BEFORE THE INDIAN CLAIMS COMMISSION

THE PONCA TRIBE OF INDIANS OF OKLAHOMA, et al., Petitioners,	)	
v.	)	Docket No. 323
THE UNITED STATES OF AMERICA, Defendant.	)	

Decided: June 19, 1958

Appearances:

Edward P. Morse, with whom were Edwin A. Rothschild and Louis L. Rochmes, Attorney for Petitioners

Bernard M. Newburg, with whom was Mr. Assistant Attorney General Perry W. Morton, Attorneys for Defendant

O P I N I O N

PER CURIAM

On August 10, 1951, the Ponca Tribe of Indians of Oklahoma and three alleged members of the Ponca Tribe filed a petition setting forth two claims designated as Count I and Count II, but we are here concerned only with the Count II.

One of the defenses set up in defendant's answer to Count II is that: The petition fails to state a claim upon which relief can be granted.

On May 2, 1957, defendant filed its motion for a preliminary hearing on the defendant's defense. And on May 13, 1957, the petitioners answered the motion and consented to a determination of the legal sufficiency of the claim pleaded in said Count II.

On May 15, 1957, the defendant's motion was argued before the Commission and the parties were permitted to file briefs, the defendant filing its brief on June 15, 1957, and the petitioners did not file their brief until April 11, 1958.

We shall treat the defendant's motion of May 2, 1957, as one to dismiss because of the failure of the petition to state facts constituting a cause of action against the defendant under the Indian Claims Commission Act.

According to the allegations of the petition (Count II) the defendant, pursuant to the Act of March 3, 1883, 22 Stat. 603, 623, purchased with tribal funds of the Ponca previously appropriated, 101,804 acres of land from the Cherokee and on June 14, 1883, the Cherokee conveyed such lands to defendant in trust for the use and benefit of the Ponca Tribe.

Later the defendant allotted all the Ponca lands, except 943 acres which remained tribal lands, to the individual members of the Ponca tribe under the General Allotment Act of February 8, 1883, 24 Stat. 388, under which trust patents were issued to the individual members of the tribe and by which the allotted lands were held in trust for the allottees for a period of 25 years, or longer, as was the case of the Ponca. Although it is not specifically alleged, under the General Allotment Act at the

of the trust period, whether 25 years or longer, an unrestricted pa-

tent in fee was issued each allottee and until the expiration of the trust period the allottee could not legally dispose of his land.

It is alleged in the petition that defendant permitted almost two-thirds of the reservation to fall into the hands of persons "other than the petitioner and its members." We must read such allegations in connection with the provisions of the Allotment Act and conclude that the allotted lands were acquired by white persons from allottees who had received unrestricted patents and were thereby freed from government control of the lands.

According to the allegations of Count II, only the Ponca Indians of Oklahoma were interested in the reservation lands above referred to, and that it was such tribal lands that were allotted to members of the tribe, except the 943 acres, which remained tribal.

The power of the defendant to allot the lands to the members of the tribe is not and cannot be questioned. When the allotments were made, the title, under the General Allotment Act, vested in the allottees. For the period of 25 years, or such longer as the President may direct, the patent issued is restricted, but at the end of such period the allottees were given a patent in fee, discharged of control of the allotment by the defendant. So when the restricted patents were issued, the tribal title to the lands passed from the tribe to and became vested in the allottees. If the allottees made an improvident sale of their land it was of no concern of the tribal entity, nor did it, as such, suffer any loss by reason thereof, hence, it can base no claim on such loss. Whatever the loss, it was that of the allottee. We, of course, have no jurisdiction to entertain claims of individual Indians, nor, as we held in the

Underwood case, 1 Ind. Cl. Comm. 178, does a common suit for individual claims give us jurisdiction to adjudicate a claim based upon the individual losses of members of a tribe of Indians.

It is alleged in the petition that the tribe desired to hold the reservation lands in common and opposed the allotment program. It was not necessary to obtain the consent of the Indians to the allotment program for the General Allotment Act vested the power in the President to determine whether the reservation lands should be allotted in severalty and his action in directing allotment of the lands did not require tribal consent. We conclude, therefore, that no cause of action has been alleged in Count II of the petition, and an order sustaining the defendant's motion will be made.

The petitioners' response to defendant's motion contains these statements:

> * * * At the present time the evidence to support the allegations of Count II has not been assembled. Our investigation indicates that the assembling of such evidence will be an extremely difficult task. It may be that the Tribe will decide that the expense to it of presenting the evidence would be disproportionate to the recovery. In that event the Tribe may decide not to proceed with proof under this count. Whatever decision is made, we will advise counsel for defendant and the Commission so that defendant will not be required to engage in unnecessary preparation. The decision will be forthcoming well in advance of trial.

Our records show that the petition containing Count II was filed nearly seven years ago - August 10, 1951. The petitioners now admit they did not have facts to support the allegations of Count II when they filed their petition and it now appears they may never be able to assemble such evidence. It would seem to follow they may not be able to assemble facts to sustain an amendment of the claim, should one be allowed. However

that may be, we are here dealing with existing allegations of the petition and are not now concerned with the facts, except those alleged. We have held that such facts do not state a claim against the Government, so assembling evidence to support the present allegations of Count II would be wasted effort. Whether facts may be found that would justify an amended claim can only be determined if and when petitioners make seasonable and appropriate request to amend. Obviously, we cannot and do not postpone action on defendant's motion pending the remote chance that petitioners may be able to allege and sustain a claim of the character now alleged in Count II.

s/ Edgar E. Witt
Chief Commissioner

s/ Louis J. O'Marr
Associate Commissioner

s/ Wm. M. Holt
Associate Commissioner