5-18-1848

Cherokee Indians in North Carolina

THIRTIETH CONGRESS—FIRST SESSION.

Report No. 632.

[To accompany bill H. R. No. 508.]

HOUSE OF REPRESENTATIVES.

CHEROKEE INDIANS IN NORTH CAROLINA.

MAY 18, 1848.

Mr. MCILVAINE, from the Committee on Indian Affairs, made the following

REPORT:

The Committee on Indian Affairs, to whom was referred the resolution of the House, instructing the committee to "inquire into the propriety of causing the sum allowed for removal and subsistence, under the Cherokee treaty, to be paid to such Cherokees as were not required under the provisions of those treaties to remove west of the Mississippi," respectfully report:

That they have bestowed more than ordinary time and labor upon the subject embraced in this resolution, and after the most thorough investigation, they have come to the conclusion that the allowance would be proper and just, and proceed to offer some of the reasons which led them to this conclusion.

The subject of conflicting jurisdiction of State and Indian government, within many of the States of the Union, has engaged the attention of the government from an early day. To some of the States it stood bound to extinguish the Indian title at the earliest practicable period. The desire of the government to rid itself of this embarrassment, and a further desire to gather the various Indian tribes (remaining within the States) together in a country separate from the whites, and free from State or territorial jurisdiction, led to the establishment of a system of ultimate extinction of the Indian title by the general government within the States, by an exchange of territory and the removal of the Indians, as far as practicable, to the country west.

By the treaty of 1828, made with the Cherokees residing in Arkansas, and who had previously emigrated thereto under the

advice of the government from 1808, a cession of seven millions of acres of land was made to the Cherokee nation, west of the Territory of Arkansas. And it was provided that whenever any of the tribe, then remaining within the limits of any of the States east of the Mississippi, might desire to remove west, the cost of the emigration of all such should be borne by the United States, and their subsistence for twelve months after their arrival at the agency. But, in consequence of the valuable property held by the chiefs and other Indians, their advancement in civilization, and their aversion to leaving the graves of their fathers, they emigrated but slowly. Georgia, within whose limits the greater part of the nation resided, becoming impatient to possess herself of their valuable possessions, urged the government to a speedy extinguishment of the Indian title, and, by the adoption of a stringent policy towards the Indians, inclined them to listen to propositions for their removal; and in February, 1835, (see treaty of December, 1835, and House document 286, 1st session, 24th Congress,) it was agreed between a delegation of the Cherokee nation and the President of the United States, after some unsuccessful attempts at negotiation, to submit to the Senate "to fix the amount which should be allowed the Cherokees for their claims, and for a cession of their lands east of the Mississippi river." Whereupon, the Senate advised "that a sum not exceeding five millions of dollars be paid to the Cherokee Indians, for all their lands and possessions east of the Mississippi river."

A portion of the tribe were, however, still averse to removal, as well as to the terms designated by the Senate, (House document 286, 1st session, 24th Congress,) but a *project* of a treaty was, March 14th, (see same document) arranged, upon the basis of the Senate proposition, between Jno. F. Schermerhorn, a commissioner on the part of the United States, and another delegation of the Cherokee nation, representing that portion of the tribe which was favorable to removal, which was, by direction of the President, to be submitted to the nation for their concurrence, and which was submitted to a general council of the nation, convened for another purpose, at "Running Waters," on the 20th July, (see same document.)

The ninth article of this *project* stipulated for the removal of the Indians to their new homes, and their subsistence for one year after their arrival there. And further provided that such of them as were capable of removing and subsisting themselves should be permitted to do so, and should be allowed for the same twenty-five dollars for removal, and thirty-three dollars and thirty-three cents for subsistence. And the fourteenth article provided that "those individuals and families of the Cherokee nation that are averse to a removal to the Cherokee country west of the Mississippi, and are desirous to become citizens of the States where they reside, and such as, in the opinion of the agent, 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, ferries, *removal* and *subsistence*;

but they shall not be entitled to any share or portion of the funds vested or to be expended for the common benefit of the nation." And President Jackson accompanied this *project* with an address "to the Cherokee tribe of Indians east of the Mississippi river," recommending to them the acceptance of its terms. The Secretary of War, in his letter to the commissioners, announcing their appointment, (Senate document 120, 2d session, 25th Congress,) says: "The great object being to insure the entire removal of the tribe, no reservations will be granted. If individuals are desirous of remaining, they must purchase residences for themselves like white persons, and must be left to the care of the laws of the States within which they reside." The commissioner also addressed the council upon this subject, and in explanation of the terms proposed he said: "Article fourteenth makes provision for such Cherokees as do not wish to remove west of the Mississippi, and wish to become citizens of the States where they live, and are qualified, in the opinion of the agent, to take care of themselves. They will have paid to them *here* all that is due them for their claims, improvements, ferries, per capita allowance, *removal* and subsistence; but they must buy their own lands like other citizens, and settle *where they please*, subjects of the laws of the country where they live."

This proposition, slightly modified, was again submitted to a general council, held at the Red Clay council ground, on the 30th of October, (House doc. 286, 1st ses. 24th Cong.,) and with a similar explanation, as will appear from paper A, appended to this report. But from the general repugnance of the nation to the terms offered them, nothing definite was agreed upon until the 29th of December, when a treaty was arranged with the committee, representing a small portion of the tribe, convened at New Echota, on that day, (same doc.,) upon the basis proposed by the President, with some modification of details. The 8th article of this treaty fixes the amount to be paid by the government, for removal and subsistence, to such as should remove and subsist themselves at fifty-three dollars and thirty-three cents; and the 12th article (corresponding with the 14th of the *projet*) provides that "those individuals and families of the Cherokee nation that are averse to a removal to the Cherokee country, west of the Mississippi, and are desirous 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*, as soon as an appropriation is made for this treaty."

Although in the terms here used, to embrace this provision, the words *removal* and *subsistence* are omitted, it is manifest from Mr. Schermerhorn's journal, and the statement of Mr. Wm. Rogers, paper B, that the commutation for removal and subsistence was understood to be retained by both the contracting parties.

Mr. Schermerhorn, in his journal, after citing the provision which he had allowed for pre-emptions, and for the advance of two years annuities for the benefit of the poorer Indians, says, "in the other articles of the treaty no material alterations of the treaty will be found. (See doc. 120, 2d ses. 21st Cong.)

Pending the consideration of the treaty in the Senate, the Cherokees residing in North Carolina, who had been kindly dealt with by that State, and were generally averse to removal, and who had theretofore taken no part in the negotiations, learning that the treaty when ratified, would be held binding upon the whole nation, and that their lands would be sold from them, appeared by their representative, Wm. H. Thomas, to see that their equal rights were properly guarded. (Sen. doc. 408, 1st ses. 29th Cong.)

Mr. Thomas, upon an examination of the treaty, did not consider the 12th article sufficiently explicit to secure the rights of the people whom he represented, but was assured by the commissioner and the chiefs who negotiated the treaty, and who were present in this city, (Sen. doc. 408, 1st ses. 29th Cong.,) that the terms used were sufficiently comprehensive to cover all their interests, and that "there could be no danger of any construction being given to the treaty which would deprive the Cherokees, who remained last, of their *removal* and *subsistence* allowance." And, whether charged upon the original fund or directly upon the treasury of the United States, as was subsequently provided, it is equally necessary to place those who, having relinquished their property, chose to remain "and purchase residences for themselves," upon equality with those who were removed west, that they should receive commutation for removal and subsistence.

To secure, beyond the possibility of a doubt, the interests of the Carolina Indians, Mr. Thomas procured from the treaty delegation an agreement, which runs as follows: (On file in War Department.)

"The delegation, whose names are hereunto annexed, for the Cherokees who have emigrated, and expected to emigrate, to their new homes west of the Mississippi, of the first part, and William H. Thomas, for the Cherokees belonging to, or which shall belong to, the following towns and settlements: Qualla, Alarka, Aquona, Stekosh, and Che-o-ih, with their respective settlements, expected to remain east, of the second part:

ART. 1. It is admitted that the Cherokees above mentioned are entitled to an equal share, proportioned to their numbers, in all the lands belonging to the Cherokee nation of Indians. And notwithstanding they have been deprived of their share of the annuities since the year 1820, are nevertheless entitled to all sums in the possession of the President of the United States, for the use of, and annuites due from the United States to the Cherokee nation of Indians, (except such as belong exclusively to the Cherokees now living west of the Mississippi,) their proportional share of which benefit was intended to be secured to them, by the 12th article of the New Echota treaty.

* * * * * *

ART. 2. (Immaterial.)

ART. 3. It is further agreed, that if any construction be given to any of the articles of the New Echota treaty, whereby the Cherokees belonging to, or which may belong to, said towns and settlements, shall be deprived of an equal share, proportioned to their numbers, in all the sums arising from a sale or transfer of the common property

mentioned in this first article of this agreement, payable to the Cherokee nation of Indians or people, we will request the President and Senate of the United States, and they are hereby requested, to allow them such supplemental articles thereto as shall remove such improper constructions, and enable them to receive their equal proportioned share, as above mentioned.

ART. 4. It is further understood that one claim, to which said Cherokees desiring to remain are entitled by the 12th article of the New Echota treaty, amounting to fifty-three dollars and fifty-three cents, intended to place them on terms of equality with those that chose to emigrate within two years from the ratification of the above treaty, who are allowed that sum for removal and subsistence, out of the money arising from the sale of the common property, shall be placed by them on interest in the State bank of North Carolina, or some other safe institution, to furnish those desiring to emigrate to their new homes in the west with removal and subsistence, without which they might not be able to reach their friends in the west.

Articles 5 and 6 immaterial.

Signed by Major Ridge, William Rogers, Elias Boudinot, and others of the treaty delegation, and Wm. H. Thomas, agent, on the part of the Cherokees expected to remain east after the expiration of two years.

This agreement was submitted to the Commissioner of Indian Affairs by Mr. Thomas, July 4, 1836, with a request that a decision of the Secretary of War might be had upon the claims of the North Carolina Indians therein referred to, and on the 19th he received the following answer. (Sen. Doc., 408, 1st ses. 29th Con.)

"SIR: Your communication, of the 4th instant, has been laid before the Secretary of War, with the accompanying documents, relating to the interest of the Cherokees residing in the State of North Carolina, in the treaty of December 29, 1835.

"I am instructed to inform you, that it is the impression of the department that the Cherokees in North Carolina have an interest, proportionate to their numbers, in all the stipulations of that treaty.

"C. A. HARRIS,
"*Commissioner.*

"WM. H. THOMAS, Esq.,
"*Scotts Creek, Haywood, N. C.*"

Hon. Willie P. Mangum, then and now a senator from North Carolina, in answer to a communication from a member of your committee, dated May 10, 1848, says:

"In reply to your inquiries in regard to the understanding, *at the time of the ratification*, of the effect of the treaty with the Cherokees, I have to state that, at the time, my attention was intensely turned to the subject. Many of the Cherokees resided within the limits of North Carolina. During the angry and dangerous controversies between Georgia and the Cherokees within her limits,

North Carolina had taken a different line of policy, and had indicated towards them (which has been fully redeemed) a most liberal and considerate course for their ease and the gratification of their reasonable wishes.

"There were many and formidable objections to the ratification of the treaty, and it was known that, without the full vote of North Carolina, it must be defeated. It became my duty, therefore, to look to the interests of the North Carolina Cherokees. I had many interviews on the subject with W. H. Thomas, (and others,) their intelligent agent here, and who was understood to be entirely identified with them.

"I know that many of the North Carolina Cherokees entertained no purpose of removing while the policy indicated by North Carolina should be adhered to in good faith; and that, among other objections on their part, they did not wish the means to be unequally distributed, as well those stipulated by the treaty as others that might follow as a consequence of it.

"Much intercourse and negotiation was had between the parties—the treaty and anti-treaty parties—on the effect and details of the instrument. I cannot pretend to state with accuracy the various and minute details involved in those discussions.

"This I know, that Mr. Thomas, a shrewd, intelligent, and, as I believe, faithful agent of the North Carolina Indians, became entirely satisfied with ratification, and urged upon me the policy of that course.

"From his known character and habits of business, I feel assured that he was convinced the non-emigrating party would, in all respects, save in the domain provided, participate equally in every benefit resulting from the treaty, or any subsequent legislation necessary to its consummation. That was my impression; and, without it, my vote would not have been given for ratification; in which case it would have been defeated. It was given at last with the utmost reluctance.

"I have constantly entertained the opinion that, not only *liberal*, but *strict* justice requires that the remaining Indians should be put on an equal footing with the emigrants, as to '*removal and subsistence*.'

"They may yet go; they may be compelled to go, and *that* must be considered as part consideration for the immense domain they ceded; and, unless they receive their 'removal and subsistence' pay, they will have received a very inadequate compensation for their cession.

"WILLIE P. MANGUM."

From the foregoing it will be seen that a portion of the Cherokee Indians were known to the government to be averse to removal west; that provision was made for them in the *project* of a treaty, first submitted to them by the President, *in terms*, for commutation pay for *removal and subsistence here*; that the commissioner was so informed by the Secretary of War; that the commissioner so explained it to the Indians; that the treaty, though couched in other

words, was explained, by the commissioner at the time of negotiation, to make the same provision; that it was so understood by the treaty party, as well as by the non-emigrating party, at the time of the ratification, and that, but for that understanding, it could not have become a treaty.

It further appears that the Secretary of War, subsequent to the ratification of the treaty, (July 19th,) decided, upon the submission of Mr. Thomas's argument to him, that the Cherokees in North Carolina had an interest, proportionate to their numbers, in all the stipulations of the treaty; *which argument asserted that the Cherokees desiring to remain were entitled, by the 12th article of the treaty, to removal and subsistence pay.*

The whole may be summed up in this: The government was desirous to extinguish the Indian title to lands held by them in the States, and their removal from them; and proposed, as a condition of cession and removal, either to the west or "*where they pleased*," subject to "the laws of the States," that they should be removed and subsisted for one year, or paid for removing and subsisting themselves fifty-three dollars and thirty-three cents. The North Carolina Cherokees, as well as those who emigrated west, did cede their lands, and have removed to "residences purchased for themselves," and are equally entitled to removal and subsistence pay.

The removal of the Indian tribes from the States to the country allotted to them west of the Mississippi, though an object with the government, was not the only object of this treaty. The extinguishment of the Indian title in the States, and particularly in the State of Georgia, was an object more important than the former *at that time*. To accomplish this, it was necessary as well to satisfy those who choose to remain as those who were willing to remove. It *was* accomplished, and the government should keep its faith.

This undertaking of the treaty was for a time adhered to, and a portion of the remaining Cherokees received their removal and subsistence pay, (see attorney general's opinion annexed;) but a change of public officers brought with it a change of construction, and the treaty has since been administered according to the strictness of the letter. After repeated efforts by Mr. Thomas to obtain for his people what he conceived to be justice from the department, the President, at his instance, submitted the question to the attorney general, Mr. Mason, (June, 1845,) and with it several interrogatories put by Mr. Thomas.

The first of which was, "are the Cherokees remaining in the State of North Carolina and Tennessee entitled, under the 8th and 12th articles of the Cherokee treaty of December, 1835, to $53 33 for their claims for removal and subsistence allowance, which have been paid to the Cherokees in Georgia?"

In September, the attorney general made an elaborate report, in which he says, "the first of these (the interrogatories) involves an inquiry whether, under the treaty of New Echota, those Cherokees who had remained in the States of Tennessee and North Carolina

are entitled, under the 8th and 12th articles of the treaty, to $53 33 for removal and subsistence allowance?

"This inquiry is embarrassed by the fact that these allowances have been made to Cherokees who have remained in Georgia, by decisions at the War Department, and by the fact of payment being made to others of the tribe who did not emigrate, by the joint resolution of Congress, approved June 15, 1844. The interpretation under which the Georgia Indians were paid appears to have been acted upon by the War Department for but a short time, and that department has, for many years, uniformly rejected such claims. The circumstances under which the payments were directed by the joint resolution are stated in the report of the Commissioner of Indian Affairs. It appears to me that the confirmation of the decision of Messrs. Eaton and Hubley,* declared by that resolution cannot, with all the respect due to Congress, be regarded as settling the construction of the treaty so as to furnish a guide to the executive in carrying the treaty, as a law, into execution. In determining your duty in this report, it appears to me that the only guide is the treaty itself in all its stipulations, and if a measure of relief is withheld, it will be competent for Congress to supply the deficiency. * * * * * * * *

"The other three questions may be resolved into one inquiry, whether the lands in North Carolina belonged to the Indians residing on them. These lands have been sold by the State of North Carolina, and are, I presume, in the possession of the purchasers. As the executive of the United States would have no power to divest those now in possession, and the question is one for the judiciary, I have not deemed it necessary to embrace my views on it in this communication. Nor have I deemed it proper to express my opinion on the hard measure which seems to have been dealt out to the North Carolina Indians, whose lands have been sold, while they have received no corresponding benefit. I have examined the subject as one of legal construction only, and have no doubt of the correctness of my conclusions in that respect."

From this it appears that the Attorney General *examined the subject as one of legal construction only*, and hence felt constrained to advise the President that *his only guide was the treaty itself, in all its stipulations*, irrespective of explanatory testimony, referring to Congress the "measure of relief" to which he evidently considers the North Carolina Indians entitled to, "*whose lands have been sold, while they have received no corresponding benefit.*"

In his decision, he does not appear to have consulted either the law of nations, the opinions of his predecessors, or the decisions of the court. Vattell says, page 247, "In the interpretation of a treaty, or any other deed whatever, the question is, *to discover what the contracting parties have agreed upon;* to determine precisely, on any particular occasion, what has been *promised* and *ac-*

* Commissioners appointed by the President to decide upon claims arising under the treaty, among which were the claims of certain non-emigrating Cherokees, for commutation pay for removal and subsistence.

cepted; that is to say, not only what *one* of the parties *intended* to promise, but also what the *other* must candidly and *reasonably have supposed to be promised to him;* what has been sufficiently *declared* to him, and what must *have influenced his acceptance.* Every deed, therefore, and every *treaty must be interpreted by certain fixed rules, calculated to determine its meaning as naturally understood by the parties concerned, at the time when the deed was drawn up and accepted.*"

Chief Justice Taney, whilst Attorney General, in an opinion which he gave upon an Indian treaty, said: "In an instrument of this sort, made with such persons as the Choctaws, I do not think that *strict* and *technical* rules of construction should be applied to it. *It ought to be expounded liberally, according to the intent.*" (Attorney Generals' Opinions, page 483.)

The Supreme Court of the United States, in their decision in the case of Worcester *vs.* the State of Georgia, say: "The language used in treaties with Indians ought never to be construed to their prejudice. * * * * How the words of the treaty were *understood* by *this unlettered people,* (the Cherokees,) rather than their *actual meaning,* should form the rule of construction." (6 Peters, page 576.)

However straight the executive department of the government has considered its line of construction and action, under this treaty, with these "unlettered people," your committee are of the opinion that justice to them, as well as the honor of the nation, demand, at least, that they should be dealt with according to the "*meaning, as naturally understood by the parties concerned at the time.*"

By a supplemental article to the treaty, it was agreed that the charge for removal should be borne by the treasury of the United States, and not by the Indian fund; and an appropriation was made for this purpose, July 2, 1836. A further appropriation was subsequently made for removal and subsistence, but still inadequate to the gross amount paid for that purpose; the residue being charged upon the Indian fund. (Senate Doc. 298, 1st sess., 29th Con.)

With the view, therefore, of carrying out the intent of the treaty, as understood by the parties thereto, at the time of its ratification, and of placing those Cherokees who chose to remain and purchase houses for themselves, subject to the laws of the States, upon perfect equality with those who have been removed and subsisted at the expense of the government, the committee report a bill, setting apart, in the treasury, a sum equal to $53 33 for every Cherokee residing in the State of North Carolina at the time of the ratification of the treaty, and who have not removed west, nor received commutation pay for removal and subsistence, bearing interest, from the date of such ratification, at the rate of six per cent.; the principal to be applied to their removal west, when any or all of them shall choose to go.

APPENDIX.

A.

WASHINGTON CITY, *January* 30, 1840.

SIR: In reply to your inquiries I will state, unhesitatingly, that I was present when Mr. Schermerhorn, as the commissioner on behalf of the United States, submitted to the Cherokee Indians the propositions on which was based the treaty of the 29th December, 1835, (and had examined its provisions before it was submitted.) He distinctly informed them that such as desired to remain east, and become citizens of the States, would be entitled to receive all the personal benefits of the treaty, including their claims for removal and subsistence. This was at Red Clay council ground, in October, 1835.

After the same treaty was concluded and submitted to the Senate of the United States for ratification, in the spring of 1836, I well recollect that you applied to Mr. Schermerhorn, in my presence, to know if the 12th article of the treaty secured to the Cherokees, who should remain east, commutation for removal and subsistence allowance of $53 33, each, with all the other advantages of the treaty? and his answer was, that on that point there could not remain a doubt, as such was the intention of the parties to the treaty; and on your requesting my opinion on the same subject, I gave it in accordance with that of Mr. Schermerhorn, not then or now, in the least, doubting the accuracy of that opinion.

On obtaining the opinions above stated, you agreed to withhold a supplement to the treaty which you had previously prepared and had deemed necessary, as an explanation for the protection of the interests of the Cherokees in North Carolina, several hundreds of whom you at that time fully represented.

All I have stated I should not hesitate to verify in the most solemn form, if necessary.

I am, very respectfully, your obedient servant,

WM. Y. HANSELL,
of Milledgeville, Ga.

WM. H. THOMAS, Esq.,
of North Carolina.

WASHINGTON, *February*, 3, 1840.

I have long been acquainted with William Y. Hansell, esq., the writer of the foregoing statement or letter, and consider the statement of Mr. Hansell entitled to credit and respectful consideration.

WILSON LUMPKIN.

WASHINGTON, *April* 25, 1845.

SIR: I have examined the foregoing letter of Mr. Hansell, and the statements therein made, as far as relates to what I stated to you in reference to the Cherokee treaty, are true.

J. F. SCHERMERHORN.

W. H. THOMAS.

B.

WASHINGTON CITY, *February* 1, 1840.

SIR: In reply to your inquiry, I have to state that I was one of the negotiating committee who, on the part of the Cherokees, entered into the treaty of December, 1835, with the government of the United States, and was one of a sub-committee, appointed by the first mentioned committee, to examine said treaty, with a view to ascertain whether it was such a one as ought to be signed by the committee of negotiation.

It was the understanding of the parties to this treaty, before it was signed, that there were many persons and families amongst the Cherokees so averse to a removal to the west, that it was deemed politic and just to make the terms of the treaty such as to give perfect freedom of choice to all to go or to stay, as they might prefer, excepting such only as might be deemed incompetent to "take care of themselves and property."

This object was never lost sight of. The sub-committee most particularly insisted upon it; and not only upon the liberty of choice, but also upon securing to those, who might prefer to remain, a share of the money arising from the sale of the country, equal in every respect (the vested funds excepted) to that secured to the emigrants. I recollect very distinctly, that, when the 12th article of said treaty was under consideration, the sub-committee objected to it, as not being couched in language sufficient to put it beyond all doubt that those desirous to become citizens of the United States, were to receive their *removal and subsistence money*. The commissioner of the United States was appealed to on this particular point, and, in explanation, stated that the words "due portion of all the personal benefits accruing under the treaty," were so comprehensive as to preclude all idea of any interpretation by any one, so as to deprive those choosing to remain of their removal and subsistence money. He asked, is this not a personal benefit? If so, it is secured to them beyond a doubt. With this explanation, the sub-committee were satisfied, and reported the treaty thus explained to the committee of negotiation. And it was so explained by the commissioner to the people; and, with this explanation, signed and sealed.

I have further to state that such a construction as this has been given to this article of the treaty, so far as myself and many others are concerned, who are now, and have always been residing

east of the Mississippi. We have received our removal and subsistance money.

I am, respectfully, your friend,
WILLIAM ROGERS.

WILLIAM H. THOMAS, Esq.

WASHINGTON, *February* 3, 1840.

From an acquaintance of many years' standing with Mr. William Rogers, the writer of the foregoing letter, I have no hesitancy in saying I consider Mr. Rogers a man of integrity and veracity; and, therefore, any statement coming from him entitled to full credit.

WILSON LUMPKIN.

WASHINGTON, D. C., *April* 25, 1845.

DEAR SIR: The statement made in this letter by Mr. William Rogers, as far as relates to my observations and expositions of the treaty to the Indians, is correct.

J. F. SCHEMERHORN.

WILLIAM H. THOMAS.

STATE OF NORTH CAROLINA,
Haywood County.

SUPERIOR COURT OFFICE.

I, William Johnson, clerk of the superior court of law in and for the county of Haywood aforesaid, do certify, that on examination of the records, it does not appear that any Indian residing in this State, has been indicted in this court for the last ten years, during which time, I have been the acting clerk of said court; and that *Qualla Town*, where a majority of the Cherokee Indians, in this State, are said to reside, is situated in this county.

In testimony whereof, I have hereunto set my hand, and [L. S.] affixed the seal of the court at office, this 12th day of October, A. D. 1843.

WILLIAM JOHNSON, *Clerk.*

ATTORNEY GENERAL'S OFFICE,
September 19, 1845.

SIR: On the 11th June last, you did me the honor to refer to me a report of the Commissioner of Indian Affairs of the 19th May, and a reply thereto by William H. Thomas, on behalf of certain Cherokee Indians, who claim a commutation for removal and subsistence under the Cherokee treaty, approved 23d May, 1836, with

the accompanying papers, and to direct me to communicate to you my opinion in writing, touching the said claims and the legal construction of the treaty and laws under which they are preferred.

I regret that very urgent engagements have delayed so long my compliance with your direction. I have devoted a considerable portion of time to the examination of the subject, and have arrived at conclusions, which I will now proceed to state.

In a memorandum, which is among the papers transmitted, there are four questions propounded, on which you are desired to take my opinion. They are:

1st. Are the Cherokees remaining in the States of North Carolina and Tennessee entitled, under the 8th and 12th articles of the Cherokee treaty of December, 1835, to $53 33⅓ for their claims for removal and subsistence allowance, which has been paid to the Cherokees in Georgia?

2d. In the event that the Attorney General should be of opinion that the Cherokees in North Carolina and Tennessee, are not entitled to compensation for their claims for removal and subsistence allowance, whether the grant made by the State of North Carolina to the Cherokee Indians in the year 1783, vested the fee simple title in the Indians, while they continued to reside thereon, and whether, under this provision of the grant, the fee simple title has not vested exclusively in the Cherokee Indians now residing within its limits."

3d. Whether the treaty of December, 1835, made with the Cherokees of Georgia, does or does not legally convey to the United States the land granted to the North Carolina Indians by the act of 1783; whether the power of the Cherokees as a nation had or had not ceased to exist at the time of the treaty of December, 1835, was concluded in consequence of the tribe having passed under the dominion of the States?

4th. Whether the relinquishment of interest in the lands which the treaty of 1835 purports to convey is, or is not, confined to those Cherokees who have, and do receive, their due portion of the consideration money; and whether the title of those who receive no part of the compensation has passed to the United States?

The first of these involves an enquiry whether, under the treaty of New Echota, those Cherokees who have remained in the States of Tennessee and North Carolina are entitled, under the 8th and 12th articles of the treaty, to $53 33⅓ for removal and subsistence allowance.

This inquiry is embarrassed by the fact that these allowances have been made to Cherokees who have remained in Georgia by decisions at the War Department, and by the fact of payment being made to others of the tribe who did not emigrate by the joint resolution of Congress, approved 15th June, 1844. The interpretation under which the Georgia Indians were paid appears to have been acted on by the War Department for but a short time, and that department for many years has uniformly rejected such claims. The circumstances under which the payments were directed by the joint resolution are stated in the report of the Commissioner of

Indian Affairs. It appears to me that the confirmation of the decision of Messrs. Eaton & Hubley, declared by that resolution, cannot, with all the respect due to Congress, be regarded as settling the construction of the treaty so as to furnish a guide to the Executive in carrying the treaty as a law into execution. In determining your duty in this respect, it appears to me that the only guide is the treaty in itself in all its stipulations, and if a measure of relief is withheld, it will be competent for Congress to supply the deficiency.

"The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceeding by ourselves, having each a definite and well understood meaning. We have applied them to Indians as well as to other nations."

The Indian nations, and as one of them, the Cherokees, have been at all times regarded by this government as independent political communities; and while they have at all times been treated and acknowledged to be within the jurisdictional limits of the United States, they have been dealt with as separate communities. Treaties of cession have been held to convey the joint property and to divest the title of the tribe as to the community and as to the individuals composing it. The Executive of the United States must therefore regard the treaty of New Echota as binding on the whole Cherokee tribe, and the Indians, whether in Georgia, Alabama, Tennessee, or North Carolina, are bound by its provisions; as a necessary consequence, they are entitled to its advantages. The North Carolina Indians, in asking the benefit of the removal and subsistence commutation, necessarily admit the binding influence of the treaty on them and their rights; they cannot take its benefits without submitting to its burthens. The executive must regard the the treaty as a supreme law, and as a law construe its provisions. In its construction it is said "that the language used in this treaty with Indians should never be construed to their prejudice. * * * How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction." So far as there are conflicts of interest between the United States and the Indians, there ought always to be the utmost liberality in construing the language of treaties with Indians. But in construing provisions which affect only the rights of different portions of the tribe, I cannot perceive on what principle the government, in its fiduciary character, as the common trustee of the whole tribe, can depart from the established rule of construction to benefit one portion at the expense of another. If this claim is paid out of the Cherokee fund, the per capita dividend of those Indians who have emigrated will be diminished to that extent. It is a question between the Indians themselves, and the treaty must be executed according to the intention of the parties to it, if to be

derived from its stipulations and the language in which they are expressed. If there is no ambiguity, then parole evidence is not admissible to explain or to give to the language employed a different meaning than that which it plainly imports. When the treaty of New Echota was negotiated, a portion of the Cherokee tribe had emigrated and were settled on their lands west of the Mississippi, and the larger portion still inhabited their lands in the States of Georgia, North Carolina, Tennessee, and Alabama. The primary object of the treaty was to promote the emigration of the Indians east, and a re-union with their brethren west. An entire cession of the lands of the nation east of the Mississippi was contemplated and provided for in the first article of the treaty. This cession contemplated all their lands east of that river. That nation ceased to be a landholder within the States on the ratification of the treaty. Individual Indians became proprietors of the lands reserved to them individually. The United States agreed to pay five millions of dollars as the consideration to be expended, paid, and invested, as stipulated in the succeeding articles.

By the 8th article, the United States stipulated to remove the Cherokees to their new homes, and to subsist them one year after their arrival there, for which appropriations were to be made. The expense thus incurred was a charge upon the fund. But this article provides that "such persons and families as in the opinion of the emigrating agent are capable of subsisting and removing themselves, shall be permitted to do so, and they shall be allowed in full for all claims for the same, twenty dollars for each member of their family; and in lieu of their one year's rations, they shall be paid the sum of thirty-three dollars and thirty-three cents, *if they prefer it.*

It cannot be questioned that this article was intended exclusively to stipulate the mode of emigration, and its plain and unambiguous provisions were intended to enure only to those who should emigrate. The United States agreed to *remove* the Cherokees to their new homes and to subsist them for one year *there.* If any chose to remove themselves, and the agent thought them capable of doing so, a commutation in money is given them; that is, in lieu of bearing their expenses of removal to and subsistence at their new homes, fifty-three dollars and thirty-three cents for each one thus deemed capable and permitted to emigrate himself, was to be paid in money. If there could be any doubt on this subject, it would seem to be removed by the concluding clause of this article: "Such Cherokees *also* as reside at present out of the nation *and shall remove* with them, within two years, west of the Mississippi, shall be entitled to allowance for removal and subsistence, as above provided."

Taking the 8th article by itself, I cannot perceive how it is possible to doubt that emigration and residence west of the river were indispensable conditions to a claim for the allowances for removal and subsistence.

The 12th article provides that: "Those individuals and families of the Cherokee nation that are averse to a removal to the Cherokee country west of the Mississippi, and are desirous to become citizens

of the State 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, as soon as an appropriation is made for this treaty."

What were the *personal benefits* thus secured to those Indians who did not emigrate? They were limited to claims, improvements, and per capita. It cannot be maintained that the term "*claim*" covers the removal and subsistence allowance. It is true, the treaty secures many rights, and each individual of the tribe has, in some sense, a claim given by the treaty to each of its beneficial provisions; but this is not the sense in which the term is employed in the 12th article, because if so, there would have been no propriety in using the terms improvements and per capita; for after the ratification of the treaty, the claim for the value of improvements and for the per capita dividend, provided in the 15th article, were at least as strong as that for removal and subsistence. The claims secured to those who did not emigrate were claims for spoliations which existed prior to and independent of the treaty, and the 12th article, which treats only of those who did not intend to emigrate, affords a strong confirmation of the construction which I have placed on the 8th article. The 15th article, and the supplemental article, corroborates this interpretation of the term "claims." It is not contended that the personal benefit for improvements includes the pecuniary allowance of $53 33. Does the term "per capita?" The 15th article provides: "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 * * * *the balance*, whatever the same may be, shall be equally divided among all the people belonging to the Cherokee nation east, according to the census just completed." This is the only per capita division or claim which the treaty contemplates, and does not take place until the expenditures for removal and subsistence have been made. Therefore, no claim to the personal benefit growing out of the commutation allowance in money can be based on this per capita division.

With one more remark, I will close my examination of the subject. The United States were to remove and subsist the Indians. Those who were, by the emigrating agent, deemed capable of doing this for themselves and families, were to have a commutation in money. It was not intended to be given to any class or division of the tribe, but to individuals adjudged to possess these qualifications. Now, if the claim set up shall be recognized, it extends the benefit to the whole of the North Carolina Cherokees, without emigration and without reference to their capacity to remove and subsist themselves.

For these reasons, it appears to me that, according to the plain and unambiguous stipulations of the treaty, those Indians of the Cherokee tribe, wherever they may have resided, who did not emi-

grate, are not entitled to the money allowance provided in the 8th article of $53 33⅓ a head.

In the papers accompanying your communication are several statements, furnished by the commissioner who negotiated the treaty on the part of the United States, and by respectable persons who were privy to the negotiations, tending to show that the Indians were assured that those who did not emigrate should have the benefit of this pecuniary allowance. An agreement entered into by William H. Thomas on the part of the North Carolina Indians and the treaty party, is also transmitted. This last mentioned paper bears date three days after the ratification of the treaty, and does not appear to have any title to be regarded as a part of the treaty. The 4th article of that agreement shows very conclusively that the commutation allowance was only to be expended for emigration and subsistence west.

According to well established principles of law, I am of opinion that this evidence is not admissible to establish a construction of the treaty inconsistent with its own provisions and unauthorized by its language. Whatever may be done by Congress to fulfil expectations thus created, I am clearly of opinion that the executive cannot execute the treaty on any such construction.

The other three questions may be resolved into one inquiry. Whether the lands in North Carolina belonged to the Indians residing on them. These lands have been sold by the State of North Carolina, and are, I presume, in the possession of the purchasers. As the Executive of the United States would have no power to divest those in possession, and the question is one for the judiciary, I have not deemed it necessary to embrace my views on it in this communication. Nor have I deemed it proper to express my opinion on the hard measure which seems to have been dealt out to the North Carolina Indians whose lands have been sold, while they have received no corresponding benefit. I have examined the subject as one of legal construction only, and have no doubt of the correctness of my conclusions in that aspect.

I have the honor to be, respectfully, sir, your obedient servant,

J. Y. MASON.