44TH CONGRESS, 2d Session. } HOUSE OF REPRESENTATIVES. { REPORT No. 188.

CERTAIN INDIAN LANDS IN THE STATE OF KANSAS.

MARCH 3, 1877.—Recommitted to the Committee on the Public Lands and ordered to be printed.

Mr. CROUNSE, from the Committee on the Public Lands, submitted the following

REPORT:

[To accompany bills H. R. 543 and H. R. 640.]

The Committee on the Public Lands, to whom were referred bills (H. R. 543 and H. R. 640) relating to certain Indian lands in the State of Kansas, submit the following report:

By the first article of the Shawnee treaty of May 10, 1854, the Shawnee tribe of Indians ceded and conveyed to the United States a certain tract of land, designated and set apart for them in fulfillment of the second and third articles of the treaty of 1825, and conveyed to them by a patent bearing date the 11th day of May, 1844. By the second article, as amended by the Senate, the United States retroceded 200,000 acres of said tract, to be selected between the Missouri State line and a line parallel to and west of the same, thirty miles distant. The article provides, among other things, that each Shawnee residing east of said parallel line shall be entitled, in severalty, to 200 acres, and, if the head of a family, a quantity equal to 200 acres for each member of his or her family. It was also further agreed that those known as the "Black Rob's" band of the Shawnee tribe should be allowed, for the time being, to hold this land in common, and should have set apart for them, in a compact body, a tract equal to 200 acres to each and every Indian of said band.

By the fourth article of said treaty the members of said Black Bob's band were authorized to make selections, whenever they desired so to do, of 200 acres each from the tract provided to be set apart as aforesaid, the same to be patented to them in severalty, and that said selections should be made, in all respects, in conformity with the rule provided to govern those who should in the first instance make selections.

By the act of Congress approved March 3, 1859, the Secretary of the Interior was authorized to issue patents to such Indians in Kansas as, by treaty, were entitled to the same, under such guards and restrictions as the said Secretary might deem proper. Subsequently, under rules and regulations made and promulgated by the Secretary of the Interior in conformity with said act of March 3, 1859, selections were made and patents issued therefor to all the members of the Shawnee tribe, except the aforesaid Black Bob's band, and for said Black Bob's band there was set apart, to be held in common for the time being, a tract of 33,400 acres, being an amount equal to 200 acres to each member of said band, said tract being bounded on the east by the boundary-line between the States of Kansas and Missouri.

It appears from the records in the Indian Office that during the late war, these Indians, for security, were compelled to leave their homes upon said lands and seek shelter among the severalty Shawnees living farther west; and before they could return, after the close of the war, their lands were occupied by trespassers who had settled upon the same without authority of law and against the protest of said Indians, officially made through their proper agent. These trespassers have ever since refused to vacate said lands, or purchase the same from the Indians when they had secured patents therefor.

In 1866, a portion of said "Black Bob's" band elected to take their land in severalty, and sixty-nine members thereof made selections of 200 acres each from said tract and received patents therefor. These patents, sixty-nine in number, were delivered in the summer of 1867, and recorded in the office of the register of deeds for Johnson County, Kansas, in which county said lands are located. The settlers upon these lands refusing to purchase the same from the patentees upon any terms, or to recognize any right or title in them to said lands, the patentees then sold the greater portion of the same to other parties at a price averaging nearly $4 per acre; and conveyances for the same were made and executed in accordance with the rules and regulations made and promulgated by the Secretary of the Interior for that purpose. It appears that these settlers had banded together with a declared purpose to not recognize the titles of the Indians to said lands, or to allow them, or parties who might purchase from them under the patents, to occupy the same, claiming that they would secure titles to said lands under the pre-emption laws, at $1.25 per acre. The sales of lands embraced in the sixty-nine patents referred to took place in November and December, 1867, and in January, 1868. When said sales were being made the settlers upon said lands attempted to defeat the same by representing to the Indian Office that the Indians were being swindled out of their lands by speculators, and in the name of the patentees, and without their knowledge or consent, represented to the Commissioner of Indian Affairs that they had never made selections and applications for patents, and requested that the patents thus issued and delivered should be recalled and canceled. On the 10th of January, 1868, Commissioner N. G. Taylor directed Superintendent Murphy to investigate and report upon all matters pertaining to the sixty-nine selections and applications for patents as aforesaid, and also of all matters pertaining to the sale and conveyance of land embraced in said patents. On the 29th of January, 1868, Superintendent Murphy reported that the entire transaction had been strictly legal and regular in every particular, and recommended the approval of the deeds executed by the said Indian patentees. Upon the receipt of said report of Superintendent Murphy, the Indian Office examined the deeds then filed for approval, as required by the rules and regulations, and finding that said rules and regulations of the Secretary of the Interior, made by authority of the act of March 3, 1859, to govern the sales and conveyances of lands by said Indians, had been strictly complied with, the Commissioner of Indian Affairs, N. G. Taylor, did, on the 3d of April, 1869, approve the same. However, before said deeds had reached the Secretary of the Interior, and received the formal approval of that official, Commissioner Taylor was succeeded in office by E. S. Parker. He, in June, 1869, made a further reference of the whole subject, including the application for patents for the sixty-five additional selections, filed in November, 1868, to the newly appointed superintendent, Enoch Hoag.

On the 17th of September, 1869, Superintendent Hoag made a report

upon the subject-matter referred to him, as above stated, and recommended as follows:

First. That the deeds of conveyance to lands embraced in the sixty-nine patents issued and delivered in 1867 should be approved, upon notification to the Indian Office, through the superintendent, that a certain alleged difference between the amounts named as the consideration in said deeds and the amount claimed to have been received by the grantors, as stated by them to Superintendent Hoag when investigating the subject-matter, had been paid by the grantees.

Second. That patents should issue upon the sixty-five applications filed in November, 1868, and, when issued, the same should be delivered to the patentees entitled thereto who should not then have sold their lands; but in cases where the land embraced in said patents had been sold by the patentees, then said patents should be delivered to the grantees of the patentee, upon proper proof to the superintendent that the grantor had received a fair compensation for the land so conveyed.

On the 28th of September, 1869, Secretary Cox acknowledged the receipt of the aforesaid report of Superintendent Hoag, and approved of the recommendations therein made, as above stated, and directed the Commissioner of Indian Affairs to carry said recommendations into effect.

On the 22d of November, 1869, Superintendent Hoag writes the Commissioner of Indian Affairs that the amount of the deficiency before referred to had been paid to him by the grantees for the benefit of the grantors, and that therefore the deeds before mentioned should be approved. Thereupon Commissioner Parker indorsed thereon his concurrence in the approval of his predecessor, Commissioner Taylor. But when only two of said deeds had reached the Secretary of the Interior and received his signature of approval, and when the lands embraced in the sixty-five patents applied for in November, 1868, which patents had been issued, signed, sealed, and delivered by the General Land-Office to the Indian Office, were, by direction of the Secretary of the Interior, being sold and conveyed by the Indians entitled to the patents, a Senate resolution was received by said Secretary, requesting him to suspend all action in reference to the "Black Bob" Indian lands in Kansas, and to transmit copies of all papers relating thereto to the Senate. This interference was followed by the incorporation of section 14 in the sundry civil appropriation bill, approved July 15, 1870, which provided as follows:

> That the Secretary of the Interior is hereby directed to withhold patents for any portion of the lands known as "Black Bob" Indian lands in Kansas, and also to withhold his approval of all transfers of said lands, and to permit peaceable occupancy by all settlers and Indians now residing thereon, until further action of Congress in relation thereto, without prejudice to existing rights.

It appears that said section 14 was incorporated in said bill by a conference committee during the last hours of the session, and necessarily received little or no consideration in either house. At the ensuing session of Congress the House of Representatives, upon a memorial of said Indians and the recommendations of the Commissioner of Indian Affairs and Secretary of the Interior, passed a bill repealing section 14 referred to, but its action failed to receive the concurrence of the Senate.

Two bills respecting this matter have been referred to this committee, (H. R. 543 and H. R. 640.) The latter looks to a sale of these lands to the settlers thereon at a price named, and from the proceeds re-imburse the purchasers from the Indians the price heretofore paid for the lands purchased from them.

From the foregoing recital of what has transpired respecting these lands, we submit that Congress has not the power to do what is proposed by this bill.

The retrocession to the tribe, and the provision that each Shawnee should be entitled to a specific tract, to be selected by him, vested in him an absolute and complete title in fee to such tract when selected.

The effect of the treaty and the exercise of the right of selection under it secured much more than a possessory right to the selected tract. If the Shawnees had held by the original Indian title, and then ceded to the United States their lands, reserving therefrom certain tracts, they would have held merely the right to use and occupy such tract subject to the ultimate title of the Government, and its exclusive power to acquire that right. But here the Shawnees had the title of the United States. They became joint owners, with a further stipulation binding upon them and the United States, securing to each Indian two hundred acres, when selected, as provided by that stipulation; the tract was converted into individual property, and the title thereto vested as effectually as if a patent had issued therefor conformable to an express provision of law. In the case of the United States *vs.* Brooks (10 Howard, 442) the Supreme Court decided that a supplemental article of a treaty of a cession of land with a tribe of Indians, reciting that a certain quantity of land had been granted by the tribe to certain persons, and stipulating that those persons should have their right to said land reserved for them and their heirs and assigns forever, to be laid off on the southeast corner of the land ceded, gave to the persons named a fee-simple, and their grantee had a perfect title. A grant like that in this treaty passes to the grantee all the estate which the United States had in the subject-matter. This point is, in the language of Attorney-General Black, firmly settled, if the highest judicial authority can settle anything, (9 Opinions Attorneys-General, page 42.) The earliest case on the subject in the United States courts is Rutherford *vs.* Green, (2 Wheaton, 196.) It has been followed by United States *vs.* Percheman, (7 Peters, 51;) Mitchell *vs.* United States, (9 Peters, 711;) Ludige *vs.* Roland, (2 Howard, 581;) Lessieur *vs.* Price, (12 Howard, 59.)

Attorney-General Bates (11 Opinions Attorneys-General, page 49,) remarks:

> A grant of public land by statute is the highest and strongest form of title known to our law. It is stronger than a patent, for a patent may be annulled by the judiciary upon a proper case shown of fraud, accident, or mistake, while even Congress cannot repeal a statutory grant. A grant by Congress is higher evidence of title than a patent. (Erigmon *vs.* Astor, 2 Howard, 319.) A treaty is to be regarded as an act of Congress whenever it operates without the aid of any legislative provision. (Foster *vs.* Neilson, 2 Peters, 314.)

The power to dispose of these lands has passed from Congress, and any attempt at legislation as proposed in bill 640 is not only unauthorized, but tends to complicate titles, involve those in whose interest it is proposed in fruitless and expensive litigation, and ultimately retard lawful settlement. The rights of the several parties interested are fixed by the treaty stipulations and proceedings had in pursuance of them. Section 14 of the appropriation bill of July 15, 1870, simply inhibits the Secretary of the Interior from the performance of a ministerial duty. It is mischievous in its effect. It holds out a hope to the settler or trespasser of ultimate title to the lands which must prove delusive. Its continuance upon the statute-books is a wrong, both to the settler and the rightful owner of the land, and should be repealed at once.

Your committee, therefore, recommends the passage of H. R. No. 543, modified so as to simply effect such repeal.

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