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# United States Court of Claims.

*No. 18,932.*

The Choctaw Nation and The Chickasaw Nation,

CLAIMANTS,

vs.

The United States and the Wichita and Affiliated Bands of Indians,

DEFENDANTS.

## BRIEF FOR CLAIMANTS.

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# United States Court of Claims.

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THE CHOCTAW NATION AND THE CHICKASAW NATION, CLAIMANTS,

*vs.*

THE UNITED STATES AND THE WICHITA AND AFFILIATED BANDS OF INDIANS, DEFENDANTS.

I shall attempt to maintain the following propositions:

1. The term *cede* when used in a treaty transfers dominion over the ceded territory and also public property in lands included therein; but it does not *per se* transfer, or divest, private property in lands embraced in the cession; such transfer or divestiture can only be effected by the co-operation of supplemental words in the treaty, or other writings, or the relations or usage of the parties, or other facts outside the treaty.

2. This principle of the law of nations is applicable to the treaty of April 28, 1866, between the United States and the Choctaw and Chickasaw nations.

3. All the territory ceded to the United States by the treaty of April 28, 1866, was, at the date of that treaty, the private property of the citizens of the Choctaw and Chickasaw nations; no part of it was held, as public property, by the Choctaw or Chickasaw national government.

4. The word *cede* in the treaty of April 28, 1866, did not *per se* transfer or divest the property of the citizens of the Choctaw and Chickasaw nations in the ceded lands, but such transfer, or divestiture, if in fact effected through the exercise of the power of eminent domain, must have been effected by the co-operation of other words in the treaty itself, or other writings, or the relations or usage of the parties, or other facts outside the treaty.

5. If these lands had been held, as public property, by the Choctaw and Chickasaw governments, the term *cede*, employed in the treaty of April 28, 1866, would not have transferred an absolute and perfect title, if other words of the treaty, or writings or facts outside the treaty, constituting lawful aids in its interpretation, showed that the word *cede* was employed by the parties for the sole purpose of investing the United States with an estate in trust for the settlement of friendly Indians on the lands.

6. In the interpretation of this treaty the following rules of international law are to be observed: (1) The intention of the parties must prevail; a disposition of territory will have the effect properly implied in the terms used, if such shall appear to have been the intention of the parties; but its signification will be enlarged, or restricted, if it shall appear that the parties, at the time, so understood it. (2) An interpretation, which leads to an absurdity, is to be rejected.

7. In the interpretation of this treaty we are also to observe the rule, established by the supreme court, that treaties, between the United States and Indian nations, are to be liberally construed in favor of the Indians.

8. No property in the lands of the leased district, whether private property of Choctaw and Chickasaw citizens, or public property of the Choctaw and Chickasaw governments, was absolutely and unconditionally transferred, or devested, by the aid of any supplemental words in the treaty, or of any writings or facts outside the treaty, or of any relation or usage of the parties; but, on the contrary, other words, used in the treaty itself, and writings and facts outside the treaty, constituting lawful aids in its interpretation, show that the transfer of property in the ceded lands, was restricted to the single object of settling friendly Indians thereon; that it was only a conveyance in trust, for the accomplishment of that object; and that the property of the Choctaws and Chickasaws was divested only to the extent and for the period of such settlements.



But if the effect of the treaty of April 28, 1866, had been to invest the United States with an indefeasible legal estate, and absolutely to divest the Choctaws and Chickasaws of the legal title, the legal estate, so vested in the United States, would nevertheless have been an estate in trust, for the settlement of friendly Indians on the lands, and the Choctaws and Chickasaws would be entitled to compensation for such of these lands as have been, or shall be, diverted from the uses prescribed in the treaty.

9. Unless the cession of April 28, 1866, was a conveyance in trust, for the settlement of friendly Indians on the ceded lands, there was no consideration for the cession, and the cession was void. An interpretation of the treaty, which involves such an absurdity, is to be rejected.

10. The right of the Choctaws and Chickasaws to compensation, for such of the ceded lands as have been, or shall be, diverted from the uses prescribed in the treaty, can not be impaired or affected, by any interest, or title, which the Wichita and affiliated bands may have acquired in, or to, these lands, however substantial such interest, or title, or any claim based thereon, may be, as against the United States.

11. Neither the Wichita tribe, nor any other one of the affiliated bands held any title to the Wichita reservation, or to any other part of the leased district in 1820; nor has the Wichita tribe or either one of those affiliated bands acquired any title to or interest therein, since 1820, except by virtue of agreements subsequent, in date, to 1859.

## I.

*The term cede, when used in a treaty between two or more nations, transfers dominion over the ceded territory, and also public property in lands included within the ceded territory; but it does not per se transfer, or divest, private property in the lands embraced in the cession. Such transfer or divestiture can only be effected by the co-operation of supplemental words in the treaty, or other writings or the relations or usage of the parties, or other facts outside the treaty.*

This rule of international law has been repeatedly recognized and approved by the supreme court of the United States. The import of the word *cede*, in a treaty between two nations, is very different from that of the word *grant*, or its synonyms, in a deed between two individuals. The word *grant*, in a deed, imports a transfer of private property in the land, but not a transfer of dominion over the land. The word *cede*, in a treaty, imports a transfer of dominion, but not of private property. In United States *v.* Arredondo, 6 Peters, 691, 738, the court said:

> A government is never presumed to grant the same land twice, 7 J. R. 8. Thus a grant, even by act of parliament, which conveys a title good against the king, takes away no right of property from any other; though it contains no saving clause, it passes no other right than that of the public, although the grant is general of the land; 8 Co. 274, b; 1 Vent. 176; 2 J. R. 263.

In United States *v.* Perchman, 7 Peters, 86, Chief Justice Marshall said:



> The modern usage of nations, which has become law, would be violated; that sense of justice and of right, which is acknowledged and felt by the whole civilized world, would be outraged, if private property should be generally confiscated and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other and their rights of property remain undisturbed. If this be the modern rule, even in cases of conquest, who can doubt its application to the case of an amicable cession of territory?

In United States *v.* Clarke, 8 Peters, 444, Chief Justice Marshall said:

> Florida contained an immense quantity of vacant land, which the United States desired to sell. Numerous tracts, in various parts of this territory, to an amount not ascertained, had been granted by its former sovereigns, and confirmed by treaty. To avoid any conflict between these titles and those which might be acquired under the United States, it was necessary to ascertain their validity and the location of the lands. For this purpose boards of commissioners were appointed, with extensive powers, and great progress was made in the adjustment of claims. But neither the law of nations, nor the faith of the United States, would justify the legislature in authorizing these boards to annul pre-existing titles, which might consequently be asserted, in the ordinary courts of the country, against any grantee of the American government.

In Delassus *v.* United States, 9 Peters, 117, 133, Chief Justice Marshall said:

> That the perfect inviolability and security of property is among these rights all will assert and maintain. The right of property, then, is protected and secured by the treaty; and no principle is better settled in this country than that an inchoate title to lands is property. Independent of treaty stipulation this right would be held sacred. The sovereign, who acquires an inhabited territory, acquires full dominion over it; but this dominion is never supposed to divest the vested rights of individuals to property.

In Mitchell *et al. v.* The United States, 9 Peters, 711, 734, the court said:

> * * It will suffice to state some general results of former adjudications, which are applicable to this case, are definitively settled, so far as the power of this court can do it, and must be taken to the rules of its judgment. They are these:
>
> That, by the law of nations, the inhabitants, citizens, or subjects, of a conquered, or ceded, country, territory, or province, retain all the rights of property which have not been taken from them, by the orders of the conqueror, or the laws of the sovereign who acquires it by cession, and remain under their former laws, until they shall be changed.

In Strother *v.* Lucas, 12 Peters, 410, 435, 436, the court said:

The state in which the premises are situated was formerly a part of the territory, first of France, next of Spain, then of France, who ceded it to the United States, by the treaty of 1803, in full propriety, sovereignty, and dominion, as she had acquired and held it; 2 Peters 301, &c.; by which this government put itself in place of the former sovereigns, and became invested with all their rights, subject to their concomitant obligations to the inhabitants. 4 Peters 512; 9 Peters 734; 10 Peters 330, 335, 726, 732, 736. Both were regulated by the law of nations, according to which the rights of property are protected, even in the case of a conquered country, and held sacred and inviolable when it is ceded by treaty, with, or without, any stipulation to such effect.

In United States *v.* Moreno, 1 Wall. 404, the court said:

These two sovereignties are the spring heads of all the land titles in California, existing at the time of the cession of that country to the United States, by the treaty of Guadalupe Hidalgo. That cession did not impair the rights of private property. They were consecrated by the law of nations, and protected by the treaty. The treaty stipulation was but a formal recognition of the pre-existing sanction in the law of nations.

## II.

*The principle of the law of nations that the word cede, used in a treaty, does not per se transfer or divest private property in lands embraced in the cession, is applicable to the treaty of April* 28, 1866, *between the United States and the Choctaw and Chickasaw nations.*

1. All the parties to that treaty were nations capable of making valid treaties. The Choctaw and Chickasaw nations have been known to history as such for more than two hundred years. They were found, in the seventeenth century, residing east of the Mississippi river, on the identical lands from which they emigrated to the country which they now occupy. Their governments are older than that of the United States. The treaties, which have been, from time to time, made with these nations by the United States, cover the entire period of the existence of this republic. They number twenty-three, the series commencing in 1786 and ending in 1866.

The decisions of the supreme court of the United



States have established the doctrine that treaties, between the United States and these nations, are placed, by the law of nations, on the same footing as treaties between the United States and foreign nations, with this single exception, that the former are to be liberally interpreted in favor of the Indian nations. In Cherokee Nation *v.* State of Georgia, 5 Peters, 1, 16, 17, Chief Justice Marshall, delivering the opinion of the court, said:

So much of the argument as was intended to prove the character of the Cherokees as a state, as a distinct political society, separated from others, capable of managing its own affairs, and governing itself, has, in the opinion of a majority of the judges, been completely successful. They have been uniformly treated as a state, from the settlement of our country. The numerous treaties, made with them by the United States, recognize them as a people capable of maintaining the relations of peace and war, of being responsible, *in their political character*, for any violation of their engagements, or for any aggression committed on the citizens of the United States, by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts.

A question of much more difficulty remains. Do the Cherokees constitute a foreign state? * * It may well be doubted whether those tribes, which reside within the acknowledged boundaries of the United States, can, with strict accuracy, be denominated foreign nations. They may more correctly, perhaps, be denominated domestic, dependent nations.

In this case Justices Story and Baldwin were of the opinion that the Cherokee nation, not only was a nation, but was a foreign nation. Mr. Justice Baldwin, having stated the grounds of their opinion, said:

I have endeavored to show that the Cherokee nation is a foreign state, and, as such, a competent party to maintain an original suit, in this court, against one of the United States. * * Upon the whole I am of opinion: 1. That the Cherokees compose a foreign state, within the sense and meaning of the constitution, and constitute a competent party to maintain a suit against the state of Georgia. * * And I am authorized by my brother Story to say that he concurs with me in this opinion.

In Worcester *v.* The State of Georgia, 6 Peters, 515, 559, 560, 561, Chief Justice Marshall, delivering the opinion of the court, said:

The Indian nations had always been considered as distinct independent political communities, retaining their original, natural rights, as the undisputed possessors of the soil from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed; and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term "nation," so generally applied to them, means "a people distinct from others." The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings by ourselves, having each a definite and well-understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. *They are applied to all in the same sense.* * *

In opposition to this original right, possessed by the undisputed occupants of every country,—to this recognition of that right, which is evidenced by our history in every change, through which we have passed,—is placed the charters granted by the monarch of a distant and distinct region, parcelling out a territory in possession of others, whom he could not remove and did not attempt to remove, and the cession made of his claims by the treaty of peace.

The actual state of things, at the time, and all history since explain these charters; and the king of Great Britain, at the treaty of peace, could cede only what belonged to his crown. These newly asserted titles can derive no aid from the articles so often repeated in Indian treaties, extending to them first the protection of Great Britain and afterwards that of the United States. These articles are associated with others recognizing their title to self-government. The very fact of repeated treaties with them recognizes it; and the settled doctrine of the law of nations is, that a weaker power does not surrender its independence, its right of self-government, by associating with a stronger and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government and ceasing to be a state. Examples of this kind are not wanting in Europe. "Tributary and feudatory states," says Vattel, "do not thereby cease to be sovereign and independent states, so long as self-government and sovereign and independent authority are left in the administration of the state." At the present day more than one state may be considered as holding its rights of self-government under the guaranty and protection of one or more allies.

In the same case, pages 582, 583, Mr. Justice Washington said:

The president and senate, except under the treaty-making power, cannot enter into compacts with the Indians, or with foreign nations. This power has been uniformly exercised, in forming treaties with the Indians. * * * After a lapse of more than forty years since treaties with the Indians have been solemnly ratified by the general government, it is too late to deny their binding force. Have the numerous treaties,



which have been formed with them, and the ratifications by the president and senate been nothing more than an idle pageantry?

By numerous treaties with the Indian tribes, we have acquired accessions of territory, of incalculable value to the union. Except by compact, we have not even claimed a right of way through the Indian lands. We have recognized in them the right to make war. No one has ever supposed that the Indians could commit treason against the United States. We have punished them for their violation of treaties; but we have inflicted the punishment on them, as a nation, and not on individual offenders among them, as traitors.

In the executive, legislative, and judicial branches of our government, we have admitted, by the most solemn sanctions, the existence of the Indians as a separate and distinct people, and being vested with rights which constitute them a state or separate community, not as belonging to the confederacy, but as existing within it and, of necessity, bearing to it a peculiar relation.

The treaty of April 28, 1866, was made between the United States and the Choctaw and Chickasaw *nations*. The president's proclamation of the treaty contains the following statements:

Andrew Johnson, president of the United States of America, to all and singular to whom these presents shall come, greeting: Whereas a treaty was made and concluded, at the City of Washington, in the District of Columbia, on the twenty-eighth day of April, in the year eighteen hundred and sixty-six, by and between Dennis N. Cooley, Elijah Sells, and E. S. Parker, commissioners on the part of the United States, and Alfred Wade, Allen Wright, James Riley, and John Page, commissioners on the part of the Choctaw *nation* of Indians, and Winchester Colbert, Edmund Pickens, Holmes Colbert, Colbert Carter and Robert H. Love, commissioners on the part of the Chickasaw *nation* of Indians, all of which commissioners were duly authorized thereto, which treaty is in the words and figures following, to wit:

Articles of agreement and convention between the United States and the Choctaw and Chickasaw *nations* of Indians, made and concluded, at the City of Washington, the twenty-eighth day of April, in the year eighteen hundred and sixty six. * *

In testimony whereof the said Dennis N. Cooley, Elijah Sells and E. S. Parker, commissioners in behalf of the United States, and the said commissioners, on behalf of the Choctaw and Chickasaw *nations*, have hereunto set their hands and seals, the day and year first above written. * *

And whereas the said treaty having been submitted to the senate of the United States, for its constitutional action thereon, the senate did, on the twenty-eighth day of June, one thousand eight hundred and sixty-six, advise and consent to the ratification of the same, by a resolution with amendments, in the words and figures following, to wit: In executive session, senate of the United States, June 28, 1866; Resolved (two-thirds of the senators present concurring,) That the senate advise and consent to the articles of agreement and convention, between the United States and the Choctaw and Chickasaw *nations* of Indians, made and concluded at the City of Washington, the twenty-eighth day of April, in the year eighteen hundred and sixty-six. * *

Now therefore be it known that I, Andrew Johnson, president of the United States of America, do, in pursuance of the advice and consent of the senate, as expressed in its resolution of the twenty-eighth day of June, one thousand eight hundred and sixty-six, accept, ratify and confirm the said treaty, with the amendments as aforesaid.

The commissioners who signed the treaty, on the part of the Chickasaw *nation*, were appointed and commissioned by the governor of the Chickasaw *nation*, in pursuance of an act of the Chickasaw legislature, approved November 18, 1865. The Choctaw commissioners were appointed and commissioned, by the principal chief of the Choctaw *nation*, in obedience to an act of the Choctaw council.

This treaty, therefore, was not a treaty between the United States and individual citizens of the Choctaw and Chickasaw *nations* represented by their agents, but was a treaty between the United States and the Choctaw and Chickasaw *nations*.

2. If the term *cede*, when used in an Indian treaty, has not the same import as when used in a European treaty, it certainly has no broader meaning. The scope of a cession, by an Indian nation, will not be enlarged by presumptions not applicable to cessions by the United States or by European powers. This word, in an Indian treaty, will not convey private property, unless it shall have that effect, by virtue of some special relation, or usage, of the parties, or other special facts, or circumstances.

## III.

*All the land included in the territory ceded to the United States by the treaty of April* 28, 1866, *was, at the date of that treaty, private property. No part of it was held by the Choctaw or Chickasaw national government.*

The land in question was originally ceded by the United States to the Choctaw *nation*. By that cession which was



made in article 2 of the treaty of October 18, 1820, this land was constituted the *public* property of the Choctaw *nation*. The Choctaw *nation* thereupon owned and held the land in its corporate capacity. The following are the terms of this cession :

ART. 2. For and in consideration of the foregoing cession on the part of the Choctaw *nation*, and in part satisfaction for the same, the commissioners of the United States, in behalf of said states, do hereby *cede to said nation* a tract of country west of the Mississippi river, situate between the Arkansas and Red river, and bounded as follows : Beginning on the Arkansas river, where the lower boundary line of the Cherokees strikes the same ; thence up the Arkansas to the Canadian fork, and up the same to its source ; thence due south to the Red river ; thence down Red river three miles below the mouth of Little river, which empties itself into Red river on the north side ; thence a direct line to the beginning.

On the 27th of September, 1830, the United States and the Choctaw and Chickasaw *nations* entered into another treaty. Under the provisions of this treaty, and of the patent executed by the president in accordance with its requirements, the title to these lands was vested in " the Choctaw *nation*," " *and their descendants, to inure to them while they shall exist as a nation and live upon it.*" The following is the language of the treaty :

ARTICLE II. The United States, under a grant specially to be made by the president of the U. S., shall cause to be conveyed to the Choctaw *nation* a tract of country west of the Mississippi river, *in fee simple, to them and their descendants*, to inure to them while they shall exist as a nation and live on it, beginning near Fort Smith, where the Arkansas boundary crosses the Arkansas river, running thence to the source of the Canadian fork, if in the limits of the United States, or to those limits ; thence due south to Red river, and down Red river to the west boundary of the territory of Arkansas ; thence north, along that line, to the beginning. The boundary of the same to be agreeably to the treaty made and concluded at Washington city in the year 1825. The grant to be executed as soon as the present treaty shall be ratified.

The patent, which was granted on the 23d day of March, 1842, contained the following clauses :

Now know ye that the United States of America, in consideration of the premises, and in execution of the agreement and stipulation in the aforesaid treaty, have given and granted, and by these presents do give and grant, unto the said Choctaw *nation*, the aforesaid tract of country

west of the Mississippi, to have and to hold the same, with all the rights, privileges and immunities and appurtenances, of whatsoever nature, thereunto belonging, as intended to be conveyed by the aforesaid article, *in fee simple, to them and their descendants*, to inure to them while they shall exist, as a nation, and live on it, liable to no transfer, or alienation, except to the United States, or with their consent.

On the 22d of June, 1855, the United States and the Choctaw and Chickasaw nations entered into a treaty which contains the following provisions:

ARTICLE I. The following shall constitute and remain the boundaries of the Choctaw and Chickasaw country, viz: Beginning at a point on the Arkansas river one hundred paces east of old Fort Smith, where the western boundary line of the state of Arkansas crosses the said river, and running thence due south to Red river; thence up Red river to the point where the meridian of one hundred degrees west longitude crosses the same; thence north, along said meridian, to the main Canadian river; thence down said river to its junction with the Arkansas river; thence down said river to the place of beginning.

And, pursuant to an act of congress approved May 28, 1830, the United States do hereby forever secure and guaranty the lands embraced within the said limits to the *members* of the Choctaw and Chickasaw tribes, *their heirs and successors, to be held in common, so that each and every member of either tribe shall have an equal undivided interest in the whole:* Provided, however, no part thereof shall ever be sold, without the consent of both tribes; and that said land shall revert to the United States, if said Indians and their heirs become extinct, or abandon the same.

The effect of this treaty was to vest in the *individual members* of the Choctaw and Chickasaw tribes, the title to the land in question, which had formerly been held by the Choctaw nation in its corporate capacity. This was the condition of the title when the Choctaw and Chickasaw governments, by the treaty of April 28, 1866, ceded the "leased district," including what is now known as the "Wichita reservation," to the United States.

Whatever question might possibly be suggested as to the condition, in which the title to the lands under consideration was placed, by the peculiar phraseology of the treaty of September 27, 1830, it is certain, beyond the possibility of question, that the treaty of October 18, 1820, vested the title to the land, as *public property*, in the Choctaw *nation*, and that the treaty of June 22, 1855,



vested the title to the land, as *private property*, in the *members* of the Choctaw and Chickasaw tribes.

## IV.

*The word cede, in the treaty of April* 28, 1866, *did not per se transfer, or divest, the property of the citizens of the Choctaw and Chickasaw nations in the ceded lands; but such transfer or divestiture, if in fact effected, through the exercise of the power of eminent domain, must have been effected by the co-operation of other words in the treaty itself, or other writings, or the relations or usage of the parties, or other facts outside the treaty.*

At the date of the treaty of April 28, 1866, very peculiar relations existed between the Choctaw and Chickasaw nations and the United States, between those two nations and the lands in question, and between the United States and those lands. The Choctaw and Chickasaw nations were not independent foreign sovereignties but were, in the words of Chief Justice Marshall, "domestic dependent nations." Their governments exercised unquestioned dominion, in their own country; but the dominion of the United States over their country was paramount. They were invested with the right of eminent domain; but their right of eminent domain was subordinate to that of the United States. They were treaty-making powers; but they were powerless to make treaties with any nation, except the United States.

The only dominion which their governments could transfer, by treaty, was that qualified dominion which they exercised, in subordination to the superior dominion of the United States. And they could only transfer that to the United States. The title to the land being vested in the *citizens* of those nations, it was not competent for

their *governments* to transfer that property, except in the exercise of the right of eminent domain.

A *cession* of the state of Maine, by the government of the United States, to a foreign power, could not be presumed to carry private property in the lands of the ceded state. If the word *cede* were not reinforced by something else, within or outside the treaty, showing the cession to be a transfer of private property, as well as of dominion, the presumption would be that dominion only was ceded.

The same principle is applicable to this cession, by the Choctaw and Chickasaw nations, to the United States. Unless there are words in the treaty or facts or writings outside the treaty, co-operating with the word *cede*, to show that the title of the individual citizens of these nations was to be devested by the cession, they are still the owners of the land. The first clause of the third article of the treaty, standing alone, does not divest them of their property. *If we are not to go beyond that clause to ascertain the meaning of the treaty, we must conclude that the Choctaw and Chickasaw citizens are still the owners of this land.*

The defendants must find a basis for their case outside the text of this treaty or their case will of necessity fail. The burden of proof does not rest on the claimants to show that the term *cede* as used in the treaty is not supplemented and reinforced by anything, in the treaty, or elsewhere, importing the divestiture and transfer of the private property of the citizens of the Choctaw and Chickasaw nations in the lands of the leased district. On the contrary, the burden rests on the defendants to show that this term is so supplemented and reinforced. The first clause of article 3, standing alone, only transferred that qualified dominion which the Choctaw and Chickasaw governments then held over the land. The



private property of Choctaw and Chickasaw citizens in the land was not divested by this clause, and the allotments of these lands to members of the Wichita and affiliated bands, if supported only by a title conveyed by that clause, were illegal and void, as against the Choctaws and Chickasaws, unless vested in the alottees by the exercise of the power of eminent domain, in which case the right of the Choctaws and Chickasaws to compensation therefor would, of course, be unquestionable.

But while it is necessary for the United States to look beyond that clause, for the basis of a title to the leased district, or of any right thereto, except that of exclusive dominion over it, it is, of course, competent for any of the defendants, as well as for the claimants, to resort, for proof of the real meaning of the treaty, not only to other provisions of that instrument, but also to writings and facts outside the treaty, constituting lawful aids in its interpretation.

V.

*If these lands had been held, as public property, by the Choctaw and Chickasaw governments, the term cede, employed in the treaty of April* 28, 1866, *would not have transferred an absolute and perfect title, if other words of the treaty or writings or facts outside the treaty, constituting lawful aids in its interpretation, showed that the word cede was employed by the parties for the sole purpose of investing the United States with an estate in trust for the settlement of friendly Indians on the lands.*

Let us now assume that the Choctaw and Chickasaw nations held and owned the leased district in their corporate capacity, on the 28th of April, 1866. Upon this hypothesis what would be the presumptive effect of the term cede used in the first clause of the third article of

the treaty? In the absence of proof to the contrary, its effect would obviously be to convey not only dominion over the land, but also the public property of the Choctaw and Chickasaw nations in the land. The question then would be whether such facts surrounding the treaty, and writings connected with it, as constitute lawful aids in its interpretation, so restrict the effect of the cession as to make it a conveyance in trust and not an absolute conveyance of the beneficial ownership of the land. Before I ask the court to consider the facts and writings which fix the meaning of this treaty, I will remind the court of the canons of interpretation applicable to the case.

## VI.

*In the interpretation of this treaty, the following rules of international law are to be observed:* (1) *The intention of the parties must prevail; a disposition of territory will have the effect literally implied in the terms used, if such shall appear to have been the intention of the parties; but its signification will be enlarged, or restricted, if it shall appear that the parties, at the time, so understood it.* (2) *An interpretation, which leads to an absurdity, is to be rejected.*

Vattel's twelve rules for the interpretation of treaties, as condensed on page 902 of Halleck's "International Law," include the following:

1st. We must seek to discover the thoughts of the parties who drew up the treaty, and interpret it accordingly. Thus we must give to a disposition the full extent properly implied in the terms, if such appear to have been the intention of the parties; but its signification should be restrained, if it be probable that the parties, at the time, so understood it.

7th. Every interpretation that leads to an absurdity should be rejected.

10th. The whole treaty must be considered together, and an interpretation given to each particular expression, to agree with the tenor of the whole instrument.



11th. The words of a party should be construed in accordance with the general reasons and motives of the agreement.

12th. The interpretation may be restrictive, or extensive, according to reason and the probable intention of the contracting parties.

Dr. Paley, in his "Moral and Political Philosophy," b. 3, pt. 1, ch. 5, says:

Where the terms of promise admit of more senses than one, the promise is to be performed in that sense in which the promiser apprehended, at the time, that the promisee received it. It is not the sense, in which the promiser actually intended it, that always governs the interpretation of an equivocal promise; because, at that rate, you might excite expectations which you never meant, nor would be obliged, to satisfy. Much less is it the sense in which the promisee actually received the promise; for, according to that rule, you might be drawn into engagements which you never designed to undertake. It must therefore be the sense (for there is no other remaining) in which the promiser believed that the promisee accepted the promise. This will not differ from the actual intention of the promiser, when the promise is given without collusion, or reserve.

In re Ross, 140 U. S. 453, the court said:

It is a canon of interpretation to so construe a law, or a treaty, as to give effect to the object designed, and, for that purpose, all of its provisions must be examined in the light of attendant and surrounding circumstances. To some terms and expressions a literal meaning will be given, and to others a larger and more extended one. The reports of adjudged cases and approved legal treatises are full of illustrations of the application of this rule. The inquiry, in all such cases, is as to what was intended in the law by the legislature, and in the treaty by the contracting parties.

In Geoffroy *v.* Riggs, 133 U. S. 258, the supreme court was called upon to interpret the treaty of February 23, 1853, between the United States and France. That treaty contained the following clause:

In all the states of the Union, whose existing laws permit it, so long and to the same extent as the said laws shall remain in force, Frenchmen shall enjoy the right of possessing personal and real property, by the same title, and in the same manner as the citizens of the United States.

The question, in the case, was whether citizens of France could inherit real property in the District of Columbia. The court held that, within the meaning of the treaty, the District of Columbia was one of the "states of the union," such construction being necessary to give consistency to

the provisions of the treaty, and *not to defeat the consideration given to France, for her concession of certain rights to citizens of the United States.* The court said:

By the last clause of the article, the government of France accords to the citizens of the United States the same rights, within its territory, in respect to real and personal property and to inheritance, as are enjoyed there by its own citizens. There is no limitation as to the territory of France in which the right of inheritance is conceded. And it declares that this right is given, by the government of the United States, to the citizens of France. To ensure reciprocity, in the terms of the treaty, it would be necessary to hold that by "*states of the union*" is meant all the political communities, exercising legislative powers in the country, embracing, not only those political communities which constitute the United States, but also those communities which constitute the political bodies known as territories, and the District of Columbia. It is a general principle of construction, with respect to treaties, that they shall be liberally construed, so as to carry out the apparent intention of the parties, to secure equality and reciprocity between them.

The treaty of October 27, 1795, between the United States and Spain, secured certain privileges to the "subjects of his Catholic Majesty." In the case of the Pizarro, Wheaton, 227, 245, it was contended that the term "subjects" did not include inhabitants of Spain, who were citizens or *subjects of other nations.* The court said:

As to the second objection, it assumes, as its basis, that the term "*subjects*," as used in the treaty, applies only to persons who, by birth, or naturalization, owe a permanent allegiance to the Spanish government. It is, in our opinion, very clear that such is not the true interpretation of the language. The provisions of the treaty are manifestly designed to give reciprocal and co-extensive privileges to both countries; and to effectuate this object, the term "*subjects*," when applied to persons owing allegiance to Spain, must be construed in the same sense as the term "*citizens*" and "*inhabitants*," when applied to persons owing allegiance to the United States.

In United States *v.* Payne, 8 Fed. Rep. 883, the court said:

In construing a treaty, we have a right to take into consideration the situation of the parties to it, at the time it was made, the property which is the subject-matter of the treaty, and the intention and purpose of the party in making the treaty. To get at the purposes and intentions of the parties, we have a right to consider the construction the parties to the treaty, and who were to be affected by it, have given it, and what has been their action under it.



## VII.

*In the interpretation of this treaty, we are also to observe the rule established by the supreme court, that treaties between the United States and Indian nations are to be liberally construed in favor of the Indians.*

The case of Worcester *v.* Georgia, 6 Peters, 515, involved the construction of the treaty of November 28, 1785, between the United States and the Cherokee nation. The fourth article of the treaty contains the following clause:

The boundary *allotted* to the Cherokees, for their hunting grounds, between the said Indians and the citizens of the United States, within the limits of the United States of America, is and shall be the following, viz: * * *

The fifth article of the same treaty contains the following provision:

If any citizen of the United States, or other person not being an Indian, shall attempt to settle on any of the lands westward or southward of the said boundary, which are hereby *allotted* to the Indians, for their hunting grounds, or, having already settled, and will not remove from the same within six months after the ratification of this treaty, such person shall forfeit the protection of the United States, and the Indians may punish him, or not, as they please.

It was insisted that the use of the word "*allotted*" in these two articles, of the treaty, showed that the United States had previously owned the lands west and south of the stipulated boundary, and, by the treaty, conveyed those lands to the Indians.

Chief Justice Marshall, delivering the opinion of the court, said:

The language, used in treaties with the Indians, should never be construed to their prejudice. If words be made use of, which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense. To contend that the word "*allotted*," in reference to the land guarantied to the Indians in certain treaties, indicates a favor conferred, rather than a right acknowledged, would, it would seem to me, do injustice to the understanding of the parties. How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.

In the case of the Kansas Indians, 5 Wall. 737, 760, the court said:

There is, however, one provision in the Miami treaty,—being in addition to the securities furnished the Shawnees and Weas,—which, of itself, preserves the Miami lands from taxation. This particular provision exempts the lands from "levy, sale, execution and forfeiture." It is argued that these words refer to a levy and sale under judicial proceedings; but such a construction would be an exceedingly narrow one, whereas *enlarged rules of construction are adopted in reference to Indian treaties.* In speaking of these rules, Chief Justice Marshall says: "The language used in treaties with the Indians shall never be construed to their prejudice, if words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty."

Applying this principle to the case in hand, is it not evident that the words "levy, sale, execution and forfeiture," are susceptible of a meaning which would extend them to the ordinary proceedings for the collection of taxes? Taxes must be first levied; and they cannot be realized, without the power of sale and forfeiture, in case of non-payment. The position, it seems to us, is too plain for argument. The object of the treaty was to hedge the lands around with guards and restrictions, so as to preserve them for the permanent homes of the Indians. In order to accomplish this object, they must be relieved from every species of levy, sale and forfeiture—from a levy and sale for taxes, as well as the ordinary judicial levy and sale.

In Choctaw Nation *v.* United States, 119 U. S. 1, 28, the court said:

The recognized relation between the parties to this controversy, therefore, is that between *a superior and an inferior*, whereby the latter is placed under the control of the former, and which, *while it authorizes the adoption, on the part of the United States, of such a policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing; and that inequality is to be made good by the superior justice which looks only to the substance of the right*, without regard to technical rules, framed under a system of municipal jurisprudence formulating the rights and obligations of private persons equally subject to the same laws.

*The rules to be applied, in the present case, are those which govern public treaties, which, even in controversies between nations equally independent, are not to be read as rigidly as documents between private persons governed by a system of technical law, but in the light of that larger reason which constitutes the spirit of the law of nations. And it is the treaties made between the United States and the Choctaw nation holding such a relation, the assumptions of fact and of right which they pre-suppose, the acts and conduct of the parties under them, which constitute the material for settling the controversies which have arisen under them.* The rule of interpretation, already stated as arising out of the nature and relation of the parties, is sanctioned and adopted by the express terms of the treaties themselves. In the 11th article of the treaty of 1855, the government of the



United States expresses itself as being desirous that the rights and claim of the Choctaw people, against the United States, "shall receive a just, fair and liberal consideration." * * *

The only money payments secured by the treaty, over and above the necessary expenditures in removing the Indians, in providing for their subsistence for twelve months, after reaching their new homes, and paying for their cattle and their improvements, are, first, an annuity of $20 000 for twenty years, commencing after their removal to the west; and, second, the amount to be expended in the education of forty Choctaw youths, for twenty years, together with the cost of erecting some public buildings, and furnishing blacksmiths, weapons and agricultural implements, in addition to the several annuities and sums secured, under former treaties, to the Choctaw nation and people. It is nowhere expressed in the treaty that these payments are to be made as the price of the lands ceded; and they are all only such expenditures as the government of the United States could well afford to incur, for the mere purpose of executing its policy in reference to the removal of the Indians to their new homes. As a consideration for the value of the lands ceded by the treaty, they must be regarded as a meagre pittance.

It is, perhaps, impossible to interpret the language of this instrument, considered as a contract between parties standing upon an equal footing and dealing at arm's length, as a conveyance of the legal title, by the Choctaw nation to the United States, to hold as trustee for the pecuniary benefit of the Choctaw people; and yet it is quite apparent that the only consideration for the transfer of the lands, that can be considered as inuring to them, is the general advantage which they may be supposed to have derived from the faithful execution of the treaty on the part of the United States; *and when, in that connection, it is considered that the treaty was not executed, on the part of the United States, according to its just intent and spirit, with a view to securing to the Choctaw people the very advantages which they had a right to expect would accrue to them, under it, it would seem as though it were a case where they had lost their lands, without receiving the promised equivalent. In such a case there is a plain equity to enforce compensation, by requiring the party in default to account for all the pecuniary benefits it has actually derived from the lands themselves.*

In answer to questions proposed by President Jackson, Attorney General Taney on the 1st of November, 1831, said:

The language of that clause in the treaty, which gives the president the power to pay fifty cents, an acre, for reservations, would, according to its strict and literal interpretation, seem to imply that the reservations for the chiefs, and others named in the treaty, were not embraced in this provision. But it is manifestly for the interest of the Choctaws, that this power of purchase, by the government, should exist as to all the reservations; because, if the persons entitled are unable to sell before their removal, and prefer accepting the fifty cents, per acre, rather than wait for an individual purchaser, it enables the government to give them this compensation, as soon as they arrive at their new homes, when, for the most part, it would be very convenient for them to receive it.

*In an instrument of this sort, and made with such persons as the Choc-*

*laws. I do not think that strict and technical rules of construction should be applied to it. It ought to be expounded liberally according to its spirit, so as to give the Indians all the advantages and facilities, in their removal, which appear to have been contemplated by the general scope and spirit of the treaty.* And this rule of construction is sanctioned by the clause, at the end of the 8th article, which stipulates that, whenever well founded doubts shall arise, it shall be construed most favorably towards the Choctaws. And, regarding the subject in this light, and looking to the objects of the treaty, I think that, according to a fair and liberal interpretation of its terms and provisions, the president has the power to accept, from any of the chiefs named, a relinquishment of his title, and to direct him to be paid fifty cents per acre for it. 2 Opin. Atty. Genl. 467.

## VIII.

*No property in the lands of the leased district, whether private property of Choctaw and Chickasaw citizens, or public property of the Choctaw and Chickasaw governments, was absolutely and unconditionally transferred, or divested, by the aid of any supplemental words in the treaty, or of any writings, or facts, outside the treaty or of any relation or usage of the parties; but, on the contrary, other words used in the treaty itself, and writings and facts outside the treaty, constituting lawful aids in its interpretation, show that the transfer of property in the ceded lands was restricted to the single object of settling friendly Indians on the lands,—that it was only a conveyance in trust for the accomplishment of that object,—and that the property of the Choctaws and Chickasaws was divested only to the extent and for the period of such settlements.*

*But, if the effect of the treaty of April* 28, 1866, *had been to invest the United States with an indefeasible legal estate, and absolutely to divest the Choctaws and Chickasaws of the legal title, the estate so vested in the United States would have been an estate in trust for the settlement of friendly Indians on the lands; and the Choctaws and Chickasaws would be entitled to compensation for such of these lands as have been, or shall be, diverted from the uses*



*prescribed in the treaty;* and it is competent for the claimants to prove, by written or parol evidence, that such was the character of the conveyance.

This trust was not expressly created by specific clauses of the treaty of April 28, 1866, but results from provisions of that treaty supplemented and reinforced by writings and facts antecedent and subsequent to the date of the treaty.

At common law, a trust, in a conveyance of land by one private person to another, could be created by parol, and could also be proven by parol evidence. Under the English statute of frauds, trusts of lands could be created by parol, but could only be proven by written evidence. Trusts, like uses, are, of their own nature averrable, *i. e.*, may be declared by word of mouth without writing; as if, before the statute of frauds, an estate had been conveyed unto, and to the use of, A and his heirs, a trust might have been raised, by parol, in favor of B. And the statute of frauds will be satisfied if the trust can be manifested, or proved, *by any subsequent acknowledgment by the trustee, as by an express declaration, or any memorandum to that effect*, or by a letter under his hand, or by his answer in chancery, or by his affidavit, or by a recital in a bond, or deed, or by a pamphlet written by the trustee, or by an entry in a bank deposit book; in short *by any writing in which the fiduciary relation of the parties and its terms can be clearly read.* Lewin on Trusts, 1st Amer. from 8th Eng. Ed. pp. 51, 55, 56; cases cited and notes; Perry on Trusts, vol. 1, sec. 82, and cases cited; 4 Kent Com. 305 and cases cited; 1 Greenl. Ev. sec. 266, and cases cited; Osterman *v.* Baldwin, 6 Wall. 116; Foy *v.* Foy, 2 Hayw. 141.

The English statute of frauds is not operative, for any purpose, in any territory of the United States, or in the

District of Columbia, or in the Indian country, except so far as it has been adopted by federal authority. It has never been established, by federal authority, in the leased district. Nor has it ever been recognized, by the United States, or by the Choctaw or the Chickasaw nation, as governing transactions between the United States and those nations. It is operative, neither upon treaties between the United States and foreign nations, nor upon treaties between the United States and the Choctaw and Chickasaw nations.

Under the rules of international, or public, law, which are never narrower, nor more technical, than those of the common law, a trust, in a cession of land, like a trust in a grant of land at common law, although not expressly declared in specific provisions of the treaty, may result from facts and writings outside the treaty, of even date therewith, or, in date, antecedent or subsequent thereto, as well as by implication from provisions of the treaty itself.

The case now under consideration does not involve the common conveyance in trust, in which the grantor, intending to confer a benefit upon a cestui que trust designated by himself, selects a third party as the agent for conferring the benefit, and invests him with the power to confer it. The grantors and the trustee were *all* to be *beneficiaries*, under this arrangement. The Choctaw and Chickasaw nations made the United States their trustees for the settlement of friendly Indians; and they invested the trustees with a discretion, to determine the extent to which they would execute the trust.

It was the well-founded opinion of the officers of the United States government, that the condition and prospects of the wandering tribes and bands of Indians would be greatly improved, if they could be induced to settle



upon lands, to be designated by the United States, within this district, for their occupation. But there was nothing, in the transaction, upon which they could predicate a claim to any *rights* under the cession.

The assemblage of these Indians, in the leased district, was most confidently and most reasonably expected to be of great advantage to the United States, not only through the improved facilities for dealing with these wild tribes to result from their closer aggregation, but also from the civilizing influences to be exerted upon them by the civilized tribes. The government of the United States became therefore a cestui que trust, as well as the trustee.

But still more important were the advantages anticipated by the Choctaw and Chickasaw nations, as the result of this promised settlement of friendly Indians within the ceded district. They had found themselves involved in an unequal struggle against irruptions of whites, on their eastern and southern frontiers. They had learned, by hard experience, what troubles and dangers were to be apprehended, from the close proximity of such covetous, strong-armed, light-fingered neighbors. They saw the coming of the evil day,—the approaching overthrow of their cherished institutions,—the extinction of their governments and national existence, which were older than their most ancient traditions. They were anxious to interpose a barrier of red men, between the whites and themselves, on their western frontier. They were eager to secure this district against occupation by white men. They would have peremptorily refused their consent to its occupation by white men. As will hereafter be shown, *the sole consideration for this cession of the leased district, in the treaty of* 1866, *was the undertaking of the United States to locate friendly Indians on the ceded lands.*

It was, then, a peculiarity of this arrangement that the

government of the United States, the nominal trustee, was itself to be a cestui que trust; and so also was each of the makers of the trust deed to be a cestui que trust. The transaction, creating the trust, was a contract entered into for the advantage of both the parties thereto, as well for the advantage of the Choctaws and Chickasaws as for the advantage of the United States.

How, then, stands the case? The Choctaws and Chickasaws find the very arrangement, into which they entered for the preservation of their institutions, their government, and their national existence, perverted to their destruction. They find that instead of erecting the promised barrier of friendly Indians, on their western frontier, the United States are about to move the white frontier eastward, from the one hundredth to the ninety-eighth meridian of longitude, and to bring their enterprising white neighbors to their very doors. They learn that the lands, which they entrusted to the United States, for the use of red men, and for no other use, are about to be diverted from that use. They learn that the United States propose to shake off the trust, with which these lands have been invested, by the Choctaw and Chickasaw nations, and to invest themselves with full beneficial ownership of the land. *They find that the United States propose to nullify the sole consideration for which the land was ceded.*

Not only do the United States propose to nullify the consideration for this trust deed, but the Wichitas propose to nullify the deed itself, whether regarded as a deed in trust, or as an absolute deed. They assert that the land, which they have acquired, as a gratuity, from the Choctaws and Chickasaws, is theirs by a title paramount to that of either party to the deed.

The trust, in the case now under consideration, although



it had its incipiency in the treaty of 1855, first appeared, as a feature of the cession of 1866, in a written submission by the United States, to the Choctaw and Chickasaw nations, of a definite proposition, as one of the bases of a contemplated treaty between the United States and those two nations, followed by an acceptance of the proposition so submitted.

The treaty was signed at Washington in 1866, but the preliminary negotiations were conducted, and the substance of its provisions determined on, at Fort Smith, in 1865. It was not signed at Fort Smith, in 1865, because the Indian commissioners had not been authorized, by their respective governments, to sign it. Such authority was subsequently conferred upon commissioners of the respective nations, and the treaty itself was signed the next year, at Washington, without further negotiation as to the use for which the land was ceded, or as to the consideration for the cession.

The following documents, outside the treaty, and prior, in date, to its formal execution, constitute legitimate aids in its interpretation:

I. On pages 33, 34, of the report of the commissioner of Indian affairs, for 1864, appears the following statement:

> Under these circumstances, I feel that I cannot too strongly urge the importance of preserving the Indian country for the use of the Indians alone, and in all treaties or other arrangements, which may hereinafter be made with its former owners insisting upon, and, if need be, enforcing such terms as will secure ample homes within that country for all such tribes as, from time to time, it may be found practicable and expedient to remove thereto.

II. The commissioners of the United States, in their address to the delegates of the Indian nations, at the council held at Fort Smith, September 9, 1865, which address is now on file in the Indian office, said:

> Brothers: After considering your speeches, made yesterday, the commissioners have decided to make the following reply and statement of the policy of the government:

Brothers: We are instructed, by the president, to negotiate a treaty, or treaties, with any, or all, of the nations, tribes, or bands of Indians, in the Indian Territory, Kansas, or the plains west of the Indian Territory and Kansas.

* * * * * * * * *

The president is anxious to renew the relations, which existed at the breaking out of the rebellion.

We, as representatives of the president, are empowered to enter into new treaties, with the proper delegates of the tribes located within the so-called Indian Territory, and others above named, living west and north of the Indian Territory.

Such treaties must contain substantially the following stipulations:

1. Each tribe must enter into a treaty for permanent peace and amity with themselves, each nation and tribe, and with the United States.

2. Those settled in the Indian Territory must bind themselves, when called upon by the government, to aid in compelling the Indians of the plains to maintain peaceful relations with each other, with the Indians in the Territory, and with the United States.

3. The institution of slavery, which has existed among several of the tribes, must be forthwith abolished, and measures taken for the unconditional emancipation of all persons held in bondage, and for their incorporation into the tribes, on an equal footing with the original members, or suitably provided for.

4. A stipulation, in the treaties, that slavery or involuntary servitude shall never exist, in the tribe, or nation, except in punishment of crime.

5. A portion of the lands, hitherto owned and occupied by you, *must be set apart for the friendly tribes, now in Kansas and elsewhere*, on such terms as may be agreed upon by the parties and approved by government, or such as may be fixed by the government.

6. It is the policy of the government, unless other arrangements be made, that all the nations and tribes, in the Indian Territory, be formed into one consolidated government, after the plan proposed by the senate of the United States for organizing the Indian Territory.

7th. No white person, except officers, agents, and employés of the government, or of any internal improvement authorized by the government, will be permitted to reside in the territory, unless formally incorporated with some tribe, according to the usages of the band.

Brothers: You have now heard and understand what are the views and wishes of the president; and the commissioners, as they told you yesterday, *will expect definite answers* from each of you, upon the questions submitted.

This address, in manuscript, in the Indian office, bears the following indorsement:

We propose to renew the treaty stipulations that existed previous to, or at the breaking out of, the rebellion, so far as regards the annuities.

*The government will insist on purchasing a portion of their lands for the settlement of friendly Indians.*

No part of any moneys expended by the president, in providing for the relief of destitute Indians, which were reduced to want on account of their friendship for the government, will be refunded.

A stipulation of general amnesty must be incorporated, and no individual shall be proscribed, or any act of confiscation, or forfeiture,



passed, against those who remained friendly to the U. S.; but they shall enjoy equal privileges with the other members of the nations.

To this address the Choctaw and Chickasaw delegates made a reply, which is now on file in the Indian office, and contains the following paragraphs:

The committee, on the part of the Choctaws and Chickasaws, reply to the propositions made on the part of the United States, as the basis of new treaties that * * *

On certain terms, on which we can doubtless agree with you, *we are willing to admit the settlement of other tribes within our territory, as proposed in the 5th article.*

The following reply to the address of the United States commissioners is also on file in the Indian office:

We, the delegation on the part of the loyal element of the Choctaw people, came here with the expectation of meeting our southern brethren here, and to see what sort of a treaty would, or could, be made with the government of the United States. * * *

In answer, therefore, to your propositions to the several tribes of Indians, *we say that the first, second, third, fourth, fifth, and sixth articles meet our approval.* We respectfully suggest that the seventh article may be changed to read thus:

"No white person, except officers, agents, and employés of the government or of any internal-improvement company authorized by the government of the United States; also no persons of African descent, except our former slaves or free persons of color who are now or have been residents of the territory, will be permitted to reside in the territory, unless formally incorporated with some tribe according to the usages of the band."

Mr. Cooley, the president of the commission, said to the delegates, or agents, of the Indians:

The agents will be supplied with printed copies of the address, and *are requested to go, with an interpreter, to their respective tribes, for the purpose of fully explaining what is said there.*

This is shown in the minutes of the council, printed in the report of the commissioner of Indian affairs for 1865. It proves that the authorities of the United States did not expect the treaty, of which they made this fifth proposition a *sine qua non*, to be *signed* during the session of the council of 1865.

In order to bridge over the interval of time between the adjournment of the Fort Smith council and the formal execution of the contemplated definitive general treaty,

a provisional treaty of peace was signed at Fort Smith in December, 1865. The general treaty was signed at Washington, on the 28th of April, 1866.

III. The commissioners, who represented the United States at the Fort Smith council, in 1865, were D. N. Cooley, Elijah Sells, Thomas Wistar, W. S. Harney and E. S. Parker. Mr. Cooley was president of the council, and was also, at the time, commissioner of Indian affairs. In his annual report for 1865, he said:

*With the Choctaws and Chickasaws a treaty was agreed upon, based on the seven propositions* heretofore stated, in addition to which these tribes agreed to a thorough friendly union among their own people and forgetfulness of past doings and *the opening of the leased lands to the settlement of any tribes whom the government of the United States might desire to place thereon.* * * * This treaty, after its approval by the councils of the Choctaws and Chickasaws, *is to be signed, in this city, by three delegates from each nation, to be sent here for that purpose.*

IV. An act of the Chickasaw legislature, approved November 18, 1865, contains the following provision:

SEC. 1. Be it enacted by the legislature of the Chickasaw nation. That the governor of the Chickasaw nation be, and he is hereby, requested and authorized to appoint and commission three competent persons, by and with the advice and consent of the senate, as delegates to visit Washington city, during the next session of congress, with full and efficient powers to reconstruct, or enter into, new treaties, or conventions, with the United States of America.

The following documents, subsequent, in date, to the treaty, constitute lawful aids in its interpretation:

I. The commissioner of Indian affairs, who presided in the negotiation of the treaty of 1866, in his report for 1866, relating to that treaty, said:

Four principal points came up for settlement, to wit: * Cession of lands by the several tribes, to be used for the settlement thereon of Indians whom it is in contemplation to remove from Kansas. * The first tribe, with which arrangements were consummated, were the Seminoles. * The Indians cede the government the entire domain secured to them by the treaty of 1856. * The next treaty, in this series, was made with the confederate nations of Choctaws and Chickasaws. * The Indians cede to the government the whole of that tract of land known as the leased lands. *

If this language of the commissioner implies that either one of these cessions was a conveyance in trust, it obviously implies that the other was a conveyance in trust. He makes no discrimination between them. And yet, under the treaty of 1866, the United States paid the Seminoles for this cession, as a conveyance in trust, the sum of $325,362; and afterwards, under the act of March 2, 1889, 25 Stat. 1004, paid them, for an absolute cession of the same land, the additional sum of $1,912,942.02.



II. The secretary of the interior in an official communication dated May 1, 1879, said:

* The title acquired by the government, by the treaties of 1866, was secured in pursuance and furtherance of the same purpose of Indian settlement, which was the foundation of the original scheme. That purpose was the removal of Indian tribes from the limits of the political state and territorial organizations, and their present permanent location upon other lands sufficient for the needs of each tribe. These lands being ample in area for the purpose, it has become a settled policy to locate other tribes thereon, as fast as arrangements can be made; and provision has been constantly made, by treaties, agreements and acts of congress, to effect these objects.

That purpose is expressly declared in the said treaties. The cessions of the Creeks and Seminoles are stated to have been made, "in compliance with the desire of the United States to locate other Indians and freedmen thereon." These words must be held to create a trust equivalent to what would have been imposed had the language been, "for the purpose of locating Indians and freedmen thereon."

The lands ceded by the Choctaws and Chickasaws were, by article 9 of the treaty of June 22, 1855, "leased to the United States, * for the permanent settlement of the Wichita and such other tribes, or bands, of Indians, as the government may desire to locate therein." *The treaty of* 1866 *substituted a direct purchase for the lease, but did not extinguish or alter the trust.*

III. In the president's proclamation of February 12, 1880, relating to the Indian Territory, he says:

Which territory is designated, recognized, and described by the treaties and laws of the United States, and by the executive authorities, as Indian country, and, as such, *is subject only to occupation by Indian tribes*, officers of the Indian department, military posts, and such persons as may be privileged to reside and trade therein, under the intercourse law of the United States.

IV. The report of the Indian office, transmitted by the secretary of the interior to the president, February 17, 1882, contains the following statements:

The lands to which the United States holds the legal title, within the Indian Territory, are reserved, by treaty stipulation and acts of con-

gress, and *are not, and never have been, public lands subject to general occupation.*

*The treaties, by which the United States acquired title to any of the lands in the Indian Territory, or obtained the conditional right to control the disposal of any of said lands, were the treaties with the Seminoles of March* 21, 1866, *with the Choctaws and Chickasaws of April* 28, 1866, *with the Creeks of June* 14, 1866, *and with the Cherokees of July* 19, 1866.

*The lands reconveyed to the United States by the foregoing treaties are, therefore, held subject to the trust named.* They can be appropriated *only to the uses specified, and to those only by the United States, and then only in the manner provided by law.* Miscellaneous immigration, even by the intended beneficiaries, would be unauthorized and illegal.

*The Choctaw and Chickasaw cession of April* 28, 1866, (14 *Stats.* 769), *was by the tenth section thereof made subject to the conditions of the compact of June* 22, 1855 (11 *Stats.* 613), *by the ninth article of which it was stipulated that the lands should be appropriated for the permanent settlement of such tribes, or bands, of Indians as the United States might desire to locate thereon.*

*The title of the United States to lands in the Indian Territory is, as heretofore shown, subject to specific trusts, and it is not within the lawful power of either the legislative, or executive, departments of the government, to annihilate such trusts, or to avoid the obligation arising thereunder. Such trusts are for the benefit of Indian tribes and Indian freedmen.*

V. A report of the Indian office, dated January 31, 1884, transmitted by the secretary of the interior to the senate, contains the following statement relating to the Indian Territory:

No part of said territory remains free from appropriation either to a direct trust, assumed by treaty, or by reservations for tribes thereon under executive order, except that portion still claimed by the state of Texas, and lying between Red river and the North fork of the same.

VI. On the 14th of February, 1884, the secretary of the interior, in response to a resolution of inquiry adopted by the senate, said:

These lands were acquired by treaties with the various Indian nations or tribes in that territory in 1866, to be held for Indian purposes, and to some extent for the settlement of the former slaves of some of said nations, or portions thereof. Such are the purposes for which said lands are now being used or held according to the common understanding of the objects of the treaties by which they were acquired, and from these arise the necessity for, or obligation to keep said lands in their present condition of occupancy or otherwise.

VII. A proclamation of the president, dated July 1, 1884, relating to the Indian Territory, contains the following statement:



Which territory is designated, recognized, and described by the treaties and laws of the United States and by the executive authorities as Indian country, and as such is subject to Indian occupation only.

VIII. In an official communication from the secretary of the interior to the president relating to the Indian Territory, dated January 26, 1885, the secretary refers to a former decision, "that no part of said territory remains free from appropriation, either to a direct trust assumed by treaty, or by reservations for tribes thereon under executive order, except that portion still claimed by the state of Texas and lying between Red river and the North fork of the same," and says:

This status of the land, as thus determined, has been adhered to by this department; and on April 26, 1879, February 12, 1880, and in July, 1884, proclamations were issued by the president, warning unauthorized persons against going upon these lands.

*Objection will be made to the occupation of any part of the Indian Territory by other than Indians, on the ground that the government set apart the territory for the exclusive use of the Indians and covenanted that no others should reside therein. It is not denied that the treaties so provide.* It is, however, within the power of the government, with the consent of the Indians interested, to change this provision of the treaties so that these desirable unoccupied lands may be placed within the lawful reach of the settlers.

IX. An official report of the Indian office, dated January 26, 1885, contains the following:

*The title acquired by the government, by the treaties of* 1866, *was secured in pursuance and furtherance of the same purpose of Indian settlement which was the foundation of the original scheme. That purpose was the removal of Indian tribes from the limits of the political state and territorial organizations, and their permanent location upon other lands sufficient for the needs of each tribe.*

These lands being ample in area for the purpose, *it has become a settled policy to locate other tribes thereon,* as fast as arrangements can be made, and provisions have been constantly made, by treaties, agreements, and acts of congress, to effect these objects.

X. Congress has expressly acknowledged this trust. The act approved March 3, 1891, (26 Stat. 1025) contains the following clause:

*Said lands have been ceded in trust by article three of the treaty between the United States and the said Choctaw and Chickasaw nations of Indians, which was concluded April* 28, 1866, *and proclaimed on the* 10*th day of August of the same year.*

XI. Both houses of congress, by votes approaching closely to absolute unanimity, in response to President Harrison's message of February 17, 1892, resolved that *the cession of* 1866 *was not an absolute conveyance, but was a conveyance in trust for the settlement of friendly Indians on the ceded lands.*

XII. A communication from the Indian office to the committee on Indian affairs of the house of representatives, dated September 13, 1890, contained the following statement:

It is possible that the commission, when it came to negotiate with the Choctaws and Chickasaws, may have omitted from the treaty with those Indians a similar condition and reservation regarding the purposes for which the lands were to be used, because of the fact that the United States had secured by a prior treaty a lease, which amounted to a permanent lease, of the lands in question for Indian purposes, for which, together with other considerations, it had paid the sum of $800,000. Considering this fact, the commission negotiating the treaty may have considered the payment of the $300,000 additional, as provided for in the treaty of 1866, a sufficient compensation for an absolute cession of all right, title, and interest that the Choctaws and Chickasaws had in and to the said "leased district." *This conclusion, however, can not be fairly reached, when the record of the negotiations is fully considered; for we have already seen that these Indians accepted the terms proposed by the commission, upon which the treaties would be negotiated; and these very terms indicate the purpose for which the ceded lands were to be used. And it shows quite clearly that the Indians understood that they were parting with whatever right, title, and interest remained to them in the "leased district" to the United States, to be used for the location and settlement of other Indians thereon.*

The negotiations made about that time by the United States with Indian tribes show very conclusively that a policy had been carefully mapped out for the acquisition by the United States of the right to locate other Indians upon portions of the lands owned and occupied by the five civilized tribes in the Indian Territory.

I am inclined, therefore, to the opinion that the Choctaw and Chickasaw Indians have good ground for the claim that the United States took the land ceded by them upon the trust to settle other Indians and freedmen thereon, as the policy upon which the negotiations were made clearly indicated its desire and purpose to do.

While there are clearly no words of limitation in the treaty of 1866 as to the use to which the ceded lands should be put by the United States, *the history of the negotiation preceding and resulting in that treaty and the subsequent treatment of the subject quite clearly indicate that the Choctaws and Chickasaws have good ground for claiming that they understood that the lands were to be used for the location of other Indians and freedmen thereon.*



If that be a sound rule of law, which is recognized by all the authorities, to the effect that a trust, not expressed in a conveyance, may be proved "*by any subsequent acknowledgment by the trustee,—as, for example, by an express declaration, or by a memorandum thereof, or by any other writing in which the fiduciary relation of the parties and its terms can be clearly read,*" then certainly these numerous acknowledgments of the trust, in this case, by the senate, by the house of representatives, by the presidents, by the secretaries of the interior, and by the commissioners of Indian affairs, must be sufficient to prove that the cession of 1866 was a cession in trust.

If the exigency of the claimants' case required it, they would confidently assert the proposition that, as to all the lands within the Wichita reservation not actually allotted to individual Indians, the title of the United States has become extinct, and those lands are now the property of the citizens of the Choctaw and Chickasaw nations. In Doe, Lessee of Poor, *v.* Considine, 6 Wall. 458, 461, the court said:

When a trust has been created, it is to be held large enough to enable the trustee to accomplish the objects of its creation. If a fee simple estate be necessary, it will be held to exist, though no words of limitation be found in the instrument, by which the title was passed to the trustee, and the estate created. On the other hand, it is equally well settled that, where no intention to the contrary appears, the language, used in the creation of the estate, will be limited and restrained to the purposes of its creation. And when they are satisfied, the estate of the trustee ceases to exist, and his title becomes extinct. The extent and duration of the estate are measured by the objects of its creation.

Jarman says: "Trustees take exactly the estate which the purposes of the trust require; and the question is not whether the testator has used words of limitation, or expressions adequate to carry an estate of inheritance, but whether the exigencies of the trust demand the fee simple, or can be satisfied by any and what less estate."

Chancellor Kent says: "The general rule is that a trust estate is not to continue beyond the period required by the purposes of the trust; and, notwithstanding the device to the trustees *and their heirs*, they take only a chattel interest, where the trust does not require an estate of higher quality."

For more than a quarter of a century, the government

had understood *and asserted* the treaty of April 28, 1866, to be a conveyance of a mere trust estate in the leased district, when President Harrison, in his message of February 17, 1892, expressed the opinion that the treaty invested the United States with the absolute beneficial ownership of the land. He had refused to execute the act of congress, which he had approved March 3, 1891. By this act an appropriation of $2,991,450 was made, to pay the Choctaws and Chickasaws, for their interest in the Cheyenne and Arapahoe reservation. In his message, President Harrison informed congress of his reason for refusing to execute the law. The response of the senate to that message, was the following resolution:

Resolved, That, for reasons set forth in the report of the committee on Indian affairs, upon the president's message of February 17, 1892, upon the appropriation of March 3, 1891, for payment to the Choctaw and Chickasaw nations, for their interest in the Cheyenne and Arapahoe reservation, in the Indian territory, submitted with this resolution, that it is the opinion of the senate that there is no sufficient reason for interference in the due execution of the law referred to.

The vote in the senate on this resolution was yeas 43, nays 13. The vote on the same resolution and report in the house was yeas 163, nays 47.

The reasons assigned by the president, for his refusal to execute the law, were met by the committee as follows:

1. In the message of the president, transmitted to congress February 17, 1892, he says:

"After a somewhat careful examination of the question I do not believe that the lands for which this money is to be paid were, to quote the language of section 15 of the Indian appropriation bill already set out, 'ceded in trust by article 3 of treaty between the United States and said Choctaw and Chickasaw nations of Indians, which was concluded April 28, 1866.'"

The president is of the opinion that the lands in question were not ceded in trust to the United States by this treaty. He thinks that an absolute, unqualified title was conveyed by the treaty, and as he elsewhere says, that the United States paid the Choctaws and Chickasaws therefor the sum of $300,000. On the contrary, your committee believe that the estate conveyed was a trust estate only; that whereas the treaty of 1855 empowered the United States to locate upon these lands only those Indians whose ranges were included within certain specified limits, this treaty of 1866 authorized the United States—



(1) To locate upon these lands Indians like the Cheyennes and Arapahoes, whose ranges were not within the limits designated in the treaty of 1855, and whom, prior to the treaty of 1866, the United States had no right to locate upon the lands;

(2) To locate upon the lands Choctaw and Chickasaw freedmen;

(3) Deprived the Choctaws and Chickasaws themselves of the right to settle thereon.

The treaty disposed of this sum of $300,000 as follows:

It was to remain in the treasury of the United States. If the Choctaws and Chickasaws should decide not to confer citizenship upon their freedmen, and the United States should remove the freedmen with their consent from the Choctaw and Chickasaw nations, then the sum of $300,000 was to be held in trust for the freedmen. If the Choctaws and Chickasaws should decide not to admit their freedmen to citizenship, and the freedmen should decline to be removed from the Choctaw and Chickasaw nations, then this sum of $300,000 was to remain the property of the United States. But if within two years the freedmen should be invested with citizenship, and should refuse to leave the Choctaw and Chickasaw nations, then, and only then, was the money to be paid to the Choctaws and Chickasaws.

The purpose of this provision relating to the $300,000 was not to pay for the land. Its object was to cover the cost of the removal of the freedmen if the Choctaws and Chickasaws should not admit them to citizenship, or to compensate the Choctaws and Chickasaws in some measure for the benefits conferred upon the freedmen by conferring citizenship upon them, in case this should be done. These benefits were material and substantial; in addition to all the civil and political rights enjoyed by the Indians themselves, they acquired property rights such as were conferred upon no freedmen outside of the Indian Territory. They have the free use of lands just as the Indians have, and the benefit of excellent schools, for the support of which they have never contributed in any way a single cent. To have these rights conferred upon 3,000 freedmen the government agreed to pay $300,000. The Choctaws agreed to it, the Chickasaws did not. This sum was fixed at $300,000 because the number of freedmen were estimated at 3,000, and it was agreed that each freedman, in case of removal, should receive for the expenses incident to emigration the sum of $100.

The Choctaws admitted their freedmen to citizenship and received their share of the sum of $300,000, less $7,200 paid to freedmen who promised to emigrate from the Choctaw nation.

The committee proceed to set forth, at length, on pages 11, 12, 13 and 14 of the report, the grounds on which they base the conclusion that the estate conveyed by the treaty was a trust estate only. Their statement merits careful consideration.

2. The committee then reply to another statement of the president:

But the president, referring to the leased district, says:

"As to these lands, the government had already, under the treaty of

1855, secured the right to use them perpetually for the settlement of friendly Indians. This was not true as to the other tribes referred to."

This statement, if material to the question now at issue, means, first, that by the treaty of 1855 the government acquired the right to locate upon these lands *any* Indian tribes which it might be convenient for the government to locate thereon, without restriction or limitation; and, secondly, that the government, by the treaty of 1855, acquired the right to allot these lands in severalty to such Indians. On both of these points, your committee think, the president is mistaken.

The treaty of 1855 secured to the government the right to locate on the lands in controversy those Indian tribes whose homes and ranges were within certain designated limits, and no others. The following is the text of the treaty:

"The Choctaws and Chickasaws do hereby lease to the United States all that portion of their common territory west of the ninety-eighth degree of west longitude, for the permanent settlement of such other tribes or bands of Indians as the government may desire to locate therein: excluding, however, all the Indians of New Mexico, and also all those whose usual ranges at present are north of the Arkansas river, and whose permanent locations are north of the Canadian river, but including those bands whose permanent ranges are south of the Canadian, or between it and the Arkansas."

Moreover, the treaty of 1855 did not grant, or purport to grant, to the United States any right to allot these lands in severalty to individual owners, or to transfer the ownership of the lands. As to these lands the treaty of 1855 was not a deed in fee simple, but only a lease from the Choctaws and Chickasaws to the United States. It empowered the United States, not to convey, but only to sublet the lands. The words of the treaty are:

"The Choctaws and Chickasaws do hereby lease to the United States all that portion of their common territory west of the ninety-eighth degree of west longitude."

Until the Choctaws and Chickasaws assented to the provisions of the act of March 3, 1891, they were never willing nor did they ever consent that these lands should be opened to settlement by whites, or allotted, or conveyed in severalty, to whites, blacks, or Indians.

3. In answer to a third reason assigned by the president, for his refusal to execute the law, the committee say:

The president expresses the opinion that the conditions attached to the cessions in the Creek and Seminole treaties of 1866 were the same as those which were attached to the lease in the Choctaw and Chickasaw treaty of 1855, and that, therefore, the claim of the Choctaws and Chickasaws that the cession in their latter treaty of 1866 was encumbered by a condition, or trust, is not supported by any analogies of the Creek and Seminole cases. This is a mistake. The trusts created in the Creek and Seminole treaties of 1866 were trusts (1) for the location of friendly Indians, in general, without restriction, and (2) for the location of freedmen. Neither of these two trusts was created by the Choctaw and Chickasaw treaty of 1855. Neither of them existed, in the case of the leased district, until created by the Choctaw and Chickasaw treaty of 1866. The trust created by the Choctaw and Chickasaw treaty of 1855 was a trust not to locate Indians in general, but to locate certain



Indians whose ranges were included within the boundaries designated in the treaty. This treaty of 1855 contained no trust whatever for the location of freedmen. That trust was first created, for the leased district, by the Choctaw and Chickasaw treaty of 1866.

It is true that these two trusts of the Choctaw and Chickasaw treaty of 1866 are not created by express words qualifying the grant. But this is also true of the Creek and Seminole treaties. In those treaties the trusts are not expressed, but are implied in words used in recitals only. They are not implied in either of those treaties, in words used in the body of the grant. The recital in each case is in the following words: "In compliance with the desire of the United States to locate other Indians and freedmen thereon," etc. The words of the grant are even stronger in the Creek and Seminole treaties than in the Choctaw and Chickasaw treaty. The Choctaws and Chickasaws "cede," but the Creeks and Seminoles "cede and convey."

These trusts in the Choctaw and Chickasaw treaty of 1866 are implied in the language of the third article, in which the words of conveyance, the statement of the consideration, and the arrangements for the freedmen are placed in such juxtaposition as not only to warrant, but to necessitate, the inference that it was the object of the parties, and the effect of the treaties, to authorize the United States to locate upon these lands Indians whose ranges were not embraced within the limits designated in the treaty of 1855, and also to locate Choctaw and Chickasaw freedmen thereon, and that the cession was encumbered by corresponding trusts.

If this be not true, if the Choctaw and Chickasaw deed of 1866 was an absolute deed, while those of the Creeks and Seminoles were only deeds in trust, then gross injustice was practiced upon the Choctaws and Chickasaws by the United States in 1866, for the Creeks then received $325,362 for a deed in trust of only 2,169,080 acres of land, and the Seminoles received $975,168 for a deed in trust of only 3,250,560 acres; but for 7,713,239 acres of land, which had been previously held by the United States under a gratuitous lease for eleven years, the Choctaws and Chickasaws received not a single penny, unless the $300,000 provided for the freedmen be erroneously reckoned as compensation to the Choctaws and Chickasaws for the grant. And now the president having, in 1889, paid the Creeks for the same lands the additional sum of $2,280,857, and having, in the same year, paid the Seminoles for the same lands an additional sum of $1,912,942.02, has, for almost twelve months, refused to pay the Choctaws and Chickasaws the amount appropriated by the act of March 3, 1891.

4. The committee further answer the president as follows:

The treaty between the United States and Spain, by which the United States ceded these lands to Spain, in part payment for Florida, which was ratified February 19, 1821, is designated by the president as the treaty of 1819. And he designates the treaty by which the United States had previously ceded the same lands to the Choctaws as the treaty of 1820. He says:

"The boundary between the Louisiana purchase and the Spanish possession, by our treaty of 1819 with Spain, was, as to these lands, fixed upon the one hundredth degree of west longitude. Our treaty with the

Choctaws and Chickasaws, made in 1820, extended their grant to the limit of our possessions. It followed, of course, that these lands were included within the bounds of the state of Texas, when that state was admitted to the union, and the release of the Choctaws and Chickasaws, whatever it was worth, operated for the benefit of the state of Texas, and not of the United States."

These statements are altogether erroneous. They mean that the lands in question had been sold to Spain before the Choctaw treaty of 1820 was made, and so were not ceded to the Choctaws by the treaty of 1820, and, therefore, the release of 1855 operated for the benefit of Texas, whose title was derived from Spain, and not for the benefit of the United States. But the facts are as follows:

The district west of the one hundredth meridian, as already shown, belonged to France, as a part of the province of Louisiana, from 1685 to 1762. In 1762 it was ceded by France to Spain. In 1800 it was retroceded by Spain to France. In 1803 it was ceded by France to the United States. In 1820 it was ceded by the United States to the Choctaws in part payment for their lands east of the Mississippi river. In 1821, while this district was the property of the Choctaws, the United States, without their consent or knowledge, ceded it to Spain in part payment for Florida. It afterwards became successively the property of Mexico and Texas. (American State Papers, vol. 2, pp. 574, 575, 630, 634, 637, 663, 664; vol. 4, pp. 471, 473, 478, 479; Henry Clay's speech, house of representatives, April 3, 1820; sixteen European maps, eighteenth century.)

The Spanish treaty was negotiated in 1819; but it was most vehemently opposed in the congress of the United States *and was rejected by the king of Spain.* While this rejected treaty was dead the United States, in 1820, conveyed the same land to the Choctaws, without disclosing to the Choctaws the facts connected with the defunct Spanish treaty. After the treaty had been dead and buried nearly two years, it experienced a resurrection and a ratification in 1821.

The government then found itself in this embarrassing predicament: The Choctaws, by the treaty of 1820, had conveyed to the United States all their lands in the State of Mississippi, and in payment therefor the United States had conveyed to the Choctaws all the lands included within certain defined boundaries west of the Mississippi river. The deed to the Choctaws embraced the district west of the one hundredth meridian, but afterwards, in 1821, the United States, without the consent or knowledge of the Choctaws, conveyed the same lands to Spain in part payment for Florida. It then became obligatory upon the United States, as already indicated, to take one of four courses, either to reconvey to the Choctaws a part of their lands in the state of Mississippi, or to convey to the Choctaws additional lands west of the Mississippi river, or to surrender the treaty of 1820 altogether and restore to the Choctaws all their lands in the state of Mississippi, and receive back the lands ceded to them west of the Mississippi river, or, finally, to compensate the Choctaws in money for those lands west of the one hundredth meridian which had been sold to, and paid for, by them, and subsequently, without their consent, conveyed to Spain. The United States chose the latter course, and by the treaty of 1855, for the sum of $800,000, secured from the Choctaws a quitclaim of their title to these lands and a lease of the lands between the ninety-eighth and one hundredth meridians of west longitude.

The president thinks that when the Choctaws and Chickasaws, for the sum of $800,000, relinquished their right of reclamation against the United States for the alienation of their lands, by a release or quitclaim of their interest in those lands, this release "operated for the benefit, not of the United States, but of the owner deriving title from Spain." But the Chickasaws assert, with good reason, as your committee think, that when they furnished the United States 6,589,440 acres of land, which was actually applied by the United States in part payment for Florida, the transaction inured to the benefit of the United States. They think that when an individual furnishes a debtor means to pay his debts, the transaction inures to the benefit of the debtor. But then it is not true that "our treaty with the Choctaws and Chickasaws, made in 1820, extended their grant to the limit of our possessions." There was no such provision in the treaty of 1820. It occurred, for the first time, in the treaty of 1830, made ten years after the land had been sold to the Choctaws; and, while it did deprive the Choctaws of that part of their land which was sold to Spain in 1821, it did not curtail the area actually ceded by the United States to the Choctaws in 1820, nor did it impair their right of reclamation against the United States.



5. The president, in his message of February 17, 1892, expressed the opinion that a considerable part of this sum of $800,000, was probably intended as rent for the leased district. He said:

It seems probable that a very considerable part of this consideration must have related to the leased lands, because these were the lands in which the Indian title was recognized and the treaty gave to the United States a permanent right of occupation by friendly Indians.

To this suggestion of the president the senate committee replied as follows:

One of the grounds assigned for the president's opinion is that the Indian title to the leased lands "was recognized" by the United States. This implies that the Indian title to the lands west of the one hundredth meridian was not recognized by the United States. But your committee think that this fact, if it were a fact, would have no bearing whatever upon the question of the apportionment of the consideration of $800,000 as between the conveyance and the lease. The Indians themselves recognized the fact that the legal title conveyed to them in 1820 had been extinguished by the conveyance to Spain in 1821. They knew that the United States, a sovereign power, invested with the right of eminent domain, had ceded their lands, by a valid treaty, to the king of Spain. But they believed that the ratification of the Spanish treaty in 1821 had not extinguished their right of reclamation against the United States for this transfer of their lands without their consent to a foreign power.

Your committee, therefore, believe that the entire sum of $800,000, paid in pursuance of the treaty of 1855, was but a small part of the value of the 6,589,440 acres of land west of the one hundredth meridian, and that the whole of that sum was fairly applicable to the quitclaim or release of that land west of the one hundredth meridian.

6. Further answering the president the committee say:

The president thinks that if an Indian nation, being the owner of a tract of land purchased from the United States and fully paid for, cedes

the land back to the United States, by a conveyance in trust, the terms of the trust permitting the location of other Indians and of freedmen upon the land, but interdicting the location of white men thereon, the United States can evade the interdict, by locating other Indians upon the land and purchasing from them a release from the interdict, and can then open the land to settlement by white citizens. He thinks that, upon the assumption that the Choctaws and Chickasaws, in their lease of 1855 and in their cession of 1866, interdicted the location of whites upon the leased district, it was nevertheless competent for the United States to cede the land to the Cheyennes and Arapahoes and then purchase from the Cheyennes and Arapahoes their interest in the land, with the right to open it to "white settlement," and that, by this device, the United States could evade the interdict of the Choctaws and Chickasaws. He thinks that if the United States, after paying the Cheyennes and Arapahoes for their interest in the lands, should be required to pay the Choctaws and Chickasaws for exemption from the restrictions imposed by their conveyance, then the United States would, in effect, be required to pay twice for the privilege of opening the land to "white settlement," or, as he expresses it, would be compelled to pay twice for the same land.

On this point your committee are constrained to differ in opinion with the president. It certainly was competent for the United States to locate Cheyennes and Arapahoes upon these lands and afterward to pay them whatever the United States saw fit to pay for a quitclaim of their interest in the land and for their consent to the location of whites thereon. But whatever effect such an arrangement might have as between the United States and the Cheyennes and Arapahoes, it could have no effect whatever to release the United States from the restrictions imposed in the treaties of the Choctaws and Chickasaws. In the same way an individual holding land in trust might, by purchasing from his own grantee a release from the obligation of the trust imposed by the grantor, divest his title of the trust and invest himself with an absolute title, and then resist his grantor's demand for redress by setting up his grantee's release and his own payment to his grantee for such release. If the United States saw fit not only to give the Cheyennes and Arapahoes allotments in severalty of a part of the land, but also to pay them money for their quitclaim of the residue and for their consent to its occupation by white settlers, and attempted by that arrangement to evade the terms of the Choctaw and Chickasaw lease of 1855 and cession of 1866, the United States ought to bear the expense of this speculation themselves and cannot rightfully recoup that expense from the Choctaws and Chickasaws.

Your committee, therefore, conclude that the United States are not the absolute owners of the leased district, but only hold a trust estate therein; and they submit the following recapitulation of the grounds on which this conclusion is based:

(1) Under the treaty of 1855 the sum of $800,000 was paid for the release of the land west of the one hundredth meridian and the lease of the land between the ninety-eighth and one hundredth meridians.

(2) Much the larger part of that payment was applicable to the release of the land west of the one hundredth meridian, and a small part, if any, of it to the lease of the land between the ninety-eighth and one hundredth meridians.

(3) In 1865 the commissioners, appointed by the president, officially



notified the five civilized tribes, at Fort Smith, that the lands to be treated for were to be acquired for the use, not of white men, but of Indians.

(4) The Choctaws and Chickasaws, as well as the other civilized tribes, formally accepted that basis of the proposed negotiations, and upon that basis consented to treat, and did treat, in 1865.

(5) When the commissioners of the Choctaws and Chickasaws met the commissioners of the United States to negotiate the treaty of 1866, there is no pretense that anything had been paid by the United States towards the purchase of the land between the ninety-eighth and one hundredth meridians, although the United States had held that land under lease for eleven years.

(6) The treaty of 1866 provided no compensation for the transfer of the absolute ownership of the leased district. The sum of $300,000, named in the third section of that treaty, was to be paid to the freedmen, if they should be removed, but was to remain the property of the United States if citizenship should not be conferred upon the freedmen, and was only to be paid to the Choctaws and Chickasaws in the event that citizenship should be conferred upon the freedmen and they should refuse to emigrate.

(7) The sum of $300,000, named in the treaty of 1866, was not to compensate the Choctaws and Chickasaws for anything except for conferring citizenship and a right to forty acres of land each, upon the freedmen. If citizenship should not be conferred upon the freedmen, the United States, by the terms of the treaty, were to acquire whatever new interest the treaty conveyed in the land, without paying the Choctaws and Chickasaws a dollar for such conveyance.

(8) The effect of the treaty of 1866 was to authorize the government of the United States, whenever it should remove the freedmen, to locate them in the leased district.

(9) It was also the effect of the treaty of 1866 to open the leased district to settlement by friendly Indians *in general;* for the treaty of 1866 omitted the inhibition of the lease of 1855, which excluded from that district all Indians, except those residing or ranging within certain specified limits.

(10) The Creeks and Seminoles entered into treaties with the United States in 1866 upon the basis which had been proposed to and accepted by the five civilized tribes in 1865, and which excluded white settlers from the lands to be ceded to the United States.

(11) The United States, in 1866, paid the Creeks 30 cents per acre for 3,250,560 acres, and also paid the Seminoles $325,362 for 2,169,080 acres, but paid the Choctaws and Chickasaws nothing for 7,713,239 acres ceded, unless the sum of $300,000 provided as compensation for the possible grant of citizenship to the freedmen is to be regarded as payment for the land.

(12) In 1889 the United States paid the Creeks $2,280,857.10 for a release of their interest in the lands ceded by them in 1866, and also paid the Seminoles $1,912,942.02 for a release of their interest in the lands ceded by them in 1866.

(13) To assume that the cession of 1866 was intended, by the parties to the treaty, as an absolute conveyance, is to assume that the Choctaws and Chickasaws intended to convey, and the United States intended to acquire, without any compensation whatever, 7,713,239 acres of land, worth more than $10,000,000 in 1886 and worth more than $40,000,000 at the present time.

(14) As the supreme court has often held, treaties between the United States and the Indian tribes are not without necessity to be so construed as to work injustice upon the "wards of the nation;" but a construction of the treaty of 1866 which makes that treaty the conveyance of an absolute title to the United States will inflict a grievous and unnecessary wrong upon the Choctaw and Chickasaw nations.

(15) The propositions submitted to the civilized tribes by the United States in 1865 as the basis of the negotiation of the treaties of 1866, the provisions of the treaty of 1866, the facts and circumstances attending the making of that treaty, and the contemporaneous dealings of the United States with the Creeks and Seminoles necessitate the conclusion that the cession made in the Choctaw and Chickasaw treaty of 1866 was intended as a conveyance, not of an absolute title, but only of a trust estate.

## IX.

*Unless the cession of April* 28, 1866, *was a conveyance in trust, for the settlement of friendly Indians on the ceded lands, there was no consideration for the cession, and the cession was void. An interpretation of the treaty, which involves such an absurdity, is to be rejected.*

(1.) The sum of $300,000, named in the third article of the treaty of April 28, 1866, was not the consideration, or any part of the consideration moving from the United States to the Choctaw and Chickasaw nations, for the cession of the leased district. This will be apparent upon a careful scrutiny of the provisions of the treaty, in the light of facts constituting legitimate aids in its interpretation.

The third article of the treaty commences as follows:

> The Choctaws and Chickasaws, in consideration of the sum of $300,000, hereby cede to the United States the territory west of the ninety-eighth degree west longitude known as the leased district: Provided, etc.

From this language, if disconnected with the context, most readers would probably infer that it was the purpose of the parties to the treaty, that the United States should pay the sum of $300,000 to the Choctaws and Chickasaws as the consideration for the conveyance of this land. It is possible, but not probable, that the commissioners, who drafted this treaty and signed it on behalf of the United States, intended to convey to the Indians and to the public the impression, that the Choctaws and Chickasaws were about to realize $300,000, from this cession. But nothing could have been farther from the truth. Not a penny of that sum was to go to the Choctaws or Chickasaws, as compensation for their interest in the land. This will be discovered at once by digging down to the bottom of the dust-heap thrown over this sum of $300,000, in the third article of the treaty.



This money remained in the treasury of the United States. It was to remain there two years unless, before the expiration of the two years, the Choctaws and Chickasaws should elect to confer, and should confer, upon their freedmen "*all the rights, privileges, and immunities (including the right of suffrage) of citizens of said nations*, except in their annuities, moneys, and public domain," and should also give to their freedmen,—men, women, and children,—each forty acres of land. If their freedmen, who were estimated to number 3,000, should emigrate, this sum of $300,000 was all to be paid to them,—$100 to each emigrant. If none of the freedmen should emigrate, and if the Choctaws and Chickasaws should fail to confer upon each freedman citizenship and forty acres of land, the whole of the $300,000 was to remain the property of the United States. If a part only of the freedmen should emigrate, and the Choctaws and Chickasaws should grant citizenship and forty acres of land to those refusing to emigrate, the Choctaws and Chickasaws were to receive the balance of the $300,000, after deducting the amount paid to the emigrants. Only in the event that the Choctaws and Chickasaws should grant citizenship and forty acres of land to each of the freedmen, and all the freedmen should refuse to emigrate, was the sum of $300,000

to become wholly the property of the Choctaws and Chickasaws.

But this sum was not, nor was any part of it, to be paid to the Choctaws and Chickasaws, as the *consideration* for the cession of the leased district. It was to be paid to them as a consideration for the grant of forty acres of land and of citizenship, including the right of suffrage, to each of the freedmen who should emigrate.

Such are the facts connected with this stipulation relating to the sum of $300,000. And yet President Harrison, in his message of February 18, 1892, said:

*The United States paid to the Choctaws and Chickasaws three hundred thousand dollars.*

(2) No part of the sum of $800,000, paid to the Choctaws and Chickasaws, under the treaty of June 22, 1855, entered directly or indirectly into the consideration for the cession made to the United States, by the treaty of April 28, 1866.

By the treaty of June 22, 1855, the Choctaws relinquished to the United States all their title to the lands west of the one hundredth meridian of west longitude, and the Choctaws and Chickasaws *leased* to the United States, for certain specified uses, their lands between the ninety-eighth and one hundredth meridians. The aggregate consideration for the relinquishment and lease was fixed in the treaty at $800,000. There was no apportionment of this consideration as between the relinquishment of the lands west of the one hundredth meridian and the lease of the land between the ninety-eighth and one hundredth meridians. The following are the provisions of the treaty relating to this subject:

ART. 9. The Choctaw Indians do hereby absolutely and forever quitclaim and relinquish to the United States all their right, title, and interest in and to any and all lands west of the one hundredth degree of west longitude, and the Choctaws and Chickasaws do hereby lease to the United States all that portion of their common territory west of the ninety-eighth degree of west longitude for the permanent settlement of the Wichita and such other tribes or bands of Indians as the government may desire to locate therein, excluding, however, all the Indians of New Mexico, and also those whose usual ranges at present are north of the Arkansas river and whose permanent locations are north of the Canadian river, but including those bands whose permanent ranges are south of the Canadian, or between it and the Arkansas, which Indians shall be subject to the exclusive control of the United States, under such rules and regulations, not inconsistent with the rights and interests of the Choctaws and Chickasaws, as may from time to time be prescribed by the president for their government: *Provided, however*, That the territory so leased shall remain open to settlement by Choctaws and Chickasaws as heretofore. (11 Stat., 613.)



ART. 10. In consideration of the foregoing relinquishment and lease, and as soon as practicable after the ratification of this convention, the United States will pay to the Choctaws the sum of six hundred thousand dollars, and to the Chickasaws the sum of two hundred thousand dollars, in such manner as their general councils shall respectively direct. (11 Stat., 613.)

What, then, was the interest in lands west of the one hundredth meridian which the Choctaws by this treaty relinquished to the United States?

On the 18th of October, 1820, Generals Andrew Jackson and Thomas Hinds, commissioners on the part of the United States, signed a treaty, by which the Choctaw nation ceded to the United States, certain lands, described by metes and bounds, east of the Mississippi river, and, in exchange therefor, the United States ceded to the Choctaw nation certain lands, described by metes and bounds, west of the Mississippi river. The following are the first and second articles of the treaty:

ART. 1. To enable the president of the United States to carry into effect the above grand and humane objects, the Mingoes, head men and warriors of the Choctaw nation, in full council assembled, in behalf of themselves and the said nation, do, by these presents, cede to the United States of America all the land lying and being within the boundaries following, to wit: Beginning on the Choctaw boundary, east of Pearl river, at a point due south of the White Oak spring, on the old Indian path; thence north to said spring; thence northwardly to a black oak standing on the Natchez road, about forty poles eastwardly from Doake's fence, marked A. J. and blazed, with two large pines and a black oak standing near thereto and marked as pointers; thence a straight line to the head of Black creek or Bouge Loosa; thence down Black creek or Bouge Loosa to a small lake; thence a direct course so as to strike the Mississippi one mile below the mouth of the Arkansas river; thence down the

Mississippi to our boundary; thence around and along the same to the beginning. (7 Stat. 211.)

ART. 2. For and in consideration of the foregoing cession on the part of the Choctaw nation and in part satisfaction for the same, the commissioners of the United States in behalf of said states do hereby cede to said nation a tract of country west of the Mississippi river situate between the Arkansas and Red river and bounded as follows: Beginning on the Arkansas river where the lower boundary line of the Cherokees strikes the same; thence up the Arkansas to the Canadian fork, and up the same to its source; thence due south to the Red river; thence down Red river three miles below the mouth of Little river, which empties itself into Red river on the north side; thence a direct line to the beginning. (7 Stat. 211.)

Here was an exchange of lands between the United States and the Choctaw nation. The consideration for which the Choctaws ceded to the United States their lands east of the Mississippi *was not a part of the land* included within the metes and bounds of the western country ceded to them by the United States, *but was the whole of the land* included within those metes and bounds. If it had happened that a part of the land covered by this deed of the United States to the Choctaws was not in fact and in law owned by the United States on the 18th day of October, 1820, when the treaty was signed, the obligation of the United States would have been identical with the obligation incurred by an individual who, being a party to an exchange of farms, should prove not to be the owner of all the land covered by his deed.

In that event it would have become the duty of the United States to do one of four things: Either to acquire a complete title to all the land covered by their deed, and to convey the same to the Choctaws, or to restore to the Choctaws a part of their land east of the Mississippi river; or to rescind the treaty altogether and place the parties *in statu quo;* or, finally, to make just reimbursement in money for the land purchased and paid for by the Choctaws, but not delivered by the United States.

If it had been true that on the 18th day of October,



1820, the date of the exchange of lands between the United States and the Choctaw nation, the United States had owned no lands between the Red and Canadian rivers west of the one hundredth degree of west longitude, then unless the United States had subsequently acquired and conveyed such lands, or restored to the Choctaws a part of their land east of the Mississippi river, or rescinded the treaty, the United States would have become bound to make just compensation to the Choctaws in money for the lands deeded but not delivered to them. So it would have to come to pass that when the Choctaws, on the 22d day of June, 1855, relinquished their interest in the lands west of the one hundredth meridian, the interest so relinquished, as between the Choctaws and the United States, would have been precisely as valuable if the United States had not owned these lands on the 18th of October, 1820, as it would have been if the United States had owned the lands on that day. In one case it would have been the land itself which the Choctaws relinquished on the 22d day of June, 1855; in the other case it would have been an indisputable claim for the just value of the lands which the Choctaws relinquished.

But while the reimbursement, to which the Choctaws would have been entitled for the relinquishment of their interest in these lands west of the one hundredth meridian of longitude in 1855, would have been the same whether the lands did or did not belong to the United States on the 18th day of October, 1820, when the exchange was made, the fact is that on that day these lands did belong to the United States, having been acquired from France, by the treaty of April 30, 1803.

On that day the United States owned, not only the country east of the one hundredth meridian now occupied by the Choctaws and Chickasaws, together with the

leased district, but also all the land bounded by that meridian on the east, by the Canadian river on the north, by the Red river on the south, and on the west by a straight line drawn from the headwaters of the Canadian river to the headwaters of the Red river.

The title of France to the province of Louisiana, including the land just described, was based upon the following grounds :

1. During the seventeenth and eighteenth centuries, the European powers universally recognized, as rules of international law, the following principles :

(*a*) The sovereign, whose subjects first discovered a river, in the western hemisphere, acquired exclusive dominion over all territory lying between branches of that river, not previously discovered by subjects of other sovereigns.

(*b*) The sovereign, whose subjects first discovered a line of sea-coast, on the American continent, acquired dominion over all territory lying between all rivers entering the sea on that coast.

(*c*) In the case of discoveries by subjects of different sovereigns, at different points on the same coast, the most convenient line between such points, at proximately equal distances therefrom, became the common boundary of the territories of the respective sovereigns.

2. In 1683, La Salle, a subject of the king of France, descended the Mississippi river, to the Gulf of Mexico ; and in 1685 he established a settlement and fort on the bay of Matagorda. There was, at that time, no Spanish settlement, or discovery, nearer than Panuco, on the river of that name. The Rio Del Norte, otherwise known as the Rio Bravo, although somewhat nearer to Matagorda bay than to Panuco, afforded the most convenient midway boundary between the provinces of France and Spain.



The sources of the Red and Canadian rivers were east of and near to the Rio Del Norte.

The result of the application of the rules of international law, above stated, to the facts of the case was that, in the years 1683–1685, France became invested with the sovereignty of the province named, from her king, Louisiana, extending from the Mississippi river, on the east, to the Rio Del Norte, on the west, and from the Gulf of Mexico, northward, beyond the fortieth parallel of north latitude.

The adoption and observance by the European powers, of the above-mentioned rules relating to discoveries in America, and the facts relating to the discovery of Louisiana, are proved by evidence which ought to be conclusive upon the government of the United States, because that government is itself the witness that furnishes the evidence. This evidence will be found in Nos. 11 to 20 of the documents filed as claimants' evidence in chief.

This tract of land, bounded on the north by the Canadian river, on the east by the one hundredth meridian, on the south by the Red river, and on the west by a line drawn from the headwaters of the Canadian river to the headwaters of the Red river, which became a part of the province of Louisiana, upon the original acquisition of that province by France, by virtue of the discovery of La Salle in 1683, and the settlement of La Salle on the bay now known as Matagorda bay in 1685, continued to be a part of Louisiana for 77 years from the acquisition of that province by France in 1683 and 1685 until France ceded Louisiana to Spain on the 3d of November, 1762. It was a part of the province of Louisiana which France then ceded to Spain. It continued to be a part of the province of Louisiana during the period of 38 years from the cession by France to Spain in 1762 to the retrocession by Spain to France in 1800 by the treaty of St. Ildefonso. It was

a part of the province of Louisiana retroceded to France by that treaty. It remained a part of Louisiana from the retrocession by Spain to France in 1800 to the cession by France to the United States in 1803. It was a part of the province of Louisiana ceded by France to the United States in 1803. And, finally, it continued to be a part of Louisiana from 1803 until the treaty of October 18, 1820, between the United States and the Choctaws, and was ceded by that treaty to the Choctaw nation. The facts stated above are established by the state papers in the archives of the government of the United States, by different maps of Louisiana published in London, Paris, Leyden, St. Petersburgh, and Amsterdam, between the year 1702 and the year 1774, and by a map published in Paris, in 1820, by M. Barbé-Marbois, who was the French negotiator of the treaty by which France was ceded to the United States in 1803.

Now it happened that there was an inconsistency between the *natural objects* and one of the *courses* specified in the conveyance made by the United States to the Choctaws in the treaty of October 18, 1820. It is a fact that a line drawn *due south* from the *source of the Canadian* will not touch the *Red river*, because the source of the Red river is further eastward than the source of the Canadian.

But Mr. Justice Story, delivering the opinion of the supreme court of the United States in Preston's Heirs *v.* Bowman, 6 Wheat., 580, laid it down as "a universal rule that course and distance yield to natural and ascertained objects." And in Newsom *v.* Prior, 7 Wheat., 7, Chief-Justice Marshall said:

> The courts of Tennessee, and all other courts by whom cases of this description have been decided, have adopted the same principle and adhered to it. It is that the most material and most certain calls shall control those which are less material and less certain. A call for a natural object, as a river, or a known stream, a spring, or even a marked tree, shall control both course and distance.



It is unnecessary to cite the numerous, not to say innumerable authorities, by which this principle has been recognized and approved.

Applying these indisputable rules of law to the case under consideration, we find that two of the calls of this conveyance to the Choctaw nation are for *natural objects*, namely; first, the *source* of the Canadian river; and, second, the *Red river;* that a third call is for a *course* connecting the Red river with the source of the Canadian; that this course, being due south from the source of the Canadian, is inconsistent with the other two calls, because the source of the Canadian is further west than that of the Red river; and that this third call is therefore controlled by the other two calls of the description. The result is that the Red river and the source of the Canadian are to be connected by a straight line drawn from the source of the Canadian to the nearest point of the Red river, which nearest point happens to be the source of the Red river.

But on the map prepared in the Indian office, in 1895, and now on file in that office, the source of the Canadian river is located at 104° 30′ west longitude, and the source of the Red river at 103° 30′ west longitude and 34° 45′ north latitude. The map No. 39, claimants' evidence in chief, is an accurate tracing from that map, the townships being delineated on the scale of those in the Chickasaw nation. This map shows the dimensions of the land owned by the Choctaws west of the one hundredth meridian.

When the Choctaws relinquished their interest in the lands between the Red and the Canadian rivers west of the one hundredth meridian of west longitude, on the 22d day of June, 1855, they were entitled to receive in com-

pensation for that relinquishment the just value of those lands. What, then, was the just value of those lands in 1855? The territory of the Choctaws west of the one hundredth meridian of west longitude contained 333 full townships, excluding fractional townships, amounting to 11,988 square miles or 7,672,320 acres of land. Including fractional townships, equal to 24 full townships, it amounted to 357 full townships, or 8,225,280 acres. At the price of 10 cents per acre this land amounted in value to $822,528. But in the treaty of June 22, 1855, the sum of $800,000 was constituted the entire pecuniary consideration, not only for the relinquishment by the Choctaws of their interest west of the one hundredth meridian, but also for the lease by the Choctaws and Chickasaws to the United States of the land between the ninety-eighth and the one hundredth meridians. The sum of $800,000 was not sufficient to compensate the Choctaws for the relinquishment of the land west of the one hundredth meridian. Nothing remained, then, to apply on the lease of the land between the ninety-eighth and one hundredth meridians, which amounted to 7,713,239 acres. The rent of 7,713,239 acres of land between these meridians was, therefore, altogether nominal. It did not amount, in the aggregate, to one dollar. For a consideration of less than one dollar the United States held 7,713,239 acres of land from June, 1855, until March, 1892, a period of more than thirty-six years. There were two considerations which reconciled the Choctaws and Chickasaws to this lease. These considerations were the uses to which the lands were devoted. In the first place, by the express terms of the lease, the lands were to be used for the settlement of the Wichitas and other bands or tribes of Indians, entirely satisfactory to the Choctaws and to none other; in the second place,



they were to remain open to settlement by the Choctaws and Chickasaws themselves, as before the lease.

But on the 27th day of September, 1830, ten years after the Choctaws had purchased and paid for their western country, including this land west of the one hundredth meridian, the United States caused the following article to be inserted in a new treaty between the United States and the Choctaw nation:

ARTICLE 2. The United States, under a grant specially to be made by the president of the U. S., shall cause to be conveyed to the Choctaw nation a tract of country west of the Mississippi river, in fee simple, to them and their descendants, to inure to them while they shall exist as a nation, and live on it, beginning near Fort Smith, where the Arkansas boundary crosses the Arkansas river; running thence to the source of the Canadian fork, *if in the limits of the United States, or to those limits;* thence due south to Red river, and down Red river to the west boundary of the territory of Arkansas; thence north along that line to the beginning. * * (7 Stat. 331.)

In this article, the western line of the Choctaw country is declared to extend from "the source of the Canadian fork, *if in the limits of the United States*" due south to Red river. But there was no such "if" in the deed, by which the Choctaws acquired this land, on the 18th of October, 1820, and under which they had already, for ten years, held either a title to the land itself, or a right to its value in money.

What is the explanation of this new demarkation of the western boundary of the Choctaw country? And what is its bearing upon the right of the Choctaws to compensation for the relinquishment subsequently made by them in the treaty of June 22, 1855? The explanation is this: After the United States had sold this land to the Choctaws and received payment in full therefor, the United States sold the same land, out from under the Choctaws, to the king of Spain. On the 19th day of February, 1821, four months after the purchase of this land by the Choctaws, the senate of the United States ratified a

treaty whereby the United States sold the western part of the province of Louisiana, including the land of the Choctaws west of the 100th meridian, to the Spanish king in part payment for the much-coveted province of Florida. This treaty was signed on the 22d of February, 1819; *but it had been rejected by the king of Spain*, and was vigorously opposed in the senate of the United States. Pending the negotiation of the treaty by which the United States sold this land to the Choctaws, the United States never disclosed to the Choctaws their purpose to sell the land to a foreign power. The Choctaws were not apprised that the consummation of such a sale to the king of Spain awaited a possible resurrection of a treaty which had lain dead for nearly two years. And yet this Spanish treaty divested the Choctaws of their legal title to the land west of the 100th meridian, which the United States had previously deeded to them, and for which they had fully paid. When the United States sold this land to the Choctaws, without notifying them of the negotiations with Spain, it was far from being certain or even probable in the minds of the legislative and executive officers of the government of the United States, that the exchange of western Louisiana for Florida would be consummated; for not only had the king of Spain rejected the treaty, but a vigorous opposition to the exchange of western Louisiana for Florida had sprung up in the congress of the United States, based on the ground that the price to be paid for Florida was extravagantly large, and also on the ground that the sale of the territory of the United States to a foreign government, by the president and senate, in the exercise of the treaty-making power, without the co-operation of the house of representatives, was unconstitutional and void. On the 28th day of March, 1820, Henry Clay, of Kentucky, introduced the following reso-



lutions in the house of representatives of the United States:

1. Resolved, that the constitution of the United States vests in congress the power of disposing of the territory belonging to them, and that no treaty purporting to alienate any portion thereof, is valid without the concurrence of congress.

2 Resolved, that the equivalent proposed to be given by Spain to the United States, in the treaty concluded between them on the 22d day of February, 1819, for that part of Louisiana lying west of the Sabine, was inadequate, and that it would be inexpedient to make a transfer thereof to any foreign power, or to renew the aforesaid treaty.

On the 3d day of April, 1820, Mr. Clay delivered a speech in the house of representatives, in support of these resolutions, in which he used this language:

The first resolution which he had presented asserted that the constitution vests in the congress of the United States the power to dispose of the territory belonging to them, and that no treaty purporting to alienate any portion thereof is valid without the concurrence of congress. The proposition which it asserts was, he thought, sufficiently maintained by barely reading the clause in the constitution on which it rests;

"The congress shall have power to dispose of, etc., the territory or other property belonging to the United States." * * *

But in the Florida treaty it was not pretended that the object was simply a declaration of where the western limit of Louisiana was. It was, on the contrary, the case of an avowed cession of territory from the United States to Spain. * * *

On the second resolution, he said:

It results then, that we have given for Florida, charged and encumbered as it is, first, unencumbered Texas; second, five millions of dollars; third, a surrender of all our claims upon Spain not included in that five millions; and, fourth, if the interpretation of the treaty which he had stated were well founded, about a million of acres of the best unseated land in the state of Louisiana worth perhaps about ten millions of dollars. The first proposition contained in the second resolution was thus, Mr. C. thought, fully sustained. The next was, it was inexpedient to cede Texas to any foreign power. Mr. C. said he was opposed to the transfer of any part of the territory of the United States to any foreign power. They constituted, in his opinion, a sacred inheritance of posterity which we ought to preserve unimpaired. He wished it was, if it were not, a fundamental and available law of the land, that they should be inalienable to any foreign power. * * *

The last proposition which the second resolution affirms, is that it is inexpedient to renew the treaty. If Spain had promptly ratified it, bad as it is, he would have acquiesced in it. After the protracted negotiation which it terminated, after the irritating and exasperating correspondence which preceded it, he would have taken the treaty as a man who has passed a long and restless night, turning and tossing in his bed, snatches at day an hour's disturbed repose. But she would not ratify it;

she would not consent to be bound by it, and she has liberated us from it. * * * Let us put aside the treaty; tell her to grant us our rights to their uttermost extent. And if she still palters, let us assert those rights by whatever measures it is for the interest of our country to adopt. (Ann. Cong., Sixteenth Congress, first session, vol. 2, pp. 1691, 1724, 1725, 1726, 1729, 1730, and 1731.)

When the Choctaw treaty of 1830 was signed the United States, being apprehensive that a part of the land sold to the Choctaws by metes and bounds in 1820 would prove to be within the boundaries of the land subsequently sold to Spain, in part payment for Florida, insisted upon such a modification of the boundaries of the Choctaw nation as would, in effect, make its western line coincident with the eastern line of the land sold to Spain. By the Spanish treaty the eastern boundary of that part of Louisiana which was ceded to Spain in exchange for Florida was fixed as follows:

ART. 3. The boundary line between the two countries west of the Mississippi shall begin on the Gulf of Mexico, at the mouth of the river Sabine, in the sea, continuing north along the western bank of that river to the thirty-second degree of latitude; thence by a line due north to the degree of latitude where it strikes the Rio Roxo of Natchitoches or Red river; then following the course of the Rio Roxo westward to the degree of longitude one hundred west from London and twenty-three from Washington; then crossing the said Red river and running thence by a line due north to the river Arkansas; thence following the course of the southern bank of the Arkansas to its source in latitude forty-two north, and thence by that parallel of latitude to the south sea. (8 Stat., 254.)

The stipulation in the Choctaw treaty of 1830 as to boundaries was a mere recognition of what had been for nine years an accomplished fact. It was only a recognition of the fact that so much of the land sold to the Choctaws on the 18th of October, 1820, as lay west of the one hundredth meridian had been sold to Spain on the 19th of February, 1821, and that the title of the Choctaws thereto had been extinguished by such sale. It was in no sense a stipulation, either express or implied, on the part of the Choctaws to waive their right for reimbursement for the lands which they had bought and paid for and then



involuntarily lost. If this land had not been the property of the United States when the United States conveyed it to the Choctaws and received payment therefor from the Choctaws, the right of the Choctaws to reimbursement would have been incontestable. *A fortiori* was the right to reimbursement incontestable when the United States, having sold the land to the Choctaws and received full payment for it, subsequently sold it, without their knowledge or consent, to the king of Spain.

It was with good reason, then, that the United States and the Choctaws stipulated in the treaty of June 22, 1855, for the relinquishment of the interest of the Choctaws in the land west of the one hundredth meridian. This stipulation was not merely a nominal stipulation for the relinquishment of an intangible, nebulous, imaginary claim, but was a *bona fide* stipulation, entered into for the relinquishment of a substantial right, recognized as such by both parties to the treaty.

The final ratification of the Spanish treaty extinguished the title of the Choctaws to their land west of the one hundredth meridian, but it did not extinguish their right of reclamation against the United States for this land, which had been sold to the Choctaws by the United States and paid for by the Choctaws, and then sold without the knowledge or consent of the Choctaws to the king of Spain.

All treaties, as well those for cessions of territory as for other purposes, are binding upon the contracting parties, so far as their rights are concerned, from the date of signature. The ratification relates back to the time of signing. Davis *v.* Police Jury, 9 How. 280, 289; Haver *v.* Yaker, 9 Wall. 32, 34; Vattel, B. 4, C. 2, § 22; Mart. Summary, B. 8, C. 7, § 5. On the 22d of February, 1819, as already stated, a treaty was signed

between the United States and Spain ceding to Spain the land west of the one hundredth meridian between the Red and Canadian rivers. Before the 28th of March, 1820, the king of Spain rejected that treaty; and it became null and void. From the 22d of February, 1819, the day on which this treaty was signed by the plenipotentiaries, John Quincy Adams, and Luis de Onis, until the king of Spain rejected and destroyed it, the treaty was binding on Spain and on the United States. During that period of time the United States had, under the law of nations, no right to cede the territory to any other power.

But when the king of Spain rejected the treaty, its obligation on the United States ended. Thenceforth it was the right of the United States to cede the land to any other nation. This right was not affected by the possibility of a subsequent resurrection of the dead treaty. Until such resurrection, the United States had the right to cede this land to the Choctaw nation, or to any other nation. On the 18th day of October, 1820, before the Spanish treaty was renewed, or was ratified, either by Spain, or by the United States, the United States ceded to the Choctaws all their territory west of the one hundredth meridian, between the Canadian and Red rivers. This cession conveyed a perfect title to the Choctaws, good under the law of nations, as against both Spain and the United States. That title was not impaired by the renewal of the Spanish treaty, or by the subsequent ratification of that treaty by Spain and the United States. If after the rejection of the Spanish treaty, by the king of Spain, the United States had ceded the land to England instead of the Choctaw nation, *England would have held the land.* The Choctaw nation had precisely the same right. And, recognizing that right, the United States



paid *nominally* for the Choctaw title to this land, *and* for a lease of other land, but *in fact* for the Choctaw title to this land alone, the insignificant price of less than 10 cents per acre, amounting to the sum of $800,000.

It has been suggested that the phraseology of article 10 of the treaty of June 22, 1855, tends to establish the proposition that the stipulated payment of $800,000 must have been, in part, applicable to the lease of the district between the 98th and 100th meridians. The following is the text of this article:

ART. 10. In consideration of the foregoing relinquishment and lease, and as soon as practicable after the ratification of this convention, the United States will pay to the Choctaws the sum of six hundred thousand dollars, and to the Chickasaws the sum of two hundred thousand dollars, in such manner as their general councils shall respectively direct.

It has been asserted that the Chickasaws had no rights connected with the land west of the 100th meridian, and therefore the provision that, one-fourth of the sum of $800,000 should be paid to them, implied that a part of the payment of $800,000 was applicable to the lease. But this is a two-fold error. In the first place, the Chickasaws did, in fact, then hold rights connected with the lands, between the Red and Canadian rivers, west of the 100th meridian. Their interest therein was, in character, identical with the corresponding interest of the Choctaws. It was inferior in extent, because the Chickasaws were inferior in numbers to the Choctaws. The Choctaws were entitled to three-fourths and the Chickasaws to one-fourth of the compensation for the relinquishment of title to this land. The Choctaws conveyed this interest to the Chickasaws by a provision in article 1 of the convention of January 17, 1837, as follows:

ARTICLE 1. It is agreed by the Choctaws that the Chickasaws shall have the privilege of forming a district within the limits of their country, to be held on the same terms that the Choctaws now hold it, except the right of disposing of it, which is held in common with the Choctaws and

Chickasaws, to be called the Chickasaw district of the Choctaw nation, to have an equal representation in their general council, and to be placed on an equal footing, in every other respect, with any of the other districts of said nation, except a voice in the management of the consideration which is given for these rights and privileges; *and the Chickasaw people to be entitled to all the rights and privileges of Choctaws*, with the exception of participating in the Choctaw annuities, and the consideration to be paid for these rights and privileges, and to be subject to the same laws to which the Choctaws are; but the Chickasaws reserve to themselves the sole right and privilege of controlling and managing the residue of their funds, as far as is consistent with the late treaty between the said people and the government of the United States, and of making such regulations and electing such officers, for that purpose, as they may think proper.

In the third article of this convention of 1837, the Chickasaws agreed to pay the sum of $530,000, for the rights and privileges granted in the first article. In this sum of $530,000, when paid to the Choctaws, the Chickasaws were to have no right to participate. Nor were they to have any right to participate in the Choctaw annuities. But in all other rights and privileges of the Choctaws the Chickasaws became participants, such rights and privileges being held in common, three-fourths by the Choctaws, and one-fourth by the Chickasaws. The rights and privileges, so acquired by the Chickasaws, included the right to one-fourth of the compensation for the land west of the 100th meridian, which the United States had sold to the Choctaws, and for which the Choctaws had paid the United States, which land the United States had subsequently sold and conveyed to the king of Spain.

But then, in the next place, if the Chickasaws had not been holders in common of this right of reclamation, as against the United States, the question, whether a part of the $800,000, should be paid to the Chickasaws, was a question between the Choctaws and Chickasaws. If, in view of the intimate political and proprietary relations, which had been established between the two nations by the convention of 1837, and had continued for eighteen



years, the Choctaws had seen fit to permit the Chickasaws to receive one-fourth of the $800,000, that arrangement would have concerned the Choctaws and Chickasaws only.

If this cession of 1866 was not a conveyance in trust, but was an absolute conveyance, then the United States have contrived to obtain from the Choctaws and Chickasaws a conveyance of 7,713,239 acres in the leased district and 8,225,280 acres west of the 100th meridian, in all 15,938,519 acres of land for $800,000, that is to say for five cents per acre.

Moreover the United States will have discriminated most indefensibly against the Choctaws and Chickasaws, and in favor of the Creeks and Seminoles, who have been compensated, not only for their conveyances of lands in trust, for the settlement of Indians and freedmen, but also, subsequently, for the relinquishment of the same lands to the United States, for general occupation.

No part of the sum of $300,000, named in the treaty of 1866, or of the sum of $800,000, named in the treaty of 1855, having entered into the consideration for the cession of 1866, what consideration can be discovered to rescue that cession from the condition of a void conveyance? The only consideration that could support this cession, as a valid deed, was the obligation assumed by the United States, in the acceptance of the trust to settle friendly Indians on these lands. *If the cession was not a conveyance in trust for that purpose, it was without consideration and void.*

A slight addition to this consideration would have resulted, if the conditional undertaking of the United States to pay $100 to each emigrating freedman had yielded any appreciable benefit to the Choctaws and Chickasaws. But the few payments made on that score yielded nothing to

the Chickasaws, and next to nothing to the Choctaws. Not a dollar was paid to a Chickasaw freedman. Seventy-two Choctaw freedmen *promised* to emigrate, and received each one hundred dollars. There is no evidence that one of them ever left the Choctaw nation. But if they had all left the nation and not returned, the money paid to them would have amounted to less than one mill per acre for the ceded lands.

The claimants therefore assert, with absolute confidence, that the entire sum of $800,000, paid in pursuance of the treaty of June 22, 1855, was justly applicable to the extinguishment of the legal and equitable obligation resting upon the United States to make compensation for the interests west of the 100th meridian relinquished by the Choctaws, and that, as a consequence, whenever the tenure by which the United States hold the lands of the Choctaws and Chickasaws between the 98th and 100th meridians shall be relieved of the express trusts which now adhere to those lands, and the lands shall be opened, as it is manifestly for the interest of the people of the United States that they shall be opened, to settlement under the homestead laws or otherwise, it will then be the right of the Choctaws and Chickasaws to demand, and the duty of the United States to pay, to the Choctaws and Chickasaws the just value of those lands.

## X.

*The right of the Choctaws and Chickasaws to compensation for such of the ceded lands as have been, or shall be, diverted from the uses prescribed in the treaty, cannot be impaired, or affected, by any interest or title which the Wichita and affiliated bands may have acquired in, or to, these lands, however substantial such interest, or*



*title, or any claim based thereon, may be, as against the United States.*

If it were a fact that, on the 18th day of October, 1820, when the United States ceded to the Choctaws, the country west of the Mississippi river, including the leased district, the Wichita and affiliated bands were the owners of that district, that fact would not affect the right of the Choctaws and Chickasaws to compensation for the land. If those bands had been the owners of the land, the title conveyed to the Choctaws, by the United States, would have been valid, for the United States were not only vested with the power of eminent domain over the land, but were also invested with the unquestionable right to exercise that power in a treaty, whether with the Choctaw nation or with Spain. If the United States had ceded in fee simple to the Choctaws land belonging to the Wichita and affiliated bands, the title of those bands to the land *in specie* would have been extinguished. In lieu of that title those bands would have acquired a right to compensation for the lands, of which they had been deprived by, and for the benefit of, the United States. But the title acquired by the Choctaws would have been, in that case, just as valid and perfect as it would have been if the Wichita and affiliated bands had never held any title to or interest in the lands.

If, on the other hand, the title conveyed to the Choctaws had proved invalid, or defective, it would have been obligatory upon the United States to make good their conveyance to the Choctaws by adequate compensation for any failure or defect in the title. If the effect of the alleged admissions of the United States, in the treaty of 1835, or of the alleged promises of Messrs. Rector and Neighbors, in 1859, had been to invest the Wichita and affiliated bands with a title to the leased district, valid as against

the Choctaws and Chickasaws, the right of the Choctaws and Chickasaws to compensation for their land so transferred would be unquestionable.

## XI.

*But neither the Wichita tribe, nor any of the affiliated bands, held any title, legal or equitable, to any part of the leased district, in* 1820. *Nor has either of those bands acquired an interest therein, since* 1820, *except by virtue of agreements subsequent, in date, to the treaty of* 1855.

The "Wichita and affiliated bands" claim the proceeds of the sales of the unallotted lands in the reservation which they now occupy under the unratified agreement of October 19, 1872. They base this claim upon the following grounds:

1. They assert that they have, from time immemorial, resided on these lands and within the leased district, and are, therefore, the aboriginal proprietors of the leased district, including this reservation.

2. They insist that, by the treaty of August 24, 1835, the United States and the Choctaw nation recognized the validity of their title to the leased district, including the reservation which they now occupy, and that the United States and the Choctaws are now estopped from questioning its validity.

3. They assert that in 1859 Elias Rector and Robert S. Neighbors, Indian agents, promised the entire leased district to the "Wichita and affiliated bands;" that Charles E. Mix, then acting commissioner of Indian affairs, approved this promise; and that this promise is binding on the United States.

These three alleged grounds of title to the leased district are not consistent with each other. So far as the claim



of title is based on the alleged estoppel, in the treaty of 1835, and on the alleged promise of the agents Rector and Neighbors, it purports to make the Comanches, Wichitas, Wacos, Towaconies, Caddos, Ionis, Keechies, and Delawares the proprietors of the leased district. But so far as it is based on "pristine habitat," so called, it is a claim of title for the Wichitas alone; for, as the defendants, on page 24 of their answer, show, the pristine habitat of the other bands *was not in the leased district.* This insignificant Wichita band of less than 200 men, women, and children, in effect, claims to be the owner of 7,000,000 acres of land, each man, woman, and child owning 35,000 acres. The seven other bands are to be mere jackals to secure prey for the Wichita lion.

*First.* The Wichitas never held any legal or equitable title, by occupancy, to any part of the Wichita reservation, or of the leased district. Their "pristine habitat" was not within the Wichita reservation or the leased district. That the other affiliated bands never acquired any title, by occupancy, to any part of the Wichita reservation, or of the leased district, is conceded in the answer of the defendants.

The Wichitas inherit no title to any part of the leased district from the Caddo tribe. In the first place there is no evidence that the Caddo tribe ever occupied a foot of land in the leased district, prior to 1859. The proof to the contrary is clear and conclusive. The history of the tribe, from 1690 to 1896, is involved in no obscurity. The claimants have shown, by multitudinous proofs, that, until an early period in the 19th century, the Caddos always resided in northeastern Texas, northwestern Louisiana, and southwestern Arkansas, and never within the leased district, nor within 200 miles of that district. It is shown that, early in the 19th century, they migrated to

the Brazos river country, in Texas, and resided there, except when absent on hunting, fighting, or horse-stealing expeditions, until their removal to the Indian Territory, by the United States, in 1859. No scrap of history, or narrative, no map, shows the Caddos in the leased district prior to 1859.

But then, in the second place, if the Caddos had ever held a title, by occupancy, to the leased district, the Wichitas would have no pretext for appropriating that title to themselves. The two tribes have sometimes been neighbors, but have often been far apart. They have sometimes been at peace, and sometimes at war with each other. Before the middle of the 18th century, the Wichitas were driven, by the Chickasaws, from their villages on the lower Washita, in Louisiana, northwestwardly to the country of the Caddos. In 1720, they were located by Bernard on the south bank of the Arkansas river, in the Choctaw country. In 1741, they were on the Red river, in the Choctaw nation. In 1755, Brevel found them on the south bank of the Red river, west of the 100th meridian. In 1778, De Mesieres found them on both banks of the Red river near the Cross Timbers, further east than the eastern boundary of the leased district. In 1788, Fragoso found them on the south bank of the Red river, about 50 miles west of the Cross Timbers. In 1805, Sibley found them on the south bank of Red river in Texas. In 1833, Col. Dodge found them near the mouth of the North fork of Red river. In 1841, they were in the "Pan handle" of Texas. They were in the Wichita mountains in 1851. If the Wichitas were Panis, or Paniassa, as they claim to have been, they were north of the Arkansas river during the first half of the 18th century.

From 1836 to 1856, they resided, from time to time, on



the south bank of the Wichita river, in Texas. They resided longer there than anywhere else. But during that period they located their wigwams, from time to time, on the Brazos river, on the North fork, on Otter creek, on Rush creek, on Cache creek, as well as in the Wichita mountains. Wherever they were they were always inveterate thieves, and often cruel murderers of men, women and children. I will now present the substance of the evidence, by which these facts are established. The documents will be cited in their numerical order, except No. 1, which will be considered hereafter. It will appear that the names Wichita, Witchita, Towiache, Toweash, Toyash, Towish, Taoviase, Taouayache, Tahawayase, Ouichita, Ouachita, Ouasita, Ousita, Wachita, Washetaw, and Panis Piques, have all been applied to the same tribe or band.

*Evidence in disproof of Wichita title.*

1. No. 1 will be considered hereafter.

2. Lieutenant Beach testifies to the following facts: (Evidence in rebuttal No. 2.)

Melish's map of 1818 shows a "Panee" village upon Red river, *just west of the 96th meridian.* Darby shows a "Panis" village upon the Red river, *at about* 97° 31′ *west longitude.* Pike shows "Pawnee hunting ground" at about 103° west longitude. Disturnell shows "Pawnies" upon Red river, at two places *between* 93° *and* 97° *west longitude.* Humboldt shows the "Tauaizes" between 102° and 103° west longitude. The De Cordova map shows the "Towash" on the Brazos. Disturnell shows the "Toyask" on the Red river, east of the 97th meridian.

Not one of these localities is within the "leased district."

3. The report of the Spanish Lieut.-Col. de Mesieres,

dated April 18th, 1778, printed on pages 890, 891, of the record in United States *v.* Texas, shows the following facts:

This officer, having started from Bexar, on an expedition, reached Bucarely, on the Trinity river, March 9th, 1778 (p. 886). He started from Bucarely March 18th, 1778, and reached the Tuacane settlement, on the Brazos river, April 5th, 1778. He left that settlement April 8th, and reached the *Taoviase* village, on the Red river, April 15th. He proceeded no further, but returned from the *Taoviase* village to Bucarely, where he was on the 2d of May, 1778. He made no excursion north of the Red river. He does not state, or imply, that the *Taoviases* occupied a mile of land north of the river and within the leased district. He says (p. 890):

> From the Brazos river, on which the Tuacanas dwell, to the stream that waters the *Taoviase* village, there is seen, on the right, a forest justly called by the natives the "Big Forest" (Cross Timbers). It is very thick, although not very wide. The *Taoviase* nation is divided into two villages, one situated *north* of the Rio Bermejo (Red river) or River of Natchitoches, and the other opposite. * The *former* village is composed of *thirty-seven* houses and the *latter* of *one hundred and twenty-three* houses. They have fuel at hand in that big forest above mentioned, extending eighty leagues in length, and one, two, or more leagues in width, where bear and wild hogs are found. The Rio Bermejo runs from the mountains of New Mexico, at about four days' travel from the *Taoviase*, and forms three forks which unite near the village.

This statement shows that, in 1778, the Wichita village was divided by the Red river, more than three-fourths of the wigwams being on the south bank of the river. It also shows that this double village was located at the point where the Cross Timbers, extending from the Brazos to the Red river, strike the latter river, and was therefore east of the ninety-eighth meridian, which constitutes the eastern boundary of the leased district.

4. Volume 15 of Hubert H. Bancroft's work, quoted on page 733 of the record in United States *v.* Texas, contains the following statement:



> A conference of officers, at Bexar, in January, 1759, made plans for the campaign. * The army of five hundred soldiers and volunteers, with a large force of Apache auxiliaries, in the best of spirits, started in August, under the command of Parilla. After marching some hundred and fifty leagues they surprised a rancheria, killing fifty-five of the foe and making many captives. They then advanced against the towns of the *Taovaiases* and, in the region of what was later called San Teodoro, found six thousand Indians of different tribes, in a strongly fortified position, many of them armed with muskets, and displaying a French flag. * The savages did not wait to be attacked, but made a sortie in force and the Spaniards fled in a panic.

This battle occurred south of the Red river. The statement shows that the *Taovaiases* were located, not north, but south of the Red river in 1759.

5. In 1834, fifty-six years after De Mesieres visited the *Taovaiase* village, and 75 years after Parilla's defeat, Colonel Henry Dodge, of the United States dragoons, marched, with his regiment, from Fort Gibson to a village, which he calls the "*Toyash* village."

The journal of this expedition contains the following statements, quoted on pages 853, 854, of the record in United States *v.* Texas:

> July 15th. Comanches, Kiowas and the band called by us *Pawnee Picts*, but correctly termed the *Toyash*, are friends and to a certain extent allies. The Comanches are, we learn, the largest band, the proudest and boldest; therefore the colonel has resolved to visit them first; thence to the *Toyash* village.
>
> July 16th. * * The Comanche captains informed us that it is but a short distance to their camp. * * Two or three miles brought us in sight of their camp situated in a valley. * * The Comanches have hoisted an American flag over their camp. * * We are now in sight of a chain of peaks, so-called mountains, bearing south and west. Behind these are the *Toyash* villages. Some of these hills cannot be less than 2,000 feet above the prairie at their base.
>
> July 19th. Marched for the *Toyash* village, twenty-three miles southwest. * *
>
> July 20th. The command moved. * * West * * thirty-seven miles; road literally of granite rock for miles. We encamped five miles from the *Toyash* village, which is situated on a branch of the Red river. Width of the branch of Red river about five hundred feet from bank to bank.
>
> July 21st. The command marched for the *Toyash* village; proceeded a mile or two, when we met about sixty Indians, who came out to meet us. * * We soon reached the *village*, which is situated immediately *under mountains of granite* some six hundred feet in height. *In front of the village runs the river.* * *

July 26th. * * From conversation to-day with one of the Indians (Ski-sa-so-ka, an intelligent *Toyash*) we learn that *their nation lived formerly south; that their oldest men were born there.* * *

This journal shows that in 1834 the Wichita village was located near the mouth of the North fork of Red river; that the nation was formerly located in Texas, where their oldest men were born. It will be observed, hereafter, that the old Wichita, Uts-tuts-kins, testified that forty-eight years prior to 1882, that is to say in 1834, the Wichitas moved from their location near the mouth of the North fork, to the site of Fort Sill, and, that, in 1841, they moved to Rush creek, and afterwards to Fort Arbuckle. Fort Sill was on the eastern border of the leased district; but their locations, on Rush creek and near Fort Arbuckle, were both outside the leased district.

6. On page 201 of Margry, volume 2, occurs the following statement of La Salle, *made in* 1682:

I have one of them (a boy), of the nation of the *Pana*, who live more than two hundred leagues westward, on one of the branches of the Mississippi, and inhabit there *two villages near each other*.

If the distance of these villages from the Mississippi was 200 leagues *by land*, they were further west than the western limit of the leased district. If the distance was 200 leagues *by the course of the Red river*, they were east of the eastern boundary of the leased district.

7. In Bernard, 188, Amsterdam, 1734, Tonti, under date of February, 1688, says:

When I arrived among the Taensas, the chiefs of that nation informed me of their quarrel with the Natchitoches on account of the salt, in which the latter would give them no share, and they prayed that I would intervene for their reconcilation. I willingly undertook this mediation. Thirty Taensas joined themselves to our company. We arrived, after a march of eight days, at the village of the *Natchitoches*. This nation makes but one people with two other nations, which are the *Ouasita* and the *Capicis*. These chiefs of three nations being assembled, I was made to take a seat in their midst. The thirty Taensas, before they took their places, asked permission to go to the temple to implore their God to aid them in securing a good peace. * * These conventions being made, they swear a mutual peace, and dance the Calumet. Then I took leave of them all.



This shows that in 1688 the Wichitas resided in Louisiana, in the locality which is now the site of the town of Natchitoches.

8 and 9. In La Harpe's journal, 6 Margry, 289, 292, under date of September 3, 1719, he says:

At gun-shot distance from their habitations, we crossed a beautiful rivulet enclosed by a thin wood, above which are the villages, situated on declivities along the southwest branch of the river of the Alkansas. These villages make only one, the houses joining themselves one to another, running from east to west, one league, in the most beautiful situation possible to be seen. The natives of these establishments are the Tonacaras, Toayas, Caumaches, Aderos, *Ousitas*, Ascanis, Quataquois, Quicasquiris, Honechas. They can furnish six thousand persons of both sexes.

The 8th, I caused all the principal chiefs of these nations to assemble, in order that I might be informed by them of the position of the river of the Alcansas, the nearest dwelling place of the Spaniards, the commerce which they carried on with the Padoucas. To which they answered me that their river formed two branches below their village; that the branch, upon which their dwellings were situated, extended towards the setting sun to villages of the Spaniards and Padoucas.

If this proves that the habitat of the Wichitas was within the leased district, in 1719, and that, therefore, they were the proprietors of the leased district, it also proves that the habitat of the Comanches and of every other one of the nine tribes mentioned was within the leased district, and that each one of them was its owner. What it really proves, I submit, is that La Harpe met parts of these nine tribes temporarily encamped near the confluence of the Canadian, which rises in the west, in the vicinity of the Spanish settlement of Santa Fé, with the Arkansas, which flows down from the north.

If the place where La Harpe held this council with the chiefs was on the Canadian river, which is the southwest branch of the Arkansas, it was not within 75 miles of the nearest point in the land now in controversy. These villages must have been situated either at the junction of the Canadian with the main stream of the Arkansas, in what is now the Cherokee nation, or at the confluence of the north and south forks of the Canadian, on the boundary

between the Creek and Cherokee nations. There are no other points on the Canadian answering La Harpe's description. In either case the "Ousitas" were more than seventy-five miles from the nearest point of the leased district.

10. The "History of Louisiana," by Du Pratz, published in Paris, in 1758, contains, at page 243 of volume 2, the following statement:

From the River Rouge to the Arkansas there *is no nation*. There was one on the Black river; this was the *Ouichitas* who had given their name to that river. Nothing remains at present of this nation, the Chickasaws having destroyed it in great part, and the remnant having retired amongst the Cadodaquioux, amongst whom the Chickasaws dare not disturb them.

This shows that, prior to 1758, the Wichitas had resided on the Washita river, to which they had given their name, within the district constituting the present state of Louisiana, and were driven thence, westward, by the Chickasaws, into the Caddo nation, which, as is elsewhere proven, was located in northwestern Louisiana and northeastern Texas.

11. Jeffrey's History, London, 1761, page 165, vol. 1.

About a hundred leagues from the place where this river falls into the *Mississippi* are the habitations of a vast nation called *Cadodaquioux*, which extends, in different tribes, a vast way. They, as well as the people before mentioned, have a language peculiar to themselves; but that of the *Chickasaws* is understood among them all, like *lingua Franca*, in the Levant; they call it the vulgar tongue.

The *Ouachitas* are intermixed among them, having abandoned the Black river, to which they gave name, to avoid the rage of the *Chickasaws*, who dare not follow them; for the same reason the *Taensas*, who formerly inhabited this coast, near a river to which they lent their denomination, withdrew to the neighborhood of the *Mobileans*, where we before took notice of them.

This corroborates the statement made in Du Pratz's History of Louisiana.

12. Robin, Paris, 1807, vol. 3, page 3.

From the *Natchitoches* to *Yatasses* the distance, reckoned by water, is *twenty-five* leagues; from this savage village to that of the *Little Cadeaux*, *thirty*; and from there to the *Grand Cadeaux*, *fifty*; from the *Grand Cadeaux* to the *Taouayaches*, who are located on the west bank of said river and the *Ouitcitas* on the east, the two villages being opposite each other, *twenty-four* leagues. Ascending the same river we find, at a distance of fifty leagues from these two villages, a rock of calcined salt, which serves to supply the natives of this region, who make commerce of it among themselves. This, with many other salt streams, renders the waters of the Red river very brackish when it is low. Higher up this river continues large, but flat and fordable.



This seems to indicate that, in 1807, the Toyache and Wichita villages were located opposite to each other, on the north and south banks of Red river, 387 miles by water from the mouth of the river, that is to say, east of the eastern boundary of the leased district.

13.

Itinerary, diary and computation of leagues of a journey of discovery, from this the province of New Mexico, to the Fort of Natchistoches, and the province of the Texas, undertaken, by superior orders, jointly with Don Pedro Vial, by me, the undersigned, commissioner for this purpose. Francisco Xavier Fragoso. Town of Santa Fe, the 24th of June, 1788.

June 24. This day, all necessary preparations having been made, and after having received the orders of his lordship, the governor of this province, Don Fernando de la Concha, and the correspondence and dispatches addressed to their lordships, the governor and commandant of said fort and the province of Texas, at about the eleventh hour, in the morning, I started from the capital, the town of Santa Fe, with the following persons: Don Pedro Vial, a native of Lyons, France; myself, Francisco Xavier Fragoso, of the city of Mexico; José Maria Romero, Gregorio Leyva and Juan Lusero, natives of Santa Fe; shaping my course southward, in the direction of the Pecos village. After leaving the woodland, entered a short cañon, and reached a rolling table-land, where the village was descried. This day travelled 8 leagues.

* * * * * * * *

July 3. Started at 6 o'clock a. m.; eastward course. Soon entered the plains, which are so extensive that nothing but the sky and plain is seen. Passed, this day, thirteen lakes. Halted at 7 o'clock p. m. at the head of the Rio Blanco (White river). Twelve leagues.

* * * * * * * *

July 11. Started at 5 o'clock a. m.; same course, and down the river, the Cumanchis having advised me not to leave the river, which follows steadily that course; camped at 7 o'clock, at San Diego; grass, fuel, and no stones. Twelve leagues.

* * * * * * * * *

July 15. Started at 6 o'clock a. m.; same course, and along said river; travelled over good land, well supplied with grass, fuel and meat; halted at 7 o'clock p. m., and crossed the river, which is already very wide. This day I crossed a creek which runs from the south. Ten leagues.

July 16. Started at 5 o'clock a. m. on a northern course, and on a very large Cumanchi trail, to overtake them and ascertain whether I was, or was not, on the right direction. I overtook them, and camped with them at 6 o'clock p. m. Six leagues.

* * * * * * * * *

July 20. Started at 5 o'clock a. m.; course eastward; after crossing the river struck a plain, two or three leagues in length, and reached the *Taguaychi* (*Tahauayase*) villages, at 9 o'clock a. m. Four leagues.

July 28. Started at 6 o'clock a. m., same course, and, after travelling four leagues, we reached a very fine forest, which is called "Monte Grande" (Cross Timbers), which is said to be 200 leagues long and only 3 leagues wide; there I camped. Four and one-half leagues.

The Rio Blanco, which Fragoso reached on the 3d of July, 1788, was found by the supreme court, in United States *v.* Texas, to be the main stream of Red river, above the mouth of the North fork. Fragoso travelled down the south bank of that stream, until July 15, when he crossed the river. On the 16th he went northward and overtook the Comanches. On the 20th, he recrossed the river and reached the *Wichita* (*Tahuayase, Toyash*) village, where he remained until July 26. On the 28th of July, he reached the *Cross Timbers*, which are located on Tanner's map (No. 56), on Kennedy's (No. 49), on Hunt and Randel's (No. 48), and on Austin's (No. 46), at 97° 15′ west longitude.

According to Fragoso's itinerary, he left the *Wichita* village July 26, and travelled that day 7 leagues in 11 hours. On the 27th he travelled 12 hours; but he does not state the distance made. On the 28th, after travelling 4 leagues, he reached the *Cross Timbers*. The average hourly distance made during the 22 days prior to his arrival at the *Wichita* village, for which the distances are stated, was four-fifths of a mile. The distance from the *Wichita* village to the *Cross Timbers* was, therefore, about 21 leagues, or 63 miles. The *Wichita* village, visited by Fragoso, in 1788, appears to have been on the south bank of the Red river, about 40 or 50 miles east of the mouth of the *Little Wichita*, as laid down on the Indian Office map of 1895, and east of, or near, the 98th meridian of west longitude.



14.

KIOWA, COMANCHE AND WICHITA AGENCY,
ANADARKO, IND. T., *January* 22, 1883.

At a general council of the Wichita Indians and other affiliated tribes, convened this day at the office of the agent for the purpose of presenting their claim to all of the country in the Indian Territory lying west of the ninety-eighth meridian and south of the Canadian river, the following was said in open council, as interpreted by William Shirley:

ES-QUETCH-CHEE, Wichita (Old Man), says:

He is about 85 years of age; *was born on Red river not far from the mouth of the Big Wichita*. When I was a boy the chief of the Wichitas was killed, and after that *my people moved into the Wichita mountains*, and had many villages. When I became a man *I moved with some of my people to Rush springs*, east of where Fort Sill is now, where we made farms and had everything plenty; never wanted for anything. We lived there a great many years, quiet and peaceable, until soldiers came there in search of Comanches who were camped near our village, buying corn and watermelons from us, and who had before coming to our village committed depredations on the frontier in Texas.

The soldiers had first searched through the Wichita mountains, and were under command of Major Van Dorn. When they came to our village they had Towaconie, Waco, Keechi, and Caddo scouts with them. Some days before they came the Towaconie and Waco scouts had been sent out by Major Van Dorn to look for the Comanches. These scouts came to us as friends and relatives, and we told them that there was a large camp of Comanches on Rush creek a short distance from our village, and that night the scouts left our village without our knowledge, which made us uneasy.

The next day, soon after daylight, the soldiers came, led by the Towaconie and Waco scouts, and had a fight with the Comanches, killing a great many. My people then became afraid, because the Comanches knew the Wacos and Towaconies were friends of ours and had been to our village the day before, and had returned to Major Van Dorn, and told him where the Comanches were camped. We thought it best to abandon our fields of corn and go and live *near Arbuckle*, until we knew the Comanches would not molest us.

When arriving at Arbuckle we were destitute, having left everything in the way of food at our village on Rush creek. We asked the commanding officer for rations, telling him we had nothing to eat. We then had beef issued to us, the first we ever received from the white man. We *lived a while on Caddo creek, but moved near Arbuckle*, to a clump of timber, where we received beef.

UTS-TUTS-KINS (Wichita):

The following statement was made by Uts-tuts-kin *in the spring of* 1882, several months before his decease. He was said to have been *the oldest member* of the Wichita tribe. His statement was written down at the time, as follows, viz: *Tradition says, my people, the Wichitas, long ago came from a far-off country and walked down. They used only bows and arrows. Men came in wagons on Missouri river* and issued trinkets, &c., to them. *After that our people came south; a party went ahead and struck Comanches* who had horses; said they had caught them wild; and Wichitas then did the same, which was the first the tribe had.

Afterwards the young chief concluded would *all move to Neosho*; after living there some time *they moved to Salt fork*, and *from there to the Red hills on the North fork of the Canadian*, *where they made corn three years*, and then *moved to mouth of Otter creek*, on North fork of Red river, and *divided into three parties*—one to the *mouth of the Little Wichita on main Red river*, and one to *Clear fork of Brazos*, and the *other remained at the mouth of Otter creek*.

The chief at mouth of *Otter creek* died, and *his people joined those at mouth of Wichita*, and in five years the chief died at *Clear fork*, and his people *joined those at mouth of Wichita, and all were together again and lived there a long time. I (Uts-tuts-kin) was born at the mouth of the Wichita.* While we lived there white men came in search of money, had a little fight, and whites left.

*Afterwards* Wichitas disagreed as to where they should stop, but *went to mouth of Cache creek.* I was then *young.* At Cache creek had trouble with Osages, and wounded our chief in cheek; and then we had small-pox, and lost more than half our people; from there we *moved to mouth of Otter creek. I was then* 11 *years old.* While at mouth of Otter creek I concluded to go with some young friends on warpath east, and saw no Indians, but when coming home found long trail made by Indians or whites, but when we got home found soldiers holding council. *Soldiers come with boy they had captured at Coffey's bend on Red river.* Our chief said we would some day have to as whites do. This was just 48 *years ago. Moved from Otter creek to where Fort Sill is now*, and remained 6 years. Our big chief was buried there, and we afterwards moved to *Rush springs.* We lived there about 8 years when Van Dorn had fight with Comanches near our place; that was in 1858. We then moved to Caddo creek, near Fort Arbuckle; found Indians and soldiers and considered them intruders, but did not care to make any trouble with them.

The above and foregoing is a correct translation of statement made by Uts-tuts-kins in the spring or summer of 1882.

WM. SHIRLEY,
*U. S. Indian Interpreter.*

The deposition of Es-quetch-chee, a Wichita, shows that he was born near the mouth of the Big Wichita, in Texas, about 1798; that before he became a man, the Wichitas moved to Rush creek, where they were outside the leased district; that afterwards they moved eastward, to Fort Arbuckle, which was also outside the leased district.

The deposition of Uts-tuts-kins, also a Wichita, taken in 1882, shows that, according to tradition, the Wichitas long ago resided on the Missouri river; that they moved thence to Neosho, in Kansas; thence to Salt fork, in Kansas; thence to the North fork of the Canadian, in Kansas, thence to Otter creek, near the mouth of the



North fork of Red river; that the nation then separated into three parties, one remaining on Otter creek, the second moving to the mouth of the little Wichita, in Texas, and the third moving to the Brazos river, in Texas; that subsequently the Otter creek party joined those at the mouth of the Little Wichita, in Texas, and those who settled on the Brazos moved to the Little Wichita, so that the whole tribe was reunited. This deposition further shows that Uts-tuts-kins himself was born at the mouth of the Wichita; that the Wichitas moved to Cache creek, when he was young, and thence to Otter creek; that in 1834 they moved from Otter creek to the site of Fort Sill, on the eastern border of the leased district; thence to Rush creek, where they were outside the leased district; and thence to the vicinity of Fort Arbuckle, where they were also outside the leased district.

15. In 1 Schoolcroft, 239, will be found the following statement, made August 20, 1847, by David G. Burnet, formerly president of the republic of Texas:

The Whacoes, Tawacanies, *Toweash*, Aynies, San Pedros, Nabaduchoes, Nacadochuts, and Hitchies are small tribes, or fragments of tribes, and, separately considered, are quite insignificant. *They have been long resident in Texas, and properly belong to it;* but they are originally, the Hitchies excepted, of the Caddo stock, being offsets from that family. *The Whacoes* are the most considerable of these bands, amounting probably to 150 warriors, it being understood among Indians that every adult male is a warrior. They are a *stealthy, thieving, faithless race, and have done much mischief, first and last, on our frontier.* They *live in a village on the Upper Brazos*, and raise corn, beans, pumpkins, &c., and usually spend the winter months in hunting. *The other* small parties, amounting to about fifty families each, *live* in villages, *on the waters of the Trinity and Neches*, and cultivate the ground to a small extent.

The Hitchies, once a distinct and isolated tribe, have so intermarried with their neighbor bands that they have lost their identity, and may be considered merged into the common stock. *The Caddoes formerly resided on Red river of Louisiana, above Natchitoches and below the Great Raft*, and were included in the jurisdiction of the Indian agency stationed, in 1819, at Natchitoches. They removed to Texas a few years ago and now claim to be Texas Indians.

This statement of Ex-President Burnet shows that the Wichitas (Toweash) were in Texas, in 1847, and "properly

belonged" to that republic; that the Wacos lived on the upper Brazos, and, although they raised corn, beans, and pumpkins (like the Wichitas), were a stealthy, thieving, faithless, mischievous race; and that the Tawaconies and Aynies (Ionis) lived on the Trinity and Neches, all in Texas.

16. "An account of Louisiana laid before congress, by direction of the president of the United States, November 14th, 1803."

On page 12 occurs the following statement:

*Red River and its Settlements.*

On the west side of the Mississippi, 70 leagues from New Orleans, is the mouth of the Red river, on whose banks and vicinity are the settlements of Rapide, Avoyelles, and Natchitoches, all of them thriving and populous. The latter is situate 75 leagues up the Red river. On the north side of the Red river, a few leagues from its junction with the Mississippi, is the Black river, on one of whose branches, a considerable way up, is the infant settlement of *Ouichita*, which, from the richness of the soil, may be made a place of importance.

On pages 34, 35, and 36 of the same work will be found the following statements:

About eighty leagues above Natchitoches, on the Red river, is the nation of the Cadoquies, called, by abbreviation, Cados; they can raise from three to four hundred warriors, are the friends of the whites, and are esteemed the bravest and most generous of all the nations in this vast country. * *

In this statement President Jefferson accurately locates the Wichitas and the Caddos in their ancient habitats in Louisiana.

18. A narrative of the exploration of the Red river of Louisiana, in 1852, by Capt. Randolph B. Marcy, assisted by Lieut. George B. McClellan (senate executive document No. 54, 32d congress, 2d session) contains the following statements:

The *Wichitas* are an insignificant tribe, in point of numbers, not having more than five hundred souls in the nation, and are not, of course, prepared to substantiate or enforce their title to this country; and indeed I very much doubt if they have any claims upon the consideration or generosity of our government, being *the most notorious and inveterate horse thieves upon the borders.* P. 69.



We reached the villages (which were situated *upon the banks of Rush creek*) and encamped about half a mile below them in the valley. * * There are two villages here occupied by the *Wichitas* and Wacos respectively. * * The village of the *Wichitas* has forty-two lodges, each containing two families of about ten persons. * * With the exception of a few families that live upon the Canadian, the whole *Wichita* nation is concentrated at this place; their numbers do not exceed five hundred souls. *They have, during the early settlement of Texas, been more trouble to the people upon the northern border of that state than any other Indians. They have no regard for truth, will steal, and are wholly unworthy of the least confidence, and their vicious propensities are only kept in check now by force.* * *

The particular district embracing the Witchita mountains has, for many years, been occupied and (with much justice, as it seems to me) claimed by the Witchita Indians, who have a tradition that their original progenitor issued from the rocks of these mountains, and that the Great Spirit gave him and his posterity the country in the vicinity for a heritage, and here they have continued to live and plant corn for a long time.

They have a large stock of horses and mules, many of which are the small Spanish breed, with the Mexican brand upon them, while others are large, well-formed animals, and have undoubtedly been *stolen from the border white settlers.* * *

This extensive belt of woodland (Cross Timbers), which forms one of the most prominent and anomalous features upon the face of the country, is from five to thirty miles wide, and extends from the Arkansas river, in a southwesterly direction, to the Brazos some four hundred miles.

Captain Marcy's journal indicates that in 1852 the Wichitas, excepting a few families, were located on Rush creek. This location was not in the leased district. He also states that the Wichitas, for many years prior to 1852, had occupied and claimed the district embracing the Wichita mountains, and that they had a tradition that their original progenitor issued from the rocks of these mountains. He shows further that the Cross Timbers extended from the Arkansas river in a southwesterly direction to the Brazos.

19. Kennedy's Texas, 1841, vol. 1, p. 349:

In alliance with the Wacos were the *Pawnee Picts*, or *Toweashes, residing on the Red river, sometimes on the side of the United States, and sometimes in Texas.*

20. This shows that in 1820 Maj. Long understood that the Panis Piques were somewhere on Red river.

21. French's Historical Collections of Louisiana, New York, 1846.

At page 72, of part 1, appears the following statement, in the English language, purporting to be a translation of Tonti's narrative:

We set off on the 12th, with 12 Taencas, and, after a voyage of twelve leagues to the N. W., we left our boat and made twenty leagues portage, and, on the 17th of February, 1790 (1788 ?) came to *Natchitoches*. They made us stay at the place, which is in the midst of the three villages called *Natchitoches*, *Ouasita*, and *Capiché*. The chiefs of the three nations assembled, and before they began to speak, the 30 Taencas, who were with me, got up and, leaving their arms, went to the temple, to show how sincerely they wished to make a solid peace.

From this statement it appears that in 1788, or 1790, the Wichitas resided within the district which now constitutes the state of Louisiana, in the vicinity of the present town of Natchitoches.

23. Report of John Sibley to Secretary of War, April 5, 1805. American State Papers, volume 1, Indian Affairs, pages 721 et seq., contains the following paragraphs:

Panis or Towiaches. The French call them *Panis*, and the Spaniards *Towiaches;* the latter is the proper Indian name. They live *on the south bank of the Red river*, by the course of the river upwards of eight hundred miles above Natchitoches, and by land, by the nearest path, is estimated at about three hundred and forty. They have two towns near together. The lower town, where the chief lives, is called *Witcheta*, and the other is called *Towa-a-hach*. They call their present chief the Great Bear. They are at war with the Spaniards, but friendly to those French and American hunters who have lately been among them: they are also at war with the Osages, as is every other nation. For many hundred miles around them, the country is rich prairie, covered with luxuriant grass, which is green summer and winter, with skirts of wood on the river bank, by the springs and creeks. * * They have but few guns, and very little ammunition; what they have they keep for war, and hunt with the bow; their meat is principally buffalo; seldom kill deer, though they are so plenty they come into their villages and about their houses, like a domestic animal. Elk, bear, wolves, and wild hogs are plenty within their country, and white rabbits, or hares as well as the common rabbit; white bears sometimes come down among them, and wolves of all colors.

*The men go entirely naked, and the women nearly so*, only wearing a small flap of a piece of skin. They have a number of Spaniards among them, of a fair complexion, *taken* from the settlement of Santa Fe when they were children, who live as they do, and have no knowledge of where they came from. Their language differs from that of any other nation, the Tawakenos excepted. * *

Hietans or Comanches. * They are strong and athletic, and the elder men as fat as though they lived upon English beef and porter.



* * They are, for savages, *uncommonly cleanly*, in their persons; the *dress of the women is a long loose robe*, that reaches from the chin to the ground, tied around with a fancy sash, or girdle, all made of neatly dressed leather, (buckskin?) on which they paint figures of different colors and significations. The *dress of the men is close leather pantaloons, and hunting shirt, or frock*, of the same. * * They alternately *occupy the immense space of country from the Trinity and Brazos, crossing the Red river to the heads of Arkansas and Missouri*, to river Grande and beyond it about Santa Fe, and over the dividing ridge on the waters of the western ocean. * *

From the mouth of this river (False Wachita), through the prairie, to the main branch (Canadian) of the Arkensa, is three days' journey; perhaps sixty or seventy miles, in a straight line. From this to the Panis or Towiache towns, by land, is about thirty miles, and by water double that distance. The river is nearly a mile wide. * *

Dr. Sibley reports Brevel's narrative as follows:

About forty years ago, I set off on foot from the Panis nation (*who then lived about fifty leagues above where they now live*), in company with a party of young Indian men, with whom I had been partly raised, on a hunting voyage, and to procure horses. *We kept upon the south side of Red river*, as near it as we could conveniently cross the small streams that fall in, sometimes at some distance, and at others very near it and in sight of it.

Dr. Sibley's report shows that in 1805 the Wichitas lived not only south of the Red river but also east of the 98th meridian, only about thirty miles by land from the mouth of the False Wachita. This report also shows that in 1765 the Wichitas resided about 150 miles further west, on the south side of Red river. They were further west than the western boundary of the leased district. The report also shows that so late as 1805 the Wichita men were entirely naked and the women nearly so, although the Comanches were then handsomely clothed in ornamented buckskin garments.

40. Report of Indian agent, dated "Special agency for Texas, on Purdanallas, near Fredericksburg, Oct. 6th, 1851."

The tribes and bands met here are Lapans, Comanches, Muscalaros, Apaches, Delawares, Cadoes, Toncaways, Wacoes, *Witchetaws*, and few wandering tribes.

It appears that, in 1851, the Wichitas were in Texas.

66. Moore's description of Texas, 1844, 2d ed.

The principal tribes now residing within the limits of Texas are* * the Toweash. They live high up on the Colorado, above the San Saba.

This makes the Wichitas residents of Texas in 1844.

67. In Martin's History of Louisiana, page 102, it is stated that in 1699,

Bienville and St. Denys returned to Biloxi. They had found the country, through which they intended to pass, entirely covered with water, and had proceeded to the village of the *Wachitas*, in which they found but five huts, the Indians having mostly removed to the *Natchitoches*.

This statement imports that in 1699 the *Wichitas* were in Louisiana, near the *Natchitoches*, who are shown, by all the authorities, including ancient maps as well as narratives of travellers, to have resided near the place which is now the site of the city of Natchitoches in the state of Louisiana. The village of the *Wichitas* is located in that vicinity on nearly all the maps of the 17th and 18th centuries.

68. Notes of Captain Marcy's Expedition of 1854.

The surveying parties having concluded their labors, we struck tents this morning and marched to Fort Belknap, where we camped, for a short time, to procure stores and prepare for future work, in locating and surveying lands for the Caddos, Ionies, Ah nan-da-kas, To-wac-konies, *Wichitas*, and Tonkah-was, who *exist in this neighborhood.* * *

We arrived at Fort Belknap on the seventh (September, 1854). At a council, held here, the Ionies and Ah-nan-dah-kas were represented by Jose Maria, the Caddos by Tinah, the *Wichitas* and Wacos by O-che-ash and Ack-a-quash, and the To-wac-ko-nies by Utsiocks. * *

The Indians, who exist in the vast regions of the far southwest, are the Comanches, * * *Wichitas*, * * and Navajoes *all nomadic* and the * * Shawnees and Delawares who live in permanent houses.

As far as could be ascertained, there are 80 *Wichita* men, 112 women and 122 children. *They are most arrant horse thieves and scoundrels, and have given more trouble to the settlers in Texas than any other tribe.*

They have a village up on Rush creek, a tributary to the Washita, a kind of *rendezvous for them, from which they make constant marauding expeditions.*

Fort Belknap, one of the most distant posts on this frontier, is situated about a mile from the Brazos.

This document shows that in 1854 the Wichitas resided in the "neighborhood" of Fort Belknap, which was situated about a mile from the Brazos river in the state of Texas; that they had on Rush creek, *east of the leased*



*district*, a rendezvous, from which they made constant marauding expeditions; that they were nomads and "most arrant horse thieves and scoundrels."

69. Report of Major S. H. Long, January 30, 1818.

He says the Caddos make some claim to the country between the Mississippi, Arkansas and Red rivers and a line running south from the forks of the Arkansas to Red river; that the Quapaws, a branch of the Osages, also claim it; but that the Osages probably have the best title.

72. Statement of W. J. Raines, March 11, 1836:

Hon. Lewis Cass,
*Secretary of War.*

For the last five years, I have had much communication with the Comanche Indians and their allies. They inhabit the country from latitude 33°, on Red river, to the Rio del Norte, extending north to the road that leads from Saint Louis to S'ta Fe, south to the headwaters of Trinity, Guadaloupe, Brazos and Colorado rivers of Texas. * * The different tribes are Comanche, Kyawas, *Towash or Southern Pawnees*, Cados, Wacos, and Skiddies. * * *Depredating upon the Mexicans of the interior states, ravaging their towns, carrying off large numbers of horses and mules, murdering their people and taking prisoners* and converting them into servants, naturally prompts these wandering hordes to look upon themselves as the most powerful of nations. * *

They have, from time to time, *murdered more than fifty of our people*, on the road from St. Louis to S'ta Fe, and on the frontiers of Arkansas; and as Arkansas appears to be the place (and I hope a permanent home) for our friendly Indians, it is desirable, on their account also, that we cultivate a good understanding with *these land pirates* of the great west.

This statement shows that in 1836 six Indian tribes, including the Wichitas, roamed over the country between the headwaters of the Texas rivers,—the Trinity, Guadaloupe, Brazos and Colorado,—and the road from St. Louis to Santa Fe, stealing, murdering and taking prisoners.

73. Report of Captain J. Brown, Little Rock, July 18th, 1837. Having named the Choctaws, Cherokees, Creeks, Seminoles, Senecas, Shawnees, Quapaws and Osages, he says:

The foregoing comprise *all the tribes* of Indians residing within the Acting Superintendency of the Southwestern Territory.

This superintendency included the country between the Arkansas and Red rivers, extending westward to the one hundredth meridian of longitude, but did not include the state of Texas. Capt. Brown's statement shows that in 1837 the *Wichitas* did not *reside* in the leased district.

74. Report of Indian agent, Chickasaw agency, May 27, 1844. He says:

I have just heard that the two boys, that were missing from Trinity river, in the republic of Texas, about the last of February, or first of March, ult., (*at the time that their father, mother and two children were murdered, in the most shocking manner, the lady had her limbs cut off at her body*) are now among the *Wichitaw* Indians, who live north of Red river, and south of the False Washita, and are *within the Chickasaw district of the Choctaw nation.* * *

You will please excuse me for giving you my opinion of what ought to be done. It is this: that some discreet person should be sent there, with a tolerably strong command, and induce those Indians to give up the prisoners and also the Indians who committed the murder, and let them know distinctly that they will not be permitted to live in this country and go into Texas (a republic that we are on the most friendly terms with) and *commit murder, and then fly into this for protection.*

This report bears the following indorsement by the commissioner of Indian affairs:

Respectfully referred to the secretary of war. The outrage was committed on Texan citizens, but *by wild Indians who are as much inhabitants of that republic as of our territory.* The murderers should be delivered up to Texas and the lads liberated; and as they are now within our limits the matter is respectfully submitted.

The foregoing report and indorsement show that in 1844 the Wichitas were not in the leased district, but were in the Chickasaw nation; that they had made a raid into Texas, as far as the Trinity river, and murdered a man and his wife and two children, horribly mutilating the wife, and carried their two sons captive to their rendezvous in the Chickasaw nation; that the Wichitas were wild Indians, who were as much inhabitants of Texas as of the United States.

75. Report of Indian agent, Chickasaw agency, August 16, 1845.



In the extreme *western part of the Chickasaw district*, there are several tribes, or parts of tribes, settled, which are generally called the *wild Indians*, viz.: The Kechi, the *Tow-a-ash*, the *Witchataws* and Wacoes.

The "leased district" was west of the Chickasaw district. In 1845 therefore these wild Indians were not inhabitants of the leased district.

76. Report of commissioner of Indian affairs for 1845.

This is a large district, and requires the undivided attention of the present efficient superintendent, owing to the unsettled condition of the Comanches, *Witchetaws and other tribes who lead a wandering life. Sometimes being in Texas and sometimes in the United States*, it has been impossible to extend over them the eye of this department. *They have neither belonged, hitherto, to the one government, nor to the other;* and, although several attempts have been made to negotiate with them, every effort of the kind has thus far proved unsuccessful.

This report shows that in 1845 the Wichitas belonged neither to the republic of Texas nor to the United States, but were sometimes on one side of the boundary line and sometimes on the other.

77. Statement of P. P. Pilchlynn, Washington, January 19, 1846.

The *To-wi-ash*, Waco, Tow-a-gany and *Wachita* Indians *are on the Red river, above the Cross Timbers, with their villages on both sides and near each other.*

78. Report of Commissioner P. M. Butler, Council Ground, Comanche Peak, 20 March, 1846.

The talk of each chief is herewith enclosed as expressive of their views in their own language. * *

Talk of Car-ce-ro-ka, chief of the *Wichita* and *Towiash* tribes.

"My Brother: We got the word that our great father had sent commissioners here to see us, and that our red brothers, the Muscogees, Cherokees, Chickasaws and Choctaws were with them, to make a big peace. When we first heard it, we were scared to death. Some of our *young men had been out, on a war party, and had stolen some of the commissioners' horses.* We did not stop to get up *our* horses, but catched the first we could come to, and hurried here to meet you. * * From this day forward there shall be *no more killing and stealing from Texas by our people;* and there shall be peace as long as the sun rises and sets. We chiefs have thought deep on it, and come to this conclusion. * * Our young men *have brought in all the horses, that they stole from you*, and delivered them up to you to-day. *All the rest that we have will be brought down and delivered at the next council*, when we meet you. * * You told us to quit warring and stealing from Texas, which we agree to. But *does our great father mean that we shall quit stealing from the Spaniards? Our young men must have horses from somewhere.*"

The Towacone chief spoke a second time and said:

"It is my duty to tell the big captain that my red brother, the Keechie has told him a lie. He has said his people have no horses stolen from Texas. I saw seven head, myself, about a week ago."

This report shows that, in 1846, the Wichitas resided in Texas; and it presents an apt illustration of the character of these horse-thieves and murderers.

80. Statement, by Indian agent, July 17, 1846, of "*Names of Indian delegation from the Prairies of Texas*," who visited Washington, in that month.

This list includes the names of Yo-sa-quash and Ish-ar-e-wah, chiefs of the *Wichitas*. It is accompanied by a recommendation that a large medal be awarded to Yo-sa-quash, and a smaller one to Ish-ar-e-wah. It is also accompanied by an estimate of the expense of returning the delegates to Torry's Trading House, *on the Brazos river, in the state of Texas*. These documents show that the *Wichitas*, who made the treaty of 1846, lived in Texas.

81. Report of Indian agent, Austin, Texas, October 27, 1846.

The Wacos, *Wichitas*, and Keechies *have stolen quite a number of horses*, on our northern frontier, but have spilled no blood.

82. Report of Indian agent, Austin, Texas, May 16, 1847:

The Comanches, Lapans, Tonkahras, Caddoes, Ionies, Anandacos, Keechies, and the small bands of Shawnees, Delawares and Cherokees, are all perfectly peaceable, and I can hear nothing of a hostile character charged against them.

The Wacoes, Towacorros, and *Wichitas have committed numerous depredations on our citizens, in the last few months.* The latter part of Feby. last, *they attacked a party of our citizens and killed two men.* They are continually down on our borders, and *have stolen several hundred head of horses.* In the immediate vicinity of this place, *about ten nights since, they stole* 20 *horses*, and made their escape with them.

I would again earnestly call the attention of the department to the absolute necessity of taking *prompt measures to chastize those Indians. It is a loss of time* to think of inducing them to remain quiet by *peaceful measures.* They have been in treaty with the Texas and U. S. governments, for 4 or 5 years, and *broken their treaty engagements almost as soon*



*as made, and are now doing more damage to our citizens than at any previous time.* And, as the Chief Aquaquash says, "*They were born thieves and nothing but force will prevent them from stealing.*" *They not only depredate on the whites, but steal from the friendly Indians*, and must, in a short time, unless taken in hand, cause much difficulty, as *neither our citizens or the friendly Indians will put up with them much longer.* * * *They steal our horses and kill our citizens*, with perfect impunity. The Comanches and all the Indians that are true are extremely anxious that the government should send troops into the Indian country, and particularly that those bands should be broken up. They offer their services as guides, whenever the government will order a force sufficient for that purpose. * *

It will be found that the word "borders," as used by Major Neighbors in many reports, refers, not to that part of Texas immediately south of Red river, but to the region south of the boundary between the whites and Indians in Texas, previously designated by General Houston. This report shows that in 1847 the Wichitas were, as usual, in the state of Texas, murdering citizens and stealing horses.

84. Report of Indian agent, July 15, 1847. He reports that no depredations have been committed by the *Wichitas, since June* 22 *ultimo.* This report establishes the amazing fact that, for a period of 23 days, the Wichitas had stolen no horses and murdered no citizens in the state of Texas.

85. Report of Major George Andrews, September 3, 1847. The *Wichitas visit Fort Washita in the Chickasaw nation.* They are "*erratic*" *Indians.*

86. Report of Indian agent, September 14, 1847. He found the *Wichitas* in Texas, about 175 miles above Torry's Trading House. He says:

I found the Indians residing in that neighborhood, viz: the Keechies. Wacos, *Wichitas* and Tah wah carros (whose village is about six miles further up the river) in a very contented and happy condition.

87. Report of Indian agent, October 12, 1847.

He reports that the *Wichitas* were present at the distribution, at the Texas agency, on the 28th of September, 1847.

88. Report of Indian agent, March 2, 1848.

The only depredation, that can be traced to these bands, is a theft, committed by three Keechies and one *Wichita*, who *stole twelve horses* from our settlements.

A spasm of moderation had seized the Wichitas.

89. Report of Indian agent, March 16, 1848.

The lines proposed to be run, for the purpose of establishing the boundaries of "Peters'" colony, will pass directly through the country *now occupied* by the Keechies, *Wichitas*, Wacos, Tah wac carros, Caddos, Ionies, and Tenawish Indians.

This colony was wholly within the state of Texas. And this report shows that the Wichitas were there in 1848.

90. Report of Indian agent, April 28, 1848.

This report encloses the following statement of C. E. Barnard, interpreter:

On the 9th inst. three surveyors, engaged in running the line of Peters' colony, *were killed and scalped, by some Indians, supposed to be Wichitas.*

This would seem to indicate the presence of Wichitas in Texas, and their return to their "pristine" practices.

91. Report of Indian agent, June 15, 1848.

The *Wichitas* still hold themselves aloof from our councils, and occupy a very doubtful and threatening position, since their people were killed by Capt. Highsmith's company. I am informed, by the friendly Indians, that *they are making preparations to attack our frontier, as soon as their corn is harvested.*

This shows that the *Wichitas* were then raising corn in Texas. The frontier mentioned was the line, within the state of Texas, separating the Texas Indians from the whites.

92. Report of Indian agent, August 10, 1848.

Since the date of my last report there has been no movement worthy of notice among our border tribes of Indians, until about the 1st instant, when a small party, supposed to be *Wichitas*, Wacoes, and some of the upper Comanches, made a descent on our frontier, visiting the stations of Captains Highsmith and Crump, when they succeeded in *stealing* from the former company *thirty*, and the latter *twenty*, *horses.*

This frontier was the line separating the Texas Indians from the whites.



94. Report of Indian agent, September 14, 1848.

I have not as yet been able to see any of the *Wichitas*, but have sent them a *talk*, and shall proceed to the upper Brazos to see them in a few days.

This shows that the *Wichitas* were then in Texas.

95. Report of Indian agent, December 26, 1848.

During the whole fall they (the *Wichitas*) have been absent from their villages, under the pretext of hunting. They have been most of the time on the headwaters of Red river and in the neighborhood of the Wichita mountains.

This report, by the agent for the Texas Indians, shows that the villages of the *Wichitas* were in Texas, in 1848; but they had been, for some time, absent from their villages.

96. Report of Indian agent, March 7, 1849.

These Indians (*Wichitas* and other tribes) range promiscuously across our frontier, from Red river to the Rio Grande, during the greater portion of the year, and seek shelter, during the winter, in the upper Cross Timbers of Texas.

This report shows not only that the Wichitas ranged over northern Texas, but that they wintered in the Texas Cross Timbers.

97. Report of H. G. Catlett, May 12, 1849:

He says the *Wichitas*, *Towash* and Keechies *live* near together, *upon the Brazos head of the Trinity, and upon the Big Wichita* (the main southern branch of Red river). These localities were in Texas.

98. Report of Lieutenant F. Hamilton, Fort Graham, Texas, May 31, 1849.

Aquaquash, chief of the Wacoe Indians, arrived at this post, on the 25th inst., with a small portion of his tribe. He informed me that he had succeeded in *making the Wichitas deliver up to him a portion of the horses, they had stolen from citizens of this state.* * * He also informed me that a small portion of his tribe, together with a large party of Towakarros, were not far behind, *were bringing in the stolen horses, together with Tad-a-da, chief of the Wichitas*, and a few of his warriors. * * The horses, that Aquaquash recovered, were brought in on the 27th inst., accompanied by nearly one hundred Wacoes, Towakarros and *Wichitas.* * * I had, at his request, *a talk with the great Wichita chief, Tad-a-da.* He has promised in future to be friendly, and to do all in his power to prevent his tribe from *stealing horses.*

This shows that in 1849 the Wichitas were in Texas, and were horse-thieves still.

99. Report of Major R. A. Arnold, Fort Worth, Texas, June 18, 1849.

Ne-o-cho-se-ras, chief of the Tah-wah-carros, and Gideos, with two other chiefs of the *Wichita* tribe, are now visiting me. This is the party who lately came into Fort Graham (on the Brazos distant 60 miles), under A-qui-quash, the Wacoe chief, bringing and delivering up some 35 horses and mules, which they had taken from the *Wichetas*. These horses, &c., had been *stolen from citizens by the Wichetas*.

This report, corroborating that of Lieut. Hamilton, shows that the Wichitas were in Texas in 1849.

100. Report of Lieutenant F. Hamilton, Fort Graham, Texas, June, 22, 1849.

Since this post has been established, it has been visited by parties of the Delawares, * * *Wichitas* and Towaharros, at diferent times.

This report also shows that the Wichitas were in Texas in 1849.

101. Report of Indian agent, Torry's Trading House, July 9, 1849.

The Wacos, Tahwocarros, Keechies and *Wichitas* have been perfectly quiet for some time past. They are *making corn on the Brazos*.

This shows that the Wichitas were in Texas, during the planting season, in 1849.

102. Report of Indian agent, Chickasaw agency, August 29, 1849.

The *Witchetaws* have been, for some time, living in the western part of the (Chickasaw) district, and the Chickasaws would be very much pleased for them to move off. * * The *Witchetaws* and Caddoes have had some difficulties this spring. The *Witchetaws stole several horses from the Caddoes;* and the Caddoes went to the camp of the *Witchetaws*, and requested them to give them up. The *Witchetaws* positively refused, and the Caddoes * * drove off a number of the *Witchetaws'* horses. The *Witchetaws* saw and followed them, and, after going a mile or two, the Caddoes were overtaken and fired on by the *Witchetaws*. The Caddoes returned the fire and, during the fight, the Caddoes lost two men killed and one wounded; the *Witchetaws* lost ten or twelve killed and wounded. * * The Keechies are also opposed to the *Witchetaws*. They say that the *Witchetaws are continually committing depredations upon the citizens of Texas*. * * These people I have no control over; but I thought it my duty to put a stop to their *stealing and killing each other*, if I could by



counsel. If they were to fight for a month, I would have no means to put a stop to it.

This report shows that the Wichitas went into the Chickasaw nation in 1849 and also that their alleged membership in the "Caddoan lingual family" did not prevent the Wichitas from killing and wounding three Caddos nor prevent the Caddos from killing and wounding ten or twelve Chickasaws nor prevent the Wichitas from stealing the horses of the Caddos.

103. Report of interpreter, Barnard's Trading House, Texas, October 9, 1849.

The Keechis, Wacoes, *Wichitas* and Tonkahuas are all quiet and awaiting your arrival, to hear what the president has to say to them.

This report shows that the Wichitas were in Texas, in October, 1849.

104. Report of Indian agent, Austin, Texas, November 2, 1850.

The *Wichitas*, Tonkaways and Keechies I did not see. They are, as I am informed, somewhere on Red river, and *have formed a general combination for the purposes of plunder*. It is this combination that does most of the *horse stealing* along the frontier. I do not expect them at the council; consider them beyond my control, and refer them to the government, as a set of *rascals who ought to be exterminated*.

This report shows that the Wichitas were in Texas in 1850 and were not "good Indians."

105. Statement of C. G. Todd, March 25, 1851. Referring to the boundary line between the whites and Indians in Texas, established by Gen. Houston, in 1843, he says that it has tended to the preservation of peace.

106. Report of Indian agent, July, 1851.

He reports that the *Wichitas* have "*left Texas* and are *now* inhabiting the Washita mountains north of Red river."

107. Report of Indian agent, Fort Graham, Texas, March 18, 1852.

They (the Comanches) say that *most of the depredations* on our frontier are committed by the *Witchitas*, and the Comanches north of Red river.

108. Report of Indian agent, Fort Belknap, Texas, June 12, 1852.

As reported, under date of May 12, last, I have been making a tour in the Indian country, and visiting the Indian villages on the *Brazos*. I find that the *Wichita* Indians, formerly of Texas, and associates of the Wacoes and Towaccarros, have recently been *making very frequent depredations on the frontiers of Texas* below this and are now *constantly engaged in stealing horses*, and passing through this vicinity, on their way to their nomes, in the Wichita mountains beyond Red river.

These *depredations* are recently becoming so *frequent*, two or three small parties having passed along here with *stolen horses*, since I left Fort Graham, that I have conceived it to be my duty to call on the military, for a party of dragoons, for the purpose of visiting the *Wichitas*, at their homes, recovering the *stolen property* in their possession, and taking some hostages, or other security, for the future. I apprehend no occasion to resort to force.

This report shows that the Wichitas, having previously resided in Texas, were in the Wichita mountains in June, 1852, and were constantly making depredations thence into Texas and stealing horses in that state.

109. Report of George T. Howard, superintendent, June 14, 1852.

His "Estimate of the different tribes of *Indians in Texas*" includes the *Wichitas*.

110. Report of Indian agent, Fort Graham, Texas, October 8, 1852.

Under date of 12 June, last, I communicated the fact that the *Wichitas* had been in the habit of visiting the frontiers of Texas, in small parties, and committing occasional depredations on her citizens, and, although they are perhaps not *now* strictly within the jurisdiction of Texas, I conceived it to be my duty to make an effort to arrest these practices, and establish some understanding with them, more especially as they have been parties to treatfes with the government *heretofore made within the limits of this state*, and so far as I know, are *not under the charge of any other officer or agent of the government*.

I accordingly dispatched a messenger (a chief of the Wacoes) to their villages, in the Wichita mountains, with some tobacco, and a talk to them upon the subject of their depredations, and a demand of such *stolen property* as they had in their possession. Soon afterward, and while I was out in the Indian country, another party of *this tribe robbed the train of W. Mackay of eight horses and mules*. I thereupon procured a small escort, under command of Lt. Beall, of 5th Inf., and started after my messenger, intending to visit the *Wichitas* in person. We encountered a succession of rains and high waters, which so embarrassed and delayed us, that after swimming several streams, we were finally



stopped by Red river, within forty-five miles of the *Wichita* village, and, being too nearly out of provisions to await the subsidence of the stream, were compelled to return.

My messenger brought back *eight stolen horses*, which were given up by the *Wichitas*, and reported that the chief of that tribe expressed the determination to put a stop to these aggressions of his people.

Besides these I recovered four government horses, from other Indian tribes, while on this expedition.

Lieutenant Beall afterwards, in the month of August, while out in search of Captain Marcy and his command (then reported to have been massacred by the Comanches), visited the *Wichita* villages, and held a talk with them. They then delivered up *six more horses and mules* and, so far as I know, have committed no outrage on this frontier, since the robbery of Mackay's train. * *

This report shows that in October, 1852, the Wichitas still made their rendezvous, in the Wichita mountains, the base of their horse-stealing operations in Texas.

111. Report of Indian agent, supposed to have been made in 1853.

Having taken considerable pains to get information with regard to those associate bands of *wild Indians*, the Wacoes, *Wichitaws*, Towacarres and Keechies, I submit it to the department for what it is worth. These bands, although small in number, are more trouble and *commit more depredations upon the people of Texas than all the other bands that roam through her territory, extending their predatory excursions down into the settlements, as far as the San Antonio river; travelling mostly on foot, avoiding the military posts, they swoop down upon the settlers and drive off their animals with impunity*, not even sparing their enemies, the Delawares and other Indians friendly to the whites. This leads to frequent hostile meetings, and whilst with me, a party of Delawares brought in the bleeding scalps of some Wacoes, who were caught stealing their horses.

This report shows that the Wichitas were then roaming through Texas territory, committing depredations upon the people as far south as the San Antonio river.

112. Report of Indian agent, San Antonio, November 2, 1853.

I have the honor to enclose a report by special agent Hill, in answer to your communication enclosing to Jesse Stem, reports, &c., in regard to the Wacos and *Wachita* Indians, which I would commend to your consideration. These Indians left Texas, immediately after that difficulty, and have not returned since. Our frontier has consequently been relieved from the *worst and most thieving bands of Indians now in the United States*, and the beneficial results to the frontier citizens of Texas, since they were attacked by Maj. Sibley, is clearly perceptible. * * I do not approve paying for the property taken from them, from the fact that they are *notorious thieves, and had no property but what they had*

*stolen from some one else;* and in that attack they have been taught a lesson that has so far proved beneficial; and now, to give them indemnity, will only encourage them to commence their old practices.

This report shows that the Wichitas and Wacos had left Texas and relieved the people of that State of the presence of "the worst and most thieving bands of Indians in the United States."

113. Report of Indian agent, San Antonio, Texas, September 16, 1854.

There now reside on our border, in the *Choctaw and Chickasaw reserve*, the *Wichitas*, Wacoes, Tah-waccones, Keechies, and small bands of Ionies and a considerable band of Kickapoos. They have from time to tim, crossed into Texas, and *have, during the year, stolen large numbers of horse and committed other serious depredations on our citizens.*

This report shows that in 1854 the Wichitas, Wacos, Tah-wac-cones, Keechies and small bands of Ionies, and also a band of Kickapoos resided on the Choctaw and Chickasaw reserve, and had, during the year, stolen large numbers of horses in Texas, and committed other serious depredations on the citizens of that state.

114. Report of Indian agent, Fort Belknap, Texas, September 20, 1854.

The *Wichitas* I have not met during the year; *in fact they may be considered in a state of open hostility with our people, on this portion of the frontier. They commit depredations, by stealing horses, from time to time, as opportunities offer and prospects of escape will justify.*

115. Report of commissioner of Indian affairs for 1856.

The flattering success in Texas gives promise that, by a similar policy, the southern Comanches, *Wichitas and other wandering bands* may be successfully colonized on the western end of the Choctaw country.

This report shows that in 1856 the Wichitas were nomads, whom it was desirable to colonize within the leased district.

116. Report of Indian agent, Brazos agency, Texas, December 27, 1856.

On the 26th inst. we were visited by ten camps of *Wichita* Indians, who came in for the purpose of expressing their sincere friendship for the Indians of the reserve. *They show a strong desire to settle here and come under the rules and regulations of this agency.*



This report shows that the Wichitas, in 1856, in contempt, or in ignorance, of their alleged ownership of the leased district, were themselves anxious to be colonized on the Brazos river, in Texas.

117. Report of Indian agent, March 6, 1857.

*That country for a number of years has been a general rendezvous of horse thieves, viz: Witchitas*, Keechies, Kickapoos and renegades from other tribes, who have carried on a very lucrative trade with Indians, and white traders from the Creeks and Cherokees, and white traders from Arkansas, and a large portion of the *horses stolen from Texas, have been disposed of in this very territory.*

This report shows the purpose and character of the alleged "residence" of the Wichitas in the Wichita mountains.

118. Report of Indian agent, Brazos agency, Texas, April 30, 1857.

It appears that the *Wichitas* are very destitute, having lost or eaten nearly all their horses. Some of them have, this spring, visited this agency, and have procured seed corn for planting and, by the advice of spl. agent Ross, are now planting corn, *at their village near the mouth of the Big Wichita.* * * By the adoption of these suggestions, I feel confident that success will attend the efforts, proposed to be made, of at once colonizing the *Wichitas*, and other Indians and that our frontier will be soon relieved of the serious *depredations that have heretofore interrupted its quiet.*

This report shows that in April, 1857, a part of the *Wichitas* resided and were planting corn, on the Big Wichita, in Texas, and that there was hope that the state would soon be relieved of their presence.

119. Report of commissioner of Indian affairs for 1858.

I regret to state that no progress has yet been made in carrying out the provision in the act of March 3, 1857, for "collecting and establishing the southern Comanches, *Wichitas* and certain other bands of Indians, on reservations to be located south of the Arkansas river and west of the ninety-eighth degree of longitude." *Those Indians are wild and lawless*, in their disposition and habits, and cannot be brought together without danger of difficulties accruing among themselves, or of their committing *forays upon the western Choctaws and Chickasaws*, with whom they will be brought into close proximity, and whom we are bound, by treaty stipulations, to protect from such casualties. *A strong military force, in the region of country where it is intended to settle them, is absolutely necessary, to hold in check and control them*, and to afford the requisite protection to the agent appointed to take them in charge.

This report shows that in November, 1858, the *Wichitas* were not living on what is now known as the Wichita reservation, but were still *wild* and *lawless* Indians, whom it was dangerous to colonize in the leased district.

120. Report of Indian agent, San Antonio, Texas, December 19th, 1858.

The *Wichitas* have, on several occasions, within the last three years, been refused permission by me to emigrate to Texas and settle on the reserve at Brazos.

This report shows that the *Wichitas* looked not to the leased district for a home, but to the Brazos river in Texas.

121. Order of C. E. Mix, acting commissioner of Indian affairs, March 30, 1859.

So soon as it may be practicable and safe for the *Wichitas* to remove to their new location, you will *require them to go there*, giving them to understand that it is to be their permanent home, and that *none of them must leave* the reservation, without the permission of the agent.

This order implies that pressure was requisite to place and keep the Wichitas in their *new "home."*

122. Mr. Rector was of the impression that the Wichitas had resided in the leased district for a long period. He evidently had very little knowledge of early Wichita history. He may or may not have been better informed as to the character, extent and purpose of the more recent "residence" of the Wichitas in the leased district.

126. Report of Indian agent, Wichita agency, Indian Territory, Oct. 1, 1868.

The work of building fences and putting in crops commenced, with commendable energy and zeal, on the part of the Shawnees and Delawares, they using the ploughs with very little assistance and instruction; the *Wichitas* and some of the other tribes *refusing to make any effort in that direction, saying they could not think of making a squaw of themselves, by working. The women and children, however, managed to plant and cultivate an amount of ground* beyond my expectation.

On page 21 of their answer the defendants paint this charming picture:



The Wichita Indians were always *industrious*, *peaceful* and *non-nomadic*. They were an *agricultural* people, raising crops of corn, melons, and pumpkins, which they traded with the Comanches and other roving tribes.

Nothing in Virgil surpasses this fancy sketch of Wichita rural life. Are these the Wichitas who, so late as October, 1868, refused to plough their ground, because they "could not think of making squaws of themselves by working," who during the entire period of authentic history have been nomads, horse-thieves and murderers?

127. Report of Indian agent, Wichita agency, August 20, 1877.

The *Wichitas*, Wacoes and Towaconies are virtually one people, speaking the same language, the names Wacoes and Towaconies being given to the descendants of *two bands of the Wichitas, who, about one hundred years ago, left the main tribe on the Neosho river, in Kansas, one taking up a residence on the Arkansas river, near the present town of Wichita, and the other pushing on to Texas.*

This opinion is fortified by the Wichita tradition to which Uts-tuts-kins testifies. And if any prehistoric fact, connected with the Wichitas, has such verisimilitude as to warrant its acceptance on Indian tradition, it is this fact of their early habitat on the Neosho river, in what is now the state of Kansas.

128. Jonathan Richards was of the opinion that the title of the Wichitas was recognized at Fort Arbuckle in 1858–9. I shall soon have occasion to show by whom, in what manner and to what extent this alleged title was recognized at Fort Arbuckle.

141. Report of Indian Agent, Anandarko, September 1, 1881.

It is said that about *one hundred years ago two bands left the main tribe (the Wichitas) on the Neosho river, in Kansas, one taking up its residence on the Arkansas river, near the present town of Wichita, Kansas, and the other going to Texas.*

155. Report of Commissioner of Indian Affairs for 1890.

The *Wichita* reservation, in Indian Territory, is defined in an unratified agreement, made October 19, 1872; * * *there is no evidence that*

*they hold it by any higher title than that contained in said unratified agreement*, although they claim to have resided thereon for many years prior to said order.

149. Report of Indian Commissioners, Washington, August 8, 1846.

The other little bands, viz: *Witchataws*, *Toweash*, Towaconies, Keechies, and Wacoes are inconsiderable, in number, and *degenerate in character*. * * *They have the reputation of being the best horse-thieves in the prairie.*

Also Report of Texas Commissioner of Indian Affairs, Houston, November 3, 1838.

The *Pawnee Picts or Toweashes* reside on Red river; they are *sometimes in the United States and sometimes in Texas*. * * They are in alliance with the Wacoes and Caddoes, and *their depredations are generally confined to the upper Brazos country.*

The first of these reports shows what these "industrious, peaceful, non-nomadic agriculturists" were doing, in 1846; the last shows where they "resided," in 1838.

153. P. H. Dunbar in his "Pawnee Indian" says:

* * The Wichitas, I am told, have a tradition that the primitive home of themselves and the Pawnees was upon the Red river, below the mouth of the Wichita. This would place them in close proximity with the Caddos. *

It must certainly be easier to accept this tradition, which locates the primitive home of the Wichitas in Texas, than the tradition that the progenitor of the Wichitas was born of a rock, thereafter named the Wichita mountain,—a repetition of the old fiasco: "*Parturiunt montes, nascetur ridiculus mus.*"

154. Bienville's Journal shows that in 1700 the Wichitas were on the Washita river, in the state of Louisiana.

157. H. P. Jones testifies that Camp Radzyminski was on the west side of Otter creek, about fifteen or sixteen miles from its mouth; that its shortest distance from Red river was not over *six or seven miles*; and that Fort Sill was about a mile and a half from the eastern extremity of the Wichita range.

159. The deposition of A. J. Mears shows that about



one-seventh of the Wichita range is south-west of the North fork of Red river and about six-sevenths east thereof.

160. The deposition of James Mooney shows that the Wichitas themselves gave the name "Wichita mountain" only to the extreme western spur of that range, and that they said they gave their name to it, because they had once lived there. They said they left it and went to Fort Sill, in the summer "after the stars fell," that is to say, in the summer of 1834. Colonel Dodge found the Wichitas at the western extremity of this range in 1833. But they had not resided there long; for the old Wichita, Uts-tuts-kins, who also testifies that the Wichitas left this locality in 1834, says that he was a *young man* when Colonel Dodge visited the Wichita village, in 1833, and that when they moved from Texas to that village he was eleven years of age. They may therefore have resided five or six years at the western extremity of the Wichita range, in the southwest corner of the leased district.

161. The letter of Stokes and Arbuckle, dated September 15, 1835, shows that some of the Wichitas were then in the state of Texas, and some north of the Red river.

162. The letter of Commissioners Clark and Chouteau shows that, prior to 1818, the leased district had always been considered the property of the Quapaws, not only by the successive governments of the United States, but also by the Osages, the neighbors of the Quapaws.

163. Wm. Darby's Description of Louisiana, Second Edition, 1817, contains the following statement:

The Panis or Towiache Indians have their village at 97° W. lon. and 35° 20′ N. lat. * A ridge of hills winds along the south bank of Red river near the Panis village, discharging the waters southwards towards the gulf.

This *probably* locates the village in Texas. It *certainly* does not locate it in the leased district; for the eastern boundary of that district is the 98th meridian.

Summarizing the evidence in disproof of the claim that the leased district was the "pristine habitat" of the Wichitas, we find that the *Wichitas* are located in *Texas* by the claimants' written proofs in rebuttal, numbered, respectively, as follows: No. 1, 1806; No. 4, 1847; No. 6, 1682; No. 13, 1788; No. 14, 1800–1810; No. 15, 1759; No. 17, 1806; No. 22, 1805; No. 72, 1836; No. 77, 1846; No. 78, 1846; No. 80, 1846; No. 82, 1847; No. 86, 1847; No. 87, 1847; No. 89, 1848; No. 91, 1848; No. 94, 1848; No. 95, 1848; No. 96, 1849; No. 97, 1849; No. 98, 1849; No. 99, 1849; No. 100, 1849; No. 101, 1849; No. 103, 1849; No. 104, 1850; No. 118, 1857; No. 119, 1858.

They are also located in *Texas* on fourteen maps, included in the claimants' evidence in rebuttal, as follows: No. 35, Robin, 1802; No. 38, John Melish (Pana), 1818; No. 41, S. F. Austin, 1830; No. 44, E. F. Lee, 1836; No. 46, Texas Land Office Map, 1837; No. 47, Hunt & Randel, 1839; No. 48, Outline Hunt & Randel, 1839; No. 49, Kennedy, 1841; No. 55, State Map of Texas, 1858; No. 58, De Cordova, 1848; No. 57, Creutzbar, 1848; No. 56, H. S. Tanner (Pawneys), 1846; No. 60, W. Darby (Panis); No. 63, Creutzbar, 1856.

They are located in *Louisiana* by rebutting proofs, No. 7, 1688; No. 11, 1761; No. 21, 1690; No. 67, 1699; also by maps (Ev. in chief), as follows: No. 22, De l'Isle, 1703; No. 27, H. Moll, 1715; No. 30, De l' Isle, 1722; No. 49, De l' Isle, 1703; No. 53, Bernard, 1720; also by maps (Ev. in reb.), as follows: No. 24, Popple, 1741; No. 35, Robin, 1802.

They are located in the *"Panhandle" of Texas* on maps (Ev. in reb.) as follows: No. 42, Outline Indian Localities, 1842; No. 45, Young, 1836; No. 50, Kennedy, 1841.

They are located in the *Chickasaw nation*, by written proofs (Ev. in chief) No. 74, 1844; No. 75, 1845; No. 85, 1847; No. 102, 1849; also on maps (Ev. in reb.) No. 26, Moll, 1715; No. 59, Tracing Adjutant General's Office; and by report No. 18, 1852.



They are located on the *south bank of the Arkansas river, in the Choctaw nation*, on maps (Ev. in chief) No. 28, De l'Isle, 1741; No. 53, Bernard, 1720.

They are located in the *Choctaw nation on the Red river*, by written proof (Ev. in chief) No. 28, 1741.

They are shown to have been *sometimes in Texas and sometimes north of Red river*, by written proofs (Ev. in reb.) No. 76, 1845; No. 149; No. 19, 1841.

They are located in *villages near to each other, on the north and south banks of Red river*, by written proofs (Ev. in reb.) No. 3, 1778; No. 12, 1775; No. 77, 1846.

They are located in the *Wichita mountains*, by written proofs (Ev. in reb.) No. 106, 1851; No. 108, 1852; No. 110, 1852.

Their location, prior to their migration to Louisiana and Texas, is said to have been on the *Neosho river in Kansas, and afterwards near the site of the town of Wichita in Kansas.* Ev. in reb. Nos. 138 and 141.

The *Quiceta* (*Wichita?*) are located on the *"Panhandle" of Texas, west of the 101st meridian* on map (Ev. in reb.) No. 35, Robin, 1802.

A *Pawnee* (*Wichita?*) village is located in the *Choctaw nation, on the north bank of the Red river*, on map (Ev. in reb.) No. 43, S. H. Long, 1834.

A *Pawnee* (*Wichita?*) village is located on the *north bank of the Red river*, near the 100th meridian, on map (Ev. in reb.) No. 49, Kennedy, 1841.

A *Pawnee* (*Wichita?*) village is located on the north *bank of the Red river in the leased district*, on map (Ev. in reb.) No. 52, Vandermaelen, 1827.

A locality south of *Mt. Scott* is designated as an *"old*

*Indian village*," on map (Ev. in reb.) No. 59, Tracing from Adjutant General's office.

The *Panis* (*Wichitas ?*) are located *north of the Arkansas river* on maps (Ev. in chief) No. 22, De l'Isle, 1703; No. 23, Senex, 1710; No. 25, Moll, 1715; No. 27, Moll, 1715; No. 30, De l'Isle, 1722; No. 49, De l'Isle, 1703.

The *Paniassa* (*Wichitas?*) are located *north of the Arkansas river* on maps (Ev. in chief) No. 22, De l'Isle, 1703; No. 23, Senex, 1710; No. 25, Moll, 1715; No. 27, Moll, 1715; No. 28, De l'Isle, 1741; No. 30, De l'Isle, 1722; No. 32, Popple, 1735; No. 33, Popple, 1735; No. 37, Le Rouge, 1778; No. 46, Popple, 1737; No. 49, De l'Isle, 1703; (rebuttal) No. 53, Le Rouge, 1778; No. 65, Mitchell, 1776.

Twenty-seven different tribes of Indians were located between the Red and Arkansas rivers, at different times, on maps included in the claimants' evidence, as follows, viz:

1. *Chacacants.* (Ev. in chief) No. 36, American Map, 1753; No. 46, H. Popple, 1737; No. 5, Bernard, 1720. (Ev. in reb.) No. 26, J. Palairet, 1759; No. 30, John Mitchell, 1776; No. 31, Jeffery, 1777; No. 32, Le Rouge, 1778; No. 33, T. Pownall, 1794; No. 53, Le Rouge, 1778; No. 65, J. Mitchell, 1776.

2. *Quirereches.* (Ev. in chief) No. 36, American Map, 1753. (Ev. in reb.) No. 26, J. Palairet, 1759; No. 28, E. Bowen, 1772; No. 29, D'Amille, 1772; No. 31, Jeffery, 1777; No. 35, Robin, 1802; No. 37, J. Pinkerton, 1815; No. 53, Le Rouge, 1778; No. 65, J. Mitchell, 1776.

3. *Quainco.* (Ev. in chief) No. 36, American Map, 1753; No. 53, Bernard, 1720. (Ev. in reb.) No. 26, J. Palairet, 1759; No. 30, John Mitchell, 1776; No. 31, Jeffery. 1777; No. 32, Le Rouge, 1778; No. 33, T. Pownall, 1794; No. 53, Le Rouge, 1778; No. 65, J. Mitchell, 1776.



4. *Canioüis.* (Ev. in chief) No. 36, American Map, 1753. (Ev. in reb.) No. 26, J. Palairet, 1759; No. 30, J. Mitchell, 1776; No. 53, Le Rouge, 1778; No. 65, Mitchell, 1776.

5. *Paniassa.* (Ev. in chief) No. 36, American Map, 1853; (Ev. in reb.) No. 28, E. Bowen, 1772; No. 29, D'Amille, 1772. No. 33, Pownall, 1794; No. 53, Le Rouge, 1778; No. 65, Mitchell, 1776.

6. *Osages.* (Ev. in chief) No. 37, Le Rouge, 1778; No. 53, Bernard, 1737 (Les Akensa).

7. *Mentous.* (Ev. in chief) No. 22, De l'Isle, 1703; No. 23, Senex, 1710; No. 25, Moll, 1715; No. 27, Moll, 1715; No. 49, De l'Isle, 1703. (Ev. in reb.) No. 28, Bowen, 1772, No. 29, D'Amille, 1772; No. 33, Pownall, 1794.

8. *Taensas.* (Ev. in chief) No. 21, De l'Isle, 1700; No. 26, Moll, 1715; No. 31, De l'Isle, 1733.

9. *Les Sitoue.* (Ev. in chief) No. 22, De l'Isle, 1703.

10. *Cahenoua.* (Ev. in chief) No. 22, De l'Isle, 1703; No. 25, Moll, 1715. (Ev. in reb.) No. 26, Palairet, 1759.

11. *Chaquanhe.* (Ev. in chief) No. 23, Senex, 1710; No. 53, Bernard, 1720.

12. *Les Tongua.* (Ev. in chief) No. 49, De l'Isle, 1703.

13. *Nassoni.* (Ev. in chief) No. 22, De l'Isle, 1703; No. 30, De l'Isle, 1722; No. 31, De l'Isle, 1733.

14. *Wihaias.* (Ev. in chief) No. 22, De l'Isle, 1703.

15. *Nihata.* (Ev. in chief) No. 23, Senex, 1710; No. 25, Moll, 1715; No. 27, Moll, 1715; No. 46, Popple, 1737; No. 49, De l'Isle, 1733.

16. *Chicantesou.* (Ev. in chief) No. 32, Popple, 1735; No. 53, Bernard, 1720; No. 33, Popple, 1735; No. 46, Popple, 1737.

17. *Ouanahinan.* (Ev. in chief) No. 32, Popple, 1735; No. 53, Bernard, 1720; No. 33, Popple, 1735; No. 46, Popple, 1737.

18. *Comanches.* (Tetans) (Ev. in reb.) No. 39, Dirwald, 1823; No. 45, Young, 1836; No. 50, Kennedy, 1841.

19. *Kio-hu-ha-has.* (Ev. in reb.) No. 31, Jeffery, 1777; No. 33, Pownall, 1794.

20. *Canicous.* (Ev. in reb.) No. 34, De Lozieres, 1794–8.

21. *Kanses Hunting Grounds.* (Ev. in reb.) No. 37, Pinkerton, 1815.

22. *Nabici.* (Ev. in chief) No. 32, Popple, 1735; No. 53, Bernard, 1720; No. 33, Popple, 1735; No. 46, Popple, 1737.

23. *Pawnee Hunting Grounds.* (Ev. in reb.) No. 37, Pinkerton, 1815.

24. *Genaiches.* (Ev. in chief) No. 32, Popple, 1735; No. 33, Popple, 1735; No. 46, Popple, 1737.

25. *Cancatinos.* (Ev. in chief) No. 37, Pinkerton, 1815.

26. *Nadsoos.* (Ev. in reb.) No. 29, D'Amille, 1772; No. 30, Mitchell, 1776; No. 32, Le Rouge, 1778; No. 33, Pownall, 1794; No. 53, Le Rouge, 1778; No. 65, Mitchell, 1776.

27. *Canessis.* (Ev. in reb.) No. 26, Palairet, 1759; No. 28, Bowen, 1772; No. 29, D'Amille, 1772; No. 31, Jeffery, 1777; No. 33, Pownall, 1794; No. 37, Pinkerton, 1815; No. 53, Le Rouge, 1778; No. 65, Mitchell, 1776.

The Caddos are located in northwestern Louisiana, southwestern Arkansas, and northeastern Texas, on ten maps, included in the claimants' evidence in chief, and on twenty-two maps, included in their evidence in rebuttal, as follows: (in chief) No. 21, De l'Isle, 1700; No. 22, De l'Isle, 1703; No. 23, Senex, 1710; No. 25, Moll, 1715; No. 27, Moll, 1715; No. 30, De l'Isle, 1722; No. 31, De l'Isle, 1733; No. 35, Boehme, 1746; No. 49, De l'Isle, 1703; No. 53, Bernard, 1720; (in rebuttal) No. 24, Popple, 1741; No. 25, old American map, 1755; No. 26, Palairet, 1759; No. 27, Roque, 1761; No. 28, Bowen, 1772; No. 29, D'Amille, 1772; No. 30, Mitchell, 1776; No. 31, Jeffery, 1777; No. 32, Le Rouge, 1778; No. 33, Pownall, 1794; No. 34, De Lozieres, 1794–8; No. 36, Arrowsmith, and Lewis, 1812; No. 37, Pinkerton, 1815; No. 38, Melish, 1818; No. 39, Dirwald, 1823; No. 42, Outline Indian Localities, 1833; No. 44, E. F. Lee, 1836; No. 47, Hunt and Randel, 1839; No. 48, Outline Hunt and Randel, 1839; No. 51, Melish, 1823; No. 53, Le Rouge, 1778; No. 60, Darby.



The modesty of the Wichitas is not exhausted by the claim of ownership of every region, where, in their wanderings, they have pitched their own wigwams; but, claiming to be, or to have been, in some way, connected with the southern group of the so-called "Caddoan lingual family," they arrogate to themselves the ownership of every square mile within the geographical boundaries of that "family," although no Caddo or Wichita ever actually set foot on the land so claimed. They invoke a delineation of those boundaries prepared by Mr. Dorsey, of the bureau of ethnology, and published in the seventh annual report of that bureau, in 1885–6; and they claim the leased district for themselves, because it lies within those boundaries. This is what Mr. Dorsey says:

> We are led to fix upon the following as the approximate boundaries of the habitat of the southern group of the Caddoan family: Beginning, on the northwest, with that part of Indian Territory now occupied by the Wichita, Chickasaw, and Kiowa and Comanche reservations, and running along the southern border of the Choctaw reservation, to the Arkansas line; thence due east to the headwaters of the Washita, or Witchita river, Polk county, Arkansas; thence, through Arkansas and Louisiana, along the western bank of that river, to its mouth; thence southwest, through Louisiana, striking the Sabine river near Salem and Belgrade; thence southwest through Texas to Tawakony creek, and along that stream to the Brazos river; thence, following that stream, to Palo Pinto, Texas; thence northwest to the mouth of the north fork of the Red river; and thence to the beginning.

If this delineation includes the leased district and the Chickasaw nation, as it must, unless it is meaningless, the

first course is from the northwest corner of that district, down the Canadian, in a southeasterly direction, to the line which separates the Choctaw and Chickasaw nations; thence, with a sharp turn, due south, along that line, to Island Bayou; thence down Island Bayou to the Red river; thence down Red river, along the southern border of the Choctaw nation, to the western boundary of Arkansas; thence due east to the headwaters of the Washita, or Witchita, in Polk county, Arkansas. If this zigzag resulted from any natural features of the country, it would not be so remarkable. But nature furnishes no excuse for this rectangular departure from the Red river, upon a due south line, along the dividing line between the Choctaw and Chickasaw nations.

But then the course from the southeastern corner of the Choctaw nation, "due east to the headwaters of the Washita, or Witchita river, Polk county, Arkansas," is an impossible course. The headwaters of the Washita are more than fifty miles north of this line. The southern boundary of Polk county is more than twenty-five miles north of it; and the western border of Polk county is due north of the initial point of this last course.

But Mr. Dorsey has himself corrected the errors of this delineation. Some years after the publication of the seventh annual report of the bureau of ethnology, he prepared the chapter in Johnson's Cyclopedia, in which the boundaries of the southern group of the "Caddoan lingual family" are laid down as follows:

> After comparing the recorded statements about the several tribes, it would appear that *the original habitat of the southern group of the Caddoan Indians was a section of country now embracing northeastern and part of eastern Texas, and adjacent territory in Arkansas and Louisiana, its boundaries being the Red, the Sabine, and the Brazos rivers.*

Again the map of linguistic stocks, appended to Mr.



Walker's deposition, as Exhibit No. 11, is taken from the seventh annual report of the ethnological bureau, from which was also taken the muddled demarkation of boundaries to which I have referred. It will be observed that the delineation on the map and the verbal description are at marked variance with each other. The verbal description makes the *southern boundary* of the Choctaw nation one of the lines. On the map this line passes through the *middle* of that nation. Moreover the lower part of the southwestern boundary of the "Caddoan family" is almost one hundred miles further west on the map than in the description.

If the defendants' extract from the seventh annual report of the bureau of ethnology, and the accompanying map, of the country of the "Caddoan lingual family," prove the two hundred Wichitas to be the proprietors of the leased district, they also prove them to be the proprietors, not only of the whole Chickasaw nation, but also of a large part of the state of Texas. They do not prove them to be the proprietors of one portion of this vast heritage more than of another. Indeed the map generously "throws in" one-half of the Choctaw nation. So each man, woman, and child of these "agricultural" savages, becomes the owner of 150,000 acres of land as fertile as any in this hemisphere. These two hundred naked Wichitas incontinently "sit down on" and "flatten out" not only 10,000 Comanche warriors, clad in "ornamented buck-skin garments," but also more than forty other tribes, who have, from time to time, roamed and hunted and scalped in this "Fancy's Realm" of the "Caddoan Lingual Family."

In maintenance of the title of the Wichitas, their counsel refer to certain so-called "affidavits," printed in Senate Executive Document No. 13, 48th Congress, 1st ses-

sion. But these statements are not affidavits, although perhaps truthful and reliable. They do not show that either one of these Indians, or of their tribes, had a "pristine habitat" on the lands in controversy. There are twelve of these statements, two purporting to have been made by Tow-a-co-nies, three by Wichitas, four by Caddos, two by Pene-teth-kas, and one by a Keechi. Not one of them pretends to have been born north of Red river. I have already cited the statements of the two Wichitas, Esquetch-chee and Uts-tuts-kins. The third Wichita, Cheste-de-des-ah, says that his people were living at Arbuckle, which was in the Chickasaw nation, in 1859; but he does not state where they lived at an earlier period, or where he was born. All the others say that their people lived in Texas, except Tosh-e-way, a Penetethka, who says nothing on the subject.

In 1820 Major Long and his command attempted to descend the Red river from the west. (House Ex. Doc. No. 21, 50th Cong. 1st Sess.) Having followed the course of the river, for about 14 days, to their intense disgust they reached its confluence with the Arkansas. The river, which they had mistaken for the Red river, proved to be the Canadian. It was not the true Red river. If it had not already been named, Major Long might have named it the False Red river. There is a well known *Washita* river, flowing from the north into the Red river, in the state of Louisiana. It bore the name "Washita," before the False Washita was known to white men. The earliest map on which I have been able to find the False Washita, bearing any name whatever, is John Melish's map of 1823. On that map it is named the False Washita, as it was by Dr. Sibley, in his report of 1805. It is so named on the succeeding maps of Austin, 1830, Young, 1836, Cordova, 1848, Creutzbar, 1856, and on Major Merrill's



map. On maps of recent date the word False is often omitted.

Why was this river named the *False Washita?* There are two *Wichita* (Washita) rivers in Texas, and one (Washita) in Louisiana. They are, all three, so named because the *Wichitas* resided on their banks. If the False Washita had been originally named the *Washita*, or *Wichita*, it would seem to be a reasonable supposition that it was so named because the Wichitas had lived on its banks. But the presence of the word "False" would seem to suggest a very different explanation. There is no evidence that any Wichitas ever resided on its banks prior to 1823; and I am unable to resist the conviction that it was named the "False Washita" because some disappointed and disgusted hunter, or explorer, like Major Long, mistook it for the genuine Washita. I am unable to accept the name False Washita as proof that the Wichitas formerly inhabited its banks.

The evidence submitted by the claimants effectually dispels the hallucination that the Wichitas have, from time immemorial, resided on the Wichita reservation, or anywhere else within the limits of the leased district. The proofs do not show that a Wichita ever set foot within the bounds of the Wichita reservation prior to 1850. They show that once or twice, prior to 1833, they erected their wigwams on the north bank of the Red river in the leased district, seventy miles from the Wichita reservation; that, in 1833, their wigwams appeared near the mouth of the North fork, in the southwestern corner of the leased district; that they encamped for a short time on Otter creek and again on Cache creek, in the leased district. No other occupancy of any part of the leased district, by the Wichitas, is known to history or to tradition.

Authentic history never saw a Wichita in the leased district prior to 1833. Their wigwams have appeared in almost every part of the southwest, except on the land where they claim to have always resided.

If the Wichitas are invested with the ownership of every region in which they have temporarily located their grass wigwams, they are the owners of the states of Missouri, Kansas, Arkansas, Louisiana and Texas, and are the most extensive land-holders of modern times, every horse thief, squaw and pappoose, among them, being the owner of more than a million acres of land. But this "habitat" deluge rolls no further than the states named; it does not engulf the leased district. Their occasional use of the Wichita mountains, since 1833, as a base for marauding expeditions into Texas, and as a "fence" for the sale of stolen property and the ransom of white captives, constitutes no "habitat" capable of supporting any title to the leased district. The four short visits of the Wichitas to the leased district, prior to 1833, did not invest them with squatters' rights of weight and amplitude sufficient to overwhelm the rights of the twenty-seven other tribes, which history shows *did reside*, prior to 1833, between the Red river and the Canadian.

*Second.* The Wichitas claim another basis for their title to the land in controversy. They base it upon an admission alleged to have been made on the 24th of August, 1835, in a treaty between the United States and the Comanches, Wichitas and other Indians. But this invocation of the treaty of 1835, in maintenance of the Wichita title, must prove unsuccessful for many reasons.

1. In order to establish their claim that, by this treaty, the United States and the Choctaws recognized the immemorial right of the Wichitas to hunt in the district in controversy the counsel assume:



(1.) That this treaty refers to settlements, towns and hunting grounds, in the leased district, and *not elsewhere.*

(2.) That it requires the other parties to refrain from certain acts, in the leased district, and *not elsewhere.*

(3.) That, as a consequence, the United States and the Choctaw nation solemnly and conclusively admitted that the Wichitas had such towns and hunting grounds in the leased district.

(4.) That thereby the United States and the Choctaw nation recognized the possession, by the Wichitas, of the usual, or customary, Indian title, by occupancy, to that country.

I submit that the opposing counsel mistake the scope and effect of this treaty. There were three parties to the treaty: (1) The United States; (2) The Comanches, Wichitas, Wacos, Towaconies, Caddos, Ionis, Keechies, and Delawares; and (3) The Cherokees, Muscogees, Choctaws, Osages, Senecas and Quapaws. The counsel for the defendants show, on page 24 of their answer, that, prior to 1859, the Wacos, Towaconies, Caddos, Ionis, Keechies, and Delawares never lived in the leased district. At the date of the treaty their home was in a foreign country, in Texas, one of the provinces of the republic of Mexico. They had hunting grounds in Texas. Whatever towns and settlements they had were in Texas. If they had any hunting grounds, or towns, or settlements in the leased district, or elsewhere in the United States, they held them, not by inheritance, nor by immemorial right, but by permission of the United States, or of the Choctaw nation. If the United States and the parties of the third part, by signing this treaty, admitted that the *Wichitas* had "towns and hunting grounds and dominion," in the Wichita reservation, between the Washita and Canadian rivers, they also admitted that the Comanches, Wacos, Towaconies,

Caddos, Ionis, Keechies, and Delawares had "towns and hunting grounds and dominion" in that reservation. If, by such admission, they acknowledged that the *Wichitas* held an ancient and immemorial right to this Wichita reservation, as a hunting ground, they also acknowledged that each one of the affiliated bands and also the Comanches held such an immemorial right. If they acknowledged that the *Wichitas* held a title, by occupancy, either to the entire leased district, or to the Wichita reservation, they also acknowledged that the Comanches and each one of the six other affiliated bands held the same title.

The stipulation of article 3 was expressly made applicable to each of the other parties of the second part, as well as to the Comanches and *Wichitas*. It contains the following clause, not quoted in the answer of the defendants:

> And that each of the nations, or tribes, named in this article, further agree to pay the full value for any injury, their people may do, to the goods or property of citizens of the United States, taken, or destroyed, when peaceably passing through the country they *inhabit*, or *hunt in, or elsewhere*.

This article requires these eight bands to permit citizens of the United States to pass and repass freely and without molestation through their settlements, or hunting grounds, in Texas, or in the leased district, *or elsewhere*, on their way to and from the other provinces of the republic of Mexico.

Article 4 is not more a grant of the right to hunt and trap west of the Cross Timbers *by* the Wichitas, *to* any or all of the other twelve tribes who were parties to the treaty, than it is such a grant *by* each of the other twelve tribes, *to* the Wichitas. The language of the article places them all on the same footing. This is its language:

> ARTICLE 4. It is understood and agreed by all the nations or tribes of Indians, parties to this treaty, that each and all of the said nations or tribes have free permission to hunt and trap in the Great Prairie west of the Cross Timber, to the western limits of the United States.



If this treaty of 1835 means that the Wichitas had settlements and hunting grounds, in the leased district, and were, therefore, the owners of that district, it also means that the Wacos, Towaconies, Caddos, Ionis, Keechies, Delawares and Comanches had settlements and hunting grounds, in that district, and were, therefore, its proprietors. But there is no proof, and there can be no pretense that either of these bands, except the Comanches, ever resided for a single month, in this district.

The "*pristine habitat*" of the Comanches, was probably south of the Red river. Some of them had crossed the river, and hunted in the leased district, and established camps or settlements there. The obligation of the Comanches, under the third article of the treaty, to give free and safe passage through their hunting grounds and camps, or settlements, south of the Red river, was as clear and strong as was their obligation to give free and safe passage through camps, or settlements and hunting grounds, which the United States, by the terms of that treaty, permitted them to enjoy north of the river. The obligation imposed on the other six parties of the second part, to accord free and safe transit through their ancient towns and settlements and hunting grounds south of the Red river, was as strong as was their obligation to give free and safe transit through lands which they were permitted, by the treaty, to use as hunting grounds north of the river.

The obligation, imposed by article 3 of the treaty of August 24, 1835, upon the *Wichitas*, whose "*pristine habitat*" was not in the leased district, to permit the parties of the third part to pass freely and safely through the eighty leagues of hunting ground, in the Cross Timbers, south of the Red river, which they had used at intervals for a hundred years, was just as plain and impera-

tive as was the obligation which it imposed upon them, to permit free and safe transit through any region in which the United States and the Choctaws, by the treaty, permitted these foreign-born Indians to hunt north of the Red river. The obligation imposed upon the Wichitas, to accord free and safe transit, through their village of one hundred and twenty-three grass wigwams, on the south side of Red river, was just as plain and imperative as was the obligation to give free and safe transit through the village of thirty-seven grass wigwams, which these foreigners had, without the knowledge of the United States, temporarily located under the high rocky range on the north bank of the river.

Unless the terms "settlements" and "hunting-ground," in this treaty, refer to settlements and hunting-ground outside the leased district, they are meaningless, as to the associated bands, who were parties to the treaty. These associated bands, I repeat, were the Wacos, Towaconies, Keechies, Caddos, Delawares and Ionis. The treaty binds each one of these bands to refrain from molesting citizens of the United States, entering their settlements, or hunting-ground, on their way to any of the provinces of Mexico. The answer of the Wichitas and affiliated bands shows, and the proofs incontrovertibly prove, that these bands were Texas Indians, had settlements in Texas, and had no settlements elsewhere. The treaty required them to refrain from the molestation of travellers, in their own settlements, in Texas, or, as to them, this third article of the treaty amounted to nothing.

The sixth article required these bands to refrain from doing any harm to Indians, strangers to the treaty, visiting their settlements, which settlements were in Texas, and nowhere else.

The use of the terms "settlements" and "hunting-



ground," in the treaty, then, did not imply that any of these bands had settlements in the leased district, and were therefore proprietors of the leased district. These words implied *per se* nothing whatever, as to the location of the settlements of any tribe, or band, included among the "Comanche and Wichita nations and their associated bands or tribes," who constituted the second party to the treaty of 1835. Nor did these words *per se* imply that either of these tribes, or nations, was the proprietor of the leased district, or of any other particular section of the earth's surface.

Nor does the statement, in the 9th article, that "the Comanches principally inhabit" Mexico (which then included Texas), imply that either of these nations, or tribes, owned the leased district. These words did imply that the Comanche tribe did not constantly, or for the greater part of the year, inhabit the leased district; but they did not imply, for they could not imply, that the Wacos, or Keechies, or Ionies, or Towaconies, did not constantly inhabit Mexico,—they did not, and could not, imply that the Wichitas had not inhabited Mexico, *i. e.*, Texas, at different times, and for long periods, prior to their removal, in 1833, to the western spur of the Wichita mountains, where Colonel Dodge found them in that year.

The counsel for the Wichitas contend that the statement, that "the Comanches principally inhabit" Mexico, implies that the other tribes principally inhabit the leased district. This is a grave mistake. Such an implication would have been a downright falsification of history, which, from the time of the emigration from Louisiana, had known the Wacos, Ionies, Keechies, and Towaconies, as *always* inhabitants of Texas, and *never* inhabitants of the leased district,—which had known the Wichitas, for more than eighty years, as residing, for long periods, in

Texas, on the Wichita river, on the Brazos river, on the south bank of the Red river, and on what is now known as the Texas "Panhandle," all of which localities were in Mexico at the date of the treaty.

It is true that from 1833 to 1835 the Wichitas had "principally inhabited" the western extremity of the Wichita mountains; but nothing in the treaty implies that they had "principally inhabited" these mountains for any length of time prior to 1835.

2. As a muniment of title, this treaty of 1835 stands confronted by the treaty concluded on the 26th of May, 1837, between the United States and the Kioway, Ka-ta-ka and Ta-wa-ka-ro nations, and their associated tribes or bands of Indians. If the court will compare these two treaties, it will be found that, with the exception of a few wholly immaterial words in the last article of each, these two treaties are, *mutatis mutandis*, absolutely identical. If it be true that, in the former treaty, the United States admit that the *Wichitas* and their associated bands are the proprietors of the leased district, then, for a like reason, it must also be true, that, in the latter treaty, the United States admit that the Kioway, Ka-ta-ka and Ta-wa-ka-ro nations and their associated bands are proprietors of the leased district. If it be true that, in the former treaty, the Muscogees and Osages acquire the right to hunt, in the territory west of the Cross Timbers, from the *Wichitas*, it must also be true that, in the latter treaty, the Muscogees and Osages acquire their right to hunt, in the country west of the Cross Timbers, from the *Ka-ta-kas*, or *Ta-wa-ka-ros*, or *Kioways*. If it be true that this grant, in the treaty of 1835, of the right to hunt, in the country west of the Cross Timbers, proved that country to be the property of the *Wichitas*, it must also be true that the grant, in the treaty of 1837, of the right to hunt there,



proved the country to be the property of the Ka-ta-kas, or Ta-wa-ka-ros, or Kioways. If it be true that the acceptance of the promise, in the first treaty, not to interfere with travel to Mexico, is a recognition of the title of the *Wichitas* to the leased district, so also must it be true that the acceptance of a like promise, in the second treaty, is a recognition of the title of the Ta-wa-ka-ros, Kioways, and Ka-ta-kas to the same land.

The third article of the treaty of August 24, 1835, contains the following clause:

> And it is distinctly understood and agreed, by the Comanche and Witchetaw nations and their associated bands or tribes of Indians, that the citizens of the United States are freely permitted to pass and repass, through their settlements or hunting ground, without molestation, or injury, on their way to any of the provinces of Mexico, or returning therefrom.

The third article of the treaty of May 26, 1837, contains this clause:

> And it is distinctly understood and agreed by the Kioway, Ka-ta-ka and Ta-wa-ka-ro nations and their associated bands or tribes of Indians, that the citizens of the United States are freely permitted to pass and repass, through their settlements or hunting ground, without molestation or injury, on their way to any of the provinces of the republics of Mexico, or Texas, or returning therefrom.

If the acceptance, by the United States, of this stipulation in the treaty of 1835 amounted to a recognition of the title of the *Wichitas*, to the leased district, the acceptance of the same stipulation in the treaty of 1837 amounted to a recognition of the title of the Ka-ta-kas, and Ta-wa-ka-ros and Kioways to that district.

Article 4 is, word for word, the same in each treaty, as follows:

> Article 4. It is understood and agreed, by *all* the nations or tribes of Indians parties to this treaty, that *each and all* of the said nations, or tribes, shall have free permission to hunt and trap in the Great Prairie, west of the Cross Timbers, to the western limits of the United States.

If this article, in the treaty of 1835, amounts to a recognition of the *Wichita* title, the same article, in the

treaty of 1837, amounts to a recognition of the Ka-ta-ka title. If it recognizes the title of the *Wichitas*, it also recognizes the title of the Ta-wa-ka-ros, the Kioways, the Comanches, the Cherokees, the Muscogees, the Choctaws, the Osages, the Senecas and the Quapaws. Indeed the Osage and Muscogee titles obtain a recognition two-fold stronger than that of the *Wichitas*, for they are parties to both treaties, and the *Wichitas* are a party to only one.

The names alone being changed, the fifth and sixth articles of the two treaties are identical, as follows :

ARTICLE 5. The Comanche and Witchetaw (Kioway, Ka-ta-ka and Ta-wa-ka-ro) nations and their associated bands or tribes of Indians (severally) agree and bind themselves to pay full value, for any injury their people may do to the goods, or other property, of such traders as the president of the United States may place near to their settlements or hunting ground, for the purpose of trading with them.

ARTICLE 6. The Comanche and Witchetaw (Kioway, Ka-ta-ka and Ta-wa-ka-ro) nations and their associated bands or tribes of Indians agree, that, in the event any of the red people, belonging to the nations or tribes residing south of the Missouri river and west of the states of Missouri (and Arkansas), not parties to this treaty, should visit their towns, or be found on their hunting ground, that they will treat them with kindness and friendship, and do no injury to them in any way whatever.

The "settlements and hunting ground," referred to in these two articles include, of course, the settlements and hunting grounds of the Wacos, Ionis, Keechies and Caddos. If the presence of these words proves that the Wichitas have, from time immemorial, had settlements and hunting grounds in the leased district, their presence also proves that the Wacos, Ionis, Keechies and Caddos have from time immemorial had hunting grounds in the leased district. This falsifies the answer of the defendants, who aver that these tribes have not from time immemorial had settlements and hunting grounds in that district. If the presence of these words proves the Wichitas to be the original and sole proprietors of the leased district, their presence also proves that the Kataka, Kioway



and Comanche tribes are its original and sole proprietors, and that the Wichitas are, therefore, not its original and sole proprietors. This "*proof*," like the monster in the fable, devours itself.

The counsel for the defendants are mistaken in their opinion that, by this treaty, the United States and the Choctaws recognized, in these foreign-born Indians, a right, held from time immemorial, to the land which the United States had, in 1820, conveyed to the Choctaws in payment for their country east of the Mississippi river. They are mistaken, in their opinion, that the effect of the treaty is to hold the United States to an acknowledgment of the existence of Wichita, Waco, Towaconi, Caddo, Ioni, Keechi, and Delaware towns, settlements, and hunting rights, where none in fact existed. It is not true that the treaty amounted to a solemn, binding recognition, by the United States, or by the Choctaws, of any title of any kind to the land now in controversy, or to any other part of the leased district, or to the country west of the leased district. The effect of the treaty was to grant the privilege of hunting, in the western country, to *all* the parties of the second part, and also to grant that privilege to all the parties of the third part, except the Choctaws who were made owners of that western country by the treaty of October 18, 1820, and needed no new grant to secure to them the privilege of hunting on their own lands. Another effect of the treaty was to secure from these foreign-born savages, who constituted the party of the second part, a promise not to kill or rob the more civilized parties of the second part, either in Texas or in the leased district, or in the western country, or *anywhere else*.

The mere fact that the United States entered into the treaty of 1835 with the Comanches and Wichitas is no

evidence that the Wichitas were owners or bona-fide residents of any part of the territory of the United States. Nor is it any evidence that the authorities of the United States admitted or considered them to be such owners or residents. It is no more evidence that the Wichitas were, or were considered, such owners or residents, than that the Comanches were, or were considered, such. In 1833 Colonel Dodge found a handful of Wichitas and a swarm of Comanches in the south-west corner of the leased district; and he reported their presence to the secretary of war. Learning that these Indians were within the limits of the United States, and apprehending mischievous consequences to the civilized Indians and whites, the president concluded to avail himself of their presence, within the jurisdiction of the United States, to tie their hands, as far as possible, by a treaty. The result was the treaty of 1835.

The journal of the commissioners who negotiated this treaty (Ev. Reb. No. 1) shows that the object of the United States was to secure peaceful relations between the powerful Comanches and the weak but vicious Wichitas, on one side, and the whites and civilized and semi-civilized Indians, on the other; that the United States authorities entered into this treaty, not because they regarded the great Comanche nation, or the little Wichita tribe, as the owner of the leased district, but because these wild Indians had located their wigwams there, for the time being, and were troublesome neighbors to other and better Indians, as well as to the whites.

*Third.* The Wichitas assert, as the third basis of their title, that in 1859 Messrs. Rector and Neighbors, agents of the United States, promised the leased district to the Wichitas, Wacos, Towaconies, Caddos, Ionies, Keechies and Delawares; and that the acting commissioner of Indian affairs approved this action of Messrs. Rector and Neighbors. At that time these bands, including men, women and children, numbered less than 1,500. (See commissioner's reports for 1854, 1867, 1870.) The leased district contained 7,713,239 acres of land. It is claimed that this alleged action of the agents and acting commissioner was effectual to invest each man, woman and child with a title to 5,142 acres.



But no such attempt to give away the property of the Choctaws and Chickasaws was made by these agents, or by the acting commissioner of Indian affairs. In the report which constitutes No. 5 of the claimants' proofs in rebuttal Mr. Commissioner Price accurately states the facts as follows:

> In the second place the Wichitas base their claim to the country south of the Canadian upon the promises made by Major Neighbors and Superintendent Rector at Fort Arbuckle.
>
> At a general council of the Wichita and other affiliated tribes convened at the Wichita agency January 22, 1883, as certified to by William Shirley, interpreter, it was claimed by the various chiefs of the different bands that at the council at Arbuckle the Indians were promised the country extending from Red river to the Canadian and from the Chickasaw country (or the ninety-eighth degree of west longitude) to the Antelope hills (near the one hundredth degree), and this is the claim made on their behalf by Mr. Pike and others. Reference to the contemporary correspondence concerning the council at Fort Arbuckle does not bear out this construction.
>
> In a letter dated February 1, 1855, Superintendent Neighbors suggested the propriety of negotiating with the Choctaw delegation, then in Washington, for a tract of land lying on the east side of Red river (known as Cache creek) near the Wichita mountains, for the colonization of the Wichita Indians and such other Prairie Indians as might be convenient to that location. (This recommendation is a recognition of the fact that the Choctaws and not the Wichitas had the title to the country in question.) It is presumed that this suggestion ultimately led to the council at Arbuckle.
>
> Troubles having arisen between the various tribes located in Texas and the frontiersmen of that state, it was determined to colonize these tribes in the Indian Territory, upon the lands leased from the Choctaws (the country now claimed by the Wichitas); Superintendent Neighbors was charged with this duty.
>
> On the 30th of March, 1859, Superintendent Rector was informed that the want of a military post with an adequate force at the proper point had necessarily delayed the commencement of operations for colonizing the Indians in the leased country, including the Wichitas, but that the war department had determined to establish the post. He was therefore

instructed to select a proper site for the agency in the same vicinity, and at the same time to fix upon a suitable location for the Wichitas and make such an examination of the country as would enable him to determine upon the proper place for locating and colonizing the Texas and other Indians, which it was intended to place within the leased district. In carrying out this policy the different bands were to be located upon distinct reservations, to be divided in severalty.

On the 2d of July, 1859, Superintendent Rector submitted his report in which he gives an account of his travels in search of suitable locations, describes those selected for the Delawares and Caddoes, Wichitas and others, and states that on the 30th of June he met Major Neighbors, who had arrived with the headmen of the Comanches, Huecos, Tanques, Tawacarros, Caddoes and Anadaghcos; that after Mr. Neighbors and himself had fully conferred together, the headmen of all the bands of those there, and of those in Texas, met in council, and were informed by them of the selections which had been made for their future homes; that they explained to the Indians the great pain and regret felt by their government at being compelled so hastily to remove those in Texas to another country, but assured them that they would be paid for all losses thus incurred, and that after removal they would occupy a country belonging to the United States and not within any state, where none could intrude upon them, and they would remain, they and their children, as long as waters should run, protected from all harm by the United States; that to the Wichitas they also promised to endeavor to obtain remuneration for their losses, incurred in consequence of the hostility of the Comanches, provoked by the slaying of their people encamped with peaceful intentions by the troops of the United States; and that the Indians expressed themselves entirely satisfied with the country selected for them.

It will be observed that the country selected was spoken of by these superintendents, who were well acquainted with both it and the Indians, as belonging to the United States and not to the Wichitas, they being present and expressing themselves as satisfied with the selection. They reported that the Indians were not prepared to take lands in severalty, and that such action would result disastrously. He states that the country around the Wichita mountains should be reserved as *common hunting ground.*

On the 14th of July, 1859, Superintendent Neighbors submitted his report concurring in that of Mr. Rector. On the 18th of July, 1859, Superintendent Rector transmitted a sketch of the country then recently visited by him, showing the selections made for the Wichitas and Kichais, Delawares and Caddoes, and the several bands to be removed from Texas, which he says is a very accurate one.

This sketch shows the reservation selected for the Wichitas and Kichais to be immediately south of 35° 30′ northlatitude, and immediately west of the ninety-eighth degree of west longitude, being 13½ miles in length and 8 in width, and containing by calculation 69,120 acres.

The reservation selected for the Caddoes, Delawares, and Texas Indians is a few miles southwest of the Wichita selection, being 19 miles long and 7 miles wide, containing 85,120 acres; total, 154,240 acres. Both these reservations are within the reservation at present occupied by the Wichitas.

S. A. Blain, agent for the Wichitas, in a report dated January 15, 1859, advocates bringing the Shawnees and Kickapoos to that agency, and



states that he had invited the chiefs of the Kickapoos to bring their people to his camp and settle upon the same terms granted to the Wichitas and others. He also says that

"The extent of the country, its fertility, its capability of sustaining a dense population, contradicts the position assumed that it was intended alone for the Wichitas, Keechies, and a few other trifling bands, all of whom collected and settled as contemplated will not make up a population of more than 4,000."

From these reports there does not appear to be any foundation for the claim that the agreement at Arbuckle gave the country south of the Canadian to the Wichitas. On the contrary, their reservation was exactly defined, it being suggested that the country around the Wichita mountains be reserved as "common hunting ground."

Mr. Pike says that Superintendent Rector promised the Indians "that they and their children would be permitted to remain on the particular reservations selected for them, and have all the other country as a common hunting ground and range for their cattle as *long as the waters should run.*" This statement is true as to the particular reservations only. Superintendent Rector does not state that he promised the country (except the reservations) to the Indians for any purpose, but says the country around the Wichita mountains "ought to be reserved as common hunting grounds, for which alone nearly the whole of it is fitted." Not a word is said of a range for cattle.

In the absence of any agreement ceding their lands, therefore, it is believed that the claims of the Wichitas cannot be sustained, but unless the agreement entered into October 19, 1872, can be successfully impeached, they have parted with whatever rights they may have possessed prior to that time.

It will be observed that Mr. Pike in his printed brief is silent upon this point. Mr. Leonard, however, as before stated, claims that said agreement was unauthorized, deceptive, and fraudulent in character.

At the council before referred to, purporting to have been held January 22, 1883, the several chiefs stated that their people had never consented to give any part of their country away. To the proceedings of the council is appended the affidavit of Philip McCusker, interpreter, to the effect that he was in Washington with the delegation from the Wichitas and affiliated bands in 1872; that Commissioner Walker told them that he wanted to fix the western boundary of the reservation; that he had decided to establish it 10 miles west of Fort Cobb, but none of the Indians were willing to consent to this, as they claimed to the 100th meridian, or, as they stated it, about 6 miles west of Antelope hills; that the commissioner refused to take any further action; and that the Indians, without consenting to the line fixed by the commissioner, returned to their homes.

J. J. Stem, in an affidavit taken at the same time, deposes that he accompanied the delegation to Washington; that the commissioner told them that he had brought them to Washington to tell them where the boundaries of their reservation would be fixed, and first spoke of making Cobb creek the western boundary, to which all of the Indians wanted to protest, but the commissioner would not permit them to talk; that the commissioner finally said that he would fix the boundary so as to take in the headwaters and tributaries of Cobb creek, which was substantially the same as had been determined on by the commissioner, and to which the Indians were unwilling to consent, although they finally signed a

paper to that effect under protest, which has never been ratified by the tribes; and that when they returned home they were abused by their people because they had signed such a paper.

William Shirley, interpreter, also testified to the same effect, stating that the delegation alleged that they had not been delegated by their people to cede any part of their country, or to relinquish any rights they might possess. These interpreters also testify that as the agreement has never been ratified either by the tribes or by congress the Indians regard it as void.

Special Agent Townsend reports that the Indians repudiate and reject the unratified agreement, and claim that they were coerced into signing it; that all but three of the signers are dead; that from two of them he could gain but little satisfaction, but that George Washington, a very reliable and intelligent man, and one of the signers, told him that at the time of the signing of that agreement the Indians did fully understand the conditions and terms of the papers they were signing; that at first Commissioner Walker proposed to run the western boundary near old Fort Cobb, but upon the Indians objecting, the lines were carried beyond the timber farther west, and then they, the Indians, were satisfied; that this is corroborated by the statements of others; and from the fact that by this agreement they obtained 589,517.19 acres more than was originally assigned them by the promises made at Fort Arbuckle, it is fair to presume that they were satisfied.

That this agreement was signed by all of the delegates from the different bands present in Washington, nine in number, does not admit of question. As to their authority to make such an agreement, the report made October 10, 1872, by Special Commissioner Henry E. Alvord, under whose charge they were brought to Washington, furnishes important information. He says:

"The Caddoes, Wichitas, and affiliated bands have yet no country which they can call their own; and it is very important that they should be satisfied in this respect. Most of the Indians of their agency are on the north side of the Washita river and south of the Canadian, but some are in the Eureka valley and below, on the Comanche reservation. To allow their occupation of any part of a reservation already set apart formally for other tribes will cause confusion and difficulties. There is a fine country between the Canadian and Washita rivers never yet specially assigned, and abundant for these people. Every *tribe and band of them are represented by chiefs or headmen in the delegation, prepared to discuss and settle their reservation question at the present visit*, and I trust the matter will be fixed before they return to their people. After a careful consideration of this subject, extending through the past five years, and *thorough discussion of it with the* Indians interested, I recommend that the country between the main channels of the Canadian and Washita rivers, from west longitude 98 to 98.30, be set apart for a permanent reservation for the Caddoes, Wichitas, and affiliated bands." (Annual Report, 1872, p. 140.)

This is the tract of country included in the agreement, except that the latter extends some ten miles farther west. Of the Caddoes he says: "The most important matter for this tribe is the final adjustment of their reservation question" (page 139). Of the Wichitas and their affiliated bands he says: "These tribes are interested, like the Caddoes, in the settlement of their reservation question; are *prepared by their delegates to fix the matter during this visit.*"



The commissioner of Indian Affairs, Hon. Francis A. Walker, in his annual report for 1872, referring to the Wichita agency, says:

"A permanent reservation should be set aside for this agency. * * * In the chapter of this report containing specific recommendations for legislation to be had by congress at its approaching session will be found the text of an agreement between these bands and the commissioner of Indian affairs, by which the Indians relinquished all their claims on account of lands formerly held by them, and of which they were dispossessed without their consent, and the government on its part confirms to them the tract now in fact occupied by them. Effect should be given to this agreement by congress at as early date as practicable. The claims relinquished have been long before congress, and may or may not have merit, a question not here considered; but it is equally for the interest of the government and of the Indians that these bands should be put as early as practicable in the way of self-support, a result which will be greatly forwarded by confirming to them a permanent home." (Page 44.)

These extracts show that this delegation had authority to make the agreement. They also show that the consideration for the relinquishment of their claims to land was the fact that by such relinquishment they secured undisputed title to a large tract of country, their right to which had theretofore been questioned.

There is no question in my mind but that the Wichitas and affiliated bands, by the agreement of October 19, 1872, relinquished all claim which they might have had before that date to any and all lands within the United States, except the reservation now occupied by them; and had the agreement been confirmed by congress at the time, as it should have been, its validity would never have been disputed or questioned.

The Wichitas are invested with no title to the leased district as the result either of "pristine habitat," or of admissions in the treaty of 1835, or of Mr. Rector's promises in 1859. But they resort to another ground of title. They think that neither the United States nor the Choctaws ever owned this land, and therefore the Wichitas must be its owners. They think that a lack of title in the United States and Choctaws is effectual to create a valid title in the Wichitas. But if it were a fact that neither the United States nor the Choctaws ever owned the land, that fact would not invest the Wichita tribe with its ownership. The Wichita title must stand on its own bottom. It cannot stand on a "dropped out" bottom of the United States title or of the Choctaw title.

The Wichitas insist that the Quapaws were not the owners of the leased district, when they ceded it to the United States. Suppose this to be true. The United

States, nevertheless, held, at the date of the cession to the Choctaws, an absolute and perfect title to the land, subject to any right of occupancy possessed by any Indian tribe or tribes. It was competent for the United States, at any time, in the exercise of the right of eminent domain, to remove from their title the incumbrance of this right of occupancy, making, of course, just compensation for the right so extinguished. When the United States ceded this land, in fee simple, to the Choctaws, they did, in fact and in law, finally and wholly divest the title of any and all rights of occupancy possessed by any Indian tribes, if any such rights theretofore existed. It thereupon became the duty of the United States to make just compensation for such extinguished rights of occupancy. But if any one or more of the twenty-seven tribes, shown to have temporarily located their wigwams between the Red and Canadian rivers, acquired such a right of occupancy as to be entitled to compensation therefor, neither the Wichitas nor any other one of the affiliated bands ever acquired such right. For the interests of these twenty-seven tribes in the leased district the United States are to account to those tribes, not to the Wichitas who are neither their heirs, assignees, guardians, nor attorneys.

In 1820 the Choctaws purchased from the United States the territory which, including the lands now known as the leased district, extended westward, between the Red and Canadian rivers, to the source of the Canadian; and they paid for this territory its full value, by the conveyance, to the United States, of their own lands east of the Mississippi. The Cherokees, Creeks and Seminoles, in like manner, paid in full for their western lands. But, for the privileges which these nomads the Wacos, Caddos, Ionis, Keechies and Wichitas have received from the United States, they have paid to the United



States, nothing, in money, or in land. When the Wichitas entered the leased district, they left their squatters' rights in Missouri, Kansas, Arkansas, Louisiana, and Texas, behind them. They had nothing with which to pay for the privileges conferred upon them, by the United States. They had no property except stolen horses and mules. Sibley says of the Wichitas of 1805: "The men go entirely naked, and the women nearly so." Colonel Dodge says of the Wichitas of 1833: "These Indians are chiefly naked, and armed with bows and arrows." Having been permitted, by the United States and the Choctaw nation, to hunt on Choctaw land, they imagine that this concession has obliterated from history the fact that they were mere nomads,—roaming in the regions west of the Mississippi,—now in Kansas, now in Arkansas, now in Louisiana, now in Texas, on the Brazos, on the Big Wichita, on the south bank of the Red river, on the remote "Panhandle," but never, before 1833, within the Wichita reservation, or within the leased district, except when, once or twice, they planted their wigwams on the north bank of the Red river.

For 150 years they have been known to history as nomads, wandering to and fro, in Kansas, Arkansas, Louisiana, and Texas. Until they were located on the Wichita reservation, they were always "wild Indians of the prairie." For more than half a century they have been notorious not as fierce warriors, like the Comanches, but as "arrant horse-thieves." They have moved their camps from the Neosho river, in Kansas, to the lower Washita in Louisiana, thence along the south bank of the Red river to the headwaters of that river, in the "Panhandle" of Texas; then back to the south bank of Red river, to the neighborhood of the Cross Timbers; then to the south bank of the Big Wichita, in Texas; then to the

south bank of the Red river, about 50 miles west of the Cross Timbers; then to the headwaters of the Brazos; then back again to the south bank of the Texas Wichita; and they have made the Wichita mountains their rendezvous, for the sale of horses and mules stolen, and the ransom of white children captured, in Texas. In their own answer, these Wichitas pose as gentle husbandmen, raising Indian corn, melons, and pumpkins, and knowing no guile; but in history, they figure as naked horse-thieves, murdering white men, torturing white women, and carrying white children into captivity.

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SEPTEMBER, 1896.