50TH CONGRESS, 1st Session. } HOUSE OF REPRESENTATIVES. { REPORT No. 2857.

# ORGANIZATION OF THE TERRITORY OF OKLAHOMA.

JULY 11, 1888.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed.

Mr. SPRINGER, from the Committee on the Territories, submitted the following

## REPORT:

[To accompany bill H. R. 10614.]

The Committee on the Territories, to whom was referred the bill (H. R. 10614) to organize the Territory of Oklahoma, and for other purposes, having had the same under consideration, report it back without amendment and recommend its passage.

The bill is substantially a reprint of H. R. 1277, "to provide for the organization of the Territory of Oklahoma, and for other purposes," heretofore, on February 7, 1888, reported from this committee, together with the amendments which the committee recommended. It also contains some other slight modifications, which do not change the general character of the measure. The committee refer to House Report No. 262, submitted in support of House bill 1277, for full explanation of the provisions of the bill H. R. 10614, herewith reported, and for the reasons for reporting the same with a favorable recommendation and make the same a part of this report.

**House Report No. 263, Fiftieth Congress, first session.**

# ORGANIZATION OF THE TERRITORY OF OKLAHOMA.

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FEBRUARY 7, 1888.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed.

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Mr. SPRINGER, from the Committee on the Territories, submitted the following

## REPORT:

[To accompany bill H. R. 1277.]

The Committee on the Territories, to whom was referred the bill (H. R. 1277) to provide for the organization of the Territory of Oklahoma, and for other purposes, having had the same under consideration, have directed me to report the same back and recommend its passage with certain amendments thereto.

The first section of the bill provides for the organization of a Territory to be known as Oklahoma, to be composed of all that part of the Indian Territory west of the lands occupied by the five civilized tribes, and also what is known as the Public Land Strip, lying north of Texas, east of New Mexico, south of Colorado and Kansas, and west of the Indian Territory.

As a portion of the area of this new Territory is now occupied by Indian tribes under departmental orders, or in pursuance of special agreements with such tribes, it is provided that nothing in the act organizing the Territory shall be construed to impair the rights of such tribes under the laws and treaties of the United States. The lands embraced within the limits of the proposed Territory contain about 23,267,719 acres. That portion of the Territory occupied by Indian tribes is shown in the following table, which also shows the number of each tribe, the acreage per capita, the acreage required by Indians, allowing them 160 acres for family of four, and the amount of surplus lands:

| Name of tribe. | Population. | Acreage of reservation. | Acreage per capita. | Acreage required by Indians, allowing them 160 acres for family of four. | Surplus. |
|---|---|---|---|---|---|
| Osage | 1,552 | 1,470,059 | 947½ | 62,080 | 1,407,979 |
| Kansas (Kaw) | 225 | 100,137 | 440⅞ | 5,000 | 95,137 |
| Pawnee | 1,045 | 283,120 | 270⅝ | 41,800 | 241,220 |
| Sac and Fox | 457 | 479,667 | 1,049½ | 18,280 | 461,387 |
| Pottawatomie | 550 | 575,877 | 1,047 | 22,000 | 553,877 |
| Tonkawa | 92 | 100,000 | 1,087 | 3,680 | 96,320 |
| Ponca | 574 | 101,894 | 177½ | 8,610 | 93,284 |
| Otoe and Missouria | 266 | 129,113 | 485½ | 10,640 | 118,473 |
| Iowa | 89 | 228,418 | 2,566½ | 3,260 | 225,158 |
| Kickapoo | 346 | 206,466 | 596⅝ | 14,590 | 190,876 |
| Cheyenne and Arapahoe | 3,609 | 4,297,771 | 1,193⅜ | 144,160 | 4,153,611 |
| Wichitaw | 189 | 743,610 | 3,900 | 7,560 | 736,050 |
| Kiowa, Comanche, and Apache | 3,032 | 2,968,893 | 979 | 121,280 | 2,847,613 |
| Total | 10,374 | 11,685,035 | ..... | 462,940 | 11,582,684 |

The area in said Territory not occupied by Indian tribes and the acreage thereof is as follows:

| | Acres. |
|---|---|
| Cherokee outlet | 6,022,244 |
| Public Land Strip | 3,672,640 |
| Oklahoma lands | 1,887,800 |
| Total | 11,582,684 |

These areas do not include what is known as Greer County. The bill simply provides that the Territory to be organized shall be bounded on the south by the State of Texas wherever that line may be determined hereafter to be. If it should be decided that Greer County is a part of the Indian Territory and belongs to the United States it will be embraced within the provisions of the bill and the lands thereof be opened to settlement. Including this county the area of the whole Territory organized under this bill comprises 38,718 square miles, or 24,779,885 acres, an area about the size of the State of Ohio. The Indian tribes now located within said Territory by Departmental orders and special acts of Congress are included within the Territory for judicial purposes, and for such other purposes as may be consistent with our treaty obligations with each of these tribes. But it is expressly provided, as stated heretofore, that nothing in the bill shall interfere with any right which any Indian tribe may now have under any treaties or agreements with the United States heretofore ratified.

The bill to provide for the organization of the Territory of Oklahoma, reported to the House of Representatives from the Committee on Territories of the Forty-ninth Congress, included within the limits of the Territory for judicial purposes the reservations occupied by the Cherokees, Creeks, Chickasaws, Choctaws, and Seminoles, known as the five civilized tribes. Representatives of those tribes appeared before that committee during that Congress and protested against being included within the limits of the proposed Territory. It will be observed that the bill now reported does not include the lands occupied by the five civilized tribes within its provisions. Your committee prefer, notwithstanding the discords and crimes which prevail among those tribes, that they should be left, so far as this bill is concerned, to be dealt with hereafter as Congress may in its wisdom provide.

The second section of the bill authorizes the President to appoint, by and with the advice and consent of the Senate, a governor, secretary, a supreme court consisting of three judges, a marshal, and an attorney, and for the election of a Territorial legislature and a Delegate in Congress, at such time as in the opinion of the President the public interest may require. The section also provides who shall be entitled to vote at the first election in the Territory and who shall be eligible to office therein, and fixes the number of the council of the Territory at thirteen members, and the house of representatives thereof at twenty-six members, which may be increased hereafter to thirty-nine.

The third section of the bill extends over the whole Territory thus organized the Constitution and laws of the United States, and provides for the exercise of the judicial powers already referred to.

The fourth section opens the public land strip to settlement under the homestead laws of the United States only, reserving the sixteenth and thirty-sixth sections for school purposes. The area of this strip is 3,672,640 acres.

The fifth section of the bill relates to the mode of disposing of the land ceded to the United States by the Creek and Seminole Indians by

the treaties of 1866. By those treaties the United States purchased and paid for these lands commonly known as Oklahoma, declaring in the treaty that they were purchased for the purpose of settling thereon friendly Indians and freedmen. With this limitation only, the conveyance was one in fee simple on the part of the tribes, the United States purchasing with this declared purpose. The bill provides that, in case the commission authorized in the subsequent section of the bill should be of opinion that the Indians are entitled to further compensation for said lands by reason of the purpose of the United States being changed, an agreement may be made with said Indians to pay them an additional compensation therefor, not exceeding $1.25 per acre, less the amount heretofore paid and the cost of sale by the United States. The lands disposed of in this section number 1,887,800 acres.

The sixth section of the bill provides the manner in which the Government of the United States may open to settlement to actual settlers that portion of the Indian Territory known as the Cherokee outlet west of the ninety-sixth degree of longitude, except such portions as are now occupied by tribes of Indians by special acts of Congress. The unoccupied portion it is proposed to open to settlement embraces 6,022,244 acres. In view of the fact that the contract of purchase of this land was made coupled with a declaration in the treaty that it was to be used for the settlement of friendly Indians, it is deemed just that the commission appointed in a subsequent section of the bill should first make an agreement with the Cherokee Indians, with a view to additional compensation for said lands by reason of the fact that they are to be used for the settlement of white settlers. It is further provided in the bill, the consent of the Indians first to be obtained, that the United States shall pay the Cherokee Indians $1.25 per acre for the land instead of 47.49 cents as now provided by appraisement fixed by the President of the United States under the act of 1872. The United States is to place this sum to the credit of the Cherokee Indians on the books of the Treasury of the United States as it may receive payment for such land by actual settlers, as provided in the bill, less the amount already paid on account of said lands and the cost of sale.

In this and the preceding section it is provided that the sixteenth and thirty-sixth sections of land shall be reserved for school purposes. The other lands are to be disposed of to actual settlers only in quantities not to exceed 160 acres in square form to each settler at the price of $1.25 per acre All persons who are heads of families or over twenty-one years of age and are citizens of the United States, or have resided in the United States for two years and have declared their intention to become citizens thereof, shall be entitled to become actual settlers on such lands.

It is also provided that no person shall be authorized to enter upon or occupy any of the lands mentioned in sections five and six for the purpose of settlement, or otherwise, until after the tribes mentioned and the commissioners, provided in a subsequent section of the bill, have concluded an agreement to that effect and have presented the same to the President of the United States, who is thereupon authorized to issue his proclamation declaring such lands open to settlement, and fixing the time from and after which such lands may be taken. Any person who may enter upon such land prior to the time fixed by the President's proclamation shall not be permitted to make any entry thereof in consequence of priority of settlement.

It is not contemplated by any of the provisions of the bill to open to white settlement any other portions of the Territory of Oklahoma now

occupied by Indians, unless said lands may be relinquished by the tribes now occupying them.

That such will be the result at an early day is more than probable, from the fact that the Indians in other parts of the Territory have assigned to them lands largely in excess of their present or future wants. For instance, the Cheyennes and Arapahoes, numbering 3,376, have assigned to them, for their use, 4,297,771 acres, or more than 5,000 acres to each family of four persons. Less than 1,000 acres of this land has been reduced to cultivation, and it is well known not to be useful for hunting purposes. The other Indian tribes occupy lands largely in excess of their present or future requirements, and it is believed that future agreements may be made under the allotment law passed at the last session of Congress and departmental orders issued which will reduce the limits of those reservations and open up other large areas in the near future to actual settlement by white people.

The seventh section of the bill authorizes the establishment of land offices in the Territory at such time as the President may deem it necessary and the appointment of the proper officers to conduct the same. It is provided that no person shall take more than 160 acres of land; that he shall occupy the same for three years before acquiring perfect title thereto; shall actually cultivate the same, and that he shall not act as agent for other persons, but in good faith, in order to acquire a title for himself; and the payments therefor, at the rate of $1.25 per acre, except the Public Land Strip, which may be taken for homesteads only, are to be made in installments, as the Secretary of the Interior may prescribe.

The eighth section of the bill is intended to throw around the homestead such legal restrictions as will prevent, under any conceivable circumstances, the actual settlers from being despoiled of their holdings. The committee recommend a substitute for this section, which more carefully protects the rights of settlers than was secured by the text of the section. The substitute is as follows:

SEC. 8. That the procedure in applications, entries, contests, and adjudications under this act shall be in the form and manner prescribed under the homestead laws of the United States; and the general principles and provisions of the homestead laws, except as modified by the provisions of this act, shall be applicable to all entries made hereunder; and no patent shall be issued to any person who is not a citizen of the United States at the time he makes final proof and payment. Final proof and payment, except in cases of contest, shall be made within three months after the expiration of three years from the date of entry, and in default thereof, or in default of the payment of any installment of the purchase money when due, the entry shall be liable to cancellation, and the money paid thereon shall be forfeited to the United States. Lands entered under the provisions of this act shall be liable to taxation after the first installment of the purchase money shall have been paid, but the same shall not be subject to any judgment or lien obtained upon indebtedness contracted or obligation incurred prior to the issue of patents therefor; nor shall such lands be sold or contracted to be sold, leased or contracted to be leased, conveyed, mortgaged, or in any manner incumbered prior to final proof or payment and the record thereof made in the office of the register and receiver of the district where the land is located; and any sale, lease, conveyance, or mortgage made, executed or contracted for prior to such final proof, payment, and record shall be absolutely null and void; and all assignments, transfers, and mortgages of unpatented land entries shall be at the risk of the assignees, transferees, and mortgagees, who shall have no recourse against the United States for any failure of claimant's title before issue of patent: *Provided*, That the provisions of section 2305 of the Revised Statutes of the United States, entitled "Homesteads," shall not be modified or changed by anything in this act.

The ninth section of the bill provides that whenever any portion of the lands open to settlement under this bill shall be occupied in good faith for town-site purposes, the Secretary of the Interior shall issue

patents therefor under such rules and regulations as he may prescribe, to any legally organized company entitled to the same, upon the payment in cash of $20 per acre for the lands so occupied. The money to be received from the sale of town-sites shall be held as a separate school fund for the benefit of the people of said town, and shall be expended under the direction of the Secretary of the Interior for the erection of school buildings and the support of schools therein.

The committee recommend an amendment to this section by inserting after the word "town-site," in the tenth line of the section on page nine, the words "except such amount as may be required to be paid to the Indian tribes, as provided in sections five and six of this act."

This amendment requires the sums necessary to satisfy the claims of the Indians to be first paid and the remainder to be used for school purposes.

The tenth section provides that all lands in the Territory of Oklahoma not embraced in sections four, five, and six of the act and which are not required for the use of any Indian tribes or which may hereafter be relinquished as an Indian reservation, shall be open to settlement under the provisions of the act. The President of the United States is authorized to fix the price to be paid therefor by actual settlers, which shall in no case exceed $1.25 per acre, and the proceeds shall be held for the benefit of the Indians concerned, as provided in sections five and six. An examination of the treaties, laws, and agreements under which the 11,685,035 acres in the Territory are subject to Indian occupancy will disclose the fact that the absolute title to a large portion of said land is in the United States. For the purpose of raising a fund for the support of the Indians and thus relieve Congress from the necessity of making direct annual appropriations for this purpose, this part of the public domain can be sold, as provided in this section, or so much thereof as may not be required for the location of the Indians on lands in severalty.

Section 11 provides for the appointment by the President of a commission, to be composed of five persons, not more than three of whom shall be members of one political party, whose duty it shall be to open negotiations with the Creeks, Seminoles, and Cherokees, for the purpose of securing the consent of said Indians, so far as it may be necessary, to the provisions of sections 5 and 6 of the act. Any agreement made is to be submitted to the President of the United States for his action thereon, as provided in the bill. The compensation of the commission is to be at the rate of $10 per day for each member, and they are authorized to appoint a secretary, to receive $6 per day; and they shall be allowed their necessary traveling expenses, stationery, and postage.

Section 12 makes it unlawful for any person, for himself or any company, association, or corporation, to directly or indirectly procure any person to settle upon any lands open to settlement with a view to their afterwards acquiring title to said lands from said occupants, and provides for the punishment of parties for such fraudulent settlement.

The thirteenth section of the bill provides as follows:

That all leases of lands belonging to the United States, or held in common by any of the Indian tribes within the Territory of Oklahoma, as organized by this act, including the Cherokee Strip west of the ninety-sixth degree of longitude, whether controlled by persons, corporations, or others, except such leases as are held for the purpose of cultivating the soil strictly for farming purposes, are hereby declared void and contrary to public policy; and it is hereby made the duty of the President, immediately after the passage of this act, to cause the lessees of said lands, or persons illegally occupying the same, to be removed from said lands.

This provision declares null and void and contrary to public policy all leases which may be entered into with any Indian tribe with cattle syndicates, corporations, or individuals for other than mere agricultural purposes within the limits of Oklahoma Territory.

Attention is called to the fact that during the past twenty years the lands heretofore mentioned, known as the Cherokee outlet, and lands known as Oklahoma proper have not been occupied lawfully, either by Indian tribes or by other persons with the sanction of the United States. The declared policy of the Government is at this time not to settle friendly Indians upon those lands, and Congress has upon more than one occasion recognized this fact. This vast region, therefore, is now without legal occupancy of any kind. But the Cherokee tribe of Indians has entered into a lease for grazing purposes with a cattle syndicate known as the "Cherokee Strip Live Stock Association," which lease is to continue for five years from October 1, 1883, and by the terms of which that corporation agrees to pay $100,000 a year to those Indians for the use of such lands. It is well known that the corporation referred to has sublet these lands to more than one hundred firms and individuals engaged in the cattle business for the purpose of pasturing their cattle thereon, and that these sublessees pay the parent company sums largely in excess of the amount that that company pays to the Indians. It has therefore become a question to be determined by Congress whether the Cherokee Indians shall be permitted to lease these unoccupied lands without legal authority to cattle syndicates, to the exclusion of white settlers, or whether the United States will enter into further agreement with them with a view of opening said lands to bona fide settlers, and thus furnishing homes to our people.

It has been the settled policy of the Government from its foundation to the present time to exercise the right to regulate and control the sale or lease of Indian lands. As early as 1796 it was enacted that no nation or tribe of Indians within the boundaries of the United States should grant, sell, or lease or make any other conveyance of lands, or of any title or claim thereto, without the consent of the United States, made and entered into by some public treaty held under authority thereof. This act has remained in force from that time to the present, and was re-enacted in section 2116 of the Revised Statutes of the United States. There is no exception in the history of the Government to this declared policy. In no case has the United States recognized the authority of any Indian tribe or nation to sell, lease, or otherwise alienate or grant a claim to any portion of the lands occupied by them, whether such lands are held by patent in fee-simple or by Departmental orders.

All treaties heretofore entered into between the United States and Indian tribes have been made and published while this law was in existence. All treaties so called with Indian tribes, having been made during the existence of this provision now incorporated in the Revised Statutes, section 2116, are made subject to those provisions, and they are just as much a part of all such treaties as if they had been incorporated into the text thereof. This would be true if they were treaties with foreign and independent nations, for it is conceded that the treaty-making power, which consists of the President and the Senate, can not make a treaty with a foreign nation that contravenes an act of Congress until Congress shall pass a law modifying its statutes in accordance with the treaties. But your committee are of the opinion that treaties made with Indian tribes are mere agreements entered into between the United States and such tribes, and are clearly and unques-

tionably subject to all the provisions of existing law. Whatever therefore may be the terms of any of the titles or previous treaties with any of the Indian tribes in regard to the lands that they occupy or hold, it still remains indisputable that all such titles are made subject to the laws of the United States in force at the time.

But we are not left in doubt upon this subject or required to rest the case upon the settled policy of the United States. At least two Attorneys-General of the United States have expressly held that the title of the Cherokee Nation to the Cherokee outlet does not authorize that tribe to sell any of their lands or lease them for grazing purposes. Attorney-General Devens, in the 16th Attorney-General's Opinions, page 470, held that the Cherokee Nation itself could not settle one of its own tribe upon the Cherokee outlet, and if such tribe could not settle one of its own citizens thereon, it follows that it could not authorize the settlement thereon of any white persons, or lease the same to any person, which includes the right of occupancy. Attorney General Garland has, in a recent opinion, covered the whole subject. In July, 1885, the Secretary of the Interior submitted certain questions to the law officer of the Government for his legal opinion thereon. Attorney-General Garland answered under date of July 21, 1885, reviewing all the authorities upon the subject, and delivering an opinion, which is deemed by your committee to be conclusive upon this subject. That opinion is as follows:

DEPARTMENT OF JUSTICE,
*Washington, July* 21, 1885.

SIR: By your letter of the 8th instant, inclosing a communication from the Commissioner of Indian Affairs of the 7th, the following questions are, at his suggestion, submitted to me with request for an opinion thereon:

"Whether there is any law empowering the Interior Department to authorize Indians to enter into contract with any parties for the lease of Indian lands for grazing purposes; and also whether the President or the Interior Department has any authority to make a lease for grazing purposes of any part of any Indian reservation, or whether the approval by the President or the Secretary of the Interior would render any such lease made by Indians with other parties lawful and valid."

These questions are propounded with reference to certain Indian reservations, namely:

1. The Cherokee lands in the Indian Territory west of ninety-sixth degree of longitude, except such parts thereof as have heretofore been appropriated for and conveyed to friendly tribes of Indians.
2. The Cheyenne and Arapaho Reservation in the Indian Territory.
3. The Kiowa and Comanche Reservation in the Indian Territory.

Our Government has ever claimed the right, and from a very early period its settled policy has been, to regulate and control the alienation or other disposition by Indians, and especially by Indian nations or tribes, of their lands. This policy was originally adopted in view of their peculiar character and habits, which rendered them incapable of sustaining any other relation with the whites than that of dependence and pupilage. There was no other way of dealing with them than that of keeping them separate, subordinate, and dependent, with a guardian care thrown around them for their protection. (3 Kent Com., 381; Beecher *v.* Wetherby, 95 U. S., 517, where most of the cases on this subject are cited and discussed.)

Thus, in 1783 the Congress of the Confederation, by a proclamation, prohibited "all persons from making settlements on lands inhabited or claimed by Indians without the limits or jurisdiction of any particular State, and from purchasing or receiving any gift or cession of such lands or claims without the express authority and directions of the United States in Congress assembled," and declared "that every such purchase or settlement, gift or cession, not having the authority aforesaid, is null and void, and that no right or title will accrue in consequence of any such purchase, gift, cession, or settlement." By section 4 of the act of July 22, 1790, chapter 33, the Congress of the United States enacted "that no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any State, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States." A similar provision was again enacted in section 8 of the act of March 1, 1793, chapter 19, which by its terms included any "purchase

or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States." The provision was further extended by section 12 of the act of May 19, 1796, chapter 30, so as to embrace any "purchase, grant, *lease*, or other conveyance of lands, or of any title or claim thereto." As thus extended it was re-enacted by the act of March 3, 1799, chapter 46, section 12, and also by the act of March 30, 1802, chapter 30, section 12.

In the above legislation the provision in terms applied to purchases, grants, leases, etc., from individual Indians as well as from Indian tribes or nations; but by the twelfth section of the act of June 30, 1834, chapter 161, it was limited to such as emanate "from any Indian *nation* or *tribe* of Indians." And the provision of the act of 1834, just referred to, has been reproduced in section 2116, Revised Statutes, which is now in force.

The last-named section declares: "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 statutory provision is very general and comprehensive. Its operation does not depend upon the nature or extent of the title to the land which the tribe or nation may hold. Whether such a title be a fee-simple, or a right of occupancy merely, is not material; in either case the statute applies. It is not, therefore, deemed necessary or important, in connection with the subject under consideration, to inquire into the particular right or title to the above-mentioned reservations held by the Indian tribes or nations respectively which claim them. Whatever the right or title may be, each of these tribes or nations is precluded, by the force and effect of the statute, from either alienating or leasing any part of its reservation, or imparting any interest or claim in and to the same, without the consent of the Government of the United States. A lease of the land for grazing purposes is as clearly within the statute as a lease for any other or for general purposes, and the duration of the term is immaterial. One who enters with cattle or other live stock upon an Indian reservation under a lease of that description, made in violation of the statute, is an intruder, and may be removed therefrom as such, notwithstanding his entry is with consent of the tribe. Such consent may exempt him from the penalty imposed by section 2117, Revised Statutes, for taking his stock there, but it cannot validate the lease, or confer upon him any legal right whatsoever to remain upon the land; and to this extent and no further was the decision of Judge Brewer in United States *v.* Hunter, 21 Fed. Rep., 615.

But the present inquiry in substance is (1) whether the Department of the Interior can authorize these Indians to make leases of their lands for grazing purposes, or whether the approval of such leases by the President or the Secretary of the Interior would make them lawful and valid; (2) whether the President or the Department of the Interior has authority to lease for such purposes any part of an Indian reservation.

I submit that the power of the Department to authorize such leases to be made, or that of the President or the Secretary to approve or to make the same, if it exists at all, must rest upon some *law*, and therefore be derived from either a treaty or statutory provision. I am not aware of any treaty provision, applicable to the particular reservations in question, that confers such powers. The Revised Statutes contain provisions regulating contracts or agreements with Indians, and prescribing how they shall be executed and approved (see section 2103); but those provisions do not include contracts of the character described in section 2116, hereinbefore mentioned. No general power appears to be conferred by statute upon either the President or Secretary, or any other officer of the Government, to make, authorize, or approve leases of lands held by Indian tribes; and the absence of such power was doubtless one of the main considerations which led to the adoption of the act of February 19, 1875, chapter 90, "to authorize the Seneca Nation of New York Indians to lease lands within the Cattaraugus and Allegany Reservations and to confirm existing leases."

The act just cited is, moreover, significant as showing that, in the view of Congress, Indian tribes cannot lease their reservations without the authority of some law of the United States.

In my opinion, therefore, each of the questions proposed in your letter should be answered in the negative, and I so answer them.

I am, sir, very respectfully,

A. H. GARLAND,
*Attorney-General.*

The SECRETARY OF THE INTERIOR.

In view of the foregoing, your committee are of the opinion that the leases mentioned in the bill are null and void, as well as contrary to public policy, and should be so declared by Congress. The point made that a lease for grazing purposes is not a lease of land in contemplation

of section 2116 of the Revised Statutes, but a simple right to pasture the land, is a mere legal subtlety, a distinction without a difference. A lease is a mere right to occupy and use land, and conveys no other title whatever, and such are the cattle leases mentioned in the bill. They differ in no respect from other farm leases.

In view of the foregoing, your committee are of the opinion that it is the imperative duty of Congress to make speedy provision for the opening of the unoccupied lands in said Territory, as is provided in this bill, and for the establishment of such a government over that portion of the Territory as will insure law and order. Its passage will open up in the immediate future a vast region of fertile and healthy country to be occupied as homes for actual settlers. From all over the country numerous petitions were received during the Forty-ninth Congress, praying for the opening up and settlement of this country. Thousands of people are now watching anxiously the action of Congress upon this bill, hoping thereby to secure themselves homes.

There is another provision in the bill to which attention should be called, and that is the provision declaring forfeited all land grants that may have been granted heretofore by Congress in aid of the construction of railroads within the limits of the Indian Territory. Out of abundant caution, and for fear some grants may be revived by the provisions of this bill, your committee have thought it prudent to incorporate a section declaring all such grants forfeited, if any, to the United States, repealing all laws heretofore passed making such grants, and prohibiting the Territorial legislature or any Indian tribe hereafter from making a donation of land to aid in the construction of any railroad now organized or hereafter to be organized, or on account of any railroad already constructed.

There is but one other section of the bill to which attention should be called. It provides that neither the legislative assembly of said Territory nor any county, township, town, or city therein shall have power to create or contract any indebtedness for any work of public improvement, or in aid of any railroad constructed or to be constructed, or to subscribe for or purchase any shares of stock in any railroad company or corporation.

In addition to the amendment heretofore mentioned, the committee propose the following amendment to the bill:

Add to section 7, on page 8, the following:

*Provided*, That there shall be reserved public highways four rods wide around every section of land in said Territory, the section lines being the center of such highways; but no deduction shall be made in the amount to be paid for each quarter-section of land by reason of such reservation.

The Secretary of the Interior, in his annual report for the year ending June 30, 1887, says:

Similar laws are now in force in several Western States and Territories, passed by local legislatures early in their development, to provide frequent and ample means of communication throughout the country with little expense to the counties. Such laws have heretofore proved very beneficial to the people and the State, obviating the frequent and vexatious determinations of highways prevalent in localities where such a statute has not been in operation.

The Secretary further says of such provision:

An additional advantage, too, would follow from these highways in opening free access to the streams and water-courses throughout the whole grazing region, now so completely and exclusively occupied by a few to the permanent injury of many desirous of ranging stock upon the broad uplands of the public domain.

The other amendment which your committee recommend to the bill is the following proviso to be added to section 9:

*And provided further*, That all patents issued for town-sites in the Territory of Oklahoma shall contain reservations for parks and other public purposes, embracing in the aggregate not less than 10 nor more than 20 acres; but no deduction shall be allowed on this account in the amount to be paid for such town-sites, as provided in this section.

The bill has been carefully considered, and every provision inserted which may be necessary to guard the interests and treaty rights of the Indians. At the same time provision is made for opening up to actual *bona fide* settlers a vast region of country now unoccupied by Indians or required for their use in the future, but which has been appropriated, in violation of law, to the exclusive use of cattle companies, and has become the refuge of criminals and desperadoes from all parts of the country. Nothing but the establishment of a Territorial government over that region will arrest the carnival of crime which prevails there, or protect the Indians therein from the rapidly increasing invasion of the criminal classes.

Your committee are informed, upon information deemed reliable, that a large number of persons, estimated as high as 10,000, have recently settled upon that portion of the area embraced within the provisions of this bill, known as the Public Land Strip. The probabilities are that the number of persons who will settle upon this land in the near future will be much greater. Should the land embraced within this area be opened to homestead settlers, as provided in this bill, it is believed that the whole amount would be taken under the homestead laws within one year from the passage of the act. The information also received by your committee in regard to this land is to the effect that it is well adapted to agricultural purposes; that the climate is salubrious; that the water is reasonably plentiful; and that there are other valuable resources, such as coal, building material, etc.

The people now settled upon the Public Land Strip can not acquire a legal title to the land. They are without laws for their government, except such as have been enacted by a provisional council known as the "Council of the Territory of Cimarron." This council has assumed to exercise legislative power upon very few subjects, only such matters being embraced as are absolutely necessary for the temporary security of persons and property. The Territorial council has sent a memorial to Congress, which has been referred to your committee, praying for authority to organize a government which will afford protection to persons and property. In other words, they desire a Territorial government, and are willing to be embraced within the provisions of this bill. The number of people who have already settled upon the Public Land Strip is such as to imperatively require the interposition of Congress, so as to afford them the protection of the law, and enable them to secure titles to the land.

Your committee are of the opinion that in order to enable the settlers already there and those who may come after them to secure titles to the land, that the provisions of the homestead law should be applied, and that a local territorial government should be afforded them. It would not be expedient to attach the Public Land Strip to any State or Territory for judicial purposes or to extend the land laws of the United States over that region without, at the same time, affording the people residing there the protection of local government. If the land laws of the United States should be extended over the Public Land Strip, and no local government provided, the opportunities for frauds upon the public domain

in connection with land entries would be afforded and no adequate means of preventing them would be provided. Your committee are therefore of the opinion that the interests of the United States, as well as those of the people who may reside upon the Public Land Strip, imperatively require that local self-government and the homestead laws, properly guarded, should be afforded them. This is accomplished in the bill for the organization of the Territory of Oklahoma.

In the foregoing report reference has only been made to some of the more important amendments which your committee recommend. Several other amendments are proposed. In order that there may be no confusion or misunderstanding as to what amendments are recommended, they are all set forth in the order adopted, as follows:

Amend the first section of the bill as follows:

In line 22, after the word "tribe," strike out the word "to" and insert in lieu thereof the word "for"; in the same line, after the word "patent," insert the words "or otherwise."

After the words "United States," in line 23, insert the words "or to which such tribe may be entitled by law or treaty."

In line 29 strike out the word "tribes" and insert in lieu thereof the word "tribe"; and strike out the word "their," in the same line, and insert in lieu thereof the word "its."

Amend the third section of the bill as follows:

In line 11, after the word "act," strike out all up to and including the word "Texas" in line 14; and also in line 15 strike out the word "said."

Amend section 5 of the bill as follows:

In line 23, after the word "compensation," insert the words "than that heretofore paid."

Amend section 6 of the bill as follows:

In lines 29 and 30 strike out the words "Indian tribes mentioned," and insert in lieu thereof the words "said Indian tribe."

Amend section 7 of the bill as follows:

Strike out all after the word "void" in line 15 down to the end of the section, and insert in lieu thereof the following:

and all persons settling on lands under the provisions of this act shall be required to select the same in square form, as near as may be, and to maintain a continuous personal residence of three years on the land, and to improve and cultivate the same for that period in the manner required by the homestead laws before obtaining title thereto; but payments for lands, where payment is required to be made by this act, shall be made in four equal installments, under such rules and regulations as may be prescribed by the Secretary of the Interior, as follows: The first payment shall be made at the time of entry, the second at the expiration of one year from date of entry the third at the expiration of two years from date of entry, and the final payment shall be made at the expiration of three years from the date of entry.

Also amend section 7 of the bill as follows:

At the end of the section add the following:

*Provided*, That there shall be reserved public highways four rods wide around every section of land in said Territory, the section lines being the center of said highways; but no deduction shall be made in the amount to be paid for each quarter-section of land by reason of such reservation.

Strike out the eighth section of the bill and insert in lieu thereof the following:

That the procedure in applications, entries, contests, and adjudications under this act shall be in the form and manner prescribed under the homestead laws of the United States, and the general principles and provisions of the homestead laws, except as modified by the provisions of this act, shall be applicable to all entries made hereunder, and no patent shall be issued to any person who is not a citizen of the United States at the time he makes final proof and payment. Final

proof and payment, except in cases of contest, shall be made within three months after the expiration of three years from the date of entry, and in default thereof, or in default of the payment of any installment of the purchase money when due, the entry shall be liable to cancellation, and the money paid thereon shall be forfeited to the United States. Lands entered under the provisions of this act shall be liable to taxation after the first installment of the purchase money shall have been paid; but the same shall not be subject to any judgment or lien obtained upon indebtedness contracted or obligation incurred prior to the issue of patents therefor, nor shall such lands be sold, or contracted to be sold, leased, or contracted to be leased, conveyed, mortgaged, or in any manner encumbered prior to final proof or payment and the record thereof made in the office of the register and receiver of the district where the land is located; and any sale, lease, conveyance or mortgage made, executed, or contracted for prior to such final proof, payment, and record shall be absolutely null and void; and all assignments, transfers, and mortgages of unpatented land entries shall be at the risk of the assignees, transferees, and mortgagees, who shall have no recourse against the United States for any failure of claimant's title before issue of patent: *Provided*, That the provisions of section 2305 of the Revised Statutes of the United States, entitled "Homesteads," shall not be modified or changed by anything in this act.

Amend section 9 of the bill as follows:

After the word "company," in line 8, insert the words "occupying and".

In line 10, after the words "town-site," insert the words "except such amount as may be required to be paid to the Indian tribes, as provided in sections five and six of this act."

At the end of the section add the following:

*Provided further*, That all patents issued for town-sites in the Territory of Oklahoma shall contain reservations for parks and other public purposes, embracing in the aggregate not less than 10 nor more than 20 acres; but no deduction shall be allowed on this account in the amount to be paid for said town-sites as provided in this section; and patents for such reservations shall be issued to the towns respectively when organized as municipalities.

Amend section ten of the bill as follows:

In line four strike out the word "tribes" and insert in lieu thereof the word "tribe."

Amend section eleven of the bill as follows:

In line twelve strike out the words "action as hereinbefore provided" and insert in lieu thereof the words, "for his approval or rejection."

Amend section thirteen of the bill as follows:

In line ten strike out the word "or" and insert in lieu thereof the words "and any other."

Amend the bill by adding thereto the following new section:

SEC. 16. That the provisions of this act shall not be applicable to lands lying within the limits of what is known as Greer County until the question of title thereto between the United States and the State of Texas shall have been finally determined in favor of the United States.

Your committee recommend that the bill be amended as indicated above, and that as amended it be passed. All of which is respectfully submitted.

# VIEWS OF THE MINORITY.

Mr. BARNES, from the Committee on the Territories, submitted the following as the views of the minority on H. R. 10614, "organize the Territory of Oklahoma, and for other purposes:"

The undersigned refer to their views, submitted on the 7th day of February, 1888, in reference to H. R. 1277, in House Report 263, part 2, and adopt the same as their reasons for opposing the passage of this bill, and now again herewith presented. They also recommend the passage of the substitute submitted by Mr. BARNES on June 29, 1888, for the bill (H. R. 10614) "to organize the Territory of Oklahoma, and for other purposes."

GEO. T. BARNES.
WM. ELLIOTT.
CHAS. S. BAKER.

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[Fiftieth Congress, first session, H. R. 10614.]

Mr. BARNES submitted the following as a proposed substitute for the bill (H. R. 10614) to organize the Territory of Oklahoma, and for other purposes:

A BILL to provide a commission for the purpose of negotiating with the Indians in the Indian Territory, with a view of opening a part of said Territory to white settlement.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the President, by and with the advice and consent of the Senate, is hereby authorized and directed to appoint three commissioners, whose duty it shall be to negotiate and make treaties with the Choctaw, Chickasaw, Seminole, Creek, and Cherokee Indians, for the purpose of securing homes and reservations east of the ninety-eighth degree of longitude for the Kiowa, Comanche, Apache, Cheyenne, and Arapaho Indians, and the Wichita and affiliated bands living with them.

SEC. 2. That in order to open up the country for occupancy by citizens of the United States west of the ninety-eighth degree of longitude, now occupied by the Comanches, Kiowas, and Apaches, and the country occupied by the Cheyennes and Arapahoes, and by the Wichita and affiliated bands, said commissioners shall treat with said Indians for an exchange of the lands now occupied by them for permanent homes and reservations east of said ninety-eighth degree of longitude.

SEC. 3. That in treating with the Choctaw, Chickasaw, Seminole, Creek, and Cherokee Indians for the occupancy by American citizens of the country west of the ninety-eighth degree of longitude leased, sold, ceded, or agreed to be ceded by them to the United States for the settlement of Indians and freedmen thereon, it shall be stipulated that the lands so to be occupied by citizens of the United States shall not be paid for at a greater rate than one dollar and twenty-five cents per acre, and that any and all sums of money heretofore received by any of said Indians as a payment thereon shall be deducted from the amounts agreed to be paid.

SEC. 4. That negotiations with the tribes and bands of Indians now living west of the ninety-eighth degree of longitude shall proceed upon the basis of securing to them homes and reservations east of said degree of longitude in perpetuity, and compensation for their removal and settlement in a new country, and pay for their improvements.

SEC. 5. That in treating with any and all of said Indians, consideration shall be given to any and all matters unsettled, or about which any controversy exists, between said Indians and the United States, growing out of any treaty or agreement or statute heretofore made by the authority of the United States, to the end that all such matters may be finally determined.

SEC. 6. That said commissioners shall be allowed pay at the rate of ten dollars per day each, and necessary traveling and other expenses, while actually engaged in the discharge of the duties required herein, and a stenographic secretary, whose pay shall be at the rate of six dollars and actual expenses while engaged as such secretary.

SEC. 7. That the President direct the speediest accomplishment of the requirements of this act, and the sum of fifteen thousand dollars, or so much thereof as may be necessary, be, and the same is hereby, appropriated to carry the same into effect.

House Report No. 263, Part 2, Fiftieth Congress, first session.

# 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 of the 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 guaranteed 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.

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