RELIEF OF THE HEIRS OF THE EASTERN CHEROKEE INDIANS

HEARINGS

BEFORE A

SUBCOMMITTEE OF THE COMMITTEE ON INDIAN AFFAIRS

HOUSE OF REPRESENTATIVES

SIXTY-FOURTH CONGRESS

FIRST SESSION

ON

H. R. 3680

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RELIEF OF HEIRS OF THE EASTERN CHEROKEE INDIANS.

SUBCOMMITTEE OF THE
COMMITTEE ON INDIAN AFFAIRS,
HOUSE OF REPRESENTATIVES.

Present: Representatives Church (presiding), Tillman, and Dempsey.

Mr. CHURCH. Now, you gentlemen wish to be heard on H. R. 3680, I believe. I would say that unless you prefer to appear, a brief probably would be just as helpful to the committee. Of course, if you prefer to make a short statement in regard to it, we will be glad to listen to you. But I believe a brief would answer all the purposes probably better than a verbal statement.

STATEMENT OF MR. WILSON L. TOWNSEND, OF WASHINGTON, D. C., REPRESENTING EASTERN CHEROKEE INDIANS.

Mr. SMITH. I think in that case we would like to take advantage of both opportunities, make a short statement of not over half an hour, and then submit briefs in addition.

Mr. CHURCH. Very well; that is satisfactory.

Mr. TOWNSEND. This bill seeks to remedy an error in the distribution of a fund that was due the heirs of the Eastern Cherokee Indians. It was appropriated by Congress for them and the Supreme Court ordered it paid to them, but by an error in the mandate of the Supreme Court, through an order of the Court of Claims changing that mandate, the fund was distributed to other Eastern Cherokee Indians largely, and these people only got a small share of what they were entitled to. The facts leading up to that are as follows——

Mr. CHURCH. Now, excuse me there—the Indians that the fund was authorized to be distributed to only received a part of it, and some other Indians that had nothing to do with it, were not the distributees of the fund, received part of it?

Mr. TOWNSEND. The mandate was changed. The order was that the heirs of these Eastern or Emigrant Cherokees should be paid this fund, and the Court of Claims changed the mandate somewhat, and the fund was paid to the Eastern Cherokees per capita—the descendants of these people—and of course these heirs got some of it, as coming in under the general class, but instead of being paid to them directly and exclusively, it was distributed among them and these others.

Mr. CHURCH. In order to get this straight, who were the Eastern Cherokees?

Mr. TOWNSEND. They were Cherokees living east of the Mississippi up to 1835, in Georgia, Alabama, North and South Carolina, and Tennessee, 16,000 of them. A good many of the Cherokees had already gone west of the Mississippi River of their own accord, but

in 1835 the Government made this treaty that has been mentioned before, whereby these Indians were to give up their lands east of the Mississippi and move west. The Government agreed to pay them a certain amount of money, $5,000,000 I believe it was. Then they moved in accordance with this treaty, but the money was not paid. Then came the treaty of 1846, when all the rights of these Eastern Cherokees were supposed to be settled up. In that treaty the Government provided for the payment of this sum which had not been paid in accordance with the treaty of 1835. If I may read article 9 of that treaty—it covers our claim very largely. Article 9 provided:

The United States agree to make a fair and just settlement of all moneys due to the Cherokees, and subject to the per capita division under the treaty of 29th December, 1835, which said settlement shall exhibit all money properly expended under said treaty and shall embrace all sums paid for improvements, ferries, spoliations, removal, and subsistence, and commutation therefor, debts and claims upon the Cherokee Nation of Indians, for the additional quantity of land ceded to said nation; and the several sums provided in the several articles of the treaty to be invested as the general funds of the nation, and, also, all sums which may be hereafter properly allowed and paid under the provisions of the treaty of 1835. The aggregate of which several sums shall be deducted from the sum of $6,647,067, and the balance thus found to be due shall be paid over per capita, in equal amounts, to all those individuals, heads of families, or their legal representatives, entitled to receive the same under the treaty of 1835, and the supplement of 1836, being all those Cherokees residing east at the date of said treaty and the supplement thereto.

This treaty affirmed the prior treaty and assured to the Cherokees who moved west their money due them under the treaty of 1835. The money was distributed in 1852 on rolls that had been made up in 1851; but in paying this money the Government kept back a part of it as the cost of removal of these Eastern Cherokees to their new lands west of the Mississippi. Ever since 1852 these Cherokees have been petitioning Congress, and complaining that this was an unjust charge, and that the cost of removal was to have been paid by the United States.

Mr. CHURCH. How much was the cost of removal?

Mr. TOWNSEND. It was later found by the accountants to be about $1,111,284.

Mr. CHURCH. That is the amount you are asking for?

Mr. TOWNSEND. That is the foundation of the case. It was acted upon, passed through the courts, and ordered paid with interest. It was distributed, but was distributed to the wrong parties; that is our claim in large part; and these people here are claiming their right share of that sum, which was paid to others instead of being paid to them.

Mr. CHURCH. How many were paid?

Mr. TOWNSEND. It was to all the eastern Cherokees by blood per capita; the main fact comes out in the order of the court. Our contention concerns the method of distribution, not the main claim, which has been allowed all the way through. But the facts that we will bring out show that our claim arose out of the method of distribution. The claim has its foundation in the decisions of the Court of Claims; so that if I can submit those later on I think that point will be made clear.

In 1893, by the act of March 3, Congress referred this matter to the Secretary of the Interior with instructions to employ accountants and strike an account between the United States and the Cherokees. Slade and Bender were appointed by the Secretary and made an

accounting in which they stated that this sum was due the Cherokee Indians and was a charge against the United States and not against this fund—the sum of $1,111,000. This was referred in 1902 to the Court of Claims. The Court of Claims passed on it and also found the sum to be due the Cherokees.

With regard to the distribution of this item the Court of Claims stated in its opinion, after providing for the payment of expenses of ascertaining title to this money, and attorneys' fees, etc., as follows:

> The remainder to be distributed directly to the eastern and western Cherokees, who were parties either to the treaty of New Echota, as proclaimed May 23, 1836, or the treaty of Washington of August 6, 1846, as individuals, whether east or west of the Mississippi River, or to the legal representatives of such individuals.

That is the vital part of this decree. This was appealed to the Supreme Court and affirmed, and the Supreme Court made a modification of the mandate so that the old settlers already west of the Mississippi would be excluded from participation. As amended the Supreme Court sent it back, and the Court of Claims modified its decree in accordance with the decree of the Supreme Court. The Court of Claims then referred the matter to the Secretary of the Interior and told him to appoint a commissioner to make up the roll of those entitled to share in the distribution, and to make the distribution on the basis of the roll of 1851, which is the one upon which the main part of this fund was paid when it was due, in accordance with Article IX of the treaty of 1846, which I read before.

Mr. Guion Miller was appointed the agent of the department for this purpose. His procedure was as follows—this is his report to the Court of Claims, February 4, 1910:

> Immediately upon my appointment as special agent of the Office of Indian Affairs I prepared a notice in the name of the commissioner which bore date of August 20, 1906, to all eastern Cherokees to file their applications for participation in the fund with the Commissioner of Indian Affairs by January 31, 1907. This advertisement set forth that the rolls of 1851, upon which the per capita payment to the eastern Cherokees was made would be accepted as a basis and the fund would be distributed to the individuals named in said rolls of 1851 or to their legal representatives.

Mr. Miller, afterwards, in 1907, reported that the distribution which he had contemplated—a per stirpes distribution—under the order of the court was impracticable. The Secretary of the Interior sent that report to the Court of Claims, and the Court of Claims had a hearing on the proposition and then vacated its previous order and entered the following order:

> It further appearing to the court that the lands disposed of by the eastern Cherokees under the treaties of 1835–36 and 1846 were owned by them as a community and the rights arising under said treaties, as established by the decree of May 29, 1906, accrued to the said eastern Cherokees as communal owners of said land; and it further appearing from the report of Special Agent Guion Miller, accompanying the reference of the Secretary of the Interior of February 20, 1907, above referred to, that a per stirpes distribution to the eastern Cherokees who were parties to the treaties of 1835–36 and 1846 is impracticable; it is therefore further ordered that the commissioner hereinafter named shall enroll, as entitled to share in the fund arising from said decree of May 28, 1906, all such individual eastern Cherokee Indians, by blood, living on May 28, 1906, as shall establish the fact that they were members of the eastern Cherokee Tribe of Indians at the date of the treaty of 1835–36 and 1846 or are descendants of such persons.

The committee will see the change there in the order. The prior order of the Court of Claims, which I have read, was that the remainder should be distributed to the parties—individuals, whether east or west of the Mississippi River, or to their legal representatives.

Mr. Miller was then reappointed agent of the Court of Claims, in compliance with the second order of the court, and made up a roll of the Cherokee Indians by blood living in the Cherokee country, eastern and emigrant Cherokees and parties to those treaties of 1835 and 1836, or the descendants of them. This roll of his was returned to the Court of Claims on February 4, 1910. On March 7, 1910, the court approved this roll, and distribution was commenced.

On October 17, 1910, a petition was filed on behalf of the eastern Cherokee Indians in the Supreme Court of the United States for a writ of mandamus to compel the Court of Claims to distribute this fund in accordance with the original order of the Supreme Court of the United States.

The Supreme Court heard arguments on this petition and dismissed it on the sole ground of laches. They did not take up the merits of the case at all, but said the petitioners had slept on their rights, and dismissed the petition. A bill was subsequently introduced in Congress for their relief about two years ago. It was not acted upon, and this bill was subsequently reintroduced.

Mr. Smith is going to take up the legal phases of the argument. I was going to state the facts, and I hope I have made them clear.

I wish to file the following brief:

BRIEF SUBMITTED AS PART OF RECORD IN EASTERN CHEROKEE INDIAN CASE.

STATEMENT OF FACTS.

This bill seeks to correct an error in the distribution of a fund due the *heirs of the eastern or emigrant Cherokees*, appropriated by Congress, and directed by the Supreme Court of the United States to be paid to them, which was in large part diverted from them and paid to *the descendants of eastern Cherokees per capita* through an order of the Court of Claims changing the original mandate of the Supreme Court.

The facts are these:

Prior to 1835 there were some 16,000 Cherokees living east of the Mississippi whose lands were desired for settlement. In 1835 a treaty was entered into between these Cherokees, called eastern Cherokees to distinguish them from others who had *already* moved west, and the United States (vol. 7, Stat. L., 488), whereby, in consideration of the removal of these Cherokees to lands provided for them west of the Mississippi, the United States agreed to pay them $5,000,000. Part of this sum was to be charged off in various ways and the balance distributed equally among all of the people of the Cherokee Nation east.

The Cherokees duly removed west, but the payment agreed upon was not made, and in 1846 a new treaty was made (9 Stat. L., 871) to settle up the matter, which provided as follows, in Article IX:

"ART. IX. The United States agree to make a fair and just settlement of all moneys due to the Cherokees, and subject to the per capita division under the treaty of 29th December, 1835, which said settlement shall exhibit all money properly expended under said treaty and shall embrace all sums paid for improvements, ferries, spoliations, removal, and subsistence, and commutation therefor, debts and claims upon the Cherokee Nation of Indians, for the additional quantity of land ceded to said nation, and the several sums provided in the several articles of the treaty to be invested as the general funds of the nation, and also all sums which may be hereafter properly allowed and paid under the provisions of the treaty of 1835. The aggregate of which said several sums shall be deducted from the sum of $6,647,067, and the balance thus found to be due *shall be paid over per capita, in equal amounts, to all those individuals, heads of families, or their legal representatives* entitled to receive the same under the treaty of 1835 and the supplement of 1836, being all those Cherokees residing east at the date of said treaty and the supplement thereto." [Italic ours.]

Distribution under this treaty was made in 1852, on rolls prepared the previous year with the exception of a sum charged off as removal expenses, being the cost of the emigration from the lands east of the Mississippi to Oklahoma. That sum is the one now under consideration.

Ever since 1852 these Eastern Cherokees have claimed that the charge for removal was an improper one, as the United States was pledged to bear this expense. Congress was petitioned constantly, and finally, under the act of March 3, 1893, the controversy was referred to the Secretary of the Interior with instructions to employ accountants to make an account of moneys due the Cherokees. Messrs. Slade and Bender were thereupon appointed by the Secretary, and after nearly two years of work they submitted their report, which was transmitted to Congress January 7, 1895. (H. Ex. Doc. No. 182, 53d Cong., 3d sess.) This report found that there was due the Eastern Cherokees, among other items, the sum of $1,111,284.70, being the expense of removal improperly charged to the treaty fund. Nothing further was done in this matter until the act of July 1, 1902, by which the Court of Claims was given jurisdiction to hear and determine the claims of the parties claiming this fund.

After extended arguments and hearings, on May 18, 1905, the Court of Claims decided in favor of the claimants to this fund, and stated in its decree, with regard to the item of $1,111,284.70 for removal expenses, as follows:

* * * * * * *

"Second. The remainder to be distributed directly to the Eastern and Western Cherokees who were parties either to the treaty of New Echota, as proclaimed May 23, 1836, or the treaty of Washington of August 6, 1846, as individuals, whether east or west of the Mississippi River, or to the legal representatives of such individuals."

* * * * * * *

(See opinion Court of Claims in 40 Ct. Cls., 252.)

On appeal to the Supreme Court of the United States this decree was affirmed April 30, 1906 (202 U. S., 101), with a modification which would more clearly exclude the Old Settlers, or Cherokees already residing west of the Mississippi at the time of the emigration of those east, from participation in this fund. In directing this modification the Supreme Court said:

"We concur with the Court of Claims in the wisdom of rendering judgment in favor of the Cherokee Nation, subject to the limitation that the amount thereof should be paid to the Secretary of the Interior, to be distributed directly to the parties entitled to it, but we think that the terms of the second subdivision of the fourth paragraph of the decree, in directing that the distribution be made to the 'Eastern and Western Cherokees,' are perhaps liable to misconstruction, although limited to those 'who were parties either to the treaty of New Echota, as proclaimed May 23, 1836, or the treaty of Washington of August 6, 1846, as individuals, whether east or west of the Mississippi River.' This should be modified so as to direct the distribution to be made to the Eastern Cherokees as individuals, whether east or west of the Mississippi, parties to the treaties of 1835-36 and 1846, and exclusive of the Old Settlers."

The Court of Claims immediately thereafter modified its decree in accordance with this decision, and on May 28, 1906, entered an order directing the Secretary of the Interior to prepare a roll of persons coming within the description entitled to share in this fund, taking as a basis the rolls of 1851 (upon which the original distribution to the Eastern Cherokees of the main part of the money due them was made), and directing him to make such distribution in pursuance of Article IX of the treaty of 1846, before referred to.

The Secretary of the Interior appointed Guion Miller as special agent or commissioner to prepare the rolls, and his method of procedure is set out in his report to the Court of Claims of February 4, 1910, and is as follows:

"Immediately upon my appointment as special agent of the Office of Indian Affairs I prepared a notice in the name of the commissioner, which bore date of August 20, 1906, to all Eastern Cherokees to file their applications for participation in the fund with the Commissioner of Indian Affairs by January 31, 1907. This advertisement set forth that the rolls of 1851, upon which the per capita payment to the Eastern Cherokees was made, would be accepted as a basis and the fund would be distributed to the individuals named in said rolls of 1851 or to their legal representatives."

Early in 1907 Guion Miller reported to the Interior Department that a per stirpes distribution, which he had contemplated, was impracticable. This report was transmitted by the Secretary to the Court of Claims on February 20, 1907.

Thereafter, on the 28th of April, 1907, the Court of Claims, after holding a hearing on the question, vacated its previous order in the following terms:

* * * * * * *

"It further appearing to the court that the lands disposed of by the Eastern Cherokees under the treaties of 1835-36 and 1846 were owned by them as a community, and the rights arising under said treaties, as established by the decree of May 28, 1906, accrued to the said Eastern Cherokees as communal owners of said lands; and it further appearing from the report of Special Agent Guion Miller, accompanying the

reference of the Secretary of the Interior of February 20, 1907, above referred to, that a per stirpes distribution to the Eastern Cherokees who were parties to the treaties of 1835–36 and 1846 is impracticable; it is therefore further ordered that the commissioner hereinafter named shall enroll, as entitled to share in the fund arising from said decree of May 28, 1906, all such individual Eastern Cherokee Indians, by blood, living on May 28, 1906, as shall establish the fact that they were members of the Eastern Cherokee Tribe of Indians at the date of the treaty of 1835–36 and 1846 or are descendants of such persons. * * *."

Guion Miller was then reappointed agent of the Court of Claims, and he proceeded to the Cherokee country and there made up a roll of all Cherokees coming under the order of the court.

On February 4, 1910, Miller reported to the Court of Claims that the roll was complete, and on March 7, 1910, the court approved this roll and the fund was distributed per capita to those whose names appeared thereon.

On October 17, 1910, a petition for a writ of mandamus was filed in the Supreme Court on behalf of the Cherokees, who claimed that the original decree called for a per stirpes distribution of this fund, asking that the Court of Claims be commanded to obey the mandate of the Supreme Court. Briefs were filed, and after hearing arguments the Supreme Court dismissed the petition on the sole ground of laches. The Eastern Cherokees now appeal to Congress for relief.

A bill was introduced in the last Congress, but no action taken thereon.

Mr. CHURCH. We will now hear Mr. Smith.

STATEMENT OF MR. FRANK S. SMITH, OF WASHINGTON, D. C., REPRESENTING EASTERN CHEROKEE INDIANS.

Mr. SMITH. First of all, gentlemen, we want you to understand exactly what it is we are asking. If you do not understand it fully, I wish you would cross-examine me until you do.

What we are asking is a per stirpes distribution. We are not asking a per capita distribution as of this time, but a per stirpes distribution, which is a per capita distribution as of 1835; that is, that it be given to the heirs of each one of those individuals who was entitled to share in the distribution at that time. Therefore we call that, and in our brief it is referred to as a per stirpes distribution.

The first proposition that we want to make is that there can be no question—and I believe no Member of Congress will question the fact—that there was a real indebtedness from the United States to the Eastern Cherokees in the year 1906. That indebtedness, of course, is proven by (1) the Slade and Bender accounting, which showed the indebtedness to be exactly as we claim; (2) the decrees of the courts—first, the decree of the Court of Claims, then the Supreme Court decree, the mandate of the Supreme Court on appeal from the Court of Claims, and then the final decree of the Court of Claims under the mandate of the Supreme Court—and the final distribution. These all show that there was a sum in existence—a debt in existence. The only payment for that debt was this per capita distribution, a distribution equally among all the descendants of these Eastern Cherokees; whereas it should have been to these individual members of the Eastern Cherokees entitled to share in the distribution under the treaties of 1835, 1836, and 1846, as parties thereto, the heirs of each deceased party entitled to take his share as they would take other property belonging to him.

Now, no further attempt will be made to show the existence and amount of the claim, and the only question is, should this payment have been made per stirpes or per capita? In other words, was the payment made a real satisfaction of the obligation?

In that regard it is necessary to first consider a couple of preliminary points that come up in the interpretation of these different treaties and decisions.

Some of these may seem self-evident to you, and the only reason we advance them is the fact that in prior briefs these same points have been advanced by the opponents to our theory. The first point is the use of the words "per capita" in the original treaty. That clearly does not mean per capita as of to-day. Of course, distribution was to be per capita as of that date; that is the fact upon which we base our claim. The words "per capita" in that treaty were used to distinguish this fund from the communal property. "Per capita" as of to-day means an entirely different thing from "per capita" of that date, clearly, and what we claim as a per stirpes distribution is a per capita distribution as of that date—not as of to-day, but as of that date. A per capita distribution as of that date is directed in the original treaties of 1835 and 1836 and in the treaty of 1846. We make these points now because this probably will be brought to the attention of the members of the committee by those opposing this bill, and we wish to discount them at the start, if possible. The words in the treaty of 1835 upon which the whole claim is based, "to be divided equally," mean divided equally at that time, not to-day. That again is the basis of our claim and can not be twisted to direct an equal division to all descendants in 1910 or to-day.

In the opinion of the Supreme Court in the Old Settlers case the fund is referred to as the "per capita" fund, to distinguish it from funds or lands in which there was a community interest. That what we call a per stripes distribution was directed by the court in that case is shown by the fact that the actual distribution in that case was per stirpes; that is exactly what we are asking here, a distribution per capita as of the original date.

The words "legal representatives" appear in the treaty of 1846, and it seems to us that no words could have a clearer meaning. I do not mean a clearer meaning as to whether they mean heirs or administrators or next of kin. That is a disputed question, but that they mean one of those two I think is obvious. We do not care which one you take, but those words should be interpreted to mean either heirs or next of kin. So far as we can find there has never been any holding that these words "legal representatives" mean other than heirs or next of kin. Further, the context shows conclusively that that is the meaning, because otherwise only the survivors of the original treaties would take. In the treaty of 1846 it says: "To the Eastern Cherokees, parties to the treaty of 1835, and their legal representatives." If "legal representatives" does not mean heirs or administrators, then only the survivors take, as there is no provision to cover descendants other than the words "legal representatives." Now that clearly was not the meaning, and I do not suppose anybody ever advanced that as the meaning of the treaty.

Another disputed question is the question of whether or not the mandate of the Supreme Court of the United States of April 29, 1906—that is, the mandate when the case was before the Supreme Court the first time on the appeal from the original decision of the Court of Claims, not the mandamus case—did or did not affirm a per stirpes

distribution. That question comes up in this way: The original decree of the Court of Claims admittedly directed a per stirpes distribution, using the language quoted in the opinion below immediately followed by the words "or to the legal representatives of such individuals." This decree of the Court of Claims was amended, and the question is whether or not the words "or the legal representatives of such individuals" were amended or left untouched.

The purpose of the amendment is shown clearly in the language of the opinion of the Supreme Court:

"We concur with the Court of Claims in the wisdom of rendering judgment in favor of the Cherokee Nation, subject to the limitation that the amount thereof should be paid to the Secretary of the Interior, to be distributed directly to the parties entitled to it, but we think that the terms of the second subdivision of the fourth paragraph of the decree, in directing that the distribution be made to 'the Eastern and Western Cherokees,' are perhaps liable to misconstruction, although limited to those 'who were parties either to the treaty of New Echota, as proclaimed May 23, 1836, or the treaty of Washington of August 6, 1846, as individuals, whether east or west of the Mississippi River.' This should be modified so as to direct the distribution to be made to the Eastern Cherokees as individuals, whether east or west of the Mississippi, parties to the treaties of 1835–36 and 1846 and exclusive of the Old Settlers."

We claim that that modification simply applies to the words quoted in this opinion. They do not modify any other words, and therefore they do not touch the words "legal representatives," which come very close to the words quoted there—in fact, in the same sentence, but yet are not quoted here as to be amended. Further, the opinion makes not the slightest mention of any change from per stirpes to per capita distribution. Therefore the words "or to the legal representatives of such individuals" were to be in the amended mandate just as truly as they were in the original mandate. They amended the mandate of the Court of Claims, but the language they used in the opinion shows clearly what they amended. They amended certain quoted words. They quote these words and say: "This should be modified." That means clearly the words quoted. The per stirpes distribution was affirmed.

Now, if these three preliminary points are accepted, then we find our case is as follows:

The original treaty called for a per stirpes distribution. It was to be divided equally among the Cherokee Indians east of the Mississippi. That calls for a per stirpes distribution of personal property to each individual.

Second, the treaty of 1846 called for exactly the same thing, to these parties or their legal representatives: to the Eastern Cherokees, parties to the treaty of 1835, or their legal representatives.

Later on, the actual distribution to the Old Settlers, under an exactly parallel claim, under the same treaty, 1846, was made per stirpes. The first decision of the Court of Claims called for a per stirpes distribution clearly. The mandate of the Supreme Court of the United States, on appeal from the Court of Claims, as I have just set forth, called for a per stirpes distribution, using the words "per capita" in the sense I have used them all along, per capita as of 1835.

The first mandate of the Court of Claims and the mandate of the Supreme Court called for a per stirpes distribution, and then only

did this other question come in; then only was any attempt made to make a per capita distribution, and on the report of Guion Miller the Court of Claims on its own initiative entered an order directing a per capita payment. It had gone through all those stages. This case has been through the courts; it has had a varied career in the courts and Congress, and at no stage have the merits of this case been passed on contra to these claimants. They lost out in the Court of Claims on one ground only, impracticability. The court does attempt in a most weak-kneed way to bolster up its per capita distribution by another theory. It does not put it on that ground; it does not go that far, but simply states another point. I think perhaps nothing could show more clearly the rights, the merits of these claimants, the merits of their claim, than the attempt which the Court of Claims makes to justify per capita distribution. They look around for the best arguments they can find, and this is all that they find.

Mr. CHURCH. Would it be difficult to locate the legal representatives of these people?

Mr. SMITH. Of course, that is the only argument, absolutely, against our claim. There can be none other advanced, and if there is any other argument in the minds of you gentlemen it is because we have not presented the case clearly.

Mr. CHURCH. Can those representatives be located?

Mr. SMITH. Yes, sir.

Mr. CHURCH. Perhaps that is the reason they took this view of it.

Mr. SMITH. Yes, sir; that is the only reason. They really admit—and we want to get this point clearly in the minds of the committee—that other than impracticability there can be no objection. It has been passed on again and again that on the merits it should go to these parties as heirs, not per capita to the descendants of the Eastern Cherokee Indians; and the impracticability of doing that was the only real argument ever advanced against it. As I say, the Court of Claims did put in another small argument on the side, but all through before that they had gone on the other theory, a per stirpes distribution, without advancing any such argument.

On the question of practicability perhaps nothing could be stronger, certainly nothing could be stronger, than the fact that a per stirpes distribution exactly as we ask was successfully executed in the case of the Old Settlers. That was done in 1896. Arguments might be advanced by us on the question of practicability and impracticability indefinitely, but they could not have the effect of that one statement, it has been done in a case which was in every practical way identical with this. It is more work, there is no question about that. It is a hard job, a much more difficult task than to divide it per capita. But, gentlemen, Mr. Miller himself when he decided their rights to share in the per capita payment had to pass on the question of whether or not each one of these individual claimants was a descendant of a party to this treaty—that is, really an Eastern Cherokee by blood. When he passed on that question—as he did pass on it—he could have ruled on the question of just how many of those Eastern Cherokees he was descended from. And if he had passed on that question of just how many the claimant was descended from, complete data for the per stirpes distribution would have been before him. It would not have been a simple matter; it would have been

somewhat complicated, of course, but it could have been done. The data was almost all there before him, and it could have been worked out from those facts—that is, not quite from the facts he decided, but from the one further fact. He decided whether or not he was descended from any Eastern Cherokee, and in order to make a per stirpes distribution he would have had to go further and decide just exactly how many Eastern Cherokees he was descended from.

But here is another point. Is not this answer absolutley applicable to this question? Even admitting that it would be impracticable, had the Government any right to use this rule of convenience in this case: to say that merely because many of these claimants could not prove their claims, that those who could prove their claims should not recover according to their rights?

Now, it undoubtedly will be the case, if this bill is passed by Congress, that a great many can not prove the amount they are entitled to. That is all well enough. They have already received payment under the per capita distribution of more than they were entitled to, because they were not and are not entitled to anything. But those who are prepared and ready to prove their claims should be given an opportunity. We have in our office over 1,000 applications which we believe set forth facts sufficient as a basis for a per stirpes distribution in those cases. Now, if there are only 1,000 who can prove their claims, that is basis enough for the interference of Congress in this matter.

Finally, gentlemen—I will not take your time any further except to say this: If there was only one fact in this case upon whch to base our whole claim, and that fact was this original treaty providing that the money should be divided equally among these Eastern Cherokees, we could come before you and ask this same relief. But there is nothing of that kind. Instead of that, court after court has passed on the proposition and decided on the whole case that we are entitled to a distribution per stirpes, and finally the Court of Claims, contra to the mandate of the Supreme Court of the United States, made a distribution—not on a legal ground—per capita instead of per stirpes, not on a legal ground but simply on the ground of practicability, in face of the fact that not many years before there had been such a distribution in practically a similar case.

Mr. CHURCH. How much did each one get under the per capita distribution?

Mr. SMITH. There were 30,000 of them practically—a little over 30,000, and the sum was $4,000,000.

Mr. TILLMAN. Instead of distributing this money, then, to the heirs of the Eastern Cherokees, they distributed it to all the Cherokees per capita instead of per stirpes?

Mr. SMITH. Not all the Cherokees, only the Eastern Cherokees.

Mr. TILLMAN. I understand, but these people you are representing received some of this money, but your contention is it should have been distributed per stirpes; that is to say, the heirs of the Eastern Cherokees should have received it instead of the whole number of Cherokees receiving it per capita, which of course would limit the amount paid leave a smaller amount than they would have received by a per stirpes distribution. I wish you would develop that fact.

Mr. SMITH. I will not say anything more except on that question of exactly what our claim is.

Mr. DEMPSEY. I would just like to ask one or two questions. As I understand it the situation is this: If these recitals in this bill are correct here is a question, I can not understand one thing, if you claim that the decision of the Court of Claims was wrong, why did you not appeal from it?

Mr. SMITH. Well, as my colleague mentioned that fact I did not put any stress on it at all. There was a mandamus proceeding brought to order the Court of Claims to enter their mandate, or make their distribution in accordance with the prior decision, the prior mandate of the Supreme Court of the United States, and that was dismissed on the one ground of laches.

Mr. DEMPSEY. In other words, you did not do it within such time as the court held you should have done it if you wanted to proceed?

Mr. SMITH. Well, even on that——

Mr. DEMPSEY (interposing). That was what the court acted on?

Mr. SMITH. Yes: that was the theory of the court.

Mr. DEMPSEY. Instead of taking the ordinary appeal you proceeded by mandamus, and proceeded, as the court said, too late?

Mr. SMITH. Yes.

Mr. DEMPSEY. How long ago was that decision rendered?

Mr. SMITH. In 1912. This bill was introduced shortly after the decision, and it died a natural death at the end of the last Congress.

Mr. DEMPSEY. Judge, can you see any escape from the fact that—isn't this an appeal from the decision of the court?

Mr. TILLMAN. It is somewhat in that category, I guess.

Mr. DEMPSEY. It is legislating to override the decision of the court.

Mr. TILLMAN. Going into another forum to establish their contention.

Mr. SMITH. Now, if I might add this one word on the point you mentioned, there is one answer to the decision of the Supreme Court. There is one line of decisions that was not brought to their attention, which they did not consider and did not mention. That is the line which you gentlemen are all familiar with, the line that laches can not be imputed to a tribal Indian. Now, on that question, as you know, there have been plenty of decisions. We have cited decisions in our brief, and we argue that question. That is one of the points presented.

Mr. DEMPSEY. Can we presume, as a committee of the House of Representatives, that the Supreme Court has overlooked a controlling decision? That would be the only ground upon which we could say that this was not an appeal from the decision of the Supreme Court, that the Supreme Court had overlooked a certain line of decisions.

Mr. SMITH. Yes, sir.

Mr. DEMPSEY. That they made it through inadvertence.

Mr. SMITH. I think that is pretty evident when you read their decision. They certainly would have considered that line of decisions at least of importance enough to justify mentioning it in the opinion, if it had been considered at all.

Mr. TILLMAN. When did you say distribution was made?

Mr. SMITH. Actual distribution?

Mr. TILLMAN. Yes.

Mr. SMITH. It ended about 1910.

Mr. TILLMAN. When did it begin?

Mr. TOWNSEND. It started some time after March 7, 1910. The Guion Miller roll was finally approved March 7, 1910.

Mr. SMITH. It was made during 1910, because the distribution had been made to all but 300 when the mandamus proceedings were brought.

On these grounds, gentlemen, we ask your relief.

I wish to submit the following brief:

ARGUMENT.

First as a preliminary proposition the Eastern Cherokee Indians were entitled in 1906 to the sum of $1,111,284.70 with interest from June 12, 1838. This is shown by the Slade-Bender account, by the Court of Claims decision, the Supreme Court decision on appeal, and the actual payment after the appropriation by Congress. No further attempt will be made herein to show the existence or amount of this indebtedness. Further, this indebtedness has not been satisfied by other means than the per capita distribution to the Eastern Cherokee Indians parties to the treaties of 1835–36 and 1846. This was not payment and full satisfaction unless the per capita distribution was correct, which is the real question in issue here.

This sum should have been paid to the individual Eastern Cherokee Indians, parties to these treaties, the heirs of each dead party taking his share.

In considering this point there are three preliminary questions of interpretation which must be first decided. These questions all bear upon the question of whether different treaties, opinions, etc., direct a per stirpes or per capita distribution.

1. The use of the words "per capita" in the treaty of 1846 and the use of the words "to be divided equally" in the treaty of 1835 in no way direct or justify a per capita distribution of 1910 or of to-day between the descendants of the original parties. The distribution was to be and should be per capita as of the date 1835. The reason for the use of these phrases is evident. The sum was to be paid in consideration of communal property of the Cherokees. The words "per capita" are used in contradistinction to the idea of communal ownership. They are necessary as the fund was not to be a tribal fund but individual property. The direction of a per capita distribution as of 1835 is the basis for our claim for what we are calling a per stirpes distribution to-day. Also, in the opinion of the Supreme Court of the United States in the "Old Settlers case" (118 U. S., 147) the fund is spoken of as the "per capita" fund to emphasize the fact that there was no communal ownership in regard to it. The opinion nowhere directs a per capita payment to the parties to the treaties and their descendants, but directs distribution according to the treaty of 1846. The actual distribution was per stirpes.

2. We submit that the words "legal representatives" used in the treaty of 1846 do not mean merely persons in loco parentis, but heirs or administrators. This is the general meaning of the words as is shown in Thompson *v.* United States (20 Ct. Cls., 276), where the court said:

"The term 'legal representative' is not of uniform interpretation. It may mean those who succeed to the inheritance of the estate, or it may mean those upon whom the law devolves the legal capacity of an administrator. The ordinary meaning of the words 'representatives,' 'legal representatives,' 'personal representatives,' is that they refer to the person constituted representative by the proper court, and the onus is upon those attempting to maintain a different construction to show a different meaning.

"In the absence of anything appearing in the context, those words found in a statute or written instrument *must be held as meaning the administrator or executor.*" [Italics ours.]

Further the context shows conclusively that such is the meaning here, because otherwise in the case of all those entitled under the treaty of 1835 who had died between 1835 and 1846, leaving descendants, the wording of the treaty of 1846 would entirely eliminate such descendants from distribution, and only the survivors could recover, as the treaty directs payment "to all those individuals, heads of families, or their legal representatives entitled to receive the same under the treaty of 1835," etc. It has never been claimed and can not now be claimed that the intention was to pay survivors only. Therefore, legal representatives must be interpreted to mean heirs or administrator. Further, it is well settled that in transaction with Indians their interpretation of what is meant by the language must, if possible, be followed. (Choctaw Nation *v.* U. S., 119 U. S., 1; Worcester *v.* Georgia, 6 Pet., 515–582; Jones *v.* Meehan, 175 U. S., 1–29.)

The laws of the Cherokee Nation provide, and did then provide, for the descent of property. Therefore all their property was not held under community of ownership.

The natural interpretation of the words "legal representatives" would be heirs or administrator.

3. The mandate of the Supreme Court of April 29, 1906, affirmed the per stirpes distribution provided for in the decision of the court in the Court of Claims, for the opinion accompanying said mandate states:

"We concur with the Court of Claims in the wisdom of rendering judgment in favor of the Cherokee Nation, subject to the limitation that the amount thereof should be paid to the Secretary of the Interior, to be distributed directly to the parties entitled to it, but we think that the terms of the second subdivision of the fourth paragraph of the decree, directing that the distribution be made to 'the Eastern and Western Cherokees,' are perhaps liable to misconstruction, although limited to those 'who were parties either to the treaty of New Echota, as proclaimed May 23, 1836, or the treaty of Washington of August 6, 1846, as individuals, whether east or west of the Mississippi River.' *This* should be modified so as to direct the distribution to be made to the Eastern Cherokees as individuals, whether east or west of the Mississippi, parties to the treaties of 1835–36 and 1846, and exclusive of the Old Settlers."

The word which we have italicized, "this," clearly refers back to the quotation from the decree of the Court of Claims. Only the words quoted are to be modified. The quotation does not include the words "or to the legal representatives of such individuals." These words, though coming in the same sentence as and immediately following the words quoted, are carefully omitted from said words quoted. Therefore they stand unchanged. Further, the mandate itself shows that it was not to affect the words "or to the legal representatives of such individuals" in the mandate of the Court of Claims. For if it were interpreted to exclude these words, the mandate would direct distribution to the survivors of the parties to the treaties of 1835–36 and 1846. The obvious purpose of the amendment was to exclude the Old Settlers.

We have advanced three propositions in regard to interpretation of certain treaties and decisions.

1. That the words "per capita" as used in the treaty of 1846 and in the opinion of the Supreme Court in the Old Settlers case did not mean a present per capita distribution among all those entitled but a distribution per capita as of the year 1835, which is what we ask, designating such distribution by the name per stirpes.

2. That the words "or the legal representatives" meant their heirs, executors, or administrators.

3. That the mandate of the Supreme Court of the United States of April 30, 1906, affirmed the per stirpes distribution.

Presuming these propositions correct, on the question of whether distribution should be per capita or per stirpes, it can be stated that: (1) Treaty of 1835 contracted for a per stirpes distribution; (2) the treaty of 1846 contracted for a per stirpes distribution; (3) the Old Settlers indentical claim under the same treaty (1846) was paid per stirpes; (4) the Court of Claims original decree directed the per stirpes distribution; (5) the Supreme Court of the United States in its mandate of April 30, 1906, affirmed a per stirpes distribution; (6) the original decree of the Court of Claims in accordance with said mandate directed a per stirpes distribution. This shows in the form of a summary how the merits of claimants' case have been upheld by different tribunals.

Later, Guion Miller, the special commissioner appointed by the Court of Claims, reported a per stirpes distribution impracticable, and the Court of Claims then ordered a per capita distribution, no one appearing in opposition thereto. Even when the Court of Claims decided to make a per capita distribution it advanced no real reason, except the impracticability of the per stirpes distribution. Perhaps no affirmative argument could show the injustice of a per capita distribution and the absence of legal grounds therefor more than the weakness of the reasons advanced by the Court of Claims to uphold their order of per capita distribution. Their discussion of the point in full is as follows:

"It further appearing to the court that the lands disposed of by the Eastern Cherokees under the treaties of 1835–36 and 1846 were owned by them as a community, and the rights arising under said treaties, as established by the decree of May 28, 1906, accrued to the said Eastern Cherokees as communal owners of said land; and it further appearing that from the report of Special Agent Guion Miller, accompanying the reference of the Secretary of the Interior of February 20, 1907, above referred to, that a per stirpes distribution to the Eastern Cherokees who were parties to the treaties of 1835–36 and 1846 is impracticable, it is therefore further," etc.

The first ground that was advanced in this opinion for a per capita distribution, namely, that the property was held in the communal interest, is expressly answered by the language of the Old Settlers case (148 U. S., 427, 479):

"The lands west of the Mississippi were held as communal property, not vested in the Cherokee as individuals, as tenants in common or joint tenants; but by the treaties

of 1835 and 1846 the communal character of the property was terminated as to both Eastern and Western Cherokees, and the fund taking the place of the realty, was invested in the various ways we have mentioned, leaving the remainder to be distributed per capita."

So the only ground worthy of mention advanced for the per capita distribution was the impracticability of the per stirpes distribution. In the mandamus proceedings May 28, 1910, the petition of your present claimants was denied on the single ground of laches.

So we are presenting to Congress a claim which has had a varied career in the Congress and courts of this country, which has never been decided against your claimants on the merits by any body, legislative or judicial, and yet which was not paid on the single ground that it was impracticable to make the per stirpes distribution. Still further a rehearing on the question was denied because of laches. Upon these facts we maintain that the distribution should have been to the individual Eastern Cherokees parties to the treaties of 1835–36, and 1846, the heirs of each deceased to take his share rather than to the descendants of said Eastern Cherokees parties to said treaties per capita.

The per stirpes distribution was ruled out on the ground of impracticability, but we submit that the per stirpes distribution is practicable. Under the per capita distribution which was made it was necessary for the commissioner, Mr. Guion Miller, to pass upon the question whether or not each applicant for distribution had descended from an Eastern Cherokee party to the treaties of 1835 and 1846. If it was possible for him to pass accurately upon this question, it was possible for him to go further to decide whether or not each claimant had descended from three or four of these Eastern Cherokees. This once done the facts upon which to pass a per stirpes distribution are ascertained. We do not claim that a per stirpes distribution would have been a simple matter. However, only by this method can the parties rightfully entitled be paid. A mere balance of convenience rule can not justify a distribution counter to the terms of the treaties. But most important of all a per stirpes distribution has been successfully carried out in the past as in the case of the Old Settlers in 1896. No argument to show the practicability or impracticability can compare with this very simple one—in a similar case it has been done. Further the burden is upon the Indians; they must prove their claims or lose their rights. Even though some, perhaps many, of the Indians entitled could not prove their claims, yet those who can prove their claims should be paid in accordance with the original obligation of the United States. We the attorneys for the claimants have in our possession over 1,000 applications which, we believe, contain sufficient evidence upon which to base a per stirpes distribution.

Though the merits of our case do not depend upon it, we nevertheless advance this final proposition. We merely suggest that the Supreme Court of the United States, in its decision in the mandamus proceedings, in which it denied the petition, obviously overlooked the line of decisions which was nowhere brought to their attention, and that as a result the Supreme Court was in error in holding the petitioners guilty of laches. The line of decisions referred to holds that a tribal Indian can not be guilty of laches. In Cherokee Nation *v.* State of Georgia (30 U. S., 1, 17), Chief Justice said, in regard to the Indians: "Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian." The American and English Encyclopedia of Law of volume 18, page 108, under the title "Laches," has this paragraph:

"*d.* Tribal Indians.—Laches can not be imputed to one who is under disability as a tribal Indian."

In Laughton *v.* Nadeau et al. (75 Fed. Rep., 789), X had represented plaintiff as dead, and thereby obtained patent. In a bill by plaintiff to clear title after a lapse of 23 years and 7 years after he had become a citizen, the court said:

"No laches could be imputed to the complainant while under disability as a tribal Indian. He and his lands were under the control of the Government."

In the case of Felix *v.* Patrick (145 U. S., 317 332), the Supreme Court said:

"But, *conceding that the plaintiffs were incapable, so long as they retained their tribal relations, of being affected with laches*, and that these relations were not dissolved until 1887, when they were first apprised of their right to this land, it does not necessarily follow that they are entitled to the relief demanded by this bill." [Italics ours.]

So long as the tribal existence continues, the admission of Indians to citizenship does not terminate the relation of guardian and ward upon which the rule that laches can not be imputed to the tribal Indians is based. (Marchie Tiger *v.* Western Improvement Co., 221 U. S., 286; Heckman *v.* U. S., 224 U. S., 413, at 436; Rainbow *v.* Young, 161 Fed. Rep., 835, U. S. *v.* Celestine, 215 U. S., 278; and in re Coombs, 127 Mass., 278.) These cases are quoted for two purposes: First, they suggest that the

Supreme Court may have erred. But even if the Supreme Court did not err, even if the strict legal rules would bar claimants from relief in courts because of laches, are not these cases of persuasive value to suggest how much more broadly the principle should be applied by this body, untrammeled as it is by technical rules?

We are asking Congress to pay a debt for the second time. That, to our minds, is the most substantial objection to this claim. But we submit that the facts of this case justify such a double payment by the United States. With the treaties of 1835–36 and 1846 as they were, even if court after court had directed a per capita distribution, we would have good foundation for this claim, requesting that a miscarriage of justice be righted. But we have a far better case than that. It has been favorably passed upon on the merits by every tribunal before which it has come. It has been denied only because of impracticability in the face of the fact that a successful execution in a similar case affords the clearest proof of its practicability. A further hearing on the question was denied on the ground of laches without consideration of the authorities we have advanced to show that laches can not be imputed to a tribal Indian.

These are the facts upon which we base our right to relief from the Congress of the United States.

We are not asking Congress to pass a bill on the theory that the courts have decided the case incorrectly after hearing our arguments. We are asking Congress to legislate so as to affirm all the decisions except the final one of the Court of Claims. We are not asking Congress to go behind the Supreme Court of the United States. We are merely asking Congress not to bar claimants because of laches, notwithstanding the fact that the Supreme Court did so bar them.

Respectfully submitted.

Mr. CHURCH. Now, Mrs. Sanders, you want to speak for three minutes?

STATEMENT OF MRS. SUSAN SANDERS, OF ST. LOUIS, MO.

Mrs. SANDERS. Yes; one minute. He now has rendered your most sincere, earnest attention to me, and this gentleman speaks very fluently and it seems he understands what the lawyers have related to you.

Now, I want to say to you, gentlemen, that after John B. Daish put his brief in as findings of fact to the Supreme Court—you know for the mandamus—we found later in the law that laches can not be imputed to tribal Indians; and by the 20 letters which were left here for this committee you will find that I have set out most every specific point in the Freedmen case and the Emigrant case—giving you such as I have copied from the records of the court.

Now, I wish to relate one little point. Laches can not be imputed against tribal Indians.

Now, then, so long as I live, I leave it to you men, and I believe you are men of honor and hearts and of future ideas—now, then, can your heir take your father's and mother's estate while you live? The law says no. Can my grandchildren come in and take what belonged to my father and my mother? There is no law in the United States, in justice and in equity, can ever take the property while I live, without a will. If it is left by a will, that is different, but if it is left open, my father's estate comes to me as long as I am the surviving heir.

I thank you for your attention.

Mr. CHURCH. I believe that concludes the hearing.

(Whereupon, at 4.20 o'clock p. m., the subcommittee adjourned.)

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