Hereinafter Cited as Fuller

No. J. 231

IN THE

United States Court of Claims

THE CHOCTAW NATION OF INDIANS,
Complainant,

vs.

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

BRIEF

on behalf of

THE CHICKASAW NATION OF INDIANS.

WILLIAM H. FULLER
and
MELVEN CORNISH,
Special Attorneys,
The Chickasaw Nation of Indians.

OUTLINE OF BRIEF.

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A complete "OUTLINE OF BRIEF" (together with citations of *Treaties, Laws, Court Decisions* and *Official Records* and *Reports),* appears upon the preceding lettered pages, showing the arrangement of subjects, by divisions and sub-divisions, with appropriate references to the pages of the Brief where such subjects are treated and such citations appear.

I.

REQUEST FOR SPECIAL FINDINGS OF FACT.

In view of the fact that, in the present status of the instant case, the interests of the defendants, the United States and the Chickasaw Nation, are identical in resisting the contentions of the plaintiff, the Choctaw Nation, that the basis of *Three Fourths to the Choctaw Nation* and *One Fourth to the Chickasaw Nation* was not the legal basis for the apportionment of moneys arising from the sale, or disposition otherwise, of the common properties of the two Nations; and in support of the contentions of the defendant, the Chickasaw Nation, it hereby adopts the

"DEFENDANT'S OBJECTIONS TO FINDINGS OF FACT REQUESTED BY THE PLAINTIFF"
and
"REQUEST FOR FINDINGS OF FACT",

as set out in the Brief of the defendant, the United States, heretofore filed.

The Chickasaw Nation is not submitting a further *"Request for Special Findings of Fact"*; referring the Court to paragraphs (1) to (10), inclusive, of "(b) *The contentions of the plaintiff, the Chickasaw Nation"*, under sub-division "(2) THE ISSUES", in Division "II. STATEMENT OF THE CASE", for such facts as are deemed to have been proven, for its use in any additional "Special Findings of Fact" which may be necessary or advisable, in the final consideration of, and decision in the instant case.

The instant case was set for hearing on the M
Calendar of the Court of Claims; and no Special
having been formally ployed
were

(1)

The Present Status of the Case.

The instant case, No. J. 231 (entitled *"Choctaw Nation, Complainant, vs. The United States of America, Defendant")*, was filed in the United States Court of Claims, under the Jurisdictional Act of Congress of June 7, 1924 (43 Stat., 537), permitting the Choctaw Nation and the Chickasaw Nation, either jointly or severally, to file suits and proceedings against the United States; and the jurisdiction of the Court of Claims, in the said Act of Congress of June 7, 1924, is therein fixed and defined as follows:

> "That jurisdiction be, and is hereby conferred upon the Court of Claims, notwithstanding the lapse of time or statutes of limitation, to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Choctaw and Chickasaw Indian Nations or Tribes, or either of them, or arising under or growing out of any act of Congress in relation to Indian affairs which said Choctaw and Chickasaw Nations or Tribes may have against the United States, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States."

The same Act also provides:

> ner of Indian Affairs on May 1, 1935, and by the retary of the Interior on May 13, 1935.

I.

REQUEST FOR SPECIAL FINDINGS OF FACT.

The Assistant Attorney General, on behalf of the defendant, the United States, concluded that the Chickasaw Nation was a necessary and proper party, "to the final determination of the matters in controversy", and, to that end and under the provision of the Jurisdictional Act of Congress of June 7, 1924, last above quoted, on December 20, 1934, filed a "MOTION TO BRING IN AND MAKE THE CHICKASAW NATION A PARTY TO THIS SUIT"; and on January 5, 1935, such Motion was allowed. Thus, the Chickasaw Nation was made a party defendant.

The Chickasaw Nation has heretofore filed, in the Court of Claims, under the same Jurisdictional Act of Congress of June 7, 1924 (and Act of Congress amendatory thereto) several suits and proceedings *against* the United States; but the instant case is the only one in which it has been made a *party defendant.*

It has heretofore employed "Special Attorneys", with the consent of the Commissioner of Indian Affairs and the Secretary of the Interior, to represent it in all suits and proceedings wherein it is the *complainant* and the United States is the *defendant.*

When it was made a *party defendant,* in the instant case No. J. 231, it was found that its "Special Attorneys", theretofore employed, were without power and decision in the instant case.

The instant case was set for hearing on the May Calendar of the Court of Claims; and no Special Attorneys having been formally employed, none were authorized to plead and defend, on behalf of the Chickasaw Nation.

In this situation, the Commissioner of Indian Affairs and the Secretary of the Interior gave special permission to the attorneys who now file and present this Brief, to call to the attention of the Court the existing status of the case.

Accordingly, a "MOTION FOR EXTENSION OF TIME FOR HEARING AND FINAL CONSIDERATION" was filed on March 14, 1935, which Motion was duly allowed by the Court, and the case was removed from the May Calendar.

Such Motion, after setting out the facts, as above stated, contained the following prayer:

> "Wherefore, upon consideration of the foregoing statement of facts, the Chickasaw Nation prays that this Motion be allowed; and that an order be made and entered by this Honorable Court, striking the instant case from its May Calendar, and that the same be placed upon a future calendar *when it shall be ready for hearing and final consideration.*"

Later, a formal contract of employment between the Governor of the Chickasaw Nation and the attorneys who now file and present this Brief, was entered into; and the same was duly approved by the Commissioner of Indian Affairs on May 1, 1935, and by the Secretary of the Interior on May 13, 1935.

The Special Attorneys for the Chickasaw Nation, then filed herein its

MOTION OF DEFENDANT,
THE CHICKASAW NATION OF INDIANS:

(1) *To postpone final consideration of, and decision in, the instant case No. J. 231, until final decision, by the Supreme Court of the United States, in Case No. H. 37; and*

(2) *To consolidate, for final consideration, and decision, by the United States Court of Claims, Cases No. J. 231 and No. K. 336.*

The United States filed its

"REPLY TO THE MOTION OF THE CHICKASAW NATION TO POSTPONE AND CONSOLIDATE, FILED OCTOBER 4, 1935",

and the Choctaw Nation, likewise, filed its

"REPLY OF CHOCTAW NATION TO MOTION OF CHICKASAW NATION TO POSTPONE AND CONSOLIDATE, FILED OCTOBER 4, 1935."

On October 14, 1935, in passing upon the Motion of the Chickasaw Nation to postpone and consolidate, the Court made and entered the following order:

"ALLOWED AS TO PARAGRAPH NO. 1",

and

"OVERRULED WITHOUT PREJUDICE AS TO PARAGRAPH NO. 2."

Now, since the case upon which the postponement, as prayed for in such Motion, was granted (H. 37), has been finally decided, it is deemed advisable, by the Special Attorneys for the Chickasaw Nation, that their Brief, upon the merits of the instant case, should be prepared and filed, in order that the Chickasaw Nation may be heard, when the time shall arrive for its final consideration.

(2)

The Issues.

(a) *The contentions of the plaintiff, the Choctaw Nation.*

The plaintiff, the Choctaw Nation, contends:

That the moneys arising from the sale, or disposition otherwise, of the common properties of the Choctaw and Chickasaw Nations, should have been made upon the basis of the total individual membership of the *two Nations*, and not upon the basis of *Three Fourths to the Choctaw Nation* and *One Fourth to the Chickasaw Nation;* and that, in the actual apportionment and payment of such moneys, by the United States, upon that basis, the Choctaws have received *less* (and the Chickasaws *more)* than they were entitled to;

That, having failed to sustain its contention (in Case H-37; that "Mississippi Choctaws" were entitled *only* to lands, and not to the apportionment and payment of *any* moneys), it now solely relies upon Article I of the Treaty of 1855, contending that the wording therein contained, conferred upon the *individual mem-*

bers of the two Nations, *vested rights* and *"absolute rights of property"* to *equal shares* in all common and undistributed property, whether lands or moneys, and that such rights have been violated;

That the acts of the United States, in the apportionment and payment of common moneys, upon the basis of *Three Fourths to the Choctaw Nation* and *One Fourth to the Chickasaw Nation,* are illegal; and that it should have judgment against the United States, in the sum of $599,789.31, the difference between the two *bases,* as above set out.

(b) *The contentions of the defendant, the Chickasaw Nation.*

The contentions of the defendant, the Chickasaw Nation, are so fully set out in the "ARGUMENT" which follows (supported by citations of, and quotations from, treaties, laws, authorities and official records and reports), that, in order to avoid repetition, this preliminary statement will be confined to a brief synopsis of the various sub-divisions of such "ARGUMENT", with appropriate reference to each such subdivision, in the order in which the same occurs.

The defendant, the Chickasaw Nation contends:

(1)

The apportionment and payment, by the United States, to the Choctaws and Chickasaws, of moneys arising from the sale, or disposition otherwise, of common properties, has resulted in all individual members of the two Nations receiving *equal shares;* and the contentions of the plaintiff, the Choctaw Nation, that such members have received *unequal shares,* have no foundation in fact, and are, therefore, not well taken.

—(III, ARGUMENT, Sub-division 1.)

(2)

The basis for the apportionment and payment of moneys, arising from the sale, or disposition otherwise, of common properties of the Choctaw and Chickasaw Nations, was fixed and agreed upon in the Treaties of 1855, 1866, 1898 and 1902, in the proportions of *Three Fourths to the Choctaws* and *One Fourth to the Chickasaws;* and the apportionments and payments of such moneys, by the United States, upon that basis, are legal and binding upon the Choctaw and Chickasaw Nations.

—(III, ARGUMENT, Sub-division 2.)

(3)

All acts of Congress, relating to the apportionment and payment, to the Choctaws and Chickasaws, of moneys arising from the sale, or disposition otherwise, of common properties, have been passed and administered in conformity to the basis fixed and agreed upon in treaties between the United States and the Choctaw and Chickasaw Nations (of *Three-Fourths* to the Choctaw Nation and *One-Fourth* to the Chickasaw Nation).

—(III, ARGUMENT, Sub-division 3.)

(4)

The Choctaw and Chickasaw Nations have, by their official acts, recognized and accepted the existing basis of *Three-Fourths to the Choctaws* and *One-Fourth to the Chickasaws,* as fixed and agreed upon in treaties or agreements, for the apportionment and payment of moneys arising from the sale, or disposition otherwise, of the common properties of the two Nations; and may not now question the legality of the acts of the United States in making apportionments and payments of such moneys, upon the basis thus fixed and agreed upon, under such treaties and under laws passed and administered in conformity thereto.

—(III, ARGUMENT, Sub-division 4.)

(5)

The Treaty of 1902, providing for allotments of land to so-called "Mississippi Choctaws", did not have the effect of changing the existing basis for the apportionment and payment of moneys arising from the sale, or disposition otherwise, of the common properties of the Choctaws and Chickasaws (fixed and agreed upon in the Treaties of 1855, 1866, 1898 and 1902), and of repealing all provisions of all treaties and laws upon that subject.

—(III, ARGUMENT, Sub-division 5.)

(6)

Article 1 of the Treaty of 1855 had no relation to the apportionment and payment of moneys arising from the sale, or disposition otherwise, of the common

properties of the Choctaw and Chickasaw Nations; but relates, solely and wholly, to the settlement of "dissentions and controversies" between the two Nations, and has no bearing upon the issues in the instant case.

—(III, ARGUMENT, Sub-division 6.)

(7)

The Chickasaw Nation purchased and acquired, under the Treaty of 1837, for a valuable consideration, a common interest in the lands of the Choctaw Nation; and the interest thus acquired became fixed and vested, and may not be increased nor diminished, to the advantage of one Nation and to the disadvantage of the other Nation, without the consent of both Nations.

—(III, ARGUMENT, Sub-division 7.)

(8)

The United States has always dealt with the *Choctaw Nation* and the *Chickasaw Nation*, in their *"Corporate capacities"*, so long as they existed, and not with their *individual members;* and such nations held the title to all common lands and moneys, in their *"corporate capacities"*, and dealt with their *individual members* as they deemed advisable; and when they ceased to exist, the United States then dealt with *individual members,* as the *successors of such nations.* At no time, have the *individual members* of such nations had any vested rights or *"absolute rights of property"* in and

to the *mere expectancy* of sharing in common lands or moneys.

—(III, ARGUMENT, Sub-division 8.)

(9)

If, as contended by the plaintiff, the Choctaw Nation, in the instant case, the vested rights and *"absolute rights of property"* of *individual members* of the Choctaw Nation (claimed to have been fixed by the quoted wording in Article 1 of the Treaty of 1855) have been violated, *that issue* may not be decided in the instant case, since suits may be filed and maintained, against the United States, *only* by the *Choctaw Nation* or the *Chickasaw Nation,* separately or jointly (in their *"corporate capacities")* and not by the individual members of either Nation.

—(III, ARGUMENT, Sub-division 9.)

(10)

Irrespective of the validity or invalidity of any or all of the contentions of the plaintiff, the Choctaw Nation, or of the defendants, the United States and the Chickasaw Nation, the plaintiff *has not proven such a state of facts* as would entitle it to recovery.

—(III, ARGUMENT, Sub-division 10.)

These, briefly, are the contentions of the parties, in the instant case; and we shall now proceed to set forth the views of the Chickasaw Nation, and the reasons why, as we contend, its contentions should be sustained, in the Argument which shall follow.

III.

ARGUMENT.

(1)

The apportionment and payment, by the United States, to the Choctaws and Chickasaws, of moneys arising from the sale, or disposition otherwise, of common properties, has resulted in all individual members of the two Nations receiving *equal shares;* and the contentions of the plaintiff, the Choctaw Nation, that such members have received *unequal shares,* have no foundation in fact, and are, therefore, not well taken.

(Throughout the following Argument, and the several sub-divisions thereof, certain portions of treaties, laws, authorities and official records and reports, therein cited and quoted, have been *italicized,* for the purpose of emphasizing the meaning and application of the same; and this general notation is here made to avoid separate notations (of *"Italics ours")* following each of the numerous citations and quotations referred to.)

We shall, in later portions of this Argument, fully answer the contentions of the plaintiff, the Choctaw Nation, and show that all acts of the United States, in the apportionments and payments of such moneys to the Choctaws and Chickasaws, upon the basis of *Three Fourths to the Choctaws* and *One Fourth to the Chickasaws,* were in strict accordance with the basis fixed and agreed upon, in the Treaties of 1855, 1866, 1898 and 1902, and under laws passed in conformity thereto; that such moneys were received and enjoyed,

throughout all the years from 1855 to the present time, without protest or objection, thus showing the understanding of all the interested parties as to the power and authority of the United States to make such apportionments and payments upon that basis; and that all such acts of the United States are legal and binding upon all the interested parties.

What, then, are the facts, as shown by the official records and reports, as to whether such apportionments and payments were *equal* or *unequal*, irrespective of any contention as to the legality or illegality thereof?

In presenting the instant case, the plaintiff, the Choctaw Nation, has overlooked the facts, as shown by the reports of the responsible officials of the United States.

Such reports, as shown by the printed record, make plain that apportionments and payments of the moneys to which the instant case relates, *were equal*, as among the members of the two Nations.

If this be true, then, as stated, the contentions of the Choctaw Nation, in the instant case, have no foundation in fact, and are not well taken.

The report of the Commissioner of Indian Affairs, dated December 19, 1910, appearing upon page 20 of the Record, says:

unequal payments, the total amount involved would be $31,520. Of this amount, upon that assumption, the Choctaws, would be entitled to *Three Fourths* of this amount; or to the sum of $23,640, and not to the sum of $599,789.31, as claimed in the instant suit.

But neither assumption is correct. The apparent inequality, in favor of apportionments and payments to the Chickasaws, is fully accounted for by reports of United States officials, which appear in the same Record and which has been printed and filed by the plaintiff, the Choctaw Nation, and by which it is bound.

In the same report of the Secretary of the Interior upon the instant suit, dated June 2, 1933 (on page 17-18 of the Record), he says:

> "Relative to the receipts and expenditures of the Chickasaw tribal funds and to a general accounting thereof, reference is made herein to the General Accounting Office report of March 16, 1933, submitted to you for your information and use in the suit of the Chickasaw Nation vs. United States, Case No. K. 544, pending in the Court of Claims.
>
> "It is understood that a report of similar nature relative to the receipts and expenditures and a general accounting thereof of the Choctaw tribal funds is in course of preparation in the General Accounting Office and will be submitted by that office at an early date to you for your information and use in the suit of the Choctaw Nation vs. United States, Case No. K-260, pending in the Court of Claims.

"In connection with the matters involved in the present case (J-231) special reference is made herein to certain information contained in statements Nos. 75 and 77 (pages 506 and 511, respectively, of the above mentioned General Accounting Office report in Case No. K. 544). It appears from said statement No. 75 that the per capita payment made to the Chickasaw Indians aggregated $6,516,963.80 and from said statement No. 77 that the proceeds from the sales and disposition of the tribal property were deposited in the United States Treasury in certain amounts to the credit of the Chickasaw Nation, and in certain amounts to the credit of the Choctaw Nation."

Also on page 17 of the Record (in the same report), it is said:

"The funds placed in the United States Treasury to the credit of the Choctaw and Chickasaw Indian Nations have been used for *many purposes* besides that of making per capita distributions to the enrolled members of said tribes. These funds in the case of the respective Nations were subject to appropriations made by *valid Acts of the respective tribal legislatures, the tribal government, including schools of each tribe,* being supported out of the funds of the respective tribes."

The same wording, relative to the use of moneys "for many purposes besides that of making per capita distributions" appears in several other official reports appearing in the Record.

The most that can be contended by the plaintiff, the Choctaw Nation, is that, in per capita distributions,

the Chickasaws have received *five dollars each* more than the Choctaws.

This may be accounted for by the fact, as shown by the official reports in the Record, that moneys of the *Choctaw Nation* and the *Chickasaw Nation* have been used for *other purposes,* such as "valid acts of the tribal legislatures, the *tribal government, including schools of each tribe",* the legality of which expenditures have not been attacked and cannot be successfully attacked.

The reports of the General Accounting Office, relating to all the fiscal and financial relations between the United States and the Indians (prepared for special use in Cases K. 260 and K. 544, and now pending in this court) are above referred to; and are available for such use as they may be in the instant case.

Not all of the moneys of the Choctaw Nation and the Chickasaw Nation, used for *per capita distribution* and for *other purposes,* referred to in the above quoted official reports, came from the sale or disposition otherwise, of the *common properties* of the Choctaws and and Chickasaws.

Both the Choctaw and Chickasaw Nations had large sums of money known (and carried, to their credit upon the books of the United States Treasury) as *"Trust Funds"* and *"Invested Funds".* These moneys existed, and were *separately owned* by each Nation, long before the allotment of lands, the sale of common property and per capita distribution of the proceeds began under the later Treaties of 1898 and 1902.

They still existed and were *separately owned* when that era began after 1898. They had to be dealt with by the United States, in its long years of effort, from 1898 to the present time, in finally closing up the tribal affairs of the Indians.

Two kinds of moneys had to be constantly kept in mind to-wit: Moneys *separately owned* by each Nation and arising from other sources, and *common moneys* arising from the sale, or disposition otherwise, of common properties.

To the moneys *separately owned* by the Choctaw Nation were added *Three Fourths* of the moneys arising out of common property; and, likewise, to the moneys *separately owned* by the Chickasaws were added *One Fourth* of the moneys arising out of common property.

These moneys, thus existing when the era of distribution began (and accumulating as the new era progressed), were used for per capita distribution and for *other purposes*, as the needs of the Nations arose and were met.

Prior to 1898, the Chickasaws had considerably more *"Trust Funds"* or *"Invested Funds"* per capita, than the Choctaws (and reports of the General Accounting Office, above referred to, will show).

Whatever "Trust Funds" or "Invested Funds", separately owned, and not used for *other purposes* were, necessarily, distributed per capita, except the moneys still remaining in the Treasury to the credit of the tribes.

Since, as above shown by the quoted report of the responsible officials of the United States that:

> "In the expenditures of these funds * * * in all cases of per capita payments, of town lot moneys, etc., *each Choctaw and Chickasaw has received an equal amount.*",

is the conclusion not irresistible that if the Chickasaws have each received *five dollars* more than each Choctaw, the excess came from the moneys *separately owned* by the Chickasaws; that is from their *"Trust Funds"* or *"Invested Funds"*, and not from the proceeds of the sales of common properties? In that case the Choctaws would have no grounds for complaint.

Has the plaintiff, the Choctaw Nation, shown, in the instant case, *what moneys* out of *"Trust Funds"* or *"Invested Funds"* and *what moneys* arising from the sale of common property, have been used for per capita payments and for *other purposes;* and has it been shown *what moneys* still remain in the Treasury to the credit of each Nation?

May it not be that there is *now* to the credit of the Choctaw Nation, in the United States Treasury, a sufficient sum of money which, if distributed per capita, would equal the excess payment of five dollars each which the Chickasaws appear to have received, and of which, only, the Choctaw Nation may complain? Has the Choctaw Nation shown that it now has, to its credit, *no moneys* available for distribution?

Before it may demand recovery of the tremendous sum claimed (or any sum) must the Choctaw Nation not have proven, by competent and sufficient evi-

dence, the exact disposition of the *"Trust Funds"* or *"Invested Funds"* of the two Nations, and how, and to what extent, they entered into per capita payments, or were used for other purposes, and *what moneys,* if any, now exist, to their credit, and are available for per capita distribution or otherwise?

None of these necessary and essential things have been shown; and it must be contended that the proof, in this respect, in support of the contentions of the plaintiff, the Choctaw Nation, has failed.

The plaintiff merely creates a fraction, made up of the total of the members of Chickasaw Nation as the numerator, and the total of the members of the Choctaw Nation as the denominator, and then applies the fraction thus constructed to the grand total of moneys arising from the sale, or disposition otherwise, of common properties; and by that process, solely and alone, arrives at the conclusion that it has been damaged to the tremendous amount of $599,789,31.

Then, if it is entitled to the principal, it would, also, be entitled to interest, from the time, or times, it was illegally (as it claims) deprived of moneys to which it was entitled. What amounts, and upon what dates? Per capita payments were made in 1904, 1906, 1908, 1911, 1912 and 1914, and also, in later years (Record, pages 12-18).

If its contentions are correct, how may its fractions be constructed and applied for each of the per capita payment years, since the *exact membership* of

the two Nations had not been determined, even as late as the year 1915 (Report of the Superintendent for the Five Civilized Tribes to the Secretary of the Interior, 1915).

Has not the proof of the plaintiff, in this respect, wholly failed?

Having shown, it is respectfully submitted, that the contentions of the plaintiff, the Choctaw Nation, as to alleged *unequal* payments, have no foundation in fact, and are not well taken, and that its proof, in support of the same, has failed, we shall, nevertheless, proceed to fully answer its contentions that the apportionments and payments of moneys arising from the sale, or disposition otherwise, of common properties, by the United States, upon the basis of *Three Fourths to the Choctaws* and *One Fourth to the Chickasaws* was not the correct basis, and therefore, illegal, in that part of the Argument which follows, and show, as we contend, that, in both fact and law, exactly the opposite is true.

(2)

The basis for the apportionment and payment of moneys, arising from the sale, or disposition otherwise, of common properties of the Choctaw and Chickasaw Nations, was fixed and agreed upon in the treaties of 1855, 1866, 1898 and 1902, in the proportions of *three fourths to the Choctaws* and *one fourth to the Chickasaws;* and apportionments and payments of such moneys, by the United States, upon that basis, are legal and binding upon the Choctaw and Chickasaw Nations.

It is respectfully submitted that the provisions of the Treaties of 1855, 1866, 1898 and 1902 are decisive of the issues in the instant case, as to the legality of apportionments and payments of all moneys arising from the sale, or disposition otherwise, of the common properties of the Choctaw and Chickasaw Nations.

It has always been earnestly insisted by the Choctaws and Chickasaws (and by other Indians, in all controversies that have arisen) that provisions of Treaties or Agreements should be scrupulously observed; and, in the instant case, an examination of Treaty provisions, particularly relating to subject under consideration, will show that the basis has been fixed and agreed upon in provisions of all Treaties or Agreements entered into, during the whole period covering the transaction complained of, from 1855 to the present time; and that the basis thus fixed and agreed upon, for the apportionment and payment of such moneys, was that of *Three Fourths to the Choctaw Nation* and *One Fourth to the Chickasaw Nation.*

We shall now set out, in the order in which they were entered into, the various provisions of the Treaties of 1855, 1866, 1898 and 1902, bearing upon that subject, together with our comments upon the same.

(a) *Treaty of 1855* (11 Stat., 611).

The following are the Articles of the Treaty of 1855, which are applicable to the subject of the apportionment and payment of moneys arising from the sale, or disposition otherwise, of common property of the Choctaw and Chickasaw Nations:

> ARTICLE 9. The Choctaw Indians do hereby absolutely and forever quit-claim and relinquish to the United States all their right, title, and interest in, and to any and all lands, west of the one hundreth degree of west longitude; and the Choctaws and Chickasaws do hereby lease to the United States all that portion of their common territory west of the ninety-eighth degree of west longitude, for the permanent settlement of the Wichita and such other tribes or bands of Indians as the Government may desire to locate therein; excluding, however, all the Indians of New Mexico, and also those whose usual ranges at present are north of the Arkansas River, and whose permanent locations are north of the Canadian River, but including those bands whose permanent ranges are south of the Canadian, or between it and the Arkansas; which Indians shall be subject to the exclusive control of the United States, under such rules and regulations, not inconsistent with the rights and interests of the Choctaws and Chickasaws, as may from time to time be prescribed by the President for their government: *Provided, however,* The

territory so leased shall remain open to settlement by Choctaws and Chickasaws as heretofore.

ARTICLE 10. In consideration of the foregoing relinquishment and lease, and as soon as practicable after the ratification of this convention, *the United States will pay to the Choctaws the sum of six hundred thousand dollars, and to the Chickasaws the sum of two hundred thousand dollars, in such manner as their general councils shall respectively direct.*

It thus appears that, by Article 9, the Choctaws and Chickasaws *quit claimed and relinquished* the lands lying west of the 100th meridian of west longitude; and *leased* the lands lying between the 98th and 100th meridians of west longitude, on the east and west, and between the Canadian and Red Rivers, on the North and South (known as the "Leased District").

For such *sale and lease* (In Article 10) the United States paid the Choctaws and Chickasaws the sum of $800,000. This money was paid for the *sale* and *lease* of *common properties* of the two Nations.

It was further provided (in Article 10) that the Choctaws should be paid the sum of $600,000; and the Chickasaws the sum of $200,000.

Thus, the proportions of *Three Fourths to the Choctaws* and *One Fourth to the Chickasaws,* for the apportionment and payment of moneys arising from the sale, or disposition otherwise, of common properties of the two Nations, was first established by treaty; and that is the basis which runs through, and is reaffirmed

by, all the later treaties, and through all laws passed in conformity thereto, which bear upon the subject.

It should also be noted that these sums of money (of $600,000 to the Choctaw and $200,000 to the Chickasaws) were to be paid *"in such manner as their general councils shall respectively direct"*, thus showing that the United States was dealing with the *Nations,* in the matter of the apportionments and payments of these moneys, and not with their *individual members;* and this language is stressed in support of our contention (which will be made in a later portion of this Argument) that the United States always dealt with the *Nations,* so long as they existed, and not with the *individual members* thereof; and that, when such Nations ceased to exist (under the Treaties of 1898 and 1902), the United States then dealt with *individual members,* as the *successor of such Nations,* doing the things which such Nations had formerly done, in their public and *"corporate capacities"*, on behalf of their individual members.

In the instant case, the Choctaw Nation, in support of its contention that this basis (of *Three Fourths* and *One Fourth)* is not the legal basis, for the apportionment of such moneys, relies upon *another provision of the same Treaty* (to-wit: Article 1, which will be fully commented upon in another portion of this Argument), and relating, not to the *apportionment of moneys arising from the sale, or disposition otherwise, of the common properties of the two Nations,* but to

a wholly different subject, to-wit: the *use and occupancy of lands,* by individual members of the two Nations.

The provisions for the apportionment of moneys are positive and clear, and bear upon the particular issues arising in the instant case. The Choctaws and Chickasaws had (in Article 9) *quit claimed and relinquished* certain common lands to the United States, and, at the same time, *leased* certain lands to the United States. For all of this, they were paid $800,000.

Then arose the question of the basis for apportionment and payment. All agreed (Choctaws and Chickasaws, as well as the United States) that it should be apportioned upon the basis of *Three Fourths to the Choctaws* and *One Fourth to the Chickasaws;* and *that* basis was definitely and specifically set out (in Article 10), and solemnly fixed and agreed upon by all the *three parties* to the Treaty. There is no ambiguity in the language used. There is no conflict between this language and the language in Article 1 of the same Treaty bearing upon the *use and occupancy of lands.* There can be no doubt as to what the parties did, and intended to do, upon the subject of the apportionment of moneys arising from the sale, or disposition otherwise, of the common properties of the two Nations.

As stated, this was the *first time* the question of the apportionment and payment of such moneys had arisen. Prior to that time, no common properties had been sold or otherwise disposed of. The question arose; and the treaty makers solved it, by providing that such moneys should be apportioned and paid upon the

agreed basis of *Three Fourths to the Choctaws* and *One Fourth to the Chickasaws.*

The basis thus fixed and agreed upon, was restated and reaffirmed in all later treaties and Acts of Congress passed in conformity thereto (as will be presently shown), and uniformly followed from the day of its first solution to the present day.

(b) *The Treaty of 1866* (14 Stat., 769).

The following are the applicable provisions of the Treaty of 1866:

> ARTICLE 3. The Choctaws and Chickasaws, in consideration of the sum of three hundred thousand dollars, hereby cede to the United States the territory west of the 98° west longitude, known as the leased district, provided that the said sum shall be invested and held by the United States, at an interest not less than five per cent., in trust for the said nations, until the legislatures of the Choctaw and Chickasaw Nations respectively shall have made such laws, rules, and regulations as may be necessary to give all persons of African descent, resident in the said nation at the date of the treaty of Fort Smith, and their descendants, heretofore held in slavery among said nations, all the rights, privileges, and immunities, including the right of suffrage, of citizens of said nations, except in the annuities, moneys, and public domain claimed by, or belonging to, said nations respectively; and also to give to such persons who were residents as aforesaid, and their descendents, forty acres each of the land of said nations on the same terms as the Choctaws and Chickasaws, to be selected on the survey of said land, after the Choctaws and

Chickasaws and Kansas Indians have made their selections as herein provided; and immediately on the enactment of such laws, rules, and regulations, the *said sum of three hundred thousand dollars shall be paid to the said Choctaw and Chickasaw Nations in the proportion of three-fourths to the former and one-fourth to the latter,*—less such sum, at the rate of one hundred dollars per capita, as shall be sufficient to pay such persons of African descent before referred to as within ninety days after the passage of such laws, rules, and regulations shall elect to remove and actually remove from the said nations respectively.

ARTICLE 30. *The Choctaw and Chickasaw Nations* will receive into their respective districts east of the ninety-eighth degree of west longitude, *in the proportion of one-fourth in the Chickasaw and three-fourths in the Choctaw Nation,* civilized Indians from the tribes known by the general name of Kansas Indians, being Indians to the north of the Indian Territory, not exceeding ten thousand in number, who shall have in the *Choctaw and Chickasaw Nations,* respectively, the same rights as the Choctaws and Chickasaws, of whom they shall be the fellow-citizens, governed by the same laws, and enjoying the same privileges, with the exception of the right to participate in the Choctaw and Chickasaw annuities and other moneys, and in the public domain, should the same, or the proceeds thereof, be divided per capita among the Choctaws and Chickasaws.

ARTICLE 37. In consideration of the right of selection hereinbefore accorded to certain Indians other than the Choctaws and Chickasaws, the United States agree to pay to the *Choctaw and Chickasaw Nations,* out of the funds of Indians re-

moving into said nations respectively, under the provisions of this treaty, such sum as may be fixed by the *legislatures of said nations,* not exceeding one dollar per acre, *to be divided between the said nations in the proportion of one-fourth to the Chickasaw Nation and three-fourths to the Choctaw Nation,* with the understanding that at the expiration of twelve months the actual number of said immigrating Indians shall be ascertained, and the amount paid that may be actually due at the rate aforesaid; and should still further immigrations take place from among said Kansas Indians, still further payments shall be made accordingly from time to time.

ARTICLE 46. Of the moneys stipulated to be paid to the Choctaws and Chickasaws under this treaty for the cession of the leased district, and the admission of the Kansas Indians among them, *the sum of one hundred and fifty thousand dollars shall be advanced and paid to the Choctaws, and fifty thousand dollars to the Chickasaws, through their respective treasurers,* as soon as practicable after the ratification of this treaty, to be repaid out of said moneys or any other moneys of said nations in the hands of the United States; the residue, not affected by any provisions of this treaty, to remain in the Treasury of the United States at an annual interest of five per cent., no part of which shall be paid out as annuity, but shall be annually paid to the *treasurer of said nations respectively,* to be regularly and judiciously applied, *under the direction of their respective legislative councils,* to the support of their government, the purposes of education, and such other objects as may be best calculated to promote and advance the welfare and happiness of said nations and their people respectively.

Article 3, above quoted, related to the consideration agreed to be paid to the Choctaws and Chickasaws for the cession of the so-called "Leased District" lands.

This transaction has, perhaps, been the most controversial of all the transactions between the United States and the Choctaw and Chickasaw Indians; and is the subject of another proceeding now pending before this court (No. Congressional 17,641). However, none of the questions arising in that case have any relations to the issues in the instant case. The questions therein arising, as to whether these conditions were ever complied with, or whether the consideration therein agreed to be paid was a fair and just consideration for the lands agreed to be ceded, do not arise herein.

In Article 3, the United States agreed (provided the conditions therein laid down were complied with) to pay the Choctaws and Chickasaws the sum of $300,000.

This transaction being a sale of common properties of the Choctaws and Chickasaws, the question arose as to how such moneys should be apportioned and paid.

The language of the treaty, relating to the apportionment and payment of such moneys, is so plain and clear that no construction or comment is necessary. It says:

> "* * * the said sum of three hundred thousand dollars shall be paid to the said *Choctaw and Chickasaw Nation* in the proportion of *three fourths* to the former and *one fourth* to the latter. * * * "

Article 30 fixes the basis upon which the *Choctaw and Chickasaw Nations* will receive, *into their respective districts,* Indians of other tribes which, under other provisions of the same treaty, they had agreed might settle among them.

It says that such Indians will be received

> "* * * in the proportion of *one fourth in the Chickasaw Nation* and *three fourths in the Choctaw Nation.*"

The language, in the last part of Article 30, is particularly significant as bearing upon the basis for the apportionment of moneys arising from the sale, or disposition otherwise, of the common properties of the Choctaws and Chickasaws.

It says that Kansas Indians (who were permitted to settle among the Choctaws and Chickasaws) shall have the same rights and privileges as Choctaws and Chickasaws,

> "* * * with the exception of the right to participate in the Choctaw and Chickasaw annuities and other moneys, and *in the public domain,* should the same or the *proceeds thereof,* be *divided per capita* among the Choctaws and Chickasaws."

This language seems to look forward to the time when the public domain (the common property of the Choctaws and Chickasaws) *may be disposed of* and the proceeds *divided per capita.*

The Kansas Indians were excluded from participation; but if and when such sale and per capita distribution of the proceeds shall come, it would seem to

be clear that this provision of the treaty means that *the basis* of such distribution was to be *the same* as the basis fixed and agreed upon for the use and occupancy by the Kansas Indians, of the *same lands,* under the *same article* of the *same treaty,* to-wit:

> "* * * in the proportion of *one fourth* in the Chickasaw and *three fourths* in the Choctaw Nation. * * * "

Article 37 definitely and specifically provides how the moneys to be paid by "certain Indians other than the Choctaws and Chickasaws", for the lands which they were permitted to use and occupy, shall be apportioned.

It says:

> "* * * the United States agree to pay to the *Choctaw and Chickasaw Nations,* out of the funds of Indians removing into *said Nation respectively,* under the provisions of this treaty, such sum as *may be fixed by the legislatures of said Nations* * * * to be divided *between said Nations* in the proportion of *one fourth to the Chickasaw Nation* and *three fourths to the Choctaw Nation.* * * * "

It is plain and clear, as in other treaty provisions, that such basis was to be *One Fourth to the Chickasaw Nation* and *Three Fourths to the Choctaw Nation;* and it is also plain and clear that such moneys arose from the sale, or disposition otherwise, of the common properties of the Choctaws and Chickasaws.

Article 46 relates, generally, to *all* moneys arising from the sale, or disposition otherwise, of the common properties of the Choctaws and Chickasaws, under the various provisions of the Treaty of 1866; and also to other moneys still in the hands of the United States.

The Indians were, apparently, in need of moneys, since the Cival War had just closed and they had not escaped it ravages.

The conditions attached to the consideration of $300,000 had not been complied with, and no one knew if they would ever be complied with; and neither was it then known what amount of money would be due them for the use and occupancy of their lands by the Kansas and other Indians.

Under these conditions, the United States agreed to advance them certain sums of money,

> "* * * to be repaid out of said moneys or any other moneys of said Nations in the hands of the United States. * * * "

It was, accordingly, provided that

> "* * * the sum of *one hundred and fifty thousand dollars* shall be advanced and paid to the Choctaws and *fifty thousand* to the Chickasaws, *through their respective treasurers.* * * * "

The basis of *Three Fourths to the Choctaw Nation* and *One Fourth to the Chickasaw Nation* is thus again fixed and agreed upon, as in numerous other provisions of the same treaty.

We again call attention to the fact that the United States, in all of these transactions, dealt with the

Nations, and not with their *individual members* (since payments were to be made to the *treasurers,* and the moneys disposed of by the *legislatures* of the *Nations),* for the same purpose as has been done in commenting upon the Treaty of 1855, to-wit: That the United States has always dealt with such *Nations* (and not with their *individual members)* so long as such Nations existed; and then, after they ceased to exist (under the provisions of later treaties) the United States succeeded to the powers and authority of such Nations, and made apportionments and distributions of moneys to their *individual members, as the successor of such Nations,* dealing, thereafter with the *individual members* as the Nations would have done, if still in existence.

(c) *Treaty of 1898* (30 Stat., 495); and
Treaty of 1902 (32 Stat., 641).

No treaties were entered into between the United States and the Choctaw and Chickasaw Nations from 1866 until the later Treaties of 1898 and 1902.

During that time, many Acts of Congress relating to the apportionment and payment of moneys arising from the sale, or disposition otherwise of the common properties of the two Nations, were passed, under which moneys were apportioned and paid upon the basis of *Three Fourths* to the Choctaw Nation and *One Fourth* to the Chickasaw Nation.

The Choctaw and Chickasaw Nations received these apportionments, without protest or objection; and it is reasonable to conclude that the United States

acted, in apportioning and paying such moneys (and the Indians accepted and enjoyed the same), with the understanding that the basis for such apportionments and payments had long since been fixed and agreed upon, in the Treaties of 1855 and 1866; and that both the United States and the Indians were bound thereby.

(These various Acts of Congress and the transactions thereunder will be set out in the next part of this Argument.)

The Treaties of 1898 and 1902 came as the result of the pressure, from all quarters, to require the Indians of Indian Territory to agree to abolish their Tribal Governments, to accept allotments and the distribution of their common property, in preparation for Oklahoma Statehood.

Has this basis, so definitely fixed and agreed upon in the Treaties of 1855 and 1866, for the apportionment and payment of such moneys, been changed by provisions of the later Treaties of 1898 and 1902?

We say not; and the various provisions, upon that subject will now be referred to.

Every provision in the Treaties of 1898 and 1902, relating to the apportionment and payment of moneys arising from the sale, or disposition otherwise, of the common properties of the Choctaw and Chickasaw Nations, clearly show (with one possible exception, which, as we shall presently show, not only stands isolated

and alone, and is in conflict with the overwhelming weight of other expressions *in the same treaties* and *upon the same subject*, but was definitely and specifically nullified by a provision in the final Treaty of 1902) that there was no intention, upon the part of the treaty makers, in drafting the two later Treaties of 1898 and 1902, to change the basis fixed and agreed upon in the early Treaties of 1855 and 1866, for the apportionment and payment of such moneys, and which basis had been uniformly adhered to by the United States (and accepted by the Choctaws and Chickasaws) from 1855 to the present time.

The following are excerpts from, and comments upon, the *Treaty of 1898* (30 Stat., 495; the paragraphs of the Treaty are not numbered):

By far, the most valuable part of the Indian estate which, it was expected would produce moneys for the benefit of the Indians, was the coal and asphalt deposits. Provision was made for leasing the same, and the payment of royalties.

After setting up a plan for leasing, it is provided for the apportionment and payment of the royalty moneys, as follows:

> "All coal and asphalt mines in the two nations, whether now developed, or to be hereafter developed, shall be operated, and the royalties therefrom paid into the Treasury of the United States, *and shall be drawn therefrom under such rules and regulations as shall be prescribed by the Secretary of the Interior.*"

Then, there is a general provision for making, *hereafter,* per capita payments to the *individual members* of the two Nations, by a bonded officer of the United States. This same treaty contained a provision for the abolition of the Tribal Governments. Theretofore, all apportionments had been made to each *Nation,* and each Nation dealt with its *individual members.* Since the *Nation* ceased to exist, the United States was empowered to deal with *individual members* as the successor of the *Nations.*

This provision is as follows:

> "That all per capita payments *hereafter made* to the members of the Choctaw or Chickasaw nations shall be paid directly to *each individual member by a bonded officer of the United States, under the direction of the Secretary of the Interior,* which officer shall be required to give strict account for such disbursements to said Secretary."

Then follows a general provision for the capitalization, apportionment and payment of trust funds of the Indians, in harmony with the purposes of the preceding paragraph, as follows:

> "It is further agreed that all of the funds invested, in lieu of investment, treaty funds, or otherwise, now held by the United States in trust for the Choctaw and Chickasaw tribes, shall be capitalized *within one year after the tribal governments shall cease,* so far as the same may legally be done, and be apportioned and paid, *by some officer of the United States* appointed for the purpose, to the Choctaws and Chickasaws (freedmen

of the tribes, freedmen excepted, *as are other funds of the tribes.*''

Can it be said, after an examination of these various provisions of the Treaties of 1898 and 1902, that there was any purpose or intention, upon the part of the treaty makers (who were the same parties, and parties in interest, to the Treaties of 1855 and 1866) to alter or change the existing basis for the apportionment and payment of such moneys, which had theretofore been fixed and agreed upon, and rigidly and implicitly adhered to throughout all the years?

When it is said, over and over again, by the parties who, alone, had the power and authority to change the existing basis, that such moneys shall be apportioned and paid

''under such rules and regulations as shall be prescribed by the Secretary of the Interior''; or

''under the direction of the Secretary of the Interior''; or

''distributed per capita as other funds of the tribes''; or

''according to their respective interests''; or

''in the manner provided by law''; or

''as are other funds of the tribes'',

can it be reasonably contended that, in the use of these words and expressions, it was the intention of the treaty makers to upset and overturn the basis theretofore fixed and agreed upon, and uniformly acted upon, by all parties in interest, from 1855 to that time (nearly 50 years), and on to the present time (exactly 80 years)?

Is it not thus shown that all parties to the Treaties of 1898 and 1902 considered that the basis for the apportionment of moneys was a ''closed incident''; that the basis, long theretofore fixed and agreed upon and accepted, without protest or objection, from 1855 to that time (and to the present time, for that matter) needed no attention at the hands of the treaty makers?

Is it not reasonable to contend that, if the treaty makers had any reason to conclude that the basis for the apportionment of moneys was still an ''open question'', it would have been *closed* by the adoption of definite and specific provisions, upon that subject, evidencing their wish and intention to change the *existing basis?*

We have said that these are the expressions of the Treaties of 1898 and 1902, *''with one exception''*.

That will now be referred to.

Under the caption of ''Townsites'', in the Treaty of 1898, it is provided that moneys arising from the sale of town lots shall,

> ''* * * at the end of one year from the ratification of this agreement, and at the end of each year thereafter * * * be divided and paid to the Choctaws and Chickasaws * * * each member of the two tribes to receive an equal portion thereof.''

As stated, this is the *one exception* among all the other provisions of the two Treaties of 1898 and 1902,

upon that subject, that would seem to conflict, to any extent whatsoever, with the basis theretofore fixed and agreed upon, and then existing, for the apportionment of moneys. Every other provision of the two Treaties of 1898 and 1902 is, as above set out, in complete harmony with the basis long since fixed and agreed upon, and accepted and acted upon by all parties in interest.

Counsel for the plaintiff, the Choctaw Nation, in the instant case, stress this isolated language, referring to only a small proportion or percentage of the apportionable moneys, and insist that it should have a far reaching effect, and nullify all the other provisions of the *same treaties* upon the *same subject* of the apportionment of moneys.

Counsel for the plaintiff, in stressing this language, overlook other language in the *same treaty* and upon the *same subject.*

The first paragraph, under the caption of "Townsites" contains the following language:

> "It is further agreed that there shall be appointed a commission for each of the two Nations. Each Commission shall consist of one member *to be appointed by the executive of the tribe* for which said commission is to act * * * and one to be appointed by the President of the United States."

It is thus made plain that the United States was dealing with the *Nation* or tribe (the *Nations* or tribes still then existing, and holding the title to all common and undistributed properties), in its official or "corporate capacity"; and that there was no intention to depart from its uniform policy (based upon existing treaty provisions) of dealing with the *Nations,* and not with their *individual members,* except as the *successor of such Nations.*

Then the language stressed by plaintiff's counsel was wholly nullified by another provision, upon the same subject, in the later Treaty of 1902.

It is a historical fact that the Treaty of 1898 was only a beginning, in the consummation of the Government's program for the settlement of the Choctaw-Chickasaw estate. It was soon learned that it was wholly insufficient for carrying out what the Government had planned. Thus, the Treaty of 1902 was necessary to take the place of the inadequate Treaty of 1898; and for that purpose, and to that end, the Treaty of 1902 was entered into.

In the meantime, the Government could not wait, in the matter of townsites; and the Act of Congress of May 31, 1900 was passed. This act included a comprehensive plan covering the whole subject of townsites; and the Government, in proceeding under it, wholly ignored the unworkable plan contained in the Treaty of 1898.

If the Act of Congress of May 31, 1900 had not been adopted by the later Treaty of 1902, counsel for the plaintiff could contend, and would contend, that the provisions of the Treaty of 1898 could not be nullified by a mere Act of Congress; and that the treaty provisions were still in force.

But the Act of Congress of May 31, 1900, did not stand alone and unsupported as a mere act of Congress. It is a fact that the Government acted, at the time, wholly under the Act of Congress of May 31, 1900, in the matter of townsites; but when the Treaty of 1902 come to be made, there was included therein the following:

> "45. The Choctaw and Chickasaw tribes *hereby assent to the act of Congress approved May 31, 1900* (31 Stats., 221), *in so far as it pertains to townsites* in the Choctaw and Chickasaw nations, *ratifying and confirming all acts of the Government of the United States thereunder, and consent to a continuance of the provision of said act not in conflict with the terms of this agreement.*"

Thus, the whole scheme and plan contained in the Treaty of 1898, was superseded by Section 42 of the Treaty of 1902 (which wholly adopted the Act of Congress of May 31, 1900), and agreed to a continuance of its provisions "not in conflict with *this agreement*".

We, therefore, must look to the Treaty of 1902 (including the adopted Act of May 31, 1900), for the power and authority which the United States exercised in dealing with the subject of *Townsites* in the Choctaw and Chickasaw Nations, and *not to the Treaty of 1898;* and the isolated and inadvertent language in the Treaty of 1898, relating to townsites, which has been quoted and stressed by counsel for the plaintiff, *must give way to the language of the later Treaty of 1902,* and leave unchanged and unaffected, the various general expressions contained in the Treaties of 1898 and

1902, affirming and ratifying the acts of the United States, on the apportionment and payment of moneys, upon the basis fixed and agreed upon and always adhered to, from 1855 to the present time.

The view here expressed, to-wit: That the Acts of the United States, in the apportionment and payment of such moneys upon the basis of *Three Fourths to the Choctaw Nation and One Fourth to the Chickasaw Nation,* was legal, and in strict conformity to the basis fixed and agreed upon in the early Treaties of 1855 and 1866 (and not changed by the later Treaties of 1898 and 1902), is merely a restatement of the conclusions long since reached by the law officers of the United States, after a full consideration of the whole subject.

The following is an excerpt from the report of the Commissioner of Indian Affairs to the Secretary of the Interior, dated December 19, 1910, and appearing upon page 20 of the Record:

> "*No provision is found* in the Act for the protection of the people of the Indian Territory approved June 28, 1898 (30 Stats. L. 495), known as the 'Curtis Act', nor in the act approved July 1, 1902 (32 Stats. L. 641), to ratify and confirm an agreement with the Choctaw and Chickasaw Indians, *changing the proportional interests* of these Indians in their lands, or the funds accruing to them under these acts, such funds having been brought on the books of this Office by Treasury

Department warrants in the proportion—three-fourths, Choctaws, and one-fourth, Chickasaws."

As stated in the first sub-division of the Argument herein, the contentions of the plaintiff would seem to be not founded upon fact, and, therefore, not well taken, in view of the fact that an examination of the whole Record will show that apportionments and payments, to the individual members of the two Nations, were *approximately equal* (as shown in the first part of this Argument); but we have deemed it advisable to answer all technical contentions of the plaintiff, and to show that the acts of the United States, in the apportionments and payments of such moneys, *were legal* and in strict conformity to the power and authority conferred upon it by the various treaties, even if, in the exercise of such authority, the shares of the individual members of the two Nations *had been unequal,* so long as they were upon the fixed and agreed treaty basis of *Three Fourths to the Choctaws* and *One Fourth to the Chickasaws.*

(3)

All Acts of Congress, relating to the apportionment and payment, to the Choctaws and Chickasaws, of moneys arising from the sale, or disposition otherwise, of common properties, have been passed and administered in conformity to the basis fixed and agreed upon in treaties between the United States and the Choctaw and Chickasaw Nations (of *three fourths* to the Choctaw Nation and *one fourth* to the Chickasaw Nation).

The various Acts of Congress bearing upon the apportionment and payment of moneys to the Choctaws and Chickasaws, will now be set out and commented upon.

(a) *Act of Congress of May 7, 1882* (22 Stat., 73).

This act appropriated the sum of $10,000 (presumably out of the $300,000 which, under Article 3 of the Treaty of 1866, was to have been paid the Choctaws and Chickasaws for the cession of the "Leased District" lands),

"* * * to be expended under the direction of the Secretary of the Interior, in the proportions of *three fourths among the Choctaws* and *one fourth among the Chickasaws,* for promoting education among the Freedmen of said Nations. * * *"

(b) *Act of Congress of August 2, 1882* (22 Stat., 181).

This Act granted a right of way for railroad and telegraph lines through the Choctaw and Chickasaw Nations, to the St. Louis and San Francisco Railway Company; and, in Section 4, required that company to pay quarter-annually, *to the National Treasurers of such Nations,* for the use and benefit of schools, the sum of Seven Hundred and Fifty Dollars,

> "* * * *one fourth* of said payments to be paid to the Chickasaws and *three fourths* to be paid to the Choctaws. * * *"

(c) *Act of Congress of March 3, 1891* (26 Stat., 989).

This act appropriated the sum of $2,991,450 to compensate the Choctaws and Chickasaws for their "right, title and interest" in that part of the so-called "Leased District" lands known as the Cheyenne and Arapahoe Reservation, comprising some 2,393,160 acres.

The history of the "Leased District" lands has no bearing upon the issues in the instant case, except that part which bears upon *the basis* upon which the appropriated moneys were paid by the United States and received and enjoyed by the Choctaws and Chickasaws.

The Choctaws and Chickasaws contended that, under Article 3 of the Treaty of 1866, they had merely ceded such lands, *in trust* to the United States, for the settlement of other Indians thereon. The Cheyennes and Arapahoes had been settled upon the lands in con-

troversy; and when the United States proposed to give those Indians allotments in severally, and to open the balance to white settlement, the Choctaws and Chickasaws asserted their rights, and demanded compensation.

Congress agreed, their rights were recognized; and the money was appropriated and made available for apportionment and payment to the two Nations.

The appropriation Act (after all other necessary provisions relating to the history and description of such lands), provided:

> "* * * *three fourths* of this appropriation (of $2,991,450) to be paid to such person or persons as are or shall be duly *authorized by the laws of said Choctaw Nation to receive the same,* at such time and in such sums as are directed and required by the *legislative authority of said Choctaw Nation,* and *one fourth* of this appropriation to be paid to such person or persons as are or shall be duly *authorized by the laws of said Chickasaw Nation to receive the same,* at such time and in such sums as directed and required by the *legislative authority of said Chickasaw Nation* * * *."

It should be noted that the United States, in this act, did not deal with the *individual members* of the Nations. It dealt only with the *Nations;* and no part of this tremendous appropriation was apportioned or paid out until the *legislative authorities* laid down *the basis* for such apportionment and payment.

Let us see what the *legislative authorities* of the *two Nations* did do, in the matter of *the basis* for such apportionment and payment.

They did just what the United States has always done, in the apportionment of common moneys. They acted in strict conformity to the basis fixed and agreed upon in the Treaties of 1855 and 1866, to-wit: *Three Fourths to the Choctaws* and *One Fourth to the Chickasaws,* and which basis has been adhered to by all the interested parties, from 1855 to the present time.

On April 9, 1891, the General Council of the Choctaw Nation, passed the following Act:

> "AN ACT making requisition for the sum of $2,243,587.50, *due the Choctaw Nation* under an act of Congress approved March 3, 1891.
>
> "*Be it enacted by the general council of the Choctaw Nation assembled,* That the delegation of 1889, the *national treasurer* of the Choctaw Nation, and some one to be selected by the *principal chief,* with the *advice and consent of the senate,* are hereby authorized and directed to proceed to Washington, D. C., and make a requisition on the Government of the United States in such manner and form as may be satisfactory to the proper authorities of the United States for the sum of $2,243,587.50, being *three-fourths* of the sum of $2,991,450 appropriated by the act of Congress of the United States, approved March 3, 1891, in payment of the interest of the Choctaw and Chickasaw Nations in the lands west of 98th degree of west longitude."

On April 1, 1891, the Legislature of the Nation passed the following Act:

> "AN ACT to comply with the requirements of the act of Congress, approved March 3, 1891, making an appropriation to compensate the Choctaws and Chickasaws for their interest in the lands lying south of the Canadian River, now occupied under executive order by the Cheyenne and Arapahoe Indians * * *."
>
> "*Now, therefore, be it enacted by the legislature of the Chickasaw Nation,* That Benjamin F. Byrd, *treasurer* of the Chickasaw Nation be, and he hereby is, authorized to receive, on behalf of the *Chickasaw Nation,* the sum of seven hundred and forty-seven thousand eight hundred and sixty-two dollars and fifty cents, being *one fourth* part of the amount appropriated in said act of Congress to compensate the Choctaw and Chickasaw nations for their interest in the lands lying south of the Canadian River and now occupied, under executive order, by the Cheyenne and Arapahoe Indians."
>
> —(Senate Executive Document No. 42, 52nd Congress, 1st Session.)

Can there be made a stronger argument in support of the contention that the basis for the apportionment of common moneys had been fixed and agreed upon (and was so understood and accepted by all the interested parties, the United States and the Indians themselves) than to set out these legislative expressions?

If another basis had been in the mind of any one, would it not have arisen and been dealt with before this tremendous sum of nearly three millions of dollars was apportioned and paid out?

It is a part of the history of the two Nations that this money, after being received, was paid out, per capita, to the *individual members* of the two Nations,

by the regularly constituted authorities of the two Nations, thus again supporting our contention that the United States always dealt with the *Tribal Governments of the two Nations,* so long as they existed, and then, with the *individual members* of the Nations (after they ceased to exist) as the *successor* of the two Nations, in the same manner, and for the same purposes as the Nations would have done, if they had still existed.

(d) *Act of Congress of June 10, 1896* (29 Stat., 321).

This act provided for the location of Absentee Wyandotte Indians upon the lands of the Choctaws and Chickasaws, in accordance with the provisions of Articles 30, 31 and 37 of the Treaty of 1866; and that the sums of $15,686.00 (appropriated by the Act of Congress of August 15, 1894, and $6,000.00 appropriated by the Act of March 2, 1895, for procuring homes for such Indians), should be apportioned and paid to the Choctaws and Chickasaws, as compensation for their lands thus taken and used.

In the matter of the apportionment and payment of such moneys to the Choctaws and Chickasaws, it was provided:

> "* * * which said fund shall be paid to the *National treasurers* of the Choctaw and Chickasaw Nations in the proportions of *three fourths* to the former and *one fourth* to the latter * * *."

Thus, this money was not only apportioned and paid upon the basis theretofore fixed and agreed upon,

of *Three Fourths* to the Choctaw Nation and *One Fourth* to the Chickasaw Nation (which basis had always, theretofore and thereafter, been recognized and accepted by all parties in interest); but it was apportioned and paid to the *National treasurers* of the two *Nations.*

(e) *Act of Congress of June 28, 1898* (30 Stat., 495).

This act is generally known, in the later history of the relations between the United States and the Choctaws and Chickasaws, in the settlement of the affairs of the Indians, as the "Curtis Act".

The first step which the United States took, to that end, was the passage of the Act of Congress of March 3, 1893 (27 Stat., 612), creating the "Commission to the Five Civilized Tribes" (commonly known throughout all the following years as the "Dawes Commission"), the paragraph thereof showing the objectives of the United States to be as follows:

> "SEC. 16. The President shall nominate and, by and with the advice and consent of the Senate, shall appoint three commissioners to enter into negotiations with the Cherokee Nation, the Choctaw Nation, the Chickasaw Nation, the Muskogee (or Creek) Nation; the Seminole Nation, for the purpose of the extinguishment of the national or tribal title to any lands within that Territory now held by any and all of such nations or tribes, either by cession of the same or some part thereof to the United States, or by the allotment and division of the same in severalty among the In-

dians of such nations or tribes, respectively, as may be entitled to the same, or by such other method as may be agreed upon between the several nations and tribes aforesaid, or each of them, with the United States, with a view to such an adjustment, upon the basis of justice and equity, as may, with the consent of such nations or tribes of Indians, so far as may be necessary, be requisite and suitable *to enable the ultimate creation of a State or States of the Union which shall embrace the lands within said Indian Territory.*"

Under this power and authority, the Commission negotiated with the several Nations for some four years; and finally, in 1897, a tentative agreement, or treaty, was entered into with the Choctaws and Chickasaws.

The Indians were loath to agree to the allotment of their lands, the division of their tribal property and the abolition of their Tribal Governments.

Therefore, when the so-called "Atoka Agreement" was entered into on April 23, 1897, no one knew whether it would be accepted or rejected by the Indians.

The United States had reached the conclusion that the time had arrived for the consummation of its program (by agreement with the Indians, if possible, and without an agreement, if none could be procured); and, accordingly the Act of Congress of June 28, 1898, was passed.

The first 28 Sections of that Act comprise a complete plan of action, so far as the United States could

legally act; and Section 29 contains the "Atoka Agreement".

It was provided (in Section 29) that the Agreement should be submitted to the Choctaws and Chickasaws, at a special election; and, if accepted, it should become effective.

It was further provided that if such agreement should be ratified,

"* * * the provisions of this act shall then only apply to said tribes *where the same do not conflict with the provisions of said agreement.* * * *."

What, then, are the provisions of the Act of June 28, 1898, which relate to the issues in the instant suit, to-wit: the apportionment and payment of moneys?

Are such provisions beyond the power of the United States to pass and administer, and do they conflict with the Agreement, in the matter of the apportionment and payment of moneys?

As to the apportionment and payment of townsite moneys (after creating townsite commissions and defining their duties), it is provided, in Section 15:

"* * * and thereafter the purchase money shall *become the property of the tribe;* and all such moneys shall * * * be *paid per capita to the members of the tribe.*"

As to the apportionment and payment of royalties, it is provided, in Section 16:

"* * * and all royalties or rents hereafter payable to the tribe shall be paid, under such *rules and*

regulations as may be prescribed by the Secretary of the Interior, into the Treasury of the United States *to the credit of the tribe to which they belong.''*

Then, Section 19 directs *how* and *by whom,* and *to whom all moneys* of the tribes shall, thereafter, be apportioned and paid, as follows:

''SEC. 19. That no payment of any moneys or any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement, but payments of all sums to members of said tribes shall be made *under direction of the Secretary of the Interior by an officer appointed by him;* and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any prevoiusly contracted obligation.''

Is there, in these provisions, any suggestion or intimation that the *basis* for the apportionment and payment of moneys, as between the Tribes, should differ from *the basis* then existing, and always, theretofore and thereafter, uniformly followed?

Is not Section 19 a confirmation of the contention that, theretofore, the United States had always dealt with the Nations, and that, thereafter, it was to become the *successor of the Nations,* in dealing with their individual members?

Are not the expressions in these quoted provisions of the Act of Congress of June 28, 1898, that such moneys shall be apportioned and paid

''per capita to the members of the tribe''; and

''under such rules and regulations as may be prescribed by the Secretary of the Interior''; and

''under the direction of the Secretary of the Inter by an officer appointed by him''

in complete harmony with like expressions in the Treaties of 1898 and 1902, thus showing that all parties in interest had no thought or understanding that there was any existing question or problem as to *the basis* for the apportionment and payment of moneys; but that the *sole and only* question and problem that existed was the transfer of the responsibility for apportionments and payments, from *the Nations* to the United States, in so far as *individual members* were concerned?

Is it not reasonable to say, and sufficient to say, that if the United States and the Indians had felt that there were good reasons for changing the *existing basis* for the apportionment and payment of moneys (long theretofore fixed and agreed upon, and uniformly adhered to), it would have been changed by the use of such words, in treaties and laws, as would have left no doubt as to the intentions and understandings of the interested parties, in a matter of such tremendous and outstanding importance?

(f) *Act of Congress of April 26, 1906* (34 Stat., 137).

This act contained many broad and far reaching provisions ''for the final disposition of the affairs of

the Five Civilized Tribes", which have no bearing upon the issues in the instant case.

However, Section 12 of the act has an important bearing upon the instant issues.

It is therein provided that the Secretary of the Interior shall sell all town lots theretofore reserved for use in connection with the operation of coal and asphalt mining leases; and that

> "* * * the proceeds arising from such sale shall be deposited in the Treasury of the United States *as are other funds of the tribes.*"

"Other funds" of the tribes arising from the sale, or disposition otherwise, of the common property of the Choctaws and Chickasaws had always been deposited, *Three Fourths* to the Choctaws and *One Fourth* to the Chickasaws; and drawn therefrom and paid to the tribes upon the same basis.

Therefore, these moneys were to be disposed of *"as are other funds of the tribes"*.

Then, this language is important, for another purpose.

It has been shown that the *single exception,* in all the provisions of the later treaties of 1898 and 1902, which might be construed as conflicting with the basis of *Three Fourths* and *One Fourth,* laid down and repeated in *all the treaties and laws* upon the subject of the apportionment and payment of the common moneys of the Choctaws and Chickasaws, is that isolated provision in the Treaty of 1898 relating to the equal

division of *townsite moneys.* It has also been shown that the whole plan for the disposition of townsites, contained in the Treaty of 1898, was nullified and superseded by Section 45 of the Treaty of 1902, in adopting the complete plan, upon that subject contained in the Act of Congress of May 31, 1900.

Here, in the Act of April 26, 1906, is *another plan* relating to the subject of *townsites;* and, in that act, the proceeds are to be disposed of *"as are other funds of the tribes"*.

May it not be said that the forced and strained meaning which counsel for the Choctaw Nation seek to read into the *single and isolated* exception contained in the Treaty of 1898, is wholly in conflict with all other provisions of all other treaties and laws upon the subject of the apportionment and payment of common moneys of the Choctaws and Chickasaws?

Does this particular provision, drafted and passed some eight years after the Treaty of 1898, not show the understanding of the United States to have been, all the way through, that *townsite moneys* were to be dealt with and disposed of *"as are the other funds of the tribes"?*

(g) *Act of Congress of February 19, 1912* (37 Stat., 67).

This act provided for the sale of the surface of the "Segregated Coal and Asphalt Lands" of the Choctaws and Chickasaws, separate from the coal and asphalt deposits; and that the proceeds should be dis-

posed of in accordance with the provisions of the Acts of Congress of April 26, 1906, and March 3, 1911.

The act of March 3, 1911 (36 Stat., 1058), merely provided for the deposit of the net receipts of sales of surplus and unallotted lands, in banks within the State of Oklahoma, and has no bearing upon the issues of apportionments and payments arising in the instant case.

The act of April 26, 1906 (34 Stat., 137), in the matter of the use of moneys belonging to the Five Civilized Tribes, provides that so much thereof as may be necessary shall be used for the support and operation of tribal schools, and that

> "* * * any of such tribal funds so set aside remaining unexpended when a public school system under a future state or Territorial government has been established, shall be *distributed per capita* among the citizens of the Nations, *in the same manner as other funds.*"

Thus, the proceeds of the sales of the surface of the segregated coal and asphalt lands (which might remain unexpended after their use for tribal schools should cease, upon the organization of State or Territorial schools) were to be distributed per capita "*in the same manner as other funds*".

In what manner? In the manner fixed and agreed upon in the early Treaties of 1855 and 1866, and not changed by the later Treaties of 1898 and 1902.

In the same manner in which all the common moneys of the Choctaws and Chickasaws had always been apportioned and paid, under treaties, and under laws

passed in conformity thereto, to-wit: *Three Fourths* to the Choctaws and *One Fourth* to the Chickasaws; and which basis had always been followed by the United States and accepted by the Indians.

(h) *Acts of Congress granting Right of Ways to Railway Companies.*

Prior to the allotment of the land and the division of the tribal property of the Choctaws and Chickasaws, various railway companies were given the right to acquire lands for rights of way and station grounds over and upon the lands of the Nations.

There are some *thirty* of such Acts of Congress; and it has not been deemed necessary to set them all out (since they are all similar), but to make a general reference to the Statutes at Large of the United States in which they appear.

It is provided, in all of these acts, that the railway company shall pay to the Secretary of the Interior, *for the benefit of the nations or tribes through whose lands the railway shall be located,* the sum of fifty dollars per mile; and that, if the *general councils of either of the Nations* or tribes shall dissent, the compensation shall be fixed by a board of referees, one to be appointed by the President, one by the *Chief of the Nation* and one by the railway company.

Then, in the matter of the apportionment and payment of such moneys, it was provided (this language being *identical* in all such acts):

"The money paid to the Secretary of the Interior under the provisions of this act shall be *apportioned by him in accordance with the laws and treaties now in force between the United States and said nations and tribes.* * * *"

Thus, as stated, some *thirty* right of ways were granted and paid for; and the moneys were apportioned and paid to the *Choctaw and Chickasaw Nations* in the proportions of *Three Fourths to the Choctaw Nation* and *One Fourth to the Chickasaw Nation, "in accordance with the laws and treaties now in force".*

In all of these transactions (as well as in many other like transactions) it never occurred to the United States, nor to the Indians, that the *basis* for such apportionment and payment of such moneys had not long since been fixed and agreed upon; or that there existed an open question, upon that point, requiring further legislation, in either treaties or laws.

Finally, in passing from the discussion of treaties and laws bearing upon the subject, it may be said that what the United States and the Indians actually *did do,* in this very important matter of the apportionment and payment of moneys, is the best evidence of what all the interested parties considered they had the legal power and authority to do, under the existing treaties and laws.

Throughout all the years, from 1855 to the present time, the United States did actually apportion and pay all moneys arising from the sale, or disposition

otherwise, of the common properties of the Indians upon the basis of *Three Fourths to the Choctaws* and *One Fourth to the Chickasaws.*

Throughout all the same years the Indians did actually receive and enjoy such moneys, upon that basis, without protest or objection.

In so doing, the United States acted upon the advice and counsel of its law officers, from the Attorney General of the United States, on down through the law officers of the various Departments having the administration of Indian affairs.

True, in later years, it was conceived by a subordinate law officer in the Interior Department, that the existing basis for the apportionment and payment of such moneys might be wrong because of the wording of Article 1 of the Treaty of 1855.

It has been shown, in another part of this argument, that such wording related to the *use and occupancy* of the common lands of the Choctaw and Chickasaws (to overcome the differences which had arisen; and that the Treaty of 1855 was made, mainly, for the purpose of composing these differences); and that this wording could not have any application to the apportionment and payment of moneys, for the reason that *that subject* was *separately dealt with* in the *same treaty* (followed by *like treatment* in all the later treaties and laws).

Then, the expressed views of this one subordinate law officer of the Interior Department, in later years (Mr. J. W. Howell) has had only one result: It has

given birth to the questions which arise in the instant case. The contentions of the Choctaw Nation, herein, rest, solely and wholly, upon the views which he expressed; and are nowhere else supported by the views of any other law officer of the United States, either above him or below him.

It cannot be said that the views of this subordinate law officer, standing, as they do stand, isolated and alone, among the views of a long and distinguished line of predecessors, contemporaries and successors, are entitled to very much consideration and weight, since such views have never been sustained, in any quarter, and have been reversed by every other law officer of the United States who has given official expressions upon the subject.

What has the United States actually done, throughout all the years, in the apportionment and payment of such moneys?

We quote from various official reports appearing in the printed Record.

In the report of the Secretary of the Interior, upon the instant case, dated June 2, 1933 (Record, page 12), it is said:

> "In the expenditure of such funds for the benefit of both tribes, the necessary amounts have been drawn from the Treasury in the proportion that they were covered in * * *."

In the report of the Commissioner of Indian Affairs, dated January 7, 1920 (Record, page 38), it is said:

> "Such funds as have been derived from disposition of the tribal land of the Choctaw and Chickasaw Nations have been brought on the books of the Indian Office by Treasury Department warrants in the proportion of ¾ to the credit of the Choctaw Nation and ¼ to the credit of the Chickasaw Nation."
>
> "In the expenditure of such funds for the benefit of both tribes the necessary amounts have been withdrawn from the Treasury in the same proportion that they were covered in."

Exactly the same wording appears in a later report of the Commissioner of Indian Affairs, dated January 5, 1926, and appearing upon page 43 of the printed Record.

It thus appears, we respectfully submit, that all moneys of the Choctaws and Chickasaws to which the instant case relates have been apportioned and paid upon the basis of *Three Fourths to the Choctaws* and *One Fourth to the Chickasaws,* as fixed and agreed upon in the early Treaties of 1855 and 1866 (and not changed by the later Treaties of 1898 and 1902), and under Acts of Congress passed in conformity thereto; that such moneys have been received and enjoyed, through all the years, under such treaties, and Acts of Congress; and that such apportionments and payments, upon that basis, are legal and binding upon all the interested parties.

(4)

The Choctaw and Chickasaw Nations have, by their official acts, recognized and accepted the existing basis of *three fourths to the Choctaws* and *one fourth to the Chickasaws*, as fixed and agreed upon in treaties or agreements, for the apportionment and payment of moneys arising from the sale, or disposition otherwise, of the common properties of the two Nations; and may not now question the legality of the acts of the United States in making apportionments and payments of such moneys, upon the basis thus fixed and agreed upon, under such treaties and under laws passed and administered in conformity thereto.

When, under the Act of Congress of March 3, 1891 (26 Stat., 1095), there was appropriated the sum of $2,991,450 to compensate the Choctaw and Chickasaw Nations for the Cheyenne and Arapahoe Reservation lands (a part of the so-called "Leased District" ceded to the United States under Article 3 of the Treaty of 1866), the question arose as to how, and in what proportions, the money should be apportioned and paid, as between the two Nations.

Solemn acts of the General Council of the Choctaw Nation (passed and approved on April 9, 1891), and by the Legislature of the Chickasaw Nation (passed and approved on April 1, 1891), making requisitions, by each Nation, of the share to which it was entitled, were passed.

The Choctaw Nation demanded payment of the sum of $2,243,587.50, out of the total sum appropriated, "being *three-fourths of the sum of $2,991,450*"; and the Chickasaw Nation demanded payment of the

sum of $747,862.50, out of the total sum appropriated, "*being one fourth of the amount appropriated*".

(The acts of the Choctaw Council and the Chickasaw Legislature, and also the Act of Congress of March 3, 1891, have been fully set out under subdivision (3) of this Argument, and need not be repeated here; and our comments upon that subject are also therein fully set out.)

All the interested parties (the United States and the Indians) understood that the basis for the apportionment and payment of such moneys had long since been fixed and agreed upon; and that nothing remained to be done except to apportion and pay over the moneys, according to such basis.

Then, later, the United States proposed to open the so-called Wichita Reservation lands (also a part of the "Leased District") to white settlement.

The Choctaws and Chickasaws demanded compensation for these lands, in the same way and at the same rate as they had demanded and received compensation for the Cheyenne and Arapahoe Reservation lands.

Payment was not so promptly made for these lands; but, by the Act of Congress of March 2, 1895 (28 Stat., 876), the Choctaw and Chickasaw Nations were permitted to file suit in the United States Court of Claims to have their rights determined, with right of appeal to the Supreme Court of the United States.

The issues and outcome of that suit have no relation to the issues in the instant case; but the state-

ments of the Choctaw and Chickasaw Nations, in the pleadings filed therein, in so far as they relate to the interests of the Choctaw and Chickasaw Nations in any sum of money that might be recovered in that suit, have a tremendously important bearing upon the issues in the instant case.

This suit (being one of the most important ever filed and maintained by the Choctaw and Chickasaw Nations) was begun by Petition, filed in the United States Court of Claims on March 26, 1895, in the case of *"The Choctaw Nation and The Chickasaw Nation vs. The United States and the Wichita and Affiliated Bands of Indians"*, No. 18932; and is set out on pages 1-20 of the "Transcript of Record" in the Supreme Court of the United States, filed, upon appeal from the Court of Claims, on June 30, 1899.

This original Petition was signed and filed by James G. Standley, Delegate for the Choctaw Nation, and J. H. McGowan, Attorney for the Chickasaw Nation; and the following distinguished attorneys were "Of Counsel" for the Choctaw and Chickasaw Nations: Sam'l Shellabarger, J. M. Wilson, Rob't L. Owen, Halbert E. Payne and George T. Barnes.

These names are given in order that it may appear that the Choctaw and Chickasaw Nations were most ably represented; and we are entitled to attach the greatest and gravest importance to any statements and conclusions that may appear in the Petition and Briefs, in so far as they may bear upon the issues in the instant case.

We quote from page 6 of the Supreme Court Record:

> "The *proportionate interest of the Choctaws and Chickasaws in the lands in controversy in the present case is fixed by the 10th article of the treaty of June 22, 1855* (11 Stats., 613), *by the 3d and 37th articles of said treaty of April 28, 1866* (14 Stats., 769), *and by the 15th section of the act of March 3, 1891* (26 Stats., 1025), at *three-fourths* in the Choctaws and *one-fourth* in the Chickasaws."

We also quote from page 20 of the same Record, being a part of the Prayer of the Petition:

> "3. That this court will from time to time, as sales are made, and the proceeds thereof deposited in the Treasury, as provided by said act, pass its order and decree directing the payment out of said proceeds so deposited to the Choctaw Nation *three-fourths* of said proceeds of sale so deposited, and to the Chickasaw Nation the other *one-fourth.*"
>
> "4. That when the quantity and value of said lands to be allotted as aforesaid to the members of the Wichita and affiliated bands and reserved for school and other purposes, as hereinbefore set forth, are ascertained and determined, the court will decree the claimants aforesaid in said proportions of *three-fourths to the Choctaws* and *one-fourth to the Chickasaws,* of the entire value of said lands so allotted to said several and respective members of the Wichita and affiliated bands and reserved for school and other purposes."

The Choctaw and Chickasaw delegates who were charged with the conduct of this great suit were men

of affairs in the Nations, and were, perhaps, their most intelligent, well informed and outstanding citizezns.

The attorneys who conducted the suit ranked high among the legal practitioners of the whole nation.

Are we not justified in attaching the greatest and gravest importance to these statements and conclusions (carefully considered, deliberately stated and *supported by the same authorities relied upon by us in the instant case),* setting out the respective interests of the Choctaw and Chickasaw Nations in the moneys sought to be recovered as compensation for the common properties of the two Nations?

Then, when this suit come to be decided by the United States Court of Claims, on January 9, 1899 (32 Ct. Cls., 17-168), the decision was in favor of the Choctaw and Chickasaw Nations, and on page 107 of the opinion the court expressed its views upon the particular questions arising in the instant case, as follows:

> "The rights of the Choctaws and Chickasaws as between themselves had been fixed by agreement, with the consent of the Government, in the proportion of *three-fourths to the former* and *one-fourth to the latter tribe* in all land to which either tribe could lay claim."

We think the use of the word "land", by the court, was inadvertant. No division of *land* was involved in the case before it; and no division of *land* is involved in the instant case.

In the early Treaties of 1855 and 1866, no division of *all* land was contemplated. True, the Treaty of 1866

contained a plan for the partial allotment of 160 acres each; but that plan was never carried out.

Then, Article 33 provides:

> "* * * the *unselected land* shall be the common property of the Choctaw and Chickasaw Nations, *in their corporate capacities,* subject to the joint control of their *legislative authorities.*"

The question before the court in the case which resulted in the above quoted opinion, was as to the basis for the apportionment and payment of *moneys* arising from the sale, or disposition otherwise, of the common properties of the tribes, to-wit: the *moneys* which might be recovered from the United States for the taking of the lands of the Wichita Reservation; and the language of the court could have no application to any questions or issues except those arising out of the case before it; and upon that, it does hold the *agreed basis* to have been *Three Fourths* and *One Fourth.*

In the instant case, the questions and issues are the same, to-wit: The *basis for the apportionment and payment of moneys* arising from the sale, or disposition otherwise, of common properties.

When the Treaty of 1898 and 1902 came to be made, the subject of the *allotment of the lands* was treated; and it was provided that each individual member of the two Nations should receive lands equal to 320 acres of average land. They deemed it necessary to further legislate upon *that* subject; and they *did* legislate upon it, as they had the power to do. The al-

lotment thus provided, was only partial, as to lands—vast areas of unallotted lands were left over.

They provided, in the same treaty, that the *unallotted lands* should be sold and proceeds distributed percapita.

Did they legislate further and anew upon the subject of the *basis* for the apportionment and payment of such moneys? Did they change the existing basis of *Three Fourths to the Choctaws* and *One Fourth to the Chickasaws,* fixed and agreed upon in the earlier Treaties of 1855 and 1866?

They did not. As shown, when they come to say how these moneys were to be apportioned and paid, they deemed no further legislation necessary; and were entirely content to permit the *existing basis* to stand, by merely providing, in section after section and in provision after provision, that such moneys be apportioned and paid

"as other funds of the tribes"; or

"in the manner provided by law"; or

"under the direction of the Secretary of the Interior"

and other like expressions.

The basis for the apportionment and payment of such moneys, having been fixed and agreed upon, in solemn form, in the earlier Treaties of 1855 and 1866, must stand and be respected until and unless changed by those, who, alone, had the power to change it; and it *was not changed* by the later Treaties of 1898 and 1902.

(5)

The Treaty of 1902, providing for allotments of land to so-called "Mississippi Choctaws", did not have the effect of changing the existing basis for the apportionment and payment of moneys arising from the sale, or disposition otherwise, of the common properties of the Choctaws and Chickasaws (fixed and agreed upon in the Treaties of 1855, 1866, 1898 and 1902), and of repealing all provisions of all treaties and laws upon that subject.

But for the insistence of the Choctaws (at the beginning of the movement for closing the affairs of the Five Civilized Tribes, looking to the ultimate creation of the new State of Oklahoma) that some provision be made for their indigent kinsmen (still in the State of Mississippi, and known as "Mississippi Choctaws") their contentions in the instant case would never have arisen.

It was provided in the Treaty of 1902, (in Sections 41, 42, 43 and 44; 30 Stat., 641) that such of them as were "identified" as the descendents of those who took lands in Mississippi, under Article 14 of the Treaty of 1830, might receive allotments of land, provided they made *bona fide* settlement in Choctaw-Chickasaw country, within six months after the date of their identification, and continuously resided thereon for a period of three years.

It was, further, meticulously and specifically provided that such "Mississippi Choctaws" should

"* * * be enrolled by said Commission as *Mississippi Choctaws.* * * *"; and

"* * * be entitled to *allotment.* * * *"; and
" * * * shall be upon a *separate roll.* * * *"

The Choctaw Nation has contended, (in Case No. H-37) in the Court of Claims, that the "Mississippi Choctaws" were entitled to *allotments of land only,* and not to percapita shares of money; and the Chickasaw Nation was in entire sympathy with the purposes of that suit.

However, the Court of Claims has decided adversely upon that contention; and its decision has now become final, since the Supreme Court of the United States has refused to grant its petition for *certiorari* to the Court of Claims.

It has now been settled that the "Mississippi Choctaws" were legally entitled to the percapita shares of moneys which they have already received; and the question arises, upon the contentions of the Choctaw Nation, in the instant case, as to whether *the basis* upon which such moneys were apportioned and paid *shall be changed,* to the advantage of the Choctaw Nation, and to the disadvantage of the United States and the Chickasaw Nation.

As stated, the "Mississippi Choctaws" have already received percapita shares of money. These shares have been apportioned and paid out of the *Three Fourths* of all moneys arising from the sale, or disposition otherwise, of common properties, heretofore apportioned and paid to the Choctaw Nations, upon the basis of *Three Fourths to the Choctaw Nation* and *One Fourth to the Chickasaw Nation,* as fixed and agreed upon (as we contend, and, as we think, has been shown) in the Treaties of 1855, 1866, 1898 and 1902, and in all acts of Congress relating to that subject, and upon which basis, and under which treaties and laws, all such moneys have always been apportioned and paid, from 1855 to the present time.

We have said that we were in agreement with the Choctaw Nation in its contention (in Case No. H-37) that the "Mississippi Choctaws" were not entitled to *any money,* in the percapita distribution of moneys; but the courts have decided otherwise, and that phase of the two cases is now closed.

Since the Choctaw Nation has failed to sustain its contention, (in Case H-37), is that any good reason for it to now seek to pass the burden on to the United States and the Chickasaw Nation?

The burden of taking care of the per capita payments to "Mississippi Choctaws" is the burden of the *Choctaw Nation;* and, to hold otherwise, would, as we respectfully contend, be in direct conflict with all that has been said and done, in and under all treaties and laws upon the subject of the apportionment and payment of moneys arising from the sale, or disposition otherwise, of the common properties of the two Nations.

If we should restate the history of the "Mississippi Choctaws", in their relations with the Choctaw Na-

tions, and again quote the provisions of treaties and laws relied upon by the Choctaw Nation in support of its contention, (in Case No. H.-37) that they were not entitled to percapita payments of moneys, it would seem to be a reargument of the issues in that case, now finally decided and disposed of; and that we shall not do.

We shall, therefore, confine ourselves to the phases of that case which affect the issues in the instant case.

"Mississippi Choctaws" were those Choctaw Indians who, under Article 14 of the Treaty of 1830 (11 Stat., 573) chose to remain in Mississippi and become citizens of that state, and not to emigrate, along with the other members of the tribe, to the western country. Those of this class were given allotments of land of 640 acres each.

The other members of the tribe (constituting the great majority) went west; and, in doing so, they not only endured the hardships of the journey, and underwent the privations and sacrifices necessary to establish themselves in the western wilderness, but cooperated with the United States in carrying out its far reaching plans for the relocation of the tribes.

As the years passed, and after their allotted lands in Mississippi had passed out of their hands, and they had fallen to low estate, they heard of the good fortune of their kinsmen who had come into the possession and ownership of a rich and extensive western empire. They made it known that they wished to rejoin the tribe, and to share in that which they had spurned.

The Choctaws, kindly and charitable, (and realizing that, irrespective of what had transpired, the "Mississippi Choctaws" were their blood kinsmen) let it be known that such of them as might come west would be welcome.

It should be remembered that, at that time, there were no tribal moneys, and nothing was further from the thoughts of any of them than the percapita distribution of public moneys.

There was nothing but *land,* in so far as the Nation was concerned; and only the common *use and occupancy* of land.

At first, a few "Mississippi Choctaws" went west, from time to time; and were permitted to live among the Choctaws, upon their western lands.

Generations passed. A few more came west, and were received, in like manner. From the Treaty of 1830 until final allotment and the breaking up of tribal relations, under the Treaties of 1898 and 1902, the total number of "Mississippi Choctaws" who rejoined the tribe did not exceed a few hundred.

When it was seen that the lands of the Choctaws and Chickasaws were to be divided, by allotment, and that the unallotted lands were to be sold and the proceeds distributed per capita, the "Mississippi Choctaws" still remaining in the State of Mississippi acquired two groups of friends and advocates:

First, Those members of Congress from the State of Mississippi who sympathized with their plight of poverty; and

Second, Those designing speculators who, under contracts carrying large percentages, sought to share in the lands and moneys that would follow the reestablishment of full citizenship.

It was soon seen that there were legal difficulties impossible to overcome.

Article 14 of the Treaty of 1830 provided that *those only who actually applied for and received land* in Mississippi, had any actual rights in the western lands.

All realized that the "Mississippi Choctaws", (because of their illiteracy and low estate) would be wholly unable, after a lapse of some 70 years, to establish, by legal evidence, that they were the descendants of allottees under Article 14 of the Treaty of 1830.

However, the pressure, in their favor, was strong enough to bring about the passage of an Act of Congress (a part of the Act of June 28, 1898; 30 stat., 495) as follows;

"said Commission (the 'Dawes Commission') shall have authority to determine the *identity* of Choctaw Indians *claiming rights* in the Choctaw lands. * * *"

under Article 14 of the Treaty of 1830.

The Commission proceeded under this act; and, after holding hearings in various counties in Mississippi, early in 1899, some 1900 Indians were listed, but *less than ten* were able to establish their identity as descendants of beneficiaries under Article 14 of the Treaty of 1830.

The Secretary of the Interior refused admission to all except those who had established their identity (*Winton* v. *Amos,* 51 Ct. Cls., 286-92; *Same,* 255 U. S. 373).

Thus matters stood until the Treaty of 1902.

In the meantime the pressure had grown stronger. In addition, the Choctaws become more sympathetic with the plight of their indigent kinsmen.

Through it all, the Chickasaws had nothing to say; and were not called upon to take any action.

They felt sure that the "Mississippi Choctaws" would never be able to establish any legal right to share in the lands and tribal property in which they (the Chickasaws) owned a common interest, under the Treaties of 1837 and 1855; and that their rights and interests would ever be thereby jeopardized.

When the Treaty of 1902 came to be made, the advocates of the "Mississippi Choctaws" changed their tactics. Realizing that the rights of these claimants could never be *legally* established, they appealed to the sympathies and charitable impulses of the treaty makers.

It was argued that, since those "Mississippi Choctaws" who were still in Mississippi were *full bloods,*

notwithstanding their inability to legally establish any rights, because of their plight of poverty, *it might be assumed,* and *ought to be assumed* that they were the descendants of 14th Article beneficiaries, and therefore, they ought to be *given* allotments of land.

This argument was pressed upon the Chickasaws, by the Choctaws, on behalf of their indigent kinsmen; and it was taken up by others having selfish purposes to serve.

This was the first time the Chickasaws were called upon to agree that the "Mississippi Choctaws" be *given something,* at their expense. The "Mississippi Choctaws" were *Choctaws;* and the Chickasaws felt no obligation to give them a share in lands in which they owned a common interest, by purchase and for a valuable consideration, under the Treaties of 1837 and 1855; and they, naturally refused to cooperate.

Finally, it was urged upon them that there were ample lands for all; that there were less than 2,000 full blood "Mississippi Choctaws"; and that, in no event, would they be permitted to share in the moneys arising from the sale of unallotted lands, townsites, coal and asphalt lands and other common properties.

Finally, under pressure so strong as to be no longer withstood, they agreed to the insertion, in the Treaty of 1902, of Sections 41, 42 and 43, insisting upon the safeguards therein contained; and were assured by both the Choctaws and the official representatives of the United States, that the privileges of "Mississippi Choctaws," *thus given to them* were to

be limited to *allotments of land* (and then only after they had lived upon the same for a period of three years).

The Chickasaws felt that if, in their charity and generosity, they chose to yield to the importunities of the Choctaws, on behalf of their indigent kinsmen, and agree to make them *gifts* of allotments of land, that was their affair, and within their power and authority; but they also felt, at the same time, that they had the right to provide that the lands thus bestowed should be upon such terms as would be of most use and benefit to the actual beneficiaries, and be removed, as far as possible, from the machinations of land speculators.

Thus and under these conditions, some 1600 "Mississippi Choctaws" were enrolled and given allotments of land.

At no time, in any of the discussions, did the subject of the per capita distribution of moneys to the "Mississippi Choctaws" ever arise.

That arose years after the Treaty of 1902, and after allotments had been completed and after townsites, unallotted lands and other tribal properties came to be sold.

If it had arisen, the Chickasaws would have had, and made, the same answer they now make in the instant suit, to-wit: That the basis for the apportionment and payment of moneys arising from the sale or

disposition otherwise, of common properties, had been fixed and agreed upon of *Three Fourths to the Choctaw Nation* and *One Fourth to the Chickasaw Nation,* in the Treaties of 1855 and 1866 (and not changed in the Treaties of 1898 and 1902, followed by many acts of Congress in conformity to such treaty provisions), under which provisions of treaties and laws all such moneys had always been apportioned and paid; and that such basis, so fixed and agreed upon, and uniformly acted upon (by being apportioned and paid by the United States, and received, accepted and enjoyed by the Indians, without protest or objection) was legal and binding upon all the interested parties.

They would have, also (if the question of per capita apportionment and payment of such moneys had then arisen), then made the further answer which they now make, to-wit: That if the "Mississippi Choctaws" were to receive moneys, their shares would, naturally and necessarily, come out of the *Three Fourths* of common moneys to which the Choctaws and the Choctaw Nation were entitled, under treaties and laws; and that no part of such shares should, or could, legally, come out of the *One Fourth* of such moneys to which the Chickasaws and Chickasaw Nation were entitled.

As stated, that question did not arise. In fact, the wording of same *treaty* which gave the "Mississippi Choctaws" the privilege of acquiring allotments of land, shows that there was no thought, upon the part of the treaty makers, to alter or change the *existing*

basis for the apportionment and payment of common moneys.

Section 44 of the Treaty of 1902 (32 Stat., 641), provides that if any "Mississippi Choctaw" shall fail to make proof of his continuous bona fide residence for the period prescribed, he shall have no interest in the lands set apart for him; and that the same shall be sold,

> "* * * and the proceeds paid into the Treasury the United States to the credit of the Choctaw and Chickasaw tribes, *and distributed percapita with the other funds of the tribes.* * * * "

This is only one of the many like provisions contained in the Treaties of 1898 and 1902 relating to the apportionment and payment of moneys arising from the sale, or disposition otherwise, of common properties.

It bears, with powerful force, upon the issues in the instant case, since it is in the *same treaty* and in the *same sections* and upon the *same subject.*

If, as stated, the treaty makers had considered the apportionment and payment of such moneys an open question, would it not have been closed by the use of definite and specific language to that end? Especially, would they not have done so when dealing with the subject of "Mississippi Choctaws", out of which the contentions of the plaintiff, the Choctaw Nation, in the instant case, arises.

The "Mississippi Choctaws" (being *Choctaws,* if anything, and *not Chickasaws)* were apportioned and

paid percapita shares out of the *Three Fourths* of such moneys, set apart, as shown by the above quoted official records, as the share of the *Choctaw Nation* in common moneys.

The Choctaw Nation took the position that such apportionments and payments were illegal and a violation of its rights.

Suit was filed; and the United States was sought to be held accountable.

It is most significant that such suit was entitled *"The Choctaw Nation"* vs *the United States* (Case No. H. 37). The Chickasaw Nation was not a party plaintiff, in that case; and felt no particular interest in its outcome, except a general sympathy with the contentions of the Choctaws that the "Mississippi Choctaws" were not entitled to *any* money.

If it had prevailed (in Case H-37) it would have received the whole recovery, since the moneys paid "Mississippi Choctaws" came out of the *Three Fourths* of common moneys theretofore apportioned to the Choctaw Nation, under the existing treaty basis.

Now, that its contentions have failed (in Case H-37), it seeks to recover the same moneys from the United States and the Chickasaw Nation, in the instant case, upon another theory: That the apportionment and payment of such moneys, upon the existing treaty basis of *Three Fourths* and *One Fourth,* was illegal.

It is felt that the contentions of the plaintiff, the Choctaw Nation, in the instant case, are fully answered herein; but upon this particular phase of the case, it is deemed fair and proper to inquire: Should the complacence of the United States, and the charity and generosity of the Chickasaws, in cooperating to the extent of relieving the poverty and distress of the "Mississippi Choctaws" (the indigent kinsmen of the Choctaws), by *giving* them allotments of lands to which they were never legally entitled, be penalized (by permitting the Choctaws to overturn, and to set at naught, all the provisions of all treaties and laws relating to the apportionment and payment of such moneys) in order that the Choctaws may be reimbursed for the moneys apportioned and paid their needy fellow citizens, and to which (as now held by the courts, in Case H-37) they were entitled, as *Choctaw citizens?*

(6)

Article I of the Treaty of 1855 has no relation to the apportionment and payment of moneys arising from the sale, or disposition otherwise, of the common properties of the Choctaw and Chickasaw Nations; but relates, solely and wholly, to the settlement of "dissensions and controversies" between the two nations, and has no bearing upon the issues in the instant case.

Since the plaintiff, the Choctaw Nation, has failed to sustain its contention (in Case No. H. 37) that the "Mississippi Choctaws" were not entitled to *any moneys,* upon percapita distribution, it now changes its tactics, and relies upon Article 1 of the Treaty of 1855, in support of its contention that moneys arising

from the sale of common properties should have been paid into a common fund, and that all percapita apportionments and payments should have been made out of such common fund, irrespective of the Nations or the individual members thereof; and that thereby, the Chickasaws should have borne their proportionate share of the moneys apportioned and paid to "Mississippi Choctaws".

Article 1 of the Treaty of 1855, upon which the Choctaw Nation now relies, (after setting out the boundaries of the Choctaw-Chickasaw country) provides:

> "And pursuant to an act of Congress approved May 28, 1830, the United States do hereby forever secure and guarantee the lands embraced within the said limits, to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common; so that each and every member of either tribe shall have an equal, undivided interest in the whole."

In making use of this wording, as its sole reliance, and in ascribing to it the meaning which, (as we contend) it does not have, the Choctaw Nation has wholly ignored the primary reasons and purposes for the making the Treaty of 1855.

These reasons and purposes clearly appear in the Preamble, as follows:

> "Whereas, the political connection heretofore existing between the Choctaw and the Chickasaw tribes of Indians, has given rise to unhappy and injurious dissensions and controversies among them, which render necessary a re-adjustment of their relations to each other and to the United States;"

Then follows Article 21, further bearing upon reasons and purposes, as follows:

> "This convention shall *supersede and take the place of all former treaties* between the United States and the Choctaws, and also, of all treaty stipulations between the United States and the Chickasaws, and between the Choctaws and Chickasaws, inconsistent with this agreement, and shall take effect and be obligatory upon the contracting parties, from the date hereof, whenever the same shall be ratified by the *respective councils of the Choctaw and Chickasaw tribes,* and by the President and Senate of the United States."

To fully understand the reasons and purposes of the Treaty of 1855, it is necessary to go back and examine the Treaty of 1837, (11 Stat., 611) under which the Chickasaws, for a valuable consideration, purchased a common interest in the western lands of the Choctaws.

The Chickasaws, like the Choctaws, were required to leave the State of Mississippi; and to find a new home in the west.

The Choctaws had preceded them, and had acquired, under the Treaties of 1820 and 1830, a large area of western lands.

The Chickasaws, under the Treaty of 1837 (with the cooperation of the United States), purchased, for a

consideration of $530,000, a common interest in the Choctaw lands.

It should be kept in mind that the allotment of lands in severalty, and the division of the tribal property which the Indians occupied in common, was farthest from the minds of the interested parties. The *use and occupancy* of common lands was all that was thought of or considered; and there is nothing in either of the treaties (of 1837 and 1855) that intimates anything otherwise.

The first Article of the Treaty of 1837 clearly shows that the Chickasaw Nation was to remain a *separate entity,* by the formation of a *Chickasaw District;* and other provisions seem to show that, at first, the Chickasaw Nation might become a subordinate unit in the government of the Choctaw Nation. It is as follows:

> "It is agreed by the Choctaws that the Chickasaws shall have the privilege of forming a district *within the limits of their country,* to be held on the same terms that the Choctaws now hold it, except the right of disposing of it, (which is held in common with the Choctaw and Chickasaws,) to be called the *Chickasaw district of the Choctaw Nation;* to have an equal representation in their general council, and to be placed on an equal footing in every other respect with any of the other districts of said nation, except a voice in the management of the consideration which is given for these rights and privileges."

This two-fold plan: First, for the union of the two Nations; and, Second, for the formation of a limited

"Chickasaw district, within the Choctaw Nation", (which proved unsatisfactory to the Chickasaws, both as to location and size), failed. "Dissensions and controversies" arose; and it was for the purpose of composing the same, that the Treaty of 1855 became necessary.

It forever settled two matters of controversy:

First, That a Chickasaw District (satisfactory to the Chickasaws, and differing, in location and size, from the original unsatisfactory district set up in the Treaty of 1837), was to be set apart for their *use and occupancy;* and

Second, The Chickasaw Nation was to organize and maintain its own *separate government* (to take the place of the unsatisfactory plan, in the Treaty of 1837, under which the Chickasaws were to form a "Chickasaw district of the Choctaw Nation") separate and apart from the Choctaw government, the two tribal governments thereafter sustaining no relations whatever except the obligation to exist alongside of each other, as good neighbors, and to practice those principles of comity and good feeling which should always exist between civilized governments.

This is all confirmed by the provisions of the Treaty of 1855.

The Preamble, relating to "injurious dissensions and controversies" growing out of the Treaty of 1837, has already been set out.

Article 2 creates the Chickasaw District, as follows:

> "A district for the Chickasaws is hereby established, bounded as follows";

and then follows a description of such "Chickasaw District", by metes and bounds, differing wholly, both as to size and location, from the Chickasaw district" set up (as a *part of the Choctaw Nation,* under the Treaty of 1837).

Then, in Article 4, it is provided that the Chickasaws are to set up and maintain their separate government, as follows:

> "The government and laws now in operation and not incompatible with this instrument, shall be and remain in full force and effect within the limits of the Chickasaw district, until the Chickasaws shall adopt a constitution, and enact laws, superseding, abrogating or changing the same."

The same treaty also contains other provisions, similar to those of other independent states, defining the relations that shall be maintained between the tribal governments of the Choctaw and Chickasaw Nations, relating to the surrender of persons charged with crimes, free passage and safe conduct of the citizens of the *two Nations,* etc.,

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We have thus shown that, insofar as lands were concerned, the *use and occupancy,* only was considered and dealt with, under the Treaty of 1855; that, *after the Treaty of 1855,* there were *two Nations* and

two *entities,* with which the United States has always dealt; and that the United States has so dealt with the Nations, in their public and *"corporate capacities",* (and not with their individual members), until the Nations ceased to exist, as such, under the later Treaties of 1898 and 1902.

We shall now endeavor to show that Article 1 of the Treaty of 1855, (upon which the plaintiff, the Choctaw Nation, now solely relies, in support of its contentions that the basis upon which moneys have been apportioned and paid, per capita, are illegal, and that it should have recovery therefor) has no bearing upon the issues in the instant case.

It contends that, because of the wording therein, relating to lands, that

> "* * * so that each and every member of either tribe shall have an equal, undivided interest in the whole. * * *",

the provisions in the same treaty (and in all other treaties and laws) for the fixed and agreed basis for the apportionment and payment of moneys, shall be disregarded and held for naught.

We contend that this provision relates wholly to *lands,* and to the *use and occupancy* of lands, by the individual members of the tribes, since the division of lands, by allotment or otherwise, was not then under consideration; and was used as a part of the plan to carry out the principal purpose of the treaty, to-wit: that of composing the "unhappy and injurious dissensions and controversies", which has arisen out

of the unsatisfactory "Chickasaw district", and the unworkable union of the two Nations, proposed in the Treaty of 1837.

The subject of the "unhappy and injurious dissensions and controversies" existed; and it was disposed of, under Articles 1 and 4 (*satisfactory "Chickasaw district"* and *separate government*).

The subject of the *apportionment and payment of moneys arising from the sale, or disposition otherwise, of common properties of the two Nations,* likewise, arose, and was disposed of, in Articles 9 and 10.

In Article 9, the Choctaws and Chickasaws *quit claimed* and *relinquished* their right, title and interest in and to the lands lying west of the 100th meridian of west longitude; and *leased* the lands lying between the 98th and 100th meridians.

In Article 10, it was provided that the consideration for these two acts of the Nations should be the sum of $800,000; and that this money, thus arising, should be apportioned and paid, *Three Fourths to the Choctaws* and *One Fourth to the Chickasaws.*

Two subjects were dealt with, under the Treaty of 1855, to-wit: First, the settlement of "dissensions and controversies" arising over the *use and occupancy* of lands; and Second, the basis for the *apportionment and payment of moneys* arising from the sale, or disposition otherwise, of common properties.

Both subjects were disposed by *separate articles* of the *same treaty.* Neither subject has any relation

to the other; and, in the language used in the disposition of the two subjects, there is no conflict.

Then, the basis for the apportionment and payment of such moneys, first fixed and agreed upon in the Treaty of 1855, runs through the Treaty of 1866 and the later Treaties of 1898 and 1902; and through all the Acts of Congress, passed in succeeding years in strict conformity with s u c h treaty basis, under which many millions of dollars have been apportioned and paid to the Choctaw and Chickasaw Nations and to the individual members of such Nations, thus showing the intentions of all the interested parties, upon *that subject,* throughout all the years. Such moneys have always been received and enjoyed by such Nations (so long as they existed) and by the individual members thereof (after such nations ceased to exist), not only without protest or objection, but with the definite and specific approval of legislative bodies of such Nations, in all instances where such approval was required.

Can it be reasonably contended that this quoted wording, in Article 1 of the Treaty of 1855 (standing isolated and alone, clearly applying to *one subject,* accomplishing a clearly stated purpose, and having no relation to the subject of the apportionment and payment of moneys), shall be given the force and effect of striking down other provisions of the *same treaty,* every other provision of *every other treaty* (as well as like provisions of numerous laws, passed in conformi-

ty thereto), upon *another subject;* and, of having declared invalid every act of the United States, under such treaties and laws, in such apportionment and payment of moneys, throughout all the years from 1855 to the present time?

(7)

The Chickasaw Nation purchased and acquired, under the Treaty of 1837, for a valuable consideration, a common interest in the lands of the Choctaw Nation; and the interest thus acquired became fixed and vested, and may not be increased nor diminished, to the advantage of one nation and to the disadvantage of the other nation, without the consent of both nations.

For the valuable consideration of $530,000, the Chickasaw Nation purchased and acquired, under the Treaty of 1837 (11 Stat., 573), a common interest in the western lands of the Choctaw Nation.

Title to such landed interests, thus acquired, is held by the *Chickasaw Nation,* in its public or *"corporate capacity";* and the same amounts to a vested right, and to the *"absolute right of property". (Stephens* v. *Cherokee Nation,* 174 U. S. 445; *Cherokee Nation* v. *Hitchcock,* 187 U. S. 294; and *Sizemore* v. *Brady,* 235 U. S. 441).

The Chickasaw Nation (and the Choctaw Nation, as well) is entitled to have its rights, in and to such lands, weighed and measured by conditions *then existing,* as to the percentages and proportions of memberships of the two Nations; and neither Nation may (by the addition of large blocks of memberships not then constituting parts of the Nations who were the parties to the treaty contract of purchase and sale, nor by any other means) increase or decrease the interests thus purchased and sold (to the advantage of *one Nation,* and to the disadvantage of the *other Nation)* without the consent of *both Nations.*

There is no disagreement as to the conditions *then existing.* It is conceded by the plaintiff, the Choctaw Nation (in Case H-37) that the percentages and proportions of memberships, as between the two Nations, was then approximately *Three Fourths* and *One Fourth;* and that the same condition, in this respect, has always existed, and now exists, as regards the regular memberships of the two Nations. The disproportion arises over the incorporation, into the membership of the *Choctaw Nation,* of some 1660 "Mississippi Choctaws", under the Treaty of 1902. (Excerpts from Briefs of the Choctaw Nation, in Case H-37, set out "Motion to Postpone and Consolidate", filed herein by the Chickasaw Nation, and allowed, in part, by the Court, on October 14, 1935.)

The "Mississippi Choctaws" are entitled to the *lands* allotted to them, under the Treaty of 1902, because the *owners* of the land (the Choctaw Nation and the Chickasaw Nation) so agreed, in that treaty.

They are entitled to the *moneys* heretofore apportioned and paid to them, because the courts have so held (in case H-37); but the courts, in so holding, have not held that *the basis* for the apportionment and payment of moneys arising from the sale, or disposition otherwise, of the common properties of the Choctaw and Chickasaw Nations (fixed and agreed upon in the Treaties of 1855, 1866 1898 and 1902, and adhered to by the United States, in such apportionments and payments, under treaties, and laws passed in conformity thereto, from 1855 to the present time), should be changed.

"Mississippi Choctaws", if members for any purpose, or for all purposes, are members of the *Choctaw Nation;* and, as such, take the status of all other members of the Choctaw Nation. Their shares of moneys are chargeable to the *Three Fourths* of all such moneys apportionable to the Choctaw Nation, upon the basis fixed and agreed upon in all the treaties and laws; and no part thereof is chargeable to the *One Fourth* of such moneys apportionable to the Chickasaw Nation and its members.

To subject the Chickasaw Nation and its members to any part of this burden would, we respectfully contend, constitute an interference with the vested rights of the Chickasaw Nation, purchased and acquired, for a valuable consideration, under the Treaty of 1837 (and confirmed by the Treaty of 1855), as well as a violation of all provisions of all treaties and laws fixing the

basis for the apportionment and payment of such moneys.

May it not be said that, perhaps, the treaty makers, in their wisdom and foresight, sensed that just such a situation as has arisen regarding the "Mississippi Choctaws", might arise at some time in the future; and that one Nation might attempt (by increasing its membership by a large block of members, not a part of its membership at the time of the treaty contract of purchase and sale) to interfere with the vested rights of the other Nation; and, sensing the possibility of such a situation arising, wrote into all of the Treaties of 1855, 1866, 1898 and 1902, definite and specific provisions for the apportionment and payment of common moneys, thus rendering impossible the perpetration of injustices, as between the Nations, corresponding to the demands of the plaintiff, the Choctaw Nation, in the instant case?

(8)

The United States has always dealt with the *Choctaw Nation* and the *Chickasaw Nation*, in their *"corporate capacities"*, so long as they existed, and not with their *individual members*. Such Nations held the title to all common lands and moneys, in their *"corporate capacities"*, and dealt with *their individual members* as they deemed advisable; and when they ceased to exist, the United States then dealt with *individual members*, as the *successor of such nations*. At no time, have the *individual members* of such nations had any vested rights or *"absolute rights of property"* in and to the *mere expectancy* of sharing in common lands or moneys.

In the Treaty of 1837 (11 Stat., 573), under which the Chickasaws purchased and acquired, for the valuable consideration of $530,000, the Chickasaws were permitted (in Article 1) to form a district, to be called the "Chickasaw District", thus setting them apart from the Choctaws, in so far as the occupancy of the lands was concerned. This district was limited in area, and was to be called the "Chickasaw district of the Choctaw Nation"; and was "to be placed upon an equal footing * * * with any of the other districts of said Nation."

An attempt was also made to incorporate the Chickasaws into the existing Choctaw political government.

These plans wholly failed, were abrogated by the Treaty of 1855; and were never again attempted.

In the Treaty of 1855 (11 Stat., 611), because of "unhappy and injurious dissentions and controversies" (Preamble), the Chickasaws were again permitted (in Article 2) to form a "district" (comprising a large area lying west of the Choctaw Nation, extending to the 98th meridian of west longitude, and corresponding to the "Chickasaw Nation", as now known); and they were also permitted (in Article 4) to organize and maintain their own separate political government.

Thus, their right to the separate *use and occupancy* of lands, and their right to organize and maintain their own *separate political government* was solemnly agreed to by all the interested parties (the United States, the Choctaws and the Chickasaws); the exercise of these rights has never resulted in any further "unhappy and injurious dissensions and controversies"; and these rights, thus guaranteed by treaty, have always been recognized, and never questioned, from that time until the two Nations ceased to exist on March 4, 1906. During all of those years, the United States dealt with the *Choctaw Nation* and the *Chickasaw Nation* as separate *political entities*, leaving to such *Nations* the full power and authority to deal with their *individual members* as they might see fit.

This is further confirmed by other Articles of the same treaty.

In Article 9, the Choctaws and Chickasaws quit claimed and relinquished, to the United States, their right, title and interest in and to their common lands

lying west of the 100th meridian of west longitude; and leased the lands lying between the 98th and 100th meridians.

In Article 10 the consideration for such relinquishment and lease was fixed at $800,00; and, as has already been shown, in another part of this Argument, the Choctaws were paid $600,000 (Three Fourths), and the Chickasaws were paid $200,000 (One Fourth).

The inquiry that arises, in this connection is as *to whom* this considerable sum of money was to be paid; to the *Nations* or to the *individual members,* according to the contentions of the plaintiff, in the instant case?

It was not so paid; and, therefore all the interested parties concluded (as we contend in the instant case) that the wording of Article 1, upon which the plaintiff now solely relies, wherein it is provided that "each and every member of either tribe shall have an equal, undivided interest in the whole" related to the *use and occupancy* of lands, and had no relation to the apportionment of moneys arising from the sale, or disposition otherwise, of common properties. *That subject* was, definitely and specifically, *separately* dealt with in *another provision* of the same treaty; and such money was paid over to the Nations in the proportions of *Three Fourths* to the Choctaw Nation and *One Fourth* to the Chickasaw Nation.

How was it paid? Article 10 provides that it shall be paid

> "* * * in such manner as their *general councils* (that is, the *Nations)* shall respectively direct."

In the Treaty of 1866 (14 Stat., 769) are several provisions bearing upon the same subject; that is, that the United States always dealt with the *Nations,* as political entities, and in their *corporate capacities,* and not with their *individual members.*

In Article 3, it is provided that the consideration of $300,000 for the cession of the "Leased District" lands, such moneys shall be held

> "* * * in trust for said *Nations,* until the *legislatures of said Nations respectively* * * *"

shall take such action as the treaty requires, regarding their Freedmen.

Then, further along in the same Article, it is provided that

> "* * * the said sum of three hundred thousand dollars shall be paid to the said *Choctaw and Chickasaw Nation,* in the proportion of three fourths to the former and one fourth to the latter * * *"

after such Nation shall have complied with the treaty requirements as to Freedmen.

Article 24 relates to townsites which might be laid out and acquired by the members of the tribes, under a plan which was never carried out.

As to "town lots which may be unoccupied" it is provided that they

> "* * * shall be disposed of for the benefit of the particular *Nation* as the *legislative authorities* may direct from time to time. * * * "

Article 33 relates to "unselected land" which may be left after a proposed plan of partial allotments, which was, likewise, never carried out.

It provides that

> "* * * the unselected land shall be the common property of the *Choctaw and Chickasaw Nations, in their corporate capacities,* subject to the joint control of their *legislative authorities.*"

Is there, anywhere, in any of the treaties or laws, a more complete answer to the contention of the plaintiff, the Choctaw Nation, in the instant case, that the individual members had vested rights to individual shares in common property, and that the quoted language in Article 1 of the Treaty of 1855 fixed and guaranteed those rights, even before allotments in severalty and before the sale, or disposition otherwise, of common properties?

After allotments in severalty have actually been made, such members, undoubtedly, have vested rights in and to the lands allotted to them.

After common lands have been sold, or otherwise disposed of, and the proceeds have been apportioned and paid to individual members, they, undoubtedly, have vested rights in and to the moneys so apportioned and paid to them.

But not until then.

The attorneys for the United States have discussed this phase of the instant case; and in support of their contentions, they have cited the case of *Stephens* v. *Cherokee Nation* (174 U. S. 445), which says (in the syllabus):

> "The acts of Congress in respect to the determination of citizenship in Indian tribes are *not unconstitutional as impairing or destroying vested rights,* as the lands and moneys of these tribes (the Five Civilized Tribes) are *public lands* and are not held in *individual ownership.*"

Also, in *Sizemore* v. *Brady* (235 U. S. 441), it is said:

> "Anterior to the legislation which we must consider, the Creek *lands and funds belonged to the tribe as a community,* and *not to the members severally or as tenants in common.*"

Also, in *Cherokee Nation* v. *Hitchcock* (187 U. S. 294), it is said:

> "* * * as we have said, the *title to these lands* is held by the tribes, in trust for the people. * * * "

In Article 46, it is provided that (out of the "Leased District" consideration and the proceeds of certain lands sold to "Kansas Indians"), there shall be advanced $150,000 to the Choctaws and $50,000 to the Chickasaws *(Three Fourths* and *One Fourth* of the total).

In this payment, did the United States deal with *individual members* or with the Nations?

As to the manner of payment, it is provided that such moneys shall be paid *"through their respective treasurers."*

It is further provided, in the same Article, that the balance of moneys belonging to the tribes shall remain in the Treasury of the United States, at an annual interest of five percentum; and that

> "* * * no part of which shall be paid out as annuity, but shall be annually paid to the *treasurer of said Nations, respectively,* to be regularly and judiciously applied, under the direction of *their respective legislative councils.* * * * "

In the Act of Congress of March 3, 1891 (26 Stat., 989), the United States paid the Choctaws and Chickasaws the sum of $2,991,450 as compensation for the Cheyenne and Arapahoe lands (a part of the "Leased District").

How was this tremendous sum of money paid, and to whom? It was not paid to the *individual members of the two Nations.* It was paid, *Three Fourths to the Choctaw Nation* and *One Fourth to the Chickasaw Nation,* leaving the two *Nations* to deal with their *individual members* as they might deem advisable.

The act says that the money shall be paid to "the *Choctaw and Chickasaw Nations* of Indians"; and that

> "* * * *three fourths* of this appropriation to be paid to such person or persons as are or shall be duly authorized by the laws of the Choctaw Nation to recover the same, at such time and in such sums as directed and required by the *legislative authority of said Choctaw Nation* * * *."

In like manner, *One Fourth* of such moneys was to be paid to the *Chickasaw Nation.*

The *legislative authority* of *each Nation* acted, separately; and the money was duly paid over, and, later, there was a per capita distribution of the same, *by each Nation,* to its *individual members.*

The reasons for the assumption, by the United States, of the power and authority, in the administration and distribution of common property, theretofore possessed and exercised by the Nations (and, as we contend, the United States, thereafter, exercised such power and authority as the *successor of such nations)* are set out in the case of *Cherokee Nation* v. *Hitchcock* (187 U. S. 294).

After stating that, in some instances, this power and authority had not been wisely and justly exercised, the court says:

> "* * * as we have said, *the title to these lands is held by the tribes in trust for the people.* We have shown that this trust is not being properly executed, nor will it be if left to the Indians, and the question arises: What is the duty of the Government of the United States with reference to this trust? While we have recognized these tribes as dependent *Nations,* the Government has likewise recognized its guardainship over the Indians and its obligations to protect them in their property and personal rights."

It is not an issue here to as whether this power and authority, thus possessed and exercised by the *Nations,* in their *"corporate capacities",* as the trus-

tees of their *individual members,* was exercised wisely or unwisely, justly or unjustly.

The fact remains that *it was so possessed and exercised;* and that, when it ceased to exist, by the provisions of treaties, *it was assumed* by the United States, as the *successor of such Nations.*

Therefore, as we contend, the quoted language contained in Article 1 of the Treaty of 1855, upon which the plaintiff, the Choctaw Nation solely relies, in the instant case, has no application to the issues herein; that the *individual members of the Nations* neither acquired thereby (nor have they ever had) any *vested rights,* nor any *"absolute rights of property"* in the *mere expectancy* of sharing in the common lands and moneys, prior to actual allotments in severalty and actual apportionments and payments of moneys; and that, then, and then only, after acquiring full title to the lands, thus allotted to them, and complete individual ownership in and to the moneys thus apportioned and paid to them, out of the sale, or disposition otherwise, of common properties.

(9)

If, as contended by the plaintiff, the Choctaw Nation, in the instant case, the vested rights and *"absolute rights of property"* of *individual members* of the Choctaw Nation (claimed to have been fixed by the quoted wording in Article I of the Treaty of 1855) have been violated, *that issue* may not be decided in the instant case, since suits may be filed and maintained, against the United States, *only* by the *Choctaw Nation* or the *Chickasaw Nation,* separately or jointly (in their *"corporate capacities"*) and not by the *individual members* of either nation.

Upon this phase of the instant case, the attention of the court is called to the *title* and *style* of the case, and the capacity in which it has been filed and is sought to be maintained.

It is: *"The Choctaw Nation* vs. The United States." (Later the *Chickasaw Nation* has been made a party defendant, upon Motion of the United States.)

If the *Choctaw Nation* (in its "corporate capacity") is the real party plaintiff, then it has nothing of which it may complain, since *Three Fourths* of all common moneys have been apportioned, paid to it (so long as it existed); and the same percentage and proportion of such moneys have been set apart for its use and benefit (by its *successor,* the United States), after it ceased to exist.

The filing of the instant suit, by the *Choctaw Nation,* would seem to be a concession of everything for which the United States and the Chickasaw Nation contend, to-wit: That *individual members* of the Nations

have no *vested rights* or *"absolute right of property"* in their *mere expectancy* of sharing in common lands and moneys; and that the quoted words of Article 1 of the Treaty of 1855 (upon which the plaintiff, the Choctaw Nation, now solely relies) cannot be given the force and effect of creating *vested rights,* and the *"absolute right of property"* in common property (lands and moneys) which has not been allotted or apportioned and paid.

The *Choctaw Nation* (and the United States, as its successor) were parties to all apportionments and payments of the moneys, and acted under the plan, and upon the basis, complained of; and in doing so they followed the basis fixed and agreed upon in all treaties (to which the Choctaw Nation, and the other interested parties) were parties, and under laws passed in conformity thereto.

Neither the *Choctaw Nation,* nor the *Chickasaw Nation,* nor the *United States,* is in a position to question the validity of such treaties and laws, or the legality of the acts of the interested parties thereunder.

Therefore, if the contentions of the plaintiff (that the quoted wording of Article 1 of the Treaty of 1855 created *vested rights,* and the "absolute right of property" in their *mere expectancy* of sharing, at some future time, in common property) are sound, then, and in that event, the *individual members* of the Choctaw Nation are the parties in interest (and the *necessary parties plaintiff)* and not the *Choctaw Nation.*

They are not parties plaintiff in the instant case; and the attorneys for the Choctaw Nation have no authority to represent them, nor do they claim to have any such authority.

An examination of the Jurisdictional Act of Congress of June 7, 1924 (under which all suits against the United States may be filed and maintained) very definitely and very specifically provides that

> "Jurisdiction is conferred upon the Court of Claims * * * to * * * render judgment in any and all * * * claims arising under or growing out of any treaty or agreement between the United States and the *Choctaw and Chickasaw Nations,* or either of them, or * * * any Act of Congress, in relation to Indian affairs, which *said Choctaw or Chickasaw Nations or tribes* may have against the United States. * * *"

The act further provides that

"The claim or claims of each of *said Indian Nations"*

shall be presented as therein provided; and that attorneys may be employed under contracts

> "* * * executed on behalf of the tribe by the *governor* or *principal chief* thereof. * * * "

and approved by the Commissioner of Indian Affairs and the Secretary of the Interior.

Therefore, it is respectfully contended, that if the *individual members* of the Choctaw Nation have grounds for complaint (which we deny throughout this Argument) they are not *parties plaintiff,* in the instant case, and have no present right to file and maintain a suit, under the plain terms of the Jurisdictional Act.

The *Choctaw Nation,* only, was permitted to file and maintain suits; and the Choctaw Nation is estop-

ped from recovering, in the instant case, for the reason stated.

While we feel that the contention, as above set out, is valid, and should, in the last analysis, result in the defeat of any recovery by the plaintiff, the Choctaw Nation, we have endeavored, in the various parts of this Argument, to meet and answer every contention which has arisen, or may arise herein, as will be seen upon a consideration of the whole Brief.

(10)

Irrespective of the validity or invalidity of any or all of the contentions of the plaintiff, the Choctaw Nation, or of the defendants, the United States and the Chickasaw Nation, the plaintiff *has not proven such a state of facts* as would entitle it to recovery.

Provision for making the rolls of the Choctaw and Chickasaw Nations was begun under the Act of Congress of June 10, 1896 (29 Stat., 321); and June 7, 1897 (30 Stat., 62).

Then came the "Curtis Act" of June 28, 1898 (30 Stat., 495). This Act (in Section 21) conferred additional powers upon the "Dawes Commission" for that purpose; and Section 29 of the same act contained the "Atoka Agreement" which, when ratified by the Indians, became the law; but it contained no provisions, of any consequence, relating to citizenship rolls.

The next legislation relating to citizenship rolls was the Act of Congress of May 31, 1900 (31 Stat., 221).

Then come the "Supplementary Agreement" of 1902, ratified by Act of Congress of July 1, 1902 (32 Stat., 641), and by the members of the Choctaw and Chickasaw Nation on September 25, 1902.

In Sections 27-35 of that Treaty-Agreement is contained a complete plan for the enrollment of the citizens of the two Nations, by the adoption of Acts of Congress formerly passed, and by the incorporation of new provisions.

Section 28 provides:

> "The names of all persons *living on the date of the final ratification of this agreement* * * * shall be placed upon the rolls *by said Commission;* and no child born thereafter to any citizen * * * shall be entitled to enrollment or to participate in the distribution of tribal property of the Choctaws and Chickasaws."

All expected that this provision of the treaty would put an early end to enrollment; and that such rolls were fixed as of the date of the ratification of the treaty, on September 25, 1902.

However, because of the magnitude of the task of enrollment and allotment, the work continued from year to year. In the meantime Choctaw and Chickasaw babies continued to be born; and the citizens of those Nations demanded their enrollment.

Thus, and for this purpose, it was provided in the Act of Congress of March 3, 1905 (33 Stat., 1048) that such "new borns" who were born prior to March 4, 1905, might be enrolled.

Then, the enrollment and allotment work of the United States continued, without completion. More babies were born; and the same demand was made, in their behalf.

Thus, and in compliance with the demand, the Act of Congress of April 26, 1906 (34 Stat., 137), was passed, providing that such "new borns" as were born prior to March 4, 1906, might be enrolled.

No other acts for general enrollment were passed; but, later on, other acts were passed by Congress, providing for the enrollment of a considerable number of designated and named applicants, which have no bearing upon the issues in the instant case.

These various Acts of Congress and treaty provisions are referred to and cited, for the purpose of showing the tremendously controversial and complicated problems that confronted the officials of the United States, and the magnitude of the whole undertaking, in passing upon the citizenship rights of from 25,000 to 30,000 individual members, and the division of the tribal estates having a combined value of approximately $150,000,000.

The activities of the United States extended through a period of some thirty years; and the task is not yet wholly completed.

If the contentions of the Choctaw Nation, in the instant case, are correct, insurmountable and impossible burdens of administration would have been heaped upon, and required of, the officials of the United States.

The plaintiff says that each individual member of both Nations was entitled to an *equal share* of all common moneys.

It contends that each such individual member of the Choctaw Nation was entitled to that part of the total of such moneys, represented by the application of a fraction constructed by the use of the *total Choctaw membership for the numerator,* and the *total membership of the two Nations for the denominator;* and that the shares of the members of the Chickasaw Nation should have been arrived at by the same process.

But the total *exact membership* of neither tribe was *ever arrived at* until practically all moneys had been apportioned and paid.

The report of the Superintendent for the Five Civilized Tribes to the Secretary of the Interior, for the year 1915, submits rolls "*corrected to August 12, 1915.*"

Obviously, there were corrections, from time to time, prior to that date; and it is reasonable to conclude, from the official statement attached, that there have been corrections since that time.

How and why were these corrections made?

Plaintiff assumes that the total membership became fixed and certain on September 25, 1902, ignor-

ing the Acts of Congress of 1905 and 1906 authorizing additional enrollments of "new borns".

It is true that the *right to enrollment* become fixed upon the date set by the "Supplementary Agreement" of 1902 (on September 25, 1902; and as to "new borns" on March 4, 1905, and March 4, 1906), provided such right to enrollment *be established by legal evidence.* Plaintiff wholly ignores the vastness of the labor to be performed by the officials of the United States, and the almost insurmountable difficulties that confronted them, for years upon years, in determining what applicants were *entitled,* and what are *not entitled* to final enrollment.

The right to enroll or reject *rested solely with the officials of the United States.* The procedure was (in contested cases, and in cases wherein the officials entertained doubts as to the rights of the applicants), to take testimony in the offices of the Commission and in the field, to hear arguments and to examine briefs; and then, upon appeal, to send all records on to Washington, for further examination there, and to await the final decision of the Secretary of the Interior.

It is so well known that it need only to be stated that many such contested cases were pending for years, because of the spirited contests waged on behalf of the applicants, and resisted by the Nations and their attorneys. Many of such cases made many journeys back and forth, between Muskogee and Washington.

What was the nature of some of these contests?

The treaty provided that persons *living* on September 25, 1902, if otherwise entitled, should be enrolled. Many applications were made by heirs, on behalf of deceased members; and the question arose as to whether the members were or were not, living on the treaty date. Property of the value of several thousands of dollars was at stake; and cupidity and self interest entered into the controversy.

The same was true as to children born around the treaty date; and around the dates of March 4, 1905 and March 4, 1906, as to the later "new borns".

Then, the principal, and bitterest, contests arose over *primary rights* to be enrolled. There were many thousands of applications lodged by designing persons who saw an opportunity to share in the division of these rich tribal estates; and these claimants were amply financed by speculators who, under generous contracts, sought to profit by the recovery, and represented by the ablest and most skilful attorneys in Indian Territory.

These are some of the reasons why the final preparation of the final citizenship rolls was delayed, from year to year; and why the officials of the United States were only able, in 1915, to report rolls "*corrected to August 12, 1915*".

The report of the Secretary of the Interior, upon the instant case, dated June 2, 1933 (Record, pages 12-18) shows that percapita payments were made (neces-

sarily to those members who were finally enrolled), in the years 1904, 1906, 1908, 1911, 1912 and 1914.

How many members had been finally enrolled upon the dates of these several payments; and how many were still involved in contests; and how many, thus involved, were finally enrolled, and how many were finally rejected, and when?

Then, other per capita payments were made in 1916 and in later years.

How many contests were still pending in 1915, when the Commission reported rolls "corrected to August 12, 1915"? Clearly the rolls, thus reported, were not finally completed, else this qualifying statement would not have been attached to the rolls which were then reported.

It would seem to be that never, during those years, was the *exact number* of the *individual members* of the Choctaw and Chickasaw Nation possible of ascertainment; and that the theory of the plaintiff, the Choctaw Nation, that such membership was a *fixed and determined* number, at any time within the time when the acts complained of, were being performed, is proven to be a fallacy.

It demands that the fantastic fractions, as above described, be constructed and applied.

If constructed and applied, according to the theory of the plaintiff, *one* such fraction would have to to be constructed and applied to the moneys available for per capita distribution in 1904, based upon

the members of the two Nations *then approved* and enrolled; and again in 1906; and again in 1908, and for each year in which a per capita payment was made.

The mere statement of existing conditions would seem to show the absurdities to which the contentions of the plaintiff would lead.

This is the only exact method by which the rights of the plaintiff, the Choctaw Nation, may be determined, if its contentions be correct.

Proof of the facts (that is, as to the exact number of the approved and enrolled members of the two Nations, at the time of each per capita payment) are necessary, before there can be a determination upon the facts, as contended by the plaintiff.

It is not for the defendants, the United States and the Chickasaw Nation to furnish this necessary evidence.

Has the plaintiff done so? An examination of the Record, which has been printed and filed, on behalf of the plaintiff, will show that no evidence in that respect, has been offered; and, therefore, the proof, upon that very necessary and essential phase of the case, has failed.

We think the wisdom and foresight of the treaty makers are again to be commended in writing provisions into the treaties for the prevention of what is now being attempted, in the instant case.

They must have foreseen that the very obstacles and difficulties, in the matter of administration, which

actually *did arise,* would inevitably arise, in the apportionment and payment of moneys.

It was not difficult to allot to each member *equal partial shares of land.* That partial allotment, by no means, comprised *all of the land.* Many millions of acres of "unallotted land" were left over; and, later on (under the provisions of the same treaty), these lands were sold for many millions of dollars.

The *equal shares* of land (as provided by the Treaty of 1902, and which the treaty makers had the power to provide, and saw fit to provide) meant, simply, that the division of *a part* of the tribal estate, then and thus made, should be equal.

There was *no such provision,* as has been shown, relating to the moneys arising from the sale, or disposition otherwise, of common properties.

As to the apportionment and payment of such moneys, the treaty makers must have foreseen that *the basis* which was actually fixed and agreed upon, of *Three Fourths to the Choctaw Nation* and *One Fourth to the Chickasaw Nation,* was the only workable and feasible basis, and for that reason, it was fixed and agreed upon in the early Treaties of 1855 and 1866 and not changed in the later Treaties of 1898 and 1902.

IV.

CONCLUSION.

It is respectfully submitted that we have shown, in this Brief, on behalf of the defendant, the Chickasaw Nation, that the plaintiff, the Choctaw Nation, is not entitled to recover judgment in the instant case, for the amount to which it claims to be entitled, in its Petition filed herein (or for any amount), against either of the defendants, the United States or the Chickasaw Nation, for the reasons set out in paragraphs (1) to (10), inclusive, of "(b) *The contentions of the plaintiff, the Chickasaw Nation",* under sub-division "(2) THE ISSUES", in Division "II. STATEMENT OF THE CASE" (which, for brevity, are not here repeated); and that, therefore, for the reasons stated, the Petition of the plaintiff, the Choctaw Nation, should be dismissed.

Respectfully submitted,

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and
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