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Report : Claim of the Western Cherokees

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IN THE SENATE OF THE UNITED STATES.

MARCH 29, 1882.—Ordered to be printed.

Mr. CAMERON, of Wisconsin, from the Committee on Indian Affairs, submitted the following

REPORT:

[To accompany bill S. 321.]

The Committee on Indian Affairs, to whom was referred the bill (S. 321) to refer the claim of the "Western Cherokees," or "Old Settlers," to the United States Court of Claims for adjudication, have considered the same and report thereon as follows:

A bill, of which this is a copy, was considered by the Senate Committee on Indian Affairs at the last session of Congress, and it was reported favorably from that committee by Senator Logan.

The report made by Senator Logan was as follows, viz:

It appears from the papers submitted to us that the claim presented by the memorial is based upon the stipulations contained in treaties between these Indians and the United States, dated respectively in the years of 1835, 1836, and 1846. The "Old Settlers or Western Cherokee Indians," so called, consist of that portion of the Cherokee Indians who emigrated at an early day in this country's history, west of the Mississippi River. Indeed, many of them emigrated to that country while it belonged to France, and after the United States had acquired that territory, President Jefferson encouraged these Indians to emigrate there, by his letter of January 9, 1809. Between that date and the year of 1817, so large a number of the Cherokees had emigrated to and settled upon lands west of the Mississippi that they assumed a national or tribal character, and in July of the latter year a treaty was entered into between General Andrew Jackson, Governor Joseph McMinn, and General David Merriweather, as commissioners on the part of the United States, and deputies from the Cherokee Indians east, and those west of the Mississippi River, in what is now the State of Arkansas. By this treaty the *final division* of the tribe, previously agreed upon, was consummated. It was stipulated in the 3d, 4th, and 5th articles that they should thereafter hold their property separately, under the names of the "Cherokee Nation east of the Mississippi River" and the "Cherokee Nation west of the Mississippi River." By the terms of that treaty, in consideration of lands ceded by the Western Cherokees to the United States east of the Mississippi River, the United States bound themselves "to give to that part of the Cherokee Nation on the Arkansas River as much land on said river and White River as they had or might thereafter receive from the Cherokee Nation east of the Mississippi, acre for acre, as the just portion due that part of the nation on the Arkansas River, agreeably to their numbers"; the boundaries of which were described by the 5th article.

That the treaty of 1817 was concluded to carry into effect in an efficient and binding manner the arrangement agreed upon in 1808-'09, is clearly shown in its preamble. At the time of making that treaty, the Cherokees on the Arkansas did not exceed two thousand souls, and in order to ascertain what number intended to emigrate and join the Western Nation, the 3d article of the treaty provided "that a census shall be taken of the whole Cherokee Nation during the month of June, 1818," in the following manner, viz: that "the census of those on the east side of the Mississippi River who declare their intention of removing, shall be taken by a commissioner appointed by the Cherokees on the Arkansas River; and the census of the Cherokees on the Arkansas River, and those removing there, and who at that time declared their intention of removing there, shall be taken by a commissioner appointed by the President of the United States, and one appointed by the Cherokees east of the Mississippi River."

We have been thus particular in referring to the treaty of 1817, as it is the first official or binding compact entered into between the United States and the Cherokees for the establishment of a *nation* west of the Mississippi. It appears manifest from a careful examination of this instrument that two *nations of Cherokees* were established. Thus that part of the Cherokees who decided to become part of the Cherokees on the Arkansas ceded their portion of the Cherokee lands east of the Mississippi River in exchange for lands west of that river, acre for acre. Not one dollar was paid them. By this treaty the separation of the tribe of Cherokees, and a division of their *common property*, was put in legal form. The stipulation that a census should be taken of all who had emigrated or intended to remove west and become citizens of the western nation clearly shows that the "country on the Arkansas" was not intended to be given to the *whole nation*, but to *that portion* of it who had arrived there, or who would express their intention of removing there on or before a certain day. It was then agreed that the *common property* of the whole should be equitably divided and thereafter held separately. This treaty it seems was looked upon as the groundwork of the future removal of the Indian population from the South and Southwestern States beyond the Mississippi, and every means were used by the government to induce emigration under its provisions.

Afterwards the Hon. John C. Calhoun, then Secretary of War, entered into a convention with those delegates, by which a new treaty with the Eastern Cherokees was concluded February 27, 1819. In this treaty or convention the Western Cherokees were not represented. It was negotiated and concluded between the United States and the Eastern Cherokees exclusively; but by its terms the separate and independent character and rights of the Western Cherokees were distinctly recognized and preserved.

The 6th article of this treaty specially stipulates and defines the separate and relative rights of the two nations of Cherokees. It provides that "The contracting parties agree that the annuity of the Cherokee Nation shall be paid, *two-thirds* to the Cherokees east of the Mississippi and *one-third* to the Cherokees west of that river, as it is estimated that those who have emigrated and have enrolled for emigration constitute *one-third* of the whole nation."

Here is a clear and unequivocal declaration made by the United States and the Cherokees east, that there was at that time a *nation of Cherokees west of Mississippi*; that the property they formerly held *in common* was *divided*.

The Western or "Old Settler" Cherokees consented to the stipulations of this latter treaty so far as the same related to them and their property rights.

The territory assigned and conveyed to them in Arkansas was surveyed and marked off, embracing about four million two hundred thousand acres, with the pledge from the Government of the United States that the lands *west of their western boundary* should be attached thereto as soon as they could be purchased from the aboriginal occupants. The annuities were thereafter divided as agreed upon, *viz, one-third* paid to the Cherokee Nation west, and *two-thirds* to the Cherokee Nation east of the Mississippi River. They had separate agents appointed by the United States, and from that time were treated as separate and distinct nations, each holding its own property.

In the year of 1828 the government, desiring to extinguish the title of the Western Cherokees to their lands in what is now the State of Arkansas, entered into another treaty with them for that purpose. By the 2d article of that treaty the United States solemnly guaranteed to that nation of Indians 7,000,000 acres of land west of the western boundary of Arkansas, the boundaries of which are specifically defined by that article. The same article further guaranteed to those Indians as follows: "In addition to the *seven millions of acres* thus provided for and bounded, the United States further *guarantee* to the Cherokee Nation a perpetual outlet west, and a free and unmolested use of all the country lying west of the western boundary of the above-described limits, and as far west as the sovereignty of the United States and their right of soil extends." So it will be seen that the title to the lands embraced and described in the 2d article of the treaty of 1828, in the Old Settler or Western Cherokees, was solemnly confirmed by the United States.

This same guarantee is contained in the 1st article of the treaty with them in the year of 1833, with some slight and unimportant changes in the boundaries.

The views of the committee in regard to the rights of the Western Cherokees, acquired under the treaties of 1817, 1819, and 1828, are sustained by the correspondence between the contracting parties to them, to be found among the documents on that subject in the Executive and War Departments anterior to the treaty of 1835, as well as the preambles to the treaties of 1828 and 1833, between the United States and the Western Cherokees; all of which show that the treaty of 1819 was regarded by all parties as a final measure, and that thereafter the Eastern and Western Cherokees were to be separate nations entirely independent of each other.

Thus the separate nationality of the Western Cherokees, and their exclusive title

to their lands referred to, stood until 1835, when the treaty of that year was concluded between the United States and the Cherokee Indians.

By the 1st article of this latter treaty the Cherokees, in consideration of the sum of five million dollars, ceded, relinquished, and conveyed to the United States all their lands east of the Mississippi River, and released all their claims upon the United States for spoliations of every kind.

The 2d article of this treaty makes the first attempt to deprive the Western Cherokees of their absolute right as a separate part of the Cherokees, to the lands guaranteed to them by the treaty of 1828, and reaffirmed by the treaty of 1833, and it will be observed that only two of the Western Cherokees signed this treaty, namely, John Smith and James Rogers, who, it will be seen by reference to the statement prefixed to their signatures to the treaty of 1835, were only visitors from the Western Cherokees to the Cherokees east of the Mississippi, to give assurance of the friendly disposition of their people towards the Eastern Cherokees, &c., and not as delegates of the Western Cherokees authorized to negotiate and sign treaties.

It will also be seen by reference to the report of Mr. Medill, Commissioner of Indian Affairs (Ex. Doc. 65, page 15, 1st session 30th Congress), that in the settlement made with the Eastern Cherokees, they are charged with the sum of \$1,500 "*paid to John Smith and James Rogers, delegates from the Western Cherokees, present at the negotiation of treaty of 1835-'36 for their trouble and expenses.*" This payment would seem to have been made as an inducement to Smith and Rogers to sign that treaty, because there is no other item charged against the Eastern Cherokees to pay for the trouble and expenses of any others of the delegates that negotiated that treaty. By the terms of the treaty of 1835 the Eastern Cherokees were to be removed west of the Mississippi River and settled upon the land formerly granted and guaranteed to the Western Cherokees.

Under the 15th article of this treaty there was authorized to be deducted from the fund due these Indians, "the amount which shall be actually expended for the payment for improvements, ferries, claims, for spoliations, removal, and subsistence, and debts and claims upon the Cherokee Nation, and for additional quantity of land, and goods for the poorer of Cherokees, and the several sums to be invested for the general national funds provided for in the several articles of that 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."

By the second article of the supplement to this latter treaty it is provided and declared "that the sum of five millions of dollars fixed by the Senate in their resolution of — day of March, 1835, as the value of the Cherokee lands and possessions east of the Mississippi River was not intended to include the amount which may be required to remove them, nor the value of certain claims which many of their people had against the United States."

The third article of the supplement to that treaty allows these Indians the sum of \$600,000, to meet the foregoing items, and the balance of this latter sum, that "may remain after removal and payment of the claims so ascertained shall be turned over and belong to the educational fund."

After concluding the last-named treaty and the supplement thereto it seems that serious difficulties arose between portions of the people constituting and organized as the Cherokee Nation of Indians, growing out of charges to be made against the Western Cherokees, and to be deducted from the \$5,000,000 fund, as the purchase of their lands east of the Mississippi River, under the treaty of 1835. To settle these difficulties and to bring about a final and amicable settlement of all these causes of differences the treaty of August 6, 1846, was entered into between both the Eastern and Western Cherokees and the United States.

By the first article of this treaty all the lands formerly granted to and held and occupied by the "Western Cherokees" were to be occupied and enjoyed by all the Cherokees in common.

And, to settle and have definitely understood what claims or charges that should, and what should not, be made against the \$5,000,000 fund (the proceeds of the sale of their land east), the third article of this latter treaty provides that—

"Whereas certain claims have been allowed by the several boards of commissioners heretofore appointed under the treaty of 1835 for rents under the name of improvements and spoliations, and for property of which the Indians were dispossessed, provided for under the 16th article of the treaty of 1835; and whereas the said claims have been paid out of the \$5,000,000 fund; and whereas said claims were not justly chargeable to that fund, but were to be paid by the United States, the said United States agree to reimburse the said fund the amount thus charged to said fund—and the same shall form a part of the aggregate amount to be distributed to the Cherokee people—as provided in the 9th article of this treaty; and whereas a further amount has been allowed for reservations under the provisions of the 13th article of the treaty of 1835 by said commissioners, and has been paid out of said fund, and which said sums were properly chargeable to, and should have been paid by, the United States: the said United States further agree to

reimburse the amounts thus paid for reservations to said fund; and whereas the expenses of making the treaty of New Echota were also paid out of said fund, when they should have been borne by the United States: the United States agree to reimburse the same, and also to reimburse all other sums paid to any other agent of the government and improperly charged to said fund, and the same shall form a part of the aggregate amount to be distributed to the Cherokee people as provided for in the 9th article of this treaty."

By the 4th article of the last-named treaty the old settlers or Western Cherokees became entitled to one-third of the proceeds of the Cherokee lands east of the Mississippi River, freed from the charges mentioned in and specially excepted as charges to be made by the 3d article of that treaty.

The terms "excluding all extravagant and improper expenditures," contained in the 4th article, evidently meant the items specified in the 3d article, which declares that the items therein mentioned should not be chargeable to the \$5,000,000 fund, but be borne by the United States. It is provided by the 4th article that "so far as the Western Cherokees are concerned, in estimating the expense of removal and subsistence of an Eastern Cherokee, to be charged to the aggregate fund of five millions six hundred thousand dollars above mentioned, the sums for removal and subsistence stipulated in the 8th article of the treaty of 1835, as commutation money in those cases in which the parties entitled to it removed themselves, shall be adopted."

The 8th article of the treaty of 1835 fixes those sums at \$53.33 per head.

The 4th article of the treaty of 1846 further provides that so far as the settlement with the Western Cherokees is concerned, "there shall be no deduction from the fund before mentioned in consideration of any payments which may hereafter be made out of said fund; and it is hereby further understood and agreed that the principle above defined shall embrace all of those Cherokees west of the Mississippi who emigrated prior to the treaty of 1835."

This article and the 3d article of the treaty of 1846 define the basis of the settlement to be made with the old settlers or Western Cherokees, and fixes the sum from which the charges proper to be made against them shall be deducted at \$5,600,000.

The 9th article of this treaty fixes the basis of settlement with the Eastern Cherokees, and the sum from which charges against them shall be deducted, at \$6,647,067.

The eleventh and only remaining article of the treaty of 1846, affecting the claim of the Western Cherokees, provides as follows:

"Whereas the Cherokee delegates contend that the amount expended for one year's subsistence of the Eastern Cherokees after their arrival in the West, is not properly chargeable to the treaty fund: it is hereby agreed that the question shall be submitted to the Senate of the United States for its decision, which shall decide whether the subsistence shall be borne by the United States or the Cherokee fund, and if by the Cherokees, then to say whether the subsistence shall be charged at a greater rate than thirty-three, thirty-three one-hundredths dollars per head; and also the question whether the Cherokee Nation shall be allowed interest on whatever sum may be found to be due the nation, and from what date and at what rate per annum."

The twelfth article of this treaty was stricken out by the Senate upon the ratification of the treaty, which was assented to by the Cherokees.

The questions submitted to the Senate of the United States by the eleventh article were settled by the Senate, and thereby became a part of the treaty stipulations by the adoption of the following resolutions, September 5, 1850 (Cong. Globe, vol. 21, part 2, 1849-50, p. 1760):

"Resolved by the Senate of the United States, That the Cherokee Nation of Indians are entitled to the sum of \$189,422.76 for subsistence, being the difference between the amount actually paid and that expended by the United States, and which excess was improperly charged to the 'treaty fund' in the report of the accounting officer of the Treasury.

Resolved, That it is the sense of the Senate that interest at the rate of 5 per cent. per annum should be allowed upon the sums found due the Eastern and Western Cherokees, respectively, from the 12th day of June, 1838, upon the treaty of 1846."

By the second of the above resolutions it was declared that the Cherokees were entitled to interest upon any sums due them under the treaties of 1835 and 1846, from the 12th day of June, 1838.

The committee find that among the items of the claim of the Western Cherokees there is one that is a manifest error in settling with these Indians, namely, the item of "removal and subsistence, at the rate of \$53.33 per head, \$909,313.34," found on page 19, Report of the Commissioner of Indian Affairs, Ex. Doc. 65, 1st session 30th Congress. This item in the Commissioner's statement of the account does not state the number of Indians removed and subsisted at that rate, but on page 17 of that report the number is stated at 13,149. That number at the rate of \$53.33 per head would amount to the sum of \$701,236, instead of \$909,313.34 as charged, making an error against the Western Cherokees of \$208,077.34 in the simple matter of calculation.

Besides this item, these Indians claim that by a fair construction of the treaties

with them, and the acts of Congress relating to their rights under these treaties, they should not be charged, as was done by the accounting officers of the government, in their settlements, with the items—

First. The charge for claims of citizens of the United States of \$59,574.25.

Second. The charge for claims of individual Cherokees, \$17,561.41.

Third. The charge for compensation to Cherokee committee, \$22,026.89.

Fourth. The charge for spoliation, rents, and damages, \$434,861.85.

Fifth. The charge for reservations, allowed, \$116,882.50.

Sixth. The charge for pre-emptions, \$15,589.

Seventh. The charge for and on account of removal and subsistence, \$32,666.65.

There is a peculiarity about the last of the above items that throws some doubt around its correctness, for the cost of subsistence and removal to be borne by the Western Cherokees, as above shown, had not only been charged to them, but overcharged, and the fact that it took just this latter sum to effect a balance of the account with these Indians seems to furnish the reason for the doubt about the correctness of this last item.

The claimants contend, and the committee are of opinion, that the receipt by these Indians of the sum of \$523,782.18, appropriated by the act of September 30, 1850, in the manner in which they received it, does not preclude them from making their claim for any other sum that may be justly due them under a fair and proper interpretation of the treaties with them. Though the act making that appropriation provides "that the Indians who shall receive the said money shall first respectively sign a receipt or release acknowledging the same to be in full of all demands under the fourth article of said treaty," it appears that before these Indians would consent to receive the said sum thus appropriated, they were assured by the agent of the government sent to make the payments, Mr. John Drennon, that they could receive the money under protest and thereby preserve their rights under the treaties between them and the United States for any amounts that might be due them by a just and equitable construction of said treaties.

It also appears that these Indians, before receiving any part of that appropriation, did formally and in writing deliver to said agent their solemn protest against receiving the same as a full settlement of all their claims against the United States under said treaties, which protest, as appears by the records of the Interior Department, was forwarded to the Commissioner of Indian Affairs at Washington City.

The facts necessary to determine the justness of the claim preferred by these Indians consist almost, if not entirely, of the public treaties, proceedings of the Senate, acts of Congress, and the records of the several departments of the government, all of which are preserved.

The committee are of opinion that the claim of these Indians possesses sufficient merit to demand a careful and thorough investigation of the same; that such an investigation involves a judicial interpretation of the several treaties between them and the United States, the construction of the several acts of Congress in relation thereto, and the examination of all settlements made and accounts stated with them under these treaties and acts of Congress; that such an investigation cannot be made by a committee of Congress in the limited time allowed such committee by the performance of the ordinary legislative duty imposed upon its members; and that this case should receive a full investigation by the courts.

The committee therefore report the accompanying bill, and recommend its passage.

"Copy of proceedings of the council of the Old Settler or Western Cherokee Indians, November 30, 1880.

"TALEQUAH, CHEROKEE NATION, November 20, 1880.

"At a meeting of the Old Settler Cherokees, held in the council room of the capital, there were present Rev. W. A. Duncan, Mr. J. M. Bryan, H. D. Reese, W. C. Woodall, D. C. Duncan, Caleb Starr, Wm. McCracken, J. M. Smith, and John Hendricks, George Drum, B. H. Severe, Simon Girty, George Crittenton, Charles Johnson, L. C. Woodall, Wm. Hendricks, members of council; J. M. Duncan and other old settlers.

"W. A. Duncan was called to preside, and H. D. Reese appointed secretary.

"Mr. J. M. Bryan was requested to make his report as to the present status of the claim for which he is agent, &c.

"Mr. Bryan made his report to the meeting, and made known that the said claim of the Old Settlers against the United States was now before the Indian Committee of the Senate, and that for various causes has been delayed to be reported to the Senate.

"Report was interpreted and adopted. It was moved and seconded that a committee be appointed by the chair to report resolutions reiterating the powers granted Mr. Bryan by a former meeting. Adopted.

"The chair appointed Messrs. H. D. Reese, W. C. Woodall, and John Hendricks said committee, who submitted the following, to wit:

"To the Old Settler Council now in session:

"Whereas, According to notice published in the Cherokee Advocate by J. M. Bryan, William Wilson, and William Hendricks, our commissioners appointed in 1875 to prosecute the 'Old Settler' Cherokee claim against the Government of the United States for balances due said 'Old Settler' Cherokees, as provided for mainly by Cherokee treaty of 1846; and

"Whereas, Our said commissioners in their reports have given general satisfaction up to the time of the present council: Therefore,

"Resolved, That we this day ratify and confirm all the action taken in the premises by our said commissioners, and hereby confirm all contracts made with attorneys by our said commissioners for the services rendered in the prosecution of our said claim.

"Be it further resolved, That J. M. Bryan, our special commissioner and attorney, who is himself a citizen of the Cherokee Nation and an 'Old Settler,' and by our former council was duly made treasurer for the amount of 35 per cent. of the amount of the claim that may be allowed. The first council creating said commission was in 1875, at which council 35 per cent. of the whole claim was set apart to pay the expense of former Old Settlers councils, to pay the expenses of our commissioners, to pay the expenses of attorneys employed to help prosecute said claim, or as much thereof as might be necessary,

"Therefore, we again reiterate that J. M. Bryan is fully authorized to receive the said amount of 35 per cent. of the whole amount allowed on said claim, as the 'Old Settler' Cherokee treasurer, and to receipt to the proper authorities of the United States for said amount, which shall be the 'Old Settler' Cherokees' receipt for the same.

"Submitted by—

"H. D. REESE,
"W. C. WOODALL,
"JOHN HENDRICKS,
"Committee.

"The above resolution being interpreted and put to vote was unanimously adopted.

"W. A. DUNCAN,
"President.

"H. D. REESE,
"Secretary.

"I hereby certify that the above is a true copy of the proceedings had by the 'Old Settlers' council.

"Given under my hand and seal of office, at Tahlequah, Cherokee Nation, I. T., this 23d day of November, 1880.

"ALLEN ROSS, Clerk,
"Tahlequah Dist., C. N., I. T.

"Approved November 26, 1880.

"D. W. BUSHYHEAD,
"Principal Chief, Cherokee Nation.

"I hereby certify that this is a true copy of the original.

"DELOZIER DAVIDSON,
"Notary Public.

"WASHINGTON, D. C., January 3, 1881."

Your committee concur in and adopt this report, and report back the bill with the recommendation that it do pass.