BEFORE THE INDIAN CLAIMS COMMISSION

THE SENECA NATION OF INDIANS,)
THE TONAWANDA BAND OF SENECA INDIANS,)
Petitioners,)
v.) Docket No. 342-A
THE UNITED STATES OF AMERICA,) Docket No. 368-A
Defendant.)

Decided: October 24, 1963

Appearances:
Paul G. Reilly, Attorney for Petitioners.

Wilma C. Martin, 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.

This case is now before the Commission to determine the question as to the liability of the United States on four claims consolidated in two dockets, 342-A and 368-A, asserted by the petitioners herein against the United States. As shown in Finding 1, the petitioners are identifiable groups of Indians within the meaning of Section 2 of the Indian Claims Commission Act (60 Stat. 1049, 25 U.S.C. Sec. 70), and as such are entitled to bring and maintain this action. A brief history of the petitioners is set forth in Findings 1 through 4 and 8, and need not be repeated in this opinion. It is sufficient to state that the said petitioners are entitled to bring and maintain these actions in behalf of the Seneca Nation as it existed when the claims arose.

The petitioners base their claims on four purchases. The parties to and particulars of these purchases are set forth fully in Finding 17.

Likewise, the reason for consolidating Dockets 342-A and 368-A is also set forth in said finding.

These two cases were consolidated for trial by order of this Commission, dated February 7, 1957, and are now before the Commission for a determination as to whether or not the United States was under an obligation or acted in a manner which would render it liable to indemnify the petitioners for injury which the petitioners alleged accrued from the sale of their lands. Unless it is determined that the United States is liable to so indemnify the petitioners for such injury, no question as to the value of the land or the adequacy of the consideration paid for the land will arise.

The four purchases which are the subject of this consolidated action are those made (1) in 1788 by Oliver Phelps and Nathaniel Gorham, (2) in 1797 by Robert Morris, (3)in 1826 by Robert Troup, Thomas Ogden and Benjamin W. Rogers (often referred to as the Ogden Land Company), and (4) in 1838 by Thomas Ludlow Ogden and Joseph Fellows (also referred to as the Ogden Land Company). For purposes of clarification the Commission will discuss each of the four purchases separately, reserving, however, the questions of fraud, undue influence, fair and honorable dealings, and fiduciary relationship until the end of the opinion.

The circumstances and background of the Phelps and Gorham Purchase of July 8, 1788, are thoroughly discussed in Findings 10 and 11. At the time of this sale the United States had no public lands other than those acquired by cession from the original states. Lands which prior to the Revolutionary War were vested in the Crown, or as in the case of proprietary states, in the proprietaries, became vested in the individual states and not in the United States as a result of the Revolution. Harcourt

v. Gaillard, 12 Wheat. 523, 526 (1827); Clark v. Smith, 13 Pet. 195, 201 New York, 271 U.S. 65, 85-86 (1926).

It is the Commission's opinion that the cases of Texas Cherokee et al., v. United States, 2 Ind. Cl. Comm. 516, and Wichita Indians v. United States 80 C. Cls. 378, are strongly in point as to petitioners' first claim in Docket 342-A. In the Wichita case which involved lands in Texas, the court held that:

> All public lands within the borders of Texas remained, upon the admission of Texas as a state, property of the State and the United States has never at any time had title to or claimed any public lands in that state . . . the United States cannot be held liable to compensate these Indians for the loss of their lands in Texas, in and to which the United States had no right, title, or interest before or after the Indians were compelled to abandon them . . .

This Commission adopted this same theory in the Cherokee case stating that:

> . . . the United States never had or claimed title to the Texas lands occupied by the Wichita; that those lands belonged to Texas at the time of its admission as a state and so remained after its admission . . . if plaintiff had a claim for the loss of their lands against any government . . . it was that nation /Texas/ which expelled the Indians from Texas and retained the lands the Indians now claim they owned.

The Commission views the factual situation in the Wichita case indistinguishable from the case herein. In both instances the lands allegedly owned by the Indians were lands owned in fee by the states within whose borders said lands were situated. The United States had no claim upon, or interest in, the lands before or after any Indian title was extinguished. In neither case was there any taking, either actual or alleged, by the United States.

Petitioners also rely upon the Treaty of Fort Stanwix, dated October 22, 1784 (7 Stat. 15), as imposing duties upon the defendant which would make the defendant liable to petitioners for the purchase of petitioners' lands as owners to rights of pre-emption. The said right of pre-emption. is explained and set forth in Finding 10. The defendant maintains that the United States did not assume any obligation which would render it liable to petitioners for a claim arising out of the Phelps and Gorham Purchase.in 1788. In this connection it should be noted that the United States had no representative at the signing of said purchase.

The provisions of the Treaty of Fort Stanwix are set forth in Finding 12. Petitioners allege that a show of force was used by the United States during the proceedings leading to the signing of the treaty, and that the treaty was signed against the Indians' wishes (Pet. Fdg. 14). Petitioners further allege that subsequent to the signing of the Treaty of Fort Stanwix, the United States Treaty Commissioner told the Indians that Congress was their only protector (Def. Ex. 68, p. 34, Dkt. 344). However, defendant claims that the statement of the Commissioner, when read in full, should be interpreted as follows: "We have now planted the tree of peace." He told the Indians to care for it and cultivate it and "beware of the blasts from the north /Canada/ which may chill its growth and nip its bud," and then he said that "Congress /not the King/ is now your only protectors." (Def. Ex. 68, pp. 33-34, Dkt. 344)

In this connection petitioner also relies on a statement made by President Washington in 1790 in which he stated:

> The General Government only, has the power to treat with the Indian nations, and any treaty formed, and held without its authority, will not be binding. * * * Here then is the security for the remainder of your lands. No State, nor person, can purchase your lands unless at some public treaty held under the authority of the United States. The General Government will never consent to your being defrauded but it will protect you in all your just rights. (Def. Ex. 80, p. 142)

However, in this same statement General Washington said:

> I am not uninformed, that the Six Nations have been led into some difficulties, with respect to the sale of their lands, since the peace. But I must inform you that these evils arose before the present Government of the United States was established, when the separate States, and individuals under their authority, undertook to treat with the Indian tribes respecting the sale of their lands. But the case is now entirely altered; the General Government, only, has the power to treat with the Indian nations, and any treaty formed, and held without its authority will not be binding.

Since petitioners are relying upon the Fort Stanwix Treaty, it is necessary to go into the background and circumstances which led to that treaty. The provisions of the treaty have been set forth in Finding 12.

The peace treaty entered into between the United States and Great Britain at the end of the Revolutionary War made no reference to England's Indian allies and did not provide for amicable relations between the hostile Indians and the new sovereign nation, the United States of America.

Meanwhile, in 1777 the delegates of the several states agreed to articles of confederation and perpetual union between the thirteen states. Article IX (1 U.S. Const. Anno. 16, 18) provided in part that:

> The United States in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war . . . The United States in Congress assembled shall also have the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated . . .

The Articles of Confederation were ratified by the States, excepting Maryland, in 1778 and 1779.

In 1783 the Continental Congress passed a Resolution recognizing the need for a peace treaty with the Indians who had been allied with the British during the Revolutionary War. In part, that Resolution provided:

> Resolved, That a convention be held with the Indians residing in the northern and middle departments, who have taken up arms against the United States, for the purpose of receiving them into the favor and protection of the United States, . . .
>
> Sixthly, And whereas the Oneida and Tuscarora tribes have adhered to the cause of America and joined her arms in the course of the late war, and Congress have frequently assured them of peculiar marks of favour and friendship, the said commissioners are therefore instructed to reassure the said tribes of the friendship of the United States and that they may rely that the lands which they claim as their inheritance will be reserved for their sole use and benefit until they may think it for their own advantage to dispose of the same . . .
>
> Resolved, That the preceding measures of Congress relative to Indian affairs, shall not be construed to affect the territorial claims of any of the states, or their legislative rights within their respective limits . . . (Def. Ex. 9)

As a result of this resolution, the United States Treaty Commissioners and Indian representatives concluded the Treaty of Fort Stanwix.

It should be remembered that the Government at this time was acting under the Articles of Confederation. Article IX of said Articles contained the provision that the legislative right of any State within its own limits be not infringed or violated. It should also be remembered that Article III of the Treaty of Fort Stanwix, which secured to the

Indians peaceful possession of their lands, did not refer to lands belonging to the United States but to the lands belonging either to the State of Massachusetts or the State of New York. Finally, the authority granted to the Commissioners, who negotiated the Treaty of Fort Stanwix, provided that the treaty should not be construed to affect the territorial claims of any of the states, or their legislative rights within their respective limits.

It is the Commission's opinion that neither the Treaty of Fort Stanwix nor the circumstances leading up to it or occurring thereafter, imposed a liability upon the part of the United States in regard to petitioners' claim herein. Rather, it was the primary purpose of the Government to make a peace treaty with formerly hostile Indians and at the same time obtain cessions of territory outside the bounds of the states by asserting the Central Government's right of conquest. It was not intended that there by any interference with the states' right of purchase as to lands lying within the respective states' boundaries. The guarantee of peaceful possession by the Indians of lands east of the boundary line was an assurance by the Central Government that it would make no further claim by right of conquest. In short, it was a guarantee against intrusion on the part of the Central Government and nothing more than that.

The Morris Purchase of September 15, 1797, is discussed in Finding 13. This purchase is the basis of petitioners' Second Claim in Docket No. 342-A. The same reasons for denying recovery on the Phelps Gorham Purchase,

discussed in pages 2 and 3 herein, apply to the Morris Purchase and the Commission is, therefore, of the opinion that the petitioners' claim, insofar as it is based on the allegations described in pages 2 and 3 shows no obligation or duty imposed upon the United States by reason of said purchase.

The petitioners allege that the Treaty of Canandaigua, dated November 11, 1794 (7 Stat. 44), imposed an obligation upon the defendant and created rights in the petitioners that would make the defendant liable to petitioners.

The pertinent provisions of the Treaty of Canandaigua are set forth in Finding 18. The background of said treaty may be summarized as follows: It was entered into to correct a boundary mistake that arose because of the inexact knowledge as to the western boundary of New York State at the time of the Treaty of Fort Stanwix. Article III of the Treaty of Canandaigua states the correct description of the western boundary. The primary purpose of the treaty was to relinquish any claim which the United States may have acquired under the Treaty of Fort Stanwix. A further purpose was to remove all causes of complaint and to establish peace and friendship between the United States and the Six Nations (Def. Exs. 49 and 54).

The Commission is of the opinion that the Treaty of Canandaigua was not intended to, and did not, divest the rights of the States of New York and Massachusetts of any of the lands which are the subject of this claim, nor did it in any way enlarge the rights of the Indians. It is apparent

on its face that the treaty was not intended to, and did not, create any greater rights in the Indians than had existed previously, with the exception of the area to which the United States had obtained a cession by the Treaty of Fort Stanwix under the mistaken belief that it lay outside the bounds of the State of New York. In the first place it recognized the right of the State of New York and the grantees of Massachusetts to purchase Indian title by describing the lands currently belonging to them by reference to the transactions which had occurred previously between the Indians and the States of Massachusetts and New York, and between the Indians and Phelps and Gorham. Moreover, the very language used to spell out the undertaking by the United States is an explicit acknowledgment of that right. The treaty says "the United States will never claim the same nor disturb * * * /the Indians/ * * * in the free use and enjoyment thereof; but it shall remain theirs until they choose to sell the same to the people of the United States, who have the right to purchase." The Commission is of the opinion that the provisions of the treaty did not guarantee the Indians their lands in perpetuity, nor, did it guarantee that the United States, the defendant herein, would see to it that the Indians would receive any minimum price when they sold their lands to the State of New York or Massachusetts, or to said states' grantees.

A careful reading of the draft of a letter from United States Commissioner Thomas Pickering to Secretary of War Knox (Def. Ex. 54) substantiates this opinion, for in that letter Pickering states among other things the following:

> 1. I knew that the U. States had no right to any part of the Seneka Country, but by virtue of the cession made by the States of New York & Massachusetts, which Congress had accepted.
>
> 2. I knew that the line of cession, when ascertained by Mr. Ellicot, was what now constitutes the eastern boundary of the triangular piece of land which the U. States sold to Pennsylvania. ~~and consequently, that the U. States had no right to one foot of the land in question.~~
>
> 3. I knew that by the agreement between the two states of New York & Massachusetts, the pre-emption right to all the land in question belonged to Massachusetts; excepting a strip, a mile wide, along the strait of Niagara, which I understood New York was to retain: and that the whole lay within the Jurisdiction of New York,
>
> 4. I knew that by the Constitution of the State of New York, no purchase or contract for the sale of lands ~~within the state~~ made of or with the Indians, within the limits of that state, could be binding on the Indians, or deemed valid, unless made under the authority, and with the consent of the legislature of that state. And from the nature of the case, I knew that such authority & consent could never have been given, in regard to the lands in question, when ~~they were~~ in the terms of the treaty of Fort Stanwix, they were ceded to the United States.//
>
> 5. I knew, therefore, that the United States had no ~~proper title to~~ right to the lands which I relinquished.

Petitioners also contend that the wording contained in the Treaty of Fort Canandaigua constituted a recognition of title as used in Miami Tribe v. United States, 5 Ind. Cl. Comm. 198, 213. The Commission is of the opinion that the United States had no right or power to grant property rights to Indians to land belonging to and lying in the State

of New York, and that there was no recognition of title by the defendant in the sense used in the Miami case.

Petitioners' Third Claim in Docket 342-A is also Petitioners' First Claim in 368-A. The reason for the consolidation is explained in Finding 17, and the sale and description of the lands, which are the subject of the two claims, is set forth in Finding 15. The general reasons for denying United States liability in this purchase are the same as those set forth in the Phelps and Gorham, and the Morris purchases above and will not be repeated. However, petitioners allege additional grounds for United States liability by reason of actions and statements of certain Commissioners of the United States, notably Oliver Forward. The negotiations for the purchase were attended by Oliver Forward, who was appointed by the President to represent the United States (Def. Ex. 116).

Some seven months after the sale had been concluded a memorial was sent to the Governor of New York by the Indians, asking the Governor for his aid in getting the land returned to the Indians. The memorial was sent by the Seneca, Red Jacket, who made a general allegation that coercion had been used in bringing about the sale (Pet. Ex. 232, Vol. 2, p. 584). A similar complaint was sent to the President (Def. Ex. 122). As a result of this communication, the Secretary of War asked Oliver Forward and other officials present at the negotiations for such information as they could give (Def. Ex. 117; Pet. Ex. 234; 235; Vol. 2, pp. 587, 588). Meanwhile, another group of Senecas sent a memorial to the President asking that he pay no attention to Red Jacket (Def. Ex. 114, 115). In

his reply to the Secretary of War, Oliver Forward denied the charges made by Red Jacket (Def. Ex. 118, 119). Finally a separate investigation was made when Secretary of War Knox appointed Richard M. Livingston to conduct an inquiry. Livingston's report found no evidence of bribery, but his report did state that it was the feeling that the majority of the Indians signed the purchase agreement out of fear of removal. However, the evidence is conflicting as to whether the Indians actually considered themselves under any compulsion to sell. The Commission is of the opinion that from the evidence produced there is nothing that would require the United States to set aside the sale. The mere fact that Oliver Forward, the United States Commissioner, thought the Indians should sell their lands does not warrant the charge of bribery, duress, or fraud against him or the defendant herein.

The basis for the petitioners' Fourth Claim in Docket 342-A and the Second Claim in Docket 368-A is set forth in Finding 25. Also set forth in Finding 25 is a discussion in detail involving the removal policy of the United States in regard to the New York Indians and the treaties covering said removal. No purpose, other than that of repetition, would be served by again setting forth this evidence. It is enough to state that there is nothing shown by the said facts that would lead the Commission to a different conclusion than that reached as to the other claims previously discussed herein.

The petitioners have made allegations regarding two other matters

that deserve and require the opinion of the Commission. The first is the Trade and Intercourse Acts enacted by Congress from time to time to regulate trade and intercourse with the various Indian tribes. These acts are set forth in detail in Finding 20. Petitioners rely particularly on the provisions of Section 12 of the Trade and Intercourse Act of 1796, which provided that no purchase of lands from Indians would be valid unless made by a treaty or convention entered into pursuant to the Constitution, provided, however, that:

> * * * it shall be lawful for the agent or agents of any state, who may be present at any treaty held with Indians, under the authority of the United States, in the presence, and with the approbation of the Commissioner or commissioners of the United States, appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made, for their claims to lands within such state, which shall be extinguished by the treaty.

There were no treaty commissioners present at the Phelps and Gorham purchase of 1788. However, there was a United States Treaty Commissioner present at all other land sales which are the basis of petitioners' claims herein.

The Commission wishes to quote the Court of Appeals in Seneca Nation v. Christie, 126 N. Y. 122, Writ of Error dismissed 162 U.S. 283, in which the court stated:

> There is room for question whether the act of 1802 was intended to apply to treaties made by a sovereign state with tribes within the state for the extinguishment of the Indian title to lands therein, or, assuming that such treaties were as a general rule within the purview of the statute, whether the act was intended to apply to and regulate the manner of acquiring the Indian title to lands embraced within the compact between Massachusetts and

> New York, which compact, afterwards ratified by Congress, specifically authorized treaties to be made by Massachusetts with the Indians, and purchases to be made by the grantees of Massachusetts subject only to the condition that they should be made under the supervision of a commissioner of that state and confirmed by the legislature.

However, the Court held that the grant "was a valid transaction and was not in contravention of the provisions of the Federal Court or the Indian Intercourse Act of 1802." The Commission is therefore of the opinion that the act created no obligation on the part of the United States to Indian tribes so as to give rise to claims against it under its provisions. Nor did the United States render itself liable on the claim asserted here by appointing a commissioner to supervise the purchase and subsequently ratifying it purportedly in accordance with Section 12 of the Trade and Intercourse Act.

The Commission is of the opinion that the mere fact that a Government official appeared at a given sale of their lands by the Indians does not mean that such an official was venally motivated or was acting against the Indians' best interest or was guilty of less than fair and honorable dealings with the Indians. Thorough consideration of the Trade and Intercourse Acts reveals nothing that would impose any liability on the part of the defendant in regard to petitioners' claim herein.

The final matter to be disposed of is one that occurs throughout all of petitioners' pleadings, and that is petitioners' contention that the United States had a duty to the petitioners as a fiduciary or protector over the Indians and was guilty of less than fair and honorable dealings with the Indians (Tr. Mar. 25, 1963, pp. 33-38). The Court of Claims has spoken quite clearly on this matter in Gila River-Pima Maricopa Indians v. United States, 135 C. Cls. 180.

> 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.

Petitioners appear to substantiate their "protector" theory on statements made in their Finding 16, which statements are repeated in their brief on page 8, and also on the statement of President Washington, which was repeated in the argument before the Commission on March 25, 1963 (Tr. p. 37). The first of these statements was made by the United States Treaty Commissioner after the Treaty of Fort Stanwix, and is set forth in defendant's proposed Finding 16 as follows: "Congress is now your only protection. * * * So long as you conduct yourselves like good children, so long as you may all rely on the parental protection of the United States." However, the background for this statement as well as an addition to the statement should also be considered. The statement was made one year after the treaty of peace between England and the United States, ending the Revolutionary War, during which war the petitioners had been on the side of the English and during which time the Indians had been told that the King was their protector. In addition to the statement set forth in petitioners' Proposed Finding 16, the Treaty Commissioner also told the Indians "We have now planted the tree of peace."

He told the Indians to care and cultivate it, and to beware of blasts from the north, and then added "Congress is now your only protectors." Thus the Commission is of the opinion that the Treaty Commissioner's statement was to make clear to the Indians that the King of England no longer had any authority over them, and that the United States was now the sovereign power over the Indians. The Commission believes that the statement was also made to assure the Indians that no encroachment would be made by the United States Government on the Indian lands described in the Treaty of Fort Stanwix. However, the Commission is of the opinion that there was no guarantee to the Indians that the United States would be responsible in any manner for the sale of Indian lands that lay within the State of New York.

The second statement that petitioners rely upon particularly as to the Phelps and Gorham Purchase was that made by President Washington, which has been fully set forth on pages 4 and 5 in regard to the Treaty of Fort Stanwix. First it may be strongly argued that there is some question as to President Washington's authority to bind the defendant by the statement. At any rate, the statement should be shown in context. It appears in petitioners' Proposed Finding 16 as follows:

> The General Government only, has the power to treat with the Indian nations, and any treaty formed, and held without its authority, will not be binding. * * * Here then is the security for the remainder of your lands. No state, nor person, can purchase your lands unless at some public treaty held under the authority of the United States. The General Government will never consent to your being defrauded but it will protect you in all your just rights.