BEFORE THE INDIAN CLAIMS COMMISSION

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| THE WESTERN (OLD SETTLER) CHEROKEE INDIANS, on the relation of Dorothea Owen, John B. Sixkiller, Alice Flourney-Smith, William B. Keeler, Charles C. Victory and O. H. P. Brewer, | ) | |
| Plaintiffs, | ) | |
| v. | ) | Docket No. 41 |
| UNITED STATES OF AMERICA, | ) | |
| Defendant. | ) | |

Appearances:

Wilfred Hearn, with whom were George E. Norvell, Earl Boyd Pierce, Dennis Bushyhead and Houston B. Tehee, Attorneys for Plaintiffs.

Jules H. Sigal and Ralph A. Barney with whom was Mr. Assistant Attorney General A. Devitt Vanech, Attorneys for Defendant.

DEC 28 1950

OPINION OF THE COMMISSION

O'Marr, Commissioner, delivered the opinion of the Commission:

The claim involved in this proceeding is for the recovery from defendant of the sum of $278,672.46 and interest, which the plaintiffs allege was paid out of trust funds belonging to a group of Cherokee Indians known as Western or Old Settlers, to compensate the attorneys

who successfully prosecuted an action against the defendant and obtained a judgment for said group in the sum of $800,386.31. See Western Cherokee Indians v. United States, 27 C. Cls. 1, as modified by Supreme Court, 148 U. S. 426, 37 L. ed. 509.

As stated above, the claim, as clearly shown by the allegations of the petition, is to recover the amount paid out of the judgment fund for attorneys' fees. The undisputed proof is that the entire cost of the litigation in so far as payment to attorneys is concerned amounted to the sum of $142,446.60 and not the sum of $278,672.46 as alleged in the petition. Defendant's Exhibits 10 and 11. In their brief, plaintiffs refer to the sum of $243,115.58 as the amount "paid out in payment for services rendered by attorneys and others in the prosecution" of the action, Western Cherokees v. United States, 27 C. Cls. 1, for which the expenditures were made, but if plaintiffs seek recovery for the entire expenses of the litigation, the petition falls far short of making any claim except for attorneys' fees; however, if plaintiffs had claimed reimbursement for the entire costs and expenses of the litigation our conclusions, herein expressed, would be the same.

A brief review of the history of the Cherokee Tribe or Nation of Indians will be helpful in understanding the litigation in which the recovery of the amount expended for attorneys' fees is here claimed.

The Cherokee Indians formerly lived east of the Mississippi river in parts of Georgia, Alabama and Tennessee, and early in the

nineteenth century a part of the tribe, from a section known as the lower towns, became dissatisfied with their condition caused by the scarcity of game and the encroachment of the white people and wanted to move west and continue the hunter life. The desires of this part of the Cherokees were considered by the government and the lower town Indians were permitted to select an area of land west of the Mississippi river between the Arkansas and White rivers in what is now the State of Arkansas, in exchange for a part of Cherokee lands east of the Mississippi river. See treaties of July 8, 1817, 7 Stat. 156, and February 27, 1819, 7 Stat. 195. The Arkansas lands proved unfavorable for the Indians and by the treaty made by the Cherokees who moved to Arkansas, and defendant, dated May 6, 1828, 7 Stat. 311, the Western Cherokees ceded to the United States their Arkansas lands for lands located in what is now the State of Oklahoma. The Cherokees who moved west are historically known as the Western or Old Settler Cherokees, while those who remained east of the Mississippi river are known as the Eastern Cherokees.

The Eastern Cherokees finally concluded to move west and join the western group and by treaty between the Cherokee Tribe of Indians and the United States, dated December 29, 1835, 7 Stat. 478, the Indians ceded to the United States, for a consideration of $5,000,000, all their remaining lands east of the Mississippi river. The Western Cherokees agreed to this treaty. The United States also ceded to the Cherokees by this treaty for a consideration of $500,000 a tract of

land comprising 800,000 acres. The $5,000,000 to be paid the Cherokee tribe by the 1835 treaty was increased by $600,000 in the supplementary treaty of March 1, 1836, 7 Stat. 488, so the credit to the Cherokee treaty fund amounted to the sum of $5,600,000.

Following the 1835 treaty dissension arose between the two factions. The Western Cherokees claimed they had been deprived of two-thirds of their western lands by the settlement of the Eastern Cherokees among them and had received no compensation therefor, while the Eastern Cherokees had received the full $5,600,000 paid under the treaty of 1835-6. An attempt was made to settle the difficulties by the treaty of August 6, 1846, 9 Stat. 871.

The treaty of 1846 was between the United States, the Cherokee Nation and the Western Cherokees. There was a fourth group called the "Treaty Party," but it was settled with and need not be further considered. This treaty provided in effect that all lands of the Western Cherokees and the 800,000 acres acquired by the 1835 treaty should become the property of all the Cherokee people, those of the East as well as those of the West, and in order to settle the Western Cherokees claim for their land occupied by the Eastern Cherokees, they were to receive one-third of the $5,600,000 treaty fund remaining after making certain deductions. A formula for determining the amount payable the Western Cherokees was provided in the treaty; however, the 1846 treaty did not settle the controversy for the question then arose as to the propriety of certain deductions and this controversy raged

until Congress by the Act of June 12, 1850, 9 Stat. 554, 556, appropriated $532,896.90 which was paid the Western Cherokees. Other adjustments and payments were made by the defendant but there still remained a dispute as to the interest of the Western Cherokees in the treaty fund and the propriety of certain charges against it made by the defendant.

By the Act of February 25, 1889, 25 Stat. 694, the Court of Claims was granted jurisdiction to try and determine what sums of money, if any, were due from the United States to the Western Cherokee Indians, arising or growing out of treaty stipulations and acts of Congress relating thereto. Pursuant to this jurisdictional act, a suit was instituted and tried, resulting in the judgment in favor of the claimants, which is referred to above. It is the fees paid for legal services in prosecuting this claim under the Act of February 25, 1889, that the plaintiffs demand here. This act is silent as to the matter of attorneys' fees. The plaintiffs point to no other statute nor to any agreement requiring the defendant to pay or reimburse them for such attorneys' fees, nor can we find any. According to the allegations of their petition they rely upon the relationship between the parties for they allege that the defendant was the "guardian of their respective persons, and curator of their communal joint and several estates." On the assumption that the defendant, in administering the treaty fund, acted as guardian or trustee for the Indians, they argue in effect that the defendant was governed by the rules and liabilities

of an ordinary guardian or trustee and is therefore liable for attorneys' fees because of its improper administration of the trust fund. The fundamental error of this reasoning is that the government had never been held to all the liabilities of an ordinary trustee, cf. Osage v. United States, Docket No. 9, decided December 30, 1948. But even if the defendant were subject to the same liability as an ordinary trustee there are no allegations in the petition or any proof that would justify an award for the expenses of the suit under the Act of 1889. The government in handling the treaty fund gained nothing for itself and the proof shows beyond question that it acted in good faith in handling the treaty fund. During the administration of the fund it made adjustments by paying into it public funds or by paying plaintiffs large sums out of Congressional appropriations to satisfy the demands of plaintiffs. Of course, the Court of Claims found that there was due the Indians a sum of some $800,000, including interest, in addition to the sums theretofore paid, but at no place did that Court or the Supreme Court, in the opinions, even intimate that the defendant acted otherwise than in best of faith and as it construed the treaty stipulations to require. Certainly, no court would charge an ordinary trustee with attorneys' fees or other costs in an accounting action under facts shown here.

Another and equally compelling reason for denying plaintiffs' claim is that the United States is not liable for attorneys' fees in the absence of a statute permitting such a charge. Piggly Wiggly

Corporation v. United States, 112 C. Cls. 391, 432. Counsel have cited no statute, nor have we found any, which permits an allowance of counsel fees in suits against the United States. Since the beginning of our government the Supreme Court has consistently held that, in the absence of statute directly permitting it, the United States is not liable for the costs and expenses of litigation. United States v. Chemical Foundation, 272 U. S. 1, 71 L. ed. 131, 145; United States v. Worley, 281 U. S. 334, 74 L. ed. 887, 891. We are of course familiar with the case Reconstruction Finance Corp. v. Menihan, 312 U. S. 81, 85 L. ed. 595 (and the cases therein discussed), in which the court allowed costs, but in that case the court made it clear that governmental immunity as to costs did not apply to "federal instrumentalities" which had been given the authority to "sue and be sued." The reasoning back of the determination being "that when the Congress launched a governmental agency into the commercial world, and it endowed it with authority to 'sue and be sued' that agency is not less amenable to judicial process than a private enterprise under like circumstances would be" in the absence of a contrary showing. The Court also applied the principle that there is no presumption that a governmental agency is clothed with sovereign immunity. It is plain that the above case cannot apply here where the claim is not asserted against an instrumentality or agency of the government, but directly against it under a jurisdictional act which merely permits a claim and is silent on the question of costs and attorneys' fees. We find nothing in the Act of

August 13, 1946 (28 U.S.C.A. 70) which can be construed as in anywise permitting the collection or awarding of costs against the defendant. Attorneys' fees are in the nature of costs and expenses of suit.

But plaintiffs, in their brief, say that if there is no rule of equity which permits the award they may recover under clause (5) of section 2 of the Act creating the Indian Claims Commission, which permits a claim "based upon fair and honorable dealings not recognized by any existing rule of law or equity."

The argument of plaintiffs in support of their position may be epitomized as follows: That the defendant, for a period of sixty years, disputed the plaintiffs' right to the trust funds found to be due them in the Western Cherokee case and accounted for them only after the determination by the Court of Claims and the Supreme Court; that during that entire period of time, the Executive branch of the government or Congress could have submitted the disputed questions of fact and questions of law with respect to plaintiffs' rights to the Court of Claims for determination, and not having done so, the plaintiffs were put to the expense of paying attorneys to prosecute their claim.

Much of what we have said with respect to the relationship of the parties and the immunity of the defendant from expenses of suit applies to the argument outlined above. The solution of the problem involved in plaintiffs' argument must, we think, be determined by the answer to this question: Did the Congress intend by said clause (5) to set aside all settled law respecting the allowance of expenses of suits or claims

against the government and permit recovery of them under said clause (5)? To give the clause such effect would require us to read into it a meaning far outside the text without anything to warrant an implication that such expenses should be allowed. We cannot escape the feeling that if the Congress in passing the Indian Claims Commission Act had any such purpose in mind it would have made such purpose unmistakably clear in order to overcome the long-settled doctrine that the government is immune from expenses of suit in the absence of a statute directly authorizing them. Also, it must be presumed that had Congress intended to permit claims for attorneys' fees (aggregating many million of dollars, no doubt) heretofore paid out by Indians in the successful prosecution of their claims against the United States it would have made such an intention plain.

After the submission of this case, plaintiffs filed a motion to make "The Cherokee Nation" an additional party plaintiff. The view we have taken of this claim makes the additional party unnecessary because our conclusions would be the same if the Cherokee Nation had been a party plaintiff from the beginning. Furthermore, in Western (Old Settler) Cherokee Indians, Docket No. 24, we held that the plaintiffs therein constituted an identifiable group within the provisions of our act. The motion must, therefore, be denied.

It follows from the above that the petition herein must be dismissed.

Chief Commissioner Witt and Associate Commissioner Holt concur.

Dated this 28th day of December, 1950.