3-14-1854

Report : Mr. Brown

33d CONGRESS, 1st Session. [SENATE.] REP. COM. No. 165.

IN THE SENATE OF THE UNITED STATES.

MARCH 14, 1854.—Ordered to be printed.

Mr. BROWN made the following

REPORT.

[To accompany Bill S. 280.]

The Committee on Indian Affairs, to whom was referred the memorial of Messrs. Amos and John E. Kendall, claiming to be reimbursed for moneys belonging to them, wrongfully paid out by the United States to the Western Cherokees, or old settler Indians, have had the same under consideration, and report:

That the Western Cherokees, a branch of the Cherokee tribe of Indians, have a country west of the Mississippi river, to which they emigrated about the year 1820. Here they established a government of their own, with a written constitution and laws, and an independent chief. The United States treated with them, in all respects, as a separate nation.

In 1835 the United States treated with the Eastern Cherokees, and some time after removed them to the west and settled them on the territory then occupied by the Western Cherokees. Feuds sprung up which soon led to violence and bloodshed. The authority of the Western Cherokees was overthrown, their laws put at defiance, and their chief expelled. These transactions, in the judgment of the Western Cherokees, gave them, as a separate tribe, a just claim on the United States for indemnity. But this claim was not respected by the executive department of the government.

In 1843 the Western Cherokees sent a delegation to Washington, fully empowered to present and urge their claim, to employ counsel, and generally to do whatever was necessary to the successful prosecution of the case. This delegation engaged the services of Amos Kendall and Jno. E. Kendall, as attorneys, and entered into a written agreement with them, whereby the Kendalls obliged themselves to prosecute the claim, and the Indians agreed to pay them five per cent. of whatever should be obtained. The contract authorized and empowered the Kendalls to draw from the United States, in their own name, this five per cent.

The evidence is abundant that the Messrs. Kendalls prosecuted the claim with industry, skill, and ability, to a final issue, whereby the Indians recovered from the United States a sum exceeding eight hundred and eighty thousand dollars. The sum to be paid was settled by treaty stipulations entered into between the United States and the Western

Cherokees. The United States paid the whole sum to the Indians in disregard of Kendall's claim for five per cent. And the disbursing officer of the government, in pursuance of an act of Congress to that effect, paid the money to the Indians *per capita.*

The Kendalls make the following allegations:

1st. That they had a subsisting valid contract with the Indians, whereby they were to have five per cent. of the amount recovered, with a right to draw on the United States, in their own name, for that sum; that, for this purpose, they have a power of attorney, properly executed, of which the United States had notice; and that said power of attorney was irrevocable, and was, in fact, an assignment to them of the five per cent.

2d. That, notwithstanding these facts, the United States entered into a treaty with the Indians, and agreed to pay them the whole sum of eight hundred and eighty thousand dollars and upwards, and even rejected a proposition of the Indians to set apart a small sum to pay their debts. And then, as if to prevent the head men and chiefs from complying with their contract to pay their attorneys, the United States, without solicitation from the Indians, paid the money *per capita;* and, finally, that the United States, by their treaty with the Western Cherokees, obliterated them as a tribe and merged them in the Cherokee nation. By all of which acts, the claimants allege, they have been defeated in obtaining their just dues from the Indians, and that the United States has rendered itself liable to them for payment.

There has been no *laches*, on the part of the Kendalls, whereby their rights have been lost, nor can it be pretended that they have not kept the government constantly advised of the existence and nature of their claim.

The claim rests mainly, we think, on these points:

1st. Was the contract valid, as between the Indians and Kendalls?

2d. Was Kendall's power of attorney irrevocable; and was it, in fact, an assignment to them of five per cent.?

3d. Has the conduct of the United States been such as to defeat the Kendalls in collecting a just debt from the Indians, and to render it impossible for them ever to collect it?

On the first point—We find that, to within the last few years, and long after the Kendalls made their contract with the Western Cherokees, the government had been in the habit of respecting contracts like these. Custom, which had become the common law of the case, sanctioned the contract at the time it was made. And, though the government may now treat the Indians as infants, incapable of contracting, yet we submit that a contract, even with an infant, would be binding, if it was sanctioned by the custom and common law at the time at which it was made. The contract before us was sanctioned by the every-day practice of the government at, and anterior to, its execution. It was in nowise repugnant to any existing custom or law regulating intercourse with the Indians, and we think it was valid as between the Indians and Kendalls.

We may here add, that the compensation (five per cent.) was not exorbitant, considering the nature of the claim, and the time, labor, and money expended by the Kendalls in bringing it to a favorable issue.

On the second point—We think the power of attorney was irrevocable. It authorized the Kendalls "to receive, directly from the United States, without any further act or authority, by or from the Indians," their fee of five per cent. That such a power of attorney cannot be revoked the authorities are full and clear. (See Espenasse, p. 565–6; Wheaton, 8th vol. p. 201–2, and the cases referred to; Attorney General's Opinions, p. 1,066; B. F. Butler, p. 1,303–4; Attorney General Gilpin.) We think the assignment of the five per cent. is fairly deducible from the language of the instrument which authorizes the Kendalls "*to demand and receive, from the United States, or from the proper officer, or officers thereof, five per cent*," * * "*and to execute any receipts, acquittances, or other instruments in writing*" therefor.

The power of attorney being irrevocable, the Indians had no right to demand the money. And the United States being fully notified of the assignment of the five per cent. to the Kendalls ought not to have paid it over to the Indians.

On the third point—It is clearly shown that, when the Indians treated with the United States, they desired to pay their debts, and inserted an item of fifty thousand dollars in the treaty for that purpose; but the Senate struck it out before the treaty was ratified. The Indian delegates who made the treaty requested the Secretary of War to pay the Kendalls; but Congress had directed the money to be paid to the Indians *per capita*, and it was accordingly so paid. The United States, by these acts, prevented the Kendalls from collecting their debt from the Indians. And, by their further act of obliterating them as a separate tribe, and merging them in the Cherokee nation, they rendered it impossible for the Kendalls to prosecute a claim against them.

Finding that the claimants had a valid contract with the Western Cherokees, and that they had, with fidelity and skill, executed their part of the contract; that they had an assignment of money in the hands of the United States to pay their claim, and a power of attorney to draw for it, and to execute a receipt; that the United States had full notice thereof; and further, that it not only did not pay the money as it ought, but that it prevented the Indians from doing so; and has, by its own acts, rendered it impossible for the claimants to prosecute their claim against the Indians. Your committee conclude that the United States, in equity and justice, is liable for the debt, and therefore they report a bill.