BEFORE THE INDIAN CLAIMS COMMISSION

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,	)	
v.	)	Docket No. 5
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 3, this day decided by the Commission, on a motion for a summary judgment by the defendant in each case. The Western (Old Settler) Cherokee Indians and the plaintiffs herein are joined as parties plaintiff in case number 2. The Western (Old Settler) Cherokee Indians are plaintiffs in case number 3, but, aside from the difference in amount claimed, the issues involved in that case are substantially the same as in the case here under consideration.

The present claim is asserted by the Eastern (Emigrant) Cherokee groups 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 decide whether they are necessary or even proper parties, as they allege no individual rights and it is apparent they are acting on behalf and asserting the claim for said group of Indians, 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.

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 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 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." 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 provision 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 make no objection 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 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 the 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.

In the present case, as in the companion cases numbered 2 and 3, counsel for plaintiffs, during the oral argument, was inclined to concede that the pending claim and the one decided by the Court of Claims (No. 42077; 82 Ct. Cls., 180) involve the same parties and that the facts are the same in both cases. He contended, however, that the Court of Claims in that case was restricted by the terms of the

jurisdictional act and could therefore not grant the relief the plaintiffs were entitled to 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 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 Eastern (Emigrant) Cherokee Indians (No. 42077, Supra) decided by the Court of Claims on December 2, 1935, and upon which a petition by the plaintiffs for a writ of certiorari to the Court of Claims was denied on October 12, 1936 by the Supreme Court of the United States (299 U.S. 511).

A comparison of the pending action with the former case No. 42077 in the Court of Claims shows that the parties were the same in both cases. In case No. 42077 the plaintiffs sought to recover and, according to the allegations in the amended petition in this case, the plaintiffs now seek to recover the sum of $664,377.63, without interest, and for an alleged balance due on interest-bearing principal due on March 15, 1910, in the sum of $1,989,218.49, with interest until paid at the rate of 5% per annum. 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 the 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 treaty of 1846 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 the 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 in the sum of $2,067,539.14, 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 on April 5, 1852 the accumulated interest due thereon amounted to $1,428,018.13 and the payment made by defendant on April 5, 1852 of $1,506,338.78, when first applied on accumulated interest and balance on principal, leaves a

balance of interest-bearing principal of $1,989,218.49; that subsequent payments made by the defendant when applied on accumulated interest leaves the sum of $1,989,218.49 of unpaid interest-bearing principal with interest from March 15, 1910 (date of last payment), and, unpaid accumulated interest of $664,377.63, which are the amounts claimed by plaintiffs.

The difference between the account as now stated by plaintiffs, and as it was found and stated by the Court of Claims in Consolidated Cherokee Nation vs. The United States (40 Ct. Cls. 252), is in the application of the payment made April 5, 1852 of $1,506,338.78, of which amount $914,026.13 was the balance of the principal fund then ascertained to be due and unpaid and the remainder being interest thereon from June 12, 1838. In that case the $914,026.13 was deducted as a principal payment from the balance found due the plaintiffs and a judgment entered for the balance of $1,111,284.70 with interest at 5% from June 12, 1838, which was paid in full.

It is urged by the plaintiffs that upon the rendition of the decree by the Supreme Court of the United States in the case of The United States v. The Cherokee Nation (202 U.S. 101) on review of the decision of the Court of Claims in Cherokee Nation v. The United States (40 Ct. Cls. 252), 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 by first

applying payments made to the discharge of accumulated interest, and any balance to the payment of 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, 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 the plaintiffs in the former case (No. 42077) was of the opinion that plaintiffs' claim had not only theretofore been determined and adjudicated on the merits by that court, in Cherokee Nation v. United States (40 Ct. Cls 252) and affirmed in United States v. Cherokee Nation (202 U.S. 101), and paid in full, but that such determination was also

on a correct statement of the account between the plaintiffs and defendant, and decided:

> "The claim sued upon by the plaintiffs having been adjudicated by this court and the Supreme Court of the United States on its merits and paid in full, is, under the terms of the jurisdictional act, without the jurisdiction of the Court. The petition will therefore be dismissed. It is so ordered."

The jurisdictional act (47 Stat. 137) under which the Court of Claims determined the former case No. 42077, 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 same 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 the 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, supra, under which the former case (42077) 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 former case (42077), 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.

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. 42077; 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:

I agree with the decision of the majority of the Commissioners that the motion of the defendant for summary judgment should be granted, but I do not agree with all the reasons given or statements made in their opinion.

My principal disagreement is with the statement that "* * * so that this case as now presented, under the allegations of the amended petition, would be for consideration under subsection (1) of Section 2 of the Act." I think that the pleadings by the plaintiffs in the case at bar 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 its decisions in the cases of Cherokee Nation v. U.S., 40 Ct. Cls., 252, and Eastern Cherokee V. U. S., 82 Ct. Cls 180, 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.

Attention is called to the statements of Chief Justice Nott of the Court of Claims in 40th Ct. Cls., decision that

> "the court, or the accountants, were to go behind statutory and treaty bars and receipts in full and were to consider 'any alleged or declared amount of money promised but withheld' 'under any of said treaties or laws'. This meant that there were to be no technical defenses set up, no pleas of res judicata, no releases or relinquishments, compromises or settlements; or it meant nothing." "Interpreted in the light of the long, sore controversy which had existed between the parties, it is plain that the Cherokees believed the agreement to mean (and the United States allowed them to so believe) that all of their claims and rights and equities were to be reopened and reexamined de novo."

Attention is also called to the language of Chief Justice Fuller of the Supreme Court in its opinion affirming (with modification only as to distribution of the judgment), as follows:

> "Recovery of the item of $1,111,284.70 was adjudged 'with interest thereon at the rate of 5% from June 12, 1838, to date of payment', and it is contended that the Court of Claims erred in this allowance of interest * * *."
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> "In view of the terms of the jurisdictional act and the conclusion reached in reference to the amount due, it appears to us that the decision of the Senate in respect to interest is controlling, and that, therefore interest must be allowed from June 12, 1838 upon the balance we have heretofore indicated."

The plaintiffs had opportunity in the 40th 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 views, it is my opinion that having had the opportunity to do so, before a court having jurisdiction to consider same, the decision in the case becomes res judicata of that issue, as held by the Court of Claims in 82 Ct. Cls.180.

/s/ EDGAR E. WITT,
Chief Commissioner