

IN THE SENATE OF THE UNITED STATES.

JANUARY 22, 1873.—Ordered to be printed.

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

REPORT:

The Committee on Indian Affairs, having had under consideration the letter of the Secretary of the Treasury of January 6, 1873, in relation to the payment of \$250,000, in bonds of the United States, to the Choctaw Indians, respectfully submit the following report:

That the treaty of June 22, 1855, between the United States and the said Indian tribe, contains the following provisions, viz:

ARTICLE XI. The Government of the United States not being prepared to assent to the claim set up under the treaty of September 27, 1830, and so earnestly contended for by the Choctaws as a rule of settlement, but justly appreciating the sacrifices, faithful services, and general good conduct of the Choctaw people, and being desirous that their rights and claims against the United States shall receive a just, fair, and liberal consideration, it is therefore stipulated that the following questions be submitted for adjudication to the Senate of the United States:

"First. Whether the Choctaws are entitled to, or shall be allowed, the proceeds of the sale of the land ceded by them to the United States by the treaty of September 27, 1830, deducting therefrom the costs of their survey and sale, and all just and proper expenditures and payments under the provisions of said treaty; and, if so, what price per acre shall be allowed to the Choctaws for the lands remaining unsold, in order that a final settlement with them may be promptly effected; or

"Second. Whether the Choctaws shall be allowed a gross sum in further and full satisfaction of all their claims, national and individual, against the United States; and if so, how much."

ARTICLE XII. "In case the Senate shall award to the Choctaws the net proceeds of the lands ceded as aforesaid, the same shall be received by them in full satisfaction of all their claims against the United States, whether national or individual, arising under any former treaty; and the Choctaws shall thereupon become liable and bound to pay all such individual claims as may be adjudged by the proper authorities of the tribe to be equitable and just; the settlement and payment to be made with the advice and under the direction of the United States agent for the tribe; and so much of the fund awarded by the Senate to the Choctaws as the proper authorities thereof shall ascertain and determine to be necessary for the payment of the just liabilities of the tribe shall, on their requisition, be paid over to them by the United States. But should the Senate allow a gross sum in further and full satisfaction of all their claims, whether national or individual, against the United States, the same shall be accepted by the Choctaws, and they shall thereupon become liable for and bound to pay all the individual claims as aforesaid; it being expressly understood that the adjudication and decision of the Senate shall be final."

That in pursuance of this agreement between the two contracting parties, the Senate proceeded to the adjudication of the questions submitted, and referred the subject to the Committee on Indian Affairs for examination. On the 15th day of February, 1859, the committee submitted an elaborate report, and introduced the following resolutions, viz:

Whereas the eleventh article of the treaty of June 22, 1855, with the Choctaw and Chickasaw Indians, provides that the following questions be submitted for decision to the Senate of the United States:

"First, whether the Choctaws are entitled to or shall be allowed the proceeds of the sale of the lands ceded by them to the United States by the treaty of September 27, 1830, deducting therefrom the costs of their survey and sale, and all just and proper expenditures and payments under the provisions of said treaty, and, if so, what price per acre shall be allowed to the Choctaws for the lands remaining unsold, in order that a final settlement with them may be promptly effected; or

"Second, whether the Choctaws shall be allowed a gross sum, in further and full satisfaction of all their claims, national and individual, against the United States; and, if so, how much."

Resolved, That the Choctaws be allowed the proceeds of the sale of such lands as had been sold by the United States, on the day of _____, deducting therefrom the cost of survey and sale, and all proper expenditures and payments under said treaty, estimating all the reservations allowed and secured, or the scrip issued in lieu of reservations, at the rate of \$1.25 per acre; and, further, that it is the judgment of the Senate that the lands remaining unsold after said period are worth nothing, after deducting expenses of sale.

Resolved, That the Secretary of the Interior cause an account to be stated with the Choctaws, showing what amount is due them according to the above-prescribed principles of settlement, and report the same to Congress.

(Senate committee's report, No. 374, 2d session, 35th Congress.)

That, on the 29th of March following, the Senate considered these resolutions, and, after amendment, they were adopted as follows:

Whereas the eleventh article of the treaty of June 22, 1855, with the Choctaw and Chickasaw Indians, provides that the following questions be submitted for decision to the Senate of the United States.

"1st. Whether the Choctaws are entitled to or shall be allowed the proceeds of the sale of the lands ceded by them to the United States by the treaty of September 27, 1830, deducting therefrom the costs of their survey and sale, and all just and proper expenditures and payments under the provisions of said treaty; and, if so, what price per acre shall be allowed to the Choctaws for the lands remaining unsold, in order that a final settlement with them may be promptly effected. Or, second, whether the Choctaws shall be allowed a gross sum in *further* and full satisfaction of *all* their claims, national and individual, against the United States; and, if so, how much."

Resolved, That the Choctaws be allowed the proceeds of the sale of such lands as have been sold by the United States on the 1st day of January last, deducting therefrom the costs of their survey and sale, and all proper expenditures and payments under said treaty, excluding the reservations allowed and secured, and estimating the scrip issued in lieu of reservations at the rate of one dollar and twenty-five cents per acre; and, further, that they be also allowed twelve and a half cents per acre for the residue of said lands.

Resolved, That the Secretary of the Interior cause an account to be stated with the Choctaws, showing what amount is due them according to the above-prescribed principles of settlement, and report the same to Congress.

(Senate Journal, 2d session, 35th Congress, page 493.)

That, in pursuance of this award, the Secretary of the Interior, as directed by the closing resolution, proceeded to state an account between the United States and the Choctaw Indians, upon the principles decided by the Senate in the first resolution, and reported the same to the Senate, May 8, 1860. (Ex. Doc. No. 82, 1st sess., 36th Cong.)

That this authorized and official statement, made in pursuance of the Senate award, shows a balance of \$2,981,247.30 to be due said Indians. But that the Commissioner of Indian Affairs (A. B. Greenwood) suggested, in his report accompanying the Secretary's communication to the Senate, a doubt whether certain moneys paid the Choctaws by the United States, for a lease of that part of their western lands lying west of the 98th meridian, and moneys paid the Choctaws by the Chickasaws, for the use of a part of said lands lying east of said meridian, amounting to \$1,130,000, should not be deducted from the foregoing sum, leaving only \$1,851,247.30 due the Choctaws. It will be found, however, that the Committee on Indian Affairs examined this question, and made an exhaustive report to the Senate, June 19, 1860, in which the committee deny the equity and justice of this deduction. But after going over the account as stated, and making certain corrections, which were deemed

proper, and deducting the \$600,000 paid by the United States for the use of the leased lands, the justice of which they denied, the committee recommended the payment of \$2,332,560.85. (Senate Reports of Com., No. 283, first session Thirty-sixth Congress.)

That in part payment of this award, Congress put the following item into the Indian appropriation bill of March 2, 1861, viz:

For payment to the Choctaw Nation or tribe of Indians, on account of their claim under the eleventh and twelfth articles of the treaty with said nation or tribe, made the twenty-second of June, eighteen hundred and fifty-five, the sum of five hundred thousand dollars; two hundred and fifty thousand dollars of which sum shall be paid in money, and for the residue, the Secretary of the Treasury shall cause to be issued to the proper authorities of the nation or tribe, on their requisition, bonds of the United States, authorized by law at the present session of Congress: *Provided*, That in the future adjustment of the claim of the Choctaws, under the treaty aforesaid, the said sum shall be charged against the said Indians. (Statutes at Large, vol. 12, p. 238.)

That, in pursuance of this act, the \$250,000 in money was paid to the Choctaws, but that the bonds were not delivered, on account of the interruption of intercourse with said Indians, occasioned by the war of the rebellion.

That, after the close of the war, intercourse was restored, and the treaty of April 28, 1866, was agreed to between the United States and said Indians, which contains the following provision, viz:

ARTICLE X. The United States re-affirms all obligations arising out of treaty stipulations or acts of legislation with regard to the Choctaw and Chickasaw Nations, entered into prior to the late rebellion, and in force at that time, not inconsistent herewith; and further agrees to renew the payment of all annuities and other moneys accruing under such treaty stipulations, and acts of legislation, from and after the close of the fiscal year ending on the 30th of June, in the year (1866) eighteen hundred and sixty-six. (Statutes at Large, vol. 14, p. 774.)

That said Indians applied for these bonds, claiming that they were due under the before-mentioned act and said treaty.

That the Secretary of the Treasury referred the question to the Attorney-General for his opinion on the question of his authority to deliver them.

That the Attorney-General wrote an opinion on the subject, dated December 15, 1870, hereto appended, (marked A,) in the closing paragraph of which he says:

Waiving all discussion of the desirableness, on grounds of expediency, of immediate authority from Congress, and responding to your question according to my judgment of the law of the case, I am of the opinion that you may lawfully issue the bonds to the Choctaws.

That the Secretary of the Treasury communicated this decision of the Attorney-General to Congress for such action as might be deemed proper, in a letter dated December 20, 1870.

That this letter, and said decision of the Attorney-General, were referred by the Senate to the Committee on Indian Affairs, which, after careful examination on the part of the late Senator Davis, and a full committee, on the 5th of January, 1871, made the following report, viz:

The Committee on Indian Affairs, to which was referred the communication of the Secretary of the Treasury to Congress, transmitting a copy of the opinion of the Attorney-General of the United States upon the claim of the Choctaw Nation of Indians for \$250,000 of United States bonds, have had the same under consideration, and report:

They have examined the opinion of the Attorney-General, and concur with him in his reasonings and conclusions. There is a subsisting treaty between the United States and the Choctaw Nation of Indians which entitles said nation to two hundred and fifty thousand dollars of bonds of the United States of America, and which requires the President to make and deliver that amount of said bonds to said Indian nation. This treaty is the supreme law of the land, and the President is charged with its execution as a ministerial function. He has full authority to execute that law by the

making and delivery of those bonds, in compliance with the treaty, to the proper authorities of the Choctaw Nation: Wherefore they report this resolution:

Resolved, That the President having full authority under existing law to issue and deliver to the Choctaw Nation of Indians two hundred and fifty thousand dollars of United States bonds, no other legislation by Congress is necessary to that end. (Senate Committee Reports, third session Forty-first Congress.)

That on the same day this resolution was adopted by the Senate, and the Secretary was ordered to communicate a copy of the said report and resolution to the President of the United States. (Senate Journal, third session Forty-first Congress, page 95.)

That the Secretary of the Treasury having declined to deliver the bonds, Congress put the following provision in the Indian appropriation bill of March 3, 1871:

For contingent expenses of trust-funds, heretofore and to be hereafter incurred, three thousand dollars; and the Secretary of the Treasury is hereby authorized to issue to the Choctaw tribe of Indians, bonds of the United States to the amount of two hundred and fifty thousand dollars as directed by the act of March 2, 1861, entitled "An act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes."

That after a delay of nearly two years to carry into effect this law, the Secretary of the Treasury has sent to Congress his letter of January 6, 1873, accompanied by a report from the Solicitor of the Treasury, dated November 14, 1872, which was referred to this committee, and is the subject of this report, assigning his reasons for non-compliance.

Your committee have carefully considered the reasons as stated, in his letter and report of the Solicitor, and find them to be substantially as follows, viz:

1st. That in the opinion of the Solicitor of the Treasury, in which the Secretary partially concurs, the President and the Senate erred in making the treaty of June 22, 1855, admitting that anything might be due the Choctaws as claimed by them, and providing a tribunal for its adjudication.

2d. That the Senate erred in making the award of March 29, 1859, and in directing the Secretary of the Interior to state an account in pursuance thereof.

3d. That the Senate Committee on Indian Affairs erred in recommending the payment of \$2,332,560.85 in their report of June 19, 1860, or any sum whatever, as due these Indians.

4th. That Congress erred in the enactment of the law of March 3, 1871, directing the delivery of \$250,000 of bonds, not previously delivered under the act of March 2, 1861.

And as evidence in support of these conclusions produces a copy of an act of the Choctaw legislature, dated November 6, 1852, which the Secretary thinks is conclusive that this Choctaw claim has not only been paid, but is barred by a receipt in full given by the authorities of the Choctaw Nation of Indians, and also a long list of payments made by the United States to these Indians, and advantages conferred on them by the Government under the treaty of 1830, which he seems to think bars the equity and justice of any additional payments.

Your committee have carefully examined and weighed these considerations and find—

1st. That the act of the Choctaw Nation of November 6, 1852, which is claimed to be a receipt in full, is dated several years prior to the treaty of June 22, 1855, and could not be considered in law as barring claims arising under said treaty and subsequent acts of Congress. That said "receipt in full," given in pursuance of a prior act of Congress, requiring it as a condition-*precedent* to the payment covered by said receipt

(Statutes at Large, vol. 10, p. 19) might have been treated by the United States as a final conclusion of the controversy over the subject-matter. But it was not so treated. By agreement of both parties this settlement was again opened under the stipulations of the treaty of June 22, 1855. The right of the contracting parties to re-open a question previously settled is too clear to need argument. That this question was so re-opened is a fact that will not admit of dispute. And having been thus re-opened and re-adjudicated by the tribunal agreed on by the parties, and an award having been made by it of a large sum as still due the Choctaws, and Congress having by two several acts directed the payment, in part, of this award, it is, in the opinion of your committee, too late to plead a prior settlement in bar.

2d. Your committee also find that the "receipt in full" covered only a comparatively small part of the subject-matter of the Choctaw claims submitted to the Senate for adjustment by the treaty of June 22, 1855, and that it was fully considered by the Secretary of the Interior and deducted from the total sum, which otherwise would have been found to be due the Choctaws in the Secretary's statement of account. The "receipt in full" is for money paid the Choctaws in the redemption of scrip issued to them under the treaty of September 27, 1830, in lieu of lands to which they were entitled and never received. The total amount of scrip issued was divided into two equal parts. One-half was delivered to the Indians. The other half was held by the Government as a trust fund, on which interest was paid by the Government to said Indians at the rate of 5 per cent. per annum. The half thus held in trust, with accrued interest, amounted to \$872,000, and is the sum covered by said receipt of November 6, 1852. But it will be seen, on examination of the account as stated by the Secretary of the Interior, that the Indians are charged with the value of this trust-fund scrip, and also with the value of the other scrip previously delivered to the Choctaws at \$1.25 per acre, both together amounting to \$1,749,900.

Your committee also find many matters mentioned in Solicitor Banfield's report as benefits conferred on said Indians, under the treaty of 1830, erroneously stated; and, on a careful comparison of said Solicitor's report, so far as a comparison is possible, with the account stated by the Secretary of the Interior, that each and all the items *correctly* stated by the Solicitor are charged against the Indians in the said statement of account by the Secretary of the Interior.

From a careful examination of the whole subject, your committee entertains no doubt that the whole subject was fully understood by the Committee of Indian Affairs when, on June 19, 1860, they recommended the payment of \$2,332,560.85, and by Congress, when, by the act of March 2, 1861, they directed the payment of \$500,000 on account, in pursuance of the Senate award. And this committee find nothing in the history of the case to justify the conclusion that the Secretary of the Interior, in his statement of account, or the committee of that date, in their recommendation, or Congress, in ordering a payment on account, committed any substantial error against the interests of the United States; but are of the opinion that if the case were re-opened and adjudicated as an original question by any impartial umpire, a much larger sum would be found due said Indians, which they would undoubtedly recover were they in a condition to compel justice.

This conclusion will be clearly established by a reference to a few facts bearing on the alleged grievances of the Choctaw Indians.

Their grievances, which the United States agreed to redress, under the provisions of the treaty of 1855, were threefold:

1st. That the treaty of 1830 was not made by them of their own unrestrained will and choice.

This allegation should be admitted, as it is admitted in the preamble to the treaty itself, which is in these words, viz:

Whereas the general assembly of the State of Mississippi has extended the laws of said State to persons and property within the chartered limits of the same, and the President of the United States has said that he cannot protect the Choctaw people from the operation of these laws: Now, therefore, that the Choctaws may live under their own laws in peace with the United States and the State of Mississippi, they have determined to sell their lands east of the Mississippi, and have accordingly agreed to the following articles of treaty.—(Statutes at Large, vol. 7, p. 333.)

It is therefore clear that they consented to this treaty, and consequent removal, to avoid their subjugation and extinction as an independent people. The history of the transaction also proves that they utterly refused to sign the treaty until brought to do so by threats and intimidation. Consequently, by the most obvious principles of law and justice, they were not morally bound by its provisions.

2d. They complained that the terms of the treaty did not award them adequate consideration for the value of the land, the losses of property, and the personal sacrifices and hardships required by the removal to the western country, had these several provisions been fairly carried into effect.

This will be abundantly proved by an examination of the treaty itself. The chief amount of money promised as a consideration for these lands, amounting to 10,432,139 $\frac{6}{100}$ acres, under the treaty of 1830, was an annuity of \$20,000 per year for twenty years. The other considerations of pecuniary value requiring payments of money were chiefly for losses of property, expenses of removal and subsistence at their new homes, which they would not have incurred had they remained on their eastern lands.

And, contrary to the general impression, the Choctaws did not receive any western lands under the provisions of this treaty of 1830. Ten years before, under the treaty of October 13, 1820, they ceded to the United States 4,150,000 acres of land in Mississippi, covering more than half the river-front, and took in part payment their western lands, being a large tract embracing a considerable district falling in the western part of Arkansas, and extending westward to the western boundary of the United States. And, on the other hand, the Choctaws, in the treaty of 1830, cede to the United States all that part of their western lands lying in Arkansas, and west of the one hundredth meridian. The only lands they were promised under the provisions of the treaty of 1830 were homesteads of 640 acres to each head of a family; 320 acres to each child over ten years of age; and 160 to each child under ten years, of such Choctaws as might consent, within six months, to remain in Mississippi and become citizens of the United States, to be selected in the tract ceded by this treaty; which provision it was expected would not include a considerable number. Hence it will be seen that about all the money consideration promised these Indians as a consideration for the value of this vast tract of over 10,000,000 acres of the best cotton and sugar lands in the State of Mississippi, was the annuity of \$20,000 a year for twenty years; probably not equal to the value of that part of their western lands ceded to the United States by the Choctaws under this treaty, which lands they acquired in exchange for Mississippi lands in 1820; and your committee conclude that to insist that the Indians were promised adequate compensation for their Mississippi lands would be the most naked mockery.

3. The Choctaws insist that the provisions of this treaty of 1830, although providing such adequate compensation for lands, losses, and suffering, were not carried into effect in good faith by the United States, according to their plain intendment.

That they had abundant grounds for this complaint, your committee find ample proof in the history of these transactions.

They were not furnished with an adequate opportunity within the stipulated period of six months to register their desire to become citizens of the United States and select their homesteads; to remove their stock, of which they owned immense herds, to the western country, or to prove the value of that necessarily lost on account of a forced removal; or the value of improvements abandoned; or adequate means of transportation of their families and household effects; or proper subsistence on the journey and after their arrival; nor a fair equivalent for the headrights to which many were entitled, which they were forced to abandon.

Your committee are therefore of opinion that the payment of the net proceeds of the sales of their reserve in Mississippi, under the circumstances, as awarded by the Senate, deducting therefrom all payments actually made to them under the provisions of the treaty of 1830, being chiefly expenses incurred on account of removal, would be far below what justice required.

The total net proceeds of their lands, deducting therefrom all payments made under the provisions of the treaty of 1830, were, as we have seen, \$2,981,247.30; as corrected by the committee in their report of June 19, 1860, it was reduced to \$2,932,560.85.

To charge these Indians with, and to deduct from said amount, the further sum of \$600,000, paid the Choctaws under this treaty for the lease of lands in the western country for the use of other Indians, would be clearly unjust; for, as before stated, these western lands were acquired by the Choctaws in part payment for lands ceded to the United States in the treaty of 1820, and were the property of the Choctaws ten years before the treaty of 1830 was made.

But as the Committee of the Senate on Indian Affairs state in their report of June 19, 1860, that the Choctaws expressed a willingness to admit this charge and to accept the residue, being \$2,332,560.85 in stocks of the United States, your committee are of opinion that this sum should be paid them with accrued interest from the date of said award, deducting therefrom \$250,000, paid to them in money, as directed by the act of March 2, 1861; and, therefore, find no sufficient reason for further delay in carrying into effect that provision of the aforementioned act, and the act of March 3, 1871, by the delivery of the bonds therein described with accrued interest from the date of the act of March 2, 1861.

EXHIBIT A.

DEPARTMENT OF JUSTICE, December 15, 1870.

SIR: In answering the question propounded in your letter of the 29th of September, 1870, it is necessary that I should consider a series of treaties and statutes.

In the treaty of June 22, 1855, with the Choctaw and Chickasaw Indians, (11 United States Stat., p. 611,) it was provided that certain claims of the Choctaws against the United States set up under a prior treaty should be submitted for adjudication to the Senate of the United States. The Senate does not appear to have ever adjudicated the claim by any separate action; but in the Indian appropriation act of March 2, 1861, it was provided that there should be paid "to the Choctaw Nation or tribe of Indians, on account of their claim under the eleventh and twelfth articles of the treaty with said nation or tribe made the 22d of June, 1855, the sum of \$500,000; \$250,000 of which sum shall be paid in money; and for the residue, the Secretary of the Treasury shall cause to be issued to the proper authorities of the nation or tribe, on their requisition, bonds of the United States, authorized by law at the present session of Congress; provided that in the future adjustment of the claim of the Choctaws, under the treaty aforesaid, the said sum shall be charged against the said Indians." (12 United States Stat., p. 238.)

In the Indian appropriation bill of July 5, 1862, (12 United States Stat., p. 528,) it was provided "that all appropriations heretofore or hereafter made to carry into effect treaty stipulations, or otherwise, in behalf of any tribe or tribes of Indians, all or any portion of whom shall be in a state of actual hostility to the Government of the United States, including the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, Wichitas, and other affiliated tribes, may and shall be suspended and postponed wholly or in part at and during the discretion and pleasure of the President," and the President was further authorized to expend any unexpended part of previous appropriations for the benefit of said tribes, for the relief of such individual members of the tribes as had been driven from their homes and reduced to want, on account of their friendship to the Government.

In the Indian appropriation act of March 3, 1865, (13 United States Stat., p. 562,) the Secretary of the Treasury is authorized and directed, in lieu of the bonds for the sum of \$250,000 appropriated for the use of the Choctaws in the act of March 2, 1861, "to pay to the Secretary of the Interior \$250,000 for the relief and support of individual members of the Cherokee, Creek, Choctaw, Chickasaw, Seminole, Wichita, and other affiliated tribes of Indians who have been driven from their homes and reduced to want on account of their friendship to the Government."

On the 28th of April, 1866, a treaty was made with the Choctaw and Chickasaw Indians, (14 United States Stat., p. 769,) the tenth article of which is in the following words: "The United States re-affirms all obligations arising out of treaty stipulations, or acts of legislation, with regard to the Choctaw and Chickasaw Nations, entered into prior to the late rebellion and in force at that time, not inconsistent herewith; and further agrees to renew the payment of all annuities and other moneys accruing under such treaty stipulations and acts of legislation from and after the close of the fiscal year ending on the 30th of June, in the year 1866." The forty-fifth article is in these words: "All the rights, privileges, and immunities heretofore possessed by said nations, or individuals thereof, or to which they were entitled under the treaties and legislation heretofore made and had in connection with them, shall be, and are hereby declared to be, in full force, so far as they are consistent with the provisions of this treaty."

The Choctaw Indians have made requisition on the Secretary of the Treasury for bonds of the United States to the amount of \$250,000 under the act of March 2, 1861; and the question upon which you desire my opinion is, whether such bonds may lawfully be issued to them.

Without considering the effect of other legislation on the subject, I am of the opinion that the act of March 3, 1865, withdrew from the Secretary of the Treasury the authority, vested in him by the act of 1861, to issue the bonds; and unless that authority is revived in the treaty of July, 1866, it does not now exist. But I am further of opinion that such authority is revived by that treaty, if a treaty can have such effect.

By the treaty the United States re-affirms all obligations arising out of treaty stipulations or acts of legislation with regard to the Choctaw and Chickasaw Nations, entered into prior to the late rebellion and in force at that time. In every reasonable sense of the word obligations as used in that treaty, the provision in the act of 1861, for issuing the bonds, was an obligation. Liberal rules of construction are adopted in reference to Indian treaties, (5 Wall., p. 760.) It was an obligation which grew out of a treaty stipulation and an act of legislation in part execution of a treaty stipulation. It was entered into prior to the late rebellion. It was in force when the rebellion began. Thus it answers every part of the description in the treaty.

The sections of the treaty above quoted, together with others of its provisions, place these Indians, as to all dues from the Government, just as they stood at the outbreak

of the rebellion, in April, 1861. To re-affirm obligations arising out of a repealed act of legislation must signify the restriction of the parties to the positions in which they stood when the act of legislation was in force.

The serious question, however, does not relate to the meaning, but to the authority of the treaty of 1866. The statute of March 3, 1865, repeals the direction of the Secretary of the Treasury in the act of March 2, 1861. The treaty undertakes to revive that direction. Is such an act within its competency?

By the sixth article of the Constitution, treaties as well as statutes are the laws of the land. There is nothing in the Constitution which assigns different ranks to treaties and to statutes. The Constitution itself is of higher rank than either by the very structure of the Government. A statute not inconsistent with it, and a treaty not inconsistent with it, relating to subjects within the scope of the treaty-making power, seem to stand upon the same level, and to be of equal validity; and, as in the case of all laws emanating from an equal authority, the earlier in date yields to the later.

In 1791, Mr. Madison wrote as follows: "Treaties, as I understand the Constitution, are made supreme over the constitutions and laws of the particular States, and, like a subsequent law of the United States, over pre-existing laws of the United States; provided, however, that the treaty be within the prerogative of making treaties, which no doubt has certain limits." (Writings of Madison, vol. i, p. 524.)

In the United States *vs.* The Schooner *Peggy*, (1 Cranch, p. 37,) the Supreme Court of the United States, in an opinion delivered by Chief Justice Marshall, held, in effect, that a treaty changed the pre-existing law, "and is as much to be regarded by the court as an act of Congress."

In *Foster and Elam vs. Neilson*, (2 Peters, p. 253,) the Supreme Court says: "Our Constitution declares a treaty to be a law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision;" and, in applying this principle to the case before them, say that if the treaty then under consideration had acted directly upon the subject, it "would have repealed those acts of Congress which were repugnant to it."

In *Taylor vs. Morton*, (2 Curtis, C. C. R., p. 454,) it was held that Congress may repeal a treaty so far as it is a municipal law, provided its subject-matter is within the legislative power of Congress.

The just correlative of this proposition would seem to be that the treaty-making power may repeal a statute, provided its subject-matter is within the province of the treaty-making power.

Attorney-General Cushing, in 1854, after a full examination of the subject, came to the conclusion that a treaty, assuming it to be made conformably to the Constitution, has the effect of repealing all pre-existing Federal law in conflict with it. (Opinions, vol. vi, p. 291.)

Hamilton says: "The treaty power binding the *will* of the nation must, within its constitutional limits, be paramount to the legislative power which is that will; or at least, the last law being a treaty, must repeal an antecedent contrary law." (Works of Hamilton, vol. vi, p. 95.)

Again: It is a question among some theoretical writers, whether a treaty can repeal *pre-existing laws*.

This question must always be answered by the particular form of government of each nation. In our Constitution, which gives, *ipso facto*, the force of law to treaties, making them equal to the acts of Congress, the supreme law of the land, a treaty must necessarily repeal an antecedent law contrary to it, according to the legal maxim that "*leges posteriores priores contrarias abrogant.*" (*Ibid.*, vol. vii, p. 512.)

An engagement to pay money is certainly within the province of the treaty-making power, and I cannot perceive that such an engagement is carried beyond that province by the circumstance that it provides for issuing through the agency of a particular officer an obligation to pay money at a particular time; for such, in effect, is a bond.

Can the Secretary of the Treasury issue the bonds without a new direction from Congress? In other words, is the treaty a law for him, or can he know no laws except such as are passed by Congress?

The Secretary is an officer of the executive department of the Government. It is established by a long course of authoritative opinion and conforming practices that, in many cases, the Executive of the United States can execute the stipulations of a treaty without provision by act of Congress. In some instances this has been done as a general executive duty, when the treaty itself pointed out no particular mode of execution. This was the course taken in the case of Thomas Nash, otherwise called Jonathan Robbins, who was delivered up by the direction of President Adams to the British authorities, in execution of the treaty with Great Britain of 1794. An attempt to bring the censure of Congress upon the President for this act was encountered by an argument from Chief Justice Marshall, then a Representative from Virginia, which exclusively established the power. In other cases the President has acted when the mode of action was pointed out in the treaty.

In the treaty of Washington of 1842 there was a provision for extradition of criminals. Prior to any legislation for carrying out this provision of the treaty, it was executed by officers of the United States. In 1845, James Buchanan, Secretary of State, issued a warrant for the arrest of certain persons, subjects of Great Britain, who were charged with a crime committed under British jurisdiction and against British laws, and it was decided by Mr. Justice Woodbury, upon the return to a writ of *habeas corpus*, that the warrant and the arrest were legal. (1 Woodbury & Minot's Rep., p. 66.) The learned justice remarks: "It is here only on the ground that the act to be done is chiefly ministerial, and the details full in the treaty, that no act of Congress seems to me necessary." (*Ibid.*, p. 74.)

Attorney-General Nelson, in discussing this treaty, remarks: "It has been made under the authority of the United States, and is the supreme law of the land. It has prescribed by its own terms the manner, mode, and authority in and by which it shall be executed. It has left nothing to be supplied by legislative authority, but has indicated means suitable and efficient for the accomplishment of its object. It needs no sanctions other or different than those inherent in its own stipulations, and requires no aid from Congress. Surely it cannot be necessary to invoke the legislative authority to give it validity by its re-enactment." (4 Opinions, p. 209.) This language may be fitly applied to the treaty with the Choctaws.

I am aware of the distinction which has been taken between such treaties as do and such as do not import a contract, and of the current notion that, in the former case, Congress must act before the treaty can be executed. But the practice of the Government in extradition treaties and in other sorts of international covenants has been at variance with this notion.

If the Executive may constitutionally execute a treaty for delivering persons to a foreign jurisdiction, it may well feel authorized by the Constitution to execute a treaty that stipulates for the less important matter of issuing bonds.

According to Article I, section 9, of the Constitution, as construed by the practice of the Government, an act of Congress is necessary to appropriate money to pay the public debt, however created. The change of the form of the debt, from a general stipulation in the treaty to bonds with particular provisions, does not take away that necessity. The time for the exercise of whatever power Congress has over the subject will come when provision for the payment of the bonds is to be made.

Waiving all discussion of the desirableness, on grounds of expediency, of immediate authority from Congress, and responding to your question according to my judgment of the law of the case, I am of opinion that you may lawfully issue the bonds to the Choctaws.

Very respectfully, your obedient servant,

A. T. AKERMAN,
Attorney-General.

Hon. GEORGE S. BOUTWELL,
Secretary of the Treasury.

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