

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

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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

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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

