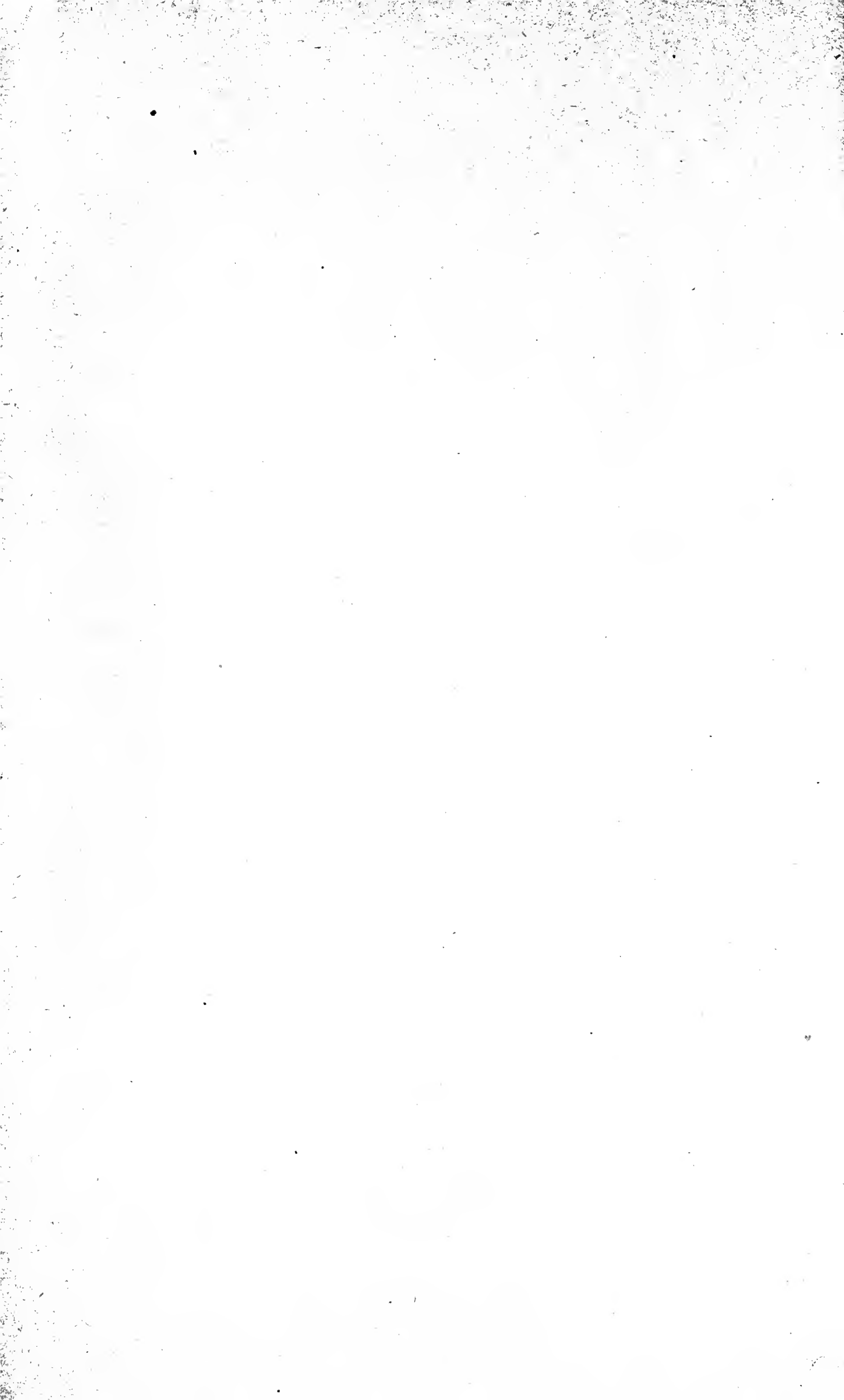
BANCROFT
LIBRARY

THE LIBRARY
OF
THE UNIVERSITY
OF CALIFORNIA



E 77
.P18

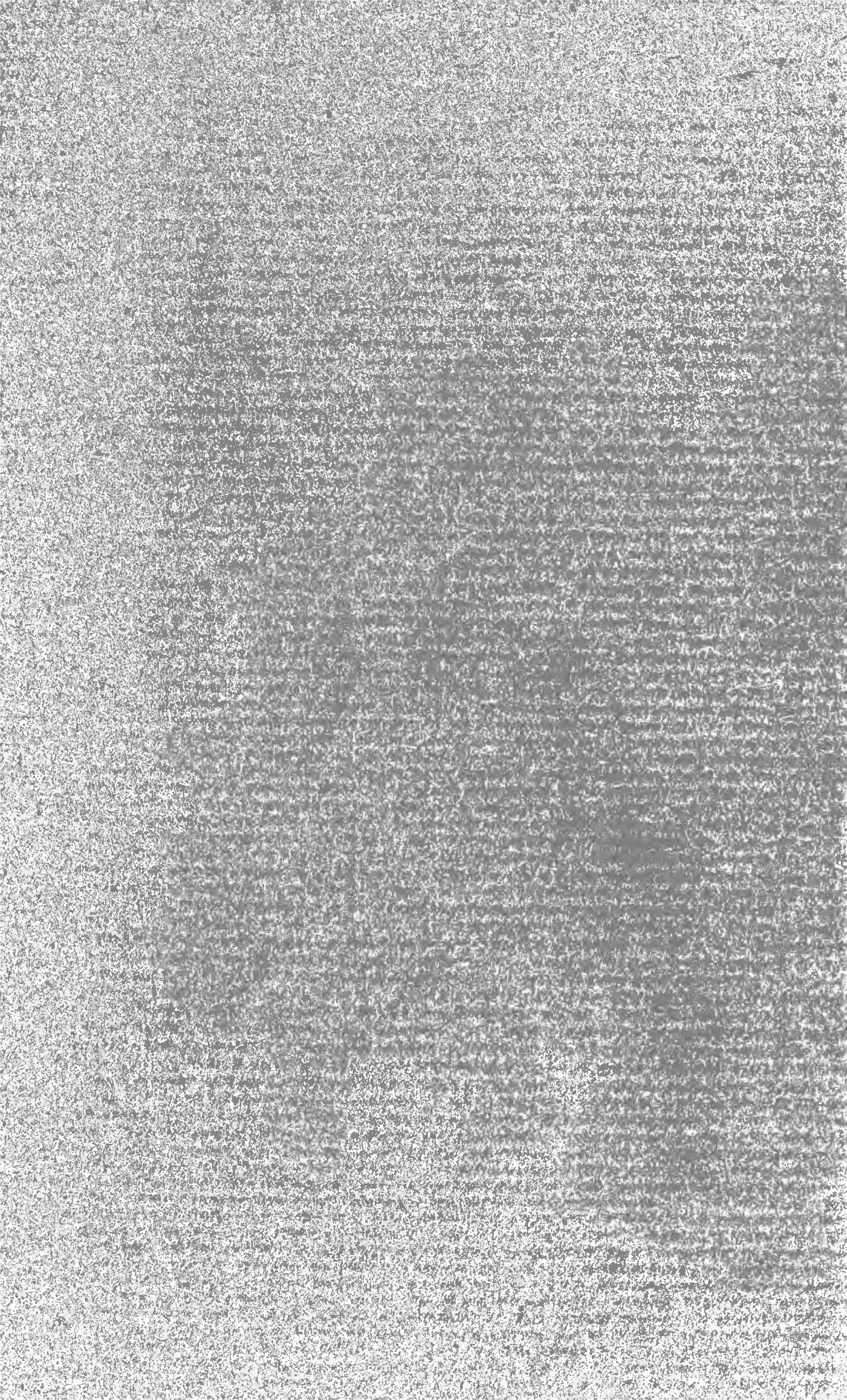
# In the Court of Claims of the United States.

INDIAN DEPREDATIONS.

CALVIN T. HAZELWOOD
*vs.*
THE UNITED STATES AND THE KIOWA and Comanche bands or tribes of Indians.
} No. 2276.

DEFENDANTS' REQUEST FOR FINDINGS OF FACT.—OBJECTIONS TO FINDINGS OF FACT REQUESTED BY CLAIMANT.—BRIEF AND ARGUMENT OF COUNSEL FOR DEFENSE.

L. W. COLBY,
*Assistant Attorney-General.*



# In the Court of Claims of the United States.

INDIAN DEPREDATIONS.

---

| | |
|---|---|
| CALVIN T. HAZELWOOD<br>*vs.*<br>THE UNITED STATES AND THE KIOWA and Comanche bands or tribes of Indians. | No. 2276. |

---

**DEFENDANTS' REQUEST FOR FINDINGS OF FACT AND OBJECTIONS TO FINDINGS OF FACT REQUESTED BY CLAIMANT.**

I.

Defendants object to the second, third, and sixth findings of fact requested by claimant.

II.

The defendants, considering the facts hereinafter set forth to be proven, and deeming them material to the due presentation of the case in the findings of fact, request the court to find the same as follows :

(1) The defendant Indians were not in amity with the United States at the time of the alleged depredation.

(2) The maximum amount of loss which the evidence can in any event be presumed to establish does not exceed $2,940, the amount recommended for allowance by the Commissioner of Indian Affairs, September 2, 1873.

(3) It does not appear from the evidence that claimant did not seek or attempt to obtain private satisfaction or revenge.

(4) It does not appear from the evidence that the depredation was committed without just cause or provocation.

L. W. Colby,
*Assistant Attorney-General.*

# In the Court of Claims of the United States.

INDIAN DEPREDATIONS.

---

| | |
|---|---|
| CALVIN T. HAZELWOOD<br>*vs.*<br>THE UNITED STATES AND THE KIOWA and Comanche band or tribe of Indians. | No. 2276. |

---

**BRIEF AND ARGUMENT OF COUNSEL FOR DEFENSE.**

## I.

### STATEMENT OF THE CASE.

The depredation, the loss from which forms the subject-matter of this case, is alleged to have been committed by Kiowa and Comanche Indians in Palo Pinto County, Tex., in the years 1866 and 1871. By this depredation the claimant, in his petition, alleges the loss of "a number of horses of the aggregate value of $5,635." On the 2d day of September, 1873, the Commissioner of Indian Affairs made a report upon the claim, recommending an allowance of $2,940. The only evidence that this report

was concurred in by the Secretary is a statement to that effect contained in copies of several bills presented before the House of Representatives.

None of the original evidence in the case, except a letter from the Indian agent, is on file in this court, and no new evidence has been taken. The reply to the call on the Clerk of the House of Representatives informs us that the papers in the "case were referred to the Committee on Indian Affairs in the Forty-seventh Congress and never reappeared in the files of the House."

The claimant's attorney, in his request for findings of fact and brief, proceeds upon the assumption that this is a case entitled to priority of consideration by the court and to judgment in case neither party elects to reopen. As the case was not examined, approved, and allowed by the Secretary subsequent to the act of 1885, it is not, according to a recent decision of the court, a priority case.

## II.

### EVIDENCE INSUFFICIENT.

The only evidence now in the case is a letter from the Indian agent and a copy of the report of the Commisioner of Indian Affairs. This, it is submitted, is insufficient to establish the claimant's right to recover. The evidence has not even the value of *ex parte* affidavits. An argument on behalf of defendants as to the value to be accorded this kind of evidence seems absolutely useless. All we know of the evidence presented before the Interior Department is that the claimant and two herders swear that

the horses "were taken." We are not even told by whom. There is no competent evidence to show that the defendant Indians took or destroyed the property.

It is incumbent upon the claimant to make out his case, and not upon the defendants to defeat his alleged right by proving that the material facts do not exist. It was within his power to furnish evidence of a proper character by taking depositions since the filing of the case in this court and the discovery of the loss of the affidavits. But he chooses rather to rely upon a copy of a meager report of the Commissioner of Indian Affairs for the substantiation of his case.

## III.

### IDENTITY OF INDIANS AND CONDITION OF AMITY NOT ESTABLISHED.

The only indication in the case that the horses were taken by Indians is a reported admission shown by an unverified letter of the Indian agent to that effect. But if we accept this much of their reported and unverified statements as evidence we must accept them all; and they say further that "they were all on the warpath a portion of the time." So, if it is proved that the Indians took the property, it is likewise proved that they were not in amity, and the claimant must fail in either case. Going to the corroboration of this statement of the Indians, there is evidence of a continued war or hostile condition from 1864 to 1873 of the Comanches, Kiowas, Arapahoes, and Utes to be found in the executive documents of those years; and to these the attention of the court is directed should

it desire further evidence upon this feature of the case. See Gen. Hancock's reports for 1867–'68; Gen. Sheridan's reports for 1869–'70–'71–'72–'73.

## IV.

### DEPREDATION NOT SHOWN TO BE WITHOUT JUST CAUSE OR PROVOCATION.

It does not appear from the evidence that the taking or destruction of claimant's property was without just cause or provocation on the part of the owner or agent in charge.

The act of March 3, 1891, gives authority to the Court of Claims to inquire into and adjudicate claims of the kind in controversy only when the property was destroyed *without just cause or provocation.* The wording of the act in this regard is as follows:

> All claims for property of citizens of the United States taken or destroyed by Indians belonging to any tribe, band, or nation in amity with the United States, *without just cause or provocation on the part of the owner or agent in charge,* and not returned or paid for. * * *

This is a fact necessary to be proved by claimant and found by the court before judgment can be rendered in cases included in the first class of section 1. It must be affirmatively shown. It can not be presumed. It is jurisdictional, a necessary part of each case, and without it no cause of action exists in the first class of claims authorized under the act of March 3, 1891. There is no proof of any kind to be found in the record on this material

part of claimant's case. The record is absolutely silent. There is nothing to show what cause or provocation the Indians had, whether they had any, whether just or unjust. The court can not presume that the Indians had no cause for committing the depredations charged. It can not be assumed that they were the unjust aggressors and that the claimant was blameless. The law always presumes the defendant innocent in criminal cases, and raises no presumption in favor of one who charges another with an offense.

It is submitted that in this class of cases, which are in reality but civil remedies for criminal acts, the burden of proof rests upon the claimant to prove by a preponderance of competent evidence each and every material allegation in his petition, and if any such allegation is not proven he must fail and the cause be dismissed. The depredation being committed *without just cause or provocation* was wisely and plainly made material and jurisdictional by the terms of the act itself, and can not be ignored. When, as in this case, there is an entire absence of proof on a material fact within the knowledge of the party, the court, by the principles of evidence, should construe the same strongly against such party, and can say with reason that there must have been just cause or provocation for the actions charged. The court is cited to the following authorities in support of this principle of evidence: 1 Greenleaf on Evidence, secs. 37 and 80, and notes; *Attorney-General* vs. *Dean et al.* (24 Beavan, 679); *Thompson* vs. *Thompson* (9 Ind., 323); *Armory* vs. *Delamirie* (1 Smith's Ldg. Cases, 609).

## V.

### NO PROOF THAT CLAIMANT DID NOT SEEK PRIVATE SATISFACTION OR REVENGE.

There is no allegation in the petition or proofs in the record that the claimant did not seek or attempt to obtain private satisfaction or revenge. This is a material and necessary element to be shown, if the claim is one of those included in the second class of the first section of the act of March 3, 1891, as is contended by claimant's counsel. This being the case, the laws in force at the time must govern in the adjudication after the jurisdictional elements required by the act of March 3, 1891, are proven, and these expressly restrict the right of recovery to those who do not seek private satisfaction or revenge for their injuries.

One of the provisions of the act of June 30, 1834, is:

> If such injured party, his representative, attorney, or agent, shall in anyway violate any of the provisions of this act by seeking or attempting to obtain *private satisfaction or revenge*, he shall forfeit all claim upon the United States for such indemnification.

The amendment by the act of 1859, it will be seen, touches only the provision that in certain cases payment be made from the Treasury, and leaves the act in other respects unchanged. The claimant still has, after the amendment of 1859, "a claim upon the United States for idemnification." It may be paid either out of funds or annuities due the Indian tribes or by special acts of Congress making appropriations for that purpose; but it is

to the United States that the claimant must look and not to the Indians themselves if he would obtain a peaceful settlement for his losses. The clause prohibiting him from seeking private satisfaction or revenge is therefore left intact.

This provision of the law was in the intention of Congress vital to the whole act, and of prime importance; in fact, it was the key to the purpose of the promise of eventual indemnification by the United States. This fact will be more clearly appreciated when it is remembered that this provision was made in all the legislation which preceded the act of 1834, and that other portions of that act itself, as well as of the previous acts, bear evidence of being inspired by the same purpose. The attention of the court is directed to the fact that from the first act which was passed relative to Indian depredations, in 1796, up to and including this act of 1834, provision was made for the payment only of damages arising from depredations committed by Indians *in amity* with the United States. In each of the acts mentioned will also be found, after the guaranty of eventual indemnification, this same provision that if any attempt be made by the claimant or his agents to obtain private satisfaction or revenge "he shall forfeit all claim upon the United States for indemnification."

The reason for the incorporation of this provision in the law is not far to seek. It was the same as that which limited the guaranty of indemnification to those depredations committed by tribes "in amity" with the United States; it was identical with the reason for the indemnifica-

tion itself, which appears in the policy of all these acts; it was to preserve peace and prevent war between the United States and the Indian tribes.

This was the main object of the law. Its purpose was not so much to provide a cure for losses already suffered by individuals as to prevent further and more extensive depredations and acts of violence by the Indians, which would surely be consequent upon an attempt by the settlers to revenge or redress themselves for their losses.

If it had been otherwise, as has been hereinbefore noted, if the object of the law had been primarily the indemnification of individuals, the acts of Congress would have included depredations committed by members of all Indian tribes, whether in amity with the United States or not, and this provision prohibiting the seeking of private satisfaction or revenge would have been omitted; rather would the one depredated have been commanded to use due diligence in recovering his property from the depredators by his own exertions. As far as the interests of the settler were concerned, what difference did it make whether or not the Indians who had stolen his property were in amity with the United States? Or, if his interests and his indemnification were the principal objects of the law, what reason was there for preventing him by that same law from following the red thieves and recovering his property by force, as he might legally do with a white thief?

The same purpose of placating the Indians and avoiding trouble between them and their aggressive white neighbors is seen in a corresponding and even stronger

provision in regard to depredations committed upon Indians by white men, which appears both in the act of 1834 and in all the previous acts on this subject. This clause provides that such white depredators shall, upon conviction, pay to the Indians twice the value of the property stolen or destroyed, and in case they are unable to do so, or can not be apprehended, the United States agrees to make up from the National Treasury at least the full value of the losses so caused, provided that neither the Indians interested nor any of their tribe shall seek *private satisfaction or revenge.*

The conclusion seems irresistible; the object of the act is manifest; and the provision concerning private satisfaction and revenge is one of its most vital parts.

L. W. Colby,
*Assistant Attorney-General.*

○