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CHOCTAW INDIAN CLAIM.

LETTER

OF

THE SECRETARY OF THE TREASURY,

TRANSMITTING

*A copy of an opinion given by the Attorney General of the United States upon the claim of the Choctaw Indians to the issue of United States bonds to the amount of two hundred and fifty thousand dollars.*

DECEMBER 21, 1870.—Referred to the Committee on Indian Affairs and ordered to be printed.

TREASURY DEPARTMENT,  
*Office of the Secretary, December 20, 1870.*

SIR: For the information of the House of Representatives, I transmit herewith a copy of an opinion given by the Attorney General of the United States upon the claim of the Choctaw Indians to the issue of United States bonds to the amount of two hundred and fifty thousand dollars, as provided in the act of March 2, 1861, (12 U. S. Stat., p. 238,) and in accordance with the stipulations of the treaty of April 28, 1866, with that tribe.

All the essential facts of the case are stated in the opinion of the Attorney General, and the authorities given on which reliance is placed in support of the conclusion reached.

It is the opinion of the Attorney General that the Secretary of the Treasury may lawfully issue the bonds to the Choctaws; but in connection with that opinion is a suggestion that the bonds cannot be paid except an appropriation be first made by Congress.

I foresee that bonds issued under such circumstances would be questioned, and their value consequently depreciated in the market. I therefore respectfully submit the subject to Congress for such action as may be thought proper.

I have the honor to be, &c.,

GEO. S. BOUTWELL,  
*Secretary.*

Hon. JAMES G. BLAINE,  
*Speaker National House of Representatives.*

DEPARTMENT OF JUSTICE,  
December 15, 1870.

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

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

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

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

On the 28th of April, 1866, a treaty was made with the Choctaw and Chickasaw Indians, (14 United States Stat., p. 769,) the tenth article of which is in the following words: "The United States 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." The forty-fifth article is in these words: "All the rights, privileges, and immunities heretofore possessed by said nations, or individuals thereof, or to which they were entitled under the treaties and legislation heretofore made and had in connection with them, shall be, and are

hereby declared to be, in full force, so far as they are consistent with the provisions of this treaty."

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

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

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

The sections of the treaty above quoted, together with others of its provisions, place these Indians, as to all dues from the Government, just as they stood at the outbreak of the rebellion in April 1861. To reaffirm obligations arising out of a repealed act of legislation must signify the restriction of the parties to the positions in which they stood when the act of legislation was in force.

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

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

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

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

In *Foster and Elam vs. Neilson*, (2 Peters, p. 253,) the Supreme Court says: "Our Constitution declares a treaty to be a law of the land. It

is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision;" and, in applying this principle to the case before them, say that if the treaty then under consideration had acted directly upon the subject, it "would have repealed those acts of Congress which were repugnant to it."

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

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

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

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

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

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

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

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

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

In the treaty of Washington of 1842 there was a provision for extradition of criminals. Prior to any legislation for carrying out this provision of the treaty, it was executed by officers of the United States. In 1845, James Buchanan, Secretary of State, issued a warrant for the arrest of certain persons, subjects of Great Britain, who were charged

with a crime committed under British jurisdiction and against British laws, and it was decided by Mr. Justice Woodbury, upon the return to a writ of *habeas corpus*, that the warrant and the arrest were legal. (1 Woodbury & Minot's Rep., p. 66.) The learned justice remarks: "It is here only on the ground that the act to be done is chiefly ministerial, and the details full in the treaty, that no act of Congress seems to me necessary." (*Ibid.*, p. 74.)

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

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

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

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

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

Very respectfully, your obedient servant,

A. T. AKERMAN,  
*Attorney General.*

HON. GEORGE S. BOUTWELL,  
*Secretary of the Treasury.*

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