

2-15-1884

Report : Petition of J. Dear

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IN THE SENATE OF THE UNITED STATES.

FEBRUARY 15, 1884.—Ordered to be printed.

Mr. MAXEY, from the Committee on Military Affairs, submitted the following

REPORT:

[To accompany bill S. 644.]

The Committee on Military Affairs, to which was submitted the bill (S. 644) for the relief of the administrator of the estate of John W. Dear, deceased, respectfully submit the following report :

The bill was submitted by the committee to the Secretary of War for such information as might be furnished by the Department pertinent to the case, and his reply is as follows :

WAR DEPARTMENT,
Washington City, January 12, 1884.

SIR: Referring to so much of your communication of the 22d ultimo as requests information concerning the claim of John W. Dear for value of buildings included in the Fort Robinson (Nebraska) military reservation, I have the honor to forward herewith copy of a brief of the case, prepared from the papers on file in this Department.

It will be noticed that, while the Senate bill (No. 644) directs payment to "Samuel E. Rogers, administrator of John W. Dear," one R. B. Dear claimed to own the buildings in March, 1879, and it does not appear from any papers filed here that he has transferred his interest therein.

The appraisement of the buildings referred to in the Senate bill was ordered not with a view of recommending payment, but to prevent the possibility of an exorbitant demand for their value at a time when it would be difficult to ascertain the facts in the case.

There is also on file an application of "H. C. Dear," dated Washington, D. C., March 5, 1883, for "a copy of the report of the board of appraisement of my property at Fort Robinson, Nebr."

Very respectfully, your obedient servant,

ROBERT T. LINCOLN,
Secretary of War.

Hon. S. B. MAXEY,
Of Committee on Military Affairs, United States Senate.

1. The committee would direct attention to these points in the Secretary's letter:

1st. The administrator of the estate of John W. Dear, deceased, is a claimant for the value of the buildings described in the bill.

2d. In March, 1879, R. B. Dear claimed the same property, and the Secretary adds, "It does not appear from any papers filed here that he has transferred his interest therein."

3d. That H. C. Dear has on file in the War Department, under date March 15, 1883, an application for "a copy of the board of appraisement of my property at Fort Robinson, Nebr."

The committee respectfully declines to sit as a court to adjudicate upon the merits (if any) of their respective claims.

2. The Secretary forwards with his report a copy of a brief of the case prepared from the papers on file in the War Department. The brief called for is as follows :

CASE OF ESTATE OF JOHN W. DEAR.

SENATE BILL 644.

IN THE SENATE OF THE UNITED STATES, DECEMBER 12, 1883.

A BILL for the relief of the administrator of the estate of John W. Dear, deceased.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he is hereby, authorized and directed to pay to Samuel E. Rogers, administrator of the estate of John W. Dear, deceased, the sum of three thousand dollars out of any money in the Treasury of the United States not otherwise appropriated; being payment in full on account of certain buildings belonging to said Dear that were included in the extension of the lines of the Fort Robinson Military Reservation and taken for military purposes under direction of the Secretary of War of July fifteenth, eighteen hundred and eighty-one, said amount being the appraised value established by a board of officers and approved by the Lieutenant-General of the Army.

In the matter of the claim of J. W. Dear for loss of buildings, &c.

In this case it may not be improper, *in limine*, to call attention to the fact that one R. B. Dear, by his letter to this Department, dated the 31st of March, 1879, in which he stated that about the time the troops came in the country he erected certain buildings about 1½ miles from Fort Robinson, and carried on a legitimate business, keeping a stage and express office on the Sidney and Black Hills stage route; that the then recent survey of the proposed enlargement of the Fort Robinson Reservation would include his place and improvements, and that to close his business would entail on him very heavy losses; and, by his letter, asking permission to remain on the reservation and carry on his former business. (3-3374, A. G. O., 1879.)

No action was had in the matter, and from thence thereafter, R. B. Dear, as a claimant, seems to have entirely disappeared from sight.

However, he, in referring to his buildings and improvements, does not advise the Department of the basis of his claim, nor does he refer to any license or authority under which he made his erections or improvements. If he had no such license or authority, then he was a mere intruder, and his buildings, being erected on public land, as he shows, became parcel thereof and merged in the realty, and thus became absolutely the property of the United States, and he had no right to the buildings erected by him or to dispose of the materials of which they were composed. If, on the other hand, he were licensed as an Indian trader, or for any other legal purpose, affecting the public lands and erected *while such license was in force* and they were necessary convenient for the execution of the purposes for which it was granted, then he has the right to remove the same or dispose of the materials thereof as his own personal property. (See 14 Attorney Generals' Opinions, 125.)

The opinion referred to, in its special application, refers, it is true, to the rights of post traders, yet the several statutes in relation to post traders and Indian traders being so closely assimilated, each to the other, in their several purposes and provisions, it is submitted that in the particular case discussed, the same interpretation and conclusion, announced in the opinion, may, very properly, and by parity of reason, be applied to the question under discussion.

It is stated by R. B. Dear in his letter that it was "about six years before the troops came into the country" that he built up his place and improvements. Therefore assuming that the advent of the troops was about the time that camp (afterwards Fort Robinson) was established (which was on the 8th of March, 1874). (Mil. Posts, p. 44, ed. of 1874), it may be approximately inferred that his buildings were built about the year 1868.

On the 25th of February, 1880, J. W. Dear, by his letter of that date, addressed to the Adjutant-General, claiming to be compensated also for losses by him sustained by the deprivation of certain buildings and injury to his business, caused by the same enlargement of the Fort Robinson Reservation, perhaps for the same losses, in whole or part, sustained by the same cause, by R. B. Dear, as by him stated above (1419, A. G. O., 1880), and which losses were specifically detailed in his memorial, under which, presented to the board of officers, appointed by direction of the Secretary to examine into his claim and appraise his buildings, &c., in which he stated that, in the fall of 1873, he, as a licensed Indian trader, erected his store and dwelling about a year before the building of Fort Robinson, of which he had possession ever since, &c. (Exhibit F, 3-4012, A. G. O., 1881).

By an unofficial inquiry at the Indian Office it was ascertained that Mr. J. W. Dear was licensed to trade with the Indians on the 11th day of October, 1873; again, on the 11th October, 1874; also on March 8, 1877; and again on the 16th March, 1878; each license being for the period of one year.

Therefore, if Mr. Dear, as such trader, constructed his store and dwelling under his license and while the same was operative, and said buildings were convenient and necessary aids to his business or operations as such trader, and if, in addition thereto, he acquired the buildings erected by R. B. Dear (provided he had lawful license or authority to build the same), then, in that case, J. W. Dear had the right, upon the termination of his license, or within a reasonable time thereafter, to remove the buildings acquired by him of R. B. Dear, as well as those erected by himself, or to sell the materials thereof, according to the ruling of the Attorney-General above referred to.

But perhaps the matters above may, in view of the probable action taken by the Department in regard to the claim, be of no significance or importance, yet they were referred out of abundant caution as being perhaps of moment in some possible aspect of the case.

AS TO THE COMPENSATION CLAIMED.

The last license granted to Mr. Dear expired, by its own limitation, on the 16th day of March, 1879; the enlargement of the reservation was ordered by the President on the 28th of June, 1879; and its boundaries announced October 14, in the same year. The license had expired prior to both of those dates and he was a mere occupant of the site of his buildings at the suffrage of the Government. The act of enlargement was a lawful act of which he had no right to complain. If he sustained damage thereby it was a damage for which the law accords no indemnity and satisfaction; and it may be, in this connection, further said that the submission of the claim to a board of officers to "examine the claim and appraise the value of his buildings" (2-4012 A. G. O., 1881) and the action of the board, does not commit the Government to accord to Mr. Dear any relief, their action being merely advisory for the Secretary of War.

On a reference of the claim to the Judge-Advocate General for his opinion it was held by him, in his opinion of the date of the 13th of April, 1880, that "no authority of law is known for any payment by the War Department of the unliquidated damages demanded for the loss of claimant's business. Should, however, it now be deemed unadvisable to allow him to remain on the reservation (which is a question of expediency for the military authorities to consider) the utmost relief within the power of the Executive to afford would be to allow him to take away his buildings, or to purchase such of them, or their material, as may be useful for military purposes as could be paid for out of any appropriation lawfully available for the purpose. (With 1419, A. G. O., 1889.)

Even if the claim in this case was a proper claim against the Government in respect to direct damages, unliquidated damages could not be taken into account and allowed even by the accounting officers, without the special act of Congress. (4 Opins., 327-14 *Id.*, 24.)

The current of authorities fully sustains the opinion of the Judge-Advocate General, and warrants and enforces the conclusion that J. W. Dear has no legal claim for indemnity or compensation against the Government for the loss of his buildings, and the stoppage of his business, caused by the enlargement of said reservation; and it may even be further said that he would not have a right to remove his buildings, unless the same were erected under some license or authority, lawfully emanating from the Government, as they would, in the absence of such authority, be the property of the Government, as part of the realty.

Respectfully submitted,

E. S. TERRY.

OCTOBER, 1883.

The ADJUTANT-GENERAL.

A true copy.

JOHN TWEEDALE,
Chief Clerk.

WAR DEPARTMENT, January 12, 1883.

From this brief it is by no means clear that any of the several claimants has any claim to the value of the property, and certainly without clear proof that the United States is responsible, and to whom, the committee would not recommend payment. The committee, for the reasons set forth, recommend that the bill (S. 644) do not pass, and that the committee be discharged from its further consideration.