BEFORE THE INDIAN CLAIMS COMMISSION

THE EASTERN (EMIGRANT) CHEROKEE INDIANS, on the relation of Jesse B. Milam, James Pickup, et al., Plaintiffs, vs. THE UNITED STATES OF AMERICA, Defendant.	)	Docket No. 42

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:

By the petition filed in this case eight members of the Eastern (Emigrant) Cherokee Indians have presented a claim for and on behalf of all the members of that part of the Cherokee Nation of Indians who became known as the Eastern or Emigrant Cherokees. They seek an award against the United States in the sum of $992,550.31 with interest at

the rate of 5% per annum from November 3, 1906. The three items making up this claim will be referred to later.

Early in the nineteenth century the Cherokee Indians lived east of the Mississippi river in parts of the States of Georgia, Alabama, Tennessee and the Carolinas. Part of the Cherokees, which became known as the Western or Old Settler Cherokees, moved west of the Mississippi river and finally located in what is now the State of Oklahoma. See treaty of May 6, 1828, 7 Stat. 311. After the settlement of the Western Cherokees in Oklahoma, the Cherokee Nation ceded to the United States for a consideration of $5,600,000 (Treaties of December 29, 1835, 7 Stat. 478 and March 1, 1836, 7 Stat. 488) all its remaining lands lying east of said river and moved to the Western Cherokee lands in what is now the State of Oklahoma and settled thereon and on the 800,000-acre tract acquired from the defendant by the treaty of 1835.

Attorneys' Fees

A dispute arose between the Eastern Cherokees and the defendant as to the handling of the treaty fund and other matters, and by the act of July 1, 1902, 32 Stat. 726, as amended by the Act of March 3, 1903, 32 Stat. 996, the Cherokee Nation and the Eastern Cherokees were permitted to sue the United States in the Court of Claims for any claim they may have against the United States arising under treaty stipulations. Accordingly, separate suits were brought by the Cherokee Nation, No. 23,199, the Eastern Cherokees, No. 23,214, and the Eastern

and Emigrant Cherokees, No. 23,212, which were consolidated and tried, with the result that the Cherokee Nation on May 18, 1905, obtained a judgment in the sum of $1,111,284.70 with interest, amounting in all to $5,098,361.08. (See Cherokee Nation v. United States, 40 Ct. Cls. 252, 363-365; and Def. Ex. 2 as to amount of interest accrued on judgment). The judgment included other items but this item was for the sole benefit of the Eastern Cherokees and it is for the following deductions made from this item that the plaintiffs are here complaining, namely:

1. The sum of $740,555.42 paid to plaintiffs' attorneys.

2. The sum of $148,245.15 paid the attorneys of the Cherokee Nation.

3. The sum of $103,749.74 for the expense of ascertaining and identifying the persons entitled to the judgment fund and distributing it.

As to the first and second deductions, being those made for fees paid attorneys for the Eastern Cherokees and attorneys for the Cherokee Nation, respectively, we have this day decided in the case, Western (Old Settler) Cherokees v. United States, Docket No. 41, that those Indians may not recover attorneys' fees under facts quite similar to those presented here, the only factual difference being that in No. 41 the amount paid was fixed by contract, while here the amount was fixed by the court, but in both cases the theory advanced for recovery is the same. So, for the reasons set forth in No. 41,

we must deny both of these claims.

There is an additional reason why the claim for the sum of $148,245.15 deducted from the judgment to pay the attorneys for the Cherokee Nation, cannot be allowed and that is that the Eastern Cherokees, in their case No. 23,214, petitioned the Court of Claims to so construe its decree of May 18, 1905, that the judgment for the benefit of the plaintiffs herein in said sum of $1,111,284.70 be not chargeable with the fees of the attorneys for the Cherokee Nation. All the parties, the United States, the Cherokee Nation, as well as the petitioners, the Eastern Cherokees, were represented at the hearing on the supplemental petition, and the Court of Claims determined the matter against the Eastern Cherokees and dismissed the supplemental petition. (See Eastern Cherokees v. United States, 45 Ct. Cls. 104, affirmed by the Supreme Court, 225 U. S. 572, 56 L. ed. 1212). Thus, we see, there has been an adjudication on the merits. We decided in Western (Old Settlers) Cherokees v. United States, Docket No. 3, and Eastern (Emigrant) Cherokees, Docket No. 5, decided November 15, 1948, affirmed by Court of Claims (Appeals Dockets Nos. 2 and 3, decided May 1, 1950, 116 C. Cls. _____), that a claim once litigated on the merits cannot be relitigated under clause (5), which is the ground plaintiffs, in their brief, rely on here. The rule in those cases applies here.

Expense of Distributing Judgment Fund

By the decree of the Court of Claims of May 18, 1905 (40 C. Cls.

363-365) there was awarded for the benefit of the Eastern Cherokees the sum of $1,111,284.70 and interest, a total of $5,098,361.08, which, after deducting attorneys' fees and the cost of determining the persons entitled thereto and the costs of distribution, was ordered distributed per capita to the Eastern Cherokees. (See order of May 28, 1906, Def. Ex. 1).

The orders of May 18, 1905, and May 28, 1906, provided for the distribution to be made by the Secretary of the Interior, but on April 29, 1907, the Court of Claims in said case No. 23,214 modified its original orders by retaining jurisdiction of the distribution and appointed one Guion Miller a special commissioner to prepare a roll of the Eastern Cherokees entitled to share in the award. The order also provided that the expenses and costs of determining who were entitled to the per capita payments should be borne by the judgment fund. (See Ex. A, Appendix to Defendant's brief).

The order of April 29, 1907, was made pursuant to a petition on behalf of the Eastern Cherokees in said No. 23,214, and letters of the Commissioner of Indian Affairs and the Secretary of the Interior. (Exhibits D, C and B, Appendix to Defendant's brief). There was accordingly distributed to the Indians $4,105,810.53, and the costs and expenses of ascertaining the distributees and paying them out of the appropriation made to pay the judgment, was the sum of $103,749.74. It is because of the deduction of this sum that plaintiffs are seeking reimbursement here. The allegations of the petition concerning this

item are as follows:

> "That although the Cherokee Nation was then in existence, and as trustee for said Eastern Cherokees, prosecuted such action to a successful conclusion, and had efficient officers in sufficient numbers, and ample authority to distribute the remainder of the proceeds of such judgment, and were in the superior position of knowing what individuals were entitled to enjoy the results thereof; that, nevertheless, the defendant procured the appointment of one Guion Miller, Esquire, of the Baltimore, Maryland Bar, a total stranger to the Eastern (Emigrant) Cherokees, as a Special Master, to make such payment, at an expense to them of $103,749.74."

It will be seen from the above allegations that the plaintiffs make no charge that the expense of ascertaining the persons to whom the money appropriated to pay the judgment was to be paid, or of distributing the fund, was excessive or improper, or that the Special Commissioner acted to the disadvantage of the Indians. The real complaint is that the Cherokee Nation which obtained the judgment had efficient officers in sufficient numbers and ample authority to make the distribution, and should have been authorized to make it. Plaintiffs have offered no proof whatever to support the above allegations. It is admitted by the defendant that Miller was appointed to make the distribution and the defendant's evidence shows (Def. Ex. 2) that the sum of $103,749.74 was expended by the Special Commissioner in his work. In so far as anything appears to the contrary, the Special Commissioner performed his duties efficiently and, we may assume, with the approval of the court. It is odd, to say the least, that after petitioning the court to have the distribution made under its supervision, rather than that of the Secretary of the Interior, it should

now object. Be that as it may, we shall now pass on to the broader question, which we suppose is involved in plaintiffs' pleading, namely, the propriety of charging the judgment fund with the cost of determining the distributees and paying them.

At the outset, it will be remembered, the court decided (40 C. Cls. 327) that the judgment fund belonged to the Eastern Cherokees as communal owners, and accordingly, ordered it distributed per capita to them. To make the required distribution it was necessary to determine the persons who belonged to that group. This determination was for the sole benefit of the distributees; without it a distribution of the money would have been impossible, so in directing and supervising the handling of the fund the court took the only logical course possible to insure payment to the individual Indians entitled to the money. The Government derived no pecuniary benefit from the fund, so how can it be said it should stand the expense of disbursing it. Even if the Government were considered an ordinary trustee, as plaintiffs contend, it would have been entitled to be compensated for the expenses of distribution. Not only that, when the Indians petitioned the court to supervise the distribution of the fund they must be presumed to have expected there would be costs which could only be paid out of the judgment fund for the appropriation therefor was only to pay the amount found due the Indians, plus interest to date of payment. Acts of June 30, 1906, 34 Stat. 634, 664, and March 4, 1909, 35 Stat. 907, 938.

The defendant, neither by treaty, agreement, nor act of Congress, became obligated to pay the cost and expense of distributing the fund, nor has it been the policy of the Government to bear such costs. Cf. Choctaw Nation v. United States, 91 Ct. Cls. 320. This item must, therefore, be disallowed.

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 will be the same if the Cherokee Nation had been a party from the beginning.

For the reasons set forth above, plaintiffs' petition must be dismissed.

Chief Commissioner Witt and Associate Commissioner Holt concur.

Dated this 28th day of December, 1950.