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R_P of B. Overton

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S. Rep. No. 476, 45th Cong., 2nd Sess. (1878)

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IN THE SENATE OF THE UNITED STATES.

JUNE 6, 1878.—Ordered to be printed.

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

REPORT:

[To accompany bill S. 1226.]

The Committee on Indian Affairs, to whom was referred the petition of B. F. Overton, governor of the Chickasaw Nation, relating to the arrears of interest due on trust-funds held by the United States for that nation, respectfully submit the following report:

The "non-paying stocks" held by the United States in trust for fourteen different nations and tribes of Indians, embrace the following bonds held in trust for the Chickasaws:

Nashville, Murfreesboro and Shelbyville Turnpike Company bonds (5½ per cent.)	\$66,666 66½
Nashville and Chattanooga Railroad Company bonds (6 per cent.).....	512,000 00
East Tennessee and Georgia Railroad Company bonds (6 per cent.)	104,000 00
	682,666 66½

In the years 1832 and 1834 the Chickasaw Nation, then occupying their ancient lands in the State of Mississippi, entered into four treaties with the United States, whereby they sold to the United States all of their lands east of the Mississippi River, and agreed to emigrate to territory west of that river; and the United States agreed to dispose of the proceeds of sales of their lands in Mississippi, in accordance with the following stipulation:

The funds thence resulting, after the necessary expenses of surveying and selling, and other advances which may be made are repaid to the United States, shall, from time to time, be invested in some secure stocks, redeemable within a period of not more than twenty years, and the United States will cause the interest arising therefrom annually to be paid to the Chickasaws. (7 Stat., 454, art. 11.)

In 1852, the United States and the Chickasaw Nation entered into a treaty, which contains the following provision:

ARTICLE 5. The Chickasaw Nation desires that the whole amount of their national fund shall remain with the United States, in trust for the benefit of this people, and that the same shall on no account be diminished. It is, therefore, agreed that the United States shall continue to hold the said fund in trust as aforesaid, and shall constantly keep the same invested in safe and valuable stock, the interest upon which shall be annually paid to the Chickasaw Nation: Provided, That so much of said fund as the Chickasaws may require for the purpose of enabling them to effect the permanent settlement of the tribe, as contemplated by the treaty of 1834, shall be subject to the control of their general council. (10 Stat., 975, art. 5.)

The bonds which are described above were purchased by the United States with the proceeds of the lands of the Chickasaws, under the foregoing treaty stipulations. They were guaranteed by the State of

Tennessee. The interest which accrued on these bonds between the 1st of January, 1861, and the 1st of July, 1866, amounting to the sum of \$222,290.25, has never been paid. Its payment was suspended during that period, as was also the payment of interest on non-paying stocks to the amount of \$1,704,300, held in trust for other tribes and nations.

On the 7th of December, 1863, the Secretary of the Treasury transmitted to the House of Representatives an estimate—

For payment of interest on \$1,704,300 of non-paying stocks held by the Secretary of the Interior in trust for various Indian tribes up to and including the interest payable July 1, 1866, \$350,220.50.

This estimate appears on page 110, Ex. Doc. No. 2, 1st session, Thirty-eighth Congress, and refers, by a note, to the statement on pages 132, 133 of the same document, which purports to be a "Statement of non-paying stocks held by the Secretary of the Interior in trust for various Indian tribes, showing the amount of each kind and the interest upon the same, computed from the date of the last payment or appropriation by Congress to July 1, 1864." And yet, while it shows in detail the nature and amount of the non-paying stocks held in trust for each of the other thirteen tribes, including the Choctaws, Cherokees, Creeks, and Seminoles, it contains no reference whatever either to the *above-mentioned bonds* held in trust for the Chickasaw Nation, or to certain other non-paying stocks (Arkansas bonds), amounting to \$90,000, which were then held in trust for that nation. Through whose fault, or mistake, this omission occurred the committee have not been able to ascertain.

No appropriation was made upon this estimate, and on the 5th of December, 1864, the Secretary of the Treasury transmitted an estimate "For payment of interest on \$1,690,300 of non-paying stocks held by the Secretary of the Interior in trust for various Indian tribes, up to and including the interest payable July 1, 1866, \$446,433.50." No details accompanied this estimate, which will be found on page 161 of estimates, second session, Thirty-eighth Congress.

In a general appropriation bill, approved March 3, 1865, an appropriation was made—

For payment of interest on \$1,690,300 non-paying stock, held by the Secretary of the Interior in trust for various Indian tribes, up to and including the interest payable July 1, 1866, \$446,433.50. (13 Stat., 559.)

Although this appropriation was not, in terms, restricted to any particular tribes, yet no part of it was applied to the payment of interest on the railroad and turnpike bonds held in trust for the Chickasaws. But all the interest which accrued on non-paying stocks in favor of all the other tribes (including the Choctaws, Cherokees, Creeks, and Seminoles) between the 1st of January, 1861, and the 1st of July, 1866, has been fully paid out of the appropriation. And although all the interest due the Chickasaws, as well as the other tribes, since July 1, 1866, has been fully paid, this particular interest has never been provided for.

Whether this discrimination against the Chickasaws resulted in the first instance from a failure to mention their bonds in the "statement" which accompanied the estimate of 1863, or from some other cause, the committee are not advised. But it appears that subsequently an apprehension that the interest, if paid, might not reach the treasury of the Chickasaw Nation influenced the authorities of the United States.

There is no warrant for this discrimination against the Chickasaws in the treaties made by the United States with the Choctaws, Chickasaws, Cherokees, Creeks, and Seminoles, respectively, in the year 1866.

By the treaty entered into April 28, 1866, between the United States and the Choctaw and Chickasaw Nations, it is provided as follows:

ARTICLE 5. A general amnesty of all past offenses against the laws of the United States, committed before the signing of this treaty by any member of the Choctaw or Chickasaw Nations, is hereby declared; and the United States will especially request the States of Missouri, Kansas, Arkansas, and Texas to grant the like amnesty as to all offenses committed by any member of the Choctaw or Chickasaw Nations; and the Choctaws and Chickasaws, anxious for the restoration of kind and friendly feelings among themselves, do hereby declare an amnesty for all past offenses against their respective governments, and no Indian or Indians shall be prosecuted, or any act of forfeiture or confiscation passed against those who may have remained friendly to the United States, but they shall enjoy equal privileges with other members of said tribes, and all laws heretofore passed inconsistent herewith are hereby declared inoperative.

ARTICLE 10. The United States reaffirms 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.

ARTICLE 40. 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. (14 Stat., 770, 774, 779.)

These articles, construed together, afforded a general amnesty to all members of the Chickasaw Nation for all past offenses against the United States committed by any member of said nation before the signing of the treaty; the United States reaffirming all obligations arising out of treaty stipulations or acts of legislation with regard to the Chickasaw Nation, entered into prior to the late rebellion, not inconsistent with the stipulations of the treaty of April 28, 1866.

The treaty of June 14, 1866, between the Creek Nation and the United States, contains the following provisions:

ARTICLE 1. * * * A general amnesty of all past offenses against the laws of the United States, committed by any member of the Creek Nation, is hereby declared. And the Creeks, anxious for the restoration of kind and friendly feelings among themselves, do hereby declare an amnesty for all past offenses against their government, and no Indian or Indians shall be proscribed, or any act of forfeiture or confiscation passed against those who may have remained friendly to the United States, but they shall enjoy equal privileges with other members of said tribe, and all laws heretofore passed inconsistent herewith are hereby declared inoperative.

ARTICLE 10. The United States reaffirm and reassume all obligations of treaty stipulations with the Creek Nation, entered into before the treaty of said Creek Nation with the so-called Confederate States July 10, 1861, not inconsistent herewith; and further agree to renew all payments of annuities accruing by force of said treaty stipulations, from and after the close of the present fiscal year, June 30, 1866, except as is provided in article eleventh.

The provisions of the Seminole treaty of March 21, 1866, are in these words:

ARTICLE 1. A general amnesty of all past offenses against the laws of the United States, committed by any member of the Seminole Nation, is hereby declared. And the Seminoles, anxious for the restoration of kind and friendly feelings among themselves, do hereby declare an amnesty for all past offenses against their government, and no Indian or Indians shall be proscribed, or any act of forfeiture or confiscation passed against those who may have remained friendly to the United States, but they shall enjoy equal privileges with other members of said tribe, and all laws heretofore passed inconsistent herewith are hereby declared inoperative.

ARTICLE 9. The United States reaffirm and reassume all obligations of treaty stipulations with the Seminole Nation, entered into before the treaty of said Seminole Nation with the so-called Confederate States, August 1, 1861, not inconsistent herewith; and further agree to renew all payments of annuities accruing by force of said treaty stipulations, from and after the close of the present fiscal year, June 30, 1866, except as is provided in article 8 (viii).

The Cherokee treaty, of July 19, 1866, contains the following provisions:

ARTICLE 2. Amnesty is hereby declared by the United States and the Cherokee Nation for all crimes and misdemeanors committed by one Cherokee on the person or property of another Cherokee, or of a citizen of the United States prior to the 4th day of July, 1866; and no right of action arising out of wrongs committed in aid or in the suppression of the rebellion shall be prosecuted or maintained in the courts of the United States, or in the courts of the Cherokee Nation.

This treaty contains no provisions corresponding to that contained in the 10th article of the Choctaw and Chickasaw treaty, and in the 9th and 12th articles, respectively, of the Seminole and Creek treaties.

The Secretary of the Interior gave full consideration to this question, and made report to the House of Representatives, in a communication of January 25, 1878, and says, to the Committee of Indian Affairs of the House, that he is of opinion that the Chickasaw Nation has both a legal and equitable claim against the United States for the sum of \$222,290.25, being for interest which accrued between the dates of January 1, 1861, and July 1, 1866, on certain bonds held in trust by the United States for the use of the Chickasaw Nation.

The committee can see no good reason for the failure to pay this interest to the Chickasaws at the time when the arrears of interest due all the other tribes were paid, under the act of March 3, 1865, nor can they see any excuse for further delay.

They have carefully considered the question whether the fact that the Chickasaws were, to some extent, connected with the rebellion, has released the Government of the United States from its obligation to pay this interest, and have reached the following conclusions.

In the first place the question involved in this objection is not an open question. It has been repeatedly adjudicated by Congress, as well as by the executive departments of the government. The Choctaws, Cherokees, Creeks, and Seminoles were, like the Chickasaws, implicated in the late rebellion. And yet the Government of the United States has paid all the interest which accrued on non-paying stocks in favor of those four nations between the 1st of January, 1861, and the 1st of July, 1866.

It would, in the opinion of the committee, neither satisfy the demands of justice nor comport with the dignity of the government to adopt one rule for the Chickasaws and a different rule for the other nations.

But then the Chickasaw Nation did not *voluntarily* engage in the rebellion. At its commencement the governor of the nation applied to the commander of the United States troops stationed there for that protection which the United States were by treaty bound to afford, and offered to take up arms for the United States. The officer in command replied that his orders were to withdraw his troops forthwith from the Indian Territory; and, in response to the governor's request for arms and ammunition for self-defense, he replied that they would inevitably be overpowered, and that to furnish them with arms would only eventually aid the enemy. Before the United States troops had evacuated the Indian Territory several thousand Confederate troops were there in pursuit, and the Chickasaws were overpowered and forced into relations hostile to the government. Their country lies on the Texas line, more than 100 miles south of the southern boundary of the State of Missouri, and no course seems to have been possible to them except to yield to power which they could not resist, and against which the United States were unable to defend them.

In the next place, while a state of war may *defer payment* of a public debt, it never *extinguishes* the debt itself. On this point there is no conflict in the authorities.

Phillimore states the law as follows :

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

Vattel further says :

Thus, claims founded on a debt, or on an injury which has been done prior to the war, but which made no part of the reasons for undertaking it, still stand on their former footing, and are not abolished by the treaty, unless it be expressly extended to the extinction of every claim whatever. (Vattel, 439.)

Grotius says :

Yet those debts which were due to private persons, at the beginning of the war, are not accounted forgiven, for these are not acquired by the right of war; therefore, the impediment being removed, *i. e.*, the war ended, they remain in full force. (3 Gro., c. 20, s. 16.)

Kent states the law in these words :

Debts existing prior to the war, and injuries committed prior to the war, but which made no part of the reasons for undertaking it, remain entire, and the remedies are revived. (1 Kent, 170.) When treaties contemplate a *permanent arrangement* of national rights, or by their terms are meant to provide for the event of an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of the war. They revive at peace, unless waived, or new or repugnant stipulations be made. (1 Kent, 177.)

But then if this obligation, instead of being a public debt due from the government itself to the Chickasaws, which, under the law of nations, is incapable of confiscation, had been a private debt due from individuals to the Chickasaws, and the government could have lawfully confiscated it, nevertheless, when those Chickasaws who took part in the rebellion ceased to be enemies, and the possibility of confiscation was extinguished by the amnesty of article 5 of the Choctaw and Chickasaw treaty of April 28, 1866, and by the first clause of article 10 of that treaty, their title to this interest was just as complete as it would have been if none of them had participated in the rebellion. A reference to the several treaties of 1866, already cited, will show that the amnesty to the Chickasaws was just as broad and complete as the amnesty to the Choctaws, Cherokees, Creeks, and Seminoles, who have received all their arrears of interest for the period intervening between January 1, 1861, and July 1, 1866.

It has been suggested that the purchase of these railroad and turnpike bonds by the Government of the United States was a full discharge of its duty under article 11 of the treaty of 1834 and article 5 of the treaty of 1852, and that, therefore, no obligation rests upon the United States to provide for interest on the non-paying stocks. The committee have carefully considered this objection, and are unable to find in it any justification for a refusal to pay the arrears of interest due the Chickasaw Nation.

In the first place, the question suggested is not an open question. Few questions have been more effectually settled. Congress has in twenty-one different statutes, covering a period of thirty-three years, asserted and affirmed the obligation of the government to meet the interest on the non-paying stocks. Eight of these statutes were enacted before

the late war, the first on the 3d of March, 1845, and thirteen have been enacted since the war, the last on the 3d day of March, 1877. Moreover, the Senate and House of Representatives of the Forty-fifth Congress have, in the Indian appropriation bill, passed at the present session, affirmed the same obligation, by providing for the payment of the current interest on all these non-paying stocks, including those held for the Chickasaws as well as those held for the other nations. In these bills, appropriations have been made for every penny of interest which accrued on the non-paying stocks, in favor of all the nations, *before* the war, *during* the war, and *after* the war, except the interest which accrued in favor of the Chickasaws, on these railroad and turnpike bonds, *between* the 1st of January, 1861, and the 1st of July, 1866. Every dollar which accrued to the Chickasaws *before* and *after* that period has been appropriated and paid. Of these acts, six contained appropriations wholly or partly for *arrears* of interest, and the rest for *current* interest.

If legislative action can possibly settle any question, this question would seem to be "*res judicata*."

But in view of the relations between the United States and the Chickasaw Nation; of the history of these relations; of the origin of this fund resulting from the sale of the ancient homes of the Chickasaws; of the treaty stipulations of the United States to "keep the same invested in some secure stocks"; to "cause the interest arising therefrom annually to be paid to the Chickasaws"; to "constantly keep the same invested in safe and valuable stocks, the interest upon which shall be annually paid to the Chickasaw Nation"; and in view of the nature of these investments, the committee are of the opinion that no court of equity, here or elsewhere, if it could take jurisdiction of this case, and if the questions involved were open questions, and not, as they are, *res judicata*, could permit the United States to thrust this loss upon the Indians, who, under our Constitution and laws, have never been permitted to enter our courts as plaintiffs for the enforcement of their rights respecting these trusts.

It has also been suggested that the last clause of article 10 of the treaty of 1866, between the United States and the Choctaw and Chickasaw Nations, did not provide for the payment of the interest which accrued between January 1, 1861, and July 1, 1866, but only for annuities and other money accruing after July 1, 1866, and therefore the arrears of interest due the Chickasaws are not to be paid.

But the committee are unable to see how a failure to provide in that treaty for the *payment* of a debt, which was of perfect obligation under the public law, without regard to the treaty, could *extinguish* the debt. Besides, the consequences of the adoption of such a principle would not be limited to the Chickasaws; for this treaty of 1866 was a treaty with the Choctaws as well as with the Chickasaws. If it contained no provision for the payment of the interest which accrued before July 1, 1866, in favor of the Chickasaws, so also did it contain no provision for the payment of the interest which accrued before July 1, 1866, in favor of the Choctaws. And yet, by the act of March 3, 1865, all the interest on the non-paying stocks which accrued in favor of the Choctaws between the 1st day of January, 1861, and the 1st day of July, 1866, was appropriated and paid.

Furthermore, treaties were made with the Cherokees, Creeks, and Seminoles during the year 1866, as has already been shown. And upon reference to the extracts from those treaties already given, it will be seen that the concluding clauses of article 12 of the Creek treaty and article 1 of the Seminole treaty are almost identical with the last clause

of article 10 of the Choctaw and Chickasaw treaty; and yet the act of March 3, 1865, under which the Creeks and Seminoles received their arrears of interest, had been passed more than a year when the treaties were signed. So the Cherokees had received their arrears of interest under the act of March 3, 1865, and their treaty contained no provision corresponding to that now under consideration.

The committee find that all appropriations heretofore made, either for *current* interest or for *arrears* of interest on these "non-paying stocks," for all the tribes, have been made, without exception, in general appropriation bills, and that there have been twenty-one such appropriations in general bills (commencing March 3, 1845), of which six were wholly or partly for *arrears* and the rest for *current* interest.

The committee are unable to see any reason why this case should be made an exception to the rule, and concur with the Secretary of the Interior in the opinion that this appropriation should be made in some one of the general bills. They therefore respectfully recommend that the following appropriation be made:

For trust-fund interest which accrued between the 1st day of January, 1861, and the 1st day of July, 1866, on trust-funds held by the United States for the Chickasaw Nation, the sum of \$222,290.25: *Provided*, That \$50,000 of said sum shall be invested in bonds of the United States, to be held in trust for said nation by the United States, and the residue shall be paid into the treasury of said nation: *Provided further*, That no compensation shall be paid to any person for services connected with said arrears of interest without the approval of the Secretary of the Interior first had and obtained; and any person receiving, directly or indirectly, any money or other thing of value in violation hereof shall be punishable by a fine of not less than \$500 and by imprisonment for not less than six months.