In the Court of Claims.

OF THE

UNITED STATES.

December Term, 1905.

JOHN T. AYRES, Executor of the Estate of Eli Ayres, Deceased, *Claimant.*

vs.

THE UNITED STATES.

No. 11903, Congressional.

Claimant's Reply Brief.

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It is not that the report of the present Commissioner of Indian Affairs contained in the appendix is in itself a formidable weapon against the claim in controversy, or to any of the claimant's requests for findings of fact which were submitted to him for his report and recommendation

by the assistant attorney general who represents the Government in the pending case, but because the report comes here in an official character and parts of it have been used by the Assistant Attorney General in his brief, that we have concluded to call the attention of the court to the apparent errors which it contains, the unwarrantable conclusions both of law and of fact which it seeks to establish, and to the antagonisms and disregard of the various rulings by his predecessors in passing upon the questions involved in this claim.

It is a significant feature of the report that the Commissioner nowhere alludes to the rulings of any of his predecessors in the Indian Office, which have arisen in the history of the case, although vital and important in many ways, and to no one of his predecessors in a long line extending from Commissioner Crawford, who took the office as far back as 1838, to Commissioner Smith, under Secretary Chandler, to Commissioner Price, under Secretary Teller, all of whom made important decisions and rulings in the case, does he pay the "cold respect of a passing glance."

We now call the attention of the court to the conclusions general and specific contained in the report and shall then proceed to consider the line of reasoning by which the Commissioner claims to have reached these conclusions.

Conclusions of the Commissioner.

The Commissioner says:

> 1st. "It appears that the claimant, as to reservations under the 5th article, fails to establish the validity of the reservations he purchased. Indeed, it is reasonable to conclude that such reservations were fraudulent and certainly no title vested in the reservees; therefore, the 3rd section of the request for findings is objectionable; it should be that the Indians named therein never acquired title to the lands claimed by them." Appen. p. 28.

The Commissioner says:

> 2nd. "The locations under the 6th article rest on an entirely different article of the treaty. It expressly provides that a commission of seven persons named shall prepare a list of those entitled. And as Ayres purchased from some who were certified by the Commission his claim would be good if there were not a saving provision in the law governing." "The restrictions referred to in the 4th article are expressed in the following language (see appendix page 29 for this), and upon this the Commissioner concludes that: "None of the deeds taken by Ayres received the approval required and hence his title to reservations selected under the 6th article of the treaty is void. This requirement was a part of the law authorizing the selection of the lands by the Indians, and as Ayres had absolute notice thereof, he could have no equitable claim to these lands."
>
> "The failure to acquire legal title and a lack of an equitable right as relates to the selections under the 6th article should appear in the findings." Appen. p. 30.

As a basis for the foregoing conclusions the Commissioner starts out with the proposition that "there is absolutely nothing in any of the treaties controlling the selections which were to be made under the 5th article, except that the reservees must be the heads of families, etc." * * *

> "Thus it appears that there was no method provided for determining who should have the right to reservations under the 5th article. The certificates of the members of the Commission designated to certify as to minors and others covered by the 6th article are relied on by the claimant as establishing the rights of his grantors who claim as reservees under the 5th article. These certificates (says the Commissioner) being unauthorized amount to nothing more than recommendations. The rolls prepared from such certificates do not purport to be based upon the knowledge of the agent, but upon these recommendations." Appen. p. 28.

The Commissioner errs in claiming that the certificates of the members of the Commission designated to certify as to *minors* and others covered by the 6th article, are relied on by the claimant as establishing the rights of his grantors who claimed as reservees under the 5th article.

A glance at article 6 will show that it makes no allusion to certificates as to minors. Article 8 is the one that makes special provision as to minors, or, "males or females under the age of 21 years" as designated therein, and expressly provides that these persons shall not be computed as parts of families under the 5th article.

It is but fair to say that the Commissioner must have confounded article 8 and its provisions with article 6, which he names.

It impeaches the intelligence, if not the integrity, of every officer of the Government connected with the execution of the treaty, to say that Ayres could or was permitted to employ the recommendations or certificates mentioned in the foregoing statement of the Commissioner in establishing the rights of his grantors who claimed as reservees under the 5th article; and it further shows that the Commissioner did not take the time or pains to inform himself as to the real methods instituted by his predecessors and the executive authorities for establishing the rights of the reservees under the 5th article of the treaty or he would have not fallen into this grave error, or indulged in the statement that "such reservations were fraudulent,"—or in holding that "no title vested in the reservees."

The fact is, as the proofs show and the records in the office of the Commissioner himself show, and which were immediately available for his examination and guidance, that President Jackson and his advisors, in order to carry out the full intent of the provisions of the treaty and to secure locations to those entitled under the 5th article as

well as to those entitled under the 6th, carefully formulated the following regulations for the guidance of the officers in charge, viz: "The list will be prepared by the persons named in the fourth article of the said treaty of 1834, or any three of them and by the agent, containing the names of all the heads of families and entitled to land under the fifth article of the treaty." See regulations of December 22, 1834, on file.

We, therefore, submit to the court that the agent, register and receiver followed this instruction in fixing reservations and locations under the fifth article. They were compelled to do so and the practice pursued by them was right. And further, we submit that the Commissioner is hardly in a position, from the standpoint of the office he holds, to question the validity or propriety of this regulation approved by the President and acted upon by his predecessors, to hold, as he seems to have done in his report, namely, that "There was no method providing for determining who should have the right to reservations under the fifth article of the treaty," or to justify him in charging or intimating any fraud or invalidity in connection with the location under the fifth article.

The Commissioner says:

> "It is evident that the executive department had to pass on the rights of a claimant and control the locations if frauds and conflicts were to be avoided." Why should the Commissioner say that this is "evident"? He was bound to know that it has been conclusively settled to the contrary, by courts of competent jurisdiction, the High Court of Errors and Appeals of Mississippi, and by the Supreme Court of the United States in the case of Best vs. Polk. These tribunals held that "The only classes of cases in regard to the location of which any discretion was granted to the Secretary of

War was the reservation of orphans' claims in the eighth article." (See 10 S. & M., page 462, and 10 Wall., page 112.) Appen. p. 28.

It is not unworthy of notice as a tribute to the legal ability of J. Hartley Crawford, the third Commissioner of Indian Affairs, then acting under the Secretary of War, that in his letter to John Bell, the head of that Department, as far back as April 12, 1841, and now upon the records of the Commissioner's office, he expressed a like opinion with the courts on this question as follows:

> "To carry into effect those treaties, regulations were prescribed by President Jackson, and in one of them, that of December, 1834, the mode of locating the reservees is particularly pointed out, and the fourth article or subdivision thereof, declares that the title to the selected tracts shall not be vested in the reservees until their locations shall have been approved by the President. It is presumed that that regulation or injunction has been one of the causes of the presentation to this department of the claims now the subject of consideration, for I do not perceive that in any portion or part of either treaty authority has been reserved to the President to control the location of the reservations. This view is fortified by the twelfth article which declares that where any portion of the country is fully surveyed the President may order the same to be sold, but will allow six months from the date of the first sale and three months' notice of any subsequent intended public sale, within which period of time those who can claim reservations in the offered ranges or country shall file their applications with the Register and Receiver, that the name of the owner or claimant of the same may be entered and marked on the general plat," etc.

And it may be properly noted here that in that same letter he very clearly reserves from the submission of the lists of reservees which were alleged to involve their nationality

as Chickasaws, to the Commission named in the fourth article, for revision, the purchases which Ayres had made three years before from his Indian grantors by the closing words: "Unless where a sale has been made by the Indian, when the Government will determine upon it as to right and equity may appear to belong."

The following propositions appear in the Appendix at page 28:

> First. "When a question did arise it was referred to the Commission who were to make the list provided for in Article 6, but it was passed on by a council at Boggy Depot. After the matter had been pending before the Indian Agent for eighteen months, and though the rights of 524 people were voted on in one day, it seems improbable that the Indians had not canvassed the merits of the several claimants before that date."

In this statement Commissioner Leupp concedes the jurisdiction of the question involved vested in the commission of seven men provided for in the sixth article of the treaty. Does it not then follow, and is it not in fact admitted as a logical sequence, that the act of the Boggy Depot council in passing upon such question was an usurpation and void? And, further, that the mere assertion that the Indians had probably canvassed the rights of the claimants before the Boggy council met has no foundation, either upon the proofs in the record, or upon any inferences that can be drawn from such proofs. And, even if such canvass had been had, it would not have given the so-called council jurisdiction of the question erroneously submitted to them; nor could it have affected the rights of the Indian reservees as located on the land, or the rights of the grantee, Eli Ayres, already vested in equity, if not in the law.

Second. The second proposition of Commissioner Leupp in the same paragraph is as follows:

> "They (the Indians) must have known that the agent (Major Armstrong) had a list of questionable claimants for eighteen months, and that such list had been sent to him at their request." Appen. p. 28.

The record shows just how the question as to the integrity of the list of 524 originated, and how Major Armstrong became possessed of the same. Commissioner Crawford gives it in his report as follows:

> "One or more of the chiefs, through acting superintendent of the Western Territory, Major Armstrong, suggested that frauds *may* exist in the claims 'made within the last year or two,' and suggested that lists of claimants may be submitted to them for examination. I, therefore, recommend (Crawford says) that lists of the claimants referred to be made out and delivered to Major Armstrong with instructions to submit the same to the Chickasaw Commissioners, agreeably to their request." (See Commissioner Crawford's report, pp. 14-15, Senator Teller's report.)

The Secretary of War, John Bell, on the fourth day of the following month, approved this recommendation of Commissioner Crawford, and in strict conformity thereto, ordered "that the list of unconfirmed locations be sent to the Committee provided for in the fourth article of the treaty for their revision." (See page 25, Abs. and Stat.) It will be observed in this connection, by the language of this order, that the reservations embraced in the list had already been located under Articles 5 and 6 of the Treaty, and were held in the War Department pending action under the fourteenth regulation of President Jackson.

It is well to note that Major Armstrong was not an appointee known to the Treaty, but was a special officer of the Department of War, and appointed to superintend the exodus of the tribe from the State of Mississippi to the

Indian Territory, and to aid in locating them there on land purchased of the Choctaws. He was designated by Crawford in his report as "acting superintendent of the Western Territory." As such he received the order of John Bell, Secretary of War, and the list of "unconfirmed locations," accompanied with the specific instructions in writing from his superior officers "to submit the same to the committee provided for in the fourth article of the Treaty for their revision." (See letter of instructions of Commissioner Crawford, June 16, 1841.)

Plainly he had no more authority to disobey, disregard, modify or change these instructions than a special messenger would have had, if sent by the department, to deliver the same under like instructions. Major Armstrong does not offer a word of explanation in his report or otherwise as to why he failed to obey the instructions of his superiors, or whether he made any effort to carry them out. He doesn't say whether he attempted to call the commission together for this or any other purpose, and if he called them together and submitted the lists to them as a commission, whether they did not decline to revise the list on the ground that they had already enrolled and recommended every one of the 524 reservees as Chickasaws entitled to reservations, and that they did so honestly, believing their action to be right, and that upon the good faith of which enrollment their Indian agents, Upshur and Reynolds, provided for in the treaty had certified to the register and receiver the correctness of the same upon which they had made the locations.

All this would have been quite pertinent to show that he had at least made an effort in the line of duty to carry out the instructions of his superior officers.

He does not fail, however, to report to them how, after eighteen months of delay (a sufficient period of time it

would seem in which to have called together the committee of seven and delivered his instructions) he called together twenty-five persons at the Boggy Depot in the Indian Territory, a list of whose names are contained in his report, only two of whom could write their names, and termed it "a council largely attended," and submitted to them in open violation of his instructions the said "unconfirmed lists" for their revision, and had the temerity to premise his report of its proceedings with the false statement:

"In accordance with the requirements of the War Department, we proceeded to business."

The manner of conducting the proceedings was in no way in compliance with the directions given in the letter of instructions. The more important instructions contained therein were entirely ignored at the so-called Boggy Depot Council. (See letter of instructions.)

Two of the twenty-five that composed the so-called council were Ish-ta-ho-ta-pa, the King, and Isaac Alberson, members of the committee named in the fourth article, who had acted with said committee in making out these identical "unconfirmed lists" and filing them with their Indian agent, upon whose certificate the register and receiver had already located said reservations.

We think that there is good ground for believing that Alberson and the King were the only members of the committee that could be used for the purpose, and although they did act as a part of the council and whether justly chargeable with self-stulification, or not, in so doing, we contend that they were clearly not authorized to participate in any proceedings involving the revision of the lists, either in conjunction with the committee named in the said fourth article of the treaty, or as in the capacity of commissioners in the so-called Boggy Depot council.

Whatever part they took in the proceedings of the so-called Boggy Depot council was taken by them therefore as individual Indians and nothing more.

The report says that notice had been given that the council would be held to examine the land claims, but he does not enlighten us as to the kind of notice, whether by advertisement, posting or personal service. Not one of Ayres Indian grantors put in an appearance to have his "day in court," or otherwise. And the fact that Ayres, their grantee, was at the time residing in Mississippi and inaccessible, would, even in the absence of his sworn statement that he received no notice and knew nothing about the council until long afterward, overcome any reasonable presumption that he was notified of this indiscriminate assemblage of Chickasaw Indians to pass upon his rights to a hundred and ninety-four sections of land for which he had paid in cash eight hundred dollars a section to his Indian grantors, two years or more before.

Armstrong had due notice, however, of the very important exception contained in Crawford's report: "Unless where a sale has been made by the Indian when the Government will determine upon it as to right and equity may appear to belong," upon which Commissioner Price founded the conclusion in his report of 1882 as follows: "As Mr. Ayres' purchases were made before this investigation was had he would seem to be an innocent purchaser, whose rights it was intended should be protected." (See report page 9, Ex. A, Teller's Report.) A conclusion confirmed by Secretary Teller. (See letter of transmittal, page 10, Ex. B, Teller's Report.)

It is true, as stated in our ninth request for findings of fact, that Spencer, the Secretary of War, immediately succeeding John Bell, approved the Armstrong report, almost immediately upon its receipt, expressed in the following order:

"In the matter of certain claimants to reservations under the treaty of Pontotoc and Washington, representing themselves to be Chickasaws, the list of 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 interest of the State of Mississippi requires 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 probability that a more full and satisfactory 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."

We must not lose sight of the significant fact which appears upon the face of the foregoing order of Mr. Spencer that he is careful to recite in the first instance as the basis of his jurisdiction to act therein the following statement:

"The list of names having been transmitted to the committee as provided by the fourth article of that treaty for examination, they have reported against the claimant."

That he was well aware that this was not true appears further on the face of the order wherein he says without now

saying that this report (Armstrong's) under the provisions of the treaty is conclusive although I am very much inclined to that opinion, yet it commands the highest confidence and justifies action particularly on the ground of the interest of the State of Mississippi.

In the light of the subsequent decisions of the courts it turns out that all the proceedings to revise the "unconfirmed locations" involved in this controversy were void ab initio. That Bell's order was unauthorized. That Armstrong's report, whatever view may be taken of it as to its regularity, was unauthorzied, and that the order of Spencer approving that report was equally unauthorized and void.

The court says the instructions from the War Department, as to the construction of the treaty, have no binding force:

"The instruction referred to in argument, provides that no location, under any of the articles of the treaty, shall be considered as final or as conferring any right whatever until the same shall be approved by the President. The rules of the Department as to the mode of carrying the treaty into execution and for the guidance of the officers of the Government not trenching upon the rights of the parties would be considered obligatory. But the Department could impose no new condition upon the reservees. The only class of cases in regard to the location of which any discretion was granted to the Secretary of War was the reservation of orphan claims in the eighth article." 10th S. & M. (Miss.) Wray vs. Doe, page 462.

This is strengthened by the further holding of the court that:

"The treaty had a positive stipulation that the reservations under the sixth section should be located by the register and receiver." (Ibid.)

It follows irresistibly, we submit, that the usurpation of power over the locations by the Executive Department prevented the exercise of the power vested in the President by

the treaty to approve the deeds for which neither Ayres nor his Indian grantors could be held blamable or responsible, and yet this unauthorized action had the effect to prevent Ayres from obtaining the approval of his deeds.

The third position taken in the paragraph is as follows:

> "The 6th article of the treaty of June 22, 1852 (10 Stats., 976) would indicate that the Indians still had in mind these fraudulent attempts to locate reservations."

Article 6 is as follows:

> "The powers and duties conferred on certain persons particularly mentioned in the fourth article of the treaty of 1834, and their successors in office, shall hereafter be vested in and performed by the General Council of the Chickasaws, or such officers as may be by said council appointed for that purpose; and no certificate or deed given or executed by the persons aforesaid, from which the approval of the President of the United States has once been withheld, shall be hereafter approved unless the same shall first receive the sanction of the Chickasaw Council, or the officers appointed as aforesaid, and of the agent of the United States for said Chickasaw nation."

Even if such an inference could be drawn from the language of this article as the Commissioner claims for it, in what possible way could such an inference have the least bearing upon the questions submitted to this court under the act of Congress for findings of fact. Ayres is not here seeking to have his deeds approved. Again what evidence is there in the record of "fraudulent attempts to locate reservations." "Fraudulent attempts" to locate reservations, can not under any rule of law known to us, be presumed, but must be proved.

This article has been a stranger thus far to the record in this case. Neither the committees of Congress nor the

courts nor the departments have ever mentioned or alluded to it as a factor in the claim, the record of a predecessor showing that one of the Ayres deeds was recommended for approval by the President more than twenty years after the date of this treaty, and we cheerfully accord to Commissioner Leupp the merit of its discovery for such purpose if it can now be interpreted as material for any legitimate purpose in the case, as it now stands before this court.

Upon a careful reading of the article we are strongly impressed with the idea that it was placed in the treaty in the interest and at the instance of the white people of Mississippi, who held title and were in possession under patents from the United States Government of Chickasaw Reservation lands, which became imperiled and uncertain on account of the decision of the High Court of Errors and Appeals of the State in the case of Wray vs. Doe, as early as the October term of 1848, in itself a reasonable and natural cause of alarm, and which manifestly had the effect to hasten the action of Secretary Spencer in approving the Armstrong report of the Boggy Council proceedings, because he says therein:

> "The interests of the State of Mississippi require that the question which has so long been depending should be settled, etc., and this view is augmented by the fact that all the bills introduced in Congress relating to the Ayres claim have been not only for his relief but entitled also 'to quiet land claims in the State of Mississippi.'"

And as the Indian Commission named in the 4th Article made up the list of "unconfirmed locations" themselves, and furnished them to their agent, the inference of the Commissioner, if warranted, could have no other effect than a reflection upon their integrity alone, but if it be true that the minds of the Indians in 1852 were haunted, as the Com-

missioner indicates, with apparitions of "fraudulent attempts to locate reservations," is it not as reasonable to infer that the apparition arose out of the fact within their knowledge, that the individual Indian grantors of Ayres got his money for their lands and that the nation or tribe got the proceeds of the sales of the same and that Ayres was left out in the cold, minus his lands and the money, or, as Secretary Teller puts it in his report:

> "In this case Ayres paid the individual Indians for the land and took their title which was in fee. The Government then appropriated the land, sold a part of it, and invested the proceeds in 5 per cent interest bearing securities resulting in the creation of the fund now in its hands.
>
> "It turns out now that neither the land nor the proceeds of the sale belong to the Government.
>
> "It turns out now that the Chickasaw Indians as a tribe did not own the land or any part of it.
>
> "It turns out now that the Indian reservees, as individuals from whom Ayres bought did own the land in fee."

We now call the attention of the court to the interpretation given by Commissioner Leupp to the decisions of the court which have been cited by us as applicable to the questions now pending before this court.

These views will be found at page 30 of the Appendix. First, the Commissioner states "That Best vs. Polk is correctly cited but the controlling factor is not mentioned in the decision or adverted to by the claimant."He then defines what he means by this controlling factor in the following language:

> "Best's reservee took under the sixth article. The reservees under that article were those on the list made by the commission of seven created in said section for the purpose. Were Ayres grantors purporting to be locators or reservees under section six on a list prepared by the seven in accordance with the provisions of the section? If so, they undoubtedly were vested with an indefeasable title."

We have only to turn to the case at page 118 to learn that this "controlling factor" knocked at the door of the court for recognition as material to the case, but was denied admission as a controlling factor or otherwise, for the very good reason given by the court in its decision in the following language:

> "It is insisted that this certificate did not go far enough; that it ought to have shown that a list including this Indian was furnished by the seven chiefs to the agent, and that the agent certified to the register and receiver, prior to the location, that he believed the list to be accurate. If this was so, no presumption could arise that local land officers, charged with the performance of a duty, had discharged it in conformity with law.
>
> "It would be a hard rule to hold that the reservees under this treaty in case of contest were required to prove not only that the locations were made by the proper officers, but that the conditions on which these officers were authorized to act had been observed by them."

Second. The Commissioner further says:

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

We should be exceedingly gratified if the Commissioner had defined just what this remedy was. In the absence of such a definition we take it that he meant that Ayres should follow the remedy sought in Best vs. Polk, and institute

suits of ejectment in the courts of Mississippi, to oust the hundreds of settlers located upon a hundred and ninety-four sections of land under patents from the Government, which Ayres had purchased from the Indians.

Is it not plain that Ayres could not sue the individual Indians who were his grantors? Is it not equally plain that he could not maintain a suit in ejectment because the President had not approved his deeds to give him a legal title upon which to maintain such a suit?

The record shows that this very complication of the land titles in Mississippi covering these very lands was a potent reason why the Department advised Mr. Ayres, after making every effort he could with its officers to have his deeds approved, to seek relief in the Congress of the United States upon his equitable rights. He was so advised by Secretary Schurz, by Secretary Teller, and by Hiram Price, the predecessor of the present Commissioner in the Indian Office. Upon which advice the action, shown by the record, was taken in Congress.

We contrast these views of Commissioner Leupp with those expressed by the Committees of Congress as to the application of these decisions to the case at bar.

The Committee on Indian Affairs of the Senate, composed of some of the leading lawyers in the land, among whom was Senator Platt, of Connecticut, for a long time chairman of the Judiciary Committee of the Senate, said:

> "The case must be accepted as conclusive as to the proper construction of the treaties, and that the one of 1834 operated to vest a perfect and complete title to the lands selected, in the Indians. It also sets at rest all questions touching the proper enrollment of the reservees and the regularity of their location. It is proper to add that the Supreme Court of Mississippi had previous to this case given the treaties the same interpretation as did the Supreme Court of the United States. It now

> follows that the treaty of 1834 being in reality a grant in all respects complete and absolute, all that remained to be done in order to segregate any parcel of land and vest the title in fee simple absolute in the individual was to identify the same by selection and proper location. This step taken, the individual Indian became at once vested of a title only to be questioned in a court of competent jurisdiction by proper action at law or in equity." (See report of Senator Jones, Senate Report, No. 1457, 54th Congress, 2d Session, at page 24.)

The Committee on Indian Affairs of the House of Representatives, in their report numbered 2959, 51st Congress, 1st Session, says:

> "These two decisions of the Mississippi court were approved and confirmed in a decision coming up on exactly similar facts by the Supreme Court of the United States in Best vs. Polk, 18 Wall., 112. The conclusion of the courts in these several cases was that the treaty of 1834, by force of its own provisions, conveyed the title to the Indians and was nothing more nor less than a grant. In each case the Indian title was one of those here in question, and it was contested by a party holding a United States patent subsequently given The court in each case held the absolute title to be in the Indian and the patent void.
>
> "In the first case of Wray vs. Doe, Congress appropriated money to repay the amount paid by the patentee (See 11 Stat., 514). In Hardin vs. Doe, the Executive Department made similar restitution to the party claiming under the patent. (See Land Book 3, page 300.)
>
> "Thus all the Departments of the Government have recognized the binding force of the court decisions. As to the cases themselves of course the decisions are *res adjudicata*. As to the other cases under consideration, these decisions are *stare decisis*. They form a rule of right,' made by the highest court, after due deliberation which it would be a great hardship to disregard."

These cases seem to us to hold conclusively that the location made by the register and receiver was a finality and carried with it a presumption having all the force of actual proof that every requirement and condition of the treaty leading up to this final act was properly fulfilled, and that it is too late now to go behind the "returns."

The argument of the Assistant Attorney General which begins at page 22 of his brief, so far as it is embraced in pages 22, 23, 24 and 25 therein, is devoted mainly to a discussion of the rights of reservees, grantors of Eli Ayres under the 5th Article of the Treaty, upon the theory that there was no regulation made by the Department to carry the provisions of the 5th Article into effect, but inasmuch as there was one which was adopted and acted upon by the proper officers named in the treaty, this part of the argument is fallacious.

The remaining pages of the brief are devoted mainly to views of the Assistant Attorney General, based upon quotations from the report of Commissioner Leupp, which appear in the brief at pages 26 and 30, which have already been commented upon by us heretofore in this brief. We now call the attention of the court to some of the propositions laid down by the Assistant Attorney General independent of the said report and which we submit are not well founded in fact or law.

At page 28 of the brief he says:

> "Inasmuch as the King of the Chickasaws signed the report (Boggy Council) may we not presume in the absence of any direct testimony to the contrary, that the remaining names affixed in the report were chiefs," etc.

But Armstrong's report is itself "direct testimony to the contrary," and, further, we point the Assistant Attorney General to a significant finding of Commissioner Price, which is in the following language:

> "From the original report on file in this office it appears that the investigation upon the report of which the above action of the War Department was based (Armstrong's report) was not made by the commission named in the treaty but by a council of Chickasaws.
>
> "The report is signed by twenty-five persons; two of whom are among the commissioners named in the treaty." (Report of April 19, 1882 to Secretary Teller.)

At page 31 of his brief he lays down the proposition that the approval of the deeds by the President as required by the treaty "was a part of the law authorizing the selection of lands by the Indians." Evidently this is not so. The President had nothing to do with the selection of lands; his duty was limited to the approval or deeds.

Again he says immediately following:

> "Mr. Ayres had notice of this fact (that the President was required to approve the deed) and it would therefore seem that he had no equitable claim to these lands."

But Ayres had no notice when he bought the lands of the Indian that the President would not approve the deeds. He had a right to suppose that he would.

Again Commissioner Price answers this position very happily:

> "It is true that the deeds taken by him required the approval of the President, and that he acquired no legal title until such approval was given. It was necesary, however, that he should pay the purchase money before he could obtain such approval and the reservations being properly located, as shown by the local Land Office, and the deeds being in regular form as

required by the treaty, he would seem to be justified in regarding such an approval as a matter of course."

Again he says at page 32 of his brief:

"He (Ayres) dealt with parties in obtaining these deeds who were not recognized as being eligible to reservations under the treaties."

But they were recognized and duly located as recognized in the statement just made from the report of Commissioner Price without resorting to other proof that appears upon the record.

Again he says immediately following:

"He (Ayres) paid his money before the certificates were furnished, as provided by law."

We are at a loss to know what certificates are alluded to.

The applications made to the Indian agent for the locations of lands of Chickasaw Indians were for the use of the agent only. When the agent had made out the lists and reservations and locations of lands for the Indians specifically named in said applications, these applications had answered their purpose and were, strictly speaking, of no further use.

The lands reserved and located by the agents were contained in the certificates made by such Indian agents in accordance with said applications, such certificates then becoming evidence in the case to be transmitted or filed with the Register and Receiver by such Indian agents It does not appear from the treaty that there was any specified time in which the Indian agent was to file the roll of Indians and locations of land with the Register and Receiver.

In relation to the grantors of Ayres these certificates were filed with the Register and Receiver, and by them transmitted to the General Land Office.

The certificates of rolls of Indians and locations of land of all the grantors of Ayres are now on file in this case, having been transmitted here from the General Land Office (see Book 13) and make certain the fact that all of the proceedings in relation thereto were conceded to be regular under the treaty. This is the presumption of law anyway, and no question has ever been raised on this point in the Departments.

In the progress of the trial in Wray vs. Doe, supra, a question was propounded to a witness as to "whether any, and, if any, what certificate was appended to the roll of the reservees by the chiefs and agent to the Register's office."

The proposed testimony was excluded upon the ground that the Indians had done all in their power to secure their reservations by having their names put upon the roll, and if the agent afterwards neglected his duty by failing to annex a proper certificate to the roll before he returned it to the Register's office, the Indian is not to be prejudiced thereby.

We contend that if the roll shows that the Indian grantors of Ayres are contained in the rolls furnished by the agent to the Register, as shown by such rolls now in evidence, that neither said Indian grantors nor Eli Ayres, their grantee, can be prejudiced in their rights by any irregularity that may exist as to the form or contents of the certificate of the Indian agent, or as to the time of filing the certificate with the Register.

The treaty does not require the list or roll of the agent to be filed with the Register and Receiver before the location can be made. Such a list or roll or certificate could be made to the Register and Receiver without returning to them the list made by the seven chiefs to the agent.

"The certificate required may have been made by the agent upon the return of the lists to him by the chiefs,

and the location may have been made by the Register and Receiver upon the list filed with the agent, which list may not have been deposited with the Register and Receiver for several months afterwards."

The locations of the lands to the grantors of Eli Ayres is evidence of itself that all the prerequisites were complied with and that a violation of duty on the part of the officers who made the locations is not to be presumed, and such a construction will be given to the certificates as will justify the acts of the officers and render the locations valid. (Hardin vs. Ho-yo-po-Hubby, 27 Miss., 582.)

The treaty granted the land, but the locations had to be fixed before the grant could become operative. After this was done, the estate became vested and the right to it perfect.

The grant to the Indian grantors of Eli Ayres was complete when the location was made, and the location is, in itself, evidence that the directions of the treaty on the subject were observed and it can not be presumed that the officers empowered to make the location violated their duty. Even if the agent neglected to annex a proper certificate to the roll of Indians entitled to the reservations, it is difficult to see how the Indians could be prejudiced by this neglect. (Best vs. Polk, 18 Wall., 118.)

From the foregoing it appears to be conclusive from the records and proofs furnished by the Government in this case that the locations of land to the grantors of Eli Ayres, as Chickasaw Indians, were duly made according to the treaty, and that the locations themselves are evidence of the fact.

Again he says on page 32 of his brief, "It seems that a business man seeking to obtain title from Indians who are justly entitled to the reservations, would have made some business arrangement, whereby the money should lie in the hands of a third party until all the requirements of the

treaties had been fulfilled. For his failure so to do neither the Government nor the Chickasaw Nation should now be called upon to respond in any sum whatever." As a rule of interpretation of the provision of the treaty involved, this furnishes a most unique and liberal one, but we think that the Assistant Attorney General will not be able to reconcile this precautionary measure which a business man would adopt with the condition of the treaty which confronts him, that the agent must first certify that the payment has been made and is a fair consideration for the land purchased, before the deed can be delivered by the Indians. All of which is respectfully submitted.

GEORGE C. HAZELTON,
Attorney for Claimant.

John. H. Hazelton, *of Counsel.*

APPENDIX.

REPORT OF COMMISSIONER LEUPP.

DEPARTMENT OF THE INTERIOR.

Office of Indian Affairs.

WASHINGTON, JAN. 27, 1906.

(Copy.)

The Honorable,

The Secretary of the Interior.

Sir: I have the honor to acknowledge the receipt of your letter of December 29, 1905, transmitting a communication from the Department of Justice, dated December 28, 1905, and papers in the case of John T. Ayres, Executor of the Estate of Eli Ayres, deceased, vs. United States, No. 11903 Congressional, now pending in the Court of Claims, consisting of the "Claimant's Amended Petition," "Claimant's Statement" and "Abstract of Evidence," and "Claimant's Request for Findings of Fact." The reference is for immediate report and recommendation.

The Department of Justice says that these documents are forwarded for the purpose of ascertaining whether, in your judgment, there are any objections that should be made to the requested findings of fact, and of securing such information as may enable that Department to present a proper defense of the claim. It is further remarked that the documents relating to the case are mostly found in this Office. The latter concludes by saying that any suggestions that may be deemed pertinent will be incorporated in the defense of the Government.

Permit me to say that all papers belonging in this Office relating to the case in question, were transmitted to the Department under date of July 27, 1905, to be transmitted to the Department of Justice, there to be examined with a view of ascertaining what part of them would be required by it in defending the suit under consideration. From the papers transmitted in your letter of December 29, 1905,

it appears that these records have been filed in the Court of Claims, so that it is not possible to verify that part of the requested findings of facts which purports to show what the records disclose. It is presumed, however, that in this respect the requested findings are correct.

The claim involves the title or the right to lands covered by two distinct articles of the treaty concluded with the Chickasaw Indians on May 24, 1834 (7 Stats., 450). It is alleged that Eli Ayres purchased the lands described in the petition from various Indians who acquired title thereto by virtue of the 5th and 6th articles of the said treaty, his purchases having been made in the year 1839.

The basis of the claim against the United States is that the regular course of proceedings in the approval of the deeds and the title of Eli Ayres to these lands was twice interfered with by the Government and its officers; first, by the action of the President in December, 1834, five years prior to the time Ayres claimed to have acquired title, when regulations were promulgated to carry into effect the provisions of the treaty. The 14th article or subdivision of those regulations declared that the title to the reserve tracts should not be vested in the reservees until their locations should be approved by the President. The second interference was when the Secretary of War approved the "unauthorized" report of the council held at Boggy Depot on October 26, 1842, which approval controlled and suspended all subsequent action of the United States respecting these reservations and locations and the sales thereof by the Chickasaw reservees to Eli Ayres, who, it is claimed, was an innocent bona fide purchaser of the lands for a fair consideration. It is argued that there was no authority conferred on the President or the Executive Department to interfere with the terms of the treaty and control the location of the reservations.

There is absolutely nothing in any of the treaties controlling the selections that were to be made under the 5th article, except that the reservees must be heads of families, but if the original selections should be "adjudged unfit for cultivation by the agent, and three of the seven persons named in the fourth article above, the party entitled, shall be, and is, hereby authorized, to locate his claim on other lands." * * *

Thus it appears that there was no method provided for

determining who should have the right to reservations under the 5th article. The certificates of the members of the commission designated to certify as to minors and others covered by the 6th article are relied on by the claimant as establishing the rights of his grantors who claimed as reservees under the 5th article. These certificates, being unauthorized, amount to nothing more than a recommendation. The rolls prepared from such certificates do not purport to be based on the knowledge of the Agent but on these recommendations.

The rights of claimants of necessity had to be passed on by some competent authority. It is evident that the Executive Department had to pass on the rights of claimants and control the locations if frauds and conflicts were to be avoided. Such supervision seems to have been acceptable to the Indians as there is no record of a protest or objection from them, and the acceptance by the Indians precludes the raising of the question by a stranger to the treaty.

When a question did arise it was referred to the Commission who were to make the list provided for in article six; but it was passed on by a council at Boggy Depot after the matter had been pending before the Indian Agent eighteen months, and though the rights of 524 people were voted on in one day it seems improbable that the Indians had not canvassed the merits of the several claimants before that date. They must have known that the Agent had a list of questionable claimants for eighteen months, and that such list had been sent him at their request. The 6th article of the treaty of June 22, 1852 (10 Stats., 974), would indicate that the Indians still had in mind these fraudulent attempts to locate reservations.

It appears that the claimant, as to reservations under the 5th article, fails to establish the validity of the reservations he purchased; indeed, it is reasonable to conclude that such reservations were fraudulent, and certainly no title vested in the reservees. Therefore the third section of the request for findings is objectionable; it should be, that the Indians named therein never acquired title to lands claimed by them.

The locations under the 6th article rest on an entirely different provision of the treaty. It expressly provides that a commission of seven persons named shall prepare a list of

those entitled. And, as Ayres purchased from some who were certified by the Commission, his claim would be good if there were not a saving provision in the law governing. The 6th article further provides:

> * * * "And as to the sale, lease, or disposition of their reserves, they are to be subject to the conditions and restrictions set forth in the fourth article."

The restrictions referred to in the fourth article are expressed in the following language:

> * * * "It is therefore agreed that the reservations hereinafter admitted, shall not be permitted to be sold, leased, or disposed of unless it appears by the certificates of at least two of the following persons, to wit: Ish-ta-ho-ta-pa the King, Levi Colbert, George Colbert, Martin Colbert, Isaac Alberson, Henry Love, and Benj. Love, of which five have affixed their names to this treaty, that the party owning or claiming the same, as capable to manage, and to 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; and 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 of 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 recommendation 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 remain as part of the general Chickasaw fund in the hands of the Government until such time as the chiefs in council shall think it advisable to pay it to the claimant or those who may rightfully claim under said claimant and shall so recommend it."

None of the deeds taken by Ayres received the approval required, and hence his title to reservations selected under the provisions of the 6th article of the treaty is void. This requirement was a part of the law authorizing the selections of lands by the Indians, and, as Ayres had absolute notice thereof, he could have no equitable claim to these lands.

The failure to acquire legal title and the lack of an equitable right as relates to the selections under the 6th article should appear in the findings.

Claimant insists that Best vs. Polk (18 Wall., 112), Wray vs. Doe (10 Smedes & Marshall, 647), and Hardin vs. Hoya-pa-nubby (27 Miss. 567), hold that locations by reservees vested title in them. Best vs. Polk is correctly cited, but the controlling factor is not mentioned in the decision or adverted to by claimant. Best's reservee took under the 6th article. The reservees under that article were those on the list made by the commission of seven created in said section for the purpose. Were Ayres' grantors purporting to be locators or reservees under section six on a list prepared by the seven in accordance with the provisions of the section? If so, they undoubtedly were vested with an indefeasible title. If any of his 6th section grantors were not certified by the *entire* seven, they did not acquire title. All that can be deduced from Best vs. Polk is that Ayres had a remedy. That being so, he was bound to take advantage of it. Applied to the cause pending, it has no bearing for Best had title as grantee from the reservee. In Ayres' case one class of grantees never acquired title and the other did not convey even though they did acquire title. And it should be borne in mind that the latter did not obtain title unless they were certified by the entire commission of seven.

The reports containing the other two cases are not at hand, but it is fair to presume that the locations and transfers, if any, were in all three cases strictly in accordance with the terms of the treaty and perhaps all were 6th article selections, as was the case in Best vs. Polk.

One of the objects of this suit is to charge the funds of the Chickasaw Indians with the damages, and it seems as if the claimant should be compelled to follow the same course he would were the Indians citizens, and show that he had at-

tempted to defend his title or had asserted it in a court of competent jurisdiction, and had been defeated before making a claim against the grantors.

The foregoing seem to be all the points that suggest themselves which should be brought out in the proceedings so far as relates to the position of the Government, but there remains one other, which deserves the utmost consideration. The claimant, although proceeding against the United States, seeks to have the findings show that the funds of the Chickasaw Indians should be charged with $191,044.70, but the Chickasaws have not had notice of the suit or been afforded an opportunity to present any defense to this claim. They are not even a party to the proceedings. It is urged earnestly that no findings should be made until after those who have the most at stake have had an ample opportunity to make a defense to the claim.

Very respectfully,

F. E. LEUPP, *Commissioner.*