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Heirs of George Fisher

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HEIRS OF GEORGE FISHER.

MARCH 27, 1874.—Committed to a Committee of the Whole House and ordered to be printed.

Mr. HUNTON, from the Committee on Military Affairs, submitted the following

REPORT:

[To accompany bill H. R. 1253.]

The Committee on Military Affairs, to whom was referred the bill (H. R. 1253) for the relief of the heirs of George Fisher, having had the matter under consideration, beg leave to submit the following report :

In 1813 the property of Col. George Fisher was taken and used, or destroyed, by the troops of the United States in the then Territory of Mississippi, during the war with the Creek Indians.

Colonel Fisher applied to the Fourteenth Congress for indemnity, and continued to make this application till his death, in 1841. This claim has been prosecuted by his legal representatives since his death. By reference to the first volume of private claims in the House, page 630, it will be seen this claim was presented to the House nine times.

On 12th April, 1848, Congress passed a bill directing the Second Auditor of the Treasury "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 of the value of property taken or destroyed by the troops of the United States engaged in suppressing Indian hostilities in the year 1813, and that said legal representatives be paid for the same out of any money in the Treasury not otherwise appropriated."

In the second section of said act it was provided, if it could not be decided as to the specific quantity of property taken or destroyed by the troops and by the Indians, the said officer was directed "to apportion the losses as he may think just and equitable, Statutes at Large, vol. 9, p. 712. so as to afford a full and fair indemnity for all losses and injuries occasioned by said troops, and allow the claimants accordingly."

Under the provisions of this law the then Second Auditor, McCalla, made a partial settlement of this case, which was predicated on the evidence of only three witnesses out of six. The witnesses whose testimony was allowed were R. G. Hayden, H. L. Revier, and Absalom Presnel. The testimony of Wiley Davis, James Turner, and Samuel Harrison was rejected, because the Auditor said their depositions were not properly authenticated by the governor. Upon the testimony thus admitted he estimated the value of the property destroyed at \$17,946, and presuming that the Indians had destroyed one-half, allowed \$8,973, or by mistake of \$100 in addition, \$8,873, *without interest*. In December following, the attention of the Auditor was called to the language of the second section of the act, and interest was claimed

under said section. The Auditor affected to consider the case *de novo*, but upon examination it will be found he only considered the same evidence, and paid no attention to the testimony of the three last-named witnesses. The Auditor on this second examination awarded the same sum (correcting the error of \$100) of \$8,973, with interest from 1832 to 1848.

These rejected depositions were of great importance, because they disproved the presumption that one-half the property was destroyed by Indians, and established that the whole of it was used or destroyed by the troops of the United States.

The claimant proceeded to perfect the rejected depositions, and asked of the Auditor an allowance upon them, but Clayton, the new Auditor, refused to entertain the further claim on the ground that the case was closed.

By act of Congress approved December 22, 1854, the Second Auditor of the Treasury was directed "under the provisions of the act of 12 April, 1848, to re-examine this case and to allow the claimants the benefit of the rejected testimony, provided the same is now properly authenticated." This act was supplementary to the act of April 12, 1848. This supplementary act, which gave directions to the Second Auditor alone, was never executed, *James Guthrie, then Secretary of Treasury*, having intervened to prevent its execution, on the unwarranted assumption that the claimants had already had the benefit of the rejected testimony. This assumption is disproved by the testimony of George M. Bibb, to be found in fifth volume Reports of Committees, page 22, and the identity of both of the awards of Auditor McCalla. By a joint resolution approved 3d of June, 1858, "the duties imposed or required to be performed by the said act of Congress were to be discharged by the Secretary of War."

Under this resolution the Secretary of War allowed the claimants \$18,104, with interest from date of destruction of the property. This was substantially the same in amount as that made by the Auditor.

With a full knowledge of all these facts, Congress, on June 1, 1860, passed a joint resolution requiring the Secretary of War to re-examine the whole case, to give effect to all the evidence on file, and to make such further allowances as in his opinion justice to the claimants required.

The Secretary of War, acting under this last resolution, says, "It is very plain, from the language of the resolution and reports of committees, that it was considered necessary to require a revision of the account in detail, and that Congress regarded the estimate of value of the property made by the Auditor, and substantially the same as my own, as being much less than the evidence required."

"I find, on careful examination of the depositions, substantial ground for such assumption."

The Secretary then awarded to the claimants, as the fair value of the property destroyed, the sum of \$34,952, with interest on \$22,202 from July, 1813, and on \$12,750 from September, 1814, aggregating principal and interest, November, 1860, \$133,323.18.

Under these various awards the claimants have been paid the following sums, to wit:

April 22, 1848.....	\$8,773 00
December 31, 1848.....	8,797 94
May 12, 1849.....	10,004 89
October 12, 1858.....	22,681 28
November 6, 1858.....	16,346 22
Aggregating	66,803 33

It will appear by calculation that these various payments, properly applied, will only discharge the sum of \$18,104, with interest from 1813, the amount of the first award of the Secretary of War, leaving the balance of \$16,868, with interest as aforesaid, still due to the claimants.

Before this balance was paid Congress, by joint resolution, approved March 2, 1861, rescinded the former joint resolution of June 1, 1860, and no further action was taken for some time, by reason of the civil war which soon thereafter ensued.

Is the sum of \$16,848, with interest from 1813 to 1814, still due the representatives of George Fisher? Two objections have been taken against paying the same. The first is that the resolution under which this sum was awarded having been rescinded the award was a nullity.

This is a new and not very creditable way of paying old debts. If that award is wrong, if any mistake has been found in it, then there would be some equity in correcting it; but it appears to the committee to be fair and just, and manifestly, in the opinion of the Congress that passed the resolution of June 1, 1860, these claimants had not received what the law of 1848 contemplated, "fair and full indemnity for all losses." But it is believed that the award of the Secretary of War under the resolution of June 1, 1860, was binding on the Government, and unless the claimants have released, this sum (principal and interest) is still due them.

It is a principle too old and well established to be controverted that after an award or judgment has been regularly obtained under a valid and existing law, a repeal of the law cannot impair the validity of such award or judgment.

In *Fletcher vs. Peck*, the court held that a grant by the legislature of the State of Georgia could not be annulled by a subsequent repeal, although the grant had been improperly obtained. (6 Cranch, 87-185, &c.)

State of Pennsylvania vs. the Wheeling Bridge Company, 18 Howard, 421-431. Justice Nelson, delivering the opinion of the court, says: "It is urged that the act of Congress cannot have the effect and operation to annul the judgment of the court already rendered, or the right thereby determined in favor of the plaintiff. This, as a general proposition, is certainly not to be denied."

An award stands upon same ground as a judgment. (3 Bl. Com., 16, 160 to 164.)

Many other adjudicated cases might be cited to sustain the proposition laid down. But this view of the question has been more than once sanctioned by this House in the last few years.

On 2d March, 1867, when the House was in Committee of the Whole on the appropriation bill, Mr. Schenck moved the insertion of a section containing a provision on this claim, in many respects similar to this bill. Mr. Stevens, of Pennsylvania, was then chairman of the committee on appropriations and examined the papers on which this claim was founded. The section was adopted in Committee of the Whole and passed the House, but was struck out in the Senate, because the friend of the bill was absent and no one present to explain it.

On 4th June, 1868, Mr. Stevens, from the same committee, reported a special appropriation bill containing provisions similar to this bill, which passed the House.

This bill again failed in the Senate, it is believed because there was not time of the session left to consider it.

It will be seen that the justice of this claim has been acknowledged by this House repeatedly, and, notwithstanding the repeal of the resolu-

Congressional Globe and appendix 2d sess. 39th Con. p. 1742.

Congressional Globe 2d sess., 40th Cong., p. 2828.

tion, the propriety and obligation to pay this claim has never been seriously contested in this House.

The other objection to this claim is that interest should not be paid.

It may be proper to advert to the circumstances which attended the actual preparation of the award in question.

It appears to have been prepared not at the War Department, or by the Secretary of War. We have the official letter of the then Assistant Attorney-General of the United States, addressed to the Hon. Edwin M. Stanton, Secretary of War, that the whole case was transmitted to the Attorney-General's Office, requesting that all the facts might be inquired into, and an award made in accordance therewith. We submit the letter of the Hon. A. B. McCalmen, addressed to the Secretary of War, which shows:

The terms of the act of 1848 indicate clearly that the intention of the legislature was to pay interest. The damages accrued in 1813 and 1814, and in 1848 Congress, by its act, commanded that the claimants shall be "afforded a fair and full indemnity for all losses and injuries." This could not be done by allowing less than the value of the property destroyed, and interest from date of destruction.

The Supreme Court has decided that "the prime cost or value of the property lost, and in cases of injury, the diminution in value, by reason of the injury, *with* interest thereon, affords the true rule for estimating damages in such cases, (5 Wheaton, 385.)

I. Toucey, Attorney-General, gave an opinion in this case, in which he states that, under the terms of the bill of 1848, "it would seem to follow, of course, that the interest should be computed from the time when the property was taken or destroyed."

Fifth volume of Opinions,
page 71.

Fifth volume,
page 97.

Attorney-General Johnson, to whom this question was submitted, said the opinion of Mr. Toucey was conclusive in this case.

The claim has been acknowledged to be just so often that it is useless for your committee to go further into the details of the case, and your committee sees no reason to doubt that the sum of \$34,952, with interest, according to the award of the Secretary of War, subject to sums of money paid, is still due the claimants in this case. But, in view of the almost invariable practice of the Government in such cases established in the last few years and of the large amount of interest due in this case, your committee recommend a proviso to this bill, limiting payment under it to \$16,848, the principal sum due, and, with this proviso, they recommend the passage of the bill.