

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 Pierce, Houston B. Tehee,
and Demmis Bushyhead,
Attorneys for Plaintiffs.

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

OPINION OF THE COMMISSION

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

The claim here presented is by the Cherokee Nation of Indians for and on behalf of that part of the Cherokee Nation who emigrated from east of the Mississippi river to Arkansas and became known as the Western or Old Settler Cherokee Indians. This segment of the Cherokee Nation will hereafter be referred to as the Western Cherokees. (Paragraph 1 of Statement).

The claim was originally presented by "The Western (Old Settler) Cherokee Indians on the relation of" six individual descendants of Western Cherokees, but by amendment of the petition shortly before August 13, 1951, the claimant was changed to that mentioned above. (Par. 1 of Statement).

The plaintiffs seek to recover for the Western Cherokees the value of two-thirds of 13,574,135.14 acres of land located in the State of Oklahoma, which they allege the Western Cherokees exclusively owned and for which they received an unconscionable consideration under the treaty of August 6, 1846, 9 Stat. 871. (Par. 2 of Statement).

It may here be stated that on July 9, 1951, plaintiffs filed their motion to amend their petition by striking out the last sentence beginning with the word "That," at the bottom of page 20, and all of pages 21 and 22, and inserting in place thereof the typewritten allegations attached to the petition. So by said amendments the allegations of fraud, that is, duress and oppression, were eliminated from the petition and the claim is to be determined on the ground that the compensation or consideration the Western Cherokees received for their alleged deprivation of two-thirds of their land was unconscionable. (See also pp. 3-4 of Transcript of hearing of July 12, 1951). The above amendments were made pursuant to an order of the Commission dated July 12, 1951. (Par. 3 of Statement).

Since the right of the plaintiffs to recover in this case depends primarily upon the exclusive rights of the Western Cherokees in the

lands involved at the time of the 1846 treaty, the parties, after the evidence was closed, and the petition amended, through their respective counsel, appeared before the Commission in open hearing on the 11th day of October, 1951, and orally agreed 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."

And by order of the Commission made and entered on October 11, 1951, which order included the above stipulation, the Commission approved such stipulation of the parties. Accordingly, and pursuant to the stipulation, the Commission will now consider and determine the question whether the Western Cherokees had exclusive rights to the territory involved in the 1846 treaty. (Par. 3 of Statement).

A brief review of the history of the Cherokee Nation and the Western Cherokees may be helpful in understanding the claim here

presented. Originally the Cherokee Indians were located in the southern states, principally in the States of Alabama, Tennessee and Georgia. About the year 1808 a part of the Cherokees desired to move west of the Mississippi river (these Indians were then known as Lower Town Cherokees) and continue the hunter life since game where they lived had become scarce. Another part of the Indians, then known as the Upper Town Cherokees, wished to remain where they were and "engage in the pursuits of agriculture and a civilized life." So in 1808 deputations of the Upper and Lower Town Cherokees, authorized by the Cherokee Nation, went to Washington, D. C., to discuss their problems with the President, with the result that a delegation of Lower Town Cherokees went west to explore the country in Arkansas, between the Arkansas and White rivers, and that territory being acceptable to those Indians, a treaty was concluded on July 8, 1817, 7 Stat. 156, between the United States and "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 certain described tracts of their land east of the Mississippi river in exchange for the lands west of that river, located between the White and Arkansas rivers in what is now the State of Arkansas. (This cession is shown as tract 143, Arkansas 2, Royce's Indian Land Cession). These Indians who moved west became historically and officially known as the Western or Old Settler Cherokees. By Article 5 of said treaty,

as is shown by Finding 2, the lands in the west were given "to that part of the Cherokee Nation on the Arkansas," that is, to those Western Cherokees who had moved to the territory between the Arkansas and White rivers. Thus, the Western Cherokees located in the west and established themselves in Arkansas on lands allocated them by said treaty. The claim here made grows out of the subsequent transactions between the Western Cherokees and the United States, which will now be reviewed. As to the cession of Cherokee lands east of the Mississippi river for those west, the plaintiffs in their brief claim that those eastern lands were those to which the Western Cherokees were entitled, but there is no proof to sustain that claim. They were lands belonging to the whole Cherokee Nation.

The next treaty was concluded on February 27, 1819, 7 Stat. 195. This treaty was between the United States and that part of the Cherokee Nation remaining in their ancestral homes east of the Mississippi river. The objects to be accomplished by this treaty were to settle without the delay and expense of taking the census required by Articles 3 and 4 of the 1817 treaty, the division of the national annuities and a final adjustment of land which the United States might be entitled to under the 1817 treaty, which required the Cherokee Nation to surrender lands in the east agreeably to the number of Cherokees moving west or declaring their intention to move west. (Finding 3). So by the 1819 treaty more lands were ceded as "in full satisfaction of all claims which the United States have on them (the Cherokee Nation), on account

