

JOSHUA KENNEDY.

[To accompany S. bill No. 5.]

JANUARY 28, 1845.

Mr. VANCE, from the Committee of Claims, made the following

REPORT:

The Committee of Claims, to whom was referred the bill of the Senate No. 5, for the relief of the legal representatives of Joshua Kennedy, of Alabama, report:

That this claim has been the subject of investigation before different committees from the year 1818 up to the present session of Congress.

The committee find that, in 1831, Mr. White, of Tennessee, then at the head of the Committee on Indian Affairs, reported in favor of this claim; and that on the 2d of March, of the same year, Mr. Whittlesey reported against it. On the 4th of June, 1844, Mr. White, of Indiana, also made a favorable report on this claim, on which the present bill appears to be founded. The committee ask that these three reports may be printed, for the purpose of placing the views of the respective committees before the House.

The committee have, with great care, examined the reports, the evidence, (which is very voluminous,) and the treaty with the Creek Indians, made on the 9th of August, 1814. From the wording of this treaty, it appears that it was the intention of the Indians to cede land sufficient to cover damages for the loss of individuals, as well as to pay the expenses of the government in the prosecution of the war. If this is the true reading of that treaty, the claim of the representatives of Joshua Kennedy is a valid one, without bringing the destruction of his property within the provisions of the law of 1816.

One of the principal objections, both by the Third Auditor, and the committee reporting adversely to this claim, is founded upon the deposition of George Stiggins, who places the date of the destruction in November of that year. From an examination of the State papers, and other evidence, your committee are led to believe that the deponent was in error, and that it should have been September, instead of November, as stated in the deposition.

The committee attach a summary of the testimony, as a part of this report; and report back the bill, and recommend its passage.

SUMMARY OF THE TESTIMONY.

William C. Vaughn (overseer for Mrs. Hollinger) proves Kennedy a rich merchant, to whom all cotton planters on the Tombigbee and Alabama

rivers used to sell their crops. Sold Mrs. Hollinger's crop to him for that year for \$2,200. Proves that this lot of cotton, and much more, together with the cotton-house, mills, &c., were burnt by the Creeks. Proves the occupation by United States, as a fortified and armed place of defence, the cause of the destruction.

George Stiggins proves that he was going down the Tensaw, in a boat, from a quarter to half a mile from the mills. Heard the Indians, and saw the light of the fire. Was afterwards told by a half-breed named *John Cook* that he was with the band of hostile Creeks who burnt "Kennedy's mills."

Andrew Milton proves that he was a United States soldier stationed at Kennedy's mills, which were stockaded—"occupied as a fort." On the fall of Fort Mimms, the soldiers retreated from "Kennedy's mills," leaving them as an unoccupied fort. "Shortly after, said mills were burnt."

James Conway proves Kennedy's mills, houses, and cotton buildings very valuable. Proves they were burnt by the Indians, by matters found on the ground after they had retired—such as carcasses of sheep, &c. Cause of the burning was their having been occupied and fortified by the United States. Other mills in the vicinity, and houses above and below, not molested.

J. Pierce. J. P. was at "Kennedy's mills" 1st September. Saw them with a stockade about them, occupied by United States troops, who retreated on the fall of Fort Mimms.

Nicholas Cook proves the mills to have been an out station of Fort Mimms, under the command of the commander of that fort, Major Beasley. Was then enclosed with strong timbers; port-holes cut. Heard Major Beasley order trench to be dug in front, and pickets to be driven.

Mills new; best machinery he ever saw. Loss by destruction of mills and contents, \$15,000 to \$20,000. The troops and all the inhabitants retreated to Mobile.

"Some days after" was informed by a man named *George Stiggins* that "Kennedy's mills" were burnt. Afterwards, went with Kennedy to the place where his mills had been burnt; and it was evident from appearances, (remains of sheep, broken arrows pointed with iron, war clubs, &c.,) that the hostile Indians had been there.

William Pierce.—"Kennedy's mills" were stockaded on or about 1st September, 1813, and United States troops stationed there, who retreated on fall of Fort Mimms, leaving the mills an "unoccupied station."

William Kitchen proves the occupancy and fortification of the mills by United States troops. Saw Captain Beasley there. Troops retreated from the mills the day after fall of Fort Mimms. The mills shortly after burnt—supposed by Indians, as all the inhabitants had fled, as deponent knows; family of his father being the last which fled.

The mills were very valuable, and a large quantity of cotton in the gin, which was burnt.

Samuel Kitchen.—"Kennedy's mills," 14 miles south of Fort Mimms, occupied by order of Gen. Claiborne as an armed garrison or stockade a month previous to the massacre at Fort Mimms, the detachment under the command of Major Beasley. Shortly after the massacre at Fort Mimms, the soldiers retreated from the mills in terror. Shortly after the retreat of the soldiers, the mills and all connected with them were burnt by the Indians. The mills and contents destroyed worth, at a low estimate, \$15,000.

Aaron Barlow proves the occupancy of the mills; their enclosure and

fortification by United States troops latter part of 1813, shortly before the massacre at Fort Mimms. After the fall of Fort Mimms, it was said that a large body of Indians was approaching to attack them; the soldiers retreated to Mobile, "leaving the mills as an *unoccupied fort*." Shortly after, the mills, with all the other buildings at the place, together with their contents, were destroyed by hostile Indians. Loss from \$20,000 to \$25,000. The mills very large and complete; best deponent has seen in the State. The *occupancy and fortification* by the United States, the cause of burning. No other private property molested.

IN SENATE OF THE UNITED STATES.

JUNE 4, 1844.

The Committee on Indian Affairs, to whom was referred bill No. 167, "to provide for the payment to the legal representatives of Joshua Kennedy, of Alabama, for the losses sustained by the destruction of his property, in the year 1813, by the hostile Creek Indians, in consequence of its having been occupied as a fort or garrison by the troops of the United States," report:

That this claim has been alternately the subject of favorable and unfavorable consideration and decision, both by committees of Congress, and by the proper auditing officer of the government.

The facts, as stated by the petitioner, and substantially verified by his proofs, are: "That in 1810 he was the owner of land on the Tensaw river, south of latitude 31° north, which country, by proclamation of President Madison, was declared to be under the protection of the United States, and was taken possession of by them; that, under this assurance of the government, petitioner improved his land by building his dwelling-house, a saw mill, cotton gin, cotton press, &c.; and, as a trading post, he had on hand, during the war with Great Britain, and in the year 1813, large quantities of cotton, rope, cordage, baling rope, and lumber; that said mill and a portion of said premises were stockaded and occupied by the troops of the United States, under the military orders of an officer of the government. In 1813, after the massacre of Fort Mimms, (which was distant about fourteen miles,) in the panic which followed that event, the troops were hastily withdrawn from his premises, which were shortly thereafter entered by the hostile Creeks, and all the buildings and personal property aforesaid were destroyed by fire.

"He presented his claim in January, 1818, to the Hon. Richard B. Lee, special commissioner appointed under the act of 1816, for allowance, but no report was made thereon; and about the year 1830 he petitioned Congress for the allowance, upon which no final action of the two houses has been hitherto had."

The committee are of opinion that this claim comes within the provisions of the "Act to authorize the payment for property lost, captured, or destroyed by the enemy, while in the military service of the United States, and for other purposes." passed in 1816, and of the acts amendatory thereto. The reasons heretofore given by the Third Auditor, and by committees of the

Senate, for its disallowance, are—that, from the lapse of time between the military abandonment of the post and its destruction, an inference cannot be drawn that the destruction was *in consequence* of the military occupation; and because the premises were not in the actual occupancy of the troops at the time of their destruction.

Upon the first point, the proof, being properly weighed, renders it probable that the property was burnt within a period of from two to four weeks after its desertion; and from the impunity of other similar property in the neighborhood, as well as from the direct proofs of the witnesses, the committee cannot doubt that its military occupation and aspect were the provocatives of its burning by the hostile Creeks.

Upon the other point, the committee are equally satisfied that this property was “in the military occupation of the United States” at the time of its destruction, within the meaning of the statute; it never having been surrendered to the owner by the United States, who are still in constructive possession. If too technical and strict a construction be given to this clause of the act, it destroys its virtue. The buildings and personal property not within the stockade were distant only a quarter of a mile, and, sharing the same fate with the mill, should be the subjects of the same remedy.

An additional argument for this allowance is found in the treaty made between the United States and the Creek Indians on the 9th of August, 1814, and ratified February 16, 1815, in which the country where the petitioner's premises were situated was purchased. This treaty (article 1) recites that, prior to the conquest of that part of the Creek nation hostile to the United States, numberless aggressions had been committed against the peace, the property, and the lives of citizens of the United States and those of the Creek nation in amity with her, at the mouth of Duck river, Fort Mimms, and elsewhere, contrary to the national faith,” &c. * * * “wherefore, 1st, the United States demand an equivalent for all expenses incurred in prosecuting the war to its termination, by a cession of all the territory belonging to the Creek nation” within the limits therein specified—which article was then and there ratified by the contracting parties. It is deemed by the committee that this treaty imposes upon the United States an equitable obligation to remunerate those who lost property by the aggressions of the Creeks therein alluded to, beyond the terms of the several acts hereinbefore referred to. It remains to inquire, what is the value of the property destroyed? The petitioner has presented rather a confusion of proof upon this point; estimates being made in the aggregate, and somewhat at random, without any specification of details, and without distinguishing the real and personal property. One witness states that there was on the premises one lot of cotton for which Kennedy paid \$2,400 in cash and negroes, “and a great quantity besides.” Another witness estimates the whole property, real and personal, at from \$15,000 to \$20,000; another values it at \$15,000; another at from \$20,000 to \$25,000. But none of them specify the amount of personal property on hand, further than is above stated of the first named witness; nor do they characterize the quality of the buildings or their value.

In this looseness of the testimony as to the value of the burnt property, if the committee resort to the sworn statements of the petitioner, they are equally at fault. In his petition to Congress he states that his “improvements” cost him \$10,851, and his cotton \$11,740; but he affixes no esti-

mate of value to the cordage, &c. In his memorial to the commissioner, Mr. Lee, he states that "the property destroyed, belonging to your memorialist, actually within the pickets, was worth \$9,000; though more property adjacent to the same, of the value of \$2,000 or \$3,000, was at the same time destroyed." It is suggested by the petitioner's representatives, (Joshua Kennedy being now dead,) that this estimate must have referred to the *real* property alone. There is nothing to convince the committee of this, or that satisfaction was not sought before the commissioner as well for the personal as for the real property destroyed. The committee, therefore, are of opinion that the heirs are estopped by this first admission of their ancestor from asserting a value for the *whole* of the lost property beyond \$12,000, with which amount the committee have agreed to fill the blank in the bill; and with this amendment they recommend that the bill be passed.

IN SENATE OF THE UNITED STATES.

MARCH 29, 1830.

The Committee of Indian Affairs, to whom was referred the memorial of Joshua Kennedy, praying indemnity for the destruction of property by the hostile Creek Indians, in the year 1813, ask leave to submit the following report:

The memorialist states, that, in the year one thousand eight hundred and ten, he purchased a tract of land on the Tensaw river, about one and a half mile south of latitude thirty-one degrees north, the line of demarcation between the United States and the Spanish territory; that, in the month of October of that year, the then President of the United States issued his proclamation directing Governor Claiborne to take possession, for the United States, of the country including the said tract, and promising that the inhabitants should be protected in their persons, their property, and their religion; that, in confidence of the protection thus promised, the memorialist proceeded to improve said tract of land, by building dwelling-houses, mills, a cotton gin, cotton press, &c.; that he purchased and had on hand large quantities of cotton, rope, cordage, baleing rope, as well as lumber, which he had sawed for sale; that while a war was raging with Great Britain, and apprehending an attack upon the settlements on the lower Tensaw, in the summer or fall of 1813, the officer of the United States intrusted with the defence of that part of the country ordered his said buildings to be occupied by the troops of the United States, as a fort or garrison: the said buildings, in pursuance of said orders, were fitted up and occupied accordingly. Some time afterwards, and during the same year last mentioned, and after the memorable massacre of Fort Mimms, in the panic occasioned by that disaster, the troops were withdrawn from his premises, and they left entirely exposed to the ravages of the enemy; and that the hostile Creeks, under the lead of the celebrated Francis, in a few days burned and destroyed all his houses, his mills, his cotton gin and press, all his cotton and lumber, and at the same time killed his cattle and other stock; and that his loss, occasioned thereby, amounted to upwards of twenty-three thousand dollars; and that he verily believes such loss was occasioned by his possessions having been occupied as a garrison or fort.

The memorialist further states, that his case, as he believes, is embraced by the principles recognised in the act of 1816; and that he made a regular application to the commissioner, and furnished the necessary testimony; but, owing to the circumstance of the time for which the commissioner was appointed expiring, no allowance has been made to him for his losses, and therefore he prays indemnity to be provided by Congress.

The depositions of sundry witnesses have been furnished with the memorial; and, in the opinion of the committee, fully establish every material fact set forth in the memorial; and they further believe that the case of the memorialist is fairly embraced by the principles recognised in the act of 1816, making provision for the loss and destruction of property during the war; and, therefore, they report a bill making provision for the indemnity of the memorialist.

MARCH 9, 1832.

The Committee of Claims, to whom was referred a bill from the Senate, "to provide for the payment of Joshua Kennedy, of Alabama, for the losses sustained by him, by the destruction of his property, in the year one thousand eight hundred and thirteen, by the hostile Creek Indians, in consequence of its having been occupied as a fort or garrison by the troops of the United States," report:

That this claim, on a bill from the Senate being referred to this committee at the last session of Congress, was fully and carefully examined, and a report concluding with a resolution recommending a rejection of the bill, was submitted to the House on the second day of March, 1831; to which the committee now refer, and make the same a part of this report. Concurring in that report, the following resolution is again submitted:

Resolved, That the bill from the Senate for the relief of Joshua Kennedy be rejected.

MARCH 2, 1831.

The Committee of Claims, to whom was referred a bill from the Senate for the relief of Joshua Kennedy, report:

The bill provides for the payment of \$20,000 for the losses he sustained in the destruction of his property, situate on the river Tensaw, in the fall of the year 1813, by the hostile Creek Indians. In deciding on this class of cases, this committee have endeavored to take the acts of April 9, 1816, and of March 3, 1825, as their guides. The liability of the government to compensate for property destroyed by an enemy in time of war, was fully discussed in Congress on the passage of these acts; and, by them, the extent of that liability is clearly defined. One cardinal principle is, that the property to be paid for must have been in the military occupation of the United States at the time of the destruction. The property for which this bill pro-

vides the payment, consisted of buildings, such as dwelling-houses, mills, a cotton-gin, cotton press, of cotton, rope, cordage, baleing rope, and lumber. The United States troops took possession of his saw-mill, and fortified it for the better protection of the inhabitants, as well as for the protection of those in military service. If payment should be made in this case for the destruction of the cotton-gin, cotton press, cotton, rope, cordage, baleing rope, and lumber, which could not have been in the military service of the United States, or necessary for the defence of the country or prosecution of the war, the committee cannot foresee any limitation to the liability of the United States to pay for all the property which was destroyed by the enemy during the late war.

In this case, there is not sufficient evidence to satisfy the committee that the property was destroyed by the hostile Creek Indians. The rule, in this particular, has never been relaxed. The testimony does not prove that the property was in the military service of the United States at the time it was destroyed; but, on the contrary, it is proven that the troops abandoned the property several months before the destruction. The committee, on examining the whole case, do not concur with the Senate in believing that the petitioner is entitled to relief, and submit the following resolution:

Resolved, That the bill from the Senate, for the relief of Joshua Kennedy, be rejected.

TREASURY DEPARTMENT,
Third Auditor's Office, January 22, 1831.

SIR: I have the honor to acknowledge the receipt of your letter of the 16th instant, enclosing the memorial and documents of Joshua Kennedy, and asking for any evidence this office may afford, touching the amount, merits, or demerits of the same; and expressing, inasmuch as from the statements of the claimant his case was submitted to the late commissioner of claims for adjudication, under the act of 1816, a desire to see the papers so submitted, and to learn, if any decision was had on the case, what it was.

On reference to the files of the commissioner, a memorial of the claimant, verified on oath before Judge Toulmin, on the 1st November, 1817, has been found, and of which a copy is herewith transmitted. It appears to have been forwarded to the commissioner, in a letter from Judge Toulmin, of which a copy is also herewith sent. The object of the application to the commissioner, as is therein manifested, was the having a commission issued for taking the testimony; and the endorsement on the letter, which is in the hand-writing of the commissioner, shows that a commission was sent on the 25th February, 1818, being only a few weeks before the termination of his duties. The records, neither of his office nor of this, can be found to afford any evidence of the return of the commission, or of the reception of any testimony taken under it; and, on looking over the proofs you have sent to me, I find the same to be insufficient to bring the claim within the provisions of the laws he had to execute. Those provisions did not extend to any buildings other than such as were occupied for the military purposes therein designated *at the time of destruction*. The military occupation, in this case, whatever it may have comprehended, is shown to have been abandoned early in September, 1813, before any enemy was in sight; and

the destruction, according to the deposition of George Stiggins, did not take place till November following. According to the claimant's memorial to Congress, the order of General Claiborne did not authorize the occupation of more than the saw-mills ; nor are any other buildings that I see therein, or in the proofs, alleged to have been occupied by the troops. Hence, had the occupation continued to the time of destruction, an indemnity for the mills only could have been granted, agreeably to the law. In this memorial, it is observed, the claimant has alleged that his loss exceeded \$23,000. It will be seen that, in the one sworn to before Judge Toulmin, the property destroyed within the pickets is not declared to have been worth more than \$9,000 ; and the other, which is represented to have been destroyed adjacent thereto, is not put down as of the value of beyond \$2,000 or \$3,000 more. The papers are returned.

With great respect, your most obedient servant,
PETER HAGNER,
Auditor.

Hon. WILLIAM MCCOY,
Committee of Claims, House of Representatives.

Copy of Judge Toulmin's letter to the Commissioner of Claims.

FORT STODDERT, *January 12, 1818.*

SIR: I have been requested to transmit to you the enclosed petition of Joshua Kennedy.

I embrace the opportunity of remarking, that no commission has yet arrived in the case of Mrs. Hannah Mimms, who claims compensation for the destruction of her dwelling-house and out houses, when occupied by the troops of the United States, under the name of Fort Mimms. It is probable that you have supposed that a commission had been sent, inasmuch as the papers were forwarded to me.

Myself or Mr. John Pierce would be sufficiently convenient to the witnesses, in both cases, to act as commissioners.

I have the honor to be, very respectfully, your most obedient servant,
H. TOULMIN.

Superscribed—

To the Hon. RICHARD B. LEE, *Commissioner of Claims.*

Endorsed—

Alabama Territory, Hon. H. TOULMIN, Fort Stoddert, 12th January, 1818, relative to claims of Mrs. H. Mimms and Mr. Joshua Kennedy. Commissions sent February 25, 1818.

Copy of Mr. J. Kennedy's memorial to the Commissioner of Claims.

To the honorable Richard B. Lee, Commissioner of Claims : the memorial of Joshua Kennedy, of the county of Mobile, in the Alabama Territory,

RESPECTFULLY REPRESENTS :

That, during the late war between the United States and Great Britain, your petitioner was possessed of a mill and other buildings, in the said county, which were fortified or picketed in, and occupied as a fort or barracks by a detachment of the troops of the United States, then under the command of Brigadier General Ferdinand L. Claiborne, who were stationed at the said mill for the purpose of protecting the settlement adjacent, and enabling the mill to continue in operation whilst sawing plank for the use of Fort Bowyer.

That the said mill was destroyed by the enemy, (viz : the Creek Indians,) then in alliance with Great Britain, in the month of September, 1813, soon after the fall of Fort Mimms ; that the property destroyed, belonging to your memorialist, actually within the pickets, was worth \$9,000 ; though more property, adjacent to the same, of the value of \$2,000 or \$3,000, was at the same time destroyed ; for none of which has he received any compensation.

Your memorialist, therefore, humbly prays that a commission may issue to one or more persons, authorizing them, or either of them, to take the testimony of such witnesses as may be produced, relative to the claim of your memorialist against the United States, under the authority of the laws in such cases made and provided.

JOSHUA KENNEDY.

I hereby certify that the above-named Joshua Kennedy personally appeared before me, one of the judges of the Alabama Territory, on this first day of November, 1817, and solemnly swore that the facts contained in the above memorial are true.

HARRY TOULMIN.