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ever, tending to show that, with the assistance of this map, a surveyor would find any difficulty in locating it according to its calls.

In the cases of Frémont and of Larkin, the grants were much more vague than the present, and the same remark which was made in the latter case will equally apply to this. "No question appears to have been made as to the practicability of locating the grant in the tribunals below, nor do we see any ground upon which such a question could have been properly raised in the case."

The judgment is therefore affirmed.

Mr. Justice DANIEL dissented.

JOSEPH FELLOWS, SURVIVOR OF ROBERT KENDLE, PLAINTIFF IN ERROR, *v.* SUSAN BLACKSMITH AND ELY S. PARKER, ADMINISTRATORS OF JOHN BLACKSMITH, DECEASED.

The United States made two treaties, one in 1838, and one in 1842, with the Seneca Indians, residing in the State of New York, by which the Indians agreed to remove to the West within five years, and relinquish their possessions to certain assignees of the State of Massachusetts, and the United States agreed that they would appropriate a large sum of money to aid in the removal, and to support the Indians for the first year after their removal to their new residence.

But neither treaty made any provision as to the mode or manner in which the removal of the Indians or surrender of the reservations was to take place.

The grantees of the land, under the Massachusetts assignment, cannot enter upon it and take forcible possession of a farm occupied by an Indian, but are liable to an action of trespass, *quare clausum fregit*, if they do so.

The removal of tribes of Indians is to be made by the authority and under the care of the Government; and a forcible removal, if made at all, must be made under the direction of the United States.

The courts cannot go behind a treaty, when ratified, to inquire whether or not the tribe was properly represented by its head men.

THIS case was brought up from the Supreme Court of the State of New York, by a writ of error issued under the 25th section of the judiciary act.

The facts of the case are stated in the opinion of the court.

It was argued by *Mr. Gillet* and *Mr. Brown* for the plaintiff in error, and by *Mr. Martindale* for the defendants.

Mr. Justice NELSON delivered the opinion of the court.

This is a writ of error to the Supreme Court of the State of New York. The case was decided by the Court of Appeals of that State; but the record had been remitted, after the de-

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cision, to the Supreme Court, from which the appeal had been taken.

The suit in the Supreme Court was an action of trespass, *quare clausum fregit*, brought by the intestate, John Blacksmith, against the defendants, Joseph Fellows and Robert Kendle, for entering, with force and arms, into the close of the plaintiff, commonly known as an Indian sawmill and yard, at the town of Pembroke, county of Genesee, and then and there having expelled and dispossessed the said plaintiff.

The defendants plead, 1st, not guilty; and 2d, that the said close, &c., was the soil and freehold of the defendant, Fellows, and that the defendant, Fellows, in his own right, and the defendant, Kendle, as his servant, and by his command, broke and entered the said close, &c., as they lawfully might, for the cause aforesaid. To this plea there was a replication, averring that the close, soil, and freehold, was not the close of the defendant, Fellows.

On the trial, it was proved by the plaintiff that the close mentioned in the declaration is situate in the town of Pembroke, county of Genesee, upon a tract of land of twelve thousand eight hundred acres, commonly known as the Tonawanda reservation, and was, at the time of the entry complained of, an Indian improvement upon the same; that said improvement was made about twenty years before the treaty, by the plaintiff and seven other Tonawanda Indians; that the plaintiff is a native Indian, belonging to the Tonawanda band of the Seneca Indians, who reside on that reservation, and are a part of the Seneca Nation, and has so been known for at least thirty-six years; that he has resided on this reservation from his birth, and was in the actual possession of the said improvement at the time of the entry complained of; that on the 13th July, 1846, the defendants entered into and took possession of the said close, and turned the plaintiff out, and in doing so committed the trespass. It was admitted, that a treaty had been made between the United States and the Six Nations of Indians on the 11th November, 1794, by which certain lands in western New York, including this Tonawanda reservation, are declared "to be the property of the Seneca Nation; and the United States will never claim the same, nor disturb the Seneca Nation, nor any of the Six Nations, or their Indian friends residing thereon, and united with them in the free use and enjoyment thereof; but it shall remain theirs until they choose to sell the same to the people of the United States, who have the right to purchase."

The plaintiff then rested.

The defendants gave in evidence certain documents and acts

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of the Legislatures of the States of New York and Massachusetts, showing that a dispute had arisen, at an early day, between the two States, in respect to the title to a large tract of land within the limits of New York, of which the *locus in quo* is a part. That in 1786, the dispute was amicably settled by a cession from Massachusetts to New York of the sovereignty and jurisdiction over the tract, and by a cession from New York to Massachusetts of the right of pre-emption to the soil from the Indians.

The lands were then in the independent occupancy of the Seneca Nation, and owned by them, and that Massachusetts acquired by the cession the exclusive right of purchasing their title whenever they became disposed to sell; that this right had become duly vested in Thomas L. Ogden and Joseph Fellows, by proper conveyances from Massachusetts, which survived to the latter on the death of Ogden.

A treaty was then given in evidence, between the United States and the New York Indians, bearing date 15th January, 1838, and another between the United States and the Seneca Nation, bearing date the 20th May, 1842, under which the defendant claims that he had acquired the Indian title to the close in question, and by virtue of which it is admitted the defence to the action in this case rests.

The treaty of 1838 (7 U. S. Stat., 551) set apart a tract of country, situated west of the State of Missouri, as a permanent home for all the New York Indians, containing one million eight hundred and twenty-four acres of land, being, as is expressed in the treaty, "three hundred and twenty acres for each soul of said Indians, as their numbers are at present computed." The tract is particularly described and located. It was intended for the future home of nine tribes of Indians, containing, according to the official estimate, a population of five thousand four hundred and eighty-five. The Seneca tribe, including among them their friends, the Onondagas and Cayugas, numbers a population of two thousand six hundred and thirty-three.

By the tenth section of this treaty, special provision was made concerning this tribe and their friends already mentioned. They were to have assigned to them the easterly part of the tract set apart to the New York Indians, and to extend so far as to include one half section of land for each soul. The tribe agrees to remove from New York to their new home within five years, and continue to reside there. The section then recites the purchase of the title of the Seneca Nation to certain lands described in a deed of conveyance by Ogden and Fellows, assignees of the State of Massachusetts, for the consideration

of \$202,000, and also that the Nation has agreed that said money shall be paid to the United States, and that out of this sum \$102,000 shall be paid to the owners of the improvements on the land so conveyed, the residue to be invested in stocks by the Government, the income of which is to be paid annually to the Nation at their new homes. The improvements were to be appraised, and a distribution of the \$102,000 made among the owners, and "to be paid by the United States to the individuals who were entitled to the same, &c., on their relinquishing their respective possessions to Ogden and Fellows."

By the fifteenth section of the treaty, the United States agree that they will appropriate the sum of \$400,000, to be applied from time to time, under the direction of the President of the United States, in such proportions as may be most for the interest of the Indians who were parties to the treaty, "to aid them in the removal to their homes, and in supporting them the first year after their removal; to encourage and assist them in education, and in being taught to cultivate their lands; in the erection of mills, houses," &c.

A large tract of land in Wisconsin that had been set apart to certain Indians was relinquished to the Government.

The deed of conveyance from the Seneca Nation to Ogden and Fellows, and referred to in the treaty, is annexed thereto. It conveys four reservations in western New York: the Buffalo Creek reservation, containing 49,920 acres; the Cattaraugus, 21,680 acres; the Allegany, 30,469 acres; and the Tonawanda, 12,800 acres.

Some difficulty occurred in carrying this treaty into execution, which it is not important to refer to. These difficulties raised by the Indians resulted in a modification of it by a second treaty entered into on 20th May, 1842, which, after referring to the first, and to the deed of conveyance to Ogden and Fellows, and to the differences that had arisen between the parties, provides in the first article that Ogden and Fellows, in consideration of the release and agreements afterwards mentioned, stipulate that the Seneca Nation might continue in the occupation and enjoyment of two of the reservations, the Cattaraugus and the Allegany, the same as before the deed of conveyance. And in the second article, the Seneca Nation, in consideration of the foregoing and other stipulations, agree to release and confirm to Ogden and Fellows the two remaining reservations, the Buffalo Creek and the Tonawanda.

The third article provides for reducing the amount of the purchase-money to be paid by Ogden and Fellows, so as to correspond with the relative value of the two reservations released to the value of the four, as fixed in the treaty of 1838.

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The fourth article provides for the appraisal of the land and improvements in these two reservations, by appraisers—one to be appointed by the Secretary of War, and the other by Ogden and Fellows—and to report their proceedings to the Secretary, and also to Ogden and Fellows.

The fifth article provides that the possession of the two tracts confirmed to Ogden and Fellows should be surrendered up as follows: the unimproved lands on the tracts within one month after the reports of the appraisers, and the improvements within two years, provided that the amount to be ascertained and awarded as the proportionate value of said improvements shall, on the surrender thereof, be paid to the President of the United States, to be distributed among the owners according to the determination of the appraisers; and provided, also, the consideration for the release and conveyance of the lands shall, at the time of the surrender thereof, be paid or secured to the satisfaction of the Secretary of War, the income of which to be paid to the Seneca Indians annually.

The seventh article provides that the modification in this treaty of 1842 shall be a substitute for that of 1838, wherein it differs from it, and to this extent shall be deemed to repeal it.

It will be seen that the principal change under the second treaty consists in the release, by Ogden and Fellows, to the Indians, of two of the four reservations conveyed to them under the treaty of 1838, and the corresponding reduction of the price to be paid. Most of the other provisions of the treaty are untouched, and remained in force. The assignment by the Government of the large tract of country for the New York Indians west of the Missouri—the special tract therein assigned to this Seneca Nation—their agreement to remove to their new homes, and the large appropriation to aid in their removal and in their support and encouragement after they had arrived—all these provisions remained unaffected by the second treaty.

Neither treaty made any provision as to the mode or manner in which the removal of the Indians or surrender of the reservations was to take place. The grantees have assumed that they were authorized to take forcible possession of the two reservations, or of the four, as the case would have been under the first treaty. The plaintiff in this case was expelled by force; and unless this mode of removal can be sustained, the recovery against the defendants for the trespass was right, and must be affirmed.

The removal of tribes and nations of Indians from their ancient possessions to their new homes in the West, under

treaties made with them by the United States, have been, according to the usage and practice of the Government, by its authority and under its care and superintendence. And, indeed, it is difficult to see how any other mode of a forcible removal can be consistent with the peace of the country, or with the duty of the Government to these dependent people, who have been influenced by its counsel and authority to change their habitations.

The negotiations with them as a quasi nation, possessing some of the attributes of an independent people, and to be dealt with accordingly, would seem to lead to the conclusion, unless otherwise expressly stipulated, that the treaty was to be carried into execution by the authority or power of the Government, which was a party to it; and more especially, when made with a tribe of Indians who are in a state of pupillage, and hold the relation to the Government as a ward to his guardian. It is difficult to believe that it could have been intended by the Government that these people were to be left, after they had parted with their title to their homes, to be expelled by the irregular force and violence of the individuals who had acquired it, or through the intervention of the courts of justice. As we have seen, the Seneca Nation upon the four reservations consisted of a population of some two thousand six hundred and thirty-three souls; and if we include the Tuscaroras, whose lands were also purchased under the same treaty, nearly three thousand. It is obvious that any such litigation would be appalling.

If we look into the provisions of the two treaties, we think the conclusion as clear, from a consideration of them, that no such means or manner of removal were contemplated, as that derived from a consideration of their unfitness and impropriety under the circumstances stated.

The treaty of 1838 contemplated a removal to the tract west of the State of Missouri, and putting the Indians in possession of it. A large fund was appropriated, and in the hands of the Government, to be disbursed in aid of such removal, and of their support and encouragement after their arrival. It did not, therefore, separate these Indians from the care and protection of the Government on its ratification, but contemplated further duties towards them, and for which means were supplied. Besides, the purchase-money for the reservations was to be paid to the Government; and, by the express terms of the treaty of 1842, the appraised value of the improvements was, on the surrender of the possessions, to be paid to the President of the United States, to be distributed among the owners of the improvements according to the award of the appraisers. This provision shows,

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that the Government was to be present at the surrender and payment for the improvements.

The clause in the treaty of 1838 is still more specific, which was, that the improvements were "to be paid by the United States to the individuals who were entitled to the same," &c., "on their relinquishing their respective possessions to the said Ogden and Fellows." It is also worthy of remark, that the St. Regis Indians, one of the nine tribes of the New York Indians, in giving their assent to the treaty of 1838, deemed it necessary to guard against a forcible removal to the West, by a clause providing that they "shall not be compelled to remove under the treaty;" a removal to the West being in contemplation.

We think, therefore, that the grantees derived no power, under the treaty, to dispossess by force these Indians, or right of entry, so as to sustain an ejectment in a court of law; that no private remedy of this nature was contemplated by the treaty, and that a forcible removal must be made, if made at all, under the direction of the United States; that this interpretation is in accordance with the usages and practice of the Government in providing for the removal of Indian tribes from their ancient possessions, with the fitness and propriety of the thing itself, and with the fair import of the language of the several articles bearing upon the subject.

An objection was taken, on the argument, to the validity of the treaty, on the ground that the Tonawanda band of the Seneca Indians were not represented by the chiefs and head men of the band in the negotiations and execution of it. But the answer to this is, that the treaty, after executed and ratified by the proper authorities of the Government, becomes the supreme law of the land, and the courts can no more go behind it for the purpose of annulling its effect and operation, than they can behind an act of Congress. (1 Cranch, 103; 6 Pet., 735; 10 How., 442; 2 Pet., 307, 309, 314; 3 Story Const. Law, p. 695.)

The view we have taken of the case makes it unnecessary to examine the ground upon which the learned court below placed their decision; that court held the appraisal of the improvements, and payment therefor, were conditions precedent to the surrender of them by the Indians; and that the refusal of the Tonawanda band to permit the appraisal did not excuse the performance of these conditions. The ground upon which we have placed our judgment is not in conflict with this view. We hold that the performance was not a duty that belonged to the grantees, but for the Government under the treaty.

Roberts v. Cooper.

We think the judgment of the court below right, and should be affirmed.

ENOCH C. ROBERTS, PLAINTIFF IN ERROR, *v.* JAMES M. COOPER.

Where the judgment of the Circuit Court, in an action of ejectment, was against the defendant, in which nominal damages only were awarded, who sued out a writ of error in order to bring the case before this court, this court cannot grant a motion to enlarge the security in the appeal bond, for the purpose of covering apprehended damages, which the plaintiff below thinks he may sustain by being kept out of his land.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the district of Michigan.

It will be seen, by reference to 18 Howard, that this court, at the last term, in a case between these same parties, decided in favor of Cooper's title to a tract of land in Michigan. In order to recover a part of the tract which was not included in the former suit, Cooper brought an ejectment against Roberts, and obtained a judgment against him. Roberts then brought the case up to this court by writ of error.

But in consequence of its being so low upon the docket as not to be reached at the present term, *Mr. Vinton*, counsel for Cooper, moved for an order requiring the plaintiff in error to give additional security in the sum of \$25,000, or for such other sum as, in the judgment of the court, would be sufficient to answer all damages and costs which Cooper might suffer if the writ of error should not be prosecuted with effect; and filed an affidavit by Cooper in support thereof.

The motion was argued by *Mr. Vinton* in support, and by *Mr. Romeyn* against it.

Mr. Justice WAYNE delivered the opinion of the court.

In this case, Roberts, who is the plaintiff in error, on the allowance of the writ of error, gave security in the sum of one thousand dollars, conditioned that he would prosecute his writ to effect, and answer all damages and costs if he failed to make his plea good. Cooper now declares that the bond for one thousand dollars is not sufficient to answer all the damages and costs, if Roberts should fail to prosecute his writ to effect, and refers to an affidavit filed by him as the basis of this motion to show that fact.

Mr. Vinton, counsel of Cooper, now moves the court for an order requiring Roberts to give additional security in the sum