

BEFORE THE INDIAN CLAIMS COMMISSION

THE CREEK NATION,)	
)	
Plaintiff,)	
)	
v.)	Docket No. 273
)	
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	

Decided: September 9, 1970

Appearances:

Paul M. Niebell, Attorney for the Plaintiff.

Craig A. Decker and Jonathan U. Burdick, with whom was Mr. Assistant Attorney General Shiro Kashiwa, Attorneys for the Defendant.

OPINION ON MOTIONS TO DETERMINE ISSUES

Yarborough, Commissioner, delivered the Opinion of the Commission.

This suit was brought to recover whatever sum might be due if Sections 10 through 15 of the Creek Agreement proclaimed on June 28, 1901 (31 Stat. 861), were revised on the ground of unconscionable consideration or other equitable grounds (clause 3 of section 2 of the Indian Claims Commission Act of 1946, 25 U.S.C. 70a(3)) or, alternatively, to recover any balance which might be due the plaintiff as a consequence of the defendant's failure in negotiating the cited Creek Agreement to adhere to the criterion of fair and honorable dealings (clause 5 of section 2 of the Act).

The facts upon which this suit is founded were at issue in the Court of Claims under a special jurisdictional statute in the case of Creek Nation v. United States, 97 Ct. Cl. 602 (1942), cert. denied, 318 U.S. 787 (1943). Beginning in 1902, the defendant appointed three-man commissions to appraise Creek-owned townlots prior to their sale to the public. These townlots were located in a number of townsites in what is now the State of Oklahoma, and their proceeds were to be deposited to the plaintiff's credit. After appraisal, a majority of the townlots were sold at half their appraised value to settlers who, holding the property, were entitled to buy under Section 11, 12 or 13 of the Creek Agreement (supra), and the remainder were auctioned under Section 14 (id.). While a majority of the lots were claimed and sold under the half-value provisions, a number which had been improperly scheduled for half-value selection were, through litigation initiated by the defendant, retrieved for subsequent auction.

By a pretrial statement filed on February 19, 1970, as refined by a motion for an order determining the issues to be tried, filed on June 16, 1970, the defendant sought to establish the issue of liability and limit the quantum of damages if liability were found to exist. The plaintiff responded with similarly-titled pleadings on May 25, 1970, and June 18, 1970. Respecting the issues, the parties agree that if the half-price conditions were imposed upon the plaintiff improperly, i.e., without conscionable consideration, inequitably, or as a consequence of unfair or dishonorable dealings, liability

exists to the extent of the remaining one-half of the appraised value of each of the townlots selected under Section 11, or 12 or 13 of the Creek Agreement (supra).

The defendant concedes that the assertion of this claim is not barred by res judicata as it presents a claim not within the jurisdiction of the Court of Claims in the prior litigation. Creek Nation v. United States, 168 Ct. Cl. 483 (1964). As it is apparently not contested that the fair market value of the townlots was at least the appraised value, payment of only 50% of their value as consideration likely will be held unconscionable upon the production of appropriate proof. See Nez Perce Tribe v. United States, 176 Ct. Cl. 815 (1966); at 826, 827, cert. denied, 386 U.S. 984 (1967).

The plaintiff also urges that the appraisal commissions in fact failed to appraise the townlots as high as their true market value, and that therefore this Commission ought to value each of the appraised townlots and award the plaintiff the difference. The defendant contends that the principle of collateral estoppel bars relitigation of this factual issue which was raised in the prior Creek case (97 Ct. Cl. 602).^{1/}

^{1/} The defendant further contends that the parties' agreement on issues, as expressed in a previous hearing, also bars litigation of this point (Tr., 21, 22). However, we decline to hold that a party's statement in oral argument will effect a waiver of a claim stated in the pleadings under the circumstances of this case.

The prior litigation in the Court of Claims presented this single issue (Creek Nation, supra, at 610):

. . . whether or not these townsite commissions were guilty of fraud or made such a gross mistake as would justify us in setting aside their action and ourselves determining the value of these townsites.

On that single issue, the Court concluded that (id., at 611):

Under these circumstances, it would take proof of the strongest character to make us conclude that there was either fraud or gross error in these valuations. The proof offered by the plaintiff fails to convince us of either.

The defendant contends that because the underlying factual basis is the same, i.e., whether the townlots were in fact appraised at their true market value, the claim or cause of action is the same and is consequently barred of relitigation by the principle of collateral estoppel, a defense available to the defendant under appropriate circumstances. Creek Nation v. United States, 168 Ct. Cl. 512 (1964).

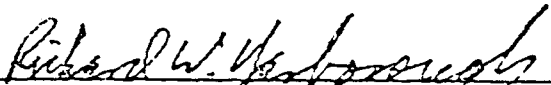
We agree that the parties are collaterally estopped from relitigating any fact which (1) was determined in the litigation styled Creek Nation v. United States, 97 Ct. Cl. 602 (1942), and (2) was essential to that decision. Commissioner v. Sunnen, 333 U.S. 591 (1947).

The difference in the ultimate issue to be determined in this case and the prior case is apparent. There the Court was concerned with whether the evidence of higher true market value constituted proof that the appraisals must have been arrived at through fraud or gross error. For the purpose of this claim, the Commission will be


required to weigh the evidence and determine the true market value for comparison with the consideration, but will not be concerned with whether the value evidence establishes fraud or gross error on the part of the appraisers. Such a difference in the controlling factual issue would prevent the application of collateral estoppel to exclude the entire issue of fair market value of townlots.

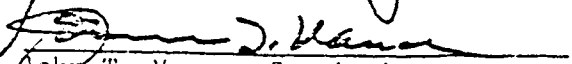
In view of the foregoing discussion, it is apparent that these must be the two issues to be next litigated in the case at bar:

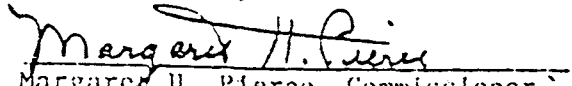
1. Whether the half-price conditions were imposed by the defendant upon the plaintiff without conscionable consideration, or otherwise inequitably, or without adherence to the principle of fair and honorable dealings.
2. The fair market value of each of the selected townlots appraised by the several appraisal commissions.

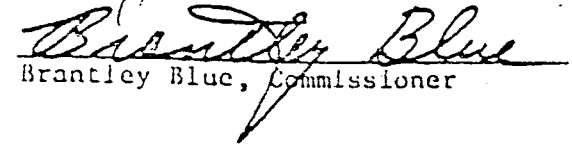

Richard W. Yarborough, Commissioner

We Concur:


Jerome K. Kuykendall, Chairman


John T. Vance, Commissioner


Margaret H. Pierce, Commissioner


Brantley Blue, Commissioner