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No statutes

In the Court of Claims of the United States

L–174

(Decided February 3, 1936)

CHEROKEE NATION v. THE UNITED STATES

Mr. Clarence C. Calhoun for the plaintiff. *Messrs. Frank J. Boudinot*, *Ralph H. Case*, *Frank K. Nebeker*, and *George C. Ober*, of counsel.

Mr. Robert L. Owen on behalf of The Western Cherokees or Old Settler Indians, as intervenors.

Mr. Wilfred Hearn, with whom was *Mr. Assistant Attorney General Harry W. Blair*, for the defendant. *Mr. George T. Stormont* was on the brief.

This case having been heard by the Court of Claims, the court, upon the evidence adduced, makes the following

SPECIAL FINDINGS OF FACT

1. By act of Congress approved March 19, 1924 (43 Stat. 27), it was provided:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That jurisdiction be, and is hereby, conferred upon the Court of Claims, notwithstanding the lapse of time or statutes of limitation, to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Cherokee Indian Nation or Tribe, or arising under or growing out of any act of Congress in relation to Indian affairs, which said Cherokee Nation or Tribe may have against the United States, which claims have not heretofore been determined

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and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States.

"SEC. 2. Any and all claims against the United States within the purview of this act shall be forever barred unless suit be instituted or petition filed as herein provided in the Court of Claims within five years from the date of approval of this Act, and such suit shall make the Cherokee Nation party plaintiff and the United States party defendant. The petition shall be verified by the attorney or attorneys employed to prosecute such claim or claims under contract with the Cherokees approved by the Commissioner of Indian Affairs and the Secretary of the Interior; and said contract shall be executed in their behalf by a committee chosen by them under the direction and approval of the Commissioner of Indian Affairs and the Secretary of the Interior. Official letters, papers, documents, and records, or certified copies thereof, may be used in evidence, and the departments of the Government shall give access to the attorney or attorneys of said Indian Nation to such treaties, papers, correspondence, or records as may be needed by the attorney or attorneys of said Indian Nation.

"SEC. 3. In said suit the Court shall also hear, examine, consider, and adjudicate any claims which the United States may have against said Indian Nation, but any payment which may have been made by the United States upon any claim against the United States shall not operate as an estoppel, but may be pleaded as an offset in such suit.

"SEC. 4. That from the decision of the Court of Claims in any suit prosecuted under the authority of this Act, an appeal may be taken by either party as in other cases to the Supreme Court of the United States.

"SEC. 5. That upon the final determination of any suit instituted under this Act, the Court of Claims shall decree such amount or amounts as it may find reasonable to be paid the attorney or attorneys so employed by said Indian Nation for the services and expenses of said attorneys rendered or incurred prior or subsequent to the date of approval of this Act; *Provided*, That in no case shall the aggregate amounts decreed by said Court of Claims for fees be in excess of the amount or amounts stipulated in the contract of employment, or in excess of a sum equal to 10 per centum of the amount of recovery against the United States.

"SEC. 6. The Court of Claims shall have full authority by proper orders and process to bring in and make parties to such suit any or all persons deemed by it necessary or proper to the final determination of the matters in controversy.

"SEC. 7. A copy of the petition shall, in such case, be served upon the Attorney General of the United States, and he, or some attorney from the Department of Justice to be designated by him, is hereby directed to appear and defend the interests of the United States in such case."

Public Resolution No. 27, 69th Congress, authorized the Cherokee Indians to prosecute claims against the United States jointly or severally, in one or more petitions, as its "attorney or attorneys may elect."

Public Resolution No. 88, 70th Congress, extended the time in which suits might be filed under the Jurisdictional Act of March 19, 1924, to June 30, 1930.

Under the authority of the aforesaid act and resolutions, the Cherokee Nation has filed a petition in this case for the benefit of those portions of the Cherokee Nation known, respectively, as Eastern or Emigrant Cherokee Indians, and the Western or Old Settler Cherokee Indians.

FINDINGS APPLICABLE TO CLAIM ON BEHALF OF EASTERN OR EMIGRANT CHEROKEES

2. It was provided in article IX of the treaty between the United States and the Cherokees (the Eastern or Emigrant Cherokees and the Western or Old Settler Cherokees being parties thereto) of the date of August 6, 1846 (9 Stat. 871), that—

"The United States agree to make a fair and just settlement of all moneys due to the Cherokees, and subject to the *per capita* division under the treaty of 29th December 1835, which said settlement shall exhibit all money properly expended under said treaty, and shall embrace all sums paid for improvements, ferries, spoliations, removal, and subsistence and commutation therefor, debts and claims upon the Cherokee Nation of Indians, for the additional quantity of land ceded to said nation; and the several sums provided in the several articles of the treaty, to be invested as the general funds of the nation; and also all sums which may be hereafter properly allowed and paid under the provisions of the treaty of 1835. The aggregate of which said several sums shall be deducted from the sum of six millions six hundred and forty-seven thousand and sixty-seven dollars, and the balance thus found to be due shall be paid over, *per cap-*

ita, in equal amounts, to all those individuals, heads of families, or their legal representatives, entitled to receive the same under the treaty of 1835, and the supplement of 1836, being all those Cherokees residing East at the date of said treaty and the supplement thereto."

3. By article XI of the treaty of 1846 it was provided:

"Whereas the Cherokee delegations contend that the amount expended for the one year's subsistence, after their arrival in the West, of the Eastern Cherokees, is not properly chargeable to the treaty fund: It is hereby agreed that that question shall be submitted to the Senate of the United States for its decision, which shall decide whether the subsistence shall be borne by the United States or the Cherokee funds, and if by the Cherokees, then to say, whether the subsistence shall be charged at a greater rate than thirty-three, 33/100 dollars per head; and also the question, whether the Cherokee Nation shall be allowed interest on whatever sum may be found to be due the nation, and from what date and at what rate per annum."

4. Pursuant to article IX of the treaty of 1846, the accounting officers of defendant in 1849 made and prepared for settlement the account therein provided for, upon the assumption, however, that the cost of removal of plaintiffs from east of the Mississippi to their lands west of the Mississippi should in part be a charge against the 1835 treaty fund of $5,000,000. The account was stated as follows:

Statement of the claims of the Cherokee Nation of Indians, according to the principles established by the treaty of August 1846, between the United States and said Indians, prepared by the accounting officers in obedience to a resolution of Congress approved August 7, 1848.

Amount granted to the Cherokees by the first article of the treaty of 1835, for their lands east of the Mississippi		$5,000,000.00
Amount granted by the third article of the supplement		600,000.00
Amount appropriated by Congress for objects specified in the third article of the supplement, per act of June 12, 1838		1,047,067.00
		6,647,067.00
From which deduct amount paid for—		
Improvements	$1,540,572.27	
Ferries	159,572.12	
Spoliations	264,894.09	
Removal and subsistence, and commutation therefor, including $2,765.84 expended for goods for the poorer classes of Cherokees, as mentioned in the fifteenth article of the treaty of 1835–36; and including, also necessary incidental expenses of enrolling agents, conductors, commissaries, medical attendance and supplies, &c., viz:		
Removal and subsistence, and commutation therefor	$2,823,192.93	
Physicians, matrons, medicines, hospital stores, etc	32,003.91	

From which deduct amount paid for—Con.		
Removal, etc.—Con.		
Superintendent of removal	$7,188.70	
Clerk to superintendent of removal	3,985.50	
Interpreter to superintendent of removal	2,706.54	
Disbursing agents	2,725.00	
Conductors	12,097.40	
Interpreters to various agents	16,102.00	
Issuing agents	9,792.40	
Enrolling agents	16,418.50	
Contingent expenses of superintendent and disbursing agent	25,983.38	
	96,999.42	
		$2,952,196.26
Debts and claims upon the Cherokee Nation, viz:		
National debts (10th article)	18,062.06	
Claims of United States citizens, &c. (10th article)	61,073.49	
Cherokee committee (12th article)	22,212.76	
		101,348.31
Amount allowed the United States for the additional quantity of land ceded to said nation		500,000.00
Amount invested as the general fund of the nation		500,880.00
		$6,019,463.05
Balance due Cherokee Indians		627,603.95

5. The United States Senate under the authority conferred in article XI of the treaty considered the subject of whether the subsistence of the Eastern Cherokees for one year after their arrival West was properly chargeable to the treaty fund, and whether interest should be allowed on whatever sum was found due, and if so, from what date and at what rate per annum.

In respect to the first question submitted the Senate adopted the following resolution:

"*Resolved by the Senate of the United States*, That the Cherokee Nation of Indians are entitled to the sum of one hundred and eighty-nine thousand four hundred and twenty-two dollars and seventy-six cents for subsistence, being the difference between the amount allowed by the act of June 12th, 1838, and the amount actually paid and expended by the United States, and which excess was improperly charged to the '*treaty fund*' in the report of the accounting officer of the Treasury."

In respect to the second question submitted, the Senate adopted the following resolution:

"*Resolved*, That it is the sense of the Senate that interest at the rate of five percent per annum should be allowed upon the sums found due the Eastern and Western Cherokees, respectively, from the twelfth day of June, eighteen hundred and thirty-eight, until paid."

6. On September 30, 1850 (9 Stat. 556), Congress appropriated the sum of $189,422.76 with interest thereon at 5 percent per annum from June 12, 1838, in accordance with the award of the Senate, and on February 27, 1851 (9 Stat. 572), appropriated the sum of $724,603.37, with interest thereon at the rate of 5 percent per annum, from June 12, 1838, until paid, the said sum being composed of the balance of $627,603.95 as shown to be due in the account set out in finding 4, and the sum of $96,999.42 found by the Senate Committee on Indian Affairs (Senate Journal, 31st Cong., 1st sess., p. 601) to have been an amount wrongfully charged against the treaty fund, incident to the expenses of employees of defendant in connection with plaintiffs' removal from east to west of the Mississippi.

7. Pursuant to the appropriation act of September 30, 1850 (9 Stat. 556), there was set up on the books of the Treasury, under the heading "Additional Amount for Expenses paid for Subsistence, etc., according to the award of the Senate of 5th September 1850, etc.", the total sum of

$317,989.26, being principal and interest; and pursuant to the appropriation act of February 27, 1851 (9 Stat. 572), there was also set up on the books of the Treasury under the heading "Payment to Cherokee Nation of $724,603.37 and interest at 5% from June 1838 until paid", a total sum of $1,188,349.52, being principal and interest. Thereafter, as of April 5, 1852, there was disbursed from said accounts to plaintiffs the entire amount thereof, $1,506,338.78.

8. Although the Cherokees had upon the payments of the sums stated in the preceding finding, as they were required to do under the terms of the appropriation act, accepted the same as full satisfaction and a final settlement of all "claims and demands whatsoever of the Cherokee Nation against the United States, under any treaty heretofore made with the Cherokees" they were not satisfied with the settlement. They challenged the correctness of charging certain disbursments made by the defendant against the sum of $6,647,-067.00, and particularly with respect to a charge of $1,111,-284.70 to cover in part the cost of the removal of the Eastern Cherokees from east of the Mississippi to their lands west. This controversy remained unsettled in December 1891, when the United States entered into an agreement in respect to the purchase and sale of a tract of land known as the "Cherokee Outlet." The Cherokee Commissioners demanded as a condition of the cession, in addition to other considerations, that all past treaty transactions between the United States and the Cherokee Nation should be reopened. This demand was acceded to by the United States and the following provision was incorporated in the agreement, which was ratified by Congress in the act of March 3, 1893 (27 Stat. 640):

"The United States shall, without delay, render to the Cherokee Nation, through any agent appointed by authority of the national council, a complete account of moneys due the Cherokee Nation under any of the treaties ratified in the years 1817, 1819, 1825, 1828, 1835–36, 1846, 1866, and 1868, and any laws passed by the Congress of the United States for the purpose of carrying said treaties, or any of them, into effect; and upon such accounting, should the Cherokee Nation, by its national council, conclude and determine that such accounting is incorrect or unjust, then the Cherokee Nation shall have the right, within twelve months, to enter suit against the United States in the Court of Claims, with

the right of appeal to the Supreme Court of the United States by either party, for any alleged or declared amount of money promised but withheld by the United States from the Cherokee Nation, under any of said treaties or laws, which may be claimed to be omitted from, or improperly or unjustly or illegally adjusted in, said accountings; and the Congress of the United States shall at its next session, after such case shall be finally decided and certified to Congress according to law, appropriate a sufficient sum of money to pay such judgment to the Cherokee Nation, should judgment be rendered in her favor; or if it shall be found upon such accounting that any sum of money has been so withheld, the amount shall be duly appropriated by Congress, payable to the Cherokee Nation, upon the order of its national council, such appropriation to be made by Congress, if then in session, and if not, then at the session immediately following such accounting."

9. In accordance with the provisions of the agreement aforesaid, James A. Slade and Joseph T. Bender, having been chosen by defendant for the purpose, made and rendered the account as therein required to be made upon the principle that the sum of $1,111,284.70 was improperly charged against the fund. The account was stated as follows:

Figuring upon the basis stated in the ninth article of the treaty of 1846, and following the Auditor's and Comptroller's figures in the accounting of December 3, 1849, and eliminating from the charges made against the total fund of $6,647,067, the excess of payments over the amounts appropriated by the United States for that purpose, the true statement of the account is as follows:

For improvements		$1,540,572.27
For ferries		159,572.12
For spoliations		264,894.09
For removal and subsistence, being the amount actually provided and expended for these purposes, and consisting of the following items	$335,105.91	
	1,047,067.00	
		1,382,172.91
For debts and claims upon the Cherokee Nation		101,348.31
For the additional quantity of land ceded to the nation		500,000.00
For amount invested as the general fund of the nation		500,880.00
For subsistence furnished after expiration of one year, under agreement that it should be charged to treaty fund		172,316.47
		4,621,756.17

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For lands and possessions	$5,000,000.00
For spoliations	264,894.09
Balance of $600,000 applicable to removal	335,105.91
Appropriation of June 12, 1838	1,047,067.00
	6,647,067.00
From which deduct charges as above	4,621,756.17
Balance to be distributed *per capita*	2,025,310.83
Deduct amount actually distributed, as already explained	914,026.13
Balance due	1,111,284.70

The foregoing statement covers, it is believed, every point at issue which can be raised under the treaties described in the articles of agreement; (a number of demands made by the Cherokee Nation were disallowed), and the result of the finding is submitted in the following schedule:

Under the treaty of 1819:	
Value of three tracts of land containing 1,700 acres, at $1.25 per acre, to be added to the principal of the "School" fund	$2,125.00
(With interest from February 27, 1819, to date of payment.)	
Under treaty of 1835:	
Amount paid for removal of Eastern Cherokees to the Indian Territory, improperly charged to treaty fund	1,111,284.70
(With interest from June 12, 1838, to date of payment.)	
Under treaty of 1866:	
Amount received by receiver of public moneys at Independence, Kansas, never credited to Cherokee Nation	432.28
(With interest from January 1, 1874, to date of payment.)	
Under act of Congress, March 3, 1893:	
Interest on $15,000 of Choctaw funds applied in 1862 to relief of indigent Cherokees, said interest being improperly charged to Cherokee national fund	20,406.25
(With interest from July 1, 1893, to date of restoration of the principal of the Cherokee funds, held in trust in lieu of investments.)	

WASHINGTON, D. C., *April 28, 1894.*

(Signed) JAS. A. SLADE.
JOS. T. BENDER.

10. The account as stated by Slade and Bender was referred to the Commissioner of Indian Affairs for examination and report, who approved the same and returned it to the Secretary of the Interior. The Secretary of the Interior transmitted the account to the Cherokee Nation. The Cherokee Nation by formal act of its national council on December 1, 1894, accepted the report as a correct statement of the account and approved the same. The principal chief of the Cherokee Nation thereupon notified the Secretary of the Interior of the acceptance of the account as stated by Slade and Bender, and requested him to notify the Congress of the United States of such acceptance. Congress upon receipt of the report transmitted the same to the Attorney General with directions to review the conclusions of law reached by the accountants. The Attorney General in a report to Congress on December 2, 1895, held that the amounts charged against the Cherokee funds for the expenses of the removal of the Eastern Cherokees to the west were proper charges. Congress did not appropriate the funds necessary to pay the ~~Seminole~~ Cherokee Nation the amount shown to be due in the said report.

11. The act of July 1, 1902 (32 Stat. 726), contained the following provision:

"Jurisdiction is hereby conferred upon the Court of Claims to examine, consider, and adjudicate, with a right of appeal to the Supreme Court of the United States by any party in interest feeling aggrieved at the decision of the Court of Claims, any claim which the Cherokee tribe, or any band thereof, arising under treaty stipulations, may have against the United States, upon which suit shall be instituted within two years after the approval of this Act; and also to examine, consider, and adjudicate any claim which the United States may have against said tribe, or any band thereof. The institution, prosecution, or defense, as the case may be, on the part of the tribe or any band, of any such suit, shall be through attorneys employed and to be compensated in the manner prescribed in sections twenty-one hundred and three to twenty-one hundred and six, both inclusive, of the Revised Statutes of the United States, the tribe acting through its principal chief in the employment of such attorneys, and the band acting through a committee recognized by the Secretary of the Interior. The Court of Claims shall have full authority, by proper orders and process, to make parties to any such suit all persons whose

presence in the litigation it may deem necessary or proper to the final determination of the matter in controversy, and any such suit shall, on motion of either party, be advanced on the docket of either of said courts and be determined at the earliest practicable time."

12. Thereafter by act approved March 3, 1903, entitled "An act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June Thirty, Nineteen Hundred and Four, and for other purposes" (32 Stat. 996), it was provided:

"Section sixty-eight of the Act of Congress entitled 'An act to provide for the allotment of the lands of the Cherokee Nation, for the disposition of town sites therein, and for other purposes' approved July first, nineteen hundred and two, shall be so construed as to give the Eastern Cherokees, so called, including those in the Cherokee Nation and those who remained east of the Mississippi River, acting together or as two bodies, as they may be advised, the status of a band or bands, as the case may be, for all the purposes of said section: *Provided*, That the prosecution of such suit on the part of the Eastern Cherokees shall be through attorneys employed by their proper authorities, their compensation for expenses and services rendered in relation to such claim to be fixed by the Court of Claims upon the termination of such suit; and said section shall be further so construed as to require that both the Cherokee Nation and said Eastern Cherokees, so called, shall be made parties to any suit which may be instituted against the United States under said section upon the claim mentioned in House of Representative Executive Document Numbered Three hundred and nine of the second session of the Fifty-seventh Congress; and if said claim shall be sustained in whole or in part the Court of Claims, subject to the right of appeal named in said section, shall be authorized to render a judgment in favor of the rightful claimant, and also to determine as between the different claimants, to whom the judgment so rendered, equitably belongs either wholly or in part, and shall be required to determine whether, for the purpose of participating in said claim, the Cherokee Indians who remained east of the Mississippi River constitute a part of the Cherokee Nation, or of the Eastern Cherokees, so called, as the case may be."

13. Pursuant to the authority of the foregoing acts, petitions were filed in the Court of Claims on behalf of the Cherokee Nation, no. 23199; on behalf of the Eastern Cherokees, no. 23214; and on behalf of the Eastern and Emigrant Cherokees, no. 23212; all of which petitions sought a recovery against the United States for the several amounts shown to be owing by the Slade and Bender report, with interest as therein specified. The three cases were consolidated for both hearing and judgment and upon the hearing a judgment (40 C. Cls. 252, 363) was entered in favor of plaintiffs for the amount shown by the report of Messrs. Slade and Bender to be owing plaintiffs, with interest thereon.

14. By the acts of June 30, 1906 (34 Stat. 664), and March 4, 1909 (35 Stat. 938), Congress made appropriations to pay the judgment in the foregoing causes, together with interest thereon. Pursuant to these appropriation acts there was set up on the books of the Treasury of the United States under the heading "Judgment, Court of Claims, Cherokee Nation", a total sum of $5,158,005.54, of which amount so set up there was disbursed to plaintiffs on account of item 2 of the said judgment, the sum of $5,098,361.08.

FINDINGS APPLICABLE TO CLAIM ON BEHALF OF OLD SETTLERS OR WESTERN CHEROKEES

15. Prior to the year 1817 the Cherokee Indians lived east of the Mississippi. By the treaties of 1817 (7 Stat. 156) and 1819 (7 Stat. 195) they made a cession of certain of their lands in Georgia, Tennessee, and Alabama to the United States and received in exchange therefor lands in the Territory of Arkansas on the Arkansas and White Rivers, to which lands a part of the Cherokees emigrated and thereafter had their homes. These Cherokees were thereafter known as Western Cherokees or Old Settlers. By the treaty of 1828 (7 Stat. 311) the Western Cherokees or Old Settlers exchanged their lands in Arkansas for other lands in what is now the State of Oklahoma. The description of the lands granted to the Western Cherokees in this treaty was corrected by the supplementary treaty of 1833 (7 Stat. 414). The Western Cherokees alone were parties to these treaties and they were the sole owners of the lands granted to them by the two treaties, the Cherokees then remaining east of the Mississippi, known as the "Eastern Cherokees", having no interest and claiming no interest therein. The Eastern Cherokees were the sole owners of the Cherokee lands lying east of the Mississippi River, the

Western Cherokees or Old Settlers having no interest, and claiming no interest in such lands.

16. Article IV of the Treaty of 1846, heretofore referred to in Findings 3 and 4, provided:

"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 by 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 insofar 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. Now, in order to ascertain the value of that interest, it is agreed that the following principle shall be adopted, *viz:* All the investments and expenditures which are properly chargeable upon the sums granted in the Treaty of 1835, amounting in the whole to five million six hundred thousand dollars (which investments and expenditures are particularly enumerated in the 15th article of the Treaty of 1835), to be first deducted from said aggregate sum, thus ascertaining the residuum or amount which would, under such marshalling of accounts, be left for *per capita* distribution among the Cherokees, emigrating under the Treaty of 1835, excluding all extravagant and improper expenditures, and then allow to the Old Settlers (or Western Cherokees) a sum equal to one-third part of said residuum, to be distributed *per capita* to each individual of said party of 'Old Settlers' or 'Western Cherokees.'"

17. Thereafter, on August 8, 1850, the Senate Committee on Indian Affairs made a report to the Senate with reference to the debts due from the United States to the Cherokees (Senate Rpt. No. 176, 31st Congress, 1st session) which report is, in part, as follows:

* * * To ascertain their (Old Settlers) interest, it was assumed that they constituted one-third of the entire nation, and should be entitled to an amount equal to one-third of the treaty fund, after all just charges were deducted. This fund, provided by the treaty of 1835, consisted of $5,600,000.00

From which are to be deducted, under the treaty of 1846 (4th article), the sums chargeable under the 15th article of the treaty of 1835, which, according to the report of the accounting officers, will stand thus:

For improvements	$1,540,572.27	
For ferries	159,572.12	
For spoliations	264,894.09	
For removal and subsistence of 18,026 Indians, at $53.33⅓ per head	961,386.66	
Debts and claims upon the Cherokee nation, viz:		
National debts (10th article)	$18,062.06	
Claims of United States citizens (10th article)	61,073.49	
Cherokee committee (12th article)	22,212.76	
	101,348.31	
Amount allowed United States for additional quantity of land ceded	500,000.00	
Amount invested as general fund of the nation	500,880.00	
Making in the aggregate the sum of		4,028,653.45

Which, being deducted from the treaty fund of $5,600,000, leaves the residuum, contemplated by the 4th article of the treaty of 1846, of 1,571,346.55

Of which amount one-third is to be allowed to the western Cherokees for their interest in the Cherokee country east, being the sum of $523,782.18, for which the committee recommend an appropriation.

The foregoing statement of account was made up by the accounting officer of the Treasury pursuant to Joint Resolution of August 7, 1848 (9 Stat. 339).

18. Congress by the act of September 30, 1850 (9 Stat. 544, 556), appropriated the sum of $532,896.90, with interest thereon, in accordance with the foregoing Committee Report of the Senate. Subsequently there was set up on the books of the Treasury under the heading "Payments to Old Settlers or Western Cherokees" the total sum of $887,480.15, which amount represented the principal sum of $532,896.90 and interest thereon from June 12, 1838, the entire amount of which was disbursed and paid to the Old Settlers or Western Cherokees as of the date of September 22, 1851. Upon being paid the money the Indians signed a receipt or release, acknowledging the same to be in full of all demands under the fourth article of the treaty of August 6, 1846, but filed with the Superintendent of Indian Affairs a written protest, setting forth their reasons why the payment would not be received in full of all demands, and stated that they would thereafter appeal to the authorities of the United States for full and complete justice.

19. By act of Congress approved February 25, 1889 (25 Stat. 694, Ch. 238), jurisdiction was conferred upon the Court of Claims and, upon appeal to the Supreme Court, to adjudicate the claims of plaintiffs for money in addition to that theretofore paid as aforesaid. Said act is in part as follows:

"That the Claim of that part of the Cherokee Indians, known as the Old Settlers or Western Cherokees, against the United States, which claim was set forth in the report of the Secretary of the Interior to Congress of February third, eighteen hundred and eighty-three (said report being made under act of Congress of August seventh, eighteen hundred and eighty-two), and contained in Executive Document Number Sixty of the second session of the Forty-seventh Congress, be, and the same hereby is, referred to the Court of Claims for adjudication; * * *"

Pursuant to the authority of the said act the Western or Old Settler Cherokees filed their petition in the Court of Claims, and among other claims asserted that there was due them under Article IV of the Treaty of 1846, $330,756.94 of the principal sum guaranteed to be paid to the Cherokees under Article IX of the Treaty.

20. Thereafter, on November 30, 1891, upon a hearing of the cause mentioned in the preceding finding, the Court of

Claims (*Western Cherokees* v. *United States*, 27 C. Cls. 1, 47) said:

"The account of the Western Cherokees, as stated and allowed by the court, will therefore stand as follows:

The treaty fund		$5,600,000.00
Less for 800,000 acres of land	$500,000.00	
For investment in the general fund	500,000.00	
For improvements of individual Cherokees	1,540,572.27	
For ferries belonging to individuals	159,572.12	
For spoliations of individual property	264,894.09	
For expenses of Cherokee committee	22,212.76	
For removal of 16,957 Cherokees	339,140.00	
		3,326,391.24
Giving as the true residuum to be divided		2,273,608.76
Due to the Western Cherokees, ⅓ of residuum		757,869.58
Less payment September 22, 1851, under the act September 30, 1850		532,896.90
Leaving as the balance due the Western Cherokees		224,972.68"

Judgment was awarded the plaintiffs in the sum of $224,972.68, together with interest thereon from June 12, 1838, up to and until the entry of the decree.

Upon appeal to the Supreme Court the account as found and stated by the Court of Claims was modified and stated in the opinion of the Court as follows (148 U. S. 427):

The treaty fund		$5,600,000.00
Less—		
For 800,000 acres of land	$500,000.00	
For general fund	500,000.00	
For improvements	1,540,572.27	
For ferries	159,572.12	
For spoliations	264,894.09	
For debts, etc	60,000.00	
For removal of 16,957 Cherokees at $20 each	339,140.00	
		3,364,178.48
Giving as the residuum to be divided		2,235,281.52
One-third due to the Western Cherokees		745,273.84
Less payment September 22, 1851		532,896.90
Leaving a balance of		212,376.94

Thereafter, on June 6, 1893, the Court of Claims modified its judgment in said cause in conformity with the decision of the Supreme Court, in which the obligation on account of said judgment was stated as follows:

Principal of the judgment	$212,376.94
Interest thereon at 5% per annum from June 12, 1838, to June 6, 1893	583,830.12
Total	796,207.06

21. By act of Congress of August 23, 1894 (28 Stat. 451), $800,386.31 was appropriated for the payment of the aforesaid judgment. Of said appropriation $4,179.25 covered the item of said judgment, for a like amount shown not to be an interest-bearing fund, leaving the balance of $796,207.06, applicable to the payment of the interest-bearing item of said judgment of $212,376.94, and interest thereon as therein provided, which amounts were thereafter paid to plaintiffs, The Old Settlers or Western Cherokees.

Thereafter, by an act approved March 3, 1899 (30 Stat. 1214, 1235), Congress appropriated an additional sum of $29,850.74 in payment of interest on the said sum of $212,376.94, from June 6, 1893, to March 28, 1896. The money thus appropriated was paid over to the plaintiffs, The Old Settlers or Western Cherokees, during the fiscal year 1899.

CONCLUSION OF LAW

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover and the petition is therefore dismissed.

OPINION

WILLIAMS, *Judge*, delivered the opinion of the court:

The petition herein was filed by the Cherokee Nation of Indians under the provisions of the act of Congress, approved March 19, 1924 (43 Stat. 27), which conferred jurisdiction upon the Court of Claims to hear, examine, adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Cherokee

nation or tribe, or arising under or growing out of any act of Congress in relation to Indian affairs, which said Cherokee nation or tribe may have against the United States, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States. The petition sets forth claims for the benefit of those portions of the Cherokee Nation known respectively as the Eastern and Western Cherokees, the two groups constituting the Cherokee Nation of Indians at the time of the treaty of August 6, 1846 (9 Stat. 871).

The claim asserted on behalf of the Eastern Cherokees is as follows:

"The balance of the principal sum agreed to be paid by the terms of the treaties of 1835 and 1846, for the benefit of that portion of the Cherokee Nation known as 'Eastern' Cherokees, amounting to $1,989,218.49 together with interest thereon at the rate of 5% per annum from March 15, 1910, until paid.

"The balance of the interest due on said sum from April 5, 1852, to March 15, 1910, amounting to $664,377.63."

The claim asserted on behalf of the Western Cherokees is:

"The balance of the principal sum agreed to be paid by the terms of the treaty of 1846 for the benefit of that portion of the Cherokee Nation known as the 'Western' Cherokees, amounting to $320,134.70 together with interest thereon at the rate of 5% per annum from March 3, 1899, until paid.

"The balance of the interest due on said sum from August 24, 1894, to March 3, 1899, amounting to $42,552.31."

Subsequent to the filing of the plaintiff's petition Congress by the act of April 25, 1932 (47 Stat. 137), provided:

"That all claims against the United States of the Eastern or Emigrant Cherokees, and the Western Cherokee or Old Settler Indians, so called, who are duly enrolled members of the Cherokee Tribe of Indians of Oklahoma, as classes, respectively, may be submitted to the Court of Claims, and jurisdiction is hereby conferred upon the Court of Claims, notwithstanding the lapse of time or statutes of limitations, to hear, examine, adjudicate, and render judgment in any and all legal and equitable claims arising or growing out of any treaty or agreement between the United States and the Cherokee Indians, or arising or growing out of any act of Congress in relation to Indian affairs, which

the said Eastern or Emigrant and Western or Old Settler Cherokees may have against the United States, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States and paid in full: *Provided*, That said Eastern or Emigrant and Western or Old Settler Cherokee Indians may act together or as two bodies hereunder as they may be advised: *Provided further*, That the said Eastern or Emigrant and Western or Old Settler Cherokees may intervene in any suit or suits now pending in the Court of Claims under authority of the act of Congress approved March 19, 1924 (43 Stat. L. 27, 28), in which the Cherokee Nation is party plaintiff and the United States party defendant."

Under the authority of this act the Western or Old Settler Cherokees, and the Eastern or Emigrant Cherokees, filed their respective petitions in this court on October 22, 1932, *Western or Old Settler Cherokees* v. *United States* (No. 42078), and *Eastern or Emigrant Cherokees* v. *United States* (No. 42077). The claims asserted in these petitions are identical in every respect with the claims asserted by the plaintiff in behalf of these Indians in this suit. The treaty provisions and acts of Congress relied upon by the plaintiff in this suit were also relied upon by the respective plaintiffs in the cases mentioned, and the amounts involved are the same.

The court on December 2, 1935, made findings of fact and entered judgment in *Eastern or Emigrant Cherokees* v. *United States* (No. 42077), in which it was held that the claim therein asserted had previously been determined and adjudicated by this court and the Supreme Court of the United States on the merits. The petition was consequently dismissed. We have today decided *Western or Old Settler Cherokees* v. *United States* (No. 42078) in which the same holding is made and the petition dismissed. In the conclusions arrived at in these cases the contentions so ably presented by counsel in the instant case were given most careful consideration.

Obviously the plaintiff's petition will have to be dismissed, and it is so ordered.

WHALEY, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

A true copy.
Test:

Chief Clerk, Court of Claims
of the United States.

U. S. GOVERNMENT PRINTING OFFICE: 1936