BEFORE THE INDIAN CLAIMS COMMISSION

THE WESTERN (OLD SETTLER) CHEROKEE INDIANS, on the relation of Dorothea Owen, Thomas Roach, Ellis Crowell Duncan, Elizabeth Schrimsher-Lewis, Alice Flourney-Smith and Maxine Woodall;	
and	
THE EASTERN (EMIGRANT) CHEROKEE INDIANS, on the relation of Florian H. Nash, Junior, Francis A. Nash, Henry C. Walkley, Rachel Davis-Driver, Nell Stopler-Bradshaw, Nannie R. Mayes and Ellen Morgan-Fleetwood,	Docket No. 2
Plaintiffs	
vs.	
THE UNITED STATES OF AMERICA,	
Defendant	

Mr. Woodsen E. Norvell and Mr. George E. Norvell for the plaintiffs.

Mr. Ralph A. Barney and Mr. Jules M. Sigal, with whom was Mr. Assistant Attorney General A. Devitt Vanech, for the defendant.

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OPINION OF THE COMMISSION

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

This claim, as indicated by the title set forth above, is asserted by two groups of Cherokee Indians. Added to the respective groups are named individual descendants and heirs-at-law of members of one or the other of such groups. We shall not determine the status of such individuals in this action nor decide whether they are necessary or even proper parties; they allege no individual rights and it is apparent they are acting on behalf of said groups of Indians and are asserting the claims of the two groups, namely, the Western (Old Settler) and the Eastern (Emigrant) Cherokee Indians. We shall, therefore, dispose of the questions to be considered as though the individual Indians had not been named as party plaintiffs.

After plaintiffs amended petition was filed herein the defendant filed its motion for a summary judgment under section 11 of the Rules of Procedure of the Commission. The motion was orally argued before the Commission and taken under advisement.

This case was submitted to the Commission on the motion of the defendant for a summary judgment asking that the amended petition herein be dismissed "on the ground that there is no genuine issue as to any material fact and that defendant is entitled to judgment as a matter of law in that the issues contained in the petition have been herebefore judicially determined and the matter is res judicata by reason of former decisions of the Court of Claims and the Supreme Court of the United States." Accompanying said motion an affidavit was filed (Exhibit "A") the facts therein set up being undenied.

In support of its motion the United States maintains that by express provisions of the Act it may interpose all legal and equitable defenses, including res judicata, save only those of the statutes of limitation and laches.

Plaintiffs make no objection as to the manner in which the question is raised, but contend, in substance, that under the provisions of the Act creating the Indian Claims Commission (60 Stat. 1049; 25 U.S.C.A. 70) jurisdiction is vested in the Commission to hear and determine their

claim "without reference to any former litigation, any action of the Congress, or other department of the defendant Government relating thereto." And they argue, in effect, that to permit the defense of res judicata would be to contradict or limit the plain and unambiguous language of the statute giving the Commission jurisdiction to hear and determine claims against the Government of the character specified in the Act, of which plaintiffs' claim is one.

The positions of the parties, as briefly stated above, require us to determine whether the defense now, for the first time, asserted by the Government is permitted by the terms of the Act creating the Commission and fixing its jurisdiction.

Paragraph 1 of Section 2 of the Act gives the Commission jurisdiction to hear and determine five classes of claims against the United States which may be presented by any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska. It is not necessary to specify here the several classes of claims which may be considered.

In paragraph 2 of said Section 2 we find the following:

> "All claims hereunder may be heard and determined by the Commission notwithstanding any statute of limitations or laches, but all other defenses shall be available to the United States."
>
> (italics ours)

Here is plain and unambiguous language giving the Government the right to assert any and all available defenses it may have, save only the

defenses of laches and the statutes of limitation. The use of the words "All other defenses", is comprehensive and includes the defense of res judicata. It is a well established rule of interpretation of statutes "that an exception in a statute amounts to an affirmation of the application of its provisions to all other cases not excepted." Bond v. Hoyt, 10 U.S. 263, 13 Pet. 263; 30 Am. Jur. 455, sec. 434; cf., Kendall v. U. S., 27 U.S. 123. Then, there is the rule stated in Am. Jur., supra, which reads: "Where express exceptions are made in a statute, the legal presumption is that the legislature did not intend to save other cases from the operation of the statute. In such case the inference is a strong one that no other exceptions were intended, and the rule generally applied is that an exception in a statute amounts to an affirmation of the application of its provisions to all other cases not excepted, and excludes all other exceptions or the enlargement of the exceptions made."

Applying these rules to the provisions quoted above, the conclusion is irresistible that the Commission is without jurisdiction to hear and determine a case between the same parties which has been determined on its merits by any court of the United States.

We need not, however, rely entirely upon rules governing interpretation of the statutes to divine the intent of Congress in respect to the effect of former adjudications of claims, for the following legislative history of the enactment creating the Commission, which was introduced as H. R. 4497, plainly shows a purpose to exclude from consideration by the Commission any claim by the same parties which has been decided on its

merits by any court of the United States.

H. R. 4497, as introduced, contained this provision:

> "No claim shall be excluded from consideration on the ground that it has become barred by law or any rule of law or equity, or that it is barred by any statute of limitations or by laches."

While the bill was being considered on the floor of the House Congressman Taber raised the question as to whether the above clause barred the consideration of claims which had already been adjudicated by the courts. On this subject the following discussion was had:

> "MR. HALLECK: Mr. Speaker, will the gentleman yield?
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> MR. TABER: I yield.
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> MR. HALLECK: First of all I would say my understanding about this proposal is that it is designed to give the Indian citizens of the country their day in court in respect to their claims.
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> Now, if any one of those citizens has had his day in court and has had an adjudication of his claim, that should end it. While I support the rule and this bill, I certainly would support such language in the bill, by amendment or otherwise, that would definitely provide that there be no reopening of claims where it can be shown or where, in truth and in fact, the claimant has had his day in court and has had a decision by a competent tribunal authorized to hear and determine the case.
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> MR. MUNDT: Mr. Speaker, will the gentleman yield?
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> MR. TABER: I yield.
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> MR. MUNDT: In response to the gentleman from Indiana (MR. HALLECK) the committee has a committee amendment which has been unanimously agreed to, to meet the specific objection which has rightfully been raised by the gentleman from New York (MR. TABER).

MR. TABER: That amendment has been submitted to me. Frankly, I do not think it does exactly meet the situation, but I would hope that something might be worked out overnight that might meet the situation.

MR. MUNDT: Mr. Speaker, will the gentleman yield?

MR. TABER: I yield.

MR. MUNDT: I would like to read the amendment at this point and then perhaps some suggestion will be developed overnight.

MR. TABER: I would like to see it put into the RECORD at this point.

MR. MUNDT: The amendment is offered by the gentleman from Washington (MR. JACKSON) in behalf of the committee:

Page 3, line 3, substitute a colon for the period and insert the following: 'Provided, however, That any final determination upon an issue of law or fact involved in any claim that has been made upon the merits of such issue by any court of the United States in a prior proceeding with respect to such claim shall be binding upon the Commission.'

It seems to me that states very clearly the fact that where a competent court has made a ruling, that claim shall not be reopened. Certainly that is the intention of the committee. We have never departed from that idea. The record of the testimony in the hearings, the record of the debate on the floor of the House bears that out. The amendment bears it out. But if the gentleman wishes to tighten the language to achieve the same goal, certainly the committee will be glad to go along with him."

(92 Cong. R. 5409-10, May 20, 1946)

During the above discussions there was inserted in the RECORD a letter from the Comptroller General in which he referred to the provision set forth above as follows:

"As hereinbefore suggested, another feature of the bill which appears open to objection arises from the fact that the exceptionally broad powers to be conferred upon the Commission to hear and determine 'all claims of every nature whatsoever' against the United States, together with the provision that 'no claim shall be excluded from consideration on the ground that it has become barred by law or any rule of law or equity', might be regarded as authorizing the reopening of all Indian claims and suits heretofore adjudicated by the courts or otherwise disposed of. In this connection, attention is invited to a table printed at pages 167 to 170 of the hearings before the Committee on Indians Affairs, House of Representatives, on H.R. 1198 and H.R. 1341, Seventy-ninth Congress--bills to create an Indian Claims Commission. The said table, which summarizes the results of suits by Indians in the Court of Claims, shows that the total of amount allowed by the Court of Claims in such cases was $49,401,518.71 and that against this amount the court allowed offsets amounting to $29,387,217.74, thus reducing the net total amount of the judgments to $20,014,300.97. If H.R. 4497 is enacted in its present form, it might be anticipated that many of those suits would be reopened before the Commission and that, in view of the very liberal provisions of the bill, many of the amounts heretofore set off against the claims of Indians would not be allowed as offsets by the Commission."

The Attorney General also commented on the provision as contained in his letter which was inserted in the RECORD. He wrote:

"The bill provides in section 2 that 'No claim shall be excluded from consideration on the ground that it has become barred by law or any rule of law or equity * * *'. This provision would seem to be subject to the interpretation that a Claimant might sue again upon a claim which has already been adjudicated or upon a claim which has been satisfied by compromise or settlement. It is even possible that this language might be interpreted to mean that a claimant would be entitled to seek from the Commission an additional recovery upon a claim which had been successfully prosecuted in the Court of Claims." (Cong. Rec. 5410-12, May 20, 1946)

When the bill was read for amendments (Cong. Rec. 5421) Congressman Jackson offered the following amendment:

"Amendment offered by Mr. Jackson: On page 3, line 3, strike out the period, insert a comma and the following: "But no claim shall be considered by the Commission where a final determination upon an issue of law or fact involved has been made on the merits of such issue by any court of the United States in a proceeding with respect to such claim.'"

The amendment was adopted and the bill containing this amendment went to the Senate. (Cong. Rec. 5423 and see page 2, Senate Hearing on H.R. 4497, before Committee on Indian Affairs, 79th Cong., second session.)

The bill having been referred to the Committee on Indian Affairs of the Senate, its Chairman, Senator O'Mahoney, requested the views of the Attorney General with respect to the bill and on May 31, 1946, he wrote the Senator as follows:

"As pointed out in the enclosed statement, the bill provides in section 2 that no claim shall be excluded from consideration on the ground that it has become barred by law or any rule of law or equity, or that it is barred by any statute of limitations or by laches, but no claim shall be considered by the Commission where a final determination upon an issue of law or fact involved has been made on the merits of such issue by any court of the United States in a proceeding with respect to such claim. This provision may be subject to the interpretation that a claimant would be permitted to sue upon a claim which had been settled. Indeed in view of the broad language to the effect that no claim shall become barred 'by law or any rule of law or equity' it is not clear just what defense the Government might have against the various claims permitted to be filed before the Commission. In order to avoid unnecessary litigation it would seem highly desirable that this language be clarified. It would seem that this might be done by striking lines 24 and 25, page 2 and lines 1 to 6, inclusive, page 3 of the bill and substituting therefor the following:

'All claims hereunder may be heard and determined by the Commission notwithstanding any statute of limitation or laches but all other defenses shall be available to the United States.'"

(Page 24, Hearing before Senate Committee on Indian Affairs, 79th Cong. 2d Session.)

Congressman Stigler, a member of the House Committee on Indian Affairs, to which H. R. 4497 had been referred, testified before the Senate Committee, and with respect to the clause we are discussing here, said:

> "In conclusion, I might add this: When our Committee in the House considered this measure, it was unanimous in this that they did not want to exclude any Indian claim on its merits but where a court had considered it on its merits they thought the claim should be barred. Since this bill has passed my attention has been called to the Osage claim as well as that of another tribe and it should be liberalized so as to permit these claims to be entertained."
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> (Page 8--Hearing before Senate Committee on Indian Affairs, 79th Cong. 2d. Session.)

The Senate Committee adopted the amendment suggested by the Attorney General and in its report made this explanation:

> "It is understood that the bill as it passed the House was intended to permit all defenses to the Government except the plea of statute of limitation or laches, and as amended this is made clear in the bill."
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> (Report of Senate Committee on Indian Affairs on H.R. 4497, Page 6, par. 2.)

When the bill went to the Conference Committee of the two Houses that Committee agreed upon the Senate amendment respecting defenses of the Government and the House members of that Committee attached a statement to the Conference Report, which among other things read as follows:

> "Amendment No. 5: The House bill provided that no claim should be considered by the Commission where a final determination of such claim had already been made on the merits. The Senate Amendment, made upon recommendation of the Department of Justice, provided that all defenses, except statutes of limitation and laches, should be available to the United States. This amendment was accepted by the conferees. It is implicit, however, from the purpose, history, and language of the entire bill, that this amendment does not permit the Government to plead as a defense to any of the five enumerated classes of claims that such facts constitute only a political and not a justiciable wrong for the