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Recommended Citation

H.R. Exec. Doc. No. 64, 42nd Cong., 2nd Sess. (1872)

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BLACK BOB INDIAN LANDS.

LETTER

FROM THE

SECRETARY OF THE INTERIOR,

IN RELATION TO

Certain lands in the State of Kansas belonging to the Black Bob band of Shawnee Indians, with bill for the sale of the same.

JANUARY 16, 1872.—Referred to the Committee on Indian Affairs and ordered to be printed.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., January 15, 1872.

SIR: I have the honor to transmit herewith a communication from the Commissioner of Indian Affairs, relative to certain lands in the State of Kansas belonging to the Black Bob band of Shawnee Indians, and to request that the suggestions and recommendations contained in said communication may be adopted, and that the draught of a bill, also herewith transmitted, may receive the favorable consideration of Congress.

Very respectfully, your obedient servant,

C. DELANO,
Secretary.

Hon. JAMES G. BLAINE,
Speaker House of Representatives.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
January 13, 1872.

SIR: Under instructions from the Department of this date, I have the honor to report the action and the views of this office relative to the so-called Black Bob (Indian) lands of Kansas, as follows:

Under the provisions of the second article of the treaty concluded with the Shawnees on the 10th of May, 1854, (10 Statutes at Large, p. 1053,) there was assigned to a portion of the tribe known as Black Bob's band, a tract of land within the now State of Kansas, containing

about 34,000 acres, to be held by them in common, the remainder of the tribe receiving at the same time selections in severalty. This tract was further, in contemplation of the parties to this treaty in the fourth article thereof, by which it was provided that "those of the Shawnees who may elect to live in common, shall hereafter be permitted, if they so desire, to make separate selections within the bounds of the tract which may have been assigned to them in common; and such selections shall be made in all respects in conformity with the rule herein provided to govern those who shall, in the first instance, make separate selections." The ninth article of the same treaty further provides that "Congress may hereafter provide for the issuing, to such of the Shawnees as may make separate selections, patents for the same, with such guards and restrictions as may seem advisable for their protection therein."

No additional legislation, by which it is claimed that Congress sought to carry out the provisions of the ninth article, just quoted, or intended to authorize the issue of patents to any Shawnee Indian, was had by that body prior to the act of March 3, 1859, (11 Statutes at Large, p. 430,) the eleventh section of which reads as follows:

That in all cases where, by the terms of any Indian treaty in Kansas Territory, said Indians are entitled to separate selections of land, and to a patent therefor, under guards, restrictions, or conditions for their benefit, the Secretary of the Interior is hereby authorized to cause patents therefor to issue to such Indian or Indians, and their heirs, upon such conditions and limitation, and under such guards or restrictions as may be prescribed by said Secretary: *Provided*, That nothing herein contained shall be construed to apply to the New York Indians, or to affect their rights under the treaty made by them in eighteen hundred and thirty-eight, at Buffalo Creek.

The question here arises whether, under this legislation, the Shawnees were entitled to patents for their selections. Following the opinion of Attorney General Wirt, (1 Opinions of the Attorneys General, p. 361,) that "authority for the issue of patents must be pursued strictly," the position that they were cannot, in my judgment, be maintained.

The treaty with these Indians made no provision whatever for the issue of patents for their selections, and the operations of the act of 1859, being confined by its plain terms to those cases in which, under treaty stipulations, Indians were entitled to separate selections, and to patents therefor under guards, the Shawnees were excluded from its benefits.

Furthermore, as bearing upon the question of intent, it is not necessary, in order to give meaning to the said eleventh section, that it should be held to apply to the treaty with the Shawnees. Treaties then in force with other tribes of Indians residing in the then Territory of Kansas, supply sufficient meaning to this portion of the act of 1859. These treaties generally provide that patents may issue under such restrictions as Congress, (see those stipulations of the treaty with the Delawares which relate to the Christian Indians, 10th Statutes at Large, p. 1051,) or the President, (see treaty with the Kickapoos, 10th Statutes at Large, p. 1079,) or either, (see treaty with the Miainis, 10th Statutes at Large, p. 1094,) should provide. It was to treaties containing such provisions that the act of 1859 was intended to apply.

Upon the 30th of September, 1866, Mr. James B. Abbot, Indian agent for the Shawnees, forwarded to this office a list of selections made by sixty-nine members of Black Bob's band from the land assigned them to be held in common, under the provisions of the 4th article of the treaty of 1854. Upon the recommendation of Hon. A. G. Taylor, the then Commissioner of Indian Affairs, these selections were approved by the honorable the Secretary of the Interior, who directed the Commissioner of the General Land Office to issue patents for the same, and for-

ward them to the Office of Indian Affairs for delivery through its agency to the parties entitled.

At the request of Hon. Sidney Clarke, member of Congress, the patents issued in accordance with these instructions were forwarded by the Commissioner of Indian Affairs to him on the 20th of July, 1867, for transmission to Mr. H. L. Taylor, who was at that time the agent of the Shawnees, to be by him delivered to the patentees. On the 13th of the following December, instructions were forwarded to Agent Taylor by telegraph to suspend the delivery of these patents. His reply of the 28th of the same month, promising compliance with these instructions, is on file in this office. These orders were never revoked, but it appears by a letter received from Agent Taylor, dated November 18, 1868, that on the 24th of the preceding August, while he was absent from his office, Mr. Abbot, the former agent, delivered the patents to the chiefs and councilmen of the tribe, who called at the agent's office for them. Mr. Taylor further says that all his efforts to recover possession of these patents were ineffectual.

It has within the present week been alleged, in a communication addressed to this office by Mr. Abbot, the principal actor in this transaction, that certain of the sixty-nine patents in question had been duly delivered, prior to the order of suspension. This allegation is in direct contravention of all the information in possession of this office, and is unsupported by proof.

The irregularities of this delivery seem to me to have been so great as to vitiate the entire transaction. The delivery of a deed or patent has been universally regarded by courts of law as of the highest importance in a transfer of lands. The full observance of all its formalities has been invariably insisted on, and a failure to comply with them invalidates all preceding steps. The Supreme Court of the United States say, in 3d Wallace, p. 641, that "the delivery of a deed is essential to the transfer of a title. It is the final act, without which all other formalities are ineffectual. To constitute such a delivery, the grantor must part with the possession of the deed, or the right to retain it." I cannot acknowledge that the Government in this delivery parted with the "right to retain" these patents. It does not appear that the patents were delivered with the consent of the Government, by its agent duly authorized, to the parties entitled, or to some one duly empowered to represent them and to signify their acceptance. All of these conditions are essential to the validity of a delivery. All are wanting. The record shows that these patents were delivered in express violation of explicit orders from the Department, by a person having no official position whatever under the Government, and no authority, either general or special, to represent it in the transaction, and delivered, moreover, not to the patentees, but to the chiefs and councilmen of the tribe, who do not appear to have furnished any evidence of their right to represent the patentees in this particular. Such a delivery as this cannot be claimed as valid. On the other hand, it must be characterized as in every particular fraudulent; and, if fraudulent, as failing to pass any title whatever to the lands specified.

I shall content myself with citing, in further support of this position, a case to be found in 1st McLean, p. 243. The court say that "the delivery of a deed is as essential to its validity as the signing of it; they are both essential to the execution of the deed." In the same opinion, passing upon the rights of a grantee fraudulently obtaining from his grantor a deed, the court held that a deed thus obtained did not deprive the grantor of the possession of his land. This opinion seems to me

to be perfectly applicable to the delivery of these patents, and fully conclusive.

In view of the facts and considerations above recited, I have the honor to recommend that the honorable the Attorney General be addressed with a request that he will cause proceedings to be commenced to secure the judicial avoidance of the sixty-nine patents which were prepared in the names of members of the Black Bob band upon their individual selections, but which have passed from the possession of the Government, though the Government has at no time parted with the right to retain them; or that the institution of such proceedings be directed by resolution of Congress.

Furthermore, in view of the facts heretofore made the subject of official report, that the members of this tribe are not and have not for years been in occupancy and enjoyment of the tract assigned them by the treaty of 1854; that they are without homes, and without the present means of subsistence, I have to recommend that Congress be asked to provide for the sale of their lands, and the application of the proceeds, under direction of the Secretary of the Interior, to the purposes of their settlement, subsistence, and civilization.

Furthermore, in view of this additional fact, heretofore made the subject of official report, and not brought in dispute, that these Indians were dispossessed mainly by act of war, and not in the usual course of intrusion upon Indian lands, I feel justified in regarding the present case as one where a conflict of equities exists, and would not therefore recommend that the lands be brought into market for sale to the highest bidder, but that they be sold at a fixed price, which shall somewhat exceed the value of the lands to the Indians for their own occupation, but shall be also somewhat below the present actual or speculative value of such lands. And from this consideration, and from this only, I would recommend that the interests and claims of the present occupants be so far recognized and respected as to provide for giving to them a reasonable preference in the purchase of such lands as they may have settled upon and improved, subject to the usual restriction as to amount.

I inclose a draught of a bill calculated, in my opinion, to accomplish the object sought.

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

F. A. WALKER,
Commissioner.

Hon. SECRETARY OF THE INTERIOR.

A BILL for the sale of the Black Bob Indian lands in the State of Kansas.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That each person, or the heirs of such, being a citizen of the United States, or who has declared his intention to become such, and who is the head of a family, or single person over twenty-one years of age, who has made settlement and improvement upon; and on the first day of January, eighteen hundred and seventy-two, actually occupied, any portion of a certain tract of land in the State of Kansas, set apart by a treaty made between the United States and the Shawnee tribe of Indians on the tenth day of May, eighteen hundred and fifty-four, and proclaimed upon the second day of November of the same year, to be held in common in a compact body by certain Indians of Black Bob's settlement, shall be entitled at any time within one year from the passage of this act to purchase the lands so occupied and improved, not to exceed one hundred and sixty acres in each case, at the price of four dollars per acre, under the same rules and regulations, as regards proof of settlement, required by the act approved September fourth, eighteen hundred and forty one, granting pre-emption rights to settlers on the public lands. And all of said lands which shall not, within

one year from the passage of this act, be purchased as hereinbefore provided, shall be sold under the direction of the Secretary of the Interior as soon as the quantity and description of the same are ascertained, in parcels not exceeding one hundred and sixty acres each, to the highest bidder for cash, the sale to be made upon sealed proposals, to be duly invited by public advertisement, and patents in fee-simple shall be issued to the purchasers under the provisions of this section: *Provided*, That no portion of said lands shall be sold at a less price than four dollars per acre.

SECTION 2. That all patents for any of the foregoing lands made, or claimed to have been made in pursuance of said Shawnee treaty of May tenth, eighteen hundred and fifty-four, be, and the same are hereby, declared to be null and void: *Provided*, however, That all persons who have in good faith paid money to any bona-fide members of the said Black Bob's band, with the approval of the United States Indian agent for said Shawnee tribe, in pursuance of any assumed sales, conveyances, or transfers made under and by virtue of such patents, shall be entitled to receive back the amount so paid, upon proof satisfactory to the Secretary of the Interior of such payment, the said amounts so refunded and paid back to be charged to the account of the Indian or Indians having received the same, and to be deducted from his, her, or their proportion of the proceeds of the sales of said lands.

SECTION 3. The proceeds of the sale of said lands, after defraying the expenses of the sale of such as shall be disposed of at public sale, and after making deductions and payments therefrom, as provided in the second section of this act, shall be invested or expended under the direction of the Secretary of the Interior in such manner and for such objects as he shall deem for the best interests of said Indians in advancing them in civilization, and securing their permanent settlement. The Secretary of the Interior is hereby empowered to cause an enumeration to be made of the Black Bob band of Shawnee Indians, in order to determine who are entitled to the benefits of the provisions of the act.