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Report : Claim of A. and J. Kendall, and S. Starnbaugh

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Recommended Citation

S. Rep. No. 180, 31st Cong., 1st Sess. (1850)

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IN SENATE OF THE UNITED STATES.

AUGUST 10, 1850.

Submitted, and ordered to be printed.

Mr. SEBASTIAN made the following

REPORT:

The Committee on Indian Affairs, to whom was referred the memorial of Amos and John E. Kendall, and S. C. Stambaugh, asking payment of their claims against the "Western Cherokees," have had the same under consideration, and respectfully report :

That on the 6th day of August, 1846, a treaty was made between the United States, by commissioners appointed on her part, and the Cherokees, consisting of three distinct recognised parties or factions, each of whom had a separate and distinct interest, and were represented by distinct delegations, who executed the treaty as parties, and prosecuted their claims through different counsel. These divisions had existed for many years, and originated in the treaty of 1835, made with the Eastern Cherokees. These parties to the treaty of 1846 were the "government party," or "Eastern Cherokees;" the "treaty party," and the "Western Cherokees," or "Old Settlers," being those who had emigrated to the west under the treaties of 1817 and '19, and were the undisputed occupants of the country when the treaty of 1835 provided for the final emigration of the remaining or Eastern Cherokees to the west. To prosecute their claim, and procure redress for their wrongs, the Western Cherokees employed S. C. Stambaugh and Messrs. Amos and John E. Kendall as their agents or attorneys, investing them with full power and authority in the premises, and stipulating to pay them a certain commission upon all amounts which they might recover or get allowed by the United States. These contracts were entered into in writing, by the delegates duly chosen by the national council and specially authorized to employ counsel. Their contracts with these persons appear to have received the subsequent assent of several national councils, and again ratified by the delegates who made the treaty, and the payment of their compensation directed out of any moneys which might be due them. These contracts, copies of which are annexed, appear to have been fairly made—not unreasonable in their terms, since they were entirely contingent in their character. When these engagements were made, the chances were that nothing would ever be recovered. The prosecution of these claims, it was evident, would be a work requiring much time, labor, and expense. The Commissioner of Indian Affairs, in his special report made to Congress February 8, 1849, fully attests the ability and fidelity with which they

discharged their duty. For the full details of the facts connected with this subject, the committee refer to that report.

Inasmuch as these contracts appear to have been made for a necessary purpose, for a good consideration not forbidden by law, and in terms which have been faithfully performed by the memorialists, the committee are of opinion that they should be discharged according to their tenor, if any redress be left in the power of Congress to afford. Upon this question the following observations are submitted:

When these engagements were entered into, the Western Cherokee were a distinct party, forming, in fact, a separate political body, and directing their separate interests through the action of a "national council." As such they were recognised, through their delegations and their agents, from 1842 until and at the making of the treaty of 1846, in which the United States regarded them as having distinct interests and competent to release their separate claim to the country east, and agree to an indemnity for it. This same authority had created this debt against the "Western Cherokees," and secured it by an equitable lien on the funds to be paid them under that treaty, of which the United States were fully cognizant. At this time it was a debt against the "Western Cherokee," for which any national fund of theirs would be liable generally, but that under the treaty *specifically*. By that treaty provision was made for setting apart the sum of \$50,000 to discharge their national debts; but this provision was stricken out by the Senate, the effect of which was to appropriate the whole of their money due under that treaty to a *per capita* distribution. Thus the *treaty fund was gone*. The clause of the treaty which merged all the different parties in one common nation, and under one government, destroyed their separate political existence, "except for the purpose of executing the treaty." Thus every national fund was gone, and the nation extinguished. Against whom did the debt survive? Not against the individual Cherokees; for they were not parties to it. Not against the nation, for that was extinct. Not against the whole nation of Cherokees, for the union was political, and had no reference to the separate debts of its factions; but the debt survived, and against the fund pledged for its payment, or, in default of that, against the United States. The Cherokees could not by the treaty release their obligation, nor could the United States, neither debtor nor creditor, release it. But they could by the treaty enter into an obligation *inconsistent with its payment*, and thus become responsible for it themselves. Other means of payment being exhausted, either the United States are liable, if the treaty has *released the fund*, or the fund is liable, if the treaty has not destroyed the lien. That there was a specification and appropriation of so much of that fund as was necessary to pay the debt, cannot, we think, be questioned. It was created by an authority competent to do it. The pledge was irrevocable. It was not a mere agency to receive, but an equitable transfer of so much of the fund. It was a security for payment; and if the United States has discharged it, they are liable for the debt. But the committee are of opinion that the treaty does not necessarily exempt the fund, provided under it, from the satisfaction of those just claims charged upon it, by competent authority, prior to the treaty. It may be regarded as a stipulation to pay in a particular form the *balance* justly due the Cherokees. This balance is the residuum after paying those claims, which, by the application of the principle of law to such case, are a lien on the fund. So far as respects these debts, the

United States is not only the debtor, but the trustee. The whole fund is a trust, for the proper disbursement of which this government is bound, according to the terms fixing its disposition. The first of these is the contract with the memorialists, directing the payment of a certain amount to them by the United States: the other, the 5th article of the treaty of 1846, directing a *per capita* distribution. Both compacts were made by the same authority, and both equally binding as a disposition of the fund to which they refer; and both can be executed as a trust, which the United States can discharge by administering one, subject to the prior obligation to perform the other.

The committee are aware that the opinion has been entertained that these debts were destroyed by the treaty of 1846, and that the distributive shares of the treaty fund have become private property beyond the control either of the Cherokees or of Congress, and that a payment of these claims would be a misapplication of the treaty fund, for which the United States would be responsible. If this be so, they are also liable for the destruction of the debt by treaty. As the United States, it would seem, are liable at all events, it is surely better to provide for the payment out of the fund originally and properly charged with it, and thus prevent payment out of the treasury. In such case, the claim of the Indians for reimbursement would scarcely be urged effectually. This would do effectual justice to all parties, and settle this prolonged and intricate controversy with the Cherokees while the whole subject is yet in our hands. The committee believe that to set apart a portion of this treaty fund, to enable the Indians to discharge their national debts contracted and charged by competent authority upon the fund *before* it became the subject of *individual property*, would not only be just, but a true discharge of the trust which the United States have assumed.

The committee therefore recommend that in the proper appropriation bill a provision should be adopted, setting apart a certain amount of the sum due the Western Cherokees, for satisfaction of these claims.