IN THE

Court of Claims of the United States

December Term 1904

JOHN T. AYRES, Executor of the estate of Eli Ayres, deceased,
vs.
THE UNITED STATES.

No. 11903.

BRIEF ON BEHALF OF THE CHICKASAW NATION.

(Including Objections to Claimant's Requests for Findings of Fact; Requests for Findings in Lieu of Those Proposed by Claimant, and Requests for Findings on Behalf of the Chickasaw Nation.)

MANSFIELD, McMURRAY & CORNISH,
Attorneys for Chickasaw Nation.

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(Including objections to claimant's requests for findings of fact; requests for findings in lieu of those proposed by claimant, and requests for findings on behalf of the Chickasaw Nation.)

That part of the Act of Congress approved February 24, 1905, conferring jurisdiction upon the Court in this case is set forth in the "Amended Petition" of the claimant (pp. 2, 3 and 4.).

Notwithstanding the fact that the claimant seeks reimbursement from the trust funds of the Chickasaw Nation in the hands of the United States to the amount of $191,044.70, no step was taken by him towards notifying the Chickasaw Nation of the suit, and its officers had no knowledge of pendency thereof until such knowledge was conveyed to the Governor of the Chickasaw Nation by the larned counsel representing the United States.

A petition stating (among other things):

"That in view of the contention of the claimant and upon consideration of the whole subject, it is believed that the interests of the Chickasaw Nation may be affected by the findings of fact by this Honorable Court and that it is, therefore, necessary that attorneys for said Nation be heard upon the issues arising in the case."
was immediately filed and called to the attention of the Court, and permission was granted the attorneys representing the Chickasaw Nation to be heard upon such issues arising in the case as may affect its interests.

It is our view that the two questions in this case of paramount importance, and which include all other questions that may arise, are:

First: Were the persons from whom Eli Ayres claimed to have purchased lands, entitled to reservations under the treaties of 1832 and 1834, governing the disposition of the lands of the Chickasaws in the State of Mississippi?

Second: If so, did the said Ayres purchase from such persons in such a way as to acquire title to said lands or to entitle him to reimbursement for money paid?

A holding of the Court adverse to the applicant upon either of these propositions would be fatal to his contention, and our argument will, therefore, be confined to the two propositions stated; but we shall first set forth our objections to claimant's requests for findings of fact, and our own requests for findings in lieu of those proposed by the claimant.

While the arrangement of requests for findings of fact adopted by counsel for applicant does not seem to logically conform to the questions submitted to the Court in the act of Congress conferring

jurisdiction upon it, we believe less confusion of the issues will result if we conform to such arrangement in setting forth our objections to such requests and our own requests in lieu thereof. We shall, therefore, first address ourselves to claimant's requests for findings of fact in the order in which they appear; after which we shall request findings of fact on behalf of the Chickasaw Nation upon the paramount propositions above set out.

OBJECTIONS TO CLAIMANT'S REQUESTS FOR FINDINGS OF FACT; AND REQUESTS FOR FINDINGS IN LIEU OF THOSE PROPOSED BY CLAIMANT.

There is no objection to claimant's first and second requests.

The Chickasaw Nation objects to claimant's third request and asks the Court to find, in lieu thereof, the following:

III.

That the persons from whom claimant's decedent, Eli Ayres, attempted to purchase certain lands in the State of Mississippi (Book 13, pp. 83 to 88), were not duly listed and enrolled, and lands were not legally reserved and located for them pursuant to the provisions of the treaties of 1832 and 1834, governing the disposition of the lands of the Chickasaws; and that such persons did not acquire the title to such lands.

The Chickasaw Nation objects to claimant's fourth request and asks the Court to find, in lieu thereof, the following:

IV.

That the persons from whom the said Ayres attempted to purchase certain lands in the State of Mississippi (Book 13, pp. 130 to 136), were not duly listed and enrolled, and lands were not legally reserved and located for them pursuant to the provisions of the treaties of 1832 and 1834, governing the disposition of the lands of the Chickasaws; and that such persons did not acquire the title to such lands.

The Chickasaw Nation obects to claimant's fifth request and

asks the Court to find, in lieu thereof, the following:

That the said Ayres attempted to purchase, at various dates, in the monthsj of May and June, in the year 1839, from various persons alleged by him to have been reservees under the treaties of 1832 and 1834 governing the disposition of the lands of the Chickasaws in the state of Mississippi (a list of such persons appearing in claimant's third and fourth requests for findings of fact); that instruments of writing purporting to be deeds of conveyance were attempted to be executed by said persons and delivered to the said Ayres, and have been offered in evidence; that it has not been shown, by competent evidence, that the sums of money alleged by the said Ayres to have been paid, were actually paid; or that if paid, as alleged, such payment represented a fair consideration for the lands.

The Chickasaw Nation objects to claimant's sixth request, and asks the Court to find, in lieu thereof, the following:

VI.

That the United States and its officers charged with the administrations of the affairs of the Chickasaws in the disposition of their lands in the State of Mississippi, under the treaties of 1832 and 1834, have disregarded the claim of the said Ayres; and that the lands alleged to have been purchased by him have been disposed of, as shown by the tabulated statement (46) transmitted by the Secretary of the Interior, dated August 3, 1905, and appearing upon pages 12, 13, 14, 15 and 16 of "Claimant's Requests for Findings of Facts."

The Chickasaw Nation objects to claimant's seventh request and asks the Court to find, in lieu thereof, the following:

VII.

That the remainder of said lands alleged by the said Ayres to have been reserved and located for Chickasaw Indian reservees, and which he claimed to have purchased, was disposed of by the Government of the United States, under the provisions of the treaties of 1832 and 1834 governing the disposition of the lands of the Chickasaws in the State of Mississippi, as shown by the tabulated statement transmitted by the Secretary of the Interior and referred to in the preceding paragraph.

The Chickasaw Nation objects to claimant's eighth request and asks the Court to find, in lieu thereof, the following:

VIII.

That the sum of $48,061.56, the proceeds of the public sales of the portion of said lands alleged by the said Ayres to have been reserved and located for Chickasaw Indian reservees (a list of such alleged reservees appearing in claimant's third and fourth requests for findings of fact) and which he claimed to have purchased, was disposed of and the proceeds invested by the United States as shown by the report of the Secretary of the Treasury dated November 14, 1905, and set forth on pages 17 and 18 of "Claimant's Requests for Findings of Fact."

The Chickasaw Nation objects to claimant's ninth request and asks the Court to find, in lieu thereof, the following:

IX.

That twenty-one of the instruments of writing purporting to be deeds of conveyance to the said Ayres have attached to them the certificate of one only of the committee of seven persons authorized by article four of the treaty of 1834 to pass upon the competency of reservees; and that there is also attached to each of said twenty-one purported deeds a certificate of A. M. M. Upshaw, Chickasaw Agent, purporting to be in accordance with said treaty.

That the remaining 129 instruments of writing purporting to be deeds of conveyance to said Ayres have attached to them the certificate of one only of said committee of seven, and there is no certificate of the Indian Agent attached to these purported deeds as required by the treaty.

That none of said purported deeds were ever approved by the President of the United States or by any person designated by him to approve the same, and that none, with the requisite approval endorsed thereon, were ever registered under the laws of the State of Mississippi, as required by the treaty.

That the right of the persons from whom said Ayres claimed to have purchased was questioned and, upon the suggestion of the Indian Agent, the Commissioner of Indian Affairs recommended to the Secretary of War who directed, on May 4, 1841, that the list of such persons be sent to the committee provided by the fourth article of the treaty of 1834 for revision.

That said list was forwarded to Major Armstrong and submitted to the committee, and on the 26th of October, 1842, the following report was submitted:

Boggy Depot, 26th Oct., 1842.

Sir:—At a council of Chickasaws began & held this day for the purpose of examining certain land claims forwarded to Wm. Armstrong, act. supt., by the War Dept., being the land claims submitted by Joseph Bryan & Alfred Iverson. In accordance with the require-

ments of the War Dept., we proceeded to business by first calling the name of each claimant from the roll. This was done in the presence of three commissioners and a number of the oldest Chickasaws in the Nation. Inquiry was made, if the individual was not present, whether he was a Chickasaw or not and entitled to land. Notice had previously been given that a council would be held to examine these land claims. After a careful and full examination, as above stated, we can only find four individuals that we consider entitled to land. Their names are Onah mah umby, No. 748, one section; Stimo both ka, No. 370, two sections; Ebah chuck way tubby, No. 746, one section; Tish qui yua, No. 595, one section.

We felt convinced that there could not possibly be such a number of Chickasaws yet entitled to land. In this we were not mistaken, and as a large tract of country has been reserved from sale to satisfy these claims we now hope the government of the United States will have these lands sold for the benefit of the Chickasaw people to whom they of right belong. The manner of getting up these land claims bears the impress of injustice. We are desirous of seeing every Chickasaw entitled to land provided for, but after a fair and open investigation in the presence of Capt. Armstrong, act. supt., and a large number of Chickasaws, embracing some of the oldest and most respectable citizens of the nation, we certainly have a right to expect that no further attention will be paid to these claims and that the land may go into the Chickasaw fund, as other lands have. These claims are got up by those claiming to reside west. If they were really Chickasaws it would show that a very large portion of our nation emigrated before the treaty of 1834. We repeat again

our wish to do justice to every Chickasaw, but to sanction these land claims would be an act of injustice to our people and giving land to those who have no claim. The four names mentioned as entitled to land were known to be Chickasaws who have never been provided for. We wish them to have land. All others we most earnestly and solemnly protest against receiving land. We have forborne to say anything in relation to the magnitude of these claims. We leave it to others to determine whether the whole affair does not show an attempt at speculation at our expense. We look to the government to do us justice by setting aside these claims.

(Signed) Ish te ho to pa King (His X mark).

(Here follow twenty-four other names.)

Witness: Pitman Colbert
Joseph Colbert (His X mark).
Chas Johnson

T. Hartley Crawford, Esq.,
Comms. of Ind. Affairs,
Washington City.

(See document marked in red ink 27, filed in this cause August 4, 1905.)

That subsequent thereto, on Oct. 28, 1842, Major Armstrong submitted his report as to what action had been taken on the list sent by the Secretary of the Interior for revision, of which the following is a copy:

Choctaw Agency,
Octr. 28th, 1842.

Sir: After paying the Choctaw annuity for 1841 I returned

home by way of Boggy Depot and attended a council of the Chickasaws convened for the purpose of investigating the claims of individuals for land under the Chickasaw treaty. This business has been delayed unusually long, owing to the fact that an arrangement was made with the Chickasaws a pear ago to make the investigation immediately after the annuity of 1841 should be paid to the Choctaws. This was considered a proper time to give notice to all concerned. The annuity, you are aware, has not been paid until lately. This is the reason for the delay.

In making an examination I was as particular as I could be. I first read your report to the Secretary of War, and also your instructions authorizing investigations. The whole business was well understood and explained. The council was large, and I observed the oldest and most respectable Chickasaws were present. Some of the Indians whose names were on the roolls appeared and endeavored to satisfy the Chickasaw Commissioners that they were really Chickasaws entitled to land under the treaty. This they were unable to do except the following names: Onah Mah um bly, 748 one section; Sti mo both ka, No. 370; two sections; Ebah Chuck may tubby, No. 746, one section; Tush qui qua, No. 595, one section of land. In this I concurred. There might have been a few others that could have produced evidence of their being Chickasaws had they been present. This is, however, doubtful as I am well satisfied that the claimants are, generally, Choctaws who have been prevailed upon by land speculators to make the attempt to obtain land as Chickasaws.

It will be observed that none of the applicants were ever before me. I was in the Nation as agent all the time, and if the claimants and those who purchased their lands were satisfied of the justice of

the claims, it might fairly be presumed that they would have been proved up before me. It is said that deeds have been obtained and registered in the county in which the land lies in Mississippi. Nothing has ever been paid, so far as I have ever heard or believe, for these lands. The manner of proceeding in investigating the claims is stated in a communication from the Chickasaws who were present. A fair opportunity was given the claimants to come forward. I saw no indisposition on the part of the Chickasaw commissionerss to pass the claims of such as were really entitled to land. Many of the names I know myself to be Choctaws—such at least I have considered them ever since their emigration.

I have therefore no hestitation in stating that the claimants rejected were not entitled to land, with a bare possibility that out of such a large number there might have been some two or three others that, could they have been present, might have satisfied the commissioners that they were entitled to land.

I enclose the rolls and other papers upon which I acted being the same sent to me by the Department.

Very respectfully your Obt. Servant,

(Signed.) WM. ARMSTRONG,

Act. Supt W. T.

T. Hartley Crawfor d,Esq.,

Washington City.

(See report of Major Armstrong, marked in red ink 26, filed in this cause August 4, 1905.)

That the action of the Boggy Council and the recommendation of Major Armstrong, the representative of the Goverment, were ap-

proved by the Secretary of War as follows:

"In the mattre of certain claimants to reservations under the treaties of Pontotoc and Washington, representing themselves to be Chickasaws, the lists of their names having been transmitted to the committee, as provided in the fourth article of that treaty, for examination, they have reported against the claimants that, excepting a few (4) named they are not Chickasaws entitled to reservations; and this report is concurred in by the agent and superintendent who represents the circumstances under which the decision of the committee was made to have been peculiarly favorable to a full and fair investigation. Without now saying that this report, under the provisions of the treaty, is conclusive, although I am very much inclined to that opinion, yet it commands the highest confidence.

The interests of the State of Mississippi require that this question, which has been so long depending, should be settled, and the large tracts of land necessary to meet these claims should be relieved from this contingent incumbrance, or that it should be made final.

As there is no probabillity that a more full and satisfatcory investigation can be had under all the circumstances, the report of the committee aforesaid, concurred in by the Indian Agent, is approved. The claims recommended by them are admitted, and those disallowed by them are rejected.

If, however, they have reported in favor of any Chickasaw who emigrated prior to the treaty of Washington of

1834, such claim can not be allowed, as the utmost liberality of construction can not extend the provisions of the treaties aforesaid beyond the date mentioned.

It is obvious that by treaty of 1834 the reservations became the individual and absolute property of the reservees, and that the proceeds of all sales made pursuant to the provisions of the treaty belong to the reservees, respectively, and not to the Chickasaw Nation.

(See copy of letter addressed to Hon. James M. Porter, Secretary of War, dated War Department, Office Indian Affairs, 17th July, 1843, signed T. Hartley Crawford, marked on back in blue pencil "No. 9," and in red ink "No. 23," filed in this cause August 4, 1905.)

The Chickasaw Nation objects to claimant's tenth request and asks the Court to find in lieu there of, the following:

X.

That while said Ayres has been industrious in the presentation of his claim to Congress, his industry has been exerted in the wrong direction; and that, notwithstanding the fact that the Courts had ample power to protect and enforce his rights if he was in fact the owner of the title of lands claimed, he has failed to submit himself and his alleged rights to the jurisdiction of the courts and his failure so to do amounts to a confession that he had no rights which were enforcible.

The Chickasaw Nation objects to claimant's eleventh request and asks the Court to find, in lieu thereof, the following:

XI.

That neither the said Ayres, in his lifetime, nor his heirs or legal representatives, nor any person or persons in his or their behalf, have received from the alleged Indian reservees claimed by the said Ayres to have been their grantors, or from the United States, any reimbursement for money claimed to have been paid.

The Chickasaw Nation objects to claimant's twetlfth request for the reason that it is a repetition, in transposed form, of the report of the Secretary of the Treasury dated November 14, 1905, and quoted in claimants eighth request for findings of fact; and for the further reason that his request for a holding that,

"—the claimant should be reimbursed from the account for 'Carrying into effect Treaty with Chickasaws,' under Act of April 20, 1836."

is not warranted by the Act of Congress conferring jurisdiction upon this Honorable Court.

XIII.

The Chickasaw Nation joins in the Government's objection to claimant's thirteenth requested finding of fact.

REQUESTS FOR FINDING OF FACT ON BEHAL OF THE CHICKASAW NATION

The Chickasaw Nation, in addition to the findings of fact requested in lieu of those proposed by claimant, requests the Court to find as follows:

I.

That the persons alleged to have been the grantors of claimant's decedent, Eli Ayres, were not entitled to reservations under the treaties of 1832 and 1834 governing the disposition of the lands of the Chickasaws in the state of Mississippi; and that no title was ever acquired by them to the lands which the said Ayres claimed to have purchased.

II.

That, without regard to whether such persons were entitled to reservations or acquired title thereto, under the treaties above mentioned, the said Ayres failed to comply with the requirements of the fourth article of the treaty of 1834 governing the sale of the lands of Chickasaw Indian reserves, and the instruments of writing purporting to be deeds of conveyance from such alleged reservees to him are void, and that he thereby acquired no title to the lands claimed to have been purchased.

ARGUMENT.

THE PERSONS ALLEGED TO HAVE BEEN GRANTORS OF CLAIMANT'S DECEDENT, ELI AYRES, WERE NOT ENTITLED TO RESERVATIONS UNDER THE TREATIES OF 1832 AND 1834 GOVERNING THE DISPOSITION OF THE LANDS OF THE CHICKASAWS IN THE STATE OF MISSISSIPPI; AND NO TITLE WAS EVER ACQUIRED BY THEM TO THE LANDS WHICH THE SAID AYRES CLAIMS TO HAVE PURCHASED.

(1) Such persons, if Chickasaw Indians, were not entitled to reservations under the treaties of 1832 and 1834 because they had abandoned their tribal relations and removed west of the Mississippi River.

By article one of the treaty of Oct. 20, 1832, (7 Stat. at L. p. 382) the Chickasaws ceded to the United States "all the land which they own on the east side of the Missippi River, including all the country where they at present live and occupy."

The reasons, considerations, etc., for this cession are duly expressed in the treaty, one of them being that the "Chickasaws desired to seek a home in the west."

The second article of the treaty authorized the United Statet to survey and sell these lands for the benefit of the Chickasaws.

The fourth article provides that should the Chickasaws fail to procure such a country to remove to and settle on, previous to the first public sale of these lands, then they were to select out of the surveys a comfortable settlement for every family *in the Chickasaw Nation,*

to be held and occupied until they should find a country suited to their wants and conditions; and the United States guaranteed to them the quiet possession and uninterrupted use of said lands so long as they might *live on and occupy the same.*

The objects of this treaty have been repeatly declared and are well known to this court. The main object was to rid the State of Mississippi of the Indians by providing them a suitable home elsewhere; one better suited to their conditions. When such a home was found and removed to their occupancy of the lands in Mississippi was to cease and these lands were to be sold by the United States. This is expressly declared in the supplement and explanation to said treaty of Oct. 22, 1832, (7 Stat. at L. p. 388).

This treaty, therefore, indisputably vested the title to these lands in the United States, reserving to each family *in the Chickasaw Nation* a temporary right of occupancy.

The treaty of May 24, 1834, materially changed the Pontotoc agreement of 1832. Its provisions have been thoroughly discussed by counsel for the government in his brief and it has been many times before the highest courts.

Article two thereof (7 Stat. at L. p. 450) sets forth that "the Chickasaws are about to abandon their homes, which they have long cherished and loved; and though hitherto unsuccessful they still hope to find a country adequate to the wants and support of their people."

By article three the United States agree to protect said Indians in the rights of person and property.

Then comes article four which provides: "Many of the people are quite competent to manage their own affairs, though some are not capable and might be imposed upon *by designing persons.*" It is

therefore agreed that the reservations thereinafter admitted, should not be permitted to be sold, leased or disposed of, except under certain conditions precedent which are enumerated in the sections.

Articles five and six designate the persons entitled to reservations and the amounts of land which they shall be entitled to select. Articles six further provides that the class of persons referred to therein, before entitled to reservations, shall be selected by the seven commissioners mentioned in article four and that as to the sale, lease or disposition of their reserves they shall be subject to the conditions and restrictions set forth in said fourth article.

By the fourteenth article all the articles of the treaty of Pontotoc except the twelfth and thirteenth articles thereof, inconsistent with the provisions of this treaty are declared to be revoked.

As will be seen, the treaty of 1832 ceded to the United States all the lands of the Chickasaws east of the Mississippi River and by the treaty of 1834 the United States re-ceded to the Chickasaw Nation a limited quantity of said land for a permanent home.

Rest v. Doe, 85 U. S., 807.

It ceded back to the Chickasaws in Mississippi what was agreed upon by the parties to the treaty as enough land for their wants, the amounts which each was to receive being stated in articles five and six of the treaty.

It cannot be denied that the title to the residue of the lands, after the selections and locations had been made, under the treaty of 1834, remained in the United States to be sold by it and the proceeds devoted to the purposes named in the treaties.

Holden v. Joy, 17 Wall, 211.

U. S. v. The Choctaw Nation, 179 U. S. 494.

Nor can it be successfully disputed, and we do not pretend to do , that when the selections and locations were made *in accordance ith the terms of the treaty* the reservees became vested with ll title and that such Indian reservees had precedence over a subseent patentee of the government.

The two treaties under discussion must be read together. Unss the language is plain and well understood by both the conacting parties the intent of each at the time of the making of each of e treaties governs their construction. If a doubt exists it must be esolved in favor of the Indians.

All portions of the treaty of 1832 not inconsistent in any respect ith the provisions of the later treaty remained in full force and ffect.

The preamble of the treaty of 1832 reads: "The Chickasaw Nation find themselves oppressed in their present situation * * .. .. They prefer to seek a home in the west."

Article four provides that should they fail to procure a suitable ome they were to select a comfortable settlement for *every family in the Chickasaw Nation,* to be held until a country was found suitable for their wants and conditions. The land so set apart was not to be even rented, but preserved for the benefit of posterity so long s the Nation should live on it.

Supp. treaty 1832, 7th Stat. L. p. 388.

True, this mode of settlement was changed by the treaty of 1834 but for the puprose of our argument the recital is valuable, as showing the intent of the Indians at that time. The treaty of 1834 provides that the Chickasaws desire to have *within their own direction and control* the means of taking tracre of themselves.

The seventh article, conferring certain rights upon intermarr white persons, provides: "Rights to reservations as are herein, *and other articles of this agreement secured,* will pertain to those w heretofore intermarried with the Chickasaws and are *residents the Nation.*

We contend that a careful reading of these treaties will sh that they contemplated the the setting apart of reservations to o such Chickasaws as were in the nation at the time the treaties we made.

It is conceded by counsel for claimant in his statement and a stract of evidence, and the record undoubtedly shows, that the alleg grantors of Ayres were not residents in the nation at the time of t treaty of 1834. If they were Chickasaws at all (and the reco shows they were not) they had abandoned their tribe and mov west. They had sought and found, with the Choctaws, a new hom apparently suitable to them and were not such Indians as were co templated by the fourth, fifth and sixth articles of the treaty of 183

The evidence shows that Ayres was a resident of the State Mississippi and that Dollarhide, one of the witnesses to his purporte deeds was a resident of Arkansas, and that all of the transactio surrounding the alleged purchases occurred west of the Mississip River in the new Choctaw country. It is interesting to note furth that these transactions occurred in 1839, seven years after the mak ing of the treaty of 1832, five years after the treaty of 1834, and tw years after the Chickasaws had closed out all of their affairs in Mis sissippi and removed to and purchased an interest in the new Choctaw country by the Choctaw-Chickasaw treaty of 1837. In view of thes conditions is it not reasonable to conclude that it was Ayres who co

ived the idea that the persons claimed as his grantors might be en- lled and given reservations and that his plight, in the loss of his oney (if indeed it was lost) is but the result of his failure to carry rward to a successful consummation a gigantic speculation in the nds of the Government's wards, by reason of the vigilance and effi- ency of the Government's representatives.

(2) *Such persons were not entitled to reservations because hey were not listed and enrolled as reservees according to the re- uirements of the treaties* of 1832 and 1834.

The claimant contends that the alleged grantors of Ayres were duly and regularly listed and enrolled as reservees. He avoids the facts as shown by the record, relating to their alleged listing and en- rollment, and relies upon a few expressions of opinion of certain offi- cers of the government, which are set forth by him. There have been probably a hundred reports on this claim and, in the main, they have all been adverse, since no relief whatever has ever been given the claimant from the institution of the claim some fifty years ago. It is our view that no expression of opinion by any individual officer of the Government heretofore made, should be highly persuasive with this Court. The act conferring jurisdiction upon it requires a finding upon the facts and the facts appear from the record. A consideration of all the reports heretofore made, however, if insisted upon by the claimant would be of no advantage to him, since there have been per- haps twenty reports adverse to him where there has been a single ex- pression in his favor.

Ayres claimed to have purchased from reservees under the fifth and sixth articles of the treaties of 1834. Were these persons listed and enrolled as required by the treaties?

The learned counsel for the Government has abundantly de monstrated the requirements of the treaties of 1832 and 1834 as t the listing and enrollment of reservees thereunder. We shall, there fore, take the liberty of adopting, as a whole the argument made b him upon that proposition, and assume that it has been established

First, that reservees under the fifth article of the treaty of 1834 were to be listed by the *Chiefs of the Chickasaw Nation* as requir ed by the 14th article of the treaty of 1832; and

Second, that reservees under the sixth article of the treaty of 1834, were to be listed and enrolled by the *committee of seven per sons* named in the fourth article of the treaty of 1834.

On page 26 of claimant's statement and abstract of evidence, in his effort to show the nullity of the action of the Boggy Depot coun cil he states: "In this connection it is pertinent to call attention to the order of the Secretary of War directing that the same be referred for investigation. That order, in express terms, refers the matter to the committee provided for in the fourth article of the treaty of 1834. The committee referred to consisted *at that time of the king, and the* six chiefs or headman named in article four."

On page 25 of the same document, counsel, in discussing this same question, says: "The Secretary of War ordered the list to be sent to the committee provided for in the fourth article of the treaty of 1834. The committee named in article four of the treaty consist ed of Ish to ho pa, the king, Levi Colbert, George Colbert, Martin Colbert, Isaac Alberson, Henry Love and Benj. Love." Thus oppos ing counsel admits the fact, and bases his argument as to the action of the Boggy Depot Council hereafter referred to, that the seven persons named in article four of the treaty of 1834 were living in 1841. They

were, then, certainly living and in being in 1839 when Ayres' operations began. Did they (such persons) perform the duties required of them in the enrollment of these alleged sixth article reservees? They did not according to the evidence offered by the applicant. On pages seven eight and nine of "Claimant's Statement and Abstract of Evidence" appear copies of alleged certificates upon which claimant seems to rely to give validity to the enrollment of reservees. To no one of such certificates is attached the names of the seven persons mentioned in article four of the treaty of 1834. To the first the name of three of such persons appear to be attached. To the next only two and to the next only one. There is no evidence to establish the fact that these are the certificates which were in fact attached to the list of persons claimed to have been the sixth article grantors of Ayres, but since they are the only purported certificates which the claimant sets forth we presume it is his purpose to have the Court infer that they are the certificates relied upon. If so, they are, as above shown, of little advantage to him since they not only fail to show that the treaty was complied with but they show affirmatively that the requirements of the treaty were not complied with.

It also appears from the evidence offered by the claimant that the alleged enrollment of the persons claimed to have been fifth article reservees were equally irregular. The certificate set out on page 8 of "Claimant's Statement and Abstract of Evidence" certifying that certain claimants were Chickasaws is signed by the "Chiefs and Captains of the Choctaw Nation residing west of the Mississippi."

How can it be contended that the Chiefs of the *Choctaw Nation* had any authority to pass upon the listing and enrollment of Chickasaw reservees under the treaty of 1834? Yet it is apparent that the

claimant relies, in a measure, upon their acts, to give validity to the enrollment of the alleged reservees claimed to be his grantors. To what extent he so relies does not appear, and this instance, standing apart as it does, as the most absurd effort in a long chain of absurd efforts to elude the watchful eye of the Government and defraud its wards of their lands, throws a flood of light upon all the other circumstances attending this very remarkable transaction.

The fact that the *Chiefs* of the Choctaw Nation were dragooned into service to make it possible for Ayres to get his land speculations on foot, is a concession by them that reservees should be listed and enrolled by *Chiefs*. True, as shown by counsel for the Government and above referred to, the reservees under the fifth article of the treaty of 1834 were required to be listed and enrolled by the Chiefs of the *Chickasaw Nation;* but when Ayres conceived his plan and began his operations in 1839, there were no Chiefs of the Chickasaw Nation, since as that Nation had, in 1837, removed from Mississippi and purchased a home in the west. This small circumstance did not seem to discourage Ayres. Since there were *no* Chickasaw Chiefs he doubtless decided to do the next best thing and bring the Choctaw Chiefs into service!!

(3)..*Such persons were not entitled to reservations because, whatever was done originally in an effort to list and enroll them, as reservees was undone and set aside by the "Boggy Depot Council."*

We deem it unnecessary to here set forth the history of the proceedings of the "Boggy Depot Council" further than to refer to the various documents appearing in the record. We deem it sufficient to say that the representatives of the government and the leading officials and men of the Chickasaws realized that a stupendous wrong

was about to be perpretrated. As we have heretofore shown, lists of persons were prepared in violation of the requirements of the treaties of 1832 and 1834 and rights were beginning to be asserted by speculators who claimed to have purchased them. This condition was called to the attention of the government's officers and, vigilant and watchful as it ever is of the interest of its wards, it took immediate steps to ascertain if the persons alleged to have been enrolled as fifth and sixth article reservees were, in fact, so listed and enrolled as required by the treaty. This duty the government was required to exercise by its solemn treaty obligation to its wards. It was a duty resting with it in its sovereign capacity and a duty specifically required by the treaties in the superintendance and administration of the affairs of its wards, the Chickasaw Indians. It was in the discharge of this duty that the highest executive officer of the Government having the management of Indian Affairs, the *Secretary of War,* called together the "Boggy Depot Council"' and directed that it act, in conjunction with the government's representative, the Indian Agent, in ascertaining the facts with reference to the alleged enrollment of these persons and, if properly enrolled, to approve them, and if not properly enrolled, to so declare.

Counsel for claimants, with much industry, urges that the "Boggy Depot Council" was irregular and that its acts were unauthorized. He cannot have his cake and eat it at the same time. We contend that the "Boggy Depot Council" was regular and that it had full authority to do that which it did But passing from this, let us compare its regularity and authority in setting aside the enrollment of these alleged 5th and 6th article reservees with the authority and regularity of their alleged original enrollment.

As heretofore shown 5th article reservees were required to be listed and enrolled by the *Chiefs of the Chickasaw Nation;* and 6th article reservees were required to be enrolled by the *seven persons* named in article four of the treaty of 1834.

As to the persons alleged by Ayres to have been his 5th article grantors there is no pretense that they were listed and enrolled by the *Chiefs of the Chickasaw Nation,* but there is a lame pretense and an invitation for us to infer that they were listed and enrolled by certain Chiefs of the *Choctaw Nation* in the new Choctaws country, four years after the treaty of 1834 and a year after the Chickasaw Nation in Mississippi went out of existence and moved to the western country. There was present at the "Boggy Depot Council," as shown by the records, Ish-to-ho-to-pa, King of the Chickasaws, and perhaps other persons who had been Chiefs under the old organization, because it is stated by the Indian Agent that the council was composed of the leading men of the tribe. It thus appears that the "Boggy Depot Council"composed of the King of the Chickasaws and its leading man, was vested with more authority to act in the matter of the listing and enrollment of fifth article reservees, under the fourteenth article of the treaty of 1832, than the "Chiefs and Captains of the Choctaw Nation," who assumed to act but who had no more authority to act for the Chickasaws and to affect their property than the aged and troublesome Geronimo, Chief of the Apaches.

As to the persons alleged by Ayres to have been his 6th article grantors, there can be no contention that they were listed and enrolled by the seven persons mentioned in article 4, of the treaty of 1834, as required, even if the copies of the certificates offered in evidence are, in fact, the certificates relied upon to give validity of the list. The

treaty required such list to be made up by the seven persons, and to the certificate appearing in the record there are appended to certain of them the names of only three, and to certain others only two, of the seven persons. There were present at the "Boggy Depot Council," as shown by the record, Ish-to-ho-to-pa, and Isaac Alberson, two of the persons mentioned in article four, and also, as stated by the Indian Agent, other leading men of the tribe. It can therefore not be contended that those of the committee of seven who attended the "Boggy Depot Council" and participated in its actions were not clothed with as much power and that their acts were not as regular as the acts of the two or three persons who originally attempted to list and enroll the alleged 6th article grantors of Ayres.

This council reported that the Chickasaws were willing and anxious that all Chickasaws should have land. That the claims under investigation bore the impress of fraud. That they were gotten up by those claiming to reside west, and that if the claimants were really Chickasaws it would show that a very large portion of their nation emigrated before the treaty of 1834. It rejected 520 of the claimants, including all the alleged grantors of Ayres, on the grounds that they were not Chickasaws; and Major Armstrong, in his report above referred to, states that many of the names on the list were known to him to be Choctaws—such at least he had considered them ever since their emigration. He further states that none of the applicants, or purchasers from them, ever appeared before him to prove their claims as Chickasaws, though he had been in the nation as agent all the time.

The report of this Council received the approval of the proper departments of the government and the president. It found that the original listings were obtained by fraud or mistake. Its action was

as valid and more valid than were the original lists from which the reservations was made. It was called by one of the parties to the treaties with the consent and acquiescence of the other, and its report was adopted, accepted, and recognized by both of said parties.

Counsel for claimant insists that those of the committee of seven who participated in the "Boggy Depot Council" stulified themselves. This would seem to be a conclusive confession that the "Boggy Depot Council."did undo that which was originally attempted. It being agreed that the original attempted listing and enroll ment, was in fact, undone the proposition is reduced to an inquiry into the motives of that tribunal and whether they were justified in the action taken. Upon this proposition the facts, as shown by the record, are not difficult to understand. The original attempted listing and enrollment of these fifth and sixth article reservees was a scheme hatched and attempted to be carried through by land speculators in Mississippi who followed the Indians into the new country in the west and sought by inducing some of their leading men to committ illegal and unauthorized acts, to procure, for a nominal consideration, large areas of lands of the Chickasaws in the State of Mississippi, which had not, up to that time, been sold by the Government.

The leading Chickasaws who had been induced originally, to recommend the listing and enrollment of these persons, when they realized the far reaching consequences of their acts, did all in their power to avert the wrong about to be perpretrated and called upon their guardian government for its co-operation. That co-operation was given promptly and effectively, and the assembling of the "Boggy Depot Council" was the result. By it the alleged reservees were

found not to be Chickasaws and not entitled to reservation of land; and this action is not only creditable to the leading men of the Chickasaw Nation who participated in it, but the result of that council stands as a monument of credit to the government and its representatives in the administration and disposition of the property of its helpless wards.

CASES CITED BY ATTORNEY FOR CLAIMANT.

The following decisions are cited and relied upon as establishing title in the alleged grantors of Ayres:

Wray v. Doe, 10 Smed. & Mar. (Miss.) 461.

Hardin v. Ho-yo-po-nubby's Lessee, 27 Miss. Rep. (5 Cush) 582.

Best v. Polk, 18 Wall, 115.

After an examination of these decisions, it is difficult to understand why applicant extracts so much comfort from them, even if it be conceded that they decide what he urges. Our view is that since Ayres wholly failed to comply with the requirements of the treaty of 1834, in his alleged purchases, the title or lack of title in the alleged Indian reservees is not a matter that has any bearing upon his rights. But, before passing to a discussion of the irregularity and illegality of the alleged purchasers of Ayres, we shall address ourselves to the decisions referred to; and upon a consideration thereof we believe it will appear that they have no bearing upon the facts before this Honorable Court, of advantage to the applicant or his alleged grantors.

The case of Wray v. Doe is first referred to. The case of Hardin v. Ho-yo-po-nubby's Lessee is merely an affirmance of the former decision, the facts being the same. In the case of Best v. Polk, decided by the Supreme Court of the United States the facts before the Court parallel, in all respects, the facts in the two preceding cases.

In all these the facts were as follows: Suit in ejectment was instituted against a patentee of the government who had purchased at the public land sales, on behalf of a person claiming to be a Chickasaw Indian and for whom the land in controversy was located and set

aside under the sixth article of the treaty of 1834. As showing title of the alleged Indian, the certificate of the Register of the Land Office showing that the lands in controversy were reserved and set apart for him, under the article of the treaty referred to, was offered in evidence. The defendants objected and the objection was overruled, the court holding such certificate to be competent evidence. The defendants then sought to have the Court require the alleged Indian reservee to show that all of the preliminary steps leading up to the location and setting aside of the lands, required by the treaties of 1832 and 1834, had been regularly taken. Upon this proposition the court held that the filing of the certificate of the Register of the Land Office showing the setting aside and location of the lands, raised a presumption that the preliminary steps required by the treaty had been taken.

No further evidence was offered and upon these facts all the cases were decided.

The decisions of the courts in these cases were correct. The filing of the documentary evidence of the title of the alleged Indian reservees certainly raised a *presumption,* in his favor, that all things required by the treaty had been done. This presumption could have been overcome, however, if the defendant had offered in evidence the facts which are now before this Court. None of the facts which the record in this case show, relative to the illegal and unauthorized attempt to enroll, in the first instance, the alleged grantors of Ayres, as fifth and sixth article reservees, and none of the facts relative to the action of the "Boggy Depot Council" and of the representatives of the government thereon, were made known to the Court, in evidence. It is not for us to speculate as to why this was not done. The fact remains that it was not done, and the courts in the cases referred to

had before them only the formal certificate of the Register of the Land Office, showing the location of the land in controversy for the plaintiff, as a Chickasaw Indian Reservee under the sixth article of the treaty of 1834. The facts which are now presented to this Court, if they had been presented to the other courts, would undoubtedly have overturned the presumption of legality and regularity in favor of the alleged reservee raised by the filing of the certificate of the Register.

Nowhere in any of these decisions does the court say or intimate that the preliminary steps as to the listing and enrollment of reservees, required by the treaty, had been taken. The decisions are based upon the *presumption* raised by the filing of the Register's certificate; and the defendants in these cases did not see fit, or were unable at the time, to overcome and rebut the presumption thus raised.

In the case of Wray v. Doe, the court does say:

"The whole question is whether the Indian reservee has precedence over the subsequent patentee."

And also:

"The reservation was secured before the date of the patent (of the subseqquent purchaser of the government) and has the preference over it, *if the location was properly made.* On this point the only evidence is the certificate of the Register of the Land Office at Pontotoc, showing that this Indian was located upon the lands in dispute in June, 1838."

In the case of Best v. Polk, the court says:

"If therefore, the location of the land in controversy was properly made, the legal title to it was consumated and the subsequent patent was unauthorized;"

And also:

"We concude, therefore, that the certificate of the Register was competent evidence and if the location were not as there stated, it was easy for the plaintiff below to show that fact."

These quotations are taken from the decisions referred to and here set forth for the purpose of showing that they are based wholly upon the *presumption* of the legality and regularity of the status of the alleged Indian reservee; and that no facts were presented such as are here presented to this Honorable Court to rebut that presumption.

We fully agree with the argument of counsel for the Government in his discussion of these decisions and particularly on the proposition as to how they effect Ayres and his alleged rights, if at all. As stated in his brief, in which has been included a report from the Commissioner of Indian Affairs:

"All that can be adduced from Best v. Polk is that Ayres had a remedy. That being so he was bound to take advantage of it."

If, as contended by Ayres, the status of his alleged grantors parallels, in all respects, the status of the alleged Indian reservees in the cases above referred to, the courts would have given them and their grantees all the relief which it gave those who were parties in the cases before them. If Ayres' alleged grantors were Indian reservees and the owners of the title to the lands claimed, the courts would have so held; and furthermore, if they were reservees and owners of the lands and Ayres was their grantee, according to the requirements of the treaties governing the sale of the lands of the Chickasaws, the courts would have so held in proper suits, and the rights of the claimant, of which he claims to have been deprived, would have been fully protected. He did not avail himself of the remedies which were his.

because, according to all presumptions which are fair and reasonable from the circumstances, he realized that he had no rights which were enforceable in the courts.

WITHOUT REGARD TO WHETHER THE PERSONS ALLEGED TO BE THE GRANTORS OF AYRES WERE ENTITLED TO RESERVATIONS OR ACQUIRED TITLE THERETO, UNDER THE TREATIES, THE SAID AYRES FAILED TO COMPLY WITH THE REQUIREMENTS OF THE FOURTH ARTICLE OF THE TREATY OF 1834, GOVERNING THE SALE OF THE LANDS OF CHICKASAW INDIAN RESERVEES, AND THE INSTRUMENTS OF WRITING PURPORTING TO BE DEEDS OF CONVEYANCE FROM SUCH INDIAN RESERVEES ARE VOID, AND HE THEREBY ACQUIRED NO TITLE TO THE LANDS CLAIMED TO HAVE BEEN PURCHASED.

Article four of the treaty of 1834 governs the sale of the lands of Chickasaw Indian reservees, and, while it appears elsewhere in the record, we deem it advisable to here set it out in full, for the convenience of the Court in considering the contentions hereinafter made, relative to the failure of Ayres to comply with its requirements. It is as follows:

"Art. IV. The Chickasaws desire to have within their own direction and control, the means of taking care of themselves. Many of their people are quite competent to manage their affairs, though some are not capable, and might be imposed upon by designing persons, it is therefore agreed that the reservations hereinafter admitted,

shall not be permitted to be sold, leased or disposed of unless it appear by the certificate of at least two of the following persons, towit: Ishta-ho-ta-pa the King, Levi Colbert, George Colbert, Martin Colbert, Isaac Alberson, Henry Love and Benj. Love, of which five have affixde their names to this treaty, that the party owning or claiming the same, is capable to manage and take care of his or her affairs; which fact, to the best of his knowledge and information, shall be certified by the agent; and furthermore that a fair consideration has been paid; thereupon the deed of conveyance shall be valid provided the President of the United States, or such other person as he may designate shall approve the same, and endorse it on the deed; which said deed and approval, shall be registered, at the place and within the time, required by the laws of the State, in which the land may be situated; otherwise to be void. And where such certificate is not obtained; upon the recommendantion of a majority of the Delegation, and the approval of the agent, at the discretion of the President of the United States, the same may be sold; but the consideration thereof, shall remainu as part of the general Chickasaw fund in the hands of Government, until such time as the chiefs in council shall think it advisable to pay it to the claimant or to those, who may rightfully claim under said claimant, and shall so recommend it. And as the King, Levi Colbert, and the delegation, who have signed this agreement, and to whom certain important and interesting duties pertaining to the nation, are assigned, may die, resign or remove, so that their people may be without the benefit of their services, it is stipulated, that as often as any vacancy happens, by death, resignation, or otherwise, the chiefs shall select some discreet person of their nation to fill the occurring vacancy, who, upon a certificate of qualification,

discretion and capability, by the agent, shall be appointed by the Secretary of War; whereupon, he shall possess all the authority granted to those who are here named, and the nation will make to person so appointed, such reasonable compensation, as they with the assent of the agent and the Secretary of War, may think right, proper and reasonable to be allowed."

It will be noted that article four of the treaty provided, in terms, that the lands of reservees should "not be permitted to be sold, leased, or disposed of unless:"

First: The reservee has been declared, by the certificate of two out of seven persons therein named, to be capable of managing and taking care of his or her own affairs;

Second: The consideration has been paid and is a fair one;

Third: The competency of the reservee and the reasonableness and the fairness of the consideration and the fact that it has been paid, has been certified by the Indian Agent;

Fourth: The President of the United States or some other person designated by him has approved the deed and such approval is endorsed thereon;

Fifth: Such deed and approval has been registered at the place and within the time required by the laws of the State in which the lands may be situated.

It is further provided, in express terms, that unless all of these things are done the deed is to be *void*.

We shall apply, in the order stated, these plain requirements of the treaty to the transaction of Ayres.

The instruments in writing purporting to be the original deeds of

conveyance upon which Ayres relies, appear to have attached to them what purports to be certificates of competency of the alleged reservees. It appears, however, that they were not executed by two of the seven persons named in article four as required. The name of "James Colbert" is appended to all the purported certificates of competency referred to in "Claimant's Statement and Abstract of Evidence." James Colbert was *not* one of the seven persons mentioned in article four. The most that can be said for the certificates offered is that they were signed by only *one* of the seven persons mentioned, whereas the treaty requires that they be signed by *two*. There can be no satisfactory explanation of the attempted exercise, by James Colbert, of the duties required of seven persons named in article four of the treaty, since, as shown by attorney for claimant in his statement and abstract of evidence, (pages 25 & 26) in his criticism of the instructions of the Secretary of War to the "Boggy Depot Council," that "the committee referred to consisted at that time (1841) of the King and six chiefs or head men named in article four."

The next requirement of the treaty was as to the payment of a fair consideration. When all of the facts attending the transactions of Ayres are considered, it appears that the consideration paid by him if paid at all, was not a fair one. The treaties themselves throw light upon this phase of the matter. The supplement to the treaty of 1832 contains the following:

"As the reserve tracts of land above alluded to, will be the first choice of lands in the nation, it is determined that the minimum of all the reserved tracts, shall be *three dollars an* acre, until the nation may determine to reduce the price, and then they will notify the Pres-

ident, of their wishes, and the price to which they desire to reduce it."

It will be remembered that this clause was drafted two years before the treaty of 1834 (and was not repealed by that treaty) and seven years before the alleged purchase of the land by Ayres. The lands alleged to have been purchased by him were "reserved tracts" within the meaning of the supplement to the treaty of 1832, and *three dollars per acre* was fixed as the minimun price at that time. If his alleged purchases had been made in 1832 the consideration would have been considerably less than one half of the minimum fixed by the treaty, whereas, since they were made seven years after that time, it is reasonable to conclude that the settlement and developement of country made the lands vastly more valuable; and that a fair consideration in 1839 was many times the $1.25 per acre which he claimed to have paid. In this connection we call the Court's attention to the report of the "Boggy Depot Council," so often referred to, where the Indians called upon others (meaning the government's officers) to determine whether the whole affair, relative to the selection, location and sale of these lands, did not show an attempt at speculation at their expense. Major Armstrong, the Indian Agent, in his letter of Oct. 28, 1842, (in referring to the attempted sales of these lands) says: "Nothing has ever been paid, so far as I have ever heard or believe, for these lands."

We now pass to the third requirement of the fourth article of the treaty, governing the sale of these lands, and that was that the competency of the reservees and the fairness of the consideration and that it had been paid, should be certified by the Indian Agent. As to 129 out of 150 of the purported deeds, there is no claim or pretense that

there is any certificate of the Indian Agent, required by the treaty, attached thereto. To 21 there appears to be attached what purports to be such a certificate. In said 21 purported certificates it appears that the Indian Agent overlooked the fact, above referred to, that the act of "James Colbert" in certifying to the competency of the alleged reservees was unauthorized, by reason of the facts that he was not one of the seven persons named in article four of the treaty.

The fourth and fifth requirements are that the deeds shall bear the approval of the President of the United States or some person designated by him for that purpose, and such approval shall be endorsed thereupon; and that such deeds and the approval endorsed thereon shall be registered at the place, and within the times required by the laws of the State within which the land is situated. There is no claim or pretense that either of these requirements were complied with. None of the deeds were ever approved by the President of the United States and none of them, bearing his approval thereon, were ever recorded as required. It may be that the instruments of writing were recorded at some place and at some time, but the deeds and approval were not, and could not have been, recorded, because they never received the approval of the President.

It therefore appears that the facts relative to the attempted purchase of these lands by Ayres are as follows:

The certificates of the competency of his alleged grantors, if executed at all, were executed by only *one* of the seven persons instead of by *two*, as required; that the consideration paid, if paid at all, was not a fair one, that only 21 out of 150 of the alleged deeds bear anything that purports to be a certificate of the Indian Agent as to the competency of the alleged reservee and as to the consideration; that

none of them ever received the approval of the President or any person designated by him; and that none of them, with the President's approval thereon, were ever recorded.

Practically none of the five requirements of the treaty were complied with and the purported deeds of Ayres are, therefore, void.

The next and final inquiry is:

"Under all the facts, as shown by the record, should the Court hold that the heirs of the said Ayres are entitled to reimbursement?"

It cannot be said that they are entitled to equitable relief. Ayres had his remedy at law and failed to avail himself of it. As heretofore shown, if his alleged grantors had been the owners of the title to the lands, as Chickasaw reservees, and Ayres had legally purchased the title from them, his right could and would have been enforced by the courts.

It can not be said, even if such would be of advantage to him, that Ayres was ignorant of the requirements of the treaties governing the sale of Chickasaw lands and that he was imposed upon or misled. He was in the business of speculating in Indian lands, as shown by the record; having gone into the business upon a stupendous scale. He was a resident of the State of Mississippi, and, after the emigration of the Indians into the western country, followed them and there put on foot the speculations which, according to his statement, turned out disastrously, from a financial standpoint.

It can not be said that the provisions of the treaties, governing the sale of Chickasaw lands, were harsh and unreasonable. The safeguards appearing in the fourth article of the treaty of 1834 parallel, in all essential respects, the safeguards which have been, by the government of the United States, wisely inserted in practically every Indian treaty, from the beginning of its Indian policy to the present time. Were it not for the vigilance and wisdom of the government, in thus safeguarding the sale of lands of its helpless wards they would be immediately absorbed, without ceremony or restraint, by land speculators of the class to which Ayres belonged.

The provisions of the treaties governing the sale of Chickasaw and Choctaw lands in Indian Territory at this time parallel, in practically every essential respect, the provisions of the treaty of 1834. After the expiration of more than seventy years the government is still of the opinion that restrictions should be thrown around the alienation of Indian lands. At this time no Indian by blood can dispose of any portion of his lands until his competency is determined and certified by the Secretary of the Interior, and that certificate is recorded in the district wherein the land is located. Will counsel for the claimant contend that if he should purchase the lands of 150 Indians, in the Indian Territory, and pay out his money therefor, that he would be entitled to any relief, either in law or in equity?

The title acquired by the reservees under the treaty was an indefeasible fee. It could not be defeated, set aside or taken away, but it was a conditional fee. It could not be disposed of except upon compliance with every condition of article four of the treaty. All of these conditions had to be performed before the reservee could divest himself of title, and no title passed to his grantee until these requirements were specifically and literally fulfilled. These were conditions precedent to a perfect title in the grantee. Until they were complied with the title of the grantee was imperfect. This has been distictly

held in the following cases:

Doe v. Partier, 12 S. & M. (Miss.), 425-427;
Pickering v. Lomax, 155 U. S., 718;
Lomax v. Pickering, 173 U. S., 602;
Lykin v. McGrath, 184 U. S., 169,

and numerous other cases.

Counsel for claimant, with considerable industry, suggests the reasons *why* Ayres failed to comply with article four of the treaty, in his alleged purchases. It is stated that certain officers of the government failed to do their duty and that certain other officers of the government were prevented from acting favorably to him by the misconduct of certain other officers. Under the provisions of article four of the treaty the Indian Agent and the President were authorized to do certain things in order for the purchases to be valid. If these things were not done they were to be invalid. They were authorized, in their discretion, to grant or withhold their approval. It was not a matter of proper inquiry at the time, and is not a matter of proper inquiry at this time, as to what led them to withhold their approval of the attempted purchases by Ayres. The fact remains that such approval *was* withheld and never given. Counsel for claimant insists upon entering the realm of speculation as to what moved the Indian Agent and the President in withholding the desired approval; and in that connection urges that the Secretary of War was imposed upon by the Indian Agent and that the President was imposed upon by the Secretary of War. As above stated, we are reluctant to enter the realms of speculation for this purpose, since it is wholly improper, but as counsel for claimant has done so we venture to suggest the solution that the President and Indian Agent were advised of the

facts, to-wit: that the original enrollment and the setting aside of lands for the alleged grantors of Ayres was wholly unauthorized; that they were not Chickasaw Indians and not entitled thereto; that the alleged certificates of competency were executed by only *one* of the seven persons named in article four of the treaty; that the consideration alleged to have been paid by Ayres was grossly inadequate, and that the whole series of transactions from beginning to end was a gigantic effort to prey upon the incompetency and credulity of the helpless wards of the government and to fraudulently deprive them of their lands.

We wish to express our thanks to the Court for having been granted permission to submit this brief on behalf of the Chickasaw Nation, upon the issues involved in the case which may affect its interests; and we wish also to make expression of our obligations to the learned counsel for the government for courtesies extended and services rendered toward enabling us to prepare and submit this brief within the time required.

Respectfully submitted,

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