In the

Supreme Court of the United States

STATE OF OKLAHOMA, Petitioner, v. ARCHIE L. MASON and MARGARET R. MASON, etc., et al., Respondents; and UNITED STATES OF AMERICA, Petitioner, v. ARCHIE L. MASON, et al., Respondents.	)	No. 72-606 No. 72-654

Washington, D. C.
April 18, 1973

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Washington, D. C.
Wednesday, April 18, 1973

The above-entitled matter came on for argument at 10:52 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

ERWIN N. GRISWOLD, Solicitor General, Department of Justice, Washington, D. C. 20530; for Petitioner United States.

PAUL C. DUNCAN, Assistant Attorney General, 112 State Capitol Building, Oklahoma City, Oklahoma 73105; for Petitioner Oklahoma.

CHARLES A. HOBBS, Esq., 1616 H Street, N.W., Washington, D. C. 20006; for the Respondents.

C O N T E N T S

* * *

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Oklahoma against Mason.

Mr. Solicitor General, you may proceed whenever you are ready.

ORAL ARGUMENT OF ERWIN N. GRISWOLD, ESQ.,

ON BEHALF OF PETITIONER UNITED STATES

MR. GRISWOLD: May it please the Court:

In the present fluid state of our law, courts spend a good deal of time going over old ground. That is the situation in this case. The case is here on certiorari to review a judgment of the Court of Claims.

The suit there was begun by the administrators of the estate of Rose Mason, who was a restricted Osage Indian. Acting pursuant to this Court's decision in West v. Oklahoma Tax Commission, 334 U.S., the Osage agency of the Department of the Interior filed an Oklahoma estate tax return on her estate and paid the tax due.

The claim in the suit in the court below is that this payment, though in conformity with a decision of this Court, conceded to be squarely in point and not overruled, was in fact a breach of trust, because the United States should have known that the West case would be overruled by this Court.

The Court of Claims so held and held the United

States liable to the estate for the amount of the tax paid.

Q Could it not be something less than that, Mr. Solicitor General, that there was enough of a question about the West case that some precautions might have been taken?

MR. GRISWOLD: Yes, Mr. Chief Justice, I think that is true, but I suppose that is almost always true with respect to a trustee if there is a decision 20 years old and maybe there are various things which might have happened and he ought to present it to a court again. I think that the question of the duty of a subordinate agency of the United States to question decisions of this Court ought not to arise to the dignity of a breach of trust. At any rate, that is the issue in this case.

Q Mr. Solicitor, does the record show the approximate size of the decedent's estate? I take it the state tax was about $8,000, which would indicate a very substantial estate, as I recall state inheritance tax rates.

MR. GRISWOLD: I believe that the items are indicated on page 6 of the appendix, and they would appear on a quick addition to come to about $125,000 for the estate. Osage head rights, $48,000; securities held in trust, $19,000; surplus trust funds, $48,000; and two other items. On a quick adding I get something like a hundred and twenty, hundred and twenty-five thousand dollars, on

which the tax paid was $7,700.

The United States brought Oklahoma into the case as a third-party defendant. And the court below also held that Oklahoma was liable to the United States in the amount of the tax. Both Oklahoma and the United States have sought review of this decision, and I shall appear for 20 minutes and Mr. Duncan representing Oklahoma will use the other ten minutes.

In order to determine whether the United States committed a breach of trust, it will be necessary to review some decisions. There are three decisions of this Court which are particularly relevant.

The first of these, decided 30 years ago, Oklahoma Tax Commission v. United States, in an opinion by Justice Black dealt with restricted Osage property. And although the United States appeared there and vigorously contended, as is shown by the brief filed, that the restricted Osage property was not subject to Oklahoma inheritance tax, this Court reviewed the situation, concluded that there was nothing in the Osage allotment act which established a tax exemption and directly held that the restricted property was subject to Oklahoma inheritance tax.

Justice Murphy was one of the dissenters in that case. But just five years later there came up the case of

West v. Oklahoma Tax Commission in 334 U.S., where Justice Murphy wrote the opinion. That case involved property held in trust for an Osage Indian, identical types of property to that which is involved here, item by item the same types of property, trust property, and the Court, again reviewing the situation, held that the Oklahoma inheritance tax was applicable to property held in trust by the United States for an Osage Indian.

It was less than eight years later that the third of these cases came to the Court. That is Squire v. Capoeman in 351 U.S. in an opinion by Chief Justice Warren. That case involved Quinaielt Indians in the state of Washington under a different statute, the General Allotment Act. It was an income tax case, not an inheritance tax case. It was a federal income tax case where the guardian was seeking to take a tax from the ward's property, and it was a tax on capital gain derived from the sale of timber on the Indians' lands when the timber constituted the only substantial value of those lands. And the Court in Squire v. Capoeman held that that federal income tax was not due.

I think it can surely be said, though, that the Squire Court did not understand that it was overruling the West case. Nor was this decision so understood by others at the time. It can be said that the approach of the Court

in the Squire case was not wholly consistent with that of the Court in the West case. But the cases were clearly distinguishable. As I have said, West was an inheritance tax case while Squire was an income tax case. West involved a state tax while Squire involved a federal tax.

Q In this connection, does everyone concede there is no difference between the Osage Allotment Act and the General Allotment Act for purposes of this case?

MR. GRISWOLD: No, Mr. Justice, I think there are clear distinctions between the Osage Allotment Act and the General Allotment Act, including the two items that were specifically relied on by the Court in the West case. The obligation to return the property--I forgot the exact word, I was about to say "undiminished" but I am not sure that is--

Q You mean the Squire case?

MR. GRISWOLD: I am sorry, Mr. Justice?

Q In the Squire case. Relied on in the Squire case?

MR. GRISWOLD: In the Squire case the General--

Q Particularly the obligation to return the property.

MR. GRISWOLD: The obligation to return the property and a provision that the property should be subject to taxation after a certain date, which carried an

implication that it was not subject to taxation beforehand.

The Court of Claims relied upon certain subsequent developments. A decision in the Court of Claims in Big Eagle v. United States in 300 Federal 2nd, 1962: That was a federal income tax case, and the Court of Claims held that the Squire case meant that the federal income tax could not be collected from trust property such as is involved here.

And there is a later case in 1968 called Beartrack v. United States where the United States settled by payment in full--I do not want to suggest that there was a compromise because of doubt about liability--settled by payment in full a federal estate tax case involving Osage property. And finally after the tax was paid here--and, incidentally, the Beartrack case was after most of the tax was paid here--in Revenue Ruling 69-164 in 1969, the Treasury issued a ruling that Osage trust property is not subject to the federal estate tax.

Whether these actions were right or wrong, they did not deal directly with the question of the liability of the estate of an Osage Indian for state inheritance taxes.

Moreover, they were actions taken by the Treasury and the Justice Departments. The Government is necessarily large and complex, with many subdivisions of

responsibilities. And it is asking a lot for a subordinate office of the Interior Department in Oklahoma to keep abreast of these developments in other departments on a matter not directly in point. This Court had decided the West case. This was known to the appropriate officers of the Interior Department. They acted accordingly, and they ought to be able to rely on a decision of this Court which has not been overruled nor even remotely questioned here.

In this connection, I would like to call attention to the decisions of this Court just three weeks ago yesterday in McClanahan v. Arizona State Tax Commission and Mescalero Apache Tribe v. Jones. Not only do these cases show the extreme complexity and uncertainty of the field of state taxation of Indians, but in the Mescalero case this Court on page 11 cited Oklahoma Tax Commission v. United States and Squire v. Capoeman in the same paragraph, indeed back to back it might be said.

Oklahoma Tax Commission was the case on which the West decision is based. And it hardly seems likely that this Court three weeks ago contemplated that Squire had overruled Oklahoma Tax Commission. Squire is a case to be dealt with, of course, but it is a federal income tax case involving a very special kind of income tax, a capital gains tax imposed on the realization of most of the value of the Indians' property by the sale of the timber which

gave it its value.

Oklahoma Tax Commission and West involve a state inheritance tax, often treated differently from an income tax, as in the case, for example, of the federal estate tax as applied to the transfer of state and municipal bonds, where the income is not taxable but the Court over a period of 75 years has held that a transfer tax on death can properly be collected.

Also a responsible officer in the Osage agency in Oklahoma might have understood and felt and acted accordingly.

By appropriate standards of the law of trust, this was not a breach of trust, we contend, and the United States should not have been held liable for complying with a decision of this Court. The liability imposed here is so novel that we have not been able to find trust decisions directly in point. But we have cited Professor Scott's treatise, and we believe it supports our position that the Court of Claims went too far in finding liability here.

Of course, if the United States is liable, we support the decision below in holding that Oklahoma is liable to indemnify the United States as a third-party defendant.

The ultimate question here, of course, is whether West should be overruled. On that question I find myself

in a dilemma for the United States as trustee for the Indians, and I am obligated to represent the Indians as I did here last Monday. And the United States has been held liable and has tax revenues at stake in the general situation, and I am obligated to represent the United States in that capacity too.

In private practice, when such a conflict of interest develops, a lawyer must withdraw from one of the representations. That is not so easy in public office. We have only limited authority to retain outside counsel, and even if such counsel were retained, they would still be subject to the overall authority of the Attorney General and the conflict would remain. It is inherent in the situation.

The President has asked Congress to establish an Indian Trust Council Authority which would resolve this particular problem. This has not been done.

It has been suggested that the Solicitor General might ask various interested agencies of the Government to file briefs or to incorporate the views of different agencies in a single brief. It is not clear, though, that this would always meet the responsibility of the Solicitor General to this Court; for one of the functions of the Solicitor General, I suppose, is to reconcile and adjust divergent views of Government officers and, so far as

possible, to present a single view to this Court.

This area can be one of great difficulty, for there are often widely divergent views with respect to Indian problems, depending on whether one looks at it solely from the point of view of the Indians or whether he seeks to deal with and reconcile as far as possible many competing governmental interests, such as the taxing power or the law of governmental instrumentalities or the responsibility for the enforcement of criminal law.

In many cases it has been possible to work these things out and to present a unified view. That was done, for example, in McClanahan and Mescalero.

In other cases, the difficulties have been acute, as in the Aqua Caliente case, where the Court asked the Solicitor General to state his views and he did so, though endeavoring to make it plain that his view was not shared by some other officers of the Government.

In this case, we have filed a brief in which we have endeavored to state both sides as fairly and evenly as possible without taking an official position. Consequently, on this final question, I ask the Court to consider the materials in our brief. If the time has come when West should be overruled, this Court is the place where that action should be taken.

If the West case can still stand, it would be

helpful if this Court would state that fact and in terms which would indicate whether the decision is applicable to federal income and estate taxes as well.

Q Mr. Solicitor General, even if it were overruled, I take it your position would be, nevertheless, the liability was erroneously--

MR. GRISWOLD: Yes, Mr. Justice. Our position would be that it was not a breach of trust to comply with an outstanding unqualified decision of this Court, as to which this Court had never indicated in any way the slightest doubt and as to which only three weeks ago it seemed to regard--

Q So, you would press for reversal here, even if we were to overrule West.

MR. GRISWOLD: We would press for reversal even if you were to overrule it.

Q Would West take with it Oklahoma Tax Commission in 319 U.S.?

MR. GRISWOLD: Would West--

Q Would overruling West take with it Oklahoma Tax Commission?

MR. GRISWOLD: I would think so, Mr. Justice. I have never been able to see any distinction between the restricted property in this case and trust property, and I think that the Court in the West case regarded Oklahoma

Tax Commission as the clearer and controlling authority.

Q But a state privilege to tax would not mean the federals would have to. And, as a matter of federal tax policy, the Federal Government would not need to impose its taxes--

MR. GRISWOLD: Not necessarily, although it is quite clear that the actions which have been taken by federal executive representatives have been taken based on a view that the approach in Squire weakens the West case.

Q But I would suppose that if Congress expressly said in so many words that federal estate taxes still applied to Indian property, that that would be the end of the matter.

MR. GRISWOLD: Congress could say so. There is not the slightest doubt Congress has not said so.

Q It is a matter of administrative application of the existing estate tax.

MR. GRISWOLD: Influenced, Mr. Justice, by impressions created as to whether this Court in Squire so impaired the West case that it ought not to be followed. There is no view from Congress as to whether the tax--there has been no action by Congress in this field from the beginning and certainly not since Oklahoma Tax Commission and West were decided.

Q Certainly there has never been any indication

that Congress disagreed with either West or Oklahoma.

MR. GRISWOLD: No, neither agreed nor disagreed.

Q Or Squire.

MR. GRISWOLD: Or Squire, that's right.

In either event, the Court should reverse the decision below insofar as it held the United States liable for a breach of trust. For the officers of the United States should not rightly be held in default for failing to attack a decision of this Court which has never been qualified or doubted here.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor General.

Mr. Duncan.

ORAL ARGUMENT OF PAUL C. DUNCAN, ESQ.,

ON BEHALF OF PETITIONER STATE OF OKLAHOMA

MR. DUNCAN: Mr. Chief Justice, may it please the Court:

As the Solicitor General has pointed out, this is a very difficult situation which both the United States Government and the State of Oklahoma finds itself in today.

The State of Oklahoma is in a particularly difficult position because, as the Solicitor General indicates, under the Court of Claims decision, if the United States is found to be liable for a breach of fiduciary relationship, then the ultimate responsibility for the

payment of this breach rests with the State of Oklahoma.

Since 1947 the State of Oklahoma has gone about collecting the tax in question in conformity with this Court's decision in West--

Q Do you know how much tax is on the barrelhead at issue here for Oklahoma?

MR. DUNCAN: Yes, sir. Of course, in this particular case, Mr. Justice, I think--

Q The overall.

MR. DUNCAN: Yes, sir. Respondents have filed a class action lawsuit with regard to all the other Osage Indian estates so similarly situated; although we have not been able to arrive at a figure, we anticipate it is in excess of several million dollars, depdnding, of course, upon what time frame might ultimately be applied.

The Court of Claims, in deciding the case, did say that as of 1967 or 1968, when the Rose Mason case came about, that the Federal Government breached its fiduciary relationship at that time. It did not apparently foreclose the possibility that under different circumstances they might go back even to an earlier period of time; some time, I guess, would have to be necessitated by the advent of the Capoeman case in 1954, could not go back prior to that time. But the State of Oklahoma recognizes that it faces a possible severe tax refund consequence if the Court of

Claims decision is allowed to stand.

Q Mr. Duncan, suppose that the United States in this case had taken the position that it would not pay the inheritance tax, what would Oklahoma have done?

MR. DUNCAN: I think that we would have had to taken the United States to court in reliance upon the West decision.

Q So, you do feel that West is correctly decided?

MR. DUNCAN: I think that the practicality of the situation would require the state to have taken the Government to court with regard to West. Whether or not West should be considered good law, should this Court decide otherwise, would not place a severe burden upon the State of Oklahoma, if we are talking about prospective actions only.

Q The reason I asked this last question is because I think I did not find in your brief any statement to the effect that you felt that West was a correct decision.

MR. DUNCAN: Well--

Q A lot of trust properties have expired, have they not?

MR. DUNCAN: Yes, sir.

Q So that timewise it is of limited significance.

I mean, it is not going to go on forever.

MR. DUNCAN: No, that is correct. I checked and I believe there is in the neighborhood of 550 present restricted Osage Indian estates at the present time, or Osage accounts at the present time, that might become involved in future--

Q Do you have any idea what they aggregate, Mr. Duncan?

MR. DUNCAN: In the future or in the past?

Q The existing ones.

MR. DUNCAN: No, sir, I do not. With regard to the past, we do not have any information because the past has been paid through the Bureau of Indian Affairs and the Department of the Interior to the Oklahoma Tax Commission, as would any other estate tax be paid. And the Oklahoma Tax Commission has not seen fit in the past to segregate this money or even have a specific accountancy, accounting of the monies collected from the Osage estate.

If some rule is set down where Oklahoma would be liable for all this in the past, even 1967 or 1968, we would have to go back and rely on the records of the Department of the Interior as to what--

Q Mr. Duncan, following up on Mr. Justice Blackmun's question, I can certainly see why the Solicitor General of the United States feels itself in a difficult

position here, since it is both a fiduciary for the Indians and representative of the United States. I too was surprised to see that the State of Oklahoma did not take the position that West is rightly decided. You are not a trustee for the Indians. The Indians presumably have very capable counsel. You have a decision in favor of your state that says you are entitled to tax.

MR. DUNCAN: Mr. Justice, I am sorry if we gave that impression. We feel that the West decision is good law at the present time. The only point that the state was trying to make in its brief was if the court wishes to change that ruling or feels that West should no longer be the state of the law, it should not impose the burden upon the State of Oklahoma for the past actions of the Federal Government in collecting the tax for the breach of duty thereon.

We feel that until this Court says otherwise, that the West decision must be considered good law. We do not feel the Capoeman case--although the rationale perhaps is different in the Capoeman case--we do not feel that it had a direct, overruling effect on the West decision and that the West would still be the correct interpretation. And certainly had not this come about, we would still be making every attempt to collect the tax.

Q At least in theory in this case, we do not

need to decide anything more than what you just argued, do we, in order to decide in your favor. That until or unless the West case is overruled, it is to be considered the law, period, without expressing any view on whether or not-- without either overruling it or affirming it; is that not correct? That is what your argument is.

MR. DUNCAN: Yes.

Q Not that the West case should be overruled or not be overruled. But simply that until it is overruled, it is the law that has to be followed, and the Court of Claims was wrong in not doing so.

MR. DUNCAN: Yes, Mr. Justice, that is of course what we argued at the time before the Court of Claims.

Q In theory we would not need to say anything more in order to decide in your favor in this case. We would not have to say whether or not the West case should be overruled or it is going to be overruled. And certainly we would not have to reaffirm it in order to decide in your favor.

MR. DUNCAN: I believe that is correct. The only question that I think might be is whether or not you have overruled it. Of course, I think respondents take the position and the Court of claims takes the position that this Court has overruled the case insofar as--

Q Eroded or undermined it or whatever.

MR. DUNCAN: Yes, sir.

Q But nobody claims that it has been expressly overruled.

MR. DUNCAN: No, that is correct. And of course we argued this before the Court of Claims, but they did not accept this argument. It is interesting to note that with regard to this undermining or eroding of the West decision the Court of Claims also relied upon a number of cases the Solicitor General has referred to, including the Internal Revenue ruling which Oklahoma was not a part to or had no part in, and which the State of Oklahoma takes the position that these rulings by an inferior court cannot in any way, although they are expressions of an interpretation by that court or that agency with regard to these ancillary tax questions, they in and of themselves cannot possibly overrule a decision of this Court.

Q All you need to say is that as of the time this case was heard in the Court of Claims it was a good law; West was a good law. That is all you have to do.

MR. DUNCAN: Yes, sir.

Q It was the law of this Court.

MR. DUNCAN: That is right. It was the law.

Q It was the law.

MR. DUNCAN: It was the law.

Q You do not need any more than that, do you?

MR. DUNCAN: No.

Q Do you have a statute of limitations on refund of inheritance taxes?

MR. DUNCAN: Yes, Your Honor, 68-03, Section 227, provides for the general time in which a refund can be claimed. It is a one-year statute of limitations when it is a mistake of law, a question of law, and three years on a question of fact.

However, there is a provision, Subtitle 2; it provides that estate tax must be questioned at the time of the payment, and this would fall under that category. So, at the time they would have had to have contested under the Oklahoma statute at the time that this payment was made.

Q Is Oklahoma Tax Commission v. Texas Company in 336 U.S. also involved here, implicated here?

MR. DUNCAN: Of course, you referred to it in your opinion in Mescalero when--although it was not a part of my brief at the time--

Q Let us assume that West and Oklahoma Tax Commission in 319 had to go. What about the Texas Company case?

MR. DUNCAN: We would like for the Texas Company case to stay. However, if the West decision goes, if the Court overturns the West decision, which is a case on all fours squarely in point, it is hard to imagine that we are

going to have some other case that is going to put us in a better situation.

Q I know, but would you conclude that the Texas Company case was in great trouble also if West went?

MR. DUNCAN: I would assume it would be in trouble also.

Q Sort of a dominoe effect.

MR. DUNCAN: Yes, sir.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Hobbs.

ORAL ARGUMENT OF CHARLES A. HOBBS, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. HOBBS: Mr. Chief Justice, and may it please the Court:

One point brought out by the Solicitor General I would like to reply to immediately, and that is, he referred to the conflict of interest in the Government when it comes to representing questions of Indian rights as are raised in this case. He said that sometimes it is possible to solve the problem by reaching an accommodation between the divergent views of the agencies of Government. That is a perfectly correct, tenable way to handle divergencies among the various agencies which are not trustees of the Indians. But once you see the Government wearing the hat of trustee of the Indians, there is no substitute for a

separate voice speaking for the Indians. This could be done by hiring special counsel or it could be done as the Solicitor General referred as presenting two different views in one brief, and that was done in the Stevens case in the Ninth Circuit last year, one of the most recent cases construing Capoeman in a way inconsistent with West.

Q Does that really solve in a technical sense the conflict problem? Because the special counsel would still be speaking for the United States, the same United States that is trustee; is that not so?

MR. HOBBS: The same problem occurs in the public defender area where the Government employs both sides of the fence there. But I think we are used to accepting the divergent loyalty of both sides of the counsel there, and I think that could grow up with respect to Indian rights.

Our basic theme is that the West case was good law--well, never was good law but was entitled to be followed until 1956 when Capoeman overruled it. You do not need an express overruling of a case in order to render it bad law or invalid law. Capoeman did so by implication and so we that when Capoeman made its ruling, it related back to West and declared West and the case it in turn depended on, Oklahoma Tax Commission--

Q Mr. Hobbs, it has never been overruled, right?

MR. HOBBS: West to this day has never been expressly overruled.

Q That was not my question. Has it ever been overruled?

MR. HOBBS: West?

Q Yes.

MR. HOBBS: Yes, Your Honor, it was overruled in 1956 by this Court.

Q In what language, sir?

MR. HOBBS: It was by implication--

Q Ah, overruled by implication. What does a lawyer do when he is advising his client; he tells him that this is overruled by implication?

MR. HOBBS: The trustee should have taken action to hire an attorney and have this question resolved in 1956.

Q You mean he could have gotten a better attorney than the Solicitor General's office?

MR. HOBBS: No, it is the Solicitor General's--

Q If so, where.

MR. HOBBS: --office who should have been the one to do it.

Q What other lawyer could have given better advice than that?

MR. HOBBS: I am not sure I follow the question,

but the United States--

Q The question is, When you have got a case that is on all fours with your case, how can you get better advice than to say that is still the law?

MR. HOBBS: Eight lower courts have disagreed with you, Your Honor, and have held that the--

Q We are not considering any lower court. We are considering a decision of this Court.

MR. HOBBS: Of course, but there is--

Q What court of competent jurisdiction has overruled this Court.

MR. HOBBS: No lower court can overrule this Court. Only this Court can do so and did so in 1956.

Q Even if this Court now says that West should be overruled, do you win?

MR. HOBBS: We then reach the question of fiduciary liability, but ultimately we would win, yes.

Q You think so.

MR. HOBBS: I think it is a necessary conclusion. It has been suggested during the argument of Mr. Duncan that perhaps all this Court needs to decide is that West has never been overruled, period. This would throw us back to another court, I assume, to try another way to get a ruling of this Court that West has been overruled. I suppose if we arrange our jurisdictional amounts properly, we can

go in the federal district court. We could go through the Oklahoma state authorities, of course and come back up here that way.

But that is inevitable. The day that this Court overrules West, as we feel it will unless it puts a dam across the entire tide of the law since 1956--they must do that to keep West alive--if West is overruled, it then becomes the duty of the United States to get that money back to the Indians that it has wrongfully paid over to the State of Oklahoma.

Q Why is it wrongfully paid over?

MR. HOBBS: If West is, as I say--

Q How far back, to the time West was decided?

MR. HOBBS: West was decided in 1948.

Q Does it go back that far?

MR. HOBBS: Yes. The United States is not subject to a statute of limitations, at least until 1977.

Q So, it goes back forever.

MR. HOBBS: They could go back to 1947.

Q Why not further?

MR. HOBBS: Pardon?

Q Why not further?

MR. HOBBS: Oklahoma did not collect the tax earlier than that.

Q Oh, I see.

MR. HOBBS: We are just dealing with 24 years of taxation.

Our theory is that we hold that the fiduciary duty here was clearly breached. You had Capoeman in 1956. It was the talk of the Bar whether this now caused a re-evaluation of West, Oklahoma Tax Commission, Chotoe v. Burnett, at least some dicta in that. And our law firm began litigation the following year, of which this case today is the culmination to test this premise. The Capoeman case was also our case.

Q The Court did not even think Chotoe was relevant enough to the case and Squire to be cited and distinguished and did not even think West and Oklahoma were relevant enough to be cited apparently. But they were cited. They were litigated in the case.

MR. HOBBS: One must draw his own conclusions as to why they weren't cited. My conclusion is that they could not handle--could not reconcile Capoeman with West, and that it was therefore wiser for--

Q Different allotment acts were involved, were they not?

MR. HOBBS: Yes. They are so parallel that it is almost impossible to reach different conclusions under them.

Q That is your argument.

MR. HOBBS: Yes, of course.

Q In the Capoeman case, did you ask this Court to overrule West?

MR. HOBBS: No, we did not.

Q Why?

MR. HOBBS: I do not know.

Q You said it was so horrible.

MR. HOBBS: I was not with the firm at that time and I cannot personally answer you.

Q You looked at the briefs, did you not?

MR. HOBBS: Yes.

Q I am looking at it right now.

Q Did the brief ask that it be overruled?

MR. HOBBS: I do not know, Your Honor. It is my recollection of a reading some time ago of the brief that we did not ask that it be overruled. It was not necessary to get into that. It would have been easy to leave that for a later day, today.

But, to conclude my point, we say the Government has breached its fiduciary duty by not taking action after 1956 to test the validity of West and see if it still was good law. Certainly there were good minds who thought that it had undermined the West case. And if the duty did not accrue then, it certainly accrued at some point over the years up to the time when it actually paid the tax in this

case. There were seven cases decided by the lower court in an unbroken row deciding that the Capoeman case reverses the spirit of those cases in the 1930's and 1940's which include West and Oklahoma Tax Commission. They did not hold so out loud, but by comparing the language, it is perfectly plain that the parallelism was inconsistent. There were parallel cases but inconsistent.

Q I suppose it would be possible to decide that the Government perhaps did have an obligation to begin testing through litigation after 1956, even though this Court were to decide that West was still good law. There you would have a breach of duty but no damage resulting from it.

MR. HOBBS: Correct. We would take that position. The duty of the Government became more and more pronounced as the years went on and these lower cases kept ticking off anti-West decisions. They paid the tax in two bites. The first bite was September, '67. Then the Beartrack case, which was another case we had brought involving federal death taxes, which cannot be distinguished from West, we say; neither can the income tax cases, we say.

At any rate, in the Beartrack case the Government gave up and agreed to a refund, paid the refund, and the Internal Revenue Service subsequently held that it would not collect federal death taxes anymore. After that, the

Government still pays Oklahoma the death tax in this case. We say by that time all the bells are ringing and the watchman should have awakened and done his duty and did not.

But should you find there was no liability for failure to bring suit and nevertheless reached the West case in this case, then it is squarely brought before you, we think. Should you disagree, it will be before you a couple of years later. When you decide that West is no longer good law, if you do, at that moment the Government has a duty to file suit for refund. It can do so. It is not subject to the Oklahoma statute of limitations. That is settled law. And, therefore, it could go back and collect all of the refunds that were erroneously paid, especially erroneously paid after the Capoeman case.

There is a question as to how much money is involved here. We happen to know something about that. Oklahoma has a budget. The Oklahoma state authorities sent us a budget. And for the fiscal year ending 1963, the budget would be $1.1 billion. Of the revenues to cover that, seven hundred million will be raised by Oklahoma from its own sources, and four hundred million will be given to it by the Federal Government.

Of the seven hundred million raised by Oklahoma from its own sources, largely taxes, $15 million comes from death taxes in Oklahoma. Of the fifteen million there is

no breakdown to show how much was Osage property. But the Osage agency has advised that over a six and a half year period the payments to Oklahoma averaged $26,000 a year. Oklahoma has been collecting taxes for 24 years. And so, if you assume that the $26,000 a year is an average, we come to $624,000. That would be a total refund of all estate taxes ever paid.

Q Would there be other tribes than the Osage involved?

MR. HOBBS: Osage is extremely unique. They are the only tribe in Oklahoma that still has a reservation. To me it would not necessarily be true that other tribes would have a change in their tax situation. I am not sure. I have not studied it. But Osage is the only one with a reservation in Oklahoma.

I would like to give some of the historical background, because I think the Court should have this when it considers whether the West case is still good law. To me, the critical fact to keep in mind, when you are considering the West case and the Oklahoma Tax Commission case is this. When this Court made that decision, involving state taxes, it was assumed by everyone that this Indian property was subject to federal estate and income taxation. This Court had held in the Superintendent Five Tribes case in 1935, in a broad general statement not

subject to qualification, that Indians pay income taxes on their trust property, unless there is an express exemption.

This was taken to mean and later held to mean that Indians pay taxes like everyone else, unless there is an express exemption.

By 1943, when the Oklahoma Tax Commission case came up, it was generally assumed and not doubted, and the Internal Revenue Service was collecting on this assumption, that federal taxes were correct.

This Court or any other tribunal would have a very hard time finding that state taxes should not lie if federal taxes would lie. And the Court at that time was assuming that federal taxes did lie. It said as much with respect to income taxes. The Internal Revenue Service was collecting the death taxes.

The Court in West and Oklahoma Tax Commission really made a ruling of law which should not be overruled. It is still good law. It said, after reviewing the situation and finding that these properties were taxable, it said: "However, should any of these properties not be subject to direct taxes, then there would be no death tax."

That is a rule of law, we say, that is still good. The only thing wrong with those cases is that they mistakenly assume, because of some language which has been

overruled--and I will show you why in a minute--that the Osage property and the Creek property in the other case was subject to federal taxation. Had this Court realized that federal taxes would not lie--and it later held that in Capoeman--why then it is a fortiori that it would not have held that state taxes lie. It is an error to allow state taxes if federal taxes do not lie. The state taxes are an a fortiori case.

It is this accident of history that explains how the Court got off the track on that--

Q If it is an a fortiori case, in which direction? You said earlier it would be very difficult and extremely anomalous to hold that state taxes did not apply if federal taxes did.

MR. HOBBS: That is right.

Q But does it work the same way in the opposite direction?

MR. HOBBS: No. If federal taxes, then a fortiori state taxes. If state taxes--

Q It is not a fortiori.

MR. HOBBS: Not a fortiori but very compelling, very difficult not to find the other.

Q But it is certainly not a fortiori.

MR. HOBBS: No. The a fortiori runs in the direction I said.

Q Some cannot be a fortiori in both directions, by definition.

MR. HOBBS: No, of course not.

Q Is not the whole question a statutory question?

MR. HOBBS: Yes, it is, interpretation of statutes.

Q Strictly of statutes. And Congress easily could, I suppose, exempt Indian property from its own estate tax and still permit states to tax.

MR. HOBBS: Certainly it could.

Q And you are relying on an implied exemption from state estate taxes. There is no express exemption in the statute.

MR. HOBBS: No, of course not.

Q And there is no express exemption in the regulations or anything else.

MR. HOBBS: Right. Nor in the Capoeman case.

Q No, no. Except that the Court read the particular allotment statute there to imply an exemption.

MR. HOBBS: Yes. Here is what the Court saw in the Capoeman case. It saw a governmental undertaking--when this tribal property had been broken up and distributed to the members of the tribe--it saw a governmental undertaking to hold this property in trust. This is vital to our case.

This is the heart of our case, to hold this property in trust until the Indian was competent to compete in society by himself. During this interval he would be trained by the United States, taught to manage his own affairs, and presumably, hopefully soon, he would enter the melting pot and be as competent as anybody else.

In the meantime, this property was to be held in trust undiminished by any claims. A simple Indian is at the mercy of loan sharks and speculators who want to buy his land. Congress knew this, and so it made the land inalienable. No charges or encumbrances were to be placed on this land.

Q But this Indian has died.

MR. HOBBS: Mr. Justice Blackmun, there should be no question that the death is not significant in the impact of this tax exemption. The exemption carries forward, bridges the death, and goes until the heir becomes competent. This is clear from the language of the General Allotment Act, which says that the United States shall hold this land in trust for the Indian or, in case he dies, his heir until he becomes competent. And it is also expressly so in the Osage Allotment Act.

In our brief in the footnote on page 11, we cite four of the many references to the concern that Congress had for the heirs.

Furthermore, the West and Oklahoma Tax Commission cases, when they say, "If this property is exempt from direct tax, then it is exempt from death tax," sort of forecloses that question, we feel. We feel that Capoeman has proved that these properties are exempt from direct taxes and that therefore under West and Oklahoma Tax Commission, without any overruling at all, they are still good law when they say that therefore no death tax. So, we do not think that death is relevant here.

But back to the General Allotment Act. The trust relationship, the termination of the trust when the Indian became competent, the freedom from charge or encumbrance, this Court held in Capoeman, may well be sufficient to support the tax exemption.

And then there was more in the Capoeman case.

The General Allotment Act was passed in 1887. The Osages were not allotted--and, incidentally, the Osages were left out of the General Allotment Act by a fluke. The General Allotment Act was supposed to apply to all Indians in the country, with a few exceptions. And those exceptions were the Indians who held their land in fee. And the Osages were believed to own their land in fee because they were in Oklahoma.

But, unlike any other tribe in Oklahoma, they did not. Their lands were in trust. And therefore the

Osages were not under the General Allotment Act. In 1903 this Court held that when the General Allotment Act exempts land from levy, attachment, or charge or encumbrance, that means tax exemption. That was the Rickert case in 1903.

The next thing that happens is that in 1906 Congress amends the General Allotment Act, and it says that--for the first time adds the idea that the trust period can end sooner than the 25-years extended if the Indian becomes competent sooner than that time. And it says that after he reaches the point of competency, the trust will end and he gets his land, and all restrictions as to alienation and taxation are lifted.

This implies that Congress thought that the land was free of tax up to that point and well so. Only three years ago this Supreme Court, in 1903, had held that a restriction on alienation added up to a tax exemption. So, Congress assumed on very good authority in 1906 that the restriction on alienation was the equivalent of a tax exemption.

When we come to the Osage Allotment Act, also in 1906, we have Congress very much aware of all this at the time. Congress says of the Osage property, "The tribal land will be allotted to the individual Osages. They will pick 160 acres of land, and that is going to be tax exempt." The rest of their land, which would be several hundred

acres, Congress said would be taxable. Congress expressly said that this land would be taxable.

The implication is that when Congress does not say the Osage property is taxable, then it is not. When it came to the minerals, it was not wise just to divide up the minerals along with the surface rights. So, what they did was they took the whole mineral estate as if it were a single body or reservation, held it in trust for the Osage tribe, and allotted the minerals by allotting head rights to the individual osages.

Each head right, just like the General Allotment Act, was to be inalienable until the Indian became competent. The parallelism is compelling.

Congress also permitted still another tax. In 1919, this Court had held that because Congress had not authorized an Oklahoma gross production tax, no such tax could lie. That is an important case. It is holding that silence in this context means no taxes.

So, Oklahoma then went to Congress and persuaded Congress to pass a statute expressly authorizing the Oklahoma gross production tax, and Congress did so in 1921. And from that day to this, Congress or Oklahoma has collected, and no one has challenged it, the gross production tax on all this head right minerals.

Incidentally, there is so much I am not going to

be able to cover, but one thing I wanted you to know is that these head rights have diminished in value and annual income. They are now paying about $3,300 a year. In the 1910s and the 1920s, they were paying enormous amounts of money. I am sure you are familiar with some of the stories that arose in that time.

Q Mr. Hobbs, suppose the fiduciary had not been the Government. I realize you have an Indian involved here. But let us assume you had a private fiduciary, a lawyer in Oklahoma, representing a private estate in which all of the other facts and circumstances in this case existed substantially, Supreme Court decision not overruled except that some lawyers, as you do, think that it was overruled by implication. Would you feel that that fiduciary was subject to be surcharged to the same extent and in the same manner as the Government as fiduciary in this case?

MR. HOBBS: Well, as in this case, certainly. I would say the fiduciary liability does not start out full blown in 1956. There is more to the story. A case was decided in '57, '58, '62, '63, '66, '67, two in '68. By '68, when this tax was finally paid, in my opinion any fiduciary would have been surcharged for failure to bring a suit to get the question cleared up.

I think a review of those lower court cases will compel the same conclusion. They do not say West is

overruled. They do not dare tackle it. But it is clear from what they say that they are disregarding West, that they are regarding it as overruled. And a lawyer has to look at these things in order to properly advise his client or a trustee to take care of his beneficiary's property; he has to look at the tideoof the law that flows along.

Q What about--this is a general suggestion--that just three weeks ago we did not think it was overruled?

MR. HOBBS: You cite Squire v. Capoeman, in my opinion, showing that there are many ideas in that case that you still have full blown agreement with. The citing of Oklahoma Tax Commission in the way you cited it in those cases in my opinion sheds--does not put anyone on warning that you still think West is a good case.

West is a complicated case and it goes with--excuse me--Oklahoma Tax Commission. We do not ask that it be overruled. We ask that it be modified. The part about land exempt from direct taxes is also exempt from death taxes, is a good ruling. We do not suggest that that be overruled. So, there are parts of West that remain good law.

Q Then you are not suggesting any return to federal instrumentality law?

MR. HOBBS: Excuse me, Your Honor?

Q - You are not requesting any return to federal instrumentality law, which Oklahoma Tax Commission case was heavily involved in?

MR. HOBBS: No, the case is perfectly valid and accepted by the bar, Indian Bar, with that respect, federal instrumentality rule. That was what Oklahoma Tax Commission was all about. That was in the midst of the tumbling of this federal instrumentality rule which courts had relied on for Indian tax exemption. And it was not discovered until Capoeman that there is another basis for finding tax exemption, and that is really a sounder basis where you examine statutes carefully, the suite of statutes for each tribe, and reach an individual conclusion for each tribe.

Q In West the Court said expressly that we do not find any exemption here. There must be an express exemption. We are saying there is not one and there is not going to be one until Congress comes along and itself gives one under this General Allotment Act.

MR. HOBBS: I am not sure I follow it.

Q That was what the Court said in West.

MR. HOBBS: Yes. It was following an idea first born in the Chotoe case, 1931; carried along in Superintendent Five Tribes--

Q But that is what its conclusion was. It said

to Congress, in effect, "If there is to be an exemption, provide one."

MR. HOBBS: But Capoeman said it is not necessary to do that. That is where they are inconsistent. They both cannot stand together.

Q Was not at least part of the rationale of Capoeman the proposition that it could hardly be presumed that the guardian would tax the ward? There was emphasis in parts of the opinion upon that relationship. And that relationship simply does not exist in this case.

MR. HOBBS: It does, Your Honor. It most assuredly does.

Q Nor in West. Oklahoma is not the guardian of these Indians.

MR. HOBBS: Oh, I am sorry. No, the United States is.

Q Exactly. And that was a United States tax in Capoeman.

MR. HOBBS: I was troubled by that language in Capoeman because that language harks back to a 1924 attorney general's ruling which followed a line of cases which said just that. That line of cases was overruled in the thirties and forties. I confess I cannot remember the case or cases that did it. But it was a weak reed when Capoeman came along. The strength of Capoeman is in

examining the General Allotment Act.

Q That is your view. That is the way you read it. But concededly there was language in the Capoeman opinion along the lines I have indicated, was there not? That it is hardly to be presumed that the guardian would tax the ward for the guardian's benefit. And also there is language in the Capoeman opinion, as I remember it, that said that the guardian, the United States as guardian, was the one who determined when and how the timber would be cut and therefore was in a conflict of interest as a tax collector. It would maximize the income or whatever.

MR. HOBBS: The United States has a great deal to say when this oil is pulled out of the ground too.

Q Yes, but this is an Oklahoma tax we are talking about here.

MR. HOBBS: If the Guardian is not going to tax his own ward, it has always been regarded at least by myself that if the federal tax does not lie, state tax a fortiori does not lie.

Q But maybe your a fortiori is in the other direction here.

Q That is what I was suggesting.

Q The language Justice Stewart quotes from Capoeman is the dominant force in that case.

MR. HOBBS: No. I have learned through many cases

and many textbooks and reach that conclusion through that, and that is the way I see it, that the federal tax is the hardest tax to find that lies. No, I am sorry, the state tax is the hardest tax to find that it lies.

Q You were right the first time, I think.

MR. HOBBS: I admit confusion.

Q The Court was trying to accommodate two federal statutes there, the federal tax statute and a federal allotment statute.

MR. HOBBS: Perhaps. What I meant to say was based on this. The state, in order to tax, must, number one, find jurisdiction; and, number two, must find congressional intent to permit. Whereas, in the case of a federal tax you need only find congressional intent to permit. You do not have the jurisdictional problem.

Q The Court in West said you had to find an express exemption.

MR. HOBBS: Capoeman said you did not have to find an express exemption.

Q From federal tax.

MR. HOBBS: True. An argument I have not made here but have made in the brief is that the Osage Reservation is still a reservation and if the Mescalero case applies to Osage, then Oklahoma has no jurisdiction to impose any tax whatsoever except those taxes that Congress has specifically

authorized, which would be a tax on the non-homestead land and the gross production tax.

So, we relied on Mescalero.

Q This property here is not timber; it is mineral property primarily, is it not?

MR. HOBBS: Yes.

Q Oil and gas?

MR. HOBBS: That is correct.

Q And you say each head now is down to about an income of something over $3,000 a year?

MR. HOBBS: Correct.

Q It used to be astronomically high, was it not?

MR. HOBBS: Yes. It is petering out.

Q By reason of depletion?

MR. HOBBS: Yes. It is gone.

Q Was it oil or gas or both?

MR. HOBBS: Oil. Well, some gas. Mostly oil. They are on secondary recovery methods now, and that is going to peter out.

I would like to make one final quote from the Mescalero case, which also supports our position. Mescalero said that--I am quoting--"In the special area of state taxation, absent session of jurisdiction or other federal statutes permitting it, there has been no

satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation."

As we argue more fully in the brief, we question where Oklahoma gets the jurisdiction to impose this tax. They have the same constitution that Arizona does that disclaims jurisdiction. Congress has permitted two taxes, and we concede that those lie. But where is the jurisdiction under the McClanahan case or following this quotation from the Mescalero case? Where is the jurisdiction to impose the tax in this case? Osage is the only reservation left in Oklahoma. But it is a reservation, shown as such in the BIA maps.

Q The decedent lived on the reservation, was a reservation Indian?

MR. HOBBS: Yes.

MR. GRISWOLD: It is not so alleged.

MR. HOBBS: The Solicitor General suggests that that is not alleged in the record, but it is a fact.

Q If it is not in the record, you can hardly--in any event, if it is not in the record, it means that you have not relied on it up till now.

MR. HOBBS: That is right. We have not relied on it.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Hobbs.

MR. HOBBS: Thank you very much, Your Honors.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor General.

The case is submitted.

[Whereupon, at 11:57 o'clock a.m., the case was submitted.]

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