43D CONGRESS, 1st Session. } HOUSE OF REPRESENTATIVES. { REPORT No. 780.

JOHN FLETCHER.

JUNE 22, 1874.—Committed to a Committee of the Whole House and ordered to be printed.

Mr. COMINGO, from the Committee on Indian Affairs, submitted the following

REPORT:

[To accompany bill H. R. 3315.]

The Committee on Indian Affairs, having had under consideration the bill (H. R. 3315) for the relief of John Fletcher, respectfully submit the following report thereon:

Claimant seeks to recover the sum of $3,450 for depredations alleged to have been committed by the Cheyenne and Arapaho Indians, in the month of November, 1870. The chief question that arises is as to the liability of the Government to indemnify the claimant in view of the facts that exist and are established in the case.

Your committee find that on the 4th day of May, 1870, claimant entered into a contract in writing with "Brevet Brigadier-General M. R. Morgan, commissary of subsistence, United States Army, chief commissary of the department of the Missouri," by the terms of which he was to furnish between the 1st day of July, 1870, and the 30th day of June, 1871, at Forts Harker, Hays, Wallace, Larned, and Dodge, in the State of Kansas, and Camp Supply, in the Indian Territory, beef and beef-cattle on the hoof, and that he executed bond with approved security for the faithful performance of his said contract. Your committee further find from the evidence adduced that on or about the 25th of November, 1870, while claimant, in pursuance of the terms of his said contract, was en route from Fort Dodge, Kansas, to Camp Supply, in the Indian Territory, with a drove of one hundred and twenty-five beef-cattle, for the use of the Government troops stationed at the latter point, and when within about twenty-five miles thereof, a band of Cheyenne and Arapaho Indians stampeded claimant's said herd of cattle, and succeeded in driving away sixty-nine head of them, none of which claimant ever recovered; that it does not appear that claimant was guilty of negligence whereby said loss was occasioned, nor does it appear that he ever recovered any part of said sixty-nine head of cattle, or that he has ever recovered any payment or other indemnity for his said loss.

Your committee further find from the evidence adduced that said cattle had cost plaintiff a greater sum than he seeks to recover by the bill under consideration; that he paid fifty dollars per head for them in Shawnee County, in the State of Kansas, which is all he seeks to recover; and that in the opinion of claimant and one of his witnesses, they were worth seventy-five dollars per head at the time and place at which they were lost; which your committee think is not improbable, in view

of the fact that, by the terms of the contract, they were to be American cattle and of an average weight of one thousand pounds; and the stipulated price per pound, net, was twelve and a quarter cents.

In the opinion of your committee the testimony shows that they, in character, weight, and quality, conformed to the requirements of the contract; at all events, such is clearly the tendency of the testimony, and your committee find nothing that contravenes it.

Such being the facts in the case, is the Government liable to indemnify claimant for his said loss? That we may be able to arrive at a satisfactory and just conclusion in the premises, it may be well to consider the relations the Indians bear to the Government, and the legislation that affects that relation. Between them and the citizens of the United States legislation has interposed a "high wall and a deep ditch," and has thereby left the latter without remedy, if the Government is not liable for the depredations of those around whom it has thrown its protecting arms, and between whom and its citizens it has interposed insuperable barriers.

The Indians have long been regarded and treated as the wards of the Government. This relation was recognized and acted upon almost three-quarters of a century ago, and at no time since has it been disclaimed. As far back as 1802 our ancestors saw the propriety and necessity of protecting the citizens of the then feeble republic from the rapacity and violence of that race, and provided means of indemnity for spoliations committed by such of them as were in "amity with the United States." (2 Stats. at Large, page 143.)

This liability and promise to indemnify continued as a part of the written law of the land from that time until 1859, when, as we shall presently see, the promise, but not the liability, was revoked by act of Congress. The liability, in the opinion of your committee, did not depend upon, nor was it created by, the promise. It existed independent of the latter—the latter being a simple recognition of the former; and, in the opinion of your committee, the liability has not yet been ignored, but, to the contrary, has been recognized in all subsequent legislation on the subject, although the express promise of indemnity has been recalled.

The trade-and-intercourse act of 1834 expressly repeals that of 1802; (4 Stats. at Large, page 734,) but by the seventeenth section of said act (4 Stats. at Large, page 731) provisions are made for full indemnity, and the same is guaranteed by the Government. This statute *remained in force from the 30th of June, 1834, to the 28th of February, 1859*, at which time it was repealed. The repealing clause is as follows:

> *And be it further enacted*, That so much of the act entitled "An act to regulate trade and intercourse with the Indian tribes and to preserve peace on the frontiers, approved June 30, 1834, as provides that the United States shall make indemnification out of the Treasury for property taken or destroyed in certain cases by Indians trespassing on white men, as described in said act, be, and the same is hereby, repealed: *Provided, however*, That nothing herein contained shall be so construed as to impair or destroy the obligation of the Indians to make indemnification out of the annuities as prescribed in said act. (11 Stats. at Large, p. 401, sec. 8.)

Let it be remembered that this leaves in force all of said act except the clause that guarantees indemnity out of the Treasury. The 17th section of the act of June 30, 1834, contains the following among other provisions:

> *Provided*, That if such injured party, his representative, attorney, or agent shall in any way violate any of the provisions of this act, by seeking or attempting to obtain private satisfaction or revenge, he shall forfeit all claims on the United States for such indemnification.

Thus, we find, the citizens of the United States are wholly without remedy for wrongs and injuries perpetrated by the Indians unless by reason of the peculiar relationship they sustain to the Government, and the exclusive guardianship over them, assumed by the latter, it is responsible for their willful and unprovoked trespasses.

The act of July 15, 1870, (16 Stats. at Large, sec. 4, p. 360,) forbids the use of any part of the annuities then due, or thereafter to become due the Indians designated in the act, in payment of claims growing out of their depredations. It should be observed that it does not ignore the liability of the Government in such cases, but rather recognizes it by providing that claims of that character shall not be paid out of annuities, and that they may be paid by a special appropriation made for that purpose by an act of Congress.

The section last referred to reads as follows:

> That no part of the moneys hereby appropriated by this act, or which may hereafter be appropriated in any general act or deficiency bill making appropriations for the current and contingent expenses of the Indian Department, to pay annuities due to or to be used and expended for the care and benefit of any tribe or tribes of Indians *named herein*, shall be applied to the payment of any claim for depredations that may have been or that may be committed by said tribe or tribes, or any member or members thereof; and no claims for Indian depredations shall hereafter be paid, *until Congress shall make special appropriations therefor;* and all acts or parts of acts inconsistent herewith are hereby repealed.

By the 7th section of an act approved May 29, 1872, (17 Stats. at Large, page 190,) the last clause of the foregoing section is re-enacted, and it is made the duty of the Secretary of the Interior to prepare and publish such rules and regulations as he may deem necessary, prescribing the manner of presenting claims for compensation for depredations committed by Indians, and the degree and character of the evidence necessary to support the same, and to report to Congress, at each session thereof, the nature and character, &c., of such claims, whether allowed by him or not, and the evidence on which the action was based.

Provisions are thus made for ascertaining the extent of injuries that may be inflicted on citizens of the United States; the result of these injuries we call *claims*, and we provide that they may be paid out of our general treasury, and that they shall not be paid out of the annuities due or to become due the Indians. If we do not thereby recognize a right on the part of those who suffer from the depredations of these people to recover the actual damages they may sustain, what is the meaning and effect of all this legislation? Why do we forbid the injured to redress their own grievances? and why lock up the annuities of those who despoil our citizens, and hold out a pretended promise of payment?

Congress may make appropriations to pay these losses. This is plain. But it is insisted by some that there is no legal liability to pay them. If this be true, when did the liability cease? Why have we continued to pay some of these claims, and why make provisions for prosecuting them in the manner in which we have done? and why do we provide for paying them out of the Treasury? If they are not valid claims, by what authority can we appropriate money out of the Treasury to pay them? The right of recovery depends, in each case, on the particular facts that bear upon it. In this respect it does not differ from the right of recovery in any civil action, such as assumpsit, covenant, or trespass.

Your committee, therefore, recommend that the bill under consideration do pass.

○

JOHN FLETCHER.

JUNE 22, 1874.—Committed to a Committee of the Whole House and ordered to be printed.

Mr. SHANKS, from the Committee on Indian Affairs, submitted the following as the

VIEWS OF THE MINORITY.

[To accompany bill H. R. 3315.]

The undersigned, members of the Committee on Indian Affairs, dissent from the report and opinions of the majority of said committee on the bill (H. R. 3315) for the relief of John Fletcher, appropriating $3,450, for depredations by Cheyenne and Arapahoe Indians, in the forcible seizure and detention by portions of said tribes of sixty head of cattle, estimated at that amount.

That the true ground of difference may be better understood, the points of agreement and dissent are stated as follows:

The minority concede the facts of the report—

1. That the claimant had a contract with the Government as stated.
2. That the Indians did stampede claimant's cattle as stated.

But the minority totally dissent as to the general liability of the Government for depredations by Indians as claimed and stated in the report; nor in any other case, or class of cases, *unless so made by act of Congress.*

In support of this view we urge the following reasons:

1. The Government is not liable for depredations by one citizen on another.
2. Nor by a foreigner on a citizen.
3. Nor by a citizen on a foreign resident.
4. Nor by a citizen on an Indian, unless under treaty or act of Congress.
5. Nor, in our opinion, by an Indian or Indians on a citizen or citizens, unless under a treaty or act of Congress.

The following reasons for the fifth proposition, being the only proposition pertinent to the facts of the report, are:

1. That the courts have not held that the Government was liable for such damages in any adjudicated case before the courts of the United States, except under act of Congress declaring such liability.

2. Prior to the act of March 30, 1802, (see 2 Stat. at L., 143,) during the entire history of the country, colonial and federative, there was no such liability recognized or claimed by courts or officials of the United States or of any State. The statute of that date (March 30, 1802) was the first recognition of liability by the Government in such cases, and was specially in aid and encouragement of frontier settlements contending against the then numerous and powerful tribes in possession of the then extended frontier. It was a voluntary liability of the Government,

under a statute, for the especial benefit of a class of citizens undertaking special enterprises and undergoing peculiar hardships and dangers then existing.

3. This permitted liability was re-declared by the act of June 30, 1834, (see 4 Stat. at L., 734.) This last act neither enlarged nor diminished the liability of the Government to the frontier settlers, the original reason for the concession still existing in 1834 as in 1802.

4. The increased number of the white people and the strength of their Government, the comparative diminished strength and numbers of Indian tribes and people, and also the numerous fraudulent, gross, and exorbitant claims against the Government, traveling over this road to the doors of the Treasury, through the nation's generosity, were sufficient causes for the act of February 28, 1859, repealing the provisions of the act of 1834, and declaring affirmatively that the Government would not be liable for such losses thereafter.

5. The act of 1834, making Indian tribes liable out of their annuities for the acts of individuals of the tribe, remained in force until, from the injustice and abuse of the remedy by claimants, that provision was repealed.

6. There has been no recognized liability of the Government since February 28, 1859, except by special statute providing for the allowance and payment of claims for Indian depredations.

7. The act of May 29, 1872, does not contain any part of the spirit or statutory liability of those referred to from 1802 to 1859. The provision of said act is for a hearing, upon evidence, as to the merits of each case, and prohibiting payment, without the future voluntary assumption of liability by an appropriation by Congress.

Thus sustaining these views: That there is no liability of the Government beyond that voluntarily assumed by law, and which may be withdrawn at pleasure; that it was originally assumed and continued to aid and encourage settlements in the face of the Indians who were likely to commit depredations; that, having served its purpose, it was repealed as unnecessary, and to abate the corruption and injustice practiced by unworthy claimants under it; that it required, under its voluntary liability, that the tribe or members committing depredations to be redressed should be at *amity* with the United States.

And finally, if the relation and liability, as in the case of guardian and ward, or of special control over the Indian, or guarantee for his conduct, exists against the United States, then all claims, including war-claims, irrespective of condition of *amity*, would attach, and the liability and losses of the Government would be illimitable.

We, therefore, dissent from the principles enunciated in the report of the majority.

JOHN P. C. SHANKS.
JNO. D. LAWSON.
B. W. HARRIS.
J. H. RAINEY.
H. L. RICHMOND.

O