46TH CONGRESS, 2d Session. } HOUSE OF REPRESENTATIVES. { REPORT 755, Part 2.

# UNITED STATES COURTS IN THE INDIAN TERRITORY.

APRIL 10, 1880.—Ordered to be printed.

Mr. MULDROW, from the Committee on the Territories, submitted the following as the

## VIEWS OF THE MINORITY:

[To accompany bill H. R. 5634.]

The substitute is objectionable and cannot receive the sanction of the minority of this committee.

### I.

The first twenty-nine sections provide for the establishment and operation of a United States court in the Indian Territory, with civil and criminal jurisdiction.

Article 13, of the treaty of 1866 with the Cherokee Indians, provides that the judicial tribunals of the nation shall be allowed to retain exclusive jurisdiction in all civil and criminal cases "where the cause of action shall arise in the Cherokee Nation."

The Choctaw and Chickasaw treaty of 1866 provides for the establishing of United States courts, with such jurisdiction as Congress may prescribe, "but the same shall not interfere with the local judiciary of either of said nations."

The fifth section of this bill violates these provisions. It gives the court to be established *exclusive jurisdiction* of all cases, civil and criminal, wherein the United States, or any citizen of the United States, is a party, where the amount in controversy is not less than one hundred dollars. It totally disregards the local judiciary established by these tribes, and virtually abolishes the courts of their own creation. The exclusive jurisdiction given to the United States court to be established *ex necessitate* will interfere with the local judiciary of the tribes, and seems to be so intended.

The jurisdiction of the local and Federal courts is not to be *concurrent*, but that of the Federal court is to be exclusive. All causes of action, therefore, which would now be triable in the local courts, where the amount in controversy shall exceed one hundred dollars, must then be tried in the Federal court, and in that court alone. But were these articles of these treaties not in existence, there seems to be no urgent necessity for the creation of this court. From the best information in the possession of the committee it would seem that justice is fairly administered by the local courts, and the Territory will compare favorably in its administration of law and in the preservation of the public peace with the Territories of the union organized under the acts of Congress.

There would be less necessity for this legislation still if the United States would observe its treaties, and see to it that its own citizens re-

spected the law, and did not trespass upon territory which belongs exclusively to these Indians—territory which is theirs, as is evidenced both by the treaties and the patents of our government.

This bill proposes to make a judicial district of the whole Territory, embracing various tribes, more than thirty in number, besides the Cherokees, Creeks, Seminoles, Choctaws, and Chickasaws. The advocates of the bill urge that the treaties with the tribes *named* give the authority for the establishment of a court, but in contending for this they wholly disregard the rights of the other tribes in the Territory. It is not claimed that all, if any, of the treaties between these other tribes and the government authorize the creation of such a court, and yet the bill ignores their wishes in the premises and Congress is asked to legislate as though they were not in existence.

These uncared for tribes have treaties with the government, and although they may be too poor or too ignorant to present their protest here, yet we cannot be unmindful that these treaties exist, and they must operate with binding force upon our sense of justice.

II.

Another objectionable feature of this bill is that it is questionable at least, whether the members of the Indian tribes will be competent jurors in the court to be created by its provisions. It makes those competent only who are "male residents of the districts being citizens of the United States and over twenty-one years of age." If the effect of this will be to deprive the members of the Indian tribes of competency as jurors, no more flagrant disregard of their interest could be suggested, and the result would be that they and their rights of person and property must be turned over to the tender mercies of traders, railroad corporations, and the bummers of civilization who may chance to go to their country to despoil them of their property.

III.

The next object of the bill is to survey and allot the lands comprising the reservations of the Choctaw, Cherokee, Chickasaw, Creek, and Seminole Nations into title and possession in severalty, which are now held by the people of those nations in common. Their treaties with us, and the laws of Congress heretofore enacted, protect them against this legislation. The act of May 28, 1830, provides—

> That it shall and may be lawful for the President of the United States to cause so much of any territory belonging to the United States west of the river Mississippi, not included in any State or organized Territory, and to which the "Indian title" has been extinguished, as he may judge necessary, to be divided into a suitable number of districts for the reception of such tribes or nations as may choose to exchange the lands where they now reside and remove there, and to cause such of said districts to be described by natural or artificial marks so as to be easily distinguished from every other. * * * That in the making of any such exchange or exchanges, it shall and may be lawful for the President solemnly to assure the tribe or nation with which the exchange is made that the United States will forever secure and guarantee to them and their heirs and successors the country so exchanged with them, and if they prefer it, the United States will cause a *patent* or *grant* to be made and executed to them for the same: *Provided*, That such lands shall revert to the United States if the Indians become extinct or abandon the same. * * * That it shall and may be lawful for the President to cause such tribe or nation to be protected at their new residence against all interruption or disturbance from any other tribe or nation of Indians, or from any other person or persons whatever.

This act is really the foundation of the present "Indian policy." Under its provisions all of the present Indian country (in which is located

these nations) is set apart, with its fixed metes and bounds, outside of the limits of any State or Territory of the United States, embracing an area of about 44,154,240 acres of land, to which the "Indian title" was extinguished *before the removal of these nations there.*

This act also preserves *inviolate* the treaties before made with the Indians, among which was the Cherokee treaty of ———, 1828 (Revision of Indian Treaties, p. 61), which provides as follows:

> Whereas it being the anxious desire of the Government of the United States to secure to the Cherokee Nation of Indians, as well those now living within the limits of the Territory of Arkansas as those of their friends and brothers who reside in States east of the Mississippi, and who may wish to join their brothers of the West, *a permanent home, and which shall, under the most solemn guarantee of the United States, be and remain theirs forever—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 State or Territory, nor be pressed upon by the extension, in any way, of any of the limits of any existing Territory or State* * * * The United States agree to possess the Cherokees, and to guarantee it to them forever, and that guarantee is hereby solemnly pledged of seven millions of acres of land, to be bounded as follows. * * *

The treaties with the other civilized tribes are in substance the same, the controlling idea being that the Indian was to be given a country which was to be to them a permanent home and be and remain theirs forever, undisturbed by contact and association with the white man. The Indians knew then and are better informed to-day that the interests of the red man and the white, when mingled in the same community, cannot co-exist. The red man always suffers by the contact. They are convinced that the division of their lands into severalty will result in bringing swarms of white men in their midst, will be disastrous to them as a people, and hence their protest.

The holding of lands in common and not in severalty has generally been best for the Indian where the two experiments have been tried.

The table subjoined enumerates fourteen bands or tribes upon which the experiment of citizenship with tenure in severalty has been tried. Out of these fourteen there is no evidence in the reports of the Commissioner of Indian Affairs to show that it has been completely successful in more than one—the Brothertown band, in Wisconsin. The Sioux of Flandreau may and probably will ultimately succeed in taking care of themselves. For the present they need government help. Of the Miamies in Indiana, and the Winnebago half-breeds in Minnesota, no accounts are given. Assuming that with them the change was in all respects beneficial, and adding them to the Flandreau Sioux and the Brothertown Indians, gives a total of four cases of success out of fourteen—the four giving a total of 1,226, out of an aggregate of 13,653—1,226 cases of success against 12,427 cases of failure.

*List of Indian tribes made citizens in whole or in part, showing the treaty or act of Congress authorizing or recognizing such citizenship, the aggregate number of each tribe or band, and the authority for stating such aggregate number.*

| Name of tribe or band. | Location when made citizens. | By what act or treaty made citizens. | Whole number of tribe or band. | Authority for stating number. |
|---|---|---|---|---|
| Brothertown | Wisconsin | Act March 3, 1839 | 400 | 8th Indian Removals, p. 206. * |
| Stockbridge | do | Act March 3, 1843 | 338 | Indian Office Report for 1865. * |
| Ottawas and Chippewas | Michigan | Treaty July 31, 1855 | 6,115 | Indian Office Report for 1875, p. 51. |
| Chippewas of Saginaw | do | Treaty August 2, 1855 | 1,580 | Do. |
| Wyandotts | Kansas | Treaty March 1, 1855 | 554 | Indian Office Report for 1855—pay-roll, 1854. |
| Ottawas of Blanchard's Fork | do | Treaty June 24, 1862 | 207 | Indian Office Report for 1861. |
| Peorias | do | Treaties May 30, 1854, and February 23, 1867. | 242 | Revised Indian Treaties, pp. 430, 431, and 432. |
| Pottawatomies | do | Treaty November 15, 1861 | 2,050 | Indian Office Report for 1877, p. 118—450 as a tribe in Kansas.<br>Indian Office letter, January 14, 1878—1,600 "citizens" in Indian Territory. |
| Kickapoos | do | Treaty June 28, 1862 | 344 | Indian Office Report for 1855—pay-roll, 1854. |
| Delawares | do | Treaty July 4, 1866 | 902 | Indian Office Report for 1855. |
| Miamies | do | Act March 31, 1873 | 95 | Indian Office Report for 1872, p. 31. |
| Do | Indiana | Treaty June 5, 1854 | 302 | Revision Indian Treaties, p. 516. |
| Winnebagoes | Minnesota | Act July 15, 1870 | 160 | Indian Office Report for 1871, p. 20. |
| Sioux of Flandreau | Dakota | Treaty April 29, 1868 | 364 | Indian Office Report for 1877. |
| Aggregate population of bands made citizens in whole or in part | | | 13,653 | |

* On page 556 of 7 Statutes at Large the number of Brothertown Indians is stated at 360; of Stockbridge and Munsees, at 349.

These experiments are enough to warn and satisfy the Indians of the danger of the policy of the division of their lands into titles in severalty. And as to these particular tribes it is not necessary to go outside of their own experience to apprise them of the danger now threatening their prosperity, if not their existence. In their memorial of April 22, 1878, they say:

> It is the conviction that disastrous consequences would result from the proposed changes, which causes the nearly unanimous opposition to such measures on the part of the Five Nations. Their own experience tells them exactly what the system of allotment and citizenship means. Provisions for that purpose were made in the treaties of 1817 and 1819 with the Cherokees, of 1830 with the Choctaws, and of 1832 with the Creeks. Hundreds of Indians entitled to patents for land under those treaties have never secured a single acre. Many more whose rights were recognized by the government were shamefully wronged by the whites, and have to this day been unable to obtain relief or redress.

This sentiment has been expressed and repeated by them whenever opportunity has been offered.

It must be remembered that with the exception of the treaties made with the Cherokees, Choctaws, and Chickasaws, there is no provision made for the allotment of the Indian lands, and in no event, even in the case of the Cherokees, Choctaws, and Chickasaws, is this to be done except when requested through their national councils.

The proposed legislation in this regard is arbitrary. Their title to their lands has been conceded by the decision of our highest court. In Holden *v.* Joy (17 Wall., 211), the Supreme Court used this language:

> Possessed as the United States were of the fee-simple title to the neutral lands, discharged of the right of occupancy by the Osage Indians, it was clearly competent for the proper authorities of the United States to convey the same to the Cherokee Nation. Subsequent acts of the United States show that the stipulations, covenants, and agreements of the treaty in question were regarded by all the departments of the government as creating binding obligations, as fully appears from the fact that they all concurred in carrying the provisions into full effect. (Minis *v.* United States, 15 Pet., 448; Porterfield *v.* Clark, 2 How., 76.)
>
> Appropriations were made for surveys, and surveys were ordered and plats were made, and on the 1st of December, 1838, a patent for the land promised was issued by the President, in full execution of the second and third articles of the treaty. Among other things it is recited in the patent that it is issued in execution of the agreements and stipulations contained in the said several treaties, and that the United States do give and grant unto the Cherokee Nation the two described tracts of land, as surveyed, containing the whole quantity therein mentioned, 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 certain conditions therein specified, of which the last one is that the lands hereby granted shall revert to the United States if the said Cherokee Nation becomes extinct or abandons the premises.

These lands therefore belong to these people as absolutely as do those of any citizen or corporation in the land. Their title is perfect, subject only to the ultimate fee of the Government of the United States in the event the Indians "become extinct or abandon the same."

No good reason is assigned for the proposed infraction of the treaties between these Indians and the government, and there is no just ground for the enactment of such arbitrary legislation with reference to property which does not belong to the government.

It is not pretended that these Indians have broken faith or violated their part of the contract. They have been peaceable, law-abiding, and forbearing. Without going to war and thereby involving the government in the sacrifice of life and treasure, they have given up large bodies of valuable lands which now constitute the domain of some of our most prosperous States.

It is true that the forty-third section of the bill provides that this

feature is not to "take effect until the councils of the Indian tribes named acting separately or a general council of delegates acting for all of said nations shall consent," &c.

These Indian nations have given no intimation that they or either of them desire any such legislation. On the other hand they have been here by their authorized delegations for years objecting to and protesting against all such action on the part of Congress. Conscious of their weakness and feeling their dependence, they have, through their memorials presented by their accredited agents, appealed to the conscience and the manhood of this body to spare their existence and pay a decent regard for the compacts of the government. They have sought to touch every generous emotion of a brave nature to induce the strong to spare the weak. That about which they have shown the most concern, that concerning which they have fought the hardest and manifested the greatest signs of distress, has been legislation looking to the allotment of their lands into severalty titles which are now held in common. It would be nearly as pertinent, with what we know of their wishes in this regard, to pass a bill *confiscating* their lands, with a proviso that it should not take effect until they gave their consent, as to pass the present bill with such *proviso*.

It is said by the advocates of the bill that the Indian Territory will be opened to the white man sooner or later, and as it is inevitable that it may as well be done now as at any other time. In this idea we cannot concur. If the treaties of our government with these Indians must be annulled at some future time, let the Congress annulling them bear the odium that must attach to our broken faith. It will be a poor justification in the eyes of the world, and it is illogical and untenable in morals to say that because a great wrong will some day be perpetrated, that therefore we must hasten to commit it ourselves. This is worse than the plea of necessity for the commission of a crime, and could not receive the sanction of any intelligent and civilized body of men.

## IV.

The provision of the bill which enables the Indian to become a citizen is unnecessary, there being already a law in existence which gives him this right, upon his leaving his tribe and becoming identified as a citizen of some one of the States or Territories. The moment he pays a poll-tax as a resident, making his home under such jurisdiction outside of his tribe, he ceases to belong to the class of "Indians not taxed," and becomes a citizen of the United States, as defined by section 1992 of the Revised Statutes, which says that "all persons born in the United States, and not subject to any foreign power, excluding Indians *not taxed*, are declared to be citizens of the United States."

But if there was no law on the subject, and one is now enacted, it should be free from the objection and the charge that it is violative of our treaties with these Indian tribes.

Article 10 of the Cherokee treaty of 1835 (Revision Indian Treaties, pp. 71, 72), after providing for the permanent investment of the funds of the Cherokee Nation, specifies that the interest on *these funds shall be paid*—

*Annually to such person or persons as shall be authorized and appointed by the Nation,* * * * and their receipt shall be a full discharge for the amount paid to them. * * * *The council of the Nation may, by giving two years' notice of their intention, withdraw their funds by and with the consent of the President and Senate of the United States, and invest them in such manner* as they may deem most proper for their interest.

Again, article 23 of the Cherokee treaty of 1866 (Revision Indian Treaties, p. 95) provides:

> All funds now due the nation, or that may hereafter accrue from the sale of their lands by the United States, as herein provided for, *shall be invested in the United States registered stocks at their current value, and the interest on all such funds shall be paid semi-annually on the order of the Cherokee Nation; and shall be applied to national, school, and orphan purposes.*

The treaties with the other civilized Indians are in substance the same. Their funds are invested for the benefit of the tribes. They are to be paid on the order of the nation to which they belong, and to such person or persons as shall be authorized and appointed by the nation; and they cannot be withdrawn except by the concurrent action of the nation and the President and Senate of the United States, after two years' notice given by the nation. These treaties have been uniformly recognized by Congress in making appropriations, and the good faith of the government is yet pledged to their observance. The consent of the Indian tribes for which provision is made in the bill is not to be expected to this, any more than it may be to the proposition to allot their lands into titles in severalty; for the ink with which the bill was written was scarcely dry before Congress is notified by their accredited representatives of their earnest and unalterable opposition to the measure. What, we would ask, is the necessity or propriety of legislation resting upon this condition precedent, when we are informed beforehand that if the will of these Indian tribes is fairly expressed it is almost a unit against the proposition sought to be enacted into law?

## V.

It cannot be successfully denied that the encroachments of the white race on this continent upon Indian settlements have been unceasing and persistent from the time of its discovery to the present. Our Indian history has been marked by the Anglo Saxon with an unwarrantable greed for gain and a disregard for the proper method by which such end might be accomplished. The Europeans who came to this country brought with them their own maxims, the chief of which was that power was the proper standard of right, and that all opposing forces must yield to this idea in their acquisition of territory, and upon this they have acted.

Our population as a whole have reaped the benefits of the acts which have resulted from this theory, and as a rule have either not thought of the question of its justice, or, having thought of it, have consoled themselves with the idea that the march of civilization must know no bounds in its strides of conquest, and that all means were proper to the end of this accomplishment.

The policy of the Government of the United States toward the Indian has been almost invariably inconsistent. It has recognized the Indian tribes as nations to the extent of making formal treaties with them, under our Constitution, and as often as these treaties have been made they have been broken. The government has from time to time pledged its sacred guarantees of good faith, but to have them violated or to permit their violation by its citizens. In but few instances can it be shown as a justification for wrong-doing that the Indians have given just cause for these violated promises. They have yielded to the demands of our government and retreated step by step before the march of its encroachments, until sometimes, driven to desperation, they have temporarily turned upon us and given us battle. They have gone from home to home, from

reservation to reservation, usually without causing our government to make any sacrifice of life or treasure, no matter how great the loss to themselves, and regardless of the unreasonable requirements made by us.

It would have been more honorable and in a braver spirit had this government in the beginning recognized no right in the soil to the aborigines, and declared openly to the world that in the interest of civilization and Christianity this policy would be asserted and maintained; that they had no rights which we were bound to respect, and no interest which they must not surrender to the march of civilization from ocean to ocean. We did not do this, but treated with them as one nation does with another. The question now confronts us, what is our duty to them and what to ourselves in this era of our history?

In 1826 the then Secretary of War indulged in this reflection. Referring to the Indian race, he said:

> Shall we go on quietly in a course which, judging from the past, threatens their extinction, while their past sufferings and future prospects so pathetically appeal to our compassion. The responsibility to which I refer is what a nation owes to itself, to its future character in all time to come. For next to the means of self-defense and the blessings of free government stands in point of importance the character of a nation. Its distinguishing characteristics should be justice and moderation. To spare the weak, its brightest ornament. It is therefore a source of the highest gratification that an opportunity is now offered the people of the United States to practice these maxims and give an example of the triumph of liberal principles over that sordid selfishness which has been the fruitful spring of human calamity.

These remarks are as applicable now as they were then. It is the duty of the government to deal honestly with these Indian tribes, to observe treaties made with them, if for no other reason that its own honor may be preserved; for we should never cease to remember that we are dealing with a weak and dependent people. These tribes, when they left their homes east and went west of the Mississippi, were induced by those high in authority amongst us to do so. Indeed, they were induced by the very action of the government to believe that in the event of such removal they would have a home of their own, for all time to come, free from and undisturbed by our laws and customs, and controlled by their own councils, organized upon their own plans. From Monroe to Jackson these promises were repeatedly given and these pledges constantly made. Mr. Monroe, in one of his messages, said:

> Experience has clearly demonstrated that in their present state it is impossible to incorporate them—the Indians—in such masses in any form whatever into our system. It has demonstrated with equal certainty that without a timely anticipation of and provisions against the dangers to which they are exposed under causes which it will be difficult, if not impossible, to control, their degradation and extermination will be inevitable. The great object to be accomplished is the removal of these tribes to the territory designated on conditions which shall be satisfactory to themselves and honorable to the United States. This can be done only by conveying to such tribe a good title to an adequate portion of land to which it may consent to remove, and providing for it there a system of internal improvement which shall protect their property from invasion.

And the then Secretary of War said:

> One of the greatest evils to which they are now subjected is that incessant pressure of our population. To guard against this evil, so fatal to the race, there ought to be the strongest and most solemn assurance that the country given them should be theirs as a permanent home for themselves and their posterity, without being disturbed by the encroachments of our citizens.

This subject continued to be agitated from time to time, and in December of 1829, President Jackson, in furtherance of the same idea, sent a message to Congress embodying the same thought, and in which appears the following:

> As a means of effecting this end, I suggest for your consideration the propriety of setting apart an ample district west of the Mississippi, and without the limits of any

State or Territory now formed, to be guaranteed to the Indian tribes as long as they shall occupy it, each tribe having the distinct control over the portion designated for its own use, that they may be secured in the enjoyment of governments of their own choice, subject to no other control from the United States than such as may be necessary to preserve peace on the frontier and between the several tribes.

Shortly following, the act of May 28, 1830, a part of which is before quoted, was passed. The Indians, accepting in good faith promises of the government, moved westward to secure a home which should be theirs forever, and in which the government pledged them protection. This compact came from the government of its own motion.

Will the government now make good, or will it renounce, its obligations voluntarily made with this weak and defenseless people?

It is the opinion of the minority of this committee that they should be observed, and therefore they oppose the passage of this bill.

H. L. MULDROW.
B. F. MARTIN.
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H. Rep. 755, p. 2——2