

*Materials cited but no judgment for Pltffs  
no declarations of law upon "Materials"*

# In the Court of Claims of the United States

No. 42078

(Decided February 3, 1936)

## WESTERN OR OLD SETTLER CHEROKEES v. THE UNITED STATES

*Mr. Robert L. Owen* for the plaintiffs. *Messrs. Houston B. Teehee* and *Myron M. Cohen* of counsel.

*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 the act of Congress approved April 25, 1932 (Ch. 136, 47 Stat. 137), it was provided:

*"Be it Enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all claims against the United States of the Eastern or Emigrant Cherokees, and the Western Cherokees or Old Settler Indians, so-called, who are duly enrolled members of the Cherokee Tribe of Indians in 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 limitation 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.

"SEC. 2. Any and all claims against the United States within the purview of this Act shall be forever barred unless suit or suits or intervening petition shall be filed, subject to amendment, however, as herein provided in the Court of Claims within six months from the date of approval of this Act, and such suit or suits shall make the Eastern or Emigrant and/or Western or Old Settler Cherokees party or parties plaintiff and the United States party defendant. The petition or petitions shall be verified by the attorney or attorneys employed to prosecute such claim or claims under contract or contracts with the said Indians approved in accordance with existing laws, and said contract or contracts shall be executed in their behalf by a committee or committees selected by said Indians or provided by existing law. Official letters, papers, documents, and records, maps, 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 Indians to such treaties, papers, maps, correspondence, or reports as they may require in the preparation and prosecution of any suit or suits instituted under this Act.

"SEC. 3. In said suit or suits the court shall also hear, examine, consider, and adjudicate any claims which the United States may have against the said Indians or any of them, but any payment or payments which have been made by the United States upon any such claim or claims shall not operate as an estoppel but may be placed (sic) as an off-set in such suit or suits, and the United States shall be allowed to plead and shall be given credit for all sums, (including gratuities,) paid to or expended for any of said classes of Indians: *Provided, however*, That in any claim sued on by said Cherokees for any part of an interest-bearing fund upon which account any payment or payments shall have been made, such payment or payments shall first be applied to reduction or payment of interest earned to the date of such respective payments, and the balance, if any, shall then be applied to reduce the interest-bearing principal and not otherwise.

"SEC. 4. Any other tribes or bands of Indians the court may deem necessary to a final determination<sup>1</sup> of any suit or suits brought hereunder may be joined therein as the court may order: *Provided*, that upon final determination of such suit or suits the Court of Claims shall have jurisdiction to fix and determine a reasonable fee, not to exceed 10 per centum of recovery or recoveries, together with all necessary and proper expenses incurred in the preparation and prosecution of such suit or suits, to be paid to the attorney or attorneys employed as herein provided by the said Indians, and the same shall be included in the decree and shall be paid out of any sum or sums adjudged to be due said Indians, or any of them, and the balance of such sum or sums shall be placed in the Treasury of the United States, where it shall draw interest at the rate of 4 per centum per annum and be disposed of as provided by existing law."

Pursuant to the authority of the foregoing act plaintiffs, the Western or Old Settler Cherokees, filed their petition in this case on October 22, 1932.

The plaintiffs had previously, on June 21, 1932, filed an intervening petition in *Cherokee Nation v. United States*, L-174, which had been instituted under the act of Congress of March 19, 1924, and in which the same cause of action was asserted.

2. 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 re-

<sup>1</sup> So in original.

maining 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.

3. By the Treaty of December 29, 1835 (7 Stat. 478), the Eastern Cherokees ceded all their lands east of the Mississippi River to the United States. The consideration for the cession was \$5,000,000, less certain stipulated deductions. One of the provisions of the treaty was that the Cherokees would remove to the lands in Oklahoma granted to the Western Cherokees in the treaties of 1828 and 1833, which lands, the United States agreed, together with the lands ceded in the treaty "shall be included in one patent executed to the Cherokee Nation of Indians by the President of the United States according to the provisions of the act of May 28, 1830." Two delegates purporting to represent the Western Cherokees approved and signed the said treaty. Both the Eastern Cherokees and the Western Cherokees repudiated this treaty and claimed that it had been falsely executed in their name by unofficial and unauthorized persons. However, the provisions of the treaty of 1835, as supplemented by the treaty of 1836, were in effect ratified and confirmed by the treaty of August 6, 1846 (9 Stat. 871), to which both the Eastern Cherokees and the Western or Old Settler Cherokees were parties.

4. Article IV of the treaty of 1846 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 in 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 beforementioned 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.'"

5. It was provided in Article IX of the treaty of 1846 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 here-

after 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 capita*, 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."

6. With respect to the subject of interest on the money owed to plaintiffs under Article IV of the treaty of 1846 (9 Stat. 871, 875), Article XI of said treaty provided as follows:

"\* \* \* It is hereby agreed that the question shall be submitted to the Senate of the United States for its decision, which shall decide \* \* \* 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."

Pursuant to the foregoing treaty provision, the Senate of the United States on September 5, 1850, adopted the following resolution:

"*Resolved*, That it is the sense of the Senate that interest at the rate of five per centum per annum, should be allowed upon the sums found due the 'Eastern' and 'Western' Cherokees, respectively, from the 12th day of June, 1838, until paid." (Sen. Jour. 31st Congress, 1st Session, p. 601).

7. 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 \$53.33½ per head_____	961,386.66
Debts and claims upon the Cherokee nation, viz:	
National debts (10th ar- ticle)_____	\$18,062.06
Claims of United States citizens (10th article)_____	61,073.49
Cherokee committee (12th article)_____	22,212.76
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	101,348.31
Amount allowed United States for addi- tional quantity of land ceded_____	500,000.00
Amount invested as general fund of the nation_____	500,880.00
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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).

8. 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.

9. 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.

10. 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
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	\$3,326,391.14

Giving as the true residuum to be divided.....	2,273,608.76
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Due to the Western Cherokees, 1/3 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"
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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

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	3,364,178.48

Giving as the residuum to be divided.....	2,235,281.52
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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
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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

11. By act of Congress of August 23, 1894 (28 Stat. 451), \$800,386.31 was appropriated for the payment of the afore-said 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 \$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.

12. From the year 1812 to the end of the year 1846, during which period of time the plaintiffs composed approximately one-third of the Cherokee Indians (Rept. Int. Dept. Rec. in No. 42077, p. 124) the United States expended gratuitously for the Cherokee Indians the sum of \$259,017.46 for the purposes and in the amounts respectively as follows:

Agency buildings and repairs (Report G. A. O. in Case No. L-174, pp. 64-76, 153, 154, 107-110, 92, 116, 113, 114, 136)	\$7,519.32
Agricultural aid (Id., p. 152)	21.50
Agricultural implements and equipment (Id., pp. 108, 152-154)	8,082.14
Burial of Indians (Id., p. 114)	60.00
Clothing (Id., pp. 151, 152)	1,030.57
Education (Id., pp. 103, 152)	17,247.42
Expenses of delegations (Id., pp. 107, 113, 114, 152-154, 190, 191, 192, 230)	38,231.60
Expenses of making per capita payments (Id., pp. 112, 113, 116)	2,027.00
Expenses of transporting and distributing annuities (Id., pp. 107-111, 152, 153, 229, 330)	2,544.68
Feed and care of live stock (Id., p. 152)	252.63
Fuel, light, and water (Id., pp. 113, 114, 136)	337.50

Hardware, glass, oils, and paints (Id., pp. 107, 119, 151, 152)	\$4,675.70
Indian houses (Id., pp. 151, 152)	1,058.58
Medical attention (Id., pp. 151, 152, 154, 107, 232)	542.25
Mills and shops (Id., p. 189)	350.00
Miscellaneous agency expenses (Id., pp. 107-114, 151-154)	24,944.20
Miscellaneous building material (Id., p. 114)	54.00
Pay of Indian agents (Id., pp. 107, 137, 151-154, 194, 198, 201)	86,154.58
Pay of Interpreters (Id., pp. 107-111, 136, 151-154, 199)	19,300.84
Pay of miscellaneous employees (Id., pp. 107-111, 152-154)	4,391.52
Pay of skilled employees (Id., pp. 107-110, 151-154, 193)	13,434.56
Presents (Id., pp. 152-154, 108, 113)	5,816.76
Provisions and other rations (Id., pp. 107-114, 151-154, 203, 204)	20,014.17
Transportation of supplies (Id., pp. 108, 109, 112-114)	258.50
Work and stock animals (Id., pp. 152-154)	515.00
	259,017.46
One-third thereof	86,339.15

13. From the year 1847 to the end of the year 1865, during which period of time the plaintiffs, Western or Old Settler Cherokees, composed approximately one-third of the Cherokee Indians (Rept. Int. Dept., Rec. in No. 42077, p. 124) the United States expended gratuitously for the Cherokee Indians the sum of \$49,889.82 for the purposes and in the amounts respectively as follows:

Agency buildings and repairs (Report G. A. O. in Case No. L-174, pp. 92, 116, 78)	\$5,405.13
Education (Id., pp. 103, 104)	5,058.93
Expenses of delegations (Id., pp. 39, 115, 116)	3,230.33
Expenses of making per capita and other payments (Id., pp. 117, 117)	7,471.99
Fuel, light, and water (Id., pp. 115-118)	433.00
Hardware, glass, oils, and paint (Id., p. 119)	20.00
Miscellaneous agency expenses (Id., pp. 114-119, 136, 78)	5,067.08
Pay of Indian agents (Id., pp. 137, 194)	8,459.49
Pay of interpreters (Id., pp. 137, 194)	6,250.40
Pay of miscellaneous employees (Id., pp. 114, 115, 119, 136)	1,066.75

Provisions and other rations (Id., p. 203)-----	\$2,349.60
Transportation of supplies (Id., pp. 114, 152, 228)-----	4,627.12
Work and stock animals (Id., p. 119)-----	450.00
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	49,889.82
One-third thereof-----	16,629.94

14. During the period beginning with the year 1866 and ending with the fiscal year 1932 the United States expended gratuitously for the Cherokee Tribe of Indians, being composed of plaintiffs, the Western or Old Settler Cherokees, and the Eastern or Emigrant Cherokees, certain Delaware and Shawnee Indians, and white persons adopted into said tribe; and certain freedmen and freed colored persons affiliated with the Cherokees, the sum of \$2,041,387.27 for the purposes and in the amounts respectively as follows:

Agency buildings and repairs (Report G. A. O. in Case No. L-174, pp. 79, 80, 121, 122)-----	\$2,126.78
Agricultural aid (Id., p. 220)-----	253.04
Education (Id., pp. 161-175, 178-180, 205, 212, 214, 220, 226, 227)-----	1,971,100.47
Expenses of delegations (Id., pp. 124, 203, 120)-----	6,294.50
Feed and care of livestock (Id., p. 122)-----	187.50
Fuel, light, and water (Id., pp. 78, 79, 120-122)-----	250.65
Household equipment (Id., p. 120)-----	53.00
Medical attention (Id., pp. 105, 106, 122, 213-216, 220-223, 232)-----	17,386.98
Miscellaneous agency expenses (Id., pp. 120-132, 224, 226, 231, 78, 79)-----	5,770.75
Pay and expenses of field matrons (Id., p. 184)-----	1,169.51
Pay of Indian agents (Id., pp. 121, 122, 201, 217)-----	11,155.92
Pay of interpreters (Id., pp. 199, 204)-----	3,452.04
Presents (Id., p. 202)-----	63.29
Provisions and other rations (Id., p. 203)-----	568.00
Relief of destitute Indians (Id., pp. 138, 214-216, 220-221)-----	15,468.40
Removals (Id., p. 122)-----	302.00
Surveying, allotting, sale, etc. of lands (Id., pp. 220-221, 142)-----	1,184.13
Transportation of supplies (Id., pp. 121, 129)-----	42.60
Work and stock animals (Id., p. 224)-----	1,326.00
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	2,041,387.27

15. During the period beginning with the year 1866 and ending with the fiscal year 1932, the plaintiffs, the Western

or Old Settler Cherokees, and the Eastern or Emigrant Cherokees constituted at least four-fifths of all the persons receiving the benefits of the gratuity expenditures shown to have been made in the finding next preceding (Rept. Int. Dept. Rec. in No. 42077, pp. 129, 134, 137, 138, 151, 152, 154). Upon that basis and the fact that plaintiffs constituted one-third of all Cherokees, the plaintiffs should be charged with four-fifteenths of the sum shown in said finding to have been expended, which is \$544,369.93.

16. During the period from January 1876 to the end of the fiscal year 1932 the United States expended gratuitously for the Cherokee, Choctaw, Chickasaw, and Seminole Indians the sum of \$4,209,018.40 for the purposes and in the amounts respectively as follows:

Agency buildings and repairs (Report G. A. O. in Case No. L-174, pp. 80-90, '23, 124, 141, 147-149, 156, 157)-----	\$125,775.63
Agricultural aid (Id., pp. 123-126, 220, 221)-----	15,706.66
Agricultural implements and equipment (Id., pp. 123, 124-126)-----	152.20
Construction and maintenance of Claremore Hospital (Id., pp. 105, 148, 155, 211, 212)-----	77,127.98
Education (Id., pp. 93-102, 105, 144-146, 150, 156-181, 205-216, 231)-----	1,698,470.55
Expenses of delegations (Id., p. 120)-----	5.96
Feed and care of live stock (Id., pp. 123-126)-----	1,396.28
Fuel, light, and water (Id., pp. 123-135, 141)-----	899.70
Hardware, glass, oils, and paints (Id., pp. 123, 125)-----	11.24
Household equipment (Id., pp. 220, 221)-----	2,195.24
Medical attention (Id., pp. 123-125, 213-216, 105, 223, 232, 203)-----	4,227.09
Miscellaneous agency expenses (Id., pp. 123-135, 141, 142, 218, 219, 114, 121, 220, 221, 224, 225, 227)-----	190,011.53
Pay and expenses of farmers (Id., pp. 77, 125, 144-146, 182-188)-----	308,495.18
Pay and expenses of field matrons (Id., pp. 144, 183, 184)-----	6,217.32
Pay and expenses of Indian police (Id., pp. 125, 129, 141, 144, 145)-----	155,843.73
Pay of Indian agents (Id., pp. 195, 201)-----	67,639.53
Pay of interpreters (Id., pp. 144-146, 218-221)-----	104,150.81
Pay of miscellaneous employees (Id., pp. 123-135, 141-146, 219, 220, 221)-----	1,243,610.49
Pay of probate attorneys (Id., pp. 142, 144-146)-----	16,678.32
Pay of skilled employees (Id., pp. 123-126)-----	415.80

Surveying, allotting, sale, etc., of lands.....	\$80, 809. 05
Transportation of supplies (Id., pp. 123, 127, 128, 130, 131, 141, 205-212, 220, 226, 227, 228, 231).....	8, 330. 61
Work and stock animals (Id., pp. 123-125).....	547. 50
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	4, 209, 018. 40

17. During the period from 1876 to the end of the fiscal year 1932 the Cherokee Nation composed approximately one-sixth of the total number of Indians and others for whom the expenditures set forth in the finding next preceding were made (Rept. Int. Dept., Rec. in No. 42077, pp. 130, 131, 151, 152, 154). Upon that basis plaintiffs should be charged on account of the expenditures as made with the sum of \$233,834.35, that being one-third of one-sixth of said expenditures.

18. During the year 1834 the United States expended gratuitously for plaintiffs the sum of \$2,600 to cover expenses of five delegates from the Western Cherokees (4 Stat. 707; Rept. G. A. O. filed in case No. L-174, p. 140).

#### 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 plaintiffs are not entitled to recover, and the petition is therefore dismissed.

#### OPINION

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

The plaintiffs herein, are the Western or Old Settler Cherokees referred to in section 1 of the Jurisdictional Act, and are those Cherokees or their successors who were parties to the treaty between the United States and the Cherokee Nation of Indians of the date of August 6, 1846 (9 Stat. 871), and as identified in Article IV thereof.

Prior to 1817 the Cherokee Indians lived east of the Mississippi River where they had occupied and had possession of a large domain for a period long antedating the coming of the White Man to America. By the Treaty of 1817 (7 Stat. 156), and by the Treaty of 1819 (7 Stat. 195)

they made a cession of certain of their lands in Georgia, Tennessee, and Alabama, to the United States in consideration for certain lands in the then territory of Arkansas on the Arkansas and White Rivers. A portion of the Cherokees thereafter emigrated to this territory in Arkansas and were thereafter designated as the Western Cherokees.

By the Treaty of 1828 (7 Stat. 311) amended by the supplementary treaty of 1833 (7 Stat. 414), the Western Cherokees exchanged the lands ceded to them by the treaties of 1817 and 1819 for lands in what is now the State of Oklahoma and removed thereto. The Cherokee Indians remaining in the East, and then known as the Eastern Cherokees, were not parties to these treaties and had no interest and claimed no interest in the land ceded therein.

By the Treaty of 1835 (7 Stat. 478), the Eastern Cherokees in the name of the Cherokee Nation ceded to the United States all their lands and possessions east of the Mississippi River for the sum of \$5,000,000, after making certain stipulated deductions therefrom. An additional sum of \$600,000 to be expended for certain specific purposes, and any balance thereof, not so expended, to be added to the Cherokee school fund, was provided by the supplementary treaty of 1836 (7 Stat. 488) between the same parties. One of the provisions of the Treaty of 1835 was that the Cherokees would remove to the lands in Oklahoma granted to the Western Cherokees in the treaties of 1828 and 1833, which lands the United States agreed, together with other lands ceded in this treaty "shall be included in one patent executed to the Cherokee Nation of Indians by the President of the United States according to the provisions of the act of May 28, 1830." At the time these treaties were executed the Western Cherokees had no interest in the Cherokee lands east of the Mississippi River and claimed none.

The major portion of the Cherokees living east of the Mississippi River were removed to the Cherokee lands in Indian Territory by the United States in about 1838 and they were subsequently known or designated as the Eastern or Emigrant Cherokees, while the Western Cherokees were thereafter designated as the Western or Old Settler Cherokees. Both groups repudiated the Treaty of 1835, contend-

ing that it was falsely executed by unauthorized persons and that the rights of both groups were utterly disregarded by its terms. Also bitter controversies arose between the Cherokees themselves after their reunion on the Indian Territory lands. These controversies led to the execution of the Treaty of August 6, 1846, to which both the Eastern or Emigrant Cherokees and the Western or Old Settler Cherokees were parties. By the terms of this treaty the provisions of the Treaty of 1835 and the supplementary treaty of 1836 were, in effect, ratified and confirmed. By Article IX the United States agreed to make a fair and just settlement of all monies due to the Cherokees, subject to the *per capita* division under the Treaty of 1835, and to pay whatever balance was found to be due after proper deductions therefrom, in equal amounts, *per capita*, to all those individuals, heads of families, or their legal representatives, entitled to receive the same under the Treaty of 1835 and the supplement thereto of 1836, being those Cherokees residing East at the date of the treaty and the supplement. By Article IV of the Treaty the United States agreed to pay a sum equal to one-third part of the residuum found to be due the Cherokee Nation, to the Old Settlers or Western Cherokees, to be distributed *per capita* to each individual of the said group (Finding 4). In speaking of this treaty, the court in *Western Cherokee Indians v. United States*, 27 C. Cls. 1, 36, said:

"That treaty was a compact between three parties, the United States, the Eastern, and the Western Cherokees. Its purpose was to make the Eastern and Western Cherokees parties to the treaty of New Echota [1835], which they had never conceded themselves to be, and to secure peace in the Cherokee country. The principle upon which it sought to accomplish this purpose was, that on the one hand the Western Cherokees should participate in the purchase money which had been paid for the lands east of the Mississippi; and on the other, that they should abandon their autonomy and become subject to the government which had been established by the Eastern Cherokees.

"The reason behind the principle was that in 1835 the Western Cherokees owned the Cherokee country west and had paid for it, and that the Eastern Cherokees acquired by the terms of the treaty of New Echota two-thirds of this

without paying for it, and at the same time retained all of the purchase money which had been given for their possessions east of the Mississippi.

\* \* \* \* \*

"By the terms of this arrangement the Eastern Cherokees consented to their [Western Cherokees] sharing in the purchase money so far as it was still held by the United States in the form of trusts and annuities; and the United States agreed that so far as it had been paid away to individual Indians and could not be restored they should pay it over again, and thus make good to the Western Cherokees their rightful proportion of the fund; \* \* \*."

By Article XI of the Treaty of 1846 it was agreed that the question as to whether the Cherokee Nation shall be allowed interest on whatever sum be found due the Nation, and from what date, and at what rate per annum, would be submitted to the Senate of the United States for decision.

The act of April 25, 1932, confers jurisdiction upon the Court of Claims, notwithstanding the lapse of time or statute 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.

It is alleged in the petition that the original amount due the Western Cherokees or Old Settlers under the provisions of Article IV of the Treaty of 1846 was the sum of \$746,618.53; that this said sum was an interest bearing fund at the rate of 5% per annum from June 12, 1838, until paid; that three several payments have heretofore been made to plaintiffs on account of this interest bearing fund on the respective dates of September 22, 1851, August 24, 1894, and March 3, 1899; that applying these partial payments at the dates respectively made, as directed in the proviso of section 3 of the jurisdictional act, there is now due the plaintiffs the sum of \$320,134.70, together with in-

terest thereon from March 4, 1899, the date of the last payment, until paid; and, that there is also due the plaintiffs the further sum of \$42,552.31 interest which had accrued on the principal sum prior to March 4, 1899. The plaintiffs ask a judgment for these several amounts and assert in the petition that the claim now presented has not heretofore been determined on the merits by the Court of Claims or the Supreme Court of the United States and paid in full.

The defendant contends that the claim sued upon—the amount due plaintiffs under Article IV of the Treaty of 1846, principal and interest—has heretofore been determined and adjudicated on the merits by both the Court of Claims and the Supreme Court of the United States, and paid in full.

It was held in the case of the *Eastern or Emigrant Cherokees v. United States*, No. 42077, decided on December 2, 1935, that the claim therein made, similar in every respect to the claim here made by plaintiffs, and based essentially on the identical facts disclosed in the instant case, was *res judicata* by reason of former decisions of this Court (*Cherokee Nation v. United States*, 40 C. Cls. 252), and the Supreme Court of the United States (*United States v. Cherokee Nation*, 202 U. S. 101). What was said in *Eastern or Emigrant Cherokees case No. 42077* is applicable to the facts disclosed in this case and the contentions made by plaintiffs in respect to them, and is controlling.

The plaintiffs here are the same Western or Old Settler Cherokees who were parties plaintiff in *Western Cherokee Indians v. United States*, in 27 C. Cls. 1, 61. The claim now sued upon is the precise claim adjudicated in that case—the balance, principal and interest, due the Western or Old Settler Cherokee Indians under Article IV of the Treaty of 1846, Article XI of the same treaty, and the Resolution of the United States Senate on September 5, 1850. The plaintiffs asserted that there was then due them under Article IV of the Treaty of 1846 a balance of \$330,756.94 on the principal sum and interest thereon at 5% per annum from June 12, 1838, until paid. The court in deciding the issues raised

in plaintiffs' petition said in respect to the amount due plaintiffs from the residue of the Cherokee treaty fund:

"The final account, therefore, between the parties of all subjects of difference 'arising from or growing out of treaty stipulations and acts of Congress', adjusted and determined by this suit, 'so that', in the words of the statute, 'the rights, legal and equitable, both of the United States and of said Indians', are now fully determined and forever at rest, will be stated as follows:

"Balance remaining due to Western Cherokees of their just and proper proportion, being one-third of the true residuum of the treaty fund, \$224,972.68; interest thereon from 12th June, 1838, to 30th November, 1891, \$601,426.70."

The court entered a decree awarding the plaintiffs a judgment for the amount shown to be due on this statement of the account. The Supreme Court upon appeal (*United States v. Old Settlers*, 148 U. S. 427) modified somewhat the account as stated by the Court of Claims and found and held that the balance due to the Cherokees on account of the Cherokee treaty fund was \$212,376.94. Thereafter, upon receiving the mandate of the Supreme Court, the Court of Claims modified its former judgment in conformity with the decision of the Supreme Court and awarded judgment 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

The amount of this judgment, both principal and interest, was subsequently appropriated in full by Congress and paid to the plaintiffs, the Western or Old Settler Cherokees, in accordance with the provisions of Article IV of the Treaty of 1846.

It is clear, too clear for argument, that the judgment of this court in *Western Cherokee Indians v. United States*, *supra*, in conformity with the mandate of the Supreme Court of the United States, was a final determination and adjudication on the merits of any and all claims of the plaintiffs against the United States arising under the provisions

of Article IV of the Treaty of 1846, Article XI of the same treaty, and the Resolution of the Senate of the date of September 5, 1850. The claim sued upon having been heretofore determined and adjudicated, both by the Court of Claims and the Supreme Court of the United States, and paid in full, does not come within the terms of the jurisdictional act.

Section 3 of the Jurisdictional Act provides:

"SEC. 3. In said suit or suits the court shall also hear, examine, consider, and adjudicate any claims which the United States may have against the said Indians or any of them, but any payment or payments which have been made by the United States upon any such claim or claims shall not operate as an estoppel but may be placed [sic] as an offset in such suit or suits, and the United States shall be allowed to plead and shall be given credit for all sums, including gratuities, paid to or expended for any of said classes of Indians: *Provided, however,* That in any claim sued on by said Cherokees for any part of an interest-bearing fund upon which account any payment or payments shall have been made, such payment or payments shall first be applied to reduction or payment of interest earned to the date of such respective payments, and the balance, if any, shall then be applied to reduce the interest-bearing principal, and not otherwise."

The plaintiffs construe the proviso of this section as conferring authority on the court, notwithstanding the former adjudication, to reopen the account in respect to the principal treaty fund and to adjudicate it in the manner directed in the proviso, applying the various partial payments first to the reduction of interest, and the balance, if any, to the principal sum due. This contention was made in *Eastern or Emigrant Cherokees v. United States, No. 42077, supra*, and was rejected by the court. It was there said:

"The proviso as we construe it is purely procedural. It lays down the manner in which partial payments are to be applied on claims sued upon which come within the jurisdiction of the court as defined in section 1 of the Act. The court's jurisdiction as defined in section 1 is expressly limited to claims which 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.' The proviso in no way changes or enlarges the jurisdiction thus conferred. It has application only to such claims as plaintiffs have a right to assert, and the court has the right to hear and determine under the provisions of section 1 of the jurisdictional act."

The claim asserted by plaintiffs in this action is not within the terms of the jurisdictional act and the court is without authority to hear and determine it. The petition is accordingly dismissed. 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.*