12-2-1895

In the Senate of the United States. Letter from the Attorney-General, transmitting a report upon the conclusions of law reached by the Department of the Interior in an account of moneys due the Cherokee Nation under certain treaties and the laws passed to carry the same into effect.

54TH CONGRESS, 1st Session. } SENATE. { DOCUMENT No. 16.

IN THE SENATE OF THE UNITED STATES.

LETTER

FROM

THE ATTORNEY-GENERAL,

TRANSMITTING

A report upon the conclusions of law reached by the Department of the Interior in an account of moneys due the Cherokee Nation under certain treaties and the laws passed to carry the same into effect.

DECEMBER 9, 1895.—Referred to the Committee on Indian Affairs and ordered to be printed.

DEPARTMENT OF JUSTICE,
Washington, D. C., December 2, 1895.

The Senate and House of Representatives of the United States in Congress assembled:

Pursuant to the act approved March 2, 1895, making appropriations for the legislative, executive, and judicial expenses of the Government, whereby I am directed to review and report upon the conclusions of law reached by the Department of the Interior in an account of moneys due the Cherokee Nation under certain treaties and the laws passed to carry them into effect, prepared in accordance with the act of Congress of March 3, 1893, and reported in House Ex. Doc. No. 182, Fifty-third Congress, third session, I have the honor to report as follows:

The chief item in the schedule of amounts found due from the Government to the Cherokee Nation (report, p. 32) is "Amount paid for removal of Eastern Cherokees to the Indian Territory, improperly charged to treaty fund, $1,111,284.70."

After careful consideration I am unable to concur in the conclusion of the Department of the Interior as to this item.

By the treaty of 1835 the United States agreed to pay the Cherokees $5,000,000 for their lands east of the Mississippi, and furnish them other lands to the westward. Supplementary articles were added in 1836, the second of which recites the fact that the Cherokee people supposed that such sum of $5,000,000 was not to include the amount required to remove them, nor certain claims, in which supposition they had been confirmed by the opinions of the War Department and some of the Senators who voted upon the question; that the President was willing that the subject should be referred to the Senate, and if it was not intended by the Senate that the $5,000,000 should include said objects, then that such further provision should be made therefor as the Senate should think just. The third supplemental article therefore allows the additional sum of $600,000 to include the expense of removal and all claims

of every nature and description against the United States not otherwise expressly provided for.

The $600,000 having been exhausted, however, a further provision of $1,047,067 was made June 12, 1838, in full of all the objects specified in the third supplementary article above named, and for the further object of aiding in the subsistence of the Cherokees for one year after their removal, with the proviso that "no part of said money shall be deducted from the five millions stipulated to be paid said tribe by said treaty."

The various other objects of the two additional sums above named having reduced them below the amount required to pay the entire expense of removal, the question is whether the remainder was to be charged against the $5,000,000, or to be paid by the United States in addition thereto.

Whatever may be said as to the true construction in this regard of the treaty of 1835, with its supplement, and the subsequent acts of Congress relating thereto, it is certain that there was continual doubt and dispute about it arising chiefly from the apparent contradiction between article 8, wherein the United States agreed "to remove the Cherokees to their new homes," and article 15, wherein "the amount which shall be actually expended for * * * removal," is mentioned among the items to be deducted from the sum to be paid. This is quite evident from the report of the Department of the Interior; but see also reports of committees, first session Twenty-eighth Congress. (Vol. 2, 1843–44, pp. 7, 17.)

In this situation the natural course was taken. The parties made a new treaty, proclaimed August 17, 1846 (9 Stat. L., p. 871), each appearing by duly constituted representatives, and there being no suggestion from any quarter of the slightest unfairness or misunderstanding.

The purpose of the treaty is clearly set forth in the preamble:

> Whereas serious difficulties have for a considerable time past existed between the different portions of the people constituting and recognized as the Cherokee Nation of Indians, which it is desirable should be speedily settled, so that peace and harmony may be restored among them; and whereas *certain claims* exist on the part of the Cherokee Nation and portions of the Cherokee people against the United States, therefore, with a view to the *final and amicable settlement* of the difficulties *and claims* before mentioned, it is mutually agreed by the several parties to this convention as follows, viz:

There were three distinct classes of Cherokees, one known as the "Old Settlers," or "Western Cherokees," who had removed before the treaty of 1835; another as the "Ross," or anti-treaty party, who had opposed that treaty, and a third as "the treaty party," who had favored and finally carried it.

Article 4 of the treaty of 1846 dealt with the claim of the Western Cherokees to an interest in the property east of the Mississippi, notwithstanding their removal, for which they should be paid. The existence of such equitable right was admitted, and in order to ascertain its value it was agreed that—

> 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 fifteenth article of the treaty of 1835), to be first deducted from said aggregate sum, thus ascertaining the residuum or amount which would, under such marshaling 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 allow 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 was further agreed that—

So far as the Western Cherokees are concerned, in estimating the expense of removal and subsistence of an Eastern Cherokee, to be charged to the aggregate fund of $5,600,000 above mentioned, the sums for removal and subsistence stipulated in the eighth article of the treaty of 1835, as commutation money in those cases in which the parties entitled to it removed themselves, shall be adopted.

By article 9:

The United States agree to make a fair and just settlement of all moneys due to the Cherokees and subject to the per capita division under the treaty of 29th of December, 1835, which said settlement shall exhibit all money properly expended under said treaty, and shall embrace all sums paid for improvements, ferries, spoliations, removal, and subsistence, and commutation therefor, * * * the aggregate of which said several sums shall be deducted from the sum of $6,647,067, and the balance thus found to be due shall be paid over, per capita, in equal amounts, etc.

Article 11 dealt with the contention of the Cherokees that the amount expended for one year's subsistence after the arrival in the West of the Eastern Cherokees was not properly chargeable to the treaty fund, which was submitted to the Senate.

It is clear that the exact question now presented was raised and settled by the parties in that treaty. If confirmation were needed it could be found in article 12 (which the Senate did not approve), wherein the Western Cherokees claimed that in the settlement with them provided in article 4 "the expenses incurred for the *removal* and subsistence of Cherokees *after* the 23d day of May, 1838, should not be charged upon the $5,000,000 allowed to the Cherokees for their lands," etc. It will be noted that the date so named was after the expiration of the two years limited in the treaty of 1835 as the period within which removals must be made. The admission is evident that the expense of removals prior to that date was properly chargeable to the fund.

The other provisions of the treaty of 1846, while they do not in terms refer to the present question, strongly confirm the view I have taken, because they were intended to settle all possible questions of dispute, both among the different classes of Cherokees and between them or any of them and the United States. The treaty contains many mutual considerations and concessions, on account of which it would have been quite natural for the Cherokees to abandon their claim as to expenses of removal, even if it were founded on the better reason. I see no escape from the conclusion that by that treaty they did abandon that claim, and therefore the item above referred to is not properly a debt of the United States.

It will be remembered that the provisions of the treaty of 1846 have been carried out. The matter of the charge for one year's subsistence, which was by article 11 submitted to the Senate and decided by it in favor of the Cherokees, was settled by restoring to the Cherokee fund $189,422.76 which had been charged against it.

The Western Cherokees having, notwithstanding this, been charged with commutation for subsistence under the provisions of article 4, a special act was passed authorizing them to sue in the Court of Claims to recover the amount so charged. They did sue and recovered the amount with interest. (Old Settlers *v.* United States, 148 U. S., 427.)

The petition in that case conceded that the charge for removal was proper under the treaty of 1846, but sought to reduce its amount by having it applied only to Cherokees who removed prior to the expiration of the two years named in the treaty of 1835.

I am unable to agree with the suggestion made in the report of the Department of the Interior (p. 21) that the true construction of article 9 of the treaty of 1846 is that it was intended to make no change

whatever in the treaty of 1835. This claim is based chiefly on the use of the word "properly." The United States agreed to make a fair and just settlement of all moneys due the Cherokees under the treaty of 1835, "which said settlement shall exhibit all money *properly* expended under said treaty." If nothing more was intended than a mere reiteration of the obligations of the treaty of 1835, without any attempt to settle its disputed construction, it is difficult to imagine any occasion for the treaty. The language which follows that just quoted removes all doubt, viz, "and *shall embrace all sums paid* for improvements, ferries, spoliations, *removal*, and subsistence," etc. Certain purposes for which it was agreed that money had been "properly expended under said treaty" are here recited, and that of removal is one of them.

I think that the value of three tracts of land containing 1,700 acres, at $1.25 per acre, to be added to the principal of the school fund, constituting the first item of the finding (p. 32), is due the Cherokee Nation, but the value should be stated at $2 per acre instead of $1.25. (See United States *v.* Blackfeather, 155 U. S., 180.)

I also concur in the finding as to the item of $132.28. There seems to be no doubt that this sum was due the Cherokees, and has not been paid.

The only remaining item is "$20,406.25, with interest on $15,000, of Choctaw funds applied in 1863 to relief of indigent Cherokees, said interest being improperly charged to Cherokee national fund."

The facts which give rise to this charge are not stated except in the item itself. The circumstances under which Choctaw funds were applied to the relief of Cherokees do not fully appear, but so far as they do I see nothing to distinguish the case from that in which all national, school, and orphan funds belonging to the Cherokees were applied during the war for the support of loyal Cherokees who had been dispossessed of their homes, as to which the report of the Department of the Interior says:

> It is understood that the Cherokee Nation makes no objection and raises no question as to the propriety of the several disbursements during this exceptional period.

This excludes from consideration the fact that said Choctaw funds were applied to the benefit of individual Cherokees, and not for that of the Nation. I will therefore dispose of this item on the assumption that the question is merely one of accounts, and not one of chargeability to the Nation.

It is said that the $15,000 borrowed from the Choctaws by the United States was repaid under act of Congress of August 19, 1890, and the interest thereon also paid under the act of March 3, 1893, amounting to $20,406.25, which sum was by that act improperly charged to the Cherokee fund, which error the present credit is intended to correct.

As it appears that, by reason of such expenditure of the Choctaw fund for the benefit of the Cherokees, an equal amount of the Cherokee fund remained unexpended and earned interest during the same period covered by the interest charge now in question, and presumably at the same rate, I am unable to see why the interest on the Choctaw money is not chargeable to the Cherokee fund the same as the principal. Assuming the principal to be so chargeable (which is not denied), it follows that the interest is chargeable also. The result of charging such interest against the Cherokee fund is to leave the Cherokees just as they would have been if their own money had been expended instead of that of the Choctaws.

Respectfully submitted.

JUDSON HARMON,
Attorney-General.

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