

BEFORE THE INDIAN CLAIMS COMMISSION

CHEROKEE FREEDMEN, and CHEROKEE
FREEDMEN'S ASSOCIATION, ex rel
EDWARD CURLS, RUTH CLAGGATT,
JACKSON SMITH, GLADYS LANNAGAN,
and WILBERT ROGERS,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

Docket No. 123

Decided September 9, 1952.

Appearances:

Walter H. Maloney, with whom was
James N. Beery,
Attorneys for Plaintiffs

Ralph H. Barney, with whom was
Mr. Acting Assistant Attorney General
Ralph J. Inttrel,
Attorneys for Defendant

MEMORANDUM OPINION ON DEFENDANT'S MOTION TO DISMISS

PER CURIAM. This matter comes before the Commission on a motion of the defendant, filed herein on January 25, 1952, to dismiss the petition on three grounds. Two of said grounds are (1) that the plaintiffs are not a "tribe, band or other identifiable group of American Indians"; and (2) that the claims asserted are individual and not group claims, hence, this Commission has no jurisdiction to entertain the claim set forth in the petition.

First, it may be stated that the motion is based entirely upon

the allegations of fact set forth in the petition, at least insofar as the above grounds are concerned.

The claim is asserted by the Cherokee Freedmen, Cherokee Freedmen's Association, and five named individuals who, it is alleged, are Cherokee Freedmen and make claim for themselves and all Cherokee Freedmen for the value of properties and money of the Cherokee Nation wrongfully withheld from the Cherokee Freedmen.

It is alleged in the petition that Article 9 of the treaty of July 19, 1866, between the Cherokee Nation of Indians and the United States, provides:

They further agree that all freedmen who have been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the country at the commencement of the rebellion and are now residents therein, or who may return within six months, and their descendants, shall have all the rights of native Cherokees.

And that the Freedmen referred to in the treaty were adopted by the amended Constitution of the Cherokee Nation and have been continuously thereafter recognized by the United States Government and by statute as Cherokee Freedmen, and that they and their descendants were by said treaty and Constitution given equal rights as citizens and equal interest in the property of the Cherokee Nation and all rights of the Cherokee Indians by blood.

It is further alleged that rolls of the Cherokee Freedmen were made at various times pursuant to the treaty, statutes, decree of court, etc., so those who constitute such group can be identified. And in paragraph 15 of the petition it is alleged:

Plaintiffs allege that the Commission to the Five Civilized Tribes and the Secretary of Interior, as agents and representatives of the Defendant, entered upon their duties prescribed by Congress, but in violation of the trust imposed upon them they wholly disregarded their powers, obligations and duties; assumed authority not given to them, and so administered said trust as to result in discrimination, misrepresentation, duress, collusion and fraud as against these plaintiffs and their ancestors; that they wrongfully, fraudulently and unlawfully refused to accept and consider the membership rolls of the Freedmen theretofore authorized by Congress, and Opinion of the Court of Claims February 3, 1896 supra), which were approved and confirmed by the Tribe and the Secretary of the Interior, and reconfirmed by Congress; that without notice or warning, they illegally and without authority entirely eliminated Cherokee Freedmen from the tribal rolls or refused to accept their applications for allotments of lands and payments of money to which they were lawfully entitled; that they arbitrarily and without notice or authority and without regard to the rights of the Freedmen, set up their own plan of distributing or allotting the lands belonging to the Cherokee Nation in which these plaintiffs and their ancestors were entitled to participate as lawful members of the Tribe. As a result of the aforesaid acts, misdeeds and improper and illegal conduct of Defendant's agents and representatives, plaintiffs and their ancestors were deprived of their property, and the lawful right to participate in the property of the Cherokee Indian Tribe, for all of which Defendant should account to Plaintiffs.

And in paragraph 16 of the petition it is alleged that, as a result of the unlawful and fraudulent acts of defendant and its agents and representatives, as alleged, that with the exception of a favored few Cherokee Freedmen, plaintiffs suffered loss of property and money of the Cherokee Nation to which they were entitled.

We believe, therefore, that insofar as the allegations in the pleading are concerned, the plaintiffs have shown themselves to be a group entitled to maintain the claim under the ruling of the Court of Claims in McGhee, et al v. Creek Nation and United States, 121 C. Cls. _____, decided May 6, 1952. Whether the claim is individual or common can only be determined by proof upon a hearing of evidence which of course is not before

the Commission. The plaintiffs must, of course, prove that they have a common claim.

The third ground for dismissal is: The Commission lacks jurisdiction in that the attorney had not and has not authority to file the petition herein or to appear herein because his contract has not been approved by the Commissioner of Indian Affairs.

The facts are, as shown by the records in the custody of the Clerk of this Commission, that the claim of the plaintiffs was filed herein by Walter H. Maloney, attorney, on June 13, 1951, and at the same time the said attorney filed copies of two contracts, duly executed, dated October 4, 1949, by which he was employed by the Cherokee Freedmen's Association. In some respects there are substantial differences between the two contracts, however, it fairly appears from the contracts and the resolutions of the Cherokee Freedmen's Association attached thereto, that said Walter H. Maloney was employed, as an attorney, to prosecute claims before this Commission of the group of colored persons who by virtue of the provisions of the treaty of July 19, 1866 (14 Stat. 799) and the provisions of the Constitution of the Cherokee Nation became members and citizens of said Nation. This group became historically and officially known as the Cherokee Freedmen.

The Cherokee Freedmen's Association, "consisting of the legal members of the original Cherokee Nation of Indians and their descendants and colored persons and their descendants, as better described in Article 9 of the treaty by and between the United States, and the Cherokee Nation of Indians, dated July 19, 1866" (as described in one of the contracts)

is, as it fairly appears from the above and by the statements signed by three representatives of said association attached to said contracts, dated May 29, 1951, an organization of Cherokee Freedmen created for the purpose, among others, to handle the prosecution of claims of the Cherokee Freedmen against the United States before this Commission. While such association appears as one of the party plaintiffs, we do not consider that fact important because there are other parties, namely, the Cherokee Freedmen (which is a name descriptive of the group of colored people who became part of the Cherokee Nation, referred to above) and five individual plaintiffs who are so-called Cherokee Freedmen and sue in a representative capacity. There is certainly no allegation in the petition showing that the Cherokee Freedmen's Association has any claim, so that name, as a party plaintiff may be considered as surplusage, but this does not mean it may not act as agent or representative for the Cherokee Freedmen in the handling and prosecution of this claim. Since there is nothing to show otherwise, we presume it was and is so acting and, that being so, it may employ legal counsel for that purpose, but the contracts therefor must be in writing and approved by the Commissioner of Indian Affairs. (25 U.S.C.A. 70(n); 25 U.S.C.A. 81, R. S. 2103).

The contracts for legal services are, as we have stated above, different in some respects and are not in many ways like other contracts for such services approved by the Commissioner of Indian Affairs, but irrespective of that, a contract such as those above is void unless approved by the Commissioner of Indian Affairs (the authority of the Secretary of the Interior having been delegated to the Commissioner of

Indian Affairs) as required by Sec. 81, 25 U.S.C.A. (R. S. sec. 2103). See Pueblo of Santa Rosa v. Fall, 273 U. S. 315. And under the ruling in that case this claim could be dismissed, since it has been shown that no such approval has been obtained, as is required by Section 15 of the Indian Claims Commission Act and 25 U.S.C.A. 81.

Were we permitted to dismiss this claim without prejudice, we believe we would be required to do so under the Santa Rosa case, supra, but a dismissal now, because the time limit for receiving claims has long since expired, might deprive the plaintiffs of the right to again submit their claim. We, therefore, feel justified in reserving action on the motion relating to the attorney's contract until December 31, 1952, in order that an approved attorney's contract may be obtained.

We note that the sole reason advanced by the Commissioner of Indian Affairs (letter of June 20, 1951, attached to defendant's motion) for not approving the attorney's contract is that the Cherokee Freedmen are not an Indian tribal entity, that is, the Cherokee Freedmen is not a tribe, band or identifiable group of American Indians. In view of the fact that we are overruling defendant's motion on the other grounds, both of which involve their capacity to sue, the plaintiffs may see fit to again submit a contract to the Commissioner of Indian Affairs for his consideration.

It follows that defendant's motion must be overruled as to the first and second grounds and the ruling on the third ground reserved until after December 31, 1952.