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THE CREEK CONTROVERSY.

IMPORTANT CORRESPONDENCE. Department of War, September 5th, 1833.

Sir—I have had the honor to receive, and to lay before the President, your letter of the 20th ultimo, and I have the pleasure to communicate to you his answer upon the subject of the intruders on the Creek lands to which you refer.

The occurrence, which has resulted in the death of an individual is much to be deplored. Whether the circumstances were such as to justify the act, is not for me to judge.

It is the wish of the Department, that the force employed in this unpleasant duty be applied so as to produce the desired result, with the least possible injury to individuals and with the greatest forbearance; and such will be found to be the spirit of all the instructions which have been issued.

The treaty by which the Creek Indians in March, 1832, ceded to the United States their possessions in Alabama, contained this stipulation.

Article 5th.—"All intruders upon the country hereby ceded shall be removed therefrom in the same manner as intruders may be removed by law from other public land until the country is surveyed, and the selections made; excepting however from this provision, those white persons who have made their own improvements, and not expelled the Creeks from their lands."

It will be seen that by this Article, the Government assumed upon itself the obligation of removing intruders from this land, in the same manner as intruders may be removed by law from other public land. The "manner" therein referred to is prescribed in the Act of Congress, passed March 3d, 1807, entitled "An Act to prevent settlements being made on lands, ceded to the United States, until authorized by law."

This Act provides for the interposition of the Marshal and the employment of Military force, under the orders of the President, and furnishes the authority, by virtue of which the proceedings in Alabama, in relation to this subject, have taken place.

There are two limitations to this obligation. One excepts from its operation, "those white persons, who have made their own improvements, and not expelled the Creek from their lands; such persons may remain till their crops are gathered." As the season herein alluded to has passed away, and the crops have been gathered, this provision is no longer applicable to any settler upon these lands.

The other limitation is to the district of country, confining the obligations of the Government to remove intruders to the tracts located for the Indians, after the country is surveyed and the selections made, and leaving the duty of removal imperative over the whole cession, until both of these objects are accomplished. The country is now surveyed, but the locations are not yet made, and considerable time must elapse before this is done.

No exertions on the part of the Government will be spared to accomplish this object as speedily as possible, but from reports which have been made, that impositions have been practiced upon the Agents employed in taking the census; and that more than two thousand names of persons are returned upon the lists, who are not entitled to reservations, and from the consequent necessity of rigid examination, as well as from the nature and extent of the locating duties, it is evident, that this business will occupy some months.

It is obvious therefore, that the treaty imposes upon the Government the duty of removing intruders from these lands. It is equally obvious, that the mode of removal is prescribed in that instrument, and is specifically provided for in an Act of Congress; and I may add the fact, that the whole subject was fully explained to the Creek Chiefs, previously to the execution of the treaty, and that they were told what were the legal powers of the Government upon this subject, and how they would be carried into effect. These Chiefs were exceedingly anxious, that a stipulation should be inserted, providing for the extension of the intercourse act

of 1802, over this country, and thus vesting the whole jurisdiction in the United States. But they were explicitly told that the President could not and would not assent to this. But that as the land by the cession would become the property of the United States, all intruders from it should be removed, as they may be removed from other public lands. In this, after some time, and with some reluctance, they acquiesced.

I have the honor to enclose a copy of an opinion of the Attorney General, by which you will see that that officer considers it the right and the duty of the President to cause these removals to be made. Indeed, I am not aware, that the Constitutionality of the Act of Congress of March 3d, 1807, for preventing settlements upon the public lands has ever been called in question and the considerations, connected with the subject are so obvious, as to preclude all reasonable doubts upon the matter.

Here then is a positive duty, and an acknowledged constitutional authority, requiring the interposition of the President in the case under consideration. Are there any circumstances so imperative in their character as to justify the neglect of the obligations, assumed by the Government in the Creek treaty?

In order, Sir, that you may have a full view of this matter, I have enclosed copies of various instructions and other papers, having relation to it. These will place you in possession of the principal facts.

Since the ratification of this treaty repeated representations have been made to this Department, by the public Agents, by respectable individuals, and by the Indians, that gross and wanton outrages have been committed upon the latter, by persons, who have intruded upon the ceded lands. It has been stated, that the houses of the Indians have been forcibly taken possession of, and sometimes burnt, and the owners driven into the woods, that their fields and improvements have been wrested from them and occupied by white persons, that aggravated injuries have been committed upon the persons of the Indians, and that their horses, cattle, hogs and other property have been forcibly taken from them.

The Appeals of the Chiefs to the Government to carry the treaty into effect and to afford their people protection have been repeated and forcible. They represent that their crops have been taken from them, and they look forward to a state of starvation, unless some decisive step is adopted in their favor.

And in addition to all this, the Deputy Marshal reports that there are four hundred persons selling Whiskey to the Indians upon the ceded lands.

That this state of things requires a change cannot be doubted. Surely no one would expect the Government to sit still and witness such aggressions, without any effort to prevent them. You suggest, that the law of Alabama, providing for the removal of intruders by actions of forcible entry and detainer, would be found sufficient for the protection of the Indians, and propose proceedings under it should be adopted with that view. To this suggestion the President sees two objections.

1st. The treaty expressly provides a different mode, and therefore leaves no discretion with the Executive, and, 2d. There is every reason to fear, that the remedy pointed out, would, if adopted, be found wholly insufficient.

Looking at the condition of the Indians, the intrusions among them, the injuries they have suffered and are exposed to, the difficulty of proof, and the great delay which would attend the prosecution of such a number of lawsuits, and in a community, which could not but be excited upon the subject, it would be in vain to expect, that the protection promised could in this way be insured.

You do justice to the feelings of the President, in stating it as your belief, that he is disposed "to cause the treaty to be carried into effect by such means only as are clearly authorized by the Constitution and laws." There is not the slightest wish, unnecessarily to injure or oppress the settlers upon these lands. I am well aware of the hardships and inconveniences to which frontier settlers are exposed, and every reasonable allowance should be made for their position. When there are no other obligations intervening, settlements have extended over the public lands without inconvenience to the country, and without the interference of the Government. But in this case, the rights of others are concerned, and the executive is called upon to fulfil the obligations of a solemn treaty. I do not however see that the "treaty, by obvious construction, permits settlements upon any of the lands ceded, except reservations" &c. The stipulation is, that intruders shall be removed from the ceded lands, before the country is surveyed and the locations made; but that after these Acts are done, this provision shall not operate upon that part of the country not included in the selections. No permission to settle is here granted. The Government did not indeed stipulate with the Indians that intruders on lands unlocated should be removed, but the ordinance provisions of the law still apply to

all persons living upon such land, and the prescribed penalty attaches to them. Your Excellency suggests that "encouraged by the treaty, by the laws of the State, and the express permission of the Government to settle upon and occupy them, population has moved upon them" &c. There is a misapprehension upon this subject, which I trust the enclosed documents will remove. No person has moved upon this land by the permission of the Government. Settlers without that permission having taken possession of the country, and the Government in this as in all other cases, being desirous of fulfilling its obligations with as little inconvenience to the citizens as possible, on the application of the members of Congress from Alabama and others, consented in December last, that the settlers upon the land might remain till the locations were made. This was done, as the instructions will show upon the presumption, that the country would be surveyed, and the locations made, before it would be time to put in another crop, and also in the belief that no inconvenience or injury would result to the Indians. In both these expectations there has been a disappointment. The country has indeed been surveyed, but the locations have not been and cannot, for some time be made, and the complaints of the Indians are assuming such a shape as imperatively to call upon the Government for its interference. It becomes therefore necessary to terminate the qualified permission which has been granted to residents.

Your Excellency supposes that the Marshal, with an armed force, is making incursions among the inhabitants with a view of settling disputes between them and the Indians.

If the Marshal, or the Military detachment under his orders, have assumed such an authority, they are acting without the instructions of the Government, and contrary to its views. They are stationed upon the public lands for the purpose of removing intruders. There is not an individual settled upon the ceded lands, who has the slightest legal claim to remain there. There is not one who has not by the Act of settlement exposed himself, not only to forcible eviction but to a specific penalty. There are no disputes, which the Marshal is authorized to adjust.

As a matter of favor, and to prevent injury as far as possible, that officer was authorized to permit such persons temporarily to remain, as had not injured the Indians. The investigation of this fact may be necessary to the action of the Marshal, but it is an investigation, not to give the right of interference, but to stay proceedings which otherwise under the law and his instructions, must be had. I cannot, therefore conceive what questions, "in their character strictly and properly legal," can come before the Marshal.

Allow me to repeat, that the President is sincerely desirous of carrying the Creek treaty into effect, with every proper attention to the wishes and feeling of the citizens of Alabama. I trust this disposition has been fully manifested in all the instructions that have been issued, and I cannot but hope that the propriety of removing from the ceded land, will be generally felt and acknowledged.

Very respectfully, I am, Sir, your obedient servant, LEWIS CASS.

His Excellency, JOHN GAYLE, Governor of Alabama, Tuscaloosa.

EXECUTIVE DEPARTMENT, Tuscaloosa, 21 Oct. 1833.

Sir—I have the honor to acknowledge the receipt of your letter of the 5th ultimo, together with the accompanying documents. They have been examined with the deliberate attention due to the subject to which they relate.

In mine of the 29th August, the objects I had principally in view, were to suggest to the President a mode of proceeding, for the protection of the Indians in their possessions and reservations, more congenial to the spirit of our institutions, than that of sending among our citizens an armed force; and to call his attention to the irregularities inseparable from its employment, in executing the stipulations of the Treaty, of which the killing of Owen is an instance.

I did not advert to the condition of the settlers, upon such parts of the ceded territory, as were not included in the selections of the Indians, nor attempted to show that they had any right, founded either upon their claims to the indulgence of the government, or the laws of the land to remain. It was impossible for me to anticipate the order contained in your letter to the Marshal of the 26th Aug. directing the expulsion of our whole white population from the ceded territory. I beg leave, therefore, to submit, for the consideration of the President, my views upon this new and unexpected state of things, still trusting with undiminished confidence, that upon a review of the whole subject, he will find ample room to rescind this measure, which I am constrained to believe is one of uncalculated and unnecessary severity.

In looking over that portion of the documents furnishing complaints against the settlers, which you did me

the honor to enclose for my inspection, I was at once led to the conclusion that the determination to remove them had been produced mainly, if not exclusively, by the information contained in the letters of Mr. Austin, written in the months of July and August. All these documents, except the letters referred to, and one from some of the Chiefs of the 20th December last, are of a date anterior to your communication to our delegation in Congress of the 8th December, 1832, giving permission to "those persons who obtained peaceable possession of the lands on which they live, &c. to occupy these tracts till the several selections are made." It appears that the injuries complained of before this period, were more numerous, frequent and aggravated than any which have been inflicted since. Mr. Austin has adopted the plan, it seems, of reporting to the War Department, individual cases of intrusion, and when they are all summed up, they do not amount to any considerable number.

It is true that the tenor and complexion of his letters are calculated to make an unfavorable impression of the settlers generally, but it is obvious that his prejudices are very strong, that his feelings had become excited, and that a correct representation of their character, or of the true condition of the Indians, is to be obtained from some other source. If you have been led to form, from the letters of this gentleman, an unfavorable opinion of the great body of these people, I beg leave to assure you that it is utterly erroneous and unjust. Nine tenths of them have not interfered with the Indians, and in the upper counties, which are the most populous, not a whisper of dissatisfaction has been uttered.

The country in question, as you have been advised, has been laid off into nine counties, by an act of our General Assembly, and organized, so as to put the entire machinery of our State Government into full operation. This measure was adopted as well in conformity with the known views and wishes of the President, as in pursuance of the constitution of the State of Alabama. Several of these counties contain a population of six or eight thousand souls, and the aggregate amount will not be short of twenty-five thousand.

The great object of the settlers, this year, has been to raise a sufficiency of corn and other provisions, to supply the wants of the next season, and also to obtain the necessary quantity of cattle, hogs and other stock. It is well known that the first business of settlers in a new country, is to exchange their transportation for the means of subsistence, and this has actually been done by the greater portion of the population in the Creek Nation. Their wagons, carts, horses, &c. are gone and very many cannot possibly leave the country within the time specified in your instructions to the Marshal.

The agricultural labors of these people have been crowned with success, and their crops of corn, peas, potatoes, &c. will place them during the ensuing year above the difficulties produced by the scarcity of the last.

Imagine, for a moment, the almost total destruction of these crops, the loss of most of the stock, and the wretched and destitute condition of thousands of women and children, and you will have a faithful picture of the scene which your orders, if executed, will spread over this entire region.

It seems to me, that the obligations resting upon the President, to avert from this large community, so dire and overwhelming a calamity are as imperative in their character, as any which have been assumed in the Creek Treaty. At least they interpose considerations of equal weight, I should suppose, with those by which it has been induced to overlook these obligations until the present time.

It is not to be lost sight of, that these people do not stand in the light of intruders who have settled upon the public land, and continued their settlements against the orders of the government. As before remarked, since your letters to Col. King and others of the 8th December last, all who were then in the country, had permission to remain until the selections were made. This you say was given, as it doubtless was, "upon the presumption that the country would be surveyed and the selections made, before it would be time to put in another crop and also in the belief that no inconvenience or injury would result to the Indians." You further observe that "in both these expectations there has been a disappointment."

The delay in making the locations was not produced by any of the settlers, and the injuries complained of have been inflicted by but few. If the first cause of disappointment be matter of complaint, the sin does not lie at their door, and if offences have been committed, justice demands that the perpetrators alone should be punished.

The fifth article of the Treaty of March 1832 requires, "that all intruders upon the country hereby ceded, shall be removed therefrom in the same manner as intruders may be removed from other public land, until the country is surveyed and the selections

made" &c. For the "manner" of removal, you refer to the act of Congress of the 31 March 1807, and take for granted, that in all cases of settlement upon the public land, the employment of Military force may be resorted to. I have no disposition to question the constitutionality of this act, but I doubt the correctness of your construction.

It was not the intention of Congress, in passing the act of 1807, to restrain persons from settling the public lands, who had no object in view beyond their cultivation.

Any one who is conversant with the fraudulent claims, which individuals as well as companies had set up to large tracts of land, before and at the period when the act in question was passed, will find no difficulty in perceiving, that the principal, if not only, purpose of Congress was to prevent them from obtaining possession, by which they expected to give strength and validity to their claims. The Yazoo purchase, effected by a fraudulent contract with the State of Georgia, embraced thirty-five millions of acres. It was believed by those interested in this contract, that they would be in a situation to contend with the government, with better prospects of success, if they could succeed in making settlements upon the territory they had purchased. It was their object to decide the controversy by suits at law, and to this end they had determined to place themselves in the attitude of defendants, by taking possession of the tract of country in which the county of Madison, in this State is situated.

The act of 1807 was framed to counteract the views of these and other fraudulent claimants, and to prevent such persons only from making settlements, as entertained the design of opposing the policy of the government, as indicated in the rules and regulations established by Congress, respecting the territory of the United States.

This view is confirmed by the fact, that as often as the settlers upon whom the act was to operate are mentioned, their claims are also adverted to; and the severest penalty denounced against them is the forfeiture of these claims.

All persons who had made settlements previous to the passage of the act, are permitted to remain, provided they will sign a declaration that they do not lay any claim to the land, and do not occupy the same, by virtue of any claim derived from any person whatever, and provided also they will yield quiet possession to any person who may purchase of the United States. If they refuse to submit to these conditions, the Marshal, at any time after the first of January, and after three months notice, is authorized to remove them, and they incur the penalty of one hundred dollars, and imprisonment not exceeding six months. The evidence to be furnished against those who may be indicted, among other things, is the certificate of the register that their claims to the land they had occupied, had not been recognized and confirmed by the United States.

Those who make settlements after the passage of the act, at the discretion of the President, may be removed by the Marshal, and they forfeit all title to whatever claim they may have which shall be vested in the United States.

A recital of the several acts of Congress passed in relation to persons who have occupied and cultivated the public lands, will confirm the opinion still more conclusively, that that body did not intend to prevent their cultivation, and that this was not the evil sought to be remedied by the act of 1807.

By the act of 10th May 1800, "each person who before the passage of the act, shall have erected or begun to erect a grist mill or saw mill upon any of the lands herein directed to be sold, shall be entitled to the pre-emption of the section including such mill, at the rate of two dollars per acre."

By the Act of the 5th Feb. 1812, "every person or the legal representatives of every person who has actually inhabited and cultivated a tract of land lying in either of the districts established for the sale of the public lands, in the Illinois territory, which tracts are not claimed by any other person, and who shall not have removed from said territory, every such person and his legal representatives, shall be entitled to a preference in becoming the purchaser from the U. States of such tract of land at private sale."

By the Act of 12th April, 1814, "every person and the legal representatives of every person, who has actually inhabited and cultivated a tract of land, lying in that part of the State of Louisiana which composed the late territory of Orleans, or the Mississippi territory, which tract is not rightfully claimed by any other person, and who shall not have removed from said state or territory, shall be entitled to the right of pre-emption in the purchase thereof."

By the Act of 23d April, 1825, "every person or the legal representatives of every person, who being either the head of a family, or twenty one years of age, did on or before the first day of January 1825, actually inhabit and cultivate a tract of land, situated in the territory of Florida, which tract is not rightfully claimed by any other person, & who shall not have removed from the said territory, shall be entitled to the

right of pre-emption in the purchase thereof."

By the 5th section of the same act, "every person, or his other legal representatives, comprised in the list of actual settlers, reported to the commissioner of the general land office, by the register and receiver for the district of Jackson Court House, in the State of Mississippi, under the authority of an act of Congress entitled an act, &c. not having any written evidence of claim to land, in said district, and who on the third day of March, 1819, did actually inhabit and cultivate a tract of land in said district, not claimed, &c. shall be entitled to the right of pre-emption, on becoming the purchaser of the United States of such tract of land." (See Gordon's digest from which these extracts are taken.)

Each of these acts embraced settlers in a particular State or territory and were generally passed in anticipation of the sales of the public lands. But the Act of 1830 is more general in its provisions, and includes all persons whatever, who had settled upon the public domain.

By that Act it is provided "that every settler or occupant of the public lands, prior to the passage of this act, who is now in possession and cultivated any part thereof, in the year 1830, shall be and he is hereby authorized to enter, with the register of the land office, for the district in which such lands may lie, by legal subdivisions, any number of acres not more than 160, or quarter section, to include his improvement upon, paying to the U. States, the then minimum price of the land."

Here is a continued succession of acts embracing and running through a period of thirty years, all conferring upon settlers the valuable privilege of pre-emption. They show beyond dispute, that during this time it was the settled policy of the Government to encourage our citizens to settle and occupy the public lands, that this class of our population has always been esteemed highly meritorious; and that the exclusive right to purchase at private sale has been extended to them, in consideration of, and as a reward for the services they have rendered, by these settlements, in testing the value and productiveness of the soil; and in affording facilities to purchasers to examine it.

These acts have been passed with the exception of that of 1800, subsequently to 1807, and if it be a crime to cultivate the public land, the government has subverted our citizens to its perpetration, by offering them large rewards and conferring on them valuable privileges.

If, then, the settlement of the waste lands of the United States, is not unlawful of itself according to the spirit, true intent and meaning of the act of 1807, the President cannot properly exert the discretionary power conferred on him for the removal of settlers, unless he has good reasons to apprehend, that they intend preferring a claim to the land they occupy, or in some other respect opposing the Acts of Congress for the disposal of the public domain, or interfering with and defeating "the rules and regulations respecting the territory of the United States." Nothing of this kind has been done by our people, who have settled in the country ceded by the Creek Indians. They designate no boundaries thereon by marking trees or otherwise, nor have they any intention to withhold it from any person or persons who may purchase of the United States. Their only object is to occupy their settlements, until they shall be offered for sale, and then to go into the market upon equal terms with other persons. The "manner" therefore of removing occupants, who settle upon the public lands with no design, but to cultivate them, is not by military force.

A treaty like an act of Congress is the supreme law of the land only when it is made in pursuance of the Constitution of the United States. If it trenches upon the admitted jurisdiction of a State, or violates the constitutional rights of a citizen, it is not law, can impose no obligation on our people, and will be declared null and void by the legally constituted authorities.

Such is believed to be the character of that part of the 5th article of the Creek treaty, by which the Government has undertaken to remove by force all intruders upon the occupations of the Indians, "until the country is surveyed and the selections made," and also to remove them in the same manner "from these selections for the term of five years from the ratification of the treaty," &c.—The Indians while they retained their character of a Tribe, had an unqualified indefeasible right to their immediate improvements. The second article of the treaty not only confirms this right of possession until the selections are made, but after that period adds to it a fee simple title. The article referred to requires that a "census of these persons shall be taken under the direction of the President, and the selections shall be made so as to include the improvements of each person within his selection, if the same can be made, and if not, then all the persons belonging to the same town entitled to selections, and who cannot make the same so as to include their improvements, shall take them in one body in