BEFORE THE INDIAN CLAIMS COMMISSION

THE ONEIDA TRIBE OF INDIANS OF WISCONSIN, Petitioner,	)	
v.	)	Docket No. 159
THE UNITED STATES OF AMERICA, Defendant.	)	

Decided: December 6, 1962

Appearances:
Ely M. Aaron with whom were Marvin S. Chapman and Louis L. Rochmes, Attorneys for Petitioners.

James J. Manogue with whom was Mr. Assistant Attorney General Ramsey Clark, Attorneys for Defendant.

OPINION OF THE COMMISSION

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

The case is now before the Commission for a determination as to:

I. Whether or not timber on the Oneida Reservation was tribal property owned by the petitioner herein.

II. Did the removal of growing timber, without benefit to the tribe, constitute a tribal loss. Did the defendant have a fiduciary duty to act to protect the petitioner under Sec. 2(1) and Sec. 2(2) of the Indian Claims Commission Act and did the defendant breach the alleged fiduciary duty.

III. Is the defendant liable under the so-called fair and honorable dealings section (Section 5) of the above cited Act, entitled Public

Law 726, 79th Congress.

To answer the foregoing querries it seems first necessary to briefly summarize the facts by reason of which facts this action is brought.

The Oneida Tribe of Indians of Wisconsin, the petitioner herein, is a recognized tribe of Indians with a constitution and by-laws approved by the Secretary of the Interior (Dkt. 75, 5 Ind. Cl. Comm. 560). As such a recognized tribe it has the capacity to bring and maintain this action.

By a treaty dated February 3, 1838, (7 Stat. 566) a reservation was set aside for the Oneida Indians in Wisconsin. This reservation was in the southerly portion of Royce Area 158 Wisconsin, Map No. 2, said land being located in northern Wisconsin. This tract, reference No. 158, was used by Royce in his Wisconsin maps of the Indian land cessions outlined in the 8th Annual Report of the Bureau of American Ethnology for 1896-1897.

Said Indians were referred to in the treaty as the First Christian and Orchard Parties. The reservation comprised approximately 65,000 acres. Article VI of the treaty provided that the treaty was to be binding when ratified by the United States Senate. On May 12, 1838, the Senate by resolution did ratify and confirm said treaty.

In 1838 the lands contained in the reservation were virtually all covered with a dense growth of pine and hardwood timber (Letter of Indian Agent Davis to Commander Cole, dated September 27, 1862; and a letter from Indian Agent Davis to Commissioner Cooly dated September 25, 1865;

Annual Report of Commissioner of Indian Affairs, 1862, Doc. No. 68, pp. 328-334 and Annual Report of Commissioner of Indian Affairs, 1865, Docket No. 173, pp. 619-623.)

The Oneida property was tribal property (Pet. Exs. 15, 17, 18; Def. Ex. 55) and remained so until the lands were allotted or distributed in severalty among members of the tribe on or about 1889. Such distribution was pursuant to the General Allotment Act of February 8, 1887 (24 Stat. 388).

After the treaty of February 3, 1838, timber was cut and sold from lands on the tribal reservation by some members of the tribe, as it had been done prior to the treaty. The majority of said cutting and selling continued from some time before the date of the treaty to approximately 1879. Both petitioner and defendant agree that said cutting and selling did occur (Pet. Exs. 11, 12, 14, 21, and 22; Def. Exs. 55, 64). Some of the Indian chiefs did object to the said cutting and protested to various Indian Agents of the Government. These protests were presented over a period of years (Pet. Exs. 3, 5, 9, 11, 18, 20; Def. Ex. 11). The cutting and selling of timber on the reservation was virtually halted by a series of legal actions brought by the United States government, one of which was United States v. Cook, 86 U. S., p. 591. This decision held that the United States could maintain a replevin action against one George Cook for logs cut by individual Oneida Indians on the subject lands and sold to the defendant, Cook. The plaintiff was awarded a cash verdict and judgment was entered and after execution the amount of the judgment was paid into the United States Treasury.

The government in 1868 had also taken action to halt the unauthorized sale of tribal timber by means of a letter from the Commissioner of Indian Affairs to the United States agent for the Oneida Indians in which the Commissioner informed the agent that it was the intent of the Department of Interior to put a stop to the unauthorized cutting from the tribal reservation and that any person or persons hereafter committing such trespass would be brought to justice. (Def. Ex. 15).

However, as noted above, prior to 1870 the great bulk of timber on the reservation lands had already been cut and removed. This fact is not in dispute between the parties in this action.

With the summary of the above facts the Commission now proceeds to the following determination:

OWNERSHIP OF THE TIMBER ON THE LANDS CONTAINED IN THE TREATY OF FEBRUARY 3, 1838

The petitioner contends that the words of reservation contained in the Treaty of February 3, 1838, "to be held as other Indian lands are held" created a tribal reservation, and petitioner further contends that timber growing on a tribal reservation belongs to the tribe. In support of this theory petitioner cites United States v. Shoshone Tribe, 304 U.S. 111; and United States v. Klamath and Modoc Tribes, 304 U.S. 119.

Defendant contends in answer to this argument that there is a difference between the nature of the Oneida Reservation herein and the Shoshone and Klamath reservations. In support of this theory the defendant cites among other cases Tee-hit-ton Indians v. United States, 348 U. S. 272. Defendant contends under this theory that as in the Tee-hit-ton case the land involved herein was not treaty land and that in the present

case the land involved was not a part of the so-called aboriginal title of the Oneida tribe but was land purchased from Menominee Indians in 1821 and 1822 and that the Menominee conveyed no more to the petitioner than the Menominee had received from the government. However, the defendant recognizes that some rights were granted by the treaty of 1838 to the petitioner herein but argues that these were not permanent rights and quotes the decision in the Tee-hit-ton case referred to above to sustain his position. It is necessary to mention that the Tee-hit-ton case involved a treaty that was never ratified by Congressional action.

The Commission is of the opinion that it is now well-settled law that where the Congress by treaty has declared that thereafter specific Indians were to hold lands permanently, compensation must be paid for subsequent taking. United States v. Creek Nation, 259 U. S. 103, 109-110; Shoshone Tribe v. United States, 299 U. S. 476, 497; Chippewa Indians v. United States, 301 U. S. 358, 375-376; United States v. Klamath Indians, 304 U. S. 119; Sioux Tribe v. United States, 316 U. S. 317, 326. As was stated in the Tee-hit-ton case there is no particular form for congressional recognition of Indian rights of permanent occupancy. It may be established in a variety of ways but there must be the definite intention by congressional action or authority to accord legal rights, not merely permissive occupation. Hynes v. Grimes Packing Co. 337 U. S. 86, 101. The Shoshone case and the Klamath Indian case cited immediately above held that the words of the reservation in each of the treaties involved created a tribal reservation and that timber growing on the tribal lands reserved belonged to the respective tribes.

Defendant also contends that the Supreme Court has twice held that timber cut from the Oneida Reservation by individual Oneida Indians is the property of the United States and that these two decisions are therefore stare decisis and should be decisive in this case. The defendant does not set forth the two cases he refers to, but it obviously does have reference to United States v. Cook, and Wooden Ware Company v. United States. These two cases are referred to in Finding of Fact No. 7 herein.

The Commission is of the opinion that the two cases set forth above should not be held to be stare decisis on the question of the scope of Indian title to the timber in view of the language in the case of Shoshone Indians v. United States, 304 U. S. 111, which stated:

> United States v. Cook . . . gives no support to the contention that in ascertaining just compensation for the Indian right taken, the value of mineral and timber resources in the reservation should be excluded. That case did not involve adjudication of the scope of Indian title to land, minerals or standing timber, but only the right of the United States to replevin logs cut and sold by a few unauthorized members of the tribe. We held that, as against the purchaser from the wrongdoers, the United States was entitled to possession. It was not there decided that the tribe's right of occupancy in perpetuity did not include ownership of the land or mineral deposits or standing timber upon the reservation, or that the tribe's right was the mere equivalent of, or like, the title of a life tenant.

The Commission is of the opinion that the language of the treaty involved herein, which treaty contained a clause stating that the land was to be held as other Indian lands are held and which treaty was ratified by congressional action indicated an intention by Congress to grant to the petitioner a permanent right in the lands involved herein and thus the instant case is distinguished from the United States v.

Cook and United States v. Wooden Ware, cases relied upon by the defendant and therefore the timber on the reservation land herein was tribal property owned by the petitioner herein.

WAS THERE A TRIBAL LOSS?

There is no question that the selling and removal of the growing timber was a tribal loss with the benefits from the sale of said timber being realized by white purchasers and individual Indians of the petitioning tribe (Pet. Exs. 1-4; 7-15; 17 and 19; 20-24 and 26).

I. WAS THERE A FIDUCIARY RELATIONSHIP? IF SO, WAS IT BREACHED?
II. WERE THE DEFENDANT'S DEALINGS WITH THE PETITIONER LESS THAN FAIR AND HONORABLE?

Petitioner contends that the land involved herein was tribal property from the date of the treaty until its allotment to individual Indians occurring in the period from 1889 to 1894. The Commission having upheld petitioner's position on this point, the question arises, did the defendant by any wrongful acts or omissions to act breach its fiduciary duty to the petitioner (if any such duty existed) under the treaty of 1838 with the petitioner, or under the Constitution and laws of the United States, and the further question arises, was there damage to the petitioner, for which recovery is authorized by petitioner under Section 2(1) and Section 2(2) of the Indian Claims Commission Act of August 13, 1946 (60 Stat. 1049).

The petitioner in its brief states that the defendant had knowledge of the timber cutting. Petitioner's point is well established both by evidence submitted by petitioner and defendant. (Pet. Exs. 1-4, 7, 11-15, 17, 18, 21-24; Def. Exs. 14, 18, 55)

The petitioner alleges that this cutting caused a tribal loss. This position, as noted above, has been sustained by the Commission herein.

The petitioner then alleges that the defendant had a duty to act to halt the alleged unauthorized cutting because of the alleged guardian relationship it had assumed over the petitioner herein, and that the government's failure to so act resulted in substantial losses to the petitioner, for which the defendant should respond in damages.

There is no argument between the parties as to who actually did the cutting and removal of said timber. Said cutting was done by individual Indians of the petitioner tribe, sometimes under written contract with white individuals (Def. Exs. 26, 29, 30, 57, 67, 69, and 73), and sometimes under informal agreements to sell the timber at nearby white settlements (Pet. Exs. 1-4, 7, 11-15). There is no allegation by petitioner anywhere in the pleadings or in the evidence submitted herein that the defendant, through its agents, aided or abetted in said cutting and removal. In fact, quite the opposite was true. The various agents remonstrated with the individual Indians and with any of the tribal chiefs that would listen, stating in effect that the cutting of the timber would work to the ultimate detriment of the tribe. Some of the Indians were in favor of individual allotments to help stop the cutting (Def. Exs. 5, 8, 11; Pet. Exs. 11 and 55). However, some of the Indians and tribal chiefs refused to heed the agent's warnings and were in favor of continued cutting of timber and against land allotments (Def. Ex. 64). A review of the evidence submitted including all exhibits introduced by both petitioner and defendant indicates that the first written reports on the cutting were dated in

1854 and continued quite regularly until 1879. The evidence of cutting and removal from the period of 1838, the date of the treaty, until 1854 is quite scanty with the exception of the location of the mill on Duck Creek. The existence of said mill is set forth in Finding of Fact No. 8 herein.

It should finally be set out that petitioner is not advancing any argument or complaint that the terms of the treaty of 1838, between petitioner and defendant, were not fair or equitable. Furthermore, petitioner has raised no question as to the fairness or adequacy of the consideration paid to the petitioner by the defendant, nor does petitioner allege that there are any specific words of a fiduciary or guardianship nature contained in the treaty, nor does petitioner contend that he misunderstood the terms of the treaty. In short, petitioner apparently accepts the treaty as it was consummated. As stated above, petitioners, complaint lies in alleged wrongful acts and/or omissions to act by defendant that occurred after the date of the treaty. Said acts and/or omissions to act allegedly causing damage to the petitioner by reason of a breach of defendant's fiduciary duty to petitioner as its guardian.

An examination of cases involving the alleged fiduciary relationship between the government and various Indian tribes is helpful in defining and setting out the government's duty to the various Indian tribes under the guardian-ward theory proposed by petitioner in this case.

Petitioner cites four cases in support of its theory in the instant case that the government had a duty to act under its duty as a guardian to the petitioner.

The first case cited is United States v. Boyd et al., 83 Fed. 547. In that case the court held that the Indians involved (Cherokees) were wards of the nation and that the Indians themselves had recognized this status from 1848 to the time of the contract. Further, in this case the decision of the court turned upon the fact of whether or not the Secretary of the Interior had power to refuse to sanction a contract for sale of timber under terms of a treaty and deed. The Court held that the Secretary did have such power and this fact was held to be conclusive. There is nothing akin to this point in the present case. Also, in the present case there is nothing, as above noted, presented in the evidence or in the treaty to show that either party recognized a guardian-ward relationship.

The petitioner then cites the cases of the United States v. Kempf 171 Fed. 1021, and United States v. Konkapot, 43 Fed.64. Both of these cases concerned prosecution of individuals who had violated specific statutes against unauthorized cutting of Indian reservation timber. In both cases it was held that the government had jurisdiction to so prosecute. However, neither case turned on the issue of a guardian-ward, or other type of fiduciary relationship, but rather upon the violation of the specific statutes involved.

The last case quoted by the petitioner was that of St. Marie et al., v. United States, 24 Fed. Sup. 237. This case was involved with the question of land allotments and the Secretary of the Interior's power or duty to make such allotments to individual Indians under a specific Congressional Act. The quotation in this case, cited by the petitioner in his brief on page 9, sets forth the paternalistic position of the

government in its relationship with the Indians. However, the case did not turn upon the guardian ward factor, but rather with the power of the Secretary of the Interior in his dealings with the petitioning Indian tribe.

The defendant in his pleadings did not cite any cases wherein a guardian-ward relationship was involved. He confined his pleadings to a matter of equity and made the following statement:

> This Commission has long recognized that the Indian Claims Commission Act is based on equitable principles (Klamath & Modoc Tribe v. United States, 2 Ind. Cl. Comm. 684, 688 (1954); Osage Nation v. United States, 3 Ind. Cl. Comm. 217, 270 (1954)). This being true it is a well-established principle of equity jurisprudence that he who comes into equity must do so with clean hands. Here the evidence is overwhelming and without contradiction that it was the members of the tribe (and only those members) who 'wasted and destroyed' the timber; it was the members of the petitioner tribe (and only those members) who were guilty of 'the systematic spoilation of the timber'. (Def. Findings of Fact, p. 30)

However, there are cases that have come before the Indian Claims Commission which are pertinent to the guardian-ward or fiduciary relationship of the United States Government to certain Indian tribes. These cases are now set out.

Sioux Tribe of Indians et al., v. United States, 2 Ind. Cl. Comm. 646, Affirmed, 146 Fed. Sup. 229, stated in regard to the guardian-ward theory advanced by the petitioner,

> . . . If the United States was in any legal sense the guardian of the Sioux with respect to the property in question, there might be some merit to appellant's argument. However, we do not find that the legal relationship of guardian and ward did exist between the United States and the Sioux. While it has often been said by this court and the Supreme Court that the general relationship of the Government to the Indians of the United States

is similar to that of a guardian and ward, it has never been held that such a general relationship amounts to a legal guardian-ward relationship in the absence of some specific language to that effect in a treaty, agreement, or act of Congress. In the absence of such specific language, the general relationship of the United States to the Indians has been that of a strong and powerful sovereign to a comparatively weak and defenseless people and because of that fact, the courts have likened the relationship to that of guardian and ward and held that doubts in treaties and agreements should be resolved in favor of the weak and defenseless party to such treaties and agreements. This issue of the existence of a legal guardian-ward relationship between the Indians and the United States absent to specific provision in a treaty or agreement spelling out such a relationship was before this court in the case of Gila River Pima-Maricopa Indian Community, et al., v. United States, 110 Fed. Supp. 776, decided May 1, 1956, which stated:

> Whether or not the legal relationship of guardian and ward exists between a particular Indian tribe and the United States depends, we think, upon the express provisions of the particular treaty, agreement, executive order, or statute under which the claim presented arises. It is true that the word 'fiduciary' and the expression 'guardian-ward relationship' have been used by the courts to describe generally the nature of the relationship existing between the Indians and the Government. However, in the absence of some language in a treaty, agreement or statute spelling out such a relationship, the courts seem to have meant merely that the relationship between the Indians and the Government is 'similar to' or 'resembles' such a legal relationship and that doubtful language in the treaty or statute under consideration should be interpreted in favor of the weak and dependent Indians. Creek Nation v. United States, 318 U. S. 629, 642.

In Omaha Tribe of Nebraska et al., v. United States, 6 Ind. Cl. Comm. 68, petitioner alleged exclusive possession of certain lands located in Nebraska. Petitioner further alleged that white settlers, miners, U. S. troops and other persons committed various acts of trespass including unlawfully carrying away and cutting timber located

on petitioner's lands; and that defendant failed to protect petitioner from said trespasses, thereby causing damage to petitioner; and petitioner further alleged said acts were contrary to treaties between the parties and further stated that said acts and omission to act were in breach of law and equity, in breach of defendant's obligation to petitioner as trustee fiduciary and guardian-ward; and in contravention of fair and honorable dealings.

The Commission first found that there was nothing in petitioner's allegations on these arguments which point to any specific language in a treaty spelling out the contractual obligation and duty which petitioner desires to impose upon defendant under Section 2(1) of the Indian Claims Commission Act of 1946.

The Commission then quoted the language of the Pima-Maricopa Indian case (140 Fed. Supp. 776) referred to above, to show there was considerable doubt of the existence of any fiduciary relationship involving legal obligations which is not founded upon some language in a treaty, statute or executive action.

The Commission stated that while the court recognized in the Pima-Maricopa case that a claim for breach of a fiduciary relationship

> . . . may be brought under the provisions of the Indian Claims Commission Act, it in no way intimated that the act itself created or acknowledged the existence of such fiduciary relationship as a matter of law. An examination of the legislative history of the act shows that the United States is not to be considered in the role of an ordinary fiduciary whenever a legal claim is filed before the Commission, but whether the United States is or is not acting as a fiduciary must be determined under the facts in each particular case.

In Kansas Indians v. The United States, 80 Ct. Clms., 264, the court stated that where a treaty between the Indians and the United States contained language that the Indians are to be under the protection of the United States, such treaty did not create a fiduciary relationship but at most recognizes an existing relationship between a dependent Indian tribe and a superior political entity. However, as stated above, in the treaty in the instant case there are no words of any fiduciary relationship whatsoever. Nor is any such relationship shown by the petitioner in his evidence.

In the four cases last cited above, the issue of guardian-ward or fiduciary relationship was before the respective court and/or commission and it was necessary for the court and/or commission in these cases to decide this point to enable the court and/or commission to reach a complete decision. One case, the Omaha Tribe of Nebraska, et al., v. The United States, did not reach a Federal Court. In each case cited above it was held that there was not a guardian-ward or fiduciary relationship, and it was further held in Sious Tribe of Indians of Nebraska, et al., v. United States (146 Fed. 229), and in Omaha Tribe of Nebraska, et al., v. United States (6 Ind. Cl. Comm. 68) that the petitioner had not proven that the United States had acted in a less than fair and honorable way.

Thus in all four of the cases outlined above the issue went against the petitioners on their theory of guardian-ward or fiduciary relationship and in the two cases where the issue of fair and honorable dealings was raised, the issue was also against the petitioner.

Assuming only for the purpose of argument that the petitioner is

not barred by reason of defendant's contention that he who comes into equity must do so with clean hands, and that it was not the petitioning tribe as such that cut and removed the timber but only individual members of the tribe and therefore the petitioning tribe was not guilty of any wrongdoing, it therefore becomes necessary to reach an opinion on whether or not the petitioner may recover on his guardian-ward or fiduciary theory.

A careful review of the pleadings and evidence, including the cases cited herein, leads to the conclusion that the petitioner has not established a guardian-ward or fiduciary relationship. Also, it seems clear that petitioner has submitted no evidence of any kind that would establish the fact of any wrongdoing on the part of the defendant. In fact, the opposite is true, for while the defendant was not bound by the treaty in question, nor by any statute or executive action, to act in a fiduciary capacity, the defendant nevertheless remonstrated and pleaded with individual members of the tribe and with many of their chiefs to halt the cutting and removal of the timber from the reservation (Def. Ex. 64). The fact that defendant through its agents was not successful in its efforts stems not from a want of diligence on its part but rather from the fact that the Indians themselves could not apparently make up their minds as to what they wanted done (Def. Ex. 64).

The petitioner in count two of his petition states that he also has grounds for recovery under Section 2(5) of the Indian Claims Commission Act. Said clause five, for purposes of clarity and convenience, shall hereafter be referred to as the "fair and honorable clause."