BEFORE THE INDIAN CLAIMS COMMISSION

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| OTTAWA-CHIPPEWA TRIBE OF MICHIGAN, Plaintiff, | ) | |
| v. | ) | Docket No. 364 |
| THE UNITED STATES OF AMERICA, Defendant. | ) | |

Decided: April 1, 1977

Appearances:

Rodney J. Edwards, Attorney for Plaintiff.

Dean K. Dunsmore with whom was Assistant Attorney General Wallace H. Johnson, Attorneys for Defendant.

## OPINION OF THE COMMISSION

Blue, Commissioner, delivered the opinion of the Commission.

## INTRODUCTORY STATEMENT

This accounting case of the Ottawa-Chippewa Tribe of Michigan is now before us for final judgment.

Plaintiff is the entity identified as the Indian party to the Treaty of July 31, 1855, 11 Stat. 621, 2 Kappler 725.[1/] By a petition filed on

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1/ Ottawa-Chippewa Tribe v. United States, 30 Ind. Cl. Comm. 288 (1973).

August 13, 1951, plaintiff presented five claims. The first was for the value of allotments which were to be made to individual members of the plaintiff pursuant to Article 1 of the 1855 treaty, and which plaintiff alleged were not made. Plaintiff's second claim was for an accounting under Articles 1 and 2 of the treaty. Plaintiff's third claim was for all trust funds on deposit in the Treasury of the United States to the credit of the plaintiff or its members. Plaintiff's fourth claim was for the value of annuities due the plaintiff pursuant to treaties entered into prior to the 1855 treaty. Plaintiff's fifth claim was for the expenses and reasonable value of the services of Jacob Walker Cobmoosa deceased, in the preparation and the presentation of the plaintiffs' claims before agencies of the United States.

By the opinion and order of the Commission of January 27, 1975, [2/] plaintiff's first and fifth claims were dismissed. In addition, plaintiff's third claim was dismissed insofar as it related to funds held in the Treasury of the United States to the credit of individual members of the Ottawa and Chippewa Tribe of Michigan. The opinion and order also dealt with certain aspects of the remaining second, third, and fourth claims.

We entered nine findings of fact in an earlier stage of these proceedings (see 30 Ind. Cl. Comm. 288-292). Among other things, we found

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2/ Ottawa-Chippewa Tribe v. United States, 35 Ind. Cl. Comm. 385, 387-88, 394-95, 417 (1975).

that the present plaintiff is identical with the Ottawa and Chippewa Indians of Michigan who were the party plaintiff in our Docket No. 58, that this is an identifiable group of American Indians residing within the territorial limits of the United States within the meaning of Section 2 of the Indian Claims Commission Act (25 U.S.C. § 70a), but that it has no tribal organization at the present time. We also found that its petition under the Act was timely filed with this Commission. These findings support the conclusion that the plaintiff is entitled to maintain the present action.

A pretrial conference was held on April 4, 1975. The issues remaining for decision were specified in a pretrial memorandum approved by both parties, dated April 9, 1975.

This case has been submitted on the documentary evidence of the parties and their respective briefs. There were no live witnesses, and consequently no trial in the usual sense.

This opinion will discuss the plaintiff's subsisting claims in order.

SECOND CLAIM

The second claim is for an accounting under the last clause of Article 1 and each of the five clauses of Article 2 of the 1855 treaty. We discuss them in order:

A. Article 1, Last Clause -- Payment of Indians' Debts.

The plaintiff's exception to the accounting under this clause was dismissed in our 1975 decision (35 Ind. Cl. Comm. at 417), and plaintiff has not sought to reopen the matter.

B. Article 2, First Clause -- $80,000 for Education.

In this clause, the United States agreed with the plaintiff to spend $80,000 in ten equal annual installments for educational purposes. Eighty-one thousand, ninety dollars and twenty-three cents ($81,090.23) were actually spent by the defendant, but in fifteen unequal annual installments.

In 1975, (35 Ind. Cl. Comm. at 397) we ruled that the burden was on plaintiff to show damages from this technical breach of the treaty.

(1) Interest Not Due. The plaintiff has produced no factual evidence of damages; but claims a legal right to interest on the delayed payment. The appropriations to fulfill the various clauses of Article 2 were trust funds, plaintiff claims, and should have been invested to produce interest under the Act of September 11, 1841, 31 U.S.C. § 547a.

Plaintiff argues:

> The disbursements of the funds by the government agents also is consistent with a determination that these were trust funds. In many of the years the agents did not disburse the entire amount appropriated by Congress. The moneys were carried over and disbursed in later years. We pose the question where was this money kept if it was not in a Plaintiff's Indian Trust Fund? The government accounting procedures are that any agency funds that are not committed at the end of the fiscal year are returned to Treasury and new appropriations have to be made to have the money available for disbursement in subsequent years. This latter situation was not the case in respect to Congressional Appropriation of the 1855 Treaty payments. The appropriated funds had been committed to the Indian Trust Funds.

A short answer to where the money was kept is that it stayed in the general fund of the Treasury. As the Court of Claims stated in Hukill v.

United States, 16 Ct. Cl. 562, 565 (1880):

> An appropriation by Congress of a given sum of money, for a named purpose, is not a designation of any particular pile of coin or roll of notes to be set aside and held for that purpose, and to be used for no other; but simply a legal authority to apply so much of any money in the Treasury to the indicated object.

Until appropriated money is actually withdrawn from the Treasury, the appropriation remains:

> . . . nothing more than the legislative authorization prescribed by the Constitution that money may be paid out of the Treasury.3/

Under section 10 of the Act of August 31, 1852, c. 108, 10 Stat. 76, 98, in force during the period here in question, appropriations lapsed two years after the expiration of the fiscal year in which made, unless a longer duration was specially provided by law.

The failure of the disbursing officers to draw promptly on the 1855 treaty appropriations, therefore, has no bearing on the question of whether trust funds were established. Trust funds would have to be established by appropriate language in the appropriation acts or by subsequent legislation or administrative action. TeMoak Bands v. United States, 33 Ind. Cl. Comm. 417, 421 (1974--on rehearing), aff'd in part sub nom., United States v. Mescalero Apache Tribe, 207 Ct. Cl. 369 (1975).

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3/ Campagna v. United States, 26 Ct. Cl. 316, 317 (1891); cf. Cincinnati Soap Co. v. United States, 301 U.S. 308, 321 (1937).

The record reveals none of these modes of establishing a trust fund; and the conclusion is inescapable that none was established. Until paid, the belated installments simply represented unfulfilled obligations of the United States, which, in the absence of a law or contract so providing, do not bear interest. Loyal Creek Indians v. United States, 118 Ct. Cl. 362, 97 F. Supp. 426, cert. denied, 342 U.S. 813 (1951).[4/]

We granted partial summary judgment for defendant in our 1975 decision, ruling out interest on any deficiencies which may be found to exist under any part of the 1855 treaty except Article 2, Clause Fourth. See 35 Ind. Cl. Comm. at 389. A fortiori, we ruled out interest on late payments under any clause except that one. Plaintiff has moved for reconsideration of our summary judgment. For the reasons stated above, we deny the motion and adhere to our 1975 decision.

(2) Specie Payment Not Required. Plaintiff claims it should receive the coin equivalent of certain payments under Article 2, Clause 1, made in paper currency which was unredeemable during the Civil War and Reconstruction periods. As we stated in our opinion of 1975, only Article 2, fourth, of the 1855 treaty provided for payment in coin (35 Ind. Cl. Comm. at 410). Currency payments under all other clauses were authorized by the Act of February 25, 1862, c. 33, 12 Stat. 345. The Court of Claims has

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4/ Cf. Gila River Indian Community v. United States, Docket 236-E, 38 Ind. Cl. Comm. 1 (1976), where money earned by the tribe was wrongfully taken by the United States.

squarely held that the Government is accountable only on a currency basis under an Indian treaty not expressly providing for payment in coin. Delaware Tribe v. United States, 74 Ct. Cl. 368 (1932). Consequently, the plaintiff's claim for coin equivalents must be rejected under the first clause of Article 2 and all other clauses of the 1855 treaty except Article 2, fourth clause.

The Government's accounting under Article 2, first clause, will be allowed and approved.

C. Article 2, Second Clause -- $75,000 for Agricultural Implements, etc.

This clause provided for the expenditures of $75,000 in five equal annual installments for "agricultural implements and carpenters' tools, household furniture and building materials, cattle, labor, and all such articles as may be necessary and useful for them [the Indians] in removing to the homes herein provided and getting permanently settled thereon."

The GAO report does not expressly state which of the expenditures it shows were made under the second clause of Article 2. The defendant's counsel has compiled a table (Ex. 182), using figures from the report, in which he identifies the following items as expended under the second clause:

| | |
|---|---|
| *Agricultural aid | $ 1,337.47 |
| Agricultural implements and equipment | 14,476.18 |
| *Clothing | 40,560.01 |
| *Expenses of allotting lands | 150.00 |
| *Feed and care of livestock | 72.50 |
| *Fish barrels | 136.52 |
| Hardware | 1,590.69 |
| Household equipment | 2,634.22 |
| Indian building | 36.46 |
| *Medical attention | 250.00 |
| Miscellaneous building materials | 2,740.03 |
| Pay of farmers | 1,350.00 |
| Pay of gunsmiths | 210.00 |
| Pay of other mechanics | 250.00 |
| *Provisions and rations | 5,750.45 |
| *Removal of Indians | 1,404.41 |
| Supplies for other shops | 74.06 |
| Work and stock animals | 6,669.26 |
| | $ 79,692.26 |

The plaintiff has challenged the legality of the items we have marked with asterisks. These items total $49,661.36.

The grounds for the challenge are that the items "were not for the articles and purposes set forth in the treaty stipulations and were not allowable as payment on the claim by Section 70a of the Indian Claims Commission Act as amended by Public Law 93-494, approved October 27, 1974. . . " [88 Stat. 1499].

We believe all the starred items were authorized under the second clause except the expense of allotting lands.

Agricultural aid, clothing, feed and care of livestock, fish barrels, medical attention, provisions and rations, and removal of Indians all fall within the category of "labor, and all such articles as may be necessary and useful for them in removing to the homes herein provided and getting permanently settled thereon."

As to "Expenses of allotting lands," the whole tenor of Article 1 of the treaty is that such expenses shall be borne by the United States. For example, the word "give" in the fifth paragraph at 11 Stat. 622 implies the absence of any charge; the statement in the same paragraph that the gift will be under "the following rules and regulations," which do not mention a charge, further implies that there will be none. The $150.00 charge for expenses of allotting land, therefore, cannot be credited against the Government's $75,000 obligation under Article 2, second clause. But since the total expended by the Government under the clause was $79,692.26, the disallowance of this item does not impose liability.

Plaintiff's invocation of Public Law 93-494 raises a question that is not difficult but requires clear explanation:

The amendment made by this law only concerns offsets. The last paragraph of section 2 of the Indian Claims Commission Act (25 U.S.C. § 70a), which it amended, is the act's offset paragraph.

As stated in the Conference Report (H.R. Rep. No. 93-1446 (1974) at 3):

> . . . While couched in general terms, the amendment would have had or will have only a minimal effect on all claims decided before the Commission except the claim of the Teton Sioux Nation in Indian Claims Commission Docket No. 74-B.

The claim in Docket 74-B is described thus in H. R. Rep. No. 93-1456, at 5:

> Docket 74-B
>
> Docket 74-B of the Indian Claims Commission is the Sioux claim for the taking of the Black Hills area and for gold taken from there. To date, it is estimated that over $2 billion worth of gold has been taken from the area.
>
> After an earlier decision of the Commission that the Sioux had recognized title to the area taken by the 1877 Act, the Commission, on February 14, 1974, decided that the 1877 value of the land taken was $17,100,000 and that the value of the gold taken between 1868 and 1877 was $450,000.
>
> The Commission also found that this was a unilateral taking by the United States in violation of the 5th Amendment to the Constitution. Therefore, the United States is liable for the payment of 5% simple interest annually on the total amount of the award. If there were no offsets against this amount, the Sioux would be entitled to an award of approximately $104,000,000.
>
> However, the Commission determined that the United States was entitled to prove, at a later hearing, and offset any expenditures it made on behalf of the Sioux

> under the 1877 agreement as a payment on the claim. These expenditures were almost all in the form of food, rations, and other subsistence provisions. Additionally, these offsets would be applied under a formula which offsets them on a year-by-year basis with a portion applied to the principal amount of the award and a portion to the interest. The net effect of this is that the award would be virtually nullified.

The situation in the instant case is quite distinct from that in 74-B. That was a land claim -- for the value of property taken from the plaintiff by the defendant. The amount of the claim is the value of the land. Once that is determined (assuming liability), the Commission must find out how much of this value has already been reimbursed to the plaintiff by the Government. The process of determining the reimbursement is what Congress had in mind when it enacted in Public Law 93-493, "That expenditures for food, rations, or provisions shall not be deemed payments on the claim." 5/

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5/ The Commission explained "payments on the claim" as follows in Sioux Nation v. United States, Docket 74-B, 33 Ind. Cl. Comm. 151, 219 (1974), aff'd in part, rev'd in part, 207 Ct. Cl. 234 (1975).

> . . . Whatever compensation has been received by plaintiffs must be considered payments on the claim.
>
> In determining the extent of the compensation received by plaintiffs for their property taken under the 1877 act, defendant is entitled to credit, as payments on the claim, for the value of all property transferred to plaintiffs under the act, and for all expenditures on behalf of the Sioux made by the United States in fulfillment of the new obligations assumed under the act.

The instant case, on the other hand, is an accounting claim. It is not for the value of a specified piece of land or other property allegedly taken by the defendant, but:

> . . . For the unexpended balance of the following accounts or for the amounts improperly expended, with interest, under Articles 1 and 2 of the Treaty of 1855 . . . [Petition, page 2.]

To adjudicate such a claim, the Commission cannot determine a value and then take offsets against it. The amount claimed -- the unexpended balances and improper expenditures (if any) -- is determined by examining the Government's expenditures, and crediting those which are proper against the appropriate treaty obligation. Determining the Government's allowable credits constitutes the primary adjudication. It is not a matter of offset, and Public Law 93-493 cannot apply to it.

Our ruling is, that where, as here, a treaty permitted the United States to fulfill an obligation to Indians by the delivery of food,

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Footnote 5/ (continued)

> Under the Indian Claims Commission Act, the burden of proof with respect to payments on the claim is on the defendant. . .
>
> In meeting its burden of proof, defendant must relate each expenditure that it claims to a specific obligation assumed under the act. General designations, such as "payment in fulfillment of the Act of February 28, 1877," will be insufficient to entitle defendant to any credit. Nor can defendant receive credit for any expenditure made in furtherance of obligations assumed under other treaties or acts of Congress.

rations, or provisions, the United States will continue to receive credit for such deliveries in accounting cases, unaffected by Public Law 93-494.

The Government's accounting under Article 2, second clause, will be allowed and approved.

D. Article 2, Third Clause — $42,400 for Blacksmith Shops.

Plaintiff claims it should receive the difference between coin and currency value of the $44,578.54 defendant expended under this clause plus five percent interest on temporarily short or delayed payments.

For the reasons stated in our discussion of the first clause, above, we reject plaintiff's contentions. Defendant's account under the third clause will be allowed and approved.

E. Article 2, Fourth Clause — $306,000 in Coin, Plus Interest, for Per Capita Distribution.

There is no dispute that the Government paid out more than enough dollars to satisfy its obligation under this clause, if all the installments were timely met in coin. The installments and the principal distributions after 1862, however, were paid in paper currency; and there is dispute whether the amounts disbursed were of equivalent value to the coin owed.

There is considerable confusion between the parties about the due dates of the ten installments payable under Article 2, fourth clause. Fixing the due dates is necessary before we can determine if all the interest owed was paid.

The defendant argues for the concept of "annuity years." The first annuity year would start on the effective date of the treaty, September 10, 1856,[6/] and extend to September 10, 1857, and the second would extend to September 10, 1858, and so on. Under this theory the first installment of principal and interest would be timely if paid any time in the first annuity year, the second if paid any time in the second year, etc.

The plaintiff, on the other hand, suggests, in the alternative, (1) that the installments fell due on each anniversary date of the treaty's effective date, (2) within the fiscal year for which appropriated by Congress, or (3) on the date of the treasury warrant for such appropriation.

We have heretofore commented on the ambiguity of the fourth clause of Article 2. See 35 Ind. Cl. Comm. at 401.[7/] We think the best guide

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6/ See 35 Ind. Cl. Comm. 400, fn. 4.

7/ The rule that ambiguous laws are to be liberally construed in favor of dependent Indian tribes has been reaffirmed by the Supreme Court as recently as June 14, 1976. See Bryan v. Itaska County, 426 U.S. 373.

to its meaning in regard to due dates is contemporaneous congressional practice in making appropriations and administrative practice in making payments. Congress appropriated the first principal payment and interest on the remaining balance in advance of the effective date of the treaty, contingert upon the Indians' assenting to the Senate amendment. 8/ Each year thereafter it appropriated a principal installment, if one was due, and interest on the remaining balance, in advance of the anniversary date. 9/ In the case of the first payment, the Indian Office began distributing the money to the Indians in November following the effective date and completed it before the end of the calendar year. Each successive payment, with rare exceptions, was made between September 10 and the end of the calendar year in which it was appropriated.

We think the proper interpretation of the treaty, in view of the above practices, is that the ten installments fell due on September 10 of each year commencing with 1856, and were payable, without additional interest, within a reasonable time of the due dates.

Existing circumstances determined what was a reasonable time. The distribution of the money to the Indians took several weeks. The Ottawas and Chippewas of Michigan comprised 49 or 50 bands and lived on

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8/ Act of August 18, 1856, c. 128, 11 Stat. 65, 73.

9/ See list of appropriation acts in Tables I and II on pages 23 and 34, below.

14 scattered reservations, accessible only "over the worst of roads," or by boat in advance of the winter freeze. 10/

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10/ Def. ex. 35 at 486, 488 (Annual Report, Commissioner of Indian Affairs, 1862).

Agent D. C. Leach reported as follows from the Mackinac Indian Agency on October 17, 1863 (Annual Report, Commissioner of Indian Affairs, 1863: def. ex. 36 at 494):

> This report would have been made some time since, had not a recent tour among the Indians been unexpectedly prolonged. On the first day of September I left Detroit for the purpose of distributing annuities to the Ottawas and Chippewas at Mackinac, Little Traverse, Grand Traverse, and Garden Island, and to two bands of the Chippewas of Lake Superior, who reside near the boundary line of Michigan and Wisconsin, and whom I had promised to meet this year at or near their homes. Adverse winds, and other unavoidable difficulties attending the travelling from place to place in that new region, have prolonged my journey considerably beyond the time set apart for it, and prevented my forwarding this report until the present moment. I have now completed the distribution of annuities to the Chippewas of Lake Superior, and to the Ottawas and Chippewas, with the exception of those residing in Oceana and Mason counties, and a few in Isabella county. In the performance of this duty I have been engaged since the 30th day of July, and have travelled not less than thirty-three hundred miles.
>
> There remain yet to be paid, the Ottawas and Chippewas above mentioned, the Chippewas of Saginaw, the Chippewas, Ottawas and Pottawatomies, and the Pottawatomies of Huron.
>
> To complete these payments will require six weeks' time and fourteen hundred miles' travel. Thus four months will have been consumed in the distribution of annuities, and not less than forty-seven hundred miles travelled.

See also def. ex. 264 (letter of Agent R. M. Smith to Commissioner of Indian Affairs, February 12, 1866).

Under the circumstances, we think the installments of principal and interest were timely paid if distribution to the Indians was completed by December 31 following each September 10.

We state the account under Article 2, fourth clause, in Tables I and II, pages 23 and 34, below.

Table I covers the calendar years 1856 through 1862, during which period payment was made exclusively in coin. All payments due were fully and timely met, with two exceptions.

The first involved the 1857 installment; $1,840 of this was paid late, on May 13, 1858, to the Indians at Mackinac. Def. ex. 239. The second involved the 1858 payment; $3,000 of this was unlawfully diverted to surveying and locating lots. See 35 Ind. Cl. Comm. 385, 408. In allocating between principal and interest the shortages resulting from these two improprieties we follow the general rule stated in Uintah and White River Bands v. United States, 139 Ct. Cl. 1, 10 (1957), that the debtor may effectively direct the application of his payment. The 1857 appropriation act (cited in Table I) directed $10,000 to be paid on principal and $14,300 on interest. The latter sum was less by $25.41 than the total interest due when the Mackinac bands were finally paid, 245 days late. We show the $25.41 as simply a shortage of interest. Further interest is not due on such a shortage, under the familiar rule that compound interest cannot be awarded against the Government. See United States v. Mescalero Apache Tribe, 207 Ct. Cl. 369, 404 (1975). The $3,000 diverted to surveying is stated by the defendant to have been paid out of principal (GAO report at 94) and is so shown on Table I. This amount bears 5% simple interest, that is, $150 per annum, until paid.

TABLE I
Article 2, Fourth Clause
1856-1862 -- All Payments in Coin

| | Payment due Sept. 10: | Appropriation Act | Balance at Start of Yr. | Amount due in Coin: Principal | Amount due in Coin: Interest | Amount Paid in Coin: Principal | Amount Paid in Coin: Interest | | Cumulative Interest Shortage |
|---|---|---|---|---|---|---|---|---|---|
| 1 | 1856 | Aug. 18, 1856, c. 128, 11 Stat. 65, 73 | $306,000 | $10,000 | $14,800 | $10,000 | $14,800 | | |
| 2 | 1857 | Mar. 3, 1857, c. 90, 11 Stat. 169, 178 | 296,000 | 10,000 | 14,300 | 10,000 | 14,300 | (a) | $ 25.41 |
| 3 | 1858 | May 5, 1858, c. 29, 11 Stat. 273, 280 | 286,000 | 10,000 | 13,800 | (b) 7,000 | 13,800 | | 25.41 |
| 4 | 1859 | Feb. 28, 1859, c. 65, 11 Stat. 388, 396 | 279,000 | 10,000 | 13,450 | 10,000 | 13,300 | | 175.41 |
| 5 | 1860 | June 19, 1860, c. 157, 12 Stat. 44, 52 | 269,000 | 10,000 | 12,950 | 10,000 | 12,800 | | 325.41 |
| 6 | 1861 | Mar. 2, 1861, c. 85, 12 Stat. 221, 227 | 259,000 | 10,000 | 12,450 | 10,000 | 12,300 | | 475.41 |
| 7 | 1862 | July 5, 1862, c. 135, 12 Stat. 512, 519 | 249,000 | 10,000 | 11,950 | 10,000 | 11,800 | (c) | 625.41 |

(a) 245 days interest on $757.20 principal payment to Mackinac bands, paid March 13, 1858. The $1,840 payment to those bands is allocated in the proportion 10,000/14,300 to get the $757.20 ascribed to principal.

(b) $3,000 of the amount appropriated by Congress for this principal payment was improperly diverted to expenses of surveying and locating lots. See def. ex. 1 at 94 (GAO report); 35 Ind. Cl. Comm. 385, 408.

(c) Plus $150 interest per year on the 1858 principal shortage until paid.

Table II covers the calendar years 1863 through 1872, during which period all payments were made in currency.

The 1862 annuity was paid in the fourth quarter of that year, in coin, despite earlier adoption of the Legal Tender Act of February 25, 1862, c. 33, 12 Stat. 345. See def. ex. 250. Both the Executive and the Congress acknowledged that the obligation of Article 2, fourth clause, to pay in coin survived the Legal Tender Act. This was done first by the Departments of the Interior and the Treasury in making the 1862 coin payment, then by the letter (def. ex. 103), quoted below, and later by the Acts of April 10, 1869, c. 16, 16 Stat. 13, 27; July 15, 1870, c. 296, 16 Stat. 335, 337, 348; and of March 13, 1871, c. 120, 16 Stat. 544, 557.

In 1863 and 1864, however, the annuities were paid in paper currency, in the same dollar amounts owed in coin. At the time of the payments currency was greatly depreciated in terms of gold and silver. Some of the Indians complained bitterly. Def. ex. 37 at 447. The next year, the Acting Commissioner of Indian Affairs wrote as follows to the Indian Agent at Detroit (def. ex. 103):

> In cases where annuities are payable, by the terms of any treaty, in "gold", "specie", or "coin", it has been determined by this Department, that the Indians shall have the benefit of this stipulation, and the only question is, how to carry out this policy in such a manner as to insure to the Indians its full benefit.
>
> Gold or coin is not now a circulating medium, but merely an article of merchandise and speculation; and to pay it out to the

> Indians would merely result in a strong additional incentive to traders and Speculators to defraud them.
>
> It has therefore been decided to convert the coin into currency, and have the premium passed to the credit of the Indians, to be drawn by them hereafter. . . .

This procedure was followed in 1865 and every year thereafter to and including 1871. Thus, the Indians never actually received the gold or silver dollars owed them, but got a larger number of greenbacks, which were supposed to be of equivalent value.

The plaintiff has not objected to the practice of converting coin to currency, but contends not enough currency was paid.

We had two preliminary questions to answer before we could state the account for the years of currency payment. The first was when the conversions from coin to paper money ought to be made; and the second was what range of premiums ought to be obtained.

While the Government was not a trustee as to these treaty appropriations, it was nevertheless bound to a fiduciary standard in dealing with plaintiff. Seminole Nation v. United States, 316 U.S. 286, 295-297 (1942); cf. Quick Bear v. Leupp, 210 U.S. 50 (1908). Trust law, therefore, governs its handling of the funds after withdrawal from the treasury. G. Bogert, Trusts and Trustees § 686 at 375 (2d ed. 1960), states:

> If the trustee converts a trust investment, he must use ordinary care and prudence in making a sale, as to price to be asked, time of sale, and other factors . . . No fixed period of months or years can be set as a reasonable period of delay in all cases . . . Each case will be decided upon

> its own merits in this respect, the type of security and market condition being given special consideration. . . .

The coin appropriated to pay any year's annuity would not be available before the date of the treasury appropriation warrant. That marks the beginning of the defendant's allowable period in which to sell it for currency. Currency would not be available for timely distribution to the plaintiff Indians if the sale were not completed by the following September 10. That date, therefore, marks the close of the allowable period.

During all the years of currency payment there was an open market in gold coin, and daily quotations are in the record. See pl. ex. A-8. We have taken the high and low quotes between the date of the treasury warrant (or the date of the appropriation act where the warrant date is not in evidence) and September 10 of each year, and if the coin was sold within that range, we consider the currency received in exchange as discharging the obligation, provided it was paid over by the end of the year. In Table II, the actual currency payments are set out, and are also stated in their coin equivalents. By comparing the coin equivalents to the amount appropriated, the shortage or overage of each payment can be found in terms of coin, the medium of payment specified in the treaty. Coin equivalents were calculated for the Table using the actual rate at which coin withdrawn from the treasury in the same year to fulfill the treaty was sold for currency, except for 1872, when no coin was withdrawn, and 1866, where the coin was sold below the market. The minimum market rate, 44 3/4 percent premium, was used for the 1866 calculation. The 1865

and 1866 premiums were withheld by the Government until the next year's annuity payment. The value of greenbacks fell between 1865 and 1866; the fall is reflected in the statement of the 1865 premium's coin equivalent at the 1866 rate. Between 1866 and 1867 the value of greenbacks rose. The rise is not reflected in Table II, but the coin equivalent of the greenbacks is entered in the 1867 line at the 1866 rate. This is because of the rule that a trustee may not set off a gain from one breach of trust against a loss from another. See Restatement (Second) of Trusts § 213 (1959).

The Government's purchase of greenbacks with gold was reasonable only so long as the greenbacks were for immediate payment to the Indians. When they were deliberately held back for a year, the purchase amounted to an investment, in unproductive and speculative paper, which no prudent man would have made in the management of his own affairs.

The coin equivalent of the 1872 payment is calculated at the lowest premium rate prevailing during June of that year.

By the Act of July 15, 1870, c. 296, 16 Stat. 335, 337, Congress appropriated $36,353.47 in coin to make up the deficiency resulting from the currency payments made in 1863 and 1864 to plaintiff and several other tribes, with interest at 5 percent from the dates of the treasury warrants to June 30, 1870. This statute constitutes a Congressional interpretation of Article 2, clause fourth, of the Ottawa-Chippewa treaty which is particularly significant in two respects: First, it shows that interest continued to accrue until payment, and not just for 10 years, as

argued by defendant.[11/] We have already ruled to this effect. See 35 Ind. Cl. Comm. at 401-403. Second, it shows that the obligation to pay in coin was not abrogated by the Legal Tender Act.

Out of the total appropriation, $23,215.32 was allocated to plaintiff tribe and the remainder to other Indians. The basis of the allocation does not appear in the record. The $23,215.32 in coin was sold at a premium of 17.255 percent, and proceeds in the sum of $27,221.18 in currency were paid to plaintiffs. Def. ex. 120; GAO Rep. 102, 121.

The date of the treasury warrant for the original 1863 appropriation (by Act of March 3, c. 99, 12 Stat. 774, 781) was April 2, 1863. See def. ex. 281. On that date the gold premium ranged from a low of 53 1/4 to a high of 57. Pl. ex. A-8, page 291. The 1863 shortages, at a minimum, thus, were as follows:

| Principal | |
|---|---|
| Due in coin | $ 10,000.00 |
| Paid in currency $10,000--divide by 1.5325 for gold equivalent | 6,525.29 |
| Shortage in coin | $ 3,474.71 |

| Interest | |
|---|---|
| Due in coin | $ 11,300.00 |
| Paid in currency $11,300--divide by 1.5325 for gold equivalent | 7,373.57 |
| Shortage in coin | $ 3,926.43 |

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11/ See note 7, above.

Interest at 5 percent per annum, on the principal shortage only, from April 2, 1863, to June 30, 1870 (7 years and 89 days), amounts to $1,258.51. Therefore:

| | |
|---|---|
| Principal shortage | $3,474.71 |
| Interest shortage | 3,926.43 |
| Interest on principal shortage | 1,258.51 |
| Total 1863 deficiency | $8,659.65 |

The date of the treasury warrant for the original 1864 appropriation (by Act of June 25, c. 148, 13 Stat. 161, 168) was July 11, 1864. On that date the gold premium ranged from a low of 176 to a high of 185. The latter represented the all-time high between the suspension of specie payment in 1861 and its resumption in 1879. Pl. ex. A-8, pp. 4,295. The 1864 shortages, on the basis of the July 11 low, were as follows:

| Principal | | | |
|---|---|---|---|
| Due in coin | | | $10,000.00 |
| Paid in currency | $10,000 ÷ 2.76 | = | 3,623.19 |
| Shortage in coin | | | $ 6,376.81 |

| Interest | | | |
|---|---|---|---|
| Due in coin | | | $10,800.00 |
| Paid in currency | $10,800 ÷ 2.76 | = | 3,913.04 |
| Shortage in coin | | | $ 6,886.96 |

Interest at 5 percent per annum, on the principal shortage only, from July 11, 1864, to June 30, 1870 (6 years minus 11 days), amounts to $1,903.43. Therefore:

| | |
|---|---|
| Principal shortage | $ 6,376.81 |
| Interest shortage | 6,886.96 |
| Interest on principal shortage | 1,903.43 |
| Total 1864 deficiency | $15,167.20 |
| Plus 1863 deficiency | 8,659.65 |
| Grand total deficiency | $23,826.85 |

We are unable to account for the difference between the above grand total and the $23,215.32 paid to plaintiff out of the 1870 appropriation, and accordingly charge the defendant with a shortage of $611.53.

In its Proposed Finding 40, defendant has calculated the 1863 and 1864 underpayments on the basis of the gold premiums prevailing on the dates of the currency payments, and figured interest from those dates to December 31, 1870. The result is an asserted overpayment of $2,007.34 under the 1870 Act. We cannot accept such methodology, since the Act expressly requires calculation of the underpayments as of the dates of the treasury warrants and provides for interest from those dates to June 30, 1870.

Our calculations follow the statute strictly.

Neither the 1870 Act nor the evidence shows how Congress intended the appropriation to be allocated between principal and interest. We cannot even say, as the Court of Claims could in Uintah and White River Bands, supra, 139 Ct. Cl. 1, that Congress intended the amount paid to be in full satisfaction of plaintiff's claims, for the $23,215.32 was segregated out of a larger appropriation by administrative action on an unknown basis. Congress may well have intended plaintiff to get a larger share of the $36,753.47 it appropriated.

In Table II we allocate the $23,215.32 first to interest, and the remainder to principal. This is the traditional rule for allocating part payments on debts.[12/] Defendant suggests we use this method in connection

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12/ Story v. Livingston, 38 U.S. (13 Pet.) 359 (1839); cf. Peoria Tribe v. United States, Docket 65, 20 Ind. Cl. Comm. 62, 67 (1968).

with the late payment of the 1865 premium and with the asserted overpayment in 1870. See Proposed Findings 32 and 43. We believe the traditional rule is applicable here, rather than the formula used to allocate the part payment on the eminent domain taking in Uintah.

Our allocation of the $23,215.32 payment shown in Table II was made as follows:

| | | |
|---|---|---|
| Amount paid to plaintiff | | $23,215.32 |
| 1863 interest shortage | $ 3,926.43 | |
| 1864 " " | 6,886.96 | |
| Subtotal | $10,813.39 | |
| Interest on principal shortage | | |
| 1863-1870 | 1,258.51 | |
| 1864-1870 | 1,903.46 | |
| Subtotal | $ 3,161.97 | |
| Aggregate, allocate to interest | | $13,975.33 |
| Remainder, allocate to principal | | $ 9,239.99 |

The amount allocated to interest above is exactly 60 percent of $23,215.32, and the amount allocated to principal 40 percent. We allocate on the same basis the $4,005.86 gold premium realized when the $23,215.32 was sold in 1870.

The final distribution of principal from the Ottawa-Chippewa fund, $51,500 in coin, fell due on September 10, 1871. The interest on this sum had been paid in advance the preceding fall. The coin was sold for a premium; and the proceeds in currency, amounting to $53,963.86, were

remitted to the Indian Agent in Detroit on August 29, 1871. The agent, Richard M. Smith, promptly distributed $9,555.88, and then met his death by accident. The remainder of the $57,963.88 was not paid to the Indians until the following June. See Finding 32.

The defendant, as above stated, contends that payment was timely if within one year of the due date; but we have ruled to the contrary. In footnote 1 on page 81 of its Proposed Findings, defendant further contends that the United States cannot be held liable because the delay was caused by events beyond its control. We find this not to be true. Agent Smith died in mid-October, 1871, 13/ when there was still time to pay the Indians before winter closed in. The unpaid balance of the Ottawa-Chippewa fund was on deposit in Smith's official bank account (def. ex. 122), but was not made available to his successor, George J. Betts, until February 5, 1872 (def. ex. 281), although Betts on December 13 had requested that the funds be sent to him as expeditiously as possible. Def. ex. 128. Because of "the rigors of winter," Betts deferred payment of the annuities, when the funds finally arrived, until May and June of 1872. Def. exs. 121, 45 at 586.

It would have been difficult, but not impossible, for the Government to complete payment by December 31, 1871. The usual rule in contract law

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13/ The last transaction on Mr. Smith's official bank account was on October 13 (def. ex. 122), and George J. Betts was appointed agent on October 31, (def. ex. 25). A Mr. Bradley was appointed to succeed Smith but died almost immediately. Betts entered on his duties on November 23 (def. ex. 45).

is that impossibility rather than difficulty is required to excuse performance. 17 Am. Jur. 2d Contracts § 402 (1964). We follow that rule here, and do not excuse the lateness in payment.

Even if timely payment were impossible, however, we do not think that would stop the running of interest. The Government's obligation under the Treaty of 1855 was not like that under a coupon bond, where the holder has to come forward and claim his money. Here the Government assumed the duty of getting the money out to the payees. We think it thereby assumed liability for delays in payment. Where payment was late from any cause, we think the Government's duty to provide interest continued until the money was paid over. Cf. Peoria Tribe v. United States, 390 U.S. 468, 472 (1968).

In Table II we charge the defendant with eight and one-half months' interest on the money paid in May and June of 1872.

TABLE II
Article 2, Fourth Clause
1863-1872 -- All Payments in Currency

| Instal-ment No. | Payt. due Sept. 10, | Balance of Authorization at Start of Yr. | Treasury Warrant Date | Gold Premium Lo | Gold Premium Hi | Gold Premium Actual | Principal: Actual Currency Paid | Principal: Coin Equivalent | Principal: Appropriation | Principal: (Shortage) Overage | Interest on Principal Coin Shortage | Interest: Actual Currency Paid | Interest: Coin Equivalent | Interest: Appropriation | Interest: (Shortage) Overage |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 8 | 1863 | $ 236,000 | April 2 | | | 53.2500(a) | $ 10,000.00 | $ 6,525.29 | $ 10,000 | $ (3,474.71) | | $ 11,300.00 | $ 7,373.57 | $11,300 | $ (3,926.43) |
| 9 | 1864 | 226,000 | July 11 | | | 176.0000(a) | 10,000.00 | 3,623.19 | 10,000 | (6,376.81) | $ (173.74) | 10,800.00 | 3,913.04 | 10,800 | (6,886.96) |
| 10 | 1865 | 216,000 | Mar. 18 | 28 5/8 | 67 1/4 | 43.6061(b) | 10,000.00 | 6,963.49 | 10,000 | (3,036.51) | (492.58) | 10,300.00 | 7,172.40 | 10,300 | (3,127.60) |
| 11 | 1866 | 206,000 | Aug. 8 | 44 3/4 | 52 1/4 | 44.6250(c) | 4,360.61(d) | 3,012.51 | None | 3,012.51 | (644.40) | 14,791.42(e) | 10,218.60 | 10,300 | (81.40) |
| 12 | 1867 | 206,000 | Mar. 2(f) | 32 3/4 | 44 1/4 | 37.8380 | -0- | None | None | None | (493.78) | 18,793.68(g) | 13,475.39(h) | 10,300 | 3,175.39 |
| 13 | 1868 | 206,000 | July 27(f) | 43 1/2 | 50 | 44.3755 | 74,353.35 | 51,500.00 | 51,500 | None | (493.78) | 11,153.02 | 7,725.00 | 7,725 | None |
| 14 | 1869 | 154,500 | May 1 | 31 1/4 | 44 7/8 | 35.8614 | 69,968.63 | 51,500.00 | 51,500 | None | (493.78) | 6,996.85 | 5,150.00 | 5,150 | None |
| 15 | 1870 | 103,000 | July 26 | 13 1/4 | 22 | 17.2498 | 60,383.67 | 51,500.00 | 51,500 | None | (493.78) | 3,019.18 | 2,575.00 | 2,575 | None |
| | (i) | | July 15(f) | 13 1/4 | 22 3/4 | 17.2552 | 10,842.33 | 9,239.99 | (i) | 9,239.99 | 3,161.94 | 16,378.85 | 10,813.39 | (i) | 10,813.39 |
| 16 | 1871 | 51,500 | April 20 | 10 1/2 | 14 1/4 | 12.5500 | 9,555.88 | 8,490.36 | 51,500 | (43,009.66) | (31.78) | | | | |
| | (1872) | -0- | | 13 | 14 3/4 | | 48,390.00 | 42,823.01 | None | 42,823.01 | (1,557.76)(j) | | | | |
| TOTALS | | | | | | | $307,854.47 | $235,177.82 | $236,000 | $ (822.18) | $ (1,713.44)(k) | $103,533.00 | $68,416.39 | $68,450 | $ (33.61) |

Citations of Appropriation Acts
1863 March 3, c. 99, 12 Stat. 774, 781
1864 June 25, c. 148, 13 Stat. 161, 168
1865 March 3, c. 126, 13 Stat. 541, 547
1866 July 26, c. 266, 14 Stat. 255, 261
1867 March 2, c. 173, 14 Stat. 492, 504
1868 July 27, c. 248, 15 Stat. 198, 211
1869 April 10, c. 16, 16 Stat. 13, 27-28
1870 July 15, c. 296, 16 Stat. 335, 348
1871 March 3, c. 120, 16 Stat. 544, 557

Notes to Table II
(Gold premiums are allocated between principal and interest in proportion to the ratio between principal and interest due for the year in question)

Notes to Table II (Continued)

(a) Lowest quotation on date of treasury warrant, Act July 15, 1870 (16 Stat. 337), requiring use of that exact date.

(b) Coin was sold in 1865 at this rate but premium was distributed to Indians with 1866 annuity. See def. exs. 102, 116, 257, 281.

(c) Coin was sold in 1866 at this rate, but the premium was distributed to Indians with 1867 annuity. See def. exs. 117, 281. Note that rate obtained was below lowest quotation between treasury warrant date and September 10, 1866.

(d) Part of 1865 gold premium apportioned to principal.

(e) The interest due Sept. 10, 1866 ($10,300) paid in currency without premium, plus that part of 1865 premium apportioned to interest ($4,491.42).

(f) Dates of appropriation acts. Dates of treasury warrants not in evidence.

(g) Broken down as follows (def. ex. 117):

| | |
|---|---|
| 1866 gold premium | $ 4,596.37 |
| 1867 interest due | 10,300.00 |
| 1867 gold premium | 3,897.31 |
| | $18,793.68 |

(h) Consisting of 1867 interest entered at the amount of the coin appropriation $10,300, since it was converted to currency within market range and timely paid, plus $3,175.39, representing the 1866 gold premium reconverted to a currency value at the lowest actual premium quotation between Aug. 8 and Sept. 10, 1866 (44.75). See discussion at page 27 of text.

(i) Appropriated by Act of July 15, 1870, c. 296, 16 Stat. 335, 337, to compensate for currency payments in 1863 and 1864. This money was paid to the Indians with the 1870 annuity.

(j) Eight and one-half months' interest on $43,645.19 cumulative principal shortage as of September 10, 1871, plus three and one-half months' interest on remaining principal shortage ($822.18) after payment of $42,823.01 in May and June of 1872.

(k) Plus $41.109 per year on principal shortage until paid.

Summary of Account as of December 31, 1872

As of the end of calendar year 1872 the status of the account between plaintiff and defendant under Article 2, fourth clause, was as follows (all figures are expressed in coin):

| Principal Owed | | Interest Owed | |
|---|---|---|---|
| 1858 shortage | $3,000.00 | From Table I | $ 625.41 |
| 1863-'64 shortage | 611.53 | From Table II | 1,747.05 |
| Shortage resulting from holding 1865 premium on declining market | 24.00 | Additional interest on 1858 shortage Sept. 10, 1862, to Sept. 10, 1872 | 1,500.00 |
| Shortage resulting from holding part 1871 payment on declining market and disallowance of $18.00 (def. ex. 124) | 186.65 | Interest Sept. 10-Dec. 31, 1872, on entire principal shortage | 58.64 |
| | $3,822.18 | | $3,931.10 |

Interest continues to accrue, on the unpaid principal only, at the rate of $191.109 per year until paid.

The Double Payment of 1911-1922

In October of 1871, while engaged in distributing the final installment of the Ottawa and Chippewa principal fund, Indian Agent Richard M. Smith perished in a disaster which also destroyed his books and papers. On August 29, $57,963.88 had been remitted to him in currency, representing the proceeds of sale of the $51,500.00 in coin still owed to the Ottawa and Chippewa Indians under the 1855 treaty. Smith was the agent for several other tribes besides plaintiff, but apparently maintained only one official account, in a Detroit bank, in which he mingled moneys intended for all tribes under his agency. A balance of $62,438.37 was found in this account after Smith's death and was returned to the U.S. Treasury. The Indian Office, using its best judgment as to which

appropriations should be credited, posted its accounts as if none of the 1871 Ottawa and Chippewa annuity had been paid. On February 5, 1872, the entire $62,438.37 was sent back to Agent George J. Betts, Mr. Smith's successor. Mr. Betts found that $9,555.88 of the 1871 principal payment due to the plaintiff had already been distributed, and accordingly refunded that sum to the U. S. Treasury.

In a letter to the Secretary of the Interior dated August 31, 1873 (def. ex. 122), the Commissioner of Indian Affairs recited the above facts, and stated that the late Agent should have received credit for a refund of only $48,408 under the appropriation 'Fulfilling treaty with Ottawas and Chippewas of Michigan' rather than for the entire $57,963.88.

The record now before us shows that despite the Commissioner's letter the ledger "Fulfilling Treaties with Ottawas and Chippewas (Annuities)" (def. ex. 281) was never corrected. An entry of August 29, 1871, debits $57,963.88 by R. M. Smith, Agent. An entry of December 27, 1871, recredits the entire amount to the appropriation. An entry of February 5, 1872, debits the same amount by George J. Betts, Agent, and an entry of May 14, 1873, credits the $9,555.88 refunded by Betts. The earlier payment of this amount to the Indians by Smith does not appear. Finally, on June 30, 1877, by Surplus Warrant No. 732, the $9,555.88 was cleared from the account.

On May 19, 1902, the Secretary of the Interior, clearly unaware of the payment by Agent Smith in 1871, wrote to the Secretary of the Treasury requesting that the $9,555.88 be restored to the credit of the Ottawas and Chippewas, stating it had been erroneously carried to surplus.

The Secretary of the Treasury referred the communication to the Comptroller, who ruled that the money should be restored. 8 Comp. Dec. 881 (1902). The Comptroller's decision shows no awareness of the payment by Smith in 1871.

A total of $9,786.69 was in fact returned to the plaintiff's credit, consisting of the $9,555.88 and an additional $230.81 said to be still owing under the 1855 treaty for agricultural implements. Id., GAO Report at 100, note (e). From the total, $9,598.77 was paid to plaintiff's members per capita between 1911 and 1942. GAO Report, Disbursement Schedule 12 at 112-119; see also note (d) on pages 97-98.

It is clear, from the evidence now before us, that $9,555.88 of these 20th century per capita distributions represented double payment.

The first per capita payment of the money erroneously restored from surplus took place in fiscal year 1911. GAO Report at 112. Only the years, but not the exact dates, of the payments are given. In such cases, we treat the scheduled payments as made at the midpoint of the fiscal year. Thus, the fiscal 1911 payment is presumed to have occurred at midnight between December 31, 1910, and January 1, 1911.

As stated in the Summary of Account on page , above, $3,822.18 was owed on principal and $3,931.10 on interest as of December 31, 1872; and interest continued to accrue at the rate of $191.109 per year. The total interest due at the midpoint of fiscal year 1911 is computed as follows:

| | |
|---|---|
| Balance on December 31, 1872: | $ 3,931.10 |
| 1872-1910, 38 years x $191.109: | 7,262.14 |
| | $11,193.24 |

Since the accrued interest in 1911 exceeded the amount of the double payment, under the traditional rule which credits part payment first to interest, there was no reduction of the unpaid principal. The erroneous per capita payments should be credited on the interest account in the manner shown in Table III.

TABLE III
Effect of Double Payment 1911-1922 on Interest Due

| Fiscal Year | Midpoint bal. before payment | Payment from GAO Report | Interest Ensuing Cal. Year |
|---|---|---|---|
| 1911 | $11,193.24 | $9,472.19 | $191.109 |
| 1912 | 1,912.16 | 15.59 | 191.109 |
| 1913 | 2,087.68 | 6.92 | 191.109 |
| 1914 | 2,271.87 | 1.73 | 191.109 |
| 1915 | 2,461.25 | | 191.109 |
| 1916 | 2,652.36 | 24.25 | 191.109 |
| 1917 | 2,819.21 | | 191.109 |
| 1918 | 3,010.32 | 3.47 | 191.109 |
| 1919 | 3,197.96 | 5.20 | 191.109 |
| 1920 | 3,383.87 | 1.74 | 191.109 |
| 1921 | 3,573.24 | | 191.109 |
| 1922 | 3,764.35 | (a) 24.79 | 191.109 |
| 1923 | 3,930.67 | | |
| | | $9,555.88 | $2,293.31 |

(a) Remaining balance of the $9,555.88 double payment. Actual payment was $38.14.

Summary of Account Under Article 2, Fourth Clause, as of January 1, 1977.

The defendant's indebtedness to the plaintiff under Article 2, fourth clause, as of January 1, 1977, is computed as follows:

| | |
|---|---|
| Principal (see page 35, above): | $ 3,822.18 |
| Interest to January 1, 1923, less payments to end of fiscal year 1922: | 3,930.67 |
| Additional interest, on principal only, for 54 years: | 10,319.89 |
| | $18,072.74 |

F. Article 2, Fifth Clause -- $35,000 for Grand River Ottawas.

This sum was to be distributed per capita in ten equal annual installments. The medium of payment is not specified. Plaintiff claims the difference between coin and currency values of installments paid in currency and for reimbursement of $2,000 paid in goods instead of cash out of the 1860 installment.

We have ruled above, at page 12, that the claim for coin equivalents must be rejected under all clauses of the 1851 treaty other than Article 2, Fourth. As to the payment in provisions, we ruled in our 1975 opinion (35 Ind. Cl. Comm. at 409) that the burden was on the plaintiff to show resultant actual damages. No such showing has been attempted; but, at the pretrial, plaintiff invoked Public Law 93-494 as grounds for disallowing credit for the provision issue. Our adverse ruling under the second clause, page 17,above, compels a similar ruling here.

The Government's accounting under Article 2, fifth clause, will be allowed and approved.

THIRD CLAIM

Plaintiff's third claim was for "all of the trust funds on deposit or deemed by this Commission to be held on deposit in the Treasury of the United States to the credit of the Ottawa-Chippewa Tribe of Michigan or its members....together with interest thereon."

The GAO report showed two such funds. The first consisted of the undistributed balance of the judgment of the Court of Claims in Ottawa and Chippewa Indians of Michigan v. United States, 42 Ct. Cl. 240 (1907),

and the second of undistributed interest thereon, which had been credited under the Act of February 12, 1929, as amended, 25 U.S.C. § 161a.

In last year's decision we held we had jurisdiction to give judgment for these funds, if the plaintiff should appear entitled thereto, except to the extent that they were held in trust for individuals rather than the tribe, 35 Ind. Cl. Comm. at 385.

Congress appropriated $131,188.94 for payment of the Court of Claims judgment, by the Act of February 15, 1908, c. 27, 35 Stat. 8, 27. The GAO report (pp. 35, 82) shows the following disposition of the appropriation:

| | Dr. | Cr. |
|---|---|---|
| Appropriated by Congress | $131,188.94 | |
| Attorneys' fees | | $ 19,678.34 |
| Miscellaneous agency expenses | | 5,751.91 |
| Per capita payments | | 103,755.69 |
| Balance as of June 30, 1949 | | 2,003.00 |
| | $131,188.94 | $131,188.94 |

Plaintiff challenges the first two items of credit shown above, on the ground that defendant has not demonstrated authority for making these expenditures.

Attorneys' fees in the amount of 15 percent of the judgment were allowed by the Court of Claims. Ottawa and Chippewa Indians v. United States, 42 Ct. Cl. 518 (1907). The court was authorized to award "a proper attorney fee" by the jurisdictional Act, of March 3, 1905, c. 1479, 33 Stat. 1048, 1082. The amount shown in the GAO Report, $19,678.34, is

exactly 15 percent of $131,188.94. Accordingly, the plaintiff's challenge to the attorneys' fees must be rejected.

"Miscellaneous agency expenses" is a nearly meaningless caption, which would cause the item so labeled to be disallowed in the absence of further explanation. Blackfeet and Gros Ventre Tribes v. United States, Dockets 279-C, 250-A, 32 Ind. Cl. Comm. 65, 85, 117 (1973). The Government, however, has shown, in def. exhibits 288-322, that the $5,751.91 assigned to this category actually represents the pay and expenses of Horace B. Durant in preparing the roll of Indians entitled to share in the judgment. 14/ Charging these costs against the judgment fund was authorized by the Act of April 30, 1908, c. 153, 35 Stat. 70, 81. Accordingly, we reject plaintiff's challenge to the item "Miscellaneous agency expenses."

As to the balance of the judgment fund, defendant contends plaintiff's claim is an aggregate of individual claims and hence beyond our jurisdiction. This is clearly not so.

The balance in question represents the residue of the judgment fund which remained undistributed because the persons on Durant's roll to whom it was intended to be paid were not found. Plaintiff is not asserting the present claim in behalf of those missing persons, but in its own behalf. The claim, whatever its merit, is within our jurisdiction.

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14/ The Durant roll is mentioned in Finding 11 of Red Lake Band v. United States, Dockets 18-E, 58, 7 Ind. Cl. Comm. 576, 590 (1959), where the statement is made, "The enrolled parties or their descendants are the membership of the plaintiff organization in Docket No. 58." We have found that the plaintiff in Docket No. 58 and the instant Docket No. 364 is identical. 30 Ind. Cl. Comm. 288 (1973).

Defendant says the judgment fund was "individualized." If ownership of the remaining balance has already vested in individuals, of course the plaintiff's claim must fail. On this point, the evidence shows that the judgment was rendered for "The Ottawa and Chippewa Indians of the State of Michigan," without any individual being named; and the proceeds were set up on the books of the treasury in the same fashion. Defendant contends that since the tribal organization of these Indians had been abolished by Article 5 of the 1855 treaty, there was no entity to which to credit the judgment. If this be true, it does not necessarily follow that the proceeds became individual property immediately upon appropriation, since Article 5 contemplates breaking the tribe up into its constituent bands rather than individuals. But we do not think the treaty is controlling. The jurisdictional act, in our opinion, recreated enough of an entity to prosecute the Court of Claims case; and it would be unreasonable to hold Congress intended this entity to pop out of existence before the recovery could be distributed.

It would be quite unrealistic, we think, to consider the judgment fund vested in individuals before the roll of the Indians entitled to participate in it was prepared and approved by the Secretary of the Interior. The real question is whether ownership of individual shares in the fund vested then, when they were finally ascertained by approval of the roll, or only later, upon actual payment. This is a question of law.

The cases indicate that vesting does not occur until possession of the property changes hands. Sizemore v. Brady, 235 U.S. 441 (1914);

Gritts v. Fisher, 224 U.S. 640 (1912); cf. Stephens v. Cherokee Nation, 174 U.S. 445 (1899). The fact that the Act of April 30, 1908, c. 153, 35 Stat. 81, states that the roll of those entitled to participate in the judgment fund "shall be final and conclusive," does not change the situation. United States v. Rowell, 243 U.S. 464 (1917); Gritts v. Fisher, supra, 224 U.S. at 648. Wallace v. Adams, 204 U.S. 415 (1907). Up to the time the GAO Report was prepared, the undistributed residue of the judgment fund was carried on the books of the treasury in account "14x7066 Judgments, Court of Claims, Ottawa and Chippewa Indians of Michigan." It was never segregated into separate accounts for designated individuals. In our opinion it remained tribal property.

We are not deciding a case between the Ottawa and Chippewa tribe on one side and its members who were never paid shares in the Court of Claims judgment on the other. We are deciding only whether the tribe or the Government has the better title to the unexpended balance of the judgment fund. We have no hesitation in holding that the tribe has. Jurisdiction to determine how any recovery in this case may be distributed is vested in the Executive and Congress. Peoria Tribe v. United States, 169 Ct. Cl. 1009, 1011 (1965), aff'g Docket 314. Hence, it is not for us to decide whether the judgment fund should be longer held for the missing claimants under the Durant roll, or redistributed, on the assumption that if they have not shown up in 67 years they are never going to show up.

We say this in full awareness of Public Law 87-283 of September 22, 1961, 25 U.S.C. § 164, 165, which provides for restoration to tribal ownership of unclaimed per capita shares of Indian tribal or group funds except where the tribe or group has no governing body recognized by the Secretary of the Interior, in which case they shall be deposited in the general fund of the Treasury. That statute does not apply here for several reasons. First, the funds here involved had already been carried to surplus before it was enacted. Second, the statute is not self-executing, but requires positive action of the Secretary of the Interior to restore or deposit unclaimed shares, after 60 days notice to the Interior and Insular Affairs Committee of both Houses, during which time the committees must notify the Secretary that they have no objection, a procedure that, of course, was not followed with the Ottawa and Chippewa funds. Third, there is no indication that the statute was intended to apply to funds already in litigation between an Indian group and the Government, or to constitute a rule of decision for this Commission. See H.R. No. 1005, 87th Cong., 1st Sess (1961).

In 1956 the balance in the judgment fund was transferred to surplus. 15/

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15/ See def. ex. 251. The meaning of the phrase "transferred to surplus" or "carried to surplus" is explained in the Foreword to the Treasury Department's Combined Statement of Receipts, Expenditures and Balances of the United States Government for the Fiscal Year Ended June 30, 1975, at page 6, as follows: (Continued on next page)

The transfer was expressly authorized by section 3 of the Act of June 13, 1930 (25 U.S.C. § 161c), which reads as follows:

> The amount held in any tribal fund account which, in the judgment of the Secretary of the Interior, is not required for the purpose for which the fund was created, shall be covered into the surplus fund of the Treasury; and so much thereof as is found to be necessary for such purpose may at any time thereafter be restored to the account on books of the Treasury without appropriation by Congress.

The quoted section is part of a statute providing for interest on tribal trust funds; and its evident purpose is to provide a method to stop interest on dormant accounts, like the one in question here. As the last sentence shows, it has no effect on the beneficial interest in the

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15/ (Continued)

> Transfers of unexpended balances of appropriations to what is termed in the law the "Surplus Fund of the Treasury" represent withdrawals of funds from such appropriations on the books without affecting the cash in the Treasury. The term "Surplus Fund of the Treasury," as used by the Congress in the Act of March 3, 1795 (1 Stat. 437) and in certain other acts, and by the Treasury Department, does not represent a fund consisting of unappropriated surplus or other assets as the term would ordinarily imply in accounting terminology; nor does it have any relation to surplus income. It is merely an expression of the action to give effect to an act of the Congress to withdraw or writeoff balances of certain appropriations.

In the instant case the $2,003.40 balance of the Ottawa and Chippewa judgment fund found its way to the surplus fund by a complicated procedure. First it was transferred from the nonexpenditure (interest-bearing) account 14x7066(900) to the related expenditure account 14x7066, and from there to the miscellaneous receipt account "140969 unclaimed funds and abandoned property not otherwise classified." The last named account is merely a passageway into the general fund of the treasury. See def. ex. 252.

fund carried to surplus, and of course cannot affect the jurisdiction of this Commission.[16/]

The transfer to surplus, however, stopped interest, on April 24, 1956. See Treasury Journal Voucher of that date included in def. ex. 252.

We come now to the questions of the lapse in interest payment between 1907 and 1930, and whether interest was paid at the proper rate.

The Court of Claims judgment which created the principal fund here at issue was for the value of an earlier trust fund, created by the Treaty of March 28, 1836 (7 Stat. 491). Article 4 of the treaty provided that the fund should be invested in "stock," a term which then included what we now call bonds.[17/] In 1885, $4,000 in Tennessee and Virginia bonds, assets of the trust, and $58,496.40, being the proceeds of sale of other stocks and bonds in the trust, a total of $62,496.40, were converted to the use of the United States under a mistaken interpretation of the release clause in Article 3 of the 1855 treaty. The plaintiff brought action to recover the principal sum, plus interest under section 3659 Revised Statutes (31 U.S.C. § 547a), which required a minimum rate of

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16/ A letter discussing the judgment fund, dated December 21, 1955, from the Acting Area Director of the Bureau of Indian Affairs in Minneapolis to the Area Director in Aberdeen, South Dakota, included in def. ex. 252, refers to an "attached. . . copy of Washington Office letter of June 11, 1951 addressed to Miss Rosemary Scott, Attorney for the Ottawa and Chippewa Indians in Michigan." The copy is not included in the exhibit, but the implication is that the Interior Department personnel who initiated the transfer had actual knowledge of the pendency of this litigation, in which Miss Scott was then plaintiff's attorney of record. We believe this information worthy of comment, but not controlling.

17/ Peoria Tribe v. United States, 390 U.S. 468, 470, note 2 (1968).

5 percent a year on Federal trust investments. The Court gave judgment for $62,496.40 "and interest thereon from the 9th day of March, 1885, at the rate of 5 percent per annum." 42 Ct. Cl. 240, 248. The cut-off date of the interest is not stated.

Transmitting the list of judgments to Congress for appropriation, the Secretary of the Treasury wrote, "Interest runs from Mar. 9, 1885, to Mar. 4, 1907." H.R. Doc. No. 345, 60th Cong., 1st Sess. 8 (1907) (def. ex. 285). March 4, 1907, is the date of the Court of Claims judgment. The Secretary calculated the total amount due for principal and interest at $131,188.94.[18/] This was the sum Congress appropriated in the Act of February 15, 1908 (35 Stat. at 27).

Cutting off interest provided in a judgment at the date of judgment violates Court of Claims practice. We conclude that interest should have continued after the date of judgment in this case.

The 1907 judgment in effect resulted in the restoration of an interest-bearing fund. In Menominee Tribe v. United States (No. 44296), 102 Ct. Cl. 555 (1945), it was held that the Government, acting as a fiduciary, could not profit at the expense of its ward by withdrawing amounts from a fund on which it was obligated to pay 5 percent interest and restoring them to a fund on which it was obligated to pay 4 percent. The only distinction we can see between Menominee and the instant case is that there the withdrawals were lawful, and here the conversion of the

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18/ The Secretary calculated the interest as amounting to $68,692.54. Our calculation of interest at 5 percent per annum for 21 years, 359 days, is $68,694.67.

original fund in 1885 was unlawful. This is the stronger case of the two. When the Government restored the 5 percent Ottawa and Chippewa fund as a result of the judgment, it could not, therefore, under the rule in Menominee, put it in non-interest bearing status, or pay only 4 percent on it.

We award 5 percent simple interest on balances of the principal portion of the Court of Claims judgment from the date of judgment until the money in satisfaction thereof was deposited in the treasury. Since the record does not disclose the date of the appropriation warrant, we presume this was the same date as that of the appropriation act, February 15, 1908.

We shall also give judgment for the 4 percent interest actually credited on the Court of Claims judgment fund, but never distributed. According to the GAO report (pp. 32, 130) a total of $1,628.08 was appropriated and credited between January 31, 1930, and March 10, 1949. Per capita payments totalling $34.69 were made out of this interest in 1935 and 1942 (id. at 72). The amount in the interest account had grown to $2,154.23 by 1956, at which time it was carried to the surplus fund. Def. ex. 251.

We calculate the recovery plaintiff is entitled to for the judgment fund and interest thereon in Findings 43, 44 and 45.

## FOURTH CLAIM

The fourth claim in the petition is for annuities under treaties of earlier date than 1855. Article 3 of the 1855 treaty is a clause whereby

plaintiff released defendant from all liability under former treaties. In our 1975 decision (35 Ind. Cl. Comm. at 394) we ruled that plaintiff had the burden of proving misrepresentation or unconscionability before we would go behind the release clause. Plaintiff has submitted no evidence at all relevant to these matters. Accordingly the fourth claim must be dismissed.

This case has been one of great complexity despite the relatively minor sums involved. Mr. Dunsmore, attorney for the defendant, is to be complimented for his excellent presentation. Mr. Edwards, for the plaintiff, should also be commended, for taking up a case to which he was assigned involuntarily and presenting it in a thoroughly professional manner. The work of the Indian Trust Accounting Division of the General Services Administration also merits special praise.

Final award will be entered as follows:

(1) Dismissing plaintiff's fourth claim.

(2) Allowing, approving, and settling defendant's accounting under Article I, last clause, and Article 2, first, second, third, and fifth clauses of the 1855 treaty.

(3) Under Article 2, fourth clause, of the treaty, surcharging the defendant with $18,072.74 plus interest at the rate of 5 percent per year on the principal sum of $3,822.18 from January 1, 1977, until paid.

(4) Under the third claim, granting judgment in favor of plaintiff in the amount of $7,160.37.

Brantley Blue, Commissioner

We concur:

Jerome K. Kuykendall, Chairman

John T. Vance, Commissioner

Margaret H. Pierce, Commissioner

Yarborough, Commissioner, concurring

With respect to the third claim, I think the assumption of jurisdiction by the Commission over trust fund balances properly credited to plaintiffs is unsound, as stated previously in this case at 35 Ind. Cl. Comm. 385, 416 (1975) and before that in another instance, at 34 Ind. Cl. Comm. 189 (1974). However, I share the view of my colleagues that there should be some remedy available to plaintiffs for the failure of the defendant for 70 years now to find some way to benefit tribe or entitled individuals from all the proceeds of the 1907 judgment. Further, I am now satisfied that the ingenuity of the defendant does extend to avoiding making a double payment, contrary to my fears expressed at 34 Ind. Cl. Comm. 189 (1974). Thus with jurisdictional misgivings but confidence in the substantive justice being done, I join the majority.

Richard W. Yarborough, Commissioner