

GEORGIA AND ALABAMA CLAIMS.

[To accompany Bill H. R. No. 367.]

MARCH 12, 1858.

Mr. WOODSON, from the Committee on Indian Affairs, made the following

REPORT.

The Committee on Indian Affairs, to whom was referred the claims of certain citizens of the States of Georgia and Alabama for losses occasioned by the depredations of the Creek Indians in the year 1836, have unanimously instructed me to report:

That, on the 12th February, 1825, a treaty was entered into with the Creek nation for the purpose, as declared in the preamble of the treaty, to carry out "the policy and earnest wish of the general government, that the several Indian tribes within the limits of any of the States of the Union should remove to territory to be designated on the west side of the Mississippi river."

By the terms of this treaty the Creek nation ceded all their lands to the east of the Chatahoochie, in the State of Georgia, on a stipulation that the United States would give in exchange "the like quantity, acre for acre, westward of the Mississippi, on the Arkansas."

Being thus disposed of all their lands east of the Chatahoochie on the 24th March, 1832, another treaty was entered into by which the said Creek nation "ceded to the United States all their lands east of the Mississippi." By its stipulations ninety of the principal chiefs and each head of a family were to be entitled, after the land had been surveyed, to certain reservations, which reservations they were authorized to dispose of for a fair consideration.

By the 12th article of the treaty the desire of the United States is expressed, "that the Creeks should remove to the country west of the Mississippi, and join their countrymen there," and provision is made for their emigration.

This article contains a proviso that it is not to be construed "so as to compel any Creek Indian to emigrate." But it is evident that the government intended to pursue its great policy of emigrating this tribe, a policy founded in long experience, which demonstrated that the interests of the Indians as well as the whites demanded their emigration. This is seen not only in the article referred to, but in the provision which authorized them to sell the small reservations of

all the land that remained to them east of the Mississippi. Situated in the midst of white settlements the authority to sell was equivalent to a decree of sale, as the event showed.

The government having completed the survey under the treaty, lands were placed in market early in 1834, and a settlement of whites invited. The reservations of the Indians became immediately the subject of speculation and purchase, so that by the spring of 1836 there were but few who had not dispossessed themselves of all their landed rights. To investigate certain alleged frauds in some of these sales, a commission was instituted by the government, which sat in 1835 and 1836.

The means thus obtained by the Indians were soon dissipated, and a great number were reduced to the condition of starving vagabonds. This condition of things awakened the most serious apprehensions on the part of the white settlers. Petitions were forwarded by the settlers to the governors of Georgia and Alabama, and by them to the government of the United States, in which their critical condition was fully stated, and asking for protection and for the removal of the Indians. These petitions were unheeded; so far from affording relief, the government removed the small force—the only one—it had in that region of country then stationed at Fort Mitchel for the purpose of employing it in the Seminole war. The government was also notified of this condition of affairs by Col. Hogan, who had been appointed to investigate in the nation the character of the sales made by the Indians of their reservations.

The danger apprehended by the settlers was soon realized, and early in May, 1836, the depredations and hostilities were of so serious a character that the settlers had to seek safety in a hasty flight into the denser white settlements of Georgia and Alabama.

To suppress these hostilities State troops were called out, and Gen. Jesup was ordered to take command. He moved on the 12th June with 720 volunteers, and was joined by a brigade of Indians on the 14th and 17th, consisting of 1,300 to 1,500 warriors. With this force, without fighting any battle, by the 1st August hostilities were suppressed, peace secured, and shortly afterwards the Indians were emigrated to their home west of the Mississippi.

It is for the loss and damage suffered by the citizens on both sides of the Chatahoochie, during this period, that this claim is now presented.

This subject was first brought to the attention of Congress by President Jackson in his message of December, 1836, but four months after the occurrence, when all the circumstances of the case were fresh, and when the question of liability for redress was most likely to receive a proper solution. In that message the President says:

“On the unexpected breaking out of hostilities in Florida, Alabama, and Georgia, it became necessary in some cases to take the property of individuals for public use. Provision should be made by law for indemnifying the owners, and I would also respectfully suggest whether some provision may not be made consistently with the principles of our government for the relief of the sufferers by Indian depredations, or by the operations of our troops.”

Congress, in accordance with this recommendation, by their second session of the act approved March 3, 1837, entitled "An act making appropriations for the current expenses of the Indian department," enacted :

"That the sum of \$5,000 be, and is hereby appropriated to enable the President of the United States by suitable agents to inquire what depredations were committed by the Seminole and Creek Indians on the property of citizens of Florida, Georgia, and Alabama, immediately before the commencement of actual hostilities on the part of said respective tribes of Indians; what amount of depredations were committed during the pendency of said hostilities; what portion of the Creek tribe were engaged in such hostilities, and what depredations have been committed by a remnant of said tribe, supposed to be friendly, and a part of whom were actually employed against the Seminoles, since the removal of the main body of them west of the Mississippi; and that the President report the information so acquired to Congress at its next session: *Provided*, Nothing hereinbefore contained shall be so construed as to subject the United States to pay for depredations not provided for by the act of April 9, 1816, and the acts amendatory thereto, nor by acts regulating the intercourse between the Indian tribes and the United States."

Under this act commissioners were appointed who made the examination required of him, and their report upon the matters thus referred was communicated to Congress on the 27th January, 1838. The mode in which they scrutinized the claims presented may be judged of by their statement:

"Claims in some cases have been unreasonably large, and the charges for property, even if admitted to have been destroyed by the Creeks, so high as to compel the commissioners to dock the accounts largely. In most cases they have felt it their duty to make a discount of 33½ per cent. In some, however, when, from the nature of the account, it was apparent that the charges were excessive, 50 per cent. has not been deemed too large a reduction to bring the claim within the bounds of probability. It may not be improper to add that in a few cases, when the circumstances were such as to create on the minds of the commissioners still greater doubt, they have acknowledged no rule, but made the allowance altogether arbitrary. In no case have they allowed a claim for consequential damages; these claims, however, were urged upon the commissioners with as much apparent conviction of their justice as those which were predicated on direct losses; but not being able, in their view of the law, to consider them depredations, they were of course disallowed."

Acting upon these stringent principles on the aggregate amount claimed of \$1,272,722, they allowed the sum of \$349,120. For the payment of this sum the claimants have constantly pressed upon Congress; a favorable and adverse report have been made by committees of the House of Representatives. The committees of the Senate, as we understand, have always reported in favor of its payment, and at the last Congress a bill for that purpose passed the Senate, but was left unacted on by the House. But one of these claims has been paid heretofore, to wit: No. 805, in favor of Henry W. Jergman & Co., for \$18,940, assigned to the Central Bank of the State of Georgia.

From this statement it will be seen that the case presented for relief is a peculiar one. It is not the usual one for damage and loss inflicted by an enemy whether savage or civilized, but for depredations committed by a portion of a tribe of Indians collected by the government and located in the midst of the citizens of one of the States and maintained there temporarily, for the purpose of being emigrated to the west, where, by treaty stipulations, a new home had been secured to them.

If the protection which the government owes to its citizens is anything more than a name, it was its duty, under such circumstances to guard against the consequences which its own acts produced. If there is no precedent for such a liability, it is because the course adopted by the government is without a parallel.

It does not follow that because the government may not be liable for losses occasioned by an enemy, and which it had not the power to prevent, that it is therefore freed from all liability for loss which the least precaution could have avoided. The government could not, for any purpose of its own, expose its citizens to danger, and at the same time withhold the use of those precautionary measures which ordinary prudence demanded.

But government is not only bound to use its means to prevent damage to its citizens from hostile acts, but also to endeavor to obtain redress when that damage has been inflicted.

"Whoever," says Vattel, "uses a citizen ill, indirectly offends the State, which is bound to protect this citizen; and the sovereign of the latter should avenge his wrongs, punish the aggressor, and if possible, oblige him to make full reparation; since otherwise the citizen would not obtain the great end of the civil associations, which is safety." (§ 71.)

In the case of *Debode vs. Regina*, the doctrine of the law of nations was enforced by the Lord Chancellor of England in the following emphatic language: "*It is admitted law, that if the subject of a country is spoliated by a foreign government, he is entitled to obtain redress from the foreign government, through the means of his own government, but if from weakness, timidity, or any other cause on the part of his own government, no redress is obtained from the foreign, then he has a claim against his own government.*"

These principles are much broader than are necessary to be maintained in order to sustain the claim now made. These acts were not committed by an enemy in any just sense of that term. The general relation of the Indian tribes to the federal government is declared by the Supreme Court of the United States to be one of pupilage. But the relation in this particular case is one still more dependant and absolute, involving still greater extent of liability. A keeper of wild beasts, who, from want of ordinary precaution, should permit them to escape, whereby damage to the neighbors should accrue, would be bound to make good that damage on the clearest common law principles. In collecting together these savages, in a confined territory in one of the States, inviting the white settlers to purchase the government lands, permitting the Indians to sell the small remnant of lands

reserved to them, and leaving them without any Indian agent to govern them, or without any military force to keep them in subjection, and when warned and appealed to by its citizens, omitting to take any measures to prevent the threatened outbreak, presents a case of liability equally as indisputable, if, indeed, any liability at all exists on the part of the government.

In the adverse report made on this claim by Mr. Whittlesey, May 15, 1838, he says: "The obligation of the government is not to reimburse such losses, but to prevent their occurrence as far as is practicable. It is the liability flowing from this very obligation which is now invoked in behalf of this claim.

Your committee find that the chief objection heretofore relied on in opposition to the liability of the government, is that these losses occurred during a war with this tribe of Indians. The commissioners, in their report, say "that after the most diligent inquiry they find it very difficult to determine what portion of the Creek tribe were engaged in actual hostilities. Intelligent men, claiming to have been favored by the best means of information, differ widely on the subject. So much appears to be certain, that a very small number, without any apparent concert with the rest, did commence and carry on hostilities for several days before they received any accession to their strength, and that ultimately a majority of the warriors of the tribe did engage in acts of open hostility." This is all the evidence upon which the idea of a war has been predicated. It requires the will of the nation, expressed by some national declaration or act, to constitute a war. There is no pretence that anything of the kind ever existed in this case. These depredators, few at first, increased their numbers by the successes they met with, and the immunity which seemed to shield their transgressions. There never was a declaration of war nor a treaty of peace. In suppressing the outbreak, the government had rallied under its banners the principal chief of the nation, with some fifteen hundred warriors, while the hostiles were scattered in small predatory bands, pillaging wherever there was no power to resist them, and never collected in force sufficient to make a show of resistance.

General Jesup, in his letter to the committee of the 13th June, 1838, says: "But a small portion of the Indians were at any time hostile." Again: "From the best information I could obtain there were about 1,000 warriors in the different hostile camps, but not more than 40 or 50 had at any time been concerned in burning houses or committing murders, and not over 150 warriors had ever engaged in active hostilities." And this concurs not only with all the other evidence in the case, but with the action of the government itself.

If this had been a war in the sense that term is understood among nations, the government, as we have seen, upon well recognized principles would have been bound, if in its power, to have sought redress for the injuries inflicted upon its citizens. Wrongs done to our citizens by a powerful nation may go unredressed, because of the want of ability in our government to compel a reparation. The treaty which concludes a war in such a case may contain no stipulation for indemnity. But when the government has the ability, it is bound to demand the indemnity, and this is the almost universal practice.

But the government could demand no indemnity in this case, because there was no treaty of peace. There was no treaty of peace because there was no war. This question, however, is completely at rest by the treaty made with the Creek nation on 23d November 1838.

By the 1st article of this treaty the "Creek nation relinquish all claims for property and improvements abandoned or lost in consequence of their emigration west of the Mississippi," in consideration of the stipulations by the United States contained in the 2d, 3d, 4th, and 5th articles.

The 6th article is as follows: "In consideration of the suffering condition of about 2,500 of the Creek nation, who were removed to this country as hostiles, and who are not provided for by this treaty, and the representation of the chiefs of the nation that their extreme poverty has and will cause them to commit depredations on their neighbors, it is, therefore, agreed, on the part of the United States, that the Creek Indians referred to in this article shall receive ten thousand dollars in stock animals for one year, as soon as convenience will permit after the ratification of this treaty."

It is thus seen that, instead of demanding indemnity for wrongs done to our citizens, the government had to stipulate to be released from paying indemnity to the Creek nation for the losses they sustained by emigrating. But not only this, the government also agreed to pay a sum of money to that portion of the tribe which had committed the depredations complained of. This treaty is also worthy of remark in this connexion as showing the destruction which was recognized by the government between the Creek nation and that portion of them who had been removed as "hostiles."

It is only necessary to add that, in 1850, when a bill was pending before the Senate to deduct from the Creek annuities the amount of their claims, the Indian chiefs, who were then in Washington, protested against any such action, upon the ground that the nation had never made war against the United States, and that the hostilities complained of had never been in any manner authorized or countenanced by it, and that the individuals engaged in them were alone responsible.

The character of these losses may be gathered from the following extracts in the letter of General Jesup. He says: "I passed on the 5th June from Columbus to Tuskegee, distance forty-two miles. The plantations on nearly the whole route had been destroyed; many of the buildings were burning as I passed, and at one or two places the Indians were seen carrying off corn." There were, as I learned, large supplies of corn, bacon, and fodder, and numerous herds of cattle and hogs, belonging to the inhabitants who had fled, which, in consequence of the delay in the movement of the troops, fell into the hands of the Indians." Again: "One object of my movement was to secure for the troops a quantity of corn and other supplies reported to have been left at the plantations on the road to Fort Mitchell; but I was too late, the enemy had destroyed the fodder, carried off the corn, and driven off the cattle and hogs. I raised a brigade of Indian warriors; part of them joined me on the 14th and part on the 17th June. From

the time they marched until they returned to the neighborhood of Tuskegee, about the 1st July, they derived, perhaps, half their subsistence from the cattle and corn taken in the country."

General Jesup then adds, "that Colonel Hogan's, Major Collins', and Major Torrence's statements are substantially correct, and General Woodward's is correct, with the exception of his remarks in regard to myself." And concludes with the remark: "Whether the property lost can be paid for or not by the public? I have no hesitation in declaring that much of it might have been saved by a prompt determined movement of the troops early in June."

Colonel Hogan states in his letter of September 18, 1837: "Of the cattle that were killed for the subsistence of the Indian forces under my command no marks or numbers were taken. Indeed such a course was impracticable. I was ordered by General Jessup *to subsist the force in the best manner I could*, and I had forage parties out every day hunting up corn and fodder and beef. As soon as the Indians would drive up a gang of cows, calves, or oxen, before I was aware of their being in any part of my camp, which was very extensive, having from thirteen hundred to fifteen hundred Indians scattered all over the hills about the Big Springs, those Indians who were most in want of provisions would commence shooting them down. In this way an immense number of cattle were destroyed, and *a great many more than were required for the actual subsistence of the whole army*. To prevent a general destruction of cattle was utterly impossible, and equally so to obtain a list of marks and brands."

General Woodward says: "Cattle were killed and made use of both by whites and Indians, though it is true that many more were killed than were really necessary for the use of the troops. This was done by order of General Jesup. There was much other property taken that belonged to the whites, such as mules, horses, corn, fodder, and many things too tedious to mention. As to household furniture, it appeared not to be an object with the friendly or hostile Indians, for it was scattered over the woods in every direction, sometimes burned, and at others torn up and broken to pieces."

Major Collins testifies that he served with the regiment of friendly Indians under "Jim Boy" from the time they took up arms until they were discharged from the service of the United States. That they "had no rations supplied by the government until a surrender was made; that they drew a little provision which was given them to get it out of the wagons to enable them to move quicker, as they intended moving to Fort Mitchell, where stores were supplied for the subsistence of the army. All former supplies we had were such as were left by the unfortunate settlers; of this the Indians felt authorized to use, and did so freely wherever they could find any. The Indians said they were to have all the property they could find, according to the proposition made to them by the commander-in-chief, General Jesup, and was acceded to by him, it being their mode of warfare. They accordingly continued to kill a great many cattle, more than was actually necessary for the subsistence of the whole army, which they said they killed to starve the hostiles. They also

carried off mules, horses, and other things of value which originally belonged to the white settlers."

Charles McLemore testifies that he was in service and command for some time a large force of friendly Indians, and that the Indians did take and use everything they could get hold of; stock of all description, corn, fodder, bacon, and a large quantity of household furniture. The Indians who were friendly considered themselves entitled to all the plunder they could find," &c.

John B. Strange states that he was with Opoth-le-yohole and Jim Boy in every expedition, and is able to say "that nothing like stock or plunder of any kind escaped them. True it was they drew some rations, but every bushel of corn and every stack of fodder on any plantation through which we passed was either carried off by them or destroyed, to prevent, as they said, their falling into the hands of the hostiles. At the same time a great many cattle were killed; in fact all that were seen, and a number of horses and mules were carried off by them, and all belonging to the unfortunate white settlers, which the Indians considered as their own property when taken."

Major Torrence testifies: "In addition to the stock destroyed by the friendly Indians, they took all the corn they found, and burned their horses on the green corn and oats." Again: "Where we marched we saw the traces of mischief—houses and fences burned, cattle and hogs shot. At Neah Micos' and Neah Muthlas' camps we found hundreds of dollars of property of almost every description, which was wholly lost to the original owners."

Your committee have been thus copious in their extracts from the evidence annexed to the report of the commissioners, that the House may be fully possessed of the uncontradicted facts of the case. It is evident from these statements that a very large amount of property included in this claim was taken, and used by the troops of the United States. It has never been denied that the government is liable for this. In the adverse report made by Mr. Whittlesey, July 2, 1838, this is admitted, and a bill was reported to pay the same. It is equally clear that, owing to the peculiar circumstances of this case; no means are at hand to enable the parties to ascertain what that amount is. In the adverse report it is said: "In many cases it was difficult to make proof of a claim, and in the cases now under consideration that difficulty will be greatly increased. It may be the misfortune of the sufferers that they cannot, in all instances, prove their property was used in the military service; but that consideration should not open the door to an indiscriminate payment," &c. Your committee have nothing to object to this statement as a general proposition, but if the misfortune thus spoken of was produced by the fault of the government, then it would be but adding insult to injury to permit the government to take advantage of its own wrong. That the misfortune was thus produced has been heretofore fully demonstrated.

The committee come now to consider the effect of the act of 3d March, 1837, under which these commissioners were directed to make their report. The proviso to that act, "that nothing hereinbefore contained shall be so construed as to subject the United States to pay for depredations not provided for by the act of 9th April, 1816, and

the acts amendatory thereto, nor by acts regulating the intercourse between the Indian tribes and the United States," must be construed as maintaining the implication that if the depredations were such as were provided for by those acts, then the United States would pay for them. The proviso operates as an exception, limiting the extent to which Congress was willing to admit their liability.

What, then, was the meaning of Congress in referring their liability to these several acts? Did they intend to limit their liability to cases which fell within their *letter*, or did they intend to include depredations which would be included within their *spirit* and *equity*? It is very clear to your committee that the latter could alone have been intended; for they cannot presume that Congress was ignorant of the fact, that by no possibility could these claims have been included by the express terms of those acts.

First, the act of 9th April, 1816, and the acts amendatory thereto, relate solely to losses *during the late war with Great Britain*, and by its very terms excludes all other cases.

Second, as to acts regulating intercourse between the Indian tribes and the United States, it is to be observed that the only act in force in 1837 was the act of 1834, which repealed the prior acts for that purpose. The 1st section of the latter act declares "that all that part of the United States west of the Mississippi, and not within the States of Missouri and Louisiana, or the Territory of Arkansas; and also that part of the United States east of the Mississippi river, and not within any State, to which the Indian title has not been extinguished for the purposes of this act, be taken and deemed to be the '*Indian country*.'"

The 17th section, then, provides "that if any Indians belonging to a tribe in amity with the United States, shall, within the '*Indian country*,' on passing from the '*Indian country*' into any State or territory inhabited by citizens of the United States, take and destroy their property, the owners of said property shall make claim to the superintendent or Indian agent, who, upon due proof of the loss, under the direction of the President, apply to the tribe for satisfaction; and if such satisfaction be not made within twelve months, the same shall be reported to the Commissioner of Indian Affairs, that such steps may be taken as shall be proper to obtain satisfaction; and in the meantime, in respect to the property so taken, stolen, or destroyed, the United States guarantee to the party so injured an *immediate* indemnification."

This recital of the provisions of the act show that its terms necessarily exclude the present claims. This must have been well known to Congress; and therefore, in referring to it, they could only have intended to appeal to the spirit of the enactment and the principles on which it is based.

To suppose that they intended only to declare that they would pay those claims which come within the express terms of the acts referred to in the proviso, would attribute to them the folly of announcing their willingness to pay what the laws would have given to the parties without their act. The very fact that the petitioners were com-

pelled to come before Congress with their claims was a confession on their part, that the existing laws afforded them no redress.

Your committee are satisfied that the losses in this case, which consist either of property used by the United States forces, or property destroyed by the hostile portion of the Indian tribes, are clearly within the spirit of the act of 1816 and 1834, and that the act of 1837 was a pledge to the petitioners that such losses should be paid over when they should make proper proof of the same before the commissioners appointed for that purpose.

But whether the act of 1837 is to be considered as obligatory on this Congress or not, the committee are of opinion that the peculiar facts of this transaction make out a strong case of liability, on the part of the government, to pay the sum which has been allowed by the commissioners in auditing these claims. The committee, therefore, report a bill to pay the amount allowed and reported by the commissioner, less the amount already paid. And provided, further, that the amount so allowed shall be accepted in full satisfaction of all claims for damages for property lost by the act of the Creek Indians in 1836, 1837, and 1838, or taken for government use.