

BEFORE THE INDIAN CLAIMS COMMISSION

THE EASTERN BAND OF CHEROKEE INDIANS, )	
) Petitioner, )	
) v. )	Docket No. 282
) THE UNITED STATES OF AMERICA, )	
) Defendant. )	

Decided: Feb. 20, 1959

Appearances:

J. Scroop Styles  
 William M. Styles  
 Frank M. Parker  
 Horace S. Whitman  
 Attorneys for Petitioner

Lester Reynolds, with whom  
 was Mr. Assistant Attorney  
 General Perry W. Morton  
 Attorneys for Defendant

O'Marr, Commissioner, delivered the opinion of the Commission.

Pursuant to the provisions of the Indian Claims Commission Act (60 Stat. 1049), the petitioner, The Eastern Band of Cherokee Indians, filed a petition setting forth some seventeen separate claims against the United States. Defendant in due course answered the complaint, raising multiple defenses both legal and factual, to the individual claims, and in general denying liability to the petitioner in any manner. Thereafter the defendant followed up its answer by filing a lengthy motion for summary judgment, asking this Commission to find

that there exists no genuine issue of fact between the parties and that all the claims asserted by the petitioner should be resolved in defendant's favor as a matter of law. Petitioner has responded to defendant's motion by filing its "Statement of Opposing Points and Authorities To The Motion Of The Defendant For Summary Judgment." In opposition to the defendant's motion the petitioner demanded oral argument on the motion and for the most part insisted that only a trial on the merits could settle the issues as raised in the pleadings.

The motion for summary judgment is intended to raise all matters in the pleadings as well as any matters outside the record properly presented by affidavit or otherwise. At this state of the proceedings the entire record consists of the complaint and answer and all other matters which this Commission can take judicial notice, namely, all those prior judicial determinations involving these litigants, as well as pertinent statutes and other applicable law.

Before discussing in detail the individual claims in the petition some background material on the petitioner band would seem to be in order to understand fully the capacity in which the petitioner brings this action, since the defendant has challenged the legal capacity of the petitioner band both factually and legally in its answer, and again as a matter of law in its motion for summary judgment.

Early in the nineteenth century the entire Cherokee Nation lived east of the Mississippi River, residing primarily in what are now the States of Georgia, Alabama, Tennessee, North Carolina and South Carolina.

There they purportedly possessed and owned in Indian fashion a vast territory of approximately 14,000,000 acres. Because of the diversity of social and economic interests between those Cherokee Indians who occupied what might be termed the "upper towns" and those of their bretheren who live in the "lower towns", a division of their territory was thought to be most desirable. Accordingly, a part of Cherokee Nation, who felt the need to pursue the forest game and enjoy the agricultural pursuits, sought permission to exchange their present lands for more desirable sites west of the Mississippi River. This idea became a reality through treaties concluded in 1817 and 1819 when certain lands were set aside by the Government for the use of the new Cherokee emigrants who thereafter began to move westward across the Mississippi. In 1828 the United States by treaty dealt further but separately with the "Cherokee Nations of Indians west of the Mississippi" by exchanging the lands already ceded to them under the treaties of 1817 and 1819 for other lands west of the Mississippi situated in what was described as the Indian Territory. This was the first instance in which the United States dealt separately with a group of Cherokee Indians as a single entity apart from the Cherokee Nation. This western group became more commonly known and referred to as the "Old Settlers" or "Western Cherokees."

In 1835 those Cherokee Indians remaining east of the Mississippi purportedly executed a treaty with the United States at New Echota, Georgia, whereby the Cherokee Nation in consideration of \$5,000,000 ceded all its remaining lands east of the Mississippi River with the

idea that it would in like manner remove in a body westward across the river and join up with the "Western Cherokees".

The New Echota Treaty proved to be a bitter pill to the Cherokee Nation, as a great many Cherokees rose to challenge its validity as being the unauthorized act of a small group of Cherokees who did not in fact represent the Cherokee Nation. Regardless of its validity, the treaty invoked a great deal of animosity, bitter feeling and untold hardship among the Cherokees east of the Mississippi. Their stubborn refusal to recognize the treaty or comply with its provisions caused the Government to resort to military force in order to move these Indians across the Mississippi. By 1838, the bulk of these "Eastern Cherokees" had either voluntarily or involuntarily emigrated westward into the lands of the "Western Cherokees". Of those Cherokees who refused to emigrate and ultimately remained behind, the majority were located in North Carolina. These Cherokees in North Carolina numbered about 1400 and it is from this group that the present petitioner, The Eastern Band of Cherokees claim lineal descent.

This ancestral group of Cherokees never did rejoin the Cherokee Nation but remained an unorganized collection of individual Cherokees until 1868 when they did band into a group for certain limited purposes. They adopted a form of constitution but their members never were organized into any communal land-owning entity, nor did they in any other manner relinquish their individual property rights. Being no stranger to litigation, it is possible to gain some idea of how their status and relationship to the Cherokee Nation was viewed by the Supreme Court.

In the case of the Eastern Band of Cherokees v. United States, 117 U.S. 208 (1886), also known as the Cherokee Trust Fund Case, the court had the following to say:

The Cherokees in North Carolina dissolved their connection with their Nation when they refused to accompany the body of it on its removal, and they have had no separate political organization since. Whatever union they have had among themselves has been merely a social or business one. It was formed in 1868 at the suggestion of an officer of the Indian Office, for the purpose of enabling them to transact business with the Government with greater convenience. Although its articles are drawn in the form of a constitution for a separate civil government, they have never been recognized as a separate Nation by the United States; no treaty has been made with them, they can pass no laws; they are citizens of that state and bound by its laws. (at page 309)

By foregoing the tribal way of life in withdrawing from the Cherokee Nation, the Eastern Band of Cherokees, necessarily relinquished its tribal and communal rights to the property and assets of the Cherokee Nation from that day forward, and this was true of every individual Cherokee Indian who left the community. As was so adequately stated in the case of the Western Cherokee Indians v. United States, 27 C. Cls. at page 53,

The individual Cherokee had no vested right which he could convey or devise or make the subject of a suit in partition. If he withdrew from the community, he left all rights behind him; and if a stranger was admitted, he acquired a right by virtue of his admission alone. The property was communal - a property wherein every person, not as an individual but as a member of the community held an equal indistinguishable, indivisible right of user and nothing more.

It only follows that in contrast with communal or tribal rights, those rights which are individual or personal shall follow any member of the Cherokees whether he leaves the community or not. Such personal rights attributed to the individual Indian are not ordinary or common, but come into existence by virtue of a treaty or statute

or under the law of the nation in which he shall reside. Thus the mere fact that those Cherokees in North Carolina who remained outside of the Cherokee Nation from 1838 on, became organized in 1868 under the name of Eastern Band of Cherokee Indians, did not transform any individual rights which they may have acquired under any treaty with the United States prior to 1838, into communal or tribal rights.

If the Indians east of the Mississippi River wish to enjoy the common benefits of the common property of the nation, in whatever form it may be, whether in permanent fund or in the proceeds of the sale of common lands, they must comply with its constitution and laws and become readmitted to citizenship as therein provided. Eastern Band of Cherokee Indians v. United States, 20 C. Cls. 449 (1885)

Having in the most general manner touched upon the background and composition of the Eastern Band of Cherokee Indians without particular reference to the present law suit, it becomes necessary to examine in more detail the petitioner band's legal capacity under our Act as governed by the claims it now asserts herein. For indeed it is the nature of the claims, whether communal or individual, which has a direct bearing upon the capacity in which the petitioner must choose to litigate.

Paragraph 3 of the petition does afford some insight into the overall position the petitioner will assume in presenting its claims. The following excerpts are noted.

The Eastern Band of Cherokee Indians is composed of the direct descendants of those Cherokee Indians who did not, either voluntarily or involuntarily, emigrate west of the Mississippi. . .

And further,

. . .that this petitioner, The Eastern Band of Cherokee Indians is entitled to its pro rata portion of all claims of the entire body of Cherokee Indians against the United States,  
 . . . .

And further,

. . .that this petitioner is entitled to recover on a pro-rata basis one -fifteenth of all amounts which the Indian Claims Commission may find to be justly due by the United States on account of the taking of the lands of the Cherokees.

The claim, being one for "the taking of the lands of the Cherokees," is by its nature tribal or common claim, since ownership thereof is communal and not individual.

Therefore in its pleadings the petitioner herein wishes to identify itself with the Cherokee Nation on a communal basis; its position being that ancestral membership alone is adequate to protect tribal rights to the property and other communal benefits accruing to the Cherokee Nation, and thus in proportion to its members at the time of its separation from the Cherokee Nation petitioner desires a pro rata share of any recovery due to said nation.

Part 1.

Part one of defendant's motion attacks those claims enumerated in paragraphs 5 through 16 of the petition. The basis of each of these claims is a treaty of cession between the defendant and the Cherokee Nation in which the Cherokees yielded for a stated consideration certain lands to the United States. Petitioner band now contends that the United States far overreached the Cherokees, taking such unfair advantage of them that the consideration which passed to the Indians for lands ceded was totally inadequate and unconscionable. Thus, as petitioner states in preliminary paragraph 4, (Petition, p. 3):

This petitioner respectfully requests that each of the treaties hereinafter referred to be revised on said grounds of fraud, duress and unconscionable consideration to the end that just compensation be paid to this petitioner for its proportionate part of the true value of said lands at the time of the taking of the same together with interest thereon.

Two defenses are raised in part one of defendant's motion; (1) in abandoning the Cherokee Nation in 1838, petitioner's ancestors, under the constitution and laws of the Cherokee Nation, suffered loss of citizenship and forfeiture of all tribal rights to the property of said Nation, and (2) there was a discharge of all Cherokee claims and demands upon the United States arising from the aforesaid treaties by virtue of payment pursuant to the provisions of the Treaty of 1846 (9 Stat. 871), the Resolution of August 7, 1848 (9 Stat. 339) and the Act of Congress of 1851 (9Stat. 572).

Looking at the first defense, we find that all the claims spelled out in paragraphs 5 through 16 of the petition are based entirely upon events which occurred prior to 1838, the supposed date of departure of petitioner's ancestors from the Cherokee Nation. Thus, during the long period prior to 1838, petitioner's ancestors enjoyed full and equal communal and tribal status with all other members of the Cherokee Nation. It only follows then that during this same period, any alleged wrong or injustice worked upon the Cherokee Nation affected the entire nation as then constituted.

Accepting the proposition that abandonment from the tribe causes forfeiture of all tribal rights from that day forward, it does not follow that such an occurrence has a retroactive effect. It is this

retroactive effect that defendant wishes to apply in defense of these claims. The law, however, does not lend support to defendant's position.

In the case of C. W. McGhee, et al., v. The Creek Nation and the United States, 122 C. Cls. 380, (1952) a group of Creek Indians, styled "The Creek Nation East of the Mississippi", tried to intervene in a suit before the Indian Claims Commission brought by the Creek Nation against the United States in which said Nation sought recovery for lands ceded to the United States under an 1814 treaty. The Commission denied the petitioner's motion to intervene and an appeal was taken to the Court of Claims. There is a striking similarity in the status of the intervening petitioners in the McGhee case as related to the Creek Nation, and the status of the present petitioner band in the instant case as related to the Cherokee Nation.

The facts in the McGhee case show that division in the Creek Nation occurred between certain Creeks east of the Mississippi and the bulk of the Nation which emigrated west. This split was the aftermath of a series of treaties with the United States in which the Creek Nation ceded and exchanged its eastern lands for more desirable sites west of the Mississippi River. As it eventually turned out, those lands west of the Mississippi failed to attract all members of the Creek Nation, and by 1832, an unorganized splinter group who had refused to join the main body of Creeks west of the Mississippi became citizens of the United States, dissolving all tribal organization for the purpose of holding communal property. Their descendants sought intervention in pending suits brought by the Creek Nation on the grounds that in 1814, when the basis for claims arose, the Creek

Nation was one entire tribal group, and, since at that time their long departed ancestors were truly members of the Creek Nation regardless of their withdrawal in 1832, they have a real and legitimate interest in the outcome of this lawsuit. In reversing the decision of the Indian Claims Commission and sustaining the motion to intervene the Court of Claims stated:

The maintenance or lack of maintenance of tribal relations and the occurrence or non occurrence of acts of recognition of tribal organization of the Creek Indians in Oklahoma or east of the Mississippi, subsequent to 1814, would not affect or change what was done to the Creek Nation of 1814. Any claim for an injury to the Creek Nation of 1814, is a claim belonging, if at all, to the descendants of all the members of that Nation whether they live east or west of the Mississippi, and whether organized or not, subsequent to that date. (122 C. Cls. 388)

Having settled the legal basis fundamental to the claim itself subject to proof, the court then went on to settle the basic jurisdictional question under the Indian Claims Commission Act; that is, whether "The Creek Nation East of the Mississippi" qualifies as an "identifiable group". The court settled this issue in the following manner:

To identify is to establish the identity of, and if a group presenting a claim under the Act is capable of being identified as a group of Indians consisting of the descendants of members of the tribes or bands which existed at the time the claim arose, the jurisdictional requirements of the statute, in our opinion, have been met. (122 C. Cls. 391)

There is no honest reason to distinguish between the legal status and capacity of the petitioner band in the instant case, and the position which confronted the intervening Creeks in the McChee case. Finding none, defendant's first defense is not applicable. Here the Eastern Band of Cherokee Indians, pursuant to the Indian Claims Commission Act

seek a revision of twelve treaties negotiated by the United States with the Cherokee Nation at a time when petitioner's ancestors were bona fide members of said Nation. These claims are communal in substance even though the petitioner has filed suit in its own name and not in behalf of the Cherokee Nation. But this is a matter of form, not substance; and the petitioner band has shown in the pleadings that it seeks only a pro rata share of what may be due the Cherokee Nation.

Defendant's second defense suggests that there has been a discharge and release of all Cherokee claims because of per capita payments to individual Cherokees under the Act of Congress of February 21, 1851. Upon receipt of these payments the Cherokees, pursuant to said statute, were to execute releases showing that said payments were to "be in full satisfaction and final settlement of all claims and demands whatsoever of the Cherokee Nation against the United States, under any treaty heretofore made with the Cherokees" (Cherokee Nation v. U. S., 40 C. Cls. 252, 285)

Thus defendant sums up its position as these claims as follows:

In consideration of the releases executed and delivered by the Cherokee Nation, the Eastern Cherokees, and the Western Old Settlers, as above related, coupled with the full payment and discharge of the two claims made following the protest of the settlements under Article 9 of the treaty of 1846 and the stipulation for an accounting contained in the purchase agreement of 1903 relating to the Cherokee outlet, it is submitted that the Cherokee Nation is estopped to assert any claims arising under the treaties had with the United States and the claims set forth in the petition under items 282(a) and 282(1), being paragraphs 3 to 16 inclusive, of the petition should be dismissed. (Motion for Summary Judgment, pp. 45,46)

The soundness of defendant's agreement and position taken in this

instance is overshadowed by its applicability or rather inapplicability, as a proper defense to the asserted claims. Asking for the revision of a treaty because the consideration paid for the land ceded thereunder is unconscionable, is not a claim arising under the terms of the treaty, but exists in spite of the treaty solely because it is a new cause of action created under Clause (3) of Section 2 of the Indian Claims Commission Act. It was under this Act that Congress not only provided the power to litigate such a claim but admitted liability for same to be in the United States if the facts so warranted. Undoubtedly the treaty provisions form some basis upon which to bring such a suit by at least setting the consideration paid, if any, or perhaps determining the title issue if such be the case. But this is not transformed into a claim arising under a treaty in which the sum and substance of such a claim must be contained wholly within its terms and asserted as a treaty obligation. Therefore, defendant's second defense is also inapplicable to the claims asserted.

#### Part 2

Part 2 of defendant's motion is aimed at paragraph 17 of the petition in which there is set forth a twofold claim arising out of the New Echota Treaty of 1835 (7 Stat. 473). The eleventh article of the New Echota Treaty provided that the annuity of \$10,000 per annum due the Cherokee Nation should be commuted into a permanent annuity fund of \$214,000 which monies were to be invested by the defendant as part of the general fund of the Nation. On grounds that its ancestors were members of the Cherokee Nation at the time of the New Echota Treaty, the petitioner band in this action seeks a pro rata share of the

\$214,000 stating that, "no part of this fund has ever been accounted for to these claimants." In like manner petitioner band also seeks a pro rata share of the \$5,000,000 consideration which passed for the Cherokee lands ceded under this treaty. The claims as presented fall within Clause 1 of Section 2 of the Indian Claim's Commission Act as claims arising under a treaty. No other grounds under Section 2 are cited as a basis of recovery for the claims presented in paragraph 17.

To the claim for a share in the \$214,000 permanent annuity fund, the defendant raises the prime defense of "res judicata" in which it cites the case of the Eastern Band of Cherokee Indians v. United States and the Cherokee Nation, 20 C. Cls. 449 (1885), aff'd 117 U.S. 288 (1886), as determining adversely to the petitioner any right it may have, legal or equitable to this fund.

In this case the jurisdictional act among other things, authorized the Eastern Band of Cherokee Indians "to institute a suit in the Court of Claims against the United States to determine the rights of the said band in and to the moneys, stocks and bonds, held by the United States in trust for the Cherokee Indians, arising out of the sales of lands lying west of the Mississippi River, and also in a certain fund, commonly called the permanent annuity fund, to which suit the Cherokee Nation, commonly called the Cherokee Nation West, shall be made a party defendant." (22 Stat. 535).

The petitioner in the instant case before the Commission is the same organization which petitioned the Court of Claims in the 1885 Eastern Band case and which represented itself at that time and was so found to be by the Court, "The organization (is) composed of

persons residing mostly in North Carolina, members and descendants of the members and subjects of the Cherokee Nation, who did not remove with their brethren to this Indian Territory, west of the Mississippi River, but who remained east." (20 C. Cls. 157)

Not only are the parties identical but the claim, as presented in paragraph 17 in the petition herein, is identical with the claim made against the same fund in the 1885 case. The court stated the sum and substance of the 1885 claim in the following language:

The present claimant band seeks to recover such a share of this commutation fund and the interest thereon ever since it was invested by the United States, as will be in proportion to the numbers of its members as compared with the citizens of the Cherokee Nation who live west on the common lands; all of the income having been paid to the Cherokee Nation as a body politic, and none to the claimant. (20 C. Cls. p. 470)

The court decided upon the merits of the case that the petitioner band had no legal or equitable right to the permanent annuity fund. It reasoned that this fund was the common property of the entire Cherokee Nation, to which no individual rights had attached. Its enjoyment was solely communal being of common interest to all members of the tribe. The Eastern Band of Cherokee Indians, having severed all tribal connection and affiliation with the Cherokee Nation as of 1838, and having never been readmitted subsequent thereto, have forfeited all tribal and communal rights and benefits in accordance with the constitution and laws of the Cherokee Nation.

The status of the Eastern Band in the 1885 case which is identical with the position adopted by the present petitioner is summed up by the court as follows:

If the Indians east of the Mississippi River wish to enjoy the common benefits of the common property of the nation, in whatever form it may be, whether in permanent fund or in the proceeds of the sale of common lands, they must comply with its constitution and laws and become readmitted to citizenship as therein provided. They cannot have a divided share of this common property of the nation, and thus gain rights and privileges not accorded to any other Cherokee Indians -- the living out of national territory, avoiding subjecting themselves to the laws of the nation, dividing its common fund and common property, and managing their affairs wholly independent of national authority. (20 C. Cls. 453)

There having been previously litigated on the merits in the 1885 Eastern Band case a claim against the permanent annuity fund indistinguishable in substance from that stated in paragraph 17 of the complaint, the plea of "res judicata" defeats the claim herein and defendant's motion for summary judgment should be granted.

To the other claim seeking a pro rata share of the \$5,000,000 for the lands ceded under the New Echota Treaty of 1835, the defendant also raised the defense of prior adjudication on the merits and cites principally the case of The Cherokee Nation, et al., v. United States, , 40 C. Cls. 252 (1905), aff'd 202 U.S. 101 (1906). The claim as presented arises wholly from the terms of the treaty and is asserted as a claim against the tribal property of the Cherokee Nation. In connection with the proceeds of the sale or sales of tribal lands, the conversion of realty into money does not change the fundamental character of the corpus of the transaction; proceeds therefrom still remain tribal property. On this point the Supreme Court had stated on appeal in the 1885 Eastern Band case:

The lands from the sales of which the proceeds were derived belonged to the Cherokee Nation as a political body and not to its individual members. (117 U.S. 303)

As has previously been discussed, the petitioner's ancestors had forfeited all right to participate in or enjoy the communal or tribal property of the Cherokee Nation by withdrawing therefrom. Therefore, their rights, if any, to all or part of \$5,000,000 depend on the terms of the 1835 New Echota Treaty, under which treaty the petitioner band is now asserting this claim as their ancestral representative.

In affirming the 1836 Eastern Band case, the Supreme Court pointed out the source of any rights which the Eastern Band generally may have against the tribal property of the Cherokee Nation:

Whatever rights, therefore, the Cherokees in North Carolina who refused to join their countrymen in the removal to the lands ceded to them west of the Mississippi, can claim in the funds arising from sales of portions of such lands, or in the fund created by a commutation of the annuities granted upon cessions of the lands of the Cherokee Nation, must depend entirely upon the treaties out of which those funds originated.  
(117 U.S. 308)

With this in mind, an examination of the New Echota Treaty of 1835 reveals that under Section 15 the right reserved to those Cherokees, who chose to remain east of the Mississippi subsequent to the conclusion of said treaty, was the right, after stipulated deductions were made, to share on a per capita basis in the proceeds of the sale of the eastern lands. According to the Court of Claims, the term "per capita" meant:

. . .the proportionate share given to each Cherokee east not choosing to emigrate, of the money received on the cession of the lands east of the Mississippi, after deducting certain expenditures mentioned in Article 15.

Therefore, any rights accruing to petitioner's ancestors or their proper representatives under the 1835 New Echota Treaty with respect to treaty funds are individual rights and it is these individual rights which confer

the claim asserted by the present petitioner for a pro rata share of the treaty considerations. As was pointed out earlier in this opinion a collection of individual rights are not converted into a tribal claim simply because it is asserted as a class action by a subsequently organized group claiming in a representative capacity. Indian claims which are substantially individual claims are not triable before the Commission under the Indian Claims Commission Act. Petitioner's claim as asserted under the New Echota Treaty of 1835 falls into this category and should be dismissed under defendant's motion as not stating a cause of action under which relief can be granted.

Since defendant pled "res judicata" to this claim some comment should be made upon the fact that what has been said concerning the individual character of the above asserted claim has been judicially determined in the case of the Cherokee Nation, et al., v. United States, 40 C. Cls. 252 (1905), in which suit the Eastern Band of Cherokee Indians was a party plaintiff. In this case the liability of the United States to the Eastern Band for a per capita distribution of the proceeds of the ceded lands under the New Echota Treaty was ascertained; judgment in favor of the Indians having been rendered and affirmed on appeal by the Supreme Court. [202 U.S. 101 (1906)]

Thus, even if the claim as presented by the petitioner would have been triable under the Indian Claims Commission Act, "res judicata" would have applied even though the prior judgment in the Court of Claims had been favorable to the Indians.

Part 3

Paragraph 18 of the petition is the object of Part 3 of defendant's motion for summary judgment. Here the petitioner band again asserts a claim arising out of the New Echota Treaty of 1835 in which it asks the Commission for a pro rata share of the \$500,000 used by the Cherokee Nation to purchase 800,000 acres of Kansas lands; the purchase money according to petitioner being deducted from the \$5,000,000 which the defendant agreed to pay the Cherokee Nation for all its lands east of the Mississippi River. (Art. 2, 7 Stat. 478)

In effect the petitioner band argues that in 1835, its ancestors (who were members of the Cherokee Nation) "were joint owners of the lands east of the Mississippi River at the time of the taking of the same by the defendant," for which lands the defendant agreed to pay \$5,000,000. Since the sum of \$500,000 was used to purchase the lands west of the Mississippi River, and since, according to the defendant, petitioner band has no interest, in these western lands, it is entitled to a "distributive share of the said \$5000,000, which constituted the purchase price of said lands." Defendant in its motion argues that the holdings in the Cherokee Trust Fund Case, 117 U.S. 288, which has been previously discussed in disposing of the claim against the commuted annuity fund (Part 2), bars recovery in this case.

Defendant's position is sound on this point and the petitioner as a matter of law has failed to state a claim upon which relief can be granted.

Intitially, petitioner has erred in stating its ancestral

in the lands east of the Mississippi River at the time of the New Echota Treaty. Petitioner's ancestors were not "joint owners" of the lands east of the Mississippi River in 1835. They were bona fide members of the Cherokee Nation and were "communal" owners with all other Cherokees having an indistinguishable and undivided common interest. In like manner as previously discussed, merely selling these tribal lands did not change the character of the proceeds of the sale. The monies thus received constituted a tribal fund out of which the \$5000,000 was used in exchange for additional tribal lands west of the Mississippi River. Thus, having no individual rights upon which to demand a partition or division of tribal property at the time of the 1835 treaty, petitioner band certainly acquired no such interest in tribal lands by leaving the Cherokee Nation three years later. On the contrary they forfeited all rights to the tribal or communal property belonging to the Cherokee Nation, and the only rights, if any, petitioner may have retained in the property of the Cherokee Nation are reserved in the New Echota Treaty of 1835, which treaty provisions are the basis of this claim.

In the 1886 Cherokee Trust Fund Case (Eastern Band of Cherokee Indians v. United States, et al., 117 U.S. 208), the Eastern Band of Cherokees brought suit for a share of the proceeds of the sale of these same Kansas lands. They were denied recovery on the same basis they were denied a right to the commutation annuity fund of \$214,000; namely, that said lands were the then common property of the Cherokee Nation and the Eastern Band had forfeited all tribal rights to said lands. As the Supreme Court said in disposing of this claim:

The claim now presented by the Cherokees of North Carolina to a share \* \* \* of the fund created by sales of lands west of the Mississippi ceded to the Cherokee Nation, resting, as it does, upon the designation in the treaties of the lands originally possessed by the Cherokees and ceded to the United States, or subsequently acquired by them from the United States, as "the common property of the Nation", or as held for the "common use and benefit" of the Cherokee people, has no substantial foundation. (117 U.S. p. 311)

There being no other grounds under the Indian Claims Commission Act cited by the petitioner under which the relief sought in paragraph 18 could be adjudicated by the Commission, petitioner's present suit, pleaded as a treaty claim, fails to state a claim upon which relief can be granted, and should be denied as a matter of law under defendant's motion for summary judgment.

#### Part 4

Paragraph 19 of the complaint sets forth a unique cause of action. As the fundamental basis of its claim, the petitioner cites the results of two Supreme Court cases. The first of these, United States v. The Old Settlers, et al., (Western Cherokees) 148 U.S. 434 (1893), determined what amounts were due to the "Western Cherokees" under the treaty of 1846 (9 Stat. 871) as their share "per capita" in the residuum of the sale of the lands east of the Mississippi under the New Echota Treaty of 1835. The "Old Settlers" or "Western Cherokees" had emigrated west across the Mississippi prior to 1838 and had been ceded lands by the United States under a separate treaty in 1828 in which the "Western Cherokees" were dealt with as a separate nation. When those Cherokees east of the Mississippi moved west by 1838 to join the Western Cherokees on their lands as a result of the cession of all Cherokee lands east of the Mississippi under the New Echota Treaty of 1835, it resulted in a

great deal of friction and discord between the two factions of Cherokees. Thereafter, the East and West became reunited as the Cherokee Nation, adopting and ratifying a new constitution in 1840. Despite the apparent union of the Cherokee Nation bitter feeling still persisted and thus in 1846 the United States, "with a view to the final and amicable settlement of the difficulties and claims" concluded a new treaty in which the rights of all Cherokees, both East and West, under the New Echota Treaty of 1835 were to be clarified, adjusted and settled. Under the provisions of Article 4 of the 1846 Treaty (also cited by the petitioner in its claim), the Western Cherokees relinquished any exclusive claim to those lands west of the Mississippi River ceded to them under the Treaty of 1828, and such lands were to become the common property of the whole Cherokee Nation, and in addition the Cherokees west of the Mississippi acquired a common interest in those lands occupied by the Cherokees east of the Mississippi "which was not provided for in the treaty of 1835" and which "therefore they have an equitable claim upon the United States for the value of that interest, whatever it may be." It was then determined that in proportion to Eastern Cherokees, the "Old Settlers" constituted 1/3 of the new Cherokee Nation and that from the residuum of those monies paid to the Cherokee Nation under the Treaty of 1835, after certain expenditures and charges had been deducted, there then should be allowed "to the Old Settlers (Or Western Cherokees) a sum equal to one third part of said residuum to be distributed per capita to each individual of said party of 'Old Settlers' or 'Western Cherokees'." (Art. 4, 9 Stat. 871)

The court affirmed a final judgment in behalf of the Western Cherokees in the amount of \$212,376.94 "together with interest thereon at the rate of five per centum per annum from the 12th day of June, 1838."

The petitioner's ancestors were not a party to the 1846 treaty nor was the Eastern Band of Cherokee Indians a party litigant to the 1893 "Old Settlers" case. However, under the provisions of Article 10 of the 1846 treaty any rights which those Cherokees, residing in those States east of the Mississippi River, acquired under the treaty of 1835 were to be preserved and not affected in any degree. Thus, in the second cause cited by the petitioner band, United States v. Cherokee Nation, 202 U.S. 101 (1906), those Cherokees who were east of the Mississippi as of the date of the New Echota Treaty of 1835 and its 1836 supplement, had their rights and interests adjudicated under the 1846 treaty on an "account" stated relative to the monies due for distribution after deducting proper charges from the residuum of the treaty funds of 1835-36 excluding, of course, what had already been awarded the "Western Cherokees" under the 1893 "Old Settlers Case." Included within the Eastern Cherokee group and made a party plaintiff to the suit as filed originally in the Court of Claims were the Eastern Band of Cherokee Indians (identified in the suit as the Eastern and Emigrant Cherokees), who wish to assert a claim for a pro rata share of the monies due to the Eastern Cherokees under the

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\* This "account" refers to the Slide-Sender audit of monies due to the Cherokee Nation under the 1835 New Echota Treaty as a result of certain improper charges against the Cherokee Treaty Fund. The audit was conducted pursuant to Act of March 3, 1893 (27 Stat. 641), and the final report was approved by the Cherokee National Council on December 1, 1894. Failure of the Government to acknowledge liability and pay on the account as stated precipitated the aforementioned lawsuit by the Cherokee Nation against the United States.

1846 treaty. The court held that in accordance with the provisions of Article 9 of the 1846 treaty, payment of monies due to those Cherokees residing east of the Mississippi as of the effective date of the 1835 treaty and the 1836 supplement thereto, should be made "per capita, in equal amounts to all those individuals, head of families, or their legal representatives, entitled to receive the same under the treaty of 1835, and the supplement of 1836".

The sum finally determined to be due the Eastern Cherokees and the petitioner band on the account as stated and approved by the court for a per capita distribution in accordance with the provisions of Section 9 of the 1846 treaty was \$1,111,284.70 (after deducting counsel fees, costs and expenses) with interest at five per centum per annum from June 17, 1838 to the date of payment. In rejecting the contentions of the Eastern band for a pro rata share of the whole sum due the Eastern Cherokees, the court stated.

But we think they (Eastern Band) are only entitled to receive the per capita payment with the Eastern Cherokees and should obtain that payment accordingly. (202 U.S. at page 132)

Petitioner band now desires in the present suit to lump together the monies found due under both the "Old Settlers" case and the Cherokee Nation case and extract a pro rata 1/15th share with interest thereon from June 17, 1838 till paid.

The most difficult problem in intelligently discussing the petitioner's claim is fathoming the legal theory upon which it pleads its cause of action. The petitioner complains that it hasn't been paid monies allegedly due it under the Supreme Court decisions just discussed.

Pursuing this thought, logically it would seem to follow that petitioner desires an accounting for monies awarded and due on a judgment, or judgments of the Supreme Court, for petitioner, in confessing lack of knowledge regarding any amounts which may have already been paid the claimants herein, states on page 19 of the petition that:

"for that reason we are claiming the full amounts due under the Supreme Court rulings above set out, subject to any proper payments made by the defendant, such payments to be applied first to the payment of accumulated interest, and the balance to reductions of principal indebtedness."

In its statement opposing defendant's motion for summary judgment, petitioner argues the following on this point:

"By its claim No. 282 (o) (paragraph 19 of the Petition), petitioner asks as an alternative claim that the defendant be required to render an accounting, and if necessary to re-state and correct the accounts, relative to certain sums awarded in two suits described in said claim." (p. 2 - Statement of Opposing Points, etc. - claim 282 (o))

And further on petitioner states:

". . . certainly the petitioner is entitled to receive from the defendant a proper and correct accounting of these funds which have been heretofore adjudicated as being due from the defendant."  
(ibid)

Hence if petitioner is correct, and there are monies due under a judgment the remedy is a suit on the judgment, and petitioner's allegations in paragraph 19, being somewhat ambiguous, do lend themselves to that interpretation. Of course, under the Indian Claims Commission Act, the Commission does not have jurisdiction to entertain a suit on any final judgment nor to directly or collaterally set aside, alter or interfere with a judgment rendered on the merits by the Court of Claims.

Therefore, if petitioner intended to plead a suit to enforce a deficiency, if there be one, on judgments rendered by the Court of Claims, it must be dismissed under the Indian Claims Commission Act for lack of jurisdiction over the subject matter.

Another theory adaptable to the pleadings would frame petitioner's claim as an original cause of action asking a pro rata share in the aforementioned judicial awards based first on tribal membership in the Cherokee Nation as of 1838 during which time said sums of money were due and owing to the Cherokee Nation and, secondly, Section 4 of the treaty of 1846 as cited in the petition.

However, even if it be asserted in this manner the fundamental principles of law and prior court decisions heretofore discussed operate to defeat petitioner's claim. Upon withdrawal from the Cherokee Nation in 1838, petitioner's ancestors forfeited any tribal claim to the common property of the Cherokee Nation. The 1835 New Echota Treaty, and the 1836 supplement thereto are the source of the monies of which petitioner bands seek a pro rata share in this claim. These funds, being the proceeds of the sale of the Cherokee tribal lands east of the Mississippi River are the common property of the Cherokee Nation. What rights, if any, petitioner's ancestors may have acquired in these common funds must be found in the provisions of the 1835 New Echota Treaty, and its 1836 supplement. Section 12 of the 1835 treaty enabled those Cherokees adverse to removal to share per capita in all personal benefits accruing under said treaty. The 1846 treaty, to which petitioner's ancestors were not a party, they having departed from the Cherokee Nation some eight years

prior thereto, reserved unaffected unto those Cherokees who had chosen to remain east of the Mississippi, all rights acquired under the 1835 New Echota Treaty.

The "Old Settlers" or "Western Cherokees", who had moved west across the Mississippi River to lands ceded to them in 1828, and who were not parties to the New Echota Treaty of 1835, and the "Eastern Cherokees" who were parties to the 1835 treaty, and who in 1838 emigrated in a body to Cherokee lands west of the Mississippi River, each had their rights determined in like manner to proceeds of the sale of the eastern Cherokee lands, and each group was to share on a per capita basis in the balance of these funds after stipulated deductions had been made. Thereafter, the rights of all the Cherokees under the foregoing treaties were judicially examined and fixed under the decisions in the aforementioned 1893 Old Settlers case and the 1906 Cherokee Nation case.

The total amount awarded to "Old Settlers" subject to "per capita" distribution was fixed at 1/3 the total proceeds, Neither the "Eastern Cherokees" or petitioner's ancestors were parties to the 1893 Old Settlers case nor did they have any interest in the award made thereunder. Their interest lay in the remaining two-thirds of the balance of the proceeds and their rights thereto were judicially determined and fixed under the 1906 Cherokee Nation case.

The original suit in the Cherokee Nation case was filed in the Court of Claims on an account stated in which the Cherokee Nation was party plaintiff (in a representative capacity for all the Eastern Cherokees).

In addition, the Eastern Band of Cherokee Indians was specifically made a party plaintiff. The liability of the United States on the account stated (which had been approved previously by the Cherokee Nation) was affirmed by the court, and a favorable judgment rendered on behalf of all plaintiffs fixed the total amounts due to these Cherokees for per capita distribution of all monies due under the 1835-36 New Echota Treaty. The suit, as adjudicated on the merits in the Cherokee Nation case to which the present petitioner band was a party, is identical with the claim in paragraph 19 of the petition, if said claim were presented as an original cause of action. "Res judicata" would therefore apply barring the claim as a matter of law.

One other point raised by the petitioner needs particular comment. It is alleged that on the effective date of the aforementioned Supreme Court decisions, the General Accounting Office should have restated the account to give, as petitioner contends, "the true status of the several accounts and to give them the advantages and principals of partial payments, by first applying any payment to the discharge of accumulated interest, and to apply only the sums in excess thereof to the interest bearing principal, etc." (Petition, p. 19)

In other words what the petitioner band is seeking is compound interest, and, in order to do this it suggests going behind the judgment of the Supreme Court, which approved the account stated therein fixing the amount due, and substituting a different account. - This idea has already been tested in the Court of Claims by the Eastern Cherokees and found wanting. In the case of the Eastern or Emigrant Cherokees v. United States, 22 C. Cls. 120 (1935), the plaintiffs sought to have this

same account restated and for the same reason the present petitioner band now argues. The court ruled that the Cherokee Nation case was a final adjudication on the merits of the claims presented therein and the plaintiffs are barred to assert any new theory of accounting upon which to change the end result of that case. The present petitioner band, having admittedly been a party to the Cherokee Nation case is in no better position to assert the same argument in the present law suit. This issue as to correctness of the account as stated upon which judgment was rendered in favor of the petitioner band in the Cherokee Nation case has been finalized on the merits and as a matter of law, is a bar to the instant claim.

In conclusion, defendant's motion for summary judgment as to the claim asserted in paragraph 19 of the petition should be granted. If the claim be viewed as a suit on a former judgment, it should be dismissed for lack of jurisdiction over the subject matter for it fails to state a claim under our act for which relief can be granted. . If it is an original cause of action for monies due under a treaty, it is barred under the doctrine of "res judicata" by virtue of the decision in the case of the United States v. Cherokee Nation, et al., 202 U.S. 101 (1906).

#### Part 5

Petitioner's final claim as asserted in paragraph 20 of the complaint, seeks to recover from the defendant ten per cent of the amount awarded by the court in the case of the United States v. Cherokee Nation, et al. 202 U.S. 101 (1906) as costs and attorney fees which were

chargeable against the amount of the judgment obtained by the Cherokee plaintiffs. Petitioner band argues that the court made an improper charge against the Cherokee funds, and, since the defendant "wrongfully disbursed said amounts" then "in equity, good conscience and fair and honest dealings" \* it should account to the petitioner for its share of the amounts improperly expended.

In this instance petitioner's claim that it was improper to charge Cherokee funds with costs and attorneys' fees, fails to state a claim upon which relief can be granted even under the Indian Claims Commission Act. The Commission has already ruled contrary to the petitioner on an identical claim asserted in Docket 42 by the Eastern (Emigrant) Cherokees, who, like the petitioner band, were parties to the 1906 Cherokee Nation case, and from whom the petitioner in the instant claim bases its standing to demand a pro rata share of any possible award "by reason of (their) having been numbered with the Eastern Cherokee Indians at the time the debt was contracted." (Pet. p. 21)

In Docket No. 42, The Eastern (Emigrant) Cherokee Indians, et al. v. United States, 1 Ind. Cl. Com. 414, the Commission went into the problem thoroughly, discussing the propriety and impropriety of charging the Cherokee funds with these same costs and fees as was ordered by the court in the aforesaid Cherokee Nation case. Without evidence of any pecuniary advantage to the United States because of said award, or any wrongdoing, dishonesty, unfair advantage or dishonorable dealings with the Cherokees (no such facts as would indicate the same are pleaded in the instant suit),

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\* Petition, p. 22

the Commission dismissed the complaint in stating the following:

The defendant, neither by treaty, agreement, nor act of Congress, became obligated to pay the cost and expense of distributing the fund, nor has it been the policy of the Government to bear such costs. Cf. Choctaw Nation v. United States, 91 U. S. 320. This item therefore must be disallowed. (1 Ind. Cl. Com. 421)

Certainly, if the Eastern (Emigrant) Cherokees were turned down by the Commission on a similar claim, the present petitioner cannot recover merely by filing the same claim in the nature of a derivative action in which it demands a pro rata share of what might be due its Eastern brethren.

Accordingly, defendant's motion for summary judgment should be granted and paragraph 20 of the petition should be dismissed for failure to state a claim upon which relief can be granted.

#### Conclusion

As to Part 1 of defendant's motion for summary judgment filed herein, said motion is denied as to those claims set out in paragraph 5 through 16 of the petition and designated in the motion as claims 282(a) through (1) inclusive. Each of these claims will be set down for trial or other proceedings as the case may be and assigned separate docket numbers.

Defendant's motion for summary judgment (Parts 2, 3, 4 and 5) is granted as to those claims set out in paragraphs 17 through 20 and the same are dismissed on the grounds heretofore discussed.

Louis J. O'Herr  
Associate Commissioner

We concur:

Edgar E. Witt  
Chief Commissioner

Mr. H. Holt  
Associate Commissioner