

BEFORE THE INDIAN CLAIMS COMMISSION

THE CHEROKEE NATION, FOR AND
ON BEHALF OF THE WESTERN
(OLD SETTLER) CHEROKEE INDIANS,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,

Defendant.

Docket No. 24

Decided April 3, 1952

Appearances: Paul M. Niebell and Wilfred Hearn,
with whom were George E. Norvell,
Earl Boyd Pierca, Houston B. Tehee,
and Dennis Bushyhead,
Attorneys for Plaintiffs.

Ralph A. Barney, with whom were
Mr. Assistant Attorney General
Wm. Amory Underhill,
and Joseph G. Burke,
Attorneys for Defendant.

STATEMENT AND FINDINGS OF FACT

STATEMENT

1. The claim here asserted was originally presented by "The Western (Old Settler) Cherokee Indians, on the relation of" six named individual Cherokee Indians. On May 11, 1951, the petition was amended to change the name of the claimant to "The Cherokee Nation" which now presents the claim "for and on behalf of the Western (Old Settler) Cherokee Indians."
2. The petition was further amended on July 12, 1951, by amending paragraph 24 thereof and striking out paragraphs 25 and 26, and

adding new paragraphs and a new prayer, thus basing the cause of action upon unconscionable consideration, and eliminating the allegations of duress and oppression contained in the original petition. (See Trans., pp. 20-29, Hearing of July 2, 1951; Trans., pp. 3-4, Hearing of July 12, 1951; Order of July 12, 1951).

3. After the evidence was closed and on October 11, 1951, the parties hereto appeared before the Commission and made an oral agreement which was embodied in the Commission's order of that date reading as follows:

"The parties to the above-entitled cause this day appeared before the Commission in open hearing, the Plaintiffs being represented by their counsel, Wilfred Hearn and Paul M. Niebell, and the defendant being represented by its counsel, Ralph A. Barney, and orally agreed that the Commission shall first determine upon the evidence now before the Commission the sole question whether the Western (Old Settler) Cherokee Indians had Indian or other title to the lands involved in this action, exclusive of the Eastern (Emigrant) Cherokee Indians or the Cherokee Nation (other than the 800,000 acres ceded the Cherokee Nation by the treaty of August 6, 1846, 9 Stat. 871) and to make an interlocutory order determining such question. Should the Commission find and decide that the Western (Old Settler) Cherokee Indians did not have Indian or other title to said lands exclusive of the Eastern (Emigrant) Cherokee Indians or the Cherokee Nation at the time of the 1846 treaty, said order shall dismiss said petition, from which order Plaintiffs may appeal, on the other hand, if the Commission should decide that the Western (Old Settler) Cherokee Indians were possessed of Indian or other title to said lands exclusive of the Eastern (Emigrant) Cherokee Indians or the Cherokee Nation at the time of the 1846 treaty, the case shall proceed to final determination of all other issues involved in said cause.

"IT IS THEREFORE ORDERED that said agreement and stipulation of the parties be, and the same is, hereby approved."

The Commission makes the following findings of fact:

1. (a) The plaintiff, the Cherokee Nation, is an organized tribe of American Indians residing within the territorial limits of the United States, and is recognized by the Secretary of the Interior as having authority to represent such tribe and to represent the Western (Old Settler) Cherokee Indians herein; that the Western or Old Settler Cherokees, who will hereinafter be referred to as Western Cherokees, constitute that part of the Cherokee Nation who moved west of the Mississippi river pursuant to the treaties hereinafter referred to, and occupied territory, first in the State of Arkansas, and finally in what is now the State of Oklahoma.

That the Cherokees who remained on their ancestral lands east of the Mississippi became historically and officially known as the Eastern Cherokees but were sometimes referred to as the Emigrant Cherokees.

(b) The ancestral home of the Cherokee Indians was in the southern states, principally the States of Alabama, Tennessee and Georgia. About the year 1808, a part of the Cherokees then known as "Lower Town" Cherokees became dissatisfied with conditions then existing in the East because of the scarcity of game and desired to move west and continue the hunter life. The other part of the Cherokee Nation were known as the "Upper Town" Cherokees. Because of the unrest of the Lower Town group, a delegation consisting of both the Upper and Lower Town groups was sent to Washington, D. C. to present their problems to the President, resulting in the sending of a delegation of Lower

Town Cherokees to explore the country between the Arkansas and White rivers, west of the Mississippi river, and this delegation having found that territory satisfactory, a treaty was concluded on July 8, 1817, 7 Stat. 156, between the United States and the Cherokee Nation. This treaty will be referred to in Finding No. 2 hereof.

2. To give the so-called Lower Town Cherokees the land selected by them in what is now the State of Arkansas, a treaty was concluded on July 8, 1817, 7 Stat. 156, between the United States, the "chiefs, head men, and warriors, of the Cherokee Nation, east of the Mississippi river," and the "chiefs, head men, and warriors, of the Cherokees on the Arkansas river." By this treaty the "whole Cherokee Nation" ceded to the United States certain tracts of land lying east of the Mississippi river in exchange for the Arkansas land, which was ceded to "that part of the Cherokee Nation on the Arkansas" by Article 5 of the treaty, which reads as follows:

The United States bind themselves, in exchange for the lands ceded in the first and second articles hereof, to give to that part of the Cherokee Nation on the Arkansas as much land on said river and White river as they have or may hereafter receive from the Cherokee Nation east of the Mississippi, acre for acre, as the just proportion due that part of the nation on the Arkansas agreeably to their numbers; which is to commence on the north side of the Arkansas river, at the mouth of Point Remove or Budwell's Old Place; thence, by a straight line, northwardly, to strike Chataunga mountain, or the hill first above Shield's Ferry on White river, running up and between said rivers for complement, the banks of which rivers to be the lines; and to have the above line, from the point of beginning to the point on White river, run and marked, which shall be done soon after the ratification of this treaty; and all citizens of the United States, except Mrs. P. Lovely, who is to remain where she lives during life, removed from within the bounds as above named. And it is further stipulated,

that the treaties heretofore between the Cherokee Nation and the United States are to continue in full force with both parts of the nation, and both parts thereof entitled to all the immunities and privilege which the old nation enjoyed under the aforesaid treaties; the United States reserving the right of establishing factories, a military post, and roads, within the boundaries above defined.

The Cherokees who moved west became historically and officially known as the Western or Old Settler Cherokees, and will herein be referred to as Western Cherokees.

3. The 1817 treaty required the Cherokee Nation to cede land east of the Mississippi river equal in quantity to that given by defendant to the Cherokees on the Arkansas river agreeably to the number of Cherokees locating in the west. To determine the number of Indians moving to and locating in the west, and in order to make a division of the national annuities a census was provided for in Articles 3 and 4 thereof. In order to avoid the delay, trouble and expense of taking the census and to finally adjust the claim for additional land, the Cherokee Nation of Indians concluded a treaty on February 27, 1819, 7 Stat. 195, by which it is ceded to the United States additional land in the east which was accepted as a final adjustment of the treaty of 1817. (See article 1 of the 1819 treaty). Said 1819 treaty also contained the following provisions:

"Art. 6. The contracting parties agree that the annuity to the Cherokee nation shall be paid, two-thirds to the Cherokees east of the Mississippi, and one-third to the Cherokees west of that river, as it is estimated that those who have emigrated, and who have enrolled for emigration, constitute one-third of the whole nation; but if the Cherokees west of the Mississippi object to this

distribution, of which due notice shall be given them, before the expiration of one year after the ratification of this treaty, then the census, solely for distributing the annuity, shall be taken at such times, and in such manner, as the President of the United States may designate.

4. Owing to the settlement of white people in the Arkansas territory, and the encroachment upon their land by whites, the Cherokees on the Arkansas became dissatisfied with the Arkansas location and desired to move farther west, so a treaty was made with the Western Cherokees alone on May 6, 1828, 7 Stat. 311, by which they ceded their Arkansas lands to the United States and received therefor 7,000,000 acres of land in what is now Oklahoma State, plus a perpetual outlet west as far as the sovereignty of the United States extends.

The preamble of the treaty reads in part as follows:

"WHEREAS, it being the anxious desire of the Government of the United States to secure to the Cherokee nation of Indians, as well those now living within the limits of the Territory of Arkansas, as those of their friends and brothers who reside in States East of the Mississippi, and who may wish to join their brothers of the West, a permanent home, and which shall, under the most solemn guarantee of the United States, be, and remain, theirs forever—a home that shall never, in all future time, be embarrassed by having extended around it the lines, or placed over it the jurisdiction of a Territory or State, nor be pressed upon by the extension, in any way, of any of the limits of any existing Territory or State; * * * ."

Article 2 of the treaty is as follows:

"The United States agree to possess the Cherokees, and to guarantee it to them forever, and that guarantee is hereby solemnly pledged, of seven millions of acres of land, to be bounded as follows, (description of land omitted because it was corrected by the treaty of 1833). * * * In addition to the seven millions of acres thus provided for, and bounded, the United States further guarantee to the Cherokee Nation a

perpetual outlet, West, and a free and unmolested use of all the country lying west of the Western boundary of the above described limits, and as far West as the sovereignty of the United States, and their right of soil extend."

Said treaty also contained the following provisions:

"Art. 8. The Cherokee Nation, West of the Mississippi having, by this agreement, freed themselves from the harassing and ruinous effects consequent upon a location amidst a white population, and secured to themselves and their posterity, under the solemn sanction of the guarantee of the United States, as contained in this agreement, a large extent of unembarrassed country; and that their brothers yet remaining in the States may be induced to join them and enjoy the repose and blessings of such a State in the future, it is further agreed, on the part of the United States, that to each Head of a Cherokee family now residing within the chartered limits of Georgia, or of either of the States, East of the Mississippi, who may desire to remove West, shall be given, on enrolling himself for emigration, a good Rifle, a Blanket, and Kettle, and five pounds of Tobacco; (and to each member of his family one Blanket,) also, a just compensation for the property he may abandon, to be assessed by persons to be appointed by the President of the United States. The cost of the emigration of all such shall also be borne by the United States, and good and suitable ways opened, and provisions procured for their comfort, accommodation, and support, by the way, and provisions for twelve months after their arrival at the Agency; and to each person, or head of a family, if he take along with him four persons, shall be paid immediately on his arriving at the Agency and reporting himself and his family or followers, as emigrants and permanent settlers, in addition to the above, provided he and they shall have emigrated from within the Chartered limits of the State of Georgia, the sum of fifty dollars, and this sum in proportion to any greater or less number that may accompany him from within the aforesaid Chartered limits of the State of Georgia.

4.(a) About three years after this treaty and on December 23, 1831 (Def. Ex. 1), the Chief of the Western Cherokees, wrote the Principal and Second Chiefs of the Eastern Cherokees a letter containing this statement:

"The country secured by the treaty of 1828, is considered the joint property of the Cherokees both east and west; and the first wish of my heart is to see all the Cherokees united as one people; and whenever you and your people should become disposed to join us in the west, and partake of our exemption from the troubles we left behind, you will find a hearty welcome awaiting your arrival."

5. Following the 1828 treaty it was discovered that the lands ceded to the Cherokees by that treaty conflicted with lands to which the Creek nation was entitled; the Western Cherokees and the Creeks made a voluntary settlement of their boundary conflicts and the United States and the Western Cherokees concluded a supplementary treaty on February 14, 1833, 7 Stat. 414, in which the new boundaries of the 1828 cession were described in and fixed in Article I thereof, which reads as follows:

"The United States agree to possess the Cherokees, and to guarantee it to them forever, and that guarantee, is hereby pledged, of seven millions of acres of land, to be bounded as follows viz: Beginning at a point on the old western territorial line of Arkansas Territory, being twenty-five miles north from the point, where the Territorial line crosses Arkansas river—thence running from said north point, south, on the said Territorial line, to the place where said Territorial line crosses the Verdigris river—thence down said Verdigris river, to the Arkansas river—thence down said Arkansas to a point, where a stone is placed opposite to the east or lower bank of Grand river at its junction with the Arkansas—thence running south, forty-four degrees west, one mile—thence in a straight line to a point four miles northerly from the mouth of the north fork of the Canadian—thence along the said four miles line to the Canadian—thence down the Canadian to the Arkansas—thence, down the Arkansas, to that point on the Arkansas, where the Eastern Choctaw boundary strikes, said river; and running thence with the western line of Arkansas Territory as now defined, to the southwest corner of Missouri—thence along the western Missouri line, to the land assigned the Senecas; thence, on the south line of the Senecas to Grand river; thence, up said Grand river, as far as the south line of the Osage reservation, extended if necessary—thence up and between said south Osage line, extended west if necessary and a line drawn due west, from the point of beginning, to a certain distance

west, at which, a line running north and south, from said Osage line, to said dus west line, will make seven millions of acres within the whole described boundaries. In addition to the seven millions of acres of land, thus provided for, and bounded, the United States, further guarantee to the Cherokee nation, a perpetual outlet west and a free and unmolested use of all the country lying west, of the western boundary of said seven millions of acres, as far west as the sovereignty of the United States and their right of soil extend—Provided however, that if the saline, or salt plain, on the great western prairie, shall fall within said limits prescribed for said outlet, the right is reserved to the United States to permit other tribes of red men, to get salt on said plain in common with the Cherokees—and letters patent shall be issued by the United States as soon as practicable for the land hereby guaranteed."

The lands described in said Article I are those involved in this action.

6. On December 29, 1835, 7 Stat. 478, a treaty was made at New Echota, Georgia, between the United States and the "Chiefs Head Men and People of the Cherokee tribe of Indians." By this treaty all lands of the Cherokees lying east of the Mississippi river were ceded to the United States for a consideration of \$5,000,000. This amount was increased by \$600,000 in the supplementary treaty of March 1, 1836, 7 Stat. 488.

The United States in the 1835 treaty conveyed to the Cherokee Nation 800,000 acres west of the Mississippi river for a consideration of \$500,000. This land was an addition to the lands then held by the Cherokees in Oklahoma. The Cherokees were to move west within two years.

On December 31, 1838, defendant issued a patent to the Cherokee Nation for all the lands described in the 1833 treaty, including the

outlet, and the 800,000 acres, being in all 14,374,135.14 acres, reciting therein it was made pursuant to the treaties of 1828, 1833 and 1835.

The Western Cherokees were not a party to the 1835 treaty, but two days after it was executed two persons, James Rogers and John Smith, purporting to be delegates from the Western Cherokees, signed a statement at the end of which they urged the Eastern Cherokees to join the Western group; they also agreed to the treaty, 7 Stat. 487. And thereafter, and on August 23, 1836, just three months after the proclamation thereof, the principal chief of the Western Cherokees, two members of the Executive Council and seven other members of the tribe addressed a letter to the Eastern Cherokees urging the union of the whole Cherokee Nation in the west. (Def. Ex. 2).

7. At the time of the 1835 treaty, some 2000 of the Eastern Cherokees were in favor of the treaty and became known as the "treaty party," and were recognized as such in the treaty of 1846. It was vigorously contended by the Cherokees, east and those west that the 1835 treaty was not the treaty of the nation since those who executed it were not authorized by either the Eastern or Western Cherokees.

The removal of the Eastern Cherokees to the west brought about violent disturbances between the Indians, and this situation continued for many years during which time measures were taken to bring order to the chaotic conditions resulting from the removal, generally forced removal, of the Eastern Cherokees to the lands occupied by the Western Cherokees.

8. On June 24, 1846, a delegation representing the Government, Treaty and Settlers, parties of the Cherokee Nation requested the President to appoint a Commission to settle all matters in controversy among the Cherokee people, and they agreed to abide by any award the Commission might make and to execute such instrument or treaty as might be deemed necessary to carry out such award. On the same day a delegation of "Western Cherokees or Old Settlers" made two similar requests and pledges to be bound by the award of the Commission. Def. Exs. 7 and 8.

9. Pursuant to the Indians' request, the President appointed a Commission composed of three persons who heard the claims of all factions of the Cherokee Nation, including the land claim of the Western Cherokees here asserted, and with respect to that concluded (p. 32 of Def. Ex. 11) as follows:

"That, under the provisions of the treaty of 1828, as well as in conformity with the general policy of the Government of the United States in relation to the removal of the Indian Tribes, and the Cherokee Nation in particular, the Western Cherokees have no exclusive title to the territory ceded by that treaty, but that the same was intended for the use of and to be a home for, the whole Cherokee Nation, including that portion east, as that portion west of the Mississippi river."

10. In accordance with said Commission's conclusions and award and the consent and pledge of the Western Cherokees, as set forth in Finding 8 hereof, they, together with the Cherokee Nation (then known or referred to as the Government Party), the Treaty Party, and the United States, on the 6th day of August, 1846, 9 Stat. 871, concluded a treaty containing the following provisions:

"Article 1. That the lands now occupied by the Cherokee Nation shall be secured to the whole Cherokee people for their common use and benefit; and a patent shall be issued for the same, including the eight hundred thousand acres purchased, together with the outlet west, promised by the United States, in conformity with the provisions relating thereto, contained in the third article of the treaty of 1835, * * * .

"Article 4. And whereas it has been decided by the board of commissioners recently appointed by the President of the United States to examine and adjust the claims and difficulties existing against and between the Cherokee people and the United States, as well as between the Cherokees themselves, that under the provisions of the treaty of 1828, as well as in conformity with the general policy of the United States in relation to the Indian tribes, and the Cherokee Nation in particular, that that portion of the Cherokee people known as the "Old Settlers," or "Western Cherokees," had no exclusive title to the territory ceded in that treaty, but that the same was intended for the use of, and to be the home for, the whole nation, including as well that portion then east as that portion then west of the Mississippi; and whereas the said board of commissioners further decided that, inasmuch as the territory before mentioned became the common property of the whole Cherokee Nation by the operation of the treaty of 1828, the Cherokees then west of the Mississippi, by the equitable operation of the same treaty, acquired a common interest in the lands occupied by the Cherokees east of the Mississippi river, as well as in those occupied by themselves west of that river, which interest should have been provided for in the treaty of 1835, but which was not, except in so far as they, as a constituent portion of the nation, retained, in proportion to their numbers, a common interest in the country west of the Mississippi, and in the general funds of the nation; and therefore they have an equitable claim upon the United States for the value of that interest, whatever it may be. * * *

"In the consideration of the foregoing stipulation on the part of the United States, the "Western Cherokees," or "Old Settlers," hereby release and quit-claim to the United States all right, title, interest, or claim they may have to a common property in the Cherokee lands east of the Mississippi River, and to exclusive ownership to the lands ceded to them by the treaty of 1833 west of the Mississippi, including the outlet west, consenting and agreeing that the said lands, together with the eight hundred thousand acres ceded to the Cherokees by the treaty of 1835, shall be and remain the common property of the whole Cherokee people, themselves included.

"Article 13. This treaty, after the same shall be ratified by the President and Senate of the United States, shall be

obligatory on the contracting parties.

This treaty was ratified on August 8, 1846, and thereafter proclaimed on August 17, 1846.

EDGAR E. WITT
Chief Commissioner

MOIS J. O'MARR
Associate Commissioner

W. M. HOLT
Associate Commissioner

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