

BEFORE THE INDIAN CLAIMS COMMISSION

THE OTTAWA TRIBE AND GUY JENNISON,)
BRONSON EDWARDS and GENE JENNISON,)
As Representatives of THE OTTAWA)
TRIBE,)

Petitioners,)

vs.)

Docket No. 303

THE UNITED STATES OF AMERICA,)

Defendant.)

Decided: June 29, 1960

Appearances:

Allan Hull, with whom were
Harrison, Thomas, Spangenberg
& Hull, and Louis L. Rochmes,
Attorneys for Petitioners

William D. McFarlane, with whom
was Mr. Assistant Attorney General,
Perry W. Morton,
Attorneys for Defendant

OPINION OF THE COMMISSION

Holt, Commissioner, delivered the opinion of the Commission.

Petitioner herein is The Ottawa Tribe of Oklahoma, a tribe organized under the Oklahoma Welfare Act (49 Stat. 1967). It comprises and represents bands of Ottawa Indians formerly known as the Ottawas of Blanchards Fork and Roche de Boeuf. Defendant admits petitioner has the capacity to maintain this suit.

These bands of Ottawa Indians at one time resided in the State of Ohio. By the Treaty of August 30, 1831 (7 Stat. 359), they ceded to the United States certain lands they then held in that State and agreed to move west

to a new reservation in Indian Territory (now Kansas). The Ottawas moved to this new location and commenced to progress on a tract of some 75,000 acres in what is now Franklin County, Kansas.

The claim presented by petitioner arises out of the two treaties concluded by the Ottawa Tribe with defendant on June 24, 1862 (12 Stat. 1237) and February 23, 1867 (15 Stat. 513, 517) which provided, among other things, for allotments in their Kansas Reservation to members of the Tribe, and for the setting apart of some 20,640 acres of the tribe's land for the purpose of endowing a school for the benefit of the Ottawas; and for the sale of the remainder of the tribe's lands at the best price obtainable. Petitioner seeks to recover the benefits of the educational trust of which they allegedly were deprived by fraud and mismanagement, and for certain trust funds from the sale of the remainder of its reservation lands alleged to have been withheld from them, and either embezzled or used unlawfully.

With the passage of time the ever westward surge of settlement began to bring demand for the opening of Indian country to white settlers. In 1853, Congress authorized negotiations with the Indian tribes west of the States of Missouri and Iowa for the purpose of opening the lands to white settlement by extinguishing the title of the Indians to all or part of their lands. A number of the tribes, by treaties in 1854, gave up part of their lands and reserved the remainder. The Kansas-Nebraska Act of 1854 (10 Stat. 277) established Kansas and Nebraska Territories, and provided for territorial governments. With the extinguishment of Indian title to part of the lands in these new territories, settlement of the eastern portion of the lands in the former Indian country came quickly.

Ceded Indian lands bordered the Ottawa reservation on the north, east and south.

The Ottawa Indians, who primarily lived by cultivating the soil, had made fine progress on their reservation where they were said to have lived in comfortable homes and had good farms. In 1854, they decided not to dispose of any of their lands. They were said to be considering dividing their lands equally among themselves and becoming as soon as possible citizens of the United States. With the settlement of the country around them these Ottawas in a few years realized the necessity, in order to protect their property, of holding their lands in severalty. In 1859, they proposed a treaty which would permit allotment of their reservation lands and the cession of the balance in trust to the United States to be sold for their benefit. They proposed \$40,000.00 of the proceeds be set apart and the interest used to support a school for their children for twenty-five years and longer and that, if thought advisable by the Secretary of the Interior, the treaty should provide the Ottawas would become citizens five years after ratification of the treaty. In March 1860, the Indians again suggested a treaty providing for a division of their lands and sale of the balance for their benefit after allotments. No action, apparently, was ever taken by the Government on these proposals.

At this point the stage appears to have been set for the first act that led to the treaty dealing with the Ottawa lands. In December 1860, a letter was sent to the Commissioner of Indian Affairs signed by John T. Jones and William Hurr for the Ottawa Indians and I. S. Kalloch for the Board of Trustees of "Roger Williams University" and "Company." This

letter proposed a treaty be made by which the Ottawa Indians, after allotments to members of the tribe and certain grants, would give to the trustees of Roger Williams University 20,000 acres of their land provided the trustees within two years expended "\$10,000.00 in buildings and otherwise" towards the education of the Ottawa children. It also was proposed that said trustees thereafter would board, clothe and educate not exceeding fifty Ottawa children annually for 30 years and after that period 10 scholarships were to be furnished the Ottawas at the University forever.

This letter of December 1860 also contained the offer of the Ottawas to sell the remaining portion of their reserve to a "Company", said company agreeing to work with the Board of Trustees, for \$2.00 per acre to be paid in equal payments over a four year period. The letter indicates that it was contemplated a town-site was to be chosen and the lands around it, aside from that reserved for the college, of eight contiguous sections were to be owned one-half by the trustees and one-half by the company.

The proposals set forth in the December 1860 letter to the Commissioner of Indian Affairs are important and enlightening as we come to examine the provisions of the Treaty of June 24, 1862 (12 Stat. 1237, II Kapp. 830), and the subsequent events relating to the disposal of the Ottawa lands. Two white persons whose names are mentioned in the letter were to become deeply involved in the handling of the Ottawa property following the 1862 treaty. One was the signer of the letter for the Board of Trustees of the "University" and the "Company," Reverend I. S. Killoch. The other named in the proposal as a member of the company was C. C. Hutchinson. In the period intervening between the writing of this letter

and the negotiation of the 1862 treaty, the same Hutchinson managed to become Indian Agent for the Ottawas and was present when the treaty was made in Washington, D. C. The record also shows that as of the date of the 1860 letter, and even at the date of the treaty, the "Roger Williams University," later to be known as Ottawa University, was an ethereal institution. It was an institution on paper only with no tangible assets, and with little prospects unless lands were obtained from the Ottawas.

By the Treaty of June 24, 1862, it was provided that allotments would be made to all members of the tribe and certain special grants were made to designated individuals and the Baptist Church. The Treaty provided also that 20,640 acres were to be set aside for the permanent endowment of a school for the benefit of the Ottawas (Article 6). To manage the funds and property which would be involved in this endowment the treaty provided for seven trustees. Five were named in the treaty and the other two, who were required to be white citizens of Kansas, were to be elected "by said Ottawa Indians." Four of the five named in the treaty were Ottawa Indians, the fifth was John G. Pratt, United States Indian Agent for the Delaware Indians. Three of the four Ottawa trustees were members of the Ottawa Tribal Council. Of the acreage so set apart 640 acres was the school site. Of the remaining 20,000 acres it was provided 5,000 acres might be sold by the trustees to secure funds for the erection of buildings and improvements on the school site. The balance of 15,000 acres was to be sold by the trustees, the proceeds invested, and the interest only to be applied to the support of the school.

The 1862 treaty fails to mention "Roger Williams University," which

will hereinafter be referred to as Ottawa University since the name was soon so changed. The striking similarity between the provisions of the treaty in some respects and the 1860 letter leaves no doubt but that the backers of the ethereal institution were successful in obtaining the lands needed to go ahead with their project. As the events following the treaty are set forth herein, it will be seen that the originators of the University project and the "Company" mentioned in the same 1860 letter soon were able to commence on the plans they had formulated in 1860.

Soon after ratification of the 1862 treaty, the Indian trustees elected two white members to the Board. They were C. C. Hutchinson, the Indian agent, and as previously noted a member of the "Company" which in 1860 proposed to purchase the Ottawa lands, and John W. Young, Hutchinson's father-in-law. At this meeting, Pratt being absent, the board elected officers and transacted one item of business. The board contracted to sell to Young, the trustee, 5,000 acres at a price of \$1.25 per acre to be paid in cash or by erecting school buildings satisfactory to the board. A deed was issued about four months later to Young for a 640 acre tract for \$800 by the Treasurer of the Board, John T. Jones. By this time Young was no longer a resident of the State of Kansas, if, in fact, he had ever been one. Young conveyed this 640 acre tract to Hutchinson before approval of the sale by the Secretary of the Interior and before the patent was issued. This 640 acre tract was the townsite of what became known as Ottawa, Kansas. There can be little doubt that this was the townsite planned by the "Company" mentioned in the 1860 letter. So the real estate speculation which clearly was the main purpose of those whites who were part of the 1860 proposal began to materialize.

Hutchinson according to the deed records conveyed the townsite to the Ottawa Town Company, of which he was an officer for a stated \$10,000.00. It is questionable whether he actually received such a sum of money or whether he received certain interests in the Town Company. Also an officer of this company was none other than the signer of the 1860 letter, the Reverend I. S. Kalloch. At the second meeting of the Board of Trustees of Ottawa University, this same Kalloch was elected a trustee to replace Young who it was presumed had resigned. Kalloch became the assignee of Young under the contract to purchase the 5,000 acres and later received the patent to the remaining 4,348.79 acres which for the most part were selected from school lands surrounding the school site and the townsite which was similar to the plan set forth in the 1860 letter. Their plan for development of the townsite was remarkably successful for by October of 1864 (patent was issued in May 1864) a thriving village was located on the 640 acre tract and it had become the county seat. Kalloch upon issuance of a patent for the remainder of the approximately 5,000 acres sold by the trustees was soon thereafter in business selling these lands surrounding the school and town sections at a profit.

Trustee Pratt, Indian agent for the Delawares, who was not present at the meeting when the trustees contracted to sell the 5,000 acres to Young, questioned the transaction in a letter to the Secretary of the Interior prior to the Secretary's approving the sale. The Ottawa Indians in a petition statedly representative of a majority of the tribe charged that Agent Hutchinson was handling the Ottawa lands with a view to his own enrichment. An investigation of the charges by Superintendent Albin supported Hutchinson's contention that the complaints were by a few disgruntled

Indians, but this investigation did not report that Hutchinson was a member of the board of trustees, that the townsite had been conveyed to him by Young, that Hutchinson was an officer of the Town Company, or that Young was Hutchinson's father-in-law.

With the proceeds of the sale of the 5,000 acres of school lands, amounting to \$6,250.00, work commenced on a school building. A basement was dug forty feet wide and sixty-five feet long. The Indian trustees, with the exception of Jones, protested the size of the building but were assured by Hutchinson and Kalloch that sufficient funds would be obtained in the east from donations to complete the building. The size of the building and the activities of Hutchinson and Kalloch from this time on make it clear that their main purpose was to build a University primarily for whites. Little or no consideration was given to the educational needs of the Indian children and from the date of the treaty until their removal to Oklahoma they received at most one year's schooling. Kalloch and Hutchinson had little success in securing financial assistance from their denominational friends in the east although large sums were expended for their traveling expenses seeking such aid.

From the beginning the white trustees, with the exception of Pratt who was at the Delaware agency and attended few meetings, dominated the actions of and controlled the board. Although the Indian trustees were a majority on the board, they were not sufficiently advanced to cope with the business world. They were unaccustomed to the management of such an educational trust and, with the exception of Jones, not well acquainted with the English language. While the tribe had been described as "far advanced in civilization" their chiefs knew no English and only

a few of the Indians could understand the language. Kalloch and Hutchinson remained in control of the board for a number of years. Hutchinson resigned in April 1867 following discovery of the fact he had not accounted in full for the proceeds of the sale of the Ottawa trust lands, to be discussed in more detail shortly. Kalloch resigned in February 1868. During their tenure, however, Hutchinson sold some 3,032 acres of school lands for \$22,685. According to the provisions of the treaty the proceeds of the sale of these lands should have been invested and the interest only applied to the support of the school. This was not done and was a violation of the trust. Kalloch, on the other hand, sold a reported 2,800 acres of the residue of the trust lands, which were purchased by the Board of Trustees by the 1867 treaty and which will be discussed in more detail later, and claimed the proceeds to settle his demands against the University. The board ratified Kalloch's sales and thus settled with him.

Before proceeding to the second phase of the history of the school lands with the active participation of the Baptist denomination and the completion of the University building, it may be well to digress to determine what responsibilities the Government had undertaken with respect to the school trust and what duties, if any, it had with respect to the management of the school trust. The 1862 treaty is unique in many ways. It provides to begin with that the Ottawas were to become citizens of the United States and their relations with the Government as a tribe were to be dissolved and terminated five years from the ratification date of the treaty. The fact that the treaty provided for this eventuality no doubt accounts for the composition of the board of trustees and the provisions with respect to the management and control of the educational trust being placed solely in the hands of the

trustees and their successors.

The 1862 treaty in the first paragraph of Article 6 provides for the setting apart of 20,000 acres "for the purpose of endowing a school for the benefit of said Ottawas" and also the selection of one section for school purposes. The last paragraph of said Article expressly provides for the right of the children of Ottawas and their descendants to enter the school and enjoy all privileges thereof, no matter where they may emigrate. There is no mention in the treaty of a University or a school for whites.

There is no express provision in the treaty for Governmental supervision or control of the trustees. The only function to be performed by the Government was the issuance of patents to the purchasers of school lands upon request of the trustees. It is true that John G. Pratt, one of the trustees named in the treaty, was Government agent for the Delaware Indians. If, however, his presence on the board was in an official capacity, it is not so stated in the treaty and there is no evidence he was to act as a governmental representative, or that he ever did, unless his questioning of the sale to Young may be so construed.

It is apparent, therefore, that the treaty was so framed as to leave control and management of the educational trust in the hands of the trustees with no governmental supervision or control. The relationship between the United States and the Ottawa Indians at the time of the negotiations of the treaty was similar to that of guardian and ward and a high degree of fiduciary duty rested upon the Government. Pottawatomie Tribe v. United States, 3 Ind. Cl. Comm. 10, 47. There is no evidence that the officials of the Government ever first investigated to determine the capacity of the Ottawa

Indians or the white trustees to manage and control an educational trust. Neither is there any evidence that there was any effort made to determine whether the Ottawa Indians were ready to take on the responsibilities of citizenship which the treaty provided they would obtain five years after ratification of the treaty. It is a fact, however, that at the time of the 1862 treaty their chiefs knew no English and only a few could speak the language. Under the circumstances there was a moral obligation on the part of the defendant to thoroughly check on their ability to face the responsibilities of citizenship and to administer a trust. There was also a duty to provide ample safeguards in the treaty for the supervision and accountability of the trustees so as to prevent mismanagement. This is especially true since by the letter of 1860 containing the proposals of the Ottawas and the backers of the "University" and "company" the officials of the Government did have knowledge of the interest in the Ottawa lands displayed by the original planners of the "University" and "company."

It is for all the reasons hereinbefore stated that the Commission concludes that the United States was morally obligated in negotiating the 1862 treaty with the Ottawa Indians to see to it that ample safeguards in the way of supervision and control of the educational trust by the Government were provided in the treaty. The failure to provide these safeguards resulted in a loss to the Ottawa Indians because of the violations of the trust by the trustees. It was a violation of the trust for the trustees to sell the 5000 acres to a member of the Board of Trustees (54 Am. Jur. Sec. 314). It was a violation of the trust for the trustees to sell the 3032 acres of the remaining 15,000 acres and not invest the proceeds. Proper supervision and control of the Board of Trustees for the benefit of the Indians by defendant would have prevented these

violations. The Commission based upon the findings of fact herein made and the record as a whole concludes that the United States is liable to petitioner for whatever profit, based on bona-fide first sales, that was made by Hutchinson and Kalloch on the resale of the approximately 5,000 acre tract. The defendant is also liable to petitioner for the proceeds of the sale of 3032.24 acres of school lands, amounting to at least \$22,685.13, which were never invested as required by the treaty for school purposes.

In order to follow the subsequent history of the school property, it is necessary to discuss the disposition of the Ottawa Trust Lands. By article 9 of the 1862 treaty the lands in the reserve remaining after allotments, special grants and school lands had been selected, were to be sold for the benefit of the Ottawas at not less than \$1.25 per acre. These trust lands amounting to about 30,000 acres were appraised and offered for sale by Agent Hutchinson. The agent sold some 22,000 acres of the trust lands but it was discovered that he had never turned over to the Government \$30,603.94 of the proceeds. Special Investigator Irwin who checked Hutchinson's accounts in 1867 forwarded deeds to property which Hutchinson had offered in admitting the shortage. Irwin was of the opinion the property offered would bring \$15,000.00. The deeds were not accepted by the Government. In 1869 the Government instituted suit against Hutchinson and his sureties alleging a shortage of \$41,993.71, which included the shortage of proceeds of sale; interest on the moneys collected from date of sale; funds for payroll of Government employees; funds for payment of treaty obligations; and miscellaneous interest. At the time of the trial Hutchinson offered a receipt (Fdg. 21) signed by the Ottawa Chief and William Hurr and James Wind (the last two being Indian members of the Board of Trustees of

the University) as duly authorized and empowered delegates of the tribe. The receipt acknowledged having received through Hutchinson the sum of \$41,993.77 in full of all demands against the United States or Hutchinson on account of trust, school or other monies of the tribe received by Hutchinson as special agent and unaccounted for. The receipt relates it was given because it "satisfactorily appears" that the sum was expended for the benefit of the tribe in the erection of school buildings, the improvement of their lands, and for other beneficial purposes. The United States Attorney for the District of Kansas, made no objections or exceptions at the trial. Judgment was for defendants. The United States Attorney, S. A. Riggs, was suspended from office. His successor, who was directed to move for a new trial, stated, "the judgment for the defendant was really with consent" of Riggs. The new United States Attorney moved for a new trial which was granted and the case continued to the next term of court. The Commissioner of Indian Affairs directed Superintendent of Indian Affairs Hoag of Lawrence, Kansas, to investigate Hutchinson's administration of the trust lands. The Commissioner wrote to Hoag that the receipt had never been considered binding or valid by the Department of the Interior and had never been admitted to its files as an authenticated or official paper. Hoag reported that the Ottawa Indians, who believed Hutchinson had expended the money on the school property and who had been assured by Hutchinson that their interest in the fund was secured by their rights in the school property, wanted the Government to accept the receipt.

In 1879, the Secretary of the Interior in commenting on the Hoag report to the Commissioner of Indian Affairs stated that even if Hutchinson had made the expenditures on the school property he was unable to see how

it was possible for the Department of the Interior to recognize the expenditures as forming any part of a legal settlement of Hutchinson's accounts with the Government. The Secretary was of the opinion that "the acceptance of such a paper as a valid voucher in the hands of an agent of the United States would be every way contrary, both to the laws for the settlement, and disbursement of moneys put into the hands of agents, or coming into them by authority of law, and would also be contrary to every sound rule of policy in regard to the dealings of Agents with Indian Tribes, opening the door to so great abuses as to make it impossible for the Department to accept such a mode of settlement." In December 1871, however, Hutchinson offered a compromise settlement to the Solicitor of the Treasury Department by which he agreed to pay \$1,000.00 plus accrued costs. The Secretary of the Interior in view of the legal questions involved in the suit against Hutchinson left the decision in the matter up to the Treasury Department. The compromise agreement was then accepted.

The receipt given Hutchinson by the Ottawa Indians was obtained by his assurances to the tribe that the amount so receipted for would be made secure to the tribe by placing them in absolute possession and control of the school property. The naiveness of the Indians in signing the paper is readily apparent when one considers that the receipt acknowledged the expenditure of non-existent sums such as the amount claimed against Hutchinson for interest from date of collection of the land proceeds to date of statement of the account and miscellaneous interest sought from Hutchinson in the court action. Hutchinson was accountable only to the Government and only the defendant could settle with him. The Secretary of the Interior readily saw

the dangers of accepting such a paper as a valid voucher and only acquiesced in the compromise agreement later because of the doubtful legal status of the action against Hutchinson which had been caused by the mishandling of the proceedings by the United States Attorney in the earlier trial. The Government in selling the trust lands of the Ottawa Indians assumed the duty to account to the tribe for the funds collected. As trustee with respect to these funds defendant may not evade accounting therefor on the basis of a receipt given to a former agent which paper the officials of the Government refused to recognize as valid or binding. The failure of the United States to supervise and control the accountability of Hutchinson caused the loss to the Indians.

For the reasons above-stated, and based upon the findings of fact herein made and the record as a whole, the Commission concludes that petitioner is entitled to recover from the defendant the sum of \$30,603.94, with accrued interest thereon at the rate of 5 percent from March 22, 1869, the date of the stating of the account until March 22, 1934, and 4 percent thereafter.

In 1866, while Kalloch and Hutchinson were still members of the Board of Trustees, Kalloch wrote to the Secretary of the Interior with an offer to have the board take over the sale of the residue of the trust lands amounting to 7,691.83 acres. Hutchinson signified his approval as agent. The Ottawa Tribe requested that the lands be sold to the University at \$1.50 per acre. The Secretary of the Interior and the Commissioner of Indian Affairs recommended the sale subject to certain modifications of the terms of sale. Superintendent Murphy who was directed to look into the proposed sale informed the Department of Interior he believed the

price was fair, satisfactory to the Ottawas and the sale had the advantage of disposing of the lands in a body rather than piecemeal disposal which would take years. Kalloch in offering to take over these lands pointed out that by permitting the University to sell the lands the Indians would get all they could for the lands which was their appraised value and the University, which he said was for the benefit of the Indians, would get the profit.

The Treaty of February 23, 1867, 15 Stat. 513, II Kapp. 960, ratified on June 18, 1868, contained provisions for the sale of the residue trust lands to the trustees of Ottawa University "to be disposed of for the benefit of said institution at the appraised value thereof, * * *." While the treaty was awaiting ratification, Kalloch wrote the Secretary of Interior that the board of trustees was willing to pay the appraised value of these lands which was somewhat more than the \$1.50 per acre the Ottawas had agreed to sell them for. He stated the trustees planned to give these lands as a bonus for subscriptions to backers of the University. The trustees paid \$13,532.22 for these lands plus \$1,014.92 interest when payment was not made in the time prescribed by the treaty. The trustees sold 7,247.70 acres of these lands through 1872 for \$34,014.17 and the remaining 444 acres were appraised in December 1872 at \$1,485.70.

There is no substantial evidence that the residue trust lands were sold to the trustees for less than their market value. It is true that the appraisal, on which the purchase price was figured, was made in 1864. These lands, however, were the balance after the sale of some 22,000 acres of the total trust lands. Their sale in a block was an advantageous way of disposing of them. The Ottawas themselves urged the sale and the

Commissioner of Indian Affairs had the proposed sale looked into by the Superintendent. While the trustees did make a profit on the sale of these lands it may well be that this occurred through the subscription plan proposed to be used in the sale of the lands for the benefit of the University. The evidence does not justify holding the United States failed to exercise due care in permitting this sale to the school board.

As early as 1865, the Ottawa Indians were reported as much divided with respect to the question of making a new treaty and moving south. The increased white settlement and growth of Kansas with the resulting hemming in and mixing with the Indians caused Government officials to urge new treaties with the tribes and bands in that State with the avowed purpose of removing the Indians. By the Treaty of February 23, 1867, supra, the Ottawas purchased a reservation in Indian country (now Oklahoma). The provisions of the 1862 treaty with respect to the Ottawas becoming citizens were extended for two years. The Sixth Article of the 1862 treaty providing for the educational trust was left unchanged except Article 19 of the 1867 treaty provided the school ages would be between 6 and 18 and that such children would be entitled to be received at the institution and be subsisted, clothed, educated and attended in sickness. These rights were to continue as long as any children presented themselves at the school. This article also provided that the Secretary of the Interior and the senior corresponding secretary of the American Baptist Home Mission Society were to be members ex-officio of the Board of Trustees.

In January 1868, Robert Atkinson, District Secretary for Kansas of the Baptist Home Mission Society became a member of the school board. His duties as district secretary required him to cooperate with the trustees of Ottawa

University by rendering any aid to advance its interest, usefulness and prosperity. The Society had resolved in state convention to "assure the trustees of Ottawa University that our sympathies are enlisted in its speedy completion and its highest success as a Baptist-institution."

Atkinson was successful in raising funds with the support of the Society and was able to complete the college building in time to re-open the school in the spring of 1869 at which time separate white and Indian branches of the school were planned.

The terms of the 1867 treaty provided for the removal of the Ottawa Indians to Indian country. The chief of the tribe met with the school board in January 1869 seeking educational aid for them at their new home. The board offered to pay \$3,000.00 a year when it could be realized as interest on funds raised from the sale of school lands. The following month the Ottawa Chief and Indian trustees Wind, Hurr and King, as "Delegates," signed a letter prepared by an attorney, one Blackledge, to the Commissioner of Indian Affairs requesting a treaty by which they could sell their entire Ottawa interest in the college and college lands. The white trustees with Jones, the adopted Ottawa Indian, opposed the making of such a treaty and stated the school board was ready to provide the education for the Indians. The white trustees and Jones claimed there were vested rights in the institution "which forbid any change in the present relations of the Institution, without the unanimous consent of the trustees and donors of the moneys that were expended in the creation of building and improvement of the property; * * *."

The Commissioner of Indian Affairs on September 3, 1869, instructed Superintendent Hoag to investigate the administration of the school trust.

Hoag's lengthy report (Fdg. 26) in January 1870 concluded the trustees had violated their trust, the Department had been too tardy in checking this wrong and recommended steps should be taken to restore the property to the Ottawa Indians. The Indians and their attorneys continued to press the Department of Interior in an effort to secure their rights in the school property. As a result the Secretary of Interior sent a draft of a bill to Congress which became law on June 10, 1872 (17 Stat. 388). This act provided for three Commissioners to inventory and appraise all unsold lands and assets arising from the sales of land by the school trustees and the legislation authorized the Commissioners to sell the lands and assets, and distribute the proceeds to the Indians after deducting the pay and necessary expenses of the Commissioners.

The report of the Commissioners filed on December 7, 1872, in addition to containing the appraisement of the lands and assets of the school property, also discussed the equities claimed by the Baptists.

The report states in part that:

The evidence obtained by the Commissioners shows that from the commencement the representation has been made by the white trustees (assented to by Jones) under the sixth article of the treaty of 1862, and other parties connected with them, that a white school or university would be created and perpetrated, and all along, in representing the matter to the public, the Indian school seems to have been a minor consideration. Contributions have been obtained, and emigration induced, on the ground of a white school.

And it is claimed that the increase in value of property belonging to the trust, and also all other property in this locality, is due to the efforts made in behalf of a white school.

The Baptists commenced their labors among the Ottawas many years ago; the majority of the trustees have been Baptists, and for the past four years the Baptist Home

Missionary Society has exercised supervision over this trust. * * *

The claim of the Baptists for the right to control this trust, and to create and maintain a white school, are set forth in the statement of Mr. Atkinson herewith, and by other parties, to the Commission, * * *

It will be seen that they lay much stress on a paper signed by the Indians in 1861 /1860/, agreeing to give 20,000 acres of land to Roger Williams University, which they claim was the origin of the trust, but it does not appear that this paper was signed with the knowledge or consent of the executive. * * *

This paper or agreement (Def. Ex. 183) relied on as the origin of the trust is quite similar to the December 1860 letter (Fdg. 5) to the Commissioner of Indian Affairs from the Ottawas and I. S. Kalloch, previously discussed, in which a treaty was proposed giving land to the ethereal Roger Williams University and providing requirements for the education of the Ottawa children. The commissioners also reported Atkinson, treasurer of Ottawa University, refused to turn over to them possession of the school property.

In view of the refusal of the trustees to turn over possession of the school property, the protests of the Baptists' friends of the University, and a memorandum of understanding dated November 9, 1872, entered into by an attorney for the Ottawas, the president of the school board and a representative of the Baptist Home Mission Society, the Secretary of the Interior left it up to Congress to decide what action should be taken in the matter. The Secretary in forwarding the Commission's report and other papers to Congress wrote in part as follows:

I feel compelled to state that in my judgment the persons in charge of this property have managed it in violation of their duties as trustees in several particulars, as will be seen by a careful examination of the report of the Commissioners

already referred to. Whether this mismanagement is so gross as to justify Congress in repealing the trust vested by the treaty, before referred to, is a question for that body to determine. The best information I have been able to obtain induces me to think that had the trust been legitimately managed and properly conducted the property would have been quite as valuable as it now is, without any augmentation by contributions from any outside source whatever. * * *

As to the memorandum of understanding, above mentioned, by which it was proposed the interested parties unite with the Secretary of the Interior in securing new legislation by which a commission would be authorized to determine the equitable interests of the parties, the Secretary said he did not feel at liberty to unite with these parties in seeking such legislation. The Secretary said he had no knowledge that the attorney who signed the memorandum for the Ottawas had any authority to do so.

A commission was established by the Act of March 3, 1873 (17 Stat. 623), which act generally followed the proposals of the memorandum of understanding. The act also provided that should the parties agree on a settlement then the Secretary of the Interior was authorized to carry it into effect. Such a settlement was agreed on by the parties on September 6, 1873. By this settlement the school section and 1280 acres were given to the school board; notes and mortgages held by the school board on lands sold stated to amount to at least \$15,000 were to be delivered to a person designated by the attorneys for the Indians; the remaining unsold school lands (10,702 acres appraised at \$50,196.97) were turned over to trustees to be sold for the benefit of the Indians; and the expenses and compensation of the Commissions set up by the 1872 and 1873 acts were to be paid equally by the school trustees and the Indians.

Under the terms of this settlement the school board received the school section appraised by the Irwin Commission (1872) at \$22,600.00 and 1280 acres appraised at \$7,490.00. The Ottawa Indians fared less handsomely by the terms of the agreement. The notes and mortgages estimated by the Irwin Commission to be worth at least \$15,000.00 were earmarked for the attorneys for the Ottawas. With respect to the 10,702 acres appraised by the same commission at \$50,196.97 the Indians eventually realized less than \$13,000.00 due to mismanagement of the trust in liquidation through the sale of land at far less than their market value and the Ottawa Indians paid half the expenses of the Commission.

By this settlement, which was approved by the Secretary of the Interior on October 29, 1873, the Ottawas agreed to make no claim to the University property or any other property held or claimed by the school trustees. The Ottawas gave up their educational rights guaranteed them by the 1862 and 1867 treaties. The consideration providing for the relinquishment of the Ottawa rights under those treaties could scarcely be called fair and just to the Ottawa Indians who alone were the beneficiaries of the trust created by the 1862 treaty. The consideration passing from the other parties, whose equities are questionable, to the Ottawa Indians under the settlement agreement was in effect no more than the value of the notes and mortgages. Defendant, whose officials were required to approve the settlement, had a duty to protect the rights of the Ottawa Indians in the school property and to secure for them full compensation for the relinquishment of their beneficiary rights under the 1862 and 1867 treaties to the school property and to an education for their children. The failure of the defendant from the beginning of the

educational trust to protect the rights of the Ottawa Indians therein resulted in others eventually claiming alleged equities in the trust, loss of property rights to the Ottawa Indians by violations of the trust by the trustees handling Ottawa property, dissipation of funds to attorneys for the Ottawas which would have been unnecessary if defendant had performed its duty to the Indians, the making of a settlement agreement that was not fair or just to the Indians, and charging the Indians the expenses of commissions.

Because of the complexity of the many transactions that involved the disposition of the Ottawa Reserve in Kansas it was thought best to discuss them before setting forth the contentions of the parties. Defendant takes the position that Article VI of the 1862 treaty created a permanent charitable educational trust wholly under the control of the trustees named in the treaty and that therefore there existed no fiduciary relationship between the United States and the Ottawa Indians as to the school lands. The defendant's position fails to take into consideration the fact that at the time of the making of the 1862 treaty the relationship existing between the Indians and the Government was similar to that of guardian and ward. As previously pointed out defendant was then under a duty to see that safeguards were incorporated into the treaty to protect the rights of the Ottawa Indians and to provide supervision and control of the trust therein created. This defendant failed to do. Nor did this moral obligation end with the making of the treaty since even after that time the Indians remained in effect wards of the Government.

In its findings of fact and on oral argument, defendant intimates that the Ottawa had become citizens (Tr. 235-236) with the legal right to make

settlements and engage attorneys. The question of the termination of the tribal status of the Ottawas under the 1862 and 1867 treaties has been decided otherwise by the Supreme Court of the United States in Wiggan v. Connolly, 163 U. S. 56, 41 L. ed. 69.

Defendant contends that no liability exists as to the shortage in Agent Hutchinson's account with respect to the sale of the Ottawa trust lands since the release executed by the Ottawas to the United States fully relieved the Government from further liability. Reasons why the receipt given Hutchinson is not a bar to the claim of the Ottawas for a full accounting from defendant with respect to the trust land proceeds have been hereinbefore fully discussed and will not be reiterated.

With respect to the settlement made between the Ottawas, the school trustees, and the American Home Mission Society in 1873 defendant urges that these were made upon substantial consideration and resulted in a full release of the United States from further liability with respect to the school lands issue. As previously pointed out this Commission does not consider that the settlement, made with the approval of defendant, was based upon substantial consideration. The United States was under a duty to see that full and ample consideration passed to the Ottawas for relinquishment of their educational rights in the school and for permitting title to the school site and other lands to be vested in the University. The only consideration passing to the Ottawas for giving up these rights was the return to them of certain school lands of which they were beneficial owners and some notes and mortgages (earmarked for their attorneys) of an appraised value of \$14,099.98.

Petitioner contends that in order for the Ottawa Indians to be made

whole with respect to damages they may recover, interest or some equivalent should be allowed by this Commission. As to the Government's liability to account to the Ottawa Indians for the proceeds of sale of the trust lands, this is a legal liability since the defendant assumed the duty to sell them for the benefit of the Indians. The 1862 treaty specifically provides for accruing interest on funds the United States held or may hold for the tribe. The United States paid interest on such funds as was deposited with it for the sale of trust lands. For these reasons accrued interest is allowed on the sum of \$30,603.94 at 5 percent interest from date of the stating of the account, March 22, 1869, until March 22, 1934, and 4 percent thereafter. See sec. 2516(a) of Title 28, U. S. Code, revised; The Miami Tribe of Oklahoma v. United States, 6 Ind. Cl. Comm. 513. Interest is not allowed on the other sums petitioner is herein found entitled to recover since the duty owed petitioner in respect to those transactions is based on a moral obligation to protect the Indians and their property and recovery is allowed under clause (5) of Section 2 of the Indian Claims Commission Act. Osage Tribe v. United States, 119 C. Cls. 592, 672; Loyal Creek Indians v. United States, 118 C. Cls. 373, 383.

This case was submitted by the parties on the limited issue of petitioners' right to recover. The findings of this Commission with respect to some of the transactions complained of reveal that the amount of recovery is ascertainable from the record. Petitioners, therefore, are entitled to recover from defendant:

1. Trust Land Funds unaccounted for by Agent Hutchinson (with accrued interest thereon at rate of 5 percent from March 22, 1869, to March 22, 1934 and 4 percent thereafter) \$30,603.94

2. Appraised value of School Section	22,600.00
3. Appraised value of 1280 acres conveyed to University	7,490.00
4. Treaty Funds	3,354.75
5. Expenses of 1872 and 1873 Commission paid by Ottawas	1,202.42

In addition petitioners are entitled to recover from defendant (a) the appraised value of the 10,702 acres of school lands, amounting to \$50,196.97, turned over to trustees by the 1873 agreement for sale for the benefit of the Ottawas, less whatever sums are shown to have been actually paid to the Indians by the trustees from the proceeds of sale and less the amounts expended for expenses and services of trustees set forth in Finding 44; (b) an amount equal to the profit that may be shown was made by Hutchinson and Kalloch from the sale of 5,000 acres of school land which may be shown by the records of bona-fide first sales of these lands; and (c) the value of the 3,032 acres of school lands sold by the trustees who did not invest the proceeds as required by the 1862 Treaty--the amount to be determined by taking the average sales prices of record for these sales. Accordingly, an interlocutory order will be entered.

Wm. M. Holt
Associate Commissioner

I concur:

Edgar E. Witt
Chief Commissioner

Commissioner Watkins took no part in the consideration and decision of this case.