2-1-1879

Eastern band of Cherokees. Remonstrance of the principal chief and delegates of the Cherokee Nation of Indians against the passage of any bill to allow the Eastern band of Cherokees to sue the Cherokee Nation

45TH CONGRESS, 3d Session. } HOUSE OF REPRESENTATIVES. { MIS. DOC. No. 17.

EASTERN BAND OF CHEROKEES.

REMONSTRANCE

OF

THE PRINCIPAL CHIEF AND DELEGATES OF THE CHEROKEE NATION OF INDIANS

AGAINST

The passage of any bill to allow the Eastern Band of Cherokees to sue the Cherokee Nation.

FEBRUARY 1, 1879.—Referred to the Committee on Indian Affairs and ordered to be printed.

WASHINGTON, D. C., *January* 27, 1879.

To the Congress of the United States:

The undersigned, principal chief and delegates of the Cherokee Nation, ask leave to present, as they now do, for your consideration, the accompanying "objections of the Cherokee delegation (for 1878) to bill S. No. 230, and bill H. R. No. 228, and similar measures," pending before you, authorizing the so-called Eastern Band of Cherokees (now citizens of North Carolina) to sue the Cherokee Nation, &c.

We present this document, as expressive of our views, in reference to said bills, and as a protest against the passage of either one of them, and respectfully ask that it be so considered in connection with the bills.

Very respectfully,

CHARLES THOMPSON,
Principal Chief.
W. P. ADAIR,
WILL. P. ROSS,
SAM'L SMITH,
DAN'L H. ROSS,
Cherokee Delegation.

OBJECTIONS OF THE CHEROKEE DELEGATION TO BILL S. NO. 230 AND BILL H. R. NO. 228, AND SIMILAR MEASURES, PENDING BEFORE THE FIRST SESSION FORTY-FIFTH CONGRESS, AUTHORIZING THE SO-CALLED "EASTERN BAND" OF THE CHEROKEES (CITIZENS OF NORTH CAROLINA) TO SUE THE CHEROKEE NATION, &c.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

There are pending before your honorable bodies bills S. No. 230 and H. R. No. 228, and similar measures, entitled generally as bills "To authorize and enable the 'Eastern Band' of the Cherokee Indians to institute and prosecute a suit in the Court of Claims against the Cherokee Nation"; against the passage of which by your honorable bodies we respectfully but firmly protest for the following reasons:

1st. The principle involved in the *subject-matter* of the litigation provided by the bills to be adjudicated by the Court of Claims has already been adjudicated and settled by that court. [See the decision of the Court of Claims delivered by Judge Scarburgh in 1855 and 1857, in the case, No. 46, of "J. K. Rogers, for himself, and 2,133 'Eastern' Cherokees (the same ones authorized to sue in the bill now under consideration), *vs.* The United States."] In this case, as shown from the records of the court from 1855 to February, 1857, the claims of these same "Eastern" Cherokees were decided *adversely*, for the reason, among others, that he, Rogers, and the other "Eastern" Cherokee, plaintiffs, "having availed himself (under the 12th article of the Cherokee treaty of 1836) of the privilege of becoming a citizen of the State where he resided, he no longer remained an 'individual' of the Cherokee Nation," &c.

2d. The "Cherokee Nation," or the "Cherokee people," are not citizens of the United States. (See report No. 268, U. S. Senate, 41st Congress, 3d session, of the Committee on the Judiciary, submitted by Senator Carpenter.) The people of the Cherokee Nation not being citizens of the United States, and the Cherokee Nation not being a "State" of the American Union, nor a "foreign" state or power, within the meaning of the United States Constitution, it (the "Cherokee Nation," as named in the bills) cannot be a party to a suit, under the Constitution, in the courts of the United States. (See decisions Supreme Court—"Cherokee Nation *vs.* The State of Georgia," 5 Pet., 17; "Worcester *vs.* The State of Georgia," 6 Pet., 543.) Also in the case of "Holden *vs.* Joy," 17 Wallace, 211, this court, said:

"Indian tribes are States in a certain sense, though not foreign States, or States of the United States, within the meaning of the second section of the third article of the Constitution, which extends the judicial power to controversies between two or more States, between a State and citizens of another State, between citizens of different States, and between a State or the citizens thereof and foreign States, citizens or subjects." * * * * * * *

If, therefore, these so-called "Eastern" Cherokees (now citizens of North Carolina) have any just demands against the Cherokee Nation (which we deny), their remedy *cannot* be before the courts without a change in the fundamental law—the Constitution; but must be before the executive department, whose duty it is under the Constitution to see that the Constitution itself, as well as the "laws" and "treaties" referred to in the bill now in question, is faithfully executed. The bills under consideration are not in the nature of an *amendment* to the Constitution, and if they should pass Congress in violation of the provision of the Constitution referred to by the deliverances of the Supreme Court, they would simply be *unconstitutional* and of no effect. As before stated, the people of the "Cherokee Nation" *are not citizens of the United States*, while the "Eastern Band" of the Cherokees named in the bills in question have made a *self-admission*, indorsed by the political and executive action of the government, *that they are citizens of the United States*. (See admissions of Mr. Thomas, the attorney for these "Eastern" Cherokees, on file in Indian Bureau, 1845-'46; also the message of President Polk, and accompanying documents, April 13, 1846, on "Cherokee difficulties," Senate Doc. 298, p. 184, vol. 35, 1st sess. 29th Congress.) At that time (1846) these "Eastern" Cherokees (so-called) admitted, through the mouth of their attorney (Thomas), that they "having been mostly born in the State (of North Carolina), nothing more was necessary to make them citizens but a continued residence within her limits twelve months, agreeably to the laws of the State." This admission, with President Polk's message, taken with the decision of the Court of Claims, already referred to, settles the question beyond doubt as to the United States citizenship of these so-called "Eastern Band" of the Cherokees. As they are citizens of the State of North Carolina, Congress cannot pass a law to authorize them to sue the Cherokee Nation without violating the provision of the Constitution referred to by the decisions of the Supreme Court, named above.

3d. There is really no foundation or cause of action, either in law or fact, for the suits before the court authorized or contemplated by the bills in question. We hold it as a sound maxim or rule of civilized justice that all complainants should show some violation of law or great wrong on the part of the defendaut before their remedy for redress should be transferred from the constitutional authorities (other departments of the government) to the judicial department by extraordinary and *retroactive* legisla-

tion, such as these bills propose. In this view of the matter we assert that there is no provision in our treaties with the United States nor any act of Congress relating to the rights of these "Eastern" Cherokees that the Cherokee Nation has violated; and that on examination of our treaties and the United States statutes, and the facts bearing on the subject, it will appear that these "Eastern" Cherokees have no just demands against the Cherokee Nation to be settled by the Court of Claims or any other court of the United States, and are not entitled (while they are not permanently domiciled in the Cherokee Nation according to treaty) to any interest in the funds and lands owned and now possessed by the Cherokee Nation now located in the West because—

First. The lands that are occupied and owned by the Cherokee Nation were purchased in the first place by the "Western" Cherokees, called Old Settlers, under the treaties of 1817, 1819, 1828, and 1833, as the property and "home" of all Cherokees who should *remove and permanently locate thereon.* (SeeRevision Indian Treaties, pp. 45, 50, 56, 61.)

Second. By the treaty of 1835–'36 provision was made whereby all the Cherokees then east of the Mississippi River should have an equal interest with said "Western Cherokees" in said lands, provided they removed and located on the same as a "home" within two years from the date of said treaty. (*Ibid.*, pp. 65, 77, 303.)

Third. The Cherokees, now resident in North Carolina and elsewhere east of the Mississippi River, did not avail themselves of this privilege, and under the general laws of the United States and the local laws of the States in which they reside they became citizens of such States. The act of Congress of 1848, providing funds for their emigration to the Cherokee Nation, shows that their removal was a condition *precedent* to their becoming citizens of the nation, and of owning an interest in the lands and funds of the same. And the act of 1869, and subsequent acts for the benefit of said North Carolina Cherokees, related only to *them*, and did not affect the status of the Cherokee Nation. And all of these acts are *special*, including that of 1848, and go to show clearly that the government considers the North Carolina Cherokees as not a part of the Cherokee Nation, and are therefore not entitled to their demands by virtue of their connection with that nation. (See U. S. Stats., vol. 9, secs. 4 and 5, pp. 264, 265; also vol. 10, p. 700; vol. 16, pp. 38, 362.)

Fourth. By the treaty of 1846, the "Old Settlers" or "Western Cherokees" quitclaimed all their exclusive claims to the Cherokee lands west to the whole Cherokee people, viz, to the parties making the treaty, the "Ross" party, the "Treaty" party, and the "Old Settlers" party of Cherokees, which were acknowledged by that treaty (1846) to constitute the "*Cherokee Nation*," and no reference was made to the North Carolina Cherokees, outside of the old provisions of the treaty of 1835. (*Ibid.*, p. 79.)

Fifth. To show conclnsively that *actual* possession by the Cherokees, of the Cherokee lands west, is a condition *precedent* to ownership of said lands, all of our treaties, the act of 1830, as well as the patent of the Cherokee Nation to the lands, declare, in specific terms, that in case the Cherokees now on the lands should abandon the same, the said lands shall "*revert to the United States*"; so that if the Cherokees who are now occupying the lands should *leave* them and remove to the State of North Carolina, and locate (as the North Carolina or "Eastern Band" Cherokees are now located), *then all of our lands would revert to and become the property of the United States.* (See Revision Indian Treaties, pp. 56, 61, 65, 77, 79, 303, U. S. Stats., vol. 4, p. 411.)

Sixth. By the treaty of 1835, the Cherokee lands, comprising the old Cherokee Nation, east of the Mississippi River, were disposed of for the round sum of $5,000,000. This sum was applied as follows, viz: 1st. By the 2d and 15th articles of the treaty of 1835, and 4th and 9th articles of the treaty of 1846, $500,000 to the purchase of the "Cherokee neutral lands" in Kansas, under the apprehension that this tract was necessary to be added to the other lands in order to accommodate the Cherokees on their "*removal.*" 2d. By the 10th and 12th articles of the treaty of 1835, and 2d article of the treaty of 1836, the sum of $300,000 was invested for a general fund of the nation. 3d. By the 10th article of the treaty of 1835, the sum of $150,000 was invested for educational purposes of the nation. 4th. By the 10th article of the treaty of 1835 the sum of $50,000 was invested for orphan purposes of the nation; and as before indicated, the treaties provide that the interest on these funds shall be applied as the "Cherokee Nation may direct"; and the treaty of 1835 provides that the interest funds are for the benefit of those Cherokees "*who have removed or may remove west to the Cherokee Nation.*" These several sums aggregate the sum of $1,000,000, which being deducted from the original $5,000,000 obtained for the lands east of the Mississippi River, would leave the sum of $4,000,000 to be paid per capita, under special provisions of treaty stipulations, to the Western and Eastern Cherokees, including also the North Carolina or "Eastern Band" of Cherokees, giving one-third of the amount to the Western Cherokees, or Old Settlers, and the other two-thirds to the other Cherokees, including also the said North Carolina or "Eastern Band" of Cherokees. The government made this per capita settlement with the Cherokees in 1851–'52, in pursuance of acts of Congress of that date. This settlement, it is true, has never been satisfactory to *any* portion of the Cherokees; yet the North Carolina or "Eastern Band" of Cherokees, like the others,

must look to the United States Government for the balance of said funds due them, and not to the Cherokee Nation.

Seventh. The 23d article of the treaty of 1866, which is the last and final legal expression of the government on the question, *settles it forever* as to the lands, as well as funds of the Cherokee Nation, by providing that all the Cherokee funds then (in 1866) in the custody of the government, as well as all that might arise thereafter from the sale of the Cherokee lands, should be invested in United States registered stocks at their current value, and the interest on the same applied to national, school, and orphan purposes of the nation, by *order of the Cherokee Nation*. This provision of the treaty of 1866 is still in force, and *wipes out* every provision of law or treaty of a previous date in conflict with it, and of course excludes the said so-called "Eastern Band" of Cherokees.

Eighth. As regards any "agreement" between the said "Eastern Band" of Cherokees and the "Cherokee Nation," referred to in the bills under consideration, it will appear by reference to the opinion of Attorney-General Mason that such agreement has been declared by him as of no effect. Also by reference to the opinions of Attorneys-General Mason and Crittenden (which are sometimes misconstrued by these "Eastern Band" Cherokee claimants, as authorizing their claim to a part of the money and lands of the Cherokee Nation in the West), it will appear that these opinions had no reference whatever to the lands of the Cherokee Nation in the West, nor to their funds which have been since invested to the credit of the Cherokee Nation, but only had reference to the "transportation and subsistence funds" of said Cherokees, which were afterward accordingly provided for by the act of Congress of 1848 already referred to; and to the "per capita" funds, received in consideration of the Cherokee lands east of the Mississippi River, sold under the treaty of 1835–'36. But if these opinions ever had any weight in support of the enormous claims of these "Eastern Band" claimants (which we deny), they have long since been superseded by the 23d article of the subsequent Cherokee treaty of 1866, which, as before stated, provides that all the funds of the Cherokee Nation in the custody of the government at that time (1866), and all that might arise thereafter from the sale of the lands of the Cherokee Nation, shall be permanently invested in United States stocks, and the interest on the same shall be paid to the Cherokee Nation in the West, on its order for school, orphan, and national purposes. (See Revision of Indian Treaties, p. —.)

Ninth. If any wrong has been perpetrated upon these citizens of North Carolina styled the "Eastern Band" of Cherokees; or if the Cherokee treaties securing the alleged rights of these aggrieved individuals have been violated or not executed, the fault is justly chargeable to the government of the United States, notably to the Executive Department, upon which it is incumbent to see the treaties faithfully executed, and not upon the Cherokee Nation. If, therefore, Congress is *forced* and *compelled* to pass a law to authorize these aggrieved individuals to sue any party, the proper one to be sued, we hold, will be the Government of the United States, which alone is responsible for the execution of the treaties, and the protection of these individuals. And this is not only *our* view of the subject, but also is really the view taken and already followed by the Court of Claims itself and the "Eastern Band" Cherokees, in 1855–'57, when that court, as already indicated, *decided against them.*

In conclusion, we would respectfully submit, that if your government has in reality perpetrated any wrong on these "Eastern Band" (so-called Cherokee) claimants by failing to comply with your treaty stipulations with them, we think that you should not take advantage of the wrong of your own government, and pass a law that will shift the responsibility of such wrong from your own great government to that of the Cherokee Nation, and thus visit upon the said Cherokee Nation an injustice that will be greatly to the advantage of claim agents and lobbyists, who are standing "behind the scenes," in the profits to be thus realized, while the Cherokee Nation is being victimized. Trusting that your honorable bodies will not pass the said bills or any similar measures in view of this, our solemn protest, we have the honor to be, very respectfully,

W. P. ADAIR,
D. H. ROSS,
Cherokee Delegation.

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