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Memorandum in Support of Bill to Provide an Attorney for the New York Indians.

THE PROPOSITION.

The proposition is that the official suggested should have the following powers and be charged with the following duties:

a. To advise the New York Indians generally upon their rights and as to the steps proper for the protection of their interests.

b. To bring and prosecute, subject to the approval of the Department of the Interior, civil suits and proceedings in the federal courts as shall be necessary for the enforcement of the rights and protection of the interests of these tribes except as to matters of difference between tribes or members.

c. To appear for and defend members of these tribes in any criminal suit or proceeding brought against them in federal courts.

REASONS IN SUPPORT OF THE PROPOSITION.

1. Existing federal establishments are inadequate to secure proper protection of the New York Indians.

1. Existing provisions within the Department of the Interior consist practically of the services of a single officer known as the Special Agent for the New York Indians. This office may and has generally been filled by laymen and the duties have consisted in the collecting and reporting of statistics covering the population, industrial activities and moral and physical condition of these Indians, in addition to which this agent distributes the annuities payable to Six Nation Indians by the federal government and the cloth which is annually furnished them by the federal government. The compensation of this officer is $1000. a year. He has followed the policy of inactivity

in respect to these Indians pursued by the Department of the Interior for many years past in regard to protection of tribal rights and by acquiesence in the exercise and in the extension of governmental power over them by the State of New York. He has usually encouraged these Indians to acquiesce on their part in submission to state jurisdiction. He has not protected them against such state activity so far as that may be harmful to them or antagonistic to the policies of federal legislation now in force. He has thus acted in harmony, however, with the policy of the Department of the Interior.

The Indian office within late years has gone on record as declaring that the federal government has not assumed any jurisdiction over the affairs and lands of the New York Indians. In 1898 the Indian Office advised that the legislature of New York should by its own legislation subject the action of tribal courts in respect to tribal matters to the review of state courts. (See ~~Senate Doc. 190, 55th Congress, Second Session~~ Rep. of Secy. Int. for 1898 p 58). That attitude of the Indian Office was not only erroneous inherently but in disrespect of the decisions of the federal courts on this subject. In 1866 in the case of The New York Indians × (5 Wallace 761), the United States Supreme Court held that New York State could not tax the Six Nations because the state had no governmental power over them. To extend legislative power on any other subject, or to extend judicial compulsion is equally the attempt to extend governmental power on the part of the state. In 1885 the same court in the Kagama case (118 U. S. 375) said that, the White Man's governmental jurisdiction over tribal Indians was in the federal government alone because it had never existed anywhere else. This question of law must be deemed closed now because the Court of Appeals of New York in 1914, in People ex rel Cusick vs. Daly as Sheriff, × (212 N. Y. 180), has held that the New York Indians are no exception to the rule that Indian tribes are subject only to the governmental powers of the federal government. In the forty-eight years since the

S.C. below Fellows Decision Supp 73 Fed 420 — 1896

× In both these cases the New York Indians had to fight the State Government and at their own expense -

New York Indian case was decided the Interior Department has shown no new activity in looking after the New York Indians. The activity of the local agent of that department in initiating prosecutions for wrongs attempted or perpetrated upon these Indians has been confined, in cooperation with the Department of Justice, to prosecuting those and only those who have furnished intoxicants to these Indians. Under the charge of this local agent there were in 1912 a total of 5406 Six Nation Indians occupying reserves scattered about the state aggregating 87967 acres if we include the St. Regis tribe. The Census Bulletin of 1890, dealing with Six Nation Indians, says that this agent exercises no charge over the St. Regis. Why the Interior Department has wholly abandoned this tribe if it has, is difficult to explain. The United States treated with them as a tribe in 1838. Certainly the abandonment has never been authorized by Congress nor have the St. Regis by any authority of Congress been dissolved as an Indian trive and accepted into United States citizenship. They exist as a tribe to-day and occupy land which they have occupied for centuries.

2. The Department of Justice is possessed of power by express statute to enforce federal legislation and is under an implied duty under the decisions of the federal courts (224 U. S. 413) not only to prosecute for crimes committed upon Indians but to bring and prosecute remedial civil suits to enforce and protect their rights and interests. Perhaps no case of dereliction on the part of that department in those respects may have occurred. But there is probably no record of a case of prosecution for penalties by the Department of Justice of trespassers who have invaded New York reservations. Penalties against trespassing hunters have been provided by the U. S. R. S. (Sec. 2137) since 1834. In 1834 trespassing hunters destroyed game food while to-day they destroy in addition the food crops which the Six Nation people have taken pains to sow. Within the last few years, because of the widespread posting of private farm lands by white

people of New York, hunters have swarmed over the Indian reservations of New York and have killed practically all living creatures found thereon. These Indians are very loath to instigate prosecution of their white neighbors for that results in retaliation along the frontier, and unless that unpleasant duty is performed by some official charged therewith these trespassers will go unpunished. But the Department of Justice has come to be overwhelmed with the business of white men in New York State at least, while its existing facilities for work are practically no greater than they were fifty years ago. The Department as now officered is inadequate for protection of the Six Nations. The department considers that its first duty is to ~~protect~~ prosecute erring directors of national banks, counterfeiters and violators of the anti-trust laws, and the department officials have little time left to initiate and prosecute civil suits to protect Six Nation interests in New York whatever the fact may be in this regard in other states where there are fewer whites and more Indians. In some of the western states United States district attorneys do not hesitate to appeal to the federal courts to protect Indians from prosecution in state courts. For such a case see 109 Federal Reporter 139. A recent instance of the unactivity of the Department of Justice in respect to Six Nation interests has occurred as follows:

In the year 1906 a civil action was instituted in the supreme court of New York, Madison County, by a white person claiming an undivided interest in a parcel of thirty acres of land to have the same partitioned. The plaintiff traced her interest through a deed executed by an Oneida Indian but made without the consent either of the federal government of of the government of New York. The other shares were acknowledged to belong to Oneida Indians and the lands to have been a part of the lands reserved to Oneidas under state treaties confirmed by the federal government. The court held (133 A. D., N.Y. Reps, 514) that it had jurisdiction

of the case and that to preserve the property which contained two houses and conceded to be worth some $1200., the whole must be sold and the proceeds divided. The land was sold in due time, being bid off by the plaintiff who encountered no competition from the Indian defendants for they had no means to compete in land purchasing. After paying the plaintiff's costs out of the proceeds there was left about $7. apiece for each of the seven or eight Indians recognized as entitled to share in the remainder of the proceeds. These Indians with their families were then forcibly ejected by the sheriff of the county from this land which up to that time had from time immemorial been the home of these Oneida Indians and their ancestors. These Indians made protest to the governor of the state but that proved ineffectual for their protection. The writer learning of the affair invoked the activity of the Department of the Interior and of the Department of Justice to procure the restoration of this land to these Indians who thereafter became wanderers. After something like a year of such effort the Department of the Interior recognized that a wrong had been done and called upon the Department of Justice to take action. The Department of Justice about two years ago directed the district attorney of the ~~eastern~~ northern district of New York to investigate the case and to bring suit if the facts justified. The writer then supplied the district attorney's office with all documents necessary to establish the facts. No action has as yet been instituted. It is not intended by what has been here said to cast reflections upon the faithfulness of any federal official. It would seem, however, that so long as the white man's government is the acknowledged protector of tribal Indians, and that government in this case being the federal government, the activities of that government should be exercised in such a case as this for the protection of its own wards even if the protection ~~of its own affairs~~ of its own citizens be somewhat interrupted. If the interests of white men must come first then it follows that the interests of the New York Indians cannot be properly cared for by the Department of Justice and the Department

of the Interior unless these departments are supplied with additional officials detailed for the purpose.

NEW YORK STATE ESTABLISHMENTS.

The State of New York has presumed throughout its existence to possess and exercise a jurisdiction coördinate with if not superior to the jurisdiction of the federal government over the New York Indians. Because federal ~~governments~~ departments have pursued a policy of inaction in this regard New York has been extremely active in the exercise of control over these Indians through her legislature, her judicial department and the subordinate officials of her executive departments. The state has created and furnished officials through whom it has undertaken to administer ostensibly for the protection of these Indians. The state has furnished officers known as agents or attorneys to various tribes as follows:

Agent to the Onondagas. (State Indian Law, Sec. 20, Laws of 1909, Chap. 31). This officer is charged with the duty of making up a roll of the Onondagas and of distributing among them the annuity of $2430. payable to them by the state. He also supervises the leasing of Onondaga lands which the state laws say may be leased by the Onondagas. This agent receives a salary of $200. a year. There are 538 Onondagas and their reservation contains 6100 acres. This agent is not their adviser and he has no power to protect against encroachments.

Attorney for the Seneca Nation. (Indian Law, Sec. 74). He must be an attorney at law. It is his duty to advise the tribe as to their rights and to prosecute actions with the consent of the tribe and to defend actions brought against the tribe by white persons. But whether or not he shall prosecute an action rests in his own discretion. The Seneca Nation consists of 923 Allegany Senecas and 1291 Cattaraugus Senecas, total 2214, who occupy reservations containing in all 52789 acres. This attorney draws a salary of $150. Presumably the office is filled by a $150. man but not to exceed $150. worth of performance will

be rendered by him.

The state furnishes no attorney or agent to the Tuscaroras who number 367 and whose reservation contains 6249 acres.

Attorney to the St. Regis tribe. (Indian Law Sec. 100). This officer is not required to be an attorney at law. It is his duty to receive and distribute among the tribe $2131.67 payable by the State of New York and all other moneys belonging to the tribe which may include rentals falling due under leases of tribal lands which the state legislature has said might be leased. It is also the duty of the attorney to bring action in the name of the state to collect these rentals when unpaid. Presumably in bringing such action he employs an attorney at law to assist him. There are 1368 members of the St. Regis tribe who occupy a reservation of 14648 acres. This officer receives a compensation of $150. a year and is necessarily a $150. man.

Attorney for the Tonawanda tribe. (Indian Laws Sec. 81). The Tonawandas are Senecas. The duties of this attorney are performed exofficio by the district attorney of the County of Genesee. It is his duty under the New York statute to advise the tribe and its members and to prosecute such actions as he deems proper, and on complaint of the Chiefs to bring civil suits in cases of trespass. There are 489 Tonawandas who occupy a reservation of 7549 acres. With the consent of the district attorney the Tonawandas under state legislation may lease their lands to white persons. This attorney draws for this extra service $150. per year and he cannot be expected to render services worth much more.

It is the duty of the district attorney in any county (Indian Laws Sec. 11) to bring civil suits in case of trespass upon tribal lands of Indians, but <u>he may only bring such suit where the chiefs of the tribe give bonds that they will pay the costs if the suit is unsuccessful.</u> It would seem to go without argument that if an Indian tribe is entitled to protection against trespassers the protection should be extended to them without demanding that the chiefs give bonds. How Indian Chiefs could enter into

effective bonds when the enforcement of an execution against them might result in the alienation of Indian lands in defiance of congressional legislation is not explained by the New York statute which provides for this alleged protection.

There is no state agent or attorney to the Cayugas. But there are 181 Cayugas maintaining their tribal existence under their own chiefs and domiciled principally on the Cattaraugus Reservation of the Senecas who have furnished them with an asylum since 1795 when the Cayugas sold the last of the Cayuga lands within New York State. The state now pays the Cayugas in annuities $13306.18, but this sum is ~~partly~~ shared by a few Cayugas now living west of the Mississippi River.

The state furnishes no agent to the Oneidas. The Oneidas have disposed of nearly all their lands and under the warrant of state legislation. There are a few scattered pieces that have never yet been sold by the tribe. It is now commonly but erroneously supposed that the Oneida tribe in New York is extinct and that the lands constituting their former reservation have been wholly divided among the individual Oneidas and that the title thereto is now held by force of state legislation. There are nevertheless 269 tribal Oneidas in New York maintaining their own chiefs and holding together as best they can under those circumstances.

All the state officials above named are of a petit order and are paid by the state. Such officials would if they were disposed to be active in protecting the New York Indians, fail to antagonize state jurisdiction where it conflicted with federal jurisdiction or contravened federal legislation. None of these state-created agents or state-created attorneys with their nominal compensations have ever been instrumental in securing by civil remedy the redress of any grievance entertained by these tribes or tribal members on account of state aggression. No courting of such a responsibility should be expected from petit

officials so compensated and so restricted in power of action by statutes under which they are appointed.

In the building of schoolhouses and furnishing of school teachers, and in the improvement of reservation roads by the State of New York, and in the furnishing of higher educational facilities by the federal government, there have been very practical and great benefits bestowed in both cases upon these Indians by these respective governments, but this educating of these Indians has only led them to a keener appreciation of their tribal rights.

LEASES OF INDIAN LANDS.

The authority which the State of New York has presumed to offer for themaking of leases of tribal lands by the Onondagas and the St. Regis tribes, a practice which has been followed upon other reservations in defiance of the Indian Intercourse Act (U. S. R. S. Sec. 2116) which forbids the people of the United States to enter into any leases of Indian lands without the consent of the federal government. This system of leasing in New York State has actually resulted in a very large portion of the territory of these reservations finding itself in the possession of white men for farming purposes. The extension of this occupation must add immeasurably to the difficulties to be encountered in the future in the administration of Indian interests.

MORE RECENT FORMS OF INVASION OF INDIAN RIGHTS.

Within late years there have arisen new activities in the way of detrimental and unwarranted invasion of the rights of the Six Nation people by New York officials. The Paul policy pursued by New York (N.Y. Real Property Law Sec 10) which would prohibit an unnaturalized Chinaman from inheriting property located in New York under the laws of New York ((unless China and the United States agreed between themselves to reciprocal legislation and they have not) operates to deny the child of an Onondaga woman marrying a Seneca man the right to inherit from his father

because the son is an Onondaga and therefore an alien among the Senecas. Where such a case has come before the Surrogate of the County of Erie or of Genesee the Surrogate has considered that such situation was one to be corrected and to consider that the state judiciary is the proper body to make the correction, and he holds accordingly that estates of tribal Indians are within his judicial jurisdiction and are to be administered in compliance with the laws of the State of New York. The intermediate appellate courts of New York have upheld such decisions.. (In re Printup, 121 A. D. N. Y. 323). The surrogate's Indian petitioner who expected in such a case to profit by evading the jurisdiction of his tribe over estates of deceased members, has usually found that when his father's property was reduced to money and the fees of the white lawyer and of the white guardians appointed by the surrogate's court are paid, there is nothing left after all for the petitioner, for an Indian has very little in the way of property as his white brethren are accustomed to appraise estates.

Justices of the peace in the State of New York are a class of men seldom learned in the law and seldom versed in Indian history in this day. And yet they entertain, with the consent of the intermediate appellate courts of the state a New York jurisdiction over disputes by Indians where the defendant objects to the jurisdiction, and they render judgments for or against the parties (Peters vs. Tall Chief, 121 A. D. N. Y. 309). If these judgments are enforcible at all it means that the private property of the Indian is to be seized by a sheriff. That means that an ostensible lien of record is created against Indian land which under federal legislation cannot be alienated. This procedure therefore is a defiance of federal legislation. // After the State of New York recently adopted the policy of requiring by statute that all hunters take out a license to entitle them to hunt in New York, the state officials administering that law have undertaken to enforce it against New York Indians hunting on their own reservations or enjoying reserved rights of hunting on ceded lands. Petit officials called game wardens in consequence have

engaged in spying around upon the Indian reservations to discover if they could an Indian taking fish with a spear or perhaps shooting a rabbit with a bow and arrow, both of which practices are forbidden by the game law of New York, if that applies to Indians, although that law does not in terms say that it applies to Indians on their own reserves. These game wardens share in any fines that they can collect in these cases. No less an officer than the attorney general of the state within a month (November 1914) lent the power of his great office to this system of persecution. He appeared in the supreme court of the state to assist in prosecuting three Senecas who last May were arrested while engaged in spearing suckers in Indian waters where they had reserved the right to fish and hunt without qualification as to time and method to be pursued. An Indian when prosecuted by such a formidable officer assuming to represent the great State of New York is not likely to conceive that he can successfully resist the prosecution, much less has he individually the means to provide himself with adequate assistance in defending himself. The result is that in those cases which have occurred year after year, the Indian is usually convicted, and when convicted he has to pay the few dollars which he may possess to satisfy the fine or go to the penitentiary. He usually goes to the penitentiary. He comes out a sullen man and his children inherit his sullenness.

It is the duty of the federal government under its obligation of protecting the New York Indians, to furnish them with a competent attorney at its own expense to protect them against these illegal and unwarranted prosecutions at the hands of the State of New York or in the name of its authority.

PROSECUTIONS OF NEW YORK INDIANS IN FEDERAL COURTS.

It has seemed wise to congress that Indians should be required in certain cases to behave as white men behave and if they fail, to suffer the penalty meted out in the same cases to white men. Accordingly an Indian who kills on his reservation, or who robs, is prosecuted by indictment in the federal courts.

When asked if he has counsel, and he says he has not, he tells the truth. Thereupon the court assigns to his defense some young lawyer who covets experience but who never perhaps defended a criminal case before, much less had enough experience with an Indian to understand an Indian so far as the Indian can be induced to talk. Statistics are not available and so cannot be given, but the writer is firmly of the opinion that the conviction of Indians for crime when they are innocent, frequently occurs. To guard against the likelihood of such a result in the case of a people who are so clannish and who usually exhibit their higher regard for their own institutions by a stolid silence, requires that provision for a skilled public defender of Indians in criminal cases in New York should be made. If as is now widely contended in the case of prosecution of white men, a public defender of acknowledged skill should be provided, how much more does that reasoning apply in the case of tribal Indians who are still the acknowledged wards of the white man's government ?

F I N A L L Y .

The widely indulged view that the Six Nation Indians are an exception to the rule that the authority of the United States is superior to the authority of the state within which Indian tribes may dwell, has been due to nonaction in congress and to the inactivity of federal departments during the century or more of the relationship betweenthe Six Nation Indians and the federal government. The creation of an officer charged with the duty proposed would center responsibility for action, and would reflect a determination on the part of congress to make amends for its past neglect in this matter. The measure would help to clear up a situation which has become more and more intolerable to these patient people and which has furnished a false basis for reasoning on the part of many sympathetic white brethren of theirs as to what should be done for them. If it was the federal government which was responsible for their proper care and for seeing that they get justice, that duty cannot be discharged to-day by the

military department for hostilities have long ceased to exist between the Six Nation people and their white brethren. This duty must be discharged by activity of other departments, viz. the legislative, the judicial and the executive and, if suit should be brought to vindicate Six Nation rights, or if suits should be defended to protect their rights, neither the expense of prosecution nor of the defense should rest as a burden upon these wards of government. If these Indians must go undefended where an aggression is committed and must therefore beg or hire at their own expense a lawyer here or a lawyer there, they will in either case be employing local lawyers accustomed to practice in state courts and not accustomed to conceive that defense against aggression may ever consist in challenging the judicial jurisdiction of state courts even in an Indian case. If these Indians are in trouble they cannot journey to Washington to-day to any purpose to air their grievances for when they get to Washington there is no one there with time to listen. They are entitled to approach the federal government through an official counselor located near them, and that official should be invested with such power as will compel respect for the office he holds.

THE SERVICE WHICH WOULD BE REQUIRED.

The duties of this officer would undoubtedly require him to attend all terms of district courts both in the western and in the northern districts of New York containing these reservations in connection with criminal cases against Six Nation Indians. He might have to be engaged in the handling of civil cases involving their interests in any of the various federal courts. For some time to come the promiscuous and widespread trespassing upon these reserves would require that he bring and prosecute many suits for penalties under the federal statutes . In addition he would have to spend much time and exercise no little patience in answering the hundreds of questions that every generation of these Indians have to ask and as to which they have heretofore had difficulty in getting satisfaction. He would have plenty of work to do for these 5500 Indians living in such close contact with their many

millions of white neighbors.

A THE PRECEDENT.

In the regular Indian Appropriation Bill for the year ending June 30, 1914 (Act of June 30, 1913; Chap. 4), there was appropriated by Section 18 :

> $250,000. for expense of administration of the affairs of the Five Civilized Tribes of Oklahoma including such attorneys as the secretary of the Interior may in his discretion employ in connection with probate matters affecting individual allottees.

The Pueblo Indians of New Mexico are also furnished with a special attorney.

The present burden of the federal government on account of administration of Six Nation interests does not exceed an average of fifty cents per capita of the Indians affected. It would seem that the expense of the proposed office of attorney was a very modest increase amply justified by the importance of the interests involved and as well by the past neglect of the subject by the federal government.

THE WRITER.

This memorandum is prepared by George P. Decker of Rochester, N. Y. who has there practiced law for thirty years at a point midway between the Onondaga Reservation and the Tonawanda, Cattaraugus and Allegany Reservations of New York Indians, during which period he has had official experience successively as a deputy in the office of the Attorney General; assistant to the Counsel to the Governor; Chief Counsel to the Department of Forest, Fish & Game; assistant counsel to the Conservation Commission in New York and, by special assignment of the Department of State, assistant in the preparation of the defense of the United States to the British Claim now pending before an Arbitration Tribunal involving the question of the rights of the Cayuga Indians in Canada under the treaties between New York State and the Cayugas. He was also one of the attorneys for the New York Cayugas in prosecuting for about eight years their claim against the State of New York which was finally adjusted by the State of New York in the year 1913. He has been employed directly by the Senecas to defend them in 4 criminal prosecutions instigated by state officers of New York.