BEFORE THE INDIAN CLAIMS COMMISSION

THE CHOCTAW NATION, Petitioner, v. THE UNITED STATES OF AMERICA, Defendant.	)	Docket No. 55

JUN 1 1 1951

OPINION OF THE COMMISSION

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

This suit is to recover a total of $753,701.41 (corrected to $753,609.41, See Finding No. 2) alleged to be the aggregate of administrative and agency expenses incurred by the defendant, and improperly charged to petitioner, in carrying out the provisions of what are known as the Atoka Agreement (30 Stat. 495) and the Supplemental Agreement (32 Stat. 641) entered into by the Dawes Commission with the Choctaw Nation, the first on April 23, 1897, and the latter on September 25, 1902, and subsequently properly ratified and approved by the Choctaw Nation and by the Congress of the United States.

Petitioner's complaint is that to induce and persuade petitioner and its membership to enter into the aforesaid Agreements, the defendant represented to petitioner and its members throughout the negotiations that resulted in the adoption and ratification of said Agreements, that said Agreements contemplated and provided for the payment of the expenses herein sued for by the defendant, and that same were thereafter by the

defendant improperly taken from petitioner's funds, and that the said tribe should be reimbursed therefor.

The defendant urged in a motion for summary judgment in the instant case that a previous decision (91 Ct. Cls. 320) was res judicata of the instant case. The Commission overruled this motion, but same is being urged in the defendant's answer to the merits as a defense to the action.

In petitioner's response to defendant's motion for summary judgment it is stated with reference to the decision relied upon by the defendant as being res judicata "that the parties (in the former and in the instant cases) are the same and the subject matter is the same since petitioner is again seeking restitution of its funds spent by the defendant for the purposes alleged in this case," which are the same as in the former case; and upon the trial on the merits petitioner offered in evidence the items of alleged wrongful expenditures from petitioner's funds constituting the total of $753,609.41, and stated that all of same were sued for in the former case. It was pointed out that additional amounts aggregating $265,605.93 were also sued for in the former case but were omitted in the instant case.

Petitioner makes the contention that provisions (3) and (5) of Section 2 of the Indian Claims Commission Act creates in petitioner a new cause of action which did not exist at the time of the previous litigation and that therefore the decision in the previous litigation is not res judicata of the instant case.

For the reasons hereafter stated, we are of the opinion that the previous decision is res judicata of the instant case and that we have no jurisdiction to hear and determine the claims herein asserted.

That the defense of res judicata is available, where applicable, has previously been held by this Commission and by the Court of Claims in the cases of Western (Old Settler) Cherokee Indians and the Eastern (Emigrant) Cherokee Indians vs. United States, Dockets Nos. 3 and 5 of this Commission, and Appeals Dockets Nos. 2 and 3 of the Court of Claims.

In the instant case petitioner sued, as hereinbefore set out, for the same items of expense as sued for in the previous case, alleging same had been improperly charged to it and should be refunded, as alleged in the previous case. Petitioner based its claim upon the same allegations as to representations and preliminary proposals made by the Dawes Commission as inducing the petitioner to believe that the expenses as sued for would be borne by the defendant, as in the previous case; and that but for such representations and such understanding of the meaning of the provisions of the Agreements, the petitioner would not have entered into such Agreements.

The trial record in the Court of Claims case shows that the propositions submitted by the Dawes Commission, as introduced in evidence in the instant case, were called to the attention of that Court, and the Court's attention was directed to the negotiations leading up to the treaties.

The representations of the Dawes Commission were urged in the Motion

for New Trial filed in the Court of Claims, and of the provisions in the Agreements as to expenses, and of petitioner's understanding of same.

Notwithstanding the aforesaid pleadings, evidence, argument in original briefs and in Motion for Rehearing, the Court, in its decision, held that defendant was not obligated to bear the expenditures in question.

The decision of the Court of Claims denying the right of the petitioner to recover in a suit for the same items that are urged in the instant case, and based on the same contentions as are urged in the instant case, show that the Court recognized that the language used in the Agreements as to expenses was not entirely clear and certain--that the intentions of the parties to these Agreements could not be determined solely from the language used therein--but that extraneous matters had to be taken into consideration, and were taken into consideration, in determining the meaning of the contract provisions.

It is unnecessary to cite authority, for the principle of law is well recognized, that in considering plea of res judicata the petitioner will not be permitted to relitigate issues in order to secure consideration of evidence that could have been introduced in a prior lawsuit. It would seem that under the pleadings in the prior case, and the viewpoint of the Court with reference to the need to give consideration to evidence other than the language of the Agreements themselves in order to determine its meaning, that all the evidence introduced in the instant case could have been introduced in the prior litigation. (12 Amer. Juris.-

Contracts, Pars. 242, 247, 249).

From the above, it seems clear that the claims as asserted in the instant case have been previously considered and adjudicated on their merits, and that the petitioner is not in position to contend that it has a new cause of action or has not had its day in Court on the same cause. (Western and Eastern Cherokee vs. U. S. cases, Court of Claims Appeals Dockets Nos. 2 and 3).

But even if petitioner is not precluded by the former adjudication, we are nevertheless of opinion that it is not entitled to recover upon the merits as presented in the instant case.

It is petitioner's contention that the provision in the Atoka Agreement to the effect that "all the lands" would be allotted so as to give each member a fair and equitable share therein and that the United States should put each allottee in possession of his allotment and remove all persons therefrom objectionable to the allottee, had the effect, when by the Supplemental Agreement all the land of the Indians was not allotted,--but only a portion--of obligating the defendant to put allottees in possession of all their "estate," both as to lands allotted and otherwise, without expense to them. The only provision with reference to expenses to be assumed by defendant is the one in the Atoka Agreement, and neither in that Agreement, nor in the Supplemental Agreement, was there any specific agreement to the effect that the defendant would assume and pay the expenses incident to the management, control, and disposition of the unallotted lands,

which by the terms of the Agreements were not to be allotted.

Petitioner, in its Reply Brief, pp. 2 and 3, in making objection to the Defendant's Requested Finding No. 10, says:

> "Petitioner does not, and has not, claimed there is anything in the agreements that contemplates that defendant would place the tribal membership in possession of the respective interests in the estate without cost to them."

And the petitioner continues:

> "That contention was disposed of once and for all by the Court of Claims in K-260 (91 Ct. Cls. 320). * * * We do not seek to relitigate that issue." But, "We say that when the tribes and their memberships entered into the agreements, they believed them to contain such provisions." (Underscoring supplied.)

The oral evidence does not, in the opinion of this Commission, support petitioner's contention that the Choctaw people, at the time of making these Agreements, had held out to them as inducement for the making of said Agreements, or that they had reason to believe as to expenses, anything other than that they would be put in possession of their allotments free of expenses to themselves.

A witness whose testimony is contended as indicating a belief at the time these treaties were executed that the Government was obligating itself to bear the expenses complained about, was Ben H. Colbert, a Chickasaw Indian, who was one of the representatives of that Nation in negotiating its treaty. He testified.

> "It is my understanding the Government would take care of all the expense in surveying the land, making the rolls, and allotting the lands, and putting the allottees in peaceable possession of their property."

The witness quoted no promise of the defendant inducing such belief.

Thereafter, he was questioned more in detail with reference to the cost of putting Indians in possession of their allotments, and stated that same would have been so expensive that it couldn't have been done except by the Government. (McA. R. p. 29).

This witness admitted (page 32) that there was no discussion of expense in connection with the negotiations of the Supplemental Agreement; and also, that at the time this Agreement was negotiated, the Indians had their own attorney present.

The witness Wright, for the petitioner, said about the matter of expenses:

> "I can only state my impression. And the impression I gathered from the general opinions, and that was that we were to be at no expense at all."

The witness quoted no promise of the defendant inducing such belief.

He later admitted that he had gone all later years without knowledge that the Government had not borne all expenses until he was called as a witness in this case. (McA. R. pp. 39-41).

A witness, D. C. McCurtain, was a man 77 years of age, a son of Green McCurtain (who was the Chief of the Choctaws from 1896 to 1898, and from 1902 until 1910 or 1911) and a nephew of Jack McCurtain and of Edwin McCurtain, (also Chiefs of the Choctaws) a graduate of Kemper Military Academy of Booneville, Missouri, and a former student of

Roanoke College at Salem, Virginia, and of the University of Missouri, and also of George Washington University of Washington, D.C., a former County Attorney, County Judge, and District Judge, private secretary for his father from 1898 to 1900, and in the office of the attorney for the Choctaw Nation in 1900 and 1901, and a delegate of the tribe to Washington in company with the Commissioners representing the tribe at the time of the negotiation of the Supplemental Agreement. This witness was asked the question as to what was his "understanding and the understanding of those there at that time as to the provisions of that Agreement with respect to the costs of placing individual allottees in possession of their allotments." The witness answered: "It was the understanding by everybody, both the representatives of the Government and of the tribe, that the provisions in the Atoka Agreement to the effect that those expenses should be borne by the Government. That was accepted and understood with the Government and by everybody."

"Q. You are speaking specifically of the expenses concerning allotments?"

"A. I think it also covered the expenses of sale of town lots."

"Q. As to the matter of costs, when you say placing the individual allottees in possession of his allotment, do you include the entire allotment program?"

"A. Yes, sir."

"Q. The entire expenses of the Government program proposed to the Indians by the Dawes Commission was to be borne by the Federal Government?"

"A. Yes, sir."

When asked as to what he and the other members of the tribe understood by that provision of the Agreement providing that the United States would bear "the expenses of surveying and plotting the lands and town sites, or for grading, appraising and allotting the lands, or for appraising and disposing of the town lots, as herein provided," the witness answered: "I don't think I could amplify on the language itself, that they should bear all the expenses of allotment, survey and appraisement, etc." (McA. R. pp. 5, 6, 7).

The witness said there was no discussion of expenses in connection with the submission of the Supplemental Agreement. The witness testified that the best minds of the two tribes were actively engaged in the campaign dealing with the Supplemental Agreement, the real issue being whether the tribes would accept the Government's proposal to put the members on allotted tracts or whether they should continue communal ownership--the matter of expenses not being discussed. The witness testified that the Atoka Agreement, when submitted to the popular vote of the Choctaw Indians, was overwhelmingly adopted.

As a final question, the witness was asked if he understood the provisions with reference to expenses herein previously quoted as including "the clerical hire and administrative help and all of the million duties in administering the estate of the volume of these

two tribes." He said "Yes."

Other witnesses gave substantially the same testimony as the ones quoted. It is significant that not a witness testified to a statement of any representative of the Government in reference to the matter of expenses. The strongest that any witness would say was what his understanding was of what the defendant would do in the way of bearing expenses.

It is not thought by the Commission that the testimony of the witnesses shows any sufficient basis for the belief of the Indians, or such of them as may have had that belief, that the defendant was promising, or by the Agreement entered, was agreeing to bear the expenses sued for; certainly, it is not sufficient to discharge the burden assumed by petitioner necessary to vary the written Agreements as already construed by the previous litigation.

The only item sued for which suggests the possibility of having been incurred in connection with the allotments is the item for pay of Indian police in the amount of $8,591.74. However, there is nothing in the record to show that this expense was incurred in connection with the placing of allottees in possession of their allotments and their protection in such possession,—which is certainly the burden of the petitioner to establish if it is contended that this was an expense incurred in connection with said allotments. Moreover, the Findings of Fact as to such item by the Court of Claims (Finding No. 10) found that these expenses were incurred in the years

1910 to 1913, inclusive, presumably long after allottees had been put in possession.

Another item for the expenses of sale of town lots in the amount of $15,457.32 was found by the Court of Claims in the previous litigation to have been expenses incurred as to town lots not referred to in the Atoka Agreement, and therefore, the provision of that Agreement is not applicable thereto and same was denied and the defendant held not liable therefor. (Deft's. Ex. No. 4, pp. 59, 60, 61.)

In any event, the petitioner has not shown that the above items, or any other items sued for, were incurred in connection with any matters, the expenses of which were assumed by the defendant; nor has petitioner shown any representations on the part of the defendant that it would bear any of the expenses for which suit is brought, nor has petitioner shown any reasonable basis for it, or any of its members believing, if they did, that the defendant was to bear the expenses complained of.

From what has been said, it follows that the petition must be dismissed.

It is so ordered.

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

June 11, 1951.