26th Congress, 2d Session. Rep. No. 186. Ho. of Reps.

BENJAMIN MURPHY.

[To accompany Senate bill No. 55.]

February 12, 1841.

Mr. Russell, from the Committee of Claims, made the following

REPORT:

The Committee of Claims, to which was referred the bill from the Senate (No. 55) entitled "An act to authorize the Secretary of War to adjust and pay to Benjamin Murphy, of Arkansas, the value of his corn, cattle, and hogs, taken by the Cherokee Indians in the month of December, one thousand eight hundred and twenty-eight," make the following report:

The bill is in the following words: "That, under the direction of the Secretary of War, there shall be paid to Benjamin Murphy, of Arkansas, the reasonable value of the corn, the cattle, and hogs, the property of the said Benjamin, which were taken by the Cherokee Indians west of the river Mississippi, and appropriated to their own use, in the month of December, in the year one thousand eight hundred and twenty-eight: *Provided, always*, That the said Benjamin shall produce satisfactory evidence that his property was taken by said Indians, and the value of such property so taken.

"Sec. 2. *And be it further enacted*, That said payment shall be made out of any money in the Treasury not otherwise appropriated."

There is no report accompanying the bill from the Senate; but it appears that, on the 16th May, 1828, a treaty was made and concluded between the United States and the Cherokee nation of Indians, by which the United States ceded to the Cherokee nation a tract of seven millions of acres of land in the western part of the (then) Territory of Arkansas; which said ceded territory it was agreed should be designated by the United States, by a line drawn between given points, by the 1st day of October in that year; and the United States agreed to remove, immediately after running the line, all white persons from the west to the east of said line, and thereafter to keep them from the west of said line. The depredations complained of were committed about the middle of December, 1828, on the west of said line, and within the ceded territory. At the time this treaty was consummated, the petitioner resided with his family in that part of the territory which was ceded to the Cherokees, and possessed a large stock of cattle and hogs ranging at large upon the prairies and in the woods. The petitioner removed with his family from the ceded territory some time in the year 1828, (at what precise time does not appear, but it is understood to have been after the 6th of May;) leaving his cattle and hogs ranging on the prairies and in the woods, as formerly, and leaving in a crib, at the place he abandoned, about sixty-five bushels of corn. The ceded territory had never

been offered for sale, nor was it subject to private entry. It does not appear at what precise time the line contemplated by the treaty to be run was in fact run; but it appears to have been done before the 1st of December in that year. In the month of February, 1829, the petitioner returned to the Cherokee country, for the purpose of collecting and securing his property: that while he was in the act of collecting and marking his cattle and hogs, a controversy arose between him and some of the Indians, in consequence, as the Indians allege, of his marking some of their cattle or hogs. This controversy became so animated, and the determined hostility of the Indians became so alarming, that the petitioner fled the country to avoid personal injury, leaving the cattle and hogs, some in the possession of the Indians, and others ranging at large as before. The corn, it appears, had been used or destroyed before his return in February. The petitioner afterwards applied to the Cherokee nation for relief and compensation for the loss sustained, and exhibited to them the following particulars of his claim:

"1830. CHEROKEE NATION

To Benjamin Murphy, DR.

"To hogs taken by the nation—say 521, at $6 per hog	$3,126 00
"To 137 head of cattle—say $7 per head	959 00
"To one yoke of oxen	80 00
"To 65 bushels of corn—say	60 00
"To cattle drove off—say 50 head, at $7 per head	350 00
	4,575 00

"Presented by John Linton, attorney in fact for Benjamin Murphy."

A council of the nation was called to consider the claim, and a decision was made against the petitioner. He then made application to the Executive Department of this Government for relief, and exhibited the same items which had been presented against the Cherokee nation. But it was there also rejected; and though the ground upon which it was then rejected does not distinctly appear, the committee apprehend that one reason for rejecting it was, that the petitioner was occupying the Indian lands in violation of the laws of the United States.

The humane policy of the laws of the United States regulating the intercourse with Indian tribes or nations has been steadily and perseveringly adhered to, so far as the legislation of Congress has been concerned, from the earliest period of our history as an independent Government; and the effect has been the amelioration of the condition of these tribes, and their approximation to a state of civilization. The rude ferocity of their national character has been, in some degree at least, overcome; and their early habits of indolence exchanged, in many instances, for those pursuits of civilized life, which this judicious policy has brought to their observation, and induced them to cultivate. Their roving disposition has been checked, and whole tribes have been stimulated to pursuits of industry, and the enjoyment of social and domestic comforts, by the benevolent influences diffused among them by the rigid observance of the laws of the United States regulating the intercourse with them. The duty enjoined by this treaty *the petitioner disregarded;* and the laws and policy which dictated them were *equally disregarded when the petitioner entered upon the land in question;*

and if this entry was not in direct violation of these laws and this treaty stipulation, it was at least without authority of law. The petitioner suffered his cattle and hogs to range in the Indian country, and in a manner calculated to produce collision with the Cherokee Indians. He was not within the protection of the intercourse laws; but chose to locate himself in a section of country in advance of the white population and of civilization, in a situation peculiarly exposed to multiplied casualties. Being in an Indian country, he was subject to Indian laws, and liable to Indian depredations; the remedy for which must be sought for by application to the tribe, or against the offending individual Indians, under their laws. If indemnity were granted, as is provided in this bill, no claim could be founded upon it by the United States against the tribe, under any treaty stipulation or law of the United States. The petitioner being an intruder into their country, he thereby subjected himself and his property to their peculiar customs and laws; but if the petitioner was lawfully in the country before the line designating the ceded territory was run, upon that event he was bound, as a citizen having respect for the laws, to remove therefrom with his property, and withdraw within the jurisdiction of the laws of the United States. Other citizens of the United States were bound to know and regard this treaty stipulation, and the line established by it; and there is no reason for discriminating between him and others. The treaty was made in May, 1828, and after the petitioner removed with his family from the ceded territory, leaving his property ranging as before. At whose risk was this property left in this hazardous condition? Is it possible that it could have been at the risk of the United States? If, under other circumstances, the United States would have been liable, it is a principle universally regarded, that they will grant no indemnity when property has been lost or destroyed in consequence of the negligence of the owner; and upon that principle, if upon no other, no indemnity could be allowed in the present case.

There can be few cases which more strikingly illustrate the propriety of the laws regulating the intercourse with the Indians, than the one under consideration. The petitioner's location in their country, permitting his cattle to range promiscuously with those of the Indians—the manifest object of his location—the herding and marking his cattle and hogs in the manner it was done—would necessarily excite unfriendly feelings in the minds of the savages, not only against the petitioner, but against the white population generally; and the excitement arising from these causes led to the necessity of the petitioner's fleeing the Indian country. It was a consequence which might have been anticipated, and which the exercise of reasonable prudence would have prevented, by abstaining from the acts. For this want of prudence and discretion on the part of the petitioner, the United States certainly were not culpable; nor for this collision; nor for the necessity which produced the petitioner's flight from the Indian country: these were occurrences over which the Government had no control, and cannot in reason, much less upon any principle founded upon a just sense of moral obligation, be held to respond in damages for the loss sustained. Possessing these views, (and in the absence of a report accompanying the bill, presenting the principle upon which it was introduced and passed in the Senate,) the committee recommend that said bill be amended, by striking out the enacting clause.