"Gratuities"

No. 42078

In the Court of Claims of the United States

WESTERN OR OLD SETTLER CHEROKEES

v.

THE UNITED STATES

DEFENDANT'S OBJECTIONS TO PLAINTIFFS' REQUESTED FINDINGS OF FACT, DEFENDANT'S REQUESTED FINDINGS, AND BRIEF

HARRY W. BLAIR,
Assistant Attorney General.

GEORGE T. STORMONT,
Attorney.

WILFRED HEARN,
Attorney.

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CITATIONS

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(Interest Case)

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DEFENDANT'S OBJECTIONS TO PLAINTIFFS' REQUESTED FINDINGS OF FACT

FINDINGS I AND II

No objections.

FINDING III

This finding states a conclusion of law and for that reason objection is made thereto. There would be no objection to a finding which states that plaintiffs assert a claim *alleged* to arise or grow out of Articles 4 and 11 of the Treaty of 1846 (9 Stat. 871), a resolution of the Senate of the United States adopted pursuant thereto on September 5, 1850 (Sen. Jour., 31st Cong., 1st Sess., p. 601), and the act under which this suit is brought. The statement that a claim has arisen is tantamount to the statement that there is a claim. If there is a claim plaintiffs would be entitled to a judgment. Fur-

thermore, the statement that the claim arises or grows out of the act under which the suit is brought, is equivalent to the statement that the act creates a liability. Such a statement is clearly a conclusion of law. The jurisdictional act does not admit, assume, or create a liability. The requested finding is clearly a statement of a conclusion of law and should have no place in a finding of fact.

Findings IV, V, and VI

No objections.

Finding VII

The first paragraph of this finding is objected to because it fails to set forth correctly the expenditures properly deductible from the sum of $5,600,000. The error is found in the deduction "for spoliations, removals, etc., of $600,000." In the case of *United States* v. *Old Settlers* (148 U. S. 427, 477), the court determined the deduction on account of spoliation to be $264,894.09 and on account of removal, to be $339,140, and for both spoliations and removals, a total of $604,034.09. Plaintiffs have taken $600,000 as the deduction for spoliation and removal from the account as stated in the case of *United States* v. *Cherokee Nation* (202 U. S. 101, 115–116). It is submitted that under the jurisdictional act, the account as stated in *United States* v. *Old Settlers* (148 U. S. 427, 477–478) must prevail.

The last paragraph of this finding is also objected to because the Supreme Court has determined the aggregate amount of the expenditures

deductible from the said sum of $5,600,000 to be $3,364,178.48, that the residuum to be divided is $2,235,821.52, and that an amount equal to ⅓ of said residuum, being the interest of plaintiffs, is $745,273.84 (*United States* v. *Old Settlers*, 148 U. S. 427, 478).

Finding VIII

No objection.

Finding IX

This finding is objected to because it omits that part of Section 3 of the jurisdictional act to which the proviso therein contained relates.

Finding X

This finding is objected to because it contradicts the decision of the Supreme Court in the case of *United States* v. *Old Settlers* (148 U. S. 427, 477–478) wherein the account is stated as follows:

> In view of these considerations we find and state the account as follows:

The treaty fund		$5,600,000.00
Less—		
For 800,000 acres of land	$500,000.00	
For general fund	500,000.00	
For improvements	1,540,572.27	
For ferries	159,572.12	
For spoliations	264,894.09	
For debts, etc	60,000.00	
For removal of 16,957 Cherokees at $20 each	339,140.00	
	3,364,178.48	3,364,178.48
Giving as the residuum to be divided		2,235,821.52
One third due to the Western Cherokees		745,273.84
Less payment September 22, 1851		532,896.90
Leaving a balance of		212,376.94

This finding is objectionable for the further reason that it is predicated upon the erroneous theory that the jurisdictional act creates a liability, in that it requires the court to ignore a former adjudication and restate the account upon the principle that payments made thereon should be applied first to the payment of accrued interest. No treaty, agreement, resolution, or act of Congress has created an obligation to pay interest on the fund in question at any time prior to the payment of the fund itself. The jurisdictional act has not enlarged the obligation of defendant with respect to the fund involved. This point is more fully discussed in defendant's brief.

DEFENDANT'S REQUEST FOR FINDINGS OF FACT

FINDING I

By the act of Congress approved April 25, 1932 (Ch. 136, 47 Stat. 137), it was provided:

> *Be it Enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That all claims against the United States of the Eastern or Emigrant Cherokees, and the Western Cherokees or Old Settler Indians, so-called, who are duly enrolled members of the Cherokee Tribe of Indians in Oklahoma, as classes, respectively, may be submitted to the Court of Claims, and jurisdiction is hereby conferred upon the Court of Claims, notwithstanding the lapse of time or statutes of limitation to hear, examine, adjudicate,

and render judgment in any and all legal and equitable claims arising or growing out of any treaty or agreement between the United States and the Cherokee Indians, or arising or growing out of any Act of Congress in relation to Indian affairs, which the said Eastern or Emigrant and Western or Old Settler Cherokees may have against the United States, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States and paid in full: *Provided,* That said Eastern or Emigrant and Western or Old Settler Cherokee Indians may act together or as two bodies hereunder as they may be advised: *Provided further*, That the said Eastern or Emigrant and Western or Old Settler Cherokees may intervene in any suit or suits now pending in the Court of Claims under authority of the Act of Congress approved March 19, 1924 (43 Stat. L. 27, 28), in which the Cherokee Nation is party plaintiff and the United States party defendant.

SEC. 2. Any and all claims against the United States within the purview of this Act shall be forever barred unless suit or suits or intervening petition shall be filed, subject to amendment, however, as herein provided in the Court of Claims within six months from the date of approval of this Act, and such suit or suits shall make the Eastern or Emigrant and/or Western or Old Settler Cherokees party or parties plaintiff and the

United States party defendant. The petition or petitions shall be verified by the attorney or attorneys employed to prosecute such claim or claims under contract or contracts with the said Indians approved in accordance with existing laws, and said contract or contracts shall be executed in their behalf by a committee or committees selected by said Indians or provided by existing law. Official letters, papers, documents, and records, maps, or certified copies thereof, may be used in evidence; and the departments of the Government shall give access to the attorney or attorneys of said Indians to such treaties, papers, maps, correspondence, or reports as they may require in the preparation and prosecution of any suit or suits instituted under this Act.

SEC. 3. In said suit or suits the court shall also hear, examine, consider, and adjudicate any claims which the United States may have against the said Indians or any of them, but any payment or payments which have been made by the United States upon any such claim or claims shall not operate as an estoppel but may be placed (sic) as an off-set in such suit or suits, and the United States shall be allowed to plead and shall be given credit for all sums, including gratuities, paid to or expended for any of said classes of Indians: *Provided, however,* That in any claim sued on by said Cherokees for any part of an interest-bearing fund upon which account any payment or payments

shall have been made, such payment or payments shall first be applied to reduction or payment of interest earned to the date of such respective payments, and the balance, if any, shall then be applied to reduce the interest-bearing principal and not otherwise.

SEC. 4. Any other tribes or bands of Indians the court may deem necessary to a final determiniation[1] of any suit or suits brought hereunder may be joined therein as the court may order: *Provided,* that upon final determination of such suit or suits the Court of Claims shall have jurisdiction to fix and determine a reasonable fee, not to exceed 10 per centum of recovery or recoveries, together with all necessary and proper expenses incurred in the preparation and prosecution of such suit or suits, to be paid to the attorney or attorneys employed as herein provided by the said Indians, and the same shall be included in the decree and shall be paid out of any sum or sums adjudged to be due said Indians, or any of them, and the balance of such sum or sums shall be placed in the Treasury of the United States, where it shall draw interest at the rate of 4 per centum per annum and be disposed of as provided by existing law.

Pursuant to the authority of the foregoing act plaintiffs, the Western or Old Settler Cherokees, filed their petition in this case on October 22, 1932.

[1] So in original.

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FINDING II

Plaintiffs designation as Western or Old Settler Cherokees, is explained by the Court of Claims in the case of *Western Cherokee Indians* v. *United States* (27 C. Cls. 1, 2), wherein this court as its Finding I says:

> Under the treaty of 26th December, 1817, a portion of the Cherokee Nation removed from the Cherokee country in Georgia to the land ceded to them by the United States in Arkansas, and have since been known as the Western Cherokees or Old Settlers. The obligations of the treaty and of the treaty of 1819 were maintained and carried into effect by the high contracting parties; the United States acquired and possessed the lands east of the Mississippi ceded to them by the Western Cherokees, being their portion of the land of the Cherokee Nation, and the Western Cherokees acquired and possessed the land ceded to them by the United States in Arkansas. From the time of their removal all tribal relations with the Cherokee Nation, east, ceased. The Western Cherokees asserted no right or interest in the lands of the nation lying east of the Mississippi, and the Eastern Cherokees asserted no right or interest in the lands of the Western Cherokees in Arkansas.

FINDING III

Under the provisions of Article 4 of the treaty of 1846 between the United States and the Cherokee Nation of Indians (9 Stat. 871) there became due plaintiffs, the Western or Old Settler Cherokees, the sum of $745,273.84, as shown from the account as stated by the Supreme Court in the case of *United States* v. *Old Settlers* (148 U. S. 427, 477), as follows:

> In view of these considerations we find and state the account as follows:

The treaty fund		$5,600,000.00
Less—		
For 800,000 acres of land	$500,000.00	
For general fund	500,000.00	
For improvements	1,540,572.27	
For ferries	159,572.12	
For spoliations	264,894.09	
For debts, etc	60,000.00	
For removal of 16,957 Cherokees at $20 each	339,140.00	
		3,364,178.48
Giving as the residuum to be divided		2,235,821.52
One-third due to the Western Cherokees		745,273.84
Less payment September 22, 1851		532,896.90
Leaving balance of		212,376.94

The said sum of $745,273.84 is the interest-bearing fund which plaintiffs make the basis of their cause of action.

FINDING IV

With respect to the subject of interest on the money owed to plaintiffs under Article IV of the treaty of 1846 (9 Stat. 871, 875); Article XI of said treaty provided as follows:

> ARTICLE 11. * * * it is hereby agreed that the question shall be submitted to the Senate of the United States for its decision, which shall decide * * * whether the

Cherokee Nation shall be allowed interest on whatever sum may be found to be due the Nation, and from what date and at what rate per annum.

Pursuant to the foregoing treaty provision, the Senate of the United States on September 5, 1850, adopted the following resolution:

> *Resolved,* That it is the sense of the Senate that interest at the rate of five per centum per annum, should be allowed upon the sums found due the "Eastern" and "Western" Cherokees, respectively, from the 12th day of June, 1838, until paid.
>
> (Sen. Jour. 31st Congress, 1st Session, p. 601.)

Finding V

Thereafter on August 8, 1850, the Senate Committee on Indian Affairs made a report to the Senate with reference to the debts due from the United States to the Cherokees (Senate Rpt. No. 176, 31st Congress, 1st session) which report is, in part, as follows:

* * * To ascertain their (Old Settlers) interest, it was assumed that they constituted one-third of the entire nation, and should be entitled to an amount equal to one-third of the treaty fund, after all just charges were deducted. This fund, provided by the treaty of 1835, consisted of		$5,600,000.00
From which are to be deducted, under the treaty of 1846 (4th article), the sums chargeable under the 15th article of the treaty of 1835, which, according to the report of the accounting officers, will stand thus:		
For improvements	$1,540,572.27	
For ferries	159,572.12	
For spoliations	264,894.09	
For removal and subsistence of 18,026 Indians, at $53.33⅓ per head	961,386.66	
Debts and claims upon the Cherokee nation, viz:		
National debts (10th article)	$18,062.06	
Claims of United States citizens (10th article)	61,073.49	
Cherokee committee (12th article)	22,212.76	
		$101,348.31
Amount allowed United States for additional quantity of land ceded		500,000.00
Amount invested as general fund of the nation		500,880.00
Making in the aggregate the sum of		$4,028,653.45
Which, being deducted from the treaty fund of $5,600,000, leaves the residuum, contemplated by the 4th article of the treaty of 1846, of		1,571,346.55

Of which amount one-third is to be allowed to the western Cherokees for their interest in the Cherokee country east, being the sum of $523,782.18, for which the committee recommend an appropriation.

(Rpt. G. A. O. in case L–174, p. 43.)

Finding VI

By act of Congress approved September 30, 1850 (9 Stat. 544, 556), an appropriation of $532,-896.90 with interest thereon in accordance with the foregoing award of the Senate, was made. Said act, in part, provides as follows:

> To the "old settlers," or "Western Cherokees," in full of all demands, under the provisions of the treaty of sixth August, eighteen hundred and forty-six, according to the principles established in the fourth article thereof, five hundred and thirty-two thousand eight hundred and ninety-six dollars and ninety cents; and that interest be allowed and paid upon the above sums

FINDING X

Pursuant to the authority of said act the plaintiffs, Western or Old Settler Cherokees, filed their petition in the Court of Claims (27 C. Cl. 1), and, among other claims, asserted that the account of the treaty, or interest-bearing, fund should be stated as follows:

	Dr.	Cr.
By "treaty fund" under 4th article, treaty 1846		$5, 600, 000. 00
To improvements	$1, 540, 572. 27	
To ferries	159, 572. 12	
To spoliations	264, 894. 09	
To additional lands	500, 000. 00	
To invested funds	500, 000. 00	
To removal 2,200 Indians	44, 000. 00	
	3, 009, 038. 48	5, 600, 000. 00
		3, 009, 038. 48
Balance of "treaty fund," after proper reductions		2, 590, 961. 52
By ⅓ of the above balance, under terms of said 4th article of treaty of 1846		863, 653. 84
To appropriation, act September 30, 1850		532, 896. 90
Principal sum due under 4th article of treaty of 1846		330, 756. 94

(*United States* v. *Old Settlers,* 148 U. S. 427, 433).

FINDING XI

Thereafter on June 6, 1893, upon the hearing of the cause mentioned in the Finding next preceding, the Court of Claims (27 C. Cl. 1, 47) stated the account of said treaty fund as follows:

> The account of the Western Cherokees, as stated and allowed by the court, will therefore stand as follows:

The treaty fund		$5, 600, 000. 00
Less for 800,000 acres of land	$500, 000. 00	
For investment in the general fund	500, 000. 00	
For improvements of individual Cherokees	1, 540, 572. 27	
For ferries belonging to individuals	159, 572. 12	
For spoliations of individual property	264, 894. 09	
For expenses of Cherokee committee	22, 212. 76	
For removal of 16,957 Cherokees	339, 140. 00	
		3, 326, 391. 24
Giving as the true residuum to be divided		2, 273, 608. 76
Due to the western Cherokees, ⅓ of residuum		757, 869. 58
Less payment September 22, 1851, under the act September 30, 1850		532, 896. 90
Leaving as the balance due the Western Cherokees		224, 972. 68

(148 U. S. 427, 477–478)

Upon an appeal, the Supreme Court in its opinion said:

> In view of these considerations we find and state the account as follows:

The treaty fund		$5, 600, 000. 00
Less—		
For 800,000 acres of land	$500, 000. 00	
For general fund	500, 000. 00	
For improvements	1, 540, 572. 27	
For ferries	159, 572. 12	
For spoliations	264, 894. 09	
For debts, etc	60, 000. 00	
For removal of 16,957 Cherokees at $20 each	339, 140. 00	
		3, 364, 178. 48
Giving as the residuum to be divided		2, 235, 281. 52
One-third due to the Western Cherokees		745, 273. 84
Less payment September 22, 1851		532, 896. 90
Leaving a balance of		212, 376. 94

FINDING XII

Thereafter, on June 6, 1893, the Court of Claims modified its judgment in said cause in conformity

with the decision of the Supreme Court, in which the obligation on account of said judgment was stated as follows:

Principal of the judgment	$212,376.94
Interest thereon at 5% per annum from June 12, 1838, to June 6, 1893	583,830.12
Total	796,207.06

Finding XIII

By act of Congress of August 23, 1894 (28 Stat. 451), $800,386.31 was appropriated for the payment of the aforesaid judgment. Said act in part provides as follows:

> The "Old Settlers" or Western Cherokee Indians, by Joel M. Bryan, William Wilson, and William H. Hendricks, commissioners, and Joel M. Bryan, treasurer, and so forth, eight hundred thousand, three hundred and eighty-six dollars and thirty-one cents; and the Commissioner of Indian Affairs is directed to withhold from distribution among said Indians only so much of that part of the said judgment set apart by the said Indians for the prosecution of their claim as is necessary for him to pay the expenses, and for legal services justly or equitably payable on account of said prosecution; * * *.

Of said appropriation $4,179.25 covered the item of said judgment, for a like amount shown not to be an interest-bearing fund, leaving the balance of $796,207.06, applicable to the payment of the interest-bearing item of said judgment of $212,376.96, and interest thereon as therein provided,

which amounts were thereafter paid to plaintiffs, as shown by the report of the General Accounting Office (Rpt. G. A. O. in case No. L. 268, pp. 541–545).

Finding XIV

Thereafter, by an act approved March 3, 1899 (30 Stat. 1214, 1235), Congress appropriated an additional sum of $29,840.74 in payment of interest on the said sum of $212,376.94, from June 6, 1893, to March 28, 1896. Said act is in part as follows:

> That the sum of twenty-nine thousand eight hundred and fifty dollars and seventy-four cents, being the interest at five per centum per annum from June sixth, eighteen hundred and ninety-three, to March twenty-eighth, eighteen hundred and ninety-six, due the Western Cherokee Indians under the award of the United States Senate of September fifth, eighteen hundred and fifty, on the principal sum of two hundred and twelve thousand three hundred and seventy-six dollars and ninety-four cents found to be due them under the decision of the Supreme Court of June sixth, eighteen hundred and ninety-three, is hereby appropriated, to be paid to the authorized agent of the council of the Western Cherokee Indians.

And the money thus appropriated was paid over to the plaintiffs during the fiscal year 1899 (Rpt. G. A. O., in case No. L. 268, p. 547).

FINDING XV

From the year 1812 to the end of the year 1846, during which period of time the plaintiffs composed approximately one-third of the Cherokee Indians (Rept. Int. Dept. Rec. in No. 42077, p. 124) the United States expended gratuitously for the Cherokee Indians the sum of $259,017.46 for the purposes and in the amounts respectively as follows:

Agency buildings and repairs (Report G. A. O. in Case No. L–174, pp. 64–76, 153, 154, 107–110, 92, 116, 113, 114, 136)	$7,519.32
Agricultural aid (Id., p. 152)	21.50
Agricultural implements and equipment (Id., pp. 108, 152–154)	8,082.14
Burial of Indians (Id., p. 114)	60.00
Clothing (Id., pp. 151, 152)	1,030.57
Education (Id., pp. 103, 152)	17,247.42
Expenses of delegations (Id., pp. 107, 113, 114, 152–154, 190, 191, 192, 230)	38,231.60
Expenses of making per capita payments (Id., pp. 112, 113, 116)	2,027.00
Expenses of transporting and distributing annuities (Id., pp. 107–111, 152, 153, 229, 330)	2,544.68
Feed and care of live stock (Id., p. 152)	252.63
Fuel, light, and water (Id., pp. 113, 114, 136)	337.50
Hardware, glass, oils, and paints (Id., pp. 107, 119, 151, 152)	4,675.70
Indian houses (Id., pp. 151, 152)	1,058.58
Medical attention (Id., pp. 151, 152, 154, 107, 232)	542.25
Mills and shops (Id., p. 189)	350.00
Miscellaneous agency expenses (Id., pp. 107–114, 151–154)	24,944.20
Miscellaneous building material (Id., p. 114)	54.00
Pay of Indian agents (Id., pp. 107, 137, 151–154, 194, 198, 201)	86,154.58
Pay of Interpreters (Id., pp. 107–111, 136, 151–154, 199)	19,300.84
Pay of miscellaneous employees (Id., pp. 107–111, 152–154)	4,391.52
Pay of skilled employees (Id., pp. 107–110, 151–154, 193)	13,434.56
Presents (Id., pp. 152–154, 108, 113)	5,816.76
Provisions and other rations (Id., pp. 107–114, 151–154, 203, 204)	20,014.17
Transportation of supplies (Id., pp. 108, 109, 112–114)	$258.50
Work and stock animals (Id., pp. 152–154)	515.00
	259,017.46
One-third thereof	86,339.15

FINDING XVI

From the year 1847 to the end of the year 1865, during which period of time the plaintiffs, Western or Old Settler Cherokees, composed approximately one-third of the Cherokee Indians (Rept. Int. Dept., Rec. in No. 42077, p. 124) the United States expended gratuitously for the Cherokee Indians the sum of $49,889.82 for the purposes and in the amounts respectively as follows:

Agency buildings and repairs (Report G. A. O. in Case No. L–174, pp. 92, 116, 78)	$5,405.13
Education (Id., pp. 103, 104)	5,058.93
Expenses of delegations (Id., pp. 39, 115, 116)	3,230.33
Expenses of making per capita and other payments (Id., pp. 117, 117)	7,471.99
Fuel, light, and water (Id., pp. 115–118)	433.00
Hardware, glass, oils, and paint (Id., p. 119)	20.00
Miscellaneous agency expenses (Id., pp. 114–119, 136 78)	5,067.08
Pay of Indian agents (Id., pp. 137, 194)	8,459.49
Pay of interpreters (Id., pp. 137, 194)	6,250.40
Pay of miscellaneous employees (Id., pp. 114, 115, 119, 136)	1,066.75
Provisions and other rations (Id., p. 203)	2,349.60
Transportation of supplies (Id., pp. 114, 152, 228)	4,627.12
Work and stock animals (Id., p. 119)	450.00
	49,889.82
One-third thereof	16,629.94

FINDING XVII

During the period beginning with the year 1866 and ending with the fiscal year 1932 the United States expended gratuitously for the Cherokee

Tribe of Indians, being composed of plaintiffs, the Western or Old Settler Cherokees and the Eastern or Emigrant Cherokees, certain Delaware and Shawnee Indians, and white persons adopted into said tribe; and certain freedmen and freed colored persons affiliated with the Cherokees, the sum of $2,041,387.27 for the purposes and in the amounts respectively as follows:

Agency buildings and repairs (Report G. A. O. in Case No. L–174, pp. 79, 80, 121, 122)	$2,126.78
Agricultural aid (Id., p. 220)	253.04
Education (Id., pp. 161–175, 178–180, 205, 212, 214, 220, 226, 227)	1,971,100.47
Expenses of delegations (Id., pp. 124, 203, 120)	6,294.50
Feed and care of live stock (Id., p. 122)	187.50
Fuel, light, and water (Id., pp. 78, 79, 120–122)	250.65
Household equipment (Id., p. 120)	53.00
Medical attention (Id., pp. 105, 106, 122, 213–216, 220–223, 232)	17,386.98
Miscellaneous agency expenses (Id., pp. 120–132, 224, 226, 231, 78, 79)	5,770.75
Pay and expenses of field matrons (Id., p. 184)	1,169.51
Pay of Indian agents (Id., pp. 121, 122, 201, 217)	11,155.92
Pay of interpreters (Id., pp. 199, 204)	3,452.04
Presents (Id., p. 202)	63.29
Provisions and other rations (Id., p. 203)	568.00
Relief of destitute Indians (Id., pp. 138, 214–216, 220–221)	15,468.40
Removals (Id., p. 122)	302.00
Surveying, allotting, sale, etc. of lands (Id., pp. 220–221, 142)	1,184.13
Transportation of supplies (Id., pp. 121, 129)	42.60
Work and stock animals (Id., p. 224)	1,326.00
	2,041,387.27

Finding XVIII

During the period beginning with the year 1866 and ending with the fiscal year 1932, the plaintiffs, the Western or Old Settler Cherokees and the Eastern or Emigrant Cherokees constituted at least

four-fifths of all the persons receiving the benefits of the gratuity expenditures shown to have been made in the finding next preceding (Rept. Int. Dept. Rec. in No. 42077, pp. 129, 134, 137, 138, 151, 152, 154). Upon that basis and the fact that plaintiffs constituted one-third of all Cherokees, the plaintiff should be charged with four-fifteenths of the sum shown in said finding to have been expended, which is $544,369.93.

Finding XIX

During the period from January 1876 to the end of the fiscal year 1932 the United States expended gratuitously for the Cherokee, Choctaw, Chickasaw, and Seminole Indians the sum of $4,209,018.40 for the purposes and in the amounts respectively as follows:

Agency buildings and repairs (Report G. A. O. in Case No. L–174, pp. 80–90, 123, 124, 141, 147–149, 156, 157)	$125,775.63
Agricultural aid (Id., pp. 123–126, 220, 221)	15,706.66
Agricultural implements and equipment (Id., pp. 123, 124–126)	152.20
Construction and maintenance of Claremore Hospital (Id., pp. 105, 148, 155, 211, 212)	77,127.98
Education (Id., pp. 93–102, 105, 144–146, 150, 156–181, 205–216, 231)	1,698,470.55
Expenses of delegations (Id., p. 120)	5.96
Feed and care of live stock (Id., pp. 123–126)	1,396.28
Fuel, light, and water (Id., pp. 123–135, 141)	899.70
Hardware, glass, oils, and paints (Id., pp. 123, 125)	11.24
Household equipment (Id., pp. 220, 221)	2,195.24
Medical attention (Id., pp. 123–125, 213–216, 105, 223, 232, 203)	4,227.09
Miscellaneous agency expenses (Id., pp. 123–135, 141, 142, 218, 219, 114, 121, 220, 221, 224, 225, 227)	190,011.53
Pay and expenses of farmers (Id., pp. 77, 125, 144–146, 182–188)	308,495.18
Pay and expenses of field matrons (Id., pp. 144, 183, 184)	6,217.32

Tribe of Indians, being composed of plaintiffs, the Western or Old Settler Cherokees and the Eastern or Emigrant Cherokees, certain Delaware and Shawnee Indians, and white persons adopted into said tribe; and certain freedmen and freed colored persons affiliated with the Cherokees, the sum of $2,041,387.27 for the purposes and in the amounts respectively as follows:

Agency buildings and repairs (Report G. A. O. in Case No. L–174, pp. 79, 80, 121, 122)	$2,126.78
Agricultural aid (Id., p. 220)	253.04
Education (Id., pp. 161–175, 178–180, 205, 212, 214, 220, 226, 227)	1,971,100.47
Expenses of delegations (Id., pp. 124, 203, 120)	6,294.50
Feed and care of live stock (Id., p. 122)	187.50
Fuel, light, and water (Id., pp. 78, 79, 120–122)	250.65
Household equipment (Id., p. 120)	53.00
Medical attention (Id., pp. 105, 106, 122, 213–216, 220–223, 232)	17,386.98
Miscellaneous agency expenses (Id., pp. 120–132, 224, 226, 231, 78, 79)	5,770.75
Pay and expenses of field matrons (Id., p. 184)	1,169.51
Pay of Indian agents (Id., pp. 121, 122, 201, 217)	11,155.92
Pay of interpreters (Id., pp. 199, 204)	3,452.04
Presents (Id., p. 202)	63.29
Provisions and other rations (Id., p. 203)	568.00
Relief of destitute Indians (Id., pp. 138, 214–216, 220–221)	15,468.40
Removals (Id., p. 122)	302.00
Surveying, allotting, sale, etc. of lands (Id., pp. 220–221, 142)	1,184.13
Transportation of supplies (Id., pp. 121, 129)	42.60
Work and stock animals (Id., p. 224)	1,326.00
	2,041,387.27

Finding XVIII

During the period beginning with the year 1866 and ending with the fiscal year 1932, the plaintiffs, the Western or Old Settler Cherokees and the Eastern or Emigrant Cherokees constituted at least

four-fifths of all the persons receiving the benefits of the gratuity expenditures shown to have been made in the finding next preceding (Rept. Int. Dept. Rec. in No. 42077, pp. 129, 134, 137, 138, 151, 152, 154). Upon that basis and the fact that plaintiffs constituted one-third of all Cherokees, the plaintiff should be charged with four-fifteenths of the sum shown in said finding to have been expended, which is $544,369.93.

Finding XIX

During the period from January 1876 to the end of the fiscal year 1932 the United States expended gratuitously for the Cherokee, Choctaw, Chickasaw, and Seminole Indians the sum of $4,209,018.40 for the purposes and in the amounts respectively as follows:

Agency buildings and repairs (Report G. A. O. in Case No. L–174, pp. 80–90, 123, 124, 141, 147–149, 156, 157)	$125,775.63
Agricultural aid (Id., pp. 123–126, 220, 221)	15,706.66
Agricultural implements and equipment (Id., pp. 123, 124–126)	152.20
Construction and maintenance of Claremore Hospital (Id., pp. 105, 148, 155, 211, 212)	77,127.98
Education (Id., pp. 93–102, 105, 144–146, 150, 156–181, 205–216, 231)	1,698,470.55
Expenses of delegations (Id., p. 120)	5.96
Feed and care of live stock (Id., pp. 123–126)	1,396.28
Fuel, light, and water (Id., pp. 123–135, 141)	899.70
Hardware, glass, oils, and paints (Id., pp. 123, 125)	11.24
Household equipment (Id., pp. 220, 221)	2,195.24
Medical attention (Id., pp. 123–125, 213–216, 105, 223, 232, 203)	4,227.09
Miscellaneous agency expenses (Id., pp. 123–135, 141, 142, 218, 219, 114, 121, 220, 221, 224, 225, 227)	190,011.53
Pay and expenses of farmers (Id., pp. 77, 125, 144–146, 182–188)	308,495.18
Pay and expenses of field matrons (Id., pp. 144, 183, 184)	6,217.32

Pay and expenses of Indian police (Id., pp. 125, 129, 141, 144, 145)	$155,843.73
Pay of Indian agents (Id., pp. 195, 201)	67,639.53
Pay of interpreters (Id., pp. 144–146, 218–221)	104,150.81
Pay of miscellaneous employees (Id., pp. 123–135, 141–146, 219, 220, 221)	1,243,610.49
Pay of probate attorneys (Id., pp. 142, 144–146)	16,678.32
Pay of skilled employees (Id., pp. 123–126)	415.80
Surveying, allotting, sale, etc., of lands	80,809.05
Transportation of supplies (Id., pp. 123, 127, 128, 130, 131, 141, 205–212, 220, 226, 227, 228, 231)	8,330.61
Work and stock animals (Id., pp. 123–125)	547.50
	4,209,018.40

Finding XX

During the period from 1876 to the end of the fiscal year 1832 the Cherokee Nation composed approximately one-sixth of the total number of Indians and others for whom the expenditures set forth in the finding next preceding were made (Rept. Int. Dept., Rec. in No. 42077, pp. 130, 131, 151, 152, 154). Upon that basis plaintiffs should be charged on account of the expenditures as made with the sum of $233,834.35, that being one-third of one-sixth of said expenditures.

Finding XXI

During the year 1834 the United States expended gratuitously for plaintiffs the sum of $2,600 to cover expenses of five delegates from the Western Cherokees (4 Stat. 707; Rept. G. A. O. filed in case No. L–174, p. 140).

Finding XXII

Defendant paid interest on $212,376.94, the principal of the judgment in the case of Western Cherokees v. United States (27 C. Cls. 1), from June 6, 1893, to March 28, 1896. The interest so paid for that part of said period beginning August 23, 1894, to March 28, 1896, in the sum of $16,785.50, was paid without legal obligation so to do (30 Stat. 1235).

Finding XXIII

That defendant is entitled to off-sets for gratuities and on account of payment of interest without legal obligation in the total sum of $900,558.87 as shown below:

1. Disbursements made from 1812 to 1846 (Finding XV)	$86,339.15
2. Disbursements from 1847 to end of 1865 (Finding XVI)	16,629.94
3. Disbursements made from 1866 to 1932 (Findings XVII, XVIII)	544,369.93
4. Disbursements made for benefit of Cherokees and other tribes, plaintiffs' pro rata share (Findings XIX, XX)	233,834.35
5. Disbursements made for delegates (Finding XXI)	2,600.00
6. Overpayment of interest (Finding XXII)	16,785.50

BRIEF

STATEMENT OF THE CASE

This is one of the actions brought under the authority of the jurisdictional act approved April 25, 1932 (Chap. 136, 47 Stat. 137), Section 1 of which confers jurisdiction on the Court of Claims to hear and determine "all legal and equitable claims arising or growing out of any treaty or agreement between the United States and the Cherokee Indians, or arising or growing out of any Act of Congress in relation to Indians affairs, which the said Eastern or Emigrant and Western or Old Settler Cherokees may have against the United States,

which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States and paid in full; * * *." (Italics ours.)

Section 3 of the said act provides:

> SEC. 3. In said suit or suits the court shall also hear, examine, consider, and adjudicate any claims which the United States may have against the said Indians *or any of them,* but *any payment or payments* which have been made by the United States upon any *such* claim or claims *shall not operate as an estoppel,* but may be placed (sic) as an off-set in such suit or suits, and the United States shall be allowed to plead and shall be given credit for all sums, including gratuities, paid to or expended for any of said classes of Indians: *Provided, however,* that in any claim sued by said Cherokees *for any part of an interest-bearing fund* upon which account any payment or payments shall have been made, such payment or payments shall first be applied to reduction or payment of interest earned to the date of such respective payments, and the balance, if any, shall then be applied to reduce the interest-bearing principal and not otherwise. (Italics ours.)

The petition seeks the recovery of an interest-bearing fund alleged to be due plaintiffs from defendant arising out of the obligations of articles 9 and 11 of the treaty of 1846 (9 Stat. 871) and the resolution of the Senate of September 5, 1850 (Sen.

Jour., 31st Cong., 1st Sess., p. 601), being the same interest-bearing fund which was at issue in the case of the *Western Cherokees* v. *United States* (27 C. Cls. 1), wherein on appeal the Supreme Court (148 U. S. 427, 477–478) stated the account of said fund as follows:

> In view of these considerations we find and state the account as follows:

The treaty fund		$5,600,000.00
Less—		
For 800,000 acres of land	$500,000.00	
For general fund	500,000.00	
For improvements	1,540,572.27	
For ferries	159,572.12	
For spoliations	264,894.09	
For debts, &c	60,000.00	
For removal of 16,957 Cherokees at $20 each	339,140.00	
		3,364,178.48
Giving as the residuum to be divided		2,235,821.52
One-third due to the Western Cherokees		745,273.84
Less payment of September 22, 1851		532,896.90
Leaving a balance of		212,376.94

On August 8, 1850, the Senate Committee on Indian Affairs made a report to the Senate wherein the account of the treaty, or interest-bearing fund, as the same relates to the Western or Old Settlers, was stated from which it appeared that the amount due the Old Settlers was $523,782.18 with interest thereon at the rate of five per centum per annum from June 12, 1838 (Finding V).

The account stated by the Senate Committee included a charge against the treaty fund of $961,386.66 to cover the cost of removal and subsistence of 18,026 Indians at $53.33⅓ per head.

Pursuant to the said report Congress by act of September 30, 1850 (9 Stat. 556), appropriated the sum of $532,896.90 and interest thereon, in accordance with the award of the Senate, as payment in full of the sum owing the Western or Old Settler Cherokees on account of the treaty, or interest-bearing fund. Under said appropriation there was paid to the Old Settlers as of September 22, 1851, the sum of $887,480.15.

The Old Settlers protested the correctness of the account as stated and the settlement as made. Thereafter on Febraury 25, 1889, an act of Congress was approved conferring jurisdiction upon the Court of Claims, and, upon appeal, upon the Supreme Court to adjudicate the claims of these plaintiffs for money in addition to that theretofore paid on account of said treaty, or interest-bearing fund. Pursuant to the authority of said act the Western Cherokees filed their petition in the Court of Claims wherein plaintiffs charged that the account of the "Treaty Fund" is correctly stated as follows:

Balance of "Treaty Fund" after proper deductions	$2,590,961.52
By ⅓ of the above balance, under terms of said 4th Article of Treaty of 1846	863,653.84
To appropriation, Act Sept. 30, 1850	532,896.90
Principal sum due under 4th Article of Treaty of 1846	330,756.94

Upon the trial of the cause the Court of Claims decided that plaintiffs were entitled to recover on account of the treaty, or interest-bearing, fund a balance of $224,972.68, with interest thereon at five

per centum per annum from June 12, 1838, up to the entry of the decree (27 C. Cls. 1, 47). Upon an appeal the Supreme Court decided (148 U. S. 427, 477–478, 481) that plaintiffs were entitled to judgment on a balance of $212,376.94 with interest on said balance as determined by the Court of Claims. Thereafter on June 6, 1893, judgment was entered in the Court of Claims in said cause pursuant to the mandate of the Supreme Court in favor of the Western or Old Settler Cherokees in the sum of $800,386.31 (Journal 10, p. 335) of which amount $796,207.06 represented the principal of the interest-bearing fund of $212,376.94 and interest thereon. The said sum of $796,207.06 was disbursed to plaintiffs as of August 24, 1894.

The petition of plaintiffs is drawn upon the theory that the jurisdictional act requires the court to restate this account in such a manner as that the payment of $887,480.15 made as of September 22, 1851, should first be applied to the payment of interest on the principal sum of $745,273.84 from June 12, 1838, and likewise, when the distribution of $796,207.05 was made pursuant to the judgment of the Court of Claims in the case of *The Western Cherokees* v. *United States,* (27 C. Cls. 1) the payment so made should first be applied to the payment of accrued interest and the remainder, if any, to the reduction of the principal.

CONTENTIONS OF PLAINTIFFS

1. That the proviso contained in section 3 of the jurisdictional act requires the court to readjudicate the claim of plaintiffs for money alleged to be due on an interest bearing fund, notwithstanding the provision of the act which denies the right to the plaintiffs to present, and the authority of the court to adjudicate, a claim, which has been formerly adjudicated on its merits and paid in full.

2. That upon a re-statement of the account of the interest-bearing fund, plaintiffs are entitled to a judgment.

CONTENTIONS OF DEFENDANT

1. That the claim asserted by plaintiffs, having heretofore been determined and adjudicated on its merits and paid in full, is without the jurisdiction of the court.

2. That no obligation was created, by treaty, agreement, law of Congress, or resolution of the Senate, to pay interest on the interest-bearing fund here involved at any time before the payment of the fund itself.

3. That the proviso contained in section 3 of the jurisdictional act does not enlarge the authority of the court as conferred by the enabling clause of the act, nor does it abrogate or modify the provision therein contained limiting the right of plaintiffs to present, and the authority of the court to adjudicate, claims which have not theretofore been adjudicated on their merits and paid in full.

4. That the proviso contained in section 3 of the jurisdictional act was not intended to revive or re-establish an interest-bearing fund which had passed out of existence by reason of an adjudication on its merits and the satisfaction of the judgment of the court in full.

5. That the jurisdictional act does not admit, assume, or create a liability.

ARGUMENT

Res judicata

The jurisdictional act expressly withholds the right to present a claim, and the authority for the Court to hear and adjudicate a claim, which has heretofore been adjudicated on its merits by the Court of Claims or the Supreme Court and paid in full.

It is a fact beyond dispute that the interest-bearing fund alleged in the petition to be owing was the subject of a claim presented by plaintiffs in the case of the *Western Cherokees* v. *United States* (27 C. Cls. 1, 148 U. S. 427), wherein a judgment was entered in favor of these plaintiffs, which judgment has been paid in full.

The judgment in said case was on the merits. In Black on Judgments (Volume 2, Section 694), a judgment is held to be on the merits "when it amounts to a declaration of the law as to the respective rights and duties of the parties, based upon the ultimate fact or set of facts disclosed by the pleadings and evidence, and upon which the

right of recovery depends, irrespective of formal, technical, or dilatory objections or contentions."

In Corpus Juris, Volume 34, page 776, it is said:

> If a case is brought to an issue, heard upon evidence submitted pro and con, and decided by the verdict of a jury or the findings of a court, the judgment rendered is on the merits.

As evidence of the fact that in the former case the court made its determination of the amount of the interest-bearing fund and amount of interest due thereon upon a consideration of all treaties and agreements between the parties, resolution of the Senate, and all laws applicable thereto, we quote from the opinion of the Court of Claims (27 C. Cls. 1) as follows:

> (Page 49) Immediately after this decision of the Senate, and in conformity thereto, Congress passed the *Act 30th September,* 1850 (9 Stat. L., p. 556), appropriating for distribution among the Western Cherokees $887,480.15, of which $532,896.90 was for money due to them under the treaty 1846 and $354,583.25 was for interest thereon.
>
> We have, then, this demand for interest, not arising after the execution of the instrument and the performance of the contract, but existing before the treaty was signed, and forming a subject of difference *ab initio* while the negotiations were carried on; we have this subject of difference provided for in the treaty itself and determined in the

manner provided; we have the determination accepted as valid and binding by the party against whom it was made, and carried into effect by the payment of the money; finally we have the jurisdictional act directing the court "to try and determine all questions that may arise in such cause on behalf of either party thereto and render final judgment thereon," and declaring it to be "the intention of this act to allow the said Court of Claims unrestricted latitude in adjusting and determining the said claim."

The court is therefore constrained to decide that by the force of the treaty which made the compact between the parties, and of the statute by virtue of which the controversy with all matters of difference between the parties is now being brought to a final determination, the Western Cherokees should recover interest at the rate of 5 percent upon the unpaid balance of the treaty fund ($224,972.68) from the 12th day of June 1838, to the day of the rendering of this decision, being for fifty-three years, five months, and eighteen days, and amounting to $601,426.70.

(Pages 50–51.) The final account, therefore, between the parties of all subjects of difference "arising from or growing out of treaty stipulations and acts of Congress", adjusted and determined by this suit, "so that", in the words of the statute, "the rights, legal and equitable, both of the

United States and of said Indians", are now fully determined and forever at rest, will be stated as follows:

Balance remaining due to Western Cherokees of their just and proper proportion, being one-third of the true residuum of the treaty fund	$224, 972. 68
Interest thereon from 12th June 1838, to 30th November 1891	601, 426. 70
Proceeds of 3,343 41/100 acres of land in Arkansas	4, 179. 26
Amounting in the aggregate to	830, 578. 64

As before stated, the difference between the account as stated in the petition filed in this cause and as it is stated by the court in the former action is found in the application of the payment of $887,-480.15 made as of September 22, 1851, of which $532,896.90 was appropriated by Congress for the payment of the principal and the remainder as interest thereon. In the petition the account is stated upon the theory that the payment of $887,480.15 should be applied first to the payment of interest on the sum of the items of $532,896.90 and $212,-376.94, and then to the reduction of principal. In the account as stated by the court this payment was applied in the manner as directed by the appropriation act, viz: $532,896.90 on principal, remainder as interest thereon, and in complete satisfaction of the obligations and requirements of treaties and agreements between the parties as then established and in compliance with all resolutions and laws applicable to the subject.

The failure of plaintiffs in the foregoing case to assert the claim that the payment of $887,480.15

made pursuant to the appropriations act of September 30, 1850 (9 Stat. 556), which authorized payment to the plaintiffs of the principal sum of $532,896.90, and interest thereon in accordance with the resolution of the Senate, as well as the failure of the courts in stating the account to apply the entire sum of $887,480.15 first to the payment of interest accrued and the balance to the reduction of the principal was not due to an oversight but rather to the law of the case.

The only obligation to pay interest arose from the resolution of the Senate, sitting as an umpire, which says:

> *Resolved,* That it is the sense of the Senate that interest, at the rate of five per centum per annum, should be allowed *upon the sums found due* the "Eastern" and "Western" Cherokees, respectively, from the 12th day of June, 1838, until paid. (Italics ours.)

When Congress made the appropriation of September 30, 1850, that appropriation covered in full all "sums found due" up to that time, with interest thereon from June 12, 1838. The resolution of the Senate with respect to interest was carried out to the letter. That the Senate Committee on Indian Affairs had made an error in charging certain expenditures incident to the removal to plaintiffs does not change the situation. The resolution provided for the payment of interest "on the sums found due", and the obligations of the resolution were perfomed. The situation would have been

the same had the Senate Committee correctly stated the account and Congress had made an appropriation to pay $532,896.90 of the principal found due, with interest thereon, as required by the Senate resolution. Furthermore, if Congress had made an appropriation to pay interest before the payment of the principal, such an appropriation would have been a gratuity. An obligation to pay interest before payment of principal did not exist.

It thus appears that not only is this claim without the jurisdiction of the court under the terms of the enabling act, the claim having heretofore been adjudicated on its merits, but that the appropriation of the $887,480.15 was correctly applied in the payment of the Government's obligation as it was then established.

Construction of Proviso Contained in Section 3 of Jurisdictional Act

It will be observed from the brief of plaintiffs that the liability of defendant is claimed to be founded upon the proviso contained in Section 3 of the jurisdictional act, which is as follows (47 Stat. 137, 138):

> In said suit or suits the court shall also hear, examine, consider, and adjudicate any claims which the United States may have against the said Indians, or any of them, but any payment or payments which may have been made by the United States upon any such claim or claims shall not operate as an estoppel but may be placed (sic) as an offset

> in such suit or suits, and the United States shall be allowed to plead and shall be given credit for all sums, including gratuities, paid to or expended for any of said classes of Indians: *Provided, however,* That in any claim sued on by said Cherokees for any part of an interest-bearing fund upon which account any payment or payments shall have been made, such payment or payments shall first be applied to reduction or payment of interest earned to the date of such respective payments, and the balance, if any, shall then be applied to reduce the interest-bearing principal, and not otherwise.

As heretofore stated, there was no obligation on the part of the United States to pay interest on the fund in question until the fund itself was paid. This fact undoubtedly accounts for the failure of the plaintiffs in the former case (27 C. Cls. 1) to present the claim now made, and also for the failure of this court and the Supreme Court to state the account as the same is now stated by plaintiffs. The court will observe that in the petition at page 6, plaintiffs allege that the claim sued on "arises under or grows out of Article 4 of the treaty of 1846 (9 Stat. 871), article 11 of the same treaty, and a resolution of the Senate passed pursuant thereto September 5, 1850 (Senate Journal, 31st Congress, 1st Session, page 601)." However, plaintiffs request the court to find as a fact that plaintiffs' claim arises out of the treaty of 1846,

the resolution of the Senate, and, in addition, out of the jurisdictional act (Plaintiffs' requested Finding 3, R., p. 17).

It appears, therefore, that plaintiffs concede that without the proviso contained in Section 3 of the jurisdictional act there is no basis for the claim, and proceed upon the theory that the proviso creates the claim. Defendant agrees with plaintiff only to this extent—that if by any chance a claim covering the subject matter of the petition exists, such a claim has been created by the proviso in Section 3 of the jurisdictional act.

The enabling clause of the jurisdictional act sets forth the basis of any and all claims which plaintiffs are permitted to present to the court, and specifically withholds the right to present a claim theretofore adjudicated on its merits and paid in full.

At the outset, the question arises, did Congress intend that the proviso in Section 3 of the act should give a new life to an interest-bearing fund which has, by reason of former adjudication and satisfaction of judgment in full, passed out of existence? Defendant thinks not. The proviso relates only to an interest-bearing fund which was in existence at the time the act was passed.

Furthermore, the use of the words " Provided, *however,*" (Italics ours) in introducing the proviso establishes a positive and definite relationship between the office of the proviso and the subjects covered by that part of Section 3 of the act preceding the proviso.

Therefore, defendant contends that the proviso was intended to have this, and no other, office, viz: In the event a claim is presented on an interest-bearing fund, upon which claim a payment or payments have been made, but which payment or payments are not permitted under the act to be pleaded as an estoppel, then such payment or payments shall be applied first to the accrued interest and the remainder to the principal. In other words, the proviso was not intended to affect in any manner a controversy which had been settled by agreement, or, as the act specifically prescribes, a controversy which has been adjudicated and the judgment thereon fully satisfied. If plaintiff's contention is sound, then plaintiffs are permitted to present a claim for any interest-bearing fund, regardless of former settlement or a former adjudication.

But the plaintiffs' contention that former adjudication is not a bar to the claim asserted, by reason of the proviso in Section 3 of the act, is again overthrown by the plain language of the act. Section 1 permits plaintiffs to submit to the court "claims * * *, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States and paid in full." The act, therefore, specifically denies to plaintiffs the right to present to the court a claim which has been adjudicated on its merits and paid in full. The proviso in Section 3 of the act says, "That *in any claim*

sued on by said Cherokees for any part of an interest-bearing fund" (Italics ours), payments thereon shall first be applied to the payment of interest. In the use of the words "any claim sued on", Congress did not intend that the limitation with respect to the right of plaintiffs, as granted in the enacting clause, to present claims, as well as the authority of the court to hear and determine them, should be enlarged. Therefore, when in the proviso Congress used the expression "any claim sued on", it did not mean any claim which plaintiffs may choose to sue on, but claims which plaintiffs have the right under the act to make the basis of an action.

In the *Duwamish case,* No. F–275, decided June 4, 1934, this question was involved and there this Court said (Opinion, p. 31):

> Obviously this section is procedural; it is not the enabling clause of the act. It waives the limitation statute of six years and prescribes a rule of adjudication for the subject matter referred to in section one of the act. It was not intended as an enlargement of the jurisdiction of the court so as to include claims aside from those specifically mentioned.

Let it be said again that plaintiffs are without the right to present a claim for an interest-bearing fund if a claim for the same interest-bearing fund has been adjudicated by the Court of Claims or the Supreme Court and the judgment of the court satisfied in full.

It would do violence to the plain meaning of the act to conclude that the proviso was intended to nullify the language defining the class of claims permitted by section 1 of the act to be presented to the court.

The Jurisdictional Act Does Not Admit, Assume, or Create a Liability

Although the jurisdictional act withholds from plaintiffs the right to present a claim heretofore adjudicated on its merits and paid in full, as well as the authority for the court to adjudicate such a claim, it is also clear that even had the act waived the estoppel of former adjudication plaintiffs' claim would fail, unless the act creates a liability. The treaties and agreements between the parties, the resolution of the Senate with respect to interest, and the laws of Congress in relation to Indian Affairs which were in effect when the jurisdictional act was approved, fail to supply a basis for the claim plaintiffs assert. In other words, there was no obligation on the part of the defendant to make an interest payment on account of the interest-bearing fund prior to the payment of such fund.

It was the intention of Congress that the claims permitted to be asserted should arise out of treaties, agreements, and laws of Congress which were in effect at the time of the approval of the jurisdictional act.

If there was an obligation to pay interest on the interest-bearing fund at any time prior to the payment of the fund itself, this Court and the Supreme

Court would have recognized the same, and that obligation would have been reflected in the judgment heretofore entered. The law of the case stands now as it stood when the former cases were decided.

Thus it is seen that the plaintiffs are forced to contend that the proviso creates the liability. That this, however, cannot be the effect of the proviso becomes apparent when one considers the absurdity to which such a construction leads. The act authorizes defendant to plead as off-sets payments made for the benefit of plaintiffs, including gratuities. Congress did not intend that the jurisdictional act should grant to defendant the right to plead gratuities as off-sets and at the same time create a gratuity which was to be the basis of plaintiffs' claim.

Therefore the defendant contends that the jurisdictional act neither admits, creates, nor assumes any liability.

Set-Offs

Under Section 3 of the jurisdictional act it is provided:

> In said suit or suits the court shall also hear, examine, consider, and adjudicate any claims which the United States may have against the said Indians or any of them, but any payment or payments which have been made by the United States upon any such claim or claims shall not operate as an estoppel but may be placed as an off-set in such suit or suits, and the United States shall be allowed to plead and shall be given credit for all sums, including gratuities, paid to or expended for any of said classes of Indians.

It appears from the report of the General Accounting Office filed in case number L–174 (pp. 64–76) that a large sum of money has been expended gratuitously by the United States for the sole benefit of the Cherokee Indians, and it appears also that a large sum of money has been expended gratuitously by the United States for the joint benefit of the Cherokees, the Choctaws, the Chickasaws, the Creeks, and the Seminole Indians.

It is the contention of the defendant that the jurisdictional act requires that defendant be allowed off-sets for said gratuities in the same proportion as the membership of plaintiff class of Cherokees bears to the entire number for whose benefit such expenditures were made.

The act says "and the United States shall be allowed to plead and shall be given credit for all sums, including gratuities paid to or expended for any of said classes of Indians." The words "said classes" are used for the sake of brevity and mean the Eastern or Emigrant Cherokees and the Western or Old Settler Cherokees. If, therefore, the intent of the act should be expressed without brevity, it would be stated thus—"and the United States shall be allowed to plead and shall be given credit for all sums, including gratuities, paid to or expended for said Eastern or Emigrant Cherokees and Western or Old Settler Cherokees."

It is plain that Congress intended to give to the United States a right of set-off for gratuities expended for the benefit of plaintiffs. The test is found in the answer to this question—Did the particular class share in the benefits of the gratuity?

A gratuity expended for the benefit of all Cherokees is a gratuity *pro tanto* for the benefit of the plaintiffs, one of the classes of Cherokees. A gratuity expended for the joint benefit of the Cherokees, the Choctaws, the Chickasaws, the Creeks, and Seminole Indians, is also a gratuity *pro tanto* for the benefit of plaintiffs.

This Court has had occasion to decide this question in a number of cases, among them being the Klamath case No. E–346, decided November 5, 1934. In that case the jurisdictional act authorized setoffs for gratuities expended for the benefit of said Indians or any band thereof. It appeared that certain sums were expended for the maintenance of nonreservation schools. The Court allowed as setoffs an amount which bore the same ratio to the entire expenditure as the Klamath students bore to the entire school attendance.

Defendant also presents a claim for an offset growing out of the payment of interest on the sum of $212,376.94, the balance of the interest-bearing fund as found by the Supreme Court (148 U. S. 477–478), from August 23, 1894, the date of the appropriation to pay the judgment, to March 18, 1896. It is defendant's contention that the obligation to pay interest ceased upon the making of the appropriation of August 23, 1894, consequently the appropriation of $29,840.74 made on March 3, 1899 (Finding XIV), resulted in an overpayment on account of interest in the sum of $16,785.50.

Defendant submits that on the record in the case the Court should hold as follows:

1. That the claim asserted by plaintiffs is one which has heretofore been adjudicated on its merits by the Court of Claims and the Supreme Court and paid in full; therefore the Court is without jurisdiction to hear and determine the same.

2. That the proviso contained in Section 3 of the jurisdictional act does not enlarge, modify, or abrogate the authority of the Court as conferred by the enabling clause of the act, neither does said proviso revive or reestablish an interest-bearing fund which had passed out of existence by reason of adjudication and payment in full of the judgment.

3. That the jurisdictional act does not admit, assume, or create a liability.

4. That defendant is entitled to an offset for gratuities and overpayment of interest against any recovery to which plaintiff may be entitled in the sum of $900,558.87 (See Defendants' Requested Findings XV–XXII).

Respectfully submitted.

HARRY W. BLAIR,
Assistant Attorney General.

GEORGE T. STORMONT,
Attorney.

WILFRED HEARN,
Attorney.

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