49TH CONGRESS, 1st Session. } HOUSE OF REPRESENTATIVES. { REPORT No. 1684.

ORGANIZATION OF THE TERRITORY OF OKLAHOMA.

APRIL 15, 1886.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed.

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

REPORT:

[To accompany bill H. R. 7217.]

The Committee on the Territories, to whom was referred the bill (H. R. 7217) to organize the Territory of Oklahoma, and for other purposes, have had the same under consideration, and report the same back and recommend its passage.

The first section of the bill organizes a Territory to be known as Oklahoma, and to be composed of all that part of the United States known as the Indian Territory and the public land strip west thereof and north of the Pan Handle of Texas. But the lands occupied by the five civilized tribes who hold them by patent from the United States are expressly excluded from the jurisdiction of the Territory, except for judicial purposes. The judicial purposes for which this region is included in the Territory are defined in the bill to be three courts, to be held by judges appointed by the President at such places as those judges may fix within the territory occupied by the five civilized tribes, and to have and exercise the same jurisdiction within those five civilized tribes that is now exercised by the United States district court for the western district of Arkansas, the district of Kansas, and the northern district of Texas. For no other purposes are the five civilized tribes placed within the jurisdiction of the Territory, unless they should hereafter signify in a legal way their desire to be incorporated within the Territory of Oklahoma. The other Indian tribes now located within said Territory by Departmental orders and special acts of Congress are included within the Territory for judicial purposes and such other purposes as may be consistent with our treaty obligations with each of these tribes. But it is expressly provided that nothing in the bill shall interfere with any right which any Indian tribes may now have under any treaties or agreements with the United States heretofore ratified.

It is conceded that the United States has the power to establish courts in said Territory. The lawless condition of the Indian Territory heretofore and the enormous expense entailed upon the courts of the United States held in the western district of Arkansas, and the district of Kansas and the northern district of Texas, imperatively demand that there shall be a change in the manner of administering justice in that Territory. It is now the refuge for ex-convicts and desperate characters from all the States, and the only law which prevails is that of might supported by the revolver and the rifle, except such laws as

are made by the five civilized tribes for their government within their tribal relations.

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 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 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 public land strip heretofore mentioned contains 3,672,640 acres. The aggregate, therefore, of the lands to be opened to settlement under the provisions of this bill is 11,583,295 acres, a section of country larger in area than the three States of Massachusetts, Rhode Island, and New Jersey. The greater portion of this region is of the very best agricultural lands, and will furnish homes and comfortable incomes to half a million of people.

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 strip or 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 6,022,855 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.

It is not contemplated by any of the provisions of the bill to open to white settlement any other portions of the Indian Territory unless by consent of such Indians hereafter to be obtained by the commission authorized to be appointed by the bill. 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 to 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 and departmental orders issued which will reduce the limits of these 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 a land office 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 a space of five 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 provides for the appointment by the President, by and with the advice and consent of the Senate, of a commission of five persons, not more than three of whom shall be members of one political party, each to be entitled to a compensation of $3,000 a year, who shall appoint a secretary at a compensation of $1,800 a year. This commission is authorized to enter into agreements with the Indian tribes within the limits of the Territory with a view to carrying out the provisions of this act, to the settlement of Indians upon other reservations than those occupied by them now, to apportioning their lands in severalty, and to their education and civilization. Such agreements so entered into with any of the Indian tribes in said Territory are to be reported to Congress for its future action.

The tenth 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 the Indian Territory.

Attention is called to the fact that during the past twenty years the lands heretofore mentioned, known as the Cherokee strip or 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 to 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 is claimed by some members of the committee that the leases made by the Cherokee tribe to the cattle company referred to are valid and cannot be abrogated by act of Congress. This position, in the opinion of your committee, is wholly untenable. 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 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 the undersigned 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 unquestionably 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 land strip or outlet does not authorize that nation or 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 Strip, 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 last, 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 Cheorokee 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 "pur-

chase, 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, &c., 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 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. A copy of the principal lease in question is hereunto attached and made a part of this report, and marked Exhibit B. It will be seen that it is an ordinary lease of lands, and differs in no respect from other farm leases.

The only other point made in opposition to this bill is that it establishes a Territorial government in the Indian Territory. A careful reading of the bill will show that this point is not well taken. No Territorial government is proposed to be established over the five civilized tribes, or any portion of land occupied by them, unless they should hereafter signify their desire to become incorporated in the Territorial government, and that action rests entirely upon their own will or volition. The only provisions of the bill which operate upon the five civilized tribes are those which establish a court of the United States, having the jurisdiction that is already exercised by United States courts, which courts are to be held within the limits of the Territory hereafter instead of without them, and the right to do this is conceded to Congress in the treaties of 1866. For no other purpose and in no other way are the five civilized tribes affected by the provisions of this bill, unless it be that the region is hereafter to be called Oklahoma instead of the Indian Territory.

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 have been received by your committee from people in all parts thereof, 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 but one other 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 has thought it prudent to incorporate a section declaring all such grants, if any, forfeited to the United States, repealing all laws heretofore passed making such grants, and prohibting 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.

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 syndicates and desperadoes from all parts of the country.

Your committee recommend that the bill be amended, as indicated by the accompanying amendments, and that as amended it be passed.

EXHIBIT B.

THE CHEROKEE LEASE TO THE CATTLE SYNDICATE.

[See Senate Ex. Doc. No. 17, Forty-eighth Congress, second session.]

EXECUTIVE DEPARTMENT, CHEROKEE NATION,
Tahlequah, June 19, 1884.

I, John L. Adair, assistant executive secretary, hereby certify that the transcripts hereunto attached are correct copies of the original papers now on file in this department, the lease of the Cherokee lands west of the Arkansas River, various powers of attorney, authorizing the signing of certain names thereto, and a resolution of the Cherokee Strip Live Stock Association confirming the action of attorneys.

Witness my hand and seal of the Cherokee Nation, this the day and year first above written.

[SEAL.]

JOHN L. ADAIR,
Assistant Executive Secretary.

This indenture, made the fifth day of July, in the year of our Lord one thousand eight hundred and eighty-three, by and between Dennis W. Bushyhead, principal chief of the Cherokee Nation, for and on behalf of said Cherokee Nation, party of the first part, and E. M. Hewins, J. W. Hamilton, A. J. Day, S. Tuttle, M. H. Bennett, Ben. S. Miller, A. Drumm, E. W. Payne, and Charles H. Eldred, directors in trust for and on behalf of the Cherokee Strip Live Stock Association, a corporation organized and existing under and by virtue of the laws of the State of Kansas, for themselves, as directors in trust and assigns, parties of the second part.

Witnesseth, That the said party of the first part, for and in consideration of the rents, covenants, and agreements hereinafter mentioned, reserved, and contained on the part and on behalf of the party of the second part, and their successors in trust and assigns, to be well and faithfully kept and performed, doth, by authority of law in him vested as principal chief, by and through an act of the national council, which said is entitled "An act to amend an act to tax stock grazing upon Cherokee lands west of the ninety-sixth meridian," approved in special session May 19, A. D. 1883, which said act is especially referred to and made part of these presents, does by these presents lease for grazing purposes only unto the aforesaid E. M. Hewins, J. W. Hamilton, A. J. Day, S. Tuttle, M. H. Bennett, Ben. S. Miller, A. Drumm, E. W. Payne, and Charles H. Eldred, directors in trust as aforesaid, their successors and assigns, parties of the second part, all and singular, the unoccupied lands of and belonging to the Cherokee Nation, being and lying west of the ninety-sixth "meridian" and west of the Arkansas River, not including any portion occupied, sold, and conveyed to the Pawnees, Poncas, Nez Percés, Otoes, Missourias, Osages, and Kansas Indians, or the Salines, set apart to be leased separately under act of Congress, approved August 7, A. D. 1882, as hereinafter set forth; the said portion herein leased for grazing purposes containing six million (6,000,000) of acres, more or less, and lying east of the one hundredth meridian, and the said hereinbefore named parties of the second part, their successors and assigns, shall, for the purpose herein set forth, have and hold the above mentioned and described premises from and after the first day of October, one thousand eight hundred and eighty-three (1883), for and during the term and period of five years thence next ensuing from said date, subject to the qualifications hereinafter provided for, and upon yielding and paying for the same the amounts of money as hereinafter provided for; and the said E. M. Hewins, J. W. Hamilton, A. J. Day, S. Tuttle, M. H. Bennett, Ben. S. Miller, A. Drumm, E. W. Payne, and Charles H. Eldred, directors in trust as aforesaid, hereby covenant and agree, on behalf of themselves, as such directors in trust for said Cherokee Strip Live Stock Association, their successors in trust and assigns, and not otherwise, in consideration hereof, and of the leasing aforesaid, to pay, on the order of the principal chief aforesaid, into the treasury of the Cherokee Nation at Tahlequah, Indian Territory, yearly, and for each and every one of said five years, the annual sum of one hundred thousand dollars ($100,000.00) lawful money of the United States, the same to be paid in two equal semi-annual payments, to be made and so paid in advance, to wit: On the first day of October and the first day of April in each and every year during the said term. Provided always, and it is further covenanted and agreed between the said parties hereto that if the said semi-annual payment in advance, or any part thereof, shall remain unpaid after the expiration of thirty days after the date the same becomes due as herein agreed to be paid; or if default shall be made in any of the covenants hereinbefore or hereinafter set forth, or as contained and required by the act of the national council approved May 19, A. D. 1883, as aforesaid, on the part and in behalf of the said parties of the second part, then and from thenceforth, it may be lawful, and is agreed, that said principal chief, or his suc-

cessors in office, may declare the lease to be forfeited and annulled, and the said party of the first part may enter into and resume possession of the premises herein leased.

And it is further agreed, in accordance with the act of said national council, that in case the lands hereinbefore described, or any part of them included in the terms of this lease, shall be disposed of under present existing laws, or laws hereinafter to be passed by the Congress of the United States, by the said Cherokee Nation, that on the party of the first part giving six months' notice thereof to the party of the second part, that then, and in that event, the terms and conditions of this lease and the lease thereof shall terminate on the expiration of the said six months from the date of said notice, to all or to any portion of said tract of unoccupied Cherokee land thus sold or disposed of, and the parties to whom said lands or any portion of them should then be disposed of or sold to may enter into and take possession of the same; but then, and in that event, the said party of the second part, their successors and assigns, shall not be chargeable with rent on the lands so sold, but shall be allowed a rebate on all subsequent payments made on account of this lease at the rate of one and two-thirds (1⅔) cents per acre per annum on the lands so sold or disposed of.

Further, it shall be the privilege of said party of the second part, their successors or assigns, to erect on said lands such fences, corrals, and other improvements as may be necessary and proper and convenient for the carrying on of their business and for utilizing said lands for the purposes for which they are leased. And in case this lease shall be terminated as to all or any part of said lands by the disposal of the same as heretofore provided and set out, the said party of the second part shall have the right to remove all of said improvements, fences, and corrals, except such portions thereof as may be made from the timber or other property of the Cherokee Nation, or timber for which has been obtained from the aforesaid tract. It shall further be the privilege of said party of the second part, their successors and assigns, to cut from the territory herein leased such timber as may be necessary for the purpose of building the fences, corrals, and improvements here before authorized to be erected on said leased premises, and to cut from said lands such timber as may be necessary for fire-wood and fuel, but not otherwise, and to commit no waste thereon.

And the said party of the second part doth further covenant and agree with the said Dennis W. Bushyhead as aforesaid, and as parts and conditions of this lease or contract, well and truly and without deduction or delay, to make all payments as required in the foregoing, in the manner limited and prescribed; and in case of any failure as aforesaid, the said party of the second part agree that they will peaceably surrender the premises herein leased, and all improvements or erections thereon; and the said party of the second part, their successors and assigns, further agree and obligate themselves, and this is one of the conditions of this lease, to make no permanent improvements (the improvement, the right to make which is hereinbefore granted, being considered temporary improvements) on the aforesaid premises or leased tract, and only such temporary improvements as are authorized by the act of the national council approved May 19, 1883, hereinbefore referred to; and on the expiration of the lease or its being declared forfeited by default in the payments, as hereinbefore provided, then, and in either event, all improvements, structures, or erections thereon shall be and become the property of the Cherokee Nation; and said nation shall have possession of the same, and all and singular of such erections and improvements shall absolutely revert to and become the property of the Cherokee Nation, party of the first part.

And the *second* party of the second part further covenants and agrees with the said party of the first part, as one of the conditions of this lease, that they will cut no timber for removal from said lands, or take or remove any material or property being part of the premises so leased; or remove or ship material therefrom; and that they will use all due diligence to prevent the cutting or removing of any timber or other material therefrom; and that they will faithfully observe the intercourse laws of the United States; that they will obstruct no mail or stage line, and that they will not interfere with the salines, located or to be located, under the provisions of the act of Congress, before mentioned, approved August 7, 1882. And it is further agreed between the parties of the first part and the second part that the grounds excepted and reserved from, and not included in, the terms of this lease, necessary for the manufacture of salt at the said salines, may and shall not exceed in the aggregate for said salines, and all of them, 100,000 acres, with a right of way to and from said salines, such as may be required properly to work them; and the said party of the second part do hereby obligate themselves, for themselves as directors in trust aforesaid, their successors and assigns, *will* and truly to observe and faithfully execute all and singular of the foregoing agreements and covenants, which are declared to be part of the agreement, in consideration of which this lease is granted. And the said party of the first part, principal chief of the Cherokee Nation, in accordance with the act of the national council, as aforesaid, and on condition of the faithful payment of the sum of money as hereinbefore stipulated, in the manner and with the conditions hereinbefore prescribed, and as the further condition that the said party

of the second part will well and truly fulfill all of the conditions, covenants, and agreements herein set forth, doth hereby covenant and agree by these presents that the said E. M. Hewins, J. W. Hamilton, A. J. Day, S. Tuttle, M. H. Bennett, Ben. S. Miller, A. Drumm, E. W. Payne, and Chas. H. Eldred, directors in trust for the Cherokee Strip Live Stock Association, their successors in trust, and assigns, shall and may at all times during the said term, subject to the conditions as aforesaid, peaceably hold and enjoy all the privileges of lease on the said premises, free, clear, and harmless from any let or hindrance whatsoever, together with all the privileges and rights of said party of the first part, in reference to the same, according to law and treaty stipulation.

In testimony whereof the said party of the first part, the said D. W. Bushyhead, principal chief, has signed his name as such principal chief, and caused the seal of the Cherokee Nation to be affixed to these presents, and the said parties of the second part, the said E. N. Hewins, J. W. Hamilton, A. J. Day, S. Tuttle, M. H. Bennett, Ben. S. Miller, A. Drumm, and E. W. Payne, directors in trust, have caused these presents to be signed on their behalf by Chas. H. Eldred, their true and lawful attorney in fact, evidence of his authority being attached to the lease retained by the party of the first part, and the said Chas. H. Eldred, director in trust, signing himself.

Done in duplicate, at Muscogee, Indian Territory, this the seventh day of July, in the year of our Lord one thousand eight hundred and eighty-three.

D. W. BUSHYHEAD, [SEAL.]
Principal Chief.
E. M. HEWENS, [SEAL.]
By CHAS. H. ELDRED,
Attorney in Fact.

Signed and sealed in the presence of—
J. E. VOSE.
EDWIN E. WILSON.
JNO. F. LYONS.

J. W. HAMILTON, [SEAL.]
By CHAS. H. ELDRED,
Attorney in Fact.
A. J. DAY, [SEAL.]
By CHAS. H. ELDRED,
Attorney in Fact.
S. TUTTLE, [SEAL.]
By CHAS. H. ELDRED,
Attorney in Fact.
M. H. BENNETT, [SEAL.]
By CHAS. H. ELDRED,
Attorney in Fact.
BEN. S. MILLER, [SEAL.]
By CHAS. H. ELDRED,
Attorney in Fact.
A. DRUMM, [SEAL.]
By CHAS. H. ELDRED,
Attorney in Fact.
E. W. PAYNE, [SEAL.]
By CHAS. H. ELDRED,
Attorney in Fact.
CHAS. H. ELDRED. [SEAL.]

Resolved, That the action of Charles H. Eldred, acting under separate and individual power of attorney from the members of this board, in signing and executing on behalf of the board of directors and the association, the lease of the Cherokee Strip made between the principal chief of the Cherokee Nation and the board of directors be, and the same is hereby, confirmed, fully ratified, and adopted as the act and deed of the board of directors, acting for and on behalf of the Cherokee Strip Live Stock Association, and the secretary is directed to forward a copy of this resolution, duly certified and sealed, to Chief Bushyhead, to be by him attached to the original lease in his possession.

Attest,
[SEAL.]

JOHN A. BLAIR,
Sec'y C. S. L. S. Asso.

CALDWELL, KANS., *July* 10, 1883.

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, these different measures provide, should embrace what is now known as "The Public Land Strip," together with either the whole of what is now designated, though never so organized as a political division, as the Indian Territory, or at least so much thereof as does not lie within the districts inhabited as well as owned by the five civilized tribes, the Cherokees, the Creeks, the Seminoles, and the Choctaws, and 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 would have under one proposition an area of 44,771,998 acres, and under the other would embrace 24,325,408 acres. There are twenty-seven tribes dwelling in the Indian Territory. The civilized tribes have a population of about sixty-five thousand, and the remaining tribes a population of about fifteen thousand.

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 guarantee it to them forever, and that guarantee 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 guarantee it to them forever; and that guarantee 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 guarantee 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 guaranteed. 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 guarantee 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.

n 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, &c., as before mentioned in the articles recited in said patent, and subject also to the condition provided in the ac tof 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—a 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 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 board 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 guaranteed 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 guaranteed 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 guarantee 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, 7th Stat., 333, all their lands east of the Mississippi, and by the 2d 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 p. 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 land 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 guaranteed 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.*, p. 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 guarantee 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°.

By article 3 of the treaty of 1866 the Choctaws and Chickasaws cede to the United States this leased district. Nothing is said in this article as to the purposes for which the cession is made, and it would seem that the United States acquired by this cession a right to make such use of this territory as it may deem proper. 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, Cosmanches, and Apaches. 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 cannot 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 Devens's opinion, volume 16, page 470; but in that very opinion he admits 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, your committee 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.

Nor do we find any release from these obligations presented in the bill reported to the House from this committee (No. 7217) and then recommitted to us, after being printed, for our consideration.

The bill proposes to organize a Territory, and obtain the consent of the Indians after its passage. If that consent cannot be obtained, then the Territory still remains constituted alone of the Public land strip. Anticipating that this question would be before the present Congress, representatives from the five tribes met in general council at Eufaula, in the Indian Territory, last June, and resolved that said tribes were opposed to any action on the part of the General Government involving the establishment of a Territory of the United States within the limits of the Indian Territory. The resolutions of the general council were ratified and confirmed by the separate legislative assemblies of each of the tribes. Their delegates have appeared before this committee during the past winter, and appealing to the solemn sanction of the treaties made with them by our fathers, have protested against the proposed establishment of this territorial government.

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 tenth 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 Na-

tion; 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. This 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, 2d 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 catttle, estimated at 300,000; that on about 200,000 of these the owners paid to the Chrokees 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 sesion): "The Department neither recognizes nor disaffirms leases from the Cherokee national authorities for grazing priveleges. 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 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 cannot 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 guaranteed 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, 16th 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 cannot interfere with their rightful use and occupation of their lands, which are 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 modfied 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 cannot, in view of that history, and with our convictions con-

cerning 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.

If the policy of settling Indians on the lands is to be continued, let it be firmly adhered to. If it is to be abandoned, then let us seek by open and fair negotiation, as suggested in the majority report of the Committee on Expenditures for Indians, submitted through its chairman, Judge Holman, to the House on the 16th of last month, to concentrate the Indians now in the western part of the Indian Territory on more eastern portions thereof, and open up the western part thus rendered vacant to white settlement. As the bill presented by that committee contemplates the appointment of a commission which could appropriately enter upon the discharge of the duties of such a negotiation, we do not recommend the appointment of a special commission for this purpose; but until the free consent of these tribes is secured through this or similar means, a due regard for the solemn obligations into which we have entered with these people will prevent our giving our support to this bill, and we therefore recommend that it do not pass.

GEO. T. BARNES.
BINGER HERMANN.
W. H. PERRY.
CHARLES S. BAKER.
C. E. BOYLE.

ADDITIONAL VIEWS OF MR. CHARLES S. BAKER.

The undersigned concurs generally in the foregoing minority report, both in its statements of facts and conclusions, and begs leave respectfully to add the following observations:

The proposed Territory, if created under the bill in question, must be in direct violation of existing treaty covenants with the five civilized Indian tribes named, embracing a population of about 65,000 persons. Those tribes have their churches, both Protestant and Catholic, their schools and a college; they maintain charitable organizations and have regular tribal governments and courts; they enact their own laws and have in operation proper tribunals for the maintainance of law and enforcement of order. Their title, derived by patent from the United States, is as stated, an absolute title in fee, in giving which the Government recognized the right of the grantees to own and control as absolutely as any other person.

The legality of the leases to the cattle corporations is a question which, in my judgment, should be passed upon by competent legal tribunals. The policy of the Government should not be based upon acts in disregard of our sacred treaty obligations with those tribes.

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. The condition provided in the bill, making its taking effect dependent upon a future consent by these tribes, would be more likely to result through a coercive policy than through the voluntary and free exercise by them of their uninfluenced will.

The majority report by the Committee on Expenditures for Indians submitted, as is stated, through the Hon. Mr. Holman, on the 16th day of March, a proposition to create a commission to take into consideration the whole question at issue, and a report from such a commission should precede any legislation involving changes in the rights, relations, or status of the several tribes interested. While the undersigned favors generally the creation of territorial governments, and would be glad to favor such for the Indian Territory whenever it may be done, with due regard for the rights guaranteed by our Government to the Indian tribes interested, and without violating national honor, it seems to him that the commission contemplated by the bill above referred to should give the subject their action and consideration prior to any action by Congress as contemplated by the bill now under consideration by the committee. The vast extent of Government lands available for settlement in the several existing States and Territories would seem to render any haste unnecessary for the purpose of affording additional public lands. The existing civil and criminal tribunals can be maintained as at present until such a commission can be enabled to report and due consideration and action taken by Congress.

In the meantime all the legal rights of parties in interest, with the

legal status of the Indian tribes under existing treaties and land patents, may be made the subject of due judical inquiry.

The proposed repeal of railroad-land grants can be, as I would advise, effected by direct act for such purpose, as this Congress has already properly done in the cases of other companies, due regard being had for vested rights in proper cases.

Respectfully submitted.

CHAS. S. BAKER.

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