



the decision of the Court of Claims reversing the decision of the Indian Claims Commission in denying said intervention.

Subsequent to said decision of the Court of Claims, on the 21st day of December, 1953, this Commission entered an order allowing the intervention of the said Creek Nation East of the Mississippi, said order providing, however, that all the evidence theretofore introduced should be considered as evidence in the further trial of said Docket 21; and on said date this Commission also ordered that said cause be reopened for such further evidence as the defendant and the intervenor might desire to offer in said cause.

Thereafter further evidence was introduced and the intervenor introduced the Treaty of Ghent entered into between Great Britain and the United States, being the treaty ending what was called the War of 1812 between the United States and Great Britain, and asserted that Article IX of said treaty required the United States to return to the Creek Nation the lands that had been ceded to the United States by said Nation by the Treaty of Ft. Jackson entered into between the United States and the Creek Nation. This treaty had not been urged by the plaintiff as a basis of liability of the defendant and the contention of the intervenor based on said treaty is the principal new issue and new question raised by said intervention.

The determination of whether or not the Treaty of Ghent creates liability of the defendant as asserted by the intervenor depends upon the construction of Article IX of said treaty, and whether or not same is available to the plaintiff.

The defendant contends that the intervenor by raising the issue of liability of the defendant to the plaintiff under Article IX of the Treaty

of Ghent has changed the issue in the case and is not entitled to do so under its Amended Motion of Intervention, Paragraph 13 of which reads as follows:

"13. Applicants do not seek to alter or expand in any way in this proceeding the claim of the Creeks against the United States arising out of the Treaty of 1814, the merits of which are the principal issue in this proceeding. Moreover, understanding fully that a trial has already been held upon the merits of the claim and upon the amount of damages, they do not seek to re-open the record for the taking of additional testimony or the presentation of any other additional evidence on these issues. Applicants desire to offer only whatever additional proof this Commission desires in order to establish: (a) that the injury was one to the Creek Nation as it existed prior to the migration, (b) that all descendants of members of such Creek Nation are entitled to recover therefor, and (c) that applicants are members of such class."

Intervenor contends that the paragraph quoted does not restrict its evidence under the order of the Commission permitting the intervention; that the ultimate issue is the liability of the defendant for the value of the land ceded by the Treaty of Ft. Jackson and that the assertion by it of liability by reason of Article IX of the Treaty of Ghent is merely urging an additional basis for liability — that the ultimate issue is not changed.

Even if the issue made by the intervenor is a new issue it would seem that it probably has the right to assert the same because it was filed on April 4, 1951, prior to the limitation date of the filing of claims. Another reason that this Commission thinks the intervenor has a right to urge said basis of liability, if it be one, is because of the liberal construction that should be given in these Indian cases to the assertion of rights on the part of the Indians and of pleadings on their part. Even though we be in error in granting the right to urge said treaty as a

basis of liability, our holding with reference to same, as it will hereafter appear, makes said error (if any) of no effect.

In construing the Treaty of Ghent under Article IX thereof and the terms and intent of the parties thereto, it is conceded by both parties that recourse may be had to its history, including the negotiations therefor, the diplomatic correspondence of contracting parties, the official acts of the Government or its officials in interpreting the same, etc. (Int. Orig. Brf., p. 203; Def. Brf., p. 57).

Article IX of the Treaty of Ghent provides in part as follows:

"The United States of America engage to put an end, immediately after the ratification of the present treaty, to hostilities with all the tribes or nations of Indians with whom they may be at war at the time of such ratifications; and forthwith to restore to such tribes or nations, respectively, all the possessions, rights and privileges which they may have enjoyed or been entitled to in one thousand eight hundred and eleven, previous to such hostilities: Provided always, That such tribes or nations shall agree to desist from all hostilities against the United States of America, their citizens and subjects, upon the ratification of the present treaty being notified to such tribes or nations, and shall so desist accordingly."

The Treaty of Ghent was concluded on December 24, 1814, and ratifications of same by the respective nations involved were exchanged on February 17, 1815, and it was proclaimed by the President on February 18, 1815. The treaty provides that it shall become effective and binding when these ratifications have been exchanged.

The so-called Treaty of Ft. Jackson was concluded on August 9, 1814, and was proclaimed on February 16, 1815.

The eighth Article of the Treaty of Ft. Jackson provides that peace shall ensue between the Creek Nation and the United States from its date.

The last expression of the American Commissioners to the British Commissioners with reference to the provisions of the Treaty of Ghent (later concluded) as to the provisions therein made with reference to Indians was contained in a letter dated October 13, 1814, which reads as follows:

"The article proposed by the British Plenipotentiaries, in their last note, not including the Indian tribes as parties in the Peace, and leaving the United States free to effect its object in the mode consonant with the relations which they have constantly maintained with those tribes, partaking also of the nature of an amnesty, and being at the same time reciprocal, is not liable to that objection; and accords with the views uniformly professed by the undersigned, of placing those tribes precisely, and in every respect, in the same situation as that in which they stood before the commencement of hostilities. This article, thus proposing only what the undersigned have so often assured the British Plenipotentiaries would necessarily follow, if, indeed, it has not already, as is highly probable, preceded, a peace between Great Britain and the United States, the undersigned agree to admit it in substance as a provisional article, subject in the manner originally proposed by the British Government, to the approbation or rejection of the Government of the United States, which, having given no instructions to the undersigned on this point, cannot be bound by any article they may admit on the subject."

The receipt of this statement is acknowledged by the British Commissioners in letter dated October 21, 1814, such letter of acknowledgment using this language:

"The undersigned have had the honor of receiving the note of the American Plenipotentiaries of the 13th instant, communicating their acceptance of the Article which the undersigned had proposed on the subject of the pacification and rights of the Indian nations."

No further mention in said letter of said British Commissioners is made as to the article of the Treaty dealing with the Indians.

The negotiations preliminary to the execution of the Treaty of Ghent disclosed definitely that the British attempted to include the Indians as parties to said treaty as to which they did not succeed, and









Creeks as being entitled to benefits under Article IX were made while said Creeks were in Florida and were associated with the Seminoles at the time who were then directed by English officers and provided with arms and ammunition by the Spanish and English. (See Int. Req. Fdgs., pp. 125-154, inc.) They certainly were not any more of a separate organization capable of making a treaty than they were at the time of the execution of the Treaty of Ft. Jackson, at which time Intervenor asked a finding that they were not such an entity as was capable of making a treaty or authorized to cede land. (Id. p. 194).

Even if the Treaty of Ghent required a return to the Indians of the lands ceded by the Treaty of Ft. Jackson, which we think it was not intended to do, we are of the opinion that such requirement is subject to abrogation by the United States without creating any legal liability. The Supreme Court has repeatedly held that Congress is authorized to modify provisions of previously executed treaties. The latest decision found dealing with this question is that of Moser v. United States, 341 U. S. 41. While it is held by this decision that the act of the Government complained of as not being in keeping with a treaty was not directly an issue — (the Court being of the opinion that the statute involved was not inconsistent with the treaty it was alleged to contravene) — the Court in discussing the question made this statement:

"Not doubting that a treaty may be modified by a subsequent act of Congress, it is not necessary to invoke such authority here, for we find in this congressionally imposed limitation on citizenship nothing inconsistent with the purposes and subject matter of the treaty." (Underscoring supplied).

The following cases are cited as authority for Congress to modify a previously executed treaty:













