

A. H. JONES AND H. M. C. BROWNE.

LETTER

FROM

THE SECRETARY OF THE INTERIOR,

RECOMMENDING

An appropriation to pay Messrs. Jones and Browne for running and marking boundary lines between certain Indian tribes.

FEBRUARY 10, 1863.—Referred to the Committee of Ways and Means, and ordered to be printed.

DEPARTMENT OF THE INTERIOR,

February 9, 1863.

SIR: On the 18th July, 1862, the Secretary of the Interior decided that Messrs. A. H. Jones and H. M. C. Browne, contractors for the surveying of certain boundary lines under their contract of the 13th October, 1857, with the Indian department, were entitled to \$3,145 83, being the amount withheld from them as a part of their compensation for services rendered under their contract.

In the settlement of their accounts by the proper officers of the Treasury Department it was discovered that there was remaining in the treasury only the sum of \$694 87 applicable to the payment of the debt due the contractors, which sum was duly paid to them, leaving unpaid a balance of \$2,449 96.

I therefore have the honor to recommend that an appropriation be made by Congress of \$2,449 96, to be paid to A. H. Jones and H. M. C. Browne, being a balance found due to them as compensation for their services in the execution of a contract between the Indian department and themselves, dated October 13, 1857, for running and marking the boundary lines between the Cherokee, Chickasaw, Creek, and Seminole tribes of Indians.

A copy of the contract herein referred to, together with copies of the decisions of this department of the 11th February, 1860, and 18th July, 1862, in the case, are herewith transmitted.

Very respectfully, your obedient servant,

J. P. USHER, *Secretary.*

Hon. GALUSHA A. GROW,
Speaker of the House of Representatives.

Special instructions accompanying and forming a part of the contract entered into between the government of the United States and A. H. Jones and H. M. C. Browne, bearing date October 13, 1857.

DEPARTMENT OF THE INTERIOR,
Office of Indian Affairs, October 13, 1857.

GENTLEMEN: You will proceed without delay to perform the services agreed upon under your contract of this date, October 13, 1857.

First. You will survey the boundary lines with strict accuracy, using either theodolite or transit instruments of approved manufacture, and operating independently of the magnetic needle.

Second. Every line run by you must be upon the "true meridian," so as to conform with the law and practice of the United States surveys. The measurements may be made with a Gunter's *two or four pole chain*.

Third. Where the lines pass through a timbered country, you will cut down all obstructing line trees, and remove other obstructions interfering with a "clear vista" for your instruments. The trees within (12) twelve feet on each side of the lines must be marked with a *full blaze facing the line*, and a deep chop above and below the blaze. This has been the usual practice of marking the government township lines established by the General Land Office, and has proved to be the most durable and conspicuous.

Fourth. It is expected that the first line run will be the eastern boundary of the Choctaw and Chickasaw country, beginning at a point on the Arkansas river (100) one hundred paces east of old Fort Smith, where the western boundary line of the State of Arkansas crosses the said river (*vide* 1st article of treaty dated June 22, 1855.) In order to adjust in future any interference with *vested rights* of property abutting on this line, as run in 1824, you are hereby instructed to make careful measurements, at the end of every mile, to the *nearest corner boundaries of the public surveys*, whenever, after diligent search, they can be found, and note in your field-book and map these connexions; also the deviation of your own line and that which may occur with the line run in 1824 by Mr. Downs. This information is of great importance to the general government, in order to control correct action upon any question that may arise from the deviation of boundary. The compensation for the measurement of these connecting lines to be specified and determined upon by the "Commissioner of Indian Affairs," after a full knowledge of the difficulties encountered in the survey.

Fifth. With regard to monuments to perpetuate the respective boundaries described in your contract, you will be governed by the following instructions, to wit:

The old initial point or mound one hundred (100) paces east of old Fort Smith, as described in the treaty of June 22, 1855, must be carefully repaired with stone, erecting a conical mound at least six feet high, and a cubical block of stone eighteen (18) inches square planted upon the top of said mound, having upon its face engraved characters, the words "*initial point*;" on the east side, "Arkansas;" on the west side, "Choctaw;" on the south side, 1857 or 1858, as the fact may be.

Sixth. After establishing this initial point beyond all doubt, you will run south on a "true meridian," making a mound of either earth or stone, at the end of each mile, six (6) feet high, surrounded on each of the four sides with a trench, eighteen inches from the base of the mound, of sufficient depth and width to obtain the earth to erect the mound. Wherever stone can be obtained, it is expected that a monument will be erected of the same, surrounded by a trench one foot in depth and eighteen inches wide. In the centre of each mound, and at the exact termination of each mile, you will plant a (charred)

post eight feet in length and six inches square, and sunk in the ground *two feet*, before constructing the mound, marking on the east side, "Arkansas;" on the west side, "Choctaw;" on the north side, the number of each mile run from the initial point, to wit, 1 m., 2 m., &c., until you arrive at the terminating point on Red river, and here you will erect a monument on the north side of said river, above high-water mark, in every respect similar to the one described as the initial point on the Arkansas river.

Seventh. After finishing the above line you will proceed to run the ninety-eighth and one hundredth degrees of west longitude from any practical points established by the astronomer as the true meridian, making their initial points in the same manner as hereinbefore directed, planting charred posts or stone at the end of each mile, erecting mounds or earth of the same height and dimensions, digging trenches of the same depth as previously described for the western boundary of Arkansas. You will be careful to mark the posts or stone at the end of each mile on the ninety-eighth meridian in graved characters; on the east side, "Chickasaw;" on the west side, "Choctaw and Chickasaw;" on the north side, "98° w. l.;" on the south side, "1858," and "1 m.," and "2 m." &c., counting from south to north. On the one hundredth meridian the characters marked on the posts or stone at the end of each mile must be, on the west side, "Texas;" on the east side, "Choctaw and Chickasaw;" on the north side, "100th w. l.;" on the south side, "1858," and "1 m.," and "2 m.," &c., counting from south to north. The mound and post, or stone, at the intersection of the northern boundary of the Creek country with the one hundredth meridian, must be placed with its diagonal to the meridian and prime vertical. The northeast face to be marked "Cherokee;" the southeast, "Seminole;" the southwest, "Texas;" the northwest, "1858."

Eighth. The northern boundary of the Creek country must be run and marked in the same manner as described in the report of Lieutenant Woodruff, a copy of which is hereby handed to you.

Ninth. When you run the line between the Creeks and Seminoles, your attention is strictly called to the first article of the treaty made on the 7th day of August, 1856, between the Creeks and Seminoles, a copy of which is hereby given you. You will also establish in a similar manner, as previously directed for the other boundaries, a mound and post at the end of each mile. On the east side the word "Creek;" on the west side, "Seminole;" on the north side, "1858;" and on the south side the number of the mile run from the initial point.

The ninety-eighth and one-hundredth degrees of west longitude being important geographical lines requiring careful astronomical observations for their correct determination, you will therefore exert your best ability to discharge this duty to the satisfaction of the government and to your own credit, giving every facility to the astronomer to fix these points upon the ground in accordance with treaty stipulations. The astronomer will therefore be ordered to report to you whenever you signify your readiness to execute the above bounden duty.

The Department of the Interior, reposing great confidence in your integrity and long field experience as surveyors, have thought it conducive to the public interests to appoint you to perform this work, and it is expected that it will be executed without delay, consistent with the faithful performance of your duties.

Very respectfully,

J. W. DENVER, *Commissioner.*

Messrs. A. H. JONES and H. M. C. BROWNE.

This agreement, made this thirteenth day of October, 1857, between Charles E. Mix, Acting Commissioner of Indian Affairs, acting for and in behalf of the United States, of the one part, and Alfred H. Jones and Henry M. C. Browne of the other part, witnesseth: That the said Jones & Browne, for and in consideration of the conditions, terms, provisions, and covenants hereafter expressed, and according to the true intent and meaning thereof, do hereby covenant and agree with the said Charles E. Mix, in his capacity aforesaid, that they, the said Jones & Browne, in their own proper persons, with the assistance of such chainmen, axemen, flag-bearers, and other persons as may be necessary, agreeably with the laws of the United States, and with such instructions as they may receive from the Commissioner of Indian Affairs, will faithfully survey and mark, in the manner hereafter described in special instructions, which are hereto annexed and form part of this agreement, the following boundary lines, to wit: the eastern and western boundary of the tract of country described in the first article of the treaty between the United States and the Choctaw and Chickasaw Indians, concluded June 22, 1855, and the western boundary of the Chickasaw district, as described in the second article of said treaty; also the line described in the first article of the treaty between the United States and the Creeks and Seminoles, concluded August 7, 1856, as follows:

"Beginning on the Canadian river, a few miles east of the ninety-seventh 'parallel' of west longitude, where Och-hi-Appo, or Pond creek, empties into the same, thence due north to the north fork of the Canadian." Also to complete the survey and marking, in the manner aforesaid, of the northern and western boundary of the Creek country from the point on the north fork of the Canadian, to which point it was surveyed and marked by Lieutenant J. C. Woodruff, United States topographical engineer, under instructions from the War Department, and reported on by him to Colonel J. J. Abert, chief corps topographical engineers United States army, September 1, 1851, a copy of which is herewith attached. And that they, the said Jones & Browne, will complete these surveys in the manner described in the said special instructions, and return the true and original field-notes thereof to the office of said Commissioner of Indian Affairs on or before the 1st day of March, 1857, (acts of God excepted,) on penalty of forfeiture and paying to the United States the sum mentioned in the annexed bond, if default be made in any of the herein-expressed conditions.

And the said Charles E. Mix, in his capacity aforesaid, covenants and agrees with the said Jones & Browne that on the completion of the surveys above named, in the manner aforesaid, there shall be paid to the said Jones & Browne, on account of the United States, by the Treasury Department, upon the receipt of their account at the office of the Commissioner of Indian Affairs, properly sworn to and certified as hereafter described, accompanied by correct and certified plats of the surveys for which the account is rendered, as a full compensation for the whole expense of surveying and making return thereof, eighty dollars per mile for every mile and part of a mile actually run and marked in the field, random lines and offsets not included; and for every mile and part of a mile exceeding four hundred and fifty miles the said Charles E. Mix, in his capacity aforesaid, reserves to himself the discretion of paying for such excess at such rates per mile as he may deem proper.

And it is further understood and agreed between the parties to this agreement, that an astronomer shall be appointed by said Charles E. Mix, in his capacity aforesaid, and his salary, at the rate of twenty-five hundred dollars per annum, to be paid by the said Charles E. Mix out of whatever moneys may be due the said Jones & Browne for the services herein agreed upon, upon conditions herein expressed, but all other expenses incidental to the performance of the duties required of him, the said astronomer, in the field, to be paid by the said Jones & Browne; and the said astronomer shall be held responsible to the United States for the determination of such astronomical points as may be

necessary to fulfil the conditions of this agreement. Said astronomer shall therefore be allowed ample time and facilities for fixing said astronomical points, viz., the 100th and 98th meridians, to his entire satisfaction, provided that not more than six months be exceeded; and said astronomer shall further be considered, and is hereby authorized, on the part of the United States, to act as examiner and inspector of all surveys while in progress in the field, or after completion thereof; for which service the said astronomer shall be paid an additional compensation of five hundred dollars per annum by said Charles E. Mix, in his capacity aforesaid, out of moneys of the United States appropriated for the boundaries above mentioned; and that no payment shall be made for any surveys not examined and inspected and reported to the Commissioner of Indian Affairs, to be correctly run and marked, according to this agreement and said special instructions, hereto annexed, as part of this agreement, as aforesaid.

And it is further understood and agreed by the parties to this agreement that the said Jones & Browne shall be held responsible to said Charles E. Mix, in his capacity aforesaid, for such instruments as shall be furnished said Jones & Browne by the said Charles E. Mix, the said instruments to be returned to the office of the Commissioner of Indian Affairs, on completion of said surveys, in as good condition (wear and use excepted) as when received.

In testimony whereof, the parties to these articles of agreement have hereunto set their hands and seals the day and year first above written.

The words "in the field" interlined before signing.

CHARLES E. MIX,
Acting Commissioner of Indian Affairs.

ALFRED H. JONES.

HENRY M. C. BROWNE.

Signed, sealed, and acknowledged before us—

E. B. GRAYSON.

GEORGE H. HOLTZMAN.

We, Alfred H. Jones and Henry M. C. Browne, do solemnly swear that we will faithfully and impartially execute the surveys mentioned in the foregoing contract to the best of our skill and ability.

Sworn to and subscribed before me, at Washington, in the District of Columbia, this 13th day of October, 1857.

JOHN S. HOLLINGSHEAD,
Justice of the Peace.

DEPARTMENT OF THE INTERIOR,
February 11, 1860.

SIR: I have carefully considered the written arguments submitted by you on the 11th November last and 20th ultimo, in behalf of the claim of Messrs. Jones & Browne, surveyors, &c., to be paid the sum of \$3,145 83, being the difference between the amount paid by the Commissioner of Indian Affairs to Mr. Major, the astronomer, and the amount for which they (Messrs. J. & B.) consider themselves liable under their contract of the 3d October, 1857.

In the argument filed November 11 you state the point at issue as follows: "This claim depends upon the question whether the salary of D. G. Major, as astronomer, at the rate of \$2,500 per annum, is to be charged to Messrs. Jones & Browne for more than six months. Mr. Major's salary, at the rate of \$2,500

per annum, is proposed to be charged to Messrs. Jones & Browne for twenty-one months and three days. If not more than six months ought to be charged, then the proposed charge would be an excess of fifteen months and three days, which, at the rate of \$2,500 per annum, makes an error of \$3,145 83 ;" and you proceed to argue, with great ingenuity, that the contract itself expressly provides that Messrs. Jones & Browne should not be required to pay Mr. Major's salary, as astronomer, for a longer period than six months. In this, I think, you are clearly mistaken ; but, before considering the positions assumed in that argument, it is proper to say a word in reference to the points raised in your argument of the 20th ultimo.

These may be reduced to two: First, the contract itself is the proper evidence of the intention of the parties to it, and of the obligations they respectively assumed, and parol evidence is not admissible to vary or modify those obligations; and, second, Mr. Major was delayed in the field longer than was contemplated, by reason of the laches of the United States in failing to give military protection to the surveying party, and therefore the United States are equitably bound to pay his salary while so delayed.

To the first of these propositions I readily assent, and shall not look beyond the contract itself in considering the obligation of Messrs. Jones & Browne to pay Mr. Major's salary for a longer period than six months. To the second, I must demur, for two reasons: First, it is *not stipulated in the contract* that military protection should be furnished by the United States; and, second, even if it were shown (which I do not admit) that, but for the failure of the United States to afford military protection, Mr. Major would have completed his work and returned home. I deny the liability of the United States on general principles. The government of the United States is not the insurer of its citizens, and when they, in pursuance of a private enterprise, find it necessary to enter the Indian country, they do so at their own risk. If in the pursuit of lawful enterprise in the Indian country they are damnified in person or property; the law furnishes a remedy, and they have no other. I would so far recognize the plea as to abstain from enforcing a forfeiture of their bond on the ground of non-compliance with the terms of their contract, but it is the utmost limit to which I can go. The contract excepts the "acts of God," but it does not except the "acts of the public enemy." The contractors took that risk themselves, and they must meet it themselves.

Having premised this, I come now to consider the contract itself. In your argument of the 11th November you analyze the several clauses of the contract separately; and in summing up your views as to the first clause, you use the following language: "On the face of this clause of the contract, it appears that near four hundred and fifty miles of boundary line were to be run and marked by Jones & Browne, and that Jones & Browne were to do this work personally, and they were required to take an oath to perform it faithfully and impartially; and had, moreover, to give heavy bonds for its faithful execution. It is obvious the work required skill, experience, science, and fidelity for its execution, and these were contracted for on the part of Jones & Browne. And *they* were to pay the *expense incurred in the execution of the work.*"

It is admitted that the establishment, *astronomically*, of the 98th and 100th meridians was indispensable "in the execution of the work." The expense of establishing them, (including, of course, the pay of those who were employed to do it,) was, therefore, one of the necessary "expenses incurred in the execution of the work." These Messrs. Jones & Browne were to pay. It is clear, therefore, that if nothing further had been said, there could have been no dispute as to the liability of Messrs. Jones & Browne.

But the next clause of the contract provides specifically how, and by whom, the meridians were to be established, and how the service was to be paid. What is the true interpretation of the clause? First, as the establishment of the me-

ridians requires astronomical knowledge, the Indian office is unwilling to intrust the duty to Jones & Browne, but stipulates that it shall be performed by an astronomer. Second, to make sure that a competent astronomer shall be employed, the Indian office will select one itself. Third, the astronomer shall be paid at the rate of \$2,500 per annum, by Jones & Browne; but to relieve his (the astronomer's) mind from any uneasiness about the payment of his salary, the Indian office guarantees it, and will retain it for him out of moneys due Jones & Browne upon their contract. Fourth, the astronomer's expenses are to be paid by Jones & Browne, but the Indian office does not guarantee these for them; he must rely on the good faith of Jones & Browne. Fifth, Jones & Browne are relieved from all responsibility for the correctness of the astronomical portion of the work; therefore, they must not hurry the astronomer, but must allow him ample time to establish the meridians to his own satisfaction; but the astronomer, being thus made independent of Jones & Browne, may consume too much time and unnecessarily delay the work in the field; therefore, sixth, he shall not take more than six months to establish the meridians. Seventh, the United States will allow the astronomer to act as inspector of the surveys, and will contribute, at the rate of \$500 per annum, to pay for his services in that capacity. Note here that surveys executed for the United States are *never* paid for until they have been inspected and certified, *and the expense of such inspection is always borne by the surveyors*; and it has been usual to withhold ten per cent. of the amount due any surveyor, or upon a contract to survey, *for this very purpose*. Suppose the astronomer had not been allowed to act as inspector, what would have been the result to Messrs. Jones & Browne in a pecuniary point of view. They would have been compelled to pay for an inspection of their work, and this, at the rate of \$8 per mile, would have cost them in round numbers about \$3,600. Viewed in this light, it is clear that the appointment of the astronomer as inspector was intended to relieve Jones & Browne from this expense, not only by allowing the work to be done by a member of their party, but even by contributing a portion of his salary.

You seem to have been misled by two phrases in the first paragraph of the second clause of the contract, and when you consider them more carefully you will, I think, agree with me that there is no obscurity in the clause. The expression, "upon conditions herein expressed," does not refer to the *conditions* of payment, but to the *fund* from which payment is to be made; it does not qualify "*paid*," but "*due*." The provision is *not* that the salary, &c., shall be *paid* "upon conditions herein expressed," but that it shall be paid "out of whatever moneys may be due Jones & Browne." How due them? For services rendered "upon conditions herein expressed." On the other hand, the word "but" *does* refer to the manner of payment, and not to the fund from which payment is to be made. The salary is to be paid "by the Commissioner," but "the expenses, &c., are" to be paid by the said Jones & Browne. In both cases, however, the money is to come out of the pockets of Jones & Browne.

On the whole, then, I think the contract itself clearly shows that it was contemplated that the astronomer should receive a salary of \$3,000 per annum, clear of all expenses, and that he should continue with the party from its organization until the completion of the work in the field. How else could he inspect "all the surveys while in progress in the field?" and, as he was not to be paid by the job, or by days' work, but as a salaried employé, it is clear his salary was due and payable so long as he held his office, whether he was actually at work or not. Therefore, he received his salary as inspector while at work in the observatory, and when he could not possibly have been "examining and inspecting surveys," and therefore he was entitled to his salary as astronomer, although he was not studying the stars. Indeed, any other construction would be absurd. You say, "it is *obvious* that the work (the surveying) required skill, experience,

science, and fidelity for its execution." Granted. It is equally obvious that the establishment of the meridians required the same qualities, and *something more in addition*; and yet you make the contract say that \$500 per annum is a sufficient compensation for all these! Is not this an absurdity?

It is true, you do not take the ground that Mr. Major's services were worth no more than five hundred dollars per annum; but the practical result of your construction of the contract would be, that he was to perform certain duties, all of which required skill, fidelity, &c., and that, while he was to receive compensation for his services at the rate of \$2,500 per annum for a part of the time, he was to receive only at the rate of \$500 per annum for the remainder. I cannot believe this to be the true construction of the contract, and I must decline to revise or reverse the action of the Indian office in the premises.

And I must add, in conclusion, that I feel the greater confidence in the correctness of the construction I have given to the contract, inasmuch as the correspondence on file in the Indian office shows most conclusively that this very interpretation was always given to it by Jones & Browne themselves.

Very respectfully, your obedient servant,

J. THOMPSON, *Secretary.*

S. S. BAXTER, Esq.,

Attorney-at-Law, Washington, D. C.

DEPARTMENT OF THE INTERIOR,

July 18, 1862.

SIR: The case of Messrs. Jones & Browne, contractors for the surveying of certain boundary lines, under their contract of the 13th October, 1857, between themselves and the Commissioner of Indian Affairs, was decided against them on the 14th February, 1860, by the late Secretary of the Interior.

His decision is based upon the legal construction of the contract, which I think was clearly erroneous.

The contract, stripped of all verbiage, is simply this: Jones & Browne agreed to run certain boundary lines for a stipulated price per mile. To determine where these lines should be, it became necessary that certain astronomical observations should be taken to ascertain accurately the points of departure of the boundary lines agreed to be run. The astronomer was to be appointed by the government. His salary would have been a matter of no concern whatever to Jones & Browne but for a stipulation in the agreement that they were to pay it, or rather that the Commissioner should pay it out of the moneys stipulated to be paid to them. That stipulation made it important that they should know how much they had to pay for the service. Accordingly it was stipulated that it should be at the rate of \$2,500 per annum, to be paid by the Commissioner out of their earnings, "upon conditions herein expressed." Now, what condition was expressed? There is but one that can, by any possibility, have any reference to this subject, and that, after stating the necessity for time, declares that ample time shall be given, is in these words: "*Provided that more than six months be exceeded.*" The agreement also declares that the astronomer shall be the inspector of the work, and that his wages shall be \$500 per annum. I do not perceive what that stipulation has to do with Jones & Browne further than an agreement on their part that the astronomer, whoever he might be, should be the inspector of their work. It was no concern of theirs what he was paid. It is not stipulated in the contract that they, Jones & Browne, shall pay him anything beyond the six months' time, which it possibly might consume to take the astronomical observations. In addition to this, they were to support the astronomer while he was in the field, and that is all the contract

requires at their hands. Suppose the astronomer had made the proper observation in six days—which might have been quite practicable—is there anything in the contract which will require Jones & Browne to pay him after that time for any service? I think not; and that the contract ought to have been construed to be an agreement on the part of Jones & Brown to do the work at the stipulated price; to pay out of the contract price to be paid them the salary of the astronomer, at the rate of \$2,500 per annum, for a period not exceeding six months, and to pay all expenses incidental to the performance of his duties while he was in the field, and that subject to the deduction for six months' salary of the astronomer, at \$2,500 per annum, the account should have been settled. The decision of my predecessor upon this question is not conclusive upon the rights of the claimants. It has been frequently held by this department, in accordance with the opinions of several Attorneys General, that an erroneous decision of the head of one of the executive departments rejecting a claim may be reviewed and reversed.

If there is not a sufficient amount of the appropriation made by Congress for this work, as expended, to meet the balance due to the claimants, their only remedy will be an application to Congress.

Very respectfully, your obedient servant,

CALEB B. SMITH,
Secretary.

The COMMISSIONER OF INDIAN AFFAIRS.

H. Ex. Doc. 62—2

