BEFORE THE INDIAN CLAIMS COMMISSION

THE TEXAS-CHEROKEES, and ASSOCIATE BANDS, on the relation of W. W. Keeler, Homer L. Smith, Frank M. Carr, Paul Johnson and Joe Rogers, members of its Executive Committee,	)	
Plaintiffs,	)	
v.	)	Docket No. 26
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

Decided: December 28, 1953

Appearances:

Wilfred Hearn, Harley Van Cleave, Raymon B. Thomas, John T. Harley, George E. Norvell, Earl Boyd Pierce, Houston B. Tehee, Dennis Bushyhead, and Paul M. Niebell,
Attorneys for Plaintiffs,

Ralph A. Barney, with whom was Mr. Acting Assistant Attorney General J. Edward Williams,
Attorneys for Defendant.

OPINION OF THE COMMISSION

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

The petition herein purports to state a claim on behalf of a group of Indians who syle themselves "The Texas-Cherokees and Associate Bands." The claim asserted is for the value of 1,640,000 acres of land located in the present State of Texas. The value of the land

is alleged to be $5,000,000 and the claim is for that amount, plus interest thereon at the rate of five per centum per annum from January 1, 1840, or the value of the use of said lands since said date.

On August 29, 1949, the Commission made an order directing that there first be determined whether the plaintiffs are entitled to sue and that such issue be raised by a formal pleading. Thereafter, defendant filed its answer and hearings were had on that limited issued at which hearings evidence was offered by both parties, briefs were filed and the case was submitted on the briefs on that issue, but before determining that issue the Commission concluded that the question of capacity to sue should be joined with the issue of the plaintiffs' right to recover and on December 27, 1951 entered its order directing that the two issued be presented. This was done and the case argued before the Commission on October 26, 1953.

The facts as pleaded and submitted are relatively simple. The Cherokee Nation was originally located east of the Mississippi River, and long prior to 1811 a group of the Cherokees, under the leadership of John Bowles, an Indian chief, migrated to the St. Francis River country in southeast Missouri and about the winter of 1811-12 this part of the Cherokees moved to Arkansas territory and located in the vicinity of Petit Jean Creek on the south side of the Arkansas River and outside the territory ceded to the Cherokee Nation in exchange for lands east of the Mississippi River. Treaty of July 8, 1817, 7 Stat. 156.

During the winter of 1819-20 the Bowles group, consisting of some 60 Cherokee families, emigrated to a place on the Sabine River, in what was then the Province of Texas in Spanish territory, on lands alleged to have been promised them by the Dominion of Spain. The original group was augmented from time to time by other Cherokees and refugees from about a dozen other tribes located in the United States, but the Cherokees constituted the largest part of the group and Bowles -- known to the whites as Colonel Bowles -- was regarded as chief of them all. There appears to have been some negotiations with the Spanish authorities and it is claimed the Indians settled on lands promised them by the representatives of Spain, however, the Mexican revolution started soon after the Indians located in Spanish territory and the Indians, through their representative, Richard Fields, started negotiations for lands with the Mexican authorities. Fields first wrote a letter to the Acalde (Mayor) of Nacogdoches on February 1, 1822, to the effect that the Indians claimed they had grants given them when they lived under the Spanish government and he wanted to know whether the grants would "be reversed or not," and signed the letter "as a chief of the Cherokee Nation." Pl Ex. 1, p. 55

The Fields letter was referred to the Governor of the Province of Texas and a delegation of Cherokee went to Bexar, and on November 8, 1822, "Captain Richard Fields of the Cherokee Nation" concluded an agreement with the Governor of the Province of Texas which authorized Fields and five others of his tribe and two interpreters to "proceed to Mexico, to treat with his Imperial Majesty, relative to the settlement which said

chief wishes to make for those of his tribe who are already in the territory of Texas, and also for those who are in the United States." Richard Fields was one of the signers of the agreement and it was recited therein that it was executed in the presence of twenty-two Cherokee Indians of the Baron de Bastrop. Pl. Ex. 1.

Fields certainly represented the Cherokee Indians and Bowles was later their representative in negotiating for lands with the Provisional Government of Texas.

After the secession of Texas from Mexico and on November 13, 1835, the delegates of the Provisional Government of Texas recognized the Indians as a tribe or band, for in the Declaration of November 13, 1835, the "delegates of the Consultation of the people of all Texas" referred to them as the "Cherokee Indians, and their associate bands, twelve in number, agreeable to their last general council in Texas." Pl. Ex. 1, pp. 72-74. And in the appointment of Commissioners and their instructions for treating with the Indians, required by the Declaration, they were similarly referred to and recognized. Pl. Ex. 1, pp. 76-79. Also, in the treaty of February 23, 1836 (Pl. Ex. 1, pp. 80-82), they were dealt with as the "Cherokees and their associate bands now residing in Texas, on the other part, to-wit: Shawnees, Delawares, Kickapoos, Quopaws, Choctaws, Bolupies, Jawanies, Alabomas, Cochaties, Caddoes of the Noches, Tahov-cattokes, and Unatuquouous, by the head chiefs and head men and warriors of the Cherokees, as elder brothers and representatives of all other bands, agreeable to their last council." And in the body of the treaty they are referred to as tribes and bands.

In defendant's Exhibit 2 it is stated that the Cherokees and their associated bands, consisting of the bands named in the above treaty, formed together a loose confederacy, and that Bowles was regarded as their chief and principal man of them all.

Thus we find that a group of Cherokees under the leadership of their chief located in Texas were joined by other Cherokees and members of a number of other tribes, forming a loose confederacy, occupying a more or less defined territory, holding general councils, and acting through chiefs, head men and warriors. According to Emmet Starr, noted historian, the Cherokees were a separate and independent government and were so treated in the Declaration of the Provisional Government of Texas, referred to above. Pl. Ex. 1, p. 111.

The above undisputed facts show that while in Texas the plaintiffs lived and functioned in the usual Indian manner as an organized band or tribe, and were recognized as such by the Mexican, Texas Provisional and Republic of Texas governments until they were expelled by the latter in 1839-40. This confederacy was there known, apparently, as the "Texas-Cherokees and Associate Bands" for the Declaration of November 13, 1835, by the Provisional Government of Texas was directed to them, and they were so named in caption of the Texas treaty of 1836. Par. 25-26 of Petition.

The Bowles group of Cherokees left Arkansas voluntarily and emigrated to the Province of Texas, and it appears without contradiction, that they and the Indians who joined them in Texas intended to remain there

permanently. They lived there twenty years and throughout the entire period pressed their land claims with three successive foreign governments, and strenuously resisted their removal by the Texas armed forces, and were only expelled after bloody resistance and suffering the loss of their chief, John Bowles. Pl. Ex. 1, pp. 103-106. There is no evidence that the defendant ever sought their return prior to their expulsion, although we find that on May 30, 1839, a letter of instructions from the Secretary of State of the Republic of Texas to its Minister in Washington was written directing the Minister to inform the United States of its intention to expel the Indians from Texas and suggesting that the United States restrain them from returning, invoking the provisions of Article 33 of the treaty between Mexico and the United States of April 5, 1831. Pl. Ex. 1, pp. 96-101. In this letter appears this statement:

> "If, in the progress of your correspondence it shall be assumed as has been suggested by the Charge de Affairs here, that the government of the United States is not bound to receive or to restrain those Indians and the ill-advised treaty partially made with them on the 23d day of February, 1836, * * * be alleged in support of their position, you can present * *."

This indicates that our government recognized no obligations respecting plaintiffs and did not look with favor upon their return to the United States.

The only proof that any official of this government was interested in the return of the Texas-Cherokees was the letter April 28, 1840 (Def. Ex. 6) from General Arbuckle, U.S.A., to the President of Texas, in which he conveyed the "desire" of the "Cherokee Council assembled

at this Post (Fort Gibson) of late" that all of their people then in Texas be immediately returned to their nation, including the prisoners held in Texas. It will be noticed that the writer of the letter made it very clear he was simply conveying the desire of the Cherokee Council and not a request or demand of the United States. As a result of General Arbuckle's letter the Cherokee Indians then remaining in Texas seem to have returned to the United States and were furnished rations (Def. Exs. 5, 7 and 8), at the request of the Cherokee Council in the United States.

In addition to the evidence above stated respecting the organization of the Texas-Cherokees and Associat Bands, plaintiffs have offered evidence to the effect that after their removal from Texas the Cherokees at least returned to the tribe and became a part thereof and were officially enrolled as members of the Cherokee Nation without in any way separating or distinguishing them from other enrollees. The testimony of the witnesses is to the effect that efforts by individual Cherokees to have the Texas claim recognized by either Texas or the United States began as early as 1848, and on December 30, 1925, a meeting of the "heirs of the Texas-Cherokees and Affiliated Bands" was held at Miami, Oklahoma, at which meeting the only business conducted was to elect an Executive Committee to represent those Indians in prosecuting a claim against Texas for their lands located in that State. Other such meetings were held at Claremore and Bartlesville, Oklahoma, for the purpose of pressing a claim for the Texas lands. There is no evidence whatever that those who returned from Texas in 1839-40 ever continued or carried on the tribal

or group organization which existed in Texas. The proof is to the effect that those Indians returned to the parent tribes and became officially enrolled members of their parent tribes. All activities in behalf of that group were carried on by an Executive Committee selected originally by the descendents of the members of the Texas group and continued by the remaining committee members filling vacancies therein. We decided in Western Cherokees v. United States (Docket No. 24, Opinion of Sept. 13, 1949) that an organization of Indians created for the purpose of presenting a claim is not a tribal organization as that term is generally understood, so we believe that the activities of the "heirs" of the original Texas group or that of their Executive Committee are of no consequence in creating a tribe, band or identifiable group of American Indians permitted to submit claims under the Indian Claims Commission Act.

The evidence is quite convincing that these Indians ceased to be a political group upon their return to the United States and the United States have never recognized them or had any dealings with them (Def. Exs. 11 and 12) as such or in any way whatever. Whatever tribal or group status the Indians in the Texas Republic had was not continued after their return to the United States and, as we have said, was never recognized by this government, either during their voluntary absence from the United States or after their expulsion from Texas.

RIGHT TO RECOVER

On the question of the plaintiffs' right to recover it is claimed, and evidence has been offered, that the plaintiffs were entitled to

some 1,640,000 acres of land in the present State of Texas, which were taken from them by the Republic of Texas in 1839-40 and that the United States owed the plaintiffs the duty to enforce the plaintiffs' rights against the State of Texas, and its failure to do so is based upon the fiduciary relationship existing between the Indians and this government and the failure of the United States to act fairly and honorably in its dealings with these Indians.

We will not review the evidence concerning plaintiffs' right to land in the State of Texas for, as we look at the claim, plaintiffs cannot recover even if they proved and we found they had valid rights to the land described in the petition.

The case, Wichita Indians et al. v. United States, 89 C. Cls. 378, has a bearing on the question here under consideration. In that case the Indians sued for the value of some 5,200,000 acres of land situate in the State of Texas. It was shown that the Wichita and its affiliated bands had, at the time of the admission of Texas as a state, 1845, and long prior thereto, inhabited the territory when it was under the dominion of Spain, Mexico and the Texas Republic, respectively. In denying liability of the United States for the loss of the lands, the Court of Claims at pages 421-22, said:

> "* * * We think it is clear that this claim cannot be sustained. All public lands within the borders of Texas remained, upon its admission as a state; property of the State of Texas and the government of the United States has never at any time had title to or claimed any public lands in that state. Texas had made certain treaties with the Indian tribes within its borders, but

> we need not discuss those treaties here. When the Indians were removed by the United States from Texas for their own protection and safety, the reservation in that state formerly occupied by them became the property of the State of Texas and the lands within those reservations were added by Texas to its public domain. The citizens of Texas were responsible for the removal of the affiliated bands to Oklahoma, as shown by the annual report of the Commissioner of Indian Affairs, 1859. In these circumstances the United States cannot be held liable to compensate these Indians for the loss of their lands in the State of Texas, in an to which the United States had no right, title, or interest before or after the Indians were compelled to abandon them."

The basis for this decision was that the United States never had or claimed title to the Texas lands occupied by the Wichita; that those lands belonged to Texas at the time of its admission as a state, and so remained after its admission. The same situation exists in the case before us. The plaintiffs do not claim the United States ever owned the area in question. The Wichita case is much stronger than the one before us because, according to the opinion, the Wichita were removed from Texas by the United States. No such factual situation is shown here, in fact, the evidence is that the United States had no part in the removal of the plaintiffs except to permit their return to this country, the country they voluntarily left in 1819-20.

But, the plaintiffs contend, the United States by the Joint Resolution ((March 1, 1845), 5 Stat. 795), admitting Texas to the Union, obligated itself to protect plaintiffs in their claim against Texas and they point to the following provisions of that resolution:

> "and /Texas/ shall also retain all vacant and unappropriated lands lying within its limits, to be applied to the payment of the debts and liabilities of said Republic of Texas, and the residue of said lands, after discharging said debts and liabilities, to be disposed of as said State may direct; but in no event are said debts and liabilities to become a charge upon the Government of the United States."

Beyond question, if plaintiffs had a claim for the loss of their lands against any government it was the Republic of Texas for the evidence is undisputed that it was that nation which expelled the Indians from Texas and retained the lands the Indians now claim they owned. Whether the Indians actually acquired lands in Texas we do not decide.

The action relied upon by the Indians lends no substance to their argument, as reading of the applicable provisions shows. It merely provides that all the vacant and unappropriated lands lying within its boundaries shall be retained by the State and part applied to the payment of the debts of the Republic of Texas. Nothing in the quoted language can be construed as creating an obligation on the part of either government in favor of any creditor of the Republic of Texas and most certainly not the United States, for the resolution expressly provides that in no event shall the debts and liabilities of the Republic of Texas become a charge of the United States.

The next position taken by the Indians is that the United States, because of the fiduciary relationship generally considered to exist between Indians and the government, it should have prosecuted the Indians' claim against Texas under the Resolution of March 1, 1845, quoted above. We have above shown that the United States was under no obligation to

any creditor of the Republic of Texas, nor is there anything in the resolution obligating this government to prosecute any such claim. Moreover, it will be remembered that the plaintiffs voluntarily left this country and became inhabitants of a foreign state with the evident intention of becoming permanent residents thereof, and thus severing their right to the protection of this government. We know of no rule of law or equity which extends the defendant's fiduciary duties to these expatriates relating to transactions they had with foreign governments, and concerning which this government had no part and perhaps no knowledge.

Again, the Indians invoke the provisions of clause (5) of section 2 of the Indian Claims Commission Act, which provides for "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity." The argument advanced is to the effect that in not pressing the Indians' claim under the provisions of the Resolution of March 1, 1845 (the annexation resolution quoted above) defendant "violated the rules of fair and honorable dealings." We have shown above that the defendant was under no fiduciary or legal duty to press such claim under said act, so we do not see how defendant can be charged with having been derelict in its duty to the Indians under clause (5). That clause does not create a new substantive right (Turner v. United States, 248, U.S. 354, 63 L. Ed. 291) but merely permits a recovery of an existing right. See also United States v. Mille Lac Band, 229 U.S. 498, 57 L. Ed. 1299 and Shoshone v. United States, 299 U. S. 476, 81 L. Ed. 360. Accordingly, if the United States did not bind itself by the 1845 Resolution

to prosecute the Indians' claim against the State of Texas, and that State did not consent to be sued therefor, it is plain there is no basis for the claim that the United States acted unfairly or dishonorably in not prosecuting the Indians' claim against the State of Texas, or incurred liability in failing to do so.

The whole argument of the plaintiffs is based upon the premise that the United States was authorized by the 1845 Resolution, which was accepted by the State of Texas, to enforce the plaintiffs' claim against the State. Even if we were to assume (which we do not) that the plaintiffs' claim was a debt or liability of the Republic of Texas, mentioned in the Resolution, there is nothing in the Resolution authorizing a suit against the State by the United States on behalf of the plaintiffs. Moreover, the law is plain that it is exclusively the province of the State of Texas to determine what liabilities of the Republic of Texas it will acknowledge and the courts of the United States have no right to interfere under any power granted them by the Constitution or Acts of Congress. See League v. De Young, 13 L. Ed. 657, 11 How. 184.

Finally, plaintiffs refer to the Act of September 9, 1850, 9 Stat. 446, by which the State of Texas relinquished all claim upon the United States for liability for the debts of Texas, compensation for property passing to the United States at the time of annexation and for cessions of lands claimed by the State outside of the state boundaries established by that Act. For these things the United States delivered to the State of Texas $10,000,000 of its bonds. The argument proceeds on the theory that

the United States should have withheld enough of the settlement to compensate the plaintiffs for their lands in Texas. Just what bearing this transaction had on the claim here asserted is not pointed out, nor do we find anything in the Act even remotely connected with this claim. We cannot believe the contention is seriously made.

We conclude, therefore, that the petition herein must be dismissed.

Edgar E. Witt
Chief Commissioner

Louis J. O'Marr
Associate Commissioner

Wm. M. Holt
Associate Commissioner