BEFORE THE INDIAN CLAIMS COMMISSION

THE CHOCTAW NATION, Petitioner, vs. THE UNITED STATES OF AMERICA, Defendant.	)	Docket No. 56

Grady Lewis, with whom was W. F. Semple and H. L. Fitzgerald, Jr., Attorneys for Petitioner.

Ralph A. Barney and Jules H. Sigal, with whom was Mr. Assistant Attorney General A. Devitt Vanech, Attorneys for Defendant.

JUL 14 1950

OPINION

Witt, Chief Commissioner, delivered the opinion of the Commission:

The case was submitted to the Commission upon the motion of the defendant for a summary judgment in defendant's favor, dismissing the action "on the ground that there is no genuine issue as to any material fact and that the defendant is entitled to a judgment as a matter of law in that the issues contained in the petition have been heretofore judicially determined and the matter is res judicata by reason of the former decision of the United States Court of Claims in the case of The Choctaw

Nation v. The United States, 91 Ct. Cls. 320." (No. K-260 in that Court.) The motion was made pursuant to Sec. 11(b) of the Commission's Rules of Procedure.

Accompanying said motion an affidavit was filed marked Exhibit A. Upon a hearing of said motion, the defendant introduced in evidence the original petition (Def's. Ex. No. 1); a first amended petition (Def's. Ex. No. 2); a second amended original petition (Def's. Ex. No. 3)—all filed in the case of The Choctaw Nation v. The United States, 91 Ct. Cls. 320; also the special findings of fact and the opinion of the Court of Claims, as reported in said case (Def's. Ex. No. 4).

The motion was orally argued before the Commission and was taken under advisement.

The right of the defendant to interpose the defense of res judicata under the terms of the act creating the Commission and fixing its jurisdiction has been upheld by this Commission in its opinions in its Docket No. 2, The Western (Old Settler) and Eastern (Emigrant) Cherokee Indians; No. 3, The Western or Old Settler Group of Cherokee Indians; and Docket No. 5, The Eastern (Emigrant) Cherokee Indians, and that right confirmed by opinions rendered by the Court of Claims upon appeals in the aforesaid cases.

A comparison of the pending action with the former case in the Court of Claims shows that the parties were the same in both cases; and that the plaintiff alleged that under Article 13 of the treaty of June 22, 1855 a trust fund of $500,000 was created for the Choctaw Indians,

bearing interest at 5% per annum, and that the said Choctaws received interest at 5% per annum on this trust fund, or the residue thereof, until the act of March 1, 1907 (34 Stat. 1027) at which time the said residue of $390,257.92 was set up on the books of the Treasury Department under "Choctaw Three Per Cent fund;" and interest thereon at 3% per annum was credited to the Choctaw Nation until 1913, after which time the fund was diminished by disbursements thereof, and interest at 3% per annum was credited on the diminished amounts until 1922, when the fund was exhausted; the plaintiffs further stated that the interest derived from this 3% fund amounted to $95,134.66, whereas had this fund been continued at 5% per annum the interest earned would have been $158,559.48, "or a difference of $63,423.11, for which amount the plaintiff is entitled to judgment." (Par. X, p. 26, Plaintiff's Second Amended Petition, Def's. Ex. No. 3). The plaintiffs also filed a claim for interest at 5% per annum allegedly due under the "Choctaw Three Per Cent fund" and stated that said interest was claimed on the disbursements from the close of the fiscal year in which made to June 30, 1935, in the amount of $371,431.96 (Par. IX(d), p. 26, Plaintiff's Second Amended Petition, Def's. Ex. No. 3).

In the instant case the petitioner alleges, as was alleged in case No. K-260 in the Court of Claims, the provisions of the treaty of June 22, 1855 by the Choctaw Nation and the United States creating a trust fund in the sum of $500,000 which was to bear interest at 5% per annum and

that said interest was for a period paid at the rate of 3% per annum by virtue of the act of March 1, 1907 as pleaded in case No. K-260, and that said reduction of interest paid illegally reduced the amount due and owing by the defendant; and "that had the petitioner been paid at the rate of 5% instead of 3% there would have been due the petitioner as earned interest on said trust fund as of June 30, 1935, the total additional sum of $63,423.11 (Plaintiff's pet., pars. 4 and 5). Petitioner further pleads "that the reduction in the rate of interest from 5% to 3% constituted a breach of defendant's treaty obligations and was made without petitioner's consent, by reason whereof petitioner is justly entitled to recover the sum of $63,423.11, with interest at 4% per annum from June 30, 1935." (Plaintiff's pet., par. 6).

Petitioner further seeks interest on $63,423.11 computed from the several dates when annual interest payments comprising said sum became due and were unpaid (Plaintiff's pet., par. 7).

The claim in the instant case is shown to be the exact claim as made in No. K-260 in the Court of Claims.

Said case No. K-260 was decided on April 1, 1940 (91 Ct. Cls. 320) and the Court of Claims found and determined that the Choctaw Nation was entitled to judgment in the amount of $63,423.11, the exact amount which the plaintiffs sought to recover in that case and the exact amount sought in the instant case; but the Court held that offsets authorized by the statute of August 12, 1935 (49 Stat. 571, 596), and conceded by

the plaintiff therein to be proper in the amount of $63,450.26 (if the Court should hold the offset statute constitutional—which it did), more than equaled the amount of the award to which plaintiff was entitled and therefore the petition of the plaintiff should be and was dismissed (91 Ct. Cls. 320, et al., Def's. Ex. No. 4).

It was further held by said Court of Claims in said opinion that interest on the $63,423.11 was not recoverable as such or as damages under section 177 of the Judicial Code, and also because the provisions of Article 13 of the treaty of 1855 (11 Stat. 611) did not require that interest should become a part of the trust fund.

A petition by the plaintiff in cause No. K-260 for a writ of certiorari in the Court of Claims was denied by the Supreme Court of the United States on March 3, 1941 (312 U.S. 695).

In response to the motion for summary judgment petitioner pleaded that the statement of facts as contained in the motion of defendant "is substantially correct" and, further, that "the Court of Claims specifically found that as a matter of law the plaintiff was entitled to recover the difference in interest from the trust fund when paid at 3% rather than at 5%" (in amount $63,423.11). The plaintiff offered no evidence.

Petitioner contends, however, that the Court of Claims "concluded that the defendant was entitled to offset against the claim of the plaintiff gratuity disbursements in the sum of $3,574,439.65," and that "such method of offsetting valid claims is not proper, correct, nor valid." In support

of its legal contention petitioner cites the cases of the Seminole Nation v. United States, reported in 316 U.S. 286 and 310.

Based on such contention the petitioner asserts the right to relitigate the exact claim litigated and decided in the Court of Claims in case No. K-260, reported in 91 Ct. Cls. 320.

This Commission is of the opinion that the previous decision is res judicata and that petitioner's contentions cannot be sustained.

The Commission is of the opinion that if the Court of Claims had offset the sum of $3,574,439.65 against the claim of petitioner as petitioner claims, that nevertheless such action, if error, would not prevent the said decision from being res judicata of the instant case for the reason that petitioner had opportunity in that proceeding to urge the same contentions that it urges here as to the proper determination of offsets, and had such opportunity in the Supreme Court, which denied certiorari in said case.

However, the Court of Claims in its opinion in case No. K-260 sets out specific items of expenditure which the opinion says the plaintiff therein concedes as proper offsets in the following amounts (Def's. Ex. No. 4), to wit:

In finding 31 of fact, items constituting $16,488.60 are identified as constituting allowable offsets (p. 25); likewise, finding 32, $5,998.82 is identified (p. 26); finding 33, $31,076.22 is identified (p. 26); finding 35, $8,710.52 is identified (p. 28); finding 36, $672.96 is identified

(p. 32); finding 38, $403.14 is identified (p. 32). These specially identified items are allowed as offsets aggregating the total amount of $63,450.26 and, this being in excess of the only claim which the court had allowed in the case, the plaintiff's petition was dismissed (Def's. Ex. No. 4, p. 80).

In petitioner's response to motion for summary judgment it is alleged that "the permission to claim gratuities as authorized in the said act of August 12, 1935 is denied the defendant" by the act creating the Indian Claims Commission and, further, that "the defense that was available to the United States in K-260 * * * has now been taken away from it, with the result that the concededly valid claim of the plaintiff stands unsatisfied and not offset and the privilege of offsetting it is now not available to the defendant."

That case (K-260) was tried at a time when the gratuities mentioned were allowable offsets by the Government and they were so used to liquidate the claim. We find nothing in the Indian Claims Commission Act which permits a reconsideration of the offsets on the basis of the present act. The judgment of the Court of Claims wiped out the claim and the Indian Claims Commission has no power to reconsider it.

The motion for summary judgment is sustained and the case is dismissed.

It is so ordered.

Commissioners O'Marr and Holt concur in the above opinion.

July 14, 1950