BEFORE THE INDIAN CLAIMS COMMISSION

THE CREEK NATION, Plaintiff,	)	
v.	)	Docket No. 274
THE UNITED STATES OF AMERICA, Defendant.	)	

Decided: November 5, 1968

Appearances:

Paul M. Niebell, 1201 19th Street, N.W., Washington, D. C., 20036: Counsel for Plaintiff.

Keith Browne, with whom was Mr. Assistant Attorney General Clyde O. Martz: Counsel for Defendant.

OPINION OF THE COMMISSION

Kuykendall, Commissioner, delivered the opinion of the Commission.

This suit was brought to recover $331,916.39 in treaty payments disbursed for the maintenance of various refugee Indians during the Civil War, and to recover $100,000.00 in reparations resulting from that war.

The plaintiff contends that the larger sum is recoverable under Clause 1 of Section 2 of the Indian Claims Commission Act of 1946, 25 U.S.C. 70a (hereinafter "the Act") relating to claims in law or equity arising under treaties of the United States; under Clause 3 of Section 2 of the Act relating to unconscionable consideration; and under Clause 5 of Section 2 of the Act relating to fair and honorable dealings. The

plaintiff further contends that the smaller sum is recoverable under the cited third and fifth clauses.

Before discussing the merits of this suit, it may be desirable to clear away some of the haze respecting precedents. The defendant cites three Commission decisions involving the Five Civilized Tribes [Cherokees, Chickasaws, Choctaws, Creeks, and Seminoles] and involving claims generated by the Civil War. Seminole Nation v. United States, 10 Ind. Cl. Comm. 450 (1962); Cherokee Nation v. United States, 12 Ind. Cl. Comm. 570 (1963), affd. 180 C. Cls. 191 (1967); and Seminole Nation v. United States, 12 Ind. Cl. Comm. 798 (1963), affd. 171 C. Cls. 477 (1965). The plaintiff cites with repeated approval the dissenting opinion of the Court of Claims in Creek Nation v. United States, 7 Ind. Cl. Comm. 117 (1959), affd. 152 C. Cls. 739 (1961), left standing without opinion by an equally divided Supreme Court, 370 U.S. 157 (1962).

Viewing the circumstances of the first three cited decisions and the case at bar as substantially identical (Def. Br., p. 49) the defendant contends that "The issues there are the issues here. What was said and done there should determine what should be done here." The plaintiff responded that the cited cases would not be res judicata as to the case at bar because the issues are different and the facts are entirely different. These differences, if there be differences, will be examined infra. Suffice it now to say there is no unity of parties, facts, and remedies, hence no res judicata resulting from the three cases cited by the defendant as controlling. Seminole Nation v. United

States, 10 Ind. Cl. Comm. 452 (1963), at 465, 466. On the other hand, there is a unity of parties and facts as between the Commission's Creek decision cited above and the case at bar. To the extent of the unity of facts, the cited decision will work a judicial estoppel (Seminole Nation, supra) and the instant plaintiff is estopped from relying on an alleged fact directly contrary to the corresponding fact found in the Commission's earlier decision.

In view of the three cases cited by the defendant as controlling, the doctrine of stare decisis requires this Commission to conclude that, for instance, the execution by one of the Five Civilized Tribes of a treaty with the "Confederate States of America" abrogated all pre-existing treaties between that tribe and the United States. Likewise, the doctrine compels the conclusion that the action of the United States at the inception of the Civil War in withdrawing troops [for whatever reason] was not a violation of treaties obligating the United States to protect any of the Five Civilized Tribes "...from domestic strife, from hostile invasion, and from aggression by other Indians and white persons, not subject to their jurisdiction and laws;..." (Article XVIII of the Treaty of August 7, 1856, 11 Stat. 699).

The plaintiff contends that the United States improperly disbursed Creek treaty funds during the course of the Civil War. Such funds were derived from treaties which existed from their various effective dates until July 10, 1861, the date when the Creek Nation entered into a treaty with the Confederate States of America (Finding No. 8, Creek Nation v. United States, 7 Ind. Cl. Comm. 117 (1959), at 124).

When the Creek Nation entered into that treaty with the Confederacy, the Creek Nation thereby unilaterally abrogated all treaties which then existed between the Creek Nation and the United States and no action on the part of any component of the United States contributed to the abrogation, or was needed. Cherokee Nation v. United States, 12 Ind. Cl. Comm. 570 (1963), at 632.

During the Civil War, Congress repeatedly appropriated sums equivalent to the Creeks' treaty payments: Act of July 5, 1862 (12 Stat. 512); Act of March 3, 1863 (12 Stat. 774); Act of June 25, 1864 (13 Stat. 161); Act of March 3, 1865 (13 Stat. 541); and Act of July 26, 1866 (14 Stat. 255). Such appropriations were disbursed for the subsistence of refugee Indians, Creeks and others. At the same time, appropriations equivalent to other tribes' treaty payments were disbursed for subsistence of refugee Indians, Creeks and others, and the funds were commingled as authorized by a Congressional resolution of February 22, 1862 (12 Stat. 614), and a portion of the Act of July 5, 1862 (supra). The "Resolution for the Relief of the loyal Portion of the Creek, Seminole, Chickasaw, and Choctaw Indians" provided:

> ... That the Secretary of the Interior be authorized to pay out of the annuities payable to the Seminoles, Creeks, Choctaws, and Chickasaws, and which have not been paid, in consequence of the cessation of intercourse with those tribes, so much of the same as may be necessary to be applied to the relief of such portions of said tribes as have remained loyal to the United States, and have been or may be driven from their homes in the Indian Territory into the State of Kansas or elsewhere.

The Act of July 5, 1862, reinforced the above-quoted Resolution and added, inter alia:

> ...And an account shall be kept of the sums so paid for the benefit of such tribe, which account shall be rendered to Congress at the commencement of the next session thereof.

The commingled funds were expended for the subsistence of "destitute loyal Indians" and the required reports were periodically rendered to Congress by the Secretary of the Interior. Cherokee Nation v. United States, 102 C. Cls. 720 (1945), at 730, 758.

There was no de facto tribal government separate and apart from the tribal entities which elected to cast their destinies with the cause of the rebels. The simple humanitarianism which was displayed by the United States in caring for destitute loyal Indians during the course of the Civil War did not amount to the Federal Government's recognition or designation of the subsisted individuals, or any of them, as the de facto governments of the tribes to which they belonged, there being none such during the war. The plaintiff's contention that this Commission should somehow construe the historical facts as accommodating two separate Creek Nations, neither responsible for the act of the other (Pl. Rep. Br., pp. 8, 9), was rendered invalid by the course of history. Seminole Nation v. United States, 10 Ind. Cl. Comm. 450 (1962), at 490.

The plaintiff suggests that the efforts in 1863 to consummate a treaty of cession between the defendant and the "loyal" Creeks (i.e., the Creek refugees), although rendered inconclusive by the amendments which

the Senate incorporated into ratification and which the "loyal" Creeks found intolerable, are collective evidence that the defendant in 1863 "recognized" the refugee Creeks as the actual Creek government. Neither prior decisions nor contemporaneous Act of Congress sanction the view that the United States was unaware, or had any illusions to the contrary, that governments of the Five Civilized Tribes, including the Creeks, were in fact at war with the United States during the period 1861 to 1865. Act of July 5, 1862 (supra); Seminole Nation (1962 decision, supra); Creek Nation (1959 decision, supra); Cherokee Nation (1963 decision, supra); Choctaw and Chickasaw Nations v. United States, 34 C. Cls. 17 (1899), at 107, rev. other grounds 179 U.S. 494 (1900). In view of the actual facts, this Commission cannot accept the plaintiff's argument of an inferred recognition of a "loyal" Creek government in 1863, either in lieu of or in addition to the Creek Nation which was at war with the United States. In this connection, it may be again emphasized that where a tribal entity, such as the Creek Nation, is in fact at war with the United States, it is immaterial how many or what proportion of the tribe's citizens adhere to or oppose the course of conduct of the tribal entity. Seminole Nation, supra.

When the Civil War was over, it became possible for the lately-hostile Creek Nation and the United States to again enjoy the mutual advantages of a treaty. Treaty terms were negotiated, inconclusively, at Fort Smith, Arkansas, in 1865; the 1866 negotiations at Washington, D. C., led to a treaty of settlement and cession: Treaty of June 14, 1866, 14

Stat. 785. In the preamble thereto, the Creek Nation acknowledged that it had lately been at war with the United States, with predictable fiscal results, and agreed to thirteen articles numbered one through five and seven through 14 (2 Kapp. 931 - 937). Plaintiff's present quarrel is solely with Articles 3 (second cause of action) and 11 (first cause of action).

The plaintiff's first cause of action relates to the said Article 11 of the 1866 treaty which provided:

> The stipulations of this treaty are to be a full settlement of all claims of said Creek Nation for damages and losses of every kind growing out of the late rebellion and all expenditures by the United States of annuities in clothing and feeding refugee and destitute Indians since the diversion of annuities for that purpose consequent upon the late war with the so-called Confederate States; and the Creeks hereby ratify and confirm all such diversions of annuities heretofore made from the funds of the Creek Nation by the United States, and the United States agree that no annuities shall be diverted from the objects for which they were originally devoted by treaty stipulations with the Creeks, to the use of refugee and destitute Indians other than the Creeks or members of the Creek Nation after the close of the present fiscal year, June thirtieth, eighteen hundred and sixty-six.

The plaintiff contends that precisely $331,916.39 was diverted from Creek funds during the war and expended for the subsistence of destitute loyal Indians who were not Creeks. The plaintiff asserts three alternative theories which, it contends, warrants recovery of this sum from the defendant:

a. That the general release, Article 11 above quoted, was unconscionable in the sense that it was not supported by adequate consideration; or

b. That the general release, Article 11, unaccompanied by an accounting of the precise sum being released, was a violation of the fiduciary standards applicable to the United States in its relationship with the Creek Nation; or

c. That the circumstances surrounding the Creek Nation's agreement to the said Article 11 amounted to a violation of fair and honorable dealings.

These theories will be examined in the above order.

Was the general release, Article 11, supported by adequate consideration? This Commission has not heretofore had the opportunity to assess the worth of the beneficences conferred by the victor upon the lately-hostile Creek Nation. However, the identical, and in the Commission's view, indistinguishable, beneficences are found in the Seminole treaty of March 21, 1866 (2 Kapp. 910), and those this Commission has determined comprised substantial and adequate consideration. Seminole Nation v. United States, 12 Ind. Cl. Comm. 798 (1963), at 822. The circumstantial or factual differences between the Seminole situation during and following the Civil War and the Creek situation during and following the Civil War are not apparent on the record. The Seminole Nation entered into a treaty with "The Confederate States of America". So did the Creek Nation. The Seminole Nation thereby abrogated all pre-existing treaties between it and the United States. So did the Creek Nation. A substantial quantity of individual Seminoles elected to refrain from honoring the treaty with The Confederate States of America.

So did a substantial quantity of individual Creeks. The parallels thus suggested can be drawn for the entire course of the Civil War and all of the negotiations thereafter, and the alleged differences are de minimis. The general release was not defective for want of adequate consideration.

The plaintiff's second ground for recovery, breach of a fiduciary relationship, presupposes that there was a fiduciary relationship between belligerents during the Civil War. In other words, the plaintiff contends that despite the active hostilities the defendant was under an absolute obligation as a then fiduciary to keep accurate accounts of monies belonging to its enemies but in the custody of the United States, and under an equally absolute obligation after the war to apprise its enemies of the disposition of their assets. The Commission finds no law in support of this novel position and the plaintiff's support is only rhetorical. The plaintiff asks "Why did Congress demand that an accurate account be kept of the disbursements of the moneys of each tribe, in the Act of July 5, 1862?" and answers "Clearly for the purpose of adjustment of such trust funds at the end of the war." But there are more rational answers, simpler and more plausible. Congress regularly accepts proof that a given mandate has been executed. To that end Congress customarily requests, and indeed requires, that records be kept. This is merely sound fiscal practice, routine in this government. Such sound fiscal practice confers no novel rights upon those individuals who may be interested in the funds involved.

The final ground for the recovery of the larger sum (the first cause of action) is that the circumstances surrounding the Creek Nation's agreement to the general release amounted to a violation of fair and honorable dealings. The settings are two: The 1865 negotiations at Fort Smith, Arkansas, and the 1866 negotiations at Washington, D. C.

The argument concerning the Fort Smith negotiations are outworn. They have been examined in detail by this Commission and by the Court of Claims (supra), and re-examination would be warranted only if the distinctive factual differences heralded by the plaintiff had materialized. The distinctive factual differences did not materialize and the plaintiff is in precisely the same position vis-a-vis the Fort Smith proceedings as were the other components of the Five Civilized Tribes. That is, during the first days of the negotiations only factions denoted as "loyal" were present, other factions were present later, no one was under any misapprehension as to what was said or what was intended by the conferees, and the actions of representatives of the United States were not productive of fraud or duress. The United States representatives conducted themselves and the conference fairly and honorably with the contemplation of Clause (5) of Section (2) of the Act. Cherokee Nation v. United States, 12 Ind. Cl. Comm. 570 (1963), at 638.

The possibility remains that the individual negotiations conducted at Washington, D. C., early in 1866 tainted the resultant treaty with a want of fair and honorable dealings. The plaintiff harps on a single string to prove the taint: That the United States negotiators falsely accused the Creek Nation of a want of fidelity to the United States during

the Civil War and that all evils flowed from that particular false accusation. But that was not a "false" accusation; the Creek Nation was in fact at war with the United States and did in fact enter into a treaty with "The Confederate States of America". Apparently it is again necessary to point out that the fact of war depends upon the actions of nations and not upon random groups of individuals who happen to be of those nations. Williams v. Bruffy, 96 U.S. 176 (1877). Since the alleged false accusation which was the wellspring of the evils complained of, was in fact true, and since the plaintiff does not complain of negotiations qua negotiations involving a degree of fraud or duress, or partaking of a character which could be designated as unfair or dishonorable, the Commission is compelled to conclude that in neither the 1865 negotiations nor the 1866 negotiations nor in the resultant treaty was there any violation of the standard of fair and honorable dealings. It is apparent that the plaintiff's first cause of action is without merit.

Article 3 of the Treaty of June 14, 1866 (2 Kapp. 931, 933), upon which the plaintiff's second and final cause of action is predicated, provided in part that,

> . . . in consideration of said cession . . .the United States agree to pay . . . nine hundred and seventy-five thousand one hundred and sixty-eight dollars, in the manner hereinafter provided, to wit: . . . One hundred thousand dollars shall be paid in money and divided to soldiers that enlisted in the Federal Army and the loyal refugee Indians and freedmen who were driven from their homes by the rebel forces, to reimburse them in proportion to their respective losses; . . .

The "one hundred thousand dollars" mentioned immediately above is the subject of the plaintiff's second cause of action. The plaintiff contends that the requirement that the soldiers', refugees', and freedmen's losses be paid out of Creek Nation funds was a violation of Article 18 of the Creek Treaty of August 7, 1856 (2 Kapp. 756, 762), which provided:

> Article 18. The united States shall protect the Creeks and Seminoles from domestic strife, from hostile invasion, and from aggression by other Indians and white persons, not subject to their jurisdiction and laws; and for all injuries resulting from such invasion or aggression, full indemnity is hereby guaranteed to the party or parties injured out of the Treasury of the United States, upon the same principle and according to the same rules upon which white persons are entitled to indemnity for injuries or aggressions upon them, committed by Indians. (Emphasis supplied.)

The plaintiff contends that paying the injuries out of Creek Nation funds instead of out of the treasury of the United States, as contemplated in 1856, was in violation of the fiduciary duty owed by the United States to the Creek Nation and was in violation of the standard of fair and honorable dealings.

The 1856 treaty is one of those which the plaintiff correctly contends was never abrogated by the United States, but which was in fact unilaterally abrogated by the Creek Nation, itself and alone, when it entered into a treaty with "The Confederate States of America". Since the Creek Nation chose to render the 1856 treaty a nullity, it cannot now rely upon any of the provisions of that treaty. The Commission agrees that the successful party to a war is apt to demand indemnity, and when that party is doing an act of grace and restoring annuities forfeited because of damage

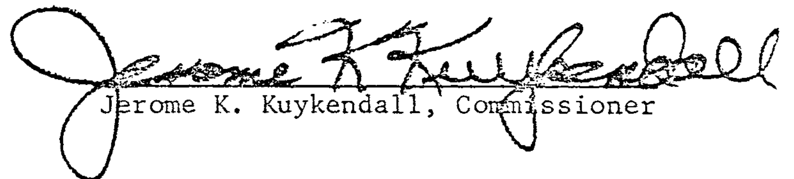
done, it is absurd to ask that it should leave consideration of the charge for damage out of account. United States v. Sisseton and Wahpeton Bands of Sioux Indians, 208 U.S. 561 (1907), at 566. Here, the United States tried to discharge an implied obligation to alleviate the sufferings of those upon whom the Creek Nation visited the rigors of war, and it was neither unfair nor dishonorable to insist that the moving party, the Creek Nation, bear the costs which would to some extent relieve those sufferings. Seminole Nation v. United States, 12 Ind. Cl. Comm. 798 (1963). Additionally, the defendant had in fact paid sums out of the United States treasury amounting to 92.3% of the total amount received by the refugees and such before this suit was brought, and in so doing the defendant acted according to the highest principle of fair and honorable dealings. Seminole Nation, supra, at 820. The one hundred thousand unwillingly contributed by the Creek Nation was but a pittance compared to the one million two hundred thousand contributed by the defendant.

There remains the recurrent fiduciary-violation theory, the argument that requiring the Creek Nation to pay for its own misdeeds was an overreaching on the part of the defendant. But there is no legal guardian-ward relationship between the plaintiff and the United States based merely on the fact that the plaintiff is an Indian tribe; nor does the United States have a fiduciary obligation to protect the plaintiff's property and interests based on this fact alone. Any fiduciary obligation owed by the United States to the plaintiff must grow out of the express provisions of a treaty, agreement, executive order, or statute. Seneca Nation of Indians v. United States, 12 Ind. Cl. Comm. 552 (1963), at 565.

And as we have seen, the Creek Nation unilaterally wiped out all such pre-Civil-War commitments, leaving a clean slate upon which the terms of the 1866 treaty were to be written.

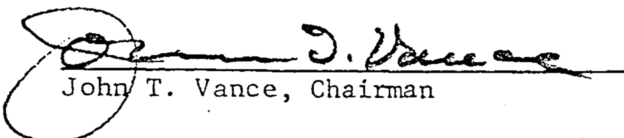
The Commission is of the opinion that the defendant's agreement with the Creek Nation that the latter contribute what turned out to be a mere 7.7% of the indemnities payable to soldiers, refugees, and freedmen was not conceived with a want of fair and honorable dealings and was not a breach of any fiduciary duty which the defendant then owed to the plaintiff. It follows that the plaintiff's second cause of action is without merit.

In view of the foregoing discussions, it is apparent that no judgment can be recovered on either of the causes of action set out in the case at bar. An order dismissing this suit in its entirety will be entered.

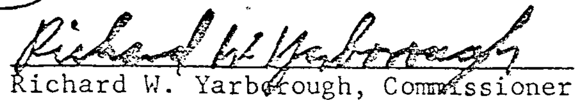


Jerome K. Kuykendall, Commissioner

Concurring:



John T. Vance, Chairman



Richard W. Yarborough, Commissioner