52D CONGRESS, 1st Session. } HOUSE OF REPRESENTATIVES. { REPORT No. 1858.

INDIAN BENEFICIARIES UNDER TREATY CONCLUDED AT BUFFALO CREEK.

JULY 13, 1892.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed.

Mr. HOOKER, of New York, from the Committee on Indian Affairs, submitted the following

REPORT:

[To accompany H. R. 5679.]

The Committee on Indian Affairs, to whom was referred the bill (H. R. 5679) to provide for a settlement with the Indians who were parties to and beneficiaries under the treaty concluded at Buffalo Creek, in the State of New York, January 15, 1838, for the unexecuted stipulations of that treaty, have considered the same and in respect thereto report as follows:

By treaties duly entered into in the years 1784 (7 Stats., 15), 1789 (7 Stats., 33), and 1794 (7 Stats., 44), the United States secured the Six Nations of New York Indians in the peaceful possession of their lands described by definite boundaries and guaranteed peace and perpetual friendship between the United States and the said Indians, among other things engaging that the United States would never claim the said lands or disturb any of the said Six Nations or their Indian friends residing thereon and enjoying the same, and engaging that the same should remain theirs until they chose to sell them to the United States.

In 1810 the said New York Indians petitioned the President of the United States for leave to purchase reservations of their western brethren, with the privilege of removing to and occupying the same, and thereupon with the approbation of the President lands situated at Green Bay, Wis., were purchased by the said New York Indians from the Menomonee and Winnebago tribes. By subsequent treaties of 1821, 1822, 1831, and 1832 (Senate Doc. 189, second session, Twenty-seventh Congress, pp. 7 to 22; 7 Stats., 345, 347, 348, 409, 305, and 342; Debates in Congressional Globe, Thirty-fifth Congress, second session, 1858 and 1859, pp. 1634 to 1636), the United States recognized the fact that prior to February, 1831, the said New York Indians, with the approbation of the President, had purchased for a valuable consideration from the Menomonee and Winnebago Indians certain lands at Green Bay, Wis., in addition to three townships set apart for the Stockbridge, Muncie, and Brothertown tribes, which said lands, at first aggregating by their description a very much larger quantity, were finally reduced by the United States so as to include only 500,000 acres, in addition to the three townships aforesaid.

In the negotiations resulting in this outcome, the United States secured from the Menomonee Indians, without any other consideration than the assent of the United States to the agreement between the Menomonees and the New York Indians, 2,500,000 acres of land (7 Stats., 342).

The title of the New York Indians to these 500,000 acres of land has since been several times recognized by the United States, as in the treaty with the Menomonees of September 3, 1836 (7 Stats., 506); in the treaty with the Stockbridges and Muncies of September 3, 1839 (7 Stats., 380); in the treaty with the New York Indians concluded at Buffalo Creek January 15, 1838 (7 Stats. 550); and in the treaty with the Tonawanda band of Senecas of November 5, 1857 (11 Stats., 409).

The treaty whose stipulations are the subject of the bill under consideration was concluded on the 15th of January, 1838, at Buffalo Creek. This treaty was the outcome of an application of the New York Indians to the President to take their Green Bay lands and provide them new lands in the Indian Territory. The provisions of the treaty are, in brief, as follows: That, in consideration of the premises and the covenants contained in the treaty itself to be performed by the United States, the New York Indians cede and relinquish to the United States all their right, title, and interest in and to their Green Bay lands (excepting a small reservation), and in consideration of this cession and relinquishment the United States, in and by the treaty, agree and guarantee as follows:

First. To set apart as a permanent home for the New York Indians a certain tract of country west of the Mississippi River, described by metes and bounds, and to include 1,824,000 acres of land, to be divided equally among them, according to the number of individuals in each tribe, as set forth in a schedule annexed to the treaty and designated as Schedule A, on condition that such of the Indians as should not accept and agree to remove to the country set apart for them within five years, or such other time as the President might from time to time appoint, should forfeit to the United States all interest in the lands so set apart.

Second. The United States agreed to protect and defend the New York Indians in the peaceable possession and enjoyment of their new homes, and to secure their right to establish their own government, subject to the legislation of Congress respecting trade and intercourse with the Indians.

Third. The United States agreed that the lands secured to the Indians by the treaty should never be included in any State or Territory of the Union.

Fourth. The United States agreed to pay to the several tribes and nations of Indians hereinafter mentioned, on their removal West, the following sums, respectively, namely: To the St. Regis tribe, $5,000; to the Seneca Nation the income annually of $100,000 (being part of the money due said nation for lands sold by them in New York, and which sum they authorized to be paid to the United States); to the Cayugas, $2,500 cash and the annual income of $2,500; to the Onondagas, $2,000 cash and the annual income of $2,500; to the Oneidas, $6,000 cash; and to the Tuscaroras, $3,000.

Fifth. The United States agreed to appropriate the sum of $400,000, to be applied from time to time by the President of the United States for the following purposes, namely: To aid the Indians in removing to their new homes, and supporting themselves the first year after their removal; to encourage and assist them in being taught to cultivate their lands; to aid them in erecting mills and other necessary houses; to aid them in purchasing domestic animals and farming utensils, and in acquiring a knowledge of the mechanic arts. Article 3 of the treaty provides that such of the tribes of the New York Indians as did not accept and agree to remove to the country set apart for their new homes

within five years, or such other time as the President might from time to time appoint, should forfeit to the United States all interest in the lands so set apart. By supplemental article the St. Regis Indians assented to the treaty, with this stipulation, viz:

> And it is further agreed that any of the St. Regis Indians who wish to do so shall be at liberty to remove to the said country at any time hereafter within the time specified in this treaty, but the Government shall not compel them to remove.

At the time of the making of the treaty of 1838 the New York Indians and the several tribes and nations thereof owned and possessed in the State of New York valuable lands, comprising many thousands of acres, the preëmptive right of none of which was in the United States; and for many years prior to the making of the treaty the said several nations or tribes of Indians had improved and cultivated their lands on which they resided, and from the products of which they chiefly sustained themselves.

The President of the United States never prescribed any time for the removal of the New York Indians, or any of them, to the lands, or any of them, set apart by the said treaty; and no provision of any kind was ever made for the actual removal of more than about 260 individuals of the claimant tribes as contemplated by the treaty of Buffalo Creek, and of this number only 32 ever received patents or certificates of allotment of any of the lands mentioned in the first article of the treaty, and the amount allotted to those 32 was at the rate of 320 acres each, or 10,240 acres in all.

In 1845 Abram Hogeboom represented to the Government of the United States that a number of the New York Indians, parties to the treaty of 1838, desired to remove to the Kansas lands, and upon such representation and in conformity with such desire Hogeboom was appointed special agent of the Government to remove the said Indians to Kansas.

The sum of $9,464.08 of the amount appropriated by Congress was expended in the removal of a party of New York Indians, under his direction, in 1846.

From Hogeboom's muster roll in the Indian Office it appears that 271 were mustered for emigration. The roll shows that of this number 73 did not leave New York with the party. The number, thus reduced to 191, arrived in Kansas June 15, 1846; 17 other Indians arrived subsequently; 62 died, and 17 returned to New York.

It does not appear that any of the 32 Indians to whom allotments were made settled permanently in Kansas.

On the other hand, the United States, after the conclusion of the treaty, surveyed and made part of the public domain the lands at Green Bay ceded by the Indians, and sold, or otherwise disposed of, and conveyed the same and received the consideration therefor. The lands west of the Mississippi, secured to the Indians by the treaty of 1838, were also afterwards surveyed and made part of the public domain, and were sold or otherwise disposed of by the United States, which received the entire consideration therefor; and the said lands thereafter were and now are included within the territorial limits of the State of Kansas. The price realized by the United States for such of the lands as were sold was at the rate of $1.34 per acre, while the cost of surveying, etc., the same was at the rate of about 12 cents per acre, making the net price realized by the United States about $1.22 per acre.

By treaty with the Tonawanda band of the Senecas, numbering 650 individuals, the United States, November 5, 1857, in consideration of the release by the said band of its claims upon the United States to

the lands west of the State of Missouri, all right and claim to be removed thither and for support and assistance after removal, and all other claims against the United States under the treaty of 1838 (reserving their rights to moneys paid or payable by Ogden & Fellows), agreed to pay and invest, and did pay and invest for said band the sum of $256,000. This amounted in substance to compensating the beneficiaries of the treaty of 1838 at the rate of $1 per acre for their claims to lands in Kansas under said treaty, and also their proportionate share of the $400,000 provided to be appropriated in that treaty.

After March 21, 1859, an order of the Secretary of the Interior was made which directed that the tract of land in Kansas Territory, known as the New York Indian reserve, should be surveyed, with a view of allotting a half section each to such of the New York Indians as had removed there under treaty provision, after which the residue was to become public domain. After this, and before the proclamation of the President of said lands as part of the public domain (December 3 and 17, 1860), the New York Indians employed counsel to protect and prosecute their claims in the premises, asserting in the powers of attorney that the United States had seized upon the said lands contrary to the obligations of said treaty, and would not permit the said Indians to occupy the same or make any disposition thereof, and the said Indians have steadily since asserted their said claims.

Of the sum of $400,000, agreed by the treaty of Buffalo Creek to be appropriated by the United States for the purposes mentioned above, only the sum of $20,477.50 was so appropriated (except as hereinafter stated). Of this sum only $9,464.08 was actually expended, and this sum was expended for the removal, more than five years after the ratification of the treaty, of some of the 260 individuals mentioned above; but in addition to said sum of $9,464.08 there was paid for the Tonawanda band of Senecas $256,000, as mentioned above.

The above facts have all been ascertained by the committee in its investigations, and after a careful examination of the record evidence bearing upon the claims of the Indians.

In addition, a bill of substantially the same character as the one under consideration was introduced into both Houses in the Forty-seventh Congress, and was favorably reported to the House by the House Committee on Indian Affairs (House Report No. 2001, Forty-seventh Congress, second session), and in the next session was referred by the Senate Committee on Indian Affairs to the Court of Claims under the "Bowman act," so-called. That court, after hearing counsel for the Indians and the United States, and after full consideration of the case, as appears by its findings, duly reported to the Senate its findings (Senate Mis. Doc. No. 46, Fifty-second Congress, first session), which in all respects bear out the conclusions of the committee above set forth. The amount due the Indians under the treaty, as ascertained by the committee and the Court of Claims, is $1,971,295.92, after making all allowances for credits in behalf of the United States.

In view of these facts the committee recommends the passage of the the bill with the usual allowance of interest in cases of Indian claims and judgments of the Court of Claims, namely, 5 per cent from the 5th day of November, 1857.

As respects the legal rights of the Indians under the treaty under consideration, the committee deems it necessary to advert to but one feature of the case, namely, the question of the effect of the fact that

the Indians did not remove to the Kansas lands within five years after the ratification of the treaty.

This question has had the committee's full and careful consideration, and the committee is clearly of the opinion that it presents no difficulty whatever in the way of the rights of the Indians. The language of the treaty, as above appears, is that the Kansas lands were set apart for the Indians on condition that such of them as should not *accept* and *agree* to remove within five years, *or* such other time as the President might from time to time appoint, should forfeit to the United States all interest in the lands. It is seen at a glance that the condition was not removal, but *agreement* to remove, to be evidenced by *acceptance* by the Indians of the terms of the treaty. They did *accept*, and thereby *agreed* to remove (except the St. Regis tribe, as to whom, as above appears, the treaty was modified in this respect), and thus literally and fully they complied with the imposed condition.

All question of a forfeiture thus disappeared. It remained only for the President to appoint a time or times for the removal of the Indians. This the President never did, and as, in violation of the stipulations of the treaty, by including the lands within the territorial limits of the State of Kansas, throwing them into the public domain and selling them and receiving the money therefor, the United States has made it impossible for the Indians to be removed; a removal is now wholly out of the question, and this, too, without any fault of the Indians.

In these views the committee has the support of no less an authority than the Supreme Court of the United States.

The treaty of Buffalo Creek (with its supplement of 1842, which, however, does not affect the claim under consideration) and the mutual duties of the United States and the Indians thereunder have been twice considered by the Supreme Court of the United States, and the court has spoken on the subject with no uncertain sound:

> Neither treaty made any provision as to the mode or manner in which the removal of the Indians * * * was to take place. * * *
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> The removal of tribes and nations of Indians from their ancient possessions to their new homes in the West, under the treaties made with them by the United States, have been, according to the usage and practice of the Government, by its authority and under its care and superintendence. * * *
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> The negotiations with them as a *quasi* nation, possessing some of the attributes of an independent people, and to be dealt with accordingly, would seem to lead to the conclusion, *unless otherwise expressly stipulated*, that *the treaty was to be carried into execution by the authority or power of the Government*, which was a party to it; *and more especially when made with a tribe of Indians who are in a state of pupilage and hold the relation to the Government as a ward to its guardian.* * * *
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> The treaty of 1838 contemplated a removal to the tract west of the State of Missouri, *and putting the Indians in possession of it.* A large fund was appropriated and in the hands of the Government, to be disbursed *in aid of such removal*, and of their support and encouragement after their arrival. It did not, therefore, separate those Indians from the care and protection of the Government on its ratification, but contemplated further duties towards them, and for such means were supplied. * * *
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> We hold that the performance [of the conditions of the treaty] was not a duty that belonged to the grantees, but to the Government, under the treaty. (Fellows *v.* Blacksmith, 19 How., 366.)

On the second occasion when the treaty was under consideration by the court its language was:

> This court have decided in the case of Fellows *v.* Blacksmith (19 How., 366) that this treaty has made no provision as to the mode or manner in which the removal of the Indians * * * was to take place; *that it can be carried into execution only by the authority or power of the Government*, which was a party to it. *The Indians are to be removed to their new homes by their guardians, the United States.* (New York *v.* Dibble, 21 How., p. 371.)

And the views of the committee are further supported by the treaty making and legislative branches of the Government.

Thus, following the decision of the Supreme Court in the case of Fellows *v.* Blacksmith, which was rendered March 5, 1857, a treaty was made with the Tonawanda band of the Senecas, as above set forth, on November 5, 1857, by the terms of which those Indians (part of the New York Indians), in consideration of the release by them of their claims to the Kansas lands and to the right to be removed thither and to support and assistance after removal, and all other claims against the United States under the treaty of Buffalo Creek, were paid by the United States (by investment for their benefit) the sum of $256,000, which sum, as above stated, amounted in substance to compensating those Indians at the rate of $1 per acre for their share of the lands and also their proportionate share of the $400,000 provided by that treaty to be appropriated. It is to be noted that this action was taken by the United States more than *nineteen* years after the date of the treaty and more than *fifteen* years after its proclamation as amended, a fact showing beyond all doubt that after the Supreme Court had spoken on the subject the United States, speaking by its highest branch, the treaty-making power, unequivocally recognized the double fact that it was the duty of the Government to remove the Indians and that the lapse of more than five years played no part whatever in the matter.

Another not less striking feature of the matter is that the Tonawanda band was not represented in the execution of the treaty, and, accordingly, should least of all be entitled to compensation in the premises. This fact was urged, on the argument of Fellows *vs.* Blacksmith, as invalidating the treaty of Buffalo Creek, but the court made short work of the point, saying (19 How., p. 372):

> An objection was taken, on the argument, to the validity of the treaty, on the ground that the Tonawanda band of the Seneca Indians were not represented by the chiefs and headmen of the band in the negotiations and execution of it. But the answer to this is that the treaty, after executed and ratified by the proper authorities of the Government, becomes the supreme law of the land, and the courts can no more go behind it for the purpose of annulling its effect and operation than they can go behind an act of Congress.

In view of this fact the Tonawanda treaty becomes to the last degree significant. Of course, if those Indians were not parties to the treaty of Buffalo Creek, they had no claims to yield in consideration of a money payment; and yet, not having been actual parties, they were the first and only portion of the Indians to be compensated for the Government's broken faith.

The committee having thus the support of the Supreme Court and the treaty-making power, has the support of the legislative branch of the Government also. In the sundry civil bill of March 3, 1859, the rights of these Indians are distinctly recognized. That act (11 Stats., 430, 431) authorized the issue by the Secretary of the Interior of patents for land to certain Indians in Kansas, but expressly declared "that nothing herein contained shall be construed to apply to the New York Indians or to affect their rights under the treaty made by them at Buffalo Creek." Following, as it did, the decision of the Supreme Court and the treaty with the Tonawanda band, this act can be viewed only as a distinct and intentional recognition of the rights of the Indians in the premises.

As respects the question of interest, the committee is equally clear in its recommendation.

The rule of the law on this subject is well understood.

Interest should be allowed in all cases of contract where it is the duty of the debtor to pay money without a previous demand. (West Republic Co. *v.* Jones, 108 Pa. St., 55.) Whenever a debtor knows what he is to pay and when he is to pay it he is chargeable with interest if he neglects or refuses to pay it. (Curtis *v.* Inerarity, 6 How., 146; Young *v.* Godbe, 15 Wall., 562; Dodge *v.* Perkins, 9 Pick., 369.)

Where one receives an advantage or benefit from the use of money of another he is chargeable with interest. (Lewis *v.* Bradford, 8 Ala., 632; Miller *v.* Bank of N. O., 5 Wheat., 503; Sims *v.* Willing, 8 S. and R., 103; Killian *v.* Eigenmann, 57 Ind., 480.) If an amount is capable of being ascertained the account is so far liquidated as to bear interest. (Graham *v.* Chrystal, 1 Abb. Pr. N. S., 121.)

Tried by this rule of the law, this case properly calls for the allowance of interest from November 5, 1857, the date of the Tonawanda treaty; because by that treaty the United States admitted both knowledge of the amount payable by it and its obligation to pay; because the time of payment to the Tonawandas was, by the treaty, the confessed time of payment of all of the Indians; because the amount payable to the Indians was at that time so capable of ascertainment, and in fact so ascertained, as to be, in contemplation of law, liquidated, and because from that time, at least, the United States had the benefit of the use of money properly payable to the Indians.

In addition, there appear to the committee strong equitable reasons for the allowance of interest in this case, namely:

First, the bill provides for the payment by the United States to the Indians at the rate of $1 an acre only for the lands in question, whereas the price actually realized by the United States from the sale of the lands was $1.22 per acre net.

Second. The United States at an early period disposed of the 500,000 acres of land in Wisconsin belonging to the Indians and the 1,824,000 acres in Kansas, and the proceeds in each case were received into the Treasury of the United States, and the United States has ever since had the use of the moneys derived from the lands.

Third. Upon the execution of the treaty with the Tonawandas on November 5, 1857, the United States paid and invested for those Indians the sum of $256,000, so that they have since that date had the benefit of that sum of money, representing as aforesaid their interest under the treaty.

Fourth. On March 21, 1859, the Secretary of the Interior directed the Commissioner of the Land Office to cause the Kansas lands to be surveyed with a view of placing them on the market for sale as part of the public domain, and they were so placed on sale in accordance with the proclamations of the President of December 3 and 17, 1860, notwithstanding that the Indians in the fall of 1859, and in advance of the proclamations of the President, employed counsel, protesting against the action of the Government in the premises, to secure indemnity, and from thence hitherto they have continuously asserted their rights, and have been engaged in so doing at the cost of great labor and expense to themselves, and the delay in procuring a settlement has not only been no fault of the Indians, but also has been in the face of their repeated and earnest efforts.

Fifth. As above stated, if indemnity was due to any of the Indians at the time of the Tonawanda treaty, as was confessed by the United States by the fact of entering into that treaty, it was due to all of the Indians, and all of them should be put upon the same footing in point of justice.

Sixth. The United States has had the use of the $423,000 stipulated by the treaty of Buffalo Creek to be paid to the New York Indians ever since the conclusion of that treaty, less the amount paid to the Tonawanda band, a fact recognized in terms by the Supreme Court of the United States in its decision in the case of Fellows *vs.* Blacksmith, in which the court treats the treaty as in effect effecting an appropriation.

And in this connection the committee desires, in conclusion, to call attention to the well-considered report of Senator Jackson, from the Senate Committee on Claims, submitted at the first session of the Forty-eighth Congress (Senate Report 326), in which is noted a long list of acts of Congress allowing interest to every class of claimants, especially to the Indian tribes and nations.

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