BEFORE THE INDIAN CLAIMS COMMISSION

REEK NATION, Plaintiff,)
vs.) Docket No. 169
E UNITED STATES OF AMERICA,)
Defendant.)

Decided: April 28, 1958

Appearances:

Paul M. Niebell,
Attorney for Plaintiff

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

OPINION OF THE COMMISSION

itt, Chief Commissioner, delivered the opinion of the Commission.

The Creek Nation is herein asserting a claim against the United ates Government based on allegations that the defendant Government is able to it because the so-called Dawes Commission, acting under legistion of Congress and agreements entered into between the Creeks and the vernment, wrongfully placed persons on the rolls as citizens of said tion, who thereby became wrongfully entitled to share in the property said nation, to the loss of plaintiff, for which loss said tribe serts liability of the defendant.

On May 17, 1957 the defendant filed its motion for summary judgment dismissal of this claim upon the ground that matters put in issue

are res judicata, by reason of a previous decision adverse to plaintiff in the case of the Creek Nation vs. United States, decided January 6, 1941, and reported in 92 C. Cls. 346; reconsidered and affirmed in 93 C. Cls. 767; certiorari denied by the Supreme Court October 20, 1941, 314 U. S. 667. Defendant further contends that the petition of the plaintiff is a collateral attack upon the final judgment of the Dawes Commission and does not, therefore, state a cause of action over which this Commission has jurisdiction.

The contention of the Government makes it necessary to examine the issues determined in the former case and the asserted bases of liability therein, and compare them with those in the present case.

It is undisputed that the parties in the two cases are the same, and that the claim of liability of losses accruing to the petitioner is based upon the same facts--except in the first case liability was claimed for the wrongful placing of two thousand persons on the rolls as citizens of the Creek Nation, while in the instant case liability is claimed for the alleged wrongful placing of three hundred persons on the rolls.

However, the claim of liability in the previous case was an alleged legal liability by reason of errors and irregularities and was not based on fraud or any other equitable ground. Moreover, the defendant contended that the Act under which the suit was brought did not give the Court jurisdiction to adjudicate equitable claims, and that Court did not consider it necessary to determine whether it had such jurisdiction. In the decision of the Court of Claims appears the following statement:

> We do not think it is necessary to determine whether this Court has had its jurisdiction enlarged by the Act under which this suit is brought. The petition does not allege want of jurisdiction, fraud, or any other ground of equitable interference which would justify the court in setting aside the decrees of the Dawes Commission. It merely alleges errors and irregularities, which, as has often been held, are not sufficient to set aside a judgment when attacked collaterally. They are clearly insufficient to form a basis for holding the decrees of the Dawes Commission to be void.

The defendant demurred to the petition on the ground that the facts set forth therein did not furnish grounds for relief. There was no trial on the facts. The court sustained the demurrer and dismissed the petition.

In the instant case the petition asks "that the decisions of the Dawes Commission, in placing said erroneous enrollees on the Creek tribal rolls . . . without jurisdiction, and by accident or mistake, be revised and corrected"; and also that plaintiff be awarded judgment against .endant for the loss of its lands and funds, thus occasioned by reason of the "failure of defendant to deal honorably and fairly without regard for any rule of law or equity."

The basis of liability claimed in the previous law suit was stated by the court to be limited to legal liability, which the court held did not exist.

At the time of the previous law suit liability of the defendant to the petitioner on the basis claimed in the present law suit did not exist, and therefore the decision could not possibly be an adjudication of such liability, which was created by the Indian Claims Commission Act of August 13, 1946. Western (Old Settler) Cherokee Indians vs. United States,

1 Ind. Cls. Comm. 20, 114 C. Cls. 716; Chickasaw Nation vs. United States, 3 Ind. Cls. Comm. 402, 132 C. Cls. 359.

In keeping with the decisions cited, defendant's motion for summary judgment must be denied. However, such holding is merely as to jurisdiction; that this Commission shall entertain the petition and shall hear and determine the claims asserted, the merits thereof and the proof that will be required to establish the same are not involved.

Edgar E. Witt
Chief Commissioner

Concurring:

Wm. M. Holt
Associate Commissioner

DISSENTING OPINION OF COMMISSIONER O'MARR

The gist of the present petition is set forth in paragraphs X and XV wherein it is alleged that the Dawes Commission, with the approval of the Secretary of the Interior, in violation of the terms of the Curtis Act of June 28, 1898, 30 Stat. 495, and certain Creek agreements, erroneously added names of persons who were not citizens of the Creek Nation and therefore not entitled to enrollment, and made duplicate and triplicate enrollments to one and the same person; that as a result of such errors each person so enrolled received Creek lands and funds which were thereby lost to that nation.

The defendant filed its motion to dismiss the petition herein on the ground that the claim now asserted had been previously decided against the plaintiff by two decisions of the Court of Claims in No. F-373, 92 C. Cls. 346 and 93 C. Cls. 767.

With the motion, the defendant submitted copies of the petitions filed by the plaintiff in said court, which are as follows:

Exhibit "A" is the original petition filed in the Court of Claims on December 2, 1926. This petition need not be considered because it was superseded by an amended petition filed on December 27, 1937.

Exhibit "B" is an "Amended Petition" filed on December 27, 1937, and is the petition before the Court of Claims which the court dismissed. To this amended petition the defendant demurred on the ground that the facts set forth did not furnish grounds for relief. The court sustained the demurrer and dismissed the petition. See opinion in 92 C. Cls. 346 which was rendered in case No. F-373 on January 6, 1941.

Exhibit "C". After the first decision of the Court of Claims above cited, the plaintiff, on February 24, 1941, filed a pleading entitled "Second Amended Petition." To this petition defendant demurred as follows:

> Defendant demurs to the second amended petition of the plaintiff upon the grounds (a) that the said petition does not state facts sufficient to constitute a cause of action, and (b) that the cause of action attempted to be alleged is not within the jurisdiction of the court.

This petition, Exhibit C, is important because its paragraphs Nos. II to XV, inclusive, are, except for minor changes which do not affect the substance, identical to the allegations now set forth in the petition before us as paragraphs II to X, XII to XVI. And paragraph XV of Exhibit C is in substance included in paragraphs XVIII and XXI of the present petition.

The second amended petition and the demurrer were submitted to the Court of Claims and the court on June 2, 1941, held:

> "Defendant's demurrer to plaintiff's second amended petition sustained, and petition dismissed." (See 93 C. Cls. 767).

There was no opinion, but in view of the comprehensive discussion of the issues in the opinion of January 6, 1941 (92 C. Cls. 346) no opinion was necessary, but it will not be seriously contended, I believe, that the judgment of dismissal is any less effective because there was no opinion.

The Commission, according to its opinion, denied the defendant's motion on two main grounds: (1) That since the dismissal by the Court of Claims in the former case was rendered on a demurrer to the petition

in that case there was no trial on the merits; and (2) that the grounds upon which liability is now claimed did not exist at the time the former claim was decided.

It is fundamental to the doctrine of res judicata that the judgment relied upon as a bar to a second action must have been rendered on the merits, 30 Am. Jur. 944, sec. 208 and cases cited. The first question then is whether the action of the Court of Claims in sustaining the defendant's demurrer and dismissing the claim was a disposition of the former case on the merits.

It is correctly stated in the Commission's opinion that the parties in the two cases are the same and that the claim of liability for losses accruing to the petitioner is based upon the same pleaded facts, except in the former case the claim was for wrongfully placing 2000 persons on the Creek rolls, while in the present case it is alleged that the number so placed on such rolls was 300.

It is the rule of the Court of Claims and the Supreme Court, and in all other courts, I believe, that the disposal of a case on a demurrer is as much a determination on the merits as a trial of the facts alleged in a pleading; and the reason is that the demurrer admits the well-pleaded facts. There are cases, of course, to which the rule does not apply, but they are invariably cases in which the pleading is materially defective because of an omission of essential allegations. Oerlikon et al. v. United States, 121 C. Cls. 616, illustrates the exception to the general rule, but it does not apply here.

The Court of Claims succinctly stated the rule in Porter v. United States, 20 C. Cls. 307, 314, thus:

> In the year 1874 a suit was commenced in this court by the petitioners, founded on the same cause of action embraced in the petition in this case. To the petition a general demurrer was filed by the United States, and, by the consent of the attorneys for the claimants, said demurrer was sustained and cause dismissed. That in legal effect in this court is equivalent to a judgment on the merits of the case, and operates in law as a bar to the petitioners' right to recover in this proceeding.

See also Brown v. District of Columbia, 19 C. Cls. 445, 459-460.

In the case Gould v. Evansville, etc., 91 U. S. 526, 533, 23 L. Ed. 416, 419, the rule is stated and elaborated upon as follows:

> Decided cases may be found in which it is questioned whether a former judgment can be a bar to a subsequent action, even for the same cause, if it appears that the first judgment was rendered on demurrer; but it is settled law, that it makes no difference in principle whether the facts upon which the court proceeded were proved by competent evidence, or whether they were admitted by the parties; and that the admission, even if by way of demurrer to a pleading in which the facts are alleged, is just as available to the opposite party as if the admission was made ore tenus before a jury.
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> From these suggestions and authorities two propositions may be deduced, each of which has more or less application to certain views of the case before the court: (1) That a judgment rendered upon demurrer to the declaration or to a material pleading, setting forth the facts, is equally conclusive of the matters confessed by the demurrer as a verdict finding the same facts would be, since the matters in controversy are established in the former case, as well as in the latter, by matter of record; and the rule is, that facts thus established can never after be contested between the same parties or those in privity with them. (2) That if judgment is rendered for the defendant on demurrer to the declaration, or to a material pleading in chief, the plaintiff can never after maintain against the same defendant or his privies any similar or concurrent action for the same cause upon the same grounds as were disclosed in the first declaration; for the reason that the judgment upon such a demurrer determines the merits of the cause, and a final judgment deciding the right must put an end to the dispute, else the litigation would be endless.

See also Northern Pacific v. Slaght, 205 U. S. 122, 130, 51 L. Ed. 738, 1, where it is stated: "It is well established that a judgment on demurrer is as conclusive as one rendered upon proof."

The above disposes of the Commission's holding that there was no trial on the merits in the former case.

The determinative question then is whether the present petition alleges facts that were not grounds for recovery when the former case was decided against the plaintiff. The Commission has quoted this language from the prayer of the petition as indicative of the difference between the cause of action pleaded in the former case and the one now before us: "that the decisions of the Dawes Commission, in placing said erroneous enrollees on the Creek tribal rolls * * without jurisdiction, and by accident or mistake be revised and corrected * *."

It plainly appears from the present petition and the plaintiff's brief that the alleged erroneous enrollments were made by official action of the Dawes Commission, with the approval of the Secretary of the Interior, as required by the Curtis Act of June 28, 1898, 30 Stat. 495. So what the plaintiff now asks is that we ignore the adjudication of the Dawes Commission that the 300 persons (whoever they are - a fact not disclosed by the pleading) were entitled to enrollment as citizens of the Creek Nation and as such entitled to the lands and funds here complained of resulting from such enrollments.

The judicial status of the Dawes Commission is not open to question, for in United States v. Wildcat, 244 U. S. 111, 118, the Supreme Court said:

* * * There was thus constituted a quasi judicial tribunal whose judgments within the limits of its jurisdiction were only subject to attack for fraud or such mistake of law or fact as would justify the holding that its judgments were voidable. * * *

When the Commission proceeded in good faith to determine the matter and to act upon information before it, not arbitrarily, but according to its best judgment, we think it was the intention of the act that the matter, upon the approval of the Secretary, should be finally concluded and the rights of the parties forever settled, subject to such attacks as could successfully be made upon judgments of this character for fraud or mistake.

And again the same court in United States v. Atkins, 260 U. S. 220, 225, referred to the effect of the determinations of the Dawes Commission by this language:

It must be accepted now as finally settled that the enrolment of a member of an Indian tribe by the Dawes Commission, when duly approved, amounts to a judgment in an adversary proceeding determining the existence of the individual and his right to membership, subject, of course, to impeachment under the well-established rules where such judgments are involved.

The Court of Claims in Creek Nation v. United States, 92 C. Cls. 346, also decided that in the absence of fraud or intentional misconduct the decrees of the Dawes Commission were final.

What these cases hold is that as against a second claim between the same parties for the same subject matter based upon intrinsic mistake or fraud, which is the claim stated in the present petition, the adjudication of the Dawes Commission is final and res judicata.

By comparing the allegations of the "Amended Petition" and the "Second Amended Petition," which are referred to above, with the present petition it will be seen that they are essentially the same and seek a determination by the Indian Claims Commission that the adjudications of

the Dawes Commission were erroneous in that it enrolled as citizens of
the Creek Nation persons not entitled to enrollment, or in effect, they
now ask us to ignore and correct the adjudications of the Dawes Commission
and award the Indians the value of the lands and the amount of funds of
the Creeks that passed to the erroneous enrollees.

The allegations of the present petition are, but for minor changes,
identical to the allegations contained in the "Second Amended Petition,"
except that they now add that the plaintiff "is entitled to redress under
the principles of fair and honorable dealings between the plaintiff and
defendant, without regard to any existing rule of law or equity * *."
This clause will be considered later.

What the present petition and the two former petitions allege is
merely that the Dawes Commission made erroneous allotments, and for the
purposes of the motion it must be admitted that they did, but as stated
above there was a determination of such enrollments and there are no
allegations in the present petition or the former petitions that the
adjudications of the Dawes Commission were the result of extrinsic mis-
take that would void such determinations. It is true that the prayer
quoted above says the Dawes Commission was "without jurisdiction" but a
reading of the petition shows that what was meant was that it must enroll
only persons eligible for enrollment. But as stated in United States v.
Wildcat, 244 U. S. 111, 118, correct conclusions as to enrollments were
not necessary to the binding character of the Dawes Commission's decisions.

The distinction between intrinsic fraud or mistake and extrinsic
fraud or mistake is plainly shown in Tiger v. Twin State Oil Co.,

42 F. (2d) 509 (C. C. A., 10th Circuit) cited by plaintiff as authority for impeaching the adjudication of the Dawes Commission in this case.

In the Tiger case, the Dawes Commission erroneously made two enrollments and allotments to the same person, the first in the name of Tiger and the other in the name of Do-sa-cher. The suit involved the second allotment which had been conveyed to the oil company. The plaintiffs (heirs of Do-saw-cher) contended that the act of the Dawes Commission in enrolling Do-saw-cher could not be attacked collaterally by the Government, as it did in defending the case in the interest of the Creeks.

As shown by the court's opinion, it was held that the determination of the Dawes Commission could not be impeached for intrinsic mistake if the Commission had determined that no duplication of the allotment had in fact existed. But, as the court stated, the Dawes Commission did not so determine; on the contrary, it found that the duplication did exist and notified the Secretary thereof and recommended that Do-saw-cher's name be stricken from the Creek rolls and that the deed issued in his name be cancelled, which he did. The fact that the Secretary's action was ineffectual is not material to the question here, for, as the court held, the error was "not intrinsic mistake in the decision of disputed facts or law in a matter presented to and determined by it" [the Dawes Commission]. Again the court said: "The duplicate enrollment and allotment was not an intrinsic mistake in a determination, but an extrinsic mistake in making two records of one determination."

From the above, it is plain that since, according to allegations ... the petition, there had been a determination by the Dawes Commission of the validity of the enrollments here complained of, such determination cannot now be impeached upon the mere mistakes of that Commission. See United States v. Wildcat, 61 L. Ed. 1024; United States v. Atkins, 67 L. Ed. 224; Tiger v. United States, 48 (2d) 509; Creek Nation v. United States, 92 C. Cls. 346. So the Tiger case instead of supporting the plaintiff's position holds that the judgments of the Dawes Commission are final and cannot be attacked collaterally.

Moreover, the Court of Claims has twice decided the present claim against the plaintiff, holding that the judgments of the Dawes Commission are not subject to collateral attack and are res judicata.

The first case was decided on January 26, 1941, 92 C. Cls. 346. The ...ition in that case was based upon errors and irregularities of the Dawes Commission and the petition was dismissed because the alleged facts were "clearly insufficient to form a basis for holding the decrees of the Dawes to be void." The petition before the court was the "Amended Petition," Exhibit B, mentioned above, and was in substance the same as the present petition. In that decision the court did not, as counsel for the Creeks now contend, hold that it had no jurisdiction to grant the relief sought. On the contrary, it only decided that, whether it had jurisdiction to set aside the decrees of the Dawes Commission or not, the allegations of the petition did not state facts that would justify equitable interference with such decrees, namely, want of jurisdiction, fraud or any other

equitable grounds, and it then proceeded to pass upon the allegations of the petition and dismissed it. Early in its opinion the court said: "The action is not instituted for the primary purpose of setting aside or modifying the judgment of this tribunal [Dawes Commission] and consequently is not a direct attack upon it."

The second decision was on the "Second Amended Petition," Exhibit C, and sustained a demurrer to that on June 2, 1941. 93 C. Cls. 767.

As I have said before, and as the Commission holds, the case decided by the Court of Claims and the present case are the same and based upon the same pleaded facts. So the two decisions of the Court of Claims are _res judicata_ of the questions raised by defendant's motion and a bar to the present claim.

Fair and Honorable Dealings

The plaintiff contends, and the Commission apparently agrees, that because clause (5), the fair and honorable dealings clause, was not in existence at the time the former decisions of the Court of Claims were rendered they are not _res judicata_ of the right of the Creeks to maintain the present claim. They and the Commission rely upon the following decisions of the Court of Claims.

In _Western Cherokee_ v. _United States_, 114 C. Cls. 716, the Cherokee filed its claim with us for compensation for an outlet extending west of the 100th meridian west of lands that had been ceded by treaty in 1817 (7 Stat. 156), but provision for the outlet was either intentionally or mistakenly omitted from the treaty. They alleged that except for the mistake or had the United States dealt fairly and honorably with them

they would have received the outlet lands or would have been paid for them. We sustained the defendant's motion to dismiss on the ground that the issues presented had been determined by the Court of Claims in Eastern Cherokee et al. v. United States, 88 C. Cls. 452. In that case, the court now holds, that it was confined to claims arising out of the treaty of 1817 and therefore, "By no process of liberal interpretation could a provision for an outlet to the west, which was not mentioned in the treaty, be incorporated into the treaty, no matter what may have been the reason for its omission." Hence, at the time of its former adjudication, the court had no power to make an award based upon the omission. So, it held the former adjudication was not a bar to the Cherokee claim presented to us.

Incidentally, the Cherokee claim involved in the above appeal was decided by us against the Cherokee on the merits on February 2, 1952, Ind. Cls. Comm. 22.

The other case is Chickasaw v. United States, 132 C. Cls. 359. The Chickasaw presented its claim to us for the value of an interest of the Chickasaw in certain lands erroneously allotted Choctaw freedmen out of lands jointly owned by the Chickasaw and Choctaw. In their petition filed with the Commission the Chickasaw alleged in certain agreements with the defendant they were misled by the language employed and that there was a unilateral mistake on their part as to the meaning of the agreements.

We sustained the defendant's motion to dismiss on the ground that the issues presented to us had been adjudicated by the Supreme Court in Chickasaw v. United States, 318 U. S. 423, and that decision was a bar to the second claim for their interest in the lands allotted the Choctaw.

In reversing, the Court of Claims (132 C. Cls. 363) stated that the Supreme Court did not and could not decide upon the validity of the new grounds of the claim because they were not then grounds for a claim.

But those cases do not support the plaintiff's right to maintain the present claim for the obvious reason that in those cases the court held there had been no trial upon the merits of the cases relied upon as a bar to the new claims set forth in the petitions filed with us.

The present claim is entirely different in that it is the same claim that was presented to the Court of Claims and twice dismissed on the merits. It is true that the fair and honorable dealings clause is invoked in the present petition, but, as will be seen later, such ground does not change the effect of the bar of the former decisions.

In Omaha Tribe v. United States, 6 Ind. Cls. Comm. 68, 83-84, (decided December 27, 1957), we considered clause (5) in a case similar to that here under consideration, and we said:

> * * * Clause (5) of section 2 of the Indian Claims Commission Act does not supply a claimant with a new theory under which he may prosecute a perfectly valid legal or equitable claim. The Court of Claims has made this position abundantly clear in the case of the Blackfeet and Gros Ventre Tribe v. United States, 127 C. Cls. 807, where in unmistakable language it stated:
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> > 'The contention is without merit. Clause (5) has reference to moral claims which were not recognized by any rule of law or equity. If a tribe was not entitled to recover under any rule of law or equity, it still might recover under clause (5); but if its claim was recognized by a rule of law or equity, then clause (5) has no application.'
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> And in a prior case, Western Cherokee v. United States, 116 C. Cls. 665, which was an appeal from a judgment of this Commission dismissing a petition for additional interest on a claim previously determined by that court,--it was there contended before us and the Court of Claims that there could have been no determination

on the merits in the former cases because the fair and honorable dealings clause was not in existence at the time of the former decisions and that clause permits a reconsideration of the interest question by this Commission. In overruling these contentions, the court said at page 677:

> '* * * In addition, we think it is clear from the history of the Act of 1946 that Congress did not intend to confer upon the Commission jurisdiction to permit claims, such as are here involved, to be re-litigated under clause (5) of Section 2 on the basis of fair and honorable dealings. Clause (5) obviously has reference to the fundamental character of the claim rather than to the theory on which an Indian tribe or band may seek to invoke the jurisdiction of the Indian Claims Commission.'

And at page 678 added:

> '* * * If the claims made by appellants in these cases could be again heard and determined by the Indian Claims Commission, it would be difficult to imagine a claim, even though previously considered and decided on the merits by this court, which could not be relitigated before the Commission merely by basing the claimed right of recovery on the provision of clause (5), _supra_. Clause (5) was intended, as its language clearly shows, when considered in the light of history and other provisions of Section 2, to cover only moral claims based on justice and fair and honorable dealings or broad principles of equity and justice, with respect to which no court had theretofore made a determination on the merits, or could have made such a determination under the terms of prior jurisdictional acts.'

Plaintiff's present claim, under the facts alleged in its petition, falls squarely within the proscription of the rule of the above cases. It is a claim not only previously recognized by a rule of law or equity, but one that has been twice adjudicated by the Court of Claims on the merits under a jurisdictional act giving it jurisdiction to finally dispose of it, as it did against the Creeks. 92 C. Cls. 346 and 93 C. Cls. 767.

For the reasons stated I am of the opinion the defendant's motion to dismiss should have been sustained and the present petition dismissed.

Louis J. O'Marr
Associate Commissioner