. . . BEFORE THE INDIAN CLAIMS COMMISSION

THE CREEK NATION,

Plaintiff

vs.

THE UNITED STATES OF AMERICA,

Defendant.

Docket No. 292

Decided: Feb. 18, 1959

Appearances:

Mr. Paul M. Niebell
Attorney for Plaintiff

Mr. Keith Browne, with whom
was Mr. Assistant Attorney
General, Perry W. Morton,
Attorneys for Defendant

OPINION OF THE COMMISSION

Witt, Chief Commissioner, delivered the opinion of the Commission.

The plaintiff in its original petition asserts that it was the owner of trust and other funds, which said trust and other funds were held in trust by the defendant and paid and administered for the use and benefit of plaintiff, and that it was provided by the treaties between plaintiff and defendant that said trust and other funds were to be managed and invested and otherwise disposed of by defendant for the benefit of plaintiff, said treaties being specifically referred to in later allegations of said petition.

However, in the several claims thereafter in the petition specifically set out, no one of said claims in the opinion of this Commission, is shown to involve trust funds.

The first claim is for $87,309.75 and is described in detail in Sec. IV of plaintiff's petition and in Requested Finding No. 4 of plaintiff's requested findings of fact. Both descriptions of said claim state that same arose under Article II of the Treaty of June 16, 1802 (7 Stat. 68). In the petition it is alleged that defendant's total obligation under said treaty amounted to $320,000.00 and that defendant disbursed $232,690.25 only on said treaty obligation and therefore the amount of $87,309.75 is due and owing to plaintiff from defendant for defendant's failure to fulfill said treaty obligation. In the Requested Finding No. 4 plaintiff requests a finding that the total obligations of the United States under said Article II of said treaty amount to $317,000.00 on which the United States had only disbursed and accounted to the plaintiff for $254,690.25 and that defendant is now due and owing to the Creek Nation a balance of $62,309.75, for which the defendant has failed to account.

Both descriptions of said claim are for indebtedness claimed to have been created on the part of the defendant to the plaintiff by the provisions of the Treaty of June 16, 1802, and not for moneys it had received from or for the plaintiff, the management of which the defendant became trustee.

The next claim for which suit is brought is set out in Sec. V of plaintiff's petition. This claim is based on the provisions of Article III of the Treaty of November 14, 1805 between the Creek Nation and the United States (7 Stat. 96). The plaintiff alleges that said Article III created a total obligation on the part of the

United States to defendant in the amount of $196,000.00 on which the defendant disbursed $169,452.25 only on said treaty obligation, and therefore the amount of $26,547.75 is due and owing to plaintiff for defendant's failure to fulfill said treaty obligation.

This claim is again described in plaintiff's Requested Finding No. 5 in which it is stated that the total obligation under said treaty was $206,000.00 and total disbursements shown by General Accounting Office to be only $169,452.75, although Congress has appropriated the full amount due. And the balance now due and owing by the defendant on said treaty obligation is in the amount of $36,547.75.

The next claim is described in Sec. VI of plaintiff's petition as arising under provisions of the Treaty of March 24, 1832 between the United States and the Creek Nation (7 Stat. 366) which total obligation under said treaty is alleged to be $60,000.00 on which it is alleged the defendant disbursed $49,938.99 only on said treaty obligation and therefore the amount of $10,061.01 is now due and owing. This claim is again described in plaintiff's Finding No. 6 wherein the total obligation under said treaty is stated to be $60,000.00, the total disbursement of the defendant on said obligation as having been only $49,938.99, leaving a balance now due and owing from the United States to the Creek Nation in the amount of $10,061.01 .

The next claim for which suit is brought is described in Sec. VII of plaintiff's petition as arising out of treaty between the United States and the Creek Nation on February 14, 1833 (7 Stat. 417). It is alleged that the total obligation of the United States to the plaintiff under the provisions of said treaty was $119,240.00, on which the

defendant disbursed only $74,290.45, and the defendant is now due and owing to the plaintiff $44,949.55 .

In petitioner's Finding No. 7 the total of said obligation under the above treaty is stated to have been $105,690.00, on which the defendant paid and disbursed to the Creek Nation in fulfillment thereof only the amount of $80,981.45 and that there is a balance now due and owing by the defendant to the plaintiff under said treaty obligation the amount of $24,708.45.

In plaintiff's reply brief (pp.32, 33,)it is alleged that an error had been made in giving the defendant credit for $4,696.00 to which it was not entitled and that the total disbursement to which the defendant was entitled to credit was only $76,285.45 and that plaintiff's claim on said item is the amount of $29,404.55.

In Sec. VIII of the plaintiff's petition a provision of the Treaty of August 7, 1856 (11 Stat. 699) is alleged as creating an obligation on the part of defendant to pay annually an item of $10,000.00 as interest to plaintiff; that said interest became due and owing for the years 1857-61 inclusive in the total amount of $50,000.00 on which obligation the defendant disbursed only $21,000, although Congress appropriated the total of $50,000.00, and [illegible] fore the amount of $29,000.00 is due and owing to plaintiff from defendant because of defendant's failure to fulfill said treaty obligation.

This liability is also described in plaintiff's Requested Finding No. 8 in practically the same language as described in the original petition.

The final prayer of the plaintiff in its original petition reads as follows:

"WHEREFORE, plaintiff prays:

1. That plaintiff be awarded judgment against defendant for the total amounts of said unfulfilled treaty obligations, together with interest at five per centum per annum on said amounts to date."

In plaintiff's last Requested Finding No. 9 in recapitulation the plaintiff asks for this finding:

"Therefore, there is due and owing to the Creek Nation from the United States the following unpaid balance under the above treaty obligations of the United States."

Then follows an itemized statement of the several amounts previously asked for as due and owing aggregating with the added amounts stated in the reply brief in the total amount of $167,923.06.

In plaintiff's Request for Findings of Fact No. 2 the treaty between the Creek Nation and the United States of August 7, 1790 (7 Stat. 35) is quoted the provisions whereby the Creek Nation acknowledges itself to be under the protection of the United States and no other sovereign, etc. and it is requested that this treaty provision be found to have created thereafter a fiduciary relationship between the Creek Nation and the United States as that of guardian and Indian ward. Thereafter in plaintiff's brief (p. 11) in support of the above requested finding, the plaintiff alleges that the claim (meaning all of the claims in the present suit) is for an accounting brought against the United States, "its guardian."

Statement is then made (Brief, p. 2) that the claims presented are "claims under treaty provisions as the General Accounting Report clearly shows were not fulfilled by the United States, and as to

which balances are shown therein to be due and owing from the United States to the Creek Nation." Both parties make many and varying contentions as to the items of charge and credit involved, but we think the disposition of the case, without going into many of the contentions and controversies as to items, is determined by where the burden of proof lies -- that is whether the burden is on the part of the plaintiff to prove a failure to discharge the obligations undertaken by the defendant, or whether the burden is on the defendant to prove that it discharged these obligations and is liable to the plaintiff upon its failure to do so. This question is determinable by whether the defendant stands in relation to the plaintiff as guardian or as trustee of funds belonging to the plaintiff, or whether the relationship is that of debtor and creditor.

As supporting its contention that the relationship is that of guardian and ward, the plaintiff relies on the language of the Treaty of 1790 which is quoted in findings of fact and also in the decisions of the Supreme Court in the Seminole case (316 U.S. 286, 295-297) and that of the Sioux Tribe v. United States (105 C. Cls. 725-802). The language of the Supreme Court case, upon which the plaintiff relies, is language in keeping with that of many other decisions of the Supreme Court and other courts to the effect that there is a duty upon the Government in its dealings with the Indian Tribes of a more exacting nature than with two entities that might be called on a par with each other; but there is nothing in the decision that indicates a change in the burden of proof in such matters as are involved in this

present law suit. The decision of the Supreme Court cited was rendered on May 11, 1942. Some of the funds involved in that case grew out of treaties and obligations of debt created thereby. Others were trust funds.

The language quoted by the plaintiff from that decision was with regard to a claim based on alleged liability for a trust fund, provided by Article VIII of a Treaty of 1856 (11 Stat. 699), which fund was to be invested and managed for the plaintiff by the Government. At a later date (Nov. 5, 1945) the Supreme Court held by refusing Writ of Certiorari that a mere indebtedness of the Government to an Indian Tribe was not a trust fund.

We refer to the case of the Chickasaw Indians against the United States (in which, by the way, Mr. Paul M. Niebell, who is counsel in this case, was counsel therein) reported in 103 C.Cls. 1-57, as to which the Supreme Court on November 5, 1945 denied certiorari as to the judgment on the merits. This case involves, among other claims, plain and simple treaty obligations of the United States to the plaintiff Indians, as to which the plaintiff claimed nonpayment and non-fulfillment. As in the case at bar the evidence upon which the plaintiff relied for the nonfulfillment of the obligations, and its right to recover therefor, was a failure of the defendant to prove compliance and fulfillment. In many instances there was a showing of merchandise due and owing by the defendant to the plaintiff, and by the defendant, merely a memorandum of purchase for the plaintiff, but no showing of actual

delivery to the plaintiff. There being no proof on the part of the plaintiff that it did not get the goods and value. The plaintiff therein contended, as in the case at bar, that the burden was on the defendant to prove delivery to plaintiff, or payment to plaintiff. A statement of the Court as to same is applicable to many of the situations in the case at bar; "for the years 1798, 1799, and 1800 goods of the annuity values were forwarded from the War Department Storehouse in Philadelphia for the Chickasaw Nation. It must be presumed that they were received in due course. (underscoring supplied) To require defendant to prove affirmatively that the goods were received (the proof at this late date would have to be documentary) would place an impossible burden where it does not rightfully belong. The burden is upon the plaintiff to prove its case. While the jurisdictional act waives the lapse of time, it does not thereby shift the burden of proof to the defendant, nor does the jurisdictional act by its terms excuse the absence of proof by the plaintiff."

Other claims in the Chickasaw case were for deposits of Chickasaw money to other tribes. The Court says: "there is lack of proof that the deposits were erroneously made. The mere fact of deposit to other than a Chickasaw fund, without more, does not entitle plaintiff to recover * * *" "No judgment of recovery can be based on the showing made." (p. 42)

There were some items of claim allowed in the Chickasaw case, items in which the burden of proof was not involved. Offsets were allowed, however, which wiped out the entire amount of the [illegible]

Petition for Certiorari was filed with the Supreme Court on the whole case. It was allowed only as to the offsets. We find, upon examining the petition for certiorari that it was stated that the basic question presented was "whether the regular equitable principles governing an accounting between the guardian and ward are to be appled to a case in which the Chickasaw Nation demands an accounting from the United States of moneys due it under treaties and agreements." Also, "whether the Indian ward has the burden of proving the items it excepts to in the guardian's account." The refusal of the Supreme Court to allow certiorari on the matters hereinabove specifically called to its attention is evidence that it approved the holdings of the Court of Claims in reference to such matters; and this, of course, leaves the law as applied to the "burden of proof" where it was found by the Court of Claims to be -- that was on the plaintiff. This is therefore the law as to the burden of proof applicable to the claims in the instant case.

As the plaintiff, in support of its viewpoint as to the burden of proof also cites the case of Sioux v. United States (105 C. Cls. 725) wherein the court states that "The defendant is the trustee; it kept and has all the records and evidence and it has the burden of making the proper accounting," (p. 802), attention will be called to the fact that in that case the matter involved was the proceeds in the possession of defendant of land sold by the defendant, which money, of course, was a trust fund and the handling of same is governed by the rules applying to trustee and guardian. Such is not the

situation in the present case, but only involves the relationship of relationship of ordinary debtor and creditor.

The plaintiff relies soley on the language of the Treaty of 1790 (under which no claim asserted is based) as the basis for its claim that the relationship of guardian and ward existed between it and the defendant. One of the latest pronouncements with reference to the relationship between the Indian tribes and the United States is that of Gila River Pima - Maricopa Indian Community v. United States (Ct. Cls., 140 F. Supp. 766, 780)

> Whether or not the legal relationship of guardian and ward exists between a particular Indian tribe and the United States depends, we think, upon the express provisions of the particular treaty, agreement, executive Order, or statute under which the claim presented arises. It is true that the word "fiduciary" and the expression "guardian-ward relationship" have been used by the courts to describe generally the nature of the relationship existing between the Indians and the Government. However, in the absence of some language in a treaty, agreement or statute spelling out such a relationship, the courts seem to have meant merely that the relationship between the Indians and the Government is "similar to" or "resembles" such a legal relationship and that the doubtful language in the treaty or statute under consideration should be interpreted in favor of the weak and dependent Indians. (Citing Creek Nation v. United States, 318 U.S. 629,642)

We also call attention to a discussion of the Court of Claims as to the relationship of guardian and ward as between Indian Tribes and the Government appearing in the decision of that Court in the case of Sioux Tribe vs. United States, 146 F. Supp. 299 (1956); also discussion of this question by this Commission in its opinion in the Omaha Tribe, et al vs. United States, 6 Ind. Cls. Com. 68,73, 74.

The plaintiff makes mention in its reply brief of the Chickasaw case (103 C.Cls. 1) and insists that the decision therein has no application to the present case, and in any event the holding of the Court of Claims in the Sioux case, 105 C. Cls. 725, overrules the holdings in the Chickasaw case. The decision in the Sioux case, if it were different from that in the Chickasaw case, could not overrule the same because the Sioux case is a Court of Claims opinion only, while the holdings in the Chickasaw case were approved by the Supreme Court by its refusal to grant a writ of certiorari. However, the holding in the Sioux case is not on facts of the kind involved in the Chickasaw case, because claim in the Sioux case was based on the handling of funds received by the United States as the proceeds of the sale by it of lands belonging to the Sioux Tribe whereby said funds became trust funds and the principle of law applying to the handling of same by trustee or guardian applied.

The plaintiff makes the statement in its reply brief (p. 51) that if it "had filed suit under the Creek Treaties of 1790 and 1796, and under the Secret Article of the 1790 treaty, we would have had a somewhat similar case to that of the Chickasaws." We cannot follow such reasoning. The instant case seems to be on "all fours" with the claims we rely on in the Chickasaw case.

The Menominee case, reported at 102 C. Cls. 555, involved proceeds of sale of plaintiff's property, and that reported 118 C. Cls. 326 involved offsets asserted by it, and are not applicable to the case at bar.

As to the monetary liability, if any, created by the obligation of the Government to furnish black-smith, wheelwright and equipment, as to which specific money obligations are not specified, the defendant contends that such obligations do not create a fixed monetary liability; and that to recover for a failure on the part of the defendant to comply with the treaty stipulations would require proof on the part of the plaintiff as to the pecuniary losses suffered by reason of the alleged failure. As to whether or not this contention is correct, or as to whether the basis for the sums claimed by the plaintiff as money liability for the alleged failure on the part of the defendant is correct, it is not necessary for us to determine under our holding that plaintiff has not proven the alleged failures of the defendant to fulfill its obligations as it is its duty to do before any recovery can be had.

Defendant contends that the claims are res judicata by reason of jurisdictional acts and cases cited. The defendant also claims that by provisions of the Treaty of August 7, 1856 plaintiff released many of the claims urged in this case. This Commission is inclined to the opinion that the defense of res judicata is not well taken but with reference to the effect of the release provisions of the Treaty of [illegible] it is inclined to agree with defendant; however, in view of its decisions on the merits, it is not necessary for it to decide as to the plea of res judicata or as to the effect of release provisions of the Treaty of [illegible]. As to said release, however, the plaintiff practically admits its effectiveness as to all claims based on the treaties of 1805 and [illegible]

says in its reply brief (p. 56), "As a legal matter this release would bar the claims under the Treaties of 1805 and 1832 as defendant contends." Certainly the claims of this suit are based on treaties, not on moral obligations and are definitely and unquestionably legal claims and are being so urged and urged only as legal claims.

In keeping with this opinion and findings of fact filed herein, this case will be dismissed.

s/ Edgar E. Witt
Chief Commissioner

Concurring:

s/ Louis J. O'Marr
Associate Commissioner

s/ Wm. M. Holt
Associate Commissioner