BEFORE THE INDIAN CLAIMS COMMISSION

THE OMAHA TRIBE OF NEBRASKA, AND AMOS LAMSON, CHARLES J. SPRINGER, JOHN F. TURNER AND HENRY F. FREEMONT, EX REL. OMAHA TRIBE OF NEBRASKA, OMAHA TRIBE AND NATION, INCLUDING ALL GROUPS, BANDS AND MEMBERS OF SAID OMAHA TRIBE AND NATION,	)	
Plaintiffs,	)	
v.	)	Docket No. 225-A
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

Decided: October 19, 1954

Appearances:

David Cobb, with whom were
I. S. Weissbrodt, Abe W. Weissbrodt,
James E. Curry, Jay H. Hoag, and
Harry Lamberton,
Attorneys for Plaintiffs.

Maurice H. Cooperman, with whom
was Mr. Assistant Attorney General
Perry W. Morton,
Attorneys for Defendant.

OPINION OF THE COMMISSION

O'Marr, Commissioner, delivered the opinion of the Commission.

The plaintiffs herein, Omaha Tribe of Nebraska, are seeking recovery for the difference between the amount they received for upwards of 5,200,000 acres of land located in the northeast corner of the State of Nebraska, and the value thereof at the time they ceded the land by the Treaty of March 16, 1854, 10 Stat. 1043.

In their amended complaint the Omaha allege that the defendant in various ways recognized that the Omaha exclusively owned, occupied and used the ceded lands and that they were entitled to own, occupy and use said lands at the time of said treaty.

The Omaha also allege in their amended complaint, that in the case, Omaha Tribe v. United States, No. 31002, 53 C. Cls. 549, the Court of Claims decided they were the owners of the lands ceded by the 1854 treaty and that the United States may not now be heard to deny the Omaha ownership of said lands when they ceded them in 1854.

On October 12, 1953, the Omaha filed a motion for an interlocutory order for the purpose of obtaining a decision of the Commission as to whether, and the extent to which, the determinations of the Court of Claims in the former case are final and conclusive upon the parties to this cause. We are giving the motion consideration at this early stage of the case because, if the Court of Claims decided in the former case that any part of the lands which are involved in the pending claim belonged to the Indians at the time of the 1854 cession, proof of Indian title to such lands as come within the determination of the Court of Claims decision will not be necessary.

For the purpose of bringing to the attention of the Commission the pertinent parts of the record upon which the Court of Claims based its decision in the former case, the parties have offered in evidence certain documents, the Omaha having offered documents Nos. 1 to 21, inclusive, and defendant having offered documents Nos. 1 to 10, inclusive. Since many of the documents are overlapping and voluminous we have prepared findings of fact in order to bring in focus the essential

parts of the record in the former case. In this connection, we are herein citing the defendant's exhibits because they are full and complete while the claimant's exhibits are only excerpts from some of the same documents.

Before reviewing the determination of the Court of Claims in the former case we shall consider the applicable principles of law which we think govern our action on the motion, having in mind, however, that the case now pending before us is upon a second and different claim between the same parties although arising out of the same treaty -- that of March 16, 1854; as to this the parties are agreed.

The classic statement of the meaning and scope of res judicata is set forth in Cromwell v. County of Sac, 94 U. S. 351, 24 L. ed. 195, a case invariably cited and followed in the Federal Courts, where estoppel by judgment is under consideration. That case plainly shows there are two branches of the rule, one is as to the effect of a judgment on the merits in a former case as a bar to a subsequent demand for the same claim between the same parties or their privies. In such cases the former judgment is final and conclusive on the parties as to the demand in controversy as to every matter which was offered and received to sustain or defeat the claim, and as to any other matter which might have been offered for those purposes. The second branch of the rule, and that is the only one we are concerned about here, is stated as follows:

> "But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of

which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action; not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action.

"The difference in the operation of a judgment in the two classes of cases mentioned is seen through all the leading adjudications upon the doctrine of estoppel." (Emphasis added).

Another case, and a later one, Commissioner v. Sunnen, 333 U. S. 591, 92 L. ed. 898, states what we have called the second branch of the rule of res judicata, to be:

"But where the second action between the same parties is upon a different cause or demand, the principle of res judicata is applied much more narrowly. In this situation, the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but 'only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.' Cromwell v. Sac County, supra (94 US 353, 24 L ed 198). And see Russell v. Place, 94 US 606, 24 L ed 214; Southern P. R. Co. v. United States, 168 US 1, 48, 42 L ed 355, 376, 18 S. Ct 18; Mercoid Corp. v. Mid-Continent Invest. Co. 320 US 661, 671, 88 L ed 376, 384, 64 S Ct 268. Since the cause of action involved in the second proceeding is not swallowed by the judgment in the prior suit, the parties are free to litigate points which were not at issue in the first proceeding, even though such points might have been tendered and decided at that time. But matters which were actually litigated and determined in the first proceeding cannot later be relitigated. Once a party has fought out a matter in litigation with the other party, he cannot later renew that duel. In this sense, res judicata is usually and more accurately referred to as estoppel by judgment, or collateral estoppel." (Emphasis added).

The Court of Claims has adopted a similar rule. See Union Pacific v. United States, 121 C. Cls. 463, 465.

The use of the phrase "only as to those matters in issue or points controverted, upon the determination of which the finding or verdict is rendered," which appears in the above quotations, needs clarification, for, as we will show, that and similar language used in many cases and text books, is of special significance in considering estoppel of the character here discussed. For, as so clearly stated in Lillis v. Ditch Company (Cal.), 30 Pac. 1108, 1110:

> "If, however, the cause of action or demand upon which the former judgment was rendered is different from the one prosecuted in the second action, it is then necessary to ascertain as a question of fact what issues or matters were determined in the former action, and then to determine as a matter of law whether those issues and their determination were essential to the former judgment; for it is only issues upon which that judgment depends that the parties are estopped from litigating in any other action. Matters which were merely collateral or incidental to the former determination do not constitute an estoppel, even though they were litigated and decided therein."

Or, as stated in Freeman on Judgments (5th Ed.) sec. 689:

> "where the causes of action are different, the former adjudication is conclusive only as to facts admitted or directly and distinctly put in issue, and the finding of which is necessary to uphold the judgment."

Or, as stated in Bigelow on Estoppel (6th Ed.) sec. 179, note, that "the reason why there is no estoppel concerning matters not necessarily involved in the decision of a case is that, from the very fact that they were not of the essence of the action, they would not require, and in all probability did not receive, that searching examination and scrutiny that would be given to a matter in issue the decision of which would determine the case." (See also Radford v. Meyers, 58 L. Ed. 454;

Southern Pac. v. United States, 42 L. Ed. 355; Nalle v. Oyster, 57 L. Ed. 1439; Willis v. Willis (Wyo), 49 Pac. (2d) 670; County v. Block, 25 L. Ed. 491, 493.

Whatever the phraseology, it seems plain that unless it was essential or material or necessary that a certain fact be determined in the former case, such determination does not operate as an estoppel in a second case on a different cause of action. The rule applies even though the non-essential facts had been put in issue by the pleadings and directly decided in the former case. Hines v. Veterans Bureau, 23 Fed. (2d) 979; Freeman on Judgments (5th Ed.) sec. 697; Willis v. Willis, 49 Pac. (2d) 670, 675; Silberstein v. Silberstein (N.Y.), 113 N.E. 495, 496; Landon v. Clark, 221 Fed. 841.

With the above rules of law in mind we shall now consider the issues of law and fact disposed of by the Court of Claims in the former case.

An examination of the petition in that case (Find. 4, Def. Ex. 1) will show that the Omaha did not sue for the amount the Government agreed, by Article 1 of the 1854 treaty, to pay them for the lands north of the Ayoway River line in the event they did not accept them for their future home; that was the same price per acre it paid for the lands south of that line, but sued for the amount the Government received from the sale of the lands north of the Ayoway River line and the sum of $1.25 per acre for such of such lands as were disposed of by the Government other than by sale, less sale price of 300,000

acres thereof to compensate the Government for a like acreage selected by the Omaha south of said line. The theory upon which the Omaha presented their claim is not important, but it is fully shown in its petition. (Def. Ex. 1).

But the Court of Claims did not make an award to the Omaha on the basis of the asserted claim, but decided they were entitled to payment for the ceded lands north of the Ayoway River line at the same price per acre (less 300,000 acres) the Government paid them for the ceded lands south of said line, as required by Article 1 of the treaty.

Since the treaty did not fix the boundaries of the lands ceded by the Omaha, except the eastern boundary, the court, in order to make the award, had to determine:

> (1) the area of the lands north of Ayoway river line which had been reserved for the Omaha for their future home should they decide to reside there;
>
> (2) the area south of such line which the Omaha ceded;
>
> (3) and the consideration paid for the lands south of such line.

Northern Tract.

As to the tract north of the Ayoway river line the Court of Claims made no definitive finding as to boundaries. The only finding is set forth in our Finding 10 herein (see p. 557 of 53 C. Cls.) and is to the effect that there were 783,365 acres in this tract "which belonged to said Omaha Indians." In the opinion, the court stated: "From the evidence in this case it appears that the number of acres belonging to the Omaha Indians north of the due west line, and ceded by them to

the United States, was 783,365 acres * *." This language, together with the clause in the treaty, referring specifically to the northern tract as "all of the country belonging to the Indians north of said due west line, shall be and is hereby ceded * *," shows a definite determination that the Omaha had Indian title to such lands. Any question about this would seem resolved by this further statement in the opinion:

> "* * * The contention of the defendants is that the Omaha Indians never owned any land north of the due-west line above referred to, and never had the right to cede the land to the defendants. At the time the treaty was made the United States recognized the Omahas as having title to this land north of the due-west line, and specifically promised to pay for it. Those making the treaty for the United States were well acquainted with the country; they knew what the Omahas claimed; they knew that their possession and occupation of this land was considered with reference to their habits and modes of life; that the Indians had a right to the exclusive enjoyment of it in their own way until they abandoned the land or ceded it to the Government; their right of occupancy was considered as firmly established--this the treaty makers on behalf of the Government recognized when this treaty was made, and the defendants can not now be heard to say that the Indians did not own the land when the treaty was made and had no right to make a cession of it."

But this does not fix the boundaries of the northern tract; the court merely determined the acreage, so we must resort to the evidence before the court to find the basis for the determination of acreage.

There was received in evidence by the court a report from the Assistant Commissioner of the General Land Office (Def. Ex. 2, pp. 297-8) in which he, relying largely on map No. 41 of Royce's Indian Land Cessions, fixes the boundaries of this tract as the Ayoway river line on the south, the western boundary "as existing coincidentally

with the west line of range 5 west, from the intersection of said line with the Dakota-Nebraska state line to a point where said range line reaches and crosses the stream known as Shell Creek, near the northern boundary line of T. 21 N., R. 5 west, 6th P.M., from which point it follows the meanders of that stream to its junction with the Platte River in T. 17 N., R. 4 W., 6th P. M." This boundary description and the acreage determined by the General Land Office seems to be the only evidence before the court that it could have accepted and reached the determination it did as to the acreage of the northern tract; in any event it is evidence supporting that finding and determination.

Our function is not to inquire into the correctness of the court's determination of the area fixed by the Court of Claims, but to determine what that court decided with respect to the northern tract.

What, then, is the effect of such determination as to boundaries, acreage and ownership of the northern tract on the present case?

The evidence herein conclusively shows that the ownership of the northern tract was an issue — an important and vigorously contested issue, in fact -- in the former case. The Omaha, in their petition, alleged ownership and that it was recognized by the United States. (Def. Ex. 1; Find. 4 herein). On the other hand, by its general traverse and counterclaim (Def. Ex. 5, pp. 13-14) the defendant denied such ownership and affirmatively alleged that such lands belonged to the Ponca Tribe, all of which was denied by the Omaha in their reply. (Def. Ex. 5, p. 14). And, as a reference to the briefs filed in the

former case (Def. Exs. 6-10) in both the Court of Claims and the Supreme Court will show, the ownership of the northern tract formed a vital question for determination.

So it is plain beyond question that the ownership, and this includes the boundaries and acreage, of the Omaha to the lands north of the Ayoway river line was a material issue before the Court of Claims in the former case and one that was vigorously litigated, the determination of which was essential to the judgment rendered in that case. Therefore, under the authorities cited and quoted from above, the question of the ownership of the Omaha to the northern tract as of the date of the 1854 treaty is foreclosed by the judgment of the Court of Claims and cannot now be relitigated either as to Indian title or as to the boundaries of that area.

Southern Tract.

By Article 1 of the 1854 treaty (Find. 1) the Omaha unconditionally ceded and relinquished "all their lands" south of the Ayoway river line and west of the Missouri river "to the western boundary of the Omaha country." It cannot be determined from the treaty what the southern or western boundaries of the lands ceded were. But in order to find the purchase price per acre to be paid the Omaha for their northern tract the court had to determine the price per acre that was paid for the southern tract and to do this it had to determine the acreage of that tract, and to ascertain the acreage the boundaries had to be determined.

The court did declare that there were 4,500,000 acres in the southern