

GEORGE FISHER—LEGAL REPRESENTATIVES OF.

[To accompany S. R. 21.]

MAY 29, 1858.

Mr. LEITER, from the Committee on Indian Affairs, made the following

REPORT.

The Committee on Indian Affairs, to whom was referred Senate resolution No. 21, "devolving upon the Secretary of War the execution of the act of Congress entitled 'An act supplemental to an act therein mentioned,' " approved December twenty-two, eighteen hundred and fifty-four, report :

That they have carefully examined the subject-matter of said resolution, and come to the unanimous conclusion to recommend the passage of said resolution.

Your committee adopt the report of the Committee of Indian Affairs of the Senate, made on the 15th of March, A. D. 1858, herewith filed and made a part of this report.

IN THE SENATE OF THE UNITED STATES, *March 15, 1858.*

Mr. DOOLITTLE made the following report :

The Committee on Indian Affairs, to whom was referred the memorial of David Gordon, in behalf of himself and others, beg leave to report :

That in the year 1848 Congress passed the following act :

AN ACT for the relief of the legal representatives of George Fisher, deceased.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Second Auditor of the Treasury of the United States be, and he is hereby, authorized and required 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 for 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 the said legal representatives be paid for the same out of any money in the treasury not otherwise appropriated.

SEC. 2. *And be it further enacted*, That, if it shall be found impracticable for the claimants to furnish distinct proof as to the specific quantity of property respectively taken or destroyed by the troops and by the Indians, it shall be lawful for the said accounting officer to apportion the losses caused by said troops and Indians, respectively, in such manner as, from the proofs, he may think just and equitable, *so as to afford a fair and full indemnity for all losses and injuries occasioned by said troops, and allow the claimants accordingly: Provided*, That nothing herein contained shall authorize any payment for property destroyed by Indians.

Approved April 12, 1848.

Under the provisions of this law there were two adjustments of the claim, which will appear by reference to copies of the Second Auditor's reports, hereto attached as part of this report. After this settlement Congress passed the following act:

AN ACT supplemental to an act therein mentioned.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall be the duty of the Second Auditor of the Treasury, under the provisions of the act of Congress for the relief of the legal representatives of George Fisher, deceased, approved 12th of April, 1848, to re-examine the said case, and to allow the claimants the benefit of the testimony heretofore marked "*rejected for the want of authentication:*" *Provided*, The same is now legally authenticated by the executive of Alabama; the adjustment to be made in strict accordance with the act herein above referred to, and to which this act is barely supplemental.

Approved December 22, 1854.

This law has never been executed. The late Secretary of the Treasury, Mr. Guthrie, refused to permit the Second Auditor to readjust the claim. His reasons therefor are hereto attached as a part of this report. The main reason which controlled his action was, that he assumed that the claimants had already had the benefit of the testimony marked "*rejected for want of authentication,*" (abstracts of which are hereto annexed,) and he assumed that Congress in passing that law were ignorant of that fact. But the assumption of the Secretary was without foundation, and proceeded upon an entire mistake of the facts on his part, as appears conclusively by the affidavit of George M. Bibb, the certificate of the governor of the State of Alabama, and the other papers annexed to this report. The present Secretary of the Treasury declines to open the case for a new consideration, upon the ground that he is bound by the action of his predecessor. The character of the injuries complained of are such as to make the case one peculiarly proper for the consideration and adjustment of the War Department. The committee, therefore, recommend the passage of the accompanying joint resolution.

TREASURY DEPARTMENT,
Second Auditor's Office, March 30, 1855.

SIR: By an act approved December 22, 1854, entitled "An act supplemental to the act for the relief of the legal representatives of George Fisher, deceased," which original act was approved April 12, 1848, it is made the duty of the Second Auditor to examine the said case, and to allow the claimants the benefit of the testimony heretofore marked "*rejected for the want of authentication*, provided the same is now legally authenticated by the executive of Alabama," the adjustment to be made in strict accordance with the act above referred to, and to which this act is barely supplemental.

The facts in the case are these: My predecessor had submitted to him in this claim originally the deposition of six individuals, viz: Haden, Reviere, Presnal, Davis, Harrison, and Turner, testifying to the amount and value of property in the possession of George Fisher on a farm in Mississippi Territory, which, they alleged, was destroyed in the year 1813. Their evidence estimates the value of the property at sums varying between \$13,000 and \$22,000. In April, 1848, an award was made, on the deposition of Haden, Reviere, and Presnal, allowing \$8,873, without interest, the claimants protesting at the time against the amount, and insisting upon their right to interest; the depositions of Davis, Harrison, and Turner were rejected for want of authentication. In December, 1848, the Auditor again took up the case, and upon these rejected depositions allowed the further sum of \$8,973, with interest on the same from 13th of February, 1832, till December, 1848; in rendering the award, however, he deducted from said second allowance the sum of \$8,873, with interest thereon from 22d April, 1848, to December, 1848, amounting to \$9,237 79, which really absorbed the interest upon, and a part of the principal of, \$8,973, the second award; the claimants still protesting against the allowance, and contending for interest from 1813, the date of the destruction of the property, and not from February, 1832, the time alleged by the Auditor as the earliest period of the presentation of the claim.

The question as to the time when interest should commence was submitted to the Attorney General, and, in an opinion given by him, dated February 16, 1849, he held that, as the Second Auditor had decided that the value of the property taken or destroyed, with interest upon it, should be paid as a fair and full indemnity, that the interest should be computed from the time when the property was taken and destroyed. At this point the case rested when I came into office, the 9th of April, 1849, and I submitted to the Secretary the two questions: 1st. Whether the opinion of the late Attorney General upon the decision of the late Second Auditor was obligatory on my action? and, second, ought interest to have been allowed under the act of Congress referred to? I was answered by an opinion from the Attorney General, dated May 8, 1849, that I had no discretion in the matter, and interest was allowed on \$8,973 from the 13th of July, 1813, to the 13th February, 1832, amounting to \$10,004 89, pre-

suming that the interest had been allowed as intended by the awards of my predecessor from 1832 to 1848.

In looking into the case now, under the provisions of the act approved December 22, 1854, I find that Congress acted under the impression that the testimony marked "rejected for want of authentication" had never been acted on, whilst the second award of my predecessor shows that he admitted the testimony and allowed the sum of \$8,973. I also discover the mistake of my predecessor in calculating the interest.

The point on which I desire your advice and decision is, whether I am restricted by the last act to the question of the rejected testimony, and whether I have the power to correct the error in the calculation of interest.

The whole subject, with all the papers connected with the case, is submitted for your decision.

I enclose a statement showing what amount has been paid under the several decisions heretofore made, and what amount is due if the awards of my predecessor are carried out, allowing interest upon the same from the 13th of July, 1813, to the 22d of April, 1848, the date of the first award. I also send with the papers, by request, the argument of counsel in the case.

Very respectfully, your obedient servant,

P. CLAYTON,
Second Auditor.

Hon. JAMES GUTHRIE,
Secretary of the Treasury.

Statement of the claim of the representatives of George Fisher, deceased, as due under the several awards heretofore made, and the amounts paid under said awards:

Amount awarded in April, 1848.....	\$8,873 00
Amount awarded in December, 1848.....	8,973 00
	17,846 00
Interest on \$17,846, the amount of the above awards, from 13th July, 1813, the date of the destruction of the property, to 22d April, 1848, the date of the first award, 34 years, 9 months, and 10 days, at 6 per cent. per annum	37,238 66
	55,084 66
From which deduct—	
Amount paid 22d April, 1848.....	\$8,873 00
Amount paid 30th December, 1848.....	8,797 94
Amount paid 12th May, 1849	10,004 89
	27,675 83
	27,408 83

Basis of the first award.

100 acres of corn on Bassett's creek, 30 bushels to the acre, (one-half)	\$1,500
400 cattle, \$10 each, (one-half).....	2,000
350 stock hogs, \$3 each, (one-half).....	525
75 fat hogs, \$14 each, (one-half).....	525
Hats and goods used by troops, (one-half).....	500
4 dozen wine.....	48
125 gallons of whiskey.....	125
Wheat in stacks.....	250
Corn in Alabama.....	3,500
	8,873
	8,873

Error of \$100 in addition.

Basis of the second award.

Corn on Bassett's creek, 3,000 bushels, at \$1 each, (one half)	\$1,500
Cattle, 500 head, (200 used,) at \$10 each.....	2,000
Hogs, stock, 350, at \$3 each, (one half).....	525
Hogs, fat, 75, at \$14 each, (one half).....	525
Furs, hats, and goods in store, whiskey and wine... ..	673
Wheat in stacks, (35 acres).....	250
Whole crop on Alabama river farm, Fort Claiborne.....	3,500
	8,973
	8,973

TREASURY DEPARTMENT,
Second Auditor's Office, February 14, 1857.

SIR: In answer to the resolution adoption by the Committee on Indian Affairs of the Senate, and referred to this office yesterday, asking what action has been taken by the department in execution of the two acts of Congress "for the relief of the legal representatives of George Fisher, deceased, approved April 12, 1848, and December 22, 1854," and requesting the decisions of the Attorney General in relation to interest on said claim, I have the honor to report:

That on a settlement of the account on April 22, 1848, there was allowed and paid, without interest.....	\$8,873 00
That on settlement of December 30, 1848, there was awarded \$8,973, with interest thereon from February 13, 1832, to date of this settlement, at 6 per cent. per annum, amounting to \$18,035 73, from which was de- ducted \$8,873 paid on previous settlement, and interest thereon, at the same rate, to the date of this settlement, amounting to \$9,237 79, which leaves a balance, which was paid December 30, 1848.....	8,797 94

And that on the last settlement, on the 12th of May, 1849, there was allowed and paid as interest on \$8,973, awarded to the representatives of George Fisher, from July 13, 1813, to February 13, 1832, at 6 per cent. per annum, under opinion of Attorney General of May 8, 1849, \$10,004 89

27,675 83

The opinions of the Attorney General, of December 20, 1849, February 16, 1849, and May 8, 1849, are herewith transmitted, as requested.

The foregoing exhibits all the action of this office by settlement under the act "for the relief of the representatives of George Fisher," approved April 12, 1848. Under the act approved December 22, 1854, no action has taken place, further than is contained in my letters of March 30, 1855, and June 11, 1855, addressed to the Secretary of the Treasury. The final action on the case, I presume, is on file in the office of the Secretary, as it was not transmitted with the papers of George Fisher's representatives when returned to this office. The resolution and letter of Mr. Sebastian are returned herewith.

Very respectfully, your obedient servant,

P. CLAYTON,
Second Auditor.

Hon. JAMES GUTHRIE,
Secretary of the Treasury.

TREASURY DEPARTMENT,
April 4, 1855.

SIR: I find that the Second Auditor, under date of the 22d of April, 1848, rejecting certain depositions for want of sufficient authentication, awarded to the representatives of George Fisher the sum of \$8,873, as a full and fair equivalent for the property destroyed by the United States troops, and that said sum was accordingly paid to the representatives. I also find that the said Auditor again took up the said case, under an opinion of the Attorney General as to the rejected depositions, and made another award, in which he allowed, on the whole case, for the property destroyed by the United States troops, the sum of \$8,973, being \$100 more than allowed by the first award, and on this latter award allowed interest, at the rate of six per cent., from the 13th of February, 1832, the time when Congress was first petitioned to settle the claim, and deducted therefrom the first award of \$8,873, leaving a balance of \$8,797 94, which was paid the representatives.

I further find that, upon the opinion of Attorney General Toucey, you took up the case and allowed interest upon the last award of \$8,973 from the 13th of July, 1813, to the 13th of February, 1832, and allowed the further sum of \$10,004 89.

You will thus see that the sum awarded to Fisher's representatives,

by your predecessor, under his second award, embracing the rejected depositions, has been fully paid, with interest from the 13th of February, 1813, and that there was not the two sums of \$8,873 and \$8,973, constituting \$17,846, awarded for the damages done by the United States troops, and, consequently, there is no such balance due for interest or otherwise, as you suppose.

In my opinion, the second award of your predecessor, allowing interest from 1832 to the time application was first made to Congress for compensation, was all that equity and justice called for, and that Attorney General Toucey's opinion ought not to have been applied to the case as it stood, and did not justify the further allowance of interest.

As the second award of your predecessor was made on the basis of the rejected depositions on making his first award, the act of 1854, authorizing those depositions to be considered, and a further award made, was for the want of the proper information; and as they have already been considered and acted upon, you are not authorized to revise the action of your predecessor under the provision of the act of 1854, but should make a detailed report of the case to me, so that I may lay it before the President, to be presented to Congress for their consideration.

I am, very respectfully,

JAMES GUTHRIE,
Secretary of the Treasury.

P. CLAYTON, Esq.,
Second Auditor of the Treasury.

The papers are herewith returned.

TREASURY DEPARTMENT,
December 20, 1856.

SIR: I have the honor to report to you, in order that the fact may, if you think proper, be communicated to Congress, that the act entitled "An act supplementary to an act therein mentioned," approved 22d December, 1884, has not been executed for the reasons and under the circumstances which will be stated.

The act provides "that it shall be the duty of the Second Auditor of the Treasury, under the provisions of the act of Congress for the relief of the legal representatives of George Fisher, deceased, approved April 12, 1828, to re-examine the said case, and to allow the claimants the benefit of the testimony heretofore marked *rejected for the want of authentication*, provided the same is now legally authenticated by the executive of Alabama; the adjustment to be made in strict accordance with the act hereinbefore referred to, and to which this act is barely supplemental."

The facts of the case are, that under the said act of 12th April, 1848, the Second Auditor made an award, upon the testimony of Robert G. Hayden, H. L. Deviene and Absalom P. Greswall, on which there was allowed and paid \$8,873. The Auditor, in December, 1848, made a subsequent award, in which, taking into view the testimony considered in the former, as well as the affidavits of Davis, Turner, and

Hanson, then rejected "because there was no proof that the several persons before whom they were taken were justices of the peace," allowed, by force of the whole, the sum of (being \$100 more than the sums previously allowed).....	\$8,973 00
The Auditor allowed interest on this sum from the 12th of February, 1832, when Colonel Fisher first presented his petition to Congress.....	9,062 73
<hr/>	
Making	18,035 73
And deducted the amount of the former award, \$8,873, with interest thereon from date of payment.....	9,237 79
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Being	8,797 84
which was paid on the 30th December, 1848.	

Under opinions of successive Attorneys General, of 16th February and 8th May, 1849, the Auditor further allowed interest from the 13th July, 1813, when the injury is alleged to have been done, to the said 13th February, 1832, amounting to \$10,004 87—making, in all, \$27,675 83 awarded and paid in this case, of which \$8,973 is for damages, and \$18,702 85 for interest.

The act of 22d December, 1854, supplementary to an act therein mentioned, was introduced and passed in the Senate without papers.

The case was brought to my notice under a misapprehension on the part of the Auditor of the amount of principal paid under the act of 1848, and a submission of the question of a further allowance of interest. My decision on that point is annexed; the law being now settled at the treasury in respect to such cases, that where interest is not granted in express terms, or by necessary implication, it is not allowed.

By the passage of the recited act Congress intended to give Fisher's representatives the benefit of the rejected testimony; but as they had already had the benefit of that testimony in the second award made by the Auditor, and which fact was not known to Congress when they passed the supplementary act, the particular relief provided for cannot be granted. It seems manifest that Congress did not intend any relief other than the benefit of the rejected testimony, although an examination of the case is directed; but if there was authority now to re-examine the whole case, and the accounting officers of the treasury should arrive at the conclusion that Fisher's representatives were entitled to compensation for the whole damage claimed, as well that done by the United States troops, for which the allowance was made, as that done by the Indians, which was excluded, inasmuch as Fisher's representatives have received more interest than the whole amount of damage proved, and as no interest on such claims is now allowable, no further payment could be made on this claim. Neither of the acts for the benefit of Fisher's representatives gives interest, or directs the accounting officers to allow it; and there is no general law authorizing the payment of interest in this class of cases, whilst the practice of the government is against it. A petition to Congress in this class of cases is an appeal to the equity and justice of all the people of the United States; and the act of Congress stands like a judgment or de-

cree in equity between individuals, and carries no interest unless given in the judgment or decree.

Upon this state of the case, the act of December, 1854, being imperative, the thing directed having been before done, if you shall think it fit to submit this report to Congress, it will be for that body to repeal the said act, or take such other order in the premises as it may deem proper.

Most respectfully, your obedient servant,

JAMES GUTHRIE,
Secretary of the Treasury.

Endorsed as follows :

I approve the views expressed within, and am not inclined to recommend further legislation in the case.

FRANKLIN PIERCE.

JANUARY 18, 1856.

TREASURY DEPARTMENT, *December 20, 1855.*

SIR: I have the honor to report to you, in order that the fact may, if you think proper, be communicated to Congress, that the act entitled "An act supplemental to an act therein mentioned," approved December 22, 1854, has not been executed, for the reasons and under the circumstances which will be stated.

The act provides "that it shall be the duty of the Second Auditor of the Treasury, under the provisions of the act of Congress for the relief of the legal representatives of George Fisher, deceased, approved April 12, 1848, to re-examine the said case, and to allow the claimants the benefit of the testimony heretofore marked *rejected for the want of authentication*, provided the same is now legally authenticated by the executive of Alabama; the adjustment to be made in strict accordance with the act hereinbefore referred to, and to which this act is barely supplemental."

The facts of the case are, that, under the said act of April 12, 1848, the Second Auditor made an award upon the testimony of Robert G. Hayden, H. L. Deviene, and Absalom Preswal, on which there was allowed and paid \$8,873. The Auditor, in December, 1848, made a subsequent award, in which, taking into view the testimony considered on the former, as well as the affidavits of Davis, Turner, and Hanson, then rejected "because there was no proof that the several persons before whom they were taken were justices of the peace," allowed, by force of the whole, the sum of \$8,973, being \$100 more than the sum previously allowed. The Auditor allowed interest on this sum from the 12th of February, 1832, when Colonel Fisher first presented his petition to Congress, \$9,062 73, making \$18,035 73, and deducted the amount of the former award, \$8,873, with interest thereon from date of payment, \$9,237 79, leaving \$8,797 74; which was paid on the 30th of December, 1848.

Under opinions of successive Attorneys General, of February 16 and May 8, 1849, the Auditor further allowed interest from the 13th of July, 1813, when the injury is alleged to have been done, to the

said 13th of February, 1832, amounting to \$10,004 89—making, in all, \$27,675 83 awarded and paid in this case, of which \$8,973 is for damages, and \$18,702 83 for interest.

The act of December 22, 1854, supplementary to an act therein mentioned, was introduced and passed in the Senate without papers. The case was brought to my notice, under a misapprehension on the part of the Auditor of the amount of principal paid under the act of 1848, and a submission of the question of a further allowance of interest. My decision on that point is annexed; the law being now settled at the treasury, in respect to such cases, that where interest is not granted in express terms, or by necessary implication, it is not allowable.

By the passage of the recited act, Congress intended to give Fisher's representatives the benefit of the rejected testimony; but as they had already had the benefit of that testimony in the second award made by the Auditor, and which fact was not known to Congress when they passed the supplementary act, the particular relief provided for cannot be granted. It seems manifest that Congress did not intend any relief other than the benefit of the rejected testimony, although a re-examination of the case is directed; but if there was authority now to re-examine the whole case, and the accounting officers of the treasury should arrive at the conclusion that Fisher's representatives were entitled to compensation for the whole damage claimed, as well that done by the United States troops, for which the allowance was made, as that done by the Indians, which was excluded, inasmuch as Fisher's representatives have received more interest than the whole amount of damage proved, and as no interest on such claims is now allowable, no further payment could be made on this claim. Neither of the acts for the benefit of Fisher's representatives gives interest, or directs the accounting officers to allow it; and there is no general law authorizing the payment of interest in this class of cases, whilst the practice of the government is against it.

A petition to Congress, in this class of cases, is an appeal to the equity and justice of all the people of the United States; and the act of Congress stands like a judgment or decree in equity between individuals, and carries no interest unless given in the judgment or decree.

Upon this state of the case, the act of December, 1854, being imperative, the thing directed having been before done, if you shall think it fit to submit this report to Congress, it will be for that body to repeal the said act, or take such other order in the premises as it may deem proper.

Most respectfully, your obedient servant;

JAMES GUTHRIE,
Secretary of the Treasury.

The PRESIDENT OF THE UNITED STATES.

Endorsed as follows:

I approve the views expressed within, and am not inclined to recommend further legislation in this case.

FRANKLIN PIERCE.

JANUARY 18, 1856.

ATTORNEY GENERAL'S OFFICE, *December 20, 1848.*

SIR: In reply to your inquiry, I beg leave to say that, under the act of Congress of April 12, 1848, for the relief of the legal representatives of George Fisher, deceased, authorizing and requiring the Second Auditor of the Treasury to examine and adjust their claims for spoliations during the war of 1812, on principles of equity and justice, the Second Auditor is very clearly permitted to receive proof of a claim, although he may have previously ruled out the same proof for informality, and reported upon the other claims satisfactorily established. Indeed, I think he is required to do it. It is not necessary for Congress to re-enact the law. If the claim be a just one, the act is broad enough to permit it to be allowed. No chancellor would feel at liberty peremptorily and finally to reject it because there was a slip in the forms of proof. I think the Second Auditor has full power under this act to do justice upon the principles which prevail in courts of equity, one of which is, not to permit a just claim to be defeated by an accidental omission or mistake like that in question.

I have the honor to be, very respectfully, sir, your obedient servant,
 ISAAC TOUCEY,
Attorney General.

Hon. ROBERT J. WALKER,
Secretary of the Treasury.

ATTORNEY GENERAL'S OFFICE,
February 16, 1849.

SIR: In administering the relief provided by the act of Congress for the legal representatives of George Fisher, deceased, approved April 12, 1848, it being held by the Second Auditor that the value of the property taken or destroyed, with interest upon it, is to be paid as "a fair and full indemnity," it would seem to follow, of course, that the interest should be computed from the time when the property was taken or destroyed by the troops of the United States.

As to the rate of interest, it is not fixed by any contract, nor is interest to be paid in pursuance of any contract. It is to be referred to as a measure of what is deemed, under the laws and practice of this government, a fair indemnity for the detention of the value, and that is six per cent. per annum during the period of the detention.

I have the honor to be, very respectfully, sir, your obedient servant,
 I. TOUCEY,
Attorney General.

Hon. ROBERT J. WALKER,
Secretary of the Treasury.

ATTORNEY GENERAL'S OFFICE,
May 8, 1849.

SIR: In the matter of the claim of the representatives of George Fisher, made under the act for their relief of the 12th April, 1848,

the two questions you have submitted to this office I have duly considered ; they are these :

“ *First.* Is the opinion of this office of the 16th February, 1849, upon the decision of the late Second Auditor obligatory upon the present incumbent ? ”

“ *And secondly.* Ought interest to have been allowed under the act of Congress referred to ? ”

First. The duties of the Attorney General are prescribed by the judiciary act of 1789, and are : “ To give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments touching any matters that may concern their departments. ”

The act does not declare what effect shall be given to such advice and opinion, but it is believed that the practice of the government has been invariable always to follow it. This has been done from the great advantage, and almost absolute necessity, of having uniform rules of decision in all questions of law in analogous cases—a result much more certain under the guidance and decision of a single department, constituted for the very purpose of advising upon all such questions, and with supposed special qualifications for such a duty. In my opinion, this practice should be considered as law.

Second. By reference to the act giving relief in this case, it will be seen that the whole subject of the claim is submitted to the exclusive judgment of the Second Auditor. No other department had any jurisdiction over it. His judgment was made absolute. By the last report of that officer, he did allow interest ; and the interest, with the principal then allowed, has been paid to the claimants. This, in my judgment, decides the question as to the title to interest under the act. The Auditor thought—whether correctly or not, is not submitted to me, and I express no opinion upon it—that such was the meaning of the law. His successor, under another rule, perfectly well settled, has no right to disregard the decision. He is bound to esteem it a correct one.—(See *United States vs. Bank of Metropolis*, 15 Pet., 377.)

I have the honor to be, respectfully, sir, your obedient servant,
 REVERDY JOHNSON,
Attorney General.

Hon. WILLIAM M. MEREDITH,
Secretary of the Treasury.

Additional papers in connexion with the claim of Fisher's legal representatives, (referred to in the report of the House Committee on the Judiciary, No. 206, and Senate Report No. 446, third session, thirty-fourth Congress.)

ORIGINAL AWARD OF MR. MCCALLA.

TREASURY DEPARTMENT,
Second Auditor's Office, April 22, 1848.

SIR : In compliance with the provisions of an act of Congress, entitled “ An act for the relief of the legal representatives of George Fisher, deceased, ” approved April 12, 1848, I have carefully ex-

amined the said claim, and on the depositions of Robert G. Haden, H. L. Riviere, and Absalom Presnal, have concluded to allow the sum of \$8,873, as a full and fair equivalent for the property destroyed by troops of the United States. This amount I have to request may be paid out of any appropriation applicable thereto, and in the following proportions, in pursuance of instructions from the attorney of administrator :

To David Gordon, one-half of the amount.....	\$4,436 50
To Mrs. Susan E. Gordon, one-third the remaining half....	1,478 83
To Hon. E. C. Cabell, attorney for administrator, the remaining two-thirds.....	2,957 67
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Making, as above.....	\$8,873 00
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Very respectfully, your obedient servant,

J. M. McCALLA,
Second Auditor.

A. K. PARRIS, Esq.,
Second Comptroller, Treasury Department.

[The depositions of Davis, Harrison, and Turner were not even considered when this award was made.]

The Judiciary Committee, in their report, No. 206, have made several direct issues of fact with Mr. Guthrie ; one, very material, as to the precise character of the award in December, 1848. Mr. Guthrie assumes that it was for principal ; the committee say it was for interest only, including the \$100 previously omitted or left out by mistake. The following official letter of the Second Auditor settles the question. It establishes beyond controversy that the committee are right.

TREASURY DEPARTMENT,
Second Auditor's Office, April 18, 1849.

SIR: By an act of Congress, entitled " An act for the relief of George Fisher's legal representatives," approved April 12, 1848, the Second Auditor of the Treasury is authorized and required to examine and adjust the claims of the legal representatives of George Fisher, deceased, on principles of equity and justice. My immediate predecessor, under the authority given him by the aforesaid act of Congress, awarded the sum of \$8,873 for property destroyed by the troops of the United States, engaged in suppressing Indian hostilities in the year 1813 ; this award is dated April 22, 1848. And by a second award of December 30, 1848, the said Auditor allowed the further sum of \$8,797 94, *as interest*, computing the interest from the 13th of February, 1832, the day of the presentation of the claim, to the 30th of December, 1848, the day of the rendition of the award. The legal representatives of George Fisher now interpose the further claim of interest from the year 1813, the year in which the property was destroyed, to the 13th of February, 1832, the date from which the Second Auditor *ex officio* computed the interest in his second award.

Their claim is based upon the fact that the aforesaid Second Auditor

referred the question "when the calculation of interest shall begin?" to the late Secretary of the Treasury, and received through him the opinion of the late Attorney General in reference to the point. The reference and opinion will be found among the papers.

The points I wish to present are two: 1st. Is the opinion of the late Attorney General upon the decision of the late Second Auditor obligatory upon me? and 2d. Ought interest to have been allowed under the act of Congress referred to?

The Hon. Secretary of the Treasury will please advise the Second Auditor on these points.

Very respectfully,

P. CLAYTON, *Second Auditor.*

Hon. WILLIAM MEREDITH, *Secretary of the Treasury.*

The depositions marked "rejected," &c, were mentioned in the December award; but the only consideration given to them was to reject them. Judge Bibb's deposition is conclusive as to this fact: *observe the date or time* at which he swears the depositions were rejected for want of authentication, viz: in December, 1848.

UNITED STATES OF AMERICA, }
District of Columbia, } *ct.*

CITY OF WASHINGTON, *April 13, 1855.*

This day, before me, the undersigned, one of the justices of the peace of the United States in and for the district and city aforesaid, duly commissioned, sworn, and acting as such, came George M. Bibb, in the aforesaid city, and then and there made oath, that in December, 1848, at the instance of Mr. David Gordon, this affiant prosecuted the claim of the representatives of George Fisher, deceased, before the then Second Auditor of the Treasury, General John McCalla, for the property of said Fisher, taken or destroyed by the troops of the United States in the year 1813; and then filed with said Auditor, in support of the claim of the said representatives to an allowance in addition to the sum of \$8,873, which had been before that time awarded to them by said Auditor McCalla. The case was then opened and re-examined, because of the production of the additional evidence of the Rev. Thomas Berry. This affiant was present and at the table of the said Auditor when he made his statement and requisition, certified to the Second Comptroller for the sum of eight thousand nine hundred and seventy-three dollars, (\$8,973,) as the principal, with interest thereon from some day in February, 1832, deducting therefrom the former sum of \$8,973 which said Auditor McCalla had awarded to said representatives on 22d April, 1848, and interest thereon, as stated in said requisition or certificate addressed to said Comptroller. Said Auditor, in the presence of this affiant, made the statement of the whole amount of property of said Fisher which had been taken or destroyed, which amounted to the sum of seventeen thousand nine hundred and forty-six dollars, and then deducted the one-half thereof, reducing the sum to be allowed to said representatives, as principal,

to the sum of \$8,973, as aforesaid, upon which said McCalla allowed interest, commencing in February, 1832, as aforesaid.

When said Auditor McCalla deducted the one-half, as aforesaid, this affiant asked said Auditor why he had deducted the one-half, and thereby reduced the principal sum to be allowed to said representatives to the sum of \$8,973 only; to which said McCalla answered he had so done upon the presumption that the Indians had taken and destroyed as much of Fisher's property as the troops of the United States. This affiant stated that the affidavits of Davis, Harrison, and Turner repelled any such presumption, and proved that the property of said Fisher, mentioned by them, was taken by the troops for their use; and that which they did not take to themselves was destroyed by the troops of the United States, to prevent the Indians from getting it. To this said McCalla replied, that the depositions of Davis, Harrison, and Turner were not legally authenticated, and therefore he rejected them. This affiant suggested that the person certifying the oaths of the witnesses had also certified and styled himself a justice of the peace, and therefore he ought to be presumed to be so, as the contrary was not shown. To this said McCalla responded that he could not so presume.

After Auditor McCalla, in December, 1848, handed to me his requisition or certificate to the Comptroller for said allowance of the sum of \$8,973, with the interest thereon commencing in February, 1832, this affiant delivered to the Auditor the protest against said sum of principal and interest, as being too little; which protest is now on file in the Auditor's office, bearing date 29th December, 1848, but endorsed as filed 30th December, 1848.

The affiant further says, in March, 1855, he re-examined the papers in the said case, at the instance of said David Gordon, in consequence of the supplemental act of Congress, approved 22d December, 1854, and filed an argument thereon with the Hon. P. Clayton, the Second Auditor. Upon this examination, the bases of the award of 22d April, 1848, on file, shows the particular articles of property of said Fisher, for which Auditor McCalla allowed compensation, showing deductions of one-half of the valuation. The particulars of these allowances, when correctly added, amount to the sum of \$8,973, but, by error in addition, their aggregate value was summed up at only \$8,873; and this statement is endorsed; that the depositions of Harrison, Davis, Turner, and Colonel George Fisher were rejected, signed by J. F. Polk, and dated May, 1849; the depositions of Davis, Harrison, and Turner are also endorsed as rejected "by the late Auditor, General McCalla," for want of authentication.

On said examination of the papers, in the year 1855, this affiant saw the award of the Auditor, General McCalla, without date, in which it is stated that the depositions of Davis, Harrison, and Turner were considered; and it is therein stated (among other things) that the hides in the tanyard of Fisher could not be used by the troops of the United States; that the crockerywares were probably destroyed by the Indians; that for the smith's tools and the carpenter's tools, the troops of the United States had no use, and that the houses were probably destroyed by the Indians. This award, so without date, was

not shown to this affiant in 1848 ; it was not among the papers when said requisition or certificate to the Second Comptroller was delivered to this affiant in December, 1848, and when this affiant delivered to said Auditor McCalla the protest before mentioned. The award of 22d April, 1848, when the error in addition is corrected, and the said principal sum allowed in December, 1848, are identically the same sum. So that if Auditor McCalla did, in December, 1848, consider the depositions of Davis, Harrison, and Turner, he gave no effect to them, but must have considered them as of no avail for want of authentication ; otherwise he could not have taken off the one-half upon the presumption that the one-half of the said property had been taken or destroyed by the Indians. The authentication of the depositions of Davis, Harrison, and Turner, by the certificate of the governor of the State of Alabama, was not affixed to them until in the year 1850, October 19, as is seen by inspection.

This affiant states that, for his services aforesaid, rendered in the year 1848, the said David Gordon paid him five hundred dollars ; that, for his services in writing the argument in 1855, the said Gordon gave his note to this affiant for three hundred dollars, without condition or contingency, dated 28th March, 1855, payable at sixty days after date, and also a writing of same date, promising to pay this affiant five per centum on the *one-half* of whatever sum should be allowed to the representatives of George Fisher, deceased, under the said supplemental act of 1854. This latter writing for said contingent per centage this affiant has released and delivered up to said Gordon, and said Gordon has released this affiant from further prosecution of said claim of the representatives of George Fisher ; and this affiant hath not now any interest whatever, of profit or loss, in expectancy upon the event of the application of the said representatives under the said act of 1854.

GEORGE M. BIBB.

Sworn to and subscribed before me, on the day and year and place stated in the caption.

T. C. DONN, *J. P.*

TREASURY DEPARTMENT,
Second Auditor's Office, March 28, 1856.

SIR : In reply to your letter of this date, asking what depositions in the case of the legal representatives of George Fisher, deceased, bear the endorsement "rejected for the want of authentication," I have the honor to report that the following depositions bear that endorsement, viz : Wiley Davis, Samuel Harrison, and James Turner.

Very respectfully, your obedient servant,

P. CLAYTON,
Second Auditor.

Hon. W. K. SEBASTIAN,
Chairman Committee of Indian Affairs, Senate U. S.

Mr. Guthrie alleges that the claimants had the benefit of the testimony marked "rejected for the want of authentication" in December, 1848. The following official certificate of Governor Collier, of Alabama, shows that these depositions were *not* authenticated until 19th of October, 1850, nearly two years subsequent to the time at which Mr. Guthrie assumes to say "they had that before:"

EXECUTIVE DEPARTMENT,
Montgomery, Alabama.

I, Henry W. Collier, governor of the State of Alabama, do hereby declare and make known to all persons whom it may concern, that Thomas Simmons, whose signature appears to the foregoing certificate, was, at the time of signing the same, and at the date thereof, an acting justice of the peace in and for the county of Macon, in said State of Alabama, and that full faith and credit are due to all his official attestations as such.

In testimony whereof, I have hereunto set my hand and caused the seal of the State to be affixed, at Montgomery, this nineteenth [L. s.] day of October, A. D. 1850, and of the independence of the United States of America the seventy-fifth.

H. W. COLLIER.

By the Governor :

W. GARRET,
Secretary of State.

[The depositions marked "*rejected*," &c., were not regarded as entitled to any validity, without legal authentication. The following letter to the chairman of the Senate's Committee on Indian Affairs is conclusive as to that point.]

WASHINGTON, D. C., June 28, 1856.

SIR : I have the honor to make this brief statement in reference to the endorsements made by me while I was chief clerk in the office of the Second Auditor of the Treasury, on certain depositions in the account of George Fisher, deceased, viz :

That, according to the best of my recollection, said endorsements were made at the time when, by direction of the Auditor, they were taken from among the papers and delivered or sent to Mr. Gordon for the purpose of having the certificates of the justices of the peace, which were annexed to them, authenticated—without which *they were inadmissible as testimony in the case.*

I have the honor to be, very respectfully, your obedient servant,

J. F. POLK.

Hon. W. K. SEBASTIAN, U. S. Senate.

TREASURY DEPARTMENT,
April 4, 1855.

SIR : I find that the Second Auditor, under date of the 22d of April, 1848, rejecting certain depositions for want of sufficient authentication, awarded to the representatives of George Fisher the sum of \$8,873, as a full and fair equivalent for the property destroyed by the United States troops, and that said sum was accordingly paid to the representatives. I also find that the said Auditor again took up the said case, under an opinion of the Attorney General as to the rejected depositions, and made another award, in which he allowed, on the whole case, for the property destroyed by the United States troops, the sum of \$8,973, being \$100 more than allowed by the first award ;

H. Rep. Com. 467—2

and on this latter award allowed interest, at the rate of six per cent., from the 13th of February, 1832, to the time when Congress was first petitioned to settle the claim, and deducted therefrom the first award of \$8,873, leaving a balance of \$8,797 94, which was paid the representatives.

I further find that, upon the opinion of Attorney General Toucey, you took up the case and allowed interest upon the last award of \$8,973 from the 13th of July, 1813, to the 13th of February, 1832, and allowed the further sum of \$10,004 89.

You will thus see that the sum awarded to Fisher's representatives by your predecessor, under his second award, embracing the rejected depositions, has been fully paid, with interest from the 13th of February, 1813, and that there was not the two sums of \$8,873 and \$8,973, constituting \$17,846, awarded for the damages done by the United States troops, and, consequently, there is no such balance due for interest or otherwise, as you suppose.

In my opinion, the second award of your predecessor, allowing interest from 1832 to the time application was first made to Congress for compensation, was all that equity and justice called for, and that Attorney General Toucey's opinion ought not to have been applied to the case as it stood, and did not justify the further allowance of interest.

As the second award of your predecessor was made on the basis of the rejected depositions on making his first award, the act of 1854, authorizing those depositions to be considered, and a further award made, was for the want of the proper information; and as they have already been considered and acted upon, you are not authorized to revise the action of your predecessor under the provision of the act of 1854, but should make a detailed report of the case to me, so that I may lay it before the President, to be presented to Congress for their consideration.

I am, very respectfully,

JAMES GUTHRIE,
Secretary of the Treasury.

P. CLAYTON, Esq.,
Second Auditor of the Treasury.

The papers are herewith returned.

TREASURY DEPARTMENT,
Second Auditor's Office, January 20, 1858.

SIR: In reply to your letter of this date, asking for a specific list from the testimony marked "rejected" in the Fisher case, I have the honor to send herewith a statement as taken from the testimony referred to.

Very respectfully, yours,

T. J. D. FULLER,
Second Auditor.

Hon. A. IVERSON,
Chairman Committee on Claims, U. S. Senate.

Statement of the property of George Fisher, deceased, taken, used, or destroyed by the troops and militia in the service of the United States in the year 1813.

Between 500 and 600 head of cattle, at that time worth \$10 per head.

86 head of drove hogs, for which he paid \$14 per head.

350 head of stock hogs, worth, at that time, \$5 per head.

100 acres of corn on Bassett's creek.

10 or 12 barrels of groceries, and between 8 and 12 hundred dollars worth of goods, and a quantity of other property, destroyed on the plantation on Bassett's creek.

Planted upwards of 100 acres of corn on the Alabama river, below Fort Claiborne, destroyed by the public horses, turned in by order of Colonel Milton; old corn, at that time, was difficult to be had at from \$2 50 to \$3 per bushel.

The above is the testimony of Samuel Harrison and James Turner.

According to the testimony of Willie Davis:

500 head of cattle, or upwards; 86 head of large Tennessee pork hogs, for which he paid \$14 per head; 350 head of stock hogs, \$5 to 6 per head; some \$1,000 or \$1,200 worth of dry goods; some 8 or 10 barrels of whiskey; 2 or 3 barrels of rum or brandy, in a store on Bassett's creek; fully 100 acres of corn planted on Bassett's creek; something like 120 acres planted in corn on the Alabama river, corn scarcely to be purchased at *\$— and 50 cents per bushel, besides a good crop of peas and pumpkins; cattle, quick sale at \$10 per head. The said Fisher lost considerable other property not recollected; all of which was destroyed by the United States troops.

Thomas Berry's deposition states that the quantity of corn, per acre, in his field at Fort Claiborne, was at least fifty bushels to the acre, and probably more.

IN THE HOUSE OF REPRESENTATIVES, *February* 13, 1857.

Mr. BARBOUR, from the Committee on the Judiciary, made the following report:

The Committee on the Judiciary, to whom was referred the memorial of David Gordon, setting forth that in consequence of the non-execution of the act of Congress, entitled "An act supplemental to an act therein mentioned," approved December 22, 1854, great injury has resulted to himself and to others represented by him, and praying such relief as may be expedient and necessary, having had the same under consideration, ask leave to report upon the following statement of facts:

The case is a plain one, but the committee will recite, as briefly as may be, the circumstances which have induced the claimants to bring it again to the notice and to invoke the interposition of Congress.

* Written thus: — dollars and fifty cents.

The late Colonel George Fisher, formerly of Alabama, but more recently of the State of Florida, lost a large amount of property during the war with the Creek Indians, consisting of cattle, hogs, corn, fodder, groceries, dry goods, &c. It was taken, used, or destroyed by the troops and militia in the service of the United States.

At the first session of the thirtieth Congress an act was passed directing that the claim should be adjusted at the treasury, the Second Auditor having been specially designated to perform that duty. The committee will, at this point, recite the act, that it may be seen at a glance what its provisions are, and especially the latter clause of the second section, which has chiefly been the cause of variance between some of the officials connected with the executive branch of the government.

THIRTIETH CONGRESS—FIRST SESSION.

AN ACT for the relief of the legal representatives of George Fisher, deceased.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Second Auditor of the Treasury of the United States be, and he is hereby, authorized and required 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 for the value of property taken or destroyed by the troops of the United States engaged in suppressing Indian hostilities in the year eighteen hundred and thirteen; and that the said legal representatives be paid for the same out of any money in the treasury not otherwise appropriated.

SEC. 2. *And be it further enacted,* That if it shall be found impracticable for the claimants to furnish distinct proof as to the specific quantity of property respectively taken or destroyed by the troops and by the Indians, it shall be lawful for the said accounting officer to apportion the losses caused by said troops and Indians, respectively, in such manner as from the proofs he may think just and equitable, *so as to afford a fair and full indemnity for all losses and injuries occasioned by said troops, and allow the claimants accordingly: Provided,* That nothing herein contained shall authorize any payment for property destroyed by Indians.

Approved April 12, 1848.

This act was approved and signed by President Polk on the 12th of April, 1848.—(See Stat. at Large, p. 712, vol. 9.)

Under the provisions of this law the then Second Auditor, McCalla, made a partial settlement of the case, predicated upon the testimony of only three of the witnesses, viz: Robert G. Hayden, Henry L. Revier, and Absalom Presnel. He estimated the amount of Fisher's property, as proven by these witnesses, as amounting to \$17,946, and then deducted the one-half as all he would allow. It will thus be seen that he reduced the amount to be awarded to the claimants to the sum of \$8,973; and of this last he committed an error, or blunder, in the addition of \$100, *which was wholly omitted or left out* by mistake. Subtracting this \$100, as herein stated, the award was less than one-

half of the Auditor's own estimate of the value of the claimants' demands. The award bears date 22d April, 1848, and was for the value or principal of the debt only. The requirements of the latter clause of the second section, as to indemnity or interest, were entirely overlooked or disregarded by the accounting officer.

In the December following, the Auditor's (Mr. McCalla's) attention was invited to the provisions of the second section, in which he was commanded to make to the claimants a *fair and full indemnity for all losses and injuries occasioned by said troops, and allow the claimants accordingly.*

It is proper to state that, in pursuance of this emphatical and mandatory clause in the second section, he reviewed the case again, and affected to go through it *de novo*. But it does not appear that any testimony was regarded as entitled to any consideration, except Hayden's, Revier's, and Presnel's. So far as the principal was concerned, he made no variation, no augmentation. He stuck to his original award of 22d April preceding; but allowed the interest from 1832 up to 1848. It was in this second, or December award, that the depositions of the other witnesses was affected to have been considered. But this affectation is scattered to the winds by the fact that both of these awards, so far as the principal or capital of the debt is involved, are perfectly identical. The only difference is found in the fact that the blunder in the former award of \$100 was corrected and restored, and this is the whole of the award made in December, 1848. It is pertinent to this investigation to inquire if any validity were given to any of the depositions in the December award, except Hayden's, Revier's, and Presnel's. The committee are clearly of the opinion that no validity whatever was given to any of them, except those mentioned in the April award.

If there was any doubt upon this point, it is removed by the following statement of the chief clerk, J. F. Polk, esq., whose endorsement is now upon the back of the depositions of Davis, Harrison, and Turner, now on the files in the Second Auditor's office:

“In the account of the heirs and representatives of George Fisher, deceased, there were several depositions rejected by the Second Auditor on settlement of said account. On referring to them this day, I find that they were endorsed by myself, I being the chief clerk of the Second Auditor's office at that time, to this effect: ‘rejected by General McCalla, for want of authentication.’

“J. F. POLK.

“FEBRUARY 9, 1855.”

In the endeavor to make the award of principal in December correspond, rather to make it coincide in amount, with his award in April, the Auditor concluded to reject the depositions of Wiley Davis, James Turner, and Samuel Harrison, on the ground of not having the seal of authentication upon them, and to disregard, but not for the same cause, (as, indeed, he could not,) the deposition of Thomas Barry.

These depositions were of vital importance, as they contained evidence which repelled a presumption of the Auditor, and proved the direct reverse of what was assumed: “*that one half* of the claimants

property might have been taken by the Indians." When this fact was brought to the notice of the Auditor, he observed: "the depositions of Davis, Harrison, and Turner, were not legally authenticated, and therefore he rejected them." See the following extract from the deposition of the Hon. George M. Bibb:

UNITED STATES OF AMERICA, }
 District of Columbia. } *scit*:

CITY OF WASHINGTON, *April 13, 1855.*

This day personally appeared before me, the undersigned, one of the justices of the peace of the United States in and for the District and city aforesaid, duly commissioned and sworn, and acting as such, came George M. Bibb, in the aforesaid city, and then and there made oath * * * * *

"Said Auditor, in the presence of this affiant, made the statement of the whole amount of property of said Fisher, which had been taken or destroyed, which amounted to the sum of seventeen thousand nine hundred and forty-six dollars, and then deducted the one-half thereof, reducing the sum to be allowed to said representatives, as principal, to the sum of \$8,973, as aforesaid, upon which said McCalla allowed interest, commencing in February, 1832, as aforesaid.

"When said Auditor, McCalla, deducted the one-half, as aforesaid, this affiant asked said Auditor why he had deducted the one-half, and thereby reducing the principal sum to be allowed to the representatives to the sum of \$8,973 only; said McCalla answered, he had so done upon the presumption that the Indians had taken and destroyed as much of Fisher's property as the troops of the United States; this affiant stated that the affidavits of Davis, Harrison, and Turner repelled any such presumption, and proved that the property of said Fisher mentioned by them was taken by the troops for their use, and that which they did not take to themselves was destroyed by the troops of the United States, to prevent the Indians from getting it; to this said McCalla replied that the depositions of Davis, Harrison, and Turner were not legally authenticated, and, therefore, he rejected them. * * * * *

"GEORGE M. BIBB."

Sworn to before—

T. C. DONN, *J. P.*

But, to make assurance doubly sure, it may be necessary to state that all the material facts deposed to by Judge Bibb refer to the action of the Second Auditor (McCalla) in December, 1848; for the affiant had no connexion with the case previous to that time.

It remains, then, only to state that all the results of McCalla's adjudication in this case consists of an award of \$8,973, made up in April, 1848, and reaffirmed, without variation, in his review of the case in the December following, together with the allowance of interest or indemnity from 1832 up to 1848. It is proper to state that the subsequent allowance of interest was made by McCalla's successor, under a decision of the Attorney General, the Hon. Isaac Toucey, previous to his retirement from office.

Having now traced the progress of this case up to the period at which the testimony of certain persons was rejected, and that exclusively for the want of legal authentication, including the retirement of Mr. McCalla from office, which occurred early in 1849, the committee proceed to notice, very briefly, the progress of the case since.

The claimants proceeded to perfect the rejected testimony by having it legally authenticated by the executive of Alabama. This was done under the seal of State, signed by the governor and attested by the Secretary of State, under date of October 19, 1850.

It was then filed at the Auditor's office, and an allowance asked upon it, but the new Auditor, Mr. Clayton, declined to entertain the demand, on the ground that it was closed.

The claimants were again forced to apply to Congress, which, at the 2d session of the 33d Congress, passed the following act :

AN ACT supplemental to an act therein mentioned.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That it shall be the duty of the Second Auditor of the Treasury, under the provisions of the act of Congress for the relief of the legal representatives of George Fisher, deceased, approved 12th of April, 1848, to re-examine the said case, and to allow the claimants the benefit of the testimony heretofore marked "*Rejected for the want of authentication,*" provided the same is now legally authenticated by the executive of Alabama; the adjustment to be made in strict accordance with the act herein above referred to, and to which this act is barely supplemental.

Approved December 22, 1854.

This act is brief, explicit, plain, and mandatory upon the Second Auditor. Its execution cannot be legally evaded, nor the duties it imposes avoided. It excludes all intervention by any other officer, either Comptroller or Secretary, and recognizes obligation to no power at the treasury, but to Congress alone.

It is pertinent now to inquire, why has this law not been executed? It has come to the knowledge of the committee that the present Secretary of the Treasury, Mr. Guthrie, has intervened to prevent its execution.

The reasons advanced by the functionary just referred to, in relation to his intervention in this case, are, in the judgment of the committee, inconclusive, unsatisfactory, and wholly unauthorized.

The allegation in his letter to the President, that the claimants had the benefit of the testimony specified in the supplemental act, in the award or review of the case by McCalla, in December, 1848, is fallacious. The committee have already shown that this allegation is contradicted by the facts, and disproved, emphatically, by the testimony of Judge Bibb, and by the coincident identity, as to the principal, in both of McCalla's awards. The claimants never had any substantial benefits or advantage from any consideration given to the rejected testimony by the Second Auditor up to the present time. It is alleged that the claimants were not entitled to interest under the law of April 12, 1848. This is a question of law exclusively, and is, as to the case

now under consideration, absolutely settled by the decision of the accounting officer, who allowed it, and sanctioned by two successive Attorneys General—the Hon. Mr. Toucey, and the Hon. Reverdy Johnson.—(See extracts from their opinions, quoted in this report.)

But the title to interest under the law of 1848, passed for the relief of the claimants, does not depend exclusively upon the decisions of either the Auditor who allowed it or the Attorneys General who sanctioned it. It is expressly enjoined in the 2d section of the law of 1848, that the Auditor shall afford (the claimants) “a fair and full indemnity for all losses and injuries occasioned by said troops, and allow the claimants accordingly.” Now, if any words in the English language are plainer, more emphatical, or mandatory, the committee plead ignorance of their existence.

The legal signification of indemnity, as expounded by the late Attorney General, William Wirt, is to the point, conclusive, and embraces this case exactly.

The following extract from his opinion is quoted by the committee, and in their judgment settles the significancy of the language employed by Congress when it enacted the second section of the act now under review. The whole opinion will be found in the 1st volume of Opinions, pages 499 to 501, inclusive, date May 17, 1826.

“OFFICE OF THE ATTORNEY GENERAL,
“May 17, 1826.

* * * * *

“1st. ‘Is interest a part of the indemnity?’

“After the most deliberate consideration of all the arguments which have been urged *pro* and *con*, I am clearly of the opinion that interest at least is a necessary part of the indemnity. * * * *

“What is a *just indemnification* for a wrong? Is it the reparation of the one-half or two-thirds of that wrong? Is it anything less than a reparation of the whole wrong? On these few simple ideas the whole question turns. If an injury is *justly redressed* which is only *half redressed*, then the British commissioner is right; but if an injury is only redressed when the redress is commensurate with the whole extent of the injury, then he is wrong. Let us put aside the emphatic and striking word *just*, and take the word *indemnification* alone: what does the word ‘indemnification’ mean? The *saving harmless from danger*. Is that man saved harmless from danger who is left to bear *one-half of the damage* himself? The question seems to me too plain for discussion. * * * *

“WM. WIRT.”

The committee will now refer to the construction given by the Hon. Mr. Toucey and the Hon. Reverdy Johnson. Mr. Toucey’s opinion is dated February 16, 1849, and will be found in vol. 2, “Opinions,” page 2139. Mr. Johnson’s will be found in same volume, page 2005. Both of the extracts are necessarily brief. The extended opinions of all three will be found *in loc.* by reference to the volumes above indicated.

“ATTORNEY GENERAL’S OFFICE,
February 16, 1849.

“The interest of the claim of the representatives of George Fisher, deceased, for property taken or destroyed by the troops of the United States, should be computed from the time of the taking or destruction.

“The rate of interest to be allowed should be six per cent. for the period of detention. * * * * *

“ISAAC TOUCEY.

“Hon. R. J. WALKER,
“Secretary of the Treasury.”

“ATTORNEY GENERAL’S OFFICE,
“May 8, 1849.

* * * * *

“By reference to the act giving relief in this case, it will be seen that the whole subject of the claim is submitted to the exclusive judgment of the Second Auditor. No other department has any jurisdiction over it. His judgment was made absolute. By the last report of that officer he did allow interest, and the interest, with the principal then allowed, has been paid the claimants. This, in my judgment, decides the question as to the title to interest under the act. The Auditor thought that such was the meaning of the law. His successor, under another rule perfectly well settled, has no right to disregard the decision. He is bound to esteem it a correct one.—(The United States vs. Bank of the Metropolis, 15 Pet, 377.)

“I have the honor to be, very respectfully, sir, your obedient servant,

“REVERDY JOHNSON.

“Hon. WM. M. MEREDITH,
“Secretary of the Treasury.”

The committee might here suspend all further exposition of this case; but, in vindication of the unquestionable privileges and power of Congress to prescribe the mode and manner of all adjustments at the treasury, to designate an appropriate arbitrator, and to enjoin the performance of a specific duty, and that these attributes of the National Legislature may not be questioned, its solemn enactments: defeated and perverted, they will devote a few sentences by way of additional elucidation.

It is said, that “by the present regulations of the department, interest is not allowed, unless expressly stipulated in the law or provided for by necessary implication,” &c. It is enough for the committee to say, in this connexion, and on this point, that the objector is concluded by the latter clause of the the second section of the act of 12th April, 1848, which the committee have already shown, commands that a fair and full indemnity should be made to the claimants “for all losses and injuries.” The act gives or commands indemnity—*fair indemnity—full indemnity*. But, as if those words were not suffi-

ciently emphatic, the law superadds these words—"for all losses and injuries." Now, will it be contended for one moment that when the Congress of the United States, by solemn enactment, concedes that persons in its service took private property in the year 1813, and appropriated the same to public use, provides that payment shall be made, and a fair and full indemnity afforded, that the bare return of the value only would come up to the requirements of such a law? It is a *solecism in terms* to give such an interpretation to the plain language of the second section. But these regulations of a department, what are they? To be potential, they must be in conformity, not in conflict, with the acts of Congress. But it would really seem as if these *ex parte* rules, made at a department by an individual not in all instances, perhaps, very thoroughly furnished for his appropriate duties, obliges, or compels, that acts of Congress shall bend, and be made to harmonize with these regulations, and that departmental regulations are superior to the legislative will of the nation.

It has been well said by a learned judge,* who is now reflecting dignity upon the profession—"It is Congress that is supreme in such matters, and not an executive department." "If an improvident or ill advised law is passed, neither we (the court) nor they (the departments) have any right to repeal it; nor any right to place obstacles in the way of its full and perfect execution." This is the only safety of the republic; that the law, and that alone, shall be executed according to its *simple and obvious meaning*. We have no right, when Congress admits evidence of a certain kind, to decide that we will not render a judgment for a claimant unless he produces other evidence.—(McGruder vs. United States, per Gilchrist.) But the Supreme Court has decided in the case of the United States vs. Dickson, (15 Peters, 161,) "the construction given to the laws by any department of the executive government, is necessarily *ex parte*, without the benefit of opposing argument when the very matter is in controversy; and when the construction is once given there is no opportunity to question or revise it by those who are most interested in it. * * * It is not to be forgotten that ours is a government of laws and not of men."—(See the whole decision, *in loc.*)

This is the true doctrine, and whenever it is ignored or disregarded, oppression must inevitably be the consequence. It is hardly necessary for the committee to superadd, that it is the duty of an executive officer to obey the law, not to reverse, much less to pervert or defeat it.

To insinuate that Congress was not well advised as to the facts when it passed the supplemental act, is, in the judgment of the committee, a gratuitous assumption. As before observed, it is their duty to carry out what is plainly expressed in the law; not to question the intelligence, or the motives, under the influence of which the legislative will is made manifest upon the statute book.

Whenever it can be ascertained that a purpose is in contemplation by an executive officer to defeat or to pervert the solemn enactments of the two Houses of Congress, and especially the humane intendment

* C. J. Gilchrist, C. C.

of remedial laws passed for the relief of private claimants, it is an unhallowed usurpation, and should not only be rebuked, but, if persisted in, the highest powers of the legislative branch of the government should be invoked to put it down.

Nor is it competent to the Second Auditor to evade the responsibility which the laws now under review have imposed upon him by "a submission of the question of interest" to the Secretary, or to any other officer. If Congress had intended to embrace the other accounting officers, including the head of the department, it would have said so. But as the claim was to be adjusted by a specific subordinate, not so much, if at all, in his capacity of Second Auditor, but as an arbitrator, somewhat analogous to a commissioner in chancery, he cannot transfer the responsibility which attaches to his position to any other officer, always excepting what may be doubtful as to a question of law, and that, as a matter of course, as well as of usage, must be submitted to the Attorney General.

The laws under which this case is to be adjusted and paid are plain, explicit, and mandatory. They speak with all the authority of the legislative power of the government, and as long as a single dollar of the claimants' demands remain unpaid and unaccounted for, so long will these laws speak potentially to the officer upon whom Congress has devolved the duty of their execution.

The committee have considered this case chiefly as a question of law and construction, embracing, incidentally, other matters involved in it, have arrived at the following conclusions, and possessing, in their judgment, all the force of self-evident propositions:

1. That the Second Auditor, McCalla, threw away or deducted \$8,973 of the claimants' principal, upon a mere presumption.

2. That if he had not rejected the depositions of Harrison, Davis, and Turner, he could not have done so.

3. That these depositions were rejected at the time and on the occasion of making his second or December award; and that he never gave any validity to them nor to the testimony of Thomas Berry.

4. That in estimating the amount and valuations of Fisher's loss, every item was cut down to the lowest figure possible; whereas it was incumbent on the accounting officer to allow the claimants a credit for every item and valuation specified and fairly set out in the testimony.

5. That the testimony which was rejected by the Auditor for want of authentication is now legally authenticated by the executive of Alabama, meeting the condition, and the only condition, required by the supplemental act.

6. That it is not competent to the Secretary of the Treasury to intervene in the case, both laws having confined the matter of adjustment to the Second Auditor exclusively.

7. That it is too late to raise the question of interest, as it is *res adjudicata*, settled and fixed by the officer who allowed it, and sanctioned by two successive Attorneys General, Hon. Isaac Toucey and the Hon. Reverdy Johnson.

8. That the legal signification of indemnity is truly expounded by the late Attorney General, Wm. Wirt, and embraces this case exactly,

and that its application in the administration of the laws now in review cannot be resisted without a manifest infraction or evasion of the law of 1848, passed for the relief of the claimants.

9. That to repeal either of these laws while a large portion of the claimants' demands are unpaid, would be acting in bad faith, and would involve the question of repudiation—a doctrine so odious and discreditable "that to be hated has but to be seen."

10. That inasmuch as the laws already passed are sufficient, if properly administered, to secure a fair and liberal settlement of the claim—an indefinite and standing appropriation having been made in the law referred to in the supplemental act for its payment—the committee recommend that the following resolution be agreed to :

Resolved, That the Second Auditor has exclusive jurisdiction under both the enactments referred to in this report; that the laws already passed are plenary and sufficient to secure to the claimants a fair and liberal adjustment of their demands; that no additional legislation is requisite, and that the committee be discharged from the further consideration of the subject.

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