## OKLAHOMA.

[House Bill No. 1277, for the organization of the Territory of Oklahoma.]

# VIEWS OF THE MINORITY.

Mr. BARNES, from the Committee on Territories, submitted the following report as the views of the minority in opposition to the passage of the bill:

The undersigned members of the Committee on Territories have had before them several bills, referred by the House, which they have considered in connection with other propositions discussed in the committee, all having one common object, the organization of a new Territory, to be called the Territory of Oklahoma.

The proposed Territory, as constituted by the bill presented by the committee, embraces what is now known as "The Public Land Strip," together with so much of what is *designated*, though never so organized as a political division, as the Indian Territory, as does not lie within the districts inhabited as well as owned by the five civilized tribes, the Cherokees, the Creeks, the Seminoles, the Choctaws, and the Chickasaws. The Public Land Strip covers an area of 3,673,600 acres. The Indian Territory has an area of 41,098,398 acres. The area of the country inhabited by the five tribes has an extent of 20,446,590 acres, and there are in the Indian Territory outside of that portion of it so inhabited 20,651,808 acres. The Territory of Oklahoma, as proposed to be organized, would embrace 24,325,408 acres. There are twenty-seven tribes dwelling in the Indian Territory. The civilized tribes have a population of about 65,000, and the remaining tribes a population of about 15,000.

In extent, the country is quite sufficient for the establishment of a separate Territorial government; its population is wholly unfitted for the exercise of the duties of citizenship. What are the rights and duties of the Government with respect to it?

The United States acquired title to all the land embraced in the Indian Territory by the treaty with France, 1803, and they extinguished the Indian title of occupancy thereto, by treaty with the Osages, December 30, 1825 (7 Stats., p. 240). On the 26th of March, 1804, Congress passed an act (2 Stats., p. 283) authorizing the President to stipulate, with any Indian tribe owning land on the east side of the Mississippi River, and residing thereon, for an exchange of lands, the property of the United States on the west side of that river.

By virtue of treaties thereafter made, the emigration of the Cherokees and other tribes commenced, and by 1825 fully one-third of the Cherokee Nation had settled in new homes now situate in the present State of Arkansas. The United States, on the 6th of May, 1828, declaring it to be the wish of the Government to secure a permanent home for the Cherokee Nation, as well those residing in Arkansas as those residing east of the Mississippi River—a home that shall never, in all future time, be embarrassed by having extended around it the lines, or placed over it the jurisdiction of a Territory or State, nor be pressed upon by the

extension in any way of any of the limits of any existing Territory or State, declare by treaty of that date (see Revision of Treaties, p. 56, *et seq.*) that the United States "agree to possess to the Cherokees, and to guaranty it to them forever, and that guaranty is hereby solemnly pledged of seven millions of acres therein described, together with a perpetual outlet west, and a free and unmolested use of all the country lying west of the western boundary of the previously described limits, and as far west as the sovereignty of the United States and their right to the soil extend."

The Senate ratified this treaty, subject to a proviso that the northern boundary of the Cherokee outlet should not extend north of 36° north latitude, or interfere with the lands assigned, or to be assigned, west of the Mississippi River to the Creek Indians, who have emigrated, or may emigrate, from Georgia or Alabama, under provisions of any treaty heretofore concluded with them, or with lands heretofore ceded or assigned to any tribe or tribes of Indians by any treaty then in force (Revision of Indian Treaties, p. 61).

It subsequently appeared that the Creeks in fact had selected, under a treaty made with them on the 24th of January, 1826 (*ibid.*, p. 101), a part of the country described in the boundaries of that assigned the Cherokees under said treaty of May 6, 1828. A new treaty was therefore entered into with the Cherokees (Revision of Treaties, p. 61), on the 14th of February, 1833, by virtue of which the United States agreed to possess the Cherokees, and to guaranty it to them forever; and that guaranty was declared thereby to be pledged, of other seven millions of acres of land as in the first article of said treaty described, together with a public guaranty to the Cherokee Nation of a perpetual outlet west and a free and unmolested use of all the country lying west of the western boundary of said 7,000,000 acres, as far west as the sovereignty of the United States and their right of soil extend, with a single proviso that if the saline or salt plain on the great western prairie shall fall within said limits prescribed for said outlet, the right is reserved to the United States to permit other tribes of red men to get salt on said plain, in common with the Cherokees. And in this article it was added that letters patent shall be issued by the United States, as soon as practicable, for the land hereby guarantied. It was further declared that this treaty of February 14, 1833 (*ibid.*, p. 64), is merely supplementary to the treaty of May 6, 1828, and is not to vary the rights of the parties any further than said treaty of 1828 is inconsistent with that of 1833, and that is only so far as the territory described in the one is inconsistent with the territory described in the other.

The territory as now owned and occupied by the Cherokees or tribes located thereon, together with what is known as the Cherokee strip or outlet west, is substantially the same with that described in said treaty of 1833. So much thereof as was in the present limits of Kansas was subsequently ceded and became a part of that State. Under its terms, as generally construed and understood, the 100th degree of west longitude became its western boundary, that being as far west as it was considered the sovereignty of the United States then extended.

Prior to this treaty, Congress, by the act of May 28, 1830 (4 Stat., p. 411), made provision for an exchange of lands with the Indians residing in any of the States or Territories, and for their removal west of the river Mississippi; and by the third section of said act the President was authorized solemnly to assure the tribe or nation with whom such exchange might be made that the United States would forever secure and guaranty to them and their heirs or successors the country so

exchanged with them, and, if they preferred it, the United States will cause a patent or grant to be made and executed to them for the same; provided, always, that such lands shall revert to the United States if the Indians become extinct or abandon the same. This proviso is not to be found either in the treaty of May 6, 1828, or in the treaty supplementary thereto of February 14, 1833.

On the 29th of December, 1835, a treaty was concluded at New Echota, in the State of Georgia, between the United States and the people of the Cherokee tribe of Indians. (Revision of Treaties, p. 65.) This treaty provided for the removal of the Cherokees then east of the Mississippi to the lands which had been ceded the nation on the west side of the Mississippi, as recited in the foregoing mentioned treaties, and for a further conveyance by patent in fee simple to the said Indians and their descendants of an additional tract, estimated to contain 800,000 acres (which said tract of 800,000 acres was subsequently, by treaty of 1866, reconveyed to the United States); and by the third article of said treaty the United States agreed that the lands ceded by treaty of February 14, 1833, including the outlet, and the said 800,000 acres ceded by this treaty, shall all be included in one patent, according to the provisions of the act of May 28, 1830, hereinbefore recited.

The United States again, by the fifth article of this treaty, covenanted and agreed that the lands so ceded to the Cherokee Nation shall in no future time, without their consent, be included within the territorial limits or jurisdiction of any State or Territory. These lands having been surveyed, a patent was duly executed bearing date December 31, 1838, by the United States to the said Cherokee Nation of the said tracts of land, containing in the whole 14,374,135$\frac{14}{100}$ acres, in which it is recited that the United States, in execution of the agreements and stipulations contained in the said several treaties, have given and granted, and by these presents do give and grant, unto the said Cherokee Nation the said described land, to have and to hold the same, together with all the rights, privileges, and appurtenances thereto belonging, to the said Cherokee Nation forever, subject to the right by other red men to get salt on the salt plain before referred to, and to such reservations in behalf of the United States as to military posts, etc., as before mentioned in the articles recited in said patent, and subject also to the condition provided in the act of Congress of the 28th of May, 1830, that the lands hereby granted shall revert to the United States if the said Cherokee Nation becomes extinct or abandons the same. [For patent see Senate Ex. Doc. 124, Forty-sixth Congress, second session.]

The inquiry at once suggests itself, what was the character of the estate acquired under this patent? It has been gravely argued that an Indian tribe can hold no other than a mere possessory title—title by occupancy—such a title as the Indian held when the discoverer first planted his foot on the soil. But this is no longer an open question, for the Supreme Court of the United States have held in Holden *v.* Joy, 17 Wallace, p. 211, that the Indian tribes are capable of taking, as owners in fee-simple, lands by purchase, when the United States in form and for a valuable and adequate consideration so sell them to them. That they were capable of acquiring a fee-simple title then there can be no doubt. Did they in fact acquire it? It was argued in the same case that the title conveyed under this patent was not a fee simple, because qualified by the condition "that the lands hereby granted shall revert to the United States if the said Cherokee Nation becomes extinct or abandons the same." We have already seen that this condition was

taken from the act of Congress of May 28, 1830, and that it has no place either in the treaty of May 6, 1828, nor in the treaty supplementary thereto of February 14, 1833. And in speaking of this condition, the Supreme Court say:

> Strong doubts are entertained whether that (this) condition in the patent is valid, as it was not authorized by the treaty under which it was issued. By the treaty, the United States covenanted and agreed to convey the lands in fee-simple title, and it may well be held that if that condition reduces the estate conveyed to less than a fee, it is void; but it is not necessary to decide that point.

Here is an intimation almost as strong as a decision itself of what the court would have decided had it have become necessary to pass on the point. Relying on this case and citing it, Attorney-General Devens held, in 16 Opinions, 430—

> The effect of the conveyance by the United States to the Cherokee Nation of this tract of land [he is referring to the 800,000-acre tract, but, it will be borne in mind, it is included in the same patent with the other tracts] upon the purchase made by them under the treaty of 1835 was to vest in the tribe a fee-simple title to said tract. This tribe did not hold this tract of land by the ordinary Indian title, which is one of occupancy only, which may be continued indefinitely. In such case the fee simple to the land is in the United States. The effect of this sale was to separate distinctly the tract from the public lands of the United States and vest it in private ownership.

But since the decision in Holden *v.* Joy, decided in 1872, there has been an express decision on this very point in the case of the United States *v.* Reese, in the United States court of the western district of Arkansas, rendered in 1879. In this case, Judge Parker, after quoting the granting and habendum clauses of the patent, asks, what kind of a title do these several treaties and this law of 1830 give the Cherokees to their lands? "If it was not for the treaty of 1835 (which it will be recollected recites act of 1830), the treaty of 1833 is broad enough in its terms to convey a fee-simple title. This treaty is subsequent in date to act of 1830, which contains the clause that the lands should revert to United States if the Indians become extinct or abandon the same. There is no limitation to the title conveyed by the United States under the treaty of 1833. If such treaty is inconsistent with the law of 1830, it repealed so much of it as was inconsistent." And again, referring to treaty of 1835, he says: "If the lands had been already ceded by treaty of 1833 (and which cession was recognized by second article of treaty of 1835), then the agreement by the United States, by the third article of the treaty of 1835, to give them a patent of these lands, according to act of May 28, 1830, was a mere *nudum pactum*."

The conclusion is irresistible from the language of the treaties, and in the light of these decisions, that, however other Indians may hold their lands, the Cherokees hold all their lands by an *absolute fee-simple title.* This is not *strictly* true of any other of the civilized tribes.

The Creeks ceded their country east of the Mississippi by treaty of April 4, 1832 (see Revision of Treaties, p. 101), and by the fourteenth article of said treaty a country west of the Mississippi was guarantied to them; and in said article it was provided that no State nor Territory should ever pass laws for their government, but that they should be allowed to govern themselves, so far as may be compatible with the general jurisdiction Congress may think proper to exercise over them; and as soon as their boundaries were ascertained the United States were to execute to them a patent conformable to the act of May 28, 1830.

By the fourth article, treaty of 1833 (Stat., p. 417), the Seminoles were provided with a home in the Creek country, and were to be received as a constituent part of the Creek Nation. On the 7th of August, 1856 (Revision of Treaties, p. 104), a treaty was made by which distinct tracts of

country were assigned to Creeks and Seminoles. The United States guarantied to each tribe that they should hold their respective tracts by the same title and tenure as are provided for in treaties of 1832 and 1833, and agreeable to letters patent issued to Creek Nation August 11, 1852, and the guaranty was again renewed that no State or Territory should ever pass laws for the government of either of these tribes, and that no portion of either tract should ever be included within any Territory or State, nor shall either or any part of either ever be erected into a Territory, without the full and free consent of the legislative authority of the tribe owning the same.

The Choctaws ceded, by treaty of September 15, 1830 (7 Stat. 333), all their lands east of the Mississippi, and by the second article thereof it was provided that the United States would convey a tract of country therein described, being a part of the Indian Territory west of the Mississippi, to them and their descendants, to inure to them while they shall exist as a nation and live on it. The fourth article provided that no part of the land should ever be embraced in a State and Territory. The Chickasaws were subsequently located on the same land, and the two tribes not being able to agree, as distinct parties, they entered into a treaty with the United States, June 22, 1855 (11 Stat., 611), under which distinct districts were assigned each tribe.

A patent was issued to the Choctaws for this land March 23, 1842. It can be found on pages 5 and 6, Senate Ex. Doc., 124, Forty-sixth Congress, second session. The patent to the Creeks, which includes the lands of the Seminoles, and the patent to the Choctaws, which includes the lands of the Chickasaws, properly contained a condition limiting the fee in them as long as they existed as a nation, or continued to reside on the land, for the condition was conformable to the treaties into which they entered. But the condition is inserted in the patent to the Cherokees, without warrant of authority, and is therefore void.

The whole of the Indian Territory was held by a fee-simple title from the United States, the Cherokees holding their lands *by an absolute fee-simple title*, the Creeks with the Seminoles, and the Choctaws with the Chickasaws, their respective districts by a *qualified* fee. Has this status been changed?

By the treaty of June 11, 1855, already referred to, the Choctaws and Chickasaws leased all their land west of 98° to the United States for a permanent settlement of the Wichitas and other tribes. No period of time was fixed for the lease, and the settlement provided for these tribes was to be permanent in its nature.

It has been said that the rights guarantied under these treaties were forfeited by the participation of these tribes in the war, on the side of the Confederate States. Without investigating whether there was any such participation, or, if any, the extent of it, we think we are justified in saying there was no such forfeiture. Congress, on the 5th of July, 1862, provided "that in cases where the tribal organization of any Indian tribe shall be in actual hostility to the United States, the President is hereby authorized to declare all treaties with such tribe to be abrogated, if, in his opinion, the same can be done consistently with good faith and legal and national obligations."

This power was never exercised by the President, and the treaties remained in full force.

Besides, the treaties of 1866 with these different tribes provide for a general amnesty for all past offenses. (Choctaw and Chickasaw treaty, Revision of Treaties, p. 285, article 5; Seminole treaty, *ibid.*, p. 810, a general amnesty and reciting previous revocation of a treaty made with

so-called Confederate States; preamble and article 1, Creek treaty, *ibid.*, p. 114, a general amnesty, and reciting a previous revocation of treaty with so-called Confederate States; preamble and article 1 Cherokee treaty, *ibid.*, page 85, revocation of treaty with so-called Confederate States and general amnesty. See articles 1, 2, 3, and 4.)

It is apparent, then, that there never was any exercise of power abrogating these treaties, and any implied abrogation is clearly rebutted by the full condonation of any offense which could have caused such abrogation by the foregoing-recited provisions in the treaties of 1866. But more than this, the United States, in the treaties of 1866, reaffirmed and reassumed all obligations of the former treaties not inconsistent with said treaties. (See articles 10 and 45, Choctaw and Chickasaw treaty; article 9, Seminole treaty; article 12, Creek treaty; article 31, Cherokee treaty.) Now, the guaranty against a territorial government provided for in former treaties is not merely preserved by this reaffirmance and reassumption, but it is rendered, if possible, still more secure by the creation of a general council, composed of delegates from these Indian tribes, with legislative powers utterly inconsistent with the existence within the same limits of a territorial legislature, as is proposed to be organized.

We come now to notice the cession of lands made by these tribes to the United States. We have seen by the treaty of June 11, 1855, the Choctaws and Chickasaws leased to the United States (see art. 9) all that portion of their common territory west of 98°. While the word lease is used in the treaty, yet it is declared that the land leased is leased for a *permanent* home for the Wichitas, and such other Indian tribes as the Government may see fit to locate thereon.

By the treaty of 1866 this lease is converted in terms into an absolute conveyance. This territory embraces the districts marked on the map as Nos. 22, 23, and 24, being so much of the Cheyenne and Arapahoe reservation as is south of the Canadian River, and the reservations for the Wichitas, Kiowas, Comanches, and Apaches. The construction placed upon this treaty by the Interior Department is that the conveyance was made subject to the treaty of 1855, and the original treaties, and the cession was accompanied by the trust that the land should be used entirely or the settlement of Indians. (See letter of Acting Commissioner Holcombe to Hon. S. J. Kirkwood, Secretary of the Interior, April 25, 1881, printed by Secretary Kirkwood in response to a resolution of the Senate, Forty-second Congress, first session, Senate Ex. Doc. 111. See opinions of Secretary Schurz, Ex. Doc. No. 50, Forty-eighth Congress, second session.) The title to district No. 25, we are informed, is in dispute between Texas and the United States, and the adjustment of boundary lines now the subject matter of investigation.

The Creeks, by article 3, treaty of 1866, ceded the west half of their entire domain. The article reads:

"In compliance with the desire of the United States to locate other Indians and freedmen thereon, the Creeks hereby cede and convey to the United States, to be sold to and used as homes for such other civilized Indians as the United States may choose to settle thereon, the west half of their entire domain;" and for said western half, estimated to contain 3,250,560 acres, the United States agreed to pay the sum of 30 cents per acre.

The Seminoles ceded their entire domain. The article of their treaty, article 3, reads: "In compliance with the desire of the United States to locate other Indians and freedmen thereon, the Seminoles cede and convey to the United States their entire domain;" being that acquired from

the Creeks under the treaty of 1856, estimated at 2,169,080 acres, for which the United States agreed to pay 15 cents per acre. The United States sold to the Seminoles 200,000 acres of the tract ceded by the Creeks, and being that on which they are now located. The tract so ceded by the Creeks and Seminoles, and now held by the United States under said treaties, embraces districts numbered on the map 16, 17, 18, and 19, occupied by the Iowas, Sacs and Foxes, Kickapoos, and Pottawatomies, respectively; districts 15, 20, and 21, commonly designated as Oklahoma; and so much of district 22 as is north of the Canadian River, and being a part of the Cheyenne and Arapahoe Reservation, together with so much of district 11, occupied by the Pawnees, as is south of the southern line of the Cherokee strip, extended.

The area so held by the United States, according to the estimates in the treaties, should embrace 5,219,640 acres, all of which the undersigned believe has been paid for. We do not propose to enter into a legal argument for the purpose of deciding whether the settlement by the United States, on the lands so ceded, of persons other than Indians and freedmen, as mentioned in the articles of cession, would be such a breach of the condition as would constitute a defeat of the conveyance. It is sufficient to say that such a settlement was not contemplated at the time by either of the parties to the contract.

The Indian view of such a settlement is most aptly described in the testimony of an Indian, Pleasant Porter, on page 226 of the Report of the Indian Commission, recently submitted to the House (Report No. 1076):

> The location of citizens of the United States upon any portion of it would be an infringement of the bond. * * * The Indians would regard it as the beginning of the end. * * * They (the Indians) have a remaining equity in it—a right to have a properly specified object carried out—and the Government has promised to do that.

We believe this to be an honest and a just view of the question, and we unhesitatingly say the Government can not afford to violate its promise to these people.

The sixteenth article of the treaty of 1866 with the Cherokees is as follows:

> The United States may settle friendly Indians in any part of the Cherokee country west of 96°, to be taken in a compact form in quantity not exceeding one hundred and sixty acres for each member of each of said tribes thus to be settled; the boundaries of each of said districts to be distinctly marked, and the land conveyed in fee-simple to each of said tribes to be held in common or by their members in severalty, as the United States may decide.
>
> Said lands thus disposed of to be paid for to the Cherokee Nation at such price as may be agreed on between said parties in interest, subject to the approval of the President: and if they should not agree, then the price to be fixed by the President.
>
> The Cherokee Nation to retain the right of possession of and jurisdiction over all of said country west of 96° of longitude until thus sold and occupied, after which their jurisdiction and right of possession to terminate forever as to each of said districts thus sold and occupied.

Jurisdiction over and right of possession in this land remains in the Cherokee Nation—and it so continues—until the lands are disposed of in the manner mentioned in this article, and when so disposed of the United States can settle thereon none but friendly Indians. (See Secretary Kirkwood's letter, February 28, 1882, House Ex. Doc. 89, Forty-seventh Congress, first session; Judge Parker's decision in case of Rogers, western district of Arkansas).

The Cherokees may not *settle* thereon nor allow others to make *permanent settlement* thereon. This is the extent of Attorney-General Deven's opinion, volume 16, page 470; but in that very opinion he ad-

mits that *the possession of and jurisdiction over* this strip continues in the Cherokees until disposed of.

It has been urged, however, that the Cherokees have waived their right to jurisdiction over and possession in these lands by accepting payments in part compensation of the same.

No payment made on account of these lands could be construed into such a waiver, unless so distinctly understood by the Cherokee Nation and the United States at the time. But, in fact, no such payments have been made. No appraisement even of the lands has ever been made in accordance with the treaty, for under the treaty the price was only to be fixed by the President when the Cherokees and the Indians proposing to purchase could not agree.

Nevertheless Congress by act of 29th of May, 1872, 17th Stat., 190, authorized the President and Secretary of Interior to make an appraisement of Cherokee lands west of 96°, and west of land of Osage Indians. This was an act authorizing the President to appraise lands which did not belong to the Government. This act failed for want of an appropriation; and Congress, by act of July 31, 1876, 19 Stat., 120, made an appropriation to carry it into effect. Commissioners were appointed, who, in appraising, estimated the value at one-half the sum which they said they would have fixed had it been intended for white settlers. Mr. Schurz, Secretary of the Interior, says in his report to the President, June 21, 1879 (see House Ex. Doc. 54, Forty-seventh Congress, second session, p. 32), the Cherokees object to this appraisement as unreasonable and unjust. The President, June 23, 1879 (see House Ex. Doc. 89, Forty-seventh Congress, first session, p. 31), appraised the lands west of 96°, set apart to the Pawnees under act of April 10, 1876, 19 Stat., 29, embracing an area of 230,014.04 acres, at 70 cents per acre, and all other lands embraced under the so-called cession under article 16 of the treaty of 1866, embracing an area of 6,344,562.01 acres, at 47.49 cents per acre.

January 11, 1882 (*ibid*), W. A. Phillips, as agent of the Cherokees, and Daniel H. Ross and R. W. Wolfe, as Cherokee delegates, claimed that the amount, according to this valuation, was due, with interest thereon from July 1, 1879. Treaties had then been made with other tribes by which the lands constituting the Cherokee strip were to be assigned them. This claim, however, was rejected by Secretary Kirkwood, as appears from his letter of February 28, 1882 (*ibid*), in which he stands on the letter of the sixteenth article of the treaty, and he says that while it had been contemplated to settle the Cheyennes and Arapahoes, the Kiowas and Comanches, on the Cherokee strip, no such settlement had in fact been made. He admits, however, that the Cherokees have an equitable claim against the United States, because the United States in settling tribes of friendly Indians had located them on the eastern and more valuable portion of the lands, and that the less valuable may remain for many years or forever unoccupied if the United States shall continue to pay for lands only as they are occupied.

The following year, January 18, 1883 (see Ex. Doc. No. 54, Forty-seventh Congress, second session, House Representatives), Secretary Teller addressed a letter to the President, which was by him communicated to Congress, stating that he had received communications from Hon. W. A. Phillips, a special agent of the Cherokees, and Messrs. Wolfe and Ross, as their delegates, "presenting separate propositions for the payment of moneys claimed to be due the Cherokees for lands *already taken* by the United States for the settlement of friendly Indians thereon, under the provision of the sixteenth article of the treaty of

1866, and for the sale of the remainder of the lands not yet so occupied to the United States." "For all of the lands so taken, and upon which friendly Indians have been settled, viz, 551,732.44 acres, the charge of $1.25 per acre is made, amounting to $689,665.55, against which credits for sums already appropriated and placed to the credit of the Cherokee Nation on account of such lands are given, amounting in all to $348,389.46; leaving a balance of $341,276.09."

Here was a distinct repudiation of the appraisement made. As to the absolute purchase of all the lands—the other lands—the delegates and their counsel say, "We are prepared to meet any fair proposition for the disposal of west of 96°, or for all west of the 98°, or west of the Indian settlements." Secretary Teller recommended the purchase of the entire tract by the Government, at the valuation which had been placed on it by the President, less the amount already paid.

At this time there had been settled by friendly Indians 551,732.44 acres, valued at the appraisement of the President for 230,014.04 acres, at 70 cents per acre, $161,009.82, and the balance, 321,718.40, at 47.49 cents, $152,783.91, making a total of $313,793.73; and there had been paid, under act of June 16, 1880 (21 Stats., 248), $300,000; under act of March 3, 1881 (21 Stats., 422), $48,389.46, making $348,389.46. (See Commissioner Price's letter to Secretary of Interior, December 30, 1884, Forty-eighth Congress, second session, Senate Ex. Doc. No. 19.)

Now, these being the facts at the time, with Secretary Teller's recommendation for an absolute purchase, and with Secretary Kirkwood's views as to the equity of the Cherokee claim for a sum larger for lands already settled than the appraisement of the President, what did Congress do?

It appropriated on March 3, 1883 (22 Stats., 624), out of the funds due under appraisement for Cherokee lands west of the Arkansas River, the sum of $300,000. Now, this is what Congress did. And for what was the appropriation made? The answer is found in the proviso annexed to the appropriation: "*Provided*, That the Cherokee Nation shall execute conveyances, satisfactory to the Secretary of the Interior, to the United States in trust only for the benefit of the Pawnees, Poncas, Nez Perces, Otoes, Missourias, and Osages, *now occupying* said tract, as they respectively occupy the same, before the payment of said sum of money."

Such are the facts. They do not support the assertion that there has been any payment on account of lands which have not been occupied.

Those who are seeking to open the lands to white settlement have called attention to the fact that under act of March 3, 1871, 16 Stat., 566, it is no longer the policy of the Government to make treaties with the Indians. But this very act provides that it shall not be so construed as to invalidate or impair any existing treaty. They then asserted that we had on the statute books a statute prohibiting the settlement of any other Indian tribes on it; but when we examine the act—the act of February 13, 1879, 20 Stat., 313—we find the prohibition applies only to the Apaches and other Indians of New Mexico.

There is nothing, then, either to prevent faithful adherence to the treaties or to the continuation of the policy marked out by statesmen of a preceding generation, of making further settlements of Indians within this Territory. As late as 1870, Mr. Cox, then Secretary of the Interior, in a document indorsed by President Grant, said: "The policy of preserving the Indian Territory as far as possible from intrusion in any form has been hitherto regarded as firmly established in this country. * * * And in order to carry it out with any degree of success it is necessary to adhere to it as firmly as possible."

But without discussing the policy, the undersigned are constrained to say, upon a full review of all the facts as herein presented, that the United States are still bound by the most solemn treaty obligations not to erect any Territorial government in any part of the Indian Territory inhabited by the five civilized tribes, or in any part covered by the cession of the Creeks and Seminoles in 1866, or under that portion agreed to be ceded by the Cherokees under the treaty with them of that year, or in that covered by the cession of the Choctaws and Chickasaws of 1886.

The bill proposes to organize a Territory to be composed of the Public Land Strip and so much of the Indian Territory as in the first place is not occupied by the five civilized tribes; and, secondly, of so much of the remainder, if any there be, for which title has not been conveyed by patent or otherwise from the United States, or which may not be held by a tribe under a law or treaty, or any territory which by treaty or agreement with any Indian tribe is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any State or Territory.

If the consent of such tribes can be obtained, then such parts are to be included within the proposed new Territory; if the consent is refused, then such parts are to be excluded. The limits ofthe proposed new Territory are altogether vague and uncertain. So far as the consent of the five civilized tribes is necessary, it is sufficient to say that they have time and again solemnly protested against the proposed establishment of any territorial government. There are other tribes occupying small areas within the proposed territorial limits who hold what they occupy either under patents or solemn treaty of the Government. But they are few in number and powerless for resistance.

The passage of a bill organizing a Territorial government, under such circumstances, over a weak and defenseless people, with a condition requiring their assent before the bill should become operative, would evince on the part of a powerful Government like that of the United States such a predetermination to create the proposed government as would deprive these people of all freedom of volition in the matter. It would be a miserable perversion of terms to call an assent thus obtained free and voluntary.

But this bill does more. It proposes in plain terms to confiscate the lands of these Indians, unless they consent to the organization of this Territory.

There can be no mistake in the meaning of the thirteenth section. The proposition to declare void the leases therein contained is intended to render useless to the Indians the lands on which they now permit cattle to graze, and more especially the Cherokee land strip. Thus rendered valueless, and with no other purchaser but the United States, it is expected that the Indian will be forced to consent.

Such is not the kind of consent contemplated by the treaties.

We are told, however, that those leases are void under existing law, and we are asked if we will sustain the lease made to a great monopoly like the Cherokee Strip Live Stock Association. We are not the advocates of monopolies, nor cattle associations, nor specially of the Cherokee Strip Live Stock Association. We are simply considering whether the proposed Territory of Oklahoma can be properly and lawfully organized, and in the course of that consideration we propose to inquire whether it would be legal or proper to declare that or any other so-called lease void.

This contract, usually called the Cherokee strip lease, was made between the Cherokee Nation and the Cherokee Strip Live Stock Association, a corporation created under the laws of Kansas, in pursuance of an act of the national council of the Cherokee Nation passed in *special* session May 19, 1883. It bears date July 25, 1883, became operative 1st of October, 1883, and terminates on the 1st of October, 1888. Under the terms of the contract the lessees are to hold the lands described, being the lands generally known as the Cherokee strip, containing 6,000,000 acres, more or less, *for grazing purposes only*, for and in consideration of $100,000, to be paid annually, as provided in the contract; the contract to terminate as to any lands which shall be disposed of under any existing or future act of Congress, or of the Cherokee Nation; the structures allowed to be only such as may be necessary for *carrying on the grazing business;* the only timber cut such as may be necessary for such structures, or for fuel, and no improvements of a *permanent* character to be permitted. The contract in its essence is only a license to pasture cattle on the land described, and to do whatever is necessary for the protection of the cattle while so grazing. (For the law, see p. 152, Senate Ex. Doc. No. 17, Forty-eighth Congress, second session.)

This contract was made under these circumstances: John Tufts, Indian agent, writes from Union Agency, March 1, 1883, to Hon. H. Price, Commissioner of Indian Affairs (see p. 148, Senate Ex. Doc., Forty-eighth Congress, first session), that he had visited the Cherokee strip, and finds there a large number of cattle, estimated at 300,000; that on about 200,000 of these the owners paid to the Cherokees a grazing tax of about $41,000 in 1882, and that about 100,000 belong to citizens of Kansas, who turn them loose on their lands and pay no tax. He recommends that the fencing of the ranges be allowed, to prevent the destruction of timber. "Much of the valuable timber," he writes, "has been taken from the Cimarron River, a distance of 60 miles from the Kansas line. Unless the wholesale destruction of this timber is stopped, it is safe to state that all timber on these lands will be destroyed within three years." "After full review of the subject, the Secretary of the Interior, March 16, 1883 (*Ibid.*, p. 152), decided to permit no more fencing, and that those constructed would not be permitted to remain, except on satisfactory arrangements with Cherokee national authorities." (*Ibid.*, p. 153.)

Commissioner Price writes Tufts, Indian agent, March 21, 1883, informing him of the Secretary's decision, and informs him that on the day previous he had an interview with Chief Bushyhead (of the Cherokee Nation) in which he promised to call an early session of the national council to consider the subject, and report the result to this office. Price, Commissioner, June 28, 1883 (*Ibid.*, p. 155), writes Chief Bushyhead, referring to interview of March 20, and says three months have passed, and his office is without any official information as to the result of the deliberations of the national council on the subject, and he requests information to be furnished within next twenty days. Bushyhead replies, July 8, 1883 (*Ibid.*, p. 156), inclosing copy of act passed at special session in May, authorizing and directing him to execute a lease to the Cherokee Strip Live-Stock Association. This lease, in accordance with the act, was executed the 25th of July afterwards. No objections appear ever to have been made by any Department of the Government, although made, as is clearly seen, with its full knowledge. The Department of the Interior, through Acting Secretary Joslyn, July 30, 1884, thus announces the position of the Department (see p. 165, Senate Ex. Doc. No. 17, Forty-

eighth Congress, second session): "The Department neither recognizes nor disaffirms leases from the Cherokee national authorities for grazing privileges. Parties occupying under such leases are not included in the Department request for the removal of intruders."

It might be questionable—independent of legal right—whether it would be quite just to set aside by a mere stroke of the pen a contract made under such circumstances. But let us examine existing laws. The right to pasture cattle on the Indian lands, with the consent of the Indians, says Secretary Teller in his letter, January 3, 1885 (Forty-eighth Congress, second session, Senate Ex. Doc. No. 17), has never been doubted until lately.

It is now said that such a license is violative of section 2116 of the Revised Statutes.

That section reads:

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity unless the same be made by treaty or convention entered into pursuant to the Constitution.

This language is broad in itself, but it is not broad enough to embrace any instrument which in itself does not convey land, or an interest in land, or a title or a claim to land. Beyond that in its very terms it does not go. It does not render invalid an instrument, by whatever name it may be called, which merely conveys a certain limited use in the land, whether that use be in the grass which naturally grows on the land, or in the products which through the labor of man may have been produced from its soil. But this section must be construed in conjunction with section 2117, which reads as follows:

Every person who drives or otherwise conveys any stock or horses, mules, or cattle to range and feed on any lands belonging to any Indian tribe, without the consent of such tribe, is liable to a penalty of one dollar for each animal of such stock.

When these two sections are read together, is it not apparent to any mind that the first section refers to a conveyance of land, or some interest therein, or a title or claim to land, and the second refers to a certain special use of the land? Says Judge Brewer, in the case of The United States *v.* Hunter, 21 Federal Reporter, p. 617, quoting this last-mentioned section:

This implies that an Indian tribe may consent to the use of their lands for grazing purposes—

Thereby expressing an opinion on the section, but recalling that the construction of the section was not before him for decision, adding cautiously—

or, *at least*, if it does consent, no penalty attaches.

And then proceeding, he says:

If the tribe may so consent, it may express such consent in writing, and for at least any brief and reasonable time.

But the Supreme Court of the United States, in United States *v.* Cook, 19th Wall, 503, speaking of the use which the Indian, who has only the ordinary Indian title of occupation, may make of his land, say:

The right of use and occupation by the Indians is unlimited. They may exercise it at their discretion. If the lands are desirable for purposes of cultivation, they may be cleared of their timber to such an extent as may be reasonable under the circumstances. The timber so cut may be sold. * * * Any cutting beyond this would be waste, and such timber could not be sold. The timber while standing is a part of the realty, and it can only be sold as the land could be. * * * When rightfully severed, as for purpose of cultivation, its severance is only a legitimate use of

the land, * * * and it can be sold. [The court is preserving throughout the distinction between a sale of land and a sale of the use of it.] The court subsequently states the doctrine more broadly, thus: "These are familiar principles in this country, and well settled, as applicable to tenants for life and remainder-men. But a tenant for life has all the rights of occupancy in the lands of the remainder-man. The Indians have the same rights in the lands of their reservations. What a tenant for life may do upon the lands of a remainder-man the Indians may do upon their reservations, but no more."

Now if under this decision, a decision made with sections 2116 and 2117 in full force, a tenant for life could grant the right of pasturage—and this can not be doubted—and an Indian with only a right of occupancy, like a tenant for life, can make such a grant, most assuredly any one of the civilized tribes, having either an absolute or a qualified fee, with the enjoyment of property guarantied to it by solemn treaty, can dispose of the grass growing on its soil in its unlimited discretion.

It may well be doubted whether section 2116 of the Revised Statutes would of itself be applicable to Indians, like the five tribes, holding lands either by absolute or qualified fee-simple titles. This section is taken from the Indian intercourse act of 1830. At that time no Indian tribe in the United States had a fee-simple title to land.

The title of the Cherokees to all their lands is an absolute, unqualified fee, and they have all the rights and privileges appurtenant to an estate of that character. Whatever restrictions exist in reference to those rights and privileges are only such as are imposed by treaty. The only restriction imposed by the treaty of 1866, sixteenth article, is as to the Cherokee strip; and as to that, the simple concession is to the United States of the right to *settle friendly Indians* thereon in accordance with the terms of said article. But even in this very concession their right and title to this strip is recognized by the stipulation that the land on which the United States *may settle the friendly Indians* is to be paid for *at a price to be agreed on* between the Cherokees and the friendly Indians, subject to the approval of the President; and it is expressly provided in said stipulation that as to said lands, until so sold and occupied, the right of possession in and jurisdiction over remains in the Cherokees. Subject to this right of settlement of friendly Indians the fee-simple title of the Cherokees remains unimpaired; and nowhere in this or any other treaty can there be found any recognition, says Secretary Teller, "of any right in the United States to control this or any other Cherokee property, or prevent the nation from having the full and absolute control of the products of their lands."

As has been well said by Secretary Teller in his report, Forty-eighth Congress, second session, Senate Ex. Doc. No. 17, page 3:

> The Cherokees have a fee-simple title to their lands, and they do not recognize the right of the Department to interfere in the management of their affairs with reference thereto.

And again, speaking of the Cherokee strip, on page 5:

> The land is theirs, and they have an undoubted right to use it in any way that a white man would use it with the same character of title, and an attempt to deprive the nation of the right would be in direct conflict with the treaty, as well as the plain words of the patent. They are quite capable of determining, without the aid of the Indian Department or Congress, what is to their advantage or disadvantage, and the Government can not interfere with their rightful use and occupation of their lands, which are as rightfully theirs as the public domain is that of the United States, subject only to the provisions of article 16 of the treaty of 1866, which, at most, *is only a contract to sell* certain portions of the land; but, until the Government *settles* friendly Indians thereon and *pays* for the land the right of possession and occupancy is especially reserved.

This letter of Secretary Teller still controls the Department of the Interior, for Commissioner of Indian Affairs Atkins, in his letter of

July 10, 1885, in the Faucett case, thus expresses himself in regard to it: "The opinion of the Department as to the title by which the Cherokee Nation holds its lands is a matter of official record in Department letter of January 3, 1885," and "under the general power of supervision of Indian affairs, vested by law in the Secretary of the Interior, the views of the Department as thus expressed must, until reversed or modified by competent authority, be held to govern this office."

Such we consider to be the true character of the title by which the Cherokees hold this land. And now, having thus given a true history, as we believe, of the relations between these people and the Government, we can not, in view of that history, and with our convictions concerning the law and our treaty obligations, give our assent to a measure which seeks to secure the consent of the Indians to the proposed organization of the Territory by rendering a large part of their lands valueless unless such consent be given. A consent so obtained would not be "the full and free consent" expressed through their legislative assemblies, without which our treaties with them declared that no portion nor any part of their land should ever be placed under the government of any State or Territory. National honor forbids a departure from these treaty obligations to a dependent people.

But the obligation extends beyond the original five civilized tribes. While the whole of the Indian Territory was patented to them, yet from them the Government secured the right to locate other friendly Indian tribes within the same territorial limits. These other Indian tribes, induced by the same considerations, sold their old homes, and accepted at the hands of the Government permanent homes within the limits of the Indian Territory, which were to be free from the intrusion of the white man. The inducement to them to abandon their old homes was, adopting with slight modification the language of one of the counsel who appeared before the committee, "that the entire Territory would be perpetually devoted to Indian occupancy alone, and thus they would be for all time surrounded by friends and allies, and shielded from the pressure of white populations. The pledge of public faith was virtually to each tribe that the whole Indian Territory should continue to be devoted exclusively to Indians, and if this policy is to be changed the assent of each tribe occupying the Territory should be obtained."

Commissioners Eaton and Coffee, speaking for President Jackson, in 1830, said to the Chickasaws:

> We advise you, for your own sake, to remove, that you may rest in a country free from white man's interruption.

And in 1870, in a document of the Secretary of the Interior, Mr. Cox, indorsed by President Grant, he says:

> The policy of preserving the Indian Territory as far as possible from intrusion by white settlers in any form has been hitherto regarded as firmly established in this country. Negotiations for the removal of Indians from the small reservations in Kansas and Nebraska to the Indian Territory have been based upon this policy, and in order to carry it out, with any degree of success, it is necessary to adhere to it as firmly as possible.

Through a long series of years the general purpose of the Government has been made manifest to make the entire Indian Territory a permanent home for Indians, where each tribe would have Indians for their neighbors, and where they would be free from molestation by the white man.

This policy has to a great extent been based on contract. It is now proposed to be changed, and changed by the erection of a Territorial government within the limits of the Indian Territory. If the change is

to be made, wise statesmanship would seem to dictate that the assent of the parties to the change should be secured in advance of, and not subsequent to, the establishment of a Territorial government. In this way clearly ascertained limits for the new Territory will be secured, and all the irritation and collision which must arise from the sudden irruption of white settlers into long-established Indian neighborhoods avoided.

Sound policy and good faith both seem to concur in demanding that the negotiations should precede and not follow the organization of the Territory. With these convictions we can not give our assent to the bill in the form presented by the committee, and we therefore respectfully oppose its passage.

GEO. T. BARNES.
WM. ELLIOTT.

## ADDITIONAL VIEWS OF MR. CHARLES S. BAKER.

The undersigned, while concurring in the main in the foregoing minority report, begs leave respectfully to add the following observations:

I recognize the importance and the value to the Indians in their tribal and individual relations of extending to them as speedily as may be the benefits of civilization and all the rights and privileges guarantied under our Constitution and laws, as speedily as may be done consistent with existing treaty stipulations and obligations.

I recognize the fact that some of the objections urged to the bill which was considered by our committee in the last Congress and discussed upon the floor of the House have been eliminated from the present bill, notably, the fact that the present bill expressly excludes from the operation thereof all the lands in the Territory actually occupied by the five civilized tribes. But I recognize the fact that the Congress of the United States just before the expiration of the term of President Arthur, enacted by the eighth section of the act entitled "An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various tribes, for the year ending June 30, 1886, and for other purposes," approved March 3, 1885:

> That the President is hereby authorized to open negotiations with the Creeks, Seminoles, and Cherokees for the purpose of opening to settlement under the homestead laws the unassigned lands in said Indian Territory ceded by them respectively to the United States by the several treaties of August 11, 1866, March 21, 1866, and July 19, 1866; and for that purpose the sum of $5,000, or so much thereof as may be necessary, be, and the same is hereby, appropriated out of any money in the Treasury not otherwise appropriated; his action hereunder to be reported to Congress.

Thereby recognizing the duty of the Government to treat with said tribes of Indians for the extinguishment of any existing rights, titles, or interest, in advance of any legislation proposing to affect the same. And it seems to me inconsistent for us to enact legislation of the character proposed in view of the President's suggestions concerning the Indian problem, contained in his first annual message to Congress, from which I quote as follows:

> I recommend the passage of a law authorizing the appointment of six commissioners, three of whom shall be detailed from the Army, to be charged with the duty of a careful inspection, from time to time, of all the Indians upon our reservations or subject to the care and control of the Government, with a view of discovering their exact condition and needs, and determining what steps shall be taken on behalf of the Government to improve their situation in the direction of their self-support and complete civilization; that they may ascertain from such inspection what, if any, of the reservations may be reduced in the area, and in such cases what part, not needed for Indian occupation, *may be purchased by the Government from the Indians and disposed of for their benefit;* what, if any, Indians may, *with their consent, be removed* to other reservations, with a view of their concentration and the sale on their behalf of their abandoned reservations; what Indian lands now held in common should be allotted in severalty; in what manner and to what extent the Indians upon the reservations can be placed under the protection of our laws and subjected to their penalties; and which, if any, Indians should be invested with the rights of citizenship. The powers and functions of the commissioners in regard to the subjects should be clearly de-

fined, though they should, in conjunction with the Secretary of the Interior, be given all the authority to deal definitely with the questions presented, deemed safe and consistent.

They should be also charged with the duty of ascertaining the Indians who might properly be furnished with implements of agriculture and of what kind; in what cases the support of the Government should be withdrawn; where the present plan of distributing Indian supplies should be changed; where schools may be established and where discontinued; the conduct, methods, and fitness of agents in charge of reservations; the extent to which such reservations are occupied or intruded upon by unauthorized persons, and generally all matters relating to the welfare and improvement of the Indian.

They should advise with the Secretary of the Interior concerning these matters of detail in management, and should be given power to deal with them fully, if he is not invested with such power.

This plan contemplates the selection of persons for commissioners who are interested in the Indian question, and who have practical ideas on the subject of their treatment.

The expense of the Indian Bureau during the last fiscal year was more than $6,500,000. I believe much of this expenditure might be saved under the plan proposed; that its economical effects would be increased with its continuance; that the safety of our frontier settlers would be subserved under its operation, and that the nation would be saved through its results from the imputation of inhumanity, injustice, and mismanagement.

I regard these recommendations of the President worthy the most candid consideration of Congress, but there seems to be little prospect of any consideration by this House.

It has been the settled policy of the Government to preserve the Indian Territory from intrusion in any form, and in order to carry out such policy with any degree of success, it should be firmly adhered to.

I can not resist the conviction that the condition provided in the bill, making any of its provisions taking effect dependent upon the future consent of these tribes, would be more likely to result through a coercive policy than through the voluntary and free exercise of their uninfluenced wisdom. At all events it would seem to be fair that any consent to be obtained of the Indian tribes, affecting rights or interests in any of these lands, should be such consent as will embrace that of all the tribes, as contemplated by an amendment providing substantially as follows:

*Provided*, That nothing contained in this act respecting the boundaries of said Territory of Oklahoma shall be construed to impair the rights of persons or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by agreement between the United States and such Indians, or to include any part of the territory of the Indian Territory, without the consent of all the tribes established by treaty or law within the same; but all such territory shall be excepted out of the boundaries and constitute no part of the Territory of Oklahoma until all of said tribes shall signify their assent to the President of the United States that it be included within said Territory, or to affect the authority of Congress to make any regulations respecting such Indians, their lands, property, or other rights, by agreement, law, or otherwise; but all such authority is directly reserved to Congress. The consent hereinbefore mentioned, when given by a tribe having an organized civil government, shall be given by the proper constituted authorities thereof, and where given by a tribe without such organized civil government shall be by the assent of not less than two-thirds of its male members over twenty-one years of age.

It is a matter of regret that the authority conferred upon the President by the eighth section above quoted was not promptly exercised, for, if it had been, the questions and and rights involved would doubtless have been adjusted and settled before the present date, so that Congress might now proceed with the organization of a Territory, under an act which could not possibly be criticised as in any manner infringing upon the rights of the Indians, or as over-riding or breaking down any existing treaty stipulations or covenants. A bill was introduced and considered during the Forty-ninth Congress, but the House of

Representatives seemed indisposed to pass the same. It is the same bill pending in this Congress introduced by Mr. Holman, of Indiana, is numbered 1340, and will, if enacted into law, carry into effect the recommendations of the President above quoted. The President has never proceeded to execute the power and discharge the duty conferred by the eighth section of the act of March 3, 1885. Nor has Congress, so far as I have been able to learn, ever received any information why the President has not exercised such power and discharged the duty conferred by that section; but it is fair to presume that a bill so radical in its provisions as the pending bill to create the Territory of Oklahoma would hardly meet or merit executive approval in view of the undischarged authority and power under existing law, and in such utter disregard of the President's recommendations, so wisely stated by him in his message. He might, in disapproving such a measure, well claim that his exercise of the veto power would save the nation "from the imputation of inhumanity, injustice, and mismanagement."

All which is respectfully submitted.

CHARLES S. BAKER.