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Oklahoma

43D CONGRESS, 2d Session. } HOUSE OF REPRESENTATIVES. { REPORT No. 151.

OKLAHOMA.

FEBRUARY 16, 1875.—Laid on the table and ordered to be printed.

Mr. RODERICK R. BUTLER, from the Committee on Indian Affairs, submitted the following

REPORT:

[To accompany bill H. R. 164.]

The Committee on Indian Affairs, to whom was referred the bill (H. R. 164) which looked to providing for the organization of a territorial form of government over the country usually known as the Indian Territory, and for other purposes, respectfully submit the following report:

After a careful, thorough, and impartial consideration of the subject, we find, in view of the peculiar relations to the Government sustained by the people therein, no authority which will justify, but on the contrary we find much, in the many treaties with the Indians occupying and owning that Territory, in acts of Congress vesting and guaranteeing certain rights and immunities to them, and in opinions of the Supreme Court of the United States interpreting, defining, and sustaining the same, which expressly forbids the legislation proposed.

Believing, as we do, the legislation proposed in these bills to be unjust and inexpedient and therefore unwise, we trust the seal of disapprobation will be, by Congress, emphatically set upon these and kindred measures calculated to impair or destroy the binding force of the nation's obligation to the feeble people who are thereby to be affected. The people of this great nation ought to know, and those of the Indian Territory ought to be re-assured, that the Congress of the United States cannot and will not lend its sanction to any measure tarnishing the nation's honor, especially where its faith has been plighted by solemn guarantee and written covenant.

While these bills seem to differ in minor and unimportant respects, they agree in the main; they all contemplate the creation of a new and unauthorized form of government over that country, in lieu of those now in operation and created or recognized by provisions of treaty.

No amount of sophistry should be permitted to mystify or divert the mind from this important feature of these bills, called by whatever name. Their operation will be the subversion of the Indian nationalities in the Territory.

In the Indian Territory there are five principal nations, well advanced in all the elements of civilized life; besides more than twenty smaller tribes or bands, each separate and distinct, the one from the others, and speaking almost as many different languages as there are tribes. The most of these people, and but recently, lived in localities remote from their present possessions. The Cherokees, Muscogees, Choctaws, Chickasaws, and Seminoles, numbering between fifty and fifty-five thousand of

the sixty-five or seventy thousand inhabitants of the Territory, have been removed into it from the States of North Carolina, Tennessee, Georgia, Alabama, Mississippi, and Florida; the Delawares, Shawnees, and others from States of the north; one small band, the Modocs, from the lava-beds of Oregon, and others from Texas. In short, they have been gathered from the north, the east, south, and west to this Territory, their last abiding-place in a continent once all their own, and here, under the fostering and protective care of the Government, must be solved the problem of their complete civilization and fitness for eventual citizenship.

The first question presented in considering the measure before the committee is, Can it be done in good faith to the people chiefly to be affected by it? Is it right? The United States have treaties with these Indian nations, dating from the days of the confederation of the States down to as late as 1868. For nearly a century they have been by the Government recognized and treated as separate and distinct political communities.

In the treaty of 1835 with the Cherokee Nation, article 5, we find this provision:

> The United States hereby covenant and agree that the lands ceded to the Cherokee Nation in the foregoing article shall in no future time, without their consent, be included within the territorial limits or jurisdiction of any State or Territory. But they shall secure to the Cherokee Nation the right, by their national councils, to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country belonging to their people, or such persons as have connected themselves with them.

Article 1, treaty of 1846, with the same nation, provides "That the lands now occupied by the Cherokee Nation shall be secured to the whole Cherokee people for their common use and benefit; and a patent shall be issued for the same, including the eight hundred thousand acres purchased, together with the outlet west," &c.

Article 31, treaty of 1866, with the same nation, declares that "All provisions of treaties, heretofore ratified and in force, and not inconsistent with the provisions of this treaty, are hereby re-affirmed and declared to be in full force."

The treaty of August, 1856, between the United States and the Creek and Seminole Nations, contains this provision:

> The United States do hereby solemnly agree and bind themselves, that no State or Territory shall ever pass laws for the government of the Creek or Seminole tribes of Indians, and that no portion of either of the tracts of country defined in the first and second articles of this agreement shall ever be embraced or included within, or annexed to, any Territory, or State, nor shall either, or any part of either, be erected into a Territory, without the full and free consent of the legislative authority of the tribe owning the same.

The treaty of 1830 with the Choctaw Nation provides that the United States "cause to be conveyed to the Choctaw Nation a tract of country west of the Mississippi River, in "*fee simple*," to them and their descendants, to inure to them while they shall exist and live on it." It was also stipulated in the same treaty that "the Government and people of the United States are hereby obliged to secure to the Choctaw Nation of red people the jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation of red people and their descendants," and that no part of the land granted them "shall ever be embraced in any Territory or State."

The treaty of 1855 with the Choctaws and Chickasaws provides that the "Choctaws and Chickasaws shall be secured in the unrestricted

right of self-government, and full jurisdiction over person and property, within their respective limits." Provisions of like import are to be found in nearly all the articles of convention entered into, from time to time, by the United States with the Cherokees, Muscogees, Choctaws, Chickasaws, and Seminoles.

In the case (arising out of the demand of the State of Georgia for the removal of the Cherokees) of Worcester *vs.* The State of Georgia, (6 Peters, page 515,) the Supreme Court of the United States declared that "the Indian tribes are distinct, independent political communities." And, again, in the case of the Cherokee Nation *vs.* The State of Georgia, (5 Peters, 1,) the court held that "the acts of the Government plainly recognize the Cherokee Nation as a State, and the courts are bound by these acts." Again, in the case of Kendall *vs.* United States, (N. & H., 261,) it was held by the Supreme Court that "a treaty being the paramount law, it is the duty of Congress to comply with its terms." These deliverances of the Supreme Court were, on the 14th day of December, 1870, ably sustained in an exhaustive report of the Committee on the Judiciary of the Senate of the United States, from which we quote briefly: "Volumes of treaties, acts of Congress almost without number, solemn adjudications of the highest judicial tribunal of the republic, and the universal opinion of our statesmen and people, have united to exempt the Indian—being a member of a tribe recognized by, and having treaty relations with, the United States—from the operation of our laws and the jurisdiction of our courts. Whenever we have dealt with them it has been in their collective capacity as a State, and not with their individual members, except when such members were separated from the tribe to which they belonged, and thus we have asserted such jurisdiction as every nation exercises over the subjects of another independent sovereign nation entering its territory and violating its laws."

These nations are, then, distinct political communities, having rights as such which can only be destroyed by the use of superior force, or by their voluntary consent. Among the rights inuring to them as such are the right of self-government; the right to decide for themselves the character of government under which they wish to live; the right to determine the status of citizenship among themselves; the right to acquire lands, and to determine how they shall be held, used, and disposed of, subject only to the provision of their respective treaties.

In 1830 Congress passed an act authorizing the setting apart of the lands embraced in the Indian Territory for a permanent home for such Indian nations or tribes within the limits of the States as might be induced to go there. Accordingly, the Cherokees, the Choctaws, the Chickasaws, and the Muscogees, being greatly harassed and oppressed by the unfriendly legislation of the several States, within whose chartered limits their respective lands were embraced, each relinquished their title to their lands in these States to the United States, and purchased from them other lands in the present Indian Territory. They paid for them in money or lands, moved to and took possession of and now occupy and cultivate them. They received and now hold deeds of conveyance, executed to them by the United States in fee-simple, in the form of patents, which are matters of record in the General Land-Office. By these transactions the States before named were freed from the embarrassments attending the presence of a large alien population in their midst, and the Indian secured the title of the United States, unembarrassed by the jurisdiction of any State or Territory, to the lands of their new homes, with the solemn assurance of the Government to protect them in the enjoyment of them, and in the right of self-govern-

ment. This was the solution of the Indian question of the day, and was designed by both the Government and Indians, so far as these nations are concerned, to be final.

This condition remained unchanged until the war of the rebellion. Like the States that were cursed with the institution of African slavery, these tribes divided upon the issues growing out of that institution. The greater part of them, perhaps, identified themselves with and followed the fortunes of the confederates. When the war terminated in the triumph of the Union arms it became necessary to re-establish relations of peace with them, and in so doing they were considered and treated as separate and distinct political communities in the negotiations which resulted in the treaties with them of 1866. The truth of history requires it to be said that there was no distinction made in the terms offered to those that had been friendly and those that had been hostile to the Government, or, as they were at that time miscalled, the "loyal" and "disloyal." The same hard conditions were sought to be imposed upon all alike. All were declared to have forfeited the protection of the Government, their right to their soil and of self-government. One of the conditions offered them, and insisted upon, was a provision authorizing the establishment of a territorial form of government by Congress over them. This proposition was strenuously resisted by the delegations of the Cherokees, Choctaws, Creeks, Chickasaws, and Seminoles then in Washington City. So earnest were the commissioners on the part of the United States to force this provision upon them that the then Commissioner of Indian Affairs did not hesitate to arrogate to himself the unprecedented authority to depose John Ross, who was, and had been for nearly forty years, chief of the Cherokee Nation, and who had furnished more men to the Union Army, according to population, than any State of the Union.

The result of the negotiation with the several tribes is to be found in the 12th article of the Cherokee, in the 8th article of Choctaw and Chickasaw, in the 10th article of the Creek, and in the 7th article of Seminole treaty of 1866, and provides for the "general council" of the Territory. After a careful examination of the several articles named, there seems to be nothing contained in them that warrants the conclusion that their status to the Government has been thereby changed, or that they have therein consented to the establishment by Congress of such a government over them as proposed by the bills under consideration. The articles referred to seem to have been a compromise between the views and wishes of the Government and those of the Indians, by which the latter agreed to a confederation among themselves. This is apparent from the fact that the representation in the general council is confined exclusively to the tribes or nations agreeing to the confederation; and before any change can be effected in the system it is necessary to obtain the consent of the tribes to be affected by such change. The Cherokee treaty provides the method. (See section 3, article 12, treaty of 1866, page 91, lines 3963–3968.) "Nor shall said general council legislate upon matters other than those above indicated: *Provided, however*, That the legislative power of such general council may be enlarged by the consent of the national council of each nation or tribe assenting to its establishment, with the approval of the President of the United States."

It is true that all the provisions in the treaties providing for the establishment of the general council are not the same; but it must be remembered that each nation, as a separate and distinct political community, negotiated and agreed to the provisions of its own treaty, and

is therefore only bound by them. A provision in the Choctaw treaty cannot be so construed as to affect the Cherokees, nor one in the Creek to affect the Seminoles.

In order to avoid the confusion that would necessarily arise from these discrepancies, the general council, at its session in September, 1870, by resolution, adopted the Cherokee treaty as the basis and guide of its action. Since then twenty or more tribes have joined the confederation.

The views herein expressed are in harmony with the action of the Government in annually providing the means, by appropriation, to defray the expenses of the general council, and, so far as relates to the necessity of obtaining the consent of those chiefly to be affected by the changes contemplated in the legislation proposed, they accord with the sentiment expressed by the President in his last annual message.

If there is lawlessness in the Territory or a want of proper administration of justice, as claimed by some, the remedy is not to be sought in the establishment of a territorial government over it, in opposition to the unanimous wishes of the tribes to be affected, and in violation of the treaties with them, but it is to be sought in proper amendments to the "acts regulating trade and intercourse with the Indian tribes," &c., and in the establishment of United States courts, with such jurisdiction as will accord with the wants and wishes of those chiefly to be affected and protected by them, and with the spirit of the treaties that provide for their organization.

The committee recommends that the bill be rejected.

JNO. T. AVERILL, *Chairman.*
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