In the Court of Claims of the United States.

JOHN T. AYRES, EXECUTOR OF THE estate of Eli Ayres, deceased,
v.
THE UNITED STATES.
No. 11903.

DEFENDANT'S OBJECTIONS TO CLAIMANT'S REQUESTS FOR FINDINGS OF FACT; DEFENDANT'S REQUESTS TO AMEND FINDINGS, AND DEFENDANT'S BRIEF.

No objections are raised to claimant's first and second requested findings of fact.

Defendant asks that claimant's third requested finding of fact may be modified to read as follows:

III.

That pursuant to the fifth article of the treaty of May 24, 1834, there were reserved and located for the following-named Indians, heads of families, who were listed and enrolled for the purpose (see Book 13, p. 83 to 88), sections and parcels of land in the tate of Mississippi.

(Here follows the list as found in claimant's third requested finding of fact.)

Defendant asks that claimant's fourth requested finding of fact be modified to read as follows:

IV.

That pursuant to the sixth article of the treaty of May 24, 1834, there was reserved and located for each

of the following-named Indians not heads of families, who were listed and enrolled for the purpose, a section or parcel of land in the State of Mississippi.

(Here follows the list as found in claimant's fourth requested finding of fact.)

That claimant's fifth requested finding of fact be amended to read as follows:

V.

That Eli Ayres, now deceased, purchased at various dates in the months of May and June, in the year 1839, from the Indian reservees named in the tabulated statements set out in the preceding requests numbered III and IV, the respective sections and parcels of land situated in the State of Mississippi and described in said statements, and paid to said Indians severally therefor $800 per section, or $1.25 per acre; and by virtue of said purchase the original deeds of conveyance were signed, sealed, and delivered to him by said Indians, respectively, the said original deeds having been produced as evidence herein.

(Here follows the list as set forth in claimant's fifth requested finding of fact.)

That claimant's sixth requested finding of fact be amended to read as follows:

VI.

That none of said deeds set forth in the fifth requested finding of fact were ever approved by the President of the United States, or by any person designated by him to approve the same, as required by

the fourth article of the treaty of May 24, 1834, made between the Chickasaws and the United States.

That the United States and its officers ignored and disregarded the title acquired under the grant of the treaty of May 24, 1834, by the said reservees to the said lands situated in the State of Mississipppi, and also ignored and disregarded the title of Eli Ayres to said lands and disposed of the same by selling about 141 sections or parcels of the land at public sale and locating the remainder, or about 53 sections, or parcels thereof, to other persons than said reservees, as is more particularly shown by the tabulated statement (46) transmitted by the Secretary of the Interior of date August 3, 1905, which is as follows:

(Here follows list of Chickasaws' lands located at Pontotoc, Miss., for certain reservees, as set forth in claimant's sixth requested finding of fact.)

That claimant's seventh requested finding of fact be amended to read as follows:

VII.

That the remainder of the said lands reserved and located to the Indian reservees and sold and conveyed by them to Eli Ayres, as aforesaid—namely, 53 sections and parcels—was appropriated and located to other persons by the United States Government in the years 1840, 1843, 1844, and 1846, as is shown by the tabulated statement of the Interior Department, set out in the preceding request numbered VI. That said Eli Ayres paid to his grantors, the said Indian reservees, the sum of $800 per section, or $1.25 per acre for the said land.

No objections are made to claimant's eighth requested finding of fact.

That claimant's ninth requested finding of fact be amended to read as follows:

IX.

That twenty-one of the original deeds of conveyance from the said Indian reservees and grantors to Eli Ayres have attached to each of them the original certificate of two of the persons named in article 4 of the treaty of May 24, 1834, as to the capacity of the Indian reservee and grantor named therein to manage and take care of his or her own affairs; and there is also attached to each of said deeds an original certificate of A. M. M. Upshaw, Chickasaw agent, as to the truth, to the best of his knowledge and information, of the contents of the certificate of the said persons as to the capacity of the said Indian reservee and grantor named in said deeds to manage and take care of his or her own affairs, and that the consideration named in each of the said deeds of conveyance is, in his opinion, a fair consideration, and that it has been paid, as required by article 4 of said treaty.

The remaining 129 original deeds of conveyance from said Indian reservees and grantors to Eli Ayres have attached to each of them the original certificate, duly witnessed, of two of the persons named in article 4 of the treaty of May 24, 1834, as to the capacity of the Indian reservee and grantor named therein to manage and take care of his or her own affairs. There is also attached to each of said deeds

a receipt, ~~duly~~ witnessed, showing the amount of consideration paid for the respective sections and parcels of land by Ayres, but there is no certificate of the Indian agent attached to these deeds, as required by the treaty. The failure of Ayres to procure the certificate of the Indian agent to the 129 deeds was caused by the suggestion to Acting Superintendent Armstrong of one or more Chickasaw chiefs that some of the Indians for whom lands had been reserved and located were not Chickasaws, which suggestion was reported by Superintendent Armstrong to the Commissioner of Indian Affairs, who thereupon recommended to the Secretary of War that the list of unconfirmed locations be sent to the committee provided for in the fourth article of the treaty of May 4, 1834, with the Chickasaw tribe, for their revision. The Secretary of War on May 4, 1841, approved the recommendation of the Commissioner of Indian Affairs and issued an order in accordance therewith, by the express terms of which no locations could be approved in advance or until subsequent to the revision or correction of the list by the committee, assisted by Major Armstrong.

That said list to be revised and corrected contained the names of Indians who, it was claimed, had moved west of the Mississippi before the treaties of 1832 and 1834 were ratified, and that said list contained the names of Indians from whom the alleged purchase was made by Eli Ayres.

That said list was forwarded to Major Armstrong, and that Major Armstrong acted with the committee to whom the list was submitted, Ish te ho to pa, king of the Chickasaws, being one of the committee.

That on the 26th of October, 1842, the committee presented the following report:

BOGGY DEPOT, *26 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 requirements 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 qua, 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 are 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 to see 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 claimants, 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 we know 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 the 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 claimants.

(Signed) ISH TE HO TO PA KING (his x mark).

(Here follow 24 other names.)

Witness:

PITMAN COLBERT.

JOSEPH COLBERT (his x mark).

CHAS. JOHNSON.

T. HARTLEY CRAWFORD, Esq.,

Commr. of Ind. Affairs,

Washington City.

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

That subsequent thereto, on October 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 year ago to make the investigation immediately after the annuity of 1841 should be paid 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 of 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 the investigation. 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 individuals whose names were on the rolls 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 ly, No. 748, one section; Sti mo hoth ka, No. 370, two sections; Ebah Chuck may tubba, 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 have 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 be-

lieve, 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 to claimants to come forward. I saw no indisposition on the part of the Chickasaw commissioners 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 hesitation 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. servt.,

(Signed) WM. ARMSTRONG,
Act. Supt. W. T.

T. HARTLEY CRAWFORD, Esq.,
Washington City.

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

No objection is made to claimant's tenth and eleventh requested findings of fact.

The defendant objects to the last three lines of claimant's twelfth requested finding of fact, and further objects to claimant's thirteenth requested finding of fact for the reason that the facts therein

requested to be found have not been satisfactorily established by the evidence.

The defendant requests the following findings of fact:

I.

That it has not been proven to the satisfaction of the court that the Indians from whom the claimant, Eli Ayres, purchased the several lands set forth and for which he received deeds from the Indians were actually Chickasaws and entitled to participate in the benefits of the treaties of 1832 and 1834, made between the Chickasaws and the United States.

II.

That the list set out by claimant as being reserved and located for heads of families under the fifth article of the treaty of May, 1834, was properly revised by the Boggy council, and that the names of Indians set forth in said list did not acquire title from the United States to the lands reserved to persons on said list, and that the claimant, Ayres, therefore acquired no title from the several Indians mentioned on said list.

III.

That the action of the Boggy council, as set forth in defendant's ninth request for amended findings of fact, was ratified and approved by the Secretary of the Interior in the following terms, to wit:

> In the matter of certain claimants to reservations under the treaties of Pontotoc and Washington, representing themselves to be Chicka-

saws, 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 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.

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 the treaty of 1834 the

reservations become 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.)

IV.

That the list of Indians from whom the claimant, Eli Ayres, purchased the several parcels of land in question were Indians who were supposed to have moved west prior to the ratification of the treaty of 1834. (See pages 10, 11, 12, 22, and 24, claimant's statement and abstract of evidence.)

V.

That the claimant, Eli Ayres, failed to acquire a legal title to any of the lands in question, and there is nothing in the proceedings to show that he has an equitable right to which the United States should be called upon to respond.

STATEMENT.

On October 20, 1832, there was concluded a treaty between the Chickasaw Nation and the United States, commonly termed the "Pontitoc treaty." By the terms of said treaty the Chickasaw Nation ceded to the United States all the lands which they owned

east of the Mississippi River. The United States agreed to survey and offer for sale and sell at public auction the land so ceded, and further agreed to pay to the Chickasaws all the money arising from the sale of said lands after deducting the expenses attending the same.

The fourth article provided that every family of the nation was to select out of the surveys, prior to any public sale of any of the lands so surveyed, a comfortable settlement, which was to guard against the contingency of a failure to secure a satisfactory country to emigrate to west of the Mississippi, such selections to be upon the basis of one section of land to each single man 21 years of age; to each family of five and under, two sections; to each family of six and not exceeding ten, three sections; and to each family exceeding ten in number, four sections. To each family owning ten or more slaves an additional section was granted, and to those owning less than ten slaves a half section. It was further provided in this connection that when the Chickasaws had finally secured a country and were ready to remove thereto the President of the United States should, upon being notified of such determination, proclaim said lands for sale in the manner as provided in the second article of said treaty, the net proceeds of all such sales to be paid to the Chickasaw Nation.

In order to avoid confusion and conflicts arising out of reservations under the fourth article of the treaty, it was provided by the fourteenth article of said instrument that it should be the duty of the

chiefs of the nation, with the advice and assistance of the Indian agent, to cause a correct list to be made out of each tract of land selected as and for a residence; said lists to designate the entries of lands so set apart for each family or individual in the nation, showing the precise parcel belonging to each and every of them, the same, properly authenticated, to be filed with the register of the land office as constituting the evidence of the title of each reservee to the lands so selected under the said fourth article of the treaty.

(See 7 Stat. L., p. 381.)

It appears that prior to actual occupation under said treaty the same was amended and in part abrogated by a further treaty, concluded at the city of Washington May 24, 1834, which was entitled "Articles of convention and agreement proposed by the commissioners on the part of the United States in pursuance of the request made by the delegation representing the Chickasaw Nation and which have been agreed to." (7 Stat. L., 450.)

Article 4 of this amendatory treaty contained the following provision:

> The Chickasaws desire to have within their discretion 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 appears by the certificate of at least two of the following-named persons, to wit, Ish to ho to pa, Levi Colbert, George Colbert, Martin Colbert, Isaac Alberson, Henry Love, and Benjamin Love, of which five have affixed their names to this treaty, that the party owning or claiming the same is capable to manage and take care of his or her own affairs, which fact, to the best of his knowledge or information, shall be certified by the agent, and furthermore, that a fair consideration has been paid; and thereupon the conveyance shall be valid, provided the President of the United States, or such other person as he shall designate, shall approve of the same and indorse 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.

Articles 5 and 6 are amendatory of the treaty of Pontotoc, and change article 4 of that treaty by vesting the title to reserved lands in the individual Indians in fee. The language of article 5 is as follows:

> It is agreed that the fourth article of the treaty of Pontotoc be so changed that the following reservations be granted in fee.

Then follows allotments to heads of families, etc.

Article 6 is in the language as follows:

> Also reservations of a section to each shall be granted to persons, male and female, not being heads of families, who are of the age of twenty-one years and upwards, etc.

This latter article also provides that lists of Chickasaw Indians not heads of families, alluded to in the fourth article of the "treaty of Pontotoc," shall be made out by the seven commissioners named in said treaty and filed with the agent, upon whose certificate of its believed accuracy the register and receiver shall cause said reservations to be located, etc.

The claim under consideration is based upon the alleged purchase of lands reserved under the provisions of articles 5 and 6 of the treaty of 1834. It is claimed that prior to the treaties of 1832 and 1834 a number of Chickasaw Indians had intermarried with the Choctaws, and, with others who had not so intermarried, had removed west of the Mississippi River, and therefore were not considered at the time the great body of Chickasaw Indians were enrolled. When the main body of Chickasaws moved west, it appears that they discovered some of their brethren who had preceded them, and steps were taken by Ish te ho to pa, king of the Chickasaws, and others to have such Indians properly enrolled, so that they could make reservation under the fifth and sixth articles of the treaty of 1834 and thereby be permitted to share in the benefits of said treaty to the same extent as if they had been living with and members of the tribe prior to the ratification of the treaty and to their moving west. A list of such persons who were supposed to have moved west prior to the great body of the Chickasaws was made out, with the agent's certificate of its "believed accuracy," which

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list was filed with the register and receiver, as required by the sixth article of the treaty of 1834, and copies of the list filed in the office of the Commissioner of Indian Affairs. There then arose the question as to whether or not there had been names certified as Chickasaws who, as a matter of fact, were not of Chickasaw descent, and upon a petition of certain members of the Chickasaws the list was forwarded to William Armstrong, Acting Superintendent of Indian Affairs, on the 16th of June, 1841, with instructions to submit the same to the proper Chickasaws for their rejection or approval. On the 26th of October, 1842, a council of Chickasaws was held at Boggy Depot, a report of the proceedings of which was submitted to the Secretary of War on the 1st day of March, 1843, and was returned on the 3d of March, 1843, with his decision thereon as set forth in defendant's third request for findings of fact.

This report rejected all those upon the list who had heretofore been reported as Chickasaws excepting four, the list embracing something over five hundred names. Prior to the revision of the list by the Boggy Depot council, it is alleged that claimant's decedent, Eli Ayres, had purchased certain lands from the Indians and taken deeds thereto, the grantors being persons who were upon the list that had been presented to said council and who were rejected by the council. The action of the council and proceeding thereon is set forth in defendant's ninth request for findings. Claimant's decedent, Eli Ayres, obtained the deeds from the several Indians

who, it is alleged, had moved west prior to the making of the said treaties and who were rejected by the Boggy Depot council. The list of the grantors, together with the lands so sold to Ayres, are set forth at length in claimant's brief and request for findings. The fourth article of the treaty of May 24, 1834, in making provisions for the conveyance of lands by the respective Indians, made provision for the sale of certain lands by the Indians who were attested to be Chickasaws and entitled to the benefits of the treaty, and among other provisions required that "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 indorse 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 lands may be situated, otherwise to be void."

None of the deeds obtained by Ayres from the Indians, and for which he alleges to have paid to the Indians a reasonable consideration, were ever approved by the President, or by anybody designated by him to approve the same. The Government therefore treated said conveyance to Ayres as void, in accordance with the fourth article of the treaty of 1834, and proceeded to dispose of the lands in the manner set forth in claimant's statement. One hundred and forty-one sections of said land were sold by the Government for the sum of $48,061.56, and the remaining 53 sections were located to other persons. The amount received for said 141 sections

was invested by the United States for the Chickasaw Indians, which investment has been bearing interest at not less than 5 per cent per annum. Claimant contends that he is entitled to be paid, by reason of the foregoing action, said sum of $48,061.56, with interest thereon at the rate of 5 per cent from May 1, 1846, the amount of interest computed to November 1, 1905, being $142,983.14, which, together with the principal, makes the amount November 1, 1905, $191,044.70. Claimant further asks that he be reimbursed for the 53 sections appropriated and located by the United States to other persons in the amount of $42,400.

The claim has been before Congress at various times, and a number of committees, both of the House and of the Senate, have made reports thereon. These reports have been in the main favorable to claimant, one of them recommending the payment of $155,200, with interest at 3 per cent per annum in land scrip at $1.25 per acre. Other reports recommended that Mr. Ayres be reimbursed in the actual sum expended for the lands in question. Senate reports Nos. 466, Fifty-seventh Congress, and 401, Fifty-eighth Congress, respectively, filed in this case, set forth the action of the several committees on the claim in question. The claim was referred to this court by the act of February 24, 1905 (33 Stat. L., pt. 1, p. 808), wherein jurisdiction is conferred upon this court to proceed, according to the principles and rules of both law and equity, to find the facts as to the purchase of said lands by Ayres

and as to the deeds received by him from the Chickasaw Indians, together with the amount so paid to said Indians by claimant's decedent, and also to find the facts as to the alleged appropriation by the United States of certain parcels or sections of land alleged to have been purchased by Ayres from the said Indians, and as to whether or not said lands had been disposed of by the United States, and any other material facts in connection therewith. By this act the court is required to find what amount of the proceeds of the sale of said lands, if any, is held by the Government in trust for the said Chickasaw Indians, and any other facts of importance to the parties which may arise in this claim. The court is authorized and directed to report its findings to Congress. The act makes the further provision that the affidavits of persons now dead, reports of officers of the United States Government, reports of committees of both Houses of Congress, and the several deeds from the said Chickasaw Indians to the said Eli Ayres, deceased, and all papers on file with the claim in Congress, or with the committees of either House, be considered by the court and such weight given thereto as may be deemed by the court to be right and proper.

ARGUMENT.

WHO WAS AUTHORIZED TO MAKE AND REVISE THE LIST PROVIDED FOR IN THE FIFTH ARTICLE OF THE TREATY OF 1834?

Claimant's counsel insist that the action of the Boggy council, as set forth at length in defendant's ninth request for amended finding, was irregular and unauthorized; and further, that the persons who were to prepare the lists of the Indians entitled to land under the treaty were the seven commissioners named in section 4 of the treaty of 1834.

The fourth article of the treaty of 1832, as has been heretofore shown, made provision whereby the Chickasaw Nation was to hunt out and procure homes for their people west of the Mississippi River, and further made provision that should they fail to procure homes to which they could remove before the land east of the Mississippi was offered for sale, that then and in that event they were to select out of the surveys a comfortable settlement for every family in the Chickasaw Nation, which said tract of land so selected and retained should be held and occupied by the Chickasaw people uninterrupted until they could find and obtain a country suited to their wants and conditions.

> Article XIV. As soon as the surveys are made it shall be the duty of the *chiefs*, with the advice and assistance of the agent, to cause a correct list to be made out of all and every tract of land which shall be reserved for the use and benefit of the Chickasaw people for their residence, as is provided for in the fourth article of this treaty, which list will designate the sections of land which are set apart for each family or individual in the nation, shewing the precise tracts which shall belong to each and every one of them, which list shall be returned to the register of the land office, and he shall make a record of the same in his office, to prevent him from offering any of said tracts of land for sale, and also as evidence of each person's lands. All the residue of the lands will be offered by the President for sale.

The fourth article of the treaty of 1834 recites the fact that many of the Chickasaws are competent to manage their own affairs, but others are not so capable; that the reservations named in the treaty of 1834 shall not be permitted to be sold or disposed of, unless it appear by certificate that the party owning the claim is capable to manage and to take care of his or her affairs, the certificate to be signed by at least two of the following persons: Ish ta ho ta pa, the king; Levi Colbert, George Colbert, Martin Colbert, Isaac Alberson, Henry Love, and Benjamin Love. Article 4 sets forth what the certificate shall contain, and further provides that where the certificate is not obtained the land may be sold 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, and makes further provision for filling the vacancy in case of the death, resigna-

tion, or removal of any of the delegation above mentioned.

The fifth article of the treaty of 1834 changed the fourth article of the treaty of 1832, and provided for the quantity of land to be reserved to certain Indians, the reservations to be (using the language of the statute) as follows:

> Article V. It is agreed that the fourth article of the "Treaty of Pontitoc" be so changed that the following reservations be granted in fee.

(Here follows a recital of the parcels of land to be reserved.)

It may be noted that, notwithstanding the language of the statute, "granted in fee" does not constitute a fee-simple title, but a *conditional fee*. The restrictions as to the sale and disposal of the property, as expressed in the treaty, does not comport with the definition of a title in fee simple. In other words, the grant is not an absolute inheritance clear of any condition, limitation, or restriction. The title granted by the treaty prohibits the disposal of the property in a manner which would be authorized by a fee-simple title, but clothes the title with conditions, to wit, that it can not be alienated without, first, a certificate of at least two persons named in article 4 that the party owning or claiming the land is capable to manage and take care of his or her affairs; second, that this fact shall be certified by the agent; third, that a fair consideration had been paid; fourth, that the President of the United States, or such other

person as he may designate, shall approve of the sale and indorse it on the deed.

It will be seen that the seven persons named in the fourth article of the treaty of 1834 were not designated by the treaty as the persons who should make out the lists to whom lands were granted in the fifth article of the treaty. Therefore that portion of the treaty of 1832, article 14, which provides that the list shall be made by the *chiefs*, with the advice and assent of the agent, remained in full force and effect, notwithstanding the treaty of 1834.

The sixth article of the treaty of 1834 sets out additional persons to receive lands, persons who are not heads of families, and specially provides that the list of such persons should be made by the seven persons named in the fourth article of said treaty.

Article 14 of the treaty of 1834 provided that articles 12 and 13 of the treaty of 1832 should stand, notwithstanding any provisions in the treaty of 1834, but that all other articles of the treaty of 1832 inconsistent in any respect with the provisions of the treaty of 1834 were declared to be revoked. No provision having been made as to who should prepare the lists of lands reserved and of the persons to whom the lands were reserved, as provided in section 5 of the treaty of 1834, it necessarily follows that the persons named to make selections in article 14 of the treaty of 1832 are the ones to make the lists provided for in article 5 of the treaty of 1834, and in giving this construction there is no inconsistency between the two treaties.

In this connection we desire to present the views of Hon. F. E. Leupp, Commissioner of Indian Affairs, as presented in his report dated January 27, 1906, filed in this case February 16, 1906.

> 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.
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> There is absolutely nothing in any of the treaties controlling the selections that were to be made under the fifth 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 * * *."
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> Thus it appears that there was no method provided for determining who should have the right to reservations under the fifth article. The certificates of the members of the commission designated to certify as to minors and others covered by the sixth article are relied on by the claimant as establishing the rights of his grantors who claimed as reservees under the fifth 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 6, 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 sixth 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 fifth 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.

CONTEMPORANEOUS CONSTRUCTION.

The treaties received a construction by the Department of the Interior soon after their ratification, and this construction was furthermore approved and ratified by the President of the United States, as shown by his action in refusing to approve the deeds acquired by claimant. The list as revised by the Boggy council received the approval of the Department of the Interior and the Department ratified the action of the council, which ratification immediately followed the meeting of the council and revision of the list. Inasmuch as the King of the Chickasaws signed the report, may we not presume, in the absence of any direct testimony to the contrary, that the remaining names affixed to the report were chiefs or persons properly authorized to act, as required by article 14 of the treaty of 1832, which we contend was not amended or abrogated by the treaty of 1834? This is undoubtedly the construction given it by the Department of the Interior.

The doctrine of contemporaneous construction is particularly applicable to this case. It is unnecessary here to amplify or enter into details of the force and effect of "contemporaneous construction." It is well known and recognized by this court, and citations are superfluous.

As to the Indians from whom Mr. Ayres purchased the lands in question: The names which were on the list, as provided for in the fifth article of the treaty, were undoubtedly subject to revision by the

Boggy council, which was composed of the King of the Chickasaws and the persons whose names are attached to the report acting with him, with the approval of the agent, and this was the construction given the treaty at the time by the Department of the Interior and the President of the United States.

CASES CITED BY CLAIMANT.

As to the case cited by claimant, *Wray* v. *Doe*, 10 Smeede and Marshall (Miss.), it is not at all applicable to the list enrolled under the fifth article of the treaty, for, as has been shown, those that were enrolled under the fifth article of the treaty were subject to enrollment and revision by the chiefs and agents, as set forth in article 14 of the treaty of 1832, while in the case cited the reservee, Ho ya pa nubby, had been enrolled under the sixth article of the treaty, and which article specially provided that the list should be made out by the seven persons named in the fourth article of the treaty. (See claimant's statement of facts, p. 31.)

Admitting, then, for the sake of argument, that the reservee in the case of *Wray* v. *Doe* was entitled to be placed upon the list by the seven persons named in the treaty, and not by the *chiefs*, as provided in article 14 of the treaty of 1832, the decision of the court would not at all be applicable to those enrolled under the fifth article of 1834. The opinion carries no weight in determining the title of the Indians who were enrolled under the fifth article of the treaty of 1834, and necessarily can in no way assist in de-

termining the rights of Ayres to such lands as he may have purchased from those Indians listed under said last-mentioned enrollment.

The Commissioner of Indian Affairs in his report above cited, states:

> Claimant insists that *Best* v. *Polk* (18 Wall., 112), *Wray* v. *Doe* (10 Smedes and Marshall, 647), and *Hardin* v. *Ho ya pa nubby* (27 Miss., 567), hold that location by reservees vested title in them. *Best* v. *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 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's grantors purporting to be locators or reservees under section 6 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 sixth section grantors were not certified by the *entire* seven, they did not acquire title. All that can be deduced from *Best* v. *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 a grantee from a reservee. In Ayres's 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.

CLAIMANT'S GRANTEES HAD NO TITLE.

The sixth article of the treaty makes provision for the sale, lease, or disposal of the reservees, but requires them to be subject to the conditions and restrictions set forth in the fourth article. Among these conditions and restrictions, as we have heretofore seen, are that the reservations can not be sold or leased or disposed of, unless it appear by the certificates of at least two persons named in the fourth article of the treaty that the party owning or claiming the land is capable of managing his affairs, which fact shall be certified to by the agent; and that a fair consideration has been paid. The article further provides as an additional condition that the conveyance must be approved by the President of the United States, or such person as he may designate, and that the deed and approval shall be registered at the place and within the time required by the laws of the State in which the land is situated, otherwise the deed to be void.

As will be seen in the statement, none of the deeds obtained by Mr. Ayres from the Indians, for which he alleges he paid a reasonable consideration, were ever approved by the President, nor were they approved by any person designated by the President for such purpose. This requirement was a part of the law authorizing the selection of lands by the Indians. Mr. Ayres had notice of this fact, and it would therefore seem that he had no equitable claim to these lands. In procuring his alleged title Mr. Ayres failed in almost every important step in his dealings with the Indians.

He may have acted in good faith, but if so it was hasty and ill-considered action, and neither the United States nor the Chickasaw Nation should now be called upon to reimburse the heirs of Mr. Ayres for his mistakes. He dealt with parties in obtaining these deeds who were not recognized as being eligible to reservations under the treaties; he paid his money before the certificates were furnished, as provided by law; he parted with the considerations mentioned in the deeds before the deeds were approved by the President, as required by the treaty. It seems that a business man, seeking to obtain title from Indians who were 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 to the fifty-three sections alleged to have been relocated by the Government, and for which he seeks to hold the Government directly liable, Mr. Ayres acquired no higher title than he did for the other lands. In fact he had no title, because his grantees had no title.

THE CHICKASAWS SHOULD HAVE THEIR DAY IN COURT.

It will be seen in the ninth paragraph, page 17, of claimant's amended petition, and in claimant's twelfth requested finding of fact, page 24, that he asks for a finding in the sum of $191,044.70, and that he be

reimbursed in that amount from the account of the Chickasaw Nation's trust fund. At the time of the writing of this brief the Chickasaw Nation is not a party to this action, and is therefore not before the court. In the report of Commissioner Leupp, *supra*, the Commissioner calls attention to the fact that the Chickasaws have not had notice of this suit, neither have they been afforded an opportunity to present their defense to this claim, and makes the proper request in the following form: "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."

The counsel for the Government in this case does not represent the Chickasaw Nation. He has not consulted with anyone who represents the Chickasaws. In preparing the Government's defense to that portion of the claim wherein the Government is directly sought to be charged, it became necessary to enter upon a full discussion of the whole subject-matter in order that the same might properly appear before the court.

Respectfully submitted.

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