51ST CONGRESS, 2d Session. } HOUSE OF REPRESENTATIVES. { REPORT No. 4010.

PAYMENT OF AWARDS TO CREEK INDIANS WHO ENLISTED IN THE FEDERAL ARMY.

FEBRUARY 26, 1891.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed.

Mr. PERKINS, from the Committee on Indian Affairs, submitted the following

REPORT:

[To accompany H. R. 6849.]

The Committee on Indian Affairs, to whom was referred House bill 6849, having had the same under consideration, report it favorably with the recommendation that it do pass.

Accompanying such bill, the committee submit the following report of the facts touching the claim therein embraced, with the views of the committee as to the law bearing upon it.

By article 13 of the treaty between the United States and the Creek Nation of Indians, made August 7, 1856, the United States contracted to protect the Creeks from domestic strife, from hostile invasion, and from aggression by other Indians and white persons not subject to their jurisdiction and laws; and for all injuries resulting from such invasion or aggression, full indemnity is guarantied to the party or parties injured, out of the Treasury of the United States.

By article 12, treaty of 1866, between the United States and the Creek Nation of Indians (14 Stat., 790), the United States reassumes all obligations of treaty stipulations with the Creek Nation, including those of the former article of the treaty of 1856. The preamble to the treaty between the United States and this nation of Indians of June 14, 1866, reciting that the nation, by reason of having made a treaty with the so-called Confederate States had thereby rendered themselves liable to forfeit to the United States all the benefits and advantages enjoyed by them in lands, annuities, protection and immunities, including their lands and other property held by grant or gift from the United States, is not a correct legal statement of the case in the judgment of your committee.

Phillimore states the law as follows:

> The subject of debts due from the State, in its corporate capacity, to individuals—money invested in the public funds and the like—has been already discussed. The opinion of Vattel upon this point is thus emphatically expressed: "The State never touches the money which it owes to its enemy; funds entrusted to the Government are exempt from confiscation and seizure in case of war." Emerigon (Des Assur., t. 1., p. 567), and Martens (vol. 3, c. 2, s. 5) are of the same opinion. Indeed, it is one which now may happily be said to have no gainsayers. (3 Phillimore, 135.)

Kent states the law in these words:

> Debts existing prior to the war, and injuries committed prior to the war, but which made no part of the reasons for undertaking it, remain entire, and the remedies are

revived. (1 Kent, 170, ib., 67, n. 1; 91, n. 1.) When treaties contemplate a permanent arrangement of natural rights, or by their terms are meant to provide for the event of an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of the war. They revive at peace unless waived, or new or repugnant stipulations should be made. (1 Kent, 177.)

Mr. Allison, in speaking for the Senate Committee on Indian Affairs, in Report No. 476, Forty-fifth Congress, second session, page 5, says:

Public debts due from the Government to the Chickasaws, under the law of nations, are incapable of confiscation.

This view of the case was adopted by the Congress of the United States in making appropriations for the arrears of interest due the Chickasaws, which accrued on their funds during the war. The same principle of international law applies with equal force to the Creek Nation. From this it would seem that the true legal status of this nation, with reference to their lands, etc., was not presented to them, and that in consequence thereof their assent to the treaty by which the Government of the United States was greatly advantaged (whatever may be said of the morals underlying such a procedure) was obtained.

Prior to the making of this treaty, the United States had, by numerous acts of Congress, viz.: The section found in the appropriation acts of July 5, 1862 (12 Stat., 528), March 3, 1863 (12 Stat., 793), June 24, 1864 (13 Stat., 180), joint resolution of February 22, 1862 (12 Stat., 614), authorized the diversion of the interest on funds held in trust for the Creek Nation of Indians to purposes not authorized by any treaty stipulations with those nations and in direct conflict with the treaty provisions. The United States never declared the treaty with this nation abrogated or destroyed by reason of a portion of the citizens of that nation engaging in the war with the so-called Confederate States, nor for any other reason. Nor were they ever abrogated or repealed except in so far as the treaty of 1866 repealed their former provisions. It was desirable that the United States should obtain as far as possible the assent of the Creek Nation to these unauthorized disbursements.

It is also true that at the time of making this treaty those people who had gone South and joined the Confederate army as well as those who remained North and served in the Union army were destitute. Their flocks had all been driven away, their homes despoiled, and they were compelled to begin life anew. To aid them in this it was necessary for them to secure some money. This seems to have been the central idea on the part of the Government of the United States and the nation as set out in article 3 of the treaty of 1866 (14 Stat., 786).

As to the individuals of the nation who remained loyal to the Government of the United States and who joined her armies and assisted her in suppressing the rebellion, and whose property had been taken by the United States and for the use of, and used by, the army of the United States engaged in the suppression of the rebellion, a provision was made in article 3, above referred to, that $100,000 should be paid to them and to the loyal refugee Indians and freedmen who were driven from their homes by the rebel forces, and to reimburse them in proportion to their respective losses, but the treaty nowhere declared that this should be a payment in full on account of said losses.

By article 4 of the same treaty the United States agreed to ascertain the amount due the respective citizens of the nation who enlisted in the United States Army, loyal refugee Indians and freedmen, in proportion to their several losses, and to pay the amount awarded each in the following manner, to wit:

A census of the Creek Nation shall be taken by the United States for said nation, under the direction of the Secretary of the Interior, and a roll of the names of all

soldiers who enlisted in the Federal Army, loyal refugee Indians and freedmen, be made by him. The superintendent of Indian affairs for the southern superintendency and the agent of the United States for the Creek Nation shall proceed to investigate and determine from said roll the amount due the respective refugee Indians, and shall transmit to the Commissioner of Indian Affairs, for his approval and that of the Secretary of the Interior, their awards, together with the reasons therefor.

From this it will be seen that a commission in the nature of a court was agreed upon by the contracting parties, who should investigate the whole matter of losses by those soldiers of the Creek Nation who enlisted in the Federal Army, loyal refugee Indians and freedmen, and to make an award, and to set forth their reasons for the same. The last clause of this article refers simply to the manner in which the payments of this award shall be made—that is to say, that in case such award shall be approved by the Commissioner of Indian Affairs and the Secretary of the Interior, then the same was to be paid from the sale of the lands conveyed by the treaty, and that $100,000 thereof should be paid to those citizens of the nation as soon as the same could be raised from the sale of said lands to other Indians. At this time these people were destitute, having lost everything by the war, and aid in some way had to be obtained.

Under these circumstances and without a very clear conception of their legal rights the Creek Nation of Indians signed the treaty of 1866 whereby the United States obtained the cession of a large tract of country from the nation, and agreed to pay certain classes of individual members of the nation a portion of the results of the sale of the land. While displeasure at the use of the representations to obtain the cessions from them by this treaty might exist on the part of the Indians, it is not claimed that this makes that contract void, but that it does afford reason for applying in equity and justice with great force the rule of giving those people the benefit of every doubt in its construction. This rule will be discussed more at length hereafter.

By the eleventh article of the same treaty, it was declared that the stipulations of this treaty are to be a full settlement of all claims of the nation for damages and losses of every kind growing out of the late rebellion, and all expenditures by the United States of annuities in clothing and feeding refugee and destitute Indians, since the diversion of annuities for that purpose consequent upon the late war with the so-called confederate States; and the nation ratified and confirmed all such diversions of annuities theretofore made by the United States, and the United States agree that no annuities shall be diverted from the objects for which they were originally devoted by the treaty stipulations with the Creeks, to the use of the refugee and destitute Indians, other than the Creeks or members of the Creek Nation.

This was a relinquishment by the nation of all of its claim to money unlawfully diverted by the United States. The treaty does not provide, either in express terms or by implication, that it is a relinquishment by the nation for or on behalf of those citizens of the nation who were Union soldiers, loyal refugee Indians, or freedmen. The treaty contains no such relinquishment on behalf of these claimants, and the payment provided to this class was only on account of their claims for property taken, and can not be held by any fair interpretation of the treaty to mean in full satisfaction of such claim. It is claimed that this claim of $100,000 was in full satisfaction for all injuries to property by the United States to this class of our citizens as provided in the third article of the treaty. If so, why was it deemed necessary to create a commission to determine the amount of their losses as provided by the fourth article of the treaty?

The answer to this may be that the United States desired to pay to this class of citizens this $100,000 in proportion to their respective losses. That is to say that if A suffered loss to the extent of $100, and B suffered to the extent of $50, A was to have double the amount of this $100,000 that B would obtain. Was this payment made upon this principle? If it was, it can only be regarded as a payment *pro tanto* of the amount of loss suffered by each, for the same sum, $100,000, might have been distributed per capita among this class of those citizens with equal justice and fairness, for at the close of the war all were alike destitute, no matter how much property they had lost at the hands of their friends—their guardian—the Government of the United States.

If it is true that the United States occupied to this class of those people the relation of guardian and ward, certainly the guardian can not appropriate the property of the ward, and then by any contract made with the ward subsequent thereto while such relations exist, escape the obligations to pay to the ward the value of the property so appropriated. If this class of people be regarded as citizens of a "domestic independent State," then, under the rules of international law, the United States Government would be bound to pay them for all property belonging to them taken and used by the Army of the United States.

The question as to the loyalty or disloyalty of the Creeks as a nation can not be considered, for there is no act of their legislature and no proclamation of their chief executive declaring their relations with the Government of the United States to have ceased and determined. Prior to the treaty of 1866 the nation was not an ally of the United States. They were simply denied the right to make treaties with foreign nations.

By the treaty of 1866 they became the ally of the United States. There never was any act of their legislature, or proclamation of their chief magistrate, declaring war against the Government of the United States, nor indeed was there any act of treason committed by the Creeks in their capacity as a nation.

The five civilized tribes inhabiting the Indian Territory, desiring that no pretext should be afforded the United States for severing their treaty relations with the United States Government, at the breaking out of the late rebellion, sent their delegates to visit the city of Washington to earnestly call upon the President of the United States to protect them, as guarantied by the treaties. Instead of doing this the United States withdrew all troops from their country and left them to the mercy of the Confederate Army. Some classes of the citizens of the different nations, under these circumstances, took up arms against the United States, while other classes of the various nations adhered to the Government of the United States, and abandoned their homes and fled to the Federal lines, to find that protection which had been guarantied to them by solemn treaty stipulations in the peacable enjoyment of their homes. But these were the acts of individuals; they were not the acts of the State—the Creek Nation.

A certain class of the citizens of that nation made treaties with the so-called Confederate States, but the State—the Creek Nation—never violated its treaty obligations with the United States, and the concessions obtained from them by the United States in the treaty of 1866 were, under the circumstances, subject to some criticism. The class of those citizens who were loyal to the United States were recognized by the United States as the Creek Nation in making the treaty of 1866. In no sense can these nations be said to occupy the same legal status in regard to war claims as any one of the Southern States, for the Southern States, in their corporate capacity, proclaimed their indepen-

dence and severed their relation with the Government of the United States, and this nation, in its corporate capacity, did nothing of the kind.

It has been settled by the Supreme Court in the case of Wright *v.* Tebitts, reported (1 Otto, 91 U. S., 252) that a commission called together in pursuance of treaty stipulations, or otherwise, to settle and adjust disputed claims with a view of their ultimate payment and satisfaction, is for that purpose a quasi court. Further notice of this principle will be hereafter taken.

When these loyal Creeks left their homes, their property was all left behind. After they had joined the United States Army and had been organized into the Frst, Second and Third Indian regiments of cavalry, and returned with the United States Army to their country, they found their property, flocks, and herds just as they had left them. Then began the spoliations complained of. While they were within the lines of the Union Army their property, flocks, and herds were all taken and driven away by the United States Army and citizens of the United States. The treaty of 1866 is called a "treaty of cession and indemnity."

Can it be said that while only $100,000 of the award made by the commissioners has been paid to this class of our citizens, and that, too, out of the "cession," that the award has been paid, or that "indemnity" has been made? It is plain that a cession was made by this nation of land amounting to almost $1,000,000 at 30 cents per acre, to the United States, but nothing has been paid by the United States to this nation, or to any of those citizens, except from the proceeds of the sale of these same lands. The United States has sold to the Seminoles of these lands, at 50 cents per acre, a tract amounting to 400,000 acres, and this before they obtained it from these people by the treaty of 1866.

The award made by the commission, as provided for in article 4 of the treaty of 1866, has been approved by the Commissioner of Indian Affairs and the Secretary of the Interior. It is a subsisting liability against the Government of the United States, for which just compensation must be made.

This claim was referred by the Secretary of the Interior to the Court of Claims under the Bowman Act, and was by that court, on the purely legal aspect of the case, decided adversely to claimants, but the court did not consider and pass upon the equitable view of the question presented, as it could not do under the law. The material facts, in part, are shown by that decision (19 C. Cls. R., 675).

In a former part of this report reference was made to the case of Wright *v.* Tebitts, 91 U. S., 252, as to the judicial capacity of commissioners or arbitrators to settle disputes of this character. This principle is a part of the law of all nations and people having civilized governments; and its recognition is not more important to any than to the United States. Besides its announcement in the case just referred to, publicists everywhere emphasize it. (See Cushing's Treaty of Washington, p. 197; Phillips's Jurisprudence, section 160.)

The United States, of all people, can least afford in any respect to repudiate this principle. But more especially is she compelled to uphold it with her *wards*, or the *domestic dependents*, whom she is bound by the most solemn obligations to protect. (5 Peters, 1; 6 *Ib.*, 515.)

Since these phrases—*wards, domestic, dependent nations*—were engrafted into the jurisprudence of this country, as relating to the Indians, they have become a part and parcel of all the decisions in the courts and have formed the basis of construction of all the dealings of the Government with those people.

Contracts of every description with them, treaty or oral agreement, are construed in their favor; all doubts are solved for them. The relation of superior and inferior existing between them and the United States relieves them against the rigid construction of language employed in treaties as between nations. The case of the Kansas Indians, 5 Wall., 737, settles this. But more recently the case of the Choctaw Indians, 119 U. S., 1, presents all this so clearly it is needless to do more than call attention to it.

Reference has heretofore been made to the rule of construction, and it is here invoked, that in the construction of these various contracts and dealings, not only must all doubts be settled in favor of these people, but the further rule must obtain, "how the words of the treaty were understood by this unlettered people, rather than their critical meaning." Choctaw case above referred to.

Waiving the question as to the correctness of the decision of the Court of Claims (19 C. Cls. R., 679) as to the real meaning and force of the twelfth article of the treaty of 1866, as to the United States readopting and reassuming all obligations with the Creek Nation before the supposed alliance with the Confederate States, July 10, 1861, in a mere legal point of view, in equity as towards those people according to the decisions above referred to, there can be no question it was meant by the Indians to go back to the beginning and make it complete and intact, as if no break had occurred, as if no lapse had taken place.

From the circumstances of these Indians, then, this was the chief thing intended, this was the main object sought for. And the House should not forget, as so well expressed in the language of the great Chief Justice Marshall, as quoted and adopted in the Choctaw case, "The words of the treaty as understood by these unlettered people that are adopted." And now, after so long a delay and postponement of their claim, it is respectfully submitted that the enlightened conscience and sense of justice of the nation should deal fairly and squarely with the people as they understood the language of the Government when they were in the power of the Government, and acting simply as an inferior toward a superior in adjusting their disputes. Certainly, with this fact in view, under the unbroken rulings of the courts now for nearly 60 years this claim should no longer be in doubt. It is needless in this report to recapitulate more minutely the facts of this transaction. The memorial of claimants, with other documents before the House, give full and exact information in detail of everything pertaining to it, as well as furnish several instances not so strong as is this in which liberal appropriations have been made by Congress to meet equitable demands of Indians and others who had suffered at the hands of the United States, and these papers present all the data necessary to a just and complete ascertainment of the amount due on this claim.

This demand is now old, and is fast growing, stale not, however, because of abandonment or for want of attention by the claimants, for they have been active and diligent in all respects and at all times. Since it was first presented many of the parties claiming under it have gone to their long home. Many others are old and rapidly following; and if any substantial good is to come to any reasonable number of them, in the natural course of things longer delay can not be indulged in, and it is respectfully but earnestly requested that the matter be decided and ended at an early day.

Your committee recommend the passage of the bill as an act of justice long delayed.

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