54TH CONGRESS, 2d Session. SENATE. DOCUMENT No. 130.

PROTEST OF CHEROKEE DELEGATES.

FEBRUARY 16, 1897.—Referred to the Committee on Indian Affairs and ordered to be printed.

Mr. CULLOM presented the following

PROTEST OF THE CHEROKEE DELEGATES AGAINST THE ENACTMENT OF THE SENATE AMENDMENT TO THE BILL (H. R. 10002, PP. 70-72) PROVIDING THAT THE CLAIMS ASSERTED AGAINST THE FUND NOW WITHHELD FROM DISTRIBUTION TO THE "OLD SETTLERS" OR WESTERN CHEROKEE INDIANS, AS PROVIDED IN THE ACTS OF CONGRESS APPROVED AUGUST 23, 1894 (28 STAT. L., P. 451), AND JUNE 10, 1896 (29 STAT. L., P. 344), BE REFERRED TO THE COURT OF CLAIMS FOR ADJUDICATION AND SETTLEMENT.

The Honorable the Senate and House of Representatives:

The undersigned delegates of the Cherokee Nation, being specially charged with their other duties, to urge upon Congress such considerations as may seem proper for the protection of their brethren, the "Old Settlers," or Western Cherokee Indians, against the fraudulent and unfounded claims asserted against them by William S. Peabody, the estate of James J. Newell, by John A. Sibbald, assignee, of W. W. Wilshire, by the estate of E. John Ellis, by C. M. Carter, Joel L. Baugh, by the estate of C. M. McLoud, and Marcus Erwin, by Theodore H. N. McPherson, Samuel W. Peel, Reese H. Voorhees and John Paul Jones, Belva A. Lockwood, and Stephen W. Parker submit with great respect, for the consideration of Congress, in connection with the discussion of the proposed Senate amendment the following statement and protest, to wit:

First. That the false and fictitious character of the claims asserted by said parties above named against said "Old Settlers," or Western Cherokee Indians, has heretofore been shown and made known to Congress in Senate Document No. 77, Fifty-fourth Congress, first session, pages 8 to 20 and 23 to 25, and in several communications addressed by us to the Senate and House of Representatives during the discussion of said claims in the first and second sessions of the present Congress; but notwithstanding the unfounded character of said claims has been revealed and made known to Congress, the balance of the fund belonging to said Indians is still wrongfully withheld from them, and without right retained in the custody of the United States.

Second. That the said Senate amendment to the pending Indian appropriation bill proposes in its legal effect, and as the result of its enactment, to direct the Court of Claims to render judgments which shall absorb and distribute to said parties the balance of said fund without affording said Indians the right to make such legal and proper

defense against the validity of said claims as they would be able to make if said Senate amendment is rejected or so modified as to permit said Indians to make all legal and proper defense to said claims.

Third. That said proposed Senate amendment, in its first paragraph, provides:

> That legal and equitable jurisdiction be, and the same hereby is, conferred upon the Court of Claims, to finally hear and determine, without the right of appeal, the claims of all persons upon the remainder of the fund withheld from distribution out of the money derived from 35 per cent of the judgment in favor of the Old Settler or Western Cherokee Indians against the United States. And the Old Settler or Western Cherokee Indians, for the purposes of the actions hereby authorized, shall be constituted a tribe of Indians.

It is respectfully submitted that Congress does not possess the constitutional power to declare that a small band of Indians, now being not more than one-fourth of the whole number of Cherokees, shall be "considered a tribe of Indians" for any purpose. It is not an appropriate exercise of the "power to regulate commerce with the Indian tribes" (Constitution, Art. I, sec. 8) for Congress to declare that the Old Settlers or Western Cherokee Indians are a tribe of Indians, when the treaties made by the United States with the Cherokee Indians recognize no such division or band as distinct from the tribe itself.

The Supreme Court declares in the case of The United States *v.* Old Settlers (148 U. S. R., 427, 478) as follows:

> The Old Settlers or Western Cherokees are not a governmental body politic, nor have they a corporate existence nor any capacity to act collectively.

The treaty concluded between the different divisions of the Cherokee Nation and the United States on the 6th of August, 1846, made them one tribe, which the United States has since recognized for all the purposes required in the conduct of the affairs of said nation in its relations with the United States. Since that date the United States has made treaties with the Cherokee Nation, but none with the Old Settlers, or Western Cherokee, Indians.

It is respectfully suggested that the persons who are advocating the payment of these rejected and unfounded claims might with propriety be required to show from what source Congress derives the power to create "a tribe of Indians" within a tribe with which the United States has made treaties which protect them from such an invasion of their rights by Congress. It might with equal propriety be assumed that, under the power "to regulate commerce among the several States," Congress might pick out of the counties in the State of Illinois the county of Sangamon, and by legislative enactment declare "that, for the purpose of a suit" proposed to be brought, the county of Sangamon should be considered the State of Illinois.

The absurdity of that proposition is only equaled by the declaration of the Senate amendment that the "Old Settlers," or Western Cherokee, Indians, shall be "considered a tribe of Indians." The accomplishment of that fact is not within the legislative power of Congress.

Fourth. The Senate amendment not only provides that those Old Settlers, or Western Cherokees, shall be considered "a tribe of Indians" in contempt of the fact, and in violation of the truth that they are not so, but it also provides that they shall have power to contract through their duly authorized commissioner, agent, or attorney, and the operation of sections 2103 and 2104 of the Revised Statutes of the United States are otherwise hereby suspended as to said actions, and jurisdiction is hereby conferred upon said court to hear and determine said claims and award judgment thereon.

The purpose of this provision is not only to create a new and anoma-

lous jurisdiction, to grant new trials to those claimants whose claims were examined and finally disposed of by the tribunal created by the act of August 24, 1894—the Commissioner of Indian Affairs and the Secretary of the Interior—but to make valid, binding, and enforceable against these Indians those contracts made by said claimants which were void for all purposes, under the provisions of sections 2103 and 2104 of the Revised Statutes, which it is proposed to suspend for the purposes of the suits which this amendment authorizes to be brought against these Indians in the Court of Claims.

This provision not only affects the remedy but the right. It is an elementary and familiar principle, that the laws which subsist at the time and place of making of a contract and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms; and any statute is unconstitutional and void which introduces a change into the express terms of the contract, its legal construction, its validity, its discharge, or, within certain limits, the remedy for its enforcement.

The purpose of that provision of the Senate amendment is to make legal and valid the void contracts upon which nine of the claimants of this fund whose claims were rejected in part, or were not presented for examination as provided in the act of August 23, 1894, must base their right of action in the Court of Claims. As none of these nine claimants anywhere show the slightest merit in their claims for services alleged to have been rendered to these Indians, there does not seem to be any justification for suspending the wholesome provisions of the above sections of the Revised Statutes, in order that they may be enabled to maintain an action upon contracts, which are now illegal and void.

The proposition to suspend the provisions of statutes of the United States in order that the claimants, for whose benefit the Senate amendment is proposed to be enacted, may have another chance to plunder these Indians, is as rare as it is impudent.

Fifth. The Senate amendment further provides that "separate actions shall be brought by each of said claimants or the legal representatives thereof, against the 'Old Settlers or Western Cherokee Indians' and the United States, within sixty days from the passage of this act."

The Old Settlers or Western Cherokee Indians are not liable to suit at the instance of any citizen of the United States without their consent. They have no corporate, separate, or political existence. They are a part of the aggregate number of Indians which comprise and make up the Cherokee Nation. A suit authorized against the "Old Settlers or Western Cherokee Indians" is in its legal effect a suit against the Cherokee Nation. The Cherokee Nation, under the several treaties made by it with the United States, is so far sovereign and independent of the United States as to be exempt from any suit brought against it without its consent by a citizen of the United States, although such suit may have been authorized by an act of Congress. Congress has no power to authorize such suit.

The enactment of a statute authorizing such a suit is not an appropriate exercise of the constitutional power of Congress "to regulate commerce with the Indian tribes," or "to make all needful rules and regulations respecting the Territory or other property belonging to the United States." The controversy between these Indians and the claimants of said fund who are named above is an individual controversy between said Indians and said claimants. and Congress has no power to confer upon the Court of Claims jurisdiction of such a controversy.

Sixth. Congress can confer upon the Court of Claims no part of the

judicial power, unless the subject-matter to which the jurisdiction conferred relates, has reference to or includes a "controversy to which the United States shall be a party."

The undersigned protest that the jurisdiction proposed to be conferred upon the Court of Claims by the Senate amendment does not include any "controversy" to which the United States is a party. There had been a controversy in regard to the right to said fund between said Indians and the United States, but it had been determined in favor of the Indians by the Court of Claims, and finally determined by the Supreme Court on the 5th day of April, 1893. The absolute right of these Indians to this fund was completely assured when Congress on the 23d of August, 1894, directed the payment to these Indians of the sum of $800,386.31, appropriated to pay the judgment rendered in their favor by the Supreme Court. The fund referred to in the Senate amendment, which is the balance of said sum of $800,386.31, was further declared to belong to said Indians when on the 18th day of January, 1896, the Commissioner of Indian Affairs and the Secretary of the Interior reported to the Senate their execution of the powers conferred and the duties devolved upon them by the act of August 23, 1894. (See S. Doc. No. 77, Fifty-fourth Congress, first session.)

Those officers reported that under the authority of said act they had adjusted and paid, out of 35 per cent of said fund retained by them for that purpose, claims to the amount of $193,932.57. The balance of said fund remaining subject to the order of the Commissioner of Indian Affairs and the Secretary of the Interior belonged then, and belongs now, to said Indians.

There is not now any "controversy" between the United States and the said Indians which Congress has the power to refer to the Court of Claims for determination. It is equally clear that there is no "controversy" between the United States and the claimants of said fund who are named above. The "controversy" in regard to the distribution of said fund, not only as to these Indians, but as to the United States, was finally settled and closed by the adjustment and payment of the claims asserted against said fund which were submitted to and determined by the Commissioner of Indian Affairs and the Secretary of the Interior.

There is therefore no "controversy" existing between the United States and the claimants of said fund which Congress, in the exercise of its constitutional powers, can confer upon the Court of Claims.

Seventh. It is respectfully submitted by way of protest that there is no cause existing, so far as these claimants are concerned, which demands the enactment of a statute so anomalous and extraordinary as that contemplated by the Senate amendment. The only reason suggested for legislation so unusual in its provisions is found in the statement that these claimants are not satisfied with the decisions of the tribunal provided for them by Congress.

The Senate amendment not only grants a new trial and a rehearing of the claims asserted by said claimants against said Indians before a new tribunal, without showing any reason or cause therefor which the law would recognize as sufficient to justify such proceeding, but in such new trial the proposed statute deprives the said Indians of a just and legal defense, which in such new trial they might interpose as a complete defense against the allowance of said claims or the rendition of judgments thereon.

This result is to be accomplished by the following language of the Senate amendment, to wit:

> And said actions shall be as speedily as practicable brought to trial upon joinder

of issue, and no action shall be barred or right impaired by reason of any previous award, payment, or ruling made by the Secretary of the Interior.

The purpose of the above provision of the Senate amendment is to deprive these Indians, in the litigation which the proposed amendment will authorize, of the benefit and advantage of numerous decisions of the Supreme Court which they might otherwise invoke to defeat the suits proposed to be brought against them, although the United States, is, by the amendment, to be made a codefendant with said Indians. This will become exceedingly plain by a reference to the following authorities:

In the case of Adams *v.* The United States (7 Wall., 263), the Supreme Court decided that where a citizen had voluntarily submitted his claim for decision to a commission appointed by the Secretary of War which had no judicial power, and the amount adjusted and payment accepted by the claimant, the proceeding is final; and it would be an error in the Court of Claims to rehear and revise the allowance of such a claim so heard and decided upon.

In the case of Childs et al. *v.* The United States (12 Wall., 232), the court again affirmed these principles, although in that case the claimants had not voluntarily submitted their claims to the Commission. They had, however, accepted the money paid on account of the allowance made to them by the Commission, and by reason of such payment by the United States and its acceptance by the claimants, the Supreme Court held that they could not recover on their contract any further sum in the Court of Claims.

In the case of Justice *v.* The United States (14 Wall., 535, 550) the Supreme Court held it to be thoroughly settled "that where a claim against the Government was referred to a commission which was without judicial power, and the parties whose claim was disputed went before it, participated in its proceedings, and took the sum found to be due him without protest, he will be held to have accepted it in full satisfaction of his demand."

These salutary principles, inspired by a high conception of the demands of absolute justice, are repeated and affirmed by the same court in the following cases:

In Mason *v.* The United States (17 Wall., 67, 75) the court said:

> None of those cases (cited supra) proceed upon the ground that such a commission possessed any judicial power to bind the parties by their decision, or to give the decision any conclusive effect. Nor can such a commission compel a claimant to appear before them and litigate his claim, but if he does appear and prosecute it, or subsequently accepts the sum awarded as a final settlement of the controversy, without protest, he must be understood as having precluded himself from further litigation.

The same principles are especially recognized and affirmed in the case of Grandin, administratrix of Piatt, *v.* The United States (22 Wall., 496, 513).

Neither these Indians nor those who are endeavoring to protect them from being plundered by a combination composed of the special advocates of the Senate amendment and the claimants who are to be benefited by its enactment are able to understand why it is that statutes of the United States should be suspended, or decisions of the Supreme Court should be directed to be ignored and set aside in judicial proceedings which are to be authorized by this amendment, in order that the fraudulent and unfounded claims which are to be asserted against said Indians under the authority of said amendment may be successfully prosecuted in the Court of Claims. They can neither understand nor imagine the necessity which the existence of these claims creates

for conferring upon the Court of Claims this new and unusual jurisdiction; nor the reasons why a new rule of decision which ignores and sets aside the decisions of the Supreme Court should be established for the determination of these cases. The Senate amendment might with equal propriety have declared in whose favor and for what amount the Court of Claims should render its judgments under the jurisdiction proposed to be conferred by that amendment.

We beg Senators and Representatives to consider whether the issues involved in a judicial readjustment of claims of such questionable character as are here the subject of controversy are of such gravity as to justify so great a departure from elementary and long-established principles as is involved in the enactment of the Senate amendment.

We might with propriety protest against the further detention of this money in order that these Indians may continue to be burdened and harrassed with the trouble and expense of claims asserted against said fund, which said Indians and their attorneys, and the Commissioner of Indian Affairs and the Secretary of the Interior have shown to be without the slightest merit.

We might point out the injustice to these Indians of subjecting them to the heavy expense which a proper defense of the proposed litigation will impose upon them, and strenuously object to the imposition of such a burden upon them. We might with propriety refer to the fact that for two years these Indians have been deprived of the use of this fund without right, and upon pretext so frivolous as to excite derision, and by reason thereof protest against the continuance of an injustice to them, which will be prolonged by the litigation which is to be authorized by the Senate amendment.

We have, however, thought it more useful to call the attention of Senators and Representatives to those more serious objections to the proposed legislation to which we have here specially directed the attention of Members of the Senate and House of Representatives, in the belief that these objections must at once attract the attention of Congress and secure the rejection of the Senate amendment.

Respectfully submitted as the earnest protest of the Cherokee delegates, in behalf of their brethren of the Old Settlers, or Western Cherokee, Indians.

GEORGE W. BENGE,
W. W. HASTINGS,
Cherokee Delegates.

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