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and the trial proceeded as though the cases had been included in a single petition, except that during the trial plaintiffs dismissal of Docket No. 36 eliminated that case from the consideration of the Commission and the trial proceeded and was concluded as to the cases docketed as Nos. 33, 34 and 35.

At the close of the evidence, with the exception of certain affidavits which will be referred to later, the defendant raised a question as to the sufficiency of the plaintiffs' evidence by the following demurrer:

"Comes now the Defendant and demurs to the evidence of the Plaintiff for the reason that the same is insufficient to establish the claim in favor of Plaintiff and against the Defendant. And Defendant demurs specifically to the evidence on the ground that the evidence fails to establish that the individual plaintiffs fairly represent the claims of persons which they purport to represent."

As will be seen, the demurrer is both general and special. We need not here discuss the general demurrer because it goes to the sufficiency of the evidence in general to sustain the claims and the determination of the cases on the merits will likewise determine the question of the sufficiency of the evidence; moreover, the only part argued was the failure of the evidence to "establish that the individual plaintiffs fairly represent the claims of the persons which they purport to represent." As we understand the special demurrer it directs our attention to the necessity of showing that the two individual parties fairly insure the adequate representation of the group known as the Kaw Tribe of Indians.

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The Government relies upon two cases, namely, *Pelelas v. Catterpillar Tractor Co.*, 113 F. (2d) 629, and *Weeks v. Bareco Oil Co.*, 125 F. (2d) 84. In both of these cases it was decided that in a class action it is a condition precedent to the maintenance thereof that it be proved and that the court find that the plaintiff's suit fairly insures the adequate representation of all parties interested in the case. It must be kept in mind that these cases are based upon Rule 23(a) of the Rules of Federal Procedure which reads:

"(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

We have no such rule nor are we governed by that rule. We are governed in this case by the provisions of 25 U.S.C.A. 70(i) which, with the emphasis supplied, reads as follows:

"Any claim within the provisions of this chapter may be presented to the Commission by any member of an Indian tribe, band or other identifiable group of Indians as the representative of all its members;"

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Here, by express statute, a member of a tribe, band or group may present a claim as a representative of all the members and the only qualification fixed by the Act is that he be a member of the Indian group he represents. There are, of course, certain limitations contained in the part of the section not quoted above, but those limitations apply to organized tribes and have no application here.

In our General Rules of Procedure we provided in Section 1 for presenting claims and in subdivision (d) thereof adopted the language of said Section 70(i) quoted above, and Section 8(c) of our rules requires that there be averred in a petition, by members of an Indian group, that the petitioner or petitioners are members of the tribe, band or group they represent. The statute and said rules are the only provisions which in anywise relate to the capacity of parties in representative or class claims, so it is clear that the cases relied upon by defendant are not precedents under the Act or our rules.

We believe that Section 70(i), (Section 10 of the original Act), was enacted to simplify the procedure for presenting and prosecuting Indian claims and to that end permits a member of a claimant group to present a claim as representative of all its members, and where it is alleged in the petition and proved that the individual is such a member and that he is acting as the representative of all the members of the group, he has done everything that is required of him. There may of course be cases where it is shown the individual party, because of adverse interest, bad faith, lack of capacity, and the like, should

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not be permitted to act for the others; however, that is not the case here, for the case was prosecuted with diligence and vigor by the individual parties and there has been no intimation that their interests are any different than those of the other members of the tribe, or that the case was not fully presented.

The defendant calls our attention to Docket No. 38 wherein the plaintiffs are "Kansas or Kaw Tribe of Indians" and thirteen named individual members of that tribe. The named individuals include Keenan Pappan, one of the plaintiffs in Dockets 33, 34 and 35. Incidentally, in Plaintiffs' Ex. 135 (3 parts) appear three documents dated Nov. 13, 1948, signed by about 70 members of the Kaw Tribe in which Keenan Pappan, one of the plaintiffs, is referred to as "the late Keenan Pappan." This would indicate his death after the filing of the petitions in September, 1948. If such is the case his name should be stricken as a party. There are two causes of action set forth in No. 38 which are substantially the same as those stated in Nos. 34 and 33, respectively. Defendant contends (Transcript, pp. 269-70) that the pendency of No. 38 indicates that there is a difference of opinion among the members of the Kaw Indians as to who should represent them. We do not think the filing of the last petition (No. 38) necessarily shows dissatisfaction by the members of the tribe with the plaintiffs in the other three cases, in fact the record shows Nos. 33 and 34 were filed on Sept. 10, 1948, and No. 35 on September 13, 1948, while No. 38 was not filed until Sept. 29, 1948. Had the Indians any objections to Keenan Pappan and

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Felix McCauley they had plenty of opportunity to raise them in Nos. 33, 34 and 35, between the filing of the petitions in September, 1948 and the hearing on those petitions which began September 20, 1949 and was not concluded until July 12, 1950. No such objections were made or even suggested, so we must conclude the filing of the petition in No. 38 cannot be considered as evidence that the Kaw Indians were not properly or adequately represented in the three cases here under consideration. Then, by their Exhibit No. 151, which was admitted without objection on the part of defendant (p. 272 of Transcript of Testimony) 20 members of the Kaw Tribe swore that the cases in Dockets Nos. 33, 34 and 35 have their support and the endorsement and support of a large majority of the Kaw Indians, and Plaintiffs' Ex. 135 shows that some 70 members of the tribe approved and confirmed the said four actions pending on November 13, 1948.

We conclude that Rule 23 of the Federal Rules of Civil Procedure does not apply to cases under our jurisdiction and the demurrer of the defendant is overruled.

While we are discussing procedural matters it may be of value to mention two questions of procedure that have caused the Commission some concern. The first concerns the allegations of the capacity of individual parties to present claims and to act as representatives of the tribe, band or group. We have indicated above that under the provisions of said Section 70(i) it is necessary to allege in the petition and prove that the individual plaintiff, or plaintiffs, is

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a member of the tribe and acting as a representative of all the members. The importance of such allegations and proof is, of course, apparent in the pending cases. The only allegations concerning the capacity of the individual plaintiffs are as follows:

"That, at one of the meetings held September 6, 1948, the relators, Keenan Pappan and Felix McCauley, members of said tribe, were chosen to represent said tribe, and to file this suit against the defendant."

It may be in this case, where no question has been raised as to the sufficiency of the allegation to show the tribal status of the individual plaintiffs, that it is sufficient, but we believe that in representative suits the allegations should be definite and precise so that there can be no question as to the membership of the individual plaintiffs in the tribe they purport to represent, and that they are acting for and on behalf of all the members of their group. It so happens in this case that the parties have stipulated (Transcript, p. 74) that the named plaintiffs are members of the Kaw Tribe of Indians, so the question is perhaps moot here but we wish to emphasize the importance of the allegations, not only to inform the Commission but to enable the defendant to directly traverse or admit them.

The second matter concerns the form of instituting the claims in these cases. It will be seen that the actions are presented by "The Kaw Tribe of Indians on the relation of Keenan Pappan and Felix McCauley, Plaintiffs," and the allegations of the petitions indicate

claims in the above form. Just why counsel have adopted that form is not clear to us in view of Sec. 9 of our General Rules of Procedure which reads:

"A petition filed on behalf of an organized tribe, band, or group under the provisions of section 1 (c), or an unorganized group under section 1 (d), shall be in the name of the member or members filing the same on the relation of the tribe, band, or group." (underscoring supplied)

This rule is plain and requires that representative actions should be in the name of an individual member or members of the claimant group on the relation of the tribe, band, or group. We can see no good reason why it has not been followed.

We have not heretofore questioned the form in which the parties are set forth in the petitions because it was apparent that the claims were presented on the relation of the group known as The Kaw Tribe of Indians, but we desire to emphasize the need of following our rules governing such matter and rule relating to plaintiff in class actions, Sec. 8(c).

In view of the above the plaintiffs in each of the pending actions will be permitted to amend their respective petitions, either by interlineation or typewritten pasters, to conform to the views set forth above, and the Order will so provide.

September 26, 1950