BEFORE THE INDIAN CLAIMS COMMISSION

THE OTTAWA TRIBE AND GUY JENNISON, BRONSON EDWARDS and GENE JENNISON, As Representatives of THE OTTAWA TRIBE, Petitioners,	)	
vs.	)	Docket No. 303
THE UNITED STATES OF AMERICA, Defendant.	)	

Decided: November 26, 1962

Appearances:

Allan Hull, with whom were
Harrison, Thomas, Spangenberg
& Hull, and Louis L. Rochmes,
Attorneys for Petitioners

William D. McFarlane, with whom
was Mr. Assistant Attorney General,
Ramsey Clark,
Attorneys for Defendant

OPINION OF THE COMMISSION

Holt, Associate Commissioner, delivered the opinion of the Commission.

In a prior determination in this case (8 Ind. Cl. Comm. 831) this Commission made findings of fact and rendered an opinion in which it held that petitioners herein were entitled to recover of defendant certain stated sums and that as to certain other issues the petitioners were entitled to recovery of and from the defendant but that the amounts could not be definitely determined without further hearings and proof thereon. The Commission by Interlocutory Order of June 29, 1960,

held that defendant was liable for, and the parties were ordered to submit additional proof thereon, as to the following:

> 2. * * *
>
> (a) The appraised value of the 10,702 acres of school lands, amounting to $50,196.97, turned over to trustees by the 1873 agreement for sale for benefit of the Ottawas, less whatever sums are shown to have been actually paid to the Ottawas by the trustees from the proceeds of sale and less the amounts expended for expenses and services set forth in Finding of Fact No. 44, and
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> (b) For an amount equal to the profit that may be shown was made by Hutchinson and Kalloch from the sale of 5,000 acres of Ottawa school land which may be shown by records of bona-fide first sales of these lands, and
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> (c) For the value of 3,032 acres of Ottawa school lands sold by the trustees who did not invest the proceeds as required by the Treaty of June 24, 1862 -- the amount to be determined by taking the average sales prices of record for these sales.

In addition to a determination of the above questions the Commission has now before it the issue of what offsets, if any, defendant is entitled to under the provisions of the Indian Claims Commission Act.

Following the entry of the Commission's Interlocutory Order of June 29, 1960, the defendant filed a motion for rehearing on October 14, 1960, which motion was objected to by the petitioners and orally argued before the Commission by the parties. On March 10, 1961, this Commission rendered an opinion (9 Ind. Cl. Comm. 98) denying defendant's motion for a rehearing. The previous findings of fact and opinions made in this case fully set forth the pertinent facts involved in these claims and need not be reiterated now. After denial of defendant's

motion for rehearing hearings were held on the remaining issues and defendant introduced additional evidence on the matters for determination and on offsets while petitioners rested its case on the evidence already before the Commission.

Defendant's proposed findings of fact and brief (filed on August 3, 1962) contain an exhaustive examination of the entire record on not only the limited issues as to amounts of recovery set forth in the Commission's Interlocutory Order of June 29, 1960, to be given further consideration but also a reargument of the entire case. This was done in spite of the fact that defendant's motion for rehearing was, after careful consideration thereof by the Commission, denied on March 10, 1961 (9 Ind. Cl. Comm. 98). The Commission in view of its previous findings of fact and opinions in this case intends herein to confine itself to the limited questions set forth in its Interlocutory Order of June 29, 1960, and to a determination of offsets.

Trust in Liquidation under 1873 Settlement.

Petitioners contend that the only payment made by the trustees charged with the sale of 10,702 acres of school lands under the 1873 settlement (Findings of Fact 32 and 33, 8 Ind. Cl. Comm. 831, 860-861) was the sum of $4,934.27 paid in 1881. Petitioners also contend that although a further amount of $7,280.88 was found due in 1883 from the trustees by the judge examining the accounts of the trustees named after the settlement agreement, no order for payment of such fund was entered and that there is no evidence that the Ottawa Indians ever

were paid this additional amount. Defendant urges that the $7,280.88 plus the $4,934.27, or a total of $12,215.25, should be found to have been paid the Ottawa Indians. The burden of proof is upon defendant to show payment of the $7,280.88 to the Ottawas. The record does not show such payment and this sum may not be so deducted. Petitioners are entitled to recover the amount of $50,196.97, less the amount of $4,934.27 paid to the Ottawa Indians, and less the sum of $1,571.45 expended for expenses and services of the trustees as found in Finding of Fact No. 44, leaving a balance due petitioners of $43,691.25.

Profit Made by Hutchinson and Kalloch from Sale of 5,000 Acres of School Land

The 5,000 acres include the town site of Ottawa, Kansas, of 640 acres sold by the trustees of the Ottawa school lands to one of their own members, Young, for $800.00, who in turn conveyed the land to Hutchinson, also a trustee and his son-in-law, for $800.00. Hutchinson later sold this site to the Ottawa Town Company for $10,000.00. (Finding of Fact No. 11). Petitioners seek to recover the sum of $223,728.10 which they contend the promoters of the Ottawa Town Company received as profit in the sale of town lots. Defendant on the other hand urges that the United States is liable, if at all, only for the profit made by Hutchinson by his sale to the Ottawa Town Company. Defendant asserts that the evidence shows that the sale on September 15, 1864, from Hutchinson to the Company, was a bona fide sale made for the consideration of $10,000.00, as shown by the warranty deed and the minutes of the Ottawa Town Company, and that the profit to Hutchinson being $9,200.00,

this is the sum which petitioners are entitled to recover for 640 acres of school land under paragraph 2(b) of the Commission's Interlocutory Order of June 29, 1960. Petitioners have offered no proof to show that the same of the town site to the Ottawa Town Company by Hutchinson was anything but a bona fide transaction. It is true that Hutchinson was an officer of the town company but this fact falls far short of imputing any cloud upon the transaction. The consideration paid Hutchinson by the town company, without proof to the contrary, may well have been the fair market value of the 640 acre unimproved town site at the time of purchase. The only profit that may be accurately figured from the record to have been made by Hutchinson in this transaction is $9,200.00.

The remaining acreage of the "5,000 acre school tract" consisted of 4,348.79 acres. This was part of the 5,000 acres purchased by Young which he assigned to I. S. Kalloch to whom a patent was issued in February 1865. On June 17, 1865, Kalloch sold Richard D. Lathrop an undivided one-half interest in the lands for the sum of $4,000.00, which deed was recorded June 17, 1865. Between 1865 and 1871, 4,093.60 acres of the 4,348.79 acres were resold by the following parties to the public for the sum of $43,537.03 as follows:

1. Kalloch and wife sold 2,818.12 acres for $18,292.84
2. Lathrop sold 982.81 acres for $18,106.56
3. Kalloch and Lathrop sold 130.12 acres for $2,550
4. Hutchinson sold 162.55 acres for $4,587.63

Petitioners contend that certain of these sales were not arm's length sales. One is a sale by Kalloch to United States Senator Pomeroy in April 1865 of 380 acres at $1.25 per acre of which he resold 320 acres in June 1868 for $3,000.00 and the remaining 60 acres were resold in 1869 for $1,500.00. Another questioned transaction involves 400 acres sold by Kalloch to United States Senator Lane at $1.25 an acre in April 1865 which the latter resold in May 1866, together with 90 lots in the town of Ottawa, for $2,000.00. Also questioned as a bona fide sale was the conveyance of 240 acres together with 6 lots for $100.00 by R. D. Lathrop to H. F. Sheldon on July 29, 1868. Sheldon on the same day resold the land for $1600.00. Petitioners contend that "These second sales by associates of Kalloch and Hutchinson thus returned $7,025.00 in addition to the recited consideration of $43,537.03 on first sales, or a total of $50,562.03 received by Kalloch, Hutchinson and/or associates for the sale of 4,093.60 acres." To the total sum of $50,562.03 the petitioners would add $3,151.59, which is obtained by multiplying 255.19 acres for which there was no consideration recited in the conveyances by the average price received per acre (stated to be $12.35) for the sale of the balance of the lands as described above.

Defendant urges that petitioners are entitled to recover, if at all, only the sum of $29,731.27 as the profit made by Kalloch. This amount is arrived at by adding together the following: $18,292.84 for 2,818.12 acres of land sold by Kalloch and his wife; $1,275, which is one-half of the $2,550 received by Kalloch and Lathrop for the sale of 130.12 acres; $1,575.80, Kalloch's half obtained by giving an average value of $12.35 per acre to the 255.19 acres for which no consideration

is of record; and $4,587.63 for 162.55 acres sold by C. C. Hutchinson. Unless, however, the sale of an undivided half interest to Lathrop was not bona fide, we do not see how the defendant can be charged with a sum that high. Petitioners would have the United States held liable for all the receipts received for the sale of the 4,348.79 acres because Kalloch and Hutchinson were associated with Lathrop in the Ottawa Town Company and therefore the sale of the undivided half interest, according to petitioners, was not bona fide. This contention defendant urges is an attempt to apply "guilt by association" by inference. There is nothing in the record to show that the sale of an undivided half interest by Kalloch to Lathrop was not bona fide. To reason otherwise because of the association of the men in the town company would be arbitrary and speculative. Petitioners are entitled to consider as Kalloch's profit the sum of $27,344.31, less the original payment. This sum is arrived at by taking into consideration the $4,000.00 paid Kalloch by Lathrop; $21,768.51, being half of the $43,537.03 obtained for the sale of 4,093.60 acres; and $1,575.80, which is half of the $3,151.59 applied to the 255.19 acres unaccounted for. From the $27,344.31 which would represent Kalloch's share of the sales must also be deducted the amount of $1.25 per acre originally paid by Young for these lands, or $5,450.00, leaving a net profit of $21,894.31.

Petitioners would add to their recovery by taking, as previously stated, the second sales prices in the transactions with Senators Pomeroy and Lane, and H. F. Sheldon on the grounds that the original

sales to these persons were not bona fide. As to the sales to the Senators it is to be noted that the second sales occurred a considerable length of time after the original conveyances in 1865 by Kalloch. In the case of Senator Pomeroy 320 acres were resold in 1868 and 60 acres in 1869 while the lands transferred to Senator Lane were resold over a year later in 1866 and this resale included 90 lots in the town of Ottawa, the value of the lots not being shown by the record. Even if the tracts purchased by the Senators had not been improved at time of resale, and they may well have been, the time interval with changing conditions such as economic development of the area could readily account for the increase in market value. There is no substantial evidence of record that the Senators were given a bargain price for lands worth many times the amount paid in 1865 and there is no evidence of record that the Senators were associates of Kalloch or Hutchinson in selling these lands. As to the sale by Lathrop to Sheldon of 240 acres on July 29, 1868, together with 6 lots for $100.00 which lands and lots were sold on the same date by Sheldon for $1,600.00, the record does not separately state the value of the lands and the lots. It would be arbitrary and speculative to attempt now to place a separate value on each.

With respect to the 4,348.79 acre portion of the "5,000 acre school tract" petitioners are entitled to recover from defendant the sum of $21,894.31 which is the profit made by Kalloch, as shown by the record, in the same of these lands. The total recovery for the 5,000 acre tract is therefore $21,894.31 and $9,200.00, or $31,094.31.

Sale of 3,032 Acres of Ottawa School Lands by Trustees

This issue involves the value of 3,032 acres of Ottawa school lands sold by the school trustees who did not invest the proceeds realized from the sale of these lands as required by the Treaty of June 24, 1862. Paragraph 2(c) of the Commission's Interlocutory Order of June 29, 1960, permitted the recovery to be determined by taking the average sales prices of record for these sales. The parties agree as to the facts of record with respect to the value to be given these 3,032 acres as shown by the sales and that the petitioners are entitled to recover, if at all, the amount of $24,396.17 (Def. Req. Fdg. Alternate 37 and Pet. Req. Fdg. 53). Defendant, in addition to objecting to any recovery on this item on the same grounds as previously urged to this Commission in prior hearings, also contends that there is nothing in the Irwin Report (Def. Ex. 149) which shows that Agent Hutchinson sold these 3,032.24 acres of land. These lands were sold by the school trustees and the proceeds were not invested as required by treaty so it is immaterial whether Hutchinson or some other trustee actually conveyed the property. Petitioners are entitled to recover $24,396.17.

OFFSETS

Defendant in its amended answer alleged offsets in the amount of $146,005.80. At a hearing on the question of offsets on November 8, 1961, defendant reduced the amount of claimed offsets to $15,996.26. In support of its claimed offsets defendant filed two reports of the General Accounting Office (Def. Ex. 316 and 317), offered the testimony

of Mr. Francis J. Gillies of that office who supervised their preparation and submitted as evidence photostatic copies of representative vouchers to show disbursements under the various categories of alleged offsets. Defendant seeks three classifications of offsets; (1) the value of 1,747 acres of land in the amount of $11,372.97 which defendant urges petitioners received in excess of the amount of land promised them under Articles III and XI of the Treaty of July 30, 1831, 7 Stat. 359, II Kapp. 335; (2) expenditures totaling $2,014.55 disbursed solely for the benefit of Ottawa Indians of the Blanchard's Fork and Roche de Boeuf bands during the period 1862 to 1947; and (3) expenditures made jointly for the benefit of these bands and other Indians of the Quapaw Agency from July 1, 1870 to August 31, 1947, for which defendant seeks petitioners' proportionate share of offsets based upon population figures in the amount of $2,608.74.

Petitioner takes the position that none of the alleged offsets are allowable because, in petitioners' view, the defendant has failed to demonstrate that the entire course of dealings and accounts between the United States and the claimant in good conscience warrants such action. The Commission, however, in taking into consideration these standards set forth in the Indian Claims Commission Act, 60 Stat. 1049, finds nothing in the record to justify denying defendant allowable offsets in this case.

Petitioners also object to specific items claimed by defendant as allowable offsets on the grounds that such items were individual benefits

rather than tribal benefits; were purchased with money expended under appropriations which provided funds for purposes excepted by the provisions of the Indian Claims Commission Act such as for health or education; or were expenditures made prior to the 1862 treaty. The Commission has considered each item claimed by defendant in the various categories urged and either allowed or disallowed in the findings of fact this day entered herein. It would serve no useful purpose in this opinion to paraphrase the findings of fact. In considering the claimed offsets the Commission has studied the nature of each item, the quantity involved, the population of the petitioner bands and in general has followed the guide lines set forth by this Commission in Red Lake, et al., v. United States, 9 Ind. Cl. Comm. 457.

In the three classifications of claimed offsets the Commission has found (Findings of Fact 52 through 55) defendant to be entitled to set off some of the items in two of the categories but has denied as proper the alleged offset of $11,372.97 as the value of 1,747 acres of land since the transaction occurred prior to the 1862 treaty. Of the alleged offsets for expenditures for the benefit of Ottawas alone the Commission allows a total sum of $1,055.50 as proper offsets (Finding of Fact 53). As to joint disbursements for the benefit of Ottawas and other Indians of the Quapaw Agency the Commission allows $973.27 (Finding of Fact 54). The total amount of offsets defendant is allowed therefore totals $2,028.77.

Offsets which were claimed but were expenditures, such as the purchase of seed, from the Osage Civilization Fund, are not allowable since these were not disbursements from the public fund. Many items disbursed under the appropriation "Contingencies, Indian Department" have not been allowed since they could have been for administrative or agency use. Some items such as "Travel Expenses of Indigent Indians" are denied as offsets since they are plainly an individual rather than tribal benefit.

Petitioners are entitled to recover the various sums set forth in Finding of Fact No. 50, less offsets in the amount of $2,028.77.

Wm. M. Holt
Associate Commissioner

I concur:

T. Harold Scott
Associate Commissioner

Chief Commissioner Watkins took no part in the decision of this case.