

## BEFORE THE INDIAN CLAIMS COMMISSION

|                               |   |                |
|-------------------------------|---|----------------|
| THE CREEK NATION,             | ) |                |
|                               | ) |                |
| Plaintiff,                    | ) |                |
|                               | ) |                |
| v.                            | ) | Docket No. 169 |
|                               | ) |                |
| THE UNITED STATES OF AMERICA, | ) |                |
|                               | ) |                |
| Defendant.                    | ) |                |

Decided: December 14, 1970

## Appearances:

Paul M. Niebell,  
Attorney for Plaintiff.

James E. Clubb, with whom was  
Mr. Assistant Attorney General  
Shiro Kashiwa, Attorneys for Defendant.

OPINION OF THE COMMISSION

Blue, Commissioner, delivered the opinion of the Commission.

The Creek Nation has brought this suit alleging that the defendant is liable to it because the Dawes Commission, acting under certain acts of Congress and agreements entered into between the Creek Nation and the United States, through errors and mistakes, placed approximately 200 persons on the rolls as citizens of the Creek Nation, which persons thereby became wrongfully entitled to share in the property of said Nation. These errors and mistakes are alleged to have arisen through duplicate enrollments of the same person and through enrollment of persons not yet born or already dead as of the respective dates upon which it was necessary, as established by the Congress, to have been alive in order to be enrolled. Plaintiff asserts that defendant is liable for this alleged loss suffered by the Creek Nation.

The claim is based upon the jurisdictional provisions of section 2, clauses (1) and (5) of the Indian Claims Commission Act (60 Stat. 1049).

The Creek Nation would have the Commission grant to it, under clause (1) of the Act, the fair market value of the Creek tribal lands allotted to and the Creek tribal funds distributed to the erroneous enrollees on the theory that in equity the decisions of the Dawes Commission in placing erroneous enrollees on the Creek tribal rolls were beyond its jurisdiction and in violation of the provisions of the Creek Agreements and the legislation governing such enrollments, and accordingly may be revised. In the alternative, the plaintiff urges that the defendant is liable under clause (5) of the Act because the United States acted unfairly and dishonorably in placing erroneous enrollees on the Creek tribal rolls.

#### Jurisdictional Defense

The defendant has again raised the defense that the action entitled The Creek Nation v. United States, 92 Ct. Cl. 346, reconsidered and affirmed 93 Ct. Cl. 767, cert. denied 314 U.S. 667 (1941), is res judicata of the issues raised by this claim. The defendant earlier had filed a motion for summary judgment on this ground which the Commission denied on April 28, 1958. (See 6 Ind. Cl. Comm. 230.)

Subsequently, in The Creek Nation v. The United States, 168 Ct. Cl. 483, 495 (1964), an unrelated case, the Court declared that the Indian Claims Commission Act requires the Commission to hear the Indians' claims of unfair and dishonorable dealings under clause (5) in all instances except: (1) where the facts found in the prior litigation show

on their face that the dealings were fair and honorable under the circumstances and no new and substantial factual question on the issue is raised (see The Creek Nation v. The United States, 168 Ct. Cl. 512 (1964)); and (2) where the claim based on fair and honorable dealings was recognized by a rule of law or equity in prior litigation and, therefore, clause (5) has no application (see Blackfeet and Gros Ventre Tribes v. United States, 127 Ct. Cl. 807, 818; cert. denied 348 U.S. 835 (1954)). While claims asserted under clause (5) of section 2 of the Indian Claims Commission Act will seldom be barred under the doctrine of res judicata, collateral estoppel may be applicable to bar relitigation of matters and issues actually controverted and decided in an earlier suit between the parties, even though the cause of action may be different. The Creek Nation v. The United States, 168 Ct. Cl. 483, 488, 490-91.

We are of the opinion that the prior adjudication of the Court of Claims in the 1941 Creek case is not res judicata of the claims raised in the instant case. In the case of the equitable claim under clause (1), the Court of Claims in its original opinion, 92 Ct. Cl. 346, at 351, specifically stated that it had not considered the equitable claim there presented by the Creek Nation because the Court had made no determination as to whether the special jurisdictional act under which the claim was brought had conferred such jurisdiction on the Court. Thus, based upon the Court's own statement, it cannot be said that the Court of Claims could have reached said claim in the prior litigation. In the case of the claim under clause (5), neither necessary criterion set forth by the Court of Claims for the application of the doctrine of res judicata is present here. However, the doctrine of collateral estoppel will apply

(as will hereinafter be seen) to bar relitigation of certain issues which were actually reached and passed upon by the Court in the prior Creek suit. Plaintiff's Claim Under Section 2(1) of the Act

The plaintiff's claim under this section is based, first, upon the ground that the Dawes Commission exceeded its jurisdiction in making the erroneous enrollments. Plaintiff argues that, under the Curtis Act (30 Stat. 495), defendant authorized the Dawes Commission to make "correct rolls" of the citizens by blood of the Creek Nation, eliminating from the tribal rolls such names as had been placed thereon by fraud or without authority of law, and to enroll only such citizens as had lawful right thereto and their dependents born after such rolls were made. Plaintiff asserts that it is entitled to recover within the meaning of the Commission's equitable jurisdiction in clause (1) of section 2 of the Indian Claims Commission Act either because the Dawes Commission acted beyond its jurisdiction in making the erroneous enrollments or because mistakes were made in compiling the Creek rolls.

The question of what Congress authorized the defendant's Dawes Commission to do in connection with the enrollment of Creek citizens was actually reached by the Court of Claims in the 1941 litigation between these same parties, 92 Ct. Cl. 346, supra, and the Court there passed on the question of the jurisdiction of the Dawes Commission. The doctrine of collateral estoppel is therefore applicable to bar further litigation of this issue. The Creek Nation v. United States, 168 Ct. Cl. 483, supra.

In the 1941 Creek suit in the Court of Claims, the plaintiff alleged that the defendant, in pursuance of its policy of abolishing the Creek tribal government and dividing in severalty among the citizens of the Creek Nation the communal property of the Nation, did, contrary to the terms of certain agreements between plaintiff and defendant and in violation of a certain contract between them, add to the rolls of citizenship of the plaintiff the names of 2,000 persons who were not entitled to share in the property of the Creek Nation, made duplicate and triplicate enrollments of one and the same person, and other errors, and that by reason of the acts as aforesaid by the agents and officers of the defendant the lands, money, and property of the Creek Nation were taken and confiscated by the United States without just compensation or due process of law. The plaintiff asked to recover from defendant full compensation for the lands taken from it, with interest thereon from the date of judgment, and that the defendant be required to account to plaintiff for all money belonging to the Creek Nation paid to persons erroneously enrolled as members of the Creek Nation, and for such other and further relief as the Court might deem just and proper.

In the first decision, 92 Ct. Cl. 346, supra, the Court of Claims, in sustaining the defendant's demurrer and dismissing the suit held, in part, that as long as the Dawes Commission, without fraud or intentional misconduct, proceeded in accordance with the agreements between the parties, the Commission was acting under the jurisdiction conferred by the agreements and its decrees were final. The Court found that

defendant did not agree that the rolls of Creek citizens made up by the Dawes Commission would be absolutely correct. The defendant agreed only to make rolls of Creek citizens and the agreement was "literally complied with."

In the second decision, 93 Ct. Cl. 767, supra, the Court of Claims reconsidered its first decision on the basis of an amended petition submitted by the plaintiff and sustained defendant's demurrer to that petition.

Since this plaintiff has not alleged fraud in its claim under section 2, clause (1) of the Act, the only remaining possible basis for liability on equitable grounds thereunder is that revision of the rolls would be appropriate based upon mistake cognizable in equity. Plaintiff's brief sets forth mistake generally as a ground for recovery under clause (1) based on all the alleged erroneous enrollments.

In United States v. Bessie Wildcat, et al., 244 U. S. 111 (1917), a suit in equity brought by the United States on behalf of the Creek Nation to set aside an allotment to one Barney Thlocco, who had been erroneously enrolled as a Creek citizen despite the fact that he died before April 1, 1899, the Supreme Court, in discussing the Dawes Commission, stated:

\*\*\* 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 . . . [p. 118]

A correct conclusion was not necessary to the finality and binding character of its decisions . . . [p. 118]

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 . . . [p. 119]

\*\*\* We think the decision of such tribunal, when not impeached for fraud or mistake, conclusive of the question of membership in the tribe, when followed, as was the case here, by the action of the Interior Department confirming the allotment and ordering the patents conveying the lands, which were in fact issued. \*\*\* The rule is that such decisions are presumably based upon proper showing, and that they must stand until overcome by full and convincing proof sufficient within the recognized principles of equity jurisprudence in cases of this character to invalidate them. [p. 120]

In United States v. Minnie Atkins, et al., 260 U. S. 220 (1922), another case challenging an enrollment made by the Dawes Commission, the question was whether one Thomas Atkins, a Creek enrollee, ever existed at all. The United States, on behalf of the Creek Nation, sought to strike his name from the rolls alleging that he had never existed and that his enrollment came about through fraud and gross mistake of law and fact. The lower courts had decided that the evidence established Atkins' existence and the Supreme Court affirmed. The Court quoted at length from Wildcat and concluded:

It must be accepted now as finally settled that the enrollment 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. [260 U. S. 220, 225, 226]

In Tiger, et al. v. Twin State Oil Co., 48 F. 2d 509 (1931), the Circuit Court of Appeals, Tenth Circuit, relied upon Wildcat and Atkins to cancel, under its equity powers on the basis of extrinsic mistake, the Creek enrollment of one Do-saw-cher, where the evidence showed that the same person had been enrolled twice (as John Tiger and as Do-saw-cher), that separate allotments had been made under each name, and that the Dawes Commission had acknowledged its mistake and cancelled the allotment to Do-saw-cher before the final closing of the rolls in 1907. The Court, at pages 512-13, stated as follows:

It is argued that the act of the Dawes Commission in enrolling Do-saw-cher was the determination of a quasi-judicial body that he was entitled to an allotment. This is true. A determination of the Dawes Commission, when acting within its jurisdiction, is subject only "to such attacks as could successfully be made upon judgments of this character for fraud or mistake," and such attacks must be supported by "full and convincing proof." United States v. Wildcat, 244 U. S. 111, 37 S. Ct. 561, 564, 61 L. Ed. 1024; United States v. Atkins, 260 U. S. 220, 43 S. Ct. 78, 67 L. Ed. 224. Reliance is also placed upon United States v. Lena (C. C. A.3) 261 F. 144, wherein it was held in substance that if a claim was made before the Dawes Commission that a duplication existed, and the Commission considered the matter and determined that no duplication in fact existed, that the determination of the Commission cannot be impeached. In the case at bar the Commission did not determine that no duplication existed; on the contrary, when its attention was called to the matter, it found that a duplication did exist, and the record leaves no doubt of the correctness of that finding.

This court is not only bound by the decisions in the Wildcat and Atkins Cases, but is in thorough accord with the principles there announced. If there is to be any stability to Indian titles, the determination of the Dawes Commission as to matters confided to its jurisdiction cannot be collaterally re-examined on the ground that the Commission made a mistake in its determination. But that



is not this case. The Commission in this case determined that the father of the plaintiffs was a member of the Tribe and entitled to an allotment. The mistake was in making two records of the one determination. Within the strict confines of the Wildcat and Atkins Cases, there is ample power in the court to correct this manifest error.

. . . It is entirely clear that its [Dawes Commission] actions were the result of a mistake; not an intrinsic mistake in the decision of disputed facts or law in a matter presented to and determined by it, as in the Wildcat and Atkins Cases, but a mere clerical oversight in carrying one Indian on the rolls under two names. \* \* \* The duplicate enrollment and allotment was not an intrinsic mistake in a determination, but an extrinsic mistake in making two records of one determination.

The plaintiff in the instant case has not presented evidence constituting the "full and convincing proof" (see Wildcat, supra) which would permit the Commission to determine whether any specific enrollments among the erroneous enrollments fall within the rather narrow confines of Tiger or that any such enrollments were the result of so gross a mistake as to warrant equitable relief. However, since the Commission has determined that there is a basis for recovery under clause (5) of the Act, we need not pursue further the matter of mistake.

#### Plaintiff's Claim Under Section 2(5) of the Act

Proceeding to plaintiff's claim that the United States did not deal fairly and honorably with the Creek Nation in the enrollment of the citizens thereof, plaintiff alleges that a fiduciary relationship existed between the United States and the Creek Nation (United States v. Creek Nation, 295 U.S. 103 (1935), and Seminole Nation v. United States, 316 U. S. 286 (1942)); that the duty of the United States as guardian of the Creek Nation was the preservation and protection of the Creek Nation's tribal property; that the United States agreed to make "correct rolls" of Creek citizens, "enrolling such only as may

have lawful right thereto;" and that the United States failed to perform its obligations, thereby causing the losses of which the plaintiff complains.

Plaintiff further alleges that defendant had knowledge prior to the final closing of the Creek rolls on March 4, 1907, that errors had been made on the rolls of the Creek citizens; that Commissioner Bixby had retained his interest in the Canadian Valley Trust Company; that the Creek rolls had been carried away from the Commissioner's office, copied, and were in the possession of grafters, and land companies seeking to defraud the Creek allottees; that Mr. Mott had filed charges against Commissioner Bixby; that plaintiff had objected to the change in the manner of delivery of the deeds and plaintiff's reasons for so objecting; and that plaintiff had more than once requested from the Dawes Commission copies of the Creek rolls in order to investigate independently the alleged erroneous enrollments.

Plaintiff asserts that defendant should have, in view of its knowledge of said errors and abuses, accepted plaintiff's offers to assist in purging the rolls before they were finally closed, since the errors would thereby have been eliminated. This pattern of behavior, claims plaintiff, resulted in failure on the part of defendant to fulfill its obligations to plaintiff and constituted unfair and dishonorable dealings towards the Creek Nation on the part of the United States.

Section 2(5) of the Indian Claims Commission Act extends to "extra-legal or moral claims of Indians against the United States ..." Otoe & Missouri Tribe v. United States, 131 Ct. Cl. 593, 621, 131 F. Supp. 265, 283, cert. denied 350 U.S. 848 (1955).

The United States may be held liable under the "fair and honorable dealings" clause in instances where "by its own acts, it has undertaken special duties which it has failed to fulfill." It is essential, therefore, "to determine if a special relationship was created; the nature and scope of any responsibilities assumed by the United States; and whether the Federal Government met these obligations." The Lipan Apache Tribe, et al. v. United States, 180 Ct. Cl. 487/ (1967).<sup>502</sup>

The Court of Claims stated in Oneida Tribe of Indians of Wisconsin v. United States, 165 Ct. Cl. 487, 494, cert. denied 379 U.S. 946 (1964) that if a duty is found to exist:

It is unimportant ... to characterize that obligation precisely. Whether the responsibility be termed that of a guardian, a fiduciary, a trustee, a protector, or of a superior sovereign to a dependent people, the duty of care imposed upon the defendant would be the same. It would not reach the insurer's level nor fall to that of an outsider. The measure of accountability depends, whatever the label, upon the whole complex of factors and elements which should be taken into consideration. The real question is: Did the Federal Government do whatever it was required to do, in the circumstances ... That is the standard.

It has been held in several instances that by virtue of the Curtis Act and subsequent agreements with the Five Civilized Tribes, the United States practically assumed full administrative control, custody and management over the property and affairs of the Five Civilized Tribes. Hitchcock v. United States, 187 U.S. 294 (1902); Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); United States v. Creek Nation, 295 U.S. 103 (1935); Creek Nation v. United States, 318 U.S. 629 (1943). This Commission has held, in similar circumstances, that:

The Government thereby assumed direct control over the property of the Indians, not for its own direct benefit, but for the benefit of the owners [i.e. the tribe], to liquidate and otherwise distribute same. Defendant thereby assumed such powers and functions, and we think, duties and obligations over petitioner and its property as to become in the nature of a trustee for liquidation purposes... (The Chickasaw Nation of Indians v. United States, 7 Ind. Cl. Comm. 64, 89 (1959)).

The Commission has found, after careful consideration of the historical events, including the relevant legislation and the agreements between the Creek Nation and the United States, that the United States did undertake the duty of protecting the plaintiff's rights to its property incident to the enrollment of Creek citizens and the allotment in severalty of the Tribe's communal lands to those so enrolled.

In The Snake or Piute Indians, etc. v. United States, 125 Ct. Cl. 241 (1953), the Court of Claims stated, at 255:

[A] finding respecting fair and honorable dealings is ... clearly in the nature of an inference to be drawn from all the relevant evidentiary or basic facts bearing on the entire course of dealings between the parties .... That something or someone is or is not fair or honorable is always a conclusion or an inference based upon many factual considerations. It is seldom that in a course of dealings over a long period of years, a single event will be determinative of whether, in the last analysis, a person has or has not acted fairly and honorably.

The Commission has noted the complexity of the task delegated to the Dawes Commission of dividing in severalty the tribal lands of the Five Civilized Tribes. The evidence shows that the Dawes Commission considered the applications of approximately 250,000 persons for enrollment as citizens of the Five Civilized Tribes and that it

enrolled and made allotments to approximately 101,000 of these. The Dawes Commission heard 10,952 allotment contests among the Five Civilized Tribes and accumulated voluminous records of these proceedings. (Findings of Fact No. 28) In the Creek Nation, 21,381 persons had sought enrollment, of whom 18,698 were enrolled and 2,683 were denied enrollment. (Finding of Fact No. 27)

It must be borne in mind, however, that the United States, once having decided upon and having begun to implement the dissolution of the Creek Nation became "in the nature of a trustee for liquidation purposes" with respect to the lands of the Creek Nation. See The Chickasaw Nation of Indians v. United States, *supra*. The United States assumed the task of terminating the Nation's mode of life including its manner of holding its lands. In these circumstances and when placed within the framework of the "fair and honorable dealings" clause of the Indian Claims Commission Act, it was incumbent upon the United States to take every conceivable precaution to insure that the Creek Nation did not suffer the loss of any of its lands. Apparently in an attempt to hasten the process of enrollment and allotment in order to satisfy the large white population then residing within the Creek Nation, the United States, in effect, chose to refuse to the Creek Nation the opportunity to investigate independently those persons enrolled by the Dawes Commission. This was accomplished by failing to give the Nation copies of the approved rolls before the rolls became final and after which time the right of appeal granted by the Act of

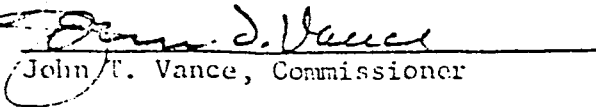
June 10, 1896, 29 Stat. 321, 339-340, became meaningless. The evidence clearly shows that the United States had knowledge of the allegations raised by the Creek Nation of errors and even fraud in the enrollment process. The Government knew that the Creek rolls had been stolen from the Commissioner's office and copied; it knew that 46 erroneous enrollees had been stricken from the rolls during the 1904 and 1905 fiscal years based on evidence supplied by the Creek Nation; it knew that Mr. Mott had filed charges against Tams Bixby three months before the date of final closing of the rolls and that the Attorney General had recommended investigation of these charges; and it knew that the Creek Nation was seeking copies of the approved rolls in order to purge any more erroneous enrollees. And yet the United States, despite this knowledge, chose early finality over later certainty when such certainty was possible given time to investigate. This in the opinion of the Commission was neither fair nor honorable to the Creek Nation.

It is the decision of the Commission, therefore, that in the course of its dealings with the Creek Nation during the enrollment period, the United States acted unfairly and dishonorably towards said Nation in breach of Section 2(5) of the Indian Claims Commission Act. This case will now proceed to a determination of damages, if any, suffered by the Creek Nation by reason of the failure of the United States to act fairly and honorably towards the Creek Nation.

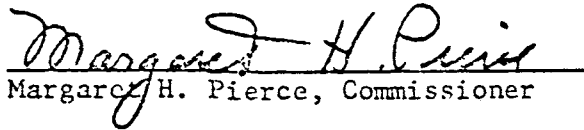
  
Brantley Blue, Commissioner

Concurring:

  
Jerome K. Kuykendall, Chairman

  
John T. Vance, Commissioner

  
Richard W. Yarborough, Commissioner

  
Margaret H. Pierce, Commissioner