

Should it be replied (to the foregoing statement that there must be, in order to make out the right of action created by the last part of section 2103, an "approval," by said Commissioner and Secretary, of a contract fixing the "amount of compensation," and which order of "approval" must be disregarded, or, in the language of the statute, "exceeded") that where compensation for the specified services is taken in the absence of any and *all* contracts, there is a taking "*in excess of the amount approved by*" said officers within the sense of and within the mischief meant to be prevented by section 2103, then the answer to such reply is obvious and conclusive.

That answer is, that this statute does not say that the crime named in section 2105 and the penal action named in section 2103 shall exist where there is no transgression of an "approved" amount as fixed by said officers. It only says that such crime and such penal action shall arise where there is a taking of payment "*in excess of*" a limitation fixed by said officers. To make said crime named in section 2105 and said penal action to exist in the absence of all contract, simply because that taking any compensation in the absence of all contracts is within the *mischief* meant to be remedied by section 2103, is, as is expressly and repeatedly stated in the cases which we above cite, to create a crime by judicial interpretation; and to do so is tolerated by no decision or authority to be found either in England or America.

If the taking of compensation from Indians in the absence of all contracts ought to be made a crime by statute, then that makes out simply *cassus omissus*, and does not make out, or tend to make out, the existence of either said penal right of action or of said crime named in section 2105.