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# [Creek Orphan Fund]

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S. Rep. No. 599, 46th Cong., 2nd Sess. (1880)

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IN THE SENATE OF THE UNITED STATES.

MAY 13, 1880.—Ordered to be printed.

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

REPORT:

[To accompany bill S. 451.]

*The Committee on Indian Affairs, to whom was referred the bill to reimburse the Creek orphan fund, have had the same under consideration, and make the following report:*

This claim is based on the second article of the treaty of March 24, 1832, which provides—

And twenty sections shall be selected, under the direction of the President of the United States, for the orphan children of the Creeks, and divided and retained, or sold for their benefit, as the President may direct, &c.

The President directed this land to be sold under the provisions of the act of March 3, 1837 (5 Stat., 186), and the proceeds, \$108,713.82, were invested in stocks. The President, under the third section of said act, ordered two payments made to the Creek orphans, to wit, August 26, 1868, \$106,534.12, and July 1, 1870, \$24,291.63. No other payments have ever been made to the orphans except on account of interest.

There was expended out of this trust-fund, and without the consent of the orphans and without warrant of law, the following sums—\$69,956.29 and \$106,799.68. There was invested, in violation of law, \$74,300, in non-interest-bearing State stocks. These three items, amounting to \$251,055.97, constitute the claim of the Creek orphans.

On the 5th of April, Hon. F. A. Walker, Commissioner of Indian Affairs, addressed a communication to Hon. C. Delano, Secretary of the Interior, in which he said:

The Assistant Attorney-General (W. H. Smith) decides, and the department rules accordingly, that the Creek orphan fund is entitled to be reimbursed in the following amounts:

1. By value of certain depreciated bonds purchased in contravention of law, with money belonging to said fund, as follows (Tennessee bonds, \$20,000; Virginia, \$3,500, \$9,000, and \$41,800)—\$74,300.

2. By the sum of \$68,956.29, taken without authority of law from said fund and applied to the general purposes of the Creek Nation.

3. By the sum of \$106,799.68, taken without authority of law from said fund and applied to the support of loyal refugees of the Creek Nation.

The said Creek orphan fund is thus, in the opinion of the Assistant Attorney-General and by the decision of the department, entitled to be reimbursed in an aggregate amount of \$251,055.97.

On April 6, 1872, Hon. B. R. Cowen, Acting Secretary of the Interior,

submitted to the Speaker of the House of Representatives the following estimate:

|   |                   |
|---|-------------------|
| Estimate of appropriation required to restore to the Creek orphans of 1832 certain funds to which they are entitled under the provisions of the treaty with the Creek Nation of March 24, 1832, but illegally invested in stocks or diverted to other purposes: |                   |
| For this amount, to restore to the Creek orphans the par value of certain stocks now held in trust by the United States for said orphans, provided that said stocks shall become the property of the United States.....   | \$74,300 00       |
| For this amount, to restore to the Creek orphans the amount taken from their fund and used for the support of the loyal refugees of the Creek people during the late rebellion.....   | 106,799 68        |
| For this amount, to restore to the Creek orphans the amount taken from their fund and used for general purposes of the tribe.....   | 69,956 29         |
| <b>Total</b> .....  | <b>251,055 97</b> |

The opinion of Assistant Attorney-General W. H. Smith, dated 15th March, 1872, and which opinion was approved by Hon. C. Delano, Secretary of the Interior, March 30, 1872, says:

My conclusion is that this orphan fund was not released, and that the same is a subsisting legal liability against the United States to its full amount, diminished only by the two payments that have been made to the orphans.

On May 18, 1878, Hon. Carl Schurz, Secretary of the Interior, submitted this matter to Hon. Charles Devens, Attorney-General, who gave, on June 6, 1878, an elaborate opinion, sustaining the right of the Creek orphans to reimbursement, as shown by the following extracts:

The accrued interest of the Creek orphan fund, arising from investments made in interest-bearing stocks, was drawn out of the Treasury by the Indian Bureau in the same manner as interest on trust-funds is generally drawn. But the act of the bureau in devoting it to the benefit of loyal refugees of this tribe was a diversion of the fund not authorized by the original intention of the treaty, the act providing for the creation of the same, nor by the subsequent legislation during the rebellion.

Again:

The diversion of this fund to the amount of \$176,755.97 by the Indian Bureau, between 1862 and 1865, to the benefit of the loyal refugees of the Creek Nation, was one that has not been ratified by the Creek Nation by its subsequent treaties.

As to the investment in State stocks, the Attorney-General decides:

While the original investment was authorized by the act of March 3, 1837, there was an actual investment made after the act of September 11, 1841, out of funds arising from a sale of stocks of the State of Alabama. By this action an error was undoubtedly made by the President in investing in stocks which the law at that time prohibited an investment in. It is to be observed that the act requiring an investment in United States stocks of this trust-fund is not a portion of the treaty, nor was it in existence at the time of the treaty, but is a rule laid down for the conduct of the trustee of this fund, in order that the provisions of the treaty might be properly carried out. In answer to your inquiry I am, therefore, of opinion that in making the investment of the proceeds of the sale of Indian lands (which sales were provided for by treaty stipulations) the President was required by the provisions of the second section of act of September 11, 1841, to make all such investments from and after that date in United States stocks, bearing interest at not less than 5 per cent. per annum. There is, however, no mode in which this error can now be remedied by the Department of the Interior, and it will be for Congress to consider whether it is just that the loss, which has been occasioned by this mistake in investing the funds, should be one which should fall upon the United States, or whether it is the duty of the United States to restore to the Creek Orphan fund the value of the property thus invested.

In this same connection the opinion of the Assistant Attorney-General says:

It seems to me that the loss should fall upon the United States, and not upon its wards.

As to the question of interest the committee, after careful and thorough consideration, report in favor of allowing interest on \$176,755.97 from

the date of the decision of the Department of the Interior, April 6, 1872, that the Creek orphans were entitled to the sum of \$251,055.97, "illegally invested in stocks or diverted to other purposes." The United States has recognized its liability to pay 5 per cent. interest on a part of this sum, to wit, \$74,300, and regularly appropriates the interest every year and pays the same to the Creek orphans, and the same principle requires that 5 per cent. interest should be paid on the balance of said amount. The United States, as a trustee, laid down the rule for its own conduct, as follows, act September 11, 1841:

All funds held in trust by the United States, and the annual interest accruing thereon, when not otherwise required by treaty, shall be invested in stocks of the United States bearing a rate of interest not less than 5 per cent. per annum. (See Revised Statutes, 3659.)

The United States, under this rule, did invest and reinvest the principal and the annual accruing interest up to the time of these illegal diversions, and had not these diversions occurred the trustee would have continued to comply with the rule beyond any doubt. "The trustee misapprehended his powers and invested in stocks which the law prohibited him from investing in, and a loss has resulted therefrom. It seems to me that the loss should fall upon the United States, and not upon its wards," says the Assistant Attorney-General. The loss has been made good as to interest in the case of the illegal investment in non-interest-bearing State stocks, and should be made good in the other case of illegal diversions of this orphan trust-fund. The error of the United States caused the loss to these orphan wards, and the trust-fund should be reimbursed according to the rule established by the trustee himself.

We recommend the passage of the bill with the following amendment: Insert in line 4, between the words "be, and," these words, to wit, "with 5 per cent. interest on \$176,755.97 from April 6, 1872."

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