

BEFORE THE INDIAN CLAIMS COMMISSION

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| THE CHICKASAW NATION, |) | |
| Plaintiff, |) | |
| v. |) | Docket No. 269 |
| THE UNITED STATES, |) | |
| Defendant. |) | |
| THE CHOCTAW NATION, |) | |
| Intervenor. |) | |

Decided: January 23, 1959

FINDINGS OF FACT

The Commission makes the following findings of fact.

1. The petitioner, the Chickasaw Nation of Indians of the State of Oklahoma, is an organized tribe of American Indians within the meaning of the Indian Claims Commission Act of August 13, 1946, c. 949, 60 Stat. 1049, 25 U.S.C. § 70 (a) et seq., and as such is authorized to bring this cause of action under Section 2 of said Act, and its petition has been timely filed herein.

2. The Treaty of January 10, 1786 (7 Stat. 24; 2 Kapp. 14), between the Chickasaw Nation and the United States, provided in part as follows:

Article II. The Commissioners Plenipotentiary of the Chickasaws do hereby acknowledge the tribes and the towns of the Chickasaw Nation, to be under the protection of the United States of America, and of no other sovereign whosoever.

Under the above provision, and under Article 1, Section 8 of the Constitution of the United States the Chickasaw Nation became a dependent Indian

Nation under the United States. (The United States v. Creek Nation, 295 U.S. 103, 109-110; Seminole Nation v. United States, 316 U.S. 286, 296-297; Choctaw Nation v. United States, 119 U.S. 1, 28; Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17-20; Choctaw and Chickasaw Nations v. United States and the Wichita and Affiliated Bands of Indians, 34 C. Cl. 17, 39, 120).

3. The lands involved in this case, located in the present State of Oklahoma, were acquired by the Choctaw Nation in a cession from the United States under Article 2 of the Treaty of October 18, 1820 (7 Stat. 210; 2 Kapp. 191), which cession was slightly modified by the Treaties of January 20, 1825 (7 Stat. 234; 2 Kapp. 211) and September 27, 1830 (7 Stat. 333; 2 Kapp. 310), between the Choctaw Nation and the United States. The title of the Choctaw Nation to said lands is evidenced by a patent issued by the United States to said Choctaw Nation on March 24, 1842.

(Admitted in dft's ans., page 2, and in ans. of intervenor, page 1).

4. For a valuable consideration the Chickasaw Nation acquired an undivided interest in said lands of the Choctaw Nation under the provisions of the Treaty of January 17, 1837 (11 Stat. 573; 2 Kapp. 486), between the Choctaw and Chickasaw Nations and the United States.

Thereafter said lands were held in common by said Choctaw and Chickasaw Nations, the Choctaw Nation having a three-fourths undivided interest in said lands, and the Chickasaw Nation having a one-fourth undivided interest in said lands; and all proceeds derived from the lease, cession, sale or other disposition of said lands, have since been distributed on the basis of three-fourths to the Choctaw Nation, and one-fourth to the Chickasaw Nation.

(Admitted in Dft's ans., page 2, and in intervenor's ans., page 1; Choctaw Nation v. The United States and the Chickasaw Nation, 83 C. Cls. 140).

5. The Treaty of June 22, 1855 (11 Stat. 611; 2 Kapp. 706), between the Choctaw and Chickasaw Nations and the United States provided in part as follows:

Article 1. The following shall constitute and remain the boundaries of the Choctaw and Chickasaw country, viz: Beginning at a point on the Arkansas River, one hundred paces east of old Fort Smith, where the western boundary-line of the State of Arkansas crosses the said river, and running thence due south to Red River; thence up Red River to the point where the meridian of one hundred degrees west longitude crosses the same; thence north along said meridian to the main Canadian River; thence down said river to its junction with the Arkansas River; thence down said river to the place of beginning.

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: Provided, however, No part thereof shall ever be sold without the consent of both tribes, and that said land shall revert to the United States if said Indians and their heirs become extinct or abandon the same.

* * * * *

Article 7. So far as may be compatible with the Constitution of the United States and the laws made in pursuance thereof, regulating trade and intercourse with the Indian tribes, the Choctaws and Chickasaws shall be secured in the unrestricted right of self-government, and full jurisdiction, over persons and property, within their respective limits; * * *

6. The Treaty of April 28, 1866 (14 Stat. 769; 2 Kapp. 918), between the United States and the Choctaw and Chickasaw Nations, provided, inter alia, as follows:

Article II. The Choctaws and Chickasaws hereby covenant and agree that henceforth neither slavery nor involuntary servitude, otherwise than in punishment of crime whereof the parties shall have been duly convicted, in accordance with laws applicable to all members of the particular nation, shall ever exist in said nations.

Article III. 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 nations 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 resident as aforesaid, and their descendants, 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. And should the said laws, rules and regulations not be made by the legislatures of the said nations, respectively, within two years from the ratifications of this treaty, then the said sum of three hundred thousand dollars shall cease to be held in trust for the said Choctaw and Chickasaw Nations, and be held for the use and benefit of such of said persons of African descent as the United States shall remove from the said territory in such manner as the United States shall deem proper--the United States agreeing, within ninety days from the expiration of the said two years, to remove from said nations all such persons of African descent as may be willing to remove; those remaining or returning after having been removed from said nations to have no benefit of said sum of three-hundred thousand dollars, or any part thereof, but shall be upon the same footing as other citizens of the United States in the said Nations.

Article III was not complied with within the two year period by either the Choctaws or the Chickasaws. The United States did not remove any freedmen pursuant to the treaty. (The Chickasaw Nation v. United States, 95 C. Cl. 192, 194-195, Finding 2; Cl. Ex. 8; Cl. Ex. 1, p. 37; Dft. Ex. 11).

7. By an act of Congress approved May 17, 1882 (22 Stat. 68, 73), the sum of \$10,000 was appropriated out of the \$300,000 reserved by Article III of the Treaty of 1866 for the education of the freedmen of the Choctaw and Chickasaw Nations. It was provided that either tribe might, before the expenditure was

made, adopt its freedmen in accordance with Article III of the Treaty of 1866 and in such case the money provided for education would be paid over to the tribe, in its proper share.

By a measure of the general council of the Choctaw Nation approved May 21, 1833, entitled "An Act to adopt the freedmen of the Choctaw Nation," enacted in conformity with the act of Congress approved May 17, 1882 (supra), the Choctaw Nation adopted its freedmen.

Sections 1 and 3 provided:

Sec. 1. Be it enacted by the general council of the Choctaw Nation assembled, that all persons of African descent resident in the Choctaw Nation at the date of the treaty of Fort Smith, Sept. 13, 1865, and their descendants formerly held in slavery by the Choctaws or Chickasaws, are hereby declared to be entitled to and invested with all the rights, privileges, and immunities, including the right of suffrage of citizens of the Choctaw Nation, except in the annuities, moneys and the public domain of the nation.

Sec. 3. Be it further enacted that all said persons are hereby declared to be entitled to forty acres each of the lands of the nation, to be selected and held by them under the same title and upon the same terms as the Choctaws.

No permanent allotments were ever made under this legislation.

The Chickasaws did not adopt their freedmen and objected to allotments to the Choctaw freedmen out of the commonly owned lands. (Chickasaw Nation v. United States, 95 C. Cl, 192, 196, Finding 3: Cl. Ex. 7; Dft. Ex. 5).

8. The Chickasaw Nation, the Choctaw Nation, and the members of the Dawes Commission to the Five Civilized Tribes, on behalf of the United States, entered into an agreement on April 23, 1897, known as the "Atoka" Agreement, providing for allotments in severalty of their common lands and the sale or disposition of other common properties of the tribes. This agreement, as amended, was ratified and confirmed by the Curtis Act (30 Stat. 495, 503), and made a part

thereof, and was subsequently approved by a majority vote of the members of each of the tribes. (Chickasaw Nation v. United States, 95 C. Cl. 192, 197, Finding 4; Dft. Ex. 12)

9. The original Atoka Agreement, between the Commissioners for the United States and the Choctaw and Chickasaw Nations was negotiated at Atoka, in the Indian Territory and signed on April 23, 1897. Chairman Dawes of the Commission was not present (Cl. Ex. 1, pp. 59-60).

The Agreement provided for forty-acre allotments to the Choctaw freedmen and contained a provision for the reduction of the allotments of Choctaw Indian citizens on account of the allotments to Choctaw freedmen as follows:

"Provided that the lands allotted to the Choctaw freedman, are to be deducted from the portion to be allotted under this agreement to the members of the Choctaw tribe, so as to reduce the allotments to the Choctaws by the value of the same and not affect the value of the allotments to the Chickasaws".

The Agreement contained no provision relating to allotments to the Chickasaw freedmen. (Chickasaw Nation v. United States, 95 C. Cls. 192, 197, Finding 5; Cl. Ex. 1, pp. 56-57, 62-63; Dft. Ex. 12.)

10. The Agreement as ratified by the Act of Congress of June 28, 1898 (30 Stat. 495), was amended by providing for the 40-acre allotments to the Chickasaw freedmen, but with the condition that such allotments were.

"* * * to be selected, held and used by them until their rights under said treaty (the Treaty of 1866), shall be determined, in such manner as shall hereafter be provided by Act of Congress;"

and the provision, set out in the preceding paragraph, for the reduction of the allotments of Choctaw Indian citizens on account of allotments of the Choctaw freedmen, was amended by providing that the allotments of Chickasaw Indian citizens be also reduced on account of allotments to the Chickasaw freedmen, as follows:

"That the lands allotted to the Choctaw and Chickasaw freedmen are to be deducted from the portion to be allotted under this agreement to the members of the Choctaw and Chickasaw tribes so as to reduce the allotment to the Choctaws and Chickasaws by the value of the same."

(Chickasaw Nation v. United States, 95 C. Cls. 192, 197, Finding 6; Cl. Ex. 1, pp. 70-76).

11. The Chickasaw Nation, the Choctaw Nation, and the United States, entered into a further agreement on March 21, 1902 (32 Stat. 641). This agreement, known as the "Supplemental" Agreement, contained detailed provisions for the enrollment of the members and freedmen of the Choctaw and Chickasaw nations, the appraisal and allotment of the common lands in severalty to the members and freedmen of the two tribes, the sale of the residue of such lands after allotments had been made and equalized, and the reservation and sale or disposition otherwise of the common properties of the two tribes, and the distribution of all moneys arising therefrom. (Chickasaw Nation v. United States, 95 C. Cls. 192, 198, Finding 7).

12. The Supplemental Agreement provided in sections 36 to 40, inclusive for a suit in the United States Court of Claims, with right of appeal to the Supreme Court, to test the rights of the Chickasaw freedmen to the commonly owned lands allotted to them under the Atoka Agreement. These sections appeared under the heading "Chickasaw Freedmen."

Sections 36, 37, and 40 provided:

"36. Authority is hereby conferred upon the Court of Claims to determine the existing controversy respecting the relations of the Chickasaw freedmen to the Chickasaw Nation and the rights of such freedmen in the lands of the Choctaw and Chickasaw nations under the third article of the treaty of eighteen hundred and sixty-six, between the United States and the Choctaw and Chickasaw nations, and under any and all laws subsequently enacted by the Chickasaw legislature or by Congress.

"37. To that end the Attorney General of the United States is hereby

directed, on behalf of the United States, to file in said Court of Claims, within sixty days after this agreement becomes effective, a bill of interpleader against the Choctaw and Chickasaw nations and the Chickasaw freedmen, setting forth the existing controversy between the Chickasaw Nation and the Chickasaw freedmen and praying that the defendants thereto be required to interplead and settle their respective rights in such suit.

"40. In the meantime the Commission to the Five Civilized Tribes shall make a roll of the Chickasaw freedmen and their descendants, as provided in the Atoka Agreement, and shall make allotments to them as provided in this agreement, which said allotments, shall be held by the said Chickasaw freedmen, not as temporary allotments, but as final allotments, and in the event that it shall be finally determined in said suit that the Chickasaw freedmen are not, independently of this agreement, entitled to allotments in the Choctaw and Chickasaw lands, the Court of Claims shall render a decree in favor of the Choctaw and Chickasaw nations according to their respective interests, and against the United States, for the value of the lands so allotted to the Chickasaw freedmen as ascertained by the appraisal thereof made by the Commission to the Five Civilized Tribes for the purpose of allotment, which decree shall take the place of the said lands and shall be in full satisfaction of all claims by the Choctaw and Chickasaw nations against the United States or the said freedmen on account of the taking of the said lands for allotment to said freedmen: Provided, That nothing contained in this paragraph shall be construed to affect or change the existing status or rights of the two tribes as between themselves respecting the lands taken for allotment to freedmen, or the money, if any, recovered as compensation therefor, as aforesaid."

It was provided in section 68 that:

"No act of Congress or treaty provision, nor any provision of the Atoka agreement, inconsistent with this agreement, shall be in force in said Choctaw and Chickasaw nations."

(Chickasaw Nation v. United States, 95 C. Cls. 192, 198-199, Finding 8).

13. At the time of the negotiations for the Supplemental Agreement in Washington, D. C., in February and March 1902, the Chickasaws insisted that the agreement contain some provision saving their rights not to have allotments to Choctaw freedmen made at the expense of the Chickasaws' interest in the commonly owned lands. After conference with the Assistant Attorney General, who was legal advisor to the Department of the Interior, it was agreed that the proviso to section 40, set out in finding 12, be included to protect their interests.

The Assistant Attorney General for the Department of the Interior (later Justice Willis VanDeVanter of the United States Supreme Court), who wrote said proviso to section 40, and who represented the United States during the negotiations for the Supplemental Agreement, Hon. Douglas H. Johnston, Governor of the Chickasaw Nation, Hon. Green McCurtain, Principal Chief of the Choctaw Nation, and the other representatives of the Indian parties present, all believed at the time said proviso was adopted by the parties that the language of said proviso preserved to the Chickasaw Nation the right to claim for its interest in the common domain of the Choctaws and Chickasaws allotted to the Choctaw freedmen. (Chickasaw Nation v. United States, 95 C. Cls. 192, 199, Finding 9; Cl. Ex. 1, pp. 84-86, also pp. 25-29, 38-45, 47-48; Deft. Ex. 9, pp. 5352, 5360).

14. Suit was brought as provided in sections 36-40 of the Supplemental Agreement. Judgment for \$606,936.08 was rendered against the United States and paid to the two nations, in the proportion of one-fourth to the Chickasaws and three-fourths to the Choctaws (38 C. Cls. 558, 193, U.S. 115).

(Chickasaw Nation v. United States, 95 C. Cl. 192, 199-200, Finding 10, C. Ex. 4).

15. In that suit, prior to the entry of final judgment on January 24, 1910, the Choctaws filed an "Application for Additional Decree" in which they set out that the Chickasaws were entitled to pay for their proportionate interest in the commonly owned lands allotted to the Choctaw freedmen and requested the court to enter a supplemental decree deducting from their proportionate share of the judgment one-fourth of the value of the jointly held lands allotted to the Choctaw freedmen and add that amount to the amount to be apportioned to

the Chickasaw Nation under the judgment.

No action was ever taken by the Court on this request.

(Chickasaw Nation v. United States 95 C. Cls. 192, 200, Finding 11, Cl. Ex. 8; Cl. Ex. 2 & 3).

16. On March 11, 1910, the Governor of the Chickasaw Nation, Hon. Douglas H. Johnston, wrote to the Commission of Indian Affairs requesting permission to employ separate counsel for the Chickasaw Nation and setting out in support of his request the Chickasaws' claim for compensation for lands allotted to the Choctaw freedmen out of the common domain of the two nations without the consent of the Chickasaws and pointed out that the Chickasaws had no attorney to represent them at the time that judgment was entered in the suit brought pursuant to the Supplemental Agreement.

On March 16, 1910, denial of the request was recommended by the Commissioner of Indian Affairs on the ground that in view of the admission of the Choctaws in their request for an additional decree, judicial action did not seem to be necessary to settle the controversy. A final determination was promised within ten days. No such determination seems ever to have been made.

(Chickasaw Nation v. United States, 95 C. Cls. 192, 200, Finding 12, Cl. Ex. 8; also Cl. Ex. 1, pp. 38-48).

17. The Chickasaw Nation has never received any compensation for its common interest in the lands allotted to the Choctaw freedmen, by the reduction of the allotments of Choctaw Indian citizens, or by an adjustment or settlement otherwise.

(Chickasaw Nation v. United States, 95 C. Cls. 192, 200, Finding 13 - Cl. Ex. 8; also Cl. Ex. 1, pp. 68, 77, 86).

18. The Superintendent for the Five Civilized Tribes reported on July 26, 1939, that allotments had been made to 5,973 Choctaw freedmen of 266,435.13 acres of land, the appraised value of which for allotment purposes was \$763,739.12.

The value of the undivided one-fourth interest of the Chickasaw Nation was one-fourth of same, \$190,934.78.

(Chickasaw Nation v. United States, 95 C. Cls. 192, 200-201, Finding 14 - Cl. Ex. 8; also Cl. Ex. 1, pp. 20-23).

19. In prior litigation under the jurisdictional act of June 7, 1924 (43 Stat. 537), between the parties hereto the United States Court of Claims held that the language of the proviso to Section 40 of said Supplemental Agreement of March 21, 1902 (32 Stat. 641), was intended by the parties to preserve and did preserve to the Chickasaw Nation the right to claim for the value of its one-fourth interest in the lands jointly owned by the Choctaw and Chickasaw Nations allotted to Choctaw freedmen, without the consent or acquiescence of the Chickasaw Nation (Chickasaw Nation v. United States and the Choctaw Nation, 95 C. Cls. 192).

On March 8, 1943, the United States Supreme Court reversed the case and held, as a matter of law, that the language of the provisions of said Supplemental Agreement could not be construed so as to preserve to the Chickasaw Nation the right to claim for its one-fourth interest in the common domain of the Choctaw and Chickasaw Nations allotted to Choctaw freedmen (Choctaw Nation v. United States and the Chickasaw Nation, 318, U.S. 423).

20. Since 1866, the petitioner's demand for compensation for any of its lands to be awarded by the Government to freedmen were well known to all concerned. (14 Stat. 769) Henry L. Dawes, the Chairman of the Commission to Five

Civilized Tribes, expressed this position of the Chickasaws to the Secretary of the Interior in his annual report dated October 11, 1897, on the question of Chickasaw freedmen allotments in this language, (Dft. Ex. 16, pp. 17-18):

The citizenship of the Chickasaw Freedmen is in dispute. There are many thousands of them. As there never has been any enrollment of them the Commission has no means of knowing how many, but without doubt there are more than in all the other tribes put together. They claim they have been made citizens by the Chickasaws, which is denied by them. If they are citizens they are entitled under treaty to an allotment of forty acres each. There can be therefore no allotment of the Chickasaw lands until this question is settled. Nor can the enrollment required be proceeded with while this question remains unsettled. It is of great importance that provision be made for its early settlement. The Choctaws and Chickasaws owning their land in common, all allotment must await this decision. If they are not Chickasaw citizens, then the United States is in under treaty obligation to remove them from the territory. (Underscoring supplied).

This same position of petitioner, consistent with its position as above described by Chairman Dawes in reference to Chickasaw freedmen, was also the petitioner's position as to Choctaw freedmen allotments and said position was never abandoned. A treaty Commissioner of the Chickasaws, Ben H. Colbert, testified in his 1940 deposition how the issue was raised in the negotiations of the subsequent 1902 agreement (Cl. Ex. 1, pp. 84-86).

We find and conclude as an ultimate fact, consistent with all of the findings of fact herein, and based upon our findings numbered 8, 9, 13, and 15 through 19, inclusive, that the Chickasaw and Choctaw Nations intended to agree, and understood and believed they had agreed upon something very different from the Supreme Court's literal interpretation of the language of the 1902 agreement (*Choctaw Nation v. U.S.*, 1943, 318 U.S. 420); that is, said Nations believed said agreement preserved to the Chickasaw Nation the right of compensation for its lands allotted to Choctaw freedmen and that the value of same would be deducted from funds of the Choctaw Nation and credited to funds of the Chickasaw

