47TH CONGRESS, 1st Session. } HOUSE OF REPRESENTATIVES. { REPORT No. 934.

RIGHT OF WAY TO SAINT LOUIS AND SAN FRANCISCO RAILROAD THROUGH THE INDIAN TERRITORY.

APRIL 6, 1882.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed.

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

REPORT:

[To accompany bill H. R. 5666.]

The Committee on Indian Affairs, to whom was referred the bill (H. R. 978) ratifying the act of the general council of the Choctaw Nation of Indians, granting to the Saint Louis and San Francisco Railway Company right of way for a railroad and telegraph line through the nation, having had the same under consideration, report back a substitute for the bill and recommend its passage.

The substitute protects the Indians in their just rights, and secures to them important advantages over the original bill. The width of the general line is reduced from 200 to 150 feet, and at stations from 400 to 300 feet, while the consideration to the Indians is increased from $2,000 to $3,000 per annum, and payment to be made for all damages sustained to person or property. Section 8 of the substitute supplies an important omission from the original bill by requiring that a sufficient number of tracks shall be provided to do all business that may be offered, and permits any railroad company to have the right of user of its main tracks and sidings by the payment of a fixed charge as rental therefor.

The substitute differs from the original bill in another important feature. Those who drew the original bill assumed that any proposition for the right of way through the Indian Territory must first be acted upon and approved by the Indians in general council, but your committee do not agree with that view of the matter. We do not find that it was ever contemplated or stipulated by the government that the Indian Territory should stand right in the very heart of our growing country as a barrier to its commerce, and an obstacle in the way of travel, traffic, and transportation between the different sections. It is of the highest importance to the nation at large that rights of way for lines of railroad and telegraph should be granted through the Indian Territory, and as generally as they are through the other Territories of the United States, and while we would observe the utmost good faith with these Indians, and would carefully guard their just rights and interests, we do not concede to them jurisdiction in this vitally important matter, because we do not find that principle laid down anywhere in the policy of the government, nor in the theory sustained by its treaties with these Indians from the earliest date. Article 18 of the treaty of 1855 with the Choctaws and Chickasaws mentions specifically the broad and unrestricted right of the United States to grant these charters and privileges through

their country, and article 7, treaty of 1855, defines the extent of their rights to self-government and of their jurisdiction, as follows: "So far as may be compatible with the Constitution of the United States and the laws made in pursuance thereof, regulating trade and intercourse with the Indian tribes, the Choctaws and Chickasaws, shall be secured in the unrestricted right of self-government, and full jurisdiction over persons and property within their respective limits."

Article 6 of the treaty of 1866 recites the fact that the Choctaws and Chickasaws grant the right of way for two railroads through their lands, but this is made expressly and in terms subject to the authority of the United States Government through Congress on the Secretary of the Interior, and is to be in accordance with the provisions of the 18th article of the treaty of 1855, to which reference is above made, and which recognizes the unlimited jurisdiction of the United States in these matters.

This position is supported by the fact that the government has never fully parted with the title to these lands. The title of the Indians is conditional on their occupancy, and will revert to the United States whenever they shall become extinct or from any cause that occupancy shall cease. They have never been clothed with authority to sell or otherwise alienate the title. For them to grant rights of way to railroads, or other kindred rights and interests (in the realty) that might extend far beyond their occupancy, and consequently beyond the limits of their title to and interest in the lands, would not only be anomalous but very unreasonable.

In 1831, Chief Justice Marshall, in delivering the opinion in the Cherokee Nation *vs.* The State of Georgia (5 Pet. 1), respecting the Cherokee reservation in Georgia, being the same which was subsequently *exchanged* for the present reservation in the Indian Territory, says:

> The Indian Territory is admitted to compose a part of the territory of the United States.
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> In all our maps, geographical treaties, histories, and laws, it is so considered.
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> In all our intercourse with foreign nations, in our commercial regulations, in any attempt at intercourse between Indians and foreign nations, they are considered within the jusisdictional limits of the United States, subject to many of those restraints which are imposed upon our own citizens.

In the case of United States *vs.* Ragers, in 1846, in the status of the present Cherokee reservation in the Indian Territory, upon the plea by the defendant that he was a Cherokee living on the reservation, and therefore exempt from the jurisdiction of the United States, Chief Justice Taney, delivering the opinion of the court against the plea, said:

> The country in which the crime is charged to have been committed *is a part of the territory of the United States,* and not within the limits of any particular State. It is true that it is occupied by the tribe of Cherokee Indians, but it *has been assigned to them by the United States as a place of domicile for the tribe,* and they hold and occupy it with assent of the United States, and under their authority. The native tribes who were found on this continent at the time of its discovery have never been acknowledged or treated as independent nations by the European governments nor regarded as the owners of the territories they respectively occupied.

Your committee hold that the sovereignty of the United States extends over the Indian Territory.

One attribute of this sovereignty is the right of eminent domain. No department of the government has ever agreed, or attempted to agree, to surrender this to the Indians, or part with this essential attribute of sovereignty; and if such an agreement or attempt had been made, it would be utterly and absolutely futile, for the right of eminent domain is a power which cannot be obliterated.

On this point we quote, from Cooley on eminent domain, the following:

(Cooley's Constitutional Limitations—the Eminent Domain, page 524.)

When the existence of a particular power in the government is recognized on the ground of necessity, no delegation of the legislative power by the people can be held to vest authority in the department which holds it in trust to bargain away such power, or so tie up the hands of the government as to preclude its repeated exercise as often and under such circumstances as the needs of the government may require. For if this were otherwise, the authority to make laws for the government and welfare of the State might be so exercised in strict conformity with its constitution as at length to preclude the State performing its ordinary and essential functions, and the agent chosen to govern the State might put an end to the State itself. It must follow that any legislative bargain in restraint of the complete, continuous, and repeated exercise of the right of eminent domain is unwarranted and void; and that provision of the Constitution of the United Stated which forbids the States violating the obligation of contracts could not be so construed as to render valid and effectual such a bargain, which originally was in excess of proper authority. Upon this subject we shall content ourselves with referring in this place to what has been said in another connection.

As under the peculiar American system the protection and regulation of private rights, privileges, and immunities in general properly pertain to the State governments, and those governments are expected to make provision for those conveniences and necessities which are usually provided for their citizens through the exercise of the right of eminent domain, the right itself, it would seem, must pertain to those governments also, rather than to the government of the nation; and such has been the conclusion of the authorities.

In the new Territories, however, where the Government of the United States exercises sovereign authority, it possesses as incident thereto the right of eminent domain which it may exercise directly or through the Territorial governments; but this right passes from the nation to the newly formed State whenever the latter is admitted into the Union.

For the reasons above stated your committee believe the power to grant this charter resides in and should be exercised by the Government of the United States, and that the interests both of the public and of the Indians will be promoted thereby.

VIEWS OF THE MINORITY.

Mr. RICE submitted the following:

The undersigned object to the passage of bill H. R. 978 granting to the St. Louis and San Francisco Railway Company a right of way for a railroad and telegraph line through the territory of the Choctaw and Chickasaw Nations, because it assumes to grant that right of way without the consent of the Choctaw and Chickasaw Nations first obtained thereto.

The relations of the United States to the Indian nations, of which the Choctaws and Chickasaws are two, are somewhat peculiar.

They are the remnants of the aborigines of this country. After its settlement by the whites, they remained in possession of large tracts of territory, distinct and separate nationalities, they were so dealt with by the British Government before the Revolution. After the Revolution the United States assumed the position with them before held by Great Britain. It made treaties with them, bought land of them, and ceded other land to them, and in various ways recognized them, as distinct, independent communities. Their peculiar situation as uncivilized tribes, occupying territory and exercising independent authority within the borders of the United States early excited controversy and discussion which resulted in appeals to the Supreme Court of the United

States, by which the status of these nations was authoritatively and definitely settled.

They are not foreign nations in the common acceptation of the term, but they are "domestic, dependent nations," allies whom we have assumed to protect; wards whose rights we have bound ourselves by solemn treaty to guard.

"Protection does not mean destruction." Guardianship does not imply the authority to appropriate and alienate the property of the ward.

The European governments asserted the right of discoverers as against each other to the territories respectively discovered by them. The United States succeeded to that right as to all territory within its original or subsequently obtained territory. This right of discovery was not an absolute ownership; it was the right to purchase of the Indians, or to take possession when their title lapsed by extinction, abandonment, or otherwise; the right of the Indians to the occupancy and use of the lands was unquestioned. The nations in question, at the close of the Revolution and the establishment of the independence of the United States, remained in possession of large tracts of territory in the Southern States. It was their territory while they occupied it. The United States had the rights of the discoverers of the territory, but this did not affect the rights of those previously in possession of it, except as to the ultimate disposal of it. It was the right to purchase acknowledging the right of the possessor to sell.

Neither the United States nor any State had any right to lay out ways through this territory without the consent of its owners. In an early treaty with the Cherokees it obtained the right to lay out a post road through the territory, thereby admitting the want of that right except as granted by the Cherokees.

Subsequently, by a course of proceedings which need not be detailed or characterized here, these nations were induced to cede their original territories to the United States, and after some intermediate stages to accept from the United States cession of new territories, which they now own and possess, in lieu of those originally theirs. These mutual cessions were made between the United States and the Indian nations on the basis of the relations between the contracting parties hereinbefore set forth. They were made by solemn treaty, and the United States guaranteed to the Indian nations the ownership and possession of their territory forever, except as modified by treaty. The Choctaws and Chickasaws own the territory now occupied by them on the same terms, except as modified by treaty, upon which they owned their old lands. While they occupy it they own that territory as absolutely as the United States owns that ceded by them to it.

Unless they have granted to the United States the right to lay out railroads through their territory the right does not exist, and any attempt to assert it would be an act of usurpation—an invasion by a strong power of the rights of a weak one; an appropriation by a guardian power of the property of its ward to its own use. Has this right been granted to the United States by treaty?

It is well to say in passing that the treaties made by this nation with the Indians are in the language of the stronger power—generally drafted by its agents and understood only imperfectly by the Indians through the medium of interpretation. Wherever there is any doubt as to the construction of these treaties, the benefit of that doubt should be scrupulously given to the Indians. This bill forces a construction of language

which upon legal principles does not admit of doubt, against these principles, in favor of the United States.

Article 18 of the treaty of 1856 gave to the United States, or any incorporated company, the right of way for railroads or lines of telegraphs through the Choctaw and Chickasaw territory.

A civilized, intelligent nation fully capable of protecting its rights would not have permitted the insertion of so loose and unguarded a provision into a treaty affecting its entire territory, and it is no special credit to the intelligent commissioners of the United States that they procured or permitted its insertion. In the treaty of 1866, article 6, this provision was modified. Instead of the unlimited right granted in 1856, the Indian nations granted the right of way through their territory to two companies to be authorized by Congress, one to build its railroad from east to west, the other from north to south. The later treaty takes the place of the former, upon all subjects dealt with by both—the unlimited rights of way granted by the first treaty are reduced to two by the last; the statement of this limitation in the second treaty determines the larger grant in the first.

Expressio unius, exclusio alterius. Since 1866, the United States has had no other right to grant to railroad companies right of way through the Choctaw and Chickasaw territory than to one running east and west and to one other running north and south. It is admitted that this right has been exhausted, and that this bill is outside of the treaty grant. It is to be asserted on the broad ground of the right of eminent domain of the United States to the Indian Territory. This claim can be maintained only by the strong arm of superior power. The United States has the right of eminent domain in this territory no more than has France in Louisiana; it might almost be said, no more than the Indians in the territory in Alabama and Tennessee ceded by them to the United States in exchange for this. The undersigned believe there would be no difficulty in obtaining the consent of the Choctaws and Chickasaws to these rights of way on reasonable terms, but must withhold their assent to this bill unless a provision for obtaining that consent is incorporated in it.

W. W. RICE.
CHAS. E. HOOKER.