28th Congress, 1st Session. Rep. No. 391. Ho. of Reps.

CLAIMS ARISING UNDER THE CHEROKEE TREATY.

[To accompany joint resolution H. R. No. 3.]

MARCH 29, 1844.

Mr. CAVE JOHNSON, from the Committee on Indian Affairs, made the following

REPORT:

The Committee on Indian Affairs, to whom was referred the following joint resolution:

"*Resolved 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 hereby is, authorized and directed to pay such sum or sums of money as may be awarded the claimants by the commissioners now adjudicating claims arising under the Cherokee treaty of 1835-'6, and in fulfilment of the several articles of said treaty; and that the certificates required to be issued to claimants by the seventeenth article, and in conformity to the uniform practice heretofore, shall be proper and sufficient vouchers, upon which payment shall be made as aforesaid: *Provided*, That no money shall be paid out of the treasury upon such certificates, after the appropriation heretofore made by Congress, in fulfilment of the treaty aforesaid, is exhausted, unless hereafter authorized by law."

have had the same under consideration, and make the following report:

By virtue of the treaties referred to in the resolution, the United States purchased of the Cherokee nation all their lands east of the Mississippi, for five millions of dollars, which was afterwards increased by acts of Congress to $6,147,067. As a party to the treaty, this sum was to be paid in full satisfaction of all claims against the Government. The treaty prescribed the disposition to be made of this large sum: certain investments were to be made by the United States for the nation, for purposes of education, &c.; the United States were to remove and subsist the Indians for one year at their new homes in the west, and to pay out of this fund, and were to pay pensions to certain warriors.

This fund was likewise subjected to the payment of the claims of certain individual Cherokees for their improvements and ferries; for their claims against their own nation, and for improvements of Cherokees who had removed west; for certain damages claimed by Cherokees against the United States for an omission to put them in possession of their lands, from which they had been driven by citizens of the United States; for spoliations committed on their property by citizens of the United States, and claims of certain citizens of the United States who had rendered services to the Cherokee nation. For the ascertainment of the amount due these several claimants, the 17th article of the treaty provides for the appointment of a board of commissioners, and expressly declares their adjudications to be *final*.

Blair & Rives, print.

After the United States shall have made the investments required by the treaty, and paid the necessary expenses for their removal and subsistence, and the adjudications of the board of commissioners in behalf of individual claimants, the balance of the fund was to be paid, *per capita*, to the Cherokee people.

A board of commissioners was organized, under the treaty, on the 7th of December, 1836, and sat in the Cherokee country two years and three months, and reported to the department that they had completed the duties assigned them under the treaty; and reported adjudications amounting to $2,329,524. The treaty fixed no period for the termination of these claims—unless it be inferred from the fact that the Indians were all to have been removed in two years; and the act of Congress making the necessary appropriation for the board, allowed pay to the commissioners and secretary for two years. The department seems to have considered these adjudications as a *final* settlement of all the individual claims upon the fund, and paid them. Congress, however, on the 26th day of August, 1842, appropriated again for the pay of commissioners and secretary for another year. A new board was appointed, which sat a short time in the Cherokee east country, and the balance of the time in the city of Washington.

It seems that, after the board had been some time in session, the executive officers became apprehensive that the commissioners were acting upon claims of various kinds, for which the Cherokee fund was not liable, and that the United States might be subjected to repayment, for a misapplication of this fund; or that the Cherokee people, entitled *per capita*, might be thus deprived of their just rights; and caused an examination to be made, from which it appeared that the new board of commissioners had decided favorably upon claims amounting to $45,331 16; and, in the opinion of the executive officers, more than one-third of this sum was founded upon claims for which the Cherokee fund was not liable by the provisions of the treaty, and over which the board of commissioners had no jurisdiction. The executive officers, learning that claims had been filed, and were then pending before the board, for very large sums—exceeding a million of dollars, which greatly exceeded the balance of the fund on hand, which amounted only to the sum of $240,000—thought it prudent to delay payments upon the certificates issued by the board, until the new board of commissioners had completed their labors and made report to the department, that the several adjudications might be examined as to the jurisdiction of the board, and whether it would not be necessary to make a *pro rata* allowance among the several claimants.

The object of the resolution referred to, then, is to compel the executive department to pay the certificates issued by the board of commissioners upon the ground that their decision is final, and not subject to any revision by the department.

The board of commissioners has been removed, a new one nominated, and no final report made. The committee thought it advisable, and with the permission of the House summoned C. K. Gardner, the secretary of the board, before them; and have had prepared a statement of the proceedings of the board, from which it appears that

31 claims had been allowed by the new board, amounting to	$69,029
15 favorably considered, but not finally acted on, amounting to	20,400
	89,429
333 claims disallowed, amounting to - - -	862,357
386 claims not acted on, amounting to - - -	458,479
	$1,410,265

The committee have carefully examined the cases alleged by the executive officers not to be within the jurisdiction of the board of commissioners, as stated in the paper which accompanies this report; and they could not but be surprised to find that the new board had taken up, revised, reversed, and issued certificates upon, claims which had been adjudicated against the claimants by the first board—directly contrary to their instructions from the department, and in violation of the 17th article of the treaty, which made their determinations final. They were not less surprised to find that the new board had taken jurisdiction of contracts made by the United States with individual Cherokees, under the 8th article of the treaty, and long after the treaty was made, and directing a large sum of money (over two thousand dollars) to be paid to the assignee or holder of certificates issued by the Government agent to certain Cherokees, who agreed, under the 8th article of the treaty, to remove and subsist themselves for $53 33$\frac{1}{3}$, but had failed and refused to remove, and are still understood to be living in the east. There can be nothing more clear than that, under the 8th article of the treaty, the Cherokees who did not remove are entitled to no part of the Cherokee fund which was to have been paid for *removal and subsistence;* and if there be any liability in consequence of the certificates issued by a Government officer, it is upon the treasury of the United States, and not upon the Cherokee fund. It will scarcely be contended that contracts made by the United States were subject to the adjudications of the board, and damages to be awarded for a non-compliance with their contracts against the United States.

Other cases are presented in the paper referred to, not less objectionable than the two preceding, and which, in the opinion of the committee, were not within the jurisdiction of the board. But it is said by the claimants, that the decision of the board is final, and cannot be re examined by the executive officers; that they have nothing to do but to pay. To this opinion the committee cannot yield. The decisions of the board (like all other tribunals of limited jurisdiction) upon matters not within their jurisdiction, are void; and a payment of the money upon such decisions would not release the Government from liability for a misapplication of the fund to the proper owners. This question was presented to a former Secretary, (Bell,) where the first board undertook to decide, and directed the money to be paid to certain individuals, as the heirs of a claimant, omitting the name of one of the heirs. The Secretary directed the name of the heir to be inserted, and his portion of the money paid him. (See paper L, and other cases similar in principle referred to.) So if the board awarded land or other property in the place of money. The committee cannot doubt that in all cases clearly not within the jurisdiction of the board, in cases of gross and palpable mistake, in cases of fraud or corruption, it would be the duty of the executive officers to withhold payment of the money until a proper

examination could be had, and right and justice done. So far, therefore, the committee content themselves with a bare statement of the facts of the case, and their conclusions; and refer the House to the arguments of the late Secretary of War, (Spencer,) and the Attorney General, (Legare,) given upon the application J. K. Rogers, one of the claimants, as conclusive, in their opinion, upon this question.

It is said, however, that a portion of the claimants, who have obtained certificates from the new board, and whose claims are clearly within the jurisdiction of the board, should be at once paid, and not subjected to further delay. The facts as stated, of so large a sum remaining unadjusted, together with those adjudicated, amounting to nearly double the sum on hand, and more than treble that sum when the order for a delay of payment was given, justified, in the opinion of the committee, the course of the President in withholding the money until a final adjustment of the whole matter, either by the board of commissioners or by Congress. The interests of the United States, as well as the claimants whose cases had not been acted on, demanded it. The delay to the claimants may be of some inconvenience; but when it is recollected that the first board sat in the Cherokee country two years and three months, closed their labors, reporting that they had decided all the cases, and when there was no reason to believe that a new board would be re-organized, and that but few of these claims (now amounting, as claimed, to near a million and a half of dollars) were even presented for adjudication to that board, there cannot be much hardship in some further delay, to enable the executive officers carefully to examine and scrutinize claims of such a character; and especially when the money is to be paid in our character as trustee for the Indians, and when the Government will be liable for a misapplication of the funds.

The committee would require a strong case—a much stronger one than is presented now—before they would feel themselves justified in recommending to the House any interference with the executive branch of the Government in the performance of treaty stipulations, which are peculiarly within the sphere of that department.

The committee, therefore, recommend a rejection of the resolution.

ABSTRACT OF REPORT OF CHEROKEE COMMISSIONERS.

Reservation claims.

103 reservation claims presented:		
5 claims allowed - - - -	$28,024	
58 claims disallowed; of which 22 amounted to	144,545	
and 36 amounts not known; but, on average with those disallowed, (22,) amount to - - - - -	236,520	
40 claims not acted on; of which 10 amounted to	61,813	
and 30 averaged with the 10 - -	185,430	
		$656,332

Pre-emption claims.

222 claims presented:		
6 claims allowed - - - -	$15,589	
5 claims disallowed - - - -	20,000	
3 claims disallowed—amounts not stated, but on average with the 5 - - -	12,000	
15 claims passed favorably by the board -	21,200	
168 claims passed unfavorably by the board; of which 39 amounted to - - -	105,250	
and 129, on average - - -	348,042	
25 claims not acted on; of which 12 amounted to	41,520	
and 13, on average with the rest, to -	44,980	
		608,581

Spoliation, improvement, and other claims.

381 claims presented:		
20 claims allowed - - - -	$21,416	
40 claims disallowed - - - -	108,798	
321 claims not acted on; of which 265 amounted to - - - - -	103,018	
and 56 not stated, but on average amounted to - - - - -	21,728	
		254,960
706 claims filed, and whole amount - - - -		1,519,873

Whole amount of claims allowed:		
5 reservation - - - -	$28,024	
6 pre-emption - - - -	15,589	
20 spoliation, &c. - - -	21,416	
		$65,029
15 pre-emption passed on favorably - -		21,200
46 claims passed favorably - - -		86,229

Amount of claims disallowed:			
58	reservation - - -	$381,065	
8	pre-emption - - -	32,000	
168	pre-emption passed on unfavorably	453,292	
40	spoliation, &c. - -	108,798	
			$975,155
274			
Amount of claims not acted on:			
40	reservation - - -	247,243	
25	pre-emption - - -	86,500	
321	spoliation, &c. - -	124,746	
			458,489
386			

RECAPITULATION.

46	Whole amount allowed - - - - -	$86,229
274	Whole amount disallowed - - - - -	975,155
386	Whole amount not acted on - - - -	458,489
706	Whole amount of claims - -	$1,519,873

List of papers accompanying report of Commissioner of Indian Affairs to the Secretary of War, on the resolution of the Senate of the United States of 20th December, 1843, respecting Cherokee matters.

A. Extract of letter from Commissioner of Indian Affairs to Cherokee commissioners, dated 8th February, 1838.

B. Extract of letter from Commissioner of Indian Affairs to Cherokee commissioners, dated 9th May, 1838.

C. Copy of letter from Commissioner of Indian Affairs to Cherokee commissioners, dated 17th January, 1839.

D. Extracts from report of Cherokee commissioners to Commissioner of Indian Affairs, (and enclosure,) dated 5th March, 1839.

E. Copy of letter from Cherokee commissioners to Secretary of War, (and endorsement,) dated 13th April, 1843.

F. Copy of letter from Commissioner of Indian Affairs to Secretary of War, (and endorsement,) dated 5th September, 1843.

G 1. Copy of letter from Cherokee commissioners to Secretary of War, dated 17th November, 1843.

G 2. Copy of report on above, by Commissioner of Indian Affairs, and endorsement by Secretary of War, dated 21st November, 1843.

G 3. Copy of letter from Commissioner of Indian Affairs to commissioners, dated 23d November, 1843.

G 4. Copy of letter from commissioners to Secretary of War, dated 23d November, 1843.

G 5. Copy of letter from Secretary of War to commissioners, dated 24th November, 1843.

H 1. Copy of instructions from Commissioner of Indian Affairs to commissioners, dated 28th September, 1842.

H 2. Copy of instructions from Commissioner of Indian Affairs to commissioners, dated 10th August, 1843.

H 3. Copy of letter from commissioners to President of United States, dated 3d October, 1843.

H 4. Copy of letter from Secretary of War to commissioners, dated 5th October, 1843.

H 5. Copy of letter from Secretary of War to commissioners, dated 25th November, 1843.

I. Copy of report from Commissioner of Indian Affairs to Secretary of War, dated 29th November, 1839.

K 1. Copy of letter from Commissioner of Indian Affairs to commissioners, dated 4th November, 1836.

K 2. Copy of letter from Commissioner of Indian Affairs to Dr. Minis, dated 4th November, 1836.

L. Copy of decision of Secretary of War in case of Tunnell *vs.* Wallace Rackley, dated 15th April, 1841.

M. Copy of letter from Commissioner of Indian Affairs to Major William Armstrong, dated 20th April, 1841.

N. Statement of claims allowed by Eaton and Hubley.

O 1. Statement of claims allowed by Eaton and Hubley, rejected or suspended by the department.

O 2. Copy of letter of Eaton and Hubley, submitting their award in favor of Johnson K. Rogers's claim, (commutation,) dated 29th December, 1842.

O 3. Copy of decision of commissioners on same.

O 4. Copy of decision of Secretary of War on same, dated 20th February, 1843.

O 5. Extract from report of Commissioner of Indian Affairs to Secretary of War, on J. K. Rogers's valuation claim, dated 14th April, 1843.

O 6. Copy of letter from commissioners to Commissioner of Indian Affairs, asking for the return to them of Rogers's papers, dated 25th January, 1839.

O 7. Copy of opinion of Attorney General of United States, dated 19th May, 1843.

Report of Second Auditor, and schedules A and B attached.

A.

Extract of a letter from the Commissioner of Indian Affairs to the Cherokee commissioners, dated February 8, 1838.

"It is the opinion of the department that your attention and efforts should be directed to the closing of all the business under the treaty by the 23d day of May next; and that you should give public notice that all claims must be presented, to be acted upon by that day. It is also considered proper that you should establish a rule not to review any case that has been once decided."

B.

Extract of a letter from the Commissioner of Indian Affairs to the Cherokee commissioners, dated May 9, 1838.

"I will thank you, immediately on the receipt of this, to report in detail all the business of the commission (specifying the different classes and amount in each) that you have just reason to believe will remain unfinished on the 23d of May. The department does not consider that your appointments will terminate then, necessarily; and you will continue in the performance of your uncompleted duties (if there be any such) until otherwise instructed. To aid in the formation of correct opinions on this last point, you are requested to communicate your views as to the time, the number of persons, and place of operations requisite and best adapted to ensure the early close of the branch of business appertaining to your commission."

C.

WAR DEPARTMENT,
Office Indian Affairs, January 17, 1839.

GENTLEMEN: From information derived from various sources, (including your own communications,) the department is induced to believe that your commission may be terminated now, without injury to any public interest; you are therefore instructed, immediately on the receipt of this letter, to complete the several registers of claims, payments, and valuations, your docket and decision-books, and to forward them, with all other books and papers connected with the execution of your duties. Before you transmit them, I trust you will satisfy yourselves that they are so made out and arranged, that distinct and correct views of all your proceedings, and of the principles that regulated your action, may be derived from them. You are further requested to send them in charge of your secretary, Mr. Mullay, to ensure their safety, and that the department may obtain from him any explanation that may be desired. This communication is designed to apply to the accounts of all disbursements you may have yourselves made, and to abstracts of all requisitions made by you on disbursing officers.

General Smith has also been directed to close the branch of business confided to him, and to turn over his books and papers to you; and you will please to forward them by Mr. Mullay, with your own.

Very respectfully, your obedient servant,

T. HARTLEY CRAWFORD.

Messrs. JOHN KENNEDY, T. W. WILSON,
and J. LIDDELL, *Athens Tenn.*

D.

Extracts from the report of Cherokee commissioners to the Commissioner of Indian Affairs, dated Athens, March 5, 1839.

"Having now completed the adjudication and settlement of the claims arising under the several provisions of the treaty of 1835–'36, which, under the instructions of the War Department, have been confided to us, we have caused to be made out a statement of the aggregate amounts allowed by the board on account of valuations, spoliations, reservations, &c., and the amounts paid by us to the claimants of various descriptions, the amounts heretofore sent west, and the aggregate of balances due on various accounts, which is herewith forwarded; all of which will be found specifically stated in the general abstract and the records of our office, which will be delivered to you, agreeably to your direction, by Maj. Mullay, secretary to our board."

"In addition, it may be proper to remark that a few valuations hitherto omitted have been made by our agents, returned to and approved by us, after the completion of the registers and abstracts, for which application had been made by the claimants several months ago, but could not be attended to at an earlier day. These valuations are, consequently, not placed upon our registers, nor their amounts included in the aggregate of valuations. An approved copy of those valuations is forwarded with the other documents."

"It will be found, from the abstract, that there have been excesses paid to several individuals—amounting in the whole to $2,741 62. Nearly the whole of these errors were inadvertently made by our former secretary, Col. Jackson, and of which your department has been heretofore advised. This excess, however, may be recovered from the individuals in whose favor they occurred, on a final settlement with them under the provisions of the treaty. We have also to state, that, owing to the neglect of the first secretary and clerks to the board to keep an account of the ordinary and incidental expenses of the commission, we are unable to report the exact amount paid out on that account. All the payments, however, of this description, were made upon the duplicated requisitions of the commissioners on the disbursing agents; and the amount can be ascertained from the vouchers and abstracts of those officers, which we presume are on file in the proper department."

"In making this our final report, it is due to ourselves to observe, that, could we have had the advantage of our present experience in the beginning of this complicated and diversified business, we might have been able to have adopted a more acceptable method of arrangement; but, having to do with such a mass of matter constituting every variety of claim that could well be conceived of, rendering it very difficult, even if aided by experience, to reduce it to system; and the interruptions to which we were constantly exposed, as well as the character of the people whose claims we had to adjudicate and settle, will, we hope, form some apology for our not having executed it more satisfactorily as regards the manner in which it has been done. But we have the consolation to believe, and a right to hope, that the Government which selected us for this duty will be satisfied that it has been performed, if not with distinguished ability, with the strictest regard to honesty and integrity."

[Enclosed in the preceding.]

A condensed statement of the amounts allowed and paid under the provisions of the Cherokee treaty of 1835–'36.

For what purpose.	Amount allowed.	Amount paid.	Amount sent west.	Amount due.
Valuations	$1,683,192 77½			
Spoliations for rent and property	416,306 80½			
Excess paid on settlement of accounts	2,741 62			
Claims against the nation, professional services, &c., &c.	70,700 19½			
Reservations taken on the territory ceded to the United States in 1817 and 1819	68,652 37			
Reservations taken on the territory ceded to the United States in 1835 and 1836	85,552 50			
Cherokee committee, for their services	21,894 89½			
Advanced on valuations and spoliations, and debts paid	–	$1,351,450 13½		
Claims against the nation, &c.	–	69,590 39½		
For reservations taken on the territory ceded in 1817 and 1819	–	17,204 77		
Cherokee committee, for their services	–	21,894 89½		
Sent west prior to January, 1839	–	–	$214,383 03½	
On valuations and spoliations	–	–	–	$536,408 03½
On national claims	–	–	–	1,109 80
On reservations taken on the territory ceded in 1817 and 1819	–	–	–	51,447 60
On reservations taken on the territory ceded in 1835 and 1836	–	–	–	85,552 50
Total	2,349,041 16	1,460,140 19½	214,383 03½	674,517 93½

By order of the commissioners;

JOHN C. MULLAY, *Secretary, &c.*

E.

APRIL 13, 1843.

DEAR SIR: Mr. Humes, the gentleman whom you have presented for our consideration, had been already previously recommended to us as a qualified assistant to the duties of our board; and, had we conceived ourselves possessed of authority over the subject, we should at once have acted, apart from any reference of the subject to you.

We repeat that our belief is, that, with the additional business assigned to us, our secretary will be incapable to keep up the record of our proceedings. We will be glad, therefore, for you to appoint Mr. Humes; had we the power, we should ourselves make the appointment of him.

Respectfully,

JOHN H. EATON,
EDW. B. HUBLEY.

[Endorsements on the above.]

Approved, and Mr. S. C. Humes appointed at a compensation of one thousand dollars per annum, and his actual travelling expenses, not exceeding ten cents a mile, when absent from the seat of Government on the business.

WAR DEPARTMENT, *April* 13, 1843.

J. M. PORTER.

The above to be paid out of the appropriation for the contingencies of the Cherokee commissioners, and as part thereof.

J. M. PORTER.

F.

WAR DEPARTMENT,
Office Indian Affairs, September 5, 1843.

SIR: By an act of Congress, approved August 26, 1842, $13,500 were appropriated "for compensation to two commissioners to examine claims under the treaty with the Cherokees of eighteen hundred and thirty five, and pay of a secretary, and provisions for Indians during the session of the board, and for contingent expenses." This appropriation was made on an estimate from this office thus:

Pay of two commissioners for a year, at $3,000 each	$6,000
Pay of secretary to commissioners	1,500
Provisions for Indians assembled on business	4,000
Contingent expenses, such as stationery, interpreters, &c.	2,000
	$13,500

The pay of one of the commissioners (Gen. John H. Eaton) commenced on the 5th of September, 1842; and, when he has drawn his compensation up to this day, the appropriation, so far as he is concerned, will be exhausted. Under these circumstances, and looking to the 25th section of the same act which made the appropriation, I deem it to be my duty to invite your at-

tention to this matter; and to submit the question whether, as there are no funds applicable to the payment of one of the commissioners, the board can be legally continued.

Very respectfully, your obedient servant,

T. HARTLEY CRAWFORD.

Hon. J. M. PORTER, *Secretary of War.*

The within letter was returned by the Secretary of War, with the following endorsement:

"The appropriation of $13,500 is 'for compensation to two commissioners to examine claims under the treaty with the Cherokees of 1835, and pay of secretary, and provisions for Indians during the session of the board, and for contingent expenses.' It is not subdivided in amounts to the specific purposes. As long as any part of the appropriation remains, it is applicable to any of the objects. The commission would not expire by the expenditure of the appropriation. All that those employed would have to do, would be to rely on Congress for being compensated.

"WAR DEPARTMENT, *October* 21, 1843.

"J. M. PORTER."

G 1.

WASHINGTON CITY, *November* 17, 1843.

SIR: As we are about making arrangements to start for the Cherokee country west of Arkansas, it is necessary to ask your decision in regard to our compensation. Mr. Crawford has suggested a difficulty in regard to it, and desired the subject to be brought before you, for your consideration and decision. We claim to be paid the same compensation for our services which was allowed to our predecessors—which was $8 per day, and 40 cents mileage for travelling expenses. We ask this, because we are satisfied "it is clearly right;" and, trusting to your well-known disposition to do what is just, we bring it to your consideration, and confidently rely upon a favorable reply.

The members of this are not those who composed the former board, but it is the same tribunal—as much so as the Supreme Court of the United States is now the same it was ten years ago. When the first action of the Government took place in reference to this Indian trust, the compensation above suggested was fixed upon; and from this trust-fund the commissioners were paid. A presumption may fairly arise that the matter was agreed on by the trustee and *cestui que trust*, and hence that it became a vested right. At any rate, it is not to be denied that the trustee and commissioners were parties to the agreed compensation.

Has anything subsequently disturbed that relation? Nothing. No law has prescribed a different compensation than that first agreed on; for the law merely says, "for paying commissioners, &c., to adjudicate claims, &c., $13,500," without declaring anything definite as to the pay. Of course, the rule first prescribed is the true one to be pursued.

Ours is not an "office," for it exists under treaty, by the mere action of the President and Senate; and hence we are under no legal rule regulating

the pay of "officers." Nothing becomes an "office" which does not obtain its creation through legislative action. Here there has been none.

Very respectfully,

JNO. H. EATON,
EDW. B. HUBLEY,
Cherokee Commissioners.

Hon. JAMES M. PORTER,
Secretary of War.

G 2.

WAR DEPARTMENT,
Office Indian Affairs, November 21, 1843.

SIR: I have the honor to report, in compliance with your direction, on the communication of Messrs. Eaton and Hubley, Cherokee commissioners, who ask for a decision on their claim for compensation at the rate of $8 per day, and 40 cents per mile each, and urge that it is the same compensation allowed to their predecessors.

The former commissioners received a per diem of $8 each, but no mileage—as I am informed in the office of the Second Auditor, where their accounts were settled. That compensation was fixed in the "Act making further appropriations for carrying into effect certain Indian treaties," approved 2d July, 1836, (vol. 9, p. 453,) and is as follows: "For compensation of two commissioners for two years, to examine claims, according to the seventeeth article of said treaty, at eight dollars per day each, eleven thousand six hundred and eighty dollars." A third commissioner was appointed in 1837; and in 1838 there was an appropriation for his pay, &c. In the letter announcing his appointment, he was informed: "Your compensation will be $8 per day, from the commencement to the termination of your duties, in full for all services and expenses."

When the attention of Congress was invited to the expediency of making a further appropriation to extend the examination of claims arising out of this treaty, an estimate of the necessary sums required was sent to the House of Representatives; which, in its language, is identical (with the exception of one word) with that part of the law of 1842 making the appropriation; but, before definitive action was had upon that estimate, the Committee of Ways and Means, through its chairman, called for a specification of items embracing the aggregate of the estimate; which was furnished, and is as follows:

Explanation of the item of $13,500 *in the additional estimate for the Indian department, sent to Congress on the 22d July*, 1842.

Pay of two commissioners for a year, at $3,000 each - -	$6,000
Pay of a secretary to the commissioners - - -	1,500
Provisions for Indians who may assemble on business connected with the commission, and who will require rations, &c., during such visits as may be invited, &c., by the board - -	4,000
Contingent expenses for stationery, witnesses, runners to give notices, &c., and the expenses of interpreters - - -	2,000
	$13,500

In the instructions to the present commissioners, they are informed that "your compensation will be at the rate of $3,000 per annum each, respectively, inclusive of all charges;" and the commissioners themselves have drawn their compensation as a yearly one, and not as so much per diem, showing their own construction; and one of them, in requesting payment, has asked for salary as Cherokee commissioner, from such a time to another specified period, at $250 per month, thus: "To salary as Cherokee commissioner, from 5th October to 5th November, 1843, $250." "To one month's pay as Cherokee commissioner, to the 5th of April, 1843, $250." "To two months' salary, from the 5th January to 5th March, $500."

The commissioners err (unintentionally, no doubt) in saying, in the communication to you of the 17th instant, that I *desired* the difficulty stated to be settled before they went west. A difference of opinion existed between Mr. Hubley and myself on the subject of the commissioners being entitled to anything beyond $3,000 per annum, or after that rate for a shorter time; I contending they must be restricted to that measure of pay; and he saying he thought they were entitled besides to mileage, or some other allowance, for their expenses when travelling. And I did say to him, as the commissioners were going into a country where they were both strangers, it would be an awkward thing to them if they should draw and negotiate drafts that would be protested; and I would therefore *advise* (but did not *desire*) them to have the thing decided before they set out; for experience had told me plainly enough that my adverse opinion would not be controlling with the gentlemen interested.

The highest sum ever allowed, where none was fixed by law, was $8 per day, and $8 for every twenty miles of travel—in analogy to pay of members of Congress; but, ever since I have been in my present position, (viz: for five years past,) per diem and mileage have never been allowed at the same time. But, in this case, there is a sum fixed by the act of 1836, viz: $8 per day, without mileage; and according to the principles laid down by the commissioners, (viz: that the sum fixed on for the first board is what they are entitled to,) they can receive but $8 per day, or $2,920 per annum. Congress, however, appropriated $3,000 a year for each of them. Their instructions told them they should have that, and no more. They have received after that rate, with full understanding; and should receive nothing additional, in my opinion.

The commissioners speak of a trustee and *cestui que trust*. I am not sure that I understand them. If, as I suppose, they refer to the Cherokee fund, and the United States as its trustees, their compensation is wholly unconnected with it, being paid out of the treasury on an appropriation.

Very respectfully, your obedient servant,

T. HARTLEY CRAWFORD.

Hon. J. M. PORTER,
Secretary of War.

Report and application returned to the Office of Indian Affairs, with the endorsement of the Secretary of War, as follows:

"WAR DEPARTMENT, *November* 22, 1843.

"The *decision* of this matter, most probably, does not pertain to the head of the War Department. If his opinion is to have any influence upon it, he thinks the views of the Commissioner of Indian Affairs correct.

"J. M. PORTER."

G 3.

WAR DEPARTMENT,
Office Indian Affairs, November 23, 1843.

GENTLEMEN: Your communication to the Secretary of War of the 17th instant, in which you ask a decision in regard to your claim for compensation, was referred to this office, and a report thereon required from me by the Secretary of War. The report, in which I expressed the opinion that you should be restricted to the allowance of $3,000 per annum each, in full, for services and expenses, was submitted on the 21st instant to the Secretary of War, who yesterday returned it to me, with an endorsement thereupon, of which the following is a copy:

"The *decision* of this matter, most probably, does not pertain to the head of the War Department. If his opinion is to have any influence upon it, he thinks the views of the Commissioner of Indian Affairs correct."

Very respectfully, your obedient servant,

T. H. CRAWFORD.

Messrs. EATON and HUBLEY,
Cherokee Commissioners, now in Washington, D. C.

G 4.

NOVEMBER 23, 1843.

SIR: You will readily perceive that Mr. Crawford's note of this morning decides nothing.

We submitted to the Secretary of War a plain question, and from him had a right to expect an answer; but if he thought it right and proper to substitute a reply from the Commissioner as his own, it should at least [have] been so definite as to be capable of being understood.

He says our communication was referred to him, with a view that he should report. He concludes by saying that the Secretary "thinks the views of the Commissioner of Indian Affairs correct." Now it would seem to be proper that we should have been advised of the "*views*" taken by the Commissioner; for, without being so informed, we can have no correct understanding of the matter, nor be able to determine whether the grounds assumed by him be technical or legal. At any rate, whatever may be the nature and character of the views of the Commissioner, it is obvious that any advantage in repelling them is not afforded, while we are kept in ignorance of them; nor can we perceive the force of any reason that should deny to us a right to inspect and to judge of them. Every respectful application to the head of a department is entitled to an answer, and that answer to be communicated to the party.

Respectfully,

J. H. EATON,
E. B. HUBLEY.

The SECRETARY OF WAR.

G 5.

WAR DEPARTMENT,
November 24, 1843.

GENTLEMEN: Your note of yesterday was handed to me last evening. By the act of July 9, 1832, section 1, the Commissioner of Indian Affairs, under the direction of the Secretary of War, &c., "has the direction and management of *all Indian affairs*, and of *all matters arising out of Indian relations*." Your communication of the 17th instant was, therefore, properly referred to that officer, to whom it ought to have been addressed by you. On his report to me, agreeably to request, his views, adverse to your claim, were approved.

If, in communicating the decision to you, he did not transmit all that you desire, upon application to him, no doubt, he will give you any additional information which he may possess on the subject.

Very respectfully, your obedient servant,

J. M. PORTER.

Hons. JOHN H. EATON and EDWARD B. HUBLEY,
Commissioners, &c.

H 1.

WAR DEPARTMENT,
Office Indian Affairs, September 28, 1842.

GENTLEMEN: Having been appointed by the President of the United States, by and with the advice and consent of the Senate, commissioners under the 17th article of the Cherokee treaty of 29th December, 1835, and the amendments thereto, and having received your commissions, I respectfully communicate to you the following instructions, conveying the views entertained by the department of the duties that have been confided to you.

The 17th article, as amended, stipulates that "all the claims arising under, or provided for in, the several articles of this treaty, shall be examined and adjudicated by such commissioners as shall be appointed by the President of the United States, by and with the advice and consent of the Senate of the United States, for that purpose; and their decision shall be final."

The first article of the treaty gives the consideration of $5,000,000 for the cession, "to be expended, paid, and invested in the manner stipulated and agreed upon" in the following articles; thus, according to the opinion of the Attorney General, and the construction uniformly given by the department, subjecting the fund to the charges imposed on it by the treaty, which embrace all the expenditures not otherwise provided for by that instrument. Those charges are enumerated in the 15th article, which is in these words: "It is expressly understood and agreed between the parties to this treaty, that, after deducting the amount which shall be actually expended for the payment for improvements, ferries, claims for spoliations, removal, subsistence, and debts and claims upon the Cherokee nation, and for the additional quantity of lands and goods for the poorer class of Cherokees, and the several sums to be invested for the

general national funds provided for in the several articles of this 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, who are entitled, by the terms of their enrolment and removal, to all the benefits resulting from the final treaty between the United States and the Cherokees east. They shall also be paid for their improvements, according to their approved value before their removal, where fraud has not already been shown in their valuation."

The 17th article makes the decisions that have been had by the former board of commissioners, and which have been reported by them to the department, final. Even the Executive cannot overrule them, where they had jurisdiction; and if they had none, you cannot possess it. You are, therefore, instructed that no case which has been adjudicated by the former board is open to your examination; and one of the great objects of furnishing you with its records is, to enable you to detect at once any application to you for the consideration of cases of any description that have been already passed on by the former board—which will be rejected.

The 9th article stipulates that the United States shall "appoint suitable agents, who shall make a just and fair valuation of all such improvements now in the possession of the Cherokees, as add any value to the lands; and also of the ferries owned by them, according to their net income; and such improvements and ferries from which they have been dispossessed in a lawless manner, or under any existing laws of the State where the same may be situated." "The just debts of the Indians shall be paid out of any moneys due them for their improvements and claims; and they shall also be furnished, at the discretion of the President of the United States, with a sufficient sum to enable them to obtain the necessary means to remove themselves to their new homes, and the balance of their dues shall be paid them at the Cherokee agency west of the Mississippi. The missionary establishments shall also be valued and appraised in a like manner, and the amount paid over by the United States to the treasurers of the respective missionary societies by whom they have been established and improved, in order to enable them to erect such buildings, and make such improvements among the Cherokees west of the Mississippi, as they may deem necessary for their benefit." These provisions embrace a large proportion of your duties. You will perceive that, where they have not been already made, and do not appear by the records of the former board of commissioners, (which will be furnished you,) and even then, if you are not satisfied with their correctness, valuations must be made of all such improvements as are submitted to your examination under those instructions, and were in the possession of the Cherokees *at the date* of the treaty, (not its ratification,) as add any value to the lands; and, also, of the ferries owned by them at the same time, according to their net income, and of such improvements and ferries as they had been dispossessed of, before the same date, in a lawless manner, or under "any existing laws of the State where the same may be situated." This duty is distinct from reservations, (which will be the subject of another part of these instructions,) and relates merely to improvements separated from the land on which they stand. The question of *ownership* of the improvements

and ferries is the first one to be decided. If they shall be found to belong to a Cherokee entitled to remuneration for them under the treaty, the inquiry arises, whether he or she was in possession of them on 29th December, 1835, or had been dispossessed thereof in a lawless manner, or under the existing laws of the State in which they were located. If either of these alternatives is answered affirmatively, then comes the question, "What is a just and fair valuation of them?" To reach the true worth of them, you are authorized to employ two respectable persons, when necessary, to assess their value; who will be paid $4 per day for every day actually and necessarily employed in making such valuations.

Such debts as the Indians may owe, will be paid out of any moneys you may award them "for their improvements and claims;" and you will investigate the indebtedness, at the date of the treaty, of those Cherokees to whom you shall decide anything to be due for improvements, ferries, reservations, or spoliations, and make a record of such debts as you shall find to be owing by them, stating to whom due, and the nature of the debt.

The next class of claims recognised by the treaty is that for spoliations—which, it will be seen, are mentioned in the 1st, and are specially provided for in the 10th article of the treaty, and the 3d of the supplementary articles. The injuries here referred to, are the theft or destruction of property, or other acts which diminish its value, committed by citizens of the United States.

There remain reservations, of which the treaty (13th article) recognises three descriptions: 1st. Those Cherokees, their heirs or descendants, to whom reservations were made in former treaties, who have not sold or conveyed the same by deed or otherwise, and have complied with the terms on which they were granted, as far as was practicable, in each case, where such reservations have been since sold by the United States, have a just claim against the Government, and "the original reservees, or their heirs or descendants, shall be entitled to receive the present value [that is, the value at the date of the treaty] thereof from the United States, as unimproved lands." 2d. When such reservations have not been sold by the United States, but where the terms on which they were made have been complied with as far as practicable, the original reservees, or their heirs or descendants, shall be entitled to the same, and receive a grant therefor—including all persons who were entitled to reservations under the treaty of 1817, and who, as far as practicable, have complied with the stipulations of said treaty, "although, by the treaty of 1819, such reservations were included in the unceded lands belonging to the Cherokee nation." 3d. Such reservees as were compelled, by the laws of the States in which their reservations were situated, to abandon the same, or purchase them from the States, shall be deemed to have a just claim against the United States for the amount by them paid to the States, with interest thereon, for such reservations; and if obliged to abandon the same, to the present (date of the treaty) value of such reservations as unimproved lands. These are the three classes of reservations recognised by the treaty, all of which are subject to this proviso in the said (13th) article: "But in all cases where the reservees have sold their reservations, or any part thereof, and conveyed the same by deed or otherwise, and have been paid for the same, they, their heirs or descendants, or their assigns, shall not be considered as having any claims upon the United States under

this article of the treaty, nor be entitled to receive any compensation for the lands thus disposed of."

It will be observed, that, by the first supplemental article, all pre-emption rights and reservations provided for in articles 12 and 13 shall be, and are hereby, relinquished and declared void; and that, by the 3d article, a pecuniary compensation therefor is substituted, which was enlarged by the act of 12th June, 1838. The first class is to be paid for as unimproved land; and the third also, where there was a compulsory abandonment. The second class is entitled to be paid for the land, and the improvements the reservees had made on it before the date of the treaty; because, by the original frame of the treaty, they were to receive a grant of the land, which would carry both; and by the 3d of the supplemental articles, the money substituted "shall be applied and distributed agreeably to the provisions of the said treaty." There are no pre-emption rights; they were provided for by the 12th article of the original treaty, but abrogated by the first of the supplemental articles, and never had more than an inchoate existence, which is gone.

There is a stipulation in the 16th article, that the Cherokees should remove to the west of the Mississippi within two years from the ratification of the treaty, and that during such term the United States would protect them in their possessions and property, and the free use and occupation of the same; and such persons as have been dispossessed of their houses and improvements, for which no grant has actually issued prior to the enactment of the law of Georgia of December, 1835, to regulate Indian occupancy, shall again be possessed thereof, and placed in the same condition and situation, in reference to the laws of Georgia, as the Indians who have not been dispossessed; "if this is not done, and the people are left unprotected, then the United States shall pay the several Cherokees for their losses and damages sustained by them in consequence thereof." It is not supposed any cases of this kind, deserving your favorable consideration, will be presented. But it is possible there may be; and it is, in any event, a part of the treaty which it was my duty to bring to your notice.

There appears to have been a doubt, when the treaty was signed, whether the spoliation claims were to be paid for out of the five millions, or not; and the question, it was stipulated by the 1st article, should be referred to the Senate, and, if the decision was in the negative, then $300,000 additional were allowed; and, in the 10th article, that sum was set apart for them. It was expressly understood (see 13th article) by the parties, that the reservation claims should not be paid for out of the consideration of the cession, or the sum allowed for spoliations, but be discharged by the United States independently thereof. The 2d supplementary article refers to the impression of the Cherokee people, that the expenses of their removal, and "the value of certain claims which many of their people had against citizens of the United States," were not to be borne by the five millions fund; which impression was thought correct "by some of the Senators who voted on the question," and the 3d article allows $600,000 "to the Cherokee people, to include the expense of their removal, and all claims of every nature and description against the Government of the United States, not herein otherwise expressly provided for, and to be in lieu of the said reservations and pre-emptions, and of the sum of $300,000 for spoliations, described in the 1st article of the above-

mentioned treaty." In addition to this, the law of 12th June, 1838, appropriated the further sum of $1,047,067 "in full for all objects specified in the 3d article of the supplementary articles of the treaty of 1835, between the United States and the Cherokee Indians, and for the further object of aiding in the subsistence of said Indians for one year after their removal west: *Provided*, That no part of the said sum of money shall be deducted from the $5,000,000 stipulated to be paid to said tribe of Indians by said treaty: *And provided, further*, That the said Indians shall receive no benefit from the said appropriation, unless they shall complete their emigration within such time as the President shall deem reasonable, and without coercion on the part of the Government."

The expense of removal, in the opinion of the late Attorney General, (Mr. Butler,) was the first charge on the sum of $600,000 provided by the 3d supplementary article, and the balance to be applied to the various claims which shall be established; and if that fund was insufficient for the several objects contemplated, then he was of opinion that the deficiency might be supplied by a resort to the general fund of $5,000,000. [See his opinions of 6th December, 1837, and of 3d February, 1838.] This is, undoubtedly, the correct interpretation of the treaty; for it must have been perfectly well known to those who made it, that the sum of $600,000 would fall very far short of meeting the purposes named in the supplement. The law of 1838, in consideration of a different reading by the Cherokees, appropriated $1,047,067 in full for all the objects specified in the 3d supplementary article, and to aid in the subsistence of the Indians for one year after their removal; proving, clearly, that the whole expense was not expected to be borne by the fund thus set apart. If, then, the removal was to be first borne, and the excess of claims over and above the balance of the $1,647,067 was to fall back on the $5,000,000, it is immaterial, as to results, which expenditure is first met—taking care that the claims recognised by the 3d supplemental article, exclusive of removal and subsistence, (which are a general charge) do not exceed the fund as enlarged by the law of 1838. This view is sustained by the Attorney General, in the opinion of 3d February, 1838, when he speaks of the preference given to the expense of removal and subsistence as merely nominal, and recognises the payment of all the claims.

The spoliations were, by the original treaty, restricted to $300,000; but the supplement enlarged the lien of this class of claims, by throwing them on a greater fund, (still further swelled by the law of 1838,) of which the supplement, expressing the last agreement of the parties, does not require that there should be any subdivision. If, therefore, the mass of the claims in the 3d supplementary article do not exceed the gross amount allotted for them, they will be paid in full, if there are means from any fund to meet them; if there are not, or they should run beyond the sum provided, there must be, in either case, a ratable distribution. The claims for improvements are a charge upon the general fund.

It next becomes necessary to inquire, Who are entitled, in reference to their personal qualifications and residence, to present claims? The treaty was made with the Cherokee nation. All their land east of the Mississippi was ceded. Whoever, therefore, owned and *possessed*, at the date of the treaty, improvements or ferries on the ceded territory, are entitled to be paid for them: this implies that they lived on that territory, unless they prove to your satisfaction that they were "dispossessed in a

lawless manner, or under any existing laws of the State where the same may be situated;" in either of which cases, they would or would not be entitled to compensation, according to the evidence they adduced on other essential points, without reference to their residence.

The claims for reservations which were taken under the treaties of of 1817 and 1819, (according to an opinion of the Attorney General of 14th May, 1838,) but which are on the land ceded in 1835, are entitled to no compensation for the reservations, because they were unauthorized, and should have been located on the cessions of 1817 and 1819; but if they were improved, the reservees would, admitting all the other prerequisites, have a claim to be paid for the improvements, under the 9th article of the treaty of 1835, because within and upon the lands ceded by it. The reservations properly taken (under the treaties of 1817 and 1819, and recognised by the treaty of 1835) must necessarily be without the Cherokee territory ceded by the latter, and are to be paid for as unimproved land, except those of the second class before stated, which require payment for land and improvements both; for the owners of them were entitled to grants of the land by the original treaty, for which money was substituted by the supplement; which would, if unaltered, have secured to them the land, and all that was on it. It is not material where the claimants for reservations lived. Their property was ceded; and, if prudent, they would probably be living on them without the cession of 1835, unless where they were forcibly ejected.

Claims under the 16th article, if any such should be preferred, it has been already stated, would not probably be entitled to your favorable consideration. This article provides for the protection of the Indians in their possessions until the 23d May, 1838; and where they had been ousted, and no grant had actually issued before the enactment of the law of Georgia of December, 1835, to regulate Indian occupancy, that they should again be put into possession, "and placed in the same situation and condition, in reference to the laws of the State of Georgia, as the Indians that have not been dispossessed; and if this is not done, and the people are left unprotected, then the United States shall pay the several Cherokees for their losses and damages sustained by them in consequence thereof." On the 3d day of March, 1823, a law was passed by Congress, appropriating $50,000 to purchase certain tracts of land in the State of Georgia, reserved to the Indians "by the treaties with the Cherokee Indians of the eighth day of July, one thousand eight hundred and seventeen, and of the twenty-seventh day of February, one thousand eight hundred and nineteen." Under this law, Col. Duncan G. Campbell (with whom was afterwards associated James Meriwether, esq.) was appointed commissioner, and his instructions are dated 17th March, 1823. They subsequently made a report, returning a list of those reservees of whom they had purchased according to the law, showing that they had paid $45,665 to them. Of this list, you will herewith receive a copy. It is presumed all those fairly entitled to its provisions applied under this law; and if they did not, that they were guilty of laches, which would operate in bar of their claims now. It is probable the clause of the 16th article was inserted to satisfy all parties who *could* claim; and it is possible there may still be just claims made under it. But all such should be very closely scrutinized; and if they might have availed themselves of the law of 1823, and did not do so, they ought not

now to receive your decree in their favor. The 12th article stipulates that those individuals and families of the Cherokee nation that are averse to a removal west, and wish to become citizens of the States where they reside, and such as are qualified to take care of themselves and their property, shall be entitled to receive "their due portion of all the personal benefits accruing under this treaty for their claims, improvements, and *per capita*." These persons should have presented their claims to the commissioners who were in session in 1836 '37 '38 and '39. As to claims that may be preferred to the board lately organized, and now in being, they are not entitled to compensation, unless those who hold them shall emigrate. If the appropriation of 12th June, 1838, had not been made, the Cherokee fund would have been exhausted long since: what remains of the consideration of the treaty, and appropriations in addition to it, can, therefore, be regarded in no other light than as a part of the $1,047,067; respecting which, the law of 1838 contains the proviso "that the said Indians shall receive no benefit from the said appropriation, unless they shall complete their emigration within such time as the President shall deem reasonable, and without coercion on the part of the Government." If this view be correct—and it is not seen how it can be otherwise—emigration is an element that must enter into every claim entitled to payment. Besides, those now east, by a rigid and strictly legal construction of the treaty, would meet with difficulty in sustaining claims; it requires an equitable interpretation to sanction them. This I think the true principle, inasmuch as most of those who had received compensation did not comply with the treaty stipulation as to removal, any more than those still east—the difference being only in the length of time; still, when the latter come before the board, it should be with the offer to place themselves on a footing with those who have preceded them.

You will not, while sitting east of the Mississippi, consider any claim that may be presented by, for, or on behalf of, a Cherokee that has heretofore emigrated; such you will receive and investigate when you shall have crossed the Mississippi, and fixed upon a place or places for your deliberations. Of this instruction, notice has been already transmitted to the superintendent and agent in the western territory.

You will proceed to such point in North Carolina as may be most suitable and convenient for the prosecution of your inquiries and the discharge of your duties; and, after their performance in North Carolina, you will be pleased to cross the Mississippi; and you will then, having given in both cases the notice necessary to afford the claimants full opportunity to present their respective claims, proceed in your examinations and investigations in the Cherokee country west.

It is very important that your reports, east and west, should be received as early as practicable, to enable the eastern Cherokees to avail themselves of the conditions on which only they can receive payment of claims, by removing to the west, if possible, during the present year. So soon as your reports are received, an apportionment of the fund will be made here, and an agent authorized to disburse it to the claimants in such ratable proportions as shall be just, after applying what may be required to the satisfaction of the debts found by you to exist at the date of the treaty. The necessity, therefore, of entering upon the duties of

your appointment at as early a day as practicable must be apparent, and furnishes a strong reason for urging it.

Your compensation will be at the rate of $3,000 per year each, and that of your secretary at the rate of $1,500 per annum, respectively, inclusive of all charges. You are authorized to draw bills of exchange on the Commissioner of Indian Affairs, if at any time you should desire to do so, for such sums as may be due on account of compensation, attested by your certificates, respectively, that so much is due to you. The same course may be pursued by your secretary, to whose drafts your certificate will be attached, that the sum drawn for is due.

Very respectfully, your obedient servant,

T. HARTLEY CRAWFORD.

Hon. JOHN H. EATON, of Washington, D. C.,
Hon. JAMES IREDELL, of Raleigh, N. C.,
Commissioners under 17th article of Cherokee treaty of 29th December, 1835.

H 2.

WAR DEPARTMENT,
Office Indian Affairs, August 10, 1843.

GENTLEMEN: Referring to my letter of the 2d instant, I have now to state that I yesterday submitted Governor Eaton's letter of the 20th ultimo to the Secretary of War, who, after having perused it, returned it to me, with directions to inform you that he thinks it is unnecessary and inexpedient for you to return to Washington until you have completed your business in Arkansas; that so soon as you have received all the claims, with the necessary proof, in North Carolina, you should at once proceed to the Cherokee country west, and while there, in waiting for the claimants to have their business prepared for your action, you can decide the cases presented in North Carolina. He directs me to say, further, that no money can or will be paid upon your awards until all the cases, both in North Carolina and in the Cherokee country west, have been finally passed upon, and the fact ascertained whether the funds applicable to the payment of them are sufficient to pay in full, or otherwise.

Very respectfully, your obedient servant,

T. HARTLEY CRAWFORD.

Messrs. EATON and HUBLEY,
Cherokee Commissioners, Murphy, Cherokee country, N. C.

H 3.

WASHINGTON, *October* 3, 1843.

SIR: The undersigned commissioners, authorized to adjudicate claims arising under the treaty of 1835 and the act of Congress of 1842, report:

That, having proceeded to the Cherokee country, North Carolina, claims by the Indians of every nature and description were presented, and the testimony of each was fully heard and examined into. This

being done, it was considered advisable to return to Washington, to make out reports in the different cases submitted; it not being conceived necessary for that purpose for the commissioners to remain where the claimants reside. A further consideration was, that many facts, not in their possession, but which rested with the records of the War Department, were indispensable and necessary to be resorted to, in making out satisfactory opinions on the presented demands.

There seemed to be a propriety in having first settled the business which occasioned our visit to North Carolina, that the amount to be charged against the appropriation of 1837, for the fulfilment of this treaty, might be fully ascertained before any action was taken in relation to those which existed amongst the Cherokee Indians in the west.

An additional consideration was, that the appropriation already made by Congress would be altogether insufficient to meet the expenses necessarily incident to an examination of the claims of the western Cherokees; and that no commitment might be made by any precedent act of ours, it was considered most advisable to defer any further action until Congress should conclude whether or not these western claims should be also examined into.

At present, we are engaged in preparing our reports and opinions, in detail, on all matters submitted; whereby the nature and character of every claim east of the Mississippi river will be presented for the information of the Department of War.

Respectfully, your most obedient,

JOHN H. EATON,
EDWARD B. HUBLEY.

The PRESIDENT OF THE UNITED STATES.

H 4.

WAR DEPARTMENT, *October* 5, 1843.

GENTLEMEN: The President of the United States has transmitted to me your letter of the 3d instant, which should have been transmitted to him through this department. He directs me to say that it is not for you to consider whether Congress may or may not make additional appropriation to meet future expenses or claims; and that it would be best, in every point of view, for you to proceed to Arkansas with as little delay as possible.

I am, very respectfully, yours,

J. M. PORTER.

JOHN H. EATON and EDWD. B. HUBLEY, Esqs.,
Commissioners, &c., Washington.

H 5.

WAR DEPARTMENT, *November* 25, 1843.

GENTLEMEN: On the 5th day of October last, by order of the President of the United States, I addressed a communication to you, in answer to

your letter of the 3d of that month. In that letter I stated that I was directed to say to you, "it would be better, in every point of view, for you to proceed to Arkansas with as little delay as possible." The President, having understood that you are still in Washington, directs me to ask why you have not complied with his wishes thus distinctly expressed.

I am, respectfully, yours,

J. M. PORTER.

JOHN H. EATON and EDWD. B. HUBLEY, Esqs.,
Commissioners, &c.

I.

WAR DEPARTMENT,
Office Indian Affairs, November 29, 1839.

SIR: I have the honor to lay before you the report of the commissioners appointed under the 17th article of the Cherokee treaty of December 29, 1835.

The first question that arises, relates to the amount belonging to the Indians under that treaty, and by virtue of the several acts of Congress which have been passed in reference to it.

The general consideration was $5,000,000; of which $500,000 was agreed upon as the price of the tract of land (per art. 2) adjoining the Missouri line, computed to contain eight hundred thousand acres of land, leaving - - - - - - - $4,500,000

By article 1 it was stipulated that, if it was not intended to include spoliations in the five millions, then an additional allowance of $300,000 was to be made for this purpose. This sum was extended, by the 2d of the supplementary articles, to $600,000, "to include the expense of their removal, and all claims of every nature and description against the Government of the United States not herein otherwise expressly provided for, and to be in lieu of the said reservations and pre-emptions, and of the sum of $300,000 for spoliations," &c. - - - - - - - - 600,000

Appropriated by act of July 2, 1836 - - - - 5,100,000

The sum of $15,000, to extinguish Osage reservations under the 5th article of the treaty of June 2, 1825; $25,000 for the improvements on the missionary reservations at Union and Harmony, as provided in the 4th article; and the investment of $214,000, for which the permanent Cherokee annuity of $10,000 is commuted by the 11th article, are to be borne by the United States, in addition to the consideration proper. By the act of June 12, 1838, section 2, there was appropriated, "in full of all objects specified in the 3d article of the supplementary articles of the treaty," &c., and "for the further object of aiding in the subsistence of said Indians for one year after their removal west" - - - - 1,047,067

6,147,067

No benefit can be received from this appropriation, unless the Indians "shall complete their emigration within such time as the President shall deem reasonable, and without coercion on the part of the Government."

There were also appropriated by the last law (section 3) "for arrearages of annuities, for supplying blankets and other articles of clothing for the Cherokees who are not able to supply themselves, and which may be necessary for their comfortable removal, and for medicines and medical assistance, &c., and for such other purposes as the President shall deem proper to facilitate the removal of the Cherokees, $100,000."

This last (of which $67,000 remain in the treasury) did not belong to the Cherokees as a nation, further than as it brought up arrearages of annuities, which would make no part of the great fund gained by the treaty of 1835 and the law of 1838.

This being the general fund provided for the use of the Cherokees at large, who were parties to the treaty of cession of 1835, or therein embraced; the next inquiry is, to what purpose, under the treaty, was it applicable?

The 1st and 10th articles provide for spoliations $300,000; but it having been suggested that this sum was not intended to be deducted from the general consideration of five millions, it was embraced in the above provision of $600,000, which was extended by the law of June 12, 1838, section 2, by $1,047,067, "in full for all objects specified in the 3d article of the supplementary articles of the treaty of 1835 between the United States and the Cherokee Indians, and for the further object of aiding in the subsistence of said Indians for one year after their removal west." This appropriation, I thought, was intended to include the above sum of $600,000, and not to be additional; but, upon examination, Congress would seem to have intended to give both.

The aggregate, $1,647,067, is applicable to all the purposes mentioned in the 3d supplementary article—to wit: removal, and all claims against the Government not otherwise expressly provided for by the treaty; and is in lieu of reservations and pre-emptions, and of the $300,000 set apart in the 1st article for spoliations; and may be used, by the act of 1838, to aid in subsisting the Indians for one year west. It must, it is considered, be expended and distributed agreeably to the limitations of the treaty; for the provision as to the $600,000 is express to that effect, and the last appropriation is only an expansion of that stipulation.

It is necessary to carry out every part of the treaty; and the inquiry is, as to the construction which will best effect this. It must be observed that, for some objects, the treaty sets apart specific funds. Spoliations are limited to $300,000 in the 1st article. They are again, by the 3d supplementary article, to be paid out of $600,000, in which the former sum is merged; and the latter is enlarged by $1,047,067 in the law of 1838. The same fund is to pay all claims against the United States not expressly otherwise provided for by the treaty; and it is to be in lieu of reservations and pre emptions, which are expressly relinquished by the 1st supplementary article. The pre-emptions had no actual existence, and, the claim to them being relinquished, they are gone; the reservations, being substantive executed rights, are to be paid for, so far as included in the treaty. The several claims just mentioned must be paid for, if compensated at all, out of the sum of $1,647,067; they have no hold on the general fund. Now, it is certain that if you pay for removal, and then bring in the other drafts which

are specific liens, you will not have sufficient money to meet them; but removal and subsistence are made by the treaty (notwithstanding an apparent inconsistency in the supplement) general charges. I would therefore apply the fund to spoliations and reservations, and any other claim not expressly provided for; and what shall remain after they are met, would go to the expense of removal and subsistence. But as it does not make any difference to the Cherokees how the funds shall be marshaled, the effect being the same in the end; and as it is not material to justice, out of what fund any particular expenditure may be taken, it is unnecessary to dwell upon this branch further than to say that the $1,647,067 are more than equal to the special purpose to which they belong. Having disposed of this particular fund, let us ascertain what are the just charges upon the general one.

By article 9, improvements which add value to the land in Cherokee possession in 1835, and also ferries owned by them, according to an appraisement, including those improvements, and ferries of which they have been dispossessed unlawfully, or by the laws of the State in which they are situated, are charged upon the great fund embracing the improvements of those who moved west since 1833, and were entitled, by the terms of their removal, to the benefits of a final treaty, according to the approved value before the emigration, unless where fraud was shown in the valuation prior to December, 1835. Out of the moneys due the Indians for "improvements and claims," their just debts shall be paid. The only claim here referred to, that I am aware of, which they could have under this treaty, would be for spoliations. This article applies to all improvements and ferries within the land ceded by the treaty of 1835; but reservees under former treaties of 1817 and 1819 (although one class, which will be noted particularly under the head of reservations, is entitled on a different principle) can make no claim for improvements under the 9th article, unless they were in possession of them; and that, it is presumed, they were not, from the provisions of the 13th article, unless where they happened to take erroneously on the land transferred in 1835. I am of opinion these reservations were as much ceded by this treaty, as the tribe property mentioned in the 1st article; for the 13th article provides for compensating two classes of claimants as for unimproved land, and for making grants to a third; and the 3d of the supplementary articles appropriates six hundred thousand dollars in lieu (among other things) of reservations which are relinquished by the first of those articles; thus cutting off the right to grants, but substituting a money remuneration, which makes an end of what was a previously recognised claim—or, in other words, cedes it.

By the 10th article, the United States agreed to pay the "just debts and claims against the Cherokee nation held by the citizens of the same; and also the just claims of citizens of the United States for services rendered to the nation; and the sum of sixty thousand dollars is appropriated for this purpose; but no claims against individual persons of the nation shall be allowed and paid by the nation." The construction put upon this claim by the Attorney General limits to $600,000 the payments to citizens of the United States, and defines the services recognised to be of a lawful nature, "performed at the instance and request of the acting authorities of the nation," excluding the Cherokee claimants against the nation from any participation in this small fund, and throwing them upon the general one. This reading doubtless executes the intent of the parties.

The same article provides for the investment of $200,000 as a national

fund, $150,000 for education, and $50,000 for orphans; and the fourth clause of the 12th article appropriates $100,000 for the poorer class of Cherokees, which, by the 4th of the supplementary articles, was added to the national fund—making an aggregate of $500,000; which, with $214,000 substituted by article 11 for the permanent annuity, (but, being a commutation of one debt due by the United States for another, is no charge upon the consideration of the treaty of 1835,) have been invested. The third clause of the 12th article designates a Cherokee committee of twelve persons, with authority, among other things, to "transact all business on the part of the Indians which may arise in carrying into effect the provisions of this treaty, and settling the same with the United States," and to fill any vacancies that might happen in their own body.

This Indian committee, it was thought, (and rightly, it appears to me,) were entitled from the nation to compensation for the time spent and services rendered by virtue of their appointment; and it was authorized.

The 9th article provides for the appointment of agents to value improvements, &c.; and their compensation, together with reasonable incidental expenses, as well as those of a proper character arising out of the disbursements to the improvement-owners, and in discharge of their debts, are payable by the Cherokee tribe.

By the 15th article it is stipulated "that, after deducting the amount which shall be actually expended for the payment for improvements, ferries, claims for spoliations, removal, subsistence, and debts and claims upon the Cherokee nation, and for the additional quantity of lands and goods for the poorer class of Cherokees, and the several sums to be invested for the general national fund provided for in the several articles of this treaty, the balance, whatever the sum 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, who are entitled by the terms of their enrolment and removal to all the benefits resulting from the final treaty between the United States and the Cherokees east. They shall also be paid for their improvements according to their approved value before their removal, where fraud has not already been shown in their valuation." This article is also subject to the modifications made by the supplemental articles.

Article 12, it may be mentioned in this connexion, declares "that those individuals and families of the Cherokee nation, that are averse to a removal to the Cherokee country west of the Mississippi, and are desirous to become citizens of the United States where they reside, and such as are qualified to take care of themselves and their property, shall be entitled to receive their due portion of all the personal benefits accruing under this treaty for their claims, improvements, and *per capita*, as soon as an appropriation is made for this treaty." The 8th article provides that "such persons and families as in the opinion of the emigrating agent are capable of subsisting and removing themselves, shall be permitted to do so; and they shall be allowed, in full for all claims for the same, twenty dollars for each member of their family; and, in lieu of their one year's rations, they shall be paid the sum of thirty-three dollars and thirty-three cents, if they prefer it."

A number of Cherokees remain east, and they, through their agent or attorney, had preferred a claim for the above sums of twenty dollars and thirty-three dollars and thirty-three cents, as a commutation for removal and subsistence. The statement of the claim refutes it. Commutation is an ex-

change of one claim or right for another. Have these eastern Cherokees earned a right to their transportation west, and subsistence there, by declining to go? It has been said, this was promised them. It is singular it should be so. Be that as it may, I find nothing in the treaty to sanction a claim so unsustained by reason, but everything opposed to it. In the second clause of the 8th article, provision is made for the removal and subsistence of those Indians who reside out of the nation, but who shall remove within two years; and the 13th article gives those who choose to stay east, "their claims, improvements, and *per capita*," in exclusion of anything in lieu of removal and subsistence. The word "claim" is relied on as broad enough to include them. It is so in the abstract; but, in this treaty, it is never used to express removal and subsistence, which are invariably spoken of specifically, and *claims* applied to spoliations and debts against the nation. It is too plain to dwell upon, and is noticed here only because it has been much pressed.

The 13th article relates to reservations, which, it was agreed, the United States should grant or pay for, according to the special provisions of the article, independent of the sum stipulated to be given for the cession of land; but the 3d supplementary article granted $600,000 (among other things) in lieu of reservations; thus casting the obligation of compensating, for this whole class of claims, upon that sum—afterwards enlarged by $1,047,067. The rights themselves, having been relinquished by the 1st supplementary article, still existed as claims to money—the amount of which was to be adjusted on the principles laid down in the 13th original article. These reservations were by it divided into three classes: 1st. Reservees under former treaties, or their heirs or descendants, who have not sold, and who had complied with the terms on which the reservations were granted, as far as practicable, should, where they had been sold by the United States, have a just claim to be paid therefor as unimproved land. 2d. Reservees who were obliged, by the laws of the State in which these lands were situated, to purchase from the State, or to abandon them, had a just claim—in the former case, to the money paid, with interest; and, in the latter, to the value of the reservation, as unimproved land. 3d. Reservees, or their heirs or descendants, whose lands had not been sold by the United States, and who had complied with the conditions on which the reservations were made, as far as practicable, were entitled to a grant of them; which provision was extended to reservees under the treaty of 1817, who had complied with the stipulations of the said treaty, as far as practicable, "although, by the treaty of 1819, such reservations were included in the unceded lands belonging to the Cherokee nation." This last provision of this inartificially drawn treaty of 1835 is not very intelligible; though it is believed to mean that reservations under the treaty of 1817, notwithstanding they were located on lands not then ceded, nor afterwards granted in 1819, shall be entitled to compensation, although both these treaties required the reservations under them, respectively, to be located within their several cessions. It is sufficiently clear that claims for reservations, under both these treaties, are provided for. The three classes are protected. The two first to be paid for as unimproved land, and not having right to improvements-compensation, under the 9th article, unless the reservees *possessed* them. The last class to receive remuneration for both land and improvements; for they were entitled, by the 13th article, to grants of the reservations, which would cover both. As I construe the treaty, the clause which confirms reservations to those to whom

they were given in 1817, "although, by the treaty of 1819, such reservations were included in the unceded lands belonging to the Cherokee nation," refers to the territory which remained to the tribe after the cession of 1819 was cut off; and it was, to my mind, intended to make good locations of reservations on the district conveyed in 1835, which, without this sanction, would have been untenable; for the treaty of 1819 clearly, and the treaty of 1817 I think, (though it is somewhat obscure,) required reservations under them, respectively, to be placed upon the district they severally granted to the United States. What land was unceded after the treaty of 1819 was executed, but that embraced in the treaty of 1835? If I were considering this question *de novo*, I should give the opinion mentioned. But the late Attorney General, on the 14th of May, 1838, expressed the opinion that there was no provision in the treaty of 1835 for the reservees under the treaties of 1817 and 1819, who located within the grant of 1835; that these locations were unauthorized, and not to be paid for as unimproved land under the 13th article; but that they were entitled to be compensated for their improvements under the 9th article, because in the last cession. I think they were entitled to be paid for both, if otherwise within the provisions of the treaty. But the view of the highest law officer of the Government must be taken as correct, and acted on accordingly. The children (or their descendants) of deceased reservees under the treaty of 1817 are entitled in their own right, because the reversion in fee is expressly given them by the 8th article, stipulating for dower for the widow of the original reservee; and I think, if any of the heads of families for whom reservations may be made should remove therefrom, they should revert to the United States. The same remark applies to the reservations granted under the 2d article of the treaty of 1819; but not to those given under the 3d article, which are in fee simple. A question here suggests itself: If the original life reservee is still living, is he to receive the whole of the money at which the land may be valued as unimproved; or would his children be entitled to any part, as reversioners? The scope of the 13th article, which, abrogated by the supplemental article, so far as grants of land are concerned, furnishes the guide for the money allowances substituted for the land, shows, in my judgment, that the original reservee may draw the whole, as he might forfeit the reservation by removing from it under the 8th article of the treaty of 1817, and the 2d article of that of 1819.

This review of the provisions of the treaty embraces all that relates to the duties of the commissions raised under the 17th article, which it is my special purpose to bring before you, and some considerations out of the range of those duties; which I embraced the occasion to express, that, if my views should be deemed erroneous, they might be corrected when the department acts finally, as it must soon do, in distribution *per capita* of whatever balance shall remain to the Cherokees.

The above article stipulates that "all the claims arising under, or provided for in, the several articles of this treaty, shall be examined and adjudicated by General Wm. Carroll and John F. Schermerhorn, or by such commissioners as shall be appointed by the President of the United States for that purpose, and their decision shall be final; and on their certificate of the amount due the several claimants, they shall be paid by the United States. All stipulations in former treaties, which have not been superseded or annulled by this, shall continue in full force and virtue."

On the 7th of July, 1836, commissioners were appointed, and instructions

issued to them on the 25th of the same month, to appropriate the value of improvements, and ferries, and claims the individual Indians may have upon the nation, to the discharge of their debts; to examine claims for spoliations, which shall be submitted to the Indian committee, and decided upon the evidence which may be adduced; to require, as a general rule, the names of those who committed depredations; to give public notice of the time and place of holding their deliberations, which shall be had in open council; to make a register of all claims, a summary of the facts in each case, and the grounds of decision, and the amount awarded; which they were required to forward to the department when their labors should be completed. If the debts exceeded the valuation, a ratable division was to be made; if they were less, the balance, of course, belonged to the Indian. The claims for national debts they were requested to lay before the Indian committee, and, if not admitted, to dispose of them according to the testimony. They were further informed that $300,000 was appropriated to spoliations, and that it was intended, when practicable, that payments for improvements, debts, or claims, should be made by the disbursing officers, under the immediate supervision of the commissioners.

On the subject of reservations, the opinion of the Attorney General was taken on the 6th of December, 1837. He classified them as I have done, (or, rather, as the treaty does;) and, as has been already stated, thought that those claimed under the treaties of 1817 and 1819, and located on the territory ceded in 1835, were not to be paid for as unimproved land. He was further of opinion, that reservations of the two first classes, under the 13th article, were entitled to a pecuniary compensation, not to be deducted from the Cherokee fund, but paid by the United States, as provided in the 13th article. This office addressed the commissioners on the 12th of December, 1837, sending a copy of the above opinion for their guidance, and requesting them "to transmit, as early as practicable, an estimate of the amount that will be required, that an appropriation may be obtained;" and on the 19th of June, 1838, they were instructed to make no payments whatever on account of reservation claims under the treaties of 1817 and 1819, either to the Indian reservees or to their assignees; but they were requested to proceed in and to complete the examination of those claims, and to report each case, and the testimony bearing upon it, in full, to this department. Without disregarding the official weight of the above opinion, or at all questioning its authoritative character, I beg leave to submit a different view. By the 13th article, the two first classes of reservations were to be paid for by the United States, and those of the third class were to be granted to the owners. The stipulation for the payment of reservation claims was special; the amount to be awarded for them "shall not be deducted out of the consideration money allowed to the Cherokees for their claims for spoliations and the cessions of their lands;" but the same is to be paid for independently by the United States, as it is only a just fulfilment of former treaty stipulations. It must not be taken from the $600,000, nor lessen the amount destined for spoliation claims. The first of the supplementary articles relinquishes all the pre-emption right, and all the reservations provided for in articles 12 and 13, and declares them void; and the 3d of these articles furnishes a fund to include all claims not otherwise expressly provided for in the treaty, and *in lieu of said reservations*, and of the sum of $300,000 for spoliations. It is a sum appropriated subsequently by Congress on the 2d of July, 1836, and set apart in the treaty for the fulfil-

ment, among other things, of the undertaking to pay in the 13th article. The exception of the claims "otherwise expressly provided for," in my judgment, applies to the payment of $15,000 for the Osage reservations; to the agreement to pay for the missionary establishments; and, perhaps, to the $214,000 which were to be invested in lieu of their permanent annuity. Neither the former treaties, under which the reservations of the 1st and 2d classes are claimed, nor the agreement to pay for them in the 13th article are, it is true, abrogated by the 1st supplemental article; but the agreement is performed in the 3d, which refers to *all* the reservations released in the 1st, and substitutes a specific sum for the claim to payment by the United States under the 13th original article. I think the Cherokees are not entitled to be paid by the United States, independently of the fund of $600,000, for reservations of the 1st and 2d classes—that is, for those which were not sold by the parties, who had done all that was practicable to comply with the terms on which they were granted, but which were sold by the United States; or where, under the like circumstances, they had been compelled, under the laws of the State in which they were situated, either to purchase them from the States, or to abandon them; but that this fund was intended to meet such claims, among others. By reference to the act of Congress of the 12th of June, 1838, it will be seen that the sum of $1,047,067, by the addition of which it increased the above funds, was given *in full* for all objects specified in the 3d supplementary article, and to further the object of aiding in their subsistence west, with a proviso that no part of the appropriation should be deducted from the $5,000,000. If the late Attorney General had formed his opinion after this law was passed, it would, probably, have been different; and it is not unlikely that his construction of the treaty, in the particular under consideration, may have led, in part, to the liberality manifested by the law. It seems to have been intended to put an end to all further Cherokee claims. Special instructions were given to the superintendent of valuations, who was required to furnish rolls of them to the commissioners, signed by the appraising agent, and certified by himself. The country was districted, and valuing agents assigned to each district. If they agreed, and the superintendent approved, their report was conclusive. If they disagreed, the decision was referred to the superintendent, or one of the commissioners, as might be most convenient; or, in case of dissatisfaction by the owner, to the joint action of the commissioners. When there was a contest about the ownership of improvements, or the title to the land, the opinion of the commissioners was to decide it.

Without entering into further detail, these appear to be the material parts of the directions given. After a careful and laborious examination of the official proceedings of the commissioners, they have, in my opinion, conformed to the provision and design of the treaty in their decisions—with few exceptions, which will be noted hereafter. In coming to this conclusion, I have been governed by the principles and views laid down in the first part of this report. I speak not now of the difference of opinion which might, and does often, arise between two intelligent men on a view of the same circumstances; for, if the commissioners had jurisdiction of any claim or question, and gave the *kind* of compensation the treaty intended, I think their decision is final and irreversible. As to admitted claims, the only inquiries are those stated. If they had not cognizance of the case, or gave a remuneration of a different description from that prescribed, (as land for

money,) you can disapprove *in toto*, or *pro tanto*. As to the rejected cases, they must, it seems to me, stand as the commissioners have left them; for, if they had jurisdiction, they had the power to reject them finally; if they had not jurisdiction, that was a good reason for not receiving them favorably.

The late Attorney General was of opinion, as before mentioned, that there was no provision in the treaty of 1835 for reservations under the treaties of 1817 and 1819, which were located within the cession of 1835, because such location was unauthorized by those treaties; and these reservations were not to be paid for as unimproved land under the 13th article, although they had a just claim for improvements under the 9th article, because on the land ceded in 1835. Two of the commissioners thought differently, and in 17 such cases allowed for the land as unimproved. I have already expressed my own opinion on this question. It appears to me the decision of the commissioners is final; and so thought the Attorney General, in an opinion of the 27th of August, 1836, saying, that because the determinations of the board were, under the treaty, without appeal, the opinions he had given must be regarded as unofficial. As to the conclusiveness of their decisions, I invoke the aid of his authority and sanction.

There are four cases of a peculiar character: in three of which, it seems to me, the commissioners have run across the principles and provisions of the treaty; and if you shall think so, their decisions may be reversed—in one case wholly, and in the others in part. The remaining one is within the reason and equity of the treaty, though in words, perhaps, against it. They are all cases of reservations. The first is William Barnes's claim, No. 10. He was a reservee, and was compelled to pay, under the laws of Tennessee, $800; but afterwards sold to Dr. A. P. Pen for $3,000, in which he was probably remunerated for the payment mentioned. The commissioners decreed his wife and children the $800, and interest; which are not paid, so far as can be gathered from the records. If no sale had taken place, this would have been well; but the 13th article provides that, "where the reservees have sold their reservations, or any part thereof, and conveyed the same by deed or otherwise, and have been paid for the same, they, their heirs or descendants, or their assignees, shall not be considered as having claims upon the United States under this article of the treaty, nor be entitled to receive any compensation for the lands thus disposed of." Money, in lieu of the reservation, is to be distributed, by the 3d supplemental article, according to the provisions of the treaty; and it seems to me that the act of the commissioners is inconsistent with them, without authority, and reversible.

The next case is that of Bald Hunter, No. 7. His heirs, when called on by the laws of Tennessee to pay $800 for their reservation, were unable to do so; and for that reason sold it to Wm. S. Blain and John McGehee. The $800 were deducted from the consideration, and paid by the grantees to the State, and were allowed by the commissioners to Bald Hunter's heirs, with interest, of which $111 40 appeared by the records to have been paid. The clause of the 13th article, cited in the last case, applies verbally here; but the equity and reason of the claim are strong. It was virtually a payment by the heirs, who sold under compulsion. If they had abandoned it, they would have had a clear claim for the value of their property as unimproved land. I submit it for your consideration. No. 66: Charles Thompson had a life-estate reservation under the treaties of 1817 and 1819, which has not been sold by the United States, but is in possession of a white

man, who drove the reservee off in 1825. The commissioners decree a grant of the land. Had they power to do so? I think not. The 13th article provides for a grant in such cases; but the right to one in such circumstances is cut off by the first of the supplementary articles, which expressly relinquishes and declares void all the reservations provided for in the 13th article; and the 3d supplemental article furnishes money instead. So far as this decree directs a grant, it is, in my opinion, against the treaty, and void, but good so far as it establishes Thompson's claim; and he ought to receive compensation for it as unimproved land, as well as remuneration for whatever improvements he made on it.

The last is the case of Sutton Stephens, No. 91, who was allotted a reservation under the treaties of 1817 and 1819, and within the cession of the latter, which he now holds, and still lives on. To him a grant is decreed. This is a hard case; but the stipulations of the treaty are positive. It is not stronger than Thompson's case; for, though Stephens is in possession, Thompson was driven off. I have tried to discover some good reason for recommending the sanction of this decision; and endeavored to find it in the fact of the reservee's possession, and to confine the operation of the 13th article to reservations not possessed by the Indians, and to those located on the cession of 1835; but it embraces all of every character under any former treaties with the United States, and they are all declared void. I am constrained, therefore, to say that a grant is forbidden, and, so far as the decision directs one, it is bad; but it establishes the claim, and Stephens should be paid for his reservation as unimproved land.

It appears, from the records of the commissioners from which this statement is made, that they allowed:

1. For improvements		$1,683,192 77½
2. Spoliations		416,306 82½
3. National debts due Cherokees	$19,058 14	
4. National debts due citizens of the United States	51,642 25	
		70,700 19*
5. Reservations (of which they have allowed 42)		159,324 87
		$2,329,524 66

Of the 1st class of reservations, there were none.

Of the 2d class, 25	$73,772 37	
Of the 3d class, 17	85,552 50	
And there were paid under their direction, on valuations and spoliations, and to debts		$1,351,450 13⅛
To national debts due citizens of the United States	$51,642 25	
To national debts due Cherokees	17,948 34	
		69,590 59
On reservations of the 2d class		17,204 77
		$1,438,245 49
		$891,279 17

* There is a plain mistake of 20 cents; but it is carried out as on the commissioners' award.

There were sent west, prior to January 1839, a list of balances (with the commissioners' requisitions) for improvements and spoliations - - - -	$214,383 03¼
There are yet due for that class of claims - -	536,408 03¼
To national debts due to Cherokees - - -	1,119 80
To reservations taken as land ceded by treaties of 1817 and 1819 - - - - - - -	56,567 60
To reservations on cession of 1835, on which nothing has been paid - - - - - - -	85,552 50
	$894,030 96⅞

The two reservation cases, in which grants are awarded, are not noticed above. The above is the substance of the statement made by the commissioners, who admit a discrepancy within $9 97½ of that which is exhibited.

By the examination which has been made of the proceedings and report of the commissioners, it appears, in reference to improvements and spoliations, as will be shown in detail by the accompanying papers marked A, B, C, and D, that they have advanced (see A) the claimants all that was found due them, to the amount of - - - - $373,937 87½

To others, before and after their debts were paid - - 94,206 38¾

By exhibit B they have—1st, stated more to be due west to individuals, than appears to be so, by - - 2,505 16

2d. Paid more to debts than the amount thereof - - 231 83¼

3d. Advanced more than appeared to be due the persons paid - - - - - - 213 65¼

By exhibit C, that sums are charged to individuals, and deducted as paid from the amounts stated to be due them, (of the payment of which the register of the commissioners furnishes no evidence,) amounting to - 779 47¾

And, by exhibit D, that moneys have been paid to one individual, when it appears by the records to have belonged to another; that sums have been credited, advances made, debts paid, and money stated to be due west, on one book, in which the proceedings were entered; and again, the same entries are found on another record, and that less is stated to be due individuals west than would seem to belong to them; and that valuations are stated on the register, which do not appear on the abstract. These errors are owing, doubtless, to inadvertence in making up their records and returns; and it is not to be wondered at that, in such a mass of business, and so complicated and numerous inquiries, mistakes should be made. In general, so far as I can judge from the papers and books, the commissioners have brought industry, capacity, and fidelity to the discharge of their duties.

It has been thought that the commissioners were not authorized to hold their deliberations or to make decisions after the 23d of May, 1838; and Congress, at its last session, in appropriating a sum for the payment of these officers, added the proviso, that it should be "applied only to the payment of expenses incurred prior to the twenty-third day of May, eighteen hundred and thirty-eight."

This legislative provision commanded, as it must, obedience. Perfect respect for Congress does not, however, prohibit me from reporting on the subject, and informing you, as is my duty, of what has been done by this

office, with particular reference to the termination of the commission. I do not find in the treaty any provision which limits the commission to the day fixed by the treaty and its ratification for the emigration; nor do I know that it ever supposed there was such limitation. The opinion that it should then close its labors, was, it is presumed, founded on the apprehension that injustice might be done the Cherokee nation, or individuals of that tribe, if white men were permitted to present their claims, and evidence in support of them, in the absence of the Indians; and it might be well entertained. But the large body of the Cherokees were east for months after the 23d of May, 1838; and if the deliberations of the commissioners were confined after that day to claims previously presented, or to those of Cherokees against the nation, or against each other, perhaps the danger apprehended, where a white man was a party, would not exist.

On the 8th of February, 1838, my predecessor instructed the commissioners that their attention and efforts should be directed to the closing of all their business under the treaty by the 23d of May, and that they should give public notice that all claims must be presented for their action by that day. On the 8th of May he called on them for a report of all the business they had reason to believe would be unfinished on the 23d of the month; and instructed them that, as the department did not consider that their duties would necessarily terminate on that day, they should continue in the performance of their uncompleted duties (if such there were) until otherwise directed. Perhaps the act of 2d of July, 1836, appropriating compensation to the commissioners and their secretary for two years, which extended beyond the 23d day of May, 1838, as they do not appear to have been appointed until 7th of July, 1836, may have conduced to the above instructions.

On the 28th of May, (as is shown by the records of the commissioners, for its receipt at this office does not appear,) a letter was addressed by them to the Commissioner of Indian Affairs, acknowledging the receipt of his of the 9th, stating that many of the Cherokees have been induced, by the representations made by Mr. John Ross, of the postponement of their emigration, and that a new treaty was about to be concluded, to withhold their claims, and that if they were permitted to receive and pass upon them, no delay would be produced in the emigration, for they could be acted on as rapidly as the Indians could be collected and removed; but if this indulgence was not accorded the Cherokees, and the department thought all future applications should be rejected, their report and records could be forwarded. To this communication no answer is on file; but on the 3d of September, 1838, the commissioners addressed a letter to General Scott, who had enclosed to them one from Mr. John Ross, in relation to the discharge of their official duties, in which they say, "we have the pleasure to inform Mr. Ross that, according to the treaty, the commissioners have, since 23d of May last, discontinued the adjudication of claims presented by citizens of the United States against the Cherokees. Agents were, however, after that time employed in valuing reservations; and in a letter to this office of 11th of November, 1838, the commissioners state the allowance to Cherokees, of spoliation claims presented (as may be inferred) after 23d of May; and their communication of 23d of January last shows that reservation claims were then in a course of examination. There is returned, in addition to the general register, a list of valuations of improvements and spoliations, made in February 1839, and approved by the commissioners, to whom claims for them were

presented; several months previous they amount to $8,546 75. Unless less you should think the commission could not sit after 23d of May, 1838, I see no reason why they should not be paid—or, indeed, why the report should not be regarded as final.

On the 17th of January, 1839, I informed them that it was believed the commission might terminate without injury to any public interest, and instructed them to complete at once all their registers, and transmit them to this office. Their report, which is dated 5th of March last, was received on the 16th of the same month; and their records, documents, and papers, soon after.

In conclusion, I recommend the adoption of the report, subject to the modifications which this communication may make necessary. The exceptions stated, are those in which it was supposed they had (in a very few instances) gone beyond their jurisdiction, or committed errors of a description that are always amendable. In all other cases, the treaty makes their decision final.

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

T. HARTLEY CRAWFORD.

Hon. J. R. POINSETT,
Secretary of War.

Approved: J. R. P.

K 1.

WAR DEPARTMENT,
Office Indian Affairs, November 4, 1836.

GENTLEMEN: Doctor Philip Minis, assistant surgeon in the United States army, has proceeded to New Echota, with instructions to report to you, having been selected to make the disbursements called for by the treaty with the Cherokees of December 29, 1835.

You were informed on the 25th of July that it was contemplated these disbursements should be made under your immediate supervision; and you were requested to give the person who should be appointed to perform this duty, instructions as to the times, places, and mode of payment.

The sum of $4,000 was remitted to the branch of the Planters' Bank of Tennessee, at Athens, by the Commissary General of Subsistence, on the 25th October, on account of the salaries of the emigrating agents, and contingent expenses. Another remittance, amounting to $8,505, was made from this office on the 29th, on account of the salaries of the appraising agents and interpreters. These amounts, and all others that may be remitted for similar objects, will be drawn from the bank by Dr. Minis's drafts, countersigned by Major Curry.

On the 3d instant, $50,000 were remitted to the bank, which will be applicable to the general purposes of the treaty. Being without estimates from you, this sum was fixed upon without precise data. I will thank you to forward estimates, monthly, of the amount that you think should be deposited at Athens.

Other remittances will be made from time to time, on account of the disbursements to Indians, or claimants under Indians, by virtue of any

stipulation in the treaty, for any objects besides those above named. Looking to the spirit of the provision in the third section of the act of Congress of July 2, 1836, "making appropriations for fortifications," that all sums appropriated at the last session shall be drawn from the treasury "only as the same may be required by the several objects of expenditure authorized by law," it seems to be proper that no more money should be drawn by Dr. Minis than the service may actually require. You will please, therefore, to inform him, from time to time, of the amount you think is wanted, and he will be instructed to make his drafts accordingly; but every draft will be countersigned by one of you, and the bank will be requested to pay none not so countersigned. I would suggest, for your consideration, the following mode of proceeding in making the disbursements to claimants: When the register, upon which the payment is to be made, is completed, exhibiting the amounts due, let corresponding numbers be prefixed to the name of each claimant upon the register, and the register of improvements or claims, according to the class to which he belongs. In addition to the receipt which you were requested to take in the letter of July 25th, let a book of blank certificates of the enclosed form be printed. Whenever a payment is made, let the same number, the name of the payee, the amount paid, the article of the treaty authorizing the payment, and the date of the treaty, corresponding with the filling up of the certificate, be entered in the margin. Let the claimant sign another receipt on the back of the certificate, in the presence of one of you, and the disbursing officer will then pay the amount. These certificates, signed by either of you, will constitute his vouchers.

If any improvement upon this plan presents itself to your minds, you will please to adopt it, and report it to this office.

Very respectfully,

C. A. HARRIS, *Commissioner.*

Hon. WILSON LUMPKIN, and JOHN KENNEDY, Esq.,
New Echota, Georgia.

—

No. —

This certifies, that $—— are due to ———— under the — article of the treaty with the Cherokee Indians of December 29, 1835, as per No. — on the register of payments to be made. This — day of ———, 183–.

————————, *Commissioner.*

Received of the United States by the hands of ————————, disbursing agent, the above amount of $——.

K 2.

WAR DEPARTMENT,
Office Indian Affairs, November 4, 1836.

The sum of $50,000 will be remitted to the branch of the Planters' Bank of Tennessee, at Athens, to be subject to your drafts, as disbursing agent under the treaty with the Cherokees of December 29th, 1835.

Regarding the intent of the provisions in the 3d section of the act of

Congress of July 2d, 1836, making appropriations for fortifications, that the sums appropriated at the last session shall be drawn from the treasury "only as they are required by the objects authorized by law," you will make your drafts according to the wants of the service. The commissioners appointed to examine claims can best judge of these; and they have been requested to inform you, from time to time, of the amount required, for which you will draw. Every draft will be countersigned by one of those gentlemen, except those on account of emigration, and the salaries of agents, which will be countersigned by Major Curry. The bank, and the proper accounting officers, have been advised of this arrangement, and requested to conform to it.

The sum now remitted is applicable to the general purposes of the treaty, and will be disbursed by you under instructions of the commissioners.

Very respectfully,
C. A. HARRIS, *Commissioner.*

Doctor PHILIP MINIS,
New Echota, Georgia.

L.

Decision of the Secretary of War in the case of Tunnell, as attorney in fact of Wallace Rackley, and in his own right, as the heirs of William Rackley, deceased.

The claim of Wallace Rackley to be admitted to share equally with the other heirs, his brothers and sisters, in the sum awarded to the heirs of William Rackley, for the value of a reservation by the commissioners under the 17th article of the treaty of 1835, cannot be resisted. The decision of the commissioners, in granting or refusing the claim for the value of the reservation, is final, by the terms of the treaty. It is not clear that it is their duty to ascertain the number or the names of the heirs. Having undertaken to do so, does not make errors or omissions incurable. Let Wallace Rackley, therefore, be admitted to share equally with those stated in the award of the commissioners, as related in the same degree with himself to the party originally entitled.

As for the demand of Tunnell to have his claim against the heirs, or any of them, for services rendered in procuring the allowance of this claim by the commissioners, adjusted and paid by this department out of the amount awarded by them, I cannot perceive any principle or authority, either of law or sound policy, justifying the intervention of the department. It is a claim resting wholly upon contract, expressed or implied, between the original claimants and their agents or attorneys. If it cannot be enforced against the Indians in a court of justice, or the Indians will not voluntarily do justice to those who have attended to their business, this department can only employ the influence of persuasion with them. I know of no authority for ordering one cent of the moneys payable to the Indians, under the decision of the commissioners in such case, to be paid to agents or attorneys, except a power of attorney to receive so much money as may be therein specified, duly executed and au-

thenticated after the making of the award by the commissioners. Such payment would be made, in that case, upon the same principle that the whole amount awarded by the commissioners would be paid to the parties entitled, or to their duly authorized agent or attorney, and on no other. Besides, if there were any discretion vested in the department to allow such claims, I would decide either one-third or one-half to be exorbitant and unreasonable, particularly where Indians are concerned.

The claim against the minor heirs for services in procuring the award by the commissioners, must, of course, be settled with their guardian or other persons authorized to receive their money and manage their business. If this department has any discretion in such a case, I would make a moderate and reasonable allowance, or per centage, on the amount of their distributive shares—say five, ten, or fifteen per cent., according to the nature or arduousness of the service rendered.

JOHN BELL.

WAR DEPARTMENT, *April* 15, 1841.

M.

WAR DEPARTMENT,
Office Indian Affairs, April 20, 1841.

SIR: Accompanying this communication, is a list designating the names of certain individuals who are entitled to compensation for reservation claims awarded them by the late commissioners under the treaty with the Cherokees of 1835 and 1836. The list indicates the sum decreed in favor of each; the amount paid out, if any, and on what account; and the balance due on each award: making an aggregate to be paid of $81,546 84, for which a requisition will be issued.

When awards are in favor of heirs, your attention is invited to the decrees of the commissioners, copies of which were sent to you on the 18th November last. It will be observed that in some instances the names are designated, and in others that they are omitted. Special care should be taken to ascertain the identity of the heirs, and to pay those only who are legally entitled. It has been represented that, in some cases, there are heirs that the commissioners have not designated in their award, who are equally entitled to share in the amount awarded their ancestors. In such cases it is suggested that the subject be referred to the Cherokee national council for investigation, and that their action be deemed conclusive as to the rights of the parties.

It has been stated to this office that some of the heirs remain east. Care should be taken to inquire in that regard, and to report such cases to this office.

Very respectfully, your obedient servant,

T. HARTLEY CRAWFORD.

Major WILLIAM ARMSTRONG,
Act'g Sup't Western Territory, now in Washington.

N.

Statement showing the claims allowed by Messrs. Eaton and Hubley, Cherokee commissioners, so far as their decisions have been communicated to the War Department.

	Names of claimants.	Character of claim.	Amount allowed.	Remarks.
1	Johnson K. Rogers -	For an improvement -	$2,933 50	It is understood that a further allowance has been made in this case, but the commissioners have not reported the amount to the War Department.
2	Toona McDaniel and children.	Value of a reservation -	11,520 00	Of this amount, $3,456 were awarded by commissioners to John F. Gillespy, attorney for claimants; out of which, and on his order, $1,000 were decreed to S. C. Stambaugh by the board.
3	David Taylor - -	For the value of a pre-emption.	3,445 50	
4	Gideon F. Morris - -	For the value of a pre-emption.	2,777 50	
5	David Taylor - -	For a spoliation - -	599 00	Of this amount, $89 were awarded to S. C. Stambaugh and Jos. Bryan, counsel for claimant.
6	Sutton Stephens and children.	Value of a reservation -	6,000 00	Of this amount, $3,000 were awarded to John F. Gillespy, attorney and counsel for claimants, on an agreement between the parties.
7	Charles Thomson -	Value of a reservation -	5,000 00	Of this amount, $2,500 were awarded to John F. Gillespy, attorney and counsel, on agreement with claimant; but $350 only have been paid thereon; the ownership of the certificate for the balance is in dispute.—This case, and the one preceding it, were admitted by former board, but its awards were set aside on the ground that, as a grant of land was decreed, the board had exceeded its authority.
8	Andrew Taylor - -	For rent - - -	1,280 00	Of this amount, $128 were allowed to S. C. Stambaugh, counsel for claimant.
9	Wah-hah-neeta, or Young Wolf.	For a spoliation - -	260 00	
10	Oo-ye-tut-la - -	For an improvement -	320 00	
11	Rebecca Henson or Starrett	For an improvement -	357 00	
12	Jason L. and S. W. Hyatt & others.	Debts against estate of N. B. Hyatt.	1,089 00	Of this amount, $120 were allowed to Felix Axley, counsel for claimants.
13	Charles Ward - -	For an improvement -	150 00	Of this amount, $15 were allowed to Felix Axley, counsel for claimant.

14	Garry Hinant - -	For property alleged to have been purchased from Creek Indians, resident in Cherokee country east in 1836.	2,077 00	The commissioners at one time expressed the opinion that they could not entertain jurisdiction of this case; subsequently, however, they reviewed the subject, and awarded the amount herein stated.
15	John Langley - -	For a spoliation - -	806 00	Of this amount, $161 were awarded to Johnson K. Rogers on contract with claimant.
16	William A. Coleman -	For a spoliation - -	1,400 00	Of this amount, $420 were awarded to Johnson K. Rogers on contract with claimant.
17	George Ward - -	Improvement and spoliation	405 00	Of this amount, $40 were awarded to W. H. Thomas, counsel for claimant.
18	Te-yolt-la (or Lowen) -	Improvement and spoliation	383 00	Of this amount, $38 were awarded to W. H. Thomas, counsel for claimant.
19	Cut-le-la-tah - -	Improvement and spoliation	198 00	Of this amount, $20 were awarded to W. H. Thomas, counsel for claimant.
20	Stesta Chik (or Mouse) -	Reservation - - -	2,304 00	Of this amount, $230 were awarded to W. H. Thomas, counsel for claimant.
21	Johnson K. Rogers -	For amount alleged to have been advanced to Cherokees as commutation for removal and subsistence, but who did not emigrate.	2,026 66	See remarks on list of rejected claims, and papers marked O 2, O 3, and O 4.
			45,331 16	

WAR DEPARTMENT,
Office of Indian Affairs, January, 1844.

O 1.

Statement showing the claims allowed by the present board of Cherokee commissioners, which have been rejected or suspended by the War Department, with the reasons therefor.

No.	Name of claimant.	Character of claim.	Amount allowed by commissioners.	Reasons for rejection or suspension.
1	Johnson K. Rogers -	For an improvement - -	$2,933 50	Disallowed, because it was rejected by the former board of commissioners.—See papers marked O 5, O 6, and O 7.
2	David Taylor - -	For a pre-emption - -	3,445 50	Suspended; doubts being entertained by the department whether pre-emption claims can be considered as embraced by the treaty.
3	Gideon F. Morris -	For a pre emption - -	2,777 50	Suspended, for reasons stated in the preceding case.
4	Andrew Taylor -	For rent - - -	1,280 00	Rejected, because the commissioners had no jurisdiction; the treaty not naming rent as a claim for which the money appropriated to carry it into effect is applicable.
5	Oo-ye-tut-la - -	Improvements - - -	320 00	Rejected, because records show that the former board awarded the same improvement to another Indian.
6	Rebecca Henson, or Starrett.	Improvements - - -	357 00	Suspended, until it can be ascertained whether this case was finally acted on by the former board or not; the records apparently showing that it was rejected, which is denied by claimant.
7	Jason L. & S. W. Hyatt, and Love & Hyatt.	Debt against the estate of N. B. Hyatt.	1,089 00	Suspended, until it can be ascertained whether the agent west, to whom the money was sent for payment before the decree of the present board was known here, has the money on hand, or whether he has paid it out on decree of the former board, which was in the name of the estate of N. B. Hyatt.
8	Johnson K. Rogers -	For the amount that was stated to be due to certain Cherokees as removal and subsistence money.	2,026 66	Rejected, because commissioners had no jurisdiction, and because the Cherokees under whom Rogers claims have not emigrated, but yet reside east of the Mississippi.—See papers marked O 2, O 3, and O 4.
9	Garry Hinant - -	For property alleged to have been purchased, which belonged to Creek Indians who resided with Cherokees east in 1836.	2,077 00	Rejected: Secretary of War expressed his opinion on report of commissioners as follows: "This is a most extraordinary proceeding, and is purely void."
			16,306 16	

WAR DEPARTMENT, *Office of Indian Affairs, January*, 1844.

O 2.

DECEMBER 29, 1842.

DEAR SIR: J. K. Rogers's case being one on which money was advanced for the Government, we have thought it advisable at once to make it known to you, for such action as may be deemed by you correct.

Respectfully,

JOHN H. EATON,
EDWARD B. HUBLEY.

To the COMMISSIONER OF INDIAN AFFAIRS.

[Endorsement by the Commissioner of Indian Affairs.]

Respectfully referred to the Secretary of War.—December 29, 1842.

T. HARTLEY CRAWFORD.

O 3.

Johnson K. Rogers presents claims amounting to $2,026 66, for that amount advanced in commutation of Cherokee Indian emigrants. The presented evidences of payment made, are certificates given by Nathaniel Smith, superintendent, approving and ordering the disbursing agent to pay them. They are receipted by the claimants.

These claims have heretofore been laid before Mr. Secretary Bell, and the accounting officers, who declined to admit them, on the ground that the Indians to whom these advances were made did not remove, and that hence the consideration had failed. The Indian Commissioner takes the further objection, that the 8th article of the treaty of 1835 did not confer upon the emigrating superintendent power to act as he has done. We differ with him. The 8th article says: "Such persons and families as, in the opinion of the emigrating agent, are capable of subsisting and emigrating themselves, shall be permitted to do so, and shall be allowed $20," &c. Now, the entire authority over this matter is confided to the agent, who did decide that the persons named in the certificates were *capable to remove themselves*, and directed the disbursing Government agent to pay the amount authorized by the treaty, which, as he himself alleges, would have been done "if, at the time, he had been in funds." In his hands, receipted after the manner they are, they would have been good vouchers, and have gone to his credit, as many similar ones before had gone; and, if available to be charged to the Government in *his* possession, equally should it be the case when others possess them. A certified statement from the Second Auditor shows that the disbursing agent of the United States, (Cruttenden,) in 1838 and 1839, had accounts exactly of the description and character that these are, to the amount of more than $30,000, which were passed to his credit by the Auditor.

But "the Indians failed to remove." That should not affect the right of innocent holders of these orders. The emigrating agent, Nathaniel Smith, had given sanction to the claims, and authorized their payment. They were in market overt, with everything of Government sanction and approval, and any person might well confide that the Government would not put forth papers to deceive. Transfers of this description of claims were customary and usual, as Mr. Liddell, one of the commissioners, states:

Charles J. Nourse and R. C. Clements allege in their statements the same thing—that they passed by mere delivery; and Rogers and others, resting on the faith of these orders, and knowing that General Smith had authority for what he was doing directly from the Indian Department, bought them. (See letter of C. A. Harris on file, which especially sanctions and authorizes the making such payments.)

Another objection made, is, that papers of this description are not negotiable. Admit it to be well taken; the answer is, that the practice has been, and at the period of their date was, for them to pass merely by *transfer*, and were thus recognised by the disbursing agent; he, as is stated, regarding only the *holders of the receipts*. In fact, Indians are incapable of writing and endorsing papers legally and properly.

Mr. Cruttenden, the disbursing agent, in a letter to Rogers, on file, dated May, 10, 1841, says: "You frequently advanced funds, and assisted to procure them for the disbursing officer, to prevent the emigration from being delayed." It is difficult to perceive what rational difference there can be, in procuring funds wherewith the agent might take up these orders, or in advancing the money to the holders, and retaining them in his possession for after settlement. The justness of the affair, in the one form or the other, is equally apparent. Did he pay these claimants? His possession of the claims, and the time he has had them, (now four years and more,) should be taken as evidence that he did. These orders or receipts are dated April, 1838; after such a lapse of time, if there were others who could claim them, doubtless they would, ere this, have made themselves known at the War Department; having failed to do so, there is, at least, created a presumption that the claims have been rightfully parted with, and are now in hands that may rightfully claim them. (See 10 Wheaton, 130.)

Mr. Bell, Secretary of War, places his rejection of this claim on the ground that the Indians had failed to remove, and says that "the claimant admitted the fact to be so." Now, he denies it. The commissioners hold this to be quite immaterial. The agent of the United States was made the special and exclusive judge in this particular; and, having issued his approval and order for the payment of these presented claims, there can be no proper reason for refusing them.

We are of opinion, then, that the claimant, Johnson K. Rogers, by the 8th article of the treaty of 1835, is entitled to receive $2,026 66 for that sum advanced to the order of the Cherokee emigrating agent.

JOHN H. EATON,
EDWARD B. HUBLEY,
Commissioners.

O 4.

WAR DEPARTMENT, *February* 20, 1843.

Johnson K. Rogers presents a paper signed "John H. Eaton, Edward B. Hubley, commissioners," which, after sundry remarks upon a claim presented to them by him, concludes as follows: "We are of opinion that the claimant, Johnson K. Rogers, by the 8th article of the treaty of 1835, is entitled to receive $2,026 66, for that sum advanced to the order of the Cherokee emigrating agent." The evidence of such payment, adduced by the claimant, and accompanying the opinion of the com-

missioners, consists of papers of the following description: an account stated, "The United States to Sarah M. Charlton, Dr., for commutation of subsistence of herself and family, consisting of eighteen persons, for one year after their arrival in the country assigned to the Cherokees, west of the Mississippi, at $33 33 per head, $600." Under which is written—"The above account is approved. The disbursing agent will please pay the same. (Signed) Nat. Smith, superintendent." There then follows a receipt in the following words: "Received, Cherokee agency, Tennessee, April 7, 1838, of Joel Cruttenden, disbursing agent of the United States for the removal and subsistence of Cherokee Indians, $600 in full of the above account. (Signed) Sarah M. Charlton." Six papers like the above are before me, varying in amount and in the name of the creditor—three of them for commutation of subsistence as above, and three of them for commutation of transportation—and amounting, in the whole, to $1,973 33.

There is no other evidence whatever presented that the claimant has advanced any money whatever "to the order of the Cherokee emigrating agent." The claimant was not the disbursing agent of the Government; of course, the orders were not addressed to him. The receipts, signed by the persons in whose names the accounts are made out, acknowledge payment to have been received of Joel Cruttenden, the disbursing agent. The claimant in no way commits himself with these papers. He has them in his hands, and asks the amount of the accounts to be paid to him. This possession absolutely proves nothing; and the only presumption which it is attempted to raise, is, that he has purchased these accounts of the parties in whose names they are made out. But even this is not established in any way that would protect the Government against a subsequent demand by these persons, if their accounts are legal and proper. The genuineness of the signatures to the receipts is not proved; there is no assignment of them to him; nor is there any acknowledgment by the disbursing agent (Cruttenden) of his having received the money, or of its having been advanced, at his request, by the claimant. Even if the accounts are valid, the claimant, in the present state of the papers, cannot receive the amount, as he shows neither assignment nor power of attorney from the persons in whose names the accounts are made out. And the commissioners had no authority or jurisdiction whatever to grant a certificate to the mere holder of such papers; nor would they have to grant one to any assignee whatever of a Cherokee claimant. Their adjudication can only be to the Cherokee claimant; and it is for this department, and the accounting officers of the treasury, to determine whether the Cherokee has executed any authority to another to receive the amount when any is awarded.

The allegation that he "advanced any money to the order of the Cherokee disbursing agent," is wholly unfounded. The term "advance" implies that he paid money in lieu and in behalf of the disbursing agent, and at his request. If not, then he was a mere volunteer, and took upon himself the duties of disbursing agent without authority. But, if he had *advanced* at the express or implied request of the disbursing agent, then his claim is upon that agent, as a personal transaction with him. The Government has never authorized him to borrow money on its account.

The commissioners say he is entitled to the money "thus advanced," under the 8th article of the Cherokee treaty of 1835. By that article, the

United States agree to remove the Cherokees to the west; and it provides that such persons and families as, in the opinion of the emigrating agent, are capable of subsisting and removing themselves, shall be permitted to do so, and are to be allowed a commutation, in money, of $20 for the removal of each person, and $33 33 for the subsistence of each one removed for one year. The persons in whose name these accounts are made out, were considered by the emigrating agent competent to remove themselves; and, they having professed a readiness to remove, received the allowances and orders of the emigrating agent upon the disbursing agent. That this was part of a mutual executory agreement, is obvious. Sarah M. Charlton agreed to remove. In consideration of that agreement, and in reliance upon it, the emigrating agent agrees to furnish the $20 commutation for the removal, and the $33 33 for subsistence. Neither party has executed the agreement. Mrs. Charlton has not removed, and the time within which she agreed to remove has long since expired. Her removal, or her agreement to remove, was the consideration of the agreement to pay the commutation. That consideration having failed by her own fault, can it, for a moment, be admitted that she can claim performance on the part of the United States? How, then, can an assignee, (if he be one,) purchasing that claim with full knowledge of the facts, as appears by his own letters to the department,—how can he derive any benefit from this fraud of the assignor, or be in any better condition than she is? It is idle to talk about the sanction of the Government to paper that went into market overt. Neither the Government nor its agent ever sanctioned any paper by which it agreed to be defrauded by a violation of the agreement of Mrs. Charlton and the other persons whose names are signed to the accounts. These accounts have no character of negotiability about them; the order is upon the disbursing agent, and the holder of that order calls upon the principal of that disbursing agent to pay a sum of money upon an executory agreement which has not been fulfilled, and cannot be; and which facts he must have well known at the time he became the holder.

What equities does he present? He does not show at what rate, or in what manner, he became possessed of these accounts; and yet he talks about being a *bona-fide* holder. If he had paid the full amount, he could not be a *bona-fide* holder, for he knew the demand was founded in fraud—that is, in a violation of an agreement, and in fraud of the treaty. By that treaty the United States agreed to pay the Cherokees a sum of money in consideration of the cession of their lands. Out of this money they agreed to defray the expenses of removing the Cherokees to the west. Those only, therefore, who removed, could receive those expenses, either in kind or by commutation; and none others could receive subsistence, either in rations or in money. To pay it to those who would not remove, would be in direct violation of the treaty, and a cruel fraud upon the Cherokees, whose fund is thus diminished. If, as is stated, the accounts of the disbursing agent for similar payments to Cherokees who have not removed, have been allowed upon the ground that he obeyed the orders of his superior, it will become a serious question whether such payment can be charged against the Cherokees. However that may be when the payment was made in good faith, and in full expectation of a removal, the case would be wholly different if it were made with knowledge that the agreement to remove had been violated, and could not be performed.

Nor is the ground on which the disbursing agent was allowed in his accounts the sums he had paid, at all applicable to this claimant, Rogers. The disbursing agent was bound to obey the directions of the emigrating agent. Rogers was not; he was no agent of the Government, but is a mere speculating volunteer.

This claim had been presented to the accounting officers of the treasury, and to the Secretary of War, and rejected by all of them—not on the ground of want of authority, but on its demerits. Claims of a similar character had been presented to a former Secretary of War, (Mr. Poinsett,) and rejected by him on the same ground—that the claimants had not fulfilled their part of the agreement, which only could entitle them to be removed and subsisted, or to be paid the expense of removal and subsistence. In a letter of his to the Hon. W. Lumpkin, then a Senator in Congress, dated February 20, 1840, he expresses his entire concurrence in the report of the Commissioner of Indian Affairs, who had submitted a very able and conclusive argument against the claims, on the ground that they did not come within the treaty. Mr. Poinsett proceeds to say, in addition, "that the Attorney General, in a conference which I had with him, confirms the opinion that the Cherokees who have not, and do not intend to remove west, are not entitled to the commutation for removal and subsistence."

The opinion of the present Attorney General has been taken on the point, whether this applicant (Rogers) had any claim as the holder or assignee of these papers, assuming that there was an assignment; and his opinion is, that he has no claim on that ground, even if he were a *bona-fide* assignee. He says he does not "attach any importance to the assignment, and its supposed effects."

This claim has not only been rejected by four different officers—two Secretaries of War, the Commissioner of Indian Affairs, and the Second Comptroller—and their decisions sustained by the opinions of two Attorneys General, but the application made to Congress also failed. A bill passed the Senate—not to pay the claimant, (Rogers,) but allowing payment to the *Cherokees* who were mustered for emigration; and not out of the Cherokee fund, but out of the treasury of the United States. Thus repudiating this claim, and admitting that the Cherokee fund was not liable for it—the very fund, and the only one, out of which the decision of the commissioners (Messrs. Eaton and Hubley) can be satisfied. But even that bill failed in the House of Representatives.

After all these proceedings, and in this state of the case, the claimant lays his papers before the commissioners (Messrs. Eaton and Hubley) for their decision.

It now becomes necessary to ascertain the extent of their jurisdiction in the matter; for, if they were not authorized by the terms of the treaty to entertain the claim, then, of course, no payment can be made upon their certificate. And it is to be remarked, that, if the commissioners have jurisdiction, then it is exclusive, and no payment for such claims can be made without their authority. The consequence is, that the heavy payments which have been made under the allowance of the accounting officers of the treasury, and by the direction of the President, of claims in fulfilment of the stipulations of the treaty, to John Ross, to various Indians, and to General Scott, were illegal and void. Before coming to

such a conclusion, we should certainly examine very carefully the grounds on which it is supposed to rest.

The authority of the commissioners is derived from the 17th article of the treaty as amended, which provides "that all the claims arising under, or provided for in, the several articles of this treaty, shall be examined and adjudicated by such commissioners as shall be appointed by the President of the United States, by and with the advice and consent of the Senate, for that purpose, and their decision shall be final; and on their certificate of the amount due the several claimants, they shall be paid by the United States."

The treaty recites that $5,000,000 had been agreed upon as the sum to be paid the Cherokees for spoliations, and the cession of their lands east of the Mississippi; and the 15th article enumerates the different subjects to which that fund may be applied; and, among others, is enumerated the removal of the Cherokees and their subsistence. Any payment to be made for that purpose, must, therefore, be out of the fund belonging to the Cherokees, or out of the appropriation made by the act of 1838, in addition to that fund, and which expressly confines payments to those only who remove. The question, then, is, "what are the claims arising under, or provided for by, the articles of this treaty," which are to be paid to the several claimants "upon the certificate of the amount being given by the commissioners?"

Article 9 provides for the claims of individual Cherokees for their improvements and ferries. Article 10 provides for debts and claims of Cherokees individually against their own nation, and for claims of citizens of the United States for services rendered to the nation, and for the claims of Cherokees upon the United States for spoliations. Article 15 stipulates to pay for certain improvements of Cherokees removing west; and article 16 to pay their damages and losses for not being put in possession of their lands. These were uncertain in their character and amount, and required investigation; and the Cherokees individually were interested in the sums that should be paid to the claimants, because, after satisfying these claims, and the other objects of the treaty, the balance was to be divided among all the people belonging to the nation. What was required, therefore, was some tribunal to arbitrate between the parties, (the Cherokees,) adjudicate upon these claims, and ascertain their amounts respectively.

The 8th article of the treaty, by which the United States agreed and stipulated to remove the Cherokees to their new homes, and to subsist them one year after their arrival there, was a compact with the Cherokee nation as such; and, for a violation of it, the nation only could make a reclamation upon the Government of the United States. It was not an agreement with any individual Cherokees; they acquired no right individually, and could claim nothing for its non-fulfilment. It is of the same character with article 14, which stipulates for pensions to certain wounded Cherokee warriors. There could be no dispute about the character or amount of the expense, for the United States were simply to remove them. There was nothing to require the investigation of a board of commissioners. It was a mere executory act, to be performed by the executive department of the Government, out of the funds placed at its disposal by Congress for that purpose. And surely it never could have been intended that any board of commissioners to be appointed by the

President should be authorized to decide whether he had performed his duty in the execution of a treaty, and to award compensation for the omission. It seems to me, therefore, very plain, that the subject-matter of that article was not, and could not be, within the jurisdiction of the commissioners.

Nor can the manner of the removal change the question. Two modes were provided: one, by the United States furnishing steamboats, baggage-wagons, &c.; another was, that such persons as were deemed capable of removing and subsisting themselves, should be permitted to do so, and should be allowed therefor certain specified sums. In both cases, the removal was to be effected by a contract, to be made by the proper agents of the Government. In the first case, it would be a contract with third persons to provide the means of removal and subsistence; in the second case, it would be a contract with the individual deemed competent, that he should remove himself and family for a stipulated price. In neither case could the contract furnish a ground of claim for the determination of the commissioners, because the whole matter was one of executive action, and had no reference whatever to the rights of the individual Cherokees as secured by the treaty, and which rights only the commissioners could be authorized to determine. To test the question: Suppose the United States had neglected to provide steamboats and baggage-wagons, or any other means of removal, and had not taken a single step to that end; and had, moreover, refused to make any allowance to those deemed competent to remove themselves: could the individual Cherokees have presented their several claims to the board of commissioners, and had their damages, or the special amount to be allowed, awarded to them? And if the Government contracted with Clements and Bryan to remove a given number, and it had failed to pay the stipulated price, could those gentlemen have applied to the commissioners for compensation? Did the Government intend to allow itself to be thus prosecuted for not fulfilling its obligations? The claims of those with whom a contract was made to remove themselves, are of the same character, and stand upon the same ground.

These are not, therefore, "claims arising under, or provided for in, the several articles of the treaty," which can be paid on "a certificate of the amount due the several claimants;" for there can be no amounts due them individually. The distinction between the expenses of removal, and the claims to be ascertained, is clearly recognised in the 3d supplementary article of the treaty, which allows $600,000 to the Cherokee people, "to include the expense of their removal, and all claims of every nature and description against the Government of the United States, not herein otherwise expressly provided for;" and this sum is to be applied and distributed agreeably to the provisions of the said treaty; and any surplus which may remain, "after removal and payment of the claims so ascertained, shall be turned over and belong to the education fund." It is very obvious that the removal was a matter entirely distinct from the claims to be ascertained.

If it were admitted that, in case of non-compliance by the United States with any contract entered into for the removal of the Cherokees, either with third persons or with them individually, a claim might be interposed before the commissioners, (which, however, is totally denied;) yet, in this case, there has been no such non-compliance. The 8th article provides

that those deemed "capable of subsisting and removing themselves shall be permitted to do so; and they shall be allowed, in full for all claims *for the same*, twenty dollars," &c. Claims for what? For removing themselves. And, so far as the treaty is concerned, the allowance is not due and payable until the service is performed. Now the Government has never refused payment for any such service, and, until such refusal, no claim whatever can arise under that article.

It is alleged, however, that the proper officers of the Government gave instructions to the emigrating agent to make advances to those Cherokees who should be deemed capable of removing themselves; and that the agent having determined these persons to be capable, they became entitled to the advance of the allowance. Now, it will be seen that this proceeds upon the ground that a claim arises from the neglect or inability of the agent to make the advance according to his instructions. But what treaty or law authorizes this board of commissioners to award compensation to persons, because the agents of Government have not executed the orders and instructions given them? These instructions were beside and independent of the treaty; they related to the mode and form in which the officers of Government undertook to carry out its stipulations; they formed no part of the treaty. For a refusal of the emigrating agent to direct an allowance, or of the disbursing agent to pay it, there could be no other redress than an appeal to the executive authority, by which they were appointed, and which had the control and direction of their conduct. Take the case of the disbursing agent, who made advances to Cherokees permitted to remove themselves, on the order of the emigrating agent. Suppose the accounting officers of the treasury had refused to allow those advances: can it be maintained, for a moment, that he could come before the board of commissioners with a claim, under this treaty? And surely Rogers, the claimant here, cannot be in a better condition than the disbursing agent. It has been shown already that he has none of the grounds in his favor which would entitle the disbursing agent to be paid by the accounting officers of the treasury.

Again: this claim is not for any demand due at the date of the treaty. The date of the certificate of the emigrating agent is April, 1838. In an opinion of the Attorney General of the United States, dated March 26, 1840, (see page 1303 of Opinions, &c.,) it is held that a debt of a Cherokee not existing at the date of the treaty, but accruing afterwards, (for professional services rendered in advocating claims under it,) was not one of the debts provided for by the treaty, and, of course, the commissioners had no authority to award its payment.

And the commissioners have, in another case, decreed the same thing. John and Elizabeth Welsh presented to them a claim for rations furnished the Cherokees in North Carolina, under the written request of the emigrating agent, (Gen. Nat. Smith,) under date of December 4, 1838, and while he had full authority, and was acting under instructions to that effect from the proper department—the letter revoking his authority being dated January 17, 1839. This claim the present commissioners (Messrs. Eaton and Hubley) rejected, on the ground that the rations were furnished more than three years after the date of the treaty, (see their endorsement on the papers,) and, therefore, did not come within its terms.

Now, the claims of Rodgers are in the same predicament. "In a note of the commissioners, dated January 10, 1843, to the Secretary of War,

written after their attention was called to the point, they state, "the receipts held by the claimant bear date the 7th of April, 1838; and the 16th article gives two years from the ratification, (which took place May 23, 1836,) within which the emigration was to take place."

The article referred to is a stipulation on the part of the Cherokees that they *will remove* within two years from the ratification of the treaty; during which time the United States were to protect them in their possessions. But, clearly, the United States were not limited to the two years, and could remove them subsequent to that period—as, in fact, they did; the great emigration under John Ross having taken place between September and the 4th of December, 1838, under the contract made by Gen. Scott with John Ross, concluded on the 2d of August, 1838. And at this very time preparations are making for the removal of those yet remaining in North Carolina.

There is no possible ground, then, for the rejection of the claim of Welsh, but that it was not a debt existing at the date of the treaty, (which I understand to be the ground assigned by the commissioners;) and that ground is equally strong against the claim of Rogers.

Again: the certificate or opinion of the commissioners is, that Johnson K. Rogers is entitled to the sum specified for that amount "advanced to the order of the Cherokee emigrating agent." What clause of the treaty authorizes the emigrating agent to give orders for advances? Would a citizen who had made a loan to the emigrating agent, to enable him to remove the Cherokees, be a claimant under the treaty, and entitled to a certificate from the commissioners? Such a claim would be founded upon a separate and independent contract with an agent of the Government, and not upon any right derived from the treaty.

But the misnaming of the transaction should neither injure nor advance the claim. It was not an advance to the order of the emigrating agent. The papers do not show it, and there is not a particle of proof of any advance. The claimant himself places his claim on the ground of being an assignee of Mrs. Charlton and the other persons in whose favor the accounts were allowed. And it has been shown that Mrs. Charlton and those persons were, in fact, contractors with the Government for their own removal; and that such contract could not be the subject of adjudication by these commissioners. It was entirely independent of the treaty, and beside it.

But, in his character of assignee, the board had no jurisdiction to make any award in his favor. He, as assignee of Mrs. Charlton, can have no rights under the treaty; for it does not recognise any assignments. Suppose another person should present himself in behalf of Mrs. Charlton, denying Rogers's right or interest in the claim, or setting up a prior assignment: could the commissioners investigate judicially the validity of these assignments? Clearly not. The claims must be such as arise under the treaty, or are provided for by it. This last expression is intended for the cases growing out of former treaties, for which provision was made in this.

In the opinion of the Attorney General, before quoted, (p. 1303 of Opinions,) he recognises the principle that the award must be made to the original claimant; and that, if he gives a power of attorney to any other, after the award is made, the department is warranted in refusing to recognise it; although, in the particular case in which he gives the opinion—that of the attorney who had assisted in obtaining the claim—he had such an interest in the fund, that it ought to be recognised.

Had an award been made in this case to Mrs. Charlton, and it had been admitted to be within the jurisdiction of the commissioners, no payment could possibly have been made to Rogers upon the papers he presents. It would be very strange if the commissioners could take from the paying department of the Government the authority to determine who was the attorney, or rightful assignee, of the claimant. There were filed with the commissioners, orders by Rogers for the payment of portions of the sum awarded him, to Mr. Gadsby, and to others. Why did not the commissioners award in favor of those assignees?

The consequences of sanctioning this decision would be most serious to the fund. If Mrs. Charlton is to be paid for staying in North Carolina, under a clause of a treaty that provides payment for her removal, then all the Cherokees yet remaining east of the Mississippi are equally entitled. She, certainly, should not be permitted to derive any advantage over them, from her fraud in representing to the agent her intention to remove—which she must have done, to obtain the allowance of her account for removal. And if they are all to be paid the same allowance, then the total amount must be ascertained before it can be known whether the fund is adequate, or whether a *pro rata* distribution is to be made.

Upon the whole, this appears to me one of the most gross and bold cases of an attempt to obtain money upon an admitted falsehood that ever presented itself. And I cannot for a moment entertain a doubt that the commissioners had no jurisdiction whatever in the case; and that they might as well entertain the claims of the contractors for removing the Cherokees, who are still petitioning Congress for relief. I therefore refuse to make any payment under the opinion or certificate delivered to me.

J. C. SPENCER.

O 5.

Extract of a letter from the Commissioner of Indian Affairs to the Secretary of War, dated 14th April, 1843.

In conformity with your directions, I report on the decision of the commissioners now sitting under the 17th article of the Cherokee treaty of 1835, on the improvement claim of Johnson K. Rogers, marked book F, page 27; register E, No. 5.

There can be no objection to the award, as it is of a class within the jurisdiction of the commissioners, unless it shall be regarded as having been rejected by the former board. It has been uniformly, so far as I am aware, so considered heretofore by the department. The letter addressed by the commissioners in 1839 to the Indian Office is recited, requesting a return of the papers, which, they say, "at the request of Mr. Rogers, he was allowed to withdraw," "in order to enable him to obtain the opinion of your (my) predecessor." Under date of 11th February, 1839, they were informed, in reply, "as you have been instructed to terminate your labors, and transmit your records, it is deemed unnecessary to return to you the papers in the case of Mr. Rogers. Your letter before me will be filed with them, and will be sufficient evidence of your rejection of his claim."

This claim was presented to this office on the 5th October, 1841, by

Messrs. King & Wilson of this city, on behalf of Mr. Rogers; to whom it was answered, on 22d November following, "that, as the late commissioners under the aforesaid treaty have virtually rejected the claim, by deciding that the improvements claimed by Mr. Rogers were not subject to valuation under the treaty of 1835–'36, this department has no power to review their decisions, with a view to setting them aside, as the 17th article of the treaty makes their decisions final."

From this opinion an appeal was made to the Secretary of War, by Messrs. King & Wilson, on the 23d November, 1841; and a report required from this office to the Secretary of War, which was made, detailing all the facts and circumstances that were known here, or deemed material; and, among them, the letter of Mr. Liddell, of 1841, referred to by the present board, in their award, is noticed. Testimony, it is stated in the above report, had been adduced by Mr. Rogers to show that the opinion of the commissioners was erroneous; of which it is said, "but I do not deem it necessary to remark on that evidence, as it is my opinion (which has been often expressed and concurred in by your predecessors) that the decision of the commissioners is made final by the treaty, and there is no authority conferred on the department to review any of their decisions, where they had jurisdiction." What action, if any, was had, or what opinion, if any, was expressed or formed by your predecessor on this report, I have, after the most careful search, not been able to trace, either in this office or the War Department.

My own opinion is unchanged. I look upon the proceedings recited as a decision by the former board, and regard the claim of Mr. Rogers as disposed of by them; and that, consequently, there was no authority in the present commissioners to consider the case.

O 6.

OFFICE OF THE UNITED STATES COMMISSIONERS,
Athens, Tenn., January 25, 1839.

SIR: We have the honor to request that you will cause to be returned to this office the papers, &c., in the case of Johnson K. Rogers, a claimant for a certain valuation. At the request of Mr. Rogers, he was allowed to withdraw the papers, in order to enable him to obtain the opinion of your predecessor on the claim. Since then, we have been furnished with the most conclusive testimony against the validity of the claim, and desire to enter our rejection on the papers, and to file them with the papers in other rejected claims of a similar description. In further explanation, it is only necessary to state that the testimony alluded to establishes the fact, clearly, that the improvements claimed by Mr. Rogers were not subject to valuation under the treaty of 1835–'36.

We have the honor to be, very respectfully, your most obedient servants,

JOHN KENNEDY,
TH. W. WILSON,
JAMES LIDDELL,
} *Commissioners.*

Hon. T. HARTLEY CRAWFORD,
Commissioner Indian Affairs, Washington City.

O 7.

OFFICE OF THE ATTORNEY GENERAL, *May* 19, 1843.

SIR: The two points propounded for my consideration, in your letter of the 17th ultimo, having been, at my request, further elucidated by a communication made me on the 12th instant, I now proceed to give the opinion which, on very full consideration, I have formed in regard to them. They are as follows:

"1. The first is that of Johnson K. Rogers; and the question is, whether the proceedings that were had before the former board amount to a rejection of the claim?

"2. The second relates to the right of the head of a family to receive the amount awarded to his claim to a reservation. Whether he is entitled to receive the whole of the principal sum, (which has been the construction heretofore put upon the various treaty provisions, and large sums paid under it,) or whether he shall receive the interest thereof only during his lifetime—the principal after his death (saving the interest of the widow) going to the children?

"The last question embraces many cases; and is for that reason, as well as because of the construction heretofore adopted, very important."

1. To understand the first point, it is necessary to have recourse to the state of the case presented in the report of the Commissioner of Indian Affairs.

"The letter addressed by the commissioners, in 1839, to the Indian Office, is recited, requesting a return of the papers; which, they say, 'at the request of Mr. Rogers, he was allowed to withdraw,' in order to 'enable him to obtain the opinion of your (my) predecessor.'

"Under date of the 11th of February, 1839, they were informed, in reply: 'As you have been instructed to terminate your labors, and transmit your records, it is deemed unnecessary to return to you the papers in the case of Mr. Rogers. Your letter before me will be filed with them, and will be sufficient evidence of your rejection of his claim.'"

The claimant did not acquiesce in this judgment of the commissioners. He has more than once appealed to the Department of War for redress, but your two immediate predecessors both rejected his application—treating the matter as *res judicata*, and considering themselves as bound by the judgment of the only competent tribunal—the commissioners duly appointed under the 17th article of the treaty.

The question presented for my consideration is, was it competent for the present commissioners to take up this claim as *res integra*?

I am, after much reflection upon the subject, of opinion that it was not. Nobody will pretend, I suppose, that the present commissioners have any authority to entertain an application in the nature of *an appeal* from the decision of their predecessors. Their jurisdiction is confined to cases—1st, provided for by the treaty; and, 2d, not disposed of by the former board. They have none whatever beyond these limits, and any act of theirs not within them is a mere nullity.

Then the next question is, Was this claim provided for by the treaty?

The state of the case does not enable me to answer this. But, from the reasoning of the late Secretary of War, I feel justified in referring you to an opinion of mine given on the 26th September, 1841, and in adding a few words in reference to the powers of commissioners under treaties between

the United States and other nations. Some confusion of ideas seems to prevail on this very important subject, and perhaps you will not regard this attempt to clear it up as either foreign from the matter now before us, or unprofitable to the department.

It is not unusual to hear the judgments of commissioners in such cases spoken of as concluding all parties whatever. This is true, as between the nations parties to the treaty. The question whether such a particular claim of a citizen of one country against the Government of the other is or is not valid as against that Government, is undoubtedly submitted to the special jurisdiction created by the treaty. But to *whose benefit* is the judgment to enure, when satisfied by that Government? This you at once perceive is quite a different matter, and falls within the usual sphere of the judicial power of the country receiving the indemnity. That either A or B or C is entitled to be paid on a specified claim against a foreign Government, such a sum, is an international or political matter. By the very fact, therefore, that it is so, it is to be adjusted by treaty, in some way to be pointed out by treaty, or it must become the object of war or reprisal. No nation can be held responsible in any other way. As soon, however, as the claim is admitted as a debt, and paid by one country to the other, *in trust* for its subjects, it ceases to be a political subject, and becomes a judicial one. The execution of this *trust* is as much within the competency of the ordinary tribunals, as that of any other. The Government is a mere stakeholder, for the use of those who are really entitled to the proceeds paid over under the treaty. The question who, of a number of citizens laying claim to the whole or part of those proceeds, are so entitled, is one to be adjudged by the courts of their common country. Not only are those courts more competent in every respect to settle such disputes, but I see no power, under our constitution, that can oust them of their jurisdiction in such matters, or vest it in commissioners appointed for the occasion, instead of judges holding during good behavior. It is true, the Government, even as a stakeholder, cannot be compelled to answer in its own courts, without its consent. But this does not release it, *in foro conscientiæ*, from its duties as a trustee to see justice done according to the constitution; neither does it, or can it, exempt from responsibility any individual who happens to be put into possession of the fund affected with such a trust.

In the very last case publicly tried by Lord Eldon, he lays down this doctrine very distinctly as law in England, where it *is* competent for Parliament to vest complete jurisdiction as between British subjects in mere commissioners; *a fortiori* is it the law of this country, in which the judicial power is not at the disposal of Congress, but set apart, by the constitution itself, as an institution co-ordinate to the Legislature. (*Hill* vs. *Reardon*, 2 Russ. 645.)

Therefore, in all questions between assignor and assignee, or their privies and alienees, the jurisdiction of commissioners under treaties is, (at any rate in the absence of an express provision, *eo nomine*, in the treaty; and, I incline to think, notwithstanding such a provision,) altogether incompetent. They are *coram non judice*.

But the case, as you propound it, does not involve any difficulty arising under a disputed assignment. The single point on which you require an opinion, is, whether the claim of Rogers was, notwithstanding what was done by the former board, *res integra* for the last. And I am of opinion that it was not.

The present commissioners object that the proceeding was irregular, Rogers having obtained leave to withdraw his papers; and I certainly concur with them, as at present advised, in that view. But the case was clearly within the jurisdiction of the first board, was fairly presented, was fully opened; and they, by what seemed to them satisfactory evidence—taken, however, it is alleged, without sufficient care, perhaps without cross-examination—were convinced that the claim was an unfounded one. They reported upon it as such, directly and positively; and their report was received and recorded as a judgment by one of your predecessors. By what authority did the present commissioners open that judgment? Because it was given in mistake; because there was irregularity in the proceedings, say they. *That*, if shown in proper time, would be a very good reason for reversing it in a competent court of appeals—but there is none such provided here; *or*, is a good ground addressed to the discretion of the same court for a new trial; *or*, *finally*, may, in *re minime dubiâ*, justify an interference of the Government party to the treaty to enforce the doing of justice under it; and, in this last case, it becomes a political question again, as it was at first. But where does a board of commissioners, authorized only to examine cases not passed upon by the former board, find authority to re-examine one that *was*?

Its *judgment*, therefore, as a judgment, is simply *void*, and would be no justification to the Secretary of War for a requisition upon the treasury.

And this leads me to another point, strenuously pressed on behalf of all the claimants.

The commissioners, it is said, have *exclusive jurisdiction* in the matter, and their award is binding on the Government. And so it is, on all subjects *within* their jurisdiction, but on none at all without it; and, above all, not *on the extent* of their jurisdiction itself. No rule of law is better settled, than that every special, limited, or inferior authority, judicial or executive, must, before it take a single step in any matter, *allege* and *prove* its jurisdiction. The *onus probandi* is upon it, and those claiming through it. The *fact* that their award is binding, right or wrong, must be established by evidence *aliunde*, not by the award itself; and it must be established before they proceed to the award, or before anybody proceeds to do any act under it. Had these gentlemen passed sentence of death upon an Indian, they, and all engaged in executing their judgment, would have been guilty of murder. Their *opinion* of their own jurisdiction would have been no plea *in bar*. And neither would it be, as I have said, any authority to the Secretary of War, or the accounting officers, in a case such as that submitted to me. Those officers must, *at their peril*, take notice of the fact—be satisfied by evidence of the fact, that the commissioners *did not* exceed their jurisdiction, *before* they proceed to draw money out of the treasury to pay the award.

And this disposes of Mr. Butler's opinion concerning the authority of the Attorney General in the premises. The question whether the commissioners ought to have decided so and so, within their jurisdiction, is for *them* to answer; though I will not say that, even in such a case, the Government have not a right to the opinion of their law officer; for if the decision be wrong in *re minime dubiâ*, and to the injury of a foreigner, *his Government* would be justified in reprisals and war on that ground. But I omit that head for the present, as not necessary to my answer to the pretension on behalf of the claimants. Admit that the Attorney General is

not authorized to give an official opinion, to prevent (it may be) any gross errors in the judgments of a board of commissioners within their undoubted jurisdiction; how does that prove that he is not bound to advise the accounting officers of the treasury when they exceed it?

I am, on the whole, of opinion that the case of Rogers was before these commissioners *coram non judice*, and that their judgment as such is not binding on the officers of the treasury.

Regarding it as a *political question*, whether the Government ought to disturb the judgment of the first board, on the ground of irregularity or error, it is properly within the province of the executive department, and has, it appears, been repeatedly passed on by it. The proper remedy, if there be any wrong, will be in an appeal to Congress.

2. The next question is one rather of *administration* than of *law*. You state that the course of the department has hitherto uniformly been, to pay over the whole sum to the father. Whether this was altogether prudent, considering the liability of these people to imposition, and their careless unthrifty habits, is exceedingly questionable. But the father, besides being the natural guardian and protector of his offspring, is made absolute arbiter of their rights in these reservations. It is at his option whether any interest at all shall vest in his children; for clearly none does, if he choose to go away at first. It depends upon him, also, whether the lands shall not be divested out of them, and revert to the Government—as they do when he goes away. The treaty, therefore, confides to him, in a most especial manner, the destiny of his family in regard to this property. It makes him their guardian *quoad hoc*.

The 13th article of the treaty of 1835 scarcely admits of any other construction, at any rate. This view of the subject (which is, unquestionably, a strong one) having been originally taken, and uniformly adhered to by the department, it is, in my opinion, too late to adopt a new one now.

I have the honor to be, sir, your obedient servant,

H. S. LEGARE.

Hon. J. M. PORTER,
Secretary of War.

TREASURY DEPARTMENT,
Second Auditor's Office, January 13, 1844.

SIR: I have the honor to transmit herewith statements A and B, showing all the payments made on certificates issued by the commissioners under the 17th article of the treaty of 1835–'6 with the Cherokee Indians, together with the cost and incidental charges of the two boards of commissioners, prepared in compliance with a resolution of the Senate of the United States, of the 20th ultimo.

The resolution is herewith returned.

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

W. B. LEWIS.

Hon. J. M. PORTER,
Secretary of War.

A.

Statement showing the amount of money paid out of the treasury on certificates issued by the board of commissioners appointed in September, 1842, under the 17th article of Cherokee treaty of 1835 and 1836, together with the expenses of said board, including salaries and other incidental charges.

Date of payment.	To whom awarded.	To whom paid.	Amount paid.	Amount awarded.	Amount withheld.	Authority for withholding two-thirds of the amount awarded by the Commissioners.
1843.						
April 17	S. C. Stambaugh and James Bryan, counsel for David Taylor.	Lusby & Duval, assignees.	$29 66	$89 00	$59 34	*Extract.*—"In consequence of the doubts whether pre-emption claims can be considered as embraced by the treaty, those of G. F. Morris and David Taylor must lie over for further consideration. The decisions of the commissioners in the cases of Toona McDaniel and children, a reservation claim, and in that of David Taylor, a spoliation claim, are confirmed; but in these cases, and in all others in which payments are to be made, it is the direction of the President that not more than one-third of the amount of each shall be paid, till the commis-
May 22	David Taylor - - - -	David Taylor - -	170 00	510 00	340 00	
23	John F. Gillespy, attorney and counsel for Sutton Stephens and children.	Charles J. Nourse, assignee.	1,000 00	3,000 00	2,000 00	
24	John F. Gillespy, attorney and counsel for Charles Thompson.	Corcoran & Riggs, assignees.	250 00	2,500 00	2,250 00	
Sept. 25	J. K. Rogers, per order of Henry Smith.	J. K. Rogers - -	66 00	66 00	-	
Nov. 25	John F. Gillespy, attorney and counsel for Toona McDaniel.	John F. Gillespy -	818 66	2,456 00	1,637 34	
27	S. C. Stambaugh, of counsel for Toona McDaniel and child, per order of J. F. Gillespy, attorney.	Charles J. Nourse, assignee.	120 00	-	-	
		S. C. Stambaugh -	213 33	1,000 00	666 67	
Dec. 2	J. K. Rogers, per order of W. A. Coleman.	Charles J. Nourse, assignee.	140 00	420 00	280 00	
2	J. K. Rogers, order of John Langley.	Charles J. Nourse, assignee.	53 66	161 00	107 34	

6	Wm. H. Thomas, attorney and counsel for George Ward.	Wm. H. Thomas -	13 33	40 00	26 67	sioners shall have completed the examination and adjudication of all the claims upon which they have to act." J. M. PORTER. WAR DEPARTMENT, *March* 28, 1843.
	Wm. H. Thomas, attorney and counsel for Te-yolt-la.	Do -	12 66	38 00	25 34	
	Wm. H. Thomas, attorney and counsel for Cut-te-la-tah.	Do -	6 66	20 00	13 34	
	Wm. H. Thomas, attorney and counsel Ste-ta-chick.	Do -	76 66	230 00	153 34	
			2,970 62	10,530 00	7,559 38	

Expense of said board, including salaries and other incidental charges, $9,915 10.

Note by Secretary of War.—This sum exhibits the amount of expenditure *as settled* in the office of the Second Auditor. The report of the Commissioner of Indian Affairs shows the amount *expended* to be $11,839 18.

TREASURY DEPARTMENT,
Second Auditor's Office, January 11, 1844.

W. B. LEWIS.

B.

Statement showing the amount of money paid on certificates issued by the board of commissioners organized in 1836, *under the* 17*th article of the treaty with the Cherokee Indians of* 1835–'36, *with the cost of the board.*

	Years in which payments were made.					Total paid.	By whom paid.				
	1836.	1837.	1838.	1839.	1840.		Captain J. P. Simonton, U. S. A.	Doctor Philip Minis, U. S. A.	C. A. Harris.	Joel Cruttenden.	Requisitions on the treasury.
Claims paid on certificates issued by the commissioners appointed in the year 1836, under the 17th article of the treaty with the Cherokee Indians of 1835–'36 -	-	$787,543 18	$640,604 34	$16,493 44	$125 44	$1,444,766 40	$1,093,944 28	$315,399 09	$5,000 00	$30,297 59	$125 44
Paid for services of commissioners, secretaries, &c. -	$1,790 00	5,361 00	11,993 00	3,581 00	-	22,725 00	14,773 00	2,386 00	-	3,776 00	1,790 00

TREASURY DEPARTMENT,
Second Auditor's Office, January 11, 1844.

W. B. LEWIS.

WAR DEPARTMENT,
Office of Indian Affairs, March 27, 1844.

SIR: I have the honor to communicate herewith, in compliance with your verbal request of this morning, the following statement of amount adjudicated by the first board of commissioners under the 17th article of the Cherokee treaty of 1835–'36, as taken from their records:

1st. For improvements	$1,683,192	77½
2d. For spoliations	416,306	82½
3d. For national debts due to Cherokees	19,058	14
4th. For national debts due citizens of United States	51,642	25
5th. For reservations	159,324	87
Aggregate	$2,329,524	86

The books in the office of the Second Auditor show that the balance, on the 1st of January last, standing to the credit of the appropriation of July, 1836, "to carry that treaty into effect," is about $240,000.

Very respectfully, your obedient servant,
T. HARTLEY CRAWFORD.

Hon. CAVE JOHNSON,
Chairman of Indian Committee, House of Reps.

28th Congress, 1st Session. Rep. No. 391. Ho. of Reps.

[To be attached to Report No. 391.]

CLAIMS ARISING UNDER THE CHEROKEE TREATY.

MARCH 29, 1844.

Mr. Foot, of Vermont, from the minority of the Committee on Indian Affairs, submitted their views upon a joint resolution referred to said committee, directing the Secretary of the Treasury to pay the sums allowed to claimants by the commissioners under the Cherokee treaty of 1835–'36, upon the presentment of the certificates issued by said commissioners, &c., as follows:

The treaty negotiated by the United States and the Cherokee tribe of Indians east of the Mississippi river, for the purchase of the lands owned and occupied by that tribe in the States of Georgia, North Carolina, Tennessee, and Alabama, and providing for the removal of these people to a country west of Arkansas, was concluded at New Echota, in the State of Georgia, on the 29th day of December, 1835; and supplementary articles thereto were agreed upon and concluded at the city of Washington, on the 1st day of March, 1836: all of which were ratified by the President and Senate of the United States on the 23d day of May, 1836. The first article of the treaty cedes all the lands owned, claimed, or possessed by the Cherokees east of the Mississippi river, to the United States, for the sum of five millions of dollars; and for and in consideration of this sum, they also release all their claims against the United States for spoliations of every kind. But, in the same article, the question is made, "whether the Senate of the United States, in a resolution fixing the value of the Cherokee lands, adopted in the month of March of the same year, intended that the *five millions of dollars* should include the claims of the Cherokees against the United States for spoliations?" and that question is left unsettled, to be again submitted for the decision of the Senate. By reference to the supplemental articles to the treaty, it is found that the Senate *did not intend* that claims for spoliations should be paid out of the money allowed for the Cherokee lands; and provision is made for a liquidation of those claims, by an additional appropriation. [*See 2d and 3d articles of the supplement.*]

The treaty, independent of the supplement, contains 19 articles. The claims of individual Cherokees, arising under and provided for by the treaty, are enumerated in the 8th, 9th, 10th, 12th, 13th, 15th, and 16th articles of that instrument, and in the 3d article of the supplement. And the mode of ascertaining and liquidating these claims is settled by the 17th article of the treaty, which is in the following words:

"ART. 17. All the claims arising under, and provided for in, the several articles of this treaty, shall be examined and adjudicated by Gen. William Carroll and John F. Schermerhorn, or by such commissioners as shall be appointed by the President of the United States for that purpose; and their

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decision shall be *final;* and on their *certificate* of the amount due the several claimants, they *shall* be paid by the United States."

This was the tribunal agreed upon between the United States and the Cherokees, when the original treaty was concluded at New Echota, on the 29th December, 1835: but in the ratification of the treaty on the 23d of May, 1836, the words "*General William Carroll and John F. Schermerhorn, or*" are stricken out; and after the words *President of the United States*, "by and with the advice and consent of the Senate of the United States," is inserted. To this amendment the Cherokee delegation assented; and so far as the "examination and adjudication of all claims arising under the treaty" is concerned, the 17th article (as amended) is recorded as the supreme law. The questions submitted to the committee, under a reference of the joint resolution of Jan. 3, 1844, are, "whether the board constituted by the above-recited article has the *exclusive* jurisdiction over the examination and adjudication of all claims arising under, or provided for by, the several articles of the treaty?" "whether any department of the Government possesses a controlling or supervisory power over the judicial action of the board?" and "whether the certificates issued by the commissioners, upon their awards, to the several claimants, must not be paid by the United States, in fulfilment of a solemn treaty obligation?"

The undersigned have given the whole subject, upon which these qnestions are predicated, an attentive and laborious investigation. They have carefully examined the several stipulations of the treaty itself—the correspondence between the Government and the Cherokee authorities, pending the negotiations which terminated in the entire relinquishment of all the lands possessed by the former east of the Mississippi, to the United States—the distinct propositions made by President Jackson, through the commissioners who concluded the treaty with the Indians, in December, 1835, as an inducement to these people to cede their country; and have thereby obtained much useful knowledge in relation to what was the clear understanding of the contracting parties at the time the contract was consummated, as well upon the question of construction, as in reference to the effect of its several stipulations upon the claims of individual Cherokees. This correspondence, and the propositions submitted by the President, will be found in the 2d volume of Senate documents, 2d session 25th Congress—the latter is embraced in a letter from Rev. J. F. Schermerhorn, one of the commissioners, to the War Department, dated August 3, 1835. [See page 450, *et seq.* of that volume.] It is manifest, from a perusal of all the proceedings anterior to the treaty, and of the various provisions of the treaty itself, that the Government of the United States was acting under a firm determination to obtain the country of the Cherokees; and, for the purpose of securing the favor or neutrality of those opposed to the cession, every species of claims are provided for, rendering many of the stipulations ambiguous in their terms, and conflicting with each other. This very circumstance, it has been alleged by some of the Cherokees, who were a party to the treaty, induced the nomination of William Carroll and John F. Schermerhorn as commissioners to adjudicate all claims arising under it. They were the commissioners who negotiated the treaty on behalf of the United States, knew the true intent and meaning of the contracting parties, and would

construe the several stipulations, not *technically*, but according to their *plain, common-sense meaning and intention.*

The board, contemplated by the 17th article, was appointed by the President and Senate, on the 7th day of July, 1836. Gen. William Carroll, of Tennessee, and Gov. Wilson Lumpkin, of Georgia, were the commissioners. Gen. Carroll did not accept of the appointment, nor did he decline accepting until the 7th of October following; and on the 25th of that month John Kennedy was appointed his successor. The first communication to the board, from the War Department, informing the commissioners of the duties confided to them by their appointment, is dated July 25, 1836. [See page 149 of Senate document already referred to.] This letter, signed by C. A. Harris, Commissioner of Indian Affairs, lays the ground-work for the execution of the Cherokee treaty. It commences as follows: "I have the honor, by direction of the Secretary of War, to communicate to you the *views* of the department respecting the duties confided to you by the commissions transmitted to you on the 7th instant. I present them as *suggestions*, as, from the very *nature* of the duties, very much must be left to your discretion and judgment." In relation to the adjudication of claims especially committed to the board under the 17th article, the third paragraph of the same letter says, "the examination of these debts and claims is confided to you, under the 17th article of the treaty, which stipulates that your decision shall be *final*, and the payments be made, upon your *certificate*, to the several claimants." To exhibit still further the independent character of the board, Commissioner Harris, acting under direction of the Secretary of War, (Governor Cass,) says, in the same communication, (fourth paragraph from the last,) "I have thought it inexpedient for me to advert to the order, time, or *place*, in which these duties shall be performed. This must be left to your own judgment."

The undersigned have deemed it proper thus to bring before the House the views entertained by the Executive Department of the Government, in relation to the powers conferred upon the Cherokee board by the 17th article of the treaty, when that tribunal was constituted in 1836, and the terms of the compact fresh in the minds of all concerned, in order that they may be compared with the views entertained and enforced by the Executive Department at and since the re organization of the board in September, 1842, of which the Cherokee claimants now complain, and from the operation of which they ask relief of Congress.

As already stated, the Cherokee board was not organized until after the resignation of Gov. Carroll, and appointment of Mr. Kennedy in October, 1836. A disbursing officer was then immediately appointed, with instructions to report to the commissioners at New Echota, Georgia, and pay to the several claimants the amount of their awards. The commissioners were apprized of the appointment of this officer in a letter addressed to them from the Indian Office here, dated November 4, 1836. (See Senate document above cited, pages 198 and 199.) In this letter, the Secretary of War again recognises the controlling power of the board; and in addition to the duties assigned by the words of the treaty, the commissioners are invested with the supervision of all disbursements made upon their decrees. It concludes as follows: "I would *suggest* for your consideration the following mode of proceeding in making disbursements to claimants: When the register upon which the payment is to be made is completed,

exhibiting the amounts due, let corresponding numbers be affixed to the name of each claimant upon the register, and the register of improvements or claims, according to the class to which he belongs. In addition to the receipt which you were requested to take in the letter of July 25th, let a book of blank certificates of the enclosed form be printed. Whenever a payment is made, let the same number, the name of the payee, the amount paid, the article of the treaty authorizing the payment, and the date of the treaty, corresponding with the filling up of the certificate, be entered in the margin. Let the claimant sign another receipt on the back of the certificate *in the presence of one of you*, and the *disbursing officer will pay the amount. These certificates, signed by either of you, will constitute his vouchers.*"

Appended to this letter, as printed, is the form of a certificate referred to as being enclosed, which corresponds in matter and substance with the certificates adopted and issued by the board at its first session. The undersigned have ascertained, by reference to the records, that 9,448 certificates were thus issued, and paid in full by the disbursing officer, amounting to $1,460,140 19½, as is shown by a recent report from the Commissioner of Indian Affairs. The whole amount awarded to claimants by the board at its first session, for reservations, improvements, and spoliations, and paid by the United States, according to a statement embraced in a report made by Mr. Cooper, chairman of the Committee on Indian Affairs, on the 2d March, 1843, is $2,217,328 90! (See report No. 288, H. of R., 3d session 27th Congress, page 52.) Beside this sum actually paid, the same report (page 54) exhibits $13,287 06 as remaining in the hands of P. M. Butler, Cherokee agent west, who was then, and has since been, engaged in paying the awards made by the board, *in full*, to the several claimants. It does not appear, so far as the undersigned have been able to ascertain, that a single decree, made by the board at its first session, in pursuance of the 17th article of the treaty, and a certificate issued thereupon, has been reviewed or set aside; but, on the contrary, all the certificates or requisitions so issued, were paid on presentation by the proper disbursing officer of the treasury. The only cases acted on by that board, which were reviewed by the War Department, as shown by the records of the Indian Office, are those of Sutton Stevens, Charles Thompson, Bold Hunter, and William Barnes; and in these cases the decision of the board, was not made *final*, and no certificate issued to the claimants in conformity to the provision of the 17th article. The claim of Charles Thompson was for a reservation taken under the treaty of 1817, and for which payment is provided by the 13th article of the treaty of 1835. Instead of ascertaining the value of the land, and awarding the amount in money, the commissioners decided in favor of the claim, but recommended that the *land* should be confirmed to the claimant. Under this decree the claimant could not be paid as stipulated by the 17th article of the treaty, and he brought his case before the Secretary of War, (Mr. Poinsett,) and it was referred to the present Commissioner of Indian Affairs, who gave his opinion, that Thompson was *entitled* to the value of the reservation, but did not say *how* or *in what manner* that value should be ascertained and paid. This opinion was endorsed as approved by the Secretary, but no steps were taken to ascertain the value of the reservation, or to pay the claim, by the last administration. All the papers in the case, embracing the ascertained value of the land, were afterwards referred to Mr. *Spencer*, as Sec-

retary of War, at the instance of claimant's attorney; upon which he made a decision, dated April 6, 1842, a portion of which is quoted as follows: "It seems to me to require only the reading of the 17th article of the treaty to be satisfied that the whole subject of claims arising under the treaty was referred *exclusively* to the board of commissioners, and that *no money can possibly be paid without their decision.*" And in adverting to an endorsement by Secretary Poinsett, of the opinion above referred to, Secretary Spencer adds: "I feel bound to say, that while I respect, and intend to follow, the decisions of a predecessor in all cases affecting the administration of any law conferring authority on this department, yet I cannot consent to be thus bound in relation to a question whether any such authority is conferred. *I am unwilling to exercise any authority, unless convinced myself that it is possessed!* I must, therefore, *decline* acting in this case, and leave it, with the *numerous other claims* under the Cherokee treaty, to be hereafter disposed of by a *legally constituted tribunal.*"

The undersigned have gone thus into detail in bringing this decision in review of the House, because it has an important bearing upon the acts of the War Department under the *same head*, subsequently to the re-appointment of the board in September, 1842, which will be commented upon in their proper place; and because the claim of Charles Thompson is one of the five cases referred to by the Commissioner of Indian Affairs, in the reply made by the Secretary of War to the resolution of inquiry adopted by the Senate on the 20th of December last, as being a claim "reversed or modified," which was adjudicated by the board at its first session. It will be seen that the claim was not adjudicated, nor was a certificate issued under the 17th article creating the board; and Secretary Spencer positively *declines* acting on the case, for the want of legal authority.

The board of commissioners first appointed in July, 1836, and organized in November of that year, adjourned on or about the 5th day of March, 1839, having been upwards of two years and three months in session. It was re-organized in November, 1842. General John H. Eaton, of Washington city, and James Iredell, esq., of North Carolina, were appointed the commissioners on the 5th September; but Mr. Iredell declined to accept the appointment, and on the 8th of November, 1842, Edward B. Hubley, esq., of Pennsylvania, was appointed in his place. The renewal of the commission was produced by a joint resolution, introduced in the Senate on the 7th March, 1842, by Hon. A. H. Sevier, directing the President of the United States to appoint three commissioners to adjudicate the claims of the Cherokees residing east of the Mississippi river. This resolution was referred to the Committee on Indian Affairs; and on the 24th day of the same month, (March,) the Hon. Mr. Morehead, from that committee, made the following report:

"That, by the 17th article of the treaty referred to, it is provided that 'all the claims arising under, or provided for by, the several articles of the treaty,' &c., [*reciting the 17th article.*] The committee are informed that there are important claims arising under, and provided for by, the several articles of the treaty, which were not adjusted by the board of commissioners heretofore appointed for that purpose; and it is believed that justice to the claimants requires that those claims should be examined, and, if found to be just, that they should be paid. But the committee are clearly of opinion that the President of the United States has full power, in virtue of the before-mentioned article of the treaty, to *renew* the com-

mission at *its* pleasure, until *its objects* are fully carried into effect. The committee, therefore, refrain from recommending any action on the part of the Senate, and ask to be discharged."

Upon this expression of opinion by the Senate, (in which the Secretary of War concurred, as is shown by his opinion in the case of Thompson, above referred to,) the department asked for an appropriation of $13,500, based upon an estimate from the Indian bureau, for the purpose of defraying the expenses of the new commission; and on the 24th of August, 1842, the appropriation for that object was made by Congress. The board was then renewed, as has been already shown; and, about the last of November following, it organized in this city, and proceeded to business.

The grievances of which the Cherokees complain, and to redress which the joint resolution referred to the committee, and now under consideration, was introduced in the House, commenced at this period. As set forth in a memorial to the President of the United States, signed by certain Cherokee claimants in the city of Washington, dated January 5, 1843, it is charged "that instructions have been issued by the War Department prescribing rules for the government of the board, and directing its *final* action in the performance of duties assigned to it alone by the treaty. For a copy of these instructions we [the claimants] have applied to the Indian Office and to the board, and our application has been refused. Instead, therefore, of having the *advice* and *counsel* of this tribunal, which is the supreme arbiter between the United States and the Cherokee nation and individual Cherokee claimants, we are left, as the *weaker party*, to grapple, unaided and unadvised, with the *most powerful* in the reference, without having even the rules of evidence or mode of action made known to us, by which the board is to be governed in its proceedings." The memorial proceeds in its complaint, by asserting "that the board of commissioners, controlled by these instructions from the War Department, refused to issue certificates to claimants upon adjudicated claims; and, instead thereof, submitted its report upon allowed claims to the Commissioner of Indian Affairs; that the first case adjudicated by the board was so reported on the 29th December, and was then (January 5th) in the hands of the Secretary of War, (Mr. Spencer,) who had sent for all the papers in the case, for the purpose of examining it himself, and determining whether the decision of the board was justified by the facts of the case and the testimony adduced."

These and other grievances are set forth in the memorial, by which the complainants declare that the power now assumed by the department "is arbitrary, and in violation of the letter and true intent and meaning of the treaty;" and show, by public documents, that it is in direct contravention of the course pursued by two preceding administrations in the execution of the trust confided by the 17th article. From this alleged oppression the memorialists then asked the President of the United States to relieve them, by directing "that the action of the Cherokee board should be *final*, as stipulated by the treaty, and the certificates issued should be paid on presentation, as was the uniform practice during the first session of the board, under whose decrees (*which were all paid in full*) more than *nineteen-twentieths* of all the claims arising under the treaty have been liquidated." On the 15th of the same month, (January, 1843,) the complainants, having received no response to their appeal to the President, and the Secretary of War still detaining the award of the board for

the purpose of reviewing and setting it aside at his pleasure, another communication, in the form of an appeal, was addressed to his excellency. This appeal was found by the claimants, some days afterwards, in the War Department, with the following endorsement, in the handwriting of the President:

"This is a matter with which I have nothing to do. If the Secretary sees cause to revise his opinion, and alter it, so well; if not, the parties must take their case to Congress.—J. T."

The Cherokee claimants then brought the question before Congress by a memorial, dated January 24, 1843, in which they embrace a copy of the memorial addressed to the President, and ask redress from Congress. This memorial, with the accompanying papers, was referred to the Committee on Indian Affairs on the 26th of the same month.—(See Doc. No. 93 of that session.) The Cherokees, in this memorial to Congress, again earnestly protest against the exercise of any controlling power by the Commissioner of Indian Affairs, or the Secretary of War, over the judicial action of the board. They assert that such power was *intended* to be denied by the parties to the treaty, and was absolutely prohibited by the 17th article; but that, notwithstanding this prohibition, instructions had been given to the board, by the War Department, which made the commissioners mere examining clerks, under the control of the Commissioner of Indian Affairs and the Secretary of War; and that these instructions, although acted upon by the board, and made the *rule* for construing the treaty, and the *law* under which claims must be decided, were, by order of the Indian Office, withheld from the claimants. In consequence of these complaints, a resolution was adopted in the House of Representatives on the 24th of January, 1843, calling upon the Secretary for the instructions; and on the 1st of February they were received, enclosed in a letter from the President, and referred to the Committee on Indian Affairs.—(See Doc. No. 110 of that session.)

The Committee on Indian Affairs, to whom the Cherokee memorial was referred, on the 9th day of February, 1843, reported a joint resolution, in substance the same as the one now under consideration, directing the Secretary of the Treasury to pay such sum or sums of money as may be awarded to claimants by the board organized under the 17th article of the Cherokee treaty of 1835, and that the certificates issued to claimants, as required by said article, shall be proper and sufficient vouchers upon which payment shall be made. This resolution passed both Houses of Congress on the 2d of March, the day before the last of the session, but was not approved by the President. It was retained in his possession until after the commencement of the present session, when, on the 18th of December, he sent a message to the House of Representatives assigning his reasons for withholding his signature. These reasons appear to be—

First. "The balance of the fund provided by Congress for satisfying claims under the 17th article of the Cherokee treaty, referred to in the resolution, is wholly insufficient to meet the claims still pending. To direct the payment, therefore, of the whole amount of those claims which happened to be first adjudicated, would prevent a ratable distribution of the fund among those equally entitled to its benefits. Such a violation of the individual rights of the claimants would impose upon the Government the obligation of making further appropriations to indemnify them; and thus Congress would be obliged to enlarge a provision, liberal and equitable,

which it had made for the satisfaction of all the demands of the Cherokees." And, *second*. "If no such indemnity should be provided, then a palpable and very gross wrong would be inflicted upon the claimants who had not been so fortunate as to have their claims taken up in preference to others. Besides, the fund having been appropriated by law to a specific purpose, in fulfilment of the treaty, it belongs to the Cherokees; and the authority of this Government to direct its application to particular claims is more than questionable." And, *third*. "The further direction, that certificates required to be issued by the treaty, and in conformity with the practice of the board heretofore, shall be proper and sufficient vouchers upon which payments shall be made at the treasury, is a departure from the system established soon after the adoption of the constitution, and maintained ever since. That system requires that payments, under the authority of any department, shall be made upon its requisition, countersigned by the proper Auditor and Comptroller. The greatest irregularity would ensue from the mode of payment prescribed by the resolution."

These are the objections made by the President of the United States to the joint resolution passed at the last session, directing payment of the awards made by the Cherokee board. It thus appears that the claimants first appealed to the President to relieve them from what they termed "an unjust and unwarrantable assumption of power by the Secretary of War," in reviewing the decrees of the board, and refusing to pay upon its awards; and to this appeal the President responded: "This is a matter with which I have nothing to do. If the Secretary sees cause to revise his opinion, and alter it, so well; if not, the parties must take their case to Congress." The parties did take their case to Congress, and obtained relief, so far as legislative action could relieve them, by the passage of the joint resolution referred to, to which the President afterwards refused his sanction. It appears, however, that on the day the resolution passed Congress, the commissioners commenced issuing *certificates* upon their decrees, in conformity with the provision of the treaty and the form adopted by the board at its first session. These certificates were then retained in the possession of the claimants until the new Secretary, (Mr. Porter,) who had just been appointed, should take charge of the department, for the purpose of bringing the question before him *de novo*. He, however, refused to take any order upon the certificates until a report of the proceedings of the board, in each case, was brought before him for revision; assigning as a reason for assuming the power of reviewing the decrees of the commissioners, that his immediate predecessor (Mr. Spencer) had claimed that power as existing in the department, in which opinion he (Mr. Porter) concurred. But, as has been shown, no certificate had been presented to Secretary Spencer, drawn up in accordance with the form prescribed under authority of the 17th article; and hence no decision had been made by him on the *new* question thus presented.

Secretary Spencer had, however, made a decision upon a REPORT of the board, referred to him on the 29th December, 1842, as has been shown, *upon which no certificate had issued*, in which he claims to possess the power of *revising the proceedings of the commissioners*. This does not comport with his opinion in the case of Charles Thompson, appealed to him by the claimant. In that opinion, (which is inserted in this report, and dated April 6, 1842, *five months anterior to the organization of the*

new commission,) he denies the existence of any inherent power in the department "to revise or review the decrees of the commissioners appointed under the 17th article of the Cherokee treaty," and says: "I must, therefore, decline acting in this case, and leave it with the NUMEROUS OTHER CLAIMS, under the Cherokee treaty, to be hereafter disposed of by a LEGALLY CONSTITUTED TRIBUNAL." This opinion he must either have forgotten, or deemed erroneous, when he afterwards assumed the power of revising the decrees of this tribunal, and of setting them aside.

In the reply made by the late Secretary, on the 16th January last, to a series of interrogatories, propounded by a resolution of the Senate of the 20th December, he communicates his reasons fully for exercising a supervisory control over the judicial action of the board. The direct question is asked in this resolution, "by what law or authority is the power conferred on the War Department to review the decisions of the Cherokee board, and set them aside or annul them?" An elaborate answer is given to this question by the Commissioner of Indian Affairs, (Mr. Crawford,) whose report in the case is incorporated in the communication of the Secretary, and made part of his reply to the Senate's inquiry upon this point. Mr. Commissioner Crawford says: "The proceedings and the statement of facts in the case are reviewed for the single purpose of ascertaining whether the commission had jurisdiction: if it had not, its acts are void." "This power the Secretary of War possesses, by his relation, as the head of an executive office, to the Indian affairs of the country, and to their administration." "The power is *inherent* which is necessary to discharge an imposed duty, unless *prohibited by law*. By the law of 1832, the Commissioner of Indian Affairs has direction and management of all Indian affairs, and of all matters arising out of Indian relations, under the direction of the Secretary of War, and agreeably to such regulations as the President may prescribe."

The Commissioner says much more in reply to the question proposed than is here quoted; and argues to prove that the treasury would be in jeopardy, if awards made by any board of commissioners were ordered to be paid without undergoing the searching examination of the War Department. The above, however, embraces all of his answer relevant to the question asked, and cites the "law and authority" by which, in his opinion, the War Department derives the power to review or revise the proceedings of the Cherokee board. An opinion of the late Attorney General (Mr. Legare) is also introduced by the Secretary of War, to sustain him in the position he has assumed in reference to the jurisdiction of the board, and his power to revise and annul its decrees. This opinion was given on the 19th of May, 1843, upon a reference made by the Secretary of War of some adjudicated cases. On the question of jurisdiction, Mr. Legare says: "No rule of law is better established than that every special, limited, or inferior authority, judicial or executive, must, before it take a single step in any matter, allege and prove its jurisdiction. The *onus probandi* is upon it, and those claiming through it. 'The fact that their award is binding, right or wrong, must be established by evidence *aliunde*, not by the award itself; and it must be established before they proceed to the award, or before anybody proceeds to do any act under it. Had these gentlemen passed sentence of death upon an Indian, they, and all engaged in executing their judgment, would have been

guilty of murder. Their opinion of their own jurisdiction would have been no plea in bar."

The undersigned have now, with much care, and in as brief a manner as possible, presented all the proceedings and material facts bearing upon the question at issue—a question which has become exceedingly complicated, and involves matter of serious importance. They have presented a condensed view of the treaty which gave rise to the question; of the construction placed upon its provisions, and the manner of its execution under the administration of President Jackson, by whom it was negotiated, and under the administration of President Van Buren. They have shown the time and mode of organizing the board in 1836, and its adjournment in 1839, and of its reorganization in 1842, under the present administration. They have also shown that a different construction is now placed upon its several stipulations; and the power conferred upon the commissioners appointed under the 17th article, recognised as being *supreme* by the two preceding administrations, is *denied* by the present one, and the final decision of claims confided to the head of the War Department. This portion of the question, exhibiting one Executive setting aside a decision of his immediate predecessors, upon a plain stipulation of an Indian treaty, so extensively acted upon as in the present instance, presents a case of peculiar importance; and the reasons assigned by the present Executive and his war minister for doing so, have been fully introduced and referred to in this report. It now becomes the duty of the undersigned to review the cases as presented, and to give their opinion, formed after mature deliberation.

The Cherokee treaty of 1835, upon its ratification by the President and Senate on the 23d day of May, 1836, became the *supreme law*, in reference to all matters therein contained. The 19th and last article says: "This treaty, after the same shall be ratified by the President and Senate of the United States, shall be obligatory on the contracting parties." It was so ratified, as shown, by the President and Senate, and has never since been altered or annulled by the contracting parties; nor does it appear that the *Indian* party have ever applied, or been applied to, upon the subject. The 17th article of the treaty, then, is the LAW under which the Cherokee board has been created; and it is, in the opinion of the undersigned, a tribunal possessing powers, within its legitimate sphere of action, co-extensive with those of the Supreme Court of the United States. The Executive has no legal or constitutional right to direct or restrict the judicial action of a tribunal thus constituted, when confined within the limits prescribed by the treaty. The constitution enjoins it as a duty upon the President, that he shall cause "the laws to be faithfully executed." In reference to this treaty, which is a *supreme law*, he has performed this duty by appointing the commissioners therein provided for. When he had done this, the special trust confided to him was discharged, and his functions ceased, unless the tribunal thus created refused to execute the law, or perpetrated some flagrant and palpable violation of it; when he might exercise the power of removal from office, or of suspending their proceeding until a proper investigation of their conduct could be made. But, whilst the commissioners are permitted to exist as a board, he cannot prescribe the boundaries of their jurisdiction, revise or rescind their decrees when rendered, or dictate rules and principles which shall control their judicial action.

In support of the opinion thus expressed, the undersigned will now cite high authority. And, in the first place, they will refer to an opinion of Attorney General Butler, which involves the direct question at issue.

This opinion appears to be elicited by several communications from the War Department, requesting his opinion on questions then pending before the board of commissioners under the 17th article of the Cherokee treaty, then in session. It is dated "Attorney General's Office, August 27, 1838," and will be found in the 6th volume of Executive Documents, 2d session 26th Congress, page 1209, published with the opinions of all the Attorney Generals of the United States, from the commencement of the Government down to the 1st of March, 1841, and declares as follows:

"The points referred to in these communications have, most of them, been examined by me in opinions heretofore transmitted to your department. It appears, however, from the extracts from the letter of the commissioners, enclosed in your letter of the 14th instant, that my opinion of the 26th of May last is unsatisfactory to the commissioners, and that they desire a reconsideration of it. In respect to that opinion, as well as to the former communications from this office on the general subject, I will observe that I am by no means surprised that they do not, in all respects, meet the views of others, more familiar than I am with the probable intent of the makers of the treaties referred to, and with the practical construction which has been given to those instruments, nor that incongruities should be detected in the views presented in those opinions on the various points discussed therein.

"From the great obscurity of the treaty provisions, and my want of accurate knowledge on many parts of the subject, I have found it exceedingly difficult (and in some cases almost impossible) to satisfy myself on the questions referred to me; and it was, therefore, not to be expected that I should be able, in every instance, to satisfy others.

"I will also observe, that the treaty provides that the claims arising under the treaty shall be *examined* and *adjudicated* by commissioners to be appointed by the *President, by and with the advice and consent of the Senate;* and that their decision shall *be final.* I am satisfied that all the opinions given in this office, in respect to the claims, have been extra-official and unauthorized; the Attorney General having no power to give an official opinion on the request of the head of a department, except *on matters that concern the official powers and duties of such department.* The character of the Cherokee board of commissioners is, in principle, the same with that of the boards appointed under the conventions with Spain, Naples, and France; and it was never supposed, in either of those cases, that the Attorney General could be called on, *through the head of any department, to examine and discuss the various claims litigated before them.* Commissioners or agents are sometimes appointed by the War Department, in the transaction of its concerns with Indian tribes, who stand in such a relation to the department as to be authorized to call on it for advice and assistance; and, in these cases, the department may call for the advice of the Attorney General on questions of law. When the application of the Cherokee commissioners was first sent from your department, it did not occur to me that they did not stand in this latter relation; and I therefore, from time to time, investigated such questions as were pre-

sented, in the hope that my views might render them some aid in the execution of their important and difficult task."

The undersigned have introduced the above opinion at length, because it embraces within its grasp the whole question under discussion. It is a clear and unequivocal exposition of the true character of the Cherokee board, and is important in other respects. Mr. Butler was appointed Attorney General in November, 1833, and resigned in September, 1838; he was, therefore, a member of President Jackson's cabinet, and no doubt consulted with regard to the terms of the treaty of 1835, before they were agreed upon. He held his office upwards of two years after the ratification of that treaty, and, during the first session of the board; he had frequently acted as Secretary of War *ad interim*, and was as well acquainted, it is presumed, with the subject-matter of the treaty, as any other officer of the Government. Yet this high law officer of the Government, with all his practical information, modestly acknowledges that, if he even had the legal right to give the opinions he had previously advanced, it by no means surprised him "that they did not meet the views of others *more familiar with the probable intent* of the makers of the treaty referred to, and with the practical construction which had been given to it." And he acknowledges, further, that, "from the great obscurity of the treaty provisions, and his want of accurate knowledge on many parts of the subject, he found it difficult—in some cases, almost impossible—to satisfy himself upon the questions referred to him."

This is the *last opinion* given by Attorney General Butler in relation to the execution of the Cherokee treaty; and in this, with all his knowledge and great experience upon the subject, he expressly declares "that no department of this Government has the right to interfere with, or control the action of, the Cherokee board;" and that all his opinions previously given were "*extra-official and unauthorized.*" Yet a Secretary of War, only a few weeks or months in office, has since, under a new construction of the treaty, assumed the power of revising the decisions of the board, and setting them aside at his pleasure. The undersigned have occupied considerable space in presenting this opinion of Mr. Butler, because it involves the precise case in controversy. They will, however, cite other opinions, by which the same principle is recognised. An award, rendered by the commissioners appointed under the 7th article of the treaty with Great Britain of 1783, was objected to by some of the parties claiming; and the question was brought before Attorney General *Breckenridge*, "upon an application to set the award aside." Mr. B.'s opinion is dated August 7, 1805, in which he says: "This would be going into a re-examination of the matters referred to, and decided on by the commissioners, of which, under the treaty, they had the *final* and *exclusive* jurisdiction." "The Government has only to see that the moneys are paid to those in whose favor they were awarded, or to those legally entitled to receive under them." (*See vol. Attorney Generals' Opinions, page* 97.) On page 106 of the same volume, the same principle is maintained, by an opinion given by Attorney General Rodney, June 22, 1807, upon a question arising under the French treaty.

The undersigned will now cite a decision made by Mr. Poinsett, Secretary of War, bearing directly on the point in question. After the adjournment of the Cherokee board, in 1839, an appeal was made to the President of the United States, by Messrs. Underwood, Hansell, and

Rockwell, from a decision of the board, upon a claim preferred by them for legal services rendered the Cherokee nation prior to the ratification of the treaty, for which provision is made by the 10th article. This claim, it appears, had been once decided, and then opened for re-hearing; and a suggestion made to refer the claim to an arbitration of lawyers, for the purpose of fixing the amount which should be allowed, according to the customary fees of the country, for similar services. The commissioners refused to adopt and act upon this suggestion; and, upon a re-hearing of the case, they made their first decision *final*. An appeal was then made directly to the President of the United States, and the conduct of the commissioners was severely commented on by the appellants.

The President referred the subject to the Secretary of War, (Mr. Poinsett,) who made his report on the case to the President on the 14th February, 1840. In this report, the question of *jurisdiction*, under the 17th article of the Cherokee treaty, is fully presented and discussed before the President of the United States. After introducing the case, by referring the President to the report of the Commissioner of Indian Affairs, Secretary Poinsett says: "But I beg leave further to remark, that, in *whatever light* the action of the commissioners in these claims may be regarded, it appears to me that there is *no power* in the *Government of the United States to revise their decisions*, or to dispose of these Indian funds in any other manner than [that] specified in the treaty." The Secretary then cites the 17th article, by which provision is made for the adjudication of all claims arising under the several stipulations, and gives his opinion as follows: "In no part of the treaty is the power vested in the President to *examine* and *adjudicate* such claims; on the contrary, the power to *revise the proceedings of the board is expressly taken away from him*. The first question to be considered is, whether the decision of the commissioners was designed to be *final*; the second, whether, assuming that it was so intended, the President can, *for any reason, review and revise it*. It appears that the commissioners gave a qualified decision, in the first place, reserving to themselves the right to revise their proceedings, and make a further allowance, &c. This examination was subsequently made, and a majority of them refused any further compensation to the claimants. The third commissioner differed from his colleagues; but the opinion of a majority of the board must stand for its decision. *Any interference of this department* was irregular, and cannot invalidate the action of the commissioners. A majority of them refused to accede to *the suggestions made to them by the department*, which they had an undoubted right to do. There does not, therefore, appear to be any reason for doubt upon the *first* point. The 17th article, already quoted, disposed of the *second*, by an express declaration *that the decision of the commissioners shall be final*."

Upon this report, the President of the United States made the following endorsement:

"The President concurs in the view taken of the subject by the Secretary of War, and directs that a copy of the within, and of the report of the Commissioner of Indian Affairs, be sent to Col. Rockwell and Mr. Hansell.—M. V. B."

The undersigned have now shown, clearly and conclusively, from the public records, that no money could be paid to claimants, under the Cher-

okee treaty of 1835, except upon awards made by commissioners appointed under the 17th article. Their authorities are found in the committal of the trust, first, to a board organized in November, 1836, by the Hon. Lewis Cass, Secretary of War, under the direction of President Jackson, and its execution upon the construction then put upon the provisions of the treaty throughout that and the succeeding administration; by the opinion of an Attorney General, who held his high place when the treaty was negotiated, and had been officially connected with its execution, through a period of five years; and by the decision of Secretary Poinsett, approved by President Van Buren, eleven months after the first commission was dissolved, and only a year before the present administration came into power. The question of jurisdiction, thus settled, establishes the following points: 1st. "All the claims arising under, and provided for in, the several articles of the Cherokee treaty, are referred, exclusively, to the arbitration of commissioners appointed under the 17th article." 2d. "That the decision of such board of commissioners is FINAL; and that their decrees must be paid in full by the proper disbursing officer of the treasury, upon a certificate issued by the board, *which shall constitute his voucher.*" 3d. That "the character of the Cherokee board of commissioners is, in principle, the same with that of the boards appointed under the conventions with Spain, Naples, and France," and cannot be interfered with by any department of this Government, "in the examination and discussion of any claims litigated before them." 4th. "That there is no power in the Government of the United States to *revise* their decisions, or to dispose of the Indian funds in any other manner than that specified in the treaty; and in no part of the treaty is the power vested in the President to examine and adjudicate such claims; on the contrary, *the power to revise the proceedings of the board is expressly taken away from him.*"

Under the construction thus placed upon the Cherokee treaty, it appears that upwards of *two millions of dollars* had been paid at the close of the last administration, upon awards made by the board at its first session; and *every claimant was paid in full.* The present Executive has disregarded the decision of his predecessors upon this question; and, by a construction of his own, or of his war minister, the power to revise the decrees of the commissioners has been conferred upon the Secretary of War and the Commissioner of Indian Affairs; and he has also willed that only *one-third* of allowed claims shall be paid. Under this assumed power, the Secretary of War has, upon every certificate presented for payment since the re-organization of the board in November, 1842, called for all the proceedings in the case; and out of awards amounting to $26,836 16 thus presented, $16,306 16 have been rejected; and only $2,970 62 have been paid, in consequence of the *pro rata* established by the President.

The undersigned are of opinion that there is no instance on record of an executive officer reversing the decision of his predecessor, solemnly made and recorded, until it was done by the present Executive. In speaking of the authority of one Executive to *review and unsettle* an act of his predecessor, Attorney General Wirt, in an opinion given on the 1st of October, 1826, says: "If it has such authority, the Executive which is to follow us must have the like authority to review and unsettle our decisions, and to set up again those of our predecessors; and, upon this principle, no question can be considered as *finally* settled." [See volume of Attorney Generals' Opinions, page 554.] A similar opinion is given by

Attorney General Taney, in a reply to a reference of the Secretary of War, dated September 10, 1831. [Page 841 same volume.]

The reasons assigned by the President for disregarding the rule here laid down, and in support of his refusal to sign the joint resolution of last session, which directed the execution of the Cherokee treaty upon the principles established and sustained by two preceding administrations, have been already inserted in this report. In the first place, he undertakes to predict that the funds yet in the treasury appropriated to pay claims arising under the treaty are wholly insufficient for that object; and intimates that a "*ratable* distribution is contemplated." This objection is not tenable. There is no *ratable* or *pro rata* payment contemplated by the treaty; every claim arising under it is to be paid *in full.* His second objection is, that if certificates were now paid in full as presented, "a very gross wrong would be inflicted upon claimants who were not so fortunate as to have their claims taken up in preference to others; and that the fund having been appropriated by law for a specific purpose, it belongs to the Cherokees; and the authority of this Government to direct its application to particular claims is more than questionable." The undersigned are at a loss to know what specific object is here intended by his excellency. The contracting parties to the treaty were the United States and the Cherokee nation. By this contract, the latter ceded all their lands east of the Mississippi river, for which the former stipulated to pay a certain amount in money; and part of this consideration was to be applied to the liquidation of claims held by individuals of the nation against the United States. In fulfilment of this last stipulation, upwards of two millions of dollars have been applied to the liquidation of such claims, out of the same fund of which the small balance yet remains in the treasury. The claims recently adjudicated, upon which certificates have been issued, are of the same "nature and description" of those heretofore adjudicated and paid, to which we have alluded. If a "very gross wrong" has been sustained by any portion of the claimants, it is by the whole body of those whose claims were left unadjudicated at the adjournment of the board in 1839, and to settle which the board was re-organized in the fall of 1842. It is too late now to avert the infliction of wrong, by establishing a *pro rata* distribution. If payment upon a *pro rata basis* could be fixed by any construction of the treaty, it should have been done, in the first instance, when payment commenced; but, upon no principle of law or justice can the Government, as guardian for the faithful execution of this trust, resort to it now, when upwards of *nineteen-twentieths* of the common stock has been exhausted in making payments to the same class of claimants. It appears, from official statements before the committee, that but little over two hundred thousand dollars yet remains in the treasury, of the *fund heretofore applied to the payment of these claims;* and a very gross and palpable wrong would be inflicted by resorting to a *ratable* distribution of this fund now, even if it was found insufficient to meet all the demands accruing under the treaty. The Cherokees have fully complied with their part of the contract, by a relinquishment to the United States of all their lands east of the Mississippi; and this Government is bound in honor and good faith to fulfil its part of the compact. But the undersigned are decided in the opinion, from the testimony before them, that the balance in the treasury will be

more than sufficient to pay all the claims that are or can be allowed by a properly constituted tribunal.

The undersigned are constrained to say, therefore, that the President has here failed to present sufficient reasons for overthrowing the decisions of his predecessors, upon which the execution of the Cherokee treaty has heretofore been conducted. They cheerfully admit the proposition, as a general rule, that the fund, being appropriated by law for a *specific* object, and belonging to Cherokees, the authority of this Government to direct its application to particular claims is "more than questionable." But the payment of these adjudicated claims, as has been shown, does not fall within this rule. The undersigned, however, beg leave to say, that a payment made out of the Cherokee fund in September, 1841, to *John and Lewis Ross*, for *removing* and *subsisting* a certain portion of the Cherokee nation in the fall and winter of 1838, was, in their opinion, a violation of this rule. By reference to the printed reports upon this subject, it appears that $581,346 88 was paid to John Ross, upon these claims, under an order from President *Tyler*, as made known by his letter to a Cherokee delegation, (composed of Ross and others,) dated September 20, 1841. These claims had been brought before President *Van Buren*, upon an appeal by claimants from the decision of the Secretary of War; and, after a careful examination of the whole case, he rejected that portion claimed as a balance due for removal, amounting to $486,939 50; and referred the item for subsistence, &c., to the proper accounting officers. This decision will be found published in the report of Mr. Cooper, from the Committee on Indian Affairs, (No. 288,) made to the House of Representatives 3d session 27th Congress, page 24, and is dated September 2, 1840. On the 7th January, 1841, the case was again brought before the President by Matthew St. Clair Clarke, esq., as attorney for John Ross and others; and a reversal of his decision asked. Upon this appeal the Secretary of War made the following endorsement: "The President regards his decision in relation to the claim of John Ross and other Cherokees, for the payment to them of $486,939 50 out of the moneys due the whole nation, as *final*, and refuses to open the case. The other case will be examined and adjusted; and the testimony given by General Scott in that particular will have its full weight." [See report above cited, page 26.] In the face of this reiterated decision, the present Executive, within a period of eight months afterwards, directed this claim to be paid; and it was paid out of the *five million fund* provided by the treaty, which was expressly exempted from any payment on account of *removal* and *subsistence* by the second and third supplemental articles of that instrument, and by the act of June, 1838, appropriating $1,047,067 to aid in carrying into effect the provisions of the said third supplemental article.

This act was approved June 12, 1838, and the second section provides as follows: "That the further sum of $1,047,067 be appropriated, in full, for all objects specified in the third supplementary article of the treaty of 1835 between the United States and the Cherokee Indians, and for the further object of aiding in the subsistence of said Indians for one year after their removal west: *Provided*, That no part of the said sum of money shall be deducted from the *five millions* stipulated to be paid to said tribe of Indians by said treaty." The full amount to which John Ross and others were entitled under their contract with General Scott, as allowed and paid by the last administration, was $776,398 98; and this sum

was paid out of the appropriation of June 12, 1838. [See report above cited, pages 52 and 53.] The additional claim, made up on account of "removal and subsistence," amounting to $581,346 68, disallowed by President Van Buren, and afterwards allowed by the present administration, has been paid out of the *five million fund*, which is expressly exempted from such payment by the treaty, and by the act of June 1838. [For the appropriation under this act, see 9th volume Laws of the United States, page 778.] Here, then, in the language of President Tyler, "*a fund appropriated for a specific object, and belonging to the Cherokees, in payment for their lands and possessions*," was applied, under the eye and direction of the present Executive, in liquidation of a claim, contrary to a law and treaty stipulation; and the "*authority of this Government to make such application*" is, indeed, "*more than questionable.*" The Cherokees claiming this fund, under the provisions of the treaty, now demand restitution of the money thus misapplied.

The third and last reason assigned by the President for withholding his signature from the joint resolution is equally untenable. He says that "the direction to pay certificates required to be issued by the treaty, and in conformity with the practice heretofore, as proper and sufficient vouchers upon which payments shall be made at the treasury, is a departure from the system established soon after the adoption of the Constitution, and maintained ever since; that system requiring that payments, under the authority of any department, shall be made upon requisitions, countersigned by the proper auditor and comptroller." This declaration, made under the circumstances of the case, may be construed into a direct censure upon the administrations of Presidents Jackson and Van Buren, whose opinions and decisions it overrules and sets aside; for, under those administrations, upwards of *nine thousand* certificates were paid by a disbursing officer of the treasury, without a single one being presented to the Secretary of War for his "requisition, to be countersigned by the proper auditor and comptroller." The treaty establishes an independent department for the liquidation of all claims arising under it; and the certificates issued by this department, constituted of a board of commissioners, are made the *requisitions* upon which payment is to be made. But, independently of this case, is it not the constant practice of all the departments of this Government to disburse money to claimants, without issuing requisitions in *each* case? The money required to pay the officers and soldiers of our army is placed in the hands of paymasters, who pay upon properly certified rolls, which are received as the vouchers at the treasury. The navy is paid in the same way, and so are all public workmen. The Indians are paid in like manner; and a large amount of money has been placed, by the present administration, in the hands of the Cherokee agent, (west,) for the purpose of paying the balances of these identical claims, upon the awards of the former board. The heads of departments and bureaus, and all the clerks, are paid in the same manner, without requiring that they must each obtain a separate requisition, to be "countersigned by the proper auditor and comptroller." It is not known that any evil has resulted from this course; and all that is now asked by the claimants under the treaty is, that their certificates shall be paid as heretofore, without being referred to the Secretary of War, or the Commissioner of Indian Affairs. The President may have based his estimate of the amount of claims yet to be adjudicated, upon the supposi-

tion that the depredations, alleged to have been sustained by the large body of Cherokees removed by Mr. Ross in the fall of 1838, must be adjudicated and paid out of the fund provided by the treaty of 1835; although, in his letter to Ross and others, in September, 1841, he promises a new treaty, guarantying full indemnity for these losses. These claims cannot be adjudicated under the provisions of the treaty of 1835. That treaty was ratified on the 23d of May, 1836; and the 16th article provides that the Cherokees "shall remove to their new homes west of the Mississippi, *within two years* after its ratification; and, during such time, the United States shall protect and defend them in their possessions and property," &c. Mr. Ross and his party (estimated at 12,500 Cherokees) did not remove *within* the two years; and the contract for their removal was entered into in August, 1838—three months *after* the expiration of that period; hence, the claims of these people, for losses sustained by their removal, were not created *within* the two years, and do not come within the pale of jurisdiction conferred upon the board by the 17th article of the treaty. The testimony of General John H. Eaton, a member of the late board of commissioners, taken before the committee, shows that this construction was placed upon the treaty provisions by that tribunal.

The undersigned now come to the reasons assigned by the Commissioner of Indian Affairs, embraced in the report of the Secretary of War, dated January 16, 1844, in reply to the resolution of the Senate, inquiring by what "law or authority the department derived the power to revise or review the proceedings of the Cherokee board." Mr. Commissioner Crawford says: "This power the Secretary of War possesses by his relation, as the head of an executive office, to the Indian affairs of the country and to their administration. The power is *inherent* which is necessary to discharge an important duty, unless *prohibited by law.*" And he proceeds: "By the law of 1832, the Commissioner of Indian Affairs has direction and management of all Indian affairs, and of all matters arising out of Indian relations, under the direction of the Secretary of War," &c.

The undersigned must dissent from the principle thus assumed, as applicable to the present case. Is not a treaty, although made with an Indian tribe, a *supreme* law? and was not any "*inherent*" power said to be possessed by the Secretary of War over the Indian affairs of the country, annulled by the 17th article of the Cherokee treaty, so far as the adjudication and payment of claims arising under that treaty were concerned? The power claimed by the Indian bureau is conferred by the law of 1832; the Cherokee treaty became a law in 1836, *four years afterwards;* and it expressly takes away all power conveyed, by any previous or conflicting law, upon the Secretary of War or the Commissioner of Indian Affairs, to interfere with the adjudication of claims arising under its various stipulations. If it does not, then Indian treaties are mere nullities; and their true character was not understood by President Jackson, Secretary Cass, (who is high authority in Indian matters,) Attorney General Butler, President Van Buren, and Secretary Poinsett—all of whom decided that "*no power existed in the Government to review or revise the decrees of the board appointed under the 17th article of the Cherokee treaty.*"

The late Secretary of War has also introduced an opinion of Attorney General *Legare*, already quoted, to sustain him in the power he has assumed of revising the decision of the Cherokee board. He says: "No rule

of law is better established than that every special, limited, or inferior authority, must, before it takes a single step in any matter, allege and prove its jurisdiction. The *onus probandi* is upon it, and those claiming through it." It is very clear, from the whole tenor of this opinion, that the proper issue was not made before Mr. *Legare*. The tribunal created by the Cherokee treaty is neither a "*special, limited*, nor *inferior* authority," within the boundaries prescribed by the 17th article. This article confers upon it *supreme power* over the adjudication of *all* claims arising under the treaty, and establishes its *jurisdiction*. No other proof is necessary, and the *onus probandi* is upon those questioning this jurisdiction, to show where the power is conferred on them by the treaty, which is the *supreme law in this case*, to do so.

In illustration of his position, as above stated, Attorney General *Legare* proceeds: "Had these gentlemen passed sentence of death upon an Indian, they, and all engaged in executing their judgment, would have been guilty of murder." As has been already said, a false issue must have been made before the late Attorney General; his attention could not have been called to the 17th article of the Cherokee treaty. It appears too ridiculous to say that a commission constituted by that article would adjudicate a claim, and award that the Indian claimant, or any other Indian, should be hung. The commissioners are empowered to examine and adjudicate claims *for money*, and, upon their certificates of the amount found due the claimants, they shall be paid by the United States. They could not well issue a *certificate* to hang an Indian, in such a form as to make it *payable* by the United States. But it is not to be presumed that commissioners, selected for their capacity and integrity to execute an important trust, plainly defined by law, would perpetrate such an outrageous violation of it, as to sentence an Indian to be hung under the 17th article of the Cherokee treaty.

The undersigned have now presented a full view of all matters connected with the Cherokee treaty and its execution, so far as concerns the adjudication of claims by a board of commissioners, in as condensed a form as possible. The question has been involved in much perplexity and confusion, and they have endeavored so to disentangle it as to make the whole subject understood by Congress. It is a question of vast importance, as connected with the present condition of the Cherokees, and should be speedily and finally settled. Some of the certificates, upon which payment has been refused by the War Department, have been issued more than a year; and it has been shown to the committee that the claimants, in many instances, have been compelled by their necessities to dispose of them at a great sacrifice. The undersigned are clearly of opinion, for the reasons assigned in this report, that these certificates ought to have been paid by the proper disbursing officer of the Government, whenever presented, if made out in the usual and legal form; that no department of the Government has the power to revise the proceedings of the commissioners, unless a case of corruption of any kind is detected, which would be a sufficient cause for their removal by the Executive. But no such charge has been made or intimated, and the undersigned are not apprized that any such charge exists. The board continued in the discharge of its duty upwards of a year, and examined and adjudicated say 500 cases, upon which it awarded $82,000. It collected and collated the testimony in say 300 cases more, upon which decrees were not made when the board was dissolved. The testimony

of the president and secretary of the board, taken before the committee, estimates the claims thus left unfinished as amounting, probably, to a less sum than those upon which decrees have been made; which would reduce the whole amount that can be adjudicated, under the 17th article of the Cherokee treaty, to less than $200,000. It appears, from official reports before the committee, that upwards of $200,000 yet remains in the treasury, as an unexpended balance of the fund heretofore applied to the payment of these claims.

More than six years have elapsed since the Cherokee party to the treaty complied with its part of the compact, by a relinquishment of every acre of the ceded lands; and the other party (the United States) is imperiously called upon to fulfil its part of it. The claims arising under the several articles of the treaty yet remaining unsettled must be adjudicated and paid; and, in the language of President Van Buren, these claims "can only be adjudicated by a board of commissioners appointed under the 17th article of the Cherokee treaty." There must be a *final* decision somewhere; and all that is asked is, that it be left with the tribunal to which the trust was confided by the treaty. If this is not done, then every claim *rejected* by the board at its former and late sessions can be appealed to the Executive or Congress, or to the councils of the Cherokee nation, and the execution of the treaty will be interminable. The undersigned must also observe, that, although the power conferred upon a board of commissioners by the treaty is a high and imposing one, yet, it is to be presumed, such commissioners, appointed by the President and Senate of the United States—men selected for their "*fidelity*, *integrity*, and *ability*," bearing the whole weight of responsibility—can be intrusted with this power, with as much safety to the Cherokee interests, and to the treasury of the United States, as a Secretary of War, or a Commissioner of Indian Affairs. And it might be presumed further, from the testimony before the committee, exhibiting the careful examination of the late commissioners, that if the claim of *John Ross* had been submitted to that tribunal for adjudication, it would have been *rejected*, and $581,346 saved to the treasury. The undersigned, therefore, beg leave respectfully to recommend to the House the adoption of the following resolution:

Resolved by the Senate and House of Representatives, That the Secretary of the Treasury be directed to pay, or cause to be paid, the several sums found due to claimants under the Cherokee treaty of 1836, upon the certificates issued, or which may be issued, by the board of commissioners appointed in pursuance of the 17th article of said treaty, out of the unexpended balance of appropriations made for the payment of such claims, upon the presentation of said certificates.

SOLOMON FOOT,
B. A. BIDLACK,
W. HUNT,
J. I. VANMETER.