

JAMES L. JOHNSON, SURVIVING PARTNER OF THE FIRM  
OF BECK & JOHNSON.

[To accompany bill H. R. C. C., No. 110.]

JANUARY 24, 1862.—Reported from the Committee of Claims, committed to a Committee of the Whole House, made the order of the day for to morrow, and ordered to be printed.

The COURT OF CLAIMS made the following

REPORT.

*To the honorable the Senate and House of Representatives of the United States in Congress assembled :*

The Court of Claims respectfully presents the following documents as the report in the case of

JAMES L. JOHNSON, SURVIVING PARTNER OF THE FIRM  
OF BECK & JOHNSON vs. THE UNITED STATES.

1. The petition of the claimant.
2. Original documentary evidence for the claimant transmitted to the House of Representatives; a printed copy transmitted to the Senate.
3. Original documentary evidence for the government transmitted to the House of Representatives; a printed copy transmitted to the Senate.
4. Claimant's brief.
5. United States solicitor's brief.
6. Opinion of the court allowing claimant two hundred and fifty dollars.
7. Bill for the relief of claimant.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Washington, this 20th day of January, A. D. 1862.

SAM'L H. HUNTINGTON,  
*Chief Clerk Court of Claims.*

## IN THE COURT OF CLAIMS.

JAMES L. JOHNSON *vs.* THE UNITED STATES.*Petition.*

Your petitioner, James L. Johnson, a citizen of the United States, and a resident of Santa Fé, in the Territory of New Mexico, would respectfully state to the court that he was, in the year 1857, doing business as a merchant in Santa Fé, in partnership with one Preston Beck, jr., deceased, under the name and style of Beck & Johnson, of which firm he is the surviving partner. Your petitioner further states that in the month of May, 1857, in the Territory of Kansas, near the site of Fort Atkinson, on the Arkansas river, the train of wagons in which their goods, wares, and merchandise were being transported to Santa Fé, was stopped by a band of Indians belonging to the tribe called Kiowas, then at amity with the United States, and by menaces, and through fear of bloodshed and hostility of said Indians, on refusal to comply with their demands, the said Preston Beck, jr., was compelled to deliver to said Indians, for the cause aforesaid, a large quantity of flour, bread, sugar, coffee, rice, tobacco, and butcher-knives, of great value, to-wit, of the value of one hundred dollars; and afterwards, to-wit, on the day and year aforesaid, the said Indians unlawfully and without provocation, killed and destroyed two of the mules of the said Beck & Johnson, while in the wagon travelling on the public highway from Independence, Missouri, to Santa Fé, New Mexico, by shooting them through with arrows, which said mules were of great value, to-wit, of the value of \$225 each, making the total loss sustained by him amount to the sum of \$550.

Your petitioner further states that out of the annuities due and payable annually to said tribe of Indians, he is entitled to indemnity for said property so lost and destroyed by said Indians, as will appear by the 17th section of the act of Congress of June 30, 1834, which reads as follows, to-wit:

*And be it further enacted,* That if any Indian or Indians belonging to any tribe in amity with the United States shall, within the Indian country, take or destroy the property of any person lawfully within said country, or shall pass from the Indian country into any State or Territory inhabited by citizens of the United States, and there take, steal, or destroy any horse, horses, or other property belonging to any citizen or inhabitant of the United States, such citizen or inhabitant, his representative, attorney, or agent, may make application to the proper superintendent, agent, or sub-agent, who, upon being furnished with the necessary documents and proofs, shall, under the direction of the President, make application to the nation or tribe to which said Indian or Indians shall belong, for satisfaction; and if such nation or tribe shall neglect or refuse to make satisfaction in a reasonable time, not exceeding twelve months, it shall be the duty of such superintendent, agent, or sub-agent, to make return of his doings to the Commis-

sioner of Indian Affairs, that such further steps may be taken as shall be proper, in the opinion of the President, to obtain satisfaction; and in the meantime, in respect to the property so taken, stolen, or destroyed, the United States guarantee to the party so injured an eventual indemnification: *Provided*, That if such injured party, his representatives, 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 claim upon the United States for such indemnification: *And provided also*, That unless such claim shall be presented within three years after the commission of the injury, the same shall be barred. And if the nation or tribe to which such Indian may belong, receive an annuity from the United States, such claim shall, at the next payment of the annuity, be deducted therefrom and paid to the party injured; and if no annuity is payable to such nation or tribe, then the amount of the claim shall be paid from the Treasury of the United States: *Provided*, Nothing herein contained shall prevent the legal apprehension and punishment of any Indians having so offended.”—See 4 vol. Statutes at Large, page 729.

That, in strict conformity with the provision of said act, the said claim with the proof in its support was placed, on the 12th day of October, 1857, in the hands of John Haverty, the proper Indian agent of said tribe of Indians; which said claim was on that day transmitted from St. Louis, Missouri, to the honorable Charles E. Mix, esquire, Acting Commissioner of Indian affairs, for the consideration of the department; and said claim, with the proof in its support, was, in due course of the mail, received by the said Acting Commissioner of Indian Affairs. Your petitioner further states, that said claim remained in the office of the Commissioner of Indian Affairs from the said 12th day of October, 1857, until the 13th day of December, 1859; and, after some correspondence about said claim between the Commissioner of Indian Affairs and John S. Watts, the attorney of the petitioner, on the 3d day of February, 1860, the Commissioner of Indian Affairs made his decision in the case, rejecting said claim, and refusing to allow any part of it, for the reason that the requirement of the law had not been fulfilled in regard to the presentation of said claim to said Indians; which said decision, on appeal, was, on the first day of March, 1860, confirmed by the Secretary of the Interior. Your petitioner avers that all the facts above mentioned will more fully appear by reference to an authenticated copy of the petition and proof and correspondence about said claim on file in the Interior Department, an authenticated copy of which is made a part of this petition (marked as Exhibit A) herein. Your petitioner further states that by law he was entitled to payment of the value of his property out of the annuities of the said tribe of Kiowa Indians, and the decision of the Secretary of the Interior has deprived the petitioner of that right. Your petitioner, therefore, asks the court to report a bill providing for the payment of the value of the said prop-

erty so destroyed, with interest thereon from the 1st day of June, 1857. The said James L. Johnson, as said surviving partner, being the sole owner of said claim.

All of which is respectfully submitted.

JOHN S. WATTS,  
*Attorney for Petitioner, Santa Fe, New Mexico.*

DISTRICT OF COLUMBIA, *Washington County, ss :*

John S. Watts, upon his oath, states that the matters and things set forth in the above petition, so far as stated from his own knowledge, are true in substance and in fact, and so far as stated from the information of others, he believes them to be true.

JOHN S. WATTS.

Subscribed and sworn to before me this 5th day of April, 1860.

THOMAS C. DONN, *J. P.*

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DEPARTMENT OF THE INTERIOR, *March 2, 1860.*

SIR: Herewith is enclosed, for your information, a copy of a letter addressed by me yesterday to John S. Watts, esq., in reference to the claim of Beck & Johnson against the Kiowa Indians.

The papers which accompanied your report of the 16th instant in this case are herewith returned.

Very respectfully, your obedient servant,

J. THOMPSON, *Secretary.*

Hon. A. B. GREENWOOD,  
*Commissioner of Indian Affairs.*

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DEPARTMENT OF THE INTERIOR, *March 1, 1860.*

SIR: I have to acknowledge the receipt of your letter of the 7th instant asking me to review the decision of the Indian office in the case of Messrs. Beck & Johnson, claiming compensation out of the Kiowa annuities for property destroyed by the Kiowas in May, 1857, and to state in reply that, in my opinion, the views expressed by the Commissioner in his letters to you on the subject are correct.

The law requires that the claim shall be submitted to the Indians in council, and until this is done the Indian office has no authority to pay it. An examination of the claim at this time would, therefore, amount to nothing. Whether the Indian office is chargeable with negligence in not promptly presenting this claim to the Kiowa council depends on the circumstances of which I have at present no knowledge. It certainly was the duty of that office so to present the claim; and, unless there were insuperable difficulties in the way, it has failed in its duty. But I do not see how I can relieve you. The spirit and the letter of the law both require the presentation of the



claim to the Indians in council as a condition precedent to its adjustment, and an executive department has no alternative but to obey the law.

Allow me to suggest that you accept the Commissioner's offer to submit the claim to the Indians now.

Very respectfully, your obedient servant,

J. THOMPSON, *Secretary.*

JOHN S. WATTS, Esq.,

*Attorney, &c., &c., Washington, D. C.*

DEPARTMENT OF THE INTERIOR,  
*Office Indian Affairs, February 16, 1860.*

SIR: I have the honor to acknowledge the receipt from you of a letter from John S. Watts, esq., in which he asks that you may review the action taken by this office in the claim of Messrs. Beck & Johnson for spoliations alleged to have been committed by the Kiowa Indians.

And instead of furnishing you with a synopsis of what has been done, I have thought it advisable to send up the original papers in the case, with a copy of the correspondence that has been held between this office and Mr. Watts, which I have the honor of transmitting herewith.

The letters of Mr. Watts are herewith returned.

Very respectfully, your obedient servant,

A. B. GREENWOOD, *Commissioner.*

Hon. J. THOMPSON,

*Secretary of the Interior.*

OFFICE SUPERINTENDENT INDIAN AFFAIRS,  
*St. Louis, October 12, 1857.*

SIR: I have the honor herewith to submit, for the consideration of the department, a claim of Messrs. Beck & Johnson, merchants of Santa Fé, for alleged depredations committed by the Kiowa Indians, amounting to \$550, which was received by yesterday's mail, under cover of a letter of the 14th ultimo, from their attorney, J. Houghton, esq.

I am, sir, very respectfully, your obedient servant,

JOHN HAVERTY,

*Superintendent Indian Affairs.*

CHARLES E. MIX, Esq.,

*Acting Commissioner of Indian Affairs.*

*To the superintendent of Indian Affairs, Central Superintendency, St. Louis, Missouri:*

SIR: Your petitioner, Preston Beck, jr., a citizen of the United States and a resident of Santa Fé, in the Territory of New Mexico,

respectfully represents: That on or about the 25th of May, 1857, when crossing the plains from Kansas to Santa Fé with his train loaded with merchandise, at a point on the Arkansas river near the site of Fort Atkinson, a band of Kiowa Indians, several hundred in number, came to the train and commenced harassing and threatening the men, driving the teams, ordering them to stop, demanded coats, blankets, provisions, &c., and with drawn bows and arrows threatened the men, and if they did not stop and give them what they wanted they would shoot them. Some of the men becoming much intimidated gave them their coats and other articles. The Indians having followed us for several miles and becoming more insolent and threatening, we were compelled to assume the defensive. The men were ordered to get out their arms and prepare for defence, and the Indians were ordered peremptorily to leave. Seeing our preparation they accordingly left. A short time afterwards their chief, known by the name of "Peshamo," came to us and told petitioner that he did right in driving his people away; said there were a large number of women and children near at hand, and if we would give some provisions he would not let his people molest us again. To avoid further trouble and perhaps bloodshed, petitioner gave them 1 sack of flour, 1 sack of crackers, 50 lbs. sugar, 50 lbs. coffee, 50 lbs. rice, 1 box of smoking tobacco, and some butcher-knives. The Indians then left us, as we supposed, to go to their own camp, but the train had passed but a few miles further when one or two of these same Indians approached the leading wagon and shot two mules dead with arrows and escaped at a gallop.

The Arrapahoe Indians afterwards informed their agent, and a Mr. Allison, that the same chief "Peshamo," had stated to them that the Kiowas had killed the mules to induce the whites *from fear* to give them more sugar and coffee next time.

Petitioner estimates his loss as follows:

|  |               |
|--|---------------|
| For provisions given to the Indians to avoid bloodshed,<br>value at the place..... | \$100 00      |
| For two large mules killed, value at the time and place                            | 450 00        |
| Total.....   | <u>550 00</u> |

This property is a perfect loss. The petitioner has neither recovered or been indemnified in any manner for any part thereof, nor has he either of himself, his representative, attorney or agent attempted to obtain private satisfaction or revenge for said loss, or in any manner violated the laws of the United States regulating intercourse with the Indian tribes.

Petitioner knows the above described Indians to be Kiowas, as he has often met them before; that they were at that time and now at peace with the United States, and drawing annuity therefrom.

Your petitioner refers to the proof herewith presented and prays that he be indemnified according to law out of the next annuity paid

to said Indians according to the act of Congress, approved June 30, 1834, or any other act that has in such case been made and provided.  
PRESTON BECK, JR.

Sworn to and subscribed before me this day. In testimony whereof,  
[L. S.] I have hereunto set my hand and affixed the seal of office  
this 12th day of September, A. D. 1857.

A. DE MARLE, *Clerk.*

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TERRITORY OF NEW MEXICO,  
*County of Santa Fé:*

On this 28th day of August, A. D. 1857, personally came before me, Augustus De Marle, clerk of the United States district court for the first judicial district, for the Territory aforesaid, Charles G. Parker, and upon his oath declared that in the month of May, June, and July, 1857, he was wagon-master for the merchant train of Preston Beck, jr., and James L. Johnson, merchants, trading in New Mexico under the style and firm of "Beck & Johnson," transporting goods from Kansas City, Missouri, to Santa Fé, New Mexico; that while on the Arkansas river, near the site of Fort Atkinson, that a large band of Kiowa Indians, 200, more or less, in number, came to the train and assuming a menacing attitude, with arrows drawn and bows strung, ordering me to stop the train and give them blankets, coats, and whatever else they wanted, or they would shoot us through. Some of the drivers became intimidated. I told them if they did not immediately leave we should defend ourselves, and began to get out our guns to do so. The Indians had then followed us some six or eight miles, when their chief (known by the name of "Peshamo") came to us and told Mr. Preston Beck, jr., and myself, that we did right in driving the Indians away, but that if we would give to a large number of women and children of his people, who were present, some provisions, he would not permit his people to molest as any more. We gave to them one sack of flour, one sack of crackers, fifty pounds sugar, fifty pounds coffee, fifty pounds rice, one box smoking tobacco, and some butcher-knives. The Indians then all left us, and said they were going to their own camp, but the train had proceeded but a few miles further when two of the same Indians fired their arrows from an ambuscade and killed two mules in the team of the leading wagon of the train, and being on horseback, made their escape at full speed.

The value of the property given to the Indians to avoid bloodshed and prevent further molestation was not less than one hundred dollars. The mules were of the largest size, and, at that place and under the circumstances, worth not less than \$225 each, making the whole amount of loss not less than five hundred and fifty dollars, (\$550,) not including property taken from the teamsters and otherwise stolen from the train. Some of the Arrapahoe Indians afterwards informed deponent that the said "Peshamo," the chief, had informed them that the Kiowas had

killed the two mules to induce the whites to give them more sugar and coffee next time.

The said Kiowa Indians were, at the time of this depredation, at peace with the United States.

Said Beck & Johnson are citizens of the United States.

CHARLES G. PARKER.

This affiant, Nesario Garay, in addition to the facts set forth in the foregoing declaration of Charles G. Parker, on oath declares that on the day referred to he, as one of the teamsters of the train, was driving the foremost team, when two Indians rushed out from an ambuscade and, with arrows, killed two of the largest and fattest mules of the team, and immediately fled on horseback. The Indians were Kiowas—the same who had been harassing the train for most of the day previous.

NESARIO <sup>his</sup> + GARAY.  
mark.

Attest:

A. DE MARLE.

T. HOUGHTON.

UNITED STATES OF AMERICA,  
*Territory of New Mexico :*

I, Augustus De Marle, clerk of the United States district court for the first judicial district of said Territory, do hereby certify that Charles G. Parker and Nesario Garay this day personally appeared before me, and after having been sworn according to law, declared upon oath that the foregoing declarations were true, and signed them in my presence.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court this 29th day of August, A. D. 1857.  
[L. S.] A. DE MARLE, *Clerk..*

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TERRITORY OF NEW MEXICO, *County of Santa Fé :*

On the 12th day of September, A. D. 1857, personally came before me, Augustus De Marle, clerk of the United States district court for the first judicial district of the Territory aforesaid, Francisco Griego, and upon oath declares that in the months of May and June, 1857, he was in the employment of Messrs. Beck & Johnson, merchants of Santa Fé, and was, with their trains, on the road from Kansas, Missouri ; that on or about the 25th May, when about to leave camp on the Arkansas, near where Fort Atkinson was situated, a large band of Kiowa Indians came to the train and demanded presents of clothes, blankets, tobacco, knives, and provisions ; threatening, upon refusal, to stop the train for that purpose, to shoot the men, and continued to threaten them with drawn bows and arrows ; many of the men becoming frightened, gave up their coats and shirts and whatever the Indians could lay their hands on.

Deponent was threatened in the same manner, and upon refusing to give up anything was punched in the side by an arrow, and would probably have been hurt, had he not been rescued by a Mexican captain among the Indians. The Indians were proceeding further to rifle the wagons, when the men were ordered to take their arms and defend themselves. The Indians, upon seeing this preparation, left, and went to one side of the road, when the chief came to the train and had a talk with Mr. Preston Beck, Jr., and the master of the train, when sugar, coffee, and tobacco were given to the Indians. Shortly afterwards one or more Indians concealed in a gulley shot two arrows through two mules in the team of leading wagon of the train and killed them on the spot, and then escaped on horseback. The mules were among the largest of the train.

Deponent further declares that said Beck & Johnson, nor Preston Beck, jr., the senior partner of said firm, have never received any satisfaction for the loss of said property, nor have they sought private revenge.

FRANCISCO GRIEGO.

Sworn to and subscribed before me the day and year above written.  
Witness my hand and seal of office.

[L. S.]

A. DE MARLE, *Clerk.*

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WASHINGTON CITY, *December 13, 1859.*

SIR: I am the attorney of Messrs. Beck & Johnson for the prosecution of a claim against the Kiowa Indians for some property taken by them. On the 12th of October, 1857, the claim was forwarded by John Haverty, superintendent of Indian affairs, to you for "consideration and decision." As there has been, since that time, some change in the principles of law applicable to such cases, I beg to call your attention to a review and reconsideration of any action which may have been had by your office upon that claim, in order that if properly proved it may be now paid out of the annuities of said Indians.

Yours, respectfully,

JOHN S. WATTS,

*Attorney for Beck & Johnson.*

Hon. A. B. GREENWOOD,  
*Commissioner of Indian Affairs.*

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DEPARTMENT OF THE INTERIOR,  
*Office Indian Affairs, December 23, 1859.*

SIR: I have to acknowledge the receipt of your letter of the 13th instant, calling my attention to the claim of Messrs. Beck & Johnson for spoliations alleged to have been committed by a party of Kiowa Indians, in the spring of 1857, to which I would reply.

Upon examination of the papers I find that the matter has never been submitted to the Indians, as the law imperatively requires shall be done in all cases. I further find that a portion of the goods charged for was voluntarily parted with to the Indians, and the high value set upon the mules seems to be partly in consideration of the difficulties attending their loss at the point where they were said to have been killed, which estimate would, therefore, seem to carry with it damages to some extent consequential in their character, rather than damages entirely actual, as contemplated to be relieved by the law.

Should you desire to have the papers sent out to the agent, to be laid before the Indians in council, I will immediately have it done.

Very respectfully, your obedient servant,

A. B. GREENWOOD, *Commissioner*.

JOHN S. WATTS, Esq.

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WASHINGTON CITY, *January 2, 1860.*

SIR: Your letter of December 29, 1859, in reply to my letter of 13th December, 1859, upon the subject of the claim of Beck & Johnson for property taken from them by the Kiowa Indians, is now before me. You say that a portion of the goods were voluntarily parted with to the Indians. If the defenceless citizen who gives his purse to the highwayman, who, with a pistol at his head, says stand and deliver, can be said to voluntarily part with his goods, then these goods were parted with voluntarily. You say that a high value is put upon the mules; reduce it then to what is proper under the evidence. I do not desire the papers sent out to the agent to make a demand for the following reasons: 1st. The Kiowas are now at war, and no demand can be made. 2d. If a demand is made it must result in nothing, and is a useless formality. 3d. After the petition, with the proof, has been placed in the hands of the proper Indian agent, it is not my business to direct a demand; the demand is a matter pertaining to your department, under the direction of the President, and if one year passes away without such demand having been made, the claimant has a right to have his claim acted upon by your department, without such demand. This claim was placed, with the proof, in the hands of the proper agent, (Mr. John Haverty,) October 12, 1857. It is not now just to the claimant to detain him another year for the purpose of going through a useless formality, which, if intended to be done, should have been done two years ago. I hope the case will be acted upon now, and allowed or rejected, as you may think legal and proper.

Yours, respectfully,

JOHN S. WATTS,  
*Attorney for claimant.*

HON. A. B. GREENWOOD,  
*Commissioner of Indian Affairs.*



DEPARTMENT OF THE INTERIOR,  
*Office Indian Affairs, January 30, 1860.*

SIR: I have to acknowledge the receipt of your letter of the 2d instant, in regard to the claim of Beck and Johnson for spoiliations alleged to have been committed by the Kiowa Indians in the spring of 1857. Referring to your letter of the 13th ultimo, wherein you represented yourself as attorney for the claimants, and asked that the case might be taken up, and to my reply on the 23d of that month, I find that it was stated to you that there was nothing in the papers to show that the matter had ever been submitted to the Indians; that it appeared that a portion of the goods charged for was voluntarily parted with, and that the high value set upon the mules killed seemed to be partly in consideration of the difficulties attending their loss at the point where they were said to have been killed.

In taking issue with me you say "if the defenceless citizen who gives his purse to the highwayman, who, with a pistol at his head, says stand and deliver, can be said to voluntarily part with his goods, then these goods were parted with voluntarily." Upon again referring to the statement of Mr. Beck, I find that when the Indians made a hostile demonstration by riding in numbers up to the train, they were deterred from making an attack by the defensive attitude assumed by the members of the party, and retreated; that afterwards, at the solicitation of the chief, who came alone, the goods were given away. Without entering into any argument to show whether this was the result of timidity or of policy, I am sure the statement of Mr. Beck himself will bear me out in the opinion expressed.

As regards the high value assessed upon the mules, I still infer from the testimony that such was the case, because of the position in which the parties were placed from their loss; had it been otherwise, it was the duty of the claimants to show their actual value; as nothing beyond their reasonable worth could be allowed by an executive officer, in carrying out the law, having no equity power to go into the question of how far the parties were damaged ultimately from not being able to prosecute, with facility, the objects of their expedition.

I am not informed as to the reasons why the papers were retained here after being received, and not sent back to be laid before the Indians, but take it for granted that they were sufficient, if any existed; or it might have been from mere omission, as until your letter of the 13th ultimo the parties seem to have slept in the premises. But I cannot see how you have arrived at the conclusion "if one year passes away," after the papers are placed in the hands of an officer of the department, "without demand having been made, the claimant has a right to have his claim acted upon without such demand." There is nothing said in the law in regard to time, except that the party claimant shall present his papers to the proper agent or other officer within three years from the day of the deed, and if the nation or tribe shall neglect or refuse to make satisfaction in a reasonable time, not exceeding twelve months after the matter is presented to them in council, it shall be the duty of the officer to make return of

his doings to the Commissioner of Indian Affairs, that such steps may be taken as may be necessary to obtain satisfaction for the injury. The law leaves me no alternative; it expressly requires that the charges shall be laid before the Indians in council that they may be heard in their defence, and whether it could be done in their present condition, or would be a useless formality, as suggested by you, it is not for me to inquire, I must conform to the law.

I again repeat that, if desired, I will send the papers out that this requirement may be fulfilled, but if you insist upon a decision I must reject the claim.

Very respectfully, your obedient servant,

A. B. GREENWOOD, *Commissioner.*

JOHN S. WATTS, Esq.,

*Washington City, D. C.*

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WASHINGTON CITY, *January 31, 1860.*

SIR: Your letter of yesterday, in reply to my letter of the 2d inst., upon the subject of the claim of Beck & Johnson for depredations of the Kiowa Indians, is now before me. It is not my purpose to rediscuss whether the goods given to the Indian chief, with a hostile band of savages ready to take them upon refusal, were given voluntary or not. It is not my purpose to rediscuss the valuation of the mules. I do not, nor do my clients, desire one dollar more than their fair cash value at the time and place of the taking. I do propose to make a few suggestions as to the point of presenting said claims to the Indians:

1st. I contend that it is only the duty of the Commissioner of Indian Affairs to make said presentation when directed by the President, and until such direction is so given by the President it is not obligatory upon you to do so.

2d. If the obligation to present to the Indians, in all cases and under all circumstances, does exist, the claim must be presented by your department within one year after the petition and proof is perfected and filed in your department or before your agent.

3d. If your department is not bound to make the presentation within the time specified by law, (one year,) then you are not bound to make it in two, three, nor ten years, which is saying to the claimant, in effect, we wont present to the Indians your claim until we see fit to do so, and you cannot have your claim adjudicated until we do present it to the Indians.

4th. It does not seem to me right to omit for years the presentation of the claim and then set up that omission as an excuse for not allowing the claim.

Let the case be decided as now presented.

Yours, respectfully,

JOHN S. WATTS,  
*Attorney for Claimants.*

Hon. A. B. GREENWOOD,

*Commissioner of Indian Affairs.*

DEPARTMENT OF THE INTERIOR,  
*Office of Indian Affairs, February 3, 1860.*

SIR: I have to acknowledge the receipt of your letter of the 31st ultimo, in reply to mine of the day previous, in regard to the claim of Messrs. Beck & Johnson for depredations alleged to have been committed by the Kiowa Indians.

As stated so expressly in my letter to you, I must again repeat that I can find it nowhere stated in the law that any definite time is prescribed within which a claim must be laid before the tribes, and in default of its being done within one year that the party claimant is to be treated as though such had been done.

As attorney for Messrs. Beck & Johnson you decline to have this requirement of the law fulfilled, and call for my decision in the premises. As the case stands, my opinion is, as you were informed must be the result, that no part of it can be allowed.

Very respectfully, your obedient servant,

A. B. GREENWOOD,  
*Commissioner.*

JOHN S. WATTS, Esq.,  
*Washington City, D. C.*

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DEPARTMENT OF THE INTERIOR,  
*Office of Indian Affairs, March 27, 1860.*

I, A. B. Greenwood, Commissioner of Indian Affairs, do hereby certify that the foregoing are true copies of the original papers of file in this office, and an exemplification of its records.

Given under my hand the day and year above written.

A. B. GREENWOOD,  
*Commissioner.*

UNITED STATES OF AMERICA:

I, Jacob Thompson, Secretary of the Department of the Interior, do hereby certify that A. B. Greenwood, whose signature is annexed to the foregoing certificate, is now, and was, at the time of signing the same, Commissioner of Indian Affairs, and that full faith and credit are due to his acts as such.

In testimony whereof, I have hereunto set my hand and caused  
[L. S.] the seal of said department to be affixed this 27th day of  
March, 1860.

J. THOMPSON.

UNITED STATES OF AMERICA,

*Territory of New Mexico, County of Santa Fé, ss:*

JAMES L. JOHNSON, surviving partner of

Beck & Johnson,

*vs.*

THE UNITED STATES.

No. 1835. In the Court  
of Claims.

The evidence in the above case was taken by agreement between R. H. Tompkins, esq., attorney on the part of the United States, and J. Howe Watts, attorney for the claimant, before David V. Whiting, notary public, within and for the Territory and county aforesaid, at the office of Hon. A. M. Jackson, secretary of the Territory of New Mexico, on the 15th day of November, 1860.

*Examined by counsel for claimant.*

Question 1. State your name, occupation, age, place of residence during the past year; whether you have any interest, direct or indirect, in the case in question; and whether, and in what degree, you are related to the claimant.

Answer. Charles G. Parker; freightor; thirty-six years of age; on the prairie; none; not related to the claimant in any degree.

Question 2. Were you in the employment of Messrs. Beck & Johnson at the time of the killing of two mules by the Indians; and if so, state when and where it was, and in what capacity you were then acting?

Answer. I was in the employment of Messrs. Beck & Johnson as wagon-master when two mules were killed by the Indians on the Arkansas, about the 25th of May, 1856.

Question 3. Before the mules were killed, what articles had been delivered to the Indians, what was the value of said articles so delivered, and for what purposes and under what assurances were said articles delivered?

(Objected to, being leading.)

Answer. We gave them some rice and crackers, some sugar, a box of tobacco, some fifty pounds of coffee, about ninety pounds of sugar, nearly a barrel of crackers, valued at fifty or sixty dollars, and were given with the assurance that we would be allowed to proceed on our journey without molestation.

Question 4. What Indians were they to whom the above articles were given and by whom the mules were killed?

Answer. The Kiowas.

Question 5. State the value of the mules killed and the circumstances under which they were killed, and to whom did the mules and other property belong.

Answer. They were not worth less than one hundred dollars each. The Indians followed the train for a distance of seven or eight miles, taking the blankets from the men and stealing articles from the

wagons. Their bows were strung, and they would threaten to shoot the men if they did not give them their coats or knives or other articles of wearing apparel. They took some stretcher sticks from the wagons and dropped one, which I picked up and waited to throw it in the wagon; when I went to throw it in the wagon, some one endeavored to jerk it out of my hand. I turned to see who it was, and saw it was an Indian. I hit him over the head with the stick, knocking him down. By this time the men had their guns prepared to fire upon the Indians, who jumped over a bank, getting out of sight. The chiefs then came up and told us that if we would give them some sugar, coffee, tobacco, and other articles, that they would tie the men who had annoyed us, and that we would be allowed to go on unmolested. We gave them the articles and travelled on. When rising a hill, two Indians came from the side of the road and shot two mules from the first wagon. The mules and other articles belonged to Beck & Johnson.

Question 6. Are you the same person who formerly gave your affidavit in regard to this matter to be sent to the Indian department?

Answer. I think I am.

*Cross-examined by counsel for the United States.*

Question 1. What was the cash value of mules such as those that were killed?

Answer. About one hundred dollars.

Question by the commissioner. Do you know of any other matter relative to the case in question? If so, state it.

Answer. I do not.

C. G. PARKER.

TERRITORY OF NEW MEXICO, *County of Santa Fé, ss:*

On this fifteenth day of November, A. D. 1860, personally came Charles G. Parker, the witness within named, and after having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within were written down by the commissioner and then proposed by him to the witness, and the answers thereto were written down by the commissioner in the presence of the witness, who then subscribed the deposition in the presence of the commissioner. The deposition of Charles G. Parker, taken at the request of John S. Watts, to be used in the investigation of a claim against the United States now pending in the Court of Claims, in the name of James L. Johnson. The adverse party was notified, did attend, and did object.

DAVID V. WHITING, *Commissioner.*

|                          |        |
|--------------------------|--------|
| Fees of witness .....    | \$1 50 |
| Commissioner's fee ..... | 6 89   |
|                          | <hr/>  |
|                          | 8 39   |
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UNITED STATES OF AMERICA,

*Territory of New Mexico, County of Santa Fé, ss :*

JAMES L. JOHNSON

*vs.*

THE UNITED STATES.

} No. 1835. In the Court of Claims.

The depositions of the witnesses hereinafter named, upon the part of the claimant, were taken on the twenty-ninth day of September, A. D. 1860, at the office of the Hon. A. M. Jackson, secretary of the Territory of New Mexico, in the city of Santa Fé, before David V. Whiting, notary public in and for the Territory and county aforesaid, by agreement between John S. Watts, attorney for claimant, and Theodore D. Wheaton representing the United States, as to time, place, and officer.

Jacob Houghton being produced as a witness on the part of the claimant, and being first sworn to tell the truth, the whole truth, and nothing but the truth, touching the above entitled cause, upon his oath states, in answer to the following interrogatories, as follows:

*By attorney for claimant.*

Question 1. State your name, occupation, age, place of residence during the past year; whether you have any interest, direct or indirect, in the claim which is the subject of inquiry; and whether, and in what degree, you are related to the claimant?

Answer. Jacob Houghton; attorney-at-law; forty-seven years of age; Santa Fé; none whatever; I bear no relationship to the claimant.

Question. In 1856-'57 was there a business firm existing in Santa Fé under the name and style of Beck & Johnson; and if so, who composed said firm, and how do you know of its existence?

Answer. There was such a firm; it was composed of Preston Beck, junior, and James L. Johnson; I drew up the articles of copartnership.

Question. When did Preston Beck, jr., die?

Answer. In April, 1858.

Question. What business was that firm engaged in?

Answer. Merchandising.

Question. Did you know of that firm owning a train of mules?

Answer. They did own a train of mules with which they transported their merchandise under the superintendence of C. G. Parker, wagon-master.

*Cross-examined on the part of the United States.*

Question. Do you know of the existence of the said firm, except in the manner above stated.

Answer. I purchased largely from them, and the accounts were always made in the name and style of the firm of Beck & Johnson.

Question. How do you know that this firm owned this mule team?

Answer. I know it from the fact that it was acknowledged as theirs by both the partners, and it was known as theirs by universal repute.



*Question by the notary public.*

Question. State if you know of any other matter relative to the claim in question; and if so, state it.

Answer. Nothing more.

J. HOUGHTON.

Francisco Griego y Maese, being produced as a witness on the part of the claimant, and being first sworn to tell the truth, the whole truth, and nothing but the truth, touching the above-entitled cause, upon his oath states, in answer to the following interrogatories, as follows:

Question 1. State your name, occupation, age, place of residence during the past year; whether you have any interest, direct or indirect, in the claim which is the subject of inquiry; and whether, and in what degree, you are related to the claimant.

Answer. Francisco Griego y Maese; laborer; twenty-three years of age; Santa Fé; I have none; I am not related to the claimant in any manner.

Question 2. Were you along with the train of Messrs. Beck & Johnson when some of their property was destroyed by the Indians on the plains? And if so, state when and where it was, and all the circumstances attending the matter.

Answer. I was; in the month of May, 1836; on the Arkansas, a little below the road going to Bent's Fort. The Indians commenced taking off articles that the teamsters had tied on to the wagons. Mr. Parker went up to them for the purpose of taking the articles away from them; the Indians became angry with him, and threatened to fire their arrows at him. When he took the articles away from the Indians they drew their arrows on him, when he struck one of them, a captive or a full-blooded Indian, with a stick; the Indians continued to extract articles from the hind boxes of the wagons after the articles mentioned were taken from them; one of the Indians went on ahead of the train and hid himself. When the train came up to where he was, he shot down two mules that were in one of the wagons. Before this matter occurred presents of coffee, sugar, rice, crackers, and butcher knives were given to them. I cannot tell how much the articles given them were worth. The mules were large American ones of the best quality; I do not know what their value was, as I have not much experience in such matters. The Indians were Kiowas and Comanches together; I recognized two Kiowa chiefs among them whom I had seen before; there were a great many Indians; they were camped on the Arkansas, and their lodges extended from the Raton mountain road to the crossing. They demanded of the men to give them their coats, hats, or other articles of clothing, and if they refused they threatened to kill them; one of them demanded of me a knife I had on, and when I refused to give it up he put an arrow to my breast and threatened to shoot me. The Indians were not molested or interfered with until they commenced taking things off the wagons.

*Cross-examined by the United States.*

Question 1. How far from the Territory of New Mexico did this occur?

Answer. I do not know if it was in the Territory or not; it took place on the eastern side of the river.

Question 2. How far off were the Indians when you first saw them?

Answer. Three or four came into our camp; when we started again we saw all the lodges on the river.

Question 3. How far was your camp from the river?

Answer. It was not three hundred yards off.

Question 4. At what time of the day were the Indians first seen?

Answer. About 11 or 12 o'clock in the day.

Question 5. How many Indians were seen first?

Answer. About four or five. Before we came down to the river, about 9 o'clock in the morning, we saw a large body of Indians in the distance coming from the river and travelling in the direction of the Raton mountains. They did not come up to us at all.

Question 6. What Indians were they?

Answer. I do not know.

Question 7. How long had you been in camp when the three or four Indians came up to you?

Answer. Not over half an hour.

Question 8. Was your train a mule or ox train?

Answer. It was a mule train.

Question 9. Were the mules turned out to graze when these Indians came up?

Answer. They were.

Question 10. How many wagons were there in the train?

Answer. I do not remember if there were eighteen, twenty, or twenty-three wagons.

Question 11. How many men were there with the train?

Answer. Twenty-eight or thirty men.

Question 12. What were the men doing when the Indians came into camp?

Answer. Some were cooking, and others were off with the mules.

Question 13. What did the Indians do when they came up?

Answer. They asked for something to eat and for presents, which were given to them.

Question 14. How were the wagons camped?

Answer. They were camped in the form of a circle, open at one side.

Question 15. How far below where you were camped was the Indian camp?

Answer. About a mile.

Question 16. Was there more than one Indian camp?

Answer. There was only one large camp, containing a great many lodges.

Question 17. Did you see many women and children?

Answer. I did.

Question 18. Are you acquainted with the customs of the Comanches and Kiowas and other Indians of the plains?

Answer. I am not.

Question 19. Do you know sufficient of their customs to know whether they take their women and children with them when they go off on a war expedition?

Answer. I believe they do not, and that their intention was to beg provisions and other articles from trains passing by.

Question 20. How long did the three or four Indians remain in camp?

Answer. About an hour.

Question 21. Was there any difficulty between them and the men while they were there?

Answer. None.

Question 22. Did you see the large body of Indians while you were camped, or was there any obstacle between?

Answer. We did not see them until we came near to them, as there was a hill between.

Question 23. When did those Indians leave?

Answer. When the train was ready to move. They were on horseback.

Question 24. How did the other Indians come up to the train—in a body, or by small parties?

Answer. They came up in small parties on horseback.

Question 25. Did the wagons have to pass through the encampment of the Indians on its journey or not.

Answer. It did not.

Question 26. Were there a sufficient number of arms in the wagons for all the men?

Answer. There were.

Question 27. Was the road over which the Indians came up to the wagons a wooded country or an open prairie?

Answer. An open prairie.

Question 28. What articles did the Indians take off from the wagons?

Answer. Poles to be used in repairing the wagons.

Question 29. How long had the Indians been around the wagons when Parker struck one of them?

Answer. About one hour and a half or two hours.

Question 30. Did any more Indians come up after Parker struck one of them.

Answer. No.

Question 31. What did he strike the Indian with?

Answer. A stick. The Indian was on horseback. He did not knock him off his horse. He struck him over the shoulders. Parker was on horseback.

Question 32. Did the Indians become insolent and threaten to shoot and kill before or after the Indian was struck by Parker?

Answer. Before.

Question 33. How long after the Indian was struck did the men draw out their arms?

Answer. The Indians drew their arms and we did ours at the same time.

Question 34. What took place after this?

Answer. The main body of the Indians drew off; a few followed the train.

Question 35. How long after the presents were given to them did this happen?

Answer. About one-half hour. While the train was moving they took the articles off.

Question 36. How many Indians were present when the provisions, &c., were given to them?

Answer. Twenty or thirty, more or less.

Question 37. What did the Indians do when the articles were given to them?

Answer. They ate them and went off. They returned again after a short time. The mules were shot about four or five o'clock in the afternoon, two or three hours after the presents were given to them. The Indian camp was still in sight, the river only intervening.

Question 38. Where was the Indian hid?

Answer. In a gully or dry creek with steep banks. The Indian was alone. The mules were killed with arrows. They were in the first wagon. There were eight or ten mules in the wagon. They were next to the wheel mules. I was driving a wagon. They must have been worth in Santa Fé from one hundred and twenty to one hundred and fifty dollars each. I was not driving the wagon. I was driving a wagon which was third or fourth behind the front team. The Indian ran off on horseback after the mules were shot.

Question 39. Did you see the Indian when he shot the mule?

Answer. I did not. I saw an Indian going up a hill, after the mules had been shot, on horseback.

Question 40. Do you know anything about the Indian shooting the mules beyond what was told you?

Answer. I know nothing except from hearsay. I saw the mules dead, pierced with arrows, and the Indian going over the hill. The Indian was about one-half mile off when I saw him.

Question 41. Could you say to what tribe the Indian belonged?

Answer. I could not.

*Re-examined by the claimant.*

Question 42. Did the Indians offer to go away if Mr. Beck would give them some presents to take to their families?

(Objected to.)

Answer. I do not know.

Question by notary public. State if you know of any other matter relative to the claim in question; and if so, state it.

Answer. I do not.

FRANCISCO GRIEGO Y MAES.

TERRITORY OF NEW MEXICO, *County of Santa Fe*, ss:

On this twenty-ninth day of September, anno Domini eighteen hundred and sixty, personally came Joal Houghton and Francisco Griego y Maes, the witnesses within named, and after having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within depositions were written down by the commissioner, and then proposed by him to the witnesses; and the answers thereto were written down by the commissioner in the presence of the respective witnesses, who then severally subscribed the depositions made by them, respectively, in the presence of the commissioner; and I do further certify that the questions proposed to Francisco Griego y Maes were set down by me in the English language, and interpreted by me to him in Spanish, and that his answers thereto were given by him in Spanish, and interpreted and set down by me in English; and I do further certify that said interpretations were properly and correctly made. The depositions of Joab Houghton and Francisco Griego y Maes, taken at the request of John S. Watts, esq., to be used in the investigation of a claim against the United States now pending in the Court of Claims, in the name of James L. Johnson. The adverse party was notified, did attend, and did object.

DAVID V. WHITING, *Commissioner*.

|                           |             |
|---------------------------|-------------|
| Witness's fees .....      | \$2 50      |
| Interpreter's fee .....   | 5 00        |
| Commissioner's fees ..... | 10 55       |
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*Evidence on the part of the government.*

DEPARTMENT OF THE INTERIOR,

*Office of Indian Affairs, January 16, 1861.*

SIR: I have the honor to acknowledge the receipt of your letter of the 27th ultimo, asking for a full report upon each of the averments contained in the petition of James L. Johnson, of the firm of Beck & Johnson, for losses alleged to have been sustained at the hands of Kiowa Indians in the month of May, 1857, and would proceed to do so.

The papers in the case appear to have been received here on the 16th of October, 1857. On the 13th of December, 1859, John S. Watts, esq., called the attention of the Indian office to the claim, which appears to have been placed on file. On the 23d of that month the reply was made to Mr. Watts that the matter had never been submitted to the Indians in council, as the law imperatively requires, and that a portion of the goods were voluntarily parted with to the Indians, and the high value of the mules seemed to carry con-

sequential damages, which could not be relieved to that extent, and the offer was made to have the matter laid before the Indians in council.

On the 2d of January, 1860, Mr. Watts replied. On the 30th of that month it was stated that when the Indians made a hostile demonstration by riding in numbers up to the train they were deterred from making an attack by the defensive attitude assumed by the members of the party and retreated; that afterwards, at the solicitation of the chief, the goods were given away, whether from timidity or policy was not shown, and reference was made to Beck's own testimony; and the high price assessed upon the mules was from the inconvenience in which they were placed, and that such was not the actual value, and consequently could not be allowed, an executive officer having no equity power to go into the question of how far the parties were damaged ultimately from not being able to prosecute with facility the objects of their mission. It was stated also that it did not appear why the papers had not been referred to the Indians in council, nor how Mr. Watts could arrive at the conclusion, "if one year passed away" without demand being made of the Indians, that the claimant had a right to have the claim acted on without such submission; that there was nothing in the law to this effect; and that it was not the province of this office to inquire whether the papers could be submitted to the Indians in council, or to decide whether it was a useless formality, but it must conform to the law. And the offer was again made to send the papers out to the proper agent for submission.

Mr. Watts again replied on the 31st of January, 1860, and was answered as before—that the office could find it nowhere stated in the law that any definite time is prescribed within which a claim must be laid before the Indians, in default of which being done within one year that the party claimant is to be treated as though such had been done. And upon his insisting upon a decision the claim was disallowed.

Mr. Watts then appealed to the Secretary of the Interior, and on the 16th of February, 1860, all the papers were sent up to that officer, who decided, on the 1st of March, that an examination into the merits of the claim would amount to nothing, as it was requisite, under the spirit and letter of the law, that a presentation of the claim should be made, and that this was a prerequisite whether the Indian office had failed in its duty or not by neglecting to have it done, and advised Mr. Watts to accept the offer of this office to have it done. He refused, and then asked for a copy of the papers and correspondence to go before the Court of Claims, all of which were furnished him on the 27th of March last.

The petition is herewith returned, which was enclosed in your letter.

Very respectfully, your obedient servant,

A. B. GREENWOOD,

*Commissioner.*

R. H. GILLET, Esq.,

*United States Solicitor, Court of Claims.*



IN THE COURT OF CLAIMS.—No. 1835.

JAMES L. JOHNSON *vs.* THE UNITED STATES.*Brief of claimant, by J. S. Watts, attorney.*

Preston Beck, jr., and James L. Johnson, in the summer of 1857, were partners in trade, doing business as merchants in Santa Fé, New Mexico, under the name and style of Beck & Johnson. Being large traders, in May, 1857, their train of wagons were engaged in transporting their goods from Kansas City, Mo., to Santa Fé, across the plains, a distance of 840 miles. When on the Arkansas, about halfway between the points aforesaid, a party of Kiowa Indians, two hundred in number, stopped the train, and commenced by force and intimidation to plunder the train. The Indians finding that Messrs. Beck and Parker, both men of courage and determination, intended to resist being thus openly plundered, drew off their forces, and through their chief then promised not to molest them if some presents were made to them; Beck, under that assurance, gave them sugar, tea, coffee, bread, knives, tobacco, and other articles, amounting in value to \$100. The Indians, instead of complying with the understanding and agreement not to molest the train, secreted themselves in advance, and killed with arrows two of the finest mules in the train, valued at \$200 each. These facts are all set forth in the petition of the claimant, and proof taken to prove them, and the same is forwarded to Mr. John Haverty, superintendent of Indian affairs at St. Louis, and the same was duly forwarded to the Commissioner of Indian Affairs and received by him. This claim remained unnoticed and unacted upon in that department from October, 1857, to December, 1859. The Kiowa Indians have an annuity paid to them, and under the 17th section of the Indian intercourse act of June 30, 1834, the claimant contends that he has a right to payment of the property so taken. Having waited three years, the claimant, on the 13th December, 1859, by letter of his attorney, calls attention to this matter. After a lapse of ten days the Commissioner of Indian Affairs replies to the letter, and takes two objections to the claim: 1st. It has not been presented to the Indians, "as the law imperatively requires." 2d. The value set upon the property is too much. The attorney replies, "It was your duty by law to present the claim; you were required to do so within one year after the proof was placed in your hands; and if you fail to comply with the law, the consequences of your neglect are not to be visited upon the head of the innocent claimant, who has complied with the law." To the 2d objection it was replied, that if the value of the property was put too high, reduce it to the lowest notch possible under the evidence. It will be seen by the correspondence that a settled purpose existed from the first not to pay anything on the claim, and to justify the refusal of payment by setting up the neglect of the department to comply with the law as a reason for non-payment. This action of the Indian department on appeal

was sustained by the Interior Department, and it is from that ruling of the Interior Department that the claimant appeals to the Court of Claims. Under all the facts before the Indian department, it was the duty of that department to pay the claimant. That duty having been refused, the court is called upon to effect what the Indian department should have done—report a bill for the value of the property, to be paid out of the annuity of the Kiowa Indians, and charge to them on account of depredations committed in May, 1857, upon Messrs. Beck & Johnson. But the necessity of a demand upon the Indians is by no means admitted in cases arising with the Indians who have an annuity. As reason is the soul and spirit of the law, where the reason of the law ceases the law ceases with it. The object of the demand is like a demand in trover, to enable the wrongdoer to restore the identical property taken to avoid liability. But if the property has been consumed or destroyed, then no demand is required, as a physical impossibility exists to the restoration of the property, and the injured party is not bound to take any property but that taken from him. Now, as these Indians are wild and wandering—have no sugar, tea, coffee, &c., to restore, and cannot bring to life the dead mules to return them, the reasons for a demand are all gone, and a demand would be nothing but a foolish and ridiculous farce. As no demand is by law required of the claimant, his right to payment of the amount due him out of the annuity of the Kiowas is clear and manifest, no matter whether the government had or had not made the demand.

The Indian department does not pretend that it was the duty of the claimant to make the demand, but the duty of the department to make it. That duty was neglected, and now the department takes advantage of its own wrong to shield a band of thieving Indians from responsibility for their robberies. If the unfortunate claimant should omit to comply with any of the provisions of the law, his neglect is visited upon his head with unfeeling rigor and merciless severity; and not satisfied with that, the department, by this decision, now throws upon the claimant's shoulders its own omissions and neglect in bar of his rights. If such is the law, it is time that an intelligent and just people should know it, in order that they may not be deluded with a seeming security where none in fact exists. If the claimant cannot have his claim adjudicated until a demand is made, and if there is no limit to the time within which the Indian department must make the demand, it is evident to the shallowest intellect that the rights of the claimant are not secured by the law, but rest upon the variable will and uncertain pleasure of the Indian department. Objection is taken to the price at which the property is valued, because it seems that an increased value is put upon the property on account of the difficulties attending the loss at the point mentioned. Is there anything illegal or improper in this? Where a trespass and robbery have been committed, the circumstances attending the outrage are proper to be considered to enhance or diminish the damage. For an Indian to kill a carriage mule in St. Louis, where the loss could be immediately supplied, would not be so great a damage as to kill the same mule four hundred miles from human habitation, where the loss could not be

supplied. The true rule of damage is the value of the property at the *time and place* of its destruction, to which may be added exemplary damages if the outrage was attended, as in this case, with "malice, insult, or deliberate oppression."—(See *Anthony vs. Gillet*, 4 Blakf., 348; *Porter vs. Allen*, 8 Ind., 1; *The Shelbyville Railroad vs. Lewark*, 4 Ind., 471; *The Terre Haute Railroad vs. Halliday*, ib., 36; *The State vs. Beakmo*, 5th Blackf., 488.) These principles are in strict conformity with the well-recognized decisions of all intelligent courts as applied to cases of this kind.

The Indian department has the money of these robbers in its hands as their trustee. The law transfers to the claimant so much of that money as will indemnify him for the loss sustained, and the amount proper to constitute that indemnity is a matter not to be determined by the arbitrary will or changing opinions of the Indian department, but by the well-established rules of law applied to the facts of the particular case. The right of the claimant to an adjudication and payment of his claim under the law, by the regulations and decision of the Indian department, has been cut off and destroyed, and in lieu of that right he is told that the time for making a demand is unlimited, and that his case will not be adjudicated until a demand is made. If such is the true construction of that law, then the Indian department of the government can extinguish at its pleasure all right to indemnity upon the part of the claimants by neglecting to make a demand, and thus, by violating the provisions of that law, confiscate their claims in defiance of the express guarantee of an act of Congress. The Indian department, as will be seen by the report of the Commissioner of Indian Affairs, under date of November 26, 1859, page 1, is much gratified at taking from the Indians 58,992,770 acres of their land, at five and three-fifths cents per acre, which, when thus obtained, is sold out to the people at \$1 25 per acre; but when a small claim is presented by one of the people against these Indians, and payment under the law claimed out of their annuity, this same Indian department is enthusiastically alive to the interest of the Indian against the white man, and leaves no stone unturned to embarrass or defeat him in the assertion of his right. Property extorted from the claimant by fear is construed into a voluntary donation, and the testimony of the witnesses, as to the value of his mules, is disbelieved and objected to. In a train of over twenty wagons, with twelve mules to each wagon, it is no uncommon or strange occurrence to find two mules worth \$200 each, not only on the plains, but in any part of the world. As the right of the claimant to payment out of the annuities of the Kiowas is clear and undoubted, and as that right has been denied by the regulations of the Interior Department, the Court of Claims is asked to report a bill providing for the payment of said claim out of the money of the Kiowas in the hands of the Indian department, and thus wrongfully and illegally withheld from the claimant by said department.

All of which is respectfully submitted.

JOHN S. WATTS,  
*Attorney for Claimant.*

SANTA FÉ, *New Mexico.*

## COURT OF CLAIMS.

JAMES L. JOHNSON *vs.* THE UNITED STATES.

## SOLICITOR'S BRIEF.

*Claim for loss by Indian depredations.*

## AVERMENTS IN CLAIMANT'S PETITION.

1. That in May, 1857, near Fort Atkinson, in the Territory of Kansas, a train of wagons, loaded with merchandise, going to Santa Fé, was stopped by the Kiowa Indians, then at amity with the United States.

2. That, on account of menaces and from fear of bloodshed, Beck, his copartner, was compelled to deliver to said Indians a large quantity of flour, bread, sugar, coffee, rice, tobacco, and butcher knives.

3. That afterwards the said Indians killed two of their mules.

4. That claimant, as surviving partner of Beck, now claims indemnity under the 17th section of the act of 1834.

5. That claimant presented to John Haverty, the proper Indian agent, proof in support of said claim, which was transmitted by him to the Commissioner of Indian Affairs.

6. That the Commissioner of Indian Affairs rejected said claim, which decision was confirmed by the Secretary of the Interior on appeal.

## MATERIAL FACTS ESTABLISHED BY THE RECORD.

*First.* That in May, 1856, (not 1857, as stated in the petition,) Beck & Johnson had a transportation train, laden with merchandise, on the Arkansas river, not far from Fort Atkinson, in charge of a wagon-master, Parker.

*Second.* That this place is in the Indian country, as organized under the act of 1834, on the Arkansas river.

The first section of that act (4 U. S. L., 729) is as follows: "That all that part of the United States west of the Mississippi, and not within the States of Missouri and Louisiana or the Territory of Arkansas, and also that part of the United States east of the Mississippi river, and not within any State, to which the Indian title has not been extinguished for the purposes of this act, be taken and deemed to be the Indian country."

At the time this act passed, the United States territory extended further west and as far south as the place in question.

*Third.* That merchandise used by the Indians was given by the conductors of the train to those who came to it and solicited or demanded the same.

*Parker*, the conductor of the train, testifies, (R., p. 31:) "We gave them some rice and crackers, some sugar, a box of tobacco, some fifty

pounds of coffee, about ninety pounds of sugar, nearly a barrel of crackers, valued at *fifty or sixty dollars*, and were given with assurance that we would be allowed to proceed on our journey without molestation."

"The chiefs then came up and told us that if we would give them some sugar, coffee, tobacco, and other articles, that they would tie the men who had annoyed us, and that we would be allowed to go on unmolested. We gave them the articles and travelled on."

*Maes*, (R., p. 37) says presents of coffee, &c., were given.

This evidence is conclusive that these articles were given away, and were not "taken, stolen, or destroyed," within the meaning of the 17th section of the act of 1834.

*Fourth.* That the two mules belonging to the train which were afterwards killed were so killed in consequence of violence used by the wagon-master upon an Indian.

*Parker's* evidence, (R., p. 31:) "They (the Indians) took some stretcher sticks from the wagons, and dropped one, which I picked up and waited to throw it into the wagon. When I went to throw it in the wagon, some one endeavored to jerk it out of my hand. I turned to see who it was, and saw it was an Indian; *I hit him over the head with the stick, knocking him down.* By this time the men had their guns prepared to fire upon the Indians, who jumped over a bank, getting out of sight."

It was after this that the sugar, &c., were given.

*Maes's* evidence, (p. 36:) "The Indians commenced taking off articles that the teamsters had tied on the wagons. Mr. Parker went up to them for the purpose of taking the articles away from them. The Indians became angry with him, and threatened to fire their arrows at him. When he took the articles away from the Indians, they drew their arrows on him, *when he struck one of them*—a captive or a full-blooded Indian—*with a stick.* The Indians continued to extract articles from the hind boxes of the wagons after the articles mentioned were taken from them. One of the Indians went on ahead of the train and hid himself. When the train came up to where he was, he shot down two mules that were in one of the wagons."

R., p. 42: "Where was the Indian hid?

"Answer. In a gully or dry creek, with steep banks. The Indian was alone. The mules were killed with arrows; they were in the first wagon. \* \* \* The Indian ran off, on horseback, after the mules were shot.

"Question. Did you see the Indian when he shot the mules?

"Answer. I did not. I saw an Indian going up a hill, after the mules had been shot, on horseback."

This evidence shows the character of the transaction. The wagon-master, without prudence or sufficient reason, knocked down an Indian with a stick, and then the Indians left, and a chief induced the managers of the train to make them presents. One Indian went alone ahead of the train and concealed himself, and shot two mules from his hiding place. This was undoubtedly the work of retaliation



or revenge for an insult and injury, and was caused by the wagon-master's wrongful act.

Although the Indian is not identified as the one knocked down, still he had provocation for what he did, and, in the absence of proof, must be presumed to have attempted to redress a wrong. He had a motive to induce such an act as is proved, while none of the others had. This is sufficient to authorize the belief that he killed the mules because he had been knocked down with a club.

*Fifth.* The Indians were probably Kiowas. The witnesses agree that Kiowas were present, and one says others were also present and acting.

*Sixth.* The mules killed were worth about \$100 each, while the amount originally claimed was \$225 each.

The other articles, claimed to be worth \$100, Parker (R., p. 31) proves worth only \$50 or \$60.

*Seventh.* The claimants got up *ex parte* affidavits concerning their loss, claiming \$100 for the merchandise which they gave the Indians, (worth only \$50 or \$60,) and \$450 for the two mules killed, (worth only \$200;) and the superintendent of Indian affairs at St. Louis enclosed them to the Commissioner of Indian Affairs.—(R., p. 11.)

*Eighth.* There is no evidence of the request which was made of the superintendent by the claimants' agent, as to what claimants desired him or others to do.

*Ninth.* The Commissioner of Indian Affairs offered claimants' counsel to present the claim to the Indians, in conformity with the statute, but he declined having the case take that course.

*Greenwood*, under date of the 23d of December, 1859, wrote Mr. Watts:

"Upon examination of the papers I find that the matter has never been submitted to the Indians, as the law imperatively requires shall be done in all cases."

"Should you desire to have the papers sent out to the agent to be laid before the Indians in council, I will immediately have it done."—(R., p. 20.)

*Watts*: "I do not desire the papers sent out to the agent to make demand, for the following reasons: 1. The Kiowas are now at war, and no demand can be made. 2. If a demand is made, it must result in nothing, and is a useless formality. 3. After the petition, with the proof, has been placed in the hands of the proper Indian agent, it is not my business to direct a demand; the demand is a matter pertaining to your department, under the direction of the President, and if one year passes away without such demand having been made, the claimant has a right to have his claim acted upon by your department without such demand."—(R., p. 21.)

*Watts* (31st January, 1860) writes the Commissioner:

"I do propose to make a few suggestions as to the point of presenting said claims to the Indians.

"1st. I contend that it is only the duty of the Commissioner of Indian Affairs to make said presentation when directed by the Presi-



dent, and until such direction is so given by the President it is not *obligatory* on you to do so.

"2d. If the obligation to present to the Indians in all cases and under all circumstances does exist, the claim must be presented by your department *within one year* after the petition and proof is perfected and filed in your department or before your agent."—(R., p. 26.)

*Greenwood*, in reply:

"As stated so expressly in my letter to you, I must again repeat that I can find it nowhere stated in the law that any definite time is prescribed within which a claim must be laid before the tribes, and in default of its being done within one year, that the party claimant is to be treated as though such had been done. As attorney for Messrs. Beck & Johnson, you decline to have this requirement of law fulfilled, and call for my decision in the premises. As the case stands, my opinion is, as you are informed must be the result, that no part of it can be allowed."—(R., p. 28.)

*Tenth.* No demand of the Indians, or return in relation thereto, or action by the President upon this claim, has ever been had.

*Eleventh.* No demand has been made upon the Commissioner of Indian Affairs, or has been made upon the President, by claimants for presenting this claim to the Kiowa Indians, or for such action as the statute requires subsequent thereto.

*Twelfth.* The demand made by the claimants was of such a character and upon such evidence as rendered it improper to be allowed.

The claim was for two items:

1st. The merchandise received from the claimants by the Indians.

It appeared by the evidence presented that the articles which the Indians received were delivered to them by those controlling the teams.

*Beck, jr.*, in his statement to the Indian department: "Seeing our preparations, they (the Indians) accordingly left. A short time afterwards their chief, known by the name of Peshamo, came to us, and told petitioner that he did right in driving his people away; said that there were a large number of women and children near at hand, and if we would give some provisions he would not let his people molest us again. To avoid further trouble, and perhaps bloodshed, petitioner gave them one sack of flour," &c. \* \* \* \* "The Indians then left us, as we supposed, to go to their own camp."—(R., p. 10.)

*Parker*: "We gave them some rice and crackers, some sugar, a box of tobacco, some fifty pounds of coffee, about ninety pounds of sugar, nearly a barrel of crackers, valued at fifty or sixty dollars, and were given the assurance that we would be allowed to proceed on our journey without molestation."—(R., p. 31.)

*Maese*, (R., p. 37:) "Before this matter (the killing the mules) occurred, presents of coffee, sugar, rice, crackers, and butcher knives, were given to them (the Indians.) I cannot tell how much the articles given them were worth."

This flour, &c., was overvalued some forty or fifty dollars, as now proved by claimant's own witnesses.

2d. The mules were valued, on the presentation of this claim, at

\$450, and were claimed, "under the circumstances, to be worth not less than \$225 each."—(R., p. 14.)

The evidence now shows that they were not worth the half of this amount, and not over \$100 each.

*Parker's ex.*, (R., p. 31:) "They (the mules) were not worth less than one hundred dollars each." (P. 32:) "About one hundred dollars each."

This is the only sworn evidence on this subject in this case.

Hence it is incontrovertible that the case presented, upon the *ex parte* evidence first offered to the Commissioner, was a *fraudulent one, which ought not to have been allowed.*

#### PROPOSITIONS OF LAW.

FIRST. *No recovery can be had, except on averments made in the pleadings and established by the evidence.*

This proposition is elementary, and authorities need not be cited to sustain it. No one will pretend that a judgment can be rendered in favor of a party for what he has not set up in his declaration. A judgment cannot be rendered for a cause of action not averred, even if it should be proved. The rule is, that there must be both averment and proof, and the latter must follow the former and sustain it. A judgment cannot be rendered in favor of what is claimed.

SECOND. *The case, as presented by the claimant to the superintendent of Indian affairs, was not provided for by the 17th section of the act of 1834, and therefore it could not be allowed.*

The executive officers of the government could not lawfully allow and pay a claim that was not strictly provided for by law. The 17th section of the act of 1834 specified several particulars which must be averred and established by evidence before a claim could be allowed and paid.

1. The property claimed to have been taken or destroyed in the Indian country must have been *lawfully* in such Indian country.

This is neither *averred nor proved* in this case.

2. Or if taken, stolen, or destroyed in a State or Territory inhabited by citizens of the United States, then it must have been done by Indians passing from the Indian country into such State or Territory.

This is neither *averred nor proved* in this case.

3. The claimant must make application to the Indian superintendent, *setting forth and proving* these facts, and furnish him with the necessary documents and proofs.

No such application, with such documents and proofs containing the necessary documents, was furnished in this case. What was furnished fell far short of these statute requirements.

It follows that no lawful action allowing said claim, or submitting it for action, could be had in this case. If any action was had thereon, it must be that of rejection. The petition in this court does not set forth and claim that all these requirements were presented, in

due and proper form, to the Indian office, or to any branch of the executive government. If no such claim was presented, then no claim can be allowed, and, of course, no recovery.

THIRD. *One portion of the claim presented bore upon its face evidence that its subject-matter was a gift, and the residue that the damages claimed were arrived at by resorting to an unlawful basis of estimation, and therefore could not be allowed.*

The Indian office could not properly allow a claim which showed on its face that it ought not to be allowed.

1. The record shows that Beck's application to the superintendent was in part for things which he had *given* to the Indians. He said:

"The Indians having followed us for several miles, and becoming more insolent and threatening, we were compelled to assume the defensive. The men were ordered to get out their arms and prepare for defence, and the Indians ordered peremptorily to leave. Seeing our preparation, they accordingly left. A short time afterwards their chief, known by the name of Peshamo, came to us and told petitioner that he did right in driving his people away; said there were a large number of women and children near at hand, and if he would *give* some provisions he would not let his people molest us again. To avoid any further trouble, and perhaps bloodshed, petitioner gave them one sack of flour, one sack of crackers, fifty pounds of sugar, fifty pounds of coffee, fifty pounds of spice, one box of smoking tobacco, and some butcher knives. The Indians then left us, as we supposed, to go to their own camp; but the train had passed but a few miles further, when one or two of the same Indians approached the leading wagon and shot two mules dead with their arrows, and escaped at a gallop."—(R., pp. 10, 11.)

Parker (R., p. 13) confirmed this statement, and so did Griegs, (R., p. 17,) who said: "The Indians, seeing this preparation, left, and went to one side of the road. When the chief came to the train and had a talk with Mr. Preston Beck, jr., and the master of the train, when sugar, coffee, and tobacco were given to the Indians."

Clearly the articles thus obtained by the Indians were *given*, and not "*taken, stolen, or destroyed*," and could not be allowed under the statute.

2. The prices affixed, on this application, upon the mules were such as could not properly be allowed.

Beck, in his statement, charged "for two large mules killed; value at the time and place, \$450."—(R., p. 11.)

Parker, the only one of those making affidavits and attempting to fix a price for the mules, said: "The mules were of the largest size, and at that *place*, and under the circumstances, worth not less than \$225 each."—(R., p. 14.)

These estimates were evidently not based upon the real value of the mules, but a fictitious value was placed upon them for the occasion. Mules were not worth any such price in market, and none such is proved to have been paid for these or other mules. Nor is it shown

that the twelve-mule team was broken up or the train delayed by this loss. That the Indian office was right in objecting to this unconscionable price is manifest from these statements as presented, and is now demonstrated by this same Parker swearing, under oath in this cause, that the true value was only \$100 each.

Without reference to other objections, these were sufficient reasons for rejecting the claim set up for the articles as charged in the claim presented. The sworn evidence taken in this cause vindicates the action of the Commissioner, and shows that it would have been grossly wrong to allow what was claimed.

It follows that there was no improper action on the part of the Indian office, and that there is no cause of complaint, and therefore that no action can be sustained against the United States for not allowing this claim. Such allowance would be wrong and unjust, and subversive of the rights of the Indians as well as of the United States, and could not be allowed upon mere *ex parte* evidence without substituting a rule leading to wrong, instead of one clearly and legally right.

FOURTH. *The mules having been killed in consequence of the previous wrong and illegal act of the claimant's wagon-master, no recovery can be had therefor.*

The facts proved by claimant's witnesses warrant the conclusion that Parker's knocking down an Indian with a club occasioned the killing of the mules; the latter act can be accounted for upon no other hypothesis. The question then arises, can the claimants recover when the wrongful and illegal act of their agent led to and occasioned the loss? Without the severe provocation proved, there would have been no loss. The statute withholds satisfaction, where, subsequently to the depredation, the party seeks private satisfaction. The object of this 17th section is clearly to preserve the peace between the whites and Indians. The same principle pervades the common law, and withholds damages for assault and battery, where the plaintiff is the aggressor in the fight. He who begins a quarrel cannot complain of the consequences which he provokes. While the blood is up, in consequence of the infliction of personal injuries, if death ensues to the aggressor, it is not murder. We cannot exact greater self-control of an Indian, smarting under a gross injury, than we do of a white man. A more indulgent rule may well be adopted towards those who by education and habit, and who are taught that honor requires them to avenge a personal insult or wrong. If the manager of the train had treated the Indian kindly instead of having knocked him down with a club, there is no reason to believe that the mules would have been killed. If the claimants are now paid by the government for the mules, it will be paying for a loss occasioned by the illegal act of their agent, sanctioned, apparently, by one of their number present at the time. Certainly the act was not rebuked. Surely the government cannot be compelled to pay for the wrongs occasioned by claimant's authorized agents.

FIFTH. *The claimants were not lawfully at the place where the mules were killed, and therefore cannot recover.*

One of the conditions of satisfaction for Indian depredations in the Indian country under the act of 1834 is that the claimant must have been "lawfully within such country." No proof has been offered to show that claimant, with his property, was lawfully within the Indian country. The affirmative of this proposition rests with the claimant. The act imposes various penalties upon persons for being in, and performing certain acts within, the Indian country, but does not provide who may be lawfully there, or under what circumstances. There is no averment in the petition to the superintendent, or to this court, that claimants and their property were *lawfully* where the mules were killed, nor is there any proof to that effect; consequently the claimants have not established this material fact in their case.

SIXTH. *The treaties made with the Kiowas in 1837 and 1853, superseded, so far as they were concerned, the provisions of the act of 1834 concerning indemnities for depredations.*

The act of 1834 made provision for two classes of cases of depredation.

1. Those committed in the Indian country upon the property of citizens lawfully there.

2. Those committed out of the Indian country, in a State or Territory, by Indians passing from the Indian country, upon the property of the citizen.

Upon taking certain proceedings, the injured party was entitled to indemnity out of the annuities of the tribe; and if no annuities were payable, then the same was to be paid from the treasury. This act was in force and binding until changed by the treaties subsequently made, which contain special and inconsistent provisions which must control. The following are among these provisions:

*Treaty of May 26, 1837.—(7 U. S. L. 533.)*

"ARTICLE 3. There shall be a free and friendly intercourse between all the contracting parties hereto; and it is distinctly understood and agreed by the Kiowa, Ka-ta-ka, and Ta-wa-ka-ro nations, and their associated bands or tribes of Indians, that the citizens of the United States are freely permitted to pass and repass through their settlements or hunting ground, without molestation or injury, on their way to any of the provinces of the republics of Mexico or Texas, or returning therefrom; and that the nations or tribes named in this article further agree to pay the full value of any injury their people may do to the goods or property of citizens of the United States taken or destroyed when peaceably passing through the country they inhabit or hunt in, or elsewhere. And the United States hereby guarantee to any Indian or Indians of the Kiowa, Ka-ta-ka, Ta-wa-ka-ro nations, and their associated bands or tribes of Indians, a full indemnification for any horses or other property which may be stolen from them: *Pro-*



vided, That the property so stolen cannot be recovered, and that sufficient proof is produced that it was actually stolen by a citizen of the United States, and within the limits thereof."

In 1853 a treaty was made with the Kiowas and other tribes, which contains the following provision, (10 U. S. L., 1013:)

"ART. 4. The Comanche, Kiowa, and Apache tribes, parties as before recited, do further agree and bind themselves *to make restitution or satisfaction for any injury done by any band or any individuals of their respective tribes to the people of the United States who may be lawfully residing in or passing through their said territories*, and to abstain hereafter from levying contributions from or molesting them in any manner, and, so far as may be in their power, to render assistance to such as need relief, and to facilitate their safe passage."

"ART. 8. It is also stipulated and provided by and between the parties to this treaty, that should any of the Indian tribes aforesaid violate any of the conditions, provisions, or agreements, herein contained, or fail to perform any of the obligations entered into on their part, then the United States may withhold the whole or any part of the annuities mentioned in the sixth article of this treaty from the tribe so offending until, in the opinion of the President or the Congress of the United States, proper satisfaction shall have been made, or until persons among the said Indians offending against the laws of the United States shall have been delivered up to justice."

These provisions, taken together, constitute a special law for the Kiowas, and stand in place of the statute of 1834. The following provisions are found in them:

1. That the Indians agree to pay for injuries done by their tribes, or bands, or individuals, to the whites lawfully residing in or passing through their country, or elsewhere.

2. That if they violate any provision of the treaty of 1853, or fail to perform any of their obligations, "then the United States may withhold the whole or any part of the annuities" provided in the treaty, "until, in the opinion of the President or the Congress of the United States, proper satisfaction shall have been made."

Here we have an agreement to pay for injuries, and if not paid, the government may withhold the annuities until proper satisfaction shall be made; but no authority is given to pay the annuities to claimants. These cannot even be withheld until a case of violation and a demand of satisfaction is made and payment refused.

Before the government can refuse to pay over their annuities the Indians must be called upon and a demand of satisfaction made, and their answer given. They may deny the commission of the offence, or plead that it grew out of the commission of an aggression by the complaining party, or that they made ample satisfaction, or that retaliation had been resorted to. They must be heard in the settlement of the facts. If these show that the Indians were wrongful depredators, the remedy is to withhold their annuities. This is the law made by the parties to the treaties, and must control.

The government, having made special provisions concerning the disposition of these matters, and what should be done with the



annuities, cannot set those provisions aside and apply the act of 1834.

The steps necessary to entitle the claimants to make demand of satisfaction of the Indians have not been taken, before which the government, even if bound as guarantor, cannot be called upon. If liable at all, the government cannot be required to make satisfaction, under the treaty of 1853, until all the steps contemplated by it have been taken by the claimants. The government is not required to become an actor until the time when it passes upon the question of withholding the annuities. The present claim is under the 17th section of the act of 1834, which cannot be carried into effect while the treaties exist, and is not demandable under the treaties if it should be held that there was an ultimate liability on the part of the government under them.

But if it should be held that the government was a guarantor, under the act of 1834, it could not be made liable as such until all the requirements of the treaty had been performed and the Indians given an opportunity to answer the charges made against them and to show them to be untrue.

SEVENTH. *The claimants declined to have their claim presented to the Indians, and therefore they cannot recover.*

Among the necessary steps required by the act of 1834 to entitle the party to indemnity is the presentation of the case, filed with the superintendent, to the Indians, for their answer thereto. This is a material step, required alike by the statute and common justice, before the annuities can be diverted from the Indians to the pockets of the claimants. The same thing is substantially contemplated by the treaty of 1853. This step has not been taken. The claimants have never demanded or requested that it should be taken. On the contrary, when the Commissioner of Indian Affairs offered to have it taken, the claimants declined to have it done. They assumed, at first, three reasons for not having the papers presented to the Indians for their response:

1. That they, the Indians, were at war, (with whom?) and a demand could not be made.

If this was true, the department was excusable for the non-presentation, if that duty devolved upon it. From necessity, it must wait until the war was over and the papers could be safely and properly presented.

2. If the demand was made, it must be a useless formality.

The United States, if liable at all, are so as guarantors of payment, if, on taking certain steps, it is not made by the Indians. The demand of the Indians is a condition precedent to the attaching of liability. The claimants cannot know that the demand will be a useless formality. It may result in establishing their claims. Demand of payment of a note, and notice of non-payment, may be a useless ceremony; but the law never dispenses with it when the indorser is sought to be made liable. The presentation to the Indians may show that the claimants were not entitled, under the act, to indem-

nity, or that they had received it, or took private satisfaction, or resorted to revenge. A step which is calculated to call out the whole truth cannot, in law, be considered useless or be dispensed with.

3. That it was not their business to direct a demand, but that such duty pertained to the department, and if not made within one year the claimant was entitled to have his claim acted upon without such presentation.

If it is not the business of the claimants to ask the doing of what they desire, it cannot be the duty of anybody to comply with their unrevealed wishes. It is their duty, if they wish a thing done, to ask the proper officer to do it, and he is not in fault until he is called upon and refuses to act. The claimants had not requested any particular steps to be taken under their papers, and had not made out a case on the face of them entitling them to anything. If in a proper case it would have been the duty of the Commissioner of Indian Affairs to have gone to the President with them, and for the latter to have sent them to the Indians for their answer, this was not so under the papers sent by the superintendent, because they did not present such a case as the statute required. But neither were required by law to act without request. Besides, the petition in this case does not aver that the claimants requested the President to act or that he refused.

The other ground assumed, to wit: that the presentation must be *within a year* or the claimants are entitled to call on the government for indemnity, is without the shadow of foundation in law. The statute does not specify the time within which the presentation shall be made. But the Indians must *answer* within twelve months after presentation under the act of 1834.

The claimants subsequently assume substantially the same ground as the reason for not wishing the presentation made to the Indians.

But whether the claimants are right or wrong in their positions, no recovery can be had until this important step is taken, whether the claim is under the act of 1834 or under the treaty of 1853. The department offered to take it and the claimants declined to have it done; said it was useless and could not be done. This step not having been taken, no recovery can be had.

*EIGHTH. If it was the duty of the President to have presented the papers and have made demand of the Indians, and he did not do so, no action will lie for the depredation, and if any will lie it must be for the omission to act when the law or the demand of the party required him to do so.*

The claim now made is for the indemnity contemplated under the 17th section of the act of 1834. Such is the averment and the design of the proof. No new position or ground of recovery can now be set up. It is not pretended that all the steps required by that act have been taken. But it is assumed that the law required certain acts at the hands of the commissioner and President which they

have not performed, and therefore those necessary steps cannot be taken.

But if these officers were required to act, and did not do so, it does not excuse the omission of these necessary steps, and no recovery can be had when in the absence of proof of them. The government did not promise to pay except upon their being taken. It could not deduct the amount of the loss from the Indian annuities unless they had been taken. They were a condition precedent which the executive and judicial branches of the government cannot dispense with.

But if the statute required certain officers to perform certain duties, and they omitted their performance, the remedy, if any, is in an action for the non-performance. Whether the officers or the government are liable, is not now discussed. The suit must be brought for the omission to do what ought to have been done. The issue would be directly upon the question of the performance of that duty. Its omission would constitute the default, and the damages, if any, would be those occasioned by that fault and not what might otherwise have been recovered in another action, if that fault had not been committed. The suit must be for the wrong itself, and not for what might have obtained had the wrong never have occurred. The duty here omitted, if any, was that of non-action; and if the claimants have suffered by it, then the suit should be instituted with proper averments, showing it, for the damages sustained thereby. If a valid and good claim to indemnity for Indian depredations has been lost by that non-action, that loss may, perhaps, be the true measure of damages. Instead of being a suit for this non-action, and showing it in proof, and the loss resulting therefrom, the claimants have brought suit to recover, not for the real injury, but for what they claim they would have received if no injury had been committed. In other words, they have mistaken their rights and the proper remedy, and therefore must fail.

The claimants may insist that the defendants may as well pay under one form of action as under another. This suggestion has never satisfied the courts, and induced them to allow a recovery for a cause of action not set up in the pleadings, much less have they been willing to override the law and substitute one cause of action for another. Such a course would work gross injustice. The Indians are interested and may have a perfect answer to the demand if made. It is the duty of their guardian, as such, as well as under the law, to allow them to be heard before resolving to deprive them of a portion of their income. They may show that in no event can the government be liable. Hence it is not the same thing to the government, whether sued for one form of action or another. It is interested in holding the parties to a strict compliance with the law, especially as that law provides, not for a legal right acquired on a full and lawful consideration, but for a gratuity to induce claimants to avoid the indulgence of their propensities for retaliation and revenge, instead of respecting the general law of the land. Hence the argument above suggested, if resorted to, can have no effect. The claimants have shown no legal rights, and cannot recover against the government.

Whether they could recover against the officers referred to, for the omission of a duty which they did not ask to have performed, but actually declined, will not be discussed at this time.

Whether, under these circumstances, the government could be held liable for such omission, need not be considered until a case is brought and attempted to be sustained on that ground.

R. H. GILLET,  
*United States Solicitor.*

MARCH 15, 1861.

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IN THE COURT OF CLAIMS.

*December 9, 1861.*

JAMES L. JOHNSON *vs.* THE UNITED STATES.

LORING, J., delivered the opinion of the court.

The petitioner claims to be indemnified for depredations committed on his property by the Kiowa Indians. The facts are that the petitioner is the surviving partner of the firm of Beck & Johnson, merchants in Santa Fé, (p. 25;) that in 1857 the wagon train of Beck & Johnson was passing through the Indian country, in the Territory of Kansas, on its way to Santa Fé, when it was approached by a band of Kiowa Indians, mounted and armed, who, with threats of violence, took articles from the wagons and clothing from the men in charge of them; these were forced to take their arms for their defence, when the Indians were intimidated and left them. Shortly after an Indian chief came up and offered that if provisions, &c., were given to him for his women and children, he would prevent the further aggressions of his people. That articles of food, &c., were accordingly given him, and the train proceeded on for a short distance, when two of the mules of their train were shot and killed by Indians concealed in the wood and who escaped on horseback.

Mr. Beck presented his application for indemnity, with necessary proofs and documents, under the act of 1834, to John Haverty, Superintendent of Indian Affairs, who, on the 12th of October, 1857, transmitted them to Charles E. Mix, esq., Acting Commissioner of Indian Affairs. The claim was not acted upon by the department, which, on application made to it on behalf of the claimants, December 13, 1859, replied December 23, 1859, that the claim could not be paid, because it had not been presented to the Indians, and also objected to it that a portion of the goods had been voluntarily parted with, and that the valuation of the mules was of their worth where and when killed, so as to involve consequential damages as distinguished from the actual damages sustained by their loss.

We think that the petitioner is entitled to be indemnified for his loss, under the 17th section of the statute of 1834.

That his application, when made and transmitted to the department, was not submitted to the Indians, is immaterial to him. He

had no concern with that procedure, and no control over it; its purpose is the security of the United States as to the means for that "*eventual* indemnification," for which they are bound. If they omit or waive their recourse against the Indians, that cannot affect the petitioner's claim against the United States.

Nor is it any reason for the non-presentment of the claim to the Indians, or for not acting on it, that the valuation fixed for the goods was their worth when and where destroyed. Such a claim was not a fraud nor in contravention of the statute. That it was not in conformity with the practice of the department did not conclude the petitioner as to its rightfulness or from having it reconsidered. All that the claim did was to add to the prime cost of the articles destroyed the expenses incurred on them. This is the ordinary way of determining value.

And it cannot be said that the goods were voluntarily parted with, for all the circumstances of the transaction are to be taken together, and they make a duress and fear of peril which was imminent, and the surrender of the articles was an incident of the aggression for which the Indians were liable, and the United States are to furnish indemnity.

It was contended in the argument that the treaties with the Kio-was superseded the statute of 1834; but the treaties of 1837 and 1853 regulate relations and matters between the Indian nations and the United States, and have no reference to the statute remedies of citizens of the United States against them.

So it was argued that the killing of the mules was provoked by one of the wagoners of the petitioner who struck one of the Indians, and that therefore the petitioner was not entitled to indemnity. But the evidence does not connect the two acts, and the blow was struck to repel the assault of the Indian who attempted to take the stretcher from the wagoner, and it was thus in self-defence, as far as the wagoner was concerned, and cannot forfeit the right of the petitioner who had nothing to do with it.

As to the value of the articles taken, Parker values the rice, crackers, tobacco, coffee, and sugar at fifty or sixty dollars, and that the mules killed were worth at least one hundred dollars each. He was a freighter, and being engaged in the trade, was likely to know the value of the articles and property used in it. Another witness for the petitioner states the value of the mules higher; but states also that he has not "much experience in such matters."

On the evidence we think that the petitioner is entitled to indemnity from the United States in the sum of fifty dollars for the articles of provision specified, and in the sum of one hundred dollars for each of the mules—making two hundred and fifty dollars.

We think the petitioner is not entitled to interest, because the statute does not prescribe it in terms nor by necessary implication, and his right is only on the statute.

A bill will be reported to Congress that the petitioner is entitled to relief in the sum of two hundred and fifty dollars.