and the same will not be repeated here.

It is, however, important to note that no evidence has been taken and filed, on behalf of the defendant, the United States, bearing upon the *fair 1875 value* of such lands; and it may be assumed that the *facts are proven,* upon that phase of the instant case.

While it has been proven that the *fair 1875 value* of such lands is *in excess* of the "Government price" of $1.25 per acre, and the complainant, the Chickasaw Nation could have reasonably contended for a *higher value,* yet it is contending only for the "Government price" of $1.25, as the *1875 value* of the lands here involved.

Where the lands owned by Indian Nations or Tribes has been *"taken"* by the United States, and *"appropriated to its own purposes",* the United States

is liable for the payment of *"just compensation"* to such Indian owners.

The conditions and circumstances attending such *"taking"* and *"appropriation"* are not important.

They may differ in certain cases; but the important thing to be established, as regards the liability of the United States, is that such lands were *"taken"* and *"appropriated"*.

When so *"taken"* and *"appropriated"*, the *rule and measure* for arriving at what constitutes *"just compensation"*, as laid down by the applicable decision of the Supreme Court of the United States, in the case of *Creek Nation vs. United States* (295 U. S., 103), is 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.*"

This *rule and measure* has been restated, in practically the same language, in the case of *Shoshone Tribe of Indians et al vs. United States* and *United States vs. Shoshone Tribe of Indians, et al* (299 U. S., 476), as follows:

> "Finally the fact is unimportant, there having been an appropriation of property within the meaning of the Fifth Amendment, that the jurisdictional act is silent as to an award of *interest or any substitute therefor.* United States vs. Creek Nation, supra, 295 U. S. 103." (and other cited cases.)
>
> "Given such a *taking,* the right to *interest or a fair equivalent,* attaches itself automatically to an award of damages" (citing cases).
>
> "Nor does the nature of the right divested avail to modify the rule. Power to control and manage the property and affairs of Indians in good faith for their betterment and welfare may be exerted in many ways and at times even in derogation of the provisions of a treaty. *Lone Wolf* v. *Hitchcock,* 187 U. S. 553. The power does not extend so far as to enable the government 'to give the tribal lands to others, or to *appropriate them to its own purposes,* without rendering, or assuming an obligation to render, *just compensation';* * * * for that 'would not be an exercise of guardianship, but an act of confiscation.' *United States* v. *Creek Nation, supra,* 295 U. S., 103" (and other cited cases).

We now come to how this *rule and measure* may be applied to the instant case.

While the lands of the Choctaw and Chickasaw Nations are owned *in common,* the *moneys* arising from the sale, or disposition otherwise, of such *common lands* are owned, and divided, upon the basis of *Three Fourths* to the Choctaw Nation and *One Fourth* to the Chickasaw Nation, as fixed and agreed to in the applicable Treaties between the Choctaw and Chickasaw Nations and the United States.

That question arose in the case of *Choctaw Nation*

vs. United States and Chickasaw Nation (83 Ct. Cls., 140), and was settled; and such decision became final, upon the dismissal, by the Supreme Court of the United States, of the petition of the Choctaw Nation for *writ of certiorari* to the Court of Claims.

In that case, the Choctaw Nation had contended that, since the *lands* of the Choctaw and Chickasaw Nations were owned *in common,* the *moneys* arising from the sale or disposition otherwise, of such lands, were also owned *in common,* and should be so divided, upon the basis of the *total membership* of the two Nations, and not upon the basis of *Three Fourths* and *One Fourth.*

Upon that theory the Choctaw Nation sued the United States for some $599,000, for moneys claimed to have been illegally paid to the Chickasaw Nation; and the Chickasaw Nation was interpleaded as a defendant, by the United States.

Upon that question, the Court of Claims held as follows:

> "The basis *agreed upon and fixed* in the treaties of 1855 and 1866 for the apportionment and payment of *moneys* arising from the disposition of the *common properties* of the Choctaw and Chickasaw Nations under those treaties, in the proportion of three-fourths to the former and one-fourth to the latter, has since been adopted and consistently followed by the legislative and executive branches of the Government in the apportionment and payment of all moneys similarly arising."

Therefore, if the court shall hold that the Chickasaw Nation is entitled to judgment against the United States, for "*just compensation*" for its interest in the "Eastern Boundary" lands, "*taken*" by the said Act of March 3, 1875 (as prayed for in Paragraph XV of its Amended Petition, filed herein on January 19, 1937; R. 11-12); and if the court shall find the *fair value* of the lands (of 136,955 acres, as reported by the Commissioner of the General Land Office, R. 28) to be the "Government price" of $1.25 per acre, the judgment would be for *One Fourth* of the *1875 value* of such lands; and also judgment for *One Fouth* of "*such addition thereto* as may be required to produce the present full equivalent of that value paid contemporaneously with the taking."

VII.

Requested Findings of Fact.

The Findings of Fact (1-15), as requested by the plaintiff, the Chickasaw Nation, are set out in Our Original Brief (R. 143-156).

The objections of the defendant, the United States, are set out in Defendant's Answer Brief (R. 237-240); and its Requested Findings of Fact are also set out in the same brief (R. 240-256).

Such of the same as conflict with the contentions of the plaintiff, the Chickasaw Nation, are objected to; but we have not deemed it advisable to make specific objections to each, by number, as that would be merely a repetition of the Arguments contained in Our Original Brief (R. 95-224), and in this, Our Reply Brief.

We have every confidence that, after a consideration of all requested findings and objections, the court will make such appropriate Findings of Fact as will reflect the *proven facts.*

CONCLUSION.

This concludes the Reply Brief of the plaintiff, the Chickasaw Nation; and the instant case is now

Respectfully submitted,

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