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Report : Memorial of D. Gordon

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IN THE SENATE OF THE UNITED STATES.

March 3, 1857.—Ordered to be printed.

Mr. RUSK made the following

REPORT.

The Committee on Indian Affairs, to whom was referred the memorial of David Gordon, in behalf of himself and others, beg leave to report :

That in the year 1848 Congress passed the following act:

AN ACT for the relief of the legal representatives of George Fisher, deceased.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Second Auditor of the Treasury of the United States be, and he is hereby, authorized and required to examine and adjust the claims of the legal representatives of George Fisher deceased, on principles of equity and justice, and having due regard to the proofs for the value of property taken or destroyed by the troops of the United States engaged in suppressing Indian hostilities in the year eighteen hundred and thirteen; and that the said legal representatives be paid for the same out of any money in the treasury not otherwise appropriated.

SEC. 2. *And be it further enacted,* That, if it shall be found impracticable for the claimants to furnish distinct proof as to the specific quantity of property respectively taken or destroyed by the troops and by the Indians, it shall be lawful for the said accounting officer to apportion the losses caused by said troops and Indians, respectively, in such manner as, from the proofs, he may think just and equitable, so as to afford a fair and full indemnity for all losses and injuries occasioned by said troops, and allow the claimants accordingly: *Provided,* That nothing herein contained shall authorize any payment for property destroyed by Indians.

Approved April 12, 1848.

Under the provisions of this law, there were two adjustments of the claim, which will appear by reference to copies of the Second Auditor's reports hereto attached as part of this report. After this settlement, Congress passed the following act:

AN ACT supplemental to an act therein mentioned.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall be the duty

of the Second Auditor of the Treasury, under the provisions of the act of Congress for the relief of the legal representatives of George Fisher, deceased, approved 12th of April, 1848, to re-examine the said case, and to allow the claimants the benefit of the testimony heretofore marked "*rejected for the want of authentication,*" provided the same is now legally authenticated by the executive of Alabama; the adjustment to be made in strict accordance with the act herein above referred to, and to which this act is barely supplemental.

Approved December 22, 1854.

This law has never been executed. The Secretary of the Treasury refused to permit the Second Auditor to readjust the claim; his reasons therefor are hereto attached as a part of this report.

The committee therefore recommend the passage of the resolution herewith reported:

Resolved, That the existing law is ample in its provisions for the adjustment of the claim of the heirs of the late George Fisher.

TREASURY DEPARTMENT,

Second Auditor's Office, March 30, 1855.

SIR: By an act approved December 22, 1854, entitled "An act supplemental to the act for the relief of the legal representatives of George Fisher, deceased," which original act was approved April 12, 1848, it is made the duty of the Second Auditor to examine the said case and to allow the claimants the benefit of the testimony heretofore marked "*rejected for the want of authentication,*" provided the same is now legally authenticated by the executive of Alabama," the adjustment to be made in strict accordance with the act above referred to, and to which this act is barely supplemental.

The facts in the case are these: My predecessor had submitted to him in this claim originally the deposition of six individuals, viz: Haden, Reviere, Presnal, Davis, Harrison, and Turner, testifying to the amount and value of property in the possession of George Fisher on a farm in Mississippi Territory, which, they alleged, was destroyed in the year 1813. Their evidence estimates the value of the property at sums varying between \$13,000 and \$22,000. In April, 1848, an award was made, on the deposition of Haden, Reviere, and Presnal, allowing \$8,873, without interest, the claimants protesting at the time against the amount and insisting upon their right to interest; the depositions of Davis, Harrison, and Turner, were rejected for want of authentication. In December, 1848, the Auditor again took up the case, and upon these rejected depositions allowed the further sum of \$8,973, with interest on the same from 13th of February, 1832, till December, 1848; in rendering the award, however, he deducted from said second allowance the sum of \$8,873, with interest thereon from 22d April, 1848, to December, 1848, amounting to \$9,237 79, which really absorbed the interest upon and a part of the principal of \$8,973, the second award; the claimants still protesting against the allowance, and contending for interest from 1813, the date of the

destruction of the property, and not from February, 1832, the time alleged by the Auditor as the earliest period of the presentation of the claim.

The question as to the time when interest should commence was submitted to the Attorney General, and, in an opinion given by him, dated February 16, 1849, he held that, as the Second Auditor had decided that the value of the property taken or destroyed, with interest upon it, should be paid as a fair and full indemnity, that the interest should be computed from the time when the property was taken and destroyed. At this point the case rested when I came into office, the 9th of April, 1849, and I submitted to the Secretary the two questions: 1st. Whether the opinion of the late Attorney General upon the decision of the late Second Auditor was obligatory on my action? and, second, ought interest to have been allowed under the act of Congress referred to? I was answered by an opinion from the Attorney General, dated May 8, 1849, that I had no discretion in the matter, and interest was allowed on \$8,973 from the 13th of July, 1813, to the 13th of February, 1832, amounting to \$10,004 89, presuming that the interest had been allowed as intended by the awards of my predecessor from 1832 to 1848.

In looking into the case now, under the provisions of the act approved December 22, 1854, I find that Congress acted under the impression that the testimony marked "rejected for want of authentication" had never been acted on, whilst the second award of my predecessor shows that he admitted the testimony and allowed the sum of \$8,973. I also discover the mistake of my predecessor in calculating the interest.

The point on which I desire your advice and decision is, whether I am restricted by the last act to the question of the rejected testimony, and whether I have the power to correct the error in the calculation of interest.

The whole subject, with all the papers connected with the case, is submitted for your decision.

I enclose a statement showing what amount has been paid under the several decisions heretofore made, and what amount is due if the awards of my predecessor are carried out, allowing interest upon the same from the 13th of July, 1813, to the 22d of April, 1848, the date of the first award. I also send with the papers, by request, the argument of counsel in the case.

Very respectfully, your obedient servant,

P. CLAYTON,
Second Auditor.

Hon. JAMES GUTHRIE,
Secretary of the Treasury.

Statement of the claim of the representatives of George Fisher, deceased, as due under the several awards heretofore made, and the amounts paid under said awards:

Amount awarded in April, 1848.....	\$8,873 00
Amount awarded in December, 1848.....	8,973 00
	<hr/>
	17,846 00
Interest on \$17,846, the amount of the above awards, from 13th July, 1813, the date of the destruction of the property, to 22d April, 1848, the date of the first award, 34 years, 9 months, and 10 days, at 6 per cent. per annum.....	37,238 66
	<hr/>
	55,084 66
From which deduct—	
Amount paid 22d April, 1848.....	\$8,873 00
Amount paid 30th December, 1848.....	8,797 94
Amount paid 12th May, 1849.....	10,004 89
	<hr/>
	27,675 83
	<hr/>
	27,408 83
	<hr/> <hr/>

Basis of the first award.

100 acres of corn on Bassett's creek, 30 bushels to the acre, (one-half) ...	\$1,500
400 cattle, \$10 each, (one-half)	2,000
350 stock hogs, \$3 each, (one-half).....	525
75 fat hogs, \$14 each, (one-half).....	525
Hats and goods used by troops, (one-half).....	500
4 dozen wine.....	48
125 gallons of whiskey	125
Wheat in stacks	250
Corn in Alabama.....	3,500
	<hr/>
	8,873
	<hr/> <hr/>

Error of \$100 in addition.

Basis of the second award.

Corn on Bassett's creek, 3,000 bushels, at \$1 each, (one-half)	\$1,500
Cattle, 500 head, (200 used,) at \$10 each.....	2,000
Hogs, stock, 350, at \$3 each, (one-half).....	525
Hogs, fat, 75, at \$14 each, (one-half).....	525
Furs, hats, and goods in store, whiskey and wine.....	673
Wheat in stacks, (35 acres).....	250
Whole crop on Alabama river farm, Fort Claiborne.....	3,500
	<hr/>
	8,973
	<hr/> <hr/>

TREASURY DEPARTMENT,
Second Auditor's Office, February 14, 1857.

SIR: In answer to the resolution adopted by the Committee on Indian Affairs of the Senate, and referred to this office yesterday, asking what action has been taken by the department in execution of the two acts of Congress "for the relief of the legal representatives of George Fisher, deceased, approved April 12, 1848, and December 22, 1854," and requesting the decisions of the Attorney General in relation to interest on said claim, I have the honor to report:

That on a settlement of the account on April 22, 1848, there was allowed and paid, without interest.....	\$8,873 00
That on settlement of December 30, 1848, there was awarded \$8,973, with interest thereon from February 13, 1832, to date of this settlement, at 6 per cent. per annum, amounting to \$18,035 73, from which was deducted \$8,873 paid on previous settlement, and interest thereon, at the same rate, to the date of this settlement, amounting to \$9,237 79, which leaves a balance, which was paid December 30, 1848.....	8,797 94
And that on the last settlement, on the 12th of May, 1849, there was allowed and paid as interest on \$8,973, awarded to the representatives of George Fisher, from July 13, 1813, to February 13, 1832, at 6 per cent. per annum, under opinion of Attorney General of May 8, 1849	10,004 89
	27,675 83
	27,675 83

The opinions of the Attorney General of December 20, 1849, February 16, 1849, and May 8, 1849, are herewith transmitted, as requested.

The foregoing exhibits all the action of this office, by settlement under the act "for the relief of the representatives of George Fisher," approved April 12, 1848. Under the act approved December 22, 1854, no action has taken place, further than is contained in my letters of March 30, 1855, and June 11, 1855, addressed to the Secretary of the Treasury. The final action on the case, I presume, is on file in the office of the Secretary, as it was not transmitted with the papers of George Fisher's representatives when returned to this office. The resolution and letter of Mr. Sebastian are returned herewith.

Very respectfully, your obedient servant,

P. CLAYTON,
Second Auditor.

Hon. JAMES GUTHRIE,
Secretary of the Treasury.

TREASURY DEPARTMENT,
April 4, 1855.

SIR: I find that the Second Auditor, under date of the 22d of April, 1848, rejecting certain depositions, for want of sufficient authentication, awarded to the representatives of George Fisher the sum of \$8,873, as a full and fair equivalent for the property destroyed by the United States troops, and that said sum was accordingly paid to the representatives. I also find that the said Auditor again took up the said case, under an opinion of the Attorney General as to the rejected depositions, and made another award, in which he allowed, on the whole case, for the property destroyed by the United States troops, the sum of \$8,973, being \$100 more than allowed by the first award, and on this latter award allowed interest at the rate of six per cent. from the 13th of February, 1832, the time when Congress was first petitioned to settle the claim, and deducted therefrom the first award of \$8,873, leaving a balance of \$8,797 94, which was paid the representatives.

I further find that, upon the opinion of Attorney General Toucey, you took up the case and allowed interest upon the last award of \$8,973 from the 13th of July, 1813, to the 13th of February, 1832, and allowed the further sum of \$10,004 89.

You will thus see that the sum awarded to Fisher's representatives, by your predecessor, under his second award, embracing the rejected depositions, has been fully paid, with interest from the 13th of February, 1813, and that there was not the two sums of \$8,873 and \$8,973, constituting \$17,846, awarded for the damages done by the United States troops, and, consequently, there is no such balance due for interest or otherwise, as you suppose.

In my opinion, the second award of your predecessor, allowing interest from 1832 to the time application was first made to Congress for compensation, was all that equity and justice called for, and that Attorney General Toucey's opinion ought not to have been applied to the case as it stood, and did not justify the further allowance of interest.

As the second award of your predecessor was made on the basis of the rejected depositions on making his first award, the act of 1854, authorizing those depositions to be considered, and a further award made, was for the want of the proper information; and as they have already been considered and acted upon, you are not authorized to revise the action of your predecessor under the provision of the act of 1854, but should make a detailed report of the case to me, so that I may lay it before the President, to be presented to Congress for their consideration.

I am, very respectfully,

JAMES GUTHRIE,
Secretary of the Treasury.

P. CLAYTON, Esq.,
Second Auditor of Treasury.

The papers are herewith returned.

TREASURY DEPARTMENT,
December 20, 1856.

SIR: I have the honor to report to you, in order that the fact may, if you think proper, be communicated to Congress, that the act entitled "An act supplementary to an act therein mentioned," approved 22d December, 1854, has not been executed for the reasons and under the circumstances which will be stated.

The act provides "that it shall be the duty of the Second Auditor of the Treasury, under the provisions of the act of Congress for the relief of the legal representatives of George Fisher, deceased, approved April 12, 1848, to re-examine the said case, and to allow the claimants the benefit of the testimony heretofore marked *rejected for the want of authentication*, provided the same is now legally authenticated by the executive of Alabama; the adjustment to be made in strict accordance with the act herein before referred to, and to which this act is barely supplemental."

The facts of the case are, that under the said act of 12th April, 1848, the Second Auditor made an award, upon the testimony of Robert G. Hayden, H. L. Deviene and Absalom P. Greswall, on which there was allowed and paid \$8,873. The Auditor, in December, 1848, made a subsequent award, in which, taking into view the testimony considered in the former, as well as the affidavits of Davis, Turner and Hanson, then rejected "because there was no proof that the several persons before whom they were taken were justices of the peace," allowed, by force of the whole, the sum of (being \$100 more than the sums previously allowed)..... \$8,973 00

The Auditor allowed interest on this sum from the 12th of February, 1832, when Col. Fisher first presented his petition to Congress.....	9,062 73
Making	18,035 73
And deducted the amount of the former award \$8,873 with interest thereon from date of payment.....	9,237 79
Being	8,797 84

which was paid on the 30th December, 1848.

Under opinions of successive Attorneys General, of 16th February and 8th May, 1849, the Auditor further allowed interest from the 13th July, 1813, when the injury is alleged to have been done, to the said 13th February, 1832, amounting to \$10,004 87, making in all \$27,675 83 awarded and paid in this case, of which \$8,973 is for damages, and \$18,702 85 for interest.

The act of 22d December, 1854, supplementary to an act therein mentioned, was introduced and passed in the Senate without papers.

The case was brought to my notice under a misapprehension on the part of the Auditor of the amount of principal paid under the act of 1848, and a submission of the question of a further allowance of interest. My decision on that point is annexed; the law being now settled at the treasury in respect to such cases, that where interest is not granted in express terms, or by necessary implication, it is not allowed.

By the passage of the recited act, Congress intended to give Fisher's representatives the benefit of the rejected testimony; but as they had already had the benefit of that testimony in the second award made by the Auditor, and which fact was not known to Congress when they passed the supplementary act, the particular relief provided for cannot be granted. It seems manifest that Congress did not intend any relief other than the benefit of the rejected testimony, although an examination of the case is directed; but if there was authority now to re-examine the whole case, and the accounting officers of the treasury should arrive at the conclusion that Fisher's representatives were entitled to compensation for the whole damage claimed, as well that done by the United States troops, for which the allowance was made, as that done by the Indians, which was excluded, inasmuch as Fisher's representatives have received more interest than the whole amount of damage proved, and as no interest on such claims is now allowable, no further payment could be made on this claim. Neither of the acts for the benefit of Fisher's representatives gives interest, or directs the accounting officers to allow it; and there is no general law authorizing the payment of interest in this class of cases, whilst the practice of the government is against it. A petition to Congress in this class of cases is an appeal to the equity and justice of all the people of the United States; and the act of Congress stands like a judgment or decree in equity between individuals, and carries no interest unless given in the judgment or decree.

Upon this state of the case, the act of December, 1854, being imperative, the thing directed having been before done, if you shall think it fit to submit this report to Congress, it will be for that body to repeal the said act, or take such other order in the premises as it may deem proper.

Most respectfully, your obedient servant,

JAMES GUTHRIE,
Secretary of the Treasury.

Endorsed as follows:

I approve the views expressed within, and am not inclined to recommend further legislation in the case.

FRANKLIN PIERCE.

JANUARY 18, 1856.

TREASURY DEPARTMENT, *December 20, 1855.*

SIR: I have the honor to report to you, in order that the fact may, if you think proper, be communicated to Congress, that the act entitled "an act supplemental to an act therein mentioned," approved December 22, 1854, has not been executed, for the reasons and under the circumstances which will be stated.

The act provides "that it shall be the duty of the Second Auditor of the Treasury, under the provisions of the act of Congress for the relief of the legal representatives of George Fisher, deceased, approved April 12, 1848, to re-examine the said case, and to allow the

claimants the benefit of the testimony heretofore marked *rejected for the want of authentication*, provided the same is now legally authenticated by the executive of Alabama; the adjustment to be made in strict accordance with the act hereinbefore referred to, and to which this act is barely supplemental."

The facts of the case are, that, under the said act of April 12, 1848, the Second Auditor made an award upon the testimony of Robert G. Hayden, H. L. Deviene, and Absalom Preswal, on which there was allowed and paid \$8,873. The Auditor, in December, 1848, made a subsequent award, in which, taking into view the testimony considered on the former, as well as the affidavits of Davis, Turner, and Hanson, then rejected "because there was no proof that the several persons before whom they were taken were justices of the peace," allowed, by force of the whole, the sum of \$8,973, being \$100 more than the sum previously allowed. The Auditor allowed interest on this sum from the 12th of February, 1832, when Colonel Fisher first presented his petition to Congress, \$9,062 73, making \$18,035 73, and deducted the amount of the former award, \$8,873, with interest thereon from date of payment, \$9,237 79, leaving \$8,797 74; which was paid on the 30th of December, 1848.

Under opinions of successive Attorneys General, of 16th February and 8th May, 1849, the Auditor further allowed interest from the 13th July, 1813, when the injury is alleged to have been done, to the said 13th of February, 1832, amounting to \$10,004 89—making, in all, \$27,675 83 awarded and paid in this case, of which \$8,973 is for damages, and \$18,702 83 for interest.

The act of December 22, 1854, supplementary to an act therein mentioned, was introduced and passed in the Senate without papers. The case was brought to my notice, under a misapprehension on the part of the Auditor of the amount of principal paid under the act of 1848, and a submission of the question of a further allowance of interest. My decision on that point is annexed; the law being now settled at the treasury, in respect to such cases, that where interest is not granted in express terms, or by necessary implication, it is not allowable.

By the passage of the recited act, Congress intended to give Fisher's representatives the benefit of the rejected testimony; but as they had already had the benefit of that testimony in the second award made by the Auditor, and which fact was not known to Congress when they passed the supplementary act, the particular relief provided for cannot be granted. It seems manifest that Congress did not intend any relief other than the benefit of the rejected testimony, although a re-examination of the case is directed; but if there was authority now to re-examine the whole case, and the accounting officers of the treasury should arrive at the conclusion that Fisher's representatives were entitled to compensation for the whole damage claimed, as well that done by the United States troops, for which the allowance was made, as that done by the Indians, which was excluded, inasmuch as Fisher's representatives have received more interest than the whole amount of damage proved, and as no interest on such claims is now allowable, no further payment could be made on this claim. Neither of the

acts for the benefit of Fisher's representatives gives interest, or directs the accounting officers to allow it; and there is no general law authorizing the payment of interest in this class of cases, whilst the practice of the government is against it.

A petition to Congress, in this class of cases, is an appeal to the equity and justice of all the people of the United States; and the act of Congress stands like a judgment or decree in equity between individuals, and carries no interest unless given in the judgment or decree.

Upon this state of the case, the act of December, 1854, being imperative, the thing directed having been before done, if you shall think it fit to submit this report to Congress, it will be for that body to repeal the said act, or take such other order in the premises as it may deem proper.

Most respectfully, your obedient servant,

JAMES GUTHRIE,
Secretary of the Treasury.

THE PRESIDENT OF THE UNITED STATES.

Endorsed as follows:

I approve the views expressed within, and am not inclined to recommend further legislation in this case.

FRANKLIN PIERCE.

JANUARY 18, 1856.

ATTORNEY GENERAL'S OFFICE, *December 20, 1848.*

SIR: In reply to your inquiry, I beg leave to say that, under the act of Congress of April 12, 1848, for the relief of the legal representatives of George Fisher, deceased, authorizing and requiring the Second Auditor of the Treasury to examine and adjust their claims for spoliations during the war of 1812, on principles of equity and justice, the Second Auditor is very clearly permitted to receive proof of a claim, although he may have previously ruled out the same proof for informality, and reported upon the other claims satisfactorily established. Indeed, I think he is required to do it. It is not necessary for Congress to re-enact the law. If the claim be a just one, the act is broad enough to permit it to be allowed. No chancellor would feel at liberty peremptorily and finally to reject it because there was a slip in the forms of proof. I think the Second Auditor has full power under this act to do justice upon the principles which prevail in courts of equity, one of which is, not to permit a just claim to be defeated by an accidental omission or mistake like that in question.

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

ISAAC TOUCEY,
Attorney General.

HON. ROBERT J. WALKER,
Secretary of the Treasury.

ATTORNEY GENERAL'S OFFICE, *February 16, 1849.*

SIR: In administering the relief provided by the act of Congress for the legal representatives of George Fisher, deceased, approved April 12, 1848, it being held by the Second Auditor that the value of the property taken or destroyed, with interest upon it, is to be paid as "a fair and full indemnity," it would seem to follow, of course, that the interest should be computed from the time when the property was taken or destroyed by the troops of the United States.

As to the rate of interest, it is not fixed by any contract, nor is interest to be paid in pursuance of any contract. It is to be referred to as a measure of what is deemed, under the laws and practice of this government, a fair indemnity for the detention of the value, and that is, six per cent. per annum during the period of the detention.

I have the honor to be, very respectfully, sir, your obedient servant,
I. TOUCEY,
Attorney General.

Hon. ROBERT J. WALKER,
Secretary of the Treasury.

ATTORNEY GENERAL'S OFFICE, *May 8, 1849.*

SIR: In the matter of the claim of the representatives of George Fisher, made under the act for their relief, of the 12th April, 1848, the two questions you have submitted to this office I have duly considered.

They are these:

"*First.* Is the opinion of this office of the 16th February, 1849, upon the decision of the late Second Auditor, obligatory upon the present incumbent?"

"*And secondly.* Ought interest to have been allowed under the act of Congress referred to?"

First. The duties of the Attorney General are prescribed by the judiciary act of 1789, and are, "to give his advice and opinion upon questions of law, when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments."

The act does not declare what effect shall be given to such advice and opinion, but it is believed that the practice of the government has been invariable always to follow it. This has been done from the great advantage, and almost absolute necessity, of having uniform rules of decision in all questions of law in analogous cases—a result much more certain under the guidance and decision of a single department, constituted for the very purpose of advising upon all such questions, and with supposed special qualifications for such a duty.

In my opinion, this practice should be considered as law.

Second. By reference to the act giving relief in this case, it will be seen that the whole subject of the claim is submitted to the exclusive judgment of the Second Auditor. No other department had any jurisdiction over it. His judgment was made absolute. By the last re-

port of that officer, he did allow interest; and the interest, with the principal then allowed, has been paid the claimants. This, in my judgment, decides the question as to the title to interest under the act. The Auditor thought—whether correctly or not is not submitted to me, and I express no opinion upon it—that such was the meaning of the law. His successor, under another rule perfectly well settled, has no right to disregard the decision. He is bound to esteem it a correct one.—(See *United States vs. Bank of Metropolis*, 15 Pet. 377.)

I have the honor to be, respectfully, sir, your obedient servant,
REVERDY JOHNSON.

HON. WILLIAM M. MEREDITH,
Secretary of the Treasury.