BEFORE THE INDIAN CLAIMS COMMISSION

FELIX McCUALEY, A MEMBER OF THE
KAW TRIBE OF INDIANS, ON THE
RELATION OF ALL MEMBERS OF THE
KAW TRIBE OF INDIANS,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

Dockets Nos. 33, 34, 35.

Decided: June 24, 1954

The controversy herein decided is that between:

Claimants and Attorneys
Wilfred Hearn, George E.
Norvell, and Charles L.
Tyler, Denominated herein
as the "Hearn Group,"

and

Claimants and Attorneys
Arthur B. Honnold, O. R.
McGuire, John M. Wheeler,
and John M. Wheeler, Jr.,
Denominated herein as the
"Honnold Group."

FINDINGS OF FACT

The Commission makes the following findings of fact:

1. On August 5, 1947, attorney Arthur B. Honnold filed a petition before the Indian Claims Commission on behalf of the Pawnee Tribe of Indians (Docket No. 10) wherein a claim was asserted based upon the allegation that the United States had acquired from said
tribe a large body of land a part of which was located within the present State of Kansas and West of the Big Blue and Smoky Hill Rivers. The eastern boundary of that part of said lands located within the present State of Kansas is stated in said petition to be "the Big Blue River to its mouth on the Kansas River, then following the Kansas River and the Smoky Hill River southwardly to the most southerly point, and then southwardly to the nearest northerly point on the Arkansas River, below Great Bend, Kansas, * * *." (Pet. in Dkt. 10).

2. At the time the petition in the Pawnee case was filed, attorney Honnold knew that the Kansas or Kaw Tribe of Indians had ceded to the United States by treaty of June 3, 1825 (7 Stat. 270) approximately 26,000,000 acres of land and that a large part of the same was located in the present State of Kansas west of the Big Blue and Smoky Hill Rivers. Honnold also knew that by the said Treaty of 1825 a reservation was created for the use and occupancy of the Kaw Indians containing approximately 6,500,000 acres, and that at least 5,500,000 acres of said reservation was located west of the Big Blue River, and in the present State of Kansas.

3. A short time prior to October 25, 1947, attorney Honnold had a conversation with Mrs. Adele Dennison, a member of the Kaw Tribe of Indians, on which occasion he stated to her that "his interest was in getting some agreement as to the common boundary between the Pawnees and the Kaws, so as not to delay the trial of the Pawnee case which had already been filed and exhibited to her the Pawnee petition and maps."
On October 25, 1947 a meeting was arranged by Mrs. Dennison which was attended by attorney Honnold and about 30 members of the Kaw Tribe, including as many as three of the five members of the Kaw Council. Attorney Honnold has testified that he addressed the meeting and made the following statement: "* * * I told the gathering in the course of my remarks that I was attorney for the Pawnees, as many of them knew, and that I wanted to see if an agreement could be reached as to a common boundary line between the Pawnees and the Kaws." (Honnold's testimony, Transcript p. 196). Honnold also testified that at that meeting the Kaw Council passed a resolution that he (Honnold) be employed to represent the Kaw Tribe, but that he stated that he could not accept such employment without the consent of the Pawnees. (Tr. p. 197).

4. On the 30th day of January, 1948, a contract was executed by Joseph L. Cross, "Chairman of Council of the Kaw Tribe" and Arthur B. Honnold, whereby the said Honnold was employed to represent the Kaw Indians in the prosecution of its claims against the United States before the Indian Claims Commission.

5. At a time prior to March 3, 1948 attorney Honnold prepared a petition to be filed with Indian Claims Commission on behalf of the Kaw Tribe. Copies of that petition reached the hands of a number of the members of the Kaw Tribe who discovered that the petition failed to assert certain claims of the Kaws, which claims were in conflict with claims which had been asserted by said Honnold on behalf of the Pawnees.
6. On September 6, 1948, at a general meeting of Kaw Indians it was decided that Dennis Bushyhead, an attorney at law, be employed to represent the Kaw Tribe of Indians to present and prosecute the claims of the Kaws against the United States before the Indian Claims Commission. Whereupon, two Kaw Indians, Nettie Cooper Glen and Felix McCauley, were chosen as a committee to enter into a contract on behalf of the Kaw Tribe with the said Dennis Bushyhead employing him to represent the Kaw Tribe in the prosecution of the claims of the Tribe. On the 22nd day of November, 1948, the contract so authorized was executed.
(Bushyhead contract).

7. Docket No. 38 filed in behalf of the Kaw Tribe by attorney Honnold, which petition had been circulated among the members of the Kaw Tribe prior to its filing on September 29, 1948, by the said Honnold, asserted two claims, and only two claims, the first being that recited in Paragraph 9 of said petition and reading as follows:

9. Plaintiffs allege that by the treaty made at St. Louis on June 3, 1825, the Kansas Nation of Indians (Kaws) ceded to the United States between 6,290,000, 8,550,000 and 12,800,000 acres of land in the best part of the present states of Missouri, Nebraska and Kansas, worth more than $1.25 per acre, for an unconscionable and grossly inadequate consideration of about 1 cent an acre. The total consideration, which was payable in installments, livestock, supplies, by furnishing instructors, etc., was approximately $65,000, considering the present worth of the installments. There was therefore due the Kaws from the United States, as of June 3, 1825, a sum between $7,800,000, $10,622,500 and $15,935,000."

The second claim is set out in Paragraph 12 of said petition and reads as follows:
"12. By the said treaty made at the Method-  
ist Mission in the Kansas Country on January 14,  
1846, the Kansas Tribe of Indians ceded to the  
United States 2,000,000 acres of land in the  
present State of Kansas, worth more than $1.25  
per acre, for the unconscionable consideration of  
$202,000, or about 10 cents an acre. Of the con-  
sideration, $200,000 was to be funded at 5 per  
centum and the interest paid annually for 30 years,  
and thereafter to be diminished pro rata, should  
their numbers decrease, but not otherwise — that  
is; the Government of the United States shall pay  
them the full interest for thirty years on the  
amount funded, and at the end of that time, should  
the Kansas tribe be less than at the first payment,  
they are to receive pro rata the sums paid them at  
the first annuity payment. The remaining $2,000  
was to be expended (1st) to pay necessary expenses  
of negotiating the treaty, (3rd) $600 to the Indians  
for a mill on the land ceded, (2nd) $400 to a Mission-  
ary Society for their improvements on the land ceded,  
and (4th) the balance to buy provisions for the Indi-  
ans during the current year. The United States was  
therefore indebted to the Kaws, as of January 14,  
1846, in the sum of at least $2,298,000."

The Treaty of June 3, 1825, provided for a reservation for the  
Kaws in the following language, to-wit:

"Article 2. From the cession aforesaid, the  
following reservation for the use of the Kansas  
nation of Indians shall be made, of a tract of  
land, to begin twenty leagues up the Kansas river,  
and to include their village on that river; ex-  
tending West thirty miles in width, through the  
lands ceded in the first Article (referring to  
the area described in Article 1), to be surveyed  
and marked under the direction of the President,  
and to such extent as he may deem necessary, and at  
the expense of the United States. * * *".

3. By Article 5 of the Treaty of January 14, 1846, it was provided  
that after the west line of the 2,000,000 acres ceded by Article 1 of  
the treaty had been determined, the President of the United States was  
authorized, if there was not a sufficiency of timber on the remaining
portion of the reservation, to cause to be selected and laid off for the tribe another body of land for the tribe, in which event the remainder of the reservation would thereby become the property of the United States. Under the authority of said provision, a reservation of lands known as the Council Grove reservation, consisting of 255,834.49 acres near the eastern boundary of the original reservation, was provided for said tribe, and thereby there was acquired by the United States the remaining portion of said original reservation, which said remaining portion comprised 4,559,040 acres.

9. The value of the 4,559,040 acres acquired by the United States under the terms of Article 5 of the Treaty of January 14, 1846, was found by the Indian Claims Commission to be of the value of 40 cents per acre at the time of its cession, or a total of $1,823,616, and to have been the property of the Kaw Tribe, and for which compensation was sought by the Hearn Group of attorneys in Docket No. 33, and for which award was made by said Commission to the Kaws in Docket 33 for $1,695,688.75.

10. No claim was asserted in Docket 38 in behalf of the Kaw Indians based on a claim of ownership of any part of the land for which said award in Docket 33 was made.

Neither the so-called Kaw Council nor Arthur B. Hennold, its attorney, has ever filed a claim before the Indian Claims Commission based on a claim of ownership of the land for which the Indian Claims Commission made an award in Docket 33, and as late as February 4, 1952, at a hearing before the Commission as to the offsets claimed, the said
Honnold, appearing as amicus curiae before the Court stated among other things in connection with the matter of said award and the conflict between the Pawnees and the Kaws that "they (meaning the Kaws) took over bodily one of my claims" (meaning Pawnee claim).

11. The contract entered into between attorney Honnold with the members of the Kaw Tribe, and the so-called Kaw Council, and the contract entered into between members of the Kaw Tribe and attorney Dennis Bushyhead, were both approved by the Commissioner of Indian Affairs.

12. Subsequent to the approval of said contracts, the Assistant Commissioner of Indian Affairs made the following statement:

"Mr. Bushyhead's contract may be approved in accordance with Section 10 of the Indian Commission Act, which provides that any member of a Tribe, band, or identifiable group may present the tribal claims to the Commission for certain causes and also under authority contained in Sections 1(c) and 8(c) of the general rules of procedure promulgated by that Commission. Section 10 of the 1946 Act." (Ex. 4 and 5). (Emphasis supplied).

As a reason for the approval of both contracts, the Assistant Commissioner of Indian Affairs, by memorandum dated April 7, 1949, states:

"A petition has been filed by Mr. Honnold on behalf of the Pawnee Tribe of Indians wherein he claims, among other things, certain lands located in Kansas and Nebraska. He has also filed a petition, No. 38, with the Commission on behalf of the Kansas or Kaw Tribe. Under Section 6 of Petition No. 38, he states that there is no controversy between the Kansas or Kaw Tribe and the Pawnee Tribe as to the location of the boundary line of the lands claimed by each. Mr. Bushyhead, as well as several Kaw Indians, disagree with the statement contained under Section
6 of Petition No. 38. Mr. Bushyhead has filed four petitions, Nos. 33, 34, 35 and 36 on behalf of the Kansas or Kaw Tribe with the Commission.

"In petition No. 33 Mr. Bushyhead makes a claim for a part of the lands claimed by Mr. Honnold on behalf of the Pawnee Tribe. According to Royce's it appears that there may be some grounds for Mr. Bushyhead's contention. Mr. Honnold contends that Royce is in error and that he has made a complete search of the records to verify the claim made by him in the Pawnee petition. If the Commission renders a decision adverse to the claims of the Pawnee Indians and Mr. Bushyhead's contract is not approved to permit the Kaw Indians to present their claim for the land in question, they may be denied their day in Court.

"In order for the Kaw Indians to fully present their claims for all lands claimed by them under various treaties and Executive Orders, it is believed that the contracts with both Mr. Honnold and Mr. Bushyhead should be approved."

In further explanation of the approval of the two contracts, by letter dated May 26, 1949, the Assistant Commissioner, addressing Mr. William Wade Head, General Superintendent of the Western Oklahoma Consolidated Agency, wrote as follows:

"This will refer to your letter of April 22, concerning two attorney contracts between the Kansas or Kaw Tribe of Indians and Arthur S. Honnold and Dennis Bushyhead, Esqs.

"You request to be advised whether the Indian tribes who have already employed counsel are free to employ additional counsel notwithstanding the existence of several attorney contracts. We do not propose to approve two attorney contracts with different attorneys with the same tribe unless sufficient justification can be shown therefor. In the Kansas or Kaw case it appeared that Mr. Honnold did not fully present the claims of the Kansas or Kaw Tribe in his behalf before the Indian Claims Commission. In one petition filed by Mr. Bushyhead
a claim was made for the Kaw Indians for certain of the lands claimed by Mr. Honnold for the Pawnee Indians.

"A copy of the Land Division memorandum, recommending approval of the two contracts, is enclosed for your information. It is believed the memorandum will fully explain our position with regard to the approval of the two contracts." (Emphasis supplied).

13. At the time Honnold filed his brief in the Pawnee case (July 5, 1949) his petition on behalf of the Kaw Tribe had been filed (Sept. 29, 1948). In the brief filed on behalf of the Pawnee Tribe, Honnold made the following statements:

"The Pawnees did not understand that they were relinquishing their claim to any land except east of the Blue, which was the battle ground of the Pawnees and the Otoes on the one hand, and the Kaws, later the Delawares, on the other. There is no evidence in the record that the Kaws ever hunted over as their own or had any permanent villages on, or ever claimed any land west of the Blue, until a few years ago, when they filed case No. F-64 before the Court of Claims."

In the footnote No. 55 it is stated:

"We know of no map prepared prior to October 1833 which credits the Kaws with any land west of the Blue. In 1825 the Kaws * * * hunted over and owned 3,140,612 acres in Nebraska * * *, about 1,000,000 acres in what is now Missouri, and approximately 5,800,000 acres in Kansas as now admitted by the Pawnees and as to which there seems to be no dispute * * *."

14. On September 17, 1951, awards were made by the Indian Claims Commission in favor of the Kaw Tribe of Indians in Dockets numbered 33 and 35, cases filed under the Bushyhead contract. On November 21, 1951, there was sent to the Commission a document to become a part of the
record in said Dockets bearing the following heading "Recognition, Adoption, and Ratification of Proceedings and Services Rendered, and matters Relating thereto." Said document adopts the proceedings in these cases in the following language:

"And ADOPTS the proceedings and results thereof in these actions, subject to the right to seek correction of errors, and approves and ratifies the services rendered in said actions with the assistance and approval of said tribal attorney, Arthur B. Honnold, by the late Woodson Norvell, and by Wilfred Hearn and George E. Norvell;

"And the Kansas or Kaw Tribe of Indians requests that a reasonable attorneys' fee, not exceeding ten percent of the amount recovered, be allowed and awarded, and that a reasonable and proper division thereof be made between and among the estate of Woodson Norvell, and Arthur B. Honnold, Wilfred Hearn and George E. Norvell, at a hearing specially set for that purpose."

The document was signed as follows:

"Kansas or Kaw Tribe of Indians, plaintiff
by Joseph L. Cross, Chairman of Council, Arthur E. Honnold, 1846 E. 15th St., Tulsa 4, Okla.,
Attorney for Kansas or Kaw Tribe of Indians."

15. Prior to the making of the contract with the Kaws, attorney Honnold had filed before the Indian Claims Commission claims in behalf of the Pawnee Indian Tribe (Docket 10 before said Commission) wherein in Paragraph 20 thereof he asserted ownership to lands west of the Blue River in the amount of several million acres which he knew were also being claimed by the Kaws, (said lands to the extent of approximately 4,500,000 acres were later found by the Indian Claims Commission in Docket 33 to have been owned by the Kaws, and by reason thereof an award was made by said Commission to the said Kaws in Docket 33 for
$1,695,688.75), said lands in said Pawnee petition being described as Tract 191 on Maps A and B attached to said Pawnee petition.

16. Hearings and the taking of evidence by the Indian Claims Commission in Docket 10 were conducted in behalf of the plaintiff by attorney Honnold and were begun on January 29, 1948, and completed in April, 1949, and judgment and findings of fact by the Indian Claims Commission were entered on July 14, 1950.

17. Hearings and the taking of evidence by the Indian Claims Commission in Dockets 33, 34 and 35 were begun in September, 1949, and were completed in July, 1950, and interlocutory judgment was entered in September, 1951, and final judgment in May, 1952.

18. Upon conclusion of the hearing of the Pawnee Tribe claim (Docket 10) claimant's attorney, Honnold, requested that the Commission find that the Pawnees owned all of the land described as Area 191 on the map attached to the petition therein, which area included approximately 4,500,000 acres claimed by the Kaws and whose ownership was by the Indian Claims Commission in Docket 33 later found to be in the Kaws and by reason thereof an award made to the Kaws for $1,695,688.75. (Requested Findings 8 and 9).

19. On appeal to the Court of Claims in Docket 10, attorney Honnold in arguing to that Court as to the ownership by the Pawnee Tribe of lands later by the Indian Claims Commission made the basis of the award previously mentioned, used the following language:
"The first and second claims are based upon Pawnee occupancy and ownership of the area west of the Blue River * * * that the Pawnees not only claimed, but used and occupied to the exclusion of other tribes, and owned, the area west of the Blue River * * *. In 1780 when the Kansas or Kaw Tribe invaded Pawnee territory as far west as the mouth of the Blue River they invaded Pawnee territory." * * *
The evidence is undisputed that the Kaw tribe claimed west only to the Blue River. (Emphasis supplied). (Def. Ex. 10).

"Until the cession of 1833, the Pawnees 'remained proud masters' of the 'true Pawnee territory', which extended from the Niobrara south to the Arkansas, and west from the Blue and Smoky Hill rivers to a line running southward from the junction of the North and South Platte to the Arkansas. * * " (Appellant's Brief, pp. 12, 13, 14).

Appellant in said brief further contends that

"No other tribe is shown by any substantial evidence to have actually occupied or possessed said land, (speaking of its plat 191, of which several million acres were later determined by the Indian Claims Commission to have belonged to the Kaws) or any portion thereof, on or prior to date of the treaty of October 9, 1833.

"The boundaries and acreage of the minimum extent of these Pawnee lands are conclusively established by a preponderance of the evidence, without substantial evidence to the contrary, as the area extending south from the Platte to the Arkansas, and extending west from the conceded common boundary between the Pawnee and the Otoe-Missouri tribes, the Blue and Smoky Hill rivers, to the line extending northwest from near Ft. Dodge to the junction of the North and South Platte." (Appellant's Brief, pp. 15, 19).

In the Pawnee reply brief in the Court of Claims, attorney Hornold argues "The first and second claims are based upon Pawnee occupancy and ownership of the area West of the Blue River * * *." And as to the land East of the Blue river "The Pawnees base no claim but concede it
to the Kansas or Kaw Tribe as of 1825. That the Pawnees not only claimed but used and occupied to the exclusion of other tribes, and land, the area west of the Blue river. In 1780 when the Kansas or Kaw Tribe invaded Pawnee territory as far west as the mouth of the Blue river they invaded Pawnee territory. The evidence is undisputed that the Kaw tribe claimed west only to the Blue River. As stated in Appellee's Brief (p. 15) the Kansas or Kaw Tribe claimed land North of the Kansas River, and as shown by appellee's evidence, this land was limited to East of the Blue. (Reply Brief of Appellant (Pawnees) in the Court of Claims, pp. 12, 13, 14 and 15).

Practically the entire page 37 of said Pawnee reply brief in the Court of Claims is argument in support of the Pawnee ownership of the lands involved in Kansas and against the ownership of same by the Kaws — and same is incorporated herein by reference.

20. The Kaw cases bearing Dockets 33, 34 and 35 being prosecuted under the Bushyhead contract, and Docket 38 being prosecuted by the so-called Kaw Council and its members under the Honnold contract, were set for trial on September 19, 1949. The Commission directed that Docket 38 be stricken from the trial assignment and that Dockets 33, 34 and 35 proceed to trial. Attorney Honnold was present at the time and neither he nor any of the petitioners in Docket 38 made any protest as to the striking of Docket 38 from the docket, or as to proceeding to trial on Dockets 33, 34 and 35.

One of the Commissioners, when attorney Honnold was on the witness stand, asked him this question:
"You did not assert before the Commission at that time that you were the only legal attorney entitled to represent the Kaw Indians and that the Norvell Group had no right to represent them."

A. "I was instrumental --".

Q. "I just asked you; you made no such claim?"

A. "No, I did not."

The same witness was asked the question:

"You are familiar with Case No. 32 that we filed?" (The question being asked by attorney Bushyhead of the Hearn Group).

A. "Yes, that is where you overlapped my claim (meaning Pawnee) and then lost it and lost my claim along with it. I am very familiar with it." (Emphasis supplied).

When Mr. Honnold was on the witness stand in February 1952 at the hearing as to offsets he asked "to be entered as attorney at this hearing today for the Kansas or Kaw Tribe of Indians, the real plaintiff of interest in this case." Commissioner O'Marr asked him:

"Well, if you are not entered as an attorney, what will happen to this case? Do you object to the judgment of the award?"

A. (Mr. Honnold) "No; that is the reason we filed that ratification and approval and adoption of the services rendered not only by Mr. Hearn, but by the late Woodson Norvell and George E. Norvell."

Q. (Comm. O'Marr) "Then what you want is compensation for services, is that right, Mr. Honnold?"

A. (Mr. Honnold) "The compensation I believe -- no, that is a matter to be determined. It is a matter of appearance today."
He was later asked by Chief Commissioner Witt:

"You are approving this litigation and the award?"

A. (Mr. Honnold) "Yes."

Commissioner O'Marr asked:

"Is the Kaw Tribe of Indians trying to repudiate this contract with Mr. Bushyhead dated the 22nd of October, 1918?"

A. (Mr. Honnold) "Yes, certainly that is a void contract."

Q. (Comm. O'Marr) "You have waited over three years before raising any question about it."

A. (Mr. Honnold) "Well, your Honors know why I waited. You know that I was crowded out originally, and the Commission has held that the claims that was made in the other petition, the Pawnee Territory, have been rejected. So now there is no conflict between the Pawnees under this decision between the Pawnees and the Kaws. Why they took over bodily one of my claims."

(Emphasis supplied).

21. The Indian Claims Commission Act provides in Sec. 10 that any existing tribal organization recognized by the Secretary of the Interior as having authority to represent it "shall be accorded the exclusive privilege of representing such Indians, unless fraud, collusion, or laches on the part of such organization be shown to the satisfaction of the Commission."

Webster's New International Unabridged Dictionary, Second Edition, says the word "laches" means "Laxness; remissness; negligence; neglect; also neglect to do a thing at the proper time; undue delay in asserting a right, or in claiming or asking for a privilege."
Black's Law Dictionary, Second Edition, gives among other definitions of "laches" — Negligence, consisting in the omission of something which a party might do, and might reasonably be expected to do, towards the vindication or enforcement of his rights."

The Joseph L. Cross group of Kansas Indians, represented by the Honnold Group of attorneys, were guilty of laches by not properly prosecuting all the claims of the Kansas or Kaw Tribe of Indians before the Indian Claims Commission. We find it unnecessary to pass on whether or not they are guilty of fraud or collusion.

22. We find that Felix McCauley is the proper representative of the Kansas or Kaw Tribe of Indians entitled to prosecute the claims here involved on behalf of said Tribe, and that the Hearn Group of attorneys under the Bushyhead contract is entitled to represent the Tribe in the prosecution of the claims asserted in its behalf in Dockets Nos. 33, 34 and 35.