1-18-1887

Eastern and Western Cherokees

49TH CONGRESS, 2d Session. | SENATE. | REPORT No. 1680.

IN THE SENATE OF THE UNITED STATES.

JANUARY 18, 1887.—Ordered to be printed.

Mr. BOWEN, from the Committee on Indian Affairs, submitted the following

REPORT:

[To accompany bill S. 3161.]

The Committee on Indian Affairs, to whom was referred the bill (S. 375) to refer the claims of the Eastern and Western bands of the Cherokee Indians to the Court of Claims, have had the same under consideration, and report:

That in compliance with the provisions of the act of August 7, 1882 (22 Stats., 328), directing the Secretary of the Interior to investigate these claims and report to Congress what, in his opinion, would be an equitable settlement of all matters of dispute between these claimants, respectively, and the United States, arising from or growing out of treaty stipulations or laws of Congress relating thereto, and what sum or sums of money, if any, should, in his opinion, be paid under such settlement, the Secretary caused an investigation of the claims of these two bands of Indians to be made, the report of which was made by him to Congress through the Executive department on February 7, 1883, near the close of the Forty-seventh Congress (Senate Ex. Doc. No. 60, second session Forty-seventh Congress).

Upon that investigation it was found by the Interior Department that there appeared to be due the Eastern Cherokees the sum of $336,031.85, not including interest, and the sum of $121,653.68 to be due to the "Old Settlers" or Western Cherokees, not including interest.

That during the first session of the Forty-eighth Congress, on December 17, 1883, the said report of the Secretary of the Interior, so far as it related to the claims of the "Old Settlers" or "Western Cherokees," was again laid before Congress (Senate Ex. Doc. No. 14, first session Forty-eighth Congress). The Committee on Indian Affairs of the Senate, to whom that report was referred, in pursuance of the provisions of an act entitled "An act to afford assistance and relief to Congress and the Executive Departments in the investigation of claims and demands against the Government," approved March 3, 1883, referred the claim of the "Old Settlers" or "Western Cherokees," together with the vouchers, papers, proofs, and documents appertaining thereto, to the Court of Claims for the investigation of the facts involved therein, and to report to that committee its finding of the facts relating to said claims.

On the 2d day of February, 1885, the court certified to that committee its finding of facts. The court, however, not being authorized by

the act under which the reference to it was made to determine the questions of law involved in the claim, found the facts *alternatively* as to the amount due from the United States to those claimants contingent upon the construction to be placed upon the treaty stipulations and the several acts of Congress relating to the claim.

The committee find that a proper determination of the law applicable to the facts found by the Court of Claims in the case of the "Old Settlers" or "Western Cherokees" involve the interpretation of several treaties and acts of Congress. And inasmuch as such a determination of those legal questions is important to both the Government and these claimants, and inasmuch as the committee, with its other important duties of a public nature, have not the time to give such legal questions that careful and thorough examination they deserve, the committee are of opinion that said questions ought to be submitted to a competent judicial tribunal for investigation and decision.

The committee also find that the claim of the Cherokee Nation (or Eastern Cherokees) has not been investigated by any judicial tribunal either as to the facts or the law involved therein. The committee are of the opinion that said claim should receive a judicial investigation of both the law and the facts.

The following is a certified copy of the finding of facts by the Court of Claims, above alluded to:

COURT OF CLAIMS.

The Western Cherokee Indians by their Commissioners.

JOEL M. BRYAN ET AL. }
v. } 14. Congressional case.
THE UNITED STATES. }

This case having been referred to this court by the Committee on Indian Affairs of the Senate of the United States, the court, upon the evidence, and after hearing counsel for the respective parties, finds the following facts to have been proven:

I.

Under the treaty, 26th December, 1817, a portion of the Cherokee Nation removed from the Cherokee country in Georgia to the lands ceded to them by the United States in Arkansas, and have since been known as the "Western Cherokees," or "Old Settlers," and are represented in this suit by their Commissioners, the nominal claimants. The obligations of the treaty were maintained and car ied into effect by the high contracting parties. The United States acquired, and possessed the lands east of the Mississippi ceded to them by the Western Cherokees, being their proportion of the lands of the Cherokee Nation, and the Western Cherokees acquired and possessed the lands ceded to them by the United States in Arkansas.

From the time of their removal, all tribal relations with the remainder of the Cherokee Nation ceased. The Western Cherokees asserted no right or interest in the lands of the nation lying east of the Mississippi, and the Eastern Cherokees asserted no right or interest in the lands of the Western Cherokees in Arkansas.

II.

Under the treaty of 12th May, 1828, the Western Cherokees ceded all of their lands in Arkansas to the United States, and removed to the lands ceded to them in the Indian Territory.

The obligations of the treaty have been maintained and carried into effect by the high contracting parties, and no controversy arising from it exists. The United States acquired and possessed the lands ceded to them in Arkansas, and the Western Cherokees acquired and enjoyed undisturbed possession of the lands in the Indian Territory ceded to them by the United States. The tribal relations of the Western Cherokees with the Nation or Eastern Cherokees continued severed, and the latter acquired from the former no right or interest in the ceded lands in the Indian Territory and asserted none.

III.

Under and in pursuance of the treaty and supplemental treaty between the United States and the Cherokee Nation, or Eastern Cherokees, concluded at New Echota during the year 1835, the Eastern Cherokees, at different times hereinafter more particularly set forth, were removed from the State of Georgia and placed upon the lands in the Indian Territory, possessed by the Western Cherokees. This treaty was made without the knowledge or consent of the Western Cheokees, and no consideration was paid to them by the United States or by the Cherokee Nation for this use of and intrusion upon these lands; nor were they guilty of any negligence, laches, or acquiescence, which could conclude them either in law or equity from asserting their full and absolute right to all of the lands ceded to them by the United States in the Indian Territory.

IV.

Immediately after the signing of the treaty of 1835 a controversy arose between the high contracting parties, the Cherokee Nation maintaining that the cost of removal of the Eastern Cherokees to the Indian Territory should not be deducted from the purchase money fund of $5,000,000, wherewith they were to be credited according to the first article of the treaty. By reason of such controversy the supplemental treaty of 1835 was concluded, whereby the United States agreed to allow the sum of $600,000 to the Eastern Cherokees, "to include the expense of their removal, and all claims of every nature and description against the Government of the United States," and these two sums, to wit, the $5,000,000 allowed by the treaty and the $600,000 allowed by the supplemental treaty, amounting in the aggregate to $5,600,000, have been since known and designated as the "treaty fund."

V.

After the conclusion of the treaty and supplemental treaty of 1835 a portion of the Eastern Cherokees, numbering 2,495, were removed from the territory ceded by these treaties east of the Mississippi, and placed upon the lands possessed by the Western Cherokees in the Indian Territory; but the greater portion of the nation, numbering, as subsequently appeared, upwards of 14,757, refused to recognize the treaty as binding or to remove from the ceded lands. Negotiations with them were carried on by the United States until an understanding was arrived at to the effect that they would recognize the treaties of 1835, and remove to the Indian Territory; but upon the condition that the expenses of their removal and subsistence should not be deducted from the "treaty fund" of $5,600,000, but should be borne by the United States. After this understanding was reached, Congress passed the act 12th June, 1838 (5 Stat. L., p. 241, Sec. 2), whereby the sum of $1,047,067 was appropriated, and whereby it was declared "That no part of the said sum of money shall be deducted from the five millions stipulated to be paid to said tribe of Indians by said treaty" of 1835. Under this arrangement nearly all of the nation remaining east of the Mississippi, numbering 14,757, were removed to the lands of the Western Cherokees, and the United States expended in so doing the whole of the $1,047,067 appropriated as above. Such continued to be the condition of affairs till the treaty of 1846, hereinafter referred to.

VI.

Under and by virtue of the treaty between the United States and the three tribes or divisions of the Cherokee Nation, the Western Cherokees agreed that the Eastern Cherokees should share in the lands in the Indian Territory, which should become "the common property" of all; and the United States and Eastern Cherokees agreed that they, the Western Cherokees, should share in the purchase moneys which the United States had agreed to pay to the Eastern Cherokees in consideration of their cession of their lands lying east of the Mississippi.

On the part of the Western Cherokees the obligations of the treaty have been maintained and carried into effect. On the part of the United States the obligations of the treaty have not been fully performed, as will hereinafter more fully appear; but the only controversy existing between the high contracting parties springs from the clauses of the treaty of 1846 (Art. IV), which provided in effect that one-third of the cost of removing and subsisting the Eastern Cherokees should be borne by the Western Cherokees at a prescribed rate; and from the act 12th June, 1883 (5 Stat. L., p. 241, sec. 2), which appropriated $1,047,067 for the removal of the then remaining portion of the Eastern Cherokees, and at the same time declared, with reference to the purchase money hereinbefore spoken of, that no part of the appropriation "shall be deducted from the five millions stipulated to be paid to said tribe of Indians by said

treaty" of 1835. The facts relating to this controversy will be found set forth in the succeeding findings. For the more ready understanding thereof, the court here inserts the treaty and statutory provisions out of which the controversy arises and to which the findings of the court refer.

Treaty of 1846.

ART. 4. And whereas it has been decided by the Board of Commissioners recently appointed by the President of the United States to examine and adjust the claims and difficulties existing against and between the Cherokee people and the United States, as well as between the Cherokees themselves, that under the provisions of the treaty of 1828, as well as in conformity with the general policy of the United States in relation to the Indian tribes, and the Cherokee Nation in particular, that that portion of the Cherokee people known as the "Old Settlers," or "Western Cherokees," had no exclusive title to the territory ceded in that treaty, but that the same was intended for the use of, and to be the home for, the whole nation, including as well that portion then east as that portion then west of the Mississippi; and whereas the said Board of Commissioners further decided that, inasmuch as the territory before mentioned became the common property of the whole Cherokee Nation by the operation of the treaty of 1828, the Cherokees then west of the Mississippi, by the equitable operation of the same treaty, acquired a common interest in the lands occupied by the Cherokees east of the Mississippi River, as well as in those occupied by themselves west of that river, which interest should have been provided for in the treaty of 1835, but which was not, except in so far as they as a constituent portion of the nation retained, in proportion to their numbers, a common interest in the country west of the Mississippi and in the general funds of the nation; and therefore they have an equitable claim upon the United States for the value of that interest, whatever it may be. Now, in order to ascertain the value of that interest, it is agreed that the following principle shall be adopted, viz:

All the investments and expenditures which are properly chargeable upon the sums granted in the treaty of 1835, amounting in the whole to $5,600,000 (which investments and expenditures are particularly enumerated in the 15th article of the treaty of 1835), to be first deducted from said aggregate sum, thus ascertaining the residuum or amount which would under such marshalling of accounts be left for *per capita* distribution among the Cherokees emigrating under the treaty of 1835, excluding all extravagant and improper expenditures and then allowed to the old settlers (or Western Cherokees) a sum equal to one-third part of said residuum, to be distributed *per capita* to each individual of said party of "Old Settlers," or Western Cherokees. It is further agreed that, so far as the Western Cherokees are concerned, in estimating the expenses of removal and subsistence of an Eastern Cherokee, to be charged to the aggregate fund of $5,600,000 above mentioned, the sum for removal and subsistence stipulated in the 8th article of the treaty of 1835 as commutation money, in those cases in which the parties entitled to it removed themselves, shall be adopted. And, as it affects the settlement with the Western Cherokees, there shall be no deduction from the fund before mentioned in consideration of any payments which may hereafter be made out of said fund; and it is hereby further understood and agreed that the principle above defined shall embrace all those Cherokees west of the Mississippi who emigrated prior to the treaty of 1835.

In the consideration of the foregoing stipulation on the part of the United States, the Western Cherokees, or "Old Settlers," hereby release and quit claim to the United States all right, title, interest, or claim they may have to a common property in the Cherokee lands east of the Mississippi River, and to exclusive ownership to the lands ceded to them by the treaty of 1833, west of the Mississippi, including the outlet west, consenting and agreeing that the said lands, together with the eight hundred thousand acres ceded to the Cherokees by the treaty of 1835, shall be and remain the common property of the whole Cherokee people, themselves included.

Treaty of 1835

ARTICLE 1. The Cherokee Nation hereby cede, relinquish, and convey to the United States all the lands owned, claimed, or possessed by them east of the Mississippi, and hereby release all their claims upon the United States for spoliations of every kind, for and in consideration of the sum of five millions of dollars, to be expended, paid, and invested in the manner stipulated and agreed upon in the following articles:

ART. 15. It is expressly understood and agreed between the parties to this treaty that after deducting the amount which shall be actually expended for the payment for improvements, ferries, claims for spoliations, removal, subsistence, and debts and claims upon the Cherokee Nation, and for the additional quantity of lands and goods for the poorer class of Cherokees and the several sums to be invested for the general national funds provided for in the several articles of this treaty, the balance, whatever the same shall be, shall be equally divided between all the people belonging to the

Cherokee Nation East, according to the census just completed, and such Cherokees as have removed West since June, 1833, who are entitled by the terms of their enrolment and removal to all the benefits resulting from the final treaty between the United States and the Cherokees East, they shall also be paid for their improvements according to their approved value before their removal, where fraud has not already been shown in their valuation."

Supplemental treaty of 1835.

ARTICLE 3. It is therefore agreed that the sum of $600,000 shall be, and the same is hereby, allowed to the Cherokee people, to include the expense of their removal, and all claims of every nature and description against the Government of the United States not herein otherwise expressly provided for, and to be in lieu of the said reservations and pre-emptions, and of the sum of $300,000 for spoliations described in the first article of the above-mentioned treaty. This sum of $600,000 shall be applied and distributed agreeably to the provisions of the said treaty, and any surplus which may remain after removal and payment of the claims so ascertained shall be turned over and belong to the education fund.

Act of 12th June, 1838.

SEC. 2. *And be it further enacted,* That the further sum of $1,047,067 be appropriated out of any money in the Treasury not otherwise appropriated in full for all objects specified in the third article of the supplementary articles of the treaty of 1835 between the United States and the Cherokee Indians, and for the further object of aiding in the subsistence of said Indians for one year after their removal West: *Provided,* That no part of the said sum of money shall be deducted from the five millions stipulated to be paid to said tribe of Indians by said treaty.

VII.

Since the beginning of this suit the accounts and vouchers in the office of the Commissioner of Indian Affairs have been duly examined by the accountants of the Treasury Department; and accounts of expenditures under the treaties of 1835 and 1846 have been stated and proved; and from the evidence, vouchers, and accounts, the court finds the following resulting facts:

The "treaty fund" being, as declared by the treaty, 1846 (Article IV), $5,600,000, there should be deducted therefrom, pursuant to the terms of the treaty of 1835, the expenditures made by the United States for improvements, for ferries, for spoliations, for national debts, for claims of citizens of the United States, for the expenses of the Cherokee committee, for additional lands ceded to the Cherokees by the United States, and for money invested by the United States in the general fund of the Cherokee Nation, the following amounts:

Treaty fund		$5,600,000 00
For improvements	$1,540,572 27	
For ferries	159,572 12	
For spoliation	264,894 09	
National debts	18,062 06	
Claims, United States citizens	61,073 49	
Cherokee committee	22,212 76	
Amount allowed United States for additional land ceded	500,000 00	
Amount invested as a general fund	500,800 00	
Amounting in the aggregate to		3,067,266 79
Leaving of the treaty fund		2,532,733 21

But this balance of $2,532,733.21 does not represent the true "residuum" of the "treaty fund," of which one-third is to be awarded to the Western Cherokees. On the contrary, this balance is to be reduced (so far as the rights and obligations of the Western Cherokees are involved) by one or the other of the amounts charged for the transportation and subsistence of the Eastern Cherokees which are set forth in the following finding:

VIII.

(1) If it shall be determined by Congress that the cost of removing that portion of the Eastern Cherokees who were removed in pursuance of the appropriation of $1,047,067 made by the act 12th June, 1838 (set forth in Finding VI), should not be de-

ducted from the treaty fund, and that it is not "*properly chargeable*" to the Western Cherokees, then the balance of $2,532,733.21, set forth in the last finding, should be reduced only by the cost of removing the 2,495 Eastern Cherokees who were removed prior to the act 12th June, 1838, as set forth in Finding V; and the final account between the United States and the Western Cherokees will stand as follows:

Balance of treaty fund, as stated in Finding VII	$2,532,733 21
Deduct for removal of 2,495 Eastern Cherokees, at $53.33 per capita, the commutation rate agreed upon by treaty of 1846	133,058 35
Leaving as the true residuum to be divided	2,399,674 86

And the amount to be awarded the Western Cherokees as their just and proper proportion of the treaty fund will be one-third thereof, to-wit, the sum of $799,891.62.

(2) But if it shall be determined by Congress that the Western Cherokees are "*properly chargeable*," notwithstanding the act 12th June, 1838, with the expenditure for the removal of those of the Cherokee Nation who were removed subsequent to the act, and whose expenses were paid out for the money appropriated thereby, then the balance of $2,532,733.21 set forth in the last finding should be reduced by the cost of removing all of the Eastern Cherokees, numbering in the aggregate 17,252 (as shown in Finding V), and the final account between the parties will stand as follows:

Balance of treaty fund, as stated in Finding VII	$2,532,733 21
Deduct for removal of 17,252 Eastern Cherokees, at $53.33 per capita	920,049 16
Leaving as the true residuum to be divided	1,612,684 05

And the amount to be awarded the Western Cherokees as their just and proper proportion of the treaty fund will be one-third thereof, to wit, the sum of $537,561.35.

(3) But whichever of the foregoing awards may be adopted by Congress there is to deducted therefrom the sum of $532,896.90, which, with the interest thereon at the rate of 5 per cent. from the 12th day of June, 1838, was on September 22, 1851, paid to the Western Cherokees under and in pursuance of the act 30th of September, 1850 (9 Stat. L., p. 556), and the final accounts above stated will stand as follows:

In subdivision (1) above given in this finding—

The Western Cherokees' proportion of the treaty fund being $799,891.62, less the above payment of $532,896.90, will leave as their just and proper recovery in this action, $266,994.72.

In the subdivision (2) above given in this finding—

The Western Cherokees' proportion of the treaty fund being $537,561.35, less the above payment of $532,896.90, will leave as their just and proper recovery in this action, $4,664.45.

IX.

At the time of receiving the payment of $532,896.90, as set forth in subdivision (3) of the preceding finding, the Western Cherokees executed a receipt in full for such payment, as was required by the act under and in pursuance of which it was made. But on the same day, and before executing such receipt in full, and before receiving the money to which it referred, they entered their protest in writing against such payment being in full of all claims against the United States, under the treaty of 1846; and they delivered the protest to the officer making the payment, and it was by him forwarded to the Commissioner of Indian Affairs, and remains on file in his office. No other settlement was ever made between the United States and the Western Cherokees.

Court of Claims, Washington, D. C.

I certify that the foregoing is a true copy of the findings of fact by the court in the case of the Western Cherokee Indians, by their commissioners, Joel M. Bryan *et al.* *v.* The United States, No. 14, Congressional case.

Test: This 9th day of February, 1885.

JOHN RANDOLPH,
Assistant Clerk Court Claims.

It is fair to assume that Congress is not afraid to trust the judiciary to ascertain the facts and to declare the conclusions of law as to such facts in any controversy, whether it be one between citizens or between a citizen (in this case some of our Indian wards) and the United States. It is to be regretted that this Republic of ours should refuse to open its courts to any of its citizens, or others subject to its jurisdiction and laws, having just demands against the Government.

Most of the other great nations afford such relief to their citizens or subjects. In the Brown case (6 Court of Claims Reports, 192) Justice Nott, in delivering the opinion of the court, uses this language:

That the legal redress given to a citizen of the United States against the United States is less than he can have against almost any Government in Christendom. The laws of other nations have been produced and proved in this court, and the mortifying fact is judicially established that the Government of the United States holds itself of nearly all Governments the least amenable to the laws. * * * Of all the Governments of Europe, it is believed that Russia alone does not hold the state amenable in matters of property to the law. Of all the countries whose laws have been examined in this court, Spain only resembles the United States in fettering the judicial proceedings of her courts by restricting and leaving the execution of their decrees dependent upon the legislative will. * * * First in the high civilization that protects the individual and assures his rights stands the great Empire of the German states.

In England, notwithstanding the principle underlying the English constitution that the King can do no wrong, the citizen who has a claim against the Government is furnished with a mode of obtaining redress. Mr. Justice Davis, in the O'Keefe case (11 Wall., 183), says:

The law allows him (the citizen) by petition to inform the King of the nature of his grievance, and as the law presumes that to know of an injury and to redress it are inseparable in the royal breast, it then issues, as of course, in the King's own name, his orders to his judges to do justice to the party aggrieved.

This valuable privilege, secured to the subject in the time of Edward I, is now crystallized in the common law of England. As the prayer of the petition is grantable *ex dibito justitiæ*, it is called a petition of right, and is a judicial proceeding to be tried like suits between subject and subject. It does not exist by virtue of any statute, nor does the recent legislation in England concerning it do more than to regulate the manner of its exercise, and to confer on the petitioner the privilege, not before granted, of instituting his proceeding in any one of the superior courts of common law or equity in Westminster.

This question received consideration of the House Committee on Claims of the Thirtieth Congress. The chairman of that committee uses this language:

The chairman of the committee has obtained from the ministers of several of the leading Governments of Europe statements as to the course pursued in claims against the Governments of Russia, Austria, and the smaller German states, and in Holland and in other nations. In relation to all mere matters of contract and ordinary trespasses, the Government is heard in the ordinary tribunals of the country, which are governed precisely by the same rules of law in these cases as between individuals. These Governments, although far behind us in civil freedom and constitutional liberty, never shirk from the full and fair investigation of these claims, and always submit to an adverse decision by the courts. It has been left to our own Government to deny to the citizen who has a demand against it the power to try the question before its own courts, and yet has furnished no adequate tribunal for the purpose. (Report No. 498, vol. 3, R. of Com., 1st sess. 48th Cong.)

In view of all which the committee are of the opinion that the bill (S. 375) should pass with certain amendments, as follows:

(1) Change the title of the bill so as to read as follows:

"To authorize the Court of Claims to hear, determine, and enter final judgment upon the claims of the Eastern and Western Cherokee Indians."

(2) After the word "property," in line 22 of the bill, insert the following:

"And try and determine all questions that may arise in such cases on behalf of any party thereto, and render final judgment therein."

(3) Strike out after the word "judgment," in the line 28 of the bill, also the whole of lines 29 and 30, the part stricken out being as follows:

"And in case of such appeal, the cause should be advanced on the docket of the Supreme Court for hearing upon the application of either party thereto."

(4) Add to the bill the following proviso:

"*And provided further*, That nothing in this act shall be accepted or construed as a confession that the Government of the United States is indebted in any sense to either of said tribes of Indians, nor shall it be construed or held as a waiver on the part of Congress of any defense, either equitable or legal, that the Government may have to said claims, or either of them."

The bill S. 375 and a new bill with the proposed amendments are returned herewith to the Senate, with the recommendation that the amendments recommended be adopted, and that the bill so amended do pass.

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