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 Flournoy-Smith and Maxine Woodall,	)	
Plaintiffs	)	
vs.	)	Docket No. 3
THE UNITED STATES OF AMERICA,	)	
Defendant	)	

Messrs. Woodsen E. Norvell and George E. Norvell for the Plaintiffs.

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

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OPINION OF THE COMMISSION

Holt, Commissioner, delivered the opinion of the Commission.

This case, in certain respects, is a companion case to cases numbered 2 and 5, this day decided by the Commission on a motion by the defendant in each case for a summary judgment. The Eastern (Emigrant) Cherokees and the plaintiffs herein are joined as parties plaintiff in case number 2. The Eastern (Emigrant) Cherokees are plaintiffs in case number 5 but, aside from the difference in the amounts claimed, the facts and issues involved are the same as in the case here under consideration.

The present claim is asserted by the Western (Old Settler) Cherokee group of Indians and added to the group are named individual

descendants and heirs-at-law of said group. We do not determine the status of such individuals in this action nor whether they are necessary or even proper parties, as they allege no individual rights and it is apparent they are acting on behalf of said group of Indians and asserting the claim of the Western (Old Settler) Cherokee Indians. We shall, therefore, dispose of the question to be considered as though the individual Indians had not been named as party plaintiffs.

The plaintiffs filed their amended petition herein and thereafter the defendant filed its motion for a summary judgment under section 11(b) 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 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 heretofore 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." That attached to said motion and made a part thereof is an affidavit (Exhibit "A"), the facts therein set forth 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 statute of limitations and laches.

The plaintiffs contending, 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 Congress, or other department of the defendant Government relating thereto."

This question of whether the defense of res judicata by the defendant is permitted under the terms of the Act, creating this Commission and fixing its jurisdiction, is settled for the purpose of the present case by the opinion in case number 2, decided this day, wherein this Commission reached the conclusion that the words "all other defenses" in the Act, includes the defense of res judicata in a proper case.

The counsel for the plaintiffs during oral argument was inclined to concede, as he did in cases numbered 2 and 5, that the pending claim and the one decided by the Court of Claims (No. 42078; 82 Ct. Cls. 566) involve the same parties and that the facts are substantially the same in both cases. He again contends, however, that the Court of Claims in that case was restricted by the terms of the jurisdictional act and could not therefore grant the relief plaintiffs were entitled while, by the Act of August 13, 1946, this Commission has been granted broader jurisdiction and may consider issues and grant relief denied the Court of Claims by the jurisdictional act under which the former case was decided.

The defendant pleads as a bar to the prosecution of the pending case, the judgment in the case of Western (Old Settler) Cherokees vs. The United States (No. 42078; 82 Ct. Cls. 566), decided by the Court of Claims on February 3, 1936, and from which judgment no appeal was taken.

A comparison of the pending action with the former case (42078) shows that the parties were the same in both cases. In the former case (42078) the plaintiffs sought to recover from the defendant the sum of $320,134.70, with interest thereon from March 4, 1899, at 5% per annum until paid, and the sum of $42,552.31 interest which it was claimed had accrued on the principal sum prior to March 4, 1899. According to the allegations of the amended petition in the present case, the plaintiffs now seek to recover the sum of $308,548.59 principal, with interest from August 24, 1894 until paid at the rate of 5% per annum and in addition the sum of $39,953.40 of unpaid interest, without interest.
In both cases the plaintiffs based their claim upon the facts, shown in the first case, and alleged in the pending case, as follows: that the Western and Eastern Cherokee Indians were dissatisfied with the results of certain treaty arrangements with the defendant and were quarreling among themselves. To settle these differences and to reunite the whole Cherokee tribe, the defendant undertook the role of mediator, and as a result a treaty was made on August 6, 1846 (9 Stat. 871) between all the

Cherokees and the defendant. This 1846 treaty provided for an adjustment and settlement of "claims and difficulties" between the Cherokees and the defendant, as well as among the Cherokees themselves, growing out of prior treaties of 1828 and 1835. It was provided in said 1846 treaty that the Senate of the United States was to determine whether interest should be allowed the Cherokee Nation on whatever amount might be found due the Nation, and from what date and the rate per annum to be paid.

Pursuant to this provision, the Senate of the United States on September 5, 1850 (Sen. Jour. 1st Session, 31st Congress, p. 601) adopted the following resolution:

> "RESOLVED, that it is the sense of the Senate that interest at the rate of 5% per annum should be allowed, upon the sums found due the 'Eastern' and 'Western' Cherokees, respectively, from the 12th day of June, 1838."

The plaintiffs now state the account between themselves and the defendant as being a balance due them under the 1846 treaty of $746,618.53 in the former case (42078), and $745,273.84 in the present case, which fund, under the resolution of the Senate of September 5, 1850, supra, is claimed to be an interest-bearing fund at the rate of 5% per annum until paid; that three several payments were made by the defendant to the plaintiffs on account of this principal fund; on September 22, 1851 the sum of $887,480.15; on August 24, 1894 the sum of $796,207.05 and on March 3, 1899 the sum of $29,850.74; that applying these partial

payments at the dates respectively made, first on the accumulated interest and the balance, if any, on the interest-bearing principal, there remains unpaid, as stated in Case No. 42078, the sum of $320,134.70 interest-bearing principal at the rate of 5% per annum from March 4, 1899 (date of last payment) until paid, and, unpaid accumulated interest of $42,552.31, and as stated in the present case, the sum of $308,548.49 interest-bearing principal at the rate of 5% per annum until paid, and, unpaid accumulated interest of $39,953.60.

The difference between the amount as it was found and stated by the Court of Claims in Western Cherokee Indians v. United States (27 Ct. Cls. 1), as modified by United States v. Old Settlers, etc., (148 U.S. 427), and as stated in case number 42078 in the Court of Claims and in the present case, is in the application of the several payments made by the defendant. The payment on September 22, 1851 was for $887,480.15, of which amount $532,896.90 was the balance of the principal then ascertained to be due the plaintiffs under the treaty of 1846, and the balance of $354,583.25 was for interest thereon. In the Court of Claims (27 Ct. Cls. 1) the $532,896.90 was deducted as a principal payment from the amount found due the plaintiffs and a judgment was entered for the balance of $224,972.68, which was later reduced to $212,376.94 by the Supreme Court; the payment made on August 24, 1896 was for the amount of the judgment of $212,376.94 and the balance of $583,830.12 for interest thereon from June 12, 1838 to June 6, 1893, or a total payment of $796,207.06; the last payment of $29,850.74 on March 3, 1899 was in payment of interest on the said judgment of $212,376.94 from

June 6, 1893 to March 28, 1896.

The plaintiffs urge that upon rendition of the decree by the Supreme Court in the case of United States v. Old Settlers, supra, it became the duty of the defendant government to adjust and restate the account of the plaintiffs in respect to interest-bearing principal and to give them the benefit of the usual rules and principles of partial payments made to the discharge of accumulated interest, and any balance to the payment of the principal debt, which it is asserted would have been that shown in the readjusted account upon which the plaintiffs now rely.

In support of this contention the plaintiffs cite the proviso in section 3 of the jurisdictional act of Congress, approved April 25, 1932 (47 Stat. 137), which provides as follows:

> "Provided, however, that any claim sued on by said Cherokees for any part of an interest-bearing fund upon which amount 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 ultimate question before the Court of Claims was whether the principal and interest claimed to be due the plaintiffs under the provisions of the 1846 treaty, had been paid as provided in the Senate resolution of September 5, 1850, supra, and whether such payments were properly made and applied. The Court of Claims in considering the foregoing facts, alleged in the pending case and relied on by plaintiffs in the former case (42078) was of the opinion that

plaintiffs' claim had not only theretofore been determined and adjudicated on the merits by that Court in Western Cherokee Indians v. United States, supra, in conformity with the mandate of the Supreme Court in United States v. Old Settlers, supra, and paid in full, but that such determination was also a correct statement of the account between the plaintiffs and defendant, and dismissed the petition.

The jurisdictional act (47 Stat. 137) under which the Court of Claims determined the former case (42078) in explicit terms conferred jurisdiction on that court

> "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 (Emigrant) * * * Cherokees may have against the United States * * * *."

That court gave due consideration to all the facts and issues of fact raised by plaintiffs, and had no difficulty in deciding that plaintiffs' claim had been determined and adjudicated on the merits as a legal and equitable claim for a specific amount of money alleged to be due under the provisions of the 1846 Treaty, the Senate resolution of September 5, 1850 and that payments made thereon were properly made and applied. The scope of the jurisdictional act, under which the former case (42078) was decided is substantially the same as that provided under clause (1) of Section 2 of the Indian Claims Commission Act. The same ultimate question is raised by the amended petition

in the present case as in the case No. 42078, so that this case as now presented, under the allegations of the amended petition, would be for consideration by the Commission under said clause (1) of Section 2 of the Act. The facts and issues now presented being the same as those previously considered and decided on the merits by the Court of Claims, it appears that there would be nothing new for this Commission to now determine.

It is true that plaintiffs have restated their claim so that the amount of principal and interest now claimed to be due differs slightly in amount from that claimed in case No. 42078, but the fundamental issue is identical in both cases.

We are, therefore, of the opinion that the cause of action stated in the amended petition is the same as that adjudicated by the Court of Claims in Case No. 42078; that it is between the same parties and that there was an adjudication by that court on the merits of the claim set forth in the amended petition herein, and therefore not within the jurisdiction of the Commission to entertain.

The motion for summary judgment will therefore be sustained and the amended petition is dismissed. It is so ordered.

Dated this 15th day of November, 1948.

/s/ WM. M. HOLT
Associate Commissioner

I, the undersigned, concur in the foregoing opinion.

/s/ LOUIS J. O'MARR
Associate Commissioner

Chief Commissioner Witt, concurring:

This case is a companion case to case No. 5 this day decided by this Commission, in which case I concurred with the decision of the majority of the Commissioners in granting the motion of the defendant for summary judgment, but did not agree with all the reasons given therefor, or statements made in their opinion. Likewise, I agree with the disposition made in this case, but disagree with some of the reasons given and statements made in the opinion rendered by my colleagues.

In view of the statements I make in the companion case to which I refer, I will in this case, merely say that my principal disagreement, as in the companion case, is with the statement that "* * * this case as now presented, under the allegations of the amended petition, would be for consideration by the Commission under said clause (1) of Section 2 of the Act". I think the pleadings by the plaintiffs in this case invoke and require the application of clause (5) of Section 2 of the Act; and I think the Act authorizes the finding of liability by the Commission if by application of clause (5) to the facts, the Commission should find that the plaintiffs have been wronged by the Government in the respects alleged, and have not had redress or a previous day in court upon the merits of their claim. However, I think that the pleadings, the findings of fact, and the decisions

of the Court of Claims in the case of Western Cherokee Indians vs. The United States, 27 C. C. 1, and Western Cherokees v. United States, 82 C. C. 566, show that that court gave consideration to every contention and fact urged in the case at bar, or could have done so, and did not decline the consideration of any fact or contention for want of jurisdiction or the absence of legal liability therefor on the part of the Government - and that therefore the decisions in the cases mentioned constitute res judicata of the instant case.

The plaintiffs had opportunity in the 27th Court of Claims case to present their contentions as to how interest should be calculated, and as to the application of partial payments; and whether or not they presented their contentions in these respects, it is my opinion that having had the opportunity to do so in a court having jurisdiction to consider same, the decision in that case becomes res judicata of those issues, as held by the Court of Claims in 82 C. C. 566, and in the case at bar.

/s/ EDGAR E. WITT,
Chief Commissioner