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Cherokee Treaty. Message from the President of the United States, transmitting a copy of instructions to commissioner under Cherokee Treaty of 1835

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CHEROKEE TREATY.

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES,

TRANSMITTING

A copy of instructions to commissioners under Cherokee treaty of 1835.

FEBRUARY 1, 1843.

Referred to the Committee on Indian Affairs.

To the House of Representatives:

In compliance with a resolution of the House of Representatives of the 24th instant, requesting me to communicate answers to certain queries therein contained, respecting instructions given to the commissioners appointed to adjudicate claims arising under the Cherokee treaty of 1835, I transmit, herewith, a report from the War Department, accompanied by a copy of the instructions referred to.

JOHN TYLER.

WASHINGTON, January 31, 1843.

WAR DEPARTMENT, January 31, 1843.

SIR: In compliance with a resolution of the House of Representatives of the 24th instant, requesting the President to communicate answers to certain questions respecting the instructions given to the commissioners under the treaty with the Cherokees of 1835, referred by you to this Department, I have the honor to submit, herewith, a report of the Commissioner of Indian Affairs, containing the only instructions known to this Department to have been given to those commissioners.

I am, sir, very respectfully, your obedient servant,

J. C. SPENCER.

To the PRESIDENT of the United States.

DEPARTMENT OF WAR,

Office Indian Affairs, January 30, 1843.

SIR: In obedience to your instruction, I have the honor to report, in reply to a resolution of the House of Representatives of the 24th instant, requesting the President of the United States to communicate "answers to the following inquiries:—" "Are the commissioners appointed in pursuance of an appropriation made at the last session of Congress to adjudicate claims arising under the Cherokee treaty of 1835, instructed to hold their sessions in Washington or among the Indians in North Carolina?"

"What other and further instructions were given to said commissioners?"

The copy of instructions, dated 28th September last, prepared by your directions, herewith transmitted, answers both inquiries, so far as the records of this office enable me to report. My files do not show any other instruction.

I think it proper to state that the Hon. James Iredell declined to accept his appointment, by letter dated the 20th day of October, and that Hon. E. B. Hubly, whose commission is dated 8th November, was subsequently appointed, and arrived in Washington soon after he was advised thereof.

Very respectfully, your most obedient servant,

T. HARTLEY CRAWFORD.

HON. JOHN C. SPENCER,
Secretary of War.

WAR DEPARTMENT,

Office Indian Affairs, September 28, 1842.

GENTLEMEN: Having been appointed by the President of the United States, by and with the advice and consent of the Senate, commissioners under the 17th article of the Cherokee treaty of December 29, 1835, and the amendments thereto, and having received your commissions, I respectfully communicate to you the following instructions, conveying the views entertained by the Department of the duties that have been confided to you.

The 17th article, as amended, stipulates, that "all the claims arising under or provided for in the several articles of this treaty shall be examined and adjudicated by such commissioners as shall be appointed by the President of the United States, by and with the advice and consent of the Senate of the United States, for that purpose, and their decision shall be final."

The first article of the treaty gives the consideration of five millions of dollars for the cession, "to be expended, paid, and invested, in the manner stipulated and agreed upon in the following articles"—thus, according to the opinion of the Attorney General, and the construction uniformly given by the Department, subjecting the fund to the charges imposed upon it by the treaty, which embrace all the expenditures not otherwise provided for by that instrument. Those charges are enumerated in the 15th article, which is in these words:

"It is expressly understood and agreed between the parties to this treaty, that, after deducting the amount which shall be actually expended for the payment for improvements, ferries, claims for spoliations, removal, subsistence, and debts, and claims upon the Cherokee nation, and for the additional quantity of lands and goods for the poorer class of Cherokees, and the several sums to be invested for the general national funds provided for in the several articles of this treaty, the balance, whatever the same may be, shall be equally divided between all the people belonging to the Cherokee nation east, according to the census just completed; and such Cherokees as have removed west since June, 1833, who are entitled, by the terms of their enrolment and removal, to all the benefits resulting from the final treaty between the United States and the Cherokees east, they shall also be paid for their improvements, according to their approved value before their removal, where fraud has not already been shown in their valuation."

The 17th article makes the decisions that have been already had by the former board of commissioners, and which have been reported by them to the Department, final. Even the Executive cannot overrule them where they had jurisdiction; and, if they had none, you cannot possess it. You are therefore instructed that no case which has been adjudicated by the former board is open to your examination; and one of the great objects in furnishing you with its records is to enable you to detect at once any application to you for the consideration of cases of any description that have been already passed on by the former board, which will be rejected.

The 9th article stipulates that the United States shall "appoint suitable agents, who shall make a just and fair valuation of all such improvements, now in the possession of the Cherokees, as add any value to the lands, and also of the ferries owned by them, according to their nett income; and such improvements and ferries, from which they have been dispossessed in a lawless manner, or under any existing laws of the State, where the same may be situated."

"The just debts of the Indians shall be paid out of any moneys due them for their improvements and claims; and they shall also be furnished, at the discretion of the President of the United States, with a sufficient sum to enable them to obtain the necessary means to remove themselves to their new homes; and the balance of their dues shall be paid them at the Cherokee agency west of the Mississippi. The missionary establishments shall also be valued and appraised in a like manner, and the amount of them paid over by the United States to the treasurers of the respective missionary societies by whom they have been established and improved, in order to enable them to erect such buildings and make such improvements, among the Cherokees west of the Mississippi, as they may deem necessary for their benefit."

These provisions embrace a large proportion of your duties. You will perceive that, where they have not been already made, and do not appear by the records of the former board of commissioners, which will be furnished you, and even then, if you are not satisfied with their correctness, valuations must be made of all such improvements as are subject to your examination under these instructions, and were in the possession of the Cherokees *at the date* of the treaty, (not its ratification,) as add any value to the lands; and, also, of the ferries owned by them at the same time, according to their *nett* income, and of such improvements and ferries as they had been dispossessed of before the same date, in a lawless manner, or under "any existing laws of the State where the same may be situated." This duty is distinct from reservations, which will be the subject of another part of these instructions, and relates merely to improvements separated from the land on which they stand. The question of *ownership* of the improvements and ferries is the first one to be decided. If they shall be found to belong to a Cherokee, entitled to remuneration for them under the treaty, the inquiry arises, whether he or she was in possession of them on the 29th December, 1835, or had been dispossessed thereof in a lawless manner, or under the existing laws of the State in which they were located. If either of these alternatives is answered affirmatively, then comes the question, "What is a just and fair valuation of them?" To reach the true worth of them, you are authorized to employ two respectable persons, when necessary, to assess their value, who will be paid \$4 per day for every day actually and necessarily employed in making such valuation.

Such debts as the Indians may owe will be paid out of any moneys you may award them "for their improvements and claims;" and you will investigate the indebtedness, at the date of the treaty, of those Cherokees to whom you shall decide any thing to be due for improvements, ferries, reservations, or spoliations; and make a record of such debts as you shall find to be owing by them, stating to whom due and the nature of the debt.

The next class of claims recognised by the treaty is that for spoliations, which, it will be seen, are mentioned in the first, and are specially provided for in the 10th article of the treaty, and the 3d of the supplementary articles. The injuries here referred to are the theft or destruction of property, or other acts which diminish its value, committed by citizens of the United States.

There remain reservations, of which the treaty (13th article) recognises three descriptions: 1st. Those Cherokees, their heirs or descendants, to whom reservations were made in former treaties, who have not sold or conveyed the same by deed or otherwise, and have complied with the terms on which they were granted, as far as was practicable, in each case, where such reservations have been since sold by the United States, have a just claim against Government, and "the original reservees, or their heirs or descendants, shall be entitled to receive the present value (that is, the value at the date of the treaty) thereof, from the United States, as unimproved lands." 2d. When such reservations have not been sold by the United States, but where the terms on which they were made have been complied with as far as was practicable, the original reservees, or their heirs or descendants, shall be entitled to the same, and receive a grant therefor, including all persons who were entitled to reservations under the treaty of 1817, and who ("as far as practicable") have complied with the stipulations of said treaty, "although, by the treaty of 1819, such reservations were included in the unceded lands belonging to the Cherokee nation." 3d. Such reservees as were compelled, by the laws of the States in which their reservations were situated to abandon the same, or purchase them from the States, shall be deemed to have a just claim against the United States for the amount by them paid to the States, with interest thereon, for such reservations, and if obliged to abandon the same, for the present (date of the treaty) value of such reservations as unimproved lands. These are the three classes of reservations recognised by the treaty, all of which are subject to this proviso in the said (the 13th) article: "But in all cases where the reservees have sold their reservations, or any part thereof, and conveyed the same by deed or otherwise, and have been paid for the same, they, their heirs or descendants, or their assignees, shall not be considered as having any claims upon the United States under this article of the treaty, nor be entitled to receive any compensation for the lands thus disposed of."

It will be observed that, by the first supplemental article, all "pre-emption rights and reservations provided for in articles twelve and thirteen shall be, and are hereby, relinquished and declared void;" and that, by the third article, a pecuniary compensation therefor is substituted, which was enlarged by the act of 12th June, 1838. The first class is to be paid for as unimproved land, and the third also, where there was a compulsory abandonment; the second class is entitled to be paid for the land and the improvements the reservees had made on it before the date of the treaty, because, in the original frame of the treaty, they were to receive a grant of the land, which would carry both; and, by the third of the supplemental

articles, the money substituted "shall be applied and distributed agreeably to the provisions of the said treaty." There are no pre-emption rights; they were provided for by the 12th article of the original treaty, but abrogated by the 1st of the supplemental articles, and never had more than an inchoate existence, which is gone.

There is a stipulation in the 16th article, that the Cherokees should remove to the west of the Mississippi within two years from the ratification of the treaty; and that during such time the United States would protect them in their possessions and property, and the free use and occupation of the same; and such persons as have been dispossessed of their houses and improvements, for which no grant has actually issued prior to the enactment of the law of Georgia, of December, 1835, to regulate Indian occupancy, shall again be possessed thereof, and placed in the same condition and situation, in reference to the laws of Georgia, as the Indians who have not been dispossessed. "If this is not done, and the people are left unprotected, then the United States shall pay the several Cherokees for their losses and damages sustained by them in consequence thereof." It is not supposed any cases of this kind, deserving your favorable consideration will be presented; but it is possible there may be, and it is, in any event, a part of the treaty which it was my duty to bring to your notice.

There appears to have been a doubt, when the treaty was signed, whether the spoliation claims were to be paid for out of the five millions or not; and the question, it was stipulated by the first article, should be referred to the Senate, and if the decision was in the negative, then \$300,000 additional were allowed, and in the 10th article that sum was set apart for them. It was expressly understood (see 13th article) by the parties, "that the reservation claims should not be paid for out of the consideration of the cession or the sum allowed for spoliations, but be discharged by the United States, independently thereof." The 2d supplementary article refers to the impression of the Cherokee people, that the expenses of their removal, and "the value of certain claims which many of their people had against citizens of the United States," were not to be borne by the five-millions fund, which impression was thought correct "by some of the Senators who voted on the question;" and the 3d article allows \$600,000 "to the Cherokee people, to include the expense of their removal, and all claims of every nature and description against the Government of the United States, not herein otherwise expressly provided for, and to be in lieu of the said reservations and pre-emptions; and of the sum of \$300,000 for spoliations, described in the 1st article of the above-mentioned treaty." In addition to this, the law of 12th June, 1838, appropriated the further sum of \$1,047,067, "in full for all objects specified in the 3d article of the supplementary articles of the treaty of 1835, between the United States and the Cherokee Indians, and for the further object of aiding in the subsistence of said Indians for one year after their removal west; provided, that no part of the said sum of money shall be deducted from the five millions stipulated to be paid to said tribe of Indians by said treaty; and provided, further, that the said Indians shall receive no benefit from the said appropriation, unless they shall complete their emigration within such time as the President shall deem reasonable, and without coercion on the part of the Government."

The expense of removal, in the opinion of the late Attorney General, (Mr. Butler,) was the first charge on the sum of \$600,000, provided

by the 3d supplementary article, and the balance to be applied to the various claims which shall be established; and if that fund was insufficient for the several objects contemplated, then he was of opinion that the deficiency might be supplied by a resort to the general fund of five millions. (See his opinions of 6th December, 1837, and of 3d February, 1838.) This is undoubtedly the correct interpretation of the treaty, for it must have been perfectly well known to those who made it that the sum of \$600,000 would fall very far short of meeting the purposes named in the supplement. The law of 1838, in consideration of a different reading by the Cherokees, appropriated \$1,047,067 in full for all the objects specified in the 3d supplemental article, and to aid in the subsistence of the Indians for one year after their removal; proving clearly that the whole expense was not expected to be borne by the funds thus set apart. If, then, the removal was to be first borne, and the excess of claims over and above the balance of the \$1,047,067 was to fall back on the \$5,000,000, it is immaterial as to results which expenditure is first met, taking care that the claims recognised by the 3d supplemental article (exclusive of removal and subsistence, which are a general charge) do not exceed the fund, as enlarged by the law of 1838. This view is sustained by the Attorney General, in the opinion of 3d February, 1838, when he speaks of the preference given to the expense of removal and subsistence as merely nominal, and recognises the payment of all the claims.

The spoliations were by the original treaty restricted to \$300,000, but the supplement enlarged the lien of this class of claims by throwing them on a greater fund, (still further swelled by the law of 1838,) of which the supplement, expressing the last agreement of the parties, does not require that there should be any subdivision. If, therefore, the mass of the claims in the 3d supplementary article do not exceed the gross amount allotted for them, they will be paid in full, if there are means from any fund to meet them; if there are not, or they should run beyond the sum provided, there must be, in either case, a ratable distribution. The claims for improvements are a charge upon the general fund.

It next becomes necessary to inquire who are entitled, in reference to their personal qualifications and residence, to present claims. The treaty was made with the Cherokee nation. All their land east of the Mississippi was ceded. Whoever, therefore, owned and *possessed*, at the date of the treaty, improvements or ferries on the ceded territory, are entitled to be paid for them. This implies that they lived on that territory, unless they prove to your satisfaction that they were "dispossessed in a lawless manner, or under any existing laws of the State where the same may be situated;" in either of which cases, they would or would not be entitled to compensation, according to the evidence they adduced on other essential points, without reference to their residence.

The claims for reservations which were taken under the treaties of 1817 and 1819, (according to an opinion of the Attorney General of 14th May, 1838,) but which are on the land ceded in 1835, are entitled to no compensation for the *reservations*, because they were unauthorized, and should have been located on the cessions of 1817 and 1819; but, if they were improved, the reservees would, admitting all the other prerequisites, have a claim to be paid for the improvements, under the ninth article of the treaty of 1835, because within and upon the lands ceded by it. The reservations properly taken (under the treaties of 1817 and 1819, and recognised by the

treaty of 1835) must necessarily be without the Cherokee territory ceded by the latter, and are to be paid for as unimproved land, except those of the second class, before stated, which require payment for land and improvements both, for the owners of them were entitled to grants of the land by the original treaty, for which money was substituted by the supplement, which would, if unaltered, have secured to them the land, and all that was on it. It is not material where the claimants for reservations lived. Their property was ceded, and, if prudent, they would probably be living on them without the cession of 1835, unless when they were forcibly ejected. Claims under the sixteenth article, if any such should be preferred, it has been already stated, would not probably be entitled to your favorable consideration. The article provides for the protection of the Indians in their possessions until the 23d May, 1838, and where they had been ousted, and no grant had actually issued before the enactment of the law of Georgia of December, 1835, to regulate Indian occupancy, that they should again be put in possession, "and placed in the same situation and condition, in reference to the laws of the State of Georgia, as the Indians that have not been dispossessed; and if this is not done, and the people are left unprotected, then the United States shall pay the several Cherokees for their losses and damages sustained by them in consequence thereof." On the 3d day of March, 1823, a law was passed by Congress, appropriating \$50,000 to purchase certain tracts of land in the State of Georgia, reserved to the Indians "by the treaties with the Cherokee Indians of the eighth day of July, one thousand eight hundred and seventeen, and of the twenty-seventh day of February, one thousand eight hundred and nineteen." Under this law, Colonel D. G. Campbell (with whom was afterwards associated James Meriwether, Esq.) was appointed commissioner, and his instructions are dated 17th March, 1823. They subsequently made a report, returning a list of the reservees of whom they had purchased according to the law, showing that they had paid \$45,665 to them. Of this list you will herewith receive a copy. It is presumed all those fairly entitled to its provisions applied under this law; and if they did not, that they were guilty of laches, which would operate in bar of their claims now. It is probable the clause of the sixteenth article was inserted to satisfy all parties who *could* claim, and it is possible there may still be just claim made under it. But all such should be very closely scrutinized; and if they might have availed themselves of the law of 1823, and did not do so, they ought not now to receive your decree in their favor.

The twelfth article stipulates that those individuals and families of the Cherokee nation that are averse to a removal west, and wish to become citizens of the States where they reside, and such as are qualified to take care of themselves and their property, shall be entitled to receive "their due portion of all the personal benefits accruing under this treaty, for their claims, improvements, and *per capita*." These persons should have presented their claims to the commissioners, who were in session in 1836, 1837, 1838, and 1839. As to claims that may be preferred to the board lately organized, and now in being, they are not entitled to compensation, unless those who hold them shall emigrate.

If the appropriation of 12th June, 1838, had not been made, the Cherokee fund would have been exhausted long since. What remains of the consideration of the treaty, and appropriations in addition to it, can therefore be regarded in no other light than as a part of the \$1,047,067, respecting

which the law of 1838 contains the proviso, "that the said Indians shall receive no benefit from the said appropriation, unless they shall complete their emigration within such time as the President shall deem reasonable, and without coercion on the part of Government." If this view be correct, and it is not seen how it can be otherwise, emigration is an element that must enter into every claim entitled to payment. Besides, those now east, by a rigid and strictly legal construction of the treaty, would meet with difficulty in sustaining claims; it requires an equitable interpretation to sanction them. This I think the true principle, inasmuch as the most of those who have received compensation did not comply with the treaty stipulation as to removal, any more than those still east, the difference being only in the length of time; still, when the latter came before the board, it should be with the offer to place themselves on a footing with those who have preceded them.

You will not, while sitting east of the Mississippi, consider any claim that may be presented by, for, or on behalf of, a Cherokee that has heretofore emigrated; such you will receive and investigate when you shall have crossed the Mississippi, and fixed upon a place or places for your deliberations. Of this instruction notice has been already transmitted to the superintendent and agent in the Western territory.

You will proceed to such point in North Carolina as may be most suitable and convenient for the prosecution of your inquiries and the discharge of your duties, and, after their performance in North Carolina, you will be pleased to cross the Mississippi, and you will then, having given in both cases the notice necessary to afford claimants full opportunity to present their respective claims, proceed in your examinations and investigations in the Cherokee country west.

It is very important that your reports east and west should be received as early as practicable, to enable the eastern Cherokees to avail themselves of the condition on which only they can receive payment of claims, by removing to the West, if possible, during the present year. So soon as your reports are received, an apportionment of the fund will be made here, and an agent authorized to disburse it to the claimants, in such ratable proportions as shall be just, after applying what may be required to the satisfactions of the debts found by you to exist at the date of the treaty. The necessity, therefore, of entering upon the duties of your appointment at as early a day as practicable must be apparent, and furnishes a strong reason for urging it.

Your compensation will be at the rate of \$3,000 per year each, and that of your secretary at the rate of \$1,500 per annum, respectively, inclusive of all charges. You are authorized to draw bills of exchange on the Commissioner of Indian Affairs, if at any time you should desire to do so, for such sums as may be due on account of compensation, attested by your certificates, respectively, that so much is due to you. The same course may be pursued by your secretary, to whose drafts your certificates will be attached that the sum drawn for is due.

Very respectfully, your obedient servant,

T. H. CRAWFORD.

HON. JOHN H. EATON, *of Washington, D. C.,*

HON. JAMES IREDELL, *of Raleigh, N. C.,*

*Commissioners under 17th article of Cherokee Treaty
of December 29, 1839.*