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Eli Ayres.

53D CONGRESS, 3d Session. } HOUSE OF REPRESENTATIVES. { REPORT No. 1900.

ELI AYRES.

FEBRUARY 21, 1895.—Committed to the Committee of the Whole House and ordered to be printed.

Mr. TURPIN, from the Committee on Indian Affairs, submitted the following

REPORT:

[To accompany H. R. 8647.]

The Committee on Indian Affairs, to whom was referred the bill (H. R. 8647) to refer the claim of Eli Ayres to the Court of Claims, etc., adopting the language of the report made by this committee on a similar bill in the Fifty-first Congress, submit the following report:

It appears from the proofs before the committee that the claimant was an old man and had been many years urging his claim in the Departments, before the courts, and in Congress. He sets forth that in the year 1839 he purchased of certain Chickasaw Indians 194 sections of land located in the State of Mississippi, for which he paid $1.25 per acre, aggregating $155,200. That all the lands so purchased had been duly granted to the Indians who were his grantors, and that they had a complete title in fee for the same. That owing to unauthorized restrictions placed upon the right of alienation by the Indians, as well as the erroneous interpretation of existing treaties between the United States and the Chickasaw Nation, his deeds were not approved by the President, therefore the legal title was not vested in him, but that he is the equitable owner of the lands in question. That the United States, not having any title to the lands, assumed to sell them to other parties and give patents for them which the courts have declared utterly void. That such action on the part of the Government has resulted in keeping him out of possession and use of the lands during all these years.

From the showing made it is evident that Ayres has persistently pressed his claim at every point and can not be charged with being guilty of laches.

To understand the claim it would be necessary to give its history somewhat in detail. The title in Ayres's grantors, if they had any, rests upon the treaties of 1832 and 1834, negotiated with the Chickasaw Nation. (See 7 Stat., 381 and 450). These two treaties relate to the then existing Chickasaw reservation lying in the State of Mississippi. In 1832 the Indians became uneasy on account of the encroachments of the whites and proposed to cede their lands to the United States and look for another reservation beyond the Mississippi. The treaty was signed the 30th of October that year. By the first article the Indians ceded all the lands in the reservation to the United States. By the second article the United States agreed to have the entire reservation surveyed and offered for sale. The third article provided, "as a full compensation to the Chickasaw Nation for the

country thus ceded," the United States would pay over to the Chickasaws all the money arising from the sale after deducting expenses. But the fourth article provided that every family of the nation was to be permitted to select out of the surveyed lands, before any sales were made, a comfortable settlement, to guard against the contingency of a failure to secure a satisfactory reservation west of the Mississippi. Such selections were to be made on 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 Indians found a suitable reservation, and were ready to remove to it, that the selections above mentioned should be sold in the same manner as the other part of the reservation had been sold, and the net proceeds paid to the nation.

In order to avoid conflicts arising out of reservations provided for, it was further agreed, by the fourteenth article of the treaty, 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 of each tract selected; said list to designate the entries set apart for each family or individual, showing the precise parcel belonging to each, the same to be properly authenticated and filed with the register of the land office as constituting the evidence of the title of each reserve to the land so selected under the provisions of the fourth article.

This treaty of 1832 was amended and in part abrogated by the treaty of May 24, 1834. Article 4 of the latter treaty contains 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, the King, 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 deed of 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 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 former treaty, and change it by vesting the title to reserved lands in the individual Indians in fee, the language of article 5 on this point being 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.

This it will be seen was a radical departure from the provisions of the former treaty. There the reservations or allotments for the individual Indians were only for their temporary use, the title to remain in the United States and the lands to be subsequently sold the same as other parts of the reservation. Articles 5 and 6 further provide the extent of these new "reservations in fee" to the heads of families and for single persons, male and female, who are of the age of 21 years and upwards. Provision is made that lists of Indians, not heads of families, shall be made out by the commissioners named in the treaty and filed with the

agent, upon whose certificate of its believed accuracy the register and receiver shall cause said reservations to be located.

As Mr. Ayres's claim is based upon alleged purchases of land reserved under the provisions of these two articles (5 and 6) of the treaty of 1834 it is not necessary to call attention to the further provisions of these two treaties, but proceed to as brief a statement of the further facts as is consistent with a full understanding of the claim.

Prior to the treaty of 1834 a considerable number of the Chickasaws had intermarried with the Choctaws, and, with others, who had not so intermarried, had removed west of the Mississippi, and in consequence, at the time the great body of Chickasaws were enrolled, were not apprised of the fact that they had rights under the treaties, and no applications for their enrollment were made for some time thereafter.

When the main body of the nation removed West they discovered their brethren that had preceded them, and immediate steps were taken by the King and others of the commissioners to have them properly enrolled and their reservations duly located. Lists were made out and certified to by the King and his associate commissioners, and forwarded to the agent as provided in the treaty, and the agent certified these lists to the register and receiver, and locations for the individual Indians named therein were duly made. Nearly all these locations were made late in the year 1838, a few being made in the early part of 1839. In every essential particular the enrollment of these Indians and the subsequent selections of lands under the treaty appear upon the face of the records as fully meeting all the requirements of both treaties. A sample of the record in the register's office, in one of these cases, is set out in the case of Wray *v.* Doe in the 10th Miss., which we allude to hereafter. Nothing appears anywhere impeaching the validity of these enrollments and reservations.

Now claimant alleges that in 1839 he bought from these reservees 194 sections, or 124,160 acres of land, paying therefor $1.25 per acre, or an aggregate of $155,200. The conveyances taken by Mr. Ayres from the Indians all appear to have contained a full covenant for title and agreeing to defend the same, etc., and were duly executed and witnessed. Each deed also had indorsed thereon the certificate of two of the Chickasaw commissioners, certifying to the competency of the grantor as required by section 4 of the treaty. Twenty-one of the deeds also bear the certificate of the Indian agent in the following form:

> I, A. M. M. Upshaw, agent for the Chickasaw Nation of Indians, do hereby certify the above certificate of capacity is true to the best of my knowledge and information; and further, that the sum of ——— dollars, the consideration of above conveyance, is, in my opinion, a fair consideration for the premises and has been paid.
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> A. M. M. UPSHAW, *C. A.*
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> NEAR FORT TOWNSON, *March 10, 1840.*

There is also attached to each of the deeds a receipt by the grantor for the purchase money, his signature being attested by two witnesses. The deeds have also been recorded. And accompanying the papers are affidavits of Ayres, the claimant, and others as to the actual payment of the consideration, and the execution and delivery of the various deeds.

The failure to secure the Indian agent's certificate to the balance of the deeds and the approval of the President is accounted for as follows: Some time in 1841, nearly, if not quite, three years after the said Indians had been enrolled and made the reservations, doubts were expressed as to the good faith of some of the reservees, or that fraud might exist in some of the claims. Doubts had been expressed as to the nationality of the reservees who were found west of the Mississippi. The result of these rumors was a recommendation by the Commissioner of

Indian Affairs that the matter of the enrollment and locations be referred to the Chickasaw commissioners, provided for in the treaty, for investigation. On the 4th of May, 1841, the Secretary of War, in pursuance of such recommendation, made an order sending the list in question to the commission, provided for in the fourth article of the treaty of 1834, for their revision.

It is now clearly apparent from the decisions of the supreme court of the State of Mississippi and of the Supreme Court of the United States that the rights of these reservees had already become vested, and they were then the owners in fee of their several reservations. The order, therefore, made by the Secretary would have had no binding validity had it been carried into effect; but the fact is that the list in question was never submitted, so far as appears, to the said commissioners. It was submitted about a year and a half after the date of the order to a self-constituted council of from twenty to twenty-five Indians who met at Boggy Depot in the Indian Territory. This council, which seems to have been wholly without authority in the premises, passed upon the validity, or invalidity, of 524 selections. The work was all done in one day. Four of the selections were declared to be valid and 520 of them invalid. This finding, with all its want of validity and regularity, seems to have found its way to the Department, and was not only treated as the report of the commission provided for in the treaty, but as furnishing sufficient basis for refusal on the part of the President to approve the deeds of any of the 520 reservees found on the list, when they attempted to alienate their reservations. More than this, all the reservations declared invalid by this council were suspended and forever after treated by the Executive as absolutely void, and subsequently sold, including all the lands claimed by Ayres, under his purchase from said reservees, except 39¾ sections, which were relocated to other Chickasaws under the treaty.

Now, if the Indians from whom Ayres purchased had the title to their lands, then the first long step in establishing Ayres's claim has been taken. If the Indians had no title the claim falls at once. And if the title had vested previously to the order of the Secretary referring the matter of the enrollment and selections to the commissioners provided in the treaty, then such order could in nowise divest or affect it. The whole question of title has been conclusively settled by the courts. The case of Wray *v.* Doe, 10th Smeede and Marshall (Miss.), 462, was a contest between the title claimed by one of these same reservees (Hoya-pa-nubby), who had conveyed to Ayres, and the patentee who had subsequently purchased the same tract from the United States. The court had before it the record of the land office showing the selection and location on behalf of the Indian and the patent under which Mr. Wray claimed. The court says:

> Under the treaty the chiefs of the Chickasaw Nation have the sole and exclusive right to determine what Indians are entitled to lands under the sixth article of the treaty.
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> The enrolling and placing the name of the plaintiff on the list of persons entitled to land under the sixth article of the treaty by the chiefs and his location by the register and receiver on a section of land is conclusive evidence of his being entitled to land under said article, and also of his title to such section of land.
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> The location of the reservee under the Chickasaw treaty on a section of land vests in such reservee a title to said land, which can not be divested by any act of the Government of the United States or any of its officers.

The court also says that—

> A sale of a section of land previously designated as the location of an Indian reservee under the Chickasaw treaty, by order of the President of the United States, or any officer of the Government, would be unlawful and void.

This decision of the supreme court of the State of Mississippi was rendered in 1848. It was reaffirmed by the same tribunal in the case of Hardin *v.* Ho ya pa nubby (same defendant as in other case), 27 Miss., 567, this decision being rendered in 1854.

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 *v.* Polk, 18 Wall., 112. The conclusion of the courts in these several cases was that the treaty of 1834, by the 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 *v.* Doe, Congress appropriated money to repay the amount paid by the patentee. (See 11 Stat., 514.) In Hardin *v.* Doe the executive department made similar restitution to the party claiming under the patent. (See Land Book 3, p. 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 courts, after due deliberation, which it would be a great hardship to disregard.

We must therefore conclude that the Indians who undertook to convey to the claimant had the title to their several reservations, and that the subsequent attempt on the part of the United States to convey the same lands to other parties by patent was wholly nugatory and void. It is, however, a fact that those claiming under patents from the United States were permitted to take possession of the lands, and have continuously held them up to the present.

The remaining considerations to which the committee addressed their attention were, whether the complainant had paid over to the Indians a proper consideration for the lands in question, and whether he had been diligent in the prosecution of his claim. On the first of these points Mr. Ayres has made much more than a prima facie case, and nothing appears in the record or on file in opposition. The deeds themselves state consideration and were duly witnessed and executed. They each have attached a receipt for the full amount, at $1.25 per acre, duly signed by the grantor and attested by two witnesses. About twenty of the deeds were certified to by the agent, as he was officially required to do, that the consideration was a fair one and that the same had been paid. In addition to these evidences of the record, the plaintiff filed the evidence of himself and one Dollarhide, showing that the compensation was a fair and proper one, and that all the payments had been duly made. The credibility and reliability of both Mr. Ayres and Mr. Dollarhide are strongly certified to by Hon. Olin Welburn, ex-Member of Congress from Texas; Mr. Jo Abbott, of Texas; Hon. J. K. Jones, Senator from Arkansas; Hon. Thomas C. McRae, Member of Congress from Arkansas, and Hon. C. R. Breckinridge, from the same State.

As to the question of vigilance in the prosecution of his claim on the part of the claimant there is abundant evidence. The treaty was made in 1834; the reservees were enrolled and located in 1838; Ayres purchased in May and June, 1839; the Boggy Depot council was held in 1842; the refusal of the Secretary to submit the deeds to the President for his approval in 1843; the decision in Wray *v.* Doe was rendered in 1848, having been decided in both the circuit and supreme courts of

Mississippi; a further application for approval of deeds was made upon the faith of the court decisions in 1849, reported against in 1850; another case (Hardin *v.* Doe) was apparently immediately instituted and decided by the supreme court of Mississippi in 1854; Wray's money was refunded to him by act of Congress in 1857; the decision of the Supreme Court of the United States (Best *v.* Polk) was rendered in 1873; another application to the President for the approval of the deeds made in 1875, and held under advisement and rejected in 1878; Ayres petitioned Congress for relief in 1878; renewed his application to the Secretary of the Interior in 1881; filed bill in Congress in 1882. This latter measure seems to have been referred to the Interior Department for consideration and report. The committee has had before it a very exhaustive report by Commissioner Hiram Price, covering the whole history of the case, finding the claimant entitled to relief and recommending the passage of the bill. Mr. Price's report was transmitted to Congress by Secretary Teller, who concurred in the findings and recommendation of the commissioner. From that time until the present bills have been pending in every Congress providing for relief.

The claim is of such character that your committee concluded the interests of the claimants and the Government would be best served and protected by the adjudication of a court, and accordingly report the accompanying bill authorizing the Court of Claims to take jurisdiction and render judgment according to the law and the facts of the case, reserving the right of either party to appeal to the Supreme Court. We report accompanying bill and recommend its passage.

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