

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 27, 1873.—Ordered to be printed.

Mr. MORRILL, of Maine, submitted the following

REPORT:

[To accompany bill S. 1233.]

*The Committee on Military Affairs, to whom was referred Senate bill 1233, "to prevent an appropriation therein mentioned from lapsing because of delay in the adjustment," have had the same under consideration, and report:*

That, apparently, the object of the bill is simply to enforce an existing award of the Department of War, made in pursuance of an act of Congress, and to prevent an appropriation for the payment of said award from lapsing in consequence of delay in its adjustment.

The effect of the measure is far more comprehensive in its consequences upon the legislation of Congress, the courts, and the action of the Executive Departments.

By the first clause the Secretary of War is "authorized and require d to carry out the award of the Department made in pursuance of a resolution of Congress, approved June 1, 1860," which resolution was, by joint resolution March 2, 1861, declared rescinded, and all proceedings under it pronounced null and void; which award, moreover, was, in October, 1863, declared to be null and void by the Court of Claims, the claimants having appealed to that court for its enforcement.

By the second clause, an act dated April 12, 1848, by which the Second Auditor of the Treasury was authorized and required "to examine and adjust these claims," and providing that the amount so allowed "be paid out of any money in the Treasury not otherwise appropriated," and under which said Auditor did examine and adjust said claims, and the several amounts allowed were paid, "is hereby re-enacted and made available, any law, resolution, rule or regulation of any Executive Department in conflict therewith to the contrary notwithstanding."

Thus it will be seen that Congress, in 1873, is invited to enforce what is inaptly termed an "award" of the Secretary of War, made by force of a resolution, both of which have been declared null and void by a former Congress and by the Court of Claims, these facts standing upon the records of Congress and court respectively; and to re-enact "the original act" which has been fully executed in the Department of the Treasury, and to make it available to this end.

Upon this showing, Congress would probably hesitate to give its sanction to a proposition so novel, not to say covert, and yet so conclusive in its methods of reaching results, unless it could be made to appear that justice was unattainable by more direct and comprehensible means.

This claim has a history which, it is believed, renders it noticeable in the claims legislation of Congress, and, it is to be hoped, altogether exceptional.

It is supposed to have had its origin in Indian depredations and spoliations of United States troops in Florida at a period as remote as 1813. The first account of it as a claim upon the Government of the United States known to the committee was upon its advent in Congress in 1832, by a petition of that date. It received no substantial recognition from Congress until 1848, when a bill was passed referring the claim to the Second Auditor of the Treasury for examination and adjustment.

The value of the property supposed to have been destroyed by the Indians and troops was adjudged in 1848 by the Second Auditor of the Treasury at \$17,946, one-half of which sum he charged to the Government as the value of property destroyed by United States troops.

On this amount, thus adjudged, there had been paid out of the Treasury of the United States, prior to 1860, the sum of \$66,803.33. To this sum it is now proposed to add the amount of the "award," \$66,519.85, making \$133,323.18; to which sum, upon the principles of legislation that attach to this claim, there will need, *a fortiori*, to be added at least \$40,000 more in interest upon the last-named sum for delay in payment; or, in all, \$173,323.18, a sum greater than the original claim as adjudged in the Treasury Department by \$164,450.18; a net result so anomalous and exorbitant as to confound all legislative sense.

It remains to be stated upon what principles, policy, and "adjudications" sums so disproportioned to the original claim have been taken from the public Treasury and these additional claims are made.

By the act of April 12, 1848, the Second Auditor of the Treasury was required to "examine and adjust the claims of the legal representatives of George Fisher, deceased." Under this act the Auditor adjusted the claims by allowing \$8,973 as a just equivalent for the property destroyed by the United States troops, with interest thereon from February, 1832, when the claimants' petition was first presented to Congress, \$9,062.73, making \$18,035.73, which was paid December 30, 1848. Subsequently the Auditor allowed interest on the \$8,973, awarded as damages, from 1813, (when the destruction occurred,) to 1832, (when the petition was presented,) \$10,504.87, making \$28,540.60; thus allowing \$19,567.60 for interest and \$8,973 for damages.

By the resolution of June 3, 1858, the duties which had been imposed upon the Auditor were devolved upon the Secretary of War. In October, 1858, he allowed for the property destroyed \$18,104, (being \$158 more than the estimated value of the Auditor,) and charged the Government for all the property destroyed. He also allowed interest from the date of the destruction of the property to the date of the adjustment, October 2, 1858, \$48,799.33, making a total of \$66,903.33.

By the resolution of June 1, 1860, the Secretary of War was required to revise his execution of the act of 1858, and restate and settle the account as justice to the claimants, in his opinion, should require.

Under this resolution, Mr. Floyd, then Secretary of War, allowed the further sum of \$66,519.85.

In arriving at this conclusion, he states an account of the legal representatives of Fisher against the United States, in which he finds that he had largely underrated the value of the property in his estimate of 1858, and also finds large accessions to the property destroyed, and reports \$34,952 as the true value, against \$18,104, his former estimate. On this amount interest is recast from—

1813-'14.....	\$98,371 18
Which, with the principal.....	34,952 00
Made a total of.....	133,323 18
Deducting for former payments.....	66,803 33
Leaves a balance of.....	66,519 85

as the award of 1860.

Certain principal facts are noticeable in the progress of this claim; namely, the computation of interest, the allowance against the Government for the damage done to property both by the Indians and the troops of the United States, and the growth of the original claim with the lapse of time.

First, as to the allowance of interest. In no one of the acts providing for the relief of Fisher is the allowance of interest authorized. The uniform rule is that when the law is thus silent, interest is not allowable. As a general proposition the Government pays no interest. The fact that the act of 1848 authorized the Auditor to "adjust the claim on principles of justice and equity," gave him no authority to allow interest.

It seems that the Auditor at first allowed interest from 1832, the date of the presentation of the claim to Congress, and afterward, upon an opinion of the Attorney-General, allowed interest from 1813, the date of the destruction of the property.

This opinion is as follows:

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 6 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.*

It will be seen by a glance at the opinion of the Attorney-General that he omits to deal with the question of interest as resulting from the authority of law or the policy of the Government as to the payment of interest. The question submitted to him was, whether interest was payable from the date of the destruction of the property, or from the presentation of the petition to Congress, and he says: "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."

Thus, it will be observed, he makes the authority to recompute interest to depend upon the *fact* that the Auditor had allowed interest for a portion of the time as an amount to be paid as a "fair and full indemnity," &c. If it was to depend upon that fact, "it would seem to follow," from the determination of the Auditor, that interest from the date of the petition was, in his judgment, "fair and full indemnity." But

we are not left to inference; for the case shows that the Auditor refused to allow interest from the date of the loss. Moreover, the language of the act, relied upon by the Attorney-General as the authority of the Auditor to allow interest, relates altogether to the performance of another duty and the exercise of other authority. The "power to examine and adjust the claim" is given by the first section of the act, and the language relied upon does not appear therein, but is contained in the second section, which authorizes the said accounting-officer to *apportion* the losses caused by the United States troops and the Indians respectively, in such manner, &c., "so as to afford a fair and full indemnity," &c. Nothing can be clearer than that the opinion of the Attorney-General was founded upon a misapplication of the provisions of the act, and nothing clearer than that the Auditor transcended his authority under the act in allowing interest at all, as an incident of the claim.

Upon this erroneous action of the Second Auditor, and not less erroneous opinion of the Attorney-General, many times the amount of the original claim has been taken from the Treasury, against the settled policy of the Government and without due provision of law, and a still larger sum is demanded.

The act of 1848, providing for the adjustment of the claim, recognizes the fact that the destruction of the property had been effected by both troops and Indians. Fisher, in presenting his petition, has presented a claim for *all* the property destroyed. That petition was the basis of the act of 1848. By its terms the Auditor was to take notice of the fact as to such destruction of the property, by both troops and Indians, and to apportion the losses accordingly, allowing only for that caused by the troops.

The proofs introduced in support of the claim show that the loss was caused by the Indians as well as by the troops, and fully justify the apportionment by the Auditor of one-half the loss to the United States.

Hayden, the kinsman and overseer of Fisher, in his affidavit taken in 1831, accompanying the petition, states:

I had the care of Fisher's property. We were compelled to fly to Fort Stephens, between thirty and forty miles. *The Indians there in the settlement destroyed everything they could*; after which the troops who were ordered in pursuit of said Indians, who were commanded by Colonels Carson and Russell, and a number of militia, took and made use of some of the crops and stock which was not taken by the hostile Indians.

To this affidavit he annexes a schedule of the property, and adds:

The schedule here annexed is a true and correct one as near as I could make.

The Auditor adopts this schedule as the basis of his adjustment, and upon this schedule and testimony allowed Fisher one-half of the estimated value of the property destroyed.

No additional claim or proof upon this point appears to have been filed at any subsequent stage of the proceedings; and yet the Secretary of War, in his subsequent review of the doings of the Auditor, charged the troops with the destruction of the whole amount of property destroyed, and places the value of the property at \$18,104, being only \$158 greater than the estimated value of the Auditor.

The growth of the claim with each fresh opportunity is noticeable. By the resolution of 1858, the duty of revising the claim under the act of 1848 was devolved upon the Secretary of War, and Mr. Floyd determined that all the property lost had been destroyed by the United States troops, and awarded accordingly.

In 1860, the same Mr. Floyd, upon a further review of the subject-matter, finds (upon what proof does not appear, and against the sworn

schedule of the overseer of the property, the finding of the Second Auditor, and his own former finding) that the true value of the property lost was \$34,952.

The items of the claim, as seen by Mr. Floyd in 1858, had largely increased as seen by him in 1860. Then the 100 acres of corn, on Bassett's Creek, valued at \$3,000, had increased in value to \$6,000; the 400 head of cattle, valued at \$4,000, had increased to 550 head, valued at \$5,500; 350 stock hogs, valued then at \$3 each, and amounting to \$1,050, are, in 1860, rated at \$5 each and charged at \$1,750.

Seventy-five fat hogs, at \$14 each—\$1,050—had increased to 86 in number, making an item of \$1,204. In place of 4 dozen wine and 125 gallons of whisky, we now have 8 barrels of whisky, \$350; 1 barrel of rum, \$70; and 2 barrels of brandy, \$280.

By this method of computation Mr. Floyd was able to state the original loss of property at \$34,952, and assumed that the whole of it was destroyed by the United States troops, against the positive testimony of Hayden, the overseer, "that the hostile Indians destroyed all they could, and that the troops took and made use of some of the crops and stock"—relying, it may be presumed, upon the well-known repugnance of the Indians for whisky for their exculpation.

He then computes interest upon the same plan, allowing—

For interest on the losses from 1813-'14 to November, 1860, the date of the award.....	\$98,371 18
To which add principal.....	34,952 00
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Making a total of.....	133,323 18
Deduct for former payments.....	66,803 33
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Amount "awarded" by Secretary Floyd.....	66,519 85
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This proceeding, in the bill referred to our committee, is denominated an "award," and we are told, in the statement of the case by Mr. Floyd, is the result of a desire to execute truly the legislative will. The committee do not care to characterize the transaction. The same proposition was before the Committee on Indian Affairs in 1870, and we quote the following from a report of that committee made by the late Senator Davis:

On those payments upon this claim at the Treasury Department, \$8,773, April 22, 1848; \$8,797.94, December 31, 1848; \$10,004.89, May 12, 1849; \$22,881.28, October 12, 1858; and \$16,346.22, November 6, 1858, compute interest on cash from the time of payment to the date to which interest was calculated upon the value of Fisher's property used and destroyed, and the principal and interest make an aggregate of \$82,973.36, which exceeds the aggregate amount of the value of the property used and destroyed, and interest upon that value from the time of its use and destruction, by \$21,091.31; but, compute interest upon the value of the property from February 13, 1813, when the petition was filed, and the claim is overpaid by \$40,096; interest upon it from November 6, 1858, makes the sum of \$68,162.20, which Fisher's representatives now owe the United States. Congress has, in the most liberal spirit and good faith, passed many special acts to have the just claims of Colonel Fisher against the United States for his property used and destroyed by the Army fully satisfied; but when his representatives, after receiving payments upon it amounting to the enormous sum of \$66,903.33, after the second and inexplicable decision of Secretary Floyd, by which he awarded to them the further sum of \$66,519.85, only \$383.48 less than the aggregate amount they had received, were importunately pressing at the Treasury the payment of this flagitious award, the patience of Congress became exhausted, and by joint resolution of March 2, 1861, it repealed the resolution of June 1, 1860, authorizing the Secretary of War to revise his first settlement. But these voracious claimants were not satisfied. On the passage of the rescinding resolution, they filed their petition in the

Court of Claims, setting up the second award of Secretary Floyd, claiming that it adjudged to them the further sum of \$66,519.85, and that their right to that sum was finally and conclusively established by his decision, and asking the judgment of the court against the United States for that amount. Upon hearing the case the prayer of the petitioners was denied and their petition dismissed by the court. But these unappeasable claimants were still not satisfied; being repulsed from the court, they again returned upon Congress, and up to this time have continued their assaults vigorously upon it.

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It cannot be reasonably doubted that when the joint resolution authorizing and directing Secretary Floyd to revise his execution of the act of 1858 passed they knew that this whole claim had been fully paid upon the most liberal principles of equity and justice; that their position, that there was a balance due upon it, was a false pretense, and that Congress was procured to pass that resolution by false and fraudulent representations. The award of Secretary Floyd under it is also false and fraudulent, and utterly null and void.

The committee report that the bill ought not to pass.