

In the United States Court of Claims.

J. HALE SYPHER

v.

THE CHOCTAW NATION OF INDIANS.

No. 25,021.

CLAIMANT'S REQUEST FOR FINDINGS OF FACT.

The claimant, considering the facts herein set forth to be proven and deeming them material to the due presentation of this case in the findings of facts, requests the court to find the same as follows:

I. That J. Hale Sypher is a citizen of the United States, residing in the District of Columbia, a lawyer by profession, and a member of the bar of this court. Record, pages 1, 5, 7, 11, 73, and list of Attorneys, Court of Claims.

II. That while in the practice of his profession in the city of Washington he was employed by the authorized Commissioners of the said Choctaw Nation, according to the terms of an agreement dated the 7th day of November, A. D. 1891, to prosecute their claim for the payment to them of \$2,206,987.50, which had been appropriated by Act of Congress approved March 3, 1891, in payment for their rights in and to certain lands designated in the said Act, and that the said authorized Commissioners of the said Choctaw Nation agreed for and in behalf of the said Nation to pay him for his services in their behalf a fee

equal to 10 per cent. of whatever sum of money should at any time be awarded or recovered on account of said claim. Record, pages 3, 4, 5, 6, 7, 12, 13, 14, 61, 62, 72, 128, 129, 134.

III. That according to the terms of the said Agreement the said Sypher was to have "direction and control of the prosecution of said claim to its final termination and adjustment;" that by its terms the provisions thereof in favor of the said Sypher were not subject to revocation nor to be affected by any services rendered by others; that the fee due him was payable immediately upon the payment to the said Choctaw Nation of the amount found due under the said appropriation by Congress, and that such payment was made on or about the 2d day of June, 1893. Record, pages 4, 5, 7, 73.

IV. That by the terms of the said Agreement the fee due the said J. Hale Sypher is \$220,698.75. Record, pages 2, 3, 4, 7, 8, and 14.

V. That by the Act of Congress approved April 21, 1904, jurisdiction was conferred upon this court to ascertain and determine the character, extent and value of the services rendered by said Sypher to said Nation, and to determine the amount justly and equitably due and payable from the said Nation to said Sypher upon the principles of a *quantum meruit*, and without regard to Section 2103 of the Revised Statutes. Record, page 1.

VI. That the said Sypher faithfully performed his duties as Attorney under said Agreement; that while acting as such Attorney he expended his own money in aid of the said Nation; that owing to an error in the amount of the appropriation made to pay the said Nation payment could not be made until after that error was corrected by Resolution of Congress approved January 18, 1893 (27 Stat. 753); that when that correction was enacted the Commissioners of the said Nation employed other counsel and attorneys

and did not consult with the said Sypher or seek his advice or service or co-operate with him, but refused so to do, though he was ready at all times to discharge his duties as attorney to them and sought to work in harmony with them and to advance the best interests of the said Nation at all times. Record, pages 5, 7, 12, 13, 15, 18, 19, 20, 21, 22, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 38, 39, 41, 43, 44, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 58, 63, 64, 65, 66, 67, 68, 87, 88, 93, 94, 95, 96, 97, 98, 99, 101, 102, 105, 109, 115, 116, 117, 123, 126, 130, 138, and 144.

BRIEF.

Two points, which otherwise might have been in controversy in the pending case, are closed by the Act of Congress approved April 21, 1904, which conferred jurisdiction upon this court. That Statute expressly waives the provisions and requirements of Section 2103 of the Revised Statutes, so that the contract made by the Choctaw Commissioners with General Sypher is exempt from the limitations of that Section; and secondly, the power and authority of the said Choctaw Commissioners, Jones, McCurtain, and Ainsworth, who contracted with J. Hale Sypher for his services, are distinctly recognized and sustained. The Statute conferring jurisdiction not only designates them as "the authorized Commissioners" of the Choctaw Nation but, for the purposes of this case, sustains the validity of the agreement made by them with the said Sypher and inferentially for the same purpose invests the Choctaw Act of the 19th of October, 1891, with full force and effect.

In the Act of Congress it is specifically provided that the said court shall ascertain and determine the character, extent and value of the services rendered by said Sypher to said Nation *under an agreement* made and entered into between the *authorized* Commissioners of said Nation and

said Sypher on the 7th day of November, 1891," and, therefore, no opinion of the Choctaw Attorney General, or any other person, as to the validity of the Choctaw Act aforesaid, or as to the authority of the said Commissioners, is before this court. In this suit all that is excluded. It is fair to presume that Congress had decided all such questions in favor of General Sypher.

Congress was satisfied that the Commissioners were "authorized;" that they made and entered into an agreement with General Sypher; that he rendered services to the Choctaw Nation, and that something is "justly and equitably due and payable from said Nation to said Sypher for services rendered by him under said agreement."

So much Congress decided for itself. It had no proper measure of value of such services except the Agreement itself, and as that involved a considerable sum, this Honorable Court was asked to find upon the principles of a *quantum meruit* the amount justly and equitably due under said agreement.

No other request is made by Congress of this court. Therefore, nearly all the testimony taken in behalf of the Choctaw Nation is inapplicable and surplusage. This court has nothing to do with the legality or illegality of the general acts of the Choctaw Council, with the petty squabbles of its various Commissioners or the amount of money they squandered in compensating lobbyists for pretended services; but it has everything to do with the one question of the amount of compensation Mr. Sypher is to receive. Of that it has full and complete jurisdiction. But it should never be forgotten that under the statute the amount the court shall find due him is to be awarded not in opposition to but "under said agreement." Therefore, it becomes necessary to consider the agreement itself and to examine its various provisions.

Let it be observed that it provides (pages 4 and 5) for

his compensation and those he may employ to assist him a fee equal to 10 per cent. of the award or recovery on account of the claim, which is the exact sum covered by the petition; that the said fee is due and payable immediately upon the payment of the amount due the Choctaw Nation, which payment was made the 2d day of June, 1893; that the said Sypher "shall have direction and control of the prosecution of said claim to its final termination and adjustment," that he should have power to receive the draft or warrant issued in payment thereof, to indorse and collect the same and retain the stipulated fee therefrom; that he was to be furnished all evidence and papers lawfully required in the prosecution of the claim, and receive such powers of attorney and other papers as might be necessary for the prosecution and full settlement and collection of said claim and the payment of said fee. And further, that the "agreement shall not be affected in any particular by any revocation of the authority granted, or which may be granted to the party of the first part, *nor by any services rendered or which may be rendered by others;*" and again that "this agreement is limited by the provisions of the Act of the Choctaw Council of October 19, 1891, requiring necessary steps to be taken to procure said money before the 1st day of December, 1891," and, lastly, that the said Sypher should diligently prosecute said claim to the best of his professional ability to a final termination.

There is not in the entire record of this case any proof that the Choctaw Nation, or its Commissioners, attempted to carry out in good faith the provisions of this agreement. They stipulated that the said Sypher should have "direction and control of the prosecution of said claim to its final termination and adjustment," yet, only a few days thereafter, without his knowledge or consent, they employed another attorney, Mr. Jeff. Chandler, and received

his advice to return to their attorneys under the contract of 1889, which involved the abandonment of Sypher, and which was directly contrary to the Act of the Choctaw Council of the 19th of October, 1891, under which they professed to act (pp. 34, 104, 130, 132, and 134).

They made it impossible for him to secure the draft or warrant issued in payment of their claim and thus to secure the payment of his fee as agreed. They did not furnish the evidence and papers necessary for the prosecution of their claim, which failure on their part rendered it essential for Mr. Sypher at his own expense to send men to the Indian Territory to secure the data and proofs required (pp. 44, 58, and 64). They have endeavored and still labor to show that they revoked the authority granted him and that others performed the service he was to render, notwithstanding they promised neither revocation nor the service of others should affect their agreement to pay.

They further claim that their agreement, and hence Sypher's employment, was limited to the first day of December, 1891, and they base that claim upon the said Choctaw Act of October 19, 1891.

The context (p. 104) does not sustain their contention. The language of the said Act is that the Commissioners are "directed to proceed at once to Washington, D. C., and make a formal demand for said money, and to this end they are authorized to procure such assistance and to take the necessary steps to procure said money before the first day of December, 1891."

Under this Act they were to do several things, viz, to proceed to Washington, to make formal demand for the money, and to take the necessary steps to procure said money before the first day of December, 1891, and to that end they were authorized to procure assistance. They did all those things. They came to Washington, they pro-

cured the assistance of General Sypher, and with him made formal demand for the money (pp. 12, 13, 15, 27, and 28); through him they assured the President they were ready to execute the necessary deeds and releases, and had the authority so to do (p. 16), and urged him to accept their conveyances and did everything they could to secure the money. Nothing was left undone which could be accomplished. That was what the said Act required. The formal demand did not become invalid because payment was not made in accordance with it prior to December 1, 1891, neither was the contract they executed with General Sypher null and void because in pursuance of the necessary steps taken payment was not made by the date before which the Commissioners were required to take those steps. Did the Act intend what is now claimed of it in behalf of the Choctaw Nation, why were the words "to take the necessary steps" inserted at all, and had those words been omitted would the Act even then sustain the construction claimed by the defendant Nation?

So anxious are the surviving members of the Choctaw Commission to defeat General Sypher's claim for compensation that one of them boldly asserts that Sypher proposed to have the Act making the appropriation to pay the Nation repealed (p. 98), and upon the suggestion of his attorney files in proof of that assertion the letter of a third party dated 11 days after the warrant in payment was issued, and the other Commissioner swears that the agreement made by them with Sypher was typewritten and that he inserted therein in ink with Sypher's consent the words "This contract expires by limitation in thirty days from date" (pp. 129, 131, 134 and 139). The actual truth is that the original agreement is not typewritten and does not contain any such words, neither does the defendant's copy filed as Exhibit "B," set forth on page 105 of the Record.

See p. 110

That General Sypher diligently prosecuted said claim to the best of his professional ability the whole Record abundantly proves. There is nothing to show the contrary. That he tried at any time to prevent the payment of the claim is false. That he did try to change the form and method of payment is true and is much to his credit, as is shown by his letter to President Cleveland (p. 18).

For his endeavor to save the Choctaw Nation from the depredations of the Indian ring lobbyists he has never been forgiven by them or by the Commissioners of the Nation. Had he joined them in a raid upon the Choctaw treasury it is probable he would have been paid his entire fee years ago.

His letter to President Cleveland is a part of the *res gestæ* of this payment to the Choctaws, and it is worthy of notice that at its date—May 29, 1893—he regarded himself as an attorney of the Choctaw Nation. That he was ignored by its Commissioners so that he did not carry their business to its final termination is not his fault. He was ever ready to work for them and aid them in every proper way. They had contracted that the services rendered by others in their behalf should not diminish his fee or affect his authority as their attorney. He faithfully performed his agreement, doing his whole duty. He has the right to insist upon equal faithfulness upon their part. His active attorneyship and service lasted more than a year and a half. His anxiety and labor were increased rather than diminished by the inefficiency and indifference, not to say disloyalty, of his clients, and solicitude for the compensation they formally contracted to pay him is not yet ended though nearly a dozen years have elapsed.

The references appended to the 6th request for Findings of Facts cover in detail the testimony in the case relative

to the service of General Sypher as attorney for the Choctaw Nation. An abstract or review of that entire testimony is not within the limits of an ordinary brief. The court is respectfully requested to examine the testimony as submitted.

No fixed rule of compensation can be applied to any case to be determined upon a *quantum meruit*. Each case is *sui generis*, and involves distinct questions of law and facts. The present one is no exception. Under the statute which confers jurisdiction this Honorable Court is to determine the amount due General Sypher upon the principles of a *quantum meruit* and to do so *under the agreement* between him and the Commissioners of the Choctaw Nation. Hence the question arises at the outset what legal value shall said agreement have in determining the compensation to be awarded? That the agreement is valid is beyond question. If it is to be given full force and effect the full fee covered by it must be awarded. This would seem to be just, as there is no evidence that General Sypher failed to perform his part of the agreement to the best of his professional ability in every particular when not thwarted by the Commissioners of the Choctaw Nation. That Nation cannot, of course, plead its own faithlessness and wrongful acts and receive a benefit therefrom. In the case of *Cutter v. Powell* (6 T. R. 320) the court said: "When it is not the plaintiff's fault that he has not performed his part of the contract, it would be obviously unjust that he should suffer by the faithlessness of the party he contracted with."

If the court should think, though Congress directed the *quantum meruit* under the said agreement, yet that its intention was that the court should not be governed by the agreement in its strict terms, but only as an indication or general guide of value, then the said agreement is complete evidence that the parties to it regarded it as a just

and equitable expression of proper compensation at the time of its execution, when the service was to be rendered and each party knew its necessity and value.

Another important measure of value is the amount paid other attorneys in this case.

It is shown by the defendant's testimony, page 113, that Mr. David M. Ross held a contract for 15 per cent., and actually received \$110,349.37, though it is not asserted that he performed any material service. On the next page (114) the defendants show that Mr. John C. Orrick was paid \$66,209.62 by Green McCurtain, national treasurer of the Choctaw Nation, for his services as an attorney, though no special service is suggested. Commissioner Ainsworth when interrogated in regard to that payment merely replied (p. 132): "We had pooled issues with the delegation of 1889 and went in together." On page 138 Mr. Ainsworth further testifies that Mr. Ross settled for \$75,000, and that he did nothing, yet his receipt shows that he was paid as above stated. On page 35 it is shown that a Mr. Stanley was paid \$441,000, and a Mr. H. W. Salmon \$400,000. Neither of these payments are disputed. The court is asked to note that General Sypher regarded these two payments as exorbitant.

It is a matter of general knowledge in legal circles in this city that contingent fees vary from 5 to 50 per cent. of the amount recovered, according to the difficulty of the case and the amount involved.

In determining the amount justly and equitably due General Sypher it is right that the fact that payment has been unjustly withheld from him for nearly a dozen years, and that he has lost the use of his fee for that time, should be considered.

In the case of *Rust v. LaRue* (4 Littell, 416) there was an attorney's contract fee of one-third of the recovery. In its opinion the court said: "It is further urged on the

part of the appellant that the fee is enormous, and, therefore, ought not to be enforced by the chancellor. To this we answer that the prospect of success was very doubtful and so proved in the end, and that Hardin risked all his services in a doubtful cause *which has remained so long in contest as to rise much in value*, and we cannot say, as the compensation was wholly contingent, that it is too enormous to preclude the aid of a chancellor."

The evident desire of Congress is that proper compensation shall be made for the professional service of General Sypher to the Choctaw Nation of Indians. His case is submitted to the court with full confidence that its findings will be equitable and just.

If at any point doubt exists he is entitled to its benefits.

HENRY M. BAKER,

Attorney.

JOHN M. THURSTON,

Of Counsel.