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 11; 12; 13; 14; 42

# Court of Claims of the United States

No. F-64

(Decided December 3, 1934)

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## KANSAS OR KAW TRIBE OF INDIANS v. THE UNITED STATES

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*Mr. Edward T. Miller* for plaintiff.

*Mr. George T. Stormont*, with whom was *Mr. Assistant Attorney General Harry W. Blair*, for defendant.

This case having been heard by the Court of Claims, the court, upon the evidence adduced, makes the following

### SPECIAL FINDINGS OF FACT

I. By an act of Congress approved March 3, 1925 (43 Stat. 1133), it was provided:

"That jurisdiction be, and is hereby, conferred upon the Court of Claims, notwithstanding the lapse of time or statutes of limitations, to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims which said Kansas or Kaw Tribe of Indians may have or claim to have against the United States, growing out of or arising under any treaty or agreement between the United States and the Kansas or Kaw Tribe of Indians, or arising under or growing out of any Act of Congress in relation to Indian affairs, 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: *Provided, however*, That the provision of this Act shall not be construed to confer jurisdiction upon the Court to hear, consider, and adjudicate any claim presented to and considered by the Kaw Commission under the provisions of Section 12 of the Act of Congress of July 1, 1902 (Thirty-second Statutes, pages 636), saving and excepting the claim known as the surplus-land claim of the Kansas or Kaw Tribe of Indians, which said claim is expressly included in this Act, and jurisdiction to consider the same is hereby conferred.

"Sec. 2. Any and all claims against the United States within the purview of this Act shall be forever barred unless suit be instituted or petition filed, as herein provided, in the Court of Claims within five years from the date of approval of this Act, and such suit shall make the Kansas or Kaw Tribe of Indians party plaintiff, and the United States party defendant. The petition shall be verified by the attorney or attorneys employed to prosecute such claim or claims under contract with the Kansas or Kaw Tribe of Indians approved

by the Commissioner of Indian Affairs and the Secretary of the Interior; and said contract shall be executed in their behalf by a committee chosen by them under the direction and approval of the Commissioner of Indian Affairs and the Secretary of the Interior, and such contract shall be executed and approved as required by section 2103-5 of the Revised Statutes of the United States. Official letters, papers, documents, and records, 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 Kansas or Kaw Tribe of Indians to such treaties, papers, correspondence, or records as may be needed by the attorney or attorneys of the Kansas or Kaw Tribe of Indians.

"SEC. 3. In said suit the court shall also hear, examine, consider, and adjudicate any claims which the United States may have against said Kansas or Kaw Tribe of Indians, but any payment which may have been made by the United States upon any claims against the United States shall not operate as an estoppel, but may be pleaded as an offset in such suit.

"SEC. 4. That from the decision of the Court of Claims in any suit prosecuted under the authority of this Act, an appeal may be taken by either party as in other cases to the Supreme Court of the United States.

"SEC. 5. That upon the final determination of any suit instituted under this Act, the Court of Claims shall decree such amount or amounts as it may find reasonable to be paid the attorney or attorneys so employed by said Kansas or Kaw Tribe of Indians for the services and expenses of said attorneys rendered or incurred subsequent to the date of approval of this Act: *Provided*, That in no case shall the aggregate amounts decreed by said Court of Claims for fees be in excess of the amount or amounts stipulated in the contract of employment, or in excess of a sum equal to 10 per centum of the amount of recovery against the United States, and in no event shall such fees exceed the sum of \$25,000.

"SEC. 6. The Court of Claims shall have full authority by proper orders and process to bring in and make parties to such suit any or all persons or tribes or bands of Indians deemed by it necessary or proper to the final determination of the matters in controversy.

"SEC. 7. A copy of the petition shall, in such case, be served upon the Attorney General of the United States, and he, or some attorney from the Department of Justice to be designated by him, is hereby directed to appear and defend the interest of the United States in such case."

Under authority of this act the plaintiff tribe filed its original petition on February 9, 1926.

II. By an act of Congress approved February 23, 1929 (45 Stat. 1258), it is provided:

"That the act entitled 'An act conferring jurisdiction upon the Court of Claims to hear, examine, adjudicate, and enter judgment in any and all claims, of whatever nature, which the Kansas or Kaw Tribe of Indians may have or claim to have against the United States, and for other purposes', approved March 3, 1925 (Forty-third Statutes at Large, page 1133), be, and the same is hereby, amended and reenacted so as to read as follows:

"SECTION 1. That jurisdiction be, and 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 which said Kansas or Kaw Tribe of Indians may have or claim to have against the United States, growing out of or arising under any treaty or agreement between the United States and the Kansas or Kaw Tribe of Indians, or arising under or growing out of any act of Congress in relation to Indian affairs, 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.

"SEC. 2. Any and all claims against the United States within the purview of this act shall be forever barred unless suit be instituted or petition filed, as herein provided, in the Court of Claims within three years from the date of approval of this act, and such suit shall be prosecuted in the name of said Kansas or Kaw Tribe of Indians as plaintiff, upon petition numbered F-64, now filed in the Court of Claims and any amendment thereto that may be necessary under the provisions of this act, and all the evidence and proceedings filed in said case numbered F-64 shall be received and accepted by the court to the same extent as though filed anew in the suit or amendment filed under this act. Official letters, papers, documents, and records, or certified copies thereof, may be used in evidence, and the departments of the Government shall give access to the attorneys of said Kansas or Kaw Tribe of Indians to such treaties, papers, correspondence, or records as may be needed by the attorneys of the Kansas or Kaw Tribe of Indians.

"SEC. 3. In said suit, the court shall also hear, examine, consider, and adjudicate any claims which the United States may have against said Kansas or Kaw Tribe of Indians, but any payment, including gratuities, which may have been made by the United States, upon any claims against the United States, shall not operate as an estoppel, but may be pleaded as an offset in such suit.

"SEC. 4. That from the decision of the Court of Claims in any suit prosecuted under the authority of this act, an appeal or other appropriate proceeding may be taken by either party as in other cases to the Supreme Court of the United States.

"SEC. 5. That upon the final determination of any suit instituted under this act, the Court of Claims shall decree such amount or amounts as it may find reasonable to be paid the said attorneys of the Kansas or Kaw Tribe of Indians for their services and expenses as said attorneys: *Provided*, That in no case shall the aggregate amounts decreed by said Court of Claims for fees be in excess of a sum equal to 10 per centum of the amount of recovery against the United States. The amount of any judgment, after payment of such fees and expenses, shall be placed in the Treasury of the United States to the credit of the Kansas or Kaw Tribe of Indians and shall draw interest at the rate of 4 per centum per annum and shall be thereafter subject to appropriation by Congress for educational, health, industrial, and other purposes for the benefit of said Indians, including the purchase of lands and building of homes, and no part of said judgment shall be paid out in per capita payments to said Indians.

"SEC. 6. The Court of Claims shall have full authority by proper order and process to bring in and make parties to such suit any or all persons or tribes or bands of Indians deemed by it necessary or proper to the final determination of the matters in controversy.

"SEC. 7. A copy of the petition shall, in such case, be served upon the Attorney General of the United States, and he, or some attorney from the Department of Justice to be designated by him, is hereby directed to appear and defend the interests of the United States in such case."

Under authority of this act the plaintiff tribe filed its amended petition on May 4, 1929, and its second amended petition on April 5, 1930.

III. The plaintiff is a tribe or band of Indians variously known under the names of Alaho, Ansaus, Cans, Canses, Canzeze, Caws, Escansagues, Hutanga, Kansas, Kaws, Konsa, Mohtawas, Quans, Ukasa, and other variations of these names, and is a branch of the Osage division of the Siouan Indian stock.

Originally their home was on the Ohio and Wabash Rivers, where they, together with the Quopaw, Omaha, Ponca, and Osage formed one tribe. Long before the coming of the white man this group had become split into five separate and distinct tribes and had migrated from their ancient home to various points along the Mississippi and Missouri Rivers, plaintiff's villages being on the Missouri. The plaintiff tribe was subsequently driven from their villages on the Missouri River by the Iowas and Sacs, and at the time the treaty of 1825 was entered into was living in two villages on the Kansas River. The tribe at that time, and from the time it was first known to the white man, claimed and hunted over a vast region drained by the Kansas River and its tributaries, as is shown by numerous maps of the period 1672 to 1819.

The western part of Kansas and that part of Colorado east of the Rocky Mountains at this time was roamed over and hunted in by a large number of prairie tribes, including the Comanche, Kiowa, Kiowa-Apache, Cheyenne, Arapahoe, Pawnee, Jicarilla Apache, Ute, Osage, Sioux, and Delaware. This region was successively claimed by the Utes, the Comanches, the Kiowas, the Cheyennes, and Arapahoes. In the treaty of Fort Laramie of 1851 (11 Stat. 749), the United States recognized the Indian title to this region to be in the Cheyenne and Arapahoe Tribes, their territory being delimited in the treaty as follows:

"Commencing at the Red Bute, or the place where the road leaves the north fork of the Platte River; thence up the north fork of the Platte River to its source; thence along the main range of the Rocky Mountains to the headwaters of the Arkansas River; thence down the Arkansas River to the crossing of the Santa Fe Road; thence in a northwesterly direction to the forks of the Platte River, and thence up the Platte River to the place of beginning."

IV. The plaintiff Indians prior to their removal to Indian Territory in 1873 were blanket Indians, illiterate, unskilled, and not advanced in civilization; few, if any, could speak or understand the English language. They were uninformed and had no knowledge of the units of measure of land, or understanding of the technical description of a tract of land except in terms of natural boundaries.

V. Pursuant to the provisions of the Treaty of Ghent of February 17, 1815 (8 Stat. 218), the United States and the Kansas Indians, on October 28, 1815 (7 Stat. 137), entered into the following treaty:

"The parties being desirous of reestablishing peace and friendship between the United States and their said tribe, and of being placed, in all things, and in every respect, upon the same footing upon which they stood before the late war between the United States and Great Britain, have agreed to the following articles:

"ARTICLE 1. Every injury or act of hostility by one or either of the contracting parties against the other shall be mutually forgiven and forgot.

"ART. 2. There shall be perpetual peace and friendship between all the citizens of the United States of America and all the individuals composing the said Kansas tribe, and all the friendly relations that existed between them before the war shall be, and the same are hereby, renewed.

"ART. 3. The undersigned chiefs and warriors, for themselves and their said tribe, do hereby acknowledge themselves to be under the protection of the United States of America, and of no other nation, power, or sovereign, whatsoever."

VI. On June 3, 1825, a treaty was concluded between the United States and the Kansas Nation of Indians (7 Stat. 244; 2 Kapp. 222), which treaty reads as follows:

"ARTICLE 1. The Kansas do hereby cede to the United States all the lands lying within the State of Missouri, to which the said nation have title or claim; and do further cede and relinquish, to the said United States, all other lands which they now occupy, or to which they have title or claim, lying West of the said State of Missouri, and within the following boundaries: beginning at the entrance of the Kansas river into the Missouri river; from thence North to the North-West corner of the State of Missouri; from thence Westwardly to the Nodewa river, thirty miles from its entrance into the Missouri; from thence to the entrance of the big Nemahaw river into the Missouri, and with that river to its source; from thence to the source of the Kansas river, leaving the old village of the Pania Republic to the West; from thence, on the ridge dividing the waters of the Kansas river from those of the Arkansas, to the Western boundary of the State line of Missouri, and with that line, thirty miles, to the place of beginning.

"ARTICLE 2. From the cession aforesaid, the following reservation for the use of Kansas nation of Indians shall be made, of a tract of land, to begin twenty leagues up the Kansas river, and to include their village on that river; extending West thirty miles in width, through the lands ceded in the first Article, to be surveyed and marked under the direction of the President, and to such extent as he may deem necessary, and at the expense of the United States. The agents for the Kansas, and the persons attached to the agency, and such teachers and instructors as the President shall authorize to reside near the Kansas, shall occupy, during his pleasure, such lands as may be necessary for them within this reservation.

"ARTICLE 3. In consideration of the cession of land and relinquishments of claims, made in the first Articles, the United States agree to pay to the Kansas nation of Indians, three thousand five hundred

dollars per annum, for twenty successive years, at their villages, or at the entrance of the Kansas river, either in money, merchandise, provisions, or domestic animals, at the option of the aforesaid nation; and when the said annuities, or any part thereof, is paid in merchandise, it shall be delivered to them at the first cost of the goods in Saint Louis, free of transportation.

"ARTICLE 4. The United States, immediately upon the ratification of this convention, or as soon thereafter as may be, shall cause to be furnished to the Kansas nation, three hundred head of cattle, three hundred hogs, five hundred domestic fowls, three yoke of oxen, and two carts, with such implements of agriculture as the Superintendent of Indian Affairs may think necessary; and shall employ such persons to aid and instruct them in their agriculture, as the President of the United States may deem expedient; and shall provide and support a blacksmith for them.

"ARTICLE 5. Out of the lands herein ceded by the Kansas Nation to the United States, the Commissioner aforesaid, in behalf of the said United States, doth further covenant and agree, that thirty-six sections of good lands, on the Big Blue river, shall be laid out under the direction of the President of the United States, and be sold for the purpose of raising a fund, to be applied, under the direction of the President, to the support of schools for the education of the Kansas children, within their Nation.

"ARTICLE 6. (Reservations for half breeds.)

"ARTICLE 7. With the view of quieting all animosities which may at present exist between a part of the white citizens of Missouri and the Kansas nation, in consequence of the lawless depredations of the latter, the United States do further agree to pay to their own citizens, the full value of such property as they can legally prove to have been stolen or destroyed since the year 1815: Provided, The sum so to be paid by the United States shall not exceed the sum of three thousand dollars.

"ARTICLE 8. And whereas the Kansas are indebted to Francis G. Choteau, for credits given them in trade, which they are unable to pay, and which they have particularly requested to have included and settled in the present treaty; it is, therefore, agreed on, by and between the parties to these presents, that the sum of five hundred dollars towards the liquidation of said debt, shall be paid by the United States to the said Francois G. Choteau.

"ARTICLE 9. There shall be selected at this place such merchandise as may be desired, amounting to two thousand dollars, to be delivered at the Kansas river, with as little delay as possible; and there shall be paid to the deputation now here, two thousand dollars in merchandise and horses, the receipt of which is hereby acknowledged; which, together with the amount agreed on in the 3d and 4th articles, and the provisions made in other articles of this Treaty, shall be considered as a full compensation for the cession herein made.

"ARTICLE 10. (Depredations, etc.)

"ARTICLE 11. It is further agreed on, by and between the parties to these presents, that the United States shall forever enjoy the right to navigate freely all water courses or navigable streams within the limits of the tract of country herein reserved to the Kansas Nation; and that the said Kansas Nation shall never sell, relinquish, or in any

manner dispose of the lands herein reserved, to any other nation, person, or persons whatever, without the permission of the United States for that purpose first had and obtained. And shall ever remain under the protection of the United States, and in friendship with them.

"ARTICLE 12. This Treaty shall take effect, and be obligatory on the contracting parties, as soon as the same shall be ratified by the President, by and with the consent and advice of the Senate of the United States."

The lands ceded in Article 1 of the foregoing treaty comprised approximately 26,000,000 acres. The lands reserved to the plaintiff in Article 2 comprised approximately 6,665,200 acres.

VII. On the day preceding the above treaty, that is, on June 2, 1825, a treaty was concluded between the United States and the Great and Little Osage Tribes (7 Stat. 240; 2 Kapp. 217), Article 1 of which treaty reads as follows:

"ARTICLE 1. The Great and Little Osage Tribes or Nations do, hereby, cede and relinquish to the United States, all their right, title, interest, and claim, to lands lying within the State of Missouri and Territory of Arkansas, and to all lands lying West of the said State of Missouri and Territory of Arkansas, North and West of the Red River, South of the Kansas River, and East of a line to be drawn from the head sources of the Kansas, Southwardly through the Rock Saline, with such reservations, for such considerations, and upon such terms as are hereinafter specified, expressed, and provided for."

Out of the cession thus made the Indian parties in Article 2 reserved as their home the following described tract:

"Beginning at a point due East of White Hair's Village, and twenty-five miles West of the Western boundary line of the State of Missouri, fronting on a North and South line, so as to leave ten miles North and forty miles South, of the point of said beginning, and extending West, with the width of fifty miles, to the Western boundary of the lands hereby ceded and relinquished by said Tribes or Nations."

VIII. On July 15, 1830, a treaty was concluded between the United States and the confederated tribes of Sacs and Foxes, the Medowah-Kanton, Wah-pacoota, Wahpeton, and Sissetong Bands or Tribes of Sioux, the Omahas, Ioways, Ottoes, and Missourias (7 Stats., 328; 2 Kapp., 305).

By Article 1 of the treaty the Indian tribes ceded to the United States all their right and title to lands lying within the following boundaries, to wit:

"Beginning at the upper fork of the Demoine River, and passing the sources of the Little Sioux, and Floyds Rivers, to the fork of the first creek which falls into the Big Sioux or Calumet on the east side; thence, down said creek, and Calumet River to the Missouri River; thence, down said Missouri River to the Missouri State line, above the Kansas; thence along said line to the northwest corner of the said State; thence to the high lands between the waters falling into the Missouri and Desmoines, passing to said high lands along the dividing ridge between the forks of the Grand River; thence along said high lands or ridge separating the waters of the Missouri from those of the Demoine, to a point opposite the source of Boyer River,

and thence in a direct line to the upper fork of the Demoine, the place of beginning."

IX. By an act of Congress approved March 3, 1825 (4 Stat. 100), the President was authorized to appoint commissioners "to mark out a road from the western frontier of the State of Missouri, to the boundary line of the United States, in the direction of Santa Fe, of New Mexico", provided that the consent by treaty of intervening tribes be obtained, and appropriated a sum of money to defray the expenses of treating with the Indians and obtaining their consent.

Under authority of this act a treaty was concluded with the Great and Little Osage Nations on August 10, 1825 (7 Stat. 268; 2 Kapp. 246), by the terms of which, for a total consideration of \$800, the tribes agreed that the United States might mark out a road "through any of the territory owned or claimed by the said Great and Little Osage Nations." On August 16, 1825, a similar treaty was concluded with the Kansas Tribe (7 Stat. 270; 2 Kapp. 248), that tribe likewise, for a total consideration of \$800, agreeing that the United States might mark out a road "through any of the territory owned or claimed by said Kansas Tribe or nation of Indians."

The road thus authorized was subsequently marked out as far as the Arkansas River, its exact location not being determinable from the record.

X. By article 4 of the treaty of June 3, 1825, *supra*, the United States agreed "to provide and support a blacksmith" for the tribe. Under the provisions of this article the United States provided and supported a blacksmith for the Kansas Tribe for the following periods:

- September 1, 1826, to December 9, 1835;
- April 1, 1836, to June 30, 1836;
- August 11, 1836, to March 31, 1839;
- March 10, 1839, to August 4, 1841;
- October 1, 1841, to Sept. 30, 1844;
- February 15, 1846, to June 30, 1846.

In addition to the blacksmith, the United States, although not obligated so to do under the treaty, supplied the tribe with strikers and assistant blacksmiths during practically all of the periods above stated. The value of the services of a blacksmith to the plaintiff tribe during the periods in which a smith was not provided, between September 1, 1826, to June 30, 1846, was \$1,000.00.

By article 7 of the treaty of January 14, 1846, between the United States and the plaintiff tribe, hereinafter referred to, which treaty was ratified on April 13, 1846, it was provided:

"Should the Government of the United States be of opinion that the Kansas Indians are not entitled to a smith under the 4th article of the treaty of June 3, 1825, it is agreed that a smith shall be supported out of the one thousand dollars provided in the 4th [second] article for agricultural purposes." (9 Stats. 842; 2 Kapp. 552, 553.)

Subsequent to this treaty—that is, from July 1, 1846, to and including June 30, 1888—the services of a blacksmith and assistant blacksmith were supplied to the plaintiff tribe by the United States, there being, however, during the period stated short intervals when such services were not supplied. The cost of these services were sustained to the extent of \$9,018.85 out of appropriations made to fulfill the stipulations of the aforesaid treaty of 1846 (total of

\$7,716.45 and \$1,302.40); to the extent of \$5,672.88 out of gratuity appropriations by the Congress; and to the extent of \$2,509.01 out of reimbursable appropriations made by the Congress. This latter amount was subsequently repaid to the United States out of funds of the plaintiff tribe arising from sales of their lands under the treaty of October 5, 1859 (12 Stat. 1111).

XI. Commencing with the year 1827 and ending with the fiscal year 1846, the United States, under the provisions of article 4 of the treaty of June 3, 1825, expended a total sum of \$7,152.61 for "pay of farmers." Thereafter expenditures for the "pay of farmers" and other agricultural assistance to the tribe were made as follows: \$8,079.98 out of appropriations to carry out the stipulations of the treaty of 1846, \$400.00 out of reimbursable appropriations made in the act of February 14, 1873 (17 Stat. 437), \$1,269.22 out of reimbursable appropriations carried in the act of June 22, 1874 (18 Stat. 140), \$2,077.12 out of gratuity appropriations made during the years 1877 to 1882, inclusive, and the sum of \$7,157.00 out of gratuity appropriations made in the years 1911 to 1919, inclusive.

XII. Under the provisions of article 5 of the treaty of June 3, 1825, thirty-six sections of land on the Big Blue River, containing 22,545.94 acres, were laid out and offered for sale to the public for the purpose of raising a fund to be applied to the education of the Kansas children within their nation. Up to September 1837, 14,629.19 acres of these lands had been sold, from which sales was realized the sum of \$17,894.87, an average of \$1.223 per acre. On September 22, 1837, the Commissioner of the General Land Office was directed to suspend sales of the balance of the lands, representations having been made that the lands selected were not of the character and quality required by the treaty. No subsequent action with reference to the residue of the lands appears to have been taken, and the record fails to disclose the disposition of the remaining 7,916.75 acres or that said residue was disposed of for the purposes stipulated in the treaty.

Under the provisions of the act of January 9, 1837 (5 Stats. 135), the aforesaid sum of \$17,894.87 was invested in certain interest-bearing bonds of the State of Missouri. Thereafter, from time to time, the interest accruing on these bonds was applied in the purchase of other bonds, and the bonds themselves were from time to time transferred from one class of securities to another until the passage of the act of April 1, 1880 (21 Stats. 70), which act authorized the Secretary of the Interior to deposit in the Treasury all sums held by him as trustee of Indian tribes on account of the redemption of United States bonds or other stocks and securities belonging to the Indian trust fund, and provided that the United States should pay interest semiannually upon the amounts so deposited at the rate per annum stipulated by treaties or prescribed by law. At the date of the passage of this act the par value of bonds held by the United States in trust for the plaintiff tribe was \$27,174.41. In the course of the next two years, the bonds so held in trust were disposed of at par, and the amount received was deposited in the United States Treasury, in lieu of investment, to the credit of the plaintiff tribe under the caption "Kansas School Fund", upon which sum the United States paid interest semiannually at the rate of 5 percent. This fund on December 4, 1903, under the provisions of the act of July 1, 1902

(32 Stats. 636), was consolidated with other funds of the tribe under the caption "Kansas Consolidated Fund"; this latter fund, with the exception of a balance of \$1,972.48 remaining in the fund as of June 30, 1928, being eventually disbursed for the benefit of the plaintiff tribe.

On the bonds so held by the United States in trust for the plaintiff tribe, interest was collected in the total sum of \$61,551.91. From the time the bonds were sold and the proceeds deposited as above shown in the "Kansas School Fund" to the time when this latter fund was transferred to the "Kansas Consolidated Fund", the United States paid interest thereon in the total sum of \$30,713.30. These amounts, together with sums realized as premiums upon the sale of coin interest, profits on the sales of bonds, and an amount transferred from an appropriation made in fulfillment of treaty stipulations, were carried on the books of the Treasury to the credit of "Interest on Kansas School Fund." The records of the General Accounting Office disclose that of the total amount credited to this fund \$11,296.84 was used in the purchase of bonds for the tribe, \$59.85 was paid in settlement of an agent's account, \$7,505.14 was unaccounted for by a former agent, \$80,304.15 was expended for the benefit of the plaintiff tribe, and \$1,217.50 was transferred to the "Kansas Consolidated Fund" under the aforesaid act of July 1, 1902. Expressed in tabular form the status of this fund is as follows:

## Credits

Interest collected on bonds and paid on "Kansas School Fund"-----	\$92,265.21
Premium on sale of coin-----	3,396.56
Proceeds of sale of bonds-----	3,546.71
Transferred from appropriation "Fulfilling treaties with the Kansas"-----	1,175.00
Total-----	100,383.48

## Debits

Purchase of bonds-----	11,296.84
Settlement in account of Agent James I. David-----	59.85
Unaccounted for by Agent M. C. Dickey-----	7,505.14
Expended for benefit of plaintiff tribe-----	80,304.15
Transferred to "Kansas Consolidated Fund"-----	1,217.50
Total-----	100,383.48

Of the above amount \$54,276.44 was disbursed for the education of Kansas children within the Kansas Nation, and \$26,027.71 was expended for the benefit of the plaintiff tribe but for noneducational purposes, as follows:

Saw and grist mill-----	\$10,000.00
Agency buildings and repairs-----	3,494.86
Work and stock animals-----	974.96
Provisions-----	9,911.37
Agricultural implements and equipment-----	508.00
Household equipment-----	29.50
Agricultural aid-----	55.30
Expenses of delegations-----	650.00
Pay of miscellaneous employees-----	396.22
Medical attention-----	.50
Fuel-----	7.00
Total-----	26,027.71

These expenditures were principally made during the period 1861 to 1869.

XIII. The United States and the plaintiff tribe entered into a treaty on January 14, 1846, which was ratified by the Senate on April 13, 1846 (9 Stat. 842; 2 Kapp. 552). This treaty provided:

"ARTICLE I. The Kansas tribe of Indians cede to the United States two millions of acres of land on the east part of their country, embracing the entire width, thirty miles, and running west for quantity.

"ARTICLE II. In consideration of the foregoing cession, the United States agree to pay to the Kansas Indians two hundred and two thousand dollars, two hundred thousand of which shall be funded at five percent, the interest of which to be paid annually for thirty years, and thereafter to be diminished and paid *pro rata*, should their numbers decrease, but not otherwise—that is, the government of the United States shall pay them the full interest for thirty years on the amount funded, and at the end of that time, should the Kansas tribe be less than at the first payment they are only to receive *pro rata* the sums paid them at the first annuity payment. One thousand dollars of the interest thus accruing shall be applied annually to the purposes of education in their own country; one thousand dollars annually for agricultural assistance, implements &c.; but should the Kansas Indians at any time be so far advanced in agriculture as to render the expenditure for agricultural assistance unnecessary, then the one thousand dollars above provided for that purpose shall be paid them in money with the balance of their annuity; the balance, eight thousand dollars, shall be paid them annually in their own country. The two thousand dollars not to be funded shall be expended in the following manner: first, the necessary expenses in negotiating this treaty; second, four hundred dollars shall be paid to the Missionary Society of the Methodist Episcopal Church for their improvements on the land ceded in the first article; third, six hundred dollars shall be applied to the erection of a mill in the country in which the Kansas shall settle for their use, it being in consideration of their mill on the land ceded in the first article. The balance to be placed in the hands of their agent, as soon after the ratification of this treaty as practicable, for the purpose of furnishing the said Kansas Indians with provisions for the present year.

"ARTICLE III. In order that the Kansas Indians may know the west line of the land which they have ceded by this treaty, it is agreed that the United States shall, as soon as may be convenient in the present year, cause the said line to be ascertained and marked by competent surveyors.

"ARTICLE IV. The Kansas Indians are to move from the lands ceded to the United States, by the first article of this treaty, by the first day of May 1847.

"ARTICLE V. As doubts exist whether there is a sufficiency of timber on the land remaining to the Kansas, after taking off the land ceded in the first article of the treaty, it is agreed by the contracting parties, that after the western line of the said cession shall be ascertained, the President of the United States shall be satisfied that there is not a sufficiency of timber, he shall cause to be selected and laid

off for the Kansas a suitable country, near the western boundary of the land ceded by this treaty, which shall remain for their use forever. In consideration of which, the Kansas Nation cede to the United States the balance of the reservation under the treaty of June 3, 1825, and not ceded in the first article of this treaty.

"ARTICLE VI. In consideration of the great distance which the Kansas Indians will be removed from the white settlements and their present agent, and their exposure to difficulties with other Indian tribes, it is agreed that the United States shall cause to reside among the Kansas Indians a sub-agent, who shall be especially charged with the direction of their farming operations, and general improvement, and to be continued as long as the President of the United States should consider it advantageous to the Kansas.

"ARTICLE VII. Should the Government of the United States be of opinion that the Kansas Indians are not entitled to a smith under the 4th article of the treaty of June 3, 1825, it is agreed that a smith shall be supported out of the one thousand dollars provided in the 4th article for agricultural purposes."

Following the ratification of the treaty, steps were taken to survey the west line of the lands ceded, as agreed upon in article 3. The plat and field notes of the original survey of the Kansas lands, however, could not be located, and it became too late in the season to proceed with the matter, and it was therefore deferred until the next year. The following year (1847), because of the uncertainty as to the quantity of timber on the reserved lands, the Commissioner of Indian Affairs determined to inquire into that matter first, as, if it should develop that the timber was insufficient, the survey of the said west line would be an unnecessary formality and a useless expense. Accordingly, in May 1847, the Commissioner of Indian Affairs instructed Superintendent of Indian Affairs Harvey to have the country explored and the matter determined and, if necessary, to select a suitable country for the tribe in lieu of the reserved lands. In accordance with these instructions Agent Cummins was directed to make the necessary explorations. On July 17, 1847, Major Cummins reported the results of his examination. He stated that, accompanied by six Kansas Indians (three of whom were chiefs), he went as far west of the Grand Point (located just above the junction of the Republican and Smoky Hill Rivers) as it was safe to do because of the presence in the country of hostile Comanches; that he did not go as far west as he had intended or wished, but that he went far enough "to become perfectly satisfied" that there was no timber on the waters of the Kansas River west of the Grand Point suitable for agricultural purposes except cottonwood; that the Kansas Indians who were with him and who were thoroughly familiar with the country assured him that there was no timber west of Grand Point except cottonwood and some very short scattering timber and that they could not live on the Kansas River or its waters anywhere west of Grand Point. He further reported that he had examined the country west of the Shawnee lands and had satisfied himself that the timber thereon was insufficient for agricultural purposes; that he had examined the country known as "Council Grove" and found it to be "a beautiful and good country" and to contain "a sufficient quantity of good timber to answer the Kansas Indians for all agri-

cultural purposes", thought it to be the most suitable location that could be made for the Kansas Indians, recommended a certain described tract 20 miles square as a suitable location for the future home of the Kansas, and stated that the Kansas Indians who were with him expressed a great desire to be located there. The Superintendent of Indian Affairs thereupon approved Major Cummins' selection of a new reservation for the Kansas tribes and recommended its approval by higher authority. Upon the recommendation of the Secretary of War, the President subsequently, on March 5, 1847, confirmed the selection.

In the fall of 1848, the plaintiff Indians were removed to the Council Grove reservation where they remained until 1873, when they went upon a new reservation in Indian Territory.

The Council Grove Reservation, as finally surveyed and set apart in 1856, contained 255,854.49 acres.

XIV. By the Act of March 3, 1853 (10 Stat. 226, 238), the President was "authorized to enter into negotiation with the Indian tribes west of the States of Missouri and Iowa for the purpose of securing the assent of said tribes to the settlement of the citizens of the United States upon the lands claimed by said Indians, and for the purpose of extinguishing the title of said Indian tribes in whole or in part to said lands." Under the authority of this act negotiations were entered into with the plaintiff tribe and a treaty was entered into between them and the United States on October 5, 1859. The material provisions of this treaty, as amended and ratified by the Senate on June 27, 1860, and accepted by the plaintiff tribe on October 4, 1860 (12 Stat. 1111) are:

"ARTICLE I. The Kansas Indians having now more lands than are necessary for their occupation and use, and being desirous of promoting settled habits of industry amongst themselves by abolishing the tenure in common by which they now hold their lands, and by assigning limited quantities thereof in severalty to the members of their tribe, owning an interest in their present reservation, to be cultivated and improved for their individual use and benefit, it is agreed and stipulated that that portion of their reservation commencing at the southwest corner of said reservation, thence north with the west boundary nine miles, hence east fourteen miles, thence south nine miles, thence west with the south boundary fourteen miles to the place of beginning, shall be set apart and retained by them for said purposes, and that out of the same there shall be assigned to each head of a family not exceeding forty acres, and to each member thereof not exceeding forty acres, and to each single male person of the age of twenty-one years and upwards not exceeding forty acres of land, to include in every case, as far as practicable, a reasonable proportion of timber. One hundred and sixty acres of said retained lands, in a suitable locality, shall also be set apart and appropriated to the occupancy and use of the agency of said Indians, and one hundred and sixty acres of said lands shall also be reserved for the establishment of a school for the education of the youth of the tribe.

\* \* \* \* \*  
 "ARTICLE IV. For the purpose of procuring the means of comfortably establishing the Kansas tribe of Indians upon the lands to

be assigned to them in severalty, by building them houses, and by furnishing them with agricultural implements, stock animals, and other necessary aid and facilities for commencing agricultural pursuits under favorable circumstances, the lands embraced in that portion not stipulated to be retained and divided as aforesaid shall be sold, under the direction of the Secretary of the Interior, in parcels not exceeding one hundred and sixty acres each, to the highest bidder for cash, the sale to be made upon sealed proposals to be duly invited by public advertisement, and should any of the tracts so to be sold have upon them improvements of any kind, which were made by or for the Indians, or for government purposes, the proposals therefor must state the price for both the land and improvements, and if, after assigning to all the members of the tribe entitled thereto, their proportions in severalty, there shall remain a surplus of that portion of the reservation retained for that purpose, outside of the exterior boundary line of the lands assigned in severalty, the Secretary of the Interior shall be authorized and empowered, whenever he shall think proper, to cause such surplus to be sold in the same manner as the other lands to be so disposed of, and the proceeds thereof to be expended for their benefit in such manner as the Secretary of the Interior may deem proper: *Provided*, That all those who had in good faith settled and made improvements upon said reservation prior to the second day of December, eighteen hundred and fifty-six (that being the day when the survey was certified by the agent of the tribe), and who would have been entitled to enter their improvements under any general or special preemption law (had their improvements not fallen within the reservation), such settlers shall be permitted to enter their improvements at the sum of one dollar and seventy-five cents per acre, in cash; said entries to be made in legal subdivisions and in such quantities as the preemption laws under which they may claim entitle them to locate; payments to be made on or before a day to be named by the Secretary of the Interior: *And provided further*, That all those who had in good faith settled upon that portion of the reservation retained by this treaty for the future homes of the Kansas tribe of Indians, and had made *bona fide* improvements thereon prior to the second day of December, eighteen hundred and fifty-six, aforesaid, and who would have been entitled to enter their lands, under the general preemption law, at one dollar and twenty-five cents per acre, had their improvements not fallen upon the reservation, such settlers shall be entitled to receive a fair compensation for their improvements, to be ascertained by the Commissioner of Indian Affairs, under the direction of the Secretary of the Interior; such compensation to be paid out of the proceeds of the lands sold in trust for said tribe of Indians. All questions growing out of this amendment, and rights claimed in consequence thereof, shall be determined by the Commissioner of Indian Affairs, to be approved by the Secretary of the Interior. And in all cases where licensed traders, or others lawfully there, may have made improvements upon said reservation, the Secretary of the Interior shall have power to adjust the claims of each upon fair and equitable terms, they paying a fair value for the lands awarded to such persons, and shall cause patents to issue in pursuance of such award.

“ARTICLE V. The Kansas tribe of Indians being anxious to relieve themselves from the burden of their *present* liabilities, and it being very essential to their welfare that they shall be enabled to commence their new mode of life and pursuits free from the annoyance and embarrassment thereof, or which may be occasioned thereby, it is agreed that the same shall be liquidated and paid out of the fund arising from the sale of their surplus lands so far as found valid and just, if they have the means, on an examination thereof, to be made by their agent and the superintendent of Indian affairs for the central superintendency, subject to revision and confirmation by the Secretary of the Interior.

“ARTICLE VI. Should the proceeds of the surplus lands of the Kansas tribe of Indians not prove to be sufficient to carry out the purposes and stipulations of this agreement, and some further aid be necessary, from time to time, to enable said Indians to sustain themselves successfully in agricultural and other industrial pursuits, such additional means may be taken, so far as may be necessary, from the moneys due and belonging to them under the provisions of former treaties, and so much thereof as may be required to furnish further aid as aforesaid shall be applied in such manner, under the direction of the Secretary of the Interior, as he shall consider best calculated to promote and advance their improvement and welfare.

“ARTICLE VII. In order to render unnecessary any further treaty engagements or arrangements hereafter with the United States, it is hereby agreed and stipulated that the President, with the assent of Congress, shall have full power to modify or change any of the provisions of former treaties with the Kansas tribes of Indians in such manner and to whatever extent he may judge to be necessary and expedient for their welfare and best interest.

“ARTICLE VIII. All the expenses connected with and incident to the making of this agreement, and the carrying out of its provisions, shall be defrayed out of the funds of the Kansas tribe of Indians.”

XV. On March 13, 1862, a further treaty, amendatory of the foregoing treaty, was entered into and submitted to the Senate of the United States for its ratification. That body ratified the treaty on February 6, 1863, with certain amendments, which amendments were assented to by the Kansas Tribe on February 26, 1863 (12 Stat. 1221). The material portions of this treaty, as amended, are as follows:

“ARTICLE 1. That the said treaty and the amendment thereof be further amended so as to provide that a fair and reasonable value of the improvements made by persons who settled on the diminished reserve of said Kansas Indians between the second day of December A. D. 1856, and the fifth day of October A. D. 1859, shall be ascertained by the Secretary of the Interior, and certificates of indebtedness by said tribe shall be issued by him to each of such persons for an amount equal to the appraisement of his or her improvements, as aforesaid, not exceeding in the aggregate the sum of fifteen thousand dollars; and that like certificates shall be issued to the class of persons who settled on said diminished reservation prior to the second day of December A. D. 1856, for the amounts of the respective claims as provided for and ascertained under the provisions of the amendment of said treaty, not exceeding in the aggregate the sum of fourteen thousand four hundred and twenty-one dollars; and that like

certificates be issued to the owners of the same for the amounts of claims which have been examined and approved by the agent and superintendent, and revised and confirmed by the Secretary of the Interior, under the provisions of the 5th article of said treaty, not exceeding in the aggregate the sum of thirty-six thousand three hundred and ninety-four dollars and forty-seven cents, and that all such certificates shall be receivable as cash, to the amount for which they may be issued, in payment for lands purchased or entered on that part of the first assigned reservation outside of said diminished reservation.

"ARTICLE 2. The Kansas Tribe of Indians, being desirous of making a suitable expression of the obligations the said tribe are under to Thomas S. Huffaker, for the many services rendered by said Huffaker as missionary, teacher, and friendly counsellor of said tribe of Indians, hereby authorize and request the Secretary of the Interior to convey to the said Thomas S. Huffaker the half section of land on which he has resided, and improved and cultivated since the year A. D. 1851, it being the south half of section eleven (11), in township numbered sixteen (16) south, range numbered eight (8) east, of the sixth principal meridian, Kansas, on the payment by said Huffaker of the appraised value of said lands, at a rate not less than one dollar and seventy-five cents per acre."

XVI. The Secretary of the Interior under the authority of the foregoing treaty, in the years 1863 and 1864, issued to settlers entitled thereto, certificates of indebtedness for improvements made by them in the total sum of \$27,691.82. These certificates were known as "class 2 scrip." He likewise issued under the same authority, in the years 1862 and 1863, certificates of indebtedness to claimants with approved claims, the sum of \$39,832.56, being \$3,438.09 in excess of the amount authorized in the treaty. These certificates were known as "class 3 scrip."

The Secretary of the Interior, in the year 1862, before the treaty of that year was entered into, issued to one Robert S. Stevens certificates of indebtedness in the total sum of \$87,133.45, in payment of his account for improvements made by him under contract for the Kansas Indians on the diminished reserve. The Secretary of the Interior was without authority to issue these certificates, which were known as "class 1 scrip."

The three classes of scrip above mentioned were issued to draw interest at the rate of six percent per annum, although the treaty under the provisions of which the class 2 and class 3 scrip were issued is silent as to the payment of interest.

XVII. Sales of lands under the fourth article of the treaty of October 5, 1859, known as "trust" lands, commenced in 1864. Up to May 8, 1872, a total of 37,906.76 acres were sold, for which was received the total sum of \$53,982.23—\$53,944.58 being in scrip and \$37.65 in cash.

By the act of May 8, 1872 (17 Stat. 85), provision was made for the appraisal and sale under stated conditions of the "trust" lands, and, if the Kansas Indians desired to sell their diminished reserve and remove from the State of Kansas and should signify such desire to the President, for the appraisal and sale under stated conditions of the lands in the diminished reserve. The Kansas Indians assented

to the provisions of this act on June 24, 1872, whereupon both the trust lands and the lands of the diminished reserve were appraised and offered for sale, in accordance with the provisions of the said act. In the year 1873 a total of 1,838.72 acres of the diminished reserve were sold for the sum of \$9,099.99.

Because of the fact that the appraisals were too high no further sales were made under this act. In the act of June 23, 1874 (18 Stats. 272), Congress, after stating that the appraisements were so high that neither settlers nor purchasers were able to pay them, provided for the sale of the lands to settlers at the appraised values in installments and provided for the disposition of the net proceeds after deducting expenses and paying outstanding indebtedness of the tribe, principal and interest. No sales were made under this act, and the Congress, by the act of July 5, 1876 (19 Stats. 74), after again stating that the appraisements were so high that neither settlers nor purchasers were able to pay them, modified the aforesaid acts by requiring in some instances smaller cash payments and extending the time within which the balances should be paid. Section 3 provided "that the Secretary of the Interior shall inquire into the correctness of the appraisal of these lands; and if he be satisfied that they have been appraised at more than their present cash value, he may appoint a new commission of three persons to re-appraise the same." By section 5 of this act it was provided that the net proceeds arising from sales, "after defraying the expenses of appraisal and sale \* \* \* and also the outstanding indebtedness, principal and interest, of said Kansas Tribe of Indians, which has heretofore been incurred under treaty stipulations", should be used in establishing the tribe in its new home in the Indian territory, the residue to be placed in the Treasury to the credit of the tribe, and that no proceedings should be taken under the act until the Kansas Indians should file an assent thereto with the Secretary of the Interior. The tribe assented to the provisions of the act on May 31, 1877, provided that the appraisers should be nominated in a stated manner. This condition was assented to by the Secretary of the Interior, whereupon the lands were re-appraised at a reduced value.

By the act of March 16, 1880 (21 Stats. 68), certain modifications in the manner of making payment for lands sold were provided for.

Under the provisions of this treaty of October 5, 1859, and the acts of Congress referred to, the entire Council Grove Reservation, consisting of 175,444.89 acres of "trust" lands and 80,409.60 acres in the diminished reserve, was disposed of. Payment was made for the lands in cash and scrip of classes 2 and 3, the payments in scrip and interest thereon amounting to \$54,065.57. The cash received, after deducting expenses and making certain adjustments, was deposited in the Treasury to the credit of the Kansas Tribe in the amount of \$404,010.23.

XVIII. Of the total amount of class 2 scrip issued, \$26,205.46, together with interest thereon in the sum of \$1,345.05, was received in payment of sales of lands of the tribe. The amount of \$703.95, with interest amounting to \$847.71, was redeemed in cash out of the funds of the tribe, and scrip of the face value of \$773.19 was never presented for redemption.

Of the total amount of \$39,832.56 of class 3 scrip issued, \$23,691.57, and interest thereon amounting to \$2,822.99, was received in payment for tribal lands sold as aforesaid. Scrip of this class to the amount of \$15,832.16, with interest thereon to the amount of \$19,831.47, was redeemed in cash out of funds of the tribe. Scrip of this class to the amount of \$308.83 was never presented for redemption.

Of the class 1, or Stevens scrip, issued in the amount of \$87,133.45, the sum of \$83,783.45 principal and \$104,585.42 interest had been redeemed in cash out of the funds of the plaintiff at the time of the report of the Kaw Commission, referred to in the succeeding finding, and \$3,350 of such scrip was outstanding. Under the act of March 3, 1909 (35 Stat. 792), \$1,500 of the plaintiff's funds were used to redeem \$750 of this outstanding scrip and interest thereon of \$750. The total redemptions in cash of scrip of all classes was \$227,084.18, of which \$101,069.58 was on account of principal and \$126,014.60 on account of interest.

XIX. By the act of July 1, 1902 (32 Stat. 636), a certain agreement proposed by the Kansas Tribe was accepted, ratified, and confirmed. Section 12 of the act made provision for the appointment of a commission to investigate and settle "all claims, of whatever nature, which said Kansas or Kaw tribe of Indians may have or claim to have against the United States" and for the payment of the amount found due by the Commission. The Commission so provided was duly appointed and proceeded to investigate the claims presented by plaintiff against the United States. The following specific claims growing out of the various certificates of indebtedness or scrip transactions were made:

For interest wrongfully paid on the Stevens scrip-----	\$88,366.55
Overissue of scrip to Stevens-----	1,214.60
For interest wrongfully paid on improvement certificates (class 2) estimated-----	51,481.12
Overissue of improvement certificates (class 2)-----	13,480.03
For interest wrongfully paid on indebtedness of the tribe (class 3), estimated-----	47,799.00
Overissue of such certificates-----	3,438.50
For reimbursement of trust fund, erroneously diverted by act of Congress approved June 25, 1888 (25 Stat. L. 222)-----	55,000.00
For interest on same, estimated-----	38,231.20
Total-----	309,011.00

The Commission, upon investigation and consideration of these specific claims and others made in a general way, found that the Kansas Tribe of Indians was entitled to \$155,976.88 in satisfaction of its claims, as follows:

Interest paid on the different classes of scrip-----	\$129,432.64
Overpayment to Stevens-----	1,714.60
Difference in interest on \$65,000 diverted from trust funds-----	30,704.21
On account of defalcation of Receiver Lines-----	59.60
Improperly carried to surplus funds and not reappropriated-----	25.00
Total-----	161,936.05
Balance due the United States, as shown above-----	5,959.17
Balance due the Indians-----	155,976.88

The award of the commission was accepted by the tribe and submitted to the Congress with a recommendation that the amount found due be appropriated. By the act of March 3, 1905 (33 Stats.

1048, 1079), the amount awarded by the commission was appropriated with the condition that no part of it should be paid "until said Indians, in general council, lawfully convened for that purpose, shall execute and deliver to the United States a general release of all claims and demands of every name and nature against the United States." The required release was executed at a general council of the tribe held for the purpose on April 22, 1905. The amount thus appropriated was credited to the Kansas Tribe under the "Kansas consolidated fund."

XX. By the act of July 15, 1870 (16 Stats. 335, 362), it was provided that whenever the Great and Little Osage Indians should agree thereto it should be the duty of the President to remove them from the State of Kansas to lands in the Indian Territory, to consist of a tract of land in compact form equal in quantity to 160 acres for each member of the tribe, the lands to be paid for out of the proceeds of the sales of their lands in Kansas. In accordance with this act the Osages in the fall of 1870 selected a tract of land in the Indian Territory of approximately 560,000 acres within that part of the territory of the Cherokee Nation lying to the west of the 96th meridian, upon which the United States in the treaty with the Cherokees of July 19, 1866 (14 Stats. 799), had acquired the right to settle friendly Indians. This selection was approved by the Department. Subsequently, upon survey, the tract was found to lie in part to the east of the 96th meridian, and the Cherokees refused to sell. Thereupon commissioners were appointed by the Secretary of the Interior to secure, if possible, the assent of the Cherokees to the Osages remaining on the entire tract selected; otherwise to select a new reservation for them.

On January 5, 1872, the commissioners appointed as aforesaid to compose the difficulty arising out of the selection of the Osage Reservation entered into an agreement with that tribe, whereunder the Osages agreed to accept, in lieu of the lands first selected by them which lay to the east of the 96th meridian, a tract which included that part of the tract first selected by them which lay to the west of the 96th meridian and additional lands adjoining on the west. This agreement further provided that—

"The Kansas or Kaw tribe of Indians, now in the State of Kansas, shall have the right to settle on the tract of land above described, and ceded to the Osage tribe of Indians; and in case the Osage and Kansas tribes of Indians cannot agree upon their respective locations or upon the price to be paid for the lands ceded to the Kansas Indians, the President of the United States shall determine these matters for them."

The lieu reservation for the Osage Indians thus agreed upon was confirmed and set apart to them by the act of June 5, 1872 (17 Stat. 228). The act defined the boundaries of the tract as follows: "Bounded on the east by the ninety-sixth meridian, on the south and west by the north line of the Creek country and the main channel of the Arkansas River, and on the north by the south line of the State of Kansas." The act contained the provision:

"That said Great and Little Osage tribe of Indians shall permit the settlement within the limits of said tract of land (of) the Kansas tribe of Indians, the lands so settled and occupied by said Kansas Indians, not exceeding one hundred and sixty acres for each member of said tribe, to be paid for by said Kansas tribe of Indians out of

the proceeds of the sales of their lands in Kansas, at a price not exceeding that paid by the Great and Little Osage Indians to the Cherokee nation of Indians."

A delegation of the plaintiff tribe accompanied by a commission appointed by the Commissioner of Indian Affairs visited the Osage Reservation in Indian Territory in August and September 1872 and made a selection of a tract of land satisfactory to the Kansas Indians in the northwest corner of the reservation, estimated as containing 102,400 acres. The plaintiff tribe removed to the reservation thus selected in 1873, and thereafter occupied and lived upon lands so selected and set apart to them. They remained a separate and distinct tribe, with a separate and distinct agency established and maintained for them, although such agency was at various times under the jurisdiction of the Osage, Ponca, and Pawnee Agencies.

XXI. By the act of March 3, 1873 (17 Stats. 530, 538), the Secretary of the Treasury was authorized to transfer from the proceeds of sales of Osage lands in Kansas and place to the credit of the Cherokee Indians upon the books of the Treasury the sum of \$1,650,600, "or so much thereof as may be necessary", to pay for lands purchased by the Osages from the Cherokees. Under the terms of this act, a total of \$1,099,137.41 of Osage funds was transferred to the credit of the Cherokee Nation upon the books of the Treasury, this sum including the value of that portion of the tract upon which has been settled the Kansas Tribe, to wit, \$70,096.12. Subsequently, under the act of June 16, 1880 (21 Stats. 291, 292), a general settlement was had between the United States and the Osage Nation, under which the Osages were credited on May 27, 1881, with a sum which included the \$70,096.12 on account of the lands secured to the Kansas Indians. Payment for the lands in the Osage Reservation secured to the Kansas Indians as aforesaid was made by the said Kansas Indians on October 27, 1881, by reimbursement to the United States of said sum of \$70,096.12 out of funds in the Treasury to the credit of the Kansas Tribe arising from the sales of tribal lands in Kansas.

XXII. In compliance with the provisions of the act of March 3, 1883 (22 Stat. 603), the Cherokee Nation, on June 14, 1883, executed its deed conveying to the United States in trust for the use of the Osage and Kansas Indians the 1,570,196.3 acres of land embraced in the lieu reservation confirmed and set apart to the Osage Tribes by the act of June 5, 1872, *supra*. The material recitations of the deed are:

"WHEREAS by the Sixteenth Article of the treaty concluded July nineteenth, A. D. eighteen hundred and sixty-six, between said Cherokee Nation and the United States, the said United States acquired the right 'to settle friendly Indians on any part of the Cherokee country west of the ninety-sixth degree' of west longitude under certain limitations therein mentioned; and

"WHEREAS under authority of an act of Congress approved June fifth, A. D. eighteen hundred and seventy-two, a certain tract of said country was set apart for the Great and Little Osage tribe of Indians, with a proviso that said Great and Little Osage tribe shall permit the settlement within the limits of said tract of the Kansas tribe of Indians; and

"WHEREAS by virtue of a provision in the act of Congress of March third, eighteen hundred and seventy-three, there has been transferred

from the proceeds of sale of Osage lands in Kansas and placed to the credit of said Cherokee Nation the sum of one million ninety-nine thousand one hundred and thirty-seven and forty-one hundredths dollars (\$1,099,137.41) in payment for said tract of land; and

"WHEREAS by an act of Congress approved March third, A. D. eighteen hundred and eighty-three, three hundred thousand dollars (\$300,000) was appropriated 'to be paid into the treasury of the Cherokee Nation out of funds due under appraisement for Cherokee lands west of the Arkansas River'; provided, 'That the Cherokee Nation through its proper authorities shall execute conveyances satisfactory to the Secretary of the Interior to the United States in trust only for the benefit of the Pawnees, Poncas, Nez Perces, Otoes and Missourias, and Osages now occupying said tract as they respectively occupy the same, before the payment of said sum of money'; now,

"WHEREFORE by authority of an act of the National Council of the Cherokee Nation aforesaid, approved May eighth, eighteen hundred and eighty-three, \* \* \* said party of the first part, by the aforesaid principal chief and delegates, and in consideration of the payment of the sum of money mentioned in the act of March third, eighteen hundred and eighty-three, aforesaid, as due under appraisement for Cherokee lands west of the Arkansas River, and of the further sum paid under the act of March third, eighteen hundred and seventy-three, as aforesaid, does by these presents grant, bargain, sell, remise, release, relinquish, and confirm unto the said party of the second part, forever, in trust nevertheless and for the use and benefit of the said Osage and Kansas Indians, all those certain tracts of land lying and being in the Indian Territory, embracing the following townships and fractional townships north, and east of the Indian Meridian, the fractional townships being on the left bank of the Arkansas River: \* \* \*; according to a plat of lands annexed hereto marked 'A' and made a part of this conveyance; containing in all one million five hundred and seventy thousand one hundred and ninety-six and thirty hundredths acres (1,570,196.30) hereby granted. Under the act aforesaid, there has been set apart for the Kansas Indians, as provided by said act, the following numbered townships and fractional townships, being a part of the lands above described, and indicated upon the before-mentioned plat: \* \* \*; containing an area of 100,137.32 acres, which aforesaid lands were paid for by the Osages to the Cherokees, and the Kansas Indians have paid for that portion assigned to them by proper transfer of the funds arising from the sale of their lands in Kansas \* \* \*"

XXIII. Section 11 of the act of June 28, 1898, 30 Stat. 495, provided that "all oil, coal, asphalt, and mineral deposits in the lands of any tribe are reserved to such tribe, and no allotment of such lands shall carry the title to such oil, coal, asphalt, or mineral deposits; and all town sites shall also be reserved to the several tribes."

During the period from 1890 to 1928, the Osage Tribes received on account of oil and gas royalties, oil leases, bonus, and interest the sum of \$233,772,964.72. The plaintiff tribe received no revenue from those sources.

During the same period the plaintiff Indians received from the sale of town sites the sum of \$5,973.48, while the Osage Indians received from the same source the sum of \$419,493.09.

The plaintiff received from grazing leases during this period the sum of \$133,181.22, the Osages received the sum of \$1,386,967.32.

The record does not show that any of the revenues received by the Osage Indians from the sources stated were derived from, or produced on, the lands of the plaintiff tribe as described in the Cherokee deed of conveyance of June 14, 1883.

During the period from 1890 to 1928, the plaintiff tribe averaged approximately 11.764015 percent of the combined population of the plaintiff and the Osage Tribes.

XXIV. Under the provisions of the act of July 1, 1902 (32 Stat. 636), 99,644 acres of the 100,137.32 acres of land set apart to the plaintiff were allotted in severalty to 247 members of the tribe; 160 acres were ceded to the United States in trust for school purposes; 80 acres were reserved as a town site; 20 acres were reserved for cemetery purposes, and the surplus remaining was disposed of under the provisions of the act of March 3, 1909 (35 Stat. 778).

XXV. The amendatory jurisdictional act by section 3 provides:

"In said suit, the Court shall also hear, examine, consider, and adjudicate any claims which the United States may have against said Kansas or Kaw Tribe of Indians, but any payment, including gratuities, which may have been made by the United States, upon any claims against the United States, shall not operate as an estoppel, but may be pleaded as an offset in such suit."

During the period from June 3, 1825, to June 30, 1928, there was expended out of gratuity appropriations by the Congress for or on behalf of the Kansas Indians a total amount of \$449,236.33, for the following purposes in the amounts stated:

Clothing	-----	\$7,466.83
Provisions	-----	69,798.95
Agricultural implements and equipment	-----	3,694.68
Work and stock animals	-----	\$2,565.24
Feed and care of livestock	-----	2,453.60
Hardware	-----	2,280.39
Medical attention	-----	37,602.60
Indian dwellings	-----	859.00
Household equipment	-----	1,983.69
Fuel	-----	2,925.42
Removal of Indians	-----	805.76
Pay of mechanics	-----	1,102.75
Pay of miscellaneous employees	-----	38,699.06
Transportation, etc., of supplies	-----	8,483.55
Agricultural aid	-----	3,116.96
Miscellaneous agency expenses	-----	9,481.68
Agency buildings and repairs	-----	5,972.64
Saw and grist mills	-----	1,469.16
Education	-----	170,697.18
Depredations	-----	1,167.00
Expenses of surveying and allotting	-----	2,168.50
Expenses of delegations	-----	2,734.65
Attorneys' fees	-----	488.00
Pay of interpreters	-----	17,207.69
Pay of agents	-----	31,188.31
Pay of Indian police	-----	4,688.34
Pay of farmers	-----	9,234.12
Presents	-----	1,691.19
Pay of blacksmith	-----	5,672.88
Blacksmith equipment	-----	84.90
Recording deeds	-----	506.35
Expenses of appraising lands	-----	945.35
Total	-----	449,236.33

From 1874 to 1903 the Kansas or Kaw Agency was under the jurisdiction of the Osage Agency; from 1913 to 1919 it was under the jurisdiction of the Ponca Agency; and from 1920 to 1928 it was under the jurisdiction of the Pawnee Agency. During this period from 1874 to June 30, 1928, there was expended for the joint benefit of the tribes attached to these agencies out of gratuity appropriations made by the Congress the total sum of \$72,159.51 for the following purposes in the amounts stated:

Provisions	-----	\$180.07
Fuel	-----	605.80
Pay of miscellaneous employees	-----	152.90
Transportation, etc., of supplies	-----	2,260.66
Agricultural aid	-----	179.25
Miscellaneous agency expenses	-----	7,942.48
Agency buildings and repairs	-----	2,235.78
Education	-----	19,875.38
Pay of interpreters	-----	1,434.49
Pay of agents	-----	36,842.20
Pay of Indian police	-----	450.50
Total	-----	72,159.51

The amount chargeable to the plaintiff tribe out of these expenditures, calculated on a percentage of population basis, is \$12,809.32, making the total amount of gratuity expenditures \$462,045.65.

#### CONCLUSION OF LAW

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that the plaintiff, upon the petition, is entitled to recover the sum of \$102,524.65.

The defendant on its counterclaim is entitled to an offset against the claim of plaintiff, gratuity disbursements amounting to \$462,045.65.

The plaintiff is therefore not entitled to a judgment against the United States.

#### OPINION

WILLIAMS, *Judge*, delivered the opinion of the court:

Congress by the act of March 3, 1925 (43 Stat. 1133), conferred jurisdiction on the court, "notwithstanding the lapse of time or statutes of limitations, to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims which said Kansas or Kaw Tribe of Indians may have or claim to have against the United States, growing out of or arising under any treaty or agreement between the United States and the Kansas or Kaw Tribe of Indians, or arising under or growing out of any Act of Congress in relation to Indian affairs, 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; \* \* \*"

The act of March 3, 1925, was amended and reenacted by the act of February 23, 1929 (45 Stat. 1258). The amendatory act is set out in full in finding II and its detailed provisions need not be restated here. Under the authority of this act the plaintiff tribe, on April 5, 1930, filed its second amended petition upon which the case is heard.

The plaintiff Indians are a branch of the Osage division of the Siouian Indian stock. Originally their home was on the Ohio and Wabash Rivers, where they, together with the Quopaw, Omaha, Ponca, and Osage formed one tribe. Long before the coming of the white man this group had become split into five separate and distinct tribes and had migrated from their ancient home to various points along the Mississippi and Missouri Rivers, plaintiff's villages being on the Missouri. The plaintiff tribe was subsequently driven from their villages on the Missouri River by the Iowas and Sacs, and at the time the treaty of 1825 was entered into was living in two villages on the Kansas River. The tribe at that time, and from the time it was first known to the white man, claimed and hunted over a vast region drained by the Kansas River and its tributaries, as is shown by numerous maps of the period 1672 to 1819. They were at that time "blanket" Indians, and like all Indians of that class, were illiterate and unskilled in the arts of civilization. Very few of them could speak or understand the English language, they had no knowledge or understanding of the units of measure of land, and understood the description of a tract of land only in the terms of its natural boundaries. They depended almost entirely upon hunting, trapping, and fishing for their support and maintenance. Their chief source of supply for the necessities of life were the herds of buffalo which abounded in great numbers in the territory occupied by them, especially the western portion of the area.

The petition sets forth eight separate and distinct claims or causes of action upon which a judgment in the sum of \$97,301,230.93 is prayed. In the plaintiff's suggested findings of fact the demand is grouped into nine separate items or claims, and the demand is reduced to \$47,530,398.65. The additional claim is based on the demand for an accounting made in the petition.

The first five claims asserted in the petition arise under the treaty of June 3, 1825 (7 Stat. 244) and are:

1. The alleged inadequacy of the consideration for the lands ceded to the United States in the first article of the treaty. The amount claimed in the petition is \$29,878,223.45, which amount is reduced to \$5,000,000.00 in the plaintiff's suggested findings of fact.

2. The alleged failure of the United States to furnish and provide a blacksmith as stipulated in article 4. The amount claimed in the petition is \$231,000.00, which sum is reduced to \$63,558.79 in the suggested findings of fact.

3. Claim for reimbursement of the sum of \$9,749.20 expended out of plaintiff's funds for "payment for farmers", which amount it is asserted the United States was obligated to pay under the fourth article of the treaty.

4. This claim arises under article 5 of the treaty and is predicated on the alleged failure of the United States to lay off and sell 36 sections of good land on the Big Blue River for the purpose of raising a fund to be applied to the support of schools for the Kansas children within the Kansas Nation. In the petition \$300,000 is claimed on this account. In the requested findings of fact the amount is reduced to \$129,524.65, with interest at the rate of 5 percent per annum to the date of filing the petition, or a total sum of \$297,906.70.

5. This claim is for the value of lands in addition to those ceded to the United States in the first article of the treaty, which it is alleged the plaintiff tribe then had title to and occupied, and which the United States has since unjustly taken possession of and sold or otherwise disposed of. The amount claimed on this item in the petition is \$12,500,000.00. In the suggested findings of fact and brief the claim is reduced to \$2,000,000.00.

The sixth and seventh claims arise under the provisions of the treaty of January 14, 1846 (9 Stat. 842) and are:

6. This claim is based on the alleged inadequacy of the consideration for the lands ceded to the United States in the first article of the treaty. The amount claimed in the petition is \$2,298,000.00. In the brief the claim is reduced to \$2,150,000, and in the alternate, as the minimum amount due, to \$100,000, with interest at 5 percent from 1846 to 1928, or \$460,000.00.

7. This claim is for the difference between the value of the lands conditionally ceded to the United States in article 5 of the treaty and the value of the Council Grove Reservation, and is predicated on the contention that the conditional cession never became operative, and that title to the lands never became vested in the United States. The amount claimed in the petition is \$10,930,181.69, and in the plaintiff's suggested findings of fact \$10,762,307.00.

8. This claim, stated in the petition to be \$300,000.00, and increased in the plaintiff's suggested findings of fact to \$878,113.35, grows out of the sale of the Council Grove Reservation. It is alleged that the United States has failed to sell all the lands, has failed to devote all the proceeds of sales to the benefit of the plaintiff, and has unlawfully divested a large portion of such proceeds to unauthorized uses.

9. This claim is for a share in the lands, and revenues derived from the sale of town sites, grazing leases, oil royalties and leases, etc., in the Osage Reservation in Indian Territory established by the act of June 5, 1872, proportional with the numbers of the plaintiff tribe to the Osage Tribes. The amount claimed in the petition is \$40,863,825.79, which amount is reduced to \$26,368,763.61 in plaintiff's suggested findings of fact and brief.

The several claims will be considered in the order heretofore stated.

1. By article 1 of the treaty of 1825 the plaintiff ceded to the United States all the lands lying within the State of Missouri, to which the tribe then had title or claim, and also ceded and relinquished to the United States all other lands which plaintiff then occupied or to which they had title or claim, lying west of the State of Missouri, and within the following boundaries:

"Beginning at the entrance of the Kansas River into the Missouri River; from thence north to the northwest corner of the State of Missouri; from thence westwardly to the Nodewa River, thirty miles from its entrance into the Missouri; from thence to the entrance of the Big Nemahaw into the Missouri, and with that river to its source; from thence to the source of the Kansas River, leaving the old village of the Pania Republic to the West; from thence, on the ridge dividing the waters of the Kansas River from those of the Arkansas, to the western boundary of the State line of Missouri, and with that line, thirty miles, to the place of beginning."

It was provided in article 2 of the treaty that from the lands ceded in the first article a reservation should be made for the use of

the plaintiff of a tract of land "to begin twenty leagues up the Kansas River, and to include their village on that river; extending west thirty miles in width, through the lands ceded in the first Article" to be surveyed and marked under the direction of the President, and to such extent as he might deem necessary, and at the expense of the United States.

The excess of the lands ceded to the United States in the first article of the treaty over the lands reserved for the use of the plaintiff in the second article was approximately 20,000,000 acres. It is contended by the plaintiff that the consideration for the cession of this territory, provided in the treaty, was wholly inadequate, and that as the relation of guardian and ward was established between the United States and plaintiff by article 3 of the treaty of October 28, 1815 (7 Stat. 137), the United States could not legally or equitably receive from the plaintiff a cession of its lands without payment of the full, fair, and reasonable value of such lands.

Pursuant to the provisions of the Treaty of Ghent between the United States and Great Britain, ratified February 17, 1815 (8 Stat. 218), the United States entered into a treaty of peace and friendship with the plaintiff tribe on October 28, 1815. The purpose of the treaty as proclaimed in the preamble was the reestablishment of peace and friendship between the United States and the plaintiff tribe of Indians and placing them in every respect upon the same footing upon which they stood before the late war (the War of 1812) between the United States and Great Britain. Article 1 provided that every injury or act of hostility by one or either of the contracting parties against the other should be mutually forgiven and forgot. Article 2 provided that there should be perpetual peace and friendship between all the citizens of the United States and all the individuals composing the Kansas Tribe, and that the friendly relations existing between them before the war be renewed. Article 3 acknowledges the Kansas Indians "to be under the protection of the United States of America, and no other nation, power, or sovereign, whatsoever." It is this provision which the plaintiff says created the legal relationship of guardian and ward between the United States and the Kansas Indians. Similar stipulations are found in many treaties between the United States and Indian tribes, both before and after the date of the treaty under consideration. It is also found in Indian treaties with Great Britain prior to the separation of the United States from that country. In discussing the origin and meaning of this stipulation Chief Justice Marshall, in *Worcester v. The State of Georgia*, 6 Pet. 515, said:

"It was introduced into their treaties with Great Britain; and may probably be found in those with other European powers. Its origin may be traced to the nature of their connection with those powers; and its true meaning is discerned in their relative situation.

"The general law of European sovereigns, respecting their claims in America, limited the intercourse of Indians, in a great degree, to the particular potentate whose ultimate right of domain was acknowledged by the others. This was the general state of things in time of peace. It was sometimes changed in war. The consequence was that their supplies were derived chiefly from that nation, and their trade confined to it. Goods indispensable to their comfort, in

the shape of presents, were received from the same hand. What was of still more importance, the strong hand of government was interposed to restrain the disorderly and licentious from intrusions into their country, from encroachments on their lands, and from those acts of violence which were often attended by reciprocal murder. The Indians perceived in this protection only what was beneficial to themselves—an engagement to punish aggressions on them. It involved, practically, no claim to their lands, no dominion over their persons. It merely bound the nation to the British Crown, as a dependent ally, claiming the protection of a powerful friend and neighbor, and receiving the advantages of that protection without involving a surrender of their national character.

"This is the true meaning of the stipulation, and is undoubtedly the sense in which it was made. Neither the British Government nor the Cherokees ever understood it otherwise.

"The same stipulation entered into with the United States is undoubtedly to be construed in the same manner. They receive the Cherokee nation into their favor and protection. The Cherokees acknowledge themselves to be under the protection of the United States and of no other power. Protection does not imply the destruction of the protected."

The stipulation that the plaintiff tribe acknowledged itself to be under the United States and no other nation, in no way divested the plaintiff tribe of its sovereign power to enter into treaties with the United States on equal terms, or lessened its obligations under such treaties when made. The purpose and effect of the treaty was to place the contracting parties upon the same footing in every respect upon which they stood before the war with Great Britain. No contention is made that the relationship of guardian and ward existed between them before the war. Certainly this relationship could not be created by a treaty that merely reestablished their preexisting political relations. The contention that this was the effect of article 3 of the treaty is without merit.

The court cannot inquire into the adequacy of the consideration for the cession made under article 1 of the treaty of 1825. It may, as the plaintiff contends, have been wholly inadequate, but the court must accept the treaty as it was written by the parties, and can neither alter nor amend any of its provisions. *Sisseton and Wahpeton Indians v. United States*, 58 C. Cls. 302, *Creek Nation v. United States*, 63 C. Cls. 270. A treaty may be modified or abrogated by an act of Congress, but the power to make and unmake is essentially political and not judicial. *United States v. Old Settlers*, 148 U. S. 427; *Osage Tribe of Indians v. United States*, 66 C. Cls. 64.

The plaintiff is not entitled to recover on this item of the claim.

2. Claim for failure to provide blacksmith. Article 4 of the treaty of 1825 provided:

"The United States, immediately upon the ratification of this convention, or as soon thereafter as may be \* \* \* shall employ such persons to aid and instruct them in their agriculture, as the President of the United States may deem expedient; and shall provide and support a blacksmith for them."

The United States provided a blacksmith for the plaintiff under the provisions of this article practically all the time for the period

September 1, 1826, to June 30, 1846, except the period from September 30, 1844, to February 15, 1846, when no blacksmith was furnished, at a total cost of \$11,507.94. This amount was charged to the fulfillment of the treaty of 1825.

Article 7 of the treaty of April 30, 1846, provided:

"Should the Government of the United States be of opinion that the Kansas Indians are not entitled to a smith under the 4th article of the treaty of June 3, 1825, it is agreed that a smith shall be supported out of the one thousand dollars provided in the 4th [second] article for agricultural purposes."

Subsequent to the ratification of this treaty payments for blacksmiths were made out of appropriations made to fulfill the stipulations of the 1846 treaty to the extent of \$9,018.85, out of gratuity appropriations to the extent of \$5,672.88, and out of reimbursable appropriations to the extent of \$2,509.01, the latter amount being subsequently repaid to the United States out of funds of the plaintiff arising from the sales of its lands under the treaty of October 5, 1859. Except during short intervals, a blacksmith and an assistant blacksmith were provided for the plaintiff tribe during the period from July 1, 1846, to June 30, 1888. Since the latter date no blacksmith has been furnished.

The plaintiff contends that article 4 of the treaty of 1825 obligated the United States to supply it with a blacksmith continuously from the date of the ratification of the treaty to the date of the filing of its petition herein, as a part of the consideration for the lands ceded in the treaty. It is contended that the reasonable value to the plaintiff of such blacksmith was \$1,000 per year, and claim is made for \$52,030.93 for the period in which the United States failed to supply a blacksmith without expense to plaintiff in accordance with its obligations under the treaty of 1825. Claim is also made for the \$9,018.85 expended by the Government for a blacksmith out of appropriations made under the treaty of 1846, and for the \$2,509.01 expended for that purpose out of reimbursable appropriations later repaid out of plaintiff's funds, making a total claim for \$63,558.79.

In respect to the contention that the obligation of the United States, to supply the plaintiff tribe with a blacksmith under the treaty of 1825, was a continuing one without limitation of time, it is only necessary to point out that the provisions of a treaty between the United States and a nation or tribe of Indians may be modified or abrogated at any time by a subsequent treaty or by an act of Congress. Section 7 of the treaty of 1846 clearly modified the provisions of section 4 of the treaty of 1825 in respect to the employment of a blacksmith. Thereafter the blacksmith was to be supported "out of the one thousand dollars provided in the fourth [second] article for agricultural purposes"; should the Government of the United States be of the opinion plaintiff was not entitled to a smith under the fourth article of the treaty of 1825. The fact that no appropriations for the support of a blacksmith was made by Congress under the treaty of 1825, after the ratification of the treaty of 1846, shows that the Government was of the opinion that the plaintiff tribe was no longer entitled to a smith under article 4 of that treaty. The obligations of the United States, under the treaty of 1825, to provide at its own expense a blacksmith for the plaintiff terminated

upon the ratification of the treaty of 1846, and the claim, insofar as it relates to the period thereafter, cannot be maintained. The plaintiff is entitled to recover for the value of the services of a blacksmith during the period in which a smith was not provided, September 30, 1844, to February 15, 1846, the sum of \$1,000.00.

3. This claim, like the one just considered, arises and grows out of article 4 of the treaty of 1825. "The United States \* \* \* shall employ such persons to aid and instruct them in their agriculture, as the President of the United States may deem expedient." Under the stipulations of this article the United States expended in "pay for farmers" for the plaintiff during the period commencing in the year 1827 and ending with the fiscal year 1846, the sum of \$7,152.61. The amount of the payments is not in dispute and no claim is made that any additional amount is due for this period. The claim covers the period subsequent to the date of the treaty of 1846. By article 1 of this treaty the plaintiff ceded to the United States 2,000,000 acres of land. By article 2 it was provided that \$200,000 of the consideration for the cession should be funded at five percent, the interest of which should be paid to plaintiff annually. It was provided that one thousand dollars of the interest so accruing should be applied annually "for agricultural assistance, implements, etc.; but should the Kansas Indians at any time be so far advanced in agriculture as to render the expenditure for agricultural assistance unnecessary, then the one thousand dollars above provided for that purpose shall be paid them in money with the balance of their annuity."

Following the ratification of the treaty of 1846 the United States, up to and including the year 1882, expended out of moneys appropriated in fulfillment of the treaty, the sum of \$8,079.98 for "pay for farmers." During the same period it expended for the same purpose the sum of \$1,269.22 out of reimbursable appropriations, which amount was subsequently repaid out of funds belonging to plaintiff, and the further sum of \$9,234.12 out of gratuity appropriations. The claim is for the refund of the amount expended for "pay for farmers" out of appropriations made to fulfill the stipulations of the treaty of 1846, and the amount paid out of reimbursable appropriations subsequently repaid, amounting in all to \$9,749.20, on the ground that the Government was obligated to make such expenditures in behalf of the plaintiff under article 4 of the treaty of 1825. This claim is without merit. The provisions of article 2 of the treaty of 1846 so clearly abrogated and superseded the provisions of article 4 of the treaty of 1825 that further discussion of the matter is unnecessary. The plaintiff is not entitled to recover on this item of the claim.

4. This claim grows out of article 5 of the treaty of 1825, which provided that "thirty-six sections of good lands, on the Big Blue River, shall be laid out under the direction of the President of the United States, and be sold for the purposes of raising a fund, to be applied, under the direction of the President, to the support of schools for education of the Kansas children, within the Nation." Pursuant to this provision, lands measuring 22,545.94 acres were laid out and offered to the public for sale. In September 1837 sales were discontinued, only 14,629.19 acres of the land having been sold.

There is no evidence as to what became of the remaining 7,916.75 acres, but that they were not disposed of for the benefit of the plaintiff is admitted. The amount received by the Government for the lands sold was \$17,894.87, an average of \$1.22 per acre. This amount under the provisions of the act of January 9, 1837, was invested in interest-bearing State bonds. These bonds from time to time were exchanged for other interest-bearing bonds, and the interest accruing on such bonds was also from time to time applied in the purchase of other bonds until the passage of the act of April 1, 1880, at which time the par value of the bonds was \$27,174.41. The bonds were then disposed of at par, and the amount received was deposited in the United States Treasury, in lieu of investment, to the credit of the plaintiff, under the heading "Kansas school fund", upon which interest was paid at the rate of 5 percent per annum. This fund was subsequently, under the act of July 1, 1902, consolidated with other funds of the tribe and, with the exception of \$1,972.48, which remained in the fund as of June 30, 1928, was disbursed for the benefit of the plaintiff.

Of the income produced from the foregoing fund, \$54,276.44 was expended up to 1903 for the education of Kansas Indian children in accordance with treaty stipulations, and \$1,217.50 was transferred to the Kansas consolidated fund in 1903. The sum of \$26,027.71 was expended for the benefit of the plaintiff but for noneducational purposes.

The plaintiff contends that upon these facts it is entitled to recover the sum of \$297,906.70, calculated in this manner: The lands set apart for school purposes had a value of \$2.00 per acre in 1827 and should have been disposed of by the Government at that price, or \$45,091.88. Interest on this amount at 5 percent from 1827 to the creation of the Kansas consolidated fund in 1903 would be \$157,821.50. Deducting from this sum \$55,493.94, which plaintiff admits has been properly accounted for, leaves \$102,327.64 as the proper interest balance to be transferred to the Kansas consolidated fund in 1903. In addition to this amount there would have been \$27,197.01 more in the principal fund had the lands been disposed of at \$2.00 per acre, making a total of \$129,524.65 additional funds that should have been available for transfer to the Kansas consolidated fund in 1903, had the Government disposed of the lands in accordance with treaty stipulations. Interest on this sum at the rate of 5 percent from 1903 to the date of the filing of the petition would make the total amount claimed \$297,906.70.

There is no evidence in the record to support the contention that the thirty-six sections of land involved were worth \$2.00 per acre in 1827. There is no evidence whatever as to the value of the land, and the fact that the Government in twelve years was able to dispose of only 14,629.19 acres of the 22,545.94 acres laid out and offered for sale, and that at an average price of only \$1.22 per acre, strongly negatives the contention that their minimum value was \$2.00 per acre. Furthermore, there is nothing in the record to justify the conclusion that the 14,629.19 acres sold were not disposed of by the Government in accordance with the terms of the treaty and at the best available prices. The claim, therefore, that the plaintiff is

entitled to an accounting of the amount due under article 5 of the treaty of 1825, on the basis of a principal fund of \$45,091.88, must fall.

The plaintiff is entitled to recover the value of 7,916.75 acres which were not disposed of for the benefit of the tribe. While there is no evidence as to the value of these lands, we think recovery should be on the basis of \$1.22 per acre, the average price received for the lands which were sold, or a sum of \$9,658.44, with interest. Had these lands been disposed of in accordance with the stipulations of article 5 of the treaty, this additional amount would have been available for investment in interest-bearing securities under the act of January 9, 1837, *supra*, and with the accumulated interest thereon would have been available for transfer to the Kansas Consolidated Fund in 1903. The additional amount thus available for transfer to the Kansas Consolidated Fund would have been \$41,521.29. Allowing interest on this amount at 5 percent, as provided in the act of July 1, 1902, *supra*, from 1903 to the date of the petition in 1929, would make the total amount plaintiff is entitled to recover \$101,751.31.

Expenditures amounting to \$26,027.71 for noneducational purposes were improperly charged against the income arising from the principal fund. They were made, however, for the benefit of the tribe; and since the United States was under no treaty or other legal obligation to make such expenditures, they were gratuities to the tribe, and under section 3 of the jurisdictional act become offsets and balance the claim for the \$26,027.71 unlawfully charged against the income from the educational fund.

5. This claim is based on the contention that the plaintiff tribe, in addition to the lands described and ceded by article 1 of the treaty of 1825, occupied and had title to and claimed lands in Missouri, Iowa, Nebraska, Kansas, Colorado, Oklahoma, and Texas, embracing more than 10,000,000 acres which the United States has illegally and unjustly taken possession of and sold, or otherwise disposed of. The claim is for the value of the additional lands claimed.

The words of the cession in article 1 of the treaty are: "The Kansas do hereby cede to the United States all the lands lying within the State of Missouri, to which the said nation have title or claim; and do further cede and relinquish, to the said United States, all other lands which they now occupy, or to which they have title or claim, lying west of the said State of Missouri, and within the following boundaries." Then follows the description by metes and bounds of the lands ceded. We think these boundaries not only embraced the lands ceded to the United States by the plaintiff, but that they are also descriptive of all other lands lying west of the State of Missouri to which the plaintiff laid claim or had title. The plain intent and purpose of article 1 of the treaty was the extinguishment of the plaintiff's title to all lands then occupied or claimed by it, and that was the legal effect of the article. This was in pursuance of the then well-established policy of the Government to extinguish tribal Indian claims to indefinite tracts of land and to provide for them certain and defined reservations. This latter purpose was accomplished by article 2 of the treaty which created a reservation

for the use of the plaintiff out of the lands ceded, and defined such reservation by metes and bounds. The effect, therefore, of articles 1 and 2 of the treaty of 1825 was to extinguish plaintiff's title or claim to all lands, both in the State of Missouri and west of that State, except the retained reservation.

The plaintiff contends that the United States recognized plaintiff's title to unceded lands in southwestern Kansas in the treaty of August 16, 1825, in which the United States, for a consideration of \$800.00, obtained the right to survey and mark out a road "through any of the territory owned or claimed by said Kansas tribe or nation of Indians." This treaty, together with a similar one with the Osage Tribe of Indians, for a like consideration, made on August 10, 1825, was entered into pursuant to an act of Congress of March 3, 1825 (4 Stat. 100), which authorized the President to appoint commissioners "to mark a road from the western frontier of the State of Missouri, to the boundary line of the United States, in the direction of Santa Fe, of New Mexico", provided that the consent, by treaty, of the intervening tribes could be obtained. This act was passed some months before the treaty of June 3, 1825, was entered into, and at a time when the plaintiff tribe claimed a right and title in, and to, a large portion of the land over which the proposed road would run. The treaty of August 16, 1825, granting the United States the right to survey and mark out the road was made some months before the treaty of June 3, 1825, was ratified and confirmed. The same situation existed in reference to the Osage Treaty of June 2, 1825, in which that tribe had ceded to the United States all lands to which it had title or claim "lying within the State of Missouri and Territory of Arkansas, and to all lands lying west of the said State of Missouri and Territory of Arkansas, north and west of the Red River, south of the Kansas River, and east of a line to be drawn from the head sources of the Kansas, southwardly through the Rock Saline", except a certain defined reservation. The road was subsequently marked as far as the Arkansas River, but its exact location is not determinable from the record. There is no doubt, however, that as far as it was marked the road traversed lands ceded to the United States by the Osage Tribe, and the plaintiff tribe, in their respective treaties of June 2 and June 3, 1825. In these circumstances the treaty of August 16, 1825, cannot be held to be a recognition by the United States of the plaintiff's title to, or claim in, any lands other than those ceded in the treaty of June 3, 1825.

The defendant challenges the jurisdiction of the court to hear and adjudicate this claim on the ground that it does not arise or grow out of any treaty or agreement between the United States and the Kansas Tribe of Indians, or any act of Congress in relation to Indian affairs. Since the plaintiff is not entitled to recover on the merits of the claim, consideration of this contention becomes unnecessary and we prefer not to unduly lengthen the opinion with a discussion of the point raised. The plaintiff can not recover on this item of the claim.

6. By article 1 of the treaty of January 14, 1846, the plaintiff tribe ceded to the United States 2,000,000 acres on the east end of the reservation retained by it in the treaty of June 3, 1825, for a consideration of \$202,000. It is contended that this was an inadequate con-

sideration for the lands ceded, and that the United States, as guardian of the plaintiff tribe is obligated to pay as a minimum the fair value of the lands, which the petition asserts was \$1.25 per acre. The claim is for the difference between the alleged fair value of the lands and the amount paid for them under the stipulations of the treaty.

This claim is similar in every respect to claim no. 1 in which additional compensation was claimed for lands ceded by the treaty of June 3, 1825. What was said in the consideration of that claim is fully applicable to this claim and need not be repeated. The plaintiff is not entitled to recover as to this item.

7. This claim also arises and grows out of the treaty of January 14, 1846. The claim is for the value of the lands conditionally ceded to the United States in article 5 of the treaty. The claim has long been known to the plaintiff tribe as the "Surplus Land Claim." The pertinent provisions of the treaty are:

"ARTICLE 3. In order that the Kansas Indians may know the west line of the land which they have ceded by this treaty, it is agreed that the United States shall, as soon as may be convenient in the present year, cause the said line to be ascertained and marked by competent surveyors.

"ARTICLE 4. The Kansas Indians are to move from the land ceded to the United States, by the first article of this treaty, by the 1st day of May 1847.

"ARTICLE 5. As doubts exist whether there is a sufficiency of timber on the land remaining to the Kansas, after taking off the land ceded in the first article of the treaty, it is agreed by the contracting parties, that after the western line of the said cession shall be ascertained, the President of the United States shall be satisfied that there is not a sufficiency of timber, he shall cause to be selected and laid off for the Kansas a suitable country, near the western boundary of the land ceded by this treaty, which shall remain for their use forever. In consideration of which, the Kansas Nation cede to the United States the balance of the reservation under the treaty of June 3d, 1825, and not ceded in the first article of this treaty."

Immediately following the ratification of the treaty steps were taken to survey the west line of the lands ceded, as provided in article 3. The plat and field notes of the original survey of the Kansas lands could not, however, be located and the matter of ascertaining the western line of the cession went over until the following year, 1847. Early in the year 1847 the Commissioner of Indian Affairs determined to inquire into the matter of the sufficiency of timber on the lands remaining to the plaintiff tribe after taking off the 2,000,000 acres ceded in the first article of the treaty without waiting for the definite ascertainment of the west line of the cession. The Superintendent of Indian Affairs at St. Louis was instructed to send a small exploring party to a point near about where the line would run to ascertain with certainty whether there was a sufficiency of timber west of the line for the plaintiff tribe. The exploration was made by an Indian agent, in company with six Kansas Indians, three of whom were chiefs. While the agent did not explore the entire tract because of the presence of hostile Indians in the vicinity

he went as far west of the Grand Point (located just above the junction of the Republican and Smoky Hill Rivers) as he thought safe. He was informed by the members of the plaintiff tribe, who were with him and who were thoroughly familiar with the country west of the Grand Point, that there was no timber west of the Point except cottonwood and some very short scattering timber of other kinds, and that they could not live on the Kansas River or its waters anywhere west of the Grand Point. The agent having "become perfectly satisfied" that there was not a sufficiency of timber on the lands remaining to the plaintiff, after taking off the lands ceded in article 1 of the treaty, proceeded under the instructions received by him to examine the country for a suitable location for the plaintiff tribe, as was provided in article 5 of the treaty. He finally determined that a tract of land 20 miles square at the headwaters of the Neosho River in the Council Grove country was "a beautiful and good country", with a "sufficient quantity of good timber to answer the Kansas Indians for all agricultural purposes", and recommended it as a suitable location for the future home of the plaintiff tribe. The Superintendent of Indian Affairs approved the selection and recommended its approval by higher authority. Upon the recommendation of the Secretary of War the President approved the selection, and the plaintiff Indians thereafter removed to it and occupied it as their home until the year 1873, when they were removed to a reservation in Indian Territory.

The Council Grove Reservation comprised 255,854.49 acres. The claim is for the difference between the value of the lands conditionally ceded in article 5 of the treaty, approximately 4,000,000 acres, and the value of the Council Grove Reservation. The claim is based on the contention that the cession never became operative because the following conditions precedent to the cession were not met by the United States: (1) The western line of the cession made by article 1 of the treaty was not ascertained as was required by article 3. (2) No proper investigation was made to determine the sufficiency of timber, and no finding made by the President. (3) As a matter of fact there was ample timber. (4) The reservation at Council Grove was not near the western boundary of the lands ceded by the treaty. (5) The Council Grove Reservation was not a "suitable country" as specified in the treaty.

While the west line of the lands ceded in article 1 of the treaty was not definitely ascertained before the Council Grove Reservation was confirmed by the President, the material provisions of article 5 of the treaty that the "President of the United States shall be satisfied that there is not a sufficiency of timber", and that "he shall cause to be selected and laid off for the Kansas a suitable country, near the western boundary of the land ceded" were substantially, if not literally, met. The approval by the President of the report of the Indian agent, who made an exploration of the lands not ceded in article 1 of the treaty, that there was not a sufficiency of timber on the lands, conclusively establishes the fact that the President was "satisfied" that there was not a sufficiency of timber. That ended the matter, and the court cannot go behind his action and inquire as to whether in fact there was, or was not, a sufficiency of timber for the use of the plaintiff on the unceded lands. If the

President was satisfied that there was an insufficiency of timber, the requirement of article 5 of the treaty as to that question was fully complied with. The same rule applies to the question as to whether or not the Council Grove Reservation was a "suitable country", within the requirements of article 5. The Indian agent who selected the Council Grove country reported that it was a "beautiful" and "a good country" and a "suitable location" for the future home of the plaintiff. The report was approved by the President, who, under the treaty, was to determine the suitability of the lieu reservation. This action by the President is conclusive as to the question of the suitability of the Council Grove Reservation, and is not subject to review by the court.

The definite ascertainment of the western line of the lands ceded in article 1 of the treaty became entirely unnecessary upon the President becoming satisfied that there was an insufficiency of timber on the remaining lands. That such line was not established before the President satisfied himself of that fact in no way operated to the disadvantage of the plaintiff, and was not a material failure to meet a condition precedent to the cession.

The President having satisfied himself of the insufficiency of timber on the lands not ceded in article 1 of the treaty, and having caused to be selected and laid off a suitable country for the use of the plaintiff, as a lieu reservation, the conditions precedent to the cession of the land involved were complied with, and the conditional cession provided in article 5 of the treaty became effective. It follows that the plaintiff is not entitled to recover on this item of the claim.

8. This claim arises under the treaty of October 5, 1859, as amended and ratified June 27, 1860 (12 Stat. 1111); the treaty of March 13, 1862, as amended and ratified February 6, 1863 (12 Stat. 1221), and certain acts of Congress hereinafter referred to.

The material provisions of the treaty of 1859 briefly stated are: (1) The tribe was to retain a certain part of the Council Grove Reservation, to be assigned in severalty to members of the tribe in stated quantities, the balance of the reservation to be sold after public advertisement, in parcels not exceeding 160 acres each, to the highest bidder for cash, these sales to be upon sealed proposals. (2) The surplus lands remaining after assignment of lands in severalty to members of the tribe to be sold in the same manner. (3) The payment out of the proceeds of sale the fair value of improvements made by settlers, who in good faith, had settled upon the land prior to December 2, 1856 (that being the day the survey of the Council Grove Reservation was certified by the agent of the tribe). (4) Payment of the valid debts of the plaintiff out of the funds arising from the sales of the surplus lands.

The treaty of March 13, 1862, as amended, provided for the issuance of certificates of indebtedness to settlers who had settled on the diminished reserve between December 2, 1856, and October 5, 1859, for the value of their improvements, in a sum not in excess of \$15,000, and for the issuance of similar certificates of indebtedness for the value of their improvements, not exceeding \$14,421, to settlers who had settled on the diminished reserve prior to December 2, 1856. The treaty also provided for the issuance of certificates of indebtedness to owners of approved claims against the tribe, in an amount

not exceeding \$36,394.47, the certificates of indebtedness to be receivable at par in payment for lands of the tribe sold under the treaty of October 5, 1859.

Sales of land under the treaty of 1859 commenced in 1864. Up to the passage of the act of May 8, 1872, only 37,906.76 acres had been sold. This act provided in part for the appraisal of the unsold lands and for their sale at appraised value to settlers for cash, for a period of one year after the date of the act, and for the sale thereafter of the remaining lands to the highest cash bidder, no lands to be sold for less than their appraised value. The act further provided for the removal of the tribe to Indian Territory, with their consent, which was given on June 24, 1872, and for the sale of the diminished reserve in the same manner as the other lands. The unsold lands, including the diminished reservation, were thereupon appraised as provided in the act, and their value was fixed at \$689,264.11. The lands were then advertised for sale under sealed bids, but because of the high appraisals and the cash terms of sale only 1,838.72 acres were sold. The act of June 23, 1874 (18 Stat. 272), reciting in the preamble that "the appraisement thus made was so high that neither settlers nor purchasers were able to pay the same", amended the act of June 24, 1872, by permitting settlers to make payments in six annual installments, and by permitting entrymen to make payment of one-fourth the appraised value upon entry and the balance in three equal annual installments. The Government not being able to dispose of the lands under the provisions of this act, Congress again liberalized the terms under which the lands should be sold in the act of July 5, 1876 (19 Stat. 74). This act also reciting in the preamble that the appraisements under the act of 1872 were so high that neither settlers nor purchasers were able to pay them, provided that settlers could make payments in six annual installments and that entrymen could make payment of one-sixth upon entry and the balance in five annual installments. The act also provided for a new appraisal of the lands if the Secretary of the Interior was satisfied that they had been appraised at more than their present cash value. After making certain provisions for the net proceeds arising from sales of the lands, the act provided "that no proceedings shall be taken under this act until the said Kansas Indians shall file their assent thereto with the Secretary of the Interior." The plaintiff tribe assented to the provisions of the act on May 31, 1877, with the condition that the appraisers should be appointed in a certain way. This condition was accepted by the Secretary of the Interior. Appraisers were thereupon appointed and a new appraisal of the lands was made. Certain modifications in the manner of making payments for the lands sold were subsequently made in the act of March 16, 1880 (21 Stat. 68).

Under the provisions of the foregoing treaties and acts of Congress, all the Council Grove Reservation, consisting of 175,444.89 acres of trust lands and 80,409.60 acres in the diminished reserve lands, was sold and disposed of at a sum of \$326,836.82 less than the original appraised value of the lands under the act of 1872.

The Secretary of the Interior, pursuant to the provisions of the treaty of 1862, as amended, issued to settlers for improvements made by them on the lands certificates of indebtedness in the sum of

\$27,691.82. These certificates were known as "class 2 scrip." He also issued certificates of indebtedness to holders of approved claims against the tribe in the sum of \$39,832.56, which sum is \$5,438.09 in excess of the amount authorized in the treaty. He also, in 1862, before the treaty of that year authorizing the issuance of the aforesaid certificates of indebtedness was entered into, issued certificates of indebtedness to one Robert S. Stevens in the sum of \$87,133.45 in payment of improvements made by him on the diminished reserve, under contract with the United States. These certificates were known as "class 1 scrip" and were not receivable in payment for lands sold. The three classes of scrip bore interest at the rate of 6 percent, although the treaty of 1862 was silent as to interest on the two classes of scrip authorized thereunder, to wit, certificates of indebtedness for improvements made by settlers on the land and certificates of indebtedness to holders of approved claims against the tribe. However, the act of August 5, 1882 (22 Stat. 257), authorized the payment of both principal and interest of so much of the Stevens scrip as was then in the possession of persons (mechanics and others) who actually performed the labor in the construction of the buildings and other improvements erected under the Stevens contract and who received such certificates in lieu of cash in payment therefor, and the act of March 3, 1885 (23 Stat. 362), likewise made provision for the payment of both principal and interest of certificates of indebtedness issued in the years 1862 and 1864, known as "Kaw or Kansas scrip." Also, the act of June 29, 1885, made provision for payment of the balance of the principal and interest of the Kaw or Kansas scrip, pursuant to the provisions of the foregoing act of March 3, 1885.

Class 2 scrip to the amount of \$26,205.46 with accrued interest to the amount of \$1,345.05 was received in payment of sales of lands, and the amount of \$703.95 with accrued interest amounting to \$847.71 was redeemed in cash out of funds belonging to plaintiff. Class 3 scrip to the amount of \$23,691.57, with interest thereon amounting to \$2,822.99, was received in payments for lands sold, and \$15,832.16 with \$19,831.47 interest thereon was redeemed in cash. Of the Stevens, or class 1 scrip, \$84,533.45 with interest thereon in the sum of \$105,335.42 was redeemed in cash out of funds of the plaintiff. The total redemption in cash of the three classes of scrip was \$101,069.58 on principal and \$126,014.60 in interest.

Upon the facts stated the plaintiff claims: (a) The difference between the appraisal value of the lands under the act of 1872 and the amount received from their sales, \$326,836.82; (b) interest at 5 percent on one-half the appraised value of the diminished reserve lands, exclusive of improvements, from 1872, \$437,859.34; (c) the difference between the actual value of the Stevens' improvement and the amount paid for the same, \$83,378.60; (d) the amount paid for class 3 scrip issued in excess of the amount authorized in the treaty, \$3,438.09; (e) the amount paid on class 2 scrip for improvements of settlers on the lands, \$26,909.43, making the total amount claimed \$878,113.35.

(a) and (b). The act of May 8, 1872, imposed no obligation on the United States to sell the lands involved at their appraised value.

The only obligation on the part of the Government in this respect was not to sell any of the lands at *less* than their appraised value, and it is not contended that the Government sold any lands under the provisions of this statute at less than their appraised value. The lands were reappraised under the act of July 5, 1876, to the provisions of which the plaintiff gave formal assent. No claim is made that any of the remaining lands sold under the provisions of this act were sold at less than their value under the new appraisal. These acts amended and superseded the provisions of the treaty of 1859 that the lands should be sold in tracts not exceeding 160 acres, to the highest bidder for cash, upon sealed proposals duly invited by public advertisement. It thus appears that the lands were all sold in conformity with the provisions of the treaty of 1859, or the statutes in effect at the time of the various sales. This being true, the plaintiff tribe has no legal or equitable claim against the United States for the difference between the appraised value of the lands under the act of 1872 and the amount received for them when sold, \$326,836.82, or any part thereof. Likewise the plaintiff has no legal or equitable claim against the United States for interest at 5 percent on one-half the appraised value of the diminished reserve lands from 1872. This claim presupposes a legal obligation on the part of the United States to make an immediate appraisal of the lands, and to dispose of them promptly at the appraised value. There is no proof that the appraisal of the lands was not made at the earliest possible time after the assent of the tribe to the act of 1872 was procured, and, as we have seen, the act did not obligate the United States to dispose of the lands of the diminished reserve at their appraised value. Furthermore, it is clearly established that it was not possible to sell the bulk of these lands until after their reappraisal under the act of 1876.

Items (c), (d), and (e) grow out of the issuance and redemption of the certificates of indebtedness heretofore referred to. All transactions relating to the issuance and redemption of these certificates were investigated, considered, and adjudicated by the Kaw commission. This commission was appointed pursuant to the act of July 1, 1902 (32 Stat. 636), for the investigation, consideration, and settlement of "all claims, of whatever nature which said Kansas or Kaw Tribe may have or claim to have against the United States", and for the payment of the amount found due by the commission. The plaintiff in the presentation of its claims before the commission "did not specifically apply for any moneys other than those growing out of the various certificates of indebtedness or scrip transactions", although in a general way claim was made for all other moneys justly due the tribe in the adjustment of the accounts between it and the United States. The commission made a comprehensive report in which every phase of the transactions relating to the issuance and redemption of the various classes of scrip, including interest thereon, was reviewed, and made an award to the plaintiff tribe of a specific amount found to be due on account of such transactions. The amount of the award was appropriated by the act of March 3, 1905 (33 Stat. 1048, 1079), with the condition that no part of it should be paid "until said Indians, in general council, lawfully convened for that

purpose, shall execute and deliver to the United States a general release of all claims and demands of every name and nature against the United States." The release was duly executed at a general council of the tribe held for that purpose, and the amount of the commission's award was credited to the Kansas consolidated fund.

The plaintiff contends that with respect to the three items now under consideration, as well as the other items comprising claim no. 8, the award made by the Kaw commission and the settlement made in accordance therewith, only partially compensated the tribe for moneys due it under the treaty of 1859. However this may be, the acceptance of the award by the plaintiff, and the execution by it of a release of all claims and demands of every name and nature against the United States, constitute, we think, a complete defense against any claim for additional compensation growing out of any of the transactions specifically considered by the commission and which formed the basis of its award. This defense is not waived by any provision of the Jurisdictional Act and cannot be waived by the court. The rule is well settled that a valid release conclusively estops the parties from reviewing and litigating the claim released. It is not contended that the release in question was invalid. It was executed in consideration of payment of the award of the commission, which at that time was satisfactory to the tribe. The act creating the commission provided that "if the settlement of the claims of said tribe or the accounting is not satisfactory to said tribe \* \* \* then the said tribe of Indians shall have two years from the date of the report and accounting in which to enter suit in the Court of Claims, with the right of appeal to the Supreme Court of the United States, by either party, for the amount due or claimed to be due said tribe \* \* \*. And jurisdiction is hereby conferred upon the United States Court of Claims to hear and determine all claims of said tribe against the United States and to enter judgment thereon." The plaintiff was satisfied with the settlement of its claims by the commission and did not avail itself of the right to have them considered by this court and the Supreme Court.

Having accepted payment of the award, and having in consideration thereof released the United States from all claims of every kind and nature, the plaintiff is estopped from now litigating any of the claims on which the award of the commission was based. Items (c), (d), and (e) of the claim under consideration, as we have seen, grow out of the various scrip transactions, all of which were exhaustively examined by the commission, and, in the main, formed the basis on which the award was made. The plaintiff, therefore, is not entitled to recover on these items and is not entitled to recover on any of the items of claim no. 8.

9. The acts of Congress, and the facts under which this claim is made, are set out in detail in the findings. The claim is based on the contention that under the act of June 5, 1872 (17 Stat. 228), and the deed from the Cherokee Tribe to the United States for 1,570,196.3 acres of land in Indian Territory, now Oklahoma, for the use and benefit of the Osage and Kansas Indians, the plaintiff tribe became entitled to an undivided pro rata interest in the entire reservation, including the value of the lands included in the reservation, and the

revenues arising and accruing from oil and mineral deposits, also from grazing leases, the sale of town sites, etc. The amount claimed in the petition is \$40,863,825.79, which in the plaintiff's suggested findings of fact is reduced to \$26,368,763.61.

A reservation in Indian Territory for the use of the Great and Little Osage Indians was provided in the act of July 15, 1870 (16 Stat. 335). It was provided that whenever these Indians agreed thereto they should be removed from the State of Kansas to land in Indian Territory, to consist of a tract of land in compact form equal in quantity to 160 acres for each member of the tribe, the lands to be paid for out of the proceeds of the sales of their Kansas lands. The Osages selected a tract of land in the Indian Territory of approximately 560,000 acres within that part of the territory of the Cherokees lying to the west of the 96th meridian, upon which the United States in a treaty with that tribe of July 19, 1866 (14 Stat. 799), was given the right to settle friendly Indians. The selection was approved. Subsequently it was discovered that part of the land selected lay east of the 96th meridian. On January 5, 1872, an agreement was entered into between the United States and the Osage Tribes under which the Indians agreed to accept in lieu of the lands formerly selected by them which lay east of the 96th meridian the lands selected by them which lay west of that meridian, and certain other additional lands. This agreement contained the provision that—

“The Kansas or Kaw tribe of Indians, now in the State of Kansas, shall have the right to settle on the tract of land above described, and ceded to the Osage tribe of Indians; and in case the Osage and Kansas tribes of Indians cannot agree upon their respective locations or upon the price to be paid for the lands ceded to the Kansas Indians, the President of the United States shall determine these matters for them.”

By the act of June 5, 1872, the selection of the lieu reservation by the Osages was confirmed and its boundaries were described by metes and bounds. The act contained the following provision:

“That said Great and Little Osage Tribe of Indians shall permit the settlement within the limits of said tract of land (of) the Kansas Tribe of Indians, the lands so settled and occupied by said Kansas Indians, not exceeding one hundred and sixty acres for each member of said tribe, to be paid for by said Kansas Tribe of Indians out of the proceeds of the sales of their lands in Kansas, at a price not exceeding that paid by the Great and Little Osage Indians to the Cherokee Nation of Indians.”

Following the passage of the foregoing act, a tract of land in the northwestern corner of the Osage Reservation, consisting of about 102,400 acres, was selected for the plaintiff tribe, to which the entire tribe removed in June 1873. In 1873 Osage moneys were transferred to the credit of the Cherokees in payment for the entire reservation, including the tract selected by plaintiff. In 1881, upon a settlement between the United States and the Osages, that tribe was credited with the sum of \$70,096.12 on account of the lands in its reservation secured to the plaintiff, which amount was subsequently reimbursed to the United States out of funds to the credit of the plaintiff tribe

arising from the sale of its Kansas lands, the result being that the plaintiff tribe paid for the lands selected and occupied by it, and the Osages paid for the lands occupied by them.

The Cherokee Tribe, on June 14, 1883, conveyed to the United States, in trust for the use and benefit of the Osage and Kansas Indians, all the lands contained in the lieu reservation confirmed to the Osages in the act of June 5, 1872, amounting to 1,570,196.3 acres. In the deed reference was made to the provision in the treaty of July 19, 1866, giving the United States the right to settle friendly Indians on certain Cherokee lands, to the act of June 5, 1872, setting apart the lands conveyed to the Great and Little Osage Indians, with the proviso that they should permit the settlement of the Kansas Tribe within the limits of the tract, and to the act of March 3, 1873, under the provisions of which the Cherokees had been paid for the lands. The lands conveyed were described as embracing certain enumerated townships and fractional townships, as shown by an annexed plat, with the recitation that certain enumerated townships and fractional townships of the lands so conveyed, containing an area of 100,137.32 acres, had been set apart for the Kansas Indians, and paid for by them.

The agreement between the United States and the Osages on January 5, 1872, undoubtedly contemplated that a certain and definite part of the lands of the Osage lieu reservation should be set apart for the plaintiff tribe. The language of the agreement that “in case the Osages and Kansas Tribes of Indians cannot agree upon their respective locations, or upon the price to be paid for the lands ceded to the Kansas Indians, the President of the United States shall determine these matters for them” is susceptible of no other reasonable construction. Likewise, the act of June 5, 1872, clearly contemplated the purchase by the plaintiff tribe of a certain and definite part of the Osage Reservation. The language “the lands so settled and occupied by said Kansas Indians, not exceeding one hundred and sixty acres for each member of said tribe, to be paid for by said Kansas Tribe \* \* \* at a price not exceeding that paid by the Great and Little Osage Indians to the Cherokee Nation of Indians” completely negatives the contention that the plaintiff purchased and became entitled to an undivided pro rata interest in the entire reservation. Neither is there any provision in the Cherokee deed of conveyance of June 14, 1883, that supports this contention. While all the lands involved were conveyed to the United States in trust for the use and benefit of the Osage and Kansas Indians, it is recited in the deed that a certain and definite part of the lands so conveyed, consisting of 100,137.32 acres, had been set apart to the plaintiff tribe and had been paid for by it. Clearly plaintiff's interest in the lands conveyed was limited to the 100,137.32 acres described in the deed, and shown on the annexed plat, as having been set apart for its use and benefit. These were the lands, then and afterwards, occupied by the plaintiff and were the precise lands paid for out of its funds. The remaining part of the lands conveyed was then occupied by the Osage Tribes, and had been paid for out of their own funds.

Upon the whole case the plaintiff is entitled to recover as follows: On claim no. 2 the sum of \$1,000.00 for the Government's failure to furnish a blacksmith for the period from September 30, 1844, to

February 15, 1846, in accordance with the provisions of article 4 of the treaty of 1825; and on claim no. 4 the sum of \$101,751.31, because of the failure of the Government to dispose of and account to the plaintiff for the value of 7,916.75 acres of land in accordance with the provisions of article 5 of the treaty of 1825, or a total sum of \$102,524.65.

## COUNTERCLAIM

The jurisdictional act provides that the court "shall also hear, examine, consider, and adjudicate any claims which the United States may have against said Kansas or Kaw Tribe of Indians, but any payment, including gratuities, \* \* \* may be pleaded as an offset in such suit."

During the period from June 3, 1825, to June 30, 1928, the United States expended for the benefit of the plaintiff tribe the sum of \$449,236.33 over and above the amount it was obligated to expend, by treaty or otherwise. From 1874 to 1903 the plaintiff agency was under the jurisdiction of the Osage Agency; from 1913 to 1919 under the jurisdiction of the Ponca Agency; and from 1920 to 1928 under the jurisdiction of the Pawnee Agency. (During this period the United States expended for the joint benefit of the tribes attached to these agencies, over and above the amount it was obligated to expend by treaty or otherwise, the sum of \$72,159.51, the amount chargeable to the plaintiff tribe on a percentage of population basis being \$12,809.32. These expenditures were gratuities, and as such are proper offsets against the amount the plaintiff is entitled to recover on its claims. The gratuity expenditures, \$462,045.65, being in excess of the amount the plaintiff is entitled to recover, \$102,524.65, it follows that the plaintiff is not entitled to judgment in any amount. The petition is accordingly dismissed.

It is so ordered.

WHALEY, *Judge*; LITTLETON, *Judge*; GREEN, *Judge*; and BOOTH, *Chief Justice*, concur.

A true copy.  
Test:

*Chief Clerk, Court of Claims of the United States.*