36TH CONGRESS, 1st Session. } SENATE. { REP. COM. No. 111.

IN THE SENATE OF THE UNITED STATES.

MARCH 6, 1860.—Ordered to be printed.

Mr. SEBASTIAN made the following

REPORT.

[To accompany Bill S. 249.]

The Committee on Indian Affairs, to whom was referred the memorial of Samuel J. Hensley, having had the same under consideration, report:

That the history of this case is so clearly and fully stated in the opinion of the Court of Claims, which subjected it to a thorough scrutiny of the facts, as to render it unnecessary to do more than to adopt their finding, in their own words, and the conclusion to which the committee has arrived from the facts thus found. The court say as follows:

This is one of a class of cases pending before this court, and arising under contracts made by commissioners and Indian agents of the United States in the State of California. The action of these commissioners and agents in making the contracts, and the validity of the claims founded on them, have been in the argument of all of them, rested in great measure upon the condition of the Indian country at the time the contracts were made, and thus that local history is a part of the evidence in this class of cases.

By act of Congress, September 28, 1850, (9 Stat. at Large, 519,) the President was authorized to appoint three Indian agents for California; and by act September 30, 1850, (9 Stat. at Large, 558,) an appropriation of $25,000 was made, "to enable the President *to hold treaties* with the various Indian tribes in the State of California."

Under the former act, Redich McKee, George W. Barbour, and O. M. Wozencraft, were constituted severally Indian agents in California, on October 10, 1850, (S. Doc. 4, p. 7,) but on the 15th of the same month their functions as Indian agents were suspended, and they were appointed "commissioners to hold treaties with various Indian tribes in the State of California, as provided in the act of Congress approved September 30, 1830." (S. Doc. 4, p. 8.)

By act of Congress, February 27, 1851, (sec. 3, 9 Stat. at Large, 586,) it was enacted "that hereafter all treaties with Indian tribes shall be negotiated by such officers and agents of the Indian Department as the President of the United States may designate for that purpose."

Under this act the functions of Messrs. McKee, Barbour, and Wozencraft, as Indian agents in California, were revived, and as such they were "designated to negotiate with the Indians in California," under the instructions theretofore given them as commissioners. (S. Doc. 4, p. 14.)

By letter, dated October 15, 1850, (S. Doc. 4, pp. 8, 9,) the commissioners had been instructed as follows: "As set forth in the law creating the commission, and the letter of the Secretary of the Interior, the object of the government is to obtain all the information it can with reference to tribes of Indians within the boundaries of California, their manners, habits, customs, and extent of civilization, and to make such treaties and compacts with them as may seem just and proper. On the arrival of Mr. McKee and Mr. Barbour in California, they will notify Mr. Wozencraft of their readiness to enter upon the duties of the mission. The board will convene, and after obtaining whatever light may be within its reach, will determine upon some rule of action which will be most efficient in obtaining the desired object, which is by all possible means to conciliate the good feelings of the Indians, and to get them to ratify those feelings by entering into written treaties binding on them towards the government and each other. You will be able to judge whether it will be best for you to act in a body, or separately, in differents parts of the Indian country."

It is observable that these instructions are very general; that they specify nothing but the objects of the government, and that emphatically repeating that object to be "to conciliate the good feelings" of the Indians, and to confirm those good feelings by permanent treaties, they leave it to the commissioners "to determine upon some rule of action which will be most efficient in attaining the desired object."

The reasons of the generality of these instructions, and the extent of the discretion vested in the commissioners, are illustrated by the preceding paragraph in the same letter: "The department is in possession of little or no information respecting the Indians in California, except what is contained in inclosed copies of papers, a list of which is appended to these instructions; but whether even these contain sufficient data to entitle them to full confidence, will be for you to judge, and they are given to you merely as points of reference."

The generality of the instructions is pressed upon the attention of the department, in a letter dated December 6, 1850, (S. Doc. 4, p. 52,) in which Commissioner McKee states that the commissioners regret that their instructions from the government "are so meager and indefinite, and throw upon them, necessarily, so much responsibility. In the absence of direct and positive instructions, or even counsel and advice, we must do the best we can, relying upon your approval of what we may do, based upon an honest desire to promote at once the best good of the Indians, while we maintain the honor and evince the benevolent designs of our government towards the unfortunate aborigines."

Thus empowered and instructed, the commissioners entered upon their duties by convening and organizing at San Francisco, January 13, 1851, and after obtaining information from the governor of California, and from the members of its legislature, then in session at

San José, they proceeded to the Indian country in California, and the condition of that country at this time makes a material fact in this class of cases. The discovery of gold had filled it with miners, whose sudden and extensive emigration had brought into collision the interests of the whites and the rights of the Indians. Difficulties of a serious character had arisen between them, and, beginning in the northern part of the State, as early as July 6, 1850, (S. Doc. 4, pp. 38, 52,) had extended to its southern border, (S. Doc. 61, pp. 2, 3.) Mr. Adam Johnston, in his official report as sub-agent, dated September 16, 1850, (S. Doc. 4, p. 44,) says of the Indians: "They have an indefinite idea of their right to the soil, and they complain that the *pale faces* are overrunning their country and destroying their means of subsistence. The immigrants are trampling down and feeding their grass, and the miners are destroying their fish-dams. For this they claim some remuneration, not in money—for they know nothing of its value—but in the shape of clothing and food."

And in December 6, 1850, (S. Doc. 4, p. 52,) Commissioner McKee, quoting an informant, says: "He informs me that the Indians on the waters of the Sacramento are in a very dissatisfied and unsettled state. Just before he left, there was an outbreak, in which blood had been shed on both sides, and the next news from that quarter will probably announce increased disturbances, if not a general war between the whites and Indians." And in the same letter he thus continues: "They were mustering volunteers at Sacramento city and at other points when my informant left, and bloody work was anticipated. What is to be the result of this state of things I cannot even conjecture. The Indians claim the country as their native soil, or hunting and fishing ground, and the whites want to explore it for gold, and, if they find the metal there, will insist on retaining its possession." And in his letter of February 11, 1851, (S. Doc. 4, pp. 54, 55,) he says of the southern district: "So many direct injuries have been inflicted on these Indians by the whites, and so many promises made them of restitution and redress, all of which remain unfulfilled, that they have lost all confidence, and are now, we are told, fighting with desperation for their lives and their country. The whites have driven most of the southern tribes up into the mountains, from whence, as opportunities serve, they sally out into the valleys to steal and drive off the cattle and mules, as the only alternative for starvation. Then comes up the cry of Indian depredations, invasion, murders, and the absolute necessity for exterminating the whole race." And generally the details of the evidence submitted to the court (S. Doc. 4, pp. 58, 60, 61, 62, 64, 65, 66, 71, 72, 81, 82, 83, 85, 89, 109, 113, 115) confirm the information given to the commissioners, and of which the summary is reported by them, (S. Doc. 4, p. 56,) that hostilities of a deadly character existed between the Indians and whites in different portions of the State, threatening, indeed, *a general border war*.

And the state of the Indian country when the commissioners began their labor in it is clearly shown by the fact that the troops of California were in the field engaged in actual hostilities with Indian tribes, (S. Doc. 4, p. 71,) and by the instruction to the commissioners, May 9, 1851, (S. Doc. 4, p. 15,) in which the Commissioner of Indian

Affairs says: "I have been informed that it is deemed necessary, by the War Department, to commence active military operations against the Indians in California; and in that event it will be highly important that one or more of the agents shall accompany each detachment of the troops sent against them, so as to be in readiness to act in the capacity of negotiators should occasion require. What particular negotiations may be required, it is impossible for this office to foresee; nor can it give any specific directions on the subject. Much must be left to the discretion of those to whom the business is immediately entrusted."

In this state of things, the commissioners adopted the measure of bringing the Indians from their homes in the mountains and mining regions, and placing them on reservations made for them by the commissioners from the unoccupied lands in the plains; and they proceeded to enter into treaties with the Indians, in which their removal into the reservations was made an indispensable condition, and their subsistence there was provided for, for the years 1851 and 1852. In the report of the commissioners, dated March 25, 1851, (S. Doc. 4, pp. 69, 70,) in detailing their proceedings in the formation of the first treaty which they made, they say: "After submitting our propositions to them, we desired them to retire and consult among themselves upon the terms that we had proposed, and in an hour we would again meet them and learn their decision, as well as hear propositions from them if they desired to make any. When we again met them they expressed themselves satisfied with the terms we offered, except their removal from their mountain fastnesses to the plains immediately at the foot of the mountains. We then explained to them the necessity of such a removal and location, and *that we would treat with them upon no other condition;* believing that, if they were to remain in the mountains, constant conflicts between the Indians and miners would take place; that the Indians could not, nor would they attempt to, support themselves otherwise than by stealing horses, mules, and cattle from the farmers in the plains, and by depredating upon small parties of miners in the mountains. After we had explained these matters fully to them they again consulted together, and finally agreed to remove their families to the plains, as we desired."

And the proceedings and purposes of the commissioners are succinctly stated by Commissioner Barbour, (S. Doc. 61, p.2,) when, after describing the strife between the Indians and the whites, he says: "Under such circumstances, the commissioners undertook to effect a reconciliation and carry out the plan agreed upon for treating with the Indians. Treaties were, with much trouble and delay, made by the joint board of commissioners with several tribes, with the terms of which you were in due time made acquainted. A very important feature in these treaties, and one, too, without which no treaty could have been made with the Indians, was the supply of an agreed amount of beef and flour to aid in the subsistence of the Indians treated with during the years 1851, 1852. Without some such provision, the commissioners, as well as every intelligent man in California, knew that no treaty made with these Indians would be observed by them. Necessity, as well as inclination, would compel them to steal from the whites animals on

which to subsist, as, in a large majority of cases, the stores of acorns laid up by them had been destroyed by the whites. The commissioner, therefore, urged by the calls of humanity and the voice of the whole country, could do nothing else than agree to furnish the provisions stipulated in the different treaties."

And the policy of the commissioners is stated by Commissioner Wozencraft, May 14, 1851, (S. Doc. 4, pp. 82, 83:) "You have been advised of the policy which we have deemed expedient to adopt; permit me to say a few words in relation to it. The common and favorite place of abode of the Indians in this country was in the valleys and within the range of mountains; the greater portion were located and had resided, as long as their recollections and traditions went, on the grounds *now being turned up for gold*, and now occupied by the gold-hunters, by whom they have been displaced and driven higher up in the range of mountains, leaving their fisheries and acorn grounds behind.

"They have been patient in endurance, until necessity taught them her lesson, which they were not slow to learn, (as it is measurably intuition with the Indian,) and thus they adopt from necessity what was deemed a virtue among the Spartans; and the result is, we have had *an incipient border war*, many lives have been lost, an incalculable amount of property stolen, and the development and settlement of the country much retarded; and this will ever remain unavoidable so long as they are compelled or permitted to remain in the mountains. They can come down in small marauding parties by night and sweep off the stock of the miners and farmers, and before the loss is known they will be beyond pursuit; and I venture the assertion that this would be the case in defiance of all the troops that could be kept here.

"Our policy is, as you have been informed, to get them down from their mountain fastnesses and place them in reservations along in the foot-hills bordering on the plains; the miners will then be between them and the mountains, making a formidable cordon, or barrier, through which it would be difficult to take their families unobserved; and in those reservations there will be no place for concealing stolen stock, and they can there have all the protection which can and should be afforded them against their persecutors; and lastly, they will there learn the ways of civilization, and thereby become useful members in the community instead of being——"

In pursuance of this policy, the commissioners acted jointly, until May 1, 1851, (S. Doc. 4, 74,) and thereafter severally, in forming the treaties under which the claim I read before the court has arisen.

All the treaties made by the commissioners, jointly or severally, contained the stipulations that the Indians should remove from their mountains into the reservations on the plains, (S. Doc. 4, pp. 128, 138,) and should there receive specified amounts of provision for each of the years 1851, 1852, and as we have seen this was the policy adopted by the commissioners, and by them reported to the department in the beginning of their proceedings. (S. Doc. 4, pp. 128, 138.)

On May 22, 1851, the Commissioner of Indian Affairs addresses the commissioners, officially, thus:

"GENTLEMEN: Your letters of March 5 and 25, 1851—the last inclosing a copy of a treaty entered into with the chief captains and head men of six tribes of Indians in California, and one from Agent McKee, of March 24, 1851, have been received.

"The department fully appreciates the difficulties with which you had to contend in executing the important trust confided to you, and is highly gratified with the results thus far achieved, especially with your energy and dispatch in procuring a location for several tribes of Indians, and promptly removing them to it.

"The provisions of the treaty, a copy of which is acknowledged above, are approved of."

Under the treaties the Indians were removed on to the reservations. (S. Doc. 4, pp. 70, 252.) The land of these reservations was poor in quality, uncultivated, and stinted in natural productions, and it was a necessary consequence of such removal of the Indians that they should be supplied with food. Mr. Wozencraft says, (S. Doc. 4, p. 83:) "The country set apart for them is very poor soil; only a small part of it is adapted to agricultural purposes." Mr. Johnston says, (S. Doc. 4, p. 105:) "On the breaking out of the war, in December last, the Indians returned to the mountains, leaving behind them their principal stores of subsistence, intending to return for them as necessity required. The whites, in pursuing them, burned and destroyed all that fell in their way; consequently, at the time the different treaties were entered into the Indians of this region were destitute of anything to subsist upon, even if left to range at liberty over their native hills. Under each treaty they were required to come from the mountains to their reservations on the plains at the base of the foot-hills. They were but children of nature, ignorant of the arts of agriculture, and incapable of producing anything, if they had been placed on the best soil of the earth. They came from the mountains without food, depending on the small amount allowed in their treaties, with the roots and seeds to be daily gathered by their females; these have been found wholly inadequate to their necessities." Again, Mr. Johnston says, (S. Doc. 4, 244:) "In none of these reservations is there any agricultural land, except in spots; a few acres only can be found together, and those upon the banks of the streams." And Superintendent Beale says, (Doc. 4, p. 325:) "With reference to the character or quality of the land reserved by the treaties for the Indians, I can only speak from personal observation with regard to those selected in the southern portion of the State. They are such as only a half-starved and defenseless people would have consented to receive, and, as a general thing, they embrace only such lands as are unfit for mining or agricultural purposes." And Commissioner McKee (S. Doc. 4, p. 249) says: "In my judgment, there are not more than two or three out of the whole number of reservations which any practical man or company would purchase, *as a whole,* at even one cent per acre, subject to State and county taxes. Still, we had endeavored to include in every such selection some good lands capable of subsisting the Indians; and it would have been a wretched policy, as well as gross injustice, to have done otherwise. Our object had been to give them lands which they could work, and upon the product subsist, after two or three years,

during which the government would aid them by supplies of food, clothing, &c."

The effect of the removal of the Indians on to the reservations was to put an end to the strife in the Indian country, which threatened a general Indian war, and to secure to the miners the peaceable possession of extensive and valuable mining districts. Mr. Johnston says of the Indians, December 3, 1851, (S. Doc. 61, p. 12:) "Those with whom treaties have been entered into, residing in any agency upon the San Joaquin, Frezno, Mercede, and Tuolumne and Stanislaus rivers, have been seemingly quiet and contented since I have been supplying them with food." And Commissioner Barbour says of the same Indians: "They occupied the country about the headwaters of the Tuolumne, Mercede, and Mariposa rivers, embracing some of the richest gold mines of the State; from the most of which they had driven the miners, killing many of them, and having driven off and destroyed a large number of horses, mules, and beef battle. By the terms of the treaty they surrendered all claims to this extensive rich mineral region, and accepted a tract of country allotted to them between the Tuolumne and Mercede rivers, to which they removed shortly after the treaty, and where they were living quietly and contentedly, and doing well when I last saw them in the month of September, 1851. And of the Indians treated with April 29, 1851, he says, (S. Doc. 4, p. 252:) "The Indians treated with on this occasion inhabited the country on the Mariposa, Chouchille, Trezno, Upper San Joaquin, and King's rivers, embracing a very large extent of the very richest gold region in the State; from which they had driven the miners, after killing many of them, and destroying their property. They, by this treaty, surrendered their title to hundreds of miles of country rich in gold, and accepted a district of country specified in the treaty, sufficient for their purposes, and well adapted to their wants. Shortly after the treaty they all removed to and settled in the district of country allotted to them, and were working industriously, doing well, and living contentedly in their new home when I left them in September last," (1851.) Mr. Wozencraft says, December 1, 1851, (S. Doc. 4, page 229:) "The Indians throughout my district are quiet and peaceable;" and again, May 29, 1852: "The Indians throughout my district are quiet and peaceable, except some few thefts;" and (S. Doc. 61, p. 24) gives Dr. Rejois's statement: "The Indians, in good faith, have come from the mountains, given up their mines and hunting grounds to the miners, and are desirous of learning from the white man the customs of civilized life."

By Senate Document 4, pp. 268, 326, it appears that the treaties made by the commissioners were submitted by the Commissioner of Indian Affairs to Lieutenant Edward F. Beale, with directions to report "his views as to the merits" of the treaties. In his report, he says: "With reference to my views as to the merits of the treaties, I state that I regard the general line of policy pursued by the commissioners and agents in negotiating with the Indians as proper and expedient under the circumstances. My own personal knowledge and experience in Indian affairs, and particularly in reference to the tribes within the State of California, incline me to the opinion that to secure

their peace and friendship, no other course of policy, however studied and labored it may have been, could have so readily and effectually secured the object in view."

But it is observable that this commendation applies only to the general line of policy adopted by the commissioners, viz: the removal of the Indians to reservations, and their temporary supply there with subsistence; and it is not to be extended to the terms of any particular contract for supplies, or the circumstances of its execution. (S. Doc. 57, p. 2; S. Doc. 4, p. 366.)

Congress appropriated by act September 30, 1850, (9 Stat. at Large, p. 558, c. 91,) to enable the President to hold treaties with the various Indian tribes in the State of California, twenty-five thousand dollars. And by the act of February 27, 1851, (9 Stat. at Large, p. 272, c. 12,) "For expense of holding treaties with the vrrious tribes of Indians in California, in addition to the appropriation of the 30th of September, 1850, $25,000.

The amount of these appropriations (fifty thousand dollars) was, by the acts themselves, applicable to *the holding* of treaties, and to no other purpose. It had no reference to expenditures incurred in the fulfillment of treaty stipulations, and was not therefore applicable to the contracts claimed upon; and the commissioners were instructed by the department, in its dispatch of June 25, 1851, (S. Doc. 4, p. 17,) which informed them of the remittance of the appropriation last made, that articles deliverable under the treaties must be provided for by future appropriations.

By instructions from the department, dated June 27, 1851, (S. Doc. 4, pp. 17, 18,) the commissioners were informed that the amount of the appropriation stated above ($50,000) was all that was applicable to *the negotiation* of treaties in California, and were instructed, "when the funds referred to have been exhausted, you will close *negotiations*, and proceed with the discharge of your duties as agents simply, as the department could not feel justified in authorizing anticipated expenditures beyond the amount of the appropriations made by Congress."

These instructions prohibited the commissioners from negotiating or entering into treaties after the appropriations were exhausted, but they had no reference whatever to the action of the commissioners under treaties made before the appropriations were exhausted.

All the treaties made by the commissioners were rejected by the Senate.

The statute of August 30, 1852, (10 Stat. at Large, p. 56,) appropriated: "For the preservation of peace with those Indians who have been dispossessed of their lands in California, until permanent arrangements be made for their future settlement, the sum of one hundred thousand dollars: *Provided*, that nothing herein contained shall be so construed as to imply an obligation on the part of the United States to feed and support the Indians who have been dispossessed of their lands in California."

And by the act of March 3, 1853, the President was authorized to make five military reservations from the public domain in the State of California, and the sum of two hundred and fifty thousand dollars

was appropriated to defray the expense of subsisting Indians in California, and removing them *to said reservations* for protection.

And the annual appropriation acts of 1854–5–6–7–8, contained similar provisions for concluding the removal and continuing the subsistence of the Indians.

The petitioner claims, that under a contract made February 10, 1852, between one Wozencraft, commissioner and Indian agent on the part of the United States, he (the petitioner) sold to the United States nineteen hundred head of beef cattle, to be delivered between the Mokelumne river and the Four rivers when, and as the same should be required by said Wozencraft, at the price of fifteen cents per pound, to be paid in bills drawn by Wozencraft upon the Secretary of the Interior.

And the petitioner avers in his petition that he delivered the said nineteen hundred head of cattle, weighing 883,333⅓ lbs., which, at the contract price, amounted to the sum of one hundred and thirty-two thousand and five hundred dollars; that said Wozencraft gave him the seven drafts or bills drawn on the Secretary of the Interior, and which are specified in the petition, and amounted to the said sum of $132,500; that the bills were presented to the Secretary of the Interior for payment, and were protested for non-acceptance and non-payment in the month of March, 1852, and the bills are now in the possession of the petitioner, and exhibited in the case.

The petitioner claims on the contract of sale and for the cattle delivered, and not on the bills or drafts. A paper purporting to be the contract, and referred to in the petition as Exhibit A, was produced, but proof of its execution was not made; it is annexed, and marked Exhibit A.

But O. M. Wozencraft, in his deposition taken in Washington March 24, 1856, in his answer to the tenth direct interrogatory, states: "I caused supplies of beef to be purchased of Samuel J. Hensley for various tribes of Indians in the San Joaquin valley. The quantity was nineteen hundred head of cattle, averaging in weight five hundred pounds each, at fifteen cents per pound.

By this statement the weight of the cattle delivered was 950,000 pounds, and the price $142,500, or $10,000 more than the sum alleged in the petition to be due, or the amount of the bills exhibited in the case.

But in the "vouchers" inclosed to the department by O. M. Wozencraft September 18, 1852, are his certificate (dated 11th of February, 1852) of the correctness of Hensley's bills against the United States for 1,900 head of cattle "furnished Indians," &c., of 500 pounds weight each, $142,500, and Hensley's receipt (dated February 11, 1852,) for drafts for $142,000. The discrepancy in the amount claimed in the petition and in the evidence is not accounted for otherwise than by the fact appearing on the petition that it was not signed by Mr. Hensley, but by his original counsel in the case.

In the argument for the petitioner at this term of the court it is contended that, under the contract made by Hensley and Wozencraft, there were delivered to Wozencraft 1,285 head of cattle, and to Lieutenant Beale, superintendent, 438 head, making in all 1,713 head of

cattle, averaging 500 pounds in weight, which, at fifteen cents per pound, amounted to $128,475.

The delivery of 1,285 head of cattle to Wozencraft is testified to by M. B. Lewis, J. J. Visonhaller, and Lewis Leach, deponents for the petitioner, as made in May, 1852, to Major Savage, sub-Indian agent, and acting for Wozencraft; and these deponents all testify that the cattle delivered to Savage were slaughtered and distributed to the Indians, and declare they are "familiar" with the matter of the distribution, and they thus swore positively to the slaughter and distribution of 1,285 head.

But it appears by the deposition of Lieutenant Beale, taken for the United States, that he received November 30, 1852, from O. M. Wozencraft, an order on Visonhaller for 212 head of cattle, and that he subsequently collected 212 head as left on hand or supposed to be lost out of the 1,285. There is nothing in the case from which it can be inferred that the disposition by Lieutenant Beale of these 212 ever came to the knowledge of either Lewis, Visonhaller, or Leach; yet the 212 were included in and made a part of the 1,285 head they testify were slaughtered and distributed to the Indians, and their inaccuracy in this respect weighs against their testimony where opposed by other evidence.

Then, as to the 408 head of cattle alleged to have been delivered to Lieutenant Beale, these deponents for the petitioner all swear to the delivery in the spring of 1853; but in what way they knew the fact, or ascertained the number, is not shown, for they were not cross-examined on these points or any other, and Lieutenant Beale in his deposition makes no mention of any such delivery to him, and mentions only the receipt of 212 head, collected by him as above stated, although he answers, under the broad interrogatory (5th): State if you know anything connected with the claim of Major Hensley against the United States for cattle supplied to the Indians in California; and, if yea, what it was?

Lieutenant Beale says in his deposition: "From all that I could learn when I was in California as superintendent of Indian affairs, and have every reason to believe, that the claim of Major Hensley against the United States is a just one." But there is no evidence in the case that Lieutenant Beale knew of any claim of Major Hensley's, beyond that specified in the account he annexed to his deposition as received from Visonhaller, for 1,285 head of cattle. And Lieutenant Beale's deposition is not an official report, and his *opinion* is not evidence here, whatever weight it may be entitled to elsewhere. As a witness, his only authority was to state *facts* as distinguished from *opinions*.

Mr. Wozencraft, in his deposition, testifies to the delivery of the whole nineteen hundred head of cattle; but his statements, when collated with his answers to Lieutenant Beale, set forth in Doc. 4, p. 368, appear to be made without personal knowledge of the facts.

We are of opinion that the evidence, when allowed all its proper force, shows the delivery under the contract of only 1,285 head.

S. Doc. 4, p. 389, shows that Lieutenant Beale, November 30, 1852, received an order on Samuel Hensley for 612 head of government cattle, and (S. Doc. 4, p. 405, November 20, 1842,) Mr. Wozencraft speaks of them as then "in charge of Major Hensley." There is no

evidence in the case that any of these were received by Lieutenant Beale; and that they were not, is the inference from the fact, that Lieutenant Beale, in his deposition, taken in September, 1856, mentions the 212 head of cattle collected by him, and referred to in the order given on Visonhaller at the same time with the order on Hensley, and makes no mention of this latter order or of any receipt under it.

The statement of Joel H. Burkes (S. Doc. 57, p. 5) is not shown, and does not appear to attach to the cattle sold by Major Hensley.

As to the weight of the cattle sold by the pound, there is no evidence that they were actually weighed, and the testimony in the case (S. Doc. 61, p. 17) shows the custom of the country was to take the estimate of persons on the ground—500 pounds seems to have been fixed upon as the average weight of the cattle sold in California.

The price of fifteen cents per pound is shown to have been a reasonable price at the time by the deponents for the petitioner in this case, and by the documents in evidence, (S. Doc. 61, p. 17; S. Doc. 4, pp. 16, 17, 18.)

It is shown in Senate Doc. 4, pp. 95, 96, that the treaty with these Indians, for whose supply the contract in this case was entered into, was made and concluded April 9, 1851, and the terms of the treaty as to supplies of food for the Indians in 1851 and 1852 are there mentioned.

It is claimed that the United States are bound to pay for the 212 head of cattle, collected and received by Lieutenant Beale. The reasons and the mode of the action of Lieutenant Beale are shown in Senate Doc. 4, p. 367, and in his receipt for the cattle, p. 359, he states: "All of the above to be held by me, subject to the decision of the department." What that decision was is not shown. There is no evidence that these cattle were ever returned to Mr. Hensley, or paid for by the United States. But the United States cannot be charged by the acts of its officers not within the line of their duty, and there is no evidence that Lieutenant Beale or the department were authorized to make purchases for the Indians *on the credit* of the United States, or to adopt or approve contracts so made.

We are of opinion that the case must be decided on considerations common to the class of cases to which it has been said it belongs, and irrespective of its peculiar circumstances or merit, and that in this case, as in each of its class, the question is, whether the contract claimed upon, is the contract of the United States, as made or adopted by their authority.

The whole authority of the commissioners *as such* was "to hold treaties with various Indian tribes in the State of California," and the meaning of "the terms *to hold treaties*" is clearly defined and precisely limited by the provisions of the constitution and the uniform practice under it, by which the executive is authorized to mold the terms of treaties, while the consent of the Senate is necessary to give them the sanction of law, authorizing action under them. It is entirely clear upon the evidence that the contracts claimed upon were made, and the supplies claimed under the contracts were furnished, months after the treaties to which they are referred had been agreed upon and reduced to writing and signed, and their formal execution as mere documents

completed; and with such execution the holding of the treaties was necessarily and entirely fulfilled, and the functions of the commissioners under the terms of their commission were determined, and for any further action on their part there was no authority in the words of their commission.

It was claimed that the treaties could not have been held or made without stipulations for these supplies of provisions in aid of the subsistence of the Indians. But the evidence does not show this; on the other hand, it tends to show that the Indians were willing to enter into treaties, but were unwilling to remove from their homes into the reservations, and it was only their removal which made the stipulations of the supplies necessary. In the report of the commissioners dated March 28, 1851, (S. Doc. 4, pp. 69, 70,) in describing the course of their negotiations with the Indians, they state: "When we again met them they expressed themselves satisfied with the terms we offered, except their removal from their mountain fastnesses to the plains immediately at the foot of the mountains. We then explained to them the necessity of such a removal and location, and that we could treat with them on no other condition, believing that, if they were permitted to remain in the mountains, constant conflicts between the Indians and whites would take place." This official report, made at the time of the transactions, is the best evidence of their circumstances and purpose. Besides, this removal of the Indians on to reservations was the policy of the commissioners, agreed upon and adopted on consultation by them before negotiating with the Indians, and before they entered the Indian country; (S. Doc. 4, pp. 59, 60, 63; Doc. 61, p. 2); and it was suggested to the department by Commissioner McKee, (Doc. 4, p. 53,) as early as December 1, 1850, and more than three months before any treaty was made or proffered. And all this tends to show that the removal of the Indians to the reservations was a condition enforced upon them by the commissioners, and that with the Indians it was not a requirement, but an objection, in the treaties made.

Then it is said that the department approved the policy of the commissioners in removing the Indians to the reservations, and thereby adopted the act and its direct consequences of furnishing them with provisions there. (Doc. 4, pp. 15, 20.) And thus, the question is whether it was in the power of the Executive, under all the circumstances of the case, to authorize or adopt these contracts.

Under the clause in the constitution which authorizes the President to make treaties, the power of the President is like that of the commissioners here, to *hold treaties* only, and the Executive, therefore, had no more authority than the commissioners to carry those treaties into execution before their ratification by the advice and consent of the Senate.

The circumstances of the case are claimed to be, that a strife, destructive of life and property, and threatening the peace of the country, was raging in the State of California, and the question is, whether, to end this strife, by separating the parties to it, the executive could use the means these commissioners used, *of pledging the credit of the United States.*

The Constitution gives to the Executive no such power in terms, and

the provisions and purpose of the Constitution preclude its implication. The power in the executive to pledge the credit of the country would render nugatory the provision of the Constitution that "no money shall be drawn from the treasury but in consequence of appropriations made by law," and would baffle the extended purposes of that provision. The power, if implied to any degree, must be to every degree, and would place the resources of the country at the disposal of the executive, and this would change the operations of the government, which the Constitution expressly makes. Admitting, therefore, all the plaintiffs claim, that the department charged with the management of Indian affairs approved the policy of the commissioners, and adopted its consequences, yet that gave to the commissioners no power to pledge the credit of the United States; such a power belongs exclusively to the Congress of the United States.

But the commissioners were also Indian agents, and it is claimed that the power to make these contracts was, under the circumstances, within their official authority as Indian agents.

The statute of the United States, June 30, 1834, (Stat. at Large, vol. 4, p. 757, sec. 7,) enacts as follows: "And it shall be the general duty of Indian agents and sub-agents to manage and superintend the intercourse with the Indians within their respective agencies, agreeably to law; to obey all legal instructions given to them by the Secretary of War, the Commissioner of Indian Affairs, or the superintendent of Indian affairs, and to carry into effect such regulations as may be presented by the President."

The general terms "to manage and superintend the intercourse with the Indians," &c., cannot in this statute be construed to involve the power to make any purchases for or on account of the Indians, because that subject is specifically provided for, in all cases contemplated by the statute, in the 13th section, which appoints specific agencies for the purpose of making purchases; and, to guard against frauds, makes express and careful provisions for the delivery of all articles purchased; and these specific agencies, and the plain purposes of the 13th section, would be rendered nugatory by construing that the power to make purchases and distribute articles purchased was involved in the general terms of the 7th section, to "manage and superintend intercourse with the Indians."

It may be that the cases in which these contracts were made were not contemplated in the 13th section, and that therefore they may not be directly within its provisions; but there is nothing to show that they were contemplated in the 7th section. And if the general terms, "manage and superintend intercourse with the Indians," do not include power to make purchases for the Indians in cases contemplated in the statute, they cannot be construed, of their own force, to involve such power in cases not contemplated by the statute.

By the remaining clause of the 7th section, the agents and sub-agents are "to obey all legal instructions given to them by the Secretary of War, the Commissioner of Indian Affairs, or the superintendent of Indian affairs, and to carry into effect such regulations as may be prescribed by the President." But if there is no power in the Executive to pledge or dispose of the credit of the United States, no

regulations or instructions from any of the executive officers mentioned in this section of the statute, and no rules of the Indian Bureau could authorize agents or sub-agents to make these contracts.

It is claimed that the contract in this case has been affirmed by Congress, and appropriations made for its payment, in the act of August 30, 1852, and subsequent appropriation acts.

In the act of 1852, all that relates to California is in these words: "For the preservation of peace with the Indians who have been dispossessed of their lands in California, until permanent arrangements be made for their future settlement, the sum of one hundred thousand dollars: *Provided*, That nothing herein contained shall be so construed as to imply an obligation on the part of the United States to feed and support the Indians who have been dispossessed of their lands in California."

The argument for the petitioner is, that this statute was intended to provide for obligations of the United States, "to feed and support the Indians *in* 1852;" the proviso expressly declares, no such obligation shall be implied from the act. Then the statute denotes in terms the period to which its appropriation is to be applied. It speaks of course from its date, August 30, 1852, and says its provision is for the preservation of peace, *until* the *future* settlement of the Indians, and is thus on its face prospective merely.

The act of 1853 authorized *new reservations* for the Indians, and then provided means for their removal to these new reservations, and for their subsistence there; and the subsequent acts are all expressly in continuance of the same measures. And from all the acts, and the evidence in the case, the conclusion is, that the United States rejected the treaties and repudiated the reservations and measures of the commissioners, and substituted other reservations and measures, and provided for them and for them only.

Then it is said that the United States have surveyed and assumed title over the lands ceded by the Indians in the treaties made by the commissioners, and thus substantially affirmed the treaties. It is enough to say that it is a part of the case that all those treaties were rejected by the Senate, and never came into existence as a means of title or of claim of title; and whatever may have been the action of the United States, there is no reason shown for referring it to any claim of title founded on those rejected treaties.

It was argued for the petitioner that the relation of the United States to the Indians was analagous to that of guardian and ward at the common law, and that the supplies furnished to the Indians were thus in performance of legal obligations of the United States. If the analogy could be sustained, the argument founded on it was answered at the bar, that the obligation of a guardian was only to apply the ward's means to his support, and not to furnish means. But the analogy does not exist, for the relation of guardian and ward is a personal relation and cannot exist between nations, whose relations are by treaty and compact between themselves. The liability of a guardian for his ward's support rests on the fact that he holds all the ward's means of support; but the United States was not entitled to the rents

or profits of the lands, or the goods and chattels of the Indian tribes or nations in California.

And upon the whole case we are of opinion that the United States are not legally liable upon the contract claimed upon, because it was not made by their authority, and has not been adopted by them.

Our decision is, that the petitioner has not established a title to the relief he prays for.

This decision of the court, it will be seen, decides only the question of its own jurisdiction. The facts constitute a claim upon the United States of a high order, but not of any class which the statutes creating the court confided to its jurisdiction. The decision is, "that the United States are not legally liable upon the contract claimed upon, because it was not made by their authority, and has not been adopted by them." This is not denied. The claim, whatever may have been urged in its favor before the court, was not a *legal* claim upon any valid contract with the United States, or its agents, acting within the scope of their powers. The whole class of these claimants were voluntary creditors of the United States, induced to become such by circumstances of the most controlling character. They had no security, except their confidence in the integrity and assurances of payment by the accredited officers of the government, and they trusted to these implicitly. They considered that there was no hazard in the venture, for they furnished subsistence to starving Indians, at a price which implied prompt payment, and actually received drafts upon the Commissioner of Indian Affairs, which, of course, were protested. The committee, however, in entertaining this case, upon grounds upon which it is competent alone for Congress to act, propose to treat it as a moral and equitable obligation of the United States, to reimburse those creditors, who have, it is believed, become so without any fault of their own. Undoubtedly their claim to the equitable consideration of Congress stands upon a very different footing to that of a legal contract. In the latter case, it would be enough to insist alone upon the performance of the contract; in the other, it is necessary to go further, and show the good faith of the parties, the justness of the consideration, and the public benefit of the service, in pursuance of some line of public policy. These points are fully established by the facts found by the court. A brief statement of a few controlling facts will make this clear.

In the acquisition of our Pacific possessions, the government of the United States has adopted new views and a new policy as to the title of the Indians to the soil. They are regarded only as occupants, and no treaty of purchase has been made with them. The government assumes a paternal relation towards them, and exercises over them full jurisdiction, imitating in this the wise policy of the Spanish mission system among them. The settlers of California, it is well known, paid no respect to the possessions of the Indians. The miners, penetrating the valleys and mountains in search of gold, successively drove the Indians from the haunts where they could obtain subsistence, until they sought the barren crests of the mountains. An irregular and predatory system of hostilities soon broke forth. It threatened extermination to the

Indians. The United States could not have restored peace at the cost of millions. The policy of peace was wisely adopted. Treaties were made providing homes and subsistence for the Indians. To be effectual, it was necessary to execute them immediately, and it was done. Without homes or subsistence, they could not await the tedious delays of the ratification of the treaties. The treaties were never ratified, but peace was restored; the United States reaped all the advantages without the inconveniences attending the treaties; an expensive war was avoided, and a rapid and peaceful settlement promoted. These were certainly cardinal objects of public policy, effected at the expense of these claimants, and with their means. There was then effected and carried out a policy of a constitutional obligation of the government to maintain peace and preserve friendship with the Indians.

The United States has not adopted the very system inaugurated by those defunct treaties, but it has sanctioned its main features, that of providing homes and subsistence to the Indians, to a partial extent. The governmental reserve system offers homes and the means of subsistence to all who wish to labor, and thus exchange their mode of life for that of the white man. The committee believe that the United States have received great benefits from the means furnished by the claimants in aid of its policy, and in relief of its treasury, and there is no reason why it should not reimburse them with a just indemnity. In doing so, we invent no new principle, nor adopt any new policy. The United States has often repaid the expenses of the States in suppressing Indian hostilities. Had California undertaken the task of pacification of the Indians by a war, she would have been the creditor of the United States for the expenses of it. Does it lessen the obligation, that the more humane and peaceful policy of the Indian commission has effected the same object? Finally, the principle involved in the whole class of cases, of which this is only one, was distinctly recognized by Congress, in an act passed July 29, 1854, in favor of Colonel John C. Frémont, one of those who furnished beef to the Indians under contract with the commissioners, and by its provision he received near two hundred and forty thousand dollars. The same justice should be extended to all the other claimants. The interest in that case was allowed upon exceptional grounds, and in violation of the general rule. No circumstances in this case are shown, warranting us in following the precedent in favor of Frémont that far. The committee, therefore, report a bill for the amount only clearly and satisfactorily established before the Court of Claims.