BEFORE THE INDIAN CLAIMS COMMISSION

TUSCARORA INDIAN NATION,)
)
Plaintiff,)
)
v.) Docket No. 321
)
THE UNITED STATES OF AMERICA,)
)
Defendant.)

Decided: May 14, 1970

Appearances:
Paul G. Reilly, Attorney for Plaintiff
Earle & Reilly were on the briefs.

Lester Reynolds, with whom was Mr. Assistant Attorney General Clyde O. Martz, Attorneys for Defendant.

OPINION OF THE COMMISSION

Chairman Kuykendall delivered the opinion for the Commission.

The plaintiff has brought the above-entitled action under various clauses of section 2 of the Indian Claims Commission Act, 60 Stat. 1049, seeking additional compensation arising from certain transactions involving lands located in Bertie County, North Carolina. The material facts in this case, concerning which there is no substantial dispute, commence with the relationship between the Colonial government of North Carolina and the Tuscarora Indians and involve transactions before the formation of the Federal Government.

At the end of the "Tuscarora War" in 1713 the hostile Tuscaroras left North Carolina and migrated to New York, where they resided with various parts of the Five Nations and eventually became the sixth nation of that confederacy. Those Tuscaroras who had been friendly to the colonists remained in North Carolina and, in 1717, were granted a tract of some 41,113 acres on the south side of the Roanoke River.

The Indians thereby held the "equivalent" of a fee simple title. The grant was subsequently surveyed and, in 1748, was confirmed by the General Assembly of the North Carolina Province. That 1748 Act also provided that any persons holding grants to the land from the late Lords Proprietor (before North Carolina became a royal colony in 1729) should become entitled to such lands if the Tuscaroras should ever desert or leave them.

The Tuscaroras resided on the lands until about 1766 when, at their request, arrangements were made for slightly more than half of the Indians to move to New York. To raise the money necessary to repay advancements made for the migration, the General Assembly approved a lease for part of the lands for a term of 150 years. Tuscaroras continued to leave North Carolina until by 1777 most of them had joined members of their tribe in New York. Other leases of the North Carolina lands had been made by the Tuscaroras which were subsequently confirmed by a 1778 Act of the North Carolina Assembly. The 1778 Act, in addition to validating long term leases, provided that at the expiration of the leases the lands would revert to the State if the Tuscarora Nation were then extinct and, further, that the lands would revert to the State at any time whenever the Tuscarora Nation should either become extinct or entirely abandon or remove themselves from every part of the tract.

The transactions and dealings to this point in the chronology of events did not in any way involve the Federal Government, and there is no basis for any responsibility on the part of the United States.

for the actions of North Carolina prior to 1790. Since the Indian Claims Commission Act, 25 U.S.C. 70a, redresses Indian grievances against the United States, not injuries done by others for which the United States had no responsibility, there would be no grounds for a recovery under the Indian Claims Commission Act based on any of the actions involving the Tuscaroras to this point in time. The Six Nations, etc., et al. v. The United States 173 Ct. Cl. 899 (1965).

However, after 1790 the United States assumed certain responsibilities with respect to the Indians. The Trade and Intercourse Act of July 22, 1790, 1 Stat. 137, 138, and successor statutes forbade the sale or conveyance of Indian lands without the consent of the Federal Government. There have been different versions of the Act, which is still in effect as section 2116 of the Revised Statutes, codified at 25 U.S.C. sec. 177, but federal consent has always been required in any disposition of Indian real property. The legislation has been interpreted as giving the Federal Government a supervisory role over conveyances by Indians to others. In Federal Power Commission v. Tuscarora Indian Nation, 362 U. S. 99, 119 (1960), the Supreme Court said: "The obvious purpose of that statute is to prevent unfair, improvident or improper disposition by Indians of lands owned or possessed by them to other parties, except the United States, without the consent of Congress..." Accordingly, under the Indian Claims Commission Act the United States could be held liable if, after 1790, there were any transactions involving the Tuscaroras' lands in which there was an "unconscionable

consideration" paid or there was a lack of "fair and honorable dealings."

In 1801 the Tuscarora Nation requested the advice and assistance of the President regarding a proposed sale of the Tuscaroras' North Carolina land in order to acquire more land in New York. In response thereto the President appointed William R. Davie Commissioner to attend negotiations in North Carolina between Tuscaroras from New York and the North Carolina representatives. Recognizing the requirements of the Trade and Intercourse Act, the President specifically authorized Commissioner Davie to give the necessary sanction and consent to terms which the Tuscarora chiefs and the legislature of North Carolina might agree on.

An agreement was reached between the Tuscaroras and North Carolina whereby all right, title, interest and claim of the Tuscarora Nation to the Bertie County lands would cease after July 12, 1916. In return North Carolina would pass legislation authorizing the leasing of the unleased lands in the tract, the existing leases would be permitted extensions until July 12, 1916, and the occupancy and possession of the tenants would be held and deemed the occupancy and possession of the Tuscarora Nation, as if the Indians actually resided on the lands. Thus the provisions of the 1778 Act calling for a reversion to the State if the Indians should ever abandon or remove themselves from the lands would no longer apply.

The terms of the agreement were included in a treaty executed on December 4, 1802, by the Tuscarora chiefs and Commissioner Davie.

The treaty was unanimously approved by the Senate on March 1, 1803, but there is no evidence that it was signed by the President. However, the actions by Commissioner Davie and the United States Senate satisfied the requirements of federal approval under the provisions of the Trade and Intercourse Act.

The North Carolina Legislature passed an act on December 16, 1802, in compliance with the agreement, and three commissioners were appointed to supervise execution of the leases and to be responsible for collecting and turning the rentals over to the Indians.

Only 3411 acres of the Tuscaroras' lands were not covered by leases. By June 20, 1803, a total of 2,917-1/2 acres had been leased for $20,966.60. The final installment in payment on the secured notes taken for balances due on the leases was paid in 1807.

The United States took an active interest in the leasing and the extensions of existing leases. On behalf of the Tuscarora Nation the United States arranged for the purchase of New York lands adjoining the reservation in that state. The lands were paid for with funds received from rentals of the North Carolina lands.

When some tenants under a lease originally entered into in 1775 were delinquent in their payments, the Tuscaroras instituted suit in the North Carolina courts. The lessees claimed that because the Indians had removed themselves from the land, the lessees had become entitled to possession under title derived from a 1726 grant and the Act of 1748. The court held that the 1717 grant had vested title in the

Tuscarora Tribe absolutely and unconditionally, and the 1748 Act was in derogation of the rights vested in the Tuscaroras. But, in any event, it had been changed by the Acts of 1778 and 1802, the latter of which provided that possession of the lessees should be considered possession of the Indians. Thus removal of the Tuscaroras from the land could not prejudice their claim to the rentals due on the leases. Sacarusa and Longboard v. William King's Heirs, etc., 4 North Carolina Reports 316, 2 Carolina Law Repository 451, (1818).

Between 1820 and 1828 the Tuscarora Indians requested that North Carolina repeal the 1802 Act to the extent that it extinguished their reversion in the Bertie County lands. In support thereof, they submitted a memorial to the State Legislature in 1828, alleging that they were aggrieved by the 1802 Act; that they had not intended to dispose of the reversion of their lands; that they did not so understand the matter.

A committee appointed by the North Carolina legislature concluded that the only consideration received by the Indians for the surrender of their reversion was permission to extend their short leases, permission to lease their unleased lands, liberty to leave (i.e. depart from) the undemised part of their lands without forfeiture, and assistance from the legislature in collecting their rents.

The report observed that North Carolina wanted its relations with the Indians to be dictated by a just, humane, and liberal policy which required that some compensation be made to the Indians for the surrender of their reversion to the state by the Act of 1802. Recognizing

that the Tuscaroras had no recourse in law, the Committee recommended that the state sell the reversion in the Bertie County lands, the proceeds of the sale to go to the Indians as compensation for the reversion.

On the basis of the report, the North Carolina Assembly enacted the 1829 Act directing the public sale of the reversion in the Tuscarora lands, the proceeds to be paid to the Indians, and the Indians were to give a release of all claim and pretense of title to the lands.

On March 17 and 18, 1829, the Commissioners appointed by the General Assembly sold North Carolina's reversionary interest in the tract and the proceeds, $3,220.71, were paid to the Tuscarora Nation.

The action of the North Carolina legislature in 1829 providing for the sale of the state's reversionary interest in the Tuscarora tract and the subsequent sale at public auction did not involve any land interest of the Tuscarora Indians. It was the state's interest in the land and the sale, for the benefit of the Indians, was a gratuitous act on North Carolina's part to correct what the state considered to have been unfair treatment of the Tuscaroras by the 1802 Act. The Trade and Intercourse Act, of course, had no application and the United States was under no obligation to participate in or approve such action by North Carolina.

However, it appears that the release which was required from the Tuscaroras could have been more than a release of a claim to the reversion. The release was in the form of a deed and extended to any and all interests which the Indians might have to the land. If that release operated to deprive the Tuscaroras of their right to rentals under the various leases, which did not expire until 1916, then the release deed was a disposition of an estate or interest in the lands and subject to the provisions of the Trade and Intercourse Act.

In 1917 the Tuscaroras sought to have the United States recover the North Carolina lands. A detailed investigative report was prepared at the direction of the Commissioner of Indian Affairs. The report included a summary of all the leases of the Tuscaroras' land. It was estimated that a total sum in excess of $50,000.00 had been paid the Tuscaroras from the rentals and sale of the reversionary interest in the land. It was concluded that the United States had consented to the provisions contained in the 1802 Act of the North Carolina legislature; that the Indians had been fairly and adequately compensated for their lands; and that there was no basis for instituting proceedings to recover the lands for the Indians.

In its brief filed with the Commission on July 18, 1968, plaintiff has defined its claim as follows:

> [The] relevant facts . . . entitle the Petitioner to a judgment of liability to be imposed upon the United States for its failure to fulfil its obligations to Petitioner, in the first instance to exercise supervision over the transactions leading to the execution and delivery of the deed of November 19, 1831 and preventing an improvident disposition of the Tuscarora Land, and in the second instance in refusing to take suitable action to either recover lands improperly acquired by North Carolina for its vendees or see to it that the Tuscaroras received a fair and adequate compensation for the complete surrender of all of their lands. (Pl. Brief, p. 1)

As we have stated, the 1829 Act of North Carolina providing for the sale of the reversionary interest did not involve any Indian interest in those lands. The United States was not under any obligation to supervise the public sale of North Carolina's reversion. The Tuscaroras did not dispose of their reversionary interest in the land by the "deed" executed in 1831. The Indians' title to the land had previously been

determined by the Act of 1802 of the North Carolina legislature whereby the Indians were to have the right to rentals under the long term leases which were to expire on July 12, 1916, at which time title was to revert to the State of North Carolina. The United States participated in and approved the agreement which was embodied in the 1802 Act. There were no grounds for the United States to "set aside" the action of the North Carolina legislature or to seek to recover the lands for the Indians. Under the circumstances there is no basis for a determination that North Carolina "improperly acquired" the lands for "its vendees."

We agree that there was a misunderstanding in 1802 concerning the nature of the Indians' title to the tract. We believe, too, that there was not adequate consideration given the Tuscaroras under the 1802 Act which converted what had been merely a possibility of a reversion into an absolute reversion to occur in 1916 by operation of law. This was a taking of an interest in land held by the Tuscarora Indians. Since the Trade and Intercourse Act imposed a duty on the United States to prevent any unfair, improvident or improper disposition of lands owned or possessed by Indians, there could be a basis for liability under the Indian Claims Commission Act for the taking by North Carolina. But North Carolina itself recognized the unfairness of the Act and sought to remedy it in 1829 by selling the reversionary interest which it had taken and paying the entire proceeds to the Tuscaroras.

Therefore there could be a question of the adequacy of the price received from the 1829 sales of the reversion in 1916 of the 41,113 acres. It would not be, as the plaintiff appears to contend, a question of the full fair market value of the tract.

Of course, the value of a reversion to occur many years in the future would be but a small fraction of the full fair market value of the land. While it is obvious that the application of the possible factor to be applied in computing the present value of a payment so far in the future would be very small, we cannot at this time speculate as to such an application to the value of the tract involved in this case. The evidence is not before us, and we have not reached that issue yet. We do not even decide at this time whether the reversionary interest should be valued as of 1802 or 1829.

We will accordingly order that this claim be set for hearing at which time the plaintiff may introduce its evidence to support the claim that the Tuscaroras were not fairly and adequately compensated for their lands.

It is not clear to the Commission whether the Indians seek to prosecute other claims against the United States arising from the transactions involved in this claim. In this regard we have noted, for example, the statements of plaintiff's counsel at the hearing on February 1, 1967, concerning the obligation of the United States "to have protected the Indians in the collection of the rents and the sale of the reversion" (Tr. 7). Concerning those rentals (under the 1802 leases), counsel stated:

> These 3,400 acres were leased on long term leases then to 1916 at the reputed or reported price of approximately $20,966. This money was apparently collected because it was paid to the Secretary of War. It was paid in installments. There is a gap in the figures for a few thousand dollars, but substantially all of this money was collected over a period of two or three years because the arrangements

had been made that installment notes were given. (Tr. 3, 4)

If there is a contention that there was a discrepancy in the accounts for which the United States was responsible, the plaintiff must show specifically what those alleged discrepancies are. If the Indians did not receive the full consideration for the leases until their expiration in 1916, such evidence should likewise be presented to the Commission. Such evidence, and any other relevant matters remaining in this claim, may be presented at the next hearing in this case, which will hereafter be set.

We must comment briefly on one other issue. Defendant has contended that the plaintiff is not the proper party in this case because the Tuscarora Nation had no privity of title to either the lands allotted King Blount and the friendly Tuscaroras or the subject tract given in 1717 in exchange for those lands. The "hostile" Tuscaroras had fled north in 1714 before the lands were allotted. Members of the Tuscarora Indian Nation, the plaintiff, are descendants of the Tuscarora Indians who moved from North Carolina to New York over the 90-year period, 1713-1803. There is no basis either geographically, by tribal membership, or otherwise of distinguishing the descendants of the Tuscaroras who migrated from North Carolina in 1713-1714 who were not beneficiaries of the Bertie County, North Carolina, grant lands in 1717, from those who migrated later including the large numbers who went to New York in 1766 and 1777 after having lived

under Blount and his successors on the Bertie County lands. The Tuscaroras who were the last to leave North Carolina went to live with those who had left in 1713-1714 and their descendants on lands which had been assigned to them by the Oneidas or Senecas or on adjoining lands. They intermingled as members of the same tribe. The Tuscarora chiefs who returned to North Carolina in 1800-1802 and 1820-1828 to obtain additional income from their Bertie County lands represented all the Tuscaroras living in Niagara County, New York, regardless of when the individual members or their ancestors left North Carolina. We have concluded that the plaintiff is the proper party to prosecute the claims presented under Docket No. 321.

Jerome K. Kuykendall, Chairman

Concurring:

John T. Vance, Commissioner

Richard W. Yarborough, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner