In the Court of Claims of the United States

No. J-231

THE CHOCTAW NATION, *Plaintiff*,

vs.

THE UNITED STATES OF AMERICA, *Defendant*.

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PLAINTIFF'S REPLY TO ANSWER BRIEF OF CHICKASAW NATION

Brief of the Chickasaw Nation was filed herein on January 4, 1936, and in reply to the matters set forth therein, we shall discuss the points raised under the sub-titles hereinafter set forth.

MISSISSIPPI CHOCTAWS HELD ENTITLED TO FULL MEMBERSHIP RIGHTS

At the time our petition was filed, we did not know the exact status of the Mississippi Choctaws. They have now been held by the court to be members with the same rights of native Choctaws. H-37. Decided January 14, 1935. The Supreme Court of the United States denied certiorari No. 446, October Term, 1935, U. S. Supreme Court. The Chickasaws ratified the treaty of 1902 under which they became members. It follows that the aggregate membership of the Choctaw tribe is 20,799 as against 6,034 for the Chickasaws. The true ratio would be 76.56 and 23.44 as claimed by plaintiff. Neither defendant questions the correctness of these figures. The Secretary admits that if the Mississippi Choctaws are held to be members and if the funds are to be apportioned on the basis as contended for by plaintiff, the true ratio would be as claimed by plaintiff. R. 16. The Comptroller General gives the exact sum received from sales of common assets. R. 49. He tells how it has been divided. R. 49. The Secretary gives the total final enrolled membership of each tribe. R. 16. These rolls were compiled pursuant to the Curtis Act, the two treaties and acts of Congress that followed, all of which are set out in our original briefs and reply. No rights

of the Chickasaws are being denied, but as they have heretofore received a full 25 per cent of the sales of tribal assets, simple justice dictates that an adjustment be made and the true ratio restored. The Congress has seen fit to let each tribe continue in existence, with their respective sets of officers, their separate schools and separate accounts in the department. Having elected to let each Nation be treated as a unit for purposes of administration, Congress in the exercise of its unquestioned powers could authorize all of the respective shares due each nation to be spent for any purpose it deemed proper, but the group known as Chickasaws could only have available (under applicable treaties and acts of Congress herein fully cited) a one 23.44 per cent of the funds coming from sales of properties owned in common. Neither defendant has denied that the membership in each nation is correctly stated by the Secretary of the Interior in his report. Under the treaties the final approval of an application for enrollment fixes the status of that Indian for all purposes. The approval relates back and he takes a full share with all other members. A minor enrolled under the Act of March 3, 1905 (33 Stat. 1048) or the Act of April 26, 1906 (34 Stat. 137) takes the same amount as an adult enrolled under the Act of 1902. As heretofore stated, the death of a member does not cause any variation in the rolls. (See Act April 28, 1904 [33 Stat. 571]) Under Section 22 of the Act of 1902 his right to an allotment and his distributive share in the common estate descended to his heirs. Members living on September 25, 1902 (the date of the ratification of the last treaty) were enrolled on applications made by administrators. See Act of 1902, *supra.* Up to 1916, according to the Report of the Secretary, nothing had been paid out to the Choctaws and only $100.00 to the Chickasaws, save and except three small payments in 1904, 1906 and 1908. R. 15. In 1916 there was undoubtedly a large cash balance on hand in the Treasury Department and the record reveals that the Congress authorized in that year a payment of $300.00 to the Choctaws and $200.00 to the Chickasaws. R. 15. As early as 1913 there was over $5,000,000.00 on hand belonging to these tribes. See Report Superintendent of Five Tribes ended June 30, 1914, pages 30-31. Also Speech Congress W. H. Murray of Oklahoma in Congressional Record of April 24, 1914. The rolls were corrected and stand unchanged from 1915. Report of Superintendent of Five Tribes for year ending June 30, 1915, page 12. That was before any considerable sums had been

withdrawn by Congress for any purpose. At that time there were millions on hand to the credit of these Indians. Since the rolls were fixed and Congress was then dealing with the nations as separate entities and authorizing many kinds of expenditures from each nation's separate account, it was the duty of the Secretary in obedience to the mandates of Congress to set up on the books of the United States Treasury 76.56 per cent to the Choctaws and 23.44 per cent to the Chickasaws. It was his duty to thereafter maintain that ratio in crediting the nations with income from sales of common properties. This he did not do. Mr. Howell in 1913 called attention to the error. R. 21. The Chiefs of both nations called attention to it. R. 28 and 30. Howell said the error was going on from day to day and Mr. Bond, the Chickasaw attorney wrote the Indian Commissioner that while he knew of no law for the arbitrary apportionment of 3/4th and 1/4th, yet if the Choctaws did not object and wanted to donate, the Chickasaws would be grateful for all favors extended. R. 31-32. The Choctaws made a vigorous protest through the tribal chief as of December 4, 1913, but to no avail . R. 28.

PER CAPITA PAYMENTS

Counsel for the Chickasaw Nation are in error in assuming that the amounts paid out as per capita payments can be taken as the basis for deciding the issues in this case, for the reason that the funds of the two tribes have been used for many purposes other than the making of per capita payments. This is fully covered in the testimony of D. Buddrus. R. 50. The Secretary also makes it clear in his report. R. 12. It is set out fully in Mr. Howell's Report to the Secretary. R. 21. Both tribes had schools maintained by acts of Congress. Each had their separate trust funds. Each had separate sets of officers. These separate funds were not only for the purpose of making per capita payments, but for many purposes. The Choctaw Nation had a trust fund created by funds received under the treaty of 1837, of $500,000.00. Another of about $550,000.00 created under the treaty of 1855, arising from a sale of the leased district. The Choctaw Nation had annuities created by the treaty of September 27, 1830, amounting to approximately $10,500.00 per year and these were not funds in which the Chickasaws had any interest. These annuities have never been capitalized but are carried in all annual appropriation acts to this date. Taking

into consideration the admitted fact that all funds arising from the sales of the common properties were set up on the books of the Treasury Department in the proportion of 3/4ths and 1/4th, and bearing in mind that each nation had its separate funds in addition to the proceeds arising from the sale of the common domain, and that each nation had separate schools and a full set of officers and separate obligations of its own, it follows that the amounts disbursed in per capita payments to the individual members pursuant to Acts of Congress affords no basis upon which to decide the issues in this case. It is wholly immaterial. The fundamental error into which the Department has fallen is that the funds arising from the sale of the common properties have been placed upon the books of the United States Treasurer on the arbitrary basis of 3/4ths and 1/4th. A readjustment as to these particular funds is all that is prayed for by the plaintiff. It is conceivable that the Chickasaws might in the last analysis receive more per capita than the Choctaws, but they would only be entitled, as a tribe, to 23.26 per cent of the $34,470,650.27 received from the sale of the common properties. Congress could authorize the tribal government to run schools or do anything it saw fit with the part so apportioned to that Nation. It could authorize the building of new schools and academies as it has done.

THE ¾ AND ¼ NOT FIXED BY ACTS OF CONGRESS

We do not deem it necessary to give extended consideration to this point that Acts of Congress and treaties provide for a 3/4 and 1/4 apportionment. Counsel are clearly in error in this respect. In the treaty of 1855 no provision is made for the disposition of the common domain of the tribe. It is true that in 1866 a special fund received from the "Leased District" was being disbursed but no provision whatever was made for the disposition of common properties constituting the domain on which the Indian lived. In providing for the apportionment of the funds received from the so-called "Leased District" the nations did agree that the same be disbursed by setting aside 1/4th to the Chickasaws and 3/4ths to the Choctaws. This was undoubtedly done for the reason that there were no rolls available and the amount as apportioned approximately set forth the true ratio then existing. In addition to the two treaties mentioned, counsel refer to the Atoka agreement of 1898 and to the supplemental treaty of 1902, but

we respectfully submit that those treaties provided for an apportionment on a per capita basis and do not in any wise support the contention of the counsel for the Chickasaw Nation. The attorneys for the Chickasaw Nation cite no acts of Congress and are so clearly in error as to require no extended answer. In the report of the Comptroller, it is said that an "examination of the records fails to dislose the reason for the apportionment of 3/4ths to the Choctaws and 1/4th to the Chickasaws. R. 149. If there had been any acts of Congress authorizing such an apportionment of the funds on the arbitrary basis adopted, the same would have been cited and relied upon by the Comptroller General, but his report frankly admits that there is no congressional sanction. Counsel for the Chickasaw Nation cite none. We, therefore, submit that this point is without merit.

In answering the further point made to the effect that the two national councils agreed to a one-fourth and three-fourths apportionment, we simply say that there are no acts of the Choctaw council which deal with the disposition of the common domain of the two nations. No such acts of council have been cited. The references to the handling of funds arising under the treaty of 1866 and other special funds prior to the promulgation of the final tribal rolls, merely indicate that the councils of the two nations were content to divide that particular income on an arbitrary basis without going to the expense of having rolls prepared.

In our original brief and in the reports made by Mr. Howell to the Secretary of the Interior, full references are made to controlling provisions of the acts of 1898 and 1902 and we think it is very clear that under the provisions of the Act of 1902, the surplus lands as well as other common properties were to be sold and the proceeds arising therefrom credited to the tribes on a percapita basis. We are here only dealing with the funds received from the sale of the common properties. There is not a syllable in the treaty of 1855 or in the treaty of 1866 which contemplates an arbitrary division of the lands on the basis of 1/4th to the Chickasaws and 3/4ths to the Choctaws. The very fact that the treaty of 1837 under which the Chickasaws acquired an interest, recites that the domain shall be held in common, means that they shall share equally and take per capita. There being a common ownership by these two groups of Indians, it necessarily

follows that each individual Indian had an undivided interest in the whole, irrespective of the tribe with which he was aligned and even in the absence of the Acts of Congress. The separate organization of the tribal governments was for political purposes only and clearly has no relation to the ownership of the tribal domain.

From November, 1910, to June 30, 1914, there had been sold in unallotted lands of the Choctaw and Chickasaw Nations $11,590,612.00. See Report of Superintendent for the Five Tribes, period ending June 30, 1914. Page 30. At page 31 of the Report of the Superintendent of the Five Tribes for period ending June 30, 1910, is given by years the receipts from the sale of town sites in the two nations. These sales reached into the millions. All receipts from the sales of common properties of the nations are given from year to year in the Reports of the Commission and the Superintendent of the Five Tribes for the period from the ratification of the Atoka Agreement to this date. The Comptroller gives the amount in bulk from sales of purely common properties and we refer for details to the Reports of his office filed in the Accounting Case of the Choctaw Nation pending in this court, styled *Choctaw Nation* v. *United States,* No. K260, and the Chickasaw Nation's accounting case, styled *Chickasaw Nation* v. *United States* No. K-544. In these reports will be set forth how much was spent in each Nation for schools. This court held in the *Creek Nation* v. *United States* No. H-510, that the maximum amount that could be spent for schools in any one year was the amount spent in the year 1905. In the Choctaw Nation, the amount spent for that year was $125,-000.00 and hence the Secretary was confined to that amount in expenditures for schools in the Choctaw Nation and he could only withdraw that amount from the 3/4ths part of the common funds set up on the books of the Department to the credit of the Choctaw Nation. All appropriations Acts for scchool purposes, as well as per capita payments, were made from the separate accounts to the credit of the respective tribes. Up to 1913 there had been realized from the sales of town lots and from leases on Coal lands upwards of six million dollars. See Howell statement. R. 23-24. From these figures it may be readily seen that many millions of dollars had been received before 1915, the point at which the rolls became definitely fixed. At that time it was known that the true ratio was not 3/4ths and 1/4th but was as we here contend.

INTEREST

We invoke the rule applied in *Creek Nation* v. *United States* No. 2 October term 1934 U. S. Sup., decided April 29, 1935. Mr. Justice VanDevanter in that case held that the Creek Nation was entitled to interest on the judgment recovered for the value of certain lands unlawfully taken for the Sac and Fox Indians. The same jurisdictional bill was before the court as is now before the court in the present case. Here the Choctaw Nation has been denied the use of over a half million dollars for many years. This money could have been placed out at interest, pursuant to Acts of Congress, all of which are set out in the Accounting Report in No. K-260 pending in this court and now a part of this record by being set forth and mentioned in the report of the Comptroller in this case. See also Chickasaw Accounting Report mentioned in Comptroller's report in this case. The Creek case is in all respects controlling and we cite no further authorities. If the funds of these nations had not been put out at interest in banks to earn interest as the Secretary was authorized to do, the plaintiff would be entitled to interest under the rule announced in the Creek case. But under the act of March 3, 1911 (36 Stat. 1058-1070) all funds arising from the sales of lands and common properties of these nations were to be placed out at interest and they were placed out at interest according to the Reports of the Superintendent of the Five Tribes. See Report for period ending June 30, 1913, Page 27. It thus appears that as a matter of fact, the Chickasaws received interest on their cash balances, whereas, a part of the funds on which interest was paid actually belonged to the Choctaws. Irrespective, however, of this well known fact, the plaintiff here is entitled to interest under the principle applied in the Creek case.

We ask for judgment for the amount claimed in our original brief and interest at a reasonable rate.

Respectfully submitted,

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