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At the close of the evidence the defendant raised the question as to the sufficiency of the plaintiff's evidence in each claim by the following demurrer:

Comes now the Defendant and demurs to the evidence of the Plaintiff for the reason that the same is insufficient to establish the claim in favor of Plaintiff and against the Defendant. And Defendant demurs specifically to the evidence on the ground that the evidence fails to establish that the individual plaintiffs fairly represent the claims of persons which they purport to represent.

By per curiam opinion of September 26, 1950 the demurrer of the defendant to plaintiff's evidence was overruled; and thereafter the three dockets were submitted together on their merits.

Docket No. 34 is for additional compensation to which plaintiff claims it is entitled for the cession of lands by treaty of June 3, 1825 which plaintiff alleges aggregated 23,962,240 acres. Plaintiff contends that said lands at the time of said cession were of the reasonable value of \$1.25 per acre, aggregating the total sum of \$29,952,800; that the consideration received by plaintiff therefor did not exceed the sum of \$75,000; that plaintiff is therefore justly entitled to recover the difference between the alleged value of said lands and the consideration received therefor. By requested findings of fact, plaintiff reduces the claim to 18,314,240 acres and acknowledges a consideration therefor of \$80,000, and the fair and reasonable value of the land at the time of cession to be not less than \$18,314,240.00.

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Docket No. 35 is for additional compensation plaintiff claims for the 2,000,000 acres off the east end of the reservation, ceded to the defendant by Article 1 of the treaty of January 14, 1846. Plaintiff contends that the \$202,000 consideration paid by the defendant to it for said 2,000,000 acres of land was \$2,298,000 less than its value at the time of the cession, and it sues for the additional sum of \$2,298,000.

Docket No. 33 is a suit for the value of 9,000,000 acres of land which plaintiff alleges was the remainder of its reservation after the deduction of the 2,000,000 acres off the east end ceded by Article 1 of the treaty of 1846. Plaintiff alleges that said 9,000,000 acres of land were worth \$10,930,180 in excess of the value of the Council Grove Reservation provided it in lieu of the 9,000,000 acres acquired by the defendant. The claim is, however, reduced by the requested findings of fact to the value of not less than 4,559,040 acres, plaintiff contending that the value of 4,559,040 acres at the time of taking was \$5,748,740 and that the value of the Council Grove Reservation provided for plaintiff in lieu of said larger tract so taken was \$319,568, thereby making plaintiff's claim for additional compensation the difference in said amounts, to wit, \$5,429,172.

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Docket No. 34

This claim is based on the contention that the plaintiff had aboriginal title to the entire acreage described in the treaty, amounting to 18,314,240 acres of land exclusive of the reservation provided by said treaty; and that, if it should be mistaken in thinking aboriginal title had been proven, the ownership of said lands was recognized and acknowledged by the defendant at the time of said cession, and that plaintiff was not, therefore, required to prove its aboriginal ownership in order to be entitled to compensation therefor.

There is practically no evidence of the occupancy and exclusive possession by the Kaws of the ceded area. The first contact of this tribe by the white man seems to have been when they were found by Juan deOnate in 1601. At that time they were living some 100 leagues northeast of San Gabriel, New Mexico, near the Panana or Pawnees. On Marquette's map, drawn about 1674, the Kansas (Kaws) were shown some distance west of the Osages and south of the Omahas. In 1724 Bourgmont found a large village of the Kansas, or Quans, as he called them, at the mouth of Independence Creek, near the Missouri River, near the present town of Doniphan, Doniphan County, Kansas. This village was about 30 leagues above the mouth of the Kansas River. The Missouri Tribe of Indians then had a village about 30 leagues below the mouth of the Kansas River. In 1723 the French established

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Fort Orleans on an island at Malta Bend in the Missouri River for the purpose of promoting and controlling trade relations which had been previously established with the Kansas, Otoes, Iowas, Osages, Missouriias, and Pawnees. According to Lewis and Clark, the Kansas or Kaw Indians in 1804 resided in two villages on the Kansas River, one about 20 leagues and the other about 40 leagues from its mouth. A treaty of peace between this tribe and the United States was made on October 28, 1815 at St. Louis, at which time they were living on the Kansas River at the mouth of the Saline River. Pike's chart, First Part, of the internal part of Louisiana, shows the Kansas villages on the south side of the Missouri River, above the mouth of the Kansas River. In Clark's map of 1810, one of these villages is located near the mouth of the Independence River and another Kansas village at a point some distance up the Kansas River.

William E. Connelley, Secretary of the Kansas Historical Society, in Volume XVII, says that the occupancy of Kansas by the Kansa Indians was but a village here and a village there and a vast hunting ground which was common to a number of tribes--that until about 1700 they had lived on the east bank of the Missouri and on the islands in that river--that they never did occupy any considerable part of the State of Kansas.

The Kansas or Kaw tribe was never a large one. Lewis and Clark in 1804 reported its numbers to be 1300; Long in 1819 reports 1500; Sibley in 1820, 800; Chouteau, in 1830, 1300-1500. In 1844 the Commissioner of Indian Affairs reports the number of the tribe to be

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803; in 1855, 300+; 1862, 217; the latest report, in 1945, the Commissioner of Indian Affairs reports the Kaw population to be 544.

That the defendant recognized other claimants to portions of the lands ceded by the Kaws in 1825 is evidenced by the various cessions made by other tribes, as set out in finding of fact No. 2.

The judicial question here presented is as to the sufficiency of the evidence to establish the original Indian title of the plaintiff tribe to the territory claimed.

In the case of Pawnee Indian Tribe v. United States, Docket No. 10, decided by this Commission July 14, 1950, an extensive review of the authorities governing the proof required to establish original Indian title was made, and based upon those authorities we concluded that the question is one of fact, to be determined as any question of fact; and we held that to constitute aboriginal possession it must be established as a fact that there was actual and exclusive occupancy of definable territory by the tribe asserting the title. As stated later by this Commission in the case of the Quapaw Tribe v. United States, Docket No. 14, decided by this Commission on March 14, 1951;

It is perhaps not required that the boundary lines be as accurately defined as a surveyor would like them but some general boundary lines of the occupied territory must be shown, and it must be shown that the occupant had the possession to the exclusion of other tribes; constructive possession is not sufficient. Authorities cited.

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The most that can be said for the proof submitted is that the Kaws at the time of the 1825 treaty, occupied two villages on the Kansas River and that no contacts by the whites prior thereto for many years had found them elsewhere than along the Kansas River, although they might at times have roamed some territory north and west of same for hunting purposes, which territory, however, was hunted over at the same time by other tribes.

After studying the entire record we can reach no other conclusion than that the evidence is insufficient to establish aboriginal possession to the lands for which compensation is asked in Docket No. 34; and therefore that plaintiff has not shown it had Indian title thereto.

We then come to the question of whether or not the ownership of this territory was recognized and acknowledged by the defendant in the negotiations for and acceptance of the cession of 1825.

If plaintiff is correct in this contention, proof of its original title is unnecessary. The treaty involved (June 3, 1825) uses this language of cession, to wit:

The Kansas do hereby cede to the United States all the lands lying within the State of Missouri, to which the said nation have title or claim; and do further cede and relinquish, to the said United States, all other lands which they now occupy, or to which they have title or claim, lying West of the said State of Missouri * * *. (Under-scoring supplied).

then follows a description of the area described in the petition; following this language is a description of the lands reserved for

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the use of the Indians (the cession of which to the defendant by a later treaty is made the basis of the claims urged under the other docket numbers). A full discussion is made by this Commission of the question of recognition of title by the defendant in the negotiations and acceptance of cessions from Indians in the decision of the Quapaw case, Docket No. 14, to which previous reference herein is made. In keeping with the viewpoint of this Commission as expressed in that opinion, the entire record in the instant case on said issue has been carefully considered, and it is the opinion of this Commission that there was no recognition by the Government of the ownership by the Kaws of the vast acreage described in the cession treaty.

To support its contention as to recognition, plaintiff cites letters of William Clark to the Secretary of War, dated June 25, 1820 and December 8, 1823. It is submitted that these letters do not describe with any definiteness lands as being owned by the Kaws or those owned by the Osages, the claims of both tribes being involved in the letters. The letters, at most, merely indicate that the writer thought that the Osage and Kansas Indians were hunting over more territory than they needed to have, and that their claim to such extensive territory should be extinguished—not that their acknowledged title to such territory should be extinguished. Moreover, said letters do not indicate what portion of the territory to which reference is made

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belonged to the Osages or what portion belonged to the Kaws. As was the habit with most Indian tribes, during a long period of years they roamed and hunted over very much larger tracts than they had the exclusive occupancy and possession of. Regardless of what might have been the opinion of William Clark, or what he might have said, he could not bind the government.

Plaintiff cites language appearing in Court of Claims opinion (80 C. Cls. 264) and in the opinion of the Indian Claims Commission in the Pawnee case (Docket No. 10) as confirming the contention of plaintiff that there was a recognition of plaintiff's ownership of the entire acreage described in the cession of 1825. This Commission cannot agree with such contention.

The plaintiff, in the opinion of this Commission, has established neither a recognized title to the lands ceded by the treaty of 1825 nor the aboriginal ownership of the same, therefore the claim as made in Docket No. 34 must be dismissed.

Docket No. 35

By Article 1 of the treaty of January 14, 1846 the said Kansas or Kaw Tribe of Indians made a definite cession of 2,000,000 acres off the east end of the reservation described in Article 2 of the 1825 treaty for the consideration of \$202,000. The remainder of said reservation was conditionally ceded by Article 5 of said treaty, but Docket No. 35

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deals solely with the cession of the 2,000,000 acres, it being alleged that the land had a value of \$2,298,000 in excess of the amount received therefor. By plaintiff's requested finding of fact No. 11, plaintiff concedes that the consideration received for the cession of said 2,000,000 acres of land as of the date of the cession was \$202,000, or 10.1¢ per acre. By requested finding of fact No. 15, plaintiff asserts the value of the 2,000,000 acres as being not less than \$1.25 per acre and contends that the consideration received for said land was unconscionable.

As to whether or not the consideration was unconscionable is dependent upon the value of the lands at the time of the cession.

This Commission has very recently, in Docket No. 14, (Quapaw) discussed at considerable length the difficult problem of determining the value of Indian lands at the early dates involved in many of these cessions. As stated in that case, the Federal Courts have consistently followed the concept of the "market value" as a practical standard to be applied in the ordinary case. (Cases cited).

Quoting from the Quapaw opinion again:

* * * the value of property at a given time depends upon the relative intensity of the social desire for it at that time, expressed in the money it would bring in the market.

Another difficulty in this case, as in the Quapaw case, is the fact that a large tract of land is involved as of a time -- over 100 years ago -- when the lands were occupied largely by Indians making

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limited use of them, and prior to which time there had been no sales in the ceded area by which value may be gauged. In a recent opinion of the Court of Claims (Appeals Docket No. 4 -- the Osage case) that Court, with reference to the fixing of the value of Indian lands, says:

In arriving at a fair determination of the market value of tribal lands, this Court has often taken into consideration the prices at which the lands sold, the extent of the land, the quality of the land, and its use at the time. It has also considered the price paid by the Government for similar land at about the same time under treaties with other bands of Indians, and the prices paid by persons other than Indians buying similar lands in the locality from private citizens.

While the evidence as to value introduced in this case is not voluminous, yet it is thought that same will furnish a reasonable basis for the opinion at which we arrive, as such evidence encompasses transactions of the various kinds to which the Courts have heretofore given consideration in similar situations.

The valuation, of course, is of the date of the cession, to wit, January 14, 1846. As early as 1820, by Act of Congress, the price of public lands was fixed at \$1.25 per acre. Of course, this Act was dealing with sales of small tracts. The Preemption Law, which also provided for sales at a minimum price of \$1.25 per acre, was passed in 1830, which dealt with tracts not exceeding 160 acres. Later, in 1854, what was called the Graduation Act was passed. This Act provided for a minimum price of \$1.25 per acre for public lands, which price was

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reduced after lands went unsold for a period of years. Then, in 1862, the Homestead Act was passed, which provided for the donation of homesteads to actual settlers. Some sales of the Kaw Reservation lands are mentioned in the finding of the Court of Claims in the Kaw case (80 Ct. Cls. 240). Up to September, 1837, 14,629.19 acres, being 36 sections on the Big Blue, were reported as having been sold at an average of \$1.223 per acre. (Finding No. XII.) A total of 37,906.76 acres of these lands was sold up to May 8, 1872 for a total of \$53,982.23, of which sum \$53,944.58 was in scrip and \$37.65 in cash. (Finding No. XVII.) The value of this scrip at this time, however, is not shown. The sale of the 255,000-plus acres of the Council Grove Reservation is found to have been the sum of \$404,010.23. (Finding No. XVII.) These sales covered the years from 1864 to 1914.

On June 17, 1846 the United States sold to the Pottawatomie Indians 576,000 acres off the East end of the Kaw Reservation at a price of 15 cents per acre. At the same time the United States acquired from the Pottawatomies 5,000,000 acres in Iowa and 870,000 acres in Southeast Kansas for a total consideration of \$850,000.

Up to 1853 that portion of what was known as the Plains country, and which later became the States of Kansas and Nebraska, was considered Indian country and none but Indians had permission to live there. However, by that time there was considerable demand to open that section for white settlement and a few settlers had crossed the Missouri River and gone into the territory with the intention of locating there.

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In 1854 numerous treaties were entered into with various tribes of Indians by which approximately 18,000,000 acres of lands in Eastern Kansas and Nebraska (most of which had been previously ceded by the United States to the Indians out of lands acquired from the Kaws and Osages) were reacquired by the United States. The territories of Kansas and Nebraska were set up in 1854 and the first land offices in Kansas and Nebraska were opened but no land was sold until 1857. There were no roads at the time except the Santa Fe Trail, the Mormon Trail, and the Oregon Trail, which were transcontinental routes to the West coast. Early settlement followed chiefly the river valleys. Neither in Kansas nor Nebraska did settlement extend very far West until some years following the opening up of this territory. The sales to settlers up to 1859 in Nebraska totaled 125,358 acres, and in Kansas 139,866 acres.

On May 10, 1854, the Shawnees ceded 1,400,000 acres of land adjoining on the South and East the land ceded by the Kaw Indians by the treaty of 1846, and for which the United States agreed to pay \$829,000, or about 59 cents per acre.

By treaty of May 18, 1854, the Sauk and Foxes ceded 96,000 acres previously assigned to them out of lands ceded by the Kaws in 1825, for which the United States paid them \$48,000, or 50 cents per acre.

By treaty of May 18, 1854, the Kickapoos ceded 618,000 acres to the United States which was a part of the lands which had been assigned

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to them out of lands ceded to the United States by the Kansas Indians in 1825. For this cession the United States agreed to pay \$300,000, approximately 50 cents per acre.

By treaty of June 5, 1854, the Miami Indians ceded lands assigned to them out of the Kaw cession "estimated to contain 500,000 acres" for \$200,000. There has been some controversy as to the acreage of this cession, and the price, by reason of such divergence of opinion as to acreage, was somewhere between 46 and 71 cents per acre.

It is in evidence that a large tract (exact acreage not mentioned) of College Grant land in Nemaha and Marshall Counties, Kansas, in 1864 was sold for an average price of 42 cents per acre. In 1878, to the North of the Kaw country in Nebraska 20,000 acres of railroad land sold for an average price of 50 cents per acre. Other railroad land sold in 1879 for \$1.67 per acre.

Dr. John Muehlbeier, as an expert for the defendant, testified that the lands involved had no actual market value in tracts of the size involved at the time of the cessions; that his opinion as to value was the result of taking into consideration (1) the use value of the land to the Indians, (2) the cost of acquisition and the receipts from the disposal of public lands, and (3) an imputed market value of the lands based on a value at the time of acquisition that would be justified by the sale price in later years, taking into consideration the matter of interest and taxes over the years. From

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these various approaches to the problem he fixes a value of from 2 to 18 cents on the reservation lands involved at the time of the cessions. Dr. Muehlbeier admitted that he knew of no Court which had used his methods in determining values.

Taking into consideration the evidence in the record, judicial notice of similar cessions and conditions surrounding the same, and the values found and sustained by the Courts, we reach the conclusion that the 2,000,000 acres involved in Docket No. 35 had a market value at the time of the cession of 50 cents per acre, or a total of \$1,000,000.

We have applied the principles and reasoning as to the determination of whether or not a consideration is unconscionable, as recently held by this Commission in Cause No. 14 (Quapaw claim), and that appearing in the decision of the Court of Claims in its Appeals Docket No. 4 (Osage case), and decide that the consideration (\$202,000) received for this 2,000,000 acres of land was unconscionable and that plaintiff is entitled to an award in the sum of \$1,000,000, less the \$202,000 paid under the provisions of the cession, and less such offsets, if any, as may hereafter be allowed in accordance with Section 12 of the General Rules of Procedure of this Commission.

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Docket No. 33

By Article 5 of the treaty of January 14, 1846 it was provided that after the Western line of the 2,000,000 acres cession, provided by Article 1 of the treaty, had been determined the President of the United States was authorized, if there was not a sufficiency of timber on the remaining land of the reservation, to cause to be selected and laid off for the tribe another body of land which should remain for the tribe's use forever, in consideration of which the remainder of the reservation not ceded in the first article of the treaty should be ceded to the United States.

It is alleged by the plaintiff herein that said provision of said treaty was made the basis of the selection of another tract of land, to wit: 255,854.49 acres near the Eastern boundary of said reservation in Council Grove and the said tribe was made to accept said Council Grove Reservation, on which they were relocated, and the remainder of the reservation, as described in the treaty of 1825, became the property of the United States. The remainder of said reservation was originally alleged to be "about 8,744,146 acres of land"; however, by plaintiff's requested finding of fact No. 16 the remainder of their reservation so acquired by the United States under and by virtue of Article 5 of said 1846 treaty is claimed as being "not less than 4,559,040 acres." Plaintiff's cause of action thereby, under Docket No. 33, becomes the alleged difference in value of the 4,559,040 acres

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acquired by the defendant and the Council Grove Reservation of 255,854.49 acres provided the plaintiff by the defendant in lieu thereof. By its requested finding of fact No. 20 plaintiff claims that the 4,559,040 acres acquired by the defendant had a value of \$5,429,172 in excess of the value of the Council Grove Reservation received by it.

Our first problem is to determine the amount of land acquired by the Government by the above exchange. It is admitted by both parties that the evidence wholly fails to show that the lands reserved to the Indians under the treaty of 1825 were surveyed at any time. The difficulty in determining the acreage is due to the difficulty in locating the Western boundary of the tract ceded by the Indians. The reservation as provided by Article 2 of the treaty provides that same shall begin 20 leagues up the Kansas River and shall be a tract 30 miles in width, extending West through the land ceded in the first article. The size of the reservation, therefore, depends upon the distance the strip extends to the West, and that distance depends on the location of the Western boundary of the cession described in Article 1. Article 1 provides that the cession shall extend to the West "to the source of the Kansas River, leaving the old village of the Pania Republic to the West; from thence, on the ridge dividing the waters of the Kansas River from those of the Arkansas, to the Western boundary of the State line of Missouri." The defendant would place this Western boundary line to the East of an old Pawnee village

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located near the 97th meridian (and not going to the source of the Kansas River) from whence, in order to reach the dividing waters of the Kansas River from those of the Arkansas, the Western line would be compelled to take an almost direct Southerly direction crossing the Kansas River and to the ridge dividing its waters from those of the Arkansas, and then almost due East following the said ridge to the boundary of the State line of Missouri. The source of the Kansas River (or the source of a stream, to wit, either the Republican or Smoky Hill, both of which flowed into what became the Kansas River) was far West of even the 100th meridian; its source was near the ridge dividing the waters of the Kansas River from those of the Arkansas; and by construing the language of the treaty as requiring the Northern boundary to reach this river's source it would make it unnecessary to proceed far in a Southerly direction to reach the ridge dividing the waters of the Kansas and Arkansas Rivers before returning in a meandering Easterly direction to the Western boundary of the State of Missouri.

It would seem that if the parties to the treaty had desired to fix the Western limit of the ceded land at or near an old village of Pania then the treaty would have so stipulated and would not have named the source of the Kansas River, and there would have been no need for naming the Kansas River unless it was to provide that the Western boundary should, from an old Pania village, proceed in a Southerly direction, across the Kansas River, to the ridge dividing its waters and those of the Arkansas.

Few map makers of the time or others fixing this Western line and the acreage ceded by the treaty of 1825 have placed the line further East than the 100th meridian. The Paul Brody map (plaintiff's Exhibit No. 4) does not show the "old village of the Pania Republic," but it does show the Western limit of the 1825 cession as the source of the Kansas River and located that source in what is now the State of Colorado. This map was made long before the claims here involved were under consideration.

Defendant's Exhibit No. 47 (referred to as the Wedel map) shows three Pawnee villages, but in testifying as to this map Dr. Wedel says (defendant's Exhibit No. 55, page 26) that he had been unable to determine to his own satisfaction which site was being referred to in the treaty of 1825. It will be noticed that there are two Pawnee villages located on this map near the 98th meridian and both are to the East of the Northern boundary line of the cession, as is the Pawnee village located near the 96th meridian.

With respect to the source of the Kansas River, the Clark map (plaintiff's Exhibit No. 3) shows that the stream now called the Smoky Hill River was designated by him as the Kansas River, and that the Solomon and Republican streams were called by him "forks of the Kansas River." In Pike's map (plaintiff's Exhibit No. 2) all three streams are called forks of the Kansas River; and Pike states that the river Kansas takes its source in the plains shown on the map to be at the headwaters of the Republican fork and Smoky Hill fork of the Kansas River.

The so-called Wedel map (defendant's Exhibit No. 47) shows the boundary of the 1825 cession to reach approximately the 101th meridian.

The report of the Commissioner of Indian Affairs dated November 30, 1825 (plaintiff's Exhibit No. 124) says the reservation to the Kaws (and Osages) in the 1825 treaty extended to the Spanish line. In 1825 this Spanish line to the west of the Kaw Reservation was approximately 106° west longitude. The treaty of the Osages of June 2, 1825 provides for the western boundary of the Osage cession in about the same language as in the Kaw cession. William Clark, in reporting the treaty of the Osages and Kaws, indicates their western boundary to be approximately the same. Subsequent dealings with the Osages (cessions of September 29, 1865 and act of Congress of July 15, 1870—Plats 475, 476 and 530 on the Royce Kansas Map) show recognition of the western boundary of the Osages cession to be approximately 100° west longitude. In the case of the Kaws v. United States, 80 C. Cls. 264, the Court of Claims makes a finding of the cession of 1825 as being approximately 26,000,000 acres, with a reservation to the Indians of approximately 6,000,000 acres.

A commission was created under agreement of the parties to settle the claims of the Kansas or Kaw Indians against the United States, which commission made a report dated January 4, 1905 (claimant's Exhibit No. 152). In reference to the size of the Kaw Reservation this commission says:

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Under the provisions of the treaty, the eastern boundary of the reservation was established in 1826 and the southern boundary surveyed and marked for a distance of 200 miles. In 1836 the north boundary was surveyed and marked, beginning at the northeast corner of the reservation as established by the former survey, and extending west to a distance of 206 miles. The reservation farther west was not surveyed, but the entire reservation contained an estimated area of 6,163,200 acres. (Plaintiff's Exhibit No. 152, page 9.)

At page 36 of this exhibit the Kaw Commission report refers to the Kaws having possessed originally "a large and valuable property which (if the Government had properly handled) would have left them one of the richest tribes."

The Commission is of the opinion that the preponderance of evidence shows that the so-called surplus lands in plaintiff's reservation (after deducting the 2,000,000 acres) was 4,559,040 acres.

The evidence of value herein detailed in Docket No. 35 applies equally to the lands involved in this Docket number, and there is nothing in the record to show that the land constituting the Council Grove Reservation was greatly, if any, different from the land comprising the 2,000,000 acres cession off the East end of the Kaw Reservation. The plaintiff alleges the same per acre value for the 2,000,000 acres cession and the Council Grove tract. There is nothing in the record upon which a different value per acre can be placed upon the Council Grove acreage from that placed on the other lands. This 255,854.49 acres is therefore found to have a value of 50 cents per acre, or a total of \$127,927.25.

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The Commission is of opinion that the 4,559,040 acre portion of the reservation being further removed from the settled country to the East than was the 2,000,000 acres and Council Grove tracts, and from transportation and other developments and conditions contributing to market value, had a value at the time it was acquired by the United States of 40 cents per acre, or a total of \$1,823,616.

The compensation received by the plaintiff, being the value of the Council Grove tract of \$127,927.25, for a tract of the value of \$1,823,616, was unconscionable, and plaintiff is therefore entitled to an award on this claim in the sum of \$1,823,616 less the value of the Council Grove Reservation, to wit, \$127,927.25, and less such offsets, if any, as may hereafter be allowed in accordance with Section 12 of the General Rules of Procedure of this Commission.

Release of Claims

The defendant alleges that the Kaw Tribe of Indians executed a release, dated April 22, 1905, for a good, valuable and sufficient consideration of all claims whatsoever the said tribe then had against defendant, and by virtue thereof plaintiff's right of action against defendant, if any they had, and defendant's liability for said claims, if any existed, were extinguished; and said release is pleaded as a settlement and extinguishment of the claims urged by plaintiff in Dockets Nos. 33, 34, and 35.

Plaintiff denies that said release had the effect of releasing

the claims mentioned for the following reasons, to wit:

1. The aforesaid claims had never been submitted to the Kaw Commission, whose award upon other claims was being paid and which claims only did the defendant have a right to require be released.

2. The Kaw Commission had no authority under the Act of Congress creating it to consider the aforesaid claims.

A commission, thereafter known as the Kaw Commission, to consider and determine claims of the Kaw Tribe of Indians against the United States was created by virtue of an Act of Congress of July 1, 1902. Section 12 of said act provided for the submission to a commission, to be appointed by the Secretary of the Interior, of all claims of whatever nature which the Kaw Tribe had or claimed to have against the United States "for investigation, consideration, and settlement." Said section further provided that the United States should submit a complete accounting of all monies agreed to be paid to said tribe to which said tribe may be entitled "under any treaty or act of Congress"; and the section further provided that if the tribe should not be satisfied with any settlement decreed by said Commission, it should have the right to enter a suit in the Court of Claims for the amount due, or claimed to be due, it from the United States "under any treaties or laws of Congress." Said section further provided that said court, if appealed to, "shall settle all the rights, both legal and equitable, of both the said Kansas or Kaw Tribe of

Indians and of the United States." Pursuant to said act of Congress, a commission was duly appointed and the Kaw Indians were notified to submit their claims to said commission. Thereafter the tribe made presentation of claims before said commission but "did not specifically apply for any moneys other than those growing out of the various certificates of indebtedness or scrip transactions, although in a general way claim was made for all other moneys justly due the tribe in the adjustment of the accounts between it and the United States." (Kaw Indians v. United States, 80 C. Cls. 319). The court, in the above case, continues with the statement:

The commission made a comprehensive report in which every phase of the transactions relating to the issuance and redemption of the various classes of scrip, including interest thereon, was reviewed, and made an award to the plaintiff tribe of a specific amount found to be due on account of such transactions.

The report of the said commission (plaintiff's Exhibit No. 152, page 37), in reference to the claim of the Indians for compensation for surplus and other lands, states that the Kaw Indians had entered into a contract with one Henry C. Dooley "stipulating for his employment to prosecute an alleged claim of said Indians against the United States for payment for surplus lands obtained by the United States under the treaties of 1825 and 1846," and that "This contract, with accompanying papers, was submitted to the Department by the Commissioner of Indian Affairs, December 20, 1898, and was approved in modified form February 7, 1899." That "In view of this approval Mr. Dooley was noti-

fied of the organization of the commission and informed that he would be afforded an opportunity to be heard in behalf of the Indians," that "He appeared before the commission soon after its organization and stated that he would be ready within a few days to present his claim." That "No further appearance was made by Mr. Dooley before the commission and no communication of any kind has since been received from him." The Commission then proceeds (although nowhere is there any evidence that any form of land claim was presented to it by the Indians or by any attorney representing them) to state the nature of the claim of the Indians for surplus land, as set forth in the mentioned contract with Mr. Dooley. Following a brief discussion of the nature of the claim and the transactions between the Indians and the defendant under the treaties of 1825 and 1846, the commission stated:

The conclusion therefore seems inevitable that by the treaties of 1825 and 1846, the Kansas Indians, in consideration of the sums therein agreed to be paid them or set apart for their benefit, and also in consideration of the setting apart of another tract of country for their future residence, relinquished to the United States all their right and title to the territory they had formerly claimed and occupied. In this view the commission is satisfied that there is no legal or equitable basis for the claim represented by Mr. Dooley.

The award of the Kaw Commission made on specific claims in the amount of \$155,976.88, was, by act of Congress of date March 3, 1905, appropriated, and the legislation appropriating the same required that it should be paid over to the Indians upon the execution by them

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of an instrument releasing and relinquishing all claims and demands of every name and nature against the United States; and thereafter the tribe, in order to secure payment to it of the amount of said award, to wit, \$155,976.88, executed an instrument providing such release (see Finding No. 11), and this is the release urged by the defendant as being a complete satisfaction and extinguishment of the claims now being asserted.

The act of Congress authorizing the Kaw Commission provides (section 12) "if the settlement of the claims of said tribe, submitted to said commission (and the accounting) is satisfactory to said tribe, the amount found due shall be placed to the credit of the members of said tribe, according to the terms of this agreement, within one year after the report of said commission is made."

The defendant thereupon became the trustee in possession of the sum so awarded said plaintiff as satisfaction and extinguishment of the specific claims submitted to said Commission for determination, and the requirement made by it, before it would pay said amount of \$155,976.88, that the Indians execute a general release of all claims (Finding No. 11), was legal duress, and in the opinion of this Commission makes said release ineffective as a release of the claims herein sued upon. Ingram vs. Lewis, 37 Fed. 2d 259; petition for writ of certiorari denied by Sup. Ct., 282 U. S. 842, 75 L. Ed. 747.

In any event, the only consideration for the release hereinabove discussed was the payment of the sum of \$155,976.88 which had been

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appropriated by said act of March 3, 1905 to settle said award of the Kaw Commission in said amount and in full settlement of all claims, which defendant contends includes those under consideration here, which the Kansas or Kaw Indians had against the United States; and under the findings herein made of value of the lands for which the plaintiff is entitled to compensation over and above that heretofore had, the amount of \$155,976.88 so paid for such release was so grossly inadequate as to constitute an unconscionable consideration.

The release is held not to be a discharge or extinguishment of the claims sued on.

Award

From the above, it follows that plaintiff is entitled to an award in the sum of \$2,493,688.75, less such offsets, if any, as may hereafter be allowed in accordance with section 12 of the General Rules of Procedure of the Commission.

Commissioners O'Marr and Holt concur in the above opinion.

September 17, 1951.