25th Congress, 2d Session. [Rep. No. 38.] Ho. of Reps.

M. GELSTON, EXECUTOR OF DAVID GELSTON.

[To accompany bill H. R. No. 50.]

DECEMBER 14, 1837.—Reprinted.

APRIL 27, 1836.

Mr. E. WHITTLESEY, from the Committee of Claims, made the following

REPORT:

The Committee of Claims, to which was referred the petition of M. Gelston, executor of David Gelston, report:

That a bill was reported for the relief of the petitioner, at the first session of the twenty-third Congress, on the 21st of February, 1834, accompanied with a report, which is No. 276 of the printed reports.

The bill was not reached on the list during that Congress.

This committee has examined that report, and, concurring in it, report a bill herewith.

FEBRUARY 21, 1834.

The Committee of Claims, to which was referred the petition of M. Gelston, executor of the last will and testament of David Gelston, late of the city of New York, report:

That it appears the said David Gelston was collector of the port of New York from 1807 to 1820, during which time the laws relating to the embargo, non-intercourse, and war, were passed; and that during his continuance in office, "he was a most faithful and vigilant officer." The petitioner says Mr. Gelston, on his resignation, transmitted his accounts to the proper officers of the Treasury, who did not think themselves legally authorized to allow all the expenses incurred, and disbursements made, in consequence of the extraordinary duties thus imposed. That, accordingly, explanations were asked for, and, in some cases, satisfactorily furnished: but that, as well in consequence of the decease of the said David Gelston, as from the length of time which has elapsed since the services were performed, it has hitherto been found impracticable to satisfy, to their full extent, the requirements of those officers. That there yet remain in these accounts several suspended items, by reason of which the surviving family of the said deceased suffer great inconvenience. He says he fully believes the accounting officers are satisfied that the services were

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performed, and the disbursements made, entirely in good faith; and he prays and requests that Congress will grant relief, either by authorizing the proper accounting officers of the Treasury to make such allowances of credits in these accounts as shall be consistent with the principles of justice and equity, or in such other manner as shall be deemed proper.

It is a rule with the committee not to report a bill authorizing the accounting officers of the Treasury, nor the head of either of the Departments, to settle a claim on the principles of justice and equity, unless they are satisfied such equitable claim exists; and being satisfied on this point in the affirmative, and the proof being defective or deficient, or it being a case which can, from its complex character, be better examined by either of said officers than by Congress, they have, in many instances, reported bills directing claims to be settled on the principles of justice and equity.

The balance found to be due to the United States by the Treasury officers is $44,818 61, as appears by a paper marked "No. 1, certified copy of David Gelston's account, and of the items suspended," to which the committee refer, and make the same a part of this report.

The committee will notice the principal items of this account, and advert to a communication from the petitioner to the Secretary of the Treasury, dated October 9, 1830, on the subject of these suspended items, urging his reasons why they should be allowed.

The first item is, "amount charged in his account, 1st quarter of 1811, for damages and costs in the case of brig Laguada, $2,737 64." The petitioner says, in the letter referred to, "this sum was recovered against Peter A. Schenck, surveyor, for seizing a vessel called the Laguada. The circumstances of this case are, shortly, these: Mr. William Van Buren, then commanding one of the cutters, made a report, in writing, to the collector, that he had good reason to believe that this vessel was an American vessel, which had sailed from Amboy, with a cargo, for Porto Cabello, in contravention of the embargo law; that a person by the name of Thomas Goodman had told him, Mr. V. B., that he knew every thing about this vessel, and enough to condemn her, but would not tell any thing until compelled so to do by the court. Upon this information, Mr. Gelston thought it his duty to seize the vessel; but on the trial this same Thomas Goodman declared he knew nothing about it, and the vessel was acquitted without a certificate of probable cause. For this act of seizure an action was brought against Peter A. Schenck, in the State court, and damages recovered, which, with costs, amount to the sum charged; which damages and costs were paid by Mr. Gelston;" and he says, see papers "Laguada." The committee understand that the vouchers in the entire case were burnt in 1814 and 1833.

In order to enforce the prompt execution of the revenue laws, and to prevent smuggling, the collector, the naval officer, and surveyor, received a moiety of the proceeds of all condemnations on their information; and to protect them, they were exonerated from all liability to those whose property they had illegally seized, if the judge before whom the libel was tried gave a certificate that there was probable cause of seizure. It is believed the judges have granted this certificate in all instances where they were satisfied the officer acted in good faith, and there were very slight circumstances of probable cause. While the Government has important rights, which are to be duly regarded, the citizen has his rights, which

should not be overlooked or forgotten in our zeal to enforce the laws. If an officer will wantonly, and without probable cause, seize upon the property of an individual who is engaged in carrying on a lawful commerce, he ought to be made to respond in the courts of justice for the injury inflicted, without the most remote prospect that he will be remunerated by the Government whose laws he has violated by oppressing one of her citizens.

The committee think this item of the account ought not to be allowed.

The next item is for amounts charged in his accounts of 1811 and 1812, for payment to witnesses beyond their legal dues, in sundry cases of seizure under the embargo and non-intercourse laws. Balance now suspended, $14,979 87. The petitioner says, in his letter above, "these expenses, I understand, were paid by Mr. Gelston in causes in which there was no recovery. Vouchers for the amount are, I believe, before the Treasury. In these causes Mr. G. had no funds from which to deduct the expenses which he had necessarily incurred in the course of the prosecution. In cases where recoveries were had, these expenses were deducted from the amount before distribution, as appears from his quarterly returns of forfeitures. The accompanying document A, shows a list of twenty-five cases, in which the vessels and goods were acquitted, and a certificate of probable cause of seizure granted by the district court; document B, a list of five, in which, on appeal, a like certificate was granted by the circuit court; and C, of five, in which a certificate of probable cause was refused. By a letter from Mr. Comptroller Rush, of the 16th of March, 1813, expenses of this nature, then incurred, were expressly authorized to be deducted from the amount of forfeitures afterwards recovered. The difficulty, however, of making an apportionment among other causes which had their own proper expenses to bear, would have been very great, if not insuperable. Informers, in other cases, might have objected with good reason to such a course, as their proportion of the forfeitures ought not to be diminished by expenses incurred in causes with which they had no concern. What number of causes was thus depending, is uncertain; and although the then naval officer and surveyor might have assented, or indeed have been bound by such arrangement, their successors might have refused it in cases in which they were interested. But admitting this course could have been pursued with the consent of all concerned, Mr. Gelston did suppose that the Government would not, on further consideration, compel him to resort to this measure, which would greatly diminish his own receipts, but would grant him what he thought he had a right to ask —indemnity for the whole expenses. They were incurred under a state of things so peculiar as to exempt them from the operation of ordinary rules. The singular difficulties with which he had to contend at that time in the discharge of his duties, gave him, as he supposed, a peculiar title to the consideration and liberality of the Government. When a public officer, in the exercise of his functions, has in good faith incurred heavy expenses, it seemed to him but an act of common justice and every day's practice to reimburse such expenses. No man has, perhaps, served the Government with better faith than Mr. Gelston, who was always distinguished for a zealous and fearless performance of duty. To this character are owing the heavy expenses he incurred; but to this also are owing the many successful prosecutions which produced so much money to the Treasury. A less zealous or more timid officer might indeed have avoided

these expenses, but in so doing would often have missed the opportunity of vindicating the laws and punishing offenders. With all his vigilance and promptitude, however, those who knew the sound sense and cautious habits of Mr. Gelston are persuaded that he never made a seizure without good reason; and whatever may have been the event of the prosecution, the records of the courts and the books of the Treasury prove that he was generally correct. The large amount of forfeitures received by the latter, in consequence of his indefatigable vigilance, had created a fund to which he thought he might with propriety look for the repayment of extraordinary expenses in causes which had proved fruitless to himself."

The committee have not been able to obtain copies of the document A, B, and C, referred to above. If the money contained in this item was paid or disbursed for and in behalf of the United States, and under circumstances and in a case where they are bound to refund or allow it, the committee would require that it be shown to whom the money was paid, when, and the necessity of paying, in the period of two years, a trifle short of $15,000 extra fees to witnesses, in a single port. Who was detained, how long, where he resided, and how much extra per diem compensation was paid to any one witness, do not appear. The Comptroller of the Treasury has furnished the committee with the copy of a letter from Mr. David Gelston to him, dated July 28, 1818, relative to the disallowance of his account for money paid to witnesses; but the amount of the item is not mentioned. Mr. Gelston relies upon orders received from Mr. Jefferson and from Mr. Madison, directing the utmost vigilance in executing the laws; and he cites the following: "Smuggling in every form must be prevented or punished, and by every legitimate means eradicate the very taint of smuggling." He speaks of the opposition to the embargo and non-intercourse laws, and of the difficulties he had to encounter, and relies mainly on the positive orders he had received to see that the laws were faithfully executed, to justify him in the expense incurred; and on allowances having been made to him for similar charges for the fourth quarter of 1808, first and second quarters of 1809, and first quarter of 1810. The committee have sent the papers twice to the Treasury Department, for all the information in the power of the Department to give relative to this claim; but not having been furnished with any of the accounts referred to, they are not able to state whether such allowances were made or not; but, judging from the correspondence that was had previous to the date of the letter referred to, and subsequent to 1812, the committee are led to doubt whether allowances were made for money paid out to witnesses for extra fees, in cases similar to those in which the money was paid, for which an allowance is now asked.

The following extract is made from a letter written by Mr. Rush, then Comptroller of the Treasury, to Mr. Gelston, dated March 16, 1813: "The abstract H shows the amount stated to have been paid by you to certain *witnesses*, who, you allege, were retained to give evidence in certain cases of forfeiture, or supposed forfeiture, on the part of the United States. Of the amount thus stated to have been paid by you, and charged to the United States, the sum of $11,157 75 has heretofore been disallowed on the settlement of your accounts; and the sum of $2,347 62, the amount stated to have been paid by you for the same purpose, in the third quarter of 1811, has not been admitted to your credit in the present settlement. Your letter to the Secretary of the Treasury, on this subject, he has had under consid-

eration, and has directed that those expenditures are to be deducted from the amount of forfeitures in cases yet depending; so that the operation of the deduction will be, that the United States pay their proportion only of the sums paid to those witnesses, in manner as before stated. In future, however, no charges of this nature are to appear in your accounts as collector. In all cases where the United States prosecute criminally, it is competent for them to bind witnesses over to appear at court, and even to ask security for their appearance; in default of giving which, commitment may take place. In cases where this power does not exist, it is conceived every useful effect may be obtained by taking their depositions, without incurring the expense of detaining them on the spot." In a letter addressed by the chairman of this committee to the Secretary of the Treasury, relative to the subject of the above extract, the inquiry was made, "Whether recoveries were had in the suits then depending, and why the deduction of the costs, contained in the item of $14,979 87, was not made from said recoveries, if any there were." In answer to these inquiries, the Secretary of the Treasury has furnished the committee with the First Comptroller's report to him, in which he states, in relation to these inquiries, "I have to observe, that from the destruction, by the late conflagration of the Treasury building, all Collector Gelston's accounts, prior to the year 1820, having been lost, it is not in my power to give a positive answer to these inquiries, namely: whether recoveries were had in the suits pending at the time alluded to; and, if so, why a deduction of the costs contained in the item of $14,979 87, was not made from such recoveries. I enclose herewith, however, an extract of a letter from Mr. Gelston to me, dated the 28th of July, 1818, (marked A,) in which he observes as follows: 'In every case in my power, I have followed the directions of Mr. Comptroller Rush, and deducted the expenses from the forfeitures,' &c."

The letter from Mr. Gelston to Mr. Anderson, from which the above extract is made, is the letter of July 28, 1818, above referred to. It should be noticed, that the claim for paying witnesses extra fees amounted, on the 16th of March, 1813, as appears from Mr. Rush's letter of that date to Mr. Gelston, above referred to, to $13,505 37. Mr. Gelston, by this letter, was directed to remunerate himself out of the future forfeitures, so that the United States should pay one moiety, and those entitled to the forfeitures, as officers at the port of New York, should pay the other moiety of this extra expense.

It appears from a paper (affixed to the petitioner's letter to the Secretary of the Treasury, and from which extracts have been made in this report, relative to this item of the account,) headed "a statement exhibiting the proportion of forfeitures which accrued to the United States, and to David Gelston, late collector of the customs for the port of New York, from the year 1807 to 1820," that the proportion received by said Gelston for the years 1813 to 1818, both inclusive, was $21,881 57. These years are taken, because Mr. Rush's letter to Mr. Gelston, directing him to remunerate himself from future forfeitures, is dated in March, 1813; and Mr. Gelston's letter to the Comptroller, in which he states "that he had, in every case in his power, followed Mr. Rush's instructions," is dated in July, 1818. Yet, notwithstanding Mr. Gelston had been directed by positive order, in March, 1813, not to incur the like expenses in any other cases, when this item of his claim was $13,505 37, and to pay this sum from future forfeitures, yet his account now is $14,979 87, when in six

years he received $21,881 57, and when in 1818 he stated that he had made the deductions in every case in his power, from forfeitures, according to the aforesaid instructions of Mr. Rush. It appears, by the documents above referred to, that the United States received, from 1807 to 1820, both inclusive, the period Mr. Gelston was collector of the port of New York, as their proportion of the forfeitures recovered in that port, the sum of $139,582 01, and that Mr. Gelston's proportion of the forfeitures for the same period was $37,523 40. There is no statement, however, that shows the amount of forfeitures received by the collector, naval officer, and surveyor; but it is presumed to be equal to the amount the United States received, as it is understood all legal costs are first deducted from the amount collected, and a division made of what remains. The necessity of incurring any expenses, by paying the witnesses extra compensation, is not apparent to the committee. If the cases were criminal, the witnesses might have been bound or recognised to appear and give testimony, and, in default of giving security, if asked, they might have been committed; and if the suit were not of a criminal character, the depositions of the witnesses might have been taken. If the collector intended, at the time he detained these witnesses, to tax the United States with the extra allowance, it was his duty to have reported the facts to the Secretary of the Treasury, or to the President, and have obtained instructions how to proceed. The committee think important principles are involved in the present question, and they have given to it all the consideration in their power, and have come to the conclusion that this item of the account ought not to be allowed: 1st, because the payment of the money, with the circumstances, is not proven; and 2d, because the paying of extra fees to witnesses, by those interested in forfeitures, ought not to be charged to the United States.

The next item is the amount charged, in the third quarter of 1815, for damages and costs in the case of the brig Mentor, $1,180 13. It is stated by the petitioner, in his letter of remarks, that this vessel was seized under general instructions to seize vessels from St. Bartholomew's. He refers to a letter he says Mr. Gelston wrote to the Secretary of the Treasury; that, in consequence of the indisposition of the judge, so long time elapsed before the cause could be brought to trial, that the witnesses could not be detained, and the vessel was acquitted for want of evidence. For this seizure, damages to the above amount were recovered against Mr. Gelston. See papers "Mentor."

These papers are understood to have been destroyed by the burning of the late Treasury building. It does not appear from any of the papers, further than is mentioned in the above extract, what were the circumstances attending this case. In the absence of all proof, the committee think this item should be rejected.

The next item is, amount charged to meet a judgment against him in the supreme court of the State of New York, in favor of Charles Baldwin, for costs, expenses, and services, as counsel in the case of the American Eagle, $5,218 21.

The judicial history of the country informs us of the seizure of the ship American Eagle, by David Gelston, under an express order from the Secretary of the Treasury, and of the discharge of the libel; of the institution of a suit against David Gelston by Gould Hoyt, the owner of the American Eagle, and the recovery of a large sum in damages by the plaintiff, for the unlawful seizure. It appears from the papers, that Mr.

Gelston, in defending the suit commenced against him by Mr. Hoyt, was directed by the Secretary of the Treasury to employ assistant counsel. He employed Charles Baldwin, Esq. Mr. Baldwin presented his bill after the cause was finally disposed of, and Mr. Gelston submitted it to the Secretary of the Treasury, to decide upon its being paid. The Secretary thought the bill was too high, and advised Mr. Gelston not to pay it. The bill not being paid, Mr. Baldwin commenced a suit, which was carried to the supreme court of the State of New York, and a final judgment entered against the defendant, David Gelston. An exemplification of the record is not before the committee; but there does not appear to be any doubt of the fact at the Treasury that such judgment was recovered.

On the 9th day of April, A. D. 1818, Congress passed an act appropriating $130,000 to discharge the judgment recovered by Mr. Hoyt against Mr. Gelston. The chairman addressed a letter to the Secretary of the Treasury, to know whether the item of $5,218 21, for which Mr. Baldwin recovered judgment against Mr. Gelston, or any part of it, was satisfied out of said appropriation.

An answer to this inquiry has been given by the Comptroller, in which he says, no part of the said sum of $130,000 was applied towards this claim of Mr. Baldwin's, and that $2,906 36 was unexpended, and carried to the surplus fund on the 1st of January, 1821; that "it is recollected that Mr. Gelston did exhibit evidence of the rendition of the judgment against him in the case in the supreme court of the State of New York, and of the payment to Mr. Baldwin; but, as the accounting officers did not, for the reasons already assigned, consider themselves authorized to allow the claim, the evidences alluded to were, upon the executor's request, and by direction of the Department, returned to him by the clerk in this office, whose duty it was to examine those accounts."

As Mr. Gelston acted under the direction of the proper organ of the Government, in making the seizure, and in defending the suit commenced against him, the committee think all expenses incurred by him should be paid by the United States. It appears that the bill of Mr. Baldwin was disputed, not because he was not engaged in the defence, nor because the United States were not holden to pay it, but because it was thought by the Secretary to be too high; and Mr. Gelston was directed to contest it on that account. Having obeyed the order of the Secretary of the Treasury in this particular, it follows, as a matter of course, that the United States are liable to pay all the expenses incurred by the said Gelston in the defence of the suit commenced against him by said Baldwin.

"Amount of duties on captured merchandise, short taken and short credited in his account for 1st, 2d, and 3d quarters of 1814, $1,521 35."

This is admitted by the executor to have been a mistake; and he appealed to the Secretary of the Treasury to make the allowance, for the reason that the said collector had a great press of business in his office, and for other reasons assigned in his remarks, to which the committee refer. They think this item should be disallowed.

The next item noticed by the petitioner in his remarks is the following:

"Amount of surplus emoluments short credited for the years 1817 to 1820, inclusive, arising from an omission to account for certificates to accompany spirits, wines, and teas, $6,232 46." It is said by the petitioner that this sum ought to be allowed, because the issuing of certifi-

cates to accompany spirits, wines, and teas, was no part of the duties of the collector of the customs, as such ; but that the collector might be designated to issue said certificates, and, in that event, that he was entitled to a compensation above the maximum allowed by law for the collector. And in support of this view of the case, he says, the said David Gelston was designated to issue said certificates in 1802, and charged said certificates in his accounts, and they were allowed until 1817.

The Comptroller, in answer to an inquiry made by the committee of the Secretary of the Treasury, says: "In relation to the item of $6,232 46, short credited by Collector Gelston in his accounts of emoluments and fees received by him as a *designated* collector, under the 7th section of the act of 6th of April, 1802, for certificates prepared and issued to accompany wines, teas, and distilled spirits, I have to observe, that, it having been decided by Mr. Secretary Gallatin, and my predecessor in office, that such fees should be included in his accounts as collector proper, and if such fees, and his fees and emoluments as collector proper, in amount exceeded the maximum fixed by law, such excess should be paid into the Treasury,—I did not consider myself authorized to disturb the construction thus given to the law." The committee are led to think, from this statement, that the petitioner must be mistaken in supposing that David Gelston was allowed for issuing these certificates above the maximum allowed to the collector, as such, or, as he is denominated, collector proper; for a contrary decision is said to have been made by Mr. Gallatin while he was Secretary of the Treasury, and he left that Department in May, 1813. If it be a fact that the said David Gelston, from 1802 to 1817, was allowed for issuing these certificates, the committee do not see why the like allowance should not be made from 1817 to 1820, unless there was a change in the law within that period, which is not suggested by the petitioner nor by the Comptroller. His claim would be strengthened by the consideration that, "by the act of May 7, 1822, it is provided, in the case of the collector of New York, if his nett emoluments as collector proper amount to $4,000 in any year, he is entitled to that amount in such capacity for such year; besides which, if his fees, as designated collector for issuing the certificates alluded to, and in other capacities, as agent for marine hospitals, light-houses, &c., amount to $400, he is also entitled to such amount for such year." But, supposing that the decision was made as stated by the Comptroller, and, of course, that Mr. Gelston did not receive an allowance from the date of such decision to 1817, the committee reject this item of the claim.

There are several other items which have been disallowed, and on which the committee will not make any remarks, as they do not perceive that the accounting officers have committed any error in their decision; and they will only notice the item of amount charged for moiety of forfeiture in case of Henry K. Toler, and duties thereon not allowed, (said Toler having been discharged from prison by authority of the President of the United States and Secretary of the Treasury,) $9,838 25.

There is no dispute about the facts in this case. Henry K. Toler was guilty of violating the revenue laws of the United States ; judgment was recovered against him after several years' litigation, and he was imprisoned to respond to it. The President of the United States discharged him on his surrendering his property. Some money has been collected from the property so assigned, and paid into the Treasury, or passed to the credit of the United States. The petitioner says the President had

no power to remit that part of the judgment which, by law, belonged to the informers, and that, having in this exceeded his authority, the United States are liable to the petitioner, and ought to pay him a moiety of the judgment; and particularly so, inasmuch as if the President had not so remitted the judgment, and discharged Toler from imprisonment, the whole judgment would have been collected from the means at Toler's command. But if this is not granted, he then asks that the expenses incurred in prosecuting the suit should be paid out of the proceeds of the property assigned, and that the balance of the money so recovered be paid to him. There is no evidence before the committee as to the ability of Toler to have paid the judgment if he had not been discharged. The committee will not investigate the powers of the President to discharge from imprisonment; but on adverting to the act of March 3, 1817, to which the petitioner refers, they find that, on discharging the person imprisoned, the President may impose such terms and conditions upon the debtor as he thinks proper, and that the judgment remains good, and is in no otherwise affected by the discharge, than that the body of the debtor cannot thereafter be taken in execution; but his property is liable, as if no discharge had been given. The committee obtained a copy of the discharge of Toler from the State Department, by which it appears that Toler should assign all his property to the United States. The assignment having been made, and "the judgment remaining good and sufficient in law," the committee do not think the petitioner has any just ground to complain because the body of Toler was released from imprisonment.

It appears by a report made by the Comptroller to the Secretary of the Treasury, in answer to a call on that Department for information, that out of the property so assigned by Toler, Mr. Tillotson, the former district attorney in New York, collected and paid into the Treasury the sum of $953 79; and that Mr. Ingersoll, late attorney for the United States in the district of Pennsylvania, recovered a debt assigned against one Armstrong, in the amount of $3,158 82. The Comptroller says Mr. Ingersoll has charged $1,000 for his own fees, in making this collection, and that he has retained the balance, in order to pay himself for extra-official services of different kinds, and in a variety of cases; which claims the officers of the Treasury have not considered themselves authorized to allow.

Although the discharge of Mr. Toler was on the condition that he "first assign and convey, to and for the use and benefit of the United States, all his property, real, personal, and mixed, now in possession or expectancy, by reversion or remainder," still the committee think the assignment was as well for the use and benefit of those entitled to a moiety of the judgment, as for the use and benefit of the United States; that whatever has been, or shall hereafter be, collected, should be paid to those entitled to it, as though no discharge had been given. It is not the duty of this committee to liquidate the charges and fees of Mr. Ingersoll; but they express the opinion, if the money retained by him is improperly retained, and the United States have not taken prompt and efficient measures to compel him to account for this money in a legal manner, that they ought to be held responsible to those whose trustees they are. With this view of the case, the committee think the petitioner is entitled, as executor of David Gelston, to the share the said David Gelston had a right, by law, to receive, as collector of the port of New York, out of the moneys collected on the judgment against said Toler, subject only to reasonable fees.